OFFICE OF COMPLIANCE
BRIEF OF AMICUS CURIAE, AFL-CIO

The AFL-CIO submits the following comments regarding the application of Section 207(a) of the Congressional Accountability Act (CAA) in response to the Office of Compliance's request for such comments. In sum, we suggest the language of Section 207(a) encompasses and makes unlawful a broad range of retaliatory employer behavior, including intimidating threats or coercive statements standing alone. We suggest that in most instances of employer intimidation the intimidating threats or coercive statements themselves will provide direct evidence of the employer's retaliatory motive and that the intimidation will, by its nature, have a single motive. However, we also note that a mixed-motive framework may be needed to analyze claims of reprisal and discrimination and suggest using the burden-shifting framework presented in *Mt. Healthy School District Board of Education v. Doyle* to determine liability in such cases.

I. Section 207(a) Defines "Unlawful Employment Practice" Broadly

Section 207(a) of the CAA makes it an unlawful employment practice for an employing office "to *intimidate, take reprisal against, or otherwise discriminate against*" employees covered by the CAA because the covered employee "has opposed any practice made unlawful by [the CAA], 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 the CAA. 2 U.S.C. § 1317 (1995) (emphasis added). This section, unlike some of the other anti-retaliation provisions contained in laws made applicable to the Legislative branch by the CAA, makes it unlawful for an employer to intimidate its employees even where the intimidation does not negatively affect the terms, conditions or

benefits of employment.[1] Because Section 207(a) prohibits a broad range of employer activity-- i.e., intimidation, reprisal and discrimination -- an approach should be adopted to analyze the distinct claims that may be raised under it.

The Americans with Disabilities Act (ADA) anti-retaliation provision contains language similar to that used in Section 207(a) of the CAA, prohibiting discrimination as well as coercion, intimidation and threats, and should provide guidance in analyzing CAA Section 207(a) claims. ADA Section 12203(a) makes it unlawful for a person to "discriminate against any individual" because the individual has opposed any act or practice made unlawful by the ADA or "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing," and Section 12203(b) makes it unlawful for a person to "coerce, intimidate, threaten or interfere with" the exercise or enjoyment of rights granted or protected by the ADA, or to "coerce, intimidate or interfere with" a person on account of their exercise or enjoyment of rights granted or protected by the ADA or their assistance of another in their exercise or enjoyment of rights granted or protected by the ADA. 42 U.S.C. § 12203(a),(b).

The language of the ADA's anti-retaliation provisions encompass a broader range of prohibited acts than Title VII, the ADEA and the FLSA, and can be used to support a claim of retaliation based on threats or coercion alone without proof that an adverse action affecting the terms, conditions or benefits of employment has been taken. As a House Report accompanying the ADA explains, Section 12203(b) was intended to make it unlawful for a person to coerce, intimidate, threaten or interfere with a person's

[1] This language seems to encompass employer behavior of the sort made illegal when combining Section 8(a)(1) of the National Labor Relations Act (NLRA), which prohibits employer interference, restraint or coercion standing alone, and Section 8(a)(3) of the NLRA, which prohibits employer discrimination. 29 U.S.C. § 158 (a)(1),(3).

exercise or enjoyment of the rights granted by the ADA. House Report No. 101-485(II), p. 138;[2] see also *Weixel v. Bd. of Edu.,* 287 F.3d 138 (2d Cir. 2002) (finding among a plaintiff's cognizable claims of retaliation evidence that a teacher threatened to institute child welfare investigations in response to plaintiff's medically excused absences from school and threats to file child abuse charges in response to plaintiff's efforts to obtain home schooling for her disabled child).

Since the language of Section 207(a) is similarly broad, acts of intimidation, which may consist of verbal or written threats, without evidence of an adverse employment action affecting the terms, conditions or benefits of employment, should be found to constitute unlawful adverse actions under the CAA.

By contrast, Title VII limits its prohibition against acts of retaliation to those that "*discriminate against* any of [its] employees or applicants." 42 U.S.C. § 2000e-3(a) (emphasis added). The language of Title VII, which makes only discrimination unlawful, has been interpreted as requiring proof of an "ultimate employment decision," e.g. hiring, promoting, granting leave, compensating or discharging, for a plaintiff to prevail; evidence of employer intimidation alone is usually not enough to show that an adverse employment action was taken. *Burger v. Stancu*, 168 F.3d 875, 878 (5th Cir. 1999). See also *Duncan v. Delta Consolidated Indus., Inc.*, 371 F.3d 1020 (8th Cir. 2004) (requiring evidence of a "tangible change in working conditions that produces a material employment disadvantage") and *Von Gunten v. Maryland*, 243 F.3d 858 (4th Cir. 2001)

[2] Adopting the interpretation given by the Department of Housing and Urban Development to a similar provision in the Fair Housing Act, see 54 Fed. Reg. 3291[54 Fed. Reg. 3232], sec. 100.400(c)(1) which makes it unlawful to "[C]oerce a person, either orally, in writing, or by other means, to deny or limit the benefits provided that person in connection with…" the rental or sale of residential real estate because of that person's protected status.

(requiring evidence an employer's action adversely affects the plaintiff's terms, conditions or benefits of employment).

The ADEA and FLSA contain retaliation provisions that resemble Title VII and have been interpreted and applied to prohibit similar behavior. See *Passer v. American Chemical Society*, 935 F.2d 322, 331 (D.C. Cir. 1991) (adopting test used in Title VII to determine whether employer's act constituted adverse action under ADEA); *Blackie v. Maine*, 75 F.3d 716, 725 (1st Cir. 1996) (finding FLSA prohibits "taking something of consequence from an employee" or withholding "from the employee an accouterment of the employment relationship").

Under these statutes, evidence of employer intimidation alone is usually not enough to show retaliation. In *Mattern v. Eastern Kodak Co.*, 104 F.3d 702 (5th Cir. 1997), the court found a supervisor's verbal threats to fire an employee who charged sexual harassment did not constitute an adverse employment action, even when combined with numerous other acts of harassment, since the language of section 704(a), unlike the general non-discrimination provision of Title VII, prohibits only "discrimination," and no other harms. In *Sweeney v. West*, 149 F.3d 550, 556 (7th Cir. 1998), the court held an employer's reprimands of its employee, which included a threat of discharge, even if unfounded, could not amount to an adverse employment action in violation of Title VII's anti-retaliation provision in the absence of some tangible job consequence accompanying them.

Because the plain language of CAA Section 207(a) encompasses more than employer discrimination, prohibiting intimidation and reprisal as well, it prohibits a broader range of employer activity than Title VII, the ADEA and the FLSA, laws made

applicable by the CAA, and it should be treated as granting employees of the Legislative branch greater protection. As a result, claims of retaliation brought under Section 207(a) should be analyzed under its more liberal language rather than under each applicable statute's anti-retaliation provisions.

Such claims of employer intimidation are analytically distinct from, and should be analyzed separately from, claims of reprisal and discrimination for two reasons. First, the act of intimidation itself constitutes a prohibited act under the language of section 207(a), obviating the need for determining whether it could be deemed an adverse employment action. Second, in cases where a plaintiff alleges an employer retaliated by engaging in intimidating threats or coercion, a burden-shifting scheme will not be needed to determine an employer's motivation since these threats and coercive statements typically indicate causation.

II. Intimidation Claims Will Not Require a Burden-Shifting Framework, But Mixed-Motive Cases Should be Analyzed According to the *Mt. Healthy* Framework

The adverse employment actions made unlawful by Section 207(a) include a broad range of conduct, some of which may require an analysis of an employer's dual motives and others of which will not. When a plaintiff alleges retaliation she will have to show (1) she engaged in protected activity; (2) her employer knew she was engaged in protected activity; (3) an adverse decision or course of action was taken against her; and (4) her protected activity and the adverse decision or course of action were causally connected. *Weixel v. Bd. of Edu.,* 287 F.3d at 148-149.

When a plaintiff alleges her employer engaged in retaliation through intimidation, she will have to show that she engaged in activity protected by the CAA, her employer knew of the protected activity and made threats or coercive statements because of that

activity. Because the threats and coercive statements will typically suggest a desired result, they will indicate the employer's motivation and the plaintiff can show causation through direct evidence--the threats or coercive statements themselves. If an employer's threats or coercive statements reveal a retaliatory motive, the plaintiff has carried her burden of proving a violation of Section 207(a).

However, where a plaintiff alleges that an employer's act constitutes reprisal or discrimination, a mixed-motives analysis may be necessary to determine whether retaliatory motives played a role. Unless accompanied by threats or coercive statements, the thoughts motivating the act will not be apparent. As a result, in cases where a plaintiff has alleged only acts of reprisal or discrimination, the plaintiff will have to show, by a preponderance of the evidence, that she engaged in protected activity and that retaliation was a "motivating" or "substantial factor" in the employer's decision to take the action. *Mt. Healthy School District Board of Education v. Doyle*, 429 U.S. 274, 287 (1977) (plaintiff bore burden of proving employer's disapproval of his First Amendment protected expression was a motivating or substantial factor in its decision not to rehire him). A plaintiff can satisfy her burden through the presentation of indirect evidence. *Silk v. City of Chicago*, 194 F.3d 788, 789 (1999) (analyzing retaliation claim under the ADA). If the plaintiff succeeds in proving the above by a preponderance of the evidence, she satisfies her burden of persuasion.

The employer then has the option to demonstrate by a preponderance of the evidence that (1) there was a legitimate justification for its action and (2) the same action would have been taken in the absence of the protected activity. *Mt. Healthy School*

District Board of Education v. Doyle, 429 U.S. 274, 287 (1977).[3] The employer bears the burden of proving it would have made the same decision in the absence of its retaliatory motive as an affirmative defense. See *NLRB v. Transp. Mgmt. Corp*., 462 U.S. 393 (1983) (approving the Board's interpretation of *Mt. Healthy School District Board of Education*, 429 U.S. 274, as shifting the burden of persuasion to the employer).

When an employer alleges it would have made the same decision in the absence of its retaliatory motive it bears the burden of showing it actually would have made the same decision, not that it could have made the same decision. *Lee v. Russell Cnty Bd. of Edu.*, 684 F.2d 769, 775 (11th Cir. 1982); see also *Avery v. Homewood City Bd. of Edu.*, 674 F.2d 337, 341 (5th Cir. 1982) (finding employer failed to meet its burden of proving its affirmative defense that it would have fired plaintiff for failure to give timely notice of pregnancy in the absence of its views on her constitutionally protected, out of wedlock pregnancy). As a result, an employer may not rely on non-retaliatory reasons in support of its affirmative defense unless the reason existed at the time of its action, the reason was known by the employer and the reason was, along with its retaliatory motive, a motivating factor.

In the event her employer chooses not to pursue an affirmative defense, the plaintiff should prevail. If an employer attempts to present an affirmative defense but is

[3] *Price Waterhouse v .Hopkins,* 490 U.S. 228, 242 (1989), which states the framework applied to mixed motive retaliation claims brought under Title VII, and *Letterkenney Army Depot v. Int'l Bhd. of Police Officers, Local 358*, 35 F.L.R.A. 113 (1990), which states the framework applied to mixed motive retaliation claims brought under the Federal Labor Relations Act, adopt the burden shifting framework announced in *Mt. Healthy City Sch. Dist. Bd. of Edu.v. Doyle*, 429 U.S. 274, 287. The First, Third, Fourth and Seventh Circuits have held the Civil Rights Act of 1991 does not apply to Title VII retaliation claims and, as a result, where an employer carries its burden of proving it would have made the same decision in the absence of its retaliatory motive it has a complete defense. See *Kubicko v. Ogden Logistics Servs.*, 181 F.3d 544 (4th Cir. 1999).

unable to carry its burden of persuading the fact finder that it would have made the same decision in the absence of its retaliatory motivation, the plaintiff should also prevail.

Because Section 207(a) makes retaliatory intimidation, reprisal and discrimination unlawful, an employer can violate the act by engaging in intimidation, reprisal or discrimination, or any combination of these, with a retaliatory motive. This means intimidating threats or comments made in retaliation for the exercise of rights protected by the CAA standing alone violate Section 207(a). Evidence that an employer's intimidation had a retaliatory motive, in violation of the CAA, will typically be direct, since intimidating threats or coercive statements usually reveal causation. However, resolution of claims that an employer engaged in reprisal or discrimination in retaliation for an employee's protected activity may necessitate a mixed-motives analysis since causation is usually less apparent and must be proved through indirect evidence. The *Mt. Healthy* burden-shifting framework should be used in such cases to determine whether a violation of Section 207(a) was committed.

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