

**Board of Directors
Office of Compliance
110 2nd Street, SE, Room LA-200
Washington, D.C. 20540**

AMICUS CURIAE BRIEF
OF THE NATIONAL FRATERNAL ORDER OF POLICE

The National Fraternal Order of Police (hereinafter referred to as the “FOP”) hereby submits this *Amicus Curiae* Brief in response to an invitation from the Board of Directors of the Office of Compliance. Before the Board is an appeal regarding the appropriate framework to be utilized in analyzing reprisal and intimidation claims raised pursuant to Section 207(a) of the Congressional Accountability Act, 2 U.S.C. 1317(a). This *Amicus* Brief shall address issues 1 and 3 stated in the Notice and Invitation to File *Amicus Curiae* Briefs dated January 24, 2005.

I. INTRODUCTION:

The National Fraternal Order of Police - More than 318,000 Men and Women of Law Enforcement Urging Reversal of the Decision of the Seventh Circuit Court of Appeals.

The National Fraternal Order of Police represents more than 318,000 law enforcement personnel at every level of crime prevention and investigation, nationwide and internationally.

The National Fraternal Order of Police was founded in 1915. What was originally contemplated as an organization for the “social welfare of all the police” has evolved into an active representative group working to protect and secure the laws and work of its law enforcement members. The work of the FOP’s law enforcement members has long been understood as a significant task:

The duties which the police officer owes to the state are of the most exacting nature. No one is compelled to choose the profession of a police officer, but having chosen it he is obliged to perform those duties, and to live up to the standards of its requirements. * * * The police officer has chosen a profession that he must hold at all peril. He is the outpost of civilization. He cannot depart from it until he is relieved. A great and honorable duty is his, to be greatly and honorably fulfilled.

But there is toward the officer a corresponding duty of the state. It owes him a generous compensation for the perils he endures for the protection of society. It owes him the knowledge of security that is to be his, from want in his declining years. It owes him that measure which is due to the great importance of the duties he discharges.¹

II. ISSUES AND LEGAL ANALYSIS:

A. 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?

The FOP, in this case, advocates the adoption of a single framework for analyzing all claims raised pursuant to Section 207(a) of the Congressional Accountability Act. Section 207(a) of the Act makes 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.”

2 U.S.C.S. § 1317(a).

¹ “The Fraternal Order of Police, A History;” Justin E. Walsh, Ph.D.; Turner Publishing Co., Ed. 2001, citing Vernon Smith, Fraternal Order of Police Journal, Vol. 47, No. 1 (Winter, 1964), p.19.

Employment law, in other contexts, has referred to such a claim as a “retaliation” or “reprisal” claim. Because this Section of the Act makes it unlawful to retaliate against an employee for exercising protected rights under the Act, it makes no difference of what type of discrimination the employee complains. In other words, it makes no matter whether the employee was seeking to enforce his or her rights pursuant to the Family and Medical Leave Act, the Americans with Disabilities Act, or Title VII, the only relevant inquiry is whether the employee was retaliated against for exercising protected rights. Such an analysis is most easily conducted based upon a single framework as opposed to frameworks applicable to “retaliation” claims pursuant to each separate employment statute made applicable to Members of Congress under the Congressional Accountability Act.

The analysis of a retaliation claim does not depend upon what substantive right was being exercised by the employee. The only issue in a retaliation claim is whether the employee was treated adversely as a result of exercising a protected right. The basis for such protected right, for the most part, is irrelevant to the analysis in a retaliation context. Therefore, a single framework for analyzing such claims would be most appropriate.

Many federal courts have recognized that the analysis of a discrimination claim under a federal employment statute is different from the analysis of a retaliation claim based upon the exercise of protected rights. See, e.g., *White v. Burlington Northern and Santa Fe Railway Co.* 364 F.3d 789 (6th Cir. 2004); *Liu v. Amway Corp.* 347 F.3d 1125 (9th Cir. 2003); *Romiszak-Sanchez v. International Union of Operating Engineers* 2005 U.S. App. LEXIS 858 (7th Cir. 2005). Specifically, most federal courts require that an employee in a retaliation context demonstrate that he or she engaged in a protected activity, the employer subjected him or her to an adverse

employment decision and there was a casual link between the protected activity and the employer's action. *Liu, supra* at 1144. Once an aggrieved employee has met the burden of demonstrating a “*prima facie* case” based upon the factors stated above, many courts employ a burden shifting analysis under the *McDonnell Douglas* test.

Adoption of a single framework for analysis of retaliation claims under the Act would also make analysis of such claims less complicated for both the Board and for complaining parties and respondents. Complaining parties and respondents would be on notice of the applicable legal standards and burdens of proof at the time of, or even prior to, the filing of any complaints under the Act. The Board would then engage in the same analysis for each particular “retaliation” claim. A single framework in this context would not only serve to protect the substantive rights of both complaining parties and respondents, it would also put all involved parties on notice that one framework would be applied to every such claim. The adoption of a single framework for the analysis of retaliation claims would also prevent situations in which there is a “split” of appellate districts or other courts under particular statutes made applicable to members of Congress by the Congressional Accountability Act. A single framework would prevent differing or conflicting opinions regarding evidentiary requirements under particular employment statutes. As a result of all reasons set forth above, the FOP in this case urges the Board to adopt a single framework for analyzing all claims raised pursuant to Section 207(a) of the Congressional Accountability Act.

B. 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?

The FOP advocates adopting a burden shifting analysis to analyze reprisal claims under Section 207(a) of the Act pursuant to the *McDonnell Douglas* framework. Because of the typical

absence of direct evidence of retaliatory animus in reprisal cases, such a burden shifting analysis results in the most effective enforcement of the prohibitions of the Act. In most cases an aggrieved employee has only circumstantial evidence upon which to rely, so an indirect proof and burden shifting scheme was created to establish a manner by which an employee, in the absence of some explanation by the employer, can show a violation of the Act. As explained by the Supreme Court, “. . . the allocation of burdens and the creation of a presumption by the establishment of a *prima facie* case is intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination.” *Texas Dept. of Community Affairs v. Burdine* (1981), 450 U.S. 248, 255 N.8. The Court has also stated that “the shifting burdens of proofs set forth in *McDonnell Douglas* are designed to assure that the plaintiff has his day in court despite the unavailability of direct evidence.” *Trans World Airlines, Inc. v. Thurston* (1985) 469 U.S. 111, 121 (Citations omitted).

Shifting evidentiary burdens in such cases are often developed to further substantive policies. Clearly a substantive policy sought to be served by the Congressional Accountability Act is to eliminate discrimination and retaliation resulting from an employee exercising his or her rights under the Act. A burden shifting framework such as that outlined in the *McDonnell Douglas* case ensures that an employer bears the burden of persuasion that it did not act with discriminatory or retaliatory animus. Since it is often very difficult for an employee to present direct evidence of discrimination, such a burden shifting framework allows the employee to establish a *prima facie* case (with circumstantial, indirect evidence or otherwise) and then shifts the burden of persuasion to the employer to provide legitimate nondiscriminatory reasons for its actions. If the employer does so, the burden of persuasion shifts back to the employee to demonstrate that the reasons proffered by

the employer for the employment action were pretextual. The *McDonnell Douglas* court likely created such a burden shifting framework to help fact finders recognize the truth of the assertions made by both parties to the litigation. The framework allows an employee to raise a presumption of discrimination or retaliation by presenting a *prima facie* case. Without a valid explanation from the employer, such a burden shifting analysis recognizes that adverse treatment of the employee may be explained by his or her membership in a protected class or exercise of protected rights. However, even if an employer is able to provide a valid business explanation for its conduct, such a burden shifting analysis still allows the employee to demonstrate that retaliatory motives were the real reason behind the employment decision.

In addition, a burden-shifting framework also recognizes the situation that faces most employees regarding proof of discrimination. Specifically, employers typically have more access to proof and other materials in an employment discrimination or retaliation case than the employee. It is most likely that an employee's only proof of retaliatory intent will be circumstantial. The employer, on the other hand, will often have access to more direct evidence including personnel files, hiring data, and performance reviews. The disparity of access to evidence in such a case is one of the probable policy reasons behind the Supreme Court's adoption of the *McDonnell Douglas* burden shifting analysis.

Therefore, for all of the reasons set forth above, the FOP advocates the adoption of the *McDonnell Douglas* burden shifting framework as the framework for analyzing reprisal claims raised pursuant to Section 207(a) of the Congressional Accountability Act.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been forwarded to *via* Federal Express
(*Overnight delivery*) this **11th** day of **March, 2005**, to the following individual(s):

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