Office of Congressional Workplace Rights

Office of the General Counsel

CAA STATUTORY, REGULATORY, AND CASE LAW UPDATES
APRIL 17, 2024

Introduction

The Congressional Accountability Act (CAA) applies more than a dozen employee protection statutes to the legislative branch. The Office of Congressional Workplace Rights (OCWR) administers a dispute resolution process for legislative branch employees who believe their rights under the CAA have been violated, and the OCWR General Counsel is tasked with enforcement of three of the CAA-applied statutes.

Since the implementation in June 2019 of changes mandated by the Congressional Accountability Act Reform Act, there have been several legislative and regulatory updates affecting the CAA and the OCWR. We summarize those updates below, along with some decisions of the OCWR Board of Directors and federal courts concerning alleged violations of the CAA.

Table of Contents

CAA Overview

A Brief History

The Congressional Accountability Act of 1995 (Pub L. 104-1, January 23, 1995) was the first law passed by the 104th Congress. The CAA initially applied about a dozen labor and employment laws to the legislative branch and established the Office of Compliance to enforce the laws, administer a dispute resolution program, and educate the legislative branch workforce on their rights and obligations under the CAA. Since the passage of the CAA, newer laws have brought additional employee protections within the scope of the statute.

In December 2018 Congress passed the CAA Reform Act, which changed the office's name to the Office of Congressional Workplace Rights, made significant changes to the dispute resolution process, expanded certain protections to unpaid staff, and required employing offices to post information regarding employees' rights under the CAA, among other changes.

The CAA is codified at 2 U.S.C. §§ 1301 et seq.

Applicable Laws

The CAA currently applies all or part of the following statutes to the legislative branch:

Genetic Information Nondiscrimination Act (GINA)
CAA section 102(c), 2 U.S.C. § 1302(c)
Prohibits the use of genetic information as a basis for taking a personnel action.

Title VII of the Civil Rights Act of 1964
CAA section 201, 2 U.S.C. § 1311
Prohibits harassment and discrimination in personnel actions based on race, color, national origin, sex, or religion.
Note: The Supreme Court held in* Bostock v. Clayton County, Georgia*, 590 U.S. 644 (2020), that under Title VII "sex" includes sexual orientation and gender identity.

Age Discrimination in Employment Act (ADEA)
CAA section 201, 2 U.S.C. § 1311
Prohibits harassment and discrimination in personnel actions based on age.

Rehabilitation Act and Americans with Disabilities Act (ADA)
CAA sections 201 & 210, 2 U.S.C. §§ 1311 & 1331
Prohibit harassment and discrimination in personnel actions based on disability, and require reasonable accommodations for employees with disabilities. The ADA public access provisions also require that employing offices make their services, programs, and activities for the public, as well as the facilities where these services, programs, and activities are provided, accessible to individuals with disabilities.

Family and Medical Leave Act (FMLA)
CAA section 202, 2 U.S.C. § 1312
Provides rights and protections for employees needing leave for specified family and medical reasons.

Fair Labor Standards Act (FLSA)
CAA section 203, 2 U.S.C. § 1313
Requires minimum wage and overtime compensation to nonexempt employees, restricts child labor, and prohibits sex-based wage differentials.

Employee Polygraph Protection Act (EPPA)
CAA section 204, 2 U.S.C. § 1314
Restricts the use and the results of polygraph testing.

Worker Adjustment and Retraining Notification (WARN) Act
CAA section 205, 2 U.S.C. § 1315
Requires that employees be notified of an office closing or of a mass layoff.

Uniformed Services Employment and Reemployment Rights Act (USERRA)
CAA section 206, 2 U.S.C. § 1316
Protects employees who are past or present members of the uniformed services from discrimination or retaliation and provides certain benefits and reemployment rights.

Veterans Employment Opportunity Act (VEOA)
Pub. L. 105-339 § 4(c), 2 U.S.C. § 1316a
Enhances access for eligible veterans to job opportunities and establishes a redress system if their veterans' preference rights are violated.

Fair Chance to Compete for Jobs Act (FCA)
CAA section 207, 2 U.S.C. § 1316b
Prohibits employing offices from asking most job applicants about their criminal history prior to extending conditional offers of employment.

Occupational Safety and Health Act (OSH Act)
CAA section 215, 2 U.S.C. § 1341
Requires employing offices to comply with occupational safety and health standards, and to provide employees with workplaces that are free of recognized hazards that are likely to cause death or serious injury.

Federal Service Labor-Management Relations Statute (FSLMRS)
CAA section 220, 2 U.S.C. § 1351
Gives many legislative branch employees the right to form, join, or assist a labor organization for the purpose of collective bargaining – or to choose not to do so – without fear of penalty or reprisal.

Pregnant Workers Fairness Act (PWFA)
Pub. L. 117-328, 42 U.S.C. § 2000gg
Requires employers to provide reasonable accommodations for an employee's known limitations related to pregnancy, childbirth, or related medical conditions.

Additionally, section 208 of the CAA, 2 U.S.C. §1317, makes it unlawful for an employing office to intimidate, take reprisal against, or otherwise discriminate against, any covered employee because the covered employee has opposed any practice made unlawful by 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.

Administrative Dispute Resolution (ADR)

The CAA establishes a framework for administrative dispute resolution for covered employees alleging violations of most of the CAA-applied laws. Overseen by the OCWR's Executive Director (ED) and Deputy Executive Director for the Senate (DED-S), and managed by the Clerk of the OCWR, this process is set forth in the statute and described in detail in the OCWR's Procedural Rules.

- Section 401, 2 U.S.C. § 1401 – Procedure for consideration of alleged violations
  This section provides an overview of the ADR process, explains the right of covered employees to file a civil action, clarifies that individuals may retain private counsel, sets forth standards for assertions made by parties, and contains provisions specific to employees of the Office of the Architect of the Capitol, the U.S. Capitol Police, and the Library of Congress.

- Section 402, 2 U.S.C. § 1402 – Initiation of procedures
  This section details the requirements for filing claims with the OCWR and the steps the OCWR must take to process claims and notify the parties.

- Section 402a, 2 U.S.C. § 1402a – Preliminary review of claims
  A hearing officer is appointed to review the claim and, based upon certain factors specified in the statute, to determine whether the individual filing the claim is a covered employee who has stated a claim which, if the allegations contained in the claim are true, relief may be granted under the CAA.

  If a claim passes preliminary review, the claimant may choose to either proceed through the OCWR's ADR process or file a complaint in federal district court. If a claim does not pass preliminary review, the claimant may still file a complaint in federal district court, but the OCWR's ADR process will not be available.

- Section 403, 2 U.S.C. § 1403 – Mediation
  Mediation is optional, and available upon request of either the claimant or the employing office and agreement of the non-requesting party.

- Section 405, 2 U.S.C. § 1405 – Hearing
  This section covers the requirements and steps for requesting and conducting administrative hearings, including provisions regarding discovery, subpoenas, and hearing officer decisions.

- Section 406, 2 U.S.C. § 1406 – Appeal to Board
  This section contains the rules for petitioning the OCWR Board for review of hearing officer decisions and sets forth the standard of review for such appeals.

- Section 407, 2 U.S.C. § 1407 – Judicial review of Board decisions and enforcement
  Establishes the jurisdiction of the U.S. Court of Appeals for the Federal Circuit to review decisions of the OCWR Board and enforce the Board's decisions, and sets forth the procedures and standard of review for such appeals.

For more detailed information about the OCWR ADR program, please visit https://www.ocwr.gov/request-assistance/dispute-resolution/.

Investigations and Enforcement

The OCWR Office of the General Counsel (OGC) is tasked with enforcing three of the laws applied by the CAA: the public access provisions of the ADA; the Occupational Safety and Health Act; and the unfair labor practice provisions of the Federal Service Labor-Management Relations Statute.

ADA Public Access – Section 210(f) of the CAA (2 U.S.C. § 1331(f)) requires the OGC to conduct inspections of the legislative branch once each Congress to identify violations of the public access provisions under Titles II and III of the ADA. As part of the biennial inspections, the OGC inspects all Member offices in the House and Senate Office Buildings, as well as certain other areas of focus, to identify barriers to access in these facilities. The OGC issues a report on each biennial inspection and works with the responsible employing offices to ensure that all identified barriers are removed.

Additionally, pursuant to section 210(d) of the CAA (2 U.S.C. §1331(d)), the OGC investigates charges of discrimination filed by individuals who have encountered barriers to access in facilities, programs, services, or activities of the legislative branch. The General Counsel may recommend mediation between the individual filing the charge and the employing office responsible for removing the barrier, and if that is unsuccessful, the General Counsel may file an administrative complaint against the employing office, which proceeds through the OCWR's hearing process.

See https://www.ocwr.gov/the-congressional-accountability-act/access-to-public-services-and-accommodations/ for more information about accessibility in the legislative branch.

OSH Act – Section 215(e) of the CAA (2 U.S.C. § 1341(e)) requires the OGC to conduct inspections of the legislative branch once each Congress to report on compliance with the requirements of the OSH Act. As part of the biennial inspections, the OGC inspects high-hazard areas throughout Capitol Hill and at other nearby legislative branch locations, as well as all Member offices in the House and Senate Office Buildings, and requests that Members' district and state offices conduct self-inspections using resources provided by the OCWR. The OGC issues a report on each biennial inspection and works with the responsible employing offices to ensure that all identified hazards are abated. The OGC also presents Safety Recognition Awards to those offices and shops that have been found to be hazard-free during the previous Congress, along with Safety Advocate Awards to individuals who exhibit exceptional support of safety processes and hazard-reduction efforts in the legislative branch.

Additionally, pursuant to section 215(c) of the CAA (2 U.S.C. § 1341(c)), the OGC investigates requests for inspection filed by covered employees, employing offices, or unions regarding safety incidents or suspected hazards in legislative branch workplaces. The OGC issues investigative reports and works with the employing office responsible for abating any identified hazards to ensure that those hazards are abated. The General Counsel may issue citations against employing offices, and file administrative complaints that proceed through the OCWR's hearing process.

See https://www.ocwr.gov/employee-rights-legislative-branch/occupational-safety-and-health/ for more information about the OCWR's OSH inspections and investigations.

FSLMRS – Section 220(c)(2) of the CAA (2 U.S.C. § 1351(c)(2)) gives the OCWR General Counsel the authority to investigate charges of unfair labor practices (ULPs) filed against legislative branch employing offices or labor organizations. After investigating the charge, if the General Counsel determines that a ULP was committed, and if the parties are not able to resolve the dispute themselves, the General Counsel may file an administrative complaint against the charged party, which proceeds through the OCWR's hearing process.

Note: other provisions of the FSLMRS as applied by the CAA, such as petitions for representation, elections, negotiability disputes, and impasse proceedings, are administered by the staff of the OCWR Executive Director.

See https://www.ocwr.gov/employee-rights-legislative-branch/labor-management-rights/ for more information about labor-management relations in the legislative branch.

Statutory Updates

Since the passage of the CAA Reform Act in December 2018, there have been several smaller but nonetheless important statutory developments that either modified the CAA directly or applied other laws to the legislative branch with enforcement through the OCWR.

Federal Employee Paid Leave Act (FEPLA)

On December 20, 2019, as part of the National Defense Authorization Act (NDAA), Congress passed the Federal Employee Paid Leave Act (FEPLA), which became effective on October 1, 2020. FEPLA amended the FMLA to allow most federal employees to substitute up to 12 weeks of paid parental leave (PPL) for unpaid FMLA leave granted in connection with the birth of an employee's child or for the placement of a child with an employee for adoption or foster care. The benefits for legislative branch employees differ in a few significant ways from those granted to executive branch employees; in particular, the eligibility and return-to-work requirements for executive branch employees do not apply to covered employees under the CAA.

For more information, see https://www.ocwr.gov/employee-rights-legislative-branch/family-and-medical-leave-act/paid-parental-leave/.

Fair Chance to Compete for Jobs Act (FCA)

The Fair Chance to Compete for Jobs Act – also known as the Fair Chance Act, FCA, or federal "Ban the Box" law – was signed into law on December 20, 2019 as part of the NDAA, and took effect in the legislative branch on December 20, 2021. It amended the CAA by adding a new section 207, 2 U.S.C. § 1316b.[1] The FCA prohibits employing offices from requesting information, either orally or in writing, from most job applicants about their criminal history prior to extending a conditional offer of employment. Applicants who believe the FCA has been violated may file claims with the OCWR and pursue those claims administratively, but FCA claims may not be filed in federal court, and there is no judicial review of OCWR Board decisions regarding FCA claims. There is no statutory remedy providing relief for claimants; rather, employees who are found to have violated the FCA receive warnings for their first violations and progressive discipline for subsequent violations, including suspensions and civil penalties. Employees alleged to have violated the FCA are entitled to notice and a hearing on the record.

For more information, see https://www.ocwr.gov/employee-rights-legislative-branch/ban-the-box/.

Pregnant Workers Fairness Act (PWFA)

The PWFA was signed into law on December 29, 2022 as part of the omnibus spending bill, and took effect on June 27, 2023.[2] The PWFA broadened the scope of accommodations for workers who are pregnant or have recently given birth, going beyond the protections provided by the ADA or the Pregnancy Discrimination Act. By its terms, the PWFA applies to covered employees and employing offices covered by the CAA, including unpaid staff. The reasonable

[1] The original section 207, which contains the CAA's anti-retaliation provision, is now designated as section 208, but is still codified at 2 U.S.C. § 1317.

[2] It is worth noting that at least one federal district court judge has found the PWFA to be unconstitutional, holding that Congress's novel proxy rule – which counted Members who were not physically present at the time of the vote toward the quorum, and which was in effect at the time the PWFA was passed – violated the Constitution's Quorum Clause. See *Texas v. Garland*, No. 5:23-CV-034-H, 2024 WL 967838 (N.D. Tex. Feb. 27, 2024). For the time being, the PWFA is still in effect and applicable to the legislative branch, pending the resolution of this and other challenges to its constitutionality.

accommodation and undue hardship provisions mirror those in the ADA, and the PWFA explicitly incorporates the ADA's interactive process, which will typically be used to determine an appropriate reasonable accommodation.

The PWFA specifies five unlawful employment practices, any of which can be redressed by filing a claim with the OCWR. These include: (1) not making a reasonable accommodation for the known limitations of a covered employee related to pregnancy, childbirth, or related medical conditions, absent a showing of undue hardship; (2) requiring an employee to accept an accommodation other than a reasonable accommodation reached through the interactive process; (3) denying employment opportunities to qualified employees because of the need to provide a reasonable accommodation; (4) requiring an employee to take leave if another reasonable accommodation is available; and (5) taking adverse action in terms, conditions, or privileges of employment against a covered employee on account of the employee requesting or using a reasonable accommodation.

For more information, see https://www.ocwr.gov/employee-rights-legislative-branch/pregnantworkersfairnessact/.

PUMP for Nursing Mothers Act (PUMP Act)

The Providing Urgent Maternal Protections for Nursing Mothers Act – also known as the PUMP for Nursing Mothers Act or simply the PUMP Act – was signed into law on December 29, 2022 as part of the omnibus spending bill. The FLSA already contained some provisions regarding nursing employees – i.e., employers were required to provide reasonable break time for employees to express breast milk, as well as a place other than a bathroom that is shielded from view and free from intrusion from coworkers and the public that employees could use for that purpose – but those protections were limited to non-exempt employees, and employers were not required to compensate employees for time spent expressing breast milk, so employees whose rights were violated had no private right of action. The stated purpose of the PUMP Act was to extend the existing protections to more employees and to ensure that employees could recover appropriate relief if their employers violated their rights under these provisions.

Unfortunately, a drafting error had the unintended consequence of actually *removing* the existing protections for nursing employees in the legislative branch, rather than expanding them: before the PUMP Act, provisions covering nursing employees had been included in section 7(r) of the FLSA, 29 U.S.C. § 207(r), which applied through section 203(a) of the CAA, but the PUMP Act struck that subsection of the FLSA and moved those provisions to a newly created section, 29 U.S.C. § 218d, without modifying CAA section 203(a) to incorporate that section or otherwise specifying that the protections would apply to covered employees and employing offices under the CAA. Both the House and Senate are aware of the problem, and we are hopeful that steps will be taken soon to fix it. In the meantime, we encourage employing offices to continue providing sufficient time and appropriate locations to their employees who are nursing, in keeping with the requirements of the PUMP Act.

The Department of Labor has guidance available at https://www.dol.gov/agencies/whd/pump-at-work.

Regulatory Updates

The CAA directs the OCWR Board of Directors to adopt regulations implementing many of the laws applied by the CAA to the legislative branch. The Board publishes proposed regulations in the Congressional Record, reviews comments submitted by stakeholders, revises the proposed regulations as appropriate, and issues a Notice of Adoption of the final regulations in the Congressional Record. These are considered pending regulations, which are not effective until approved by Congress, either by resolution of the House of Representatives or of the Senate, by concurrent resolution, or by joint resolution. Over the past several years, the OCWR Board of Directors has adopted several sets of new or updated regulations, most of which are still pending:

- **FSLMRS** – On May 10, 2022, the House of Representatives passed H. Res. 1096, which applied the OCWR Board's existing labor-management regulations to certain employing offices within the House that are listed in section 220(e)(2) of the CAA, 2 U.S.C. § 1351(e)(2). These include Member offices, committees, leadership offices, and various other offices within the House, and the labor-management regulations are therefore final for those offices. *See* 168 Cong. Rec. H5006 (May 16, 2022). However, the regulations do not yet apply to the Senate or any of the other offices listed in section 220(e)(2), and under the requirements of CAA section 220(f)(2) of the CAA, 2 U.S.C. § 1351(f)(2), that means that the rights and protections of the FSLMRS do not apply to those offices.

- **FLSA** – On September 28, 2022, the Board adopted amended regulations related to the overtime provisions in the FLSA. Those updated regulations were approved by the House of Representatives via H. Res. 1516 on December 14, 2022, and issued by the Board on March 1, 2023. *See* 169 Cong. Rec. H1008 (Mar. 1, 2023). Those regulations are therefore applicable to House employees, but are still pending with respect to the Senate and other employing offices in the legislative branch.

- **FMLA** – After Congress passed FEPLA, the Board amended its FMLA regulations to incorporate provisions regarding paid parental leave. The updated regulations were adopted by the Board in December 2021, approved by the House of Representatives in December 2022, and issued by the Board with respect to the House on March 1, 2023, with an effective date of April 30, 2023. *See* 169 Cong. Rec. H1017 (Mar. 1, 2023). Those regulations are therefore applicable to House employees, but are still pending with respect to the Senate and other employing offices in the legislative branch.

- **ADA Public Access** – On March 28, 2023, the Board issued a notice of adoption of regulations implementing the public access provisions of the ADA in the legislative branch. *See* 169 Cong. Rec. S989, H1521 (Mar. 28, 2023). These regulations are awaiting congressional approval. The Board had previously adopted regulations implementing the ADA public access provisions in 1997 and 2016, but Congress did not approve those regulations, so currently there are no regulations governing accessibility in the legislative branch.

- **USERRA** – The Board issued a notice of adoption of amended USERRA regulations on April 18, 2023. *See* 169 Cong. Rec. S1161, H1801 (Apr. 18, 2023). These regulations are awaiting congressional approval. The Board had previously adopted regulations

implementing USERRA in 2009, but Congress did not approve those regulations, so currently there are no regulations implementing USERRA in the legislative branch.

Additionally, the OCWR is in the process of developing regulations to implement the Fair Chance Act.

While updated regulations are pending, the previously issued version of those regulations remains in force. If the OCWR Board has not issued any regulations to implement a particular provision for which it is required to do so, the CAA instructs that "the hearing officer, Board, or court, as the case may be, shall apply, to the extent necessary and appropriate, the most relevant substantive executive agency regulation promulgated to implement the statutory provision at issue in the proceeding." CAA section 411, 2 U.S.C. § 1411. For the currently pending or future Board regulations, those would be:

- FEPLA – OPM regulations forthcoming
- FCA – OPM regulations, 88 FR 60317 (Sept. 1, 2023)
- PWFA – EEOC regulations forthcoming
- ADA Public Access – DOJ regulations, 28 C.F.R. Parts 35 & 36; DOT regulations, 49 C.F.R. Parts 37 & 38
- USERRA – DOL regulations, 20 C.F.R. Part 1002

For more information and to access the OCWR Board's pending and final regulations, please visit the Rules and Regulations page on the OCWR web site at https://www.ocwr.gov/the-congressional-accountability-act/rules-and-regulations/.

Case Law Updates

As discussed above, claimants alleging violations of the CAA may have a choice to pursue their claims through an OCWR administrative hearing or to file a complaint in federal district court. The Board of Directors of the OCWR publishes its opinions on review of hearing officer decisions, and Board decisions may be appealed to the U.S. Court of Appeals for the Federal Circuit. Most federal complaints under the CAA are filed in the U.S. District Court for the District of Columbia and may be appealed to the U.S. Court of Appeals for the D.C. Circuit. Below are summaries of some recent noteworthy cases decided by all four of these adjudicative bodies.

OCWR Board of Directors

FSLMRS

- *U.S. Capitol Police v. FOP Lab. Comm.*, No. 15-LMR-02 (CA), 2019 WL 4085113 (OCWR Aug. 20, 2019) – The USCP terminated an officer, and the FOP filed a grievance, alleging that the termination violated the FOP's collective bargaining agreement with the USCP. The arbitrator sustained the grievance and ordered the USCP

to pay backpay and attorneys' fees of $265,183 and expenses for the FOP of $8,723.84. The USCP did not file exceptions to the award, but it did not pay the ordered amounts. The FOP then filed an unfair labor practice charge, alleging that the USCP did not comply with the arbitrator's award. The Hearing Officer found a violation and added an additional $202,879 in attorneys' fees and $1,004.31 for the costs of litigating the USCP's non-compliance with the original award. The USCP appealed to the OCWR Board, arguing, among other things, that sovereign immunity bars the payment of attorneys' fees and the award was punitive and therefore impermissible. The Board upheld the award, emphasizing that USCP could not "collaterally attack" the arbitrator's award before the Board after it failed to file exceptions to the original award.

- *U.S. Capitol Police v. FOP Lab. Comm.*, No. 16-LMR-01 (CA), 2020 WL 6036806 (OCWR Feb. 6, 2020) – Like in 15-LMR-02, the USCP did not file exceptions to an arbitrator's award ordering the USCP to pay significant attorneys' fees, then failed to make the required payment and attacked the attorneys' fees award during unfair labor practice litigation over the USCP's failure to comply with the arbitrator's award. Relying on its decision in 15-LMR-02, the OCWR Board rejected the USCP's arguments and ordered that the arbitration award be immediately implemented.

- *FOP Lab. Comm. v. U.S. Capitol Police*, 20-LMR-01 (CA), 2022 WL 21807825 (OCWR Apr. 4, 2022) – The USCP suspended all provisions of its collective bargaining agreement with the FOP at the beginning of the COVID-19 pandemic without providing the FOP with any advance notice or opportunity to bargain about the suspension or the ensuing changes to employee working conditions. The USCP admitted that it suspended the agreement and changed working conditions but argued that those actions were permitted under the CBA and the emergency provisions of the FSLMRS. The Hearing Officer found that the CBA suspension and the failure to bargain over the ensuing changes were unlawful. The Board did not decide on the lawfulness of the suspension itself, but found that the USCP violated its duty to bargain when it changed employee working conditions without bargaining with the FOP. The case is currently pending before the Federal Circuit Court of Appeals.

Title VII

- *Torres-Velez v. Off. of the Architect of the Capitol*, No. 17-AC-36, 2019 WL 10784232 (OCWR Sept. 23, 2019) – Capitol Visitor Center Manager Torres-Velez filed a complaint alleging, among other things, that the AOC discriminated against him based on his sex by failing to promote him and promoting a woman instead. The Hearing Officer granted the AOC's motion for summary judgment, dismissing the complaint. The OCWR Board affirmed because the only evidence Torres-Velez offered was that he was paid less as a male than the identified female employee who received the promotion, which was not sufficient to rebut the AOC's legitimate, nondiscriminatory reason for promoting the female employee instead of him.

- *Leggett v. Libr. of Congress*, No. 20-LC-18, 2021 WL 4424091 (OCWR Sept. 20, 2021), *aff'd sub nom. Leggett v. OCWR*, 2022-1288, 2023 WL 1459275 (Fed. Cir. Feb. 2, 2023). – Leggett, a female of Chinese origin, filed a complaint against the Library of Congress

after she applied for a promotion to a supervisory position but the Library promoted a White woman instead. During the application process, Leggett and the selectee each submitted a questionnaire. Leggett scored a 95 and the selectee scored a 100. Both were referred for an interview. After the interviews, the panel unanimously chose the selectee. The Hearing Officer granted the Library's motion for summary judgment, finding that Leggett had established a prima facie case of discrimination, but that the Library had met its burden of showing that it had a legitimate, non-discriminatory reason for choosing the selectee instead of Leggett. In particular, it was apparent that the selectee had overall superior qualifications in all stages of the applications process. The Federal Circuit Court of Appeals affirmed the Board's decision.

- *Aiken v. Libr. of Congress*, No. 19-LC-78, 2022 WL 21807824 (OCWR May 16, 2022) – Aiken, an African-American female, filed a complaint against the Library of Congress alleging that the Library discriminated against her because of her race and color and subjected her to a hostile work environment. Aiken argued that her supervisor had failed to allow her to work additional hours, while allowing other employees to do so. The evidence showed, however, that Aiken did not submit a request to work these additional hours. As such, the Hearing Officer found that she was not subject to an adverse employment action and granted the Library's motion for summary judgment, and the Board affirmed. Similarly, regarding her hostile work environment claim, the Hearing Officer and the Board found that the facts Aiken presented were not "objectively offensive, abusive, hostile, or threatening." Affirming the Hearing Officer's grant of summary judgment in favor of the Library on the hostile work environment claim, the Board noted, "general feelings of workplace discomfort or unease unrelated to membership in a protected classification are simply not enough."

- *Waddy v. Libr. of Congress*, No. 22-LC-23, 2023 WL 8471329 (OCWR Sept. 15, 2023) – Waddy, a Library of Congress employee, refused to comply with the Library's COVID-19 safety protocols for unvaccinated employees. The Library required all unvaccinated employees to take COVID-19 tests. Waddy refused to take the tests, claiming they violated her religious beliefs. The Library then offered her an accommodation: wear a Library-issued N95 mask to the office. She refused to wear the Library-issued mask and asked to wear her own mask, but did not claim that the Library-issued mask violated her religious beliefs. The library terminated her for failing to follow protocol. Waddy filed a complaint alleging that the Library violated Title VII when it failed to accommodate her religious beliefs, harassed her because of her beliefs, and terminated her. In affirming the Hearing Officer's grant of summary judgment for the Library, the OCWR Board explained that the Library's accommodation offer "effectively eliminated the religious conflict." Regarding religious harassment, Waddy argued that each instance in which the Library raised Waddy's failure to comply with COVID-19 protocols amounted to unlawful religious harassment. The Board rejected this theory, agreeing with the Hearing Officer's determination that these were "nothing more than personnel notices." Finally, the Board found that Waddy's termination was appropriate under the standard articulated by the Supreme Court in *Groff v. DeJoy*, 600 U.S. 447 (2023), where the Court held that the employers denying a religious accommodation must show that the burden of granting it would result in substantial increased costs in relation to the conduct of its particular business. The Board found that the Library's "legitimate concerns about its ability to

protect the health of library employees" supported a finding that Waddy's accommodation would have resulted in a substantial burden on the Library's business.

ADA

- *Doe v. Off. of the Architect of the Capitol*, No. 19-AC-81, 2021 WL 1200013 (OCWR Mar. 18, 2021) – An AOC employee who worked a desk job fractured her shoulder in a car accident. She filed a request for a reasonable accommodation with her supervisor and provided a doctor's note which stated that she needed three days of telework per week for twelve weeks and a flexible schedule to allow for physical therapy and adequate rest. A separate note stated that she was unable to carry, lift, push, pull, climb ladders, or drive. The AOC denied the request and instead informed the employee that she could telework two days per week for eight weeks. The employee filed a claim alleging that the AOC prematurely ended the interactive process, particularly by not considering that she would have difficulty commuting. The Hearing Officer granted the AOC's motion for summary judgment. The OCWR Board reversed and remanded for a hearing, finding that there was a genuine issue of fact as to whether the AOC failed to engage in the interactive process with the employee. The Board found that a hearing was necessary to determine whether the doctor's "no driving" restriction put the AOC on notice of the employee's need for accommodations relating to commuting.

ADEA

- *Pillai v. U.S. Capitol Police*, Nos. 19-CP-27, 19-CP-59, 2021 WL 1963840 (OCWR May 6, 2021) – Pillai, a USCP Budget Officer, alleged discrimination based on his age, race, and national origin. After a supervisor asked when Pillai was planning to retire, and Pillai declined to respond, he received a "Meets Expectations" performance appraisal, and management initially denied a leave request only to approve it after learning the leave was for a religious purpose. The Hearing Officer granted the USCP's motion for summary judgment, finding that none of the alleged conduct amounted to an adverse action as a matter of law. The supervisor's single comment did not constitute an adverse action and, on its own, did not create a hostile work environment. Moreover, a "Meets Expectations" appraisal and a denied-then-approved leave request are not "materially adverse consequences affecting the terms, conditions, or privileges of employment." The OCWR Board affirmed.

Reprisal for Protected Activity

- *Cobbin v. U.S. Capitol Police*, No. 21-CB-10, 2023 WL 8471328 (Sept. 27, 2023) – Cobbin, an African American K-9 Sergeant, complained to his supervisors about racially-tinged emails authored by White K-9 officers. The emails included complaints about Cobbin's competence as a supervisor, particularly during the Black Lives Matter protests in 2020 and during the January 6th insurrection. After Cobbin complained to his supervisors, the USCP transferred him out of the K-9 division and replaced him with a White officer. Cobbin filed a claim with the OCWR, alleging that the transfer and replacement constituted retaliation for his complaints and discrimination against him because of his race. The Hearing Officer found that the transfer was unlawful: all the evidence showed that Cobbin was far more qualified and experienced than his White

replacement, and the USCP offered shifting, inconsistent reasons for reassigning Cobbin, which led the Hearing Officer to credit Cobbin and discredit the USCP's witnesses. The Board affirmed, rejecting the USCP's arguments that the decisionmaker was concerned about morale in Cobbin's department. The Board agreed with the Hearing Officer that the morale issues may have been caused by racial animus toward Cobbin.

- *George-Winkler v. Off. of Congressman Bobby Scott*, Nos. 19-HS-30, 19-HS-74, 2023 WL 8788936 (OCWR Dec. 8, 2023) – George-Winkler filed a complaint against her employer, the Office of Congressman Bobby Scott, alleging that the Office retaliated against her after she invoked her rights under the ADA and FMLA. The Hearing Officer dismissed the complaint, crediting the Office's witnesses over the employee. The Board issued a short opinion affirming the Hearing Officer and explaining its desire not to reverse a Hearing Officer's credibility determinations.

Procedural Issues

- *Ferguson v. Libr. of Congress*, No. 19-LC-53, 2020 WL 3316539 (OCWR May 29, 2020) – On May 16, 2019, Ferguson filed a request for counseling under the pre-Reform Act ADR procedures. The Reform Act ADR procedures took effect on June 19, 2019. Ferguson's mediation with the Library ended on August 30, 2019 without a resolution. She then filed a complaint on December 2, 2019, which contained various allegations of harassment and a violation of the FMLA, all of which occurred between September and December 2019 – i.e., after the mediation concluded and after the Reform Act took effect. The Library filed a motion to dismiss, arguing that Ferguson's allegations were premature because they were not included in the original mediation as required pre-Reform Act. The Hearing Officer granted the motion and dismissed the complaint without prejudice to Ferguson. Ferguson appealed to the Board. The Board affirmed the Hearing Officer's decision to dismiss the December 2019 complaint without prejudice, holding that because the events forming the basis for Ferguson's allegations post-dated the counseling and mediation periods as well as the Reform Act, those allegations "could not have been adjudicated under pre-Reform Act ADR procedures, and the Hearing Officer correctly dismissed this case, which was filed pursuant to those procedures." However, the Board disagreed with the Hearing Officer's decision to treat Ferguson's December 2019 complaint as an amendment to her previous complaint, and instead remanded the case to the OCWR Clerk with instruction to docket Ferguson's December 2019 complaint as a new claim subject to post-Reform Act ADR procedures.

- *Aaron West v. U.S. Capitol Police*, No. 21-CP-18, 2022 WL 21807826 (OCWR Nov. 17, 2022) – West filed a claim against the USCP, alleging that the USCP discriminated against him because of his disability. Before the hearing, the Hearing Officer set a deadline for discovery requests. West missed those deadlines and an extended deadline. During a conference call, the Hearing Officer emphasized to West the importance of meeting deadlines and warned that his case may be dismissed if he did not participate. The Hearing Officer extended the discovery deadline again and West missed it again. The USCP filed a motion to dismiss with prejudice, and the Hearing Officer granted the motion. The Board affirmed, noting that West had never explained why he was failing to meet so many deadlines.

U.S. Court of Appeals for the Federal Circuit

- *U.S. Capitol Police v. Off. of Compliance*, 913 F.3d 1361 (Fed. Cir. 2019) – The USCP refused to comply with an arbitrator's award directing the USCP to reinstate a terminated officer with back pay. The USCP argued that the OCWR Board and the Federal Circuit lacked jurisdiction over the case because the Civil Service Reform Act precluded judicial review of terminations for certain employees of the executive branch. The Federal Circuit explained, as it had in *USCP v. OOC*, 908 F.3d 748 (Fed. Cir. 2018), that this argument fails because the executive branch scheme the USCP cites is absent from the Congressional Accountability Act. The USCP also argued, as it had in the earlier case, that the Technical Corrections Act precludes arbitration of terminations by giving the Capitol Police Board the ability to ratify or disapprove of a termination decision. The Federal Circuit also rejected this argument, finding that the TCA does not "specifically provide for" terminations such that terminations would be exempt from arbitration.

- *U.S. Capitol Police v. Off. of Compliance*, 916 F.3d 1023 (Fed. Cir. 2019) – The USCP refused to submit a grievance over an employee termination to arbitration, arguing again that termination decisions are not subject to arbitration. The FOP filed an unfair labor practice charge over the USCP's refusal to arbitrate the case. The Hearing Officer found that the USCP's refusal to arbitrate was an unfair labor practice, and the Board affirmed. Because the USCP raised the same arguments it had raised in the earlier two cases, the Federal Circuit again held the USCP's conduct to be unlawful and required the USCP to submit the termination to arbitration.

U.S. Court of Appeals for the D.C. Circuit

- *Breiterman v. U.S. Capitol Police*, 15 F.4th 1166 (D.C. Cir. 2021) – The D.C. Circuit Court of Appeals affirmed the district court's grant of summary judgment to the USCP on Breiterman's claims that disciplinary actions against her were a result of sex discrimination and retaliation. She was suspended for two days after commenting to fellow employees that women had to "sleep with someone" to get ahead in the Department, and was later placed on administrative leave and ultimately demoted for leaking a picture of an unattended USCP firearm to the press. She admitted to the misconduct, but alleged the discipline was discriminatory on the basis of sex and in retaliation for her previous EEO complaint alleging race discrimination.

  Breiterman failed to offer any evidence to support an inference of pretext regarding her suspension. As to her administrative leave and demotion, she proffered more evidence of pretext, but the court still held that it was not enough to call USCP's legitimate reasons into question. None of her proposed comparators were similarly situated, as their positions were not supervisory or they did not have similar disciplinary histories to hers. She also cited alleged procedural irregularities to prove pretext – specifically, the length of the investigation and being placed on administrative leave – but the court held that these were not so irregular as to indicate unlawful discrimination.

- *Iyoha v. Architect of the Capitol*, 927 F.3d 561 (D.C. Cir. 2019) – The D.C. Circuit Court of Appeals reversed the district court's grant of summary judgment for the AOC with respect to Iyoha's discrimination claim. He had alleged that the AOC denied him promotions because of his national origin. AOC's proffered legitimate explanation for his non-selection was that "a panel of interviewers unanimously agreed that he was not the most qualified candidate." The D.C. Circuit held that a jury could find that the senior member of the panel had a history of joking about Iyoha's accent, had discriminated against him in the past, and was in a position to influence the scores given by other panel members, and could thus find that the AOC failed to provide a fairly administered selection process, and that its claim to the contrary [was] pretextual." (citation omitted). The court affirmed the grant of summary judgment to the AOC on Iyoha's claims that he was retaliated against for a previous substantiated complaint of discrimination, as he only introduced weak evidence of temporal proximity to show that the AOC's decisions were motivated by a desire to retaliate against him.

- *Mayorga v. Merdon*, 928 F.3d 84 (D.C. Cir. 2019) – The D.C. Circuit Court of Appeals vacated and remanded the district court's grant of summary judgment in favor of the AOC on Mayorga's claims of race and national origin discrimination arising from his failure to receive a promotion. The court held that there were genuine issues of material fact regarding whether AOC's proffered nondiscriminatory reasons for failing to promote Mayorga – that he lacked experience for the position he sought, and that he seemed confused during the interview about what job he had applied for – were pretextual. This, along with additional fact issues regarding whether the manager who made the promotion decision was involved in mocking the employee's name and accent, would permit a jury to infer that the AOC had discriminated against him.

U.S. District Court for the District of Columbia

- *Tango v. U.S. Capitol Police*, No. CV 22-1777 (RC), 2023 WL 4174321 (D.D.C. June 26, 2023) – Tango did not sufficiently allege she suffered an adverse employment action regarding the denial of her request for "male" uniform pants when she was not ever, in fact, deprived of those pants. Granting the USCP's motion to dismiss, the court noted, "An 11-week delay in receiving an additional set of pants, with no change in circumstances in the meantime, does not constitute an adverse employment action."

- *Niles v. U.S. Capitol Police*, No. CV 16-1209 (TSC), 2023 WL 3884547 (D.D.C. June 8, 2023), *dismissed*, No. 23-5165, 2023 WL 7268250 (D.C. Cir. Nov. 1, 2023) – The court granted the USCP's motion for summary judgment because Niles did not show that there was a genuine issue of material fact with respect to essential elements of her ADA and Title VII claims. She was an officer in a supervisory position when she tried to ride Amtrak multiple times without paying, and was terminated after a USCP Office of Professional Responsibility investigation and Disciplinary Review Board Panel appeal.

  She claimed amnesia, but failed to present sufficient evidence that she was disabled within the meaning of the ADA: she cited three doctors' reports that merely speculated

about possible diagnoses, without reaching conclusions, and all reports confirmed that she only had one instance of memory loss and was otherwise in good health. She failed to show pretext on her Title VII claims, as none of her twelve proffered comparators were similarly situated enough: many were not in supervisory positions, none had the same supervisor as Niles, and the conduct underlining their respective penalties was different. (The case was later dismissed pursuant to a stipulation of dismissal.)

- *Dodson v. U.S. Capitol Police*, 633 F. Supp. 3d 235 (D.D.C. 2022) – Dodson, a Black former USCP officer, asserted claims against his former employer under Title VII for race discrimination and retaliatory discipline for speaking out against race discrimination. The USCP moved for summary judgment. After extensive analysis regarding Dodson's proffered comparators (White officers who were allegedly treated more favorably with respect to discipline), the court found that fact issues existed regarding whether the comparators were similarly situated to Dodson, so it denied summary judgment to the USCP with respect to Dodson's disparate treatment claim. It granted summary judgment to the USCP regarding Dodson's retaliation claim. While he made a prima facie showing that he engaged in protected activity with regard to his questioning why he and other Black officers were treated differently from their White counterparts, it was too far removed (eight years before the USCP disciplined him) to raise an inference of retaliatory motive.

  In the earlier opinion *Dodson v. United States Capitol Police*, No. CV 18-2680 (RDM), 2019 WL 4860720 (D.D.C. Sept. 30, 2019), the court denied the USCP's motion to dismiss for failure to state a claim.

- *Maynard v. Architect of the Capitol*, 544 F. Supp. 3d 64 (D.D.C. 2021) and *Terry v. Architect of the Capitol*, No. CV 18-1733 (RBW), 2021 WL 2417535 (D.D.C. June 14, 2021) – In two nearly identical opinions, the court held that it lacked jurisdiction over the claims that the AOC violated the CAA by failing to pay the plaintiffs environmental hazard pay, per its pay policy, as part of their regular and overtime wages. Maynard was a plaster leader who sometimes had to work with lead- or asbestos-containing materials, and Terry was a painter who was regularly required to abate lead paint. The CAA does not explicitly waive sovereign immunity regarding claims of entitlement to environmental hazard pay. Each plaintiff instead argued that his claim fell under the CAA's incorporation of the FLSA's overtime provisions, specifically 29 U.S.C. § 207(a)(1), which mandates compensation "for a workweek longer than forty hours ... at a rate not less than [1.5] times the regular rate at which [the employee] is employed." Because the CAA permits a plaintiff to sue for failure to pay overtime wages at 1.5 times the employee's regular rate of pay, the plaintiffs argued, the court should be free to examine what the regular rate of pay should be. The court disagreed: "The mere fact that a plaintiff would have to establish facts regarding the amount of his or her 'regular rate' of pay does not mean that the Court is permitted to sweep into its analysis any internal policies or legal issues for which a waiver of sovereign immunity is not 'unequivocally expressed' in the statutory text." It held that "the defendant's pay policy cannot waive sovereign immunity, and accordingly, there is no statutory waiver of sovereign immunity over claims stemming from the defendant's pay policy." The court thus dismissed the claims for lack of subject matter jurisdiction.

- *Mahmoud v. Libr. of Cong.*, No. CV 20-1935 (JEB), 2021 WL 6808293 (D.D.C. Feb. 9, 2021) – Mahmoud, a blind IT specialist at the Library, alleged three events (in 2016, 2018, and 2020) in which his reasonable accommodation requests were denied. (His *pro se* suit was brought under the Rehabilitation Act, which the CAA did not apply to Library employees until 2018; construing his filings liberally, the court assumed he meant to sue for the 2016 event under the ADA.) However, he did not exhaust the two earlier complaints. He tried to connect all three instances of reasonable accommodation denial as stemming from a single event which went on for five years – i.e., the purchase, installation and dependence on a system known to be incompatible with his screen reader – but this could not excuse him from the exhaustion requirement because the continuing violation doctrine does not apply to failure to accommodate claims, as "any decision not to accommodate is a discrete act that must be separately exhausted." The court thus granted the Library's motion for partial dismissal.

- *Brown v. Hayden*, No. CV 18-2561 (BAH), 2020 WL 6392746 (D.D.C. Nov. 2, 2020) – Plaintiff Brown filed suit based on allegations that, following his return to work after a stroke, the Library discriminated against him on the basis of disability and age. The court granted the Library's summary judgment motion and denied Brown's cross-motion for partial summary judgment.

  Regarding the ADA claims, the court first held it lacked subject matter jurisdiction over those claims that Brown did not administratively exhaust. As to the remaining ADA claims, the Library proffered legitimate business purposes for the purportedly discriminatory and retaliatory actions, and Brown's only evidence of pretext was temporal proximity – insufficient on its own.

  Brown did not sustain his burden on his ADEA claim. Although comments about an employee's age can in some circumstances create a genuine issue of material fact as to an employer's true reason for an adverse action, the comments Brown cited did not. The court found that the Library's inquiries about his retirement plans were reasonable, given its possible confusion about those plans after Brown's own request for information about disability retirement.

  Denying reconsideration in *Brown v. Hayden*, No. CV 18-2561 (BAH), 2021 WL 780816 (D.D.C. Feb. 27, 2021), the court reiterated that exhaustion under the CAA was, at the relevant times, a jurisdictional requirement on which the plaintiff bears the burden of proof.

- *Small v. Off. of Congressman Henry Cuellar*, 485 F. Supp. 3d 275 (D.D.C. 2020) – Small was terminated from her Deputy Chief of Staff position after she requested maternity leave, but the Office argued she was terminated for performance issues during a probationary period. The court held that genuine issues of material fact precluded summary judgment on Small's sex discrimination and FMLA interference and retaliation claims. The court did grant the Office's summary judgment motion as to Small's pregnancy discrimination claim, "on the understanding that this will not prejudice Small[,]" because it was duplicative of her sex discrimination claim.

- *Shorter v. Architect of Capitol*, No. CV 18-2124 (JDB), 2020 WL 5016888 (D.D.C. Aug. 25, 2020) – Shorter was terminated after her arrest for theft, which she admitted she engaged in daily during her nearly 30 years of janitorial work for the AOC in a Senate Office Building. She alleged the AOC discriminated against her in violation of Title VII by terminating her employment for misconduct that did not lead to termination for her male and non-Hispanic colleagues. Analyzing her sex- and race-based claims together, the court granted the AOC's motion for summary judgment because Shorter provided no substantiated reason to doubt the AOC's explanation for her termination. She argued that the AOC did not call the police on or move to prosecute other individuals who took AOC property, but she failed to establish pretext by way of comparator evidence, since her proffered comparators did not engage in offenses of comparable nature or seriousness to hers. The AOC presented evidence that it had previously terminated employees outside of Shorter's protected class for less serious offenses than hers.

- *Van Meter v. U.S. Capitol Police*, No. 18-CV-0476 (KBJ), 2020 WL 13049427 (D.D.C. May 30, 2020) – Assuming *arguendo* that the perception theory of retaliation (i.e., that the plaintiff was perceived as having engaged in a protected activity) was a viable basis for claiming unlawful retaliation under the CAA, the court found that the plaintiff could state a claim for retaliation, and denied the USCP's partial motion to dismiss.

- *Kabakova v. Off. of the Architect of the Capitol*, No. CV 19-1276 (BAH), 2020 WL 1866003 (D.D.C. Apr. 14, 2020) – Most of the plaintiff's numerous discrimination and retaliation claims were dismissed for issues related to failure to exhaust and/or failure to state a claim. Her claims of discrimination and retaliation based on sex were more substantively discussed, but still failed.

    - Kabakova's supervisor initiated a complaint with the OIG alleging she submitted fraudulent worker's compensation and wage loss claims. She argued that the subsequent OIG investigation was an adverse employment action, but the court disagreed, because she did not allege that it triggered any material changes to her employment. The court also disagreed that her supervisors' failure to forward complaints of hers to the OIG was an adverse action, "as such an omission causes no change at all in employment conditions."

    - Her discrete act discrimination count failed in part because "denial of telework, denial of permission to attend trainings, and initiating investigations are not the types of actions that qualify as adverse employment actions."

    - Her hostile work environment count failed because "the alleged interference with some of plaintiff's job duties over two years, pressure to end her telework agreement, refusal to allow plaintiff to attend trainings, and scrutiny of plaintiff's workplace injury are not so severe or pervasive as to be objectively hostile or abusive[,]" and her supervisor's alleged touching of her knee and hair and hugging her were not severe or pervasive enough to be actionable.

- *Burcham v. Off. of Sergeant at Arms & Doorkeeper of the U.S. Senate*, No. 17-CV-2661 (TSC), 2020 WL 821004 (D.D.C. Feb. 19, 2020) – The court granted OSAA's motion for summary judgment on Burcham's claims of sex and age discrimination. Her claims were

premised on her termination pursuant to an investigation concluding that she had engaged in eighteen instances of inappropriate comments (including ones indicating gender, race, sexual orientation, and religious bias) and poor management conduct. Regarding pretext, Burcham focused on asserting that OSAA's investigation (its proffered nondiscriminatory reason for her termination) was "biased and flawed and its conclusions unsupported and pretextual" because of the investigation's procedures, rather than any discriminatory motive. Even had she shown that the investigation was flawed, this would not suffice to show pretext; she also would have needed to show that OSAA discriminated against her based on sex or age, which she was unable to do.

- *Doe v. Off. of Representative Sheila Jackson Lee*, No. 19-CV-0085 (DLF), 2020 WL 759177 (D.D.C. Feb. 14, 2020) – Doe sued the Office of Representative Sheila Jackson Lee, alleging that the Office unlawfully retaliated against her by terminating her after she threatened to sue the Congressional Black Caucus Foundation (CBCF), of which the Representative served as board chair, because her CBCF supervisor allegedly raped her while they worked at CBCF. (She also brought non-CAA claims against CBCF, not discussed here.) The court granted the Office's motion to dismiss.

  Doe's retaliation claim failed because she did not engage in CAA-protected activity. She argued that her opposition to the alleged sex discrimination she endured while at CBCF counted as "protected activity" under the CAA, but the court disagreed. The CAA's anti-retaliation provision applies to an employee opposing practices "made unlawful by *this chapter*" (emphasis added) or participating in proceedings "under *this chapter*" (emphasis added). CBCF is not an employer covered by the CAA, so its practices are not made unlawful by the CAA.

  Her sex discrimination claim also failed, since nothing in her complaint suggested she was terminated *because she was a woman* raising sexual assault allegations, nor did she allege facts indicating that the Office would have treated a man in the same position any differently.

- *Bing v. Architect of the Capitol*, No. CV 16-2121 (RC), 2019 WL 4750223 (D.D.C. Sept. 30, 2019) – Plaintiff Bing, a laborer for the AOC, brought discrimination and retaliation claims premised on his termination, as well as hostile work environment and retaliatory hostile work environment claims. The court granted in part and denied in part the AOC's summary judgment motion. The AOC's proffered legitimate, nondiscriminatory, nonretaliatory reason for terminating Bing was his inappropriate behavior at a safety briefing and his previous disciplinary infractions. However, Bing argued that he had been assured that he would not receive formal disciplinary action regarding the safety briefing incident, until after a staff meeting where he expressed the view that, as an African-American male, he was not treated as favorably as other employees by management. The court reasoned that, though mere temporal proximity is not sufficient to support a finding of retaliation, the AOC's "apparent reversal" arguably raised questions about its true motives and cast doubt on its proffered nonretaliatory explanation, and Bing's retaliation claim survived. His remaining claims did not.

- *Ye v. Off. of the Senate, Sergeant at Arms,* No. 17-CV-1332 (TSC), 2019 WL 3344458 (D.D.C. July 25, 2019) – The court granted SAA's motion for summary judgment on Ye's claims of discrimination based on national origin, race, and sex under Title VII as applied by the CAA. Ye admitted that no supervisor made a disparaging comment in her presence about her protected classes, but pointed to several instances that she claimed showed her team lead's discriminatory animus towards her. SAA, however, claimed that it suspended and terminated Ye because of her continuous acts of insubordination, and met its evidentiary burden by providing sufficient evidence for a factfinder to conclude that the insubordinate acts were the reason for discipline, suspension, and termination.

  The court found that Ye did not meet her burden to show pretext. She presented evidence intended to counter the allegations of insubordination, but that is not the relevant inquiry at the summary judgment stage, and she failed to produce evidence to rebut SAA's honest belief that she was insubordinate. Even if she had, she presented no evidence to support her cat's paw theory of liability – that SAA suspended and terminated her because of her team lead's discriminatory animus. In part, the court reasoned that she could not rely on the conclusory allegation that the team lead's HR complaint about her proved his discriminatory animus to defeat summary judgment, because although the HR investigation showed her conduct did not constitute harassment or hostile work environment, it did conclude that she acted unprofessionally.

- *Ham v. Ayers*, No. CV 15-1390 (RMC), 2019 WL 12 02453 (D.D.C. Mar. 14, 2019) – Plaintiff Ham, a sheet-metal mechanic for the AOC, alleged that he suffered a hostile work environment in violation of the ADA. The parties cross-moved for summary judgment, and the court granted the AOC's motion and denied Ham's, because the only incident relevant to the alleged hostile work environment that occurred before he sought OCWR counseling was a single occasion when his supervisor refused to let him take a break and was threatening. Ham did not provide further facts or allege an ongoing violation in his counseling request, so the AOC was not put on notice of an alleged continuing violation. The court reasoned that in those instances in which courts have permitted the use of later acts to support a hostile work environment claim, the plaintiff's original claim alleged an ongoing violation and the later acts were "adequately linked into a coherent hostile environment claim." (citation omitted)

Resources

OCWR web site: https://www.ocwr.gov/

Procedural Rules: https://www.ocwr.gov/the-congressional-accountability-act/rules-and-regulations/procedural-rules/

Final Regulations: https://www.ocwr.gov/the-congressional-accountability-act/rules-and-regulations/final-substantive-regulations/

Pending Regulations: https://www.ocwr.gov/the-congressional-accountability-act/rules-and-regulations/pending-substantive-regulations/

Decisions of the OCWR Board of Directors: https://www.ocwr.gov/board-decisions/

Congressional Record: https://www.congress.gov/congressional-record

OCWR Brown Bag Lunch Series Presentations: https://www.ocwr.gov/publications/general-counsels-brown-bag-outlines/