Washington, DC 20515

OFFICE OF GENERAL COUNSEL
March 14, 2005

Susan S. Robfogel, Esquire
Chair, Board of Directors
Office of Compliance
LA 200 John Adams Building
Washington, D.C. 20540-1999

Re: Notice and Invitation to File Amicus Curiae Briefs
dated January 24, 2005

Dear Chair Robfogel:

Enclosed is a brief (10 copies) on behalf of the Office of the Architect of the Capitol in response to the above Notice.

Very truly yours,

Kevin Mulshine, Associate General Counsel
Office of General Counsel
Office of the Architect of the Capitol

The Office of the Architect of the Capitol (hereinafter AOC) and others who are interested have been invited by the Board of Directors of the Office of Compliance (hereinafter the Board) to provide an amicus brief concerning Section 207(a), 2 U.S.C. 1317(a), of the Congressional Accountability Act (hereinafter CAA). The Board invites answers to five specific questions, all of which involve the legal standards that should apply to claims brought under Section 207. AOC respectfully submits this brief in response to this invitation.

INTRODUCTION AND GENERAL COMMENTS

Section 207 prohibits discrimination or reprisal[1] against legislative employees who have exercised rights protected by the CAA or opposed any practices made unlawful under the CAA. The statute reads in relevant part:

> SEC. 207. PROHIBITION OF INTIMIDATION OR REPRISAL.
> Sec. 207(a)
> (a) IN GENERAL.--It shall be unlawful for an employing office to intimidate, take reprisal against, or otherwise discriminate against, any covered employee because the covered 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.

The starting point for construing the statute must be its language. To establish a reprisal claim, Section 207 requires, that the employee demonstrate, first, that he or she (a) opposed an unlawful practice, or (b) made a charge or participated in some capacity in a hearing or other proceeding under the CAA. Second, the employee must show that the employing office "intimidate[d], [took] reprisal" or "otherwise discriminate[d]" "against" the employee. Third, the employee must demonstrate that the employing office took this action "because" the

[1] This brief uses the terms "reprisal" and "retaliation" interchangeably, as is commonly done in many of the cases cited below. See, e.g., Britton v. Office of the Architect of the Capitol, 01-AC-346 (CV,FM,RP) (June 3, 2003).

employee opposed an unlawful practice or participated in a CAA proceeding. Unless all of these requirements are met, an employee does not have an actionable reprisal claim under the CAA.

The questions presented by the Board pertain to how these requirements should be construed under the CAA. In the AOC's view, the questions presented should be considered in light of the intent of Congress when it enacted the CAA. Congress made clear that its intent was to apply to legislative branch employing offices the *same requirements* that applied to private sector and executive branch employers. See, e.g., 141 Cong. Rec. S163 (daily ed. Jan. 4, 1995) (statement of Sen. Glenn) ("I am very pleased that * * * we can * * * eliminate this congressional double standard under which we have enacted laws that apply to everyone but ourselves. * * * My guiding principle has been we in Congress should be subject to *the same laws* as apply to a business back in our home state.") (emphasis added); 141 Cong. Rec. H95 (daily ed. Jan. 4, 1995) (Statement of Rep. Hamilton) ("[I]t is simply unfair to congressional employees not to extend to them *the same rights and protections* available to those who work elsewhere.") (emphasis added); 141 Cong. Rec. S165 (daily ed. Jan. 4, 1995) (Statement of Sen. Leahy) ("Congress ... must provide to all its employees *the same protections* it requires other employers to give.") (emphasis added).

Consistent with this legislative intent, the CAA instructs: "[E]xcept where inconsistent with definitions and exemptions provided in this chapter, the definitions and exemptions in the laws made applicable by this chapter [including, e.g., Title VII of the 1964 Civil Rights Act and the Americans with Disabilities Act] shall apply under this chapter." 2 U.S.C. § 1361(f)(1). The CAA, moreover, expressly applies the rights and protections of Title VII of the Civil Rights Act, stating that "[a]ll personnel actions affecting covered employees shall be made free from any discrimination based upon * * * (1) race, color, religion, sex, or national origin, within the

meaning of section 703 of the Civil Rights Act (42 U.S.C. § 2000e-2)." 2 U.S.C. § 1311(a). In Haddon v. Executive Residence at the White House, 313 F.3d 1352 (Fed. Cir. 2002), the Federal Circuit interpreted nearly identical language in the Government Employee Rights Act (a precursor statute to the CAA, which had applied Title VII and several other statutes to certain Presidential appointees) as incorporating Title VII standards – including the requirement of demonstrating an adverse employment action. See Haddon, 313 F.3d at 1363 (interpreting 2 U.S.C. § 1202 (1991)).

Section 207, therefore, should be construed in a manner that comports with Title VII and with the construction of other employment discrimination statutes that apply to private employers and executive branch employees. Claims under Section 207 should be governed by the same analytical standards that apply to reprisal claims under the substantive statutes that are incorporated into the CAA. This approach comports with Congressional intent and with the CAA's express instruction that the Hearing Officer "shall be guided by *judicial* decisions under the laws made applicable" by the Act. 2 U.S.C. § 1405(h) (emphasis added); see also 2 U.S.C. §1361(f)(1) (incorporating definitions set forth in laws made applicable by the CAA). There is no basis for adopting rules that would impose a more burdensome standard on legislative branch employing offices than apply to private sector and executive branch employers. For example, the courts have typically required a showing of an "adverse employment action" to support a claim of reprisal under federal employment discrimination statutes. This concept should likewise be incorporated into Section 207 of the CAA.

This result is supported, not only by the statutory language and Congressional intent, but also by the important interest in allowing legislative branch employing offices to function without oversight or interference beyond what Congress intended. As the Supreme Court has repeatedly

indicated, decisions by a court or other tribunal should not dictate the manner in which a business operates. See, e.g., Furnco Construction Corp. v. Waters, 438 U.S. 569 (1978)("Courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it."); Bishop v. Wood, 426 U.S. 341 (1976) (" the federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. We must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs."); Faragher v. City of Boca Raton, 524 U.S. 775 (1998) ("the supervisor is clearly charged with maintaining a productive, safe work environment. The supervisor directs and controls the conduct of the employees, and the manner of doing so may inure to the employer's benefit or detriment.").

This rule applies with equal, if not greater force, in the context of legislative branch operations. It is well established that federal employees have limited employment rights. Thus, for example, under the CAA, employing offices have management rights that are not negotiable in a collective bargaining relationship. The manner in which the Office of Compliance construes Section 207 may constrict management decision-making and the disciplinary actions that are exclusively the right of employing offices. Accordingly, we urge the to proceed with caution and avoid adopting rules that will unduly limit the ability of employing offices to operate effectively. For example, should The Board determine that a showing of something less than an adverse employment action is required to establish a reprisal claim, an employee the Board may find a meritorious complaint on the basis of a perceived slight by a supervisor that has no consequences whatsoever on that employee's pecuniary interests, daily work life, or career prospects. Such a rule would encourage many de minimis claims and render the Board a "micromanager" of legislative branch workplaces.

We address below the five questions presented by the Office of Compliance for comment.

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?

We believe that a tribunal should look to the framework applied to claims of retaliation under each of the substantive laws made applicable to the legislative branch under the CAA. This result is strongly suggested by other provisions of the CAA, which make clear that claims under the CAA are to be governed by the legal standards applicable to the statutes incorporated therein. Thus, as noted above, 2 U.S.C.§1405(h) requires that a Hearing Officer shall "be guided by *judicial* decisions under the laws made applicable" by the CAA (emphasis added). This statutory provision requires that OC Hearing Officers analyze claims for retaliation under the frameworks in which courts, rather than administrative agencies, have applied the applicable substantive statute incorporated into the CAA. Similarly, 2 U.S.C. §1361(f)(1) instructs that the definitions of the laws incorporated into the CAA apply "except where inconsistent with definitions and exemptions provided in this chapter." There is nothing in the plain language of Section 207 that would bar the application of the definitions that courts apply to retaliation claims under the statutes made applicable to employing offices under the CAA.

Any inclination that the Board may have to adopt a uniform rule for the sake of simplicity must withstand the contrary wording of the statute and Congress's clear intent to make the legislative branch subject to the *same* substantive employment discrimination laws (and standards) as the private sector. Adoption of a uniform standard would put the Board solidly on the course of reviewing retaliation claims under the CAA pursuant to a standard that would be

different from those that govern retaliation claims arising from other workplaces, both private and public, under the individual statutes. For instance, an employee in the private sector or the executive branch raising a Title VII retaliation claim is subject to the familiar standards governing Title VII retaliation claims (including the requirement of providing evidence of an adverse employment action), while a legislative branch employee making the identical claim under the CAA would be subject to the OC Board-specific standards, including some lower threshold of proof. Such a result would be contrary to the plain intent of Congress to apply the same standards to the legislative branch that apply to the private sector and the executive branch ignoring Supreme Court precedent. See Food and Drug Administration v. Brown and Williamson Tobacco Corporation, 529 U.S. 120, 125-26 (2000) (courts must give effect to the unambiguous expressed intent of Congress).[2]

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 the Board curred because of activity allegedly protected by Section 201(a) and by Section 220(a) of the Congressional Accountability Act?

There are differences in the 11 statutes referenced in the CAA regarding retaliation. Only the anti-retaliation provisions of the FMLA (29 U.S.C. 2615) and the Uniformed Services Employment and Reemployment Act (38 U.S.C. 4311(b)) are made applicable by the CAA.

Section 201(a) of the CAA makes applicable certain "rights and protections" of Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, the

[2] If the Board nevertheless determines to adopt a uniform standard, the only arguably defensible approach would be to adopt the most prevalent standard for establishing retaliation, the McDonnell Douglas burden-shifting test. We discuss this point further in response to question 3, below.

Rehabilitation Act of 1973, and the Americans with Disabilities Act of 1990. Section 220(a) applies the "rights, protections, and responsibilities" of portions of the Federal Service Labor-Management Relations Statute (FSLMRS), which protects certain rights pertaining to union activities and prohibits certain agency and union actions as "unfair labor practices."

Judicial decisions under the statutes made applicable under Section 201 typically follow a framework that requires an employee alleging retaliation to prove: (1) participation in protected activity, (2) knowledge of this participation by the employer official, (3) an adverse action taken against the employee, and (4) a causal connection between the participation and the adverse action. Haddon v. Executive Residence at White House, 313 F.3d 1352, 1359 (Fed. Cir. 2002). The unfair labor practice analysis under the FSLMRS requires that, in all cases of anti-union discrimination, whether "pretext" or "mixed motive," the General Counsel must establish that: (1) the employee against whom the alleged discriminatory action was taken was engaged in protected activity; and (2) such activity was a motivating factor in the agency's treatment of the employee in connection with hiring, tenure, promotion, or other conditions of employment. Letterkenny Army Depot and IBPO, Local 358, 35 FLRA 113 (1990).

In a case that alleges retaliation under Section 207 for exercising rights citing both an anti-discrimination statutes referenced in CAA Section 201, and under the unfair labor practices statute referenced in CAA Section 220, the requirements set forth in Section 207 must be followed for both claims. Thus, to establish a claim the employee demonstrate that: (1) he or she opposed an unlawful practice or made a charge or participated in a hearing or other proceeding under the CAA; (2) the employing office "intimidate[d], [took] reprisal" or "otherwise discriminate[d]" "against" the employee; and (3) the employing office took this action "because" the employee opposed an unlawful practice or participated in a CAA proceeding. 2 U.S.C.

§ 1317(a). Unless all of these requirements are met, an employee does not have an actionable claim under Section 207.

In determining whether the requirements of Section 207 have been satisfied in a case involving claims under two different CAA provisions, the standards used to analyze retaliation claims under Title VII of the Civil Rights Act of 1964 should be applied because the language of Section 207 is almost identical to the language of the retaliation provisions set forth in Title VII. Section 207 provides that it is unlawful for an employing office to take reprisal or discriminate against an employee "because the covered employee has opposed any practice made unlawful by this chapter, 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 chapter." 2 U.S.C. § 1317(a). Title VII's anti-retaliation provision similarly provides that it is unlawful for an employer to discriminate against an employee "because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a). It is thus reasonable to assume that Congress intended Section 207 to be construed in a manner consistent with Title VII's retaliation provision.

3. If a single framework is adopted for all Section 207(a) claims, should the McDonnell Douglas, Letterkenny Army Depot, or other framework be adopted as the framework for analyzing reprisal claims raised pursuant to Section 207(a) of the Congressional Accountability Act?

As noted above, we contend that the single framework approach cannot be reconciled with Congressional intent. Each claim of retaliation should be evaluated under the judicial decisions analyzing such claims under the relevant substantive statute incorporated into the CAA.

To the extent that the Board nevertheless decides to apply a single framework to Section 207 claims, the only supportable approach would be to apply the framework that the courts apply to reprisal claims under Title VII and the other anti-discrimination statutes, the familiar McDonnell Douglas burden-shifting analysis. See, e.g., Brown v. Brody, 199 F.3d 446, 452 (D.C. Cir. 1999) (applying " the familiar test of McDonnell Douglas v. Green" to Title VII claim against the federal government). As the Federal Circuit recently explained, "In the context of a retaliation claim, this is done by showing that: (1) the plaintiff participated in a protected activity, (2) the defendant had knowledge of this participation, (3) the defendant took adverse action against the plaintiff, and (4) there was a "causal connection" between the plaintiff's protected activity and the defendant's adverse action against the plaintiff." Haddon v. Executive Residence at White House, 313 F.3d 1352, 1359 (Fed. Cir. 2002). "If the plaintiff is successful in showing a prima facie case, the burden then shifts to the defendant to show that there was a legitimate nondiscriminatory reason for the rejection * * * Finally, the plaintiff is given the opportunity to show by a preponderance of the evidence that the stated reason is a mere pretext, and the real reason was prohibited discrimination." Haddon at 1359.

As discussed in section 2, supra, the standards used to analyze retaliation claims under Title VII of the Civil Rights Act of 1964 should be applied to Section 207 claims because the language of Section 207 is almost identical to the language of the retaliation provisions set forth in Title VII. *Compare* 2 U.S.C. § 1317(a) *with* 42 U.S.C. § 2000e-3(a). It is thus reasonable to assume that Congress intended Section 207 to be construed in a manner consistent with Title VII's retaliation provision.

There would be no justification for making the standard adopted in Letterkenny Army Depot and IBPO, Local 358, 35 FLRA 113 (1990) the uniform standard adopted for resolving

claims under Section 207. Letterkenny is an administrative decision from the Federal Labor Relations Authority construing 5 U.S.C. § 7116(a)(2), which states that it is an " unfair labor practice" for an agency "to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment." While the language of Title VII is markedly similar to the language of Section 207, the language of 5 U.S.C. § 7116 is strikingly different. There is thus no reason to believe that Congress meant for Section 207 claims to be governed by the standards courts apply to claims under § 7116.

Moreover, Section 207 of the CAA, like the provisions of Title VII and the other anti-discrimination laws, protects the rights of the individual employee, and permits the employee to file a claim on her own behalf and thereby control the litigation. The statutory scheme upon which Section 220(a) of the CAA relies, by contrast, addresses the rights of unions and the rights of the employer, as well as the rights of employees. A Section 220 proceeding may involve, not only an employee and an employing office, but also charges against a third-party union, while Section 201, like Section 207, will only be an employee action against the employing office.

Further, Section 220 advances the public interest in protecting the concerted activities of employee through their unions and in promoting workplace harmony. The statute upon which Section 220 is based provides protection for union related and protected activities by means of the "unfair labor practice" (ULP) complaint mechanism. Section 7102 of Title 5 provides employees the rights to engage in (or refrain from engaging in) union activities "without fear of penalty or reprisal." Section 7116 of Title V provides the mechanism to protect these rights in which, pursuant to 5 U.S.C. 7118, the General Counsel has the authority to decide whether to prosecute the ULP charges through a formal complaint.

The ULP procedure in which Section 220 claims are considered is wholly distinct from litigation between employing office and employee contemplated by Sections 201 and 207. In the former process, it is the General Counsel, not the employee, who prosecutes the ULP charge if the General Counsel's investigation shows it to be substantiated. The employee may be an interested party in this proceeding, but the employee does not have the ability to control the litigation like the employee has in a proceeding under 201 or 207. In short, because the framework for resolving unfair labor practices claims under Section 220 is entirely different from the framework for resolving Section 207 claims, there is no basis for applying the legal standards that govern unfair labor practices claims to Section 207 claims.

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

The courts have taken different approaches with respect to precisely what sort of conduct constitutes an adverse employment action, for purposes of stating a claim of employment discrimination. While two circuits have suggested that an adverse action must be an "ultimate employment decision," Mattern v. Eastman Kodak Co., 104 F.3d 702, 707, 709 (5th Cir.), *cert. denied*, 522 U.S. 932 (1997); Buettner v. Arch Coal Sales Co., 216 F.3d 707 (8th Cir. 2000), *cert. denied*, 531 U.S. 1077 (2001),[3] the majority of circuit courts, including the Federal Circuit, have held that a retaliation claimant must prove an employment action that constitutes a materially adverse change in the terms, conditions, or privileges of employment. See Haddon, 313 F.3d at 1363.[4] Such actions generally include "'termination of employment, a demotion evidenced by a

[3] The Eighth Circuit defines "ultimate employment action" to include a "tangible change in duties or working conditions that constituted a material employment disadvantage." Manning v. Metropolitan Life Ins. Co., 127 F.3d 686, 692 (8th Cir. 1997).

[4] See also, e.g., Von Gunten v. Maryland, 243 F.3d 858, 864-65 (4th Cir. 2001); Gupta v. Florida Bd. of Regents, 212 F.3d 571, 587-88 (11th Cir. 2000); Ribando v. United Airlines, Inc., 200 F.3d 507, 510-11 (7th Cir. 1999); Brown v. Brody, 199 F.3d 446, 456-57 (D.C. Cir. 1999); Hollins v. Atlantic Co., 188 F.3d 652, 662 (6th Cir. 1999); Richardson v. New York State Dep't

decrease in wage and salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.'" Ibid. (citations omitted). Cf. Burlington Indus., Inc. v. Ellereth, 524 U.S. 742, 761 (1998) (noting, in sexual harassment context, that "[a] tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[5]

By law, as noted above, only the decisions of courts have precedential value before the OC hearing officers and the Board OC. 2 U.S.C. §1405(h) Because the Board's decisions are subject to direct appeal to the Federal Circuit, the decision of that Circuit should control. Thus, in accordance with the overwhelming weight of authority, the Board should conclude that only serious employment actions, involving tangible consequences that affect an employees' job benefits or livelihood – such as terminations, suspensions, demotions with reduction in salary, and losses of pay – should be considered sufficient to support a claim under Section 207. Under

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of Corr. Serv., 180 F.3d 426, 446 (2d Cir. 1999); Robinson v. City of Pittsburgh, 120 F.3d 1286, 1300 (3d Cir. 1997).

[5] The EEOC has issued guidance that might be read to sanction a lesser showing, stating that an "adverse employment action" in the retaliation context includes "any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity." EEOC Compliance Manual Section 8, "Retaliation" (1998). Only one circuit – the Ninth – has adopted the EEOC formulation. See Ray v. Henderson, 217 F.3d 1234, 1242-43 (9th Cir. 2000). However, the Ninth Circuit's application of the standard appears similar to the majority rule, since that court subsequently made clear that an adverse action must be final and must have permanent consequences. See Kortan v. California Youth Auth., 217 F.3d 1104, 1112-1113 (9th Cir. 2000) (holding that a retaliatory performance evaluation that subsequently is corrected is not actionable). In any event, to the extent there is any conflict, the Board is bound by the Federal Circuit's holding in Haddon.

this standard, being given additional work;[6] being placed on absent without leave status;[7] a purely lateral transfer with no loss in pay;[8] or changes in work assignments or duties without a decrease in salary or hours are insufficient evidence to support a reprisal claim.[9] None of these actions is sufficiently substantial to constitute an employment action that is actionable under Section 207.

We note that in a recent decision, the Board discussed applying a more lenient standard for evaluating a retaliation claim under the Family Medical and Leave Act's own retaliation provision, 29 U.S.C. § 2615, whose "rights and protections" have been made applicable to employing offices by the CAA, 2 U.S.C. § 1312(a). Britton v. Office of the Architect of the Capitol, 01-AC-346 (CV,FM,RP) (Decided June 3, 2003), published online. In Britton, the Board followed a decision from the Ninth Circuit holding that a claim of interference with FMLA rights under 29 U.S.C. § 2615(a)(1) should be judged under the standards that govern the National Labor Relations Act and does not require a showing of an ultimate, permanent, or tangible employment action. Britton, at 6, citing Bachelder v. America West Airlines, 259 F.3d 112 (9th

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[6]Brodetski v. Duffey, 199 F.R.D. 14, 21 (D.D.C. 2000).

[7]Graham v. State Farm Mutual Insurance Co., 193 F.3d 1274, 1282 (11th Cir. 1999).

[8]Medina v. Henderson, 1999 WL 2325497 (D.C. Cir. 1999); citing Doe v. DeKalb County School. Dist., 145 F.3d 1441, 1447-51 (11th Cir.1998); Williams v. Bristol-Myers Squibb Co., 85 F.3d 270, 274 (7th Cir.1996); Mungin v. Katten Muchin & Zavis, 116 F.3d 1549, 1556 (D.C. Cir.1997) (noting that "other circuits have held that changes in assignments or work-related duties do not ordinarily constitute adverse employment decisions if unaccompanied by a decrease in salary or work hour changes"); Dilenno v. Goodwill Industries, Inc., 162 F.3d 235, 236 (3d Cir.1998) (observing that desire to live in a certain city is not "job-related attribute" to be considered when determining whether lateral transfer was adverse employment action); Smart v. Ball State University, 89 F.3d 437, 441 (7th Cir.1996) (emphasizing that "not everything that makes an employee unhappy is an actionable adverse action").

[9]Mungin v. Katten, Muchin, & Zavis, 116 F.3d 1549, 1557-58 (D.C.Cir. 1999), citing Kocsis v. Multi-Care Management, 97 F.3d 876, 886-87 (6th Cir.1996); Crady v. Liberty National Bank & Trust Co., 993 F.2d 132, 136 (7th Cir.1993); Williams v. Bristol-Myers Squibb Co., 85 F.3d 270, 274 (7th Cir.1996).

Cir. 2001). We believe that this construction of the FMLA's retaliation provision is incorrect. Most courts of appeals have agreed that FMLA retaliation claims require a showing of an adverse personnel action. Hodgens v. General Dynamics Corp., 144 F.3d 151, 161 (1st Cir. 1998); Darby v. Bratch, 287 F.3d 673, 679 (8th Cir. 2002); Richmond v. ONEOK, Inc., 120 F.3d 205, 208 (10th Cir.1997).[10]

But regardless of what FMLA's own retaliation provision requires, there is utterly no basis for importing the test for establishing retaliation under the National Labor Relations Act to Section 207 claims. As explained above, the language of the CAA retaliation provision tracks the language of the Title VII retaliation provision, which clearly requires a showing of an adverse employment action. The language of Section 207 bears no resemblance to language found in the National Labor Relations Act, a statute that the Congress deliberately chose not to include in the CAA.[11]

Assuming arguendo that retaliation may be established under the NLRA without showing that an adverse employment action took place, that rule has no relevance whatsoever to the proper construction of Section 207 the CAA.

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

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[10] We also note that on remand, the Hearing Officer in Britton held that the plaintiff had failed to establish her retaliation claim. Britton, No. 01-AC-346 (CV, FM, RP) (November 5, 2003). The Britton case is currently on appeal to the Federal Circuit on the issue of timeliness. Britton v. Office of Compliance, No. 04-6004 (Fed. Cir.).

[11] The language of CAA Section 207(a) does not track the language of the NLRA. *Compare* CAA Section 207(a) (making it "unlawful for an employing office to intimidate, take reprisal against, or otherwise discriminate against, any covered employee because the covered 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") *with* 29 U.S.C. § 158 (providing that it is an unfair labor practice to "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title").

applied to reprisal claims under Section 207(a), specifically those that involve a mixed-motive claim?

The Supreme Court's decision in Desert Palace has little, if any, relation to the general evidentiary framework governing retaliation claims under section 207(a). In Desert Palace, the Court considered whether a specific provision of the Civil Rights Act of 1991 – 42 U.S.C. § 2000e-2(m) – required a Title VII plaintiff to prove by direct evidence that an impermissible consideration was a "motivating factor" in an adverse employment action, thus triggering the employer's burden to prove that it would have made the same decision even if it had not considered the prohibited factor. *See* 539 U.S. at 94-95. Relying upon the language of that particular statutory provision, the court held that a plaintiff need not submit direct evidence that the employment decision was motivated by discriminatory purpose in order to receive a "mixed motive" jury instruction. *Id.* at 95-102.

Nothing in *Desert Palace* purported to alter the familiar and longstanding McDonnell Douglas framework applicable to discrimination cases generally, and therefore the decision should not be interpreted as affecting that framework in the context of section 207(a) cases generally. The Supreme Court and other courts have adopted the McDonnell Douglas three-step analysis for claims of retaliation, FMLA, and other statutes.[12] There is no reason why that standard should be rejected in addressing claims under section 207.

Of course, the Desert Palace decision does apply in Title VII "mixed-motive" cases brought pursuant to CAA section 201(a). As we have discussed, section 201(a) applies the rights and protections of Title VII, and the Board must look to the Title VII standards (as interpreted by the courts) when confronted with a claim of discrimination or retaliation in the context of a claim otherwise cognizable under Title VII.

[12]See discussion regarding Question 3, above.

Conclusion

In summary, the AOC asserts that Section 207 claims should be considered consistent with the framework established in reprisal or retaliation claims under Title VII and other similar statutes. By law, the Board (and hearing officers) must look to court decisions, not administrative decisions, as precedent. Specifically, the Supreme Court decision in McDonnell Douglas applies to Section 207 claims. That analysis continues to apply, without significant alteration after the Desert Palace decision. Finally, the Board should adopt the same "adverse action" analysis relied on by the Federal Circuit and the U.S. Court of Appeals for the D.C. Circuit in reprisal cases.

Respectfully submitted,

for 3/14/05

Peter Kushner
Kevin Mulshine
Office of General Counsel
Office of the Architect of the Capitol