

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO**

VALENTINE FERTITTA,

Plaintiff,

v.

MERRICK GARLAND, in his official capacity  
as Attorney General of the United States of  
America,

Defendant.

Civil Action No. 1:22-cv-00966 GJF/SCY

Jury Trial Demanded

**AMENDED COMPLAINT**

Plaintiff, Valentine Fertitta (“Mr. Fertitta”), by and through his undersigned attorneys, brings this Complaint against the United States Department of Justice (“Defendant”) and alleges as follows:

**I. NATURE OF THIS ACTION**

1. This case is brought pursuant to the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 791, *et seq.* (“Rehabilitation Act”).

**II. JURISDICTION, VENUE & EXHAUSTION OF ADMINISTRATIVE REMEDIES**

2. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331.

3. The United States District Court for the District of New Mexico is a proper venue for this action because Defendant maintains a place of business in this judicial district and the acts/omissions alleged in this complaint occurred in this District. *See* 28 U.S.C. § 1391(b).

4. Mr. Fertitta exhausted his administrative remedies by contacting an EEO counselor (June 23, 2021) with 45 days of first learning (May 17, 2021) that his application for a promotion

(Primary Relief Supervisor (PRS)) had been denied and then filing a formal written complaint on or around October 22, 2021.

5. Mr. Fertitta further exhausted his administrative remedies as to the retaliation claims of (a) being referred to the FBI's security division for "lack of candor" and (b) having his request to transfer to the Norfolk Residence Agency effectively denied by FBI by timely contacting the EEO counselor on October 2, 2023, filing an Agency-internal EEO complaint on October 24, 2023, and waiting 180 days before bringing these claims in this Court.

6. Neither Mr. Fertitta or his lawyers ever received a final decision on his complaint, and more than 180 days have passed since the complaint was filed.

### **III. PARTIES**

7. The defendant, Merrick Garland, is the Attorney General of the United States of America and is sued in his capacity as head of a department in the executive branch of the Federal Government within the meaning of 29 U.S.C. §§ 791 and 794.

8. Mr. Fertitta is Special Agent of the Federal Bureau of Investigation and worked for the FBI in New Mexico at all times relevant to this lawsuit. At all times relevant to this lawsuit Mr. Fertitta was a member of the U.S. Marine Corps Reserves (USMCR).

### **IV. FACTS**

9. Mr. Fertitta is a Major in the USMCR. Mr. Fertitta is also a veteran of the wars in Iraq and Afghanistan. While serving in Iraq, in 2004, he was injured in an explosion. One of his superiors died during that event.

10. 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.

11. In 2017 Mr. Fertitta was diagnosed with Post Traumatic Stress Disorder (PTSD) stemming from his three combat deployments (two to Iraq, one to Afghanistan). The Agency was made aware of Mr. Fertitta's PTSD diagnosis on or around mid-2018 during the required Agent Fit For Duty (FFD) medical examination.

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

13. 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 deployments 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.

14. In late-November 2020 Mr. Fertitta and SSA Giles met in SSA Giles' office. During that meeting Mr. Fertitta's military reserve service (which includes leaving the Agency to attend military-mandated medical appointments) 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, including military mandated medical appointments. In response SSA Giles asked Mr. Fertitta how he (Fertitta) was able to mitigate the impact his military reserve duty (which included medical appointments to address service-related injuries) had on his FBI duties.

15. The medical issue the USMCR identified as needing treatment related to hearing loss and a vision anomaly that caused Mr. Fertitta to be designated "Not medically ready" for the first time in his near 23-year career. This designation can be cause for involuntary medical

separation from military service. This is a disability because it affects the “major life activity” of hearing. On March 20, 2021, Mr. Fertitta was required to travel to Walter-Reed Army Medical Center for the advanced hearing tests. These tests were conducted on March 22, 2021. Due to the travel involved in coming from New Mexico to Maryland Mr. Fertitta remained in the area until he was assured no further tests were required to attain a status of “Fully Medically Ready”. This was the only way to get the adverse medical designation removed. All told this resulted in six days of medical abscess from the FBI.

16. A follow up eye exam through Mr. Fertitta’s VA optometrist on March 1, 2021, found an anomaly in Mr. Fertitta’s pupils indicating a possible brain bleed or pending aneurism. The optometrist recommended an immediate follow up diagnostic imaging of Mr. Fertitta’s brain. On March 2, 2021, Mr. Fertitta traveled to the Albuquerque VA Medical Center for a follow consult with his doctor. An emergency CT scan was subsequently scheduled for March 8, 2021. On approximately March 12, 2021, Mr. Fertitta was notified by the VA that the scan did not indicate any such injury and the anomaly was innocuous.

17. Mr. Fertitta’s military mandated medical treatment absences occurred on or about December 7, 10, 11, 14, 15, 16, 17, 18, 21, 22; January 6, 7, 14; February 19; March 1, 2, 5, 6, 8, 12, 19, 22, 23, 24, 25, 26; April 6 & 8.

18. 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 regardless of whether these military caused absences related to treating Mr. Fertitta’s disability impairments.

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

---

**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 no run afoul of either.

Thank you for your time talking this through last night.

V/r  
SA V. Fertitta

20. Mr. Fertitta's January 15, 2021, email constitutes an action to enforce his right, under, *inter alia*, the Rehabilitation Act, to leave work to get medical treatment.

21. 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.

22. 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.

23. 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).

24. On May 10, 2021, SSA Giles made an entry into Sentinel, the FBI system of record, stating Mr. Fertitta's PRS application was denied. Mr. Fertitta, however, did not read SSA Giles' May 10, 2021, entry until May 17, 2021, as he was on family related sick leave in Baltimore, MD (his father had been involved in a near fatal car accident) and did not have access to the Agency's

system until May 17<sup>th</sup>. Note the Sentinel system resides on a classified network not accessible outside of FBI buildings.

25. 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.

26. On May 26, 2021, Mr. Fertitta met with SAC Bujanda and provided him with the details and background pertaining to the canvass. This included the family childcare challenges faced by the dual agent couple that precluded Mr. Fertitta applying to positions a significant distance from SFRA. 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."

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

28. 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.

29. 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. Over the objections of SSA Giles and ASAC Kaskel. Furthermore, SSA Giles then classified the PAR “SECRET//NOFORN utilizing the U.S. Government’s classification system to further hinder any recourse sought by Mr. Fertitta. Note, Mr. Fertitta’s year end performance rating covering the entirety of the year, including the previous period marked SECRET//NOFORN, was marked UNCLASSIFIED and omitted mention of Mr. Fertitta’s failed attempt at applying for the position. As of December 7, 2022, the derogatory PAR remains in FBI’s performance eval system.

30. On June 23, 2021, Mr. Fertitta (a non-attorney who was not represented by counsel at the time) emailed the Agency’s EEO Counselor (EEO\_Counseling@fbi.gov) to seek guidance on the correct venue to file a complaint about SSA Giles’ May 2021 denial of Mr. Fertitta’s PRS application.

31. The EEO counselor did not (in the context of addressing Mr. Fertitta’s June 23, 2022, email) inquire as to the factual bases of Mr. Fertitta’s inquiry. Instead, the EEO Counselor erroneously sent Mr. Fertitta to the U.S. Department of Labor.

32. 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 (RA) 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 (more on that below) were shifted from the Albuquerque RA to the Santa Fe RA. 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.

33. In June 2021 Mr. Fertitta began experiencing stress related absences from work as the Agency's retaliatory acts exacerbated his combat-caused Post Traumatic Stress Disorder (PTSD). All told, between November 3, 2021, and April 22, 2022, Mr. Fertitta took approximately 450.5 hours of Sick Leave - Without Pay to treat the PTSD now exacerbated by the Agency's acts/omissions. This total does not include paid hours of sick leave taken prior to Mr. Fertitta exhausting all accrued sick leave.

34. 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. Mr. Fertitta military absent from the workplace was from July 5, 2021, through August 15, 2021. Upon returning home Mr. Fertitta learned that he had contracted COVID 19 during the exercise. All told, Mr. Fertitta's military and COVID related absence from the workplace was from July 5, 2021, through August 31, 2021.



35. 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 requested and received authorization from his military chain of command 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.

36. 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) rating form with the application. Mr. Fertitta assessed SSA Giles' reasoning as pretextual because, *inter alia*, Mr. Fertitta possessed a completed SDP with high ratings.

37. 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.

38. 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. Mr. Fertitta later found out that

---

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

ASAC Kaskel falsely informed the LCB, Mr. Fertitta's application could not be considered because he was not administratively assigned to SFRA.

39. On September 2, 2021, Mr. Fertitta informed SSA Giles and ASAC Kaskel that he invoked the EEO process so as to get his PRS application considered by the LCB.

40. The retaliation continued. Ultimately (and only after being told that the EEO process was invoked) 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.

41. 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.

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

43. On October 14, 2021, SAC Bujanda stated that Mr. Fertitta should use his once-in-a-career OP (Office of Preference) selection to get moved to SFRA. However, as described below numerous agents in AQ Division have received interdivision transfers in 2021-2022 without being required to use their OP. None of those individuals have, to Mr. Fertitta's knowledge, made EEO claims against the FBI whereas Mr. Fertitta has. 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.”

44. By forcing Mr. Fertitta to use the OP to move from Albuquerque to Santa Fe the Agency was requiring that he use a benefit valued ranging between \$20,000-\$50,000 depending on distance of the move, home value, and other specific move benefits provided to FBI employees. E.g. an FBI partially paid for move in January 2015 from Maryland to New Mexico was valued at approximately \$20,000 to move just the Fertitta’s house-hold goods.

45. 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 November 9, 2021, meeting with SSRA Luther Seals (the SSRA for SFRA) Mr. Fertitta asked why the SAC would not allow Mr. Fertitta to work out of the SFRA to which SSRA Seals responded that SAC Bujanda said words to the effect of “we don’t want to award people for making complaints.”

46. By way of comparison, between July 2021 and March 2022, SAC Bujanda allowed four other agents to move from the Albuquerque RA to the Santa Fe RA (two agents), Farmington RA (one agent), and Las Curses (one agent) but did not require those agents to use their OP. To the best of Mr. Fertitta’s knowledge, none of those four agents made an EEO complaint nor were required to leave work on a regular basis for medical treatment.

47. On October 22, 2021, Mr. Fertitta filed his DOJ-211 EEO complaint.

48. On November 3, 2021, Agency Nurse, Amanda Price, told Mr. Fertitta that he needed to have a mental evaluation to determine his access to national security information, ability to use a weapon, and to see if Mr. Fertitta was a danger to himself and others. Mr. Fertitta found this request odd because the Agency had declared him fit for duty on September 9, 2021.

49. Ms. Price told Mr. Fertitta that although the Agency was aware of Mr. Fertitta's PTSD, the diagnosis was "now an issue." Of note FBI Human Resources Division Policy Memo of May 2021, titled "Mental Health and Wellness Lines of Effort" specifically states FBI Agents seeking medical or mental health assistance, including the taking of medications, related to military, combat, and/or first responder service is not required to be reported to the FBI.

50. On January 12, 2022, Mr. Fertitta was directed by Ms. Price to complete form FD-948: Certificate of Essential Duty Status. Mr. Fertitta called Ms. Price to get context behind the request. Ms. Price responded that she was "afraid to put anything in writing" but that an unidentified "ASAC" made a request (through Ms. Price's boss) because the Agency management doubted the necessity of Mr. Fertitta's medical absences.

51. On December 20, 2022, Mr. Fertitta filed the above-captioned action.

52. In July 2022 the United State Marine Corps recalled Mr. Fertitta for a period of military service.

53. On August 22, 2023, Mr. Fertitta informed his FBI chain of command in Albuquerque via email that he would be released from military duty and return to work in January 2024.

54. On or around August 31, 2023, SA Emily Fertitta (Mr. Fertitta's spouse) was contacted by Liston Smith of FBI SecD (Security Division) wherein Mr. Smith requested that Ms. Fertitta provide contact information for Mr. Fertitta for an undisclosed reason.

55. Mr. Fertitta found this (Smith contacting his wife) odd as FBI practice precludes the disclosure of a “National Security Investigation” to persons without a need to know. Additionally, Mr. Fertitta’s contact information was readily available in FBI systems, such as those used to find contact information for Ms. Fertitta. Furthermore, even though Mr. Fertitta was on military orders he (Mr. Fertitta) had his FBI issued phone with FBI email. Mr. Fertitta had also maintained regular contact with the local SecD representatives, Chief Security Officers (CSO), in both the FBI’s Norfolk and Albuquerque offices. Both CSOs also had Mr. Fertitta’s contact information to include military, command, and email, and office phone number.

56. On approximately August 31, 2023, Mr. Fertitta returned Mr. Smith’s call wherein Mr. Smith told Mr. Fertitta he (Smith) needed to conduct a “procedural security interview”. When Mr. Fertitta asked for details, Mr. Smith stated “it’s purely procedural and we can do it over the phone.” Mr. Fertitta asked if the substance of the interview had any relation to Mr. Fertitta’s EEO or Whistleblower cases against the FBI to which Mr. Smith responded with words to the effect “we are aware of the cases, and this has nothing to do with that.”

57. Mr. Fertitta then agreed to a telephonic interview set for September 12, 2023.

58. On September 11, 2023, Mr. Smith called back and stated he made a mistake and the interview had to be done in person due to the “Tops Secret” (TS) nature of the material to be discussed.

59. Mr. Fertitta found this odd, having held a clearance for over 20 years and discussing TS material in a “procedural” security interview did not sound procedural at all. Mr. Fertitta then again asked for clarification as to the purpose and nature of the interview. None was given. Mr. Fertitta requested, in writing via email clarification and that the FBI investigators record the interview” but received no response.

60. On September 27, 2023, Mr. Fertitta took leave from his military duty and traveled to the Norfolk Virginia FBI Field office for the interview with Mr. Smith. Mr. Smith was accompanied by Ivonn Waller. Both identified themselves as retired agents now working for the FBI as investigators for FBI Security Division.

61. The interview opened immediately addressing unclassified documents directly relative to Mr. Fertitta's lawsuit. Mr. Fertitta (irked at the FBI's apparent ex parte contact with a represented plaintiff in a federal lawsuit) stated "this is an issue directly relative to my EEO case. I am done with this interview." Mr. Smith then admonished Mr. Fertitta that cooperation was "compulsory" due to "National Security" and indicated if Mr. Fertitta didn't comply the FBI could revoke or suspend his clearance making him ineligible to return to his duties as an FBI agent.

62. At this point, Mr. Fertitta again asked that he be allowed to record the interview wherein he was told he could not. Mr. Fertitta then requested the agents record it and file a copy with their records, to which Mr. Fertitta was told "we can't do that, procedure and policy prohibit recording in National Security interviews." The FBI regularly records Top Secret information and is fully equipped with the systems to handle recorded TS information, which there was none.

63. Upon information and belief, there is no FBI policy that prohibits the recording of a security clearance related interview.

64. Mr. Fertitta then asked the agents if they had courier cards and the required lockable courier pouch. A courier card and pouch allows a cleared person to transport classified material outside a Secure Compartmentalized Information Facility (SCIF). In lay terms, a SCIF is where TS material is stored and discussed. Mr. Fertitta stated, "if your described purpose of this interview was to discuss Top Secret material and you will be leaving this FBI facility and driving back to DC with presumably classified notes, you will need a courier card".

65. The SecD investigators informed Mr. Fertitta they did not have currier cards.

66. This lack of currier cards means there never was any TS material and the pretense for the interview was misrepresented.

67. Indeed, the “National Security” interview involving “TS” material then proceeded in an area not cleared for discussing TS material.

68. The investigators stated that the allegations were referred to FBI HQ by FBI AQ management and would have to have been forwarded by SAC Bujanda, who is named in this lawsuit. When Mr. Fertitta asked when the allegations were first referred, Mr. Smith advised “Oh about a year ago”. If true that would be late summer of 2022. Again leaving Mr. Fertitta with an active access to TS/SCI and nuclear weapons secrets for nearly a year after SecD presumably knew of the allegations.

69. The investigators asked Mr. Fertitta about the forwarding of unclassified emails from his unclassified FBI email account to email account [USERRA\\_EEO\\_OPR@protonmail.com](mailto:USERRA_EEO_OPR@protonmail.com) residing outside of FBI systems- - an issue that FBI AQ Chief Security Officer (CSO), Marvin Garcia addressed and resolved with Mr. Fertitta in January/February 2023.

70. The investigators stated SSA Giles, ASAC Kaskel, and SAC Bujanda alleged that Mr. Fertitta verbally admitted to intentionally double signing his application to the PRS position to in violation of FBI policy in a June 2021 meeting where only the four parties were present. The unintentional double signing documents in Sentinel is a known problem or “glitch” with the system software and a simple online search on FBI systems will return a record of the issue dating back to 2016. Much like the forwarding of unclassified email issue, the dual-signing of the PRS application was resolved years earlier.

71. The investigators then asked Mr. Fertitta whether he was engaged in a “house flipping” business. Indeed Mr. Fertitta is nearing 27 years of service in the Marine Corps and 10 years in the FBI. Both jobs require mobility, and the Fertitta family has moved over a dozen times buying and selling 7 properties in that period (one property every 3+ years). This allegation clearly shows the intent of the investigation as the FBI is attempting to use a requirement of the jobs to create a violation of policy where there is none. The only person who could have conceivably provided SecD with this (bogus) “house flipping” allegation is the above-referenced SSA Giles who (in 2021 while at Mr. Fertitta’s house) jokingly asked if Mr. Fertitta was in the “house flipping” business to which Mr. Fertitta responded (during this same 2021 conversation) “no.”

72. Mr. Fertitta held a “Q” clearance until February 2023 (whereupon he voluntarily relinquished that access due to lack of need-to-know). A “Q” clearance is a highly sensitive TS-level clearance. If FBI AQ leadership or SecD believed the above-referenced email forwarding/double signing/house flipping issues credible and Mr. Fertitta was a national security threat, why would the Country’s lead counterintelligence agency leave Mr. Fertitta with access to Q-level nuclear weapons secrets for years after these alleged incidents of wrongdoing?

73. On approximately April 22, 2024, Mr. Fertitta returned to work with the FBI and was granted full access to TS/SCI and SCIF areas of the building.

74. During the interview Mr. Smith referenced multiple documents. Not a single document referenced was classified. Mr. Fertitta could also see all the document titles on Mr. Smith’s computer screen. They were all emails and documents that were and are with only one exception, related to Mr. Fertitta’s EEO and civil action against the FBI. Of note the one document that was not related to Mr. Fertitta’s case, but was of interest to the investigators, was a completely unclassified document from 2018 titled “Observations and Recommendations”. The document is



critical of the way the FBI conducts initial training and the treatment of women in the FBI academy. The document was drafted by Mr. Fertitta in 2018 in response to questions posed to him and his wife by former GS-15 and SES level FBI managers. The document could in no way be construed as compromising national security and further indicates the true nature of the inquiry was to intimidate and protect the FBI from embarrassment not to protect national security.

75. On May 16, 2024, Ms. Fertitta received an email from Mr. Smith advising her she was required to report to FBI Headquarters (under the threat of disciplinary action) for 16 hours of compelled interviews related to a “National Security investigation” into Mr. Fertitta.

76. Ms. Fertitta was further admonished she could not tell anyone about the interview, had no right to an attorney, and she had no spousal privilege given the nature of the interview.

77. Ms. Fertitta was informed if she did not cooperate in answering questions she would be subject to a National Security Investigation of her own thus threatening her security clearance. Ms. Fertitta was given less than one weeks’ notice and was to report on May 22, 2024.

78. Prior to attending the interview, Ms. Fertitta asked specific questions to ascertain her rights and request SecD provide the policy and law under which SecD was compelling her to comply and denying her rights to counsel and spousal privilege. Again, SecD could or would not cite their lawful authority but did agree a lawyer could be present, but not speak, advise, or in any way participate. SecD refused to answer if Ms. Fertitta would be free to leave the interview.

79. On May 20, 2024, Ms. Fertitta, ended up having a significant medical event for which she was transported to a local emergency room in Virginia Beach, VA. Through blood work and other testing, doctors found irregularities in body and heart function they diagnosed as being the combination of long-term endurance of stress and an “acute stress reaction”. The doctor in the ER administered anxiety-relieving medication, the first in Ms. Fertitta’s lifetime. The Doctor

directed a period of “no duty” for one week, “light duty” for the following week and follow up care with specialty doctors and primary care. Out of significant concerns for her health, and attempting to coordinate care with multiple specialty doctors, Ms. Fertitta subsequently took Sick Leave without pay starting on June 4, 2024, through August 1, 2024.

80. A security clearance is necessary for an FBI Special Agent to perform his or her Special Agent duties.

81. In the event the FBI suspends, revokes, or otherwise affects a Special Agent’s security clearance that Special Agent is suspended without pay indefinitely without any judicial recourse to contest the FBI’s security clearance related decision. This is a known FBI retaliation method, and is further confirmed in DOJ, OIG Management Advisory Memorandum 24-067 of May 2024.

82. It is clear the allegations of misconduct against Mr. Fertitta were referred to SecD by SAC Bujanda (or others acting at his direction) based on facts provided by former SSA Giles (“house flipping:”), and ASAC Kaskel (“double signing of PRS application), the same managers named in this lawsuit.

83. The following facts substantiate the lack of true “national security” jurisdiction and retaliatory intent of the investigation:

- a. All of the documents involved in the event SecD bases its “national security” investigation at the UNCLASSIFIED//FOUO level or below and are linked to Mr. Fertitta’s ongoing EEO action.
- b. The allegations against Mr. Fertitta are all covered under the FBI disciplinary policy and should be investigated in an open and unclassified process that is not concealed behind the veil of “national security”.
- c. The manner in which the investigators have acted thus far are consistent with interrogation tactics and techniques aimed at placing the interviewee in a position of surprise and distress. Under these conditions interviewees often make unclear or poorly worded statements under duress that may be later represented to the interviewee’s disadvantage, hence the introduction of Ms. Fertitta into the equation.

- d. The FBI refused to acknowledge exculpatory evidence in Mr. Fertitta's favor. The FBI historically places great value in the polygraph. Mr. Fertitta was administered a National Security polygraph for Naval Criminal Investigative Service (NCIS) in December 2023. FBI is aware of this polygraph and has been since January 2024. Under the Director of National Security Policy (ICD 704) an NCIS polygraph meets the same USIC standards as an FBI national security polygraph.

84. On May 22, 2024, SA V. Fertitta learned that as late as May 10, 2024, both SecD Clearance Adjudication Unit at FBI HQ and both investigators Waller and Smith had no idea Mr. Fertitta had active Special Compartmented Information (SCI) access.

85. If this case was of such gravity that the FBI was prepared to spend nearly \$2,000 in travel funds to get Ms. Fertitta to FBI HQ in DC, use national security law to relieve her of her rights of representation, spousal privilege, and subject her to 16 hours of "compelled" interviews wouldn't the FBI investigators have checked to see what type of active SCI accesses Mr. Fertitta currently has and has had since 2015?

86. This type of oversight clearly shows the purpose of the Security Division's investigation is not to protect classified material. The true intent of the investigations is to harass and intimidate the Fertitta family from continuing their EEO lawsuit against the FBI/DOJ.

87. On or around September 20, 2023, Mr. Fertitta applied for a No Cost (no cost to the government) transfer from New Mexico to Norfolk, Virginia to be posted with Ms. Fertitta (who transferred to Norfolk in November 2022). Relevant policy: Policy Guide 1138 Section **4.5.3.1. Special Agent and Intelligence Analyst Couples** *"If one of the spouses in an SA couple or an IA couple receives a transfer, the other spouse is afforded a no-cost common household transfer to accompany the spouse receiving the transfer. The spouse receiving the no-cost transfer does not exhaust his or her OP."*

88. As of September 2023 the Norfolk office was understaffed by approximately four FBI agents.

89. The Norfolk Field Office SAC indicated he would support Mr. Fertitta's transfer to Norfolk but that the decision would lie with SAC Bujanda and FBI HRD.

90. On September 28, 2023, Mr. Fertitta learned that SAC Bujanda had declined to make a definitive decision on Mr. Fertitta's transfer for "fear of setting precedent."

91. On approximately October 25, 2023, Mr. Fertitta requested an updated status of his request. FBI Human Resources responded via email stating the request was still undecided and sitting with SAC Bujanda at the Albuquerque Division. Mr. Fertitta received no further response.

92. On approximately January 2, 2024, Mr. Fertitta requested an update on the status of his common household move request via his FBI chain of command in Albuquerque. He received no response.

93. As of July 17, 2024, Mr. Fertitta's transfer request to Norfolk has not been approved.

## V. VIOLATIONS OF THE REHABILITATION ACT

94. Plaintiff re-alleges the above paragraphs.

### (Count I – Discrimination)

95. To create a jury issue on disparate treatment under the Rehabilitation Act a plaintiff must show "he suffered an adverse employment action because of his disability. *Brown v. Austin*, 13 F.4th 1079, 1092 (10th Cir. 2021). An adverse employment action is one that causes a significant change in employment status or benefits. *Id.* The "disability" prong of a Rehabilitation Act discrimination claim includes both a disability as well as a "record of impairment." *Doebele v. Sprint/United Mgmt. Co.*, 342 F.3d 1117, 1132 (10th Cir. 2003)("[T]he record-of-impairment standard is satisfied only if she actually suffered [an impairment] that substantially limited one or more of her major life activities.").

96. Here Mr. Fertitta has a record of impairment as it relates to the treatment he received from the VA from approximately July 2018 to present to treat his hearing disability.

97. Mr. Fertitta's hearing impairment is permanent. It significantly affects the major life activity of hearing. Indeed, Mr. Fertitta's hearing disability was so severe that the military saw fit to order him to military duty to treat that disability for 9 separate days over a four month period spanning December 2020 through March 2021. This does not include sick leave days taken by Mr. Fertitta days prior to and during this period when receiving treatment at the VA Medical Center.

98. Mr. Fertitta informed Mr. Giles of his hearing disability verbally on or around December 20, 2020 and again on or about December 28, 2020, and again via email on or about January 4, 2021. Mr. Fertitta also told Mr. Giles that he needed to go on military duty to treat those disabilities on or around December 20, 2020.

99. Mr. Giles, having a documented history of being preoccupied with "stats" or statistical accomplishments, presumably felt Mr. Fertitta's absence would have a negative impact on the HUMINT Squad's perceived performance denied Mr. Fertitta's May 2021 PRS application.

100. Mr. Giles denied Mr. Fertitta's May 2021 PRS application (and subsequent applications) because of disability or record of impairment.

101. Defendant's acts/omissions caused Mr. Fertitta damages in an amount to be proven at trial.

**(Count II – Retaliation)**

102. To state a claim for retaliation under the Rehabilitation Act the plaintiff must show "(1) that he engaged in protected opposition to discrimination, (2) that a reasonable employee

would have found the challenged action materially adverse, and (3) that a causal connection existed between the protected activity and the materially adverse action.” *EEOC v. C.R. England, Inc.*, 644 F.3d 1028, 1051 (10th Cir. 2011) (quoting *Proctor v. UPS*, 502 F.3d 1200, 1208 (10th Cir. 2007)). “Regarding the second element, an adverse action is generally one that causes a significant change in employment status or benefits.” *Brown v. Austin*, 13 F.4th 1079, 1090 (10th Cir. 2021).

103. Here Mr. Fertitta engaged in protected activity on September 2, 2021, by telling management he initiated the EEO process and was retaliated against when the Agency gave him the PRS job but required he supervise his new charges from a place nearly 50 miles away - - - an act that a former SSRA (Buie) describes as adverse. To move closer to his squad the Agency required Mr. Fertitta to use his OP, a value of \$20,000.00, whereas the Agency did not require four other similarly situated Agents to use their OP in order to move from Albuquerque to other RAs in New Mexico.

104. Mr. Fertitta again engaged in protected activity on October 22, 2021, when he made his formal EEO complaint and the Agency retaliated in November 2021 and January 2022 by seeking additional medical information. This request of additional medical information is material to a FBI Agent’s career because the issuing of a security clearance is at the discretion of each issuing “sponsor” (DOJ for FBI, DoD, CIA, etc). A ‘sponsor’s’ interpretation of medical records is highly subjective and can result on the removal of a clearance for which there is no judicial recourse. The loss of a clearance effectively eliminates an agent’s ability to be employed anywhere inside or outside the FBI in a national security capacity. Additionally, any related employment outside the FBI will ask as part of the application process if you have ever had your clearance or access removed for any reason. If an agent has, they are virtually unemployable.

Unlike other agencies, the FBI's clearance determinations, suspensions, and revocations, cannot be challenged by their employees in any meaningful way.

105. Thus, the Agency's request for these records right after Mr. Fertitta's official complaint was a clear message "you should shut up or we will make you unemployable."

106. These unwarranted and retaliatory medical record requests also caused Mr. Fertitta to make multiple trips to the VA to determine how to deal with the requests which, in turn, required more missed work and use of more sick time.

107. The Agency recognizes that making a request for medical information is an adverse action.

108. Mr. Fertitta again engaged in protected activity by filing the above-captioned lawsuit and the FBI retaliated against Mr. Fertitta as described in paragraphs 52-93.

109. Defendant's acts/omissions caused Mr. Fertitta damages in an amount to be proven at trial.

## **VI. PRAYER FOR RELIEF**

Mr. Fertitta respectfully prays for:

- A. Compensation for all injury and damages suffered by Mr. Fertitta including, but not limited to, economic damages in the amount to be proven at trial including back pay, pre and post judgment interest, negative tax consequences of any award, and general damages as provided by law.
- B. Plaintiff's reasonable attorney, expert fees, and costs, as otherwise provided by law.
- C. Approval of his transfer to Norfolk and cessation of the SecD investigation.
- D. For such other and further relief as this Court deems just and equitable.

**VII. JURY DEMAND**

Plaintiff hereby demands a trial by jury of all issues so triable pursuant to Rule 38 of the Federal Rules of Civil Procedure

Respectfully submitted this 12th day of August 2024.

Respectfully submitted,

ROSARIO D. VEGA LYNN LAW OFFICES, LLC

By: /s/ Rosario D. Vega Lynn  
Rosario D. Vega Lynn  
PO Box 65513  
Albuquerque, NM 87193  
Telephone: (505) 903-9411  
Email: [rosariovegalynnlawfirm@outlook.com](mailto:rosariovegalynnlawfirm@outlook.com)

RIVERSIDE NW LAW GROUP, PLLC

By: /s/  
MATTHEW Z. CROTTY, *Pro Hac Vice Pending*  
MATTHEW Z. MENSİK, *Pro Hac Vice Pending*  
905 West Riverside, Suite 404  
Spokane, WA 99201-0300  
Telephone: (509) 850 7011  
Email: [mzc@rnwlg.com](mailto:mzc@rnwlg.com)  
[mam@rnwlg.com](mailto:mam@rnwlg.com)

Attorneys for Plaintiff VALENTINE FERTITTA



**CERTIFICATE OF SERVICE**

I certify that on August 12, 2024, I caused the forgoing to be electronically filed with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to all counsel of record.

*//Matthew Z. Crotty*

MATTHEW Z. CROTTY  
Riverside NW Law Group, PLLC  
905 W. Riverside Ave, Suite 208  
Spokane, WA 99201  
Telephone: (509) 850-7011  
Email: mzc@rnwlg.com