

No. 18-882

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**In the  
Supreme Court of the United States**

NORIS BABB,

*Petitioner,*

v.

ROBERT WILKIE,  
SECRETARY OF VETERANS AFFAIRS,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

**JOINT APPENDIX**

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PETITION FOR CERTIORARI FILED JANUARY 7, 2019

CERTIORARI GRANTED JUNE 28, 2019

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In accordance with Supreme Court Rule 26.1, the following items have been omitted in printing this joint appendix because they appear on the following pages of the appendix to the Petition for a Writ of Certiorari (January 7, 2019):

Opinion of the United States Court of Appeals for the Eleventh Circuit, July 16, 2018.....	1a
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**RELEVANT DOCKET ENTRIES**

**U.S. Court of Appeals for the Eleventh Circuit  
Case No. 16-16492**

<b>Date Filed</b>	<b>Docket Text</b>
10/12/2016	CIVIL APPEAL DOCKETED. Notice of appeal filed by Appellant Noris Babb on 10/11/2016. Fee Status: Fee Not Paid. Awaiting Appellant's CIP Due on or before 11/02/2016 as to Appellant Noris Babb [Entered: 10/19/2016 10:24 AM] * * *
12/21/2016	Appellant's brief filed by Noris Babb. (ECF: Joseph Magri) [Entered: 12/21/2016 05:56 PM] * * *
12/28/2016	Appendix filed [12 VOLUMES] by Appellant Noris Babb. (ECF: Joseph Magri) [Entered: 12/28/2016 11:03 AM] * * *
05/02/2017	Appellee's Brief filed by Appellee Secretary, Department of Veterans Affairs. (ECF: Peter Sholl) [Entered: 05/02/2017 03:39 PM] * * *
06/06/2017	Reply Brief filed by Appellant Noris Babb. (ECF: Joseph Magri) [Entered: 06/06/2017 04:57 PM] * * *

<b>Date Filed</b>	<b>Docket Text</b>
02/07/2018	Oral argument held. Oral Argument participants were Joseph D. Magri for Appellant Noris Babb and Peter J. Sholl for Appellee Secretary, Department of Veterans Affairs. [Entered: 02/07/2018 11:40 AM]
02/15/2018	Appellant's Citation of Supplemental Authority filed by Attorney Joseph D. Magri for Appellant Noris Babb. (ECF: Joseph Magri) [Entered: 02/15/2018 03:50 PM]
02/21/2018	Appellee's Response to Aplts. Supplemental Authority filed by Appellee Secretary, Department of Veterans Affairs. (ECF: Peter Sholl) [Entered: 02/21/2018 03:25 PM]
07/16/2018	Opinion issued by court as to Appellant Noris Babb. Decision: Affirmed in part, Reversed in part, and Remanded. Opinion type: Non-Published. Opinion method: Per Curiam. The opinion is also available through the Court's Opinions page at this link <a href="http://www.ca11.uscourts.gov/opinions">http://www.ca11.uscourts.gov/opinions</a> . (Opinion corrected on 7/16/2018.)-- [Edited 07/16/2018 by JRP] [Entered: 07/16/2018 11:21 AM]
07/16/2018	Judgment entered as to Appellant Noris Babb. [Entered: 07/16/2018 11:22 AM]

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<b>Date Filed</b>	<b>Docket Text</b>
08/30/2018	Petition for rehearing en banc (with panel rehearing) filed by Appellant Noris Babb. (ECF: Joseph Magri) [Entered: 08/30/2018 02:08 PM]
10/09/2018	ORDER: The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled, the Petition(s) for Rehearing En Banc filed by Appellant Noris Babb are DENIED. [8585677-1] [Entered: 10/09/2018 02:17 PM]
10/17/2018	Mandate issued as to Appellant Noris Babb. [Entered: 10/17/2018 11:14 AM]
01/09/2019	Notice of Writ of Certiorari filed as to Appellant Noris Babb. SC# 18-882. [Entered: 01/10/2019 03:08 PM]

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**RELEVANT DOCKET ENTRIES**

**U.S. District Court for the  
Middle District of Florida  
Case No. 8:14-cv-01732-VMC-TBM**

<b>Date Filed</b>	<b>#</b>	<b>Docket Text</b>
07/17/2014	1	COMPLAINT against Sloan D. Gibson with Jury Demand (Filing fee \$ 400 receipt number TPA24583) filed by Noris Babb. (Attachments: # 1 Civil Cover Sheet)(VCG) (Entered: 07/17/2014) * * *
10/10/2014	12	AMENDED COMPLAINT against Sloan D. Gibson with Jury Demand. filed by Noris Babb. Related document: 1 Complaint filed by Noris Babb.(Magri, Joseph) (Entered: 10/10/2014) * * *
10/23/2014	14	MOTION to Dismiss the First Amended Complaint <i>and Incorporated Memorandum of Law</i> by Robert A. McDonald. (Kenneth, Michael) (Entered: 10/23/2014) * * *
11/07/2014	17	Unopposed MOTION to Amend/Correct 12 Amended Complaint by Noris Babb. (Magri, Joseph) (Entered: 11/07/2014)

<b>Date Filed</b>	<b>#</b>	<b>Docket Text</b>
11/07/2014	18	ENDORSED ORDER: Plaintiff's Unopposed Motion to Amend/ Correct the Amended Complaint 17 is granted. In light of the foregoing, Defendant's Motion to Dismiss the First Amended Complaint 14 is denied as moot. Plaintiff shall file the Second Amended Complaint on or before November 12, 2014. Defendant shall file its response on or before November 21, 2014. Signed by Judge Virginia M. Hernandez Covington on 11/7/2014. (AKH) (Entered: 11/07/2014)
11/12/2014	19	SECOND AMENDED COMPLAINT against Robert A. McDonald with Jury Demand. filed by Noris Babb.(Magri, Joseph) Modified text on 11/13/2014 (LYB). (Entered: 11/12/2014)
11/21/2014	20	MOTION to Dismiss Second Amended Complaint by Robert A. McDonald. (Kenneth, Michael) (Entered: 11/21/2014)
12/08/2014	21	RESPONSE in Opposition re 20 MOTION to Dismiss Second Amended Complaint filed by Noris Babb. (Attachments: # 1 Exhibit A- Excerpt Investigative Report, # 2 Exhibit B- Counselor Report,

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<b>Date Filed</b>	<b>#</b>	<b>Docket Text</b>
		# 3 Exhibit C- Notice of Partial Acceptance of EEO Complaint, # 4 Exhibit D- Formal Complaint of Discrimination)(Magri, Joseph) (Entered: 12/08/2014)
12/08/2014	22	ORDER: Defendant Robert A. McDonald, Secretary of the Department of Veterans Affairs' Motion to Dismiss Second Amended Complaint and Incorporated Memorandum of Law 20 is GRANTED. Plaintiff Noris Babb has until and including December 19, 2014, to file a Third Amended Complaint consistent with this Order. Defendant has until and including January 8, 2015, to file its response to the Third Amended Complaint. Signed by Judge Virginia M. Hernandez Covington on 12/8/2014. (AKH) (Entered: 12/08/2014)  * * *
12/19/2014	27	AMENDED COMPLAINT <i>Third</i> against Robert A. McDonald with Jury Demand. filed by Noris Babb. Related document: 19 Amended Complaint filed by Noris Babb.(Magri, Joseph) (Entered: 12/19/2014)

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<b>Date Filed</b>	<b>#</b>	<b>Docket Text</b>
12/24/2014	28	MOTION to Dismiss Third Amended Complaint <i>and Incorporated Memorandum of Law</i> by Robert A. McDonald. (Kenneth, Michael) (Entered: 12/24/2014)
01/12/2015	29	RESPONSE in Opposition re 28 MOTION to Dismiss Third Amended Complaint <i>and Incorporated Memorandum of Law</i> filed by Noris Babb. (Attachments: # 1 Exhibit A. Watts First Amended Complaint)(Magri, Joseph) (Entered: 01/12/2015)
01/22/2015	30	ORDER: Defendant Robert A. McDonald, Secretary of the Department of Veterans Affairs' Motion to Dismiss Third Amended Complaint and Incorporated Memorandum of Law 28 is DENIED. Defendant has until and including January 30, 2015, to file its Answer to the Third Amended Complaint. Signed by Judge Virginia M. Hernandez Covington on 1/22/2015. (AKH) (Entered: 01/22/2015)

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<b>Date Filed</b>	<b>#</b>	<b>Docket Text</b>
02/06/2015	33	<i>Defendant's</i> ANSWER and affirmative defenses to 27 Amended Complaint by Robert A. McDonald.(Kenneth, Michael) (Entered: 02/06/2015)  * * *
02/10/2015	35	ORDER appointing Peter J. Grilli, Esq. as mediator. The mediation conference is scheduled for August 6, 2015. The Court directs that all counsel, parties, corporate representatives, and any other required claims professionals shall be present at the mediation conference with full authority to negotiate a settlement. The Court does not allow mediation by telephone or video conference. Personal attendance is required. See Local Rule 9.05(c). Signed by Judge Virginia M. Hernandez Covington on 2/10/2015. (KAK) (Entered: 02/10/2015)  * * *
08/06/2015	39	MEDIATION report Hearing held on August 6, 2015. Hearing outcome: The parties have reached an impasse.. (Grilli, Peter) (Entered: 08/06/2015)  * * *

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<b>Date Filed</b>	<b>#</b>	<b>Docket Text</b>
04/11/2016	52	MOTION for summary judgment by Robert A. McDonald. (Attachments: # 1 Index, # 2 Exhibit 1-44, # 3 Exhibit 45-94)(Kenneth, Michael) (Entered: 04/11/2016)
04/11/2016	53	DEPOSITION of Gary Wilson taken on February 16, 2016 re 52 MOTION for summary judgment by Robert A. McDonald. . (Kenneth, Michael) (Entered: 04/11/2016)
04/11/2016	54	DEPOSITION of John Hull taken on March 8, 2016 re 52 MOTION for summary judgment by Robert A. McDonald. . (Kenneth, Michael) (Entered: 04/11/2016)
04/11/2016	55	DEPOSITION of Keri Justice taken on February 18, 2016 re 52 MOTION for summary judgment by Robert A. McDonald. . (Kenneth, Michael) (Entered: 04/11/2016)
04/11/2016	56	DEPOSITION of Leonard Williams taken on February 19, 2016 re 52 MOTION for summary judgment by Robert A. McDonald. . (Kenneth, Michael) (Entered: 04/11/2016)

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<b>Date Filed</b>	<b>#</b>	<b>Docket Text</b>
04/11/2016	57	DEPOSITION of Marjorie Howard taken on February 16, 2016 re 52 MOTION for summary judgment by Robert A. McDonald. . (Kenneth, Michael) (Entered: 04/11/2016)
04/11/2016	58	DEPOSITION of Megan Martinez taken on February 19, 2016 re 52 MOTION for summary judgment by Robert A. McDonald. . (Kenneth, Michael) (Entered: 04/11/2016)
04/11/2016	59	DEPOSITION of Noris Babb taken on February 26, 2016 re 52 MOTION for summary judgment by Robert A. McDonald. . (Kenneth, Michael) (Entered: 04/11/2016)
04/11/2016	60	DEPOSITION of Robert Stewart taken on February 18, 2016 re 52 MOTION for summary judgment by Robert A. McDonald. . (Kenneth, Michael) (Entered: 04/11/2016)
		* * *
04/26/2016	62	DEPOSITION of Keri Justice taken on February 18, 2016 re 52 MOTION for summary judgment by Robert A. McDonald. [including

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<b>Date Filed</b>	<b>#</b>	<b>Docket Text</b>
		errata sheet]. (Kenneth, Michael) (Entered: 04/26/2016)  * * *
05/18/2016	68	RESPONSE to Motion re 52 MOTION for summary judgment filed by Noris Babb. (Attachments: # 1 Exhibit Exhibit List to Pl's Response to MSJ, # 2 Exhibit Pl's Exhibits 1a-3a, # 3 Exhibit Pl's Exhibits 3b-14, # 4 Exhibit Pl's Exhibits A-M2, # 5 Exhibit Pl's Exhibits N-P, # 6 Exhibit Pl's Exhibits Q-Y, # 7 Exhibit Pl's Exhibits Z-KK)(Magri, Joseph) (Entered: 05/18/2016)
05/19/2016	69	NOTICE of <i>Correction</i> by Noris Babb re 68 Response to motion (Attachments: # 1 Exhibit Revised Exhibit List to Pl's Response to MSJ, # 2 Exhibit Pl's Exhibit LL to Resp to MSJ)(Magri, Joseph) Modified text on 5/20/2016. (AG) (Entered: 05/19/2016)
06/01/2016	70	REPLY to Response to Motion re 52 MOTION for summary judgment filed by Robert A. McDonald. (Attachments: # 1 Exhibits 1-5)(Kenneth, Michael) (Entered: 06/01/2016)  * * *

<b>Date Filed</b>	<b>#</b>	<b>Docket Text</b>
06/08/2016	73	RESPONSE re 70 Reply to Response to Motion to <i>Defendant's De Facto Motion to Strike Set Forth in Footnote 1 of its Reply in Support of Its Motion for Summary Judgment</i> filed by Noris Babb. (Magri, Joseph) (Entered: 06/08/2016)
06/13/2016	74	PLAINTIFF'S BRIEF re 70 Reply to Response to Motion for <i>Summary Judgment-Surreply</i> filed by Noris Babb. (Attachments: # 1 Affidavit Ex 1e-Declaration of Noris Babb, # 2 Exhibit Ex. 7a Excerpt of Depo of Linda Rolston)(Magri, Joseph) (Entered: 06/13/2016)
		* * *
08/23/2016	83	<b>ORDER: Defendant the Secretary of Veterans Affairs' Motion for Summary Judgment (Doc. # 52) is GRANTED. The Clerk is directed to enter Judgment in favor of Defendant the Secretary of Veterans Affairs and thereafter to CLOSE THE CASE. Signed by Judge Virginia M. Hernandez Covington on 8/23/2016. (KAK) (Entered: 08/23/2016)</b>

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<b>Date Filed</b>	<b>#</b>	<b>Docket Text</b>
08/23/2016	84	JUDGMENT in favor of Robert A. McDonald against Noris Babb (Signed by Deputy Clerk) (LD) (Entered: 08/23/2016)  * * *
10/11/2016	89	NOTICE OF APPEAL as to 84 Judgment by Noris Babb. Filing fee not paid. (Magri, Joseph) (Entered: 10/11/2016)  * * *
12/28/2016		Pursuant to F.R.A.P. 11(c), the Clerk of the District Court for the Middle District of Florida certifies that the record is complete for the purposes of this appeal re: 89 Notice of appeal. All documents are imaged and available for the USCA to retrieve electronically. USCA number: 16-16492-FF (AMD) (Entered: 12/28/2016)
07/16/2018	92	OPINION of USCA. Opinion issued by court as to Appellant Noris Babb. Decision: Affirmed in part, Reversed in part, and Remanded as to 89 Notice of appeal filed by Noris Babb. EOD: 7/16/2018; Mandate to issue at a later date. USCA number: 16-16492-FF. (SRC) (Entered: 07/16/2018)

<b>Date Filed</b>	<b>#</b>	<b>Docket Text</b>
10/18/2018	93	MANDATE of USCA: Affirmed in part, Reversed in part, and Remanded as to 89 Notice of appeal filed by Noris Babb. Issued as Mandate: 10/17/18 USCA number: 16-16492-FF. (JNB) (Entered: 10/18/2018)
		* * *
10/25/2018	95	Unopposed MOTION to stay re 94 Order by Noris Babb. (Magri, Joseph) (Entered: 10/25/2018)
10/25/2018	96	<b>ENDORSED ORDER granting (Doc. # 95) Plaintiff's Unopposed Motion to Stay Proceedings. The case is stayed and administratively closed pending the filing of Plaintiff's petition for certiorari with the United States Supreme Court. The parties are directed to file a status report on January 25, 2019, and every 90 days thereafter. Signed by Judge Virginia M. Hernandez Covington on 10/25/2018. (KAK) (Entered: 10/25/2018)</b>

\* \* \*

**UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION**

**NORIS BABB**

**Plaintiff,**

**v.**

**Case No.: 8:14-cv-  
1732-T-33TBM**

**ROBERT A.  
McDONALD, Secretary,  
DEPARTMENT OF  
VETERANS AFFAIRS,**

**Defendant**

**/**

**THIRD AMENDED COMPLAINT AND  
DEMAND FOR JURY TRIAL  
INJUNCTIVE RELIEF REQUESTED**

Plaintiff, Noris Babb complains of Defendant, Robert A. McDonald, Secretary, Department of Veterans Affairs as follows:

1. This court has jurisdiction pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, including 42 U.S.C. § 2000e-16 and the Age Discrimination in Employment Act of 1967 (29 U.S.C. § 626).

2. Plaintiff has complied with all jurisdictional prerequisites to action under Title VII of the Civil Rights Act of 1964 as amended including having exhausted their administrative remedies.

3. C.W. "Bill" Young VA Healthcare System (Young VAHCS), formerly known as Bay Pines VA

Health Care System, is a Veterans Administration (VA) hospital and medical center with related services.

4. It is broken down into various services. Mike Tyler (Tyler) is a Clinical Pharmacist at Young VAHCS. Now, he is the Plaintiff's first-line supervisor. At all times material to this complaint, Dr. Marjorie Howard (Howard) was the Plaintiff's direct supervisor. Gary Wilson (Wilson) is the Chief of Pharmacy, Dr. Keri Justice (Justice) is Assistant Chief of Pharmacy, and Dr. Camaro West-Lee (West-Lee) is Assistant Chief of Pharmacy. Each of the employees of the VA as described herein were employed by the Defendant and were acting within the course and scope of his or her employment with the Defendant at the time of the conduct described herein. Each of the employees was there during the relevant times of this complaint.

#### **GENERAL ALLEGATIONS**

5. Donna Trask (Trask) and Anita Truitt (Truitt) are fellow employees of Noris Babb, and like the Plaintiff at material times were GS-12 Clinical Pharmacists at Young VAHCS and worked in the same Clinical Pharmacy at Young VAHCS during the relevant times of Babb's complaint. Both Trask and Truitt have filed administrative complaints and current federal lawsuits against Young VAHCS on the grounds of gender, age, reprisal, and hostile work environment. Younger, predominately male pharmacists were given Patient Aligned Care Team (PACT) positions as clinical pharmacy specialists. Despite comprising only 13.9% of the pharmacists, younger males received two-thirds of the positions. Younger females received the remaining third.

Females over 40 received none of the positions. These positions were upgraded to GS-13 positions. Only certain positions, including the ones Drs. Truitt and Trask applied for, were advertised. While they had extensive experience in Disease State Management (DSM) they were denied training for an advanced scope given to a male who was selected. Another male received a PACT position without DSM experience. Procedures that had been in place for years concerning advance scopes and the support of the PACT position physicians whose patients they would have been working with were ignored. Babb developed a good faith belief that Trask and Truitt were discriminated against. She was named as a Trask and Truitt witness in the EEO administrative process, and she assisted and participated in those administrative investigations by giving several statements in behalf of Trask and Truitt and related to what she described as gender and age discrimination against Drs. Truitt and Trask. Trask case number was ORM 200I- 0516-2011104650 and Truitt case number was 200I-0516-2011104649. She sent those statements on April 26, 2012, May 10, 2012 (Truitt only), and May 11, 2012 to an EEO investigator detailing her knowledge with respect to Dr. Trask's and Dr. Truitt's respective discrimination claims. Her statements were "protected activity" under 42 USC § 2000e- 3(a) and under EEO Guidelines §§ 8-11-C 1, both of which forbid retaliation by the Defendant against any individual who assists or participates in any manner in EEO proceedings. Babb wrote in an email dated May 10, 2012 during Dr. Truitt's proceedings that "I do fear retaliation from Pharmacy Admin." Babb gave specific statements as to Wilson's and Justice's

actions in those cases, as well as other information supportive of Trask and Truitt.

6. The statements supported Dr. Trask and Dr. Truitt's contentions that there was and is gender and age discrimination and a hostile work environment against older females in the Pharmacy department. Dr. Babb stated, *inter alia*, that older females were not given the training for positions that a younger male, Brian Steele, was given. He received a Patient Aligned Care Team (PACT) position after being given the training. Dr. Trask was removed from a Spinal Cord Team that was supposed to transition into PACT and William Lavinghousez, a male with no experience was placed on the team. Drs. Truitt and Trask were denied training for credentials, which were made central to appointment to these positions which was given to Dr. Steele. The alleged reason was short staffing. However, young males were seen giving tours of the facility to students while the facility was allegedly short staffed. Trask was denied attendance at meetings a young male was allowed to go to. Another younger male, Mark Lobley, without experience or training in Disease State Management also got a PACT position which was not advertised. She also stated that the PACT scoring sheets were changed in a fashion that did not value experience, so that the new system disfavored older females. Dr. Babb stated that Dr. Trask lost her clinical position, a chance for advancement. She confirmed there was a hostile work environment associated with Wilson, Justice and West. She identified condescending remarks made by Keri Justice at Mod meetings towards older female pharmacists which insinuated that we would not be able to transition to the New

PACT models. These remarks were never made to younger males.

7. Wilson and Justice as well as other management of the Defendant became aware of Dr. Truitt and Dr. Truitt's EEOC cases by at least September 2011 when Dr. Wilson discussed them with an EEOC counselor. Dr. Wilson testified in Trask on April 18, 2012 and in Truitt on April 18, 2012. Dr. Justice testified in Trask on April 17, 2012 and Truitt on April 18, 2012. During the administrative process they became aware of Dr. Babb's participation. Subsequently, Reports of Investigations (ROIs) containing the Plaintiff's statements were sent to the Regional EEO officer on June 7, 2012 (Trask) and June 21, 2012 (Truitt). Shortly thereafter the Defendant began to commit acts of reprisal and acts of harassment against her. In addition in December 19, 2012 Donna Trask's interrogatory answers in the Administrative Proceedings in *Donna Trask v. Eric Shineki*, EEOC No. 510-2012-00328X, Agency No. 200I-0516-2011104650, Dr. Trask identified Dr. Babb as one of the witnesses to EEO case in Interrogatory Answers. On February 8, 2013, the Plaintiff opposed discrimination when she met with Keri Justice and complained about treatment of older females and the lack of promotion of older females. On March 24, 2014, she testified in Trask and Truitt's Federal Court EEO case.

8. The Plaintiff, is a female over the age of forty, now age 53, who is a GS-12/10 Clinical Pharmacist at Young VAHCS. Plaintiff has been employed at Young VAHCS since 2006. Plaintiff has held this position for eight (8) years.

9. Babb filed an informal EEO complaint on May 6, 2013. Babb filed her formal complaint on June 21, 2013, which contained 11 Claims. On July 26, 2013, Babb requested to add to her formal complaint two separate Reports of Contact write ups which were Event No. 12. On August 2, 2013, the ORM issued a partial acceptance of the Babb's complaint stating that all her Events Nos. 1 through 12 were accepted as part of a hostile work environment based on gender (female), age, and reprisal, and accepted also Events Nos. 10 and 11 as independently actionable discrete claims which were "also sufficiently related to the overall pattern of harassment." The Plaintiff testified on November 26, 2013. Supervisor Wilson testified on December 6, 2013, Supervisor Howard gave an affidavit November 27, 2013 and follow up on December 18, 2013. A Federal Complaint was filed on July 17, 2014. More than 360 days have passed since the informal filing date, thus satisfying the jurisdictional requirements. Subsequent like and related acts occurred after the Federal Complaint was filed (¶s 10o and p) and have been added to this complaint based upon case law.

**Gender, Age, Reprisal, and Hostile Work  
Environment**

10. Babb has been subjected to a hostile work environment and harassment based upon gender (female), age, and except for paragraph 10b, reprisal (EEO activity).

a. Since Fall of 2012, Howard has denied the Plaintiff's repeated requests for training in anticoagulation. This practice has occurred over several months. Babb and other Pharmacists were involved in a PACT. After hearing that Young

VAHCS was short in the anticoagulant clinic and needed assistance, Babb wanted to help out. However, the positions which were opened required pharmacists to have an advanced scope of practice in this area which required specific training in anticoagulants. Babb had an advanced scope of practice in disease state management but she did not have the training in anticoagulation and asked Howard on several occasions for this training so that she may qualify for this position. These requests were never granted and as a result Babb did not get the necessary training for this job. In fact, younger female pharmacists, who were at least ten years younger than the Plaintiff, were hired for these positions and the anticoagulant training was not required for these pharmacists.

b. On March 22, 2012 at a PACT meeting, with employees present, Howard asked Babb "When do you retire?" This remark was made by Howard at one of the PACT meetings. Babb was offended by the remark, as she was the oldest pharmacist in the group. Babb's belief was that Howard is trying to see how soon Babb is going to leave employment at Young VAHCS so that she could put one of the younger pharmacists in her position. In part because the management at Young VAHCS favors younger pharmacists who are residency trained rather than older pharmacist such as Babb, who are not residency trained, but rather are trained by experience and are board certified. There is favoritism towards younger Pharmacists who have doctorate degrees over older Pharmacists with the same degrees. This comment was embarrassing to Babb and created stress for her in work place.

c. September 2012, Howard told Babb that Babb was not allowed to participate in the construction of a new or revised Service Agreement between Pharmacy and Geriatrics. Howard told Babb that the agreement was just between service chiefs, Wilson as Chief of Pharmacy, and Dr. Leonard Williams, the Chief of Geriatric Care and Extended Care. Babb had been the expert in the geriatric field of Pharmacy. The new Service Agreement resulted in the loss of Babb's Scope of Practice. Furthermore, Babb learned that a younger female, infectious disease pharmacist, Lindsey Childs, and a male pharmacist, William Lavinghousez both of whom were more than ten years younger than the Plaintiff were allowed to participate in the construction of their Service Agreements. To be excluded from these types of meetings has been recognized by the EEOC as a form of a behavior which affects a term, condition, or privilege of employment.

d. During a conversation prior to an RAC meeting Keri Justice, Assistant Chief of Pharmacy asked Babb "have you seen the movie Magic Mike?" John Hoeldtke, Pharm D, asked, "what's that?" Justice replied, "a middle aged woman movie." Babb felt humiliated and embarrassed from Justice's comment about her age. This also increased her stress in the workplace. With regard to gender, a supervisor told the Plaintiff that Supervisor Justice "definitely likes the guys better." All the pharmacists who received advertised PACT positions were in their thirties. They were predominately male. A male who was the Plaintiff's age received a PACT position in Sarasota.

e. On September 27, 2012, Howard denied Babb's attendance for the Geriatrics and Extended Care PACT training. In early to mid-September 2012, Babb found out that a teleconference for Geriatrics and Extended PACT training would be held for the PACT that she was on. Babb repeatedly requested to be able to attend this training session, but Howard denied those requests and stated that it was late notice and she was unable to arrange coverage or cancel one of Babb's clinics. Babb could have arranged her schedule in her clinic so that she could attend; however, she was not allowed to attend. Another pharmacist Marina Sulik, who is more than 10 years younger than Plaintiff, was allowed to cancel her clinical session so that she could attend an off campus training conference with her PACT team. All of the other PACT pharmacists were allowed to attend training during this same time period. Babb was impacted as a result of not being allowed to attend this teleconference because the training was required for the PACT. To be excluded from these types of meetings has been recognized by the EEOC as a form of a behavior which affects a term, condition, or privilege of employment. Again this lack of training cost her promotion which would have brought her pay, compensation, benefits or a higher salary.

f. In October 2012 Babb received her Mid-term Performance Appraisal and asked Howard for clarification on the item "mentoring." Howard replied "don't worry about that, that's for an outstanding." On November 29, 2012 however, Babb received a "fully successful" on the mentoring element, not an "outstanding" on her Final Evaluation Performance Appraisal. When Babb inquired with Howard about this, Howard replied, "you can go to the Union and file

a grievance.” This lower proficiency rating cost her chance for higher pay, salary, or an award or bonus, and possibly a promotion.

g. In December 2012, Babb received a verbal reprimand by Wilson for not having training approved by the Education Department. One of the issues between Babb and Wilson involved a cardiac class that she had a pharmacy resident teach. The material given to Babb was very old and typewritten and looked unprofessional, so Babb had the packet updated by a resident. Wilson reprimanded her for not having this package approved by the Education Department. Babb did send this package for approval, but in the meantime, Babb was not allowed to teach the class any longer. The same material was handed out by two male counterparts, Eric Mathis and Victor Rozance, who had been using the material in their classes for several years since 1997 without any reprimand. The denial of allowing Babb to teach this class thereafter really annoyed her and gave her more stress.

h. On February 6, 2013, while Babb was discussing her disappointment on the revocation of her advanced scope of practice with her supervisor Ms. Howard. Babb stated “so no promotion for me” and Howard replied “there never was.” Howard informed Babb that she could not be promoted to GS-13, because Babb did not get the number of patients required in her clinic and that Babb needed to have 25% of her time spent seeing patients. The numbers of patients, however, were cut by management so that Babb could not meet that quota and to prevent her from meeting the standard for promotion. On the other hand, a younger female Pharmacist, Marina

Sulik, was given the numbers so that she could qualify for a promotion to GS-13. As a result, plaintiff was told she could not be promoted to GS-13 at that time which could had brought her a higher salary, pay, compensation and benefits.

i. Shortly after Babb opposed discrimination in conversation with Supervisor Justice, on February 15, 2013, Babb became aware that Wilson removed her advanced scope of practice despite the fact that it wasn't due to expire until October 31, 2013. By pulling her advanced scope, Babb could not be promoted to GS-13. The GS-13 position would have given her the ability to order medications without a doctor cosigning it and the ability to do this when other pharmacists with advanced scope of practices were not available. Having this scope of practice pulled changed Babb's career which resulted in no commensurate raise in pay or other benefits. In addition, this meant that Babb could no longer be in promotable status with the other pharmacists in the PACT.

j. On March 27, 2013, Babb became aware that Wilson was excluding Babb from promotions by implementing new qualification standards. These qualification standards would make it easier for those remaining pharmacists to qualify with advanced scope of practice to be promoted to GS-13. This included the predominately male pharmacists selected to the PACT. This could have benefited Babb had her scope of practice not been taken away. As a result, plaintiff knew she could not be promoted to GS-13 which would have brought her a higher salary, pay, compensation and benefits.

k. On April 18, 2013, Babb was selected specifically as a witness of probable knowledge for an administrative proceeding. The Director of Young VAHCS had received an anonymous letter postmarked March 13, 2013 which was to Wilson's home address. This letter contained derogatory comments about Wilson's leadership, alleging low morale, low job satisfaction, among other vulgar statements. Drs. Babb, Truitt and Trask were all called to testify. Babb knew nothing about the letter and was confused as to why she had been called as a witness in this investigation. This was an act that was not justified under the circumstances. This act brought additional stress upon Babb.

l. On April 23, 2013, Babb became aware by email from Wilson that she was not selected for the position of Clinical Pharmacy Specialist, anticoagulation GS-12, Announcement No. NY-13-CRP-845941. Babb was interviewed for this position by three panel members Rob Stewart Kim Hall, and Cathy Sidnewski. The selecting official was Keri Justice. Ms. Justice was aware that Babb had been a witness in the prior EEOs filed by Trask and Truitt, and that Babb opposed discrimination. The two pharmacists chosen for these positions were females around thirty (30) years old, Sarah Groff and Amy Mack who were close to over 20 years younger than the Plaintiff. Both individuals had their doctorates, but did not have the experience that Babb possessed. A score sheet used to rank the applicants favored younger applicants by not including years of experience as a pharmacist. Babb's far superior qualifications were not assessed. Babb was at a significant disadvantage because all along she had been denied the necessary training for

anticoagulation in the first place which would have increased the likelihood of her selection. Babb believes that she was denied this training as a result of reprisal for her earlier testimony in the Trask and Truitt cases. As a result, plaintiff was not promoted to the Clinical Pharmacy Specialist, anticoagulation GS-12 which could had brought her a higher salary, pay, compensation and benefits because all anticoagulation Clinical Pharmacists were upgraded to GS-13.

m. On April 24, 2013 Justice denied Babb a lateral move from the geriatric primary care PACT to the Mod B PACT. Originally, in June 2012, Howard had offered this proposed lateral move, to Babb. Initially, Babb turned down this move because she had planned on continuing to work in Geriatrics with the GPC interdisciplinary team to increase the pharmacy PACT GPC grid and assist in reaching the team's goals. After Truitt and Trask's ROIs were sent to the Agency, that position was taken away as alleged in paragraphs 10c and 10h. Babb therefore reconsidered and agreed to accept the lateral move. However, Keri Justice then informed her that she could not move anyone into a position without advertising it, a position she only took with Truitt and Trask and did so despite Human Resources recommendation to the contrary. However, it was not advertised for over a year. The lateral Mod B PACT position move was no longer an option. A male was moved into a PACT position without it being advertised. Given what had happened as alleged in paragraphs 10c, e and h, Babb felt she had to leave the Geriatric clinic where she had worked. She ended up as a float pharmacist. She lost her office and her duties changed as a result. All this was done by

Justice in retaliation for her testimony and her statements in the Trask and Truitt cases.

n. On June 18, 2013, Babb learned she had been written up with two separate Reports of Contact. Prior to these alleged incidents, Babb had never received a write-up for any reason. The first Report of Contact was initiated by Mary Kiso, Nurse Case Manager, Geriatrics, referencing an incident allegedly occurring April 22, 2013 where Babb changed the dosage of a drug for an elderly person to a lower dose, which was done so due to an FDA mandate. The second Report of Contact was also initiated by Kiso dated June 12, 2013 alleging that Babb did not answer a page, which was during the time Babb went home sick from work. Both Reports of Contact were then given to the Clinical Pharmacy Supervisor, Rob Stewart. These were unjustified acts which gave Babb increased stress in the workplace.

o. In or around October 2014, a younger female, Megan Martinez, who was more than ten years younger than the Plaintiff, and who was not engaged in EEO activity, obtained a position different from Endo-Pharmcare. She was allowed to get a job for Clinical Pharmacy Specialist Float, GS-13, which was not posted anywhere so that the Plaintiff did not know that the job opened up. The Plaintiff would have applied for this job had she known of this position.

p. In March 2014, the Plaintiff obtained a Clinical Specialist Pharmacy position which was announced as a GS-13. It had a compressed schedule of working four nine hours days a week from Tuesday through Friday and four hours on Saturday. She had wanted a GS-13 for some time and it had been denied. She took this position in order to receive a GS-13.

However, after taking it she remained as a GS-12 for months because, *inter alia*, she needed training. She eventually was given the GS-13 but no training was done. After reviewing her time cards, later, and time cards of other employees she learned that due to the scheduling, she was only entitled to four hours Holiday pay for each of the five legal federal Holidays on a Monday, (Martin Luther King Jr. Day, Presidents Day, Memorial Day, Labor Day and Columbus Day). However, other employees were being paid the full amount of a holiday. This act will cost at least \$1000.00 a year in Holiday Pay in the future.

## **COUNT I**

### **Retaliation**

11. Plaintiff, Noris Babb sues Robert A. McDonald, as Secretary of the Department of Veterans Affairs, for retaliation under Title VII and 29 USC § 626.

12. Plaintiff incorporates and re-alleges paragraphs 1 through 10, except paragraph 10b.

13. Plaintiff engaged in EEO activity which is protected under Title VII and 29 USC § 626. That included good faith opposition to unlawful gender and age discrimination as well as participation in her own EEO case and Drs. Trask and Truitt's case.

14. As alleged in paragraphs 5, 6, 7, and 9 above the Defendant was aware of the Plaintiff's protected EEO activities.

15. The discrete acts alleged are set forth in paragraphs 10j, 10 l, 10m, 10o, and 10p. Each of those acts followed shortly after Babb engaged in EEO activity. Moreover, as alleged in paragraph 10, they

are part of a long pattern of material adverse actions and antagonism against Babb. As alleged, the adverse actions included loss of pay, credentials, duties, opportunity for advancement and positions.

16. Babb has worked at the Bay Pines VA since 2004 and had never had a report of contact written up on her until she filed her claims. She had an excellent record and developed the clinic in geriatrics. Everything was proceeding smoothly up to June 2012 after she participated in the EEO cases of Drs. Trask and Truitt. Denial of her training happened after that, her clinic was closed and her advanced scope was removed before it was set to expire. Among other things listed in paragraph 10, Babb was denied pay, advancement, positions, and had duties and credentials removed and training denied which was material to her advancement.

17. As alleged in paragraph 10, the aforesaid adverse employment actions, other adverse actions, misconduct, and other conduct, acts and omissions to the Plaintiff's detriment, were all taken (or failed to be taken) by administrators and managing and supervisory personnel with the Young VAHCS in retaliation for the protected or EEO activity of the Plaintiff including those set forth above. They are the direct and proximate result of the EEO activity.

18. The Defendant, through the supervisors of the Plaintiff, has engaged in, directed, and/or ratified retaliatory conduct, and has frustrated the Plaintiff's efforts to obtain relief and intentionally maintained these retaliatory and unlawful practices to the detriment of its employees. The Defendant at all relevant times knew or should have known of the retaliatory actions being taken against the Plaintiff

and failed to take necessary action to prevent or correct the retaliatory actions being taken and, in fact, ratified such conduct.

19. The Defendant, through acceptance of such conduct in this case and others, including *Gowski v. Peake*, 682 F.3d 1299 (11<sup>th</sup> Cir. 2012) has fostered an attitude among administrators, managers and supervisors at the Young VAHCS that retaliation against employees in order to discourage protected EEO activity is an acceptable employment practice. For example, in *Gowski*, the highest ranking officials at the Young VAHCS were found to be involved in a scheme to retaliate in order to deter EEO activity, which was widely known at the facility and for which they were not punished as required by statute. As a direct and proximate result of actions of the Defendant and its administrators, managers and supervisors Plaintiff has been and continues to be denied her right to equal employment opportunity in violation of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq* and 29 USC § 626.

20. As a result of the foregoing, Plaintiff has been damaged. Such damages include, but are not limited to loss of pay; loss of benefits; payment of attorneys' fees and legal costs; loss of an amicable work environment; loss of career and professional opportunities; harm to professional reputations; and humiliation, anxiety, degradation, embarrassment, and severe emotional suffering and distress. Plaintiff will continue in the future to suffer the same damages absent relief from this Court.

21. Plaintiff has satisfied all conditions precedent to the filing of this suit or has been prevented by the Defendant from satisfying such

conditions or is excused under the law from satisfying any other conditions.

WHEREFORE, Plaintiff requests prospective relief, a judgment for damages, attorneys' fees and costs and such other and further relief as this Court deems just and proper and for a trial by jury on all issues so triable.

## COUNT II

### **Gender and Age Discrimination**

22. Plaintiff, Noris Babb sues Robert A. McDonald, as Secretary of the Department of Veterans Affairs for gender and age discrimination under Title VII and 29 U.S.C. § 626.

23. Plaintiff incorporates and re-alleges paragraphs 1 through 10. The discrete acts alleged are set forth in paragraphs 10 l and m. The remainder of the allegations provide background evidence.

24. As a direct and proximate result of the foregoing conduct, Plaintiff has been denied equal employment opportunity for wages, promotion, and other terms and conditions of employment by the Defendant due to gender (female) and age.

25. The above discriminatory actions were taken by the supervisory personnel within the VA in order to deprive the Plaintiff of employment and other employment action because of their gender and age. Given the long history of these actions and based upon all the conduct alleged in paragraphs 1 to 10, the Defendant at all relevant times knew, or should have known, of the above-referenced discrimination against the Plaintiff. The Defendant has failed to take necessary action to prevent or correct the

complaint of discrimination and, in fact, ratified such conduct. The Defendant, through the Plaintiff's managers and supervisors has engaged in, directed or ratified conduct, and denied and frustrated the Plaintiff's efforts to obtain relief. The Defendant, through acceptance of the complained of conduct within the pharmacy department, has fostered an attitude among supervisors within the Bay Pines VAHCS that age discrimination and gender discrimination are acceptable employment practices. Because of the willful actions of the Defendant and its administrators, managers and supervisors, and as a proximate cause thereof, the Plaintiff have been and continue to be denied their rights to equal employment opportunity in violation of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq* and 29 USC § 626.

26. As a result of the foregoing, the Plaintiff has been damaged. Those damages include, but are not limited to loss of pay; loss of benefits; loss of an amicable working environment; loss of career and professional opportunities; payment of attorneys' fees and legal costs; harm to her professional reputations; and humiliation, degradation, embarrassment, and severe emotional suffering and distress. Plaintiff will continue in the future to suffer from these damages absent relief from this Court.

27. Plaintiff has satisfied all conditions precedent to the filing of this suit or has been prevented by the Defendant from satisfying such conditions precedent, or is excused under the law from satisfying any other conditions.

WHEREFORE, Plaintiff requests prospective relief, judgment for damages, attorneys' fees and

costs, and such other relief as this Court deems just and proper and for a trial by jury on all issues so triable.

### **Count III**

#### **Hostile Work Environment**

28. Plaintiff, Noris Babb sues Robert A. McDonald, as Secretary of the Department of Veterans Affairs, for hostile work environment based upon gender, age and retaliation.

29. Plaintiff incorporates and re-alleges paragraphs 1 through 10; 13 through 19; and 25 and 26. Included within this environment are adverse actions or material adverse actions within 45 days of filing the complaint as alleged in paragraphs 10 l and m. In the case of retaliatory hostile work environment, the environment includes the material adverse actions alleged in paragraphs 10j, l, m, and p.

30. The aforesaid actions and conduct have created an intolerable hostile work environment.

31. As a result of the foregoing, Plaintiff has been damaged. Such damages include, but are not limited to payment of attorneys' fees and legal costs, loss of an amicable work environment, humiliation, anxiety, degradation, embarrassment, physical injury or illness, and severe emotional suffering and distress. Plaintiff will continue in the future to suffer the same damages absent relief from this Court.

32. Plaintiff has satisfied all conditions precedent to the filing of this suit or has been prevented by the Defendant from satisfying such conditions or is excused under the law from satisfying any other conditions.

WHEREFORE, Plaintiff requests prospective relief, a judgment for damages, attorneys' fees and costs and such other and further relief as this Court deems just and proper and for a trial by jury on all issues so triable.

**Count IV**

**Injunctive Relief**

33. Plaintiff, Noris Babb, sues Defendant, Robert A. McDonald, as Secretary of the Department of Veterans Affairs.

34. Plaintiff incorporates and re-alleges paragraphs 1 through 10, 13 through 19; 25 and 26; and 20 through 32.

35. Unless the above practices are enjoined, Plaintiff will suffer irreparable harm.

36. There is (1) a substantial likelihood of success on the merits; (2) irreparable injury that will be suffered unless an injunction is issued; (3) the threatened injury to the Plaintiff is greater than any damage the proposed injunction may cause the opposing party; and (4) the injunction, if issued, will not disserve the public interest.

37. Plaintiff requests the Court award her attorneys' fees and costs and enter preliminary and permanent injunctions enjoining the following practices, actions and conduct:

a. Violating Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, as described above including retaliation against Plaintiff for protected or EEO activity and discrimination based on age and gender (female).

b. Such other practices, actions or conduct that the court deems appropriate and proper to enjoin.

WHEREFORE, Plaintiff demand trial by jury of all issues so triable and such other and further relief as the Court deems just and appropriate.

**DEMAND FOR JURY TRIAL**

Plaintiff, Noris Babb hereby demands a trial by jury on all issues so triable.

Dated: December 19, 2014

Respectfully submitted,

**/s/ Joseph D. Magri**

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\* \* \*

**UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION**

NORIS BABB,

Plaintiff,

v.

ROBERT A. McDONALD,  
Secretary,  
DEPARTMENT OF  
VETERANS AFFAIRS,

Defendant.

Case No.: 8:14-cv-  
1732-T-33TBM

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**DEFENDANT'S ANSWER TO  
THIRD AMENDED COMPLAINT**

COMES NOW Defendant, Robert A. McDonald, Secretary, Department of Veteran Affairs, by and through the undersigned Assistant United States Attorney, to answer Plaintiff's Third Amended Complaint as follows:

1. Paragraph 1 is a jurisdictional statement to which no response is required.
2. Paragraph 2 contains legal conclusions to which no response is required.
3. Admitted that the C.W. Bill Young VA Medical Center (Young VA) is a Veterans Affairs (VA) hospital and medical center with related services. The Young VA is also the main facility within the Bay Pines VA Healthcare System (Bay Pines VA HCS). To the extent a further response is required, Defendant denies the remaining allegations of Paragraph 3.

4. Defendant admits that the Bay Pines VA HCS is broken down into various services. Defendant admits that Michael Tyler is a Float Pharmacy Supervisor at the Young VA. Defendant admits that Dr. Gary Wilson is the Chief of Pharmacy, Dr. Keri Justice is an Associate Chief of Pharmacy, and Dr. West-Lee is an Associate Chief of Pharmacy. Defendant admits that each of the employees of the VA described herein was employed by the Defendant and acting within the scope of his or her employment with the Defendant at the time of the conduct described herein. To the extent a further response is required, Defendant denies the remaining allegations of Paragraph 4.

5. With regard to the first sentence of Paragraph 5, admitted that Dr. Donna Trask and Dr. Anita Truitt are employed as GS-12 Clinical Pharmacists at the Young VA and were employed as such during the relevant times of Dr. Babb's complaint. Defendant admits the allegations of the second sentence of Paragraph 5. Defendant denies the third, fourth, fifth, and sixth sentence of Paragraph 5. With regard to the seventh sentence of Paragraph 5, Defendant admits that PACT assignments were eligible to become GS-13 positions after approval by the VISN PSB in August 2013. With regard to the eighth sentence of Paragraph 5, Defendant admits that certain PACT assignments, including the ones Drs. Trask and Truitt applied for, were advertised, while the PACT assignment Dr. Babb received was not advertised. Defendant denies the ninth sentence of Paragraph 5. With regard to the tenth sentence, Defendant admits that pharmacists of both genders who lacked disease state management experience but who had experience independently managing

patients under an Advanced Scope of Practice received PACT positions. Defendant denies the eleventh and twelfth sentences of Paragraph 5. Defendant admits the allegations in the fourteenth sentence of Paragraph 5. With regard to the thirteenth, fifteenth, seventeenth, and eighteenth sentences of Paragraph 5, Defendant admits that Drs. Trask and Truitt named Dr. Babb as a witness in their EEO claims and that Dr. Babb sent statements to the an EEO investigator on April 26, 2012, May 10, 2012, and May 11, 2012, which speak for themselves. The sixteenth sentence of Paragraph 5 contains legal conclusions to which no response is required. To the extent a further response is required, Defendant denies the remaining allegations of Paragraph 5.

6. Defendant denies that Plaintiff's characterization of Plaintiff's statements fully and accurately sets forth the contents thereof, which speak for themselves. To the extent a further response is required, Defendant denies the allegations of Paragraph 6.

7. Defendant admits that Dr. Wilson and Dr. Justice became aware of Dr. Trask and Dr. Truitt's EEOC cases by at least September 2011. Defendant denies the remaining allegations of the first sentence of Paragraph 7. Defendant admits the allegations of the second and third sentence of Paragraph 7. Defendant denies the allegations of the fourth sentence of Paragraph 7. Defendant admits the allegations of the fifth sentence of Paragraph 7. Defendant denies the allegations of the sixth sentence of Paragraph 7. Defendant is without sufficient information to admit or deny the allegations of the seventh sentence of Paragraph 7. Defendant denies

the allegations of the eighth sentence of Paragraph 7. Defendant admits the ninth sentence of Paragraph 7.

8. Defendant admits that Plaintiff is a female over the age of forty who is employed at the Young VA. Defendant denies the remaining allegations of Paragraph 8.

9. Defendant admits that Plaintiff contacted an EEO counselor on May 6, 2013 and filed a formal complaint on June 21, 2013, which speaks for itself. Defendant further admits that on July 26, 2013 Plaintiff requested to add an additional event related to two Reports of Contact. Defendant admits that on August 2, 2013 the Office of Resolution Management issued a Notice of Partial Acceptance, which speaks for itself. Defendant admits that Plaintiff testified on November 26, 2013, Dr. Wilson testified on December 6, 2013, Dr. Howard submitted an affidavit on November 27, 2013, and Dr. Howard responded to a follow up email on December 18, 2013. Defendant admits that Plaintiff filed a federal complaint on July 17, 2014. The final two sentences of Paragraph 9 contain legal conclusions to which no response is required. To the extent a further response is required, Defendant denies the remaining allegations of Paragraph 9.

10. Defendant denies the allegations of Paragraph 10.

a. Defendant admits that Plaintiff had an advanced scope of practice in geriatrics at the time and that she did not have training in anticoagulation. Defendant admits that younger female pharmacists with prior relevant experience managing anticoagulation patients were hired for

anticoagulation positions. Defendant denies the remaining allegations of Paragraph 10(a).

- b. Defendant denies the allegations of Paragraph 10(b).
- c. Defendant admits that Dr. Lindsay Childs participated in the construction of a service agreement. Defendant denies the remaining allegations of Paragraph 10(c).
- d. With regard to the first two sentences of Paragraph 10(d), Defendant admits that a conversation took place regarding the movie Magic Mike in which Dr. Justice responded to Dr. Hoeldtke's question about the movie. Defendant denies that Paragraph 10(d) fully and accurately sets forth the content of the conversation. Defendant denies the remaining allegations of Paragraph 10(d).
- e. Defendant admits that Plaintiff was not permitted to go to a training for which there was a lack of staffing to cover her absence and which was not necessary for Plaintiff to perform her duties. Defendant denies the remaining allegations of Paragraph 10(e).
- f. Defendant is without sufficient information to admit or deny the allegations of the third sentence of Paragraph 10(f). Defendant denies the remaining allegations of Paragraph 10(f).
- g. Defendant admits that Dr. Wilson reminded Plaintiff not to send materials without education committee approval.

Defendant denies that Dr. Wilson gave Plaintiff a verbal reprimand. Defendant denies the remaining allegations of Paragraph 10(g).

- h. Defendant admits that the Geriatric Clinic never agreed to Plaintiff seeing sufficient patients to qualify for a GS-13. Defendant denies the remaining allegations of Paragraph 10(h).
- i. Defendant admits that Plaintiff's advanced scope of practice was discontinued effective February 15, 2013 because that was the last day she needed to use it. Defendant denies the remaining allegations of Paragraph 10(i).
- j. Defendant admits that the pharmacy service implemented new qualification standards that led to certain pharmacists being promoted to GS-13s after receiving approval from Human Resources and the Director. Defendant denies the remaining allegations of Paragraph 10(j).
- k. Defendant admits that Drs. Trask, Truitt, and Babb, as well as others, were called to testify as witnesses in an administrative investigation into an anonymous letter sent to the homes of Dr. Wilson, Dr. West-Lee and Dr. Justice. Defendant denies the remaining allegations of Paragraph 10(k).
- l. Defendant admits that Plaintiff was interviewed for the position by Dr. Robert Stewart, Dr. Kim Hall, and Dr. Cathy Sypniewski. Defendant admits that the two pharmacists, who had happened to be

younger females, chosen for the Clinical Pharmacy Specialist, anticoagulation GS-12 positions, Announcement No. NY-13-CRP-845941 had relevant experience managing anticoagulation patients that Plaintiff lacked. Defendant is without sufficient information to admit or deny the first and third sentences of Paragraph 10(l). Defendant denies the remaining allegations of Paragraph 10(l).

- m. Defendant admits that, following the advice of HR, both males and females, including Plaintiff, had been moved into PACT assignments without them being advertised, as alleged in the eighth sentence of Paragraph 11(m). Defendant admits that at the time Plaintiff requested the lateral move into Mod B PACT, Defendant had already decided not to fill the position based on workload. Defendant is without sufficient information to admit or deny the allegations of the third, fifth, and tenth sentences of Paragraph 10(m). Defendant denies the remaining allegations of Paragraph 10(m).
- n. Defendant admits that Plaintiff received two Reports of Contact, both of which speak for themselves. Defendant further admits that the Reports of Contact were given to Dr. Stewart, who took no disciplinary action. Defendant is without sufficient information to admit or deny the allegations of the second and the final sentence of Paragraph 10(n). Defendant

denies the remaining allegations of Paragraph 10(n).

o. Defendant denies the allegations of Paragraph 10(o).

p. Defendant admits the first two sentences of Paragraph 10(p). Defendant is without sufficient information to admit or deny the allegations of the third, fourth and seventh sentences of the Paragraph 10(p). Defendant denies the remaining allegations of Paragraph 10(p).

11. Paragraph 11 contains a description of a legal claim to which no response is required.

12. Defendant incorporates its responses to Paragraphs 1-10 as though fully stated herein.

13. Defendant admits that Plaintiff engaged in EEO activity, including her participation in her own EEO case and Drs. Trask and Truitt's case. Defendant denies the remaining allegations of Paragraph 13.

14. Defendant denies the allegations of Paragraph 14.

15. Defendant denies the allegations of Paragraph 15.

16. Defendant admits that Plaintiff worked at the Bay Pines VA since 2004. Defendant is without sufficient information to admit or deny the remaining allegations of the first sentence of Paragraph 16, as well as the second and third sentences of Paragraph 16. Defendant denies the remaining allegations of Paragraph 16.

17. Defendant denies the allegations of Paragraph 17.

18. Defendant denies the allegations of Paragraph 18.

19. Defendant denies that Plaintiff's characterization of Gowski v. Peake, 682 F.3d 1299 (11th Cir. 2012), fully and accurately sets forth the contents thereof, which speak for themselves. Defendant denies the remaining allegations of Paragraph 19.

20. Defendant denies the allegations of Paragraph 20.

21. Paragraph 21 contains legal conclusions to which no response is required.

With regard to the Wherefore Paragraph, the Defendant denies that the Plaintiff is entitled to any relief on Count I.

22. Paragraph 22 contains a description of a legal claim to which no response is required.

23. Defendant incorporates its responses to Paragraphs 1-10 as though fully stated herein.

24. Defendant denies the allegations of Paragraph 24.

25. Defendant denies the allegations of Paragraph 25.

26. Defendant denies the allegations of Paragraph 26.

27. Paragraph 27 contains legal conclusions to which no response is required.

With regard to the Wherefore Paragraph, the Defendant denies that the Plaintiff is entitled to any relief on Count II.

28. Paragraph 28 contains a description of a legal claim to which no response is required.

29. Defendant incorporates its responses to Paragraphs 1-10, 13-19, and 25-26 as though fully stated herein. To the extent a further response is required, Defendant denies the remaining allegations of Paragraph 29.

30. Defendant denies the allegations of Paragraph 30.

31. Defendant denies the allegations of Paragraph 31.

32. Paragraph 32 contains legal conclusions to which no response is required.

With regard to the Wherefore Paragraph, the Defendant denies that the Plaintiff is entitled to any relief on Count III.

33. Paragraph 33 contains a description of a legal claim to which no response is required.

34. Defendant incorporates its responses to Paragraphs 1-10, 13-19, 25-26, and 20-32 as though fully stated herein. To the extent a further response is required, Defendant denies the remaining allegations of Paragraph 34.

35. Defendant denies the allegations of Paragraph 35.

36. Paragraph 36 contains legal conclusions to which no response is required. To extent a further response is required, Defendant denies the allegations of Paragraph 36.

37. Paragraph 37 contains a request for relief to which no response is required.

- a. Paragraph 37(a) contains a request for relief to which no response is required.
- b. Paragraph 37(b) contains a request for relief to which no response is required.

With regard to the Wherefore Paragraph, the Defendant denies that the Plaintiff is entitled to any relief on Count IV.

**General Denial**

The Defendant hereby denies all allegations of the Third Amended Complaint not otherwise answered.

**First Affirmative Defense**

Plaintiff's Third Amended Complaint, and each cause of action therein, fails to state a claim upon which relief may be granted.

**Second Affirmative Defense**

The actions of the Defendant were based upon legitimate and non-discriminatory reasons.

**Third Affirmative Defense**

For any acts of discrimination and/or retaliation not brought to the attention of an EEO counselor within 45 days, those acts are time barred.

**Fourth Affirmative Defense**

The Plaintiff's claims are barred insofar as the Plaintiff failed to administratively exhaust her claims.

**Fifth Affirmative Defense**

The Plaintiff is precluded from recovering attorney fees, compensatory damages, and consequential damages with respect to the claims of discrimination based on age.

**Sixth Affirmative Defense**

The Plaintiff is not entitled to a trial by jury with respect to the claims of discrimination based on age.

**Seventh Affirmative Defense**

Even if the Defendant's decisions were motivated by gender, the Defendant would have made the same decisions regardless of Plaintiff's gender.

**Eighth Affirmative Defense**

Plaintiff has failed to mitigate her damages.

**Ninth Affirmative Defense**

The Affirmative Defenses that have been asserted heretofore in this Answer are not exhaustive, and the Defendant hereby expressly reserves the right to amend this Answer to bring additional defenses over the course of this action, as the facts and evidence may warrant.

Respectfully submitted, this 6th day of February, 2015.

**A. LEE BENTLEY, III**

United States Attorney

By: /s/ Michael R. Kenneth

**MICHAEL R. KENNETH**

Assistant United States  
Attorney

Florida Bar No. 44341

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JA-49

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION

NORIS BABB,

Plaintiff,

v.

Case No.: 8:14-cv-  
1732-T-33TBM

ROBERT A. McDONALD,  
Secretary, Department of  
Veterans Affairs,

Defendant.

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**DECLARATION OF KERI JUSTICE**

Pursuant 28 U.S.C. § 1746, I, Keri Justice, Pharm.D., declare under penalty of perjury as follows:

1. I am currently employed as an Associate Chief of Pharmacy for the Department of Veterans Affairs.
2. Until the loss of her Advanced Scope in 2013, Dr. Babb provided disease state management in diabetes, hypertension, and lipids.
3. Pharmacists in the anticoagulation clinic must have an Advanced Scope for anticoagulation.
4. My April 2, 2014 email to Sandra Lynch and Aner Mayami-Acosta was to initiate the process of the approval of Dr. Babb's promotion to GS-13 status.
5. Based on the implementation of continuity measures, we decided that PACT pharmacists would

be backups for the anticoagulation providers based on their assigned primary care providers. As a result, Dr. Brian Steele, the only PACT pharmacist without an Advanced Scope in anticoagulation at that time, began training on September 17, 2013 and continued until May 12, 2014. He received an Advanced Scope in anticoagulation in May 2014.

6. The form submitted on behalf of Dr. Babb was the standard form provided by credentialing when a practitioner is requesting an Advanced Scope. I was unable to find the first page of the form.

7. We did not take any disciplinary action regarding the June 2013 Reports of Contact because we believed the problem stemmed from a personality conflict, and Dr. Babb had already requested to leave the clinic to move to the float pool.

8. At the time of the negotiation of the Infectious Disease service agreement, Dr. Raoula Baroudi and Patricia Simoes (ARNP) worked in the Infectious Disease clinic and neither were managers.

9. I did not immediately relinquish my Advanced Scope when I became the Associate Chief for Clinical Services because I was the first Associate Chief for Clinical Services, and I did not know whether I would need to maintain my Advances Scope to cover for vacancies or leave.

10. In early 2014, a GS-13 position was available that was split between Anticoagulation at the Young V.A. and the Palm Harbor Community Based Outpatient Clinic. The position was offered to Dr. Linda Rolston, who turned it down, and then Dr. Noris Babb, who turned it down. At the time that Dr. Ebert was offered the half-time Palm Harbor, half-

time anticoagulation position in March 2014, he had an Advanced Scope only in anticoagulation.

11. A Clinic Utilization Statistical Summary (CUSS) report shows the number of available appointments and how many were used. The CUSS report produced at VA 10192 identifies the number of scheduled appointments for Dr. Babb from October 12, 2012 through December 31, 2012, but does not identify whether those encounters would count towards the 25% threshold, which requires a review of the notes. While I was not aware in 2013 that Dr. Babb believed she was spending enough time as a mid-level practitioner (that is, using her advanced scope), to meet the 25% threshold, I have reviewed all of her notes from that time (VA 012215-013083), and I have identified 111 encounters in which I would consider Dr. Babb to have operated as a mid-level practitioner<sup>1</sup>; we would count those encounters

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<sup>1</sup> Those encounters begin at VA 012626, 012638, 012516, 012451, 012609, 012399, 012804, 013044, 012696, 012537, 012424, 013080, 012509, 012757, 012252, 012828, 012281, 012261, 012727, 012322, 012690, 012950, 013032, 012552, 012483, 012272, 012794, 013076, 012669, 013050, 012526, 012983, 012920, 012468, 012910, 012512, 012590, 013073, 012788, 012333, 012244, 012767, 013060, 012413, 012620, 012521, 013020, 012995, 013056, 012928, 012391, 012310, 012546, 012445, 012779, 012887, 012817, 012351, 012680, 012977, 013009, 012957, 012860, 012753, 012894, 012841, 013028, 012739, 012774, 012557, 012595, 013036, 012418, 012439, 012582, 012945, 012236, 012463, 012338, 012747, 012836, 012472, 012532, 012361, 012367, 012661, 012294, 013003, 012855, 012275, 012903, 012458, 012733, 012987, 012266, 012722, 012566, 012654, 012225, 012878, 012851, 012435, 012710, 012377, 012971, 012705, 012382, 012355, 012431, 012486, 012288, 012924, 012492, 012809, 012614,

towards the 25% requirement for promotion to GS-13. According to Dr. Babb's notes, which in all but three instances included an estimated time of contact, the total time for those clinic encounters was approximately 54 hours (3240 minutes). There were three notes that did not include an estimated amount of time spent with the patient, and I assume those were 30 minutes each. The amount of time covered was 43 clinical days, which is each day with at least one patient note between October 12, 2012 and December 31, 2012. 54 hours over 43 days is approximately 1.25 hours per day. This is less than 25% of her time, so we would not have considered as qualifying for a GS-13 for her work during that time period.

**DECLARATION**

(28 U.S.C. § 1746)

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 8, 2016.

/s/ Keri Justice  
Keri Justice

JA-53

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**From:** Stewart, Robert D.  
**To:** Justice, Keri  
**Sent:** 1/30/2013 11:48:20 AM  
**Subject:** RE: Inactivating SOP's

Hope not

Robert D. Stewart, PharmD  
Clinical Pharmacy Supervisor  
Pharmaceutical Drug Cache Manager  
Bay Pines VAHCS  
Bay Pines, Florida  
(727)398-6661 Ext 5303

**From:** Justice, Keri  
**Sent:** Wednesday, January 30, 2013 11:48 AM  
**To:** Stewart, Robert D.  
**Subject:** RE: Inactivating SOP's

I feel a EEO coming on...

**From:** Stewart, Robert D.  
**Sent:** Wednesday, January 30, 2013 11:47 AM  
**To:** Justice, Keri  
**Subject:** RE: Inactivating SOP's

JA-54

Me too but I think the GS is what she is targeting not the job

Robert D. Stewart, PharmD  
Clinical Pharmacy Supervisor  
Pharmaceutical Drug Cache Manager  
Bay Pines VAHCS  
Bay Pines, Florida  
(727)398-6661 Ext 5303

**From:** Justice, Keri  
**Sent:** Wednesday, January 30, 2013 11:44 AM  
**To:** Stewart, Robert D.  
**Subject:** RE: Inactivating SOP's

Just like Anita said she was trained there for days...  
I'm sure she'll remember it differently. I think Noris  
should go for the DOM.

**From:** Stewart, Robert D.  
**Sent:** Wednesday, January 30, 2013 11:39 AM  
**To:** Justice, Keri  
**Subject:** RE: Inactivating SOP's

She has never been there before!

JA-55

Robert D. Stewart, PharmD  
Clinical Pharmacy Supervisor  
Pharmaceutical Drug Cache Manager  
Bay Pines VAHCS  
Bay Pines, Florida  
(727)398-6661 Ext 5303

**From:** Justice, Keri  
**Sent:** Wednesday, January 30, 2013 11:39 AM  
**To:** Stewart, Robert D.  
**Subject:** RE: Inactivating SOP's

Oh boy – okay. She can get on the list – and she isn't scoped in that area now.

**From:** Stewart, Robert D.  
**Sent:** Wednesday, January 30, 2013 11:37 AM  
**To:** Justice, Keri  
**Subject:** RE: Inactivating SOP's

Just got a call from noris who is VERY interested in a Coag position.

I will need to talk to you and Marjorie about possibly training her in that area per her request.

CONFIDENTIAL

JA-56

Robert D. Stewart, PharmD  
Clinical Pharmacy Supervisor  
Pharmaceutical Drug Cache Manager  
Bay Pines VAHCS  
Bay Pines, Florida  
(727)398-6661 Ext 5303

**From:** Justice, Keri  
**Sent:** Wednesday, January 30, 2013 11:33 AM  
**To:** Ladd, Tanya E.; Stewart, Robert D.; Wilson, Gary L.  
**Subject:** RE: Inactivating SOP's

That is correct – thanks Tanya!

**From:** Ladd, Tanya E.  
**Sent:** Wednesday, January 30, 2013 11:06 AM  
**To:** Stewart, Robert D.; Justice, Keri; Wilson, Gary L.  
**Cc:** Ladd, Tanya, E.  
**Subject:** Inactivating SOP's  
**Importance:** High

We received the quarterly certification of current providers' appointments report back and the following pharmacist's have cancel Scope of Practice, no longer needed beside their names:

JA-57

Dr. Noris Babb	Expire 10/31/2013
Dr. Paige Kelley	Expire 1/31/2014
Dr. Anna Meyers	Expire 7/31/2013
Dr. Lorie Montano-Roman	Expire 3/31/2013
Dr. Valerie Steele	Expire 4/30/2013

If they are not currently working under their SOP's and do not need them, I can add them to the next MSEB on 2/06/2013 to inactive their SOP's. Please advise.

[graphic omitted]

**Tanya Ladd**  
***Program Specialist (Credentialing & Privileging) 00QSS***  
***Bay Pines VA Healthcare System***  
***PO Box 5005***  
***Bay Pines, Fl 33744***  
***(727) 398-9477***  
***(727)398-6661 ext 5677***  
***(727)319-1252 (Fax)***

JA-58

[1]

IN THE MATTER OF:	)	
NORIS BABB,	)	
Complainant,	)	
vs.	)	Complaint No.
DEPARTMENT OF	)	200I-0516-
VETERANS AFFAIRS,	)	2013102948
BAY PINES VA	)	
MEDICAL	)	
HEALTHCARE SYSTEM,	)	CERTIFIED
BAY PINES, FLORIDA	)	COPY
Respondent.	)	

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**AFFIDAVIT**

**AUDIO TRANSCRIPTION OF PROCEEDINGS**  
in the above-entitled cause of the examination  
of Gary L. Wilson, M.D., before EEO Investigator  
Douglas Hobdy, on Friday, December 6, 2013.

\*\*\*

[2]

**FRIDAY, DECEMBER 6, 2013**

**INVESTIGATOR HOBODY:** Today's date is  
December 6, 2013, and the time is 11:03 Eastern  
Standard Time. This is an interview between  
Douglas Hobdy, EEO investigator, ORM Southeast  
Operations, St. Petersburg, Florida, and Dr. Gary

Wilson. Case number 200I-0516-2013102948. Noris Babb versus Department of Veterans Affairs, Bay Pines VA Healthcare System, Bay Pines, Florida.

**Q And Dr. Wilson, do you solemnly swear or affirm that the information given in response to the following questions are true and complete to the best of your knowledge and belief?**

A I do.

**Q. And for the record, could you please state your full name and spell it.**

A. My full name is Gary, G-a-r-y, L. Wilson, W-i-l-s-o-n.

**Q. And you have the right to have a representative present.**

**Do you have a representative?**

A. No, I do not.

**Q. Would you like to proceed without one?**

A. Yes.

**[3] Q. For the record, could you please identify your job title, your grade, and your service of assignment.**

A. I am the chief of Pharmacy Service. I'm a GS-15 at the Bay Pines VA Healthcare System.

**Q. Okay.**

**And how long have you worked in this position?**

A. In this position, since August of 2009.

**Q. Okay.**

**And are you the complainant's first- or second-line supervisor?**

A. I would be her second-line because -- actually, probably would be third-line because she has a direct

supervisor and then there's an assistant chief over Clinical Services, over that supervisor, and then myself.

**Q. Okay.**

**And for the record, could you please identify your gender.**

A. Male.

**Q. And the complainant's gender.**

A. Female.

**Q. Okay.**

**And for the record, could you also identify [4] your age, including a month and year.**

A. Sure.

I am 58. And I was born July [redacted] 1955.

**Q. Okay.**

**And are you aware of the complainant's age? If so, how did you become aware?**

A. Well, I don't normally make it a habit of actually keeping up with people's age, as far as that goes. But I understand because of the complaint that this is over age and gender, so I'm going to assume that she's over the age of 40.

**Q. Okay.**

**And did you have any prior EEO activity, either as a responding management official, complainant or witness?**

A. Yes.

**Q. Okay.**

**And are you aware of complainant's prior EEO activity?**

A. I'm not aware of that she has filed any other EEO complaints, no.

**Q. Okay.**

**As far as what about her being a witness in any other EEO complaints within the agency?**

A. Not that I'm aware of.

**[5] Q. Okay. And that's fine.**

**Okay. And the complainant claims in this complaint: Whether the complainant was subjected to a hostile work environment based on gender, female; age and reprisal as evidenced by the following events.**

**Claim one: Since fall of 2012, Gary Wilson has denied the complainant's repeated request for training in anticoagulation.**

**What knowledge, if any, do you have of this claim?**

A. Okay.

I have not directly, as far as I can recall, ever denied her training in anticoagulation. I will tell you that any time we have a need to train individuals for areas of backup, we send out messages to the staff opening them up so that they can apply to be interested in being trained.

In fact, Dr. Babb has put in for the training in the Dom, which she got, and she currently is a backup in that area and received training. And she's also received training in another area, which is research. But we have not sent out anything to individuals requesting if they were interested in being trained as a backup for anticoagulation.

**Q. Okay. In her testimony she stated that she [6] had talked to Dr. Marjorie Howard about this issue several times and that Dr. Howard told her that there were other pharmacists already scheduled for training and whenever an opening came about she would notify her, but she basically never has.**

A. Okay. I will tell you that, yes, there are some other people that are interested in being trained. But that has not occurred as well because we really haven't had a need to train any more staff in anticoagulation because if they're not going to use that training, then it's of no value to the service.

**Q. Okay.**

**On claim two: On March 22nd, 2012, at a Patient Aligned Care Team meeting Marjorie Howard asked the complainant, "When do you retire?"**

**What knowledge, if any, do you have of this claim?**

A. I can't really comment on this one because I wasn't present for that meeting so I don't know the circumstances or the context which this would have been even asked or if it was asked.

**Q. On claim three: In September 2012, the complainant stated that Marjorie Howard told her that she was not allowed to participate in the construction of her service agreement between pharmacy, geriatrics [7] and extended care.**

A. Okay.

It was not Dr. Babb's service agreement to create or to assist with. Service agreements are

created by management between the two services, between GRECC and also the Pharmacy Service.

**Q. Okay. So basically what I'm hearing you say, this is something that's done by the service chief and not the employees.**

A. Right. It's supervisory staff.

**Q. Okay.**

**And was Dr. Babb informed of this?**

A. I'm going to assume that she was by her supervisor.

**Q. Okay.**

**Anything else you'd like to add on that particular claim?**

A. No, sir.

**Q. Is there a policy or any guidelines indicating that these agreements will be only created by the service chiefs?**

A. No. But that's just basically how we do.

**Q. Okay.**

**On claim four: On September 27, 2012, Marjorie Howard denied the complainant's attendance [8] for geriatric and extended care Patient Aligned Care Team training.**

**What knowledge, if any, do you have of this claim?**

A. I'm aware of the fact that she had requested this training. But she was -- it was denied because of staffing issues. Actually, we had a staffing shortage on that date.

**Q. Okay. Now, is this training necessary for her to complete her daily duties or part of her functional statement?**

A. No, not really, because I believe on this particular training the items that were being gone over were things that she already had knowledge of as well. That's according to the supervisor.

**Q. Okay.**

**On claim five: In December 2012, the complainant received a verbal reprimand by Gary Wilson for not having training information approved by the Education Department.**

**What knowledge, if any, do you have of this claim?**

A. Okay.

There was no verbal reprimand given to Dr. Babb. If there had been, she would have been given [9] a written copy of that for her own records. And also something -- it would have been sent to personnel to be placed in her record. And there was nothing of this nature done.

I will tell you this. She was reminded not to go and hand out training materials to veterans unless they've been -- gone through the education committee. And she actually did take the training materials to the education committee and got approval after this.

**Q. Okay.**

**And refresh my memory, I think what happened with this, there was some training material that she updated, or something to that effect.**

A. Yes.

**Q. And is there a policy or guidelines that state that training material --**

A. There is -- there's medical center policy out there concerning educational materials given to patients need to go through the education committee, yes.

**Q. Okay.**

**Anything else you want to add on this particular claim?**

A. No.

**Q. On claim six: On February 6, 2013, while the [10] complainant was discussing her disappointment on the revocation of her advanced scope, she stated, "So no promotion for me?" And her supervisor, Marjorie Howard, replied, "There never was."**

**What knowledge, if any, do you have of this claim?**

A. I can't really comment one way or the other on this because I wasn't present for this conversation so I do not know.

**Q. Okay.**

**On February 15, 2013, the complainant realized that Gary Wilson removed her advance scope of practice.**

**What knowledge, if any, do you have of this claim?**

A. Yes. Her advance scope of practice was removed. The reason it was removed was because her job function changed in the area she was working in. What -- did not require an advance scope of practice.

**Q. I believe she was working in geriatrics. Is that correct?**

A. Yes, she was working geriatrics.

And there were also -- at the same time, there were four other individuals who had their advance scopes of practice removed as well.

**[11] Q. Okay.**

**What does advance scope of practice involve?**

A. It is a conditional privileging to act as a mid-level provider with prescriptive authority to actually write prescriptions. And that was no longer needed in the geriatric clinic.

**Q. Okay.**

**And she moved on to another position.**

A. Yes. She eventually decided to leave geriatric clinic and go into the float pool.

**Q. And was it explained to the complainant why her advance scope of practice was being removed?**

A. I believe it was. I cannot -- I'm assuming that the supervisor did but I can't answer that question.

**Q. And that would be Marjorie Howard, correct?**

A. Yes.

**Q. And I believe you stated that there were four other pharmacists that also had their advance scope of practice removed.**

A. Right. It would be something that would be routine if individuals were no longer using that advance scope. Because if they're not using it, we have no means of determining through peer review that they are working at the appropriate levels.

**[12] Q. Okay.**

**Anything else you'd like to add?**

A. No. I believe that's it.

**Q. On claim eight: On March 27, 2013, the complainant became aware that Gary Wilson was excluding her from promotion by implementing new qualification standards.**

A. I did not exclude her from a promotion. Those new qualification standards came back -- came out in June of 2012. And those were created at VACO. And they sent a new handbook that came out, so I sent a message out to the staff to let them know that we would be moving forward to take action on this new policy.

**Q. Matter of fact; all pharmacists?**

A. Yes, uh-huh.

**Q. Okay. And I believe this policy -- I believe I have a copy of it.**

A. Right. It's VHA handbook 5005/55, Part Two, Appendix G-15. And June 7th, 2012. A licensed pharmacist qualification standards, GS-660.

**Q. And in short, I believe it stated that in order to qualify for a GS-13 position the employee must -- 25 percent of their work must be seeing patients, something to that effect?**

A. (Unintelligible) percent of their time is [13] working at the highest level of practice. And that would include having prescriptive authority as part of that.

**Q. Okay.**

**And again, this was a policy that was put out by VA central office.**

A. Right.

**Q. And affected all pharmacists.**

A. Exactly.

**Q. Okay.**

**Anything else you want to add on that particular claim?**

A. No, sir.

**Q. On claim nine: In April -- on April 18th, 2013, for no apparent reason the complainant was selected specifically as a witness for an administrative investigation.**

**What knowledge, if any, do you have of this claim?**

A. Actually, on this one, I can't really comment on it. If you want any information on this, you would have to go to the medical center director. It was the medical center director who actually set charge of a grid to do this AIB.

**Q. Okay.**

**[14] To your knowledge, was the complainant the only employee that was required to act as a witness?**

A. I do not know, in fact, who all was called in to interview. I've not seen the results of this at all.

**Q. Okay.**

**On claim ten: On April 23rd, 2013, the complainant became aware by e-mail from chief of pharmacy, Dr. Gary Wilson, that she was not selected for a position of clinical pharmacy specialist, anticoagulation, GS-12, Announcement No. NY-13-SRP-845941.**

**Were you the selecting official for this position in question?**

A. Yes, I was.

There was a panel that was selected to interview all four applicants. All four applicants were women. One was Noris Babb and there were three

other applicants. They were younger than her. But two applicants were selected based on their qualifications by the panel. And that was given to me. Noris was not selected and nor was another, younger female as well.

**Q. Okay.**

A. And I sent a message out as a courtesy to all four applicants letting them know whether they were [15] selected or not.

**Q. Okay. Can you kind of briefly explain the process to make the selection, how the panel operated?**

A. The panel actually had a set of questions that were asked of all four applicants across the board. And they ranked the individuals appropriately. The information from that was given to me, and I went off the rankings of the panel.

**Q. Did the complainant have the necessary experience in the position that she had applied for?**

A. Well, everyone can apply for positions. There's nothing that excludes them. Whether she had the necessary training, that depends on the individual. But there were individuals that had the training and actually had been doing the job.

**Q. Okay. I guess what I'm getting at here is what specific qualifications did the selectee or the selectees possess to cause them to be the most qualified candidates (unintelligible)?**

A. One of them was the anticoagulation supervisor. The other was a member of the anticoagulation team. And the other was an inpatient pharmacist who does anticoagulation on the inpatient side of the house.

**Q. Okay.**

[16] **A. And they're all qualified.**

**Q. And did the complainant have this experience or similar experience?**

**A. As far as anticoagulation goes?**

**Q. Correct.**

**A. No.**

**Q. Based on what I'm hearing from you and what I've seen in the panel members' affidavits, it appears that the general theme, selectee for selectee, based on their experience but more so based on their experience in anticoagulation.**

**Would you say that's a true statement?**

**A. Yes.**

**Q. Okay.**

**For some reason I received information that Dr. Keri -- I can't recall her last name now.**

**A. Keri Justice?**

**Q, Justice. Was the selecting official.**

**A. No.**

**Q. Okay.**

**Did the complainant's gender play a role in selection?**

**A. No, because they were all female.**

**Q. Okay. And what about her age, was that an issue?**

[17] **A. No. Age doesn't play a role in these positions.**

**Q. Okay.**

**And the complainant's prior EEO activity, was that a factor in nonselection?**

**A. No.**

**Q. On claim 11: On April 24th, 2013, Dr. Keri Justice denied the complainant a lateral move from geriatric primary care PACT to Mod B PACT team.**

**What knowledge, if any, do you have of this claim?**

A. Okay.

I can let you know on this one that there had been a Module B PACT position that had been vacated. But this had been a while back. And we had determined because of the productivity reports and data on whether there was even a need to continue that position, we had actually suspended it and were no longer filling it. So when the complainant asked about a lateral move, there was no position there in the first place. Also, we couldn't do a lateral move. We would end up having to announce it and make it competitive to all the pharmacy staff. We couldn't just make it a lateral.

**Q. Okay. So once the position was vacated, you [18] just decided not to fill it.**

A. Yes. And this was way prior to any of this complaint from the -- from the individual.

**Q. Okay.**

**On claim 12.**

A. Uh-huh.

**Q. On June 18th, 2013, the complainant became aware that she had been written up with two separate reports of contacts.**

In her testimony she stated that she was written up by an RN, I believe Mary Priso (phonetic). One, for allegedly not writing prescription for an elderly patient for Ambien

**or something of that nature. And the other was that she was paged and not able to be located.**

**Do you have any knowledge of this?**

A. I am aware that there were two reports of contact that were written up on Dr. Babb. As far as anything else, that was handled at the level of the supervisor.

**Q. Okay.**

**Do you know if there was any actual disciplinary action? Or there was just reports of contacts and that was the end of it?**

A. That was the end of it. I'm not aware of [19] anything disciplinary that was taken on Dr. Babb.

**Q. Okay.**

**And you said this issue probably was addressed by Dr. Howard.**

A. Actually, it was probably not Dr. Howard that was involved in this. It would have been Dr. Rob Stuart. When she moved from the position that she was in under geriatrics, she moved under a different supervisor.

**Q. Okay.**

**Now, based on listening to all the claims that you've heard today in this complaint, do you believe the complainant was subject to harassment/hostile work environment because of her age?**

A. No, I do not.

**Q. Gender?**

A. No.

**Q. Or prior EEO activity?**

A. No.

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**Q. And do you have any direct or relevant information that has not been revealed that you'd like to share at this time?**

A. No, I do not.

**INVESTIGATOR HOBDY:** Okay

**[20]** The time is currently 11:27. And this is gonna conclude our interview.

(End of transcription.)

\* \* \*

[Seal omitted]

DEPARTMENT OF VETERANS AFFAIRS  
OFFICE OF RESOLUTION MANAGEMENT  
Southeastern Operations  
140 Fountain Parkway, 6th Floor, Suite 620  
St. Petersburg, FL 33716

Written Affidavit  
In the Matter of the EEO Complaint of  
Discrimination

Noris Babb	)	
	)	
Complainant	)	
v.	)	ORM
	)	Complaint
Secretary	)	Number:
Department of Veterans	)	2001-060516-
Affairs	)	2013102948
810 Vermont Avenue NW	)	
Washington, DC 20420	)	
Respondent	)	

Facility: Bay Pines Health Care-System  
Bay Pines, FL

The claims accepted for investigation is:

Whether complainant was subjected to a hostile work environment based on gender (Female), age, and reprisal as evidenced by the following events:

2. On March 22, 2012, at a Patient Aligned Care Team Meeting, Marjorie Howard asked complainant, "When do you retire?"

3. In September 2012, complainant stated Marjorie Howard told her she was not allowed to

participate in the construction of her Service Agreement between Pharmacy and Geriatrics and Extended Care.

4. On September 27, 2012, Marjorie Howard denied complainant's attendance for Geriatrics and Extended Care Patient Aligned Care Team (PACT) Training.

6. On February 6, 2013, while complainant was discussing her disappointment on the revocation of her Advanced Scope, she stated, "So no promotion for me," and her supervisor Marjorie Howard (MH) replied, "There never was."

I, Marjorie Howard, solemnly swear/affirm that the information given in response to the following questions are true and complete to the best of my knowledge and belief.

1. Please identify your job title/position, grade, and service of assignment.

Clinical Pharmacy Supervisor GS13  
Pharmacy service

a. How long have you worked in this position/facility?

This position since March 2011 at the facility since August 2003

b. Are you the complainant's 1st or 2nd line supervisor?

Currently I am neither. Previously I was her 1st line supervisor

2. Please identify your gender. Female

Are you aware of the complainant's gender? Yes

3. Please identify your age (month & year), 35 yo  
06/1978

Are you aware of the complainant's age? If so, when and how did you become aware? No

4. Do you have any prior EEO activity (RMO, Complainant, or Witness)

Yes, as a witness

Are you aware of the complainant's prior EEO activity? If so, when and how did you become aware of it, and what do you know about it?

This is the first complaint I am aware of.

**Claim: 2. On March 22, 2012, at a Patient Aligned Care Team Meeting, Marjorie Howard asked complainant, "When do you retire?"**

What knowledge, if any, do you have of this claim?

I am not aware where this claim is coming from.

Did you ask the complainant when she was going to retire? If so, why?

I have no recollection of ever asking this employee when she was going to retire.

If you did not make this statement, why do you think, the complainant would make this allegation against you?

I am not sure why Dr. Babb is making this claim. She is not happy that the Geriatrics Department determined they no longer wanted her to function at a level needing an advanced scope that may qualify her for a promotion and I believe she blames me for this.

**Claim: 3 In September 2012, complainant stated Marjorie Howard told her she was not allowed to participate in the construction of her**

**Service Agreement bet ween Pharmacy and Geriatrics and Extended Care.**

What knowledge if any, do you have of this claim?  
Full knowledge

What reason did you give to the complainant for denying her participation in the construction of the abovementioned service agreement?

The participation was not denied, but was explained it was not required for the first draft. I had explained that the first service agreement submitted to the Geriatrics and Extended Care was going to be the same as the one submitted to Primary Care with only minor changes. (Copies maybe provided if requested). At the meeting with Dr. Wilson, Dr. Williams, Robert “Jake” Bauer and I, Dr. Williams stated he did not feel they needed the disease state management by the pharmacist. I informed Dr. Babb of this decision.

As a result Dr. Babb met with the Geriatrics Team and participated in the development of a second proposed service agreement in August 2012 from her team. Dr. Babb also participated in a revision on that second service agreement.

Dr. Williams in December 2012 rejected that revised second service agreement and requested a service agreement that was streamlined and did not include disease state management be provided as soon as possible to close this matter.

Does the complainant position, position description/scope of practice require her to participate in the construction of service agreements?

No, this is not a required function.

Was it management's intention to subject the complainant to harassment/hostile work environment based on this incident?

No

**Claim: 4. On September 27, 2012, Marjorie Howard denied complainant's attendance for Geriatrics and Extended Care Patient Aligned Care Team (PACT) Training.**

What knowledge, if any, do you have of this claim? I am not aware of what Geriatrics and Extended Care Patient Aligned Care Team (PACT) training was denied. The training that was denied by me was the Miami GRECC Conference Internet Based Technologies in the Care of the Older Veteran September 27 and 28, 2012. This was not a Patient Aligned Care Team Training.

Is this training necessary for the complainant to perform her daily duties, or part of her Functional Statement/Scope of Practice?

No

Why was the complainant's request to attend this training denied?

The first I was aware of the Miami GRECC Conference Internet Based Technologies in the Care of the Older Veteran Program was on September 7th when Dr. Babb asked me if I aware of the telehealth conference. When she received the information about the training the registration date for the training had already past so she was unable to register.

In addition the training was on how to provide telehealth. Dr. Babb was already trained and utilizing all forms of telehealth including CCHT, SM,

and was even a provider for a Clinical Video Telehealth Clinic. Therefore I felt she already had the knowledge this training would be providing her.

Most importantly, Dr. Babb was providing a Clinical Video Telehealth Clinic seeing patients in Bradenton which I was unable to arrange alternative coverage for that day. The pharmacy department was also short staffed in several areas, so pulling her would have impacted patient care.

Was it management's intention to subject the complainant to harassment/hostile work environment based on this incident?

No. Regardless of who the pharmacist was, I always prioritize patient care. No pharmacist was allowed to attend this training.

**Claim: 6. On February 6, 2013, while complainant was discussing her disappointment on the revocation of her Advanced Scope, she stated, "So no promotion for me," and her supervisor Marjorie Howard (MH) replied, "There never was."**

Briefly describe your knowledge of this incident.

In January and February 2013, Dr. Babb came to my office several times upset about the new service agreement and change in duties no longer requiring an Advanced Scope. I explained to her that her position would not have qualified even if the advanced scope had been maintained based on the number of patient visits and required percentage or time she must be working at a higher level.

VA Handbook 5005/55 Part 11 Appendix G15 which defines a Clinical Pharmacy Specialist states "For all

assignments above the full performance level, the higher level duties must consist of significant scope, administrative independence, complexity (difficulty) and range of variety as described in this stand and at the specified grade level and be performed by the incumbent at least 25%, of the time.”

Dr. Hull the CMO of Geriatric Primary Care stated at a meeting on September 27, 2012 that he did not feel the pharmacist should see more than 3 patients a day due to his concern that when the pharmacist has more patients a day, patients seeing the provider who require pharmacy counseling would then have to wait a prolonged time to see the pharmacist for this counseling. I did make Dr. Babb aware of this request from the CMO.

Providing only 3 slots a day would be 7.5 hours a week which is only 18.75% of her time providing advanced care which is also assuming all of the patients show for the clinic appointments. This would put her below the requirement for the new qualification standards stated above.

Based on all of the claims listed in this complaint, was the complainant subject to harassment/hostile work environment based on her gender, age, or reprisal?

No.

Do you have any direct or relevant information that has not been revealed, that you would like to share at this time?

Neither the Pharmacy Department nor I wanted for the Geriatric Pharmacy Position to change from one that was similar to the Primary Care PACT pharmacy positions including having a higher number of

appointments a day and an Advanced Scope. It was the decision of the Geriatrics Extended Care Department to remove the duties of disease state management from that pharmacy position. Dr. Williams stated this decision was made based on the provider panel sizes, the providers having one hour appointments rather than the 30minutes in primary care and the fact their metrics were good in the areas of lipids, diabetes and hypertension. I believe he would have made this decision regardless of who the pharmacist was.

**I solemnly swear/affirm that the information given in response to the following questions is true and complete to the best of your knowledge and belief. This statement is made under penalty of perjury, this twenty-seventh day of November 2013.**

Marjorie Howard  
(Affiant's Printed name)

/s/ Marjorie Howard  
(Affiant's signature)

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION

NORIS BABB, )  
Plaintiff, )  
vs. ) Case No. :  
ROBERT A. MCDONALD, ) 8:14-cv-1732-T-  
Secretary, DEPARTMENT ) 33TBM  
OF VETERANS AFFAIRS, )  
Defendant. ))

DEPOSITION OF KERI JUSTICE

Date: February 18, 2016

\* \* \*

[33]

**BY MR. MAGRI:**

\* \* \*

Q Okay. Now, did you know that Dr. Babb had requested training in anticoagulation?

A. Yes.

**MR. KENNETH:** Object to the form.

**THE WITNESS:** I did know that.

**BY MR. MAGRI:**

Q Okay. And how did you know that?

**MR. KENNETH:** Object to the form.

**THE WITNESS:** I believe her supervisor informed me of that at the time.

**BY MR. MAGRI:**

Q And her supervisor at that time was whom?

A Well, there were two different supervisors, Rob Stewart and before that it was Marjorie Howard, Showalter Howard.

Q Okay. And so which one informed you of that?

**MR. KENNETH:** Object to the form.

**THE WITNESS:** I'm not sure honestly. It could have been both. I know that she had requested it more [34] than once.

**BY MR. MAGRI:**

Q All right. And when you were informed -- do you recall when that occurred?

**MR. KENNETH:** Object to the form.

**THE WITNESS:** I believe she asked for training in 2012 and then again in 2013.

**BY MR. MAGRI:**

Q Did you tell them that she couldn't have it?

A Yes.

Q Why?

A Because -- a couple of reasons. We were very short in anticoag at the time, and when you're short isn't a good time to train anyone.

The second reason is that we had -- at some point in there we had residents we were training and that's part of their training program. And they -- even when they're trained, which would have been in the end of 2012, they still have to be cosigned because they don't have scopes of practice. So there were -- there were already additional responsibilities on the pharmacists that that were in anticoag.

And then the last reason is that it wasn't a part of her job where she was stationed at the time in

geriatrics, and so we didn't have to train her. It wasn't in her functional statement.

[35] Q Okay. Her functional statement required her to be in geriatrics?

A I believe so. I mean, that's what her job position was she worked in the geriatric clinic.

Q Well, was it a functional statement that required her to be in geriatrics?

**MR. KENNETH:** Object to the form.

**THE WITNESS:** The functional statement doesn't require where she is. Management determines where the employees work.

**BY MR. MAGRI:**

Q So management had decided that because Dr. Babb worked in geriatrics she didn't need the training?

A Correct.

Q Did geriatrics have a need for an anticoag pharmacist?

A No.

Q All right. So there wasn't a pharmacist that was involved in anticoag with regard to geriatrics?

A The geriatric patients that were on an anticoagulant were managed centrally through the anticoagulation clinic.

\* \* \*

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION

NORIS BABB,	)	
Plaintiff,	)	
	)	
vs.	)	Case No. :
ROBERT A. McDONALD,	)	8:14-cv-1732-T-
Secretary,	)	33TBM
DEPARTMENT OF	)	
VETERANS AFFAIRS,	)	
Defendant	)	

DEPOSITION OF NORRIS BABB

Date: February 26, 2016

\* \* \*

[46]

BY MR. KENNETH:

Q Dr. Babb, I'm handing you what's been marked as Exhibit 5. Let me know when you're done reviewing it, I have what I think is a quick question.

A Okay.

Q Do you recognize the document?

A Yes, I do.

Q I just want to ask you in your e-mail to Dr. Stewart, cc'g Keri Justice, the second paragraph, the first sentence makes reference to, "The GPC team's inexplicable lack of support in maintaining what had been a very successful clinic that I developed even

before PACT have all pushed me to this very difficult decision.”

Your reference to the inexplicable lack of support, is that what you were just describing before the break?

A I'll tell you what happened. I had my scope of practice taken away and I was extremely, extremely depressed when that happened, because it just was -- it was something I could not understand why pharmacy did not support me.

[47] And after hearing last week that Dr. Williams would have supported disease state management in that clinic, I could no longer keep the door of my office open. Patients -- I was right off the main corridor and patients were used to just wheeling themselves in, you know, in those motorized scooters and coming in for X, Y and Z refills or whatever. And I started keeping the door of my office closed just because I was unable to function otherwise.

And I don't think the team was ever told what happened, why I couldn't see patients, why I no longer saw patients. And the nurses just couldn't understand why I had gone from being a happy team player to someone that just came in, closed the door to my office and left at 4:30.

So they just thought I had become this lazy person that was no longer a team player, and they resented it. And, you know, they brought a patient in when they had to. The doctors and providers no longer brought patients in like they used to. Dr. Hull no longer just marched into my office, and it was just a very difficult work environment. One day one of the nurses said, *What happened? Why don't you see patients any more?*

And Susan Lewis and Dr. Hull rarely even looked at my face. It was probably the lowest point of my [48] professional career. I felt that pharmacy had destroyed a very good clinic that provided excellent care to our veterans, the most frail population on the V.A. campus as far as ambulatory clinics.

And not only did I have lack of support from the people that I worked with daily, but I had lack of support from my administration, from my supervisors, that in all honesty I thought and I believed for the longest time had my best interests.

And it wasn't until this time period that I had the opportunity to sit there in my office, while I processed pending prescriptions, to review what had occurred. And that's when I decided that I had worked under very hostile conditions and realized that all this started, my whole career had changed after I had been a witness in the Truitt and Trask case. That up until then pharmacy administration had been in support of me.

And I realized that I had been retaliated against, and that none of this had ever happened to a male in the pharmacy department and that only older females had been displaced from their positions and that I fell into this group. What your question?

\* \* \*

[53]

\* \* \*

Q Why did you think at the time that Dr. Justice didn't care?

A Because she -- she didn't give me a Megan-Martinez save. She could have just -- all you had to do to keep your scope of practice was do ten clinical

notes a quarter. Ten clinical notes a quarter. See ten patients in a quarter, that's all I had to do.

They were still always looking for people in coag. They never had enough people in coag. Anticoag has to be done six days a week here.

Q If you had been seeing ten clinical patients a quarter, you wouldn't have got a 13, right?

A Nope, but I would have kept my scope and that would have kept me in the running.

Q When you say it would have kept you in the [54] running, what do you mean?

A Because people that had an advanced scope had a leg in the door, as opposed to somebody -- when you apply for a position, *Well, she already has a scope of practice*, as opposed to somebody that doesn't have a scope of practice that has to apply for the position and then get scoped and then -- you know, as opposed to somebody, *Well, she already has a scope of practice, she can just start the position and go*.

Q So is that why they should have --

A That's why if they had just given me Saturday coverage or a clinical specialist float position.

Q So those wouldn't -- you're saying those wouldn't have got you a 13, but it would have given you a leg up in applying for a job that couldn't have gotten you --

A Correct.

Q Just let me -- I know you knew what I'm saying --

A I'm sorry.

Q Just -- all right. Let me just ask it again so it's clear. So if you gotten Saturday coverage or a CPS

JA-89

float position at the time, you wouldn't have got a 13, but it would have given you a leg up in applying for another job that could have gotten you a 13?

A Yes.

\* \* \*

JA-90

**UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION**

**NORIS BABB,  
Plaintiff,**

**v.**

**Case No.: 8:14-cv-  
1732-T-33TBM**

**ROBERT A.  
McDONALD,  
SECRETARY,  
DEPARTMENT OF  
VETERANS AFFAIRS,  
Defendant**

\_\_\_\_\_ /

**DECLARATION OF NORRIS BABB**

Pursuant to 28 U.S.C. § 1746, I, Noris Babb, Pharm. D., declare under penalty of perjury as follows:

1. I started working at CW Young VA HCS (CWY) in 2/4/2004 as a float pharmacist. I received my Doctor of Pharmacology in May of 1991.

2. I got Board Certified Geriatric Pharmacist (CGP) Certification in May of 2004. I was interested in the field of Geriatrics and seeing there was a clinic at CWY VA I thought this would help me get a position there, should it become available in the future. I covered in the Geriatric Clinic occasionally as a float pharmacist and liked it very much.

3. In 2006 the Geriatrics Pharmacist position was posted and I applied for it. I had the CGP credential and was also a registered Consultant

Pharmacist in the State of Florida, which allowed me to consult in nursing homes, which that position also required. I started working in the Geriatric Primary Care (GPC) Clinic as the full time pharmacist in September of 2006.

4. In October of 2007 I earned another board certification as a Board Certified Pharmacotherapy Specialist. From the Board of Pharmacy Specialties (BPS) website: “In pharmacy, BPS board certification is considered the gold standard when it comes to determining a pharmacist’s qualifications and capabilities within a specialty area.”

5. The BOPS certification, along with some training in the Pharmcare clinic allowed me to get my Advanced Scope of Practice. The Pharmcare clinic was a pharmacist run Disease State Management (DSM) clinic where pharmacists were allowed to prescribe and change medications in three disease states (hypertension, lipids and diabetes) with their own advanced scope of practice without consulting a physician, as long as they followed certain published protocols triggered by test results, vital signs, patient history, etc. The pharmcare pharmacists received special DSM training and had a physician sign off on their advanced scope, stating the pharmacist was competent as an independent midlevel practitioner.

6. In Fall of 2009 I approached then, Chief of Pharmacy, Dr. Paul Laucka, and asked if I could develop a pharmacist run clinic in Geriatrics similar to what was already available in Primary Care. I saw the need to provide this clinic specialized for the frail elderly patients. As with the other Pharmcare clinics I would provide medication adjustments for diabetes, hypertension and lipids. I had received training in Pharmcare as a float, and with the assistance of Dr.

Hull, the physician in Geriatrics who was willing to assist me, I was ready to start seeing patients and making adjustments to medications. Dr. Laucka approved my Advanced Scope of Practice in diabetes, hypertension and lipids. This allowed me to prescribe medications for these three disease states without consulting a physician. Dr. Hull had signed off on the Scope. The Chief of Geriatrics at the time, was Dr. John Frutchey and he was also in agreement that a pharmacist run Disease State Management (DSM) clinic would be a positive asset for the Geriatric clinic.

7. I named the clinic Geriatric Pharmacotherapy Clinic (GPC) because it would be reasonable to have the same acronym as the Clinic name, yet different from Pharmcare to be distinct. The clinic was set up to run by consults. Pharmcare also ran by the consult method. Providers would enter a consult to the GPC (pharmacotherapy) clinic when they wanted a patient to be followed by me for medication therapy adjustment. It ran that way until the consults were canceled, due to the implementation of Patient Aligned Care Teams (PACT). At that time, the Service Agreement replaced the consult based service. The theory behind PACT and the Service Agreement was to improve access to patients by the pharmacist. Once a Service, such as Primary Care signed the Agreement with Pharmacy, the Clinical Pharmacy Specialist (CPS) was allowed to look for patients in a database that didn't meet certain VA goals like A1c(for diabetics), blood pressure levels or lipid levels. The CPS then didn't need to wait to be consulted by the provider, instead the pharmacist would find patients not at goal, make appointments with them to adjust their medications to get them to goal. In my performance

appraisals from 2008 to 2012 I was rated outstanding (highest rating) each year while doing DSM 2009 to 2012.

8. PACT was implemented at CWY in Fall of 2011. Since my implementation of my DSM clinic in 2009, GPC had really been doing this model for years but now it was official, GeriPACT. I was a CPS. This was a multidisciplinary team approach to patient centered care. A provider (physician or ARNP), a nurse and an administrative clerk are at the core “Teamlet” in Primary Care. Additional team members are added as needed, social worker, pharmacist, mental health practitioners, etc. In the Geriatrics arena the Social Worker and the Pharmacist were integral parts of the team and as such are part of the Teamlet. I sent the Geri-Pact Memo to my supervisor Howard and Associate Chief Justice, as soon as I received it from the folks in Geriatrics to keep my boss up-to-date. Exhibit C-1. (Bates 010796-010814). This memo makes it clear in bold type that **“This memorandum guides this transformation further in the realm of geriatrics”** and **“PACT is intended to transform all VHA primary care programs.”** *Id.* p. 010799. From this memo we read: **“Each GeriPACT Teamlet should include a social worker and a pharmacist as team members, since psychosocial and medication issues are present in nearly every GeriPACT case.”** *Id.* p.010800. Although page 010804 is dated 2011, it was also part of the same email that was sent to me, and that I forwarded. We see the pharmacist referred to as a **“Clinical Pharmacist”** just as in the memo dated July 13, 2012. With the implementation of PACT, clinical pharmacists doing DSM were referred to as **“Clinical Pharmacy Specialist (CPS)”**. The memo

states that the duties of the pharmacist are the same as the pharmacist in Primary Care ExGG which states that the role of the CPS is to do disease state pharmacotherapy management including lipids, diabetes, and other disease states. This is the definition of what the pharmacist in a PACT team is supposed to do; the pharmacists work imbedded in a clinic managing diabetes, hypertension and lipids for patients not at specific goals. Whether the pharmacist was in Geriatric Primary Care or Primary Care or Well Womans Clinic (young Marina Sulik) we were all considered PACT CPS, we all had the same evaluations and we all practiced under an Advanced Scope. It was not until after I testified in the EEO case for older female colleagues that Howard wrote an email to Associate Chief Justice and Outpatient Supervisor Dierlam: "GeriPACT national guidance states they should have a pharmacist to work with the team/patients, but does not require the DSM". ExCC p.VA-011467. The National Interim Guidance (ExC-1) should clearly be interpreted to state that GeriPACT is a PACT team in a specialty are and should function as every other PACT, including having a CPS practicing at the top of his/her professional level, ie doing DSM. Additionally, the newest GeriPACT guidance clarifies the Clinical Pharmacist requirement for Scope of Practice. In the total context of all national guidance, it is clear that a pharmacist in GeriPACT is required to be a CPS with Advance Scope. I contend that this was a method to disqualify me for promotion through retaliation.

9. In April of 2012 I provided statements in an EEO for two middle aged female colleagues that I believed were discriminated against when Pharmcare was closed and PACT positions were given out. They

didn't receive PACT positions. While as stated therein I feared retaliation, at the time they did not have Advance Scopes, I had an Advance Scope and was actively working in a clinic doing DSM following multiple patients. I also had two board certifications.

10. In June of 2012 my supervisor Marjorie Howard asked if I would like to move from Geri-PACT to Mod-B since they had a CPS leaving Mod-B, I thanked her but stated in an email dated 6/19/2012 "I have developed a good rapport with the providers in GEC(Geriatrics and Extended Care) and feel my professional calling is to assist this patient population". ExDD p10076. In Justice's deposition she states this was not a real job offer and Howard had no authority to make this job offer. Ex3b p67:23-68:2. Per review of the email this is contradictory and so is the conversation I had with Justice on 2/3/13 when she stated "I could read the writing on the wall" referring to the fact that she somehow knew that Geriatrics would not want to continue DSM by a pharmacist prior to the negotiations for the Service Agreement. It is apparent that after review of discovery that Pharmacy Administration never intended to allow DSM in the Service Agreement with Geriatrics and convinced Chief Williams to remove it from the Service Agreement he finally signed on December 12, 2012. ExD.

11. In Fall of 2012, the GPC-Consult (pharmacotherapy) was eliminated by Pharmacy Management and I had no way of getting new patients since there was no Service Agreement yet between Pharmacy and Geriatrics. Dr. Howard had closed the consult based DSM clinic in September, which was the only way I had of getting new patients referred since there was not a Service Agreement with

Geriatrics. This prevented me from getting new patients. Pharmacy and Primary Care did have a Service Agreement and the PACT CPS in Primary Care had no trouble finding patients and doing DSM. With the implementation of PACT, Pharmacy Administration had told the PACT CPSs that we would need to schedule patients into appointment slots, similar to what we had been doing, but it was now called a grid. We needed to make sure that at least 25% of our day was spent doing DSM or we would not be eligible for promotion to GS-13.

12. In Fall of 2012 Pharmacy Management started negotiating with Geriatrics for the Service Agreement. I was told that this was something taken care of at the Service Chief level and I didn't need to be concerned about it. I believed and trusted Howard. Later I would find out that younger pharmacist Lyndsey Childs (then 30) was able to work on the Pharmacy-Infectious Disease Service Agreement from the very beginning and she was not a Chief. Pharmacy Management had virtually no involvement with GPC, but said they did not need me for this. While I did not know it then the fact that I was the expert from pharmacy working with the Geriatrics department and was not allowed to work with Dr. Williams the Chief of Geriatrics in developing the Service Agreement turned out to be very bad for my career. The Service Agreement that was finalized on December 12, 2012, ExD, eventually had the effect of "officially" taking away DSM and the clinic I developed was closed. William Lavinghousez (then 32) was also allowed to help negotiate a service agreement.

13. In Fall of 2012 I also requested training for a Geri-PACT team class and was denied by my

supervisor Marjorie Howard. Younger CPS Marina Sulik (then 31) was allowed to attend a Primary Care conference held the same week that I was denied. Howard said she didn't receive notice in enough time to allow me to attend, however the GPC team had enrolled me in the class which was on station. Howard was made aware of this by Dr. Hull, Medical Director of GPC who sent repeated emails to Howard requesting that I attend this educational seminar since it was a PACT team session. Sulik was permitted to attend an off station educational seminar that same week. Howard also stated I had one patient scheduled. This was only because I had kept the tele-patient scheduled so I would have something to do that day. That one patient could have been rescheduled on another day if I had been approved to attend the training. Sulik was allowed to cancel her clinic to attend her educational opportunity.

14. October of 2012 Howard and I discussed my mid-term evaluation. The mentoring element was ignored by her. When I asked about that, she stated "that's only for people who are getting outstanding". I had been rated outstanding since 2008. I wasn't quite sure what to make of that reply but expected in good faith things would change by the final evaluation.

15. End of November 2012 (evaluations were done late that year), I was given outstanding for all elements including clinic utilization, but received "fully successful" on the mentoring element. I told supervisor Howard I didn't agree with this, she said "take it to the Union and grieve it." I thought really that was an odd reply, that there would be no discussion, no bringing Associate Chief Justice. So I

did go to the Union, and learned how to file a grievance. I had never done this my entire career as a pharmacist, 24 years. I felt belittled that she treated me this way.

16. December 5, 2012 I met with Service Chief Gary Wilson, HR Rep Peter Zeh and Union Rep Donna Trask regarding my grievance. Chief Wilson spoke harshly to me, I was not used to his tone and was surprised. He reprimanded me in front of HR, something which can be used later, if necessary. Mr. Zeh kept talking to the Union Rep about how they had messed up allowing a term like "etc." on the Performance Appraisal. Wilson denied my grievance and it went up to the Medical Center Director who sided with me on 1/29/13. As a result my performance appraisal was upgraded to "outstanding."

17. January 23, 2013 I was called by Howard to a meeting in her office and was told that my Advanced Scope would be removed, although it was not due for renewal until 10/31/13. Howard also said the Pharmacotherapy clinic would be closed and all patients would be discharged. She also said that the Chief of Geriatrics didn't see the need for DSM by a CPS which was not a true statement, but I did not know that until discovery. In fact, I wondered if I could have changed it, but in a meeting with Williams, I was cut off. William's deposition states he was ok with me doing DSM but was told by pharmacy that with only 3 grid slots per day I wouldn't meet the 25% quota needed for promotion to GS-13 so Pharmacy removed the DSM from the Service Agreement. Ex4 p. 17:2-19:1. I had been cut down to 3 grid slots per day since Sept. 2012 but since I knew I needed to spend 25% of my time working as a CPS I

overbooked patients all the time, and DID MEET THE 25% requirement.

18. I went to see my supervisor Marjorie Howard on February 6, 2013 and mentioned to her that now that my scope of practice would be removed I no longer had a chance of promotion. Her reply to me was that I had never had a chance since I didn't meet the 25% requirement of time in clinic. I told her that I did meet it. Please see excel spread sheet. It is remarkable that Marjorie Howard did not offer to produce any calculations or documents in view of our disagreement. I contend this is another example an arbitrary action to disqualify me for promotion based on retaliation.

19. On February 15, 2013 my Scope was actually taken away and I saw the final patients. I was actually entering the prescription on the computer when it would not allow me to do it. All patients that I had followed were deferred back to their Primary Care Providers in the Geriatric Clinic.

20. March 27, 2013 Chief of Pharmacy Gary Wilson announced that CPSs doing DSM would be promoted to GS-13. I was so upset I called associate Chief Justice and had to work in the Outpatient Pharmacy. I was overcome with emotion and could not stop crying. It was this day that I looked back at all that had happened over the past months since I testified in the Truitt/Trask EEO, and realized that I had been working in a hostile environment, that I had been retaliated against for testifying for my colleagues, and that I had had my Scope taken away to prevent me from being promoted along with my other PACT colleagues. I was the only older female in the group, the only pharmacist who had her scope removed. I remembered my supervisor; Howard had

asked me “when do you retire” at a PACT meeting in March 2012. Associate Chief Justice asked if I had gone to see the “middle aged movie, Magic Mike” in June of 2012. I had been denied training, when younger CPS Sulik was allowed to attend her training the same week. Pharmacy Management also gave her extra work doing anticoagulation of women veterans to boost her clinic time to 25%.

21. April 24, 2013 Justice denied my request for a lateral move to Mod B to work as a CPS. This is the same position that had been offered to me the previous summer which I had declined at that time thinking things in GPC would work out and I could continue to do DSM in Geriatrics. Justice stated “Lastly, we cannot move anyone into a position without advertising it. The positions you mention-both requiring an advanced scope-have promotion potential due to the 2012 Qualification Standards.” Ex EE p.012135. This statement made by Justice is in direct contradiction to a question asked of Chief of Pharmacy Gary Wilson in a document entitled Promotion Recommendations of GS-12 Clinical Pharmacists to GS-13 Clinical Pharmacy Specialists per Pharmacists Qualification Standards. This is from an email written by Wilson where he is asked: “I was told by the local labor union that per master agreement they could not promote people from GS-12 to GS-13, but must post the job announcement instead. Can you address this?” Wilson’s reply is: “When a new qualification standard is signed and given in the field the field has to apply the standards. Hybrids (which is what the pharmacists are) are not under competitive procedures and the service has to ensure that the pharmacist is in the right assignment based on the new qualification standards. According

to AFGE master agreement, a job that is vacant must be posted; however, this is not the case here.” EX.KK. People were talking out of both sides of their mouths.

22. April, 2013 I was called in for AIB, I felt singled out and humiliated. Chief Wilson apparently was mailed a vulgar letter and I was sent in for questioning regarding this. I was really upset that anyone would think I am such a low person to do something like that. I felt targeted and explained Dr. Wilson had an open door policy and I would speak to him if I had need to, as I had done back in Sept. 2012 when I was denied the Geri-training.

23. Also in April of 2013, I interviewed for an anticoagulation CPS pharmacist position. I was very interested in moving out of Geriatrics since I could no longer perform the medication management that I had trained so hard to do and felt was so helpful to the patients and the providers. I was very depressed and sad about not being able to do the duties I once took such pride in doing. I still felt Dr. Williams was involved. The rest of the staff in Geriatrics also wondered what had happened to me, why I was no longer seeing patients, why I was no longer assisting them as I once had. I kept my office door closed most of the time, since I was so emotionally upset, I had a difficult time just making it in to work. The anticoagulation interview was terribly difficult for me because I was devastated over the loss of what had been a great career. I got very few points as a “team player” and was also told I lacked training in anticoagulation. I had been asking for training and been repeatedly denied training since October of 2012. Management always had an excuse, either the anticoagulation clinic was understaffed or it was a busy time of the year, or it was not required for my

current position in GPC. Younger male CPS Brian Steele was allowed to have this anticoag training in Fall of 2011, even though it was not required for his position in PACT at that time just like it was not required of me. Also young female CPS Marina Sulik, had her anticoagulation scope reinstated and was given the women patients needing anticoagulation to fill her grid. Ex8 p.57:23-59:17. Pharmacy administration has stated that Sulik was given the women patients as part of a new directive, but there is nothing in this directive that states the pharmacist from Well Women's clinic (where Sulik worked) needs to manage women's anticoagulation. Ex. JJ. I could have been given the women coag patients to manage, or could have been given the elderly patients needing anticoagulation as I once thought would ensure my 25%. I believe they gave Sulik the women patients to get her to the 25% needed to meet the promotion criteria, since supervisor Howard stated in her depo that Sulik didn't meet the 25%. Ex8 p57:23-58:4. I also did not have a residency and it is clear Amy Mack (30) and Sarah Grawe (26) did. Grawe never had an advanced scope and was not a CPS. The score sheets show significant extra application points for residency. It is also reflected in both of their experience. Dr. Stewart rated me far lower. I was upset when I read his email exchange about this with Dr. Justice before I even applied. ExG.

24. I filed my own EEO on May 6, 2013. ExO contains various dates and activities.

25. In May 2013, I had to start seeing a therapist through employee health for my depression and anxiety directly caused by having my scope removed and my clinic closed. I felt my career had been destroyed needlessly. I also developed an upset

stomach and had a lot of nausea, for which I took medication. I called in sick much more than usual due to my inability to face going in to work and just process orders rather than work seeing patients and doing DSM. I was finally ready to move out of GPC and go into the float pool. This would mean giving up my set schedule of Monday-Friday 8-4:30, my office. Ex. II.

26. June 24, 2013, I started working in the float pool. The float pool is a group of pharmacists that cover and fill in as needed, rotating shifts (3:30-midnight, weekends, holidays, Inpatient and Outpatient areas of the Medical Center). My first assignment was 3:30 to midnight coverage in the inpatient side of the Medical Center. I continued to ask for training in anticoagulation but was told that as a float pharmacist that training was not needed. I enjoyed being out of GPC and the comradery of working with other pharmacists in the Medical Center. My spirits improved a great deal. I applied for other PACT positions as they became available, but younger pharmacists got them until the position in March 2014 became available, which I got.

27. In March of 2014, I got the CWY PHARM PACT B-D CPS position which required an Advanced Scope of Practice and was advertised as a GS-13 position. This position had an unusual work schedule Tuesday-Friday 7:00 a.m. to 4:30 p.m. and Saturday 8-12 p.m. I thought I had a good chance at this position since very few pharmacists would be willing to work every Saturday. I was not told I would not receive full holiday excused time. When I realized that I asked Pharmacy to change it, but they did not. Another employee got the full 8 hours. Ex9. Also unusual was that there was no interview for this position, yet it

had been posted nationally. I was given the position and Justice told me that I was the most qualified pharmacist and that is why I got the position. My credentials had not changed. In fact, despite what I was told in April of 2013, I was also offered a part-time anticoagulation, part-time PACT Palm Harbor position that I declined. I had not received any training in anticoagulation, but was offered an anticoagulation position. Also the part-time coag/PACT position was a promotable position that I was offered but had not applied for. My Monday Federal Holiday pay was then reduced to only four hours, which was not explained to me at the time I took the position. Dr. Camaro West-Lee in the Pharmacy Administration, was hostile when I attempted to get the situation corrected (and it still has not been corrected).

28. I observed that in 2010 and 2011 a male, Dr. Brian Steele, received preferential treatment and two outstanding pharmacists, Drs. Donna Trask and Anita Truitt, were denied PACT positions in what I and many other pharmacists believed was an example of unfair discrimination against older females. See Composite ExM. Drs. Truitt and Trask filed EEO cases in September 2011. I supported them by sending statements dated April 26, 2012 (Truitt and Trask), May 10, 2012 (Truitt only), and May 11, 2012 (Truitt and Trask) to the EEO investigator detailing my knowledge with respect to Dr. Trask's and Dr. Truitt's respective discrimination claims. *Id.*

29. I stated, *inter alia*, that older females were not given the training for positions that a younger male, Brian Steele, was given PACT position after being given the training. Dr. Trask was removed from a Spinal Cord Team that was supposed to transition

into PACT and William Lavinghousez, a male with no experience was placed on the team. Drs. Truitt and Trask were denied training for credentials which Pharmacy Management made central to appointment to the position which was given to Dr. Steele. The alleged reason was short staffing. However, young males were seen giving tours of the facility to students while the facility was allegedly short staffed. Trask was denied attendance at meetings a young male was allowed to go to. Another older male, Mark Lobley, without experience or training in disease state management also got a PACT position which was not advertised. I also stated that the PACT scoring sheets were changed in a fashion that did not value experience, so that the new system disfavored older females. I confirmed there was a hostile work environment from Wilson, Justice and West. I identified condescending remarks made by Keri Justice at Mod meetings towards older female pharmacists which insinuated that they would not be able to transition to the new PACT models. These remarks were never made to younger males. In fact an older male, Steve Totterdale was lauded.

30. I filed an informal EEO complaint on May 6, 2013. I filed my formal complaint on June 21, 2013, which contained 11 Claims. ExO. On July 26, 2013, I requested to add to my formal complaint two separate Reports of Contact write ups which were Event No. 12. On August 2, 2013, the ORM issued a partial acceptance of my complaint staying that all my events Nos. 1 through 12 were accepted as part of a hostile work environment based on gender (female), age, and reprisal. Events 10 and 11 were “also sufficiently related to the overall pattern of harassment.” I testified on November 26, 2013. ExO.

Supervisor Wilson testified on December 6, 2013, Supervisor Howard gave an affidavit November 27, 2013 and follow up on December 18, 2013. ExO. A Federal Complaint was filed on July 17, 2014. Dkt. 1. Subsequent like and related acts occurred after the Federal Complaint was filed (¶s 10o and p) and have been added to this complaint.

31. All the pharmacists who received advertised PACT positions were in their thirties. They were predominately male. A male (Steve Toterdale) who was closer to my age received a PACT position in Sarasota. ExR.

32. I have reviewed Dr. Justice's declaration and the basis for her saying I did not meet the 25% requirement. I have looked at records produced and listed in her declaration against the actual records. Numerous encounters which should have been included (ExGG) were not produced which affected the numerator. A number of days are included in the denominator which should not have been. Exhibit FF shows that properly calculated, 27% of my time was spent doing CPS work. That does not include work up time which is normally calculated into those totals and various other data normally recognized. See p. 5 of Ex FF; see also ExGG. I have the last four of each of these patients listed to match records that Dr. Justice produced.

33. The loss to me of not having the GS-13 promotion was \$7000/year.

34. The loss to me of not getting the Monday Holiday pay has been \$2,320 to date.

35. At this time I am still not been made whole, even though I have had my Advance Scope reinstated and obtained a CPS position, and but for the EEO

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action I was forced to make, I would still not have the Scope and GS-13 position. I still work in a hostile environment and my professional reputation is damaged. I have had to invest significant financial resources to defend my career. I suffered mentally and physically. I have the direct losses of salary and holiday pay named above, which also affect my retirement.

36. None of the women over 50 who like myself had DSM advance scopes received a GS-13 prior to June 2014 except Cecelia Morelli who received it under a prior administration. Ramona Billings received a GS-13 in February 2015.

**DECLARATION**

(28 U.S.C. § 1746)

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 18th day of May, 2016.

/s/ Noris Babb

Noris Babb