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Amicus Curiae Brief in Response to
January 24, 2005 Notice and Invitation to File Amicus Briefs

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Date: March 11, 2005

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In response to the January 24, 2005 Notice and Invitation to File Amicus Curiae Briefs ("Notice") issued by the Board of Directors of the Office of Compliance ("the Board"), the Office of House Employment Counsel ("OHEC") respectfully submits the following brief.

I. Statement of Interest

As the legal counsel for many employing offices covered by the Congressional Accountability Act ("CAA"), OHEC has an interest in the Board's determination of the legal issues presented in the Notice. In particular, OHEC is interested in the maintenance of uniform legal standards in Section 408 judicial proceedings, Section 405 administrative hearings, and Section 406 Board appellate review. Such uniformity provides guidance to employing offices regarding compliance with the CAA, creates for both covered employees and employing offices predictability in the administration of justice under the CAA, and, most importantly, reduces forum shopping by Complainants based upon differences in interpretation of the CAA. Because the CAA was intended to create a "dual track" for vindication of employee rights, not a "dual system" of justice, the adjudication on the merits of any CAA claim should never depend upon the track selected.

The CAA directly addresses these concerns in Section 405(h), which requires hearing officers to "be guided by *judicial decisions* under the laws made applicable [by the CAA] and by Board decisions." 2 U.S.C. § 1405(h) (emphasis added). The Board, in turn, is similarly constrained, by the limited nature of its review, to follow judicial decisions on the appropriate legal standards to be employed in CAA cases. *See* 2 U.S.C. § 1406(c). If a hearing officer has been properly guided by judicial decisions, then a hearing officer's adoption of a particular legal standard would never be "arbitrary, capricious, an abuse of discretion, or otherwise not consistent

with the law." *Id.* Congress further safeguarded judicial decisions on the underlying employment laws by requiring the Federal Circuit to "set aside a final decision of the Board if it is determined that the decision was . . . otherwise not consistent with law. . . ." 2 U.S.C. § 1407(d)(1). Rejection by the Board or hearing officer of a well-established legal standard would be inconsistent with the CAA and, thus, would likely be disapproved by the Federal Circuit.

II. Adoption of a Rule of Decision

Differences, both large and small, exist between the federal courts of appeals ("Circuits") on many employment law standards. Before adopting any standards governing Section 207 actions, OHEC urges the Board first consider adopting an overarching, principled rule of decision to assist hearing officers in selecting the appropriate caselaw to follow. Such a rule of decision would contribute to the predictability, consistency and fairness that are hallmarks of any adjudicative system. OHEC recommends that the following rule of decision be adopted for resolving CAA issues: apply, in descending order, available precedents from

(1) the United States Supreme Court;
(2) the Federal Circuit;
(3) the Circuit in which the Complainant is/was employed;
(4) the D.C. Circuit;
(5) any other Circuit or federal district court.

The binding effect of precedents below the second level (Federal Circuit) should be limited to cases originating from that particular Circuit. Under the proposed rule of decision, the Federal Circuit is given binding effect and higher priority in recognition of its role as reviewer of Board decisions. The D.C. Circuit is given higher priority than the other "non-resident" Circuits (but not binding effect) because the majority of the covered employees are bound by its precedents in federal court litigation. This proposed rule discourages forum shopping by guaranteeing that an

administrative hearing case arising in a district office outside Washington, D.C., will be resolved using the same precedents that would have been applied in the local federal district court, while not constraining hearing officers to follow Board decisions founded upon other Circuit law.

III. Retaliation Claims Under The CAA

With the exception of the FMLA and USERRA, the CAA does not incorporate the anti-retaliation provisions of the underlying employment laws made applicable to Congress.[1] Rather, the CAA creates a private right of action for retaliation claims in a separate section, Section 207. 2 U.S.C. § 1317(a).

IV. Argument

A. A Single Framework For All Section 207(a) Claims Is Required By The CAA

The Board has posed the question whether it should adopt a single framework for all Section 207(a) claims or adopt an approach "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 [CAA]." Notice at 1. It is clear from the text and structure of the CAA, as well as the legislative history, that a single framework should be adopted for Section 207 claims.

The CAA's anti-retaliation section, Section 207, closely mimics the anti-retaliation provisions in Title VII, ADEA, ADA, FLSA, FMLA, EPPA, and USERRA.[2] *See* note 1, *supra*;

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[1] *See, e.g.*, 42 U.S.C. § 2000e-3(a) (Title VII); 29 U.S.C. § 623(d) (ADEA); 42 U.S.C. § 12203 (ADA); 29 U.S.C. § 794(a) (Rehabilitation Act incorporating ADA retaliation provision); 29 U.S.C. § 215(a)(3) (FLSA); 29 U.S.C. § 2002(4) (EPPA).

The CAA does incorporate the anti-retaliation provisions in the FMLA, 29 U.S.C. § 2615(b), and USERRA, 38 U.S.C. § 4311(b). *See* 2 U.S.C. §§ 1312(a)(1), 1316(a)(1)(A). However, the CAA remedies are limited to those remedies, including liquidated damages, available under the underlying statutes. 2 U.S.C. §§ 1312(b), 1316(b)); *see* 29 U.S.C. § 2617(a); 38 U.S.C. § 4323(d). Thus, the remedies available for a Section 207 violation are arguably constrained by the more specific provisions concerning the FMLA and USERRA remedies, which do not permit compensatory damages. *See* 2 U.S.C. § 1361(f)(1).

[2] For instance, Title VII provides: "It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because

38 U.S.C. § 4311(b) (USERRA). While Title VII, unlike the CAA, does not specifically contain prohibitions on "intimidation" and "taking reprisal against" an employee, the CAA's use of the phrase "or otherwise discriminate against" makes clear that intimidation and reprisal are considered forms of discrimination and do not create broader protection than the anti-retaliation provisions in the underlying statutes. *See* 2 U.S.C. § 1317(a). Because the CAA's language mirrors the anti-retaliation provisions of the underlying employment laws, Section 207 should be interpreted in a manner consistent with those provisions.

Although the CAA's text is determinative, the legislative history of Section 207(a) further supports a single framework. The section-by-section analysis of the CAA, which was introduced by Senators Grassley and Lieberman during floor debate, confirms that Section 207 "provides *one uniform remedy* for intimidation or reprisal taken against covered employees for exercising rights and pursuing remedies of violations for the violation of rights conferred by [the CAA]." 141 CONG. REC. S624 (daily ed. Jan. 9, 1995) (emphasis added). Adoption of multiple frameworks dependent upon which underlying employment law is at issue would undermine Congress' intent to provide "one uniform remedy" for all retaliation claims.

B. The *McDonnell-Douglas* Framework For Retaliation Claims Is The Appropriate Framework For All Section 207(a) Claims Where There Is No Direct Evidence Of Retaliation

1. With the exception of USERRA and the FLRMA, the *McDonnell Douglas* framework is universally used for employment retaliation claims under the laws incorporated by the CAA

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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) (emphasis added). As discussed in greater detail in Section III.B.2, *infra*, the burden-of-proof framework for USERRA retaliation claims differs from these other statutes due to a specific statutory provision. *See* 38 U.S.C. § 4311(c)(2).

In *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973), the Supreme Court developed an evidentiary framework for Title VII disparate treatment discrimination claims where there is *no direct evidence of discrimination. See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985) ("the *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination"). Under the familiar *McDonnell Douglas* framework,

> it is the plaintiff's burden to establish a prima facie case of discrimination by a preponderance of the evidence. If the plaintiff establishes a prima facie case, the employer must then articulate a legitimate nondiscriminatory reason for its actions. The plaintiff must then demonstrate that the employer's stated reason was pretextual and that the true reason was discriminatory.

Stella v. Mineta, 284 F.3d 135, 144 (D.C. Cir. 2002) (citations omitted). A *prima facie* case of discrimination is shown if (1) the plaintiff was a member of a protected class; (2) the plaintiff suffered an adverse employment action; and (3) the unfavorable action gives rise to the inference of discrimination. *See, e.g., Brown v. Brody*, 199 F.3d 446, 452 (D.C. Cir. 1999).

While the *McDonnell Douglas* framework has also been applied to retaliation claims, "the prima facie requirements are slightly different." *Brown*, 199 F.3d at 452. The plaintiff must show (1) that she engaged in a statutorily protected activity; (2) that the employer took an adverse personnel action; and (3) that a causal connection existed between the two. *Id.* Every Circuit employs the *McDonnell Douglas* framework for Title VII retaliation claims and applies substantially the same formulation of the *prima facie* case standard in *Brown*.[3] As the D.C.

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[3] *See, e.g., Hernandez-Torres v. Intercontinental Trading, Inc.*, 158 F.3d 43, 46 (1st Cir. 1998); *Gordon v. New York City Bd. of Educ.*, 232 F.3d 111, 113 (2d Cir. 2000); *Farrell v. Planters Lifesavers Co.*, 206 F.2d 271, 279 (3d Cir. 2000); *Von Gunten v. Maryland*, 243 F.3d 858, 863 (4th Cir. 2001); *Pierce v. Texas Dep't of Crim. Justice, Institutional Div.*, 37 F.3d 1146, 1151 (5th Cir. 1994); *Nguyen v. City of Cleveland*, 229 F.3d 559, 563 (6th Cir. 2000); *Smart v. Ball State Univ.*, 89 F.3d 437, 440 (7th Cir. 1996); *Sims v. Sauer-Sundstrand Co.*, 130 F.3d 341, 343 (8th Cir. 1997); *Ray v. Henderson*, 217 F.3d 1234, 1240 (9th Cir. 2000); *Kelley v. Goodyear*

Circuit noted in *Brown*,

> Courts of appeals routinely apply the same standards to evaluate Title VII claims as they do ADA claims, ADEA claims, and even ERISA claims. This is so because these statutes often use the same 'terms and conditions' language to proscribe discriminatory practices. For the same reason, courts rely on cases applying like-worded retaliation provisions in different statutes.

Id. at 456 n.10 (citations omitted). Thus, courts have universally applied the *McDonnell Douglas* framework to retaliation claims under the ADEA,[4] ADA/Rehabilitation Act,[5] FLSA,[6] and

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Tire & Rubber Co., 220 F.3d 1174, 1179 (10th Cir. 2000); *Berman v. Orkin Exterminating Co.*, 160 F.3d 697, 701 (11th Cir. 1998); *Haddon v. Executive Residence of the White House*, 313 F.3d 1352, 1359 (Fed. Cir. 2002).

[4] *See, e.g., Loeb v. Textron, Inc.*, 600 F.2d 1003, 1010 & n.3 (1st Cir. 1979); *Wanamaker v. Columbian Rope Co.*, 108 F.3d 462, 465 (2d Cir. 1997); *Sarulo v. United States Postal Serv.*, 352 F.3d 789, 797 (3d Cir. 2003); *Hill v. Lockheed Martin Logistics Management, Inc.*, 354 F.3d 277, 284 (4th Cir. 2004); *Patrick v. Ridge*, 394 F.3d 311, 315 n.10 (5th Cir. 2004); *DiCarlo v. Potter*, 358 F.3d 408, 415 (6th Cir. 2004); *Paluck v. Gooding Rubber Co.*, 221 F.3d 1003, 1011 (7th Cir. 2000); *Calder v. TCI Cablevision of Mo., Inc.*, 298 F.3d 723, 731 (8th Cir. 2002); *Sanghvi v. City of Claremont*, 328 F.3d 532, 536 n.3 (9th Cir. 2003); *Anderson v. Phillips Petroleum Co.*, 861 F.2d 631, 634 (10th Cir. 1988); *Wright v. Southland Corp.*, 187 F.3d 1287, 1290-91 & n.2 (11th Cir. 1999); *Carter v. George Washington Univ.*, 387 F.3d 872, 878 (D.C. Cir. 2004).

[5] *See, e.g., New England Health Care Employees Union v. Rhode Island Legal Servs.*, 273 F.3d 425, 429 (1st Cir. 2001); *Regional Econ. Cmty. Action Program, Inc. v. City of Middletown*, 294 F.3d 35, 54 (2d Cir. 2002); *Williams v. Philadelphia Housing Auth. Police Dep't*, 380 F.3d 751, 759 n.3 (3d Cir. 2004); *Ennis v. National Ass'n of Business & Educ. Radio, Inc.*, 53 F.3d 55, 58 (4th Cir. 1995); *Sherrod v. American Airlines, Inc.*, 132 F.3d 1112, 1122 (5th Cir. 1998); *Grosjean v. First Energy Corp.*, 245 F.3d 547, 550 (6th Cir. 2001); *Kersting v. Wal-Mart Stores, Inc.*, 250 F.3d 1109, 1117 (7th Cir. 2001); *Amir v. St. Louis Univ.*, 184 F.3d 1017, 1025 (8th Cir. 1999); *Brown v. City of Tuscon*, 336 F.3d 1181, 1186 (9th Cir. 2003); *Doebele v. Sprint/United Management Co.*, 342 F.3d 1117, 1135 (10th Cir. 2003); *Lucas v. W.W. Grainger, Inc.*, 257 F.3d 1249, 1261 (11th Cir. 2001).

[6] *See, e.g., Blackie v. State of Me.*, 75 F.3d 716, 722 (1st Cir. 1996); *Brock v. Casey Truck Sales, Inc.*, 839 F.2d 872, 876-78 (2d Cir. 1988); *Brock v. Richardson*, 812 F.2d 121, 123 n.1 (3d Cir. 1987); *Kanida v. Gulf Coast Med. Personnel LP*, 363 F.3d 568, 577 (5th Cir. 2004); *Grey v. City of Oak Grove*, 396 F.3d 1031, 1034 (8th Cir. 2005); *Pacheco v. Whiting Farms, Inc.*, 365 F.3d 1199, 1206 (10th Cir. 2004); *Wolf v. Coca-Cola Co.*, 200 F.3d 1337, 1342-43 (11th Cir.

FMLA.[7]

2. USERRA specifically requires use of the *Transportation Management* framework for retaliation claims

Unlike in other employment retaliation cases, courts have applied the *Transportation Management* "but for" test for USERRA retaliation claims.[8] The Eighth Circuit has noted:

> Unlike the *McDonnell Douglas* framework . . ., the procedural framework and evidentiary burdens set out in [38 U.S.C. § 4311] shift the burden of persuasion, as well as production, to the employer. "Thus in USERRA actions there must be an initial showing by the employee that military status was at least a motivating or substantial factor in the [employer's] action, upon which the [employer] must prove, by a preponderance of the evidence, that the action would have been taken despite the protected status." [*Sheehan v. Department of Navy*, 240 F.3d 1009, 1013 (Fed. Cir. 2001)].

Gagnon v. Sprint Corp., 284 F.3d 839, 854 (8th Cir. 2002).

2000); *see also Dennett v. Anne Arundel County*, No. 99-1475, 2000 WL 517513 (4th Cir. May 1, 2000) (unpublished per curiam opinion); *Irwin v. State of Wis.*, No. 92-2509, 1993 WL 134051 (7th Cir. Apr. 28, 1993) (unpublished opinion).

[7] *See, e.g., Hodgens v. General Dynamics Corp.*, 144 F.3d 151, 160 (1st Cir. 1998); *Potenza v. City of New York*, 365 F.3d 165, 167-68 (2d Cir. 2004) (per curiam); *Conoshenti v. Public Serv. Elec. & Gas Co.*, 364 F.3d 135, 146 & n.9 (3d Cir. 2004); *Nichols v. Ashland Hosp. Corp.*, 251 F.3d 496, 501(4th Cir. 2001); *Chaffin v. John H. Carter Co.*, 179 F.3d 316, 319 (5th Cir. 1999); *Skrjanc v. Great Lakes Power Serv. Co.*, 272 F.3d 309, 315 (6th Cir. 2001); *King v. Preferred Technical Group*, 166 F.3d 887, 891-92 (7th Cir. 1999); *Smith v. Allen Health Sys., Inc.*, 302 F.3d 827, 832 (8th Cir. 2002); *Doebele v. Sprint/United Management Co.*, 342 F.3d 1117, 1135 (10th Cir. 2003); *Brungart v. BellSouth Telecomms., Inc.*, 231 F.3d 791, 798 (11th Cir. 2000); *Gleklen v. Democratic Cong. Campaign Committee, Inc.*, 199 F.3d 1365, 1368 (D.C. Cir. 2000); *but see Bachelder v. American W. Airlines, Inc.*, 259 F.3d 1112, 1124-25 (9th Cir. 2001) (not adopting burden shifting framework to claims under 29 U.S.C. § 2615(a)(1) but reserving question as to claims under § 2615(a)(2)); *Britton v. Architect of the Capitol*, No. 01-AC-346 (June 3, 2003) (website opinion) (following *Bachelder*).

[8] *See, e.g., Gagnon v. Sprint Corp.*, 284 F.3d 839, 853-54 (8th Cir. 2002); *Sheehan v. Department of Navy*, 240 F.3d 1009, 1013 (Fed. Cir. 2001); *see also Transportation Mgt. Corp. v. NLRB*, 462 U.S. 393, 401 (1983) (modified by *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267 (1994)).

The different approach to USERRA retaliation claims is rooted in the unique history of USERRA's passage and the text of the statute. While USERRA defines the prohibited forms of retaliation in the same general terms as Title VII, USERRA specifically states that an employer violates the retaliation provision if one of the enumerated reasons "is *a motivating factor* in the employer's action, unless the employer can prove that the action would have been taken in the absence of such person's enforcement action, testimony, statement, assistance, participation, or exercise of a right." 38 U.S.C. § 4311(c)(2) (emphasis added); *cf.* 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2) (adopting "a motivating factor" test for § 2000e-2(a) discrimination claims but not for § 2000e-3 retaliation claims).

In 1994, Congress enacted USERRA to "clarify, simplify, and, where necessary, strengthen the existing veterans' employment and reemployment rights provisions." *Gummo v. Village of Depew*, N.Y., 75 F.3d 98, 105 (2d Cir. 1996) (quoting H.R. Rep. No. 65, 103d Cong., 2d Sess. 18 (1994)). In particular, Congress rejected judicial decisions that had only found liability for retaliation if the employer's action was solely motivated by a prohibited factor, and reaffirmed "the original intent of Congress that the standard of proof in a discrimination or retaliation case is the so-called 'but-for' test and that the burden of proof is on the employer, once a prima facie case is established." *Gummo*, 75 F.3d at 105-06 (quoting H.R. REP. NO. 65 at 24); *see also* S. REP. NO. 158, 103 Cong., 2d Sess. 45 (1994); *Sheehan*, 240 F.3d at 1012-13. Both the House and Senate committee reports specifically stated that courts should "use the scheme of burden-of-proof allocations approved by the Supreme Court in [*Transportation Management*]." *Gummo*, 75 F.3d at 106 (citing H.R. REP. NO. 65 at 24 and S. REP. NO. 158 at 45).

The absence of the equivalent *Transportation Management*-type burden of proof scheme language in Section 207 of the CAA strongly suggests that the "ubiquitous" *McDonnell Douglas*

burden shifting framework was intended to be used for Section 207 claims. *See NLRB v. Louis A. Weiss Mem. Hosp.*, 172 F.3d 432, 442 (7th Cir. 1999). Moreover, because the CAA was drafted and passed nearly contemporaneously with USERRA, if Congress intended to adopt the *Transportation Management* scheme for Section 207, it knew what statutory language to use.[9]

3. The *Letterkenny* framework is only applicable to unfair labor practice cases brought by the Office of Compliance General Counsel

The Board's Notice asks whether the FLRA's framework in *Letterkenny Army Depot*, 35 FLRA 113 (1990) has any application to Section 207(a) retaliation claims, particularly where "the claim asserts that retaliation or intimidation occurred because of activity allegedly protected by . . . Section 220(a) of the [CAA]." Notice at 2. OHEC contends that the *Letterkenny* framework is only applicable to Section 220 unfair labor practice cases and has no relevance to Section 207 retaliation claims.

Section 220(a) of the CAA, 2 U.S.C. § 1351(a)(1), incorporates the "rights, protections, and responsibilities" in 5 U.S.C. § 7116(a). Section 7116(a) provides that it is "an unfair labor practice for an agency . . . to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under" the Federal Labor Management Relations Act ("FLMRA"). However, as with the FLMRA, the CAA does not provide a private right of action for covered employees for violations of the rights in Section 7116(a). *Compare* 5 U.S.C. § 7118(a) *with* 2 U.S.C. § 1351(c)(2). Instead, the CAA requires the OOC General Counsel to investigate unfair labor practice charges and, where appropriate, to file a complaint against the employing office or

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[9] Because the CAA preserves the USERRA retaliation standard by directly incorporating it under Section 206, USERRA rights are not diminished. 2 U.S.C. § 1316(a); *see Britton*, website opinion at 5 (CAA directly incorporates FMLA's stronger retaliation provisions).

labor organization. 2 U.S.C. § 1351(c)(2). Such complaints are submitted for an administrative hearing in accordance with the provisions of Section 405 of the CAA.

For Section 220(a) complaints, the Board's approach in *United States Capitol Police Board v. Fraternal Order of Police, United States Capitol Police Labor Committee*, No. LMR-CA-0037 (June 11, 2002) (website opinion), is essentially correct. The Board's framework is built upon *Wright Line*, 251 NLRB 1083 (1980), *enf'd*, 662 F.2d 899 (1st Cir. 1981), *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 402-03 (1983), and *Letterkenny Army Depot*, 35 FLRA 113. Thus, in a Section 220(a) mixed-motive case, the General Counsel must establish, by a preponderance of the evidence, that an employee's protected activity was "a substantial motivation or factor" in the allegedly retaliatory action. *Fraternal Order of Police*, website op. at 5. If such a showing is made, "the burden of persuasion then shifts to the employer to rebut the presumption by establishing, through a preponderance of the evidence, that it would have taken the same action even absent the employee's protected activity." *Id.* at 4.

There is no basis for applying the *Letterkenny* approach to claims under Section 207, which contains *vastly* different language than the unfair labor practice language of 5 U.S.C. § 7116(a). Indeed, Section 207(a) does not cover many situations where an employing office retaliates against an employee for exercising rights provided by Section 220. Thus, for instance, the termination of a union shop steward based in part on anti-union animus would not necessarily implicate Section 207, but the termination of the same shop steward for filing an unfair labor practice charge under Section 220 would, because such activity would constitute participation in an "other proceeding" under the CAA. In the latter situation, the employee could file both a Section 220 unfair labor practice charge and pursue a Section 207 claim. However, the Section

207 claim would still be governed only by the general framework applicable to all CAA retaliation claims.[10]

C. The Effect Of *Desert Palace* On Section 207(a) Claims

The Board has solicited opinions regarding, "[i]f 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?" Notice at 2. Because the statute interpreted by *Desert Palace*, 42 U.S.C. § 2000e-2(m) has no application to mixed-motive *retaliation* cases under Title VII or the CAA, the Supreme Court's confusing plurality ruling in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), still governs mixed-motive *retaliation* cases. The Circuits are deeply divided on the meaning of "direct evidence," as used by Justice O'Connor in her *Price Waterhouse* concurrence. However, *Desert Palace* may shed some light on the meaning of "direct evidence," and thus assist the Board in determining the appropriate standard for mixed-motive retaliation cases.

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[10] As described in Section IV.C.3, *infra*, there are two principal evidentiary differences in mixed-motive cases under Section 207 (*Price Waterhouse*) and Section 220 (*Letterkenny*). First, the employee must show in a Section 207 case that the retaliatory reason was a "substantial factor," rather than "a motivating factor" in the decision before shifting the burden to the employing office to demonstrate that it would have taken the same action absent the protected activity. *Compare Price Waterhouse v. Hopkins*, 490 U.S. 228, 276 (1989) (O'Connor, J., concurring) *with Letterkenny*, 35 FLRA at 118 *and Transportation Management*, 462 U.S. at 402-03; *but see Fraternal Order of Police*, website op. at 5 (requiring showing of "substantial motivation or factor"). Second, the *Price Waterhouse* framework is only available if the employee produces "direct evidence" of discrimination, whereas *Letterkenny* states no such requirement. *Price Waterhouse*, 490 U.S. at 276 (O'Connor, J., concurring). As discussed more fully in Section IV.C.4.a, *infra*, what constitutes "direct evidence" has proven to be an elusive concept. *See, e.g., Fernandes v. Costa Bros. Masonry, Inc.*, 199 F.3d 572, 581-83 (1st Cir. 1999).

Of course, by meeting the more rigorous *Price Waterhouse* standard in the Section 207 arena, the employee arguably gains access to the broader array of remedies available under that provision, including emotional distress damages. *Compare* 2 U.S.C. § 1317(b) *with* 2 U.S.C. § 1351(b) (incorporating limited remedies of 5 U.S.C. § 7118(a)(7)).

1. Circuit courts have found that *Desert Palace* did not significantly impact the *McDonnell Douglas* framework

Post-*Desert Palace* Circuit decisions have left largely undisturbed the *McDonnell Douglas* framework in discrimination cases. *See Cooper v. Southern Co.*, 390 F.3d 695 (11th Cir. 2004); *Griffith v. City of Des Moines*, 387 F.3d 733, 735-366 & n.2 (8th Cir. 2004); *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 312 (5th Cir. 2004); *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1122 (9th Cir. 2004). In all these cases, the Circuits applied the *McDonnell Douglas* and *Price Waterhouse* frameworks in the summary judgment phase.

In *Rachid v. Jack in the Box, Inc.*, the Fifth Circuit, relying upon *Desert Palace*, first held that "direct evidence of discrimination is not necessary to receive a mixed-motives analysis for an ADEA claim." 376 F.3d at 311. The Court reasoned that, like Title VII, the ADEA "does not mention, much less require, that a plaintiff make a heightened showing through direct evidence" in a mixed-motives case. *Id.* (quoting *Desert Palace*, 539 U.S. at 98); *but see Glanzman v. Metropolitan Mgmt. Corp.*, 391 F.3d 506, 512 n3. (3d Cir. 2004); *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 284-85 n.2 (4th Cir. 2004). The Fifth Circuit then explained:

> Our holding . . . that the mixed-motives analysis used in Title VII cases post-*Desert Palace* is applicable in ADEA [cases] represents a merging of the *McDonnell Douglas* and *Price Waterhouse* approaches. Under this integrated approach, called, for simplicity, the modified *McDonnell Douglas* approach: the plaintiff must still demonstrate a prima facie case of discrimination; the defendant then must articulate a legitimate, non-discriminatory reason for its decision to terminate the plaintiff; and, if the defendant meets its burden of production, "the plaintiff must then offer sufficient evidence of a genuine issue of material fact 'either (1) that the defendant's reason is not true, but is instead a pretext for discrimination (pretext alternative); or (2) that the defendant's reason, while true, is only one of the reasons for its conduct, and another 'motivating factor' is the plaintiff's protected characteristic (mixed-motive[s] alternative)."

Id. (quoting *Rishel v. Nationwide Mut. Ins. Co.*, 297 F. Supp. 2d 854, 865 (M.D.N.C. 2003)). In the "mixed-motive alternative," the showing of "'another motivating factor'" then triggers the employer's obligation to raise the affirmative defense that it would have taken the same action regardless of the improper motive. *Rachid*, 376 F.3d at 312-13.

In *McGinest v. GTE Service Corp.*, a case involving both racial discrimination and retaliation claims, the parties debated whether the plaintiff had adduced direct or circumstantial evidence of discrimination and the relevance of this distinction to the proper analytical framework to be used by the court. 360 F.3d at 1122. The Ninth Circuit determined that it need not resolve the evidence characterization issue because the Supreme Court held in *Desert Palace* that "the distinction between direct and circumstantial evidence is irrelevant to determining what analytical framework to apply." *Id.* The Court explained that a plaintiff "may proceed by using the *McDonnell Douglas* framework, or alternatively, may simply produce direct or circumstantial evidence demonstrating that a discriminatory reason more likely than not motivated [the employer]." *Id.* (citing *Costa v. Desert Palace*, 299 F.3d 838, 855 (9th Cir. 2002), *aff'd*, 539 U.S. 90 (1993). The Ninth Circuit further noted that once the first two steps of the *McDonnell Douglas* framework had been established, "the sole remaining issue was discrimination *vel non*." *McGinest*, 360 F.3d at 1123 (quoting *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714 (1983)). In that situation, "it is not particularly significant whether [the plaintiff] relies on the *McDonnell Douglas* presumption or, whether he relies on direct or circumstantial evidence of discriminatory intent to meet his burden." *McGinest*, 360 F.3d at 1123. Under either approach, the plaintiff must produce some evidence that the adverse action "was due in part or whole to discriminatory intent." *Id.*

In *Griffith v. City of Des Moines*, the Eighth Circuit concluded that *Desert Palace* "had no impact on prior Eighth Circuit summary judgment decisions." 387 F.3d at 736. The Court explained:

> While in general the standard for summary judgment "mirrors" the standard for judgment as a matter of law, *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000), the contexts of the two inquiries are significantly different. At the summary judgment stage, the issue is whether the plaintiff has sufficient evidence that unlawful discrimination was a motivating factor in the defendant's adverse employment action. If so, the presence of additional legitimate motives will not entitle the defendant to summary judgment. Therefore, evidence of additional motives, and the question whether the presence of mixed motives defeats all or some part of plaintiff's claims, are trial issues, not summary judgment issues. Thus, *Desert Palace*, a decision in which the Supreme Court decided only a mixed motive jury instruction issue, is an inherently unreliable basis for district courts to begin ignoring this Circuit's controlling summary judgment precedents. For concrete evidence confirming that *Desert Palace* did not forecast a sea change in the Court's thinking, we need look no further than *Raytheon Co. v. Hernandez*, 540 U.S. 44, 49-50 & n.3 (2003), a *post-Desert Palace* decision in which the Court approved of the use of the *McDonnell Douglas* analysis at the summary judgment stage.

Griffith, 387 F.3d at 735. The Eighth Circuit then summarized the two ways in which a plaintiff may survive a summary judgment motion:

> The first is by proof of "direct evidence" of discrimination. Direct evidence in this context is not the converse of circumstantial evidence, as many seem to assume. Rather, direct evidence is evidence "showing a specific link between the alleged discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated" the adverse employment action. *Thomas v. First Nat'l Bank of Wynne*, 111 F.3d 64, 66 (8th Cir. 1997). Thus, "direct" refers to the causal strength of the proof, not whether it is "circumstantial" evidence. A plaintiff with strong (direct) evidence that illegal discrimination motivated the employer's adverse action does not need the three-part *McDonnell Douglas* analysis to get to the jury, regardless of whether his strong evidence is circumstantial. But if the plaintiff lacks evidence that clearly points to the presence of an illegal motive, he must avoid summary judgment by creating the requisite inference of unlawful discrimination through the *McDonnell Douglas* analysis, including evidence of pretext. This formulation is entirely consistent with *Desert Palace*.

Griffith, 387 F.3d at 736. The Court also pointed out that the *Desert Palace* Court did not "address the second question on which [it] granted certiorari: 'What are the appropriate standards for lower courts to follow in making a direct evidence determination in 'mixed motive' cases.'" *Id.* at 736 n.2 (quoting *Desert Palace*, 539 U.S. at 101 n.3).

In summary, these three post-*Desert Palace* cases all recognize the continuing role of the *McDonnell Douglas* framework and, either implicitly or explicitly, require in mixed-motive cases that the employee produce some evidence sufficient to support a finding by a reasonable trier of fact that an illegal factor at least partly motivated the employer's action.[11] Regardless of what precise framework is used and the type and strength of the evidence mustered, employees in retaliation cases will always be required to show the *prima facie* elements of (1) engagement in protected activity, (2) an adverse employment action, and (3) some causal connection between the two. In a mixed-motive case, the Board need only determine, using the *Price Waterhouse* analysis, what "direct evidence" is sufficient to shift the burden of persuasion to the employer to demonstrate that the adverse action would have been taken absent the retaliatory motive. *Desert Palace* merely confirms that such evidence may be either circumstantial or non-inferential (*i.e.*, "direct" in *Desert Palace* parlance).

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[11] In *Cooper*, a non-mixed motive case, the Eleventh Circuit rejected plaintiff's argument that *Desert Palace* had "radically revised" the *McDonnell Douglas* framework by requiring the employer to prove it would have taken the same action absent the alleged discrimination once the plaintiff establishes a *prima facie* case. *Cooper*, 390 F.3d at 725 n.17. The Eleventh Circuit noted that "[T]he *Desert Palace* holding was expressly limited to the context of mixed-motive discrimination cases under 42 U.S.C. § 2000e-2(m). Indeed, the Court explained that it did not decide whether its analysis applied in other contexts." *Cooper*, 390 F.3d at 725 n.17 (*Desert Palace*, 539 U.S. at 94 n.1).

2. *Price Waterhouse* still applies to mixed-motive retaliation cases

In the Title VII context, the Supreme Court recognized in *Price Waterhouse* that an employer can avoid liability if it can prove it would have made the same disputed employment decision in the absence of the alleged bias. 490 U.S. at 258. With the passage of the Civil Rights Act of 1991, "Congress overruled in part the *Price Waterhouse v. Hopkins* holding regarding the mixed-motive defense in Title VII cases. The Act did so by reinstating limited damages for discrimination based on 'race, color, religion, sex and national origin . . ., even though other factors also motivated the practice.' 42 U.S.C. § 2000e-2(m)." *Pennington v. City of Huntsville*, 261 F.3d 1262, 1269 (3d Cir. 2001); *see also* 42 U.S.C. § 2000e-5(g)(2)(B). Section 2000e-2(m) also made clear that an employee need only show that the impermissible motive was "a motivating factor," as opposed to a "substantial factor" in the employment action.[12] *Compare Price Waterhouse*, 490 U.S. at 258 (Brennan, J.) (plurality opinion) *with id.* at 259 (White, J., concurring) *and id.* at 276 (O'Connor, J., concurring). In *Desert Palace*, the Supreme Court held that no "heightened showing" of "direct evidence" of discrimination is required to obtain a mixed-motive jury instruction under Section 2000e-2(m). 539 U.S. at 98-101.

Desert Palace did not address the applicability of Section 2000e-2(m) to Section 2000e-3 retaliation cases. However, before *Desert Palace* was decided, most Circuits had already held that the "mixed-motive" provisions of Section 2000e-2(m) did not apply to Title VII retaliation

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[12] As shown by its emphasis on the words "motivating" and "substantial" in its *Desert Palace* discussion of *Price Waterhouse*, the Supreme Court appears to attach significance to the difference between the two terms. *See Desert Palace*, 539 U.S. at 93; *but see Fraternal Order of Police*, website op. at 5 (requiring evidence that retaliation was "a substantial motivation or factor").

cases brought under Section 2000e-3.[13] In addition, the *Price Waterhouse* mixed-motive proof scheme has been "unanimously applied" by Circuits that have considered the issue. *Kubicko*, 181 F.3d at 552 n.8.[14] Thus, the proof scheme first enunciated by the Supreme Court in *Price Waterhouse*, a plurality opinion with separate concurrences by Justices O'Connor and White, remains the embarkation point for consideration of mixed-motive retaliation claims under Title VII and, by analogy, the CAA.

3. *Desert Palace* did not resolve the Circuit split regarding the meaning of "direct evidence" in *Price Waterhouse*

In *Price Waterhouse*, a gender discrimination case under Title VII, the Supreme Court "considered whether an employment decision is made 'because of' sex in a 'mixed-motive' case, *i.e.*, where both legitimate and illegitimate reasons motivated the decision." *Desert Palace*, 539 U.S. at 93; *see* 42 U.S.C. § 2000e-2(a)(1). The *Desert Palace* Court summarized *Price Waterhouse* as follows:

> The Court concluded that, under § 2000e-2(a)(1), an employer could "avoid a finding of liability . . . by proving that it would have made the same decision even if it had not allowed gender to play such a role." The Court was divided, however, over the predicate question of when the burden of proof may be shifted to an employer to prove the affirmative defense.

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[13] The First Circuit's treatment of this issue in *Tanca v. Nordberg*, 98 F.3d 680, 682-85 (1st Cir. 1996), is particularly lengthy and persuasive. *See also Matima v. Celli*, 228 F.3d 68, 81 (2d Cir. 2000); *Woodson v. Scott Paper Co.*,109 F.3d 913, 935 (3d Cir. 1997); *Kubicko v. Ogden Logistic Servs.*, 181 F.3d 544, 552 n.7 (4th Cir. 1999); *McNutt v. Board of Trustees*, 141 F.3d 706, 707-09 (7th Cir. 1998); *Norbeck v. Basin Elec. Power Coop.*, 215 F.3d 848, 852 (8th Cir. 2002); *Pennington v. City of Huntsville*, 261 F.3d 1262, 1269 (11th Cir. 2001); *see also Behne v. 3M Microtouch Sys., Inc.*, 11 Fed. Appx. 856, 860, 2001 WL 338087 (9th Cir. Apr. 5, 2001) (unpublished opinion).

[14] *See, e.g., Medlock v. Ortho Biotech, Inc.*, 164 F.3d 545, 549-51 (10th Cir. 1999); *Thomas*, 131 F.3d at 202-03; *Tanca*, 98 F.3d at 685; *Cosgrove v. Sears, Roebuck & Co.*, 9 F.3d 1033, 1039-41 (2d Cir. 1993); *Griffiths v. CIGNA Corp.*, 47 F.3d 586, 596 n.8 (3d Cir. 1995).

> Justice Brennan, writing for a plurality of four justices, would have held that "when a plaintiff . . . proves that her gender played a *motivating* part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account." The plurality did not, however, "suggest a limitation on the possible ways of proving that [gender] stereotyping played a motivating role in an employment decision."
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> Justice White . . . would have shifted the burden to the employer only when a plaintiff "show[ed] that the unlawful motive was a *substantial* factor in the adverse employment action." Justice O'Connor, like Justice White, would have required the plaintiff to show that an illegitimate consideration was a "substantial factor" in the employment decision. But, under Justice O'Connor's view, "the burden on the issue of causation" would shift to the employer only where "a disparate treatment plaintiff [could] show by *direct evidence* that an illegitimate criterion was a substantial factor in the decision."

Desert Palace, 539 U.S. at 93-94 (citations omitted) (emphasis added by Supreme Court).

Due to Justice O'Connor's concurrence, a Circuit split developed over whether a heightened showing of "direct evidence" was required to establish liability in a mixed-motive discrimination case under Title VII, as amended by the Civil Rights Act of 1991. *See id.* at 95, and cases cited therein. While *Desert Palace* resolved that question in the negative, it specifically left unanswered "which of the opinions in *Price Waterhouse* is controlling." *Id.* at 98; *see also Griffith v. City of Des Moines*, 387 F.3d 733, 736 n.2 (8th Cir. 2004); *Monaco v. American Gen. Assur. Corp.*, 359 F.3d 296, 300 n.5 (3d Cir. 2004). Furthermore, the Court in *Desert Palace* was construing the provision in Section 2000e-2(m), a section inapplicable to retaliation claims under Title VII. *See, e.g., Tanca*, 98 F.3d at 682-685. Finally, the *Desert Palace* Court did not "address the second question on which [it] granted certiorari: 'What are the appropriate standards for lower courts to follow in making a direct evidence determination in 'mixed motive' cases.'" *Griffith*, 387 F.3d at 736 n.2 (quoting *Desert Palace*, 539 U.S. at 101

n.3). Thus, even after *Desert Palace*, there is controversy over how to apply *Price Waterhouse* to retaliation claims, *i.e.*, what is meant by "direct evidence" in Justice O'Connor's concurrence.

4. The Board should adopt the D.C. Circuit's view of "direct evidence" in mixed-motive retaliation cases

With regard to this second question not addressed by *Desert Palace*, a deep Circuit split developed over the application of *Price Waterhouse* and the meaning of "direct evidence" in Justice O'Connor's concurrence. This section reviews the various approaches taken by the Circuits and recommends that the Board follow the D.C. Circuit's understanding of "direct evidence," as articulated in *Thomas*, 131 F.3d 198.[15]

a. Three possible views of "direct evidence"

In *Fernandes v. Costa Brothers Masonry, Inc.*, 199 F.3d 572, 580-83 (1st Cir. 1999), the First Circuit summarized the analytical problem created by *Price Waterhouse*. The Court explained:

> It is readily apparent that this mixed-motive approach, uncabined, has the potential to swallow whole the traditional *McDonnell Douglas* analysis. To guard against this possibility, the Court restricted its applicability to those infrequent cases in which a plaintiff can demonstrate with a high degree of assurance that the employment decision of which he complains "was the product of a mixture of legitimate and illegitimate motives." *Price Waterhouse*, 490 U.S. at 247. Under this formulation, access to the mixed motive approach ultimately depends on the quality of the available evidence. Most courts agree that Justice O'Connor's

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[15] If the Board adopts OHEC's proposed rule of decision, *see* Section II, *supra*, the Board will be bound by the Federal Circuit's view of "direct evidence" in *Haddon*, 313 F.3d at 1358-59, unless it determines that the reasoning in *Haddon* conflicts with *Desert Palace* or other intervening Supreme Court authority. *See* Section IV.C.4.b, *infra*.

Under OHEC's proposed rule of decision, *see* Section II, *supra*, if *Haddon* is inapplicable due to *Desert Palace*, the Board should look next to the D.C. Circuit for guidance. However, in urging rejection of the *Haddon* view and adoption of the D.C. Circuit's *Thomas* approach, OHEC is *not* relying upon application of its proposed rule of decision. Rather, OHEC asserts that *Thomas* best interprets the meaning of "direct evidence" in Justice O'Connor's concurrence.

> concurrence in *Price Waterhouse* furnishes the best device for testing quality (and, thus, the best roadmap for segregating mixed-motive cases from the mine-run of discrimination cases). After all, when the Supreme Court rules by means of a plurality opinion (as was true in *Price Waterhouse*), inferior courts should give effect to the narrowest ground upon which a majority of the Justices supporting the judgment would agree. *See Marks v. United States*, 430 U.S. 188 (1977). The O'Connor concurrence fits this profile.

199 F.3d at 580. While acknowledging that "direct evidence is the touchstone for mixed-motive analysis," the First Circuit observed that "jurists have struggled in attempting to define the term ["direct evidence"] affirmatively." The Court noted a "patchwork of intra-circuit conflicts, but concluded that, "[g]enerally speaking, three schools of thought have emerged." *Id.* at 581.

Under the "classic" view, led by the Fifth and Tenth Circuits, "["direct evidence"] signifies evidence which if believed, suffices to prove the fact of discriminatory animus without inference, presumption, or resort to other evidence. *Id.* at 582; *see, e.g., Shorter v. ICG Holdings, Inc.*, 188 F.3d 1204, 1207 (10th Cir. 1999); *Haas v. ADVO Sys., Inc.*, 168 F.3d 732, 734 n.2 (5th Cir. 1999); *see also Haddon*, 313 F.3d at 1358-59. This view is the most restrictive reading of Justice O'Connor's concurrence. In *Haddon*, a pre-*Desert Palace* case, the Federal Circuit appeared to follow the "classic view" in ruling that a memorandum that was not discriminatory or retaliatory on its face was not "direct evidence" and finding that "[a]ll the evidence pointed to by [the plaintiff] requires some inferences to get at a retaliatory motive for his discharge and does not qualify as direct evidence." 313 F.3d at 1358-59. The Court also noted that "direct evidence is rarely available in retaliation cases and that it is usually necessary to rely on circumstantial evidence." *Id.* at 1358 (citing *Webster v. Department of the Army*, 911 F.3d 679, 689 (Fed. Cir. 1990)). To the extent that the Board determines it is bound by Federal Circuit precedent, it must adopt the *Haddon* standard for *Price Waterhouse* mixed-motive retaliation cases, unless *Desert Palace* impacts the analysis. *See* Section IV.C.4.b, *infra*.

Under the "animus plus" position, led by the Fourth and D.C. Circuits, "direct evidence" is "evidence, both direct and circumstantial, of conduct or statements that (1) reflect directly the alleged discriminatory animus and (2) bear squarely on the contested employment action." *Fernandes*, 199 F.3d at 582; *see, e.g., Taylor v. Virginia Union Univ.*, 193 F.3d 219, 232 (4th Cir. 1999) (en banc); *Thomas*, 131 F.3d at 204. This position "emphasize[s] that the mixed-motive trigger depends on the strength of the plaintiff's case." *Fernandes*, 199 F.3d at 582 (citations omitted).

In the third variant, the "animus" position, courts have held that "as long as the evidence (whether direct or circumstantial) is tied to the alleged discriminatory animus, it need not bear squarely on the challenged employment decision." *Id.*; *see, e.g., Lightfoot v. Union Carbide Corp.*, 110 F.3d 898, 913 (2d Cir. 1997); *Kerns v. Capital Graphics, Inc.*, 178 F.3d 1011, 1017-18 (8th Cir. 1999) and other cases cited in *Fernandes*.

b. *Desert Palace* undermines the *Haddon* approach

If the Board is bound by Federal Circuit precedent, then it must either follow *Haddon v. Executive Residence of the White House*, 313 F.3d 1352, 1358-59 (Fed. Cir. 2002), or decline to adopt it based on *Desert Palace* or other intervening Supreme Court authority. In *Haddon*, the Federal Circuit appears to define "direct evidence" as non-circumstantial evidence. *Id.* This view appears to have been rejected in *Desert Palace*, which declared that direct and circumstantial evidence should be treated alike. *Desert Palace*, 539 U.S. at 100. Thus, OHEC contends that *Haddon* no longer controls the "direct evidence" analysis.

c. The D.C. Circuit's view in *Thomas* is in accord with *Desert Palace*

In light of *Desert Palace*, OHEC recommends that the Board eschew *Haddon* and adopt the D.C. Circuit's approach to "direct evidence" in mixed-motive retaliation cases, as described in *Thomas*, 131 F.3d at 202-204. The *Thomas* approach is consistent with both the Supreme Court's understanding of the role of direct and circumstantial evidence and post-*Desert Palace* Circuit opinions regarding the *McDonnell Douglas* framework.

In *Thomas*, a pre-*Desert Palace* case, the D.C. Circuit waded into the *Price Waterhouse* debate and reconciled the *McDonnell Douglas* and *Price Waterhouse* frameworks for Title VII retaliation cases. *See id.* The Court opined:[16]

> The plaintiff may aim to prove that a [retaliatory] motive was the only basis for the employer's action, or the plaintiff may seek to show that the employer was motivated by both permissible and impermissible motives. The plaintiff often will--quite reasonably-- argue both alternatives. *See* [*Price Waterhouse*, 490 U.S. at 247 n.12 (Brennan, J.)]. . . . Where the plaintiff argues that a [retaliatory] motivation constituted the only basis for the employer's action, the plaintiff may persuade the trier of fact of the pretextual nature of the defendant's asserted reason "either directly by persuading the court that a [retaliatory] reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." [*Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981)].
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> Where, on the other hand, the plaintiff argues that the action resulted from mixed motives, a slightly different model operates. A plaintiff asserting mixed motives must persuade the trier of fact by a preponderance of the evidence that unlawful retaliation constituted a substantial factor in the defendant's action. *Price Waterhouse*, 490 U.S. at 276 (O'Connor, J., concurring); *id.* at 259 (White, J., concurring). When the plaintiff successfully shows that an unlawful motive was a substantial factor in the employer's action, the defendant may seek to prove in response that it would have taken the contested action even absent the [retaliatory] motive. *See id.* at 244-45 (Brennan, J.). If the defendant fails to persuade the trier of fact by a preponderance of the evidence that it would have taken the action even absent the [retaliatory] motive, the plaintiff will prevail. *See id.* at 276

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[16] The D.C. Circuit's use of "discriminatory" rather than "retaliatory" in certain instances adds unnecessary confusion to its analysis of retaliation claims. Accordingly, "retaliatory" has been substituted in the *Thomas* passage where appropriate.

(O'Connor, J., concurring).

> This burden on a defendant in a mixed-motives case has been characterized both as an affirmative defense, *id.* at 246 (Brennan, J.) and as a shifting burden of persuasion, *id.* at 274 (O'Connor, J., concurring). The question of characterization is "semantic," and need not be definitely resolved. *See id.* at 250 (White, J., concurring). What is noteworthy, however, is that under *Price Waterhouse* a defendant who is guilty of acting pursuant to an unlawful motive may nonetheless escape liability by proving that it would have made the same decision in the absence of the unlawful motivation.

Thomas, 131 F.3d at 202-203.

In a holding consistent with the Supreme Court's statutory interpretation in *Desert Palace*, the *Thomas* Court rejected the contention that the burden of persuasion shifts to the defendant in a mixed-motive case only where the plaintiff has provided "direct" rather than "inferential" evidence of retaliatory animus. *Id.* at 203; *see Desert Palace*, 539 U.S. at 98-101. The Court found that "[t]he purported distinction between 'circumstantial' or 'inferential' and 'direct' evidence . . . does not make logical sense, because the decision to shift the burden of persuasion properly rests upon the strength of the plaintiff's evidence of [retaliation], not the contingent methods by which that evidence is adduced." *Thomas*, 131 F.3d at 204; *see also Crawford-El v. Britton*, 93 F.3d 813, 818 (D.C. Cir. 1996) (en banc) ("the distinction between direct and circumstantial evidence has no direct correlation with the strength of [a] plaintiff's case."), *judgment vacated on other grounds*, 523 U.S. 574 (1998); *cf. Desert Palace*, 539 F.3d at 100 ("The reason for treating circumstantial and direct evidence alike is both clear and deep-rooted: 'Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.'") (quoting *Rogers v. Missouri Pac. R. Co.*, 352 U.S. 500, 508 n.17 (1957)). Thus, the Court held that "the burden of persuasion shifts to the defendant when the plaintiff has shown by a preponderance of 'any sufficiently probative direct or indirect

evidence' that unlawful [retaliation] was a substantial factor in the employment decision." *Thomas*, 131 F.3d at 203 (quoting *White v. Federal Express Corp.*, 939 F.2d 157, 160 (4th Cir. 1991)).

While questioning whether Justice O'Connor's concurring opinion should be taken as binding precedent, the D.C. Circuit stated that the "emphasis of Justice O'Connor's opinion is on the substantial factor requirement, not on the distinction between types of evidence," and concluded that "Justice O'Connor's invocation of 'direct' evidence [was] not intended to disqualify circumstantial evidence nor to require that the evidence signify without inference." *Thomas*, 131 F.3d at 203-04; *but see Desert Palace*, 539 U.S. at 102 (O'Connor, J., concurring) (suggesting that, prior to the Civil Rights Act of 1991, only direct non-inferential evidence sufficed). Rather, "the evidence marshaled in support of the substantiality of the [retaliatory] motive must actually relate to the question of [retaliation] *in the particular employment decision*, not to the mere existence of other, potentially unrelated, forms of [retaliation] in the workplace." *Thomas*, 131 F.3d at 204 (emphasis in original); *accord Medlock*, 164 F.3d at 550 (quoting *Thomas*). The D.C. Circuit stated that the use of "direct" in Justice O'Connor's opinion "simply distinguishes evidence that shows that an unlawful consideration constituted a substantial factor *in the particular employment decision* from evidence insufficiently related to the particular event." *Thomas*, 131 F.3d at 204. Thus, "[t]he 'direct' evidence to which Justice O'Connor alludes certainly may be circumstantial in nature, so long as it establishes that discriminatory motive played a substantial role in the employment decision." *Id.* (citing *Griffiths*, 988 F.3d at 470).

Admittedly, the *Thomas* opinion joined the fray of a deeply divided Circuit split. *See Thomas*, 131 F.3d at 204 and cases cited therein (joining the Second, Third, Fourth and Eighth

Circuits and opposing the Fifth, Tenth, and Eleventh Circuits' requirement of non-inferential or non-circumstantial evidence); *see also Fernandes*, 199 F.3d at 581-84 (discussing Circuit split). However, the D.C. Circuit approach is well-reasoned and entirely consistent with both *Desert Palace*'s equal treatment of direct (non-inferential) and circumstantial evidence and the post-*Desert Palace* Circuit cases discussed in Section IV.C.1, *supra.*[17]

D. The Board Should Look To Federal Circuit and D.C. Circuit Title VII-Type Precedents To Determine What Constitutes An Adverse Action in Section 207 Retaliation Cases

If the Board adopts the rule of decision proposed in Section II, *supra*, it should look in this case to the Supreme Court, Federal Circuit, and D.C. Circuit to determine the appropriate standard for an adverse action under Section 207. Even if no such rule is adopted, these three courts provide the best guidance on what constitutes an adverse action.

The Federal Circuit "generally addresses adverse employment actions in the context of appeals from the Merit Systems Protection Board (MSPB), where adverse employment actions are defined by statute." *Haddon*, 313 F.3d at 1363; *see* 5 U.S.C. §§ 2302, 7701(c)(2). In *Haddon*, the Federal Circuit considered a retaliation claim by a presidential appointee under the Government Employee Rights Act of 1991, 2 U.S.C. § 1219, which incorporated the anti-discrimination protection of 42 U.S.C. § 2000e-16, an amendment to Title VII. The plaintiff alleged that, in retaliation for filing an EEO complaint, he had been escorted from the White House and denied access to his job for two days while the Secret Service conducted a private investigation into alleged unstable behavior on his part. *Haddon*, 313 F.3d at 1355.

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[17] OHEC further notes that *Thomas*, for the majority of the employees covered by the CAA, would constitute the applicable law in a Section 408 district court action. Adoption of *Thomas* by the Board would provide the additional benefit of improving the consistency between Section 405 and Section 408 proceedings.

In determining the adverse action standard, the Federal Circuit "look[ed] to how other circuits have defined what qualifies as an adverse employment action in Title VII cases." *Id.* at 1363. Describing an adverse action as a "'tangible change in working conditions that produces a material employment disadvantage,'" *id.* (quoting *Gagnon*, 284 F.3d at 850), the Court noted:

> Courts have declined to create an exclusive list of activities that qualify as adverse employment actions because there are so many special circumstances, but adverse actions generally include "termination, a demotion evidenced by a decrease in wage or 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." Most of the actions that courts have recognized as adverse employment actions are more tangible and permanent than the short suspension without loss of pay at issue here.

Haddon, 313 F.3d at 1363 (quoting *Hilt-Dyson v. City of Chicago*, 282 F.3d 456, 465-66 (7th Cir. 2002)). The Court also found that "ostracism suffered at the hands of coworkers cannot constitute an adverse employment action." *Haddon*, 313 F.3d at 1363 (quoting *Brooks v. City of San Mateo*, 229 F.3d 919, 929 (9th Cir. 2000)). The Court further noted that internal investigations "generally do not qualify as adverse employment actions." *Haddon*, 313 F.3d at 1363 (citing *Von Gunten v. Maryland*, 243 F.3d 858, 869 (4th Cir. 2001)). Finally, the Court looked by analogy to MSPB law and concluded it would make "little sense" to treat the plaintiff's two-day suspension with pay as an adverse employment action when, under MSPB law, a fourteen-day suspension without pay is not. *Haddon*, 313 F.3d at 1364.

Because the Federal Circuit has provided relatively little guidance on the adverse action standard, the Board should look to other Circuits to fill in the gaps. The D.C. Circuit's views are of particular importance because the majority of covered employees fall within its jurisdiction and it has developed a substantial body of precedents on the adverse action standard. *See, e.g.*,

Stewart v. Evans, 275 F.3d 1126, 1136 (D.C. Cir. 2002); *Russell v. Principi*, 257 F.3d 815, 818-19 (D.C. Cir. 2002); *Brown*, 199 F.3d at 453. Furthermore, district courts in the D.C. Circuit have applied the *Brown* line of cases to CAA claims. *See, e.g., Blackmon-Malloy v. United States Capitol Police Bd.*, 338 F. Supp. 2d 97, 106-07 (D.D.C. 2004); *Raymond v. U.S. Capitol Police Bd.*, 157 F. Supp. 2d 50, 57 (D.D.C. 2001).

In *Brown*, the D.C. Circuit noted that the Supreme Court had defined a "tangible employment action" as "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." *Brown*, 199 F.3d at 453 (quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1995)). The Court further noted that the Supreme Court had identified "discharge, demotion, or unfavorable reassignment" as three kinds of actionable adverse actions. *Brown*, 199 F.3d at 457 (citing *Ellerth*, 524 U.S. at 765, and *Faragher v. City of Boca Raton*, 524 U.S. 775, 808 (1995)). The D.C. Circuit thus held that an employee

> who is made to undertake or who is denied a lateral transfer–that is, one in which she suffers no diminution in pay or benefits–does not suffer an actionable injury unless there are some other materially adverse consequences affecting the terms, conditions, or privileges of her employment or her future employment opportunities such that a reasonable trier of fact could conclude that the plaintiff has suffered *objectively tangible harm*.

Brown, 199 F.3d at 457 (emphasis added). Consistent with *Brown*, district courts have held that undesirable assignments, without any effect on salary, benefits, or grade, also do not constitute adverse actions. *See Blackmon-Malloy*, 338 F. Supp. 2d at 106; *Crenshaw v. Georgetown Univ.*, 23 F. Supp. 2d 11, 18 (D.D.C. 1998), *aff'd*, No. 98-7194, 1999 WL 730808 (D.C. Cir. Aug. 13, 1999) (holding, prior to *Brown*, that change in duties without corresponding reduction in pay is

not an adverse action). Post-*Brown* D.C. Circuit decisions have expanded upon the "objectively tangible harm" requirement for an adverse action. *See Stewart*, 275 F.3d at 1136 ("formal criticisms or reprimands, without additional disciplinary action such as a change in grade, salary, or other benefits do not constitute adverse employment actions."); *Russell*, 257 F.3d at 818-19 (requiring plaintiff to show that a poor performance evaluation had an actual effect on an employee's pay or benefits).

These cases, along with the lower court decisions in the District Court for the District of Columbia, provide a well-reasoned approach to Section 207(a) retaliation claims. The D.C. Circuit has shared the Seventh Circuit observation that,

> [w]hile adverse employment actions extend beyond readily quantifiable losses, not everything that makes an employee unhappy is an actionable adverse action. Minor and even trivial employment actions that "an irritable, chip-on-the-shoulder employee did not like would otherwise form the basis of a [retaliation] suit."

Smart v. Ball State Univ., 89 F.3d 437, 441 (7th Cir. 1996) (citation omitted) (quoted favorably in *Russell*, 257 F.3d at 818). Thus, the "objectively tangible harm" requirement "guards against both 'judicial micromanagement of business practices,' and frivolous suits over insignificant slights." *Russell*, 257 F.3d at 818 (quoting *Mungin v. Katten, Muchin & Zavis*, 116 F.3d 1549, 1556 (D.C. Cir. 1997)).

To the extent that the Board looks to traditional labor law for an adverse action standard, OHEC contends that NLRB and FLRA precedents regarding retaliation have no bearing on the standard for Section 207 cases. In the context of the FMLA's "internal anti-reprisal provision," 29 U.S.C. § 2615(a)(1), the Board has noted that the NLRA's prohibition on retaliation "focuses on the foreseeable effects of the employer conduct and not necessarily on whether the employee

has suffered an ultimate personnel action such as discharge, suspension, demotion, denied promotion, etc." *Britton v. Architect of the Capitol*, No. 01-AC-346 (June 3, 2003), website opinion at 5 (citations omitted). The Board remanded the case for consideration by the hearing officer "whether Complainant's alleged mistreatment met 'some threshold level of substantiality.'" *Id.* (citations omitted).[18] However, as the Board noted in *Britton*, the NLRA-type prohibition language in 29 U.S.C. § 2615(a)(1) "clearly is broader than a non-discrimination anti-retaliation provision," such as that found in Section 207(a) of the CAA. *Id.* OHEC agrees with the Board that "when Congress intend[s] . . . to limit protection to discrimination, it state[s] so expressly" by using the type of language found in 29 U.S.C. §§ 2615(a)(2) and (b), and in

[18] The *Fraternal Order of Police* case does not address the standard for an adverse action in retaliation cases, but the five-day suspension at issue would qualify as an adverse action under the D.C. Circuit's "objectively tangible harm" standard advocated by OHEC. *See Fraternal Order of Police*, website op. at 2; *but see Haddon*, 313 F.3d at 1364 (suggesting that suspensions without pay of less than fourteen days does not constitute an adverse action).

Section 207(a) of the CAA. *Id.*

V. Conclusion

In summary, OHEC asserts that all Section 207 claims should be analyzed in a manner consistent with jurisprudence from retaliation cases under Title VII and other similarly worded statutes. Thus, the Supreme Court's *McDonnell Douglas* and *Price Waterhouse* frameworks apply to Section 207 claims. In light of *Desert Palace*, OHEC recommends that the Board adopt the D.C. Circuit's view of the meaning of "direct evidence" in Justice O'Connor's *Price Waterhouse* concurrence. In addition, the Board should adopt the same "adverse action" requirement used by the Federal Circuit and the D.C. Circuit in Title VII-type cases.

Respectfully submitted,

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Date: March 11, 2005.