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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

Dr. WAGIH H. MAKKY,

Plaintiff,

v.

MICHAEL CHERTOFF, Secretary of the
Department of Homeland Security, in his official
capacity; KIP HAWLEY, Director, Transportation
Security Administration, in his official capacity;
DEPARTMENT OF HOMELAND SECURITY;
TRANSPORTATION SECURITY
ADMINISTRATION; OFFICE OF PERSONNEL
MANAGEMENT; and FEDERAL BUREAU OF
INVESTIGATION,

Defendants.

COMPLAINT

Case No. _____

Hon. _____

INTRODUCTION

1. Plaintiff, Dr. Wagih H. Makky, a naturalized American citizen of Egyptian descent, brings this action pursuant to Title VII of the 1964 Civil Rights Act, as amended, and the Civil Service Reform Act of 1978, to obtain relief after being wrongfully suspended without pay from his employment as an electronics engineer and aviation security expert in the Transportation Security Administration (“TSA”), and raises Freedom of Information Act (“FOIA”) and Privacy Act claims to obtain inappropriately withheld documents that have served as thin pretext for his suspension.

2. Dr. Makky immigrated to America from Egypt thirty years ago to pursue graduate studies. He subsequently married, became an American citizen, and held prestigious research appointments. Following the catastrophic bombing of a Pan American Airways airliner over Lockerbie, Scotland, Dr. Makky was tapped to create a special technical unit within the Federal Aviation Administration (“FAA”) – later transferred to the TSA – to focus governmental resources and expertise toward preventing terrorist attacks on American airliners. In this capacity, Dr. Makky has spent more than a decade using his technical expertise to develop devices to detect and prevent explosives from being brought aboard all forms of mass transportation, particularly commercial airplanes and railroad passenger cars. Dr. Makky has become one of the nation’s – and the world’s – foremost technical experts on transportation security.

3. Unfortunately, throughout his distinguished career in government service, and despite his exceptional performance reviews and unquestioned expertise, Dr. Makky, an Arab and a Muslim, has faced persistent prejudice and derogatory comments directed to him on account of his national origin and religion. After September 11, prejudice and hostility toward

him on account of his background escalated at work. Indeed, when Dr. Makky came under the authority of a new supervisor, Robin Burke, in 2002, the very first question Burke asked Dr. Makky upon meeting him was about Dr. Makky's ethnic background. Thereafter, Burke's wholly inappropriate concern with Dr. Makky's Arab and Muslim heritage drove him to undertake a series of unjustified employment actions against Dr. Makky.

4. On the day the United States invaded Iraq, in March 2003, Burke abruptly placed Dr. Makky on administrative leave and instructed him not to report to work.

Mr. Burke based his decision on a classified FBI investigative file that he obtained under suspicious circumstances, and which he kept in his private safe. Despite the fact that Dr. Makky had held a security clearance for fifteen years without incident, including a "top secret" clearance since 1995, and despite having filed a truthful clearance renewal application that reflected no material changes from previous applications, Dr. Makky was informed in January 2005 that a preliminary determination had been made to revoke his clearance. He was not given the legal documents on which this determination was based.

5. Once Dr. Makky obtained counsel and began to exercise his legal rights to contest this preliminary determination, Burke retaliated against him. In August 2005, Burke made a unilateral decision to suspend Dr. Makky without pay for an indefinite period. Evidently, Burke did not wish to wait for the final determination to be made regarding Dr. Makky's security clearance, because Dr. Makky was about to be transferred out of Burke's authority.

6. In violation of applicable statutory and regulatory provisions, the agency has never provided Dr. Makky with a copy of the FBI file in Burke's safe upon which the suspension was allegedly based. Dr. Makky requested his entire background file under the Freedom of Information Act and the Privacy Act; the government provided him with only limited portions of

the file. The Merit Systems Protection Board – the administrative agency responsible for preventing arbitrary or procedurally improper terminations of civil servants – has denied Dr. Makky’s claims for violations of federal employment discrimination and civil service laws.

7. To this day, Dr. Makky remains suspended, without pay, for reasons he has not been given, and has suffered severe financial and emotional hardship.

8. In many instances, the dangers of the post-September 11 world require a careful balance between two compelling but competing interests: American values and the security of the American people. In this case, these interests are perfectly aligned. Dr. Makky has devoted his career as a TSA engineer to protecting the American people from terrorist attacks. In spite of his distinguished service to his country, last year he was suspended by a prejudiced supervisor based upon a secret file Dr. Makky has never been allowed to see. Dr. Makky’s suspension not only betrays the core American values of equal treatment and fair process, but also compromises the security of the American people by depriving them of the expertise of one of their ablest security technicians. To vindicate both of these interests, Dr. Makky seeks relief from this Court.

PARTIES

9. Plaintiff Dr. Wagih H. Makky is a United States citizen of Egyptian descent and Muslim faith, who holds a Ph.D. from Colorado State University in electrical engineering and who has held prominent research appointments at the University of Illinois and at the Argonne National Laboratory. He has spent the past sixteen years of his life employed as a government electronics engineer at an FAA (now TSA) facility in Atlantic City, New Jersey, where he has gained an international reputation as one of the foremost experts in designing and evaluating systems to prevent the smuggling of explosives onto passenger transport planes and

trains. Dr. Makky began his tenure as a federal employee in 1990 working for the FAA; his office subsequently became part of the TSA, under the Department of Homeland Security. He currently resides in Chesapeake City, Maryland.

10. Defendant United States Department of Homeland Security (“DHS”) is the federal government agency with primary responsibility for protecting our nation from terrorist attacks. DHS is an “executive agency” within the meaning of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-16(a), prohibiting discrimination in federal government employment.

11. Defendant Michael Chertoff is the Secretary of DHS. He is being sued in his official capacity.

12. Defendant Transportation Security Administration (“TSA”) is the division of DHS that is responsible for protecting the nation’s transportation systems. TSA is an “executive agency” within the meaning of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-16(a), prohibiting discrimination in federal government employment. Dr. Makky is currently an employee of TSA, within DHS, though has been suspended from his job.

13. Defendant Kip Hawley is the Director of TSA. He is being sued in his official capacity.

14. Defendant Office of Personnel Management (“OPM”) is responsible for coordinating and carrying out background investigations for employees of the Department of Homeland Security. OPM is an agency within the meaning of FOIA, 5 U.S.C. § 552, and therefore also the Privacy Act, 5 U.S.C. § 552a(a)(1). OPM has possession and control over records sought by Dr. Makky.

15. Defendant Federal Bureau of Investigation (“FBI”) is a division of the United States Department of Justice (“DOJ”). The FBI is an agency within the meaning of FOIA, 5 U.S.C. § 552, and therefore also the Privacy Act, 5 U.S.C. § 552a(a)(1). The FBI has possession and control over records sought by Dr. Makky.

JURISDICTION AND VENUE

16. This Court has jurisdiction over the plaintiff’s claim for violations of Title VII pursuant to 42 U.S.C. § 2000e-5(f)(3), as incorporated by 42 U.S.C. § 2000e-16(c) (Title VII action against federal employer). These same provisions, as further incorporated by 5 U.S.C. §§ 7703(a)(1) & 7703(b)(2) (judicial review of civil service cases involving discrimination), also establish this Court’s jurisdiction over the plaintiff’s petition for review of the decision of the Merit Systems Protection Board. This Court has jurisdiction over the plaintiff’s claims under the Freedom of Information Act and Privacy Act pursuant to 5 U.S.C. § 552(a)(4)(B) and 5 U.S.C. § 552a(g)(1)(B), respectively. This Court also has jurisdiction over this entire action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction).

17. Venue lies in this District pursuant to 42 U.S.C. § 2000e-5(f)(3), as incorporated by 42 U.S.C. § 2000e-16(d), and as further incorporated by 5 U.S.C. § 7703(b)(2), because the unlawful employment practice was committed in this State. Venue lies in this District pursuant to 5 U.S.C. § 552(a)(4)(B) and 5 U.S.C. § 552a(g)(5), because Dr. Makky’s principal place of business is in this District. Venue also lies in this District pursuant to 28 U.S.C. § 1391(e), because a substantial part of the events giving rise to the claim occurred here.

18. Vicinage is appropriate in Newark, New Jersey, for the sake of convenience. Plaintiff’s counsel – Seton Hall Center for Social Justice and the ACLU-NJ have their offices in

Newark, and Newark is the most accessible vicinage by plane and train for the out-of-state witnesses.

FACTUAL ALLEGATIONS

Dr. Makky's Educational Pursuits and U.S. Citizenship

19. Dr. Makky was born in Cairo, Egypt, on September 25, 1950.

20. After receiving both a bachelor's degree and a master's degree in electrical engineering in Cairo, and following a six-year term as an officer in the Egyptian Air Force, Dr. Makky came to the United States in 1978 to continue his education and professional development.

21. Shortly after coming to the United States, Dr. Makky married Linda Marie Vandenberg, an American citizen born in Denver, Colorado, and they began to build their life together here in the United States. They have been married for twenty-five years.

22. Dr. Makky received his Ph.D. in electrical engineering from Colorado State University in 1983.

23. For the next six years, Dr. Makky taught engineering as an associate professor at the University of Illinois. During much of this time, he served as a visiting scientist and consultant at the Argonne National Laboratory, one of the federal government's most prestigious engineering research facilities.

24. In 1987, Dr. Makky completed the naturalization process to become a United States citizen. He took the Oath of Allegiance to the United States of America, swearing: "I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state or sovereignty, of whom or which I have heretofore been a subject or citizen."

25. At the time Dr. Makky became an American citizen, both of his parents, his two brothers, and his sister all resided in Egypt. Since that time, however, Dr. Makky's parents and his sister have passed away, leaving his two brothers, Adel Makky and Mamdouh Makky, as the only foreign nationals with whom Dr. Makky is closely associated.

26. It was Dr. Makky's belief that, once he had taken his oath of citizenship, he was exclusively a citizen of the United States. He later learned, however, based upon information provided by the United States Department of State, that Egyptian law views any child born to an Egyptian father as irrevocably a citizen of Egypt.

27. Notwithstanding this technicality of foreign law, Dr. Makky's undivided and resolute loyalty lies with the United States. Dr. Makky does not possess an Egyptian passport, he does not own any real property in Egypt, and he has never registered his marriage of twenty-five years with the Egyptian government.

Dr. Makky's Distinguished Career in Government Service

28. Dr. Makky first applied for a security clearance in the summer of 1987, when he was a senior fellow at the Naval Oceans Systems Center. His application was approved and he was granted a "secret" level security clearance.

29. In 1990, following the catastrophic bombing of a Pan American Airways airliner over Lockerbie, Scotland, the federal government sought out Dr. Makky's expertise to help build a federal program in aviation security.

30. Dr. Makky agreed and accepted a position as an electronics engineer with the FAA. In connection with the position, he once again sought a security clearance and was again granted a "secret" level security clearance.

31. From September 1990 to March 2003, Dr. Makky worked as an electronics engineer for the FAA's Aviation Security Research and Development division (later renamed the Transportation Security Research and Development division and transferred to the newly-established Transportation Security Administration) in Atlantic City, New Jersey.

32. Dr. Makky was one of six founding members of the division and was one of only three members who had earned a Ph.D.

33. The role of Dr. Makky's division was to develop sophisticated devices to detect and prevent explosives from being detonated aboard various modes of transportation, particularly commercial airplanes and passenger trains. Long before the terrorist attacks of September 11, 2001, Dr. Makky was among the engineers whom the American government entrusted with the crucial task of keeping its people safe from attack; Dr. Makky's entire government career has been devoted to this goal.

34. Dr. Makky's expertise in the detection of contraband and explosives is recognized throughout the world. He has contributed to the design, management, and supervision of major international research and development projects leading to the development of advanced automated systems for transportation security and explosives detection. He has participated in the development of several automated materials detection/identification systems. He has chaired numerous national and international symposia on explosives detection at home and abroad. He has served on several national inter-agency committees reviewing the status of presently available technology to determine federal government policy on aviation security and explosives detection. He has authored numerous scientific papers in the fields of lasers, solid state physics, microelectronic devices, material science, nuclear physics applications, and artificial intelligence.

35. Dr. Makky's job performance has been exemplary. His performance reviews reflect several ratings of "exceptional" and "outstanding," and Dr. Makky has been commended for his "extraordinary technical insight" and "careful consideration for near and far-term realistic milestones." Dr. Makky has also been assigned to organize and chair several national and international conferences on behalf of his division. He was repeatedly given foreign travel assignments by the U.S. government.

36. In 1995, Dr. Makky applied for renewal of his security clearance. Having recently become aware that the Egyptian government still viewed him as a citizen of that country, Dr. Makky indicated on his 1995 security clearance application that he was a dual citizen of the United States and of Egypt. In 1996, Dr. Makky's renewal application was approved and his clearance was upgraded to a "top secret" level clearance.

37. Despite Dr. Makky's excellent performance and dedication to his job, he was always treated differently than the other members of the group on account of his national origin and religion. For example, Dr. Makky was later told by the very person who hired him that it was a mistake to hire someone of Arab descent. Another supervisor, speaking with several employees (including Dr. Makky) about the possibility of a terrorist attack by Islamic fundamentalists, opined that "Muslims have no brains." Despite being made to feel like an outsider, Dr. Makky continued to work as a team player and to contribute to the group's objectives in every way he could. Throughout his tenure, Dr. Makky was the only Muslim and the only individual of Arab descent in his division.

Dr. Makky Is Singled Out for Adverse Action

38. After the tragic events of September 11, 2001, Dr. Makky found himself subjected with increasing frequency to harassing comments at work based on his national origin and religion. Many derogatory comments were made regarding Muslims and people of Arab descent.

39. In 2002, Dr. Makky's security clearance was up for renewal, and he completed the required application on March 13, 2002. Consistent with his 1995 application, Dr. Makky indicated that he was a dual citizen of the United States and Egypt based on Egyptian law. As he had done on all his past applications, he answered each of the questions on the application thoroughly and truthfully.

40. Since Dr. Makky was first granted a security clearance in 1987, there had been no material changes in his activities, associations, or preferences, and he had not acted in any manner that would allow reasonable questioning of his allegiance to the United States. Indeed, since his sister died in 1999, his connections with Egypt were even fewer in 2002 than in 1987.

41. While his security clearance renewal was pending, Dr. Makky continued his work in his division, as he had during the pendency of prior applications.

42. In October 2002, with the clearance renewal application still pending, Robin Burke became the Deputy Administrator in charge of the entire Security Lab, which includes Dr. Makky's division.

43. Upon Burke's arrival, he took an unusual interest in Dr. Makky's national origin.

44. Immediately after Burke gained authority over the Security Lab, he made it a point to meet Dr. Makky one-on-one and specifically inquired as to Dr. Makky's "background."

When Dr. Makky began to explain his technical and professional background, Burke then made it clear that he wanted to know Dr. Makky's national origin. Dr. Makky was the only non-supervisory employee that Burke met with individually. The first and only thing Burke wanted to know about Dr. Makky was his national origin. Thereafter, the only actions Burke undertook regarding Dr. Makky – either openly or in secret – related to questioning and attempting to undermine Dr. Makky's long-standing and unblemished security clearance.

45. In February 2003, a representative of OPM met with Dr. Makky to interview him about the renewal of his security clearance pursuant to agency procedure. Dr. Makky truthfully answered questions about his application, including the technicality regarding the Egyptian government's view of his citizenship.

46. During the interview, the interviewing official showed Dr. Makky her copy of his security clearance application. Upon inspection, he noticed that his application was not the same as the copy that he had submitted on March 13, 2002. Specifically, the date on the certification page and the signed release forms had been altered to read "11/20/02," instead of reading "3/13/02," as it did on his original, which he brought with him to the meeting. Dr. Makky demonstrated this evident discrepancy to the interviewing official and told her that he did not make the change.

47. Dr. Makky notified Burke of the discrepancy and raised the possibility that someone had tampered with his application. Burke inexplicably refused to investigate and even denied having any knowledge of the existence of the March 2002 application.

48. Sometime in early 2003, Burke somehow obtained an FBI investigative file regarding Dr. Makky. Though this document would play a central role in Burke's subsequent actions against Dr. Makky, the file has never been fully disclosed to Dr. Makky or his attorneys.

49. Dr. Makky does not know what derogatory information could possibly be contained in the portion of the FBI file that he has not seen; the only recent change in his activities was the fact that he had participated in peaceful, lawful political demonstrations opposing the U.S. invasion of Iraq.

50. When Burke was asked (at a subsequent administrative proceeding) why he came to possess a copy of this FBI report, in spite of the fact that he plays no official role in the security clearance process, Burke first claimed that the report was transferred to him along with the other personnel files for the employees of the Security Lab. But when pressed about how many employee files he received, Burke admitted that he did not actually receive any employee personnel files. Burke admitted that he did not even receive Dr. Makky's entire personnel file; he only received the FBI report about Dr. Makky. Dr. Makky was the only employee about whom Burke received any information.

51. Instead of forwarding the document to the Office of Transportation Vetting and Credentialing ("OTVC"), the entity with authority over security clearances, Burke put the FBI report in his personal safe and kept it for himself.

52. On March 19, 2003, the day the United States armed forces invaded Iraq, Burke placed Dr. Makky on administrative leave and ordered him not to return to work.

53. After a week during which Dr. Makky received no explanation for the sudden suspension, Burke informed Dr. Makky by letter dated March 28 that he had been placed on administrative leave with pay status "as a result of questions concerning [his] security clearance." Despite Dr. Makky's repeated attempts to learn more, he received no further explanation for nearly two years.

54. Even though Dr. Makky had already completed a security clearance application in March 2002, Burke demanded that Dr. Makky complete a second security clearance application and threatened to fire him if he did not comply. Dr. Makky completed a second application, again answering the questions thoroughly and truthfully.

55. In the meantime, Burke assumed an active and involved role in the investigation and handling of Dr. Makky's security clearance, even though Burke had no authority over security clearances.

56. Mr. Burke demanded weekly or bi-weekly updates and was constantly pushing OTVC for information about Dr. Makky's case.

57. Intent on producing any pretext to terminate Dr. Makky during the pendency of his administrative leave, Mr. Burke ordered that Dr. Makky's work computer be searched to determine if there was any evidence that Dr. Makky had used his computer for non-official purposes. Nothing was found.

58. When OTVC was preparing to issue a preliminary determination regarding Dr. Makky's security clearance, Burke – contrary to agency policy – received a copy of the non-final version before it was sent to Dr. Makky.

59. In January 2005, OTVC issued its preliminary determination that Dr. Makky's security clearance should be revoked. This "Initial Determination" expressly provided that it was "not a final decision," that Dr. Makky had the right to respond to the Initial Determination, and that Dr. Makky was entitled to a copy of his background investigation file on which the Initial Determination was based.

Dr. Makky Exercises His Legal Rights and Is Suspended Without Pay

60. Pursuant to OTVC's instructions and the provisions of Executive Order 12968, Dr. Makky submitted to OPM two written Freedom of Information Act/Privacy Act requests (dated February 1, 2005 and March 3, 2005, respectively) for his complete background investigation file and any other information upon which the OTVC's Initial Determination regarding his security clearance was based.

61. Over the next several months, OPM and FBI (the agency to which OPM referred Dr. Makky's FOIA request) responded with a series of incomplete and inconsistent document productions. Justifications for withholdings changed from one production to the next; new justifications were belatedly asserted; documents were redacted in inconsistent fashion. (The agencies' various responses are discussed in more detail below.) Dr. Makky has never received a complete copy of his background investigation file.

62. Meanwhile, Dr. Makky was facing OTVC's deadline for a response to the Initial Determination. In April 2005, Dr. Makky made his response, subject to the objection that had not received all the information to which he was entitled and might be unable to answer OTVC's suspicions without knowing what they were.

63. During this time, Burke was aware that Dr. Makky was exercising his legal rights to obtain legal representation, to oppose OTVC's Initial Determination, and to submit FOIA and Privacy Act requests for his background investigation file.

64. Burke also learned that, pursuant to an administrative reorganization, a group of approximately 60 employees – including Dr. Makky – were to be transferred out of Burke's authority on October 1, 2005.

65. With Dr. Makky exercising his legal rights and Burke about to lose his authority over Dr. Makky, Burke decided to take further action against Dr. Makky without even waiting for a final decision about Dr. Makky's security clearance.

66. On August 8, 2005, Burke initiated the process of suspending Dr. Makky, without pay, via a Notice of Proposed Suspension for an Indefinite Period.

67. In startling violation of agency regulations, which prohibit obvious conflicts of interest by requiring that the official who decides upon an adverse action against an employee "[m]ust be a higher level official in the employee's chain of command than the official who proposed the action," TSA Management Directive No. 1100.75-3 (hereinafter "Directive 1100-75.3"), sec. 6(H)(3)(a)(3), Burke both directed that the Notice of Proposed Suspension be drafted and himself approved that notice.

68. Agency regulations also require that the "notice of proposed adverse action must include . . . [t]he charge(s) and specification(s) for each charge, and [a description of] the evidence that supports the charge(s)," Directive 1100-75.3, sec. 6(H)(3)(a)(1)(a), and that the "employee should be provided a copy of the material relied upon to support each charge and specification." Directive 1100-75.3, sec. 6(H)(3)(a)(1)(i). The sensitive nature of the information at issue does not diminish the employee's right to see it; rather, the regulations specifically provide for this contingency: "if the material . . . contains sensitive information, the employee shall be given the opportunity to review the material at a designated TSA location." Directive 1100-75.3, sec. 6(H)(3)(a)(1)(i).

69. In contravention of these regulations and with disregard for elementary requirements of fairness and due process, the agency has never provided Dr. Makky with the FBI investigative file that Burke kept in his safe, even though, as testimony in Dr. Makky's

subsequent administrative proceeding revealed, this file played a central role in the decision to suspend Dr. Makky.

70. Denying Dr. Makky access to the FBI file directly violated Directive 1100-75.3 and effectively denied Dr. Makky a meaningful opportunity to respond to the agency's proposal to suspend him.

71. On September 7, 2005, Burke made the final decision to suspend Dr. Makky, indefinitely, without pay. This decision constituted a final adverse employment action.

72. Burke was well aware of Dr. Makky's national origin and religion when he decided to suspend Dr. Makky on September 7, 2005. Indeed, Burke had made it a point to learn of Dr. Makky's national origin at their very first meeting, and Burke had known of both Dr. Makky's national origin and his religion throughout his entire course of action against Dr. Makky – including placing Dr. Makky on administrative leave in March 2003, taking a particular interest in Dr. Makky's case in the following months and years, and sending the Notice of Proposed Suspension in August 2005.

73. Though "questions" concerning Dr. Makky's security clearance had allegedly existed (at least in Burke's mind) since March 2003, Dr. Makky had remained on administrative leave with pay from March 2003 through September 2005.

74. Even after January 2005, when OTVC made a preliminary determination that Dr. Makky's clearance should be revoked, Dr. Makky remained on administrative leave with pay.

75. Nor was Dr. Makky's suspension without pay an inevitable consequence of the January 2005 Initial Determination; in fact, on at least one previous occasion, an employee who

worked for Dr. Makky's agency and whose security clearance was *revoked* (not merely called into question) was reassigned to another division and even promoted.

76. It was only after Dr. Makky first began to exercise his legal rights in the spring of 2005 – by obtaining legal representation, opposing OTVC's Initial Determination, and submitting FOIA and Privacy Act requests for his background investigation file – that Burke, who now also faced the prospect of losing supervisory authority over Dr. Makky, resorted to the more punitive measure of suspension without pay.

The Consequences of Dr. Makky's Suspension

77. On March 7, 2006, six months after Dr. Makky was suspended without pay, TSA issued a Final Denial of Security Clearance ("Final Denial") to Dr. Makky.

78. Tellingly, the Final Denial noted that Dr. Makky had, in his administrative proceeding, "successfully mitigated" all but one of OTVC's original allegations against him. The one allegation that he had not "successfully mitigated" related to material in his file that he has never been permitted to see or contest.

79. On April 7, 2006, Dr. Makky appealed the Final Denial to the Security Appeals Panel of the Department of Homeland Security. That appeal is still pending.

80. To date, despite numerous formal and informal requests, Dr. Makky still has not received a complete copy of the background investigation file on which OTVC's Initial Determination and TSA's Final Denial were allegedly based. As a result, Dr. Makky has not yet been able to make a complete and informed response to the allegations against him.

81. On information and belief, if Dr. Makky loses his appeal of the revocation of his security clearance, he will be removed from his position as an electronics engineer with TSA and will be unable to find suitable employment within his field of expertise.

82. As a result of the September 7, 2005, suspension, Dr. Makky and his wife have suffered persistent emotional distress.

83. Dr. Makky's suspension has caused him and his wife to lose their health insurance. He has suffered extreme anxiety about his health and financial situation; his anxiety, in turn, has caused an unhealthy increase in Dr. Makky's blood pressure. Additionally, because he no longer has health insurance, Dr. Makky can no longer buy the medicine he needs for his high cholesterol.

84. Without Dr. Makky's salary, he and his wife have had to put their house up for sale.

Incomplete and Inconsistent Responses to Dr. Makky's FOIA/Privacy Act Requests

85. On February 1, 2005, and again on March 3, 2005, Dr. Makky submitted written Freedom of Information Act/Privacy Act requests to OPM for his complete background investigation file and any other information upon which OTVC's Initial Determination was based. The responses to his requests have been inconsistent and incomplete.

86. On March 10, 2005, OPM responded with an incomplete copy of Dr. Makky's file. OPM gave three justifications for withholding further information: (a) that a portion of the request was referred to another agency; (b) that certain documents contained information that pertained to Dr. Makky's wife and could not be released without her authorization; and (c) that "additional consultation" was required before certain information could be released. OPM did not provide a timeline for when such "additional consultation" would be complete, nor did it provide any statutory basis for withholding this information.

87. On or about April 6, 2005, pursuant to OPM's instructions, Dr. Makky filed a notarized authorization from his wife giving OPM permission to release any requested information pertaining to her.

88. On April 20, 2005, OPM released the information in the documents that pertained to Dr. Makky's wife, but asserted that additional information was being withheld under FOIA exemption (b)(3) and Privacy Act exemption (j)(1).

89. One day later, on April 21, 2005, OPM advised Dr. Makky that a "portion of [its] consultations regarding" certain documents had been completed and that it was withholding information in each of these documents under FOIA exemption (b)(3) and Privacy Act exemption (j)(1). OPM stated that it would notify Dr. Makky "as soon as the remainder of the consultation is completed," but the letter provided no information as to which portions of the documents were still under consultation or when these consultations would be completed.

90. The documents attached to OPM's April 21 cover letter showed redactions that were inconsistent with the redactions in the April 20 production. Contrary to the statement in its cover letter, OPM appeared also to be now withholding information under FOIA exemptions (b)(6) and (b)(7)(C). OPM offered no clarification or explanation for these contradictions.

91. On May 25, 2005, OPM advised Dr. Makky that the additional consultations on Document 114 had been completed and that the redacted portions could be released.

92. On or about August 18, 2005, the FBI responded to the FOIA and Privacy Act requests. The FBI's limited production was marked by inconsistency. Of the 10 pages allegedly contained in the FBI's investigative file for Dr. Makky, only 4 were produced and even those pages were heavily redacted. However, the FBI's "Deleted Page Information Sheet" stated that 8 pages had been deleted *in their entirety* and listed documents 1, 2, 4, 5, 6, 7, 10, and 11 – thus

indicating that there were more than 10 pages at issue. In addition, at least three of the documents listed on the “Deleted Page Information Sheet” were in fact produced in redacted form. The FBI cited FOIA exemptions (b)(1) and (b)(2) and exemption (k)(1) under the Privacy Act as the reasons for its redactions and withholdings.

93. On September 22, 2005, OPM advised Dr. Makky that the “additional consultations” with respect to two of the documents had been completed and that the FBI had given OPM permission to release redacted versions of these documents. The redactions and exemptions claimed on these new versions were inconsistent with versions that had been previously released.

94. On or about October 17, 2005, Dr. Makky appealed the FBI’s decision to withhold documents responsive to his FOIA and Privacy Act requests. DOJ has not yet responded to Dr. Makky’s FOIA and Privacy Act appeal.

95. On or about December 27, 2005, Dr. Makky appealed OPM’s decision to withhold documents responsive to his FOIA and Privacy Act requests.

96. OPM responded to Dr. Makky’s FOIA and Privacy Act appeal by letter dated May 12, 2006. This letter indicated that one additional document would be forthcoming from another agency, that OPM was continuing to withhold portions of certain documents based on the outcome of consultations with the Central Intelligence Agency, and that Dr. Makky would receive a final copy of his background file with the remaining redactions and claimed exemptions clearly marked. Beyond this, OPM released no further documents or portions of documents.

97. On or about May 23, 2006, Dr. Makky received the additional document promised by the May 12 letter.

98. On or about May 26, 2006, Dr. Makky received a final copy of his background investigation file with the remaining redactions and exemptions marked.

Claims Exhausted Before the Merit Systems Protection Board

99. Raising discrimination, due process, and civil service protection claims, Dr. Makky timely appealed his suspension without pay to the Merit Systems Protection Board.

100. An Administrative Judge affirmed the agency's action on April 4, 2006.

101. Dr. Makky timely petitioned the full Board for review.

102. On August 15, 2006, the Board denied the petition and adopted the Administrative Judge's decision as the final decision of the Board.

CAUSES OF ACTION

COUNT ONE:

Title VII of the Civil Rights Act – Employment Discrimination

103. Dr. Makky realleges and incorporates by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

104. Dr. Makky, an Egyptian-American and a Muslim, is a member of two protected classes of employees.

105. An adverse employment action – suspension without pay – was taken against Dr. Makky because of his membership in one or both of these protected classes.

106. Defendants Chertoff, Hawley, DHS and TSA have suspended Dr. Makky without pay on account of his national origin and/or religion, and thus discriminated against Dr. Makky in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16(a).

107. As a result of defendants' actions, Dr. Makky has suffered lost wages, and emotional and medical damages in an amount to be determined at trial.

COUNT TWO:
Civil Service Reform Act – Employment Discrimination

108. Dr. Makky realleges and incorporates by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

109. Defendants Chertoff, Hawley, DHS and TSA have suspended Dr. Makky without pay on account of his national origin and/or religion, and thus discriminated against Dr. Makky, an action that constitutes a prohibited personnel practice under the Civil Service Reform Act of 1978, 5 U.S.C. § 2302(b)(1)(A).

110. Because Dr. Makky's suspension without pay was based on a prohibited personnel practice under 5 U.S.C. § 2302(b), this employment action should not have been sustained by the Merit Systems Protection Board under the Civil Service Reform Act of 1978, 5 U.S.C. § 7701(c)(2)(B).

111. As a result of defendants' actions, Dr. Makky has suffered lost wages, and emotional and medical damages in an amount to be determined at trial.

COUNT THREE:
Fifth Amendment to the U.S. Constitution – Procedural Due Process

112. Dr. Makky realleges and incorporates by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

113. Robin Burke, the agency official who made the decision to suspend Dr. Makky without pay, was biased against Dr. Makky on account of Dr. Makky's national origin and religion.

114. Defendants Chertoff, Hawley, DHS and TSA have failed to ensure that the decision to suspend Dr. Makky without pay was made by an unbiased decisionmaker, and thus deprived Dr. Makky of his Fifth Amendment right to due process of law.

115. Defendants Chertoff, Hawley, DHS and TSA have never permitted Dr. Makky to see the FBI file that formed the basis for the decision to suspend him without pay.

116. By refusing to provide Dr. Makky with the evidence upon which his suspension without pay was based, defendants Chertoff, Hawley, DHS and TSA have denied Dr. Makky an adequate opportunity to contest his suspension, and thus deprived Dr. Makky of his Fifth Amendment right to due process of law.

117. Because Dr. Makky's suspension without pay was unconstitutionally carried out and therefore not in accordance with law, this employment action should not have been sustained by the Merit Systems Protection Board under the Civil Service Reform Act of 1978, 5 U.S.C. § 7701(c)(2)(C).

118. As a result of defendants' actions, Dr. Makky has suffered lost wages, and emotional and medical damages in an amount to be determined at trial.

COUNT FOUR:
Civil Service Reform Act – Harmful Error in Application of Agency Procedures

119. Dr. Makky realleges and incorporates by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

120. Defendants Chertoff, Hawley, DHS and TSA have never permitted Dr. Makky to see the FBI file that formed the basis for the decision to suspend him without pay.

121. Therefore, defendants Chertoff, Hawley, DHS and TSA failed to comply with TSA Management Directive No. 1100.75-3, which requires that the "notice of proposed adverse action must include . . . [t]he charge(s) and specification(s) for each charge, and [a description

of] the evidence that supports the charge(s),” Directive 1100-75.3, sec. 6(H)(3)(a)(1)(a), and that the “employee should be provided a copy of the material relied upon to support each charge and specification,” Directive 1100-75.3, sec. 6(H)(3)(a)(1)(i), or at least be entitled to “review the material” if it “contains sensitive information,” Directive 1100-75.3, sec. 6(H)(3)(a)(1)(i).

122. Had Dr. Makky seen the FBI file, he could have contested this evidence and likely overcome it.

123. The agency’s failure to follow its procedures was harmful error because it likely affected the result of the determination whether to suspend Dr. Makky.

124. Robin Burke, the agency official who made the decision to suspend Dr. Makky without pay, was biased against Dr. Makky on account of Dr. Makky’s national origin and religion.

125. Permitting Burke to take this adverse action against Dr. Makky was harmful error because an unbiased decisionmaker likely would not have suspended Dr. Makky without pay.

126. Because of harmful errors in the application of the agency’s procedures to Dr. Makky’s suspension without pay, this employment action should not have been sustained by the Merit Systems Protection Board under the Civil Service Reform Act of 1978, 5 U.S.C. § 7701(c)(2)(A).

127. As a result of defendants’ actions, Dr. Makky has suffered lost wages, and emotional and medical damages in an amount to be determined at trial.

COUNT FIVE:
Civil Service Reform Act – Retaliation for the Exercise of Legal Rights

128. Dr. Makky realleges and incorporates by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

129. Dr. Makky engaged in the statutorily protected activities of contesting the Initial Determination to revoke his security clearance and of submitting FOIA/Privacy Act requests for his background file.

130. Defendants Chertoff, Hawley, DHS and TSA have taken adverse employment action against him because he engaged in these protected activities.

131. Defendants Chertoff, Hawley, DHS and TSA have suspended Dr. Makky without pay in retaliation for his exercise of his legal rights, in violation of the Civil Service Reform Act of 1978, 5 U.S.C. § 2302(b)(9)(A).

132. Because Dr. Makky's suspension without pay was based on a prohibited personnel practice under 5 U.S.C. § 2302(b), this employment action should not have been sustained by the Merit Systems Protection Board under the Civil Service Reform Act of 1978, 5 U.S.C. § 7701(c)(2)(B).

133. As a result of defendants' actions, Dr. Makky has suffered lost wages, and emotional and medical damages in an amount to be determined at trial.

COUNT SIX:
Freedom of Information Act – Withholding of Records

134. Dr. Makky realleges and incorporates by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

135. Defendants OPM and FBI have each failed to make promptly available all the records sought by plaintiff's requests, in violation of the FOIA, 5 U.S.C. § 552(a)(3)(A).

COUNT SEVEN:
Privacy Act – Withholding of Records

136. Dr. Makky realleges and incorporates by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

137. Defendants OPM and FBI have each failed to make promptly available all the records sought by plaintiff's requests, in violation of the Privacy Act, 5 U.S.C. § 552a(d)(1).

RELIEF REQUESTED

WHEREFORE, plaintiff prays that this Court:

- A. Grant this petition for review of the decision of the Merit Systems Protection Board upholding the illegal actions taken against Dr. Makky, and reverse the decision of the Board;
- B. Award plaintiff back pay, plus interest, covering the period from September 7, 2005, until this Court's award;
- C. Award plaintiff compensatory damages;
- D. Order that plaintiff be reinstated to his position at TSA (or award plaintiff front pay if he cannot be reinstated);
- E. Order defendants OPM and FBI immediately to disclose to the plaintiff the requested records in their entirety;
- F. Award plaintiff costs and reasonable attorneys' fees incurred in this action; and
- G. Grant such other relief as the Court may deem just and proper.

Plaintiff demands a trial by jury.

Dated: Newark, New Jersey
September 14, 2006

/s/ Baher Azmy
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