

BELLO, SERGIO J

From: BLANCO, MARTA M
Sent: Thursday, November 13, 2008 9:50 AM
To: DORMAN, LEONARD
Cc: MATTINA, THOMAS; BELLO, SERGIO J
Subject: FW: Officer Humphrey

Lenny,

As per our conversation these were my instructions to the A-TCET Supervisors and Managers,

Marta

From: BLANCO, MARTA M
Sent: Thursday, November 13, 2008 9:46 AM
To: CHATFIELD, PAUL V; PIERRE, MARCEL; PROKOLYSHEN, STEVEN A; RODRIGUEZ, MARIO ANTONIO;
SAVAGE, FRANCES A; SKINKIS, HEATHER M; STUMPF, MARK J
Cc: MATTINA, THOMAS; BELLO, SERGIO J; RALEIGH, DWIGHT A
Subject: Officer Humphrey

All,

Effective immediately Officer Humphrey will be assigned to desk duty; he cannot be assigned to the field either on regular time or overtime.

Marta M. Blanco
Chief
Tactical Operations
(305) 511-1111 cell
(305) 511-1111 ofc.

4/13/2009

: 00204

000204

EXHIBIT 02

BRESLIN, JOHN H

From: BELLO, SERGIO J
Sent: Thursday, November 13, 2008 10:29 AM
To: DORMAN, LEONARD
Cc: MATTINA, THOMAS; BLANCO, MARTA M
Subject: FW: E20 Incident

Lenny,

CBPO Humphrey Part II :

Below is SCBPO Marcel Pierre's email regarding last night's Humphrey incident followed by an email by CBPO Humphrey.

We will be obtaining the MDPD report and he has been reassigned to an office position as Chief Blanco indicated in an earlier email.

I will await your feedback on this issue prior to contacting intake on the first.

Thank you,
Sergio

From: PIERRE, MARCEL
Sent: Wednesday, November 12, 2008 7:52 PM
To: MATTINA, THOMAS
Cc: BLANCO, MARTA M; BELLO, SERGIO J
Subject: E20 Incident

Mr. Mattina,

At approximately 1725 hours, I received a call from CBP Officer [redacted] requesting that I come to E20. I drove to E20, and there I saw three Miami Dade Police Officers, a handful of Miami Dade Aviation agents, and some A-TCET officers. CBPO K. Humphrey was talking to two Miami Dade Aviation agents and one police officer. I introduced myself and asked MDPD Officer E. Lopez, the lead officer, (Badge # 3140, Tel # 305 878 7373) to give me an account of what he knows thus far. MDPD Officer Lopez told me that he was called to the scene by Miami Dade Aviation to settle an argument between their agents and CBPO Humphrey. MDPD Lopez stated that he believes that the problem is some kind of misunderstanding between Miami Dade Aviation and CBP.

Here is what Miami Dade Aviation Agent [redacted] told me:

[redacted], badge # [redacted], stated that he was assigned to gate E20 to check American Airlines FLT # 1244. According to Mr. [redacted], after September 11, 2001, Miami Dade Aviation agents check all aircrafts that will land at Reagan National Airport. Since this flight next stop is to Reagan National Airport, Mr. [redacted] stated that he went upstairs to do his job. While he was there, Mr. [redacted] stated that he was approached by Officer Humphrey. According to Mr. [redacted], Officer Humphrey asked him what he was doing there. Mr. [redacted] stated that he is going the check the flight before it departs to Reagan National Airport. Officer Humphrey told Mr. [redacted] that he is not supposed to be there, so he needs to give him his I.D. card. Mr. [redacted] stated that he gave Officer Humphrey his I. D card and he called his supervisor. Miami Dade Aviation supervisor [redacted], badge # [redacted] responded to the scene. Mr. [redacted] stated that he tried to explain to Officer Humphrey the reason why Mr. [redacted] was at the jet way. Mr. [redacted] also stated that Officer Humphrey refused to listen to him.

11/17/2008

EXHIBIT 03

Graves, Karen T (IA)

From: BRESLIN, JOHN H
Sent: Tuesday, January 13, 2009 2:56 PM
To: JOINT INTAKE
Subject: HUMPHREY, Kenneth
Attachments: DOC002.PDF

Joint Intake,

This file was sent up back on November 13, 2008. It appears that it may not have made it. I am sending a second time. Any questions feel free to call.

John H. Breslin
Labor Relations Specialist
South Florida, Miami
(305) [REDACTED]
Fax (305) [REDACTED]

1/13/2009

EXHIBIT 04

BRESLIN, JOHN H

From: DORMAN, LEONARD
Sent: Friday, November 14, 2008 8:48 AM
To: BRESLIN, JOHN H
Subject: FW: CBPO Humphrey Incident
Attachments: RE: ; RE: Investigation; FW: E20 Incident; FW: Officer Humphrey; E20 Incident; FW: Incidents at Gate E22 w/FBI AA1244 ; MIA Customs.pdf; To who it may concern.docx

For your file. Thanks.

From: BELLO, SERGIO J
Sent: Thursday, November 13, 2008 4:57 PM
To: DORMAN, LEONARD
Subject: FW: CBPO Humphrey Incident

The following was sent to the Intake Center and I faxed them the Police Report.

From: BELLO, SERGIO J
Sent: Thursday, November 13, 2008 4:14 PM
To: 'Joint.Intake@dhs.gov'; PACE, JESSICA (IA)
Cc: MATTINA, THOMAS; BLANCO, MARTA M
Subject: CBPO Humphrey Incident

Intake Center,

Attached are the emails concerning the two incidents reported earlier involving CBPO Kenneth Humphrey. The second incident also involved to a lesser degree CEO [REDACTED] as his partner, but not mentioned in the statements.

The first and last two attachments (Re, Re:Inv, MIA, To Whom) all involve the first incident.

The three "FW" attachments and the "E20" statement all involve last night's incident.

I will fax over the police report separately.

Thank you,

Chief Sergio Bello
Tactical Operations
A-TCET Miami Airport
305-[REDACTED] Office
305-[REDACTED] Nextel
305-[REDACTED] Fax

11/17/2008

EXHIBIT 05

EXHIBIT G1

ANN-DEE LEVINE 
CONTRACT EEO INVESTIGATOR

Investigator's Memorandum to the File

DATE: May 1, 2009
RE: Witness Not Interviewed

Port Director Christopher Maston suggested that John Breslin from Labor and Employee Relations (LER) be interviewed, noting that management consulted with Mr. Breslin regarding issues involving Complainant. Per guidance provided by the Complaints Processing Center, while LER employees provide guidance to managers, they are not considered to be decision-makers and should not generally be interviewed. Accordingly, testimony was not obtained from Mr. Breslin.

: 00407

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EXHIBIT 06

EXHIBIT

P

Page 1 of 1
EXHIBIT F15

CBPO Humphrey,

Be advised that both Chief Blanco and I have received and read your email. She is out on Sick Leave today, but she will be providing a response as soon as possible.

It is our intention and that of the agency to treat you and all employees in a fair manner.

Thank you,

Chief Bello
Tactical Operations
305- [REDACTED] Office
305- [REDACTED] Nextel

From: HUMPHREY, KENNETH D
Sent: Thursday, November 27, 2008 10:20 PM
To: BLANCO, MARTA M
Cc: BELLO, SERGIO J
Subject: REQUEST FOR FAIRNESS

Chief Blanco;

This is a request for fairness, in reasons behind job placement and removal from field operations. Please insure a fair process in reviewing, what is perceived and what is actually happening in field operations activities. Actions that might not be viewed as penalization, might be taken by all as such. Serious issues are rotten out the foundation of superficial services (meaning that major gaps really exist in BASE coverages).

I can attest in this note, that preconceived notions of my job value, have no knowledge of what I have been witnessing for some time (as a truly experienced operant), as to the sifting of A-TCET coverages.

Again I ask for fairness in knowing the grounds or accusations, and equity in the handling of whatever said matters exist.

Thanks, Kenneth D. Humphrey

<https://cbpmail.cbp.dhs.gov/exchange/KENNETH.D.HUMPHREY.cbp.dhs.gov/Inbox/RE...> 00206 12/2/2008

000206
EXHIBIT P

EXHIBIT

Q

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SENSITIVE

Page 1 of 4

 <p style="text-align: center;">DEPARTMENT OF HOMELAND SECURITY Immigration and Customs Enforcement Office of Professional Responsibility</p> <p style="text-align: center;">REPORT OF INVESTIGATION HS 4200-01 (37), Special Agent Handbook</p>		<p>1. CASE NUMBER 200903280</p>
		<p>PREPARED BY KNOTT, CURSTEN</p>
		<p>2. REPORT NUMBER 001</p>
<p>3. TITLE HUMPHREY, KENNETH/CBP OFFCR/Non-Criminal Misconduct/MIAMI, DADE, FL</p>		
<p>4. FINAL RESOLUTION</p>		
<p>5. STATUS Initial Report</p>	<p>6. TYPE OF REPORT Allegation</p>	<p>7. RELATED CASES</p>
<p>8. TOPIC CBPO at the Miami International Airport allegedly behaved in an unprofessional manner.</p>		
<p>9. SYNOPSIS On January 14, 2009, the Joint Intake Center (JIC), Washington, D.C., received information reporting the alleged misconduct of a Customs and Border Protection Officer (CBPO) in Miami, FL. On November 12, 2008, CBPO Kenneth HUMPHREY, Miami, FL allegedly behaved in an unprofessional manner during an incident involving Miami Dade Aviation Agents at the Miami International Airport.</p> <p>This report contains a verbatim excerpt of relevant material received. No spelling or grammatical changes have been made.</p>		
<p>10. CASE OFFICER (Print Name & Title) KNOTT, CURSTEN - Joint Intake Specialist</p>	<p>11. COMPLETION DATE 21-JAN-2009</p>	<p>14. ORIGIN OFFICE Joint Intake Center</p>
<p>12. APPROVED BY(Print Name & Title) JAN BORRIS - JIC Supervisor</p>	<p>13. APPROVED DATE 23-JAN-2009</p>	<p>15. TELEPHONE NUMBER No Phone Number</p>
<p><small>THIS DOCUMENT IS LOANED TO YOU FOR OFFICIAL USE ONLY AND REMAINS THE PROPERTY OF THE DEPARTMENT OF HOMELAND SECURITY. ANY FURTHER REQUEST FOR DISCLOSURE OF THIS DOCUMENT OR INFORMATION CONTAINED HEREIN SHOULD BE REFERRED TO HEADQUARTERS, DEPARTMENT OF HOMELAND SECURITY, TOGETHER WITH A COPY OF THIS DOCUMENT.</small></p> <p><small>THIS DOCUMENT CONTAINS INFORMATION REGARDING CURRENT AND ONGOING ACTIVITIES OF A SENSITIVE NATURE. IT IS FOR THE EXCLUSIVE USE OF OFFICIAL U.S. GOVERNMENT AGENCIES AND REMAINS THE PROPERTY OF THE DEPARTMENT OF HOMELAND SECURITY. IT CONTAINS NEITHER RECOMMENDATIONS NOR CONCLUSIONS OF THE DEPARTMENT OF HOMELAND SECURITY. DISTRIBUTION OF THIS DOCUMENT HAS BEEN LIMITED AND FURTHER DISSEMINATION OR EXTRACTS FROM THE DOCUMENT MAY NOT BE MADE WITHOUT PRIOR WRITTEN AUTHORIZATION OF THE ORIGINATOR.</small></p>		

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EXHIBIT Q1

DEPARTMENT OF HOMELAND SECURITY U.S. Customs And Border Protection TRANSMITTAL AND ROUTING SLIP	SUBJECT OR FILE NO. HUMPHREY, Kenneth 200903260	SUSPENSE DATE
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ACTION CODES	1. ACTIONS 2. APPROVAL 3. AS REQUESTED	4. CIRCULATE 5. COMMENT 6. COORDINATE	INITIALS	7. CORRECT 8. FILE 9. INFORMATION	TO	10. INITIAL ATTACHMENT 11. PER CONVERSATION 12. RETURN	13. SEE ME 14. SEE REMARKS 15. SIGNATURE	OUT DATE
1	Mattina, Thomas	1,5			5			
2	BLANCO, Marta	6			6			
3					7			
4	RAMIREZ, Carlos	12			8			

REMARKS:

Please review the attached case file and provide your decision regarding the appropriate action you wish to proceed with. You will be the Deciding Official on actions ranging from **NO ACTION*** up to and including an Official Letter of Reprimand (LOR). Should you decide action exceeding an LOR is warranted, you will be the Proposing Official up to and including a Suspension of 14-days. If you believe action beyond a Suspension of 14-days is warranted, your recommendation will be coordinated through the Service Port Director, and if in agreement with your recommendation, will be forwarded to the DRB for review.

Please provide your written decision, proposal or recommendation; complete with your **JUSTIFICATION** (what you base it on), on this CBP-3107, in a memo or via cmail, along with the original case file, to me in the Service Port Office. Should you have any questions or need any assistance or guidance, please feel free to contact me at (305) 869-2800.

***NOTE: PER THE DFO AND LER, IF YOU DETERMINE NO ACTION IS WARRANTED, YOU MUST INCLUDE A STATEMENT FOR THE REASON(S) WHY NO ACTION SHOULD BE TAKEN.**

DECISION, PROPOSAL, RECOMMENDATION: Incident with Miami-Dade Gate Agents.

Please return to C. Ramirez with recommendation or if no further action, to close case.

FROM: SPV Carlos Ramirez	OFFICE AND ROOM NO. MIAMI SERVICE PORT OFFICE	PHONE 305-869-2800	DATE 6 March 2009
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EXHIBIT Q2

000 089J 00102090191-01 0119018980-0013 0012:20 01 EXHIBIT F20
 03/16/2009 15:19 3058692822 PORT DIRECTOR MIAMI PAGE 02/02

DEPARTMENT OF HOMELAND SECURITY U.S. Customs And Border Protection TRANSMITTAL AND ROUTING SLIP				SUBJECT OR FILE NO. HUMPHREY, Kenneth 200903260			SUSPENSE DATE			
ACTION CODES	1. ACTION 2. APPROVAL 3. AS REQUESTED	4. CIRCULATE 5. COMMENT 6. COORDINATE	7. CORRECT 8. FILE 9. INFORMATION	10. INITIAL ATTACHMENT 11. PER CONVERSATION 12. RETURN	13. SEE ME 14. SEE REMARKS 15. SIGNATURE	TO	DESTINATION	ACTION CODE(S)	INITIALS	OUT DATE
1	LOPTUS, Diane	1,5		5						
2	ARCIL, Javier	6		6						
3	RAMIREZ, Carlos	12		7						
4				8						

REMARKS:
 Please review the attached case file and provide your decision regarding the appropriate action you wish to proceed with. You will be the Deciding Official on actions ranging from NO ACTION* up to and including an Official Letter of Reprimand (LOR). Should you decide action exceeding an LOR is warranted, you will be the Proposing Official up to and including a Suspension of 14-days. If you believe action beyond a Suspension of 14-days is warranted, your recommendation will be coordinated through the Service Port Director, and if in agreement with your recommendation, will be forwarded to the DRB for review.

Please provide your written decision, proposal or recommendation; complete with your JUSTIFICATION (what you base it on), on this CBP-3107, in a memo or via email, along with the original case file, to me in the Service Port Office. Should you have any questions or need any assistance or guidance, please feel free to contact me at (305) 869-2800.

***NOTE: PER THE DFO AND LER, IF YOU DETERMINE NO ACTION IS WARRANTED, YOU MUST INCLUDE A STATEMENT FOR THE REASON(S) WHY NO ACTION SHOULD BE TAKEN.**

.....

DECISION, PROPOSAL, RECOMMENDATION: No Past Discipline. Incident with Miami-Dade Gate Agents. Referred by Mattina since employee is now assigned to PAX. May consult Mattina for disposition.

Please return to C. Ramirez with recommendation.

Recommend no action.
dl 3/11/09

FROM: SPV Carlos Ramirez	OFFICE AND ROOM NO. MIAMI SERVICE PORT OFFICE	PHONE 205-869-2800	DATE 12 March 2009
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U.S. Government Printing Office: 2004-304-532/02702 CBP 3107 (04/03)

000329
 EXHIBIT Q3

EXHIBIT

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HUMPHREY, KENNETH D

From: HUMPHREY, KENNETH D **Sent:** Thu 1/22/2009 3:02 PM
To: BELLO, SERGIO J
Cc: BLANCO, MARTA M; OTERO, MARIA C; LAMBOGLIA, JOSE A
Subject: ILLEGAL BID, ROTATION AND PLACEMENT
Attachments:

Chief Sergio Bello;

This is a request for legal and fair Bid, Rotation and Placement - according to 'NATIONAL STANDARD BID OPPORTUNITY ANNOUNCEMENT' procedures. This is a legal step in requesting the grounds for placement in other than my bid choice for the bid rotation, beginning 02-01-2009.

I ask in this request, the authority and individuals making the determination to refute my BID choice submitted twice on 01-01-2009.

At this point, it is important for me to find the legal standings for the determinations, and the basis for such determinations, made by whom.

If the Miami Field Office operates on some other unpublished criteria's outside the realm of Fair Labor Practices, it is now the best time for me to document such is the case. If this is not the case, I request on this date to be notified on what public and published grounds are labor practices being conducted.

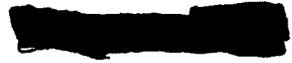
There are US National Standards of FAIR LABOR PRACTICES and there are other practices. Please understand that all should be operating under one correct documented proceedings in such a situation as the Bid, Rotation and Placement of CBP employees.

This is my statement of the continued grieving of unfair Labor Practices in relationship to my being allowed equal and fair employment opportunities in CBP.

I sincerely hope that this is viewed as an urgent request for fair and equal response-treatment at CBP.

Truly, Kenneth D Humphrey, CBPO, MIA A-TCET

EXHIBIT R1



**LISTING OF EMPLOYEES WHO WERE NOT ELIGIBLE FOR THE BID
ROTATION DUE TO A PENDING INVESTIGATION:**

1. EMPLOYEE A – RACE- WHITE, DATE OF BIRTH: [REDACTED]-1958
2. EMPLOYEE B – RACE- HISPANIC, DATE OF BIRTH: [REDACTED]-78
3. EMPLOYEE C – RACE- HISPANIC, DATE OF BIRTH: [REDACTED]-62
4. EMPLOYEE D – RACE- HISPANIC, DATE OF BIRTH: [REDACTED]-79
5. EMPLOYEE E- RACE-AFRICAN AMERICAN, DATE OF BIRTH: 04-26-45
COMPLAINANT

The above information was compiled by EEO Specialist Stacey Willardson based on information provided by Branch Chief Maria C. Otero on June 5, 2009.

00417

000417
EXHIBIT R2

EXHIBIT

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Management resent the fact that I voiced dissatisfaction of not providing 'BELIEVED PUBLIC SERVICES', and why I was not happy to have a good paying job and continuing on with the "Ponzi-Madoff scheme" as practiced.

I immediately fell out of favor, even as believed by most to be a good worker, when in our seldom held major staff meeting of all personnel in about 2004, I stood up and said "we look like Keystone Cops, running around like chickens with our heads cut off".

EVEN THOUGH as late as the fall 2008.....

All staff members (management included) held target assignments for my assigned shift 1500-2300, when they wanted reliable and trusted inspections, even if it meant holding the targets until my shift started because of the confidence that was consistently established from the 1500-2300 teams.

I feel a Law suit is the only forum in which the complete picture can be clearly establish. The punitive nature of treatments, is the results of my being very uncomfortable in not being a part of the conspiracy to get paid well, and continue pretending to be providing public protection above the reality of only 1-10%.

Overtime entitlements discrepancies are as follows:

Julio Acosta never took an only 5 hour overtime assignment on his days off unless he arrived a very few times for a full 8 hour job and did not like the assigned duties or personnel he was assigned to ride with, then he would find some reason to leave early.

Julio Acosta is in control of all budgets, purchases, contract selections, overtime calculations and assignments, accounts and payables. Most of all senior management of AT-CET allows this carte Blanc empowerment, and his ability to change his shift hours, and the ability to add overtime hours before or after his shift unchecked.

Once in early 2008, Julio Acosta and Chief Marta Blanco could not fathom or understand my being very upset when I showed up to work on my day off (a stated before-hand, full 8 hour overtime shift), when upon arriving to be told that monies were short and only 4-5 hours are now available. Not one phone call from any personnel was made ahead of me leaving home to be informed of such. (Only after seeing how upset I was at this treatment was the situation allowed as an 8 hour overtime job).

I repeatedly always signed-up for any available overtime jobs beginning at 2300hours Thursday night thru Fridays and until 2300hours on Saturdays.

1. I signed-up for November 13-14, 2008. Was not selected for any overtime assignments in any areas.

EXHIBIT S1

2. I signed-up for December 04-06, 2008. Took this offer for office (ATU) work Friday 1500-2300 hours, because no other options existed for any extra income as others received.
3. I signed-up for December 11-13, 2008. Got a call from Julio Acosta on December 11, 2008 at 0958 hour offering only office (ATU) for Friday December 12th for 1500-2000 hour. Julio stated that's all available, which I refused.
4. On December 18, 2008 at 0725 hour, Julio called and only offered 5 hours for day off December 19, 2008 Friday 1500-2000 hour for office (ATU). [REDACTED] got assigned to work office (ATU) on December 20th for overtime 0700-1500, holding much higher earnings than myself, but my signed request for full hours was ignored).
5. On December 23, 2008 Julio offered Friday December 26th for an 8 hour shift in office (ATU) from 1500-2300, which I worked because no one else wanted it.
6. On December 30, 2008 at 0815 hour, Julio offered for the first time since my restrictions, two full 8 hours overtime shifts in office (ATU) at 2300-0700 hours for both January 1-3, 2009 because no one else wanted such hours, which I worked.
7. On January 8, 2009 at 0745 hour, Julio only offered for both days requested any shifts, just 1500-2000 hours in the office (ATU). I stated refusal because that offer is more hardship than benefit.

Financial hardships are greatly compounded by my work restrictions due to the fact I am not given overtime assignments as others. Since being transferred to Passenger Control, I am assigned shifts where I have even losses of 15% night differential pay of my 8 years shifts of 1500-2300 hours and also the loss of Sunday premium pay, because I have not been assigned any other than training schedules for over the past two months.

April 5, 2009

Kenneth D. Humphrey
CBPO, MIA
Customs and Border Protection

EXHIBIT S1

BELLO, SERGIO J

From: ACOSTA, JULIO R
Sent: Thursday, December 18, 2008 7:24 AM
To: BLANCO, MARTA M; BELLO, SERGIO J
Subject: FW: CBPO HUMPHREY
Importance: High

CBPO Humphrey sign up for OT Friday PM December 19th, was offered a 15-20 ATU OT assignment and was declined by Mr. Humphrey.

CBPO
J. Acosta.

From: ACOSTA, JULIO R
Sent: Thursday, December 11, 2008 10:24 AM
To: BLANCO, MARTA M
Cc: BELLO, SERGIO J; SAVAGE, FRANCES A
Subject: CBPO HUMPHREY
Importance: High

Chief Blanco, Officer Humphrey was contacted this morning about an OT assignment Friday 15-20:00 in ATU he stated he is being deprived of a full OT assignment. My explanation to Officer Humphrey's allegation was that the OT assignments on Friday's and Saturday's in ATU are based first on budget availability and second are assign to assist the two Regular Officers working ATU 15-2300.

Officer Humphrey was not happy with my explanation and declined the Overtime assignment.

Julio R. Acosta
A-TCET Miami Int'l. Airport
CBPO/LPO/SCO
Office Number 30 [REDACTED]
Fax 3 [REDACTED]

4/9/2009

: 00209

000209
EXHIBIT S2

BELLO, SERGIO J

From: ACOSTA, JULIO R
Sent: Thursday, January 08, 2009 8:05 AM
To: BLANCO, MARTA M; BELLO, SERGIO J
Subject: OFFICER Humphrey
Importance: High

Chief again we had the same situation as the last time with Officer Humphrey's Overtime assignment for ATU 15-20 on Friday Night 1/9/2009. I again explained to Officer Humphrey that we only backfield this position until 20:00 hrs both Friday's and Saturday's in case one of the regular ATU Officer is absent from his/her regular assignment, if this is the case then the Duty Supervisor has the option to request the 15-20 OT officer to stay until 23:00 hrs if necessary.

Officer Humphrey again DECLINED his Overtime assignment for ATU 15-20 hrs on Friday January 9th, 2009.

*Julio R. Acosta
A-TGET Miami Int'l. Airport
CBPOL/PO/SCO
Office Number 305- [REDACTED]
Fax 305- [REDACTED]*

4/9/2009

: 00210

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EXHIBIT S3

EXHIBIT

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HUMPHREY, KENNETH D

From: HUMPHREY, KENNETH D **Sent:** Fri 4/10/2009 6:26 PM
To: JERGUSON, PAUL E
Cc:
Subject: PERMANENT SHIFT CHANGE REQUEST
Attachments:

SCBPO PAUL JERGUSON:

On Friday 4-10-2009, I submitted a form request for Schedule Change to SCBPO Chase. I was advised that also should be noted to you by email of my request.

In COSS, I am having a difficult time following my reporting schedule that appears not set. My request is a selection of 1600-2400 hour shift as first choice, and the 1400-2200 shift as next choice. If any personnel with less seniority than myself of 01-03-2000, is permanently assigned to Baggage Control, I also request that assignment if given as a option based on seniority.

Greatly appreciate the ability to work a shift that would be beneficial to all concerned as noted.

Thanks,
Kenneth D. Humphrey, CBPO, MIA [REDACTED]

EXHIBIT T1

Kenneth D Humphrey

From: "HUMPHREY, KENNETH D" <kenneth.humphrey@dhs.gov>
To: [REDACTED]@comcast.net
Sent: Tuesday, May 05, 2009 3:39 PM
Attach: humphrey shift email.htm; humphrey baggage placement.htm
Subject: FW: COSS and rotating into baggage control

From: HUMPHREY, KENNETH D
Sent: Mon 5/4/2009 7:15 PM
To: [REDACTED]@comcast.net
Subject: FW: COSS and rotating into baggage control

From: FAILDE, ALEXANDER
Sent: Wed 4/29/2009 8:22 AM
To: HUMPHREY, KENNETH D
Cc: CHASE, VALO S; GREGORY, LOUIS L; ARCE, JAVIER; JERGUSON, PAUL E
Subject: COSS and rotating into baggage control

COSS is USUALLY updated the week before the pay period starts. Unfortunately, that is not always the case. As I stated in a previous email, there is no permanent placement in either baggage control, or passport control except for FTOs. You will be rotated between both areas.

I included the original email stating that your shift was 1600-2400, and the email explaining that you will be rotated between baggage control and passport control.

If you have any questions, or need further clarification, please feel free to contact a scheduling supervisor.

Regards,

Alex Failde
U.S. Customs and Border Protection
Miami International Airport
Scheduling and Oversight
786-[REDACTED]

From: HUMPHREY, KENNETH D
Sent: Sunday, April 26, 2009 9:59 PM
To: FAILDE, ALEXANDER
Subject:

CBPO FAILDE,

PLEASE ADVISE ME IF POSSIBLE. I AM REQUESTING PLACEMENT IN BAGGAGE CONTROL AND SAW IN **COSS** FOR THE NEXT PAY PERIOD A SCHEDULE FOR 1000-1800. PLEASE KNOW I DO WISH BAGGAGE CONTROL PLACEMENT, BUT I WOULD LIKE TO KNOW THAT I HAVE A STABLE SHIFT ASSIGNMENT OF

EXHIBIT T2

5/6/2009

EXHIBIT

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From: "HUMPHREY, KENNETH D" <kenneth.humphrey@dhs.gov>
To: [REDACTED]@bellsouth.net>
Sent: Monday, October 05, 2009 8:07 PM
Subject: FW: Second Request for follow-up

From: LAMBOGLIA, JOSE A
Sent: Mon 10/5/2009 10:47 AM
To: HUMPHREY, KENNETH D
Cc: OTERO, MARIA C
Subject: RE: Second Request for follow-up

Mr. Humphrey,

The reason your BID preference was not honored is that the KSA's qualifications statement you submitted were not the qualifications and it was obvious that the statement you submitted was not the proper KSA's. Management challenged your KSA's and upon a BID rotation committee decision your BID was disqualified. Since you only bid for two work units you were assigned to next bid preference (Passenger Processing).

Jose Lamboglia
NTEU 137

From: HUMPHREY, KENNETH D
Sent: Sun 10/4/2009 4:13 PM
To: LAMBOGLIA, JOSE A
Subject: Second Request for follow-up

Union President Jose Lamboglia:

This is an initiation request for an investigation of the reasons behind my being denied my 1st choice BID submitted before September 5, 2009, for placement in A-TCET Unit at 1500-2300 hr shift.

Please inquire about the initial number of slots open in said unit for the 1500-2300 hr block, and the number filled after the closing of the bid.

Please ask also about the seniority of the officers placed in the noted slots 1500-2300 hr for the A-TCET Unit.

If the slots were cancelled, why were they open for bidding at all.

I appreciate the Union support in this inquiry request.

Sincerely, Kenneth D Humphrey, CBPO, MIA

EXHIBIT U1

10/6/2009

99 pure

From: "HUMPHREY, KENNETH D" <kenneth.humphrey@dhs.gov>
To: "LAMBOGLIA, JOSE A" <jose.lamboglia@dhs.gov>
Cc: "OTERO, MARIA C" <maria.otero@dhs.gov>
Sent: Tuesday, October 06, 2009 10:46 PM
Subject: Request proper procedure for contesting denial of bid

Union President Jose A. Lamboglia:

RE: Formal Request Procedures to grieve denial of Bid.

This is a request for the formal steps to grieve the denial of latest Bid Placement Request. I am informing all of this initial step to the highest level of grievance of 'prohibited personnel practices' allowed to be imposed as reprisal methods.

No investigation existed in the denial of my first Bid of January 2, 2009, even though the ploy was accepted as a reprisal method by all offices that were supposed to protect against such abuses. The Labor Employee Relations officials allowed with participations, CBP MIA Management to inflict reprisal activities, and the Union representation accepted as face value, the non-existent investigation ploy as reasons for the denial of Bid Placement in January 2009. Now in this recent Bid Placement Request, groundless reasons are selectively used to deny again the correct BID placement.

Every statement in the KSA's for both bids were true and correct. I am qualified, and CBP's MIA gross mismanagement, and abuse of authority, and whistleblowing activities counter to "CBP's Missions" still exist as stated.

Please note this step is another proper indication that all must be on notice that the constant denials of Bid selections is a 'Prohibited Personnel Practice' as defined by law 2302(b) of title 5 of the United States Code (U.S.C.).

This again is the initiation to all involved that were supposed to protect against 'prohibited personnel practices', the filing request to grieve what is violations of law against whistleblowers and EEOC filers.

Sincerely, Kenneth D. Humphrey, CBPO, MIA

EXHIBIT U2

10/7/2009

99 pure

From: "HUMPHREY, KENNETH D" <kenneth.humphrey@dhs.gov>
To: "OTERO, MARIA C" <maria.otero@dhs.gov>; "CASALE, JOHN G" <JOHN.Casale@dhs.gov>
Cc: "LAMBOGLIA, JOSE A" <jose.lamboglia@dhs.gov>; "JERGUSON, PAUL E" <paul.e.jerguson@dhs.gov>
Sent: Tuesday, October 27, 2009 9:30 PM
Subject: REQUEST FAIR HEARING ON GRIEVENCE OF DENIED BIB 9-05-09

My earlier inquiries in reference to grounds of denial for Placement Bid on September 05, 2009, have yet to be established as to any legal standards.

I found a recorded cell phone message late Thursday 10-22-09 from Scheduling Sprv., inquiring about a change of shift possibility for Friday 10-23-09 1400-2200, in order to confer in reference to something about my bid. I am unable to find any follow-up contact in order to respond.

I believe fully that a number of parties have abused use of authority in the handling of my January 02, 2009 Placement Bid, and now the same abuse of authority in the manners of this Bid matters seem totally out of the realm of legality.

I truly need and now therefore am requesting a copy of the Memo from LER John Breslin sent to APD Maria Otero in reference to my name listed as one of the Officers 'under investigation' for the January 2009 Bid Placement. Please assign in the entitlement to this information if there are actually, any legitimate processes occurring in Bid Placement Procedures at MIA.

It is seriously disturbing to witness methods being employed by very senior CBP/DHS personnel that are more and more appearing beyond being legal at any level.

This is an urgent request for correct managerial actions on official issues of Fair Labor Standards that are noted as not being fairly implemented.

Matters do not have to be noted as being in reprisal and retaliatory, before they are strongly indicated as being nothing but such.

Sincerely, Kenneth D. Humphrey, CBPO, MIA

p.s.... copies and records on person and in my CBP Personnel Files should indicate a vastness in work done for DHS/CBP-MIA, always above 110% in contacts with vast numbers of individuals in execution of actual duties, yet by chance, how a miniscule of close occurring incidents of job functions as 'CBPs Missions', brought up such maliciousness from CBP/MIA Management is still mind boggling that this would be leadership that anyone should dare follow.

EXHIBIT U3

10/28/2009

EXHIBIT

V

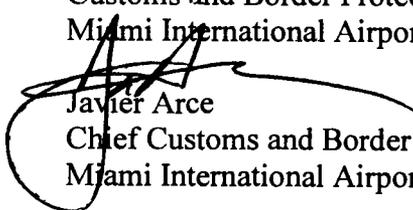
PO Box 997930
Miami, FL 33299-7930



**U.S. Customs and
Border Protection**

March 3, 2010

MEMORANDUM FOR: Mr. Kenneth Humphrey
Customs and Border Protection Officer
Miami International Airport

FROM: 
Javier Arce
Chief Customs and Border Protection Officer
Miami International Airport

SUBJECT: Letter of Leave Restriction

Dear Mr. Humphrey:

You are hereby issued this letter of leave restriction because you failed to maintain a regular and dependable work schedule. On 11/12/2009, you were verbally counseled about your unreliable attendance and were advised of the requirements you must meet before leave would be approved. In spite of the counseling you received, you have continued to take excessive amounts of unscheduled leave. As of February 23, 2010, you have used 16 hours of unscheduled annual leave and 48 hours of sick leave. Your current leave balance as of today is 5.5 hours of annual leave and eight (8) hours of sick leave. Since the date of your counseling you have used sick leave four (4) times on days immediately before or after your regular days off, and on six (6) times on days falling on the weekend.

As a result of your poor attendance record I find it necessary to reiterate in writing your responsibilities regarding attendance and requesting leave. You must observe the following:

- a. Your working hours are 1600 to 2400 pm. You are expected to be at your workstation ready to work at the beginning of your workday. If you are late for any reason, you must provide an explanation to a scheduling supervisor on duty as soon as you arrive for work.
- b. All leave requests must be documented on a SF-71, Application for Leave, and approved by the scheduling supervisor or, on duty supervisor, or chief at your work location if a scheduling supervisor is not available. You can reach

EXHIBIT V1

me at (305) [REDACTED] or (305) [REDACTED] if none of the above are available. You must not assume that your leave has been approved until a supervisor or chief have signed and acknowledged approval. For emergency leave requests, a SF-71 must be submitted for signature the day you return to work following the unscheduled absence.

- c. Annual leave and non-emergency sick leave (routine medical, dental or optical appointments) must be scheduled and approved by a scheduling supervisor at least 48 hours in advance of the day you wish to take leave. To request unscheduled annual or sick leave, you must personally contact the Duty Shift Supervisor no later than one (1) hour from the beginning of your work day. Such leave must be for a bonafide emergency only. The existence of an emergency situation will be determined by the scheduling supervisor or chief, or in the case of their absence, whoever the supervisor or chief is at your work location. Emergency situations are expected to occur only rarely. If no supervisor is available when you call, you must leave a phone number where you can be reached. Again, do not assume that leave has been approved until you receive confirmation from an appropriate supervisor or chief.
- d. Any request for unscheduled sick leave must be substantiated by a physician's certificate before the absence will be considered for approval. This certificate must be furnished by close of business not later than two (2) days following the sick leave absence not including RDOs. Pending receipt of the certificate and approval of leave, your absence will be recorded as AWOL. To be considered acceptable, a medical certificate must contain the following information:
 1. Your name;
 2. Statement that you were incapacitated for duty and/or why reporting for work was inadvisable;
 3. Nature of incapacitation;
 4. Duration of period of incapacitation and dates of office visits;
 5. Physician's signature, address, telephone number and date of certificate.
- e. Leave without pay (LWOP) will be approved only if your services can be spared without detriment to the work performed in our operations, and if you properly request it. You should be prepared to provide documentation supporting any request for leave without pay. If requesting approval for an absence, you must specify on the SF-71 if you have leave to cover the absence or if any part of the absence could result in leave without pay.

Failure to observe the requirements of this letter will be considered a failure to follow instructions, which may be the basis for disciplinary action, up to and including removal.

EXHIBIT V1

Absence for which leave is not approved will be recorded as AWOL, and may also result in disciplinary action.

If personal issues are impacting your ability to maintain a regular and reliable attendance record, you are strongly encouraged to contact Employee Assistance Program (EAP) on 1-800-755-7002. Qualified professionals staff the EAP, and its services are free and totally confidential. However, be advised that whether or not you take advantage of EAP's services, you will be held accountable for adhering to the instructions outlined above.

You remain under the restrictions above for a period of (6) six months. At that time, I will reassess your attendance record, and reserve the right to re-issue another letter of leave restriction if you fail to demonstrate significant improvement.

EXHIBIT V 1

HUMPHREY, KENNETH D

To... LAMBOGLIA, JOSE A; ARCE, JAVIER

Cc... DORMAN, LEONARD; CADAVID, LUIS; BRESLIN, JOHN H; ROSARIO, RAMON A

Bcc...

Subject: ADMINISTRATIVE GRIEVANCE FORM

Attachments: LETTER LEAVE RESTRICTION.pdf(137KB)

U.S. CUSTOMS AND BORDER PROTECTION

Administrative Grievance Form:

Kenneth D. Humphrey
CBPO
Passport Control/MIA
786 [REDACTED]

TO: JOSE A. LAMBOGLIA, UNION PRESIDENT, NTEU
JAVIER ARCE, CHIEF, CBP, MIA

March 19,2010

Attachment: see Letter of Leave Restriction

On March the 9th 2010, the above attached Letter of Leave Restriction was presented to me to acknowledge receipt of by SCBPO Ramon Rosario upon the request of Chief Javier Arce in witness. I informed on written notice that this Letter of Leave Restriction is an illegal stated requirement and restriction.

This is viewed as further retaliatory adverse actions by management of CBP/MIA.

There are no grounds that **SELF-CERTIFICATION** allowance sick leave request should not be afforded to me. There are no grounds that I now have the burden of personal Medical Cost in addition to being absent sick for one or two days in an occurrence.

Federal Rules of Civil Procedure as an EEOC Complainant are applicable provisions to seek temporary relief against unlawful employment retaliatory and discriminating activities such as this noted requirements and restrictions.

I am requesting a review of all MIA CBPO's sick leave records for the past few years to compare which officers received favoritism, nepotism, preferential treatment and partiality in comparison to which CBPO's received bias, discrimination, inequities, and one-sidedness in reference to sick leave occurrences. Without a doubt, the like-group that's more nepotistic to management will find to be the least to suffer Adverse Actions.

Here is the basic Mathematics and Statistics to the noted (suggested) violations:
Let's see the mathematical possibilities and what my percentages would be as an employee working on a rotating scheduled day off during a period noted in the attached letter, say from November 12th 2009 to March 3rd, 2010.
There were 82 possible work days.
I missed 8 as sick days (9.7%).
Only 6 sick days were in conjunction with a day off (which is 7.3% of the total 82 days scheduled to work).
Out of 82 work days during this noted period, 1 out every 3 (1/3) is in conjunction with a day off.
If I happen to call in sick for a two day absence then the percentage escalates in that I would more than likely be in conjunction with a day off.
Now if the weekends are also counted as an infraction as stated, then every other day I could not help but to be in violation of this imposed restriction of conjunctions to schedule days off and also now weekends.

A review of past years sick leave records of CBPO's will surely highlight that management's nepotistic like-groups could show higher sick and other absences and never incur the same ADVERSE ACTIONS being implemented here.

I continue to suffer irreparable harm because of CBP/MIA's retaliatory activities and am using this as further indications in seeking relief to stop retaliatory actions toward myself and other non-like-group individuals of CBP.

EXHIBIT V2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 11-cv-20651-LENARD/O’SULLIVAN

_____)
KENNETH D. HUMPHREY,)
)
<i>Plaintiff,</i>)
v.)
)
JANET NAPOLITANO, Secretary,)
United States Department of Homeland)
Security, <i>et al.,</i>)
)
<i>Defendants.</i>)
_____)

DEFENDANTS’ MOTION TO DISMISS

Defendants, through the undersigned Assistant United States Attorney, pursuant to Rule 12 (b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure and Rule 7.1.A of the Local Rules for the United States District Court for the Southern District of Florida, seek an order dismissing Plaintiff’s Complaint in its entirety. The accompanying memorandum sets forth all the grounds supporting the relief requested herein. A proposed Order is annexed to this Motion.

Dated: April 27, 2011

Respectfully submitted,

WIFREDO A. FERRER
UNITED STATES ATTORNEY

By: s/ Christopher Macchiaroli
Christopher Macchiaroli (No. A5501305)
Assistant United States Attorney
Email: Christopher.Macchiaroli@usdoj.gov
United States Attorney’s Office
99 N.E. 4th Street, Suite 300
Miami, Florida 33132
Tel. No. (305) 961-9420
Fax No. (305) 530-7139

Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2011, I electronically filed the foregoing “Defendants’ Motion to Dismiss” with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or *pro se* parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/Christopher Macchiaroli
Christopher Macchiaroli
Assistant United States Attorney

SERVICE LIST

Humphrey v. Napolitano, et al.
11-cv-20651-Lenard/O'Sullivan
United States District Court Southern District of Florida

Kenneth D. Humphrey
PO Box 42-1502
Miami, Florida 33242-1502

Plaintiff

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 11-cv-20651-LENARD/O’SULLIVAN

_____)
KENNETH D. HUMPHREY,)
)
<i>Plaintiff,</i>)
v.)
)
JANET NAPOLITANO, Secretary,)
United States Department of Homeland)
Security, <i>et al.</i> ,)
)
<i>Defendants.</i>)
_____)

**MEMORANDUM IN SUPPORT OF
DEFENDANT’S MOTION TO DISMISS**

Pro-Se Plaintiff Kenneth D. Humphrey — a former employee of the United States Customs and Border Protection (CBP) agency — brings the present employment discrimination action pursuant to five different federal statutes. For the following reasons, Plaintiff’s Complaint should be dismissed in its entirety.

First, sovereign immunity bars Plaintiff’s claims against the Equal Employment Opportunity Commission.

Second, Plaintiff fails to state a claim under the False Claims Act because he is not bringing an action on behalf of the United States and has not alleged any fraud committed against the United States.

Third, Plaintiff has failed to exhaust his administrative remedies pursuant to the Whistleblower Protection Act of 1989 and even if he did exhaust — which he did not — Plaintiff fails to allege any “protected disclosure” sufficient to state a whistleblower claim.

Fourth, Plaintiff fails to state a claim under the Conspiracy to Obstruct Justice Act

because he fails to allege any facts to support a “conspiracy” by two or more people to discriminate against him or individuals in his racial and/or age classification.

Fifth, Plaintiff failed to exhaust his administrative remedies on his claim of retaliation and even if he did exhaust — which he did not — Plaintiff fails to state a claim of retaliation because Plaintiff: (i) fails to allege any retaliatory action post-dating the filing of his EEO complaint; (ii) fails to allege any facts by which this Court could conclude that any of Plaintiff’s colleagues — especially CBP’s “decision makers” — were even aware of his verbal request for EEO counseling and retaliated against him in response; (iii) fails to allege any facts that would constitute adverse employment actions; and (iv) fails to allege any facts that establish a causal link between his verbal request for EEO counseling and CBP’s investigation of the events of November 12, 2008, especially when Plaintiff concedes that CBP’s investigation commenced prior to Plaintiff’s request for EEO counseling.

Sixth, Plaintiff does not state a claim of disparate treatment because Plaintiff fails to allege that similarly situated individuals outside his protected group engaged in similar conduct, but received more favorable treatment under the same circumstances.

For all these reasons, Plaintiff’s Complaint should be dismissed in its entirety.

FACTUAL BACKGROUND

Plaintiff Kenneth D. Humphrey was employed by CBP from January 2000 to May 2010. *See* Compl. at ¶ 2 (D.E. 1).¹ On February 22, 2009, Plaintiff filed a formal EEO Complaint

¹ Plaintiff is no stranger to this Court and is well aware of the pleading requirements of Rule 8 of the Federal Rules of Civil Procedure as he has previously commenced five separate civil rights actions, including multiple duplicative matters. *See, e.g., Humphrey v. United Parcel Serv. Co.*, 05-cv-20283, 2005 WL 5643872, at *1-2 (S.D. Fla. May 23, 2005), *aff’d*, 200 F. App’x 950, 952 (11th Cir. 2006) (dismissing discrimination and RICO complaint “arising out of UPS’ alleged failure to deliver [Plaintiff] packages that were ordered from Dell”); *Humphrey v. United Parcel*

relating to conduct that took place in November 2008. *See* EEO Compl. (attached hereto as Exhibit 1).² On March 18, 2009, CBP — based on Plaintiff’s formal EEO Complaint — notified Plaintiff that the following claims were accepted for investigation:

Whether Customs and Border Protection discriminated against Complainant, CBP Officer, GS-1895-11, assigned to the Miami International Airport, Miami, FL. based on his race/national origin/color (African American/Black) and age (Date of Birth: April 26, 1945) when: (1) on or around November 12, 2008, he was removed from field duties with the Anti-Terrorism Contraband Enforcement Team (AT-CET), assigned desk duties and not permitted to work overtime in the field; (2) on or around January 21, 2009, he was notified that his bid rotation was denied; and (3) on February 16, 2009, he was assigned to Passenger Control.

CBP’s Mar. 18, 2009 Ltr. at 1-2 (attached hereto as Exhibit 2). In its claim construction letter, CBP notified Plaintiff that “[i]f [he] disagree[d] with the issues” identified, he was to notify CBP “in writing within 15 days” and “[i]f no response was received,” CBP would “assume that [Plaintiff] agree[d] with the issues and w[ould] proceed with the investigation of the complaint.” *Id.* at 2. Plaintiff did not respond to CBP’s claim construction letter, offered no amendments to his formal EEO complaint, and proceeded with an administrative litigation of his EEO claims. On November 16, 2010, Administrative Judge (AJ) Ana M. Lehmann — without the necessity of a hearing — found that Plaintiff did not establish that he was the victim of either race or age discrimination and entered judgment for CBP. *See* Nov. 16, 2010 Dec. at 9 (attached hereto as

Serv. Co., 04-cv-22553 (D.E. 32) (dismissing separate action initiated only against the United Parcel Service); *Humphrey v. Florida Mem.*, 94-cv-11 (D.E. 18) (adopting Report and Recommendation that recommended the dismissal of Plaintiff’s civil rights complaint); *Humphrey v. Florida Mem.*, 93-cv-2573 (D.E. 38) (same); *Humphrey v. Florida Mem.*, 93-cv-2572 (D.E. 46) (granting defendant’s motion to dismiss Plaintiff’s amended civil rights complaint).

² While a “court is generally limited to reviewing what is within the four corners of the complaint on a motion to dismiss, a district court may consider a document attached to a motion to dismiss without converting the motion into a motion for summary judgment where, as here, the document is central to the plaintiff’s claim, and its authenticity is not challenged.” *Fetterhoff v. Liberty Life Assur. Co.*, 282 F. App’x 740, 743 (11th Cir. 2008) (citations and punctuation omitted).

Exhibit 3). A final agency decision — adopting the AJ’s findings — was issued on December 5, 2010. *See* Dec. 5, 2010 CBP Dec. at 1 (attached hereto as Exhibit 4). On February 25, 2011, Plaintiff commenced the present federal court action against CBP and the United States Equal Employment Commission (EEOC).³

ARGUMENT

I. SOVEREIGN IMMUNITY BARS PLAINTIFF’S CLAIMS AGAINST THE EEOC

“The United States, as sovereign, is immune from suit save as it consents to be sued.” *United States v. Sherwood*, 312 U.S. 584, 586 (1941) (citations omitted). The “Supreme Court has ruled sovereign immunity shields federal agencies from suit unless that agency waived sovereign immunity.” *Reeves v. DSI Sec. Servs.*, 331 F. App’x 659, 661 (11th Cir. 2009) (citing *Dep’t of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 260 (1999)). A waiver of sovereign immunity has been recognized as a “prerequisite for jurisdiction” in a suit against the United States (*United States v. Mitchell*, 463 U.S. 206, 212 (1983)) and “must be unequivocally expressed in statutory text.” *Lane v. Pena*, 518 U.S. 187, 192 (1996).

Plaintiff has named the EEOC as a defendant in this action based on Plaintiff’s claim that the “EEOC process seldom [] provide[s] fair opportunities for *Pro se* Complainants.” Compl. at ¶ 70 (D.E. 1). As the EEOC was not Plaintiff’s employer, Title VII does not allow Plaintiff to obtain any relief against the EEOC. *See Reeves*, 331 F. App’x at 661 (affirming dismissal of Title VII claim against the EEOC); *Irwin v. Miami-Dade County Pub. Sch.*, 398 F. App’x 503, 506 (11th Cir. 2010) (“The remedy for employment discrimination is to sue the discriminating employer, not the investigating agency”); *see also Gibson v. Missouri Pac. R.R. Co.*, 579 F.2d

³ Plaintiff voluntarily retired from his employment with CBP on May 31, 2010 and he is not alleging in this matter that he was wrongfully terminated.

890, 891 (5th Cir. 1978) (“Title VII . . . confers no right of action against the enforcement agency. Nothing done or omitted by EEOC affected [Plaintiff’s] rights.”); *Smith v. Casellas*, 119 F.3d 33, 34 (D.C. Cir. 1997) (“We affirm, the district court’s dismissal of the complaint and do so in a published opinion in order to join our sister circuits in holding that Congress has not authorized, either expressly or impliedly, a cause of action against the EEOC for the EEOC’s alleged negligence or other malfeasance in processing an employment discrimination charge.”) (citations omitted).

As the EEOC “is a federal agency, and there is no evidence in the record that the EEOC waived sovereign immunity” to be sued in this case, Plaintiff “is precluded from bringing suit against the EEOC under another provision of federal law.” *Reeves*, 331 F. App’x at 661 (citation omitted); *accord Smith*, 119 F.3d at 34. Accordingly, the EEOC should be dismissed as a defendant in this action.

II. PLAINTIFF FAILS TO STATE A CLAIM UNDER THE FALSE CLAIMS ACT

The False Claims Act (FCA), 31 U.S.C. § 3729 *et seq.*, empowers the United States, or private citizens on behalf of the United States, to recover treble damages from those who knowingly make false claims for money or property upon the United States, or who submit false information in support of such claims. Plaintiff is not bringing an action on behalf of the United States and makes no allegations of fraud in his complaint. Accordingly, Count IV of Plaintiff’s Complaint — alleging a claim under the False Claims Act — should be dismissed. *See Ercole v. LaHood*, No. 07–CV–2049 (JFB)(AKT), 2011 WL 1205137, at *13 (E.D.N.Y. Mar. 29, 2011) (dismissing *pro se* federal employee’s FCA claim because plaintiff was “not bringing an action on behalf of the United States and ma[de] no allegations of fraud in his complaint”); *Mack v. United States Postal Servs.*, No. 92-CV-0068 (FB), 1998 WL 546624, at *7 (E.D.N.Y. Aug. 26,

1998) (rejecting and dismissing *pro se* federal employee's FCA claim as having not been brought "on behalf of the government").

III. PLAINTIFF'S WHISTLEBLOWER CLAIM SHOULD BE DISMISSED

A. Plaintiff Has Failed To Exhaust His Administrative Remedies

The Whistleblower Protection Act of 1989 (WPA) "provides protection to federal employees against agency reprisal for whistleblowing activities, such as disclosing illegal conduct, gross mismanagement, gross waste of funds, or acts presenting substantial dangers to health and safety." *See Hendrix v. Snow*, 170 F. App'x 68, 78 (11th Cir. 2006) (citing 5 U.S.C. § 2302(b)(8)). The "Civil Service Reform Act (CSRA) provides the exclusive remedy for claims brought pursuant to the WPA." *Fleeger v. Principi*, 221 F. App'x 111, 115 (3d Cir. 2007) (citing *Richards v. Kiernan*, 461 F.3d 880, 885-86 (7th Cir. 2006)); *accord Hendrix*, 170 F. App'x at 78-79. Pursuant to the Civil Service Reform Act (CSRA), after a federal employee alleging a WPA violation files his claim with the Office of Special Counsel (OSC), the OSC investigates the claim and may thereafter petition the United States Merit Systems Protection Board (MSPB) on behalf of the employee if the OSC finds a violation. *Hendrix*, 170 F. App'x at 79 (citing 5 U.S.C. §§ 1214(a)(3), 1221). If the OSC does not find a violation, the employee, himself, may seek review before the MSPB. *See Hendrix*, 170 F. App'x. at 79. The decision of the MSPB is then appealable to the U.S. Court of Appeals for the Federal Circuit. *Id.* (citing 5 U.S.C. § 7703); *accord Best v. Adjutant Gen., State of Florida, Dept. of Military Affairs*, 400 F.3d 889, 891-92 (11th Cir. 2005) (conveying appellate jurisdiction to the "Federal Circuit").

"The only way that an agency decision under the WPA may be reviewed by a federal court, other than the Federal Circuit, is if the plaintiff has filed a 'mixed case' complaint-that is, a complaint that raises, in addition to claims under the CSRA like whistleblowing, issues under

various anti-discrimination statutes.” *Fleeger*, 221 F. App’x at 115 (citing 5 U.S.C. § 7703(b)(2)).

In this case, Plaintiff never raised a whistleblower claim when filing his administrative employment administrative complaint (*see* Exs. 1-4) and his failure to do so warrants the dismissal of his claim in this action. *See, e.g., Fleeger*, 221 F. App’x at 115 (dismissing WPA claim because plaintiff “did not attempt to pursue such a claim and therefore did not exhaust her remedies”); *Hamilton v. Geithner*, 743 F. Supp. 2d 1, 13-14 (D.D.C. 2010) (dismissing WPA claim because “there [was] no evidence that [] plaintiff exhausted his administrative remedies before either the EEO office or the MSPB”); *Floyd v. United States Dep’t of Homeland Sec.*, No. RDB-09-0735, 2009 WL 3614830, at *3 (D. Md. Oct. 27, 2009) (dismissing WPA claim for lack of exhaustion); *Baney v. Mukasey*, No. 3:06-CV-2064-L, 2008 WL 2673753, at *4 (N.D. Tex. Jun. 30, 2008) (finding lack of exhaustion based in part on “Plaintiff’s EEO complaint rais[ing] only racial discrimination claims [. . . and] when an EEO officer for the BOP requested clarification of the issues raised in the EEO complaint, Plaintiff responded by reiterating his allegations of racial discrimination[. . .and did] not mention anything about whistleblower retaliation”); *Sperber v. Nicholson*, No. C-3-05-363, 2007 WL 4165163, at *7 (S.D. Ohio Nov. 19, 2007) (dismissing WPA claim for lack of exhaustion).

B. Even If Plaintiff Properly Exhausted His Administrative Remedies — Which He Did Not — Plaintiff Fails To Allege Any “Protected Disclosures” Sufficient To State A Claim Under The WPA

To establish a *prima facie* case of retaliation for whistleblowing activity, Plaintiff “must show both that he engaged in whistleblowing activity by making a disclosure protected under 5 U.S.C. § 2302(b)(8), and that his protected disclosure was a contributing factor in a personnel action.” *Yost v. Dep’t of Health and Human Servs.*, 4 F. App’x 900, 902 (Fed. Cir. 2001) (citing 5

U.S.C. §§ 1221(e)(1), 2302(b)(8)). A critical element of the *prima facie* case is evidence that the accused decision-making official knew of the plaintiff's disclosure. *See Stanek v. Dep't of Transp.*, 805 F.2d 1572, 1580 (Fed. Cir. 1986). "A protected disclosure is a disclosure which an employee reasonably believes evidences '(i) a violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.'" *Yost*, 4 F. App'x at 902 (citing 5 U.S.C. § 2302(b)(8)).

Plaintiff fails to allege any protected disclosure or adverse employment action in response to that disclosure sufficient to state a WPA claim. *See Floyd*, 2009 WL 3614830, at *3 (finding plaintiff to have failed to state a WPA claim when plaintiff did not "identify any protected disclosure, [or] allege any causally-related adverse personnel action"). Moreover, Plaintiff's "protected activity under Title VII and the ADEA does not constitute protected disclosures under the WPA." *Stoyanov v. Winter*, 643 F. Supp. 2d 4, 10 (D.D.C. 2009)

IV. PLAINTIFF FAILS TO STATE A CLAIM UNDER THE CONSPIRACY TO OBSTRUCT JUSTICE ACT

The Conspiracy to Obstruct Justice Act has three specific sections. Section 1 protects against conspiracies to prevent "officer[s] from performing duties."⁴ Section 2 protects against conspiracies to intimidate a party, witness, or juror from attending or testifying in federal court.⁵

⁴ Section 1985(1) prohibits "two or more persons in any State or Territory conspire[ing] to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof[.]" 42 U.S.C. § 1985(1). "The purpose of this section is to proscribe conspiracies that interfere with the performance of official duties by federal officers." *Morast v. Lance*, 807 F.2d 926, 929 (11th Cir. 1987) (citation omitted).

⁵ The "elements of a conspiracy claim under § 1985(2) are: (1) a conspiracy; (2) to deter a witness by force, intimidation, or threat from attending or testifying before a United States court; (3) that results in injury to the plaintiff." *Moore v. Potter*, 141 F. App'x 803, 806 (11th Cir. 2005) (citing *Morast*, 807 F.2d at 929-30).

Section 3 protects against a conspiracy to deprive “persons of rights or privileges.” 42 U.S.C. § 1985(1)-(3).

After a liberal and searching examination of Plaintiff’s Complaint, it appears that Plaintiff is attempting to state a claim under section 3. To “state a claim under § 1985(3), a plaintiff must allege: (1) defendants engaged in a conspiracy; (2) the conspiracy’s purpose was to directly or indirectly deprive a protected person or class the equal protection of the laws, or equal privileges and immunities under the laws; (3) a conspirator committed an act to further the conspiracy; and (4) as a result, the plaintiff suffered injury to either his person or his property, or was deprived of a right or privilege of a citizen of the United States.” *Jimenez v. Wellstar Health Sys.*, 596 F.3d 1304, 1312 (11th Cir. 2010) (citing *Johnson v. City of Fort Lauderdale*, 126 F.3d 1372, 1379 (11th Cir. 1997)). Additionally, the second element requires a plaintiff show “some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators’ action.” *Lucero v. Operation Rescue of Birmingham*, 954 F.2d 624, 628 (11th Cir. 1992) (citation omitted); *see Trawinski v. United Techs.*, 313 F.3d 1295, 1299 (11th Cir. 2002) (requiring allegations supporting an “invidious discriminatory intent”).

Plaintiff’s Complaint fails to allege *any* facts to support a conspiracy by any individuals with an “invidiously discriminatory animus” towards either Plaintiff or individuals in his racial or age classification. *See, e.g., Mickens v. Tenth Judicial Circuit*, 181 F. App’x 865, 876 (11th Cir. 2006) (affirming dismissal of § 1985(3) conspiracy claim because plaintiffs “failed to allege with specificity an agreement between the defendants to deprive the [plaintiffs] of their rights”); *Bell v. Metro. Atlanta Rapid Transit Auth.*, No. 1:10-CV-1117-JEC, 2011 WL 1225899, at *6 (N.D. Ga. Mar. 30, 2011) (dismissing conspiracy claim when plaintiff included “no allegations” supporting a “discriminatory animus”); *Artubel v. Colonial Bank Group, Inc.*, No. 8:08-cv-179-

T-23MAP, 2008 WL 3411785, at *13 (M.D. Fla. Aug. 8, 2008) (dismissing conspiracy claim when “complaint fail[ed] to allege facts sufficient to support an inference of race-based animus”); *Sanders-Alloway v. Mabry*, No. 2:06-cv-0419-MEF, 2008 WL 552648, at *5 (M.D. Ala. Feb. 27, 2008) (dismissing conspiracy claim when plaintiff failed to allege any facts substantiating an agreement and “no act in furtherance of the conspiracy”); *Leitgeb v. Kelley*, 510 F. Supp. 2d 1227, 1236 (N.D. Ga. 2007) (dismissing conspiracy claim and holding that “[i]n the absence of either an allegation that Defendants agreed to violate their rights, or that the agreement was motivated by class-based animus, a claim for conspiracy, whether to prevent participation in federal court proceedings or to deprive a person of equal protection under the law, fails as a matter of law”); *Cromer v. Crowder*, 273 F. Supp. 2d 1329, 1336 (S.D. Fla. 2003) (entering judgment for defendant on conspiracy claim because record did not “yield any evidence that Defendants concerted to undertake, nor actually took, any discriminatory action”).

Accordingly, Count V of Plaintiff’s Complaint — alleging a conspiracy to obstruct justice — should be dismissed.

V. PLAINTIFF’S RETALIATION CLAIM SHOULD BE DISMISSED

A. Plaintiff Has Failed To Exhaust His Administrative Remedies

Before filing a Title VII action, “a federal employee must exhaust h[is] administrative remedies.” *Andrews-Willmann v. Paulson*, 287 F. App’x 741, 745 (11th Cir. 2008) (citing *Crawford v. Babbitt*, 186 F.3d 1322, 1326 (11th Cir. 1999), 42 U.S.C. § 2000e-16(c)). “The purpose of [requiring the] exhaustion [of administrative remedies] is to give [an] agency the information it needs to investigate and resolve the dispute between the employee and the employer.” *Wade v. Sec’y of Army*, 796 F.2d 1369, 1377 (11th Cir. 1986).

On February 22, 2009, Plaintiff filed a formal EEO Complaint (*see* Ex. 1). On March 18,

2009, Defendant — based on Plaintiff’s formal EEO Complaint — notified Plaintiff that the following claims were accepted for investigation:

Whether Customs and Border Protection discriminated against Complainant, CBP Officer, GS-1895-11, assigned to the Miami International Airport, Miami, FL, based on his race/national origin/color (African American/Black) and age (Date of Birth: April 26, 1945) when: (1) on or around November 12, 2008, he was removed from field duties with the Anti-Terrorism Contraband Enforcement Team (AT-CET), assigned desk duties and not permitted to work overtime in the field; (2) on or around January 21, 2009, he was notified that his bid rotation was denied; and (3) on February 16, 2009, he was assigned to Passenger Control.

Ex. 2 at 1-2. In its claim construction letter, CBP notified Plaintiff that “[i]f [he] disagree[d] with the issues,” he was to notify CBP “in writing within 15 days of the date of receipt of th[e] letter” and “[i]f no response was received,” CBP would “assume that [Plaintiff] agree[d] with the issues and w[ould] proceed with the investigation of the complaint.” *Id.* at 2. Plaintiff did not respond to CBP’s construction letter, offered no amendments to his formal EEO complaint, and proceeded with an administrative litigation of his EEO claims. On November 16, 2010, Administrative Judge (AJ) Ana M. Lehmann found that Plaintiff had not established that he was the victim of race and age discrimination. *See* Ex. 3 at 9; *see also* Ex. 4 (identifying the specific claims raised by Plaintiff). Because Plaintiff never presented a retaliation claim for evaluation at the administrative level, Plaintiff’s instant attempt to now claim retaliation should be dismissed. *See, e.g., Andrews-Willmann v. Paulson*, 287 F. App’x 741, 744, 746 (11th Cir. 2008) (affirming judgment for Government when plaintiff failed to exhaust his administrative remedies on his retaliation claim even after the Government afforded him an opportunity to amend the construction of his EEO complaint); *Ramon v. AT & T Broadband*, 195 F. App’x 860, 866 (11th Cir. 2006) (affirming district court’s finding that plaintiff did not exhaust her administrative remedies on her claim of retaliation); *Hillemann v. Univ. of Central Fla.*, 167 F. App’x 747, 749-

50 (11th Cir. 2006) (affirming summary judgment on retaliation claim when “[t]he EEOC charge was silent about . . . retaliation”); *Green v. Elixir Indus., Inc.*, 152 F. App’x 838, 840-41 (11th Cir. 2005) (affirming summary judgment on retaliation claim because “all of the factual allegations contained in Green’s EEOC charge relate[d] to his termination and none relate[d] to a retaliation claim”).

The United States Court of Appeals decision in *Andrews-Willmann v. Paulson* is instructive as to why Plaintiff’s retaliation claim should be dismissed for failure to exhaust administrative remedies. In *Andrews-Willmann*, plaintiff “filed a formal EEO complaint with the Treasury Department.” 287 F. App’x at 744. Based on a review of plaintiff’s complaint, the agency issued a letter to plaintiff that construed her complaint as “harassment on the bas[is] of her physical disability [] and/or retaliation for prior EEO complaint activity” and listed” [] “five [specific] activities for investigation.” *Id.* Moreover, the agency gave plaintiff “fifteen days to notify the agency if she disagreed with the claims listed in the letter.” *Id.* Plaintiff raised no objections “to the claims as identified in the letter.” *Id.* The agency found no discrimination and the EEOC affirmed the agency’s determination and issued a right to sue letter. *Id.* Plaintiff then commenced a federal court action. When plaintiff attempted to assert a “retaliatory failure-to-promote claim” in the first instance in federal court, the district court found that plaintiff failed to exhaust administrative remedies on that claim and entered judgment for the Government. *Id.* at 745. The Eleventh Circuit affirmed and stated:

[D]uring the administrative process, the Treasury Department identified from Andrews Willmann’s complaint five alleged retaliatory acts of harassment, none of which involved a failure to promote. Andrews-Willmann was ***given an opportunity to object to the claims identified, but did not.*** Because Andrews-Willmann failed to present a retaliatory failure-to-promote claim in her EEO complaint, the agency did not investigate or develop a factual record on such a claim. Accordingly, the district court did not err in concluding that Andrews-

Willmann failed to exhaust her failure-to-promote claim.

Id. at 746 (emphasis added).

As in *Andrews-Willmann*, Plaintiff was provided a claim construction letter that identified the type of discrimination he was claiming and the specific actions that were being investigated. *See* Ex. 2. at 1-2. Moreover, as in *Andrews-Willmann*, Plaintiff was given an opportunity to object to the claims as construed and chose not to. Consistent with the Eleventh Circuit's decision, Plaintiff's purported retaliation claim — now appearing for the first time and not identified in CBP's construction letter — should be dismissed for failure to exhaust administrative remedies.

B. Even If Plaintiff Exhausted His Administrative Remedies — Which He Did Not — Plaintiff Fails To State A Claim Of Retaliation

In order to establish a *prima facie* case of retaliation, Plaintiff must show that: (1) he engaged in statutorily protected expression; (2) he suffered an adverse employment action; and (3) there was a causal link between the protected expression and the adverse action. *See Palmer v. Albertson's LLC*, No. 10-11488, 2011 WL 1045780, at *3 (11th Cir. Mar. 23, 2011); *Smalley v. Holder*, No. 09-cv-21253, 2011 WL 649355, at *9 (S.D. Fla. Feb. 22, 2011). To establish an actionable "adverse action," plaintiff must "show an employment act which is 'material and significant and not trivial,' one which 'might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Burgos-Stefanelli v. Napolitano*, No. 09-cv-60118, 2010 WL 785802, at *9 (S.D. Fla. Mar. 5, 2010) (citations omitted); *see also Davis v. Town of Lake Park, Florida*, 245 F.3d 1232, 1239 (11th Cir. 2001) (holding "an employee must show a *serious and material* change in the terms, conditions, or privileges of employment . . . [,] as viewed by a reasonable person in the circumstances" in order to establish an adverse

employment action) (emphasis in original). To establish a causal connection between EEO activity and retaliatory conduct, a plaintiff “must show that the decisionmaker was aware of the protected activity.” *Walton-Horton v. Hyundai of Alabama*, 402 F. App’x 405, 2010 WL 4121303, at *4 (11th Cir. 2010) (quoting *Higdon v. Jackson*, 393 F.3d 1211, 1220 (11th Cir. 2004)).

For the following reasons, Plaintiff’s Complaint fails to state a claim of retaliation. **First**, Plaintiff filed a complaint of discrimination on February 22, 2009 (*see* Ex. 1) and fails to allege any retaliatory action post-dating the filing of his EEO complaint. **Second**, while Plaintiff sought EEO counseling on December 8, 2008 (*see* Compl. at ¶ 16; Ex. 1 at 2, ¶19), Plaintiff’s Complaint fails to allege any facts by which this Court could conclude that any of Plaintiff’s colleagues — especially CBP “decision makers” — were even aware of his verbal request for EEO counseling and retaliated against him in response. **Third**, Plaintiff fails to allege any facts, which would constitute adverse employment actions. While Plaintiff alleges that he was not allowed to bid on a new position while there was an ongoing investigation into his actions relating to the detaining of airport employees on November 12, 2008 (*see* Compl. at ¶¶ 26, 31), such an event did not alter the terms of Plaintiff’s employment. *See Entrekin v. City of Panama City Florida*, 376 F. App’x 987, 995 (11th Cir. 2010) (finding an investigation into plaintiff that did not ultimately lead to any action taken against him not to constitute an “adverse action”); *Rademakers v. Scott*, 350 F. App’x 408, 408, 413 (11th Cir. 2009) (finding investigation into “inappropriate conduct” not to constitute an adverse event). Moreover, a temporary transfer during the course of an investigation — that does not result in the loss of pay or rank — does not constitute an adverse event. *See Barnhart v. Wal-Mart Stores, Inc.*, 206 F. App’x 890, 893 (11th Cir. 2006) (finding neither a lateral transfer not resulting in lesser pay or responsibilities, nor the

refusal to give an employee such a transfer to constitute an adverse event). *Fourth*, Plaintiff fails to allege any facts that would even establish a causal link between his verbal request for EEO counseling and CBP's investigation of the events of November 12, 2008, especially when Plaintiff concedes that CBP's investigation commenced *prior to* Plaintiff's request for EEO counseling (*see* Compl. at ¶ 28).

For all these reasons, Plaintiff's claim of retaliation should be dismissed.

VI. PLAINTIFF FAILS TO STATE A CLAIM OF RACE AND AGE DISCRIMINATION

Dismissal for failure to state a claim is proper if the factual allegations are not "enough to raise a right to relief above the speculative level." *Edwards v. Prime, Inc.*, 602 F.3d 1276, 1291 (11th Cir. 2010) (quoting *Rivell v. Private Health Care Sys., Inc.*, 520 F.3d 1308, 1309 (11th Cir. 2008), *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). To survive a motion to dismiss, a plaintiff's complaint must include "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. "Stated differently, the factual allegations in the complaint must possess enough heft to set forth a plausible entitlement to relief." *Edwards*, 602 F.3d at 1291 (citations omitted). A plaintiff's obligation to provide the "grounds" of his "entitlement to relief" requires more than "labels and conclusions," and a "formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. Absent the necessary factual allegations, "unadorned, the-defendant-unlawfully-harmed-me accusation[s]" will not suffice. *Ashcroft v. Iqbal*, --- U.S. ----, 129 S. Ct. 1937, 1949 (2009). While a discrimination "complaint need not allege facts sufficient to make out a classic *McDonnell Douglas prima facie* case," it must "provide enough factual matter (taken as true) to *suggest* intentional [] discrimination." *Davis v. Coca-Cola Bottling Co. Consol.*, 516 F.3d 955, 974 (11th Cir. 2008) (emphasis added).

Title VII prohibits an employer from discharging or otherwise discriminating against a person based on the person's race, color, religion, sex, or national origin, or retaliating against an employee for reporting discrimination. *See* 42 U.S.C. § 2000e, *et seq.* The ADEA prohibits age discrimination in employment. *See* 29 U.S.C. § 633a(a).⁶

To “establish a *prima facie* case of disparate treatment, Plaintiff must demonstrate that (1) he is a member of a protected class; (2) he was subjected to an adverse employment action; and (3) his employer treated similarly situated employees outside of her protected class more favorably than she was treated. *See Smalley*, 2011 WL 649355, at *3 (citing *Burke-Fowler v. Orange County*, 447 F.3d 1319, 1323 (11th Cir. 2006)). For purpose of disparate impact analysis, the “comparator employee[s] Plaintiff identifies must be similarly situated “*in all relevant respects.*” *Dawson v. Miami-Dade County*, No. 07-cv-20126, 2008 WL 1924266, at *9 (S.D. Fla. Mar. 11, 2008) (emphasis added) (citing *Phillips v. Aaron Rents, Inc.*, 262 F. App'x 202, 208 (11th Cir. 2008), *Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079, 1091 (11th Cir. 2004)).

In his Complaint, Plaintiff fails to allege even generally that similarly situated individuals outside his protected group engaged in similar conduct, but received more favorable treatment under the same circumstances. Plaintiff's pleading deficiency warrants the dismissal of his claims of race and age discrimination. *See, e.g., Hopkins v. Saint Lucie County Sch. Bd.*, 399 F.

⁶ Count III of Plaintiff's Complaint also appears to be based on the Vietnam Era Veterans Readjustment Assistance Act of 1974 (VEVRAA). *See* Compl. at Count III (D.E. 1)). According to the United States Supreme Court, “this Act was designed for the purpose of protecting against discrimination ‘motivated *solely* by reserve status.’” *Brown v. Orgill Bros. & Co.*, No. 93-1074-CIV-J-20, 1993 WL 548816, at *2 (M.D. Fla. Oct. 8, 1993) (quoting *Monroe v. Standard Oil Co.*, 452 U.S. 549, 559 (1981)) (emphasis in original). “Because Plaintiff's Complaint sets forth a mixed motive theory of recovery, also alleging discrimination on the basis of race [and age], his claim under VEVRAA is not actionable in this Court.” *Brown*, 1993 WL 548816, at *2.

App'x 563, 566 (11th Cir. 2010) (affirming dismissal of *pro se* complaint alleging disparate treatment when plaintiff "provide[d] no facts that would allow a court to infer that the school district treated those outside the class of African-American males more favorably"); *Crawford v. City of Tampa*, 397 F. App'x 621, 623 (11th Cir. 2010) (affirming dismissal of *pro se* complaint alleging disparate treatment when plaintiff "failed to identify appropriate comparators whose treatment would indicate race-based disparity") (citation omitted).

CONCLUSION

For all these reasons, Plaintiff's Complaint should be dismissed in its entirety.

Dated: April 27, 2011

Respectfully submitted,

WIFREDO A. FERRER
UNITED STATES ATTORNEY

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Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2011, I electronically filed the foregoing “Memorandum in Support of Defendants’ Motion to Dismiss” with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or *pro se* parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/Christopher Macchiaroli
Christopher Macchiaroli
Assistant United States Attorney

SERVICE LIST

Humphrey v. Napolitano, et al.
11-cv-20651-Lenard/O'Sullivan
United States District Court Southern District of Florida

Kenneth D. Humphrey (*via First-Class Mail*)

PO Box 42-1502

Miami, Florida 33242-1502

Plaintiff

Exhibit 1

OMB No. 1610-0001 Ex

EXHIBIT A1

DEPARTMENT OF HOMELAND SECURITY INDIVIDUAL COMPLAINT OF EMPLOYMENT DISCRIMINATION <i>(Use this form for original complaints and amendments.)</i>	FOI DEPARTMENT CASE NUMBER IS-09-EBP-003066-090104 FILING DATE 2/23/09
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PART I COMPLAINANT IDENTIFICATION

1. NAME (Last, First, Middle Initial) HUMPHREY, Kenneth D	5. NAME AND ADDRESS OF ORGANIZATION WHERE YOU WORK (If a Department of Homeland Security Employee) Bureau or Component DHS/CBP CUSTOMS and BORDER PROTECTION Office and Organizational Unit Passenger Control/Baggage Control Street Address MIAMI INTERNATIONAL AIRPORT City State Zip Code Miami FL 33122
2. TELEPHONE/FAX (Include Area Code) Home 786-274-1919 Fax 786-274-7333 Work 305-331-0366 Fax	6. EMPLOYMENT STATUS IN RELATION TO THIS COMPLAINT <input type="checkbox"/> Applicant <input type="checkbox"/> Probationary <input checked="" type="checkbox"/> Career/Career Conditional <input type="checkbox"/> Uniformed Service Member <input type="checkbox"/> Former Employee/Member FEB 24 2009 Date Left Department <input type="checkbox"/> Retired _____ Date of Retirement <input checked="" type="checkbox"/> Other (Specify) current employee
3. HOME ADDRESS (You must notify the Department of any change of address while complaint is pending, or your complaint may be dismissed.) 1750 N.E. 191st Street, D209 Miami, FL 33179	
4. IF YOU ARE A CURRENT OR FORMER EMPLOYEE OF THE FEDERAL GOVERNMENT, LIST YOUR RECENT TITLE, SERIES, AND GRADE. Title CBPO Series 1895 Grade 11-5	

7. I certify that all statements made in this complaint are true, complete, and correct to the best of my knowledge and belief.

SIGNATURE OF COMPLAINANT OR ATTORNEY REPRESENTATIVE 	DATE 02/22/2009
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PART II DESIGNATION OF REPRESENTATIVE

8. YOU MAY REPRESENT YOURSELF IN THIS COMPLAINT OR YOU MAY CHOOSE SOMEONE TO REPRESENT YOU. YOUR REPRESENTATIVE DOES NOT HAVE TO BE AN ATTORNEY. YOU MAY CHANGE YOUR DESIGNATION OF A REPRESENTATIVE AT A LATER DATE, BUT YOU MUST NOTIFY THE DEPARTMENT IMMEDIATELY IN WRITING OF ANY CHANGE, AND YOU MUST INCLUDE THE SAME INFORMATION REQUESTED IN THIS PART.

"I hereby designate (Please Print Name) Kenneth D Humphrey (self) to serve as my representative during the course of this complaint. I understand that my representative is authorized to act on my behalf."

Is the representative an attorney? YES NO

9. REPRESENTATIVE'S MAILING ADDRESS FIRM/ORGANIZATION (same as above) STREET ADDRESS CITY, STATE, & ZIP CODE	10. REPRESENTATIVE'S EMPLOYER (If Federal Agency) (same as above) 11. REPRESENTATIVE'S TELEPHONE/FAX (Include Area Code) Telephone _____ Fax _____ 12a. COMPLAINANT'S SIGNATURE 12b. DATE 02/22/2009
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000022