OOC BROWN BAG LUNCH SERIES
RETALIATION FOR PROTECTED ACTIVITY
AUGUST 24, 2016

I. Introduction

The Congressional Accountability Act of 1995 ("CAA") contains an anti-retaliation provision, Section 207, which prohibits an employing office from retaliating against any covered employee for opposing any practice made unlawful by the CAA or participating in any kind of proceeding under the CAA. Several of the statutes made applicable to the Legislative Branch by the CAA also contain their own anti-retaliation provisions, which may apply to covered employees.

II. Elements of a Retaliation Claim

The anti-retaliation provision of the CAA provides that "It shall be unlawful for an employing office to intimidate, take reprisal against, or otherwise discriminate against, any covered employee because the covered employee has opposed any practice made unlawful by this chapter, or because the covered employee has initiated proceedings, made a charge, or testified, assisted, or participated in any manner in a hearing or other proceeding under this chapter." 2 U.S.C. § 1317(a). "The remedy available for a violation of subsection (a) of this section shall be such legal or equitable remedy as may be appropriate to redress a violation of subsection (a) of this section." 2 U.S.C. § 1317(b).

It is important to note that the federal courts and the OOC Board of Directors interpret the CAA's retaliation provision differently: the courts apply the Title VII framework for retaliation cases, whereas the Board has developed its own independent formulation of the elements of a retaliation claim.[1]

1) Elements – OOC Board

a) *Britton v. Office of the Architect of the Capitol*, No. 02-AC-20 (CV, RP), 2005 WL 6236944 (OOC Board May 23, 2005) – To establish a prima facie case of retaliation under Section 207 of the CAA, a complainant must show that: (1) he engaged in activity protected by Section 207(a); (2) the employing office took action against him that is

[1] The OOC Board has thus far declined to "address the effect, if any" of the Supreme Court's decision in *Burlington Northern & Santa Fe Railway Company v. White*, 548 U.S. 53 (2006), which is followed by the federal courts and is discussed later in this outline. *See Frazier v. U.S. Capitol Police*, 12-CP-63 (CV, AG, RP), 2014 WL 793367, at *6 n.4 (OOC Board Feb. 11, 2014).

"reasonably likely to deter" protected activity; and (3) a causal connection existed between the two.

b) *Solomon v. Office of the Architect of the Capitol*, No. 02-AC-62 (RP), 2005 WL 6236948 (OOC Board Dec. 7, 2005) – Once the complainant has established a prima facie case, the burden-shifting framework of *McDonnell Douglas* applies: the employing office must rebut the presumption of retaliation by articulating a legitimate non-discriminatory reason for its actions, and then the employee may prove intentional retaliation by demonstrating that the employer's proffered legitimate reason was false and that retaliation was the "true reason" for the employing office's actions. The employee retains the ultimate burden of persuasion.

2) Elements – Federal Court

a) *Newton v. Office of the Architect of the Capitol*, 905 F. Supp. 2d 88 (D.D.C. 2012), *aff'd*, 598 F. App'x 12 (D.C. Cir. 2015) – The courts apply the same standard for retaliation under Section 207 of the CAA that they do for Title VII retaliation claims. Thus, to establish a prima facie case of retaliation, a plaintiff must show that: (1) she engaged in statutorily protected activity; (2) she suffered a materially adverse action by her employer; and (3) a causal link connects the two.

b) *Ross v. U.S. Capitol Police*, Civil No. 14-cv-1400 (KBJ), — F. Supp. 3d —, 2016 WL 3659888 (D.D.C. June 30, 2016) – To establish unlawful retaliation, a plaintiff must show (1) that he engaged in protected activity, (2) that his employer took a materially adverse action against him, and (3) that the employer took the action because of the protected activity, i.e., that the protected activity was a but-for cause of the adverse action.

III. Protected Activity

Section 207 contains both an "opposition clause" and a "participation clause." Accordingly, there are two distinct types of conduct that are protected under Section 207: *opposing* a practice made unlawful by the CAA, and *participating* in any manner in a proceeding under the CAA. The protection may even extend to activities that do not strictly fall into one of these categories, such as an employee's invoking of a right under one of the statutes incorporated by the CAA – for instance, using FMLA leave or requesting an accommodation under the ADA.

a) *Patterson v. Office of the Architect of the Capitol*, No. 08-AC-48 (RP), 2010 WL 2641754 (OOC Board June 23, 2010) –The scope of the participation clause is construed broadly, and includes protection for "participation in a hearing or proceeding under the CAA, without regard to the nature or merits of the claims advanced in that hearing or proceeding." This protection extends to covered employees who invoke the CAA's remedial processes, including initiating counseling and mediation – even if they are mistaken in their belief about the parameters of the CAA's substantive protections – as

well as to other employees who simply provide assistance, testify, or otherwise participate in a proceeding initiated by another employee.

b) *Halcomb v. U.S. Senate Sergeant at Arms*, No. 03-SN-29 (CV, RP), 2004 WL 5658967 (OOC Hearing Officer Oct. 14, 2004), *aff'd*, 2005 WL 6236945 (OOC Board Mar. 18, 2005) – To state a valid claim for retaliation under the opposition clause of Section 207, an employee must show that she opposed a practice that is made unlawful by the CAA. General complaints about working conditions – such as the complaints made by the employee in this case to members of the Executive Committee regarding her supervisor's management practices – are not considered protected activity.

c) *Moore v. Office of the Architect of the Capitol*, 828 F. Supp. 2d 254 (D.D.C. 2011) – In order to state a valid claim of retaliation for opposing an unlawful practice, the employee must prove not only that he opposed the practice, but that he communicated to his employer that he believed the practice to be unlawful. In this case, plaintiff claimed he was retaliated against for opposing what he believed were discriminatory employment practices: he had rated three of his subordinates as "outstanding" and opposed his superiors' efforts to downgrade those ratings to "fully successful." However, he never communicated to his superiors that he believed the changes to the employees' ratings were the result of unlawful discrimination based on race, age, or nationality, and therefore he could not establish that his termination was the result of retaliation.

d) *Floyd v. Office of Representative Sheila Jackson Lee*, 968 F. Supp. 2d 308 (D.D.C. 2013) – Requesting a reasonable accommodation under the Americans With Disabilities Act is treated as protected activity for purposes of the CAA's anti-retaliation provision, even though an employee making such a request has not literally opposed a practice made unlawful by the CAA or participated in a hearing or proceeding under the CAA.

e) *Joyce v. Office of the Architect of the Capitol*, 966 F. Supp. 2d 15 (D.D.C. 2013) – Exercising one's rights under the FMLA is protected activity for which retaliation is prohibited. Although typically "opposing" an unlawful practice means objecting when an employer breaks the law, not exercising the underlying right, courts nonetheless often count penalizing protected leave as FMLA retaliation.

f) *Duncan v. Office of Compliance*, 541 F.3d 1377 (Fed. Cir. 2008) – Section 207 of the CAA protects covered employees who oppose practices prohibited by the Occupational Safety and Health Act or participate in proceedings under Section 215 of the CAA.

IV. Action by Employing Office

As noted above, the standard for what constitutes actionable conduct by the employing office differs depending on whether a claim is proceeding in federal court or in an administrative hearing at the OOC. The federal district courts are not bound to adhere to OOC Board precedent, and the District Court for the District of Columbia has expressly rejected plaintiffs' arguments that it should apply the Board's arguably broader standard for what constitutes retaliatory action.

1) **OOC Board – "reasonably likely to deter"**
   a) *Britton v. Office of the Architect of the Capitol*, No. 02-AC-20 (CV, RP), 2005 WL 6236944 (OOC Board May 23, 2005) – Looking to the statutory language, the Board pointed to Congress's use of the term "intimidate" in addition to reprisal and discriminate in Section 207 as evidence of its intent to broadly define the type of employer conduct proscribed. The Board therefore adopted the EEOC's definition of an adverse action as "any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter a charging party or others from engaging in protected activity." However, even under this broader definition, the CAA should not be viewed as a "civility code," and actions will not be considered reasonably likely to deter protected activity if they are merely petty slights, trivial annoyances, or decisions that the employee simply dislikes or disagrees with.
   b) *Solomon v. Office of the Architect of the Capitol*, No. 02-AC-62 (RP), 2005 WL 6236948 (OOC Board Dec. 7, 2005) – The scope of analyzing retaliation claims under the CAA is broader than that under Title VII. Retaliation and intimidation may effectively deter employees from seeking redress even when the employing office's actions do not rise to the level of an ultimate or material employment action.
   c) *Solomon v. Office of the Architect of the Capitol*, No. 02-AC-62 (RP), 2007 WL 5914215 (OOC Board Jan. 19, 2007) – The Board declined to adopt the Hearing Officer's rationale that the employing office's lack of response to the employee's grievance failed to amount to an adverse action "reasonably likely to deter" because the employee continued with his protected activity. The Board determined that "[s]uch rationale broadly precludes any employee who continues with protected activity from making a claim of retaliation," and that "*Britton* does not stand for such broad preclusion."
   d) *Kemp v. Office of the Architect of the Capitol*, No. 13-AC-01 (CV, FL, RP), 13-AC-35 (AG, CV, RP), 2015 WL 4597722 (OOC Board July 22, 2015) – The employee alleged that in retaliation for participating in a previous case, his supervisor disapproved payment for 17 hours of overtime, became angry, raised his voice, and said he would not pay for the overtime because it had not been preapproved. Although the employee eventually received payment for the overtime worked, he had to submit three separate requests and it took six months for him to receive the payment. The Board held that the disapproval and protracted delay of the overtime payment was reasonably likely to deter an employee from engaging in protected activity.

2) **Federal Court – "materially adverse"**
   a) *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006) –Title VII's anti-retaliation provision "does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace." The anti-retaliation provision "covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant. In the present context that means that the employer's actions must be harmful to the point that they could well dissuade a

reasonable worker from making or supporting a charge of discrimination." The Supreme Court rejected the views of those appellate courts that had applied a more restrictive standard such as "adverse employment action" or "ultimate employment decision." The Court explained that an employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm outside the workplace, and pointed out that "A provision limited to employment-related actions would not deter the many forms that effective retaliation can take," and therefore would not serve the provisions' primary purpose of maintaining unfettered access to statutory remedial mechanisms.

b) *Harrison v. Office of the Architect of the Capitol*, 68 F. Supp. 3d 174 (D.D.C. 2014), *aff'd*, 793 F.3d 119 (D.C. Cir. 2015) – In denying plaintiff's motion for reconsideration, the court rejected her assertion that it should follow OOC Board precedent rather than the *Burlington Northern* standard for analyzing retaliation claims.

c) *Gordon v. U.S. Capitol Police*, 778 F.3d 158 (D.C. Cir. 2015) – Under the *Burlington Northern* standard, the plaintiff's allegations that the employing office's actions caused her to lose $850 in wages, incur travel expenses of $50, and diminish her prospects for pay increases, promotion, and transfer, could constitute materially adverse actions, because the court found it "plausible that a reasonable person in [plaintiff's] position threatened with such losses might well be dissuaded from engaging in protected activity." Additionally, a fact-specific inquiry would be necessary to determine whether the fitness-for-duty exam that the employing office required plaintiff to take could be considered materially adverse under the circumstances.

d) *Moran v. U.S. Capitol Police*, 820 F. Supp. 2d 48 (D.D.C. 2011) – Because the anti-retaliation provisions of Title VII and the CAA depend on the cooperation of employees who are willing to file complaints or act as witnesses, they must provide for broad protection while separating trivial from significant harms. A "materially adverse" action is one that may well dissuade a reasonable employee from making or supporting a charge, in that it results in significant harm or hardship, such as affecting the employee's position, grade level, salary, or promotion opportunities. In this case, the employee failed to show that personnel notes resulted in any tangible job consequences; although she was suspended with pay, a paid suspension alone is not enough to rise to the level of materially adverse unless it causes some further harm or hardship; and although she was recommended for termination, such a recommendation by itself is not necessarily sufficient to constitute a materially adverse action if the employee was not in fact terminated.

e) *Newton v. Office of the Architect of the Capitol*, 905 F. Supp. 2d 88 (D.D.C. 2012), *aff'd*, 598 F. App'x 12 (D.C. Cir. 2015) – An action only qualifies as "materially adverse" if it could conceivably dissuade a reasonable worker from making or supporting a charge of discrimination. Not everything that makes an employee unhappy is actionable. In this case, a supervisor's request to review the plaintiff's work product and referrals of "disgruntled" individuals with inquiries to plaintiff did not constitute materially adverse

actions. Nor did the letter of counseling that plaintiff received constitute a materially adverse action, because the courts have held that letter of counseling based on unsatisfactory performance and offering job-related constructive criticism are not themselves "materially adverse."

f) *Ross v. U.S. Capitol Police*, Civil No. 14-cv-1400 (KBJ), — F. Supp. 3d —, 2016 WL 3659888 (D.D.C. June 30, 2016) – The court denied the employing office's motion to dismiss, holding that the complaint sufficiently stated a claim for constructive discharge, which would constitute a materially adverse action and support a claim for unlawful retaliation. Moreover, even if an employing office's actions do not necessarily rise to the level of a constructive discharge, a credible threat of termination could well dissuade a reasonable worker from making or supporting a charge of discrimination and thus constitute unlawful retaliation.

g) *Herbert v. Office of the Architect of the Capitol*, 839 F. Supp. 2d 284 (D.D.C. 2012) – Although plaintiff's non-selection as "point man" for a team of painters during Congressional office moves did not qualify as a significant change in employment status and therefore did not support a *discrimination* claim, the court found enough evidence under the broader "materially adverse" standard for *retaliation* claims to allow the plaintiff to survive summary judgment, because "In notable contrast to the discrimination context, an employment action may still be materially adverse in the retaliation context even if it is unaccompanied by an objectively tangible consequence such as a decrease in pay or benefits."

h) *Ghori-Ahmad v. U.S. Comm'n on Int'l Religious Freedom*, 969 F. Supp. 2d 1 (D.D.C. 2013) – Whether an allegedly retaliatory action is materially adverse depends on context, and what is material in one particular set of circumstances may not be material in another. Changes in job duties and responsibilities may or may not be materially adverse, and a fact-specific inquiry is needed. In this case, the court denied the employing office's motion to dismiss so that the factual record could be developed to provide context for the significance of the alleged acts, which included isolating the plaintiff on the job, threatening to escort her from the building, downgrading her job duties, withdrawing all recommendations for full-time employment, and failing to renew or extend her temporary position.

i) *Hyson v. Office of the Architect of the Capitol*, 802 F. Supp. 2d 84 (D.D.C. 2011) – Under the circumstances of the case, the allegedly retaliatory actions – a non-disciplinary counseling memorandum, a meeting with supervisors that did not result in any consequences for the plaintiff, and an initial denial of leave that was ultimately granted – did not rise to the level of materially adverse.

3) Hostile Work Environment – "severe and pervasive"

a) *Patterson v. Office of the Architect of the Capitol*, No. 08-AC-48 (RP), 2010 WL 2641754 (OOC Board June 23, 2010) – Retaliatory hostile work environment claims are analyzed under the same framework as discriminatory hostile work environment claims,

as articulated in the Supreme Court case of *Harris v. Forklift Systems Inc.*, 510 U.S. 17, 23 (1993). A complainant alleging a retaliatory hostile work environment must show that he was subjected to harassing conduct that could reasonably be construed as so severely or pervasively hostile that it creates both an objectively and subjectively hostile or abusive work environment, and that the conduct was causally connected to the complainant's claimed protected activity. In this case, two discrete actions, occurring nearly four months apart, did not constitute "pervasive" conduct, and the alleged severity of the employing office's actions was belied by the context in which those actions occurred, so the alleged conduct did not rise to the level of a hostile work environment.

b) *Solomon v. Office of the Architect of the Capitol*, No. 02-AC-62 (RP), 2005 WL 6236948 (OOC Board Dec. 7, 2005) – In evaluating a hostile work environment claim, a Hearing Officer must look to the totality of the circumstances including background information, and consider the cumulative effect of the alleged incidents to determine whether the employing office's conduct rose to an actionable level.

c) *Floyd v. Office of Representative Sheila Jackson Lee*, 85 F. Supp. 3d 482 (D.D.C. 2015) – In a case alleging retaliation for requesting a reasonable accommodation under the Americans with Disabilities Act as applied by the CAA, the court analyzed the plaintiff's claim using the standard from the *Harris* line of cases: To establish a prima facie case for a retaliatory hostile work environment claim, a plaintiff must proffer evidence that (1) she engaged in statutorily protected activity; (2) she suffered a hostile work environment; and (3) a causal link connects the two. In order to show that the harassment "affected a term, condition, or privilege of employment," a plaintiff must show that the workplace was permeated with discriminatory intimidation, ridicule, and insult that was sufficiently severe or pervasive to alter the conditions of her employment and create an abusive working environment, and that such conduct satisfied both objective and subjective standards of hostility.

d) *Harrison v. Office of the Architect of the Capitol*, 964 F. Supp. 2d 71 (D.D.C. 2013) – In a claim for retaliatory hostile work environment, when the alleged harasser is the employee's supervisor, the employer is vicariously liable to the employee. However, in this case the court held that the alleged run-ins between the plaintiff and her supervisor were too "sporadic" in nature for a reasonable jury to consider them "severe or pervasive" such that the plaintiff's workplace was "permeated with discriminatory intimidation, ridicule, and insult," and her retaliatory hostile work environment claim therefore failed.

V. Causation

The plain language of Section 207 prohibits employing offices from retaliating against employees "because" the employees have engaged in protected activity. The complainant bears the burden to establish a causal connection between the protected activity and the allegedly retaliatory action.

1) Causal Nexus

a) *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, — U.S. —, 133 S.Ct. 2517 (2013) – Plaintiffs alleging retaliation under Title VII must establish "but-for" causation, i.e., that the harm would not have occurred in the absence of their protected activity. The Supreme Court rejected the application of the "motivating factor" standard of status-based discrimination claims to retaliation claims.[2]

b) *Evans v. U.S. Capitol Police*, Nos. 14-CP-18 (CV, RP), 13-CP-61 (CV, RP), 13-CP-23 (CV, RP), 2015 WL 9257402 (OOC Board Dec. 9, 2015) (appeal pending) – Plaintiff failed to demonstrate that any alleged retaliatory animus caused his suspension or demotion, where the evidence showed that the employing office's actions were consistent with established policies and other similarly situated employees had been treated the same way.

c) *Kemp v. Office of the Architect of the Capitol*, No. 13-AC-01 (CV, FL, RP), 13-AC-35 (AG, CV, RP), 2015 WL 4597722 (OOC Board July 22, 2015) – Plaintiff raised triable issue of fact by providing evidence that only a few months before his supervisor disapproved and protractedly delayed the plaintiff's overtime payment, the supervisor told plaintiff's coworkers that the only reason the plaintiff held his current position was because he had received a promotion as part of settlement of a discrimination case he had filed against the employing office, and that the plaintiff did not really know how to do his job.

d) *Timmons v. U.S. Capitol Police Bd.*, 407 F. Supp. 2d 8 (D.D.C. 2005) – To establish causation, a plaintiff must show that the employing office would not have taken the allegedly retaliatory action "but for" the plaintiff's protected activity.

e) *Swann v. Office of the Architect of the Capitol*, No. 13-cv-01076 (CRC), — F. Supp. 3d —, 2016 WL 2733099 (D.D.C. May 10, 2016) (appeal pending) – Retaliation claims must be proved according to traditional principles of "but-for" causation, and cannot rely on mixed-motive theories.

f) *Hyson v. Office of the Architect of the Capitol*, 802 F. Supp. 2d 84 (D.D.C. 2011) – A supervisor's behavior may well have been unjustified, unprofessional, offensive, or hostile, but it cannot be used to support a retaliatory hostile work environment claim unless the employee produces evidence to link that behavior to her protected activity, which the plaintiff in this case failed to do.

2) Temporal Proximity

a) *Halcomb v. U.S. Senate Sergeant at Arms*, No. 03-SN-29 (CV, RP), 2004 WL 5658967 (OOC Hearing Officer Oct. 14, 2004), *aff'd*, 2005 WL 6236945 (OOC Board Mar. 18, 2005) – To accept "mere temporal proximity" between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality

[2] In its 2005 *Britton* decision, the OOC Board explicitly rejected "but-for" causation in retaliation claims brought under Section 207. The Board has not yet had occasion to address the effect, if any, of the Supreme Court's *Nassar* decision on its analysis of retaliation claims.

requires that the temporal proximity be "very close." Filing a discrimination lawsuit is protected activity, but in this case the complainant's district court lawsuit was filed in June 2001 and she was not terminated until March 2003. Without more, these two events were not close enough in time to establish causation.

b) *Ross v. U.S. Capitol Police*, Civil No. 14-cv-1400 (KBJ), — F. Supp. 3d —, 2016 WL 3659888 (D.D.C. June 30, 2016) – Temporal proximity is assessed not only with respect to the initiation of protected activity, but also with respect to subsequent participation in protected activity. In this case, although many years had passed since the original filing of the lawsuit in which plaintiff was a complainant, the court noted that the lawsuit was still ongoing and that plaintiff was still a participant in the litigation at the time of the allegedly retaliatory actions, so an inference of causation could still be made based on timing.

c) *Moran v. U.S. Capitol Police*, 82 F. Supp. 3d 117 (D.D.C. 2015) – The temporal proximity between the protected activity and the alleged retaliatory act must be close enough to permit a reasonable jury to infer that the employing office's action was in retaliation for the plaintiff's lawful and protected conduct. Some courts have found that three or four months can be considered "very close" for purposes of inferring retaliatory animus from temporal proximity. In this case, however, plaintiff was terminated more than two years after the latest of her protected activities, and the court held that the termination was "so far removed in time from plaintiff's protected activities that there is no basis from which a jury could infer a causal connection."

3) Employer Knowledge

a) *Sheehan v. Office of the Architect of the Capitol*, 08-AC-58 (CV, RP), 2011 WL 332312 (OOC Board Jan. 21, 2011) – In order to establish causation, a complainant must demonstrate by a preponderance of the evidence that the decision makers had knowledge of his protected activity, because a decision maker cannot be motivated to retaliate by something unknown to him. It is not enough to show that other members of management were aware of the protected activity; there must still be evidence that such knowledge was imparted to the decision makers. In this case there was no evidence that complainant's supervisors knew of his protected activity, or that they had a "symbiotic relationship" with the complainant's coworkers such that the knowledge could be fairly attributed to the supervisors.

b) *Timmons v. U.S. Capitol Police Bd.*, 407 F. Supp. 2d 8 (D.D.C. 2005) – Plaintiff failed to show that the decision not to promote him would not have been made but for his previous gender discrimination complaint. Although the Chief of Police was aware of his previous protected activity, the decision was made largely based on the input of several supervisors in plaintiff's chain of command who recommended denying him a promotion, and who had no knowledge of his previous protected activity.

c) *Moran v. U.S. Capitol Police*, 887 F. Supp. 2d 23 (D.D.C. 2012) – To fulfill the knowledge requirement, the official responsible for ordering the employee's adverse

employment action must have known about the protected activity. The plaintiff in this case failed to carry her burden to demonstrate that the official who initiated the investigation against her actually knew of her protected activity prior to the investigation, and the official was not required to suspend the investigation after learning of the protected activity. Moreover, even if a plaintiff can show that an employer knew of her protected activity, she still must establish sufficient temporal proximity in order for causation to be inferred. Even though the Chief of Police knew of the plaintiff's previous protected activity, the fact that almost a year had passed between the protected activity and the Chief's denial of the employee's appeal of disciplinary action was fatal to her retaliation claim.

4) Pretext

a) *Herbert v. Office of the Architect of the Capitol*, 839 F. Supp. 2d 284 (D.D.C. 2012) – It is not enough for an employee to argue that his employer's decision was imprudent or unfair. An employer may make an employment decision for a good reason, a bad reason, or no reason at all, so long as the decision is not made in reprisal for the plaintiff's protected activity. In this case, however, the court denied summary judgment to the employing office, because it did not produce sufficient evidence to rebut the plaintiff's claim that his non-selection for a temporary position was pretextual.

b) *Moran v. U.S. Capitol Police*, 82 F. Supp. 3d 117 (D.D.C. 2015) – Plaintiff argued that the employing office's stated reason for terminating her was false: she was terminated for lying in an investigate interview, and she claimed that she had actually told the truth. However, in order to demonstrate that an employing office's stated reason for a materially adverse action was pretextual, the key issue is not whether the underlying events actually happened, but rather whether the employing office honestly and reasonably believed that the underlying events happened. The court found that the employing office's belief was reasonable in light of all of the evidence, so plaintiff's retaliation claim failed.

c) *Swann v. Office of the Architect of the Capitol*, No. 13-cv-01076 (CRC), — F. Supp. 3d —, 2016 WL 2733099 (D.D.C. May 10, 2016) (appeal pending) – Plaintiff failed to show that the employing office lacked an honest, reasonable belief that she falsified information on her employment application, so she could not show that this proffered reason for her termination was pretextual.

d) *Sheehan v. Office of the Architect of the Capitol*, 08-AC-58 (CV, RP), 2011 WL 332312 (OOC Board Jan. 21, 2011) – Plaintiff argued that the employing office's proffered reason for his non-selection for a supervisory position was pretextual because he had a higher online application score than those who were selected and because the decision makers' testimony about the selection process was inconsistent. However, the Board found that this was insufficient to show pretext. The online application score was simply a screening mechanism for compiling the final list of qualified applicants, and the decision makers were very familiar with the applicants' skills and had personally

supervised their work. And although the two decision makers may have differed to some degree in their assessments of individual applicants, they both agreed that the applicants selected were the most qualified.

e) *Duncan v. Office of the Architect of the Capitol*, No. 02-AC-59, 2006 WL 6172579 (OOC Board Sept. 19, 2006), *aff'd*, 541 F.3d 1377 (Fed. Cir. 2008) – In order to show that the employing office's proffered reason was pretext for discrimination, a complainant must not only show that the employing office's justification was false in some way, but also that retaliation was the "true reason" for the employing office's actions.

f) *Iyoha v. Office of the Architect of the Capitol*, Nos. 12-AC-30 (CV, DA, RP), 13-AC-03 (CV, RP), 2014 WL 3887569 (OOC Board July 30, 2014) – In a case alleging, among other things, national origin discrimination and retaliation, the Board found that the employing office's stated reason for the complainant's reassignment was inconsistent with the factual record and therefore evidence of pretext. The employing office claimed that the employee was reassigned because of performance issues, but the complainant received "outstanding" ratings on multiple performance evaluations, along with quality step increases and cash awards associated with those ratings, and he also received positive survey comments and a personal recommendation from an HR professional only months before the position change. The employing office also claimed that it reassigned the complainant because his position was redundant, but the record evidence undermined that contention as well.

5) Intervening Event

a) *Fields v. Office of Eddie Bernice Johnson*, 520 F. Supp. 2d 101 (D.D.C. 2007) – Plaintiff failed to establish causation because there was an intervening event – in this case an independent investigation of the office – that occurred between her alleged protected activity and the decision to terminate her employment, and that intervening event completely explained the termination decision.

b) *Duncan v. Office of the Architect of the Capitol*, No. 02-AC-59, 2006 WL 6172579 (OOC Board Sept. 19, 2006), *aff'd*, 541 F.3d 1377 (Fed. Cir. 2008) – Complainant's supervisor asked complainant to remove his hard hat after it hit the supervisor in the head. Complainant engaged in protected activity when he refused to remove the hard hat, which he felt would be a violation of the OSHAct. Complainant's hard hat then hit the supervisor in the head a second time, and the supervisor proceeded to remove complainant's hard hat for him, which complainant claimed was retaliatory. However, the supervisor's allegedly retaliatory action occurred not after complainant refused to remove the hard hat, but only after the supervisor was hit in the head a second time. The Board held that complainant failed to establish a nexus between his refusal to remove his hat (the protected activity) and his supervisor's forcible removal of the hat (the allegedly retaliatory action), because the supervisor being struck with the hat again was an intervening event that broke the causal chain between the protected activity and the allegedly retaliatory action.

VI. Cat's Paw/Subordinate Bias/Coworker Retaliation

Employees sometimes bring retaliation claims based on alternative theories, such as retaliation by non-supervisory coworkers, or variants of "cat's-paw" or "subordinate bias" retaliation, which are indirect forms of retaliation by biased individuals who allegedly exert influence over those making decisions regarding the plaintiffs' employment.

a) *Swann v. Office of the Architect of the Capitol*, No. 13-cv-01076 (CRC), — F. Supp. 3d —, 2016 WL 2733099 (D.D.C. May 10, 2016) (appeal pending) – A plaintiff can prevail on a cat's-paw theory if she can show that (1) a supervisor performed an act motivated by retaliatory animus, (2) the act was intended by the supervisor to cause an adverse employment action, and (3) the act is a proximate cause of the ultimate employment action. In this case, the plaintiff appeared to argue that although the individual who made the ultimate decision to terminate her employment was not motivated by retaliatory animus, the anonymous letter that gave rise to the investigation into her conduct was retaliatory. However, the plaintiff could not show that the letter was the proximate cause of her termination, because the termination decision did not rely on the letter at all, but instead was based wholly on the results of the investigation. The cat's-paw analysis requires the alleged retaliatory act to be the *proximate* cause of the adverse action, not the but-for cause.
b) *Schiappa v. Office of the Architect of the Capitol*, No. 11-AC-135 (AG, DA, RP), 2012 WL 8020672 (OOC Hearing Officer July 16, 2012) – In order to prevail on a "subordinate bias" claim, the complainant must show that the subordinate employee harboring retaliatory animus had "more than a mere 'influence' or 'input' in the decision making process," but rather that the biased subordinate's reports, recommendation, or other actions *caused* the adverse employment action. *See also Furline v. Morrison*, 953 A.2d 344 (D.C. 2008) ("the critical question is not whether a biased subordinate had *input*, but whether he had *impact*") (emphasis in original). In this case the complainant alleged that one of her supervisors was biased against her for having engaged in protected activity, and that the supervisor's bias should be imputed to the panel that denied the complainant a requested disability accommodation. The Hearing Officer did not find that the allegedly biased supervisor was able to manipulate or influence the decision-making process, that the supervisor participated in the ultimate decision, or that the panel making the decision relied on the supervisor's input in deciding to deny the complainant an accommodation.
c) *Swann v. Office of the Architect of the Capitol*, 73 F. Supp. 3d 20 (D.D.C. 2014) – An employing office may be held liable for coworker harassment if the employer knew or should have known of the harassment and failed to implement prompt and appropriate corrective action. In this case, the employing office responded promptly and appropriately to reports that the plaintiff's coworkers were sexually harassing her, so the court granted summary judgment in favor of the employing office.

VII. Exhaustion of Administrative Remedies

As with other claims under the CAA, a plaintiff alleging retaliation must go through the OOC's counseling and mediation process, even if the alleged retaliation relates to underlying claims that have already gone through that process.

a) *Gordon v. Office of the Architect of the Capitol*, 750 F. Supp. 2d 82 (D.D.C. 2010) – Plaintiff alleged, among other things, that the employing office retaliated against her for participating in counseling and mediation regarding her race discrimination claims. The court held that "the completion of counseling and mediation for one set of violations does not give the court jurisdiction over related claims of retaliation that occurred after counseling had commenced; the administrative remedies must be exhausted for each claim." Because "the request to initiate counseling, by definition, could not have included allegations of retaliation for the plaintiff's actual participation in counseling and the mediation that occurred thereafter," the plaintiff would have had to file a separate request for counseling based on the alleged subsequent retaliation. She did not do so, and the court therefore dismissed her retaliation claim to the extent it alleged retaliation for participating in the OOC's process. However, to the extent that the plaintiff alleged retaliation for expressing opposition to the employing office's actions *before* she filed her original request for counseling, the court declined to dismiss that part of her claim.
b) *Moran v. U.S. Capitol Police*, 820 F. Supp. 2d 48 (D.D.C. 2011) – Plaintiff failed to show that counseling was completed or that mediation had taken place regarding the allegedly retaliatory conduct. Because she could not carry her burden to demonstrate that the employing office had adequate notice of the claim and an opportunity to handle it internally before the commencement of a formal legal action, the plaintiff failed to prove that the court had jurisdiction over the claim.
c) *Caul v. U.S. Capitol Police*, Civil Action No. 15-1243 (BAH), 2016 WL 2962194 (D.D.C. May 19, 2016) – Plaintiff bears the burden to establish jurisdiction, and mere speculation as to what might have happened in counseling is not enough. Plaintiff must produce evidence to show that counseling and mediation have been completed in order for a court to exercise jurisdiction. In this case, even though the allegedly retaliatory actions took place during the counseling period, the plaintiff failed to produce evidence that the retaliation claims were discussed in counseling or raised in mediation, and thus he did not prove that he exhausted his administrative remedies with respect to those claims.
d) *Duncan v. Office of the Architect of the Capitol*, No. 02-AC-59, 2006 WL 6172579 (OOC Board Sept. 19, 2006), *aff'd*, 541 F.3d 1377 (Fed. Cir. 2008) – Complainant alleged two counts of retaliation in his complaint that had never been part of the counseling or mediation phases of the OOC process. The Board affirmed the Hearing Officer's dismissal of both counts for failure to meet jurisdictional prerequisites.

VIII. Good Faith of Underlying Claim

An employee may still be considered to have participated in protected activity even if the conduct he opposed was not actually unlawful, or if he participated in a proceeding in which his claims were found to be without merit, as long as the underlying opposition or participation was based on a reasonable, good-faith belief that the employing office had violated the CAA.

a) *George v. Leavitt*, 407 F.3d 405 (D.C. Cir. 2005) – An employee seeking the protection of the opposition clause must demonstrate a good faith, reasonable belief that the challenged practice violates Title VII. However, in this case the incidents about which the plaintiff had complained – and for which she claimed her employer retaliated against her – could not reasonably have been considered violations of Title VII, so she could not avail herself of Title VII's anti-retaliation protections.
b) *Moran v. U.S. Capitol Police*, 887 F. Supp. 2d 23 (D.D.C. 2012) – The court has adopted a broad reading of the opposition clause, such that the opposed actions need not actually be unlawful under the CAA for the opposition activity to be protected, as long as the employee seeking the protection of the opposition clause can demonstrate a good faith, reasonable belief that the challenged practice violated the statute. In this case, the court was persuaded that the plaintiff could have reasonably believed that the conduct she complained of constituted sex discrimination, although it ultimately rejected her claim on other grounds.
c) *Patterson v. Office of the Architect of the Capitol*, No. 08-AC-48 (RP), 2010 WL 2641754 (OOC Board June 23, 2010) –The scope of the participation clause includes protection for "participation in a hearing or proceeding under the CAA, without regard to the nature or merits of the claims advanced in that hearing or proceeding." This protection covers employees who invoke the CAA's remedial processes even if they are mistaken in their belief about the parameters of the CAA's substantive protections.

IX. Other Statutes

The CAA applies a variety of employee protection statutes to the Legislative Branch, most of which contain explicit anti-retaliation provisions. Although most of these statutes' anti-retaliation provisions have not been litigated before the OOC Board of Directors or the D.C. District Court, and although many of them are not explicitly incorporated into the CAA, they are worth noting in the event that covered employees attempt to bring claims under them either instead of or in addition to retaliation claims under Section 207 of the CAA. Additionally, most courts – including the Supreme Court and the Federal Circuit– have held that where statutes prohibit discrimination, there is also an inferred prohibition on retaliation. *Gomez-Perez v. Potter*, 553 U.S. 474 (2008) (federal employee may assert a claim for retaliation under the federal-sector provision of the ADEA, 29 U.S.C. § 633a); *Diggs v. Dep't of Hous. and Urban Dev.*, 670 F.3d 1353 (Fed. Cir. 2011) (finding that Title VII's prohibition of discrimination in federal employment extends to claims of retaliation).

In *Britton v. Office of the Architect of the Capitol*, No. 02-AC-20 (CV, RP), 2005 WL 6236944 (OOC Board May 23, 2005), the Board held that all claims of retaliation under Section 207 of the CAA should be analyzed under a uniform framework:

> Based on the statutory text, we conclude that one analytical framework should apply to all claims brought under Section 207, regardless of the nature of the underlying protected activity. Adopting an *ad hoc* approach by which the analytical framework would be determined by the nature of the underlying protected activity would result in an employee who is retaliated against because of race, sex, age, etc. discrimination, being treated differently than an employee who claims retaliation as a result of bringing an unfair labor practice charge or making a complaint that her working environment is unsafe. Such a distinction is directly contrary to the language of Section 207, which creates *one* integrated provision for retaliation for opposing *any* practice made unlawful by the CAA.

Id. at *5 (emphasis in original).

However, the courts are not bound by OOC Board precedent, so it is possible that in cases where the underlying protected activity concerned another statute, the courts would follow what the Board called an "ad hoc approach" and analyze those cases based on the framework generally applied to other claims under those specific statutes. Indeed, although the Title VII anti-retaliation is not specifically incorporated into the CAA, covered employees have been known to assert retaliation claims under Title VII, and as discussed above, the federal courts apply the Title VII *McDonnell Douglas* analysis to those claims.

1) **Title VII of the Civil Rights Act of 1964**
   It is unlawful for an employer "to discriminate against any of his employees or applicants… because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a).

2) **Age Discrimination in Employment Act (ADEA)**
   "It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment… because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter." 29 U.S.C. § 623(d). To prove retaliation, the plaintiff generally must establish that he or she suffered (i) a materially adverse action (ii) because he or she had brought or threatened to bring a discrimination claim. *Baloch v. Kempthorne*, 550 F.3d 1191, 1198 (D.C. Cir. 2008).

3) **Americans with Disabilities Act (ADA)/Rehabilitation Act**
   "No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge,

testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter." 42 U.S.C. § 12203(a). The *McDonnell Douglas* burden-shifting framework used in Title VII retaliation cases also applies to ADA retaliation cases. *Smith v. District of Columbia*, 430 F.3d 450, 455 (D.C. Cir. 2005). Although the Rehabilitation Act does not include an explicit anti-retaliation provision, courts have held that by incorporating Section 503 of the ADA into the Rehabilitation Act, Congress did in fact include retaliation as a form of employment discrimination prohibited by the Rehabilitation Act. *Duncan v. Washington Metro. Area Transit Auth.*, 214 F.R.D. 43, 49 (D.D.C. 2003).

4) Family and Medical Leave Act (FMLA)

"It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter." 29 U.S.C. § 2615(a)(2). "It shall be unlawful for any person to discharge or in any other manner discriminate against any individual because such individual—(1) has filed any charge, or has instituted or caused to be instituted any proceeding, under or related to this subchapter; (2) has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under this subchapter; or (3) has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under this subchapter." 29 U.S.C. § 2615(b). The *McDonnell Douglas* burden-shifting framework used in Title VII retaliation cases also applies to FMLA retaliation cases. *Gordon v. U.S. Capitol Police*, 778 F.3d 158, 162 (D.C. Cir. 2015). The CAA specifically incorporates the anti-retaliation provision of the FMLA 2 U.S.C. § 1312(a)(1).

5) Fair Labor Standards Act (FLSA)

It is unlawful for an employer "to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee[.]" 29 U.S.C. § 215(a)(3). Title VII retaliation case law is instructive because the elements of a prima facie case of retaliation are essentially identical under the FLSA and Title VII, but courts should be mindful to respect any differences in language and purpose between the two statutes. *Cooke v. Rosenker*, 601 F. Supp. 2d 64, 73 (D.D.C. 2009).

6) Employee Polygraph Protection Act (EPPA)

It is unlawful for an employer "to discharge, discipline, discriminate against in any manner, or deny employment or promotion to, or threaten to take any such action against, any employee or prospective employee because—(A) such employee or prospective employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, (B) such employee or prospective employee has testified or is about to testify in any such proceeding, or (C) of the exercise by such employee or prospective

employee, on behalf of such employee or another person, of any right afforded by this chapter." 29 U.S.C. § 2002(4).

7) Worker Adjustment and Retraining Notification (WARN) Act

The WARN Act does not contain an anti-retaliation provision, and we are not aware of any case law establishing a cause of action for retaliation under this statute. An employee alleging retaliation for opposing a violation of the WARN Act would be required to assert a claim under Section 207.

8) Uniformed Services Employment and Reemployment Rights Act (USERRA)

"An employer may not discriminate in employment against or take any adverse employment action against any person because such person (1) has taken an action to enforce a protection afforded any person under this chapter, (2) has testified or otherwise made a statement in or in connection with any proceeding under this chapter, (3) has assisted or otherwise participated in an investigation under this chapter, or (4) has exercised a right provided for in this chapter. The prohibition in this subsection shall apply with respect to a person regardless of whether that person has performed service in the uniformed services." 38 U.S.C.A. § 4311(b). Retaliation may be brought as a separate cause of action under USERRA. *Tridico v. District of Columbia*, 130 F. Supp. 3d 17, 29 (D.D.C. 2015). The employee must first show, by a preponderance of the evidence, that his or her protected status was a substantial or motivating factor in the adverse employment action, and the employer may then avoid liability only by showing, as an affirmative defense, that the employer would have taken the same action without regard to the employee's protected status. *Wallace v. City of San Diego*, 479 F.3d 616, 624 (9th Cir. 2007). At least one court has held that the scope of USERRA's anti-retaliation protection is narrower than that of Title VII, because "USERRA's anti-retaliation provision expressly limits actionable harm to 'adverse employment action,' not the broader 'discrimination' prohibited by Title VII's anti-retaliation provision." *Lisdahl v. Mayo Found.*, 633 F.3d 712, 721 (8th Cir. 2011). The CAA specifically incorporates the anti-retaliation provision of the USERRA. 2 U.S.C. § 1316(a)(1)(A).

9) Veterans' Preference Laws

The CAA incorporates a limited number of veteran's preference provisions, which do not contain protection against retaliation. An employee alleging retaliation for protected activity in connection with these provisions would be required to assert a claim under Section 207.

10) Genetic Information Nondiscrimination Act (GINA)

"No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter. The remedies and procedures otherwise provided for under this section shall be available to aggrieved individuals with respect to violations of this subsection." 42

U.S.C. § 2000ff-6(f). The *McDonnell Douglas* burden-shifting framework used in Title VII retaliation cases also applies to GINA retaliation cases. *Ortiz v. City of San Antonio Fire Dep't*, 806 F.3d 822, 827 (5th Cir. 2015). The CAA does not incorporate the GINA, which was enacted in 2008, but the GINA itself defines "employee" and "employer" to include covered employees and employing offices as defined in Section 101 of the CAA. 42 U.S.C. §§ 2000ff(2)(A)(iii), 2(B)(iii).

11) Occupational Safety and Health Act (OSHAct)

The CAA does not incorporate the OSHAct's whistleblower protection provision, which is located in Section 11(c) of the OSHAct, 29 U.S.C. § 660(c)(1). However, in *Duncan v. Office of Compliance*, 541 F.3d 1377 (Fed. Cir. 2008), the court held that Section 207 of the CAA protects covered employees who oppose practices prohibited by the OSHAct or participate in proceedings under Section 215 of the CAA: "[T]he express, unambiguous language of the CAA accords legislative employees anti-reprisal protection for OSHA-related claims… [T]he express language of the CAA accords legislative employees anti-reprisal protection for opposition to 'any practice made unlawful by this Act,' which… extends to OSHA-related claims."

12) Federal Service Labor-Management Relations (FSLMR) Statute

"For the purpose of this chapter, it shall be an unfair labor practice for an agency… to discipline or otherwise discriminate against an employee because the employee has filed a complaint, affidavit, or petition, or has given any information or testimony under this chapter[.]"5 U.S.C. § 7116(a)(4). *See Letterkenny Army Depot*, 35 FLRA 113 (1990), for the framework used to analyze retaliation claims under the FSLMR Statute. The CAA specifically incorporates the anti-retaliation provision of the FSLMR Statute. 2 U.S.C. § 1351(a)(1).