

**United States Court of Appeals
for the Federal Circuit**

**CODY L. ADAMS, ROSE M. ADAMSON, JOSEPH P.
AGIUS, DARA W. ALLICK, JENNIFER A. ANGEL,
MICHAEL T. ANGELO, SAMMY APONTE, ALICIA
K. AUSTIN-ZITO, LUKE M. BADARACCO, CHAD J.
BARGSTEIN, ET AL.,**
Plaintiffs-Appellants

v.

UNITED STATES,
Defendant-Appellee

2021-1662

Appeal from the United States Court of Federal Claims
in No. 1:20-cv-00783-CFL, Senior Judge Charles F. Lettow.

MOLLY A. ELKIN, McGillivary Steele Elkin LLP, Wash-
ington, DC, argued for plaintiffs-appellants. Also repre-
sented by GREGORY K. MCGILLIVARY, THEODORE REID
COPLOFF.

ERIC LAUFGRABEN, Commercial Litigation Branch,
Civil Division, United States Department of Justice, Wash-
ington, DC, argued for defendant-appellee. Also repre-
sented by BRIAN M. BOYNTON, ERIC P. BRUSKIN, ALBERT S.

IAROSSI, PATRICIA M. MCCARTHY, CATHARINE PARNELL, LIRIDONA SINANI; ADAM GARRET EISENSTEIN, DOUGLAS SETH GOLDRING, Office of General Counsel, Federal Bureau of Prisons, United States Department of Justice, Washington, DC.

PER CURIAM.

ORDER

This case was argued before a panel of three judges on October 6, 2021. Thereafter, a sua sponte request for a poll on whether to hear this case en banc was made. A poll was conducted, and a majority of the judges in regular active service voted for en banc consideration.

Accordingly,

IT IS ORDERED THAT:

(1) This case will be heard en banc under 28 U.S.C. § 46 and Federal Rule of Appellate Procedure 35(a). The court en banc shall consist of all circuit judges in regular active service who are not recused or disqualified.

(2) The parties are requested to file supplemental briefs to address the following issues:

- A. How should the term “unusual[]” be understood in the context of establishing “pay differentials” and “proper differentials” under 5 U.S.C. §§ 5343(c)(4), 5545(d)?
- B. In view of *Adair v. United States*, 497 F.3d 1244 (Fed. Cir. 2007), 5 C.F.R. § 550.902 (HDP Regulation), and Appendix A of 5 C.F.R. Pt. 550, Subpt. I (HDP Schedule), what is the meaning of “accident?” What distinction, if any, is there between accidental exposure and incidental exposure?

- C. If we hold that the HDP Schedule and 5 C.F.R. Pt. 532, Subpt. E, Appx. A (EDP Schedule) are not limited to laboratory-specific duties, what limits, if any, are there to the “work[] with or in close proximity to” language in the HDP and EDP Schedules?
- D. Are infected persons and surfaces “*primary* containers of organisms pathogenic for man,” as recited in the EDP Schedule for distinguishing between high- and low-degree hazards? *See* EDP Schedule, at Microorganisms (emphasis added).
- E. If we conclude that the Court of Federal Claims properly granted dismissal, to what extent could the underlying complaint be amended to establish a plausible claim for relief that satisfies the “short and plain statement” standard of RCFC 8?

(3) Appellants’ en banc opening brief is due 60 days from the date of this order. Appellee’s en banc response brief is due within 45 days of service of Appellants’ en banc opening brief, and Appellants’ reply brief within 30 days of service of the response brief. The court requires 28 paper copies of all briefs and appendices provided by the filer within 5 business days from the date of electronic filing of the document. The parties’ briefs must comply with Fed. Cir. R. 32(b)(1).

(4) The court invites the views of amici curiae. Any amicus brief may be filed without consent and leave of court. Any amicus brief supporting Appellants’ position or supporting neither position must be filed within 14 days after service of Appellants’ en banc opening brief. Any amicus brief supporting the Appellee’s position must be filed within 14 days after service of the Appellee’s en banc response brief. Amicus briefs must comply with Fed. Cir. R. 29(b).

(5) This case will be heard en banc based on all of the briefing and oral argument.

(6) Oral argument will be scheduled at a time and date to be announced later.

FOR THE COURT

June 27, 2022
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court