BEFORE THE BOARD OF DIRECTORS
OFFICE OF COMPLIANCE

In the Matter of:

ANONYMOUS EMPLOYEE
(Complainant-Employee)

V.

ANONYMOUS EMPLOYER
(Respondent-Employing Office)

BRIEF OF CAPITAL AREA COUNCIL OF FEDERAL EMPLOYEES, COUNCIL 26, AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES ("AFSCME"), AFL-CIO

AS *AMICUS CURIAE*

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The Capital Area Council of Federal Employees, Council 26, American Federation of State, County & Municipal Employees, AFL-CIO ("AFSCME Council 26") hereby submits this brief, by and through counsel, pursuant to the Notice and Invitation issued January 24, 2005, regarding procedures, frameworks and standards to be applied in cases alleging reprisal and intimidation under section 207 of the Congressional Accountability Act, 2 U.S.C.1317(a) ("CAA"). Council 26 believes that the standards for reprisal and intimidation cases under the CAA should be as simple and employee-friendly as possible, in order to effectuate the intent and purposes of the Act and to discourage illegal reprisal and intimidation by employers.

I. STATEMENT OF INTEREST

AFSCME Council 26 is the exclusive representative of approximately 400 employees of the Architect of the Capitol who are covered by the Congressional Accountability Act. It has represented these employees in a wide variety of cases under the Act since 1997, both before the OOC and in federal court, including equal pay, race, gender and disability discrimination cases, and reprisal and intimidation cases, as well as collective bargaining negotiations, unfair labor practice cases, negotiability appeals, and health and safety cases. Among the cases it has successfully litigated are *Harris et al. v. Architect of the Capitol* (D.D.C. 2002), and *Johnson v. Architect of the Capitol*, ___ F.3d __ (Fed. Cir. 2004). It also represents two bargaining units at the Library of Congress, who often raise safety and health complaints with the General Counsel of the OOC, and occasional experience reprisal for raising those complaints.

It is very common for our members, officers and stewards to experience reprisal and intimidation for their involvement in these cases, whether based on discrimination, anti-union

animus or some combination of both. For example, Local officers have often been disciplined and reprimanded for raising complaints about safety, short staffing, pay discrimination and unfair labor practices by the Architect over the years. Shortly after filing the Harris equal pay case, a number of female custodial workers who cleaned and maintained bathrooms in the Capitol Building and in House and Senate Office Buildings were subjected to abrupt and unusual shift changes and unilateral transfers, or were given extra work, as a result of their participation in the lawsuit, while others had their work taken away and assigned to others or to contractors. One successful plaintiff, a disabled black woman, was returned to her job with a promotion and back pay after years of litigation in two separate cases. She was then denied breaks, treated unfairly and harassed by her supervisor.

In a case which is presently pending at the administrative level, a black male union steward was suspended, threatened and nearly run down by a supervisor in the parking lot after filing two unfair labor practice complaints against the supervisor, after which he filed a charge of reprisal and was forced to seek counseling and attend mediation with the same supervisor. The latter three cases are presently pending before the Office of Compliance. This gentleman was just served with a notice of termination after over twenty years of satisfactory performance working for the Architect.

Given the immense disparity of power between in individual employee and his government agency employer, and between the individual worker and his supervisors, it is essential that claims of reprisal and/or intimidation be broadly construed, simple and inexpensive to litigate. As the Supreme Court has declared, in discussing the parallel anti-retaliation provision in Title VII of the Civil Rights Act of 1964, 29 U.S.C. § section 2000e-3(a), a “capacious reading” of the provision is necessary to fulfill its purpose of "[m]aintaining unfettered access to statutory remedial mechanisms." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997).

II. ISSUES PRESENTED

1. Should a single framework be adopted for all claims raised pursuant to Section 207(a) of the Congressional Accountability Act, or should an approach be adopted by which the tribunal would look to the framework(s) applied to claims of retaliation under the laws made applicable to the Legislative Branch by the Congressional Accountability Act?

2. If the second approach set forth in question # 1 is adopted, how should it apply when a Section 207(a) claim involves activity that is allegedly protected under laws to which different analytical frameworks apply, e.g., the claim asserts that retaliation or intimidation occurred because of activity allegedly protected by Section 201 (a) and by Section 220(a)of the Congressional Accountability Act?

3. If a single framework is adopted for all Section 207(a) claims, should the *McDonnell-Douglas Corp. v Green,* 411 U.S.792 (1973), as applied in Title VII cases, or the framework applied by the Federal Labor Relations Authority in *Letterkenny Army Depot and IBPO, Local* 358, 35 FLRA 113 (1990), or other framework be adopted as the framework for analyzing reprisal claims raised pursuant to Section 207(a)of the Congressional Accountability Act?

4. What employment actions constitute "adverse actions" for reprisal claims under Section 207(a)?

5. If the *McDonnell Douglas* framework is adopted, to what extent does *Desert Palace, Inc. v. Costa,* 539 U.S. 90 (2003) affect that framework as applied to reprisal claims under Section 207(a), specifically those that involve a mixed motive claim?

III. RECOMMENDATIONS

1. Q. Should a single framework be adopted for all claims raised pursuant to Section 207(a) of the Congressional Accountability Act, or should an approach be adopted by which the tribunal would look to the framework(s) applied to claims of retaliation under the laws made applicable to the Legislative Branch by the Congressional Accountability Act?

A. Adopt a single, unified approach for all claims raised pursuant to Section 207(a) of the Congressional Accountability Act, regardless of the underlying violation.

AFSCME Council 26 submits that any procedures, frameworks or standards which are adopted to address claims of retaliation and reprisal should be as simple and streamlined as possible. This is because forcing an employee-victim to plead and prove different facts using different standards and

caselaw depending on the employer's specific prohibited motivation for the retaliation throws up unnecessary roadblocks and makes the employees' task overly complex.

Section 207 of the Congressional Accountability Act makes it unlawful for an employing office to "intimidate, take reprisal against, or otherwise discriminate against" an employee "because the. . . employee has opposed any practice made unlawful by this Act, or because the covered employee has initiated proceedings, made a charge, or testified, assisted or participated in any manner in a hearing or other proceeding under this Act." This provision is analogous to the anti-retaliation provision found in Title VII, which forbids an employer to "discriminate" against any employee "because [the employee] has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]." 42 U.S.C. § 2000e-3(a). It is also parallel to Section 7116(a)(4) of the Federal Service Labor Management Relations Statute, 5 U.S.C. § 7116(a)(4), which makes the same conduct an unfair labor practice when motivated by union activity or membership.

However, under the CAA's rather unusual procedures, violations of Section 207 must be processed as an individual case under CAA Section 401, even though nearly identical conduct can also be prosecuted as an act of discrimination or by the General Counsel of the Office of Compliance as an unfair labor practice. *Compare* CAA Section 201(a) (requests for counseling, mediation and complaint procedure for discrimination cases); 220(c)(2) (General Counsel shall exercise role of General Counsel of Federal Labor Relations Authority to investigate, issue complaints and prosecute unfair labor practice charges).

Picture such a case from the employee's point of view, especially a person of color or disabled person who also happens to be a union steward. She asks for and is denied official time

to participate in labor-management negotiations, and files an unfair labor practice charge. Meanwhile, she is also the lead plaintiff in an equal pay lawsuit, with substantial assistance by the union, and also represents her fellow employees in Weingarten meetings (investigations leading to disciplinary matters). The supervisor then says, "I'm sick of you always complaining," and suspends her. Clearly, she has experienced reprisal, but it may be impossible for her to discern whether it came because she filed the unfair labor practice, the lawsuit, or because of her Weingarten representation. She should not have to guess. Instead, she should be permitted to file a single complaint, with a single standard and a single procedure in order to prove that the employer retaliated against her.

As a result, we submit that a reasonable reading of the CAA is to honor Congress' intent that an employee claiming reprisal on account of participation in ANY proceedings under the Act be processed in the same way under Title IV, regardless of the type of proceeding she initially participated in or the specific practice she opposed. In other words, a single procedure should be used for all such cases.

2. **Q. If the second approach set forth in question # 1 is adopted, how should it apply when a Section 207(a) claim involves activity that is allegedly protected under laws to which different analytical frameworks apply, e.g., the claim asserts that retaliation or intimidation occurred because of activity allegedly protected by Section 201 (a) and by Section 220(a)of the Congressional Accountability Act?**

A. Adopting a single, unified approach will avoid the need for duplicative and overlapping standards of proof, since all claims raised pursuant to Section 207(a) of the Congressional Accountability Act can be adjudicated under a single standard, regardless of the underlying violation.

3. **Q. If a single framework is adopted for all Section 207(a) claims, should the *McDonnell-Douglas Corp. v Green,* 411 U.S.792 (1973), as applied in Title VII cases, or the framework applied by the Federal Labor Relations Authority in *Letterkenny Army Depot and IBPO, Local* 358, 35 FLRA 113 (1990), or other framework be adopted as the framework for analyzing reprisal claims raised pursuant to Section 207(a)of the Congressional Accountability Act?**

A. The employee-victim should be permitted to present her reprisal claim in the most appropriate way, and to select the simplest, most straightforward method of proof. The tests used by the EEOC OFO, the test used in federal courts, or the "motivating factor"standard used in *Letterkenny Army Depot and IBPO, Local 358*, 35 FLRA 113 (1990) are all simpler and more useful than the *McDonnell-Douglas Corp. v. Green* approach.

Although this is good question, the majority of legislative branch employees have no idea what these terms mean or what the cited cases stand for. As a practical matter, few of them have the wherewithal to hire and pay attorneys to represent them, especially if they are already embroiled in a discrimination case and have just lost their jobs as a result. Therefore, employees should be permitted to present reprisal claims in the simplest, most straightforward way, and to select the most appropriate method of proof for presenting reprisals claim pursuant to Section 207(a)of the Congressional Accountability Act. In our view, the tests used by the EEOC OFO, the test used in federal courts, or the "motivating factor"standard used in *Letterkenny Army Depot and IBPO, Local 358*, 35 FLRA 113 (1990) are all superior to the burden-shifting "pretext" approach of *McDonnell-Douglas Corp. v Green*, 411 U.S.792 (1973), or the so-called "direct evidence" or "mixed motive" frameworks. However, each method was developed in a particular historical context, and each has its uses in certain cases.

It seems unnecessarily artificial to require all cases to proceed under a single model. As noted above, retaliation can take many forms, from terminations to work assignments to harassment, and can have at least underlying 13 statutory bases as set forth in the CAA itself.

In addition, some cases have direct evidence, although most rest on circumstantial evidence and inferences, such as where a supervisor changes his or her explanation for an event after the fact.

For example, the EEOC Commission has held that a federal employees can make out a prima facie case of reprisal discrimination simply by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination. Shapiro v. Social Security Admin., EEOC Request No. 05960403 (Dec. 6, 1996) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)). Specifically, a complainant must show that: (1) she engaged in a protected activity; (2) the agency was aware of the protected activity; (3) subsequently, she was subjected to adverse treatment by the agency; and (4) a nexus exists between the protected activity and the adverse treatment. Whitmire v. Department of the Air Force, EEC Appeal No. 01A00340 (September 25, 2000); Coffman v. Department of Veteran Affairs, EEC Request No. 05960473 (November 20, 1997).

Similarly, the D.C. Circuit court has adopted a similar "nexus" or "causal relationship" test. There, the three prima facie elements of a retaliation claim are: "(1) the employee engaged in protected activity, (2) the employer's action had an adverse impact on the employee, and (3) a causal relationship exists between the protected activity and the adverse action." Cones v. Shalala 199 F.3d 512, 521 (D.C. Cir. 2000); Paquin v. Federal Nat'l Mortgage Assoc., 119 F.3d 23, 31 (D.C. Cir. 1997). In determining causation and whether retaliation has occurred, the Court considers the totality of Plaintiff's employment situation. See Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 68 (1986); Robin v. Espo Engineering Corp., 200 F.3d 1081, 1088-89 (7th Cir. 2000) (combining direct and circumstantial evidence together may compose "'a convincing mosaic of discrimination against the plaintiff' to allow the plaintiff to surpass the summary judgment

hurdle."). These tests both seem simple and straightforward, and could easily be adapted to the CAA context.

Finally, the *Letterkenny Army Depot* test developed by the FLRA, which was in turn based upon the private sector NLRB caselaw, is also a reasonable and useful formulation of the key issues, and is very similar to the two tests set forth above. There, in order to establish a prima facie case of discrimination, the proponent/complainant (FLRA General Counsel) must prove that 1) the employee was engaged in protected activity, 2) such activity was *a motivating factor* – not the only motivating factor – in the employer's treatment of the employee with respect to hiring, tenure, promotion, or other conditions of employment. The timing of the action and the presence of anti-union animus are relevant, but not dispositive. *See, e.g. United States Department of Transportation, Federal Aviation Administration, El Paso, Texas*, 39 FLRA 1542, 1551 (1991) ("*FAA, El Paso*"). 3) When the General Counsel establishes that protected activity is a motivating factor, the burden then shifts to the agency to show that it had a legitimate reason for taking the action and that it would have taken the action even in the absence of the protected activity. *Letterkenny*, 35 FLRA at 118. This test is straightforward, simple to administer, and well-established in federal sector labor law. It could easily be adapted for cases arising under CAA § 207.

Lastly, it should be noted that the *McDonnell Douglas* burden-shifting analysis was developed as a tool for summary judgment determinations, not as a method of proof for one's case in chief. Where, as here, the cases are likely to go to hearing and to be heard by a hearing officer, there is little need for the three-part elaborate burden-shifting process.

Accordingly, we recommend that complainants be permitted to proceed under any

applicable framework, including those set forth above.

4. **Q. What employment actions constitute "adverse actions" for reprisal claims under Section 207(a)?**

A. There is no need to anser this questions because the statutory language at issue does not contain this term.

Section 207 of the Congressional Accountability Act ("the CAA") does not contain the term "adverse action." Instead, it seeks to prohibit the following" "intimidate, take reprisal against, or otherwise discriminate against [an employee]." Id. As such, no "tangible adverse action" or "ultimate employment action" is required to make out a reprisal case, and the OOC is without statutory authority to limit the kind of retaliation which is actionable; retaliation of any kind is illegal. This means that employees cannot be fired, disciplined, harassed, given extra work, downgraded on annual evaluation, or assigned tasks formerly done by others. Any such act is illegal.

As noted above, this parallels Title VII's anti-retaliation provision, which is broader than its anti-discrimination provision. Under 42 U.S.C. § 2000e-3(a), the anti-retaliation clause, the verb "discriminate" has been held to prohibit a wide variety of actions, including subjecting a person to a hostile work environment, and to"prohibit any discrimination that is reasonably likely to deter protected activity." EEOC Compl. Man. (CCH) ¶ 8005, § 8-II.D.3 (2004) See also *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997).

Furthermore, both the EEOC and the federal courts have so held, in construing many of the same laws which are incorporated by the CAA. *See, e.g. Burke v. Gould*, 286 F.3d 513 (D.C. Cir. 2002) (plaintiff sufficiently alleged loss of "a tangible, quantifiable award" as a result of lowered performance evaluation, which could constitute retaliation), citing *Russell v. Principi*, 257 F.3d

815, 819 (D.C. Cir. 2001); *Harrison v. Metro Government of Nashville*, 80 F.3 d 1107, 1119, (6th Cir. 1996) (Title VII) finding that the plaintiff's activities were scrutinized more carefully than those of comparably situated employees and that such could constitute retaliation); *Childress v. City of Richmond*, 120 F.3d 476 (4th Cir. 1997) (preparation of a false or unfair performance evaluation rises to the level of actionable retaliation); *EEOC v. Reichhold Chem., Inc*., 988 F.2d 1564, 1572 (11th Cir. 1993) (same).

If anything, the standard applied by the EEOC OFO for federal employees is even more lenient than the test used by the courts. See, e.g. *Ramsey v. United States Postal Service*, EEOC Appeal No. 07A10080 (July 18, 2003) (restricting FMLA leave was retaliatory); *Garcia v. Department of the Treasury*, EEOC Appeal No. 07A10040 (January 13, 2003), *request for reconsideration denied*, EEOC Request No. 05A30453 (May 23, 2003) (retaliation can include mere complaints and/or criticisms of an employee, telling her that management would never see her with "good eyes" or give her an Outstanding rating); *Jacoff v. Department of Homeland Security*, EEOC Appeal No. 01A20666 (September 3, 2003) (letter of counseling was retaliatory); *Barbagallo and Yost v. United States Postal Service*, EEOC Appeal Nos. 07A20012 and 07A20013 (October 2, 2003) (delay in processing pay); *Hie v. Federal Communications Commission*, EEOC Appeal No. 01A22474 (September 29, 2003) (nonselection for collateral duty); *Vasquez v. Department of Homeland Security*, EEOC Appeal No. 07A20097 (September 4, 2003) (rescheduling of meeting with EEO Counselor was retaliatory, resulting in award of damages, attorneys fees and costs).

5. Q. **If the *McDonnell Douglas* framework is adopted, to what extent does *Desert Palace, Inc. v. Costa,* 539 U.S. 90 (2003) affect that framework as applied to reprisal claims under Section 207(a), specifically those that involve a mixed motive claim?**

A. We do not recommend applying the *Desert Palace* case, just since we do not see the need to apply McDonnell Douglas to most reprisal cases.

Both the *Desert Palace* mixed motive case, its precursor *Hopkins v. Price Waterhouse*, and the *McDonnell Douglas* burden-shifting cases grew out of forty years of caselaw under Title VII in its special historical context, and in particular reflect the impact of the Civil Rights Act Amendments of 1991, with its special limiting language for certain types of cases. Because the CAA does not track that history, and does not contain the special limitations set forth in the 1991 Act, neither *McDonnell Douglas* nor *Desert Palace* are particularly relevant or helpful in analyzing reprisal cases brought under the CAA. As such, there is no reason to apply them. Indeed, the application of the ”nexus,” “causal connection” and “motivating factor” standards as set forth above accomplishes the same result – establishing the employer’s prohibited motivation – in a much simple, efficient and straightforward way. Mixed motive cases can and should be handled just like all other cases, and should require no special treatment; where ANY discrimination is proven, remedies should be awarded. We recommend that *Desert Palace* not be adopted. In the alternative, however, we recommend that the statutory term “because” be interpreted expansively to provide for liability and full remedies if any reprisal has taken place, even if the employer also harbored a legitimate motive for part of its actions.

IV. CONCLUSION

For all the reasons set forth herein, it is respectfully requested that the Board follow the recommendations set forth herein.

Respectfully submitted,

_____/s/_____

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Dated March 14, 2005

CERTIFICATE OF SERVICE

Ten copies of the foregoing BRIEF OF CAPITAL AREA COUNCIL OF FEDERAL EMPLOYEES, COUNCIL 26, AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES ("AFSCME"), AFL-CIO AS *AMICUS CURIAE* were caused to be served this 14th day of March, 2005, via facsimile and/or by hand delivery, on the following persons:

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