



**CAA
Statutory,
Regulatory,
and
Case Law
Updates**

Office of Congressional
Workplace Rights

Office of the
General Counsel

April 17, 2024

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

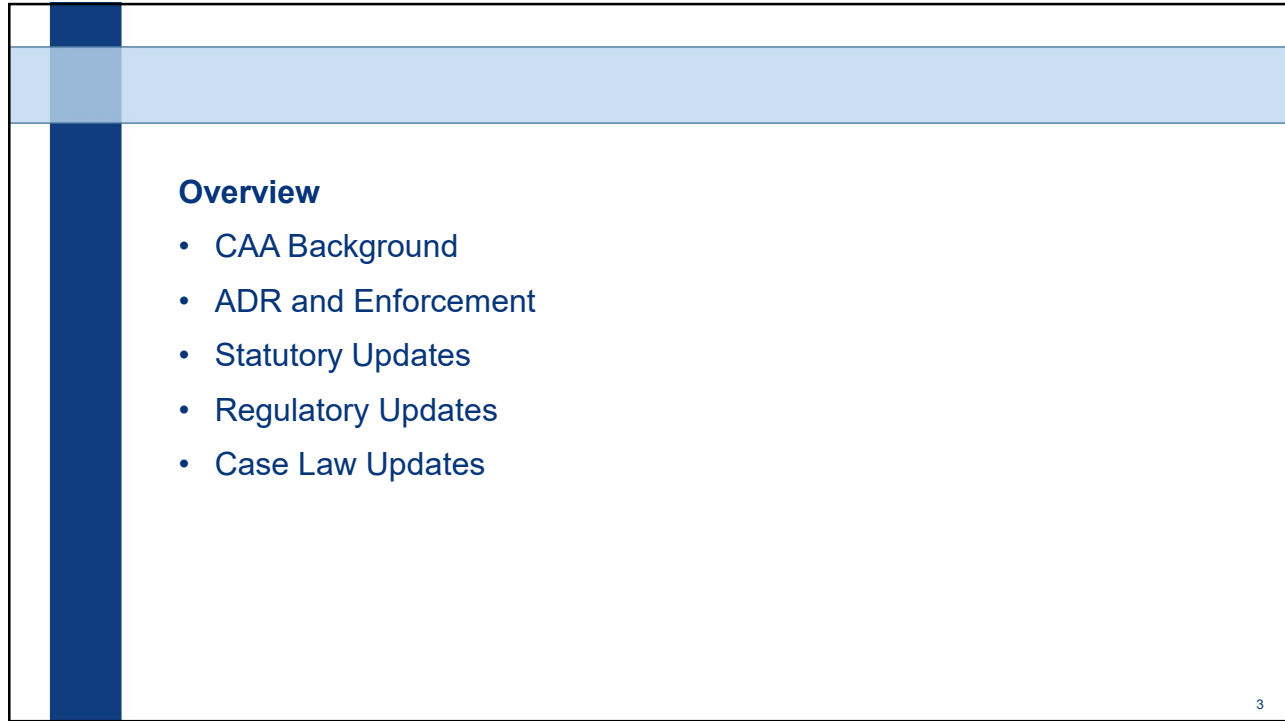


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Welcome

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Slide 3 features a dark blue vertical bar on the left and a light blue horizontal bar at the top. The main content area is white and contains the following text:

Overview

- CAA Background
- ADR and Enforcement
- Statutory Updates
- Regulatory Updates
- Case Law Updates

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Slide 4 features a dark blue vertical bar on the left and a light blue horizontal bar at the top. The main content area is white and contains the following text:

Presenters

- Hillary Benson, Deputy General Counsel
- John Mickley, Associate General Counsel
- Dynah Haubert, Associate General Counsel

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A presentation slide with a dark blue vertical bar on the left and a light blue horizontal bar across the top. The text "Congressional Accountability Act" is in bold, followed by a bulleted list of key provisions and reforms.

- **Congressional Accountability Act**
 - Pub. L. 104-1 (January 23, 1995), 2 U.S.C. §§ 1301 et seq.
 - Applied certain labor and employment laws to the legislative branch
 - Established the Office of Compliance (opened January 1996)
 - CAA Reform Act passed in December 2018, effective June 2019
 - Changed name to the Office of Congressional Workplace Rights
 - Updated ADR process
 - Required training on CAA rights and posting of CAA rights poster
 - Expanded some protections to unpaid staff
 - Mandated workplace climate survey
 - ... and other changes

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Applicable Laws

- Genetic Information Nondiscrimination Act (GINA)
- Title VII of the Civil Rights Act of 1964
- Age Discrimination in Employment Act (ADEA)
- Americans with Disabilities Act (ADA)
- Rehabilitation Act
- Family and Medical Leave Act (FMLA)
- Fair Labor Standards Act (FLSA)
- Employee Polygraph Protection Act (EPPA)
- Worker Adjustment and Retraining Notification (WARN) Act
- Uniformed Services Employment and Reemployment Rights Act (USERRA)
- Veterans Employment Opportunity Act (VEOA)
- Fair Chance to Compete for Jobs Act (FCA)
- Occupational Safety and Health Act (OSH Act)
- Federal Service Labor-Management Relations Statute (FSLMRS)
- Pregnant Workers Fairness Act (PWFA)

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Anti-Retaliation Provision

“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.”

CAA section 208(a), 2 U.S.C. § 1317(a)

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Administrative Dispute Resolution (ADR)

- Claim must be filed with OCWR within 180 days of alleged violation
- Claim assigned to Preliminary Hearing Officer
 - If claim passes preliminary review, claimant may choose to proceed with OCWR administrative hearing or file a complaint in federal district court
 - If claim fails preliminary review, claimant may only pursue allegations in federal district court
- OCWR administrative hearing
 - Confidential hearing before Merits Hearing Officer
 - Petition for review by OCWR Board of Directors
 - Appeal to U.S. Court of Appeals for the Federal Circuit

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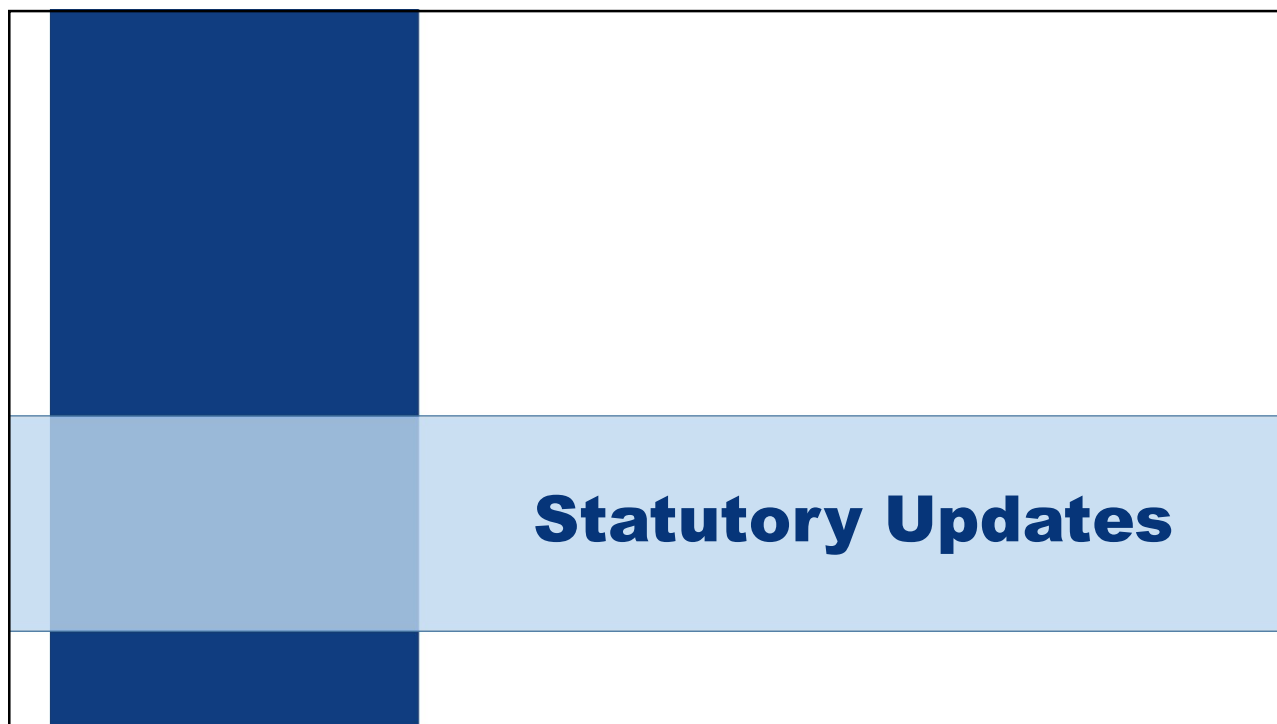
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Enforcement by Office of General Counsel

- ADA public access provisions
 - Biennial inspections – areas of focus, Member offices
 - Investigations – requests for inspection/charges of discrimination
- OSH Act
 - Biennial inspections – high hazard areas/operations, Member offices
 - Investigations – requests for inspection, incident reports, etc.
- FSLMRS unfair labor practice provisions
 - ULP charges filed by unions, employing offices, or covered employees
 - Investigation
 - Complaint → administrative hearing → petition for review by OCWR Board → appeal to U.S. Court of Appeals for the Federal Circuit

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Federal Employee Paid Leave Act (FEPLA)

- Signed into law December 2019, effective October 1, 2020
- Amended the Family and Medical Leave Act (FMLA)
- Allows most covered employees to substitute up to 12 weeks of paid parental leave for unpaid FMLA leave in connection with:
 - the birth of an employee's child; or
 - the placement of a child with an employee for adoption or foster care
- Eligibility and return-to-work requirements for executive branch employees do not apply to legislative branch employees

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Fair Chance to Compete for Jobs Act (FCA)

- Federal “Ban the Box” law
- Signed into law December 2019, effective December 20, 2021
- Amended CAA to add new section 207, 2 U.S.C. § 1316b
- 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
- Claims may be filed with the OCWR, but no federal civil action
- No relief for claimants
- No judicial review of OCWR Board decisions
- Employees found to violate FCA are subject to progressive discipline

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Pregnant Workers Fairness Act (PWFA)

- Signed into law December 2022, effective June 27, 2023
- Applicable to covered employees, including unpaid staff
- Requires employers to grant reasonable accommodations based on known limitations related to pregnancy or childbirth, unless undue hardship would result
- Five specific unlawful employment practices
- Reasonable accommodation and undue hardship provisions based on ADA, including interactive process
- Claims for violations may be filed with the OCWR

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**Providing Urgent Maternal Protections for Nursing Mothers Act
(PUMP for Nursing Mothers Act or PUMP Act)**

- Signed into law December 29, 2022
- Amends FLSA to enhance protections for nursing employees
- Requires employers to provide:
 - Reasonable break time to express breast milk whenever needed for 1 year after child's birth
 - A place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, to express milk
- Drafting error removed protections for legislative branch employees but will hopefully be corrected soon

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Regulatory Updates

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House Approved Final Regulations

- FSLMRS
 - Approved – H. Res. 1096 (May 10, 2022)
 - Issued – 168 Cong. Rec. H5006 (May 16, 2022)
- FLSA overtime provisions
 - Approved – H. Res. 1516 (Dec. 14, 2022)
 - Issued – 169 Cong. Rec. H1008 (Mar. 1, 2023)
- FMLA paid parental leave
 - Approved – H. Res. 1516 (Dec. 14, 2022)
 - Issued – 169 Cong. Rec. H1017 (Mar. 1, 2023)

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Pending Regulations

- FSLMRS for Senate and some instrumentalities
 - Issued for employing offices not listed in CAA section 220(e)(2), 142 Cong. Rec. S12062 (Oct. 1, 1996)
- FLSA overtime provisions for Senate and instrumentalities
 - Adopted – 168 Cong. Rec. S5148 (Sept. 28, 2022)
- FMLA paid parental leave for Senate and instrumentalities
 - Adopted – 167 Cong. Rec. S8966 (Dec. 7, 2021)
- ADA public access
 - Adopted – 169 Cong. Rec. S989, H1521 (Mar. 28, 2023)
- USERRA
 - Adopted – 169 Cong. Rec. S1161, H1801 (Apr. 18, 2023)

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Future Regulations

- FCA
- PWFA
- PUMP Act

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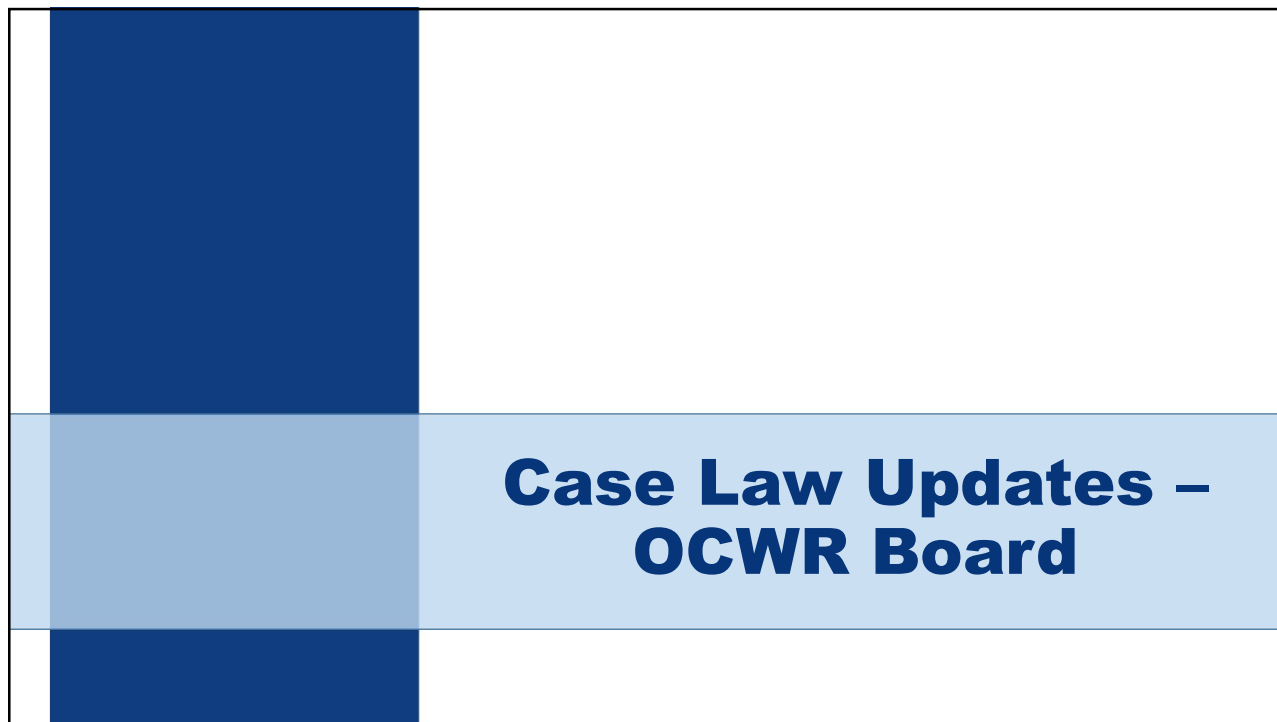
What happens if there are no regulations?

CAA section 411, 2 U.S.C. § 1411: “In any proceeding under section 1405, 1406, 1407, or 1408 of this title, except a proceeding to enforce section 1351 of this title with respect to offices listed under section 1351(e)(2) of this title, if the Board has not issued a regulation on a matter for which this chapter requires a regulation to be issued, 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.”

- 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

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Case Law Updates – OCWR Board

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A presentation slide with a dark blue vertical bar on the left and a light blue horizontal bar across the top. The text "U.S. Capitol Police v. FOP Lab. Comm., No. 15-LMR-02 (CA), 2019 WL 4085113 (OCWR Aug. 20, 2019)" is centered in the light blue bar. Below the bar is a list of five bullet points. A small number "22" is in the bottom right corner of the slide frame.

U.S. Capitol Police v. FOP Lab. Comm., No. 15-LMR-02 (CA), 2019 WL 4085113 (OCWR Aug. 20, 2019)

- FOP filed grievance alleging that officer's termination violated the CBA
- Arbitrator sustained the grievance and ordered employing office to pay backpay, attorney's fees, and expenses
- Employing office did not file exceptions, but did not comply with the arbitrator's award, and the union filed a ULP charge
- Hearing Officer found a violation of the FSLMRS, and the employing office appealed to the Board, arguing, among other things, that sovereign immunity bars the payment of attorney's fees and that the award was punitive and therefore impermissible
- Board upheld the award, emphasizing that an employing office cannot "collaterally attack" an arbitrator's award before the Board after failing to file exceptions to the original award

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***Aiken v. Libr. of Cong.*, No. 19-LC-78, 2022 WL 21807824 (OCWR May 16, 2022)**

- Claim alleged discrimination and hostile work environment based on race and color
- Summary judgment was granted for employing office on discrimination claim, and the Board affirmed, because although employee alleged that others outside her protected class were allowed to work extra hours while she was not, she did not show that she requested to work those additional hours, thus there was no adverse employment action
- Hostile work environment claim also failed because incidents presented were not “objectively offensive, abusive, hostile, or threatening”; Board noted that “general feelings of workplace discomfort or unease unrelated to membership in a protected classification are simply not enough.”

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***Waddy v. Libr. of Cong.*, No. 22-LC-23, 2023 WL 8471329 (OCWR Sep. 15, 2023)**

- Unvaccinated employee refused to take COVID-19 tests, in violation of the Library’s policy, claiming the test violated her religious beliefs
- Library offered to allow her to wear a Library-issued N95 mask to the office as a religious accommodation, but she refused, insisting on wearing only her own mask, and she was then terminated
- Hearing Officer granted summary judgment for the Library on employee’s Title VII religious discrimination claim, holding that the Library’s accommodation offer “effectively eliminated the religious conflict,” and also rejected employee’s harassment claims
- Board affirmed, holding that under the Supreme Court’s newly articulated standard in *Groff v. DeJoy*, the Library established that the employee’s request would have resulted in a substantial burden on the Library’s business, in light of the Library’s “legitimate concerns about its ability to protect the health of library employees”

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Doe v. Off. of the Architect of the Capitol, No. 19-AC-81, 2021 WL 1200013 (OCWR Mar. 18, 2021)

- Employee fractured her shoulder in a car accident, and her doctor restricted her from certain physical activities, including driving
- Employing office denied employee's accommodation request and offered her a different arrangement, which would require less telework than she requested, and therefore more commuting
- Hearing Officer granted summary judgment for employing office on employee's ADA claim, but the Board reversed and remanded, holding that a genuine issue of material fact existed as to whether the employing office failed to engage in the interactive process
- A hearing was needed to determine whether the doctor's "no driving" restriction put the employing office on notice of the employee's need for a commute-related accommodation

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Cobbin v. U.S. Capitol Police, No. 21-CB-10, 2023 WL 8471328 (Sep. 27, 2023)

- African-American K9 officer filed claim for race discrimination and retaliation based on his involuntary transfer after complaining about racially-tinged emails
- Hearing Officer held in favor of claimant, because evidence showed he was far more qualified than his White replacement and because the employing office gave shifting and inconsistent reasons for transfer
- Board affirmed, rejecting employing office's arguments that the decisionmaker was concerned about morale in the claimant's division, and agreeing with the Hearing Officer that the morale issues may have been caused by racial animus toward the claimant

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***West v. U.S. Capitol Police*, No. 21-CP-18, 2022 WL 21807826 (OCWR Nov. 17, 2022)**

- Employee filed a disability discrimination claim and elected to pursue an administrative hearing
- Claimant repeatedly missed discovery deadlines set by the Hearing Officer, including some that had been extended at claimant's request
- Hearing Officer granted employing office's motion to dismiss with prejudice, and Board affirmed, because claimant failed to explain why he failed to meet so many deadlines

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**Case Law Updates –
District Court**

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***Maynard v. Architect of the Capitol*, 544 F. Supp. 3d 64 (D.D.C. 2021);
Terry v. Architect of the Capitol, No. CV 18-1733 (RBW), 2021 WL
2417535 (D.D.C. June 14, 2021)**

- Plaintiffs both claimed that the AOC violated the CAA by failing to pay them environmental hazard pay, per its pay policy, as part of their regular and overtime wages
- The FLSA, as incorporated by the CAA, allows claims for failure to pay time-and-a-half overtime, which is based on regular rate of pay, so plaintiffs argued the court should be allowed to determine what the regular rate of pay should be
- Court held that it lacked jurisdiction to hear the claims, because the CAA does not explicitly waive sovereign immunity regarding claims of entitlement to environmental hazard pay; the claims stemmed from the AOC's pay policy, and that policy cannot waive sovereign immunity

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***Mahmoud v. Libr. of Cong.*, No. CV 20-1935 (JEB), 2021 WL 6808293
(D.D.C. Feb. 9, 2021)**

- Plaintiff alleged three events in which his reasonable accommodation requests were denied, but he failed to exhaust the first two complaints
- He tried to connect all three instances as stemming from a single event – i.e., the introduction of a new software platform that was not compatible with his screen reader software – but the court held that the continuing violation doctrine does not apply to failure-to-accommodate claims, but rather “any decision not to accommodate is a discrete act that must be separately exhausted.”
- Court therefore dismissed the claims based on the first two denials of accommodation requests

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Doe v. Off. of Representative Sheila Jackson Lee, No. 19-CV-0085 (DLF), 2020 WL 759177 (D.D.C. Feb. 14, 2020)

- Plaintiff sued the Office of Rep. 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
- Court dismissed her retaliation claim because her opposition to the alleged sex discrimination she endured while at CBCF did not qualify as “protected activity” under the CAA: CBCF is not an employing office under the CAA, and thus she did not oppose conduct made unlawful by the CAA
- Court also dismissed her discrimination claim because there was nothing in her complaint suggesting she was terminated *because she was a woman* raising sexual assault allegations

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Ham v. Ayers, No. CV 15-1390 (RMC), 2019 WL 12 02453 (D.D.C. Mar. 14, 2019)

- Plaintiff alleged hostile work environment in violation of the ADA as applied by the CAA
- Court granted summary judgment for AOC and denied summary judgment for the plaintiff, because only one of the alleged incidents supporting the hostile work environment claim happened before plaintiff sought counseling at the OOC*
- Where courts allow later acts to support a hostile work environment claim, the original claim must allege an ongoing violation and the later acts must be “adequately linked into a coherent hostile environment claim.”

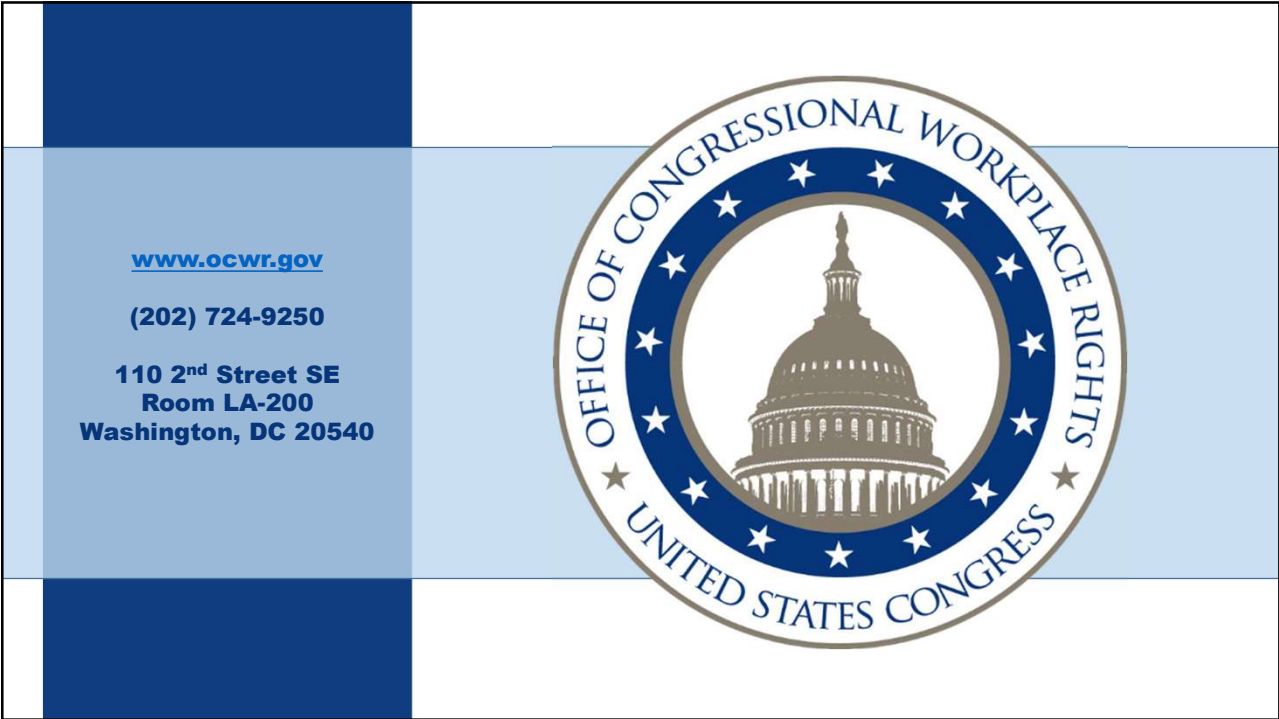
* Prior to the Reform Act, counseling was required before covered employees could file complaints either at the OOC or in district court.

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