INTRODUCTION
CHARGES, PENALTIES, AND AFFIRMATIVE DEFENSES

This is our 15th edition to the Charges and Penalties treatise. Here, we include MSPB and Federal Circuit decisions made and issued during the 2022 to February 2023 timeframe. Because the MSPB was without a majority since January 2017—Vice Chair Raymond Limon and Member Tristan Leavitt were confirmed by the Senate and sworn into their duties on March 4, 2022 and Cathy Harris, the Acting Chair, was approved by the Senate and sworn in on June 1, 2022—this is the first time in more than five years that the MSPB has been able to and has issued decisions. Note: Member Leavitt is departing the Board following the expiration of his term on February 28, 2023. Accordingly, effective March 1, 2023, the Board will have two members: Acting Chairman Harris and Member Limon. Two members constitutes a quorum, so the Board will continue to issue decisions. Accordingly, we have sought to capture numerous 2022–23 MSPB (and court) decisions, as a way to understand the leanings of the current MSPB.

As many of you know, the lack of a Board quorum for more than five years resulted in a substantial backlog of 3, 800 cases. Since March 2022, the Board estimates that it has issued more than 1,100 cases, seeking to tackle the oldest ones first. *See* MSPB.gov.

By far, the most significant new MSPB decision is *Singh v. USPS*, 2022 MSPB 15 (2022), which returns MSPB case law on penalty disparate treatment to a less employee-oriented approach; in sum, the appropriate comparators will typically not be agency-wide. There are other important decisions on penalty (e.g., *Chin v. DOD*, 2022 MSPB 34 (2022)) and, on specific charges, such as Medical Inability to Perform (e.g., *Haas v. DHS*, 2022 MSPB 36 (2022), and *Owens v. DHS*, 2023 MSPB 7 (2023)), Inappropriate Conduct by a Supervisor (*Moncada v. Executive Office of the President, Office of Admin.*, 2022 MSPB 25 (2022)) and Excessive Absences (*Robinette v. Dept. of Army*, AT-0752-16-0633-I-1 (NP 5/11/2022)). There is also the continuing trend that agencies are more frequently using general charges, such as Conduct Unbecoming or Improper Conduct. E.g., *Thomas v. Dept. of Army*, 2022 MSPB 35 (2022), *Edler v. VA*, No. 2021-1694, 122 LRP 3979 (Fed. Cir. 2022 NP), *Parkes v. DHS*, NY-0752-14-0361-I-1 (NP 10/24/2022), *Quinn v. Dept. of Air Force*, SF-0752-21-0097-I-1(NP 3/29/2022) and *Smith v. Dept. of Army*, SF-0752-21-0090-I-1 (NP 9/29/2022).

In terms of defenses, there are the usual successful due process/*Stone* defenses (e.g., *Johnson v. Dept. of Air Force*, 50 F.4th 110 (Fed. Cir. 2022)). Interestingly, and more so than in previous years, the Board has begun carefully addressing affirmative EEO claim defenses (e.g., *Pridgen v. OMB*, 2022 MSPB 31 (2022), *Haas*, *supra*, *Conde v. DHS*, DC-0752-15-1059-I-1 (NP 11/10/2022), *Gabel v. VA*, 2023 MSPB 4 (2023), *Kotsis v. Dept. of Transp.*, AT-0432-16-0006-I-1 (NP 8/9/2022), *Martin v. USPS*, 2022 MSPB 22 (2022), *SSA v. Abrams*, CB-7521-13-0008-T-1 (NP 11/17/2022), and *Lin v. Dept. of Air Force,* 2023 MSPB 2 (2023)). And, in relation to other affirmative defenses, these authors are struck by the numbers of whistleblower reprisal claims, with several interesting decisions on jurisdiction (*Abernathy v. Dept. of Army*, 2022 MSPB 37 (2022), *Covington v. Dept. of Interior*, 2023 MSPB 5 (2023)); coverage (*Smolinski v. MSPB*, 23 F.4th 1345 (Fed. Cir. 2022); exhaustion (*Chambers v. DHS*, 2022 MSPB 8 (2022)); protected disclosures (e.g., *Salazar v. VA*, 2022 MSPB 42 (2022), *Abernathy v. Dept. of Army*, 2022 MSPB 37 (2022), *Edenfield v. VA*, No. 2021-2001, 122 LRP 45911 (Fed. Cir. 2022)); *prima facie* case (*Chambers*, *supra*)); personnel actions (*Spivey v. DOJ*, 2022 MSPB 24 (2022), *Savage v. Dept. of Army*, AT-0752-11-0634-B-1 (NP 10/31/2022), *Skarada v. VA*, 2022 MSPB 17 (2022), *Doyle v. VA*, 855 Fed. Appx. 753 (Fed. Cir. 2021)); proof of the *Carr* factors (*Shibuya v. USDA*, DE-1221-09-0295-B-1 (NP 3/31/2022); *McIntosh v. DOD*, No. 2019-2454, 122 LRP 44046 (Fed. Cir. 2022)); and, clarification of the *Carr* factors (*Soto v. VA*, 2022 MSPB 6 (2022), *Bennett v. USDA*, DE-1221-15-0461-W-1 (NP 11/21/2022), *Rickel v. Dept. of Navy*, 31 F.4th 1358 (Fed. Cir. 2022)).

We provide summaries of these numerous new cases at the end of this section. But, before that, we wanted to note some changes in law, regulations and guidance.

I. NEW LAWS

There are two new laws, The Pregnant Workers Fairness Act (the PWFA) and The Providing Urgent Maternal Protections for Nursing Mothers Act, (also known as the PUMP Act). Each of those are summarized below:

The Pregnant Workers Fairness Act (the PWFA)

On December 23, 2022, Congress passed the Pregnant Workers Fairness Act (the "PWFA") as an amendment to the 2023 Consolidated Appropriations Act, which President Biden signed into law on December 29, 2022. The PWFA is set to go into effect on June 27, 2023. The PWFA expands existing federal law with respect to the accommodation of pregnant employees in at least three important ways, as follows:

- Prior to the passage of the PWFA, federal law only required employers to accommodate pregnant employees' medical restrictions to the extent those restrictions rendered the employees "disabled" within the meaning of the Americans with Disabilities Act (the "ADA"). The PWFA, however, requires employers to make reasonable accommodations for pregnancy-related medical conditions irrespective of whether those conditions rise to the level of a disability, as long as the accommodations do not impose an undue hardship on the employer.
- Employers may only require employees to use leave to accommodate pregnancy-related restrictions if no other reasonable accommodations are available. In other words, leave may only be used as a "last resort" unless, of course, the employee prefers leave as an accommodation.
- Pregnant employees must be provided with reasonable accommodations even if they cannot perform all essential functions of the job, as long as their inability to perform those essential functions is temporary.

By December 2024, the EEOC must issue regulations providing examples of reasonable accommodations that address known limitations regarding pregnancy, childbirth, and related medical conditions.

The Providing Urgent Maternal Protections for Nursing Mothers Act, (also known as the PUMP Act)

The FY 2023 omnibus appropriations law also included the Providing Urgent Maternal Protections for Nursing Mothers Act, also known as the PUMP

Act. That Act expands workplace protections for employees with a need to express breast milk. The stated purpose of the PUMP Act is "to expand access to breastfeeding accommodations in the workplace, and for other purposes." Although the Fair Labor Standards Act (FLSA) was amended to provide some protections for certain non-salaried nursing workers when the Patient Protection and Affordable Care Act was passed in 2010, the PUMP Act further amends the FLSA to increase those protections by including millions of salaried employees who were previously excluded from such protection. The new law also clarifies when workers must be compensated for time spent pumping and provides legal remedies for nursing workers for potential violations. More specifically, the PUMP Act requires employers to provide:

- a reasonable break time for an employee to express breast milk each time such employee has need to express breast milk for the 2-year period beginning on the date on which the circumstances related to such need arise; and
- a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.

The PUMP Act also requires employers to compensate employees who take such breaks if the employee is working during the break.

Before commencing an action for not providing a private place for the employee to express milk, an affected employee must notify their employer of the alleged failure to provide a private area to pump; the employer has 10 days to remedy the situation. The notification period is waived if the employee's employment has been terminated in retaliation for making the request or opposing an employer's refusal to provide a place to express milk under the law, or if the employer indicated it will not provide a private place for the employee to do so.

The PUMP Act also amends the FLSA to clarify that the same damages that are available under other provisions of the FLSA are available for violations of the PUMP Act, which include the payment of unpaid wages, reinstatement, back and front pay, and liquidated damages.

II. NEW REGULATIONS

There are also new OPM regulations, amending 5 CFR Parts 315, 432 and 752. These new regulations, in effect, rescind, regulatory changes made in 2020, that had implemented then President Trump's now-revoked EO 13839. They finalize the proposed regulations, which had been published in January 2022 and follow comments by interested organizations and individuals.

The final rule was published in the Federal Register on Nov. 10, 2022 and became effective December 12, 2022. The changes comply with the directive in President Biden's EO 14003, to "suspend, revise, or rescind" actions implementing EO 13839, while continuing "to provide agencies the necessary tools and flexibility to address matters related to unacceptable performance and misconduct or other matters contrary to the efficiency of the service," as stated by OPM in the introduction to the final rules.

Here are some of the important changes made by the final rule:

- *Clean record ban*. The final rule rescinds the portion of the Nov. 2020 rules that banned agencies from agreeing to settle a dispute in exchange for a clean record that would modify an employee's personnel record. Several commenters expressed "explicit support" for rescinding the clean record ban, with one union noting that "settlements are less costly and burdensome than litigation or arbitration, and it is in employees' as well as management's interest to encourage resolution of employment disputes through settlement."
- *Performance-based actions*. The final rule removes the language from the Nov. 2020 amendments that stated the "nature of assistance provided is in the sole and exclusive discretion of the agency. No additional performance assistance period or similar informal period shall be provided prior to or in addition to the opportunity period provided under this section." This final rule also "reverts to" the language in 5 CFR 432.104 before the Nov. 2020 amendments regarding the obligation to provide assistance to employees who have demonstrated unacceptable performance and emphasizes that employees have a right to a reasonable opportunity to improve, including assistance from the agency to improve unacceptable performance. OPM also reiterated that "agencies should take swift action to address and resolve poor performance, including by communicating clear performance standards and expectations to employees; providing periodic feedback on performance; making full use of the probationary period for employees; and maintaining effective lines of communication with a well-trained human resources staff and agency legal counsel."
- *Probationary notices*. The Nov. 2020 rule required agencies to notify supervisors at least three months and again one month before an employee's probationary period ended, along with requiring supervisors to make an affirmative decision on whether the employee should stay on the job. Although "useful to some agencies that may not have used the probationary period to full effect, [this provision] placed unnecessarily restrictive procedural requirements on agencies regarding how agencies administer the probationary period," OPM said. So, "OPM has reconsidered the wisdom of a categorical, centralized rule, and has concluded that it is more efficacious and eminently reasonable to rescind this provision so that agencies feel free to adopt any procedures that work best for them for reminding supervisors not to overlook the expiration of employee probationary periods." Even though this is not required, agencies can still provide these notifications.
- *Penalties and adverse actions*. The final rule rescinds 5 CFR 752.202 (c) through (f) and 752.403 (c) through (f), which were changed by the Nov. 2020 amendments, including:
    - A provision that an agency is not required to use progressive discipline.
    - The standard that requires consideration of, among other factors, an employee's disciplinary record and past work record in the *Douglas* factor analysis.
    - The requirement that suspension should not be a substitute for removal.
    - Adoption of the test for appropriate comparators in *Miskill v. SSA*, 863 F.3d 1379 (Fed. Cir. 2017), which required appropriate comparators to be primarily individuals in the same work unit, with the same supervisor, who engaged in the same or similar misconduct. Some management associations disagreed with removing this standard, but OPM said "agencies can be sufficiently guided by *Miskill* and other applicable case law without a regulatory amendment.»
- *Time Limits*. Removes the 15-day time limit for an agency to make a final decision on a proposed removal after receiving the employee's response; Removes the 15-day time limit for an agency to make a final decision on a proposed removal after receiving the employee's response;
- *National Guard Technicians*. Clarifies that dual status National Guard technicians are not excluded from MSPB appeal rights.

III. NEW OSC HATCH ACT GUIDANCE

In July 2022, the Office of Special Counsel released guidance on when federal employees may express their views about current events, policy issues, and matters of public interest at work or on duty.

While conduct such as discussions about abortion, gun rights, the January 6 hearings, and like matters could still violate agency-specific rules, the "Hatch Act would generally not prohibit" comments or displays on these topics because, by themselves, they "are not inherently related to" a partisan political candidate, party, or group. Nonetheless, these nonpartisan issues can easily become Hatch Act prohibited political activity if the employee is using the discussion to advocate for or against a political party or candidate.

According to the July FAQ, the OSC considers a series of factors when investigating allegations that on duty discussions about current events or policy issues might actually be political activity in violation of the Hatch Act, which include: the content, timing, length, composition, and context of the discussion, the relationship of the participants involved, and the medium used, such as email or in person contact. The OSC also looks at whether a candidate or party is mentioned even if there is no express advocacy for or against the candidate or party.

Now, for the new circuit and MSPB cases.

IV. NEW CIRCUIT AND MSPB CASES

Administrative Judges

McIntosh v. DOD, No. 2019-2454, 122 LRP 44046 (Fed. Cir. 2022) (Federal Circuit finds that MSPB administrative judges are not principal officers who must be appointed by the President and confirmed by the Senate and affirmed the Board's decision on the removal of a program and budget analyst; in addition circuit upholds Board in sustaining removal based on inappropriate conduct, failure to follow supervisory instructions, absences without leave, and lack of candor charges and rejected whistleblower reprisal affirmative defense, concluding that even absent the petitioner's grievances, the agency would have removed the petitioner);

Affirmative Defenses—EEO Reprisal

Conde v. DHS, DC-0752-15-1059-I-1 (NP 11/10/2022) (relying on *Pridgen*, Board makes clear that "Specifically, an appellant may prove such a defense by showing that her protected activity was a motivating factor, i.e., played any part in the agency's action or decision. *Pridgen*, 2022 MSPB 31, ¶ 21. But for the appellant to obtain full *status quo ante* relief on her claim, including reinstatement, back pay, and damages, her protected activity must be a but-for cause of the action or decision. *Id*. The appellant may meet this burden by submitting any combination of direct or indirect evidence, including evidence of pretext, comparator evidence, and evidence of suspicious timing or other actions or statements that, taken alone or together, could raise an inference of retaliation. *Id*., ¶ 22."; with that modification, Board sustains removal of this electrical engineer for four instances of failure to follow instructions);

Affirmative Defenses—Section 714—Mixed Cases

Davis v. VA, 2022 MSPB 45 (2022) (a mixed case appeal directly filed with the board is governed by the process and timelines found in 5 USC 7702 and its implementing regulations, rather than 38 USC 714; Department of Veterans Affairs removed the appellant as a cemetery caretaker supervisor under the Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017 based on failure to follow instructions and inappropriate conduct charges, effective Jan. 31, 2020; appellant filed an appeal with the MSPB on March 2, 2020, challenging his removal and claiming that the removal was due to discrimination, retaliation for equal employment opportunity activity, and whistleblowing reprisal; the AJ dismissed, finding that the appeal was not timely filed within 10 business days of the removal's effective date under 38 USC 714; the Board found that the appeal was a timely filed mixed case appeal; the Board discussed *Wilson v. VA,* 2022 MSPB 7 (2022), and determined that a mixed case appeal directly filed with the board is governed by the process and timelines found in 5 USC 7702 and in its implementing regulations, rather than 38 USC 714; the Board indicated that the deadline to file a mixed case appeal under the implementing regulations is 30 days after the effective date of the action or receipt of the decision, whichever is later, and the appellant had timely filed his mixed case appeal on the day of the filing deadline);

Affirmative Defenses—EEO Reprisal

Gabel v. VA, 2023 MSPB 4 (2023) (IRA appeal properly dismissed because of vague allegations; after removal, this licensed practical nurse filed an IRA appeal; the Board, as had the AJ, found that the appellant failed to make a nonfrivolous allegation of a protected disclosure under 5 USC 2302 (b)(8) or protected activity under 5 USC 2302 (b)(9)(A); the Board noted, as follow, "Here, the appellant alleged in her OSC complaint that the agency discriminated against her based on her disability and engaged in a pattern of abuse concerning her requests for leave under the Family and Medical Leave Act of 1993 (FMLA) and requests for reasonable accommodation. She vaguely claimed that she attempted to bring this wrongdoing to her supervisors attention from October 2014 through August 27, 2015, the date she filed her OSC complaint. As the administrative judge noted, however, the appellant failed to provide with any specificity the content of her alleged disclosures, to whom they were made, the dates they were made, or how they were made."; concerning the appellant's allegation that the agency retaliated against her for an EEO complaint she had filed with the agency that alleged discrimination and retaliation, the Board determined that it lacks jurisdiction because "the appellant did not allege that the substance of her EEO complaint concerned remedying a violation of 5 U.S.C. § 2302 ((b)(8)")

Affirmative Defenses—Evidentiary Standards

Lin v. Dept. of Air Force, 2023 MSPB 2 (2023) (Chapter 43 performance action reversed and remanded based on *Santos*; remand must include findings as to affirmative defenses, consistent with *Santos* v. *NASA* and *Pridgen v. OPM;* in a Demonstration Project, most but not all Chapter 43 standards apply; appellant, a senior general engineer in the Air Force's Research Laboratory was subject to a contribution-based compensation system in which the average of four factors determined his overall CCS score; after the appellant achieved an overall contribution score of 2.73 for the appraisal year ending in September 2012, which was below the 3.05 expected score, the agency placed him on a 120-day contribution improvement plan in January 2013; in September 2013, the agency told the appellant that he had successfully completed the CIP but was still subject to a 2-year period during which he could be removed for deteriorated contribution; in January 2015, the agency evaluated the appellant and found that the appellant's overall contribution score was below the expected score; appellant was removed under the agency's Science and Technology Reinvention Laboratory Personnel Management Demonstration Project for "failure to demonstrate an adequate level of contribution" for Oct. 1, 2013, through Sept. 30, 2014, within two years of a CIP and appealed his removal to the MSPB; at the Board, there is a good discussion of Demonstration Project cases; the principal finding is that the agency also needed to prove under *Santos* "that the appellant's CIP was justified

because his pre-CIP performance was inadequate"; on remand, the AJ was also directed to determine if the performance was inadequate during the CIP period; finally, because the employee raised an age discrimination claim, the AJ was directed to apply the holding in *Santos* ("that the Board must consider an appellant's pre-PIP performance in the context of an affirmative defense when, as here, the validity of the agency's proffered reason for taking the performance-based action is a factor in analyzing that claim ") and *Pridgen* (clarifying the evidentiary standards and burdens of proof for age discrimination and EEO reprisal claims and "that in determining whether the agency has afforded the appellant a reasonable opportunity to improve in a chapter 43 action, relevant factors include the nature of the duties and responsibilities of the appellant's position, including whether assignments of work were made in a discriminatory manner");

Affirmative Defenses—Title VII and Disability Discrimination

Pridgen v. OMB, 2022 MSPB 31 (2022) (appellant, a policy analyst, was removed for unacceptable performance on tasks related to two areas on her performance improvement plan, after which the appellant contested her removal with the Board and alleged affirmative defenses of race, color, national origin, age, and disability discrimination and retaliation for protected activities and disclosures; the AJ affirmed the removal and found that the appellant did not prove any of her affirmative defenses; the Board reversed and remanded, making the following findings:

- The Board reversed the agency's Chapter 43 removal of this policy analyst because it failed to provide substantial evidence in the performance of a critical element (i.e., the performance tasks for which the appellant was removed were related to the appellant's "strategic goals," which were not critical elements, rather than her "core competencies," which were critical elements).
- Generally, as to Title VII claims, the Board reversed a previous decision in *Savage*, 122 M.S.P.R. 612, ¶ 46, which had held that the *McDonnell Douglas* framework has no application to Board proceedings. It concluded instead that the "order and allocation of proof" set out in *McDonnell Douglas* applied.
- It noted that "the methods by which an appellant may prove a claim of discrimination under Title VII are: (1) direct evidence; (2) circumstantial evidence, which may include (a) evidence of "'suspicious timing, ambiguous statements oral or written, behavior toward or comments directed at other employees in the protected group, and other bits and pieces from which an inference of discriminatory intent might be drawn,' also known as a 'convincing mosaic'; (b) comparator evidence, consisting of 'evidence, whether or not rigorously statistical, that employees similarly situated to the plaintiff other than in the characteristic…on which an employer is forbidden to base a difference in treatment received systematically better treatment'; (c) evidence that the agency's stated reason for its action is 'unworthy of belief, a mere pretext for discrimination.'…"
- As to the employee's race and color claims, the Board first noted that the agency has the burden to prove that it provided the appellant with a reasonable opportunity to improve. The employee's right to a reasonable opportunity to improve is a substantive right and a necessary prerequisite to all chapter 43 actions, and in determining whether the agency has afforded the appellant this opportunity, relevant factors include the nature of the duties and responsibilities of the appellant's position, including whether assignments of work were made in a discriminatory manner.
- In regard to comparator evidence, the Board determined that the AJ viewed the appellant's comparator evidence too narrowly (i.e., "the administrative judge found that a coworker, the only other GS-15 Policy Analyst who reported to the same first-line supervisor as the appellant, was not a valid comparator because the supervisor assigned him different tasks").
- The Board further noted that "To be similarly situated, comparators must have reported to the same supervisor, been subjected to the same standards governing discipline, and engaged in conduct similar to the appellant's without differentiating or mitigating circumstances. The appellant and her coworker reported to the same first-line supervisor and had the same core competencies and strategic goals. However, as part of their annual performance plans, the supervisor assigned each of them different tasks related to the strategic goals. According to the supervisor, she assigned different tasks to the appellant and her coworker because of the need to divide work amongst her small staff. The administrative judge made no finding as to whether the assignments were the result of discrimination."…"We find that as an employee in the same position, assigned work by the same supervisor and subject to the same general standards governing performance, the appellant's coworker was similarly situated to the appellant for purposes of determining whether the tasks assigned to the appellant during the PIP period were the product of discrimination."
- While the AJ rejected the employee's EEO-related claims that she had been discriminated against for filing prior Board appeals, the Board made clear that the AJ had wrongly applied the standards for determining a 5 USC 2302(b)(9)(A)(ii) claim and not the standard for determining Title VII reprisal.
- In finding that the appellant did not prove discrimination under the Americans with Disabilities Act (ADA), the administrative judge viewed the appellant's comparator evidence too narrowly. The Board observed that "While we agree with the administrative judge's applying the motivating factor causation standard, as explained above, the appellant's coworker was similarly situated to the appellant because he was employed in the same position, assigned work by the same supervisor, and subjected to the same general standards governing performance. *See Fox*, 120 M.S.P.R. 529, ¶ 37. Thus, we must remand for the administrative judge to consider the appellant's claim that she received less favorable assignments than her coworker did due to her disability." As to the analysis for disparate treatment disability discrimination, "the administrative judge shall apply the same standards of proof set forth above regarding the appellant's Title VII claims, and the appellant may use the same methods of proof applicable to such claims."
- In agreeing with the AJ's finding that the employee did not prove retaliation for filing disability discrimination complaints, it sought to correct his analysis. In that regard, it reversed its decision in *Southerland* (including that a mixed-motive analysis applies to claims of disparate treatment discrimination under the ADA by relying on an EEOC case applying the mixed-motive standard to an ADA retaliation claim), and applied *Nassar*, which required that retaliation was the "but-for" cause of the employer's action. It also "overrule[d] the finding that an agency can avoid liability by proving by clear and convincing evidence that it would have taken the same action absent an improper motive, as such a construct would be applicable only for a motivating factor analysis."
- The Board determined that the AJ erred in concluding that the appellant failed to make a protected whistleblower reprisal disclosure, as follows: "We conclude that the alleged facts in the initial appeal and in the appellant's hearing testimony are sufficiently specific to find that a disinterested observer with knowledge of the essential facts known to, and readily ascertainable by, the appellant could reasonably conclude that the actions evidenced a violation of section 872's [i.e., section 872(a) of the NDAA for FY 2009] requirement for the promulgation of regulatory guidance, and therefore that the appellant had a reasonable belief of such. Accordingly, we find that these disclosures to the Office of the Deputy Attorney General and various OIGs in June 2012 were protected.");

Affirmative Defenses—Jurisdiction—Mixed Cases

Scanlin v. SSA, 2022 MSPB 10 (2022) (while the relevant negotiated grievance procedure permits allegations of discrimination, because the appellant could have raised a discrimination claim before the arbitrator, but has not proven that she did so, the Board lacks jurisdiction over her request for review; the claims representative appellant was removed for falsification and gross negligence and through her union, elected arbitration; following an arbitration decision sustaining the agency's action, the appellant sought review at the Board under 5 USC 7121(d); the Board dismissed on the basis that the appellant could have raised a discrimination claim before the arbitrator, but had not proven that she did so; the Board further noted that it was insufficient that the appellant mentioned in her brief that discriminatory treatment was an issue to be decided; the Board stated that "The generic posing of the question, 'was the removal discriminatory,' without more, is insufficient for purposes of proving that she raised a claim of discrimination under 5 U.S.C. § 2302(b)(1) with the arbitrator in connection with the underlying action.");

Affirmative Defenses—Waiver

Thurman v. USPS, 2022 MSPB 21 (2022) (Board clarifies the factors it will examine to determine if an appellant has waived or abandoned a previously asserted affirmative defense, overruling *Wynn v. USPS*, 115 MSPR 146, 2010 MSPB 214 (2010), to the extent that it required the Board to remand a matter for consideration of an affirmative defense when an AJ did not comply with the *Wynn* requirements; the appellant, who worked at USPS, allegedly said to a coworker that he would "end up shooting someone out of revenge and anger" if his vehicle was again towed, and also allegedly told her that he was having her followed by law enforcement due to a previous dispute but that due to her having children, he had not had something "bad" happen to her, and that he had law enforcement harassing the son of a supervisor; the appellant was removed based on an improper conduct charge; the appellant indicated on his appeal form that he was raising the affirmative defense of retaliation for prior protected activity, including filing a Board appeal; in an order summarizing a later prehearing conference, the administrative judge identified the issues presented on appeal and noted that, during the conference, the appellant's representative "indicated that he was raising no affirmative defenses"; the AJ affirmed the removal and did not reference the affirmative defense; on review, the Board upheld the AJ's decision; and even though the appellant did not raise a waiver issue, the Board determined that its prior precedent in *Wynn* seemed to suggest that it had an obligation nonetheless to *sua sponte* address that issue and remand the appeal; here, the Board disagreed with *Wynn* and rather than automatically remand the appeal, held that the "Board will examine a number of factors that are instructive as to the ultimate question of whether an appellant demonstrated his intent to continue pursuing his affirmative defense, and whether he conveyed that intent after filing the initial appeal"; the factors are: (1) how clearly and thoroughly the affirmative defense was raised; (2) the extent to which the affirmative defense continued to be pursued; (3) if an objection was made to an issues summary that did not include the defense; (4) whether the affirmative defense was raised in the petition for review; (5) the representation of an appellant and his knowledge level of the proceedings if he was not represented; and (6) the probability that the affirmative defense abandonment was due to confusion or the providing of erroneous or misleading information; the Board applied the factors and found that the appellant, who did not discuss his retaliation claim in any filing after the appeal form or at the hearing and did not object to the prehearing conference summary that indicated he was not asserting an affirmative defense, abandoned his affirmative defense, and there was no reason to remand the appeal);

Attorney Fees—Knew or Should Have Known

Brown v. DHS, SF-0752-14-0816-A-1 (NP 1/12/2023) (Member Leavitt dissenting) (appellant worked as a transportation security inspector; she was removed for submitting false reports, failure to follow directions, and failure to exercise due diligence; AJ mitigated the removal to a demotion to the position of transportation security officer and a suspension for 30 days; as to penalty, the Board noted, among others that, "the deciding official's evaluation of the relevant *Douglas* factors was lacking because he "appeared to admit in his testimony that he did not consider, in the context of the proper penalty for the submitting of false reports charge, the appellant's job level, record of experience, length of service, lack of prior discipline, ability to get along with her coworkers, and any stress, job tensions, or personality issues"; subsequently, the appellant sought $104,173.02 in attorney fees and costs, and the AJ examined the reasonableness of the requested fees and awarded $67,105.72; on review, the Board determined that an award was warranted under *Allen* category 5 because the deciding official's *Douglas* analysis was negligent and "the agency knew or should have known that it would not prevail on the merits"; in the dissent, Member Leavitt indicated that he would determine that no fee award is warranted, stating that "the agency had a reasonable, supportable basis for its action when it was taken" and discussing "the seriousness of the sustained falsification specifications alone");

Attorney Fees—OSC Disciplinary Action

Coffman v. OSC and DHS, 2022 MSPB 18 (2022) (Board awards $517,506.19 in attorney fees for representation; defense of an employee in an OSC disciplinary action; fees in such cases are awardable against the employing agency and not OSC due to changes made in the Whistleblower Protection Enhancement Act of 2012; OSC filed a disciplinary action against the petitioner, a deputy assistant commissioner for human resources management employed by the Department of Homeland Security, alleging violation of 5 USC 2302 (b)(1)(E) and 5 USC 2302 (b)(6), based on her participation in the Customs and Border Protection's efforts to employ three candidates preferred by the CBP Commissioner; after a six-day hearing, an ALJ failed to sustain any of the eight counts brought against the petitioner and the Board affirmed; in the attorney fee proceeding, the ALJ awarded $490,503.58 in attorney fees against OSC; the Board on review sustained the ALJ's finding that the petitioner was the prevailing party (fees and expenses was warranted in the interest of justice because the petitioner was substantially innocent of the charges (*Allen* factor 2) and OSC knew or should have known that it would not prevail on the merits (*Allen* factor 5), raised the fees and expenses to $517,506.19 (apparently for the additional fees and expenses in pursuing the review petition) but reversed the ALJ's decision as to the responsible party to pay the fees and expenses, relying on the changes in the Whistleblower Protection Enhancement Act of 2012);

Attorney Fees—Hourly Rate Reduced

Doe v. Dept. of State, 2022 MSPB 38 (2022) (AJ properly reduced hourly rate for fee award from $650 to $425.00 because the reasonable hourly rate is properly determined by fees awarded in comparable USERRA Board litigation rather than USERRA federal district court litigation);

AWOL—Harassing Conduct Rendered Employee Incapacitated

Savage v. Dept. of Army, AT-0752-11-0634-B-1 (NP 10/31/2022) (whistleblower reprisal; hostile work environment represented "a significant change in working conditions under 5 USC 2302(a)2)(A) (xii)," relying on the recent decision in *Skarad*a (agency action must have practical consequences to constitute a personnel action); constructive suspension; proven as a result of numerous incidents of hostile environment; AWOL; not proven due to harassing conduct that rendered employee incapacitated; in this factually complex case, the appellant, a contract specialist, filed both an IRA, and after she was removed, a Chapter 75 appeal, which included a claimed constructive suspension and a removal; this is its second remand decision; findings included that in the Chapter 75 appeal, the appellant proved a constructive suspension as to the IRA action, as a result of proving

that medically incapacitated due to a hostile work environment (reversing the AJ, who had found to the contrary); the agency failed to prove an AWOL charge in the Chapter 75 appeal because she had been constructively suspended during that period of time); the employee proved that her disclosures were a contributing factor in her removal (reversing the AJ, who had found to the contrary and had used a "not motivated by" incorrect standard); the AJ failed to properly analyze the clear and convincing evidence standard as to the affirmative defense, addressing only the first *Carr* factor, and, even as to that factor mistakenly considered the AWOL charge proven; and, as to the IRA action, the Board determined that the hostile work environment represented "a significant change in working conditions under 5 USC 2302(a)2)(A) (xii)," relying on the recent decision in *Skarad*a (agency action must have practical consequences to constitute a personnel action);

Bias—Perception and Remedy

Baker v. SSA, 2022 MSPB 27 (2022) (while the Board rejected the appellant's claim of actual bias, it determined that the AJ should have recused himself because his impartiality might reasonably be questioned under the circumstances of the case, applying the 28 USC 455 (a) standard; it remanded for determination by a different AJ; in determining that the appropriate remedy was assignment of a different AJ and a new hearing, the Board considered the three factors identified in *Liljeberg v. Health Serv. Acquisition Corp.,* 486 U.S. 847 (1988), "the risk of injustice" to the parties in the case, "the risk that the denial of relief will produce injustice in other cases," and "the risk of undermining the public's confidence in the judicial process"; the appellant worked as a paralegal specialist with the Social Security Administration's Chicago National Hearing Center, and filed a complaint with OSC, claiming that the agency retaliated against her for engaging in protected activities; she thereafter filed an IRA appeal with the MSPB; at a prehearing conference, the AJ disclosed an "ongoing personal relationship" that he had with an attorney working "in the same agency office as the appellant," stated that the relationship would not negatively affect his impartiality, and allowed any motions for recusal; the AJ denied the subsequent motion to recuse, the appellant's motion to reconsider and motion to certify an interlocutory appeal of the decision; after a hearing, the AJ denied the request for corrective action, finding that the appellant failed to prove a whistleblowing disclosure or protected activity; appellant challenged the decision; in finding a perception of bias, the Board noted that the attorney at issue was one of two attorneys who worked for a specific administrative law judge at the Chicago NHC, the two other members of her working group had received or been the subject of the alleged disclosures, and the three employees viewed the appellant unfavorably);

***Bivens* Action—Not Applicable**

Egbert v. Boule, 142 S. Ct. 1793 (2022), *reversing* 980 F.3d 1309 (9th Cir. 2020) (J. Sotomayor, J. Kagan and J. Breyer, concurred and dissented in part) (the Supreme Court determined that individuals do not have the right to sue Border Patrol agents personally for allegedly engaging in excessive force and retaliation in violation of the Fourth and First Amendments; the standard created in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), does not extend to create causes of action for a Fourth Amendment excessive-force claim and First Amendment retaliation claim);

***Bivens* Action—Not Applicable**

K.O. v. Sessions, No. 20-5255, 123 LRP 2194 (D.C. Cir. 2022) (Concurring published decision by Chief Judge Silberman) (Majority Opinion Unpublished) (*Bivens* not extended to permit cause of action for damages; lawsuit brought claiming damages against federal officials, with plaintiff children claiming they were separated from their parents after their parents were taken into custody for illegal entry, not reunited with their parents, and suffered physical abuse from federal agents; the U.S. Court of Appeals for the District of Columbia determined that the appellants' claims presented a new context and that special factors counseled against extending *Bivens*; among the special factors counseling against extending *Bivens* was that there were alternative remedies available. (i.e., "Appellants could have filed an action seeking injunctive relief to end the practice of family separation, an Administrative Procedure Act (APA) petition seeking review of the policies of various executive agencies that led to the separation of families at the border, or Appellants could have plausibly sought habeas relief.");

Conduct Unbecoming—Proven—Bullying and Inappropriate Comments

Edler v. VA, No. 2021-1694, 122 LRP 3979 (Fed. Cir. 2022 NP) (removal was appropriate despite the lack of previous discipline under 38 USC 714, based on two charges: privacy violation and conduct unbecoming of a federal employee; appellant worked as a housekeeping supervisor; he was removed for two charges privacy violation and conduct unbecoming of a federal employee; the "privacy violation charge" concerned the appellant, at a meeting, disclosing the medical conditions of employees he supervised; the second charge, related to the same meeting, where the appellant allegedly bullied a subordinate (told him that if he failed to shave his beard to be fitted for an N95 mask he risked bringing COVID-19 home to his family and that if he failed to comply, he would likely be terminated and walked out to Route 104, which is the highway that runs outside the facility) and made inappropriate comments ("Edler admitted that he made comments associating COVID-19 outbreaks in Michigan with Somali refugees" and stated that "ventilators were diverted from the Chillicothe facility to Michigan as a result of the refugees spreading the virus."); both charges were sustained and removal was reasonable, despite the appellant's lack of a disciplinary record);

Conduct Unbecoming—Safety Violation

Parkes v. DHS, NY-0752-14-0361-I-1 (NP 10/24/2022) (Board sustained the removal of this intoxicated DHS criminal investigator for proof of two of the charges, conduct unbecoming a law enforcement officer (pulling his weapon on a hotel guard) and causing a member of the public to fear for his safety (the hotel guard); the appellant, a criminal investigator, while a member of a security detail protecting United Nations General Assembly dignitaries and staying at a hotel, became intoxicated and pulled his service weapon on a hotel security guard; appellant was convicted of a criminal misdemeanor and sentenced to jail and probation based on his conduct; the Board upheld his removal as described above; it determined that the agency proved the charge of causing a member of the public to fear for his physical safety by submitting the guard's statement and the appellant's plea allocution and proved the charge of conduct unbecoming a law enforcement officer by submitting evidence of the appellant's conviction for reckless endangerment and sentence; in terms of penalty, the Board considered the seriousness of the appellant's misconduct, the appellant's law enforcement officer position, and that the appellant's potential for rehabilitation was "diminished because of his prior alcohol-related misconduct"; affirmative defenses, to include disability discrimination, were rejected);

Conduct Unbecoming—Sex-Related Comment

Quinn v. Dept. of Air Force, SF-0752-21-0097-I-1(NP 3/29/2022) (the Board agreed that a conduct unbecoming specification concerning the description of a sex act in and of itself constitutes conduct unbecoming; the appellant worked as a sexual assault prevention and response program manager; he was removed for conduct unbecoming and three other charges; one of the specifications of the conduct unbecoming charge involved the appellant's description to two of his employees of a hypothetical situation in which he engaged in a sex act with one of them; the AJ sustained each of the charges and the penalty of removal; the Board agreed, specifically finding as to the conduct unbecoming specification concerning the

description of a sex act that "We agree that a supervisor describing engaging in oral sex with a subordinate in front of both the named subordinate and another subordinate, particularly a supervisor holding the position of Sexual Assault Prevention and Response Program Manager, reflects poor judgment and is improper regardless of the appellant's purported justification for doing so."; removal was appropriate in view of the sustained charges);

Conduct Unbecoming—Security Violation—Removal Appropriate

Smith v. Dept. of Army, SF-0752-21-0090-I-1 (NP 9/29/2022) (Board sustained the removal of this Police Officer for conduct unbecoming, despite *Douglas* factor errors; the AJ erred in considering 16 rather than 20 years of service but because "there is no evidence that the administrative judge discounted mitigating *Douglas* factors when she only credited the appellant for 16 years of service, instead of 19 or 20 years of service," the error was not fatal; moreover, the AJ erred in finding that the deciding official did not consider prior discipline, when he considered a reprimand as previous misconduct; the Board then reviewed the penalty in terms of the appropriate *Douglas* factors (i.e., 20 years of service and no discipline) and found removal reasonable, principally due to the seriousness of the offense and the appellant's status as a police officer);

Constructive Suspension—Proven—Failure to Accommodate

Collazo v. USPS, PH-3443-21-0263-I-1 (NP 7/29/2022) (constructive suspension; appellant's claims that "the agency compelled him to absent himself from work because his only alternative was to work in violation of his medical restrictions and that the agency forced him into this untenable position by improperly failing to accommodate his condition" sufficient; appellant, an EAS-17 Supervisor, requested a reasonable accommodation for his post-traumatic stress disorder (PTSD); "We find that the appellant has, by these claims, made a nonfrivolous allegation that he was constructively suspended. *See Bean*, 120 M.S.P.R. 397, ¶¶ 13–14. Like the appellant in *Bean*, the appellant appears to claim that the agency compelled him to absent himself from work because his only alternative was to work in violation of his medical restrictions and that the agency forced him into this untenable position by improperly failing to accommodate his condition.");

Constructive Suspension—Proven and Disability Discrimination

Martin v. USPS, 2022 MSPB 22 (2022) (the Board, reversed the AJ, and determined that the appellant had proven a constructive suspension and shown that his absence was involuntary by demonstrating that (1) he lacked a meaningful choice; and (2) it was the agency's wrongful actions that deprived him of that choice; as to the agency's "wrongful action," the Board held that while an agency may make a medical inquiry regarding the severity of an employee's health condition if it has a reasonable belief that "an employee will pose a direct threat due to" the condition, the Board found it did not have such a reasonable belief that its employee posed a direct threat; therefore, the agency wrongfully requested medical information as a condition to allow him to return to work and committed disability discrimination; the facts are as follows: the appellant, a United States Postal Service Window Clerk, left work after experiencing an anxiety attack and asthma attack in December 2016; soon after, he saw his primary care physician and clinical psychologist for evaluation and clearance to return to work; in January 2017, the appellant's psychologist sent a note to the agency stating that appellant had sufficiently recovered from his health incident to return to work without restrictions; appellant did not hear back from the agency, and reported to his duty station a few days later; upon returning, a supervisor informed him he had to leave because he had not been cleared to work; the appellant filed the instant Board appeal alleging that the agency constructively suspended him, the agency then informed him that his return-to-work letter was deficient because it did not state whether the appellant was a threat to himself or others, and the appellant's psychologist subsequently submitted notice to the agency that the appellant was not a threat to himself or others; on appeal, the AJ found that the appellant did not show that his work absence was involuntary; the Board reversed and found disability discrimination; in relation to the "direct threat" analysis, the Board made clear that it must be based on "specific behavior" rather than solely on the individual's treatment for a psychiatric disability; here, the Board found insufficient the agency's rationale, which included the association of the absence with a mental health condition, the appellant's alleged verbal dispute with a supervisor that did not involve threatening or violent behavior, and the appellant's problems with a specific supervisor years earlier);

Constructive Suspension—Proven—Hostile Environment

Savage v. Dept. of Army, AT-0752-11-0634-B-1 (NP 10/31/2022) (whistleblower reprisal; hostile work environment represented "a significant change in working conditions under 5 USC 2302(a)2)(A) (xii)," relying on the recent decision in *Skarada* (agency action must have practical consequences to constitute a personnel action); constructive suspension; proven as a result of numerous incidents of hostile environment; AWOL; not proven due to harassing conduct that rendered employee incapacitated; in this factually complex case, the appellant, a contract specialist, filed both an IRA, and after she was removed, a Chapter 75 appeal, which included a claimed constructive suspension and a removal; this is a second remand decision; findings included that in the Chapter 75 appeal, the appellant proved a constructive suspension as to the IRA action, as a result of proving that medically incapacitated due to a hostile work environment (reversing the AJ, who had found to the contrary); the agency failed to prove an AWOL charge in the Chapter 75 appeal because she had been constructively suspended during that period of time); the employee proved that her disclosures were a contributing factor in her removal (with the Board reversing the AJ, who had found to the contrary and had used a "not motivated by" incorrect standard); the AJ failed to properly analyze the clear and convincing evidence standard as to the affirmative defense, addressing only the first *Carr* factor, and, even as to that factor mistakenly considered the AWOL charge proven; and, as to the IRA action, the Board determined that the hostile work environment represented "a significant change in working conditions under 5 USC 2302(a)2)(A) (xii)," relying on the recent decision in *Skarada* (agency action must have practical consequences to constitute a personnel action);

Disability Discrimination—Medical Inability to Perform—5 CFR 339.205 Not Applicable

Haas v. DHS, 2022 MSPB 36 (2022) (Board makes clear that in an action for medical inability to perform, 5 CFR 339.206 does not provide the proper standard to remove an employee from a position with medical standards based on a current medical condition (as opposed to simply on the basis of medical history) and overruled a line of cases to the extent they held otherwise; the board clarified that the agency needs to show that the condition prevents the employee from safely and efficiently performing the position's core duties, as described in *Clemens v. Dept. of Army*, 120 MSPR 616 (2014); disability discrimination; standard clarified in such cases; appellant worked as a Customs and Border Protection Officer, subject to medical standards; in response to the appellant's declination of reassignment to certain duties, the agency conducted a fitness for duty examination (an independent medical examination), which confirmed the appellant's bipolar disorder diagnosis; "The IME psychiatrist stated that, in these circumstances, the appellant would be unable to make the 'quick decisions required in law enforcement situations to protect the lives of self, the public and other law enforcement personnel.'"; the agency concluded that the appellant was unable to perform the essential functions of his position, with or without accommodation, searched for vacant funded positions over the following months but only found ones outside his local commuting area at lower grade levels or that were otherwise unacceptable to the appellant; it removed him for medical inability to perform; among

others, the administrative judge determined that the agency proved that the appellant was medically unable to perform these core duties, thus proving its charge, finding persuasive "the IME psychiatrist's testimony that the appellant was unable to use proper judgment, make quick decisions in law enforcement situations, or carry a weapon when symptomatic, as required for his position"; the AJ applied 5 CFR 339.206 and concluded that recurrence of the appellant's symptoms could not be ruled out, which he viewed as an element of this action; while the Board agreed with the AJ's other findings, it sought to clarify in this situation that the recurrence finding was unnecessary, concluding that "Because the appellant's removal was not based solely on his medical history, the agency was required to establish only that his medical condition prevented him from being able to safely and efficiently perform the core duties of his position. *Clemens*, 120 M.S.P.R. 616, ¶ 5. The appellant's arguments as to the likelihood of recurrence are, therefore, misplaced, and we decline to address them further."; more specifically, the Board made the following findings):

- "As relevant here, 5 C.F.R. § 339.206 provides that an employee may not be removed from a position subject to medical standards 'solely on the basis of medical history.' The regulation provides an exception only if the condition itself is disqualifying, recurrence 'is based on reasonable medical judgment,' and the position's duties are such that a recurrence 'would pose a significant risk of substantial harm to the health and safety of the employee or others that cannot be eliminated or reduced by reasonable accommodation or any other agency efforts to mitigate risk.' This regulation does not define the meaning of the term 'medical history.' However, 5 C.F.R. part 339 contains a provision stating that a 'history of…medical condition(s)…includ[es] references to findings from previous examinations, treatment, and responses to treatment.' 5 C.F.R. § 339.104(1). This explanation of medical history suggests that such a history exists when the employee's medical records indicate that he was examined or treated for the medical condition in question."
- "[W]e find that a removal is based solely on medical history if the only basis for concluding that the employee is medically unable to perform the core duties of his position is the fact that his medical records reflect that, at some time in the past, he was classified as having, was examined for, or was treated for the medical condition or impairment in question."
- "If the standard from 5 C.F.R. § 339.206 were applied to the instant appeal, the agency would be required to prove that recurrence would pose a risk of harm, even though, as discussed below, the appellant's removal was not solely based on his medical history of bipolar disorder, but also on his present inability to perform his core duties."
- "Because the appellant's removal was not based solely on his medical history, 5 C.F.R. § 339.206 does not set forth the agency's burden to prove its charge."
- "We overrule this line of cases to the extent that the Board applied 5 C.F.R. § 339.206 to a charge of medical inability when the appellant was removed based on his current medical condition or impairment."
- "As noted above, when as here the removal is based on a current medical condition, the agency must prove either a nexus between the employee's medical condition and observed deficiencies in his performance or conduct, or a high probability, given the nature of the work involved, that his condition may result in injury to himself or others. *Clemens*, 120 M.S.P.R. 616, ¶ 5; *Fox*, 120 M.S.P.R. 529, ¶¶ 24–25. In other words, the agency must establish that the appellant's medical condition prevents him from being able to safely and efficiently perform the core duties of his position. *Clemens*, 120 M.S.P.R. 616, ¶ 5; *Fox*, 120 M.S.P.R. 529, ¶ 24."
- The AJ's reliance on the IME psychiatrist's opinion was appropriate
- "…in determining whether the agency has met its burden, the Board will consider whether a reasonable accommodation, short of reassignment, exists that would enable the appellant to safely and efficiently perform his core duties. *Clemens*, 120 M.S.P.R. 616, ¶ 5. The appellant relies on the current version of 5 C.F.R. § 339.206, which requires an agency to consider whether reasonable accommodation or other efforts may "eliminate[ ] or reduce[ ]" the risk of harm an employee poses to self or others, to argue that the agency could have reduced or eliminated the risk of recurrence if he were granted certain scheduling accommodations. However, because the agency did not remove the appellant solely based on his medical history, it was not required to prove that it could not eliminate or reduce the risk of recurrence via accommodation. Rather, the agency removed the appellant because he was not medically able to perform the core duties of his CBPO position."
- "The administrative judge determined that the appellant was not a qualified individual with a disability. Regarding reasonable accommodation, we agree with the administrative judge that the appellant could not perform his position's core duties. We also agree that performing these duties was an essential function of his position. While the appellant suggests that his performance history supports a finding that he is qualified, we disagree. Our conclusion is based on the nature of bipolar disorder, his work-related incidents between 2008 and 2015, the appellant's own representations of his condition, and medical opinions offered by both the agency and the appellant. Finally, the appellant has not identified an alternative position that he desires. *See Rosario-Fabregas v. Department of the Army*, 122 M.S.P.R. 468,¶ 18 (2015) (indicating that an appellant failed to engage in the interactive process when, as relevant here, he did not identify any vacant, funded position to which the agency might have reassigned him), *aff'd*, 833 F.3d 1342 (Fed. Cir. 2016). Instead, the appellant rejected the agency's offers of reassignment. For the foregoing reasons, he cannot prevail on his claim of disability discrimination based on either a reasonable accommodation or disparate treatment theory."
- In sum then, "Because the appellant's removal was not based solely on his medical history, the agency was required to establish only that his medical condition prevented him from being able to safely and efficiently perform the core duties of his position. *Clemens*, 120 M.S.P.R. 616,¶ 5. The appellant's arguments as to the likelihood of recurrence are, therefore, misplaced, and we decline to address them further.");

Disability Discrimination—No Duty to Reasonably Accommodate

Kotsis v. Dept. of Transp., AT-0432-16-0006-I-1 (NP 8/9/2022) (performance; Chapter 43*; Santos* violation*;* failure to show that "in addition to the five elements of the agency's case set forth in the initial decision, the agency must also justify the institution of a PIP by proving by substantial evidence that the employee's performance was unacceptable prior to the PIP"; disability discrimination; claim rejected; "Reasonable accommodation is always prospective; an agency does not have a duty to retroactively excuse an employee's poor performance on the basis of a subsequent request to accommodate a previously unknown disability."; appellant, a GS-9 General Engineer was removed for Chapter 43 unacceptable performance; following the PIP, he notified supervision that he had been diagnosed with a serious illness and that he may need some time off due to a medical condition; on appeal to the Board, following his removal, he alleged a failure to accommodate his disability; both the AJ and the Board rejected that claim; as stated by the Board, "Reasonable accommodation is always prospective; an agency does not have a duty to retroactively excuse an employee's poor performance on the basis of a subsequent request to accommodate a previously unknown disability."; the Board remanded on the

basis of a *Santos* violation—a failure to show that "in addition to the five elements of the agency's case set forth in the initial decision, the agency must also justify the institution of a PIP by proving by substantial evidence that the employee's performance was unacceptable prior to the PIP.");

Disability Discrimination—No Authority to Make Medical Inquiry

Martin v. USPS, 2022 MSPB 22 (2022) (the Board, reversed the AJ, and determined that the appellant had proven a constructive suspension and shown that his absence was involuntary by demonstrating that (1) he lacked a meaningful choice; and (2) it was the agency's wrongful actions that deprived him of that choice; as to the agency's "wrongful action," the Board held that while an agency may make a medical inquiry regarding the severity of an employee's health condition if it has a reasonable belief that "an employee will pose a direct threat due to" the condition, the Board found it did not have such a reasonable belief that its employee posed a direct threat; therefore, the agency wrongfully requested medical information as a condition to allow him to return to work and committed disability discrimination; the facts are as follows: the appellant, a United States Postal Service Window Clerk, left work after experiencing an anxiety attack and asthma attack in December 2016; soon after, he saw his primary care physician and clinical psychologist for evaluation and clearance to return to work; in January 2017, the appellant's psychologist sent a note to the agency stating that appellant had sufficiently recovered from his health incident to return to work without restrictions; appellant did not hear back from the agency, and reported to his duty station a few days later; upon returning, a supervisor informed him he had to leave because he had not been cleared to work; the appellant filed the instant Board appeal alleging that the agency constructively suspended him, the agency then informed him that his return-to-work letter was deficient because it did not state whether the appellant was a threat to himself or others, and the appellant's psychologist subsequently submitted notice to the agency that the appellant was not a threat to himself or others; on appeal, the AJ found that the appellant did not show that his work absence was involuntary; the Board reversed and found disability discrimination; in relation to the "direct threat" analysis, the Board made clear that it must be based on "specific behavior" rather than solely on the individual's treatment for a psychiatric disability; here, the Board found insufficient the agency's rationale, which included the association of the absence with a mental health condition, the appellant's alleged verbal dispute with a supervisor that did not involve threatening or violent behavior, and the appellant's problems with a specific supervisor years earlier);

Disability Discrimination—Not Qualified Individual With a Disability

SSA v. Abrams, CB-7521-13-0008-T-1 (NP 11/17/2022) (failure to follow instructions not proven; charge framing; appellant only required to provide a reason for her failure not necessarily a "satisfactory" reason; disability discrimination; employee fails to prove that she is a qualified individual with a disability; her requested accommodation, while described as a modified work schedule, would have required the agency to excuse the failure to perform essential elements, which it was not required to do; appellant, an ALJ, was removed on charges of medical inability to perform, unacceptable docket management, neglect of duties, and failure to follow instructions; on appeal, the Board ALJ merged the charges of unacceptable docket management and neglect of duties and made the following findings: (1) SSA proved the unacceptable docket management and medical inability to perform charges; (2) SSA did not prove either of the failure to follow instructions charges; (3) the respondent did not prove her disability discrimination claims; and (4) SSA demonstrated good cause to remove the respondent; on review, the Board agreed that there was good cause for the removal, agreeing with the ALJ that the agency had failed to prove the failure to follow instructions; here, the agency had charged specific case managing matters but had indicated in the charge that "if she were 'unable to decide and issue instructions for any of these cases during this time period,' she was to provide the Hearing Office Chief ALJ with 'a reason why [she was] unable to do so no later than February 1, 2013.'"; "The ALJ determined that the respondent's responses satisfied her obligation under the directives; the fact that SSA did not find her responses satisfactory was a different issue than whether or not she followed the instructions contained therein. We agree with the ALJ that neither directive required the respondent to submit 'satisfactory' explanations; rather, she was only required to provide explanations if she were unable to move the requisite cases as directed. Her numerous responses indicate that she either moved the cases as directed or provided an explanation thereto."; also, as to the disability discrimination claim, the Board agreed with the ALJ that the employee was not a qualified individual with a disability because she could not show that she could perform the essential functions, even with accommodation; the Board found that the employee's requested accommodations (described by the employee as a modified work schedule) was essentially a request to be "relieved of her essential functions for extended periods of time…an 'accommodation' that the agency was not required to grant);

Due Process Violation—Lack of Opportunity to Provide an Oral Reply—Member Leavitt Dissented

Flowers v. VA, NY-0752-16-0288-I-1 (NP 1/31/2023) (a Board majority, in reversing this removal, determined that the agency violated the appellant's due process rights when it removed her without giving her the opportunity to provide an oral reply; Member Leavitt dissented and would have found that appellant was given a clear deadline, with instructions to follow for scheduling, and she simply failed to comply; appellant worked as a nursing assistant; the agency proposed her removal on May 12, 2016 for misconduct; an oral reply date was postponed on two occasions; on June 27, 2016, the agency rescinded the proposal and issued a new proposal, which was received by the appellant's union representative on June 29, 2016; the new proposal informed the appellant she had 14 days to reply, and what she needed to do to schedule it; further, in the text of an email that accompanied the new proposal, an HR representative wrote that "If Ms. Flowers chooses to do so, she has 14 calendar days to reply to the notice."; there was no request for an oral reply, as to this new proposal; on July 14, 2016, the agency issued its decision removing the appellant; on appeal, the AJ reversed, finding a due process violation and, as to the second proposal wrote that it was immaterial that the agency subsequently rescinded and reissued the proposal, noting that it was "unreasonable on the part of the agency to require that [the appellant] make a new request to make an oral reply" to the revised notice, "given that she had unequivocally expressed her desire to do so after receipt of the first notice of proposed removal"; the Board agreed with the AJ, also noting as to the 14 day notice in the new proposal that "we do not think that this seemingly boilerplate statement was sufficient to put the union representative on notice that the agency would not honor her previous request for an oral reply"; in dissent, Member Leavitt did not view the language in the new proposal as boilerplate, stating that "Rather, she was given a clear deadline, with instructions to follow for scheduling, and she simply failed to comply.");

Due Process Violation—*Stone* Violation

Johnson v. Dept. of Air Force, 50 F.4th 110 (Fed. Cir. 2022) (agency's removal of firefighter violates due process due to *ex parte* discussions by deciding official; the petitioner was employed as a firefighter by the Department of the Air Force; the agency selected the petitioner for a random drug test, which he failed; the test result indicated that the petitioner was positive for oxycodone and oxymorphone; the petitioner told his supervisor that he believed that by mistake, he had taken a pill prescribed for his mother rather than his own medication; petitioner was fired, and he challenged his removal; during the arbitration hearing, the deciding officer testified that he did not believe that the petitioner had mistakenly taken his mother's medication; the deciding officer also testified that he had discussed the case with his wife, a registered nurse, and his brother-in-law, a nurse practitioner, who both indicated that the petitioner's explanation was extremely unlikely; the arbitrator denied the petitioner's grievance and affirmed the termination; on appeal, the circuit reversed, finding, under *Stone,* that after the deciding officer received the opinions of two medical

professionals—who are also the deciding officer's family members—that the petitioner's explanation was not believable, due process required that the deciding official allow the petitioner the opportunity to respond);

Due Process Violation—Lack of Notice and an Opportunity to Respond

Maibie v. USPS, DE-0752-17-0030-I-1 (NP 12/21/2022) (the Board reversed the Agency's suspension because of a due process violation; the agency did not provide him with notice and an opportunity to respond before it suspended him; the appellant, an electronics technician—and after the District Reasonable Accommodation Committee found that the appellant was not able to perform the essential functions of the position with or without accommodation—was orally informed by the agency to not report for work anymore because it was unable to accommodate his disability; because the "suspension" lasted more than 14-days, the Board had jurisdiction and the failure to provide notice and an opportunity to respond was a due process violation);

Due Process Violation—Failure to Timely Provide Proposal and Decision

Schmitt v. VA, 2022 MSPB 40 (2022) (due process violation; failure to provide proposal and decision until one week before effective date; Section 2302(b)(9)(C) claim proven; interim relief not appropriate in Section 714 action; the agency removed the appellant chief financial officer for AWOL under Section 714; on appeal, the Board AJ found a due process violation because the agency failed to provide its proposal and decision until one week before effective date; the AJ also determined that the appellant had engaged in protected activity under 5 USC 2302(b)(9)(C) by reporting potential fraud to the agency's IG; contributing factor standard satisfied through the knowledge/timing test (the deciding official knew of the appellant's protected activity and the removal action occurred approximately 13 months after the appellant's protected activity) and agency failed to prove that it would have taken the same action anyway; on review, the Board agreed with the due process and affirmative defense findings but reversed the interim relief ruling, finding that section 714 did not allow interim relief);

Election—Not Knowing and Informed

Brock v. MSPB, No. 2021-1000, 121 LRP 41287 (Fed. Cir. 2021 NP) (circuit reversed and remanded, determining that the petitioner's initial election to proceed with a challenge to his removal through the FAA's statutory process instead of the MSPB was not knowing and informed; the petitioner air transportation systems specialist was removed for insubordination and elected the agency's Guaranteed Fair Treatment process, with a hearing before an arbitrator; thereafter, the petitioner was informed that the FAA needed arbitrators to replenish the arbitrator pool and was awaiting resumes, and withdrew her election and filed with the Board; the Board found that the petitioner had elected the Guaranteed Fair Treatment process and dismissed; the circuit reversed determining that the petitioner's decision was not knowing and informed because he had not been told that the "GFT appeal option was non-functional" before he initially decided to proceed with that option; court also noted that after the petitioner was told about the lack of arbitrators, the petitioner "promptly withdrew" his request to proceed under the GFT process and timely appealed to the MSPB);

Election—WIGI Claims—Negotiated Grievance Not Exclusive Remedy

Brookins v. Dept. of Interior, 2023 MSPB 3 (2023) (negotiated grievance procedures are not exclusive remedy for WIGI denial where appellant claims that denial was a PPP; appellant, a fishery biologist, was deemed ineligible for a within-grade increase, due to a rating of "minimally successful" and the completion of a performance improvement plan that caused his rating on a critical element to raise to "minimally successful" from "unsatisfactory"; appellant requested reconsideration, which was denied, after which he appealed to the MSPB; the Board disagreed with the AJ and found that the negotiated grievance procedures were not the exclusive remedy for a WIGI denial where the appellant claims that the denial was a PPP, as he did here, alleging a violation of 5 USC 2302 (b)(2) and (12));

Election—5 USC 7121(g) Election of Remedies Do Not Apply

Requena v. DHS, 2022 MSPB 39 (2022) (the 5 USC 7121 (g) election of remedies provisions do not apply to "supervisors" and "management officials"; the agency suspended the appellant for 30 days and changed her position from chief supervisory customs and border protection officer to supervisory customs and border protection officer due to various acts of alleged misconduct; she filed both an IRA appeal and an appeal under 5 USC 7701; the AJ dismissed the appeal of the suspension and change in position under 5 USC 7701 due to lack of jurisdiction, finding that the appellant had elected to seek corrective action with OSC before filing a Board appeal; the Board vacated and remanded, determining that the 5 USC 7121(g) election of remedies provisions do not apply to "supervisors" and "management officials" and followed a U.S. Court of Appeals nonprecedential decision, *Kammunkun v. DOD*, 800 Fed. Appx. 916 (Fed. Cir. 2020), and further overruled Board decisions to the contrary);

Excessive Absences—Notice Failure

Robinette v. Dept. of Army, AT-0752-16-0633-I-1 (NP 5/11/2022) (in this excessive absences action, the Board agreed with the AJ that the agency had failed to satisfy the notice element of such an action, that is, failed to warn the employee that an adverse action could be taken unless the employee became available for duty on a regular, full time, or part-time basis; the action was reversed; "the agency issued the appellant a Notice of Leave Restriction on February 17, 2015, which informed him that his chronic, unscheduled absences were considered excessive and negatively affected the agency's ability to accomplish its mission. On May 18, 2016, the agency issued a Notice of Proposed Removal (NOPR) for excessive absenteeism, which specified that from February 21, 2015, through April 16, 2016, he was absent 939.30 hours out of a total of 2103.70 available duty hours and that, of the 31 pay periods during that time, he worked only 3 full pay periods. The agency notified the appellant in a letter dated June 22, 2016, that his removal was effective June 24, 2016."; the Board, as had the AJ, first noted that "As a general rule, an agency's approval of leave precludes it from taking an adverse action on the basis of those absences. *Savage v. Department of the Army*, 122 M.S.P.R. 612, ¶ 30 (2015), *clarified by Gardner v. Department of Veterans Affairs*, 123 M.S.P.R. 647, ¶¶ 30-31 (2016). However, as the administrative judge correctly found, an agency may take an adverse action based on excessive use of leave if it can prove that: (1) the employee was absent for compelling reasons beyond his control so that the agency's approval or disapproval of leave was immaterial because the employee could not be on the job; (2) the absences continued beyond a reasonable time, and the agency warned the employee that an adverse action could be taken unless the employee became available for duty on a regular, full time, or part-time basis; and (3) the position needed to be filled by an employee available for duty on a regular, full-time, or part-time basis. *Combs v. Social Security Administration*, 91 M.S.P.R. 148, ¶¶ 12–13 (2002); *Cook*, 18 M.S.P.R. at 611–12."; the AJ found that a leave restriction letter had provided the requisite warning; the Board disagreed, writing that "We agree with the administrative judge that, while this letter contained warnings that the appellant's failure to follow the procedures prescribed for requesting leave could lead to 'consideration of disciplinary action,' the notice did not address any such action for excessive absences, even if the appellant complied with the restrictions. Thus, because the warnings the appellant received were insufficient to notify him that his approved absences could lead to removal for excessive absenteeism, the administrative