Causation Standards in Employment Discrimination Claims

By:

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I. Title VII

A. Discrimination Cases

Title VII prohibits discrimination **because of** race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2.

Since the enactment of Title VII, **because of** had generally been understood to mean that the prohibited basis had to be a **but-for cause** of the adverse action, that is, that the action would not have occurred in the absence of, or but-for, the prohibited basis.

In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the Court considered the causation standard applicable to claims of intentional discrimination. Ann Hopkins was denied partnership because, in the words of some of the partners, she was too "macho" and needed to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled and wear jewelry." The lower courts found Price Waterhouse liable for sex discrimination based on evidence of impermissible sex stereotypes that had infected the decision-making process. The Supreme Court considered the question of the parties' relative burdens of proving that illegal motives caused an employment decision. The plurality, with Justice Brennan writing, held that "once a plaintiff in a Title VII case shows that gender **played a motivating part** in an employment decision, the defendant may avoid a

finding of liability … by proving [by a preponderance of the evidence] that it would have made the same decision even if it had not allowed gender to play such a role." Justices O'Connor and White concurred in the judgment. Justice White agreed that it was proper to shift the burden of proof to the defendant because the record showed that an unlawful motive was a substantial factor in the adverse decision. Justice O'Connor rejected the plurality's view of the quantum of evidence necessary to shift the burden to the defendant, and wrote that such a shift should not occur unless the plaintiff adduced direct evidence, which Hopkins had done here.

Section 107—42 U.S.C. § 2000e-2(m), § 2000e-5(g)(2)(B)—response to *Price Waterhouse v. Hopkins*

The 1991 amendment adding **§ 2000e-2(m)** provides that Title VII is violated when an employment decision is motivated by permissible as well as impermissible factors, specifically stating that a violation is established when a party demonstrates "that race, color, religion, sex, or national origin was **a motivating factor** for any employment practice, even though such practice was also motivated by other factors."

The 1991 amendment to the remedies provision, **§ 2000e-5(g)(2)(B)**, directs that if the employer demonstrates it would have made the same decision in the absence of discrimination the court may grant declaratory relief, injunctive relief, attorney's fees and costs, but may not award damages or order hiring, reinstatement, or back pay.

NB – the motivating factor causation standard can be used in any Title VII disparate treatment case, and is the causation standard for all such cases in model jury instructions in the majority of jurisdictions (including the Fourth Circuit). The label of "mixed motives" only applies if a defendant asserts and proves the same decision defense.

Congress gave no indication of what type of evidence was necessary to shift the burden to the defendant in a motivating factor case, and thus did not resolve the issue that divided the *Price Waterhouse* plurality from the two concurring justices, about whether direct evidence was required or whether the evidence had to show that the impermissible motive was a substantial factor in the decision. Many litigants and lower courts assumed the **motivating factor/mixed motives**

framework only applied to cases in which there was **direct evidence** of the discriminatory motive. The Supreme Court addressed that question in 2003.

- *Desert Palace v. Costa*, 539 U.S. 90 (2003). The Court held that a plaintiff need not present direct evidence of discrimination in order to have the jury instructed on "mixed-motive" discrimination in Title VII actions. In a sex discrimination case by a woman who was terminated as a warehouse worker in an otherwise all-male workplace, the district court instructed the jury to find for the plaintiff if the jury determined the plaintiff's sex was a motivating factor in the defendant's acts, even if there were other permissible reasons. The employer challenged the verdict and appealed the jury instruction, claiming that the plaintiff had failed to present direct evidence that sex as a motivating factor. The Ninth Circuit affirmed. The Supreme Court noted that Title VII's plain language and the 1991 Act's definition of "demonstrates" do not suggest a heightened evidentiary standard. Thus, the Court held that a plaintiff need only present sufficient evidence for a reasonable jury to decide that the protected basis in question was a motivating factor by a preponderance of the evidence.

B. Retaliation Cases

Title VII prohibits discrimination against an employee **because** s/he has opposed any practice unlawful under Title VII or **because** s/he has filed a charge or participated in proceedings under the act. 42 U.S.C. § 2000e-3. In Title VII retaliation cases, plaintiffs must prove their protected conduct was the **but-for** cause of the adverse employment action alleged. The Supreme Court rejected application of the motivating factor causation standard in retaliation cases.

In *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013), the Court held that in Title VII retaliation cases plaintiffs must prove that **but for** an improper motive, the employer would not have taken the adverse action, rather than proving the prohibited basis was a motivating factor, the test operative in status-based discrimination claims. The plaintiff brought a retaliation claim arguing that the university retaliated against him for complaining of harassment by his supervisor based on his religion and ethnicity. The jury found for Nassar and the Fifth Circuit upheld the verdict on his retaliation claim, holding that the evidence showed that the official who deprived Nassar of a position was motivated at least in part by retaliatory animus because of his prior complaints. However, the Supreme Court

determined that the motivating factor test is inconsistent with the plain language, design, and structure of the Title VII retaliation provision. The Court found it compelling that the amendment adding the motivating factor standard identified only "race, color, religion, sex, or national origin," but not retaliation as bases that can support liability.

II. ADEA Cases

The Age Discrimination in Employment Act prohibits discrimination **because of** an individual's age (if the individual is 40 or over). 29 U.S.C. § 623(a)(1). Lower courts generally applied the Title VII causation standards in age cases but the Supreme Court ruled in 2009 that all age cases (discrimination and retaliation) are subject to a **but-for** causation standard.

Gross v. FBL Fin. Servs., Inc., 557 U.S. 167 (2009). In this case, the Court declined to extend Title VII's burden-shifting framework to ADEA discrimination claims. In an age discrimination action, the Eighth Circuit ruled that the jury should not have been given an instruction shifting the burden to the defendant because the plaintiff had not presented direct evidence of age as a motivating factor in his demotion. However, the Court held that the burden does not shift to the employer at all in ADEA cases to show that the employer would have taken the same action regardless of the plaintiff's age. Rather, the plaintiff bears the burden of proving, by a preponderance of the evidence, that the employer would not have acted "but-for" the employee's age. The Court noted differences in Title VII's statutory language and Congressional history that indicated the burden-shifting framework does not apply to the ADEA, specifically that Congress amended Title VII in 1991 but made no parallel amendment to the ADEA.

III. ADA Cases

The Americans with Disabilities Act prohibits discrimination against a qualified individual with a disability **on the basis of disability.** The Supreme Court has not decided whether the causation standard under the ADA requires a showing of but-for causation or if a plaintiff can prevail by proving her disability was a motivating factor for the adverse action against her. The Fourth, Sixth, and Seventh Circuits have held that plaintiffs must prove **but-for** causation. See *Gentry v. East West Partners Club Management Co., Inc.*, 816 F.3d 228, 233-235 (4th Cir. 2016); *Lewis v. Humboldt Acquisition Corp., Inc.*, 681 F.3d 312 (6th Cir. 2012); *Serwatka v. Rockwell automation, Inc.,* 591 F.3d 957, 961-62 (7th Cir. 2010). The D.C.

Court of Appeals has not decided the question, so district courts in this jurisdiction analyze evidence under both standards on summary judgment.

On the question whether "on the basis of disability" means "because of," the Fourth Circuit decided that it does, noting that it sees no textual difference between this language and terms such as "because of," "by reason of," or "based on" all of which the Supreme Court has said connote "but-for" causation. *Gentry*, 816 F.3d at 235-236.

IV. Claims for which no causation is required: *Per Se* violations.

A. Title VII

The EEOC has long prohibited federal agencies from engaging in *per se* reprisals for participating in the EEO process. It holds that an employee may suffer unlawful retaliation if a supervisor interferes with EEO activity. See *Binseel v. Dep't of the Army*, EEOC Request No. 05970584, 1998 WL 730929 (Oct. 8, 1998); see also *Marr v. Dep't of the Air Force*, EEOC Appeal No. 01941344, 2000 WL 550511 (June 27, 1996); *Smith v. Dep't of the Navy*, EEOC Request No. 0120082983, 2010 WL 750852, at *6 (Feb. 16, 2010) (finding *per se* interference with the EEO process).. In *Williams v. Department of the Army*, EEOC Appeal No. 0120090596, 2011 WL 1690815 (April 29, 2011), a supervisor told his subordinate "that it would not be in Complainant's best interest to file an EEO complaint." *Id.* at *4. The EEOC's Office of Federal Operations ("OFO") held that statements discouraging or frowning on EEO complaint violate the letter and spirit of EEO regulations and constitute an impermissible *per se* interference with the EEO process. *Id.* OFO construed such comments as "a flagrant attempt to dissuade Complainant from engaging in the EEO process by suggesting or threatening that he could suffer unpleasant consequences if he pursued his EEO claims." *Id*.

The Commission has found that even if a complainant successfully initiates the EEO process in spite of such interference, the complainant is still aggrieved. *Boyd v. Dep't of Transportation*, EEOC Appeal No. 01955276, 1997 WL 654451 (Oct. 10, 1997) ("[t]he mere fact that the appellant filed the instant formal complaint does not defeat her claim of unlawful interference with the EEO process.") OFO found that such comments are reasonably likely to deter employees from engaging in EEO activity, and as such, violate EEO regulations. See *Kirk E. Webster v. Dep't of Defense*, EEOC Appeal No. 0120080665, 2009 WL 3845793, *8 (Nov. 4, 2009) (finding "the comments made by complainant's supervisor, that the EEO complaints complainant was filing was stressing him out

and that in his 20 years at the agency no one had done anything like what complainant had done to him, constituted a *per se* violation of Title VII, since such comments are likely to have a chilling effect and deter employees from full exercise of their EEO rights").

In *Carter v. Dep't of Veterans Affairs*, EEOC Appeal No. 0120122266, 2012 WL 5285520 (October 18, 2012), the Administrative Judge ("AJ") found that the complainant's supervisor's comments that she (complainant) needed to watch when and where she said things -- made after the complainant reported finding a pornographic magazine -- , constituted *per se* retaliation. As relief, the AJ, among other things, awarded Complainant $500 in non-pecuniary compensatory damages. On appeal, the Commission found that the award of damages was proper.

B. NLRB

The National Labor Relations Act, 29 U.S.C. § 157, guarantees an employee's right to share information with co-workers.

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ..

The NLRA's prohibited practices are in 29 U.S.C. § 158(a):

> It shall be an unfair labor practice for an employer
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> (3) by discrimination . . . to encourage or discourage membership in any labor organization

On March 18, 2015, the NLRB General Counsel issued a memo (pp. 27-56):

http://apps.nlrb.gov/link/document.aspx/09031d4581b37135

It states the Board's position that the mere maintenance of a work rule may violate Section 8(a)(1) of the Act if the rule has a chilling effect on employees' Section 7 activity. The most obvious way a rule would violate Section 8(a)(1) is by explicitly restricting protected concerted activity; by banning union activity, for example. Even if a rule does not explicitly prohibit Section 7 activity, however, it will still be found unlawful if:

1) employees would reasonably construe the rule's language to prohibit Section 7 activity;

2) the rule was promulgated in response to union or other Section 7 activity; or

3) the rule was actually applied to restrict the exercise of Section 7 rights.

Employees have a Section 7 right to discuss wages, hours, and other terms and conditions of employment with fellow employees, as well as with nonemployees, such as union representatives. Thus, an employer's confidentiality policy that either specifically prohibits employee discussions of terms and conditions of employment—such as wages, hours, or workplace complaints—or that employees would reasonably understand to prohibit such discussions, violates the Act. Similarly, a confidentiality rule that broadly encompasses "employee" or "personnel" information, without further clarification, will reasonably be construed by employees to restrict Section 7-protected communications. See *Flamingo-Hilton Laughlin*, 330 NLRB 287, 288 n.3, 291-92 (1999). Examples of unlawful policies:

Do not discuss "customer or employee information" outside of work, including "phone numbers [and] addresses."

"You must not disclose proprietary or confidential information about [the Employer, or] other associates (if the proprietary or confidential information relating to [the Employer's] associates was obtained in violation of law or lawful Company policy)."

“Never publish or disclose [the Employer's] or another's confidential or other proprietary information.”

“Never publish or report on conversations that are meant to be private or internal to [the Employer].”

Prohibiting employees from "[d]isclosing ... details about the [Employer]."

“Sharing of [overheard conversations at the work site] with your coworkers, the public, or anyone outside is strictly prohibited.”

"Discuss work matters only with other [Employer] employees who have a specific business reason to know or have access to such information.. .. Do not discuss work matters in public places."

"[I]f something is not public information, you must not share it."

C. Gag Clauses

Federal whistleblower laws have long been applied to make unlawful policies or agreements that restrain protected activities.

- *Macktal v. Brown & Root, Inc*., 923 F.2d 1150, 1155-56 (5th Cir. 1991)

- *Vannoy v. Celanese Corp.*, ARB No. 09-118, ALJ No. 2008-SOX-64 (ARB Sept. 28, 2011)

  Congress clearly intended that employees would be protected in "lawfully" collecting inside information about violations of law, even though the conduct, "may have violated company policy[.]"

  The ARB cited to 17 C.F.R. § 240.21F-17(a), the SEC's new Dodd-Frank rule prohibiting employers from enforcing or threatening to enforce confidentiality agreements to prevent whistleblower employees from cooperating with the SEC.

  In a July 24, 2013, remand decision, the ALJ awarded Mr. Vannoy $380,738 in economic and non-economic compensatory damages, plus interest and attorney's fees.

  http://www.oalj.dol.gov/Decisions/ALJ/SOX/2008/VANNOY_MATTHEW_v_CELANESE_CORPORATION_2008SOX00064_%28JUL_24_2013%29_121259_CADEC_SD.PDF

- *Niswander v. Cincinnati Insurance Co*., 529 F.3d 714, 728 (6th Cir. 2008) (delivery of documents in discovery is protected if the employee reasonably believes the documents support the claim of a violation of law);

- *Quinlan v. Curtiss-Wright Corp.*, 204 N.J. 239 (2010) (New Jersey Law Against Discrimination).

- *U.S. ex rel. Yesudian v. Howard University*, 153 F.3d 731, 739-40 (D.C. Cir. 1998)(Employees are protected "before they have put all the pieces of the puzzle together.").

The Securities and Exchange Commission (SEC) has started imposing fines on companies that use confidentiality policies or agreements to deter employees or former employees from making disclosures to the SEC, or even making whistleblower award claims.

- *SEC v. KBR*, April 1, 2015 ($130,000 fine for violating whistleblower protection Rule 21F-17 enacted under the Dodd-Frank Act. KBR

required witnesses in certain internal investigations interviews to sign confidentiality statements with language warning that they could face discipline and even be fired if they discussed the matters with outside parties without the prior approval of KBR's legal department.) https://www.sec.gov/news/pressrelease/2015-54.html

- *SEC v. HealthNet*, August, 2016 ($340,000 fine for including in a settlement agreement a provision that the employee waived any SEC whistleblower award). https://www.sec.gov/news/pressrelease/2016-164.html

OSHA issued a policy against approving settlements that restrain protected activities on August 23, 2016. https://s3.amazonaws.com/zldev/wp-content/uploads/2016/09/OSHA-new-policy-guidelines-for-approving-settlement-agreements-in-WB-cases-8.23.16.pdf

V. Federal sector causation standards are different than those in the private sector.

In *Nita H. v. Jewell*, EEOC No. 0320110050, 2014 WL 3788011 (E.E.O.C.), n. 6, EEOC's Office of Federal Operations made this observation:

> In the Commission's view, the "but for" standard ("but for" its retaliatory motive, the employer would not have taken the adverse action, meaning that the retaliatory motive made a difference in the outcome) does not apply to retaliation claims by federal sector applicants or employees under Title VII or the ADEA because the relevant federal sector statutory language does not employ the "because of" language on which the Supreme Court based its holdings in *University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517 (2013) and *Gross v. FBL Fin. Servs., Inc*., 557 U.S. 167 (2009) (requiring "but for" causation for ADEA claims brought under 29 U.S.C. § 623). These federal sector provisions contain a "broad prohibition of "discrimination' rather than a list of specific prohibited practices." See *Gomez-Perez v. Potter*, 553 U.S. 474, 487-88 (2008) (holding that the broad prohibition in 29 U.S.C. § 633a(a) that personnel actions affecting federal employees who are at least 40 years of age "shall be made free from any discrimination based on age" prohibits retaliation by federal agencies); see also 42 U.S.C. § 2000e-16(a) (personnel actions affecting federal employees "shall be made free from any discrimination based on race, color, religion, sex, or national origin").

See pp. 84-85 of the Materials.

VI. Varying whistleblower causation standards.

A. Available lists of whistleblower statutes.

The KCNF chart of 101 federal sector employment protection claims is attached at pp. 1-11 of the Materials. It is updated at:

http://www.kcnlaw.com/Most-legal-claims-have-time-limits.shtml

Or go to www.kcnlaw.com and follow Pactice Areas | Whistleblower | Time Limits

The OSHA Directorate of Whistleblower Protection Programs (DWPP) maintains a Desk Aid of federal anti-retaliation statutes enforced by OSHA. It is at pp. 12-19 of the Marerials and available at:

https://www.whistleblowers.gov/statutes_page.html

https://www.whistleblowers.gov/whistleblower_acts-desk_reference.pdf

B. "Clear and convincing" is now clearer than ever.

Congress established a bifurcated "contributing factor"/"clear and convincing" framework for the first time in the Whistleblower Protection Act of 1989 (WPA). Under this framework, a federal sector whistleblower must demonstrate that protected activities were a "contributing factor" in the adverse employment action. 5 U.S.C. § 1221(e)(1). This means that an employee must establish by a preponderance of the evidence that protected activity was a factor that, alone or in connection with other factors, tended to affect the employer's decision to take an adverse action in any way. *Sylvester v. Parexel Int'l*, ARB No. 07-123, 2011 WL 2165854, *9 (ARB, May 25, 2011); *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 158 (3d Cir. 2013).

Conversely, to prevent liability, the federal agency must show "by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure." 5 U.S.C. § 1221(e)(2). By enacting this amendment to the WPA, Congress "substantially reduc[ed]" a whistleblower's burden and sent "a strong, clear signal to whistleblowers that Congress intends that they be protected from any retaliation related to their whistleblowing." 135 Cong. Rec. 5033 (1989) (Explanatory Statement on S. 20).

Three years later, Congress amended the 1978 whistleblower provisions of the Energy Reorganization Act (1992 ERA amendments) to pointedly insert nearly the exact same burden-of-proof framework. 42 U.S.C. §5851(b)(3). Since then, Congress has used this bifurcated standard of causation for employee protections in

the Surface Transportation Assistance Act (STAA), 49 U.S.C. § 31105; Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), 49 U.S.C. § 42121; Sarbanes-Oxley Act (SOX), 18 U.S.C. § 1514A; Pipeline Safety Improvement Act (PSIA), 49 U.S.C. § 60129; Federal Railroad Safety Act, 49 U.S.C. § 20109; National Transit Systems Security Act (NTSSA), 6 U.S.C. §1142; Consumer Product Safety Improvement Act (CPSIA), 15 U.S.C. § 2087; Affordable Care Act (ACA), 29 U.S.C. § 218c; Seaman's Protection Act (SPA), 46 U.S.C. § 2114; Consumer Financial Protection Act (CFPA), 12 U.S.C. § 5567; Food Safety Modernization Act (FSMA), 21 U.S.C. § 399d; Moving Ahead for Progress in the 21st Century Act (MAP-21), 49 U.S.C. § 30171; and the National Defense Authorization Act, 41 U.S.C. § 4712(c)(6).

The DOL's ARB addressed the causation standards under the FRSA in *Palmer v. Canadian National Railway*, ARB No. 16-035, ALJ No. 2014-FRS-154 (ARB Sept. 30, 2016) (en banc). "Contributing factor" means that protected activity played some role—even an insignificant or insubstantial role—in the adverse action. Decision-maker knowledge of the protected activity and close temporal proximity will typically suffice to prove causation. The whistleblower does not need to prove pretext to establish causation. The employer's nonretaliatory reasons are not "weighed against" the employee's protected activity to determine which reasons might be weightier. "Importantly, if the ALJ believes that the protected activity and the employer's nonretaliatory reasons both played a role, the analysis is over and the employee prevails on the contributing-factor question . . . . Since the employee need only show that the retaliation played some role, the employee necessarily prevails at step one if there was more than one reason and one of those reasons was the protected activity."

Under the federal Whistleblower Protection Act, 5 U.S.C, § 1221(e)(2) (see also, 5 C.F.R. § 1209.7(b)), when a federal employee shows that protected activity was a contributing factor in an adverse action, the agency cannot thereafter prevail unless it proves that it would have taken the same adverse action by ***clear and convincing evidence***.

The Supreme Court has imposed the "clear and convincing" only to protect interests that are "far more precious than any property right." *Santosky v. Kramer*, 455 U.S. 745, 758-59 (1982) (termination of parental rights); see also, *e.g.*, *Addington v. Texas*, 441 U.S. 418, 424 (1979) (requiring interests "more substantial than mere loss of money"). It is a heightened standard of proof that "concede[s] the possibility of error" but "ensure[s] that the error is generally in one direction." Ralph K. Winter, Jr., The Jury and the Risk of Non-persuasion, 5 Law

& Soc'y Rev. 335, 339-40 (1971); cf. 4 William Blackstone, Commentaries *352 ("[B]etter that ten guilty persons escape, than that one innocent suffer."). "For employers, this is a tough standard, and not by accident. Congress appears to have intended that companies in the nuclear industry face a difficult time defending themselves." *Stone & Webster Eng. Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997).

The Federal Circuit spoke to the reasons for this elevated burden on agencies in *Whitmore v. Department of Labor*, 680 F.3d 1353 (Fed. Cir. 2012). There, the Federal Circuit stated at p. 1377 that the law seeks to balance the public interest of protecting whistleblowers with an eye toward the inherent advantages agency management would otherwise have:

> The laws protecting whistleblowers from retaliatory personnel actions provide important benefits to the public, yet whistleblowers are at a severe evidentiary disadvantage to succeed in their defenses. Thus, the tribunals hearing those defenses must remain vigilant to ensure that an agency taking adverse employment action against a whistleblower carries its statutory burden to prove—by clear and convincing evidence—that the same adverse action would have been taken absent the whistleblowing.

In *Whitmore*, the Court considered the employee's admission about the following conduct:

> Whitmore put his foot in the way and told Dubois that if he ever spit on him again, he would "knock him into the basement." *** In the hallway Whitmore encountered Dave Schmidt, director of OSA, standing in a narrow passageway between a wall and some filing cabinets. *** Whitmore claimed Schmidt would not allow him to pass to Goddard's office. Whitmore then physically pushed past Schmidt while yelling "get out of my way," and possibly also spit on Schmidt. Whitmore expressed that he was so angry he "could have just cold cocked [Mr. Schmidt] right then and there" for blocking his way out of the area.

Even with this evidence, the Court could not conclude that the agency would have fired Whitmore without considering his protected activity.

The Federal Circuit has raised the bar on the "clear and convincing" standard even further for federal sector employers in *Miller v. Dep't of Justice*, 842 F.3d 1252 (Fed. Cir. 2016). The Court held that the government failed to show, by "clear and convincing" evidence, that the Bureau of Prisons would have reassigned

Mr. Miller even if he never made protected disclosures. The Court reiterated what it said in *Whitmore v. Dep't of Labor*, 680 F.3d 1353, 1367 (Fed. Cir. 2012):

> "Clear and convincing evidence" is a high burden of proof for the Government to bear. It is intended as such for two reasons. First, this burden of proof comes into play only if the employee has established by a preponderance of the evidence that the whistleblowing was a contributing factor in the action—in other words, that the agency action was "tainted." Second, this heightened burden of proof required of the agency also recognizes that when it comes to proving the basis for an agency's decision, the agency controls most of the cards …. [I]t is entirely appropriate that the agency bear a heavy burden to justify its actions.

In a key holding, the Court noted that the "clear and convincing" standard governing review of the evidence by the Board is interrelated with the "substantial evidence" the reviewing court must find. "The burden of proof a party faces necessarily impacts our review on appeal[.]" 842 F.3d at 1258; Materials, p. 63.

"We hold that no reasonable factfinder could find Warden Upton's conclusory testimony about how OIG directed him to be strong evidence of independent causation." The court added, "The Government's evidence is weak, particularly when considered in light of the record evidence endorsing Mr. Miller's character." 842 F.3d at 1259; Materials, p. 64.

The court considered that the IG investigation itself arose from Mr. Miller's own disclosure, that the government had no corroboration for the Warden's testimony, and that the government had no contemporaneous documentation to explain why it was reassigning Mr. Miller. The court emphasized that it was not altering the Board's finding that the Warden's testimony was credible, only that it was not the strong evidence required by the WPA.

C. State law causes of action.

A list of known state employment protections is in the Materials at pp. 20-26. Advantages of state law causes of action may include:

1. No cap.

2. Punitive damages.

3. Favorable jury voir dire.

Disadvantages can include:

4. Not available in all states.
5. Resistance to recognizing a claim if other claims are available.
6. Asserting federal law may permit removal to federal court.

VII. The NLRA, OSH ACT, and FLSA.

A. National Labor Relations Act (NLRA), 29 U.S.C. §§ 151-169.

The NLRA was enacted in 1935 to protect the rights of employees and employers, encourage collective bargaining, and to curtail certain private sector labor and management practices. Section 8(a)(3) of the NLRA prohibits employers from discriminating against employees due to their membership in a labor organization. In cases where an employee is terminated, causation is important to assess whether the employer was motivated by a legitimate business purpose or if there was an anti-union animus (ie. to suppress union activity).

The test applied to allegations of unlawful termination for engaging in protected union activity is the "Wright Line" test. This test was established in the case *Wright Line, a Division of Wright Line, Inc.,* 251 N.L.R.B. 1083 (1980) and affirmed by the U.S. Supreme Court in *NLRB v. Transp. Management Corp*., 462 U.S. 393 (1983). The Wright Line test puts the burden on the General Counsel of the NLRB to prove that the protected conduct was a **substantial or motivating factor** for the employee's discharge. If the General Counsel meets this burden, the burden then shifts to the employer to demonstrate by a preponderance of the evidence that the employee would have been fired regardless of the protected conduct.

B. Fair Labor Standards Act (FLSA), 29 U.S.C. § 201, et seq.

The FLSA was enacted in 1938 and establishes minimum wage, overtime pay, recordkeeping, and youth employment standards affecting employees in the private sector in the Federal, State and local governments. Under 29 U.S.C. 215(a)(3), it is unlawful for an employer to discharge or discriminate against an employee because the employee complained about violations under the FLSA. In these cases, there must be a causal link between the plaintiff's conduct and the employment action. The 11th Circuit asked whether the improper motivation was the "immediate cause" of discharge. *Reich v. Davis*, 50 F. 3d 962 (11th Cir. 1995). In the *Reich* case, the court remanded the matter to determine whether the employee would have been fired but for participation in protected activity. While the court recognized that there may have been legitimate reasons for firing the employee, it also recognized that if retaliatory motive was the "immediate cause" of termination, that would constitute a violation of the FLSA.

C. Occupational Safety and Health Act (OSH Act), 29 U.S.C. § 651, et seq.

The OSH Act was enacted in 1970 to An Act to assure safe and healthful working conditions for working men and women; by authorizing enforcement of the standards developed under the Act; by assisting and encouraging the States in their efforts to assure safe and healthful working conditions; by providing for research, information, education, and training in the field of occupational safety and health; and for other purposes. Section 11(c) of the Act prohibits employers from discharging or discriminating against any employee because the employee has filed a complaint under the Act or exercising his or her rights afforded by the Act. In a retaliation case, there must be a causal link that the adverse action would not have been carried out but for the protected activity. Once the plaintiff shows that the protected activity was a **"motivating factor"** in the adverse decision, the employer then has the burden of proving by a preponderance of the evidence that they would have reached the same decision absent the protected activity. *Martin v. Anslinger, Inc*., 794 F. Supp. 640, 646, (S.D. Tex. May 26, 1992).

Most legal claims have time limits

From: http://www.kcnlaw.com/Most-legal-claims-have-time-limits.shtml

Federal Whistleblower Laws

This chart is meant to call attention to the types of claims that employees should investigate. It is also meant to urge them to consult a lawyer to assess each claim before the time limits expire. "SOL" means "statute of limitations." It is the time limit to file a legal action. This chart is not updated on any regular basis, and it is not meant to establish an attorney-client relationship. Only by retaining an attorney can employees get answers they can legally rely on.

So, do not rely upon this table for legal advice. This summary table is provided for information only and to assist attorneys in legal research. It is not warranted to be accurate in any respect. This table cannot replace the need for independent research or legal advice regarding where, when, and how your claim can be brought. Further, the statutes of limitations herein may not apply to your case or situation, may no longer be applicable, and, like any employment-related law, are always subject to change at any time, by act of Congress, agency practice, the courts, or changing facts in the case itself. Thank you to Ann Lugbill for initiating the collection of the information on this page.

A companion page listing some state whistleblower protection laws is at:
http://www.taterenner.com/stchart.php

The Department of Labor's Desk Aid listing whistleblower laws it enforces is at:
https://www.whistleblowers.gov/whistleblower_acts-desk_reference.pdf

Whistleblower or Retaliation Statute	Legal Citation	Statute of Limitations (SOL)	Where to File
First Amendment	U.S. Const., 1st Am.	State PI limit	state or fed ct.
Civil Rights Act of 1871	42 U.S.C. 1981, 1983, 1985	State PI limit	state or fed ct.
Affordable Care Act (ACA)	29 U.S.C. 218C; Section 1558 of P.L. 111-148; 29 C.F.R. Part 1984	180 days	DOL/OSHA
Age Discrimination in Employment Act (ADEA)	29 U.S.C. 623(d)	180-300 days for administrative complaint; 2 years for court (3 years if violation is willful)	EEOC/state employment discrimination agency; private cause of action in state or federal court
Americans with Disabilities Act (ADA)	42 U.S.C. 12203(a) 29 C.F.R. Part 1640	180-300 days (45 days for federal employees)	EEOC/state employment discrimination agency; private cause of action in federal court
American Recovery and Reinvestment Act (ARRA)	Pub. L. 111-5, Section 1553; 48 C.F.R. 3.907, and sequence	None in statute	Inspector General of the funding agency
Animal Welfare Act and Regulations (AWAR)	7 U.S.C. 2146; 9 C.F.R. 2.32(c)(4)	None in statute	Secretary of Agriculture
Asbestos Hazard Emergency Response Act of 1986	15 U.S.C. 2651	90 days	DOL/OSHA
Asbestos School Hazard Detection & Control Act	20 U.S.C. 3608	None in statute	None stated.
Atomic Energy and Energy Reorganization Acts	42 U.S.C. 5851	180 days	DOL/OSHA
Bank Secrecy Act (BSA)	31 U.S.C. 5328	2 years	Federal District Court
Bankruptcy	11 U.S.C. 525(b)		
Civil Rights Act of 1964 (Title VII)	42 U.S.C. 2000e-3(a)	180-300 days; 45 days for federal employees	EEOC/state employment discrimination agency; private cause of action in federal court
Civil Rights of Institutionalized Persons Act	42 U.S.C. 1997d	None in statute	No private cause of action for employees recognized

Whistleblower or Retaliation Statute	Legal Citation	Statute of Limitations (SOL)	Where to File
Civil Service Reform Act	5 U.S.C. 2302; 5 C.F.R. Part 1201	30 days	MSPB; except for "mixed cases" under Title VII
Civil Service Reform Act (FBI employees)	5 U.S.C. 2303	None.	DOJ Inspector General; OARM
Civilian Employees of the Armed Forces	10 U.S.C. 1587		Secretary of Defense/OPM, MSPB
Civil War Reconstruction Era Federal Civil Rights Statutes	42 U.S.C. 1981, 1983, 1985, 1985(2)(witness protection)	28 U.S.C. 1658(a) applies 4-year statute of limitation to laws enacted after December 1, 1990; otherwise most analogous state law applies	Federal district court
Clayton Act (antitrust)	15 U.S.C. 15(a)	4 years-see 15 U.S.C. 15(b)	Federal District Court, generally no standing recognized for employees
Clean Air Act	42 U.S.C. 7622; 29 C.F.R. Part 24	30 days	DOL/OSHA
Clean Water Act	33 U.S.C. 1311, 1367(a), (b) , 29 C.F.R. Part 24	30 days	DOL/OSHA
Coast Guard whistleblower protection [Commercial Fishing Industry Vessel Act] and Seaman's Protection Act	46 U.S. C. 2114 (as amended 2010)	180 days	DOL/OSHA
Commercial Motor Vehicles Program (see STAA)	49 U.S.C. 31105, 29 C.F.R. Part 1978	180 days	DOL/OSHA
Comprehensive Environmental Response, Compensation and Liability Act ("Super Fund")	42 U.S.C. 9610 29 C.F.R. Part 24	30 days	DOL/OSHA
Congressional Accountability Act	2 U.S.C. 1301, 1402	180 days	Office of Compliance of Congress
Consumer Credit Protection	15 U.S.C. 1674		DOL Wage & Hour

Whistleblower or Retaliation Statute	Legal Citation	Statute of Limitations (SOL)	Where to File
Act (garnishments)			
Consumer Financial Protection Bureau (CFPB) (part of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010); per 12 U.S.C. 5481(14), coverage includes the Alternative Mortgage Parity Act of 1982, 12 U.S.C. 2801; Consumer Leasing Act of 1976, 15 U.S.C. 1667; most of the Electronic Funds Transfer Act, 15 U.S.C. 1693; Equal Credit Opportunity Act, 15 U.S.C. 1691; Fair Credit Billing Act, 15 U.S.C. 1666; most of the Fair Credit Reporting Act, 15 U.S.C 1681; Home Owners Protection Act of 1998, 12 U.S.C. 4901; Fair Debt Collection Practices Act, 15 U.S.C. 1692; parts of the Federal Deposit Insurance Act, 12 U.S.C. 1831t(c)-(f); parts of the Gramm-Leach-Bliley Act, 15 U.S.C. 6802-09; Home Mortgage Disclosure Act of 1975, 12 U.S.C 2801; Home Ownership and Equity Protection Act of 1994, 15 U.S.C. 1601 note; S.A.F.E. Mortgage Licensing Act of 2008, 12 U.S.C. 5101; the Truth in Lending Act, 15 U.S.C. 1601; the Truth in Savings Act, 12 U.S.C. 4301; section 626 of the Omnibus Appropriations Act, Pub. L. No. 111-8; and the Interstate Land Sales Full Disclosure Act, 15 U.S.C. 1701.	**12 U.S.C. 5567; 29 C.F.R. Part 1985**	**180 days**	**DOL/OSHA**

Whistleblower or Retaliation Statute	Legal Citation	Statute of Limitations (SOL)	Where to File
Consumer Product Safety Improvement Act (CPSIA)	15 U.S.C. 2087; 29 C.F.R. Part 1983	180 days	DOL/OSHA, bypass option to federal court after 210 days
Contractor Employees of the Armed Forces	10 U.S.C. 2409	3 years (for IG complaint), then 2 years for filing in court (eff. 2013-07-01)	Inspector General of contracting agency; bypass option to federal court after 210 days
Credit Union Employee Protection	12 U.S.C. 1790b	2 years	federal court
Defend Trade Secrets Act	18 U.S.C. 1833(b)	N/A	immunity from liability
Department of Energy Defense Activities Whistleblower Protection	42 U.S.C. 7239	30 days to report violation; 90 days to report retaliation	Office of Hearings and Appeals
Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Commodity Exchange Act reward)	7 U.S.C. 26; 17 C.F.R. 165	Before anyone else files	Commodity Future Trading Commission
Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (employee protection, see "Consumer Financial Protection Bureau" above for a list of covered laws)	12 U.S.C. 5567 (no regulations now, but compare with SOX regs at 29 C.F.R. Part 1980)	180 days	DOL/OSHA
Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (obstruction of justice)	15 U.S.C. 78u-6(h)(1)(A) and 18 U.S.C. 1513(e)	3 years from learning of violation and 6 years from the violation	federal court
Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Securities Exchange Act reward)	15 U.S.C. 78u-6; 17 C.F.R. Parts 240, 249	Before anyone else files	Securities Exchange Commission

Whistleblower or Retaliation Statute	Legal Citation	Statute of Limitations (SOL)	Where to File
Education Amendments of 1972 (Title IX)	**20 U.S.C. 1681, and sequence, implied claim under *Jackson v. Birmingham Bd. Of Ed.*, 544 U.S. 167 (2005)**	**None, consider state statute of limitations**	
Emergency Medical Treatment and Active Labor Act (EMTALA)	**42 U.S.C. 1395dd(i)**	**None in 1395dd(i); 2 years under 42 U.S.C. 1395dd(d)(2)(C); consider also state statutes of limitations**	**Federal or state court**
Employee Polygraph Protection Act	**29 U.S.C. 2002** **29 C.F.R. 801 *et seq.*, esp. 801-40**	**3 years**	**DOL/Federal District Court/State Court**
Employee Retirement Income Security Act (ERISA)	**29 U.S.C. 1132(a), 1140**	**3 years**	**Federal District Court**
Energy Reorganization Act	**42 U.S.C. 5851** **29 C.F.R. Part 24**	**180 days**	**DOL/OSHA, kick-out to federal court after one year**
Equal Pay Act	**29 U.S.C. 206(d)**	**2 years; 3 years if "willful" violation**	**DOL or Federal district court**
Fair Labor Standards Act (wage & hour, child labor, minimum wage, overtime)	**29 U.S.C. 215(a)(3)** **29 C.F.R. Part 783**	**2 years; 3 years if "willful" violation**	**DOL, Federal District Court, or state court**
False Claims Act (FCA) (qui tam provision)	**31 U.S.C. 3730(b)**	**6 years; and before anyone else files**	**Federal District Court, under seal**
False Claims Act (retaliation provision)	**31 U.S.C. 3730(h)**	**3 years**	**Federal District Court; see also NDAA**
Family and Medical Leave Act "[FMLA"]	**29 U.S.C. 2615**	**2 years (3 years if "willful" violation)**	**DOL, Federal District Court, or state court**
Federal Acquisition Regulations (FAR)	**48 C.F.R. 3.900, and sequence**		**Consider False Claims Act and Inspector General of the funding agency**

Whistleblower or Retaliation Statute	Legal Citation	Statute of Limitations (SOL)	Where to File
Federal Bureau of Investigation (FBI) employees	**5 U.S.C. 2303; 28 C.F.R. Part 27**	**None.**	**DOJ Inspector General; then OARM**
Federal Credit Union Act (FCUA)	**12 U.S.C. 1790(b)**	**2 years**	**Federal District Court**
Federal Deposit Insurance Corporation	**12 U.S.C. 1831j**	**2 years**	**Federal District Court**
Federal Deposit Insurance Corporation	**12 U.S.C. 1831k**	**none for reward**	**federal banking agency**
Federal Employers Liability Act (FELA)	**45 U.S.C. 60**		Federal employees suffering retaliation for making a claim may consider a WPA claim under 5 U.S.C. 2302(b)(8) and (9)
Federal Home Loan Banks, Resolution Trust Corporation	**12 U.S.C. 1441a**		
Federal Mine Health and Safety Act	**30 U.S.C. 815(c)**	**60 days**	**FMSHRC**
Federal Railroad Safety Act (FRSA)	**49 U.S.C. 20109; 29 C.F.R. Part 1982**	**180 days**	**DOL/OSHA, bypass option to federal court after 210 days**
Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), covering banks with insurance from the Federal Deposit Insurance Corporation (FDIC)	**12 U.S.C. 1831j**	**2 years**	**federal court**
Food Safety Modernization Act (FSMA), Section 402	**21 U.S.C. 399d**	**180 days**	**DOL/OSHA**
Foreign Corrupt Practices Act (FCPA), as enforced through Dodd-Frank	**15 U.S.C. 78u-6; 17 C.F.R. Parts 240, 249; 15 U.S.C. 78u-6(h)(1)(A)**	**3 years from learning of violation and 6 years from the violation**	**SEC for reward or federal court for retaliation**
Foreign Service Act of 1980	**22 U.S.C. 3905**		

Whistleblower or Retaliation Statute	Legal Citation	Statute of Limitations (SOL)	Where to File
Intelligence Authorization Act of 2014	50 U.S.C. 3341(j)	90 days	Employing agency
IRS whistleblower rewards	26 U.S.C. 7623; IRS Manual, Part 25	In time for IRS to collect; and before anyone else files	IRS Whistleblower Office, using Form 211
International Safe Container Act of 1977	46 U.S.C. 1506	60 days	DOL/OSHA
Health Insurance Portability and Accountability Act of 1996 (HIPAA)	29 C.F.R. 164.502(j)	N/A	Whistleblower defense to claims of HIPAA violations
Jones Act (Maritime employees) [See also Seaman's Protection Act]	46 U.S.C. 688		Federal District Court, common law maritime tort implied.
Jury Duty Act (for service on federal juries)	28 U.S.C. 1875		Federal District Court
Labor Management Relations Act	29 U.S.C. 301	Varies with state law, sometimes 180 days	Federal District Court
Lloyd-LaFollette Act	5 U.S.C. 7211	None in statute	
Longshoreman's and Harbor Worker's Compensation Act	33 U.S.C. 948(a); 20 C.F.R. 702.271(b)	None	DOL, ESA District Director
Major Fraud Act of 1989	18 U.S.C. 1031(h)	None in statute, consider state limitations	Federal District Court civil
Merit Systems Protection Board	5 U.S.C. 7701(e) (civil service); 5 U.S.C. 1214(a)(3), 1221 (WPA IRA); 38 U.S.C. 713 (VA SES)	30 days (civil service); 60 days (WPA IRA); 7 days (VA SES)	MSPB
Migrant and Seasonal Agricultural Workers Protection Act	29 U.S.C. 1854, 1855	180 days	DOL
Military Whistleblower Protection Act	10 U.S.C. 1034	None in statute	Office of Inspector General, administrative remedy only, no private

Whistleblower or Retaliation Statute	Legal Citation	Statute of Limitations (SOL)	Where to File
			cause of action
"Mixed cases" for federal employees under the Civil Service Reform Act	5 U.S.C. 7702	30 days (MSPB) or 45 days (Agency EEO)	After 120 days, option to file in federal court
Monetary Transactions (also called the Bank Secrecy Act)	31 U.S.C. 5328	2 years	Federal District Court
Moving Ahead for Progress in the 21st Century Act (MAP-21)	49 U.S.C. 30171	180 days	DOL / OSHA
National Credit Union Act (NCUA)	12 U.S.C. 1790b	2 years	Federal District Court
National Defense Authorization Act of 2013 (NDAA FY13), for employees of federal contractors	Public Law No. 112-239, Section 828, 41 U.S.C. 4712, and sequence; 48 C.F.R. 3.900, and sequence	3 years	Inspector General of the agency involved; then federal district court
National Labor Relations Act	29 U.S.C. 158(a)(4)	6 months	NLRB
National Transit Systems Security Act of 2007 (NTSSA)	6 U.S.C. 1142; 29 C.F.R. Part 1982	180 days	DOL / OSHA
Occupational Safety and Health Act	29 U.S.C. 660(c), 29 C.F.R. Part 1977 ("Part 11(c)")	30 days	DOL/OSHA-no private cause of action
Patient Protection and Affordable Care Act	29 U.S.C. 218C	180 days	DOL/OSHA
Pipeline Safety Improvement Act	49 U.S.C. 60129; 29 C.F.R. Part 1981	180 days	DOL/OSHA
Privacy Act	5 U.S.C. 552a	2 years	Federal District Court
Public Health Service Act	42 U.S.C. 1201 et seq. (1988), 42 C.F.R. Part 50, Subpart A, 42 C.F.R. 50.103, 104		Administrative, within funded private entity
Racketeer Influenced & Corrupt Organizations Act ("RICO")	38 U.S.C. 1961- 68; 18 U.S.C. 1513(e)	4 years (applies Clayton Act statute of limitations); 3 years from	Federal District Court

Whistleblower or Retaliation Statute	Legal Citation	Statute of Limitations (SOL)	Where to File
		discovery (under Dodd-Frank)	
Rehabilitation Act	29 U.S.C. 794,29 C.F.R. 1614, 1641, Chapter 60		Administrative, DOL/OFCCP; EEOC
Safe Containers for International Cargo Act	46 U.S.C. 1506	60 days	DOL/OSHA
Safe Drinking Water Act	42 U.S.C. 300j-9	30 days	DOL/OSHA
Sarbanes Oxley Act (SOX)	18 U.S.C. 1514A; 29 C.F.R. Part 1980	180 days	DOL/OSHA, kick-out to federal court after 180 days
Seaman's Protection Act (SPA) as amended by Section 611 of the Coast Guard Authorization Act of 2010	46 U.S. C. 2114; 29 CFR Part 1986	180 days	DOL/OSHA
Sick leave for employees of federal contractors	EO 13706; 29 C.F.R. 13.41	None in regs	DOL/WHD
Solid Waste Disposal Act (including RCRA)	42 U.S.C. 6971, 29 C.F.R. Part 24	30 days	DOL/OSHA
Surface Mining Control and Reclamation Act	30 U.S.C. 1293; 30 C.F.R. Part 865	30 days	Department of the Interior, Office of Surface Mining Reclamation and Enforcement
Surface Transportation Assistance Act (STAA)	49 U.S.C. 31105, 29 C.F.R. Part 1978	180 days to file with OSHA; wait 210 days, then file in court	DOL/OSHA/kick-out to court
Toxic Substances Control Act	15 U.S.C. 2622 29 C.F.R. Part 24	30 days	DOL/OSHA
Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA)	38 U.S.C. 4301, et seq., 38 U.S.C. 4311(b)	None; 38 U.S.C. 4327(b)	Administrative (Secretary of Defense, OPM) or private suit in Federal District Court
[Federal] Water Pollution	33 U.S.C. 1311, 1367(a),	30 days	DOL/OSHA

Whistleblower or Retaliation Statute	Legal Citation	Statute of Limitations (SOL)	Where to File
Control Act ("Clean Water Act")	**(b) , 29 C.F.R. Part 24**		
Welfare and Pensions Disclosure Act	**29 U.S.C. 1140**	**3 year**	
Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21")	**42 U.S.C. 42121; 29 C.F.R. Part 1979**	**90 days**	**DOL/OSHA, bypass option to federal court after 210 days**
Whistleblower Protection Act (federal government employees)	**5 U.S.C. 2302(b)(8) & (b)(9)**	**None.**	**Office of Special Counsel**
Workforce Investment Act, ("Welfare to Work"), formerly Job Training and Partnership Act (JTPA)	**29 U.S.C. 1574(g) or 29 U.S.C. 2934(f)**		**DOL-but see 29 C.F.R. Part 37, 629.51, 637.11**

If you know of any changes to the law not shown on this chart, let us know.

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Map & Directions

Occupational Safety and Health Administration
Directorate of Whistleblower Protection Programs (DWPP)
Whistleblower Statutes Desk Aid

Act/OSHA Regulation	Days to file	Respondents covered	Days to complete	Kick-Out Provision	Allowable Remedies				Appeal		Burden of Proof
					Backpay	Preliminary Reinstatement	Compen-satory	Punitive	Days	Venue	
Section 11(c) of the Occupational Safety & Health Act (OSHA) (1970) [29 U.S.C. § 660(c)]. Protects employees from retaliation for exercising a variety of rights guaranteed under the Act, such as filing a S&H complaint with OSHA or their employers, participating in an inspection, etc. **29 CFR 1977**	30	Private sector U.S. Postal Service Certain tribal employers	90	No	Yes	No	Yes	Yes	15	OSHA	But for
Asbestos Hazard Emergency Response Act (AHERA) (1986) [15 U.S.C. § 2651]. Protects employees from retaliation for reporting violations of the law relating to asbestos in public or private non-profit elementary and secondary school systems. **29 CFR 1977**	90	Private sector State and local government Certain DoD schools Certain tribal schools	90	No	Yes	No	Yes	Yes	15	OSHA	But for
International Safe Container Act (ISCA) (1977) [46 U.S.C. § 80507]. Protects employees from retaliation for reporting to the Coast Guard the existence of an unsafe intermodal cargo container or another violation of the Act. **29 CFR 1977**	60	Private sector Local government Certain state government and interstate compact agencies	30	No	Yes	No	Yes	Yes	15	OSHA	But for
Surface Transportation Assistance Act (STAA) (1982 [49 U.S.C. § 31105]. Protects truck drivers and other covered employees from retaliation for refusing to violate regulations related to the safety or security of commercial motor vehicles or for reporting violations of those regulations, etc. **29 CFR 1978**	180	Private sector	60	210	Yes	Yes	Yes	Yes 250K cap	30	ALJ	Contributing

Act/OSHA Regulation	Days to file	Respondents covered	Days to complete	Kick-Out Provision	Allowable Remedies				Appeal		Burden of Proof
					Backpay	Preliminary Reinstatement	Compen-satory	Punitive	Days	Venue	
Safe Drinking Water Act (SDWA) (1974) [42 U.S.C. § 300j-9(i)]. Protects employees from retaliation for, among other things, reporting violations of the Act, which requires that all drinking water systems assure that their water is potable as determined by the Environmental Protection Agency. **29 CFR 24**	30	Private sector Federal, state and municipal Indian tribes	30	No	Yes	No	Yes	Yes	30	ALJ	Motivating
Federal Water Pollution Control Act (FWPCA) (1972) [33 U.S.C. § 1367]. Protects employees from retaliation for reporting violations of the law related to water pollution. This statute is also known as the Clean Water Act. **29 CFR 24**	30	Private sector State and municipal Indian tribes Federal sovereign immunity bars investigation of FWPCA complaints filed by federal employees	30	No	Yes	No	Yes	No	30	ALJ	Motivating
Toxic Substances Control Act (TSCA) (1976) [15 U.S.C. § 2622]. Protects employees from retaliation for reporting alleged violations relating to industrial chemicals currently produced or imported into the United States and supplements the Clean Air Act (CAA) and the Toxic Release Inventory under Emergency Planning & Community Right to Know Act (EPCRA). **29 CFR 24**	30	Private sector	30	No	Yes	No	Yes	Yes	30	ALJ	Motivating
Solid Waste Disposal Act (SWDA) (1976) [42 U.S.C. § 6971]. Protects employees from retaliation for reporting violations of the law that regulates the disposal of solid waste. This statute is also known as the Resource Conservation and Recovery Act. **29 CFR 24**	30	Private sector Federal, state and municipal Indian tribes	30	No	Yes	No	Yes	No	30	ALJ	Motivating

Act/OSHA Regulation	Days to file	Respondents covered	Days to complete	Kick-Out Provision	Allowable Remedies				Appeal		Burden of Proof
					Backpay	Preliminary Reinstatement	Compen-satory	Punitive	Days	Venue	
Clean Air Act (CAA) (1977) [42 U.S.C. § 7622]. Protects employees from retaliation for reporting violations of the Act, which provides for the development and enforcement of standards regarding air quality and air pollution. **29 CFR 24**	30	Private sector Federal, state and municipal	30	No	Yes	No	Yes	No	30	ALJ	Motivating
Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) (1980) [42 U.S.C. § 9610] A.k.a. "Superfund," this statute protects employees from retaliation for reporting violations of regulations involving accidents, spills, and other emergency releases of pollutants into the environment. The Act also protects employees who report violations related to the clean-up of uncontrolled or abandoned hazardous waste sites. **29 CFR 24**	30	Private sector Federal, state and municipal	30	No	Yes	No	Yes	No	30	ALJ	Motivating

Act/OSHA Regulation	Days to file	Respondents covered	Days to complete	Kick-Out Provision	Allowable Remedies				Appeal		Burden of Proof
					Backpay	Preliminary Reinstatement	Compen-satory	Punitive	Days	Venue	
Energy Reorganization Act of 1974) (ERA) [42 U.S.C. § 5851]. Protects certain employees in the nuclear industry from retaliation for reporting violations of the Atomic Energy Act. Protected employees include employees of operators, contractors and subcontractors of nuclear power plants licensed by the Nuclear Regulatory Commission, and employees of contractors working with the Department of Energy under a contract pursuant to the Atomic Energy Act. **29 CFR 24**	180	The statute provides coverage of NRC contractors and subcontractors; NRC licensees and applicants for licenses, including contractors and subcontractors; agreement state licensees and applicants for licenses from agreement states, including their contractors and subcontractors; and DOE contractors and subcontractors. The ARB has held that the statute covers the Tennessee Valley Authority (TVA), a licensee of the NRC, since Congress included a broad "sue or be sued" clause in the Act that created the TVA. However, ARB case law indicates federal sovereign immunity likely bars investigation of ERA complaints filed against the NRC and DOE themselves and does bar investigation of ERA complaints filed against any other federal agency that does not have a "sue or be sued" clause like the TVA or other clear waiver of sovereign immunity.	30	365	Yes	No	Yes	No	30	ALJ	Contributing

Act/OSHA Regulation	Days to file	Respondents covered	Days to complete	Kick-Out Provision	Allowable Remedies				Appeal		Burden of Proof
					Backpay	Preliminary Reinstatement	Compen-satory	Punitive	Days	Venue	
Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21) (2000) [49 U.S.C. § 42121]. Protects employees of air carriers and contractors and subcontractors of air carriers from retaliation for, among other things, reporting violations of laws related to aviation safety. **29 CFR 1979**	90	Air carriers and their contractors and subcontractors	60	No	Yes	Yes	Yes	No	30	ALJ	Contributing
Sarbanes-Oxley Act (SOX) (2002) [18 U.S.C. § 1514A]. Protects employees of certain companies from retaliation for reporting alleged mail, wire, bank or securities fraud; violations of the SEC rules and regulations; or violations of federal laws related to fraud against shareholders. The Act covers employees of publically traded companies, including those companies' subsidiaries, and employees of nationally recognized statistical rating organizations, as well as contractors, subcontractors, and agents of these employers. **29 CFR 1980**	180	Companies registered under §12 or required to report under §15(d) of the SEA and their consolidated subsidiaries or affiliates, contractors, subcontractors, officers, and agents, and nationally recognized statistical rating organizations	60	180	Yes	Yes	Yes	No	30	ALJ	Contributing
Pipeline Safety Improvement Act (PSIA) (2002) [49 U.S.C. § 60129]. Protects employees from retaliation for reporting violations of federal laws related to pipeline safety and security or for refusing to violate such laws. **29 CFR 1981**	180	Private sector employers, states, municipalities, and individuals owning or operating pipeline facilities, and their contractors and subcontractors	60	No	Yes	Yes	Yes	No	60	ALJ	Contributing

Act/OSHA Regulation	Days to file	Respondents covered	Days to complete	Kick-Out Provision	Allowable Remedies				Appeal		Burden of Proof
					Backpay	Preliminary Reinstatement	Compen-satory	Punitive	Days	Venue	
Federal Railroad Safety Act (FRSA [49 U.S.C. § 20109]. Protects employees of railroad carriers and their contractors and subcontractors from retaliation for reporting a work-place injury or illness, a hazardous safety or security condition, a violation of any federal law or regulation relating to railroad safety or security, or the abuse of public funds appropriated for railroad safety. In addition, the statute protects employees from retaliation for refusing to work when confronted by a hazardous safety or security condition. **29 CFR 1982**	180	Railroad carriers and their contractors, subcontractors, and officers	60	210	Yes	Yes	Yes	Yes 250K Cap	30	ALJ	Contributing
National Transit Systems Security Act (NTSSA [6 U.S.C. §1142]. Protects transit employees from retaliation for reporting a hazardous safety or security condition, a violation of any federal law relating to public transportation agency safety, or the abuse of federal grants or other public funds appropriated for public transportation. The Act also protects public transit employees from retaliation for refusing to work when confronted by a hazardous safety or security condition, or refusing to violate a federal law related to public transportation safety. **29 CFR 1982**	180	Public transportation agencies and their contractors and subcontractors, and officers	60	210	Yes	Yes	Yes	Yes 250K Cap	30	ALJ	Contributing

Act/OSHA Regulation	Days to file	Respondents covered	Days to complete	Kick-Out Provision	Allowable Remedies				Appeal		Burden of Proof
					Backpay	Preliminary Reinstatement	Compen-satory	Punitive	Days	Venue	
Consumer Product Safety Improvement Act (CPSIA) (2008) [15 U.S.C. § 2087]. Protects employees from retaliation for reporting to their employer, the federal government, or a state attorney general reasonably perceived violations of any statute or regulation within the jurisdiction of the Consumer Product Safety Commission (CPSC). CPSIA covers employees of consumer product manufacturers, importers, distributors, retailers, and private labelers. **29 CFR 1983**	180	Manufacturing, private labeling, distribution, and retail employers in the United States	60	210 or within 90 days of OSHA finding	Yes	Yes	Yes	No	30	ALJ	Contributing
Affordable Care Act (ACA) (2010) [29 U.S.C. § 218c*].* Protects employees from retaliation for reporting violations of any provision of title I of the ACA, including but not limited to discrimination based on an individual's receipt of health insurance subsidies, the denial of coverage based on a preexisting condition, or an insurer's failure to rebate a portion of an excess premium. **29 CFR 1984**	180	Private and public sector employers	60	210 or within 90 days of OSHA finding	Yes	Yes	Yes	No	30	ALJ	Contributing
Seaman's Protection Act (SPA) [46 U.S.C. § 2114]. Protects seamen from retaliation for reporting to the Coast Guard or another federal agency a violation of a maritime safety law or regulation. Among other things, the Act also protects seamen from retaliation for refusing to work when they reasonably believe an assigned task would result in serious injury or impairment of health to themselves, other seamen, or the public. **29 CFR 1986**	180	Private-sector and State and local government employers—vessel on which seaman was employed must be American-owned (including U.S. Flagged), as defined; world-wide coverage	60	210	Yes	Yes	Yes	Yes 250 K Cap	30	ALJ	Contributing

Act/OSHA Regulation	Days to file	Respondents covered	Days to complete	Kick-Out Provision	Allowable Remedies				Appeal		Burden of Proof
					Backpay	Preliminary Reinstatement	Compen-satory	Punitive	Days	Venue	
Consumer Financial Protection Act (CFPA) (2010) [12 U.S.C. § 5567]. Protects employees performing tasks related to consumer financial products or services from retaliation for reporting reasonably perceived violations of any provision of title X of the Dodd-Frank Act or any other provision of law that is subject to the jurisdiction of the Bureau of Consumer Financial Protection, or any rule, order, standard, or prohibition prescribed by the Bureau. **29 CFR 1985**	180	Any person engaged in offering or providing a consumer financial product or service, a service provider to such person, or such person's affiliate acting as a service provider to it	60	210 or within 90 days of OSHA finding	Yes	Yes	Yes	No	30	ALJ	Contributing
FDA Food Safety Modernization Act (FSMA) (2011) [21 U.S.C. § 399d]. Protects employees of food manufacturers, distributors, packers, and transporters from retaliation for reporting a violation of the Food, Drug, and Cosmetic Act, or a regulation promulgated under the Act. Employees are also protected from retaliation for refusing to participate in a practice that violates the Act. **29 CFR 1987**	180	Any entity engaged in the manufacture, processing, packing, transporting, distribution, reception, holding, or importation of food	60	210 or within 90 days of OSHA finding	Yes	Yes	Yes	No	30	ALJ	Contributing
Section 31307 of the Moving Ahead for Progress in the 21st Century Act (MAP-21) (2012). [49 U.S.C. § 30171]. *Protects employees from* retaliation by motor vehicle manufacturers, part suppliers, and dealerships for providing information to the employer or the U.S. Department of Transportation about motor vehicle defects, noncompliance, or violations of the notification or reporting requirements enforced by the National Highway Traffic Safety Administration (NHTSA), or for engaging in related protected activities as set forth in the provision. **29 CFR 1988**	180	Motor vehicle manufacturer, part supplier, or dealership	60	210	Yes	Yes	Yes	No	30	ALJ	Contributing

Survey of State Law Claims for Safety and Health Whistleblowers

This chart is updated at: http://www.taterenner.com/stchart.php

This chart complements the Tate & Renner article on Health and Safety Whistleblower Rights. A companion chart lists federal laws that might help whistleblowers. This chart is meant to call attention to the types of claims that employees should investigate in their states. It is also meant to urge them to consult a lawyer in their states to assess each claim before the time limits expire. "SOL" means "statute of limitations." It is the time limit to file a legal action. This chart is not updated on any regular basis, and it is not meant to establish an attorney-client relationship. Only by retaining an attorney in the appropriate state can employees get answers they can legally rely on. So, do not rely upon this table for legal advice. This summary table is provided for information only and to assist attorneys in legal research. It is not warranted to be accurate in any respect. This table cannot replace the need for independent research or legal advice regarding where, when, and how your claim can be brought. Further, the statutes of limitations herein may not apply to your case or situation, may no longer be applicable, and, like any employment-related law, are always subject to change at any time, by act of Congress, agency practice, the courts, or changing facts in the case itself.

Alabama. Maybe, if discharge is "outrageous conduct." Ala. Code (1975) 25-5-11.1; *Gold Kist v. Griffin*, 657 So.2d 826, 829 (1994); but see *Grant v. Butler*, 590 So. 2d 254 (Ala. 1991) (OSHA remedy adequate). SOL 2 years.

Alaska. Yes. Alaska Whistleblower Act §39.90.100-150 (2006). *Knight v. American Guard and Alert, Inc.*, 714 P.2d 788, 791-92 (1986). SOL 2 years, AS 09.10.070.

Arizona. Yes. ARS 23-1501. SOL 10 days for state employees; unknown for other employees. Also, the Arizona Division of Occupational Health and Safety ("ADOSH") can receive complaints of retaliation in

violation of ARS 23-425(A). The time limit to file this type of complaint is thirty (30) days. See also, *Wagenseller v. Scottsdale Memorial Hospital*, 147 Ariz. 370, 710 P.2d 1025, 1035 (Ariz. 1985) (tort claim allowed for refusal to engage in illegality).

Arkansas. Maybe. Arkansas Whistle-Blower Act § 21-1- 601 (for public employees). *MBM Co. v. Counce*, 596 SW2d 681 (1980) (contract claim for violation of public policy); *Webb v. HCA Health Serv.*, 780 S.W.2d 571 (Ark. 1989) (tort claim for refusal to falsify medical records used in billing government); but see *Newton v. Brown & Root*, 658 SW2d 370 (1983) (claim disallowed when plaintiff violated safety rule because employer did not provide safe working conditions). SOL 180 days for public employees.

California. Yes. *Jenkins v. Family Health Program*, 214 Cal. App. 3d 440, 262 Cal. Rptr. 798 (1989); *Hentzel v. Singer Co.*, 138 Cal. App. 3d 290, 188 Cal. Rptr. 159 (1982). SOL 1 year. See also, Health and Safety Code, Section 1278.5 (prohibiting retaliation by health care providers).

Colorado. Maybe. *Martin Marietta Corp v. Lorenz*, 823 P.2d 100, 108 (1992) (public policy tort allowed for refusing to engage in illegality); but see *Corbin v. Sinclair Marketing*, 684 P.2d 265 (Colo. App. 1984) (disallowing claim when statute provides another remedy); *Miles v. Martin Marietta Corp.*, 861 F. Supp. 73 (D. Colo. 1994) (OSHA remedy adequate). SOL 2 years.

Connecticut. Yes. Conn. General Statutes 31-51m (1982). 90 day SOL. *Faulkner v. United Technologies Corp.*, 240 Conn. 576, 693 A.2d 293 (Conn. 1997) (claim allowed for refusing to defraud U.S. Army by using defective helicopters parts); but see *Burnham v. Karl & Gelb, P.C.*, 1997 WL 133399 *5-6 (Conn. Super. Ct. 1997).

Delaware. Yes. 29 Del. § 5115 (for public employees); Delaware Whistleblowers' Protection Act, 19 Del. § 1701. SOL 90 days for public employees; 3 years for general statute.

District of Columbia. Yes. *Adams v. George W. Cochran & Co.*, 597 A.2d 28 (1991); *Carl v. Children's Hosp.*, 702 A.2d 159 (D.C. 1997); *Liberatore v. Melville Corp.*, 168 F.3d 1326 (D.C. Cir. 1999). SOL 3 years, per D.C. Code Section 12-301(8). District of Columbia employees are protected by DC Official Code § 1-615.51 et seq. SOL for this statute is 1 year.

Florida. Yes. Fla. Stat. 448.101-105 (1991); 112.3187 (public employees); 39.203 (child abuse reports); 415.1036 (nursing home reports). SOL 4 years for tort claims, unknown for public employee claims.

Georgia. O.C.G.A. § 45-1-4 (public employees, SOL 1 year from discovery, or 3 years from the retaliatory act, whichever is sooner) and O.C.G.A. § 9-11-11.1 (free speech and right of petition); Georgia Taxpayer Protection False Claims Act, O.C.G.A. 23-3-120, and sequence (SOL 3 years); Georgia Equal Employment for Persons With Disabilities Code, O.C.G.A. § 34-6A-5 (SOL 180 days); for making sex discrimination complaints, O.C.G.A. § 34-5-3(c) (SOL 1 year). No private sector tort claim. *Taylor v. Foremost-McKesson, Inc.*, 656 F.2d 1029 (1981).

Hawaii. Yes. HRS 378-63(9). 90 day SOL. *Norris v. Hawaiian Airlines, Inc.*, 842 P.2d 634 (Haw. 1992) (tort claim allowed for refusing to falsify airline maintenance records in violation of FAA regulations), *aff'd sub nom. Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246 (1994).

Idaho. Yes. Idaho Protection of Public Employees1 Act, Idaho Code § 6-2101, and sequence; *Jackson v. Minidoka*, 563 P.2d 54 (1977). SOL 180 days.

Illinois. Yes. *Fredrick v. Simmons Airlines, Inc.*, 144 F.3d 500, 504-05 (7th Cir. 1998). SOL 5 years, per appellate decision. *Palmateer v. International Harvester Company*, 85 Ill.2d 124, 421 N.E.2d 876 (1981) (reporting to and cooperating with law enforcement). Illinois Whistleblower Act, 740 ILCS 174/1, Section 20.

Indiana. Yes. *Frampton v. Central Indiana Gas Co.*, 297 N.E.2d 425, 428 (1973); *McClanahan v. Remington Freight Lines, Inc.*, 517 N.E.2d 390 (Ind. 1988) (refusing to drive truck over legal weight limit). SOL 2 years, but consider IOSHA's reputation for administrative enforcement.

Iowa. Yes. Financial and Other Provisions for Public Officers and Employees, § 70A.28 (for public employees). *Fogel v. Trustees*, 446 N.W.2d 451, 455 (1989); *Borschel v. City of Perry*, 512 N.W.2d 565, 567 (Iowa 1994) (referring to refusal "to commit an unlawful act" as one basis for wrongful-discharge claim); *Fitzgerald v. Salsbury Chem., Inc.*, 613 N.W.2d 275, 280 (Iowa 2000) (refusal to commit perjury protected). SOL 5 years, Iowa Code, Section 614.1.

Kansas. Yes. Kansas Whistleblower Act, K.S.A. § 75-2973 (for public employees). *Flenker v. Willamette Industries, Inc.*, 967 P.2d 295, 298 (1998). SOL 90 days for public employees.

Kentucky. Yes. KRS § 61.101, and sequence (for state employees). KRS § 216B.165 for health care whistleblowers. Public policy claim recognized in *Firestone Textile co. v. Meadows*, 666 SW2d 730 (1984); *Follett v. Gateway Reg. Health System, Inc.*, 229 S.W.3d 925 (Ky. App. 2007); but not allowed when the statute provides its own remedy. *Grzyb v. Evans*, 700 SW2d 399 (1985). SOL 90 days for state employees using the statutory claim; SOL 5 years for others.

Louisiana. Yes for environmental complaints. LSA RS 23:967. However, for non-environmental complaints, employee must prove the underlying violation or face an employer claim for attorney fees. LSA RS 967(D). SOL 1 year.

Maine. Yes. 26 MRSA 831-840. SOL 6 months for complaint to Maine Human Rights Commission; 2 years for court action (which has fewer remedies).

Maryland. Maybe. Maryland Whistleblower Law in the Executive Branch of State Government, § 5-305 (for state employees). Public policy tort is recognized. *Adler v. American Standard Corp.*, 538 F.Supp. 572 (D.Md 1982); *Kessler v. Equity Management, Inc.*, 82 Md.App. 577, 572 A.2d 1144 (1990) (refusal to commit trespass and invasion of privacy). Exception, though, if the statute provides its own remedy. *Gaskins v. Marshall Craft Associates, Inc.*, 678 A.2d 615, 620 (Md. App. 1996). SOL 6 months for state employees using statutory claim; SOL 3 years for private tort claims. See also, MD Code, Criminal Law, 9-303 (prohibiting retaliation against those who report crimes); Maryland's Health Care Worker Whistleblower Protection Act, MD Code, Health Occupations Article, Sections 1-501 through 1-505 (SOL 1 year); MD Code, Labor & Employment Law, Section 5-604 (occupational health and safety, and misuse of healthcare information, SOL 30 days); MD Code, Labor & Employment Law, Section 3-308 (protection for making wage claims); MD Code, Labor & Employment Law, Section 9-1105 (workers compensation claims); MD Code, State Finance and Procurement, Section 11-303 (employees of state contractors); .

Massachusetts. Yes. *DeRose v. Putnam Management Co., Inc.*, 496 N.E.2d 428 (1986) (refusing to testify falsely at criminal trial). SOL 3 years. Statutory claims for public employees, medical whistleblowers, and nursing home professionals have an SOL of 2 years. M.G.L. c. 149 Sec 185(d). Employees can pursue the common law claim, or the statutory claim, but not both. M.G.L. c. 149 Sec 185(f).

Michigan. Yes. MCLA c.149, Sec. 185. SOL 90 days. *Trombetta v. Detroit, T. & I. R.R.*, 265 N.W.2d 385 (Mich. Ct. App. 1978) (tort claim allowed for refusing to falsify pollution control records in violation of state law).

Minnesota. Yes. MSA 181.932. SOL 2 years.

Mississippi. Yes. Protection of Public Employee from Reprisal for Giving Information to Investigative Body or Agency, Miss. Code Ann. § 25-9-171 (for state employees). *McArn v. Allied Bruce-Terminix Co.*, 626 So.2d 603, 607 (1993). SOL unknown.

Missouri. Yes. Public Officers and Employees, Miscellaneous Provisions, § 105.055 R.S. Mo. *Smith v. Arthur Baue Funeral Home*, 370 S.W.2d 249, 254 (1963); *Fleshner v. Pepose Vision Institute*, 304 S.W.3d 81 (Mo. 2010). Union members must exhaust grievance and arbitration. SOL 30 days for administrative action by state employees, 90 days for court action by state employees, 3 or 5 years for tort claims. Claims may be preempted by available statutory remedies. See *Trapp v. Von Hoffman Press, Inc.*, 2002 WL 1969650 (June 12, 2002); *Osborn v. Professional Service Industries, Inc.*, 872 F.Supp. 679 (W.D.M. 1994)

Montana. Yes. Wrongful Discharge from Employment Act (WDEA), RCM 39-905, and sequence. Employees must exhaust employer grievance process. Employers can require binding arbitration. 1 year SOL.

Nebraska. Yes. Public policy exception recognized. *Schriner v. Meginnis Ford Co.*, 421 N.W.2d 755 (1988). State employees are covered by the State Government Effectiveness Act- R.R.S. Neb. § 81-2701. SOL 4 years.

Nevada. Yes. *Hansen v. Harrah's*, 675 P.2d 394 (1994). SOL 2 years, Ch. 11.190.

New Hampshire. Yes. Whistleblowers' Protection Act, NHRSA 275-E (1987). SOL is 3 years. Employees must first report violation to employer. The whistleblowers' statute provides that an employee who alleges a violation of rights must make a reasonable effort to maintain or restore such rights through any grievance procedure or similar process available at the employee's place of employment. The employee may then obtain a hearing with the Commissioner of Labor or a designee appointed by the Commissioner. The time for filing a grievance or similar action under an agency grievance procedure or similar process will be found in such procedure or process. Wrongfully discharged employees also have a tort claim. *Porter v. City of Manchester*, 849 A.2d 103, 113 (N.H. 2004). Government employees are protected by NHRSA 98-E when they experess opinions about any government entity or policy. SOL unknown.

New Jersey. Yes. Conscientious Employee Protection Act (CEPA), NJSA 34:19, 1 year SOL; *Cerrachio v. Alden Leeds, Inc.*, 223 N.J. Super. 435, 538 A. 2d 1292 (1988); and *Lepore v. National Tool and Mfg. Co.*, 224 N.J. Super. 463, 540 A. 2d 1296 (1988); *Tartaglia v. UBS PaineWebber, Inc.*, 197 N.J. 81, 961 A.2d 1167 (2008).

New Mexico. Yes. *Weidler v. Big J Enterprises*, 953 P.2d 1089 (NM App. 1997) (no OSHA preclusion). Governmental Conduct Act, N.M. Stat. Ann. § 10-16-1, and sequence (2 year SOL); Occupation Health and Safety, N.M. Stat. Ann. § 50-9-25 (private sector). SOL 30 days for administrative complaint; 3 years for tort claim.

New York. In part. Whistleblower Statute is limited to cases where actual public health or safety violation shown. Section 740(1)(e). Violation must ordinarily be reported to supervisor. 1 year SOL. A separate health care whistleblower law protects reporting violations based on a good faith belief, and allows a 2 year SOL. Section 741.

North Carolina. Yes. Retaliatory Employment Discrimination Act (REDA), N.C.G.S. § 95-240, and sequence. SOL 180 days. Public policy tort claim also available: *Sides v. Duke Hosp.*, 328 S.E.2d 818 (1985); *Salter v. E & J Healthcare, Inc.*, 155 N.C. App. 685, 693-694, 575 S.E.2d 46, 51-52 (2003). SOL 3 years.

North Dakota. In part. NDCC 34-01-20. SOL 90 days. Backpay limited to two years.

Ohio. Yes. *Kulch v. Structural Fibers, Inc.*, 78 Ohio St. 3d 134, 677 N.E. 2d 308, 1997-Ohio-219; *Sabo v. Schott*, 1994 Ohio 249, 70 Ohio St. 3d. 527, 639 N.E.2d 783 (refusal to commit perjury). SOL 30 days for public employees to file administrative appeal with State Personnel Board of Review (R.C. 124.341(D)); 4 years for tort claims (R.C. 2305.09(D)); perhaps as long as 6 years for nursing home employee claims (R.C. 3721.24).

Oklahoma. Yes. *Burk v. K-Mart Corp.*, 770 P.2d 24 (1989); *Todd v. Frank's Tong Service, Inc.*, 1989 OK 121, ¶ 12, 784 P.2d 47 (refusing to drive truck with defective brakes, headlights, and turn signals, in violation of state law). Oklahoma Whistleblower Act, 74 Okl. St. § 840-2.5; Oklahoma Personnel Act, 74 Okl. St.§ 8401.2 (for state employees). SOL for state employee complaints to Oklahoma Merit Protection Commission is 60 days; SOL for tort claims against municipalities, 1 year. SOL for private personal injury tort claims is 2 years.

Oregon. ORS 659a 199 protects employees who complain about violation of state or federal law, regulation or rule. Also ORS 659.230 protects whistleblowers in the public sector. General public policy claim recognized. *Delaney v. Taco Time Int'l, Inc.*, 297 Or. 10, 681 P.2d 114 (1984) (refusal to sign a false and defamatory statement); *Anderson v. Evergreen International Airlines, Inc.*, 131 Or. App. 726, 886 P.2d 1068 (1994), rev. denied, 320 Or. 749 (1995) (refusing to use defective parts in defendant's aircraft, and refusing to cover up safety violations); *Babick v. Oregon Arena Corp.*, 333 Or. 401, 407, 40 P.3d 1059 (2002). But exception applies if the law provides another adequate remedy. *Walsh v. Consolidated Freightways*, 278 Or. 347, 563 P.2d 1205 (1977) (OSHA remedy adequate).

Pennsylvania. Maybe. Public policy tort recognized where employee has duty to report or shows actual violation. *Geary v. U.S. Steel Corp.*, 319 A.2d 174, 180 (1974); *Woodson v. AMF Leisureland Centers, Inc.*, 842 F.2d 699 (3d Cir. 1988) (applying Pennsylvania law) (discharging bartender for refusing to serve visibly intoxicated patron, in violation of state liquor code); *Strange v. Nationwide Mutual Ins. Co.*, 867 F. Supp. 1209, 1218-19 (E.D. Pa. 1994) (applying Pennsylvania law and protecting a refusal to engage in illegal "redlining"); *Dugan v. Bell Telephone of Pennsylvania*, 876 F. Supp. 713, 725-26 (W.D. Penn. 1994) (applying Pennsylvania law; protecting a refusal to participate in destruction of records subpoenaed by state legislature). Applied to reporting nuclear safety issues. *Field v. Phil. Elec. Co.*, 565 A.2d 1170 (1989). Whistleblower Law, 433 P.S. § 1421 (for public employees). SOL 180 days for public employees; SOL unknown for private sector.

Rhode Island. Yes. RI Gen. Law 28-50-1, and sequence. 3-year SOL.

South Carolina. Yes. General public policy tort recognized at *Ludwick v. Minute of Carolina, Inc.*, 337 S.E.2d at 215 (1985). SOL 3 years.

South Dakota. Yes. *Niesent v. Homestake Mining Co.*, 505 N.W.2d 781 (contract claim); *Bass v. Happy Rest, Inc.*, 507 N.W. 317 (1993) (tort claim may be recognized). State employee grievance procedure is at S.D. Codified Laws § 3-6A-52. SOL unknown.

Tennessee. Yes. Tenn. Code 50-1-304. SOL 1 year. In 2014, the state legislature nullified the tort claim previously recognized in *Reynolds v. Ozark Motor Lines, Inc.*, 887 S.W.2d 822 (Tenn. 1994) (refusing to violate laws requiring trucks be inspected for safety violations before driving); and *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 437 (Tenn. 2011).

Texas. Only for refusing to perform illegal act. *Winters v. Houston Chronicle Publishing Co.*, 795 S.W. 2d 723 (1990); *Sabine Pilot Serv., Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1985); *Nguyen v. Technical and Scientific Application, Inc.*, 981 S.W.2d 900 (Tex. Ct. App. 1998) (refusing to violate federal criminal copyright laws). SOL 2 years.

Utah. In part. General public policy claim recognized in *Hodges v. Gibson Prods. Co.*, 881 P.2d 151, 166 (1991), applies only for retaliation against complaints to government agencies; no protection for in-house complaints. See also, *Peterson v. Browning*, 832 P.2d 1280 (Utah 1992) (refusing to falsify tax and customs documents). SOL 4 years.

Vermont. Yes. *Payne v. Rozendall*, 520 A.2d 586, 588 (1986). SOL unknown.

Virginia. Yes. Va. Code Ann. § 40.1-51.2.1 (for workplace safety and health complaints). SOL 60 days to file administrative complaint with Virginia Commission of Labor and Industry. Va. Code Ann. § 65.2-308 (for workers comp claims). Va. Code Ann. § 54.1-515 (concerning asbestos, lead, and home inspection contractors). General tort statute of limitations is 2 years. A civil action for fraud against the state may not be brought (i) more than 6 years after the date on which the violation is committed, or (ii) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the Commonwealth charged with responsibility to act, but in that event no more than 10 years after the date on which the violation has occurred. Virginia Fraud against Taxpayers Act, Va. Code Ann. § 8.01-216.1.

Washington. Yes, for wrongful discharge only. *Warnek v. ABB*, 972 P.2d 453, 458 (1999); *Hubbard v. Spokane County*, 146 Wn. 2d 699, 707, 50 P.3d 602, 611 (2002) (en banc) (director of planning department fired for seeking assistance of county prosecutor to prevent issuance of permit to build new hotel in violation of zoning code and airport master plan). Rev Code Wash. § 42.40.010 et. seq. and § 9.60.210 and 250. SOL 60 days to file administrative complaint with Human Right Commission; 3 years for law suit.

West Virginia. Maybe. General public policy exception to at will employment is reviewed on a case-by-case basis. *Tiernan v. Charleston Area Medical Center*, 506 S.E.2d 578, 585-86 (1998); *Collins v. Elkay Mining Co.*, 371 S.E.2d 46 (W. Va. 1988) (refusing to falsify mine safety reports and refusing to violate mine safety laws). SOL 2 years.

Wisconsin. Maybe. Narrow exception to at-will employment recognized, but employees must exhaust administrative remedies. *Koehn v. Pabst Brewing Co.*, 763 F.2d 865 (7th Cir. 1985); *Kempfer v. Automated Finishing, Inc.*, 564 N.W.2d 692 (Wis. 1997) (refusing to drive delivery truck without proper licensing). SOL 6 years.

Wyoming. Maybe. Public policy tort recognized, but not if employee is protected by an independent scheme. *Hermeck v. UPS*, 938 P.2d 863, 866 (1997). State Government Fraud Reduction Act, Wyo. Stat. § 9-11-101, covers state employees. State employees must exhaust administrative remedies, and then bring court action within 90 days of final administrative decision. SOL for private sector employees is 4 years.

If you know of any changes to the law not shown on this chart, let us know.
States for which more work is needed, typically finding the SOL: AZ, MS, MO, NM, PA, SD, VT

What would happen if you decided to file a state law tort claim, and the court eventually decides that the state claim is preempted by the federal administrative procedure? By the time the court makes this decision, the time limit for a federal administrative complaint (30, 90 or 180 days, depending on the law) would be expired. One court has held that if the state law claim was filed in state court within the time to file the federal administrative complaint, then the complainant can file the Department of Labor complaint after the state court action is dismissed. *Turgeau v. Administrative Review Board*, 446 F.3d 1052 (10th Cir. 2006). Turgeau, however, had to wait years through repeated Department of Labor dismissals to get this decision. Obviously, it would be best to have the advice of an experienced attorney at the beginning of this process.

If you know of any changes to the law not shown on this chart, let us know.

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OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 15- 04 March 18, 2015

TO: All Regional Directors, Officers-in-Charge, and Resident Officers

FROM: Richard F. Griffin, Jr., General Counsel

SUBJECT: Report of the General Counsel Concerning Employer Rules

Attached is a report from the General Counsel concerning recent employer rule cases.

Attachment

cc: NLRBU
Release to the Public

Report of the General Counsel

During my term as General Counsel, I have endeavored to keep the labor-management bar fully aware of the activities of my Office. As part of this goal, I continue the practice of issuing periodic reports of cases raising significant legal or policy issues. This report presents recent case developments arising in the context of employee handbook rules. Although I believe that most employers do not draft their employee handbooks with the object of prohibiting or restricting conduct protected by the National Labor Relations Act, the law does not allow even well-intentioned rules that would inhibit employees from engaging in activities protected by the Act. Moreover, the Office of the General Counsel continues to receive meritorious charges alleging unlawful handbook rules. I am publishing this report to offer guidance on my views of this evolving area of labor law, with the hope that it will help employers to review their handbooks and other rules, and conform them, if necessary, to ensure that they are lawful.

Under the Board's decision in *Lutheran Heritage Village-Livonia,* 343 NLRB 646 (2004), the mere maintenance of a work rule may violate Section 8(a)(1) of the Act if the rule has a chilling effect on employees' Section 7 activity. The most obvious way a rule would violate Section 8(a)(1) is by explicitly restricting protected concerted activity; by banning union activity, for example. Even if a rule does not explicitly prohibit Section 7 activity, however, it will still be found unlawful if 1) employees would reasonably construe the rule's language to prohibit Section 7 activity; 2) the rule was promulgated in response to union or other Section 7 activity; or 3) the rule was actually applied to restrict the exercise of Section 7 rights.

In our experience, the vast majority of violations are found under the first prong of the *Lutheran Heritage* test. The Board has issued a number of decisions interpreting whether "employees would reasonably construe" employer rules to prohibit Section 7 activity, finding various rules to be unlawful under that standard. I have had conversations with both labor- and management-side practitioners, who have asked for guidance regarding handbook rules that are deemed acceptable under this prong of the Board's test. Thus, I am issuing this report.

This report is divided into two parts. First, the report will compare rules we found unlawful with rules we found lawful and explain our reasoning. This section will focus on the types of rules that are frequently at issue before us, such as confidentiality rules, professionalism rules, anti-harassment rules, trademark rules, photography/recording rules, and media contact rules. Second, the report will discuss handbook rules from a recently settled unfair labor practice charge against Wendy's International LLC. The settlement was negotiated following our initial

determination that several of Wendy's handbook rules were facially unlawful. The report sets forth Wendy's rules that we initially found unlawful with an explanation, along with Wendy's modified rules, adopted pursuant to a informal, bilateral Board settlement agreement, which the Office of the General Counsel does not believe violate the Act.

I hope that this report, with its specific examples of lawful and unlawful handbook policies and rules, will be of assistance to labor law practitioners and human resource professionals.

Richard F. Griffin, Jr.
General Counsel

Part 1: Examples of Lawful and Unlawful Handbook Rules

A. Employer Handbook Rules Regarding Confidentiality

Employees have a Section 7 right to discuss wages, hours, and other terms and conditions of employment with fellow employees, as well as with nonemployees, such as union representatives. Thus, an employer's confidentiality policy that either specifically prohibits employee discussions of terms and conditions of employment—such as wages, hours, or workplace complaints—or that employees would reasonably understand to prohibit such discussions, violates the Act. Similarly, a confidentiality rule that broadly encompasses "employee" or "personnel" information, without further clarification, will reasonably be construed by employees to restrict Section 7-protected communications. *See Flamingo-Hilton Laughlin*, 330 NLRB 287, 288 n.3, 291–92 (1999).

In contrast, broad prohibitions on disclosing "confidential" information are lawful so long as they do not reference information regarding employees or anything that would reasonably be considered a term or condition of employment, because employers have a substantial and legitimate interest in maintaining the privacy of certain business information. *See Lafayette Park Hotel*, 326 NLRB 824, 826 (1998), *enforced*, 203 F.3d 52 (D.C. Cir. 1999); *Super K-Mart*, 330 NLRB 263, 263 (1999). Furthermore, an otherwise unlawful confidentiality rule will be found lawful if, when viewed in context, employees would not reasonably understand the rule to prohibit Section 7 protected activity.

Unlawful Confidentiality Rules

We found the following rules to be unlawful because they restrict disclosure of employee information and therefore are unlawfully overbroad:

- **Do not discuss "customer or employee information" outside of work, including "phone numbers [and] addresses."**

In the above rule, in addition to the overbroad reference to "employee information," the blanket ban on discussing employee contact information, without regard for how employees obtain that information, is also facially unlawful.

- **"You must not disclose proprietary or confidential information about [the Employer, or] other associates (if the proprietary or confidential**

information relating to [the Employer's] associates was obtained in violation of law or lawful Company policy)."

Although this rule's restriction on disclosing information about "other associates" is not a blanket ban, it is nonetheless unlawfully overbroad because a reasonable employee would not understand how the employer determines what constitutes a "lawful Company policy."

- **"Never publish or disclose [the Employer's] or another's confidential or other proprietary information. Never publish or report on conversations that are meant to be private or internal to [the Employer]."**

While an employer may clearly ban disclosure of its own confidential information, a broad reference to "another's" information, without further clarification, as in the above rule, would reasonably be interpreted to include other *employees'* wages and other terms and conditions of employment.

We determined that the following confidentiality rules were facially unlawful, even though they did not explicitly reference terms and conditions of employment or employee information, because the rules contained broad restrictions and did not clarify, in express language or contextually, that they did not restrict Section 7 communications:

- **Prohibiting employees from "[d]isclosing . . . details about the [Employer]."**

- **"Sharing of [overheard conversations at the work site] with your co-workers, the public, or anyone outside of your immediate work group is strictly prohibited."**

- **"Discuss work matters only with other [Employer] employees who have a specific business reason to know or have access to such information. . . . Do not discuss work matters in public places."**

- **"[I]f something is not public information, you must not share it."**

Because the rule directly above bans discussion of all non-public information, we concluded that employees would reasonably understand it to encompass such non-public information as employee wages, benefits, and other terms and conditions of employment.

- **Confidential Information is: "All information in which its [sic] loss, undue use or unauthorized disclosure could adversely affect the [Employer's] interests, image and reputation or compromise personal and private information of its members."**

Employees not only have a Section 7 right to protest their wages and working conditions, but also have a right to share information in support of those complaints. This rule would reasonably lead employees to believe that they cannot disclose that kind of information because it might adversely affect the employer's interest, image, or reputation.

Lawful Confidentiality Rules

We concluded that the following rules that prohibit disclosure of confidential information were facially lawful because: 1) they do not reference information regarding employees or employee terms and conditions of employment, 2) although they use the general term "confidential," they do not define it in an overbroad manner, and 3) they do not otherwise contain language that would reasonably be construed to prohibit Section 7 communications:

- **No unauthorized disclosure of "business 'secrets' or other confidential information."**

- **"Misuse or unauthorized disclosure of confidential information not otherwise available to persons or firms outside [Employer] is cause for disciplinary action, including termination."**

- **"Do not disclose confidential financial data, or other non-public proprietary company information. Do not share confidential information regarding business partners, vendors or customers."**

Finally, even when a confidentiality policy contains overly broad language, the rule will be found lawful if, when viewed in context, employees would not reasonably understand the rule to prohibit Section 7-protected activity. The following confidentiality rule, which we found lawful based on a contextual analysis, well illustrates this principle:

- **Prohibition on disclosure of all "information acquired in the course of one's work."**

This rule uses expansive language that, when read in isolation, would reasonably be read to define employee wages and benefits as confidential information. However, in that case, the rule was nested among rules relating to conflicts of interest and compliance with SEC regulations and state and federal laws. Thus, we determined that employees would reasonably understand the information described as encompassing customer credit cards, contracts, and trade secrets, and not Section 7-protected activity.

B. Employer Handbook Rules Regarding Employee Conduct toward the Company and Supervisors

Employees also have the Section 7 right to criticize or protest their employer's labor policies or treatment of employees. Thus, rules that can reasonably be read to prohibit protected concerted criticism of the employer will be found unlawfully overbroad. For instance, a rule that prohibits employees from engaging in "disrespectful," "negative," "inappropriate," or "rude" conduct towards the employer or management, absent sufficient clarification or context, will usually be found unlawful. *See Casino San Pablo*, 361 NLRB No. 148, slip op. at 3 (Dec. 16, 2014). Moreover, employee criticism of an employer will not lose the Act's protection simply because the criticism is false or defamatory, so a rule that bans false statements will be found unlawfully overbroad unless it specifies that only maliciously false statements are prohibited. *Id.* at 4. On the other hand, a rule that requires employees to be respectful and professional to coworkers, clients, or competitors, but not the employer or management, will generally be found lawful, because employers have a legitimate business interest in having employees act professionally and courteously in their dealings with coworkers, customers, employer business partners, and other third parties. In addition, rules prohibiting conduct that amounts to insubordination would also not be construed as limiting protected activities. *See Copper River of Boiling Springs, LLC*, 360 NLRB No. 60 (Feb. 28, 2014). Also, rules that employees would reasonably understand to prohibit insubordinate conduct have been found lawful.

Unlawful Rules Regulating Employee Conduct towards the Employer

We found the following rules unlawfully overbroad since employees reasonably would construe them to ban protected criticism or protests regarding their supervisors, management, or the employer in general.

- **"[B]e respectful to the company, other employees, customers, partners, and competitors."**
- **Do "not make fun of, denigrate, or defame your co-workers, customers, franchisees, suppliers, the Company, or our competitors."**
- **"Be respectful of others and the Company."**
- **No "[d]efamatory, libelous, slanderous or discriminatory comments about [the Company], its customers and/or competitors, its employees or management.**

While the following two rules ban "insubordination," they also ban conduct that does not rise to the level of insubordination, which reasonably would be understood

as including protected concerted activity. Accordingly, we found these rules to be unlawful.

- **"Disrespectful conduct or insubordination, including, but not limited to, refusing to follow orders from a supervisor or a designated representative."**

- **"Chronic resistance to proper work-related orders or discipline, even though not overt insubordination" will result in discipline.**

In addition, employees' right to criticize an employer's labor policies and treatment of employees includes the right to do so in a public forum. *See Quicken Loans, Inc.*, 361 NLRB No. 94, slip op. at 1 n.1 (Nov. 3, 2014). Accordingly, we determined that the following rules were unlawfully overbroad because they reasonably would be read to require employees to refrain from criticizing the employer in public.

- **"Refrain from any action that would harm persons or property or cause damage to the Company's business or reputation."**

- **"[I]t is important that employees practice caution and discretion when posting content [on social media] that could affect [the Employer's] business operation or reputation."**

- **Do not make "[s]tatements "that damage the company or the company's reputation or that disrupt or damage the company's business relationships."**

- **"Never engage in behavior that would undermine the reputation of [the Employer], your peers or yourself."**

With regard to these examples, we recognize that the Act does not protect employee conduct aimed at disparaging an employer's product, as opposed to conduct critical of an employer's labor policies or working conditions. These rules, however, contained insufficient context or examples to indicate that they were aimed only at unprotected conduct.

Lawful Rules Regulating Employee Conduct towards the Employer

In contrast, when an employer's handbook simply requires employees to be respectful to customers, competitors, and the like, but does not mention the company or its management, employees reasonably would not believe that such a rule prohibits Section 7-protected criticism of the company. The following rules, which we have found lawful, are illustrative:

- **No "rudeness or unprofessional behavior toward a customer, or anyone in contact with" the company.**

- **"Employees will not be discourteous or disrespectful to a customer or any member of the public while in the course and scope of [company] business."**

Similarly, rules requiring employees to cooperate with each other and the employer in the performance of their work also usually do not implicate Section 7 rights. *See Copper River of Boiling Springs, LLC*, 360 NLRB No. 60, slip op. at 1 (Feb. 28, 2014). Thus, we found the following rule was lawful because employees would reasonably understand that it is stating the employer's legitimate expectation that employees work together in an atmosphere of civility, and that it is not prohibiting Section 7 activity:

- **"Each employee is expected to work in a cooperative manner with management/supervision, coworkers, customers and vendors."**

And we concluded that the following rule was lawful, because employees would reasonably interpret it to apply to employer investigations of workplace misconduct rather than investigations of unfair labor practices or preparations for arbitration, when read in context with other provisions:

- **"Each employee is expected to abide by Company policies and to cooperate fully in any investigation that the Company may undertake."**

As previously discussed, the Board has made clear that it will not read rules in isolation. Even when a rule includes phrases or words that, alone, reasonably would be interpreted to ban protected criticism of the employer, if the context makes plain that only serious misconduct is banned, the rule will be found lawful. *See Tradesmen International*, 338 NLRB 460, 460–62 (2002). For instance, we found the following rule lawful based on a contextual analysis:

- **"Being insubordinate, threatening, intimidating, disrespectful or assaulting a manager/supervisor, coworker, customer or vendor will result in" discipline.**

Although a ban on being "disrespectful" to management, by itself, would ordinarily be found to unlawfully chill Section 7 criticism of the employer, the term here is contained in a larger provision that is clearly focused on serious misconduct, like insubordination, threats, and assault. Viewed in that context, we concluded that employees would not reasonably believe this rule to ban protected criticism.

C. Employer Handbook Rules Regulating Conduct Towards Fellow Employees

In addition to employees' Section 7 rights to publicly discuss their terms and conditions of employment and to criticize their employer's labor policies, employees also have a right under the Act to argue and debate with each other about unions, management, and their terms and conditions of employment. These discussions can become contentious, but as the Supreme Court has noted, protected concerted speech will not lose its protection even if it includes "intemperate, abusive and inaccurate statements." *Linn v. United Plant Guards*, 383 U.S. 53 (1966). Thus, when an employer bans "negative" or "inappropriate" discussions among its employees, without further clarification, employees reasonably will read those rules to prohibit discussions and interactions that are protected under Section 7. *See Triple Play Sports Bar & Grille*, 361 NLRB No. 31, slip op. at 7 (Aug. 22, 2014); *Hills & Dales General Hospital*, 360 NLRB No. 70, slip op. at 1 (Apr. 1, 2014). For example, although employers have a legitimate and substantial interest in maintaining a harassment-free workplace, anti-harassment rules cannot be so broad that employees would reasonably read them as prohibiting vigorous debate or intemperate comments regarding Section 7-protected subjects.

Unlawful Employee-Employee Conduct Rules

We concluded that the following rules were unlawfully overbroad because employees would reasonably construe them to restrict protected discussions with their coworkers.

- **"[D]on't pick fights" online.**

We found the above rule unlawful because its broad and ambiguous language would reasonably be construed to encompass protected heated discussion among employees regarding unionization, the employer's labor policies, or the employer's treatment of employees.

- **Do not make "insulting, embarrassing, hurtful or abusive comments about other company employees online," and "avoid the use of offensive, derogatory, or prejudicial comments."**

Because debate about unionization and other protected concerted activity is often contentious and controversial, employees would reasonably read a rule that bans "offensive," "derogatory," "insulting," or "embarrassing" comments as limiting their ability to honestly discuss such subjects. These terms also would reasonably be construed to limit protected criticism of supervisors and managers, since they are also "company employees."

- **"[S]how proper consideration for others' privacy and for topics that may be considered objectionable or inflammatory, such as politics and religion."**

This rule was found unlawful because Section 7 protects communications about political matters, e.g., proposed right-to-work legislation. Its restriction on communications regarding controversial political matters, without clarifying context or examples, would be reasonably construed to cover these kinds of Section 7 communications. Indeed, discussion of unionization would also be chilled by such a rule because it can be an inflammatory topic similar to politics and religion.

- **Do not send "unwanted, offensive, or inappropriate" e-mails.**

The above rule is similarly vague and overbroad, in the absence of context or examples to clarify that it does not encompass Section 7 communications.

- **"Material that is fraudulent, harassing, embarrassing, sexually explicit, profane, obscene, intimidating, defamatory, or otherwise unlawful or inappropriate may not be sent by e-mail . . . ."**

We found the above rule unlawful because several of its terms are ambiguous as to their application to Section 7 activity—"embarrassing," "defamatory," and "otherwise . . . inappropriate." We further concluded that, viewed in context with such language, employees would reasonably construe even the term "intimidating" as covering Section 7 conduct.

Lawful Employee-Employee Conduct Rules

On the other hand, when an employer's professionalism rule simply requires employees to be respectful to customers or competitors, or directs employees not to engage in unprofessional conduct, and does not mention the company or its management, employees would not reasonably believe that such a rule prohibits Section 7-protected criticism of the company. Accordingly, we concluded that the following rules were lawful:

- **"Making inappropriate gestures, including visual staring."**

- **Any logos or graphics worn by employees "must not reflect any form of violent, discriminatory, abusive, offensive, demeaning, or otherwise unprofessional message."**

- **"[T]hreatening, intimidating, coercing, or otherwise interfering with the job performance of fellow employees or visitors."**

- **No "harassment of employees, patients or facility visitors."**

- **No "use of racial slurs, derogatory comments, or insults."**

With respect to the last example, we recognized that a blanket ban on "derogatory comments," by itself, would reasonably be read to restrict protected criticism of the employer. However, because this rule was in a section of the handbook that dealt exclusively with unlawful harassment and discrimination, employees reasonably would read it in context as prohibiting those kinds of unprotected comments toward coworkers, rather than protected criticism of the employer.

D. Employer Handbook Rules Regarding Employee Interaction with Third Parties

Another right employees have under Section 7 is the right to communicate with the news media, government agencies, and other third parties about wages, benefits, and other terms and conditions of employment. Handbook rules that reasonably would be read to restrict such communications are unlawfully overbroad. *See Trump Marina Associates*, 354 NLRB 1027, 1027 n.2 (2009), *incorporated by reference*, 355 NLRB 585 (2010), *enforced mem.*, 435 F. App'x 1 (D.C. Cir. 2011). The most frequent offenders in this category are company media policies. While employers may lawfully control who makes official statements for the company, they must be careful to ensure that their rules would not reasonably be read to ban employees from speaking to the media or other third parties on their own (or other employees') behalf.

Unlawful Rules Regulating Third Party Communications

We found the following rules were unlawfully overbroad because employees reasonably would read them to ban protected communications with the media.

- **Employees are not "authorized to speak to any representatives of the print and/or electronic media about company matters" unless designated to do so by HR, and must refer all media inquiries to the company media hotline.**

We determined that the above rule was unlawful because employees would reasonably construe the phrase "company matters" to encompass employment concerns and labor relations, and there was no limiting language or other context in the rule to clarify that the rule applied only to those speaking as official company representatives.

- **"[A]ssociates are not authorized to answer questions from the news media . . . . When approached for information, you should refer the person to [the Employer's] Media Relations Department."**

- **"[A]ll inquiries from the media must be referred to the Director of Operations in the corporate office, no exceptions."**

These two rules contain blanket restrictions on employees' responses to media inquiries. We therefore concluded that employees would reasonably understand that they apply to *all* media contacts, not only inquiries seeking the employers' official positions.

In addition, we found the following rule to be unlawfully overbroad because employees reasonably would read it to limit protected communications with government agencies.

- **"If you are contacted by any government agency you should contact the Law Department immediately for assistance."**

Although we recognize an employer's right to present its own position regarding the subject of a government inquiry, this rule contains a broader restriction. Employees would reasonably believe that they may not speak to a government agency without management approval, or even provide information in response to a Board investigation.

Lawful Rules Regulating Employee Communications with Outside Parties

In contrast, we found the following media contact rules to be lawful because employees reasonably would interpret them to mean that employees should not speak on behalf of the company, not that employees cannot speak to outsiders on their own (or other employees') behalf.

- **"The company strives to anticipate and manage crisis situations in order to reduce disruption to our employees and to maintain our reputation as a high quality company. To best serve these objectives, the company will respond to the news media in a timely and professional manner *only* through the designated spokespersons."**

We determined that this rule was lawful because it specifically referred to employee contact with the media regarding non-Section 7 related matters, such as crisis situations; sought to ensure a consistent company response or message regarding those matters; and was not a blanket prohibition against all contact with the media. Accordingly, we concluded that employees would not reasonably interpret this rule as interfering with Section 7 communications.

- **"Events may occur at our stores that will draw immediate attention from the news media. *It is imperative that one person speaks for the Company to deliver an appropriate message and to avoid giving misinformation in any media inquiry.* While reporters frequently shop as customers and may ask questions about a matter, good**

reporters identify themselves prior to asking questions. Every . . . employee is expected to adhere to the following media policy: . . . 2. Answer all media/reporter questions like this: 'I am not authorized to comment for [the Employer] (or I don't have the information you want). Let me have our public affairs office contact you.'"

We concluded that the prefatory language in this rule would cause employees to reasonably construe the rule as an attempt to control the company's message, rather than to restrict Section 7 communications to the media. Further, the required responses to media inquiries would be non-sequiturs in the context of a discussion about terms and conditions of employment or protected criticism of the company. Accordingly, we found that employees reasonably would not read this rule to restrict conversations with the news media about protected concerted activities.

E. Employer Handbook Rules Restricting Use of Company Logos, Copyrights, and Trademarks

We have also reviewed handbook rules that restrict employee use of company logos, copyrights, or trademarks. Though copyright holders have a clear interest in protecting their intellectual property, handbook rules cannot prohibit employees' fair protected use of that property. *See Pepsi-Cola Bottling Co.*, 301 NLRB 1008, 1019–20 (1991), *enforced mem.*, 953 F.2d 638 (4th Cir. 1992). For instance, a company's name and logo will usually be protected by intellectual property laws, but employees have a right to use the name and logo on picket signs, leaflets, and other protest material. Employer proprietary interests are not implicated by employees' non-commercial use of a name, logo, or other trademark to identify the employer in the course of Section 7 activity. Thus, a broad ban on such use without any clarification will generally be found unlawfully overbroad.

Unlawful Rules Banning Employee Use of Logos, Copyrights, or Trademarks

We found that the following rules were unlawful because they contain broad restrictions that employees would reasonably read to ban fair use of the employer's intellectual property in the course of protected concerted activity.

- **Do "not use any Company logos, trademarks, graphics, or advertising materials" in social media.**

- **Do not use "other people's property," such as trademarks, without permission in social media.**

- **"Use of [the Employer's] name, address or other information in your personal profile [is banned]. . . . In addition, it is prohibited to use [the Employer's] logos, trademarks or any other copyrighted material."**

- **"Company logos and trademarks may not be used without written consent . . . ."**

Lawful Rules Protecting Employer Logos, Copyrights, and Trademarks

We found that the following rules were lawful. Unlike the prior examples, which broadly ban employee use of trademarked or copyrighted material, these rules simply require employees to respect such laws, permitting fair use.

- **"Respect all copyright and other intellectual property laws. For [the Employer's] protection as well as your own, it is critical that you show proper respect for the laws governing copyright, fair use of copyrighted material owned by others, trademarks and other intellectual property, including [the Employer's] own copyrights, trademarks and brands."**

- **"DO respect the laws regarding copyrights, trademarks, rights of publicity and other third-party rights. To minimize the risk of a copyright violation, you should provide references to the source(s) of information you use and accurately cite copyrighted works you identify in your online communications. Do not infringe on [Employer] logos, brand names, taglines, slogans, or other trademarks."**

F. Employer Handbook Rules Restricting Photography and Recording

Employees also have a Section 7 right to photograph and make recordings in furtherance of their protected concerted activity, including the right to use personal devices to take such pictures and recordings. *See Hawaii Tribune-Herald*, 356 NLRB No. 63, slip op. at 1 (Feb. 14, 2011), *enforced sub nom. Stephens Media, LLC v. NLRB*, 677 F.3d 1241 (D.C. Cir. 2012); *White Oak Manor*, 353 NLRB 795, 795 (2009), *incorporated by reference*, 355 NLRB 1280 (2010), *enforced mem.*, 452 F. App'x 374 (4th Cir. 2011). Thus, rules placing a total ban on such photography or recordings, or banning the use or possession of personal cameras or recording devices, are unlawfully overbroad where they would reasonably be read to prohibit the taking of pictures or recordings on non-work time.

Unlawful Rules Banning Photography, Recordings, or Personal Electronic Devices

We found the following rules unlawfully overbroad because employees reasonably would interpret them to prohibit the use of personal equipment to engage in Section 7 activity while on breaks or other non-work time.

- **"Taking unauthorized pictures or video on company property" is prohibited.**

We concluded that employees would reasonably read this rule to prohibit all unauthorized employee use of a camera or video recorder, including attempts to document health and safety violations and other protected concerted activity.

- **"No employee shall use any recording device including but not limited to, audio, video, or digital for the purpose of recording any [Employer] employee or [Employer] operation . . . ."**

We found this rule unlawful because employees would reasonably construe it to preclude, among other things, documentation of unfair labor practices, which is an essential part of the recognized right under Section 7 to utilize the Board's processes.

- **A total ban on use or possession of personal electronic equipment on Employer property.**

- **A prohibition on personal computers or data storage devices on employer property.**

We determined that the two above rules, which contain blanket restrictions on use or possession of recording devices, violated the Act for similar reasons. Although an employer has a legitimate interest in maintaining the confidentiality of business records, these rules were not narrowly tailored to address that concern.

- **Prohibition from wearing cell phones, making personal calls or viewing or sending texts "while on duty."**

This rule, which limits the restriction on personal recording devices to time "on duty," is nonetheless unlawful, because employees reasonably would understand "on duty" to include breaks and meals during their shifts, as opposed to their actual work time.

Lawful Rules Regulating Pictures and Recording Equipment

Rules regulating employee recording or photography will be found lawful if their scope is appropriately limited. For instance, in cases where a no-photography rule is instituted in response to a breach of patient privacy, where the employer has a well-understood, strong privacy interest, the Board has found that employees would not reasonably understand a no-photography rule to limit pictures for protected concerted purposes. *See Flagstaff Medical Center*, 357 NLRB No. 65, slip op. at 5 (Aug. 26, 2011), *enforced in relevant part*, 715 F.3d 928 (D.C. Cir. 2013). We also found the following rule lawful based on a contextual analysis:

- **No cameras are to be allowed in the store or parking lot without prior approval from the corporate office.**

This rule was embedded in a lawful media policy and immediately followed instructions on how to deal with reporters in the store. We determined that, in such a context, employees would read the rule to ban *news* cameras, not their own cameras.

G. Employer Handbook Rules Restricting Employees from Leaving Work

One of the most fundamental rights employees have under Section 7 of the Act is the right to go on strike. Accordingly, rules that regulate when employees can leave work are unlawful if employees reasonably would read them to forbid protected strike actions and walkouts. *See Purple Communications, Inc.*, 361 NLRB No. 43, slip op. at 2 (Sept. 24, 2014). If, however, such a rule makes no mention of "strikes," "walkouts," "disruptions," or the like, employees will reasonably understand the rule to pertain to employees leaving their posts for reasons unrelated to protected concerted activity, and the rule will be found lawful. *See 2 Sisters Food Group*, 357 NLRB No. 168, slip op. at 2 (Dec. 29, 2011).

Unlawful Handbook Rules Relating to Restrictions on Leaving Work

We found the following rules were unlawful because they contain broad prohibitions on walking off the job, which reasonably would be read to include protected strikes and walkouts.

- **"Failure to report to your scheduled shift for more than three consecutive days without prior authorization or 'walking off the job' during a scheduled shift" is prohibited.**

- **"Walking off the job . . ." is prohibited.**

Lawful Handbook Rules Relating to Restrictions on Leaving Work

In contrast, the following handbook rule was considered lawful:

- **"Entering or leaving Company property without permission may result in discharge."**

We found this rule was lawful because, in the absence of terms like "work stoppage" or "walking off the job," a rule forbidding employees from leaving the employer's property during work time without permission will not reasonably be read to encompass strikes. However, the portion of the rule that requires employees to

obtain permission before *entering the property* was found unlawful because employers may not deny off-duty employees access to parking lots, gates, and other outside nonworking areas except where sufficiently justified by business reasons or pursuant to the kind of narrowly tailored rule approved in *Tri-County Medical Center*, 222 NLRB 1089, 1089 (1976).

- **"Walking off shift, failing to report for a scheduled shift and leaving early without supervisor permission are also grounds for immediate termination."**

Although this rule includes the term "walking off shift," which usually would be considered an overbroad term that employees reasonably would understand to include strikes, we found this rule to be lawful in the context of the employees' health care responsibilities. Where employees are directly responsible for patient care, a broad "no walkout without permission" rule is reasonably read as ensuring that patients are not left without adequate care, not as a complete ban on strikes. *See Wilshire at Lakewood*, 343 NLRB 141, 144 (2004), *vacated in part*, 345 NLRB 1050 (2005), *enforcement denied on other grounds*, *Jochims v. NLRB*, 480 F.3d 1161 (D.C. Cir. 2007). This rule was maintained by an employer that operated a care facility for people with dementia. Thus, we found that employees would reasonably read this rule as being designed to ensure continuity of care, not as a ban on protected job actions.

H. Employer Conflict-of-Interest Rules

Section 7 of the Act protects employees' right to engage in concerted activity to improve their terms and conditions of employment, even if that activity is in conflict with the employer's interests. For instance, employees may protest in front of the company, organize a boycott, and solicit support for a union while on nonwork time. *See HTH Corp.*, 356 NLRB No. 182, slip op. at 2, 25 (June 14, 2011), *enforced*, 693 F.3d 1051 (9th Cir. 2012). If an employer's conflict-of-interest rule would reasonably be read to prohibit such activities, the rule will be found unlawful. However, where the rule includes examples or otherwise clarifies that it is limited to legitimate business interests, employees will reasonably understand the rule to prohibit only unprotected activity. *See Tradesmen International*, 338 NLRB 460, 461–62 (2002).

Unlawful Conflict-of-Interest Rules

We found the following rule unlawful because it was phrased broadly and did not include any clarifying examples or context that would indicate that it did not apply to Section 7 activities:

- **Employees may not engage in "any action" that is "not in the best interest of [the Employer]."**

Lawful Conflict-of-Interest Rules

In contrast, we found the following rules lawful because they included context and examples that indicated that the rules were not meant to encompass protected concerted activity:

- **Do not "give, offer or promise, directly or indirectly, anything of value to any representative of an Outside Business," where "Outside Business" is defined as "any person, firm, corporation, or government agency that sells or provides a service to, purchases from, or competes with [the Employer]." Examples of violations include "holding an ownership or financial interest in an Outside Business" and "accepting gifts, money, or services from an Outside Business."**

We concluded that this rule is lawful because employees would reasonably understand that the rule is directed at protecting the employer from employee graft and preventing employees from engaging in a competing business, and that it does not apply to employee interactions with labor organizations or other Section 7 activity that the employer might oppose.

- **As an employee, "I will not engage in any activity that might create a conflict of interest for me or the company," where the conflict of interest policy devoted two pages to examples such as "avoid outside employment with a[n Employer] customer, supplier, or competitor, or having a significant financial interest with one of these entities."**

The above rule included multiple examples of conflicts of interest such that it would not be interpreted to restrict Section 7 activity.

- **Employees must refrain "from any activity or having any financial interest that is inconsistent with the Company's best interest" and also must refrain from "activities, investments or associations that compete with the Company, interferes with one's judgment concerning the Company's best interests, or exploits one's position with the Company for personal gains."**

We also found this rule to be lawful based on a contextual analysis. While its requirement that employees refrain from activities or associations that are inconsistent with the company's best interests could, in isolation, be interpreted to include employee participation in unions, the surrounding context and examples ensure that employees would not reasonably read it in that way. Indeed, the rule is in a section of the handbook that deals entirely with business ethics and includes requirements to act with "honesty, fairness and integrity"; comply with "all laws,

rules and regulations"; and provide "accurate, complete, fair, timely, and understandable" information in SEC filings.

Part 2: The Settlement with Wendy's International LLC

In 2014, we concluded that many of the employee handbook rules alleged in an unfair labor practice charge against Wendy's International, LLC were unlawfully overbroad under *Lutheran Heritage*'s first prong. Pursuant to an informal, bilateral Board settlement agreement, Wendy's modified its handbook rules. This section of the report presents the rules we found unlawfully overbroad, with brief discussions of our reasoning, followed by the replacement rules, which the Office of the General Counsel considers lawful, contained in the settlement agreement.

A. Wendy's Unlawful Handbook Rules

The pertinent provisions of Wendy's handbook and our conclusions are outlined below.

Handbook disclosure provision

No part of this handbook may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying, recording, or information storage and retrieval system or otherwise, for any purpose without the express written permission of Wendy's International, Inc. The information contained in this handbook is considered proprietary and confidential information of Wendy's and its intended use is strictly limited to Wendy's and its employees. The disclosure of this handbook to unauthorized parties is prohibited. Making an unauthorized disclosure of this handbook is a serious breach of Wendy's standards of conduct and ethics and shall expose the disclosing party to disciplinary action and other liabilities as permitted under law.

We concluded that this provision was unlawful because it prohibited disclosure of the Wendy's handbook, which contains employment policies, to third parties such as union representatives or the Board. Because employees have a Section 7 right to discuss their wages and other terms and conditions of employment with others, including co-workers, union representatives, and government agencies, such as the Board, a rule that precludes employees from sharing the employee handbook that contains many of their working conditions violates Section 8(a)(1).

Social Media Policy

Refrain from commenting on the company's business, financial performance, strategies, clients, policies, employees or competitors in any

social media, without the advance approval of your supervisor, Human Resources and Communications Departments. Anything you say or post may be construed as representing the Company's opinion or point of view (when it does not), or it may reflect negatively on the Company. If you wish to make a complaint or report a complaint or troubling behavior, please follow the complaint procedure in the applicable Company policy (e.g., Speak Out).

Although employers have a legitimate interest in ensuring that employee communications are not construed as misrepresenting the employer's official position, we concluded that this rule did not merely prevent employees from speaking on behalf of, or in the name of, Wendy's. Instead, it generally prohibited an employee from commenting about the Company's business, policies, or employees without authorization, particularly when it might reflect negatively on the Company. Accordingly, we found that this part of the rule was overly broad. We also concluded that the rule's instruction that employees should follow the Company's internal complaint mechanism to "make a complaint or report a complaint" chilled employees' Section 7 right to communicate employment-related complaints to persons and entities other than Wendy's.

Respect copyrights and similar laws. Do not use any copyrighted or otherwise protected information or property without the owner's written consent.

We concluded that this rule was unlawfully overbroad because it broadly prohibited *any* employee use of copyrighted or "otherwise protected" information. Employees would reasonably construe that language to prohibit Section 7 communications involving, for example, reference to the copyrighted handbook or Company website for purposes of commentary or criticism, or use of the Wendy's trademark/name and another business's trademark/name in a wage comparison. We determined that such use does not implicate the interests that courts have identified as being protected by trademark and copyright laws.

[You may not p]ost photographs taken at Company events or on Company premises without the advance consent of your supervisor, Human Resources and Communications Departments.
[You may not p]ost photographs of Company employees without their advance consent. Do not attribute or disseminate comments or statements purportedly made by employees or others without their explicit permission.

We concluded that these rules, which included no examples of unprotected conduct or other language to clarify and restrict their scope, would chill employees

from engaging in Section 7 activities, such as posting a photo of employees carrying a picket sign in front of a restaurant, documenting a health or safety concern, or discussing or making complaints about statements made by Wendy's or fellow employees.

[You may not u]se the Company's (or any of its affiliated entities) logos, marks or other protected information or property without the Legal Department's express written authorization.

As discussed above, Wendy's had no legitimate basis to prohibit the use of its logo or trademarks in this manner, which would reasonably be construed to restrict a variety of Section 7-protected uses of the Wendy's logo and trademarks. Therefore, we found this rule unlawfully overbroad.

[You may not e]mail, post, comment or blog anonymously. You may think it is anonymous, but it is most likely traceable to you and the Company.

Requiring employees to publicly self-identify in order to participate in protected activity imposes an unwarranted burden on Section 7 rights. Thus, we found this rule banning anonymous comments unlawfully overbroad.

[You may not m]ake false or misleading representations about your credentials or your work.

We found this rule unlawful, because its language clearly encompassed communications relating to working conditions, which do not lose their protection if they are false or misleading as opposed to "maliciously false" (i.e., made with knowledge of falsity or reckless disregard for the truth). A broad rule banning merely false or misleading representations about work can have a chilling effect by causing employees to become hesitant to voice their views and complaints concerning working conditions for fear that later they may be disciplined because someone may determine that those were false or misleading statements.

[You may not c]reate a blog or online group related to your job without the advance approval of the Legal and Communications.

We determined that this no-blogging rule was unlawfully overbroad because employees have a Section 7 right to discuss their terms and conditions of employment with their co-workers and/or the public, including on blogs or online groups, and it is well-settled that such pre-authorization requirements chill Section 7 activity.

Do Not Disparage:
Be thoughtful and respectful in all your communications and dealings with others, including email and social media. Do not harass, threaten, libel, malign, defame, or disparage fellow professionals, employees, clients, competitors or anyone else. Do not make personal insults, use obscenities or engage in any conduct that would be unacceptable in a professional environment.

We found this rule unlawful because its second and third sentences contained broad, sweeping prohibitions against "malign[ing], defam[ing], or disparag[ing]" that, in context, would reasonably be read to go beyond unprotected defamation and encompass concerted communications protesting or criticizing Wendy's treatment of employees, among other Section 7 activities. And, there was nothing in the rule or elsewhere in the handbook that would reasonably assure employees that Section 7 communications were excluded from the rule's broad reach.

Do Not Retaliate:
If you discover negative statements, emails or posts about you or the Company, do not respond. First seek help from the Legal and Communications Departments, who will guide any response.

We concluded that employees would reasonably read this rule as requiring them to seek permission before engaging in Section 7 activity because "negative statements about . . . the Company" would reasonably be construed as encompassing Section 7 activity. For example, employees would reasonably read the rule to require that they obtain permission from Wendy's before responding to a co-worker's complaint about working conditions or a protest of unfair labor practices. We therefore found this rule overly broad.

Conflict-of-Interest Provision

Because you are now working in one of Wendy's restaurants, it is important to realize that you have an up close and personal look at our business every day. With this in mind, you should recognize your responsibility to avoid any conflict between your personal interests and those of the Company. A conflict of interest occurs when our personal interests interfere—or appear to interfere—with our ability to make sound business decisions on behalf of Wendy's.

We determined that the Conflict-of-Interest provision was unlawfully overbroad because its requirement that employees avoid "any conflict between your personal interests and those of the Company" would reasonably be read to encompass Section 7 activity, such as union organizing activity, demanding higher

wages, or engaging in boycotts or public demonstrations related to a labor dispute. Unlike rules that provide specific examples of what constitutes a conflict of interest, nothing in this rule confined its scope to legitimate business concerns or clarified that it was not intended to apply to Section 7 activity.

Moreover, we concluded that the Conflict-of-Interest provision was even more likely to chill Section 7 activity when read together with the handbook's third-party representation provision, located about six pages later, which communicated that unions are not beneficial or in the interest of Wendy's: **[b]ecause Wendy's desires to maintain open and direct communications with all of our employees, we do not believe that third party/union involvement in our relationship would benefit our employees or Wendy's.**

Company Confidential Information Provision

During the course of your employment, you may become aware of confidential information about Wendy's business. You must not disclose any confidential information relating to Wendy's business to anyone outside of the Company. Your employee PIN and other personal information should be kept confidential. Please don't share this information with any other employee.

We concluded that the confidentiality provision was facially unlawful because it referenced employees' "personal information," which the Board has found would reasonably be read to encompass discussion of wages, hours, and terms and conditions of employment.

Employee Conduct

The Employee Conduct section of the handbook contained approximately two pages listing examples of "misconduct" and "gross misconduct," which could lead to disciplinary action, up to and including discharge, in the sole discretion of Wendy's. The list included the following:

Soliciting, collecting funds, distributing literature on Company premises without proper approvals or outside the guidelines established in the "No Solicitation/No Distribution" Policy.

The blanket prohibition against soliciting, collecting funds, or distributing literature without proper approvals was unlawfully overbroad because employees have a Section 7 right to solicit on non-work time and distribute literature in non-work areas.

Walking off the job without authorization.

We found that this rule was unlawfully overbroad because employees would reasonably construe it to prohibit Section 7 activity such as a concerted walkout or other strike activity. As discussed in Part 1 of this report, the Board has drawn a fairly bright line regarding how employees would reasonably construe rules about employees leaving work. Rules that contain phrases such as "walking off the job," as here, reasonably would be read to forbid protected strike actions and walkouts.

Threatening, intimidating, foul or inappropriate language.

We found this prohibition to be unlawful because rules that forbid the vague phrase "inappropriate language," without examples or context, would reasonably be construed to prohibit protected communications about or criticism of management, labor policies, or working conditions.

False accusations against the Company and/or against another employee or customer.

We found this rule unlawful because an accusation against an employer does not lose the protection of Section 7 merely because it is false, as opposed to being recklessly or knowingly false. As previously discussed, a rule banning merely false statements can have a chilling effect on protected concerted communications, for instance, because employees reasonably would fear that contradictory information provided by the employer would result in discipline.

No Distribution/No Solicitation Provision

[I]t is our policy to prohibit the distribution of literature in work areas and to prohibit solicitation during employees' working time. "Working time" is the time an employee is engaged, or should be engaged, in performing his/her work tasks for Wendy's. These guidelines also apply to solicitation and/or distribution by electronic means.

We concluded that this rule was unlawful because it restricted distribution by electronic means in work areas. While an employer may restrict distribution of literature in paper form in work areas, it has no legitimate business justification to restrict employees from distributing literature electronically, such as sending an email with a "flyer" attached, while the employees are in work areas during non-working time. Unlike distribution of paper literature, which can create a production hazard even when it occurs on nonworking time, electronic distribution does not

produce litter and only impinges on the employer's management interests if it occurs on working time.

Restaurant Telephone; Cell Phone; Camera Phone/Recording Devices Provision

Due to the potential for issues such as invasion of privacy, sexual harassment, and loss of productivity, no Crew Member may operate a camera phone on Company property or while performing work for the Company. The use of tape recorders, Dictaphones, or other types of voice recording devices anywhere on Company property, including to record conversations or activities of other employees or management, or while performing work for the Company, is also strictly prohibited, unless the device was provided to you by the Company and is used solely for legitimate business purposes.

We concluded that this rule, which prohibited employee use of a camera or video recorder "on Company property" at any time, precluded Section 7 activities, such as employees documenting health and safety violations, collective action, or the potential violation of employee rights under the Act. Wendy's had no business justification for such a broad prohibition. Its concerns about privacy, sexual harassment, and loss of productivity did not justify a rule that prohibited all use of a camera phone or audio recording device anywhere on the company's property at any time.

B. Wendy's Lawful Handbook Rules Pursuant to Settlement Agreement

Handbook Disclosure Provision

This Crew Orientation Handbook . . . is the property of Wendy's International LLC. No part of this handbook may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying, recording, or information storage and retrieval system or otherwise, for any business/commercial venture without the express written permission of Wendy's International, LLC. The information contained in this handbook is strictly limited to use by Wendy's and its employees. The disclosure of this handbook to competitors is prohibited. Making an unauthorized disclosure of this handbook is a serious breach of Wendy's standards of conduct and ethics and shall expose the disclosing party to disciplinary action and other liabilities as permitted under law.

Social Media Provision

- Do not comment on trade secrets and proprietary Company information (business, financial and marketing strategies) without the advance approval of your supervisor, Human Resources and Communications Departments.

- Do not make negative comments about our customers in any social media.

- Use of social media on Company equipment during working time is permitted, if your use is for legitimate, preapproved Company business. Please discuss the nature of your anticipated business use and the content of your message with your supervisor and Human Resources. Obtain their approval prior to such use.

- Respect copyright, trademark and similar laws and use such protected information in compliance with applicable legal standards.

Restrictions:

YOU MAY NOT do any of the following:

- Due to the potential for issues such as invasion of privacy (employee and customer), sexual or other harassment (as defined by our harassment /discrimination policy), protection of proprietary recipes and preparation techniques, Crew Members may not take, distribute, or post pictures, videos, or audio recordings while on working time. Crew Members also may not take pictures or make recordings of work areas. An exception to the rule concerning pictures and recordings of work areas would be to engage in activity protected by the National Labor Relations Act including, for example, taking pictures of health, safety and/or working condition concerns or of strike, protest and work-related issues and/or other protected concerted activities.

- Use the Company's (or any of its affiliated entities) logos, marks or other protected information or property for any business/commercial venture without the Legal Department's express written authorization.

- Make knowingly false representations about your credentials or your work.

- Create a blog or online group related to Wendy's (not including blogs or discussions involving wages, benefits, or other terms and conditions of employment, or protected concerted activity) without the advance approval of the Legal and Communications Departments. If a blog or online group is approved, it must contain a disclaimer approved by the Legal Department.

<u>Do Not Violate the Law and Related Company Policies</u>:

Be thoughtful in all your communications and dealings with others, including email and social media. Never harass (as defined by our anti-harassment policy), threaten, libel or defame fellow professionals, employees, clients, competitors or anyone else. In general, it is always wise to remember that what you say in social media can often be seen by anyone. Accordingly, harassing comments, obscenities or similar conduct that would violate Company policies is discouraged in general and is never allowed while using Wendy's equipment or during your working time.

Discipline:
All employees are expected to know and follow this policy. Nothing in this policy is, however, intended to prevent employees from engaging in concerted activity protected by law. If you have any questions regarding this policy, please ask your supervisor and Human Resources before acting. Any violations of this policy are grounds for disciplinary action, up to and including immediate termination of employment.

Conflict of Interest Provision

Because you are now working in one of Wendy's restaurants, it is important to realize that you have an up close and personal look at our business every day. With this in mind, you should recognize your responsibility to avoid any conflict between your personal interests and those of the Company. A conflict of interest occurs when our personal interests interfere – or appear to interfere – with your ability to make sound business decisions on behalf of Wendy's. There are some common relationships or circumstances that can create, or give the appearance of, a conflict of interest. The situations generally involve gifts and business or financial dealings or investments. Gifts, favors, tickets, entertainment and other such inducements may be attempts to "purchase" favorable treatment. Accepting such inducements could raise doubts about an employee's ability to make independent business judgments and the Company's commitment to treating people fairly. In addition, a conflict of interest exists when employees have a financial or ownership interest in a business or financial venture that may be at variance with the interests of Wendy's. Likewise, when an employee engages in business transactions that benefit family members, it may give an appearance of impropriety.

Company Confidential Information Provision

During the course of your employment, you may become aware of trade secrets and similarly protected proprietary and confidential information

about Wendy's business (e.g. recipes, preparation techniques, marketing plans and strategies, financial records). You must not disclose any such information to anyone outside of the Company. Your employee PIN and other similar personal identification information should be kept confidential. Please don't share this information with any other employee.

Employee Conduct Provision

- Soliciting, collecting funds, distributing literature on Company premises outside the guidelines established in the "No Solicitation/No Distribution" Policy.

- Leaving Company premises during working shift without permission of management.

- Threatening, harassing (as defined by our harassment/discrimination policy), intimidating, profane, obscene or similar inappropriate language in violation of Company policy.

- Making knowingly false accusations against the Company and/or against another employee, customer or vendor.

No Distribution/No Solicitation Provision

Providing the most ideal work environment possible is very important to Wendy's. We hope you feel very comfortable and at ease when you're here at work. Therefore, to protect you and our customers from unnecessary interruptions and annoyances, it is our policy to prohibit the distribution of literature in work areas and to prohibit solicitation and distribution of literature during employees' working time. "Working Time" is the time an employee is engaged or should be engaged in performing his/her work tasks for Wendy's. These guidelines also apply to solicitation by electronic means. Solicitation or distribution of any kind by non-employees on Company premises is prohibited at all times. Nothing in this section prohibits employees from discussing terms and conditions of employment.

Restaurant Telephone/ Cell Phone/Camera Phone/Recording Devices Provision

Due to the potential for issues such as invasion of privacy (employee and customer), sexual or other harassment (as defined by our harassment /discrimination policy), protection of proprietary recipes and preparation techniques, Crew Members may not take, distribute, or post pictures, videos, or audio recordings while on working time. Crew Members also may not take pictures or make recordings of work areas. An exception to the rule concerning pictures and recordings of work areas would be to engage in

activity protected by the National Labor Relations Act including, for example, taking pictures of health, safety and/or working condition concerns or of strike, protest and work-related issues and/or other protected concerted activities.

KeyCite Yellow Flag - Negative Treatment
Distinguished by Davis v. Department of Army, M.S.P.B., January 6, 2017

842 F.3d 1252
United States Court of Appeals,
Federal Circuit.

Troy W. Miller, Petitioner
v.
Department of Justice, Respondent

2015-3149
|
Decided: December 2, 2016

Synopsis
Background: Federal prison employee filed petition for review of the decision of the Merit Systems Protection Board (MSPB), 2015 WL 1548991, denying him relief under the Whistleblower Protection Act (WPA) for a personnel action taken by the Department of Justice, his federal agency employer.

[Holding:] The Court of Appeals, Stoll, Circuit Judge, held that substantial evidence did not support MSPB's determination that employee's reassignment was for reasons independent of employee's protected disclosures, as required for Department to rebut employee's prima facie WPA claim.

Reversed and remanded.

Reyna, Circuit Judge, filed concurring opinion.

Hughes, Circuit Judge, filed dissenting opinion.

West Headnotes (9)

[1] **Public Employment**🔑Reporting or opposing wrongdoing; whistleblowing

In evaluating whether the federal government agency employer successfully rebutted government employee's prima facie case under the Whistleblower Protection Act (WPA) by demonstrating independent causation for the adverse personnel action , the Court of Appeals considers the following three, albeit nonexclusive, factors: (1) the strength of the agency employer's evidence in support of its personnel action; (2) the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision; and (3) any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated. 5 U.S.C.A. §§ 1221(e), 2302(a)(2)(A), (b)(8).

Cases that cite this headnote

[2] **Public Employment**Reporting or opposing wrongdoing; whistleblowing

The federal government agency employer has no affirmative duty to produce evidence with respect to each and every one of the three factors the Court of Appeals considers in evaluating whether the government has successfully rebutted an employee's prima facie claim under the Whistleblower Protection Act (WPA); rather, the factors are merely appropriate and pertinent considerations for determining whether the agency carries its burden of proving by clear and convincing evidence that the same personnel action would have been taken absent the whistleblowing. 5 U.S.C.A. §§ 1221(e), 2302(a)(2)(A), (b)(8).

Cases that cite this headnote

[3] **Public Employment**Reporting or opposing wrongdoing; whistleblowing

Independent causation, as required for the government agency employer to rebut an employee's prima facie Whistleblower Protection Act (WPA) claim, is established upon "clear and convincing evidence," which is evidence that produces in the mind of the trier of fact an abiding conviction that the truth of a factual contention is highly probable. 5 U.S.C.A. §§ 1221(e), 2302(a)(2)(A), (b)(8).

Cases that cite this headnote

[4] **Evidence**Degree of Proof in General

The clear and convincing burden of proof imposes a heavier burden upon a litigant than that imposed by requiring proof by preponderant evidence but a somewhat lighter burden than that imposed by requiring proof beyond a reasonable doubt.

Cases that cite this headnote

[5] **Public Employment**Substantial evidence

"Substantial evidence," as required to support, on judicial review, a decision by the Merit Systems Protection Board (MSPB), means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; the substantiality of evidence must take into account whatever in the record fairly detracts from its weight. 5 U.S.C.A. § 7703(c).

Cases that cite this headnote

[6] **Public Employment**Substantial evidence

Any determination by the Merit Systems Protection Board (MSPB) that is based on findings made in the abstract and independent of the evidence which fairly detracts from its conclusions is unreasonable and, as such, is not supported by substantial evidence. 5 U.S.C.A. § 7703(c).

Cases that cite this headnote

[7] **Public Employment**Substantial evidence

Substantial evidence, as required to support a determination by the Merit Systems Protection Board (MSPB), is not a fixed quantum of evidence: what is or is not substantial may only be determined with respect to the burden of proof that the litigant bore; for example, in reviewing whether the evidence supports a finding of fact, the decision might be affirmed if the standard of proof below were weight of evidence and might be reversed on the same record if the standard of proof were clear and convincing evidence. 5 U.S.C.A. § 7703(c).

Cases that cite this headnote

[8] **Public Employment**Reporting or opposing wrongdoing; whistleblowing

Substantial evidence did not support determination by Merit Systems Protection Board (MSPB) that reassignment of federal prison employee who managed prison factory that produced military helmets to various menial jobs was for reasons independent of employee's protected disclosures regarding fund-mismanagement and sabotage at prison factory, as required for Department of Justice to rebut employee's prima facie Whistleblower Protection Act (WPA) claim; although prison warden, who was employee's direct supervisor, testified about how Office of Inspector General (OIG) directed him to reassign employee because employee might interfere with OIG's investigation at factory, such testimony was conclusory, employee had outstanding performance reviews and was valued executive for over 20 years, reassignments occurred shortly after employee's disclosures and lasted for over four years, MSPB did not examine if OIG had retaliatory motive, and Department presented no other evidence supporting its position that employee was reassigned because of pending OIG investigation or for any other independent reason. 5 U.S.C.A. §§ 1221(e), 2302(a)(2)(A), (b)(8).; 5 U.S.C.A. § 7703(c).

Cases that cite this headnote

[9] **Public Employment**Hearsay in general

Hearsay may be admitted as preponderant evidence in Merit Systems Protection Board (MSPB) proceedings if, to a reasonable mind, the circumstances are such as to lend it credence. 5 U.S.C.A. § 7703(c).

Cases that cite this headnote

***1254** Petition for review of the Merit Systems Protection Board in No. DA-1221-11-0401-W-3.

Attorneys and Law Firms

DENNIS L. FRIEDMAN, Philadelphia, PA, argued for petitioner.

ROBERT NORWAY, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for respondent. Also represented by BENJAMIN C. MIZER, ROBERT E. KIRSCHMAN, JR, ALLISON KIDD-MILLER.

Before Reyna, Hughes, and Stoll, Circuit Judges.

Opinion

Concurring opinion filed by Circuit Judge Reyna.

Dissenting opinion filed by Circuit Judge Hughes.

Stoll, Circuit Judge.

Troy Miller appeals the decision of the Merit Systems Protection Board denying him relief for a personnel action taken by the Department of Justice. The Board held that Mr. Miller met his burden of showing that certain disclosures he made, found by the Board to be protected under the Whistleblower Protection Act, contributed to his reassignment. The Board further held, however, that the Government successfully rebutted Mr. Miller's prima facie case by showing independent causation for the personnel action. Because the Board's decision is not supported by substantial evidence, we reverse.

BACKGROUND

I.

Mr. Miller worked as the Superintendent of Industries, level GS-13, at the Federal Correctional Complex, Beaumont, Texas. In this capacity, Mr. Miller oversaw a prison factory that produced ballistic helmets primarily for military use. He held significant responsibilities as Superintendent of Industries, including: managing the factory budget; executing contracts with outside suppliers; hiring, training, and overseeing inmate staff; and developing and maintaining production schedules. Performance reviews lauded Mr. Miller for taking the initiative to coordinate delivery schedules with outside vendors—a task normally performed by central office professionals—and for spearheading a business partnership with an outside armor outfitter.

UNICOR, a Government-owned corporation, operated the prison factory, but Mr. Miller worked for the Federal Bureau of Prisons within the Department of Justice, as did his direct supervisor, prison warden Jody Upton. Mr. Miller, along with the associate warden and the warden's captain, served on Warden Upton's executive staff. As a member of the Warden's executive staff, Mr. Miller drafted prison security reports sent to the regional office and responded to security incidents at the Beaumont facility, as well as other correctional facilities. He was also on rotation every six weeks to serve as the prison's acting administrative duty officer and he chaired the Inmate Issues Committee, where he was a conduit between inmates ***1255** and Warden Upton, relaying inmate concerns to the warden and providing the warden's feedback to the inmates. In

Warden Upton's absence, Mr. Miller occasionally filled in as an associate warden. Reflecting on Mr. Miller during his testimony in this case, Warden Upton described Mr. Miller as "a fantastic employee" who was "very on top of things" and with whom he had "absolutely no concerns," a sentiment reflected in Warden Upton's performance evaluations of Mr. Miller. J.A. 90–92.

On October 7, 2009, Mr. Miller disclosed to individuals at UNICOR and to Warden Upton what he perceived to be mismanagement of funds at the factory. Warden Upton testified that he received a phone call in mid-to late-October 2009 from the DOJ Office of Inspector General ("OIG") explaining that there had been reports of impropriety at the factory, but Warden Upton could not recall with whom at OIG he spoke. On December 15, 2009, OIG conducted an on-site visit to the factory as part of an investigation into the factory's operations and purported misconduct. Warden Upton asked Mr. Miller to not report to the factory on that day, relaying to him that the investigators did not want the factory staff to feel uncomfortable or intimidated by having their supervisor, Mr. Miller, present during the OIG visit.

On December 16, 2009, the day following OIG's factory visit, Mr. Miller reported to Warden Upton and others that there had been a "sabotage" at the factory, with rejected Kevlar® material having been placed on the production line. J.A. 162. Mr. Miller testified that constructing a helmet using rejected material would seriously compromise the helmet's ability to withstand projectile impact and thus would endanger the lives of soldiers outfitted in such helmets. Mr. Miller testified that "why I did what I did is there's a U.S. Marine's life at the end of this helmet, period. And it is my responsibility as a superintendent of industries when I see anything that is wrong, to report it immediately and to stop production." J.A. 276. Mr. Miller urged that the factory be closed pending an investigation of the alleged factory sabotage.

Several hours after the sabotage disclosure, Warden Upton informed Mr. Miller that he was being reassigned from the factory and would no longer serve as Superintendent of Industries. Without identifying any specific individual, Warden Upton testified that some person or persons working for OIG had directed him to reassign Mr. Miller. OIG had become concerned, testified Warden Upton, that Mr. Miller might compromise its investigation by remaining at the factory. Warden Upton testified that because Mr. Miller did not "technically work for me in the operational aspect, I contacted UNICOR's central office, as well as my regional director" and "[a] decision was made the following day that [Mr. Miller] would need to be removed from the factory." J.A. 101. Warden Upton further testified that, at some point later, OIG "made it clear that Mr. Miller was actually one of the subjects of the investigation," although he could not recall during his testimony when OIG disclosed this information to him. J.A. 99.

Over the next four and a half years, Mr. Miller was assigned to various lower-level positions which, unlike the Superintendent of Industries position, were not on the Warden's executive staff.[1] Mr. Miller's various ***1256** duties, during the times when he was assigned work, included: monitoring inmate phone calls for criminal activity; assisting with the prison's food service by wiping tables and observing inmates as they cleaned floors; performing clerical work, such as shredding documents; and working the night shift in the special housing unit.[2] Warden Upton testified that he moved Mr. Miller from one assignment to the next several times at the behest of OIG. Warden Upton testified that OIG began to fear that placing Mr. Miller in any position with inmate exposure presented a threat to the investigation. For example, Warden Upton testified that OIG believed Mr. Miller had been conversing with inmates during his food service detail and that Mr. Miller chose to monitor the phone calls of inmates who worked in the factory during his phone detail, which the Warden's staff was able to find some supporting correlative evidence of by examining phone records. Warden Upton again did not reveal the identity of any specific OIG employee with whom he spoke or provide OIG's specific justification for fearing that Mr. Miller would threaten the investigation.

Eventually, Warden Upton reassigned Mr. Miller out of the medium-security prison facility altogether and to an administrative building on the prison premises. While there, Mr. Miller was told to sit on a couch in the building lobby without being given any work to perform, which he did for eight months. He later received an office, but continued to have no work assigned to him. He remained on the GS-13 payscale all the while, yet Warden Upton testified that putting him in these positions was "absolutely" a waste of his talents.

II.

Mr. Miller brought an individual right of action ("IRA") appeal to the Board, alleging that the DOJ's actions against him violated the Whistleblower Protection Act ("WPA"). Particularly, Mr. Miller asserted that he made protected whistleblower disclosures under 5 U.S.C. § 2302(b)(8) and that they contributed to his effective reassignment out of the Superintendent of Industries position, which he contended was a personnel action under 5 U.S.C. § 2302(a)(2)(A). Mr. Miller claimed as protected his October 2009 fund-mismanagement disclosure and his December 2009 factory-sabotage disclosure.

The Administrative Judge agreed with Mr. Miller that both his October 2009 and December 2009 disclosures were protected under § 2302(b)(8). The A.J. also found that, applying the 5 U.S.C. § 1221(e)(1) "knowledge/ timing" test, Mr. Miller's disclosures contributed to his reassignment, which the A.J. found to be a personnel action under § 2302(a)(2)(A). Because the A.J. found that Mr. Miller made a protected disclosure and suffered an adverse personnel action, the burden shifted to the Government to show by clear and convincing evidence that it would have reassigned Mr. Miller regardless of his protected disclosures. The A.J. found that the Government met this burden. The A.J. relied almost entirely on testimony from Warden Upton in reaching this finding. The Government had also presented one of Mr. Miller's supervisors at UNICOR, Brad Beus, as a witness, but the Government presented no testimony or documentary evidence from OIG, the group Warden Upton testified directed him to reassign Mr. Miller.

***1257** Mr. Miller petitioned the full Board for review of the A.J.'s decision. The Board affirmed the A.J.'s initial decision, and it became the Board's final decision. Mr. Miller appeals to us, and we have jurisdiction under 5 U.S.C. § 7703(a)(1), (b)(1).

DISCUSSION

I.

IRA appeals brought under the WPA operate in a burden-shifting framework. The burden lies with the employee to show "by a preponderance of the evidence that he or she made a protected disclosure under § 2302(b)(8) that was a contributing factor to the employee's [personnel action]." *Whitmore v. Dep't of Labor*, 680 F.3d 1353, 1367 (Fed. Cir. 2012) (citing 5 U.S.C. § 1221(e)). "If the employee establishes this prima facie case of reprisal for whistleblowing, the burden of persuasion shifts to the agency to show by clear and convincing evidence that it would have taken 'the same personnel action in the absence of such disclosure,' " *id.* (quoting § 1221(e)), which we sometimes refer to as a showing of "independent causation," *see, e.g.*, *Kewley v. Department of Health & Human Services*, 153 F.3d 1357, 1364 (Fed. Cir. 1998).

[1] [2]In evaluating whether the Government has successfully rebutted an employee's prima facie case by demonstrating independent causation, this court has approved of the use of three, albeit nonexclusive, factors described in *Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999):

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

But, "[t]o be clear, *Carr* does not impose an affirmative burden on the agency to produce evidence with respect to each and every one of the three *Carr* factors to weigh them each individually in the agency's favor." *Whitmore*, 680 F.3d at 1374. Rather, "[t]he factors are merely appropriate and pertinent considerations for determining whether the agency carries its burden of proving by clear and convincing evidence that the same action would have been taken absent the whistleblowing." *Id.*

By statute, we set aside the judgment of the Board if the decision is "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." 5 U.S.C. § 7703(c); *see also Whitmore*, 680 F.3d at 1366.

II.

The Government does not dispute the Board's threshold determination that Mr. Miller made a prima facie showing that his disclosures were WPA-protected and that they contributed to his reassignment. Thus, the burden shifted to the Government to show independent causation. The issue before us is whether substantial evidence supports the Board's determination that the Government showed independent causation by clear and convincing evidence. We conclude that it does not.

A. Burden of Proof and Standard of Review

[3] [4]Independent causation is established upon clear and convincing evidence. " 'Clear and convincing' evidence has been described as evidence which produces in the mind of the trier of fact an abiding conviction that the truth of a factual contention ***1258** is 'highly probable.' " *Price v. Symsek*, 988 F.2d 1187, 1191 (Fed. Cir. 1993) (quoting *Buildex, Inc. v. Kason Indus., Inc.*, 849 F.2d 1461, 1463 (Fed. Cir. 1988)); *see also Colorado v. New Mexico*, 467 U.S. 310, 316, 104 S.Ct. 2433, 81 L.Ed.2d 247 (1983). The clear and convincing burden of proof "imposes a heavier burden upon a litigant than that imposed by requiring proof by preponderant evidence but a somewhat lighter burden than that imposed by requiring proof beyond a reasonable doubt." *Id.* (citing *Buildex*, 849 F.2d at 1463).

We have explained before that "there is no doubt that Congress considered it very important that federal agencies be required to clearly and convincingly rebut a prima facie case of whistleblower retaliation," while quoting legislative history that describes the significance of the Government's burden:

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

Whitmore, 680 F.3d at 1367 (quoting 135 Cong. Rec. H747–48 (daily ed. Mar. 21, 1989) (explanatory statement on Senate Amendment to S. 20)).

[5] [6]We review the Board's finding of independent causation for substantial evidence. *Kewley*, 153 F.3d at 1364. "Substantial evidence ... means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 229, 59 S.Ct. 206, 83 L.Ed. 126 (1938). "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *Jacobs v. Dep't of Justice*, 35 F.3d 1543, 1546 (Fed. Cir. 1994) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488, 71 S.Ct. 456, 95 L.Ed. 456 (1951)). "Any determination by an AJ that is based on findings made in the abstract and independent of the evidence which fairly detracts from his or her conclusions is unreasonable and, as such, is not supported by substantial evidence." *Whitmore*, 680 F.3d at 1376.

[7]This court's prior opinions recognize the interrelatedness of the burden of proof a party must satisfy to win its case—here, clear and convincing evidence—and our standard of appellate review—substantial evidence in this instance. The burden of proof a party faces necessarily impacts our review on appeal:

> Substantial evidence is not a fixed quantum of evidence: What is or is not substantial may only be determined with respect

to the burden of proof that the litigant bore in the trial court. "For example, in reviewing whether the evidence supports a finding of fact ... the decision might be affirmed if the standard of proof below were 'weight of evidence' and might be reversed on the same record if the standard of proof were 'clear and convincing' evidence."

***1259** *Eli Lilly & Co. v. Aradigm Corp.*, 376 F.3d 1352, 1363 (Fed. Cir. 2004) (omission in original) (quoting *SSIH Equip. S.A. v. U.S. Int'l Trade Comm'n*, 718 F.2d 365, 383 (Fed. Cir. 1983) (Nies, J., additional comments)); *see also Jackson v. Veterans Admin.*, 768 F.2d 1325, 1330 & n.5 (Fed. Cir. 1985). Indeed, our prior WPA decisions consistently describe the clear and convincing evidentiary burden as embedded within our substantial evidence appellate review. *See, e.g.*, *Greenspan v. Dep't of Veterans Affairs*, 464 F.3d 1297, 1306 (Fed. Cir. 2006) ("We have not been shown *substantial evidence* in support of the agency's burden to establish *by clear and convincing evidence* that it would have taken these disciplinary actions absent the protected disclosures." (emphases added)).[3]

B. *Carr* Factor Analysis

With this background in mind, we review the Board's analysis of the *Carr* factors.

[8] [9]The first *Carr* factor is "the strength of the agency's evidence in support of its personnel action." *Carr*, 185 F.3d at 1323. We do not focus our review of this *Carr* factor on whether the agency has put forward some evidence purporting to show independent causation, but instead we focus on whether such evidence is strong. *See id.* at 1323–24. The Board in this case relied nearly exclusively on Warden Upton's testimony to conclude that this factor weighed in the Government's favor. A considerable amount of the relied-on testimony consisted of Warden Upton's recollection of things OIG told him. We hold that no reasonable factfinder could find Warden Upton's conclusory testimony about how OIG directed him to be strong evidence of independent causation.[4] Thus, this *Carr* factor could not favor the Government as the Board concluded.

The Government and the dissent rely on three pieces of allegedly substantial evidence of a strong showing of independent causation: (1) Warden Upton's testimony that he took action because OIG told him Mr. Miller might interfere with the investigation; (2) Mr. Miller's testimony that Warden Upton told him that OIG told the Warden to reassign Mr. Miller; and (3) Warden Upton's testimony that he continued to reassign Mr. Miller because OIG told him that Mr. Miller was interfering with the investigation. Dissent 1265–266. But Warden Upton's conclusory testimony ***1260** about OIG's statements is not made more sufficient or clear and convincing simply by being repeated several times. Indeed, this evidence all collapses into essentially supporting the same basic conclusion—OIG told Warden Upton to reassign Mr. Miller because he might interfere with the investigation. The Government's evidence is weak, particularly when considered in light of the record evidence endorsing Mr. Miller's character.

The Government introduced no evidence to explain how Mr. Miller, whose second protected disclosure related to the OIG investigation, could either compromise or be a target of an investigation into the very type of activities that he reported. To the contrary, the only evidence regarding Mr. Miller's character was his "outstanding" performance review and Warden Upton's testimony that Mr. Miller was "a fantastic employee" who was "confident, organized, ... [and] very on top of things." J.A. 90–92. Warden Upton further testified that Mr. Miller "[w]as willing to do anything that you asked him to do" and that he "sought out additional duties." Warden Upton testified that he had "absolutely no concerns" about Mr. Miller, "a very good employee" who served on his executive staff, and Warden Upton testified that he had no reason to place him under investigation. *Id.* To reach the conclusion the Government suggests—that OIG directed the reassignment of Mr. Miller to various menial jobs and ultimately the couch for four and a half years for fear that he would interfere with an investigation allegedly targeting him—a reasonable fact finder would have to conclude that Mr. Miller made his protected disclosures of mismanagement as part of a cover-up. The record is devoid of any evidence supporting such a theory. To the contrary, the record demonstrates that Mr. Miller was a twenty-one-year employee of the Federal Bureau of Prisons and former U.S. Marine who was concerned about the quality of the advanced combat helmets manufactured by the prison factory. The record further demonstrates that Mr. Miller was a valued executive, whose expertise and attention to detail made his product line one of the most successful in the Agency.

Warden Upton's testimony was the only evidence supporting the seemingly unusual basis for Mr. Miller's four-and-a-half year reassignment following his protected disclosures. Yet the Warden could not testify as to significant details, such as who

at OIG he communicated with. The Government failed to present any other witness testimony to support its argument that Mr. Miller was removed out of concern that he might somehow interfere with the OIG investigation. Mr. Beus—who was Mr. Miller's supervisor at the Government-owned corporation that operated the factory, UNICOR—was the Government's only other witness and he did not corroborate Warden Upton's testimony. While Mr. Beus testified about Mr. Miller's protected disclosures and the OIG investigation generally, his only testimony regarding Mr. Miller's reassignment was that he had no input into the reassignment decision. J.A. 501–02 ("Q: Okay. So did you have any input in Mr. Miller being removed from his position as [Superintendent of Industries] on that day? A: No."). He did not testify as to who made the reassignment decision or for what reason.

The Government also failed to present any documentary evidence supporting its position. Mr. Miller was repeatedly reassigned over the course of a four-and-a-half year period, and for each step, the Government did not present a single email, memorandum, or personnel action form documenting or providing the bases for the agency's action. Common sense tells us that these repeated reassignments, occurring over a significant span of time, are the ***1261** types of personnel actions for which papers would normally attach.

To be clear, we do not hold today that testimony must be corroborated to support a showing of independent causation, although that is one of potentially many ways that the Government could have made its weak evidentiary showing stronger in this case. Likewise, we do not accept Mr. Miller's invitation to view Warden Upton's testimony as not credible. *See Chambers v. Dep't of Interior*, 515 F.3d 1362, 1370 (Fed. Cir. 2008) (holding the Board's "credibility determinations are 'virtually unreviewable' at this level" (quoting *Hambsch v. Dep't of Treasury*, 796 F.2d 430, 436 (Fed. Cir. 1986))). But even taking the Warden's testimony at face value, we conclude that his bare testimony about what OIG directed him to do affords only minimal support for Mr. Miller's removal when considered in light of the remainder of the record in this case, including the Board's unchallenged findings that Mr. Miller made protected disclosures, that those disclosures contributed to his removal, and that Mr. Miller was by all accounts an outstanding employee. Without introducing any other testimony or documentary evidence—for example, from OIG, the group that the Warden testified, *see* J.A. 118, and the Government concedes, *see* Oral Argument at 37:32–55, drove the December 2009 reassignment decision—there is a significant weakness in the quantum of the Government's evidence going towards the first *Carr* factor. By pointing to the lack of corroboration, the dearth of documents, emails, or records, and even the lack of detail in Warden Upton's recollection, we are not assessing Warden Upton's credibility. Rather, we are doing precisely what our review of this *Carr* factor demands: assessing whether a factfinder could reasonably conclude that the Government presented strong evidence of independent causation. We conclude that one could not and that this factor, therefore, could not cut in the Government's favor as the Board found.

The second *Carr* factor is "the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision." *Carr*, 185 F.3d at 1323. The A.J. found that Warden Upton had "little or no motive to retaliate against" Mr. Miller. J.A. 136. In reaching this conclusion, the A.J. relied on the fact that Warden Upton did not exercise direct oversight over the factory and the Warden's testimony that it did not matter much to him whether the factory turned a profit.

While the Board's analysis of this factor was reasonable, we note that the Warden testified that he did, in fact, have an interest in the ongoing operation of the prison factory to keep inmates "out of trouble" and occupied, instead of sitting around for months at a time. The Warden also testified that a possible shutdown of the factory would "create concern," because "you have to figure out how that fits into your daily operational plan." J.A. 116–17. And regarding the A.J.'s reliance on the Warden's lack of direct factory oversight, we have previously admonished the Board for taking a dismissive approach to the retaliatory motive *Carr* factor merely because a supervisor isn't directly involved in the work at issue in an employee's protected disclosure. In *Whitmore*, the A.J. found no evidence that the removing officials had a retaliatory motive against the employee because they were outside of his chain of command and were not implicated by his whistleblowing. 680 F.3d at 1370–71. We found that this analysis took "an unduly dismissive and restrictive view of *Carr* factor two," *id.* at 1370, and remanded with instructions for broader consideration of this factor, *id.* at 1372. We explained that "[t]hose responsible for the agency's performance ***1262** overall may well be motivated to retaliate even if they are not directly implicated by the disclosures, and even if they do not know the whistleblower personally, as the criticism reflects on them in their capacities as managers and employees." *Id.* at 1370 (citations omitted).

We also find it concerning that the A.J. made a finding regarding Warden Upton's retaliatory motive, but none regarding OIG's motive. The precise language from *Carr* makes clear that this factor should be evaluated more generally, as the factor

is directed towards "agency officials who were involved in the decision," not just the employee's direct supervisor. *Carr*, 185 F.3d at 1323; *see also Whitmore*, 680 F.3d at 1371 ("[A]n agency official's merely being outside that whistleblower's chain of command, not directly involved in alleged retaliatory actions, and not personally named in the whistleblower's disclosure is insufficient to remove the possibility of a retaliatory motive or retaliatory influence on the whistleblower's treatment."). Considering that, in this case, it was OIG that purportedly directed the Warden to reassign Mr. Miller, it would seem important in this case to examine whether one could impute a retaliatory motive to OIG.

Given these considerations, the evidence for this factor does not unfailingly support the Government. Nonetheless, given the Warden's testimony that he had no reason to be concerned about the factory's profits, the Board's conclusion that this factor ultimately tips in the Government's favor is reasonable.

The third and final *Carr* factor is "any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated." *Carr*, 185 F.3d at 1323. The A.J. found that there was no basis for evaluating this factor because Warden Upton testified that no other similar investigations involving members of his executive staff occurred during his tenure as Warden.

The Government took an exceedingly narrow approach in addressing this factor. The Warden's testimony shows there to be a lack of similarly situated non-whistleblowers only at the Beaumont prison facility working on the Warden's four-member executive staff specifically and only during his tenure there. The Government introduced no evidence as to what actions it takes against other DOJ employees during OIG investigations despite this factor being directed to the "agency" rather than to a particular supervisor at a particular Federal Bureau of Prisons facility. It may be the case that the DOJ transfers employees pending investigation by OIG with some regularity, but the Government has put forward no evidence of that here. The Government provided no evidence that the treatment of Mr. Miller is comparable to similarly situated employees who are not whistleblowers, and the court may not simply guess what might happen absent whistleblowing. The burden lies with the Government.

The Government bears the risk associated with having no evidence on record for this factor. For while we have indicated that "the absence of any evidence relating to *Carr* factor three can effectively remove that factor from the analysis," we further explained that the Government's failure to produce evidence on this factor "may be at the agency's peril" considering the Government's advantage in accessing this type of evidence. *Whitmore*, 680 F.3d at 1374 (internal citations omitted). Indeed, "the absence of any evidence concerning *Carr* factor three may well cause the agency to fail to prove its case overall." *Id.* Thus, this factor adds little to the overall analysis in this case, but if anything, tends to cut slightly against the Government.

***1263** Considering the record as a whole, we are struck by the want of evidence presented by the Government to show independent causation. Although the Government adduced some evidence for *Carr* factor two, the strength of its independent causation evidence (*Carr* factor one) was weak, and it adduced no evidence whatsoever for *Carr* factor three. While we again recognize that the Government need not introduce evidence for each *Carr* factor, or prove that each weighs in its favor to meet its burden, *id.* we cannot say that substantial evidence supports a finding that the Government clearly and convincingly proved independent causation in this case. The Government must do more than it did here to satisfy the "high burden of proof" that Congress demanded in cases where the employee has already shown that whistleblowing was a contributing factor and the burden shifts to the Government to show independent causation. *Id.* at 1367 (quoting 135 Cong. Rec. H747–48 (daily ed. Mar. 21, 1989) (explanatory statement on Senate Amendment to S. 20)). Thus, we conclude that there is not substantial evidence to support the Board's determination that the Government proved by clear and convincing evidence that it would have reassigned Mr. Miller even in the absence of his protected disclosures.

Contrary to the dissent's suggestion, we do not hold that Warden Upton is not credible or that his testimony requires corroboration as a matter of law. Nor have we reweighed the evidence. The dissent accuses our opinion of having a breadth that it simply does not have. We merely hold that, in this case, there is a failure of proof because the Government did not meet its burden. Congress instituted a particular statutory framework for analyzing whistleblower cases, including a heightened burden of proof once the whistleblower has established by a preponderance of the evidence that whistleblowing was a contributing factor in a personnel action. "This heightened burden of proof required of the agency recognizes that when it comes to proving the basis for an agency's decision, the agency controls most of the cards—the drafting of the documents supporting the decision, the testimony of witnesses who participated in the decision, and the records that could document whether similar personnel actions have been taken in other cases." *Id.* Here, there is a dearth of evidence establishing

independent causation: no testimony other than Warden Upton's conclusory testimony, no documents whatsoever supporting the agency's action, and no records to document similar actions in other cases.

The dissent also alleges that we fail to "cite to a single piece of affirmative evidence that Mr. Miller was reassigned for whistleblowing." Dissent 1269. But the dissent wholly ignores what the Board already found and the Government does not dispute on appeal: Mr. Miller "made protected disclosures under 5 U.S.C. § 2302(b)(8) that were a contributing factor in the decision to reassign him." *Miller v. Dep't of Justice*, No. DA–1221–11–0401–W–3, 2015 WL 1548991 (M.S.P.B. Apr. 8, 2015). Thus, our review is strictly limited to whether the Government met its steep burden to show independent causation guided by the *Carr* factors, in which the dissent fails to ground its discussion.

Finally, the dissent accuses our opinion of failing "to appreciate the impact of [this] decision on the agency" and Warden Upton[5] because the agency likely will be ***1264** required to report this case to Congress. Dissent 1269. But sympathy for the agency does not bear on the question before us. The statutory framework this court must follow requires us to consider whether a reasonable fact finder could find the Government met its "heavy burden to justify its actions" after the employee had already established that whistleblowing was a contributing factor in the action. *Whitmore*, 680 F.3d at 1367 (quoting 135 Cong. Rec. H747–48 (daily ed. Mar. 21, 1989) (explanatory statement on Senate Amendment to S. 20)). We conclude that, in this case, one could not.

CONCLUSION

For the foregoing reasons, we reverse the Board's decision and remand for further proceedings including determination of the remedy appropriate for the improper personnel action.

REVERSED AND REMANDED

COSTS

Costs to Petitioner.

Reyna, Circuit Judge, concurring.

I concur with the majority opinion. I write separately to elaborate on why the Board erred in evaluating the second *Carr* factor: "the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision." *Carr v. Soc. Sec. Admin.*, 185 F.3d 1318, 1323 (Fed. Cir. 1999). Warden Upton testified that Mr. Miller was "a fantastic employee" whom he reassigned only because OIG directed him to do so. Thus, not only was OIG "involved in the decision," but the record suggests that OIG—not Warden Upton—was the *de facto* decisionmaker here.

A "Cat's Paw" theory applies when an individual with knowledge of the protected disclosure influences another official to reassign the employee. Thus, the official making the reassignment is simply channeling the wishes of the *de facto* decisionmaker. We have not addressed the Cat's Paw theory in a published whistleblower decision, but the Supreme Court addressed it in a different context, writing, "[I]f a supervisor performs an act motivated by antimilitary animus that is *intended* by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable" under the relevant statute. *Staub v. Proctor Hosp.*, 562 U.S. 411, 424, 131 S.Ct. 1186, 179 L.Ed.2d 144 (2011). Here, Warden Upton performed an act intended to cause an adverse employment action but insists that he was following OIG's orders. Given Warden Upton's positive reviews of Mr. Miller's job performance, it seems unlikely that he would have reassigned Mr. Miller absent OIG's influence. Yet the Board never questioned whether OIG in fact directed Mr. Miller's reassignment or its motivation for doing so. *See* J.A. 126–27 (evaluating only Warden

Upton's retaliatory motive).[1]

In *Whitmore v. Department of Labor*, 680 F.3d 1353 (Fed. Cir. 2012), we noted that once an employee makes a prima facie case, the Board is not limited to evaluating the retaliatory motives of agency officials directly in the whistleblower's chain of ***1265** command. *Id.* at 1371. Instead, the Board should consider the possible retaliatory motives of any official who appears to have influenced the adverse employment action. Thus, at minimum, I would remand for the Board to determine OIG's role and motivation in Mr. Miller's reassignment in the first instance.

The dissent questions what OIG's possible retaliatory motive could be in light of OIG's role to protect whistleblowers. But answering that question is not Mr. Miller's burden. The parties agreed that Mr. Miller made a prima facie case, thus shifting the burden to the Government to show independent causation by clear and convincing evidence. As the majority opinion notes, it failed to do so. The Government's failure to explain OIG's obvious role in Mr. Miller's reassignment only highlights the lack of clear and convincing evidence of independent causation.

Hughes, Circuit Judge, dissenting.

In a whistleblower case where an employee makes a prima facie case of whistleblower reprisal, the burden shifts to the agency to prove by clear and convincing evidence that it took the adverse action for a reason other than whistleblower reprisal. Whether the agency had a non-retaliatory reason is a factual determination, which we review for substantial evidence. Here, the Board made that factual determination relying largely on the unrebutted, credible testimony of Warden Upton, the agency official responsible for taking the adverse action. As Warden Upton testified, and the Board found, Mr. Miller was reassigned to other job duties at OIG's request so as not to interfere with an official investigation.

The majority nowhere suggests that this reason, if true, would have been insufficient to satisfy the agency's burden. Nor does the majority anywhere directly question Warden Upton's credibility, or his testimony that Mr. Miller's interference with the investigation was the actual reason for the reassignment. Thus, the majority's reasoning would seem to lead to the following conclusions: first, the deciding official credibly testified that the reason he took the adverse action was at OIG's request; second, the majority has no reason to question this testimony or overturn the Board's implicit credibility determination that the official testified truthfully; and third, the reason given—Mr. Miller's interference with the investigation—would have met the clear and convincing evidence standard if true. These three conclusions, which can all be gleaned from the majority's opinion, require us to affirm.

Instead the majority concludes, on some undefined notion of substantial evidence, that there should be "more" here. Specifically, the majority states that the lack of "any other testimony or documentary evidence—for example, from OIG" presents a "significant weakness" in the Government's case, Maj. Op. at 1261, and that the "Government must do more than it did here to satisfy the 'high burden of proof' " that is required in whistleblower reprisal cases, *id.* at 1263. But substantial evidence requires only "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229, 59 S.Ct. 206, 83 L.Ed. 126 (1938), and the Board's factual conclusions, each of which is supported by substantial evidence, would be sufficient for a reasonable person to conclude that Mr. Miller was reassigned for reasons independent of whistleblower reprisal.

Thus, there are only three possible explanations for the majority's conclusion, all of which conflict with this Court's precedent.

The first and most likely explanation is that the majority simply disregards our ***1266** deferential standard of review. The majority reaches beyond our deference standard to re-weigh the evidence and conclude that "given the other evidence of record, the Government's sole reliance on [Warden Upton's] conclusory and unsupported testimony was not enough to satisfy the Government's burden." Maj. Op. at 1264 n.5. The majority appears to base its heightened review standard on the argument that we must take the underlying burden of proof—clear and convincing evidence—into consideration in our review on appeal, *id.* at 1257–258, and goes so far as to say that our "focus" is "on whether [the agency's evidence purporting to show independent causation] is strong," *id.* at 1259. I do not dispute that we must take into account the

Government's burden to show independent causation by clear and convincing evidence. However, this does not transform our assessment into a de novo review, and our precedent does not dictate that this Court's standard of review is to assess the strength of the agency's evidence de novo. *See Carr v. Soc. Sec. Admin.*, 185 F.3d 1318, 1323–24 (Fed. Cir. 1999) (noting that the Board, not this Court, considers the strength of the agency's evidence in support of its personnel action). Rather, established precedent dictates that we are only tasked with evaluating whether a reasonable fact finder could have arrived at the Board's determination that Mr. Miller was reassigned for reasons independent of his protected disclosures. *See In re Gartside*, 203 F.3d 1305, 1312 (Fed. Cir. 2000) (the substantial evidence standard "asks whether a reasonable fact finder could have arrived at the agency's decision").

Ample evidence exists to support the Board's factual finding that the agency demonstrated, by clear and convincing evidence, that the reason for Mr. Miller's reassignment was to prevent him from interfering with an OIG investigation. First, of course, is the consistent and credible testimony of Warden Upton, the deciding official who took the action. *See, e.g.*, J.A. 542–45 (Warden Upton testifying that OIG asked him to reassign Mr. Miller because of the investigation). Second is Mr. Miller's own testimony about the reason for the reassignment. *Id.* at 273 (Mr. Miller testifying that Warden Upton told him to leave the factory on December 15, 2009, due to the OIG investigation); *id.* at 283 (Mr. Miller testifying that Warden Upton told him he was being reassigned on December 16, 2009, because Miller had purportedly sent an email to the staff urging them not to cooperate with the OIG investigation). And, third is the fact that Mr. Miller had to be reassigned to other positions within the Bureau of Prisons because he did, in fact, continue to attempt to interfere with the investigation. *Id.* at 546–50 (Warden Upton testifying that Mr. Miller was removed from subsequent positions because he had conversations with inmates and monitored calls to gain information about the investigation). Although a different fact-finder might not have believed Warden Upton or the agency's account, we are not permitted to re-weigh or recharacterize the evidence as the majority does. *See* Maj. Op. at 1260 (concluding that there is no evidence that Mr. Miller could either compromise or be a target of an investigation that his protected disclosure related to).

Second, even as the majority denies that it is questioning Warden Upton's credibility, it essentially determines that his testimony is insufficient and the reasons he gave for the reassignment are not the truth. That, of course, we cannot do. *See Hambsch v. Dep't of the Treasury*, 796 F.2d 430, 436 (Fed. Cir. 1986) (credibility determinations are "virtually unreviewable"). There is no evidence to suggest that Warden Upton lied about his rationale for reassigning Mr. Miller. Warden Upton ***1267** consistently testified that he reassigned Mr. Miller due to the pending OIG investigation and at OIG's request. The Board was never presented with contrary testimony. The majority faults Warden Upton's testimony for his failure to "testify as to significant details, such as who at OIG he communicated with." Maj. Op. at 1260. But the majority fails to consider that Warden Upton testified about Mr. Miller's reassignment more than four years after the reassignment took place. And, in any event, the fact that Warden Upton could not remember those details goes to the credibility of his testimony, which is a question for the Board and not for us. The majority also neglects to take into account that Mr. Miller himself testified that Warden Upton explained to him on multiple occasions that he was being reassigned because of the OIG investigation. *See, e.g.*, J.A. 273, 283. The majority has to find a lack of substantial evidence to support the Board's factual finding, and cannot premise its decision on its own belief that something more happened here. *See Kewley v. Dep't of Health & Human Servs.*, 153 F.3d 1357, 1364 (Fed. Cir. 1998) (affirming the finding of independent causation by looking only to the evidence "expressly relied upon by the AJ [Administrative Judge]").[1]

The third, and perhaps the most damaging explanation for the majority's opinion, is that it has *sub silentio* imposed a corroboration requirement for a deciding official's testimony. Even though the majority denies that it is doing so or even that it is questioning Warden Upton's credibility, I can think of no other explanation for its criticisms that Warden Upton's testimony was the "only evidence supporting the seemingly unusual basis for Mr. Miller's four-and-a-half-year reassignment,"[2] and "[t]he Government failed to present any other witness testimony to support its argument that Mr. Miller was removed out of concern that he might somehow interfere with the OIG investigation." Maj. Op. at 1260. The majority also suggests that there would have been documentation of repeated reassignments. *Id.* at 1260. The majority's "common sense" speculation is unfounded and inconsistent with federal personnel law. Official personnel documents are generated for changes in grade, pay, official duty station and the like, not temporary reassignments. Contrary to the majority's assertion, I would not expect any kind of official documentation to exist for Mr. Miller's reassignments which did not involve a change in position, pay or official duty station. *See* United States Office of Personnel Mgmt., Guide to Processing Personnel Actions (2016), https://www.opm.gov/policy-data-oversight/data-analysis-documentation/personnel-documentation/#url=Processing-Personnel-Actions.

The majority's use of a corroboration requirement is the only explanation that ***1268** would suffice for it to hold that a deciding official's credible testimony is insubstantial or false. There is no one with better firsthand knowledge to testify about the reasons for a personnel action than the person responsible for taking it. Warden Upton was indisputably Mr. Miller's direct supervisor and had the authority to reassign him. While an agency official could certainly lie about his or her decision to reassign an employee, that is largely a credibility determination for the Board to make. And, the majority appears to concede that Warden Upton, the agency official in this case, provided credible testimony. *See* Maj. Op. at 1261.

The majority's erroneous findings are further highlighted through its conclusion that Warden Upton's "bare testimony about what OIG directed him to do affords only minimal support for Mr. Miller's removal" in light of other evidence. *Id.* This other evidence includes the Board's "unchallenged findings" that Mr. Miller made protected disclosures that contributed to his removal, and Mr. Miller's record as an "outstanding employee." Maj. Op. at 1261. As a preliminary matter, while the Board did find that Mr. Miller made a prima facie case that he made a protected disclosure that was a contributing factor in the reassignment, J.A. 132–35, the burden then shifted to the agency to demonstrate by clear and convincing evidence that it would have made the reassignment in the absence of the disclosures. J.A. 135. That is the sole issue on appeal here, and the *Carr* factors—which the majority concedes govern here—do not consider the employee's success in making a prima facie case of whistleblower reprisal. Indeed, it is the employee's success in doing so that mandates the consideration of the *Carr* factors in the separate inquiry into the agency's reasons for the reassignment. Furthermore, the majority mischaracterizes both the Board's finding and the Government's position as conceding that Mr. Miller's disclosures contributed to his reassignment. Maj. Op. at 1263 ("But the dissent wholly ignores what the Board already found and the Government does not dispute on appeal: Mr. Miller 'made protected disclosures under 5 U.S.C. § 2302(b)(8) that were a contributing factor in the decision to reassign him.' " (quoting *Miller v. Dep't of Justice*, No. DA–1221–11–0401–W–3, 2015 WL 1548991 (M.S.P.B. Apr. 8, 2015))). In fact, the opposite is the case. The Government asserted and the Board clearly found that Mr. Miller's disclosures did not contribute to his reassignments, which is why his whistleblower claims were rejected. *See* J.A. 146 ("[T]he record demonstrates that the appellant's initial and successive reassignments were precipitated by an external OIG investigation."); Resp. Br. at 10–12.

The majority also apparently believes that OIG is so closely tied to the agency that an OIG representative should have testified as to Mr. Miller's removal, and that the Board should have assessed whether OIG had a possible retaliatory motive.[3] That suggestion evidences a misunderstanding ***1269** of the role of the Inspectors General in our federal government. The OIGs are, by congressional design, objective units independent from the respective agencies. Their purpose is, among other things, to detect fraud and abuse. *See* Inspector General Act of 1978, Pub. L. 95–452, § 2, 92 Stat. 1101 (1978). And, in doing so, they often rely on reports from whistleblowers. *See* 5 U.S.C. § 2302(b)(8)(B) (protecting whistleblower disclosures to the Inspectors General). To suggest that the OIG would retaliate against a whistleblower flies in the face of its congressionally mandated mission. But this discussion is beside the point because there is no evidence that OIG had a retaliatory motive. It is purely speculative and has no place in a substantial evidence review.[4]

In any event, there is no dispute that Warden Upton was Mr. Miller's direct supervisor and had the sole authority to reassign him. Therefore, the majority errs in faulting the Government for failing to provide testimony from OIG.

Finally, the majority fails to appreciate the impact of its decision on the agency. The majority's reversal of the Board's decision likely means that Mr. Miller will succeed in his claim of whistleblower reprisal since the Court has now ruled that the agency failed to rebut his prima facie case. Under the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (the No FEAR Act), the agency likely will be required to report this case to Congress. *See* Pub. L. 107-174, § 203, 116 Stat. 569 (2002). The majority's decision will require this report even though the majority cannot cite to a single piece of affirmative evidence that Mr. Miller was reassigned for whistleblowing. In addition, Warden Upton will be associated with taking a personnel action that the majority now labels as whistleblower retaliation, even though the Board found his testimony credible and there is nothing in the record to indicate that he either lied or reassigned Mr. Miller for whistleblowing activity. Thus, the majority's opinion not only does damage to the law, but also harms, without any evidence of wrongdoing, a government supervisor with over 20 years of federal service.

At the end of the day, after denying that it is making a de novo credibility determination or imposing a corroboration requirement for the deciding official's testimony, the majority's basis for reversing the Board's decision seems to be that something "more" was required. But our statutorily limited scope of review over Board decisions conflicts with the

majority's requirement for "more." *See* 5 U.S.C. § 7703(c)(3) (as applicable here, we may only "hold unlawful and set aside any agency action, findings, or conclusions found to be ... unsupported by substantial evidence"). I don't dispute that additional evidence, such as more detailed testimony from Warden Upton about OIG's request to reassign Mr. Miller—for example, the requesting investigator's name, or an affidavit from OIG averring to the requested ***1270** reassignment—would certainly have bolstered the agency's case. But these considerations are only relevant to either credibility or corroboration, the first of which we do not review, and the second of which the majority disclaims.

"Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established." *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1351 (Fed. Cir. 2006). A reviewing court must consider the record as a whole, including that which "fairly detracts from its weight." *Id.* Having pointed to no evidence that detracts from Warden Upton's testimony and, indeed, disclaiming any attack on his credibility, the majority nevertheless concludes that his testimony is insufficient for a reasonable mind to accept. Or put simply, the deciding official's credible and uncontradicted testimony about the non-retaliatory reason he took the disputed action is insufficient to establish that the action was non-retaliatory. I have never heard of such an application of the substantial evidence standard that rejects uncontradicted, truthful testimony in favor of unfounded speculation about what might have happened or what more the agency should have done.

Under the proper application of the substantial evidence review standard, I would affirm the Board's decision. From the majority's contrary conclusion, I respectfully dissent.

All Citations

842 F.3d 1252, 41 IER Cases 1464

Footnotes

1 Warden Upton testified that the prison helmet factory closed somewhere between August and September 2011, nearly two years after Mr. Miller was initially reassigned out of the helmet factory. Mr. Miller received notification that he was being permanently reassigned from the Superintendent of Industries position to the position of Camp Administrator because of the factory closing.

2 Mr. Miller testified that the night shift was not desirable, and that he had not previously worked in the special housing unit.

3 *See also Briley v. Nat'l Archives & Records Admin.*, 236 F.3d 1373, 1381 (Fed. Cir. 2001); *Agoranos v. Dep't of Justice*, 602 Fed.Appx. 795, 805 (Fed. Cir. 2015); *Losada v. Dep't of Def.*, 601 Fed.Appx. 940, 943 (Fed. Cir. 2015); *Cassidy v. Dep't of Justice*, 581 Fed.Appx. 846, 847 (Fed. Cir. 2014); *McCarthy v. Int'l Boundary & Water Comm'n*, 497 Fed.Appx. 4, 14 (Fed. Cir. 2012); *Porzillo v. Dep't of Health & Human Servs.*, 369 Fed.Appx. 123, 127 (Fed. Cir. 2010); *Wadhwa v. Dep't of Veterans Affairs*, 353 Fed.Appx. 435, 438 (Fed. Cir. 2009); *Pedeleose v. Dep't of Def.*, 343 Fed.Appx. 605, 609–10 (Fed. Cir. 2009); *King v. Dep't of Veterans Affairs*, 276 Fed.Appx. 996, 998 (Fed. Cir. 2008); *Dennis v. Dep't of Veterans Affairs*, 191 Fed.Appx. 961, 964 (Fed. Cir. 2006); *Tomei v. Dep't of Educ.*, 113 Fed.Appx. 920, 923 (Fed. Cir. 2004); *Kraushaar v. Dep't of Agric.*, 60 Fed.Appx. 295, 298 (Fed. Cir. 2003); *Meyers v.Dep't of Veterans Affairs*, 33 Fed.Appx. 523, 527 (Fed. Cir. 2002); *Maston v. Dep't of Justice*, 10 Fed.Appx. 937, 942 (Fed. Cir. 2001); *Beadling v. Dep't of Justice*, 4 Fed.Appx. 798, 801 (Fed. Cir. 2001); *Gray v. Dep't of Interior*, 250 F.3d 763 (Fed. Cir. 2000) (non-precedential); *Bristow v. Dep't of Army*, 232 F.3d 908 (Fed. Cir. 2000) (non-precedential).

4 The parties disagree as to whether such testimony constitutes hearsay or, rather, whether it falls within a hearsay exception. We find that resolving this dispute bears little on the ultimate issue. Hearsay may be admitted as preponderant evidence in Board proceedings "if, to a reasonable mind, the circumstances are such as to lend it credence." *Kewley*, 153 F.3d at 1364.

5 The dissent asserts that harm will come to Warden Upton as a result of our decision. We reiterate, however, that we do not question Warden Upton's veracity. We simply conclude that, given the other evidence of record, the Government's sole reliance on his conclusory and unsupported testimony was not enough to satisfy the Government's burden.

1 The dissent implies that Mr. Miller has waived a Cat's Paw theory argument. But the Board's failure to evaluate OIG's role in Mr. Miller's reassignment lends further support that its decision was not supported by substantial evidence. *See Jacobs v. Dep't of Justice*, 35 F.3d 1543, 1546 (Fed. Cir. 1994) ("The substantiality of evidence must take into account whatever in the record fairly detracts from its weight.").

[1] At times, the majority appears to suggest that, even if Warden Upton was telling the truth, the agency also was required to demonstrate that OIG had a clear and convincing non-retaliatory reason for requesting the reassignment. *See* Maj. Op. at 1262. ("We also find it concerning that the A.J. made a finding regarding Warden Upton's retaliatory motive, but none regarding OIG's motive."). But that type of "Cat's Paw" theory, *see, e.g.*, *Howard v. Dep't of Transp.*, 511 Fed.Appx. 984, 987 (Fed. Cir. 2013) (rejecting petitioner's theory that an individual with knowledge of a protected disclosure exerted influence on the managerial official who terminated the petitioner's employment), was not presented to the Board or to this Court.

[2] And I fail to see what is "unusual" about a reassignment decision made to cooperate with an OIG investigation. Surely, the majority is not suggesting that agencies refuse to cooperate with the Inspector General. And if "unusual" refers to the length, I see nothing in the record to suggest that 4.5 years is an "unusual" length of time for an OIG investigation.

[3] The concurrence goes further and suggests that the case should, in fact, be remanded for the agency to affirmatively demonstrate a lack of any retaliation by OIG. *See* Concurring Op. at 1264–265. But, as noted above, that theory of whistleblower retaliation was never presented to the Board or even suggested to this court—it was only suggested by members of the majority. An agency should not be required, under *Carr* factor two, to disprove theories of retaliation that were never presented to the Board and not part of the prima facie case. The burden does not shift to the agency until a prima facie case has been made which makes sense. A prima facie case is made by showing a protected disclosure, a prohibited personnel action, and knowledge of the disclosure within temporal proximity by the official taking the personnel action. *See, e.g.*, *Whitmore v. Dep't of Labor*, 680 F.3d 1353, 1367 (Fed. Cir. 2012). Our precedent does not require an agency to go further and disprove other possible retaliatory actions when no prima facie case has been made. And if it does, it ought to be corrected.

[4] It is, however, potentially dangerous dicta, to the extent it suggests, that OIG might have some affirmative duty to explain its reasoning for a reassignment during an investigation or provide evidence of why it is necessary for these reassignments to take place. The circumstances of their various investigations can and do involve extremely sensitive and/or potentially criminal actions. A requirement that OIG disclose anything to the agency it is investigating has the potential to damage an ongoing investigation.

End of Document

Nita H.,
Petitioner,

v.

Sally Jewell,
Secretary,
Department of the Interior
(National Park Service),
Agency.

Petition No. 0320110050
2014 WL 3788011
MSPB Nos. AT-0752-09-0860-I-1, AT-0752-09-0860-B-2

DECISION

On September 13, 2011, Petitioner filed a timely petition with the Equal Employment Opportunity Commission, asking for review of a Final Order issued by the Merit Systems Protection Board (MSPB) concerning her claim of discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. For the reasons stated below, we DIFFER with the MSPB's final order, which found no discrimination.

ISSUE PRESENTED

The EEOC found a supervisor had engaged in a discriminatory pattern of escalating adverse treatment towards Petitioner from 2006 to 2007, including suspending her for 10 days on August 13, 2007. In 2009, this same supervisor removed Petitioner, based in part on the supervisor's previous disciplinary actions against Petitioner, including the August 13, 2007 10-day suspension. The MSPB determined that the removal was not related to the supervisor's preceding discriminatory conduct and found no discrimination. The issue presented in this decision is whether the MSPB's decision is supported by the evidence in the record as a whole, which includes the evidence and findings from the EEOC case?

BACKGROUND

Petitioner (African-American) worked as a Fiscal Officer, GS-11, at the Southeast Regional Office of the National Park Service in Atlanta, Georgia. She received the highest performance ratings before a new Southeastern Regional Controller (Caucasian) became her first-level supervisor in November 2005. Davis v. Dep't of Interior, EEOC Hearing No. 410-2009-00062X (Aug. 24, 2010), Dec. 16, 2009 Hearing Transcript (Tr.), at 57. During the supervisor's tenure at the Agency, several African-American employees, including Petitioner, complained about the supervisor's treatment and demeanor towards them.

Supervisor's Conduct During Weekly Staff Meetings

One African-American budget analyst opined that the supervisor communicated differently between white and black employees, in that she "never chastised [white employees] or humiliated them in front of other employees."1 Davis v. Dep't of Interior, EEOC Hearing No. 410-2009-00062X (Aug. 24, 2010), January 12, 2010 Hearing Transcript, at 132.

In contrast, several African-American staff members testified that the supervisor regularly, repeatedly, and harshly criticized Petitioner in front of others during weekly staff meetings. For example, an African-American budget analyst recounted one meeting:

[W]e were in a meeting and [the supervisor] asked for suggestions or recommendations. [Petitioner] would give it, and [the supervisor] would . . . kind of tear it down . . . . And then she made a statement that if, you know, she didn't like the way the meeting was going she can get up and leave, so [Petitioner] politely got up and left. Id. at 103.

Another African-American budget analyst provided corroborating testimony:

When [Petitioner] would inquire about something or make a statement, . . . [the supervisor's] gestures would become defensive and threatening and she would, at times, even slam her hands on, you know, the table. Her tone would change into a disrespectful manner and she would try to humiliate [Petitioner.] Id. at 130.

This budget analyst recalled her own verbal encounter with the supervisor on July 23, 2008:

[The supervisor] had came to my cubicle in a very confrontational, combative mode and I advised her that she shows disparate treatments between blacks and white. She called me into her office, she yelled. Went behind closed door. And I started listing the various ways that she shows disparate treatment between blacks and whites . . . . And she made the statement, oh, you and I are not equal.
. . .
I told her that was enough, I considered that a racial comment. . . . [The supervisor started] slamming her fist, wrenching her hand, well, I don't have to answer to you and I don't have to respond . . . .
. . .
I believe, based on my experience with her, she thinks whites are superior to blacks and that whites should not have to answer to blacks. That we have no rights as black African Americans. We should always be beneath her. Id. at 131-133, 140.

Leave Requests, Restrictions, Discipline, and Suspension

In early 2006, Petitioner used substantial amounts of sick and annual leave because of medical problems and complications in completing residential construction to take care of her elderly mother. In 2006 and 2007, Petitioner requested several times to take leave without pay, primarily to attend court-mandated proceedings on the residential construction. But the supervisor denied her leave requests. Petitioner felt she had no choice but to attend the court proceedings. As a result, the supervisor placed her in an absence without leave (AWOL) status, restricted her leave, issued her a letter of warning in August 2006 for being absent, and then in July 2007 proposed to suspend her for 5 days for being AWOL.

After proposing the 5-day suspension, the supervisor directed Petitioner to meet with her on July 13, 2007. Petitioner wanted an employee relations specialist to attend the meeting, and sought out multiple people. But when no representative was available, Petitioner did not enter the supervisor's office that day.

On July 17, 2007, the supervisor doubled the proposed suspension to 10 days for (1) being absent without leave, and (2) "refus[ing] to comply with a proper order" to meet with her. The Associate Regional Director for Administration of the Park Services Southeast Region upheld the 10-day suspension on August 13, 2007.

Various staff members testified that the first-level supervisor treated Petitioner differently than a white male employee, who held a position organizationally equivalent to Petitioner and took as much leave as Petitioner. They testified that the supervisor always approved the white male employee's leave requests, did not place him on leave restriction, and did not discipline him for being absent from work when he did not request leave beforehand.

One witness, a Caucasian budget analyst, testified in her deposition that the supervisor treated the white male employee preferentially over Petitioner, in that he was "not on leave restriction and he uses just as much leave as [Petitioner] does." May 5, 2008 Deposition, at 27. An African-American budget analyst opined that the white male employee was treated better than Petitioner in that he could simply send an email to the supervisor indicating he was working from home, while Petitioner was not allowed to do the same. January 12, 2010 Hearing Tr., at 138.

Denial of Access to Computer Program During Critical Time; Lower Performance Appraisal

Each year, around the last week of September, Petitioner and other fiscal officers would go to the Accounting Operation Center to closeout fiscal activities before September 30. At no time would the Accounting Operation Center allow an individual to go past the deadline date. Dec. 16, 2009 Hearing Tr., at 43.

In September 2006, Complainant was initially designated to attend the Accounting Operation Center during the closeout period. But after a dispute with the supervisor about whether she would be compensated for work performed outside of normal hours, the supervisor excused Petitioner from going to the Accounting Operation Center and then, without explanation or prior notice, suspended her from accessing the software program for managing the Agency's fiscal affairs, until after the closeout period.

After the closeout period ended, the supervisor restored Petitioner's access on October 5, 2006. Then on November 17, 2006, the supervisor gave Petitioner a lower performance rating of "fully successful," based in part on Petitioner's failure to perform all of her duties during the closeout period. Petitioner protested the rating, maintaining that her failure to perform was due to the supervisor suspending her access to the software program. During a discussion about her performance, the supervisor explained that she suspended Petitioner's access to the software system because the supervisor thought Petitioner had made a threat upon learning that she would not be going to the Accounting Operating Center. According to the supervisor, Petitioner stated that the supervisor had no idea how much Petitioner knew about the system and she would be sorry. The supervisor thought Petitioner posed a security risk and that she might try to sabotage that year's closeout. The supervisor also told Petitioner that she was not a team player, and advised her that it would be best if she found another job.

Petitioner's Attempts to Apply to a Downgraded Position

According to Petitioner, the supervisor continued to tell her multiple times every quarter that she should find another job. Dec. 16, 2009 Hearing Tr., at 85. A Caucasian budget analyst opined that there was a possibility that the supervisor wanted to get rid of Petitioner, "[j]ust because of the things happening in the office . . . . It's almost like it's a handwriting on the wall." May 5, 2008 Deposition, at 25-26.

Petitioner attempted to escape the escalating adverse treatment by applying for a GS-9 Budget Analyst position in May 2007. According to the supervisor, Petitioner did not get an interview because she was not among the best qualified applicants, even though Petitioner had previously been a GS-9 Budget Analyst and had received successful performance reviews.2

Protected EEO Activity

On November 28, 2006, Petitioner initiated EEO counselor contact, which the supervisor learned about in December 2006. While the EEO matter was pending,

Petitioner was subjected to further adverse treatment from the supervisor.

Further Discipline and Removal

The supervisor twice proposed to remove Petitioner. The first was in April 2008, in part, because Petitioner had been absent without leave, in violation of her August 2006 leave restriction, and had not complied with the supervisor's directives to (1) meet with her to discuss Petitioner's argumentative, aggressive, and unprofessional behavior; and (2) clean out her email inbox immediately after a staff meeting. But the Regional Director reduced the proposed removal to a 30-day suspension on September 10, 2008.

The second attempt occurred on May 7, 2009. The supervisor proposed to remove Petitioner for failing to comply with proper directives. Specifically, in March 2009, a park administrative officer requested help to a general Agency email account to do an "internal control assessment." The supervisor directed Petitioner to respond to the request, but Petitioner felt that she did not have sufficient time or resources to accommodate the request. She proposed instead for a GS-12 staff accountant to handle this request.

After further discussions, the supervisor directed Petitioner in April 2009 to setup a time with the park administrative officer to lead a compliance audit. Rather than lead the audit herself, Petitioner arranged for someone else to do the audit. The supervisor determined that Petitioner had not complied with her directives to timely contact, coordinate, and help the park administrative officer to do an internal control assessment. The supervisor once again proposed to remove Petitioner, finding it appropriate, given her prior disciplinary history dating back to 2006.

On July 8, 2009, the Southeast Regional Director upheld the proposed removal because Petitioner failed to comply with proper directives regarding the request for help on an internal control assessment. To justify the removal, the Regional Director explicitly referenced the history of disciplinary actions management had taken against Petitioner. This included:

* a letter of warning on September 26, 2006;
* The 10-day suspension on August 13, 2007; and
* The 30-day suspension on September 10, 2008.

The removal became effective on July 18, 2009.

Petitioner challenged her removal by filing a mixed case appeal with the MSPB.

Merit Systems Protection Board (MSPB)

In a mixed case, a federal employee alleges that an agency personnel action appealable to the MSPB was based on unlawful discrimination otherwise subject to EEOC jurisdiction. In these cases, the employee must choose whether to pursue a "mixed case complaint" through the federal sector EEO process administered by EEOC, or a "mixed case appeal" subject to MSPB jurisdiction in the first instance.

Here, Petitioner filed a "mixed case appeal." A "mixed case appeal" is an appeal filed directly with the MSPB that alleges that an appealable agency action was effected, in whole or in part, because of discrimination on the basis of race, color, religion, sex, national origin, disability, age, genetic information, or reprisal. 29 C.F.R. § 1614.302(a)(2). Appealable agency actions include removals. See, e.g., Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO-MD-110), Chapter 4: Procedures for Related Processes, Appendix I: Appealable Actions-5 C.F.R. (rev. Nov. 9, 1999).

In her mixed case appeal, Petitioner alleged that the Agency discriminated against her on the bases of race (African-American), sex (female), and reprisal for prior protected EEO activity when it removed her.

Initially, the MSPB Administrative Judge (MSPB AJ) struck the bases of race and sex from the proceedings on the grounds that Petitioner failed to allege facts, which, if proven true, would establish a prima facie case of race and sex discrimination. The MSPB AJ held a hearing on the basis of reprisal, and in November 2009, issued an initial decision that upheld Petitioner's removal.

MSPB AJ's Initial Decision on Reprisal Discrimination

The MSPB AJ first articulated the "convincing mosaic" evidentiary standard for proving retaliation:

To show retaliation using circumstantial evidence, an appellant must provide evidence showing a "convincing mosaic" of retaliation against her. A mosaic is a work of visual art composed of a large number of tiny tiles that fit smoothly with each other, a little like a crossword puzzle. "A case of discrimination can likewise be made by assembling a number of pieces of evidence none meaningful in itself, consistent with the proposition of statistical theory that a number of observations each of which supports a proposition only weakly can, when taken as a whole, provide strong support if all point in the same direction: 'a number of weak proofs can add up to a strong proof.'" As a general rule, this mosaic has been defined to include three general types of evidence: (1) evidence of suspicious timing, ambiguous oral or written statements, behavior toward or comments directed at other employees in the protected group, and other bits and pieces from which an inference of retaliatory intent might be drawn; (2) evidence that employees similarly situated to the appellant have been better treated; and (3) evidence that the employer's stated reason for its actions is pretextual. Where an employer's motives or state of mind are relevant, the record must be carefully scrutinized for circumstantial evidence that would support an inference of retaliatory animus. Furthermore, to establish that the employer's stated reason for taking a personnel action was a pretext for unlawful discrimination, it is insufficient to show that the stated reason was not the real reason; the employee must show that the real reason for the action was unlawful discrimination. (citations omitted)

Then, the MSPB AJ found that Petitioner had failed to comply with a series of proper directives to timely contact, coordinate, and help a park administrative officer do an internal control assessment. Next, the MSPB AJ determined that Petitioner failed to establish discrimination on the basis of reprisal for prior EEO activity. Finally, the MSPB AJ found the removal to be reasonable because of Petitioner's prior history of discipline for failing to comply with proper orders, including the August 13, 2007, 10-day suspension, and the September 10, 2008, 30-day suspension.

Petitioner sought review by the full Board.

EEOC Administrative Judge's Decision Finding Discrimination

While the review of the mixed case was pending before the full Board, an EEOC Administrative Judge (EEOC AJ) issued a decision on Petitioner's harassment case,3 finding that management had subjected Petitioner to hostile work environment harassment on the bases of race (African-American), sex (female), and reprisal for prior EEO activity for incidents that occurred from 2006 to 2007, including disciplinary actions such as the August 13, 2007 10-day suspension.

The EEOC AJ determined that the first-level supervisor engaged in a pattern of

escalating adverse treatment towards Petitioner that extended over a protracted period. At first, she subjected Petitioner to adverse treatment on the basis of race, in that the first-level supervisor treated Petitioner differently than a similarly situated white male employee, by restricting Petitioner's leave, intensely scrutinizing and criticizing her work, and excessively disciplining her.

[The supervisor] used Complainant's absence during the period when she was legally required to appear in court as a basis for marking her AWOL and suspending her for 10 days. [The supervisor] testified that she did not approve the leave because Complainant had failed to provide adequate documentation. But when the Agency was presented with documentation from Complainant's counsel in her civil lawsuit that provided justification for her absence, the Agency inexplicitly refused to revoke or modify the 10 day suspension. This suggests that it was searching for a pretext to discipline Complainant. The evidence established that [the supervisor] initially was prepared to issue Complainant a proposed five day suspension, but when Complainant requested representation and was unable to secure a representative to be present when she met with [the supervisor], [the supervisor] then used Complainant's failure to meet with her that day as a basis for doubling the duration of the suspension.

The EEOC AJ found the supervisor to not be credible in explaining why she suspended Petitioner's access to the Agency's fiscal software system during the closeout period in September 2006 and gave her a lower performance review:

While I find [the supervisor] not credible and Complainant's explanation of what she said to be more accurate, even the statement that [the supervisor] attributes to Complainant could just as readily be interpreted to mean that [the supervisor] would regret the loss of Complainant's expertise during the close out period . . . . The Agency was unable to identify anything in Complainant's conduct or history that suggested in any way that she posed any actual threat if she were permitted to continue the computer access she had enjoyed without incident for the prior six years. Rather, [the supervisor's] excessive reaction appears to [be] evidence [of] a discriminatory mind set on her behalf. Furthermore, [the supervisor] then used purported deficiencies in Complainant's performance during the lockout period to mark down her evaluation.

The EEOC AJ found that the first-level supervisor escalated the adverse treatment against Petitioner after she protested and initiated EEO counselor contact. For example, the EEOC AJ found the supervisor to lack credibility in explaining why Petitioner's requests to be downgraded to a GS-9 position could not be fulfilled.

When Complainant was faced with a pattern of escalating adverse treatment by [the supervisor], she requested on several occasions that she be permitted to step back from her supervisory position and revert to the position she had previously held. If [the supervisor] had been legitimately concerned about Complainant's absences or any legitimate performance issues, she should have jumped at Complainant's offer. Instead, she repeatedly rejected it. And when the position was competitively announced and Complainant applied for it, Complainant inexplicably failed to rank among the top candidates.
. . .
The Agency failed to articulate a legitimate non-discriminatory reason why Complainant, who had always received fully satisfactory or better ratings and had been promoted to her position before [the supervisor] became the Comptroller, was not among the best qualified candidates who were interviewed for the GS-9 position that she held prior to her promotion. The sole explanation the Agency offered was this was how the panel works.

The Agency accepted the EEOC AJ's findings of discrimination and did not appeal the decision to the Office of Federal Operations.

MSPB AJ's Supplemental Decision on Race and Sex Discrimination

The full Board sustained the charge of failure to comply with proper directives, as well as the MSPB AJ's finding that Petitioner failed to establish reprisal discrimination. But the Board remanded the race and sex discrimination bases for a hearing.4

On remand, Petitioner submitted the record evidence from the EEOC proceeding, along with the EEOC AJ's decision finding that the same management officials in this matter had subjected her to hostile work environment harassment from 2006 to 2007 on the bases of race, sex, and reprisal. She then withdrew her request for a hearing.

On July 11, 2011, the MSPB AJ issued a supplemental initial decision and found no race or sex discrimination. In considering the testimony, record, and findings from the EEOC administrative proceeding, the MSPB AJ gave little weight to the EEOC AJ's credibility determinations. Instead, the MSPB AJ found the first-level supervisor to be credible, based on her demeanor and consistency with other witnesses during the MSPB hearing on reprisal discrimination. Furthermore, the MSPB AJ attached no significance to the previous EEOC AJ's finding of discrimination, reasoning that the present removal (2009) was unrelated and too far removed from the 2006-2007 discriminatory matters considered by the EEOC AJ.

And even though the MSPB AJ acknowledged that the Agency should not have used the discriminatory August 13, 2007 10-day suspension to support the removal action, the MSPB AJ nevertheless found the removal to be reasonable because the Agency's table of penalties permitted removal for even one offense of failure to comply with a proper directive, and the failure in 2009 constituted Petitioner's second offense (counting the 30-day suspension in September 2008).

CONTENTIONS ON PETITION FOR REVIEW

In her petition for review, Petitioner challenges the MSPB AJ's formulation of the "convincing mosaic" evidentiary standard for establishing reprisal discrimination. Petitioner maintains that the MSPB AJ's characterization of the "convincing mosaic" standard for proving causation strongly suggests a standard of proof that is greater than the "preponderance of the evidence" burden required to prove Title VII claims. Petitioner urges the EEOC to reject the MSPB AJ's formulation of the "convincing mosaic" standard.

Petitioner argues that under the traditional, correct standard, the evidence from the EEOC and MSPB cases establish, more likely than not, that the first-level supervisor removed Petitioner based on a discriminatory or retaliatory motive. From May 2006 onward, the first-level supervisor demonstrated a pattern of extreme hostility and harsh discriminatory actions towards Petitioner: placing her on AWOL for dealing with a personal emergency and for attending court hearings; accusing her of threatening to sabotage a government computer system; humiliating her in front of coworkers; retaliating against her by suspending her for 10 days in 2007; repeatedly telling her to find a job elsewhere; and attempting to remove her on a prior occasion.

Given this history between the supervisor and Petitioner, the supervisor's second and successful attempt to remove Petitioner was a continuation of the supervisor's pattern of extreme hostility and discriminatory harsh action on the bases of race, sex, and retaliation. Petitioner's underlying conduct was not as egregious as the supervisor portrayed, and did not warrant removal. While there was a dispute between the supervisor and Petitioner over who should provide the requested assistance, Petitioner expressly stated to the supervisor before her removal had

been proposed that she did not intend to be uncooperative, but just had conflicting assignments. And the individual who requested the support told her it was acceptable to postpone the assistance.

Moreover, Petitioner argues that a development, in her EEOC litigation, provoked or stoked retaliatory animus in the supervisor and motivated the removal. Specifically, on April 22 and 28, 2009, the supervisor emailed Petitioner regarding discovery requests for the EEOC case. This coincided with Petitioner's attempts to clarify who should provide the requested assistance. Then on May 7, 2009, the supervisor allegedly told Petitioner that Agency Counsel had contacted her about the status of discovery responses in her EEOC case; later that same day, the supervisor proposed to remove Petitioner.

The Agency maintains that the Commission has essentially held that the "convincing mosaic" standard is a correct interpretation of the laws, rules, regulations, and policies governing Title VII reprisal cases, because it has previously concurred, without comment, prior MSPB decisions that applied the "convincing mosaic" standard. In addition, the Agency argues that the record supports the MSPB AJ's decision, finding no discrimination. And even if management officials should not have relied on its past discriminatory disciplinary actions to justify removing Petitioner, they still would have been justified in removing Petitioner, based solely on this one incident on failure to follow management directives.

ANALYSIS AND FINDINGS

Standard of Review

EEOC Regulations provide that the Commission has jurisdiction over mixed case appeals on which the MSPB has issued a decision that makes determinations on allegations of discrimination. 29 C.F.R. § 1614.303 et seq. Upon review, the Commission must determine whether the decision of the MSPB with respect to the allegation of discrimination constitutes a correct interpretation of any applicable law, rule, regulation or policy directive, and is supported by the evidence in the record as a whole. 29 C.F.R. § 1614.305(c).

Standard for Proving Retaliation in Federal Sector Cases

We shall clarify the Commission's view about the "convincing mosaic's" role in federal sector retaliation cases. The anti-retaliation provisions make it unlawful to discriminate against any individual because he or she has complained, testified, assisted, or participated in any manner in an investigation, proceeding, hearing, or litigation under the employment discrimination statutes.

Recently, in EEOC Appeal Nos. 0120120901, 0120123038 (Dec. 2, 2013), the Commission specified what a petitioner must generally do to prove retaliation:

To prevail, Complainant must prove by a preponderance of the evidence that (1) she engaged in protected activity; (2) was subject to an . . . adverse action; and (3) there was a causal nexus between the two. The causal nexus requires a showing that retaliation for her prior protected activity more likely than not caused the challenged actions . . . .

While the causal connection may be proved directly by evidence that on its face shows or admits retaliatory motive, it is more typically demonstrated by what one appellate court has described as a "convincing mosaic" of circumstantial evidence that would support the inference of retaliatory animus. Cloe v. City of

Indianapolis, 712 F.3d 1171 (7th Cir. 2013) (citation omitted). The pieces of that "mosaic" may include, for example, suspicious timing, verbal or written statements, comparative evidence that a similarly situated employee was treated differently, falsity of the employer's proffered reason for the adverse action, or any other "bits and pieces" from which an inference of retaliatory intent might be drawn. Id. "The law is well-established that the internal inconsistencies, implausibility, or contradictions in an employer's explanation of the challenged employment decision may be evidence of pretext for discrimination or retaliation." Conroy v. Vilsack, 707 F.3d 1163 (10th Cir. 2013) (quoting Rivera v. City and County of Denver, 365 F.3d 912, 925 (10th Cir. 2004) (finding that inconsistencies among panel members' recollections of the rating system used for the selection process was insufficient to demonstrate pretext)).

The genesis of the "convincing mosaic" term was borne out of a concern that the traditional dichotomies of "direct" and "indirect" methods of proof, as well as "direct" and circumstantial evidence, were somewhat formalistic and rigid5 when considering the myriad types of evidence in employment discrimination cases. The term "convincing mosaic" was coined in Troupe v. May Dep't Stores Co., 20 F.3d 734, 737 (7th Cir. 1994) (J. Posner), "where it was used, innocently enough, to describe the 'kind of circumstantial evidence . . . that consists of ambiguous statements, suspicious timing, discrimination against other employees, and other pieces of evidence none conclusive in itself but together composing a convincing mosaic of discrimination against the plaintiff.'" Sylvester v. SOS Children's Villages Illinois, Inc., 453 F.3d 900, 903 (7th Cir. 2006) (J. Posner). "But it was not the intention in Troupe to promulgate a new standard, whereby circumstantial evidence in a discrimination or retaliation case must . . . have a mosaic-like character." Id. at 904.

To the Commission, the "convincing mosaic" is a useful way to describe how several facts may add up to sufficient evidence to discredit an employer's explanation and demonstrate a causal connection between the prior protected activity and the challenged adverse action. Our discussion of the "convincing mosaic" in EEOC Appeal No. 0120120901 was meant to convey an additional, flexible way for plaintiffs to use different "bits and pieces" of circumstantial evidence to prove the causal connection between the adverse action and the protected conduct in retaliation cases. We did not intend to either promulgate a new standard, whereby circumstantial evidence in retaliation cases "must" have a mosaic-like character, or require plaintiffs to meet a more demanding evidentiary standard. Nor did we intend to state a preference for one evidentiary framework over another. All we intended to convey was this: under certain evidentiary scenarios, the "convincing mosaic" can serve as a useful option for establishing the causal nexus in retaliation cases.

Therefore, we determine that the MSPB AJ erred in insisting that petitioners "must" provide evidence showing a "convincing mosaic" of retaliation in order to prove retaliation using circumstantial evidence. Our view is that when an employer in a federal sector case identifies a lawful reason for an adverse action, the employee will have to produce enough evidence to either discredit the employer's explanation or prove that the real reason was retaliation.6 One way that the employee "may" discredit the defendant's explanation and demonstrate a causal connection between the prior protected activity and the challenged adverse action is by presenting a "convincing mosaic" of circumstantial evidence that would support the inference of retaliatory animus. The pieces of that "mosaic" may include a variety of types of evidence, such as suspicious timing, verbal or written statements, comparative evidence that a similarly situated employee was treated differently, falsity of the employer's proffered reason for the adverse action, or any other "bits and pieces" from which an inference of retaliatory intent might be drawn. Cloe, 712 F.3d at 1181.

Harassment by Supervisor: Link Between Harassment and Tangible Employment Action

Whenever a harassing supervisor undertakes or has significant input into a tangible employment action affecting the victim,7 a strong inference of discrimination will arise because it can be "assume[d] that the harasser . . . could not act as an objective, non-discriminatory decision maker with respect to the plaintiff." Llampallas v. Mini-Circuit Lab, Inc., 163 F.3d 1236, 1247 (11th Cir. 1998). But if the employer produces evidence of a non-discriminatory reason for the action, the employee will have to prove that the asserted reason was a pretext designed to hide the true discriminatory motive. See Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors, EEOC No. 915.002 (June 18, 1999).

For guidance on how to consider the record evidence in this case, we turn to Harmon v. U.S. Postal Serv., EEOC Petition No. 03980004 (Aug. 5, 1999). In Harmon, an EEOC AJ found in 1998 that a manager had made sexually harassing comments and innuendos to the petitioner, starting with her arrival in 1993. In 1995, the manager subsequently demoted the petitioner, on the grounds that she advertised and sold Primerica insurance on Agency premises. After an MSPB AJ sustained the agency's action, the Commission reviewed the decision. The Commission found that the petitioner's demotion was unrelated to the manager's sexual harassment discrimination because the manager did not have significant input in the petitioner's demotion. Other management officials had alerted the Agency about the petitioner's possible misconduct, initiated and conducted the investigation, and decided to demote the petitioner. Therefore, the Commission in Harmon found that the petitioner failed to show a nexus between the manager's sexual harassment and the disciplinary action taken against petitioner.

Here, the Agency stated that it removed Petitioner because her failure to comply with the first-level supervisor's directives regarding the request for a control assessment was the latest in a series of failures dating back to 2006, which resulted in an extensive history of disciplinary actions, including an August 13, 2007 10-day suspension.

We find the Agency's articulated reason to be illegitimate and discriminatory, in that the Agency explicitly relied on the supervisor's preceding harassing conduct (including disciplinary actions such as the August 13, 2007 10-day suspension) to justify removing Petitioner. Supervisors are not allowed to use their past discriminatory actions as a basis for subjecting their victims to new adverse actions. Therefore, we differ with the MSPB AJ and find that the evidence clearly establishes a nexus between the first-level supervisors's preceding harassing conduct and her subsequent removal of Petitioner.

This is not to say that a supervisor, who has previously been found to have discriminated against an employee, can never discipline, demote, or discharge the employee in the future. Discipline, demotion, and discharge decisions are typically based on either employee misconduct or unsatisfactory work performance. While neutral rules and policies regarding discipline, demotion, and discharge generally do not violate Title VII, they must be enforced in an evenhanded manner, without regard to prohibited factors, such as race, sex, or prior EEO activities.

But here, there is little evidence that the first-level supervisor was disposed to enforce the Agency's rules on discipline and removal in an objective, evenhanded, and non-discriminatory manner with respect to Petitioner. For years, she publicly belittled Petitioner in weekly staff meetings, and consistently treated Petitioner worse than a white employee with regard to leave.

She did not conceal her desire to be rid of Petitioner, in that she told Petitioner numerous times to find a new job. She refused Petitioner's requests to be downgraded in position in order to escape the harassment. She excessively and

unjustifiably disciplined Petitioner for failing to follow her "directives," no matter how trivial or erratic8 they could be, whether it was shortening the duration of Petitioner's recorded voicemail greeting or immediately clearing her inbox after a staff meeting. And she twice tried to use her discriminatory disciplinary actions as a means for removing Petitioner.

There was no evidence that the first-level supervisor noticeably shed her preexisting discriminatory attitudes or improved her conduct towards Petitioner, between the time she discriminated against Petitioner in 2006 and 2007 and the subsequent times she disciplined and removed Petitioner in 2008 and 2009. The testimony from Petitioner and another African-American colleague indicate that the supervisor, as recently as July 2008, continued to privately verbalize negative attitudes about African-Americans.

And unlike the harassing manager in Harmon, the harassing supervisor here undertook and had significant input into removing Petitioner. The Agency never undertook corrective actions or other remedial measures to stop the supervisor's harassment and ensure it would not recur.9
Because the supervisor discriminatorily harassed Petitioner in 2006 and 2007, because the supervisor showed no signs of noticeably improving her behavior or shedding her preexisting discriminatory attitude toward Petitioner and instead continued to engage in similar types of discriminatory acts in 2008 and 2009, because the harassing supervisor did not undergo any corrective actions or remedial measures that would ensure that the harassment would not recur, and because the supervisor explicitly relied on her past discriminatory actions to justify removing Petitioner, we find that the subsequent disciplinary and removal actions taken against Petitioner in 2008 and 2009 were related to the previous hostile work environment harassment in 2006 and 2007 and were discriminatorily motivated.10

CONCLUSION

Based upon a thorough review of the record, the Commission respectfully DIFFERS with the final decision of the MSPB's finding no discrimination. The Commission finds that the MSPB's decision constitutes an incorrect interpretation of the laws, rules, regulations, and policies governing this matter, and is not supported by the evidence in the record as a whole.

PETITIONER'S RIGHT TO FILE A CIVIL ACTION (V0610)

Your case is being referred back to the Merit Systems Protection Board for further consideration and the issuance of a new decision. You will have the right to file a civil action in the appropriate United States District Court, based on the new decision of the Board:

1. Within thirty (30) calendar days of the date that you receive notice of the decision of the Board to concur in this decision of the Commission; or,

2. If the Board decides to reaffirm its original decision, within thirty (30) calendar days of the date you receive notice of the final decision of the Special Panel to which your case will then be referred.

You may also file a civil action if you have not received a final decision from either the Merit Systems Protection Board or the Special Panel within one hundred and eighty (180) days of the date you filed this Petition for Review with the Commission. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department

in which you work.

RIGHT TO REQUEST COUNSEL (Z0610)

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request from the Court that the Court appoint an attorney to represent you and that the Court also permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c). The grant or denial of the request is within the sole discretion of the Court. Filing a request for an attorney with the Court does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File a Civil Action").

FOR THE COMMISSION:

_____
Bernadette B. Wilson
Acting Executive Officer
Executive Secretariat

_7/16/14_____
Date

1 Besides communicating differently between white and black employees, this budget analyst maintained that the supervisor gave out higher cash awards to white employees (approximately $2500 for white employees versus $750 to $850 for black employees in 2007) and would only publicly recognize the work of white employees. Id. at 132, 139.

2 Separately, Petitioner testified that on October 4, 2006, when Petitioner and the supervisor together were reviewing job applications for a GS-7 position, the supervisor read the qualifications of an applicant named Kamika, and commented: "I hope you don't take this as racist . . . but I don't understand why anyone would want to list their experience of having . . . black hair care products and experience in natural hair products. . . . [T]his application, I wouldn't even give a second look. . . . [I]f you hire this person, I would have a problem with that." Dec. 16, 2009 Hearing Tr., at 81-82.
3 Davis v. Dep't of the Interior, EEOC Hearing No. 410-2009-00062X (Aug. 24, 2010).
4 Davis v. Dep't of the Interior, 2010 M.S.P.B. 161 (Aug. 5, 2010).
5 See, e.g., Coleman v. Donahoe, 667 F.3d 835, 863 (7th Cir. 2012)(J. Wood, concurring).
6 In the Commission's view, the "but for" standard ("but for" its retaliatory motive, the employer would not have taken the adverse action, meaning that the retaliatory motive made a difference in the outcome) does not apply to retaliation claims by federal sector applicants or employees under Title VII or the ADEA because the relevant federal sector statutory language does not employ the "because

of" language on which the Supreme Court based its holdings in University of Texas Southwestern Medical Center v. Nassar, 133 S. Ct. 2517 (2013) and Gross v. FBL Fin. Servs., Inc., 557 U.S. 167 (2009) (requiring "but for" causation for ADEA claims brought under 29 U.S.C. § 623). These federal sector provisions contain a "broad prohibition of 'discrimination' rather than a list of specific prohibited practices." See Gomez-Perez v. Potter, 553 U.S. 474, 487-88 (2008) (holding that the broad prohibition in 29 U.S.C. § 633a(a) that personnel actions affecting federal employees who are at least 40 years of age "shall be made free from any discrimination based on age" prohibits retaliation by federal agencies); see also 42 U.S.C. § 2000e-16(a) (personnel actions affecting federal employees "shall be made free from any discrimination based on race, color, religion, sex, or national origin").

7 The link could be established even if the harasser was not the ultimate decision maker. See, e.g., Shager v Upjohn Co., 913 F.2d 398, 405 (7th Cir. 1990) (noting that committee rather than the supervisor fired plaintiff, but employer was still liable because committee functioned as supervisor's "cat's paw"), cited in Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2269 (1998).

8 One African-American budget analyst testified that the first-level supervisor had an erratic management style:

I'm really not sure how to describe her management style. It's kind of all over the place. She either wanted to know what you were doing or she didn't follow up with it to find out what you were doing or she may leave you responsible for doing certain things. It's just too much going on. Davis v. Dep't of Interior, EEOC Hearing No. 410-2009-00062X (Aug. 24, 2010), Jan. 12, 2010 Hearing Tr., at 109.

9 Examples of measures to stop harassment and ensure that it does not recur include: oral or written warning or reprimand; transfer or reassignment; demotion; reduction of wages; suspension; discharge; training or counseling of harasser to ensure that he or she understands why his or her conduct violated the employer's anti-harassment policy; and monitoring of harasser to ensure that harassment stops. Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors, EEOC No. 915.002 (June 18, 1999).

10 An employer is always liable for harassment by a supervisor on a prohibited basis that culminates in a tangible employment action. No affirmative defense is available in such cases. See Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors, EEOC No. 915.002 (June 18, 1999).

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