UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DENVER FIELD OFFICE

ROBERT L. WILSON,
Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,
Agency.

DOCKET NUMBER
DE-0432-12-0130-I-1

DATE: January 25, 2012

ORDER

The record reflects that the appellant has raised affirmative defenses of disability discrimination (general), discrimination (race, color, sex, religion, and/or national origin), age discrimination and retaliation (whistleblowing).[1] In order to ensure that the affirmative defenses are fairly adjudicated, to avoid undue delay in the processing of this appeal, and to facilitate the conduct of the prehearing conference during which the affirmative defenses will be discussed in detail, the appellant is required to specifically identify the factual bases for his claims on these matters and the agency is required to specifically respond to those claims with the information requested herein.[2] The deadlines for these submissions are set forth at the conclusion of this Order.

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[1]If the appellant is raising any other affirmative defenses, he must identify those defenses with specificity in response to this Order.

[2]If the parties are unable to provide the information requested because an outstanding discovery request has not yet been complied with, that party should file a statement to that effect. In that event, I **ORDER** the party to file the

The parties are advised that the appellant has the burden of proving, by preponderant evidence, his affirmative defenses. Accordingly, I have set forth below the burdens of proof concerning the affirmative defenses alleged by the appellant and what is necessary for him to establish a prima facie case in each instance.

I recognize that responding to this Order will be time consuming for both parties. However, experience shows that the identification of this information prior to the prehearing conference helps the appellant focus his preparation for the hearing on what he needs to prove in order to prevail, facilitates settlement discussions, and shortens both the prehearing conference and the hearing, providing cost savings to both parties and the Board.

Disability Discrimination

There are three theories of disability discrimination: reasonable accommodation (the most common claim of disability discrimination), disparate treatment[3], and disparate impact. The appellant must identify

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requested information (or to supplement any previously provided information) within **seven** days of the date of service of the response to the discovery request. If it is the appellant who needs additional time to respond to this Order due to an outstanding discovery request, the agency's response to this Order is to be filed ten days from the date of service of the appellant's eventual response.

[3] In contrast to most disparate treatment claims, in which the appellant attempts to prove discrimination by inferences drawn from the evidence, an individual may also establish discrimination by direct evidence. Direct evidence of discrimination may be any statement made by an employer that: (1) reflects directly the alleged discriminatory attitude and (2) bears directly on the contested employment discrimination. *Arredondo v. U.S. Postal Service*, 85 M.S.P.R. 113, ¶ 13 (2000). It is evidence, that, if believed, proves the existence of a fact in issue without inference or presumption; however, such evidence is composed of "only the most blatant remarks, whose intent could be nothing other than to discriminate" on the basis of some impermissible factor. *Schoenfeld v. Babbitt*, 168 F.3d 1257, 1266 (11th Cir. 1999). If an alleged discriminatory statement at best merely suggests a discriminatory motive, then it is only circumstantial evidence. *Id.* The ultimate burden of proof on the appellant, as discussed below, is the same whether

whether he is alleging a failure to accommodate, disparate treatment, and/or disparate impact as to his claims of disability discrimination. While these theories require different elements of proof, they all require proof of the existence of a disability. Pursuant to the Americans with Disabilities Act Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008) (ADAAA), the appellant may prove that he has a disability by showing that he (1) has a physical or mental impairment that substantially limits one or more major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment. 42 U.S.C. § 12102(1), 29 C.F.R. § 1630.2(g)(1),(2),(3). The definition of disability is construed in favor of broad coverage. 42 U.S.C. § 12102(4)(A).

A physical or mental impairment is any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, or any mental or psychological disorder. 29 C.F.R. § 1630.2(h). The test for whether a disability substantially limits the ability of an individual to perform a major life activity is applied as compared to most people in the general population. 29 C.F.R. § 1630.2(j). Major life activities include but are not limited to activities such as caring for oneself, performing manual tasks, eating, lifting, bending, concentrating, communicating, and working, including the operation of a major bodily function. 42 U.S.C. § 12102(2).

An individual need not prove that he is significantly restricted in order to show that a disability substantially limits a major life activity. 42 U.S.C. § 12101 note. An impairment that substantially limits one major life activity need not limit others. One that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

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she relies on circumstantial or direct evidence. *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343, 2351 (2009).

The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures other than ordinary eyeglasses or contact lenses. 42 U.S.C. § 12102(4).

A "qualified individual with a disability" shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use. However, an individual is not excluded as a qualified individual with a disability if he has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use; is participating in a supervised rehabilitation program and is no longer engaging in such use; or is erroneously regarded as engaging in such use, but is not engaging in such use. 42 U.S.C. § 12114(a),(b).

In the second method of proving a disability, an individual "has a record of" a disability if he has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities. This may include individuals who were treated for a disease but no longer have it as well as individuals who were misdiagnosed with a substantially limiting impairment even though they did not actually have that impairment. S. Rep. No. 116, 101st Cong., 2d Sess. 23. The impairment indicated in the record must be an impairment that would substantially limit one or more of the individual's major life activities. *Id*. Whether an individual has such a record is to be broadly construed. If the individual has such a record, the agency need not have relied on that record for the individual to be covered under this test.

With regard to the third method of proving disability, an individual meets the requirement of being "regarded as having such an impairment" if he establishes that he has been subjected to a prohibited action because of

an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity. However, the "regarded as" test shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of six months or less. 42 U.S.C. § 12102(3).

Regardless of which of the theories of discrimination the appellant intends to pursue, the Board has held that a mixed motive analysis is not appropriate in disability discrimination claims arising under the ADAAA. Rather, the appellant must prove by a preponderance of the evidence that the agency took its action on the basis of her disability, i.e., that but for the discrimination, the action would not have been taken.

Nothing in the ADAAA or in 42 U.S.C. chapter 126 shall provide the basis for a claim by an individual without a disability that he was subject to discrimination because of the lack of disability. 42 U.S.C. § 12201(g).

a. Accommodation

To establish a prima facie case of disability discrimination based on a failure to accommodate, the appellant must show: (a) that he is an individual with a disability under 29 C.F.R. § 1630.2(g) and that the action appealed to the Board was based upon his disability; and (b) that he is a qualified individual with a disability; that is, that he satisfies the requisite skill, experience, education, and other job-related requirements of the position he holds or desires and can perform the essential functions of the position with or without reasonable accommodation. *See* 29 C.F.R. §§ 1630.2(m), 1630.3. After the appellant has established a prima facie case, the burden shifts to the agency to demonstrate that reasonable accommodation would impose an undue hardship on its operations. Thereafter, the burden shifts back to the appellant to show that the agency's reasons are a pretext for discrimination.

An agency need not provide a reasonable accommodation or a reasonable modification to policies, practices, or procedures to an individual who meets the definition of disability solely because he is regarded as having a physical or mental impairment that substantially limits one or more major life activities. 42 U.S.C. § 12201(h).

If the appellant intends to claim a failure to accommodate, I **ORDER** the appellant to identify: (a) his medical condition; (b) whether the agency knew about the condition prior to the action appealed; (c) whether he is asserting that he meets the definition of an individual with a disability under section 1630.2(g)(1), (2) or (3); (d) whether he is claiming that he could perform the duties of his position or the one to which he seeks assignment with accommodation or without accommodation; and (e) if he is claiming that he could perform with accommodation, the reasonable accommodation which the appellant believes would enable him to perform the essential duties of his position or a vacant position to which he can be reassigned.

I **ORDER** the agency to respond to each of these matters and to whether any accommodation requested would place an undue hardship on its operations.

b. Disparate Treatment

The appellant may establish a prima facie case of prohibited discrimination on the ground of disparate treatment by introducing evidence to show that: (1) he is a member of a protected group;[4] (2) he suffered an appealable adverse employment action; and (3) the unfavorable action gives rise to the inference of discrimination. *McDonnell Douglas*

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[4] To prove membership in a protected group, the appellant must establish that she has a disability within the meaning of 29 C.F.R. § 1630.2(g). In addition, she must state whether she is asserting that she meets the definition of an individual with a disability under 29 C.F.R. § 1630.2(g)(1), (2), or (3).

Corp. v. Green, 411 U.S. 792, 802 (1973). As to the third element, an employee may rely on any evidence giving rise to an inference that the unfavorable treatment at issue was due to illegal discrimination. *See, e.g., Davis v. Department of the Interior*, 114 M.S.P.R. 527, ¶ 7 (2010), and cases cited therein. Thus, a prima facie case of disparate treatment discrimination can be established by any proof of actions taken by the employer that show a "discriminatory animus," where "in the absence of any other explanation it is more likely than not that those actions were bottomed on impermissible considerations." *Schoenfeld v. Babbitt*, 168 F.3d 1257, 1268 (11th Cir. 1999).

Once the appellant has established a prima facie case, the burden shifts to the agency to articulate a legitimate nondiscriminatory reason for its actions. Finally, if the agency articulates such a reason, the *McDonnell Douglas* framework disappears and only the ultimate burden remains,[5] meaning that the burden is on the appellant to show that the agency's proffered explanation constitutes a pretext for discrimination. To do so, the appellant can rely on "any combination of (1) evidence establishing his *prima facie* case; (2) evidence he presents to attack the employer's proffered explanation for its action; and (3) any further evidence of discrimination that may be available to him, such as independent evidence of discriminatory statements or attitudes on the part of the employer." *Holcomb v. Powell*, 433 F.3d 889, 897 (D.C. Cir. 2006) (citing *Aka v. Washington Hospital Center*, 156 F.3d 1284, 1289 (D.C. Cir. 1998)) (en banc).

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[5] *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142-43 (2000). Thus, the Board has held that if the record is complete and the agency has articulated a legitimate nondiscriminatory reason for its action, the AJ need not analyze whether the appellant made a prima facie showing of discrimination. *See, e.g., Bowman v. Department of Agriculture*, 113 M.S.P.R. 214, ¶ 7 (2010).

Thus, while evidence to make out the appellant's prima facie showing as well as his showing of pretext may include proof that the employer treated similarly situated employees differently, *see Buckler v. Federal Retirement Thrift Investment Board*, 73 M.S.P.R. 476, 497 (1997), an appellant may also prevail by introducing evidence that the employer lied about its reason for taking the action or evidence of: (1) inconsistency in the employer's explanation; (2) failure to follow established procedures; (3) general treatment of employees in the protected category or those who engage in protected activities; and/or (4) incriminating statements by the employer. *See Brady v. Office of the Sergeant at Arms, U.S. House of Representatives*, 520 F.3d 490, 495 (D.C. Cir. 2008); *Davis*, 114 M.S.P.R. 527 at ¶ 8.

If the appellant intends to raise a claim of disparate treatment discrimination, I **ORDER** the appellant to identify the evidence he relies on to prove discriminatory animus.

I **ORDER** the agency to respond in detail to the appellant's evidence.

c. Disparate Impact

To establish a prima facie case of disparate impact, the appellant must identify the specific employment practice that is challenged as responsible for the statistical disparities and show that the application of the particular practice created the disparate impact. *See Stern v. Federal Trade Commission*, 46 M.S.P.R. 328, 333 (1990). That is, the appellant must, as an initial matter, present sufficient statistical evidence to prove that the employment practice at issue fell more harshly on one group than another. *Hidalgo v. Department of Justice,* 93 M.S.P.R. 645, 653 (2003). Although statistical proof, standing alone, without specific evidence of discrimination, may be used in certain instances to establish a *prima facie* case of discrimination, *Hazelwood School District v. U.S.*, 433 U.S. 299,

307-308 (1977), the usefulness of such circumstantial evidence depends on all the surrounding circumstances. *Teamsters v. U.S.*, 431 U.S. 324, 340 (1977). Statistical disparities must be sufficiently substantial that they raise an inference of causation. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 995 (1988). Employing agencies are not required, even when defending standardized or objective tests, to introduce formal "validation studies" showing that particular criteria predict actual on-the-job performance. *Id*. at 998.

If the appellant demonstrates that the agency uses a particular employment practice that causes a disparate impact, the agency must either show that it does not cause such impact or demonstrate that the practice is job related for the position in question and consistent with business necessity. 42 U.S.C. §§ 2000e-2(k)(1)(A)(i), 2000e-2(k)(1)(B)(ii). A violation is also established if the appellant demonstrates the availability of alternative practices that achieve the same business ends with less impact on the protected group. 42 U.S.C. § 2000e-2(k)(1)(C).

If the appellant intends to raise a claim of disparate impact discrimination, I **ORDER** the appellant to identify: (1) the statistical evidence of the disparate impact; (2) the specific employment practice that is challenged as responsible for the statistical disparities; (3) how the application of this particular practice created the disparate impact; and (4) the availability of alternative practices that achieve the same business ends with less impact on the protected group.

I **ORDER** the agency to respond by identifying the legitimate business justification for its use of the practices.

Race, Color, Sex, Religion, and National Origin Discrimination

There are two theories of discrimination: disparate treatment, which is the most common claim of discrimination,[6] and disparate impact. The appellant must identify whether he is alleging disparate treatment, disparate impact, or both, as to his claims of race, color, sex, religion, and/or national origin discrimination, and whether he intends to prove his claim by direct evidence. A claim of discrimination may also be based on the failure to accommodate religious beliefs and activities.

a. Disparate Treatment

The appellant may establish a prima facie case of prohibited discrimination on the ground of disparate treatment by introducing evidence to show that: (1) he is a member of a protected group; (2) he suffered an appealable adverse employment action; and (3) the unfavorable action gives rise to the inference of discrimination. *McDonnell Douglas*

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[6]In contrast to most disparate treatment claims, in which the appellant attempts to prove discrimination by inferences drawn from the evidence, an individual may also establish discrimination by direct evidence. Direct evidence of discrimination may be any statement made by an employer that: (1) reflects directly the alleged discriminatory attitude and (2) bears directly on the contested employment discrimination. *Arredondo v. U.S. Postal Service*, 85 M.S.P.R. 113, ¶ 13 (2000). It is evidence, that, if believed, proves the existence of a fact in issue without inference or presumption; however, such evidence is composed of "only the most blatant remarks, whose intent could be nothing other than to discriminate" on the basis of some impermissible factor. *Schoenfeld v. Babbitt*, 168 F.3d 1257, 1266 (11th Cir. 1999). If an alleged discriminatory statement at best merely suggests a discriminatory motive, then it is only circumstantial evidence. *Id.* An appellant with direct evidence of discrimination will prevail on his discrimination claim if he establishes that improper motivating factors played a part in the agency decision. *Arredondo*, 85 M.S.P.R. 113 at ¶ 13. In a "mixed motive" case, i.e., a case in which the agency responds to an employee's direct evidence of discrimination with a legitimate reason for its action, *see Johnson v. Defense Logistics Agency*, 61 M.S.P.R. 601, 604 (1994), even after unlawful discrimination is found, an agency may limit relief by proving by preponderant evidence that it would have taken the same action in the absence of the proven discrimination. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 94-95 (2003).

Corp. v. Green, 411 U.S. 792, 802 (1973). As to the third element, an employee may rely on any evidence giving rise to an inference that the unfavorable treatment at issue was due to illegal discrimination. *See, e.g., Davis v. Department of the Interior*, 114 M.S.P.R. 527, ¶ 7 (2010), and cases cited therein. Thus, a prima facie case of disparate treatment discrimination can be established by any proof of actions taken by the employer that show a "discriminatory animus," where "in the absence of any other explanation it is more likely than not that those actions were bottomed on impermissible considerations." *Schoenfeld v. Babbitt*, 168 F.3d 1257, 1268 (11th Cir. 1999).

Once the appellant has established a prima facie case, the burden shifts to the agency to articulate a legitimate nondiscriminatory reason for its actions. Finally, if the agency articulates such a reason, the burden shifts to the appellant to show that the agency's proffered explanation constitutes a pretext for discrimination. To do so, the appellant can rely on "any combination of (1) evidence establishing her *prima facie* case; (2) evidence she presents to attack the employer's proffered explanation for its action; and (3) any further evidence of discrimination that may be available to her, such as independent evidence of discriminatory statements or attitudes on the part of the employer." *Holcomb v. Powell*, 433 F.3d 889, 897 (D.C. Cir. 2006) (citing *Aka v. Washington Hospital Center*, 156 F.3d 1284, 1289 (D.C. Cir. 1998)) (en banc). Direct evidence of discrimination is not required in order to prove employment discrimination in mixed-motive cases under Title VII, i.e., cases in which both a valid and a discriminatory motive may be present. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98-102 (2003). The appellant must establish that the stated reason was false or not the real reason for the action and that discrimination was the real reason. *Carter v. Small Business Administration*, 61 M.S.P.R. 656, 665 (1994).

Thus, while evidence to make out the appellant's prima facie showing as well as her showing of pretext may include proof that the employer treated similarly situated employees differently, *see Buckler v. Federal Retirement Thrift Investment Board*, 73 M.S.P.R. 476, 497 (1997), an appellant may also prevail by introducing evidence (1) that the employer lied about its reason for taking the action; or evidence of: (2) inconsistency in the employer's explanation; (3) failure to follow established procedures; (4) general treatment of employees in the protected category or those who engage in protected activities; and/or (5) incriminating statements by the employer. *See Brady v. Office of the Sergeant at Arms, U.S. House of Representatives*, 520 F.3d 490, 495 (D.C. Cir. 2008); *Davis*, 114 M.S.P.R. 527 at ¶ 8.

The parties are **ORDERED** to submit specific evidence and argument in support of their burdens of proof as set out above. The deadlines by which these submissions must be made are set forth at the end of this Order.

b. Disparate Impact

Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive is not required under a disparate impact theory. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335-36 (1977); *see also Calhoon v. Department of the Treasury*, 90 M.S.P.R. 375, ¶ 12 (2001).

Pursuant to 42 U.S.C. § 2000e-2(a), it is an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect

to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin. However, it is not an unlawful employment practice for an employer to hire and employ on the basis of religion, sex, or national origin in those certain instances where religion, sex, or national origin, but not race, is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. 42 U.S.C. § 2000-2(e)(1).

An unlawful employment practice based on disparate impact is established under 42 U.S.C. § 2000e-2(k) only where (i) the appellant demonstrates that an agency uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin, and the agency fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or (ii) the appellant makes the demonstration that an alternative employment practice has a less disparate impact and would also serve the agency's legitimate business interest but the agency refuses to adopt such practice. Even though other factors may also have motivated the practice, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for it. 42 U.S.C. § 2000e-2(m).

Thus, a disparate impact discrimination claim requires that the appellant identify a facially neutral employment practice, demonstrate a disparate impact upon the group to which she belongs, and prove causation. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 993-95 (1988). In order to make out a prima facie case of discrimination based on a disparate

impact theory, the appellant must, as an initial matter, present sufficient statistical evidence to prove that the employment practice at issue fell more harshly on one group than another. *Pigford v. Department of the Interior*, 75 M.S.P.R. 250, 256 (1997); *Hidalgo v. Department of Justice*, 93 M.S.P.R. 645, ¶ 8 (2003). If she does so, then the burden of producing evidence is on the agency to offer a business justification for its use of the practice, and the dispositive issue at this stage of the analysis is whether a challenged practice significantly serves the legitimate employment goals of the employer. If the agency meets its burden of production, the appellant may establish disparate impact by showing the availability of alternative practices that achieve the same business ends with less impact on the protected group. *See Stern v. Federal Trade Commission*, 46 M.S.P.R. 328, 333 (1990).

The Supreme Court has held that subjective or discretionary employment practices may be analyzed under the disparate impact approach in appropriate cases. *See Watson*, 487 U.S. at 991-93.

If the appellant intends to rely on a disparate impact claim, I **ORDER** him to identify: (1) the statistical evidence of the disparate impact; (2) the specific employment practice that is challenged as responsible for the statistical disparities; (3) how the application of this particular practice created the disparate impact; and (4) the availability of alternative practices that achieve the same business ends with less impact on the protected group.

I **ORDER** the agency to respond by identifying the legitimate business justification for its use of the practice.

c. Religious Discrimination

An appellant who claims discrimination based on religion may prove that claim under either a disparate treatment or a disparate impact theory in

the manner discussed above, but may also assert that the agency failed to accommodate his religious beliefs. Under the "reasonable accommodation" theory, an employee can establish a claim even though he cannot show that other employees were treated more favorably or rebut an employer's legitimate, non-discriminatory reason for her discharge. The agency must still actively attempt to accommodate the employee's religious expression or conduct, even if the reasons for his discharge were otherwise proper. *Reed v. Department of Transportation*, 76 M.S.P.R. 126, 131 (1997). The agency would be liable under Title VII for failure to accommodate the appellant's religious practices or beliefs absent proof that such accommodation could not have been made without imposing an undue hardship upon its operations. *See Trans World Airlines v. Hardison*, 432 U.S. 63, 72-75 (1977). To make out a prima facie case of religious discrimination based on a failure to accommodate, the appellant must show that: (1) he had a bona fide religious belief that conflicted with an employment requirement; (2) he informed the agency of the belief; and (3) he was disciplined for failure to comply with the conflicting requirement. *Dorsey v. Department of the Air Force*, 78 M.S.P.R. 439, 445 (1998); *Reed*, 76 M.S.P.R. at 131. If the appellant makes that showing, the agency must then prove that accommodating his beliefs would have required it to bear more than a *de minimis* cost and thus would have constituted an undue hardship. *See Hardison*, 432 U.S. at 84. Absent an underlying discriminatory purpose, however, the operation of a contractually-bargained seniority system that is neutral on its face cannot be an unlawful employment practice even if such a system has some discriminatory consequences. *See id*. at 80-82; 42 U.S.C. § 2000e-2(h).

If the appellant intends to advance a claim of religious discrimination based on a failure to accommodate, I **ORDER** him to submit

evidence and argument to support a prima facie case as set forth above, and I **ORDER** the agency to address the issue of undue hardship.

Age Discrimination

There are two theories of discrimination: disparate treatment, which is the most common claim of discrimination,[7] and disparate impact. The appellant must identify whether he is alleging disparate treatment, disparate impact, or both, as to his claim of age discrimination, and whether she intends to prove his claim by direct evidence.

Under the Age Discrimination in Employment Act (ADEA), it is "unlawful for an employer...to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). However, "the statute does not mean to stop an employer from favoring an older employee over a younger one." *General Dynamics Land Systems Inc. v. Cline*, 540 U.S. 581, 600 (2004). The ADEA was made applicable to the Federal government by 29 U.S.C. § 633a, which provides that "All personnel actions affecting employees or applicants for employment who are at least

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[7]In contrast to most disparate treatment claims, in which the appellant attempts to prove discrimination by inferences drawn from the evidence, an individual may also establish discrimination by direct evidence. Direct evidence of discrimination may be any statement made by an employer that: (1) reflects directly the alleged discriminatory attitude and (2) bears directly on the contested employment discrimination. *Arredondo v. U.S. Postal Service*, 85 M.S.P.R. 113, ¶ 13 (2000). It is evidence, that, if believed, proves the existence of a fact in issue without inference or presumption; however, such evidence is composed of "only the most blatant remarks, whose intent could be nothing other than to discriminate" on the basis of some impermissible factor. *Schoenfeld v. Babbitt*, 168 F.3d 1257, 1266 (11th Cir. 1999). If an alleged discriminatory statement at best merely suggests a discriminatory motive, then it is only circumstantial evidence. *Id.* The ultimate burden of proof on the appellant, as discussed below, is the same whether she relies on circumstantial or direct evidence. *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343, 2351 (2009).

40 years of age . . . shall be made free from any discrimination based on age." A federal sector plaintiff must make the same showing as a private sector plaintiff to establish a violation of the ADEA. *Bowman v. Department of Agriculture*, 113 M.S.P.R. 214, ¶ 8 (2010).

a. Disparate Treatment

The appellant may establish a prima facie case of prohibited discrimination on the ground of disparate treatment by introducing evidence to show that: (1) he is a member of a protected group; (2) he suffered an appealable adverse employment action; and (3) the unfavorable action gives rise to the inference of discrimination.[8] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).[9] As to the third element, an employee may rely on any evidence giving rise to an inference that the unfavorable treatment at issue was due to illegal discrimination. *See, e.g., Davis v. Department of the Interior*, 114 M.S.P.R. 527, ¶ 7 (2010), and cases cited therein. Thus, a prima facie case of disparate treatment discrimination can be established by any proof of actions taken by the employer that show a "discriminatory animus," where "in the absence of any other explanation it is more likely than not that those actions were bottomed on impermissible considerations." *Schoenfeld v. Babbitt*, 168 F.3d 1257, 1268 (11th Cir. 1999).

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[8] While the test is sometimes said to require proof of a fourth element, i.e., that the appellant was disadvantaged in some manner compared to a person outside the protected category of persons 40 and older, the Supreme Court has said that where such disadvantage is claimed, the comparator employee may nonetheless also be 40 or over; rather than the classification, the material evidence is the number of years by which the comparator is younger than the employee. *O'Connor v. Consolidated Coin Caterers, Inc.*, 517 U.S. 308, 310-12 (1996).

[9] Although the Supreme Court has not definitively decided whether the evidentiary framework of *McDonnell Douglas* is appropriate in the ADEA context, *FBL Financial Services, Inc.*, 129 S. Ct. at 2349, both the MSPB and the Equal Employment Opportunity Commission rely on it in deciding claims of age discrimination.

Once the appellant has established a prima facie case, the burden of production, but not the burden of proof, shifts to the agency to articulate a legitimate nondiscriminatory reason for its actions.[10] Finally, if the agency articulates such a reason, the *McDonnell Douglas* framework disappears and only the ultimate burden remains,[11] meaning that the appellant must show that the agency's proffered explanation constitutes a pretext for discrimination. To do so, the appellant can rely on "any combination of (1) evidence establishing her *prima facie* case; (2) evidence she presents to attack the employer's proffered explanation for its action; and (3) any further evidence of discrimination that may be available to her, such as independent evidence of discriminatory statements or attitudes on the part of the employer." *Holcomb v. Powell*, 433 F.3d 889, 897 (D.C. Cir. 2006) (citing *Aka v. Washington Hospital Center*, 156 F.3d 1284, 1289 (D.C. Cir. 1998)) (en banc). The appellant must establish that the stated reason was false or not the real reason for the action and that discrimination was the real reason, *Bowman v. Department of Agriculture*, 113 M.S.P.R. 214, ¶ 7 (2010), i.e., "that age was the 'but-for' cause of the employer's adverse

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[10] The Supreme Court has stated that the burden of proof on the ultimate issue of discrimination does not shift from the employee to the employer. *Gross*, 129 S. Ct. at 2348. Nevertheless, pursuant to 29 U.S.C. § 623(f)(1), it has held that it is not unlawful to take an action that would otherwise be prohibited by the ADEA where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business. The Court holds this to be an affirmative defense that is available to the agency in a disparate treatment case, and that it is the agency that has both the burden of production and burden of persuasion on such a defense. *Meacham v. Knolls Atomic Laboratory*, 554 U.S. 84 (2008); *see also Trans World Airlines v. Thurston*, 469 U.S. 111, 122 (1985).

[11] *Reeves v. Sanderson Plumbing Products, Inc*., 530 U.S. 133, 142-43 (2000). Thus, the Board has held that if the record is complete and the agency has articulated a legitimate nondiscriminatory reason for its action, the AJ need not analyze whether the appellant made a prima facie showing of discrimination. *See, e.g., Bowman v. Department of Agriculture*, 113 M.S.P.R. 214, ¶ 7.

decision." *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343, 2350 (2009). Thus, even if the agency's asserted reason for its action is not proven, the appellant must still show that it was taken because of intentional age discrimination. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 146-47 (2000).

While evidence to make out the appellant's prima facie showing as well as her showing of pretext may include proof that the employer treated similarly situated employees differently, *see Buckler v. Federal Retirement Thrift Investment Board*, 73 M.S.P.R. 476, 497 (1997), an appellant may also prevail by introducing evidence that the employer lied about its reasons for taking the action or evidence of (1) inconsistency in the employer's explanation; (2) failure to follow established procedures; (3) general treatment of employees in the protected category or those who engage in protected activities; and/or (4) incriminating statements by the employer. *See Brady v. Office of the Sergeant at Arms, U.S. House of Representatives*, 520 F.3d 490, 495 (D.C. Cir. 2008); *Davis*, 114 M.S.P.R. 527 at ¶ 8.

If the appellant intends to raise a claim of disparate treatment discrimination, the parties are **ORDERED** to submit specific evidence and argument in support of their burdens of proof as set out above. The deadlines by which these submissions must be made are set forth at the end of this Order.

b. Disparate Impact

Claims of disparate impact may also be brought under the ADEA. *Smith v. City of Jackson*, 544 U.S. 228, 234-240 (2005). Disparate impact claims involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive is not required under a disparate impact theory.

International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335-36 (1977); *see also Calhoon v. Department of the Treasury*, 90 M.S.P.R. 375, ¶ 12 (2001).

Proof of a disparate impact discrimination claim requires that the appellant identify a facially neutral employment practice, demonstrate a disparate impact upon the group to which she belongs, and prove causation. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 993-95 (1988). The appellant must identify a specific test, requirement, or practice that has an adverse impact on older workers and is "responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities." *City of Jackson*, 544 U.S. at 241. It is not enough to simply allege that there is a disparate impact on older workers, or point to a generalized policy that leads to such an impact. *Id.* In order to make out a prima facie case of discrimination based on a disparate impact theory, the appellant must, as an initial matter, present sufficient statistical evidence to prove that the employment practice at issue fell more harshly on one group than another. *Pigford v. Department of the Interior*, 75 M.S.P.R. 250, 256 (1997); *Hidalgo v. Department of Justice*, 93 M.S.P.R. 645, ¶ 8 (2003).

If the appellant establishes a prima facie case, the agency must offer a business justification for its use of the practice. In this phase, the agency carries the burden of producing evidence. The dispositive issue is whether a challenged practice significantly serves its legitimate employment goals. If it meets this burden of production, the appellant may still establish disparate impact by showing the availability of alternative practices that achieve the same business ends with less impact on the protected group. *See Stern v. Federal Trade Commission*, 46 M.S.P.R. 328, 333 (1990).

In connection with claims of disparate impact age discrimination the agency also has an affirmative defense available to it. Pursuant to 29

U.S.C. § 623(f)(1), it is not unlawful to take an action that would otherwise be prohibited by the ADEA "where the differentiation is based on reasonable factors other than age" (RFOA).[12] RFOA is an affirmative defense, on which the agency bears not just the burden of production, but also the burden of persuasion. *Meacham v. Knolls Atomic Laboratory*, 554 U.S. 84 (2008). Proof of the reasonableness of the agency's employment practice is the focus of the defense. *Id*. at 96.

If the appellant intends to rely on a disparate impact claim, I **ORDER** him to identify: (1) the statistical evidence of the disparate impact; (2) the specific employment practice that is challenged as responsible for the statistical disparities; (3) how the application of this particular practice created the disparate impact; and (4) the availability of alternative practices that achieve the same business ends with less impact on the protected group.

I **ORDER** the agency to respond by identifying the legitimate business justification for its use of the practice and whether it intends to raise an RFOA defense.

Retaliation for Whistleblowing

To prove a prima facie case of retaliation for whistleblowing, the appellant must prove by preponderant evidence that: (a) he made a disclosure protected by 5 U.S.C. § 2302(b)(8); and (b) it was a contributing factor in the personnel action being appealed. If the appellant meets this burden, the agency must prove by clear and convincing evidence that it

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[12] As noted above, section 623(f)(1) also provides that it is not unlawful to take an otherwise prohibited action where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business. However, in *Meacham*, 554 U.S. at 97, the Court found that "the business necessity test should have no place in ADEA disparate-impact cases."

would have taken the same action even absent the disclosure. *See Horton v. Department of the Navy*, 66 F.3d 279, 283-84 (Fed. Cir. 1995).

I **ORDER** the appellant to identify: (a) the date, substance and recipients of the protected disclosure; (b) whether the disclosure constitutes a violation of law, rule or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety; (c) whether the proposing and/or deciding official knew of the disclosure; and (d) how it constituted a contributing factor in the agency's decision in the matter appealed.

I **ORDER** the agency to respond to these matters and as to whether it would have taken the same action even in the absence of the protected disclosure.

Deadlines

The appellant's submission, as required under this Order, must be filed within 15 days of the date of this Order. The agency's submission must be filed within 25 days of the date of this Order. However, the agency need not file a response if the appellant files no response. If the appellant fails to respond to this Order in a timely manner, his affirmative defenses may not be considered.

FOR THE BOARD: /S/
Patricia M. Miller
Administrative Judge