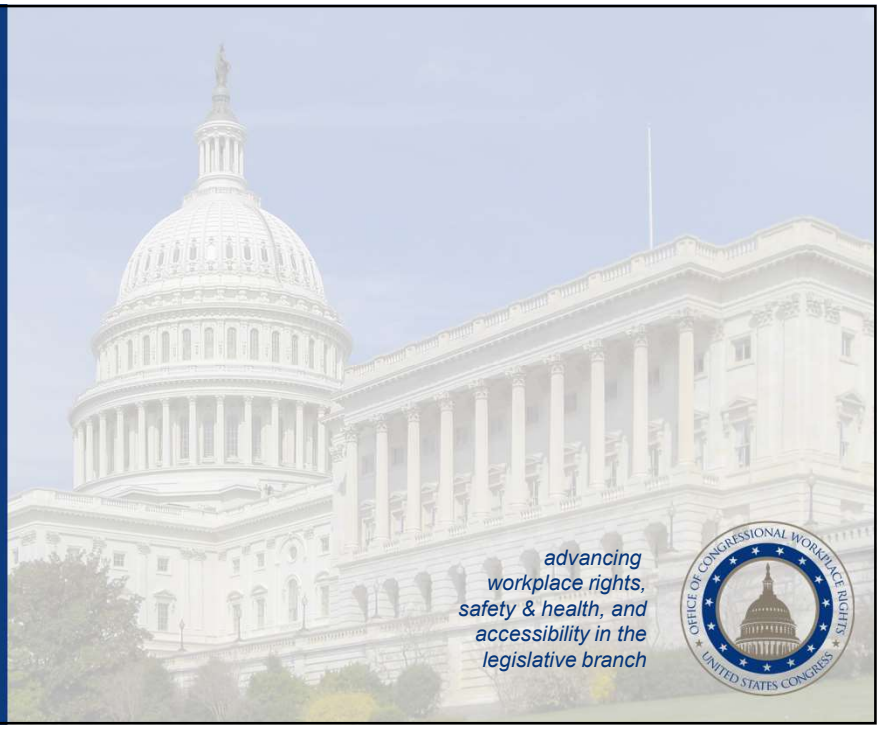
Discrimination and Retaliation for Union Activity



Office of Congressional Workplace Rights

Office of the General Counsel

September 2025
Labor-Management Forum

advancing workplace rights, safety & health, and accessibility in the legislative branch

Welcome

Introduction

- John Mickley – OCWR Associate General Counsel
- john.mickley@ocwr.gov
- 202-579-5040

Statutory Framework

- § 7116(a)(2) of the FSLMRS: It is an unfair labor practice for an Agency to encourage or discourage Union membership in a labor organization by discriminating in connection with hiring, tenure, promotion or other conditions of employment.
- § 7116(a)(4) of the FSLMRS: It is 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 the Statute.
- § 208 of the CAA: 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.

Outline

- Prima facie case – what evidence is necessary for discrimination case to proceed
- Employing office defense – how management can show the decision was not discriminatory
- When an employing office can discipline employees for misconduct occurring while the employee engages in protected activity
- The relationship between CAA section 208 and the ULP process

The Prima Facie Case of Discrimination

Letterkenny Burden Shift

The OCWR Board applies the FLRA's *Letterkenny* burden-shifting framework to analyze cases alleging discrimination for union activity.

- Under *Letterkenny*, 35 F.L.R.A. 113 (1990), to establish a prima facie case of discrimination, the General Counsel must show that (1) the employee against whom the alleged discriminatory action was taken had engaged in protected activity; and (2) such activity was a motivating factor in the agency's treatment of the employee.
- The burden then shifts to the employer to demonstrate, by a preponderance of the evidence, that (1) there was a legitimate justification for its action; and (2) the same action would have been taken even in the absence of protected activity.

USCP v. Fraternal Order of Police, No. 15-LMR-01 (CA), 2016 WL 3753511 (OCWR Board July 5, 2016)

The Prima Facie Case

- The prima facie case can be broken down to require evidence that:
  - The employee engaged in protected activity;
  - The employing office knew about the protected activity;
  - The employing office took a discriminatory action against the employee; and
  - The employee's protected activity was a motivating factor in the employing office's decision to take the discriminatory action.
- The employing office can offer evidence to rebut any of these elements, but the OCWR GC will not issue a complaint without them, and they are the GC's burden to prove before a hearing officer.

The Prima Facie Case, *cont'd*

Examples of protected activity:

- Soliciting support for the union on nonwork time
- Requesting official time
- Representing employees during grievance proceedings
- Raising the concerns of the union during a staff meeting
- Serving as a union official
- Opposing the incumbent union
- Running for union office

The Prima Facie Case, *cont'd*

- Common examples of discriminatory actions include termination, discipline, refusal to recommend for a promotion, or denial of overtime.
- The employing office's action does not have to include a loss of pay or tangible benefits to be discriminatory.
- The bar is lower than for what constitutes a change to conditions of employment that triggers the duty to bargain.
- For example, transferring an employee to a new position that did not change an employee's pay, benefits, or schedule was found to be unlawful retaliation in *Portsmouth Naval Shipyard*, 17 F.L.R.A. 773 (1985).

The Prima Facie Case, *cont'd*

Whether the employee's protected activity was a "motivating factor" in the action taken against the employee will depend on the evidence in each case, but common evidence may include:

- The timing in relation to the union activity
- Prior statements from management
- Management treated the employee differently from others
- The stated reason for the action was false, i.e., pretextual

The Prima Facie Case – An Example

- In *Department of Transportation, FAA*, 39 F.L.R.A. 1542 (1991), air traffic controller Enrique Canales filed a ULP alleging that he was forced to take sick leave instead of being assigned administrative duty in retaliation for his role as a union rep.
- The FLRA GC offered the following evidence in support of its prima facie case:
  - Canales filed a grievance on July 23 on behalf of another employee, which the supervisor called "a nit-picky and mickey mouse grievance;"
  - Canales received notice that he must stop admin leave and go out on sick leave the next day;
  - The agency had a policy of allowing capable employees to work administrative duty when they could not do air traffic control work and had allowed other employees to do so;
  - Canales' supervisor had called the union's newsletter "toilet paper;"
  - The supervisor told another union rep to run against Canales.

The Prima Facie Case – An Example, *cont'd*

The FLRA ALJ found that the GC had not established a prima facie case because it was not clear that Canales' union activity motivated the decision.

- The judge considered the supervisor's prior statements to be "animus directed toward Canales as an individual" not anti-union animus.
- The judge credited the agency's argument that it decided to put Canales on admin duty before he filed the grievance.
- The judge rejected the argument that Canales was treated differently from similarly situated employees, finding that other employees' sicknesses made them not comparable.

The Prima Facie Case – An Example, *cont'd*

The FLRA reversed the ALJ and found a violation. The GC established a prima facie case and the agency failed to show that there was a legitimate justification for the action.

- The record evidence showed that the supervisor had animus against the union in general, Canales as a union representative, and the grievance he filed the day before the decision was announced.
- Because he was on admin leave and then forced to take sick leave, the timing was significant. The FLRA rejected the agency's factual argument that it had made the decision before the grievance was filed.
- All of this supports a prima facie case and shows that the agency's defense that Canales was forced to take sick leave for non-discriminatory reasons was not true, i.e., pretextual.

The Employing Office's Defense

The Employing Office's Defense

If a prima facie case is established, the burden shifts to the employing office to prove:

1. That there was a legitimate justification for the action; and
2. That the office would have taken the same action even in the absence of the protected activity.

The charging party union or employee can offer evidence during the investigation or litigation to rebut these, but they are the employing office's burden to prove.

The Employing Office's Defense – Example 1

Federal Bureau of Prisons, FCI Elkton, Ohio, 61 F.L.R.A. 515 (2006), is an example of "mixed motive" analysis.

- Todd Hayter was the Chief Steward of his bargaining unit.
- He received a negative performance review for improperly documenting an inmate's transfer. During the review, his supervisor told him that he took too much official time. He grieved the review.
- After the initial grievance, his supervisor searched his desk.
- He filed another grievance, asking for the supervisor to be moved out of the department due to a hostile work environment.
- After he filed the grievance, Hayter himself was transferred.

The Employing Office's Defense – Example 1, *cont'd*

Hayter's union then filed a ULP alleging the transfer was retaliatory.

- The agency claimed that the hostile work environment allegation in the grievance motivated the transfer decision.
- The ALJ and FLRA found that Hayter had established a prima facie case. He was the Chief Steward and engaged in union activity by filing a grievance.
- However, the agency proved that the "ongoing conflict" between Hayter and his supervisor was the reason for the change – not any union activity. The agency transferred him out of a concern for his safety, not in retaliation for raising the safety issue.

The Employing Office's Defense – Example 2

In *Department of the Army, Fort Bragg*, 43 F.L.R.A. 1414 (1992), the FLRA found that the agency failed to meet its burden, leading to a violation.

- Thomas Dixon, a shop steward, applied for a promotion.
- His supervisor asked him why he should get the position when he was "fighting against" the supervisor by filing grievances.
- The supervisor also said that if Dixon mentioned the Union "he wouldn't get the job anyway."
- The agency hired someone else for the position.

The Employing Office's Defense – Example 2, *cont'd*

- The ALJ found that the GC established a prima facie case and that the agency failed to show that there was a legitimate justification for the decision not to promote Dixon.
- As a remedy, the ALJ ordered that the agency rerun the selection process without the supervisor involved.
- The FLRA agreed that the agency failed to establish its defense, but ordered Dixon promoted to the position and made whole. Because the agency offered no evidence to show that it would have taken the same action absent his union activity, and because the FLRA (like the OCWR) has broad remedial authority, it was appropriate to install Dixon into the position.

Losing Protection of the Statute with Flagrant Misconduct

Misconduct During Protected Activity

- Union officials acting in their official capacity may not be disciplined for actions taken in their official capacity unless their conduct exceeds the bounds of protected activity.
- The FLRA balances an employee's right to "use intemperate, abusive, or insulting behavior" while advocating for the union's position with management's right to "maintain order and respect for its supervisory staff on the jobsite."
- To that end, the FLRA finds that employees lose the protection of the statute while engaging in protected activity if they engage in "flagrant misconduct."

Dep't of the Air Force, Grissom Air Force Base, 51 F.L.R.A. 7, 12 (1995)

Misconduct During Protected Activity, *cont'd*

The balancing test weighs the following factors to determine if the misconduct was flagrant enough to lose protection:

1. The place and subject matter of the discussion
   - In front of coworkers, on the shop floor, unrelated to ongoing labor-management discussions = more likely to be flagrant
2. Whether the outburst was impulsive or planned
   - Planned = more likely to be flagrant
3. Whether the outburst was provoked
   - Unprovoked = more likely to be flagrant
4. The nature of the intemperate language and conduct

Misconduct During Protected Activity – An Example

The FLRA applied these factors in *Department of Veterans Affairs, Richmond, Va.*, 64 F.L.R.A. 661 (2010).

- An employee requested the union president's representation before testifying at an agency investigative hearing but later waived the representation.
- The union president did not know about the waiver and entered the hearing room while the employee was testifying.
- The union president, who was on official time, said in a loud voice several times, "Leave the room. You are not to testify." When the employee stayed, the union president started to yell, "Get out."
- The hearing was delayed for an hour due to this disruption and the agency issued the union president a letter disciplining her.

Misconduct During Protected Activity – An Example, *cont'd*

The FLRA found that the union president acted in her official capacity during the hearing and the discipline letter was unlawful retaliation for that protected activity.

1. The location of the activity (in the hearing room) and only one other employee present (the employee witness) weighed against a "flagrant misconduct" finding because it did not disrupt other employees' work.
2. (and 3.) There was no evidence that the union president planned this confrontation and it seemed to be provoked by the union president learning that the employee was testifying without representation.

Misconduct During Protected Activity – An Example, *cont'd*

4. The nature of the intemperate language and conduct also weighed against a finding of "flagrant misconduct."
   - The FLRA has held that using a loud tone of voice does not *per se* amount to flagrant misconduct.
   - The conduct was like an overly aggressive union negotiator standing up, pointing, and leaning over a desk, which the FLRA has found to be protected.
   - And the conduct was less like other conduct which has been found unprotected, like publishing racially inflammatory comments in a union newspaper or engaging in physical violence.

Relationship Between CAA §208 and ULP Process

Retaliation under §208 and the FSLMRS

- § 208 of the Congressional Accountability Act (2 U.S.C. § 1317) and § 7116(a)(4) of the FSLMRS both make it unlawful for employing offices to retaliate against employees who participate in OCWR proceedings, like filing an unfair labor practice charge, filing a representation petition, or providing testimony or other evidence in either proceeding.
- The burden-shifting framework of *Letterkenny* applies to unfair labor practice charges under § 7116(a)(4), but the protected activity is participating in an OCWR proceeding instead of union activity.
- A similar Title VII-style framework applies to § 208 claims, in which a violation occurs when "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." *Britton v. Architect of the Capitol*, No. 02-AC-20 (CV, RP), 2005 WL 6236944 (OOC Board May 23, 2005).

Retaliation under §208 and the FSLMRS

- Employees who believe they have experienced retaliation because they participated in an OCWR unfair labor practice or representation case can choose to file a § 208 claim with OCWR's Executive Director, an unfair labor practice charge with the OCWR's Office of the General Counsel under § 7116(a)(4), or both.
- Choosing to file both simultaneously may result in the OCWR putting one of them on hold while the other proceeds.

Final Thoughts

Resources

- FLRA ULP Case Law Outline
  - flra.gov → Resources & Training → Guides & Manuals → "ULP Case Law Outline"
- Peter Broida, *A Guide to Federal Labor Relations Authority Law and Practice* (2022)

Questions?