

**IN THE OFFICE OF ATTORNEY RECRUITMENT  
AND MANAGEMENT**

VALENTINE FERTITTA,

Complainant,

v.

THE FEDERAL BUREAU OF  
INVESTIGATION,

Respondent.

Case No. OARM-WB NO. 22-3

REQUEST FOR CORRECTIVE ACTION

**JURISDICTION**

1. The Office of Attorney Recruitment and Management has jurisdiction over this request for corrective action (RCA).

2. Complainant exhausted his administrative remedies by filing his reprisal complaint with the U.S. Department of Justice’s Office of Inspector General (OIG) on December 17, 2021, and amended that complaint December 22, 2021.

3. The U.S. Department of Justice’s OIG is an “Investigating Office” and 120 days have elapsed since December 17, 2021, and Complainant has not been notified by the “Conducting Office,” here the DOJ OIG, that it will seek a corrective action.

**FACTS**

4. Mr. Fertitta is an officer in the U.S. Marine Corps Reserves (USMCR). Mr. Fertitta is also a veteran of the Iraq war. While serving in Iraq, in 2004, he was injured in an explosion. One of his superiors died during that event.

5. Mr. Fertitta was hired by the FBI in 2014. From the date of this hire until mid-2021 his performance reviews were satisfactory, or higher. In fact, Mr. Fertitta received performance awards in the four previous years.

6. In the 2018 timeframe SSA Sal Roman (at or near the same time management forced Mr. Fertitta into an undesirable HUMINT position) told Mr. Fertitta words to the effect of “you spend way too much time on military duties.”

7. A Human Intelligence (HUMINT) assignment in the FBI’s AQ office is *not* viewed positively. In fact, it is perceived as a career ending position. Customarily, HUMINT is where agents go who are either retiring, poorly performing, or being subject to discipline. For example, in 2016-2017 SSA Marco Gonzales was assigned to HUMINT after being relieved from his Counter Terrorism (CT) duties, SSA Roman was assigned to HUMINT while awaiting retirement, and SSA Giles was assigned to supervise HUMINT after being relieved of his Violent Crimes squad duties.

8. Although assigned to the AQ office’s HUMINT squad in 2018 Mr. Fertitta effectively remains there to this day even though all other agents assigned to the AQ office’s HUMINT detachment have been allowed to leave the HUMINT detachment. Tellingly, Mr. Fertitta’s designated replacement in the HUMINT detachment is an agent who serves in the Army National Guard.

9. It is Mr. Fertitta’s position that his 2018 transfer to (and retention in) the HUMINT detachment is discrimination based on his military reserve service.

10. During the October 2020 timeframe SSA Giles became Mr. Fertitta’s supervisor. At all times relevant to this case Mr. Giles worked in the FBI’s Albuquerque (AQ) office.

11. On or around November 16, 2020, the USMCR ordered Mr. Fertitta to duty to attend a medical screening. At that screening it was discovered that Mr. Fertitta had outstanding medical issues, stemming from the above-referenced combat incident, that needed to be treated. The single medical screening combined with annual reserve required drills required Mr. Fertitta to be absent from the workplace for approximately 30 days during the period from November 16, 2020, through April 22, 2021.

12. In late-November 2020 Mr. Fertitta and SSA Giles met in SSA Giles' office. During that meeting Mr. Fertitta's military reserve service came up. As part of that conversation Mr. Fertitta told SSA Giles that his USMCR status required that he miss approximately seven weeks each year. In response SSA Giles asked Mr. Fertitta how he (Fertitta) was able to mitigate the impact his military reserve duty had on his FBI duties. Notwithstanding the fact that a servicemember does not have to accommodate his or her employer's interest in limiting the frequency, timing, and duration of his or her military service, 20 C.F.R. §1002.102, Mr. Fertitta told SSA Giles that it was his practice to conduct military duty near an FBI facility with a SCIF.

13. Mr. Fertitta's military mandated medical treatment and drill related absences occurred on or about December 7, 10, 11, 14, 15, 16, 17, 18, 21, 22; January 6, 7, 14; February 19; March 5, 6, 8, 18, 19, 22, 23, 24, 25, 26; April 29, 30, 31; March 5 and 8. Attending drill is protected activity under the Uniformed Services Employment and Re-Employment Rights Act (USERRA), 38 U.S.C. §4311(b)(4).

14. On January 14, 2021, SSA Giles told Mr. Fertitta that ASAC Amy Kaskel was upset that Mr. Fertitta was out of the office. SSA Giles told Mr. Fertitta that it was ASAC Kaskel's expectation that he (Fertitta) conduct FBI work while on military reserve status and disciplinary action may follow this military absence.

15. On January 15, 2021, Mr. Fertitta informed SSA Giles, via email, that the ASAC's directive violated federal law.

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From: Fertitta, Valentine J. IV (AQ) (FBI)  
Sent: Friday, January 15, 2021 8:30:41 AM  
To: Giles, Percy E. III (AQ) (FBI) <pegiles@fbi.gov>  
Subject: Duty Status

Sir,

I should have reached out upon receiving the CP email to confirm and point out my status at the time of the meeting.

In any case, if the ASAC has any further questions as to my duty status at the time of the meeting yesterday I have attached the evidence of status and can supply her with a letter from my command if she insists.

For her to assert that I should conduct FBI work while in drilling status would violate OPM policy and US law. I do my best to separate these responsibilities to ensure I do not run afoul of either.

Thank you for your time talking this through last night.

V/r  
SA V. Fertitta

16. Mr. Fertitta's January 15, 2021, email constitutes an action to enforce a USERRA protection for which retaliation is forbidden. *See* 38 U.S.C. § 4311(b)(1). Mr. Fertitta's January 15, 2021, email also constitutes a disclosure "to a supervisor in the direct chain of command of the employee" that Mr. Fertitta reasonably believed violated USERRA. 5 U.S.C. §2303(a)(1)(A)&(2)(A).

17. FBI regulation required SSA Giles to report Mr. Fertitta's protected disclosure to the FBI's INSD but, as far as Mr. Fertitta knows, that did not happen.

18. On April 22, 2021, a job posting, known in the FBI as a canvass, was sent to all agents in the AQ Division advertising multiple open Relief and Primary Relief Supervisor (PRS) positions.

19. Mr. Fertitta applied for that position on May 5, 2021. SSA Giles knew of Mr. Fertitta's May 5, 2021, application. SSA Giles with the support of ASAC Kaskel, refused to forward Mr. Fertitta's application to the Local Career Board (LCB) in violation of **FBI Unified Relief Supervisor Policy Guide 1074 §4.3.3** which provides in relevant part:

#### 4.3.3. Application and Approval Process

An FBI employee who is interested in applying for a posted principal relief supervisor opportunity must submit a responsive EC to his or her rating official within 10 business days of the posting. Responsive ECs must be reviewed by a duly constituted LCB (see subsection 4.3.3.1.). Each EC must include the following:

- The candidate's official Bureau name
- The candidate's division/section
- The candidate's squad/unit
- The canvassed principal relief supervisor position
- A copy of the candidate's SDP evaluation, as an enclosure

The FBIHQ division/FO head (or designee) must utilize the [Leadership Competency Model](#) to determine which competencies candidates must address. In the EC, the candidate must attest to his or her qualifications for the principal relief supervisor position by addressing the leadership competencies outlined in the principal relief supervisor canvass EC described in [subsection 4.3.2.](#)

The candidate's rating official must approve the EC for serialization and forward it to the FBIHQ division/FO head within 10 business days of submission. An LCB must be convened to select principal relief supervisors in accordance with subsection 4.3.3.1.

20. Unified Relief Supervisory Policy Guide §4.3.3 makes clear that Mr. Fertitta's rating official (Giles) "must approve the EC for serialization and forward it to the FBIHQ division/FO head within 10 business days" of May 5, 2021. The application period closed on May 7, 2021, with no applicants for the position being forwarded to the LCB for the PRS position at the Santa Fe Resident Agency (SFRA).

21. On May 10, 2021, SSA Giles admitted to denying Mr. Fertitta's application even though under Agency policy he had no discretion to do so:

Percy E. Giles III commented on May 10, 2021 at 12:20 PM  
(U) As per our conversation, your application is denied at this time. As discussed, you are currently the only HUMINT collection agent within the Albuquerque Field Office and your talents are most needed at Headquarters City (HQC). Your request to be consider for a Primary Relief Supervisor at the Santa Fe Resident Agency may be revisited once the HUMINT agent staffing levels have been augmented.

22. Violation of policy is circumstantial evidence of discrimination and/or retaliation. Moreover, SSA Giles' refusal to approve Mr. Fertitta's relief supervisor application is a prohibited personnel practice under, *inter alia*, 5 U.S.C. § 2302(a)(2)(A)(ix), as it is a decision concerning pay/benefits reasonably expected to lead to an appointment.

23. Unable to resolve the policy violation with SSA Giles and ASAC Kaskel, Mr. Fertitta requested a meeting with the Albuquerque (AQ) Division Special Agent in Charge (SAC) Raul Bujanda.

24. On May 26, 2021, at approximately 4:00 PM MST, Mr. Fertitta met with SAC Bujanda and provided him with the details and background pertaining to the canvass. Mr. Fertitta requested that his application be moved forward and presented to the LCB for consideration. During this conversation Mr. Fertitta told SAC Bujanda that SSA Giles and ASAC Kaskel's blocking of his relief supervisor position violated FBI regulation, i.e. Unified Relief Supervisory Policy Guide §4.3.3. SAC Bujanda responded words to the effect of "you are owed some answers." Reporting SSA Giles and ASAC Kaskel's violations of §4.3.3. (a FBI rule/regulation) is a protected disclosure. *See* 5 U.S.C. § 2303(a)(2)(A).

25. Due to FBI required training and an unrelated family medical emergency Mr. Fertitta was out of the office during the June 1 – June 14, 2021 timeframe.

26. On June 15, 2021, SSA Giles summoned Mr. Fertitta to his (Giles) office. Upon arrival SSA Giles asked, with a smirk, "how did your meeting with the SAC go?" SSA Giles then berated Mr. Fertitta for his "poor judgment" around his attempt to apply for the PRS position without SSA Giles' permission and seeking assistance from the SAC in correcting the regulatory violation. SSA Giles then ranked Mr. Fertitta as an "inconsistent performer," for the first time in nearly eight years of FBI service. SSA Giles' "inconsistent performer" ranking is a prohibited personnel practice. 5 U.S.C. §2302(a)(2)(A)(viii)&(ix).

27. Also on June 15, 2021, SSA Giles gave Mr. Fertitta a "inconsistent" Performance Appraisal Rating (PAR). Mr. Fertitta had never received an "inconsistent" PAR up to this point. A rating of "inconsistent" effectively stops an employee's career progression. If an employee is rated "inconsistent", they are not eligible to apply to career boards, promotional opportunities, or collateral duties. SSA Giles stated that the basis for the "inconsistent" PAR was that Mr. Fertitta

applied for the relief supervisor position without asking SSG Giles' permission. SSA Giles' acts are a prohibited personnel practice. 5 U.S.C. §2302(a)(2)(A)(viii)&(ix).

28. On or around June 21, 2021, Mr. Fertitta sent the SAC (via a memorandum, with attachments, to the SAC's secretary, Yvonne Armendariz) that rebutted the basis for the "inconsistent" PAR and further informed the SAC that USERRA was being violated by SSA Giles, ASAC Kaskel, or both. To wit:

Another incident occurred on January 14, 2021. I was out on Military leave for one day. I put the leave into WebTA, in my weekly SAR and on the squad calendar. At approximate 4:00 PM while on military duty, I received a call from SSA Giles. He was very angry that I missed a command post meeting that day. SSA Giles immediately made a statement to the affect "You missed the command post meeting and it was noticed by ASAC Kaskel, that's AWOL." SSA Giles went on to infer the ASAC may seek punitive action for my absence. I went on to explain that I was on military duty and reminded SSA Giles of the SAR and leave request. SSA Giles then advise that I should have called into the command post meeting and insisted I was derelict of my duties as an agent. SSA Giles appears unaware of US Law (USERRA) as well as OPM and FBI policy governing reserve employees. This incident further created a work environment of hostility. It also created the impression that I was being singled out at least in part for my continued participation in the military reserve. Being a former military officer himself and a supervisor of reserve military members, SSA Giles should be more aware of these polices. Whether the statements were a reflection of those made by ASAC Kaskel or not, she has allowed and contributed to a passive aggressive and inimical work environment.

29. Mr. Fertitta's June 21, 2021, disclosure was protected under 5 U.S.C. §2303(2)(A) as Mr. Fertitta was informing the SAC that SSA Giles and ASAC Kaskel violated USERRA.

30. On June 25, 2021, Mr. Fertitta met with SSA Giles, ASAC Kaskel and SAC Bujanda. During the meeting Mr. Fertitta requested (1) advancement of the application for PRS at SFRA; (2) removal of the false statements made in the retaliatory performance appraisal check-in; and, (3) a change of SSA and ASAC due to the continuing deterioration of supervisor/subordinate relations. At this meeting the SAC speculated that the reason that Mr. Fertitta's PRS application was blocked was because it was complicated to move personnel between

the Albuquerque FBI Headquarters (HQ) Office and the Santa Fe Resident Agency Office. The SAC's professed "non-discriminatory" explanation did not sit well with Mr. Fertitta because (a) the Santa Fe Office is 49 miles from the HQ office and (b) agents have regularly been shifted between these offices. Indeed, in the June/July 2021 timeframe two agents were shifted from the AQ HQ office in Albuquerque to the Santa Fe office. To Mr. Fertitta's knowledge, those agents did not have to use Office of Preference (OP) to facilitate the move. The meeting ended with the SAC declining to move the PRS application forward, declining to remove or address the false statements in his performance check-in, and stating he would consider changing Mr. Fertitta's chain of command but not without more deliberation.

31. On July 5, 2021, the USMCR involuntarily recalled Mr. Fertitta to military duty for approximately 45 days to support Naval Large Scale Exercise 2021, the largest naval exercise in 50 years. Management was made aware of Mr. Fertitta's pending absence in the meeting of June 27, 2021. All told, Mr. Fertitta was absent from the workplace from July 5, 2021, through August 15, 2021.

32. On August 4, 2021, a *second* canvass for the above referenced PRS position was released.<sup>1</sup> This second canvass occurred while Mr. Fertitta was on military orders. And had the Division's Executive Management's secretary not contacted him to notify him of the job posting being released Mr. Fertitta would have likely missed the window to apply. Accordingly, on August 7, 2021, and while still on military orders, Mr. Fertitta took time away from his military duty to travel 100 miles round trip to the nearest FBI office to submit his application on the FBI's Sentinel system. And although Mr. Fertitta made those efforts SSA Giles refused to forward his application.

33. On or around August 9, 2021, while Mr. Fertitta was still on military duty, SSA Giles again rejected Mr. Fertitta's application via email. SSA Giles' new reasoning for rejecting the application was that Mr. Fertitta did not submit a Supervisor Development Program (SDP)

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<sup>1</sup> This is because no one filled the PRS position that was first canvassed in April 2021.



rating form with the application. Mr. Fertitta assessed SSA Giles' reasoning as pretextual because (a) FBI policy gave SSA Giles no discretion to reject the application (b) FBI policy did not require submission of a SDP, and (c) Mr. Fertitta possessed a completed SDP with high ratings. Again, SSA Giles' actions constitute a prohibited personnel practice. 5 U.S.C. §2302(a)(2)(A)(ix).

34. Nonetheless, SSA Giles refused to forward Mr. Fertitta's application to the LCB without a newly created SDP rating form. And the new SSA Giles SDP form marked Mr. Fertitta as "Needs Improvement" in nearly every category. This was in stark contrast to the positive ratings Mr. Fertitta received as part of his earlier SDP program in late 2019 and early 2020 a timeframe that involved Mr. Fertitta actually serving in a relief supervisor position.

35. On August 31, 2021, the LCB convened to review applications for positions listed in the canvass released on August 4, 2021. This included PRS position for SFRA. Again, Mr. Fertitta's application was blocked and not considered by the LCB.

36. On September 2, 2021, Mr. Fertitta informed SSA Giles and ASAC Kaskel that he made a USERRA<sup>2</sup> complaint, to the US DOJ OIG, for being repeatedly blocked from applying for career enhancing opportunities. Mr. Fertitta's USERRA complaint is protected activity under both USERRA, 38 U.S.C. § 4311(b)(1), and the FBI's Whistleblower Protection statute, 5 U.S.C. § 2303(a)(1)(B)&(2).

37. The retaliation continued. Ultimately (and only after being told of the USERRA complaint) Mr. Fertitta's application was presented to an LCB. This LCB convened on September 21, 2021, solely for the purpose of reviewing Mr. Fertitta's application.

38. On September 22, 2021, the Agency informed Mr. Fertitta that he was selected to serve as a PRS - - - but the PRS for an entity located in Santa Fe that Mr. Fertitta did not work with on a regular basis. This arrangement (a PRS supervising an entity in a different geographical location, here a city 49 miles away) was a departure from the previous 17 years of precedence,

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<sup>2</sup> Mr. Fertitta also made an EEO disability discrimination and retaliation complaint.

where in the PRS always served with and was geographically co-located with the SFRA squad to ensure they had the requisite knowledge to perform the duties of PRS. Again, Mr. Fertitta's management subject him to a prohibited personnel practice, this time via a "significant change in duties, responsibilities, or working conditions" 5 U.S.C. §2302(a)(2)(A)(xii).

39. On October 15, 2021, Mr. Fertitta had a conversation with former SFRA SSRA, Mark Buie about the above-referenced arrangement. SSRA Buie (who is now retired) stated that the current arrangement sets the squad and a PRS up for failure and detailed multiple specific examples. Mr. Buie also remarked words to the effect of "who did you piss off" and "why are they f—king with you?"

40. On October 14, 2021, SAC Bujanda stated that Mr. Fertitta should use his once-in-a-career OP selection to get moved to SFRA. However, as previously stated, three agents in AQ Division have received interdivision transfers in 2021 without being required to use their OP. None of those individuals have, to Mr. Fertitta's knowledge, made USERRA or EEO claims against the FBI whereas Mr. Fertitta has. This action constitutes a prohibited personnel practice as it concerns "pay and benefits." 5 U.S.C. §2302(a)(2)(A)(ix). Indeed, FBI Employee Transfer Policy Guide 1138PG - § 4.4.6., provides in relevant part "Intradivisional Transfers For situations in which transfers do not meet the 50-mile rule, FBIHQ division and FO heads can initiate no-cost intradivisional transfers. Intradivisional transfers in FOs may include (1) transfers from headquarters city (HQC) offices to RAs, (2) RAs to HQC, and (3) RAs to RAs. Such requests must be made via HR Source. SAs and IAs receiving such transfers do not exhaust their OPs."

41. As of the date of this document Mr. Fertitta has not served any period as the Relief Supervisor for SFRA, the position to which he was appointed. The retaliatory decision has resulted in his having the job on paper, but not actually doing the job. In a meeting with the supervisory for SFRA, SSRA Seals on approximately November 9, 2021, he informed Mr. Fertitta that the current situation, if implemented would jeopardize the safety of squad operations and negatively impact

day-to-day operations because of Mr. Fertitta’s lack of familiarity with the unique missions and vast area of responsibility of the SFRA. SSRA Seals stated for the good of the squad and Mr. Fertitta “I will not and do not intend to allow you to perform the duties of relief supervisor under these circumstances.”

42. On November 3, 2021, seemingly out of nowhere, the FBI asked Mr. Fertitta to give the agency access to his U.S. Department of Veterans Affairs (VA) mental health records. The FD-1118 form made clear that the information the FBI sought was needed to assess whether Mr. Fertitta could access National Security Information or whether Mr. Fertitta was a danger to himself. There was no reason for this request. Tellingly, FBI whistleblower “protection” training deems the FBI’s request as retaliatory. To wit:

## Reprisal: Personnel Actions

The personnel actions prohibited under federal statute include taking or failing to take, or threatening to take or fail to take any of the following:

- an appointment or promotion
- disciplinary or corrective action
- a detail, transfer, or reassignment
- a reinstatement, restoration of position, or re-employment
- action on a performance evaluation
- a decision concerning pay, benefits, awards, or certain education or training
- a decision to order psychiatric testing or examination
- the implementation or enforcement of any nondisclosure policy, form, or agreement
- any other significant change in duties, responsibilities, or working conditions

As an FBI Supervisor (or Supervisory role), you must ensure FBI employees are not subjected to reprisal for making protected disclosures

### WHISTLEBLOWER CLAIMS

43. Under the Whistleblower Protection Enhancement Act of 2016 Mr. Fertitta must make a protected disclosure based on his, *inter alia*, reasonable belief that the FBI was violating “any...law.”

44. The “law” at issue here is USERRA. To better understand the interchange between USERRA and Mr. Fertitta’s whistleblower complaint, a brief explanation of USERRA follows.

45. The USERRA states, in relevant part, “the Federal Government should be a model employer in carrying out” USERRA. 38 U.S.C. §4301(b). The USERRA contains provisions barring discrimination, retaliation, and guaranteeing prompt and proper re-employment. Each of those provisions is addressed below because Mr. Fertitta’s USERRA claims encompass those provisions.

46. The *USERRA’s anti-discrimination provision*, 38 U.S.C. § 4311(a), “prohibit[s] discrimination against persons because of their service in the uniformed services.” *Sheehan v. Dep’t of Navy*, 240 F.3d 1009, 1012 (Fed. Cir. 2001). Service in the “uniformed services” includes being absent from the workplace to attend military fitness for duty examinations. 20 C.F.R. §1002.54. To establish a *prima facie* USERRA discrimination claim, the employee must prove: (a) membership in the uniformed services; (b) an adverse employment decision; and, (c) that the employee's military service was a "motivating factor" – not the sole factor – in the employer's adverse decision. 38 U.S.C. §4311(c)(1)-(2). “Motivating factor” means “that if the employer was asked at the moment of the decision what its reasons were and if it gave a truthful response, one of those reasons would be the employee’s military position or related obligations.” *Robinson v. Morris Moore Chevrolet-Buick, Inc.* 974 F.Supp. 571, 576 (E.D. Tex. 1997) (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989)). A USERRA plaintiff can establish the “motivating factor” element through direct or circumstantial evidence. *Sheehan*, 240 F.3d at 1014 (Fed. Cir. 2001).

47. Crucially, “[c]ircumstantial evidence will often be a factor in these cases, for discrimination is seldom open or notorious. Discriminatory motivation under the USERRA may be reasonably inferred from a variety of factors, including proximity in time between the employee's military activity and the adverse employment action, inconsistencies between the

proffered reason and other actions of the employer, an employer's expressed hostility towards members protected by the statute together with knowledge of the employee's military activity, and disparate treatment of certain employees compared to other employees with similar work records or offenses." *Sheehan* at 1014. Additionally, "[a] plaintiff may also raise a triable issue of pretext through evidence that an employer's deviation from established policy or practice worked to her disadvantage." *Earl v. Nielsen Media Research, Inc.*, 658 F.3d 1108, 1117 (9th Cir. 2011). This point is made to support the obvious (but sometimes lost) point that it is virtually *never* the case that an employer admits to discriminating on account of one's military service. Accordingly, judges, juries, and (in this instance) agency adjudicators *must* look at the circumstantial evidence to determine if discrimination (or retaliation) occurred.

48. The *USERRA's anti-retaliation provision*, 38 U.S.C. § 4311(b) provides that an employer "may not discriminate in employment against or take any adverse employment action against any person" because he has taken an action to enforce a protection provided by USERRA or has exercised a right provided for by USERRA. *Kitlinski v. Merit Sys. Prot. Bd.*, 857 F.3d 1374, 1381 (Fed. Cir. 2017).

49. The *USERRA's re-employment provision*, 38 U.S.C. §4312-4313, require an employer to promptly and properly re-employ a returning servicemember following that servicemember's period of military service. Regarding Mr. Fertitta's case, two USERRA regulations come into play.

50. *First*, 20 C.F.R. §1002.191 provides:

**§ 1002.191 What position is the employee entitled to upon reemployment?**

As a general rule, the employee is entitled to reemployment in the job position that he or she would have attained with reasonable certainty if not for the absence due to uniformed service. This position is known as the escalator position. The principle behind the escalator position is that, if not for the period of uniformed service, the employee could have been promoted (or, alternatively, demoted, transferred, or laid off) due to intervening events. **The escalator principle requires that the employee be reemployed in a position that reflects with reasonable**

**certainty the pay, benefits, seniority, and other job perquisites, that he or she would have attained if not for the period of service.** Depending upon the specific circumstances, the employer may have the option, or be required, to reemploy the employee in a position other than the escalator position.

51. *Second*, 20 C.F.R. §1002.193(b) provides, in relevant part:

If ... there is a reasonable certainty that he or she would have been promoted, or made eligible for promotion, during the time that the employee served in the uniformed service, then the promotion or eligibility for promotion must be made effective as of the date it would have occurred had employment not been interrupted by uniformed service.

**(The protected activity.)**

52. Here Mr. Fertitta's January 15, 2021, email to SSA Giles that ASAC Kaskel's directive to contact the Agency while Mr. Fertitta served on military duty constitutes an action to enforce a USERRA protection for which retaliation is forbidden. *See* 38 U.S.C. § 4311(b)(1). Mr. Fertitta's January 15, 2021, email also constitutes a disclosure "to a supervisor in the direct chain of command of the employee" that Mr. Fertitta reasonably believed violated USERRA. 5 U.S.C. §2303(a)(1)(A)&(2)(A).

**(The retaliation.)**

53. SSA Giles' May 10, 2021, denial of Mr. Fertitta's PRS application is a prohibited personnel practice under, *inter alia*, 5 U.S.C. § 2302(a)(2)(A)(ix), as it is a decision concerning pay/benefits reasonably expected to lead to an appointment.

**(The protected activity.)**

54. Mr. Fertitta's May 26, 2021, report to SAC Bujanda that SSA Giles and ASAC Kaskel's blocking of his relief supervisor position violated FBI regulation, i.e. Unified Relief Supervisory Policy Guide §4.3.3 (a FBI rule/regulation) is a protected disclosure. *See* 5 U.S.C. § 2303(a)(2)(A).

**(The retaliation.)**

55. On June 15, 2021, SSA Giles summoned Mr. Fertitta to his (Giles) office, asked, with a smirk, “how did your meeting with the SAC go”, berated Mr. Fertitta for his “poor judgment” around his attempt to apply for the PRS position without SSA Giles’ permission and then ranked Mr. Fertitta as an “inconsistent performer,” for the first time in nearly eight years of FBI service. SSA Giles’ “inconsistent performer” ranking is a prohibited personnel practice. 5 U.S.C. §2302(a)(2)(A)(viii)&(ix).

56. Also on June 15, 2021, SSA Giles gave Mr. Fertitta a “inconsistent” Performance Appraisal Rating (PAR). Mr. Fertitta had never received an “inconsistent” PAR up to this point. SSA Giles stated that the basis for the “inconsistent” PAR was that Mr. Fertitta applied for the relief supervisor position without asking SSG Giles’ permission. SSA Giles’ acts are a prohibited personnel practice. 5 U.S.C. §2302(a)(2)(A)(viii)&(ix).

**(The protected activity.)**

57. On or around June 21, 2021, Mr. Fertitta sent the SAC (via a memorandum, with attachments, to the SAC’s secretary, Yvonne Armendariz) that rebutted the basis for the “inconsistent” PAR and further informed the SAC that USERRA was being violated by SSA Giles, ASAC Kaskel, or both. Mr. Fertitta’s June 21, 2021, disclosure was protected under 5 U.S.C. §2303(2)(A) as Mr. Fertitta was informing the SAC that SSA Giles and ASAC Kaskel violated USERRA.

**(The retaliation.)**

58. On or around August 9, 2021, while Mr. Fertitta was still on military duty, SSA Giles again rejected Mr. Fertitta’s application because Mr. Fertitta did not submit a Supervisor Development Program (SDP) rating form with the application event though Mr. Fertitta possessed

a completed SDP with high ratings. Again, SSA Giles' actions constitute a prohibited personnel practice. 5 U.S.C. §2302(a)(2)(A)(ix).

**(The protected activity.)**

59. On September 2, 2021, Mr. Fertitta informed SSA Giles and ASAC Kaskel that he made a USERRA complaint, to the US DOJ OIG, for being repeatedly blocked from applying for career enhancing opportunities. Mr. Fertitta's USERRA complaint is protected activity under both USERRA, 38 U.S.C. § 4311(b)(1), and the FBI's Whistleblower Protection statute, 5 U.S.C. § 2303(a)(1)(B)&(2).

**(The retaliation.)**

60. On September 22, 2021, the Agency informed Mr. Fertitta that he was selected to serve as a PRS - - - but the PRS for an entity located in Santa Fe that Mr. Fertitta did not work with on a regular basis. This arrangement (a PRS supervising an entity in a different geographical location, here a city 49 miles away) was a departure from the previous 17 years of precedence, where in the PRS always served with and was geographically co-located with the SFRA squad to ensure they had the requisite knowledge to perform the duties of PRS. Again, Mr. Fertitta's management subject him to a prohibited personnel practice, this time via a "significant change in duties, responsibilities, or working conditions" 5 U.S.C. §2302(a)(2)(A)(xii).

61. On October 14, 2021, SAC Bujanda stated that Mr. Fertitta should use his once-in-a-career OP selection to get moved to SFRA. However, as previously stated, three agents in AQ Division have received interdivision transfers in 2021 without being required to use their OP. None of those individuals have, to Mr. Fertitta's knowledge, made USERRA or EEO claims against the FBI whereas Mr. Fertitta has. This action constitutes a prohibited personnel practice as it concerns "pay and benefits." 5 U.S.C. §2302(a)(2)(A)(ix).



62. On November 3, 2021, seemingly out of nowhere, the FBI asked Mr. Fertitta to give the agency access to his U.S. Department of Veterans Affairs (VA) mental health records.

### **PRAYER FOR RELIEF**

WHEREFORE Complainant seeks:

A. Cessation of all retaliatory pending FBI demands for VA medical record and/or directed mental and physical health evaluations.

B. Reimbursement of all legal expenses/fees.

C. Immediate transfer of Mr. Fertitta and his spouse (also an FBI agent) to the Norfolk Division of the FBI, specifically the HQ Office located at 509 Resource Row, Chesapeake, VA 23320 with agreement neither will be involuntarily transfer/reassign or otherwise have a “reassignment due to the needs of the FBI” for at least 36 months post assignment to Santa Fe.

D. Removal of mid-year “inconsistent” PAR check-in that still resides in FBI performance rating system.

E. Sick Leave and Annual Leave restoration to levels as they were on March 10, 2021. Additionally, restoration of leave not accrued due to having to take Leave Without Pay (LWOP) - Disabled Veterans Leave to deal with stress related issues caused by discrimination and ongoing retaliation.

F. Backpay for all Disabled Veteran’s Leave without Pay taken since June 1, 2021 because annual leave and medical leave were exhausted dealing exclusively with FBI directed retaliatory request for mental and physical health evaluations as well as the exacerbation of disability conditions due to stress of the ongoing retaliation.

H. Reimbursement of penalty/taxes paid from partial liquidation of TSP. Partial liquidation was taken to replace income from lost wages from LWOP to deal exclusively with issues related to these issues and to cover necessary legal fees.

I. Grant such other and further relief as this Court deems just and equitable.

Dated: 5/12/2022



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