No. 20-

IN THE

Supreme Court of the United States

GREGORY GREER,

Petitioner,

v.

GENERAL DYNAMICS INFO. TECH., INC.,
A DELAWARE CORPORATION DOING BUISNESS
IN THE STATE OF MARYLAND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JEFFREY M. GINSBERG
BRIEFS & MOTIONS, INC.
527 Via Assisi
Cathedral City, CA 92234
(760) 324-3830
jmginsberg1@aol.com

RALPH GREER
Counsel of Record
LAW OFFICE OF RALPH GREER
10401 Grosvenor Place, Suite 1511
Rockville, Maryland 20852
(626) 536-8700
greerlaw.rsg@gmail.com

Attorneys for Petitioner

297334

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

I. Is the language of 48 CFR 7.503(d)(13), which is inconsistent with relevant Defense Federal Acquisition Regulations Supplement provisions (DFARS) concerning contractor-employee supervision by governmental employees, vague and untenable juxtaposed with those on point DFARS?

II. Is an inherently governmental function of supervising a United States Department of Defense (DOD) employee by a superior government functionary distinct from the not inherently governmental function of supervising a DOD contractor-employee by such government functionary?

III. As Executive Order 12829 (National Industrial Security Program) [NISP] has been codified in the Federal Register and has the force of law, is a private right of action against the contractor-employer for concealment and misrepresentation of the correct security clearance level maintainable?

IV. Does the lack of debriefing when a DOD contractor-employee is terminated from his or her position violate NISP and create a private right of action to vindicate injuries from such omission?

PARTIES TO THE PROCEEDINGS

Gregory Greer, Petitioner

General Dynamics Info. Tech., Inc., (GDIT), Respondent

CORPORATE DISCLOSURE STATEMENT

Gregory Greer is an individual and not a corporation.

General Dynamics Info. Tech., Inc., is a subsidiary of General Dynamics Corporation which is its parent corporation. GDIT is not a publicly held corporation. Ten Percent or more of its stock is owned by the publicly held corporation General Dynamics Corporation.

LIST OF PROCEEDINGS

Greer v. General Dynamics Information Technology, Inc. No. 19-1235. Judgment Entered April 13, 2020. United States Court of Appeals for the Fourth Circuit.

Greer v. General Dynamics Information Technology, Inc. No. 8:18-cv-01193-PWG. Judgment Entered February 21, 2019. United States District Court for the District of Maryland, Southern Division.

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The unpublished opinion of the United States Court of Appeals for the Fourth Circuit is included herein as Appendix A, pp. 1a-8a. 808 Fed. App'x 191, 2020 U.S. App. LEXIS 11546. The memorandum opinion of the United States District Court for the District of Maryland, Southern Division, is included herein as Appendix B, pp. 9a-21a. 2019 U.S. Dist. LEXIS 27596 *| 2019 WL 764018.

JURISDICTION

This Court has jurisdiction of this Petition to review the judgment of the United States Court of Appeals for the Fourth Circuit pursuant to 28 USC § 1254(1). The Fourth Circuit's *per curiam* opinion was entered on April 13, 2020. This Petition is timely as per the Court's Order on March 19, 2020, regarding COVID-19 deadline extensions.

The District Court had subject matter jurisdiction pursuant to section 28 USC §1331, as it is a civil action arising under federal law. The District Court's opinion was entered on February 21, 2019.

RELEVANT STATUTORY/REGULATORY PROVISIONS

DFARS Subpart 237.503: "(c) The agency head or designee shall employ procedures to ensure that requirements for service contracts are vetted and approved as a safeguard to prevent contracts from being awarded or administered in a manner that constitutes an unauthorized personal services contract. Contracting officers shall follow the procedures at PGI 237.503, include

substantially similar certifications in conjunction with service contract requirements, and place the certification in the contract file. The program manager or other official responsible for the requirement, at a level specified by the agency, should execute the certification. In addition, contracting officers and program managers should remain aware of the descriptive elements at FAR 37.104(d) to ensure that a service contract does not inadvertently become administered as a personal-services contract."

DFARS Procedures, Guidance, and Information (PGI) 237.503: "The Government is normally required to obtain its employees by direct hire under competitive appointment procedures required by civil service laws. Obtaining personal services by contract, rather than by direct hire, circumvents those laws unless Congress has specifically authorized acquisition of the services by contractor."

48 CFR § 2902.101 – Definitions: "(a) Commonly used words and terms are defined in FAR subpart 2.1. This part 2902 gives DOL-specific meanings for some of these words and terms and defines other words and terms commonly used in the DOL acquisition process.

"(b) The following words and terms are used as defined in this subpart unless the context in which they are used clearly requires a different meaning, or a different definition is prescribed for a particular part or portion of a part:

"*Contracting Officer's Technical Representative* means the individual appointed by the contracting officer to represent the Department of Labor's programmatic interests on a Department of Labor contract, task order,

or delivery order. This individual is responsible to the contracting officer for overseeing receipt and acceptance of goods/services by the Government, reporting on the contractor's performance, and approving/disapproving payment to the contractor. Authority is otherwise limited to giving technical direction to the contractor within the framework of the contract (see 2901.603-71). This position may go by other titles, such as: a technical point of contact (TPOC) or Contacting Officer's Representative (COR)."

48 CFR §§ 1552.237-76: "(b) Contractor personnel shall not: (1) Be placed in a position where they are under the supervision, direction, or evaluation of a Government employee."

48 CFR § 37.104 Personal services contracts.

"(a) A personal services contract is characterized by the employer-employee relationship it creates between the Government and the contractor's personnel. The Government is normally required to obtain its employees by direct hire under competitive appointment or other procedures required by the civil service laws. Obtaining personal services by contract, rather than by direct hire, circumvents those laws unless Congress has specifically authorized acquisition of the services by contract.

"(b) Agencies shall not award personal services contracts unless specifically authorized by statute (e.g., 5 USC 3109) to do so.

"(c)

"(1) An employer-employee relationship under a service contract occurs when, as a result of (i) the

contract's terms or (ii) the manner of its administration during performance, contractor personnel are subject to the relatively continuous supervision and control of a Government officer or employee. However, giving an order for a specific article or service, with the right to reject the finished product or result, is not the type of supervision or control that converts an individual who is an independent contractor (such as a contractor employee) into a Government employee.

"(2) Each contract arrangement must be judged in the light of its own facts and circumstances, the key question always being: Will the Government exercise relatively continuous supervision and control over the contractor personnel performing the contract? The sporadic, unauthorized supervision of only one of a large number of contractor employees might reasonably be considered not relevant, while relatively continuous Government supervision of a substantial number of contractor employees would have to be taken strongly into account."

18 USC § 371: "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

STATEMENT OF THE CASE

On June 13, 2018, Petitioner filed a Second Amended Complaint (SAC), alleging that GDIT constructively terminated his employment in violation of the Defense Contractor Whistleblower Protection Act (DCWPA), 10 USC § 2409(c)(2) (Appendix C: pp. 22a-31a) (Count 1); and that GDIT intentionally and maliciously concealed his true security clearance level and failed to debrief him after his employment separation in violation of Executive Order 12289 (National Industrial Security Program) (Appendix D: pp. 40a-52a) (Count 2).

On August 17, 2018, GDIT moved to dismiss the SAC for failure to state a claim under Rule 12(b)(6). On February 21, 2019, the District Court issued a Memorandum Opinion and Order granting GDIT's Motion to Dismiss with prejudice. Petitioner filed a Notice of Appeal of the District Court's Order on February 23, 2019. On April 13, 2020, the United States Court of Appeals for the Fourth Circuit affirmed the District Court decision in an unpublished *per curiam* opinion.

GDIT provides inter alia information technology services. Petitioner was employed by GDIT from September 2011 until early 2015. Petitioner was working as a Senior Technical Writer on a GDIT contract at the Department of Research Programs within Walter Reed National Military Medical Center (WRNMMC).

The discharge was constructive because GDIT forced Petitioner to choose between working under the supervision of a federal civilian employee or resigning from his position at WRNMMC only, not from GDIT.

Such supervision arrangement violated pertinent DFARS regulations. Petitioner's claims are violations of the DCWPA and Executive Order 12829 coupled with a common law deceit cause of action.

Lisa Thompson, a GS-12 level federal civilian employee, became Petitioner's "supervisor" in late February or early March 2015. (She was actually his "technical point of contact" within the Department of Defense. See 48 CFR § 2902.101(b).) As GDIT's contract with the Department of Research Programs provided that "no one other than a GDIT employee could be [Petitioner's] supervisor," Petitioner was on notice that an unlawful arrangement was perpetrated, conceivably to his legal detriment as a participant in the subterfuge. Hence, Petitioner viewed this supervisory situation as problematic.

On March 17, 2015, Petitioner's supervisor at GDIT, Edith Druktenis, told him to attend a meeting with her and Erin Davis of GDIT's Human Resources Department instead of returning to work. GDIT's vice president Julie McGrath was also present in the office. Ms. Davis told Petitioner that he could continue to work at WRNMMC and be supervised by Ms. Thompson, or resign from his position after which GDIT would place him in the Career Assistance Program and find him a new position within the company, same as it had done twice previously.

Petitioner signed the necessary resignation paperwork from his position at WRNMMC only after the ultimatum by Ms. Davis to do so. He understood that his resignation was a condition precedent to continued employment by GDIT. He was not offered a new position within GDIT despite applying to over 100 positions. The resignation ploy was a ruse.

Furthermore, GDIT erroneously informed Petitioner through email communications to his GDIT supervisor at the Defense Centers of Excellence for Psychological Health and Traumatic Brain Injury (DCoE) in August 2012 that he had been sponsored for a Public Trust clearance when actually he had been sponsored for a Secret clearance, a much higher clearance level. This misinformation hindered securing a new position because the most valuable opportunities required Secret clearance and he was under the faulty understanding that he did not have such clearance.

On learning his actual clearance level, Petitioner secured a Secret-level position with a very sophisticated DOD agency at a salary one-third higher than his last GDIT position. Not knowing his correct clearance level prevented him from earning five years' worth of advanced-level employment at a higher salary commensurate with his Secret security clearance level. Moreover, this misrepresentation was perpetrated as no debriefing in which his true security clearance level would have been related occurred, which was a violation of Executive Order 12829. (Appendix D, pp. 40a-52a) This misrepresentation also was the underpinning for a common law claim of fraud and deceit.

This Petition also addresses a significant and important overarching federal issue: Whether the intent of Congress in enacting the civil service laws encompassed in the Federal Acquisition Regulations System can be circumvented by transforming non-personal services contracts between a contractor and a government agency into a personal services contract.

"Under FAR 37.101, a non-personal services contract means a contract under which the personnel rendering the services are not subject, either by the contract's terms or by the manner of its administration, to the supervision and control usually prevailing in relationships between the Government and its employees." *Begay v. United States* (D.N.M. Sep. 30, 2016, No. CIV 15-0358 JB/SCY) 2016 U.S.Dist.LEXIS 139063, at *5, fn. 3.

Accordingly, as set forth in the Argument *infra* the answer to that question is such Congressional intent regarding being subject to agency supervision and control cannot be so circumvented.

ARGUMENT

RULING TO DISMISS THE COMPLAINT FOR FAILURE TO STATE A CLAIM WAS ERROR AS PETITIONER SUCCESSFULLY STATED SUFFICIENT FACTUAL ALLEGATIONS AND IDENTIFIED A COGNIZABLE LEGAL THEORY FOR RELIEF

This Court has stated:

> Other provisions of the Federal Rules of Civil Procedure are inextricably linked to Rule 8(a)'s simplified notice pleading standard. Rule 8(e)(1) states that "no technical forms of pleading or motions are required," and Rule 8(f) provides that "all pleadings shall be so construed as to do substantial justice." Given the Federal Rules' simplified standard for pleading, "[a] court may dismiss a complaint

> only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations."

Swierkiewicz v. Sorema N.A. (2002) 534 U.S. 506, 513-514. (Citations omitted.)

Here, Petitioner has sedulously complied with the simplified notice pleading standard. He has posited a legal theory in his Second Amended Complaint under which relief could be granted under facts consistent with his allegations. These facts are that he was compromised in his position with GDIT because he was knowledgeable of the implications of being ostensibly supervised by a Department of Defense employee when she was actually a "technical point of contact" and not his supervisor. See 48 CFR § 2902.101(b).

GDIT put him in the position of being on a slippery slope in his dealings with Ms. Thompson (and in his status as its employee), as he knew of DFARS Subpart 237.503 and its caveat that "a service contract does not inadvertently become administered as a personal-services contract." Acquiescing to Ms. Thompson's remonstrances that she was his "supervisor" put him in jeopardy of violating that regulation. He was wary of the potentially negative consequences to his position as a contractor-employee of GDIT for its violation.

Petitioner also knew of DFARS PGI 237.503 and its significant language:

> The Government is normally required to obtain its employees by direct hire under

> competitive appointment procedures *required by civil service laws*. Obtaining personal services by contract, rather than by direct hire, circumvents those laws unless Congress has specifically authorized acquisition of the services by contractor. (Emphasis added.)

Petitioner knew that there was no such "specifically authorized acquisition" by Congress regarding his employment with GDIT. Again, he was put in the position of being at variance with DFARS regulations and potentially sabotaging his job.

Moreover, Petitioner knew that Federal Acquisition Regulation (FAR) 7.503 differentiated between inherently governmental functions and those that were not inherently governmental functions. (Appendix C: pp. 32a-39a) It was an inherently governmental function for a government employee to be under the supervision of a DOD employee like Ms. Thompson, and Petitioner was not a government employee. Ipso facto at best his ambiguous and uncertain status at WRNMMC was at odds with FAR 7.503 and he was put in the position of violating that regulation.

Notwithstanding FAR 7.503(d)(13) and its obscuring language about "[c]ontractors participating in any situation where it might be assumed that they are agency employees or representatives," which was "not considered to be an inherently governmental function," Petitioner relied on his knowledge of the DFARS provisions set forth above to conclude that he was in a problematic position because of Ms. Thompson's reproofs that she was his supervisor. (Appendix C: pp. 32a-39a)

Coupled with Ms. Thompson's incessant verbal abuse and unrelenting carping about his work, the inconsistency between those DFARS provisions and FAR 7.503(d)(13), forced Petitioner to confront GDIT about the patent wrongness of the employment situation he was in. GDIT forced him to choose between accepting Ms. Thompson as his supervisor or forfeiting his job at WRNMMC only. Reluctantly, he capitulated and chose to be reassigned as promised by GDIT upon relinquishing his position at WRNMMC. GDIT reneged on its promise of reassignment and he was forced to outright resign.

Such resignation constituted an unlawful constructive discharge. The motive for this discharge was GDIT's retaliation for Petitioner's revealing the untoward employment situation he was put in under Ms. Thompson and not buckling under GDIT's pressure to accept the unacceptable status quo. Such status quo was unacceptable because it conflicted with those DFARS provisions.

Additionally, this situation can be likened to one under 48 CFR 1552.237-76, which is an EPA regulation. Under this regulation it is stated that: "(b) Contractor personnel shall not: (1) Be placed in a position where they are under the supervision, direction, or evaluation of a Government employee."

In tandem with the DFARS provisions of 237.503 regarding civil service laws requiring specific Congressional authorization for direct hire and the illegality of circumventing those laws, it is logical for this Court to consider whether the unclear and uncertain language of FAR 7.503(d)(13) is contradicted by those applicable DFARS provisions. (Appendix C: pp. 32a-39a)

Accordingly, Petitioner has posited a legal theory under which relief can be granted.

Moreover, the DFARS provisions take precedence over that FAR subsection. "Specific terms prevail over the general in the same or another statute which otherwise might be controlling." *D. Ginsberg & Sons, Inc. v. Popkin* (1932) 285 U.S. 204, 208. "Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Morton* v. *Mancari* (1974) 417 U.S. 535, 550-551. "[I]t is a commonplace of statutory construction that the specific governs the general." *Morales v. TWA* (1992) 504 U.S. 374, 385.

Therefore, as the DFARS provisions were promulgated specifically for the Department of Defense, those pertinent regulations already set forth are controlling irrespective of any language in FAR 7.503(d)(13). (Appendix C: pp. 32a-39a)

Furthermore, Petitioner viably contends that there was complicity between GDIT and Ms. Thompson and her superiors which supports a finding of violation of 18 USC § 371:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

It is tenable that this complicity involving the wrongful "supervisory" relationship between Petitioner and Ms. Thompson was tantamount to a conspiracy between GDIT and her superiors, which unchecked, could have implicated Petitioner as co-conspirator.

> To conspire to defraud the United States means primarily to cheat the Government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest. It is not necessary that the Government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicane or the overreaching of those charged with carrying out the governmental intention.

Hammerschmidt v. United States (1924) 265 U.S. 182, 188.

Certainly, the Department of Defense was being "defrauded" by these employees at the Department of Research Programs and GDIT in their machinations to structure things so that Petitioner was under Ms. Thompson's control rather than being ultimately accountable directly to GDIT. Furthermore, these machinations were manifestly irreconcilable with

the Federal Acquisition Regulation requirements. Accordingly, this case has implications beyond any remedy for Petitioner for injury suffered, as a government agency was affected adversely by their actions, to wit, perpetration of fraud.

Moreover, it would be premature to determine that no prima facie case has been pled.

> [T]he precise requirements of a prima facie case can vary depending on the context and were "never intended to be rigid, mechanized, or ritualistic." "The specification . . . of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations." This Court "did not purport to create an inflexible formulation" for a prima facie case. "To measure a plaintiff's complaint against a particular formulation of the prima facie case at the pleading stage is inappropriate." Before discovery has unearthed relevant facts and evidence, it may be difficult to define the precise formulation of the required prima facie case in a particular case.

Swierkiewicz, *supra*, 534 U.S. 506, at p. 512. (Citations omitted.)

As discussed, Petitioner set forth in his Second Amended Complaint factual allegations which if deemed true (let alone proven) constitute grounds for obtaining judicial relief. He is entitled thus to conduct discovery to "unearth" further relevant facts and evidence to substantiate his case. The ruling granting GDIT's motion to dismiss was error.

PETITIONER'S CONSTRUCTIVE DISCHARGE CLAIM IS BASED ON THE RETALIATION COMMITTED BY GDIT IN RENEGING ON PLACING HIM IN ANOTHER POSITION WHICH VIOLATED THE ANTI-REPRISAL PROVISIONS OF 10 USC § 2409

Petitioner alleged that GDIT constructively discharged him because of the "choice" proffered by GDIT to Petitioner to accept the new dynamic of Ms. Thompson supervising him or be reassigned to another position. But this reassignment contingency was chimerical for though he acceded to this change of position, nothing panned out into another position. GDIT did retaliate against him for imparting the information regarding the new supervisory paradigm and not acceding to this new paradigm. This constructive discharge violated the anti-reprisal provisions of 10 USC § 2409, the Defense Contractor Whistleblower Protection Act (DCWPA). (Appendix C, pp. 22a-31a)

"The DCWPA prohibits retaliation against employees of defense contractors who report certain types of misconduct. *See* 10 USC § 2409(a)(1)." *United States ex rel. Cody v. Mantech Int'l Corp.* (4th Cir. 2018) 746 F.App'x 166, 178. "[I]n order to establish a prima facie case of unlawful retaliation, a whistleblower plaintiff must establish that: (1) he engaged in 'protected activity'; (2) his employer knew or was reasonably on notice that he was engaged in protected activity; and (3) his employer took adverse action against him as a result of his protected activity." *Cejka v. Vectrus Sys. Corp.* (D.Colo. 2018) 292 F. Supp. 3d 1175, 1192, fn. 7.

Here, the misconduct was in shifting authority over Petitioner from a GDIT employee to Ms. Thompson. It is cut and dry that GDIT violated the pertinent DFARS 237.503 provisions. The protected activity was Petitioner's refusal to kowtow to the new, wrongful arrangement with Ms. Thompson as his direct supervisor. More significantly, Petitioner's factual allegations about these violations, taken as true, and his assertion of DCWPA liability, make his Second Amended Complaint plausible.

"A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal* (2009) 556 U.S. 662, 678. "And, of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.'" *Bell Atl. Corp. v. Twombly* (2007) 550 U.S. 544, 556. (Citation omitted.)

An informative case that supports this notion of facial plausibility is *Lawson v. FMR LLC* (2014) 571 U.S. 429. The Court held the Sarbanes-Oxley Act of 2002, 116 Stat. 745, protected whistleblowers, shielding employees of private contractors and subcontractors who divulged malfeasances committed by publicly traded securities companies with whom they worked from retaliation for revealing corporate fraud, for example, by investment advisers, law firms, and accounting enterprises. The subsequent 2010 Dodd-Frank amendment reiterated this whistleblowing protection.

"Dodd-Frank also establishes a corporate whistleblowing reward program, accompanied by a new

provision prohibiting any employer from retaliating against 'a whistleblower' for providing information to the SEC, participating in an SEC proceeding, or making disclosures required or protected under Sarbanes-Oxley and certain other securities laws." *Id*. at p. 456.

Similarly, the DCWPA states that a contractor who discloses to his employer information "he reasonably believes is evidence" of "a violation of law, rule or regulation related to a Department contract" cannot be "discharged, demoted or otherwise discriminated against" for having made the disclosure. See 10 USC § 2409(a)(1)(A). (Appendix C: pp. 22a-31a)

Here, Petitioner disclosed that the new supervisory arrangement contradicted the pertinent DFARS provisions and that he could not be complicit in this contradictory arrangement. Yet he was constructively discharged both for making such disclosure and not playing ball by not abiding with the new arrangement.

Hence, Petitioner's claim of constructive discharge has facial plausibility in its allegations of collusion between GDIT and Ms. Thompson and her supervisors in usurping the DFARS provisions. It also has facial plausibility in its allegations of Ms. Thompson's egregious mistreatment of him.

"A constructive discharge occurs when an employer creates intolerable working conditions in a deliberate effort to force the employee to resign." *Carter v. Ball* (4th Cir. 1994) 33 F.3d 450, 459. "The general rule is that if the employer deliberately makes an employee's working conditions so intolerable that the employee is forced

into an involuntary resignation, then the employer has encompassed a constructive discharge and is as liable for any illegal conduct involved therein as if it had formally discharged the aggrieved employee." *Young v. Southwestern Sav. & Loan Asso.* (5th Cir. 1975) 509 F.2d 140, 144.

In addition to the retaliation for bucking against the GDIT hierarchy in not deferring to the new situation regarding Ms. Thompson's supervision of him, Ms. Thompson verbally assaulted and harassed him. She became increasingly dictatorial and demanded that he provide innumerable and exhaustive evidence of all the work he generated within the year prior to working with her and spoke belligerently to him about his attitude vis a vis her absolute authority over him.

Her hostility and harping infringed beyond the scope of his work duties entailing preparation of poster competitions at WRNMMC as a technical writer. It also made him fear physical assault. Such conditions can be aptly characterized as "intolerable." Petitioner's claim of constructive discharge thus is two-faceted. It was error to find this claim not facially plausible.

PETITIONER'S CLAIM FOR COMMON LAW DECEIT IS VIABLE AND ACTIONABLE AS GDIT FRAUDULENTLY MISREPRESENTED HIS SECURITY CLEARANCE LEVEL

> The elements for fraudulent misrepresentation are "(1) that the defendant made a false representation to the plaintiff, (2) that its falsity was either known to the defendant

> or that the representation was made with reckless indifference as to its truth, (3) that the misrepresentation was made for the purpose of defrauding the plaintiff, (4) that the plaintiff relied on the misrepresentation and had the right to rely on it, and (5) that the plaintiff suffered compensable injury resulting from the misrepresentation."

VF Corp. v. Wrexham Aviation Corp. (1996) 112 Md.App. 703, 714, 686 A.2d 647, 653. (Citations omitted.)

Here, Petitioner was falsely informed that his security clearance level was a Public Trust clearance when in actuality it was a Secret clearance. Such falsity was known to GDIT. This misrepresentation did defraud Petitioner who relied on it to his detriment as he suffered compensable injury from it, viz., denial of five years' worth of advanced-level employment at salary offers as high as $60 per hour ($124,800 per year) due to GDIT's willful hiding of his Secret clearance status.

In a nutshell, Petitioner was unable to use his Secret clearance status because he did not know he had such clearance level. Its concealment was largely attributable to GDIT's failure to debrief Petitioner when his WRNMMC employment was terminated, as per Executive Order 12829, the National Industrial Security Program Operating Manual (NISPOM), codified as 58 CFR 3479. (Appendix D, pp. 40a-52a), DoD 5220.22-M.

> NISPOM was issued as part of the National Industrial Security Program established in Executive Order 12,829 to prevent

> the unauthorized disclosure of classified information. *See* Exec. Order No. 12,289, 58 C.F.R. 3479, as amended 58 Fed. Reg. 3479 (January 6, 1993). The Executive Order clearly states: "The purpose of this [National Industrial Security Program] is to *safeguard classified information* that may be released or has been released to current, prospective, or former contractors, licensees, or grantees of United States agencies." *Id.* § 101 (emphasis added).

Zagami v. HP Enter. Servs., LLC (D.D.C. 2016) 212 F. Supp. 3d 185, 225.

Such debriefing failure was a violation of this Executive Order, codified in the Federal Register. As per its codification, this Order has the weight of a federal regulation and arguably as it has the force of law provides a private right of action to vindicate injuries sustained from its non-application. Regardless, the common law deceit claim stands on its own and is meritorious as laid out in setting forth the elements of fraudulent misrepresentations and their application to the facts. It was error to dismiss this claim.

Although this claim was not judged on the merits by the Court of Appeal, it is proper to raise it anew in this Petition. "But this argument is made for the first time in petitioners' brief to this Court: it was not pleaded in the complaint, argued to the Court of Appeals as a ground for reversing the District Court, or raised in the petition for certiorari. We therefore decline to consider it here." *Deshaney v. Winnebago County Dep't of Social Services* (1989) 489 U.S. 189, 195, fn. 2.

Accordingly, if Petitioner did not raise this claim in this Petition and the Petition were granted, it would be unavailing to raise this claim in his brief. But as it has been raised here now, this claim can be considered by the Court in determining whether to grant this Petition.

Moreover, Petitioner asserts deceit with the requisite particularity under Rule 9(b). "Rule 8(a)'s simplified pleading standard applies to all civil actions, with limited exceptions. Rule 9(b), for example, provides for greater particularity in all averments of fraud or mistake." *Swierkiewicz*, *supra*, 534 U.S. 506, at p. 513.

As to the Who, When, Where and How of the particularity requirements: Who: Lisa Leshin, GDIT FSO (Facility Security Officer)/Lisanne Bunce-Ozanian, GDIT PM (Project Manager); When: August 2012; Where: on the Internet; How: by email from Lisa Leshin to Lisanne Bunce-Ozanian to Gregory Greer, GDIT Employee.

With this particularity requirement met, Petitioner's deceit claim for misrepresenting the actual security level clearance he was given is airtight and actionable. To reiterate, it was error to dismiss this claim. GDIT's motion to dismiss the SAC was improperly granted.

REASONS FOR GRANTING THE PETITION

As Justice Stevens has stated:

> "The possibility that a lower court may have incorrectly decided a federal question is, of course, a relevant factor when this Court decides whether to exercise its discretionary

certiorari jurisdiction. However, as Rule 17.1 of the Rules of this Court makes plain, our certiorari jurisdiction is designed to serve purposes broader than the correction of error in particular cases:

"A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

"(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

"(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

"(c) When a state court or *a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court,* or has decided a federal

> question in a way in conflict with applicable decisions of this Court."

Watt v. Alaska (1981) 451 U.S. 259, 275, fn. 5. (conc. opn. of Stevens, J.) (Emphasis added.)

This Court should grant this Petition and reconsider the judgment of the Court of Appeals because its decision is in conflict with the relevant DFARS 237.503 provisions as discussed in the Argument of this Petition, "an important question of federal law which has not been, but should be, settled by this Court." Moreover, it gives license to contractors and federal agencies to obstruct civil service laws regarding personal services contracts.

Second, the Court of Appeal misapplied the principles of notice pleading as embodied in Federal Rule of Civil Procedure 8(a). Petitioner's SAC contained facts consistent with his allegations for which relief could be granted under the legal theories posited.

Third, a government agency, the Department of Defense, was defrauded by the complicit arrangement between GDIT and Ms. Thompson and her supervisors at the Department of Research Programs at WRNMMC, to make Ms. Thompson Petitioner's "supervisor" notwithstanding regulations and contractual provisions disallowing such relationship between a GDIT employee and a federal employee, another "important question of federal law."

CONCLUSION

For the above and foregoing reasons, Petitioner requests the issuance of a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

Respectfully Submitted,

JEFFREY M. GINSBERG
BRIEFS & MOTIONS, INC.
527 Via Assisi
Cathedral City, CA 92234
(760) 324-3830
jmginsberg1@aol.com

RALPH GREER
Counsel of Record
LAW OFFICE OF RALPH GREER
10401 Grosvenor Place, Suite 1511
Rockville, Maryland 20852
(626) 536-8700
greerlaw.rsg@gmail.com

Attorneys for Petitioner

July 30, 2020

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED APRIL 13, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-1235

GREGORY GREER,

Plaintiff-Appellant,

v.

GENERAL DYNAMICS INFORMATION TECHNOLOGY, INC., A DELAWARE CORPORATION DOING BUSINESS IN THE STATE OF MARYLAND,

Defendant-Appellee.

March 19, 2020, Submitted; April 13, 2020, Decided

Appeal from the United States District Court
for the District of Maryland, at Greenbelt.
(8:18-cv-01193-PWG). Paul W. Grimm, District Judge.

Before WILKINSON, QUATTLEBAUM, and RUSHING, Circuit Judges.

Affirmed by unpublished per curiam opinion.

PER CURIAM:

Appendix A

From 2011 to 2015, Gregory Greer was employed by General Dynamics Information Technology Incorporated as a technical editor. Greer worked on projects arising from General Dynamics' contracts with the federal government, often collaborating with employees of the Department of Defense. In early 2015, after a personnel shake-up on the project to which he was assigned at Walter Reed National Military Medical Center, Greer claims he was asked to work under the direct supervision of a government employee. Believing such an arrangement to be illegal, Greer brought it to the attention of his superiors at General Dynamics. Ultimately given the choice of accepting the arrangement and continuing to work on the project at Walter Reed or resigning his position, Greer chose to resign. He subsequently filed this lawsuit, contending that his resignation had been coerced by circumstance and therefore constituted an unlawful constructive discharge. He also alleged that General Dynamics had concealed from him his "true security clearance level." General Dynamics filed a motion to dismiss for failure to state a claim, which the district court granted. We affirm.

I.

A motion to dismiss for failure to state a claim "tests the sufficiency of a complaint." *King v. Rubenstein*, 825 F.3d 206, 214 (4th Cir. 2016). In order to survive such a motion, the plaintiff must "'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L.

Ed. 2d 929 (2007)). A complaint that lacks sufficient factual allegations or fails to identify a cognizable legal theory cannot survive application of this standard. On appeal, "we review de novo the grant of a motion to dismiss for failure to state a claim." *Garnett v. Remedi Seniorcare of Virginia, LLC*, 892 F.3d 140, 142 (4th Cir. 2018).

A.

Greer's primary contention is that General Dynamics constructively discharged him by forcing him to choose between the new staffing arrangement (thereby becoming complicit in what he believed to be illegal behavior) and resigning. That discharge, he claims, violated the "anti-reprisal" provisions of 10 U.S.C. § 2409, the Defense Contractor Whistleblower Protection Act (DCWPA). "The DCWPA prohibits retaliation against employees of defense contractors who report certain types of misconduct." *United States ex rel. Cody v. ManTech Int'l, Corp.*, 746 Fed. Appx. 166, 178 (4th Cir. 2018) (argued but unpublished). A contractor who discloses to his employer (or certain statutorily identified government entities or officials) information he "reasonably believes is evidence" of "a violation of law, rule, or regulation related to a Department contract . . . or grant" cannot be "discharged, demoted, or otherwise discriminated against" for having made the disclosure. 10 U.S.C. § 2409(a)(1)(A). Greer contends that the Federal Acquisition Regulations (FAR), 48 C.F.R. §§ 1 *et seq.*, "prohibit[] a government employee from directly supervising the employees of a contractor working on a nonpersonal services contract." Opening Br. 11. Thus, Greer argues, when he informed General Dynamics of the

new supervisory arrangement at Walter Reed, he made a disclosure regarding a violation of a regulation related to a Department contract—that is, a disclosure covered by the DCWPA—and General Dynamics engaged in an illegal reprisal when it forced him to choose between participating in what he considered illegal conduct and resigning.

In order to survive a motion to dismiss, Greer's DCWPA claim must allege facts sufficient to plausibly show that he engaged in a protected disclosure, that his employer was on notice of that disclosure, and that, as a result of the disclosure, he was subjected to an adverse employment action, such as a constructive discharge. *See United States ex rel. Cody v. Mantech Int'l Corp.*, 207 F. Supp. 3d 610, 621 (E.D. Va. 2016) ("[I]n order to establish a *prima facie* case of unlawful retaliation [under the DCWPA], a whistleblower plaintiff must establish that: (1) he engaged in protected activity; (2) his employer knew or was reasonably on notice that he was engaged in protected activity; and (3) his employer took adverse action against him as a result of his protected activity."), *aff'd* 746 Fed. Appx. 166 (4th Cir. 2018).

The district court was unable to "discern from Greer's pleadings" how the new supervisory arrangement—in which Greer would work under the direct supervision of a federal government employee—"violated [the] FAR." *Greer v. Gen. Dynamics Info. Tech., Inc.*, No. 8:18-cv-01193-PWG, 2019 U.S. Dist. LEXIS 27596, 2019 WL 764018, at *4 (D. Md. Feb. 21, 2019). Nor has Greer brought to our attention on appeal any authority supporting his

contention that the new arrangement violated the law. He points to FAR 7.503, which suggests that his argument is premised on the notion that the arrangement constitutes a contract being "used for the performance of [an] inherently governmental function[]," which is prohibited. 48 C.F.R. § 7.503(a). But the specific provision on which he relies—regarding "[c]ontractors participating in any situation where it might be assumed that they are agency employees or representatives"—is included in a list of examples "generally *not* considered to be [an] inherently governmental function[]." 48 C.F.R. § 7.503(d)(13) (emphasis added). Thus, the only authority Greer cites appears to undercut, not bolster, his claim.

It is not clear, then, that Greer made a protected disclosure that would trigger the anti-reprisal protection provided by the DCWPA. And even assuming he made a protected disclosure, we agree with the district court that an employee's mere discomfort with "a supervisory situation contrary to his employer's government contract" "simply do[es] not rise to the level of [an] intolerable" condition necessary to transform a voluntary resignation into a constructive discharge. *Greer*, 2019 U.S. Dist. LEXIS 27596, 2019 WL 764018, at *4; *see Williams v. Giant Food Inc.*, 370 F.3d 423, 434 (4th Cir. 2004) ("[D]ifficult or unpleasant working conditions are not so intolerable as to compel a reasonable person to resign." (internal quotation marks omitted)). Either way, it is evident that Greer has not advanced a plausible claim under the DCWPA, so dismissal of the first theory of liability set forth in his complaint was appropriate.

B.

Greer's second claim concerns General Dynamics' purported concealment of his level of security clearance. As outlined in the operative complaint, Greer accuses General Dynamics of "erroneously inform[ing]" him that "the security clearance [General Dynamics] had sponsored [him] for was a Public Trust clearance when in fact the clearance was a Secret clearance." J.A. 88. This "intentional[] and malicious[] conceal[ment]" of his "true security clearance level," Greer contends, was a "violation of Executive Order 12829." J.A. 90.

"As a general rule, 'there is no private right of action to enforce obligations imposed on executive branch officials by executive orders.'" *Chen Zhou Chai v. Carroll*, 48 F.3d 1331, 1338 (4th Cir. 1995) (quoting *Facchiano Constr. Co. v. U.S. Dep't of Labor*, 987 F.2d 206, 210 (3d Cir. 1993)). Thus, an executive order is only "privately enforceable" if it "is issued pursuant to a statutory mandate or delegation of congressional authority." *Id.* (citing, *inter alia, U.S. Dep't of Health & Human Servs. v. Fed. Labor Relations Auth.*, 844 F.2d 1087, 1095-1096 (4th Cir. 1987) (en banc) ("The executive branch . . . simply has no power to make the law; that power rests exclusively with Congress.")).

Executive Order 12829 was issued by President Bush in January 1993. The order "establishes a National Industrial Security Program to safeguard Federal Government classified information that is released to contractors, licensees, and grantees of the United States Government." Exec. Order No. 12829, 58 Fed. Reg. 3479 (Jan. 6, 1993).

The order contains various directives to executive branch officials designed to effectuate this presidential policy objective. Nothing in the order, however, indicates that it was issued pursuant to a statutory mandate or congressional delegation or otherwise suggests that it was intended to create a privately enforceable right of action.

On appeal, Greer has identified no authority suggesting otherwise. Instead he contends, for the first time, that his complaint raises a claim for "common law deceit." Opening Br. 4, 14. Although we retain the discretion to address arguments not previously raised in the first instance before a lower tribunal, "[i]n this circuit, we exercise that discretion sparingly." *In re Under Seal*, 749 F.3d 276, 285 (4th Cir. 2014). "Absent exceptional circumstances . . . we do not consider issues raised for the first time on appeal." *Volvo Const. Equip. N. Am., Inc. v. CLM Equip. Co.*, 386 F.3d 581, 603 (4th Cir. 2004); *see also Muth v. United States*, 1 F.3d 246, 250 (4th Cir. 1993) ("As this court has repeatedly held, issues raised for the first time on appeal generally will not be considered. Exceptions to this general rule are made only in very limited circumstances . . . ." (citations omitted)). The circumstances of this case fall well short of exceptional, and declining to address Greer's newly raised argument will not "result in a miscarriage of justice." *Nat'l Wildlife Fed'n v. Hanson*, 859 F.2d 313, 318 (4th Cir. 1988). We therefore will not address the argument raised for the first time on appeal. Left without a cognizable cause of action, Greer's second theory of liability also fails to state a claim.

* * *

Appendix A

The district court determined that Greer's complaint could not survive the testing of a motion to dismiss. Nothing on appeal indicates this conclusion was in error. Accordingly, the decision of the district court is affirmed. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, SOUTHERN DIVISION, FILED FEBRUARY 21, 2019

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

Case No.: PWG-18-1193

GREGORY GREER,

Plaintiff,

v.

GENERAL DYNAMICS INFORMATION TECHNOLOGY, INC.,

Defendant.

February 21, 2019, Filed

MEMORANDUM OPINION AND ORDER

General Dynamics Information Technology, Inc. ("General Dynamics" or "GDIT") is a company that "provides information technology (IT), systems engineering, professional services and simulation and training to customers in the defense, federal civilian government, health, homeland security, intelligence, state and local government and commercial sectors."

Second Am. Compl. ¶ 4.2, ECF No. 16.[1] General Dynamics employed Plaintiff Gregory Greer from September 2011 until he resigned in early 2015, *id.* ¶ 4.5, at which time Greer was working as a Senior Technical Editor on a General Dynamics contract at the Department of Research Programs within Walter Reed National Military Medical Center ("Walter Reed"), *id.* ¶ 4.7. In Greer's view, his resignation was constructive discharge because General Dynamics forced him to choose between resigning or working under the supervision of a federal employee, which he insists would have been a violation of a federal regulation, exposing him to criminal liability for conspiracy. He claims that, in the process of constructively discharging him, General Dynamics violated the Whistleblower Protection Act, 10 U.S.C. § 2409, and Executive Order 12829. Because he fails to state a claim under the federal statute or the Executive Order, despite having had the opportunity to amend to address his pleading deficiencies, I will grant General Dynamics's Motion to Dismiss, ECF No. 23,[2] and dismiss Greer's case with prejudice.

Background

Lisa Thompson, who is "a GS-12-level federal civilian employee," became Greer's supervisor in late February

1. For purposes of resolving Defendant's Motion to Dismiss, I accept Plaintiff's well-pleaded allegations as true. *See Aziz v. Alcolac*, 658 F.3d 388, 390 (4th Cir. 2011).

2. The parties fully briefed the motion. ECF Nos. 23-1, 24, 25. A hearing is not necessary. *See* Loc. R. 105.6.

or early March 2015. Second Am. Compl. ¶¶ 4.9-4.10. He viewed her supervision as problematic because General Dynamics's "contract with the Department of Research programs" provides "that no one other than a GDIT employee could be Plaintiff's supervisor," and he raised this issue with his "Contracting Officer's Representative, Mr. Jeremy Nelson" on March 12, 2015. *Id.* ¶¶ 4.14-4.15. Ruben Acosta, Deputy Chief of the Department of Research Programs for the United States Navy, told Greer: "Either you work for [Thompson] or you can't work here anymore. Is that clear?" *Id.* ¶¶ 4.9, 4.11. In Greer's view, Acosta's statement "was a *per se* violation of Federal Acquisition Regulation (FAR) 7.503(d)(13). *Id.* ¶ 4.12.

Greer took March 16, 2015 off "to allow GDIT time" to comply with its contract. Second Am. Compl. ¶ 4.15. The next day, his supervisor at General Dynamics, Edith Druktenis, told him to attend a meeting with her and Erin Davis of General Dynamics's Human Resources Department instead of returning to work. *Id.* ¶¶ 4.16-4.17. General Dynamics›s Vice President Julie McGrath also was present. *Id.* ¶ 4.21. Davis informed him that he could either return to work at Walter Reed "and be supervised by Ms. Thompson" or "resign from this position," in which case General Dynamics would "place [him] in the Career Assistance Program" and "[f]ind [him] a new position in the company." *Id.* ¶ 4.20.

Greer "signed the necessary resignation paperwork from his position at Walter Reed" because he believed that to return to Walter Reed "and be supervised by Ms. Thompson . . . would have forced him to conspire and

collude with GDIT in a conspiracy to violate the Federal Acquisition Regulations." *Id.* ¶ 4.22. Asserting that he did not "want[] to give up his employment with GDIT," he explains that he signed the paperwork "based on Ms. Davis' promise to find Plaintiff a new position within GDIT" and his understanding that resignation "was a condition precedent to continued employment by GDIT." *Id.* ¶¶ 4.23-4.26.

Greer was not offered a new position with General Dynamics despite "appl[ying] to well over 100 new positions within GDIT." Second Am. Compl. ¶ 4.29. He claims that, between May 2012 and September 2013, while he was working "on a GDIT contract at the Defense Centers of Excellence for Psychological Health and Traumatic Brain Injury," *id.* ¶ 4.6, General Dynamics "had erroneously informed Plaintiff (through email communication to his GDIT supervisor) that the security clearance GDIT had sponsored Plaintiff for was a Public Trust clearance when in fact the clearance was a Secret clearance." *Id.* ¶ 4.30. He claims that, after he resigned, this misinformation hindered his acquisition of a new position because "the most valuable opportunities Defendant had for Plaintiff were those with the Secret clearance requirement, which Defendant concealed from Plaintiff." *Id.* ¶ 4.27. Once he knew that he had the higher clearance, he claims, he "was immediately able to secure a Secret-level position with a very sophisticated DOD agency working on Secret-level material at a salary exactly one-third higher than his last position at GDIT." *Id.* ¶ 4.37. He claims that not knowing about his clearance prevented him from earning "five years' worth of advanced-level employment" at a higher salary. *Id.* ¶ 4.39.

Greer lodges two claims against General Dynamics. Second Am. Compl. ¶ 5; *see also* Compl., ECF No. 1; Am. Compl., ECF No. 3. First, he claims that "Defendant constructively terminated Plaintiff after Plaintiff made protected disclosures under 10 U.S.C. § 2409(c)(2)," the Defense Contractor Whistleblower Protection Act ("WPA"), that is, he disclosed "that a federal civilian employee had been appointed Plaintiff's supervisor, in violation of FAR 7.503(d)(13). Second Am. Compl. ¶ 5.1.1. He views his resignation as constructive discharge because "further employment by GDIT would [have] require[d] the Plaintiff to conspire and collude with GDIT to violate Federal Acquisition Regulations." *Id.* He alleges that the Department of Defense ("DOD") Office of Inspector General ("OIG") investigated his allegations and "confirmed that Plaintiff had made four legitimate protected-basis claims pursuant to 10 U.S.C. § 2409(c)(2)." Second Am. Compl. ¶ 4.24. Second, he claims that General Dynamics "intentionally and maliciously concealed from Plaintiff Plaintiff's true security clearance level for which Defendant had sponsored Plaintiff and then failed to debrief Plaintiff after Plaintiff's employment separation, in violation of Executive Order 12829 – National Industrial Security Program." *Id.* ¶ 5.1.2.

General Dynamics filed a motion to dismiss Plaintiff's Amended Complaint, after which I held a conference call, permitted Greer to file another amended complaint to address the deficiencies General Dynamics perceived in his pleadings, and found the initial motion to dismiss to be moot. ECF Nos. 8, 15, 17. Greer filed his Second Amended Complaint, and General Dynamics filed the Motion to Dismiss that now is pending, ECF No. 23.

Appendix B

Standard of Review

General Dynamics argues that Greer has not stated a claim against it. Def.'s Mem. 1. Federal Rule of Civil Procedure 12(b)(6) provides for "the dismissal of a complaint if it fails to state a claim upon which relief can be granted." *Velencia v. Drezhlo*, No. RDB-12-237, 2012 U.S. Dist. LEXIS 176754, 2012 WL 6562764, at *4 (D. Md. Dec. 13, 2012). This rule's purpose "is to test the sufficiency of a complaint and not to resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Id.* (quoting *Presley v. City of Charlottesville*, 464 F.3d 480, 483 (4th Cir. 2006)). To that end, the Court bears in mind the requirements of Fed. R. Civ. P. 8, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009), when considering a motion to dismiss pursuant to Rule 12(b)(6). Specifically, a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), and must state "a plausible claim for relief," as "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice," *Iqbal*, 556 U.S. at 678-79. *See Velencia*, 2012 U.S. Dist. LEXIS 176754, 2012 WL 6562764, at *4 (discussing standard from *Iqbal* and *Twombly*). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 663.

Appendix B

Discussion

Whistleblower Claim

> [W]histleblowing involves "the making of a protected disclosure." 5 C.F.R. § 1209.4(b). Federal law prohibits certain agency actions in response to receiving such disclosures from whistleblowers. *See* 5 U.S.C. § 2302. Relevant here, a federal agency cannot take—or fail to take—"a personnel action" due to
>
> > any disclosure of information by an employee . . . which the employee . . . reasonably believes evidences
> >
> > (i) any violation of any law, rule, or regulation . . . .
>
> 5 U.S.C. § 2302(b)(8). As part of these safeguards, an agency cannot fire an employee for making a protected disclosure. *See* 5 U.S.C. § 2302(a).

Flynn v. United States Sec. & Exch. Comm'n, 877 F.3d 200, 203-04 (4th Cir. 2017) (footnote omitted). The elements of a whistleblower claim are:

> "(1) the acting official has the authority to take, recommend, or approve any personnel action; (2) the aggrieved employee made a protected disclosure; (3) the acting official used his authority to take, or refuse to take, a personnel

> action against the aggrieved employee; and (4) the protected disclosure was a contributing factor in the agency's personnel action."

Id. at 204 (quoting *Chambers v. Dep't of Interior*, 602 F.3d 1370, 1376 (Fed. Cir. 2010)).

Here, General Dynamics does not challenge its official's authority to terminate Greer's employment. Assuming for the sake of argument that Greer reasonably believed that a federal employee's supervision of him was in violation of the law, such that he made a protected disclosure, I will turn to whether his resignation was indeed a constructive discharge. *Flynn*, 877 F.3d at 204.

"Constructive discharge occurs when an employer deliberatively makes an employee's working conditions intolerable and thereby forces him to quit his job." *Munday v. Waste Mgmt. of N. Am., Inc.*, 126 F.3d 239, 244 (4th Cir. 1997) (internal quotation marks and citations omitted). The employee must prove that the employer acted deliberately and that his working conditions were intolerable. *Id.* The Court considers "'the objective perspective of a reasonable person'" in determining "whether an employment environment is intolerable." *Lacasse v. Didlake, Inc.*, 712 F. App'x 231, 239 (4th Cir. 2018) (quoting *Heiko v. Colombo Sav. Bank, F.S.B.*, 434 F.3d 249, 262 (4th Cir. 2006)).

Greer alleges that his working conditions were intolerable because working under the supervision of Thompson, a federal employee, "would [have] require[d]

the Plaintiff to conspire and collude with GDIT to violate Federal Acquisition Regulations," specifically FAR 7.503(d)(13). Second Am. Compl. ¶ 5.1.1. Section 7.503 provides:

> (a) Contracts shall not be used for the performance of inherently governmental functions.
>
> . . .
>
> (d) The following is a list of examples of functions generally not considered to be inherently governmental functions. However, certain services and actions that are not considered to be inherently governmental functions may approach being in that category because of the nature of the function, the manner in which the contractor performs the contract, or the manner in which the Government administers contractor performance. . . .
>
> . . .
>
> (13) Contractors participating in any situation where it might be assumed that they are agency employees or representatives.

See https://www.acquisition.gov/content/7503-policy (GSA website).

Greer argues that "[e]nforcement of and compliance with the Federal Acquisition Regulations is a legitimate government function," and "[i]f two or more people agree to take an action that will obstruct a legitimate government function that agreement is a conspiracy and violation of 18 U.S.C. § 371." Pl.'s Opp'n ¶¶ 1.4-1.5. I cannot discern from Greer's pleadings (or his Opposition to General Dynamics's Motion to Dismiss), however, how Thompson's supervision of him violated FAR 7.503(d)(13), nor how he would have been conspiring to violate this regulation by reporting to Thompson.[3] Thus, he has not alleged a forced "conspiracy" that would create intolerable working conditions.

Certainly, his allegations suggest that Thompson's supervision of him may have been a breach of General Dynamics's "contract with the Department of Research programs," which, according to Plaintiff, provides "that no one other than a GDIT employee could be Plaintiff's supervisor." Second Am. Compl. ¶ 4.15. And, it is plausible that an employee could be displeased with and even uncomfortable with a supervisory situation contrary to his employer's government contract. But, those circumstances, albeit undesirable, simply do not rise to the level of intolerable when they do not affect the propriety of the employee's (as opposed to the company's or agency's) actions. *See U.S. Equal Employment Opportunity Comm'n v. MVM, Inc.*, No. TDC-17-2864, 2018 U.S. Dist. LEXIS 81268, 2018 WL 2197727, at *12 (D. Md. May 14,

3. This, of course, also begs the question whether Greer's disclosure was protected, for it would not be protected if the supervision was not in violation of the law.

2018) ("Constructive discharge claims are held to a high standard, and even truly awful working conditions may not rise to the level of constructive discharge." (quoting *Tawwaab v. Va. Linen Serv., Inc.*, 729 F. Supp. 2d 757, 783 (D. Md. 2010))). Thus, Greer could have chosen to continue to work under Thompson's supervision; he was not forced to resign. Consequently, he has not alleged a constructive discharge. *See Munday*, 126 F.3d at 244. Therefore, he has not alleged a personnel action to state a claim for violation of the Whistleblower Protection Act. *See Flynn*, 877 F.3d at 204.

Executive Order 12829 Claim

General Dynamics contends that "Plaintiff's claim under Executive Order 12829 fails because that document does not create a private right of action." Def.'s Mem. 12. Indeed, "a cause of action is a set of facts which would justify judgment for the plaintiff under some recognized legal theory of relief." Paul Mark Sandler & James K. Archibald, *Pleading Causes of Action in Maryland* 1.2 (MICPEL 4th ed. 2008); *see Pepper v. Johns Hopkins Hosp.*, 111 Md. App. 49, 680 A.2d 532, 542 (Md. Ct. Spec. App. 1996), *aff'd*, 346 Md. 679, 697 A.2d 1358 (Md. 1997).

In his claim for a violation of Executive Order 12829, Greer has not identified either a statutory or a common law theory of relief that this Court recognizes. As General Dynamics explains,

> Signed by President George H.W. Bush on January 6, 1993, Executive Order 12829

> established a National Industrial Security Program in order to "safeguard classified information that may be released or has been released to current, prospective, or former contractors, licensees, or grantees of United States agencies." Exec. Order No. 12829 § 101(a), 58 Fed. Reg. 3479 (Jan. 8, 1993). That Order calls for the publication of a National Industrial Security Program Operating Manual ("NISPOM") prescribing "specific requirements, restrictions, and other safeguards that are necessary to preclude unauthorized disclosure and control authorized disclosure of classified information to contractors, licensees, or grantees." *Id.* § 201(a).

Def.'s Mem. 12. And, Greer appears to concede as much, stating in his Opposition that his "complaint concerning the defendant's failure to inform him of his security level is *damnum absque injuria*," Pl.'s Opp'n ¶ 3.1.4, that is, "[l]oss or harm for which there is no legal remedy," *damnum sine injuria*, Black's Law Dictionary (7th ed. 2000) (noting that the phrase is "[a]lso termed *damnum absque injuria*").

Thus, it is undisputed that no cause of action exists in this Court for a violation of Executive Order 12829. Therefore, Greer has not pleaded facts for which this Court could provide relief, if he were to prevail on the merits. As Greer has no cause of action for a violation of Executive Order 12829, *see* Sandler & Archibald, *supra*, at 1, this claim must be dismissed. *See* Fed. R. Civ. P. 12(b)(6).

Additionally, when a plaintiff has had the opportunity to amend in response to a defendant's identification of pleading deficiencies but still fails to state a claim, as Greer has here, dismissal with prejudice is appropriate because another opportunity to amend would be futile. *See Weigel v. Maryland*, 950 F. Supp. 2d 811, 825-26 (D. Md. 2013). Accordingly, dismissal of Greer's claims with prejudice is appropriate. *See id.*

ORDER

Accordingly, it is, this 21st day of February, 2019, hereby ORDERED that

1. Defendant's Motion to Dismiss, ECF No. 23, IS GRANTED;

2. Plaintiff's Complaint IS DISMISSED WITH PREJUDICE; and

3. The Clerk SHALL CLOSE this case.

/s/ Paul W. Grimm
United States District Judge

APPENDIX C — RELEVANT STATUTES AND REGULATIONS 10 USC 2409 AND 48 CFR 7.503

10 USCS § 2409

Current through Public Law 116-149,
approved July 14, 2020.

§ 2409. Contractor employees: protection from reprisal for disclosure of certain information

(a) Prohibition of reprisals.

(1) An employee of a contractor, subcontractor, grantee, or subgrantee or personal services contractor may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing to a person or body described in paragraph (2) information that the employee reasonably believes is evidence of the following:

(A) Gross mismanagement of a Department of Defense contract or grant, a gross waste of Department funds, an abuse of authority relating to a Department contract or grant, or a violation of law, rule, or regulation related to a Department contract (including the competition for or negotiation of a contract) or grant.

(B) Gross mismanagement of a National Aeronautics and Space Administration contract or grant, a gross waste of Administration

funds, an abuse of authority relating to an Administration contract or grant, or a violation of law, rule, or regulation related to an Administration contract (including the competition for or negotiation of a contract) or grant.

(C) A substantial and specific danger to public health or safety.

(2) The persons and bodies described in this paragraph are the persons and bodies as follows:

(A) A Member of Congress or a representative of a committee of Congress.

(B) An Inspector General.

(C) The Government Accountability Office.

(D) An employee of the Department of Defense or the National Aeronautics and Space Administration, as applicable, responsible for contract oversight or management.

(E) An authorized official of the Department of Justice or other law enforcement agency.

(F) A court or grand jury.

(G) A management official or other employee of the contractor or subcontractor who has

the responsibility to investigate, discover, or address misconduct.

(3) For the purposes of paragraph (1)—

(A) an employee who initiates or provides evidence of contractor or subcontractor misconduct in any judicial or administrative proceeding relating to waste, fraud, or abuse on a Department of Defense or National Aeronautics and Space Administration contract or grant shall be deemed to have made a disclosure covered by such paragraph; and

(B) a reprisal described in paragraph (1) is prohibited even if it is undertaken at the request of a Department or Administration official, unless the request takes the form of a nondiscretionary directive and is within the authority of the Department or Administration official making the request.

(b) Investigation of complaints.

(1) A person who believes that the person has been subjected to a reprisal prohibited by subsection (a) may submit a complaint to the Inspector General of the Department of Defense, or the Inspector General of the National Aeronautics and Space Administration in the case of a complaint regarding the National Aeronautics and Space Administration. Unless the Inspector General determines that the

complaint is frivolous, fails to allege a violation of the prohibition in subsection (a), or has previously been addressed in another Federal or State judicial or administrative proceeding initiated by the complainant, the Inspector General shall investigate the complaint and, upon completion of such investigation, submit a report of the findings of the investigation to the person, the contractor concerned, and the head of the agency.

(2)

(A) Except as provided under subparagraph (B), the Inspector General shall make a determination that a complaint is frivolous, fails to allege a violation of the prohibition in subsection (a), or has previously been addressed in another Federal or State judicial or administrative proceeding initiated by the complainant or submit a report under paragraph (1) within 180 days after receiving the complaint.

(B) If the Inspector General is unable to complete an investigation in time to submit a report within the 180-day period specified in subparagraph (A) and the person submitting the complaint agrees to an extension of time, the Inspector General shall submit a report under paragraph (1) within such additional period of time, up to 180 days, as shall be agreed upon between the Inspector General and the person submitting the complaint.

(3) The Inspector General may not respond to any inquiry or disclose any information from or about any person alleging the reprisal, except to the extent that such response or disclosure is—

(A) made with the consent of the person alleging the reprisal;

(B) made in accordance with the provisions of section 552a of title 5 or as required by any other applicable Federal law; or

(C) necessary to conduct an investigation of the alleged reprisal.

(4) A complaint may not be brought under this subsection more than three years after the date on which the alleged reprisal took place.

(c) Remedy and enforcement authority.

(1) Not later than 30 days after receiving an Inspector General report pursuant to subsection (b), the head of the agency concerned shall determine whether there is sufficient basis to conclude that the contractor concerned has subjected the complainant to a reprisal prohibited by subsection (a) and shall either issue an order denying relief or shall take one or more of the following actions:

(A) Order the contractor to take affirmative action to abate the reprisal.

(B) Order the contractor to reinstate the person to the position that the person held before the reprisal, together with compensatory damages (including back pay), employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken.

(C) Order the contractor to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) that were reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal, as determined by the head of the agency.

(2) If the head of an executive agency issues an order denying relief under paragraph (1) or has not issued an order within 210 days after the submission of a complaint under subsection (b), or in the case of an extension of time under paragraph (b)(2)(B), not later than 30 days after the expiration of the extension of time, and there is no showing that such delay is due to the bad faith of the complainant, the complainant shall be deemed to have exhausted all administrative remedies with respect to the complaint, and the complainant may bring a de novo action at law or equity against the contractor to seek compensatory damages and other relief available under this section in the appropriate district court of the United States, which shall have jurisdiction over such an action

without regard to the amount in controversy. Such an action shall, at the request of either party to the action, be tried by the court with a jury. An action under this paragraph may not be brought more than two years after the date on which remedies are deemed to have been exhausted.

(3) An Inspector General determination and an agency head order denying relief under paragraph (2) shall be admissible in evidence in any de novo action at law or equity brought pursuant to this subsection.

(4) Whenever a person fails to comply with an order issued under paragraph (1), the head of the agency shall file an action for enforcement of such order in the United States district court for a district in which the reprisal was found to have occurred. In any action brought under this paragraph, the court may grant appropriate relief, including injunctive relief, compensatory and exemplary damages, and reasonable attorney fees and costs. The person upon whose behalf an order was issued may also file such an action or join in an action filed by the head of the agency.

(5) Any person adversely affected or aggrieved by an order issued under paragraph (1) may obtain review of the order's conformance with this subsection, and any regulations issued to carry out this section, in the United States court of appeals for a circuit in which the reprisal is alleged in the order to have occurred. No petition seeking such review may be

filed more than 60 days after issuance of the order by the head of the agency. Review shall conform to chapter 7 of title 5 [5 USCS §§ 701 et seq.]. Filing such an appeal shall not act to stay the enforcement of the order of the head of an agency, unless a stay is specifically entered by the court.

(6) The legal burdens of proof specified in section 1221(e) of title 5 shall be controlling for the purposes of any investigation conducted by an Inspector General, decision by the head of an agency, or judicial or administrative proceeding to determine whether discrimination prohibited under this section has occurred.

(7) The rights and remedies provided for in this section may not be waived by any agreement, policy, form, or condition of employment.

(d) Notification of employees. The Secretary of Defense and the Administrator of the National Aeronautics and Space Administration shall ensure that contractors and subcontractors of the Department of Defense and the National Aeronautics and Space Administration, as applicable, inform their employees in writing of the rights and remedies provided under this section, in the predominant native language of the workforce.

(e) Exceptions.

(1) This section shall not apply to any element of the intelligence community, as defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 3003(4)).

(2) This section shall not apply to any disclosure made by an employee of a contractor, subcontractor, or grantee of an element of the intelligence community if such disclosure—

(A) relates to an activity of an element of the intelligence community; or

(B) was discovered during contract, subcontract, or grantee services provided to an element of the intelligence community.

(f) Construction. Nothing in this section may be construed to authorize the discharge of, demotion of, or discrimination against an employee for a disclosure other than a disclosure protected by subsection (a) or to modify or derogate from a right or remedy otherwise available to the employee.

(g) Definitions. In this section:

(1) The term "agency" means an agency named in section 2303 of this title [10 USCS § 2303].

(2) The term "head of an agency" has the meaning provided by section 2302(1) of this title [10 USCS § 2302(1)].

(3) The term "contract" means a contract awarded by the head of an agency.

(4) The term "contractor" means a person awarded a contract with an agency.

(5) The term "Inspector General" means an Inspector General appointed under the Inspector General Act of 1978 and any Inspector General that receives funding from, or has oversight over contracts awarded for or on behalf of, the Secretary of Defense.

(6) The term "abuse of authority" means the following:

> **(A)** An arbitrary and capricious exercise of authority that is inconsistent with the mission of the Department of Defense or the successful performance of a Department contract or grant.
>
> **(B)** An arbitrary and capricious exercise of authority that is inconsistent with the mission of the National Aeronautics and Space Administration or the successful performance of an Administration contract or grant.

(7) The term "grantee" means a person awarded a grant with an agency.

Appendix C

48 CFR 7.503

This document is current through the July 10, 2020 issue of the Federal Register with the exception of the amendments appearing at 85 FR 41416, 85 FR 41427, and 85 FR 41780. Title 3 is current through July 2, 2020.

7.503 Policy.

(a) Contracts shall not be used for the performance of inherently governmental functions.

(b) Agency decisions which determine whether a function is or is not an inherently governmental function may be reviewed and modified by appropriate Office of Management and Budget officials.

(c) The following is a list of examples of functions considered to be inherently governmental functions or which shall be treated as such. This list is not all inclusive:

(1) The direct conduct of criminal investigations.

(2) The control of prosecutions and performance of adjudicatory functions other than those relating to arbitration or other methods of alternative dispute resolution.

(3) The command of military forces, especially the leadership of military personnel who are members of the combat, combat support, or combat service support role.

(4) The conduct of foreign relations and the determination of foreign policy.

(5) The determination of agency policy, such as determining the content and application of regulations, among other things.

(6) The determination of Federal program priorities for budget requests.

(7) The direction and control of Federal employees.

(8) The direction and control of intelligence and counter-intelligence operations.

(9) The selection or non-selection of individuals for Federal Government employment, including the interviewing of individuals for employment.

(10) The approval of position descriptions and performance standards for Federal employees.

(11) The determination of what Government property is to be disposed of and on what terms (although an agency may give contractors authority to dispose of property at prices within specified ranges and subject to other reasonable conditions deemed appropriate by the agency).

(12) In Federal procurement activities with respect to prime contracts --

(i) Determining what supplies or services are to be acquired by the Government (although an agency may give contractors authority to acquire supplies at prices within specified ranges and subject to other reasonable conditions deemed appropriate by the agency);

(ii) Participating as a voting member on any source selection boards;

(iii) Approving any contractual documents, to include documents defining requirements, incentive plans, and evaluation criteria;

(iv) Awarding contracts;

(v) Administering contracts (including ordering changes in contract performance or contract quantities, taking action based on evaluations of contractor performance, and accepting or rejecting contractor products or services);

(vi) Terminating contracts;

(vii) Determining whether contract costs are reasonable, allocable, and allowable; and

(viii) Participating as a voting member on performance evaluation boards.

(13) The approval of agency responses to Freedom of Information Act requests (other than routine

responses that, because of statute, regulation, or agency policy, do not require the exercise of judgment in determining whether documents are to be released or withheld), and the approval of agency responses to the administrative appeals of denials of Freedom of Information Act requests.

(14) The conduct of administrative hearings to determine the eligibility of any person for a security clearance, or involving actions that affect matters of personal reputation or eligibility to participate in Government programs.

(15) The approval of Federal licensing actions and inspections.

(16) The determination of budget policy, guidance, and strategy.

(17) The collection, control, and disbursement of fees, royalties, duties, fines, taxes, and other public funds, unless authorized by statute, such as 31 U.S.C. 3718 (relating to private collection contractors and private attorney collection services), but not including--

> **(i)** Collection of fees, fines, penalties, costs, or other charges from visitors to or patrons of mess halls, post or base exchange concessions, national parks, and similar entities or activities, or from other persons, where the amount to be collected is easily calculated or predetermined and the funds collected can be easily controlled

using standard case management techniques; and

(ii) Routine voucher and invoice examination.

(18) The control of the treasury accounts.

(19) The administration of public trusts.

(20) The drafting of Congressional testimony, responses to Congressional correspondence, or agency responses to audit reports from the Inspector General, the Government Accountability Office, or other Federal audit entity.

(d) The following is a list of examples of functions generally not considered to be inherently governmental functions. However, certain services and actions that are not considered to be inherently governmental functions may approach being in that category because of the nature of the function, the manner in which the contractor performs the contract, or the manner in which the Government administers contractor performance. This list is not all inclusive:

(1) Services that involve or relate to budget preparation, including workload modeling, fact finding, efficiency studies, and should-cost analyses, etc.

(2) Services that involve or relate to reorganization and planning activities.

(3) Services that involve or relate to analyses, feasibility studies, and strategy options to be used by agency personnel in developing policy.

(4) Services that involve or relate to the development of regulations.

(5) Services that involve or relate to the evaluation of another contractor's performance.

(6) Services in support of acquisition planning.

(7) Contractors providing assistance in contract management (such as where the contractor might influence official evaluations of other contractors).

(8) Contractors providing technical evaluation of contract proposals.

(9) Contractors providing assistance in the development of statements of work.

(10) Contractors providing support in preparing responses to Freedom of Information Act requests.

(11) Contractors working in any situation that permits or might permit them to gain access to confidential business information and/or any other sensitive information (other than situations covered by the National Industrial Security Program described in 4.402(b)).

(12) Contractors providing information regarding agency policies or regulations, such as attending conferences on behalf of an agency, conducting community relations campaigns, or conducting agency training courses.

(13) Contractors participating in any situation where it might be assumed that they are agency employees or representatives.

(14) Contractors participating as technical advisors to a source selection board or participating as voting or nonvoting members of a source evaluation board.

(15) Contractors serving as arbitrators or providing alternative methods of dispute resolution.

(16) Contractors constructing buildings or structures intended to be secure from electronic eavesdropping or other penetration by foreign governments.

(17) Contractors providing inspection services.

(18) Contractors providing legal advice and interpretations of regulations and statutes to Government officials.

(19) Contractors providing special non-law enforcement, security activities that do not directly involve criminal investigations, such as prisoner detention or transport and non-military national security details.

(e) Agency implementation shall include procedures requiring the agency head or designated requirements official to provide the contracting officer, concurrent with transmittal of the statement of work (or any modification thereof), a written determination that none of the functions to be performed are inherently governmental. This assessment should place emphasis on the degree to which conditions and facts restrict the discretionary authority, decision-making responsibility, or accountability of Government officials using contractor services or work products. Disagreements regarding the determination will be resolved in accordance with agency procedures before issuance of a solicitation.

APPENDIX D — EXECUTIVE ORDER 12829, OFFICE OF THE PRESIDENT OF THE UNITED STATES, JANUARY 6, 1993

58 FR 3479

VOL. 58, No. 05, Part XV, Friday, January 8, 1993

Presidential Documents

Title: Title 3 –
The President
National Industrial Security Program

Agency

PRESIDENT OF THE UNITED STATES

Identifier: Executive Order 12829 of January 6, 1993

Text

This order establishes a National Industrial Security Program to safeguard Federal Government classified information that is released to contractors, licensees, and grantees of the United States Government. To promote our national interests, the United States Government issues contracts, licenses, and grants to nongovernment organizations. When these arrangements require access to classified information, the national security requires that this information be safeguarded in a manner equivalent to its protection within the executive branch of Government. The national security also requires that our industrial security program promote the economic and technological interests of the United States. Redundant, overlapping,

or unnecessary requirements impede those interests. Therefore, the National Industrial Security Program shall serve as a single, integrated, cohesive industrial security program to protect classified information and to preserve our Nation's economic and technological interests.

Therefore, by the authority vested in me as President by the Constitution and the laws of the United States of America, including the Atomic Energy Act of 1954, as amended (42 U.S.C. 2011-2286), the National Security Act of 1947, as amended (codified as amended in scattered sections of the United States Code), and the Federal Advisory Committee Act, as amended (5 U.S.C. App. 2), it is hereby ordered as follows:

PART 1. ESTABLISHMENT AND POLICY

Section 101. *Establishment.* (a) There is established a National Industrial Security Program. The purpose of this program is to safeguard classified information that may be released or has been released to current, prospective, or former contractors, licensees, or grantees of United States agencies. For the purposes of this order, the terms "contractor, licensee, or grantee" means current, prospective, or former contractors, licensees, or grantees of United States agencies. The National Industrial Security Program shall be applicable to all executive branch departments and agencies.

(b) The National Industrial Security Program shall provide for the protection of information classified pursuant to Executive Order No. 12356 of April 2, 1982, or its successor, and the Atomic Energy Act of 1954, as amended.

(c) For the purposes of this order, the term "contractor" does not include individuals engaged under personal services contracts.

Sec. 102. *Policy Direction.* (a) The National Security Council shall provide overall policy direction for the National Industrial Security Program.

(b) The Director of the Information Security Oversight Office, established under Executive Order No. 12356 of April 2, 1982, shall be responsible for implementing and monitoring the National Industrial Security Program and shall:

(1) develop, in consultation with the agencies, and promulgate subject to the approval of the National Security Council, directives for the implementation of this order, which shall be binding on the agencies;

(2) oversee agency, contractor, licensee, and grantee actions to ensure compliance with this order and implementing directives;

(3) review all agency implementing regulations, internal rules, or guidelines. The Director shall require any regulation, rule, or guideline to be changed if it is not consistent with this order or implementing directives. Any such decision by the Director may be appealed to the National Security Council. The agency regulation, rule, or guideline shall remain in effect pending a prompt decision on the appeal;

(4) have the authority, pursuant to terms of applicable contracts, licenses, grants, or regulations, to conduct on-site reviews of the implementation of the National Industrial Security Program by each agency, contractor, licensee, and grantee that has access to or stores classified information and to require of each agency, contractor, licensee, and grantee those reports, information, and other cooperation that may be necessary to fulfill the Director's responsibilities. If these reports, inspections, or access to specific classified information, or other forms of cooperation, would pose an exceptional national security risk, the affected agency head or the senior official designated under section 203(a) of this order may request the National Security Council to deny access to the Director. The Director shall not have access pending a prompt decision by the National Security Council;

(5) report any violations of this order or its implementing directives to the head of the agency or to the senior official designated under section 203(a) of this order so that corrective action, if appropriate, may be taken. Any such report pertaining to the implementation of the National Industrial Security Program by a contractor, licensee, or grantee shall be directed to the agency that is exercising operational oversight over the contractor, licensee, or grantee under section 202 of this order;

(6) consider and take action on complaints and suggestions from persons within or outside the Government with respect to the administration of the National Industrial Security Program;

(7) consider, in consultation with the advisory committee established by this order, affected agencies, contractors, licensees, and grantees, and recommend to the President through the National Security Council changes to this order; and

(8) report at least annually to the President through the National Security Council on the implementation of the National Industrial Security Program.

(c) Nothing in this order shall be construed to supersede the authority of the Secretary of Energy or the Nuclear Regulatory Commission under the Atomic Energy Act of 1954, as amended, or the authority of the Director of Central Intelligence under the National Security Act of 1947, as amended, or Executive Order No. 12333 of December 8, 1981.

Sec. 103. *National Industrial Security Program Policy Advisory Committee.* (a) *Establishment.* There is established the National Industrial Security Program Policy Advisory Committee ("Committee"). The Director of the Information Security Oversight Office shall serve as Chairman of the Committee and appoint the members of the Committee. The members of the Committee shall be the representatives of those departments and agencies most affected by the National Industrial Security Program and nongovernment representatives of contractors, licensees, or grantees involved with classified contracts, licenses, or grants, as determined by the Chairman.

(b) *Functions.* (1) The Committee members shall advise the Chairman of the Committee on all matters concerning

the policies of the National Industrial Security Program, including recommended changes to those policies as reflected in this order, its implementing directives, or the operating manual established under this order, and serve as a forum to discuss policy issues in dispute.

(2) The Committee shall meet at the request of the Chairman, but at least twice during the calendar year.

(c) *Administration.* (1) Members of the Committee shall serve without compensation for their work on the Committee. However, nongovernment members may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by law for persons serving intermittently in the Government service (5 U.S.C. 5701-5707).

(2) To the extent permitted by law and subject to the availability of funds, the Administrator of General Services shall provide the Committee with administrative services, facilities, staff, and other support services necessary for the performance of its functions.

(d) *General.* Notwithstanding any other Executive order, the functions of the President under the Federal Advisory Committee Act, as amended, except that of reporting to the Congress, which are applicable to the Committee, shall be performed by the Administrator of General Services in accordance with the guidelines and procedures established by the General Services Administration.

Appendix D

PART 2. OPERATIONS

Sec. 201. *National Industrial Security Program Operating Manual.* (a) The Secretary of Defense, in consultation with all affected agencies and with the concurrence of the Secretary of Energy, the Nuclear Regulatory Commission, and the Director of Central Intelligence, shall issue and maintain a National Industrial Security Program Operating Manual ("Manual"). The Secretary of Energy and the Nuclear Regulatory Commission shall prescribe and issue that portion of the Manual that pertains to information classified under the Atomic Energy Act of 1954, as amended. The Director of Central Intelligence shall prescribe and issue that portion of the Manual that pertains to intelligence sources and methods, including Sensitive Compartmented Information.

(b) The Manual shall prescribe specific requirements, restrictions, and other safeguards that are necessary to preclude unauthorized disclosure and control authorized disclosure of classified information to contractors, licensees, or grantees. The Manual shall apply to the release of classified information during all phases of the contracting process including bidding, negotiation, award, performance, and termination of contracts, the licensing process, or the grant process, with or under the control of departments or agencies.

(c) The Manual shall also prescribe requirements, restrictions, and other safeguards that are necessary to protect special classes of classified information, including Restricted Data, Formerly Restricted Data, intelligence sources and methods information, Sensitive

Compartmented Information, and Special Access Program information.

(d) In establishing particular requirements, restrictions, and other safeguards within the Manual, the Secretary of Defense, the Secretary of Energy, the Nuclear Regulatory Commission, and the Director of Central Intelligence shall take into account these factors: (i) the damage to the national security that reasonably could be expected to result from an unauthorized disclosure; (ii) the existing or anticipated threat to the disclosure of information; and (iii) the short- and long-term costs of the requirements, restrictions, and other safeguards.

(e) To the extent that is practicable and reasonable, the requirements, restrictions, and safeguards that the Manual establishes for the protection of classified information by contractors, licensees, and grantees shall be consistent with the requirements, restrictions, and safeguards that directives implementing Executive Order No. 12356 of April 2, 1982, or the Atomic Energy Act of 1954, as amended, establish for the protection of classified information by agencies. Upon request by the Chairman of the Committee, the Secretary of Defense shall provide an explanation and justification for any requirement, restriction, or safeguard that results in a standard for the protection of classified information by contractors, licensees, and grantees that differs from the standard that applies to agencies.

(f) The Manual shall be issued no later than 1 year from the issuance of this order.

Appendix D

Sec. 202. *Operational Oversight.* (a) The Secretary of Defense shall serve as Executive Agent for inspecting and monitoring the contractors, licensees, and grantees who require or will require access to, or who store or will store classified information; and for determining the eligibility for access to classified information of contractors, licensees, and grantees and their respective employees. The heads of agencies shall enter into agreements with the Secretary of Defense that establish the terms of the Secretary's responsibilities on behalf of these agency heads.

(b) The Director of Central Intelligence retains authority over access to intelligence sources and methods, including Sensitive Compartmented Information. The Director of Central Intelligence may inspect and monitor contractor, licensee, and grantee programs and facilities that involve access to such information or may enter into written agreements with the Secretary of Defense, as Executive Agent, to inspect and monitor these programs or facilities, in whole or in part, on the Director's behalf.

(c) The Secretary of Energy and the Nuclear Regulatory Commission retain authority over access to information under their respective programs classified under the Atomic Energy Act of 1954, as amended. The Secretary or the Commission may inspect and monitor contractor, licensee, and grantee programs and facilities that involve access to such information or may enter into written agreements with the Secretary of Defense, as Executive Agent, to inspect and monitor these programs or facilities, in whole or in part, on behalf of the Secretary or the Commission, respectively.

(d) The Executive Agent shall have the authority to issue, after consultation with affected agencies, standard forms or other standardization that will promote the implementation of the National Industrial Security Program.

Sec. 203. *Implementation.* (a) The head of each agency that enters into classified contracts, licenses, or grants shall designate a senior agency official to direct and administer the agency's implementation and compliance with the National Industrial Security Program.

(b) Agency implementing regulations, internal rules, or guidelines shall be consistent with this order, its implementing directives, and the Manual. Agencies shall issue these regulations, rules, or guidelines no later than 180 days from the issuance of the Manual. They may incorporate all or portions of the Manual by reference.

(c) Each agency head or the senior official designated under paragraph (a) above shall take appropriate and prompt corrective action whenever a violation of this order, its implementing directives, or the Manual occurs.

(d) The senior agency official designated under paragraph (a) above shall account each year for the costs within the agency associated with the implementation of the National Industrial Security Program. These costs shall be reported to the Director of the Information Security Oversight Office, who shall include them in the reports to the President prescribed by this order.

(e) The Secretary of Defense, with the concurrence of the Administrator of General Services, the Administrator of the National Aeronautics and Space Administration, and such other agency heads or officials who may be responsible, shall amend the Federal Acquisition Regulation to be consistent with the implementation of the National Industrial Security Program.

(f) All contracts, licenses, or grants that involve access to classified information and that are advertised or proposed following the issuance of agency regulations, rules, or guidelines described in paragraph (b) above shall comply with the National Industrial Security Program. To the extent that is feasible, economical, and permitted by law, agencies shall amend, modify, or convert preexisting contracts, licenses, or grants, or previously advertised or proposed contracts, licenses, or grants, that involve access to classified information for operation under the National Industrial Security Program. Any direct inspection or monitoring of contractors, licensees, or grantees specified by this order shall be carried out pursuant to the terms of a contract, license, grant, or regulation.

(g) Executive Order No. 10865 of February 20, 1960, as amended by Executive Order No. 10909 of January 17, 1961, and Executive Order No. 11382 of November 27, 1967, is hereby amended as follows:

(1) Section 1(a) and (b) are revoked as of the effective date of this order.

(2) Section 1(c) is renumbered as Section 1 and is amended to read as follows:

> "Section 1. When used in this order, the term 'head of a department' means the Secretary of State, the Secretary of Defense, the Secretary of Transportation, the Secretary of Energy, the Nuclear Regulatory Commission, the Administrator of the National Aeronautics and Space Administration, and, in section 4, the Attorney General. The term 'head of a department' also means the head of any department or agency, including but not limited to those referenced above with whom the Department of Defense makes an agreement to extend regulations prescribed by the Secretary of Defense concerning authorizations for access to classified information pursuant to Executive Order No. 12829."

(3) Section 2 is amended by inserting the words "pursuant to Executive Order No. 12829" after the word "information."

(4) Section 3 is amended by inserting the words "pursuant to Executive Order No. 12829" between the words "revoked" and "by" in the second clause of that section.

(5) Section 6 is amended by striking out the words "The Secretary of State, the Secretary of Defense, the Administrator of the National Aeronautics and Space Administration, the Secretary of Transportation, or his representative, or the head of any other department or agency of the United States with which the Department of Defense makes an agreement under section (1)(b)," at

the beginning of the first sentence, and inserting in their place "The head of a department of the United States . . . ."

(6) Section 8 is amended by striking out paragraphs (1) through (7) and inserting in their place ". . . the deputy of that department, or the principal assistant to the head of that department, as the case may be."

(h) All delegations, rules, regulations, orders, directives, agreements, contracts, licenses, and grants issued under preexisting authorities, including section 1(a) and (b) of Executive Order No. 10865 of February 20, 1960, as amended, by Executive Order No. 10909 of January 17, 1961, and Executive Order No. 11382 of November 27, 1967, shall remain in full force and effect until amended, modified, or terminated pursuant to authority of this order.

(i) This order shall be effective immediately.

/s/ George Bush

THE WHITE HOUSE,

January 6, 1993.

[FR Doc. 93-609 Filed 1-7-93; 10:52 am]

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FEDERAL REGISTER