NO. _____

In The
Supreme Court of the United States

DENNIS MCLAIN,

Petitioner,

v.

Secretary,
DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Title VII requires that "all personnel actions effecting employees or applicants for employment … in executive agencies as defined in Title 5 … shall be made free from any discrimination based on race, color, religion, sex or national origin." *See* 42 U.S.C. § 2000e-16(a)) (emphasis added). *Babb v. Wilkie,* 589 U.S. 399 (2020) examined that language and its syntax under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 633a(a). The Eleventh Circuit subsequently held that *Babb v. Wilkie* is applicable to Title VII. *Babb v. Sec'y,* 992 F.3d 1193 (11th Cir. 2021).

The questions presented are:

1. Whether, when instructing a jury on causation in a federal employee Title VII claim under 42 U.S.C. § 2000e-16(a) it is error to fail to instruct the jury on the causation standard delineated in *Babb v. Wilkie,* 589 U.S. 399, 402-411 (2020), but rather to instruct them based on the simple and traditional but-for causation standard in *Gross v. FBL Financial Services, Inc.,* 557 U.S. 167 (2009) and *University of Texas Southwestern Medical Center v. Nassar,* 570 U.S. 338 (2013) which was expressly rejected in *Babb*.

2. Whether in a federal employee retaliation claim it is error to: use the simple and traditional but-for causation standard to admit evidence of plaintiff's protected whistleblowing and union activity, at least without limiting instructions and to exclude corroborative evidence under F.R.E. 404(b) and 801(d)(2)(D) which tended to prove differential

treatment was based on consideration of the Petitioner's EEO activity and identity and absence of mistake.

Subsidiary questions are whether the language and syntax of Title VII should be interpreted as it was under the ADEA, and whether such language bans retaliation in federal employment.

PARTIES

The petitioner is Dennis McLain.

The respondent is the Secretary, Department of Veterans Affairs.

RELATED PROCEEDINGS

- *McLain v. Shulkin, Sec'y of the Dep't of Veterans Affairs*, No 8:17-cv-1283-WFJ-CPT, United States District Court for the Middle District of Florida. Judgment entered March 17, 2022.
- *McLain v. Sec'y, Dep't. of Veterans Affairs*, No. 22-11667, U.S. Court of Appeals for the Eleventh Circuit. Judgment entered September 1, 2023.
- *McLain v. Sec'y, Dep't. of Veterans Affairs*, No. 22-11667, U.S. Court of Appeals for the Eleventh Circuit. Judgment entered December 15, 2023.

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PETITION FOR WRIT OF CERTIORARI

This case presents the Court with an opportunity to provide further necessary coherence and clarity to the statutory framework applicable to federal-sector discrimination and retaliation claims.

Federal employees' Title VII rights are determined under a statute which requires that "all personnel actions affecting employees or applicants for employment … in executive agencies as defined in Title 5 … shall be made free from any discrimination based on race, color, religion, sex or national origin." 42 U.S.C. § 2000e-16(a).

Babb v. Wilkie, 589 U.S. 399 (2020) interpreted the "shall be made free from any discrimination" language while considering the statutory syntax in the context of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 633a(a), but federal employees filing claims under Title VII with the same critical language and statutory syntax face, at best, differing standards of proof depending on where they file, and in every place, very likely face a denial of legal elements essential to the just determination of their rights. The only post-*Babb* federal appellate courts to consider and resolve the textual differences between the private- and federal-sector Title VII provisions have held that the "shall be made free from any discrimination" language in Title VII cases has the same interpretation as the one this Court determined in *Babb v. Wilkie*. *See Babb v. Sec'y,* 992 F.3d 1193

(11th Cir. 2021); *Kocher v. Sec'y, U.S. Dept. of Veterans Affairs,* No.23-1108, 2023 WL 8469762, at*1 (3d Cir. Dec. 7,2023); *Huff v. Buttigieg,* 42 F.4th 638, 644-46 (7th Cir. 2022). One Sixth Circuit district court has partially applied *Babb* to the injunctive relief portion of a retaliation claim under Title VII, but a pretext standard to full relief. *See e.g, Zickefoose v. Austin, III, Sec'y, Dept. of Defense,* 2:22-cv-1935 2023 WL 7167001 (October 31, 2023). Conversely, several District Court cases have refused to apply *Babb v. Wilkie* to Title VII cases. *See Hoang v. Wilkie,* 1:18-cv-01755 RM-KLM 2020 WL 6156563, at *9 (D.Colo. Oct. 21, 2020); *Johnson v. McDonough,* 1:19-cv-01568-APM, at *3-5 (D.D.C. Nov. 11, 2021). However, even where it is recognized that *Babb* should control, several have upheld summary judgment decisions based on a failure to establish differential treatment, generally where the plaintiff's theory is a *McDonnell Douglas* comparator analysis, but no District or as yet Appellate Court is applying *Babb* completely. *See e.g.*, App. 1a-3a.

Several district courts have applied *Babb* in a way which conflicts with *Babb* at the summary judgment stage. *See e.g.*, *Terrell v. McDonough*, No. 8:20-CV-64-WFJ-AEP, 2021 WL 4502795, at *3-8 (M.D. Fla. Oct. 1, 2021); *Bell v. McDonough*, No. 8:20-CV-1274-VMC-CPT, 2022 WL 485224, at *6-10 (M.D. Fla. Feb. 17, 2022); *Babb v. McDonough*, No. 8:14-CV-1732-VMC-TBM, 2022 WL 3577359, at *7-15 (M.D. Fla. Aug. 19, 2022).

Below, the panel of the Eleventh Circuit Court of Appeals was aware that the Circuit had previously adopted *Babb v. Wilkie* in Title VII cases. Yet it upheld jury instructions based upon the but-for test described in *Gross* and *Nassar*, and as further described in *Bostock v. Clayton County, Georgia,* 590 U.S. 644 (2020), as the simple and traditional but-for test, while finding the Petitioner was not prejudicially harmed by the application of a causation standard expressly rejected by this Court in *Babb*. App. 1a. A factor in determining whether to grant certiorari is whether a Court of Appeals has decided an important federal question in a way that conflicts with relevant decisions of this Court. Sup. Ct. R. 10(c). The Petitioner, and any other federal employee, that has their rights decided by the causation standard in the jury instructions given here, in *McLain*, App. 8a-22a, will be deprived of a jury capable of understanding and deciding critical material facts including whether differential treatment has to affect the ultimate decision, and whether once differential treatment is shown, the Secretary has to establish the same decision defense. Where, as here, jury instructions do not accurately instruct the jury on causation elements of a federal statute, nor accurately reflect what a federal plaintiff must prove, there is plain error. *See e.g., Carter v. Atlanta and St. A.B. Ry. Co.,* 338 U.S. 430 (1949). The Equal Employment Opportunity Commission (EEOC) and the Merit Systems Protection Board (MSPB) required the same decision defense before the *Babb* decision. *See Complainant v.*

Dep't. of Homeland Sec., EEOC DOC 9720140014, 2015 WL 5042782, at *5-6 (Aug.19, 2015) (retaliation under Title VII or ADEA); *Savage v. Dep't of Army,* 122 M.S.R.P. 612, 634 (Sept. 3, 2015) (retaliation under Title VII).

In the present case the government's demand for the simple and traditional but-for causation standard rejected by *Babb* was not only accepted by the District Court in jury instructions, it was used to admit cumulative evidence of plaintiff's protected whistleblowing and union activity, without instruction, and tarnished the Petitioner by turning statutorily encouraged and protected conduct into a form of "bad acts" in order to prejudice the Petitioner to the jury with non-EEO conduct which the jury might then feel justified denial of promotions while denying plaintiff corroborative evidence under Fed. R. Evid. 404(b) and 801(d)(2) which tended to prove EEO activity was considered when treating the plaintiff differently, and helped to show actual identity and absence of mistake.

This case presents questions of fundamental importance to the resolution of the Title VII cases of thousands of federal employees. As this Court held in *Anderson v. Liberty Lobby,* 477 U.S. 242 (1986) the substantive law determines material facts. Yet no federal employee can know what that law is under Title VII until these issues are faithfully resolved. While *Liberty Lobby,* unlike this case, was a summary

judgment case, juries, judges and parties must know the substantive law to determine the material facts.

As a result, federal employees at best face different burdens of proof depending on where they work and may file a claim and at worse will, as here, lose some or all of their rights under 42 U.S.C. § 2000e-16(a). As will be discussed, for nearly 50 years since Congress enacted this statute and despite this Court's efforts to protect federal employee rights, they have been denied. Waiting for recalcitrant executive agencies and misled courts to follow the basic holding of *Babb* serves only to foster confusion and deny employees justice. *See* Sup. Ct. R. 10(a), (c).

Petitioner respectfully prays that this Court grant a writ of certiorari to review the judgment and opinions of the United States Court of Appeals for the Eleventh Circuit entered on September 1, 2023 upholding errors by the District Court and resolve these important questions.

OPINIONS AND ORDERS BELOW

The September 1, 2023 opinion of the Court of Appeals, which was not designated for publication, is set out at pp.1a-3a of the Appendix. The December 15, 2023 order of the Court of Appeals denying rehearing or rehearing en banc is set out at pp.5a-6a of the Appendix.

JURISDICTION

The decision of the Court of Appeals was entered on September 1, 2023. A timely petition for rehearing and rehearing en banc was denied on December 15, 2023. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 717(a) of Title VII of the Civil Rights Act of 1964 (hereafter, "Title VII"), 42 U.S.C. § 2000e-16(a), provides in pertinent part: "All personnel actions affecting employees or applicants for employment . . . in executive agencies as defined in section 105 of Title 5 . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin."

The private sector retaliation statute 42 U.S.C. § 2000e-3(a) states:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

5 U.S.C. § 2302(b) provides in pertinent part:

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority--

* * *

(8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of—

(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences—

(i) any violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,

if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs;

* * *

(9) take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of—

> (A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation—
>
> > (i) with regard to remedying a violation of paragraph (8);
>
> (B) testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (A)(I) OR (II);
>
> (C) cooperating with or disclosing information to the Inspector General (or any other component responsible for internal investigation or review) of an agency, or the Special Counsel, in accordance with applicable provisions of law; or
>
> (D) refusing to obey an order that would require the individual to violate a law, rule, or regulation;

* * *

STATEMENT OF THE CASE

Petitioner McLain commenced this action on May 30, 2017 in the Middle District of Florida, alleging that he was subject to retaliation, and a retaliatory hostile work environment in violation of Title VII of the Civil Rights Act applicable to federal employees. Specifically, he alleged that he was the victim of retaliation because of his protected EEO activity and a retaliatory hostile work environment, in violation of the same statutory law.

On July 28, 2019, summary judgment was denied under the *Nassar* causation standard. After being delayed pending the *Babb* decisions and a period of extensive briefing of *Babb*, Supreme Court precedent concerning the same-decision defense and the equities of shifting the burden, as well as proposed jury instructions, a trial lasted nine days. The verdict was for the Secretary on March 16, 2022.

A. Factual Background

1. At material times, Petitioner Dennis McLain has been an employee with the VA for 26 years. He is a registered nurse. He worked in a critical care unit for much of his career. In 2013, he was injured and placed on light duty. Management asked him to work in the National Nurse's Union (NNU), the union for the more than one thousand registered nurses. He later became the director of the NNU. He is a VA employee, paid by the VA and not the union. Within the union it was his responsibility to represent employees in grievances and other matters including

discrimination issues. He is also involved as an employee and a union official in making whistleblowing disclosures especially when patient health and safety or fraud, waste or abuse is involved. He was on major committees and projects with, *inter alia,* Kathleen Fogarty, the Director of the hospital and upper management including the Nurse Executive, Laureen Doloresco, Chief Nurses (CN) and nurse managers and learned the overall operation of the hospital and how its services interacted. Prior union directors, without EEO activity, have been promoted to high positions.

2. Problems began after the Plaintiff engaged in EEO activity against Nurse Executive Lorraine Doloresco. In September 2014 he raised Doloresco's racially based reassignment of Heidi Salem to Director Kathleen Fogarty and Doloresco. Doloresco separately criticized him to Fogarty. Shortly after the initial events McLain was denied an opportunity to interview for the CN of Mental Health due to an alleged calculation error by Doloresco's assistant.

3. McLain engaged in further EEO activity in the fall of 2014 representing Claudette Patricio who alleged racial discrimination (Asian) and retaliation by Doloresco in a denial of a promotion. On January 25, 2015 McLain discussed Patricio and a broader lack of Asians and black Americans in management with Doloresco and Michael Benning. On February 2, 2015, McLain raised the broader issue to interim director

Marjorie Hedstrom and Doloresco. As with Fogarty, Doloresco separately replied to Hedstrom claiming these "persistent attacks on nursing leadership were the top concern of Nurse Managers and Chief Nurses". She confidentially copied five key confidants, CNs Elaine Cohen, Zahria Sanabria, Cary Burcham and Blasina Negron and Assistant CN Linda Madaris. Id. One or more were directly involved with the selection of positions McLain was denied, including the CN Mental Health, the CN Acute Care, and disciplinary actions against McClain's wife.

4. McLain was assigned an office on the 7th Floor of the hospital which in early 2015 and thereafter was repeatedly flooded with raw sewage including feces. Doloresco had a duty under the Collective Bargaining Agreement (CBA) to move him, or any such employee, to a safe location at least temporarily until corrected. She did not. He became ill.

5. On May 18, 2015, during a large reoccurring nurse manager and CN meeting, Doloresco, sarcastically stated that both our union partner and his wife applied for the Chief Nurse of Operations position and started laughter. This type of discussion was unheard of and a violation of VA policy.

6. On July 1, 2015 McLain and his wife filed their own EEO complaints.

8. On October 16, 2015, the Chief Nurse of Operations position was selected. Doloresco claimed she completely recused herself from the selection and never talked to or gave any reason to anyone involved in the selection. Yet, the selecting official testified that Doloresco called and told her that it was because of a union official and his wife. Doloresco's assistant also created scoring documents normally prepared by the selection panel members which were unlike typical scoring documents in ways that prejudiced McLain.

9. On December 3, 2015, McLain became aware of his non-selection for the Chief Nurse of Acute Care position. The panel lead was Linda Madaris, a recipient of the 2/2/15 email. She admitted she was also at the May meeting. When the CN of Acute Care was announced, Doloresco also claimed she recused herself. However, this time a panel of three management level nurses and a doctor were put on the panel by Doloresco. The lead was Linda Madaris. She was also the lead of the panel for CN of Mental Health after having told Doloresco in an email that she could not tell her how disappointed and angry with McLain she was and did not want to work with him. Another panel member for CN Acute Care was Karen Proctor against whom Doloresco knew McLain made a whistleblower disclosure regarding comp-time fraud by her and several other nurse managers in the summer of 2014. After an Office of Inspector General investigation, changes were made in VA policies.

Proctor, and other managers lost continuation of over 200 hours per year of fraudulent leave Proctor had been taking for 6 years. Cheryl Stephen-Rameau (CSR) was also a panel member. Although this evidence was not allowed, Responses to Motions in Limine show CSR admitted to Tammie Terrell and Dr. Carol Reuter that Doloresco, contrary to hiring and promotion guidelines, pre-selected her over Terrell who was rated No. 1 after each of three separate announcements. McLain represented Terrell in her EEO case based on race (Black) and retaliation. After Patricio's first EEO claim of racial discrimination was settled, in early 2014 she became part of a committee that helped develop the facilities' selection policy which requires panel members without bias for or against an applicant. Yet three-quarters of the Acute Care panel had a strong basis for bias against McLain and Doloresco knew it. Madaris was on both this panel and the one for CN mental health. Yet, the jury's main focus was not differential treatment under *Babb*, but rather the ultimate decision including the criticism of his whistleblowing and union activity.

10. The Secretary's defense consisted of a combination of five entwined approaches. First, it defended its ultimate decisions and maintained that outstanding people were selected for the positions and they were the best candidates. McLain offered evidence disproving these facts and was denied corroborative evidence relating to them. Second, Doloresco denied knowledge of important facts not

documented in writing, and she tried to hide her knowledge and identity through subordinates and others. Other evidence showed several of Doloresco's denials were not true and other Rule 404(b) knowledge and identity evidence was excluded. The third defense was to use McLain's protected whistleblowing and union activity as a form of bad acts. Doloresco testified none of this was a reason for her alleged actions in McLain's case and the Secretary did not contradict that until its Brief on appeal addressed a lack of relevance argument. It then said it was evidence its actions were not retaliatory. Fourth, the Secretary successfully convinced the court to ignore several 404(b) witnesses, including Terrell and Dr. Rueter, and witnesses that had evidence admissible under 801(d)(2)(D) of retaliatory intent or corroborative actions by Doloresco, Fogarty, Assistant Director David VanMeter and another Pentad member which helped to show intent, identify and absence of mistake.

11. The fifth and most significant way the Secretary defended the case was by convincing the trial court to give jury instructions which were in violation of the causation holdings of *Babb v. Wilkie* and *Babb v. Sec'y.* As a result the jury was not provided important instructions on differential treatment and full relief.

B. Legal Issues Involved

An appeal was timely filed challenging the jury instructions and evidentiary rulings because they were based on *Nassar* and *Gross* and, according to the Secretary on appeal, *Bostock*. Each case interpreted private sector statutory language, and in the case of *Bostock* for expressly inapplicable reasons. The appeal challenged the use of cases decided under "markedly" different statutory language to deny a federal employee the causation standards delineated in *Babb v. Wilkie* and found applicable to Title VII in *Babb v. Sec'y,* and in making evidential decisions. In *Babb v. Wilkie,* 589 U.S. at 402-411, this Court held that the *Gross* and *Nassar* causation standards arose under markedly different statutes and are not applicable to discrimination claims brought by federal-sector employees under the ADEA which contains the same critical "shall be made free from any discrimination" language as in federal sector Title VII. Reasoning provided by this Court in *Babb* and prior cases suggests that the differing statutory language applicable to federal-sector and private-sector claims and differing causation standards mandates differing jury instructions be given. *See e.g., Russello v. United States,* 464 U.S. 16, 23 (1983); *Carter v. Atlanta and St. A.B. Ry. Co.,* 338 U.S. 430 (1949). (This court has recognized that jury instructions must adequately instruct the jury on the causation elements of a federal statute and accurately reflect what a plaintiff must prove.)

The panel relied upon precedent of the Eleventh Circuit Court of Appeals to in essence hold that it was not prejudicial to the Petitioner to fail to: (1) instruct the jury on a federal statute's causation standard; and (2) to (a) admit, without any instruction, cumulative evidence of Petitioner's protected whistleblowing and union activity as if it was a consideration in denying Petitioner interviews and promotions even though the Secretary denied it was a reason for its alleged actions before the jury and only changed that in its answer brief on appeal; and (b) to simultaneously deny the Petitioner the ability to introduce countervailing evidence under Fed. R. Evid. 404(b) and 801(D)(2)(D) which tended to prove that EEO activity was the Secretary's motive, intent and basis for differential treatment and provided further relevant evidence of identity and absence of mistake.

Petitioner's argument at each stage of the case was that the *Babb* decision created an inextricably intertwined, but separate two-part framework: (1) differential treatment and (2) if that is shown, full relief. Each part requires the plaintiff to establish "but-for" causation. The Eleventh Circuit held it was applicable to Title VII claims. In contrast to *Gross* and *Nassar*, however, the "but-for" test for differential treatment under the ADEA or Title VII statutes does not require the plaintiff to prove differential treatment "affected" the ultimate decision(s). *Babb v. Wilkie*, 589 U.S. at 406-08. As to full relief, consistent with prior decisions, the only but-for cases cited with

approval in *Babb* were *Texas v. LeSage,* 528 U.S. 18 (1999) and *Mt. Healthy Cnty. Bd. of Ed. v. Doyle,* 429 U.S. 274 (1977). *Id.* at 413. Once the statutory injury is established, here differential treatment, these cases require an employer to establish the same decision defense. If it fails, the Plaintiff has shown but-for causation. *Nieves v. Bartlett,* 139 S. Ct. 1715, 1722-23 (2019); *Hartman v. Moore,* 547 U.S. 250, 260 (2006). In *Babb* the majority stated:

> We have long employed these basic principles. In *Texas v. Lesage,* 528 U.S. 18, 21-22, 120 S. Ct. 467, 145 L.Ed.2d 347 (1999) (*per curiam*), we applied this rule to a plaintiff who sought recovery under Rev. Stat. § 1979, 42 U.S.C. § 1983, for an alleged violation of the Equal Protection Clause. We explained: "[W]here a plaintiff challenges a discrete governmental decision as being based on an impermissible criterion and it is undisputed that the government would have made the same decision regardless, there is no cognizable injury warranting [damages] relief." 528 U.S. at 21, 120 S. Ct. 467. Cf. *Mt. Healthy City Bd. of Ed. v. Doyle,* 429 U.S. 274, 285, 97 S. Ct. 568, 50 L.Ed.2d 471 (1977) (rejecting rule that "would require reinstatement… even if the same decision would have been reached had the incident not occurred").

589 U.S. at 413.

Justice Thomas's dissent recognized the eight-justice majority's description of the statutory injury and criticized its principal reliance upon *LeSage* and *Mt. Healthy* for the remedial scheme. *Id*. at 418.

Petitioner argued at each stage of this case that *Babb* requires that each time an employee shows differential treatment based on a protected characteristic, an employer has to prove the same decision would have been reached regardless of the statutory injury, unless such a decision is undisputed. Yet the Secretary convinced the District Court and ultimately the Eleventh Circuit panel to uphold jury instructions based on *Gross* and *Nassar*, despite the fact that those cases formed the primary basis of the Secretary's unsuccessful causation arguments in *Babb v. Wilkie*. *Id.* at 410-11. The jury instructions in Petitioner's case were fully grounded in *Gross* and *Nassar*, as was the panel's opinion that "after careful consideration of the record and the parties' briefs, and with the benefit of oral argument we find no prejudicial error in the district court's jury instructions or evidentiary rulings." App. 2a-3a.

This error will prevent jury instructions consistent with *Babb* wherever the government argues that to avoid prejudicial error, a judge should use the *McLain* instructions. This argument has already been made in

the first case since *McLain*. *See e.g.,* App. 5a; App. 25a-28a; App. 30a-41a.[1]

During the trial, the refusal to recognize *Babb* included using "sole reason" cases of the *Gross/Nassar*-type to determine what was admissible evidence. Prior to trial and through repeated objections at trial, we sought to limit, especially without instruction, the Secretary's cumulative use of clearly protected whistleblowing and union activity. Rather, without limiting instructions including properly describing differential treatment as discussed further *infra* at p.27-29 or requiring legitimate reasons, it was used to cagily imply that whistleblowing and union activity could have caused both differential treatment and McLain's denial of promotions.

Nassar was decided under the section of Title VII applicable to retaliation claims of private-sector employees, 42 U.S.C. § 2000e-3(a) which is markedly different from 42 U.S.C. § 2000e-16(a).

Federal-sector retaliation claims under Title VII were unaddressed in *Gómez-Pérez v. Potter*, 553 U.S. 474, 488 n.4 (2008) and *Babb v. Wilkie.* In *Gómez-Pérez*, this Court found retaliation provisions

[1] While not part of the record in this case, that District Court later said it would "apply *Babb*, but not the burden shift." Given *McLain, i*t is uncertain what that will mean for differential treatment.

embodied within the "free from any discrimination" language of 29 U.S.C. § 633a(a). *Id.* at 479, 487. However, there is agreement in all Courts of Appeal that federal employees have Title VII retaliation protection. *See also Nassar*, 570 U.S. at 356 (citing *Gómez-Pérez* for the proposition that, "when construing the broadly worded federal-sector provision of the ADEA, Court refused to draw inferences from Congress's amendments to the detailed private-sector provisions").

C. PROCEEDINGS BELOW

The final instructions, as the ones in *Carter v. Atlanta and St. A.B. Ry. Co.*, , show the District and Appellate courts disagreeing with Congress about the nature of the rights that the federal employees have. In the *Babb* cases the Supreme Court and the Eleventh Circuit painstakingly described what the "shall be made free from any discrimination" language meant. Yet, here those decisions were not applied in favor of modified *McDonnell Douglas,* or *Gross* and *Nassar* decisions.

In order to show this error in the proceedings below the following discussion of the instructions at issue (App. 8a-22a) will refer to the trial transcript line by line, with emphasis added and brackets enclosing explanatory information.

First, the description of the essential element the Plaintiff must prove by a preponderance of the

evidence does not address differential treatment and consists of the four elements directly from the *Gross* and *Nassar* but-for tests *Babb* rejected. App. 14a:20-28. [Plaintiff's elements were also rejected; Plaintiff's full relief instruction was rejected]. Second, the jury had been instructed plaintiff must prove each essential element by a preponderance of the evidence. App. 11a:33-12a:5. Third, the key third element (causation) begins by telling the jury it "must decide whether Defendant took that action [i.e., the adverse employment actions] because of Plaintiff's protected activity" which means it "was a material reason for Defendant's decision" [without addressing differential treatment]; App. 16a:17-24. Fourth, it explains what it means to take an adverse employment action, because of Plaintiff's protected activity by stating: "you must decide that Defendant would not have taken that action … had Plaintiff not engaged in the protected EEO activity, but everything else had been the same"; App. 26a-31a, [and excludes discussion of "consideration" or the way or process by which a decision is made, 589 U.S. at 402]. Fifth, [after untethering a small portion of Plaintiff's proposed instructions while describing it as what the "Plaintiff claims", i.e., not the law, App. 16a:33-17a:1] the jury was told that to determine "EEO activity played a part in the way one or more employment decisions was made you must decide that Defendant treated Plaintiff differently as part of the decision that was made and would not have treated Plaintiff that way if Plaintiff had not engaged in protected activity, but

everything else had been the same". App. 17a:12-19. [This instruction directly rejects the critical hypothetical describing the meaning of the "shall be made free from any discrimination" language and differential treatment. *Babb*, 589 U.S. at 407. Miriam Webster's online dictionary defines "part" as an "essential portion or integral element". Here the instructions made clear it had to be part of the ultimate decision. Moreover, it rejects the court's holding that the differential treatment does not have to affect the ultimate decision even though it must be part of the "process" or "way" of making the decision.] 589 U.S. at 404, 406-407, 408 n.3.[2] Sixth, the "Defendant denies" section is two paragraphs which only discusses the ultimate decisions and Defendant's reasons for it, App. 17a:21-18a:5 [they do not except differential treatment and restate the *Gross* and *Nassar* causation test. *Id.*] Seventh, the second paragraph of that section [not only ignores "consideration" or the process of making a decision, but] states "An employer may not take an adverse action against an employee because of the employee's protected EEO activity" [and then eviscerates differential treatment when stating] "but an employer may choose not to interview or select any employee for any other reason, good or bad, fair or unfair, and you must not substitute your own judgment for Defendant's judgment, even if you did not agree with

[2] Plaintiff objected in numerous places. The "as part of the decision" language was added at the behest of the Secretary just before closing arguments.

it. If you believe Defendant's reasons for its decision and you find that Defendant did not make its decision because of Plaintiff's protected EEO activity, you must not second-guess that decision." App. 17a:30-18a:5. Eighth, [still in the third element, it continues *Gross*] "As I explained, Plaintiff has the burden to prove that Defendant's decision not to promote or interview Plaintiff was because of Plaintiff's protected activity." App. 18a:7-10. [In the context of the overall instructions, causation is determined by the *Gross* and *Nassar* simple, traditional test]; Ninth, the instruction then adds emphasis to that point including requiring Plaintiff to prove Defendants reasons were so unbelievable that they were a "coverup". App. 18a:12-23. Tenth, the undue influence cat's paw instruction is an established *Gross* and *Nassar* single motive instruction. App. 18a:25-19a:19. *Godwin v. Wellstar Health,* 805 Fed. Appx 518, 528-29 (11th Cir. 2015) (private sector ADEA case controlled by *Gross*). Eleventh, none of these instructions respect the language of *Babb* and all of them reject its hypotheticals, but the jury was told they must apply the instructions as a whole. App. 9a:13-17;p.21a:21-28.[3]

[3] McLain's proposed jury instructions attempted to follow *Babb* while addressing each concept in the Standard Jury Instructions. In any event, the jury instructions given were wrong as a matter of law and deserved no deference. *Carter v. Atlanta and St. A.B. Ry. Co.,* 338 U.S. 430 (1949)*; Palmer v. Bd. of Regents of U. of Ga.,* 208 F.3d 969, 973 (11th Cir. 2009); *U.S. v. Chandler*, 996 F.3d 1073, 1083 (11th Cir. 1993), cert. denied 512 U.S. 1227 (1994).

Nowhere during trial or in the court's final instructions was the jury helped to understand the meaning of differential treatment or the role this statutory injury has to the liability of the defendant, let alone to rendering a verdict giving a plaintiff the ability to enjoin the key statutory injury, for example creating biased panels, discussing animus towards Petitioner's protected EEO activity with subordinates involved in the process of making decisions and violating hiring policies designed at least in part to avoid protected characteristics decisions. *See Furnco Const. Corp v. Waters,* 438 U.S. 567, 575 (1978); *Carter v. Three Springs Residential Treatment* 132 F.3d 635, 644-45 (11th Cir. 1998).

Instead of addressing these points, the panel's decision quotes a question on the verdict form App. 23a Q.3, 24a. Yet the decision does not quote or address any of the instructions that the jury was instructed to apply when deciding that question including the instruction to apply the instructions as a whole. These instructions in several places and as a whole, prevented the jury from having a correct understanding of differential treatment and, as did the verdict form itself, placed the burden of proof on everything, including disproving the reasons for the ultimate decision, on Petitioner. By not requiring the employer to show it would have made the same decision without considering plaintiff's EEO activity, the instructions prevent the jury from understanding the role or significance of differential treatment and

that it does not have to affect the ultimate decision.

In this case Petitioner argued that differential treatment was not just the ultimate personnel actions. Many of the actions which were taken show that there was a strong basis to conclude a properly instructed jury would have found differential treatment short of the ultimate decisions. The instructions misled the jury away from whether Doloresco: considered McLain's EEO activity when she openly criticized it to managers involved in selections, during the process of making personnel actions; had assistants change scoring documents; or chose biased panel members in violation of hiring guidelines. McLain faced biased panel members consisting of people directly impacted by his protected whistleblowing actions or EEO activity, or who were present, or recipients of emails, when Doloresco criticized him for EEO activity. *Babb*, at 406-08. The facts established a basis for a jury to conclude EEO activity was considered when Doloresco did those things and expressed hostility to McLain's EEO activity to subordinates who were involved in the process of making decisions. *See Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 354-355 (6th Cir. 1998). Neither these statements nor biased panel members were taken out of the decision-making processes under circumstances far more egregious than this Court recognized required removal. *Babb*, 589 U.S. at 408 n.3. Contrary to footnote 3, and the holding that differential treatment does not have to "affect" the ultimate decision, the instructions focus

the jury on whether all of this was an essential or integral element in the ultimate decisions.

These instructions ignore differential treatment's place in the whole, render immaterial evidence of its consideration in the process of making a decision; and, at least, require the plaintiff prove the defendant treated the plaintiff differently as part of the decision that was made and would not have done so had plaintiff not engaged in protected activity but everything else was the same. This is contrary to *Babb's* express rejection of any requirement that the plaintiff prove that the differential treatment "affected" the decision as long as it occurred in the process of making the decision. The instruction required differential treatment not only affect the decision, but to be essential or integral to it, because the Secretary wanted the focus to directly be on the ultimate decisions.

Despite the intrinsically flawed whole, and hopelessly confused and flawed instruction, (see "Fifth" and fn 2), the court upheld *Gross* and *Nassar* jury instructions on causation even though this Court and a prior Eleventh Circuit panel rejected those causation standards. However, the Eleventh Circuit has not enforced these holdings.

The comments to the Eleventh Circuit Standard Civil Instructions (4:22) now seemingly recognize a causation difference. Yet, this decision

does not. It will, and has already been, used to advocate to district courts these instructions can be upheld and avoid prejudice. App. pp.5a, 26a-28a,301-41a.

One of the troubling results of these instructions, is that jurors will not focus on the simple concepts recognized in *Babb* despite hypotheticals explicitly illustrating these points. When management considers a protected characteristic in the process or way of making a decision, it has engaged in differential treatment and violated the statute. As to full relief, no jury will be allowed to consider the relationship between differential treatment and but-for causation under *LeSage* and *Mt. Healthy*. When up against the federal government, the individual federal employee needs to have burden shifting in order to receive a fair trial. In this case that burden would, in several ways, have prevented prejudicial use of whistleblowing and union activity.

There is no express discussion in this Court's decision of the "burden of proof". Yet, there is a discussion of the legal framework. That is what counsel for Babb felt was the important part of this decision. By focusing on the language of the statute the legal framework becomes clear and the burden of proof becomes obvious. *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989); *LeSage*; *Mt. Healthy*. This was further argued at both levels with citation to other

Supreme Court precedent. Indeed, as Justice Thomas recognized, when the majority cited but-for cases in the remedial scheme, those were *LeSage* and *Mt. Healthy* which shift the burden to the employer once the statutory injury, differential treatment, is shown.

Finally, please note that all of these *Gross* and *Nassar* instructions are in the third element, the causation element, making it impossible for any reasonable person to have understood what they should find under *Babb*. Where, as here, instructions do not adequately instruct the jury on the causation elements of a federal statute nor accurately reflect what a plaintiff must prove, it is error. *See e.g.*, *Carter v. Atlanta and St. A.B. Ry. Co.*, 338 U.S. 430 (1949). The panel for the Eleventh Circuit felt that there was no prejudicial error citing its own cases. It did not address any of the Petitioner's arguments based on the *Babb* case and the instructions, except to point to question 3 on the Verdict Form.

Evidential Rulings. The court's evidential rulings underscore the misapplication of *Babb*. The Petitioner filed a motion in limine attempting to limit at least without a limiting instruction testimony concerning Plaintiff's whistleblowing and union activity including 48 exhibits primarily criticizing grievance activity, which although not a statutory requirement, was like the whistleblowing activity, well based. The Secretary responded that an Eleventh Circuit single motive case justified

admitting this evidence without an instruction because the plaintiff had the burden to establish the protected characteristic was the "sole reason" for a non-*Babb* differential treatment which by the time of the jury instruction had to be an essential part of the ultimate decisions. From a relevance standpoint even the cases relied on required it to be a reason for the ultimate decision because that was the object of the sole reason. *See e.g.*, *Alvarez v. Royal Atlantic Devel, Inc.,* 610 F.3d 1253, 1256 (11th Cir. 2010); *Wallace v. SMC Pneumatics, Inc.,* 103 F.3d 1394, 1399 (7th Cir. 1997). At a prior deposition and at trial, Doloresco testified that this evidence showed a lack of collaboration but was not a reason for any alleged retaliatory actions. Nevertheless, during trial, one-quarter to one-third of Doloresco's entire testimony subjectively litigated these issues and criticized McLain's actions. During trial McLain repeatedly objected (F.R.E. 402, 403, 404 802, cumulative) and argued then and on appeal that this made the evidence not only cumulative but unduly prejudicial and irrelevant. On appeal, the Secretary sought to avoid at least the relevance part of this argument and contradicted its position before the jury saying it was evidence which showed "non-retaliatory reasons for its actions." It is instructive to consider this and other hurdles employees face when litigating with giant federal bureaucracies. Yet, not only was it cumulatively admitted, corroborative 404(b) and 801(d)(2)(D) evidence was denied. In discrimination cases such evidence can be pivotal. *U.S. Postal Serv.*

v. Aikens, 460 U.S. 711, 714 n.3 (1983); *Goldsmith v. Bagby Elevator Co., Inc.*, 513 F.3d 1261, 1285 (11th Cir. 2008). This is a consistent problem in *Terrell, Bell, Babb II* and *Sly Hollingsworth* and was especially true here.

D. Retaliatory Hostile Work Environment. A hostile work environment (HWE) is a personnel action under 5 USC § 2302(a)(2)(A)(xii). *Savage v. Dep't of the Army,* 122 M.S.P.R. 612,627 ¶23 (2015); *Sistek v. Dep't of Veterans Affairs,* 955 F.3d 948,955 (Fed. Cir. 2020). Therefore, *Babb's* legal framework including differential treatment and full relief should be applicable and reflected in the causation portion of the jury instructions.

The Eleventh Circuit denied petitioners' timely petition for panel rehearing or rehearing en banc.

REASONS FOR GRANTING THE WRIT

Federal employees currently filing retaliation claims under Title VII face differing standards of proof and very likely a denial of a just determination of their rights. This case presents an opportunity to correct a growing number of conflicts with the application of *Babb* to the "shall be made free from any discrimination" language in both 29 U.S.C. §633a(a) and 42 U.S.C. §2000-e16(a) and to settle important questions of federal law that we thought *Babb* settled, but if not, should be settled by this Court.

The panel's decision upheld jury instructions that are plainly based on *Gross* and *Nassar*. That directly conflicts with *Babb's* causation holdings after analyzing the critical "shall be made free from any discrimination" language under the ADEA and provides the court an opportunity to make clear that interpretation should be applicable to the critical "shall be made free from any discrimination" language under Title VII. It also provides another opportunity to clarify that the concepts of differential treatment and full relief should not be weakened by *Gross, Nassar*, or *Bostock*. Instructions accurately reflecting these concepts are essential to a jury's ability to identify the material facts not only when deciding differential treatment and full relief, but to understand that differential treatment does not have to affect the ultimate decision.

Action by this Court at this time is necessary to the efficient resolution of federal employee claims. While panels in the Eleventh, Seventh and Third Circuits have recognized *Babb* should be applied to Title VII, many district courts in other jurisdictions have not applied it to Title VII cases for the same prior precedent reasons at issue in *Babb*. *See e.g., Hoang v. McDonough*, No. 18-CV-01755-RM-KLM, 2022 WL 19403576, at *3 (D. Colo. Dec. 5, 2022); *Johnson v. McDonough,* 1:19-cv-01568 (APM) (D.D.C. Nov. 11, 2021); *but see Zickefoose v. Austin, III, Sec'y, Dept. of Defense,* No. 2:22-cv-1935, 2023 WL 7167001 (October 31, 2023). Moreover, no matter which circuit a District

Court is in, the Secretary continues to make arguments which conflict with *Babb*. See *Terrell v. Dept. of Veterans Affairs,* No. 21-14185-JJ (11th Cir,) *Bell v. Dept. of Veterans Affairs,* Case No. 22-12698-HH (11th Cir.), and *Babb v. Dept. of Veterans Affairs,* No. 23-10383-C (11th Cir.). For example, "seven times *Babb* uses but-for." This is even argued on appeal but never with the recognition that differential treatment does not have to affect the ultimate decisions or that the Secretary has a burden to show it would have made the same decision defense. The individual federal employees are at a distinct disadvantage against large bureaucracies with unified defenses**.**

At best, some federal employees are being treated differently than others when it comes to critical causation standards. At worse, no federal employees are receiving their full Title VII rights under 42 U.S.C. § 2000e-16(a) after nearly 50 years. Notwithstanding *Babb's* holdings and framework, lower courts are not recognizing the relationship between differential treatment and full relief and that differential treatment does not have to affect the ultimate decisions. As far as we can determine, none have yet found that if there is differential treatment, the employer must present evidence it would have made the same decision. *Babb*, 589 U.S. at 413. The panel's decision makes the likelihood of this happening without intervention by this Court remote.

In the present case, as well as *Winston Johnson* and *Dai Hoang*, district courts have refused to apply

Babb's analysis to Title VII claims, and in the later cases have opposed certifying questions to the respective Circuit Court of Appeal. In two cases we asked the attorneys for the Department of Justice if they would agree that the question of the applicability of *Babb* should be certified to the respective courts of appeal. They refused. We nevertheless asked the district courts to certify the questions and they refused.

In *Sly and Hollingsworth v. Department of Veterans Affairs,* 8:17-cv-01868-AAS (M.D. Fla.), we sought to certify the question of admissibility of 404(b) evidence in a case involving a management official who has been involved in numerous cases involving a management described program to destroy the careers and reputations of people that engage in EEO activity which began in roughly 2005. *See e.g.*, *Gowski v. Peake,* 682 F.3d 1299 (11th Cir. 2012). App. 5a, 28a-29a, 42a-44a. Again, the government has opposed certification.

The law in each of the circuits makes it quite difficult, if not impractical, to successfully certify a question without agreement. Federal employees are, as Congress recognized, at a marked disadvantage to the federal agencies in federal court. Given results to date, in the highly unlikely event that the Tenth or D.C. Circuit would agree to hear the matter in that setting, if they did, while it may be likely *Babb* would be applied, *McLain* shows that it cannot be said that the holding of *Babb* will be applied. Federal employees

simply cannot afford all of this repeated litigation. That may help to explain why these basic issues are being litigated so long after passage of the statutes.

This Court has already put in the effort that should have been necessary to resolve these issues. Nevertheless, as we argue in the *Terrell* appeal, attorneys for the Secretary successfully argued to the same District Court for the application of a "modified *McDonnell Douglas* test" which involved a complete reapplication of old law and ignored 404(b) and 801(d)(2)(D) evidence. As we argue in the *Bell* appeal, the sole black manager in a large service under Doloresco, was paid less than all non-black managers for the same duties, but a district court ruled that was a matter for the personnel department and did not even address the issue of differential treatment. As we argue in the *Babb* appeal the district court after remand failed to follow this Court's opinion in *Babb* or *Tolan v. Cotton,* 572 U.S. 650 (2014) in granting summary judgment on gender plus age claims. It ignored evidence of consideration of protected characteristics of the type cited in *Babb,* and reasoned that there were comparators against an age only claim and against a gender only claim, under the same analysis it previously applied. It did not decide whether the evidence was sufficient to raise a jury question on differential treatment of older females of which considerable favorable comparator evidence existed. At trial of retaliation claims, it only instructed on what could be argued to have been differential

treatment, for a retaliation claim while excluding any damages and 404(b) evidence of discrimination against older females which obviously lessened management's motive to retaliate. See *Whitmore v. Dept. of Labor,* 680 F.3d 1353, 1370-72 (Fed. Cir. 2012).[4]

This Court has consistently rejected the government's efforts to restrict federal employee rights under the made free from any language in federal statutes. *See e.g.*, *Loeffler v. Frank,* 486 U.S. 549, 559 (1985) (Title VII federal employees do not have less rights than private sector employees); *Gomez-Perez v. Potter,* 553 U.S. 474 (2008) (federal employees have retaliation rights under the ADEA); *Babb v. Wilkie*, 589 U.S. at 411-12, (federal employers must meet stricter standards under the ADEA). Yet a strong resistance to give federal employees those rights continues. This problem was discussed when Congress created a separate EEOC due to the failures of government anti-discrimination efforts. H.R. 100-456, 100th Congress, 1st Session, Union Calendar No. 287. November 23, 1987 (also noting the economic

[4] The appeal in *Terrell* was filed and 2021, the appeals in *McLain* and *Bell* were filed in 2022, the appeal in *Babb* was filed in 2023. We had hoped that decisions in these cases would have been made long ago and that some conformity with *Babb* would have become evident. That has not occurred.

disadvantage of federal employees and the problematic involvement of DOJ).

Addressing and resolving the statutory language difference between the "shall be made free from any discrimination" language under the ADEA and Title VII, real or imagined, is critical and needs to be consistent throughout the country as well as between the ADEA and Title VII. *Babb* should have led to that, but it may never be timely and fully addressed if this Court waits for the district courts or Circuits to resolve the issue given the government's continued unwillingness to avoid arguments it lost in *Babb* based upon cases decided under markedly different statutes. 589 U.S. at 410-11. The decision of the Eleventh Circuit panel conflicts with the statutory language of 42 U.S.C. § 2000e-16(a) and denies employees instructions defining their material rights under that statute. While "not published" the panel's decision has already affected jury instructions in other cases. Moreover, what federal employee has the resources to wage these battles and why should they if this Court can be ignored?

The statutory language regarding federal-sector ADEA and Title VII retaliation claims is similarly different from the language applicable to private-sector employees. Section 2000e-3(a) of Title VII does not apply to federal employees.

As noted by this Court, federal-sector retaliation claims under Title VII were unaddressed in *Gómez-*

Pérez. 553 U.S. at 488 n.4. In that case, this Court found retaliation provisions embodied within the "shall be free from any discrimination" language of 29 U.S.C. § 633a(a). *Id.* at 479, 487. However, the rationale of *Gómez-Pérez* requires that where, as in 42 U.S.C. § 2000e-16(a), when Congress uses the same broad, general language applicable to the federal-sector as in 29 U.S.C. § 633a(a), it bars retaliation in addition to status-based discrimination. *Id.*

The Eleventh Circuit's decision also conflicts with this Court's decisions related to principles of statutory construction. In addition to the plain meaning of the words "made free from any discrimination," as *Babb* explained the laws of statutory construction also support the decisions requested. 589 U.S. at 412. "[W]here Congress includes particular language in one section of the statute, but omits it in another . . . it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983)); see also *Central Bank of Denver v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 176-77 (1994).

Finally, one suspects that the Secretary's clever use of protected whistleblowing and union activity while denying it was a reason for its actions at trial and then claiming it could be used by the jury to find non- retaliatory reasons for its actions on appeal, troubles the Court. However, the root cause of this problem was using simple and traditional "sole reason

but-for" causation to violate two statutes while deflecting accountability under both. This could not have happened if either the district court and the instructions followed *Babb's* description of differential treatment or if the Secretary had to make the same decision defense. Recognizing these principles may have also assisted in proper applicability of 404(b) evidence.

CONCLUSION

For the foregoing reasons, this Court should grant this petition and issue a writ of certiorari to review the judgment and opinion of the Eleventh Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 22-11667

D.C. Docket No. 8:17-cv-01283-WFJ-CPT

DENNIS MCLAIN,
Plaintiff-Appellant,

versus

SECRETARY, DEPARTMENT OF VETERANS AFFAIRS,
Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(September 1, 2023)

OPINION

Before WILSON, GRANT, and BRASHER, Circuit Judges.

PER CURIAM:

Dennis McLain appeals from a jury verdict for the Secretary of Veterans Affairs and against McLain on his claims of retaliation and hostile work environment under Title VII. McLain claimed he was retaliated against and subjected to a hostile work environment

by the VA hospital where he worked as a nurse because he engaged in protected activity as a representative of the nurse's union.

After a trial, the jury found for the Secretary on both counts. On a special verdict form, the jury found that McLain was not "treated differently!] because of his protected EEO activity and protected activity played [no] part in the way one or more personnel actions were made." Likewise, the jury found that the Secretary did not "harass [McLain) because of his protected EEO activity."

On appeal, McLain raises three arguments. First, he argues that the district court's jury instructions misstated the law of causation under *Babb v. Wilkie*, 140 S. Ct. 1168 (2020) and *Babb v. Secretary*, 992 F.3d 1193 (2021). Specifically, he argues that the district court's instructions erroneously placed the burden on him to establish more than the mere presence of discriminatory considerations in his employer's decision-making process. Second, he argues the district court erred in its hostile work environment instruction. Third, he argues that the district court abused its discretion in allowing the Secretary to admit certain evidence for the jury's consideration.

We will not disturb a jury's verdict for an instructional or evidentiary error unless it affected the outcome of the proceedings. *See Watkins .v City of Montgomery, Ala.*, 75 F.3d 1280, 1289-90 (11th Cir. 2014); *Burchfield v. CSH Transp., Inc.*, 636 F.3d 1330, 1333 (11th Cir. 2011). After careful consideration of the record and the parties' briefs, and with the benefit of oral argument, we find no prejudicial error in the

district court's jury instructions or evidentiary rulings. Accordingly, we affirm.

AFFIRMED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 8:17-cv-1283-WFJ-CPT

DENNIS MCLAIN,

v.

DAVID J. SHULKIN, SECRETARY OF THE DEPARTMENT OF VETERANS AFFAIRS,

JUDGMENT IN A CIVIL CASE

(March 17, 2022)

Jury Verdict.

This action came before the Court for trial by jury. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED that Judgment is in favor of the Defendant.

March 17, 2022

ELIZABETH M. WARREN CLERK

/s/C. Houston
(By) C. Houston, Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 22-11667

DENNIS MCLAIN,
Plaintiff-Appellant,

versus

SECRETARY, DEPARTMENT OF VETERANS AFFAIRS,
Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

[Filed: December 15, 2023]

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before WILSON, GRANT, and BRASHER, Circuit Judges.

PER CURIAM:

Appellant's motion to supplement the addendum to his Petition for Panel Rehearing and Rehearing En Banc is GRANTED.

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having

requested that the Court be polled on rehearing en banc. FRAP 35. The Petition for Panel Rehearing also is DENIED. FRAP 40.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 8:17-cv-1283

DENNIS MCLAIN,

v.

DAVID J. SHULKIN, SECRETARY, DEPARTMENT OF VETERANS AFFAIRS,

REPORTER'S OFFICIAL TRANSCRIPT OF THE JURY TRIAL – DAY 9
HELD BEFORE THE HONORABLE WILLIAM F. JUNG, UNITED STATES DISTRICT JUDGE

(March 16, 2022)

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Proceedings recorded by mechanical stenography using computer-aided transcription software.

THE COURT: All right. They're all back. Let's bring them in.

(Jury in at 1:22 p.m.)

THE COURT: You all probably will never eat another Jimmy John and Domino's in your life. I'm sorry. At least the price was right.

Ladies and gentlemen of the jury, it ' s my duty to instruct you on the rules of law you must use in deciding this case. Now, I will give this copy and the verdict form to Mr. Houston to give to you and other copies he can make if you want, so you can take notes now if you want, but you will have my copy, and plus any other Xeroxes if you want them.

When I finish, you'll go to the jury room and begin your discussions sometimes called deliberations. There may be a second set of instructions and legal questionnaire I give you, but this is the first of those. Your decision -- this is the liability determination.

Your decision must be based on the evidence presented here. You must not be influenced in any way by either sympathy for or prejudice against anyone.

You must follow the law as I explain it here even if you don't agree with the law, and you have to follow all of my instructions as a whole. You must not single out or disregard any of the instructions on the law.

The fact that a governmental agency or entity is involved as a party must not affect your decision in any way. A governmental agency and all other persons stand equal before the law and must be dealt with as equals in a court of justice. When a governmental agency is involved, of course, it may only act through people as its employees, and in general a governmental agency is responsible under the law for the acts and statements of its employees that are made within the scope of their duties as employees of the governmental agency.

As I said, you must consider only the evidence that I've submitted in the case. Evidence includes the testimony of witnesses, including transcripts read in court and exhibits admitted, but anything

the lawyers say is not evidence, and isn't binding on you.

You shouldn't assume from anything I've said that I have any opinion about any factual issue in the case. Except for my instructions to you on the law, you should disregard anything I may have said during the trial and arriving at your own decision about the facts.

Your own recollection and interpretation of the evidence is what matters. In considering the evidence, you may use reasoning and common sense to make deductions and reach conclusions. You shouldn't be concerned about whether evidence is direct or circumstantial.

Direct evidence is the testimony of a person who asserts that he, or she has actual knowledge of a fact such as an eyewitness. Circumstantial evidence is proof of a chain of facts and circumstances that tend to prove or disprove a fact. There's no legal difference in the weight you may give to either direct or circumstantial evidence.

When I say you must consider all the evidence, I don't mean that you must accept all the evidence as true and accurate. You should decide whether you believe what each witness had to say and how important that testimony was. In making that decision, you may believe or disbelieve any witness in whole or in part. The number of witnesses testifying concerning a particular point doesn't necessarily matter.

To decide whether you believe any witness, I suggest you ask yourself a few questions: Did the witness impress you as one who was telling the truth? Did the witness have a particular reason not to tell the truth? Did the witness have a personal interest in the outcome of the case? Did the witness seem to have a good memory? Did the witness have the opportunity and ability to accurately observe the things he or she testified about? Did the witness appear to understand the questions clearly and answer them directly? Did the witness's testimony differ from other testimony or other evidence?

You should also ask yourself whether there was evidence that a witness testified falsely about an important fact, and ask whether there was evidence that at some other time a witness said or did something or didn't say or do something that was different from the testimony the witness gave during this trial.

But keep in mind that a simple mistake doesn't mean a witness wasn't telling the truth as he or she remembers it. People naturally tend to forget some things or remember them inaccurately. So if a witness misstated something, you must decide whether it was because of an innocent lapse of memory, or an intentional deception. The significance of your decision may depend on whether the misstatement is about an important fact or about an unimportant detail.

In this case, it's the responsibility of the plaintiff to prove every essential part of his claims by a preponderance of the evidence. This is sometimes

called the burden of proof or burden of persuasion. A preponderance of the evidence simply means an amount of evidence that is enough to persuade you that the Plaintiff's claims are more likely true than not true.

If the proof fails to establish any essential part of a claim or contention by a preponderance of the evidence, you should find against the plaintiff. When more than one claim is involved, you should consider each claim separately.

In deciding whether any fact has been proved by a preponderance of the evidence, you may consider the testimony of all witnesses, regardless of who may have called them, and all of the exhibits received in evidence, regardless of who may have produced them.

If the proof fails to establish any essential part of Plaintiff claim by a preponderance of the evidence, you should find for the Defendant as to that claim.

Even if Plaintiff proves his claims by preponderance of the evidence, Defendant can prevail in this case if he proves an affirmative defense by a preponderance of the evidence. I caution you that the Defendant does not have to disprove Plaintiff claims, but if Defendant raises an affirmative defense, the only way Defendant can prevail on that specific defense is if the Defendant proves that defense by preponderance of the evidence.

Your verdict must be unanimous. In other words, you must all agree. Your deliberations are secret, and you'll never have to explain your verdict to anyone.

Each of you must decide the case for yourself, but only after fully considering the evidence with other jurors. So you must discuss the case with one another and try to reach an agreement. While you're discussing the case, don't hesitate to re-examine your own opinion and change your mind if you become convinced that you were wrong. Don't give up your belief just because others think differently or because you simply want to get the case over with.

Remember that in a real way, your judges, judges of the facts. Your only interest is to seek the truth from evidence in the case.

In this case, the Plaintiff claims that the Defendant retaliated against Plaintiff because he took steps to enforce his lawful rights and/or those of others under Title VII. Title VII provides equal employment opportunity or EEO rights to employees. Laws that prohibit discrimination in the workplace also prohibit an employer from taking any retaliatory action against an employee because the employee has asserted rights or made complaints under those EEO laws.

Plaintiff claims he was prevented from obtaining or competing for Chief Nurse positions because he engaged in EEO activity and opposed discrimination against other employees. Plaintiff

claims that Defendant did not interview or select him for the position of Chief Nurse Mental Health, Plaintiff was not interviewed or selected for the Chief Nurse of Operations, and Plaintiff was not selected for the Chief Nurse of Acute Care.

Plaintiff asserts Defendant prevented him from obtaining or competing for one or more positions or withheld facts to avoid hiring him for an open position or disqualified him from a position for retaliatory or discriminatory reasons. Such activities, if proven, constitute adverse employment actions.

Defendant denies Plaintiff's claims and asserts that Defendant evaluated Plaintiff consistently with other applicants, and he was not selected for the positions because he was not the best applicant.

To succeeded on his claim, Plaintiff must prove each of the following facts by a preponderance of the evidence: First, Plaintiff engaged in protected EEO activity; second, Defendant then took an adverse employment action; third, Defendant took the adverse employment action because of Plaintiff's protected EEO activity; and fourth, Plaintiff suffered damages, which we will address damages in a second presentation if you find liability.

I will lay this out in the form for you on this portion of the case. It should be very self-explanatory.

For the first element, Plaintiff claims that he engaged and protected EEO activity when he

participated in his and other employees' EEO activity and opposed discrimination or retaliation against himself and other employees. He alleges this resulted in denial of several promotions for which he was qualified, derailed his career, and prevented him from advancing. If you find that the Plaintiff filed complaints for retaliation or retaliatory hostile work environment, that action is protected activity. The first element, Plaintiff also claims he was engaged and protected EEO activity when he imposed – opposed the Defendant's discrimination against other employees. Those actions are protected activity if it was based on Plaintiff's good faith, reasonable belief that Defendant discriminated against other employees.

Plaintiff had a good faith belief if he honestly believed that Defendant discriminated against others. Plaintiff had a reasonable belief if a reasonable person would under the circumstances believe that Defendant discriminated against others because of race or retaliated against others because of EEO activity.

Plaintiff does not have to prove that Defendant actually discriminated or retaliated against others, but he must prove that he had a good faith, reasonable belief that Defendant did so. In this case, Defendant acknowledges that Plaintiff engaged and protected EEO activity.

For the second element, Plaintiff claims that Defendant took adverse employment action against him as described above. For a retaliation claim, an adverse employment action is any type of action

that would have made a reasonable employee reluctant to make or support a charge of discrimination, or put another way, if a reasonable employee would be less likely to complain about or oppose alleged discrimination because he knew that Defendant would take one or more of these adverse actions against him for complaining. If the employment action would not make it less likely for a reasonable employee to make complaints about or oppose the alleged discrimination, it is not an adverse employment action. In this case, Defendant acknowledges that the non-selection of Plaintiff for the Chief Nurse positions of Mental Health, Operations, and Acute Care qualify as adverse employment actions.

For the third element, if you find that Plaintiff engaged and protected EEO activity and that Defendant took an adverse employment action against him, you must decide whether Defendant took that action because of Plaintiff's protected activity. Put another way, you must decide whether Plaintiff's protected activity was a material – a material reason for Defendant's decision.

To determine that Defendant took an adverse employment action because of Plaintiff's protected EEO activity, you must decide that Defendant would not have taken that action – the action had Plaintiff not engaged in the protected EEO activity, but everything else had been the same.

For this third element, Plaintiff claims he engaged in protected activity, and that Plaintiff's protected activity was a part of the way the

Defendant made a personnel action or actions. Federal-Sector law command that personnel actions shall be made free from any discrimination. Discrimination in this context included retaliation and means differential treatment; thus, imposes the duty of making – that is, rendering or producing – personnel actions untainted by any consideration of retaliation. In other words, his protected activity cannot play any part in the – in the way the decision was made.

To determine that Plaintiff's protected EEO activity played a part in the way one or more employment decisions was made, you must decide that Defendant treated Plaintiff differently as part of the decision that was made and would not have treated Plaintiff that way if Plaintiff had not engaged and protected activity, but everything else had been the same.

Defendant denies that it shows not to interview Plaintiff for the first two positions or select Plaintiff for any of the three Chief Nurse positions because of Plaintiff's protected EEO activity, and Defendant – and Defendant claims it evaluated Plaintiff consistently with the other applicants and made the selections based on who it believed was the best applicant.

An employer may not take an adverse action against an employee because of the employees protected EEO activity, but an employer may choose not to interview or select any employee for any other reason, good or bad, fair or unfair. If you believe Defendant's reasons for its decision and you

find that Defendant did not make its decision because of Plaintiff's protected EEO activity, you must not second-guess that decision, and you must not substitute your own judgment for Defendant's judgment, even if you did not agree with it.

As I have explained, Plaintiff has the burden to prove that Defendant's decisions not to promote or interview Plaintiff were because of Plaintiff's protected EEO activity.

I have explained to you, that evidence can be direct or circumstantial. To decide whether Defendant's decisions not to promote or interview Plaintiff were because of his protected EEO activity, you may consider the circumstances of Defendant's decisions. For example, you may consider whether you believe the reasons that Defendant gave for the decisions. If you do not believe the reasons that it gave for the decisions, you may consider whether reason reasons were so unbelievable that they were a cover-up to hide the true retaliatory reasons for the decisions.

Plaintiff claims that the Defendant's decisions not to promote or interview Plaintiff were based on the recommendation of Plaintiff's supervisor, Laureen Doloresco, and that Plaintiff's your activity was a determinative influence in the supervisor's recommendation. If Ms. Doloresco recommended that the Defendant declined to promote or interview Plaintiff and Plaintiff's activity was a determinative influence in Doloresco's recommendation, her recommendation can be a determinative influence behind the

Defendant's employment decision, even if she did not make the ultimate decision to decline to promote or interview Plaintiff.

But Plaintiff's EEO activity can be a determinative influence in Defendant's decision decision only if you find that the Plaintiff has proven each of the following by a preponderance of the evidence: (a), Ms. Doloresco acted with the intent to make Defendant deny a promotion or interview to Plaintiff, which means that Ms. Doloresco wanted Defendant to deny a promotion or interview to Plaintiff, or she believed that her actions would cause Defendant to deny a promotion or interview to Plaintiff; (b), Plaintiff's EEO activity was a material reason for Ms. Doloresco's actions; and (c), Ms. Doloresco's actions were the determinative influence or determinative cause of Plaintiff's denial of promotion or interview.

In this case, Plaintiff claims that Defendant violated the Federal Civil Rights statute that prohibits employers from retaliating against employees in the terms and conditions of employment because of their protected EEO activity. These statutes prohibit the creation of a hostile work environment caused by harassment because of Plaintiff's protected EEO activity.

Specifically, Plaintiff claims that his supervisor harassed him because of his protected EEO activity, and that harassment created a hostile work environment.

Defendant denies Plaintiff's claim and asserts that Plaintiff has not harassed – was not harassed and was not subject to a retaliatory hostile environment because of his EEO activity.

To succeeded on his claim, Plaintiff must prove the following facts by a preponderance of the evidence: One, Plaintiff's supervisor harassed him because of his protected EEO activities; two, the harassment created a hostile work environment for Plaintiff.

In the verdict form that I will explain in a moment you'll be asked to answer questions about these factual issues.

A retaliatory hostile environment created by harassment because of Plaintiff's EEO activity exists if: (a), Plaintiff was subject to offensive acts or statements about or because of his protected EEO activity, even if they were not specifically directed to him; (b), Plaintiff did not welcome the offensive acts or statements, which means that Plaintiff did not directly or indirectly invite or solicit them by his own act or statements; (c), the offensive act or statements materially altered the terms or conditions of Plaintiff's employment; (d), a reasonable person – not someone who's overly sensitive – would have found the offensive acts or statements materially altered the terms or conditions of the person's employment enough to dissuade a reasonable person from making or supporting a charge of discrimination; and (e), Plaintiff believed that the offensive acts or

statements materially altered the terms or conditions of his employment.

Actions claimed to be taken against Gina McLain, if proven to be retaliatory because of Plaintiff's protected EEO activity, can constitute unlawful retaliation against Plaintiff under Title VII because a reasonable worker might be dissuaded from engaging in protected activity if he knew his wife would be retaliated against.

Concerning the definition of priority consideration, that term is commonly understood to mean the applicant must be considered before any formal action to recruit for the vacancy and must be given bona fide consideration on the applicant's own merit without competition from other potential candidates. Priority consideration does not guarantee selection.

Okay. So that's the legal instructions. It's, you know, pretty significant instructions. You have to consider them as whole, but I would respectfully suggest the verdict form, which you will have, Will guide you through the questions on this liability phase, and then you can – if you have questions about that verdict form, you can refer back to the instructions.

So I'll ask you to take the instructions and the verdict form with you to the jury room. When your verdict is unanimous, you'll fill that out, sign it, and date it, and then you'll return to the courtroom. If you wish to communicate with me at any time, please write down any message or question. You

don't have to write anything down, but if you have such a message or question, please write it down and give it to Officer Arch or Mr. Houston, and they'll bring it to me, and I'll respond as promptly as possible. Please know I might have to talk to the lawyers if there's a legal issue, and I'll respond as quickly as I can to you.

I do caution you if you write me a note, don't tell me what your vote is or whether you voted one way or the other or how you're resolving matters. That should remain in the jury room and not be shared with anybody.

So you'll pick one member as your foreperson and deliberate and bring a true, fair, and unanimous verdict. Thank you. Any – any points for sidebar?

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 8:17-cv-1283-WFJ-CPT

DENNIS MCLAIN,

Plaintiff,

v.

DENIS MCDONOUGH, SECRETARY OF THE DEPARTMENT OF VETERANS AFFAIRS,

Defendant.

VERDICT FORM

(March 16, 2022)

VERDICT FORM

RETALIATION

Do you find from a preponderance of the evidence:

1. That Plaintiff engaged in protected EEO activity?

Answer Yes or No **YES**

If your answer is "No," skip questions 2, 3, and 4 and go to question 5. If your answer is "Yes," go to the next question.

2. That Defendant made one or more of the personnel actions of which the Plaintiff complains?

Answer Yes or No **YES**

If your answer is "No," skip questions 3 and 4 and go to question 5. If your answer is "Yes," go to the next question.

3. That Plaintff was treated differently, because of his protected EEO activity and protected activity played a part in the way one or more personnel actions were made?

Answer Yes or No **NO**

If your answer is "No," skip question 4 and go to question 5. If your answer is "Yes," go to the next question.

4. The Defendant would have made the same decision on each of the personnel actions of which the Plaintiff complaints, even if the Plaintiff had not engaged in protected EEO activity.

Answer Yes or No

RETALIATORY HOSTILE WORK ENVIRONMENT

Do you find from a preponderance of the evidence:

5. Did the Defendant harass Plaintiff because of his protected EEO activity?

Answer Yes or No **NO**

If your answer is "No," skip question 6. If your answer is "Yes," go to the next question.

6. Did the harassment create a hostile work environment?

Answer Yes or No

SO SAY WE ALL

/s/_____
Foreperson's signature

DATE: 3-16-2022

UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT

No. 22-11667-GG

D.C. Docket No. 8:17-cv-01283-WFJ-CPT

DENNIS MCLAIN,
Plaintiff-Appellant,

versus

DENIS MCDONOUGH, SECRETARY, UNITED STATES DEPARTMENT OF VETERANS AFFAIRS,
Defendant-Appellee.

On Appeal from the United States District Court
for the Middle District of Florida
Case No.: 8:17-Cv-01283-WFJ-CPT

(November 20, 2023)

UNOPPOSED MOTION FOR LEAVE TO SUPPLEMENT THE ADDENDUM TO THE PETITION FOR PANEL REHEARING AND REHEARING EN BANC

COMES NOW, the Petitioner, Dennis McLain, and files this Unopposed Motion for Leave to Supplement the Addendum to the Petition for Panel Rehearing and Rehearing En Banc.

1. On October 16, 2023 Petitioner filed the above referenced Petition, with an Addendum containing three relevant documents. Petitioner has recently received two documents that are relevant to arguments made in the Petition, namely: (1) the most recent set of Jury Instructions provided by the Secretary in a Title VI retaliation case, *Dartanya Hausburg v. Denis McDonough, Secretary, Department of Veterans Affairs*, Case No. 8:20-cv-02300-JSS, and (2) an order denying what the Defendant is currently claiming in *Hausburg*, is all 404(b) evidence in a case which si set for a multi-week trial for September, 2024. *Rosa Sly and Devona Hollingsworth v. Denis McDonough, Secretary, Department of Veterans Affairs*, Case No. 8:17-cv-1868-AAS.

2. In *Hausburg*, the parties filed jury instructions with memoranda because the parties and the trial Court wanted to have a hearing and understand what the basic Jury Instructions were before a multi-week trial begins at the end of January, 2024. As set forth on Page 14 of 29 of the Petition for Panel Rehearing and Rehearing En Banc, we have argued that one of the reasons there should be a rehearing on the jury instructions is because the September 1, 2023 ruling will result in the government attempting to duplicate, at least the *McLain* instructions in future cases. We have attached the governments instructions in *Hausburg* and also Mr. Hausburg's Jury Instructions. The indexes list the pages where the Title VI retaliation and retaliatory hostile work environment instructions are. The Title VII instructions are the issue. For convenience and without intending to be presumptuous, they are attached as Addendum Four.

The Court can note that the government provided alternative instructions. The first instructions were the *Gross* and *Nassar* instructions as set forth in 4.22 of the Eleventh Circuit Pattern Civil Jury Instructions. The alternative instructions were based on the *McLain* instructions.

3. The Order in *Sly et al* excludes the testimony of twenty Fed. Rule Evid. 404(b) witnesses in a case in which the Plaintiffs allege that the principal responsible management official (RMO) is someone who was involved in a self-styled scheme to destroy the careers and reputations of people that engaged in EEO activity brought by four Plaintiffs. The government lost all four cases, two completely and two in part. They appealed the two cases where the employees had prevailed in part. See *Gowski v. Peake*, 682 F.3d 1299 (11" Cir. 2012) (recognized a Federal employee right to bring a retaliatory hostile work environment claim; but see, as to the materiality of the action taken *Monaghan v. Worldpay U.S. Inc.*, 955 F.3d 855 (11th Cir. 2020)); *Babb .v Sec'y*, 992 F.3d 1193, 1196 (11th Cir. 2021). The RMO (Kristine Brown) involved in *Sly et al* was an RMO in roughly 20 cases following *Gowski v. Peake*, 682 F.3d 1299 (11th Cir. 2012). These included several that were ongoing at the time the retaliation started in the *Sly* case. Of those cases all settled and one resulted in an administrative determination of liability in a case in which Brown was the RMO. The witness identified as Roxanne Bronner was formerly known as Roxanne Lainhart and was one of the four plaintiffs who prevailed in *Gowski .v Peake*, 682 F.3d 1299 (11th Cir. 2012). In *Gowski*, she testified Brown encouraged her to become part of the scheme. The scheme has

continued for years as the Brown rose from an assistant to the Chief of Staff to an assistant, an associate and deputy director of the facility. All of the other witnesses and many of the original *Gowski* RMOs were involved in cases through that time period. Repeated retaliation by high levels of any agency has dramatic long-term effects on the culture of the agency.

4. The *Sly* decision, as well as *McLain*, *Terrell* and *Bell*, are being cited in other cases (i.e., *Hausburg*) to influence discretion on the admissibility of corroborative evidence such as 404(b). This is relevant to the arguments on pages 15-16 and fn 5 of the Petition.

5. The undersigned has consulted with the counsel for the Appellee who graciously advised the undersigned that he has no objections to supplementing the record with these materials.

WHEREFORE, Appellant, Dennis McLain respectfully requests that the Unopposed Motion for Leave to Supplement the Addendum to the Petition for Panel Rehearing and Rehearing En Banc be granted.

Respectfully submitted,

/s/ Joseph Magri

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 8:20-cv-02300-JSS

DARTANYA HAUSBURG,

v.

DENIS MCDONOUGH, SECRETARY,
DEPARTMENT OF VETERANS AFFAIRS,

DEFENDANT'S PROPOSED JURY INSTRUCTIONS

(October 30, 2023)

* * *

Defendant's Proposed Retaliation Instruction – Count I

4.22 Retaliation - Section 1981, Title VII, ADEA, ADA, and FLSA

In this case, Mr. Hausburg claims that the VA retaliated against him because he took steps to enforce his lawful rights under Title VII. Title VI provides Equal Employment Opportunity or "EEO" rights to employees.

Laws that prohibit discrimination in the workplace also prohibit an employer from taking any retaliatory action against an employee because the employee has asserted rights or made complaints under those laws.

Mr. Hausburg claims that the VA made improper changes to his annual leave, denied his request for an accommodation, denied his request for retirement, terminated him, and failed to pay him back pay and other benefits after his termination was mitigated to a reprimand because Mr. Hausburg filed Equal Employment Opportunity Commission ("EEO") complaints. The VA denies Mr. Hausburg's claims.

To succeed on his claim, Mr. Hausburg must prove each of the following facts by a preponderance of the evidence:

First: That Mr. Hausburg engaged in a protected activity under the FMLA;

Second: That the VA then took an adverse employment action;

Third: That the VA took the adverse employment action because of Mr. Hausburg's protected activity; and

Fourth: That Mr. Hausburg suffered damages because of the adverse employment action.

In the verdict form that I will explain in a moment, you will be asked to answer questions about these factual issues.

For the first element, Mr. Hausburg claims that he engaged in protected activity when he filed three EEO

complaints and opposed discrimination and retaliation against himself. If you find that Mr. Hausburg filed an EEO complaint then that action is "protected activity." In this case, the VA acknowledges that Mr. Hausburg engaged in protected EEO activity each time he filed an EEO complaint. Mr. Hausburg also claims that he engaged in protected activity when he opposed discrimination and retaliation against himself. A plaintiff has a "good faith" belief if he honestly believed that the defendant discriminated and retaliated against him. A plaintiff has a "reasonable" belief if a reasonable person would, under the circumstances, believe that a defendant discriminated and retaliated against him because of his EEO activity. For this part of the analysis, Mr. Hausburg does not have to prove that the VA actually discriminated or retaliated against him. But he must prove that he had a good-faith, reasonable belief that the VA did so.

For the second element, Mr. Hausburg claims that the VA took adverse employment actions against him when the VA made improper changes to his annual leave, denied his request for an accommodation, denied his request for retirement, terminated him, and failed to pay him back pay and other benefits after his termination was mitigated to a reprimand. You must decide whether these actions were adverse employment actions.

An "adverse employment action" is any type of action that would have made a reasonable employee reluctant to make or support a charge of discrimination. Put another way, if a reasonable employee would be less likely to complain about or oppose alleged discrimination because he knew that

the VA would take the action, then that action is an adverse employment action. If the employment action would not make it less likely for a reasonable employee to make complaints about or oppose the alleged discrimination, it is not an adverse employment action.

For the third element, if you find that Mr. Hausburg engaged in protected activity and that the VA took an adverse employment action against him, you must decide whether the VA took that action because of Mr. Hausburg's protected activity. Put another way, you must decide whether Mr. Hausburg's protected activity was the main reason for the VA's decision.

To determine that the VA took an adverse employment action because of Mr. Hausburg's protected activity, you must decide that the VA would not have taken the action had Mr. Hausburg not engaged in the protected activity but everything else had been the same.

The VA claims that it did not take any of the actions Mr. Hausburg claims were adverse employment actions because of his protected EEO activity. The VA claims that it did not improperly change Mr. Hausburg's annual leave and that it fully paid Mr. Hausburg for his backpay and benefits during his termination. The VA further claims that it took the remaining actions for reasons other than Mr. Hausburg's protected activity. An employer may not take an adverse action against an employee because of the employee's protected activity. But an employer may make changes to annual leave, deny requests for accommodation or retirement, terminate employees,

and fail to pay back pay and other benefits after a termination is mitigated to a reprimand for any other reason – good or bad, fair or unfair. If you believe the VA's reasons for its decisions, and you find that the VA did not make its decisions because of Mr. Hausburg's protected activity, you must not second guess that decision, and you must not substitute your own judgment for the VA's judgment – even if you do not agree with it.

For the fourth element, you must decide whether the VA's acts were the proximate cause of damages that Mr. Hausburg sustained. Put another way, you must decide, if the VA had not made improper changes to his annual leave, denied his request for an accommodation and his request for retirement, and terminated him, and failed to pay him back pay and other benefits after his termination was mitigated to a reprimand, would Mr. Hausburg's damages have occurred?

If you find that the VA's acts were the proximate cause of damages that Mr. Hausburg sustained, you must determine the amount of his damages.

Defendant's Proposed Alternative Retaliation Instruction – Count I

4.22 Retaliation – Title VII [Changes from Pattern Jury Instructions in ~~deletions~~ and <u>additions</u>]

In this case, Mr. Hausburg claims that the VA retaliated against him because he took steps to

enforce his lawful rights under Title VII. Title VI provides Equal Employment Opportunity or "EEO" rights to employees.

Laws that prohibit discrimination ni the workplace also prohibit an employer from taking any retaliatory action against an employee because the employee has asserted rights or made complaints under those EEO laws.

Mr. Hausburg claims that Defendant made improper changes to his annual leave, denied his request for an accommodation and his request for retirement, and terminated him, and failed to pay him back pay and other benefits after his termination was mitigated ot a reprimand because he filed three EEO complaints and opposed discrimination and retaliation against himself. The VA claims that it did not take any of the actions Mr. Hausburg claims were adverse employment actions because of his protected EEO activity. The VA claims that it did not improperly change Mr. Hausburg's annual leave and that ti fully paid Mr. Hausburg for his backpay and benefits during his termination. The VA further claims that it took the remaining actions for reasons other than Mr. Hausburg's protected activity and did not treat Mr. Hausburg differently in the process of making these personnel decisions. To succeed on his claim, Mr. Hausburg must prove each of the following facts by a preponderance of the evidence:

First: That Mr. Hausburg engaged in protected activity;

Second: The VA treated Mr. Hausburg differently during the processes and decisions of the adverse employment actions.

Third: The VA ~~took the adverse employment action~~ treated Mr. Hausburg differently during the processes and decisions of the adverse employment actions because of Mr. Hausburg's protected activity; and

Fourth: Mr. Hausburg suffered damages because of the adverse employment action.

In the verdict form that I will explain in a moment, you will be asked to answer questions about these factual issues.

For the first element, Mr. Hausburg claims that he engaged in protected activity when he filed three EEO complaints and opposed discrimination and retaliation against himself. If you find that Mr. Hausburg filed an EEO complaint then that action is "protected activity." In this case, the VA acknowledges that Mr. Hausburg engaged in protected EEO activity each time he filed an EEO complaint. Mr. Hausburg also claims that he engaged in protected activity when he opposed discrimination and retaliation against himself. A plaintiff has a "good faith" belief if he honestly believed that the defendant discriminated and retaliated against him. A plaintiff has a "reasonable" belief if a reasonable person would, under the circumstances, believe that a defendant discriminated and retaliated against him because of his EEO activity. For this part of the analysis, Mr. Hausburg does not have to prove that the VA actually discriminated or retaliated against him. But he must

prove that he had a good-faith, reasonable belief that the VA did so.

For the second element, Mr. Hausburg claims that the VA took adverse employment actions against him when it made improper changes to his annual leave, denied his request for an accommodation and his request for retirement, and terminated him, and failed to pay him back pay and other benefits after his termination was mitigated to a reprimand. You must decide whether these actions were an adverse employment action.

For a retaliation claim, an "adverse employment action" is any type of action that would have made a reasonable employee reluctant to make or support a charge of discrimination. Put another way, if a reasonable employee would be less likely to complain about or oppose alleged discrimination because he knew that the VA would take one or more of these actions against him then that is an "adverse employment action." If the employment action would not make it less likely for a reasonable employee to make complaints about or oppose the alleged discrimination, then it is not an adverse employment action.

Mr. Hausburg claims that he engaged in protected activity and that his protected activity was a part of the way the VA made a personnel action or actions. Federal-sector law commands that "personnel actions" "shall be made free from any discrimination." Discrimination in this context includes retaliation and means "differential treatment." Thus, it imposes the duty of making — that is rendering or producing — personnel actions untainted by any consideration of

retaliation. In other words, Mr. Hausburg's protected EEO activity cannot play any part in the way the decision was made.

To determine that Mr. Hausburg's protected EEO activity played a part in the way one or more employment decisions was made, you must decide that the VA treated Mr. Hausburg differently as part of the decision that was made and would not have treated Mr. Hausburg that way if Mr. Hausburg had not engaged in the protected EEO activity but everything else had been the same.

The VA denies that treated Mr. Hausburg differently in the process of making the personnel decisions of which he complaints. The VA claims that it did not take any of the actions Mr. Hausburg claims were adverse employment actions because of his protected EEO activity. The VA claims that it did not improperly change Mr. Hausburg's annual leave and that it fully paid Mr. Hausburg for his backpay and benefits during his termination. The VA further claims that it took the remaining actions for reasons other than Mr. Hausburg's protected activity and did not treat Mr. Hausburg differently in the process of making these personnel decisions. An employer may not take an adverse action against an employee because of the employee's protected activity. But an employer may choose to adjust leave, deny an accommodation or retirement, terminate an employee, or choose how to respond when a termination is mitigated to a reprimand for any other reason, good or bad, fair, or unfair. If you believe the VA's reasons for its decisions, and you find that the VA did not make its decision because of Mr. Hausburg's protected activity, you must not second

guess that decision, and you must not substitute your own judgment for the VA's judgment – even if you do not agree with it.

As I have explained, Mr. Hausburg has the burden to prove that the VA's ~~decisions~~ treatment ~~were~~ was because of his protected activity. I have explained to you that evidence can be direct or circumstantial. To decide whether the VA's ~~decisions~~ treatment of Mr. Hausburg ~~were~~ was because of his protected EEO activity, you may consider the circumstances of the VA's ~~decisions~~ treatment of Mr. Hausburg. For example, you may consider whether you believe the reasons that the VA gave for the ~~decisions~~ treatment. If you do not believe the reasons ~~that it gave for the decisions~~, you may consider whether the reasons were so unbelievable that they were a cover-up to hide the true retaliatory reasons for the ~~decisions~~ treatment.

For the fourth element, you must decide whether the VA's acts were the proximate cause of the damages that Mr. Hausburg claims he sustained. Put another way, you must decide, if the VA had not taken one or more adverse actions against Mr. Hausburg would these damages have occurred?

If you find that the VA's acts were the proximate cause of damages that Mr. Hausburg sustained, you must also determine the amount of these damages.

Retaliatory Hostile Work Environment – Title VII – Count II

Mr. Hausburg claims that the VA violated federal civil rights statutes that prohibit employers from retaliating against employees in the terms and conditions of employment because of their protected EEO activity. These statutes prohibit the creation of a hostile work environment caused by harassment because of a plaintiff's protected EEO activity.

Specifically, Mr. Hausburg claims that his supervisor harassed him because of his protected EEO activity, and that the harassment created a hostile work environment. The VA denies Mr. Hausburg's claim.

To succeed on his claim, Mr. Hausburg must prove each of the following facts by a preponderance of the evidence:

First: That Mr. Hausburg's supervisor harassed him because of his protected EEO activities;

Second: The harassment created a hostile work environment for Mr. Hausburg.

In the verdict form that I will explain in a moment, you will be asked to answer questions about these factual issues.

A retaliatory hostile work environment created by harassment because of Mr. Hausburg's protected EEO activities exists if:

(a) Mr. Hausburg was subjected to offensive acts or statements about or because of his protected EO activity – even if they were not specifically directed at him;

(b) Mr. Hausburg did not welcome the offensive acts or statements, which means that he did not directly or indirectly invite or solicit them by his own acts or statements;

(c) the offensive acts or statements materially altered the terms or conditions of Mr. Hausburg's employment;

(d) a reasonable person – not someone who is overly sensitive – would have found that the offensive acts or statements materially altered the terms or conditions of the person's employment enough to dissuade a reasonable person from making or supporting a charge of discrimination; and

(e) Mr. Hausburg believed that the offensive acts or statements materially altered the terms or conditions of his employment.

A "material alteration" is a significant change in conditions. Conduct that amounts only to ordinary socializing in the workplace does not create a hostile work environment. A hostile work environment will not result from occasional horseplay, offhand comments, simple teasing, sporadic use of offensive language, or occasional jokes related to a plaintiff's protected EEO activities. But retaliatory intimidation, ridicule, insults, or other verbal or physical conduct or other materially adverse conduct may materially alter the terms or conditions of employment.

* * *

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 8:17-cv-1868-AAS

ROSA SLY and DEVONA HOLLINGSWORTH,

Plaintiffs,

v.

DENIS MCDONOUGH, SECRETARY,
DEPARTMENT OF VETERANS AFFAIRS,

Defendant.

ORDER

(October 12, 2023)

ORDER

Defendant Secretary of the Department of Veterans Affairs (Secretary) moves to exclude certain exhibits at trial. (Doc. 160). Plaintiffs oppose the Secretary's motion. (Doc. 163). For the reasons stated at the October 10, 2023 pretrial conference, the Secretary's motion is **GRANTED in part** and **DENIED in part** as follows:

1. The Secretary's motion to exclude Exhibits 3-6, 8-11, 13-18, 24, 25, 36-38, 41, 42, 44,[1] 56-58, 118, 119, 121, 132-145 is **GRANTED**.

2. The Secretary's motion to exclude Exhibit 50 is **DENIED**.

3. Of the witnesses listed in Exhibit B, the Secretary's motion to exclude Dr. Lynn Anderson, James Atkinson, Linda LaFond Cohn, Dr. Claudia Cote, Kendra DiMaria, Mathis Dudley, Dr. Selim Elzayat, Diane Gowski, Mathew Gustin, Thomas Jaquis, Paul Jones, Darin Oakes, Kathleen Reilly, Walter Slam, Tatishka Thomas (Musgrove), Tim Torain, Christopher Waltz, and Dr. Sally Zachariah is **GRANTED**. The Secretary's motion to exclude Roxanne Bronner as a witness is **GRANTED in part and DENIED** in part. Ms. Bronner is prohibited from (1) testifying regarding her own litigation against Veterans Affairs and (2) testifying about the time period prior to the events giving rise to the current case. The Secretary's motion to exclude Mary Mells as a witness is **DENIED without prejudice**. As stated at the hearing, Ms. Sly will be permitted to testify that she drafted an affidavit for Ms. Mells' case. Therefore, it is likely unnecessary for Ms. Mells to be included as a witness for the sole purpose of testifying to a fact Ms. Sly can establish. To the extent Ms. Mells is needed to confirm the affidavit, the court may allow her to do so.

4. The Secretary's motion to exclude Exhibits 43, 45, 49, 59, and 64 is **GRANTED in part and DENIED in part**. These exhibits may be admitted at trial but not for the purpose of re-arguing protected

[1] Exhibit 44 is a duplicate of excluded Exhibit 36.

activity or adverse employment action issues the court has already decided.

5. The Secretary's motion to exclude Exhibits 1, 7, 32, 33, 40, and 55[2] is **DENIED without prejudice** to be addressed at trial, if necessary.

6. The Secretary's motion to exclude Exhibits 53 and 129-131 is **DENIED without prejudice** to be addressed at trial, if necessary. By October 27, 2023 counsel for Ms. Sly and Ms. Hollingsworth must give counsel for the Secretary (1) an explanation as to the contents of Exhibit 53 and (2) the complete pages for Exhibits 129-131.

7. The parties **must confer** and come to an agreement on the expected length of trial and the earliest possible month the parties will be ready for trial. After **filing a notice** with the court no later than **October 27, 2023**, the court will provide counsel with available trial weeks so that the parties can agree to specific dates for the trial.

ORDERED in Tampa, Florida, on October 12, 2023.

Ananda Anold Samme
AMANDA ARNOLD SANSONE
United States Magistrate Judge

[2] Exhibit 55 is a duplicate of Exhibit 40.