The first draft the Deputy Department Head provided to the Department Head had several marks of four and five (on a scale of one to seven). (Exh. 43) The second draft had several marks of five, but no marks of four. (Exh. 42) The third draft had marks of six or seven for all categories, but the final version the Deputy Department Head provided to the Department Head had two marks of five (in Adaptability and Evaluations). The Department Head, as the Reporting Officer, also gave a mark of five in Judgment. At one point in the process, the Associate Dean, as Reviewer, emailed the Department Head that: "Very few officers who aren't formal supervisors are getting a '6' in evaluations." (Exh. 42) The Deputy Department Head told DHS OIG that this feedback was relayed back to him through the Department Head, resulting in the change from six to five in Evaluations. (Exh. 2)

The Department Head told DHS OIG that the Academy Official1 "put a bunch of pressure on me to move [Complainant's] marks up," resulting in the Department Head meeting with the Deputy Department Head more than once to discuss the good things Complainant had done, particularly for the larger Academy community. (Exh. 4) When asked about how the third version, with all marks of six or seven, was changed to have three marks of five, the Department Head said that he also told the Deputy Department Head "not to swing the pendulum too far," unless it was warranted. (Exh. 4)

The Deputy Department Head described Complainant's performance as strong during this period. However, the Deputy Department Head also told DHS OIG that the Department Head was "pretty critical" of Complainant's performance, and persuasively communicated to the Deputy Department Head issues about her performance. For instance, the Department Head had raised issues about Complainant reaching outside the chain of command after an issue had been addressed with Complainant, and her not meeting expectations to be in the office more to support cadets.[5] At the same time, the Deputy Department Head acknowledged that he was unaware of any complaints from cadets.

The Deputy Department Head told DHS OIG that Academy Official1 was not involved in the OER process. (Exh. 2) The Associate Dean also stated that Academy Official1 does not get involved in OERs when he is not in the rating chain, though he may discuss performance issues regarding members. (Exh. 11) However, in one email to the Department Head about Complainant's OER, the Associate Dean stated: "I know that you and [Academy Official1] have been talking." (Exh. 42) Academy Official1 did not recall talking specifics of Complainant's OER with the Department Head, but did recall discussing more

[5] Deputy Department Head did not provide specific examples of Complainant reaching outside the chain of command.

number of collateral duties, and did not receive any complaints from cadets about her availability. Investigator3 concluded: "The picture that has evolved is of an officer and instructor who is extremely dedicated to the cadets and the missions of the Coast Guard."

Investigator3 further wrote: "Undeniably, repeated questions regarding a person's suitability to do their job and comments that belittle a person's work would cause a person to have insecurities. Such statements are degrading. It begs the question as to why the [Academy] administration would place her in the position, while the Department Head appears to have much visible angst with that decision." (Exh. 39)

Investigator3 also concluded that Complainant's reputation within the [redacted] Department was likely negatively impacted by the handling of the Preliminary Inquiry conducted by Investigator1 and the Climate and Culture Investigation. (Exh. 39)

Investigator3 recommended that Complainant be given the opportunity to leave the Academy, that Complainant be detailed to the [redacted] Department, or that the Department Head be removed from Complainant's rating chain and her office moved to a more neutral location. Investigator3 also recommended that the entire Academy chain of command receive additional civil rights training, but did not believe that disciplinary action was required. (Exh. 39)

ii. HQ Admiral1's Response to Findings of Investigation

On May 12, 2017, HQ Admiral1 emailed Academy Official3 and Academy Official4 to inform them that:

> The administrative investigation into allegations that [Complainant] was subject to bullying, harassment and a hostile environment is complete. The evidence failed to reveal blatant acts of discrimination or bullying. When reviewed as a whole, though, the evidence creates a picture of offensive conduct toward [Complainant] that is at a level to create a work environment that a reasonable person could consider intimidating, hostile or abusive. I have read the report and agree with the investigating officer's portrayal of the situation.

(Exh. 40)

HQ Admiral1 sent two different draft memoranda to the Academy for their feedback: one directed that the Complainant be transferred to the [redacted]

Department, while the other directed Academy Official4 to negotiate a resolution agreement with Complainant and encouraged the Complainant's transfer to the [redacted] Department as part of the agreement.[6]

Within a few days of the email, HQ Admiral1 had a phone conversation with at least Academy Official3 and Academy Official4. HQ Admiral1 did not specifically recall the conversation, but Academy Official3 did and told DHS OIG that he requested that HQ Admiral1 allow him to handle the matter, stating: "I just felt like, hey, I'm the guy in command, give me this investigation, with its recommendations, and I'd like to handle it." (Exhs. 7, 14) Academy Official4 similarly told DHS OIG that the call centered on what would set the department and Complainant on the best path for the future, and that Academy Official3 advocated for having the ability to manage the issue. (Exh. 12)

A day later, on May 17, 2017, HQ Admiral1 signed a memorandum to the Academy similar to the draft that directed Academy Official4 to negotiate a resolution agreement, with some modifications giving the Academy more flexibility. For example, the final memorandum did not order Academy Official4 to "negotiate a resolution agreement," but instead only to "enter into settlement negotiations." Further, the draft memorandum encouraged Academy Official4 to transfer Complainant as part of the agreement, but the final version only encouraged him to "consider" transferring Complainant as part of the agreement.

At the suggestion of his legal staff, HQ Admiral1 also added a line directing that "[a]ny such agreement, though, must resolve and dismiss all outstanding complaints filed by [Complainant], formal or informal, which are currently pending against the Coast Guard." (Exh. 41) (See a comparison of the memoranda in Appendix A.)

Separately, HQ Admiral1 issued a memorandum to the Civil Rights Directorate stating that:

> After reviewing this investigation, I find that the allegations are unsubstantiated. However, because the investigation highlighted communication and leadership challenges that need to be addressed, I directed corrective action to improve [Complainant's] work environment. I also encouraged [Academy Official3] to

[6] HQ Admiral1 told DHS OIG that he was supportive of transferring Complainant to the [redacted] Department, but was undecided about which memorandum would be better, and was looking for Academy Official3's perspective because Academy Official3 would have to execute whatever direction was given. (Exh. 14)

> carefully review the investigation and use it to critically evaluate the climate at the Academy, particularly the [redacted] Department.

(Exh. 41)

In addition, HQ Admiral1 issued a memorandum to Complainant stating only that the investigation was complete and, "[a]fter reviewing the investigation, I directed [Academy Official2] to meet with you to address and resolve your concerns. I also encouraged [Academy Official3] to carefully review the investigation and use it to critically evaluate the climate at the Academy, particularly the [redacted] Department." (Exh. 41) Complainant was told her allegations were unsubstantiated by Commander [redacted] ("HQ Staff Judge Advocate"), the staff judge advocate providing assistance to [redacted] on the matter. (Exh. 41)

HQ Admiral1 told DHS OIG that he never changed his opinion — which he previously stated in the May 12, 2017 email — that he agreed with the investigator's findings. (Exh. 14) HQ Admiral1 told DHS OIG that he "didn't know" why he failed to mention the evidence of a hostile work environment in the memorandum to the Civil Rights Directorate. HQ Admiral1 stated that because Investigator3 found no blatant discriminatory actions, he viewed the specific allegations of harassment or a hostile work environment based on a protected class as not substantiated. (Exh. 14)

iii. Actions Taken After HQ Admiral2 Became [redacted]

HQ Admiral1 retired a few days after issuing his May 17 memos, and was replaced by [redacted] ("HQ Admiral2"). (Exh. 15, 41) HQ Admiral2 was briefed on Complainant's situation and read a large portion of Investigator3's memorandum no later than May 29, 2017, when he requested to meet with the HQ Staff Judge Advocate. (Exh. 41)

On May 31, 2017, in an email with the subject line "Interested in a Mission Impossible?" the HQ Staff Judge Advocate asked an officer if she had:

> any interest in a special project that might help out a LCDR at the Academy. She is going to be negotiating with the Academy to settle her civil rights complaint, which has some merit. [HQ Admiral2] would like to assign her someone to assist her during the process that is not beholden to the Academy.

(Exh. 41)

Later that same day, the HQ Staff Judge Advocate informed HQ Admiral2 that although he had "several potential candidates identified to serve as a representative for [Complainant] during her negotiations with" Academy Official4, he had learned that Complainant had hired a civilian attorney. (Exh. 41) The HQ Staff Judge Advocate also told HQ Admiral2 that the Academy's staff judge advocate expressed concern about a plan to provide Complainant with an opportunity to review Investigator3's investigation. The HQ Staff Judge Advocate recommended providing Complainant with an opportunity to review it. (Exh. 41)

On June 5, 2017, HQ Admiral2 issued a findings and outcome memorandum to another office within the U.S. Coast Guard, addressing Complainant's bullying allegations that were investigated as part of Investigator3's investigation.[7] (Exh. 41) Similar to HQ Admiral1's memorandum to the Civil Rights Directorate, HQ Admiral2 wrote that after reviewing the investigation, he found that "no acts of bullying were substantiated by the administrative investigation." (Exh. 41)

Consistent with HQ Admiral1's direction, Academy Official4 did attempt to engage with Complainant and her counsel regarding mediation on more than one occasion, but Complainant declined to enter into mediation. (Exh. 41) On June 11, 2017, Academy Official4 temporarily assigned Complainant to the [redacted] Department. (Exh. 41) In July 2017, Academy Official4 communicated to Complainant possible solutions to the situation that were under consideration, and gave Complainant the opportunity to provide feedback. The options included pursuing a post-doctoral fellowship or doing a detail with the Research and Development Center. (Exh. 41)

At the request of Complainant, however, Academy Official4 instead permitted Complainant to stay in the [redacted] Department for the academic year. (Exh. 41) Academy Official4 encouraged Complainant to propose a two-year fellowship for after the academic year, then plan to return to the [redacted] Department at the conclusion of the fellowship. (Exh. 41) Academy Official4 told DHS OIG that the [redacted] Department head rotates every several years, and that the Department Head would no longer be head by the time Complainant would have returned to the department. (Exh. 12)

[7] HQ Admiral1 inadvertently failed to issue the bullying findings and outcome memorandum, which was brought to the attention of the HQ Staff Judge Advocate by Complainant. (Exh. 41)

C. Recent Developments

On February 22, 2018, the U.S. Coast Guard issued a Final Agency Decision (FAD) for Complainant's 2017 EO complaint, finding that she failed to prove by a preponderance of the evidence that she was subjected to discrimination. (Exh. 48) On July 3, 2018, the DHS Office for Civil Rights and Civil Liberties denied Complainant's request for reconsideration of the FAD. (Exh. 49)

In January 2018, a different member of the [redacted] Department filed a complaint alleging harassment and bullying behavior by the Department Head. (Exh. 46) HQ Admiral2 convened an administrative investigation, which was completed on March 26, 2018. (Exh. 46) In a memorandum dated April 20, 2018, HQ Admiral2 found that the actions of the Department Head constituted bullying and directed the Academy to take proactive steps to improve the climate of the [redacted] Department. (Exh. 46)

Separately, on April 6, 2018, the [redacted] Department, with the support of the [redacted] Department Head, requested that Academy Official1 approve Complainant's permanent move to the [redacted] Department as part of a billet swap. On Saturday, April 21, 2018, Academy Official1 approved the request for Complainant to be permanently reassigned to the [redacted] Department. (Exh. 5)

On April 19, 2018, DHS OIG sent a request to U.S. Coast Guard attorneys to arrange an interview with Academy Official3 as part of this investigation, and informed them of our plan to interview a number of other individuals at the Academy. The Academy's staff judge advocate was informed no later than April 20, 2018. On April 23, 2018, DHS OIG directly contacted Academy Official1, the Department Head, and several others at the Academy to request interviews.

On April 24, 2018, Academy Official1 requested, and Academy Official3 approved, the removal of the Department Head as the head of the [redacted] Department due to a loss of confidence relating to the substantiated bullying allegation that involved the other Academy faculty member. (Exhs. 5, 46)

V. ANALYSIS – ALLEGED RETALIATION

In reviewing whether Complainant suffered retaliation as a result of protected whistleblower activity, a determination must be made regarding whether the following elements were present: (1) one or more protected communication(s); (2) knowledge by a responsible management official of the protected communication(s); (3) personnel action(s) taken, threatened, or withheld; and (4) a causal connection between the protected disclosure and the adverse

action. If the evidence establishes that the four elements are present, the analysis shifts to whether evidence shows that the Agency would have taken the personnel action absent the protected communication.

The evidence substantiates a retaliation complaint if the evidence indicates that there was no independent basis upon which the personnel action would have been taken, threatened, or withheld, absent the protected communication. Conversely, if the evidence establishes that the Agency would have taken, threatened, or withheld the personnel action absent the protected communication, then the evidence does not substantiate the complaint.

The standard of proof for the first four elements is preponderance of the evidence, which means the degree of evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. The standard of proof following the burden shift is clear and convincing evidence, which is a higher standard than preponderance of evidence and is the degree of proof that produces in the fact finder's mind a firm belief as to the allegations sought to be established.

A. Protected Communications

The MWPA protects communications "in which a member of the armed forces complains of, or discloses information that the member reasonably believes constitutes evidence of, any of the following: (A) A violation of law or regulation, including a law or regulation prohibiting . . . unlawful discrimination."[8] "Unlawful discrimination" includes discrimination based on race and sex.[9]

To be a protected communication, the member must make the communication to one of several entities, including "any person or organization in the chain of command" or "any other person or organization designated pursuant to regulations or other established administrative procedures" to receive such communications.[10] The U.S. Coast Guard has designated the Civil Rights Directorate as a venue to receive discrimination complaints. (Exh. 45)

DHS OIG finds that Complainant made the following five protected communications, either to her chain of command or to the Civil Rights Directorate:

[8] 10 U.S.C. § 1034(c)(2)(A).
[9] *Id.* § 1034(j)(3).
[10] *Id.* § 1034(b)(1)(B).

(1) The July 2015 allegations of discriminations made to the Civil Rights Directorate representative as part of EO Complaint #1;

(2) The March 2016 Harassment Complaint of discriminatory harassment and a hostile work environment made to the Civil Rights Directorate representative;

(3) The May 2016 allegations of discrimination made to the Civil Rights Directorate representative as part of EO Complaint #2;

(4) The June 2016 allegations of discrimination made both to the Deputy Secretary of DHS and Academy Official3; and

(5) The January 2017 allegations of discrimination to Academy Official4 and the Civil Rights Directorate representative as part of EO Complaint #3 and the concurrent harassment and bullying complaint.[11]

The MWPA protects a member both when a member "complains of" misconduct, including of unlawful discrimination, and when a member "discloses information that the member reasonably believes constitutes evidence of" misconduct. 10 U.S.C. § 1034(c)(2). By distinguishing between the two types of protected communications, Congress indicated that there is no reasonableness requirement when a member "complains of" unlawful discrimination. In addition, Commandant Instruction M5350.4C, Coast Guard Civil Rights Manual, which prohibits unlawful discrimination and provides the procedures for reporting unlawful discrimination, also prohibits reprisal for filing such complaints without reference to the reasonableness of the filing.

Regardless, DHS OIG finds that Complainant had a reasonable belief that her allegations disclosed evidence of unlawful discrimination prohibited by the U.S. Coast Guard Civil Rights Manual. Complainant filed EO Complaint #1 after receiving negative treatment that was not experienced by a white male colleague who had similar credentials. In addition, Complainant filed the March 2016 Harassment Complaint after, among other things, the Deputy Department Head criticized her involvement in having an office wall painted, when a white male colleague also involved in the painting did not receive as much criticism. Complainant filed EO Complaint #2, made the June 2016 disclosures of discrimination, and filed the January 2017 complaints after experiencing harassing behavior by Department Head for more than a year, as

[11] Complainant also alleged making protected communications relating to alcohol use at the Academy. DHS OIG did not find evidence that Complainant made protected communications relating to alcohol.

was documented by Investigator3. Although Investigator3 did not find any "blatant" instances of discrimination, Complainant was reasonable to connect the instances of harassment to the fact that she was the only [redacted].

This investigation does not address the merits of the underlying discrimination, harassment, and bullying allegations that constituted the protected communications Complainant made.[12] By reasonably complaining of unlawful discrimination to persons in the chain of command or the representatives of the office designated to receive such complaints, Complainant made protected communications under 10 U.S.C. § 1034(c)(2).[13]

B. Knowledge of the Protected Communications

A preponderance of the evidence in the record shows that the Academy Official3, Academy Official2, Academy Official1, Department Head, and Deputy Department Head were all aware of EO Complaint #1 from July 2015 and the March 2016 Harassment Complaint no later than March 2016. (Exhs. 2, 4, 5, 6, 7) Academy Official4 learned of the complaints when he arrived at the Academy in the summer of 2016. (Exh. 12)

The record also indicates that Academy Official1, Academy Official2, and Academy Official3 had knowledge of Complainant's May 2016 EO complaint that was withdrawn. (Exhs. 5-7) The record further demonstrates that at least Academy Official1 and Academy Official3 were aware that Complainant raised her discrimination, harassment, and bullying allegations with Deputy Secretary Mayorkas in June 2016. (Exh. 33)

Academy Official1 and Academy Official3 also knew that Complainant subsequently made these allegations directly to the Academy Official3 later in June 2016, which the Department Head also suspected when Academy Official3 told him in the summer of 2016 that Complainant would be working

[12] Under 10 U.S.C. § 1034(d), "the Inspector General . . . shall conduct a separate investigation of the information that the member making the allegation believes constitutes evidence of wrongdoing . . . if there previously has not been such an investigation or if the Inspector General determines that the original investigation was biased or otherwise inadequate." DHS OIG determined that although the two 2016 investigations convened by Academy leadership were inadequate, the 2017 investigation conducted by Investigator3 was an adequate investigation into Complainant's allegations (notwithstanding the response to that investigation by the HQ Admiral1 and HQ Admiral2).

[13] Importantly, a complainant need not prove that the unlawful violation actually occurred for the complainant to have such a reasonable belief. *See Drake v. Agency for Int'l Dev.*, 543 F.3d 1377, 1382 (Fed. Cir. 2008) (analyzing the "reasonable belief" standard under the Whistleblower Protection Act, 5 U.S.C. § 2302(b)(8)).

for Academy Official1 during that summer. (Exhs. 4, 5, 7) Finally, the evidence indicates that Academy Official1, Academy Official3, Academy Official4, Department Head, and Deputy Department Head were aware of Complainant's January 2017 bullying, harassment, and discrimination complaints after Investigator3 began interviewing individuals in the few months following the complaint. (Exh. 41)

C. Personnel Actions

The MWPA defines a personnel action as:

> (1) The taking, or threat to take, an unfavorable action;
>
> (2) The withholding, or threat to withhold, any favorable action;
>
> (3) The making of, or threat to make, a significant change in the duties or responsibilities of a member of the armed forces not commensurate with the member's grade;
>
> (4) The failure of a superior to respond to any retaliatory action or harassment (of which the superior had actual knowledge) taken by one or more subordinate against a member; or,
>
> (5) The conducting of a retaliatory investigation of a member.[14]

Of the various actions Complainant alleged were retaliatory during the relevant time period,[15] the record demonstrates that the following actions qualify as personnel actions under the MWPA:

> (1) Complainant's OER marks for the period ending May 31, 2016; and
>
> (2) The withholding of a favorable action from June 2016 until June 2017; specifically, a transfer out of the [redacted] Department.

The evidence in the record did not show that Complainant's other allegations during this time period rose to the level of a prohibited personnel action under the MWPA. For example, Complainant stated that in January 2017, the Department Head and Assistant Department Head removed two instructors from her independent study course. (Exh. 1) The evidence indicates that the

[14] 10 U.S.C. § 1034(c)(2).
[15] Under the MWPA, an OIG need not investigate allegations made more than one year after the date the member becomes aware of a personnel action subject to the allegation. 10 U.S.C. § 1034(c)(5). However, protected communications alleged by Complainant to have occurred more than one year prior to the complaint to DHS OIG were reviewed, because an older protected communication can still contribute to a personnel action several months, or even years, following the protected communication.

removal of the instructors was not a significant change in the duties or responsibilities of Complainant, particularly because the removal was only a removal of their names in the course registration system. The Department Head credibly explained that Complainant could still have had the individuals assist with the course. (Exh. 4) Accordingly, this action does not meet the definition of a prohibited personnel action under the MWPA.

In addition, the record demonstrates that the various memos Academy Official4 issued to Complainant in the summer of 2017 concerning her temporary assignment to the [redacted] Department, options for pursuing fellowships, potential assignment to the Research and Development Center, and direction concerning her eventual return to the [redacted] Department were not personnel actions under the MWPA. Specifically, the evidence indicates that the options presented to Complainant were based on previous requests made by Complainant as part of her complaints. (Exhs. 12, 41) There is no evidence that indicates that Academy Official4 or anyone else involved in issuing the memoranda had reason to believe that these proposed options were not favorable to Complainant. Notably, Academy Official4 modified the options after receiving feedback from Complainant. (Exhs. 12, 41) Academy Official4 told DHS OIG that the options would have gotten Complainant out of the [redacted] Department for the remainder of the time that the Department Head was scheduled to remain in the position. (Exh. 12) Accordingly, a preponderance of the evidence indicates that the issuance of these memoranda did not constitute personnel actions under the MWPA.

D. Causation

To establish causation, a preponderance of the evidence must demonstrate that a protected communication was a contributing factor in an adverse action. Causation can be established by circumstantial evidence indicating that a complainant's protected communication was one of the factors tending to influence the outcome of a decision. Courts have found causation established "[i]f a whistleblower demonstrates both that the deciding official knew of the disclosure and that the [adverse] action was initiated within a reasonable time of that disclosure."[16]

When this "knowledge/timing" test is satisfied, "no further nexus need be shown, and no countervailing evidence may negate the [complainant]'s showing."[17] Courts have been reluctant to specify a precise time period as "reasonable" under the "knowledge/timing" test; however, courts generally

[16] *See Kewley v. Dep't of Health & Human Servs*, 153 F.3d 1357, 1363 (Fed. Cir. 1998).
[17] *Id.*

consider actions taken within the same performance evaluation period or within one year to satisfy the test.[18]

A preponderance of the evidence establishes that Complainant's protected communications were a contributing factor in the OER prepared over the summer of 2016. Both the Department Head and Deputy Department Head, who gave marks and comments in the OER, had knowledge of at least the first two of Complainant's protected communications made at that point. By the time Complainant received her OER, the oldest protected communication — the EO Complaint #1 from July 2015 — was only slightly older than one year.

A preponderance of the evidence also establishes that Complainant's protected communications were a contributing factor in Academy Official3's denials to move Complainant out of the [redacted] Department beginning in June 2016. Complainant's request to be moved was denied by Academy Official3 within just a few days of Academy Official3 learning of Complainant's protected communication to the Deputy Secretary of DHS, and during the same meeting in which Complainant made a protected communication directly to Academy Official3. Academy Official3 was also aware of Complainant's prior protected communications.

E. Burden Shift Analysis

Because a preponderance of the evidence demonstrates that protected communications were a contributing factor in Complainant's OER marks and the denial of her request to be moved from the [redacted] Department, DHS OIG next analyzes whether clear and convincing evidence demonstrates that the agency would have taken the same actions absent the protected communications. In making this assessment, DHS OIG generally considers the following factors for MWPA complaints:

(1) The strength of the agency's reason for the personnel action when the protected communication is excluded;

(2) The existence and strength of any motive to retaliate for the whistleblowing; and

[18] *See id; see also Jones v. Dep't of the Interior*, 74 M.S.P.R. 666, 673-78 (M.S.P.B. 1997) (applying the "per se" knowledge/timing test to a performance evaluation that "was prepared just over one year after the appellant made his protected disclosures").

(3) Any evidence of similar action against similarly situated employees for the non-whistleblowing aspect alone.[19]

DHS OIG analyzes each personnel action separately, beginning with the OER.

i. Evidence that the OER Marks Were Not Retaliatory

a) Strength of the Reasons for the OER Marks

Little documentary evidence exists to support the reasons for the marks in Complainant's OER. The Deputy Department Head did write a rationale for his first draft, which included several marks of four or five, but those were not the ultimate marks, and the rationale was vague. (Exh. 43) For example, the Deputy Department Head had proposed a mark of four for Adaptability, with a rationale in part:

> Very quick to provide recommendations that could be construed as voice of many/unit rather than own personal opinion causing supervisor, department head, [Academy Official1] and [Academy Official3] concern having not been pre-briefed and asked to weigh-in. Addressed by Dept. Head, yet continued to occur.

(Exh. 43)

The Deputy Department Head could not recall specifically what he had in mind here, but noted to DHS OIG that he learned of the issue from the Department Head. (Exh. 2)

When DHS OIG asked the Department Head about this note, he came up with two examples from this time period: one involved a conference call with a headquarters admiral who was uncomfortable with how far out Complainant was pushing on cyber, and another was a strategic scenario planning event that Complainant did at the Academy involving cadets and headquarter individuals that was a surprise to the Department Head. (Exh. 4)

The first example was addressed by Investigator3, who found email evidence suggesting that the headquarters admiral and his staff actually had positive views of Complainant's work, with one officer thanking Complainant "for the great teleconference" and writing that "Admiral Thomas and the rest of us were very impressed with the work your cadets are doing." (Exh. 39)

[19] *Duggan v. Dep't of Defense*, 883 F.3d 842, 846 (9th Cir. 2018) (considering these factors in the context of the Whistleblower Protection Act); *Greenspan v. Dep't of Veterans Affairs*, 464 F.3d 1297, 1303 (Fed. Cir. 2006) (same).

Emails relating to the second example regarding the strategic scenario planning event also failed to support the Department Head's claims that Complainant would surprise her command or fail to pre-brief him on matters. Complainant informed the Department Head about the opportunity the day after learning details about the proposed event from a headquarters commander and two months in advance of the proposed date. (Exh. 34) After Complainant emailed a summary of the opportunity to the Department Head, however, the Department Head forwarded the chain to Academy Official1 stating that "I currently have no visibility" on any formal request from the headquarters unit. Thus, if anything, these emails support Complainant's contention that the Department Head influenced others to view her negatively.

Significantly, DHS OIG found no written documentation showing the Department Head's attempt to address issues with Complainant during this period. When asked why not, the Department Head told DHS OIG:

> There were maybe emails back and forth, but why was there no—honestly? I think there was a lot of fear and eggshells around her, that she kind of was just doing what she wanted, and my sense was I didn't have any top cover to hold her accountable, and that if I were to write something down instead of just verbally talking with her or [the Deputy Department Head] verbally talking with her, that that would be used against us as retaliation. (Exh. 4)

The Deputy Department Head similarly told DHS OIG that he thought he talked informally with Complainant, but did not document any issues. (Exh. 2)

The Department Head described an environment at the Academy where performance issues are not documented. There was another department employee who the Department Head believed was a poor performer whose performance he did not document, even informally, because it "would be fodder for a union grievance." According to the Department Head, he did not document problem employees because of advice from Academy Official1 that the Academy was unlike the rest of the U.S. Coast Guard. (Exh. 4)

The strength of the reasons given is further weakened by the fact that the Deputy Department Head sent the Department Head at least four versions of the OER, with the marks varying widely in each version. The Deputy Department Head's original submission included several marks of four and five, then a later version included marks of only sixes and sevens. The final version contained three marks of five. Although the Department Head

explained that Academy Official1 had put pressure on him to keep the marks high, there is no record of how or why the marks changed with each version, with the exception of the mark for Evaluations.

After the OER had been submitted to the Associate Dean for review, the Associate Dean noted to the Department Head that very few officers who are not formal supervisors are getting marks of six in Evaluations. Because Complainant was not a formal supervisor, this information from the Associate Dean provides support for lowering the previously submitted mark of six in Evaluations to five. Although this statement may have been true generally for officers at the Academy, however, this statement by the Associate Dean is inaccurate as to [redacted] Department officers, as every other O-3 and O-4 received higher than a five for Evaluations in the 2015-2016 OER cycle.

In sum, the evidence in the record shows that the strength of the reasons provided for the OER marks is undercut by the lack of documentation of any performance issues and widely varying marks given in the drafts being sent by the Deputy Department Head to the Department Head, with the exception of the mark of five in Evaluations. As discussed below, however, even the rationale for the Evaluations mark is undercut by the analysis of similarly situated officers.

b) Motive to Retaliate

The evidence in the record shows that the Deputy Department Head and Department Head both had motive to retaliate against Complainant for her March 2016 Harassment Complaint. Both individuals believed that the Complainant was alleging that they harassed and discriminated against her based on race, gender, and other bases. Complainant also had alleged that the Department Head discriminated against her as part of her July 2015 military EO allegations. (Exhs. 2, 4)

In particular, the Deputy Department Head's initial thought after learning of the March 2016 Harassment Complaint — to demand that Complainant apologize, then resign, for filing the complaint — indicates strong animus against Complainant for filing the complaint.

The Department Head also expressed annoyance at the March 2016 Harassment Complaint and EO Complaint #1 from July 2015. In May 2016 notes written up in response to Investigator2's informal opinions about the relationship between Complainant and the Department Head, the Department Head implied that he believed Complainant used discrimination complaints to get what she otherwise could not. (Exh. 30) In response to the recommendation

for an "[h]onest, person-to-person exchange regarding perceived performance, issues, sleights and anything else," the Department Head wrote: "Ok, but no EEO category-based allegations from [Complainant] if she doesn't like what she hears." (Exh. 3)

DHS OIG did not find any evidence that the Associate Dean had a motive to retaliate in signing off on the OER, which is more of a clerical task, or when he informed the Department Head that few officers who were not supervisors were getting a six in the Evaluations category.

c) Similarly Situated Individuals

Evidence in the record supports the conclusion that Complainant was given lower OER marks in 2016 compared to similarly situated O-3 and O-4 officers in the [redacted] Department who did not file complaints.

First, Complainant received higher marks the previous year, when the Department Head was both the Supervisor and Reporting Officer. He provided marks of six or seven in all categories. Complainant also received higher marks for the period ending in 2017, when the Department Head was not involved in assigning marks. It was only in the OER in between, which was completed a few months after Complainant filed the March 2016 Harassment Complaint, that Complainant received multiple marks of five. In that OER, the Department Head was the Reporting Officer and had significant involvement in the Deputy Department Head's marks. (Exh. 44)

Second, DHS OIG reviewed the OER marks of all [redacted] Department O-3 and O-4 officers for the periods ending in 2015, 2016, and 2017, and found that no other officer had received a single mark of five in any category, including in Evaluations, even though only the Deputy Department Head was a formal supervisor. (Exh. 44) Complainant taught the same amount of classes or more compared to the rest of the staff in the [redacted] Department, and had collateral duties as significant as the other O-3 and O-4 officers, who had not filed complaints. (Exh. 39)

Thus, in sum, the totality of the evidence indicates that Complainant would have received marks of at least six had she not made her July 2015 military EO and March 2016 allegations. DHS OIG substantiates Complainant's allegations regarding her OER.

ii. Analysis of the Denial of a Transfer

a) Strength of the Reasons for Denial of a Transfer

Academy Official1 and Academy Official3 provided non-retaliatory reasons for denying the Complainant's transfer outside of the [redacted] Department, and these non-retaliatory reasons are generally supported in the record.

Academy Official1 told DHS OIG that a move to the [redacted] Department was a non-starter, because the [redacted] Department was very short-staffed, and because a unilateral, permanent transfer was unheard of. (Exh. 5)

Academy Official3 told DHS OIG: "At the end of the day, there was a collective feeling that she is a Permanent Commissioned Teaching Staff with [redacted], hired to do [redacted] work, and that that's what we needed her to do. That's the duty at hand, so to speak." (Exh. 7)

Academy Official4 also told DHS OIG that Academy Official1 had concerns that Complainant's background was not aligned with the [redacted] Department, and was concerned about her promotion ability if she taught lower level [redacted] courses. (Exh. 12)

DHS OIG finds the rationale of Academy Official1, Academy Official3, and Academy Official4 to be compelling business reasons for their decision not to move Complainant.

In contrast, Academy Official2 stated to DHS OIG that he did not support Complainant's transfer because all of her allegations were not substantiated, and to move Complainant simply because she didn't like her boss would set a bad precedent. (Exh. 6) This reasoning is not compelling, because no investigator found Complainant's allegations unsubstantiated during Academy Official2's time at the Academy. In addition, Academy Official2's contention that Complainant wanted a transfer because she merely disliked her boss is not supported by the record. Nonetheless, DHS OIG found that Academy Official2 sincerely — though erroneously — believed that all of Complainant's allegations were not substantiated at that point, thus providing some support for Academy Official2's opposition to transferring Complainant.

b) Motive to Retaliate

Academy Official1 and Academy Official3 had some motive to retaliate against Complainant after she spoke with the Deputy Secretary for DHS and alleged discrimination, harassment, and bullying. Academy Official3 seemed

particularly frustrated that she went so far up the chain of command, and characterized her conversation with the Deputy Secretary for DHS as meeting with the Deputy Secretary "under false pretenses." (Exh. 7)

With respect to Academy Official2, the evidence on balance does not indicate retaliatory motive in his June 2016 denial of Complainant's request to be moved out of the [redacted] Department just prior to Academy Official2 leaving the Academy. At that point, Academy Official2 was not the subject of any complaints. At the same time, though, Complainant and another witness reported that Academy Official2 did exhibit animosity towards the Complainant during a May 2016 meeting. (Exhs. 1, 10) Additionally, subsequent emails suggest that Academy Official2 and Academy Official3 thought negatively of Complainant. In an email to Academy Official3 on July 12, 2017, for example, Academy Official2 sarcastically asked if Academy Official3 had asked "our favorite instructor" — meaning Complainant — to complete a leadership feedback survey. However, these emails were after Complainant named Academy Official2 and Academy Official3 in complaints. (Exhs. 6, 47) Ultimately, DHS OIG could not establish any direct link between Complainant's protected disclosures and Academy Official2's negative views of Complainant.

DHS OIG found no evidence indicating that Academy Official4, who was not named in any of the complaints, had any animus against Complainant.

c) Similarly Situated Individuals

Academy Official1 told DHS OIG that he believed that there had been no permanent move of an officer to another department while he has been at the Academy. Individuals have been transferred between departments, but through swaps of positions, and usually when one of the positions was vacant. There was no vacancy in the [redacted] Department at the time. (Exh. 5) The evidence provided by the U.S. Coast Guard corroborates Academy Official1's contention that permanent moves have been done, but only as a swap of positions. (Exh. 50)

In sum, clear and convincing evidence indicates that Academy Official1, Academy Official2, and Academy Official3 would have denied Complainant's requests to be moved regardless of whether she had made a protected communication.

VI. ANALYSIS – ALLEGED FAILURE OF SUPERIORS TO RESPOND TO RETALIATION

In December 2016, Congress amended the MWPA to make "the failure of a superior to respond to any retaliatory action or harassment (of which the superior had actual knowledge) taken by one or more subordinates against a member" a prohibited personnel action.[20]

DHS OIG reviewed the actions taken in 2017 by HQ Admiral1 and HQ Admiral2 in response to Investigator3's investigation.[21]

Whether either admiral's actions constituted a failure to respond to retaliation under the MWPA appears to be an issue of first impression for DHS. DHS OIG found no legislative history that added insight into how to interpret this provision, nor any guidance issued by the Department of Defense. The closest analogue to the failure to respond provision is found in Title IX case law, where a recipient of Title IX funding can be held liable for a "failure to adequately respond" to teacher-student or student-student sexual harassment of which the funding recipient had "actual knowledge."[22] For an action to be considered a failure to adequately respond under Title IX, the funding recipient's response "must amount to deliberate indifference to discrimination."[23] Specifically, the response will only be considered a failure if it "was clearly unreasonable in light of the known circumstances."[24]

DHS OIG adopts this framework in analyzing whether either admiral failed to respond to retaliation under the MWPA. Thus, in order to substantiate an allegation of a failure to respond to retaliation, a preponderance of the evidence[25] must show that:

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[20] National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 531, 130 Stat. 2000, 2118 (2016).
[21] Nothing in the National Defense Authorization Act for Fiscal Year 2017 suggests that Congress intended the failure to respond provision to have retroactive effect. Therefore, the actions taken by Academy leadership in 2016 are not analyzed here.
[22] *See Davis v. Monroe County Bd. Of Educ.*, 526 U.S. 629, 649 (1999); *Gebser v. Lago Vista Independent Sch. Dist.*, 524 U.S. 274, 290 (1998).
[23] *Gebser*, 524 U.S. at 290.
[24] *Davis*, 526 U.S. at 649.
[25] Although the Supreme Court was not explicit as to the quantum of proof necessary to establish a failure to respond under Title IX, trials courts use preponderance of the evidence. *See, e.g., Williams ex rel. Hart v. Paint Valley Local Sch. Dist.*, 400 F.3d 360, 363 (6th Cir. 2005); *Bostic v. Smyrna Sch. Dist.*, 418 F.3d 355, 360 (3rd Cir. 2005).

(1) A superior had actual knowledge of any retaliatory action or harassment against a member taken by one of the superior's subordinates; and,

(2) The superior's response was clearly unreasonable in light of the known circumstances.[26]

While a preponderance of the evidence demonstrates that both HQ Admiral1 and HQ Admiral2 had actual knowledge of retaliatory actions and harassment, neither admiral's response was clearly unreasonable. Thus, DHS OIG does not substantiate the claims of their failure to respond.

A. Both Admirals Had Actual Knowledge of Retaliation

Both HQ Admiral1 and HQ Admiral2 reviewed Investigator3's memorandum, which identified a number of harassing behaviors, most of which occurred after Complainant's EO Complaint #1 and March 2016 Harassment Complaint. Although Investigator3 "found no evidence of overt or blatant instances of either harassment or bullying based on [Complainant's protected classes] or retaliation," "evidence corroborates her being subjected to harassment and bullying in the form of insults or put downs, psychological harassment, [and] belittling or degrading comments that may be harmful to her career or reputation." (Exh. 39)

Although the language of Investigator3's memorandum is not completely unequivocal, on balance, the memorandum provided actual knowledge of retaliation, particularly where it found that a review of Complainant's accomplishments during the 2015-2016 OER period "lends itself to the conclusion that the marks were lowered based on outside influences, versus unbiased opinion and identifiable behaviors (the OER followed the EO complaint filed by the officer against the supervisor)." (Exh. 39)

B. The Responses of the Admirals Were Not Clearly Unreasonable

i. HQ Admiral1

HQ Admiral1 considered two orders to the Academy in response to Investigator3's findings: one that would direct Complainant's transfer, and one that would direct Academy Official4 to negotiate a resolution agreement and encourage the transfer of Complainant as part of that agreement. HQ Admiral1

[26] Considerations specific to whistleblower protection could support applying a standard lower than "clearly unreasonable." However, the language added to the MWPA is almost identical to language used by the Supreme Court in *Gebser* and *Davis*, which preceded the addition of the failure to respond provision to the MWPA.

issued a memorandum directing the latter, but with an added line (suggested by legal staff) that the agreement must resolve all complaints pending against the U.S. Coast Guard. (Exhs. 14, 40-41)

Specifically, HQ Admiral1 stated that he ultimately did not immediately move Complainant out of the situation "because I wanted the Coast Guard Academy to resolve the situation" and because "I thought there was room for the Academy to resolve the issue." Although HQ Admiral1 thought it would "have made sense for the Academy" to immediately transfer Complainant, he believed that Academy Official3 deserved an opportunity to take care of the issue. (Exh. 14)

Given that Complainant had been making allegations about her work environment to Academy leadership that had gone unresolved since 2015, HQ Admiral1's rationale for delegating the decision back to the Academy is weak, but the decision is not clearly unreasonable.

HQ Admiral1's direction to enter into settlement negotiations was to Academy Official4, who Complainant had not alleged was involved in the harassment or the Academy's initial responses to her complaints. In fact, Academy Official4 was the one who received Complainant's January 2017 allegations and worked with HQ Admiral1 to have an investigation be convened. HQ Admiral1 had a basis to believe that Academy Official4 would adequately resolve the situation.

Despite the risk that HQ Admiral1's direction would leave Complainant in a hostile work environment, reasonable minds could differ on whether this approach was appropriate. Thus, based on a preponderance of the evidence, HQ Admiral1's response to Investigator3's memo was not clearly unreasonable in light of the known circumstances.

ii. HQ Admiral2

A preponderance of the evidence similarly demonstrates that HQ Admiral2's response was not clearly unreasonable.

Although HQ Admiral2 did not disturb the direction given to the Academy by HQ Admiral1, HQ Admiral2 went further than HQ Admiral1 and made efforts to find a representative for Complainant to assist her in the settlement negotiations. (Exh. 41) In an email to a potential representative, the HQ Staff Judge Advocate wrote that HQ Admiral2 did not want someone "beholden" to the Academy. (Exh. 41) HQ Admiral2 told DHS OIG that he meant he wanted someone "who would guide or give [Complainant] advice that did not necessarily have conflicting allegiances." (Exh. 15)

Ultimately, by that point, however, Complainant had retained private counsel. Within a few days of that counsel declining to enter into mediation, Academy Official4 temporarily moved Complainant to the [redacted] Department, with HQ Admiral2's knowledge. (Exh. 41)

In sum, because neither admiral acted clearly unreasonably in response to Investigator3's investigation based on a preponderance of the evidence, DHS OIG does not substantiate the allegations that they failed to respond to retaliation in violation of the MWPA.

VII. ADDITIONAL ISSUES

A. Handling of Complainant's Complaints by Academy Official2 and Academy Official1

Evidence in the record demonstrates that there were issues with the handling of the Complainant's complaints by Academy Official2 and Academy Official1. These individuals were unable to provide persuasive reasons for why, after Investigator1 recommended a full administrative investigation into Complainant's allegations conducted by someone with EEO or civil rights credentials, no such investigation was convened.

The subsequent climate and culture investigation conducted by Investigator2, who had no EEO or civil rights experience, was not an equal substitute for an investigation into Complainant's specific allegations. Moreover, the manner in which the investigation was conducted raises questions about the depth and objectivity of the fact-finding. For instance, interviews were scheduled for only 20 minutes, only asked general yes or no questions, and were conducted in the [redacted] Department space in coordination with the Department Head. (Exhs. 9, 29)

Additionally, Complainant witnessed the Department Head in the hallway pacing or lingering near the breakroom at the time of her interview, felt intimidated by it, and reported the issue. (Exhs. 1, 5) The Department Head told DHS OIG that he did not see anyone being interviewed by Investigator2 in the [redacted] Department space nor knew where others were being interviewed. (Exh. 4) This statement is contradicted by evidence provided by Academy Official1, however, who told DHS OIG that when he asked the Department Head about Complainant's concern, the Department Head explained that he "was just trying to get folks organized to see" Investigator2. (Exh. 5)