

**U.S. Department of Labor**

Office of Administrative Law Judges  
90 Seventh Street, Suite 4-800  
San Francisco, CA 94103-1516

(415) 625-2200  
(415) 625-2201 (FAX)



**Issue Date: 07 December 2015**

CASE NO.: 2015-LCA-00020

*In the Matter of:*

KALYAN CHAKRAVARTY,  
Prosecuting Party,

vs.

CALIFORNIA STATE UNIVERSITY NORTHRIDGE,  
Respondent,

and

ADMINISTRATOR, WAGE AND HOUR DIVISION,  
Party-in-Interest.

Appearances: Kalyan Chakravarty  
In Pro Per

Timothy Younger, Esquire  
For the Respondent

David M. Kahn, Esquire  
Brian J. Schmidt, Esquire  
For the Administrator

Before: William J. King  
Administrative Law Judge

**DECISION AND ORDER AFFIRMING THE ADMINISTRATOR'S DETERMINATION**

**I. Introduction**

This matter arises under the Immigration and Nationality Act, as amended, 8 U.S.C. § 1101 *et seq.* ("INA"), and the regulations promulgated thereunder at 20 C.F.R. Part 655, Subparts H and I, C.F.R. § 655.700 *et seq.* More specifically, the issues raised and addressed in this claim arise out of the statute and regulations relating to the H1-B visa program 8 U.S.C. § 1101(a)(15)(H)(i)(B).

Professor Kaylan Chakravarty (“Prosecuting Party”) has alleged that California State University Northridge (“University”) deprived him of his rights under a Labor Condition Application (“LCA”) that the University submitted with their application under the H-1B program<sup>1</sup>. Reduced to its most simple terms, Professor Chakravarty’s first allegation is that, during the period covered by the LCA when he held a H1-B visa, the terms of the LCA legally obligated the University to provide him more teaching assignments than they actually offered him. His second allegation is that once he asserted this complaint, the University withdrew offers of teaching assignments and ultimately terminated his employment. The Administrator of the Wage and Hour Division rejected both allegations and Professor Chakravarty appeals. He is not represented by counsel. For the reasons set forth below, the Administrator’s determination denying the Prosecuting Party’s allegations is AFFIRMED.

## **II. General Factual Background**

### ***A. Prosecuting Party’s Background and Employment with the University***

Professor Chakravarty was born in October 1948 in West Bengal, India. In June 1972 he was awarded a Post-Graduate Degree in Management from the University of Calcutta. (PX L, p. 2.) He was employed by the University from June 5, 2006 until May 2015. During this period of employment he worked for the University under three different programs:

1. On about June 5, 2006 the University offered Professor Chakravarty a Research Scholar position in the Department of Management. He held a J-1 visa until April 2011; and, during that period, the position was renewed annually.
2. In April 2011 the University applied to employ Professor Chakravarty under the H1-B program described below. They successfully submitted a Labor Condition Application, it was granted and Professor Chakravarty was granted an H-1B visa. From August 27, 2011 through August 26, 2014 Professor Chakravarty was appointed as a Lecturer in the Department of Management and worked under a LCA dated April 6, 2011<sup>2</sup>.
3. In August 2014 Professor Chakravarty was given the status of lawful permanent resident. He was employed by the University as a Lecturer in the Department of Management from that time until May 2015, at which time his employment was not renewed-

### ***B. The H1-B Visa Program***

The INA defines various classes of aliens who may enter the United States for prescribed periods of time and for prescribed purposes under various types of visas. 8 U.S.C. § 1101(a)(15). One class, known as “H-1B” workers, is allowed to enter the United States on a

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<sup>1</sup> Professor Chakravarty also alleged violations of the J-1 visa program but this court has no jurisdiction over that program.

<sup>2</sup> During this period when he was working under the H1-B visa, his employment was also subject to two employment contracts and collective bargaining agreements between the Board of Trustees of the California State University and the California Faculty Association.

temporary basis to work in “specialty occupations.”<sup>3</sup> 8 U.S.C. § 1101(a)(15)(H)(i)(B); 20 C.F.R. § 655.700. An employer seeking to hire an alien in a specialty occupation on an H-1B visa must follow a regulatory procedure that involves the Department of Labor and the Department of Homeland Security, as well as the Department of State. 20 C.F.R. § 655.700 *et seq.*

To hire an H-1B worker, the employer must first complete a LCA and file it with the Employment and Training Administration of the U.S. Department of Labor. In the LCA, the employer must make certain representations and attestations regarding its responsibilities. 8 U.S.C. § 1182(n). The LCA includes information about the job title, the employer’s name, the number of non-immigrants sought, the gross wages to be paid the non-immigrant, the starting and ending dates of intended employment, the place of intended employment, the prevailing wage for the occupation in the area of intended employment, and the source relied on to determine that prevailing wage. 20 C.F.R. § 655.730(c)(4).

After the LCA has been certified by the Department of Labor, the employer submits a copy to the Department of Homeland Security along with the non-immigrant visa petition, asking for an H-1B classification for the worker. 20 C.F.R. § 655.700(b)(2). If the H-1B classification is approved by the Department of Homeland Security, the non-immigrant can apply for an H-1B visa at a U.S. consular office in his or her country for entry into the United States or for a change in his or her visa status, if the non-immigrant is already in the United States. 20 C.F.R. § 655.700(b)(3). The employer can hire the H-1B worker after the visa is granted.

Employers are required to pay H-1B workers beginning on the date when the nonimmigrant is admitted to the United States pursuant to the LCA and makes himself available for work. 20 C.F.R. § 655.731(c)(6). In the LCA, the employer must attest to the fact that the non-immigrant worker will be paid the higher of the actual wage or the prevailing wage. 8 U.S.C. § 1182(n)(1)(A); 20 C.F.R. § 655.731(a). If the non-immigrant worker is identified on the LCA as a full-time worker, then the employer is obligated to pay the worker for any time during which the worker is not performing work or is in a non-productive status due to a decision by the employer (“benching”), such as lack of assigned work<sup>4</sup>. 20 C.F.R. § 655.731(c)(7)(i).

### ***C. The Stipulated Facts***

At the hearing, the parties agreed to the following stipulations:

1. The Prosecuting Party and the Respondent were in an employee/employer relationship when the Prosecuting Party worked under a J-1 Visa from academic year 2006-07 through academic year 2010-11. (*Id.* at 9-10.)
2. The Prosecuting Party and the Respondent were in an employee/employer relationship when the Prosecuting Party worked under an H-1B Visa from academic year 2011-12 through the end of academic year 2013-14 in August 2014. (*Id.* at 10-11.)

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<sup>3</sup> “Specialized occupation” is defined within the Act as an occupation requiring the application of highly specialized knowledge and the attainment of a bachelor’s degree or higher. 8 U.S.C. § 1184(i)(1).

<sup>4</sup> Either his or her full pro rata salary, if salaried, or full-time wages, if hourly.

3. The Parties are governed by the Act for all relevant acts and/or omissions that occurred during the period during which the Prosecuting Party was employed by Respondent under the terms of his H-1B Visa. (HT, pp. 8-9.)
4. During the period of time in which the Prosecuting Party worked under an H-1B Visa he was covered by the Labor Condition Application dated April 6, 2011 in RX A. (*Id.* at 12-13.)
5. During the period of time in which the Prosecuting Party worked under an H-1B Visa he and the Respondent entered into two employment agreements (each titled “Offer Letter” and dated April 4, 2011 and August 22, 2012. (*Id.* at 13.)
6. During the period of time in which the Prosecuting Party worked under an H-1B Visa, he and the Respondent were subject to the terms of the collective bargaining agreement between the Board of Trustees of the California State University and the California Faculty Association. There were two such agreements, one covering the period from September 18, 2012 to June 30, 2014 and another governing the period from November 12, 2014 to June 30, 2017. (*Id.* at 14-15.)
7. The Prosecuting Party and the Respondent were in an employee/employer relationship when the Prosecuting Party after he became a lawful permanent resident on July 15, 2014 through May 2015, when the employment relationship ended. (*Id.* at 11-12.)
8. The Prosecuting Party and Respondent entered into a settlement agreement dated June 18, 2014. (*Id.* at 20-21.)
9. The Prosecuting Party and Respondent entered into an addendum to the settlement agreement on January 15, 2015. (*Id.* at 21.)
10. The Prosecuting Party filed his appeal of the Administrator’s determination on January 3, 2015. (*Id.* at 19-20.)

### III. Issues

There are two seminal questions presented in this case:

1. Did the Prosecuting Party receive what he was legally due under the LCA?<sup>5</sup>
2. Did the Respondent retaliate against the Prosecuting Party?

In addition, there are other specific factual and legal issues in dispute<sup>6</sup>:

1. When did the Prosecuting Party make his first complaint to Wage and Hour? (HT, pp. 18-19, 24)
2. Does the one year statute of limitations in the INA apply to some or all of the Prosecuting Party's complaints? (*Id.* at 21.)
3. Do either or both of the settlement agreements between the parties apply to all or some of the Prosecuting Party's complaints?<sup>7</sup> (*Id.*)
4. Are the Prosecuting Party's complaints ripe for adjudication by OALJ? (*Id.* at 22.)

### IV. Procedural Background

#### A. *The Procedural Structure*

The remedies for violations of the statute or regulations include payment of back wages<sup>8</sup> to H-1B workers who were underpaid; debarment of the employer from future employment of aliens; and civil money penalties. 20 C.F.R. §§ 655.810, 655.855. The Administrator of the Wage and Hour Division has broad authority to investigate an employer's compliance with the representations and attestations on an LCA.<sup>9</sup> *See* 20 C.F.R. § 655.805. At the conclusion of an investigation, the Administrator issues a written decision setting forth his determination and any remedies assessed. *See* 20 C.F.R. §§ 655.805(a), 655.806(b), 655.815. Any interested party desiring review of the determination may request a hearing before an ALJ. 20 C.F.R. § 655.820. No appeal is available if Wage and Hour declines to investigate a complaint and appeal may be made only after an investigation. 20 C.F.R. §§ 655.806(a)(2), 655.820(b)(1)-(2).

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<sup>5</sup> What the Prosecuting Party was due under the LCA requires analysis of the LCA, along with the Prosecuting Parties employment contracts (titled "Offer Letters") and the Collective Bargaining Agreements.

<sup>6</sup> In their pleadings, the University also raised the issue of whether the Prosecuting Party's complaints are subject to the exclusive remedy of the collective bargaining agreement. (*Id.* at 22-23.) They did not argue this issue in their Post-Hearing Brief so it is not included here.

<sup>7</sup> The Prosecuting Party agreed that some of the complaints he made were subject to the settlement agreements, but I have listed this as an issue because it must be determined which claims are or are not covered by the settlement agreements. (HT, p. 21.)

<sup>8</sup> Under the regulations, back wages due to H-1B workers are defined as the difference between the amount that they should have been paid and the amount that they were actually paid. 20 C.F.R. § 655.810(a).

<sup>9</sup> The provisions governing the complaint and investigation process are set forth in 20 C.F.R. §§ 655.805-815.

Upon receipt of a timely request for a hearing the Chief Administrative Law Judge appoints an ALJ to hear the case. 20 C.F.R. § 655.835(a). Within seven days following the assignment of the case, the ALJ must notify all interested parties of the date, time and place of the hearing. 20 C.F.R. § 655.835(b). All parties must be given at least fourteen calendar days' notice, but the hearing must be set no more than 60 days after the date of the Administrator's determination.<sup>10</sup> 20 C.F.R. § 655.835(b)-(c). The ALJ must issue a decision within 60 days of the hearing. 20 C.F.R. § 655.840(a). Per 20 C.F.R. § 655.840(b), an ALJ has the authority to affirm, deny, reverse, or modify (in whole or in part) the determination of the Administrator.

### ***B. The Procedural Timeline***

Professor Chakravarty first submitted his complaints to Wage and Hour around April 17, 2014. On December 8, 2014 the Administrator issued a written determination on this case that implicitly rejected Professor Chakravarty's specific complaints. On January 3, 2015 Professor Chakravarty sent an email to Secretary of Labor Thomas Perez, stating that he had just received the December 8, 2014 determination letter and expressing surprise that "I did not find any reference to any of my specific issues." He noted (a) that the letter dealt with violations related to other H-1B non-immigrants that did not concern him, (b) that he did not know the determination of his issues but (c) he was "keen" to get a positive result, and had not been persuaded by his earlier dealings with Department of Labor. He concluded, "I am, therefore, keen to appeal with the Chief Administrative Law Judge to escalate my case for possible resolution of my issues in the near future."

This email generated a Correspondence Control Record and eventually the matter was referred to Wage and Hour for response.<sup>11</sup> On April 30, 2015, Wage and Hour sent Professor Chakravarty a letter explaining that the determination letter had been issued in December and the letter stated the findings and enforcement action that would be taken. Professor Chakravarty replied on May 1, 2014 asking if he could now have the specified 15 day window to file his appeal. Some telephonic conversation followed during which Professor Chakravarty was told that his 15 days had passed and he could not appeal. Later on May 1, 2015, Professor Chakravarty emailed Secretary Perez again, asking that he intervene and tell the Office of Administrative Law Judges ("OALJ") to re-start the 15 day appeals period. He did not contact OALJ. On May 3 or 4, 2015<sup>12</sup> Professor Chakravarty attempted to contact the Inspector General at the Department of Labor, relaying that he had to file a complaint all over again and asking that the Inspector General ensure that his "issues are attended to, on priority, under your surveillance." This message returned undelivered, and Professor Chakravarty forwarded it to the "Executive Secretariat" asking that they see that it be sent to the Inspector General.

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<sup>10</sup> Given the circuitous procedural history of this matter it was impossible to comply with this provision. Hearing was set within 60 days of the date on which I was assigned the case.

<sup>11</sup> According to later emails in the case file, on January 9, 2015 Wage and Hour requested that it be transferred to OALJ, but somewhere between Wage and Hour and the Executive Secretariat this request was lost. No further action is indicated in the record until April 2015, when Wage and Hour and the Executive Secretariat express uncertainty as to whether Professor Chakravarty had appealed the determination. Transfer to OALJ was declined as that would mean forwarding OALJ Professor Chakravarty's 15 page email chain, which he may or may not wish to be on the record on appeal. Instead Wage and Hour was instructed to send Professor Chakravarty another letter.

<sup>12</sup> Based on the emails it appears that Professor Chakravarty was travelling on this date and crossed the International Date Line, meaning that the time stamp on his forward of the original message is actually *before* the time stamp on the original message.

These emails to Secretary Perez and the Executive Secretariat generated another Correspondence Control Record, and eventually the Executive Secretariat decided to forward the matter to OALJ. This case originated with OALJ on May 28, 2015 when a Correspondence Control Record from the Executive Secretariat at the Department of Labor was transferred to OALJ for response.

Then-Acting Chief Administrative Law Judge Stephen Henley docketed this matter and on June 9, 2015 issued an Order to Show Cause as to whether Professor Chakravarty was entitled to a hearing. (*See* Respondent's Exhibit ("RX") G; *see also* Hearing Transcript ("HT") pp. 61-62.) The Order proved to be undeliverable at Professor Chakravarty's known address and attempts to reach him by phone were unsuccessful. Chief Judge Henley's Attorney-Advisor contacted Professor Chakravarty via email on July 9, 2015, giving him three business days to reply with a mailing address. Professor Chakravarty both called and emailed on July 10, 2015. He sent his reply to the Order to Show Cause on July 20, 2015. (*See* RX H; *see also* HT, pp. 62-63, 88-89.) The Solicitor filed a response on behalf of Wage and Hour on August 5, 2015. (*See* RX I.) On August 12, 2015, Judge Henley forwarded this matter to the San Francisco District Office. This case was assigned to me on August 18, 2015.

On August 25, 2015 I issued a Notice of Hearing setting hearing for October 5, 2015 in Long Beach, CA. I held a telephonic pre-hearing conference with the Parties on August 31, 2015. As a result of this teleconference, the hearing was moved to Pasadena and the University filed a copy of the relevant LCA for the record. On September 24, 2015 I received the Prosecuting Party's Prehearing Statement and Exhibits. On September 28, 2015 I received Respondent's Pre-Hearing Statement and Exhibit Index. Respondent's Exhibits were delivered on October 2, 2015. On September 30, 2015 the University filed "Pre-Hearing Motions" asking (a) that the appeal be dismissed due to Professor Chakravarty's failure to timely respond to the Order to Show Cause, (b) to dismiss any complaints not in compliance with the Statute of Limitations, (c) to dismiss retaliation complaints not made to Wage and Hour as unripe, and (d) to dismiss any claims for wages or benefits relating to the 2014-15 academic year.

I treat these motions as a Motion for Full or Partial Summary Decision. Given the date of this Motion, I did not issue a ruling prior to the hearing. Since a hearing has been held and the same points remain for decision below, that Motion is now moot. More importantly, 29 C.F.R. § 18.33(c)(2) provides that motions must be served within 21 days before the hearing or state why the motion was not made earlier. This Motion was filed less than a week before the hearing. Though the expedited timeline for LCA cases makes it nearly impossible to comply with the deadlines specified in the OALJ Rules of Practice and Procedure, the upshot is that motions of this nature are not appropriate unless they can be made immediately after hearing is set. Here, for example, it was impossible for the Prosecuting Party to respond and a ruling to be made before the hearing. It would be fundamentally unfair to allow one Party to ambush the other with a last minute dispositive motion, even if late filing were excusable. Respondent's Motion for Full or Partial Summary Decision is thus DENIED as moot and untimely.

Hearing was held on October 5, 2015. Due to budget uncertainty at the time, I was unable to travel to Pasadena for the hearing. The Parties were given the option of holding the hearing telephonically or delaying it. Both preferred to hold the hearing telephonically. At the

hearing I marked and admitted Administrative Law Judge (“ALJ”) Exhibits (“ALJX”) A-C, the Notice of Hearing and both Pre-Hearing Statements. (HT, pp. 24-26.) I reserved ALJX D-E for portions of the Collective Bargaining Agreement (“CBA”) that would be included at the end of the hearing. (*Id.*) I also admitted into evidence Prosecuting Party’s Exhibits (“PX”) A-N. (*Id.* at 26.) Respondent’s Exhibits A-N were marked, but by omission were not admitted into evidence. (*Id.* at 26-27.) No objections were raised, and RX A-N are hereby ADMITTED. On October 5<sup>th</sup> I heard testimony from Professor Kaylan Chakravarty, Vice-Provost Michael Neubauer, and Associate Vice-President Office of Human Resources Kristina de la Vega.

During the hearing Professor Chakravarty identified Article 12 of the CBA as relevant to this case. (HT, pp. 86-87). Vice-Provost Michael Neubauer identified Articles 10, 12, 20, and 21 as having some relevance to the matters at issue here. (*Id.* at 125-26.) In addition, Article 2 of the CBA contains definitions. There are two collective bargaining agreements relevant to the periods of this case, one covering the period from September 18, 2012 to June 30, 2014 and another governing the period from November 12, 2014 to June 30, 2017. (*Id.* at 14-15.) Articles 2, 10, 12, 20, and 21 of the CBA for September 19, 2012 to June 30, 2014 are identified as ALJX D. Articles 2, 10, 12, 20, and 21 of the CBA for November 12, 2014 to June 30, 2017 are identified as ALJX E. And as indicated at the hearing, ALJX D-E are hereby ADMITTED into evidence.

The record, then, is comprised of the case file, the Hearing Transcript, ALJX A-E, PX A-N, and RX A-N.<sup>13</sup> The Prosecuting Party’s Legal Analysis (“PLA”) was received on October 30, 2015. The Respondent’s Closing Brief (“RCB”) was received on November 3, 2015. Both closing briefs contain attached exhibits. As these were introduced for the first time after hearing, I do not consider them to be part of the record, though portions of these exhibits are either part of the record as ALJX D-E or are official, publically available Department of Labor forms, and so can be considered here. On November 19, 2015, the Administrator of the Wage and Hour Division filed a letter brief addressing the proper analysis of causation in retaliation claims under the INA.

## **V. Findings of Fact**

### ***A. The Background of Issue #1: Prosecuting Party’s Allegation of Lost Opportunity***

Professor Chakravarty alleges that the University began violating his rights under the INA when he was a J-1 Visa holder between 2006 and his appointment as a Lecturer in 2011. (ALJX B, p. 1.) He claims that this continued when he was under an H1-B Visa and that beginning in 2011-12 the Management Department began to deliberately refuse to honor its commitments as described in the LCA, the CBA and the offer letters dated April 4, 2011 and

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<sup>13</sup> The Prosecuting Party’s Exhibits are referred to via the pagination internal to the documents. When such pagination is missing, I refer to the pages by starting at one for the first page in the exhibit. The same method of reference is used for the ALJ Exhibits. With ALJX D-E the internal pagination begins anew with each Article of the CBA, so I cite to both the Article and page within that Article. Respondent’s Exhibits are sequentially numbered with a bates stamp, and I refer to these numbers when citing the exhibit in question.

August 22, 2012<sup>14</sup>. He avers that this continued, despite his complaints, through 2013-14. (PLA, pp. 1, 3; PX A, p. 1; RX H, p. 25.)

In his time with the University Professor Chakravarty testified that he has been designated a Research Scholar, Part-Time Faculty, and Lecturer but that during the entire period of his employment he was doing the same job: teaching classes. (HT, pp. 39-40.) During all times he was working for the University he was under the terms of the CBA. (*Id.* at 41.) Vice-Provost Neubauer stated that during the academic years from 2011-14 Professor Chakravarty and the University were operating under the LCA and also by the terms of the CBA. He testified that the University considered the commitment in the LCA to be to \$30,000 of salary each year, and not any specific guarantee of classes or course assignments. (*Id.* at 95-96.)

However, according to Professor Chakravarty, the CBA entitles faculty who teach a particular number of units in past semesters to continue to teach a particular number of units in future semesters. So in his case, given that 2011-12 was his sixth year of continuous teaching, he alleges that the number of regular credits he taught during that year determined the number of credits he would be entitled to over the next three years. (HT, pp. 84-86; *see also* PX E.) If, as he claims, in 2011-12 the LCA entitled him to 30 regular units instead of 12, he would have been entitled to 30 regular units, instead of 12, over each of the next three years<sup>15</sup>.

During 2011-12 Professor Chakravarty taught a total of four regular classes, or twelve units. (ALJX B, p.1.) He alleges that he should have taught a total of ten classes that year, five courses of three units each semester for a total of thirty units. He claims that though the particular shortfall in earnings in 2011-12 may have been rectified<sup>16</sup>, the opportunity he lost in terms of the loss of entitlement to teach more classes and earn more money has harmed and continues to harm him.<sup>17</sup> (*Id.* at 1-2, PLA, pp. 1, 3.)

As a result of the alleged loss of opportunity to teach courses in 2011-12 Professor Chakravarty calculates that he was deprived of twenty additional classes of three units each: six classes for eighteen units in 2011-12, three classes for nine units in 2012-13, five classes for fifteen units in 2013-14, and 6 in 2014-15. As a “conservative estimate” he values each course at \$4,200 and deducting what he has already been paid, arrives at a total figure of \$46,000 in lost wages.<sup>18</sup> (ALJX B, p. 5.) He further claims that he is entitled to benefits on all of these lost earnings, which he estimates to equate to \$56,000, including \$20,000 for the purchase of retirement service credits. (*Id.*; *see also* PLA, p. 3.)

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<sup>14</sup> The Prosecuting Party does not specify the sort or the source of the commitments. He generally refers to the INS. I find that the University’s legal obligations to him are best described in the LCA, the CBA and the offer letters.

<sup>15</sup> He didn’t think that summer and extension classes counted in determining entitlement to courses or in fulfilling that entitlement. (*Id.* at 86-87.)

<sup>16</sup> According to Professor Chakravarty, payment as part of a settlement agreement in 2015 addressed this shortfall. (*See* ALJX B, p. 2.)

<sup>17</sup> During 2010-11 and 2011-12 Professor Chakravarty also incurred COBRA costs when he needed to purchase health insurance in periods when the University assigned him no courses. He also incurred the cost of applying for the H1-B Visa. He acknowledges that the University has re-paid him to cover these costs. (ALJX B, pp. 2-3.)

<sup>18</sup> Professor Chakravarty adjusts this upward to \$52,000 for inflation, though does not explicate his method of doing so. (ALJX B, p. 5.)

## 1. The First Offer Letter and Labor Condition Agreement

On March 28, 2011, Dean William Jennings wrote the Director of U.S. Immigration and Naturalization Service in support of granting Professor Chakravarty H1-B status. He represented that Professor Chakravarty was being recommended for a part-time faculty position beginning Fall 2011 that was not a permanent position. He described Professor Chakravarty as “a skilled and experienced instructor” whose “comfortable teaching style has resulted in the respect of his peers and high student evaluations in his classes.” (PX C, p. 1.) Management Department Chair Professor William Roberts followed up with a similar recommendation letter on April 11, 2011. He stated that Professor Chakravarty’s “international background and extensive consulting brings [sic] a dimension that is difficult to find” and that Professor Chakravarty was “a skilled and experienced instructor who brings a cultural element into our classes that benefits our students in the growing global economy.” Professor Roberts considered Professor Chakravarty to be “a great addition to our faculty.” (PX D, p. 1.)

The University issued Professor Chakravarty an offer letter on April 4, 2011 for a Lecturer position in the Department of Management for the period from August 27, 2011 to August 26, 2014. The letter explained that “[t]his appointment includes a salary of \$30,000 per year from [the University] for research and living expenses. While at [the University] you will be entitled to library privileges, and reduced admissions to athletic and cultural programs sponsored by the University. You should continue to coordinate your research while at the University with Dr. William Roberts.” (PX B, p. 1)

On April 6, 2011 the University submitted a LCA to the Department of Labor. It requested one worker in the job title of “Lecturer” as a full-time position from August 27, 2011 through August 26, 2014. (RX A, pp. 2-6.) The stated wage was \$30,000 per year, the prevailing wage for the position. (*Id.* at 4.) The University agreed to the following in the LCA:

1. Wages: Pay nonimmigrants at least the local prevailing wage or the employer’s actual wage, whichever is higher, and pay for non-productive time. Offer nonimmigrants benefits on the same basis as offered to U.S. workers.
2. Working Conditions: Provide working conditions for nonimmigrants which will not adversely affect the working conditions of workers similarly employed.
3. Strike, Lockout, or Work Stoppage: There is no strike, lookout, or work stoppage in the named occupation at the place of employment.
4. Notice: Notice to union or to workers has been or will be provided in the named occupation at the place of employment. A copy of this form will be provided to each nonimmigrant worker employer pursuant to the application.

(*Id.*) The LCA was signed by University Associate Vice President Mack Johnson. (*Id.* at 5.)

## ***2. The August 22, 2012 Letter of Appointment***

On August 22, 2012 the University issued an offer letter to Professor Chakravarty for a new three year temporary appointment to cover the 2012-13 through 2014-15 academic years. (PX E, p. 1.) The appointment was based on continuous temporary employment in the Management Department since the 2006-07 academic year. (*Id.*) The letter provided that:

Your annual unit entitlement of 12 unit(s) for each of the three years of this appointment is based upon your time base during the 2011-12 academic year. Your department will make every effort to provide you with an assignment for each year of this three-year appointment that consists of at least as many units as your assignment during the 2011-12 academic year. However, as you know, all part-time temporary appointments are condition upon the availability of budget and enrollment. Therefore, your assignment during each year of this three-year appointment may vary and could be greater than, or less than, your annual entitlement of units. Your unit entitlement will remain the same throughout your three-year appointment regardless of your unit assignment for any given semester.

(*Id.*) Professor Chakravarty accepted the offer in writing on August 23, 2012. (*Id.*; *see also* HT, pp. 55-58.) During the hearing he agreed that in academic years 2011-12, 2012-13, and 2013-14 he taught at least twelve units worth of classes each year. (HT, pp. 71-72.)

Vice-Provost Neubauer explained that this was a standard letter of appointment issued to every lecturer and faculty member at the University providing their appointment for the coming year or years. (HT, pp. 97-98.) He testified that this was different from the April 4, 2011 offer letter because the earlier letter was linked specifically to the LCA while this letter of appointment is a function of the CBA. Since Professor Chakravarty was operating under a LCA, he had other responsibilities involving research and also an annual entitlement to a salary of \$30,000—something ordinary lecturers are not guaranteed. (*Id.* at 98-99.) Professor Chakravarty's unit entitlement was 12 units, and according to Vice-Provost Neubauer, he was always assigned this amount. (*Id.* at 100.) An ordinary lecturer with this unit entitlement would have earned about \$20,000 per year. (*Id.* at 101.) Professor Chakravarty earned more because he was operating under the LCA and was expected to do research as well. (*Id.* at 102.) Vice-Provost Neubauer added that nothing was issued entitling Professor Chakravarty to more than twelve units per year and that if he had been given more, that would have actually violated the CBA and led to grievances from other faculty members whose course loads would have been decreased. (*Id.* at 100-01.)

## ***3. Professor Chakravarty's Earnings, Assignment, and Classification at the University***

During Professor Chakravarty's time with the University he also taught a number of extension courses through the College of Extended Learning. The College of Extended Learning makes its own hiring decisions, but generally draws faculty from within the University. Vice-Provost Neubauer stated that these were outside the terms of the LCA in his understanding, but that if these course assignments were included, then Professor Chakravarty would have far exceeded 12 units per year. (HT, pp. 108-09.) Under the LCA and later CBA entitlement to 12

units, Professor Chakravarty taught classes in the Department of Management and earned \$30,000 in “state-side” salary. Extension classes were funded with “non-state-side” money.<sup>19</sup> Including these earnings, Professor Chakravarty’s was always paid well over \$30,000 per year. (*Id.* at 109-10.) According to Vice-Provost Neubauer, the University had an obligation to pay Professor Chakravarty \$30,000 plus whatever he earned from extension courses. (*Id.* at 111.)

Associate Vice-President in the Office of Human Resources Kristina de la Vega investigated Professor Chakravarty’s earning history after he contacted Human Resources complaining that he hadn’t been paid the promised \$30,000 wage. She determined that in 2009-10 Professor Chakravarty earned \$75,000, in 2010-11 he earned \$62,600, in 2011-12 he earned \$67,000, and in 2012-13 he earned \$65,000. (HT, pp. 127-28.) Vice-Provost Neubauer estimated that if Professor Chakravarty had been teaching 30 units per year, or 10 courses, he would have earned approximately \$40,000 per year, though he stressed that this was an estimate. (*Id.* at 123.) Associate Vice-President de la Vega determined that in some years Professor Chakravarty had been paid less than \$30,000 in “state-side” dollars. The University’s settlements in this case have been meant to ensure that Professor Chakravarty received a full \$30,000 from state-side dollars each year, even though in every year he has in fact earned well over the promised amount. (*Id.* at 129-31.) She added, however, that her particular understanding of the LCA was just that the University guaranteed him \$30,000 in salary total, regardless of funding source. (*Id.* at 131.)

According to Professor Chakravarty, full-time lecturers are treated differently from part-time lecturers in many ways. Part-time lecturers just teach a few classes while full-time lecturers are responsible for other jobs and have to attend more meetings. (HT, p. 79.) He wasn’t sure if they taught more classes, but he stated that in contrast to him, full-time lecturers were paid independently of teaching assignments. (*Id.* at 79-81.) Full-time faculty members get priority over part-time faculty members, who are treated as a sort of second class citizen. (*Id.* at 82.)

Vice-Provost Neubauer explained the categories more precisely. The first distinction is between tenured/tenure-track faculty and instructors. The former are all full-time. Within the category of lecturers the only difference between full and part time is that a full-time lecturer would be teaching at full unit entitlement, which is 30 units per year, while a part-time lecturer would be teaching at a lower entitlement. In terms of assignments and the CBA, there was no real difference. Both sometimes take on additional responsibilities at the University. (HT, p. 112.) The extension classes are entirely outside of this framework. (*Id.* at 113.)

Vice-Provost Neubauer explained that Professor Chakravarty’s salary entitlement was governed by the LCA while his unit entitlement for regular courses was governed by the letter of appointment. Because Professor Chakravarty was a foreign national in this country who was going to be working as a lecturer the University had to specify a minimum salary guarantee. This is why the LCA set a salary of \$30,000, which would ensure Professor Chakravarty enough salary to support himself. To justify this additional income, the University added research responsibilities to his position. (HT, pp. 113-14, 123.)

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<sup>19</sup> “State-side” dollars are monies from funds and programs that rely on state aid. “Non-state-side” dollars are linked to programs that are self-funding. (*See* HT, pp. 129-31.)

Vice-Provost Neubauer added that the term “full-time lecturer” is just the term they tend to use for lecturers who teach at the maximum of 30 units. (HT, pp. 115-16.) Moreover, he explained that all entitlements to units are defeasible in that they are subject to availability. Directed to the LCA indicating that Professor Chakravarty was a full-time employee identified as a lecturer, Vice-Provost Neubauer responded that there were other research responsibilities associated with Professor Chakravarty’s position that are generally not given to lecturers. (*Id.* at 118.) He explained that this case is a unique circumstance at the University, as Professor Chakravarty is the only faculty in the lecturer category for whom they have ever filed an H1-B LCA. All other H1-B employees are tenure-track faculty or technical support staff. (*Id.* at 121.)

#### ***4. The Collective Bargaining Agreement***

In this case the LCA governs what Professor Chakravarty is owed by the University and how he is classified. The CBA compliments this by determining what an employee in Professor Chakravarty’s position and classification is due from the University generally. Two CBAs are potentially relevant to this case: one covering September 18, 2012 to June 30, 2014 and another governing November 12, 2014 to June 30, 2017. (*Id.* at 14-15.) From both, the definitions in Article 2 and four substantive Articles, 10, 12, 20, and 21, have been admitted into evidence as potentially bearing on this case.

Article 10 governs the grievance procedures. It specifies the exact forms that must be used and the way that a grievance under the CBA is processed. (ALJX D Art. 10.) It includes a six week statute of limitations for filing grievances. (*Id.* at 3.) This provision has no bearing on this matter.

Article 12 relates to Appointment. Section 12.2 provides for the issuance of the type of appointments letter Professor Chakravarty received on August 22, 2012. (ALJX D Art. 12, p. 1.) Temporary faculty unit employees who have six or more years of prior consecutive service are entitled to a three-year temporary appointment pending a satisfactory evaluation. The appointment must be for a similar assignment at an equivalent unit level to those in the prior year of service. For a subsequent three-year appointment, the unit base is that of the last year of the prior three year appointment. These re-appointments also involve an evaluation that must show satisfactory performance and no serious conduct problems. (*Id.* at 3-5.) These entitlements are made contingent upon the availability of suitable work. (*Id.*)

In Article 12 the CBA specifies how regular courses are to be assigned. First the department makes assignments to tenured, probationary, and student faculty. Next the remainder of the available assignments are offered in the following order: three-year full-time appointees, other multi-year full-time appointees, three-year part-time appointees, individuals on a list of past three-year part-time employees, continuing multi-year part-time employees, visiting faculty, and then past full and part time faculty without current appointments. If there is still work remaining, part-time temporary three-year appointees are given a chance to increase their course load, then part-time temporary one-year appointees are given the same opportunity, and then the work is offered to any other qualified candidate. (*Id.* at 8-10.) Similar procedures apply to work that becomes available during the academic year. (*Id.* at 10-11.) Work for temporary employees is conditional, and the University may displace appointees by recruiting and appointing tenure-track faculty. (*Id.* at 12.) Though there are several differences between the 2012-14 Article 10

and the 2014-17 Article 10, all are relatively minor and do not bear on this case. (See ALJX E Art. 10.) The definitions in Article 2 do not distinguish between full and part time temporary faculty unit employees. Full-time faculty unit employees are those serving a full-time appointment while part-time faculty unit employees are those serving less than a full-time appointment. (ALJX D Art. 2, pp. 2-3.) No further detail is provided.

Article 20 of the CBA relates to workload. It specifies the professional responsibilities of instructional faculty as “teaching, research, scholarship, creative activity, and service to the University, profession and to the community.” Additional responsibilities include advising students, office hours, collaborative work, and administrative/committee work. (ALJX D Art. 20, p. 1.) The assignments of individual faculty members to the different types of duties is handled on a case by case basis.<sup>20</sup> (*Id.* at 2.) As with the above, the changes in the 2014-17 CBA are relatively minor.<sup>21</sup>

Summer Term Employment is addressed in Article 21 of the CBA. It specifies that both Articles 12 and 20 do not apply to summer employment. (ALJX D Art. 21, p. 1.) Instead appointments are made by the President at the University. (*Id.* at 2.) Summer term employment is defined as “a conditional temporary appointment for a period of time” and classes and appointments may be cancelled. (*Id.* at 3.) Article 21 discusses in detail the formulas for compensation for summer term courses. (*Id.* at 3-7.) For most courses, only faculty who taught at least one term in the prior academic year are eligible for an assignment.<sup>22</sup> (*Id.* at 4, 6.)

Though summer work need not be offered first to tenure or probationary (tenure-track) faculty, the CBA establishes a percentage for each campus and requires that such faculty must be at least offered summer courses. At CSU Northridge it is 41%. (*Id.* at 8.) Once the percentage is fulfilled or the offers are exhausted, courses may be provided to “qualified volunteers, administrators, TAs, or other students.” After this, the courses must be offered to the pool of qualified lectures with three or one year appointments whose time-entitlement had not been satisfied in the prior year. Next the courses are offered to the pool of lecturers generally, and finally to any qualified candidates. (*Id.* at 9.) The more rigorous order of assignment from Article 12 does not apply to summer courses. (*Id.*) Article 21 is identical in the 2014-17 CBA. (See ALJX E Art. 21.)

## ***B. Background to the Retaliation Complaint, the Investigation, and the Settlements***

### ***1. November 9, 2013 Internal Complaints***

On November 19, 2013 Professor Chakravarty met with the Provost of the University about his complaints related to his treatment as a J-1 and H1-B Visa holder. (HT, p. 67.) Professor Chakravarty met with his Department Chair, Professor John Bruton on December 3 or

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<sup>20</sup> Much of the Article is concerned with matters unrelated to this case, such as protections against over-work, librarian workload, and counselor workload. (ALJX D Art. 20, pp. 2-12.)

<sup>21</sup> The one exception concerns the addition of substantial sections on “Reduction in Instructional Assignments for New Probationary Faculty” and “Assigned Time for Exceptional Levels of Service to Students.” (ALJX E Art. 20, pp. 9-12.) These sections have no bearing on this case.

<sup>22</sup> Additionally, for summer courses “offered through the regular, general fund course schedule” service credits count towards the determination of future one and three year appointments of lecturers under Article 12. (ALJX D Art. 20, p. 7.)

4, 2013 and made complaints about violations of the LCA governing his employment under the H1-B Visa. (HT, pp. 67-68; ALJX B, p. 6.) In a follow-up email on December 4, 2013 Professor Chakravarty recorded the letters that he had provided to support his claims. He stated that he had no problems from 2006-07 to 2008-09. But in 2009-10 and 2010-11 he only taught five courses, or fifteen units, and three courses, or nine units, respectively while his appointment letters promised him \$2,278.20 per month. From 2011-12 to 2013-14 he was promised a salary of \$30,000 per year but claimed that the Management Department only assigned him four, seven, and five courses during those three years. (PX J, p. 1.)

On February 11, 2014, Professor Chakravarty applied for an H1-B extension to be sponsored by the University. (PX I, pp. 2-4.) In support of this application, Dean Kenneth Lord wrote a recommendation letter to the Director of the U.S. Immigration and Naturalization Service. Dean Lord described the position as part-time and not permanent and stated that Professor Chakravarty was “a skilled and experienced instructor” and that “[h]is comfortable teaching style has resulted in the respect of his peers and high student evaluations in his classes.” (PX L, p. 1.) Professor Bruton wrote a similar letter on February 14, 2014, describing Professor Chakravarty as “a skilled and experienced instructor who brings a cultural element into our classes that benefits our students in the growing global economy.” (*Id.* at 2.)

The extension was to cover the period from August 31, 2014 to August 22, 2015. The Department stated that “[a]s an Adjunct Faculty member Prof. Chakravarty teaches part-time. He teaches undergraduate classes in Strategic Management, Human Resource Management, and International Business. His duties include preparing and delivering lectures using appropriate pedagogy, grading and student advising.” (*Id.* at 5.) The application was executed by Professor Bruton on February 25, 2014 and Dean Lord on April 25, 2014. (*Id.*; *see also* HT, pp. 74-75.) Professor Chakravarty testified that he had sought a three year extension of his H1-B visa but that Professor Bruton had changed it to only a one year extension when he filled out the Department’s part of the form.<sup>23</sup> (HT, pp. 75-76.)

As part of the extension process, in February 2014 the University’s International and Exchange Student Center solicited employment information from the Management Department. Department Chair Professor Bruton reported that Professor Chakravarty was entitled to be employed in a “research or teaching” position at a yearly salary of \$18,624.<sup>24</sup> (PX L, p. 4.) This was less than the salary promised in the LCA. On March 4, 2014 Professor Burton sent an email to Professor Chakravarty and Patricia Marquez, an employee in the International and Exchange Student Center, stating that “the problem here” was that the promises as to salary were made on behalf of the University and that in the past Professor Chakravarty had taught for other departments as well. Professor Burton stated that “I can only guarantee him the minimum specified in his current contract with the Management Dept” and that amounts from other departments should be included in calculating his total wages. He pointed out that it was inappropriate to compare what had been promised by the whole University with what had been

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<sup>23</sup> The exhibit lists only the extension dates for the one year, not the three years Professor Chakravarty claims he sought. There is no section on the form that would indicate that the applicant sought in terms of an extension—on this particular form the Department was tasked with providing the dates for the extension sought. (PX L.)

<sup>24</sup> The form leaves a blank for hours per week, in which “16” has been entered. In the context of this case, where the number of credits assigned is more important, it is unclear what this entry means. (PX I, p. 4.)

promised by the Management Department in particular. (PX K, p. 1.) There is no distinct contract with the Management Department in evidence.

## ***2. Reduction of Fall 2014 Teaching Assignments***

On March 14, 2014 Professor Bruton informed Professor Chakravarty that he would be teaching two courses of the Strategic Management Seminar in Fall 2014. This reduced the number of courses that had previously been allotted as placeholders in the schedule. (RX L, p. 38; RX N, p. 48; HT, pp. 64-65; ALJX C, p. 10.) According to Vice-Provost Neubauer, this is a typical time for departments at the University to set their course schedules for the coming fall, though the exact timeframe varies by department. (HT, p. 107.)

On April 1, 2014 Professor Chakravarty met with Associate Vice-President de la Vega about his complaints. He told her that if the University still didn't respond to him, he was going to pursue the matter with the Department of Labor. He gave her copies of the documents he planned on submitting. (HT, p. 66.) Associate Vice-President de la Vega promised to get back to him, but she never responded to his emails after the meeting. (*Id.* at 66-67.)

## ***3. Complaints to Wage and Hour***

On about April 17, 2014<sup>25</sup> Professor Chakravarty met with representatives from the Department of Labor and submitted a package of documents.<sup>26</sup> (HT, pp. 38-39.) Professor Chakravarty's complaints were formally accepted for investigation by Wage and Hour on May 1, 2014. (PX A, p. 1; PX N, p. 1; RX H, p. 25.) The letter issued to Professor Chakravarty stated that Wage and Hour had "reviewed your information pertaining to the alleged violation(s) of the H-1B program and determined that there is reasonable cause to conduct an investigation based on the information you provided."<sup>27</sup> (PX N, p. 1.)

Professor Chakravarty alleged that he after his internal complaints and complaint to Wage and Hour he was subjected to retaliatory actions, in particular not being given a summer course to teach and having a reduction of his Fall 2014 course assignment. He alleged that as a result he was deprived of entitlement to a teaching position. (PLA, pp. 4-5; ALJX B, pp. 6-7.)

## ***4. Withdrawal of Summer 2014 Teaching Assignments***

On May 2, 2014 Department Chair Professor Bruton emailed Professor Chakravarty notifying him that "I have had to make some late changes to the Summer schedule, and as a result I am not going to be able to assign you to the BUS497A class that I had offered you. I'm sorry this has come up so late and if anything changes I will let you know right away." (RX K, p. 36; RX N, p. 49; *see also* HT pp. 65-66.) Professor Chakravarty replied shortly thereafter

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<sup>25</sup> On HT p. 39 Professor Chakravarty gave the date as May 17, but given the balance of the testimony and the timeline of the case I conclude that this was an error and the correct date is April 17, 2014.

<sup>26</sup> An annotation on an email from Mr. Longo suggests that the complaint was made on April 11, 2014. (PX M, p.1.) This cannot be confirmed, so I treat the date of complaint as April 17, 2014. The difference is not material to any of the issues in this case.

<sup>27</sup> Though Professor Chakravarty's particular complaints were not validated by Wage and Hour, the investigation led to an agreement whereby the University agreed to pay back wages to 32 other employees on H1-B or J-1 visas. (PX A, p. 1; RX H, p. 25.)

stating that “I do well understand your compulsions. I hope things change when [sic] you are able to offer me a class in summer...” (RX K, p. 36; RX N, p. 49.) In his Response to the Order to Show Cause, Professor Chakravarty allowed that the course was “justifiably offered to a tenured faculty” but maintained that Professor Bruton should have taken a course away from another faculty member for “parity and fairness.” (RX H, p. 27; *see also* HT, pp. 63-64.)

Several days later another summer course became available to teach. Professor Chakravarty replied immediately seeking the assignment, but Professor Bruton chose another a faculty member who was newer to the department. (RX H, p. 28; HT, pp. 82-83.) Professor Chakravarty admitted that nothing in the CBA required Professor Bruton to assign him the course, since summer classes operate by different rules.<sup>28</sup> (HT, pp.83-84.) But Professor Chakravarty claims that it ignored “the very basic management practices and values we all swear by” and, more importantly, that the decision to take his class, rather than any other class assigned to an instructor, when a tenured faculty member became available and then to shortly thereafter pass him over for a class that was available was in retaliation for his complaints. (RX H, p. 28.)

On May 22, 2014 the University’s ECA Office of Private Sector Exchange Administration contacted “Sponsor Staff” at the University in regards to complaints Professor Chakravarty had made to Wage and Hour. The Office asked for more information concerning complaints that the Management Department had offered Professor Chakravarty fewer courses since 2009-10, that he was not offered the number of courses required while a J-1 Visa Holder, that he was not offered any course in the Fall of 2010 even though others were given assignments, and that he had been forced to procure COBRA coverage at his own expense. (RX N, p. 46.) On May 27, 2014, Vice-Provost Neubauer forwarded this message for comment to Associate Vice-President de la Vega and Professor Bruton. (*Id.* at 45-46.) Vice-Provost Neubauer testified that he first learned of the complaints on May 22, 2014 and that Professor Bruton was first informed on May 27, 2014. (HT, pp. 106-07.)

### ***5. The First Settlement***

Vice-Provost Neubauer contacted Professor Chakravarty on May 30, 2014 after a meeting between them. Based on the totality of Professor Chakravarty’s complaints, Vice-Provost Neubauer stated that “the University has made a preliminary determination that you are owed \$30,501.44.” (PX F, p. 4; PX G, p. 7.) Professor Chakravarty replied that evening disputing the computations and arguing that summer classes should not count in the computations of what he had been paid , asking that additions be made for filing fees, and stating that the loss in past teaching credits had caused derivative or cascading harm because his current teaching entitlement was less than he believed it should be. Professor Chakravarty also expressed concern about retaliation from his department given that he was in the process of seeking another three year appointment. (PX F, pp. 2-3; PX G, pp. 5-6.) Professor Chakravarty followed this email with another the next day detailing his calculations. He agreed with the University that the shortfall in salary had been \$21,345.02. He calculated the value of lost benefits at \$26,6625.81 relating to amounts paid on which the University had not made

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<sup>28</sup> Vice-Provost Neubauer explained that Article 21 of the CBA provides that a certain number of summer courses at each campus are set aside for tenure-track faculty and the rest are assigned solely at the discretion of the department chair as the designee of the President of the University. These assignments are not subject to grievance under the CBA. (HT, p. 108.)

contributions. He argued that his loss of prospective income was \$55,857.60 relating to courses he believed he would have been entitled to but for the deprivation of courses he was entitled to. And he added \$9,992.42 for reimbursements for COBRA and H1-B related fees. (PX F, pp. 1-2; PX G, pp. 4-5.)

On June 2, 2014 Vice-Provost Neubauer responded stating that they were close to agreement on the salary shortfall and reimbursements and that he was seeking more information about the benefits claimed. But he expressed confusion about Professor Chakravarty's claim for lost income because it was based on a claimed entitlement to course assignments when the LCA promised only a salary, and not the course assignment. (PX G, p. 4.) In response Professor Chakravarty only repeated his claim. (*Id.* at 3.)

Later on June 2<sup>nd</sup> Vice-Provost Neubauer added that the University would be making the appropriate benefit contributions when it adjusted his salary payments. (*Id.*) Professor Chakravarty asked for additional clarification and for figures accounting for inflation. (*Id.*) That evening Vice-Provost Neubauer responded with another spreadsheet and representing that adjusted for inflation the University would owe him \$23,400 and that once this was paid all of the related benefit contributions would automatically be triggered. He also stated that the University owed Professor Chakravarty \$10,658.60 for COBRA payments and visa filing fees. (*Id.* at 2.) Professor Chakravarty disputed this, arguing that "as a good gesture, considering what I have been subjected to" summer payments should not count towards the calculation of what the University had paid him already or that the employer's contributions should be made on a higher amount as if all of his earnings had come from regular courses. (*Id.*)

A formal settlement offer was made on June 3<sup>rd</sup> and Professor Chakravarty indicated that he wanted a settlement of all of his complaints. (*Id.* at 1.) Despite his statement on May 30, 2014 to Vice-Provost Neubauer that "I am treating my matters with you and CSUN in strictest confidence," on June 7, 2014, Professor Chakravarty forwarded the entire email chain to Wage and Hour. (*Id.* at 1, 6.) He also claimed to Wage and Hour that he had been making "innumerable" email reminders to University officials since 2009-10 about the "gross violation of my J-1/H1B visa rules [sic]." He stated that he met with the Provost on November 19, 2013, with his Department Chair on December 4, 2013, and with the Interim Associate VP on April 1, 2014 about his complaints. Finally, he represented that "I have been harassed, financially and mentally, over the last five years, for no fault of mine." (*Id.* at 1.)

The University and Professor Chakravarty reached and executed a "Settlement Agreement and Release" on June 18, 2014 in reference to Professor Chakravarty's "compensation for the period of 2006 to 2011." (RX B, pp. 7-8.) Per the agreement the University consented to compensate Professor Chakravarty \$12,400, the equivalent of five months' salary, less the required payroll taxes and withholdings to be used to purchase retirement service credits for those five months of salary. (*Id.* at 7.) The University also agreed to reimburse Professor Chakravarty \$7,493.93 for COBRA incurred costs.<sup>29</sup> (*Id.*) In exchange, Professor Chakravarty waived, released, and discharged the

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<sup>29</sup> The record does not explain the downward adjustment of the settlement amounts from Vice-Provost Neubauer's earlier estimates, except the settlement is linked to Professor Chakravarty's time operating under a J-1 Visa. Nor is

University from any and all claims, causes of action, complaints, damages, agreements, suits, attorney's fees, loss, cost or expense, obligations and liabilities, of whatever kind or character, any statutory claims, or any and all other matters of whatever kind, nature or description, whether known or unknown, which he may have against University by reason of or arising out of or concerned his employment with University.

(*Id.*) The agreement was executed by Professor Chakravarty and Provost Harry Hellenbrand on behalf of the University. (*Id.* at 8.) Professor Chakravarty testified that he read the agreement before he signed it and had an opportunity to consider its terms and consult an attorney if he so desired. (HT, pp. 44-46.) He added that this agreement only concerned the time during which he was a J-1 Visa Holder. (*Id.* at 46.)

#### **6. *Summer and Fall 2014 to the Administrator's Determination***

On July 15, 2014, Professor Chakravarty became a legal permanent resident of the United States. (HT, p. 42; ALJX C, p. 2.) After that point Professor Chakravarty agreed that he was no longer working under the H1-B program or the LCA. (HT, p. 43.)

On July 17, 2014 Professor Chakravarty initiated contact with Professor Bruton regarding his class schedule for the Fall 2014 semester. Professor Bruton replied on July 21, 2014, stating that the Fall 2014 schedule provided in March 2014 was still correct reflecting that Professor Chakravarty would be teaching only the two Strategic Management Seminar courses. (RX L, pp. 37-38.)

On October 6, 2014 Professor Chakravarty and Richard Longo of Wage and Hour spoke and Professor Chakravarty followed up with an email in the early morning hours of October 7<sup>th</sup>. In the email he outlined the issues he believed needed to be resolved. One concerned his claim for lost income due to not being assigned more classes on account of the initial deprivation in 2011-12. Another concerned his claims for fringe benefits and particularly retirement service credits. He now stated that these were owed on \$30,854.20 of salary, including summer class payments. (PX H, p. 1.) In addition, he alleged retaliation, claiming that he wasn't being offered more than two courses in the Fall 2014, taking away his summer class, and paying his salary without allocating him teaching assignments that would make him eligible for and entitled to teaching assignments in the next academic year. (*Id.*) He further complained that the University had "unfairly and unilaterally" included his earnings from summer courses when computing the amount of back pay he was owed. (*Id.*)

Professor Bruton emailed Vice-Provost Neubauer on October 7, 2014 in reference to retaliation claims under investigation. He explained that assignment for summer and extension courses were handled differently under the CBA and that he, as Department Chair, had sole discretion as to who to assign to summer courses and that Professor Chakravarty had already been assigned the number of units he was entitled to. He added that the faculty member who ended up being assigned the extra summer course had higher student evaluations than Professor Chakravarty and that this other faculty member, unlike Professor Chakravarty, was qualified as

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it clear from the record what changed to make Professor Chakravarty accept this settlement given that he had been quite resistant to the higher amounts proposed by Vice-Provost Neubauer days earlier.

an “Instructional Practitioner.” (RX M, pp. 39-40.) He attached the provisions from the CBA that supported his view that Professor Chakravarty had no entitlement to the summer assignment. (RX M, pp. 42-43.) Later that day Professor Bruton forwarded other emails to Vice-Provost Neubauer and stated that he didn’t even know that Professor Chakravarty had made a complaint until after he had made the Fall 2014 and Summer course assignments. (RX N, p. 44.)

In October 2014 Professor Chakravarty filed a grievance with his union under the CBA, alleging that he was being discriminated against because of his complaints to the Department of Labor. He claimed that the Department was not given him courses that should have been given to him but instead was assigning courses to newcomers to the department who did not comply with the requirements for teaching the courses under the CBA. (HT, p. 51.)

On November 3, 2014, Mr. Longo sent Professor Chakravarty an email stating that “[i]t appears there are reasonable explanations towards your issues.” (PX M, p. 1; RX E, p. 12.) Related to a complaint about his 2011-2012 wages, Mr. Longo stated that that he had been paid all of the wages required by the LCA. Professor Chakravarty had alleged retaliation against him in not assigning him a course to teach during the summer of 2014 and only providing him with two, and not four classes for the fall of 2014. Mr. Longo explained that the university operated on different procedures for assigning courses in the summer and that the course sought by Professor Chakravarty was given to another professor who had more recent practical experience and better student evaluations. Moreover, the reduction of Professor Chakravarty’s teaching load from 4 to 2 courses for the fall of 2014 had occurred before any protected activity. (PX M, p. 1; RX E, p. 12; *see also* HT, pp. 59-60.) Professor Chakravarty responded to Mr. Longo the same day disputing, in some detail, each determination, alleging that “the rationale provided by the University are irrelevant, and unacceptable.” (PX I, pp. 1-2; RX F, pp. 16-17.)

Professor Chakravarty sent another email to Mr. Longo, copying Secretary Perez, on November 20, 2014, asking to speak with Mr. Longo and stating that “I am simply not willing to give it up, whatever it takes, at whatever levels, now or later...” He references three sorts of complaints: wages not paid, retaliation, and denial of fringe benefits. He asked DOL to move faster. He asked Secretary Perez to make an appointment with him. (RX F, p. 15.)

Mr. Longo replied the next day, stating as follows:

I am willing to discuss the matter further with you when I return. However, to be clear we have concluded our investigation. I sent a detailed e-mail to you indicating that we did not find retaliation and that your issues from 2011-2012 are not valid since you received wages well in excess of the LCA required wage. We have no authority to supervise a settlement.

After the e-mail we had a conversation and I explained to you that our investigation has been completed and we would be issuing you a determination letter. All interested parties including yourself have a right to an appeal.

(RX F, p. 14.)

Professor Chakravarty responded shortly thereafter, stating that he hadn't received a letter and would not accept the finding that there had been no retaliation. Regarding the wage dispute, Professor Chakravarty seems to have alleged that he was not given fringe benefits on the entire \$30,000 wage specified in the LCA because this was adjusted later without adding in fringe benefits for the adjustment. (*Id.* at 13-14.) Mr. Longo replied on the 21<sup>st</sup> of November stating that they would be taking no further action in this matter and again explaining the finding. (*Id.* at 13.) Professor Chakravarty replied that day, continuing to dispute the same basic issues. He alleges that he was denied fringe benefits, in the form of retirement service credits, on at least part of the wages included in the \$30,000 represented in the LCA. Several factual disputes regarding the retaliation claim are continued as well. (*Id.*)

The Administrator of Wage and Hour issued a written determination on December 8, 2014. The University was found to have failed to pay wages as required and assessed \$56,466 in back wages to 32 H1-B nonimmigrants related to unauthorized wage deductions. No civil penalties were applied, and the determination noted that Employer had already paid the back wages required. The letter stated that any interested party could appeal and provided the process and timeline for doing so.

### ***7. The Second Settlement, Grievances, and the End of the Employment Relationship***

On January 15, 2015 the University and Professor Chakravarty executed an "Addendum to the Settlement Agreement and Release". (RX C, p. 9.) The University agreed to pay a lump sum to Professor Chakravarty of \$10,204.00, less any applicable withholdings, to compensate him for two years of service credits in CalPERS that he did not earn. (*Id.*) It also agreed to pay Professor Chakravarty a total of \$1,490.50, less applicable deductions, to reimburse Claimant for service credit payments he had made with monies from the first settlement. (*Id.*) Finally, the University agreed to pay back wages of \$5,872.93, less taxes and withholdings, related to the academic year 2011-12. (*Id.*) In exchange, Professor Chakravarty agreed that the settlement and addendum operated to "fully resolve any and all compensation and retirement service credit matters from August 28, 2006 to August 26, 2014." (*Id.*) As in the original settlement, the addendum was executed by Professor Chakravarty and Provost Harold Hellenbrand on behalf of the University. (*Id.*)

At the hearing Professor Chakravarty claimed that this addendum did not resolve all compensation and retirement service credit matters with the University because it did not include his loss of income (or loss of opportunity claims) that he believed were still being deliberated by Wage and Hour. Though he acknowledged that this related to compensation, in his view it was outside of the agreement because he still wanted the University and Wage and Hour to take additional actions on this particular complaint. (HT, pp. 46-50.)

On February 23, 2015 Professor Chakravarty filed a grievance under the CBA alleging that the decision to hire a new lecturer for the Fall 2014 Semester had adversely affected him and his Spring 2015 Semester Teaching Schedule. He also grieved that he was being paid via "special pay" rather than pay for courses taught because this had never been done before and functioned to reduce the number of credits for the purposes of determining future course entitlement. (HT, pp. 52-53; ALJX C, p. 8.) Professor Chakravarty filed another grievance on

May 28, 2015 relating to the denial of an additional three year teaching appointment. (HT, pp. 53-54; ALJX C, p. 8; RX D, pp. 10-11.) The ground for this grievance was that the Dean wrongfully issued Professor Chakravarty an unsatisfactory evaluation in the spring of 2015 and that this had deprived him of a three year appointment renewal. (RX D, p. 11.) A University Labor Relations Manager determined that the University had fulfilled its obligations to Professor Chakravarty on June 29, 2015. (*Id.*) Professor Chakravarty's grievances are still being adjudicated at different levels in the CBA's grievance system. (HT, p. 141.)

Professor Chakravarty's employment with the University ended after May 2015 when his three year appointment from August 22, 2012 expired and he was denied another three year appointment. (HT, pp. 11-12.)

### **C. Credibility Determinations**

Though it is not required, the Administrative Review Board ("ARB") has stated its preference that the ALJ "delineate the specific credibility determinations for each witness." *Malmanger v. Air Evac EMS, Inc.*, ARB No. 08-071, ALJ No. 2007-AIR-008, slip op. at 10 (ARB July 2, 2009). In weighing the testimony of witnesses, the ALJ may consider the relationship of the witnesses to the parties, the witnesses' interest in the outcome of the proceedings, the witnesses' demeanor while testifying, the witnesses' opportunity to observe or acquire knowledge about the subject matter of the witnesses' testimony, and the extent to which the testimony was supported or contradicted by other credible evidence. *Gary v. Chautauqua Airlines*, ARB No. 04-112, ALJ No. 2003-AIR-038, slip op. at 4 (ARB Jan. 31, 2006).

#### ***1. Professor Chakravarty***

I find Professor Chakravarty generally credible. He was candid in his testimony and respectfully explained his disagreements with the University. This case does not involve deep disputes of fact. Rather, this matter turns on interpretation of the LCA, settlements, and related documents as well as the conclusions that can be drawn concerning retaliation. On both matters, there are clear disagreements in interpretation between the University and Professor Chakravarty. But no fundamental challenge has been made to any of the facts testified to by Professor Chakravarty and I find his testimony credible.

#### ***2. Vice-Provost Michael Neubauer***

Michael Neubauer is a professor of mathematics and liberal studies at CSU Northridge and is currently the Vice-Provost of the University. (HT, p. 94.) He has a variety of responsibilities in this position, including dealing with wage and course assignment disputes that "bubble up" from the Office of Faculty Affairs to the Provost's Office. This included the disputes involved Professor Chakravarty, and Vice-Provost Neubauer dealt with Professor Chakravarty after the complaints were filed with the Department of Labor. (*Id.* at 94-95.) I find Vice-Provost Neubauer very credible. He was in general quite knowledgeable and when he was uncertain or estimating, candid about the limitations of his testimony. Moreover, the correspondence in the record between Vice-Provost Neubauer and Professor Chakravarty shows that Vice-Provost Neubauer was very accommodating and helpful—he clearly attempted to

resolve the dispute in a timely and fair way. The record shows him to be a responsible agent of the University working to ensure the University fulfilled its obligations to Professor Chakravarty.

### ***3. Kristina de la Vega***

Kristina de la Vega is Associate Vice president of Human Resources for the University. She oversees the Human Resources Department. The Department administers payroll, Office of Equity and Diversity matters, recruitment, and employee relations matters. (HT, p. 127.) Ms. de la Vega's testimony was very limited in scope. The substance her testimony concerned Professor Chakravarty's earnings and their source, and here I find her credible. On the interpretation of the LCA, I attach less weight to her testimony, since it is outside her portfolio.

## **VI. Legal Analysis and Findings**

Professor Chakravarty has two claims: one based on lost opportunity to work via a deprivation of course assignments due under the LCA and one based on retaliation. The University has a number of defenses to both claims. After addressing what issues are properly on appeal, I consider the two claims separately, addressing the defenses as they become relevant.

### ***A. What Issues Are Properly on Appeal?***

The role of OALJ in complaints filed under the INA is quite limited. Complaints must first be addressed by Wage and Hour. If Wage and Hour receives a complaint but decides that no investigation is warranted, there is no right of appeal. 20 C.F.R. § 655.806(a)(2). 20 C.F.R. § 655.806(b) specifies that when an investigation has been conducted, the Administrator shall issue a written determination. That determination must set forth the determination of the Administrator, the reasons for it, and prescribe any remedies. 20 C.F.R. § 655.815(c)(1). It must inform the parties of their appeal rights, set forth the procedure for requesting an appeal, and inform the parties that if no timely appeal is filed the determination becomes final. 20 C.F.R. § 655.815(c)(2)-(4). An appeal may only be made after Wage and Hour completes its investigation and issues its determination. 20 C.F.R. § 655.820(b)(1)-(2). No particular form is required of an appeal other than it be dated, typewritten or legibly written, specify the issues contested, give the reasons that determination is in err, be signed, and provide an address for further communication. 20 C.F.R. § 655.820(c). The request must be received within 15 calendar days after the date of determination.<sup>30</sup> 20 C.F.R. § 655.820(d).

In relation to these requirements there are two issues in this case. First, the Administrator has argued that Professor Chakravarty's appeal was not timely. Second, the University has argued that the issues properly before me are very limited. I address each in turn.

### ***1. Was Professor Chakravarty's Appeal Timely?***

I find that Professor Chakravarty's appeal was timely.

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<sup>30</sup> This creates a very short appellate window: it is the date of determination, not the date that the determination is received that begins the period and the appeal must be received, not just sent, by the last day in the period.

On June 9, 2015 Chief Judge Henley issued an Order to Show Cause as to whether Professor Chakravarty was entitled to a hearing since it appeared as if either there had been no written determination of his complaints or he had missed the 15 day filing deadline.<sup>31</sup> (*See* RX G.) The Solicitor filed a response on behalf of Wage and Hour on August 5, 2015:

[T]he Administrator made adverse findings regarding all of Mr. Chakravarty's allegations, and the Administrator informed Mr. Chakravarty in November 2014 that the Administrator's investigation did not find support for his allegations. Because the Administrator did not find support for Mr. Chakravarty's allegations, consistent with agency practice, no aspects of Mr. Chakravarty's allegations were included in the Determination Letter. The Determination letter only identifies and concerns *violations* by CSU-Northridge.

(*See* RX I.) It is the Administrator's opinion that Professor Chakravarty was told clearly in November 2014 via email that they had not found sufficient evidence to support his allegations, that the investigation was closed, and that a determination letter would soon go out that he could appeal. In determination letters, "the absence of inclusion indicates that no violation was found." (*Id.*) Understood in this way, the December 8, 2014 letter sufficed as a written determination and began the running of the 15 calendar day appeals period. This period would have ended on December 23, 2014. Professor Chakravarty did not respond until January 3, 2015.

The first question is whether the December 8, 2014 letter, read in light of prior email correspondence, was a written determination of Professor Chakravarty's complaints. If not, then there has been no written determination for Professor Chakravarty to appeal. Neither the University nor Professor Chakravarty now contest the Administrator's position and argue that there has been no determination, and so I find that the Administrator issued the written determination required by regulation on December 8, 2014. The Parties in this case have stipulated that Professor Chakravarty's appeal should be dated to January 3, 2015.

So the question becomes whether equitable tolling applies to extend the deadline. Equitable tolling of filings deadlines is extended sparingly, for instance in cases where a party has actively pursued judicial remedies through defective pleadings or when a party was induced or tricked by an adversaries misconduct in allowing a deadline to pass. It is rarely applied when a party has "failed to exercise due diligence in preserving his legal rights." *Irwin v. Dep't of Veterans Affairs*, 489 U.S. 89, 96 (1990) (citing *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 151 (1984)). Equitable tolling principles apply to actions under the INA. *Wakileh v.*

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<sup>31</sup> In its pre-hearing motion the University argued that since Professor Chakravarty did not comply with Judge Henley's time limit to respond this matter should be dismissed. As the record reflects, however, it proved difficult to contact Professor Chakravarty at his last known address or via telephone, and the Order to Show Cause was only delivered when an Attorney-Advisor in Judge Henley's contact made email contact. Professor Chakravarty was then given a short timeline within which to respond, and did so in accordance with the given instructions. Judge Henley did not make a ruling as to whether or not Professor Chakravarty's appeal was timely. But Judge Henley did permit him to respond to that Order despite having missed the deadline due to a failure of delivery. And he subsequently forwarded this matter to the San Francisco Office for further proceedings. Hence, I find that Professor Chakravarty's failure to respond in a timely matter to the Order to Show Cause is excusable and that Chief Judge Henley has already rejected the University's argument on this point. After being apprised of the facts at the hearing, the University does not make this argument in its Closing Brief.

*Western Ky Univ.*, ARB 04-113, ALJ No. 2003-LCA-023, slip op. at 4 (Oct. 20, 2004). In applying equitable tolling, courts act flexibly on a case by case basis to “relieve hardships which, from time to time, arise from a hard and fast adherence’ to more absolute legal rules, which, if strictly applied, threaten ‘evils of archaic rigidity.’” *Holland v. Florida*, 560 U.S. 631, 650 (2010) (quoting *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 248 (1944)).

To be entitled to equitable tolling a party must show that he has pursued his rights diligently and that some extraordinary circumstance stood in his way to prevent timely filing. *Id.* at 649 (citing *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005); see also *Credit Suisse Sec. (USA) LLC v. Simmonds*, 132 S. Ct. 1414, 1419 (2012); *Wong v. Beebe*, 732 F.3d 1030, 1052 (9<sup>th</sup> Cir. 2013), *aff’d* 135 S. Ct. 1625 (2015); *Ramirez v. Yates*, 571 F.3d 993, 997 (9<sup>th</sup> Cir. 2009). “As to the first element, ‘[t]he standard for reasonable diligence does not require an overzealous or extreme pursuit of any and every avenue of relief. It requires the effort that a reasonable person might be expected to deliver under his or her particular circumstances.’” *Wong*, 732 F.3d at 1052 (quoting *Doe v. Busby*, 661 F.3d 1001, 1015 (9<sup>th</sup> Cir. 2011)). The analysis focuses on whether the party has been without fault in pursuing his claim. *Id.* (citing *Fed. Election Comm’n v. Williams*, 104 F.3d 237, 240 (9<sup>th</sup> Cir. 1996)). The second showing requires more than excusable negligence—extraordinary circumstances must be shown such that timely filing was prevented by external circumstances outside of the party’s control. *Id.* (citing *Holland*, 560 U.S. at 650; *Ramirez*, 571 F.3d at 997; *Harris v. Carter*, 515 F.3d 1051, 1055 (9<sup>th</sup> Cir. 2008)).

The December 8, 2014 Determination Letter did not give Professor Chakravarty notice that a determination as to *his* complaints had been made. Per the earlier emails he was told that there would be a determination coming and that it would be negative. This came on December 8, 2014. But on its face the letter deals with related issues without addressing his complaints. He was understandable confused, then, as to whether an appealable determination had been made.

The Administrator’s argument is that it is standard practice to issue negative determinations by omission. But standard practice or not, it is a very confusing way to notify a party that his complaints have been rejected. It is worth noting that the then-Acting Chief Administrative Law Judge, given the same information that Wage and Hour presented to Professor Chakravarty, wasn’t sure if a written determination had been issued. Though Wage and Hour may adopt its own standard practice and doubtless has good reason for this particular practice, if the effect of those practices is that even ALJs don’t realize that a written determination has been issued, it would be unreasonable to expect prosecuting parties to divine the actions of Wage and Hour. This is especially important given the very short timeframe for filing an appeal. This deadline is meant to expedite the process of LCA cases, not as a way to trick prosecuting parties into forfeiting their appellate rights. Yet in this case the written determination functioned to do just that, since it leaves a reasonable person not fully acquainted with Wage and Hour standard practices confused as to whether an appealable determination had been made until after the short time to file an appeal had run.

Even allowing that the December 8, 2014 determination was inadequately made, because Professor Chakravarty was on vacation he did not receive it or make any reply until January 3, 2015. (HT, pp. 78-79.) This raises a difficult question, but I find that it does not prevent the

application of equitable tolling. Even if Professor Chakravarty had received the letter shortly after it arrived, he still would have been left in the same predicament. Indeed, the email to Secretary Perez that the Parties have agreed to *treat* as an appeal does not follow the form of an appeal and does not in particular ask for an appeal. Instead it seeks to have Wage and Hour issue a determination on his complaints so that he can appeal it. It wasn't clear that a determination had been made until April 2015 when Wage and Hour responded to the January 3, 2014 query.

I find that the basis for the delayed appeal in this case is primarily with the confusion reasonably engendered by the way Wage and Hour made its determination, not lack of diligence by Professor Chakravarty. The delay between the January 3, 2015 email to Secretary Perez and this matter coming before OALJ was not due to any action or inaction of Professor Chakravarty. And since being located concerning this appeal Professor Chakravarty has diligently prosecuted his case. Thus it is appropriate to apply equitable tolling and consider Professor Chakravarty's appeal timely.

## ***2. Which Issues Are Ripe for Appeal?***

I find that the question of whether Prosecuting Party was denied course assignments promised by the LCA during the period covered by the LCA is properly before me on appeal. I further find that Prosecuting Party's allegations of retaliation by deprivation of a class in the Summer 2014 term and by reduction of his course schedule for the Fall 2014 semester are properly before me.

I may only address issues that were the subject of the investigation and determination by Wage and Hour. The University takes the position that any complaint not made to Wage and Hour in the April 2014 complaint is not yet ripe for review because it has not been addressed by Wage and Hour. (ALJX C, p. 4.) Professor Chakravarty argues that all of his claims are ripe because all were made to Wage and Hour. (ALJX B, p. 9-10.) This, of course, depends on which issues Professor Chakravarty is pursuing at this point. At various times he has asserted claims concerning his wages in 2014-15 and retaliation in how he has been paid in 2014-15. (*See, e.g.*, PX A; RX H.) And in his closing legal analysis, Professor Chakravarty adds allegations that the University has violated the "California Public Employees' Retirement Law" as well as an additional charge of retaliation based on denying him an another three year appointment. (PLA, p. 5)

These are well beyond what Wage and Hour did, or even could have, investigated and issued a determination regarding. This is not to say that Professor Chakravarty does not have actionable claims related to these accusations—that is not for me to determine. Rather, appeal in this forum is tightly limited to what has been investigated and determined by Wage and Hour. And so I cannot consider these additional issues.

Which issues *can* be considered? The inquiry is complicated by Wage and Hour standard practice of not issuing written determinations when a complaint is rejected—with no written negative determination it isn't fully manifest what exactly they *did* investigate and reject. In its Closing Argument the University softens its initial position and argues that only three issues are properly before me on appeal: 1) whether the University violated the LCA in its compensation

and course assignments to Professor Chakravarty in 2011-12; 2) whether the University treated Professor Chakravarty like a similarly situated employee in 2011-12 in terms of unit assignments; and 3) whether the University retaliated against Professor Chakravarty by taking away courses in the Summer and Fall of 2014. (RCB, p. 7.)

The University's considered opinion on which allegations of retaliation is ripe for review is well-founded.<sup>32</sup> Though obviously the retaliation complaints were not made in the first meetings with Wage and Hour, it is quite clear that Professor Chakravarty did make these allegations as the investigation proceeded and that Wage and Hour completed an investigation of them, reaching negative determinations. Professor Chakravarty alleged retaliation relating to his manner of pay and the course assignments for Summer and Fall 2014 in an October 7, 2014 email to Mr. Longo at Wage and Hour. (PX H, p. 1.) On November 2, 2014 Mr. Longo responded stating that they had investigated his complaints about being denied course assignments in the Summer and Fall of 2014 in retaliation for his complaints and rejected his allegations. (PX M, p.1; RX E, p. 12.) These two allegations of retaliation are hence properly on appeal.

The remainder of the University's position would limit consideration solely to those allegations of violations in academic year 2011-12, omitting any claims for violations in other academic years. They argue that Professor Chakravarty's theory of a violation was premised on events in 2011-12 and this was what Wage and Hour investigated, and hence the scope of appeal must be limited to violations in that academic year. (RCB, pp. 6-7.)

This point is overstated. The scope of appeal is limited to issues that were addressed by Wage and Hour. This means that I may only address complaints that were made and investigated. It does not mean that I may only consider the main argument that Claimant made in support of the claimed violation. Professor Chakravarty alleged that the LCA was violated when he was not assigned 30 units per year. He focused on 2011-12 because this was the year that was used to determine his entitlement to units under the CBA. But the alleged violation is the same regardless of the academic year covered by the LCA. And Wage and Hour did reach substantive determinations as to whether the LCA was violated.

The cases that the University relies on for its narrow understanding of the scope of appeal are not on point. *Gupta v. Perez*, 2015 U.S. Dist. LEXIS 54519 (D.N.J. Apr. 27, 2015) involved a prosecuting party who wished to raise, on appeal, allegations of failure to provide benching pay in addition to the allegations raised to Wage and Hour that the employer had taken unauthorized deductions. This was found improper. *Id.* at \*34-\*39. Those are completely different issues,

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<sup>32</sup> Initially the University appeared to argue that no retaliation claims were ripe since they were not made in the initial complaint to wage and hour. The University argued that since on July 15, 2014 Professor Chakravarty became a legal permanent resident any claims for retaliation after that date are outside the scope of the INA retaliation provisions. (ALJX C, p. 3.) This does not follow. The retaliation provisions concern actions taken because of a complaint, and the complaint need not have been filed by the H1-B Visa holder. A citizen worker could file a complaint as well. And if subjected to adverse actions due to that complaint, would have a cognizable claim for retaliation under the INA. What is protected by the retaliation provisions in the INA is the act of making (internal or external) complaints about violations of the INA, not particular rights created by the INA. It is thus immaterial that Professor Chakravarty was not a H1-B Visa Holder at the time of some of the allegedly retaliatory actions and/or complaints about retaliation. So long as those complaints related to rights under the INA, the retaliation provisions of the INA apply.

one of which had not been addressed at all by Wage and Hour. By contrast, here the issues are identical and have been addressed by Wage and Hour. The only difference is that initially Professor Chakravarty focused on 2011-12 in stating the alleged violation rather than the other years in which the exact same alleged violation occurred.

The University is correct in asserting that *Administrator, Wage and Hour Div. v. Greater Missouri Medical Pro-Care Providers, Inc.*, ARB No. 12-015, ALJ No. 2008-LCA-26 (ARB Jan. 29, 2014) stands for the proposition that the Administrator has the discretion to determine the scope of investigations. The case is slightly off point, however, because the relevant argument there was whether the charges made by a complainant limited the Administrator. *Id.* at 6ff. The present issue isn't really about an expansion of the original complaint by the Administrator or the Prosecuting Party. Instead it turns on how strictly to read the content of a complaint. Professor Chakravarty complained that the University was violating the LCA by not assigning him the required number of courses. And in making that complaint he focused on 2011-12.

A prosecuting party may not change his claim or theory on appeal. But in this case I am wary of adopting an overly strict interpretation as to exactly what theory Professor Chakravarty has pursued. The basic allegation was that the LCA was violated when he was assigned less than 30 units. This led to lost wages, lost benefits, and lost opportunity to future entitlement to courses. All that remains for decision is the last. The central argument and investigation focused on 2011-12, but the issue was the same for all three years. In the absence of clear indications from Wage and Hour as to what exactly was alleged and investigated, it is proper to err on the side of allowing hearing of an appeal when the question presented is just the same argument made in reference to a different year. I therefore find that the question of whether Claimant was denied course assignments promised by the LCA is properly before me on appeal.

### ***B. Lost Opportunity Claim***

Per 20 C.F.R. § 655.806 an “aggrieved party” may file a complaint with the Administrator of the Wage and Hour Division for particular violations of the INA related to the H-1B Visa program for specialty occupations. 8 U.S.C. § 1101(a)(15)(H)(i)(b). For example, complaints may be filed over failure to pay wages as required under the program. 20 C.F.R. § 655.805(a)(2). The relevant regulation specifies that if a violation is found the employer shall be assessed “the payment of back wages or fringe benefits to any H-1B nonimmigrant who has not been paid or provided fringe benefits as required. The back wages or fringe benefits shall be equal to the difference between the amount that should have been paid and the amount that actually was paid...” 20 C.F.R. § 655.810.

LCAs must meet a number of requirements. The first, regarding wages, requires the employer to state that the H-1B nonimmigrant shall be paid the wage rate established by the regulations. 20 C.F.R. § 655.731. This includes benefits and the eligibility for benefits, which “shall be offered to the H-1B nonimmigrant(s) on the same basis, and in accordance with the same criteria, as the employer offers to U.S. workers.” 20 C.F.R. § 655.731(c)(3). LCAs must also impose a working conditions requirement: “the employer affords working conditions to its H-1B nonimmigrant employees on the same basis and in accordance with the same criteria as it affords to its U.S. worker employees who are similarly employed, and without adverse effect

upon the working conditions of such U.S. worker employees” 20 C.F.R. § 655.732(a). The regulations explain that “[w]orking conditions include matters such as hours, shifts, vacation periods, and benefits such as seniority-based preferences for training programs and work schedules.” *Id.*

Professor Chakravarty agreed that the University has now compensated him for all of the courses that he actually taught and that he has now been provided with all benefits due during the period in which he worked under an H-1B Visa. (HT, pp. 58-59.) Professor Chakravarty’s current claim, as explained in more detail above, is that the University failed to assign him the 30 units he believed the LCA required and that if he had been assigned those units he would have also been entitled to more future assignments of units. (*Id.* at 34-35.) Crucially, Professor Chakravarty’s complaint turns on unit eligibility and not the dollar amounts paid. This is properly a working conditions complaint—an allegation that he was given the duties promised by the LCA and thereby has suffered in both potential compensation and seniority.

Wage and Hour found against Professor Chakravarty on two alternate grounds. First, Wage and Hour found that Professor Chakravarty’s complaint was barred by the statute of limitations. Wage and Hour also found against Professor Chakravarty substantively on the grounds that the LCA only entitled him to wages and he was paid all of the wages promised. (PX M, p.1; RX E, p. 12.) Moreover, the University argues that the two settlements have disposed of the claim Professor Chakravarty now makes. (RCB, pp. 12-13.)

### ***1. Are the Complaint’s Within the Statute of Limitations?***

I find that the administrator properly denied Professor Chakravarty’s complaints as to the 2011-12 academic year because they are barred by the statute of limitations; however Professor Chakravarty may still recover for any damages suffered if he was assigned less than the required number of courses during 2013-14.

20 C.F.R. § 655.806(a)(5) specifies that a

complaint must be filed not later than 12 months after the latest date on which the alleged violation(s) were committed, which would be the date on which the employer allegedly failed to perform an action or fulfill a condition specified in the LCA, or the date on which the employer, through its action or inaction, allegedly demonstrated a misrepresentation of a material fact in the LCA.

This statute of limitations is jurisdictional, but does not limit the period for which remedies, in the event a violation is found, may be assessed. *Id.*

The University claims that since Professor Chakravarty’s complaints were not filed with Wage and Hour until May 1, 2014, any complaints relating to acts or omissions prior to May 1, 2013 are barred by the Statute of Limitations. (RCB, pp. 10-11; ALJX C, p. 4.) For the purposes of the Statute of Limitations, I date the complaint to his April 17, 2014 meeting with Wage and Hour. The University’s point still holds—since the complaint was April 17, 2014, any violations prior to April 17, 2013 fall outside the statute of limitations. And this would include alleged violations concerning course assignments in 2011-12.

Professor Chakravarty argues that the fact that the University paid him a settlement of \$5,872.93 in January 2015 shows that the Statute of Limitations does not apply to his complaints. He makes the same claim regarding the 2014 payment of his COBRA expenditures from 2010-11. (PLA, pp. 1-2; ALJX B, p. 2, 9.) I do not find this argument persuasive. The mere fact that a party resolves a problem does not mean that it is legally obligated to act in the way that it did. Moreover, the statute of limitations applies only to claims made under the INA via a complaint to Wage and Hour. Professor Chakravarty may well have other legal forums in which the same or substantially similar claims could be asserted absent a one year statute of limitations. Most importantly, settlements involve compromise, and I reject the proposition that entering into a settlement somehow forfeits the legal rights of a party in regards to other claims.

Professor Chakravarty also argues that he did not file complaints earlier because he did not want to prosecute the University and instead availed himself of internal, informal procedures to rectify the violations. (ALJX B, p. 8.) He argues that it should not apply here because he was not simply sitting on his rights but was actively pursuing his complaints in other ways. (HT, pp. 89-90.) While this may all be true and explains why Professor Chakravarty didn't file earlier, it does not bootstrap his later complaints to the Department of Labor into an earlier filing date. The Statute of Limitations is quite clear and gives a hard deadline for making complaints. An aggrieved party may not simply toll it at will by pursuing different avenues of redress.

Professor Chakravarty's complaints are perhaps saved if they constitute a "continuing violation" whereby when the University continued to assign him fewer than 30 units during the running of the LCA it, in essence, committed *one* violation with an end date of July 15, 2014, when he became a permanent resident, ending the applicability of the LCA.

The University argues that there was no continuing violation, relying on *Kersten v. Lagard, Inc.*, ARB Case No. 06-111, ALJ Case no. 2005-LCA-017 (ARB Oct. 17, 2008). There the prosecuting party alleged, among other things, that the employer had underpaid him by misrepresenting his duties on the LCA. The last LCA was filed in 2002 and the complaint was filed in 2004. But the prosecuting party had worked for the employer into 2003, continuing into a period within the one year statute of limitations. He argued that this saved his complaints related to the earlier periods. This argument was rejected on the grounds that the prosecuting party had admitted that he had not been assigned duties beyond those specified in the LCA during the period of his employment that fell within the statute of limitations. *Id.* at 7-9.

The situation here is different—the allegedly offending activity *did* continue into the period that falls within the statute of limitations. So if the alleged violation is one continuing violation, the statute of limitations does not bar the claim. The University, however, convincingly argues that it does not on the basis of *AMTRAK v. Morgan*, 536 U.S. 101 (2002). Though the Court did not reject the idea of a continuing violation, it did hold that "[e]ach incident of discrimination and each retaliatory adverse employment decision constitutes an actionable" violation when the violations involve "[d]iscrete acts" that are "easy to identify." *Id.* at 114-15. The Court contrasted hostile environment claims that by nature involve repeated conduct and can constitute a continuing violation with acts like termination, failure to promote, or refusal to transfer that cannot. Rather, a series of such discrete acts constitutes a number of distinct alleged violations. *Id.*

The latter accurately captures this case. The alleged violations concern the assignment of courses over the course of a year. The actual assignments are composed of easily identifiable discrete acts. While there may be a continuing violation over the course of the particular year or encompassing the various assignments made for both semesters, there is no continuing violation over the course of the entire LCA. The University may have continued to violate the LCA into 2014 when it made course assignments under those allegedly promised via the LCA. But if it did so, it was not part of one continuing violation, since each such violation is a discrete act.

Therefore, I find that the Administrator properly denied Professor Chakravarty's complaints as to the 2011-12 academic year on the grounds that the statute of limitations had run. But since the same violation is alleged to have occurred in 2012-13 and 2013-14, there still remains the substantive question. Professor Chakravarty's complaint came in April 2014. The assignment of courses for 2013-14 would have occurred, or continued occurring within, the prior year. Hence Professor Chakravarty may still recover for any damages suffered if he was assigned less than the required number of courses during 2013-14.

## ***2. Are Professor Chakravarty's Complaints Subject to Accord and Satisfaction?***

I find they are not.

Professor Chakravarty and the University have entered into two settlement agreements related to this matter. The University claims that these settlement agreements function as accord and satisfaction for Professor Chakravarty's claims.<sup>33</sup> (RPB, pp. 12-13; ALJX C, p. 5.)

In regards to the 2014 settlement Professor Chakravarty argues that it is irrelevant because it covers only his rights and remedies for his period working under a J-1 Visa. (ALJX B, p. 9.) I agree. The release in the settlement agreement is quite broad:

[Professor Chakravarty] hereby waives and fully releases and forever discharges University from any and all claims, causes of action, complaints, damages, agreements, suits, attorney's fees, loss, cost or expense, obligations and liabilities, of whatever kind or character, any statutory claims, or any and all other matters of whatever kind, nature or description, whether known or unknown, which he may have against University by reason of or arising out of or concerned his employment with University.

(RX B, p. 7.) But the settlement's stated purpose is to "freely resolve issues relating to the Employee's compensation for the period of 2006 to 2011." (*Id.*) The University might argue—though at least in its Closing Brief it does not—that the broad language of the release trumps the narrower language of the purpose.

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<sup>33</sup> The University's argument (RCB, pp. 12-13) is slightly off point. It convincingly and correctly points out that LCA claims may be settled and that there was no fraud, duress or undue influence. This has not been contested. The remainder of their argument focuses on Professor Chakravarty's admission that all wages and benefits owed for work performed during the period of the LCA have been paid. But this skirts the real issue—Professor Chakravarty's claim is that he wasn't *assigned* work that he was entitled to under the LCA, and so the admission isn't relevant here. The issue is rather whether the settlement agreements, by their terms, have resolved the claims that Professor Chakravarty is making.

A reasonable person, however, would read the two together, especially when it was clear to everyone that there were other claims relating to the period of the H-1B visa that were currently being investigated. The settlement starts by stating that it is going to resolve the claims from 2006 to 2011, the J-1 period, and then includes a release that does so. That the release can be read more broadly doesn't obviate its meaning in context. To hold otherwise would be to allow the University to trick Professor Chakravarty into forfeiting his rights by telling him, in the text of the settlement, that he was settling one group of claims, but then insert legalese to do something that is expressly not intended by the settlement. The University drafted the agreement, and it is a fundamental principle of contract that the contract is construed against the drafter. This favors the natural, holistic reading of the settlement that limits the release to the claims that are expressly the subject of the settlement. Hence, the June 2014 settlement operates to resolve any claims Professor Chakravarty had as to the period of his J-1 visa, but does not settle the claims related to his H-1B visa, which are the subject of the current case.

The Addendum to the Settlement Agreement signed on January 15, 2015 is a quite different matter. In exchange for payments totaling \$17,567.43 Professor Chakravarty agreed that the settlement and addendum operated to "fully resolve any and all compensation and retirement service credit matters from August 28, 2006 to August 26, 2014." (RX C, p. 9.)

In his pre-hearing submissions and at the hearing Professor Chakravarty appeared to argue that since Wage and Hour had not yet satisfactorily resolved the issues he raises here they were outside the scope of the Addendum. (ALJX B, p. 9; HT, pp. 46-50) I find it difficult to make sense of this position. The point of a settlement agreement is to reach a compromise that disposes of various claims in exchange for some relief. Professor Chakravarty cannot unilaterally exempt all issues he wishes to continue to litigate from the scope of a settlement agreement just because he isn't happy with how those issues have been determined to date.

As with the June 2014 settlement, the language of the settlement agreement itself governs what claims are and are not barred. As a prefatory matter the settlement states that "[i]nasmuch as CalPERS has denied the five (5) months retirement service credit the Parties agreed to in Section 3a of Settlement Agreement and Release, the Parties hereby agree as follows..." (RX C, p. 9.) As above, this would appear to limit the settlement to that particular issue. However, the terms of the settlement expressly provide compensation for a larger scope of claims: "3. University agrees to reimburse Employee for back wages in the amount of \$5,872.93, less all tax and withholding. These back wages stem from Academic Year 2011/12, while Employee worked on a H1B Visa." (*Id.*) The release referencing "any and all compensation and retirement service credit matters from August 28, 2006 to August 26, 2014" follows. (*Id.*) Thus, I find that the January 15, 2015 Settlement Addendum includes a release of claims arising under the LCA related to compensation and retirement service credit matters.

This does not end the analysis. Professor Chakravarty's current claim is properly viewed as a working conditions complaint. He asserts that he was not given the proper assignments in courses as required by the LCA, affecting "seniority" rights under the CBA. A working conditions violation is distinct from a wage violation. The issue comes down to whether this particular "working conditions" issue is a "compensation and retirement service credit matter."

I find that it is not. Professor Chakravarty's lost opportunity claim is really a claim about working conditions. He is not alleging that he was compensated incorrectly based on the work that he did. Rather he is claiming that the LCA required that the University give him particular duties while at work. His damages relate to compensation, but the basis for those damages is the duties he was given, or not given, and the seniority that those duties would have brought. His complaint isn't fundamentally about how much he was paid but rather the duties he was assigned in order to earn that compensation. As such, the settlement agreement does not bar the claim made here, since it is not a claim sounding directly in compensation.

### ***3. Did the LCA Entitle The Prosecuting Party to A Specific Amount of Teaching Assignments?***

I find that it did not.

Wage and Hour also determined that even if there had been a timely complaint, there had been no violation of the LCA. Professor Chakravarty argues that he was a full time lecturer entitled to 30 units per year. (PLA, p. 1.) Wage and Hour agreed with the University that the LCA only provided for \$30,000 in wages and that Professor Chakravarty had been paid more than that during the relevant time period. The issue comes down to interpretation, and whether or not the LCA contained any requirement that Professor Chakravarty be assigned 30 unit credits in the Management Department. Professor Chakravarty argues that while the LCA designates him a full-time employee he was provided with only a part-time teaching position during his time with the University. (PLA, pp. 1, 3; ALJX B, pp. 1-5, 9.)

The University's position is that Professor Chakravarty's rights in this forum are limited to those based on the LCA and the LCA provides for a salary of \$30,000 per year—all of which has been paid—and not any unit assignments. (RPB, pp. 8-9.) This is correct: the LCA contains no direct reference to any entitlement to units. (*See* RX A.) And the offer letter related to the LCA makes no reference to an entitlement to teaching units, instead linking the \$30,000 salary to "research and living expenses." (*See* PX D.)

The issue is complicated, however, because the LCA also states that Professor Chakravarty's position is full time. (RX A, p. 2.) And the job title for the position in the LCA is Lecturer. (*Id.*) The CBA is not particularly enlightening on what it means to be full-time: only defining a full-time faculty unit employee as one who is serving a full-time appointment. (*See* ALJX D Art. 2, p. 2.) Vice-Provost Neubauer testified that all lecturers are temporary employees, and the University tends to call a lecturer full-time when he or she carries the maximum number of units, 30 units per year, while a part-time lecturer is assigned fewer units. (HT, p. 112-16.) Moreover, under the CBA full-time appointees in either three or one year appointments are given priority over part-time appointees in the same appointments when it comes to assigning courses. (*See* ALJX D Art. 12, pp. 8-10.) All together, Professor Chakravarty's reasoning is rather plain: the LCA identifies him as a full-time lecturer and a full time lecturer is entitled to 30 units per year and has some priority in the assignment of courses.

The University makes two related arguments against this line of reasoning. First it argues that the meaning of "full-time" should be determined with reference to its meaning in the context of the LCA and that Professor Chakravarty was a full-time employee who taught as a part-time

lecturer and also carried research responsibilities, unlike other lecturers. (RCB, p. 9.) Vice-Provost Neubauer testified that Professor Chakravarty was in a somewhat unique position in that he was the only lecturer on an H-1B visa. The University elected to designate him a full-time employee for those purposes and guarantee him a salary—something that other lecturers would not have—so that he would have adequate living expenses. To justify this salary and full-time position it gave him research responsibilities. (HT, pp. 118-21.) So Professor Chakravarty was a full-time employee with a salary and research responsibilities, but a part-time lecturer for the purposes of the CBA and teaching assignments.

There is no definition of “full-time” in the regulations governing the H-1B nonimmigrant program. *See* 20 C.F.R. § 655.715. In the LCA, it is simply a check box. (*See, e.g.*, RX A, p. 2.) The instructions for completing the LCA provide with reference to the full-time/part-time designation: “Enter whether this position is full-time by indicating ‘Yes’ or ‘No’. Although there is no regulatory definition for full-time employment, the Department generally considers 35 hours per week as the distinction point between full-time and part-time.”<sup>34</sup> Labor Condition Application for Nonimmigrant Workers, ETA Form 9035CP – General Instructions for the 9035 & 9035E, p. 2. The instructions add the following note: “If this position is part-time, the employer attests that the foreign worker(s) supported by the LCA will not regularly work more than the number of hours indicated (which must be a range of hours) on the United States Citizenship and Immigration Services Form(s) I-129 filed for the nonimmigrant(s).” *Id.*

As a teacher at a University, Professor Chakravarty was assigned courses, not given a schedule with a determinant number of hours.<sup>35</sup> So it is somewhat awkward to designate him full or part time by the terms of the LCA. Moreover, in addition to Professor Chakravarty’s teaching in the Management Department, he was able to teach additional courses through the College of Extend Learning and during the summer term. This greatly expanded the actual number of units he *did* teach from those he was *entitled* to teach as a lecturer in the Management Department. And though it is somewhat unclear what research Professor Chakravarty was doing, the letter associated with the LCA quite plainly gives him some research responsibilities, and the corresponding guarantee in pay unconnected with an obligation to teach a course.

Based on the instructions, when the University designated Professor Chakravarty full-time on the LCA it was stating that he would generally work more than 35 hours a week. Moreover, the note in instructions favors defaulting to full-time when there is uncertainty. There was certainly some uncertainty in this case, as the University could not know how many hours per week Professor Chakravarty would spend preparing for the classes he taught in the Management Department, how many classes through the College of Extended Learning he would teach in addition and how much time that would encompass, and how much time he would devote to research. Professor Chakravarty’s actual earnings were always over double the \$30,000 promised in the LCA. (HT, pp. 127-28.) And they were well in excess of the roughly

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<sup>34</sup> This accords with the definition of “full-time” given in the regulations governing the H-2B nonimmigrant program. *See* 20 C.F.R. § 655.5; *see also* 29 C.F.R. § 503.4.

<sup>35</sup> The issue of translating between hours and credits assigned has not been addressed under the INA, though it has been discussed in the context of the Affordable Care Act, where the IRS has required only a reasonable method of calculation, with an example provided, until it is able to issue further guidance. *See* Shared Responsibility for Employers Regarding Health Coverage, 79 Fed. Reg. 8543, 8551 (Feb. 12, 2014).

\$40,000 Vice-Provost Neubauer believed that a lecturer with 30 units would have been paid in the time period. (*Id.* at 123.) It follows that Professor Chakravarty *was* working full-time as a lecturer. He just wasn't working as a full-time-lecturer-in-the-Department-of-Management. Hence, for the purposes of the LCA the University properly designated him full-time, even though in terms of course assignments in the Management Department alone, he would fit in as a part-time employee per the nomenclature used to refer to lecturers.

On top of this, the University convincingly argues that Professor Chakravarty was treated the same as, and in fact better than, a similarly situated lecturer. (RPB, pp. 14-16.) The INA requires that H-1B nonimmigrants be provided with “working conditions...on the same basis and in accordance with the same criteria as it affords to its U.S. worker employees who are similarly employed, and without adverse effect upon the working conditions of such U.S. worker employees” 20 C.F.R. § 655.732(a). The CBA governs how employees in the lecturer category are treated in terms of appointments and assignments. (*See generally* ALJX D Art. 12.) There is no dispute that the University complied with the terms of the CBA and treated Professor Chakravarty like a similarly situated lecturer.

Indeed, the crux of Professor Chakravarty's argument is that because he is an H-1B worker, he is entitled to better treatment than ordinary lecturers—that despite his rights under the CBA, the LCA somehow elevates his entitlement to course assignments and the resulting seniority and opportunity to work in the future. Vice-Provost Neubauer was quite clear that if the University had in fact done what Professor Chakravarty now demands, other lecturers would have been deprived of appointments they were entitled to under the CBA and the University would have faced grievances from them. (HT, pp. 100-01.) It may also have been a violation of the INA—the University *could not* provide Professor Chakravarty with rights that exceeded those of similarly situated lecturers because it would have had an adverse effect on similarly situated lecturers, i.e. lecturers with the same standing in terms of the CBA. I have found that the designation of full-time in the LCA does not implicate an entitlement to courses. And in this particular circumstance, it would create a violation of the INA to construe it to do so.

The University may well treat all of its lecturers poorly, but that alone does not create a violation of the INA. A violation must be premised on treating Professor Chakravarty worse than U.S. employees in a similar position. And here it is clear that the University did not. If anything he was treated better than a U.S. employee in a similar position. No other lecturer with his CBA-based unit entitlement would have a salary guarantee or be deemed full-time. No other lecturer would have had the *privilege* of being compensated solely for research. Because the University wished to retain Professor Chakravarty and because to do so he had to be an H-1B nonimmigrant, the University had to file an LCA that required specifying a minimum wage and designating the employee as full or part-time. In the context of university teaching, the designation of full or part-time does not make as much sense, because the *hours* involved in the job are contingent on the particular individual. The instructions favor defaulting to full-time status, and the choice was binary. It would be improper to import a different sort of classificatory scheme for full and part-time employees into the LCA in order to reach an anomalous result that the University has extraordinary obligations to Professor Chakravarty beyond any obligations it would have to similarly situated U.S. workers.

Professor Chakravarty feels aggrieved at his treatment by the University, aggrieved that as a lecturer he was subject to the whims of the Management Department in terms of which courses he was assigned when and the number of courses he was assigned in a given year. He is pursuing other complaints related to the ultimate denial of another appointment through the CBA's grievance process. But the fact of the matter is that even with the protections of the CBA, the University appears to treat its lecturers poorly, with few guarantees of future work and subject to the whims of the assigning Department. Complaints about the poor treatment of University lecturers are not properly raised under the INA. An LCA does not require that the University treat its lecturers well, it only requires that it treat workers covered by the LCA the same as it treats its United States workers who are similarly situated.

I find that under the LCA Professor Chakravarty had both teaching and research responsibilities that made him a full-time employee. The LCA created an obligation to pay Professor Chakravarty \$30,000 per year. But it did not require the University to actually assign him 30 units per year. Rather, his entitlement to course assignments was determined by the terms of the CBA. And since the terms of the CBA were complied with from 2011-14, I find that Professor Chakravarty has been treated properly in terms of course assignments for the period covered by the LCA. And as such, there is no viable lost opportunity claim.

### ***C. Retaliation Claim***

Professor Chakravarty's second claim concerns retaliation. (HT, pp. 35-36.) He alleges that the University reduced his course assignments and deprived him of a future appointment because of his complaints related to the INS and asksThe INA provides that:

(iv) it is a violation of this clause for an employer who filed an application under this subsection to intimidate, threaten, restrain, coerce, blacklist, discharge, or in any other manner discriminate against an employee (which term, for purposes of this clause, includes a former employee and an applicant for employment) because the employee has disclosed information to the employer, or to any other person, that the employee reasonably believes evidences a violation of this subsection, or any rule or regulation pertaining to this subsection, or because the employee cooperates or seeks to cooperate in an investigation or other proceeding concerning the employer's compliance with the requirements of this subsection or any rule or regulation pertaining to this subsection.

8 U.S.C. § 1182(n)(2)(C)(iv); *see also* 20 C.F.R. § 655.801.

An aggrieved party may also file complaints alleging retaliation. 20 C.F.R. § 655.805(13). An "aggrieved party" is "any person or entity whose operations or interests are adversely affected by the employer's non-compliance with the labor condition application..." 20 C.F.R. § 655.715. If an aggrieved party is successful, the employer could be assessed civil money penalties amounting to no more than \$5,000 per violation. 20 C.F.R. § 655.810(b)(2)(iii). This penalty is payable to Wage and Hour. 20 C.F.R. § 655.810(f). In addition, if retaliation is found, reinstatement or "other appropriate legal or equitable remedies" could be ordered. 20 C.F.R. § 655.810(e)(2).

### ***1. The Particular Retaliation Allegations to be Evaluated***

Professor Chakravarty most fully explicated his retaliation claims in his Response to Chief Judge Henley's Order to Show Cause. There are four alleged instances of retaliation in this filing. First, it is alleged that after the filing of the complaint the department chair of the employer retaliated by revoking his appointment to a summer course. Professor Chakravarty allows that "this class was justifiably offered to a tenured faculty" but complains that it would have been fair to take a class away from another part-time faculty member who was teaching two or more classes that summer. Additionally, he alleges that when another summer course became available to teach a few days later he responded immediately seeking the appointment, but another faculty member was chosen instead. (PX A, pp. 3-4; RX H, pp. 27-28.)

Second, he alleges that his fall 2014 course assignments were cut in retaliation for his complaints. Not only did this deprive him of earnings during the fall of 2014, but because of the nature of the contract, it meant that he would not be eligible for or entitled to course assignments in future semesters. (PX A, p. 4; RX H, p. 28.)

Relatedly, Professor Chakravarty claims that the decision to compensate him for past due pay as special pay rather than classroom pay worked to deny him the teaching credits necessary to continue his teaching eligibility into the future. Next he claims that the denial of retirement benefits, as detailed above, has been a retaliatory act, again turning on the way that Employer choose to make him whole for past mistakes in pay.<sup>36</sup> (PX A, pp. 4-5; RX H, pp. 28-29.)

Professor Chakravarty's last allegation of retaliation is basically a summation of his general charge: after he complained to DOL the University took actions that functioned to deprive him of future eligibility for/entitlement to teaching assignments, specifically by reducing his course assignments, taking a summer class away, and resolving past pay discrepancies with a "special pay" category that did not provide him with any service credits. This has put him in a precarious financial position, which is compounded the alleged deficiency in the way his retirement benefits will be calculated. (PX A, pp. 4-5; RX H, pp. 28-29.)

Above I determined that there are two allegations of retaliation that are ripe for review because they were both raised before and investigated by Wage and Hour: (a) that he was deprived of a class in the Summer 2014 term and (b) that his course schedule was reduced for the Fall 2014 semester. Professor Chakravarty may have other allegations of retaliation. In his closing Legal Analysis the alleged retaliation extends to include the 2015/16 denial of a renewed three year appointment. Here Professor Chakravarty also casts his retaliation claim in terms of the California Whistleblower Protection Act. (PLA, pp. 3-4.)

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<sup>36</sup> Professor Chakravarty also calls past requirements that he pay various visa fees retaliatory, though I cannot make out what this claim might be. Apparently he had wrongfully been asked to pay certain fees and after the complaint was filed, the University corrected the error and paid him back for all past fees. It is not clear how this could be retaliatory. Professor Chakravarty includes, as well, allegations of mismanagement and/or complicity by various University officials and departments, though there do not appear to be any additional allegations of retaliation here. (PX A, pp. 4-5; RX H, pp. 28-29.)

The question before me is very narrow. Professor Chakravarty may well have claims under the California Whistleblower Protection Act and he may well have viable complaints of retaliation based on actions taken by the University and its agents related to the eventual non-renewal of his three-year appointment. But I am empowered to hear neither. As explained above, the scope of this hearing is limited to violations actionable under the INA and to complaints that were addressed in Wage and Hour's investigation.

That leaves only the allegations that Professor Chakravarty's Summer and Fall 2014 course assignments were altered in retaliation for his complaints about violations of the INA. These allegations of retaliation are not subject to accord and satisfaction and so are properly considered on their merits—the January 15, 2015 Settlement Addendum that address the H-1B period releases claims related to compensation and retirement service credits. (*See* RX C, p. 9.) While there is reasonable dispute about whether this encompasses the lost opportunity claim, retaliation is certainly beyond the scope of the release.

## ***2. The Legal Framework for Retaliation Claims Under the INA***

To evaluate Professor Chakravarty's claims I must first discern the proper way to analyze retaliation claims under the INA. In the response to comments on the implementing regulations of the INA the Employment and Training Administration stated that retaliation claims should be adjudicated using the “well-developed principles that have arisen under the various whistleblower protection statutes that have been administered by [DOL].” Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H-1B Visas in Specialty Occupations and as Fashion Models, 65 Fed Reg. 80,178 (Dec. 20, 2000). There is no requirement that the complainant show that there was an actual violation or more than a *de minimus* violation. Protected activity includes an employee making an “‘internal’ complaint to the employer or to any other person, as well as an employee who cooperates in an investigation or proceeding concerning an employer's compliance with the INA and these regulations” and the complainant need only have a reasonable belief that there was some violation. *Id.* The inclusion of internal complaints as protected activity follows directly from the language of the INA: it protects employees from retaliation when they have “disclosed information to the employer, or to any other person...” 8 U.S.C. § 1182(n)(2)(C)(iv).

The INA, implementing regulations, and comments on those regulations leave open the question of how exactly retaliation claims are to be adjudicated and which evidentiary framework for analyzing causation should be used, or if any such framework should be used at all. This is no issue when there is “smoking gun” evidence of retaliation—ultimately the complaining party must show causation, and if this can be done simply, there is no need for an evidentiary framework. But most retaliation cases are more complex, and evidentiary frameworks involving shifting burdens of production or proof have been developed to aid complainants in making out their case and aid courts in evaluating claims of discrimination and retaliation. The problem is that there are (at least) two distinct “well-developed principles” for adjudicating retaliation claims under the various whistleblower statutes enforced by the Department of Labor: the three-part *McDonnell Douglas* burden-shifting framework and the two-part AIR-21 burden-shifting framework. *See, e.g., Allen v. Admin. Review Bd.*, 514 F.3d 468, 475-76 (5<sup>th</sup> Cir. 2008). Initially retaliation claims under the whistleblower statutes were adjudicated using the *McDonnell Douglas* framework. The AIR-21 framework is a

congressional creation from the the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (“AIR-21”). *See, e.g., Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 157-58 (3<sup>d</sup> Cir. 2013).

Neither Professor Chakravarty nor the University has addressed the proper legal analysis of retaliation under the INA. The Administrator of the Wage and Hour Division has submitted a brief arguing that neither framework should be used.<sup>37</sup> The Administrator holds that in retaliation claims under the INA, the prosecuting party has the burden of showing “but-for” causation: that the adverse action would not have been taken by the employer *but-for* the protected activity of the prosecuting party. (AB, pp. 1-2.) This position rejects wholesale the employee-friendly burden shifting involved in the AIR-21 framework, where the employee expressly does not have the burden of showing but-for causation. In the *McDonnell Douglas* framework the employee does have the burden of showing but-for causation and the burden of proof does not shift. But the framework aids employees by structuring the inquiry and requiring employers to produce reasons for adverse actions—reasons that can then be attacked as pretextual.

The Administrator rejects use of *McDonnell Douglas* as well, favoring the more employer-friendly approach in which the complainant must show causation without any shifting burdens of production and so without being assured of the opportunity to prosecute the case by assailing the employer’s proffered reason. The Administrator’s rationale for this last move is that *McDonnell Douglas* is only appropriate in pre-trial motions and does not reflect the proper analysis of causation at trial. (*Id.* at 3 n. 1.) Since Wage and Hour is one of the implementing agencies, the Administrator’s litigation position carries some added persuasive force if it is a reasonable interpretation. *See Price v. Stevedoring Servs. of Am.*, 697 F.3d 820, 832 (9<sup>th</sup> Cir. 2012) (citing *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001); *Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 136 (1997); *Skidmore v. Swift*, 323 U.S. 134, 139-40 (1944)).

Retaliation claims in the various whistleblower statutes adjudicated before OALJ have been litigated by reference to Title VII employment discrimination jurisprudence. To understand the various options for analyzing retaliation—and to understand the Administrator’s position—it is necessary to take a brief detour into the vast, foreboding landscape of employment discrimination litigation.

Under the *McDonnell Douglas* framework developed in Title VII cases the complainant must make out a *prima facie* case of discrimination/retaliation. Then the burden shifts to the employer to offer a legitimate non-discriminatory reason for the adverse action. If it does so, then the presumption of discrimination disappears, and the complainant must prove his case by a preponderance of the evidence, perhaps by showing that the proffered reason was pretextual. *E.g. Powers v. Union Pac. R.R. Co.*, ARB Case No. 13-034, ALJ Case No. 2010-FRS-030, slip op. at 11 (ARB Apr. 21, 2015) (citing *McDonnell Douglas v. Green*, 411 U.S. 792 (1973)). A *prima facie* case requires showing a protected activity, employer knowledge of that protected activity, an adverse employment action, and some causal nexus between the two (perhaps just by

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<sup>37</sup> Per 20 C.F.R. § 655.820(b)(1) in a case such as this, when the complainant requests the hearing and becomes the prosecuting party, “the Administrator may intervene as a party or appear as amicus curiae at any time in the proceeding, at the Administrator’s discretion.”

an inference from temporal proximity, but generally enough evidence to raise an inference of causation). See, e.g., *Bartlik v. U.S. Dep't of Labor*, 73 F.3d 100, 102, 103 n. 6 (6th Cir. 1996); *Carroll v. U.S. Dep't of Labor*, 78 F.3d 352, 356 (8th Cir. 1995); *Cohen v. Fred Meyer, Inc.*, 686 F. 2d 793, 796 (9<sup>th</sup> Cir. 1982).

*McDonnell Douglas* does not alter the causal relationship that needs to be shown and it does not relieve the complainant of the burden of persuasion. Rather, it only structures the ultimate inquiry and forces the employer to produce a reason for the adverse action, that then can be subjected to critical analysis in the final step in which the complainant has the burden of showing but-for causation by a preponderance of the evidence.

Though it can be applied generally, *McDonnell Douglas* works most naturally in so-called “pretext” cases where the complainant seeks to debunk the rationale given by the employer. Its usefulness is less clear in so-called “mixed-motives” cases wherein the employee does not deny the employer’s stated rationale, and may not even deny that it could be a sufficient explanation for the adverse action, but also maintains that part of the total rationale was membership in a protected class or engagement in protected activity. The difficulty in these sorts of case is somewhat akin to the problem in the classic tort case of *Summers v. Tice*, 33 Cal. 2d 80 (1948).<sup>38</sup> Causation is overdetermined in a way, and there is a danger that there is *no* but-for cause of the relevant action. The worry is more pressing when the causal question is asked of the *reason* a particular employer undertook a particular action: motivations are multiple and complicated, and it can be difficult to ferret out *exactly* what the “true” motive was for a decision, if indeed there even was a “true” reason at all, especially when the issue is the motive of an organization composed of many individuals who might very well have different, inconsistent motives. See *Gross v. FBL Fin. Servs.*, 557 U.S.167190-91 (2008) (Breyer, J., dissenting). This is the issue the Court confronted in *Price Waterhouse v. Hopkins*.

The question before the Court was to determine the “respective burdens of proof of a defendant and plaintiff in a suit under Title VII when it has been shown that an employment decision resulted from a mixture of legitimate and illegitimate motives.” *Price Waterhouse v. Hopkins*, 490 U.S. 228, 232 (1989). A plurality of four Justices (J. Brennan, J. Marshall, J. Blackmun, and J. Stevens) rejected the use of but-for causation in such cases. Instead of having to prove the precise causal roles of the legitimate and illegitimate motives, an employee has the burden of showing only that the employer relied in some way on impermissible motives. *Id.* at 240-42. The employer can then avoid liability by proving that “it would have made the same decision even if it had not allowed [the impermissible motive] to play such a role.” *Id.* at 244. This created a new evidentiary framework with shifting burdens or *proof*, rather than the changing burdens of *production* used in *McDonnell Douglas*. But it did not go so far as the plaintiff had sought and lower courts had held in that the plurality made the employer’s showing a discharge of liability, rather than merely a way to avoid some damages for the violation. The

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<sup>38</sup> While on a hunting trip the two defendants both, simultaneously and negligently, discharged shotguns loaded with birdshot in the general direction of plaintiff. Plaintiff suffered injuries to the eye and face. Only one of the shots actually caused the injury, but plaintiff was unable to prove *which* shot in fact did cause the injury. In such cases, the court held that the burden shifts to the negligent defendants to absolve themselves of liability or be held jointly and severally liable to the plaintiff.

plurality also declined to require the employer to show that it would have taken the same action absent the illegitimate motives by clear and convincing evidence. *Id.* at 236-38, 246.

Three Justices dissented (J. Kennedy, C.J. Rehnquist, and J. Scalia) and would have required a showing of but-for causation in mixed motives cases and used the *McDonnell Douglas* framework to analyze the respective burdens. *Id.* at 279, 286-88 (Kennedy, J., dissenting). Two Justices concurred only in the judgment. Justice White agreed with the shifting burdens articulated by the plurality, but added that the employee's showing that the illegitimate motive was a motivating factor should be read to mean showing that it was a "substantial factor." He also disagreed with the proposition that the employer had to show that it would have taken the adverse action absent to illegitimate motivation by objective evidence. He stressed that credible testimony by the employer to that effect would suffice to carry the burden. *Id.* at 259-61 (White, J., concurring in the judgment). Justice O'Connor resisted rejecting but-for causation, but agreed that in mixed motives cases a departure from *McDonnell-Douglas* was warranted in which the burden of proof would shift to the employer. *Id.* at 261-63 (O'Connor, J., concurring in the judgment). She parted ways with the plurality in requiring a plaintiff to present "direct evidence that decisionmakers [sic] placed substantial negative reliance on an illegitimate criterion in reaching their decision" in order to invoke the more favorable framework in which the burden of proof shifted to the employer. *Id.* at 277-78.

In *Marks v. United States* the Court held that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those members who concurred in the judgments on the narrowest grounds...'" 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n. 15 (1976)). This rule is straightforward, except with a plurality of four and *two* Justices concurring in the judgment, there are *two* ways to get to five. The question, then, is whether Justice White's opinion or Justice O'Connor's opinion is controlling. Much ink has been spilled developing Justice O'Connor's requirement of "direct" evidence showing the illegitimate motive was a "substantial factor" in the adverse action, though arguably Justice White had the narrower ground of concurrence. *See Gross v. FBL Fin. Servs.*, 557 U.S. 167, 188 (2009) (Stevens, J., dissenting); *see also Costa v. Desert Palace*, 299 F.3d 838, 851 (9<sup>th</sup> Cir. 2002) (remarking that the reference to "direct evidence" had inspired a "cottage industry of litigation" resulting in a jurisprudential "quagmire").

Congress responded to *Hopkins* relatively quickly and amended Title VII in the Civil Rights Act of 1991, 105 Stat. 1071. Title VII now provides that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m). There is no requirement of direct evidence. *See Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003). But if the employer shows that it "would have taken the same action in the absence of the impermissible motivating factor," the court can only grant declaratory relief, some injunctive relief, and attorney's fees and costs. It cannot grant damages and cannot issue an injunction requiring the employer to reverse the adverse action. 42 U.S.C. § 2000e-5(g)(2). This abrogated part of the holding in *Hopkins* in favor of the position advocated by the complainant, changing the employer's opportunity to

avoid liability altogether into only an opportunity to limit the sort of relief available to the complaining party after a finding of liability.

It was against this background that Congress enacted the anti-retaliation provisions in AIR-21 in 2000. The two-part AIR-21 burden-shifting framework is even tougher on employers. In the first step the complainant only needs to show that there was protected activity, that an adverse action was taken, and that the protected activity was a *contributing factor* in the taking of the adverse employment action. A “contributing factor is ‘any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.’” *Williams v. Domino’s Pizza*, ARB Case No. 09-092, ALJ Case No. 2008-STA-052, slip op. at 6 (Jan. 31, 2011) (quoting *Sievers v. Alaska Airlines, Inc.*, ARB Case No. 05-109, ALJ Case No. 2004-AIR-028, slip op. at 4 (ARB Jan. 30. 2008)).

The burden of proof then shifts to the employer in the second step, and to avoid liability it must show by clear and convincing evidence that it would have taken the adverse action absent the protected activity. 49 U.S.C. § 42121(b)(2)(B); *Powers*, ABR Case No. 13-034, slip op. 11-12; *Beatty v. Inman Trucking Mgmt., Inc.*, ARB Case No. 13-039, ALJ Case Nos. 2008-STA-020, 2008-STA-020, slip op. at 7-11 (ARB May 13, 2014); *see also Addis v. Dep’t of Labor*, 575 F.3d 688, 691 (7<sup>th</sup> Cir. 2009) (noting that AIR-21 language overrules traditional case law and allows an employee to shift the burden to the employer with a “lesser showing”); *Stone & Webster Eng’g Corp. v. Herman*, 115 F.3d 1568, 1572 (11<sup>th</sup> Cir. 1997) (“For employers, this is a tough standard, and not by accident.”). “Clear and convincing evidence is ‘[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.’” *Id.* (quoting *Brune v. Horizon Air Indus., Inc.*, ARB Case No. 04-037, ALJ No. 2002-AIR-008, slip op. at 14 (ARB Jan. 31 2006.)).

In AIR-21 Congress adopted a similar analysis as the plurality in *Hopkins*, except that it opted to depart from the preponderance of the evidence standard for the employer’s burden in the second step. Instead Congress required showing that the adverse action would have been taken absent the protected activity by clear and convincing evidence, a higher burden of proof.<sup>39</sup> In contrast to *McDonnell Douglas*, the shifting burdens here are burdens of proof, not merely production, and a claimant can succeed in carrying his required burden without showing but-for causation. Moreover, the employer in AIR-21 is saddled with a high hurdle once contribution has been shown, such that in difficult cases with murky motives, the claimant will prevail.

The *McDonnell Douglas* framework was developed for analyzing retaliation under Title VII. 42 U.S.C. § 2000e-3(a). This framework is used to analyze retaliation provisions in the following whistleblower acts administered by the Department of Labor:

1. Occupational Safety and Health Act (29 U.S.C. § 660(c))
2. Asbestos Hazard Emergency Response Act (15 U.S.C. § 2651)
3. International Safe Container Act (46 U.S.C. § 80507)
4. Safe Drinking Water Act (42 U.S.C. § 300j-9(i))

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<sup>39</sup> So in Title VII Congress adopted one-half of rejected part of the plaintiff’s position in *Hopkins* by making the employer’s showing limit only the relief available instead of eliminating any liability at all. In AIR-21 Congress adopted the other half, requiring the employer’s exculpatory showing at a heightened standard of proof.

5. Federal Water Pollution Control Act (33 U.S.C. § 1367)
6. Toxic Substances Control Act (15 U.S.C. § 2622)
7. Solid Waste Disposal Act (42 U.S.C. § 6971)
8. Clean Air Act (42 U.S.C. § 7622)
9. Comprehensive Environmental Response Compensation and Liability Act (42 U.S.C. § 9610).

The AIR-21 analysis has been legislatively extended to the whistleblower provisions in other statutes administered by the Department of Labor:

1. Surface Transportation Assistance Act (49 U.S.C. § 31105(b))
2. Sarbanes-Oxley (18 U.S.C. § 1514A(b)(2)(c))
3. Energy Reorganization Act (42 U.S.C. § 5851(b)(3))
4. Federal Rail Safety Act (49 U.S.C. § 20109(d)(2)(A))
5. Pipeline Safety Improvement Act (49 U.S.C. § 60129)
6. National Transit Systems Security Act (6 U.S.C. § 1142)
7. American Recovery and Reinvestment Act of 2009 (Pub. L. No. 111-5, § 1553(c)(1))
8. Consumer Product Safety Improvement Act (15 U.S.C. § 2087)
9. Affordable Care Act (29 U.S.C. § 2087)
10. Seaman’s Protection Act (46 U.S.C. § 2114)
11. Consumer Financial Protection Act (12 U.S.C. § 5567)
12. FDA Food Safety Modernization Act (21 U.S.C. § 1012)

It is error to apply the *McDonnell Douglas* framework in cases in which the AIR-21 framework is part of the statute. *E.g. Luder v. Cont’l Airlines, Inc.*, ARB No. 10-026, ALJ No. 2008-AIR-009 (ARB Jan. 31, 2012) (AIR-21); *Beatty v. Inman Trucking Mgmt.*, ARB No. 13-039, ALJ No. 2008-STA-020 (ARB May 13, 2014) (Surface Transportation Assistance Act); *Zinn v. Am. Commercial Lines Inc.*, ARB No. 10-029, ALJ No. 2009-SOX-025 (ARB Mar. 28, 2012) (Sarbanes-Oxley); *Saporito v. Progress Energy Serv. Co.*, ARB No. 11-040, ALJ No. 2011-ERA-006 (ARB Nov. 17, 2011) (Energy Reorganization Act); *Hutton v. Union Pacific R.R. Co.*, ARB No. 11-091, ALJ No. 2010-FRS-020 (ARB May 31, 2013) (Federal Rail Safety Act).

The Administrator argues that neither framework is appropriate for use in the INA. (AB, pp. 1-3.) This position is founded on two more recent mixed-motives cases. Like the various whistleblower statutes enforced by the Department of Labor, the Age Discrimination in Employment Act of 1967 (ADEA) has been interpreted by reference to Title VII. *See, e.g., Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985). In *Gross v. FBL Fin. Servs.* the Court was presented with the question of whether an ADEA plaintiff must present “direct” evidence of age discrimination in order to get a “mixed-motive” jury instruction.<sup>40</sup> 557 U.S. at 169-70. The Court did not answer this question, instead holding that such an instruction was *never* appropriate in cases brought under the ADEA. *Id.* Noting that the ADEA lacked the language Congress inserted into Title VII in 1991 providing for liability when an illegitimate motive was one among other motivating factors, the Court held to succeed in a claim under the

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<sup>40</sup> Though Congress had incorporated and altered the holding in *Hopkins* as part of Title VII, other employment discrimination statutes are often interpreted in the light of Title VII jurisprudence, and so the proper reading of *Hopkins* as applied to the ADEA was at issue.

ADEA, the plaintiff had the burden of showing that the employer would not have taken the adverse action but-for the illegitimate motive. Unless Congress manifested an intent to depart from but-for causation, complainants “must prove by a preponderance of the evidence (which may be direct or circumstantial) that [the impermissible motive] was the ‘but-for’ cause of the challenged employer decision.” *Id.* at 174-78. Four Justices dissented (J. Stevens, J. Souter, J. Ginsburg, and J. Breyer) in favor of the framework adopted in *Hopkins* that had been presumed to apply in ADEA. The majority (J. Thomas, C.J. Roberts, J. Scalia, J. Kennedy, and J. Alito) simply noted that it was unlikely that *Hopkins* would be decided in the same manner if the current Court were to consider it in the first instance and that its difficulties in application outweighed any benefit to extending it to ADEA cases. *Id.* at 178-79.

In *Univ. of Tex. Southwestern Med. Ctr. v. Nassar* the Court extended its holding in *Gross* back into Title VII retaliation claims. 133 S.Ct. 2517 (2013). Again stating that but-for causation is the default causal standard in the absence of congressional indication otherwise, the Court held that but-for causation was required in Title VII retaliation claims because the statutory language in Title VII that provided for the lower showing of an impermissible motive being one among other motivating factors did not explicitly delineate retaliation, instead listing only the five protected categories (race, color, religion, sex, and national origin) and omitting the two areas of protected conduct (opposition to discrimination and submitting or supporting a complaint of wrongful discrimination). *Id.* at 2524-25. This made all the differences, and the Court noted as well that a lessened causation standard would encourage frivolous claims, tax judicial resources, and impose financial and reputational harms on employers. *Id.* at 2531-32.<sup>41</sup>

The Administrator’s position is a clear-sighted adoption and application of the Court’s recent moves reigning in discrimination and retaliation claims by requiring but-for causation. As the Administrator rightly notes, the INA does not define the causal standard to be used in retaliation claims. Hence, he argues, a showing of but-for causation is required. (AB, pp. 1-3.)

In 2014 the ARB was presented with the issue of how to adjudicate retaliation cases under the INA cases in *Gupta v. Compunnel Software Group, Inc.*, ARB Case No. 12-049, ALJ Case No. 2011-LCA-045 (ARB May 29, 2014). The ALJ in the case had stated that he would apply the “provisions contained in the nuclear and environmental whistleblower statutes administered by DOL” and proceeded to analyze the case under the *McDonnell Douglas* framework. *Gupta v. Compunnel Software Group, Inc.*, ALJ Case No. 2011-LCA-045, slip op. at 12-15 (ALJ Feb. 1, 2012).

The ARB remanded, noting that the statutes that the ALJ referenced contained different causation standards, some “contributing factor” standards used in the AIR-21 framework and some the standards used in the *McDonnell Douglas* framework. Rather than determine which framework and causal standard ought to be used in INA retaliation claims, the ARB elected to permit the parties to address the issue before the ALJ and allow the ALJ to engage more fully in a particular analysis. *Gupta*, ARB Case No. 12-049 at slip op. 19-21. The case is currently awaiting decision on remand.

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<sup>41</sup> The *Nassar* majority was the same as the *Gross* majority. In the dissent Justices Sotomayor and Kagan replaced Justices Stevens and Souter.

Hence, at present the proper framework for analyzing a retaliation claim under the INA is an open question. The INA and applicable regulations are silent on the matter. This is in direct contrast to the whistleblower statutes cited above that adopt the AIR-21 contributing factor analysis, but like those for which the *McDonnell Douglas* analysis has been imported judicially. This implies that retaliation allegations under the INA should be analyzed in terms of the *McDonnell Douglas* framework.

Though the ALJ in *Gupta* had said that he would use the analysis from the environmental and nuclear whistleblower statutes and this created a problem because there is no one mode of analysis in these statutes, in actual fact he used the *McDonnell Douglas* standard. Though the ARB has yet to state the correct standard for retaliation cases under the INA, it did not deem the ALJ's *McDonnell Douglas* analysis error. And one of three Administrative Appeals Judges hearing the case dissented on this point and would have held that even though the ALJ's framing of the issue was somewhat confused (which is why the other two remanded the issue); he would affirm the findings because the *McDonnell-Douglas* framework was proper. *Gupta*, ARB Case No. 12-049 at slip op. 12. (Brown, J. *concurring, in part, and dissenting, in part*).

Other courts have followed this path. In an unpublished decision, a district court in the Eastern District of New York, sitting as an appellate court reviewing an ARB determination, simply assumed that *McDonnell Douglas* was the proper framework without discussing any alternatives. *Baiju v. U.S. Dept. of Labor*, 2014 WL 349295 at \*12 (E.D.N.Y. Jan. 31, 2014) (unpublished). The ARB in that case had discussed the retaliation claim without adopting the standard, since the ALJ had found that there was no protected activity and the reason for the adverse action was not pretextual. *Baiju v. Fifth Avenue Comm.*, ARB Case No. 10-094, ALJ Case No. 2009-LCA-045, slip op. at 9-10 (ARB March 30, 2012).

In *Huang v. Ultimo Software Solutions Inc.*, ARB Case Nos. 09-056, 09-044; ALJ Case No. 2008-LCA 011 (ARB March 31, 2011), the ARB summarily affirmed an ALJ decision in an INA retaliation claim. Though not explicit about the source of the framework, the ALJ had applied the *McDonnell Douglas* framework in finding that there was retaliation. *See Huang v. Ultimo Software Solutions, Inc.*, ALJ Case No. 2008-LCA-00011 (ALJ Dec. 17, 2008). Additionally, in *Kersten v. Lagard, Inc.*, ARB Case No. 06-111, ALJ Case No. 2005-LCA-017 (ARB Oct. 17, 2008) the ARB presented the framework for a *prima facie* case in a way more consistent with the *McDonnell Douglas* analysis than an AIR-21 analysis, though it did not address the crucial differences in causal showings and burden shifting because the case turned on the gateway question of if there had been any protected activity. And in *Talukdar v. U.S. Dept. of Veterans Affairs*, ARB Case No. 04-100, ALJ Case No. 02-LCA-25 (ARB Jan. 31, 2007) the ARB affirmed a finding of retaliation without discussing the proper standard, but in a case where the ALJ had applied the *McDonnell Douglas* framework for showing causation. *See Talukdar v. U.S. Dept. of Veterans Affairs*, ALJ Case No. 02-LCA-25, slip op. at 20-23 (ALJ Apr. 12, 2004). The ARB did something similar in *U.S. Dept. of Labor v. Kutty*, ARB Case No. 03-022, ALJ Case Nos. 01-LCA-010 through 01-LCA-025 (ARB May 31, 2005).

Historically the *McDonnell Douglas* burden-shifting framework has been used as a default when the statute does not provide otherwise. See *Araujo*, 708 F.3d at 157-58 (citing *Doyle v. United States Sec’y of Labor*, 285 F.3d 242, 250 (3<sup>d</sup> Cir. 2002)). In *Araujo* the Third Circuit reasoned that the AIR-21 framework is a Congressional creation that has been extended to whistleblower statutes against a background in which courts defaulted to the *McDonnell Douglas* analysis when retaliation provisions were silent as to the shifting evidentiary burdens of proof. *Id.* And as several Circuit Courts and the ARB have noted, the AIR-21 is a somewhat extraordinary framework that places a very high burden on employers. See *Powers v. Union Pac. R.R. Co.*, ARB Case No. 13-034, ALJ Case No. 2010-FRS-030, slip op. at 11-12 (ARB Apr. 21, 2015); *Addis v. Dep’t of Labor*, 575 F.3d 688, 691 (7<sup>th</sup> Cir. 2009); *Stone & Webster Eng’g Corp. v. Herman*, 115 F.3d 1568, 1572 (11<sup>th</sup> Cir. 1997). Congress has made the determination to impose the whistleblower-friendly AIR-21 framework in particular instances, and it has done so against judicial use of *McDonnell Douglas* as a default. But Congress has chosen *not* to employ the AIR-21 language in the INA.

The Administrator is very persuasive in arguing that it would be improper to use the AIR-21 framework to analyze retaliation claims under the INA. The Court has clearly held that in the absence of legislative delineation of an alternative causal standard, the proponent of a proposition must show but-for causation. *Nassar*, 133 S.Ct. 2517; *Gross*, 557 U.S. 167. Indeed, the point is even more powerful in the context of the INS than in Title VII retaliation claims or ADEA claims because there are no other textual markers indicating a lessened causal standard (Title VII) or historical practice using a lesser causal standard (ADEA). The AIR-21 framework unabashedly departs from but-for causation, and so it would be improper to use that framework to analyze a retaliation claim under the INA.

The Administrator would go further, dispensing not only with any “contributing factor” or “mixed-motive” standard of causation and shifting burdens of proof, but also eschewing use of the *McDonnell Douglas* framework and its shifting burdens of production as well. (AB, p. 3 n. 1.) That analysis is only useful “in evaluating certain pre-trial motions in some cases” but is inappropriate “at this stage” when the question “is whether Prosecuting Party proved at trial that his protected activity was the but-for cause of the adverse action he faced, notwithstanding whatever legitimate reasons Respondent proffered.” (*Id.*)

The issue is relatively minor: but-for causation must be shown by the prosecuting party at hearing whether or not the *McDonnell Douglas* analysis is used. That analysis focuses the inquiry and gives it direction. It does not alter the necessary causal showing and does not change the burdens of proof. But it is not a distinction without a difference. For one, if the framework is inappropriate then the prosecuting party has no burden to articulate and sustain a prima facie case. See *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983). Moreover, use of *McDonnell Douglas* forces the employer to give a reason for the adverse action and thereby sets up a particular sort of inquiry on the ultimate question. This permits the employee or prosecuting party to prevail either by showing that the adverse action was more likely than not motivated by an impermissible reason *or* by showing that the employer’s proffered rationale is itself unworthy of credence. See *id.* at 717-18 (Blackmun, J., concurring) (citing *Burdine*, 450 U.S. at 256.) This is quite different from facing an undifferentiated, unexplained burden of proving but-for causation: a contest between competing but-for causal explanations takes on a

different shape than a contest in which one party must affirmatively establish but-for causation for his own account.

The cases the Administrator cites in support of his position are not convincing in the present context. In *Costa v. Desert Palace* the Ninth Circuit explained that *McDonnell Douglas* analysis primarily applies to summary judgment proceedings and is just one way in which discriminatory intent might be proven. 299 F.3d 838, 854-55 (9<sup>th</sup> Cir. 2002). It point out that the Court had held that the framework was supposed to be malleable, rather than “rigid, mechanized, or ritualistic.” *Id.* at 854 (citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978)); see also *Teamsters v. United States*, 431 U.S. 324, 358 (1977). While evidence could ultimately be presented through the *McDonnell Douglas* framework, it was generally inappropriate for the jury since “[a]t that stage, the framework ‘unnecessarily evades the ultimate question of discrimination *vel non.*’” *Id.* at 855-56 (quoting *Aikens*, 460 U.S. at 714).

*Costa* did not reject the *McDonnell Douglas* framework and certainly did not consider its merits, or demerits, in an administrative context. *Costa* was a Title VII “mixed-motives” case and particularly turned on what sort of evidence was necessary in order for the plaintiff to get a “mixed-motives” jury instruction. *McDonnell Douglas* had been introduced by the employer as part of an argument that “direct evidence” was necessary to get such an instruction. *This* was the context in which the Ninth Circuit pointed out that *McDonnell Douglas* was not the only way of showing discrimination. In particular, when Title VII created liability in mixed-motives cases, use of a mixed-motives instruction alone could be appropriate. The court explained that in Title VII *McDonnell Douglas* and “mixed-motive” analyses did not reference two distinct types of cases but rather “are separate inquires that occur at separate stages of the litigation.” *Id.* at 857. This is a far cry from the proposition that an employee in an administrative INA case absent a jury and without the benefit of any “mixed-motive” or “contributing factor” analysis should also forfeit any benefit provided by use of the *McDonnell Douglas* in framing the case and providing an opportunity to prevail by undermining the employer’s proffered rationale.

In *Shelley v. Geren* the Ninth Circuit held that even in light of *Gross* the use of the *McDonnell Douglas* framework was appropriate in the context of a motion for summary judgment in an ADEA claim. 666 F.3d 599 (9<sup>th</sup> Cir. 2012). *McDonnell Douglas* remained appropriate because it shifted only the burden of production, not the burden of persuasion. *Id.* at 607-08. This holding does not bear on the question of how an ALJ should undertake an analysis of causation in an administrative determination. Indeed, *Shelley* is largely a reaffirmation of *McDonnell Douglas* in light of *Gross* and relies on the same points elucidated above: as an analysis of causation *McDonnell Douglas* does not shift the burden of proof and still requires a showing of but-for causation. As in *Costa*, the Ninth Circuit held that it is appropriate for the summary judgment stage of litigation as a way to explicate and test the case. As explained in *Costa*, *McDonnell Douglas* doesn’t charge the burden of proof and requires showing but-for causation, but also opens the possibility of prevailing by showing that the employer’s reason is not worthy of credence. 299 F.3d at 855. The Administrator is correct that the Ninth Circuit has located its use in the summary judgment stage in Title VII litigation, but this does not license the inference that it should not be used in administrative adjudication under the INA.

The Administrator appears to misunderstand the nature of administrative adjudication of the INA at OALJ. LCA cases are designed to move quickly in OALJ and there are decidedly *not* multiple stages or hurdles. As shown in the procedural history here, dispositive motions are only a theoretical reality on the expedited calendar. Moreover, there is no jury. There is no first inquiry at a summary judgment stage before a judge in which *McDonnell Douglas* provides the mode of analysis. In administrative adjudication under the INA, there is only *one* stage and an ALJ must determine both the legal sufficiency and ultimate disposition of an allegation of retaliation. There is no way for a fact-finder to easily jump into the ultimate consideration of the causal question by evaluating alternative accounts because the cases lack the sort of prior history and judicial refinement present in an ordinary discrimination or retaliation claim under Title VII or a related act. The stage-setting aided by *McDonnell Douglas* simply has not been done.

I find that use of *McDonnell Douglas* is appropriate in retaliation claims under the INA because it in no way alters the causal standard or burden of proof, but aids in structuring the inquiry into a complex matter. If causation is obvious, there is no need for an evidentiary framework—it is plain that the reason for the adverse action was either legitimate or illegitimate. Going through the mechanics of an evidentiary framework could not hurt, but it would be superfluous and ritualistic. In more difficult cases, causation is often a blur—there are multiple actors with multiple motivations and the evidence may be quite imperfectly developed. The worry is compounded on a fast-track litigation schedule and with parties who may not have the aid of counsel. In short, INA retaliation claims, and certainly the claim before me, are in need of a structured analysis. They do not have the benefit of long development and prior definition though litigation and judicial rulings on dispositive motions. *McDonnell Douglas* provides a framework to structure these claims, and it provides a mode of analysis in which the inquiries are defined and which in the last analysis the question turns on the plausibility of competing causal claims and in which the prosecuting party must show but-for causation. In the circumstances of a difficult INA retaliation claim, it would be overly rigid *not* to employ a helpful framework.

There is a long history of using *McDonnell Douglas* as a helpful mode of analysis for retaliation claims adjudicated by OALJ. It is used because it structures an otherwise amorphous inquiry. When questioned as to how retaliation claims would be handled under the INA, the Employment and Training Administration replied that they would be adjudicated using the “well-developed principles that have arisen under the various whistleblower protection statutes that have been administered by [DOL].” Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H-1B Visas in Specialty Occupations and as Fashion Models, 65 Fed Reg. 80,178 (Dec. 20, 2000). I have agreed in full with the Administrator of Wage and Hour’s position that the INA requires but-for causation and that the burden of proof remains with the prosecuting party. This rules out use of AIR-21. I reject, however, the Administrator’s suggestion that the *McDonnell Douglas* framework should be shunted aside as well, depriving prosecuting parties of a clear opportunity to show but-for causation by undermining the employer’s proffered causal explanation and depriving the court of a helpful mode of analysis for dealing with difficult, complicated causal questions. When it is helpful in the analysis of a retaliation claim and focuses the ultimate inquiry into but-for causation, it should be used. I find it helpful in this case, and so analyze the retaliation claim with reference to *McDonnell Douglas*.

### ***3. Has Professor Chakravarty Shown the University Retaliated Against Him for Complaining About Violations of the INA?***

I find that Professor Chakravarty has failed to carry his burden and therefore affirm the Administrator's determination.

In the *McDonnell Douglas* analysis the burden is first placed on the employee to establish a *prima facie* case. *E.g. Jones v. Bernanke*, 557 F.3d 670, 677 (D.C. Cir. 2009.) A *prima facie* case requires a showing that the employee engaged in protected activity, that he was subjected to adverse action, and that a causal link exists between the two.<sup>42</sup> *Id.*; *Cohen*, 686 F. 2d at 796. "To show the requisite causal link, the [employee] present evidence sufficient to raise the inference that her protected activity was the likely reason for the adverse action." *Cohen*, 686 F.2d at 796 (citing *Hagans v. Andrus*, 651 F.2d 622, 626 (9<sup>th</sup> Cir. 1981)).

Professor Chakravarty engaged in protected activity when he made internal complaints to the provost during a November 19, 2013 meeting, when he met with Professor Bruton in early December 2013, and when he met with Associate Vice-President de la Vega on April 1, 2014. (*See* HT, pp. 66-68.) His complaints to Wage and Hour in April 2014 and subsequent cooperation with their investigation through the fall of 2014 are also protected activities. Even though Professor Chakravarty has not sustained his complaints—though some were settled before any determination was made—there is no allegation that they were unreasonable. In fact, Wage and Hour made at least the initial determination that they were reasonable enough to merit an investigation. Hence, though ultimately his complaints did not have merit, they are still protected activities.

The University took adverse action against Professor Chakravarty when Professor Bruton reduced his Fall 2014 course load in March 2014. (HT, pp. 64-65.) Further adverse action was taken when Professor Bruton took Professor Chakravarty's summer course away (instead of another lecturer's) and then decided to give a newly available course to another lecturer rather than Professor Chakravarty. (*Id.* at 65-66.) These are adverse actions because they reduced the amount of courses he would be teaching, affecting both the amount of pay he would receive and his future entitlement to assignments via the collective bargaining agreement.<sup>43</sup>

The last element in a *prima facie* case is a causal connection. Professor Chakravarty has offered no "smoking gun." The University has argued that there is no possible causal connection because the allocation of Fall 2014 courses happened before Professor Chakravarty made his complaints to the Department of Labor and the events surrounding Summer 2014 courses took place before the University, and certainly the primary actor, Professor Bruton, were aware of any protected activity. (RPB, pp. 16-18.) This argument is unconvincing—it proceeds on the assumption that protected activity requires a complaint to Wage and Hour. But the INA

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<sup>42</sup> The causal showing incorporates showing that the employer had knowledge of the protected activity (obviously an employer who has no knowledge of a protected activity cannot take any action because of that activity), an element of the *prima facie* case that is sometimes included separately.

<sup>43</sup> There are other possible adverse actions as well, such as reducing a three year H-1B extension to a one year extension, paying salary through special pay, and issuing an unfavorable recommendation resulting in a failure to renew Professor Chakravarty's appointment. But these are not adverse actions that are properly before me on a retaliation claim. Hence, they can serve only as evidence for a retaliatory motive, not as the basis for liability.

explicitly includes internal complaints as protected activity. 8 U.S.C. § 1182(n)(2)(C)(iv). So Professor Chakravarty's protected activity begins in November 2013, and the University was certainly aware of it because it was made to the Provost of the University. Professor Bruton became aware of protected activity in early December 2013 at the latest. So contrary to the University's supposition, the timeline does not rule out retaliation.

Professor Chakravarty still must provide some causal connection between the protected activity and the adverse action. He has offered no direct causal connection. Instead he must rely on temporal proximity. The two adverse actions together show that Professor Bruton was reducing Professor Chakravarty's course assignments. One possible explanation for these actions is that, upset by Professor Chakravarty's complaints, Professor Bruton simply wanted to be rid of Professor Chakravarty, to push him out of the department. This is not to say that this *is* the explanation, but it is a possibility. The timeline certainly fits well, especially when one considers the additional evidence that Professor Bruton reduced Professor Chakravarty's proposed LCA renewal from one to three years and could guarantee only \$18,624 in salary.<sup>44</sup> (See PX L, pp. 4-5.) Temporal proximity that is "very close" coupled with knowledge by the employer can alone suffice to show causation in the *prima facie* case. *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001); see also *Kwan v. Andalex Grp., LLC*, 737 F.3d 834, 845 (2d Cir. 2013); *Cifra v. GE*, 252 F.3d 205, 217 (2<sup>d</sup> Cir. 2001); *Yartsoff v. Thomas*, 809 F.2d 1371, 1376 (9<sup>th</sup> Cir. 1987); *Mitchell v. Baldrige*, 759 F.2d 80, 86 (D.C. Cir. 1985).

Though the ultimate burden remains with Professor Chakravarty, the Court has held that the burden in establishing a *prima facie* case is "not onerous" and requires raising an inference of discrimination such that "if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253-54 (1981) (quoting *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978)). Based on the timeline of the internal complaints and subsequent actions by Professor Bruton, I find that Professor Chakravarty has established a *prima facie* case of retaliation as to both allegations of adverse action. Professor Bruton knew about the complaints in early December 2013. During both of the next opportunities to assign courses, he acted adversely to Professor Chakravarty.

The onus next shifts to the University. In the second step of the *McDonnell Douglas* analysis the employer must provide a legitimate reason for the adverse action. This is a burden of production, not persuasion. *E.g. id.* at 255. Professor Bruton did not testify. But the record reflects that his defense to the charge of retaliation was that he did not know about the complaint and that acting as he did was within his power as Department Chair. (See RX N, p. 44; RX M, pp. 39-40.) Neither is an alternative explanation. Professor Bruton clearly had knowledge of the *internal* complaints before the adverse actions. And whether or not he was empowered by the CBA to act as he did is immaterial. One point of an anti-retaliation provision is that it protects whistleblowers from otherwise proper adverse actions when those adverse actions are taken *because of* the protected activity. Retaliation actions focus not on the *authority* for a particular action, but on the *motive* for that action. Professor Bruton may have had the power of a petty-

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<sup>44</sup> Though the allegation that this action was retaliatory is not properly before me, in determining whether the allegations of retaliation that are properly before me have merit I consider the evidence of record, including evidence of other contemporaneous actions that suggest a pattern of similar actions manifesting animus.

tyrant in assigning summer courses; but if he wielded that power to punish Professor Chakravarty for his complaints, then he violated the anti-retaliation provisions of the INA.

Nonetheless, the University has articulated non-retaliatory reasons for both of its actions. Wage and Hour found that the Fall Semester courses were finalized in March and that any prior courses had been mere placeholders. (PX M, p. 1; RX E, p. 12.) Vice-Provost Neubauer testified that March was a normal time to make firm assignments. (HT, p. 107). As for the summer courses, the University has produced evidence that there is an obligation to assign these courses to tenured faculty when they are willing to teach them, and that is why the course was taken away from Professor Chakravarty. (ALJX D Art. 21, p. 8.) As for why he wasn't assigned the newly available course, Professor Bruton wrote that he did so because the other lecturer had more recent experience and higher teaching evaluations. (RX M, pp. 39-40.)

Given those legitimate motivations, I proceed to the final step in the *McDonnell Douglas* analysis. To prevail the prosecuting party must show by a preponderance evidence that the adverse action was taken because of the protected activity, which can also be done via a showing that the proffered reason is pretext. *E.g. United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714-16 (1983); *Burdine*, 450 U.S. at 255. As stressed by the Administrator and stated above, the causal standard here is but-for causation. *See Nassar*, 133 S. Ct. 2517; *Gross*, 557 U.S. 167. There may be multiple but-for causes for a particular adverse action, but to succeed Professor Chakravarty must show that "the adverse action would not have occurred in the absence of the retaliatory motive." *Kwan*, 737 F.3d at 846.

Professor Chakravarty has failed to do so. Though the timeline is suspicious, and perhaps combined with the entire course of events as well as more substantive evidence in an action in another forum might be convincing, here he has not presented evidence that would support his bare assertion that these reasons are mere pretext. As the prosecuting party, Professor Chakravarty must show but-for causation via evidence and argument to prevail on the merits. Though he raises legitimate questions, he fails to carry his burden of proof.

Reviewing the entire record, including events up to Professor Chakravarty's failure to secure a renewed three year appointment, *something* fundamentally changed in the course of academic years 2013-14 and 2014-15. Whereas earlier the University had been keen on keeping Professor Chakravarty, at some point that attitude is altered, and step by step he is pushed out of the Department. Professor Bruton is tied to all of these moves. In February 2014 a proposed three year H-1B visa extension is reduced to one year, and the Department of Management insists that it owes Professor Chakravarty less than what had been promised by the University. That March when the Fall Semester class schedule is finalized, Professor Chakravarty's course load is reduced to the minimum required. Since 2014-15 would be an appointment setting year for Professor Chakravarty under the CBA, the number of courses assigned was of great consequence for his future at the University.

In May, when a tenured faculty member becomes available to teach a summer course, Professor Bruton elects to take away Professor Chakravarty's course rather than a course assigned to another lecturer. When several days later another summer course opens up and Professor Chakravarty immediately expresses interest, Professor Bruton uses his extensive power over summer courses to award the course to someone else instead, even though he had just taken a course away from Professor Chakravarty. Contacted in July, Professor Bruton maintains that in the coming academic year Professor Chakravarty will be assigned the minimum number of courses required under the CBA, even though this potentially means that the University will be paying Professor Chakravarty *not* to teach, a not insignificant waste of financial resources at a public university. Ultimately the reappointment is denied altogether when Professor Chakravarty is given an unsatisfactory evaluation by the Dean.

The only allegations of retaliation before me relate to the assignment of Summer and Fall classes in 2014. But the entire chain of events provides context for those actions, and evidence as to the possible motives behind them. They invite the rational conclusion that Professor Bruton harbored some animus to Professor Chakravarty. And given the timeline, one possible explanation for the animus is the escalating complaints of violations of the INA.

But there are other explanations. Showing animus alone is not enough—to succeed in a retaliation claim Professor Chakravarty must show that Professor Bruton's animus was based on his protected activities, rather than personal relations, personality conflict, favoritism to other faculty, or the rough and tumble of academic politics. Such animus and the seemingly systematic effort to push Professor Chakravarty out of the University do not reflect particularly well on the University, but neither is it automatically a violation of the INA. My charge is limited to addressing the latter.

In the last analysis, Professor Chakravarty has failed to demonstrate that his protected activity was the but-for cause of the adverse actions against him. He has not shown that the earlier promise of courses was more than a placeholder or that they were reduced because of his protected activity. He has agreed that it was proper to take his course away when a tenured faculty is available. And he has produced no evidence that would rebut or undermine the University's claim that the other lecturer was more qualified. Even if, in the context of the other events in this case, there appears to be an untoward motive behind these actions, that motive is only illegitimate under the INA if it relates to the protected activity in this case. And Professor Chakravarty has not provided evidence showing that any animus harbored by Professor Bruton was founded upon his protected activity rather than some other factor.

To prevail Professor Chakravarty must show by the preponderance of the evidence that if he had not engaged in protected activity, the University would not have altered his Summer and Fall 2014 course assignments. He has failed to prove as much via evidence, and so the Administrator's determination that Professor Chakravarty has not established retaliation for protected activity must be affirmed.

## VII. Conclusion and Order

Professor Chakravarty has alleged that the University deprived him of his rights under his LCA to particular course assignments and then retaliated against him due to his complaints about violations of the INA. The Administrator of Wage and Hour rejected both complaints. For the reasons stated above, the Administrator's determination is AFFIRMED.

WILLIAM J. KING  
Administrative Law Judge

**NOTICE OF APPEAL RIGHTS:** Any interested party desiring review of this Decision and Order may file a petition for review with the Administrative Review Board (Board) pursuant to 20 C.F.R. § 655.845.

The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

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If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. If you e-File your petition only one copy need be uploaded.

If no petition for review is filed, this Decision and Order becomes the final order of the Secretary of Labor. *See* 20 C.F.R. § 655.840(a). If a petition for review is timely filed, this Decision and Order shall be inoperative unless and until the Board issues an order affirming it, or, unless and until 30 calendar days have passed after the Board's receipt of the petition and the Board has not issued notice to the parties that it will review this Decision and Order.