



3 MR. CONDIT: Good morning, Your Honor.

4 MS. GRAY: Good morning, Your Honor.

5 THE COURT: Is miss Featherstone here?

6 MR. CONDIT: Your Honor, we have not seen Miss  
7 Featherstone yet this morning.

8 THE COURT: Do you have telephone numbers for --  
9 (Pause).

10 THE DEPUTY CLERK: Miss Featherstone.

11 MS. FEATHERSTONE: (By telephone) yes.

12 THE DEPUTY CLERK: I'm calling from open court with  
13 Judge Braman. Could you please identify yourself for the  
14 record?

15 MS. FEATHERSTONE: Kerslyn Featherstone on behalf of  
16 the District.

17 THE DEPUTY CLERK: Thank you.

18 THE COURT: Is she --

19 THE DEPUTY CLERK: She's on the phone.

20 THE COURT: Why isn't she here?

21 THE DEPUTY CLERK: Miss Featherstone.

22 MS. FEATHERSTONE: Yes.

23 THE DEPUTY CLERK: We have a hearing this morning at  
24 9:00 a.m.

25 MS. FEATHERSTONE: Oh, I apologize, I thought it was

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1 at 10 o'clock a.m., I'm on my way over to court right now, I  
2 was just in my office.

3 THE COURT: How long will it take her to get here?

4 THE DEPUTY CLERK: How long should it take you?

5 MS. FEATHERSTONE: About five minutes.

6 THE DEPUTY CLERK: Five minutes, Judge.  
7 THE COURT: Tell her to get right here immediately.  
8 MS. FEATHERSTONE: I apologize, I'm on my way down.  
9 THE DEPUTY CLERK: Okay.  
10 MS. FEATHERSTONE: Thank you.  
11 THE COURT: We'll stand in recess until defense  
12 counsel arrives.  
13 (Thereupon, the proceedings were recessed at 9:07  
14 a.m.)  
15 (Thereupon, the proceedings were reconvened at 9:16  
16 a.m.)  
17 THE DEPUTY CLERK: Your Honor, calling the matter of  
18 Theresa Cusick versus District of Columbia, et al.,  
19 08-CA-6915.  
20 Parties please identify yourselves for the record.  
21 MR. CONDIT: Good morning, Your Honor, Richard  
22 Condit for the Plaintiff, Theresa Cusick. With me at counsel  
23 table is my colleague Karen Gray. And the plaintiff sits  
24 behind us.  
25 MS. FEATHERSTONE: Good morning, Your Honor, Kerslyn

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1 Featherstone on behalf of the District, and also have a new  
2 attorney in our office Mr. Michael Lanzdorf who will be  
3 observing this court proceeding this morning. I apologize  
4 for being late, Your Honor.

5 THE COURT: Miss Featherstone, I'm surprised that --  
6 please be seated -- I'm surprised that my reputation for  
7 promptness has not reached you but I take the bench promptly  
8 at nine o'clock. I don't want to see a counsel arrive later  
9 than I do. I don't expect you to be late in my courtroom

10 again. Do you understand?

11 MS. FEATHERSTONE: Yes, Your Honor. I do apologize,  
12 I calendared this matter for 10 o'clock.

13 THE COURT: This matter is before the Court on the  
14 defendant's motion for summary judgment which is limited to  
15 the issues of statutory notice pursuant to section 12-309 of  
16 the code and the statute of limitations.

17 I have read counsel's briefing at least twice and I  
18 propose to proceed by questioning counsel in the first  
19 instance on matters that I think remain only partially  
20 explained or which trouble me, and then I'm going to give  
21 counsel five minutes to wrap up after the questioning.

22 Miss Featherstone, let me begin with you.

23 Please be seated, Mr. Condit.

24 MR. CONDIT: Certainly.

25 THE COURT: You were briefing a concerns the -- the

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1 now statute of limitations, your briefing focuses upon the  
2 date of June 14, 2007, and I'd like to ask you, Miss  
3 Featherstone, whether the date of September 27, 2007, it  
4 being the date of Mr. Adams' e-mail informing the plaintiff  
5 that her employment was terminated, whether that date is also  
6 significant insofar as the statute of limitations is  
7 concerned.

8 MS. FEATHERSTONE: Your Honor, with respect to the  
9 day of September 27, 2007, that date has no real bearing in  
10 this case. Simply because Miss Cusick was the general  
11 counsel for the fire department. On June 14th, 2007, that's  
12 the date that she was removed from her position and given a

13 temporary position, so the fact that Mr. Adams contacted her  
14 on September 27th is of no moment because plaintiff was never  
15 removed again, she left the agency voluntarily on September  
16 -- she advised Mr. Adams on that same date that she herself  
17 had secured employment outside of OAG and with another  
18 District agency, so --

19 THE COURT: Does that mean that if she didn't leave  
20 voluntarily it would be a critical date for statute of  
21 limitations' purposes?

22 MS. FEATHERSTONE: No, Your Honor, because just much  
23 like the Delaware State College case, Miss Cusick was  
24 advised --

25 THE COURT: The Ricks case?

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1 MS. FEATHERSTONE: Yes, Your Honor.

2 Miss Cusick was advised on June 14th that she was  
3 being removed from her position, and that she would only have  
4 a temporary position through the end of the fiscal year which  
5 would have been through September 30th.

6 The September 27th e-mail was merely to come to Miss  
7 Cusick towards the end of that tour and say have you found  
8 anything? We haven't found anything, there's nothing here,  
9 much like a reminder e-mail.

10 She's already been told, and she's admitted in her  
11 deposition and it's in the record, that she would no longer  
12 be the general counsel, and was only being given a temporary  
13 position. Her date --

14 THE COURT: Let me interrupt you. Under the  
15 whistleblower's Act it is possible, is it not, to have  
16 multiple violations of the statute, that is multiple

17 prohibited personal actions?

18 MS. FEATHERSTONE: The Plaintiff is not claiming the  
19 prohibited -- that the prohibited personnel action was the  
20 September 27, 2007 letter.

21 THE COURT: That wasn't my question, Miss  
22 Featherstone. My question is whether under the act, the  
23 statute, it is possible to have multiple prohibited personnel  
24 actions, in other words, multiple instances of retaliation?

25 MS. FEATHERSTONE: Yes.

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1 THE COURT: It is?

2 MS. FEATHERSTONE: Yes.

3 THE COURT: So, if, for example, Miss Cusick had  
4 been transferred out of the fire department and reassigned to  
5 the office of attorney general, not on a part time basis, not  
6 on a temporary basis, but merely transferred, and then after  
7 the transfer she had been let go, if she had been let go in  
8 retaliation and we'd have two discrete activities, would we  
9 not?

10 MS. FEATHERSTONE: You could couch it that way, Your  
11 Honor, but you'd also have a temporal proximity argument  
12 that --

13 THE COURT: Pardon me?

14 MS. FEATHERSTONE: There can also be a temporal  
15 proximity argument as to whether or not the second action  
16 taken against the plaintiff would have been resulted from any  
17 alleged protected activity that occurred.

18 One thing I want to point out to the Court --

19 THE COURT: No, no. The question is in my

20 hypothetical she was transferred back to the office of  
21 attorney general, not on a temporary basis, but on a strict  
22 reassignment, in other words, she had been in the office of  
23 attorney general in the first instance.

24 Miss Cusick, was that your instrument?

25 THE PLAINTIFF: I'm sorry, I thought I turned it

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1 off.

2 THE COURT: She had been in the office of attorney  
3 general before she was assigned to the fire department. Is  
4 that correct?

5 MS. FEATHERSTONE: She had been a District employee  
6 prior to the fire department, I'm not sure of her -- I don't  
7 have it right in front of me where she was employed but --

8 THE COURT: Well, I think the record shows that she  
9 was in the office of attorney general in the first instance.  
10 She was then transferred to the fire department and then on  
11 June 14, 2007, she was removed from the fire department.

12 Now my hypothetical asks you to assume that she was  
13 merely transferred back, not on a temporary basis, but  
14 transferred back as a permanent employee. Then if she was  
15 removed, depending upon all the facts, we might have a  
16 situation of two alleged, claimed, prohibited personnel  
17 actions.

18 MS. FEATHERSTONE: Given the Court's scenario and  
19 all the factors, um, that the Court has stated it's possible,  
20 but in this case Miss Cusick was an employee of the attorney  
21 general the entire time. She was merely positioned at the  
22 fire department.

23 THE COURT: Yes, I agree with that. I agree with  
Page 7

24 that.

25 Now, let's turn to the definition of prohibited

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1 personnel actions. Section 1-615.52. Do you have the  
2 statute?

3 MS. FEATHERSTONE: I do not, Your Honor, but the  
4 Court can --

5 THE COURT: Well, it's subsection five of the  
6 definitions statute which I just cited for the record. And  
7 it says, and I'm quoting, prohibited personnel action  
8 includes but is not limited to recommended, threatened, or  
9 actual termination, demotion, suspension, or reprimand,  
10 involuntary transfer, reassignment, or detail, referral for  
11 psychiatric or psychological counseling, failure to promote  
12 or hire or take other favorable personnel action, or  
13 retaliating in any manner against an employable personnel  
14 against -- excuse me, against an employee because that  
15 employee makes a protected disclosure or refuses to comply  
16 with an illegal order as those terms are defined in this  
17 section. Unquote.

18 So, it includes a failure to hire, a failure to take  
19 other favorable personnel action.

20 Now let's assume, and there was evidence in the  
21 record, that when she was removed from the fire department,  
22 she was removed and transferred back to the office of  
23 attorney general as a temporary employee. With a term that  
24 was limited to October 1.

25 There's evidence in the record to show that Mr.

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1 Adams stated that he would do everything in his power to see  
2 that Miss Cusick obtained permanent employment in the office  
3 of attorney general.

4 And let's further assume that Mr. Adams did not  
5 really try, that he misled Miss Cusick, and let's assume  
6 further that he did so because of her alleged whistle blow.

7 would that come under a prohibited personnel action?  
8 On those assumptions. And I know that you don't -- you  
9 disagree with the assumptions, but on the hypothetical that I  
10 put to you would that constitute a prohibited personnel  
11 action?

12 MS. FEATHERSTONE: Yes, Your Honor, if she was  
13 removed from her position because of alleged whistleblower  
14 activity then that's -- that is a violation of the  
15 whistleblower Act.

16 THE COURT: That's the subject of your third issue  
17 on the motion for summary judgment which we're not getting to  
18 today. But on the assumptions that I've said then we might  
19 have a case of two distinct retaliatory actions.

20 MS. FEATHERSTONE: The District disagrees, Your  
21 Honor, the first instance -- well, topic number three deals  
22 with the fact that Miss Cusick didn't make a protected  
23 disclosure. So, therefore, no action was taken against her  
24 because of that.

25 The District's main argument is that Miss Cusick did

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1 not engage in any protected activity.

2 THE COURT: I know that.  
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3 MS. FEATHERSTONE: Okay.

4 THE COURT: But I'm asking, I'm asking you, we don't  
5 have that before us now, there is evidence, and I know that  
6 you disagree with it, but the -- a jury might conclude that  
7 her dismissal on June 14, 2007, was not on the merits but was  
8 because of Miss Cusick's activity with respect to the office  
9 of inspector general and the U.S. Attorney's Office, and her  
10 disobeying what she says was the improper, illegal order that  
11 was given to her by Brian Lee.

12 The case may be thin but there's -- there may be  
13 evidence of that. If a jury finds on my hypothetical that  
14 she was removed because she did not observe Mr. Lee's order  
15 then we would have an improper action, a prohibited personnel  
16 action, on June 14. Would we not?

17 MS. FEATHERSTONE: Yes.

18 THE COURT: On that basis.

19 All right, thank you, Miss Featherstone.

20 MS. FEATHERSTONE: Thank you.

21 THE COURT: Mr. -- Mr. Condit, your argument on the  
22 statute of limitations keys on September 27, 2007, the Adams'  
23 e-mail. Am I correct?

24 MR. CONDIT: Correct, Your Honor.

25 THE COURT: And your focus is concerned with injury

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1 and damage. You're saying that there was no injury or damage  
2 in the transfer of -- from June 14, and she didn't lose any  
3 of her grade. She -- instead she was transferred to the  
4 office of attorney general with the same financial and status  
5 indicia as she enjoyed before. Is that correct?

6 MR. CONDIT: That is correct, with one caveat which  
7 is that as we briefed to the Court we do view the transfer,  
8 the reassignment as Mr. Adams would attest to it, the  
9 reassignment of Miss Cusick as being a prohibited personnel  
10 action, but it is correct that --

11 THE COURT: You do see it, the transfer?

12 MR. CONDIT: The reassignment was a prohibited  
13 personnel action under the definition in the statute.

14 THE COURT: In fact, your -- your focus on the  
15 injury and damage is not consonant with the statutes, is it?

16 MR. CONDIT: I think it is, Your Honor, I think --

17 THE COURT: Well, let's look at that. The statutory  
18 notice statute, 12-309, states: An action may not be  
19 maintained against the District of Columbia for unliquidated  
20 damages to person or property unless within six months after  
21 the injury or damage was sustained. Unquote.

22 In other words, it focuses on injury or damage just  
23 the way the plaintiff focuses upon it. Is that correct?

24 MR. CONDIT: That's correct, Your Honor.

25 THE COURT: But the whistleblower's Act has a

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1 different focus entirely. The statute of limitations there  
2 says, and I quote, this is 1-615.54 subsection two: A civil  
3 action shall be filed within three years after a violation  
4 occurs or within one year after the employee first becomes  
5 aware of the violation, unquote.

6 In other words, the statute of limitation keys on  
7 the violation, not the injury.

8 MR. CONDIT: Well, it seems, Your Honor, that the  
9 language that you just read from the amended version of the

10 whistleblower Protection Act focuses on both. The injury and  
11 the violation.

12 In this instance Miss Cusick made the decision that  
13 the transfer, while being illegal, did not amount to  
14 something significant enough for her to contest.

15 THE COURT: well, she may have fought that.

16 MR. CONDIT: Right.

17 THE COURT: But the statute is in such  
18 contradistinction from the statutory notice statute to  
19 suggest that the counsel used language very carefully. It --  
20 the whistleblower's action, the statute, excuse me, is aimed  
21 at preventing prohibited personnel actions, violations.

22 So if there was a violation, and as I understand it,  
23 the plaintiff is saying that her transfer was a prohibited  
24 personnel action; am I correct?

25 MR. CONDIT: That's correct, Your Honor.

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1 THE COURT: Then the statute is offended in that  
2 instance. And unless there is an exception such as a  
3 Continuous Violation Doctrine or unless there is lulling then  
4 the statute begins to run. Does it not?

5 MR. CONDIT: On that particular violation, yes.

6 THE COURT: All right.

7 So, the defendant then is contending -- I shouldn't  
8 say contending, the defendant agrees that there were two  
9 violations. Is that correct?

10 MS. FEATHERSTONE: No, Your Honor.

11 THE COURT: Pardon me?

12 MS. FEATHERSTONE: No, that's not correct.



17 contract. Neither of those facts were disputed.

18 Here, what's in dispute, and what doesn't permit  
19 summary judgment to be granted, is what transpired after Miss  
20 Cusick's involuntary reassignment. And Miss Cusick's  
21 position, and the evidence on her side, indicates that she  
22 was promised a permanent position. And that all steps will  
23 be taken to provide that position.

24 The defense obviously says to the contrary. I  
25 believe a jury could easily decide in favor of the plaintiff,

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1 and thus summary judgment would be inappropriate on these  
2 facts as they stand now without the jury evaluating the  
3 credibility of the parties in their testimony.

4 THE COURT: Well, you don't disagree, do you, Mr.  
5 Condit, with the proposition, with the fact that Mrs. Cusick  
6 was given a temporary position in the office of attorney  
7 general when she was transferred?

8 MR. CONDIT: The facts indicate, Your Honor, that,  
9 um, she was initially reassigned to a temporary position, and  
10 from the facts --

11 THE COURT: Subject to the promise of Mr. Adams?

12 MR. CONDIT: Correct, Your Honor.

13 THE COURT: So that you're saying that the Cusick  
14 case is different than Ricks because Ricks was a situation  
15 where there was a one-year contract that -- that followed the  
16 denial of tenure.

17 MR. CONDIT: Correct, and --

18 THE COURT: And in other words, there was no  
19 expectancy that it would go further, in fact, it was stated

20 by the college in Ricks that this would be the final year,  
21 and that the situation was here -- here was different in that  
22 there was, although there was the temporary employment which  
23 was to end with a fiscal, beginning of the fiscal year,  
24 October 1, 2007, that Mr. Adams had given his promise to use  
25 his power so that Miss Cusick would have permanent employment

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1 with the OAG. And that that promise was a false promise. Is  
2 that your -- your position?

3 MR. CONDIT: As it turned out, yes, Your Honor, it  
4 was a false promise. I believe --

5 THE COURT: Well, when you say a false promise what  
6 do you mean by that? Are you saying that it was -- that it  
7 was given with knowledge that he would not use his -- his  
8 power? And we're talking about a gentleman who was the chief  
9 deputy attorney general, the number two man. Which is it,  
10 Mr. -- Mr. Condit?

11 MR. CONDIT: Your Honor, I believe, um, the evidence  
12 indicates the inferences from the evidence that we have,  
13 understanding that, of course, discovery has been incomplete,  
14 and problematic, but the evidence that we have indicates  
15 that, first of all, um, the initial meeting that was to relay  
16 the information of the reassignment to Miss Cusick, um, was  
17 clandestinely, if you will, planned between Mr. Rubenstein  
18 and Mr. Adams in order to avoid alarming Miss Cusick by not  
19 including Mr. Adams as part of the attended meeting  
20 participants. So that's an indication right there that there  
21 was mischief afoot.

22 Beyond that, Your Honor, the fact of the matter is  
23 that Mr. Adams, if we are -- what the District would like you

24 to believe, Your Honor, is that Miss Cusick was terminated as  
25 of June the 14th, 2007.

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1 Now notice what is missing from this alleged  
2 termination. This is the office of attorney general, you  
3 know, the lawyers for the public, the District of Columbia.  
4 Lawyers put things in writing. Why isn't there a letter, a  
5 memo, some documentation that says, Miss Cusick, you are  
6 hereby terminated, um, effective October 1st, 2007?

7 There is nothing like that. There's not even human  
8 relations documentation, at least that we've been made privy  
9 to so far.

10 It is unprecedented, I think, for a -- a legal arm  
11 of the Government to have operated in such -- in what we're  
12 to believe is such a sloppy fashion.

13 THE COURT: Mr. Condit, your opposition memorandum  
14 doesn't employ the guarded language that you now espouse, you  
15 use the word deceiving.

16 MR. CONDIT: I believe, Your Honor, in a section of  
17 our brief, our initial opposition brief, where we discuss the  
18 tolling that should apply if the limitations period is to be  
19 applied.

20 THE COURT: That's what I'm talking about.

21 MR. CONDIT: Yes, I believe we did lay out, perhaps  
22 we were not as explicit as I am right now, but I believe we  
23 did lay out the perception and indicated that she was lulled  
24 into believing that if she quietly was reassigned and moved  
25 away from the -- from the general counsel position at D.C.

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1 Fire and EMS, then she would be assured a new position within  
2 the office of attorney general.

3 And that obviously did not happen, and it is, as you  
4 say, the number two man in the whole agency who is making the  
5 promise to provide a permanent position, and if he can't make  
6 that happen I think that's a very interesting indication of  
7 what was afoot at the time.

8 THE COURT: All right, thank you.

9 Miss Featherstone, may I hear you on the defendant's  
10 position on lulling? And I don't believe that your reply  
11 brief responded to that.

12 MS. FEATHERSTONE: Your Honor, we never received --  
13 I don't recall in the opposition there being any reference to  
14 the fact that Miss Cusick was lulled into accepting this  
15 transfer. She was being removed from her position. That was  
16 the intent of the meeting and there was no --

17 THE COURT: Am I mistaken that the reply brief is  
18 silent on lulling?

19 MS. FEATHERSTONE: Yes, Your Honor, because I don't  
20 believe the opposition addressed it either.

21 THE COURT: The opposition did mention lulling.

22 MS. FEATHERSTONE: The opposition mentioned that the  
23 plaintiff's claim that Mr. Rubenstein and Mr. Adams did not  
24 alert Miss Cusick in advance of her termination, of her  
25 removal meeting, of what the meeting was going to be about,

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1 but there was no allegation in the opposition that Mr. Adams  
2 did anything or told Miss Cusick anything to suggest to her

3 as to why, um, she was being removed to go quietly if she  
4 would accept this position. That evidence is not in the  
5 record, the opposition only talked about -- I'm sorry.

6 THE COURT: You're arguing, Miss Featherstone. If I  
7 understand it correctly it came through directly to me that  
8 by promising her that he, the chief deputy attorney general,  
9 would do what was in his power to make her position permanent  
10 with the office of attorney general, that plainly is lulling.

11 MS. FEATHERSTONE: Um, that's -- first, Your Honor,  
12 that's not the allegation of the plaintiff. The plaintiff's  
13 allegation was that she was expressly promised that they  
14 would look -- try to find for her employment. It was not  
15 that the position she was in was promised to her to be  
16 remaining. That was the promise that she alleges.

17 But even if the Court accepted that information  
18 there's still no injury date for anything because Miss Cusick  
19 left the agency before the end of the fiscal year. So even  
20 if she received a promise from Mr. Adams --

21 THE COURT: She received the September 27th e-mail  
22 telling her that there would be no position for her. That  
23 there was no employment after October 1.

24 MS. FEATHERSTONE: Your Honor, that's -- that was  
25 not new information. Miss Cusick knew that the position in

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1 the legal counsel division would end on October 1. That  
2 information in the September 27th e-mail reiterated that  
3 fact. It was not Miss Cusick -- was not --

4 THE COURT: There was -- it's true, and Miss Cusick  
5 has acknowledged, that she knew she was a temporary employee.

6 But there was superimposed upon that the alleged Adams  
7 promise. And Mr. Condit is stating, among other things, that  
8 that promise given by such a highly positioned individual  
9 lulled Miss Cusick so that she was relying upon his promise  
10 and did not file a complaint during the permitted statutory  
11 period.

12 MS. FEATHERSTONE: Your Honor, she did file a  
13 complaint.

14 THE COURT: She filed it late.

15 MS. FEATHERSTONE: No, she filed a complaint in  
16 November of 2008.

17 THE COURT: You're talking about her letter to the  
18 risk management section.

19 MS. FEATHERSTONE: Yes.

20 THE COURT: Of the District of Columbia. That is  
21 not a complaint that -- that satisfies the statute of  
22 limitations. She deferred filing a complaint, she says,  
23 because she was relying upon Mr. Adams's promise.

24 MS. FEATHERSTONE: Your Honor, the record evidence  
25 is that Miss Cusick, in fact, in her deposition stated that

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1 she never believed Mr. Adams when he said that he would help  
2 her locate a -- locate a position.

3 THE COURT: Where do you find that? Or are you  
4 confusing it with the fact that as time wore on that rather  
5 than being out in the cold she accepted an offer from the  
6 department of public welfare at the last moment, and that was  
7 in -- in September 26, the day before the e-mail from Mr.  
8 Adams, and not having heard from Mr. Adams she accepted the  
9 offer from the department of public welfare on September 26,

10 the day before, but she didn't say anything according to her  
11 deposition.

12 MS. FEATHERSTONE: If the Court accepts that  
13 argument then it would presuppose that Miss Cusick's  
14 knowledge or belief or her -- her reliance on any promise  
15 made by Mr. Adams was well before September 27. Given the  
16 fact that --

17 THE COURT: Miss Featherstone, I'm not accepting  
18 what Mrs. -- Miss Cusick said, testified to, I'm merely  
19 searching for the record what a jury might believe.

20 MS. FEATHERSTONE: And the District put in its reply  
21 that Miss Cusick in no way relied upon any promise by the  
22 agency given the fact that she sought her own employment  
23 outside the agency. The fact that she wasn't advised that  
24 she had gotten the position until -- at the end of the fiscal  
25 year, doesn't mean that Miss Cusick was not looking for

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1 positions prior to that. In fact, she testified that she was  
2 looking for jobs after she was transferred.

3 THE COURT: A jury might accept your perception of  
4 the record. But there's evidence to the temporary. The jury  
5 might accept literally what Miss Cusick says.

6 In any event, I understand your position now on  
7 tulling, and I think it's close question.

8 Miss Featherstone, let me ask you about 12-309, the  
9 statute on notice to the District, notice to the mayor of a  
10 claim within six months of the injury or damage.

11 And specifically, I want to ask you about the  
12 retroactivity question. That is whether the amendment to the

13 code, to the whistleblower's Act, which stated that under the  
14 act notice need not be given. You say, on behalf of the  
15 District, that the statute is not to be applied  
16 retroactively. Is that correct?

17 MS. FEATHERSTONE: Yes.

18 THE COURT: Now, this statute applies to the statute  
19 of limitations; is that correct?

20 MS. FEATHERSTONE: We believe it does, yes.

21 THE COURT: And insofar as that's concerned is it  
22 correct then to assume that this statute is procedural in  
23 nature, that it affects the remedy; is that correct?

24 MS. FEATHERSTONE: Well, statute of limitations, I  
25 mean 12-309 is not a statute of limitations.

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1 THE COURT: Pardon me?

2 MS. FEATHERSTONE: 12-309 is not a statute of  
3 limitations, it's a notice argument, and so we don't believe  
4 that the provisions addressing 12-309 are procedural.

5 THE COURT: Well, evidently the committee of the  
6 counsel, the committee on Government operations and  
7 environment in its report disagreed with you because at page  
8 six it says -- it refers to, under the heading number three,  
9 and I quote: Procedural barriers to recovery. And that  
10 section deals with statutory notice, does it not?

11 MS. FEATHERSTONE: I don't have a copy of the  
12 statute in front of me, Your Honor, but --

13 THE COURT: No, this is the account committee  
14 report.

15 MS. FEATHERSTONE: I don't have a copy of the  
16 committee requirement.

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THE COURT: I'll pass mine down to you.

MS. FEATHERSTONE: Thank you, Your Honor.

THE COURT: It's on page six of the report. And that's open to page six. It refers to procedural barriers, does it not?

MS. FEATHERSTONE: Yes, Your Honor. The statute of limitations, yes.

THE COURT: All right, would you pass it back to me?

MS. FEATHERSTONE: Yes.

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THE COURT: So, this statute is procedural.

(Pause).

THE COURT: Now, the case of Montgomery against the District of Columbia, which I don't think was cited in any of the briefs, reported at 598 Atlantic Reporter Second, at 162, states: Unless a contrary legislative intent appears changes in statute law which pertain only to procedure are generally held to apply to pending cases, unquote. Citing Singer on Sutherland statutory construction.

And it continues: This is true, although the transaction which precipitated the dispute took place prior to the enactment of the statute, unquote.

And it cites a number of cases so holding, and one of them, which was decided by Chief Judge Andrews of the New York Court of Appeals, in Lazaret against Metropolitan Rail -- Railway Company, 145 New York 581, and 40 Northeast 240 at page 241 states: By the general rule of law the procedure in an action is governed by the law regulating it at the time any question of procedure arises.

20 This must be the correct rule unless procedure is to  
21 be involved in chaos, unquote.

22 So, isn't it clear that the statute being involved  
23 in a matter of procedure is to be construed to apply to  
24 whatever case is pending, even though it may be retroactive?

25 MS. FEATHERSTONE: No, Your Honor, we don't agree

25

1 that the statute is retroactive. The procedural argument  
2 that I just read was regarding statute of limitations  
3 argument. The 12-309 is not a statute of limitations, it is  
4 a notice requirement, um, that puts the District on notice of  
5 claims.

6 And the Court states that it would include cases  
7 that are pending. Well, then it would lead to believe what  
8 does that mean, cases where you have been injured, and you  
9 have yet to file notice? Or cases where court cases have  
10 been filed and are pending before a court?

11 The city council was silent as to what should  
12 constitute a pending case. If the Court analogizes this with  
13 the Lilly Ledbetter Act that just passed it specifically put  
14 a retroactivity clause to state that any claims that were two  
15 years prior to the enactment would be considered timely under  
16 that statute. That allowed for claims that would have  
17 otherwise been time barred to somehow survive under the Lilly  
18 Ledbetter Act.

19 In this case if the counsel -- because the counsel  
20 was silent on that the statute would be retroactive, meaning  
21 that 12-309 is open, any 12-309 claim could then be filed.  
22 If it's -- since 12-309 no longer exists then as long as  
23 you're within a three-year statute of limitations period then

24 your claim somehow survives, whereas three years ago would  
25 have been too late. And it would ensue chaos.

26

1 THE COURT: There is the -- the committee report is  
2 clear in my view that the statute is to apply retroactively,  
3 and there's a Supreme Court case which I will cite presently  
4 dealing with the statute of limitations. In a case much like  
5 ours which the Court applied or sanctioned being applied  
6 retroactively. But let's get to the committee report first.

7 It states on page seven: In most instances the  
8 section 12-309 requirement is functionally equivalent to a  
9 six months statute of limitations.

10 Therefore, the proposed legislation also explicitly  
11 weighs the notice provision such that 12-309 does not preempt  
12 claims against the District, unquote.

13 There's a waiver. The Court -- the committee report  
14 likens the amendment to a waiver of the statute of  
15 limitations. And there's nothing that says the waiver  
16 doesn't apply to the pending cases. It says we waive it.

17 In point of fact this was not an ordinary statute.  
18 This statute repeals 13-09 insofar as the whistleblower's Act  
19 is concerned. The whistleblower's Act contained an  
20 affirmative provision that said that 12-309 applies. This  
21 statute, the amendment, repeals that statute, and a repealer  
22 is even more definitely retroactive than is a -- a procedural  
23 change, an ordinary procedural change.

24 This is a repeal of a statute. Which is, I say, is  
25 classically retroactive, it means it goes into effect right

27

1 now.

2 MS. FEATHERSTONE: Well, Your Honor, that's an  
3 interpretation of the absence of any language specifically  
4 stating that it is retroactive. The Court is to construe it  
5 in a very strict and narrow way, and in interpreting it to  
6 include any claims within a three-year period that would have  
7 otherwise been barred by 12-309 to state that effective March  
8 11, 2010, when the statute became effective, that it reached  
9 back the three years, because the statute of limitations  
10 changed, it reached back three years for any claims that  
11 anyone could still file, because they don't have to have  
12 12-309.

13 Claims where -- have not -- where there has been no  
14 complaint filed with the court because they thought their  
15 claim was barred by 12-309 they now have a viable action.

16 And the amendment -- the amendment is silent on how  
17 the statute would be interpreted, and it gives an effective  
18 date, and no other language regarding pending claims or  
19 otherwise or any time period regarding the 12-309. It's  
20 silent on that issue.

21 THE COURT: Miss Featherstone, the rule that I have  
22 stated and demonstrated from the authorities, is also  
23 supported by the Uniform Law Commissioner's Model Statutory  
24 Construction Act. This is the model act which has been  
25 enacted by most of the states.

28

1 And in the comment to Rule 14, to section 14, excuse  
2 me, which provides, and I quote, and this is in support of  
Page 25

3 your position, quote, a statute is presumed to be prospective  
4 in its operation unless it is expressly made retrospective,  
5 unquote. That's your position.

6 MS. FEATHERSTONE: Yes.

7 THE COURT: Correct?

8 MS. FEATHERSTONE: Yes, Your Honor.

9 THE COURT: There's a comment on it. Quote, if a  
10 procedural statute is amended the rule is that the amendment  
11 applies to pending proceedings as well as to those instituted  
12 after the amendment, unquote.

13 what could be clearer than that?

14 I also want to state -- cite the case of Chase  
15 Securities Corporation against Donaldson, and this is a  
16 Supreme Court case, reported at 325 U.S. 304, in 1945.

17 This was a change in the statute of limitations, and  
18 this change in the statute of limitations affected the case  
19 that was pending before the Court of Minnesota to make a  
20 change in the statute of limitations.

21 The statute of limitations, as it existed when the  
22 case was filed, barred the plaintiff's claim. The statute  
23 was amended during the pendency of the suit by the Minnesota  
24 legislature in which the defendant no longer had the defense  
25 of the statute of limitations.

29

1 I'm quoting from page 306 of the Supreme Court  
2 opinion. Quote, while proceedings were pending in the lower  
3 court the legislature enacted a statute effective July 1,  
4 1941, which amended the Blue Sky Laws in many particulars not  
5 pertinent here.

6           The section in question added a specific statute of  
7 limitations applicable to actions based on violations of the  
8 Blue Sky Law, and the Court goes on to explain that, as I  
9 said, the defense was no longer applicable, and the Court on  
10 page -- please bear with me -- the Court on page 316 said:  
11 Certainly it cannot be said that lifting the bar of a statute  
12 of limitations so as to restore a remedy lost through mere  
13 lapse of time is per se an offense against the 14th  
14 amendment, unquote.

15           So, I don't think that the application of -- of the  
16 repealer of the section 13 -- excuse me, 12-309, would be  
17 considered defective, the Supreme Court has validated that  
18 happening, and I fail to see how it really raises a problem.  
19 The model statute states that procedural changes apply to  
20 pending proceedings. And it seems to me that we really don't  
21 have a problem in that regard.

22           Is there anything further that you wish to say on  
23 this -- on this point?

24           MS. FEATHERSTONE: No, Your Honor.

25           THE COURT: All right, thank you.

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1           All right, Mr. Condit, I'll hear the plaintiff on --  
2 on anything that you wish to bring to my attention.

3           MR. CONDIT: Thank you, Your Honor.

4           First item I would like to bring to the Court's  
5 attention that hasn't been discussed is the argument that the  
6 plaintiff raised in her supplemental opposition regarding  
7 retroactivity.

8           And specifically, that argument concerned, um, D.C.  
9 Code section 1-615.59, and that section was in place when the

10 whistleblower Protection Act was originally passed and it was  
11 not amended by the counsel when it made its amendments to the  
12 act presently.

13 And that provision states that the statute applies  
14 to actions taken after July 13th, 1998. It is the  
15 plaintiff's position that the counsel, of course, was aware  
16 of that provision when it was amending the statute, and  
17 because the counsel chose not to alter that provision it  
18 meant to apply the amended provisions to actions currently  
19 pending and all those actions that may be viable after July  
20 13th, 1998.

21 So, contrary to what opposing counsel is stating I  
22 believe that there is actually plain language in the statute  
23 indicating that the amendments as currently written by the  
24 counsel would apply to any matter such as Miss Cusick's that  
25 came about before the Court after July 13th, 1998.

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1 The other thing I wish to bring to the Court's  
2 attention, and I've only had a moment to share this with  
3 opposing counsel when she came in, is that there was a  
4 subsequent deposition of Mr. Adams as the Rule 30 (b) (6)  
5 witness for the District of Columbia.

6 I have a copy of that, um, which I would like to  
7 share with the Court. However, consistent with the  
8 protective order that's in place, um, the --

9 THE COURT: Consistent with what?

10 MR. CONDIT: I'm sorry, the protective order that's  
11 in place in this case, the District did indicate at the time  
12 of the deposition that it wished this deposition transcript

13 to be kept confidential. There is no -- no basis has been  
14 offered for that, in other words, I don't believe there's any  
15 privacy information or other things in the deposition  
16 transcript that would be, um, problematic from a  
17 confidentiality or protective order standpoint.

18 But out of an abundance of caution I wanted to bring  
19 that to the Court's attention, and if the Court desires or  
20 would allow I would like to present a copy of the transcript  
21 to the Court and just identify a couple of key pages in that  
22 transcript that further -- that provide further evidence of  
23 the position that plaintiff has taken on this motion.

24 THE COURT: When was the deposition taken?

25 MR. CONDIT: Your Honor, the deposition was taken on

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1 August the third, and we received the transcript late  
2 yesterday afternoon.

3 THE COURT: Yes, Miss --

4 MS. FEATHERSTONE: Your Honor, Mr. Adams did not  
5 waive his signature on the deposition, he requested an  
6 opportunity to read the deposition. We had not been a made  
7 aware that the deposition transcript was ready, um, by the  
8 court reporter service, and so, Mr. Adams has not had an  
9 opportunity to review the transcript and sign off on the  
10 transcript.

11 Again, we were just made aware that the deposition  
12 transcript was ready when I walked into court this morning.

13 We took the deposition earlier than the Court had  
14 given us because Mr. Adams was out of the country from the  
15 third through the end of the month. So, we were able --  
16 sorry, from the sixth through the end of the month. So we

17 were able to take the deposition earlier than what the Court  
18 had asked us to, which would have been yesterday.

19 THE COURT: Mr. Condit.

20 MR. CONDIT: I -- I mean I can't say -- speak for  
21 Mr. Adams and what he will or will not say but I think the  
22 provisions that will be cited to the Court or the testimony  
23 that will be cited to the Court is unlikely to change with  
24 Mr. Adams' review. I would be amenable --

25 THE COURT: The deposition is not complete, and

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1 quite aside from the confidentiality matter I don't think  
2 that it is appropriate for me to recognize it now. I -- nor  
3 would I even, if it was signed, would I hear it in open  
4 court, I would read it, but -- has it been incorporated in  
5 the confidentiality -- in the protective order yet?

6 MR. CONDIT: As I said, the District made a  
7 representation during the deposition that it wished the  
8 entire deposition transcript to be kept confidential, and  
9 again there was no legal basis given for that, um --

10 THE COURT: Well, I haven't looked at the protective  
11 order recently, but there are -- I believe there is a  
12 provision allowing a -- the challenge of a request for  
13 confidentiality.

14 MS. FEATHERSTONE: Correct, Your Honor.

15 THE COURT: Well, but that's really academic, I  
16 don't have to cross that bridge because Mr. Adams is entitled  
17 to an opportunity to read, and if he wishes to state any  
18 changes that he wishes to make, of course that won't alter  
19 what he said originally what it purportedly said, but he may

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20 explain.

21 In any event, I'm not going to look at it now or  
22 hear it or read it. The record will remain as it is today.

23 MR. CONDIT: Then, Your Honor, might the Court  
24 contemplate the plaintiff being able to submit the deposition  
25 in support of her position on the summary judgment motion

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1 once the process of Mr. Adams' review has been completed?

2 THE COURT: I'm leaving, um, on the 31st of this  
3 month. By the way we have a hearing on the 31st. And I'm  
4 not going to have any contact with the case afterwards.

5 MR. CONDIT: Very well.

6 Plaintiff then has nothing further, Your Honor.

7 THE COURT: What?

8 MR. CONDIT: I said plaintiff then has nothing  
9 further.

10 THE COURT: Miss Featherstone, do you wish to add  
11 any remarks to those that you've already made?

12 MS. FEATHERSTONE: Your Honor, the District will  
13 submit on its previous stated arguments to the Court with  
14 respect to the issues raised in the procedural portions of  
15 the summary judgment motion with one added -- added argument  
16 that we believe that the supplemental memorandum in  
17 opposition to our motion regarding the language in the  
18 whistleblower statute, um, that Mr. Condit just spoke to the  
19 Court about is wrong.

20 we believe that that language --

21 THE COURT: Supplemental memorandum?

22 MS. FEATHERSTONE: The plaintiff submitted a  
23 supplemental memorandum in opposition to the summary judgment

24 motion, and he just spoke about why he believed the  
25 retroactivity of the statute applied.

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1 THE COURT: I don't know that I've seen that.

2 MS. FEATHERSTONE: Well, based on his argument here  
3 in court today he wanted to point to the Court some language  
4 in the statute that said that the act applied to all actions  
5 after 1998, July 13th, 1998. And we don't believe that that  
6 language, um, in any way creates any retroactive status to  
7 the amendments. And we want to just oppose that openly in  
8 court, but other than that, Your Honor, we have no further  
9 arguments.

10 THE COURT: Thank you.

11 Based upon the memoranda submitted in support of an  
12 opposition to the motion and the arguments advanced at the  
13 hearing today, and further, upon the entire record the Court  
14 is of the view that the statutory notice provision, section  
15 12-309, was repealed, that not only was it -- was the  
16 amendment a repealer of the previous provision that made the  
17 statutory notice provision applicable to the whistleblower's  
18 Act but that the law of the District as declared in the  
19 Montgomery case and cases cited in the Montgomery case, based  
20 upon the legislative history of the amendment to the  
21 whistleblower's Act as stated in the committee report, based  
22 upon the Uniform Law Commissioner's Model Statutory  
23 Construction Act, all of these authorities constrain the  
24 Court to apply the amendment notwithstanding that this case  
25 was pending before the amendment.

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1           On the statute of limitations, under the  
2 whistleblower's Act, the statute provides for one year  
3 statute of limitations from the time of the plaintiff's  
4 awareness of a violation.

5           As respects the purported violation of June 14,  
6 2007, which involved the involuntary transfer of the  
7 plaintiff from the fire department to the office of attorney  
8 general on plaintiff's version of the facts, based upon  
9 disputed evidence, but this -- this fact, when the suit was  
10 filed, was undisputed, this suit was filed September 25,  
11 2007. And the suit would be barred by the Ricks case unless  
12 the Continuous Violation Doctrine applies or lulling applies.

13           There's no claim here of the Continuous Violation  
14 Doctrine being applicable, so the question comes down to  
15 lulling.

16           The -- the evidence in this case shows or includes  
17 evidence that would support the notion that the June 14th  
18 transfer, involuntary transfer, was a discrete violation. It  
19 was not the kind of a violation that would be prolonged or  
20 involved repeated acts which would be evidence of a  
21 continuous violation.

22           Instead, this -- the transfer here on June 14th,  
23 2007, as well as the ultimate termination on October 1  
24 pursuant to Mr. Adams' e-mail of September 27, each of those  
25 events was a discrete offense under the case of Barrett

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1           against Covington and Burling reported at 979 Atlantic  
2 Second, 123.

3           So the question then is lulling.

4           And the issue is whether the affirmative statements,  
5 the evidence I should say, of the affirmative statements of  
6 Chief Deputy Attorney General Eugene Adams, that he would do  
7 whatever was within his power to find a permanent job in the  
8 office of attorney general for the plaintiff, would induce  
9 the reasonable person to delay filing of the suit until  
10 September 25, 2008.

11           There is evidence in the record that the plaintiff  
12 inquired of Mr. Adams in August of 2007 as to whether he had  
13 been able to find such a job.

14           And Mr. Adams, according to the plaintiff's  
15 testimony, stated that he was still doing all within his  
16 power to find a job for her. And that he didn't say at any  
17 time that she should be looking for another job.

18           So the question is whether at that point having  
19 received that information a reasonable person would have, in  
20 those circumstances, delayed filing of the suit.

21           I think this is a very close question. But on  
22 balance I reached a conclusion not without difficulty, I  
23 should add, that there is a genuine dispute, and hence, I  
24 will deny summary judgment based on the June 14th, 2007, act  
25 of involuntary transfer.

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1           The second act that's relied upon by the plaintiff  
2 -- by the plaintiff to support the -- to support compliance  
3 with the statute of limitations is the September 27th, 2007,  
4 notification from Mr. Adams that the plaintiff would be  
5 terminated at the end on October 1, 2007, the beginning of

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6 the new fiscal year.

7 On plaintiff's version of the case there's evidence  
8 to show that there is a genuine dispute on this issue.

9 The termination, pursuant to the notice of September  
10 27, was an enhancement according to the plaintiff's evidence  
11 of the June 14th claimed violation. And was a separate  
12 violation that fell within the definition of prohibited  
13 personnel action under the whistleblower's Act, section  
14 1-615.52. Subsection five.

15 This case, based upon the plaintiff's evidence, if  
16 the jury believes it, is distinguishable from the Ricks case.  
17 The Ricks case was a case of a final one-year contract after  
18 denial of tenure with a notification that this was a final  
19 year of employment.

20 This case is a case in which the definition of a  
21 prohibited personnel action is so broad as to accomplish --  
22 to accomplish and include an employment situation of an  
23 employee with a temporary position, but with an insider's  
24 promise to use the prestige of his position to aid the  
25 plaintiff in becoming a permanent employee again so that even

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1 if she never had any employment with the District, if she was  
2 just an applicant and the -- her application was turned down  
3 because of whistleblower's activity there would be a  
4 prohibited personnel action.

5 And hence, the fact that her unemployment was only  
6 temporary would not make any difference under the statute.

7 So for those reasons I will deny summary judgment.

8 Mr. Condit, will you present an order please?

9 MR. CONDIT: Yes, Your Honor.

10 MS. FEATHERSTONE: Your Honor, may I clear the  
11 record on one issue?

12 THE COURT: Yes.

13 MS. FEATHERSTONE: The Court stated that the summary  
14 judgment is denied, is the Court denying it only as to the  
15 first two?

16 THE COURT: Yes, that's all that was before me.

17 MS. FEATHERSTONE: Thank you, I just want to make  
18 the record clear, Your Honor, thank you.

19 THE COURT: Yes.

20 Stand adjourned.

21 (Thereupon, the proceedings were adjourned at 10:56  
22 a.m.)

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1 CERTIFICATE OF COURT REPORTER

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I, Loretta E. Kaczorowski, an Official Court Reporter for the Superior Court of the District of Columbia, do hereby certify that I reported, by machine shorthand, in my official capacity, the proceedings had and testimony adduced, upon the hearing in the case of THERESA CUSICK versus THE DISTRICT OF COLUMBIA, Civil Action Number 2008-CA-6915, in said court, on the 17th day of August, 2010.

I further certify that the foregoing 40 pages constitute the official transcript of said proceedings, as taken from my machine shorthand notes, together with the

13 Cusick\_SummJudg Hrg transcript\_8-17-10  
13 backup tapes of said proceedings.

14 In witness whereof, I have hereto subscribed my  
15 name, this the 17th day of August, 2010.

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Official Court Reporter

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