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Emerging Issues in Title IX Litigation

Remedies in Public Employee Cases

Maximizing Remedies: Equitable Relief, Damages, and Attorney Fees

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EMERGING ISSUES IN TITLE IX LITIGATION
THE ACADEMIC HEARING[1]

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INTRODUCTION

Following the Supreme Court's decision in *Cummings v. Premier Rehab Keller, PLLC*,[2] Title IX claims took a massive hit in terms of available remedies as the Supreme Court held that emotional distress damages were not available under Spending Clause legislation – specifically Section 1557 of the Affordable Care Act ("ACA") and Section 504 of the Rehabilitation Act of 1973 ("Rehab Act"). Most courts examining the availability of emotional distress damages post *Cummings* have applied *Cummings* to Title IX because, like the ACA and the Rehab Act, Title IX

[1] This presentation is based in part on prior presentations and briefing. The materials attached are distributed as a service to other interested individuals.
[2] 142 S.Ct. 1562 (2022), reh'g denied *Cummings v. Premier Rehab Keller, PLLC*, 142 S. Ct. 2853 (2022).

was enacted pursuant to the Spending Clause.[3] Indeed, prior to *Cummings,* monetary damages for compensatory damages, including emotional distress damages, were available under Title IX.[4] In fact, prior to *Cummings*, Title IX employee plaintiffs received verdicts or negotiated settlements in the high six or seven figures.[5]

However, post *Cummings*, some practitioners have had to alter their Title IX practices due to the foreclosure of emotional distress damages. Some try to bring claims under other laws like Title VII of the Civil Rights Act of 1964 and the Equal Pay Act. Others have shifted their focus to representing employees in internal academic sexual harassment investigations and hearings. This portion of the presentation will give the practitioner an introduction into this area of Title IX practice.

[3] *See e.g., Jane Doe 1, et al., Plaintiffs, v. The Curators of the University of Missouri, Defendant.,* No. 19-CV-04229-NKL, 2022 WL 3366765, at *3 (W.D. Mo. Aug. 15, 2022) (emotional distress damages unavailable under Title IX following *Cummings*) and *Bonnewitz v. Baylor University*, No. 6:21-cv-00491-ADA-DTG, 2022 WL 2688399 (W.D.Tex. July 12, 2022) (same).

[4] 142 S.Ct. 1562, 1577 (2022), reh'g denied *Cummings v. Premier Rehab Keller, PLLC*, 142 S. Ct. 2853 (2022) (Breyer, J., dissenting).

[5] *See e.g., Johnson Klein v. Fresno State University* (2007)($19 million verdict remitted to $6.6 million); *Vivas v. Fresno State University* (2007) ($5.85 verdict remitted to $4.52 million); *Moe- Humphries v. Univ of Calif.* (N.D.Cal. 2007) ($3.5 million settlement); and *Tappmyer v. Univ. of N. Fl.* (2016)($1.25 million settlement).

2020 AMMENDMENTS

In 2020, Congress amended Title IX's regulations to address sexual harassment in federally funded educational programs. Prior to the 2020 amendments, there was no right to procedural due process…at least under Title IX.[6] Nevertheless, most colleges and universities had some sort of investigative process to determine responsibility regarding complaints of sexual harassment. However, the approach was uneven and this resulted in a large amounts of litigation under Title IX and other laws from respondents.[7] In this vein, many courts determined that the Title IX respondent could only bring a Title IX claim in court if there was some form of gender discrimination in the college or university's internal proceedings while other courts allowed respondents to sue complainants in tort for defamation.[8]

On August 14, 2020, Title IX's implementing regulations were amended to codify a recipient's or college's responsibilities in a Title IX sexual harassment investigation, including due process rights and other rights the parties had in terms of supportive measures, investigation, hearing, and appeal. 34 C.F.R. § 106, *et. seq.*

[6] *See e.g., Cooper v. Gustavus Adolphus Coll.*, 957 F. Supp. 191, 193 (D. Minn. 1997). However, some state laws did require that colleges comport with due process. *See e.g., Starishevsky v. Hofstra Univ.,* 161 Misc.2d 137, 612 N.Y.S.2d 794, (N.Y.Sup.Ct.1994).

[7] *See e.g., Yusuf v. Vassar College,* 35 F.3d 709 (2d Cir.1994); *Xiaolu Peter Yu v. Vassar Coll.,* 97 F. Supp. 3d 448, 462 (S.D.N.Y. 2015); and *Kahn v. Yale University*, 347 Conn.1 (Conn. 2023) (decision based on proceedings prior to the 2020 amendments to Title IX).

[8] *Id.*

The 2020 regulations created a cottage industry of sorts regarding Title IX defense work within the academic setting. Yet, many practitioners have no idea how to advise or advocate for a responding party (or a complaining party) during these proceedings. This presentation will give practitioners a guide about how to practice and participate in these quasi-judicial proceedings.[9]

WHAT HAPPENS IF AN EMPLOYEE COMPLAINS ABOUT SEXUAL HARASSMENT OR IS ACCUSED OF SEXUAL HARASSMENT?

Each party is entitled to an advisor at any stage of the proceeding. 34 C.F.R. § 106.45(b)(2). An advisor can be any person and does not necessarily have to be a lawyer. *Id.* However, if you are hired as an advisor/advocate, reach out to outside counsel if known or in house counsel (if you are not sure if the college is represented by an outside law firm) and let the college know you will be acting as an advisor. Get permission about who you can speak to and who you need to copy on any communications so as not to run afoul of any ethics rules.

The recipient (college) must notify the responding party of the allegations against them and give the responding party sufficient information regarding the allegations in the complaint. *Id.* at § 106.45(b)(2)(B). Not all respondents have to

[9] There is no Title IX cause of action during the academic defense or prosecution process. If the record develops gender discrimination or bias in the investigation or proceedings, this may give rise to a potential cause of action under Title IX.

participate in the proceedings. Moreover, the recipient has to discuss supportive measures with all parties. *Id.* at § 106.30.

> **PRACTICE POINTER**: These regulations only apply to sexual harassment complaints. This can include sexual assault and dating violence. *Id.* at § 106.30. An emerging trend in academic Title IX investigations is to try to skirt the regulations and classify a sexual harassment complaint as something else. If this happens, this is a violation of the regulations, and you can complain to the U.S. Department of Education Office for Civil Rights.[10] You may also have to make a decision about whether to proceed under these circumstances or refuse to participate. Keep in mind the regulations only allow for a pause in the proceedings in certain instances and refusal to participate in the investigation is not one of them. *Id.* at §106.45(b)(1)(v).

REASONS WHY PROCEEDINGS MAY BE DELAYED

Title IX proceedings are only paused for two reasons. One is a disability accommodation of leave. *Id.* If the employee gets leave under FMLA or as a disability accommodation, the Title IX proceedings should be paused for that amount of time as well.

The other circumstances where a recipient must pause the proceedings is if there is a criminal investigation or proceeding pending. *Id.* The idea is to give the respondent an opportunity to defend themselves criminally or to see if charges will be brought. The amendments are not perfect and still create tension between the

[10] United States Department of Education Office for Civil Rights Case Processing Manual (CPM). July, 18, 2022.

respective parties' ability to get a fair and prompt proceeding as well as the college's obligations to all parties involved.

WHAT IS THE ADVISOR'S ROLE?

Advisors are not allowed to speak during the interviews. However, advisors can ask for disability accommodations or supportive measures and can submit documents on the party's behalf. Advisors cannot object or otherwise participate in the interview process. In addition, advisors may be considered witnesses to the proceedings, meaning that they could be called as a witness in a potential court case. While the advisor may not be able to represent the party in court, there is no prohibition against another member of their law firm representing the client. Check your state's ethics rules in this regard.

Following the information gathering process or the investigation, the investigator usually issues a preliminary report which the parties can review along with witness statements and corroborating evidence. The parties can then issue any objections or corrections before a final report and recommendation is issued. The advisor can assist the party in drafting objections or draft the objections themself. Investigation may continue or a final report may be issued. The recipient or college can then determine whether the allegations should be dismissed or move forward to hearing. *See generally* 34 C.F.R. §106.45(b)(5).

Again, only sexual harassment respondents get a hearing. Sometimes a college will also hold a hearing for other additional causes of action such as retaliation, but not always. Also, keep in mind that if the college clears your client of any sexual harassment allegation, they could bring your client up on other charges outside of the Title IX proceedings in which the employee will not get a Title IX hearing and may have to face other internal disciplinary proceedings.

HEARING[11]

Both the complainant and recipient are entitled to an advocate free of charge provided by the college. The advocate does not necessarily have to be an attorney. Both the complainant and the respondent can hire their own attorney to represent them. However, the college does not have to pay for private counsel.

The college will hire or appoint a hearing officer or panel that will listen to the evidence, make decisions on objections, and ultimately make a written finding. If your client chooses to participate in a hearing, the advocate's role is limited. However, the advocate, not the client, must cross examine the witnesses in most cases. 34 C.F.R. §106.45(b)(6)(i).

Further, at the hearing, there are only two objections which can be made per the regulations unless there are rules to the contrary in a college's hearing

[11] *See generally,* 34 C.F.R. §106.45(b)(6)(i).

procedures. The objections are sexual history and relevance.[12] *Id.* Keep in mind under the rules, the cadence of the cross-examination is not what it would be in a court of law. The advocate asks the question, the officer or panel rules on the objection, and then the witness can respond… if they remember the question.[13]

DECISION

Someone who is not the Title IX investigator or Title IX Coordinator makes the decision. *Id.* at §106.45(b)(7). The findings must be in writing and be detailed including a description of the procedural steps taken, findings of fact supporting the determination, conclusions regarding application of college's code of conduct, a statement of the rationale for the decision made regarding each allegation, and procedures and permissible basis for appeal. *Id.*

APPEAL

Following a decision by the panel or officer, either party can appeal the findings or write a letter of support. *Id.* at §106.45(b)(8). Generally, there are limited basis for appeal, including new evidence, procedural irregularity, or bias. *Id.* A

[12] Medical records may also be kept out of evidence.
[13] There may be a hearing for public K-12 employees, but it is not required. 34 C.F.R. §106.45(b)(6)(ii). However, with or without a live hearing, a party can submit questions to be asked of the other side keeping in mind the rule against asking about prior sexual history except to prove that someone else committed the offense. *Id.*

decision must include a rationale as to why the initial determination was upheld or reversed. *Id.* Note, the advisor can submit the appeal on behalf of the party.

WHAT HAPPENS AFTER APPEAL ?

If you represent the responding employee and that employee is found responsible, the findings will be turned over to the appropriate person for potential discipline up to and including termination. If the responding employee is found not responsible, then your work is done. Again, if there is gender discrimination or bias in the proceedings, your client may have other claims that can be pursued in another forum.

CONCLUSION

Post *Cummings* and the 2020 amendments to Title IX's regulations, there are new and expanding areas for employee representation in this quasi-judicial academic hearing landscape. Moreover, as a practitioner, you can still assist an employee defending themself or assist an employee trying to navigate a sexual harassment complaint.

I. Title IX

Title IX provides, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Victims of sexual harassment may seek damages for Title IX violations from recipients of federal funds. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 653 (1999). Damages are available if the victim establishes that: (1) she was subjected to sexual harassment that was so severe, pervasive, and objectively offensive that it effectively deprived her of equal access to opportunities or benefits provided by the school; (2) the school had actual notice of the alleged sexual harassment; and (3) the school acted with deliberate indifference to the harassment. *Id.* at 633, 650; *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998); *Doe v. Fairfax Cty. Sch. Bd.*, 1 F.4th 257, 263-64 (4th Cir. 2021). "Under Title IX, a school acts with deliberate indifference where its 'response to the [alleged] harassment or [the] lack [of any such response] is clearly unreasonable in light of the known circumstances.'" *Fairfax Cty. Sch. Bd.*, 1 F.4th at 271 (quoting *Davis*, 526 U.S. at 648) (brackets in original).

Retaliation against a person who complains about sex discrimination by an educational institution is intentional conduct that violates Title IX. *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 183 (2005). "Reporting incidents of discrimination is integral to Title IX enforcement and would be discouraged if retaliation against those who report went unpunished. Indeed, if retaliation were not prohibited, Title IX's enforcement scheme would unravel." *Id.* at 180. "Without protection from retaliation, individuals who witness discrimination would likely not report it, indifference claims would be short circuited, and the underlying discrimination would go

unremedied." *Id*. at 180-81. Most courts find Title VII case law to be instructive in assessing Title IX retaliation claims, except that Title IX retaliation claims do not require "but-for" causation.[1]

Both Title IX and Title VII of the Civil Rights Act of 1964 provide measures for protecting employees on campuses from discrimination on the basis of sex. Some courts view Title IX as an independent remedy to Title VII. *See See Doe v. Mercy Catholic Med. Ctr.*, 850 F.3d 545 (3rd Cir. 2017); *Ivan v. Kent State Univ*., 92 F.3d 1185 (6th Cir. 1996); *Preston v. Virginia ex rel. New River Cmty. Coll*., 31 F.3d 203 (4th Cir. 1994); *Lipsett v. Univ. of P.R.*, 864 F.2d 881 (1st Cir. 1988). Most courts have found that a plaintiff needs to pick one, Title VII or Title IX.[2] *See* L. Ridgeway

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[1] *See Univ. of Tex. Med. Ctr. v. Nassar*, 570 U.S. 338, 356-357 (2013) (discussing "fundamental difference in statutory structure" and finding "[t]he decisions [including Title IX decisions] are not controlling" on the question of burden of proof for Title VII claims); *Dawn L. v. Greater Johnstown School District*, 586 F.Supp.2d 332, 373-374 (W.D. Pa. 2008); *Toth v. Cal. Univ. of Pa*., 844 F. Supp. 2d 611, 642 (W.D. Pa. 2012); *Miller v. Kutztown Univ.*, No. 13-3993, 2013 U.S. Dist. LEXIS 173878, at *11 (E.D. Pa. Dec. 10, 2013) ("While it is true that the legal analysis in Title VII and Title IX is often similar, the Court made clear in *Nassar* that its holding regarding but-for causation applied to Title VII, not Title IX."); *Russell v. N.Y. Univ.*, No. 1:15-cv-2185-GHW, 2017 U.S. Dist. LEXIS 111209, at *111 (S.D.N.Y. July 17, 2017) ("The Court notes two caveats from the proposition that Title VII and Title IX are subject to the same analysis, though neither of them is material here. First, in *Nassar*, the Supreme Court imposed a stricter standard of causation for retaliation claims under Title VII."); *St. Ange v. ASML, Inc.*, 2015 U.S. Dist. LEXIS 153501 (D. Conn. 2015) (but for causation standard rejected for Section 1981 retaliation claim because *Nassar* distinguished Section 1981, 1982, and Title IX retaliation claims from Title VII retaliation claims).

[2] *See Drisin v. Fla. Int'l Univ. Bd. of Trs.*, No. 1:16-cv-24939-WILLIAMS/TORRES, 2017 WL 3505299 (S.D. Fla. June 27, 2017); *Torres v. Sch. Dist. of Manatee Cty.*, No. 8:14-cv-1021-T-33TBM, 2014 WL 4185364 (M.D. Fla. Aug 22, 2014); *Ludlow v. Nw. Univ.*, 79 F. Supp. 3d 824 (N.D. Ill. 2015); *Vandiver v. Little Rock Sch. Dist.*, No. 4:03-CV-00834 GTE, 2007 WL 2973463 (E.D. Ark. Oct. 9, 2007); *Schultz v. Bd. of Trs. of the Univ. of W. Fla*., No. 3:06cv442-RS-MD, 2007 WL 1490714 (N.D. Fla. May 21, 2007); *Hankinson v. Thomas Cty. Sch. Dist.*, No. 6:04-CV-71 (HL), 2005 WL 6802243 (M.D. Ga. Oct. 28, 2005); *Urie v. Yale Univ.*, 331 F. Supp. 2d 94 (D. Conn. 2004); *Morris v. Wallace Cmty. Coll. Selma*, 125 F. Supp. 2d 1315 (S.D. Ala. 2001); *Kemether v. Pa. Interscholastic Athletic Ass'n, Inc.*, 15 F. Supp. 2d 740 (E.D. Pa. 1998); Burrell v. City Univ. of N.Y., 995 F. Supp. 398 (S.D.N.Y. 1998); *Cooper v. Gustavus Adolphus Coll.*, 957 F. Supp. 191 (D. Minn. 1997); *Storey v. Bd. of Regents of the Univ. of Wis. Sys.*, 604 F. Supp 1200 (W.D. Wis. 1985).

Zehrt, Title IX and Title VII: Parallel Remedies in Combatting Sex Discrimination in Educational Employment, Marquette Law Review, Spring 2019.

I. Title IX Damages Post-*Cummings*

Since *Cummings*, defendants have attempted to shoehorn all categories of damages into a Supreme Court decision limited to just one. In 2022, the U.S. Supreme Court issued *Cummings v. Premier Rehab Keller*, a case involving two Spending Clause statutes, Section 504 of the Rehabilitation Act and Section 1557 of the Affordable Care Act. *Cummings v. Premier Rehab Keller, P.L.L.C.*, 142 S. Ct. 1562, 1576 (2022). There, the Supreme Court ruled that "emotional distress" damages "are not recoverable under the Spending Clause antidiscrimination statutes" that it "consider[ed]" in the case because the statutes are analogous to contracts – specifically between the federal government and funding recipients – and such damages are not traditionally available in suits for breach of contract. *Id.*

To date, there is no Supreme Court authority extending *Cummings* to Title IX actions. A small number of courts have declined to extend *Cummings* to Title IX and maintained that damages for emotional distress remain available to plaintiffs asserting claims thereunder post-*Cummings*. *See Coleman v. Cedar Hill Indep. Sch. Dist.*, No. 3:21-CV-2080-D, 2022 WL 1470957, at *3 (N.D. Tex. May 10, 2022) (limiting the holding in *Cummings* to cases brought under the Rehabilitation Act). However, most courts to directly address the issue have applied the logic of *Cummings* to Title IX (and other spending clause statutes). *See e.g.*, *Doe v. Moravian Coll.*, No. 5:20-cv-00377-JMG, 2023 WL 144436, at *7 (E.D. Pa. Jan. 10, 2023) (holding that emotional distress damages are unavailable under Title IX after Cummings); *K.G. v. Woodford Cnty. Bd. of Educ.*, No. CV 5:18-555-DCR, 2022 WL 17993127, at *3 (E.D. Ky. Dec. 29, 2022) (same); *Unknown Party v. Ariz. Bd. of Regents*, No. CV-18-01623-PHX-DWL, 2022 WL 17459745, at *4 (D. Ariz. Dec. 6,

2022) (same); *T. F. v. Greenwood ISD*, No. 7:20-CV-215-ADA, 2022 WL 17477597, at *9 (W.D. Tex. Dec. 5, 2022) (same); *Doe v. City of Pawtucket*, 633 F. SUPP. 3D 583, 588-89 (D.R.I. 2022) (same); *Doe 1 v. Curators of Univ. of Mo*., No. 19-cv-04229-NKL, 2022 WL 3366765, at *3 (W.D. Mo. Aug. 15, 2022) (same); *Doe v. Purdue Univ.*, No. 2:17-CV-33-JPK, 2022 WL 3279234, at *13 (N.D. Ind. Aug. 11, 2022) (same); *Bonnewitz v. Baylor Univ.*, No. 6:21-cv-00491-ADA-DTG, 2022 WL 2688399, at *3 (W.D. Tex. July 12, 2022) (same).

Regardless, plaintiffs have access under Title IX to a variety of compensatory, consequential, and nominal damages that have been long-accepted remedies in contractual breach cases and therefore remain available under *Cummings*. *Cummings* did not address a Title IX plaintiff's ability to recover damages for losses outside of emotional distress. Nothing in the *Cummings* opinion prohibits a Plaintiff in a Title IX case from seeking damages for lost educational opportunities, medical expenses, and lost earning capacity; these were types of damages not at issue in the *Cummings* case. Contract law allows such remedies, and the Supreme Court's decision in *Cummings* did not close the door on a Title IX plaintiff's ability to remedy the harm caused by a school's discrimination when it responds with deliberate indifference to known sexual harassment.

The United States agrees. The U.S. Department of Justice filed an *amicus* brief in support of a plaintiff's Title IX case, taking the position that these damages are available to Title IX plaintiffs:

> Many of the injuries for which S.C. seeks to recover and for which the district court awarded damages were not at issue in *Cummings* and thus still are likely recoverable. This includes compensation for lost educational benefits as a result of school officials' deliberate indifference and reimbursement of medical expenses. Depending on the resolution of S.C.'s other deliberate-indifference claims, it also could include compensation for pain and suffering that S.C. experienced as a result of any physical (as opposed to emotional) injuries.

Brief for the United States as *Amicus Curiae* Supporting Plaintiff-Appellee/Cross-Appellant, *S.C. v. Metropolitan Gov't of Nashville and Davidson Cty.*, Nos. 22-5104, 22-5125 (6th Cir. Dec. 12, 2022), ECF No. 36, https://www.justice.gov/crt/case-document/file/1559566/download.

Cummings relies on the Restatement (Second) of Contracts to identify "traditional" contract remedies that remain available in Spending Clause cases. According to the Restatement, "[e]very breach of contract gives the injured party a right to damages against the party in breach," and, subject to certain limitations, "the injured party is entitled to recover for all loss actually suffered." Restatement (Second) of Contracts §§ 346, 347 (1981). The Restatement explains that, "[o]rdinarily, when a court concludes that there has been a breach of contract, it enforces the broken promise by protecting the expectation that the injured party had" upon entering the contract. In considering damages, the court should therefore "attempt[ ] to put him in as good a position as he would have been . . . had there been no breach." *Id.* § 344(a). This "expectation interest," however, is not the only interest that may be protected. *Id.* If the beneficiary of the contract "changed his position in reliance on the contract by, for example, incurring expenses in preparing to perform, in performing, or in foregoing opportunities to make other contracts . . . the court may recognize a claim based on his reliance rather than on his expectation." *Id.* "The interest protected in this way is called 'reliance interest.'" *Id.* Remedies to protect these interests are non-exclusive remedies. *Id.* § 345(a).

Damages in cases of contractual breach "are ordinarily based on the injured party's expectation interest and are intended to give him the benefit of his bargain by awarding him a sum of money that will, to the extent possible, put him in as good a position as he would have been in had the contract been performed." *Id.* § 347. In some cases, "the sum awarded will do this adequately as, for example, where the injured party has simply had to pay an additional amount

to arrange a substitute transaction and can be adequately compensated by damages based on that amount." *Id.* In other cases, however, "the sum awarded cannot adequately compensate the injured party for his disappointed expectation as, for example, where a delay in performance has caused him to miss an invaluable opportunity." *Id.* Such losses are described in the Restatement as follows:

> Items of loss other than loss in value of the other party's performance are often characterized as incidental or consequential. Incidental losses include costs incurred in a reasonable effort, whether successful or not, to avoid loss, as where a party pays brokerage fees in arranging or attempting to arrange a substitute transaction. Consequential losses include such items as injury to person or property resulting from defective performance.

Id. (internal citations omitted). However, the Restatement cautions, "[t]he terms used to describe the type of loss are not, however, controlling, and the general principle is that all losses, however described, are recoverable." *Id.* (emphasis added).

The Supreme Court has held that compensatory damages are available for intentional violations of Title IX. *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 70-71, 76 (1992). Thus, even where courts have found that *Cummings* bars damages for "emotional distress" under Title IX, they have still found that "there is nothing in the decision that bars a plaintiff from seeking other forms of compensatory damages." *A.T. v. Oley Valley Sch. Dist.*, No. CV 17-4983, 2023 WL 1453143, at *4 (E.D. Pa. Feb. 1, 2023) (denying summary judgment and permitting plaintiffs to proceed to trial on claims for lost income, lost opportunity, fringe benefits, attorney fees, costs and any other non-emotional distress damages); *Williams v. Colo. Dep't of Corr.*, No. 21-CV-02595-NYW-NRN, 2023 WL 3585210, at *7 (D. Colo. May 22, 2023) (dismissing claims for emotional distress damages but permitting requests for damages for economic loss and physical pain and suffering to remain). Accordingly, courts have repeatedly found that *Cummings* does not bar a plaintiff's Title IX claims wholesale where they seek compensatory damages and other

remedies beyond emotional distress damages. *Doe v. Town of N. Andove*r, No. 1:20-CV-10310-IT, 2023 WL 3481494, at *12 (D. Mass. May 16, 2023).

a. Tuition and Other School Related Expenses

After *Cummings*, damages for tuition and other school-related expenses have been found to be recoverable in Title IX actions. For instance, in *Doe v. Town of North Andover*, the court denied a defendant's motion to dismiss a plaintiff's Title IX action under *Cummings*, finding that the plaintiff sought "other relief, including damages for tuition, school expenses, and expenses incurred as a consequence of have experiences several assaults. No. 1:20-CV-10310-IT, 2023 WL 3481494, at *12; *see also Alexander v. Thomas Univ., Inc.*, No. 7:21-CV-86 (HL), 2023 WL 2307612, at *6 (M.D. Ga. Mar. 1, 2023) ("[S]hould plaintiff be able to establish that defendant discriminated against her in violation of § 504 [of the Rehabilitation Act], she may be entitled to recover monetary damages, including lost tuition"); *accord Abdulsalam v. Bd. of Regents of Univ. of Neb.*, No. 4:22-CV-3004, 2023 WL 4266378, at *4 (D. Neb. June 29, 2023) (suggesting that plaintiff could potentially assert claims for tuition and moving expenses, but finding plaintiff failed to plead facts in support of such a claim, where plaintiff did not relocate and was able to complete her education at the University of Nebraska). Additionally, where Title IX violations preclude students from obtaining scholarship money to subsidize their education, damages may also be recoverable. *See Fisk v. Bd. of Trustees of Cal. State Univ.*, No. 22-CV-173 TWR (MSB), 2023 WL 2919317, at *12 (S.D. Cal. Apr. 12, 2023).

b. Lost Educational Opportunities and Benefits

Defendants moving to preclude a plaintiff from seeking damages for lost educational opportunities and benefits ignore the plain text of the statute, contract law, and the instructive decisions of other courts post-*Cummings*.

The premise of the Supreme Court's decision in *Cummings* is that a party should have "clear notice" of the potential for being held liable for an alleged harm when pursuing certain claims. *Cummings*, 142 S. Ct. at 1576; *see also Doe v. City of Pawtucket*, 633 F. Supp. 3d 583, 590 (D.R.I.2022) (noting the Court "wrestled with the disagreement over the availability of emotional distress damages, but concluded that the lack of consensus meant that such a remedy was not generally available"). The Court's analysis centered on the fact that the statutes at issue in the case were passed pursuant to Congress's Spending Clause powers and that "the 'legitimacy of Congress' power' to enact Spending Clause legislation rests . . . on 'whether the recipient [of federal funds] voluntarily and knowingly accepts the terms of that contract.'" *Id.* at 1570 (cleaned up) (quoting *Barnes v. Gorman*, 536 U.S. 181, 186 (2002)).

Title IX provides, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). There is no dispute that a Title IX plaintiff's claim can (and must) include an assertion that sexual harassment deprived her of equal access to the educational opportunities or benefits provided by a school. *Davis*, 526 U.S. at 650 ("The statute makes clear that, whatever else it prohibits, students must not be denied access to educational benefits and opportunities on the basis of gender."). No defendant can claim it did not have notice of being responsible for such loss when it is in the plain text of the statute. Educational loss is an essential element of every Title IX claim.

That aside, contract law allows for damages based on lost opportunities, and at least two courts have allowed a plaintiff to seek damages under Spending Clause statutes for lost opportunities since *Cummings. See Montgomery v. District of Columbia*, No. 18-1928 (JDB), 2022 WL 1618741, 2022 U.S. Dist. LEXIS 92281, at *72 (D.D.C. May 23, 2022); *Chaitram v. Penn*

Med.-Princeton Med. Ctr., No. 21-17583 (MAS) (TJB), 2022 WL 16821692, 2022 U.S. Dist. LEXIS 203676, at *5 (D.N.J. Nov. 8, 2022). In *Montgomery*, the plaintiff alleged the government failed to offer him an accommodation while he was in police custody in violation of the Americans with Disabilities Act and the Rehabilitation Act. *See* 2022 U.S. Dist. LEXIS 92281 at *25. The court reasoned that "while [the plaintiff] cannot recover either emotional distress or reputation damages in light of *Cummings*, he may be able to recover some small amount of damages to compensate him for the opportunity he lost when he was denied the ability to meaningfully access and participate in his interrogations" while in police custody. *Id.* at *75. The court relied on contract law's "expectation-interest" theory of damages—the plaintiff was a third-party beneficiary to the District of Columbia's contract with the federal government in which the District agreed not to discriminate against people with disabilities. The plaintiff asserted that the District failed to uphold its promise of anti-discrimination, which resulted in him losing out on an opportunity to fully participate in his interrogation with police at the same level as non-disabled people. *Id.* at *75-77. For that reason, the court found, damages to remedy the lost opportunity was "entirely appropriate in a traditional contract case." *Id.* (citing Restatement (Second) of Contracts § 347 cmt. A (Am. L. Inst. 1981) ("Contract damages are ordinarily based on the injured party's expectation interest and are intended to give him the benefit of his bargain by awarding him a sum of money that will, to the extent possible, put him in as good a position as he would have been in had the contract been performed.")).

The court in *Chaitram* reached a similar conclusion in a disability discrimination case where the plaintiff asserted a hospital failed to provide reasonable accommodations when she sought medical treatment in violation of the ADA, the Rehab Act, and Section 1557 of the Affordable Care Act. 2022 U.S. Dist. LEXIS 134592, at *2. There, the hospital moved to dismiss

the plaintiff's claims for lack of available damages. The court denied the motion, finding the plaintiff had "an expectation interest in the ability to fully participate in her own medical care through effective communication," which she alleged was denied to her. *Chaitram*, 2022 U.S. Dist. LEXIS 203676, at *6.

Although monetary losses in contract cases must be established with reasonable certainty, "this requirement does not mean, however, that the injured party is barred from recovery unless he establishes the total amount of losses." Restatement (Second) of Contracts § 352 cmt. A. No case to date has found that these damages are only cognizable when asserted with a specified monetary amount. To the contrary, the court in *Montgomery* explicitly stated that it "will not usurp the role of the jury and attempt to quantify such damages in the summary judgement setting." 2022 U.S. Dist. LEXIS 92281, at *77, n.39. Another court, post-*Cummings*, instructed the jury on how to assess and determine such damages and also left deciding the monetary amount to the jury. *See* Final Jury Instructions, *Nancy Roe v. Purdue Univ.*, No. 4:18-cv-89-JEM (N.D. Ind. Sept. 23, 2022), ECF No. 140, Instruction 24 (issuing instruction to jury to compensate for any injury "sustained as a direct result of being denied equal access to educational opportunities by Defendant Purdue University's handling of her complaint of assault," as well as economic loss, with limiting instruction regarding "emotional harm"). It is for the jury to award damages after hearing the evidence presented at trial.

Damages under constitutional claims are instructive here, where juries may award damages for the lost right—the opportunity to vote, for example—without actual monetary loss. *See Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 311 n.14 (1986) (discussing damages in voting rights case where "damages are presumed from the wrongful deprivation of it *without evidence of actual loss of money, property, or any other valuable thing*) (internal citation omitted,

emphasis added); *Nixon v. Herndon*, 273 U.S. 536 (1927) (allowing damages for lost opportunity to vote); *Piver v. Pender Cty. Bd. of Educ.*, 835 F.2d 1076, 1082 (4th Cir. 1987) (holding an "injury to a protected first amendment interest can itself constitute compensable injury *wholly apart from any emotional distress*, humiliation and personal indignity, emotional pain, embarrassment, fear, anxiety and anguish suffered by plaintiffs") (emphasis added, cleaned up)). *See also Memphis Cmty. Sch. Dist.*, 477 U.S. at 314-15 (Marshall, J. concurrence) (highlighting importance of damages for lost opportunities).

In the context of Title IX, lost educational opportunities are particularly relevant. "Lost educational opportunities lie at the heart of Title IX private right of action cases . . . . 'The statute makes clear that, whatever else it prohibits, students must not be denied access to educational benefits and opportunities on the basis of gender.'" *Doe v. Fairfax Cnty. Sch. Bd.*, No. 118CV00614MSNIDD, 2023 WL 424265, at *5 (E.D. Va. Jan. 25, 2023) (cleaned up). In *Doe v. Fairfax County School Board*, a federal court in Virginia held that the plaintiff's claims for damages of lost educational opportunities were allowable under *Cummings*. *Id.* at *5. There, the plaintiff claimed lost educational opportunities and in discovery produced "concrete, negative effect[s]" her alleged sexual assault had on her ability to participate in educational opportunities and benefits provided by the school: her grades and attendance declined after she reported the assault and she withdrew from school activities to avoid interactions with her assailant. *Id.* The court found:

> Although it is true that principles of contract law place the burden on the plaintiff to prove damages with reasonable certainty, Restatement (Second) of Contracts § 352 cmt. a (1981), compensatory damages that are not based upon specific monetary harm but stem directly from lost opportunities suffered as a result of discrimination can nonetheless serve as a basis for damages in private right of action cases based on Spending Clause statutes. Accordingly, this Court finds that such losses of educational opportunities remain recoverable post-Cummings and that it would be premature at this time to preclude Plaintiff from presenting

> evidence related to compensatory damages for lost educational opportunities and benefits.

Id. (cleaned up).

c. Medical Expenses

Medical expenses, when a breach of contract causes an injury, are compensable. "[M]any sources to which the Supreme Court referred in *Cummings* also noted the availability of damages for physical injury in breach of contract actions." *Pawtucket*, 633 F. Supp. 3d at 590. For instance, one source quoted multiple times by the court observes that, "[a]nother common exception to the general prohibition on noneconomic damages is when a breach of contract results in physical injury or extreme hardship." *Id.* at 588 (quoting David A. Hoffman & Alexander S. Radus, *Instructing Juries on Noneconomic Contract Damages*, 81 Fordham L. Rev. 1221, 1229-30 (2012)). In fact, "distinguished authority has asserted that when conduct that causes bodily harm is wrongful not because it is a breach of . . . an express contract made by the defendant, there is no reason for applying a different rule as to the damages that can be recovered." § 6.9. Common law, 6 La. Civ. L. Treatise, Law of Obligations § 6.9 (2d ed.) (citing Corbin on Contracts 428 (1964)).

The *Pawtucket* case is instructive. There, a Title IX case, the plaintiff sought damages for emotional distress, "pain and suffering," and medical expenses as three distinct categories of damages (among other damages). 633 F. Supp. 3d at 589. The court in *Pawtucket* found that *Cummings* precludes a Title IX plaintiff from seeking emotional distress damages but allowed the plaintiff to seek damages for medical expenses, some of which stemmed from physical injuries. *Id.* at *589-91. The court disallowed "pain and suffering," as it found the plaintiff in that case was not able to articulate how it was distinct from the claim of emotional distress or medical expenses. Medical expenses, however, were allowed. *Id*. In allowing medical expenses, the court cited plaintiff's complaint, which simply stated she "has needed medical care and attention." Third

Amended Complaint, *Doe v. City of Pawtucket*, No. 1:17-cv-365-JJM-LDA (D.R.I. July 18, 2018), ECF No. 57 at 21-22 ¶ 77.

Another example, in *Pennington v. Flora Community Unit School District No. 35*, several plaintiffs alleged that their damages went "beyond those sought in Cummings because Plaintiffs were diagnosed with PTSD, which 'can cause physical symptoms' and is 'also associated with long-term physical health conditions like diabetes and heart disease,' and they incurred medical costs to treat their condition." No. 3:20-CV-11-MAB, 2023 WL 348320, at *2 (S.D. Ill. Jan. 20, 2023). The *Pennington* court denied the school district's request to dismiss the plaintiffs' claims under the Rehabilitation Act and the ADA, finding "Plaintiffs alleged that they suffered an economic loss in the form of medical expenses, and Defendant did not present any argument that this type of compensatory damages is not recoverable." Id. at *4. In coming to this holding, the court opined:

> Plaintiffs did not only request emotional damages, as the School District contends. Plaintiffs very clearly requested medical expenses, which the allegations attribute to treatment for physical injuries they suffered as a result of bullying, as well as treatment for the psychological injuries (see, e.g., Doc. 73, p. 10) (alleging that James R. was stabbed in the arm with a pencil by another student and had to have it surgically removed and that James R. was hospitalized due to suicidal ideations). As the Court sees it, these are compensatory damages for economic losses, which Cummings did not preclude. The School District's contention that Plaintiff is only claiming emotional damages is therefore without merit.

Id. at *3.

Such instructions in Title IX cases are not unprecedented. For example, in *Theno v. Tonganoxie Unified Sch. Dist. No. 464*, the court instructed the jury on awarding for "pain, suffering, or mental anguish," and separately instructed on awarding for "medical care and treatment caused by the school's deliberate indifference." Jury Instructions, *Theno v. Tonganoxie Unified Sch. Dist. No. 464*, 394 F. Supp. 2d 1299 (D. Kan. 2005) (No. 04-2195-JWL), ECF No.

144, Instruction 18 (trial testimony indicating plaintiff suffered physical side effects as a result of the harassment). Any concern about a jury awarding damage for emotional distress instead of an injury or medical expense can be appropriately managed with a limiting instruction, if determined necessary during the course of the trial. *See* Final Jury Instructions, *Purdue Univ.*, No. 4:18-cv-89-JEM (N.D. Ind. Sept. 23, 2022), ECF No. 140, Instruction 24.

d. Lost Earning Capacity and Employment Opportunities

"Consequential damages for lost earning capacity are available in breach of contract cases where a plaintiff alleges the loss of identifiable professional opportunities that the defendant's breach actually adversely influenced or affected." 24 Williston on Contracts § 66.4 (4th ed. 2022) (internal quotations omitted). Thus, consistent with the Court's ruling in *Cummings*, damages for loss of future earnings or employment opportunities remain available. *See Doe v. Texas Christian Univ.*, No. 4:22-CV-00297-O, 2022 WL 17631668, at *4 (N.D. Tex. Dec. 13, 2022) (denying summary judgment on economic damages and loss of future earnings claims where plaintiff provided sufficient evidence of economic damages were "not 'entirely speculative'"); *Rullo v. Univ. of Pittsburgh*, No. 17-1380, 2021 WL 633381, at *3–4 (Feb. 18, 2021) (finding plaintiff adequately pled loss of identifiable professional opportunities where alleged Title IX violations led plaintiff to transfer to lower ranked law school and therefore lose access to certain caliber of jobs); *but see Fairfax Cnty. Sch. Bd.*, 2023 WL 424265, at *6–7 (finding plaintiff could not recover for loss of future earnings where she failed to plead any identifiable opportunity foreclosed by discrimination and alleged loss was to attenuate from violations because breach occurred while plaintiff was in high school).

The full text of the passage in the treatise offers examples of how lost earning capacity, a consequential damage in contract law, may be recoverable:

> [A] wrongfully discharged professional employee may recover consequential damages for the loss of "identifiable professional opportunities," provided that the ordinary requirements for the recovery of consequential damages, such as foreseeability and causation, are met, and provided further that the employee alleges and proves with specificity that the defendant's breach actually adversely influenced or affected future job opportunities. However, generalized evidence that the employer's breach might make the plaintiff's job search more difficult, or even expert testimony that the employee could, in the abstract, face enhanced difficulty in obtaining future employment following the defendant' breach, is not sufficient, since such proof amounts essentially to an assertion that the defendant's breach harmed the plaintiff's reputation, and the courts are in agreement that consequential damages for harm to reputation are not recoverable, because they are altogether nonquantifiable and speculative.

24 Williston on Contracts § 66.4; *see also Rice v. Cmty. Health Ass'n*, 203 F.3d 283, 288 (4th Cir. 2000) ("no court – anywhere – has held that a plaintiff cannot recover consequential damages if he has alleged and proved that breach of an employment contract resulted in the loss of future 'identifiable professional opportunities'") (quoting *Redgrave v. Boston Symphony Orchestra, Inc.*, 855 F.2d 888, 894 (1st Cir. 1988)). Therefore, a remedy for lost earning capacity is available in Title IX cases.

One court has reached the same conclusion post-*Cummings*. There, the court granted the defendant's motion for partial summary judgment on the plaintiff's request for "emotional distress damages and reputational harm damages." *Unknown Party v. Ariz. Bd. of Regents*, No. CV-18-01623-PHX-DWL, 2022 WL 17459745, 2022 U.S. Dist. LEXIS 219806, *13 (D. Ariz. Dec. 6, 2022). That decision, however, does not address or disturb the court's prior decision only a month earlier where it allowed an expert witness to present testimony on the plaintiff's alleged lost earning capacity caused by the school's discrimination, not based on an alleged reputational harm. *See Unknown Party v. Ariz. Bd. of Regents*, 641 F. Supp. 3d 702, 710, 726-28 (D. Ariz. 2022) (denying *Daubert* motion for expert who offered testimony regarding lost earning capacity after school's Title IX proceeding). This is consistent with what courts have allowed in Title IX cases

prior to the *Cummings* decision. *See, e.g., Rullo v. Univ. of Pittsburgh*, No. 17-1380, 2021 WL 633381, 2021 U.S. Dist. LEXIS 29882, at *6-8 (W.D. Pa. Feb. 18, 2021) (allowing evidence relevant to claim of lost future earnings because of school's discrimination and retaliation). Damages for lost earning capacity are allowed.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL GRABOWSKI, a single man, *Plaintiff-Appellant,* v. ARIZONA BOARD OF REGENTS; UNIVERSITY OF ARIZONA, FREDERICK LEE HARVEY, Director of Cross-Country/Track and Field, JANET HARVEY, Wife, JAMES L. LI, Associate Head Coach of Cross-Country/Distance, JEAN WANG, Wife, JAMES L. FRANCIS, Senior Associate Director of Athletics/Track and Field at the University of Arizona, *Defendants-Appellees,* and HANNAH VIVIAN PETERSON, Assistant Coach of Cross-Country/Distance, a single woman, TAMMY FRANCES, Wife, KIM HANSON BARNES, Executive	No. 22-15714 D.C. No. 4:19-cv-00460-SHR OPINION

Senior Associate Director of Athletics, ANDREW BARNES, Husband; DAVID WOOD HEEKE, Director of Athletics, ELIZABETH PANGBORN HEEKE, Wife, BENJAMIN JAMES CRAWFORD, Associate Athletics Trainer, a single man; CARLOS VILLAREAL, Student; HUNTER DAVILA, Student; JAMES L. FRANCES, Senior Associate Director of Athletics/Track and Field; TAMMI FRANCIS, Wife; ERIKA KIM HANSON BARNES, Executive Senior Associate Director of Athletics at the University of Arizona,

Defendants.

Appeal from the United States District Court
for the District of Arizona
Scott H. Rash, District Judge, Presiding

Argued and Submitted March 8, 2023
Las Vegas, Nevada

Filed June 13, 2023

Before: Susan P. Graber, Mark J. Bennett, and Roopali H. Desai, Circuit Judges.

Opinion by Judge Graber

SUMMARY*

Title IX

The panel affirmed in part, vacated in part, and reversed in part the district court's dismissal of Michael Grabowski's action under Title IX and 42 U.S.C. § 1983 against the Arizona Board of Regents, the University of Arizona, and individual defendants, and remanded for further proceedings.

Grabowski alleged that, when he was a first-year student-athlete at the University of Arizona, his teammates subjected him to frequent "sexual and homophobic bullying" because they perceived him to be gay. He claimed that the University defendants were deliberately indifferent to his claims of sexual harassment and that they retaliated against him in violation of Title IX. He also brought claims against two of his coaches under § 1983 and sought punitive damages.

The panel held that Title IX bars sexual harassment on the basis of perceived sexual orientation. In *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), the Supreme Court brought sexual-orientation discrimination within Title VII's embrace. Construing Title IX's protections consistently with those of Title VII, the panel held that discrimination on the basis of sexual orientation is a form of sex-based discrimination under Title IX. Again looking to Title VII caselaw, and agreeing with the Fourth Circuit, the panel

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

further held that discrimination on the basis of perceived sexual orientation, as opposed to actual sexual orientation, is actionable under Title IX.

The panel held that a school that receives federal funding can be liable for an individual Title IX claim of student-on-student harassment if (1) the school had substantial control over the harasser and the context of the harassment; (2) the plaintiff suffered harassment so severe that it deprived him of access to educational opportunities or benefits; (3) a school official who had authority to address the issue and institute corrective measures for the school had actual knowledge of the harassment; and (4) the school acted with deliberate indifference to the harassment such that the indifference subjected the plaintiff to harassment. The panel held that Grabowski sufficiently alleged the first, third, and fourth elements of his Title IX harassment claim, but the operative complaint failed to allege a deprivation of educational opportunity. The panel affirmed the dismissal of the harassment claim, vacated the portion of the district court's order denying leave to amend, and remanded for the district court to consider Grabowski's request to amend the complaint again, should he renew that request before the district court.

The panel held that the operative complaint sufficiently alleged that Grabowski suffered harassment on the basis of perceived sexual orientation, that he asked the University defendants to intervene, and that these defendants retaliated against him when they failed to investigate his accusations adequately. The panel therefore reversed the dismissal of Grabowski's retaliation claim and remanded for further proceedings.

Affirming the judgment for defendants on the § 1983 claim and the claim for punitive damages, the panel held that the coaches were entitled to qualified immunity as to Grabowski's claim that they violated his due process rights when they removed him from the track team and cancelled his athletic scholarship.

COUNSEL

William G. Walker (argued), William G. Walker P.C., Tucson, Arizona, for Plaintiff-Appellant.

Alexandra Z. Brodsky (argued), Adele P. Kimmel, and Mollie Berkowitz, Public Justice, Washington, D.C., for Amici Curiae Public Justice and 18 Additional Civil Rights Organizations.

Patricia V. Waterkotte (argued) and Michael J. Rusing, Rusing Lopez & Lizardi PLLC, Tucson, Arizona, for Defendants-Appellees.

Hunter Davila, Cheyenne, Wyoming, pro se Defendant.

OPINION

GRABER, Circuit Judge:

Plaintiff Michael Grabowski alleges that, when he was a first-year student-athlete at the University of Arizona, his teammates subjected him to frequent "sexual and homophobic bullying" because they perceived him to be gay. He claims that the Arizona Board of Regents and the University of Arizona ("University Defendants") were deliberately indifferent to his claims of sexual harassment and that they retaliated against him in violation of Title IX. He also brings claims under 42 U.S.C. § 1983 against two of his coaches, Frederick Harvey and James Li (collectively, "Defendant Coaches"). Finally, he seeks punitive damages against the Defendant Coaches.

The district court dismissed the action. Reviewing de novo, Soo Park v. Thompson, 851 F.3d 910, 918 (9th Cir. 2017) (dismissal for failure to state a claim); Knappenberger v. City of Phoenix, 566 F.3d 936, 939 (9th Cir. 2009) (judgment on the pleadings), we affirm in part, vacate in part, reverse in part, and remand in part.

We hold that Title IX bars sexual harassment on the basis of perceived sexual orientation. The operative complaint sufficiently alleges that Plaintiff suffered such harassment, that he asked Defendants to intervene, and that Defendants retaliated against him when they failed to investigate his accusations adequately. We therefore reverse the dismissal of his retaliation claim. But the operative complaint fails to allege a deprivation of educational opportunity, a required element of the harassment claim. As to the harassment claim, we affirm the dismissal and remand for the district court to consider Plaintiff's request to amend the complaint

again, should he renew that request before the district court. Finally, we affirm the judgment for Defendants on the § 1983 claim and the claim for punitive damages.

FACTUAL AND PROCEDURAL HISTORY

Because we review a dismissal under Federal Rule of Civil Procedure 12(b)(6) and a judgment on the pleadings, we must take as true all plausible allegations in the operative complaint. S.F. Taxi Coal. v. City & County of San Francisco, 979 F.3d 1220, 1223 (9th Cir. 2020) (judgment on the pleadings); Manzarek v. St. Paul Fire & Marine Ins. Co., 519 F.3d 1025, 1031 (9th Cir. 2008) (dismissal for failure to state a claim). Accordingly, at this stage of the litigation, our recitation of the facts assumes that the non-conclusory allegations in the operative complaint are true.

Plaintiff attended the University of Arizona on an academic and athletic scholarship, starting in 2017. He was recruited to join the university's Cross Country and Track and Field Teams ("track team" or "team"), led by the Defendant Coaches.

Plaintiff's teammates subjected him to "sexual and homophobic bullying" over the course of his first year on the track team. Beginning in August 2017, at the team's pre-season training camp, his teammates used homophobic slurs "almost daily." Plaintiff's father reported the bullying to Defendant Li, who promised to investigate the issue. Li spoke with Plaintiff about the bullying the next week. One month later, in early October 2017, Plaintiff's mother emailed the team's sports psychologist to request that she discuss the bullying with Plaintiff.

Plaintiff's teammates called him "gay" and a "fag," and on an "almost daily" basis they "made multiple additional

references alleging that they perceived him as gay." His teammates posted an "untrue," "harassing, homophobic, [and] obscene video" about Plaintiff in the team's public chat group. When Plaintiff raised his concerns to Defendant Harvey about the "constant" homophobic bullying and the published video, Harvey did not respond.

"Every time [Plaintiff] mentioned the 'sexual and homophobic bullying' to either one of the Defendant [C]oaches," they dismissed it as "Plaintiff's need to 'adjust.'" In January 2018, Li promised Plaintiff's father that he would speak to Plaintiff about the bullying, and Plaintiff's mother again emailed the team's sports psychologist to report Plaintiff's "increasing sadness."

In August 2018, Plaintiff met with his coaches. At that meeting, Li asked him if any bullying was going on, "as if he had no advance reporting of it." Plaintiff responded by naming the teammates who had subjected him to bullying; Li replied that Plaintiff "can't single out the two top runners on the team."

After Plaintiff identified his bullies to Li, Plaintiff's coaches embarked on a "concerted effort . . . to demoralize him." One such effort occurred in early September 2018, when an assistant coach scolded Plaintiff for "faking" an illness after Plaintiff vomited twice during a team meeting and then performed poorly in a race. A blood test later revealed that Plaintiff had a viral illness at the time. Around that same time, Plaintiff met with his coaches again. When he raised the issue of homophobic bullying at that meeting, the coaches denied knowledge of bullying and told Plaintiff that "there's a certain atmosphere we are trying to establish on this team, and you do not fit in it." At one point, in response to Plaintiff's raising the harassment issue,

Defendant Harvey "leapt out of his chair, ran up to within a few inches of Plaintiff's face, slammed his hands down hard on Plaintiff's arms . . . and called Plaintiff a . . . 'white racist.'" Plaintiff was so scared by Harvey's actions that he had a spontaneous bloody nose and fainted. At the end of the meeting, the coaches dismissed Plaintiff from the team.

Plaintiff then filed this action in federal court against the Arizona Board of Regents, the University of Arizona, and many individuals associated with the track team. Plaintiff amended his complaint twice to remove various defendants and claims. His third amended complaint—the operative complaint here—alleges that Plaintiff was harassed because of his perceived sexual orientation. He alleges that the University Defendants' deliberate indifference to that "severe, pervasive, and objectively offensive" harassment violated Title IX. He also asserts a retaliation claim against the University Defendants under Title IX. Finally, he seeks to hold the Defendant Coaches liable under § 1983 for constitutional violations, and requests punitive damages against them.

Defendants moved to dismiss Plaintiff's complaint for failure to state a claim. The district court granted the motion for all claims except the retaliation claim. The court denied leave to amend, reasoning that the complaint's deficiencies could not be cured by further amendment. Two months later, the court granted Defendants' motion for judgment on the pleadings for the retaliation claim, concluding that Plaintiff "failed to allege sufficient facts showing that he engaged in a protected activity," a required element for a retaliation claim. Plaintiff timely appeals.

DISCUSSION

We will address in turn Plaintiff's (A) discrimination claim under Title IX, (B) retaliation claim under Title IX, (C) § 1983 claim against the Defendant Coaches, and (D) claim for punitive damages.

A. Discrimination on the Basis of Sexual Orientation Under Title IX

Plaintiff alleges that Defendants discriminated against him "on the basis of sex," 20 U.S.C. § 1681(a), because he was mistreated due to the harassers' perception that he is gay. For example, he alleges that "[t]eammates regularly, and almost daily, claimed that Plaintiff . . . was 'gay'; that he was a 'fag'; and made multiple additional references alleging that they perceived him as gay." Additionally, "other members of the team began accusing the Plaintiff of being gay, alleging to him and others that he was homosexual, gay, a fag." Those allegations plausibly suggest that Plaintiff's teammates acted because they perceived him to be gay. See Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (holding that courts must ask whether allegations contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face'" (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007))).

We first must decide, then, whether discrimination on account of perceived sexual orientation qualifies as discrimination on the basis of sex for purposes of Title IX. Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal

financial assistance . . . ." 20 U.S.C. § 1681(a) (emphasis added).

1. "On the Basis of Sex"

In Bostock v. Clayton County, 140 S. Ct. 1731 (2020), the Supreme Court brought sexual-orientation discrimination within Title VII's embrace. The Court held that discrimination "because of" sexual orientation is a form of sex discrimination under Title VII. Id. at 1743. We conclude that the same result applies to Title IX. "The Supreme Court has often looked to its Title VII interpretations of discrimination in illuminating Title IX." Emeldi v. Univ. of Or., 673 F.3d 1218, 1224 (9th Cir. 2012), as amended, 698 F.3d 715 (9th Cir. 2012) (citation and internal quotation marks omitted). And "[w]e construe Title IX's protections consistently with those of Title VII" when considering a Title IX discrimination claim. Doe v. Snyder, 28 F.4th 103, 114 (9th Cir. 2022); see id. (reasoning that Bostock's use of the phrases "on the basis of sex" and "because of sex" interchangeably suggests interpretive consistency across the statutes); see also Emeldi, 698 F.3d at 724 (noting that "the legislative history of Title IX 'strongly suggests that Congress meant for similar substantive standards to apply under Title IX as had been developed under Title VII'" (quoting Lipsett v. Univ. of P.R., 864 F.2d 881, 897 (1st Cir. 1988))).[1] Harmonizing the Court's holding in Bostock with our holding in Snyder, we hold

[1] Since the Court's decision in Bostock, at least one other circuit has adopted the approach that we take here, in a similar context. See Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 616 (4th Cir. 2020), as amended (Aug. 28, 2020) (holding that, "[a]lthough Bostock interprets Title VII . . . , it guides our evaluation of claims under Title IX" for a discrimination claim based on transgender identity).

today that discrimination on the basis of sexual orientation is a form of sex-based discrimination under Title IX.

Plaintiff does not allege that he is gay; rather, he alleges that his harassers perceived him to be gay. We therefore next consider whether discrimination on the basis of perceived sexual orientation, as opposed to actual sexual orientation, is actionable under Title IX.[2]

Because we construe Title VII and Title IX protections consistently, Snyder, 28 F.4th at 114, we look again to Title VII caselaw to guide our analysis. The conclusion that discrimination on the basis of perceived sexual orientation is actionable under Title IX follows from two related branches of Title VII precedent. First, in Bostock, the Court established that, when an employer fires an employee for traits that it would tolerate in an employee of the opposite sex, that employer discriminates in violation of Title VII. 140 S. Ct. at 1741. There, three plaintiffs—two gay men and one transgender woman—sued their employers under Title VII, alleging unlawful discrimination because of sex. Id. at 1737–38. Each plaintiff was fired shortly after revealing their sexual orientation or transgender status to their employer. Id. at 1737. The Court held that each of those firings violated Title VII because "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." Id. at 1741. Prior to Bostock, several federal

[2] We have previously held that individuals who allege discrimination based on perceived, and not actual, sexual orientation are part of an identifiable class for the purpose of asserting a § 1983 Equal Protection claim under the Fourteenth Amendment, Flores v. Morgan Hill Unified Sch. Dist., 324 F.3d 1130, 1130–34 (9th Cir. 2003), but we have not yet considered this issue in the Title IX context.

circuits had held that discrimination because of sexual orientation was not actionable under Title VII. Id. at 1833 & n.9 (Kavanaugh, J., dissenting) (collecting cases). But, as Bostock clarifies, Title VII prohibits discriminating against someone because of sexual orientation; such discrimination occurs "in part because of sex." Id. at 1743.

Second, plaintiffs may bring a Title VII discrimination claim under the theory that their harassers perceived them as not conforming to traditional gender norms. In Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), superseded by statute on other grounds as stated in Comcast Corp. v. Nat'l Ass'n of Afr. Am.- Owned Media, 140 S. Ct. 1009, 1017 (2020), the Supreme Court held that a woman who was denied a promotion for failing to conform to traditional female gender norms had an actionable claim under Title VII. Id. at 250–51 (plurality opinion); see also id. at 277 (O'Connor, J., concurring) (noting that the plaintiff showed "direct evidence that decisionmakers placed substantial negative reliance on an illegitimate criterion," which constitutes an actionable claim under Title VII).

There, an accounting firm passed over a female senior manager for a promotion to the partnership because she was "macho" and needed to "walk more femininely, talk more femininely, dress more femininely, . . . and wear jewelry." Id. at 235. A plurality of the Court reasoned that, "[i]n the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." Id. at 250.

That reasoning applies "with equal force to a man who is discriminated against for acting too feminine." Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864, 874 (9th Cir. 2001).

In Nichols, a male employee was verbally abused because his co-workers and supervisor perceived him to be effeminate. Id. at 870, 874. His harassers derided him for carrying his serving tray "like a woman" and mocked him for not having sex with a female coworker. Id. at 874. And "at least once a week and often several times a day," his coworkers referred to him using female pronouns and called him derogatory names, such as "faggot" and "female whore." Id. at 870. Relying on Price Waterhouse, we held that the verbal abuse occurred because of sex in violation of Title VII: "At its essence, the systematic abuse directed at [the plaintiff] reflected a belief that [he] did not act as a man should act. . . . [T]hat . . . verbal abuse was closely linked to gender." Id. at 874.

The same logic applies to Plaintiff's allegations here. Under Price Waterhouse and Nichols, an employer cannot discriminate against a person—male or female—for failure to conform to a particular masculine or feminine sex stereotype. Nichols, 256 F.3d at 874; Price Waterhouse, 490 U.S. at 250. A sex stereotype is a belief that a person is not acting "as [their sex] should act." Nichols, 256 F.3d at 874. In Nichols, the harassers believed that the male plaintiff was behaving like a woman and not a man. That harassment was motivated by the stereotype that men should act masculine. Id. Here, the harassment allegedly stemmed from the belief that the male Plaintiff was attracted to men instead of women. That harassment is motivated by the stereotype that men should be attracted only to women. Both instances of harassment are motivated by a core belief that men should conform to a particular masculine stereotype. Both are impermissible forms of discrimination in violation of Title VII and Title IX. See Snyder, 28 F.4th at 114.

We are not the first court to grapple with this issue. In Roberts v. Glenn Industrial Group, Inc., 998 F.3d 111 (4th Cir. 2021), the Fourth Circuit held that Title VII protects plaintiffs who suffer discrimination because of their perceived sexual orientation. Id. at 120–21. There, the plaintiff sued under Title VII, alleging, among other things, that his supervisor sexually harassed him because of his perceived sexual orientation, including by repeatedly calling him "gay" and making "sexually explicit and derogatory remarks towards him." Id. at 115–16. The Fourth Circuit held that "a plaintiff may prove that same-sex harassment is based on sex where the plaintiff was perceived as not conforming to traditional male stereotypes." Id. at 121. The court noted that Title VII affords protection for a claim of discrimination because of perceived sexual orientation because the Court's reasoning in Bostock "applie[s] . . . broadly to employees who fail to conform to traditional sex stereotypes." Id. We agree.

Our holding also is consistent with precedent holding that discrimination because of other perceived characteristics is a violation of Title VII. In EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768 (2015), for example, the Court held that a Muslim plaintiff, who wore a headscarf to a job interview and was denied that job, need not show that the employer knew that the applicant required a religious accommodation to prevail on a religious discrimination claim under Title VII. Id. at 770, 773–74. Because Congress did not add a knowledge requirement to the intentional-discrimination provisions in Title VII, the plaintiff had to prove only that her employer was motivated by the perceived need for a religious accommodation. Id. at 773–74. Our sister circuits have applied similar reasoning when considering claims of discrimination concerning other

protected characteristics. See, e.g., EEOC v. WC&M Enters., Inc., 496 F.3d 393, 401 (5th Cir. 2007) (holding that, to bring a claim for discrimination because of national origin, a plaintiff need not show that the "discriminator knew the particular national origin group to which the complainant belonged," because "it is enough to show that the complainant was treated differently because of his or her foreign accent, appearance, or physical characteristics" (alteration omitted) (citation and internal quotation marks omitted)); Jones v. UPS Ground Freight, 683 F.3d 1283, 1299, 1304 (11th Cir. 2012) (holding that the "use of epithets associated with a different ethnic or racial minority than the plaintiff," paired with other alleged racial harassment, was sufficient to present a jury question as to whether the plaintiff endured a hostile work environment).

In sum, we hold that discrimination on the basis of perceived sexual orientation is actionable under Title IX. Our holding on that point does not resolve the issues before us, however. Plaintiff alleges that his teammates harassed him, but he sued the University Defendants for violating Title IX.[3]

2. University Defendants' Liability

A school that receives federal funding can be liable for an individual claim of student-on-student harassment, but

[3] Before us, Plaintiff argues only that the University Defendants are liable under Title IX. We therefore have no occasion to address whether Title IX could give rise to individual liability of school officials. See, e.g., Gililland v. Sw. Or. Cmty. Coll., No. 6:19-cv-00283-MK, 2021 WL 5760848, at *7 (D. Or. Dec. 3, 2021) ("Although the Ninth Circuit has not addressed the question, courts have consistently held that Title IX does not subject school officials to liability in their individual capacities." (citation and internal quotation marks omitted)).

only if (1) the school had substantial control over the harasser and the context of the harassment, Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 645 (1999); (2) the plaintiff suffered harassment so severe that it deprived the plaintiff of access to educational opportunities or benefits, id. at 650; (3) a school official who had authority to address the issue and institute corrective measures for the school had actual knowledge of the harassment, Reese v. Jefferson Sch. Dist. No. 14J, 208 F.3d 736, 739 (9th Cir. 2000); see Davis, 526 U.S. at 650; and (4) the school acted with "deliberate indifference" to the harassment such that the indifference "subject[ed the plaintiff] to harassment," Karasek v. Regents of Univ. of Cal., 956 F.3d 1093, 1105 (9th Cir. 2020) (quoting Davis, 526 U.S. at 644 (alterations in original)). We consider each element in turn.

First, taking as true all plausible allegations in the operative complaint, Plaintiff sufficiently alleges that the University Defendants had "substantial control over both the harasser and the context in which the known harassment occur[red]." Davis, 526 U.S. at 645. In Davis, the Supreme Court noted that a school retains "substantial control" when "student-on-student sexual harassment . . . takes place while the students are involved in school activities or otherwise under the supervision of school employees." Id. at 646 (citation and internal quotation marks omitted). Here, Plaintiff alleges that some harassment occurred at a pre-season camp, which was a school-sponsored activity. Plaintiff does not allege a location for the other harassing incidents, but alleges that the harassment occurred on an "almost daily" and "regular" basis. It is reasonable to infer that at least some of those interactions occurred at team practices or at other school-sponsored activities under Defendant Coaches' supervision. Thus, at the motion to

dismiss stage, Plaintiff alleges enough facts to support his claim that Defendants exercised substantial control over the circumstances in which the harassment occurred.

The second, and more difficult, question is whether Plaintiff alleges facts to support an inference that the harassment was "so severe, pervasive, and objectively offensive that it can be said to deprive [him] of access to the educational opportunities or benefits provided by the school." Id. at 650. "Whether gender-oriented conduct is harassment depends on a constellation of surrounding circumstances, expectations, and relationships . . . including, but not limited to, the harasser's and victim's ages and the number of persons involved." Id. at 631 (citing Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998)). We "must also bear in mind that schoolchildren may regularly interact in ways that would be unacceptable among adults." Id. Here, Plaintiff alleges that the bullying he experienced from his college-age peers occurred "almost daily" for about a year, from August 2017 to August 2018. That frequency is enough to meet the severity standard.

But to state a claim, Plaintiff also must allege facts plausibly supporting a "potential link between [his] education and [the alleged] misconduct." Id. at 652. Plaintiff has failed to do so. "[O]vert, physical deprivation of access to school resources" counts as a deprivation of educational opportunity. Id. at 650–51. For example, a male student physically threatening female students every day, such that he prevents the female students from using the school's athletic facilities, meets the standard. Id. But the harassment need not be as overt. Conduct that "undermines and detracts from the victims' educational experience," such that "the victim-students are effectively denied equal access to an institution's resources and opportunities," qualifies as

well. Id. at 651. In Davis, the plaintiff alleged that persistent sexual harassment over several months caused her grades to drop because she could not concentrate on her studies, and she had written a suicide note because of the conduct. Id. at 634. A simple decline in grades, on its own, is not enough. Id. at 652. But the plaintiff's decline in grades, paired with "persisten[t] and sever[e]" harassment, sufficed to state a cognizable claim under Title IX. Id.

Unlike the plaintiff in Davis, Plaintiff does not allege that his grades declined because of the alleged harassment. To the contrary, his complaint states that his "grades at school and his relationships with other students that were not in the running program [were] always exemplary." Nor does Plaintiff allege that he stopped attending team practices or team-sponsored events because of the bullying.

Instead, Plaintiff alleges that his mother asked that Plaintiff meet with the team's sports psychologist about the persistent sexual bullying, which he did. Months later, his mother contacted the team's sports psychologist again, expressing "serious concern about Plaintiff's increasing sadness and asking her to speak to Plaintiff as soon as possible." Finally, Plaintiff alleges in conclusory fashion:

> [H]is educational opportunities at the University of Arizona were significantly disrupted by the sexual and homophobic rants and subsequent discrimination by his teammates.

Those allegations fail to provide a "potential link" between the quality of Plaintiff's education and the alleged harassment. Plaintiff experienced increasing sadness, but the operative complaint contains no facts describing how, if

at all, his educational opportunities were diminished. Therefore, the district court did not err by dismissing this claim.

During oral argument, when asked what facts support Plaintiff's claim that he suffered a loss of educational opportunities, Plaintiff's lawyer asserted for the first time that he knew of additional facts that Plaintiff could add to support his claim. Because these facts,[4] if pleaded, might aid Plaintiff, we vacate the portion of the district court's order denying leave to amend that claim. On remand, if Plaintiff seeks leave to amend the complaint further, the district court is free to consider such a request.

Turning to the third element, Plaintiff has sufficiently alleged that the Defendant Coaches had actual knowledge of the bullying. Plaintiff's father notified Coach Li of the bullying in August 2017 in a telephone call. And Plaintiff told Coach Harvey about the bullying at a Halloween party in October 2017.

Finally, at this stage, Plaintiff has sufficiently alleged deliberate indifference. Deliberate indifference "must, at a minimum, cause students to undergo harassment, or make them liable or vulnerable to it." Davis, 526 U.S. at 645 (brackets omitted) (citation and internal quotation marks omitted). It requires that the officials' response to the harassment is "clearly unreasonable in light of the known circumstances." Id. at 648. "This is a fairly high standard—a 'negligent, lazy, or careless' response will not suffice. . . .

[4] Counsel stated that Plaintiff had to leave the University of Arizona "as soon as the semester was over" due to the loss of his athletic scholarship, after which Plaintiff obtained another athletic scholarship at a different university.

Instead, the plaintiff must demonstrate that the school's actions amounted to 'an official decision . . . not to remedy' the discrimination." Karasek, 956 F.3d at 1105 (second ellipsis in original) (citations omitted). Though an official need not remedy the harassment to evade a claim of deliberate indifference, Davis, 526 U.S. at 648–49, Plaintiff has alleged that Defendants took no meaningful action in response to his complaints of anti-gay bullying. In fact, Plaintiff has alleged that, other than meeting with him on two occasions, the Defendant Coaches ignored the complaints altogether and, during the second meeting, "lied about their knowledge of the sexual and homophobic bullying of Plaintiff." Those allegations are enough at the motion to dismiss stage to establish a claim of deliberate indifference.

To summarize, we hold that Plaintiff sufficiently alleges the first, third, and fourth elements of his Title IX harassment claim, but not the second element. We affirm the dismissal of this claim, vacate the portion of the district court's order denying leave to amend, and remand to allow the district court to consider any request for further amendment concerning the alleged deprivation of Plaintiff's educational opportunity.

B. Retaliation Under Title IX

We turn next to Plaintiff's retaliation claim. To establish a prima facie claim of retaliation under Title IX, a plaintiff must allege that (1) the plaintiff participated in a protected activity, (2) the plaintiff suffered an adverse action, and (3) there was a causal link between the protected activity and the adverse action. See Emeldi, 698 F.3d at 725–26. Plaintiff alleges that the Defendant Coaches dismissed him from the track team and cancelled his athletic scholarship in retaliation for reporting sex-based harassment. For the

reasons that follow, we conclude that Plaintiff has stated a retaliation claim.

First, Plaintiff sufficiently alleges that he participated in a protected activity when he reported the sex-based bullying to his coaches. In the Title IX context, speaking out against sex discrimination is protected activity. Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 176–77 (2005).[5] Peer-on-peer sexual harassment at school, "if sufficiently severe, can . . . rise to the level of [sex-based] discrimination actionable under [Title IX]." Davis, 526 U.S. at 650. Here, Plaintiff alleges that his teammates called him homophobic names almost "daily" over the span of a year. As we have held above, that alleged harassment is severe enough to rise to the level of discrimination under Title IX. Accordingly, Plaintiff's reporting of that discrimination is a protected activity. Jackson, 544 U.S. at 176–77.

Second, Plaintiff sufficiently alleges an adverse action when he claims that his scholarship was cancelled and that he was kicked off the track team. See Emeldi, 698 F.3d at 726 (noting that an action is adverse when "a reasonable person would have found the challenged action materially adverse," such that it would "dissuade[] a reasonable person from making or supporting a charge of discrimination" (quoting Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006)) (internal quotation marks and brackets omitted)).

[5] Plaintiff's retaliation claim is valid even though his discrimination claim is insufficiently pleaded. "The protected status of [a plaintiff's] alleged statements holds whether or not [the plaintiff] ultimately would be able to prove [his or her] contentions about discrimination." Emeldi, 698 F.3d at 725 (citing Moyo v. Gomez, 40 F.3d 983, 984 (9th Cir. 1994)).

Finally, Plaintiff sufficiently alleges a causal link between his reports of bullying and his removal from the team. First, his dismissal from the team occurred just a few weeks after he complained about the bullying to his coaches. "We construe the causal link element of the retaliation framework 'broadly'; a plaintiff 'merely has to prove that the protected activity and the adverse action are not completely unrelated.'" Ollier v. Sweetwater Union High Sch. Dist., 768 F.3d 843, 869 (9th Cir. 2014) (quoting Emeldi, 698 F.3d at 726) (brackets omitted). Circumstantial evidence can establish causation. Emeldi, 698 F.3d at 727. For example, proximity in time between the protected action and the alleged retaliatory decision can provide circumstantial evidence of causation. Id. at 726 (citing Cornwell v. Electra Cent. Credit Union, 439 F.3d 1018, 1035 (9th Cir. 2006)).

According to the complaint, Plaintiff or his parents complained of the anti-gay bullying on seven occasions between August 2017 and September 2018. Plaintiff's parents raised the issue with either the Defendant Coaches or the team's sports psychologists in August and in October of 2017 and January 2018. Plaintiff himself first raised the issue to Defendant Harvey on October 31, 2017, at the team's Halloween party. Nearly a year later, on August 24, 2018, Plaintiff raised the issue again with Defendant Li. At that meeting, Plaintiff named the two students who were bullying him, and Defendant Li replied that Plaintiff "can't single out the two top runners on the team." Plaintiff was dismissed from the team three weeks after that final complaint. The short time between Plaintiff's final report of bullying to his coaches and his dismissal from the track team supports a plausible inference that he was removed from the team in retaliation for complaining about bullying by "the two top runners on the team." See, e.g., Ollier, 768 F.3d at

869 (holding that there was a sufficient causal link between the protected activity and an adverse action when the plaintiffs complained in May and July 2006 of discrimination that violated Title IX, and the plaintiffs' softball coach was then fired in July 2006).

Second, Plaintiff alleges that the Defendant Coaches embarked on a "concerted effort" to "demoralize" him after he singled out the bullies. Taken together, the allegations suffice to provide a causal link. We therefore reverse the judgment on the pleadings with respect to the retaliation claim and remand for further proceedings.

C. Section 1983 Claim Against the Defendant Coaches

We next turn to Plaintiff's § 1983 claim against the Defendant Coaches. Plaintiff alleges that the Defendant Coaches violated his due process rights when they (1) removed him from the track team and (2) cancelled his athletic scholarship.[6] The Defendant Coaches contend that they are entitled to qualified immunity. We agree.

Determining whether officials receive qualified immunity involves two inquiries: (1) whether, "taken in the light most favorable to the party asserting the injury," the facts alleged show the officer's conduct violated a constitutional right; and (2) if so, whether the right was

[6] Before the district court, Plaintiff labeled his § 1983 claim as both an equal protection and a due process claim, but the analysis focused solely on the alleged due process violation. In other words, Plaintiff failed to argue an equal protection claim to the district court. To the extent that Plaintiff attempts to assert an equal protection claim on appeal, that claim is forfeited. See Kaufmann v. Kijakazi, 32 F.4th 843, 847 (9th Cir. 2022) (holding that a plaintiff forfeits a constitutional argument by failing to raise it to the district court).

"'clearly established' at the time of the violation." Tolan v. Cotton, 572 U.S. 650, 655–56 (per curiam) (brackets omitted) (citations omitted). To determine whether a constitutional right has been clearly established, we must "survey the legal landscape and examine those cases that are most like the instant case." Trevino v. Gates, 99 F.3d 911, 917 (9th Cir. 1996) (citation and internal quotation marks omitted). The contours of the right "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Hope v. Pelzer, 536 U.S. 730, 739 (2002) (citation omitted).

We begin our qualified immunity analysis, as we may, "by considering whether there is a violation of clearly established law without determining whether a constitutional violation occurred." Krainski v. Nevada ex rel. Bd. of Regents of Nev. Sys. of Higher Educ., 616 F.3d 963, 969 (9th Cir. 2010) (citing Pearson v. Callahan, 555 U.S. 223, 236 (2009)). A due process violation requires a deprivation of a constitutionally protected liberty or property interest. Shanks v. Dressel, 540 F.3d 1082, 1090 (9th Cir. 2008). Plaintiff maintains that he has a property interest both in his place on the track team and in the accompanying athletic scholarship. But the caselaw fails to demonstrate that either asserted right was clearly established at the time of the alleged violation.

Plaintiff cites two cases in which we assumed, without deciding, that a property interest in an athletic scholarship exists. In Rutledge v. Arizona Board of Regents, 660 F.2d 1345 (9th Cir. 1981), aff'd on other grounds sub nom. Kush v. Rutledge, 460 U.S. 719 (1983), the plaintiff sued his university for violations of his civil rights after they demoted him from a first-string position on the football team and refused to allow him to "red shirt" or transfer to another

school after an injury. Id. at 1352–53. That refusal effectively cancelled the plaintiff's athletic scholarship. Id. at 1353. We held that the plaintiff did not have a protected interest in his first-string position on the team. We cabined our holding to the alleged right to a particular status on a team and did not rule on general membership on the team. Id. at 1352 (citing Walsh v. La. High Sch. Athletic Ass'n, 616 F.2d 152, 159–60 (5th Cir. 1980). We also "assume[d], without deciding," that NCAA rules prohibiting the cancellation or revocation of a scholarship except for good cause "create[] an interest in 'property' within the meaning of the Fourteenth Amendment." Id. at 1353 (emphasis added). We made that assumption again in Austin v. University of Oregon, 925 F.3d 1133 (9th Cir. 2019). See id. at 1139 ("We assume, without deciding, that the student athletes have property and liberty interests in their education, scholarships, and reputation as alleged in the complaint."). Neither Rutledge nor Austin established the legal principle that Plaintiff asserts because they merely assumed the property interest arguendo. Rutledge, 660 F.3d at 1353; Austin, 925 F.3d at 1139.

Caselaw from other courts likewise does not support the proposition that Plaintiff had a clearly established property interest in his athletic scholarship.[7] See Colo. Seminary v.

[7] In November 2022, the Second Circuit held that a "one-year athletic scholarship—because it was for a fixed period and only terminable for cause, and because [the plaintiff] reasonably expected to retain the scholarship's benefits for that set period—created a contractual right that rose to the level of a constitutionally protected property interest." Radwan v. Manuel, 55 F.4th 101, 125 (2d Cir. 2022). But Radwan was decided well after the conduct in question here, so it cannot affect our conclusion that Plaintiff's asserted right was not clearly established at

Nat'l Collegiate Athletic Ass'n, 570 F.2d 320, 322 (10th Cir. 1978) (per curiam) (affirming the trial court's reasoning in Colo. Seminary v. Nat'l Collegiate Athletic Ass'n, 417 F. Supp. 885 (D. Colo. 1976), which stated that "the [contract interest implied by playing collegiate sports on scholarship] is . . . too speculative to establish a constitutionally protected right," id. at 895 n.5); Justice v. Nat'l Collegiate Athletic Ass'n, 577 F. Supp. 356, 364, 366–67 (D. Ariz. 1983) (holding that the NCAA did not infringe upon football players' "constitutionally protected contractual property interests . . . by virtue of their athletic scholarship[s]" when it excluded them from post-season and televised games). The Defendant Coaches are therefore entitled to qualified immunity as to the due process claim under § 1983. The dismissal of that claim is affirmed.

D. Punitive Damages

Finally, Plaintiff seeks punitive damages from the Defendant Coaches because they allegedly acted "maliciously and with intent to falsely harm" him.

The only substantive allegation of liability against the Defendant Coaches is the § 1983 claim; the harassment and retaliation claims are brought against the University Defendants. As we have held, the district court properly dismissed the § 1983 claim against the individual defendants. Accordingly, no claim remains against the Defendant Coaches to which punitive damages could

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the time of the alleged violation. Moreover, Plaintiff's complaint alleges no facts about the terms of his athletic scholarship. We express no view on the underlying legal issue.

attach.[8] The district court therefore properly dismissed this claim as well.

CONCLUSION

Harassment on the basis of perceived sexual orientation is discrimination on the basis of sex under Title IX. But the operative complaint fails to allege a deprivation of Plaintiff's educational opportunity, a required element for holding the University Defendants liable for the alleged harassment. We affirm the district court's dismissal of the discrimination claim and vacate the portion of the order denying leave to amend. On remand, the district court may consider any request for further amendment of the complaint. We reverse the dismissal of Plaintiff's retaliation claim. Finally, we affirm the dismissal of the § 1983 claim and the claim for punitive damages.

AFFIRMED in part, VACATED in part, REVERSED in part, and REMANDED for further proceedings. Each party shall bear its own costs on appeal.

[8] In his opening brief, Plaintiff states that, "[i]f the court permits the causes of action against the individual defendants to proceed, then punitive damages should be available." Here, we are not permitting the § 1983 cause of action to proceed, so the claim for punitive damages necessarily fails. See Papike v. Tambrands Inc., 107 F.3d 737, 744 (9th Cir. 1997) (holding that because the plaintiff's claims were properly dismissed, "[t]he claim for punitive damages obviously fails as well").

STATE OF MICHIGAN

IN THE SUPREME COURT

JANE DOE, by Next Friend GEORGEIA KOLOKITHAS,

Plaintiff-Appellant,

v

ALPENA PUBLIC SCHOOL DISTRICT and ALPENA BOARD OF EDUCATION,

Defendants-Appellees.

Supreme Court No. 165441

Court of Appeals No. 359190

Alpena Circuit Court No. 2019-009053-NZ

AMICUS CURIAE BRIEF OF PUBLIC JUSTICE, A BETTER BALANCE, AND THE AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN

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STATEMENT OF INTEREST[1]

The American Civil Liberties Union of Michigan (ACLU) is the Michigan affiliate of a nationwide nonpartisan organization of approximately 1.6 million members dedicated to protecting the liberties and civil rights guaranteed by the United States Constitution. The ACLU of Michigan regularly and frequently participates in litigation in state and federal courts seeking to protect the constitutional rights of people in Michigan. For several decades, the ACLU has advocated on behalf of the rights of students in schools to be free from all forms of harassment and discrimination, to ensure students have access to a safe environment that is conductive to learning while respecting their individual rights. The ACLU brought litigation on behalf of all Flint children after the Flint Water Crisis, advocating for systemic change of the special education system to meet the needs of children who were affected by lead in their drinking water, see *DR v Mich Dep't of Ed*, ED Mich Case No. 16-cv-13694; has long advocated for the preservation of public school funding, see *CAP v Michigan*, Supreme Court Case No. 158751;, and celebrates public schools for adopting policies that respect students' rights and identities, see *Reynolds v Talberg*, ED Mich Case No 1:18-cv-00069. The ACLU has significant experience challenging unconstitutional policies and practices under the Elliott-Larsen Civil Rights Act, including the state's archaic abortion ban, see *Planned Parenthood of Mich v Attorney General*, Court of Claims Case No. 22-000044-MM, and the narrow interpretation of sex which previously did not include sexual orientation discrimination, see *Rouch World v Mich Dep't of Civil Rights*, Supreme Court Case No. 162482.

Public Justice is a national public interest advocacy organization that fights against abusive corporate power and predatory practices, the assault on civil rights and liberties, and the

[1] Pursuant to MCR 7.312(H)(5), amici state that no counsel for a party authored this brief in whole or in part, nor did anyone, other than amici or their counsel, make a monetary contribution intended to fund the preparation or submission of the brief.

destruction of the earth's sustainability. In its Students' Civil Rights Project, Public Justice strives to create systemic change so all students can learn and thrive, and to secure justice for students who are denied educational opportunities based on their race, national origin, ethnicity, or sex, including sexual orientation, gender identity, and gender expression. Toward this end, Public Justice often represents students denied equal educational opportunities because of sexual harassment suffered at school. In Public Justice's significant experience, holding schools accountable under anti-discrimination laws is critically important to protecting students against discriminatory practices and to ensuring that students can obtain their education in a safe environment.

A Better Balance is a national legal services and advocacy organization that uses the power of the law to advance justice for workers and students so they can care for themselves and their loved ones without jeopardizing their economic security or education. A Better Balance relies on civil rights laws like Title VII and Title IX to protect the rights of all people to work and learn free from discrimination. For example, A Better Balance played an instrumental role in pregnancy discrimination class action litigation against Walmart, which settled for fourteen million dollars and benefited thousands of pregnant workers. Similarly, when governments threaten to block or repeal progressive laws, or when they are challenged in court, A Better Balance steps in to protect and defend the rights of working people and students. On its free and confidential legal helpline, A Better Balance supports pregnant and parenting students experiencing harassment and other discriminatory treatment.

INTRODUCTION

Every year, thousands and thousands of students experience sexual harassment by classmates. This abuse has the potential to derail a victim's education. Unfortunately, minimalist federal protections have proven ineffective at encouraging schools to address harassment or providing victims with meaningful remedies. Michigan students are lucky, though. They have the benefit of more robust protections under the Elliott-Larsen Civil Rights Act, which broadly prohibits sex discrimination, including sexual harassment in education. This case provides an opportunity for this Court to affirm the ELCRA's breadth and strength by adopting, for peer harassment claims against schools, a liability standard that furthers the legislature's goal: ending sex discrimination in education. To do so, this Court should build on the foundation offered by its workplace harassment case law, as proposed by the Plaintiff-Appellant Jane Doe, rather than adopting the analogous liability standard used in federal law.

ARGUMENT

I. ELCRA workplace harassment law provides a framework for peer harassment claims against schools.

As the Court of Appeals correctly noted, Michigan courts often look to employment case law to interpret the ELCRA's protections for students. *Doe v Alpena Pub Sch Dist*, __ Mich __, __; __ NW2d __ (2022) (Docket No. 359190); slip op at 7, citing *Fonseca v Mich State Univ*, 214 Mich App 28, 30; 542 NW2d 273 (1995). And ELCRA case law concerning workplace discrimination offers a well-established starting point for harassment claims: An employee can establish a claim if (1) she "belonged to a protected group," (2) she was "subjected to communication or conduct on the basis of sex," (3) the "conduct or communication" was "unwelcome," (4) the harassment "was intended to or in fact did substantially interfere with the employee's employment or created an intimidating hostile, or offensive work environment," and (5) the employer is liable

under "respondeat superior" principles. *Radtke v Everett*, 442 Mich 368, 382-383; 501 NW2d 155 (1993). As to the final element of respondeat superior, this Court has held that, for an employer to be liable for a hostile environment, it must have constructive (not actual) knowledge of the harassment, *Elezovic v Ford Motor Co,* 472 Mich 408, 426; 697 NW2d 851 (2005), and it must "fail[] to take prompt and adequate remedial action," *Chambers v Trettco, Inc*, 463 Mich 297, 313; 614 NW2d 910 (2000).

As Ms. Kolokithas has argued, consistent with the opinion below, this standard—with some minor adjustments for the education context—provides the right model for ELCRA peer sexual harassment claims against schools. See Supp Br of Plaintiff-Appellant at 15-18. If a school has constructive knowledge of sexual harassment of a student by a classmate over whom it exercised some degree of control, and the school fails to take prompt and adequate remedial action to resolve the hostile environment and so protect the victim's continued access to education, it may be liable under the ELCRA. See *id.* at 18. Consistent with the text of the ELCRA, a school would be liable if its failed response caused the victim to experience further harassment, as in this case, or where it otherwise deprived the victim of "full utilization of or benefit from the institution, or the services, activities, or programs provided by the institution." MCL 37.2402(a).

II. This Court should not adopt the U.S. Supreme Court's Title IX standard.

In sharp contrast to ELCRA workplace law, federal law governing peer sexual harassment claims would be a poor model for the design of the ELCRA's liability standard for peer harassment claims against schools. The U.S. Supreme Court has adopted a parsimonious, and ineffective, liability standard for sexual harassment claims brought against schools under Title IX of the Education Amendments of 1972, 20 USC 1681(a). And the text of the ELCRA, and structural differences

between it and Title IX, demonstrate different standards are appropriate under state and federal law.

A. The U.S. Supreme Court has adopted an unusually demanding liability standard for peer harassment claims brought under Title IX.

The ELCRA is a single statute that prohibits sex discrimination in workplaces and schools, among other contexts. By contrast, federal law relies on two separate statutes to root out discrimination in these separate arenas. The U.S. Supreme Court has adopted different liability standards for sexual harassment claims brought under each law. And, perversely, federal anti-discrimination law is more protective of adult workers who experience sexual harassment than it is of students who experience the same harms.

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against their employees based on sex, race, and other protected characteristics. 42 USC 2000e *et seq*. For hostile environment harassment claims, Title VII uses a standard similar to the ELCRA's: If an employee is harassed by a coworker, the employer is liable if it knew or should have known about the harassment and failed to take reasonable steps to address the harassment; if an employee is sexually harassed by their supervisor, the employer is ordinarily strictly liable, regardless of whether it had any notice of the harassment. *Faragher v City of Boca Raton,* 524 US 775; 118 S Ct 2275; 141 L Ed 2d 662 (1998); *Burlington Industries, Inc v Ellerth,* 524 US 742; 118 S Ct 2257; 141 L Ed 2d 633 (1998). The U.S. Supreme Court has defined actionable sexual harassment as "unwelcome" sexual conduct that is "severe or pervasive." *Meritor Sav Bank, FSB v Vinson*, 477 US 57, 67-68; 106 S Ct 2399; 91 L Ed 2d 49 (1986); see also *Radtke*, 442 Mich at 384 (defining sexual harassment in a manner "[n]ot unlike title VII").

Yet the U.S. Supreme Court adopted a much less protective standard for sexual harassment claims brought under Title IX, which prohibits sex discrimination in education. 20 USC 1681(a).

In two cases from the late 1990s, *Gebser* and *Davis*, the Court designed a test for establishing schools' liability for sexual harassment of students by teachers or classmates. See *Davis ex rel LaShonda D v Monroe Co Bd of Ed*, 526 US 629, 650; 119 S Ct 1661; 143 L Ed 2d 839 (1999) (student-on-student sexual harassment); *Gebser v Lago Vista Indep Sch Dist*, 524 US 274, 277; 118 S Ct 1989; 141 L Ed 2d 277 (1998) (teacher-on-student sexual harassment). In *Gebser*, the Court considered importing the Title VII sexual harassment standard for Title IX, but rejected that option. *Gebser*, 524 US at 284. Instead, it designed a new liability standard, explaining it had "a measure of latitude to shape a sensible remedial scheme" "[b]ecause the private right of action under Title IX is judicially implied." *Id.* The scheme the Court created required a student to establish that her school had been deliberately indifferent to sexual harassment of which the school had actual knowledge and, at least in cases of peer sexual harassment, that the harassment was severe and pervasive. *Davis*, 526 US at 650; *Gebser*, 523 US at 277.

Collectively, these requirements make it far harder for children to establish sexual harassment claims under Title IX than for adult workers to establish sexual harassment claims under Title VII: Students must establish actual rather than constructive knowledge, deliberate indifference rather than negligence, and severe *and* pervasive harassment rather than severe *or* pervasive harassment. See Patel, Tang, & Iannucci, *A Sweep As Broad As Its Promise: 50 Years Later, We Must Amend Title IX to End Sex-Based Harassment in Schools*, 83 La L Rev 939, 973 (2023); Graves, *Restoring Effective Protections for Students against Sexual Harassment in Schools: Moving Beyond the* Gebser *and* Davis *Standards*, 2 Advance 135, 139-143 (2008).

B. This Court frequently declines to adopt federal standards in favor of more rights-protective interpretations of state law.

"This Court alone is the ultimate authority with regard to the meaning and application of Michigan law." *People v Bullock*, 440 Mich 15, 27; 485 NW2d 866 (1992). Consistent with that

principle, this Court has made clear that while it might, at times, be "guided in [its] interpretation of [the ELCRA] by federal court interpretation of its counterpart statutes," it is "not compelled to follow those federal interpretations." *Chambers v Trettco, Inc*, 463 Mich 297, 313; 614 NW2d 910 (2000) (citations omitted); see also *Haynie v State*, 468 Mich 302, 321; 664 NW2d 129 (2003) ("We cannot agree [with the dissent] that any time the Michigan Legislature creates a law that is 'similar' to a federal law, it must be made identical, and the two laws must be interpreted to mean exactly the same thing."). The Court's primary obligation when interpreting Michigan law is to always "ascertain and give effect to the intent of the Legislature, . . . 'as gathered from the act itself.'" *McJunkin v Cellasto Plastic Corp*, 461 Mich 590, 598; 608 NW2d 57 (2000), quoting *In re Ramsey*, 229 Mich App 310, 314; 581 NW2d 291 (1998).

Crucially for this case, this Court will not impose "a major contraction of citizen protections" under Michigan law "simply because the United States Supreme Court has chosen to do so." *Sitz v Dep't of State Police*, 443 Mich 744, 763; 506 NW2d 209 (1993). Consistent with that principle, this Court has frequently interpreted state law to be more rights-protective than corresponding federal laws. See, e.g., *Bullock*, 440 Mich at 29 n 9 (collecting cases). For example, in *Elezovic v Ford Motor Co*, this Court interpreted the ELCRA to permit individual liability for supervisors, even though Title VII does not, because the federal rule was "contrary to the wording of" the ELCRA. *Elezovic*, 472 Mich at 422.

In the context of constitutional litigation, this Court has identified factors—equally applicable to statutory cases—that inform whether or not it should adopt a federal standard. See *People v Tanner*, 496 Mich 199, 223 n 17; 853 NW2d 653 (2014). These factors include "the textual language of the state [law]," "significant textual differences between parallel provisions of federal and state law," and "structural differences between the state and federal" laws. *Id.* As explained

below, the text of the ECLRA and differences between it and Title IX militate against adopting *Gebser* and *Davis*'s liability standard. See *infra* Sections II(C) and II(D), pp 8-12.

This Court would not be alone in declining to adopt federal standards for peer sexual harassment claims. High and appellate state courts in Missouri, New Jersey, Vermont, and Washington have expressly declined to do so. See *Doe ex rel Subia v Kansas City, Mo Sch Dist,* 372 SW3d 43, 53 (Mo App, 2012) (adopting state employment law standard); *LW ex rel LG v Toms River Regional Sch Bd of Ed,* 189 NJ 381, 405-406; 915 A2d 535 (2007) (same); *Washington v Pierce,* 179 Vt 318, 329-333; 895 A2d 173 (2005) (crafting a wholly new standard); *Mercer Island Sch Dist v Office of Superintendent of Pub Instruction*, 186 Wash App 939, 982-983; 347 P3d 924 (2015) (adopting the standard used in federal administrative actions at the time).[2]

C. The U.S. Supreme Court's reasons for adopting actual knowledge and deliberate indifference standards are inapplicable to the ELCRA.

In designing a new liability standard for Title IX, rather than importing Title VII's, the U.S. Supreme Court relied on considerations inapplicable to claims brought under the ELCRA. These include (1) the structure of federal sex discrimination law, (2) Congress's authority for passing Title IX, and (3) Title IX's administrative enforcement scheme.

First, and perhaps most simply, Title VII and Title IX are separate statutes. In *Gebser*, the U.S. Supreme Court was attuned to differences between the two statutes' texts, purposes, and sources of congressional authority, which, in the Court's view, rendered Title VII precedent inapplicable. See, e.g., *Gebser*, 524 US at 283, 286-287. In contrast, the ELCRA is a single statute that

[2] State courts in Maine and Missouri have also explicitly rejected the *Gebser-Davis* standard for state law claims arising out of teacher-on-student harassment. See *Doe ex rel Doe v Town of Hopkinton,* unpublished opinion of the Massachusetts Court of Appeals, issued March 7, 2017 (Docket No. 1281cv03399), p 4 (applying strict liability standard to teacher-on-student harassment under state law); *MN ex rel SN v North Kan City Sch Dist,* 597 SW3d 786, 793 (Mo App, 2020) (permitting vicarious liability for harassment by substitute teacher).

provides for harassment claims against both schools and workplaces, among other spheres. MCL 37.2102 (1). So, while the liability standards for Title VII and Title IX are different because Title VII and Title IX are different, it makes sense for the ELCRA to apply analogous standards across the many contexts it reaches.

Second, and related, the U.S. Supreme Court based its Title IX decisions on the fact that Title IX—unlike Title VII, see *Fitzpatrick v Bitzer*, 427 US 445, 452-453 & n 9; 96 S Ct 2666; 49 L Ed 2d 614 (1976)—is a Spending Clause statute. The law was passed under the federal constitutional provision permitting Congress to condition federal funding on the recipient's consent to certain terms—in the case of Title IX, the term being that recipients may not discriminate on the basis of sex. See *Davis*, 526 US at 640 ("[W]e have repeatedly treated Title IX as legislation enacted pursuant to Congress' authority under the Spending Clause."). The U.S. Supreme Court has analogized this "agreement not to discriminate" to a "a contract between the Government and the recipient of funds." *Gebser*, 524 US at 286. As in a contract, it has explained, the funding recipient must have clear notice of what conduct would violate the agreement and trigger money damages. *Id.* at 287. *Gebser*, without much explanation, assumed that principle meant schools must have more than constructive knowledge of harassment to be liable under Title IX. *Id.* at 287-288.

Whatever the merits of *Gebser*'s logic, it does not translate to the ELCRA, which is not dependent on the state's spending powers and is not constrained by the contract analogy. See *Blank v Dep't of Corrections*, 462 Mich 103, 157-158; 611 NW2d 530 (2000) (noting that, unlike the U.S. Congress, the Michigan Legislature "operates pursuant to a broad grant of legislative authority"); see also *Mason v Granholm*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued January 23, 2007 (Case No. 05-cv-73943), p 2 (noting the "ELCRA is th[e] legislation" that the Michigan constitution's equal protection provision "requires

the legislature" to pass), citing *Dep't of Civil Rights ex rel Forton v Waterford Twp Dep't of Parks & Recreation*, 425 Mich 173, 188; 387 NW2d 821 (1986), and *Neal v Dep't of Corrections*, 232 Mich App 730, 739; 592 NW2d 370 (1998), opinion vacated (June 25, 1999); Norris, *A Perspective on the History of Civil Rights Law in Michigan*, 1996 Det CL Mich St U L Rev 567, 591–592 (1996) (noting the ELCRA implements the Michigan Constitution's equal protection guarantee). Multiple other state high and appellate courts have adopted more generous liability standards than *Gebser* and *Davis* on the basis that their state remedies are not limited by the federal Spending Clause. See, e.g., *Washington v Pierce,* 179 Vt 318, 329-330; 895 A2d 173 (2005); *Mercer Island Sch Dist v Office of Superintendent of Pub Instruction*, 186 Wash App 939, 982-983; 347 P3d 924 (2015); *Doe ex rel Subia v Kansas City, Mo Sch Dist,* 372 SW3d 43, 53-54 (Mo App, 2012).

Third, in adopting the actual knowledge and deliberate indifference requirements, *Gebser* relied on a quirk in federal enforcement of Title IX with no analogue in the ELCRA. Title IX, like the ELCRA, may be enforced either through a private right of action or through a complaint to a civil rights agency. *Cannon v Univ of Chicago*, 441 US 677, 683, 709; 99 S Ct 1946; 60 L Ed 2d 560 (1979) (describing Title IX's enforcement scheme); MCL 37.2602 (describing the ELCRA's enforcement scheme). But Title IX, unlike the ELCRA, includes a requirement that the responsible agency give a defendant the opportunity to come into voluntary compliance with the law before it commences an enforcement action. Compare *Gebser*, 524 US at 275 (noting Title IX's voluntary compliance provision) with MCL 37.2602 (describing Michigan Department of Civil Rights' "powers and duties"). *Gebser* reasoned that because this administrative enforcement system "re-quire[s] notice" and "an opportunity for voluntary compliance," liability in court should only be available where the school had, during the events at issue, actual knowledge of the harassment. 524 US at 289. But see *id.* at 303-304 (Stevens, J., dissenting) (critiquing *Gebser*'s analogy to

administrative remedies). *Gebser* also held that this administrative enforcement scheme meant that, in private litigation, damages should only be available when a school was deliberately indifferent to harassment. That state of mind, the Court reasoned, was most analogous to that of an obstinate school that refused to comply with the law even after being hauled before a federal agency on a civil rights complaint. *Id.* at 290.

Once again, these considerations are inapplicable to the ELCRA: The statute contains no analogous requirement that the Michigan Department of Civil Rights provide an opportunity for voluntary compliance. See MCL 37.2602. To the contrary, the MDCR is permitted "at any time after a complaint is filed" to seek preliminary or temporary injunctive relief from a circuit court. MCL 37.2603. The U.S. Supreme Court's justifications for limiting Title IX's powers offer no reason for this Court to similarly weaken the ELCRA.

D. The ELCRA's text forecloses Title IX's standard for actionable sexual harassment.

This Court should not limit the ELCRA's protections to only "severe and pervasive" sexual harassment because the ELCRA defines sexual harassment, and in a manner that looks far more like Title VII's standard than Title IX's. Under the statute's plain text, sexual harassment cognizable as illegal discrimination under the ELCRA includes "unwelcome sexual advances . . . and other verbal or physical conduct or communication of a sexual nature" that "has the purpose or effect of substantially interfering with an individuals' . . . education . . . , or creating an intimidating, hostile, or offensive . . . educational . . . environment." MCL 37.2103. As this Court has explained, it will not adopt a federal liability standard "if doing so would nullify a portion of the Legislature's enactment." *Chambers*, 463 Mich at 314.

Further, although *Davis* did not expressly explain why it adopted a severe and pervasive standard rather than a severe or pervasive standard, the Court appeared to believe that only severe

and pervasive harassment could have the effect of excluding a victim from educational opportunities. See *Davis*, 526 US at 650-652. That assumption has, sadly, proven untrue. See *infra* Section II(E), pp 12-19.

E. Title IX's liability standard discourages schools from learning about and addressing sexual harassment, with tragic consequences for students.

Dissenting from the *Gebser* majority, Justice Stevens warned that "few Title IX plaintiffs who have been victims of intentional discrimination will be able to recover damages under this exceedingly high standard." *Gebser*, 524 US at 304 (Stevens, J., dissenting). As this Court has recognized, "In the case of a divided United States Supreme Court decision, we may in some cases find more persuasive, and choose to rely upon, the reasoning of the dissenting justices of that Court ..." *Bullock*, 440 Mich at 27-28. Justice Stevens's prediction has proven true: The *Gebser-Davis* standard has shielded schools from accountability in all but the most egregious cases. And, perversely, the standard has incentivized schools to make reporting harassment as difficult as possible, to avoid obtaining knowledge of it. Importing the Title IX's liability standard into Michigan state law would incentivize schools to bury their heads in the sand, ignoring and exacerbating sexual harassment and violence in Michigan schools.

Actual Knowledge

Title IX's actual knowledge standard has led to absurd, and tragic, results. Courts applying this standard have held that teachers, coaches, guidance counselors, and sometimes principals—the very employees students are most likely to know and report to—are not appropriate persons sufficient to vest a school with actual knowledge of harassment. See, e.g., *Ross v Univ of Tulsa*, 859 F3d 1280, 1283, 1289 (CA 10, 2017) (holding that "a reasonable fact-finder could not infer that campus-security officers were appropriate persons for purposes of Title IX"); *Hill v Cundiff*, 797 F3d 948, 971 (CA 11, 2015) (same, for teacher's aide, who, notably, devised plan to use eighth

grade student as "bait" in sting operation to catch classmate in the act of sexual misconduct, resulting in the student's anal rape); *Plamp v Mitchell Sch Dist No 17-2*, 565 F3d 450, 457–458 (CA 8, 2009) (same, for teachers and guidance counselor); *Baynard v Malone*, 268 F3d 228, 238–239 (CA 4, 2001) (same, for school principal); *Halvorson v Indep Sch Dist No I-007*, unpublished opinion of the United District Court for the Western District of Oklahoma, issued on November 26, 2008 (Case No. CIV-07-1363-M), p 2 (same, for coaches). Under such an exacting standard, "even if every teacher at the school knew about the harassment but did not have 'authority to institute corrective measures on the district's behalf,'" a plaintiff could not prevail under Title IX. *Gebser*, 524 US at 301 (Stevens, J., dissenting).

Not only must a student-victim disclose their assault to just the right person, they must also ensure that person has just the right information. See, e.g., *Doe v St Francis Sch Dist*, 694 F3d 869, 872 (CA 7, 2012) (holding school lacked actual knowledge of teacher's sexual abuse of student, despite other teachers "suspect[ing] an improper relationship," because "to know that someone suspects something is not to know the something," and Title IX requires more than "mere[] knowledge that would cause a reasonable person to investigate further"); *Baynard*, 268 F3d at 238, 242 (holding school lacked actual knowledge of teacher's abuse of student, despite (i) witnessing student-victim "sitting on [teacher's] lap" with "their faces . . . almost touching," (ii) receiving allegation from former student of teacher's molestation, and (iii) hearing complaint by colleague that teacher was "a pedophile"); *AW v Humble Ind Sch Dist*, 25 F Supp 3d 973, 992–993 (SD Tex, 2014) (school lacked actual knowledge, despite mother's complaint about "improper relationship" between teacher and student, as well as other parents' and students' complaints about the "obsessive and unusual relationship" between the two). "Favoritism towards the student; inordinate time spent with the student; unprofessional conduct towards the student; and vague complaints about

the teacher's behavior toward the student (which do not *expressly* allege sexual abuse of that student) fall short of creating actual notice." *KD v Douglas Co Sch Dist No 001*, 1 F4th 591, 598 (CA 8, 2021).

The actual knowledge standard leaves disabled students and younger students, who may struggle to communicate the information required to place their school on notice, particularly vulnerable to ongoing abuse. In *Rost ex rel KC v Steamboat Springs RE-2 Sch Dist*, for example, the Tenth Circuit held that a school district did not have actual knowledge when the victim—a special education student with learning disabilities—told her school counselor that a group of boys were "bothering" her. 511 F3d 1114, 1119–20 (CA 10, 2008). Had anyone bothered to inquire further, they would have learned the boys were orally raping her. *Id.* at 1117; *id.* at 1126 (McConnell, J., concurring in part, dissenting in part). "While it is tragic that [the student] did not clearly communicate that she was being sexual harassed," the Tenth Circuit wrote, the student's statement that boys were "bothering" her was insufficient to establish the requisite knowledge. *Id.* at 1120. Concurring in part, Judge McConnell agreed with the majority that the school lacked "actual knowledge" while lamenting the "disturbing" result that such a standard produces:

> [The victim] was attempting to communicate what was happening to the counselor but did not have the words. One would think a trained middle school counselor, faced with a mildly retarded young student who was severely distressed about being 'bothered' by some boys in her class, would ask the obvious follow-up question—in what way are they bothering you?—especially since one of the boys had previously been disciplined for engaging in sexual harassment. . . . [But] [t]hat is not the duty imposed by Title IX . . . [and] to impose liability on the school district would effectively hold it responsible for what it "should have known."

Id. at 1127–1128 (McConnell, J., concurring in part, dissenting in part); see also Suski, *Title IX Paradox*, 108 Ca L Rev 1147, 1169–87 (2020) (documenting the cognitive heuristics that "make the kinds of sexual harassment reporting required for a successful Title IX claim challenging for

anyone" but especially for children whose immature "brain development make those decisions particularly unrealizable").

The actual knowledge standard does not merely shelter a school retrospectively from liability for harassment of which it should have known; it also *incentivizes* schools to actively "insulate themselves from knowledge" going forward. *Gebser*, 524 US at 300–301 (Stevens, J., dissenting). Because a school can only be held liable for harassment of which it actually knows, it is in a school's interest to "discourage[] efforts to identify situations of potential abuse." *Baynard*, 268 F3d at 241 (Michael, J., dissenting). In *Baynard*, for instance, a school principal ignored repeated warning signs of sexual abuse by a teacher of a sixth-grade student, including reports by a former student and his mother that the same teacher sexually abused him, a separate report that the teacher had "sexually molested a student," and a report by the school librarian that she had witnessed the student-victim sitting on the teacher's lap. 268 F.3d at 233. The Fourth Circuit held that no reasonable jury could find actual knowledge of the abuse—a standard, the dissent reasoned, that does "little to prevent sexual abuse from occurring in the first place," encouraging a school to look the other way each time it receives a report just shy of actual knowledge: "The appropriate official can simply wait until she gains actual knowledge of current abuse"—if she ever does. *Id*. at 241 (Michael, J., dissenting). After all, if the school had investigated the concerns raised by the former student and current staff, it might well have obtained information requiring it to act and thus potentially subjecting it to liability. See generally Cantalupo, *Burying Our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence*, 43 Loyola Univ Chicago L J 205, 227 (2011) (explaining how the actual knowledge standard "encourages both passive unawareness and active avoidance of knowledge").

Deliberate Indifference

Even if a student somehow manages to divine who to tell, what, and when, the "deliberate indifference" standard shields schools from liability unless their actions (or lack thereof) were "clearly unreasonable in light of the known circumstances." *Davis*, 526 US at 648. "That is a high bar, and neither negligence nor mere unreasonableness is enough." *Sanches v Carrollton-Farmers Branch Indep Sch Dist*, 647 F3d 156, 167 (CA 5, 2011). Applying this standard, multiple courts have held that a school need not institute reasonable measures to stop the harassment and protect the victim's ongoing access to education, for example. See, e.g., *Doe v Bd of Trustees of the Neb State Colleges*, __ F4th __ (CA 8, 2023) (Case No. 22-1814) (Kelly, J., dissenting), pp 4-6 (dissenting from majority holding no deliberate indifference where student admitted to raping a classmate and the school refused the student-victim's requests for protections so she could feel safe attending class); *King v Conroe Indep Sch Dist*, 289 F Appx 1, 2–4 (CA 5, 2007) (holding no deliberate indifference to sexual abuse of student where principal did nothing more than "question[]" coach and "warn[] her to keep her relationships with students professional"); *Doe ex rel Doe v Dallas Indep Sch Dist*, 220 F3d 380, 388 (CA 5, 2000) (holding no deliberate indifference to sexual abuse of student where school failed to monitor teacher or require additional training, failed to report allegation to Child Protective Services, and told victim's parent that their child's abuser was a "good teacher"); *see also* Patel, *supra*, at 980–981 (collecting cases).[3]

[3] Indeed, the Sixth Circuit has gone so far as to require a plaintiff alleging deliberate indifference to plead "post-actual-knowledge *further* harassment" attributable to the school's response to the initial harassment, even where the deliberate indifference excludes the victim from educational opportunities. *Kollaritsch v Mich State Univ Bd of Trustees*, 944 F3d 613, 623–24 (CA 6, 2019) (emphasis added). Thankfully, other circuits have declined to adopt this extreme approach. See, e.g., *Doe v Fairfax Co Sch Bd*, 1 F4th 257, 274 (CA 4, 2021), cert den 143 S Ct 442 (2022); *Fitzgerald v Barnstable Sch Comm*, 504 F3d 165, 171 (CA 1, 2007), rev'd and remanded on other grounds 555 US 246 (2009); *Williams v Bd of Regents of Univ Sys of Ga,* 477 F3d 1282, 1296 (CA 11, 2007); *Farmer v Kan State Univ*, 918 F3d 1094, 1103, 1106 (CA 10, 2019).

The deliberate indifference standard has invited courts to excuse schools that not only fail to take action to address hostile environments but affirmatively harm victims' educations. For example, some courts have held—wrongly, in amici's view, but not inexplicably—that a school may discipline the *victim* of the abuse. In *Doe v Bibb County School District*, for instance, an Eleventh Circuit panel concluded that no reasonable juror could find a school deliberately indifferent to the gang rape of a special education student despite issuing misconduct charges against her, suspending her, and recommending her expulsion. 688 F Appx 791, 798 (CA 11, 2017); *id.* at 798–99 (Martin, J., concurring). A Second Circuit panel held a school may also push the victim out of school, encouraging her to transfer to a worse school while allowing her tormenters to remain. See, e.g., *KF ex rel CF v Monroe Woodbury Central Sch Dist*, 531 F Appx 132, 133–134 (CA 2, 2013) (holding no deliberate indifference where school recommended that student victim of repeated sexual assaults transfer to "an out-of-district program . . . attended by students with serious disciplinary records"); *Doe v Round Valley Unified Sch Dist*, 873 F Supp 2d 1124, 1138 (D Ariz, 2012) (holding no deliberate indifference where school failed to discipline harassers while recommending rape victim leave school and enroll at "alternative" school for "at-risk" students).

Severe and Pervasive

The U.S. Supreme Court's rule that Title IX liability will attach only when a victim experiences severe, pervasive, and objectively offensive harassment has also wrought terrible results. The U.S. Court of Appeals for the Sixth Circuit, for example, has held that a single rape is not actionable because, even if it is "severe," an isolated incident cannot, in its view, be "pervasive." *Kollaritsch v Michigan State Univ Bd of Trustees*, 944 F3d 613, 620-621 (CA 6, 2019). But see, e.g., *Fairfax Co*, 1 F4th at 274 (taking contrary view). A judge in the Eastern District of New York acknowledged that a single incident may meet *Davis*'s standard, "but only where the conduct

consists of *extreme* sexual assault or rape." *Carabello v NY City Dep't of Ed*, 928 F Supp 2d 627, 643 (EDNY, 2013) (emphasis added); see also Scharfen, *Peer Sexual Harassment in School: Why Title IX Doctrine Leaves Children Unprotected*, 24 S Ca Rev L & Soc Just 81, 95 (2014) (noting that courts applying the severe and pervasive standard have treated sexual touching other than "rape or other serious sexual assault" as unactionable). Accordingly, the court held, a high school freshman whose classmate "touch[ed] her breasts, stomach and legs" and "bit[] her neck hard enough to leave a mark" while "putting all his weight on her" could not establish actionable harassment. *Id.* Students have also struggled to convince courts that verbal harassment, without accompanying physical violence, is severe. See, e.g., *Doe v Plymouth-Canton Community Sch*, unpublished opinion of the United States District Court for the Eastern District, issued June 3, 2022 (Case No. 19-cv-10166), p 8 ("Although it is possible to assert a Title IX claim based exclusively on verbal harassment, it is uncommon, because courts tend to consider verbal harassment to be less severe than physical harassment."), app dis sub nom *Doe ex rel EL v Plymouth-Canton Community Sch*, unpublished opinion of the United States Court of Appeals for the Sixth Circuit, issued August 25, 2022 (Case No. 22-1555).

Contrary to the U.S. Supreme Court's assumption, see *supra* pp 11-12, harassment that falls short of the "severe and pervasive" standard can still have a dramatic effect on students' educations. One plaintiff unable to convince the Sixth Circuit her rape was severe and pervasive "took leaves of absences from [her school] and did not take classes" because she was too afraid to remain on campus with her assailant without any protections. *Kollaritsch v Michigan State Univ Bd of Trustees*, 298 F Supp 3d 1089, 1102 (WD Mich, 2017), rev'd and remanded 944 F3d 613 (CA 6, 2019). A Georgia high school student was forced to transfer to a new school due to a sexual assault and subsequent harassment that was not, a district court held, severe and pervasive. *Doe v*

Gwinnett Co Sch Dist, unpublished opinion of the United States District Court for the Northern District of Georgia, issued September 1, 2021 (Case No. 18-cv-05278) pp 5, 12, app dis sub nom *Doe v Gwinnett Co Pub Sch*, unpublished opinion of the United States Court of Appeals for the Eleventh Circuit, issued February 23, 2022 (Case No. 21-cv-13379).

Not all courts have treated Title IX cases so harshly after *Gebser* and *Davis*. But many—perhaps most—have taken the U.S. Supreme Court's invitation to tolerate all but the worst harassment and all but the worst institutional responses. This Court has the opportunity to learn from Title IX's failures and do better by Michigan students.

CONCLUSION

For the reasons explained above, the Court should adapt the ELCRA standard for workplace harassment for peer harassment claims brought by students, rather than adopting the federal standard for Title IX claims, and it should reverse and remand for further proceedings.

Respectfully submitted,

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WORD COUNT STATEMENT

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No. 23-3469

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MENG HUANG,
Plaintiff-Appellant,

v.

THE OHIO STATE UNIVERSITY, et al.
Defendant-Appellees.

On Appeal from the United States District Court
for the Southern District of Ohio
Case No. 2:19-cv-01976
The Honorable James L. Graham

BRIEF OF AMICI CURIAE WORKERS' AND STUDENTS' RIGHTS ORGANIZATIONS IN SUPPORT OF PLAINTIFF-APPELLANT MENG HUANG AND REVERSAL

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CORPORTATE DISCLOSURE STATEMENT

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STATEMENT OF AMICI CURIAE

Public Justice is a national public interest advocacy organization that fights against abusive corporate power and predatory practices, the assault on civil rights and liberties, and the destruction of the earth's sustainability. Public Justice has, for decades, litigated and advocated on behalf of workers and students who have experienced discrimination, including sexual harassment. From its significant experience, Public Justice recognizes that judicial enforcement of federal sex discrimination laws that is consistent with the statutes' full breadth and promise is crucial to ensuring student-employees who have endured discrimination receive the redress they deserve.

A Better Balance is a national legal services and advocacy organization that uses the power of the law to advance justice for workers and students so they can care for themselves and their loved ones without jeopardizing their economic security or education. In advocating for workers, students, and student-workers, A Better Balance relies on the robust enforcement of our nation's civil rights laws, Title VII and Title IX, to ensure that all people can work and learn free from discrimination.

Founded in 1985, the **National Employment Lawyers Association** (NELA) is the largest bar association in the country focused on empowering workers' rights attorneys. NELA and its sixty-nine circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to protecting the rights of workers in employment, wage and hour, labor, and civil rights disputes. NELA attorneys litigate daily in every circuit, giving NELA a unique perspective on how principles announced by courts in employment cases actually play out on the ground. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. NELA members across the country represent university employees and those experiencing sexual harassment and violence in the workplace, making NELA uniquely interested in the proper application of Title VII as it relates to graduate students.

National Women's Law Center (NWLC) is a non-profit legal advocacy organization that fights for gender justice—in the courts, in public policy, and in our society—working across the issues that are central to the lives of women and girls—especially women of color, LGBTQI+ people, and low-income women and families. Since its founding in 1972,

NWLC has worked to advance educational opportunities, workplace justice, health and reproductive rights, child care, and income security. NWLC has participated as counsel or amicus curiae in a range of cases before the Supreme Court, federal Courts of Appeals, and state courts to secure equal treatment and opportunity in all aspects of society through enforcement of the Constitution and other laws prohibiting sex discrimination.

Consistent with Federal Rule of Appellate Procedure 29(a)(4)(E), amici's counsel authored this brief, no party's counsel authored the brief in whole or in part, and no party beyond amici contributed any money toward the brief.

INTRODUCTION

Graduate students wear multiple hats. Many balance academic obligations as students with significant job duties as employees of their schools. Often their academic and employment responsibilities overlap, as when the research they are paid to complete also informs their studies. Fortunately, when graduate students are both students and workers, they are protected by both education and workplace anti-discrimination laws.

Meng Huang seeks to avail herself of those protections. Ms. Huang's supervisor sexually harassed her while she was a mechanical engineering PhD student and employee of The Ohio State University. Consistent with her dual roles, Ms. Huang brought claims under both Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, which prohibits sex discrimination in the workplace, and Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, which prohibits sex discrimination in schools. The district court, however, wrongly assumed that Ms. Huang could not simultaneously be a student *and* an employee protected by both laws. As a result, the district court sorted the adverse actions Ms. Huang experienced into two buckets with no overlap: adverse

actions related to her role as a student and adverse actions related to her role as an employee. Then, on that basis, the district court granted summary judgment on Ms. Huang's Title VII quid pro quo claim, holding the primary adverse action she experienced for turning down her supervisor's advances—his revoking of her stipend—was related only to her student role.

This disposal of Ms. Huang's Title VII claims conflicts with well-established employment law principles and precedent, threatening the rights of other graduate students. Rather than accepting defendants' classifications of their workers, this Court uses the common-law agency test to determine whether a plaintiff is an employee. Nothing about that test turns on whether the parties have an additional relationship, including an educational one. Consistent with that rule, courts have rightly held that graduate students much like Ms. Huang were employees entitled to employment law protections, even when their job duties overlapped with their academic studies. Those employment law protections can be essential given meaningful differences in Title IX and Title VII's standards and remedies—differences that may provide schools incentives to misclassify graduate students as non-employees, as Ohio State did

here. Accordingly, this Court should permit Ms. Huang's quid pro quo claim to proceed to a jury.

ARGUMENT

I. Some Graduate Students Are Employees of Their Universities Protected by Title VII.

The law, not Ohio State, controls whether there is an employer-employee relationship between a school and a graduate student. This Court uses the common-law agency test to determine whether graduate students are entitled to employment law protections. As multiple courts have recognized, nothing about that test excludes graduate students from employment law protections, even if their job and academic responsibilities overlap.

A. The Common-Law Agency Test Determines Whether Employment Laws Apply, Irrespective of a Plaintiff's Other Relationships to the Defendant.

To determine whether a plaintiff is an employee protected by Title VII, this Court uses the common-law agency test. *Shah v. Deaconess Hosp.*, 355 F.3d 496, 499 (6th Cir. 2004). The crux of this test is the defendant's "right to control the manner and means by which the [objective] is accomplished." *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751 (1989); *see Vander Boegh v. EnergySolutions, Inc.*, 772 F.3d 1056,

1061 (6th Cir. 2014) (same); Restatement of Employment Law § 1.01 (2015) (same). Relevant factors include "the source of the instrumentalities and tools," the "location of the work," the "method of payment," the "provision of employee benefits," the "extent of the hired party's discretion over when and how long to work," and "[w]hether the work is part of the regular business of the hiring party." *Reid*, 490 U.S. at 751-52. "[T]his Court has repeatedly held that the employer's ability to control job performance and the employment opportunities of the aggrieved individual are the most important of the many factors to be considered." *Marie v. Am. Red Cross*, 771 F.3d 344, 356 (6th Cir. 2014) (internal quotation marks and citations omitted).

Nothing in the common-law agency test considers—let alone treats as dispositive—whether a worker has another relationship with the employer. To the contrary, a plaintiff may be the defendant's "'employee' notwithstanding any other status the law may or may not have reposed on her (for example, a 'student')." *Doe v. Mercy Catholic Med. Ctr.*, 850 F.3d 545, 559 (3d Cir. 2017); *see Ivan v. Kent State Univ.*, 863 F. Supp. 581, 585 (N.D. Ohio 1994) (similar), *aff'd*, 92 F.3d 1185 (6th Cir. 1996); *see also, e.g.*, *Guy v. Casal Inst. of Nevada, LLC*, No. 213CV02263, 2016

WL 4479537, at *4 (D. Nev. Aug. 23, 2016) ("[T]he the Court does not find that Plaintiffs cannot as a matter of law, establish that they were employees [under FLSA] . . . merely because they were students enrolled at [the defendant]."); *cf. United States v. City of New York*, 359 F.3d 83, 86, 92 (2d Cir. 2004) (holding unpaid "welfare recipients obligated to participate in" welfare provider's "Work Experience Program . . . are employees within the meaning of Title VII"); *Trs. of Columbia Univ. in the City of New York*, 364 N.L.R.B. 1080, 1080 (Aug. 23, 2016) (holding that, under the National Labor Relations Act, "coverage is permitted by virtue of an employment relationship; it is not foreclosed by the existence of some other, additional relationship that the Act does not reach").

Any other rule would lead to absurd results. For example, under such a test, a person who worked for United HealthCare and was also insured by the company could not, legally, be an employee of United. A property manager who lived in a building managed by his employer could not, for purposes of Title VII, be its employee. Luckily, that is not how the law works.

B. Courts and the NLRB Have Held That Graduate Students May Be Both Students and Employees.

Consistent with that rule, courts have recognized that graduate students may be both students *and* employees under the common-law agency test and a close out-of-circuit analog, the "economic realities" test. *See, e.g.*, *Cuddeback v. Fla. Bd. of Educ.*, 381 F.3d 1230, 1234-35 (11th Cir. 2004) (holding graduate student was employee under economic realities test); *Ivan,* 863 F. Supp. at 585-86 (same); *Ruiz v. Trs. of Purdue Univ.*, No. 4:06-CV-130-JVB-PRC, 2008 WL 833125, at *11 (N.D. Ind. Feb. 20, 2008) (same), *report and recommendation adopted,* No. CIV.A. 4:06-CV-130, 2008 WL 833130 (N.D. Ind. Mar. 26, 2008); *Consolmagno v. Hosp. of St. Raphael Sch. of Nurse Anesthesia*, 72 F. Supp. 3d 367, 379 (D. Conn. 2014) (same, applying common-law agency test); *see also Mercy Catholic*, 850 F.3d at 559 (holding medical resident, whom court analogized to a student, was an employee under common-law agency test).[1]

In one case similar to Ms. Huang's, "[t]he fact that [the plaintiff]," a "graduate assistant," "was [also] a student d[id] not negate her

[1] The out-of-circuit "economic realities" test "looks to the totality of the circumstances involved in a relationship, including 'whether the putative employee is economically dependent upon the principal or is instead in business for himself.'" *Shah*, 355 F.3d at 499 (citation omitted). This

employee status." *Ivan*, 863 F. Supp. at 585. Rather, "[t]he totality of the circumstances of [plaintiff's] graduate assistantship . . . demonstrated she was an employee under the terms of Title VII." *Id.* at 586. In another case, a court acknowledged "that in order of importance, [the plaintiff] is likely a student first and a worker second. Nevertheless, a worker is not confined to a single role." *Ruiz*, 2008 WL 833125, at *11.[2]

The National Labor Relations Board has also concluded that "students who perform services at a university in connection with their

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Court has recognized that "the substantive differences between the" common-law agency and "economic realities" tests "are minimal." *Id.*; *see also Knight v. United Farm Bureau Mut. Ins. Co.*, 950 F.2d 377, 378-79 (7th Cir. 1991) (defining the economic realities test as aligned with many factors of the common-law agency test). Indeed, this Court occasionally applies the economic realities test. *See, e.g.*, *Acosta v. Off Duty Police Servs., Inc.*, 915 F.3d 1050, 1055-62 (6th Cir. 2019). Accordingly, case law using the economic realities test is instructive here.

[2] This Court and others also appear to have implicitly recognized employment relationships between graduate students and their universities by assessing graduate students' Title VII claims on the merits. *See, e.g.*, *Ivan v. Kent State Univ.*, 92 F.3d 1185, 1185 (6th Cir. 1996) (assessing graduate students' Title VII claim on the merits); *Brewer v. Univ. of Ill.*, 407 F. Supp. 2d 946, 963-70 (C.D. Ill. 2005) (same); *see also Gollas v. Univ. of Tex. Health Sci. Ctr. at Houston*, 425 F. App'x 318, 321-30 (5th Cir. 2011) (same, for medical resident); *Latif v. Univ. of Tex. Sw. Med. Ctr.*, 834 F. Supp. 2d 518, 525 (N.D. Tex. 2011) (observing that, in assessing merits of graduate students' claims, these courts "necessarily implie[d] that, because [graduate students] are entitled to sue under Title VII, they must also be considered employees under Title VII").

studies" may be that university's employees. *Columbia Univ.*, 364 N.L.R.B. at 1080-81. It has specifically held that "student assistants . . . engaged in research funded by external grants" may have "a common-law employment relationship with the university," and so may be protected by employment law. *Id.* at 1081.

To be sure, sometimes a graduate student is just a student. But in the familiar scenario where a graduate student both learns from and works for his school, he may be both a student and employee.

C. Overlap Between Graduate Students' Employment and Studies Does not Deprive Them of Title VII Protections.

Graduate students are typically employed by their school in their chosen field and may incorporate research they complete in their jobs into their academic work. For example, they may, like Ms. Huang, take a job conducting research for a lab and integrate their findings into their dissertation on the same topic. Contrary to the district court's assumption, then, there may not always be delineations "between graduate students' academic activities and employment activities." Summ. J. Op., R. 143, Page ID # 6669. By extension, the fact that a given task serves a student's education as well as their job duties does not foreclose a finding of an

employment relationship. Cases brought by graduate students in science, technology, engineering, and math ("STEM"), and by medical residents, illustrate this point.

For example, in *Cuddeback v. Florida Board of Education*, "much of [plaintiff's] work in [advisor's] lab was done for the purpose of satisfying the lab-work, publication, and dissertation requirements of her graduate program." 381 F.3d at 1234. The Eleventh Circuit still concluded that she "was an employee for Title VII purposes" because, among other factors, she received a stipend for her work "and the University provided the equipment and training." *Id.* at 1234-35. The nature of the *Cuddeback* plaintiff's responsibilities, and Ms. Huang's, is representative of many STEM graduate students': The work they perform for their advisors frequently aligns with both the school's preexisting research plans *and* their own dissertations or theses. That is by design.

In the biosciences, "[t]he members of a lab work to further the director's particular research agenda; the work they do will also contribute to their individual graduate theses (which may constitute focused subprojects, part of the larger research program), academic presentations and publications." Chris MacDonald & Bryn Williams-Jones, *Supervisor-*

Student Relations: Examining the Spectrum of Conflicts of Interest in Bioscience Laboratories, 16 Account Res. 106, 109 (2009). For "laboratory-based disciplines" in general, students select a faculty "principal investigator" who will serve both as their boss, directing their contributions to the lab's larger mission, and their academic advisor. *See* Michelle A. Maher et al., *Finding a Fit: Biological Science Doctoral Students' Selection of a Principal Investigator and Research Laboratory*, 19 CBE Life Sci. Educ. 1, 1 (2020). That work inures not only to the benefit of the graduate student's education but to the laboratory: "[T]he execution of research plans would be difficult without the graduate student . . . workforce." Christie L. Sampson et al., *A Graduate Student's Worth*, 28 Current Bio. Mag. 850, 850 (2018).

Cases brought by medical residents—who, like STEM graduate students, learn by working—are also instructive here. *See Columbia Univ.*, 364 N.L.R.B. at 1081-82, 1090 (looking to precedent concerning medical residents' status as employees to determine employment status of graduate students). Appellate courts have recognized that a medical residency program is a "mixed employment-training context" in which a participant is "both an employee *and* a student." *Lipsett v. Univ. of P.R.*, 864

F.2d 881, 897 (1st Cir. 1988); *see Ezekwo v. N.Y.C. Health & Hosps. Corp.*, 940 F.2d 775, 785 (2d Cir. 1991) (similar); *Mercy Catholic*, 850 F.3d at 556-57, 559 (3d Cir. 2017) (similar); *cf. Latif*, 834 F. Supp. 2d at 525-26 (rejecting defendant's contention that a resident was only a student and holding "[m]edical residents are employees for the purpose of suit under Title VII"). Courts have underscored that "[w]hile a medical residency program is largely an academic undertaking, it also is an employment relationship." *Ezekwo*, 940 F.2d at 785.

After all, "work-related activities are the foundation of resident learning." P.W. Teunissen et al., *How Residents Learn: Qualitative Evidence for the Pivotal Role of Clinical Activities*, 41 Med. Educ. 763, 768 (2007). "[P]articipants learn both by treating patients and by observing other physicians do so." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 507 (1994); *see also McKeesport Hosp. v. ACGME*, 24 F.3d 519, 525 (3d Cir. 1994) ("Medical residencies are a vital component of medical education . . . ."). There is no tension, then, between a resident's simultaneous roles as student and worker.

II. Courts Should Not Defer to Schools' Classifications of Their Graduate Students.

Courts assess for themselves whether a plaintiff is an employee rather than deferring to a defendant's classification. This principle is well established in employment law and the law of agency more generally. "The underlying economic realities of the employment relationship, rather than any designation or characterization of the relationship in an agreement or employer policy statement, determine whether a particular individual is an employee." Restatement of Employment Law § 1.01 cmt. g (2015); *see also* Restatement (Third) of Agency § 1.02 cmt. a (2006) ("[H]ow the parties to any given relationship label it is not dispositive. Nor does party characterization or nonlegal usage control whether an agent has an agency relationship with a particular person as principal."); *cf.* 26 C.F.R. § 31.3121(d)-1(a)(3) (2023) ("If the relationship of employer and employee exists, . . . it is of no consequence that the employee is designated as a partner, coadventurer, agent, independent contractor, or the like.").

Employers cannot avoid liability by, for instance, simply labeling their employees "independent contractors" when the common-law agency test reveals employment relationships instead. *See Myths About*

Misclassification, U.S. Dep't of Labor, https://www.dol.gov/agencies/whd/flsa/misclassification/myths/detail/#8 ("Your employer cannot classify you as an independent contractor just because it wants you to be an independent contractor. You are an employee if your work falls within a law's definition of employment."). A prominent contemporary example of independent-contractor misclassification is employers' attempts to deny employment law protections to members of "gig economy." In these cases, an employer's insistence that a worker is an independent contractor does not make it so. *See, e.g.*, *Acosta*, 915 F.3d at 1062 (6th Cir. 2019) (holding that self-scheduled security officers were employees entitled to overtime pay, not independent contractors as defendant claimed); *People v. Uber Techs., Inc.*, 270 Cal. Rptr. 3d 290, 296 (2020), *as modified on denial of reh'g* (Nov. 20, 2020) (restraining Uber and Lyft from misclassifying their drivers as independent contractors and thus depriving them of employment law protections). Similarly, "labeling as a partnership an enterprise that does not have the structure, the character, of the traditional partnership"—but instead that of an employer-employee relationship—"will not immunize it from" Title VII. *EEOC v. Sidley Austin Brown & Wood*, 315 F.3d 696, 706 (7th Cir. 2002).

Deference to the way schools choose to refer to their graduate students, like that exhibited by the district court below, contravenes these well-established principles of both employment and agency law. Such deference risks robbing graduate students of the employment law protections to which they are entitled. For instance, if labels ruled, a university could evade liability for employment law violations simply by labeling all its graduate students "students." Indeed, schools have no incentive to label their graduate students in perfect accordance with relevant employment law. And given that Title VII offers more protections than Title IX, they likely have incentives to the contrary. *See infra* Part III.

III. The Availability of Title VII Claims Has Significant Implications for Graduate Students.

Proper recognition of graduate students' employment relationships is crucial because Title VII offers more expansive protections and remedies than Title IX. A graduate student wrongly classified as only a student may, as a result, be deprived of any legal recourse.[3]

First, Title VII's liability standard is easier for plaintiffs to satisfy than Title IX's. Under Title VII, if an employee is harassed by a coworker,

[3] The same would be true of a graduate student who brought a race discrimination claim under Title VI of the Civil Rights Act of 1964, 42 U.S.C.

the employer is liable if it knew or should have known about the harassment and failed to take reasonable steps to address the harassment; if an employee is sexually harassed by their supervisor, the employer is ordinarily strictly liable, regardless of whether it had any notice of the harassment. *Faragher v. City of Boca Raton,* 524 U.S. 775, 807 (1998); *Burlington Indus., Inc. v. Ellerth,* 524 U.S. 742, 764-65 (1998). The Supreme Court has defined actionable sexual harassment as "unwelcome" sexual conduct that is "severe or pervasive." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67-68 (1986).

In contrast, the U.S. Supreme Court has adopted a much less protective standard for sexual harassment claims brought under Title IX of the Education Amendments of 1972, which prohibits sex discrimination in education. 20 U.S.C. § 1681(a). In two cases from the late 1990s, *Gebser* and *Davis*, the Court designed a test for establishing schools' liability for sexual harassment of students by teachers or classmates. *See Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629,

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§ 2000d *et seq*, which courts interpret as analogous to Title IX. *See, e.g.*, *Sewell v. Monroe City Sch. Bd.*, 974 F.3d 577, 584 (5th Cir. 2020) (applying Title IX precedent to Title VI harassment claim); *Maislin v. Tenn. State Univ.*, 665 F. Supp. 2d 922, 931 (M.D. Tenn. 2009) (same).

650 (1999) (student-on-student sexual harassment); *Gebser v. Lago Vista Ind. Sch. Dist.*, 524 U.S. 274, 277 (1998) (teacher-on-student sexual harassment). This standard requires a student to establish that her school was deliberately indifferent to sexual harassment of which the school had actual knowledge and, at least in cases of peer sexual harassment, that the harassment was severe *and* pervasive. *Davis*, 526 U.S. at 650; *Gebser*, 523 U.S. at 277.

Collectively, these requirements make it far harder for students to establish sexual harassment claims under Title IX than for employees to establish sexual harassment claims under Title VII. *See* Shiwali Patel et al., *A Sweep As Broad As Its Promise: 50 Years Later, We Must Amend Title IX to End Sex-Based Harassment in Schools*, 83 La. L. Rev. 939, 973 (2023); Fatima Goss Graves, *Restoring Effective Protections for Students against Sexual Harassment in Schools: Moving Beyond the* Gebser *and* Davis *Standards*, 2 Advance 135, 139-43 (2008); Catherine Fisk & Erwin Chemerinksy, *Civil Rights Without Remedies: Vicarious Liability Under Title VII, Section 1983, and Title IX*, 7 Wm. & Mary Bill Rts. J. 755, 757-58 (1999). Whether a graduate student is an employee, then, is not a

merely academic question. For a plaintiff who can satisfy Title VII's requirements, but not Title IX's, this classification may be case dispositive.

Second, some damages available under Title VII may no longer be available under Title IX after *Cummings v. Premier Rehab Keller, P.L.L.C.*, 142 S. Ct. 1562 (2022). In *Cummings*, the Supreme Court held that emotional distress damages are not recoverable in private actions enforcing the anti-discrimination provisions of the Rehabilitation Act and the Patient Protection and Affordable Care Act. *Id.* at 1571-76. Some courts have applied *Cummings* to other Spending Clause statutes, including Title IX. *E.g.*, *Party v. Ariz. Bd. of Regents*, No. CV-18-01623, 2022 WL 17459745, at *2-3 (D. Ariz. Dec. 6, 2022); *Doe v. Town of N. Andover*, No. 1:20-CV-10310, 2023 WL 3481494, at *11 (D. Mass. May 16, 2023). That limitation threatens to reduce Title IX plaintiffs' damages significantly, since "[o]ften, emotional injury is the primary (sometimes the only) harm caused by discrimination." *Cummings*, 142 S. Ct. at 1579 (Breyer, J., dissenting). But Title VII's language explicitly provides for emotional distress damages. *See* 42 U.S.C. § 1981a(b)(3). A court's rightful recognition of a graduate student's employment relationship with her school, then, can have significant ramifications for available remedies.

IV. A Jury Could Find Ms. Huang Was an Employee When She Was a Graduate Fellow.

Ms. Huang has established a dispute of material fact as to whether she was an Ohio State employee when she was a Graduate Fellow—and, accordingly, whether the revocation of her Graduate Fellow stipend was an adverse action cognizable under Title VII.

The timeline here, and Ohio State's system of classifying graduate students, is complicated. In short: Ohio State originally offered Ms. Huang the position of Graduate Research Associate in 2014, but that offer was replaced, prior to her enrollment, by an offer for the position of Graduate Fellow. Exs. 38-40 to Rizzoni Dep., R. 98-3, Page ID # 3784 (Fellow offer letter). She served as a Graduate Fellow from 2014 to late August 2017. Defs.' Mot. Summ. J., R. 105, Page ID ## 5418-5419. During that time, Ms. Huang worked on a research project sponsored by Ford Motor Company and also her dissertation on a related topic, both of which Ohio State had assigned her. Anderson Dep., R. 76, Page ID ## 660, 665, 672-675; Rizzoni Dep. Vol. 1, R. 98, Page ID # 3942. Then, in 2017, Ms. Huang became a Graduate Research Associate. Defs.' Mot. Summ. J., R. 105, Page ID # 6189 (Ex. S, Bons Aff.). In that position, she finished her

Ford-focused dissertation and conducted research for another professor. Weimer Dep., R. 87, Page ID ## 2161, 2164.

Ohio State called Ms. Huang an employee when she was a Graduate Research Associate and classified her Graduate Fellowship as a strictly academic position. Summ. J. Op., R. 143, Page ID ## 6670, 6673 n.2. And the district court accepted Ohio State's classifications at face value: While it rightly recognized that Ms. Huang's Graduate Research Associate position gave rise to an employment relationship, *id.* at 6671, the court treated her Graduate Fellow position as "a purely academic relationship, not an employment relationship," with Ohio State, *id.* at 6670.

That was incorrect. Under the common-law agency test, Ms. Huang was also an employee during her time as a Graduate Fellow because Ohio State exercised significant control over her work. *See* Opening Br. at 37-45. The district court's conclusion to the contrary was based on a misreading of the record, coupled with deference to Ohio State's classifications.

A. Ohio State Exerted Significant Control Over Ms. Huang as a Graduate Fellow.

As explained above, *see supra* p. 7, the "most important" factors for assessing a defendant's control over a plaintiff's work are its "ability to

control job performance and employment opportunities for the aggrieved individual." *Marie*, 771 F.3d at 356. Here, Ohio State exerted control over the subject, scope, and execution of Ms. Huang's job duties while she was a Graduate Fellow.

Ms. Huang's Graduate Fellow offer letter set forth the topic she would research for Ohio State as part of the Ford-sponsored University Research Project. Exs. 38-40 to Rizzoni Dep., R. 98, Page ID # 3784. It also specified that Ms. Huang would "work within a group," have "regular meetings with the group and with" her supervisor, George Rizzoni," have "individual meetings with" Rizzoni, and "participate in the meeting of [Rizzoni's] electrochemical energy storage systems research group." *Id.*[4] Consistent with the offer letter, as soon as she arrived on campus, Rizzoni assigned Huang a specific portion of the University Research Project for her doctoral research *and* made it her dissertation topic. Summ. J. Op., R. 143, Page ID ## 6662-6663. As part of this work, Rizzoni directed her

[4] In doing so, the Graduate Fellow offer letter was more proscriptive than Ms. Huang's offer letter for the Graduate Research Assistantship—a position Ohio State later characterized as an employee—indicating Ohio State exercised a greater degree of control over the putatively academic role. *Compare* Exs. 38-40 to Rizzoni Dep., R. 98, Page ID # 3784 (Fellow offer letter) *with* Pl.'s Resp. Opp'n Mot. Summ. J., R. 114, Page ID # 6302 (Ex. 4, 2014 Associate offer letter).

to participate in biweekly WebEx meetings with Ohio State and Ford staff. *Id.* at 6663; Anderson Dep., R. 76, Page ID ## 707-708.

As other courts have concluded, this kind of control demonstrates an employment relationship between a graduate student and her school. *See Cuddeback*, 381 F.3d at 1234 (explaining, in deciding graduate student was employee, that relevant factor included "whether the defendant directed the plaintiff's work"); *see also Mercy Catholic*, 850 F.3d at 559 (explaining common-law agency test "factors indeed suggest [plaintiff] was an employee under Title VII," in part because defendant "assigned [plaintiff] projects and tasks"); *Okeke v. Admins. of Tulane Educ. Fund*, No. 20-450, 2021 WL 2042213, at *4 (E.D. La. May 21, 2021) (holding medical resident was employee of defendant because resident agreement "set the terms and conditions of the residency by stipulating a period and outlining expectations").

Other factors, too, demonstrate an employment relationship. Ohio State furnished the instrumentalities, tools, and location for the University Research Project during Ms. Huang's Graduate Fellowship, in coordination with Ford. Exs. 38-40 to Rizzoni Dep., R. 98, Page ID # 3784 (specifying in Huang's Fellow offer letter that, "[a]s part of this work, you

will have access to the facilities of our electrochemical energy storage laboratory and of its staff . . . ."); *see Cuddeback*, 381 F.3d at 1234 (finding that the university's provision of "equipment and training" was a factor "weigh[ing] in favor of treating [plaintiff] as an employee for Title VII purposes"); *Mercy Catholic*, 850 F.3d at 559 (holding medical resident was employee in part because "[Defendant] was the source of the instrumentalities and tools of Doe's work as a resident, the location of Doe's work was at [Defendant], and [Defendant] assigned Doe projects and tasks.").

Additionally, the University Research Project comprised "part of the regular business of the hiring party," *Reid*, 490 U.S. at 752; *see also Mercy Catholic*, 850 F.3d at 559 (holding graduate student was employee in part because "her work was part of [Defendant's] regular business of providing healthcare to patients"): Ohio State has, for decades, conducted research for Ford at significant economic benefit to the University. *Center for Automotive Research Annual Report FY2016*, Ohio State Univ. (Oct. 10, 2016), https://issuu.com/osucar/docs/car_annualreport_2016_vfinal_single.

Finally, Ohio State provided Ms. Huang with a stipend and benefits in exchange for her work as a Graduate Fellow. Other courts have found the presence of similar stipends and benefits to point towards an employment relationship—not an exclusively educational one. For instance, the Eleventh Circuit in *Cuddeback* found the plaintiff's receipt of "a stipend and benefits for her work" to "weigh in favor of treating [her] as an employee for Title VII purposes." *Cuddeback*, 381 F.3d at 1234; *see also Ivan*, 863 F. Supp. at 585-86 (same); *see Consolmagno*, 72 F. Supp. 3d at 378 (same); *Okeke*, 2021 WL 2042213, at *4 (same).

B. The District Court Overlooked Key Evidence.

In reaching the opposite conclusion, the district court failed to view the facts in the light most favorable to Ms. Huang, as required on summary judgment. *See Scott v. Harris*, 550 U.S. 372, 380 (2007) (citing Fed. R. Civ. P. 56(c)). The court wrote, for example, that Ms. Huang "was in complete control of how to conduct her academic studies" and was "not obligated to perform any work or service for" Ohio State. Summ. J. Op., R. 143, Page ID # 6671. Far from it. As described, Ohio State required her to conduct research on a specific topic for Ford, instructed her to write

her dissertation on that topic, and managed her work down to requiring her to attend specific meetings. *See supra* Part IV.A.

The district court was also quick to accept Ohio State's characterization of Ms. Huang's Graduate Fellow stipend. Summ. J. Op., R. 143, Page ID ## 6672-6673. The district court never considered that Ohio State's payment to Ms. Huang for her research indicated an employment relationship. *See supra* p. 26. Instead, having already concluded Graduate Fellows were not employees, it asserted Huang received the renumeration "in her capacity as a student." Summ. J. Op., R. 143, Page ID # 6672. But the stipend was the exact same compensation Ohio State had offered Ms. Huang to serve as a Graduate Research Associate, an employee role. *See* Exs. 38-40 to Rizzoni Dep., R. 98, Page ID # 3784 (specifying in Huang's Fellow offer letter that the position comes "with the same stipend and benefits outlined in your original offer letter"). And, in analogizing the stipend to a student scholarship, the district court cited only an affidavit from a University official. Summ. J. Op., R. 143, Page ID # 6673 (citing Bons Aff., R. 143, Page ID ## 6188-6189). To the district court, the stipend was provided to Ms. Huang in her capacity as a student

rather than an employee—the question on which her quid pro quo claim hinged—because Ohio State said it was.

In short, the district court overlooked significant evidence that Ms. Huang, as a Graduate Fellow, was an Ohio State employee and that her stipend was related to her employment. In doing so, it doomed her Title VII quid pro quo claim. Given the disputes of material fact on this issue, Ms. Huang should have the chance to present her evidence to a jury.

CONCLUSION

This Court should reverse the district court's grant of summary judgment on Ms. Huang's Title VII quid pro quo claim and remand for trial.

September 7, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and 29(a)(5) because it contains 5,557 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office 365 in 14-point Century Schoolbook font.

Dated: September 7, 2023

/s/ Alexandra Z. Brodsky
Alexandra Z. Brodsky
Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on September 7, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: September 7, 2023

/s/ Alexandra Z. Brodsky
Alexandra Z. Brodsky
Counsel for Amici Curiae

APPENDIX:
ANTI-SLAPP LAWS

Use the Appendix chart to find out what protections you have under an anti-SLAPP law. Here is a summary of each chart column in the Appendix chart:

State: Find your state or U.S. territory in this column.

Anti-SLAPP?: This column explains if your state has an anti-SLAPP law. If it does, you can click on the link to read the full **statute**.

Statutes vs. Court Cases: When Congress or state lawmakers write a law, that written law is called a **statute**. When a **court** decides a case, it explains how the statute applies to the specific facts of the case. The law is made up of both statutes and court cases.

Rights: This column explains what rights are protected by each state's anti-SLAPP law.

- Most states' anti-SLAPP laws only protect your right to **petition**. Petition means asking your government to fix a bad outcome or change a policy. In most states, your right to petition includes speaking at a government proceeding or talking about an issue being considered by a government proceeding. A **government proceeding** is a government meeting or hearing, such as a lawsuit, agency investigation, legislative hearing, school board meeting, or workers' rights commission.
- Some states' anti-SLAPP laws also protect your right to **speech**, which usually means speaking in a public place about an "issue of public interest" (see **Sex-Based Harassment** column below for more). In some states, your right to **speech** can also include writing consumer reviews or complaints or saying something about a book, movie, or other work of art.
- Some states' anti-SLAPP laws also protect your right of free **press, assembly,** and **association**. Press usually means news and other media. Assembly and association usually mean joining a group of people to promote a shared interest.

Example: Let's say your state has an **anti-SLAPP** law that protects only the right to **petition**. If you spoke out about your abuser in a legislative hearing (**petition**), then the anti-SLAPP law would apply to your statement. But if you posted the same exact statement on social media (**speech**), then the anti-SLAPP law would not apply.

Sex-Based Harassment: This column explains if your state's **anti-SLAPP law** protects statements about **sex-based harassment** in general, outside of a **petition** to the government. In other words, this column explains if your state thinks **speech** about sex-based harassment is speech about an "issue of public interest" and thus protected by the anti-SLAPP law. In most states, the answer is unclear because the courts haven't yet decided an anti-SLAPP case about sex-based harassment. In some states, the **statute** says "political" and "social" issues are "issues of public interest," but many of their courts don't think sex-based harassment is a political or social issue. In some other states, the **statute** says "health" and "safety" are "issues of public interest," and most of their courts do think sex-based harassment is a health or safety issue. (In general, you don't have to worry about this column if you spoke out about sex-based harassment in a statement to the government asking for help, and your state's anti-SLAPP law protects the right to petition.)

Discovery: This column explains if **discovery** will be paused ("stayed") during your **anti-SLAPP motion**. Most states' anti-SLAPP laws require the court to pause discovery while the court decides your anti-SLAPP motion. This is helpful because discovery can be very invasive, expensive, and time-consuming. But most states also allow the court to order limited discovery in certain situations, like if you or your abuser needs to get specific **evidence** to win the anti-SLAPP motion.

$: If You Win: This column explains whether your abuser will have to pay your **lawyer's** fees and court costs ("fees and costs") if you win your **anti-SLAPP motion**. The answer is yes in almost all states with an anti-SLAPP law. In a few states, the court gets to decide if your abuser will pay your fees and costs.

$: If You Lose: This column explains whether you will have to pay your abuser's fees and costs if you lose your **anti-SLAPP motion**. In most states, this will only happen if the court thinks your motion was not serious ("frivolous") or filed only to delay the **lawsuit** ("dilatory"). In some states, the **anti-SLAPP statute** doesn't mention at all if you might have to pay your abuser, and the courts haven't said anything yet either.

Appeal: This column explains whether you can **appeal** right away if you lose your **anti-SLAPP motion**. (This is called an "interlocutory appeal.") The answer is yes in most states with an anti-SLAPP law. This is helpful because it means you don't have to wait to finish the rest of the **lawsuit** (which can be invasive, expensive, and time-consuming) before appealing.

Timing: Some states may have passed or updated their **anti-SLAPP law** recently, after you were sued and while your **lawsuit** is still ongoing. Your abuser may argue that the new law doesn't protect you because they sued you when the old law was in effect. Your lawyer can help you argue that the new law protects you because it also applies to lawsuits that began before the new law was passed but are still ongoing. (This is called a "retroactive" law.)

The **chart on the following pages** uses the following colors to describe how well each part of a state's anti-SLAPP law protects you:

Good	Okay	Unclear	Not good	Bad

Note: This **Appendix** should not be used as a replacement for talking with a **lawyer**. This is because many state and federal courts are still figuring out how to apply **anti-SLAPP statutes** to cases involving **defamation** and **sex-based harassment**. Some courts may have never even heard a case involving defamation and sex-based harassment before. And sometimes, even if a state statute seems broad, a court could apply it narrowly. So, it is very important to talk to a lawyer about your specific situation, your state's laws, and trends in the courts.

STATE	**ANTI-SLAPP?:** Does this state have an anti-SLAPP law?	**RIGHTS:** What rights are protected by the state's anti-SLAPP law?	**SEX-BASED HARASSMENT:** Does the state protect statements about sex-based harassment in general, outside of a petition?	**DISCOVERY:** Is discovery paused ("stayed") during the motion?	**$: IF YOU WIN,** will your abuser have to pay your fees and costs?	**$: IF YOU LOSE,** will you have to pay your abuser's fees and costs?	**APPEAL:** If you lose your motion, can you appeal right away?
AL	**No**						
AK	**No**						
AS	**No**						
AZ	Yes	The right to petition, speech, press, or assembly. State courts have held that the right to petition includes police reports.	**Unclear.** The statute does not specify, and courts have not yet addressed the issue.	**Maybe.** If you win the first step of your motion, which is showing that your abuser sued you to retaliate against you or to stop you from speaking out, then discovery will be paused during the rest of your motion.	**Maybe.** If you win your motion, it's up to the court to decide whether your abuser has to pay your fees and costs.	**Maybe.** If you lose your motion and the court thinks your motion was not serious or only filed to delay the lawsuit, then you would have to pay your abuser's fees and costs.	**Maybe.** If you win the first step of your motion, which is showing that your abuser sued you to retaliate against you or to stop you from speaking out, then you can appeal right away. All appeals are fast-tracked.
AR	Yes	The right to petition or speech on an issue of public interest, including (but not limited to) statements made: in a government proceeding, about an issue being considered by a government proceeding, or criticizing a government proceeding or official.	**Unclear.** The statute does not specify, and courts have not yet addressed the issue.	**Yes.** But the court may allow limited discovery if there's a good reason.	**Maybe.** If you win your motion, it's up to the court to decide whether your abuser has to pay your fees and costs. You might also get extra money if you show your abuser sued you to harass, retaliate, or stop you from speaking out.	**Unclear.** The statute does not specify, and courts have not yet addressed the issue.	**Unclear.** The statute does not specify, and courts have not yet addressed the issue.
CA	Yes	The right to petition or speech on an issue of public interest, including (but not limited to) statements made: in a government proceeding, about an issue being considered by a government body, or in a public place about an issue of public interest. Some state courts have said that the right to petition includes statements made in a police report, in a lawsuit, in preparation for a Title IX proceeding, in preparation for a government proceeding, or to anyone who is required by law to investigate or report abuse to police or other government body (such as a nurse). Some state courts have also said that public places include public websites, newspapers, press conferences, and online reviews. To decide if something is an issue of public interest, state courts have asked whether the statement is about: a public figure, a widespread public debate, or conduct that could affect a large number of people. Some federal courts have applied the CA's law in federal cases.	**Unclear.** The statute says it should be applied broadly, and some state courts have said that child sexual abuse and workplace sexual harassment are issues of public interest because they are issues of health or safety. In 2016, the state supreme court granted a student's motion regarding statements she made while preparing to file a Title IX complaint about sexual harassment. Some state and federal courts have said that domestic violence is an issue of public interest, but some state courts have said it's not. In 2019, a federal court said that domestic violence is an issue of public interest, but it denied the woman's motion because her boss said he had not been abusive.	**Yes.** But the court may allow limited discovery if there's a good reason.	**Yes.** And you can also sue your abuser separately for SLAPPing you (this is called a SLAPPback).	**Maybe.** If you lose your motion and the court thinks your motion was not serious or only filed to delay the lawsuit, then you would have to pay your abuser's fees and costs.	**Yes.**

STATE	**ANTI-SLAPP?:** Does this state have an anti-SLAPP law?	**RIGHTS:** What rights are protected by the state's anti-SLAPP law?	**SEX-BASED HARASSMENT:** Does the state protect statements about sex-based harassment in general, outside of a petition?	**DISCOVERY:** Is discovery paused ("stayed") during the motion?	**$: IF YOU WIN,** will your abuser have to pay your fees and costs?	**$: IF YOU LOSE,** will you have to pay your abuser's fees and costs?	**APPEAL:** If you lose your motion, can you appeal right away?
CO	Yes	The right to petition or speech on an issue of public interest, including (but not limited to) statements made: in a government proceeding, about an issue being considered by a government body, or in a public place about an issue of public interest.	**Unclear.** The statute does not specify, and courts have not really addressed the issue yet. In 2021, a state court denied a woman's anti-SLAPP motion based on her ex-husband's evidence that she filed a false police report of domestic violence. In 2021, a federal court also denied a woman's anti-SLAPP motion because her boyfriend said she lied about sexual assault and domestic violence.	**Yes.** But the court may allow limited discovery if there's a good reason.	**Yes.**	**Maybe.** If you lose your motion and the court thinks your motion was not serious or only filed to delay the lawsuit, then you would have to pay your abuser's fees and costs.	**Yes.**
CT	Yes	The right to petition, speech, or association on an issue of public concern. The right to petition means statements made about an issue being considered by a government body, to encourage a government body to consider an issue, or to get the public to encourage the government to consider an issue. The right to speech means statements made in a public place about an issue of public concern. The right to association means statements between a group of people to promote a shared interest. An issue of public concern means an issue related to health or safety; environmental, economic, or community well-being; government, zoning, or regulatory issues; a public official or public figure; or an audiovisual work.	**Probably.** State courts have said that sexual assault, child sexual abuse, workplace sexual harassment, and sexual harassment in public spaces are issues of public interest because they are related to health or safety and community well-being. A state court also said in 2019 that CT's law protects good-faith reports to police, even if the police ultimately close the investigation.	**Yes.** Discovery is also paused during any appeal of the motion. But the court may allow limited discovery if there's a good reason and it's relevant to your motion.	**Yes.**	**Maybe.** If you lose your motion and the court thinks your motion was not serious or only filed to delay the lawsuit, then you would have to pay your abuser's fees and costs.	**Yes.**
DE	Yes	The right to make statements about an applicant or holder of a government permit, zoning change, lease, license, or certificate.	**No.** You are only protected if you speak about sex-based harassment related to a government permit, zoning change, lease, license, or certificate. For example, it's possible you might be protected if you report your abuser to stop them from getting a state license to be a therapist.	**Unclear.** The statute does not specify, and courts have not yet addressed the issue.	**Maybe.** If you win your motion, it's up to the court to decide whether your abuser has to pay your fees and costs. You might also get extra money if you show your abuser sued you to harass, retaliate, or stop you from speaking out.	**Unclear.** The statute does not specify, and courts have not yet addressed the issue.	**Unclear.** The statute does not specify. One state court has allowed a defendant who lost their motion to appeal right away.

STATE	ANTI-SLAPP?: Does this state have an anti-SLAPP law?	RIGHTS: What rights are protected by the state's anti-SLAPP law?	SEX-BASED HARASSMENT: Does the state protect statements about sex-based harassment in general, outside of a petition?	DISCOVERY: Is discovery paused ("stayed") during the motion?	$: IF YOU WIN, will your abuser have to pay your fees and costs?	$: IF YOU LOSE, will you have to pay your abuser's fees and costs?	APPEAL: If you lose your motion, can you appeal right away?
DC	Yes	The right to advocate on an issue of public interest, which means: statements made about an issue being considered by a government body, statements made in a public place about an issue of public interest, or any other expressive conduct to petition the government or talk to the public about an issue of public interest. An issue of public interest means an issue related to health or safety; environmental, economic, or community well-being; the DC government; a public figure; or a good, product, or service in the marketplace. A federal appellate court has said that DC's law does not apply in federal cases.	**Probably.** DC's highest court said in 2022 that workplace sexual harassment is an issue of public interest because it is related to health or safety and community well-being.	**No.** In 2023, DC's highest court struck down a part of the statute that had required courts to pause discovery during an anti-SLAPP motion.	**Probably.** The statute says it's up to the court to decide. But DC's highest court said in 2016 that if you win, it's assumed your abuser will pay your fees and costs unless there are special circumstances that would make it unfair.	**Maybe.** If you lose your motion, and the court thinks your motion was not serious or only filed to delay the lawsuit, and it wants to make you pay your abuser's fees and costs, then you would have to pay your abuser's fees and costs.	**Yes.** The statute does not specify, but DC's highest court said in 2016 that if you lose a motion, you can appeal right away.
FL	Yes	The right to speech on a public issue, assembly, or petition. Free speech related to a public issue means a statement made: to a government body about an issue it is considering; or in or about a play, movie, TV show, radio broadcast, audiovisual work, book, magazine article, musical work, news report, or other similar work.	**Unclear.** The statute does not specify, and courts have not yet addressed the issue.	**Unclear.** The statute does not specify. One state court has granted a defendant's request to pause discovery.	**Yes.**	**Yes.**	**Unclear.** The statute does not specify, and courts have decided both ways on the issue.
GA	Yes	The right to petition or speech on an issue of public interest, including (but not limited to) statements made: in a government proceeding, about an issue being considered by a government proceeding, or in a public place about an issue of public interest. A federal appellate court has said that GA's law does not apply in federal cases.	**Unclear.** The statute says it should be applied broadly. In general, state courts look at whether the statement affects a large number of people. A state court said in 2022 that sex-based harassment is not an issue of public interest when it only involves the victim and harasser.	**Yes.** But the court may allow limited discovery if there's a good reason. And if your abuser is a public figure, then they can have limited discovery on whether you made your statements with actual malice.	**Yes.**	**Maybe.** If you lose your motion and the court thinks your motion was not serious or only filed to delay the lawsuit, then you would have to pay your abuser's fees and costs.	**Yes.**
GU	Yes	The right to petition, including to inform, get help from, change policy, or participate in the process of government.	**No.** You are only protected if you speak about sex-based harassment in a petition.	**Yes.** Discovery is also paused during any appeal of the motion.	**Yes.** The court could also punish your abuser to prevent other abusers from filing similar SLAPPs in the future. And you can also sue your abuser separately for SLAPPing you (this is called a SLAPPback).	**Unclear.** The statute does not specify, and courts have not yet addressed the issue.	**Yes.** The appeal will also be fast-tracked.

STATE	**ANTI-SLAPP?:** Does this state have an anti-SLAPP law?	**RIGHTS:** What rights are protected by the state's anti-SLAPP law?	**SEX-BASED HARASSMENT:** Does the state protect statements about sex-based harassment in general, outside of a petition?	**DISCOVERY:** Is discovery paused ("stayed") during the motion?	**$: IF YOU WIN,** will your abuser have to pay your fees and costs?	**$: IF YOU LOSE,** will you have to pay your abuser's fees and costs?	**APPEAL:** If you lose your motion, can you appeal right away?
HI	Yes	The right to speech, press, assembly, petition, or association on an issue of public concern, which includes communications made in a government proceeding or about an issue being considered by a government proceeding.	**Unclear.** The statute says it should be applied broadly and consistent with other states that have passed the uniform law. But courts have not yet addressed the issue.	**Yes.** Discovery is also paused during any appeal of the motion. But the court may allow limited discovery if it is needed to help you or your abuser win the motion.	**Yes.**	**Maybe.** If you lose your motion and the court thinks your motion was not serious or only filed to delay the lawsuit, then you would have to pay your abuser's fees and costs.	**Yes.**
ID	No						
IL	Yes	The right to petition, speech, association, or other participation in government, unless you weren't actually trying to get a government or election outcome. The state supreme court added that you also have to show your harasser sued you solely to stop you from speaking out.	**Unclear.** The statute says it should be applied broadly. But in 2013, a state court denied a woman's motion because her abusers sued her for defamation 2+ years after she sued them for sexual assault (instead of right after she sued them) and because the issue was sexual assault (not something like real estate zoning). State courts have also denied motions by victims of school and workplace abuse because the courts said their abusers sued to protect their reputation, not solely to stop the victims from speaking out.	**Yes.** But the court may allow limited discovery on whether you were exercising your right to petition, speech, association, or other participation in government.	**Yes.**	**Unclear.** The statute does not specify, and courts have not yet addressed the issue.	**Yes.** The appeal will also be fast-tracked.
IN	Yes	The right to petition or speech on an issue of public interest. State courts have said speech includes media coverage. The state supreme court has said an issue of public interest is about any political, social, or other concern to the community. Other state courts have asked whether the statement is about: a public figure, a widespread public debate, or conduct that could affect a large number of people. A state court has also said that you need to show your abuser sued you mainly to stop you from speaking out. Federal courts have said IN's law applies in federal cases.	**Unclear.** The statute does not specify, and courts have not yet addressed the issue. A court might decide that sex-based harassment is generally an issue of public interest because it is a political, social, or other concern to the community and could affect a large number of people. Or, it could decide that an incident between 2 people does not affect a large number of people.	**Unclear.** The statute says yes, and that the court may allow limited discovery if it is relevant to your motion. But a federal court said in 2010 that IN's law treats an anti-SLAPP motion as a motion for summary judgment, which means discovery is required.	**Yes.** State courts have also said that your abuser has to pay your fees and costs even if your insurer has already paid them.	**Maybe.** If you lose your motion and the court thinks your motion was not serious or only filed to delay the lawsuit, then you would have to pay your abuser's fees and costs.	**Maybe.** The statute does not specify, but some state courts have allowed defendants who lost their motions to appeal right away.
IA	No						

STATE	ANTI-SLAPP?: Does this state have an anti-SLAPP law?	RIGHTS: What rights are protected by the state's anti-SLAPP law?	SEX-BASED HARASSMENT: Does the state protect statements about sex-based harassment in general, outside of a petition?	DISCOVERY: Is discovery paused ("stayed") during the motion?	$: IF YOU WIN, will your abuser have to pay your fees and costs?	$: IF YOU LOSE, will you have to pay your abuser's fees and costs?	APPEAL: If you lose your motion, can you appeal right away?
KS	Yes	The right to petition, speech, or association on an issue of public interest. Petition means a communication: in or about a government proceeding, a proceeding of a publicly funded school or university board, or a public meeting with a public purpose; about an issue being considered by a government proceeding; to encourage a government proceeding to consider an issue; or to get the ublic to encourage the government to consider an issue. Speech means a communication about an issue of public interest. Association means a communication between a group of people to promote a shared interest. Communication means an oral, visual, written, electronic, or other statement or document. An issue of public interest means an issue related to health or safety; environmental, economic, or community well-being; the government; a public official or public figure; or a good, product, or service in the marketplace. A federal district court has said that KS's law applies in federal cases.	**Probably.** The statute says it should be applied broadly. A state court said in 2021 that emails between school officials about a student stalker were about an issue of public interest because they were related to health or safety and community well-being.	**Yes.** Discovery is also paused during any appeal of the motion. But the court may allow limited discovery if there's a good reason and it's relevant to your motion.	**Yes.** The court could also order your abuser to pay you extra money to prevent other abusers from filing similar SLAPPs against their victims.	**Maybe.** If you lose your motion and the court thinks your motion was not serious or only filed to delay the lawsuit, then you would have to pay your abuser's fees and costs.	**Yes.**
KY	Yes	The right to speech, press, assembly, petition, or association on an issue of public concern, including communications made: in a government proceeding; about an issue being considered by a government proceeding; in a consumer complaint or review; or publicly or privately about a dramatic, literary, musical, political, journalistic, audiovisual, film, television, radio, newspaper, website, magazine, or other artistic work. An issue of public concern means an issue related to a public official or public figure; an issue of political, social, or other interest to the community; or an issue of concern to the public.	**Unclear.** The statute does not specify, and courts have not yet addressed the issue. A court might decide that sex-based harassment is generally an issue of public concern because it is an issue of political, social, or other interest to the community; or is an issue of concern to the public.	**Yes.** Discovery is also paused during any appeal of the motion. But the court may allow limited discovery if it is needed to help you or your abuser win the motion.	**Yes.**	**Maybe.** If you lose your motion and the court thinks you filed your motion without a good reason, then you would have to pay your abuser's fees and costs.	**Yes.**

STATE	ANTI-SLAPP?: Does this state have an anti-SLAPP law?	RIGHTS: What rights are protected by the state's anti-SLAPP law?	SEX-BASED HARASSMENT: Does the state protect statements about sex-based harassment in general, outside of a petition?	DISCOVERY: Is discovery paused ("stayed") during the motion?	$: IF YOU WIN, will your abuser have to pay your fees and costs?	$: IF YOU LOSE, will you have to pay your abuser's fees and costs?	APPEAL: If you lose your motion, can you appeal right away?
LA	Yes	The right to petition or speech on a public issue, including (but not limited to) statements made: in a government proceeding, about an issue being considered by a government proceeding, or in a public place about an issue of public interest. The state supreme court has said an issue of public interest is about any political, social, or other concern to the community. State courts have also said an issue of public interest can involve actions between private people and includes media coverage of police reports and investigations.	**Unclear.** The statute does not specify, and courts have not yet addressed the issue. A court might decide that sex-based harassment is generally an issue of public interest because it is an issue of political, social, or other concern to the community.	**Yes.** But the court may allow limited discovery if there's a good reason.	**Yes.**	**Unclear.** The statute does not specify, and courts have not yet addressed the issue.	**Unclear.** The statute does not specify, and courts have not yet addressed the issue.
ME	Yes	The right to petition, including (but not limited to) statements made: in a government proceeding, about an issue being considered by a government proceeding, to encourage the government to consider an issue, or to get the public to encourage the government to consider an issue. State courts have said that petition includes statements made in newspapers to encourage government officials to consider an issue. Even if you were using your right to petition, your abuser could still win if they show your statements had no factual or legal basis and actually injured them. A federal appellate court has said that ME's law applies in federal cases.	**No.** You are only protected if you speak about sex-based harassment in a petition. For example, the state supreme court said in 2019 that a man's letters to a nonprofit's donors about child sexual abuse at the nonprofit were not a petition. Also, even if you speak in a petition, you could still lose: for example, a state court denied a woman patient's motion in 2011 because her doctor-abuser showed that her statements had no factual basis (his employees testified that they didn't hear her scream or see her run from his office) and because her abuser was actually injured by her statements (he spent $300 on counseling).	**Yes.** But the court may allow limited discovery if there's a good reason.	**Maybe.** If you win your motion, it's up to the court to decide whether your abuser has to pay your fees and costs.	**Unclear.** The statute does not specify, and courts have not yet addressed the issue.	**Yes.** The statute does not specify, but the state supreme court said in 2008 that if you lose your motion, you can appeal right away.
MD	Yes	The right to petition, speech, press, or assembly regarding any government issue or issue of public interest. You also have to show your abuser sued you in bad faith and to stop you from speaking out.	**Unclear.** The statute does not specify, and courts have not yet addressed the issue.	**Unclear.** The statute says all proceedings are paused during the motion, so this includes discovery. But a federal court said in 2017 that it needed discovery to decide if the plaintiff sued in bad faith and to stop the defendant from speaking out.	**Unclear.** The statute does not specify, and courts have not yet addressed the issue.	**Unclear.** The statute does not specify, and courts have not yet addressed the issue.	**Unclear.** The statute does not specify, and courts have not yet addressed the issue.

STATE	ANTI-SLAPP?: Does this state have an anti-SLAPP law?	RIGHTS: What rights are protected by the state's anti-SLAPP law?	SEX-BASED HARASSMENT: Does the state protect statements about sex-based harassment in general, outside of a petition?	DISCOVERY: Is discovery paused ("stayed") during the motion?	$: IF YOU WIN, will your abuser have to pay your fees and costs?	$: IF YOU LOSE, will you have to pay your abuser's fees and costs?	APPEAL: If you lose your motion, can you appeal right away?
MA	Yes	The right to petition, including (but not limited to) statements made: in a government proceeding, about an issue being considered by a government proceeding, to encourage the government to consider an issue, or to get the public to encourage the government to consider an issue. The state supreme court added that you have to show your abuser's main goal in suing you is to stop you from speaking out. Some state courts have said that the petition does not have to be about an issue of public interest. A federal court has said MA's law does not apply in federal cases.	**No.** You are only protected if you speak about sex-based harassment in a petition. A federal court said in 2019 that it would not treat a Title IX complaint of sexual assault as a petition without discovery.	**Yes.** But the court may allow limited discovery if there's a good reason.	**Yes.**	**Unclear.** The statute does not specify, and courts have not yet addressed the issue.	**Yes.** The statute does not specify, but the state supreme court said in 2009 that if you lose your motion, you can appeal right away.
MI	No						
MN	No						
MS	No						
MO	Yes	Speech or conduct in a court-like public hearing or meeting, including any meeting by a state or local government body, such as a council, planning commission, or review board. Federal courts have clarified that actual court proceedings do not count. A state court has said that you also need to show your abuser sued you to retaliate against you.	**No.** You are only protected if you speak about sex-based harassment in a court-like public hearing.	**Yes.** Discovery is also paused during any appeal of the motion.	**Yes.**	**Maybe.** If you lose your motion and the court thinks your motion was not serious or only filed to delay the lawsuit, then you would have to pay your abuser's fees and costs.	**Unclear.** The statute says all appeals are fast-tracked. But some state courts have said that the statute only says if you get to appeal right away, then it will be fast-tracked, but not that you always get to appeal right away.
MT	No						
NE	Yes	The right to make statements about an applicant or holder of a government permit, zoning change, lease, license, or certificate.	**No.** You are only protected if you speak about sex-based harassment related to a government permit, zoning change, lease, license, or ertificate. For example, it's possible you might be protected if you report your abuser to stop them from getting a state license to be a therapist.	**Unclear.** The statute does not specify, and courts have not yet addressed the issue.	**Maybe.** If you win your motion, it's up to the court to decide whether your abuser has to pay your fees and costs. The court could also order your abuser to pay you extra money if you can show they sued you to harass, retaliate, or stop you from speaking out.	**Maybe.** If you lose your motion, and the court thinks you made your statements with actual malice, and it wants to make you pay your abuser's fees and costs, then you would have to pay your abuser's fees and costs.	**Unclear. T**he statute does not specify, and courts have not yet addressed the issue.

STATE	ANTI-SLAPP?: Does this state have an anti-SLAPP law?	RIGHTS: What rights are protected by the state's anti-SLAPP law?	SEX-BASED HARASSMENT: Does the state protect statements about sex-based harassment in general, outside of a petition?	DISCOVERY: Is discovery paused ("stayed") during the motion?	$: IF YOU WIN, will your abuser have to pay your fees and costs?	$: IF YOU LOSE, will you have to pay your abuser's fees and costs?	APPEAL: If you lose your motion, can you appeal right away?
NV	Yes	The right to petition or speech on an issue of public interest, which means statements made: to a government employee about a government issue, about an issue being considered by a government body, in a public place about an issue of public interest, or to get a specific government or election action or outcome. The state supreme court has said that something is a public interest when: (1) the public is more than just curious about it; (2) it concerns a large number of people; (3) the statements are closely related to the specific public interest; (4) the speaker was focused on the public interest, not just trying to get support for a private disagreement; and (5) the speaker wasn't just making a private disagreement public by telling a lot of people about it. The state supreme court has also said that a statement can be on an issue of public interest even if it is made to 1 person. State courts have held that 3,000 and 8,000 are a large number of people, but not 8 or 20. A federal appellate court has said that NV's law applies in federal cases.	**Unclear.** The statute does not specify, and courts have not yet addressed the issue. A state court might decide sex-based harassment is generally an issue of public interest because it fits all 5 requirements of the state supreme court. Or, it might decide not because an incident between 2 people does not concern a large number of people.	**Yes.** Discovery is also paused during any appeal of the motion. But the court may allow limited discovery if it is needed to help your abuser win the motion.	**Yes.** The court could also order your abuser to pay you extra money, up to $10,000. And you can also sue your abuser separately for SLAPPing you (this is called a SLAPPback).	**Maybe.** If you lose your motion and the court thinks it was not serious or only filed to harass or burden your abuser, and it wants to make you pay your abuser's fees and costs, then you would have to pay your abuser's fees and costs. The court could also order you to pay your abuser extra money, up to $10,000, and punish you in other ways.	**Yes.** You would appeal directly to the state's supreme court.
NH	No						
NJ	**NJ created a new anti-SLAPP law in September 2023, after this toolkit was first published. See page 14 of this Appendix for information about NJ's new law.**						
NM	Yes	Speech or conduct in or about a court-like public hearing or meeting by a state or local government body, such as a council, planning commission, or review board. A federal appellate court has said that NM's law does not apply in federal cases.	**No.** You are only protected if you speak about sex-based harassment in or about a court-like public hearing or meeting by a state or local government body.	**Unclear.** The statute does not specify, and courts have not yet addressed the issue.	**Yes.**	**Maybe.** If you lose your motion and the court thinks your motion was not serious or only filed to delay the lawsuit, then you would have to pay your abuser's fees and costs.	**Yes.** The appeal will also be fast-tracked.
MP	No						

STATE	ANTI-SLAPP?: Does this state have an anti-SLAPP law?	RIGHTS: What rights are protected by the state's anti-SLAPP law?	SEX-BASED HARASSMENT: Does the state protect statements about sex-based harassment in general, outside of a petition?	DISCOVERY: Is discovery paused ("stayed") during the motion?	$: IF YOU WIN, will your abuser have to pay your fees and costs?	$: IF YOU LOSE, will you have to pay your abuser's fees and costs?	APPEAL: If you lose your motion, can you appeal right away?
NY	Yes	The right to petition or participation, including statements made in a public place about an issue of public interest. The term "public interest" is broad and means anything that isn't purely private. Also, your abuser must prove you made your statements with actual malice, even if they are a private figure. State courts have said that public places include press, news, books, and social media, but not a group of roommates. Some federal courts have said that NY's law (or parts of it) do not apply in federal cases.	**Yes.** The statute says "public interest" is broad and means anything that isn't purely private. State courts have said that workplace sexual harassment, domestic violence, and child abuse are issues of public interest. State lawmakers also explained they passed this law in part to protect survivors of sex-based harassment from defamation lawsuits. In 2021, a federal court allowed a woman to add an anti-SLAPP motion to her lawsuit; the court said her Facebook and LinkedIn posts about being sexually assaulted were not about a purely private issue because they mentioned #MeToo and criticized police.	**Yes.** But the court may allow limited discovery if it is needed to help your abuser win the motion.	**Yes.** Some state courts have said that you have to ask for fees and costs separately (not just in the anti-SLAPP motion). You can also get extra money if you can show your abuser sued ou to harass, retaliate, or stop you from speaking out.	**Unclear.** The statute does not specify, and courts have not yet addressed the issue.	**Yes.** The statute does not specify, but NY law allows you to appeal right away whenever you lose any type of motion.
NC	No						
ND	No						
OH	No						
OK	Yes	The right to association, speech, or petition. Association means a communication between a group of people to promote a shared interest. Speech means a communication on an issue of public concern. Petition means communications made: in or about a government proceeding, in or about a proceeding by a publicly funded school or nonprofit, in or about a public meeting about an issue of public concern, about an issue being considered by a government body, to encourage the government to consider an issue, or to get the public to encourage the government to consider an issue. A communication means an oral, visual, written, electronic, or other statement or document. An issue of public concern means an issue related to health or safety; environmental, economic, or community well-being; the government; a public official or public figure; or a good, product, or service in the marketplace.	**Probably.** The statute says it should be applied broadly. State courts are likely to decide that sex-based harassment is generally an issue of public interest because it is related to health or safety or community well-being.	**Yes.** But the court may allow limited discovery if there's a good reason and it's relevant to your motion.	**Yes.** The court can also punish your abuser as needed to prevent them from filing similar SLAPPs in the future.	**Maybe.** If you lose your motion, and the court thinks your motion was not serious or only filed to delay the lawsuit, and it wants to make you pay your abuser's fees and costs, then you would have to pay your abuser's fees and costs.	**Yes.** The appeal will also be fast-tracked.

STATE	**ANTI-SLAPP?:** Does this state have an anti-SLAPP law?	**RIGHTS:** What rights are protected by the state's anti-SLAPP law?	**SEX-BASED HARASSMENT:** Does the state protect statements about sex-based harassment in general, outside of a petition?	**DISCOVERY:** Is discovery paused ("stayed") during the motion?	**$: IF YOU WIN,** will your abuser have to pay your fees and costs?	**$: IF YOU LOSE,** will you have to pay your abuser's fees and costs?	**APPEAL:** If you lose your motion, can you appeal right away?
OR	Yes	The right to assembly, petition, association, speech, or press about an issue of public interest, including (but not limited to) statements made: in a government proceeding, about an issue being considered by a government body, or in a public place about an issue of public interest.	**Unclear.** The statute says it should be applied broadly. A federal court said in 2020 that workplace sexual harassment in a large national organization by a high-ranking officer, in a large industry, or in a large church are issues of public interest. State courts have said that workplace sexual harassment by a state official, child abuse, and domestic violence are issues of public interest. But a state court also said that when school officials told some people about a student abuser, they did not do it in a public place or about an issue of public interest. Note: A state court said in 2019 that a Facebook post criticizing a plaintiff was an opinion protected by the First Amendment because the defendant's statements made it clear she believed the plaintiff was a harasser due to her close friendship with the victim, not due to her knowledge of the facts.	**Yes.** But the court may allow limited discovery if there's a good reason.	**Yes.** And if you file an anti-SLAPP motion and your abuser dismisses a claim against you "with prejudice" (meaning they can't refile that claim), then it counts as you winning your motion, which means your abuser has to pay your fees and costs.	**Maybe.** If you lose your motion and the court thinks your motion was not serious or only filed to delay the lawsuit, then you would have to pay your abuser's fees and costs.	**Yes.**
PA	Yes	Statements about an environmental law or regulation made: in a government proceeding or to get a specific government outcome. State courts have said this includes letters to a newspaper editor, statements to journalists, and protest signs.	**No.** A court is very unlikely to think sex-based harassment is relevant to an environmental law or regulation.	**Yes.** Discovery is also paused during any appeal of the motion.	**Yes.** If you partially win, the court could order your abuser to pay your full or partial fees and costs.	**Unclear.** The statute does not specify, and courts have not yet addressed the issue.	**Yes.**
PR	No						
RI	Yes	The right to petition or speech on an issue of public concern, including statements made: to a government body or proceeding, about an issue being considered by a government body or proceeding, or about an issue of public concern—unless you weren't actually trying to get a government outcome.	**Unclear.** The statute does not specify, and courts have not yet addressed the issue.	**Yes.** But the court may allow limited discovery if there's a good reason.	Yes. You can also get extra money if you can show your abuser's lawsuit was not serious or only filed to harass you or stop you from speaking out.	**Unclear.** The statute does not specify, and courts have not yet addressed the issue.	**Unclear.** The statute does not specify, and courts have not yet addressed the issue.
SC	No						
SD	No						

STATE	ANTI-SLAPP?: Does this state have an anti-SLAPP law?	RIGHTS: What rights are protected by the state's anti-SLAPP law?	SEX-BASED HARASSMENT: Does the state protect statements about sex-based harassment in general, outside of a petition?	DISCOVERY: Is discovery paused ("stayed") during the motion?	$: IF YOU WIN, will your abuser have to pay your fees and costs?	$: IF YOU LOSE, will you have to pay your abuser's fees and costs?	APPEAL: If you lose your motion, can you appeal right away?
TN	Yes	The right to speech, petition, or association. Speech means a communication on an issue of public concern. Petition means a communication made to encourage the government to consider an issue or to get the public to encourage the government to consider an issue. Association means group action on an issue of public concern. Communication means an oral, visual, written, electronic, or other statement or document. An issue of public concern includes (but is not limited to) an issue related to health or safety; environmental, economic, or community well-being; the government; a public official or public figure; a ood, product, or service in the marketplace; or a literary, musical, artistic, political, theatrical, or audiovisual work.	**Probably.** The statute says it should be applied broadly. A state court said in 2021 that a student's Title IX complaint of sexual assault was both speech on an issue of public concern (because it was related to health or safety) and a petition (because her university was public). State courts are also likely to decide that sex-based harassment is generally an issue of public interest because it is is related to health or safety.	**Yes.** But the court may allow limited discovery if there's a good reason.	**Yes.** The court could also punish your abuser to prevent them or other abusers from filing similar SLAPPs in the future.	**Maybe.** If you lose your motion, and the court thinks your motion was not serious or only filed to delay the lawsuit, and it wants to make you pay your abuser's fees and costs, then you would have to pay your abuser's fees and costs.	**Yes.**
TX	Yes	The right to speech, association, or petition. Speech means a communication on an issue of public concern, including in a consumer complaint or review; or publicly or privately about a dramatic, literary, musical, political, journalistic, audiovisual, film, television, radio, newspaper, website, magazine, or other artistic work. Association means group action on a government proceeding or an issue of public concern. Petition includes (but is not limited to) communication made: in or about a government proceeding, in or about a proceeding by a publicly funded school or nonprofit, in or about a public meeting on an issue of public concern, about an issue being considered by a government body or proceeding, to encourage the government to consider an issue, or to get the public to encourage the government to consider an issue. Communication means an oral, visual, written, electronic, or other statement or document. An issue of public concern means an issue related to a public official or public figure; an issue of political, social, or other interest to the community; or an issue of concern to the public. TX's law used to define public concern to include health or safety and community well-being, but it doesn't anymore.	**Unclear.** The statute says it should be applied broadly, and it specifically protects public and private statements by victims of dating violence or domestic violence. But state courts have said that workplace sexual harassment and child sexual abuse are only sometimes (but not always) an issue of public concern, and that it's harder to show that sex-based harassment is a "political, social, or other interest" (under the current law) than a "health or safety" issue (under the old law). One court mentioned in passing that TX's law protects statements by victims of dating or domestic violence but oddly did not apply it to the victim's case. The state supreme court confirmed in 2015 that TX's law protects both public and private statements. A federal appellate court said in 2016 that a report of sexual assault to school officials is a petition. A federal court said in 2015 that it would not decide an anti-SLAPP motion regarding a woman's statements about domestic violence and stalking to police, service workers, doctors, on Twitter, and on TV without limited discovery.	**Yes.** But the court may allow limited discovery if there's a good reason and it's relevant to your motion.	**Yes.** The court could also punish your abuser to prevent them from filing similar SLAPPs in the future.	**Maybe.** If you lose your motion, and the court thinks your motion was not serious or only filed to delay the lawsuit, and it wants to make you pay your abuser's fees and costs, then you would have to pay your abuser's fees and costs.	**Yes.** The appeal will also be fast-tracked.

STATE	ANTI-SLAPP?: Does this state have an anti-SLAPP law?	RIGHTS: What rights are protected by the state's anti-SLAPP law?	SEX-BASED HARASSMENT: Does the state protect statements about sex-based harassment in general, outside of a petition?	DISCOVERY: Is discovery paused ("stayed") during the motion?	$: IF YOU WIN, will your abuser have to pay your fees and costs?	$: IF YOU LOSE, will you have to pay your abuser's fees and costs?	APPEAL: If you lose your motion, can you appeal right away?
VI	No						
UT	Yes	The right to speech, press, assembly, petition, or association on an issue of public concern, including communications made: in a government proceeding; or about an issue being considered by a government proceeding. UT's law only applies to lawsuits that began before May 3, 2023.	**Unclear.** The statute says it should be applied broadly and consistent with other states that have passed the uniform law. But courts have not yet addressed the issue.	**Yes.** Discovery is also paused during any appeal of the motion. But the court may allow limited discovery if it is needed to help you or your abuser to win the motion. And the court may still decide a motion to stop a threat to public health or safety.	**Yes.**	**Maybe.** If you lose your motion and the court thinks your motion was not serious or only filed to delay the lawsuit, then you would have to pay your abuser's fees and costs.	**Yes.**
VT	Yes	The right to petition or speech on an issue of public interest, including (but not limited to) statements made: in a government proceeding, about an issue being considered by a government body or proceeding, or in public place about an issue of public interest. Even if you were using your right to petition or speech, your abuser could still win if they show your statements had no factual or legal basis and actually injured them.	**Unclear.** The statute does not specify, and courts have not yet addressed the issue. The state supreme court has said in passing that public safety and crime in the community are issues of public interest.	**Yes.** But the court may allow limited discovery if there's a good reason and it helps the court decide on the motion.	**Yes.**	**Maybe.** If you lose your motion and the court thinks your motion was not serious or only filed to delay the lawsuit, then you would have to pay your abuser's fees and costs.	**Yes.**
VA	Yes	Statements made: on an issue of public concern; to a government body, such as a board, commission, or agency; or by an employee against an employer where retaliation is prohibited.	**Unclear.** The statute does not specify. A state court said in 2021 that Amber Heard couldn't use VA's anti-SLAPP law to dismiss Johnny Depp's defamation claims against her because even if they were dismissed, the case would still continue because she was also suing him. (The court also said that Depp couldn't use VA's anti-SLAPP law to dismiss Heard's claims because his statements were not on issue of public concern.) If a state court decides that VA's law applies to your case, then your abuser would have to prove you made your statements with actual malice, even if they are a private figure.	**Unclear.** The statute does not specify, and courts have not yet addressed the issue.	**Maybe.** If you win your motion (or if you win at any other stage of the lawsuit), it's up to the court to decide whether your abuser has to pay your fees and costs. A federal appellate court said in 2021 that it's ok for a defendant not to get fees and costs if the plaintiff's lawsuit was serious and not in bad faith.	**Unclear.** The statute does not specify, and courts have not yet addressed the issue.	**Unclear.** The statute does not specify, and courts have not yet addressed the issue.

STATE	ANTI-SLAPP?: Does this state have an anti-SLAPP law?	RIGHTS: What rights are protected by the state's anti-SLAPP law?	SEX-BASED HARASSMENT: Does the state protect statements about sex-based harassment in general, outside of a petition?	DISCOVERY: Is discovery paused ("stayed") during the motion?	$: IF YOU WIN, will your abuser have to pay your fees and costs?	$: IF YOU LOSE, will you have to pay your abuser's fees and costs?	APPEAL: If you lose your motion, can you appeal right away?
WA	Yes	The right to speech, press, assembly, petition, or association on an issue of public concern, including communications made: in a government proceeding; about an issue being considered by a government proceeding; in a consumer complaint or review; or publicly or privately about a dramatic, literary, musical, political, journalistic, audiovisual, film, television, radio, newspaper, website, magazine, or other artistic work.	**Unclear.** The statute says it should be applied broadly and consistent with other states that have passed the uniform law. But courts have not yet addressed the issue.	**Yes.** Discovery is also paused during any appeal of the motion. But the court may allow limited discovery if it is needed to help you or your abuser win the motion.	Yes.	**Maybe.** If you lose your motion and the court thinks your motion was not serious or only filed to delay the lawsuit, then you would have to pay your abuser's fees and costs.	Yes.
WV	No						
WI	No						
WY	No						

NJ Update September 2023:

NJ	Yes	The right to speech, press, assembly, petition, or association on an issue of public concern, including communications made in a government proceeding or about an issue being considered by a government proceeding. NJ's new law applies to SLAPP claims filed on or after Oct 7, 2023.	**Unclear.** The statute says it should be applied broadly and consistent with other states that have passed the uniform law. But courts have not yet addressed the issue.	**Maybe.** There is a presumption that discovery will be paused, but it's up to the court to decide. The court may allow limited discovery if it is needed to help you or your abuser win the motion. The court may also decide to pause discovery during any appeal of the motion.	Yes.	**Maybe.** If you lose your motion and the court thinks your motion was not serious or only filed to delay the lawsuit, then you would have to pay your abuser's fees and costs.	Yes.

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DENVER, COLORADO
APRIL 5, 2024

REMEDIES FOR PUBLIC EMPLOYEES TEACHERS, PROFESSORS, COACHES… AND COLLEGIATE ATHELETES[1]

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INTRODUCTION

Remedy can mean different things under varying circumstances and have nontraditional significance depending on whether the employee is trying to protect their employment record and potential license for some sort of alleged misconduct or whether the employee is trying to seek redress for some conduct directed at them. This presentation will touch upon three general areas of remedies that may affect the educational employee: (1) defense and protection of the employment record; (2) redressing a discrimination claim; and (3) expanding the definition of employee in order to expand available remedies to collegiates.

[1] This presentation is based in part from prior presentations and briefing. The materials attached are distributed as a service to other interested individuals and for informal use only.

PROTECTING THE RECORD/ LICENSE

At some point, a public K-12 employee or a public university professor or coach may face allegations of misconduct. The allegation alone may never go away, even if exonerated, and may be found somewhere in the public record should an individual know where to look and what to request. However, a more immediate problem may be quashing any undeserved discipline, fighting false allegations, and determining how to proceed if it looks like the employee will be found responsible for the alleged misconduct.

In this regard, if the employee is covered by a collective bargaining agreement, I would suggest that the employee take advantage of that protection. If the union representative can quash the misconduct allegation, then there is no discipline to be given and nothing goes in the employee personnel file. It also helps establish pretext if there is a concurrent or pending discrimination claim.

Apart from a Weingarten type proceeding, if the allegation of misconduct is serious enough, the employee might avail themselves to a due process, sexual harassment or other proceeding depending on the circumstances. Again, following a proceeding, if the school or college finds against responsibility, there is no record of it in the personnel file. However, if during the course of the proceedings, it looks like there may be a finding against the client, this is where you and your client may

want to talk about potential separation from employment. This would be used as a vehicle and mechanism to protect the employment record.

For example, in a Title IX sexual harassment proceeding where the employee is no longer at the school, the school can drop the proceedings. *See* 34 C.F.R. Section 106.45, *et. seq.* Further, if the institution lets the employee resign before a finding is made, the employee's reputation remains intact and they could perhaps seek employment elsewhere. Absent the parties entering into a separation agreement as part of the resignation process and signing a release, the employee can also still sue under the anti-discrimination or other laws if it looked like the institution was discriminating or otherwise violating the law.

In the event a K-12 public school teacher is found responsible for misconduct and is disciplined, they would still have the right to appeal within the school district and potentially in court… at least in Florida. Jurisdictions vary and it is important to determine what remedies and/or legal processes are available in your state so your client can avail themselves of such remedies. If the finding of responsibility and the decision to discipline was overturned, the employee could be reinstated and recover lost pay and benefits (and potentially reinstatement of seniority, etcetera).

DISCRIMINATION SUITS

You are all familiar with Title VII of the Civil Rights Act of 1964 ("Title VII") and are familiar with the remedies available pursuant to this law. However, this section addresses specific issues regarding the available remedies under Section 504 of the Rehabilitation Act ("504"); Title IX of the Education Amendments of 1972; the Age Discrimination in Employment Act ("ADEA"); and other types of discrimination lawsuits.

Spending Clause Legislation

Post *Cummings v. Premier Rehab Keller, PLLC*,[2] uncapped emotional distress damages are no longer available under 504 and Title IX—even in an employment case.[3] Punitive damages are also not available under 504 or Title IX. *Barnes* v. *Gorman,* 536 U.S. 181, 122 S.Ct. 2097, 153 L.Ed.2d 230 (2002).[4] Nevertheless, back pay and benefits are still available under Section 504 and Title IX and these claims should still be pursued on this basis, even post *Cummings*. *See e.g., Zarza v. Bd. of Regents of the Univ. of Michigan*, 2023 U.S.App. LEXIS 11114, *1 (6th Cir. May 5,

[2] 142 S.Ct. 1562 (2022), reh'g denied *Cummings v. Premier Rehab Keller, PLLC*, 142 S. Ct. 2853 (2022).

[3] However, there could be arguments to attack this ruling in future litigation. *See e.g., Cummings v. Premier Rehab Keller, P.L.L.C*., 142 S. Ct. 1562, 1577, 212 L. Ed. 2d552, reh'g denied, 142 S. Ct. 2853 (2022)(Breyer, J., dissenting)

[4] Punitive damages are also unavailable under Title VII against a public school district or a public college or university.

2023) (post *Cummings* 504 retaliation case where summary judgment was reversed and case remanded for trial on the merits). Finally, you may wish to bring additional claims in order to get an array of varying remedies. For instance, in a gender based equal pay case, you may wish to bring a Title VII and Equal Pay Act ("EPA") claim in addition to the Title IX claim. Title VII provides for compensatory damages, including emotional distress, while the EPA provides for liquidated damages for willful violations.

Attorney's fees and costs are also available under Section 1988 when litigating a 504 or Title IX case. *See e.g., Mercer v. Duke University*, 401 F.3d 199 (4th Cir. 2005)($350,000 in attorneys' fees with nominal damage award affirmed); *Mercer v. Duke Univ.,* 181 F.Supp.2d 525, 531 (M.D.N.C.2001), *vacated in part & remanded,* 50 Fed.Appx. 643 (4th Cir.2002)(In light of the Supreme Court's decision in Barnes, punitive damages award vacated).

ADEA

If your client has an age claim, you may want to look at remedies under state law as there is no private right of action under the ADEA for state public educational employees. However, if your client does have an ADEA claim, try to work closely with the EEOC to see if the EEOC could potentially litigate the case and get a remedy for the client. For example, the EEOC litigated an age discrimination retaliation case on behalf of a university professor where the university forced the

professor to take a sabbatical and then refused to renew his employment contract in retaliation for complaining about age discrimination. *EEOC, et. al. v. Florida Gulf Coast University Board of Trustees*, Case No.2:06-cv-326-FTM. (M.D.Fla. 2006).

Tenure Denial

Most universities have an appeals process if tenure is denied. If the denial is upheld, the professor usually has an academic year left to look for another position before they are terminated from the institution. These are extremely difficult cases to bring and the ones that may be viable in court are those cases with evidence of discrimination. *See e.g., Chuang v. Univ. of California Davis, Bd. of Trustees*, 225 F.3d 1115, 1128-29 (9th Cir. 2000) (a dean in the tenure review meeting referred to two Chinese tenure candidates as "two c****s" and "there were more than enough" in the department. The Ninth Circuit held that comments about an employee's national origin is enough to show that impermissible national origin discrimination played a role in the decision as to whether or not to deny tenure). In this vein, developing this evidence pre-suit may lead to a successful appeal of tenure or support a discrimination claim down the road.

Coaches

Outside of contract and traditional discrimination claims, the typical case involving a coach is a retaliation claim under Title IX for complaining about inequity in men's and women's athletics. *See Jackson v. Birmingham Bd. of Ed.,* 544 U.S.

167 (2005). In addition, if the college or university is blackballing the coach (or anyone associated with that coach) based on a Title IX retaliatory termination, the college or university may still be liable for post-employment retaliation...or at least that is what courts have held in regard to an employee's ability to get licensed by a professional board. *Papelino v. Albany College of Pharmacy of Union University*, 633 F.3d 81, 91 (2d Cir. 2011) (former students could pursue retaliation claim where college's retaliation followed them post-graduation to the State of Florida Pharmaceutical licensing board).

COLLEGIATE ATHLETES

Collegiate athletes have been trying to classify themselves as employees since the inception of collegiate athletics. Indeed, at least one athlete received such things as "free meals and tuition, a trip to Cuba, the exclusive right to sell scorecards from his games—and a job as a cigarette agent for the American Tobacco Company." *Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141, 248 (2021) (citation omitted). It was actually the Ivy League schools that initially got together and formed what later became the National Collegiate Athletic Association ("NCAA"). *Id.* (citations omitted). By 1906, the NCAA promulgated rules that no collegiate athlete would be paid. *Id*. at 2148-49.

However, these rules were largely disregarded, and by the 1920's,

colleges and universities were earning substantial money based on the labor of the athletes. For example, the University of California's athletic revenue was $480,000 per year, and Harvard's football revenue was $429,000 per year. *Id. at 2149 quoting* H. Savage, The Carnegie Foundation for the Advancement of Teaching, American College Athletics Bull. 23, p. 310 (1929). Even a century ago, athletes could see they were not being compensated fairly for their athletic performance. In fact, in 1939, "freshmen at the University of Pittsburgh went on strike because upperclassmen were reportedly earning more money." *Id. quoting* Crabb, The Amateurism Myth: A Case for a New Tradition, 28 Stan. L. & Pol'y Rev. 181, 190 (2017).

By the middle of the last century collegiate athletes tried to classify themselves as athletes in terms of state workman compensation laws. *See e.g., Univ. of Denver v. Nemeth*, 127 Colo. 385, 257 P.2d 423 (1953), *superseded by statute*. Within the next decade, a widow of a football player from the California State University System, who was killed in a plane crash with his team after a game in Ohio, successfully sued for survivor benefits (although the decision was later superseded by statute). *Van Horn v. Indus. Acc. Comm'n*, 219 Cal.App. 2d 457, 465, 33 Cal.Rptr. 169 (1963), *superseded by statute*. Following the success of employment classification in *Van Horn*, collegiate athletes' attempts to classify

themselves as athletes were thwarted in tort, under the anti-discrimination laws, and under the Fair Labor Standards Act.[5]

Yet, by the 2020's, the tides began to turn due to the Supreme Court's decision in *Alston,*[6] in which Justice Kavanaugh's concurring opinion held that the NCAA was "suppressing the pay of student athletes." *Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141, 2167-68 (2021). Justice Kavanaugh's concurrence served as a catalyst for courts to dispense with long-held notions of amateurism, which Justice Kavanaugh referred to as *stray* comments.[7]

[5] *Townsend v. State of California*, 191 Cal.App. 3d 1530, 237 Cal.Rptr. 146 (1987) (Tort); *Shephard v. Loyola Marymount Univ.*, 102 Cal.App. 4th 837, 125 Cal.Rptr.2d 829 (2002) (discrimination); *Dawson v. NCAA,* 932 F.3d 905 (9th Cir. 2019) (FLSA); *Berger v. NCAA,* 843 F.3d 285 (7th Cir. 2017) (FLSA).

[6] *Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141(2021).

> Price-fixing labor is price-fixing labor. And price-fixing labor is ordinarily a textbook antitrust problem because it extinguishes the free market in which individuals can otherwise obtain fair compensation for their work. *See, e.g., Texaco Inc. v. Dagher*, 547 U. S. 1, 5 (2006).
>
> The bottom line is that the NCAA and its member colleges are suppressing the pay of student athletes who collectively generate billions of dollars in revenues for colleges every year.

Id. at 2167-68 (Kavanaugh, J., concurring).

[7] *Id.* at 2167 (criticizing *National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla*., 468 U. S. 85 (1984) as "dicta and have no bearing on whether the NCAA's current compensation rules are lawful.")

FAIR LABOR STANDARDS ACT

Following *Alston,* at least one court bucked previous persuasive rulings and held that collegiate athletes plausibly pled that they were employees and allowed a Fair Labor Standards Act claim to survive a 12(b)(6) motion to dismiss. *Johnson v. Nat'l Collegiate Athletic Ass'n*, 556 F. Supp. 3d 491 (E.D. Pa. 2021), motion to certify appeal granted sub nom. *Johnson v. National Collegiate Athletic Ass'n*, No. CV 19-5230, 2021 WL 6125095 (E.D. Pa. Dec. 28, 2021). While a final decision is still pending, it's noteworthy that minimum wage and overtime may be potential remedies for the collegiate athlete.

TITLE VII

Post *Alston,* collegiate athletes may be classified as employees for Title VII purposes in some circumstances. Title VII uses an economic realities test to determine whether an individual is a student or an employee. *See e.g., Cuddeback v. Fla. Bd. of Educ.,* 381 F.3d 1230 (11th Cir. 2004) and *Cobb v. Sun Papers, Inc*., 673 F.2d 337, 340-41 (11th Cir.1982).

Based on this precedent, practitioners should advise collegiate athlete clients to file charges with the EEOC to determine whether they are employees under Title VII's economic realities test. Many collegiate athletes receive stipends or scholarships and the colleges provide equipment and training. These are factors that weigh in favor of employee classification. However, leave and a collective

bargaining agreement[8] are factors that may weigh against employee classification. It seems the determination of employee classification may depend on whether an adverse action was taken for educational or other reasons.

The attempt to classify collegiate athletes as employees is crucial in order to give the collegiate athlete a shot of the up to $300,000 in compensatory damages, including emotional distress damages, available under Title VII and similar anti-discrimination and anti-retaliation laws.

CONCLUSION

In many circumstances, the remedies available for employees are limited to back pay, benefits, and other compensation, unless suit is brought under Title VII or another anti-discrimination law that offers additional remedies. Post *Cummings,* collegiate athletes, who previously brought claims under Title IX and could get uncapped emotional distress damages, are turning to attempts to classify themselves as employees for purposes of availing themselves to additional remedies under Title VII. Other collegiates are attempting to classify themselves as employees under the FLSA. However, in circumstances where the employee is accused or found responsible for misconduct, they may not be entitled to

[8] Currently before the NLRB, in varying stages, are cases against USC and Dartmouth regarding collective bargaining. In this vein, Dartmouth refused to bargain for a contract covering men's basketball players and may take legal action in federal court.

compensation. In such cases, the best remedy or result the lawyer/advocate can achieve is to protect the employee's employment record and professional license so that the employee is able to move forward in other employment if feasible.

Remedies in Public Employee Cases (Non-Federal)

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NELA Spring Seminar
Representing Federal and Public Employees
Denver, CO

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I. Overview

My firm has brought multiple lawsuits against the city of Chicago and Cook County (Illinois) to remedy sex, race, and disability discrimination directed at first responders, public safety officers, and applicants for these positions. These cases include a series of class and multi-plaintiff non-class actions challenging invalid and discriminatory physical fitness tests used to exclude women from jobs as firefighters and paramedics, leading to the discontinuance of discriminatory testing and the hiring of more than 50 women as Chicago Fire Department firefighters and paramedics. Separately, in *Howard v. Cook County Sheriff's Office*, we intervened more than 500 women in a hostile work environment lawsuit filed on behalf of women employed at the Cook County Jail who were subjected to extreme and vile sexual harassment by inmates. *Howard* settled for $31 million in monetary relief and programmatic relief directed at reducing inmate-on-staff sexual harassment.

This paper discusses issued related to remedies that have arisen in my municipal employee cases. I have attached materials illustrating a number of these concepts. Following this introduction, Section II provides background on five cases my firm has litigated for employees and applicants of the Chicago Fire Department and Cook County Jail; Section

III discusses instatement of applicants for public safety positions rejected for hire or terminated from training; Section IV addresses the calculation of make-whole monetary relief, including back pay, front pay, and the pension losses common in municipal employment; Section V briefly discusses tax issues; Section VI addresses non-monetary programmatic relief; and Section VII discusses limits on and obstacles to securing relief in lawsuits against municipalities.

The issues addressed in this paper are not exclusive to municipal employment, but arise frequently in cases involving first responders and public safety officers. Effectively addressing these challenges is crucial to maximizing remedies for employees and applicants seeking these highly-coveted jobs.

II. Background on Disparate Impact and Disparate Treatment Litigation Against the City of Chicago and Cook County

A. Chicago Fire Department physical fitness testing litigation

1. *Vasich (firefighter applicants)*

In April 2010, Samantha Vasich filed a class action sex discrimination charge alleging that the city of Chicago was engaged in class-wide disparate impact and disparate treatment discrimination against women applying to be Chicago Fire Department ("CFD") firefighter/EMTs through the use of invalid and discriminatory physical testing. (Attachment 1). In July 2011, we filed the *Vasich* class action against the city of Chicago.

In 2013, we reached a class-wide settlement. (Attachment 2). Under the settlement, the City agreed to permanently discontinue use of the discriminatory pre-hire physical test that it had utilized for nearly two decades, resulting in over a 90% failure rate among female applicants for firefighter/EMT positions. As a substitute, the City agreed to validate and adopt the Candidate Physical Abilities Test (CPAT), which is a less-than-perfect but far less

discriminatory test used by hundreds of fire departments. In addition, the City agreed to: (1) re-process all class members under the age of 38 (the maximum age for new CFD firefighter/EMT hires) who passed the CPAT and other pre-hire processing steps; (2) pay class-wide back pay, which was divided among all non-hired class members; (3) pay damage awards to the individual charging parties who had joined the case as individual plaintiffs; (4) pay service awards to the class representatives; (5) provide a training fund to be used for a physical training program to help class members prepare for the CPAT; and (6) pay attorney's fees and costs to class counsel.

In 2013 and 2014, 30 *Vasich* plaintiffs entered the Chicago fire academy. All 30 graduated as CFD firefighter/EMTs. This was a historic influx of women. Before the *Vasich* settlement, there were typically 1-2 (sometimes 0) women in a class of around 120 CFD fire candidates.

Since joining CFD in 2013 and 2014, the *Vasich* women have been promoted to fire engineer at almost twice the rate of male candidates in their academy classes.

2. *Godfrey (firefighter applicants)*

In *Lewis v. City of Chicago*, a class of Black CFD firefighter applicants sued the City for race discrimination resulting from the use of an invalid written test. *See* 560 U.S. 2015 (2010) (in 9-0 opinion, reversing Seventh Circuit's ruling that the class's disparate impact claims were time-barred and establishing a statute of limitations rule for Title VII disparate impact claims). In August 2011, the judge overseeing *Lewis* entered an injunctive relief order directing the City to hire 111 Black firefighters. (Attachment 3).

When the *Lewis* injunctive relief order was entered, the *Vasich* challenge to the pre-hire physical test had already been filed. Still, the City decided to use that test to process

Lewis class members for hire. As a result, the City rejected nearly all female *Lewis* class members, and the class of 111 hires was composed of 109 men and just 2 women.

The City's use of the discriminatory physical test on *Lewis* class members spawned a second class action sex discrimination lawsuit: *Godfrey v. City of Chicago*. We filed *Godfrey* in 2012, defeated the City's serial attempts to have the case dismissed, and reached a class-wide settlement in November 2014. (Attachment 4). Under the settlement, the City agreed to: (1) hire all class members (regardless of age) who passed the CPAT and other pre-hire processing steps; (2) retroactive seniority to 1999 – the *Lewis* retroactive seniority date; (3) back pay for non-hired class members; (4) class representative service awards; and (5) attorneys' fees and costs.

In November 2015, thirteen *Godfrey* plaintiffs entered the fire academy. The plaintiffs, women in their 40s and 50s, excelled in physical fitness training. Twelve of the thirteen graduated, raising the total number of women hired under the firefighter testing litigation to forty-two – *more than doubling* the number of female CFD firefighter/EMTs.

3. *Ernst (paramedic applicants)*

In 2008, attorney Susan Malone filed suit for five women rejected for CFD paramedic positions based on invalid, pre-hire physical testing. In 2011, my firm joined Susan Malone and Goldstein, Borgen, Dardarian & Ho as plaintiffs' counsel.

Ernst went to trial in November 2014, with the disparate impact claims tried to the bench and disparate treatment claims tried to a jury. The disparate treatment claims alleged that the City's motive in instituting the pre-hire physical test was to weed out women. However, after all of the evidence was in, the trial judge changed the jury instruction on the Title VII disparate treatment claim to state that the plaintiffs could not prevail unless the

jury decided that "the City would have hired [them] had [they] been male but everything else had been the same." (Attachment 5, *Ernst v. City of Chicago*, 837 F.3d 788, 793 (7th Cir. 2016)). The City argued to the jury that this meant that the plaintiffs could not prevail unless they could show that the City hired men who had failed the physical test. The jury sent two notes related to the disputed jury instruction and, four minutes after being instructed to "reread all instructions," returned a verdict for the City. After trial, the district court also found for the City on the disparate impact claims.

In 2016, the Seventh Circuit reversed both the Title VII disparate impact and disparate treatment verdicts. (*Id.*) On the disparate impact claims, the Seventh Circuit directed the district court to enter judgment for the plaintiffs, finding that the test had an adverse impact on women and was neither valid nor job-related and therefore violated Title VII. On the intent claims, the Seventh Circuit ruled that the jury instruction was erroneous and directed the district court to conduct a new trial using the original version of the intentional discrimination instruction stating that the jury should find for plaintiffs if they proved that the City's motive in using the test was to eliminate women.

The Seventh Circuit's opinion in *Ernst* establishes that "cut scores" on entry-level employment tests should be set at the minimum acceptable level. "The minimum requirement is adequacy, not superiority." *Ernst*, 837 F.3d at 804, citing *Lanning v. Se. Pa. Transp. Auth.*, 308 F.3d 286, 287 (3d Cir. 2002).

In 2017, we tried the *Ernst* plaintiffs' disparate impact damages. Attachment 6 is the summary of our damages calculations presented to the judge at trial. In 2019, the court awarded millions of dollars in economic damages to the five plaintiffs and directed the City to instate the four plaintiffs who still resided in or near Chicago with full retroactive

seniority for all purposes (pay, pension, bidding, and promotion). (Attachment 7). The court ruled that the fifth plaintiff was not required to relocate her family back to Chicago from Philadelphia and awarded her a total of *twenty years* of back pay and front pay, representing the loss of a CFD career, plus the value of her lost annuity-based pension.

4. *Livingston (paramedic candidates/trainees)*

In 2014, the City replaced the test challenged in *Ernst* with the Paramedic Physical Abilities Test (PPAT), which does not have an adverse impact on women. With that barrier to entry removed, women began entering the paramedic academy in large numbers. However, the City then began using two physical tests administered *after* hire, during academy training, to terminate candidates. The City had never previously used physical tests to terminate candidates, and it used the tests to fire only women and no men.

In 2016, twelve women terminated from paramedic training filed *Livingston v. City of Chicago* asserting disparate impact and disparate treatment discrimination in violation of Title VII and the Illinois Civil Rights Act (which is modeled after Title VI and has no administrative exhaustion requirement or compensatory damages caps). The plaintiffs later amended the complaint to add Section 1983 equal protection claims under *Monell v. N.Y.C. Dep't of Social Servs.*, 436 U.S. 658 (1978). In January 2024, they defeated the City's summary judgment motion directed at all of their intentional discrimination claims. (Attachment 8). The case is scheduled for a four-week jury (intent claims) and bench trial (disparate impact claims) in October 2024.

B. Hostile Work Environment Litigation Against Cook County

Howard v. Cook County Sheriff's Office was filed on behalf of 2,000 female correctional officers and medical personnel who were subjected to vile sexual harassment, including

thousands of incidents of indecent exposure and masturbation, while working at the Cook County Jail. In 2019, the district court certified the case as a hostile work environment class action, but the Seventh Circuit decertified the class on the County's Rule 23(f) appeal.

After decertification, we intervened more than 500 women, and the case proceeded on the basis of mass joinder. In June 2022, on the eve of a scheduled "bellwether" trial, the parties reached an aggregate settlement of $31 million plus non-monetary relief intended to further reduce incidents of inmate-on-staff sexual harassment. (Attachment 9). Plaintiffs' counsel engaged a retired EEOC administrator to act as a third party neutral to allocate the $20 million in damages among the 560 plaintiffs. After allocation, each plaintiff had an opportunity to accept or reject her individual offer, and we arranged for independent lawyers (NELA members) to advise them on whether to accept or reject their awards. One plaintiff rejected her offer and settled separately with the County before trial.

III. Instatement and Retroactive Seniority

Firefighter and paramedic jobs with the Chicago Fire Department offer high pay, exceptional benefits including defined benefit annuity pensions, attractive work schedules, rewarding work, and prestige. Fifteen to twenty thousand people typically sit for the CFD firefighter written test when the City opens applications. The paramedic applicant pool is many times smaller, because applicants must be trained and licensed paramedics in order to apply. Still, when Chicago opens the CFD paramedic list, hundreds of licensed paramedics apply.

Many other municipal public safety agencies likewise offer high pay, opportunities for promotion, and defined benefit pensions. With jobs this valuable, the way to secure make-whole relief for a rejected applicant or terminated candidate is through instatement or

reinstatement. The damages calculations from the *Ernst* trial on disparate impact damages (Attachment 6) and the model damages calculations at Attachment 10 illustrate the value of the CFD job.

In the model at Attachment 10, which is based on calculations for a 5-year back pay period, the gross award is $4,000,000, consisting of $2,550,000 in after-tax back pay and future lost wage and pension benefits and a $1,450,000 tax increment (or "gross up") under *E.E.O.C. v. Northern Star Hospitality, Inc.*, 777 F.3d 898 (7th Cir. 2015). *See also*, *Clemens v. Centurylink Inc.*, 874 F.3d 1113 (9th Cir. 2017*)*; *Eshelman v. Agere Sys., Inc.*, 554 F.3d 426 (3d Cir. 2009); *Sears v. Atchison, Topeka & Santa Fe Railway Co.*, 749 F.2d 1451 (10th Cir. 1984); *Sonoma Apt. Assocs. v. United States*, 127 Fed. Cl. 721 (2016). *But see Dashnaw v. Pena*, 12 F.3d 1112, 1116 (D.C. Cir. 1994) (rejecting tax increment awards in *per curiam* order).[1] Of the $4,000,000 total loss, the back pay with the tax gross up is $360,000. The front pay calculated through the end of a CFD career totals $1,720,000, and the lost CFD annuity pension totals $1,920,000. Thus, the value of the expected future career, *net of mitigation*, is $3,640,000. A plaintiff in an individual discrimination case is unlikely to obtain a fair portion of that sum in settlement, and even after trial may not receive full career damages.

With a job worth over $3,000,000, the way to achieve make-whole relief is through instatement or reinstatement. However, as legal proceedings drag on, the process of obtaining this relief grows increasingly complex. Plaintiffs move forward with their lives, wearied by years of protracted litigation spanning years. Some people relocate their families.

[1] Multiple courts have rejected *Dashnaw*, including the Ninth Circuit in its *Clemens* opinion, which rejects its "matchbook musings," 874 F.3d at 1117; and a district court in the 8th Circuit, which accurately describes *Dashnaw* as "an outlier," *Monohon v. BNSF Railway Co.*, 623 F.Supp.3d 990 (S.D. Iowa 2022).

Plaintiffs age, and a job that was very appealing to a person in their 30s can seem intimidating, as first responder training programs often include extensive physical training and a quasi-military environment. Enthusiasm for the job may fade over time. Despite these challenges, given the substantial value of these jobs, it is imperative to clearly outline to clients in public safety cases the future economic benefits of instatement or reinstatement to facilitate informed decisions.

Instatement in first responder cases raises two additional issues related to remedies: retroactive seniority and the challenges posed by multiple-hurdle hiring procedures. Seniority in first responder jobs typically impacts pay, promotions, bidding, and pensions, making retroactive seniority an essential component of make-whole relief. This is particularly significant in cases involving defined benefit pensions. For instance, CFD firefighters and paramedics become eligible for annuity-based pensions after 20 years of service, ensuring financial security throughout retirement. If they fall short of the required 20 years, they lose pensions worth more than a million dollars. Securing five or more years of retroactive seniority from the original but-for hire date can significantly shorten the number of years a reinstated plaintiff must serve to qualify for their annuity pension.

Demands for retroactive seniority can be met with resistance from municipal defendants, citing potential objections from labor unions. Such resistance can often be overcome by demanding larger economic losses if seniority rights are not granted.

Additionally, settlement agreements and judgment orders in public safety cases must address multiple-hurdle hiring procedures. A discrimination plaintiff's legal challenge is usually directed at a single step in a multiple-hurdle hiring process, e.g. physical testing (that can result in sex and/or race discrimination), written testing (often results in race

discrimination), or medical examinations (often results in disability discrimination). Citing public safety concerns, municipal employers will usually demand that the plaintiff go through the entire hiring process again, with modifications to the discriminatory step they challenged. For example, the *Vasich* and *Godfrey* plaintiffs were required not only to pass the CPAT but also to complete all of CFD's other pre-hire procedures: appearance for processing, a background investigation, drug testing, and a medical examination.

Failure to address the potential for discrimination at subsequent hiring steps can render instatement relief illusory. For instance, a plaintiff rejected on the basis of an invalid fitness test could settle and release her claims only to be rejected during the medical examination process. Similarly, a plaintiff rejected based on a discriminatory written test might be denied rehire due to a biased background check, or an instated applicant could face termination during training. An employer's insistence on applying existing procedures can lead to a second round of litigation, as the city of Chicago experienced in *Godfrey*. Strategies to mitigate the risk of discrimination at later hiring stages include: (1) in an individual case, releasing claims only after instatement, (2) having the court oversee the instatement process, which may require incorporating a settlement agreement into a judgment order (*see Blue Cross and Blue Shield Ass'n v. American Express Co.*, 467 F.3d 634, 636 (7th Cir. 2006); *Shapo v. Engle*, 463 F.3d 641, 646 (7th Cir. 2006)), and (3) modifying hiring procedures for the plaintiff or plaintiff class to minimize the potential for additional discrimination.

IV. Make-Whole Monetary Relief

Economic loss calculations for public safety employees should include back pay, front pay, lost pension benefits, pre-judgment interest, and a tax increment or "gross up."

(See cases cited, *infra*, at 8 approving tax increment awards as a component of make-whole equitable relief under Title VII.)

Attachments 6 and 10 illustrate economic loss calculations in cases for rejected CFD applicants. The methodology is applicable to other cases involving rejected or terminated employees for jobs with defined benefit pensions.

Back pay

The model back pay calculations reflect make-whole relief under Title VII. They differ from basic, "back-of-the-envelope" lost wage calculations in that they:

1) Rely on an employer's payroll data, not just base pay from a collective bargaining agreement, to determine the wages the plaintiff would have earned, taking into account supplemental pay and, crucially, overtime earnings;
2) Net (subtract) the contributions that the plaintiff would have made to the pension fund (since that money would not have ended up in her pocket);
3) Subtract pre-tax mitigation earnings;
4) Convert the back pay (net of employee pension contributions, pre-tax mitigation earnings, and federal income tax) to present value, which is the equivalent of adding pre-judgment interest; and
5) Include a tax increment award.

The model calculations only net *federal* income taxes (FIT) and include a *federal* tax gross up because Illinois has a flat income tax, which means that plaintiffs in Illinois do not suffer a state income tax penalty when they receive a lump sum award of lost wages in a single tax year. However, in states with marginal income tax rates, the tax increment award

should also include the state income tax penalty caused by receipt of many years of lost wages in a single tax year.

To calculate the tax increment award, the plaintiff's expert will create a set of mock tax returns for each year of the back pay period. The mock returns assume that the plaintiff would have received the back pay spread over the back pay period. The total tax from those returns is then compared to a projection of the amount of income tax the plaintiff will be required to pay on a lump sum award. Calculating the tax increment award requires a plaintiff's complete tax returns with schedules. Accordingly, we do not object to discovery requests for the plaintiff's tax returns during the back pay period. In fact, we produce the returns under Rule 26 even when the defendant does not request them.

Front pay

Front pay is an alternative to instatement, and it should be calculated even when the plaintiff is seeking instatement. First, instatement is never guaranteed. Second, litigation can take years, and a plaintiff's circumstances can change. For example, a plaintiff might relocate, making instatement impractical. Third, public safety jobs are so valuable that the calculations serve as a cudgel: "Instate the plaintiff, with full retroactive seniority, or pay millions."

The front pay methodology in the models largely mirrors the back pay methodology, but for future losses. Like the back pay calculations, the front pay calculations:

1) Net the contribution the plaintiff would be required to make from future wages to the pension fund;
2) Use pre-tax anticipated mitigation earnings;

3) Convert the front pay (net of employee pension contributions, pre-tax mitigation earnings, and federal income tax) to present value;
4) Include a tax increment award.

Defensible projections must be made of both the future wages the plaintiff would have earned but-for discrimination and expected mitigation earnings. The calculations should incorporate step increases in collective bargaining agreement pay scales. For time periods beyond the current agreement (or if employees are currently working under an expired agreement, which is common), reasonable assumptions can be made based on historic wage increases (e.g. from one collective bargaining agreement to the next).

Selecting an appropriate, defensible duration for front pay is essential to securing make-whole relief. The *Ernst* calculations (Attachment 6) use an anticipated 20-year CFD career. The disparate impact damages trial (after the merits trial, appeal, and remand) was conducted 12 ½ years after the assumed hire date. Thus, damages for a 20-year CFD career included 12 ½ years of back pay and 7 ½ years of front pay. By the time of the court's decision, the back pay period was closer to 14 years and the front pay period 6 years, and the court awarded damages for the full 20 years including 6 years of front pay to the plaintiff who had relocated from Chicago. The court also awarded her the value of the annuity pension to which she would have been entitled after 20 years of service (minus the value of her mitigating pension).

The model at Attachment 10 assumes that the rejected applicant would retire at age 64, in her 25th year of service. The assumed back pay period is 5 years, from late 2019 to late 2024, followed by front pay to 2042.

Either set of assumptions (i.e. a 20-year career, the minimum tenure necessary to qualify for the annuity pension, or working to a certain age) is defensible. But any assumption used to support a demand for front pay and lost pension benefits must be supported by *evidence*, such as your client's testimony about how long they plan to work, data showing the length of a typical career, or data showing that relatively few employees separate before qualifying for the defined benefit pension. Data on career duration or attrition are relevant to damages and should be included in discovery requests to the defendant or pension fund.

Some municipal jobs have a mandatory retirement age. The assumed front pay period should not continue beyond the mandatory retirement date unless a defensible argument can be made that, many years into the future, the current mandatory retirement age would no longer be in place.

Defendants will scoff at requests for front pay for more than a short time period such as two years, arguing that they are speculative, excessive, and unsupported by precedent. But there is frequently no substitute for valuable first responder jobs denied based on unlawful discrimination. For example, paramedics at private ambulance companies in Chicago earn $15-$20 per hour (a maximum of $41,600/year) with no benefits. In contrast, CFD paramedics have a base salary of more than $75,000 after 12 months of employment, earn substantial overtime pay, and have a full panoply of benefits. Indeed, the CFD job is so exceptional that Chicago argued at the *Ernst* damages trial that the plaintiffs failed to mitigate their damages by failing to reapply for the CFD paramedic job while the City *was still using* the discriminatory pre-hire physical test. In other words, the City argued that the job was so spectacular that the plaintiffs were required to subject themselves to the same sex

discrimination over and over again. The court rejected the City's position, because plaintiffs are not required to re-subject themselves to discrimination in order to mitigate their damages. (Attachment 7, *Ernst v. City of Chicago*, No. 08 C 4370, 2018 WL 6725866, at *7 (N.D. Ill. Dec. 21, 2018)). Nonetheless, the City was correct that there is no realistic way for a rejected CFD firefighter or paramedic applicant to obtain comparable employment. For this reason, compelling arguments can be made that an award of make-whole relief under Title VII should span an anticipated CFD career.

Lost Pension Benefits

The pension loss calculations use the same methodology as the back pay and front pay calculations, treating any offsetting retirement benefits as mitigation. The calculations: 1) subtract any offsetting benefits net of federal tax from the defined benefit annuity pension net of federal tax, 2) convert the difference/loss to present value, and 3) add a tax increment award. The pension loss is calculated to the end of the employee's life using an appropriate life expectancy table.

Loss of Chance of Promotion

Firefighter, paramedic, police officer, correctional officer, and other public safety jobs have career service promotional tracks. To secure make-whole relief, economic loss calculations should take into account a plaintiff's lost chance of promotion.

Assumptions related to promotions can have huge impacts on the size of an award. Pay increases from one rank to the next are often substantial. Further, annuity pensions are usually based on some measure of an employee's final salary (for example, the highest base pay over the past four years). Therefore, incorporating a loss of chance of promotion can substantially increase the calculated pension loss.

Various models and assumptions can be used to calculate a plaintiff's lost chance of promotion. For example, the plaintiff's expert can use a cohort analysis, identifying an appropriate cohort, such as employees hired on a specific date or range of dates, analyze the promotional history of the cohort, and then apply reasonable assumptions about the plaintiff's experience (e.g. that the plaintiff would have an average chance of promotion).

The data required for a lost chance analysis must be obtained during discovery. We typically engage and consult with our damages expert during fact discovery to make sure we are obtaining the data he needs.

V. Taxes and Qualified Settlement Funds

A damages award, whether obtained through judgment or settlement, that includes many years of back pay, front pay, and pension losses, plus emotional distress and any other compensatory damages, will be subject to enormous tax when received in a single tax year. All of the lost wages and pension benefits will be treated as wage income and subject to FICA and federal and state (and any applicable local) income tax. Compensatory damages for emotional distress will be subject to income tax that cannot be avoided with arguments that the plaintiff suffered physical manifestations of emotional distress. Only damages attributable to physical personal injury are tax exempt. 26 U.S.C. § 104(a) (exempting amounts received "on account of personal physical injuries or physical sickness"; "emotional distress shall not be treated as a physical injury or physical sickness").

One strategy to reduce tax is to use a Qualified Settlement Fund (QSF). Funds placed into a QSF toward the end of one tax year can be paid out over two separate tax years. Additionally, funds placed into a QSF can be distributed to a structured settlement company, which creates a mechanism for deferral. Structured settlements can be used for

attorneys' fees, compensatory damages, and pre-judgment interest. However, they cannot be used to defer tax on amounts recovered for lost wages.

QSFs can be used in both individual and class cases. At least two parties/entities should participate in a QSF, which can be a single plaintiff who has all of their portion of their damages directed to the QSF and their lawyer, or two or more law firms that have all or a portion of their fees placed in the QSF.

The defendant municipal employer must agree to the use of a QSF, and the settlement documents or court order should incorporate specific language referencing the Internal Revenue Code and U.S. Treasury regulations. In the past, we have secured agreement from both Chicago and Cook County to pay funds into a QSF. The *Howard v. Cook County* settlement agreement (Attachment 9) and the *Ernst* judgment orders (Attachment 11) incorporate the required "magic language."

VI. Programmatic Relief

The programmatic relief we have secured in our physical testing cases includes:

1. Elimination of invalid pre-hire physical testing;
2. Elimination of invalid testing administered during training;
3. Remedial hiring of class members and individual plaintiffs;
4. Provision of training funds to provide physical fitness training to plaintiffs and class members before they take less discriminatory, alternative physical tests.

(*See* Attachments 2, 4, and 12.)

The programmatic relief we secured in our mass joinder hostile environment action against Cook County related to inmate-on-staff sexual harassment at the Cook County Jail includes:

1. Revisions to workplace policies;
2. Commitments to enforce existing workplace policies;
3. Implementation of a variety of measures intended to reduce the incidence of inmate-on-staff sexual harassment;
4. Identification of human resource managers as the responsible parties to receive employee sexual harassment incident reports;
5. Training of department heads, managers, and non-management employees on how to respond to sexual harassment incidents;
6. Data collection and reporting on sexual harassment incidents;
7. Appointments of internal and external compliance monitors.

(*See* Attachment 9 at Appendix B and Appendix C.)

Public entities will fight tooth and nail against consent decrees, continuing judicial oversight, or the appointment of monitors who can take enforcement action. In *Howard*, the parties agreed on the $31 million settlement after one day of mediation but had to continue for a week longer and pull in a second mediator to reach agreement on non-monetary measures to protect plaintiffs who were still working at the jail.

VII. Limitations on Remedies and Obstacles to Settlement

In actions against private employers, a plaintiff who proves that the employer acted with malice or reckless indifference can recover punitive damages. 42 U.S.C. § 1981a(b)(1). However, punitive damages are not available under Title VII against a government agency even when it acts with malice or reckless indifference to an employee's federally protected rights. Further, under Illinois law, a plaintiff cannot recover punitive damages against a government entity under any state law cause of action.

The unavailability of punitive damages exacerbates a pre-existing lack of accountability and fiscal responsibility. Municipal defendants often act contrary to the economic interests of the taxpaying public. Departments engage in reckless conduct even when warned that the conduct is unlawful, and municipal law departments fail to conduct risk assessments or to settle at early stages of litigation based on a rational economic calculus. Multiple investigations have been conducted of the city of Chicago's payment of tens of millions of dollars each year to private law firms to defend the City and its employees in civil rights litigation. *See, e.g.*, https://abc7chicago.com/chicago-budget-police-misconduct-lawsuit/12868750/ (visited March 28, 2024), reporting that Chicago pays $40 million annually to private law firms, the same as the entire law department budget, a practice a former corporation counsel described as "ridiculous"; https://www.bettergov.org/2022/11/07/budget-analysis-city-of-chicago-legal-judgment-and-settlement-spending/ (visited March 28, 2024), report of the Better Government Association; https://igchicago.org/2022/09/29/oig-found-that-shortcomings-in-the-citys-collection-of-data-regarding-police-related-litigation-compromise-risk-management-strategies/ (visited March 28, 2024), report of the Office of the Inspector General.

As in all Title VII litigation, when a municipal defendant refuses to settle based on an objective risk assessment, the plaintiff is forced to continue litigating. A single plaintiff in a Title VII case will accrue hundreds of thousands of dollars in fee-shifting attorneys' fees and litigation costs by the end of fact and expert discovery. The defendant "cannot litigate tenaciously and then be heard to complain about the time necessarily spent by the plaintiff

in response." *City of Riverside v. Rivera*, 447 U.S. 561, 580-81 n. 11 (1985) (cleaned up). Fortunately, plaintiffs in cases involving valuable municipal jobs can refute arguments that their fees and costs are "disproportionate" by utilizing the back pay, front pay, and lost pension calculations reflecting the deprivation of a job worth millions of dollars.

One final practice pointer: invoices submitted by private law firms to public entities are often subject to disclosure under public records laws. In fact, even billing records may be subject to disclosure after the redaction of attorney work product. Before entering into settlement negotiations, it can be useful to obtain the invoices and billing records of the private law firms defending the public entity in the case. In my practice, we regularly discover that the private law firms defending the city of Chicago bill more time defending against our clients' claims than we spend prosecuting them, making it difficult for the city to argue that our attorneys' fees are unreasonable.

VIII. Conclusion

In summary, make-whole relief in cases filed for public safety and other municipal employees will often include backpay, instatement or reinstatement, front pay in lieu of instatement, lost pension benefits frequently involving defined benefit pensions, and tax gross-up awards. Non-monetary or programmatic relief might encompass the elimination or replacement of discriminatory hiring steps, remedial hiring of class members or individual plaintiffs, revisions to workplace policies, and the appointment of compliance monitors, among other potential remedies. Practitioners should be cognizant of the enormous value of defined benefit pensions and thus the utility of performing loss of chance of promotion calculations and the value of securing retroactive seniority for their clients if instatement or reinstatement is offered or secured via court order. Although lump-sum settlement payments

can impose large tax burdens, they can be partially defrayed by using mechanisms such as a Qualified Settlement Fund and structured settlements, as well as including tax gross-ups in damage calculations. Although the issues addressed in this paper are not exclusive to municipal employment, effectively addressing these challenges is crucial to maximizing remedies for employees and applicants seeking these highly-coveted jobs.

NELA 165

Attachment 1

Exhibit 1

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974: See Privacy act statement before completing this form.

#

AGENCY: ☐ IDHR ☒ EEOC

CHARGE NUMBER: 440-2010-03731

Illinois Department of Human Rights and EEOC

NAME OF COMPLAINANT (Indicate Mr. Ms. Mrs.)	TELEPHONE NUMBER (include area code)
Ms. Samantha Vasich	312-909-9466

STREET ADDRESS	CITY, STATE AND ZIP CODE	DATE OF BIRTH
7132 N. Harlem, Apt 201	Chicago, IL 60631	02 / 15 / 1984 (M D YEAR)

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY, APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME (IF MORE THAN ONE LIST BELOW)

NAME OF RESPONDENT	NUMBER OF EMPLOYEES, MEMBERS	TELEPHONE (Include area code)
City of Chicago (Fire Department)	15+	312-744-0200 (Law Department)

STREET ADDRESS	CITY, STATE AND ZIP CODE	COUNTY
121 North LaSalle Street Suite 600	Chicago, IL 60602	Cook

CAUSE OF DISCRIMINATION BASED ON:	DATE OF DISCRIMINATION EARLIEST (ADEA/EPA) LATEST (ALL)
Sex	☒ CONTINUING ACTION

THE PARTICULARS OF THE CHARGE ARE AS FOLLOWS:

SEE ATTACHED

RECEIVED EEOC
APR 23 2010
CHICAGO DISTRICT OFFICE

Page 1 of

I ~~also~~ want this charge filed with the EEOC. I will advise the agencies if I change my address or telephone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

SUBSCRIBED AND SWORN TO BEFORE ME

THIS _____ DAY OF _____, _____.

NOTARY SIGNATURE

NOTARY STAMP

x Samantha A. Vasich 04.20.2010
SIGNATURE OF COMPLAINANT DATE

I declare under penalty that the foregoing is true and correct I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief

EEO-5 FORM (Rev. 11/09-INT)

Particulars of the Charge:

1. In 2006, I applied to be a firefighter with the City of Chicago Fire Department (CFD). I met all of the eligibility criteria and sat for the written examination. I passed the written examination and was assigned a number on the eligibility list.

2. In November 2009, I received a letter informing me that my name had been forwarded to the CFD as an applicant for the position of firefighter/EMT. I also received a separate packet of information with an "interest card" to return in order to move on to "the next phase of processing for the position," which was a physical abilities test. In addition to the return card, the packet contained a booklet entitled "Firefighter/EMT Physical Abilities Test" that described the "four separate tests" comprising the physical abilities test. Since I wanted to pursue the position, I turned in the card and then received another letter that directed me to report for the physical abilities test on January 13, 2010.

3. To prepare for the test, I worked out with a personal trainer who devised a training plan that would allow me to successfully perform the tests described in the City's materials. For example, he had me wear a vest filled with weights while working out on a stair climber, to prepare for the modified stair climb. He also had me drag a bag of sand around a gym floor to prepare for the hose drag. I was able to successfully perform these training activities.

4. I also picked up a test preparation DVD. (The letter with the testing booklet said that it was "extremely important" that I view it.) The DVD showed both men and women performing stretching and other exercises and the CFD physical abilities test, however, the actual footage of firefighters on the job appeared to portray only male firefighters.

5. On January 13, 2010, I took the CFD physical abilities test. Unlike at least one male member of my assigned group who I am told was allowed to pass, I performed each of the testing activities according to the specified guidelines. I felt that I had performed well and had passed the test.

6. On February 2, 2010, I received a letter stating that I had failed the physical abilities test and would be removed from the firefighter eligibility list. The letter did not identify my overall score or my score on any component part of the test or indicate which component(s) I had allegedly failed. It stated simply that I had failed the test and would be removed from the hiring list. I was not offered any opportunity to retake the test.

7. Because the letter contained no information about my test results other than to state that I had failed, I called the CFD personnel department. The woman I spoke with told me that she could not provide me with any additional information about my test results. She said that a private company handled the testing and that I would need to deal with them. But when I asked her for the name of the private company, she refused to divulge it.

8. I believe that I have been discriminated against on the basis of sex in that:

a. I am and was fully capable of all physical requirements to perform the job of a City of Chicago firefighter;

b. The physical abilities testing procedure disqualified and continues to disqualify a disproportionate number of female firefighter candidates. For example, I am told that in the most recent class to graduate the Chicago fire academy, only 5 of the 163 graduates were women. I am also told that not a single woman dropped out of training, which means that only 5 women were allowed to enter the academy;

c. The physical abilities test used to screen candidates before the academy did not and does not provide an accurate measure of an individual's, and particularly an adult female's, ability to perform the functions of a CFD firefighter and disqualifies women such as me who are fully capable of performing the duties and functions of a firefighter. I believe that the selection procedure is flawed in numerous and fundamental respects, including:

i. The procedure has an adverse impact on the hiring of female firefighters and is not a valid selection device;

ii. Any validation studies actually conducted were fundamentally flawed, including because they involved an insufficient number of active-duty female CFD firefighters. The City has also failed to maintain adequate documentation of any validity studies actually conducted;

iii. Other suitable alternative procedures exist which would have less adverse impact on female firefighter candidates. The suitability of such procedures has been demonstrated through their use by other fire departments, including departments in other large metropolitan areas, which hire a significantly higher percentage of female firefighter candidates who go on to successfully perform their jobs as firefighters;

iv. The use of the test is fundamentally unfair;

v. Candidates who are alleged to have failed the test are not afforded an opportunity for retesting and reconsideration;

vi. The testing conditions are not standardized and are invalid. For example, the proctors of the component parts are unqualified, the testing equipment is old, and the scoring is subjective. Further, the scores on one component part of the test are communicated to the proctors on all subsequent component parts of the test, injecting bias into the scoring and creating an opportunity for the manipulation of test results to fail female candidates.

9. The City of Chicago has a decades-long history of denying equal employment opportunity through the use of discriminatory testing procedures in the CFD, in violation of Title VII of the Civil Rights Act. *See, e.g., Lewis v. City of Chicago*, Case No. 98-C-5596 (N.D. Ill. Mar. 22, 2005).

10. This charge is filed on my own behalf and on behalf of all other female firefighter candidates who have been and will in the future be removed from the CFD eligibility list and refused hire based on the (alleged) results of the physical abilities test. The City of Chicago's use of the discriminatory selection device constitutes classwide discrimination on the basis of sex and is a continuing violation of Title VII of the Civil Rights Act.

Dated: April 20, 2010

Attachment 2

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SAMANTHA VASICH, RASHAUNDA DOOLEY, ANGELA MINNICK, JANIECE THEEKE, KATRINA BASIC, and JESSICA EVANS individually and on behalf of all others similarly situated, and KIMBERLY BAILEY, HAYLEY STAFEN, and JENNIFER ROCCASALVA, individually

Plaintiffs,

vs.

CITY OF CHICAGO, a municipal corporation

Defendant.

Case No.: 1:11-cv-04843

Magistrate Judge Maria Valdez

JOINT STIPULATION AND CLASS ACTION SETTLEMENT AGREEMENT

TABLE OF CONTENTS

IT IS HEREBY STIPULATED AND AGREED, by and between plaintiffs Samantha Vasich, RaShaunda Dooley, Angela Minnick, Janiece Theeke, Katrina Basic, and Jessica Evans (the "Settlement Class Representatives"), individually and on behalf of all others similarly situated, and Kimberly Bailey, Hayley Stafen and Jennifer Roccasalva, individually (the "Individual Plaintiffs") (collectively, the Settlement Class Representatives, the Individual Plaintiffs and the Settlement Class Members as defined herein are sometimes referred to in this Settlement Agreement as "Plaintiffs"), and defendant the City of Chicago (the "City"), jointly referred to herein as the "Parties," as follows:

RECITALS[1]

WHEREAS, Plaintiffs have filed and prosecuted a Complaint and three Amended Complaints alleging that the City's pre-hire physical abilities test for firefighter/emergency medical technician applicants discriminated against female applicants;

WHEREAS, Plaintiffs have claimed, and continue to claim, that each and all of the contentions asserted by them is meritorious;

WHEREAS, the City has decided it will utilize on an interim basis the Candidate Physical Ability Test as a pre-hire physical ability test for Firefighter/EMT applicants and has initiated the process of implementing its use of such test;

WHEREAS, after considering the potential benefits of settlement and delay in achieving instatement into the position for the Individual Plaintiffs and Settlement Class Members through litigation; the length of time which may necessary to continue the Action through trial and the appeals that might follow; the uncertainty inherent in any complex litigation; and the substantial benefits of the Settlement for the Settlement Class Members, including the fact that even if the

[1] Capitalized terms are defined in Article III of this Joint Stipulation and Class Action Settlement Agreement.

Settlement Class Members ultimately prevailed in their claims, there is no guarantee that they would receive any greater recovery than they will receive from the Settlement, Plaintiffs and Plaintiffs' Counsel have concluded that the proposed Settlement on the terms and conditions of this Settlement Agreement is fair, reasonable, and adequate and is in the best interests of the Settlement Class;

WHEREAS, Defendant denies the allegations in the Action, and denies any fault, wrongdoing, or liability related in any way to the physical abilities test or its administration;

WHEREAS, Defendant is electing to enter into this Settlement Agreement because, after consideration of: (a) the risks of potential liability the City could face should this matter proceed through trial and should Plaintiffs successfully prosecute their claims; (b) the benefit to the City of hiring a diverse group of individuals into the position of Firefighter/EMT; and (c) the City's immediate need to hire qualified Firefighter/EMTs, the Settlement would eliminate the burden, inconvenience and expense of further litigation and disputes concerning the alleged conduct, and achieve a release and resolution;

WHEREAS, the Settlement contemplated by this Settlement Agreement is the product of extensive, good faith, and arm's length negotiation between Plaintiffs' Counsel and Defendant's Counsel;

NOW, THEREFORE, in consideration of the foregoing Recitals and the agreements, covenants, representatives and warranties set forth herein, IT IS HEREBY STIPULATED AND AGREED by and among the Parties, by and through their counsel, that, subject to the approval of the Court pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, the Released Claims shall be finally and fully compromised, settled, released and forever discharged as to the Released

Parties, and this Action shall be dismissed with prejudice upon and subject to the following terms and conditions:

ARTICLE I.
INTENTION OF THE PARTIES

1. The Settlement Agreement and all associated exhibits and attachments made and entered into by and between the Parties, each with the assistance of their respective counsel, is intended to fully, finally, and forever settle, compromise and discharge the Released Claims against the Released Parties arising from or related to the Action, subject to the terms and conditions set forth herein. The Settlement Agreement supersedes any and all prior agreements of the Parties concerning settlement of the Action and any memoranda of understanding or term sheets containing such agreements.

2. Because this Action was pled as a class action, the Settlement must receive preliminary and final approval by the Court. Accordingly, the Parties enter into this Settlement Agreement on a conditional basis.

3. If any event constituting a Condition to Settlement as set forth in Article VIII hereof is not met, this Settlement Agreement is not approved by the Court, fails to become effective, or is reversed, withdrawn or modified by the Court or any other court with jurisdiction over the Action, the Settlement Agreement shall become null and void *ab initio* and shall have no bearing on, and shall not be admissible in connection with, further proceedings in this Action, including proceedings to determine whether class certification would be appropriate in any other context in this Action, or in any other judicial, administrative or arbitral proceeding for any purpose or with respect to any issue, substantive or procedural, and none of the Parties will be

deemed to have waived any claims, objections, defenses, privileges or arguments including but not limited to issues of class certification, the merits of Plaintiffs' claims or the City's defenses.

4. This Settlement Agreement reflects offers of compromise and, pursuant to Federal Rules of Evidence 408 and any similar federal, state or local statute or rule, neither its acceptance by the Parties nor its filing with the Court shall, in themselves, render this Settlement Agreement admissible in evidence in any other proceeding, subject to the limited exception that it shall be admissible in an action or proceeding to approve, interpret or enforce this Settlement Agreement. The Parties agree that this paragraph is not intended to limit in any way any protections afforded by Federal Rules of Evidence 408 or any similar, applicable federal, state or local statute or rule regarding admissibility of the Settlement Agreement.

ARTICLE II.
LITIGATION BACKGROUND

1. Beginning in 2008, following the administration of the City's physical ability test for applicants seeking hire as Firefighter/EMTs, several Settlement Class Representatives and Individual Plaintiffs filed charges with the Equal Employment Opportunity Commission alleging generally that the physical ability test discriminated against them and other female candidates in violation of Title VII of the Civil Rights Act of 1964.

2. On July 19, 2011, Settlement Class Representative Samantha Vasich filed the Action in the United States District Court for the Northern District of Illinois on behalf of herself and a class of female applicants for Firefighter/EMT positions with the Chicago Fire Department ("CFD"), who failed a physical abilities test ("PAT") given by the CFD to all Firefighter/EMT applicants. The case originally was assigned to the Honorable Rubin Castillo and later was transferred to the Honorable John J. Tharp, Jr. On October 11, 2012, Judge Tharp granted the

Plaintiffs leave to file their Third Amended Complaint, which is the operative pleading. The Third Amended Complaint asserts claims against the City on behalf of the Settlement Class Representatives, the Individual Plaintiffs and a proposed class.

3. The Third Amended Complaint alleges that the PAT has a disparate impact on female applicants and that its use constituted disparate treatment against female Firefighter/EMT applicants.

4. In its answers to the original Complaint, the Second Amended Complaint and Third Amended Complaint, the City denied the material allegations of Plaintiffs' claims.

5. On June 12, 2012, the City moved for partial summary judgment to limit the class period to June 27, 2009 to April 23, 2010 and strike the Plaintiffs' Prayer for Prospective Injunctive Relief. On November 1, 2012, the City moved to dismiss Count II of the Third Amended Complaint, which alleges disparate treatment. On January 7, 2013, Judge Tharp granted in part the City's Motion for Partial Summary Judgment limiting the class period to actions taken after June 2009, denied the City's Motion for Partial Summary Judgment to strike the Prayer for Prospective Injunctive Relief and denied the City's Motion to Dismiss Count II of the Third Amended Complaint alleging disparate treatment.

6. The Parties have exchanged documents both informally and formally, and have conducted written discovery. During the course of the litigation, the City produced to Plaintiffs thousands of pages of documents, including testing results and other data. The Plaintiffs took the depositions of two CFD personnel on issues relating to the City's Motion for Summary Judgment.

7. The Parties participated in settlement conferences with the Honorable Maria Valdez, Magistrate Judge, on February 26, 2013, March 22, 2013, April 10, 2013, April 11, 2013,

July 8, 2013, and July 18, 2013. At the April 11, 2013 settlement conference, with the assistance of Magistrate Judge Valdez, the Parties agreed to settle the Action. On July 8 and 18, 2013, the Parties attended additional settlement conferences with Magistrate Judge Valdez to resolve the remaining settlement issues that arose as they attempted to document their agreement. Through these five sessions, the Parties agreed to settle the Action on the terms which are more fully set forth in this Settlement Agreement.

8. It is desire of the Parties to fully, finally, and forever settle, compromise, and discharge all disputes and claims against the Released Parties arising from or related to the Action and that this Settlement Agreement shall constitute a full and complete settlement and release of all the Released Parties from all of the Released Claims alleged or could have been alleged in the Action.

ARTICLE III.
DEFINITIONS

1. “2006 Eligibility List” means the list maintained by the City’s Department of Human Resources of individuals who (a) took the written examination in 2006 administered to applicants for the position of Firefighter/EMT and (b) were deemed qualified to be considered for the position of Firefighter/EMT as a result of their score.

2. "2013 Class" means the next CFD Fire Academy class for Firefighter/EMT candidates, currently anticipated to begin on or about November 1, 2013.

3. "2014 Class" means the first CFD Fire Academy class for Firefighter/EMT candidates to begin in 2014, currently anticipated to begin on or before March 31, 2014.

4. The "Action" means the lawsuit entitled *Vasich, et al. v. City of Chicago*, No. 11 cv 04843, pending in United States District Court for the Northern District of Illinois.

5. "Administrative Expenses" means all expenses arising out of the administration of the Settlement, including but not limited to, the cost of the Claims Administrator, the cost of preparing and mailing Class Notice, the cost of publication of Summary Class Notice, the cost of creating and maintaining a website to post relevant information regarding the Claims Administration Process, and any other costs attendant to the administration of the Settlement as may be agreed to by the Parties and approved by the Court as necessary to effectuate the Settlement or the Claims Administration Process.

6. "Backpay Award" means an Individual Backpay Award or a Settlement Class Member Backpay Award.

7. "CFD" means the Chicago Fire Department, including all of its officers, employees, agents, attorneys, representatives, assigns, successors or predecessors.

8. "City" means the City of Chicago, an Illinois municipal corporation.

9. "City-Funded CPAT Testing" means (a) the station orientation, practice tests and CPAT administration at either NIPSTA or SUFD, at the City's expense, where Settlement Class Members have chosen to participate in such testing; or (b) testing at CPAT-licensed facility for which reimbursement from the City is sought pursuant to Article VII hereof.

10. "Claim" means the right to the amount of consideration to which each Claimant is entitled to receive pursuant to this Settlement Agreement.

11. "Claimant" means any Settlement Class Member who files a Proof of Claim in such form and manner and within such time as the Court may prescribe, which establishes that Settlement Class Member is entitled to participate in the Settlement.

12. "Claims Administrator" means Class Action Administration, Inc. of Colorado retained by Defendant's Counsel and on behalf of the City and approved by the Court to issue the Class Notice to the Settlement Class as provided for herein; publish the Summary Class Notice; collect and process Proofs of Claim as provided for herein; collect and process Requests for Exclusion as provided for herein; establish and maintain the Website; issue payments to Claimants as provided for herein or other duties and responsibilities as agreed to by the Parties and approved by the Court necessary to effectuate the Claims Administration Process.

13. "Claims Administration Process" means the process detailed in Article X.

14. "Claims Administration Services" means the services to be performed by the Claims Administrator.

15. "Class Notice Mailing Deadline" means a date to be set by the Court through the Preliminary Approval Order no later than 30 days following the latter of entry of the Preliminary Approval Order or approval of the Settlement by the City Council of Chicago.

16. "Class Notice Response Deadline" means a date to be set by the Court through the Preliminary Approval Order no earlier than 60 days following Class Mailing Deadline.

17. "Class Notice" means a notice to be submitted for approval by the Court substantially in the form attached hereto as Exhibit A, and which will advise Settlement Class Members of the terms of the Settlement and their right to file a Claim, object to the proposed settlement terms and exclude themselves from the Settlement Class.

18. "Classwide Backpay Amount" means the One Million, Five Hundred Ninety Thousand, Twenty-Three Dollars ($1,590,023) to be paid collectively to Non-Hired Settlement Class Members other than Individual Backpay Recipients.

19. "CPAT" means the Candidate Physical Ability Test, as licensed by the International Association of Fire Fighters.

20. "CPAT Card" means a document issued by a facility licensed by the IAFF to administer the CPAT, indicating that the individual has passed the CPAT. To be valid, the CPAT Card must identify the date on which the individual passed the CPAT. To be accepted by CFD as evidence of an applicant's physical ability to perform the essential job functions of Firefighter/EMT, the CPAT Card must have a date less than one year before the date on which the applicant begins the CFD Fire Academy. However, a CPAT Card indicating a pass date of July 1, 2013 or after will be accepted for the purposes of hiring for the 2013 Class or 2014 Class.

21. "CPAT Completion Date" means for Settlement Class Members other than Crossovers, the date by which a Settlement Class Member must present to CFD a valid CPAT Card, or present evidence to CFD through SUFD or NIPSTA of successful completion of CPAT, as set forth in detail in Article VII hereof.

22. "Court" means the United States District Court for the Northern District of Illinois.

23. "Crossovers" means Settlement Class Members eligible to be trained in the CFD Academy as firefighters who currently are employed by the CFD as paramedics.

24. "Crossover Hiring Standards" means CFD's pre-hiring requirements which include: (i) compliance with the residency obligations in Municipal Code of Chicago Section 2-152-050; (ii) compliance with the age requirements of Municipal Code of Chicago Section 2-152-410(e), subject to Article XIB(c) hereof with respect to Individual Plaintiffs and Settlement Class Representatives; (iii) passing of the CPAT; (iv) attendance and participation at all stages of Hiring Processing; (v) submission of all documents required by CFD; and (vi) successful completion of

drug screens and the stress test portion of the medical examination, which CFD paramedics applying to became Firefighters are customarily required to take.

25. "Defendant" means the City of Chicago.

26. "Defendant's Counsel" means the law firm of Shefsky & Froelich Ltd., 111 East Wacker Drive, Suite 2800, Chicago, IL 60601.

27. "Deferred Settlement Class Members" means Settlement Class Members who, despite Priority Processing, have not completed Pre-Hiring Processing fourteen (14) days before Final Processing for the 2014 Class. "Deferred Settlement Class Members" includes Settlement Class Members who, due to pregnancy, childbirth or other short-term disability, are or will be unable to complete CPAT testing on or before December 31, 2013. Deferred Settlement Class Members who provide CFD with evidence of their pregnancy or other short-term disability on or before September 1, 2013 may elect at such time to defer to a possible second 2014 Fire Academy class and may submit their CPAT Cards at least 60 days prior to the first day of a second 2014 Fire Academy class if one is held. To be eligible to elect to defer as a result of pregnancy, childbirth or other short-term disability, the Settlement Class Member must notify CFD of their reason for deferral (supported by requested documentation, as deemed necessary by CFD) and elect to defer no later than December 31, 2013. Deferred Settlement Class Members will only be considered for hire to the extent that (a) CFD holds a second 2014 Fire Academy class with candidates hired from the 2006 Eligibility List, and (b) the Deferred Settlement Class Member is deemed qualified in accordance with CFD's Normal and Customary Hiring Standards. In the event that conditions (a) and (b) above are met, and that on or before the Hiring Election Date, the Settlement Class Member elected to continue processing for potential hire as a Firefighter/EMT and to forego a

proportionate share of the Classwide Backpay Award, CFD offer employment to the Deferred Settlement Class Member for entry into the second 2014 Fire Academy Class, if any.

28. "Final Approval Date" means the date on which the Order of Final Approval is entered in the Action.

29. "Final Approval Hearing" means a hearing set by the Court to take place after the Class Notice Response Deadline for the purpose of (i) determining the fairness, adequacy and reasonableness of the Settlement Agreement; (ii) determining the good faith of the Settlement Agreement; (iii) considering the Parties' request for entry of the Final Judgment; (iv) granting or denying final Court approval to the Settlement; and (v) addressing objections and Requests for Exclusion as set forth in Article XI hereof and other such matters necessary or required for review and approval of the Settlement by the Court.

30. "Final Judgment" means the judgment to be entered by the Court pursuant to this Settlement Agreement, substantially in the form of the order attached hereto as Exhibit B.

31. "Final Processing" means mandatory attendance at the Fire Academy after CFD has extended a Settlement Class Member an unconditional offer of employment, at which time the Settlement Class Member will complete necessary paperwork to became an employee of the City and other activities required to begin training at the Fire Academy.

32. "Fire Academy" means the CFD Fire Academy South, located at 1338 S. Clinton Ave., Chicago, Illinois 60607-5037.

33. "Firefighter/EMT" means the entry level position in the CFD of Firefighter Candidate/Emergency Medical Technician.

34. "Hiring Election Date" means the date thirty days after the first day of the 2014 Class, by which date Deferred Settlement Class Members must elect, in writing, to either (i) to continue processing for potential hiring as a Firefighter/EMT, or (ii) to receive a proportionate share of the Classwide Backpay Amount. At least fourteen days prior to the Hiring Election Date, the City will inform Settlement Class Counsel as to the City's plan, if any, as of that date, whether to select and train another Fire Academy class consisting of applicants off of the 2006 Eligibility List. In the event the City notifies Settlement Class Counsel that it does not intend to select and train another Fire Academy class consisting of applicants off of the 2006 Eligibility List but does thereafter hire another class consisting, in whole or in part, of applicants off of the 2006 Eligibility List, Deferred Settlement Class Members who elected to receive a proportionate share of the Classwide Backpay Amount shall be offered at such time the opportunity to continue processing for potential hire into the Fire Academy class subject to their repayment to the City of the net amount, if any, already received as a proportionate share of the Classwide Backpay Amount. Any funds recovered by the City pursuant to this paragraph shall be paid as a *cy pres* to the Ende, Menzer, Walsh & Quinn Retirees', Widows' and Orphan's Assistance Fund.

35. "Hiring Process" means the process whereby Settlement Class Members may apply to be hired as a Firefighter/EMT as set forth in Article VII hereof.

36. "Hired Settlement Class Members" means Settlement Class Members who satisfy the Normal and Customary Hiring Standards, qualify for hiring as a Firefighter/EMT, pursuant to the process set forth in Article VII, and accept the City's offer of employment and attend Final Processing.

37. "IAFF" means the International Association of Fire Fighters.

38. "Interest Card" means the written notice sent by CFD to applicants for a Firefighter/EMT position.

39. "Individual Backpay Recipients" means Angela Minnick, Janiece Theeke, Katrina Basic, Jessica Evans, Kimberly Bailey, Hayley Stafen and Jennifer Roccasalva.

40. "Individual Backpay Award" means the Backpay Award allocated to each Individual Backpay Recipient.

41. "Individual Plaintiffs" means Kimberly Bailey, Hayley Stafen and Jennifer Roccasalva.

42. "Last Known Address" means the most recently recorded mailing address for a Settlement Class Member as such information is contained in the City's records. Mailing addresses for Settlement Class Members which Settlement Class Counsel convey to Defendant's Counsel will be included in the mailing information to be transmitted to the Claims Administrator.

43. "New Hires" means Settlement Class Members to be hired by the CFD who have not previously been employed by the CFD.

44. "Non-Hired Settlement Class Members" means Settlement Class Members who are not hired as a Firefighter/EMT pursuant to the Normal and Customary Hiring Standards and the process set forth in Article VII hereof, and includes Deferred Settlement Class Members who either elect to waive any right to be considered for hiring by the CFD for Fire Academy classes occurring after the 2014 Class, or fail to make an election in writing.

45. "NIPSTA" means the Northeastern Illinois Public Safety Training Academy, 2300 Patriot Blvd., Glenview, Illinois 60026.

46. "Non-Settlement Group" means the collective group of all Settlement Class Members who properly and timely submit a Request for Exclusion.

47. "Non-Settlement Group Member" means a person who is a member of the Non-Settlement Group.

48. "Normal and Customary Hiring Standards" means CFD's pre-hiring requirements for Firefighter/EMT which include: (i) compliance with the residency requirements in Municipal Code of Chicago Section 2-152-050; (ii) compliance with the age requirements of Municipal Code of Chicago Section 2-152-410(e), subject to Article XIB(c) hereof with respect to Individual Plaintiffs and Settlement Class Representatives; (iii) passing of the CPAT; (iv) attendance and participation at all stages of CFD's Hiring Processing, unless such attendance and participation is excused by notice of a medical emergency or other circumstance outside the candidate's control, which CFD typically considers to be excusable; (v) submission of all documents required by CFD; and (vi) successful completion of all drug screens, a background investigation including driving record review and a post-conditional offer of employment medical evaluation. "Normal and Customary Hiring Standards" shall afford Settlement Class Members the same rights to retesting or review as have been afforded to applicants in the past and shall incorporate the same standards normally and customarily applied by CFD to applicants for hire who are not Settlement Class Members.

49. "Parties" means the Settlement Class Representatives, the Individual Plaintiffs, the Settlement Class Members and the City.

50. "PAT" means the physical abilities test developed in or about 1996 by Human Performance Systems, Inc. for the CFD and modified in or about 2007, and used by the CFD through and including November 2011.

51. "Person" means an individual, corporation, partnership, limited partnership, limited liability company, association, estate, legal representative, trust, unincorporated organization and any other type of legal entity, and their heirs, predecessors, successors, representatives, and assigns.

52. "Plaintiffs" means the Settlement Class Representatives, the Individual Plaintiffs and the Settlement Class Members.

53. "Plaintiffs' Counsel" means the law firms of Goldstein, Borgen Dardarian & Ho of Oakland, California and Willenson Law, LLC, the Law Office of Susan P. Malone and Torrick A. Ward, each of Chicago, Illinois.

54. "Pre-Hiring Processing" means the process whereby an applicant for employment with CFD as a Firefighter/EMT proceeds through all of the Normal and Customary Hiring Standards.

55. "Preliminary Approval Date" means the date on which the Court enters the Preliminary Approval Order.

56. "Preliminary Approval Order" or "Order Granting Preliminary Approval of Settlement" means an order to be agreed by the Parties for entry and filing by the Court substantially in the form attached hereto as Exhibit C or other order entered by the Court granting preliminary approval to the Settlement.

57. "Preliminary Processing Session" means the first required attendance at the CFD during which Settlement Class Members interested in being hired for a Firefighter/EMT position appeared and returned Interest Cards. The Preliminary Processing Session occurred on May 6, 2013 or as re-scheduled by agreement of certain Settlement Class Members and CFD during the weeks of May 6 or May 13, 2013.

58. "Priority Processing" means the process by which Settlement Class Members will be granted priority throughout Pre-Hiring Processing as provided in Article VII hereof.

59. "Proof of Claim" means the Proof of Claim Form and Release and any necessary supporting information sufficient to allow the Claims Administrator, Defendant's Counsel and Settlement Class Counsel to determine whether an individual is a Backpay Settlement Class Member entitled to receive a Backpay Award as provided for in Article V hereof substantially in a form attached hereto as Exhibit D.

60. "Released Claims" means, collectively, all claims, demands, rights, liabilities and causes of action of every nature and description whatsoever, in law or equity, known or unknown, asserted or that might have been asserted, either directly or indirectly, in a representative or in any other capacity, by any Releasing Party against any of the Released Parties for any matter, arising out of, relating to, or in connection with the Action, the Third Amended Complaint, the Settlement Agreement, or any of the subjects resolved through the entry of the Settlement Agreement. “Released Claims” includes Unknown Claims as that term is defined herein.

61. "Released Party" or "Released Parties" means Defendant, and all of its employees, agents, attorneys, insurers, representatives, administrators, predecessors, successors and assigns and SUFD and NIPSTA,.

62. "Releasing Party" means Plaintiffs, Plaintiffs' Counsel and their respective agents, heirs, successors and assigns.

63. "Request for Exclusion" means the written notice containing the information set forth in Section XI.A. hereof, which a Settlement Class Member is required to submit to the Claims Administrator no later than the Class Notice Response Deadline to request exclusion from the Settlement Class.

64. "Second Stage Processing" means the date when Settlement Class Members other than Crossovers returned their completed Background Questionnaires and other required documentation to the Fire Academy and are drug tested, fingerprinted and photographed, which occurred on June 6, 2013 or as re-scheduled by agreement of certain Settlement Class Members and CFD during the weeks including June 6 or June 12, 2013.

65. "Service Awards" means payments to be made to Settlement Class Representatives for their service as such.

66. "Settlement" means the resolution of the Action pursuant to the Settlement Agreement.

67. "Settlement Agreement" means this Agreement, and all of its attachments and exhibits, which the Parties understand and agree sets forth all material terms and conditions of the settlement between them and which is subject to Court approval. It is understood and agreed that the City's obligations for payment under this Settlement Agreement are conditioned on, among other things, the occurrence of the Settlement Effective Date.

68. "Settlement Class" means the group of individuals who meet the requirements of the Class proposed to be certified as described in Article IV hereof, except for Non-Settlement Group Members.

69. "Settlement Class Member Backpay Award" means the pro-rata amount of the Backpay Amount to be paid to Non-Hired Class Members other than Individual Backpay Recipients.

70. "Settlement Class Member Backpay Recipient" means a Settlement Class Member who is eligible to receive a Settlement Class Member Backpay Award.

71. "Settlement Class Member" or "Member of the Settlement Class" means those individuals who meet the requirements of the class proposed to be certified as described in Article IV hereof.

72. "Settlement Class Representatives" means Samantha Vasich, RaShaunda Dooley, Angela Minnick, Janiece Theeke, Katrina Basic, and Jessica Evans.

73. "Settlement Class Counsel" means the law firms of Goldstein, Borgen, Dardarian & Ho of Oakland, California and Willenson Law LLC, and the Law Office of Susan P. Malone.

74. "Settlement Effective Date" means the date of (i) the Court's order granting final approval of the Settlement, if there are no objections to the settlement; (ii) if there are objections, then upon the expiration of time for appeal of the Final Judgment; or (iii) if there is an appeal by an objector from the Final Judgment, then upon the final resolution of any appeal from the Final Judgment.

75. "Shortfall Hires" means the minimum of fourteen (14) New Hires and Crossovers whom the City will hire as Firefighter/EMTs in the 2013 Class, subject to Article VII.C. hereof.

The City will use its best efforts to hire nine (9) New Hires and five (5) Crossovers, but if fewer than five (5) Crossovers meet the Crossover Hiring Standards, the City shall hire a sufficient number of New Hires to reach the minimum total of 14 New Hires and Crossovers. The Shortfall Hires is a minimum requirement. The City will not at any point during Pre-Hire Processing deviate from the Priority Processing requirement because the Shortfall Hires is exceeded.

76. "SUFD" means the Southwest United Fire Districts, mailing address 7045 Joliet Rd., LaGrange, Illinois, 60525.

77. "Summary Class Notice" means the notice submitted by the Parties for approval substantially in the form attached hereto as Exhibit E.

78. "Total Settlement Sum" means One Million, Nine Hundred Seventy Eight Thousand, Twenty-Three Dollars ($1,978,023).

79. "Third Amended Complaint" means the filing identified as docket number 78 filed in the Action.

80. "Unknown Claims" means any Released Claims which any Plaintiff or any Settlement Class Member does not know or suspect to exist in his or her favor at the time of the entry of the Judgment, and which, if known by him or her, might have affected his or her settlement with and release of the Released Parties, or might have affected his or her decision to request exclusion from the Settlement Class or to object to this Settlement. Plaintiffs, and each of them, and each Settlement Class Member may hereafter discover facts in addition to or different from those which they now know or believe to be true with respect to the subject matter of the Released Claims, but Plaintiffs, and each of them, and each Settlement Class Member, upon the Settlement Effective Date, shall be deemed to have, and by operation of the Final Judgment shall

have, fully, finally, and forever settled and released any and all Released Claims, known or unknown, suspected or unsuspected, contingent or non-contingent, whether or not concealed or hidden, which then exist, or heretofore have existed upon any theory of law or equity now existing or coming into existence in the future, including, but not limited to, conduct which is negligent, intentional, with or without malice, or a breach of any duty, law or rule, without regard to the subsequent discovery or existence of such different or additional facts. Plaintiffs, and each of them, acknowledge, and the Settlement Class Members shall be deemed by operation of the Final Judgment to have acknowledged, that the foregoing waiver was separately bargained for and a key element of the Settlement of which this release is a part.

81. "Updated Address" means, for Settlement Class Members who submitted an Interest Card, the address on the Interest Card, and for all other Settlement Class Members, a mailing address that was updated by a reasonable address verification measure of the Claims Administrator by an updated mailing address provided by the United States Postal Service or a Settlement Class Member, or through information Plaintiffs' Counsel has provided or may provide Defendant or the Claims Administrator, or which a Settlement Class Member provides to the CFD in connection with Pre-Hiring Processing.

82. "Website" means the website to be maintained by the Claims Administrator. The Website shall include, at a minimum, copies of the Settlement Agreement, the Class Notice, the Proof of Claim and the Preliminary Approval Order, and may be amended from time to time as agreed to by Settlement Class Counsel and Defendant's Counsel or as otherwise ordered by the Court.

ARTICLE IV.
SETTLEMENT CLASS CERTIFICATION

The Settlement Class to be conditionally certified pursuant to Federal Rule of Civil Procedure 23(b)(3) will be defined as:

> All females who passed the 2006 written qualifying exam to become a CFD firefighter/EMT, who failed the PAT between December 2007 and April 10, 2010, and who were not, prior to July 19, 2011, notified of their disqualification as an applicant for a firefighter/EMT position with the CFD for a reason other than failure of the PAT or age.

ARTICLE V.
PAYMENTS

A. Total Settlement Sum.

The City will pay the sum of One Million, Nine-Hundred Seventy-Eight Thousand, Twenty-Three Dollars ($1,978,023.00) for all purposes and to the recipients specified in this Settlement Agreement, which shall fully satisfy the City's obligations for all payments, fees, and costs identified in this Settlement Agreement, including Individual Backpay Awards, Settlement Class Member Backpay Awards, and Service Awards to Settlement Class Representatives, other than Settlement Class Counsel's and Torrick Ward's attorneys' fees and out-of-pocket litigation expenses and costs, in the amounts and by the procedures specified in this Settlement Agreement. The City shall separately pay, where required, the employer's share of applicable payroll taxes owed on payments made to Individual Plaintiffs and Settlement Class Members, if any, in addition to the settlement payments specified herein and the costs of Settlement Administration. Settlement Class Members shall pay their applicable share of federal, state or local income and Medicare and like taxes.

B. Service Awards to Settlement Class Representatives.

From the Total Settlement Sum, the City shall pay Service Awards to the Class Representatives less applicable taxes and withholdings as follows:

Samantha Vasich	$15,000.00
RaShaunda Dooley	$15,000.00
Angela Minnick	$10,000.00
Janiece Theeke	$10,000.00
Katrina Basic	$10,000.00
Jessica Evans	$10,000.00
TOTAL	**$70,000.00**

The City does not oppose or object to the approval of payment of these amounts. These Service Awards will be paid by the City or by the Claims Administrator no later than 60 days after the Settlement Effective Date. Neither a modification by this Court nor reversal on appeal of any Service Award by the Court shall be deemed a substantive modification of a material term of the Final Judgment, Settlement or this Settlement Agreement.

C. Settlement Class Member Backpay Award.

Non-Hired Settlement Class Members, other than the Individual Backpay Recipients, are eligible to receive a per capita share of the Settlement Class Member Backpay Award, subject to compliance with the Claims Administration Process. Settlement Class Member Backpay Awards shall be paid no later than 60 days after the later of the Settlement Effective Date or the Hiring Election Date.

D. Individual Backpay Award.

The Individual Backpay Recipients shall be paid a total of Two Hundred Sixty-Eight Thousand Dollars ($268,000.00) less applicable taxes and withholdings to be allocated as follows:

Angela Minnick	[redacted]
Janiece Theeke	
Katrina Basic	
Jessica Evans	
Hayley Stafen	
Kimberly Bailey	
Jennifer Roccasalva	
Total	**$268,000.00**

The Individual Backpay Awards will be paid either by the City or by the Claims Administrator no later than 60 days after the Settlement Effective Date. Neither a modification by this Court nor reversal on appeal of any Individual Backpay Award shall be deemed a substantive modification of a material term of the Final Judgment, Settlement or this Settlement Agreement.

E. Calculation of Classwide Backpay Award.

Within seven (7) days of the Hiring Election Date, the Claims Administrator will determine the number of Non-Hired Settlement Class Members. The amount paid to each Claimant as a Settlement Class Member shall be calculated as follows: One Million, Five Hundred Ninety Thousand, Twenty-Three Dollars ($1,590,023) divided by the number of Non-Hired Settlement Class Members who filed valid Proof of Claims rounded down to the nearest dollar.

F. Pay Adjustment For Individual Crossover Plaintiffs.

The City shall make a payment of Seventy Five Thousand Dollars ($75,000) to be divided equally among Individual Backpay Recipients who held the rank of Paramedic in Charge prior to 2009 and who are hired in either the 2013 or 2014 Classes. The payment will be made no later than the later of (a) fifteen (15) days after the entry of Crossovers into the 2014 Fire Academy Class or (b) sixty (60) days after the Settlement Effective Date. In the event that no Individual Backpay Recipient who holds the rank of Paramedic in Charge prior to 2009 is hired in either the 2013 or 2014 Class, the City shall pay Settlement Class Counsel Fifty Thousand Dollars ($50,000) as

reimbursement for pretest training provided to Settlement Class Members but no other payment need be made under this paragraph.

G. No Further Payment Obligation.

The foregoing consists of all the monetary components of the Settlement to the Settlement Class Representatives, Individual Plaintiffs and Settlement Class Members. The City shall have no further payment obligation, other than funding the Claims Administration process, for the City-Funded CPAT Testing and Settlement Class Counsel's and Torrick Ward's attorneys' fees pursuant to Article XVI.

H. Tax Forms.

The City or the Claims Administrator will cause to be issued appropriate tax forms to Non-Hired Settlement Class Members, Individual Backpay Recipients and Settlement Class Representatives and reports to governmental tax authorities based on the allocations set forth in this Article.

I. No Tax Advice.

The Individual Plaintiffs and Settlement Class Representatives acknowledge, for themselves and for the Settlement Class, that they have not relied upon any advice, representations, warranties, guaranties, promises, statements or estimates, by Settlement Class Counsel, Defendants' Counsel, or any of the Released Parties, or anyone representing or purporting to represent the Released Parties, regarding the tax treatment or effect of any payments made under this Settlement Agreement. The Individual Plaintiffs and Settlement Class Representatives agree, for themselves and for the Settlement Class, that in the event it should be subsequently determined that payment of taxes on any amounts received under this Settlement Agreement, or any part thereof, should have been made, that each Settlement Class Member shall

be personally and solely responsible for all such taxes, as well as for any related penalties or interest which may be due and, in addition, do hereby agree to indemnify and hold harmless Plaintiffs' Counsel, Defendant's Counsel and the Released Parties from any payment, interest, penalty and reasonable attorney's fees and costs incurred by in connection with any claim, including any claim made under the federal or state tax laws.

ARTICLE VI.
DISCONTINUANCE OF PAT

The City agrees to discontinue any and all use of the PAT for the screening or hiring of Firefighter/EMT candidates and will not resume its use at any future time. The City will make interim use of the CPAT pursuant to Section 5j of Uniform Guidelines on Employee Selection, 29 CFR Section 1607.5.J., consistent with IAFF licensing requirements for purposes of the Pre-Hiring Processing for the 2013 and 2014 Classes (including a possible second 2014 Fire Academy class), as described herein. This Agreement shall not be construed as an acceptance or endorsement of the CPAT by the Individual Plaintiffs or Settlement Class Representatives for themselves or the Settlement Class for any purpose or use other than its interim use as a term and condition of this Settlement Agreement. Plaintiffs' agreement to the use of the CPAT for interim hiring is part of a negotiated remedy for the claims alleged in the Third Amended Complaint, and in the event the Settlement is not approved by the Court, the Individual Plaintiffs' and Settlement Class Representatives' agreement to use of the CPAT for interim hiring as a term and condition of this Settlement Agreement will not constitute a defense to any legal claims arising from it use.

ARTICLE VII.
HIRING PROCESS FOR SETTLEMENT CLASS MEMBERS

A. Agreement to Hire All Qualified Plaintiffs and Settlement Class Members.

The City agrees that all Individual Plaintiffs and Settlement Class Members who (i) returned an Interest Card at Preliminary Processing indicating a continued desire for consideration for hire as a Firefighter/EMT, (ii) present a CPAT Card or who have successfully passed the CPAT pursuant to City-Funded CPAT Training on or before their respective anticipated CPAT Completion Date; and (iii) successfully complete Pre-Hiring Processing as set forth herein, will be hired in the 2013 or 2014 Classes. It is the intent of this Agreement that all qualified Individual Plaintiffs and Settlement Class Members who comply with the Normal and Customary Hiring Standards will be hired in the 2013 or 2014 Classes.

B. Shortfall Hires.

The City agrees to hire a minimum of fourteen (14) Shortfall Hires in the 2013 Class, and to use good faith efforts to ensure that at least 13 percent of the remainder of the 2013 Class is comprised of females, subject to Article VII.C. The City agrees that all Individual Plaintiffs, Settlement Class Representatives and Settlement Class members who meet the Normal and Customary Hiring Standards and the Pre-Hiring Processing set forth herein, will be hired in the 2013 Class or the 2014 Class.

C. Hiring Process.

1. Hiring will be pursuant to the following terms, including processes that were completed as of the date of the execution of this Settlement Agreement:

(a) Settlement Class Members were invited to return their Interest Cards prior to other Firefighter/EMT applicants.

(b) Settlement Class Members were given the opportunity to select their dates for NIPSTA or SUFD prior to all other Firefighter/EMT applicants.

(c) CFD will begin to process Plaintiffs' and the Settlement Class Members' background investigations before other applicants. The completion of Plaintiffs' and Settlement Class Members' background investigations is not a prerequisite to the processing of other applicants' background investigations. In addition, CFD may defer processing the background investigations for Settlement Class Members who select a CPAT Completion Date of December 31, 2013 until after the commencement of the 2013 Class.

(d) Settlement Class Member hiring shall be subject to the City Ordinance § 2 152-410(e) limiting the hiring of firefighters to persons less than 38 years of age. The City agrees to entry of a Final Judgment directing an exception to this Ordinance for the Individual Plaintiffs and Settlement Class Representatives.

(e) To be hired, all Settlement Class Members who are potential New Hires must be fully qualified for hire as a Firefighter/EMT, and must meet all of the Normal and Customary Hiring Standards, and also Settlement Class Members who are Crossovers must meet all Crossover Hiring Standards. In no instance will Normal and Customary Hiring Standards or Crossover Hiring Standards, as applicable, be modified or waived, other than (1) delayed acceptance of the CPAT Card as set forth herein and (2) subject to the age requirement exception for the Individual Plaintiffs and Settlement Class Representatives, if ordered by the Court pursuant to Article XI.B. hereof.

(f) 2013 Class

(1) All Settlement Class Members who are New Hires who submit a CPAT Card by September 1, 2013 and who are deemed fully qualified pursuant to the Normal and Customary Hiring Standards will be hired into the 2013 Class.

(2) All Settlement Class members who are Crossovers who submit a CPAT Card by the first day of the 2013 Class and who are deemed fully qualified pursuant to the Crossover Hiring Standards will be hired into the 2013 Class.

(3) Settlement Class Members must successfully complete all Pre-Hiring Processing no later than fourteen (14) calendar days prior to Final Processing.

(4) Potential New Hire Settlement Class Members who present CPAT cards by September 1, 2013, and have not completed their medical processing at least fourteen (14) days prior to Final Processing for the 2013 Class, but are subsequently deemed fully qualified for hire at least fourteen (14) days prior to Final Processing for the 2014 Class shall be given an offer for the 2014 Class.

(g) 2014 Class

(1) Settlement Class Members who are New Hires selecting a CPAT Completion Date of December 31, 2013 (at the Second Stage Processing, or as modified pursuant to Article VIIC3(b) below) shall have until December 31, 2013 to present their CPAT Cards.

(2) Settlement Class Members who are Crossovers and who select the later CPAT Completion Date shall have until the first day of the 2014 Class to present a CPAT Card to CFD.

(3) All Settlement Class Members entering the 2014 Class must have successfully completed all Pre-Hiring Processing no later than fourteen (14) calendar days prior to Final Processing for the 2014 Class.

(4) All Settlement Class Members who are New Hires who present a CPAT Card by December 31, 2013, and who are deemed fully qualified pursuant to the Normal and Customary Hiring Standards will be hired into the 2014 Class.

(5) All Settlement Class Members who are Crossovers who submit a CPAT Card by the first day of the 2014 Class and who are deemed fully qualified pursuant to the Crossover Hiring Standards will be hired into the 2014 Class.

(h) Settlement Class Members will be processed for drug testing and background qualifications simultaneously while seeking their CPAT Cards. CFD will begin to process Settlement Class Members' background investigations before other applicants. The completion of Settlement Class Members' background investigations is not a prerequisite to the processing of other applicants. If Settlement Class Members are deemed ineligible for hiring as Firefighter/EMT on the basis of information obtained through their background investigation, they shall be removed from Pre-Hiring Processing. The City will notify Settlement Class Counsel of any such disqualification within seven (7) days of CFD's notification of a Settlement Class Member of disqualifying results.

(i) Deferred Settlement Class Members who are deemed qualified under CFD's Normal and Customary Hiring Standards and who present a CPAT Card no less than 60 days prior to the first day of a second 2014 Fire Academy Class if one is held will receive offers of employment from CFD to enter the second 2014 Fire Academy Class, so long as the 2006 Eligibility List is being used to hire candidates for the second 2014 Fire Academy Class, provided, however, that each Deferred Settlement Class Member must elect in writing on or before the Hiring Election Date whether to (i) continue processing for possible hiring by the CFD as a Firefighter/EMT and waive any right to a Backpay Award, or (ii) receive a Backpay Award and waive any right to hiring by the CFD as a Firefighter/EMT. At least fourteen (14) prior to the Election Date, the City will provide Settlement Class Counsel with the names and Updated Addresses of all Deferred Settlement Class Members who will be required to make an election. A Deferred Settlement Class Member who elects to waive any right to hiring by the CFD or fails to timely make an election in writing is a Non-Hired Settlement Class Member.

(j) Hired Settlement Class Members, Settlement Class Representatives and Individual Plaintiffs will receive no retroactive seniority.

2. Preliminary Processing:

(a) All Settlement Class Members interested in being hired for a Firefighter/EMT position were required to have returned Interest Cards and attended Preliminary Processing Session on May 6, 2013 (or as rescheduled in the days thereafter) to remain eligible for hiring.

(b) Preliminary Processing occurred prior to the documentation of this Settlement Agreement and preliminary Court approval of this Settlement Agreement. The Parties agree that a total of 92 Settlement Class Members and Individual Plaintiffs appeared for and completed Preliminary Processing.

(c) Settlement Class Counsel were present at Preliminary Processing of Plaintiffs and Settlement Class Members on May 6, 2013 and allowed to independently meet with those in attendance.

3. Second Stage Processing.

(a) All Settlement Class Members interested in being hired for a Firefighter/EMT position were required to appear in person at the Fire Academy for Second Stage Processing on June 6, 2013 (or as rescheduled thereafter by CFD) to submit to the CFD a completed background

questionnaire, have their photograph and fingerprints taken, and undergo drug testing.

(b) Settlement Class Counsel were present at Second Stage Processing of Plaintiffs and Settlement Class Members on June 6, 2013 and allowed to independently meet with those in attendance.

4. CPAT Completion Date.

(a) All Settlement Class Members interested in being hired for a Firefighter/EMT position made a preliminary election in writing in June 2013 of a CPAT Completion Date either:

(1) To pass the CPAT by September 1, 2013 (with the anticipation of entering the 2013 Class) according to the following schedule:

(i) Settlement Class Members may attend the City-Funded CPAT Training at NIPSTA or SUFD and pass the CPAT by September 1, 2013. Under this option, Settlement Class Members will not receive a physical CPAT Card, but will have their results communicated directly to the City.

(ii) Settlement Class Members may obtain a CPAT Card from any licensed CPAT facility. The City shall reimburse Settlement Class Members presenting a valid CPAT Card from a facility other than NIPSTA or SUFD $150.00. However, the City will not pay for CPAT training and testing for a Settlement Class Member to participate in more than one CPAT testing program. Therefore, if a Settlement Class Member attends orientation at NIPSTA or SUFD through the City-Funded CPAT Training, she is not eligible to seek reimbursement. Reimbursement will be made to eligible Settlement Class Members at the same time the Backpay Award is made. Settlement Class Members seeking such reimbursement will be required to provide documentation supporting their entitlement to reimbursement prior to the Hiring Election Date.

(iii) Settlement Class Members who attend the City-Funded CPAT Training at NIPSTA or SUFD may also obtain and CFD will accept a CPAT Card from any licensed CPAT Facility. However, the City will not reimburse Settlement Class Members who attend the City-Funded CPAT Training at NIPSTA or SUFD for any additional CPAT testing or training.

(iv) The City will apply Priority Processing described herein to Settlement Class Members. At a minimum, the City will make good faith efforts for the 2013 Class to include the Shortfall Hires and females equaling 13% of the remainder of the 2013 Class in the 2013 Class.

(v) New Hire Settlement Class Members who select a CPAT Completion Date of September 1, 2013, or Crossover Settlement Class Members who select a CPAT Completion Date of the first day of the 2013 Class and do not pass the CPAT administered by NIPSTA or SUFD, or otherwise fail to present a CPAT Card by September 1, 2013 or the start of the 2013 Class, respectively, are ineligible for hiring, but will receive a Settlement Class Member Backpay Award.

(2) For New Hires, to present a valid CPAT Card on or before December 31, 2013, and for Crossovers, to present a valid CPAT Card on or before the first day of the 2014 Class (with the anticipation of entering the 2014 Class).

(i) Settlement Class Members selecting this option and meeting all other Normal and Customary Hiring Standards at least fourteen (14) calendar days prior to Final Processing for the 2014 Class, will be included in the 2014 Class.

(ii) Settlement Class Members who elect this option shall be eligible to participate in the City-Funded CPAT Testing at NIPSTA and SUFD and to select their NIPSTA/SUFD orientation dates at Second Stage Processing.

(iii) Settlement Class Members may obtain a CPAT Card from any licensed CPAT facility. The City shall reimburse Settlement Class Members presenting a valid CPAT Card $150.00, but in no event will the City pay for CPAT for a Settlement Class Member to participate in more than one CPAT testing program. Reimbursement will be made to eligible Settlement Class Members at the same time the Backpay Award is made. The Settlement Class Members seeking such reimbursement will be required to provide documentation supporting their entitlement to reimbursement prior to the Hiring Election Date.

(iv) New Hire Settlement Class Members other than Individual Backpay Recipients who select a CPAT Completion Date of December 31, 2013, and Crossover Settlement Class

Members who select a CPAT Completion Date of the first day of the 2014 Class and who do not pass the CPAT administered by NIPSTA or SUFD, or otherwise fail to present a CPAT Card by December 31, 2013 or the first day of the 2014 Class, respectively, or who fail to meet any other of the Normal Hiring Standards or Crossover Hiring Standards, as applicable, are ineligible for hiring, but will receive a Settlement Class Member Backpay Award.

(b) New Hire Settlement Class Members who initially select a CPAT Completion Date of September 1, 2013 or Crossover Settlement Class Members who initially select a CPAT Completion Date of the first day of the 2013 Class (with the anticipation of entering the 2013 Class) may elect to change their CPAT Completion Date ("CPAT Change") and instead elect to present a valid CPAT card on or before December 31, 2013. Any CPAT Change must be provided to Defendant's Counsel by Settlement Class Counsel, or made in writing and in person by the Settlement Class Member at the Fire Academy, no later than 3:00 p.m. CDT on July 31, 2013.

5. Settlement Class Members who fail to attend any stage of their scheduled CFD processing, do not pass CPAT or present a CPAT Card pursuant to the selected options above, drop out or are excluded from processing for a reason other than failure to pass CPAT or are or who will be 38 years old or older prior to the beginning of the 2013 Class or, if applicable, the beginning of the 2014 Class (other than Settlement Class Representatives and Individual Plaintiffs), will be ineligible for hiring but will be eligible to receive a Settlement Class Member Backpay Award.

6. The CFD shall make good faith efforts to meet the targeted dates set forth in this Article. However, the Parties recognize that the dates are subject to change based on factors outside the control of the CFD.

7. The City agrees to report to Plaintiffs' Counsel: (a) completion of CPAT transportability study relating to the City's interim use of CPAT for Firefighter/EMT hiring; (b) notice of City's receipt of CPAT licensure for use of CPAT test results; (c) notice of mailing of

invitations to Settlement Class Members to take the CPAT for additional hiring consideration; (d) attendance of Settlement Class Members at Preliminary Processing and Secondary Processing; (e) data regarding attendance by Settlement Class Members at the City-Funded CPAT Training; (f) written background investigation standards used by CFD to screen Firefighter/EMT candidates; (g) medical guidelines used by CFD to evaluate Firefighter/EMT candidates' medical status and ability to perform the essential job functions;. (h) data regarding CPAT pass rates by gender for the City-Funded CPAT Testing as described in Section III.9(a); and (i) notice of results of vendor analysis regarding development of permanent physical abilities test. The inclusion of this provision as forward looking language does not imply in any way whether the City has or has not complied with this obligation as of the date of execution of this Stipulation. The City will consider additional reasonable requests regarding information relating to processing of Settlement Class Members and development and adoption of a new physical abilities test.

ARTICLE VIII.
CONDITIONS TO SETTLEMENT

1. This Settlement Agreement shall be of no force or effect and shall be void *ab initio* without prejudice to the rights of any Party unless each of the following conditions is fully satisfied:

(a) Approval of the Settlement by the Chicago City Council;

(b) Preliminary approval by the Court of the Settlement Agreement pursuant to the terms outlined herein and the Court's entry of a Preliminary Approval Order;

(c) The City's election not to terminate this Settlement Agreement pursuant to Article XI hereof;

(d) Entry of the Final Judgment by the Court; and

(e) Occurrence of the Settlement Effective Date.

ARTICLE IX.
COURT APPROVAL OF NOTICE TO THE SETTLEMENT CLASS

A. Preliminary Approval.

1. Plaintiffs shall promptly submit this Settlement Agreement to the Court together with a Motion for Preliminary Approval of Settlement and Certification of Settlement Class, which will seek an order:

(a) Preliminarily approving the Settlement;

(b) Approving Claims Administration Services to be provided by the Claims Administrator;

(c) Approving the form and content of the Class Notice and Summary Class Notice consistent with the provisions hereof, respectively, for mailing and publication to notify Settlement Class Members of the hearing on final approval of the Settlement Agreement;

(d) Approving as to form and content the proposed Proof of Claim Form;

(e) Finding that the mailing of the Class Notice and Publication of the Summary Class Notice constitute the best and most practicable notice to Settlement Class Members under the circumstances, and are due and sufficient notice of the Final Approval Hearing, proposed Settlement Agreement and other matters set forth in the Class Notice and Summary Class Notice to all Settlement Class Members and that the Class Notice and Summary Class Notice fully satisfy the requirements of due process, the Federal Rules of Civil Procedure and any other applicable law;

(f) Directing the mailing of the Class Notice, Proof of Claims, and instructions by first class mail to Settlement Class Members;

(g) Conditionally certifying the Settlement Class for purposes of settlement and preliminarily appointing Plaintiffs Vasich, Dooley, Minnick, Theeke, Basic and Evans, as Settlement Class Representatives and preliminarily appointing Settlement Class Counsel as counsel of the Settlement Class;

(h) Preliminarily approving the proposed Service Awards to Individual Plaintiffs and Settlement Class Representatives;

(i) Scheduling the Final Approval Hearing on the question of whether the proposed Settlement should be finally approved as fair, reasonable, and adequate as to the members of the Settlement Class.

2. If the Court enters the Preliminary Approval Order, then at the resulting Final Approval Hearing, Plaintiffs and the City each through their counsel of record, shall address any written objections from Settlement Class Members or any concerns from Settlement Class Members who attend the hearing as well as any concerns of the Court, if any, and shall and hereby do, unless provided otherwise in this Settlement Agreement, stipulate to final approval of this Settlement Agreement and entry of the Final Judgment by the Court.

ARTICLE X.
CLASS NOTICE AND CLAIMS PROCEDURE

A. The Claims Administrator's Role.

1. The City will provide to the Claims Administrator information in electronic format regarding all Settlement Class Members, including Last Known Addresses and Social Security numbers.

2. For Settlement Class Members who submitted an Interest Card to CFD, the Claims Administrator shall use the mailing address on the Interest Card. For all other Settlement Class Members, prior to mailing the Class Notices, the Claims Administrator will update the addresses for the Settlement Class Members using the National Change of Address database and/or other available resources deemed suitable by and at the sole discretion of the Claims Administrator, as well as information Settlement Class Counsel or a Settlement Class Member provides to the CFD during the Preliminary Processing Session or otherwise. To the extent this process yields an Updated Address, that Updated Address shall replace the Last Known Address and be treated as the new Last Known Address for purposes of this Settlement Agreement and for subsequent mailings in particular.

3. The Claims Administrator shall supply Settlement Class Counsel and Defendant's Counsel with an updated address list for the Settlement Class Members, reflecting any corrections or updates made by the Claims Administrator in the course of administering Class Notices to the Class, and the receipt of any challenges and written objections or Requests for Exclusion.

4. Unless the Parties agree otherwise in writing or the Court so orders, the Class Notices shall be mailed to the Last Known Address or Updated Address (if applicable) of the Settlement Class Members by first class mail no later than the Class Notice Mailing Deadline. In addition to the Class Notice, each Settlement Class Member will also receive a Proof of Claim. Enclosed with all Class Notices, and Proof of Claim Forms shall be a postage-prepaid envelope, pre-printed with the following address:

Vasich/City of Chicago Firefighter Class Action Administrator
c/o [Name of Claims Administrator]
[Address of Claims Administrator]

5. The Claims Administrator will use all appropriate tracing methods to ensure that the Class Notice packets are delivered to all Settlement Class Members. Any returned envelopes from the initial mailing with forwarding addresses will be used by the Claims Administrator to locate missing Settlement Class Members and re-mail the Class Notice to the correct or Updated Address.

6. In the event that the first mailing of the Class Notice to any Settlement Class Member is returned without a forwarding address, the Claims Administrator will immediately conduct a standard skip trace in an effort to ascertain the current address for the particular Settlement Class Member in question. If a more recent or accurate address is found by this method, the Claims Administrator will resend the Class Notice to the Updated Address within three (3) calendar days of identifying the new address information.

7. The Claims Administrator shall publish the Summary Class Notice, consistent with the provisions hereof, on three (3) occasions in the legal notice section of *The Chicago Tribune* in three (3) consecutive weeks, beginning no later than fourteen (14) days following entry of the Preliminary Approval Order.

8. Costs of printing and mailing the Class Notice, the Summary Class Notice, and publication of the Summary Class Notice constitute an Administrative Expense as defined in Article III.4 hereof, and thus payable by the City. Further, all reasonable costs incurred by the Claims Administrator shall be considered Administrative Expenses to be paid by the City.

9. The Claims Administrator shall maintain a toll-free VRU telephone line and answering service containing recorded answers to frequently asked questions, the content of which shall be agreed upon between Defendant's Counsel and Settlement Class Counsel along with an option permitting potential Settlement Class Members to speak to a live operator to leave messages in a voicemail box.

10. The Claims Administrator shall maintain the Website for this Settlement for at least 90 days after the expiration of the period for the submission of Proofs of Claim.

11. At least five (5) days prior to the Final Approval Hearing, the Claims Administrator shall prepare, and the Parties shall provide the Court, a declaration by the Claims Administrator of due diligence and proof of mailing of the Class Notices and Proof of Claim required to be mailed to Settlement Class Members by this Settlement Agreement, and of the delivery results of the Claims Administrator's mailings including tracing and re-mailing efforts.

12. The Parties believe that compliance with the procedures described in this Article constitutes due and sufficient notice to Settlement Class Members of this Settlement and the Final

Approval Hearing and satisfies the requirements of due process. Nothing else shall be required of the Parties, Settlement Class Counsel or Defendants' Counsel to provide Class Notice of the Settlement and the Final Approval Hearing.

B. Settlement Class Members' Duties.

1. Settlement Class Members shall be required to complete and submit to the Claims Administrator a Proof of Claim, postmarked no later than the Class Notice Response Deadline, unless otherwise ordered by the Court, to become a Settlement Class Member entitled to receive a Settlement Class Member Backpay Award. The Proof of Claim shall provide that by submitting a Proof of Claim to the Claims Administrator, the Settlement Class Member releases and waives all Released Claims. Unless a Settlement Class Member submits a valid and timely Request for Exclusion (as described in Article XI hereof), a Settlement Class Member who takes no action will be bound by the Final Judgment, and will not receive any payment. In the event a Settlement Class Member submits both a Request for Exclusion and a timely Proof of Claim, the Proof of Claim will be honored and the Request for Exclusion will be disregarded, and the individual shall be treated as a Settlement Class Member.

2. Settlement Class Members, other than Individual Backpay Recipients, who are hired by the CFD and enter either the 2013 or 2014 Classes, are not eligible for a Settlement Class Member Backpay Award.

ARTICLE XI.
PROCEDURE FOR REQUESTING EXCLUSION AND OBJECTING TO THE SETTLEMENT

A. Opt Outs.

1. Settlement Class Members who wish to be excluded from the Settlement shall notify the Claims Administrator in writing that they want to exclude themselves from (i.e., opt out

of) the Settlement Class. The Requests for Exclusion must be in writing and include the Settlement Class Member's name, address, and last four digits of her Social Security number, and state, in writing, the desire to be excluded. The Request for Exclusion must be postmarked no later than the Class Notice Response Deadline, or as otherwise ordered by the Court, to be considered timely. Settlement Class Members shall be permitted to rescind their Request for Exclusion prior to the Final Approval Hearing, or as otherwise ordered by the Court.

2. No Settlement Class Representative or Individual Plaintiff may submit a Request for Exclusion.

3. Settlement Class Counsel shall use their best efforts to encourage Settlement Class Members not to opt out of or object to this Settlement Agreement.

4. Any Settlement Class Member who submits a Request for Exclusion shall not be eligible for hiring by the CFD pursuant to Article VII hereof, or for a Backpay Award. Notwithstanding the foregoing, Settlement Class Members who opt out shall be treated in the same manner as all other candidates who failed the PAT and have been invited to reapply for the position of Firefighter/EMT by passing the CPAT and meeting other Normal and Customary Hiring Standards. Once a Settlement Class Member opts out, Priority Processing will not apply and her application will be treated in the same manner as those of other candidates who failed the PAT and have been invited to reapply.

5. The City retains the right to assert, and does not waive, any and all defenses to liability and damages it has in the Action in the event a Non-Settlement Group Member subsequently attempts to assert any claim against the City arising from the same set of operative facts and issues alleged in the Action.

B. Objections.

Settlement Class Members other than opt-outs who wish to object to this Settlement must do so in writing or in any other manner ordered by the Court. Written objections must include the Settlement Class Member's name, address, and last four digits of her Social Security number, and state the basis of the objection. Opt-outs may not object to the Settlement. All written objections must be sent to the Claims Administrator, Settlement Class Counsel and Defendant's Counsel and postmarked no later than the Class Notice Response Deadline, or as otherwise ordered by the Court, to be considered timely. The Settlement Class Members shall be permitted to withdraw their objections prior to the Final Approval Hearing, or as otherwise ordered by the Court.

C. The City's Right to Terminate.

The City shall have the right, at its sole discretion, to terminate this Settlement Agreement in the event ten (10) or more Settlement Class Members submit Requests for Exclusion.

D. Processing of Requests for Exclusion and Objections.

1. The Claims Administrator shall (a) record all original Requests for Exclusion and objections to the settlement that it receives; (b) serve copies on Settlement Class Counsel and the Defendant's Counsel no later than three (3) business days after receipt, or immediately if received within five (5) business days of the Final Approval Hearing. The Parties shall file true and accurate copies of Requests for Exclusion with the Clerk of the Court no later than five (5) business days prior to Final Approval Hearing or immediately if received less than five (5) business days prior to the Final Approval Hearing.

2. The Claims Administrator shall also (a) record all original rescission of Request for Exclusions and withdrawal of objection statements it receives; (b) serve copies on Settlement Class Counsel and Defendant's Counsel no later than three (3) business days after receipt, or

immediately if received within five (5) business days of the Final Approval Hearing. The Settlement Class Counsel shall file the date-stamped originals with the Clerk of the Court no later than five (5) business days prior to the Final Approval Hearing or immediately if received less than five (5) business days prior to the Final Approval Hearing.

ARTICLE XII.
MOTION FOR FINAL APPROVAL AND FINAL APPROVAL HEARING

A. Motion for Final Approval.

Prior to the Final Approval Hearing and consistent with the rules imposed by the Court, Plaintiffs shall move the Court for entry of final approval of the Settlement Agreement and entry of the Final Judgment. Plaintiffs and Plaintiffs' Counsel shall be responsible for justifying the agreed upon payments set forth in Article V of this Settlement Agreement. The City agrees not to oppose such payments. To the extent possible the motion seeking entry of the Final Judgment shall be noticed for the same day as the Final Approval Hearing. The Parties shall take all reasonable efforts to secure entry of the Final Judgment. If the Court rejects the Settlement Agreement, or fails to enter the Final Judgment, this Settlement Agreement shall be void *ab initio*, and the City shall have no obligation to make any payments under the Settlement Agreement, except for payments to the Claims Administrator for services performed up to that time or as otherwise provided herein.

B. Final Judgment.

Settlement Class Counsel will submit a proposed Final Judgment which shall include findings and orders:

1. Approving the Settlement Agreement, incorporating by reference the terms and conditions of the Settlement Agreement in the Final Judgment, making the Settlement Agreement

an exhibit to the Final Judgment, adjudging the terms thereof to be fair, reasonable, and adequate, and directing that its terms and provisions be carried out;

2. Approving the payment of Service Awards to the Individual Plaintiffs and Settlement Class Representatives;

3. Approving the payment of Backpay Awards pursuant to the procedure in Article V hereof;

4. Approving the hiring process set forth in Article VII hereof;

5. Approving the Claims Administration Process;

6. Approving the CFD's interim use of CPAT pursuant to Article VI hereof;

7. Ordering the City to make an exception to the provisions of City of Chicago Ordinance Section 2-152-410(e), but only for the Individual Plaintiffs and Settlement Class Representatives, and only for purposes of this Settlement;

8. Providing that the Court terminates its jurisdiction over Released Claims, except to the extent necessary to distribute the Backpay Awards and administer, implement, interpret or enforce the Final Judgment;

9. Directing the Parties to take all actions necessary to effectuate the terms or conditions of the Final Judgment and Settlement Agreement; and

10. Determining there is no just reason for delay and directing that the Final Judgment and Order be final and appealable.

C. Fulfillment and Completion of Final Judgment.

1. Following entry of the Final Judgment, the Parties will act to assure the timely execution and the fulfillment of all its provisions, including, but not limited to, the following:

(a) Should an appeal be taken from the final approval of the Settlement Agreement, all Parties will support the approval order on appeal; and

(b) Settlement Class Counsel and the Defendant's Counsel will assist the Claims Administrator as needed or requested in the process of identifying and locating Settlement Class Members entitled to payments from the Backpay Award, Service Award or Individual Backpay Award and assuring delivery of such payments.

2. Within ten (10) days after the Hiring Election Date, the City shall transmit payment of the Backpay Award amount Sum to the Claims Administrator for distribution of Backpay Awards.

3. The Claims Administrator shall make Backpay Awards to Settlement Class Members and Individual Backpay Plaintiffs under this Agreement, as well as Service Awards to the Individual Plaintiffs and Settlement Class Representatives by issuing one check (or more if necessary for administrative convenience) payable to each Settlement Class Member, in the amount of his or her relevant Backpay and/or Service Award, less relevant withholdings. The Claims Administrator shall mail said check(s), and any necessary tax reporting forms, to each Settlement Class Member at his or her Last Known Address, or Updated Address if obtained.

4. Following the mailing of the payments to Settlement Class Member Backpay Award recipients, Individual Backpay Recipients and Settlement Class Representatives set forth in Article V hereof, the Claims Administrator shall provide a declaration of payment, which Defendant's Counsel will file with the Court within thirty (30) days of mailing the respective payments to Settlement Class Member Backpay Recipients, Individual Backpay Recipients, and Settlement Class Representatives.

5. Settlement Class Member Backpay Recipients who are sent payments shall have ninety (90) calendar days after mailing by the Claims Administrator to cash their settlement

checks. If such Settlement Class Members do not cash their checks within that period, those checks will become void and a stop payment will be placed on the uncashed checks. In such event, those Settlement Class Members will be deemed to have waived irrevocably any right in or claim to a settlement payment, and any funds remaining, after deducting stop payment fees, shall be paid as a *cy pres* to the Ende, Menzer, Walsh & Quinn Retirees', Widows' and Orphan's Assistance Fund.

ARTICLE XIII.
TERMINATION OF SETTLEMENT

A. Right to Withdraw.

In the event the Court (a) declines to enter the Preliminary Approval Order, Final Judgment or multiple orders, which together provide the same relief, or (b) enters the Preliminary Approval Order, Final Judgment or multiple orders that together provide relief which is substantively different than provided herein, the Parties shall have the right, within fourteen (14) days thereafter, to withdraw from this Settlement Agreement by written notice to the other Parties. In the event that any Settlement Class Member appeals the entry of the Final Judgment, and on appeal any appellate court reverses or substantially modifies the Final Judgment, or orders relief which is substantively different than provided therein, each of the Parties shall have the right, within fourteen (14) days thereafter, to withdraw from this Settlement by written notice to the other Party. The determination of whether any difference between the forms of Preliminary Approval and Final Approval Order, or any modification on appeal, is substantive, shall be made by each of the Parties in their sole discretion.

B. Effect of Attorneys' Fees.

Neither a modification nor reversal on appeal of any amount of attorneys' fees awarded by the Court shall be deemed a substantive modification or reversal of a part of the substantive terms of the Final Judgment.

C. Administrative Expenses.

In the event that any of the Parties elects to withdraw from this Settlement Agreement in accordance with Article XIII above, then the cost of any Administrative Expenses incurred prior to the date of termination shall be borne by the City.

D. Payment of Attorneys' Fees.

In the event that either of the Parties elects to withdraw from this Settlement Agreement in accordance with Article XIII above, then each Party shall pay their own attorneys' fees, and Defendant shall have no obligation whatsoever for the payment of Settlement Class Counsel's or Torrick Ward's Attorneys' Fees.

E. Reversion to Status Prior to Settlement.

If this Settlement Agreement is not approved, or is otherwise terminated or canceled pursuant to its terms, the Parties to this Stipulation shall be deemed to have reverted to their respective status as it existed prior to the execution of this Settlement Agreement, and they shall proceed in all respects as if this Settlement Agreement had not been executed and the related orders and judgments had not been entered, preserving all of their respective claims and defenses in the Action. In such event, Plaintiffs and Settlement Class Members will be provided the same opportunity for hire, on the same basis, as male applicants who failed the prior PAT.

ARTICLE XIV.
RELEASES

A. Release by Operation of Final Judgment.

Upon the Settlement Effective Date, Plaintiffs and each of the Settlement Class Members shall be deemed to have, and by operation of the Final Judgment shall have, fully, finally, and forever released, dismissed with prejudice, relinquished and discharged all Released Claims.

B. Settlement Class Representatives Release.

Prior to distribution of any Backpay Awards, Settlement Class Representatives and Individual Plaintiffs each agrees to execute a general release of all known and Unknown Claims they might have against the Released Parties based on or arising from or related in any manner to any allegations in the Third Amended Complaint, except for the obligations of this Settlement Agreement, the form of which is attached hereto as Exhibit F.

C. Proof of Claim to Release.

The Proof of Claim to be submitted by Settlement Class Members shall provide that the Settlement Class Member shall have, fully, finally, and forever released, dismissed with prejudice, relinquished and discharged all Released Claims.

D. Full and Complete Release.

In order to achieve a full and complete release of the City of all claims arising from this lawsuit, each Individual Plaintiff, Settlement Class Representative on behalf of Settlement Class Members and Plaintiffs' Counsel, acknowledge that this Settlement Agreement is meant to include in its effect all claims that were or could have been asserted in this Action, including claims that each Settlement Class Representative, Individual Plaintiff and Settlement Class Counsel asserted or could have asserted on behalf of Settlement Class Members including Unknown Claims.

E. Endorsement Release.

If the City so instructs the Claims Administrator, checks in payment of amounts due to Settlement Class Member Backpay Recipients may contain a brief statement of waiver of claims released pursuant to this Settlement Agreement as part of the endorsement language. Settlement Class Counsel's approval of the endorsement language shall be required, and shall not be unreasonably withheld.

ARTICLE XV.
PRELIMINARY TIMELINE FOR COMPLETION OF SETTLEMENT

The preliminary schedule for Class Notice, approval, and payment procedures carrying out this settlement is below. The schedule may be modified depending on whether and when the Court grants necessary approvals and orders notice to the class, and sets further hearings. In the event of such modification, the Parties shall cooperate in order to complete the settlement procedures as expeditiously as reasonably practicable.

1. Preliminary Approval Hearing before the Court at the earliest possible date permitted by the Court;

2. Requests for Exclusion or Objections to the Settlement must postmarked and mailed to the Claims Administrator no later than sixty (60) days after the Claims Administrator mails Class Notice to Settlement Class Members;

3. The Class Notice shall be mailed to Settlement Class Members no later than fourteen (14) days after the Court enters a Preliminary Approval Order;

4. Proof of Claim Forms from Settlement Class Members must be postmarked no later than sixty (60) days after the date of mailing of the Class Notice.

5. Final Approval Hearing before the Court will occur as soon as the Court will hear the Motion for Final Approval after the deadline for the Proof of Claim Forms, Requests for Exclusions and Objections.

ARTICLE XVI.
ATTORNEYS' FEES

The issue of attorneys' fees, costs and expenses for Settlement Class Counsel and Torrick Ward will be resolved either through non-binding mediation, with a mediator to be agreed upon by all Parties or by the Court. If mediation is unsuccessful, Settlement Class Counsel's and Torrick Ward's attorneys' fees, costs and expenses will be decided pursuant to the procedures of Northern District of Illinois Local Rule 54.3. The mediation shall occur within 60 days after entry of the Preliminary Approval Order. The City will pay attorney's fees to Settlement Class Counsel sixty (60) days after the latter of (a) the Settlement Effective Date; or (b) the entry of an order by the Court deciding the issue of attorneys' fees, costs and expenses for Settlement Class Counsel, unless a timely appeal has been filed, in which event the fees will be paid sixty (60) days after the final disposition of any appeals. Settlement Class Counsel will not seek fees and costs in excess of $1.7 million pursuant to Article XVI of this Agreement.

ARTICLE XVII.
NO ADMISSION OF LIABILITY OR WRONGDOING; INADMISSIBILITY OF SETTLEMENT

Nothing contained herein, nor the consummation of this Settlement Agreement, is to be construed or deemed an admission of liability, culpability, negligence or wrongdoing on the part of the City. Each of the Parties hereto has entered into this Settlement Agreement with the intention to avoid further disputes and litigation with the attendant inconvenience and expenses, and by entering into this Agreement does not intend to render it, or consent to its becoming, admissible in

evidence in any other proceeding. Notwithstanding the preceding sentence, this Settlement Agreement shall be admissible in any action or proceeding to approve, interpret or enforce this Settlement Agreement. The Parties agree that this paragraph is not intended to limit in any way any protections afforded by Federal Rules of Evidence 408 or any similar, applicable federal, state or local statute or rule regarding admissibility of this Settlement Agreement.

ARTICLE XVIII.
CONSENT TO MAGISTRATE JUDGE JURISDICTION

Upon execution of this Settlement Agreement, the Parties shall consent to transfer of the case from the docket of Judge Tharp to that of Magistrate Judge Valdez. The Parties will appear before the Court for a monthly status hearing, as scheduled by the Court, to report on the implementation of Article VII of this Settlement Agreement.

ARTICLE XIX.
MISCELLANEOUS PROVISIONS

A. Recitals and Definitions.

The Recitals and Definitions set forth above are essential elements of this Settlement Agreement.

B. Voiding or Modifying the Settlement Agreement.

This Settlement Agreement may not be changed, altered or modified, except in writing and signed by the Parties hereto, and approved by the Court. This Settlement Agreement may not be discharged except by performance in accordance with its terms or by a writing signed by the Parties hereto. Any modification of the Settlement Agreement does not require additional notice to the Settlement Class.

C. Parties' Authority.

The signatories hereby represent that they are fully authorized to enter into this Settlement Agreement and bind the Parties hereto to the terms and conditions hereof.

D. Mutual Full Cooperation.

The Parties agree to fully cooperate with each other to accomplish the terms of this Settlement Agreement, including but not limited to, executing such documents and taking such other action as may reasonably be necessary to implement the terms of this Settlement Agreement. The Parties to this Settlement Agreement shall use their best efforts, including all efforts contemplated by this Settlement Agreement and any other efforts that may become necessary by order of the Court or otherwise to effectuate this Settlement Agreement and the terms set forth herein. As soon as practicable after execution of this Settlement Agreement, Plaintiffs' Counsel shall, with the assistance and cooperation of Defendant's Counsel, take all necessary steps to secure the Court's preliminary and final approval of this Settlement Agreement.

E. Notices.

Unless otherwise specifically provided herein, all Notices (other than the Class Notice), demands or other communications given hereunder shall be in writing and shall be deemed to have been duly given as of the third business day after mailing by United States registered or certified mail, return receipt requested, addressed as follows:

To Plaintiffs' Counsel:

David Borgen
GOLDSTEIN, BORGEN, DARDARIAN & HO
300 Lakeside Dr., Ste. 1000
Oakland, CA 94612
(510) 763-9800
(510) 835-1417 (Fax)
dborgen@gbdhlegal.com

Marni Willenson
Willenson Law LLC
542 S. Dearborn, Suite 610
Chicago, IL 60605
(312) 508-5380
(312) 508-5382 (Fax)
marni@willensonlaw.com

Susan P. Malone
20 N. Clark Street
Suite 1725
Chicago, IL 60602
(312) 726-2639
(312) 372-6067 (Fax)
smalonelaw@sbcglobal.net

Torrick Alan Ward
4007 N. Broadway, Suite 209
Chicago, IL 60613
(312) 720-7522
torrick-ward@att.net

To the City:

Allan T. Slagel (ARDC No. 6198470)
aslagel@shefskylaw.com
Cary E. Donham (ARDC No. 6199385)
cdonham@shefskylaw.com
Heather A. Jackson (ARDC No. 6243164)
hjackson@shefskylaw.com
SHEFSKY & FROELICH LTD.
111 East Wacker Drive, Suite 2800
Chicago, Illinois 60601
Telephone: (312) 527-4000
Facsimile: (312) 527-4011

If the identity of the person(s) to be notified for any party change or their address changes, that party shall notify all other Parties of said change in writing.

F. Successors and Assigns.

This Settlement Agreement shall be binding upon and insure to the benefit of the Parties and their successors and assigns. No Party may assign its rights or obligations under this Settlement Agreement without the prior written consent of all the other Parties.

G. Third Parties.

Nothing in this Settlement Agreement, whether express or implied, is intended to confer any rights or remedies under or by reason of this Settlement Agreement on any Person other than the Parties and their respective successors and assigns, nor is anything in this Settlement Agreement intended to relief or discharge the obligations or liabilities of any third parties to any Party or shall any provision give any third parties any right of subrogation or action over or against any Party.

H. Captions and Interpretations.

Paragraph titles or captions contained herein are inserted as a matter of convenience and for reference, and in no way define, limit, extend or describe the scope of this Settlement Agreement or any provision hereof. Each term of this Settlement Agreement is contractual and not merely a recital. The Parties hereto agree that the terms and conditions of this Settlement Agreement are the result of lengthy, intensive arms-length negotiations between the Parties supervised by an experienced employment law mediator and that this Settlement Agreement shall not be construed in favor of or against any Party by reason of the extent to which any Party or his, her or its counsel participated in the drafting of this Settlement Agreement.

I. Integration Clause.

This Settlement Agreement contains the entire agreement between the Parties relating to the settlement and transaction contemplated hereby, and all prior or contemporaneous agreements, understandings, representations, and statements, whether oral or written and whether by a Party or such Party's legal counsel, are merged herein, including any memoranda of understanding or term sheets. No rights hereunder may be waived except in writing.

J. No Prior Assignments.

This Settlement Agreement shall be binding upon and inure to the benefit of the Parties hereto and their respective heirs, trustees, executors, administrators, and successors. The Parties hereto represent, covenant, and warrant that they have not directly or indirectly, assigned, transferred, encumbered, or purported to assign, transfer, or encumber to any person or entity any portion of any liability, claim, demand, action, cause of action or rights herein released and discharged except as set forth herein.

K. Settlement Class Member Signatories.

It is agreed that because the members of the Settlement Class are so numerous, it is impossible or impractical to have each Settlement Class Member execute this Settlement Agreement. Accordingly, the Individual Backpay Recipients shall sign this Settlement Agreement individually, and the Class Representatives and Settlement Class Counsel shall sign this Settlement Agreement on behalf of the Settlement Class. The Settlement Class Notice will advise all Settlement Class Members of the binding nature of the release and the Court's Final Judgment, upon its entry, shall have the same force and effect as if this Settlement Agreement were executed by each Settlement Class Member.

L. Counterparts.

This Settlement Agreement may be executed in counterparts with signatures transmitted by facsimile or as an electronic image of the original signature. When each Party has signed and delivered at least one such counterpart, each counterpart shall be deemed an original, and, when taken together with other signed counterparts, shall constitute one Settlement Agreement, which shall be binding upon and effective as to all Parties. A facsimile signature shall have the same force and effect as the original scanned signature, if and only if it is transmitted from counsel for one party to the other. Such transmissions shall be interpreted as verification by the transmitting counsel that the signature is genuine and that the party signing has authorized and reviewed the agreement.

M. Jurisdiction and Venue.

The United States District Court for the Northern District of Illinois has jurisdiction over the Parties and the subject matter of this action, and shall have the full power and authority to enforce the Final Judgment.

ON BEHALF OF PLAINTIFFS AND THE SETTLEMENT CLASS:

Samantha Vasich, individually and on behalf of the Settlement Class	RaShaunda Dooley, individually and on behalf of the Settlement Class
Angela Minnick, individually and on behalf of the Settlement Class	Janiece Theeke, individually and on behalf of the Settlement Class
Katrina Basic, individually and on behalf of the Settlement Class	Jessica Evans, individually and on behalf of the Settlement Class
Kimberly Bailey, individually	Hayley Stafen, individually

Jennifer Roccasalva, individually

David Borgen
Goldstein, Borgen, Dardarian & Ho
300 Lakeside Drive, #1000
Oakland, CA 94612

Marni Willenson
Willenson Law LLC
542 S. Dearborn, #610
Chicago, IL 60605

Susan P. Malone
20 N. Clark Street, #1725
Chicago, IL 60602

ON BEHALF OF CITY OF CHICAGO, Defendant

Allan T. Slagel, Esq.
Shefsky & Froelich Ltd.
111 E. Wacker Drive, #2800
Chicago, IL 60601

LIST OF EXHIBITS

Exhibit A	Class Notice
Exhibit B	Final Judgment
Exhibit C	Preliminary Approval Order
Exhibit D	Proof of Claim
Exhibit E	Summary Class Notice

Jennifer Roccasalva, individually

David Borgen
Goldstein, Borgen, Dardarian & Ho
300 Lakeside Drive, #1000
Oakland, CA 94612

Marni Willenson
Willenson Law LLC
542 S. Dearborn, #610
Chicago, IL 60605

Susan P. Malone
20 N. Clark Street, #1725
Chicago, IL 60602

ON BEHALF OF CITY OF CHICAGO, Defendant

Allan T. Slagel, Esq.
Shefsky & Froelich Ltd.
111 E. Wacker Drive, #2800
Chicago, IL 60601

ON BEHALF OF PLAINTIFFS AND THE SETTLEMENT CLASS:

Samantha Vasich, individually and on behalf of the Settlement Class

RaShaunda Dooley, individually and on behalf of the Settlement Class

Angela Minnick, individually and on behalf of the Settlement Class

Janiece Theeke, individually and on behalf of the Settlement Class

Katrina Basic, individually and on behalf of the Settlement Class

Jessica Evans, individually and on behalf of the Settlement Class

Kimberly Bailey, individually

Hayley Stafen, individually

Jennifer Roccasalva, individually

2/29/13

David Borgen
Goldstein, Borgen, Dardarian & Ho
300 Lakeside Drive, #1000
Oakland, CA 94612

Marni Willenson
Willenson Law LLC
542 S. Dearborn, #610
Chicago, IL 60605

Susan P. Malone
20 N. Clark Street, #1725
Chicago, IL 60602

ON BEHALF OF CITY OF CHICAGO, Defendant

Allan T. Slagel, Esq.
Shefsky & Froelich Ltd.
111 E. Wacker Drive, #2800
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111 E. Wacker Drive, #2800
Chicago, IL 60601

one party to the other. Such transmissions shall be interpreted as verification by the transmitting counsel that the signature is genuine and that the party signing has authorized and reviewed the agreement.

M. Jurisdiction and Venue.

The United States District Court for the Northern District of Illinois has jurisdiction over the Parties and the subject matter of this action, and shall have the full power and authority to enforce the Final Judgment.

ON BEHALF OF PLAINTIFFS AND THE SETTLEMENT CLASS:

Samantha Vasich, individually and on behalf of the Settlement Class

RaShaunda Dooley, individually and on behalf of the Settlement Class

Angela Minnick, individually and on behalf of the Settlement Class

Janice Theeke, individually and on behalf of the Settlement Class

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ON BEHALF OF CITY OF CHICAGO, Defendant

Allan T. Slagel, Esq.
Shefsky & Froelich Ltd.
111 E. Wacker Drive, #2800
Chicago, IL 60601

This Settlement Agreement may be executed in counterparts with signatures transmitted by facsimile or as an electronic image of the original signature. When each Party has signed and delivered at least one such counterpart, each counterpart shall be deemed an original, and, when taken together with other signed counterparts, shall constitute one Settlement Agreement, which shall be binding upon and effective as to all Parties. A facsimile signature shall have the same force and effect as the original scanned signature, if and only if it is transmitted from counsel for one party to the other. Such transmissions shall be interpreted as verification by the transmitting counsel that the signature is genuine and that the party signing has authorized and reviewed the agreement.

M. Jurisdiction and Venue.

The United States District Court for the Northern District of Illinois has jurisdiction over the Parties and the subject matter of this action, and shall have the full power and authority to enforce the Final Judgment.

ON BEHALF OF PLAINTIFFS AND THE SETTLEMENT CLASS:

Samantha Vasich, individually and on behalf of the Settlement Class	RaShaunda Dooley, individually and on behalf of the Settlement Class
Angela Minnick, individually and on behalf of the Settlement Class	Janiece Theeke, individually and on behalf of the Settlement Class
Katrina Basic, individually and on behalf of the Settlement Class	Jessica Evans, individually and on behalf of the Settlement Class
Kimberly Bailey, individually	Hayley Stafen, individually
Jennifer Roccasalva, individually	David Borgen Goldstein, Borgen, Dardarian & Ho 300 Lakeside Drive, #1000

8-30-13

8-30-13

Counsel for Jennifer Roccasalva

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SAMANTHA VASICH, RASHAUNDA DOOLEY, ANGELA MINNICK, JANIECE THEEKE, KATRINA BASIC, and JESSICA EVANS individually and on behalf of all others similarly situated, and KIMBERLY BAILEY, HAYLEY STAFEN, and JENNIFER ROCCASALVA, individually

Plaintiffs,

vs.

CITY OF CHICAGO, a municipal corporation

Defendant.

Case No.: 1:11-cv-04843

Magistrate Judge Maria Valdez

NOTICE OF PROPOSED CLASS ACTION SETTLEMENT
AND FAIRNESS HEARING

PLEASE READ THIS NOTICE CAREFULLY

IT INFORMS YOU OF A PROPOSED CLASS ACTION SETTLEMENT AGREEMENT THAT MAY AFFECT YOUR RIGHTS

Women who applied for the job of City of Chicago firefighter/EMT in 2006 and later failed the Physical Abilities Test (PAT) filed a class action lawsuit that was recently settled. You may be part of the Settlement Class and have rights under the Settlement: 1) To reapply for the Firefighter/EMT job or 2) To receive money from the Settlement Fund. This Notice explains your rights.

THE SETTLEMENT CLASS

The Settlement Class includes women who passed the **2006 written exam** to become a Chicago Fire Department ("CFD") firefighter/EMT and failed the physical abilities test (PAT) when it was administered between December 2007 and April 2010.

If this definition includes you, you may be a Settlement Class Member and had the right to reapply for the job or receive money. If you reapplied and qualify, you **will be hired** in either 2013 or early 2014. If you are **not** hired by CFD in 2013 or 2014 and you timely file a claim as set forth below, you will receive money from the Settlement Fund. Please read below for more information**.**

Women who have reached the age of 38 or will turn 38 before October 1, 2013 **ARE** in the Settlement Class and **WILL** receive money under the Settlement if they timely submit a claim, as set forth herein. But they do not qualify to reapply because a City ordinance does not permit the hiring of firefighters who have reached age 38.

Women who were notified before July 2011 that they were disqualified for some reason **other than** failing the PAT are **not** in the Settlement Class.

Women who applied to be a Chicago firefighter in **1995** (not 2006) are **not** in the Settlement Class.

Women who **passed** the PAT but were disqualified for some reason are **not** in the Settlement Class.

BASIC INFORMATION

1. Why Did I Get This Notice?

You received this Notice either because (a) you requested it or (b) CFD records indicate that you may be a member of the Settlement Class because the City sent you notice that you failed the firefighter/EMT physical abilities test (PAT) between December 2007 and April 2010.

2. What Is The Lawsuit About?

The lawsuit alleges that the physical abilities test (PAT) discriminated against female applicants. By agreeing to the proposed Settlement, the City is not admitting that it did anything wrong. The City denies all wrongdoing.

3. What are the Benefits of the Settlement?

The City has agreed to stop using the PAT and adopt a different physical test to hire firefighter/EMTs. For 2013 and 2014, the City is using the Candidate Physical Abilities Test (the "CPAT"), licensed by the International Association of Fire Firefighters. The Plaintiffs who filed the lawsuit have not endorsed the CPAT. However, they have agreed to the City's use of the CPAT for hiring Settlement Class Members under the Settlement because they believe it is an improvement compared to the PAT previously used by the City and because the CPAT is available now.

Under the Settlement, Settlement Class Members under the age of 38 were eligible for a second opportunity to be hired. The hiring process began in May 2013. If you are under the age of 38, you should have received a notice of your right to reapply and begin processing. If you did not participate in processing, you are no longer eligible to reapply for the job but will receive money under the Settlement if you timely submit a claim as set forth herein.

Settlement Class Members who are not hired for any reason (e.g. because they are over 38, don't want the job, don't pass the CPAT, decide to drop out for any reason etc.) will be eligible for a share of the Class Settlement Fund. The Class Settlement Fund will total $1,590,023, which will be divided among eligible Settlement Class Members who file claims on time. To file a claim and receive money under the Settlement, you must follow the instructions described below.

4. Who Brought the Lawsuit, and What Additional Benefits Will They Receive?

The Plaintiffs in the lawsuit are Samantha Vasich, RaShaunda Dooley, Jessica Evans, Katrina Basic, Angela Minnick, Janiece Theeke, Kimberly Bailey, Hayley Stafen and Jennifer Roccasalva. Plaintiffs Vasich, Dooley, Evans, Basic, Minick and Theeke acted as Settlement Class Representatives and will receive a total of $70,000 (split among them) for their service to the Class. Some of the Plaintiffs had filed their own charges of discrimination with the Equal Employment Opportunity Commission and filed individual claims in this lawsuit. Those Plaintiffs will also receive individual monetary payments under the Settlement totaling $268,000 ($42,000 to Plaintiffs Minnick, Theeke, Stafen and Bailey; $17,000 to Plaintiff Basic; $73,000 to Plaintiff Evans; and $10,000 to Plaintiff Roccasalva). The Plaintiffs are eligible to receive both money under the Settlement and a firefighter/EMT job, if they qualify for the job.

In addition, the Plaintiffs who held the rank of Paramedic in Charge prior to 2009 will also receive a pro rata share of $75,000 if they are hired as Firefighter/Paramedics in either the 2013 or 2014 Fire Academy Classes. If none of Plaintiffs who held the rank of Paramedic in Charge prior to 2009 are hired as Firefighter/Paramedics in the 2013 or 2014 Fire Academy Class, then the City shall pay Settlement Class Counsel $50,000 as reimbursement for pretest training provided to Settlement Class Members.

5. How Do I Submit A Claim?

To receive a benefit from this Settlement, you must submit a Claim Form by mail. **YOUR CLAIM MUST BE POSTMARKED NO LATER THAN [MONTH DAY, 2013] TO BE CONSIDERED TIMELY. IF YOUR CLAIM IS NOT POSTMARKED BY THIS DATE, YOU WILL HAVE WAIVED YOUR RIGHT TO RECEIVE ANY MONEY FROM THE SETTLEMENT FUND.**

If you are reapplying for the job, you should still file a claim. If you fail to file a claim, and you don't get a job offer, you won't get a settlement payment either. Filing a claim will not harm your chances to be hired. You should pursue the job and also file a claim.

Complete and sign the enclosed Claim Form, indicating that you wish to participate in the Class Settlement, and submit it to the Claims Administrator at the address below.

Vasich v. City of Chicago Claims Administrator

c/o Class Action Administration, Inc.
PO Box 6848
Broomfield, CO 80021

6. Must I Submit a Claim?

To receive any money under the Settlement, you must complete the enclosed Claim Form and mail it on time.

You do not need to do anything to become part of the Settlement Class. As a Settlement Class Member, you will be bound by all proceedings, orders and judgments entered in connection with the Proposed Settlement, including the release of claims, even if you do not file a Claim Form.

7. What If I Do Not Want To Be Part of The Settlement?

If you do not want to be a member of the Settlement Class and participate in the Settlement, then you must opt out of the Settlement. To opt out, send a letter to the Claims Administrator at the address below requesting exclusion from the Class.

Vasich v. City of Chicago Claims Administrator
c/o Class Action Administration, Inc.
PO Box 6848
Broomfield, CO 80021

TO OPT OUT, YOU MUST MAIL YOUR LETTER REQUESTING EXCLUSION NO LATER THAN [MONTH DAY, 2013]. IF YOUR LETTER IS NOT POSTMARKED BY [MONTH DAY, 2013] YOUR RIGHT TO OPT OUT WILL BE WAIVED, AND YOU WILL BE BOUND BY ALL ORDERS AND JUDGMENTS ENTERED IN CONNECTION WITH THE SETTLEMENT.

If you opt out, you will not receive any payment under the Settlement and you will not be allowed to comment on or object to the Settlement. However, the release will not apply to you, which means you will retain your rights.

8. How Much Money Will I Receive if I Don't Get the Job?

Class Members who are not hired as CFD firefighter/EMTs in 2013 or 2014 and who file claims on time will share the $1,590,023 Settlement Fund. The fund will be shared per capita, meaning that each Class Member will receive an equal amount.

The amount that each Class Member will receive won't be known until early 2014, because some Class Members who are reapplying for the job are not expected to be hired until that time and only Class Members who **don't** get jobs will share the money. Once it is known how many Settlement Class Members are hired, the

calculation can be done to determine how much the Settlement Class Members who were **not** hired will receive. The amount is estimated to be between $8,500 and $17,000, minus applicable taxes and other necessary withholding.

9. When Will I Get Paid?

Payment is anticipated to be made in 2014 after the start of the first 2014 Fire Academy class, when the amount due to Settlement Class Members who are not hired can be calculated.

10. Who Decides Whether a Claim Form is Valid?

The Claims Administrator decides which claims are valid, subject to review by Settlement Class Counsel and attorneys for the City and/or the Court.

11. Who Are The Attorneys Representing the Class?

Under the Settlement, the Plaintiffs will ask the Court to appoint the attorneys who filed the lawsuit for them as Class Counsel. Attorneys to Plaintiffs and the Settlement Class are:

David Borgen
dborgen@gbdhlegal.com
Goldstein, Borgen, Dardarian & Ho
300 Lakeside Drive, Suite 1000
Oakland, California 94612-3536
Tel. (510) 763-9800
Fax (510) 835-1417

Susan P. Malone
smalonelaw@sbcglobal.net
20 N. Clark St., Suite 1725
Chicago, IL 60606
Tel. (312) 726-2638
Fax (312) 372-6067

Marni Willenson
marni@willensonlaw.com
Willenson Law, LLC
542 S. Dearborn, Suite 610
Chicago, IL 60605
Tel. (312) 508-5380
Fax (312) 508-5382

12. How Will The Lawyers Be Paid?

The Civil Rights Act of 1964, which was the basis for the lawsuit, allows plaintiffs to recover their attorney's fees from the party being sued. Under the Proposed Settlement, the City will pay Settlement Class Counsel's attorney's fees. **You will not be required to pay for attorney's fees as a result of your participation in the Settlement.**

The exact amount of fees to be paid to Class Counsel has not yet been determined and will be resolved either through non-binding mediation, or if that doesn't work, then through local federal court procedures that apply to the determination of attorney's fees (Local Rule 54.3 of the Northern District of Illinois). Settlement Class Counsel have agreed as a part of the Settlement that they will not seek in excess of **$1.7 million**

13. Should I Get My Own Lawyer?

You do not need to hire your own lawyer. However, if you want your own lawyer to speak for you or appear in Court, your attorney will need to file a Notice of Appearance. Hiring a lawyer to appear for you in the lawsuit will be at your own expense.

COMMENTING ON THE PROPOSED SUPPLEMENTAL SETTLEMENT

14. Can I Comment On Or Object To the Proposed Settlement?

If you have comments about, or disagree with, any aspect of the Proposed Settlement, you may express your views to the Court in writing. **If you wish to receive money from the Settlement Fund, you must also file a Claim Form.** The written response should include your name, address, telephone number and a brief explanation of your comment or reason for objection. The document must be signed to ensure the Court's review. The response **must be postmarked on or before _____ [MONTH DAY, 2013]** and be mailed to the Court, Class Counsel (representing Plaintiffs) and Defense Counsel (attorneys for the City) at the addresses below:

COURT
Clerk of Court
US District Court for the
Northern District of Illinois
219 S. Dearborn St., 20th Floor
Chicago, IL 60604

DEFENSE COUNSEL
Allan T. Slagel, Esq.
Cary E. Donham, Esq.
Heather A. Jackson, Esq.
Shefsky & Froelich Ltd.
111 E. Wacker Drive, Ste. 2800
Chicago, IL 60601

CLASS COUNSEL
David Borgen
Goldstein, Borgen, Dardarian & Ho
300 Lakeside Drive, Suite 1000
Oakland, California
94612-3536

CLASS COUNSEL
Susan P. Malone
20 N. Clark St., Suite 1725
Chicago, IL 60606

CLASS COUNSEL
Marni Willenson
Willenson Law, LLC
542 S. Dearborn, Suite 610
Chicago, IL 60605

Your document must clearly state that it relates to Civil Action Number 11-cv-04843.

15. Dismissal With Prejudice, Approval Of The Proposed Settlement and Release Of Claims

If the Court approves the Proposed Settlement, it will enter a judgment dismissing the litigation with prejudice as to all claims of the Settlement Class against the City. In addition, the City will receive from the Settlement Class (except for those

persons who have timely opted out of the Settlement) a release and discharge of all claims, demands, actions, suits and causes of action that have been brought or could have been brought, are currently pending or were pending, by any Settlement Class Member against the City, in any forum, whether known or unknown, asserted or unasserted, under or pursuant to any statute, regulation, common law or equity, that raise the same claim as the ones raised in this case.

This means that all Settlement Class Members who have not opted out of the Settlement will be forever barred from bringing, continuing or being part of any claim or lawsuit against the City of Chicago or the Chicago Fire Department or their employees, personnel or representatives, **as to the claims made or which could have been made in the lawsuit**, for all past events. If you fall within the Settlement Class definition and do not want to be prevented from bringing, continuing or being a part of such a lawsuit, you must opt out from the Settlement Class and Proposed Settlement as explained above in Paragraph 8.

16. The Court's Final Approval Hearing

The United States District Court will hold a Final Approval Hearing on [MONTH DAY, 2013] at [HH:MM] to consider whether the Proposed Settlement is fair, reasonable and adequate. At the Hearing the Court may decide whether to approve the Proposed Settlement. If comments or objections have been timely received, the Court will consider them at that time. Updated information will be posted on the website for this Settlement operated by the Class Action Administrator, **www._____.com**.

17. Must I Attend The Final Approval Hearing?

No. Settlement Class Members are neither expected nor required to attend a final approval hearing. You are welcome to attend, and you can have a personal attorney appear for you at your own expense. If you send written comments or objections, the Court will consider them even if you do not attend.

GETTING MORE INFORMATION

18. Who Do I Contact if I Have Questions?

If you have questions about the Settlement or this Notice, you should call or e-mail Settlement Class Counsel using the information under Question 12.

If you have questions about the Claim Form or Opt-Out Form, you can contact the Claims Administrator by visiting www._____.com or calling toll-free 1-855-326-5674. You should read the information on the website regarding the "Proposed Settlement," or if you call, you the toll-free number above, you should indicate that you are a member of the "Proposed Settlement Class."

Do <u>not</u> contact the judge or the Court with the questions.

You can review and copy the legal documents filed with the Court during regular business hours at the Clerk of Court, United States District Court for the Northern District of Illinois, 219 South Dearborn Street, 20th Floor, Chicago, Illinois 60604 or by using the Public Access to Court Records (PACER) system at https://ecf.ilnd.uscourts.gov/cgi-bin/ShowIndex.pl. You need to set up a PACER account to view records online, and there is a per-page charge for most documents. The most important case-related documents will also be available on the website for this Settlement operated by the Class Action Administrator, **www._____.com**.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SAMANTHA VASICH, RASHAUNDA DOOLEY, ANGELA MINNICK, JANIECE THEEKE, KATRINA BASIC, and JESSICA EVANS individually and on behalf of all others similarly situated, and KIMBERLY BAILEY, HAYLEY STAFEN, and JENNIFER ROCCASALVA, individually,

Plaintiffs,

vs.

CITY OF CHICAGO, a municipal corporation,

Defendant.

Case No.: 1:11-cv-04843

Magistrate Judge Maria Valdez

FINAL JUDGMENT AND ORDER

Plaintiffs Samantha Vasich, RaShaunda Dooley, Angela Minnick, Janiece Theeke, Katrina Basic, and Jessica Evans (the "Settlement Class Representatives"), individually and on behalf of all others similarly situated, and Kimberly Bailey, Hayley Stafen and Jennifer Roccasalva, individually (the "Individual Plaintiffs") (collectively, "Plaintiffs"), and Defendant the City of Chicago ("Defendant"; collectively with Plaintiffs, the "Parties"), having filed a Motion for Final Approval of Class Action Settlement (collectively, the "Motion"), seeking an order granting final approval of the proposed settlement of the Action (the "Settlement"), in accordance with the Stipulation and Agreement of Settlement (the "Stipulation") entered into by the Parties;

Plaintiffs having also filed the Affidavit of the Claims Administrator (the "CAA Affidavit") and the Affidavit of Settlement Class Counsel; due and adequate notice having been given to the Settlement Class; and the Court being otherwise advised;

After review and consideration of the Stipulation, the Motion, the CAA Affidavit, and the Affidavit of Settlement Class Counsel, all other pleadings filed with the Court and the Exhibits annexed thereto, any comments received regarding the proposed Settlement, and having reviewed the entire record in the Action and good cause appearing, after due deliberation, IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. The Court, for purposes of this Final Judgment and Order (the "Order"), adopts all defined terms as set forth in the Stipulation.

2. The Court has jurisdiction over the subject matter of the Action, Plaintiffs, the Settlement Class Members, and Defendant.

3. The Court finds that the distribution of the Notice and Proof of Claim form, and publication of the Summary Notice of Proposed Class Action Settlement, as provided for in the Stipulation and Preliminary Approval Order, constituted the best notice practicable under the circumstances to apprise all persons within the definition of the Settlement Class of the pendency of the Action and their rights in it, the terms of the proposed Settlement of the Action, and afforded Settlement Class Members with an opportunity to present their objections, if any, to the Settlement. The Court finds that the provision of notice to the Settlement Class Members fully met the requirements of Federal Rule of Civil Procedure 23(C)(2)(B), due process, the United States Constitution, and any other applicable law.

4. The Court provides final approval of the prior provisional certification of the Settlement Class, for settlement purposes, pursuant to FED. R. CIV. P. 23(b)(3) consisting of all females who passed the 2006 written qualifying exam to become a CFD firefighter/EMT, who failed the PAT between December 2007 and April 10, 2010, and who were not otherwise

previously disqualified as an applicant for a firefighter/EMT position with the CFD for a reason other than age.

5. Pursuant to FED. R. CIV. P. 23(b)(3), Samantha Vasich, RaShaunda Dooley, Angela Minnick, Janiece Theeke, Katrina Basic, and Jessica Evans are approved as Settlement Class Representatives.

6. With respect to the Settlement Class, this Court expressly finds and concludes that the requirements of FED. R. CIV. P. 23(b)(3) are satisfied as: (a) the Settlement Class Members are so numerous that joinder of all Settlement Class members in the Action is impracticable; (b) there are questions of law and fact common to the Settlement Class that predominate over any individual questions; (c) the claims of the Settlement Class Representatives are typical of the claims of the Class; (d) the Settlement Class Representatives and their counsel have fairly and adequately represented and protected the interests of all the Settlement Class members; and (e) a class action is superior to other available methods for the fair and efficient adjudication of the controversy, considering: (i) the interests of the Settlement Class Members in individually controlling the prosecution of the separate actions, (ii) the extent and nature of any litigation concerning the controversy already commenced by Settlement Class Members, (iii) the desirability or undesirability of continuing the litigation of these claims in this particular forum, and (iv) the difficulties likely to be encountered in the management of the Action.

7. After hearing, and based upon the submission of the Parties, the Motion is granted. This Court approves the Settlement as set forth in the Stipulation, each of the releases, and other terms as fair, reasonable, adequate, and in the best interests of the Settlement Class. The Parties to the Stipulation are therefore directed to consummate and perform its terms.

8. In addition, the Court specifically finds:

(i) The Settlement recovery is commensurate with, if not more so, than the strength of the claims of the Settlement Class.

(ii) Further litigation of the Settlement Class Members' claims would be complex (dispositive motion practice, expert practice, trial, determining which Settlement Class Members could actually recover), lengthy and expensive, and not at all certain to yield a positive result for the Settlement Class.

(iii) There is no indication of any collusion between Class Counsel and Plaintiffs acting as class representatives, on the one hand, and Defendant, on the other. This matter has been vigorously and ably litigated by both sides.

(iv) Settlement Class Counsel, experienced class action attorneys in this niche of the law, have expressed the view that the Settlement terms are fair.

(v) The Settlement Class Members who received appropriate notice have supported the Settlement. [Optional language, depending upon objections: No Settlement Class Members have objected to the Settlement.]

(vi) The stage of proceedings is highly appropriate for a class settlement. The Parties have taken discovery and litigated limited summary judgment issues, and thus have a good sense of the value of the case.

9. In order to consummate the terms of the Stipulation, the Court hereby authorizes and directs the Claims Administrator to make the following payments in accordance with the timing set forth below:

Payee	**Amount**	**Purpose**	**Date**

Samantha Vasich	$15,000	Incentive Award	No later than 60 days after the Settlement Effective Date
Rashaunda Dooley	$15,000	Incentive Award	No later than 60 days after the Settlement Effective Date
Angela Minnick	$10,000	Incentive Award	No later than 60 days after the Settlement Effective Date
Janiece Theeke	$10,000	Incentive Award	No later than 60 days after the Settlement Effective Date
Katrina Basic	$10,000	Incentive Award	No later than 60 days after the Settlement Effective Date
Jessica Evans	$10,000	Incentive Award	No later than 60 days after the Settlement Effective Date
Angela Minnick	[redacted]	Individual Backpay Award	No later than 60 days after the Settlement Effective Date
Janiece Theeke	[redacted]	Individual Backpay Award	No later than 60 days after the Settlement Effective Date
Katrina Basic	[redacted]	Individual Backpay Award	No later than 60 days after the Settlement Effective Date
Jessica Evans	[redacted]	Individual Backpay Award	No later than 60 days after the Settlement Effective Date
Haley Stafen	[redacted]	Individual Backpay Award	No later than 60 days after the Settlement Effective Date
Kimberly Bailey	[redacted]	Individual Backpay Award	No later than 60 days after the Settlement Effective Date
Jennifer Roccasalva	[redacted]	Individual Backpay Award	No later than 60 days after the Settlement Effective Date

10. The Defendant is directed as follows with respect to the Classwide Backpay Amount following the entry of this Final Judgment and Order:

(a) Within seven days of the Hiring Election Date, the Claims Administrator will determine the number of Non-Hired Settlement Class Members.

(b) The amount paid to each Claimant as a Non-Hired Settlement Class Member shall be calculated as follows: $1,590,023 divided by the number of Non-Hired Settlement Class Members who filed valid Proof of Claims rounded down to the nearest dollar.

(c) Payment shall be made to the Non-Hired Settlement Class Members no later than 60 days after the latter of (a) the Settlement Effective Date or the (b) Hiring Election Date.

11. The Defendant shall make a payment of Seventy-Five Thousand Dollars ($75,000) to be divided equally among Individual Backpay Recipients who held the rank of Paramedic in Charge prior to 2009 and who are hired in either the 2013 or 2014 Classes. The payment will be made no later than fifteen (15) days after the latter of (a) the entry of Crossovers into the 2014 Fire Academy Class or (b) the Settlement Effective Date. In the event that no Individual Backpay Recipient who holds the rank of Paramedic in Charge prior to 2009 is hired in either the 2013 or 2014 Class, the City shall pay Settlement Class Counsel Fifty Thousand Dollars ($50,000) as reimbursement for pretest training provided to Settlement Class Members but no other payment need be made under this paragraph.

12. As of the date of the entry of this Order, the Hiring Process set forth in Article VII.C as it relates to the 2013 Class has been completed. Defendant is directed to complete hiring of qualified Plaintiffs and Settlement Class Members for the 2014 Class pursuant to Article VII of the Stipulation and the following:

(a) Settlement Class Member hiring shall be subject to the City Ordinance § 2-152-410(e) limiting the hiring of firefighters to persons less than 38 years of age.

(b) Settlement Class Members who are New Hires selecting a CPAT Completion Date of December 31, 2013 (at the Second Stage Processing, or as modified pursuant to Article VII(C)(3)(b) of the Stipulation) shall have until December 31, 2013 to present their CPAT Cards.

(c) Settlement Class Members who are Crossovers and who selected the later CPAT Completion Date shall have until the first day of the 2014 Class to present a CPAT Card to CFD.

(d) All Settlement Class Members entering the 2014 Class must have successfully completed all Pre-Hiring Processing no later than fourteen (14) calendar days prior to Final Processing for the 2014 Class.

(e) All New Hires selecting a CPAT Completion Date of December 31, 2013 who present a CPAT Card by December 31, 2013 and who are deemed fully qualified pursuant to the Normal and Customary Hiring Standards will be hired into the 2014 Class.

(f) All Settlement Class Members who are Crossovers who selected the later CPAT Completion Date submit a CPAT Card by the first day of the 2014 Class and who are deemed fully qualified pursuant to the Crossover Hiring Standards will be hired into the 2014 Class.

13. After completion of hiring by CFD for the 2014 Class, the following process shall apply to the potential hiring of Deferred Settlement Class Members for a subsequent Fire

Academy class so long as the 2006 Eligibility List is being used to hire any candidates for the second 2014 Fire Academy Class:

(a) Settlement Class Member hiring shall be subject to the City Ordinance § 2-152-410(e) limiting the hiring of firefighters to persons less than 38 years of age.

(b) Deferred Settlement Class Members who are deemed qualified under CFD's Normal and Customary Hiring Standards and who present a CPAT Card no less than 60 days prior to the first day of a second 2014 Fire Academy Class will receive offers of employment from CFD to enter the second 2014 Fire Academy Class.

(c) In order to receive an offer of employment pursuant to Paragraph 13(b) above, however, each Deferred Settlement Class Member must elect in writing on or before the Hiring Election Date whether to (i) continue processing for possible hiring by the CFD as a Firefighter/EMT and waive any right to a Backpay Award, or (ii) receive a Backpay Award and waive any right to hiring by the CFD as a Firefighter/EMT.

(d) At least fourteen (14) prior to the Election Date, the City will provide Settlement Class Counsel with the names and Updated Addresses of all Deferred Settlement Class Members who will be required to make an election. A Deferred Settlement Class Member who elects to waive any right to hiring by the CFD or fails to timely make an election in writing is a Non-Hired Settlement Class Member.

In the event the City notifies Settlement Class Counsel that it does not intend to select and train another Fire Academy class consisting of applicants off of the 2006 Eligibility List but does thereafter hire another class consisting, in whole or

in part, of applicants off of the 2006 eligibility list, Deferred Settlement Class Members who elected to receive a proportionate share of the Classwide Backpay Amount shall be offered at such time the opportunity to continue processing for potential hire into the Fire Academy class subject to their repayment to the City of the net amount, if any, already received as a proportionate share of the Classwide Backpay Amount. Any funds recovered by the City pursuant to this paragraph shall be paid as a *cy pres* to the Ende, Menzer, Walsh & Quinn Retirees', Widows' and Orphan's Assistance Fund. Deferred Settlement Class Members processed under this paragraph and who are deemed qualified under CFD's Normal and Customary Hiring Standards and who present a CPAT Card no less than 60 days prior to the first day of a second 2014 Fire Academy Class will receive offers of employment from CFD to enter the second 2014 Fire Academy Class.

14. Defendant is directed to hire the Individual Plaintiffs and the Settlement Class Representatives who are deemed qualified pursuant to the Normal and Customary Hiring Standards or Crossover Hiring Standards (as applicable), and those Individual Plaintiffs and the Settlement Class Representatives shall not be deemed disqualified solely due to age and application of City Ordinance § 2-152-410(e).

15. The Court finds that all persons within the definition of the Settlement Class have been adequately provided with an opportunity to remove themselves from the Settlement Class by executing and returning a "request for exclusion" in conformance with the terms of the Stipulation.

16. Except as to any individual claim of those Persons (identified in Exhibit 1 hereto)

who have validly and timely requested exclusion from the Settlement Class, the Action, and all claims contained therein, as well as all of the Released Claims, are dismissed with prejudice as to Plaintiffs and other Settlement Class Members.

17. The Parties are to bear their own costs, except as provided in the Stipulation and specifically in Article XVI, which sets forth the Parties' agreement as to the resolution of attorneys' fees, costs and expenses for Settlement Class Counsel.

18. By operation of the Final Judgment and Order and under the terms of the Stipulation and releases therein, it is intended to preclude, and shall preclude, Plaintiffs and all other Settlement Class Members from filing or pursuing any Released Claims under federal law or the law of any state.

19. Plaintiffs and the Settlement Class Members are deemed to have, and by operation of the Final Judgment and Order shall have fully, finally, and forever released, relinquished and discharged all Released Claims against each and all of the Released Parties, whether or not such member of the Settlement Class executed or timely delivered the Proof of Claim.

20. Only those Settlement Class Members who have filed valid and timely Proofs of Claim shall be entitled to receive a distribution from the Settlement Fund. The Proof of Claim executed by the Settlement Class Members shall further release all Released Claims against the Released Parties. All Settlement Class Members shall be bound by the releases whether or not they submit a valid and timely Proof of Claim.

21. Neither the Stipulation nor the Settlement, nor any act performed or document executed pursuant to or in furtherance of the Stipulation or the Settlement including this Final Judgment and Order (i) is or may be deemed to be or may be used as an admission of, or

evidence of, the validity of any Released Claim, or of any wrongdoing or liability of Defendant; or (ii) shall be offered in evidence by any Party for any purpose except as provided for in this paragraph. In addition, neither the Stipulation, nor the Settlement, nor any act performed or document executed to or in furtherance of the Stipulation or the Settlement including this Final Judgment and Order shall be construed as an acceptance or endorsement of the CPAT by the Individual Plaintiffs or Settlement Class Representatives for themselves or the Settlement Class or by the Court for any purpose or use other than its interim use as a term and condition of the Stipulation [THE FOLLOWING LANGUAGE DISPUTED (PROPOSED BY PLAINTIFFS/REJECTED BY CITY): and shall not be offered or received in evidence in any action or proceeding, or be used in any way as an admission, concession, or evidence of an acceptance or endorsement of the CPAT for use in employee selection or retention]. The Released Parties may file the Stipulation and/or the Final Judgment and Order in any other action that may be brought against them in order to support a defense based upon principals of res judicata, collateral estoppel, release, good faith settlement, judgment bar, or any theory of claim preclusion or issue preclusion or similar defense. The Parties may file the Stipulation in any proceeding brought to enforce any of the terms or provision of the Stipulation.

22. Only those persons who meet the definition of the Settlement Class identified on Exhibit 1 hereto as having validly filed Requests for Exclusion from the Settlement Class shall not be bound by this Final Judgment and Order.

23. Any order, or any objection to or appeal from any order approving Settlement Class Counsel's Attorney's Fees or incentive payments to Plaintiffs, shall in no way disturb or affect this Judgment and shall be considered separate from this Order.

24. The Court finds that the amount paid and other terms of the Settlement were

negotiated at arm's length and in good faith by the Parties, and reflect a settlement that was reached voluntarily based upon adequate information and after consultation with experienced legal counsel.

25. The Court finds that there is no just reason for delaying enforcement of this Order.

26. [THIS PARAGRAPH DISPUTED (PROPOSED BY PLAINTIFFS/REJECTED BY CITY): The Court retains jurisdiction for monthly status hearings, as scheduled by the Court, until the hiring process is complete.]

By the Court:

_____
Hon. Maria Valdez, Magistrate Judge

Dated:

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SAMANTHA VASICH, RASHAUNDA DOOLEY, ANGELA MINNICK, JANIECE THEEKE, KATRINA BASIC, and JESSICA EVANS individually and on behalf of all others similarly situated, and KIMBERLY BAILEY, HAYLEY STAFEN, and JENNIFER ROCCASALVA, individually,

Plaintiffs,

vs.

CITY OF CHICAGO, a municipal corporation,

Defendant.

Case No.: 1:11-cv-04843

Magistrate Judge Maria Valdez

PRELIMINARY APPROVAL ORDER

Plaintiffs Samantha Vasich, RaShaunda Dooley, Angela Minnick, Janiece Theeke, Katrina Basic, and Jessica Evans (the "Settlement Class Representatives"), on behalf of themselves and all others similarly situated ("Plaintiffs"), and Defendant the City of Chicago ("Defendant"; collectively with Plaintiffs, the "Parties"), having filed a Motion for Preliminary Approval of Class Action Settlement (the "Motion," Docket No. ___), seeking an order granting preliminary approval of the proposed settlement of the Litigation (the "Settlement"), in accordance with the Stipulation and Agreement of Settlement (the "Stipulation") entered into by the Parties;

The Parties being in agreement; and the Court being fully advised;

After review and consideration of the Stipulation and the Motion, and after due deliberation, IT IS HEREBY ORDERED that:

1. The Court, for purposes of this order (the "Preliminary Approval Order"), adopts the defined terms as set forth in the Stipulation.

2. The Court hereby conditionally certifies, solely for purposes of effectuating the Settlement, a Settlement Class pursuant to Federal Rule of Civil Procedure 23(b)(3) consisting of all females who passed the 2006 written qualifying exam to become a CFD Firefighter/EMT, who failed the PAT between December 2007 and April 10, 2010, and who were not, prior to July 19, 2011, notified of their disqualification as an applicant for a Firefighter/EMT position with the CFD for a reason other than failure of the PAT or age.

3. Pursuant to Federal Rule of Civil Procedure 23(b)(3) and for the purpose of settlement only, Samantha Vasich, RaShaunda Dooley, Angela Minnick, Janiece Theeke, Katrina Basic and Jessica Evans are appointed as Settlement Class Representatives.

4. The Court preliminarily approves the payment of Service Awards to the Settlement Class Representatives as follows:

Samantha Vasich	$15,000.00
RaShaunda Dooley	$15,000.00
Angela Minnick	$10,000.00
Janiece Theeke	$10,000.00
Katrina Basic	$10,000.00
Jessica Evans	$10,000.00
TOTAL	**$70,000.00**

5. With respect to the Settlement Class, this Court expressly finds and concludes provisionally and for settlement purposes only, that the requirements of Federal Rule of Civil Procedure 23(b)(3) are satisfied as: (a) the members of the Settlement Class are so numerous that joinder of all members of the Settlement Class in the Litigation is impracticable; (b) there are questions of law and fact common to the Settlement Class that predominate over any individual questions; (c) the claims of the Settlement Class Representatives are typical of the claims of the

Settlement Class; (d) the Settlement Class Representatives and Settlement Class Counsel have fairly and adequately represented and protected the interests of all the Settlement Class members; and (e) a class action is superior to other available methods for the fair and efficient adjudication of the controversy, considering: (i) the interests of the members of the Settlement Class in individually controlling the prosecution of separate actions, (ii) the extent and nature of any litigation concerning the controversy already commenced by members of the Settlement Class, (iii) the desirability or undesirability of continuing the litigation of these claims in this particular forum, and (iv) the difficulties likely to be encountered in the management of the Litigation.

6. The law firms of Goldstein, Borgen, Dardarian & Ho of Oakland, California and Willenson Law LLC, and the Law Office of Susan P. Malone of Chicago, Illinois are appointed as Settlement Class Counsel.

7. Settlement Class Counsel is authorized to act on behalf of the Settlement Class with respect to all acts required by, or which may be given pursuant to, the Stipulation or such other acts that are reasonably necessary to consummate the proposed Settlement set forth in the Stipulation.

8. The Court preliminarily approves the Settlement as set forth in the Stipulation as appearing to be within the range of fairness, reasonableness and adequacy. This preliminary approval is subject to the right of any Settlement Class Member to challenge the fairness, reasonableness and adequacy of the Stipulation, or the fairness and adequacy of their representation by Settlement Class Counsel, and to show cause, if any exists, why final judgment dismissing the Litigation based on the Stipulation should not be ordered herein after due and

adequate notice to the Settlement Class has been given in conformity with this Preliminary Approval Order.

9. By its express terms, the Stipulation is subject to the approval of the Settlement by the Chicago City Council, which the City intends to seek on September 11, 2013. If the Settlement is not approved by the City Council, the City shall immediately report this to the Court and Settlement Class Counsel, and the Settlement, the Stipulation, and this preliminary approval shall have no force and effect, and the Parties will be returned to the *status quo ante* as if the Stipulation had never been entered into.

10. The Court directs and authorizes the City to retain Class Action Administration, Inc. ("CAA") as the Claims Administrator to administer the Settlement in accordance with the terms and conditions of the Stipulation.

11. The Court approves the Class Notice and Summary Class Notice attached to the Stipulation as Exhibits A and E, and finds the Class Notice and Publication of Summary Class Notice: (1) to constitute the best and most practicable notice to the members of the Settlement Class under the circumstances, (2) are due and sufficient notice of the Final Approval Hearing, proposed Settlement and other matter set forth in the Class Notice and Summary Class Notice, and (3) shall fully satisfy the requirements of due process and of Federal Rule of Civil Procedure 23(c)(2)(B).

12. The Court approves the form of the Proof of Claim attached to the Stipulation as Exhibit D.

13. The Court directs and authorizes the Claims Administrator to provide Class Notice to the Last Known Address or Updated Address (if applicable) of all Settlement Class

Members by first class mail by the later of fourteen (14) days after entry of the Preliminary Approval Order or City Council approval (the "Notice Mailing"). Enclosed with all Class Notices shall be a Proof of Claim Form and postage pre-paid envelope addressed to the Claims Administrator.

14. The Court directs and authorizes the Claims Administrator to publish Summary Class Notice, in the form agreed to by the Parties, and attached to the Stipulation as Exhibit E, on three (3) occasions in the legal notice section of the *Chicago Tribune* in three (3) consecutive weeks, beginning the later of fourteen (14) days following entry of the Preliminary Approval Order or City Council approval.

15. The Court directs and authorizes the Claims Administrator to maintain a toll-free VRU telephone line and answering service containing recorded answers to frequently asked questions, the content of which shall be agreed upon between Defendant's Counsel and Settlement Class Counsel along with an option permitting potential Settlement Class Members to speak to a live operator to leave messages in a voicemail box. The Court further directs and authorizes the Claims Administrator to maintain the Website for this Settlement for at least 90 days after the expiration of the period for the submission of Proofs of Claim.

16. At least five (5) days prior to the Final Approval Hearing, the Claims Administrator shall prepare, and the Parties shall provide to the Court, a declaration by the Claims Administrator of due diligence and proof of mailing of the Class Notices and Proof of Claim, and of the delivery results of the Claims Administrator's mailings including tracing and re-mailing efforts.

17. Any Settlement Class Member who objects to the Settlement, any part thereof, the representation of the Settlement Class by Settlement Class Counsel, or who otherwise wishes to be heard, may appear in person or by her attorney at the Final Approval Hearing and present evidence or argument that may be proper or relevant; provided, however, that no person other than the Parties and their counsel shall be heard, and no papers, briefs, pleadings, or other documents submitted by any person shall be considered by the Court, unless such person objects to the Settlement, or any part thereof, in writing by mailing a written objection to the Claims Administrator postmarked no later than sixty (60) days after the Notice Mailing. Settlement Class Members shall be permitted to withdraw their objections at any time prior to the Final Approval Hearing.

18. Any person falling within the definition of the Settlement Class may, upon request, be excluded from the Settlement and the Settlement Class. Any such person must submit to the Claims Administrator a Request for Exclusion postmarked no later than sixty (60) days after the Notice Mailing. The Request for Exclusion may be rescinded at any time prior to the Final Approval Hearing.

19. Any Settlement Class Member who wishes to participate in the Settlement Class Member Backpay Award must submit a Proof of Claim to the Claims Administrator postmarked no later than sixty (60) days after the Notice Mailing. Unless a Settlement Class Member submits a valid and timely Request for Exclusion, a Settlement Class Member who takes no action will be bound by the Final Judgment, and will not receive any payment.

20. If the Settlement Effective Date does not occur for any reason whatsoever, the Settlement (including any modification thereof) made with the consent of the Parties as provided

for in the Stipulation, and any actions taken or to be taken in connection therewith (including this Order and any judgment entered herein), (i) shall be without prejudice, and none of the terms shall be effective or enforceable; (ii) the costs of Class Notice and the Administrative Costs that have been incurred or expended pursuant to the terms of the Stipulation shall be paid by the City; (iii) the Parties shall revert to their Litigation positions immediately prior to the execution of the Stipulation; and (iv) the fact and terms of the Stipulation and Settlement shall not be admissible in any trial of this or any other litigation.

21. All proceedings in the Litigation, other than those proceedings that may be necessary to carry out the terms and conditions of the Settlement are hereby stayed and suspended until further order of this Court.

22. Neither this Preliminary Approval Order, the Motion, the Stipulation, any provisions contained in the Stipulation, any negotiations, statements, or proceedings in connection therewith, nor any action undertaken pursuant thereto shall be construed as, or deemed to be evidence of, an admission or concession on the part of the City or any other person of any liability or wrongdoing by them, or any of them, and shall not be offered or received in evidence in any action or proceeding, or be used in any way as an admission, concession, or evidence of any liability or wrongdoing of any nature, and shall not be construed as, or deemed to be evidence of, an admission or concession that Plaintiffs, any member of the Settlement Class, or any other Person, has suffered any damage. In addition, neither this Preliminary Approval Order, the Motion, the Stipulation, any provisions contained in the Stipulation, any negotiations, statements, or proceedings in connection therewith, nor any action undertaken pursuant thereto shall be construed as an acceptance or endorsement of the CPAT by the Individual Plaintiffs or Settlement Class Representatives for themselves or the Settlement Class

or by the Court for any purpose or use other than its interim use as a term and condition of the Stipulation.

23. The Court reserves the right to approve the Settlement at or after the Final Approval Hearing with such modification as may be consented to by the Parties to the Stipulation and without further notice to the Settlement Class.

24. This matter is set for a hearing on final approval of the Settlement on _____ at ___:__ a.m./p.m.

25. The Parties shall appear before the Court for a status hearing to report on the implementation of Article VII of the Stipulation on _____, 2013 at _____.

Dated: August __, 2013

By the Court:

_____
Hon. Maria Valdez, Magistrate Judge

1245447_5

Vasich v. City of Chicago Claims Administrator
c/o Class Action Administration, Inc.
PO Box 6848
Broomfield, CO 80021

Vasich v. City of Chicago, No. 11-CV-04843
In the United States District Court for the
Northern District of Illinois Eastern Division

Settlement Stip. Exh D

SETTLEMENT CLAIM FORM

XXX0000001

Claim ID: CAA0123456

[Class Member Name]
[Mailing Address 1]
[Mailing Address 2]
[City, State ZIP]

By signing below, I certify that I am a class member and express my intent to participate in the Settlement of Vasich v. City of Chicago, No. 11-C-4843 (U.S. Dist. Court for the N.D. Ill.) and to receive a payment if I am not hired by the Chicago Fire Department.

I understand that by choosing to participate in the Settlement I will be bound by the terms of the Settlement Agreement including the Release of Claims and will not be able to bring my own lawsuit for the same alleged violations.

THIS FORM MUST BE POSTMARKED BY _____ AND MAILED TO THE ADDRESS BELOW IN ORDER TO BE VALID.

Vasich v. City of Chicago Claims Administrator
c/o Class Action Administration, Inc.
PO Box 6848
Broomfield, CO 80021-0015

Name and Address Updates:
If your name or address is different from what is printed above, please provide updated information below:

First Name	MI	Last Name
Mailing Address		Apt/Unit
City	State	ZIP

_____ _____
Signature **Date**

___ ___ ___ - ___ ___ - ___ ___ ___ ___
Social Security Number *(Required)*

It is your responsibility to inform the Claims Administrator of any address changes until your benefit is received.

Questions? Visit: www.[INSERT].com Call toll-free: 1-855-326-5674

LEGAL NOTICE
CLASS ACTION SETTLEMENT

If you passed the 2006 written examination to become a Chicago Firefighter/EMT and failed the physical abilities test between December 2007 and April 2010, and you are female, you may be entitled to recover money under the settlement of a class action lawsuit.

What is This About?

In 2011, women who applied to become Chicago Fire Department firefighter/EMTs filed a lawsuit against the City of Chicago alleging that the physical abilities test used to hire firefighter/EMTs discriminated against women. In April 2013, the City and the women who filed the lawsuit, named *Vasich v. City of Chicago* (Case No. 11 CV 04843 in the U.S. District Court for the Northern District of Illinois), reached a settlement.

If you are included in the lawsuit, you may be entitled to recover money under the settlement.

Who is Included?

Women who passed the 2006 written exam to become a CFD firefighter/EMT and failed the physical abilities test between December 2007 and April 2010 are included. Women who were disqualified for some other reason are not included. Women who applied for the job in 1995 are not included.

How Does This Affect Me?

Class members who are under age 38 had the right to reapply for the job and will be hired if they pass a different physical test and meet other CFD hiring standards. Women age 38 and over or who aren't hired for any other reasons will receive money under the settlement if they file a claim before the deadline.

Can I Still Reapply?

Women under age 38 should have received notice of the hiring process in April or May 2013. If you have not already reapplied, it is too late; but you will receive money under the settlement if you file a claim on time.

Who Must File a Claim?

All women in the class who want to recover money must file a claim on time. This includes women age 38 or over, women who chose not to reapply, women who did not receive notice of the right to reapply, and women who were not hired by CFD.

How Do I File a Claim?

To recover money you must mail a Claim Form to the Claims Administrator. You can download a Claim Form at www.[INSERT].com. You can also call the Claims Administrator toll-free at [INSERT] or call the lawyers representing class members at (312) 508-5380 for help.

What's the Deadline?

If your Claim Form is not postmarked by **[INSERT]**, you will not be paid.

Who Are the Attorneys Representing Class Members?

David Borgen	Marni Willenson	Susan P. Malone
Oakland, CA	Chicago, IL	Chicago, IL
510-763-9800	312-508-5380	312-726-2638

How Do I Get More Information?

You can contact the Claims Administrator at 1-855-326-5674 or by visiting www._____.com. Many of the important documents related to the case are available on that website.

Do not contact the court or the judge with questions about the lawsuit

Questions? Call toll-free 1-855-326-5674 or visit www._____.com

Attachment 3

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ARTHUR L. LEWIS, JR.; et al.,	)	
	)	No. 98 C 5596
Plaintiffs,	)	
	)	Judge Joan B. Gottschall
v.	)	
	)	
CITY OF CHICAGO,	)	
	)	
Defendant.	)	

INJUNCTIVE ORDER OF RELIEF

On March 22, 2005 the Court entered a judgment of liability against defendant, City of Chicago ("the City"), having found that the manner in which the City hired firefighters based on the 1995 written Firefighters Examination discriminated against African Americans. The court subsequently joined Chicago Firefighters Union Local #2 ("the Union") and the Firemen's Annuity and Benefit Fund of Chicago as non-aligned parties for the limited purpose of granting relief pertaining to seniority and pensions. On March 20, 2007, the Court issued a memorandum opinion and order concerning the subject of remedies. The terms of both of these earlier memorandum opinions are incorporated herein. On May 13, 2011, after a remand from the United States Supreme Court, the Seventh Circuit in turn remanded this case to this Court with directions that: "The judgment of the district court is affirmed, except with respect to the remedy based on the first batch of hires. The case is remanded with instructions to modify the remedy to eliminate any relief based on the hires of May 1996." The Seventh Circuit's mandate, Fed. R. App. Proc. 41, issued on June 6, 2011. Resolution of the claims in this case now requires

specification and implementation of the remedial relief to be provided to plaintiffs for the City's violation of Title VII.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT the City provide the relief set forth below, in accordance with the terms set forth below:

A. Rightful Place Hiring

1. Eligibility. Within ten days after the entry of this Order, a database shall be created containing the names and current addresses of all members of the class ("eligible class members") who either have not yet advanced to subsequent steps in the selection process that follow the 1995 Test or, having advanced, have not yet been offered a position at the Chicago Fire Department Training Academy and have not been disqualified at any subsequent step of pre-employment screening (i.e., by failing the background check, the physical abilities test, the drug screen or the medical examination).

2. Class Notice and Creation of Randomized Jobs Eligibility Lists. Within 20 days after the entry of this Order, the City shall send a first-class mailed notice and an "Interest Card," in the forms attached hereto as Exhibit 1, together with a stamped, self-addressed return envelope, to each eligible class member at the class member's current address. Current addresses shall be established by skip-tracing before mailing. In the event skip tracing yields one address but a class member has updated his or her contact information providing a different address, notice shall be mailed to both addresses. At the same time, the City shall conduct outreach to publicize the commencement of processing for remedial hiring under this order, by posting the class notice and the Interest Card on easily accessible pages on the City's and the Fire Department's websites and at City libraries. Sixty days after the entry of this Order, the City

shall create two randomly ordered Jobs Eligibility Lists, one containing the names of all class members who have returned an interest card indicating that they want to participate in the jobs lottery (the "Interested-in-Job List"), and the second (the "Did-Not-Return-Card List") containing the names of all remaining eligible class members except those who returned an interest card on which they affirmatively elected not to participate in the jobs lottery. At the same time, the City shall provide a copy of both randomized lists to class counsel, with each list including class members' names, addresses, telephone numbers and social security numbers.

3. Offers to Class Members to Advance to the Next Steps of the Hiring Process. Within 70 days after entry of this Order (but in no event less than 21 days after mailing of the class notice and interest cards) the City shall extend offers to class members on the randomized Jobs Eligibility Lists (referred to in paragraph A2 above) to advance to the remaining steps of the entry-level firefighter hiring process (consisting of the physical abilities test, background investigation, drug screen and medical examination). The City shall extend the first offers to advance to class members on the randomized Interested-in-Job-List in the order that the names exist on that list. If the City thereafter also makes offers to class members on the Did-Not-Return-Card List, those offers shall be made in the order that those class members appear on that list. All offers to advance shall be made both (a) by first-class and (b) by certified mail, and the City shall, no later than the time of mailing, provide class counsel with a copy of each offer to advance. The City shall continue extending offers to class members to advance to the next steps of the hiring process until there exists a pool of at least 111 class members who have undergone and passed all steps of the City's pre-employment screening for firefighters, providing that there are at least 111 class members who are willing to undergo pre-employment screening and who

have passed all steps of the pre-employment screening. All pre-employment screening of class members shall be completed within 180 days after entry of this Order.

4. Offers of Employment. Within 190 days after entry of this Order, the first 111 class members to undergo the background investigation, physical abilities test, drug screen and medical examination and to pass all of them shall be offered employment by the City as Chicago Fire Department ("CFD") candidate firefighters at the Chicago Fire Department Training Academy ("the Academy"). The City shall continue making offers of employment to class members pursuant to this Order until 111 class members have accepted such offers and entered the Academy.

5. Timing of Entry into the Academy. All class members hired pursuant to paragraph A4 of this Order shall enter the Academy as soon as reasonably possible, but in no event later than 24 months of the entry of this Order.

6. Use of the 1996 Eligibility List. The 1996 Eligibility list will be used solely for the purpose of the screening and processing of class members in order to hire the shortfall of 111 class members as firefighters, and other than hiring of class members pursuant to this Order, there shall be no further hiring from the 1996 Eligibility List.

B. Retroactive Seniority

1. Constructive Seniority Date. Any class member hired pursuant to the terms of this Order shall be entitled, after completion of the contractual nine-month probationary period of employment, to retroactive seniority credit dating back to June 1, 1999 for all purposes for which seniority is considered except

(a) sections 9.3(B)(1) and (2) of the Collective Bargaining Agreement and

(b) the seven or more years of service required of a fireman to be eligible for an occupational disease disability benefit pursuant to 40 ILCS 5/6-151.1 of the Illinois Pension Code ("Code").

For purposes of section 9.3(B)(1) and (2) and the seven-year service requirement in 40 ILCS 5/6-151.1, a class member's seniority date shall be the actual date each such class member enters the Chicago Fire Department Training Academy to begin firefighter training.

C. Back Pay

1. Backpay will be awarded with respect to 111.1 shortfall positions, which would have been filled by African Americans but for the manner in which the City hired firefighters based on the 1995 Firefighters Examination, which discriminated against African Americans. Backpay will be computed as follows:

a. Backpay period. The backpay period for each shortfall position shall begin on the date of expected hire and end on the date of actual hire for each of the shortfall positions. For purposes of backpay computations only, the parties shall assume the hire dates for class members set forth in this table:

Date of Expected Hire	Number of Class Members Expected to Have Been Hired on that Date
10/1/96	10.5
03/04/97	12.6
10/01/97	12.2
02/02/98	5.8
02/16/99	10.0
12/1/99	13.8
07/17/00	19.0
2/20/01	13.4
10/16/01	11.0
11/1/02	2.8
TOTAL	111.1

b. Attrition. For each year or partial year between the date of expected hire and date of actual hire set forth in the above table, the number of class members for whom backpay is computed shall be reduced by the following factors reflecting actual CFD attrition experience: (a) for the calendar year containing the date of expected hire, 0.0%; (b) for the first calendar year following that year, 1.7%; (c) for each calendar year or partial year after that, 0.4%.

c. Lost CFD Wages and Non-Pension Fringe Benefits. Lost compensation (wages and benefits) for purposes of backpay shall be equal to the Chicago Fire Department ("CFD") wages (including availability and average overtime pay) and non-pension fringe benefits that each shortfall hire would have earned for services as a Chicago Firefighter from the date of expected hire until the date of actual hire. These computations shall assume that class members remains at the rank of Firefighter throughout the period for which backpay is computed.

d. Mitigating earnings from interim employment. Backpay as provided in paragraph 3 shall be offset by: (a) presumed interim wages earned, which shall be calculated using wage rates for each year equal to the average of "Level 5" and "Level 6" wages as reported in the U.S. Department of Labor's National Compensation Survey for blue collar workers in the Chicago-Naperville-Joliet Metropolitan Statistical Area for the years before 2007, and the Chicago-Naperville-Michigan City Combined Statistical Area for 2007 forward, plus assumed overtime earnings; and (b) presumed interim benefits received, at the rate computed by the U.S. Department of Labor's Annual Compensation Survey for blue collar workers in the Civilian Labor Force nationwide; and (c) adjusted for the probability of unemployment, using the

Civilian Labor Force overall unemployment rate for the Chicago Metropolitan area for each year within the backpay period, as reported by the U.S. Department of Labor, adjusted by a factor of 1.4 to reflect greater relative unemployment among African Americans.

e. Backpay before prejudgment interest. The backpay total owed before prejudgment interest, shall be the difference between total lost CFD compensation (paragraph c above) and mitigating earnings from interim employment (paragraph d above).

f. Prejudgment interest. Prejudgment interest shall be awarded, with respect to backpay for each of the 111 shortfall positions using the average annual nominal prime rate of interest over the period from the expected date of hire to the actual date of hire. Prejudgment interest shall be computed daily and compounded annually.

2. Funding of Pension and Any Other Applicable Benefits Plans and Programs Back to June 1, 1999.

a. Amounts Owed. Payment shall be made by the City to the Fireman's Annuity & Benefit Fund of Chicago ("the Fund") to provide each class member hired and his or her family with the same level of pension/benefits funding as if the class member had been hired on June 1, 1999. The amounts owed to the Fund shall be calculated in accordance with the applicable provisions of Article 6 of the Illinois Pension Code (40 ILCS 5/6-101 *et seq.*).

b. Principal and Interest. The amounts owed to the Fund shall include both *principal* (i.e., contributions that would have been owed to the Fund in the form of employer and employee contributions had class members hired pursuant to paragraph C1 of this Order been hired on June 1, 1999) *and interest* (i.e., investment returns that would have been earned on those

contributions in the interim), so that the actuarial standing of the Fund is not adversely affected by this judgment.

c. Sources of Payment. Amounts owed to the Fund reflecting principal that would have been paid to the Fund in the form of employee contributions if class members had been hired on June 1, 1999 shall be paid to the Fund by the City; the City will deduct the amounts necessary to cover these payments from the backpay obligation incurred by it pursuant to paragraph C1 of this Order. Amounts due to the Fund reflecting principal that would have been paid to the Fund in the form of employer contributions, as well as all interest due on both employer and employee contributions, shall be paid by the City in addition to the backpay amount owed by the City pursuant to paragraph C1 of this Order.

d. Calculation of Interest Owed. Interest due on employee contribution amounts shall be calculated by the Fund at the Fund's average compounded rate of investment return for the period June 1, 1999 through the date of payment of the contributions. Interest due on employer contribution amounts shall be calculated by the Fund at the Fund's average compounded rate of investment return for the period from January 1, 2001 through the date of payment.

e. Timing of Payments Due to the Fund. The City shall promptly notify the Fund in writing of the hiring of any class member pursuant to this Order. Within ninety (90) days from the date the Fund has been notified in writing that a class member has been hired by the City as a member of the CFD pursuant to the terms of this Order, the Fund will issue a written notice to the City and the hired class member, through their respective counsel of record, identifying the total amount of employer and employee contributions, plus applicable interest,

due to the Fund and will provide each with the basis of the Fund's calculation. Within forty-five (45) days after that written notification has been received by class counsel and the City, the City shall remit to the Fund both the employee contribution amounts due and interest owed on those amounts. The corresponding employer contributions due to the Fund will be paid and calculated in the usual and customary manner as specifically set forth under 40 ILCS 5/6-165(a) of the Code (with the exception that the City's payment shall also include all interest due on employer contribution amounts as set forth in paragraph C2d, above).

3. Distribution of Back Pay Amounts to the Class. Within 10 days after the last class member has been hired pursuant to paragraph A4 of this Order, the City shall submit two lists to the Court and plaintiffs' counsel, one with the names all class members hired pursuant to paragraph A4 of this Order, and a second ("the Backpay Eligibility List") consisting of the names of all remaining eligible class members on the randomized list created pursuant to paragraph A1 and A2 of this order who have not been hired pursuant to paragraph A4 of this Order. Plaintiffs' counsel shall have 30 days to review the lists and file objection(s) to them, if any. Thereafter, the Court shall promptly resolve objections, if any, and approve the lists. Within 10 days after approval of the lists by the Court, pursuant to paragraph C4 of this Order, the City shall provide claims forms and claims-form information to each class member on the Backpay Eligibility List. Within 30-60 days of the deadline for the filing of these claims forms by class members, the City shall distribute funds as follows:

a. Payments to Retroactively Fund the Employee-Portion of Pension (and/or similar) Contributions Owed by Class Members Hired Pursuant to Paragraph A4 of this Order. The City shall pay amounts sufficient to relieve persons hired pursuant to paragraph A4 of this

Order of the burden of making out-of-pocket payments to retroactively fund their employee-portion of pension contributions (and/or other amounts due as payments from them to retroactively fund other benefit policies, programs or plans).

b. Distribution of Remaining Funds to Eligible Class Members Who Do Not Receive Job Offers. The remainder of funds owed pursuant to paragraph C1 of this Order shall be distributed, by first-class certified mail, in equal shares to eligible class members: **(a)** on the Backpay Eligibility List provided for in paragraph C3 of this Order and **(b)** who have filed a valid claim form pursuant to paragraph C4 of this Order (below).

c. Surplus Funds. If, after distribution of funds pursuant to paragraph C3 (a and b) above, funds remain, these shall be deposited in the Registry of the Court pending determination of their ultimate disposition.

4. Claims Process/Claims Forms. Within 30 days of the last hire from the plaintiff class, the City shall send a claim form, in a format developed by the parties and approved by the Court, to all class members on the Backpay Eligibility List by first class mail. At the same time, the City shall also publish the claims form in the Chicago Tribune and the Chicago Sun-Times and post the claim form on an easily accessible page on the City's website. The City shall bear the cost of all mailing, printing and publication and any other associated expenses. Claims forms must be returned by eligible class members, or in the case of a deceased eligible class member by the lawful heir or representative of his or her estate, to plaintiffs' counsel by first class mail, postmarked by a date to be determined by the Court.

D. Reporting and Monitoring

1. Monitoring During Academy Training. Within 120 days of entry of this Order, Annette Holt, an incumbent uniformed member of the CFD acceptable to both the City and the plaintiffs, shall be appointed to act as an ombudsman for persons hired pursuant to paragraph A4 of the Order during their Academy training, with responsibility for addressing the special needs and problems of people entering the Academy as a result of this lawsuit and for reporting to the court, if necessary, on the progress of the shortfall group. All costs of such monitoring, including salary for the monitor, shall be borne by the City. Further specifics of the monitoring may be the subject of a supplemental order of the Court.

E. Prejudgment Interest

All monetary relief provided to class members pursuant to this Order shall be awarded with compound prejudgment interest at the prime rate.

F. Postjudgment Interest

All monetary relief provided to class members pursuant to this Order shall be awarded with postjudgment interest.

G. Attorney's Fees and Expenses.

As prevailing parties, plaintiffs are entitled to an award of attorney's fees and expenses pursuant to 42 U.S.C. § 1988, including expert fees. 42 U.S.C. § 2000e-5(k). The parties shall attempt to agree upon the amount of an award pursuant to Local Rule 54.3(d) before a fee motion is filed. Plaintiffs shall also be entitled to an award of fee and costs for monitoring and implementation of this Order after its entry.

H. Retention of Jurisdiction

The Court shall retain jurisdiction of this action for purposes of construction, implementation and enforcement of the terms of this Order.

APPROVED and ORDERED this 17 day of August, 2011.

UNITED STATES DISTRICT JUDGE

Exhibit 1

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

CLASS ACTION NOTICE FOR LEWIS V. CITY OF CHICAGO

A federal court authorized this notice.
This is not a solicitation from a lawyer.

[Name (preprinted)]
[Address (preprinted)]

BASIC INFORMATION

1. Why am I receiving this notice?

You are receiving this court-approved notice because records indicate that:

- You took the 1995 Chicago Firefighter Examination, administered by the City of Chicago, seeking to become a member of the Chicago Fire Department;
- Your score on that test was between 65 and 88,
- You identified yourself on the test application as an African American, and
- You did not advance to the next steps in the hiring process (a physical abilities test, background check, drug test and medical exam) *or* you advanced to and successfully completed those next steps but were not hired because the City stopped hiring applicants from the1995 Test before hiring you.
- You are, as a result, a class member in a class action lawsuit, in which judgment was entered against the City of Chicago in federal court in Chicago, known as *Lewis v. City of Chicago.*

2. What do I get as a class member in this lawsuit, *Lewis v. City of Chicago*?

- On August [Date], 2011, the court entered an order that requires the City: (a) to hire 111 African-American class members as candidate firefighters and (b) distribute tens of millions of dollars in backpay in equal shares among the class members who are not given an opportunity to be hired.

- As a class member, you are eligible to compete for one of the 111 jobs as a candidate firefighter, at the Chicago Fire Department Training Academy, that are reserved exclusively for class members in this lawsuit.
- As a class member, you are also eligible to receive a monetary award.
- No class member will get both a job and a monetary award. If you get the job, you will not get the monetary award and vice versa...
- Both the jobs and the monetary award are the result of a court judgment that has been entered against the City of Chicago. The court has held that the manner in which the City hired firefighters between 1996 and 2001, based on their scores on the 1995 Chicago Firefighter Examination, discriminated against African Americans.

3. If I want one of the 111 jobs, what should I do to make sure I'm considered for one of those positions?

Return the Interest Card enclosed with this Notice, postmarked no later than September [ ], 2011, after filling in the box next to the words "I WANT to be considered for a candidate firefighter job." The first people to be invited for further screening for a job will be the ones who have returned the interest card indicating "I WANT to be considered for a candidate firefighter job." ***Accordingly, if you want to be considered for a job, it is in your best interest to return the Interest Card after filling in the box next to the words "I WANT to be considered for a candidate firefighter job.***

Even if you are unable to return the Interest Card for any reason, you may, however, still be considered for one of the 111 jobs, but only after those who have returned the Interest Card stating they want the job have been considered and only if insufficient numbers have returned the Interest Card stating that they want the job.

4. I don't want a firefighter job any more. What should I do?

If you do NOT want one of the 111 jobs, you should return the Interest Card enclosed with this notice, postmarked no later than September [ ], 2011, after filling in the box next to the words "I do NOT want to be considered for a candidate firefighter job." By returning the card with that box filled in, you will be giving up the opportunity to get a firefighter job, but you will still be entitled to a share of the monetary award when it is distributed.

Before starting training at the Chicago Fire Department Training Academy, all candidates must take and pass a physical abilities test, background check, drug test and medical exam. All candidates must also have a driver's license and, at the time they enter the Academy, reside in the City of Chicago. *If you will not be able to meet all those requirements, you should fill in the box next to the words "I do NOT want to be considered for a candidate firefighter job."* If you do so, you will still be entitled to a share of the monetary award when it is distributed.

5. If I am invited for further screening but I don't pass all the screens, will I still receive a share of the monetary award?

Yes.

GETTING A JOB

6. How will the Jobs Lottery be conducted?

All class members will have their names entered into a pool for the jobs lottery, except those who affirmatively opt out by returning an Interest Card with the box filled in next to the words "I do NOT want to be considered for a candidate firefighter job."

The Court has ordered the City to hire 111 class members as candidate firefighters to be trained at the Chicago Fire Department Training Academy. If your name is selected in the jobs lottery and you want to compete for one of the 111 jobs, you will have to undergo further screening, consisting of a physical abilities test, background check, drug test and medical exam.

RECEIVING A SHARE OF THE MONETARY AWARD

9. How can I receive a share of the backpay award?

If your name is at the top of this notice, and you do not receive one of the 111 jobs, then you will receive a share of the backpay. You do not need to do anything right now to protect your eligibility to receive a share of the backpay money.

10. If I receive backpay money instead of a job, how much money will I get?

Nobody will receive both a job and a backpay award. Backpay awards are for class members who do not receive jobs, although a portion of the backpay funds will be set aside to make pension contributions for those who do receive a job.

The remaining backpay funds will be shared equally among all eligible class members. As a result, exactly how much you will receive will depend on how many other class members also come forward to claim their share. Our best estimate, however, is that every eligible class member will receive at least $5,000.

11. When will backpay money be distributed?

The backpay money will not be distributed until after the 111 are hired and enter the Fire Academy. It is expected that that the 111 hires will enter the Chicago Fire Training Academy by the end of March 2012, under the court's order.

THE LAWYERS REPRESENTING YOU

12. Do I have a lawyer in this case?

Yes. Two civil rights organizations and four private law firms are working together on this case and represent the entire plaintiff class, including you. The civil rights organizations are: The Chicago Lawyers' Committee for Civil Rights Under Law and the NAACP Legal Defense and Educational Fund, Inc. (LDF). You will not be charged to be represented by any of the lawyers who represent the class. These lawyers are called Class Counsel.

GETTING MORE INFORMATION

13. Where can I find out more about this case?

You can find out more about this lawsuit, *Lewis v. City of Chicago*, online at the website created to provide information to you and other class members about the lawsuit. That website is located at: www.cfd1995testlitigation.com. You can also watch this YouTube video showing you how to prepare for the physical abilities test at:

www.youtube.com/user/ChicagoFD#p/u

OR

www.cityofchicago.org/fire — (under the Multimedia Gallery "Chicago Fire Department YouTube Channel")

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

APPLICANT INTEREST CARD
FOR LEWIS V. CITY OF CHICAGO CLASS MEMBERS

[Name (preprinted)]
[Address (preprinted)]
[Last 4 Digits SSN (preprinted)]

You should return this card, postmarked no later than September __, 2011, (you may use the enclosed stamped, self-addressed envelope) to:

1995 Chicago Firefighter Test Litigation,
P.O. Box ___,
Chicago, IL 606__.

The first people to be invited for further screening for a job will be the ones who have returned this Interest Card indicating "I WANT to be considered for a candidate firefighter job." **Accordingly, if you want to be considered for a job, it is in your best interest to return this Interest Card, postmarked no later than September __ , 2011, after filling in the box next to the words "I WANT to be considered for a candidate firefighter job."**

Please fill in the box below that applies to you:

☐ "I do NOT want to be considered for a candidate firefighter job."

☐ "I WANT to be considered for a candidate firefighter job."

Name: _____ [Print]

Signature: _____

Maximizing Remedies:
Equitable Relief, Damages, and Attorney Fees in Federal Sector Cases

Kevin L. Owen, Esq. – Gilbert Employment Law, P.C.
Bryan Schwartz, Esq. – Bryan Schwartz Law, P.C.
Harini Srinivasan, Esq. – Cohen Milstein

Topics:

- Introduction to Federal Sector Damages
- Non-Pecuniary Compensatory Damages
- Equitable Relief
- Back Pay / Front Pay
- Damages Modeling in Class Cases
- Attorney's Fees and Costs
- Questions

Introduction to Federal Sector Damages: Basics

- Forums:
  - EEOC Federal Sector Programs
  - Merit Systems Protection Board
  - Office of Special Counsel
  - Arbitration / Federal Labor Relations Authority
- Sources of Law:
  - EEOC:
    - EEOC Management Directive 110
    - 29 C.F.R. § 1614
  - OSC / MSPB:
    - 5 U.S.C. §§ 1221, 2302
    - 5 C.F.R. §§ 1201, 1820
  - Arbitration:
    - Collective Bargaining Agreement

Non-Pecuniary Compensatory Damages

- Types of Losses
- When to Present
- How to Develop
- Source of Law – EEOC Office of Federal Operations Decisions
- No Punitive Damages

Equitable Relief

- Status Quo Ante Relief
- Clean Employment Records
- Promotions as a remedy
- Service Credit
- Posting Notice, Management Training, NO FEAR Act
- Prosecution by Office of Special Counsel

Back Pay / Front Pay

- Back Pay Act, 5 U.S.C. § 5596
  - Interest
  - Benefits
  - Retiree Health Insurance
  - Debts Created by Restored Leave
- Mitigation of Damages
  - EEOC and MSPB
- DFAS and NFC
- Front Pay
- Client Expectations

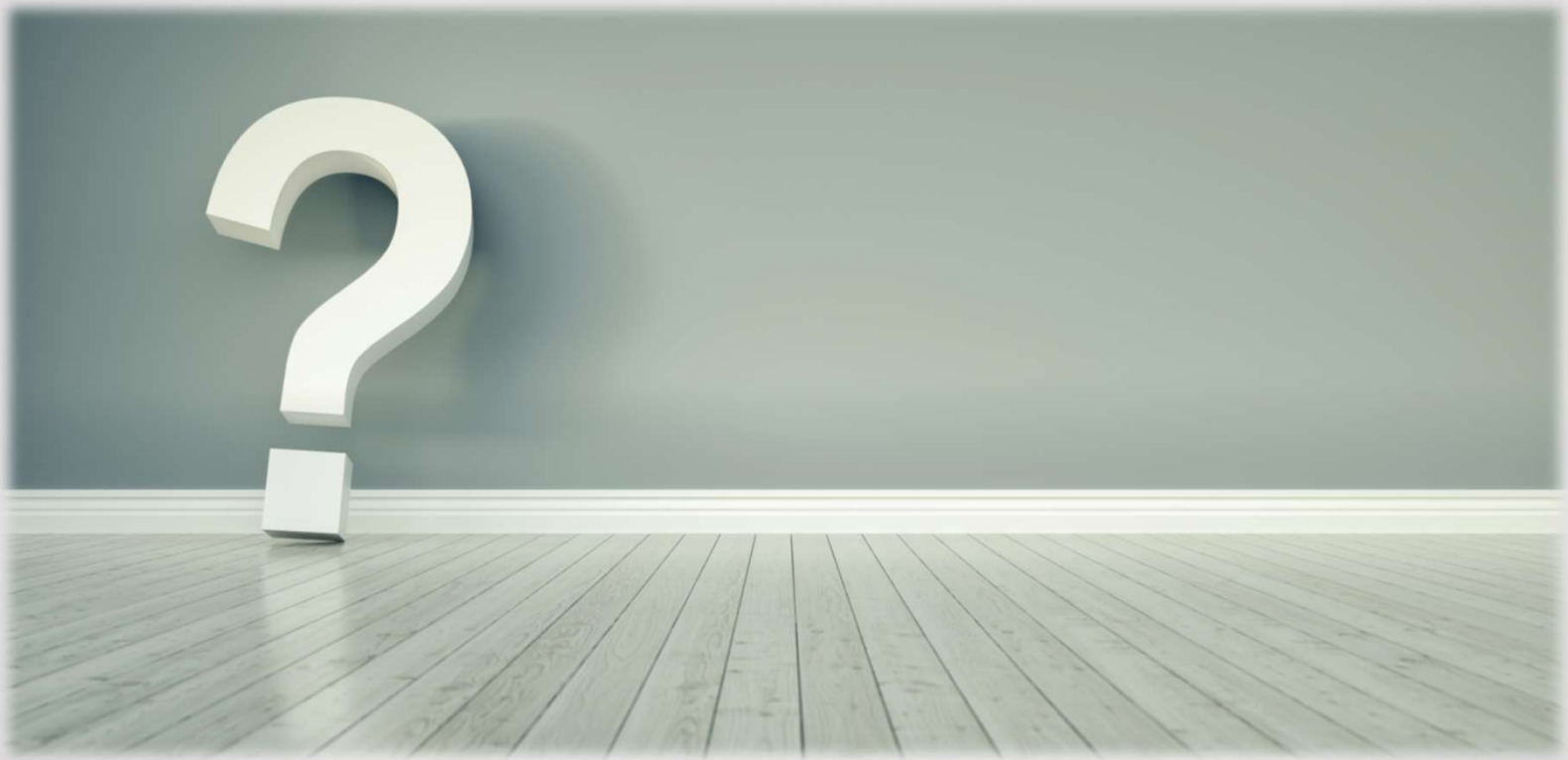
Damages Modeling in Class Cases

- Categories of Class Member Recovery
  - Back pay (minus deductions)
  - Lost benefits (TSP, lost retirement, lost fringe benefits)
  - Compensatory Damages (pecuniary and non-pecuniary)
- Emotional Distress Ranking System
  - Zero to Five
- Issues for Consideration
  - Minimum Recovery
  - Claim Form
  - Structured Settlement
  - Cy Pres

Attorney's Fees and Costs

- Fee Matrices
  - Laffey Matrix
  - Fitzpatrick Matrix
- EEOC Fee Rules
  - Out of State Counsel Rule
  - Prevailing Party on Claims
  - Recoverable Costs
  - Interest on Fees
- MSPB Fee Rules
  - Out of State Counsel Rule
  - Prevailing Party on Claims
  - Recoverable Costs
  - Interest on Fees

Questions



Title 5 —Administrative Personnel
Chapter II —Merit Systems Protection Board
Subchapter A —Organization and Procedures
Part 1201 —Practices and Procedures

Authority: 5 U.S.C. 1204, 1305, and 7701, and 38 U.S.C. 4331, unless otherwise noted.
Source: 54 FR 53504, Dec. 29, 1989, unless otherwise noted.

Subpart H—Attorney Fees (Plus Costs, Expert Witness Fees, and Litigation Expenses, Where Applicable) and Damages (Consequential, Liquidated, and Compensatory)

Source: 63 FR 41179, Aug. 3, 1998, unless otherwise noted.

§ 1201.201 Statement of purpose.

(a) This subpart governs Board proceedings for awards of attorney fees (plus costs, expert witness fees, and litigation expenses, where applicable), consequential damages, compensatory damages, and liquidated damages.

(b) There are seven statutory provisions covering attorney fee awards. Because most MSPB cases are appeals under 5 U.S.C. 7701, most requests for attorney fees will be governed by § 1201.202(a)(1). There are, however, other attorney fee provisions that apply only to specific kinds of cases. For example, § 1201.202(a)(4) applies only to certain whistleblower appeals. Sections 1201.202(a)(5) and (a)(6) apply only to corrective and disciplinary action cases brought by the Special Counsel. Section 1201.202(a)(7) applies only to appeals brought under the Uniformed Services Employment and Reemployment Rights Act.

(c) An award of consequential damages is authorized in only two situations: Where the Board orders corrective action in a whistleblower appeal under 5 U.S.C. 1221, and where the Board orders corrective action in a Special Counsel complaint under 5 U.S.C. 1214. Consequential damages include such items as medical costs and travel expenses, and other costs as determined by the Board through case law.

(d) The Civil Rights Act of 1991 (42 U.S.C. 1981a) authorizes an award of compensatory damages to a prevailing party who is found to have been intentionally discriminated against based on race, color, religion, sex, national origin, or disability. The Whistleblower Protection Enhancement Act of 2012 (5

U.S.C. 1221(g)) also authorizes an award of compensatory damages in cases where the Board orders corrective action. 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.

(e) An award equal to back pay shall be awarded as liquidated damages under 5 U.S.C. 3330c when the Board or a court determines an agency willfully violated an appellant's veterans' preference rights.

[63 FR 41179, Aug. 3, 1998, as amended at 77 FR 62372, Oct. 12, 2012; 78 FR 39545, July 2, 2013]

§ 1201.202 Authority for awards.

(a) ***Awards of attorney fees (plus costs, expert witness fees, and litigation expenses, where applicable).*** The Board is authorized by various statutes to order payment of attorney fees and, where applicable, costs, expert witness fees, and litigation expenses. These statutory authorities include, but are not limited to, the following authorities to order payment of:

(1) Attorney fees, as authorized by 5 U.S.C. 7701(g)(1), where the appellant or respondent is the prevailing party in an appeal under 5 U.S.C. 7701 or an agency action against an administrative law judge under 5 U.S.C. 7521, and an award is warranted in the interest of justice;

(2) Attorney fees, as authorized by 5 U.S.C. 7701(g)(2), where the appellant or respondent is the prevailing party in an appeal under 5 U.S.C. 7701, a request to review an arbitration decision under 5 U.S.C. 7121(d), or an agency action against an administrative law judge under 5 U.S.C. 7521, and the decision is based on a finding of discrimination prohibited under 5 U.S.C. 2302(b)(1);

(3) Attorney fees and costs, as authorized by 5 U.S.C. 1221(g)(2), where the appellant is the prevailing party in an appeal under 5 U.S.C. 7701 and the Board's decision is based on a finding of a prohibited personnel practice;

(4) Attorney fees and costs, as authorized by 5 U.S.C. 1221(g)(1)(B), where the Board orders corrective action in a whistleblower appeal to which 5 U.S.C. 1221 applies;

(5) Attorney fees, as authorized by 5 U.S.C. 1214(g)(2) or 5 U.S.C. 7701(g)(1), where the Board orders corrective action in a Special Counsel complaint under 5 U.S.C. 1214;

(6) Attorney fees, costs and damages as authorized by 5 U.S.C. 1214(h) where the Board orders corrective action in a Special Counsel complaint under 5 U.S.C. 1214 and determines that the employee has been subjected to an agency investigation that was commenced, expanded or extended in retaliation for the disclosure or protected activity that formed the basis of the corrective action.

(7) Attorney fees, as authorized by 5 U.S.C. 1204(m), where the respondent is the prevailing party in a Special Counsel complaint for disciplinary action under 5 U.S.C. 1215;

(8) Attorney fees, expert witness fees, and litigation expenses, as authorized by the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. 4324(c)(4); and

(9) Attorney fees, expert witness fees, and other litigation expenses, as authorized by the Veterans Employment Opportunities Act; 5 U.S.C. 3330c(b).

(b) ***Awards of consequential damages.*** The Board may order payment of consequential damages, including medical costs incurred, travel expenses, and any other reasonable and foreseeable consequential damages:

(1) As authorized by 5 U.S.C. 1221(g)(1)(A)(ii), where the Board orders corrective action in a whistleblower appeal to which 5 U.S.C. 1221 applies; and

(2) As authorized by 5 U.S.C. 1221(g)(4) where the Board orders corrective action to correct a prohibited personnel practice and determines that the employee has been subjected to an agency investigation that was commenced, expanded, or extended in retaliation for the disclosure or protected activity that formed the basis of the corrective action.

(3) As authorized by 5 U.S.C. 1214(g)(2), where the Board orders corrective action in a Special Counsel complaint under 5 U.S.C. 1214.

(4) As authorized by 5 U.S.C. 1214(h) where the Board orders corrective action to correct a prohibited personnel practice and determines that the employee has been subjected to an agency investigation that was commenced, expanded, or extended in retaliation for the disclosure or protected activity that formed the basis of the corrective action.

(c) ***Awards of compensatory damages.*** The Board may order payment of compensatory damages, as authorized by section 102 of the Civil Rights Act of 1991 (42 U.S.C. 1981a), based on a finding of unlawful intentional discrimination but not on an employment practice that is unlawful because of its disparate impact under the Civil Rights Act of 1964, the Rehabilitation Act of 1973, or the Americans with Disabilities Act of 1990. The Whistleblower Protection Enhancement Act of 2012 (5 U.S.C. 1221(g)) also authorizes an award of compensatory damages in cases where the Board orders corrective action. 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.

(d) ***Awards of liquidated damages.*** The Board may award an amount equal to back pay as liquidated damages under 5 U.S.C. 3330c when it determines that an agency willfully violated an appellant's veterans' preference rights.

(e) ***Definitions.*** For purposes of this subpart:

(1) A *proceeding on the merits* is a proceeding to decide an appeal of an agency action under 5 U.S.C. 1221 or 7701, an appeal under 38 U.S.C. 4324, an appeal under 5 U.S.C. 3330a, a request to review an arbitration decision under 5 U.S.C. 7121(d), a Special Counsel complaint under 5 U.S.C. 1214 or 1215, or an agency action against an administrative law judge under 5 U.S.C. 7521.

(2) An *addendum proceeding* is a proceeding conducted after issuance of a final decision in a proceeding on the merits, including a decision accepting the parties' settlement of the case. The final decision in the proceeding on the merits may be an initial decision of a judge that has become final under § 1201.113 of this part or a final decision of the Board.

[63 FR 41179, Aug. 3, 1998, as amended at 65 FR 5409, Feb. 4, 2000; 77 FR 62373, Oct. 12, 2012; 78 FR 39546, July 2, 2013]

§ 1201.203 Proceedings for attorney fees.

(a) ***Form and content of request.*** A request for attorney fees must be made by motion, must state why the appellant or respondent believes he or she is entitled to an award under the applicable statutory standard, and must be supported by evidence substantiating the amount of the request. Evidence supporting a motion for attorney fees must include at a minimum:

(1) Accurate and current time records;

(2) A copy of the terms of the fee agreement (if any);

(3) A statement of the attorney's customary billing rate for similar work, with evidence that that rate is consistent with the prevailing community rate for similar services in the community in which the attorney ordinarily practices; and

(4) An established attorney-client relationship.

(b) ***Addendum proceeding.*** A request for attorney fees will be decided in an addendum proceeding.

(c) ***Place of filing.*** Where the initial decision in the proceeding on the merits was issued by a judge in a MSPB regional or field office, a motion for attorney fees must be filed with the regional or field office that issued the initial decision. Where the decision in the proceeding on the merits was an initial decision issued by a judge at the Board's headquarters or where the only decision was a final decision issued by the Board, a motion for attorney fees must be filed with the Clerk of the Board.

(d) ***Time of filing.*** A motion for attorney fees must be filed as soon as possible after a final decision of the Board but no later than 60 days after the date on which a decision becomes final.

(e) ***Service.*** A copy of a motion for attorney fees must be served on the other parties or their representatives at the time of filing. A party may file a pleading responding to the motion within the time limit established by the judge.

(f) ***Hearing; applicability of subpart B.*** The judge may hold a hearing on a motion for attorney fees and may apply appropriate provisions of subpart B of this part to the addendum proceeding.

(g) ***Initial decision; review by the Board.*** The judge will issue an initial decision in the addendum proceeding, which shall be subject to the provisions for a petition for review by the Board under subpart C of this part.

[63 FR 41179, Aug. 3, 1998, as amended at 65 FR 24381, Apr. 26, 2000]

§ 1201.204 Proceedings for consequential, liquidated, or compensatory damages.

(a) ***Time for making request.***

(1) A request for consequential, liquidated, or compensatory damages must be made during the proceeding on the merits, no later than the end of the conference(s) held to define the issues in the case.

(2) The judge or the Board, as applicable, may waive the time limit for making a request for consequential, liquidated, or compensatory damages for good cause shown. The time limit will not be waived if a party shows that such waiver would result in undue prejudice.

(b) ***Form and content of request.*** A request for consequential, liquidated, or compensatory damages must be made in writing and must state the amount of damages sought and the reasons why the appellant or respondent believes he or she is entitled to an award under the applicable statutory standard.

(c) ***Service.*** A copy of a request for consequential, liquidated, or compensatory damages must be served on the other parties or their representatives when the request is made.

A party may file a pleading responding to the request within the time limit established by the judge or the Board, as applicable.

(d) ***Addendum proceeding.***

(1) A request for consequential, liquidated, or compensatory damages will be decided in an addendum proceeding.

(2) A judge may waive the requirement of paragraph (d)(1), either on his or her own motion or on the motion of a party, and consider a request for damages in a proceeding on the merits where the judge determines that such action is in the interest of the parties and will promote efficiency and economy in adjudication.

(e) ***Initiation of addendum proceeding.***

(1) A motion for initiation of an addendum proceeding to decide a request for consequential, liquidated, or compensatory damages must be filed as soon as possible after a final decision of the Board but no later than 60 days after the date on which a decision becomes final. Where the initial decision in the proceeding on the merits was issued by a judge in a MSPB regional or field office, the motion must be filed with the regional or field office that issued the initial decision. Where the decision in the proceeding on the merits was an initial decision issued by a judge at the Board's headquarters or where the only decision was a final decision issued by the Board, the motion must be filed with the Clerk of the Board.

(2) A copy of a motion for initiation of an addendum proceeding to decide a request for consequential, liquidated, or compensatory damages must be served on the other parties or their representatives at the time of filing. A party may file a pleading responding to the motion within the time limit established by the judge.

(f) ***Hearing; applicability of subpart B.*** The judge may hold a hearing on a request for consequential, liquidated, or compensatory damages and may apply appropriate provisions of subpart B of this part to the addendum proceeding.

(g) ***Initial decision; review by the Board.*** The judge will issue an initial decision in the addendum proceeding, which shall be subject to the provisions for a petition for review by the Board under subpart C of this part.

(h) ***Request for damages first made in proceeding before the Board.*** Where a request for consequential, liquidated, or compensatory damages is first made on petition for review of a judge's initial decision on the merits and the Board waives the time limit for making the request in accordance with paragraph (a)(2) of this section, or where the request is made in a case where the only MSPB proceeding is before the Board, including, for compensatory damages only, a request to review an arbitration decision under 5 U.S.C. 7121(d), the Board may:

(1) Consider both the merits and the request for damages and issue a final decision;

(2) Remand the case to the judge for a new initial decision, either on the request for damages only or on both the merits and the request for damages; or

(3) Where there has been no prior proceeding before a judge, forward the request for damages to a judge for hearing and a recommendation to the Board, after which the Board will issue a final decision on both the merits and the request for damages.

(i) ***EEOC review of decision on compensatory damages.*** A final decision of the Board on a request for compensatory damages pursuant to the Civil Rights Act of 1991 shall be subject to review by the Equal Employment Opportunity Commission as provided under subpart E of this part.

[63 FR 41179, Aug. 3, 1998, as amended at 77 FR 62373, Oct. 12, 2012]

§ 1201.205 Judicial review.

A final Board decision under this subpart is subject to judicial review as provided under 5 U.S.C. 7703.

Chapter 11 REMEDIES

Management Directive 110

I. INTRODUCTION

In federal EEO law, there is a strong presumption that a complainant who prevails in whole or in part on a claim of discrimination is entitled to full relief which places him/her in the position s/he would have been in absent the agency's discriminatory conduct. See **Albermarle Paper Co. v. Moody (http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=422&page=405)** , 422 U.S. 405, 418-419 (1975).

This Chapter of the Management Directive sets forth guidance for use by agencies and persons seeking remedial relief in a variety of areas, including: back pay, front pay, attorney's fees and costs, awards of compensatory damages, and other forms of equitable relief. This guidance applies only to the federal sector administrative process.

II. NON-DISCRIMINATORY PLACEMENT

When an agency or the Commission finds that an employee of the agency was discriminated against, the agency shall provide the individual with non-discriminatory placement into the position s/he would have occupied absent the discrimination. For cases in which the employee is not selected for a position or promotion due to discrimination, this would include an offer of placement into the position sought, or a substantially equivalent position. See **Carson v. Dep't. of Justice (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/0120100078.txt)** , EEOC Appeal No. 0120100078 (Feb. 16, 2012).

The offer should be made retroactive to the date of the selection in question. The individual should receive all step or pay increases and monetary benefits associated with the position. See **Stewart v. Dep't. of Homeland Security (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/0520070124.txt)** , EEOC

Request No. 0520070124 (Nov. 14, 2011). A "substantially equivalent position" is a position within the same commuting area. **Bakken v. Dep't. of Transportation (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/0120093529.txt)** , EEOC Appeal No. 0120093529 (Aug. 8, 2011).

When the relief ordered includes the offer of a position or a promotion, the offer shall be made to the complainant in writing, providing the complainant fifteen (15) days from receipt of the offer to notify the agency of the acceptance or rejection. Failure to respond within the 15-day time limit shall be construed as a declination. Any back pay liability shall cease to accrue with either the actual placement of the complainant into the position in question, or with the date the offer was declined.

In cases involving a discriminatory termination, the agency should offer to reinstate the complainant to his/her former position retroactive to the date of the termination. See **Oni v. Dep't. of the Treasury (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/0720100015.txt)** , EEOC Appeal No. 0720100015 (Oct. 11, 2011). The complainant should also receive all applicable benefits and step or pay increases.

In some cases, there is evidence that discrimination was one of multiple motivating factors for an employment action. In these "mixed motive" cases, the agency does not have to offer complainant the position sought if it can demonstrate by clear and convincing evidence that it would have taken the same action even absent the discrimination. See **Montante v. Dep't. of Transportation (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/0120110240.txt)** , EEOC Appeal No. 0120110240 (Nov. 9, 2011), request for reconsideration denied, EEOC Request No. 0520120259 (June 8, 2012). If the agency is able to make this demonstration, the complainant is not entitled to personal relief such as reinstatement, hiring, or promotion. The complainant may still be entitled to declaratory relief, injunctive relief, and/or attorneys' fees and costs. Id.

When an individual accepts an offer of employment as a remedy for discrimination, s/he shall be deemed to have performed service for the agency during the period he would have served but for the discrimination for all purposes except for meeting service requirements for completion of a required probationary or trial period.

III. BACK PAY

A. Back Pay Issues

When an agency or the Commission finds that an employee of the agency was discriminated against, the agency shall provide the individual with non-discriminatory placement into the

position s/he would have occupied absent the discrimination, with back pay computed in the manner prescribed by 5 C.F.R. § 550.805. See 29 C.F.R. § 1614.501(c)(1). The purpose of a back pay award is to restore to the complainant the income he would have otherwise earned but for the discrimination. See **Albemarle Paper Co. v. Moody (http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=422&page=405)** , 422 U.S. at 418-419 (1975); **Davis v. U.S. Postal Service (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/04900010.txt)** , EEOC Petition No. 04900010 (Nov. 29, 1990). A number of discriminatory personnel actions can generate back pay. The most common actions generating back pay are: removals, suspensions, denials of promotions, and failure to hire.

Interest on back pay shall be included in the back pay computation. The back pay computation should also include any applicable step increases or pay differentials. See **Morrow v. U.S. Postal Service (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/0720070058.txt)** , EEOC Appeal No. 0720070058 (Nov. 13, 2009) (ordering the agency to provide complainant with a back pay award which included interest, overtime, and night pay differential). Under Title VII, GINA, and the Rehabilitation Act, back pay is limited to two years prior to the date the discrimination complaint was filed.

B. Determining Gross Back Pay

Back pay includes all forms of compensation and reflects fluctuations in working time, overtime rates, penalty overtime, Sunday premium and night work, changing rates of pay, transfers, promotions, and privileges of employment. The Commission also construes "benefits" broadly to include annual leave, sick leave, health insurance, and retirement contributions. **Vereb v. Dep't. of Justice (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/04980008.txt)** , EEOC Petition No. 04980008 (Feb. 26, 1999); **Holly v. U.S. Postal Service (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/04A50003.txt)** , EEOC Petition No. 04A50003 (Nov. 2, 2005).

[T]he Commission recognizes that precise measurement cannot always be used to remedy the wrong inflicted, and therefore, the computation of back pay awards inherently involves some speculation. **Hanns v. U.S. Postal Service (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/04960030.txt)** , EEOC Petition No. 04960030 (September 18, 1997). The Commission has held that uncertainties involved in a back pay determination should be resolved against the agency that has already been found to have committed acts of discrimination. Id. See also **Davis v. U.S. Postal Service (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/04900010.txt)** , EEOC Petition No. 04900010 (Nov. 29, 1990); and **Besemer v. U.S. Postal Service (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/04890005.txt)** , EEOC Petition No. 04890005 (Dec. 14, 1989).

C. Overtime or Premium Pay as a Component of Back Pay

Back pay will be required to cover any overtime or premium pay that would have been worked absent discrimination. The parties often disagree over whether overtime would have been worked and to what extent overtime could have been earned. The overtime component of a back pay award should generally be calculated based upon the average amount of overtime worked by similarly situated employees. **Haines v. U.S. Postal Service (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/04a50018.txt)** , EEOC Petition No. 04A50018 (Nov. 23, 2005); **Holly v. U.S. Postal Service (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/04A50003.txt)** , EEOC Petition No. 04A50003 (Nov. 2, 2005). If the position is unique, such that a comparison with a similarly situated employee is not possible, the agency should calculate overtime based on the actual overtime worked by the person who was selected for the position. See, for example, **Bowman v. U.S. Postal Service (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/0120112333.txt)** , EEOC Appeal No. 0120112333 (Oct. 3, 2011), request for reconsideration denied, EEOC Request No. **0520120091 (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/0520120091.txt)** (Mar. 16, 2012).

D. Retirement Deductions and Back Pay

The Commission has held that make whole relief requires the agency to make retroactive tax-deferred contributions to the complainant's retirement account for the relevant period. To the extent complainant would have received agency contributions to a retirement fund as a component of her salary, she is entitled to have her retirement benefits adjusted as part of her back pay award, including sums which the account would have earned during the relevant period. The agency should provide its calculations of the amount of contributions to the agency's retirement system that both it and complainant would have made during her absence, as well as the earnings which would have accrued. See **Kretschmar v. Dep't. of the Navy (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/04a40044.txt)** , EEOC Petition No. 04A40044 (Mar. 25, 2005).

E. Interim Earnings Deducted from Back Pay

If the complainant lost a job or did not receive a position due to discrimination, the complainant has the responsibility of mitigating the harm by looking for other work. **Ghannam v. Agency for International Development (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/01990574.txt)** , EEOC Appeal No. 01990574 (June 22, 2004). Wages earned by the employee while separated from the agency are commonly called "interim wages." The agency should deduct the interim wages

earned by the complainant from the amount of back pay owed to the complainant as provided for in Title VII. **42 U.S.C. § 2000e (5)(g) (http://www.gpo.gov/fdsys/pkg/USCODE-2011-title42/html/USCODE-2011-title42-chap21-subchapVI.htm)** . If the agency believes that the complainant did not do enough to mitigate lost wages, it must prove so by a preponderance of the evidence. See **McNeil v. U.S. Postal Service (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/05960436.txt)** , EEOC Request No. 05960436 (Dec. 9, 1999).

However, income that the complainant could have earned while still holding the position at the agency should not be subtracted or offset from back pay. "Moonlight" employment is employment that the employee could have engaged in even while federally employed. See 5 C.F.R. § 550.805(e)(1). See **Paulk v. U.S. Postal Service (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/04A10026.txt)** , EEOC Petition No. 04A10026 (Oct. 4, 2001) (Commission found that petitioner's overtime earnings were earned from his working 65-80 hours per week in a position he acquired during the period subsequent to his termination from the agency, and thus petitioner could not have held both the supplemental job and the job he lost because of discrimination, and therefore, the agency properly offset these earnings from complainant's back pay award).

F. Worker's Compensation Benefits May Be Partially Deductible from Back Pay

A Federal Employees' Compensation Act (FECA) award is meant to compensate for lost wages and/or reparation for physical injury. A claim of back pay against a Federal agency during the same time period covered by a FECA claim would have the potential for a double recovery of back pay. Any portion of a FECA award attributable to lost wages during the back pay period in a discrimination finding will be deducted from the back pay award. The portion of the FECA award that is paid as reparation for physical injuries is not related to wages earned and should not be deducted.

If the agency contends that receipt of workers' compensation would result in double recovery, the agency must determine what portion of the FECA benefits, if any, applied to back pay, leave and other benefits, and what portion of complainant's FECA benefits applied to reparation for physical injuries. See **Ulloa v. U.S. Postal Service (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/04A30025.txt)** , EEOC Petition No. 04A30025 (Aug. 3, 2004).

G. Availability for Work – Prerequisite for Receipt of Back Pay

The applicable regulations provide that the amount of back pay awarded shall be reduced by the amounts earnable with reasonable diligence by the person discriminated against. Thus, the complainant has a duty to mitigate or lessen damages by making a reasonable good faith effort to

find other employment. This means that the complainant must seek a substantially equivalent position, that is, a position that affords virtually identical compensation, job responsibilities, working conditions, status, and promotional opportunities as the position he was discriminatorily denied. See **Knott v. U.S. Postal Service (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/0720100049.txt)** , EEOC Appeal No. 0720100049 (July 5, 2010).

As a general rule, a complainant must be ready, willing, and able to work during the period of back pay recovery in order to receive back pay. The Commission has stated that if an agency can present persuasive evidence that complainant was not able to work during the back pay period, back pay would not be awarded; however, the agency has the burden of proof. **Morman v. Dep't. of Defense (Defense Commissary Agency) (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/04A10006.txt)** , EEOC Petition No. 04A10006 (July 31, 2002). The back pay regulation 5 C.F.R. § 550.805(c) provides that periods of unavailability may not be included in the back pay period unless such periods of time are the result of an illness or injury related to an unjustified or unwarranted personnel action. When a complainant receives workers' compensation due to an agency's failure to provide reasonable accommodation, this does not preclude a back pay award. The receipt of workers' compensation benefits does not indicate that a person was unable to work during the back pay period. See **McClendon v. U.S. Postal Service (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/04960013.txt)** , EEOC Petition No. 04960013 (May 22, 1997).

H. Unemployment Compensation Not Deducted from Back Pay – the Collateral Source Rule

Unemployment compensation is an interim source of income, but it is a collateral source in the sense that it comes from the state - not the federal employer. An employer cannot set off or mitigate its damages through a collateral source - in this case the state's payment of unemployment compensation even though the employer might have contributed to the source.

When a back payment is made where unemployment had been received, in theory the unemployment compensation represents an overpayment from the state and is due to the state. See **Morra-Morrison v. U.S. Postal Service (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/04980023.txt)** , EEOC Petition No. 04980023 (June 2, 1999). This process of recoupment is generally a matter between the complainant and the state.

I. Tax Consequences of a Lump Sum Payment of Back Pay

The Commission has recognized that an agency is liable for any increased tax liability resulting from receipt of a lump sum of back pay in a single tax year. When an individual receives back pay

as a lump sum payment, s/he is entitled to a tax offset payment for the tax year in which she received the payment. Additionally, the individual will have the burden of establishing the amount of his/her increased federal income tax liability to the agency. See **Mohar v. U.S. Postal Service (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/0720100019.txt)** , EEOC Appeal No. 0720100019 (Aug. 29, 2011); **Teresita Lorenzo v. Dep't. of Defense Education Activity (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/01a61644.txt)** , EEOC Petition No. 01A61644 (September 29, 2005); **Warren Goetze v. Dep't. of the Navy (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/01991530.txt)** , EEO Appeal No. 01991530 (Aug. 23, 2001).

J. Liquidated Damages (ADEA and EPA only)

Liquidated damages in Fair Labor Standards Act cases are generally monetary awards equal to, and in addition to, the back pay due to the complainant when a violation is found to be willful or in reckless disregard of the statutes.

In Equal Pay Act cases, willfulness is not a required factor for liquidated damages. Such damages are available for a violation of the EPA unless the agency can prove that it acted in "good faith" and reasonably believed that its actions did not violate the EPA. A finding of willfulness under the EPA, however, may extend the limitations period on back pay from two (2) years to three (3) years.

Since an EPA claim may also be brought as a sex-based wage discrimination claim under Title VII, compensatory damages may also be available if the claim is brought under both statutes.

While liquidated damages for willful violations of the ADEA are available in the private sector under 29 U.S.C. Sec. 626(b), they are not available under the federal sector provisions at Sec. 633a (b). **See Jacobson v. Shalala (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/05930689.txt)** , EEO Request No. 0519930689, (June 2, 1994); **Falks v. Rubin (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/05960250.txt)** , EEOC Request No. 0519960250, (September 6, 1996); **Amaro v. Potter (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/01A20929.txt)** , EEOC Appeal No. 0120020929, (May 29, 2003).

K. Restoration of Leave

Where there has been a finding of discrimination, the complainant is entitled to back pay for time lost from work during the applicable periods, as well as the restoration of any leave used because of the agency's discriminatory actions. **Cox v. Social Security Administration (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/0720050055.txt)** , EEOC Appeal No. 0720050055 (Dec. 24, 2009). For example, the restoration of leave taken for purposes of avoiding or recovering from a discriminatory hostile work environment is a valid component of

equitable relief. See **Burton v. Dep't. of Justice (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/0720090046.txt)**, EEOC Appeal No. 0720090046 (June 9, 2011); see also **Lamb v. Social Security Administration (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/0120103232.txt)**, EEOC Appeal No. 0120103232 (Mar. 21, 2012) (leave restoration ordered where denial of reasonable accommodation resulted in leave usage); **Complainant v. Dep't. of Defense (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/0120084008.txt)**, EEOC Appeal No. 0120084008 (July 6, 2014) (leave restoration ordered where leave used in lieu of improperly denied official time).

IV. FRONT PAY

Front pay is an equitable remedy that compensates an individual when reinstatement is not possible in certain limited circumstances. The Commission has held that front pay may be awarded in lieu of reinstatement when: (1) no position is available; (2) a subsequent working relationship between the parties would be antagonistic; or (3) the employer has a record of long-term resistance to anti-discrimination efforts. **Brinkley v. U.S. Postal Service (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/05980429.txt)**, EEOC Request No, 05980429 (Aug. 12, 1999). The fact that front pay is awarded in lieu of reinstatement implies that the complainant is able to work but cannot do so because of circumstances external to the complainant. See **Cook v. U.S. Postal Service (https://law.justia.com/cases/federal/appellate-courts/F3/67/318/584151/)**, EEOC Appeal No. 01950027 (July 17, 1998).

The Commission has held that front pay is an equitable remedy to be awarded for a reasonable future period required for the victim of discrimination to reestablish his rightful place in the job market. See **Deidra Brown-Fleming v. Dep't. of Justice (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/0420080016.txt)**, EEOC Petition No. 0420080016 (Oct. 28, 2010).

V. OTHER FORMS OF EQUITABLE RELIEF

As appropriate, the agency shall also:

1. Cancel an unwarranted personnel action and restore the employee to the status s/he occupied prior to the discrimination;

2. Expunge any adverse materials relating to the discriminatory employment practice from the agency's records;[1] and

3. Provide the individual with a full opportunity to participate in the employee benefit that was denied - for example, training, preferential work assignments, or overtime scheduling.[2]

When the finding of discrimination involves a performance appraisal, the appropriate relief should include raising the rating to that which the individual would have received absent the discrimination. **McKenzie v. Dep't. of Justice (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/0120100034.txt)** , EEOC Appeal No. 0120100034 (July 7, 2011); **Hairston v. Dep't. of Education (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/0120071308.txt)** , EEOC Appeal No. 0120071308 (Apr. 15, 2010). In addition, the individual is entitled to all benefits and awards that s/he would have received if she had achieved the higher performance appraisal rating. **Cook v. Dep't. of Labor (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/0720080045.txt)** , EEOC Appeal No. 0720080045 (Feb. 22, 2010).

It is also appropriate to order training for agency personnel found to have engaged in discrimination, and to consider taking disciplinary action against those officials who engaged in the discrimination.[3] See **James v. Dep't. of Agriculture (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/0520100086.txt)** , EEOC Appeal No. 0120073831 (September 22, 2009), request for reconsideration denied, EEOC Request No. **0520100086 (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/0520100086.txt)** (Mar. 22, 2010) (ordering the agency to provide the Selecting Official who discriminated against complainant 16 hours of EEO training and to consider taking disciplinary action against the official). The Commission does not consider training to be "discipline." See **Morrow v. U.S. Postal Service (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/0720070058.txt)** , EEOC Appeal No. 0720070058 (Nov. 13, 2009).

For example, in **Burton v. Dep't. of Justice (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/0720090046.txt)** , EEOC Appeal No. 0720090046 (June 9, 2011), one of the responsible management officials found to have engaged in unlawful discrimination and retaliation was a high-level management official who set the leadership tone for the entire facility, and, thus, requiring five hours of EEO training for all facility management and supervisory staff was appropriate. See also **Kitson v. Dep't. of Justice (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/0720100052.txt)** , EEOC Appeal No. 0720100052 (Feb. 15, 2011), request for reconsideration denied, EEOC Request No. **0520110312 (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/0520110312.txt)** (June 10, 2011) (ordering the agency to provide training for upper-level employees at an agency facility following a finding of discriminatory non-selection); **Wagner v. Dep't. of Transportation (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/0120103125.txt)** , EEOC Appeal No. 0120103125 (Dec. 1, 2010) (ordering the agency to provide EEO training to all

employees at an agency facility following a finding that agency managers and employees subjected complainant to a hostile work environment).

The Commission has also found that, in cases involving discriminatory policies or practices, the appropriate relief includes ordering the agency to "cease and desist" from adhering to that policy or practice. For example, in **Smith v. Dep't. of the Navy (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/0120082983.txt)** , EEOC Appeal No. 0120082983 (Feb. 16, 2010), request for reconsideration denied, EEOC Request No. **0520100287 (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/0520100287.txt)** (July 9, 2010), the Commission ordered the agency to cease and desist from requiring that all contact with EEO Counselors be arranged by management officials.

Following a finding of discrimination, the agency should take steps to ensure that the same type of action does not recur. In **Cheeks v. Dep't. of the Army (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/0120091345.txt)** , EEOC Appeal No. 0120091345 (Feb. 1, 2012), the agency was found to have engaged in racial harassment. The agency was ordered to take all necessary steps to ensure that complainant had no contact with the supervisor responsible for the harassment, as well as to provide complainant with a designated management official to whom he could report any subsequent acts of harassment. See also **Ighile v. Dep't. of Justice (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/0720110010.txt)** , EEOC Appeal No. 0720110010 (Apr. 13, 2012) (ordering the agency to cease and desist from all hostile conduct directed to complainant, and take appropriate action to ensure that his co-workers cease and desist from any hostile conduct).

VI. ATTORNEY'S FEES AND COSTS

A. Introduction

Attorney's fees and costs shall be awarded in accordance with 29 C.F.R. § 1614.501(e).

In federal EEO law, there is a strong presumption that a complainant who prevails in whole or in part on a claim of discrimination is entitled to an award of attorney's fees and costs. More specifically, complainants who prevail on claims alleging discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, and the Rehabilitation Act of 1973, as amended, are presumptively entitled to an award of attorney's fees and costs, unless special circumstances render such an award unjust. 29 C.F.R. § 1614.501(e)(1). (Complainants prevailing on claims under the Age Discrimination in Employment Act of 1967, as amended, and the Equal Pay Act of 1963, as amended, are not entitled to attorney's fees at the administrative level.) Only where a Title VII, GINA, or Rehabilitation Act complainant rejects an offer of resolution made in accordance with 29

C.F.R. § 1614.109(c) and does not obtain more relief than the agency had offered, or in the rarest of other circumstances, might an agency limit or deny an award of fees.

B. Determination of Prevailing Party Status

1. A "prevailing party," within the meaning of Section 706(k) of Title VII, 42 U.S.C. § 2000e-5(k), is a complainant who has succeeded on any significant issue that achieved some of the benefit the complainant sought in filing the complaint. **Texas State Teachers Ass'n v. Garland I.S.D. (http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?friend=public&court=us&vol=489&page=792)** , 489 U.S. 782 (1989). The Commission has relied on a two-part test set forth in **Miller v. Staats (https://casetext.com/case/miller-v-staats)** , 706 F.2d 336 (D.C. Cir. 1983), for determining whether a complainant is a prevailing party. **Baldwin v. Dep't. of Health & Human Services (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/05910016.txt)** , EEOC Request No. 05910016 (Apr. 12, 1991). To satisfy the first part of the test, the complainant must have substantially received the relief sought. Id. To satisfy the second part of the test, there must be a determination that the complaint was a catalyst motivating the agency to provide the relief. Id. (citing **Miller (https://www.ravellaw.com/opinions/69cdf0405472e0cb8706af0cceb15b7b)** , 706 F.2d at 341). A purely technical or de minimis success is insufficient to confer "prevailing party" status. **Texas State Teachers Ass'n. (http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?friend=public&court=us&vol=489&page=792)** at 792.

2. The touchstone is whether the actual relief on the merits materially alters the legal relationship between the parties by modifying the agency's behavior in a way that directly benefits the complainant. **Farrar v. Hobby (http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=506&page=103)** , 506 U.S. 103 (1992); **Bragg v. Dep't. of the Navy (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/01945699.txt)** , EEOC Appeal No. 01945699 (Mar. 7, 1996). Even an award of nominal monetary damages may be sufficient to meet this standard. **Farrar (http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=506&page=103)** . Monetary relief is not required; non-monetary relief such as reinstatement or a higher performance rating is sufficient. Id.

3. An attorney who represents himself is not entitled to an award of fees. **Kay v. Ehrler (http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=499&page=432)** , 499 U.S. 432 (1991). Neither a non-attorney nor a federal employee (including attorneys) who represents a complainant is entitled to an award of fees. 29 C.F.R. § 1614.501(e)(1)(iii).

C. Presumption of Entitlement

1. A prevailing complainant is presumptively entitled to fees and costs unless special circumstances render such an award unjust. 29 C.F.R. § 1614.501(e)(1)(i); **New York Gaslight Club, Inc. v. Carey (http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=447&page=54)** , 447 U.S. 54 (1983); **Thomas v. Dep't. of State (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/01932717.txt)** , EEOC Appeal No. 01932717 (June 10, 1994). Special circumstances should be construed narrowly. The following arguments are not sufficient to show special circumstances:

   a. the complainant did not need an attorney;

   b. the complainant's attorney worked for a public interest organization;

   c. the complainant's attorney accepted the case pro bono;

   d. the complainant's attorney was paid from some private fee agreement;

   e. the complainant was able to pay the costs of the case;

   f. the agency acted in good faith;

   g. the agency took prompt action in remedying the discrimination;

   h. the financial burden of any fee would fall to the taxpayers;

   i. the agency has limited funds.

   See **Blanchard v. Bergeron (http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=489&page=87)** , 489 U.S. 87 (1989); **Roe v. Cheyenne Mountain Conference Resort, Inc. (https://law.justia.com/cases/federal/district-courts/FSupp/920/1153/1461550/)** , 124 F.3d 1221 (10th Cir. 1997); Jones v. Wilkinson, 800 F.2d 989 (10th Cir. 1986); **Fields v. City of Tarpon Springs (https://casetext.com/case/fields-v-city-of-tarpon-springs-fla)** , 721 F.2d 318 (11th Cir. 1983); **Copeland v. Marshall (https://casetext.com/case/copeland-v-marshall-2)** , 641 F.2d 880 (D.C. Cir. 1980); see also **Wise v. Dep't. of Veterans Affairs (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/05920056.txt)** , EEOC Request No. 05920056 (Apr. 1, 1992).

2. Agencies are not required to pay for attorney's fees for services rendered during the pre-complaint process unless an Administrative Judge issues a decision finding discrimination, the agency issues a final order that does not implement the decision, and the Commission upholds the Administrative Judge's decision on appeal. If the agency agrees to fully implement the Administrative Judge's decision, it cannot be compelled to pay attorney's fees for fees incurred during the pre-complaint process, except that fees may be recovered for a reasonable period of time for services performed in reaching the decision whether to represent the complainant. 29 C.F.R. § 1614.501(e)(1)(iv). The agency and the complainant

can agree, however, that the agency will pay attorney's fees for pre-complaint process representation. Id.

3. No attorney's fees may be awarded under the Age Discrimination in Employment Act, see **Coome v. Social Security Administration (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/0720120010.txt)**, EEOC Appeal No. 0720120010 (Oct. 12, 2012), or Equal Pay Act, see **Jacobsen v. Dep't. of the Navy (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/0720100046.txt)**, EEOC Appeal Nos. 0720100046 and 0720100047 (September 7, 2012), for services performed at the administrative level. Lowenstein v. Baldridge, 38 Fair Empl. Prac. Cas. (BNA) 466 (D.D.C. 1985); 29 C.F.R. § 1614.501(e)(1).

D. Awards to Prevailing Parties in Negotiated Settlements

1. A complainant who prevails through a negotiated settlement is entitled to attorney's fees and costs under the same standards as any other prevailing party. **Maher v. Gagne (http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=448&page=122)**, 448 U.S. 122 (1980); **Copeland v. Marshall (https://casetext.com/case/copeland-v-marshall-2)**, 641 F.2d 880 (D.C. Cir. 1980); **EEOC v. Madison Community Unit Sch. Dist. 12 (https://casetext.com/case/eeoc-v-madison-comm-unit-school-dist-no-12)**, 818 F.2d 577 (7th Cir. 1987); **Cerny v. Dep't. of the Navy (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/05930899.txt)**, EEOC Request No. 05930899 (Oct. 19, 1994). A settlement agreement that fails, however, to preserve the issue of fees and costs will operate as an implicit waiver of fees and costs. **Wakefield v. Matthews, (https://casetext.com/case/wakefield-v-mathews)** 852 F.2d 482 (9th Cir. 1988); **Elmore v. Shuler (https://law.justia.com/cases/federal/appellate-courts/F2/787/601/197624/)**, 787 F.2d 601 (D.C. Cir. 1986). The Commission strongly encourages parties to resolve fee and cost issues by negotiated settlement.[4]

2. The Administrative Judge will not review a negotiated fee agreement for fairness or reasonableness, except in class cases. **Foster v. Boise-Cascade, Inc. (https://casetext.com/case/foster-v-boise-cascade-inc)**, 577 F.2d 335 (5th Cir.)(per curiam), reh'g denied, 581 F.2d 267 (5th Cir. 1978); **Jones v. Amalgamated Warbasse Houses, Inc. (https://cite.case.law/frd/97/355/)**, 721 F.2d 881 (2d Cir. 1983), cert. denied, 466 U.S. 944 (1984). In class cases, the Administrative Judge should review the agreement to ensure that the negotiated fee is fair and reasonable to all parties.

E. Awards of Costs and Fees for Expert and Non-Lawyer Services

1. A prevailing complainant is entitled to recovery of his/her costs. Costs include those costs authorized by 28 U.S.C. § 1920. 29 C.F.R. § 1614.501(e)(2)(ii)(C). These include: witness fees; transcript costs; and printing and copying costs. In addition, reasonable out-of-pocket expenses may include all costs incurred by the attorney that are normally charged to a fee-paying client in the normal course of providing representation. **Hafiz v. Dep't. of Defense (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/04960021.txt)** , EEOC Petition No. 04960021 (July 11, 1997). These costs may include such items as mileage, postage, telephone calls, and photocopying.

2. A prevailing complainant is entitled to expert fees as part of recoverable attorney's fees. 42 U.S.C. § 1988. The fee is not limited to per diem expenditures, but includes all expenses incurred in connection with the retention of an expert. Id. Recovery is generally limited to testifying experts, but fees may be awarded for non-testifying experts if the complainant can show that the expert's services were reasonably necessary to the case.

3. A prevailing complainant is entitled to compensation for the work of law clerks, paralegals, and law students under the supervision of members of the bar, at market rates, 29 C.F.R. § 1614.501(e)(1)(iii), but not for clerical services. **Missouri v. Jenkins (http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=491&page=274)** , 491 U.S. 274 (1989).

4. Reasonable costs incurred directly by a prevailing complainant (for example, one who is unrepresented or who is represented by a non-lawyer) are compensable. Hafiz, supra. Costs must be proved in the same manner as fees are, and the complainant must provide documentation, such as bills or receipts.

5. Witness fees shall be awarded in accordance with 28 U.S.C. § 1821, except that no award shall be made for a federal employee who is in a duty status when made available as a witness. 29 C.F.R. § 1614.501(e)(2)(iii).

F. Computation of Attorney's Fees

1. Attorney's fees will be computed by determining the "lodestar." The "lodestar" is the number of hours reasonably expended multiplied by a reasonable hourly rate. **Hensley v. Eckerhart (http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=461&page=424)** , 461 U.S. 424, 434 (1983). By regulation, the Commission uses the same basis for calculating the amount of attorney's fees. 29 C.F.R. § 1614.501(e)(2)(ii)(B).

    a. All hours reasonably spent in processing the complaint are compensable. Fees shall be paid for services performed by an attorney after the filing of a written complaint,

provided that the attorney provides reasonable notice of representation to the agency, Administrative Judge, or Commission, except that fees are allowable for a reasonable period of time prior to the notification of representation for any services performed in reaching a determination to represent the complainant. 29 C.F.R. § 1614.501(e)(1)(iv).

b. Fees for services rendered during the pre-complaint process may be awarded only under the circumstances set forth above in Section III.B. See 29 C.F.R. § 1614.501(e)(1)(iv).

c. An attorney is eligible for work performed at the appeals stage for an award of fees, provided the complainant prevails at this stage.

d. The number of hours should not include excessive, redundant, or otherwise unnecessary hours. **Hensley (http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=461&page=424)** , 461 U.S. at 434; **Bernard v. Dep't. of Veterans Affairs (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/01966861.txt)** , EEOC Appeal No. 01966861 (July 17, 1998). The presence of multiple counsel at hearing or deposition may be considered duplicative in certain situations, such as where one or more counsel had little or no participation or where the presence of multiple counsel served to delay or prolong the hearing or deposition. **Hodge v. Dep't. of Transportation (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/05920057.txt)** , EEOC Request No. 05920057 (Apr. 23, 1992). The presence of multiple counsel is not necessarily duplicative, however, and is often justifiable. Time spent on clearly meritless arguments or motions, and time spent on unnecessarily uncooperative or contentious conduct may be deducted. Luciano v. Olsten Corp., 109 F.3d 111 (2d Cir. 1997); Clanton v. Allied Chemical Corp., 416 F. Supp. 39 (E.D. Va. 1976).

e. A reasonable hourly rate is a rate based on "prevailing market rates in the relevant community" for attorneys of similar experience in similar cases. **Cooley v. Dep't. of Veterans Affairs (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/05960748.txt)** , EEOC Request No. 05960748 (July 30, 1998) (quoting **Blum v. Stenson (http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=465&page=886)** , 465 U.S. 886 (1984)). A higher rate for time spent at hearing may be reasonable if trial work would command a higher rate under prevailing community standards. Where multiple attorneys have worked on the case, the rate for each attorney should be determined separately. The limits on hourly rates contained in the Equal Access to Justice Act are not applicable.

f. The applicable rate for fee awards to public interest attorneys is the prevailing hourly rate for the community in general. **Hodge v. Dep't. of Transportation (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/05920057.txt)**

, EEOC Request No. 05920057 (Apr. 23, 1992). In **Save Our Cumberland Mountains, Inc. v. Hodel, (https://scholar.google.com/scholar_case?case=4886064177353581550&hl=en&as_sdt=6&as_vis=1&oi=scholarr)** 857 F.2d 1516 (D.C. Cir. 1988), the court held that the prevailing market rate should also be used to determine fee awards to private, for-profit attorneys who represent certain clients at reduced rates, which reflect "non-economic" goals. See also **Cooley v. Dep't. of Veterans Administration (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/05960748.txt)** , EEOC Request No. 05960748 (July 30, 1998); **Hatfield v. Dep't. of the Navy (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/01892909.txt)** , EEOC Appeal No. 01892909 (Dec. 12, 1989).

g. The hours spent on unsuccessful claims should be excluded in considering the amount of a reasonable fee only where the unsuccessful claims are distinct in all respects from the successful claims. **Hensley v. Eckerhart (http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=461&page=424)** , 461 U.S. 424 (1983).

h. The degree of success is an important factor in calculating an award of attorney's fees. **Farrar v. Hobby (http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=506&page=103)** , 506 U.S. 103 (1992). In determining the degree of success, the relief obtained (including both monetary and equitable relief) should be considered in light of the complainant's goals. **City of Riverside v. Rivera (http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=477&page=561)** , 477 U.S. 561 (1986); **Cullins v. Georgia Department of Transportation (https://casetext.com/case/cullens-v-georgia-dept-of-transp-2)** , 29 F.3d 1489 (1994). Where the complainant achieved only limited success, the complainant should receive only the amount of fees that is reasonable in relation to the results obtained. **Hensley v. Eckerhart (http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=461&page=424)** , 461 U.S. 424 (1983); **Cerny v. Dep't. of the Navy (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/05930899.txt)** , EEOC Request No. 05930899 (Oct. 19, 1994). However, a reasonable fee may not be determined by mathematical formula based on monetary relief obtained. **Riverside (http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=477&page=561)** at 563; **Cullins (http://bulk.resource.org/courts.gov/c/F3/29/29.F3d.1489.93-8570.html)** at 1493. The determination of the degree of success should be made on a case-by-case basis. In many cases, an award of equitable relief only or a small award of monetary damages may reflect a high degree of success. Failure to obtain the maximum

damages allowable or a large monetary award generally does not reflect limited success.

2. There is a strong presumption that the lodestar represents the reasonable fee. 29 C.F.R. § 1614.501(e)(2)(ii)(B). In limited circumstances, the lodestar figure may be adjusted upward or downward, taking into account the degree of success, the quality of representation, and long delay caused by the agency. The lodestar may be adjusted only under the circumstances described in this subpart.

    a. An award of attorney's fees may be enhanced in cases of exceptional success. The complainant must show that such an enhancement is necessary to determine a reasonable fee. **City of Burlington v. Dague (http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=505&page=557)** , 505 U.S. 557 (1992). Conversely, a fee award may be reduced in cases of limited success. **Texas State Teachers Ass=n v. Garland I.S.D. (http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=489&page=782)** , 489 U.S. 782 (1989). However, there is no requirement that fee awards be proportional to the amount of monetary damages awarded. **City of Riverside v. Rivera (http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=477&page=561)** , 477 U.S. 561 (1986).

    b. An award of attorney's fees may be enhanced where the quality of representation is exceptional. **McKenzie v. Kennickell (https://casetext.com/case/mckenzie-v-kennickell)** , 875 F.2d 330 (D.C. Cir. 1989). Conversely, the award of attorney's fees may be reduced where the quality of representation was poor, the attorney's conduct resulted in undue delay or obstruction of the process, or where settlement likely could have been reached much earlier but for the attorney's conduct. Lanasa v. City of New Orleans, 619 F. Supp. 39 (E.D. La. 1985); Barrett v. Kalinowski, 458 F. Supp. 689 (M.D. Pa. 1978).

    c. The lodestar may not be enhanced to compensate for the risk of non-payment, risk of losing the case, or difficulty finding counsel. **City of Burlington v. Dague (http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=505&page=557)** , 505 U.S. 557 (1992).

    d. A lodestar may be adjusted to compensate for a long delay where the delay is caused by the agency. **Pennsylvania v. Delaware Valley Citizens' Council (http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=483&page=711)** , 483 U.S. 711 (1987).

    e. If the Administrative Judge or agency determines that an adjustment to the lodestar is appropriate, the Administrative Judge or agency may calculate the adjustment by either adding or subtracting a lump sum from the lodestar figure or by adding or

subtracting a percentage of the lodestar. The Administrative Judge or agency has discretion to determine the amount of the adjustment. Normally, the adjustment should be no more or less than 75% of the lodestar figure. The Administrative Judge or agency must provide a detailed written explanation of why the adjustment was made, and what factors supported the adjustment. **Coutin v. Young & Rubicam Puerto Rico, Inc., (https://casetext.com/case/coutin-v-young-rubicam-puerto-rico-inc)** 124 F.3d 331 (1st Cir. 1997).

f. The party seeking to adjust the lodestar, either up or down, has the burden of justifying the deviation. **Copeland v. Marshall (https://casetext.com/case/copeland-v-marshall-2)** , 641 F.2d 880, 892 (D.C. Cir. 1980); **Brown v. Dep't. of Commerce (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/01944999.txt)** , EEOC Appeal No. 01944999 (May 17, 1996).

3. Where a complainant rejects an offer of resolution and the final decision is not more favorable than the offer, attorney's fees and costs incurred after the expiration of the thirty (30)-day acceptance period are not compensable. 29 C.F.R. § 1614.109(c)(3). This regulation further provides that an Administrative Judge may award attorney's fees and costs despite the complainant's failure to accept an offer of resolution where Athe interests of justice would not be served@ by a denial of fees. An example of when fees would be appropriate is where the complainant received an offer of resolution, but was informed by a responsible agency official that the agency would not comply in good faith with the offer (for example, would unreasonably delay implementation of the relief offered). A complainant who rejected the offer for that reason, and who obtained less relief than was contained in the offer of resolution, would not be denied attorney's fees in this situation.

G. Contents of Fee Application and Procedure for Determination

1. When the decision-making authority, that is, the agency, an Administrative Judge, or the Commission, issues a decision finding discrimination, the decision normally should provide, under the standards set forth above, for the complainant's entitlement to attorney's fees and costs. The complainant's attorney then must submit a verified statement of attorney's fees (including expert witness fees) and other costs, as appropriate, to the agency or Administrative Judge within thirty (30) days of receipt of the decision and must submit a copy of the statement to the agency. 29 C.F.R. § 1614.501(e)(2)(i).[5]

   A statement of attorney's fees and costs must be accompanied by an affidavit executed by the attorney of record itemizing the attorney's charges for legal services. A verified statement of fees and costs shall include the following:

   a. a list of services rendered itemized by date, number of hours, detailed summary of the task, rate, and attorney's name;

b. documentary evidence of reasonableness of hours, such as contemporaneous time records, billing records, or a reasonably accurate substantial reconstruction of time records;

c. documentary evidence of reasonableness of rate, such as an affidavit stating that the requested rate is the attorney's normal billing rate, a detailed affidavit of another attorney in the community familiar with prevailing community rates for attorneys of comparable experience and expertise, a resume, a list of cases handled, or a list of comparable cases where a similar rate was accepted; and

d. documentation of costs.

National Ass'n of Concerned Veterans v. Secretary of Defense (https://casetext.com/case/nat-assn-of-concerned-vets-v-sec-of-def), 675 F.2d 1319 (D.C. Cir. 1982). A fee award may be reduced for failure to provide adequate documentation. If seeking an adjustment to the lodestar figure, the fee application shall clearly identify the specific circumstances of the case that support the requested adjustment. Id.

2. The agency may respond to the statement of fees and costs within 30 days of its receipt. If the agency contests the fee request, it must provide equally detailed documentation in support of its arguments. Id.

3. Discovery into the reasonableness of the hours or rate is permissible, but discouraged. The Administrative Judge has discretion to grant or deny permission to conduct discovery by interrogatory or document request.

4. The Administrative Judge or agency will issue a decision determining the amount of attorney's fees or costs due within 60 days of receipt of the statement and affidavit. 29 C.F.R. § 1614.501(e)(2)(ii)(A). The decision should provide a written explanation of any award of fees and costs, including, as appropriate, findings of fact, analysis, and legal conclusions. 29 C.F.R. § 1614.501(e)(2)(ii)(A). The decision must include a notice of right to appeal to the Commission.

5. The Commission encourages the parties to resolve fee and cost issues by negotiated settlement during the 30-day period for filing a fee petition. The Administrative Judge will not review a negotiated fee agreement for fairness or reasonableness, except in class cases.

6. If the Administrative Judge decides to bifurcate the liability and damages determinations in a case, the decision on liability should provide for entitlement to attorney's fees and the subsequent decision on damages should also include the determination of the amount of the award of fees and costs. The complainant's attorney should be directed to submit the statement of fees and costs within 30 days of receipt of the decision finding liability. The attorney may submit a supplemental petition for fees incurred during the damages phase of the case.

H. Miscellaneous Issues

1. An Administrative Judge may award interim fees pendente lite[6] where the complainant has prevailed on an important non-procedural allegation of discrimination in the course of the case. **Hanrahan v. Hampton (http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=446&page=754)** , 446 U.S. 754 (1980); Trout v. Garrett, 891 F.2d 332 (D.C. Cir. 1989). However, interim awards should be granted only under special circumstances, such as where a complainant's attorney has invested substantial time and resources into a case over a long period of time.

2. A prevailing complainant is entitled to an award of fees for time spent on a fee claim including time spent defending the award on appeal. **Southeast Legal Defense Group v. Adams (https://law.justia.com/cases/federal/district-courts/FSupp/436/891/1429968/)** , 657 F.2d 1118 (9th Cir. 1981); Lund v. Affleck, 587 F.2d 75 (1st Cir. 1978). However, the Administrative Judge may reduce or eliminate fees for time spent on litigating the fee award where fee claims are exorbitant or the time devoted to preparing a fee claim is excessive. **Gagne v. Maher (https://law.justia.com/cases/federal/district-courts/FSupp/455/1344/1415720/)** , 594 F.2d 336 (2d Cir. 1979), aff'd, **448 U.S. 122 (http://www.law.cornell.edu/supremecourt/text/448/122)** (1980). A reasonableness standard applies. **Black v. Dep't. of the Army (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/05960390.txt)** , EEOC Request No. 05960390 (Dec. 9, 1998).

3. Even absent a finding of discrimination, the Administrative Judge has authority to impose attorney's fees and costs as an appropriate sanction for refusal to obey discovery or other orders. 29 C.F.R. § 1614.109(f)(3)(v). For example, a complainant may be entitled to attorney's fees when the agency fails without good cause shown to respond to discovery requests, **Shine v. U.S. Postal Service (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/01972201.txt)** , EEOC Appeal No. 01972201 (Dec. 12, 1998), or falsifies documents or testimony, **Wichy v. Dep't. of the Air Force (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/01962972.txt)** , EEOC Appeal No. 01962972 (September 25, 1998). Fees and costs may be awarded for work associated with efforts to secure discovery compliance, even when the complainant does not prevail on the merits. **Stull v. Dep't. of Justice (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/01942827.txt)** , EEOC Appeal No. 01942827 (June 15, 1995).

4. Attorney's fees are available for work pursuing claim for damages. **Rivera v. National Aeronautics & Space Administration (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/0120111416.txt)** , EEOC Appeal No. 0120111416 (July 19, 2011).

VII. COMPENSATORY DAMAGES

Compensatory damages are awarded to compensate a complaining party for losses or suffering inflicted due to the discriminatory act or conduct. See Carey v. Piphus 435 U.S. 247, 254 (1978) (purpose of damages is to "compensate persons for injuries caused by the deprivation of constitutional rights"). Compensatory damages "may be had for any proximate consequences which can be established with requisite certainty." 22 Am Jur 2d Damages § 45 (1965) Compensatory damages include damages for past pecuniary loss (out-of-pocket loss), future pecuniary loss, and nonpecuniary loss (emotional harm). See **Goetze v. Dep't. of the Navy (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/01991530.txt)** , EEOC Appeal No. 01991530 (Aug. 23, 2001).

A. Entitlement to Seek Compensatory Damages

1. Pursuant to Section 102(a) of the Civil Rights Act of 1991, a complainant who establishes his/her claim of unlawful discrimination may receive, in addition to equitable remedies, compensatory damages for past and future pecuniary losses (that is, out of pocket expenses) and non-pecuniary losses (for example, pain and suffering, mental anguish). 42 U.S.C. § 1981a(b)(3). For an employer with more than 500 employees, the limit of liability for future pecuniary and non-pecuniary damages is $300,000. Id. Complainants prevailing on claims under the Age Discrimination in Employment Act of 1967, as amended, and the Equal Pay Act of 1963, as amended, are not entitled to compensatory damages at the administrative level.

2. Under Section 102 of the Civil Rights Act of 1991, compensatory damages may be awarded for past pecuniary losses, future pecuniary losses, and non-pecuniary losses that are directly or proximately caused by the agency's discriminatory conduct. However, Section 102 prohibits such awards for an employment practice that is unlawful because of its disparate impact. **Compensatory and Punitive Damages Available under Section 102 of the Civil Rights Act of 1991 (http://www.eeoc.gov/policy/docs/damages.html)** (July 14, 1992).

3. However, Section 102 also provides that an agency is not liable for compensatory damages in cases of disability discrimination where the agency demonstrates that it made a good faith effort to accommodate the complainant's disability.

   An agency can demonstrate a good faith effort by proving that it consulted with the individual with a disability and attempted to identify and make a reasonable accommodation. **Schauer v. Social Security Administration (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/01970854.txt)** , EEOC Appeal No. 01970854 (July 12, 2001); compare **Luellen v. U.S. Postal Service (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/01951340.txt)** ,

EEOC Appeal No. 01951340 (Dec. 23, 1996) (agency demonstrated good faith effort where it consulted with complainant and her physicians in attempting to identify a reasonable accommodation, despite the fact that these efforts were not sufficient to afford complainant a reasonable accommodation); **Morris v. Dep't. of Defense (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/01962984.txt)** , EEOC Appeal No. 01962984 (Oct. 1, 1998) (agency did not make a good faith effort to identify and provide a reasonable accommodation for complainant where it did not make any attempt to find an available office position for complainant in spite of his repeated requests.).

4. The Commission may set out the amount of compensatory damages to be awarded by the respondent agency in its decisions. Alternatively, the Commission may remand the matter to the agency for a determination of the amount of compensatory damages.

B. Legal Principles

1. **Non-Pecuniary Damages**

   Non-pecuniary damages are losses that are not subject to precise quantification including emotional pain and injury to character, professional standing, and reputation**.** Compensatory damages are awarded to compensate for losses or suffering inflicted due to discrimination. Punitive damages are not available against the federal government.

   The particulars of what relief may be awarded, and what proof is necessary to obtain that relief, are set forth in detail in the Commission Notice No. 915.002, **Compensatory and Punitive Damages Available under Section 102 of the Civil Rights Act of 1991 (http://www.eeoc.gov/policy/docs/damages.html)** (July 14, 1992). Briefly stated, the complainant must submit evidence to show that the agency's discriminatory conduct directly or proximately caused the losses for which damages are sought. Id. at 11-12, 14; **Rivera v. Dep't. of the Navy (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/01934157.txt)** , EEOC Appeal No. 01934157 (July 22, 1994).

   The amount awarded should reflect the extent to which the agency's discriminatory action directly or proximately caused harm to the complainant and the extent to which other factors may have played a part. **The Commission Notice No. 915.002 (http://www.eeoc.gov/policy/docs/damages.html)** , **Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991 (http://www.eeoc.gov/policy/docs/damages.html)** (July 14, 1992) at 11-12. The amount of non-pecuniary damages should also reflect the nature and severity of the harm to the complainant, and the duration or expected duration of the harm. Id. at 14.

In **Carle v. Dep't. of the Navy (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/01922369.txt)**, the Commission explained that "objective evidence" of non-pecuniary damages could include a statement by the complainant explaining how s/he was affected by the discrimination. EEOC Appeal No. **01922369 (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/01922369.txt)** (Jan. 5, 1993). Non-pecuniary damages must be limited to the sums necessary to compensate the injured party for the actual harm and should take into account the severity of the harm and the length of the time the injured party has suffered from the harm. **Carpenter v. Dep't. of Agriculture (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/01945652.txt)**, EEOC Appeal No. 01945652 (July 17, 1995).

Objective evidence of compensatory damages can include statements from complainant concerning his emotional pain or suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to professional standing, injury to character or reputation, injury to credit standing, loss of health, and any other non-pecuniary losses that are incurred as a result of the discriminatory conduct. Id. Statements from others including family members, friends, health care providers, or other EEO Counselors (including clergy) could address the outward manifestations or physical consequences of emotional distress, including sleeplessness, anxiety, stress, depression, marital strain, humiliation, emotional distress, loss of self-esteem, excessive fatigue, significant weight loss or gain, or a nervous breakdown. Id. Complainant's own testimony, along with the circumstances of a particular case, can suffice to sustain his burden in this regard. Id. The more inherently degrading or humiliating the defendant's action is, the more reasonable it is to infer that a person would suffer humiliation or distress from that action. Id.

Evidence from a health care provider or other expert is not a mandatory prerequisite for recovery of compensatory damages for emotional harm. See **Lawrence v. U.S. Postal Service (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/01952288.txt)**, EEOC Appeal No. 01952288 (Apr. 18, 1996) (citing **Carle v. Dep't. of the Navy (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/01922369.txt)**, EEOC Appeal No. 01922369 (Jan.. 5, 1993)). The absence of supporting evidence, however, may affect the amount of damages appropriate in specific cases. Id.

Non-pecuniary damages must be limited to compensation for the actual harm suffered as a result of the agency's discriminatory actions. See **Carter v. Duncan-Huggans, Ltd., (https://casetext.com/case/carter-v-duncan-huggins-ltd)** 727 F.2d 1225 (D.C. Cir. 1994); **The Commission Notice No. 915.002 (http://www.eeoc.gov/policy/docs/damages.html)**, **Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991 (http://www.eeoc.gov/policy/docs/damages.html)** (July 14, 1992) at 13. 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, supra. Additionally, 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. U.S. Postal Service (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/01972555.txt)**, EEOC Appeal No. 01972555 (Apr. 15, 1999), citing **Cygnar v. City of Chicago (https://law.justia.com/cases/federal/district-courts/FSupp/652/287/2306256/)**, 865 F. 2d 827, 848 (7th Cir. 1989). Finally, we note that in determining non-pecuniary compensatory damages, the Commission has also taken into consideration the nature of the agency's discriminatory actions. See **Utt v. U.S. Postal Service (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/0720070001_revised2.txt)**, EEOC Appeal No. 0720070001 (Mar. 26, 2009); **Brown-Fleming v. Dep't. of Justice (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/0120082667.txt)**, EEOC Appeal No. 0120082667 (Oct. 28, 2010).

2. **Past Pecuniary Damages**

Compensatory damages may be awarded for pecuniary losses that are directly or proximately caused by the agency's discriminatory conduct. See **The Commission Notice No. 915.002 (http://www.eeoc.gov/policy/docs/damages.html)**, **Compensatory and Punitive Damages Available under Section 102 of the Civil Rights Act of 1991 (http://www.eeoc.gov/policy/docs/damages.html)** (July 14, 1992) at 8. Pecuniary losses are out-of-pocket expenses incurred as a result of the agency's unlawful action, including job-hunting expenses, moving expenses, medical expenses, psychiatric expenses, physical therapy expenses, and other quantifiable out-of-pocket expenses. Id. Past pecuniary losses are losses incurred prior to the resolution of a complaint through a finding of discrimination, or a voluntary settlement. Id. at 8-9.

In a claim for pecuniary compensatory damages, complainant must demonstrate, through appropriate evidence and documentation, the harm suffered as a result of the agency's discriminatory action. **Rivera v. Dep't. of the Navy (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/01934156.txt)**, EEOC Appeal No. 01934156 (July 22, 1994); **The Commission Notice No. 915.002 (http://www.eeoc.gov/policy/docs/damages.html)**, **Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991 (http://www.eeoc.gov/policy/docs/damages.html)** (July 14, 1992), at 11-12, 14; **Carpenter v. Dep't. of Agriculture (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/01945652.txt)**, EEOC Appeal No. 01945652 (July 17, 1995). Objective evidence in support of a claim for pecuniary damages includes documentation showing actual out-of-pocket expenses with an explanation of the expenditure. See **The Commission Notice No. 915.002**

(http://www.eeoc.gov/policy/docs/damages.html) , **Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991 (http://www.eeoc.gov/policy/docs/damages.html)** (July 14, 1992) at 11-12; **Carle v. Dep't. of the Navy (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/01922369.txt)** , EEOC Appeal No. 01922369 (Jan. 5, 1993). The agency is only responsible for those damages that are clearly shown to be caused by the agency's discriminatory conduct. Id. To recover damages, the complainant must prove that the employer's discriminatory actions were the cause of the pecuniary loss. **The Commission Notice No. 915.002 (http://www.eeoc.gov/policy/docs/damages.html)** , **Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991 (http://www.eeoc.gov/policy/docs/damages.html)** (July 14, 1992) at 8.

3. **Future Pecuniary Damages**

   Future pecuniary losses are losses that are likely to occur after resolution of a complaint. See **Compensatory and Punitive Damages Available under Section 102 of the Civil Rights Act of 1991 (http://www.eeoc.gov/policy/docs/damages.html)** , the Commission Notice No. 915.002 at 9 .

   An award for the loss of future earning potential considers the effect that complainant's injury will have on her ability in the future to earn a salary comparable with what she earned before the injury. **Brinkley v. U.S. Postal Service (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/05980429.txt)** , EEOC Request No. 05980429 (Aug. 12, 1999) citing **McKnight v. General Motors Corp. (https://law.justia.com/cases/wisconsin/court-of-appeals/1990/89-2070-6.html)** , 973 F.2d 1366, 1370 (7th Cir. 1992). Where complainant has shown that her future earning power has been diminished as a result of the agency's discrimination, the Commission has awarded future pecuniary damages for the loss of future earning capacity. See **Morrison v. U.S. Postal Service (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/07a50003.txt)** , EEOC Appeal No. 07A50003 (Apr. 18, 2006) (citing **Brinkley (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/05980429.txt)** , supra); **Hernandez v. U.S. Postal Service (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/07A30005.txt)** , EEOC Appeal No. 07A30005 (July 16, 2004). Proof of entitlement to loss of future earning capacity involves evidence suggesting that the individual's injuries have narrowed the range of economic opportunities available to her. **Carpenter v. Dep't. of Agriculture (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/01945652.txt)** , EEOC Appeal No. 01945652 (July 17, 1995). Generally, the party seeking compensation for loss of earning capacity needs to provide evidence which demonstrates with reasonable certainty or reasonable probability that the loss has been sustained. Id., (citing Annotation,

Evidence of Impaired Earnings Capacity, 18 A.L.R. 3d 88, 92 (1968)). Such evidence need not prove that the injured party will, in the near future, earn less than she did previously, but that "[her] injury has caused a diminution in [her] ability to earn a living." Carpenter, supra, (citing **Gorniak v. Nat'l R.R. Passenger Corp. (https://www.casemine.com/judgement/us/5914c07cadd7b049347b3fd3)** , 889 F.2d 481, 484 (3d Cir. 1989)).

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[1] See **Sipriano v. Dep't. of Homeland Security (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/0120103167.txt)** , EEOC Appeal No. 0120103167 (Jan. 20, 2011), request for reconsideration denied, EEOC Request No. **0520110313 (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/0520110313.txt)** (May 12, 2011) (ordering the agency to expunge all documentation relating to a discriminatory termination from complainant's records); **Farrington v. Dep't. of Homeland Security (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/0720090011.txt)** , EEOC Appeal No. 0720090011 (Jan. 19, 2011), request for reconsideration denied, EEOC Request No. **0520110295 (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/0520110295.txt)** (May 12, 2011) (ordering the agency to expunge evaluation reports and documents referencing a discriminatory investigation).

[2] See 29 C.F.R. § 1614.501(c).

[3] In fact, the Commission strongly urges that agencies include consideration of disciplinary action in all agency orders on findings of intentional discrimination. In certain circumstances, training may be ordered for additional agency managers and staff.

[4] Where the parties enter into a settlement agreement that provides for but does not quantify the amount of attorney's fees and costs, the attorney should submit his/her statement of fees and costs and supporting documentation to the agency for determination of the amount due. The agency should issue a decision on fees within 60 days of receipt of the statement and supporting documentation. See 29 C.F.R. § 1614.501(e)(2)(ii)(A). If the complainant disputes the amount awarded, s/he may file an appeal with the Commission.

[5] Where the Commission finds discrimination in a case in which the agency takes final action under 29 C.F.R. § 1614.110(a), the Commission will remand the case to the Administrative Judge for a determination of attorney's fees. Where the decision on appeal originates from a case handled exclusively by the agency (that is, where the complainant elected a final agency decision under 29 C.F.R. § 1614.110(b)), the Commission will remand the case to the agency for a determination of attorney's fees.

[6] Pendente lite is Latin for awaiting the litigation (lawsuit). It is applied to court orders (such as temporary child support) which are in effect until the case is tried, or rights that cannot be enforced until the lawsuit is over.

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U.S. Merit Systems Protection Board

Judges' Handbook

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CHAPTER 13 - ADDENDUM DECISIONS

1. GENERAL.

In general, the requirements of chapter 12 apply to addendum decisions. Special requirements for addendum decisions are set forth in this chapter.

2. ATTORNEY FEES.

See 5 C.F.R. §§ 1201.201-.203; 1201.205.

a. Who May File. While anyone may file a motion for attorney fees, an award may not be granted to an agency. *See Lewis v. Department of the Army*, 31 M.S.P.R. 476 (1986). Under 5 U.S.C. § 7701, the appellant must be the prevailing party and must have had an attorney-client relationship with his or her representative to receive an award of attorney fees, but may recover attorney fees for consultation with an attorney who was not eventually hired, even as to proceedings that preceded the appeal to the Board. *See Mudrich v. Department of Agriculture*, 92 M.S.P.R. 413 (2002) ("[t]he cardinal point in establishing an attorney-client relationship is in the client's belief that he is consulting a lawyer in that capacity and his manifested intention to seek professional legal advice"). In all but WPA/WPEA appeals, the payment itself must be made to the attorney, not the appellant. *Bonggat v. Department of the Navy*, 59 M.S.P.R. 175 (1993); it is the appellant who is entitled to the fees in whistleblower appeals under 5 U.S.C. § 1221. *Rumsey v. Department of Justice*, 123 M.S.P.R. 502, ¶¶ 7-8 (2016), rev'd on other grounds, *Rumsey v. Department of Justice*, 866 F.3d 1375 (Fed. Cir. 2017).

Representation by a non–lawyer does not meet the requirement of an attorney-client relationship. However, expenses personally incurred by an appellant can be awarded under 5 U.S.C. §§ 1221(g) and 7701(g)(2). *See Bonggat, supra*; *Chin v. Department of the Treasury*, 55 M.S.P.R. 84 (1992).

b. Time and Place of Filing. A request for payment of attorney fees will be decided in an addendum proceeding before an AJ after issuance of a final decision in the proceeding on the merits, including a decision accepting the parties' settlement of the case. *See* 5 C.F.R. § 1201.203(b). The request must be filed as soon as possible after a final decision of the Board but no later than 60 days after the date on which a decision becomes final. *See* 5 C.F.R. § 1201.203(d). Usually, a request for attorney fees must be filed with the same RO or FO that issued the decision on the merits of the case. When the initial or only decision in the proceeding on the merits was issued by the Board or an AJ at headquarters, the request must be filed with OCB. *See* 5 C.F.R. § 1201.203(c).

c. Form and Content of Request. A request for payment of attorney fees must be made by motion, must state why the appellant or respondent believes he or she is entitled to an award under the applicable statutory standard, and must be supported by evidence substantiating the amount of the request. *See* 5 C.F.R. § 1201.203(a).

d. Applicable Law and Exceptions. The Board early on established the law with respect to prevailing party, interest of justice, and reasonableness, and little of that has changed concerning appeals under section 7701, where attorney fees may be awarded under subsection 7701(g)(1). However, several exceptions to the general § 7701 rules are detailed below.

USERRA: Regarding appeals brought under USERRA, *see* chapter 18 of this Handbook, the Board and the court have held that it is not section 7701 that provides the authority for an attorney fees award. Rather, it is USERRA itself, which states at 38 U.S.C. § 4324(c)(4), "If the Board determines as a result of a hearing or adjudication conducted pursuant to a complaint submitted by a person directly to the Board … that such person is entitled to an order [to comply with the law and compensate the employee for any loss of wages or benefits], the Board may, in its discretion, award such person reasonable attorney fees, expert witness fees, and other litigation expenses." Thus, the rules concerning prevailing party and interest of justice do not apply to USERRA attorney fee requests. *See Jacobsen v. Department of Justice,* 500 F.3d 1376 (Fed. Cir. 2007), stating that "Congress left the decision whether to award reasonable attorney fees, expert witness fees, and other litigation expenses to the Board's discretion." Accordingly, the court affirmed the Board's reliance on the appellant's limited degree of success to deny a fee award. While *Jacobsen* and similar Board cases have all been based on *Butterbaugh*-type appeals (involving improper charges for military leave), neither the Board nor the Federal Circuit has indicated that the rule would differ under another provision of USERRA or as to a different section 4311(a) appeal. Neither the Board nor the court has issued any precedential attorney fees cases under other provisions of VEOA.

WPA/WPEA: As noted above, appeals finding whistleblower retaliation are also subject to different rules, so that there is no interest of justice requirement to be met in such cases, and the appellant is the one entitled to the award. *See Rumsey v. Department of Justice*, 123 M.S.P.R. 502, ¶¶ 7-8 (2016), rev'd on other grounds, *Rumsey v. Department of Justice*, 866 F.3d 1375 (Fed. Cir. 2017).

Discrimination: Under 5 U.S.C. § 7701(g)(2), "[i]f an employee or applicant for employment is the prevailing party and the decision is based on a finding of discrimination prohibited under section 2302(b)(1) of ... title [V], the payment of attorney fees shall be in accordance with the standards prescribed of section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k))." Therefore, in mixed cases, when the appellant is the prevailing party by a finding of discrimination or reprisal in violation of 5 U.S.C. 2302(b)(1), the entirety of the substantive law developed under subsection (g)(1) also does not apply.

Rescission: One issue that often arises in connection with attorney fee requests is the effect of the agency's cancellation of the action prior to adjudication. When the agency fully cancels and restores the appellant to the status quo ante, resulting in the dismissal of the merits appeal as moot, the appellant may not be awarded attorney fees. The "catalyst theory" that previously allowed for an award in such circumstances is no longer valid. *Buckhannon Board and Care Home, Inc. v.*

West Virginia Department of Health and Human Resources, 532 U.S. 598 (2001); *Sacco v. Department of Justice*, 90 M.S.P.R. 225 (2001). Because the appellant does not qualify as a prevailing party, attorney fees may not be granted. That is not true, however, when the parties have settled the case. There, the appellant is a "prevailing party" eligible for an award of attorney fees, where he obtained enforceable relief through settlement agreement. *Griffith v. Department of Agriculture,* 96 M.S.P.R. 251 (2004). In most cases, however, the parties will also settle the attorney fees question, and an agreement that specifies that additional fees will not be paid controls.

Enforcement: Similarly, an appellant is the prevailing party on PFE even if the agency eventually complies, based on "the Board's oversight of the parties' compliance efforts." *Mynard v. Office of Personnel Management*, 108 M.S.P.R. 58 (2008). It reasoned that in a PFE AJs have the authority to oversee the parties' efforts to secure compliance, and the Board has express authority to order corrective action when a party has not complied, so that "the Board's oversight of the parties' compliance efforts provides the PFE process with sufficient Board imprimatur to allow an appellant to qualify as a 'prevailing party' under 5 U.S.C. § 7701(g)(1) even in the absence of a Board order finding the agency in noncompliance or an agreement executed by the parties to settle compliance matters." *Id*.

3. PROCESSING MOTIONS FOR ATTORNEY FEES.

a. Acknowledgment Order. The standard acknowledgment order (ACKFEE) must be sent to the parties within 3 workdays of receipt of a motion for attorney fees. The Order may have to be modified to cover any of the above-mentioned types of cases if no separate order appears in HotDocs.

b. Discovery and Hearing. Generally discovery is not granted and a hearing is not held on a motion for attorney fees. However, it is within the AJ's discretion to allow both. Because, as discussed in section d below, the Board does not reconsider the merits of the underlying appeal during an attorney fees proceeding, any discovery or hearing would, of necessity, be limited to addressing issues specific to the fee claim and not to the merits, such as proof of counsel's hourly rate, community rate, etc.

c. Settlement. The Board's policy is to encourage the settlement of attorney fees disputes.

d. Decision. The decision on a fee petition should be made by the AJ who wrote the merits ID, even if the final decision of the Board reversed or modified the outcome the AJ reached. In any event, though, the findings in the final decision must not be revised or second-guessed when ruling on the fee petition. *See, e.g., Gensburg v. Department of Veterans Affairs*, 80 M.S.P.R. 187 (1998); *Capeless v. Department of Veterans Affairs*, 78 M.S.P.R. 619 (1998). Before disallowing fees or costs that are not adequately explained, the AJ must notify the appellant of the AJ's intention to do so and provide a fair opportunity to address the deficiencies. *Wilson v. Department of Health & Human Services*, 834 F.2d 1011 (Fed. Cir. 1987). Further, while the Board may award fees for the proceedings before it, it lacks authority to

award them for Federal Circuit or other judicial appeals. *See* *Manley v. Department of the Air Force*, 78 M.S.P.R. 673 (1998). The Equal Access to Justice Act, 28 U.S.C. § 2412, is inapplicable to attorney fee proceedings before the Board.

4. COMPLIANCE.

See 5 C.F.R. §§ 1201.181-.183.

a. Petition for Enforcement. Any party may petition the Board for enforcement of a final decision or order issued under the Board's appellate jurisdiction, or for enforcement of a provision within a settlement agreement that was entered into the record for enforcement purposes in an order or decision under the Board's appellate jurisdiction, by filing the petition with the RO or FO that issued the ID. *See* 5 C.F.R. § 1201.182(a). A party may also file a PFE seeking rescission of a settlement agreement upon a finding of material breach. Any party seeking enforcement of a final Board decision or order issued under the Board's original jurisdiction, or for enforcement of a provision within a settlement agreement that was entered into the record for enforcement purposes in an order or decision under the Board's original jurisdiction, may file a petition with OCB. *See* 5 C.F.R. § 1201.182(b). In addition, an employee who is not a party but is aggrieved by any other employee's failure to comply with a Board order may file a PFE if granted the status of a permissive intervenor. *See* 5 C.F.R. § 1201.182(c).

   PFEs of interim relief are not to be docketed as compliance cases; rather, they are to be referred to OCB for treatment as part of the PFR process. *See* *Ginocchi v. Department of the Treasury*, 53 M.S.P.R. 62 (1992).

   The PFE must specify reasons why the petitioning party believes there is noncompliance and must include the date and results of any communications between the parties regarding compliance. A copy of the PFE must be served on the other party or that party's representative. The agency does not have the burden of showing compliance with a Board order until after a PFE has been filed.

b. Time Limits for Filing. The petition must be filed promptly with the RO or FO that issued the ID, and if it is filed more than 30 days after the date of service of the agency's notice that it has complied, the PFE must contain a statement and evidence showing good cause for the delay and a request for an extension of time for filing. *See* 5 C.F.R. § 1201.182(a). Determining timeliness differs when the issue is compliance with a settlement agreement, rather than with a Board-ordered determination. Where there has been a settlement, because the Board does not direct the parties to inform each other of the date on which they have complied, the issue is whether the PFE was filed within a reasonable time of the alleged breach. *Chudson v. Environmental Protection Agency*, 71 M.S.P.R. 115 (1996), *aff'd*, 132 F.3d 54 (Fed. Cir. 1997) (Table).

5. PROCESSING PETITIONS FOR ENFORCEMENT.

a. Acknowledgment Order. The appropriate standard acknowledgment order (ACKCOMA or ACKCOMB) must be sent to the parties within 3 workdays of receipt of the PFE. If the agency is the alleged noncomplying party, it must submit the name, title, grade, and address of the agency official charged with complying with the Board's order. 5 C.F.R. § 1201.183(a)(2). The agency must inform this official in writing of the potential sanction for noncompliance as set forth in 5 U.S.C. § 1204(a)(2) and (e)(2)(A) even if the agency is asserting that it has fully complied. *Id.* The agency must advise the Board of any change to the identity or location of this official during the course of any compliance proceeding. Absent this information, the Board will presume that the agency official responsible for compliance and all of the consequences thereof is the highest ranking, appropriate agency official who is not appointed by the President with the consent of the Senate. *Id.* Either the CAJ or an AJ may adjudicate a PFE.

When an appellant files a PFE seeking compliance with a Board order, the agency generally has the burden to prove its compliance with the Board's order by a preponderance of the evidence. 5 C.F.R. § 1201.183(d). Any party filing a PFE seeking compliance with terms of a settlement agreement, or its rescission, has the burden of proving the other party's breach of the agreement by a preponderance of the evidence. *Id.* The acknowledgment order clarifies that the parties have a right to discovery on PFE, so AJs must provide time for discovery when requested and must rule on any disputes that arise and cannot be resolved by the parties, as would be true in a merits proceeding. Cases holding to the contrary have been overruled by 5 C.F.R. § 1201.183(a)(9), which allows discovery but requires that it be initiated within a shortened time compared to discovery in a merits appeal.

b. Hearing. Although a hearing is not required, it remains within the AJ's discretion to grant. A hearing is highly recommended in cases involving issues of credibility.

c. Settlement. The Board's policy is to encourage the settlement of compliance disputes.

d. Initial Decision Finding Compliance. When the AJ finds that the agency is in compliance or is making a good faith effort to take all actions required to be in compliance with the final decision, the AJ will issue an ID finding compliance or essential compliance. This ID is treated like other IDs, and becomes final 35 days after issuance unless a party files a PFR with the Board. As is true with attorney fee petitions, the Board does not reconsider the merits of an appeal in a compliance proceeding. *See Coffey v. U.S. Postal Service*, 86 M.S.P.R. 632 (2000).

e. Initial Decision Finding Full or Partial Noncompliance. Unlike earlier versions of the process for deciding compliance matters, the AJ will issue an ID whether the ultimate finding is compliance or noncompliance. If the AJ finds that the agency has not made a good faith effort to comply in whole or in part and is not in full compliance with the final decision, the ID must resolve all issues raised in the PFE and identify the specific actions the noncomplying party must take to be in compliance with the

Board's final decision. 5 C.F.R. § 1201.183(a)(5). In addition to the standard service copies on the appropriate parties and/or their representatives, a copy of this ID must be served on the agency official charged with complying with the Board's order under 5 C.F.R. § 1201.183(a)(5). The ID finding noncompliance must also advise the parties that proof of compliance with the ID must be submitted to OCB within the time limit for filing a PFR under 5 C.F.R. § 1201.114(e), to the extent the party decides to take the actions required in the ID. 5 C.F.R. § 1201.183(a)(6)(i). To the extent the party decides not to take all of the actions required by the ID, the party must file a PFR pursuant to 5 C.F.R. §§ 1201.114-115. The complying party may file evidence and argument in response to any submission described in 5 C.F.R. § 1201.183(a)(6) by filing opposing evidence and argument with OCB within 20 days of the date such submission is filed. 5 C.F.R. § 1201.183(a)(8).

The file, along with all other files related to the appeal, must be forwarded to OGC within 3 workdays of the date the ID is issued.

6. CONSEQUENTIAL, LIQUIDATED, AND COMPENSATORY DAMAGES.

See 5 C.F.R. §§ 1201.201-.202; 1201.204-.205.

a. Time for Making Request. A request for damages should be made as early as possible in the proceeding on the merits, no later than the conferences held to define the issues in the case, subject to the AJ's authority to waive untimeliness for good cause shown. The Board may also waive the time limit for good cause shown when a request is made for the first time on PFR of a merits decision. In such a case, or where there has been no prior proceeding before an AJ, it may send the case to an AJ for adjudication. *See* 5 C.F.R. § 1201.204(a), (h).

b. Merits Proceeding or Addendum Proceeding. Because AJs may waive the application of any Board regulation not required by law, the AJ or the Board may consider and rule on the request in the decision on the merits, if such action is in the interest of the parties and will promote efficiency and economy in adjudication. Normally, however, the AJ or the Board will defer a decision on the request for an addendum proceeding. *See* 5 C.F.R. § 1201.204(d), (h)(1).

7. PROCESSING REQUESTS FOR DAMAGES.

a. Addendum Proceedings. If the AJ defers a decision on a request for consequential, liquidated, or compensatory damages for an addendum proceeding as described above in section 6b, the AJ will schedule the proceeding after issuance of an initial decision that becomes final or a final Board decision. It is within the AJ's discretion to allow discovery during the processing of the damages proceeding (although, as noted above, there is a right to appropriate discovery in a compliance proceeding).

b. Hearing. The AJ may hold a hearing on a request for consequential, liquidated, or compensatory damages and may apply appropriate provisions of 5 C.F.R. subpart B to the addendum proceeding. *See* 5 C.F.R. § 1201.204(f).

c. Settlement. The Board's policy is to encourage the settlement of disputes involving legal damages.

d. Authority. The Board has addressed the limits of its authority regarding requests for damages under certain circumstances. For compensatory damages, the Board's earliest and still lead decision is *Markiewicz-Sloan v. U.S. Postal Service*, 77 M.S.P.R. 58 (1997), which sets the basic rules applicable to such appeals; *Calhoon v. Department of the Treasury*, 90 M.S.P.R. 375 (2001) (compensatory damages are not available for disparate impact discrimination); *Simonton v. U.S. Postal Service*, 85 M.S.P.R. 189 (2000) (compensatory damages are not available for age discrimination or EEO-based retaliation); *Phillips v. Department of the Air Force*, 84 M.S.P.R. 580 (1999) (compensatory damages are not available for a PFE of a settlement agreement); *Spencer v. Department of the Navy*, 82 M.S.P.R. 149 (1999) (compensatory damages may not be awarded for disability discrimination based on the failure to accommodate if the agency has made good faith efforts to accommodate, but they are available for perceived discrimination because the appellant needs no accommodation). *See also Jones v. Department of the Army,* 75 M.S.P.R. 115, 121-22 (1997)(neither compensatory damages nor back pay can be awarded in cases in which a finding of mixed-motive discrimination has been made and the agency has established that it would have taken the same action absent the discriminatory motive); *Garrison v. Department of the Navy*, 88 M.S.P.R. 389, 392-93, ¶ 7 (2001) (in mixed-motive cases, if the agency proves that it would have taken the same action in the absence of unlawful discrimination or reprisal, the appellant is not entitled to reinstatement or back pay). The Board's more recent decision in *Savage v. Department of the Army*, 122 M.S.P.R. 612, ¶¶ 48-51 (2015), suggests the same result would obtain under the revised analysis of discrimination claims it establishes.

An amount equal to back pay shall be awarded as liquidated damages under 5 U.S.C. § 3330c of VEOA when the Board or a court determines that an agency willfully violated an appellant's veterans' preference rights. 5 C.F.R. §§ 1201.201(e) & 1201.202(d). A violation is "willful" if the agency either knew or showed reckless disregard for the matter of whether its conduct was prohibited by VEOA. *Weed v. Social Security Administration*, 107 M.S.P.R. 142, ¶ 8 (2007). An award of liquidated damages, therefore, may be made only if there is an entitlement to an award of back pay, and "in calculating damages, the AJ "will make findings regarding several outstanding issues, including when, if at all, the appellant would have been entitled to grade, step and/or pay increases after the retroactive starting date. The [AJ] shall also instruct the appellant to provide records of his income, if any, and his efforts to obtain other employment during the relevant time period, as well as proof of any relevant expenses that should be offset in an award of lost wages or benefits." *Williams v. Department of the Air Force*, 116 M.S.P.R. 245, ¶ 18 (2011). Note, however, that "lost wages or benefits" has since been interpreted to mean lost wages *and* benefits. *See Weed v. Social Security Administration*, 124 M.S.P.R. 171, ¶ 14 (2016).

As for consequential damages, *see, e.g., Bohac v. Department of Agriculture*, 239 F.3d 1334 (Fed. Cir. 2001) (nonpecuniary damages, such as for pain and suffering, may not be awarded under the WPA and instead are limited to out-of-pocket costs); *Reams v. Department of the Treasury*, 91 M.S.P.R. 447 (2002) (consequential damages do not extend to reimbursing the appellant for annual leave he or she used in prosecuting the appeal under the WPA); *Pastor v. Department of Veterans Affairs*, 87 M.S.P.R. 609 (2001) (consequential damages include not just medical expenses that the appellant has already incurred, but also future medical expenses that can be proven with reasonable certainty). For a review of several types of losses that may or may not be awarded as consequential damages, *see King v. Department of the Air Force*, 122 M.S.P.R. 531, ¶¶ 8-14 (2015).

CHAPTER 14 - EX PARTE COMMUNICATIONS

1. GENERAL.

See 5 C.F.R. §§ 1201.101-.103.

a. Definition of Ex Parte Communication. Ex parte communications are oral or written communications between decision-making officials of the Board and an interested party to a proceeding, made without providing the other parties a chance to participate. Not all ex parte communications are prohibited, only those that involve the merits of the case or those that violate other rulings requiring submissions to be in writing.

Interested parties may make inquiries about such matters as the status of a case, when it will be heard, and the method for transmitting evidence to the Board. Inquiries about the availability of witnesses also are not prohibited. *See Stec v. Office of Personnel Management*, 22 M.S.P.R. 213 (1984). Parties may not inquire about such matters as what defense they should use or whether their evidence is adequate, and the parties may not make a submission orally that is required to be in writing. Thus, if a party calls to ask for a postponement or continuance, the AJ should not rule on the request or participate in a discussion beyond informing the party that such a request should be in the form of a written motion. *See* 5 C.F.R. § 1201.55, requiring motions for postponements to be in writing and to be preceded by contact with the other party to determine if there is an objection.

b. Interested Party. The term interested party includes the following:

(1) Any party or representative of a party involved in a proceeding before the Board; or

(2) Any other person who might be affected by the outcome of a proceeding before the Board.

Note: A Member of Congress or a Congressional staff person who attempts to discuss at length the merits of a constituent's appeal pending with the Board and/or engages in intense advocacy on the constituent's behalf may be considered an interested party. The contact should then be treated as an ex parte communication in accordance with section 3 of this chapter. The CAJ may wish to contact the Congressional Member's office to determine whether the Member intends to act as a representative in the appeal.

c. Decision-making Official. Pursuant to 5 C.F.R. § 1201.101(b)(2), a "decision-making official" is "any judge, officer, or other employee of the Board designated to hear and decide cases except when such judge, officer, or other employee of the Board is serving as a mediator or settlement judge who is not the adjudicating judge."

2. SPECIFIC PROHIBITIONS/APPROVALS.

a. Time period. Ex parte communications concerning the merits of any matter before the Board for adjudication or that otherwise violate rules requiring written

submissions are prohibited from the time the persons involved have knowledge that the matter may be considered by the Board until the Board has rendered a final decision. *See* 5 C.F.R. § 1201.102.

b. Examples. Certain communications with Board decision-making officials have been ruled not to be prohibited ex parte communications. In this category are discussions between two AJs hearing two separate appeals filed by the same appellant, *Edwards v. Department of Justice*, 87 M.S.P.R. 518 (2001); the reports of a psychologist and psychiatrist to the AJ concerning the appellant's mental condition during the course of the appeal of a removal for medical disqualification, *Wyse v. Department of Transportation*, 39 M.S.P.R. 85 (1988); contacts between the AJ and the appellant's Congressional representative that did not involve the merits and were not required to be in writing, *Lynch v. Department of Justice*, 32 M.S.P.R. 33 (1986); and legal memoranda sent by the Board's OGC to the AJ addressing the penalty in an adverse action appeal, *Eng v. Department of Transportation*, 18 M.S.P.R. 220 (1983). In each of these decisions, the Board found no violation because the communication with the AJ was not by an "interested party" in the appeal. The Board has also found that while the parties' waiver of the rule against prohibited ex parte communications will allow settlement negotiations to occur outside the presence of all parties, absent such a waiver, a settlement discussion with an appellant without the presence of his own representative and that of the agency is prohibited. *Young v. Department of Veterans Affairs*, 83 M.S.P.R. 187 (1999).

c. Test. In each instance when a prohibited ex parte communication occurred, the Board has, of course, required that the communication be made a matter of record in accordance with its regulations, see below, but the ultimate test as to whether the communication required any additional proceedings or corrective action has been to determine whether the appellant's substantive rights have been prejudiced. If they were not, placement in the record constitutes the appropriate corrective action.

3. PLACEMENT IN THE RECORD/SANCTIONS.

a. Requirement of Placement in Record. Any communication made in violation of the rule against prohibited ex parte communications must be made a part of the record and an opportunity for rebuttal allowed. If the communication was oral, a memorandum stating the substance of the discussion must be placed in the record.

b. Notice of Violation. The AJ or OCB, as appropriate, will give the parties written notification that the regulation has been violated and 10 calendar days to file a response.

c. Sanctions. The following sanctions are available:

(1) Parties. The offending party may be required to show cause why, in the interest of justice, his/her claim, interest or motion should not be dismissed, denied, or otherwise adversely affected.

(2) Board Personnel. Offending Board personnel will be treated in accordance with the Board's standards of conduct.

(3) Other Persons. The Board may invoke such sanctions against offending parties, if warranted. .

4. AVOIDANCE OF PROHIBITED EX PARTE COMMUNICATIONS.

a. AJ's Responsibility. When contacted by an interested party, an AJ cannot anticipate what questions may be asked or what information may be presented during the conversation. This does not, however, alter the nature of the ex parte contact once prohibited information has been communicated, nor does it relieve the AJ of the responsibility of controlling the conversation and ensuring compliance with the Board's regulations.

b. Waiver of the Rule against Prohibited Ex Parte Communications. The parties may agree to waive the rule against prohibited ex parte communications in order to obtain the AJ's active involvement in the settlement process. This is permissible. Of course, such an agreement should be documented. A party may also waive the prohibition by not taking part in a scheduled teleconference as provided, for example, in the HotDocs document HEAROPM.

5. DUE PROCESS GUARANTEE AT THE AGENCY LEVEL.

A body of case law exists that addresses ex parte communications at the agency level prior to the decision on a personnel action. *See, e.g., Stone v. Federal Deposit Insurance Corporation*, 179 F.3d 1368 (Fed. Cir. 1999); *Sullivan v. Department of the Navy*, 720 F.2d 1266 (Fed. Cir. 1983); *Ward v. U.S. Postal Service*, 634 F.3d 1274 (Fed. Cir. 2011); *Lopes v. Department of the Navy*, 116 M.S.P.R. 470 (2011). Consistent with these decisions, sometimes the Board or the court may find that a due process denial resulted from an ex parte communication on the merits that was not reflected in the charges. Such case law, however, is not directly applicable to an ex parte communication with a Board official during the appeal stage, which is the subject of this chapter. Board case law on ex parte communications with its officials has not addressed the extent to which the court's decisions may be applicable by analogy.

CHAPTER 15 - WHISTLEBLOWER APPEALS

1. GENERAL.

A whistleblower appeal involves claim(s) under 5 U.S.C. § 2302(b)(8) that a personnel action was threatened, proposed, taken, or not taken as a result of any disclosure of information that is reasonably believed to evidence a violation of law, rule, or regulation or to evidence gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. *See* relevant statutory and regulatory provisions at 5 U.S.C.A. §§ 1201 note; 1211-1219; 1221-1222; 2302 (West Supp. 1992); 5 C.F.R. part 1209. As discussed more specifically below, under the WPEA certain activities, not just disclosures, are also protected.

The procedures for processing whistleblower appeals are those set forth in 5 C.F.R. part 1201, subparts A, B, C, E, F, and G and part 1209. Subpart H of part 1201 applies to requests for attorney fees and consequential and compensatory damages arising from these appeals. *See* 5 C.F.R. § 1209.3.

2. OTHERWISE APPEALABLE ACTION APPEALS.

See 5 C.F.R. § 1209.2(b)(2). "Otherwise appealable action" appeals are those within the Board's regular appellate jurisdiction, as described in 5 C.F.R. § 1201.3, in which the appellant raises an affirmative defense of retaliation for whistleblowing under 5 U.S.C. § 2302(b)(8) and now most of (b)(9) as well. No whistleblower or other affirmative defense, however, may be raised in an appeal under VEOA or USERRA. It is not necessary for an appellant in an OAA to first request corrective action from OSC. However, when an appellant does first raise an OAA to the OSC before appealing to the Board, the Board will find that if the choice was knowingly made, the appellant has elected his remedy. *See Agoranos v. Department of Justice*, 119 M.S.P.R. 498 (2013). This constitutes a statutorily-required change from prior law, *Massimino v. Department of Veterans Affairs*, 58 M.S.P.R. 318 (1993), under which the Board treated the appeal as an OAA for purposes of determining its scope of review. *Massimino* is no longer good law.

3. INDIVIDUAL RIGHT OF ACTION (IRA) APPEALS.

See 5 C.F.R. § 1209.2(b)(1). IRA appeals are an extension of the Board's jurisdiction pursuant to 5 U.S.C. § 1221(a). If the personnel action in question is not within the Board's regular appellate jurisdiction, the appellant must first seek corrective action from OSC before appealing to the Board. 5 U.S.C. § 1214(a)(3); *Knollenberg v. Merit Systems Protection Board*, 953 F.2d 623 (Fed. Cir. 1992). An appellant may not bring a different allegation of whistleblowing before the Board than he or she brought before OSC. *See Ward v. Merit Systems Protection Board,* 981 F.2d 521 (Fed. Cir. 1992).

4. ELECTION OF REMEDIES.

Under 5 U.S.C. § 7121(g)(2), a person covered by a collective bargaining agreement who claims to have been the victim of reprisal for whistleblowing may elect only one of three remedies--a Board appeal of an OAA, a grievance, or a complaint to OSC. *See Thurman v.*

Department of Defense, 77 M.S.P.R. 598 (1998). If the action is not otherwise directly appealable to the Board, the appellant must seek corrective action from OSC before appealing to the Board. 5 C.F.R. § 1209.2(b)(1). Filing a complaint with OSC first will allow the appellant to later file an IRA appeal with the Board under the time limits set forth below. Filing a grievance or appeal first will foreclose any other avenue. *See, e.g.*, *Sabersky v. Department of Justice*, 91 M.S.P.R. 210, 213, ¶ 8 (2002) (an appellant who previously appealed a removal action to the Board without raising an affirmative defense of whistleblower retaliation and received a valid final judgment on the merits may not later file an IRA appeal claiming that the removal was the result of such retaliation). In an IRA appeal, the only merits issues before the Board are those listed in 5 U.S.C. § 1221(e), i.e., whether the appellant has demonstrated that one or more whistleblowing disclosures was a contributing factor in one or more covered personnel actions and, if so, whether the agency has demonstrated by clear and convincing evidence that it would have taken the same personnel action(s) in the absence of the protected disclosures. 5 C.F.R. § 1209.2(c). In an IRA appeal, the appellant is precluded from raising any other affirmative defenses, such as claims of discrimination or harmful procedural error. *Id.* When taking an OAA, the agency is required to advise employees of their options under 5 U.S.C. § 7121(g) and the consequences of their election, including the fact that seeking corrective action from OSC before filing with the Board will result in forgoing important rights to raise other affirmative defenses. 5 C.F.R. § 1201.21.

The Board has held that the employee's election of remedies must be "knowing and informed." *Agoranos v. Department of Justice,* 119 M.S.P.R. 498, 505-06 (2013) (finding that elections under section 7121(d), (e) & (g) must be knowing and informed and overruling *Feiertag v. Department of the Army,* 80 M.S.P.R. 264 (1998) "to the extent it applied a different rule to all elections under § 7121(g)"). An employee's decision based on misinformation provided by the agency, whether intentionally, unintentionally, negligently, inadvertently, or even innocently, is not binding on the employee as a matter of fundamental fairness and due process. *Covington v. Department of Health & Human Services,* 750 F.2d 937, 942 (Fed. Cir. 1984); *Salazar v. Department of the Army,* 115 M.S.P.R. 296, 301-02 (2010).

5. TIME LIMITS FOR APPEALING TO THE BOARD.

See 5 U.S.C. § 1214(a)(3). The time limits for filing an OAA appeal with the Board are set forth at 5 C.F.R. § 1201.22(b). However, if the appellant chooses to first seek corrective action from OSC, the time limits are those set forth at 5 C.F.R. § 1209.5. The time limits for filing an IRA appeal depend on the action taken by OSC. *See* 5 C.F.R. § 1209.5(a), discussed below. The right to file an IRA appeal is not conditioned on an appellant's exhaustion of his or her EEO administrative remedies after filing a formal EEO complaint on the underlying personnel action. *See Horton v. Department of the Navy,* 47 M.S.P.R. 475 (1991). Thus, filing an IRA appeal before receiving a final agency decision on an EEO complaint does not render the IRA appeal premature. The EEO issue may not be heard in the IRA appeal.

a. Termination of OSC Investigation. The IRA appeal must be filed no later than 65 days after the date of issuance of the written notification by OSC to the appellant

that its investigation has been terminated. 5 C.F.R. § 1209.5(a)(1). If the appellant shows the OSC letter terminating its investigation into the allegations was received by the appellant more than 5 days after the date of issuance, the appeal must be filed within 60 days after the date the appellant received the OSC letter. In addition, the filing deadline for IRA appeals is extended to the following business day for deadlines that fall on the weekend or Federal holidays. *See Pry v. Department of the Navy*, 59 M.S.P.R. 440 (1993).

b. Equitable tolling. The Board cannot waive the statutory time limit for filing an IRA appeal. *See Wood v. Department of the Air Force*, 54 M.S.P.R. 587 (1992). However, the deadline for filing an IRA appeal with the Board may be subject to the doctrine of equitable tolling, depending on the circumstances. 5 C.F.R. § 1209.5(b). *See Irwin v. Department of Veterans Affairs,* 498 U.S. 89, 96, (1990) (Federal courts have typically extended equitable relief sparingly, including those situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass; it does not extend to a claim of excusable neglect). Thus far, at least, the Board has cited only the *Irwin* factors as possible bases for equitable tolling. *See also Pacilli v. Department of Veterans Affairs,* 113 M.S.P.R. 526, ¶ 11 (2010). Equitable tolling generally will not apply where there is a failure to exercise due diligence to preserve one's legal rights. *Brown v. U.S. Postal Service,* 110 M.S.P.R. 381, ¶ 10 (2009).

c. Expiration of 120 Days. If the appellant has not received notification from OSC of the termination of the investigation and 120 days have elapsed since he or she sought corrective action from OSC, the appellant may file an appeal with the Board. 5 U.S.C. § 1214(a)(3)(B); 5 C.F.R. § 1209.5(a)(2). After the 120-day period has expired, there is no limit to the time within which an appellant must file with the Board while the investigation is pending with OSC. When the OSC investigation concludes, the time limits in section 5(a) of this chapter apply.

See also chapter 16 concerning the time limits when a stay is requested.

6. ESTABLISHING JURISDICTION AND BURDENS AT HEARING.

An employee must occupy a covered position in a covered agency to bring a claim under the WPA, as amended. For example, the U.S. Postal Service is not a covered agency. *See Booker v. Merit Systems Protection Board,* 982 F.2d 517 (Fed. Cir. 1992), *cert. denied*, 510 U.S. 862 (1993); *Mack v. U.S. Postal Service*, 48 M.S.P.R. 617 (1991). FBI Employees cannot file an IRA appeal because their agency has specific procedures established for the internal adjudication of whistleblower retaliation claims. *Van Lancker v. Department of Justice*, 119 M.S.P.R. 514, ¶ 9 (2013). In that decision, the Board also held that an FBI employee also may not raise an affirmative defense of whistleblower retaliation. Although the Federal Circuit originally ruled, to the contrary, that FBI employees may raise an affirmative defense of reprisal for whistleblowing on appeal of an OAA, *Parkinson v. Department of Justice*, 815 F.3d 757 (Fed. Cir. 2016), the court's later en banc decision fully affirmed the Board's rulings. *Parkinson v. Department of Justice*, 874 F.3d 710 (Fed. Cir. 2017). There the court held that the Board may not hear a whistleblower reprisal claim

filed by an FBI preference eligible because the FBI was specifically exempt from protections set forth in the prohibited personnel practices statute and there is a separate review process for claims of whistleblower reprisal for both preference-eligible and non-preference-eligible FBI employees.

7. ANALYSIS.

The Board follows the Federal Circuit's analysis for establishing Board jurisdiction over an IRA appeal to establish the right to a requested hearing on a whistleblower claim. *See Yunus v. Department of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir. 2001); *Mudd v. Department of Veterans Affairs*, 120 M.S.P.R. 365, ¶ 4 (2013). The Board has jurisdiction over an IRA appeal if the appellant has exhausted the administrative remedies before OSC and makes nonfrivolous allegations of facts that, if proven, could show that: (1) the appellant engaged in whistleblowing activity by making a protected disclosure; and (2) the disclosure was a contributing factor in the agency's decision to take or fail to take, or threaten to take or fail to take, a personnel action. *Yunus,* 242 F.3d at 1371; *Mudd,* 120 M.S.P.R. at 368, ¶ 4. *See also* 5 C.F.R. § 1201.57.

a. Exhaustion. Under 5 U.S.C. § 1214(a)(3), an employee is required to seek corrective action from the OSC before seeking corrective action from the Board where the personnel action at issue is not directly appealable to the Board. *Briley v. National Archives & Records Administration,* 236 F.3d 1373, 1377 (Fed. Cir. 2001); *Coufal v. Department of Justice,* 98 M.S.P.R. 31, ¶ 14 (2004). The Board may only consider charges of whistleblowing that the appellant raised before OSC. *Ellison v. Merit Systems Protection Board,* 7 F.3d 1031, 1036 (Fed. Cir. 1993); *Coufal,* 98 M.S.P.R. 31, ¶¶ 14, 18. To satisfy the exhaustion requirement, the appellant must have informed OSC of the precise ground of each charge of whistleblowing, giving OSC a sufficient basis to pursue an investigation that might lead to corrective action. The appellant's complaint to OSC must raise "with reasonable clarity and precision the basis for his request for corrective action." *Ellison,* 7 F.3d at 1036; *Coufal,* 98 M.S.P.R. 31, ¶ 14. He need not, however, correctly label the category of wrongdoing he believes he has disclosed because OSC would be expected to properly categorize the matter. Moreover, as whistleblower protections have been increased by Congress, it appears that courts have also taken a more expansive view of whether a matter has been exhausted, so that the degree of specificity required before OSC may have been lessened if the record could be deemed to support the appellant's claim that he had, in fact, raised an issue. An appellant may demonstrate exhaustion of the OSC remedies through the initial OSC complaint, and evidence of amending or supplementing the initial OSC complaint, including but not limited to OSC's determination letter and other letters from OSC referencing the appellant's amended allegations, and the appellant's written responses to OSC referencing OSC's discussion of the amended allegations. *Mudd,* 120 M.S.P.R. at 371, ¶ 12; *Kuyoki v. Department of Veterans Affairs,* 111 M.S.P.R. 404, ¶ 13 (2009).

b. Protected Disclosure. Protected whistleblowing occurs when an appellant makes a disclosure that she reasonably believes evidences a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or

a substantial and specific danger to public health and safety. *Mudd,* 120 M.S.P.R. at 369, ¶ 5; *Mason v. Department of Homeland Security,* 116 M.S.P.R. 135, ¶ 17 (2011); *see* 5 U.S.C. § 2302(b)(8). The proper test for determining whether an employee had a reasonable belief that her disclosures were protected is whether a disinterested observer with knowledge of the essential facts known to, and readily ascertainable by, the employee could reasonably conclude that the actions evidenced a violation of a law, rule, or regulation, or one of the other conditions set forth in 5 U.S.C. § 2302(b)(8). *Mudd,* 120 M.S.P.R. at 369, ¶ 5.

Alleged disclosures contained in a grievance pursuant to a negotiated grievance procedure under a collective bargaining agreement are not protected under section 2302(b)(8). Reprisal for exercising a grievance right is a prohibited personnel practice under 5 U.S.C. § 2302(b)(9), not 5 U.S.C. § 2302(b)(8). *See*, *e.g., Serrao v. Merit Systems Protection Board,* 95 F.3d 1569, 1576 (Fed. Cir. 1996); *Mudd,* 120 M.S.P.R. at 369, ¶ 6; *Davis v. Department of Defense,* 103 M.S.P.R. 516, ¶ 11 n.2 (2006); *Fisher v. Department of Defense,* 47 M.S.P.R. 585, 587–88 (1991) (section 2302(b)(8) does not extend to reprisal for filing grievances, which is protected by section 2302(b)(9)). However, as discussed below, in section 11 of this chapter, the WPEA expanded the scope of whistleblower appeals to include most claims under 5 U.S.C. § 2302(b)(9).

Under the WPA, as amended, the appellant is not required to identify the particular statutory or regulatory provision that the agency allegedly violated. The question is whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee could reasonably conclude that the actions evidenced a violation of a law, rule, or regulation, or one of the other conditions set out in 5 U.S.C. § 2302(b)(8). *Groseclose,* 111 M.S.P.R. 194, ¶ 22 (citing *Lachance v. White,* 174 F.3d 1378, 1381 (Fed. Cir. 1999)).

Alleged protected disclosures of an abuse of authority or gross mismanagement should follow the guidance outlined in Board precedent. *See, e.g., Wheeler v. Department of Veterans Affairs,* 88 M.S.P.R. 236, ¶ 13 (2001) (an abuse of authority occurs when there 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); *White v. Department of the Air Force,* 63 M.S.P.R. 90, 95 (1994) (gross mismanagement means a management action or inaction which creates a substantial risk of significant adverse impact upon the agency's ability to accomplish its mission). As to the disclosure of a substantial and specific danger to public health or safety, *see Chambers v. Department of the Interior*, 515 F.3d 1362, 1369 (Fed. Cir. 2008):

> A variety of factors guide the application of the statutory language, helping determine when a disclosed danger is sufficiently substantial and specific to warrant protection under the WPA. One such factor is the likelihood of harm resulting from the danger. If the disclosed danger could only result in harm

under speculative or improbable conditions, the disclosure should not enjoy protection. Another important factor is when the alleged harm may occur. A harm likely to occur in the immediate or near future should identify a protected disclosure much more than a harm likely to manifest only in the distant future. Both of these factors affect the specificity of the alleged danger, while the nature of the harm—the potential consequences—affects the substantiality of the danger.

c. Contributing Factor. To satisfy the contributing factor criterion, an appellant must raise nonfrivolous allegations that the fact of, or content of, the protected disclosure was one factor that tended to affect the personnel action in any way. *Atkinson v. Department of State,* 107 M.S.P.R. 136, ¶ 15 (2007) (citing *Santos v. Department of Energy,* 102 M.S.P.R. 370, ¶ 10 (2006)). One way to establish the contributing factor element is through the knowledge/timing test of 5 U.S.C. § 1221(e)(1), where the disclosure is shown to have been a contributing factor through circumstantial evidence such as evidence that the official taking the personnel action knew of the disclosure, and that 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. *Carey v. Department of Veterans Affairs,* 93 M.S.P.R. 676, ¶ 11 (2003); *see Wadhwa v. Department of Veterans Affairs,* 110 M.S.P.R. 615, ¶ 12, *aff'd,* 353 F. App'x 435 (Fed. Cir. 2009). While the knowledge/timing test is not the only way for an appellant to satisfy the contributing factor standard, it is "one of the many possible ways" to satisfy the standard. *Carey,* 93 M.S.P.R. 676, ¶ 11. When the appellant has not specifically alleged that an official knew of the disclosure at issue, the appellant may make nonfrivolous allegations under a "cat's paw" theory that the protected disclosure was a contributing factor by alleging that the official was influenced by an individual with actual knowledge of the disclosure. *See Marchese v. Department of the Navy,* 65 M.S.P.R. 104, 108 (1994).

d. Personnel action. An IRA appeal must be based on one of the 12 "personnel actions," as that term is detailed in 5 U.S.C. § 2302(a)(2)(A). A voluntary action is not a personnel action and cannot form the basis for an IRA appeal. Thus, an employee's claim that he or she resigned or retired involuntarily can form the basis for an IRA appeal only if the employee proves that his or her facially voluntary action was actually coerced by the agency or otherwise rendered involuntary under the standards applied in chapter 75 appeals of such actions. *See Koury v. Department of Defense*, 84 M.S.P.R. 219, ¶ 10 (1999). Further, if the agency actions that form the basis for the involuntariness claim suffice to constitute a hostile environment, the creation of such an environment is a personnel action. *Colbert v. Department of Veterans Affairs*, 121 M.S.P.R. 677, ¶ 12 (2014). Conversely, a termination during probation is a personnel action, but not generally considered an appealable matter. Thus, if an appellant first files an OAA (315H) appeal based on a termination during probation that is ultimately found not to be within the Board's jurisdiction, the appellant can then file an IRA appeal without being held to his initial election of a direct appeal, since he had no right to make such an election. *Shannon v. Department of Homeland Security*, 100 M.S.P.R. 629, ¶ 17 (2005).

e. Threats. To establish Board jurisdiction, the appellant must make nonfrivolous allegations that a person with authority took, failed to take, or threatened to take or fail to take, a personnel action. What constitutes a "threat" is often not clear, but a simple belief that the appellant will face discipline does not constitute a threat. *See Rebstock Consolidation v. Department of Homeland Security*, 122 M.S.P.R. 661, ¶¶ 10-12 (2015). The term "threaten" should be interpreted broadly and, thus, a counseling memorandum warning of possible future discipline, *Campo v. Department of the Army,* 93 M.S.P.R. 1, ¶¶ 7–8 (2002), and a supervisor stating that an employee should not expect the same performance rating he had received the year before, *Special Counsel v. Hathaway*, 49 M.S.P.R. 595 (1991), were deemed threatened personnel actions. In *Rebstock* the Board stated that "[a]bstract concerns about possible disciplinary action, without any evidence that the agency actually has threatened or suggested it would take such action, do not constitute nonfrivolous allegations that the agency threatened to take a personnel action." Rather, "the agency must take some action signifying its intent to take a personnel action."

f. Burdens at Hearing. Federal agencies are prohibited from taking, failing to take, or threatening to take, a personnel action against an employee in a covered position because of the disclosure of information that the employee reasonably believes to be evidence of a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety. 5 U.S.C. § 2302(a)(2), (b)(8); *see Jenkins v. Environmental Protection Agency,* 118 M.S.P.R. 161, ¶ 16 (2012). To establish a prima facie case of whistleblower reprisal in an IRA appeal, the appellant must prove by preponderant evidence that he or she made a protected disclosure and that the disclosure was a contributing factor in a personnel action. 5 U.S.C. § 1221(e)(1); *Jenkins,* 118 M.S.P.R. 161, ¶ 16. If the appellant makes out a prima facie claim of whistleblower reprisal, the agency is given an opportunity to prove by clear and convincing evidence that it would have taken the same personnel action in the absence of the protected disclosure. 5 U.S.C. § 1221(e)(2); *Jenkins,* 118 M.S.P.R. 161, ¶ 16. In determining whether an agency has shown by clear and convincing evidence that it would have taken the same personnel action in the absence of whistleblowing, the Board will consider the following 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 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. *Carr v. Social Security Administration,* 185 F.3d 1318, 1323 (Fed. Cir. 1999); *Mattil v. Department of State,* 118 M.S.P.R. 662, 669-70, ¶¶ 11-12 (2012); *Jenkins,* 118 M.S.P.R. 161, ¶ 16.

Generally, an AJ should not bifurcate the hearing on the merits of an IRA appeal, that is, first take evidence on whether the agency met its clear and convincing evidence burden because the AJ must give full and fair consideration to the appellant's claim through adjudication of both the merits of the prima facie case of whistleblower retaliation as well as the agency's affirmative defense. *Mattil,*

118 M.S.P.R. 662, 668-69, ¶¶ 11-12 (holding that the decision to bifurcate the hearing was unwarranted under the particular circumstances of the appeal when the substance of one of the disclosures at issue was intertwined with the appellant's claim that the immediate supervisor was concerned with the effect of that disclosure on his own career). In light of the Federal Circuit's decision in *Whitmore v. Department of Labor*, 680 F.3d 1353 (Fed. Cir. 2012) (evidence only clearly and convincingly supports a conclusion when it does so in the aggregate considering all the pertinent evidence in the record, and despite the evidence that fairly detracts from that conclusion; a complete evaluation of the facts is necessary in every case), it seems likely that bifurcation usually should not be done.

Because the appellant has the burden of proof in an IRA appeal, it is the appellant who presents his or her case first, even when the underlying matter is an appealable action that the appellant chose to bring to OSC. In an OAA, of course, that would not be true.

In addition, one who is perceived as a whistleblower is entitled to the protections of the WPA, even if she has not made protected disclosures. *Jensen v. Department of Agriculture*, 104 M.S.P.R. 379, ¶ 11 n.3 (2007); *Juffer v. United States Information Agency*, 80 M.S.P.R. 81, ¶ 12 (1998); *Special Counsel v. Department of the Navy*, 46 M.S.P.R. 274, 278-80 (1990). To make such a claim, the appellant must show: (1) that she exhausted her remedies with OSC on the issue of whether the agency perceived her as a whistleblower; and (2) that the agency's perception of her as a whistleblower was a contributing factor in its decision to take or not take the personnel action at issue, which she may do through the knowledge/timing test. If the appellant meets these burdens, the agency may still prevail if it can show by clear and convincing evidence that it would have taken the personnel action at issue absent its perception of the appellant as a whistleblower. *King v. Department of the Army*, 116 M.S.P.R. 689 (2011). The Board later extended the "perceived-as" rule under the WPEA to each of the activities it covers. *Corthell v. Department of Homeland Security*, 123 M.S.P.R. 417 (2016).

8. REFERRAL TO THE OFFICE OF SPECIAL COUNSEL (OSC).

Pursuant to 5 U.S.C. § 1221(f)(3), when "under this section", the Board "determines that there is reason to believe that a current employee may have committed a prohibited personnel practice, the Board shall refer the matter to the Special Counsel to investigate and take appropriate action under section 1215." The responsibility to provide such notification now rests with OCB, both if the ID becomes final in the absence of a PFR and if the Board on PFR agrees with the decision. A Law Manager report lists all cases making such a finding and their finality dates. OCB will consult that list to keep track of finality dates and send the notice, so that the regions are relieved of the obligation. Thus, there is no need for the RO or FO to notify OCB when a decision is issued that might call for the issuance of such a referral.

9. ATTORNEY FEES.

The prevailing party test enunciated in *Cuthbertson v. Merit Systems Protection Board,* 784 F.2d 370 (Fed. Cir. 1986), for attorney fees claims under the Civil Service Retirement Act also applies to attorney fees claims under the WPA. *Hamel v. President's Commission on Executive Exchange,* 987 F.2d 1561 (Fed. Cir.), *cert*. *denied*, 510 U.S. 931 (1993). An appellant who prevails on a WPA claim is entitled to an award of costs he incurred directly, in addition to reimbursement for attorney fees. *Bonggat v. Department of the Navy,* 59 M.S.P.R. 175 (1993) (reversing *Wiatr v. Department of the Air Force,* 50 M.S.P.R. 441 (1991)). *See also* chapter 13, section 2 of this Handbook, noting that there is no interest of justice requirement to be met in appeals finding whistleblower retaliation, and that it is the appellant, not the attorney, who is entitled to the award. *See Rumsey v. Department of Justice*, 123 M.S.P.R. 502, ¶¶ 7-8 (2016), rev'd on other grounds, *Rumsey v. Department of Justice*, 866 F.3d 1375 (Fed. Cir. 2017).

10. CONSEQUENTIAL AND COMPENSATORY DAMAGES.

The Board may order payment of consequential damages, including medical costs incurred, travel expenses, and any other reasonable and foreseeable consequential damages as authorized by 5 U.S.C. § 1221(g)(1)(A)(ii), when the Board orders corrective action in a whistleblower appeal to which 5 U.S.C. § 1221 applies. 5 C.F.R. § 1201.202(b). The Board may not award nonpecuniary damages for mental distress under the consequential damages provision, however. *Kinney v. Department of Agriculture*, 82 M.S.P.R. 338, ¶ 10 (1999). It may, though, award compensation for future medical expenses which are the result of the retaliation and can be proven with reasonable certainty, under its authority to reimburse for "medical costs incurred." *See Pastor v. Department of Veterans Affairs,* 87 M.S.P.R. 609 (2001). *See also* chapter 13, sections 6 and 7 of this Handbook. Under the WPEA, compensatory damages may also be awarded. While there is little law on such damages in the context of whistleblower retaliation, *see King v. Department of the Air Force*, 119 M.S.P.R. 663 (2013) (the compensatory damages provision does not apply retroactively), there is a good bit of precedent on such damages in the context of EEO reprisal, much of which is likely to be appropriate in this context as well. Unlike EEO reprisal, however, note that the $300,000.00 limitation is missing from the WPEA.

Consequential damages represent an award that the appellant might be entitled to, if he meets the requirements of the statute. For this reason, the cancellation of the appealed action does not moot an IRA appeal or the appeal of an OAA that includes a whistleblower claim, if the appellant has requested consequential damages or has not yet been informed of his right to do so. After providing sufficient notice, the AJ must afford an appellant a specific opportunity to raise a claim for consequential damages before deciding if it is appropriate to dismiss the appeal as moot. *Vick v. Department of Transportation,* 118 M.S.P.R. 68, 69-70, ¶ 5 (2012); *Gilbert v. Department of the Interior*, 101 M.S.P.R. 238, ¶ 6 (2006). Thus, in situations where the agency may have rescinded the personnel action(s) at issue, the appellant's outstanding claim for consequential damages will preclude dismissal of the whistleblower claim as moot. *Vick,* 118 M.S.P.R. 70, ¶ 5.

Because consequential damages constitute an award beyond *status quo ante* relief, the appellant would not be eligible for such damages in a case that does not include a WPA

claim. *See Daniels v. Department of Veterans Affairs,* 105 M.S.P.R. 248 (2007) (noting that "[t]he WPA affords to a person who prevails on an allegation of reprisal for whistleblowing relief that exceeds *status quo ante* relief, including medical costs incurred, travel expenses, and other reasonably foreseeable consequential damages."). The appellant therefore will not have received all the relief to which he may be entitled in the WPA appeal even if he receives all the relief to which he is entitled in the OAA case that does not have a whistleblower affirmative defense claim under the WPA.

The Board has applied a similar rule to an arbitrator's decision in a situation where the appellant filed a grievance of his removal under chapter 75, but an appeal of the agency's action in removing him, on the same date, under chapter 43. *Dey v. Nuclear Regulatory Commission,* 106 M.S.P.R. 167 (2007). Because the appellant had raised a claim of whistleblower retaliation in his chapter 43 appeal, and requested consequential damages if he prevailed on that claim, the AJ could not properly dismiss the appeal without prejudice to await the result of the arbitration of the chapter 75 action. *Id*. Even if the appellant loses the arbitration, and therefore remains separated from the agency and so ineligible for back pay as a result of the chapter 43 appeal, the appeal is not moot because of the consequential damages claim, inasmuch as he is not eligible for such damages in his arbitration, which did not raise such a claim.

11. WHISTLEBLOWER PROTECTION ENHANCEMENT ACT (WPEA).

As a result of the WPEA, 5 U.S.C. § 2302(b)(9) protects not just disclosures, but also certain actions:

> (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 of an agency, or to the Special Counsel, in accordance with applicable provisions of law, or
>
> (D) for refusing to obey an order that would require the individual to violate a law, rule or regulation. [Note that "rule or regulation" was added by the Follow the Rules Act, not the WPEA.]

While (b)(9) pre-existed the WPEA, it did not then distinguish between (A)(i) and (ii) or provide for the filing of an IRA appeal based on the activities protected by the section. What the WPEA did was to extend the Board's IRA appeal jurisdiction to claims arising under all of (b)(9) except for (b)(9)(A)(ii). WPEA § 101(b)(1)(A). Thus, to the extent the appellant alleges that the agency took, failed to take or threatened to take a personnel action in reprisal for exercising a grievance, complaint, or appeal right, the AJ will need to determine if the Board has jurisdiction to consider such allegations in the context of the IRA appeal by determining whether that grievance, complaint, or appeal was filed to remedy a (b)(8) violation. If it was, then an IRA appeal is viable. *Clay v. Department of the Army*,

123 M.S.P.R. 245 (2016) (the appellant's claim of retaliation for his earlier Board appeal that included a whistleblower issue comes within (b)(9)(A)(i) and is to be analyzed under 5 U.S.C. § 1221(e)).

Although (b)(9)(A) protects against reprisal only for those appeals, complaints, and grievances filed by the appellant that were aimed at remedying a (b)(8) violation, as (b)(9)(B) suggests, an IRA appeal may now be filed by any employee who assisted another individual with that person's appeal, complaint, or grievance regardless of whether it involved a (b)(8) claim. *See Carney v. Department of Veterans Affairs*, 121 M.S.P.R. 446 (2014). Union stewards and others who file such actions on behalf of other employees are, of course, covered, as are individuals who were witnesses or were otherwise of assistance to a complainant, appellant, or grievant. The same burden-shifting analysis applicable to (b)(8) claims is also applicable to (b)(9), meaning that in a chapter 75 case where jurisdiction is established, the appellant must prove by preponderant evidence that he or she engaged in the protected disclosure and that it was a contributing factor to the personnel action at issue. The burden then shifts to the agency to prove by clear and convincing evidence that it would have taken the same action absent that protected activity. *Alarid v. Department of the Army*, 122 M.S.P.R. 600, ¶¶ 12-14 (2015). In IRA appeals based on (b)(9), the appellant must prove he exhausted as to the specific protected action at issue.

The WPEA also expanded the scope of protected disclosures to comport with what Congress stated it had intended all along. Thus, under 5 U.S.C. § 2302(f)(1), a disclosure is not excluded because it was made to the wrongdoer or his supervisor; it revealed information that had previously been disclosed; it was not made in writing; or it was made while off duty. The motive for making the disclosure and the amount of time that has passed since the occurrence of the events described in the disclosure also provide no basis for exclusion. Pursuant to 5 U.S.C. § 2302(f)(2), "if a disclosure is made during the normal course of duties of an employee, the disclosure shall not be excluded from subsection (b)(8) if any employee who has authority to take, direct others to take, recommend or approve any personnel action with respect to the employee making the disclosure, took, failed to take, or threatened to take or fail to take a personnel action with respect to that employee in reprisal for the disclosure." The Board has not yet fully analyzed the provision but in *Benton-Flores v. Department of Defense*, 121 M.S.P.R. 428, ¶ 15 (2014), stated that "[i]n explaining this new provision in the Act, the Senate Report stated that disclosures made in the course of one's duties are protected only if the employee also proves that the agency took the personnel action with an improper retaliatory motive. S.Rep. No. 112-155, 5-6, reprinted in 2012 U.S.C.C.A.N. 589, 593-94. Accordingly, when an appellant has made a protected disclosure in the normal course of her duties, the statute now requires her to prove that the personnel action taken was in retaliation for the disclosure."

Despite the Board's expanded jurisdiction under the WPEA, vague, nonspecific allegations of wrongdoing and simple policy disagreements remain unprotected. *See Salerno v. Department of the Interior*, 123 M.S.P.R. 230 (2016).

As a result of the WPEA and the All-Circuit Review Act, all IRAs and OAAs that involve (b)(8) and (b)(9) (except (b)(9)(a)(ii)) issues may be appealed to the US Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. The Board has not yet addressed how it will deal with any split between the circuits that may arise.

CHAPTER 16 - STAY REQUESTS

1. GENERAL.

Stay requests may be granted only when raised in connection with a whistleblower appeal, defined broadly to include those activities protected by 5 U.S.C. § 2302(b)(8) and (b)(9), except (b)(9)(A)(ii), either an IRA appeal or an OAA. *See* 5 U.S.C. § 1221(a)-(c); 5 C.F.R. §§ 1209.8-.11 5 U.S.C. §§ 1221(c)(1), 1221(i). All stay requests must be entered in the CMS as separate cases even if the stay request is not within the Board's jurisdiction. The appellant may request a stay of a personnel action that has already been effected. *Visconti v. Environmental Protection Agency*, 78 M.S.P.R. 17, 22 (1998).

2. TIME OF FILING.

An appellant may request a stay at any time after becoming eligible to file an appeal with the Board but no later than the time limit set for the close of discovery in the appeal. Within those constraints, a stay request may be filed prior to, simultaneous with, or after the filing of an appeal. *See* 5 C.F.R. § 1209.8(a). Board regulations provide no limitation on the number of times an appellant may file a stay request within these time frames.

3. PROCEDURES FOR RULING ON STAY REQUESTS.

a. General. Within 10 days of receipt of a stay request, an AJ must issue an Order ruling on the request, and set forth the factual and legal bases for the ruling. *See* 5 C.F.R. § 1209.10(b). While the statute, 5 U.S.C. § 1221(c)(2), requires only that a stay that is granted be completed within 10 days, by its regulation the Board has extended the 10-day requirement to denied stays as well. If a sufficient analysis cannot be completed within 10 days it may be appropriate for the AJ to issue a decision in the manner of a bench ruling, followed by an Opinion containing the reasons for the ruling as soon as possible, certainly within 10 additional days. The Board's original interim part 1209 regulations specified that such a procedure was acceptable. That statement was later deleted as unnecessary, however. No Board decisions have commented on use of the procedure, so it is not entirely clear what the Board's current view of it is. Given *Spithaler* and similar decisions, it may be preferable to bifurcate the ruling process than to issue an Opinion that does not meet the Board's quality standards.

b. Service of the Stay Request. Upon receipt of the stay request, the AJ should ensure that the appellant has served it on the agency as the regulations require. *See* 5 C.F.R. § 1209.8(c). Depending on the circumstances, the AJ may wish to consider issuing an acknowledgment order reminding the agency of the short time requirements for response as well as the required content of the response. *See* 5 C.F.R. § 1209.9(c).

c. Unperfected Stay Requests. The AJ must determine whether the appellant has made the requisite jurisdictional allegations for a whistleblower action before ruling on any stay request. If the appellant has not made nonfrivolous allegations on all elements of a whistleblower claim, the AJ should issue a show cause order on the jurisdictional issues. Where the appellant has failed to establish the Board's jurisdiction over the

initial stay request, the time limit for adjudicating the stay request begins on the date the record closes on the jurisdictional issue.

4. MERITS ISSUES CONCERNING STAYS.

Proof requirements. To establish entitlement to a stay under the WPA, an appellant must produce, inter alia, evidence or argument showing that there is a substantial likelihood of prevailing on the merits of the claim that reprisal for a disclosure under 5 U.S.C. § 2302(b)(8) or activity under (b)(9) was a contributing factor in the proposed, threatened, or taken personnel action. *See Eilinsfeld v. Department of the Navy*, 79 M.S.P.R. 537, 542 (1998); 5 C.F.R. §§ 1209.9(a)(6)(ii), 1209.4(c). The agency must submit evidence or argument on the same issue, as well as on whether a stay would result in extreme hardship. *Visconti,* 78 M.S.P.R. at 2. Although the appellant has the burden of proof, the burden of going forward with the evidence shifts to the agency if the appellant shows a substantial likelihood that the disclosures are a contributing factor in the personnel actions at issue. *Id*. at 23. As is true of proof of the affirmative defense in general, the appellant may meet that burden by either direct or circumstantial evidence.

5. APPEAL RIGHTS FROM A RULING ON A STAY REQUEST.

An order granting or denying a stay request is not a final order and therefore cannot be the subject of a PFR. *See Weber v. Department of the Army,* 47 M.S.P.R. 130, 132-33 (1991). Therefore, no review rights notice should be included. An interlocutory appeal, 5 C.F.R. §§ 1201.91-.93, is the only means for securing immediate review of an order regarding a stay request. The AJ has discretion to certify an interlocutory appeal of an order regarding a stay request in accordance with 5 C.F.R. § 1201.92. However, once the AJ denies a request for certification of an interlocutory appeal, the party that sought certification may raise the matter at issue in a PFR filed after the ID is issued. 5 C.F.R. § 1201.93(b). *McCarthy v. International Boundary and Water Commission: U.S. & Mexico,* 116 M.S.P.R. 594, 604 (2011).