

2013 EXCEL CONFERENCE

August 27-29

Denver, CO

EEOC CASE UPDATE

I. Supreme Court Decisions

A. Hostile Work Environment

FOR PURPOSES OF HOLDING AN EMPLOYER VICARIOUSLY LIABLE FOR UNLAWFUL HARASSMENT BY A SUPERVISOR, AN EMPLOYEE QUALIFIES AS A SUPERVISOR ONLY IF THE EMPLOYER HAS AUTHORIZED HIM OR HER TO TAKE TANGIBLE EMPLOYMENT ACTIONS AGAINST THE VICTIM OF THE HARASSMENT

Vance v. Ball State University, 133 S.Ct. 2434, (June 24, 2013)

Marietta Vance, an African-American employee in Ball State University's (BSU) Banquet and Catering Division, alleged, among other things, that she was subjected to unlawful racial harassment by another BSU employee, Saundra Davis. Vance complained that Davis "gave her a hard time at work by glaring at her, slamming pots and pans around her, and intimidating her"; "that she was 'left alone in the kitchen with Davis, who smiled at her'; that Davis 'blocked' her on an elevator and 'stood there with her cart smiling'; and that Davis often gave her 'weird' looks." Because this harassing conduct persisted despite BSU's corrective action, Vance filed a lawsuit in 2006. The Supreme Court's majority decision set forth, in summary, the following points:

- The term "supervisor" is not a statutory term set forth in Title VII. Rather, the term supervisor was adopted by the Supreme Court in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. Boca Raton*, 524 U.S. 775 (1998), to identify those employees whose conduct may give rise to vicarious employer liability under Title VII. Therefore, the meaning of the term supervisor depends on the highly structured framework adopted by those cases.
- Although *Faragher* and *Ellerth* did not resolve the question presented in this case, the resolution is, according to the Court in *Vance*, "implicit in the characteristics of the framework" adopted in those cases.
 - *Faragher* and *Ellerth* draw a "sharp line" between co-workers and supervisors, "strong[ly]" implying that the authority to take tangible employment actions is the "defining characteristic of a supervisor."

- In *Faragher* and *Ellerth*, the Court sought a workable framework that would consider the legitimate interests of both employers and employees. The Court rejected the “wholesale” incorporation of agency principles, and instead also took into account the objectives of Title VII, including limits on employer liability in certain circumstances.
- The Court noted that a complainant will still be able to prevail in a hostile work environment claim by establishing that the employer was negligent in allowing the harassment to occur.
- The Court rejected the contention that a narrow definition of supervisor status would encourage an employer to try to limit liability by empowering only a small number of employees to take tangible employment actions.
 - In such cases, individuals with decision making authority will likely have to rely on input from workers who interact with affected employees. Under these circumstances, the employer can be held to have effectively delegated the power to take tangible employment actions to the employees on whose recommendations it relies.

B. Reprisal

A “BUT FOR” AND NOT A “MOTIVATING FACTOR” CAUSATION STANDARD SET FORTH IN § 703(M) OF TITLE VII SHOULD APPLY TO TITLE VII RETALIATION CLAIMS

University of Texas Southwestern Medical Center v. Nassar, 133 S.Ct. 2517, (June 24, 2013)

Dr. Naiel Nassar was employed both as an Associate Professor of Medicine for the University, and as the Associate Medical Director of a hospital clinic affiliated with the University. He complained several times to Dr. Fitz, a manager, about his supervisor, Dr. Levine, for excessively scrutinizing his billing practices and productivity, and for stating that “middle-easterners are lazy.” To avoid further interaction with Dr. Levine, Dr. Nassar negotiated for a full-time position at the hospital without being associated with the University. After the negotiations indicated that such a move would be permitted, he resigned from the University, stating in writing that the primary reason for his resignation was Dr. Levine’s “religious, racial and cultural bias against Arabs and Muslims that resulted in a hostile work environment.” Dr. Fitz expressed shock at the letter, saying that it had publicly humiliated Dr. Levine and that she had to be publicly exonerated. Shortly after receiving the resignation letter, Dr. Fitz objected to the hospital’s offer of full-time employment to Dr. Nassar, claiming that the offer violated the hospital’s affiliation agreement with the University and its longstanding practice of staffing physician positions with University faculty. The hospital subsequently rescinded its offer to Dr. Nassar. Thereafter, Dr. Nassar then sued the University alleging, among

other things, that it pressured the hospital to rescind its offer in retaliation for his complaints about his supervisor's harassment. The Supreme Court's majority decision set forth, in summary, the following points:

- The Court concluded that the appropriate standard to establish liability for Title VII retaliation claims was "but for" causation, which "[i]n the usual course . . . requires the plaintiff to show 'that the harm would not have occurred' in the absence of-that is, but for-the defendant's conduct." The Court rejected arguments that the lower "motivating factor" causation standard set forth in § 703(m) of Title VII should apply to Title VII retaliation claims.
- The Court note that the text of § 704 of Title VII, which prohibits employers from taking adverse actions "because" of protected activity, is essentially the same as the text of the Age Discrimination in Employment Act (ADEA) prohibition that the Court interpreted in *Gross v. FBL Financial Systems, Inc.*, 557 U.S. 167 (2009). And there, the Court interpreted the relevant "because [of]" language as requiring the plaintiff to prove but-for causation.
- The Court stated that neither the plain language nor the structure of Title VII supports applying the § 703(m) causation standard to retaliation claims.
- The Court reasoned that Section 703(m) references Title VII's "status"- based prohibitions, - race, color, religion, sex, and national origin - not retaliation. From this fact, the Court opined that courts must assume this omission is deliberate and apply mixed-motive causation only to the status-based prohibitions consistent with the provision's plain language.
 - The Court stated that if Congress had wanted to provide for a motivating-factor causation standard in § 704 retaliation claims, it would have explicitly done so.
- The Court argued against applying a lesser mixed-motive causation standard, as it could lead employees to file frivolous claims to forestall adverse actions that they know are coming. The Court also opined that such a standard would also "make it far more difficult to dismiss dubious claims at the summary judgment stage."
- The Court cited EEOC charge statistics, which reflect a relatively recent dramatic increase in retaliation filings, to support this concern about frivolous claims clogging the courts.

II. Procedural Decisions

A. Fragmentation

FRAGMENTATION AND DISMISSAL OF INDIVIDUAL CLAIMS IS IMPROPER WHERE APPELLANT RAISES A HOSTILE WORK ENVIRONMENT CLAIM

Morris v. Dep't of the Army, EEOC Appeal No. 0120130749 (May 23, 2013)

Appellant, who is gay, transferred from an agency facility in New York (after filing an EEO complaint regarding incidents that took place in New York) to a facility in Millington, TN. In this new facility, he observed the general counsel and others improperly discussing his EEO complaint, spreading rumors about him, and he learned that his sexual orientation had become widely known at the facility. He alleges he was told "you are in the south now, and you and [your partner] might find you are not as safe or accepted here as you were in New York." He was also questioned about a prayer shawl he kept in his office. He also alleges that someone stated: "Jew boy faggot, we are watching, you are in the south now." Believing he was a victim of a hostile work environment, appellant filed an EEO complaint concerning the environment in the Millington, TN facility. The agency framed the complaint as a hostile work environment claim with thirteen separate incidents. The agency then dismissed the EEO complaint by breaking down and dismissing these incidents based on untimeliness, failure to state a claim, or by asserting that Title VII is not a general civility code.

On appeal, the Commission reversed the agency's decision, noting among other things that:

- The agency improperly fragmented a single hostile work environment claim into separate acts in order to dismiss (improperly) the entirety of the claim.
- The agency's assertion that several of the remarks constituted remarks or opinions without a concrete action is inaccurate. If true, the totality of rumors, remarks and acts, which appear to have been made due to his religion and sexual orientation, would comprise a hostile work environment.
- The Commission also cited to its prior decision in *Macy v. Dep't of Justice*, EEOC Appeal No. 0120120821 (April 20, 2012) noting that sex stereotyping and other circumstances could allow claims alleging sexual orientation discrimination to fall within the purview of Title VII.
- The Commission also noted, with respect to the purportedly untimely claims that based on Supreme Court precedent, that "... a complainant alleging a hostile work environment will not be time barred if all acts constituting the claim are part of the same unlawful practice and at least one act falls within the filing period." *Nat'l R.R. Passenger Corp. v. Morgan*, 123 S. Ct 2061 (June 10, 2002).

B. Joint Employer Liability

COMMISSION POLICY STATES THAT WHEN TWO AGENCIES BEAR JOINT RESPONSIBILITY FOR AN ACT OF ALLEGED DISCRIMINATION, BOTH AGENCIES ARE PROPER RESPONDENTS AND THE COMPLAINT MUST BE JOINTLY PROCESSED

Brown v. Dep't of State, EEOC Appeal No. 0120121446 (July 26, 2013)

Appellant worked as a Special Agent with the agency's Diplomatic Security Section. He was assigned to the Joint Terrorism Task Force (JTTF), and worked alongside with 15 FBI special agents in an office cubicle setting. In the spring of 2008, appellant found a noose hanging over into his cubicle. The White Male agent responsible for hanging it apologized to him and removed it. Six months later, during the election campaign, this agent and others made derogatory remarks about President Obama mocking his religion and race. Appellant also overheard the "n-word" uttered in reference to President Obama. The next month, a second hanging noose was hung over the cubicle adjacent to his with a Halloween mask to resemble a hanging. Appellant reported the incidents after the second noose appeared, and was interviewed by FBI Office of Inspector General (OIG) in November of 2008. Others, including the alleged harassers, were not interviewed until February of 2009. The State Department requested, but did not receive, at the time, a copy of the FBI OIG report of investigation. Although State was informed by FBI that the offending agents would be moved, this did not immediately occur. One junior FBI agent was immediately moved. Two other harassers were eventually moved, but still were in the appellant's work area many times to obtain work documents. Eventually, all three agents were disciplined according to an FBI supplemental investigation.

Appellant also noted that after he reported the second noose incident, he was mocked and alienated by the other agents in the office and they would not interact with him. Appellant noted that one of the two more senior harassers was moved only two cubicles away from where appellant was located, and that the work environment continued to deteriorate. In January of 2009, the State Department ordered appellant to work from home since in their view, the FBI had not taken prompt and effective remedial action. Appellant felt that he was being punished for reporting harassment by having to work from home. After filing an EEO complaint with his home agency (State) and requesting a final agency decision, the State Department concluded that it was not liable for the hostile work environment created by the FBI because it took prompt and effective remedial action, allowing him to work from home, thus removing him from the hostility that was not caused by any State Department employee. On appeal, the Commission vacated the final agency decision.

- The Commission concluded that the overwhelming weight of evidence demonstrated that appellant was subjected to a discriminatory hostile work environment based on both race and reprisal. The only question that remains is where to assess liability, if at all, for the creation of a hostile work environment.

- Commission policy states that when two agencies bear joint responsibility for an act of alleged discrimination, both agencies are proper respondents and the complaint must be jointly processed.
- Accordingly, the Commission joined both agencies and required them to issue a new, joint final agency decision.

C. Stating a Claim

INITIATION AND PROCESSING OF INTERNAL INVESTIGATIONS FOR RETALIATORY MOTIVES CAN STATE A CLAIM OF REPRISAL

Finn v. U.S Postal Serv., EEOC Appeal No. 0120113481 (Nov. 15, 2012)

Appellant alleged that he was subjected to reprisal for filing an EEO complaint when he was contacted by two special agents and informed that he was being investigated. He alleged reprisal and filed a formal EEO complaint. The agency dismissed the complaint for failing to state a cognizable claim. The Commission reversed. The Commission noted several recent decisions which have concluded that initiation and processing of internal investigations for retaliatory motives can state a claim of reprisal.

AN ONGOING PATTERN OF COMMENTS AND RUMORS REFERRING TO AN EMPLOYEE AS BEING GAY CAN BE SUFFICIENTLY SEVERE AND PERVASIVE TO CONSTITUTE SEXUAL HARASSMENT

Brooker v. U.S. Postal Serv., EEOC Request No. 0520110680 (May 20, 2013)

Appellant filed an EEO complaint alleging sexual harassment concerning his sexual preference, noting that he is gay and frequents gay bars. The claim was framed as a single occurrence and dismissed by the agency and affirmed on appeal to the Commission. Appellant sought reconsideration, noting that the claim was improperly framed as a one-time occurrence since this had been going on for a period of years. The Commission cited relevant legal authority for granting reconsideration in only limited circumstances, and then concluded that this was a circumstance since the prior decision made substantive error which impacted the analysis of the case. Having determined that the alleged harassment was ongoing and not a one-time incident, the Commission noted that:

- an ongoing pattern of comments and rumors referring to an employee as being gay can be sufficiently severe and pervasive to constitute sexual harassment.
- The Commission noted that appellant raised a claim of sexual harassment, not sexual orientation harassment, and that such allegations would be covered under Title VII.

**REMARKS AND COMMENTS RELATED TO UNDERSTANDING
ENGLISH CAN CONSTITUTE NATIONAL ORIGIN BASED
HARASSMENT AND STATE A COGNIZABLE HOSTILE WORK
ENVIRONMENT CLAIM**

Bains v. U.S. Postal Serv., EEOC Appeal No. 0120131606 (Aug 1, 2013)

Appellant alleged in a formal complaint that she was subjected to race and national origin based harassment when her supervisor put her finger in her face and said: “you have to go there after lunch. Don’t you understand English?” Appellant also alleged that her supervisor harassed her in the past, without giving further examples or details. The agency dismissed the EEO complaint for failing to state a claim. On appeal, the Commission reversed the agency’s dismissal. The Commission noted that appellant was alleging a hostile work environment because she was being insulted and being asked if she understood English on account of her race and nationality. Appellant also suggested that this was not an isolated incident that the supervisor had harassed her before, and that such allegations were sufficient to state a cognizable hostile work environment claim.

**PLACING A HARASSER BACK IN THE OFFICE AS A RESULT OF A
GRIEVANCE DECISION DOES NOT PRECLUDE THE VICTIM OF
HARASSMENT FROM RAISING A HOSTILE WORK ENVIRONMENT
CLAIM BASED ON THE HARASSER’S RETURN TO THE WORKPLACE**

Brown v. U.S. Postal Serv., EEOC Appeal No. 0120131880 (Aug. 1, 2013)

Appellant filed a formal EEO complaint alleging a hostile work environment based on race because a former co-worker, who had been terminated from employment for keeping racist materials at the workplace, was suddenly returned to the workplace accompanied by an inspector and police officer. The facts established that this co-worker prevailed in a grievance based on his termination, and was thus reinstated into his former position. Accordingly, the agency dismissed the complaint, asserting that appellant was not harmed and further, that it was an improper attack on the grievance process. The Commission reversed, noting that it disagreed with the agency’s conclusion that appellant was not harmed. Citing prior precedent, the Commission noted that an employee can be harmed when a co-worker, who had been removed from the workplace for having racist materials, suddenly returns to that workplace. The Commission also disagreed with the agency’s conclusion that it was an improper collateral attack on the grievance process. Here, it was not appellant who filed the grievance, and the fact that the grievance process allowed this person to return to work does not preclude appellant from alleging that his return creates a racially hostile work environment.

ALLEGATION OF REPRISAL STATES A CLAIM, AND WHETHER IT IS REPRISAL FOR EEO OR NON-EEO ACTIVITY IS A MATTER TO BE DETERMINED AFTER AN INVESTIGATION

Austin v. Dep't of Veterans Affairs, EEOC Appeal No. 0120131802 (July 31, 2013)

Appellant raised six different claims of reprisal. The agency dismissed the complaint alleging that she failed to state a claim of discrimination because she alleged reprisal solely based on her union activity. The Commission reversed, noting that her reference to union activity is irrelevant to the procedural issue of whether she has stated a viable claim under Title VII and the applicable regulations. By asserting that the alleged reprisal was due only to union activity, the agency addressed the merits of her claim without a proper investigation.

RAISING AN ALLEGATION THAT ONE IS OVERBURDENED WITH WORK AND PERFORMING THE DUTIES OF TWO PEOPLE STATES A COGNIZABLE CLAIM OF DISPARATE TREATMENT AND REPRISAL UTILIZING INTERNAL APPEALS, INFORMAL PROCESSES, OR FILING AN INTERNAL GRIEVANCE TO CHALLENGE ADVERSE ACTIONS DOES NOT TOLL THE TIME LIMIT TO CONTACT AN EEO COUNSELOR

Johnson v. U.S. Postal Serv., EEOC Appeal No. 0120120843 (Dec. 5, 2012)

Appellant filed an EEO complaint with seven different claims of age discrimination and reprisal. The agency dismissed all seven claims; three for untimely counselor contact and four for failure to state a claim. In claim 6, the Commission reversed the agency's dismissal. In so doing, the Commission noted that raising an allegation that one is overburdened with work and performing the duties of two people states a cognizable disparate treatment claim. The Commission further noted that such a claim, under a reprisal theory, would also deter appellant or others from engaging in EEO activity. Therefore, claim 6 also states a valid claim of reprisal.

The Commission affirmed the dismissal of the remaining claims. In so doing, the Commission discussed appellant's claim 5 where she alleged that the agency failed to remove a letter of warning from her official personnel folder. Regarding this claim, the evidence revealed that she waited over six months to contact an EEO counselor. Appellant argued that she first contacted a union official about this concern. The Commission, however, noted that it has "...consistently held that internal appeals or informal efforts to challenge an agency's adverse action and/or the filing of a grievance do not toll the running of the time limit to contact an EEO counselor." Accordingly, the Commission affirmed the dismissal of this claim.

BEING ISSUED A SUSPENSION, EVEN IF LATER REDUCED TO A DISCUSSION, STATES A COGNIZABLE CLAIM OF REPRISAL

Rezac v. U.S. Postal Serv., EEOC Appeal No. 0120123453 (Feb. 12, 2013)

Appellant received a seven day suspension for unsatisfactory work performance and failure to work in a safe matter. Through the grievance process, that discipline was reduced to a discussion. After filing an EEO complaint alleging reprisal for the discipline, the agency dismissed the claim for untimeliness and failing to state a claim. The Commission reversed. As to timeliness, the agency could not prove that the EEO complaint was untimely filed because it could not establish from postal records when appellant received the notice of right to file. The Commission then cited authority for the principle that a suspension reduced to a discussion no longer constitutes disciplinary action. However, in this case, appellant alleged reprisal. For this reason, the Commission noted that being issued a suspension, even if later reduced to a discussion, states a cognizable claim of reprisal because the original issuance of a seven day suspension would be reasonably likely to deter an individual from engaging in protected activity.

PUBLIC DISCLOSURE OF AN EMPLOYEE AS BEING ON “LIMITED DUTY” STATUS STATES A COGNIZABLE CLAIM OF BOTH REPRISAL AND A VIOLATION OF THE REHABILITATION ACT’S CONFIDENTIALITY PROVISIONS

Lambert v. U.S. Postal Serv., EEOC Appeal No. 0120122099 (May 29, 2013)

Appellant filed a formal EEO complaint alleging disability discrimination and reprisal. His complaint included two claims, the second of which was framed as follows: “The February 16-21 schedule, posted next to the badge rack, had “L/D” (limited duty) listed next to his name.” The agency dismissed this claim for failing to state a claim. The Commission reversed, and in so doing, made two different observations about this claim. As to disability discrimination, the Commission concluded that appellant was harmed by such public disclosure, which would, if true, violate the confidentiality provisions set forth in the Rehabilitation Act. As to appellant’s claim of reprisal, the Commission observed that it takes a broad view of what could constitute reprisal. The Commission thus concluded that public disclosure of an employee as being on “limited duty” status also states a cognizable claim of reprisal.

III. Rehabilitation Act Decisions

A. Medical Confidentiality

MEDICAL INFORMATION ABOUT THE CONDITION OR MEDICAL HISTORY OF AN EMPLOYEE MUST BE TREATED AS CONFIDENTIAL AND STORED IN SEPARATE MEDICAL FILES

Mayo v. Dep't of Justice (Bureau of Prisons), EEOC Appeal No. 0720120004 (Oct. 24, 2012)

Appellant, a Senior Correctional Officer at an agency correctional complex located in North Carolina, filed an EEO complaint alleging disability discrimination, harassment and reprisal concerning a few different adverse actions. He subsequently amended his complaint to include an additional claim that the agency failed to preserve the confidentiality of his medical records. In summary, appellant received a notice of proposed removal (based on medical inability to perform the essential functions of his job duties) which was subsequently rescinded after he completed a fitness for duty examination. During a meeting with the warden, appellant and his union representative inquired where his medical documentation resided, and he was informed that the documents were in the adverse action files maintained in the Human Resources department.

An AJ concluded that appellant had not been a victim of discrimination, reprisal or harassment; but that the agency violated the Rehabilitation Act when it did not properly keep medical documentation confidential. Complainant was awarded \$2,500 in compensatory damages. The agency did not implement the AJ's finding and appealed. The Commission upheld the AJ's decision, noting among other things, that:

- Under the Rehabilitation Act and Americans with Disabilities Act (ADA), information “regarding the medical condition or history of any employee shall be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record....”
- This provision applies to “any employee” and not just individuals with disabilities within the meaning of the Rehabilitation Act.
- This requirement applies to all medical information, including information that an employee voluntarily discloses.
- Employers may share confidential information only in limited circumstances.
- In this case, the agency did not maintain medical records in a separate, confidential medical file. Instead, information about appellant’s diagnosis and treatment were stored in the agency’s adverse action personnel files.

- “The agency’s failure to maintain such medical information in a confidential medical file constitutes a violation of the Rehabilitation Act **even in the absence of an unauthorized disclosure.**” (emphasis added).

B. Pre-Offer Disability Related Inquiries

AN IMPERMISSIBLE DISABILITY RELATED INQUIRY DURING A SELECTION PROCESS BEFORE AN OFFER IS MADE VIOLATES THE REHABILITATION ACT

Bozeman v. U.S. Postal Serv., EEOC Appeal No. 0120120923 (May 3, 2013)

Appellant encumbered a position in the agency due to a settlement agreement to resolve a claim of disability discrimination. He subsequently applied and was interviewed for a Labor Relations Specialist position. The selecting official narrowed his choice to either appellant or the eventual selectee. Before making a choice, the selecting official contacted appellant via telephone to clarify his medical restrictions and asked him to provide medical documentation. Appellant was not selected and he filed an EEO complaint. Appellant requested, and an AJ conducted, a hearing.

During the hearing, the selecting official claimed, in justifying he selection decision, that he had concerns about appellant’s credibility, trustworthiness, integrity and ethics. The selecting official therefore selected the other finalist for the position. The AJ concluded that the selecting official’s inquiry was not appropriate under the Rehabilitation Act, but that the selection process was not tainted based on the selecting officials detailed, articulated responses about his concerns with appellant’s integrity, ethics, trustworthiness, etc. The agency implemented the AJ’s finding of no discrimination. On appeal, the Commission noted, among other things, that:

- “Under the Rehabilitation Act, an employer may not ask disability-related questions and may not conduct medical examinations until after it makes a conditional job offer to the applicant.” [emphasis added]
- This helps to ensure that an applicant’s hidden or history of a disability is not discovered and thus not considered before weighing an applicant’s non-medical qualifications for the position.
- “An employer may not ask disability related questions or require a medical examination pre-offer even if it intends to look at the answers or results only at the post offer stage.”
- In this case, the AJ erred in reaching a conclusion that the selection process was not tainted. In this case, the Commission concluded that there was substantial evidence in the record to establish that it was the impermissible disability related inquiry, prior to making a job offer, the answers of which

caused the selecting official to question appellant's integrity, trustworthiness, etc.

- The Commission then noted that "... even if the selecting official believed [appellant's] responses regarding his medical restrictions to be less than truthful, the selecting official should not have used this perception to eliminate [appellant] from further consideration as an applicant, because such a perception stemmed from the agency's impermissible medical inquiry. An applicant's answers to an improper disability-related inquiry, even if false, cannot serve as the basis for the applicant's elimination from the applicant pool." [emphasis added]

C. Post Offer Medical Examinations

AN AGENCY IS REQUIRED TO PAY THE COSTS OF AN APPLICANT'S POST-OFFER MEDICAL EXAMINATION OF THE AGENCY'S CHOICE

Fazekas-Spencer v. Dep't of Homeland Security (Transp. Security Admin.), EEOC Appeal No. 0120091544 (Mar. 13, 2013)

Appellant applied, was found to be qualified, and received a conditional offer of employment as a Transportation Security Officer. He filled out standard medical paperwork, reported that he had depression and underwent an initial medical examination paid for by the agency. The medical officer placed appellant's application on hold, arguing that the agency needed additional information from appellant from a mental health care professional. Specifically, the medical officer wanted a health care specialist in an appropriate field to examine appellant and complete a "Global Assessment of Functioning" form. Appellant was required to obtain this form within 90 days, at his own expense. Appellant informed the agency that he could not afford to see such a professional, and instead offered to provide access to his personal physician to answer any questions from the agency's medical staff. The agency declined to do so since this was not the agency protocol. When 90 days elapsed and the Global Assessment of Functioning form was not completed by a medical professional, the agency informed appellant that he did not pass the Global Assessment process. After filing an EEO complaint, appellant requested a hearing and then withdrew a hearing request. The agency issued a decision finding no discrimination. On appeal, the Commission stated, among other things, that:

- The agency's request for a "Global Assessment of Functioning" constituted a medical examination request which is governed by the Rehabilitation Act.
- An agency's obligation to pay for a medical examination of the agency's choice at the post-offer stage is an issue of first impression since the regulation and enforcement guidance governing such examinations is silent on the issue of who is obligated to pay.

- The Commission noted that: “29 C.F.R. § 1630.14(b) provides the permissible ways in which an agency can ask disability-related inquiries and give medical examinations, to obtain basic medical information from all individuals who have been given conditional job offers in a job category.”
- After obtaining such information, an agency may obtain additional medical information from specific individuals consistent with the EEOC Enforcement Guidance on Pre-employment Disability-Related Questions and Medical Examinations.
- This Enforcement Guidance allows an agency to “give” a follow up examination to an applicant at the post offer stage, but it does not indicate who pays for such an examination.
- To answer the question of who pays for the medical examination, the Commission reviewed other circumstances where an agency may seek medical information. One such scenario occurs when an employee requests a reasonable accommodation. The Commission noted that in order for the agency to make an informed decision, the agency can seek information about the employee’s disability and need for a reasonable accommodation. The Commission noted that there are “...several ways to obtain this information:
 - Discuss with the employee the nature of the disability and functional limitations.
 - Consult with the employee’s doctor, after obtaining the employee’s consent.
 - Ask the employee for reasonable documentation about the disability or functional limitations.
 - Get technical assistance from the Commission, state or local rehabilitation agencies, or from disability constituent organizations.
 - Require an employee to go to a health professional of the agency’s choice.
- The Commission noted that agencies should consider other options before requiring an employee to go to a health professional of the agency’s choice, but that if that occurs, it is the **agency** that is responsible to pay the costs of the medical examination. The Commission recognized that where the agency is in control of the entire process including the choice of the health care professional, it is therefore reasonable to expect the agency to pay the costs associated with such a medical examination.
- The Commission then concluded that similar to the reasonable accommodation process, it concluded that “...we find it appropriate and consistent under the Rehabilitation Act to require the agency to pay for the

costs of a post-offer medical examination of the agency's choice (for an applicant), just as an agency is required to pay for the costs of a medical examination of the agency's choice with respect to its employees.

- Because the agency forestalled all other possibilities to obtain the requisite medical information and demanded the applicant/appellant to pay for his own medical examination (which he could not afford), the agency violated the Rehabilitation Act.

D. Impairments and Major Life Activities

WHEN BREATHING DIFFICULTIES ONLY ARISE DUE TO FEAR OF TAKING PUBLIC TRANSPORTATION (INCLUDING FLYING ON AIRPLANES), THEN SUCH A TEMPORARY, NON-CHRONIC IMPAIRMENT OF SHORT DURATION WILL NOT SUBSTANTIALLY LIMIT AN INDIVIDUAL IN THE MAJOR LIFE ACTIVITY OF BREATHING AN INABILITY TO FLY ON AIRPLANES OR TAKE OTHER FORMS OF TRANSPORTATION DOES NOT CONSTITUTE A SUBSTANTIAL LIMITATION ON A MAJOR LIFE ACTIVITY

Blanche v. U.S. Postal Serv., EEOC Appeal No. 0120080217 (Mar. 12, 2013)

Appellant, an Electronics Technician at an agency facility in Roanoke, Virginia, was diagnosed with Claustrophobia and Situational Anxiety. He experiences panic attacks and difficulty breathing when in enclosed spaces (public transportation, airplane, back of an automobile). He requested a reasonable accommodation to drive to an agency training course in Oklahoma instead of to fly, and to be reimbursed all reasonable expenses associated with such travel. The agency denied the reasonable accommodation request, finding that he was not disabled. Appellant was permitted to drive and be reimbursed up to the cost that would have been paid had he flown. He made the trip several times to attend these training courses and received partial reimbursement. Appellant filed an EEO complaint alleging, among other things, that he was disabled and was denied a reasonable accommodation. An AJ granted summary judgment in favor of the agency. On appeal, the Commission affirmed the AJs conclusion. Among other things, the Commission noted that:

- Because appellant's breathing problems only occur when he is in enclosed spaces and/or taking public transportation, such conditions are temporary, non-chronic and of short duration and thus are usually not disabilities.
- The Commission referenced another decision, *Washington v. U.S. Postal Service*, which reached a similar conclusion involving someone who had been diagnosed with Sinusitis and experienced trouble breathing, coughing, congestion and headaches only when exposed to dust and mold at work.

- The Commission also concluded that an inability to fly or take other forms of public transportation does not constitute a substantial limitation on a major life activity.
- Based on evidence in the record that appellant could travel in the front seat of a car, the Commission concluded that appellant is not disabled by his Situational Anxiety and Claustrophobia.

E. Worker's Compensation, Light Duty and the Rehabilitation Act

TEMPORARY IMPAIRMENTS THAT TAKE SIGNIFICANTLY LONGER TO HEAL, LONG TERM IMPAIRMENTS, OR POTENTIALLY LONG TERM IMPAIRMENTS OF INDEFINITE DURATION MAY BE DISABILITIES IF THEY ARE SEVERE

WHEN MEDICAL RESTRICTIONS CHANGE, AN AGENCY HAS AN ONGOING OBLIGATION TO MAKE REASONABLE ACCOMMODATIONS FOR ANY SUCH CHANGES

IF AN EMPLOYEE CAN NO LONGER PERFORM THE ESSENTIAL FUNCTIONS OF HIS OR HER POSITION DUE TO A DISABILITY RELATED OCCUPATIONAL INJURY, THEN AN EMPLOYER MUST REASSIGN THE EMPLOYEE TO AN EQUIVALENT VACANT POSITION TO WHICH THE EMPLOYEE IS QUALIFIED, ABSENT UNDUE HARDSHIP

Abeijon v. Dep't of Homeland Security, EEOC Appeal No. 0120080156 (Aug. 8, 2012)

Appellant, a Customs and Border Protection Officer, experienced a workplace back injury and requested light duty as a reasonable accommodation. Appellant's job duties were restructured to accommodate the various restrictions caused by the back injury; though this revised position was not a "light duty" position because he still carried a weapon and gear belt. While performing these different duties, he was diagnosed with a herniated disc and advised by his physician to never again perform work that would put him in harm's way. The surgeon recommended light duty and a special chair with low back support so that appellant can continue to work. In a light duty position, appellant would not have to carry a weapon and would not be placed in harm's way. Appellant was not immediately placed into a light duty position. Instead, the request for a chair was forwarded to the Office of Worker's Compensation Programs to see if that office would pay for the chair. The agency learned that it was responsible for providing a chair. The agency then requested additional medical documentation from appellant. Ultimately, approximately six weeks later, a special chair became available when another employee left. Appellant was thereafter placed in a light duty administrative position, and he turned in his weapon. The light duty position took roughly three months

to obtain from the date it was first requested. Appellant filed for disability retirement and also filed an EEO complaint alleging that the agency unduly delayed in providing him light duty and a special chair. After requesting a hearing, an AJ granted summary judgment in favor of the agency. The AJ concluded that appellant was not disabled since the workplace injury was not permanent. The AJ also concluded that appellant was not a qualified individual with a disability because he was unable to perform the essential functions of a law enforcement position. The AJ then concluded that even if he was disabled, the agency had provided appellant a reasonable accommodation when it restructured his job after he injured his back. The agency implemented the AJ decision. On appeal, the Commission ruled otherwise.

- The Commission first concluded that appellant had a chronic physical impairment, namely a herniated disc from an occupational injury, which, although temporary, was severe enough to rise to the level of a disability because it substantially limited several major life activities (sitting, standing, and lifting).
- The Commission stated that consistent with its compliance manual, Section 902, defining the term disability, temporary impairments that take significantly longer to heal, long term impairments, or potentially long term impairments of indefinite duration may be disabilities if they are severe.
- The Commission also concluded that the AJ erred in concluding that appellant was not a qualified individual with a disability. In this respect, the Commission noted that although appellant could no longer perform the functions of a law enforcement position, the law requires an employer to reassign him to an equivalent vacant position, or a lower graded position if no equivalent position exists, absent undue hardship.
- The Commission observed that appellant did, at first, receive a reasonable accommodation when his job duties were restructured so that he could continue to work in a law enforcement position.
- However, the agency was notified of a change in the diagnosis and recommended accommodation, as test results revealed that the back injury was more severe than anticipated when it was first diagnosed. As a result, appellant's physician requested light duty so as to avoid appellant from being in harm's way.
- Although appellant ultimately received a light duty assignment, it took over three months (February to May of 2006) for this request to be granted. Accordingly, the Commission concluded that by keeping appellant in a law enforcement position for over three months and failing to immediately assign him light duty, the agency failed to provide a reasonable accommodation.

- Under the facts of this case, the agency did make a good faith effort to reasonably accommodate appellant by communicating with him and by initially restructuring his duties. Therefore, under a good faith exception, the agency was not deemed liable for compensatory damages.

F. Safety Requirement and Direct Threat

WHEN A SAFETY REQUIREMENT WILL SCREEN OUT OR TEND TO SCREEN OUT AN INDIVIDUAL WITH A DISABILITY OR A CLASS OF INDIVIDUALS WITH DISABILITIES, THE REQUIREMENT MUST BE JOB RELATED AND CONSISTENT WITH BUSINESS NECESSITY

THIS STANDARD CAN BE ESTABLISHED BY SHOWING THAT THE REQUIREMENT, AS APPLIED TO THE INDIVIDUAL, SATISFIES THE DIRECT THREAT ANALYSIS SET FORTH IN 29 CFR SECTION 1630.2(r).

A DIRECT THREAT ANALYSIS REQUIRES AN INDIVIDUALIZED ASSESSMENT OF AN INDIVIDUAL'S PRESENT ABILITY TO PERFORM THE ESSENTIAL FUNCTIONS OF A POSITION AND IT IS THE AGENCY'S BURDEN TO ESTABLISH THE ELEMENTS OF A DIRECT THREAT AND THUS JUSTIFY THE DISCONTINUATION OF THE HIRING PROCESS FOR THAT INDIVIDUAL

Nathan v. Dep't of Justice (Federal Bureau of Investigation), EEOC Appeal No. 0720070014 (July 19, 2013)

Appellant applied and received a conditional offer of employment as a Special Agent after passing Phase I and II testing requirements. His offer was subject to several steps being completed. Appellant passed the polygraph and 1.5 mile run prerequisites and was interviewed and had a medical examination. The medical examination revealed that appellant had 20/800 vision in his right eye and the results were forwarded to the agency's chief medical officer, who recommended discontinuation of the hiring process. An agency unit chief, based on this recommendation, ultimately revoked appellant's conditional offer of employment. Appellant sought reconsideration and was informed that the decision would not be reconsidered because the agency had conducted an individualized assessment of his ability to perform the essential functions of the position. Appellant filed an EEO complaint alleging disability discrimination based on his having monocular vision, and requested a hearing. An AJ concluded that appellant had a visual impairment that substantially limited the major life activity of seeing, and that the agency failed to meet the direct threat standard since it did not perform an individualized assessment of his impairment. The agency did not implement the AJ decision. On appeal, the Commission agreed with the AJ decision that appellant was a victim of disability discrimination.

- The Commission noted that based on the hearing record, and although appellant was able to compensate some for his vision impairment, such compensation did not change the fact that he is essentially blind in his right eye, lacking depth perception with a 45 degree permanent blind spot that will never improve. The Commission thus concluded that “[b]ecause he has no visual abilities that help him overcome his visual limitations in peripheral vision and field of vision ...his diminished peripheral vision is not mitigated, and that [his] monocularly substantially limits him in the major life activity of seeing.”
- The Commission noted that the agency had established a vision standard requiring uncorrected vision of 20/20 in both eyes, or 20/40 uncorrected vision in one eye if the other eye’s uncorrected vision was 20/20. This vision standard ensures that individuals can safely serve in the position of a Special Agent.
- The Commission then explained that when a safety requirement will screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, the requirement must be job related and consistent with business necessity. This standard can be met by showing that the requirement, as applied to the individual, satisfies the direct threat analysis set forth in 29 CFR § 1630.2(r).
- In this case, the Commission agreed with the AJ that the agency did not conduct an individualized assessment of this applicant’s ability to perform the duties of a Special Agent. The testimony in the record relied on by the agency was based on that of an agency program manager, who explained the impact that monocular vision would have on a Special Agent attempting to “clear a room.” However, such generic testimony about the impact of monocular vision on one’s ability to see does not comprise the requisite individualized assessment.
- The Commission stated: “The evaluation of an applicant’s unique abilities and disabilities is the crux of an individualized assessment. At the minimum, such an assessment should take into account any special qualifications that might allow an applicant to successfully perform the essential functions of a position without posing a direct threat to himself or others. Examples of special qualifications include prior successful experience in a similar position and adaptive or learned behaviors that compensate for physical limitations imposed by a condition.”
- The Commission then noted that appellant may have both adaptive behaviors and prior successful experience (based on having graduated West Point, rising to the level of Captain in the army, serving several tours as an infantry officer with specialized training in small unit tactics, and conducting seventy five combat patrols in Bosnia).
- The Commission found no evidence that any of this was taken into account before disqualifying appellant. Instead of performing this individualized

assessment, the agency looked to the impact of vision loss on a typical person with monocular vision. In essence, the agency disqualified appellant based on the assumption that no individual with monocular vision could be a Special Agent.

- The Commission noted that the agency may have a legitimate concern about whether appellant can safely perform in a Special Agent position, but it did not meet its burden to establish a direct threat under the Rehabilitation Act.

G. Telework as a Reasonable Accommodation

**IT IS A REASONABLE ACCOMMODATION TO MODIFY A
WORKPLACE POLICY WHEN NECESSITATED BY AN INDIVIDUAL'S
DISABILITY-RELATED LIMITATIONS**

**IT IS NOT A LEGITIMATE, NONDISCRIMINATORY REASON TO
REJECT OUT-OF-HAND A REQUEST FOR TELEWORK AS A
REASONABLE ACCOMMODATION BECAUSE TELEWORK IS
GENERALLY DETERMINED AS NOT AVAILABLE TO A NON-
DISABLED WORKER'S COWORKERS**

Blocher v. Dep't of Veterans Affairs, EEOC Appeal No. 0120111937 (April 17, 2013)

Appellant, an agency employee in a Service Chief position, was born with congenital hip dysplasia. While employed at the agency, her physician informed her that she needed hip replacement surgery. Her surgery and complications kept her out of the office for approximately six months. Appellant's supervisor suggested she could work at home while recuperating. The supervisor helped appellant complete the necessary forms to request working at home (but not as a reasonable accommodation). Appellant's second level supervisor denied the request because he did not believe any Service Chief could perform job duties at home. Appellant then submitted the same request to work at home (telecommute), but this time through a reasonable accommodation. Her reasonable accommodation request was also denied based on the opinion of the second level supervisor, and without anyone consulting with appellant about her needs. Appellant filed a formal EEO complaint and requested a final agency decision. The agency concluded that appellant was disabled, but that she was not a qualified individual because face-to-face interaction was an essential function of the position and she could not perform that function while recovering from surgery.

On appeal, the Commission reversed the agency's decision. In reaching this conclusion, the Commission noted that:

- "...an agency should not base its decision regarding a request for reasonable accommodation solely on whether the employee's essential job "involves some contact and coordination with other employees" Citing Equal Employment

Opportunity Commission, Work at Home/Telework as a Reasonable Accommodation, Question 4.... (Fact Sheet). The Fact Sheet further notes that it is an appropriate reasonable accommodation to institute a part time telework schedule if the situation permits.”

- The Commission summarized the rationale of the second level supervisor, who believed that because he does not believe that any Service Chief can telecommute, then he is not discriminating against appellant since he applies the rule equally and across-the-board to everyone, disabled or not.
- The Commission disagreed with that rationale, noting that it is not a legitimate, nondiscriminatory reason to reject out-of-hand a request for telework as a reasonable accommodation because telework is generally determined as not available to a non-disabled worker’s coworkers.
- In this case, the reasonable accommodation was rejected without engaging in an interactive process, based on the second level supervisor’s belief that his actions were justified. Thus, appellant was denied a reasonable accommodation of teleworking.

IV. Reprisal Decisions

A. Per Se Reprisal

STATEMENTS BY A SUPERVISOR OR MANAGER THAT COULD HAVE A CHILLING EFFECT ON AN INDIVIDUAL’S PARTICIPATION IN THE EEO PROCESS COMPRISE PER SE REPRISAL

1. *King v. International Boundary & Water Commission*, EEOC Appeal No. 0120112384 (Mar. 19. 2013)

Six co-workers of appellant reported to the Operations Manager that appellant’s supervisor told them that appellant had filed an EEO complaint. One of the co-workers stated that this supervisor “did tell me individually that [appellant] had filed a complaint, and that I should be careful about what I said.”

- The Commission concluded that informing other employees that appellant had filed a formal complaint constituted a per se violation of Title VII, and the Commission’s regulations, by interfering with appellant’s right to pursue a remedy for alleged violations of EEO laws.
- Such comments are likely to have a chilling effect and deter employees from fully exercising their rights to engage in EEO activity.

2. *Brown v. General Services Admin.*, EEOC Appeal No. 0120130778 (May 8, 2013)

During a leadership meeting, the Network Service Director stated that appellant had an EEO complaint and he was “the mystery person” on a recent Cable News Network (CNN) story. The agency dismissed appellant’s formal complaint for failure to state a claim. The Commission reversed, noting that such comments could be reasonably likely to deter protected EEO activity. Accordingly, such comments do state a claim of reprisal and should therefore be investigated.

3. *Beckham v. Dep’t of the Treasury (U.S. Mint)*, EEOC Appeal No. 0120112323 (May 22, 2013)

Appellant filed a formal EEO complaint raising several allegations, one of which concerned a statement made by a manager to the effect that after he informed this manager that he had filed an EEO complaint, the manager informed appellant that he would have to document more fully what he said in meetings and that this may result in trust concerns. The manager also expressed to appellant that his decision made her feel sad and she would have to be more careful about what she said. This manager subsequently apologized to appellant for making those remarks. After appellant requested a hearing, the AJ granted summary judgment in favor of the agency. The AJ found no violation of law because the manager later apologized for making the remarks and appellant was therefore not harmed. On appeal, the Commission concluded that the AJ erred in concluding that there was no unlawful retaliation. In so doing, the Commission noted that:

- “Comments that, on their face, discourage an employee from participating in the EEO process violate the letter and spirit of the EEOC regulations and evidence a per se violation of the law.... When a supervisor’s behavior has a potentially chilling effect on use of the EEO complaint process – the ultimate tool that employees have to enforce equal employment opportunity – the behavior is a per se violation.”
- The fact that the manager later apologized was of little consequence and did not undo the violation of law.

B. Reprisal and Summary Judgment

**IN THE ABSENCE OF ANY GENUINE ISSUES OF MATERIAL FACTS,
THE COMMISSION CAN CONCLUDE THAT REPRISAL MORE LIKELY
THAN NOT MOTIVATED AN ADVERSE ACTION**

Coffee v. Dep’t of the Army, EEOC Appeal No. 0120120117 (Mar. 15, 2013)

Appellant worked as a Human Resources Specialist trainee at a facility in Texas. She previously prevailed in an EEO complaint when an AJ concluded that she had been

subjected to ongoing harassment based on race and sex. During the next appraisal period, her supervisor recommended a rating of level four “Exceeds Expectations.” The agency’s Chief of Staff, who was aware of Appellant’s prior EEO activity, would not allow that rating to go forward unless the supervisor lowered the rating to a level three “Valued Performer” level. The supervisor therefore lowered the rating based on instructions from the Chief of Staff. Appellant filed an EEO complaint alleging reprisal. The supervisor informed the investigator that she believed the Chief of Staff was retaliating against Appellant since he would not explain why he wanted the rating changed, and he was not in any position to assess her performance. Appellant requested a hearing and an AJ granted summary judgment in favor of the agency, finding insufficient evidence of reprisal. On appeal, the Commission agreed with the AJ that there was no genuine issue of material fact, but reached a different conclusion, namely, that the evidence in the record clearly established reprisal by the Chief of Staff.

- The Commission first noted that appellant’s rating was sufficiently adverse to state a claim of reprisal, as a reasonable person would have been deterred from engaging in EEO activity by receiving a lowered performance rating.
- The Commission next noted that there was a nexus between appellant’s EEO activity and the lowered performance appraisal rating because around the time the rating was issued, appellant’s compensatory damage award was on appeal to the Commission and the attorney’s fees award was also actively being litigated before the Commission.
- The Commission then found ample evidence in the record establishing that the rating was a pretext. The Commission noted testimony from appellant’s supervisor that appellant deserved the higher rating, and that trainees have received such ratings in the past notwithstanding a contrary statement by the Chief of Staff. This supervisor also indicated that the Chief of Staff he did not disagree with the narrative description of the rating, only the rating score.
- The Commission noted that during the fact finding conference, the agency’s representative, when cross examining this supervisor, had an opportunity to ask questions that could have raised a genuine issue of material fact. However, the agency representative did not ask any questions about the supervisor’s statements, observations, or opinion that the Chief of Staff retaliated against appellant.
- The Commission thus concluded that there was ample evidence in the record to conclude that there was reprisal and therefore grant summary judgment for appellant (not the agency).

V. Class Action Decisions

A. Merits Decision

A HIGHLY SUBJECTIVE HIRING PROCESS LACKING CLEAR GUIDELINES CAN COMPRISE THE REQUISITE POLICY OR PRACTICE AND THUS ESTABLISH THE FIRST ELEMENT OF A DISPARATE IMPACT CLAIM

IN CASES INVOLVING EITHER HIRING OR PROMOTION, APPLICANT FLOW DATA IS “THE MOST DIRECT ROUTE” TO PROOF OF DISCRIMINATION

TO ESTABLISH CLASS WIDE DISPARATE TREATMENT, “...THE CLASS MUST SHOW BY A PREPONDERANCE OF THE EVIDENCE THAT THE AGENCY REGULARLY AND PURPOSEFULLY TREATED PROTECTED CLASS MEMBERS LESS FAVORABLY THAT THE MAJORITY GROUP MEMBERS”

IN CALCULATING APPROPRIATE ATTORNEY’S FEES, A FEE ENHANCEMENT MAY BE APPROPRIATE IN CASES WHERE THERE HAS BEEN A HIGH DEGREE OF SUCCESS

Garcia et. al., v. Dep’t of Justice (Drug Enforcement Agency), EEOC Appeal No. 0120122033 (June 7, 2013)

Procedural Summary: In 1993, the Class Agent a female Special Agent, GS-13, with the Drug Enforcement Agency (DEA) filed a class complaint alleging a pattern and practice of discrimination against female Special Agents in the selection of Special Agents to foreign assignments and promotions in the early 1990s (between 1990 and 1992). The Commission certified a class of female Special Agents in a 1998 decision. The case was assigned to an Administrative Judge. Discovery ensued and in May of 2005, the proceedings were bifurcated into liability and remedy phases. Ultimately, a nine day hearing occurred in July of 2009. In April of 2011, The Administrative Judge issued an interim decision finding evidence of class wide disparate impact against female GS-11 to 13 Special Agents regarding promotional opportunities to foreign assignments. The decision also concluded that there was insufficient evidence to establish similar class wide disparate impact against GS-14 and GS-15 Special Agents. The Administrative Judge then concluded that there was sufficient evidence in the record to support a conclusion that all female Special Agents (GS-11 through GS-15) were treated differently “regularly and purposefully” than their male counterparts when applying for promotional opportunities. In October of 2011, the agency filed a Motion to Decertify based on the Supreme Court ruling in *Wal-Mart Stores, Inc. v. Dukes*. On January 12, 2012, the Administrative Judge issued an Order which denied the agency’s Motion. The Administrative Judge, among other things, ordered relief for the Class

Agent, which included an attorney's fee award of over one million dollars based on a 20% fee enhancement. The Administrative Judge ordered the agency to commence the process of class wide notification to prepare for the liability phase of the proceedings. The agency decision did not accept the decision by the Administrative Judge.

Brief Summary of Findings of Fact:

A. General Selection Process

The agency's Office of International Operations (OIP) oversaw over 70 agency foreign offices. Such assignments were highly sought after, and the agency's Deputy Administrator was the selecting official for all foreign assignments. The Deputy Administrator typically acted on recommendations of either a Career Board or OIP staff, depending on the grade of the position. OIP staff were directed to ask all candidates about their marital status, and if married, to interview spouses. However, OIP staff interrogated only female applicants about matters such as child care arrangements and whether their husbands would relocate overseas if females were offered such positions. Evidence revealed that male Special Agents were not asked such questions.

The hiring process was very subjective; applicants applied for foreign assignments through their chain of command. Names were submitted to a Personnel Office for review and often included recommendations from supervisors. A best qualified list would be prepared and shared with OIP. OIP staff reviewed the list and made recommendations. The hiring practices varied as to what documents were reviewed and there was evidence that some selections were made before interviews were even conducted. OIP recommendations were forwarded to a career board for GS-14 and GS-15 positions. During this time, the agency EEO representative repeatedly brought to the agency's attention the fact that there was an underrepresentation of women in foreign posts. The agency also had a General Accounting Office report in 1992 that also reflected a similar finding.

B. Brief Summary of Statistical Evidence

The Class expert witness found statistically significant disparities in the number of foreign assignments for male and female applicants. The Class expert relied on an analysis of applicant flow data, utilized the "Fisher's Exact Test" and aggregated the data using the "common odds ratio." The Class expert separated the selection data for GS-11 through 13 and GS-14 and GS-15 positions because the agency used a Career Board for the higher graded positions. The Class expert found a disparity in the rate males were hired over females in GS-11 through GS-13 positions, 2.42 standard deviations, that was statistically significant based on relevant case law. No statistically significant disparity was demonstrated for selections of female Special Agents to GS-14 or GS-15 positions during the relevant period.

The agency expert witness found no statistically significant disparities in the number of foreign assignments for male and female applicants at any grade. The agency expert used the "Four-Fifths rule" and conducted a "two-tailed Chi-Square" analysis of a 2 by 2 contingency rule. The agency expert also conducted a "Fisher's Exact Test." The

agency expert used different data than the Class expert, and determined in her calculations that women obtained promotions to foreign posts at a statistically higher level than men.

C. Brief Summary of Anecdotal Evidence

In summary, there was testimony from the supervisor of the Class Agent, who had highly recommend her for a certain foreign post, where remarks were made by OIP officials regarding her selection for foreign assignments to the effect of: “there is still a problem with the husband” and “[i]s her husband really going to retire and be willing to follow her overseas?” Another class agent was deemed “useless” by her supervisor once she became pregnant, and a recommendation memorandum for one foreign assignment focused on her status as a single mom. As to this assignment, an OIP staff member made statements such as: “how could [she], a single mother, want to take [her] child to a country like that.” When a third class member expressed interest in assignment to Bangkok, both her supervisors told her that she should stop getting pregnant. According to this third class member, her supervisors informed her she could not be a backup supervisor because she was pregnant, and then asked her to get abortions after she had two miscarriages. A fourth class member testified that her supervisor informed her that woman did not belong on a particular operation, or in law enforcement. A fifth class member testified that the Assistant Special Agent in Charge informed her, in front of her male colleagues, that the real reason women worked in the agency was to “f—k male agents.” This class member expressed interest in a foreign assignment to a supervisor, and in response, this male supervisor informed her that although she was a good agent, “the best female agent was not equivalent to the worst male special agent.” The AJ decision also summarized similar anecdotal testimony of animus by male Special Agents against five more female Special Agents, especially in the context of promotions to foreign posts.

D. Brief Summary of Commission Decision

- The Commission affirmed the decision by the Administrative Judge to deny the Agency’s Motion to Decertify the Class noting that the decision was issued months before the Supreme Court decision in *Wal-Mart*.
- The Commission summarized the applicable law required to establish a prima facie disparate impact case and agreed with the Administrative Judge that “...a selection process existed that was highly subjective and without clear guidelines.” Only female agents were asked about childcare issues and in some cases, only female applicants were asked about the willingness of their spouse to move overseas.
- The Commission then discussed, as to the competing results of the experts, relevant Supreme Court decisions explaining that applicant flow data is a “very relevant” statistical model and that in hiring and promotion cases, it is most often “the most direct route” to proof of discrimination. The decision then discussed

at length why the Class expert's data and conclusions were more reliable than that of the agency's expert witness. The Commission stated:

- "We agree with the AJ's determination that the agency's expert's conclusions are unreliable because her analysis does not consider the different variables concerning the number of females versus males who applied for each vacancy announcement (applicant flow data). The Agency's expert's analysis does not look at each year separately but yields results based on a combined analysis from 1998 to 1994. The Agency's expert's analysis considers all GS levels 11-15 jointly, despite different selection processes for GS-13 levels and below and GS levels 14-15...."
- The Commission then agreed with the Administrative Judge's conclusion that there was no evidence of business necessity, and as such, that female Special Agents at the GS-11 through GS-13 levels were disparately impacted by agency selection procedures for assignments to foreign posts.
- Regarding allegations of disparate treatment by the Class, the Commission first discussed relevant Supreme Court decisions setting forth the burden of proof, namely, that "...the class must show by a preponderance of the evidence that the agency regularly and purposefully treated protected class members less favorably than the majority group members."
- The Commission summarized additional key testimony by the Class agent's supervisor wherein he basically indicated that sex was a factor when Special Agents were considered for placement in foreign posts located in countries with male dominated cultures. The Commission then concluded that: "[s]ubstantial anecdotal evidence in the record reflects that this bias against female SA's in foreign positions is widespread in the Agency." The Commission also found that: "[the] record also reflects a stereotypically biased view within the Agency that husbands would not be willing to follow their SA wives to foreign countries."
- The Commission further observed that: "...the Agency did not provide an explanation for why it only interrogated female applicants about matter such as their childcare arrangements and pregnancies, and why it focused more heavily on whether female applicant's husbands could adjust to a role as an overseas spouse. As a result, we find that the Class established that it was subjected to disparate treatment." Such disparate treatment applied to female Special Agents at all relevant grades (GS-11 through GS-15).
- Regarding relief, the Administrative Judge reviewed the Class attorney's petition, which was for \$1,348,460 and determined based on the Laffey Matrix (utilized in the DC metro area to calculate fee awards) that the attorney fee award pursuant to this matrix would be \$883,628.75. The Administrative Judge then applied a 20% fee enhancement, such that the total fee award was: \$1,060,354.50.

- The Commission, in reviewing the fee award, noted that in calculating appropriate attorney's fees, a fee enhancement may be appropriate in cases where there has been a high degree of success. Accordingly, the Commission affirmed the attorney's fee award.

B. Certification

CLASS OF POSTAL INSPECTORS DENIED ACCESS TO THE AGENCY SELF REFERRAL COUNSELING PROGRAM PRESENTED SUFFICIENT EVIDENCE TO CERTIFY A CLASS COMPLAINT BASED ON RACE

Clayton v. U.S. Postal Serv., EEOC Appeal No. 0720120022 (April 23, 2012)

At the relevant time, the Class Agent was a Postal Police Officer. In 2008, the Class Agent became aware that Postal Inspectors, who are predominately White, are provided access to the Self-Referral Counseling Program (SCRCP), a benefit of employment with the agency and paid for by the agency. The Class Agent suffered from post-traumatic stress disorder after a vehicle accident. She did not have access to the SCRCP and had to obtain treatment, through her own medical insurance, at her expense. In filing a Class complaint, she alleged that the agency policy to extend SCRCP to Inspectors and not Postal Police Officers had a disparate impact on minority Postal Police Officers because the majority of them are Black or Hispanic.

The agency first dismissed the Class Complaint for failing to state a claim. The agency asserted that the Class complaint comprised a collateral attack on the negotiated collective bargaining agreement because the Postal Police and Postal Inspectors belong to different Unions and negotiated for different benefits in ratifying a collective bargaining agreement. The Commission reversed and remanded the Class claim to an Administrative Judge. Thereafter, the agency made the same argument (and other arguments) in response to Orders by the Administrative Judge. The agency also argued that the Class failed to meet the prerequisites for class certification. The Administrative Judge rejected the agency's arguments and further found that the Class established numerosity, commonality and typicality, and thus conditionally certified the Class so that the Class Agent could obtain an attorney. The agency's final order rejected the certification of the Class and the agency filed an appeal.

In its decision, the Commission rejected the agency's Final Order and conditionally certified the class. In reaching its conclusion, and in particular with respect to the repeated assertion that such an allegation is a collateral attack, the Commission noted that the agency provided no persuasive authority to support its legal argument. The Commission also observed, as did the Administrative Judge, that the agency never provided any evidence on the record to even demonstrate that this matter (the SCRCP) was even governed by the respective collective bargaining agreements. The

Commission then noted that such evidence could be presented to the Administrative Judge during the adjudication of the Class complaint.

Regarding commonality and typicality, the agency made no arguments and the Commission agreed with the findings of fact by the Administrative Judge as to these elements. The Commission then discussed numerosity by rejecting the agency's argument that there was insufficient evidence to show a class of employees denied such benefits. In so doing, the Commission noted that there are several hundred Postal Police Officers, none of whom would have the SBCR benefit available to them.

The Commission then reminded the Class Agent of her obligation to address the adequacy of representation requirement in a reasonable amount of time, or class certification could be endangered.

VI. Sanctions Decisions

A. Appellate Sanctions

REPEATED FAILURE TO SUBMIT DOCUMENTS REQUESTED BY THE COMMISSION IN ORDER TO ADJUDICATE AN APPEAL JUSTIFIED A DEFAULT JUDGMENT SANCTION AGAINST THE AGENCY

Brand v. Dep't of Agriculture, EEOC Appeal No. 0120113592 (June 5, 2013)

Appellant filed an EEO complaint alleging disparate treatment, failure to accommodate and a hostile work environment. He thereafter requested a hearing and the case was assigned to an AJ. During discovery, the agency erroneously issued a final agency decision in its favor. Appellant withdrew his hearing request, but wanted the evidence obtained during discovery to be considered on appeal. The AJ granted the request to withdraw and ordered the agency to issue a final agency decision. The agency failed to do so. Appellant appealed and the first Commission decision vacated the erroneously issued decision and ordered the agency to issue a new final agency decision after supplementing the record with all evidence obtained during discovery. Thereafter, the agency issued a new final agency decision finding no discrimination, no failure to accommodate and no hostile work environment. Appellant appealed and the Commission observed that the agency had not submitted a complete record. The Commission issued a Show Cause order. The agency did not respond to the Order and did not provide the missing discovery documents. On appeal, the Commission affirmed the agency's findings of no discrimination and no failure to accommodate because the record was complete as to those claims. The Commission next noted that the parties had conducted discovery on appellant's hostile work environment claim, but the record did not contain any of the discovery that the AJ, and then the Commission, had ordered to be included as part of the record. The Commission observed that:

- “[s]anctions serve a dual purpose. On the one hand, they aim to deter the underlying conduct of the non-complying party and prevent similar misconduct in

the future... On the other hand, they are corrective and provide equitable remedies to the opposing party.”

- “Several factors are considered in “tailoring” a sanction and determining if a particular sanction is warranted: (1) the extent and nature of the non-compliance, and the justification presented by the non-complying party; (2) the prejudicial effect of the non-compliance on the opposing party; (3) the consequences resulting from the delay in justice; and (4) the effect on the integrity of the EEO process.”
- The Commission cited to the applicable regulations and language in its Management Directive 110 setting forth an agency’s duty to timely submit information to the Commission on appeal.
- The Commission then concluded that a default judgment sanction was appropriate given the totality of facts in this case. Citing another Commission decision in *Royal v. Dep’t of Veterans*, EEOC Request No. 0520080052 (Sept 25, 2009), the Commission noted that it must determine if there is evidence to establish appellant’s right to relief in cases where a default judgment sanction is imposed.
- The Commission found sufficient evidence based on allegation of racial harassment over a period of years which management failed to address. Thus, the record established a claim of harassment and appellant was therefore entitled to relief.

THE COMMISSION HAS THE INHERENT POWER TO ORDER COMPENSATORY DAMAGES IN A DEFAULT JUDGMENT CASE EVEN ABSENT EVIDENCE OF A PRIMA FACIE CLAIM

Montes-Rodriguez v. Dep’t of Agriculture, EEOC Request No. 0520120295 (Dec. 20, 2012)

Brief History: In its first decision, the Commission reversed an agency dismissal of an EEO complaint filed by appellant and ordered the agency to complete an investigation in 150 days. However, the agency did not even commence its investigation until day 202. The case was heard by an Administrative Judge, who did not sanction the agency for its tardiness with the investigation. This led to an appeal by appellant. In its second decision, the Commission concluded that the Administrative Judge erred by failing to sanction an agency for its delay in completing an investigation. The Commission imposed a default judgment sanction on the agency. The Commission noted, in this second decision, that appellant was entitled to compensatory damages. Appellant’s failure to establish a prima facie case of national origin discrimination because she had no comparative or other evidence indicative of such animus did not prevent her from receiving compensatory damages.

The agency sought reconsideration and argued that the Commission's position that appellant was entitled to argue for an award of compensatory damages was erroneous as inconsistent with its decision in *Royal v. Dep't of Veterans*, EEOC Request No. 0520080052 (Sept 25, 2009) and a second Commission decision not cited in this summary.

This Decision:

The Commission denied reconsideration, noting that reconsideration is not a second appeal to the Commission and it must meet specific criteria for the Commission to grant reconsideration. Nonetheless, the Commission, in denying reconsideration, distinguished the *Royal* decision and set forth authority to justify its prior decision to award compensatory damages to appellant. The Commission noted that:

- "... [it] has the inherent power to protect its administrative process from abuse by any party and must ensure that agencies and complainants follow its regulations." The Commission then cited decisions where it had issued sanctions and awarded compensatory damages in the absence of a prima facie claim.
- The Commission next cited to the Supreme Court decision in *West v. Gibson*, wherein that Court stated: "to deny that an EEOC compensatory damages award is, statutorily speaking, 'appropriate,' would undermine the remedial scheme."
- The Commission thus concluded that it had the inherent authority to award compensatory damages in a default judgment case even in the absence of any evidence of a prima facie claim of reprisal.

B. Sanctions in the Hearings Process

AN AJ DID NOT ABUSE HER AUTHORITY TO SANCTION AN ABUSIVE OR HOSTILE PARTY BY WITHDRAWING THE HEARING REQUEST AND REMANDING TO THE AGENCY TO ISSUE A FINAL AGENCY DECISION AS A SANCTION

Stoyanov v. Dep't of the Navy, EEOC Appeal Nos. 0120113931-3936 (Oct. 11, 2012)

Appellant had six consolidated cases before an Administrative Judge. The Administrative Judge, having previously adjudicated claims with appellant, issued an Order which provided explicit instructions about how the parties were to engage in discovery. It warned appellant that contumacious conduct would not be tolerated. Notwithstanding this Order, the record established that appellant filed several additional inflammatory motions. The Administrative Judge sanctioned appellant by withdrawing his hearing requests and remanding to the agency to issue final agency decisions. The Administrative Judge cited to "vituperative language" in appellant's submissions and how appellant's attacks on the parties and the Commission could not be condoned.

After the agency issued its decisions, appellant filed an appeal. On appeal, the Commission concluded that the Administrative Judge "... was well within the bounds of discretion when he dismissed [appellant's] hearing requests with prejudice, as clearly, no other sanction would seem to have any effect on modifying [his] behavior."

VII. Title VII of the Civil Rights Act of 1964, as amended, (Title VII) Decisions

A. Sex Stereotyping

DISCRIMINATION OR HARASSMENT FOR FAILING TO CONFORM TO GENDER-BASED EXPECTATIONS IS SEX DISCRIMINATION AND THIS PRINCIPLE APPLIES WITH EQUAL FORCE IN CASES INVOLVING INDIVIDUALS WHO ARE GAY, BISEXUAL, HETEROSEXUAL, OR TRANSGENDER

Culp v. Dep't of Homeland Security (Transportation Security Admin.),
EEOC Appeal No. 0720130012 (May 7, 2013)

Appellant, a person known to be a lesbian, was promoted to a supervisory position in 2009. During her probationary period as a supervisor, her supervisor counseled her about being seen taking lunches and breaks with another female, lesbian employee because it created an "improper perception." Appellant thereafter received three letters of counseling and a letter of reprimand for various offenses, and ultimately received a notice of proposed removal from a supervisory position. Appellant filed an EEO complaint alleging "sexual orientation" as a basis of discrimination. She ultimately requested a hearing. The agency filed a motion to dismiss, arguing that EEOC does not have jurisdiction over such claims. The AJ denied the agency's motion, noting that appellant had raised a sex stereotyping claim that would fall under the purview of Title VII. Ultimately, appellant did not prevail on her claims of discrimination by the agency. On appeal, the agency argued that the Commission does not have jurisdiction over sexual orientation claims. In its decision, the Commission noted, among other things that:

- "...as long as the allegations state a viable claim of sex discrimination, the fact that an [appellant] has characterized the basis of discrimination as sexual orientation does not defeat an otherwise valid sex discrimination claim. See *Baker v. Social Security Admin.*, EEOC Appeal No. 0120110008 (Jan. 11, 2013)."
- As an example of sex stereotyping, appellant was counseled numerous times for taking her breaks and lunch with another female, who was lesbian. Based on these facts, appellant was alleging that her supervisor was motivated by stereotypes that women should only have relationships with men. By having women who are lesbian spend time together, appellant is not conforming to a

gender stereotype that having relationships with men is an essential part of being a woman.

- Such a claim is actionable under Title VII and the AJ did not err by denying the agency's Motion to Dismiss.

B. Religion and Reasonable Accommodation

UNDER TITLE VII, EMPLOYERS ARE REQUIRED TO ACCOMMODATE THE RELIGIOUS PRACTICES OF THEIR EMPLOYEES UNLESS A REQUESTED ACCOMMODATION ESTABLISHES AN UNDUE HARDSHIP

THERE ARE SEVERAL ACCEPTABLE ALTERNATIVES FOR ACCOMMODATING CONFLICTS BETWEEN WORK SCHEDULES AND RELIGIOUS PRACTICES, INCLUDING VOLUNTARY SUBSTITUTES AND SWAPS, FLEXIBLE SCHEDULING OR LATERAL TRANSFER AND CHANGE OF JOB ASSIGNMENT

CONCERNING VOLUNTARY SUBSTITUTIONS OR SWAPS, THE OBLIGATION TO ACCOMMODATE REQUIRES EMPLOYERS TO FACILITATE THE SECURING OF A VOLUNTARY SUBSTITUTE

AN EMPLOYER ALSO HAS AN AFFIRMATIVE DUTY TO FACILITATE REASSIGNMENT OR TRANSFER OPPORTUNITIES

Samuelson v. U.S. Postal Serv., EEOC Appeal No. 0120112777 (Feb. 19, 2013)

Appellant informed the agency of his need to observe the Sabbath on Saturday and not be assigned to work. On several occasions, he was nonetheless required to work and when he did not report, he was disciplined. The Acting Station Manager informed appellant that the agency could not accommodate his religious beliefs because a Local Memorandum of Understanding with the Union required carriers to work Saturdays, and he should consider changing crafts. After filing an EEO complaint, an AJ issued summary judgment in favor of the agency. The AJ concluded that while appellant had a bona fide religious belief that conflicted with a job requirement, the agency provided accommodation on the majority of Saturdays by allowing him to take annual leave, to be placed on other assignments, to swap days, and to not be scheduled on some Saturdays since the agreement with the union required that assignments on Saturdays be rotated among mail carriers. On appeal, the Commission found that there were genuine issues of material fact that necessitated a hearing, and therefore it reversed the agency's order which implemented the AJs decision to grant summary judgment to the agency. In so doing, the Commission explained that:

- Under Title VII, employers are required to accommodate the religious practices of their employees unless a requested accommodation establishes an undue hardship.
- There are several acceptable alternatives for accommodating conflicts between work schedules and religious practices, including voluntary substitutes and swaps, flexible scheduling or lateral transfer and change of job assignment. Concerning voluntary substitutions or swaps, the obligation to accommodate requires employers to facilitate the securing of a voluntary substitute. In addition, an employer also has an affirmative duty to facilitate reassignment or transfer opportunities.
- The Commission found evidence that required a hearing because appellant testified that for several years prior to 2009, he was not required to ever work on a Saturday. Such evidence, if true, calls into question the agency's reliance on its agreement with the union to rotate individuals pursuant to a memorandum of understanding.

VIII. Age Discrimination in Employment Act (ADEA) Decisions

A. Mixed Motive

CONTRARY TO THE SUPREME COURT DECISION IN *GROSS v. FBL FINANCIAL SERVICES, INC.*, A MIXED MOTIVE ANALYSIS APPLIES TO FEDERAL SECTOR AGE DISCRIMINATION CLAIMS

Arroyo v. Dep't of Veterans Affairs, EEOC Request No. 0520120563 (Jan. 25, 2013)

Brief Summary: Appellant alleged he was not selected for several positions. Several of the claims were dismissed as being untimely. For the one timely selection, the agency found no discrimination. On appeal, the Commission reversed as to age, noting that there was direct evidence of age discrimination when the supervisor informed appellant that he was "too old" for the position and that he was seeking someone "who would be around for a long time." The manager informed appellant that he should enjoy his retirement. The Commission then found other evidence of legitimate reasons for the selection decision, thus suggesting a mixed motive. Accordingly, with a mixed motive finding, the agency's liability was limited.

Reconsideration Decision: The agency, in seeking reconsideration of the Commission's appeal decision, argued that the Commission erred in finding a mixed motive in an age discrimination claim since the Supreme Court issued its decision precluding such an analysis in *Gross v. FBL Financial Services, Inc.*, (2009).

- The Commission denied Reconsideration, noting that there is a separate section of the ADEA that applies to the Federal Sector.
- This separate section requires that all personnel actions in federal employment “shall be made free from any discrimination based on age.”
- This difference in language, consistent with other court decisions, means that *Gross* applies to private sector, and not federal sector cases since being free from “any” age discrimination is broader than the “because of” age language contained in the relevant portion of the statute addressing private sector claims.

IX. EVIDENTIARY MATTERS

A. Hearings

AN ADMINISTRATIVE JUDGE DID NOT ABUSE HIS OR HER DISCRETION WHEN DENYING APPELLANT THE RIGHT TO QUESTION THE SELECTEE AND A CO-WORKER WHERE THEIR TESTIMONY WAS PROPERLY CONSIDERED TO BE IRRELEVANT

de Leon v. Equal Empl. Opp. Comm’n., EEOC Appeal No. 0120082572 (Aug. 10, 2012)

Appellant filed a complaint alleging discrimination concerning two different non-selections. Ultimately, after a hearing, the Administrative Judge found no discrimination. On appeal, appellant argued that the Administrative Judge was biased and abused his discretion by excluding two witnesses, by not including a statement from a third witness into the record, and by failing to properly analyze record evidence.

On appeal, the Commission disagreed and concluded that there was no evidence that the Administrative Judge was biased or abused his discretion.

- Regarding the decision to not admit the statement of one witness into the record, the Commission concluded that this witness was a subordinate of appellant and was not involved in the selection process. Appellant argued that this witness had relevant information because the selectee came to this witness for advice on how to perform the job. The Commission agreed with the Administrative Judge’s decision that since this witness was not involved in the selection process, the exclusion of his statement was not error.
- Regarding the exclusion of witness testimony from the selectee and a co-worker of appellant, the record establishes that each of these individuals rotated one month into the position at issue. Appellant argues that these witnesses could establish appellant’s superior qualifications and one of the witnesses could testify as to what transpired during workplace meetings conducted by the selecting official. The Commission concluded that the Administrative Judge did

not abuse his discretion by excluding such testimony since neither witness was involved in the selection process or were decision-makers. Thus, the proposed testimony was not relevant to adjudicate the claim.

B. Final Agency Decisions

WHEN EVIDENCE IS, AT BEST, EQUIPOISE, THEN A COMPLAINANT HAS NOT CARRIED HIS OR HER BURDEN OF PROOF BY A PREPONDERANCE OF THE EVIDENCE IN A CASE WHERE AN AGENCY MUST ISSUE A FINAL AGENCY DECISION AND A CREDIBILITY DETERMINATION BASED ON THE Demeanor OF A WITNESS IS NOT POSSIBLE

Gutierrez v. Dep't of Transp. (Federal Aviation Admin.), EEOC Appeal No. 0120113181 (June 26, 2013)

Appellant, an Air Traffic Controller, filed a formal EEO complaint alleging race, color, national origin and age discrimination when subjected to a hostile work environment by a co-worker. The agency at first dismissed the complaint for failing to state a claim, but the Commission reversed and remanded it. Thereafter, the agency accepted and investigated the complaint, listing 9 incidents related to the hostile work environment claim. Appellant requested a final agency decision. The agency concluded that appellant was not a victim of a hostile work environment. Appellant filed an appeal. The Commission affirmed the agency's decision. In so doing, the Commission made a few observations about some of the incidents.

- The Commission first noted that appellant and his co-worker each alleged harassment by the other, and that both had very different accounts of what occurred when each event took place.
- The Commission noted that agency management investigated each event shortly after each occurred, but no witness corroborated any of appellant's or the co-worker's allegations.
- For example, while appellant alleged that the co-worker referred to him as a "playing the wetback card," the co-worker denied making the remark and instead accused appellant of following him into the parking lot and starting the fight. This co-worker eventually called the police because he accused appellant of threatening to kill him. No witness corroborated either version of events.
- The Commission noted that "since [appellant] did not exercise his right to request a hearing, there were no credibility determinations made by a neutral fact finder who could observe the demeanor and testimony of [both individuals] and decide who was more credible."

- The Commission also noted that “[appellant] bears the burden to prove, by a preponderance of the evidence, that the offensive acts and comments were made. **When the evidence is at best equipoise, [appellant] fails to meet that burden.** See *Brand v. Dep’t of Agric.*, EEO Appeal No. 0120102187 (Aug. 23, 2012)...” [emphasis added]

C. Appeals

**NEW EVIDENCE WILL NOT BE ACCEPTED ON APPEAL UNLESS
“THE PARTIES AFFIRMATIVELY DEMONSTRATE IT WAS NOT
PREVIOUSLY AVAILABLE DESPITE THE EXERCISE OF DUE
DILIGENCE”**

Lewis v. U.S. Postal Serv., EEOC Appeal No. 0120131266 (July 24, 2013)

Appellant, a City Carrier Technician, filed a formal EEO complaint alleging a hostile work environment based on race, color, gender, disability and reprisal. The agency accepted and investigated the EEO complaint. At the conclusion of the investigation, appellant requested a hearing. An Administrative Judge conducted a hearing and issued a decision. The Administrative Judge concluded, based on credibility observations of appellant versus that of his supervisors, that appellant failed to establish that he was subjected to a hostile work environment as alleged. The agency implemented this decision, and appellant filed an appeal.

On appeal, appellant argued that because the Administrative Judge frequently interrupted appellant, cutting him off and interposing her own questions to each witness, appellant was not permitted to establish that he was a victim of a hostile work environment. Thus, appellant accuses the Administrative Judge of not being fair and impartial. Appellant also presented additional evidence in the form of successful grievances concerning many of the underlying issues that were presented in support of his claim that he was a victim of a hostile work environment.

- The Commission concluded that while the Administrative Judge did frequently interrupt testimony with questions, she did so regardless of whether it was appellant or the agency representative conducting the examination of the witness. Thus, the Commission found insufficient evidence that the Administrative Judge was not fair and impartial.
- The Commission then noted that appellant was attempting to support his argument with additional, new evidence not in the record. In addressing this, the Commission stated that: “[g]enerally, new evidence will not be accepted after the close of the hearing record. EEOC Management Directive 110, Section VI(A)(3). We may accept new evidence, however, only if the parties affirmatively demonstrate it was not previously available despite the exercise of due diligence...”

- Here, the Commission concluded that appellant failed to make such a showing, so the new evidence was not admitted into the appellate record in order to assess the ruling made by the Administrative Judge.

X. REMEDIES

A. Remedies and Compliance with Commission Orders

TO ESTABLISH COMPLIANCE WITH COMMISSION DECISIONS, AN AGENCY MUST PROVIDE SUPPORTING DOCUMENTATION OF HOW AWARDS WERE CALCULATED

Brown v. Dep't of the Navy, EEOC Petition No. 0420120012 (June 5, 2013)

Petitioner, an Equipment Specialist at an agency Naval Air Station during the relevant time, alleged and ultimately prevailed on appeal in his complaint alleging reprisal in 1989 when he was denied a promotion to an Inventory Manager position. In its prior decision, the Commission ordered the agency to retroactively promote Petitioner to the position as of July of 1989 and pay the appropriate amount of back pay, with interest, as well as to provide any other benefits due to Petitioner to make him whole. In 1997, Petitioner voluntarily separated with the agency. The Commission did not issue its finding of reprisal until 2002. Thereafter the parties attempted, unsuccessfully, to reach agreement on a reinstatement of Petitioner. Instead, by mutual agreement, his retirement date was recalculated to be September 3, 2003.

In June of 2004, Petitioner submitted his first petition for enforcement, raising a few different allegations that the agency did not properly calculate monies due him. In that initial decision, the Commission concluded that the back pay calculation should be calculated retroactive to September 10, 1989. The Commission also concluded that law enforcement pay should not be included in a back pay calculation, that the agency did not sufficiently explain its life insurance deductions, and that it also failed to explain its back pay calculations. The agency attempted to enforce the Commission order, but the parties again disputed the appropriate calculations.

Thereafter, Petitioner filed a second petition for enforcement alleging eleven different errors by the agency in calculating all monies due to him to remedy past discrimination and make him whole. The agency then issued a "Final Compliance Report" on December 20, 2007, stating that it fully complied with the Commission's orders.

The Commission reviewed the record and made several observations about the agency's assertion that it fully complied, and Petitioner's claims that it had not.

1. **Back Pay Period** – The agency used the wrong start date (10 days later) and the wrong end date (six weeks earlier than the agreed to retirement date of September 3, 2009). Therefore, its back pay calculation was not correct since it did not account for approximately seven weeks of back pay due to Petitioner.

2. **Leave Accrual** – The agency’s award of over \$38,000 for additional six years of leave between 1997 and 2003 was improper because it did not take into account the proper back pay period (seven week shortage noted in 1. above), and it did not include any documentation demonstrating how the agency reached its calculations. Petitioner asserts that the agency owed him more monies because he accrued additional leave not accounted for. Absent documentation demonstrating how the agency made its calculations, the Commission concluded that the agency failed to comply with this portion of the Commission’s prior order.
3. **Retirement Deductions** – “The Commission has held that make whole relief requires the agency to make retroactive tax-deferred contributions to Petitioner’s retirement account for the relevant period.” Thus, Petitioner’s retirement benefits should be adjusted as part of Petitioner’s back pay award.
4. **Retirement Annuity Deductions** – Petitioner asserted that the retirement annuity deductions were 1% too high due to a law enforcement exception. The agency did not document the record in order to respond to this. The Commission therefore concluded that the agency failed to comply with its prior order.

Petitioner also asserted that the agency deducted too much money from the gross back pay award (\$194,054.79, not \$144,600.47). The only evidence in the record speaking to this question was correspondence from the Office of Personnel Management indicating that Petitioner had received the latter amount in retirement annuity benefits. The agency did not provide evidence in the record supporting its deduction of the former amount. The Commission therefore concluded that the agency improperly deducted \$49,454.32 (the difference) from Petitioner’s gross back pay award and failed to comply with its prior order.
5. **Thrift Savings Plan (TSP) Deductions** – Petitioner alleges that the agency failed to transfer the correct amount of money from his gross back pay award to the TSP when he had requested a maximum deduction. The agency failed to present documentary evidence to explain its calculations. The agency also failed to present documentary evidence to show the amount deducted was in fact transferred into Petitioner’s TSP account. Thus, the Commission concluded that the agency failed to comply with its prior order.
6. **Interim Earnings Deductions** – Petitioner claimed the agency improperly deducted \$6,495.00 as interim earnings. The agency provided no documentation to support its interim earnings deduction so the Commission concluded that the agency failed to comply with its prior order.
7. **VSIP Deduction** – The Commission ruled, contrary to Petitioner’s assertion, that the \$25,000.00 he received as part of his voluntary severance is a form of interim earnings. Therefore, the agency did properly deduct this amount from his gross back pay award.
8. **Life Insurance Deduction** – Petitioner alleged that the agency improperly deducted life insurance premiums for basic life since he waived such coverage in

1997. Based on the documentation in the record, it clearly established such a waiver and the agency improperly deducted basic life insurance when Petitioner had waived coverage. Accordingly, the Commission concluded that the agency improperly deducted monies from Petitioner's gross back pay award and ordered the agency to reimburse Petitioner.

9. **Interest** – Petitioner asserted that the agency did not apply the correct interest to its award. The Commission found that, because the agency improperly failed to pay Petitioner approximately seven weeks of back pay (see 1. above), its interest calculation is also incorrect. Thus, the agency was required to recalculate all interest due to Petitioner after making appropriate adjustments to the gross back pay award consistent with this latest order.
10. **Repayment of Agency's Overpayment** – Petitioner allegedly owed the agency \$194,054.79 and the agency began collecting monthly repayments from Petitioner's annuity payments. The agency subsequently recalculated the overpayment to be \$58,076.32. Petitioner asserts the monthly payment should therefore be reduced. The Commission concluded that, given all the errors in appellant's favor, it is highly unlikely he owes the agency any monies. Therefore, the Commission ordered the agency to suspend its monthly deduction from Petitioner's annuity payments.
11. **Supporting Documentation** – The Commission agreed with Petitioner that the agency failed to provide supporting documentation and therefore failed to comply with the Commission's previous order.

B. Back Pay

**UNCERTAINTIES IN BACK PAY CALCULATIONS SHOULD BE
RESOLVED AGAINST THE AGENCY SINCE THE AGENCY WAS
FOUND TO HAVE ENGAGED IN ACTS OF DISCRIMINATION**

**AN AGENCY MUST PROVIDE A CLEAR AND CONCISE "PLAIN
LANGUAGE" STATEMENT SETTING FORTH THE FORMULAS AND
METHODS IT USED TO CALCULATE BACK PAY**

**AN EMPLOYER'S BACKPAY LIABILITY IS TOLLED WHEN THE
INDIVIDUAL REJECTS AN UNCONDITIONAL OFFER OF
EMPLOYMENT**

*Farrington v. Dep't of Homeland Security (Federal Emergency
Management Agency)*, EEOC Petition No. 0420130004 (July 17, 2013)

Petitioner prevailed on her complaint of discrimination when she was released from her position as a Disaster Assistance Employee. The agency was ordered to reinstate Petitioner, provide back pay, and to also provide a series of additional other remedies not relevant to this summary. Petitioner sought enforcement of the Commission's prior

order and made several allegations of non-compliance. During the pendency of the process, most all allegations were resolved by the agency, and the only disputes that remain pertained to reinstatement and back pay.

As to reinstatement, Petitioner's representative argued that compliance with all other provisions was a prerequisite to making an offer of employment. Petitioner admitted that the agency had made her an offer of deployment, but she did not receive adequate assurances that she would not be assigned to work with those who had previously harassed her so she did not accept the offer to deploy.

- The Commission noted that Petitioner's representative was not correct in arguing that all other remedial relief must first be provided. The Commission also agreed with the agency that it had made an offer of reinstatement which Petitioner refused. Accordingly, back pay liability is tolled when a party rejects an unconditional offer of employment (citing authority).
- The Commission also set forth several principles of law that apply when calculating a back pay award. It then concluded that the record did not contain adequate evidence of the agency's back pay calculations or payments already provided to the Petitioner. The Commission therefore concluded that because the agency did not provide appropriate supporting documentation, it failed to comply with its order.

C. ATTORNEY'S FEES

A REVIEW OF AN AWARD OF ATTORNEY'S FEES WILL ONLY BE MODIFIED FOR MISTAKE OF LAW OR ABUSE OF DISCRETION

THE EQUAL PAY ACT DOES NOT PERMIT ATTORNEY'S FEES AT THE ADMINISTRATIVE LEVEL

AN ATTORNEY IS NOT REQUIRED TO RECORD IN GREAT DETAIL THE MANNER IN WHICH EACH MINUTE OF HIS TIME WAS EXPENDED, BUT S/HE DOES HAVE THE BURDEN OF IDENTIFYING THE SUBJECT MATTERS ON WHICH S/HE SPENT HIS/HER TIME BY SUBMITTING SUFFICIENTLY DETAILED AND CONTEMPORANEOUS TIME RECORDS TO ENSURE THAT THE TIME SPENT WAS ACCURATELY RECORDED

Jacobsen and Taft v. Dep't of the Navy, EEOC Appeal Nos. 0720100046 & 0047 (Sept. 7, 2012)

Appellants alleged they were issued inaccurate performance appraisals, did not receive compensation awards, and were subjected to sex-based wage discrimination in violation of the Equal Pay Act (EPA) and Title VII. Both had prior appeals from an AJ's finding of no discrimination in separate adjudications. In EEOC Appeal Nos.

0120052957 and 0120053131, the appellate decisions remanded both matters to an AJ to determine whether the Agency possessed a valid defense to Appellants' EPA claims of sex-based wage discrimination. On remand, the AJ conducted a single hearing and concluded that the Agency discriminated against both because the agency was unable to present a valid defense. The Agency implemented the AJ's findings as to liability and no dispute on this question was appealed.

However, on the matter of attorney's fees, Appellants, who were represented by the same attorney, submitted a fee petition that requested nearly \$700,000 in attorney's fees and costs on behalf of one, and nearly \$480,000 in attorney's fees and costs on behalf of the other. After reviewing the fee petition and response by the agency, the AJ applied across-the-board deductions of approximately 40% of the total fee petition for each appellant, and ultimately awarded more than \$420,000 on behalf of one appellant and almost \$300,000 on behalf of the other. In its final order, and as noted above, the agency accepted the finding of discrimination but rejected the AJ's award of attorney's fees.

On appeal, the Agency argued that because the Equal Pay Act does not provide for an award of attorney's fees at the administrative level, and because there were numerous instances of over billing and exaggerated hours, the fee award was arbitrary and capricious. In commencing its review of the fee petitions, the Commission first cited to guiding language in its Management Directive 110, noting that:

- [w]e review fee awards deferentially, according substantial respect to the trial court's informed discretion. *See Brewster v. Dukakis*, 3 F.3d 488, 492 (1st Cir. 1993). We will disturb such an award only for mistake of law or abuse of discretion. *See United States v. Metropolitan Dist. Comm'n*, 847 F.2d 12, 14 (1st Cir. 1988). In this regard, an abuse of discretion occurs "when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed, but the court makes a serious mistake in weighing them." *Foster v. Mvdas Assocs., Inc.*, 943 F.2d 139, 143 (1st Cir. 1991).
- The Commission did not review the hourly rate claimed (\$465) as neither party disputed this figure which was derived from the Laffey Matrix utilized in this region of the country.
- The Commission recognized that the Equal Pay Act does not provide for an award of attorney's fees in the administrative process, but concluded that the AJ did not abuse her discretion when deducting 10% from the total fee award. The Commission, however, noted that the record showed several examples of briefs and other work that was uniquely related to the Equal Pay Act (as opposed to intertwined with the Title VII sex based wage claim issues) and thus it "exercised its own discretion" to reduce the total fee award an additional 10%.
- Regarding the agency's allegations of duplicative and excessive billing, the Commission reviewed at length the fee petition and concluded that the AJ did not

abuse her discretion by making across the board deductions instead of engaging in a line by line analysis.

- The Commission also found no abuse of discretion in any of the other reductions made by the AJ to the fee award, concluding that such reductions were all reasonable and/or “within an appropriate range under the circumstances.”
- Based on all the reductions, the ultimate fee award for Appellant one was: \$368,388.81 in fees, \$12,840.52 in costs; and for Appellant two it was: \$259,451.17 in fees, \$8,436.04 in costs.

XI. GENETIC INFORMATION NON-DISCRIMINATION ACT OF 2008 (GINA)

A. Stating a Claim

ALLEGATIONS DEVOID OF FACTS REGARDING GENETIC TESTS, THE GENETIC TESTS OF FAMILY MEMBERS, OR FAMILY MEDICAL HISTORY WILL FAIL TO STATE A COGNIZABLE CLAIM UNDER GINA

Long v. Dep’t of Def. (Army and Air Force Exchange Service), EEOC Appeal No. 0120113789 (Jan 13, 2013)

Appellant worked at the agency’s Helpdesk Support Office in Dallas, Texas. He filed an EEO complaint alleging, among other things, violations of GINA. The agency accepted and investigated his EEO complaint and appellant requested a hearing. Over the appellant’s objection, the AJ granted summary judgment for the agency. In the relevant portion of the Administrative Judge’s summary judgment decision, the Administrative Judge found no allegation that GINA was violated and therefore dismissed this allegation for failing to state a claim. The agency implemented the Administrative Judge’s decision and Appellant filed an appeal. On appeal, concerning the GINA allegation, the Commission affirmed the decision of the Administrative Judge to dismiss the GINA allegation. In so doing, the Commission stated:

- “Title II of the Genetic Information Non-Discrimination Act of 2008 (GINA) prohibits employers from discriminating against any employee because of genetic information with respect to the employee. 29 C.F.R. § 1635.1. Genetic information means information about (i) an individual's genetic tests; (ii) the genetic tests of that individual's family members; and (iii) the manifestation of a disease or disorder in family members of such individual (family medical history). 29 C.F.R. § 1635.3(c). [Appellant’s] complaint is devoid of any allegations or facts regarding genetic tests, the genetic tests of his family members, or his family medical history. As a result, the Commission finds that the AJ's dismissal was proper.”

2012 EXCEL CONFERENCE

July 31 – August 2, 2012

Dallas, TX

EEOC CASE UPDATE

I. Procedural Decisions

A. Commission Jurisdiction Generally

AGENCY DUTY TO ISSUE A FINAL AGENCY DECISION MAY BE ENFORCED THROUGH COMMISSION'S APPELLATE PROCESS

Jones v. Dep't of Veterans Affairs, EEOC Appeal No. 0120120758 (May 18, 2012)

After Appellant withdrew her request for a hearing, the Administrative Judge (AJ) ordered the Agency to issue a Final Agency Decision (FAD) in the AJ's Order of Dismissal. After six months, when the Agency had still failed to issue a FAD, Appellant filed an appeal with the EEOC's Office of Federal Operations (OFO). The Agency argued that the appeal was premature since it had not issued a FAD, and noted that it was conducting a supplemental investigation.

- The Commission asserted jurisdiction even though no FAD had been issued and observed that the Agency already had nearly one year to complete its investigation. The Commission therefore ordered the Agency to issue a FAD within 45 days.

B. Timeliness Issues

A COMMISSION RULING ON TIMELINESS RENDERED AT THE ADMINISTRATIVE LEVEL IS BINDING ON AN AGENCY IN A SUBSEQUENT FEDERAL DISTRICT COURT PROCEEDING IF THE AGENCY FAILS TO CHALLENGE THE RULING DURING THE ADMINISTRATIVE PROCESS

Ramirez v. Secretary, Department of Transportation, No. 10-15086, (11th Cir.), July 12, 2012

Appellant filed a formal administrative EEO complaint which the Agency dismissed for untimely counselor contact. On appeal, the Commission reversed and remanded the claim for processing, noting that there was nothing in the record to demonstrate that Appellant knew or should have known about the time limits to contact an EEO

counselor. See *Ramirez v. Dep't of Transportation*, EEOC Appeal No. 01A41793 (June 9, 2004). The Agency did not seek reconsideration. After a hearing, an AJ found no discrimination which was affirmed on appeal and on reconsideration (citations omitted). Thereafter, Appellant filed a civil action in Federal District Court. The Agency moved for summary judgment and argued that Appellant untimely sought EEO counselor contact. The District Court granted the Agency's motion and dismissed the non-selection claim based on the District Court Judge's conclusion that Appellant did not timely seek EEO counseling in 2001.

- The Eleventh Circuit reversed and remanded the District Court decision, noting that: "a governmental agency defendant may not have 'a second bite at the apple' by arguing lack of timely filing in federal court after failing to challenge an EEOC determination that the complaint was timely filed... [and that] following a pre-investigation agency determination that a discrimination claim is untimely, an un-appealed final EEOC determination ruling the filing timely is binding on the parties and the court in a later-related Title VII action." The Eleventh Circuit cited to decisions in the 2nd, 5th, and 9th Circuits reaching the same conclusion.

COMMENCEMENT OF A CLASS ACTION SUSPENDS APPLICABLE TIME LIMITS TO CLASS MEMBERS WHO WOULD HAVE BEEN PARTIES HAD THE CLASS BEEN CERTIFIED

Macer-Pinder v. Social Security Admin., EEOC Appeal No. 0120103581 (May 24, 2012)

Appellant filed a claim of discrimination alleging race, sex, disability, age and reprisal. The Agency issued a letter of partial acceptance and partial dismissal, in which it dismissed the second claim for untimely EEO counselor contact. Appellant's first claim was adjudicated by an AJ, who issued a decision granting summary judgment (SJ) to the Agency. Appellant never challenged the partial dismissal with the AJ, but argued on appeal that the second claim should have been subsumed in a pending Class Action.

- The Commission affirmed the Agency's dismissal of claim two on the bases of age, disability and reprisal. The Commission then noted that Appellant's claim of race and sex discrimination in claim two falls squarely within the definition of a pending Class Action. The Commission has long held that such identical claims should not be processed, but should be held in abeyance pending a ruling on the Class complaint. Therefore, the Commission reversed and remanded that portion of claim two alleging race & sex discrimination to the Agency as subsumed within the Class complaint.

IGNORANCE OF THE LAW IS NOT A VALID REASON TO GRANT A WAIVER OF FILING DEADLINES

Cooley v. Dep't of Homeland Security, EEOC Appeal No. 0120102212 (May 24, 2012)

After pursuing her termination claim through the MSPB, Appellant contacted an EEO counselor and filed a Class complaint. After the AJ retained jurisdiction, the AJ dismissed the Class complaint, among other reasons, for untimely counselor contact. On appeal, Appellant argued that she was not aware that she was waiving her right to file a claim in the EEO process when she filed her MSPB petition.

- The Commission affirmed the dismissal for untimely counselor contact, noting that it has concluded on prior occasions that ignorance of the law is not a sufficient reason to waive procedural requirements set forth in 29 C.F.R. Part 1614 (citations omitted).

FAILURE TO INCLUDE APPLICABLE TIME LIMITS FOR APPEALS AND LAWSUITS IN A FINAL AGENCY DECISION (FAD) PRECLUDES AN AGENCY FROM LATER ESTABLISHING THAT AN APPEAL IS UNTIMELY

Carter v. Social Sec. Admin., EEOC Appeal No. 0120102121 (March 8, 2012)

In this case, among other rulings, the Commission noted that EEOC Regulation 29 C.F.R. Section 1614.110(b) provides, in relevant part, that the final decision must contain notice of the right of appeal to the Commission, and the applicable time limits for appeals and lawsuits. The Agency argued that Appellant's appeal was untimely. However, the Commission noted (among other rulings not discussed in this summary) that the Agency decision in this case did not contain the requisite timeframes to file an appeal. Therefore, since the Agency did not comply with Section 1614.110(b), the time limit to submit an appeal would be suspended and the Agency would be unable to successfully establish that the appeal is untimely.

C. Framing and/or Stating a Claim

CLAIMS ALLEGING JOB MISCLASSIFICATION RESULTING IN LOWER PAY FALL WITHIN THE RUBRIC OF THE LILLY LEDBETTER FAIR PAY ACT AND SHOULD NOT BE DISMISSED FOR UNTIMELY COUNSELOR CONTACT IF COUNSELING OCCURRED WITHIN 45 DAYS OF RECEIPT OF A PAY CHECK

McKinney v. U.S. Postal Serv., EEOC Appeal No. 0120111817 (March 29, 2012)

Appellant filed a formal complaint. The Agency set forth five claims and dismissed all for untimely counselor contact. The Commission agreed that the first four claims were untimely. The Commission disagreed with the Agency conclusion regarding the fifth claim.

- The Commission concluded that the Agency improperly framed Appellant's fifth claim. The claim should have been framed as a claim that Appellant's position was classified in a discriminatory manner, resulting in him receiving less pay. Pursuant to the Lilly Ledbetter Fair Pay Act of 2009, such claims are timely when Appellant contacted an EEO counselor within 45 days of receiving a paycheck.

ROUTE ADJUSTMENTS CONSTITUTE A HARM OR LOSS WITH RESPECT TO A TERM, CONDITION, OR PRIVILEGE OF EMPLOYMENT

Greenstein v. U.S. Postal Serv., EEOC Request No. 0520110467 (Nov. 14, 2011)

Appellant alleged disability discrimination after the Agency substituted his curbside driving routes with park and loop routes that required him to lift and carry up to 35 pounds of mail on his shoulder. As a result of the change in routes, Appellant was injured on the job. The Agency dismissed Appellant's EEO complaint for failure to state a claim and the initial Commission decision affirmed the Agency's dismissal.

- The Commission granted reconsideration of its previous decision and reversed and remanded the complaint for processing. In so doing, the Commission noted that route adjustments which change the physical demands of the job aggrieved Appellant.

D. Amendments and Timeliness

AN AGENCY MAY DENY A CLAIM FOR UNTIMELY COUNSELOR CONTACT BASED ON THE TIME THAT ELAPSED BETWEEN THE DATE OF THE ALLEGED DISCRIMINATION AND THE DATE APPELLANT FILED A MOTION TO AMEND

King v. Dep't of Veterans Affairs, EEOC Request No. 0520120016 (May 30, 2012)

After an AJ denied Appellant's Motion to Amend as not like or related to the claim pending before the AJ, Appellant sought EEO counseling and filed a formal complaint. The Agency dismissed the claim after it concluded that more than 45 days had elapsed between the date of the alleged discrimination and the date Appellant filed a Motion to Amend before the AJ. The Commission initially remanded the matter to the Agency because it believed there was insufficient evidence in the record to determine whether or not EEO counselor contact was or was not timely.

- In granting reconsideration, the Commission affirmed the Agency's dismissal based on the Agency's proper calculation of dates and relevant deadlines.

- The Commission recognized that the Agency properly treated the date of EEO counselor contact as the date Appellant filed the Motion to Amend with the AJ (and not the date that he or she later contacts an EEO counselor after an AJ denies the motion).

E. Summary Judgment

MERE ALLEGATIONS, SPECULATIONS, AND CONCLUSORY STATEMENTS ARE, WITHOUT MORE, INSUFFICIENT TO CREATE A GENUINE ISSUE OF MATERIAL FACT

Lee v. Dep't of Homeland Security, EEOC Appeal No. 0520110581 (Jan. 12, 2012)

Appellant sought reconsideration of a prior Commission decision that affirmed an Agency Final Order which implemented an AJ's decision to grant summary judgment to the Agency. Appellant argued that the Commission misconstrued material facts.

- The Commission denied reconsideration of its prior decision. In so doing, the Commission noted that "... mere allegations, speculations, and conclusory statements are insufficient to create a genuine issue of material fact" (citations omitted).

FAILURE BY AN AGENCY TO DEVELOP A RECORD WHICH SETS FORTH SPECIFIC, CLEAR, AND INDIVIDUALIZED EXPLANATIONS FOR ITS ACTION(S) PERMITS A FACT FINDER TO CONCLUDE THAT IT FAILED TO MEET ITS BURDEN TO PRODUCE A LEGITIMATE, NON-DISCRIMINATORY REASON

Stewart v. Dep't of Homeland Security, EEOC Request No. 0520070124 (Nov. 14, 2011)

Appellant alleged discrimination when he was not selected for a position, and after he requested a hearing, the AJ ordered the Agency to conduct a supplemental investigation because the record was not fully developed. In this case, the alleged discrimination took place at the rating and ranking process and the record did not contain affidavits from the individuals who rated the applicants. The record was also missing other documents as well as statements from two co-workers that Appellant believed had relevant information.

The Agency completed and submitted a supplemental investigation and the AJ issued a Notice of Intent to Issue a Decision Without a Hearing. The AJ then issued a decision before receiving Appellant's submission. The AJ concluded that the Agency articulated

a legitimate, nondiscriminatory reason for the non-selection when it established that the seven selectees had higher scores and that Appellant's lower score did not allow him to be among the best qualified candidates.

The Commission initially affirmed the Agency's Final Order which implemented the AJ decision to grant SJ to the Agency. The Commission granted reconsideration of its prior decision and made several observations in reversing its prior decision.

- The Commission found that the AJ erred by not considering Appellant's Motion to Amend, and further, by issuing a decision granting SJ before the deadline for Appellant to submit a response. The failure to address the Motion to Amend amounted to harmless error, as the Commission reviewed and denied Appellant's motion.
- The Commission noted that not only did the AJs premature decision compound the Agency's original inadequate investigation, but that the Commission's own decision caused further harm by ratifying these errors. Thus, the Commission was granting reconsideration to rectify these errors.
- The Commission then concluded that even the Agency's supplemental investigation, contrary to the AJs conclusion, was inadequate. The Commission noted that the Agency did not explain why the seven applicants received higher scores, and Appellant received a lower score such that he was not on the best qualified list. Although the Agency did produce tables showing the scores given to each candidate, there is no reasoning or justification for each score given to the candidate by the panelists.
- The Commission noted that "... an Agency's burden of production is not onerous; the agency must nevertheless provide a specific, clear and individualized explanation for a non-selection so that the complainant is provided with an opportunity to prove that the agency's explanation was a pretext for discriminatory animus."
- In this case, the Commission noted that the Agency provided information about the general mechanics of the selection process, but failed to provide an individualized explanation for Appellant's score.
- The Commission then noted that "[w]e have held that an agency fails to articulate a legitimate, non-discriminatory reason when it fails to provide specific information to explain why agency officials assigned their respective ratings or scores to a complainant."
- The Commission noted that such a conclusion does not mean that scores cannot be used during a selection process. Scores, however, are subjective, and because subjective reasoning can be a pretext, an employer can only

satisfy its burden of production in such cases by articulating a clear and reasonably specific basis for the scores.

KNOWLEDGE OF A COMPLAINANT'S PROTECTED CLASS IS A PREREQUISITE TO PROVE DISCRIMINATION IN A DISPARATE TREATMENT CLAIM

INTERIM RELIEF ONLY APPLIES IN CASES INVOLVING A REMOVAL, SEPARATION, OR SUSPENSION CONTINUING BEYOND THE DATE OF THE APPEAL IN A SITUATION WHERE THE AJ ORDERS RETROACTIVE RESTORATION OF THE EMPLOYEE

Hobson v. Dep't of Veterans Affairs, EEOC Appeal No. 0720110027 (June 11, 2012)

Complainant, an applicant for employment at an Agency facility, alleged race, sex, and disability discrimination when he was not selected for a housekeeping aid or food service worker position. After discovery closed, both parties filed Motions for Summary Judgment and responses. In the Agency's Motion, it provided affidavits from the individuals involved in the selection process noting that because Complainant was an applicant, they had no independent knowledge of his race and such information was not contained in any application materials submitted for Agency review. Notwithstanding this argument, the AJ granted judgment in favor of Complainant on his race claims (not gender or disability), noting that the burden to establish a *prima facie* claim is not onerous and Complainant produced evidence that he was not selected in favor of candidates who were a different race. The AJ further ordered the Agency to comply with the applicable regulation, 29 C.F.R. Section 1614.505, and provide interim relief to Complainant if the Agency appealed the decision finding race discrimination. The Agency did not implement the AJ decision and appealed to the Commission.

- The Commission concluded that the AJ made an error of law when the AJ concluded that race discrimination could be proven regardless of whether or not the officials involved in failing to hire Complainant were aware of his race. Since Complainant is alleging disparate treatment, the ultimate factual issue is whether or not the Agency intentionally discriminated against him. (citations omitted).
- The Commission noted that if Complainant cannot establish that a selecting official was aware of his race, a fortiori, he cannot succeed in proving intentional race discrimination by the Agency.
- As there was no evidence in the record that those involved in the selection decision were aware of his race, the AJ improperly granted summary judgment in favor of Complainant.

- The Commission also discussed its interim relief regulation found at 29 C.F.R. Section 1614.505. In so doing, the Commission highlighted when interim relief would be appropriate, and noted that in a failure to hire situation, interim relief did not apply.

F. Independent Contractor / Employee

THE COMMISSION EMPLOYS THE COMMON LAW OF AGENCY TEST TO DETERMINE IF A WORKER IS AN EMPLOYEE OF AN AGENCY

Kereem v. Dep't of State, EEOC Request No. 0520110069 (April 26, 2012)

- The Commission reaffirmed its prior rulings that the “common law of agency” test is the appropriate method to determine whether or not a worker is an employee of a Federal agency.
- The Commission analyzes all the factors noted above with a particular emphasis on the extent to which an employer retains control over the worker's position.

G. Mixed Cases

EMPLOYEES MUST HAVE STANDING IN ORDER TO APPEAL ADVERSE ACTIONS TO THE MERIT SYSTEMS PROTECTION BOARD (MSPB)

Searles v. Dep't of Homeland Security, EEOC Request No. 0520120078 (April 5, 2012)

After an AJ dismissed a hearing request on a termination claim believing that the claim was a mixed case complaint, the Agency issued a FAD finding no discrimination without addressing any argument that the claim was mixed. On appeal, the Commission first concluded that Appellant’s termination claim should have been processed as a mixed case complaint. The Agency sought reconsideration.

- The Commission granted reconsideration and noted that in addition to determining if an action is appealable to the MSPB, a fact finder must also determine if the individual bringing the claim has standing to file a mixed case. In this case, Appellant had previously encumbered a position which, by operation of law, was excluded from having access to MSPB processes. Accordingly, the Commission concluded that both the AJ and the prior Commission decision erred.

H. Settlements

AN AGENCY FAILURE TO INCLUDE RELEVANT OLDER WORKER BENEFIT PROTECTION ACT (OWBPA) LANGUAGE VOIDS A SETTLEMENT AGREEMENT AS TO CLAIMS OF AGE DISCRIMINATION

AN AGENCY MUST AMEND A CLAIM TO INCLUDE LIKE OR RELATED CLAIMS DURING PROCESSING OF AN EEO COMPLAINT

Sheehy v. National Security Agency, EEOC Request No. 0520100403
(Feb. 27, 2012)

Appellant filed a formal complaint of discrimination alleging gender and disability discrimination, as well as reprisal. Throughout the processing of the complaint at the Agency level, Appellant sought to include age as a basis of discrimination. The Agency took no action to acknowledge Appellant's request. After Appellant requested a hearing, the parties entered into a settlement agreement to resolve all claims. The settlement agreement did not list the Age Discrimination in Employment Act (ADEA) as among the claims that Appellant agreed to resolve.

Thereafter, Appellant alleged that the Agency breached the agreement. The Agency disagreed. On appeal to the Commission, Appellant argued that the agreement should be voided because it did not comply with the Older Workers Benefit Protection Act (OWBPA). Initially, the Commission concluded that Appellant did not include age as a basis, but that the Agency breached the settlement agreement. A series of subsequent decisions by the Commission addressed the Agency's compliance with the Commission's initial decision finding a breach. Ultimately, the Commission, exercising its own discretion, issued a Decision on Reconsideration.

- The Commission first concluded that it erred in its initial conclusion that Appellant did not allege age as a basis. The Commission, in citing to relevant regulations and the Commission's Management Directive 110, explained that an Agency must amend an EEO complaint to include a like or related claim that is raised while the complaint is pending. The Commission concluded that the Agency failed to do so. Therefore, the Commission amended the claim to include a claim of age discrimination.
- The Commission then, in citing to the OWBPA and Commission precedent, listed the six requirements under the OWBPA for a knowing and voluntary waiver of age discrimination claims under the ADEA.
- The Commission then concluded that because the settlement agreement did not reference the ADEA in the now amended claim, the agreement

violated the OWBPA's waiver requirements. Thus, the Commission voided the settlement agreement as it pertained to Appellant's claims of age discrimination. The settlement agreement, however, was not defective with regard to Appellant's waiver of the Title VII and Rehabilitation Act claims. Thus, the Commission concluded that the agreement remains in effect with respect to those claims.

- The age claims were remanded back to the appropriate EEOC hearings unit for processing. In so doing, the Commission noted that if Appellant prevails in the age claims, the Agency can seek to reduce the award based on her receipt of benefits under the settlement agreement.
- The Commission "reminded" the parties that Appellant cannot recover compensatory damages or attorney's fees and costs under the ADEA.

IN BACK PAY CASES, AN AGENCY SHALL PROVIDE DETAILED DOCUMENTATION REGARDING BACK PAY CALCULATIONS, A DETAILED STATEMENT EXPLAINING HOW THE BACK PAY AWARD WAS CALCULATED, AND PROOF THAT PAYMENT WAS MADE

BACK PAY INFORMATION SHALL BE SHARED WITH COMPLAINANT SO HE OR SHE CAN QUESTION OR REBUT SUCH CALCULATIONS

COMMISSION HAS DISCRETION TO REINSTATE THE PRIOR EEO COMPLAINT OR REQUIRE SPECIFIC ENFORCEMENT OF THE SETTLEMENT AGREEMENT

Lopez v. Equal Empl. Opp. Commission, EEOC Appeal No. 0120111611 (March 7, 2012)

Appellant and the Agency entered into a settlement agreement where the Agency agreed to provide Appellant a two-step increase effective October 1, 2010. The Agency thereafter implemented it effective October 10, 2010, the date a new pay period commenced. Appellant objected, and the Agency claimed to have corrected the error. Appellant then sought Commission review of the Agency's decision denying a breach had occurred.

- The Commission noted that the Agency asserted that it had corrected the error. While the record contained evidence of communications within the Agency approving the change of the effective date, the Agency did not produce a new SF-50 demonstrating a corrected effective date for the two-step increase.

- The Commission noted that the best evidence of compliance in this case would be a corrected SF-50, since that matter at issue concerns an incorrect effective date on the original SF-50. Absent any explanation from the Agency as to why it did not produce a corrected SF-50, the Commission concluded that the Agency breached the agreement.
- Complainant sought reinstatement of her EEO complaint. However, the Commission rejected this request and instead determined that the most appropriate action to remedy this breach was to order specific enforcement of the settlement agreement.

SETTLEMENT AGREEMENTS MAY ONLY RESOLVE CLAIMS ARISING FROM DISCRIMINATORY ACTS OR PRACTICES WHICH OCCURRED BEFORE THE EXECUTION OF THE AGREEMENT

Bartlett v. Dep't of the Air Force, EEOC Request No. 0520110430 (Apr. 9, 2012)

Appellant filed an EEO complaint when she learned that a male employee had been placed into a newly developed GS-11 position at the Agency in 2009. The Agency dismissed the EEO complaint because it believed that its settlement of a prior EEO complaint in 2006 involving the prospect of a GS-11 position through the assignment of duties covered the issue related to the 2009 creation and placement of another individual into this GS-11 position. The Commission's initial decision affirmed the Agency's dismissal, and Appellant sought reconsideration.

- The Commission granted reconsideration and noted that the allegations concerned actions that occurred after the parties entered into a settlement agreement. Specifically, Appellant was alleging that she was receiving less pay than a similarly situated male hired in 2009 to perform similar work. Accordingly, the new claim is not covered by the 2006 settlement agreement and the Commission's first decision erred as a matter of law.

PROMISING TO TREAT AN EMPLOYEE WITH RESPECT AND DIGNITY IS NOT VALID CONSIDERATION FOR WITHDRAWING AN EEO COMPLAINT

Juarez, Jr. v. U.S. Postal Serv., EEOC Appeal No. 0120092462 (Aug. 5, 2011)

Appellant agreed to withdraw his EEO complaint based on an Agency agreement to treat him with respect and dignity in the workplace and not to single him out. Appellant subsequently accused the Agency of breaching the agreement. The Agency disagreed. The Commission first concluded that it could not ascertain if a breach occurred because

the record did not contain the settlement agreement at issue. It therefore remanded the matter to the Agency to conduct a supplemental investigation. The Agency obtained additional information from Appellant clarifying his allegations, as well as statements from the supervisors who allegedly breached the agreement. The Agency then issued a second determination that it did not breach the agreement, which Appellant appealed.

- The Commission noted that agreements which lack valid consideration are not enforceable, and that a valid contract only exists when one party obtains a right, interest, profit or benefit, and the other party bears a loss, forbearance, detriment or responsibility. Absent such an agreement, the entire transaction is void for lack of consideration.
- In this case, an agreement requiring the Agency to treat Appellant with respect and dignity and to not single him out does not provide Appellant with anything more than that to which he is already entitled to under the law. Therefore, the settlement agreement is void and the Commission ordered that Appellant's original EEO complaint reinstated for processing.

PROMISING TO ENGAGE IN A REASONABLE ACCOMMODATION PROCESS IS NOT VALID CONSIDERATION FOR WITHDRAWING AN EEO COMPLAINT

Hawkins v. U.S. Postal Serv., EEOC Appeal No. 0120120966 (Apr. 20, 2012)

Appellant agreed to withdraw her EEO complaint as long as the Agency agreed to refer her case to the District Reasonable Accommodation Committee (DRAC). As part of the agreement, the DRAC agreed to undertake its "normal process" to request medical and other appropriate information in order to determine whether reasonable accommodation is warranted. The Agency also agreed that its attorney would advise DRAC regarding the reasonable accommodation process. Appellant alleged that the Agency breached the settlement agreement by placing her in a part-time, not a full-time position. The Agency ruled otherwise and Appellant sought review by the Commission.

- The Commission concluded that the Agency DRAC is required under the Rehabilitation Act to take the actions it agreed to undertake in the settlement agreement. The added language regarding involvement by an attorney did not constitute valid consideration.
- The settlement agreement was voided and the EEO complaint reinstated for processing.

II. Sanctions Decisions

AN INVESTIGATION IS ONLY “COMPLETE” IF AN AGENCY SUCCESSFULLY PERFORMS SEVERAL ACTIONS INCLUDING PROVIDING A COPY TO COMPLAINANT

AN AGENCY MAY NOT UNILATERALLY DENY AN AJ’S INHERENT POWER TO DETERMINE HIS OR HER JURISDICTION

IN DEFAULT JUDGMENT CASES, A FACT FINDER MUST DETERMINE IF THERE IS SUFFICIENT EVIDENCE TO SATISFY THE COURT THAT WOULD ESTABLISH APPELLANT’S RIGHT TO RELIEF.

AN AJ DID NOT ABUSE HIS DISCRETION TO AWARD APPELLANT ATTORNEY’S FEES AS A SANCTION IN AN ADEA DEFAULT JUDGMENT CASE

Adkins v. Federal Deposit Insurance Corp., EEOC Appeal No. 0720080052 (Jan. 13, 2012)

In this case, with a complex procedural history, Appellant did not receive a copy of his investigation for more than two years, so he requested a hearing. When the AJ attempted to assert jurisdiction, the Agency disregarded the AJs Orders under the theory that the AJ did not have jurisdiction because the case was allegedly mixed. As such, the Agency attempted to issue a mixed case FAD before the AJ could issue rulings concerning the AJs jurisdiction. The AJ granted default judgment to Appellant because the Agency did not comply with the AJ’s orders. The Agency did not implement the AJ default judgment decision and appealed to the Commission.

- The Commission noted that it has the inherent power to protect the integrity of the EEO process. In so doing, it affirmed the AJs sanction of default judgment. In so doing, the Commission noted that an agency is entrusted with the responsibility of developing impartial and appropriate factual records and timely providing them to opposing parties. The public’s confidence in the integrity and soundness of the EEO process erodes where agencies fail to abide by such basic and fundamental duties.
- The Commission also observed that the Agency did not have good cause for the delays in the investigation or the lack of action by the Agency. The Commission did not find persuasive any of the

Agency's arguments pertaining to mixed cases or class complaints (not summarized in this update).

- The Commission further noted that once Complainant requested a hearing, the Agency no longer has jurisdiction to deny the AJ's inherent power to determine whether or not the AJ has jurisdiction. As such, the Agency should have filed a Motion to Dismiss and, if denied, challenge the AJ's ruling on appeal.
- The Commission noted that in default judgment cases, the AJ must still determine if there is evidence that would satisfy a court that Appellant would be entitled to relief, and that one method to do so is for Appellant to establish a *prima facie* claim of discrimination. The AJ properly found that Appellant established a *prima facie* non-selection claim on the basis of his age.
- The Commission then noted that although Appellant would not be entitled to attorney's fees in a pure Age claim, the AJ in this case awarded fees as a sanction. Since the accepted claim included, in part, a Title VII claim, the Commission concluded that the AJ did not abuse his discretion in awarding fees as a sanction.

APPELLATE ADVERSE INFERENCE SANCTION, WHICH RESULTED IN FINDING OF REPRISAL, WAS JUSTIFIED AFTER THE AGENCY REFUSED TO COMPLY WITH AN OFO ORDER TO SUPPLEMENT THE APPELLATE RECORD WITH COMPARATOR INFORMATION

Smith v. Dep't of Transportation, EEOC Petition No. 0320080085 (March 21, 2012)

Petitioner filed a non-selection claim and thereafter provided documentation to the EEO investigator and his attorney in support of his claim. The Agency suspended Petitioner 30 days, having charged him with four violations based on unauthorized disclosure/use of government information, and other similar violations related to privacy and the sharing of government data/information. Petitioner filed a mixed case appeal stemming from the 30-day suspension. The MSPB AJ found reprisal in all four charges. The Agency appealed. The full board reversed the finding of reprisal as to the first three charges. Petitioner appealed to the Commission. In its first decision, the Commission concluded that Petitioner established a *prima facie* reprisal claim, and further, that the Agency articulated legitimate, nondiscriminatory reasons for the 30-day suspension. However, the Commission remanded the matter back to the Agency in order to allow the Agency an opportunity to provide comparator information about what kinds of employees have been disciplined for the same or similar violations of the applicable standard of conduct. The Agency provided a copy of the relevant standard of conduct,

but the only information produced in the record demonstrated that the few people disciplined for violating the particular provision had all engaged in protected EEO activity.

- The Commission noted that the Agency asserted, without providing any documentary evidence, that others who had not engaged in prior EEO activity were also disciplined for violating the same rule.
- The Commission then noted that the Agency failed to comply with its “explicit” order to produce comparator information and drew an adverse inference that the information which would have been produced would have shown that others disciplined had also engaged in EEO activity.
- The Commission noted that the evidence in the record suggests that the Agency considered the disclosure of documents to Petitioner’s attorney, in the process of investigating an EEO complaint, to be unauthorized.
- Absent evidence that others who had not engaged in EEO activity were also disciplined, the Commission concluded that such discipline was retaliatory.

III. Title VII Decisions

INTENTIONAL DISCRIMINATION AGAINST A TRANSGENDERED INDIVIDUAL IS COGNIZABLE AS A FORM OF SEX DISCRIMINATION UNDER TITLE VII

Macy v. Dep’t of Justice, EEOC Appeal No. 0120120821 (April 20, 2012)

Appellant, a transgendered woman, applied for transfer to a different position (as a male employee) in another state and was informed that the position was hers pending completion of a background check. After she informed the background investigator that she was in the process of transitioning to a female, the Agency stated that due to budgetary reasons, the position was no longer available. Appellant subsequently learned that another individual was placed into the position notwithstanding the fact that she was told that the position was not being filled for budgetary reasons. Appellant filed a formal complaint of sex discrimination based on gender, gender identify and sex stereotyping. The Agency accepted the complaint, and in so doing, noted that her claim of gender identity stereotyping cannot be processed at the EEOC and will instead be processed in the Department of Justice’s internal process.

Appellant disagreed with the Agency and in a letter to the Commission, argued that the Agency was creating a *de-facto* dismissal of her gender identity sex stereotyping claim

before the EEOC. The Agency argued that the appeal was premature since it had accepted a Title VII sex discrimination complaint. Appellant subsequently withdrew her complaint of sex discrimination, leaving only a complaint of sex stereotyping gender identity discrimination claim.

- The Commission accepted the appeal for adjudication in order to resolve confusion over this recurring legal issue. The Commission then conducted a lengthy legal analysis of court decisions, pointing out that gender encompasses not only a person’s biological sex, but also the cultural and social aspect associated with masculinity and femininity.
- The Commission further noted that failing to conform to gender-based expectations violations Title VII, as the Supreme Court had concluded in *Price Waterhouse* (full citation omitted).
- The Commission recognized a “steady stream” of court decisions recognizing that discrimination against transgender individuals on the basis of sex stereotyping constitutes discrimination on the basis of sex.
- The Commission noted that a transgender person who experienced discrimination may establish a *prima facie* disparate treatment claim through any number of different formulations, but that such formulations are not different claims of discrimination that should be separated out and investigated in different systems.
- Accordingly, the Commission concluded that “...intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination “based on ... sex” and such discrimination therefore violates Title VII.”

**EMPLOYMENT DECISIONS THAT DISCRIMINATE AGAINST
WORKERS WITH CAREGIVING RESPONSIBILITIES ARE PROHIBITED
BY TITLE VII IF THEY ARE BASED ON SEX OR ANOTHER
PROTECTED CHARACTERISTIC**

**THERE ARE MANY WAYS TO RAISE A CLAIM OF SEX-BASED
DISPARATE TREATMENT OF FEMALE CAREGIVERS, INCLUDING
ALLEGING THAT MALE WORKERS WITH CAREGIVING
RESPONSIBILITIES RECEIVED MORE FAVORABLE TREATMENT
THAN FEMALE WORKERS WITH CAREGIVING RESPONSIBILITIES;**

**OR THAT DECISIONMAKERS OR OTHER OFFICIALS MADE
COMMENTS EVINCING SEX-BASED STEREOTYPICAL VIEWS OF
WORKING MOTHERS OR OTHER FEMALE CAREGIVERS**

**TITLE VII DOES NOT PERMIT EMPLOYERS TO TREAT FEMALE
WORKERS LESS FAVORABLY MERELY ON THE GENDER-BASED
ASSUMPTION THAT A PARTICULAR FEMALE WORKER WILL
ASSUME CARETAKING RESPONSIBILITIES OR THAT A FEMALE
WORKER'S CARETAKING RESPONSIBILITIES WILL INTERFERE
WITH HER WORK PERFORMANCE**

**HOWEVER, EMPLOYMENT DECISIONS THAT ARE BASED ON AN
EMPLOYEE'S ACTUAL WORK PERFORMANCE, RATHER THAN
ASSUMPTIONS OR STEREOTYPES, DO NOT GENERALLY VIOLATE
TITLE VII, EVEN IF AN EMPLOYEE'S UNSATISFACTORY WORK
PERFORMANCE IS ATTRIBUTABLE TO CAREGIVING
RESPONSIBILITIES**

Ramirez v. Social Security Admin., EEOC Appeal No. 0120101227 (Jan. 18, 2012)

Appellant alleged that she was subjected to disparate treatment and a hostile work environment concerning negative evaluations and a detail. The claim included several Title VII bases as well as “marital status.” The Agency provided Appellant with a right to request a hearing at the conclusion of the investigation, but excluded marital status and issued a final decision on this basis under 5 C.F.R. Section 720.901. After a hearing, the AJ concluded that the Agency did not harass or discriminate against Appellant. The Agency final order implemented the AJ decision. Appellant filed an appeal.

- The Commission first analyzed and concluded that the gravamen of Appellant’s claim was rooted in marital status because she was alleging that married caregivers have spouses to take care of kids and do not have to exhaust leave like a single caregiver with children.
- Thus, this is not a situation where Appellant is asserting a gender-based claim of disparate treatment related to caregiver responsibilities (which would be actionable under Title VII).

- The Commission also noted that making gender-based assumptions rooted in who would assume primary caretaking responsibilities would also violate Title VII. The Commission noted that employers should not make stereotypical assumptions that a woman with young children will (or should not) work long hours and/or that a new mother would be less committed to a job than before having children.
- In this case, however, the evidence demonstrated that management did not harbor such stereotypical assumptions. Rather, management was concerned with Appellant's low leave balance.

**MOTIVATION BY A SEXUAL STEREOTYPE THAT HAVING
RELATIONSHIPS WITH MEN IS AN ESSENTIAL PART OF BEING A
WOMAN STATES A PLAUSIBLE SEX STEREOTYPING CLAIM OF
HARASSMENT**

Castello v. U.S. Postal Serv., EEOC Request No. 0520110649 (Dec. 20, 2011)

Appellant alleged that she was subjected to harassment based on sex and sexual orientation when her supervisor made offensive comments about her sex life. The Agency dismissed Appellant's EEO complaint for failing to state a valid Title VII claim of harassment, and instead alleging harassment based on sexual orientation. The Commission first affirmed the Agency's dismissal of Appellant's EEO complaint.

- Upon reconsideration, the Commission determined that a fair reading of Appellant's EEO complaint demonstrated that she was raising a plausible sex stereotyping claim of harassment which would allow her relief under Title VII if she were to prevail.
- In this case, the supervisor's comment, as argued by Appellant, was based on a sexual stereotype that having relationships with men is an essential part of being a woman, and that the supervisor's comment was motivated by attitudes about stereotypical gender roles in relationships.
- Therefore, the Commission remanded the claim for processing based on a prior decision with similar facts. See *Veretto v. U.S. Postal Serv.*, EEOC Appeal No. 0120110873 (July 1, 2011) (concluding that the Agency erred in dismissing a claim of sex stereotyping discrimination under Title VII

where a gay man alleged harassment because he announced his intent to marry a man rather than a woman).

STATEMENTS BY A MANAGER REFLECTING A NEGATIVE VIEW OF APPELLANT BECAUSE SHE DISCUSSED HER INJURY AND MEDICAL NEEDS (REASSIGNMENT TO A CASUAL CLERK POSITION) CONSTITUTES DIRECT EVIDENCE OF RETALIATORY ANIMUS ROOTED IN A REQUEST FOR A REASONABLE ACCOMMODATION

A MANAGER'S VERBAL STATEMENTS THAT APPELLANT'S WORK AND ATTENDANCE WERE UNSATISFACTORY, WITHOUT SUPPORT IN THE RECORD, FAILS TO PRESENT AN AFFIRMATIVE DEFENSE AND ESTABLISH THAT THE AGENCY WOULD HAVE TERMINATED APPELLANT NOTWITHSTANDING DIRECT EVIDENCE OF RETALIATORY ANIMUS

AN AJ HAS DISCRETION IN GRANTING OR DENYING A MOTION TO AMEND, AND THE AJ DID NOT ABUSE HIS OR HER DISCRETION TO GRANT APPELLANT'S AMENDMENT TO ADD A LIKE OR RELATED CLAIM OF REPRISAL ONLY FOUR DAYS BEFORE THE HEARING

TELEPHONIC TESTIMONY SHOULD NOT BE APPROVED BY AN AJ WITHOUT FIRST ESTABLISHING THAT EXIGENT CIRCUMSTANCES EXISTED

A FEE AWARD IS NOT FRACTIONABLE WHEN SUCCESSFUL AND UNSUCCESSFUL CLAIMS WERE CLOSELY INTERTWINED IN THE SAME COMMON SET OF FACTS

Mannon v. U.S. Postal Serv., EEOC Appeal No. 0720070074 (Apr. 4, 2012)

Appellant, a casual letter carrier, experienced debilitating pain in her knee and was unable to complete her route. Appellant informed her supervisor that the Agency's Human Resource Office intended to reassign her to a different position and discussed with her supervisor her injury and medical needs. However, the day before the reassignment was to occur, Appellant's supervisor terminated her employment and provided the Human Resource Office with a negative evaluation recommending against rehiring Appellant.

During discovery and right before the hearing, the AJ amended the complaint over the Agency's objection to include a claim of reprisal. The AJ also took telephonic testimony from Appellant's physician. The AJ concluded that, of the seven claims accepted for adjudication, Appellant prevailed on a theory of reprisal and disability discrimination when she was terminated and given a bad evaluation. The AJ did not reduce the attorney's fee award even though Appellant only prevailed on one of seven claims. The Agency did not implement the AJ's decision and appealed both the finding of discrimination and the remedy awarded to the Commission.

- The Commission concluded that because the allegation of reprisal grew out of the same set of facts and involved the same supervisor, and because an AJ has discretion to grant or deny motions to amend, the AJ, therefore, did not err in granting Appellant's Motion to Amend.
- The AJ, however, erred in permitting telephonic testimony because the Agency objected to such testimony and the AJ failed to determine that exigent circumstances existed that would justify the taking of such testimony via telephone. In this case, as the Commission affirmed based on direct evidence of reprisal (and did not examine the disability claim), and thus this constituted harmless error.
- The Commission then observed that a request for reasonable accommodation does not have to use the phrase reasonable accommodation, or cite to the Rehabilitation Act. Under such circumstances, Appellant's request for a Causal clerk position in the context of her knee injury constituted a request for a reasonable accommodation.
- The Commission then concluded that based on the supervisor's statements and actions to terminate Appellant and write a negative evaluation the day before the Agency's human resource office was going to reassign Appellant, constituted direct evidence of reprisal for requesting a reasonable accommodation.
- The Commission further concluded that the Agency failed to put forth sufficient evidence to impeach Appellant's evidence and present an affirmative defense for its actions.
- Although the Agency argued that the fee award should be reduced by 50% because Appellant prevailed on only one of seven claims, the Commission disagreed. Citing relevant case law on the subject of

whether or not such claims are “fractionable,” the Commission noted that because the successful and unsuccessful claims are so closely intertwined in the same common core of facts, they cannot be viewed as a series of discrete claims. Accordingly, the claims and theories are not fractionable, and the AJ properly concluded that the attorney’s fee award should not be reduced.

UNLAWFUL ANIMUS ROOTED IN IMPLICIT RACE-BASED STEREOTYPES AND DISPLAYED ON ONLY A FEW OCCASIONS CAN, IN APPROPRIATE CASES, BE SUFFICIENTLY SEVERE SO AS TO ALTER CONDITIONS OF EMPLOYMENT

SANCTIONS, WHILE CORRECTIVE, ARE ALSO DESIGNED TO PREVENT SIMILAR MISCONDUCT IN THE FUTURE AND MUST BE TAILORED TO EACH SITUATION WITH AN INTENT OF DETERRING THE UNDERLYING MISCONDUCT

Ferebee v. Dep’t of Homeland Security (U.S. Coast Guard), EEOC Appeal No. 0720100039 (Apr. 24, 2012)

Complainant (African-American male) alleged disparate treatment and harassment based on race as a result of hostile treatment he received from a loan officer representative (Caucasian female) when applying for a loan through the Coast Guard Mutual Assistance (CGMA) program (a benefit of employment provided to Agency employees). During discovery, Complainant sought information about the race and sex of individuals granted or denied such loans. The Agency stated that while it had such information, it would be burdensome to produce such records and thus did not do so. Complainant did not file a motion to compel.

After a hearing, the AJ found evidence that the loan officer representative acted strangely toward African-American men based on testimony from Complainant and another tall African-American male, like Complainant, who had a similar experience with this loan officer representative. The AJ opined that race-based stereotyping may have motivated actions by the loan officer representative. However, the AJ concluded that based on the limited interactions Complainant had with the loan officer representative, that such treatment was not sufficiently severe or pervasive so as to alter terms and conditions of employment. The AJ also found insufficient evidence of disparate treatment regarding the approval amount of the loan.

The AJ also concluded that the Agency had a duty to keep sufficient records to demonstrate that loans applied for and either approved or denied were free from

discrimination, since such loans are a benefit of employment. Thus, the AJ issued a Show Cause Order as to why the AJ should not order a \$10,000 sanction along with fees and costs associated with discovery by Complainant in his failed attempt to have the Agency produce such records. The Agency responded, noting that it was never compelled by the AJ to produce such records, and that while it did keep such records, the Agency determined it would be burdensome to respond to Complainant's overly broad discovery request for such records. The Agency also noted that Complainant never filed a Motion to Compel after the Agency stated it would be too burdensome to provide the records sought during discovery.

The AJ concluded that the Agency's inability to produce such records warranted a sanction. The AJ sanctioned the Agency with a \$10,000 fee payable to Complainant and discovery costs to Complainant's attorney (approximately \$12,000) related to discovery matters related to that issue. The AJ also stated that he would retain authority over this case for an additional 18 months and require the Agency to submit quarterly reports regarding the granting and denial of loans. The AJ further enjoined the Agency from providing loans and grants through the CGMA program until the Agency adopted a program to keep sufficient records to analyze its obligations under Title VII. The Agency adopted the AJ's finding of no discrimination or harassment, but did not implement the sanction imposed by the Agency.

- The Commission concluded that the loan officer representative's implicit bias resulted in her "fear" of a tall, African-American man (both Complainant and a second tall, African-American man who both testified to similar mistreatment by the loan officer representative). Thus, her actions were based on race and gender.
- The Commission then concluded that contrary to the AJ's conclusion, the record supported a finding that such actions by the loan officer representative, even on a limited basis, were severe enough to alter conditions of employment. The representative yelled at Complainant even though he was confused and seeking information from her about how to apply for an emergency loan. She then called the base police when Complainant was due to return, stating to them that she was "afraid" of an "angry" "unidentified man" even though she knew who he was and why he was coming. The impact of such bias on Complainant, an African-American man, was to alter his conditions of employment and create a hostile work environment.
- The Commission further concluded that in a case of co-worker harassment, the Agency failed to produce any evidence that it took prompt

and effective remedial action to end the harassment despite being aware of the tension between the loan officer representative and Complainant that was created by her implicit bias and irrational fear of a tall African-American man.

- The Commission then reviewed evidence of compensatory damages already in the record and, in lieu of remanding to the AJ, awarded Complainant \$10,000 based on the impact such bias had on him.
- The Commission affirmed the AJ's finding of no disparate treatment by the loan officer representative's supervisor in granting Complainant a smaller loan amount than that for which he applied.
- The Commission then cited to relevant case law concerning sanctions (citations omitted) and concluded that most of the AJ's sanction was not tailored to remedy the harm. Sanctioning the Agency for discovery costs was reasonable, but the other sanctions were inappropriate, especially where the AJ's overly zealous sanction enjoining the Agency from granting or denying loans exceeded his authority and jurisdiction.
- The Commission suggested that the more appropriate and tailored sanction would be to require the Agency to collect and analyze loan data pursuant to the Agency's obligations set forth in MD-715, and to include such information in its annual reporting to the Commission consistent with MD-715. As such, the Commission modified the sanction to remove the other sanctions imposed by the AJ and to substitute this process as a sanction.

ONGOING AND INAPPROPRIATE STARING AND OTHER BEHAVIOR OF A SEXUAL NATURE BY A MALE SUPERVISOR TOWARD HIS FEMALE SUBORDINATES, EVEN WITHOUT ANY PHYSICAL CONTACT, CAN BE SUFFICIENTLY SEVERE OR PERVASIVE TO ESTABLISH A HOSTILE WORK ENVIRONMENT

AN AFFIRMATIVE DEFENSE TO UNLAWFUL HARASSMENT BY A SUPERVISOR CREATING A HOSTILE WORK ENVIRONMENT IS NOT AVAILABLE IF THE AGENCY FAILS TO TAKE PROMPT AND EFFECTIVE ACTION TO RESPOND TO THE ALLEGATIONS

Schmid v. U.S. Postal Serv., EEOC Appeal No. 0120101575 (June 12, 2012)

Appellant filed an EEO complaint alleging that the Agency discriminated against her on the bases of sex (female) and in reprisal for prior protected EEO activity when since July 2008 and continuing, Appellant was subjected to sexual harassment/hostile work environment by her supervisor. After a hearing, the AJ concluded that Appellant was not subjected to harassment based on sex that was sufficiently severe or pervasive to alter the terms and conditions of employment and create a hostile work environment. The Agency fully implemented the decision and Appellant filed an appeal.

- The Commission agreed with the AJ that the record supported a conclusion that Appellant was subjected to sex-based treatment when her supervisor repeatedly stared at her breasts, her crotch, her legs, and would have conversations of an intimate nature with her. Appellant discussed how her supervisor discussed his sex life, repeatedly commented how attractive she was, and stated that she should find a man. The record contained additional evidence of such treatment toward females, but not males.
- The Commission then stated that the AJ's legal conclusion as to whether such conduct was sufficiently severe or pervasive is a conclusion of law subject to *de novo* review. In this case, the Commission disagreed with the AJ's conclusion of law and determined that the record as a whole supported a conclusion that Appellant experienced sexual harassment that was sufficiently severe and pervasive as to alter her conditions of employment and create a hostile work environment.
- The Commission then observed that although the Agency commenced an investigation within five days of becoming aware of the alleged harassment, it failed to separate Appellant and the supervisor until four months later. Moreover, management conducted a town hall style meeting shortly after the allegations surfaced and Appellant and other female employees were made to feel uncomfortable about discussing these matters in such a forum in front of the alleged harasser. Finally, the Commission noted how the supervisor even interrupted a meeting involving Appellant and asked to speak with her behind closed doors after he had been separated from her. Ultimately, the supervisor was issued a letter of warning and made to understand he no longer supervised Appellant. These incidents all support a conclusion that the Agency cannot establish the first prong of an affirmative defense to allegations of harassment by a supervisor (citations omitted).

IV. Rehabilitation Act Decisions

FAILURE BY AN AGENCY TO ENGAGE IN AN INTERACTIVE PROCESS DOES NOT, BY ITSELF, NECESSITATE A FINDING THAT AN EMPLOYEE WAS DENIED A REASONABLE ACCOMMODATION

THE EMPLOYEE MUST SHOW THAT THE FAILURE TO ENGAGE IN THE INTERACTIVE PROCESS RESULTED IN THE DENIAL OF A REASONABLE ACCOMMODATION

BEFORE ESTABLISHING A VIOLATION OF THE REHABILITATION ACT IN A FAILURE TO ACCOMMODATE CASE, THE EMPLOYEE MUST FIRST DEMONSTRATE THAT HE OR SHE IS A QUALIFIED INDIVIDUAL WITH A DISABILITY

A PROBATIONARY EMPLOYEE MAY NOT BE DENIED REASSIGNMENT AS A REASONABLE ACCOMMODATION SOLELY ON THE BASIS OF HIS OR HER PROBATIONARY STATUS

A PROBATIONARY EMPLOYEE MUST DEMONSTRATE THAT HE OR SHE WAS ABLE TO PERFORM THE ESSENTIAL FUNCTIONS OF THE JOB WITH OR WITHOUT REASONABLE ACCOMMODATION IN ORDER TO BE ABLE TO BE REASSIGNED AS AN ACCOMMODATION

A PROBATIONARY EMPLOYEE WHO HAS NEVER ADEQUATELY PERFORMED THE ESSENTIAL FUNCTIONS OF THE POSITION WOULD NOT BE ELIGIBLE FOR REASSIGNMENT BECAUSE HE OR SHE NEVER DEMONSTRATED THAT HE OR SHE WAS QUALIFIED FOR THE POSITION FOR WHICH HE OR SHE WAS HIRED

Shelley v. U.S. Postal Serv., EEOC Appeal No. 0720070076 (June 14, 2012)

Appellant, a diabetic, commenced employment as a mail handler, but had to seek medical treatment seven days after starting the position due to a diabetic ulcer that was exacerbated by performing the job. Ultimately, after several months of treatment and discussions about returning to another position, the Agency instead terminated his employment. Appellant filed an EEO complaint and after a hearing before an AJ, the AJ issued a bench decision concluding that appellant was an individual with a disability.

The AJ further concluded that the Agency did not engage in an interactive process with Appellant and therefore the Agency never determined if he could perform the essential functions of a mail handler or any other position. Thus, Appellant was therefore denied a reasonable accommodation and terminated unlawfully by the Agency. The Agency did not implement the decision.

- The Commission first noted that in and of itself, a failure to engage in the interactive process is, absent an additional showing, not a violation of the Rehabilitation Act. A party must make a showing that the failure to engage in an interactive process resulted in the Agency's failure to provide a reasonable accommodation.
- The Commission next noted that based on prior Commission precedent, the AJ erred as a matter of law in making a finding of discrimination without first determining if whether or not Appellant is a qualified individual with a disability (citation omitted).
- In this case, as Appellant was probationary, the Commission looked to language in its Enforcement Guidance on Reasonable Accommodation that discussed how to analyze appropriate legal questions based on Appellant's status as a probationary employee.
- This Enforcement Guidance notes that a probationary employee cannot be denied a reasonable accommodation solely because he or she is probationary. To be eligible for reassignment, the probationary employee must demonstrate that he or she was qualified for the position he or she was first hired to work before he or she can be eligible for reassignment.
- The Enforcement Guidance states that there is no "bright line" test for how long a probationary employee must have successfully worked in his or her position before demonstrating that he or she is a qualified individual with a disability. In this case, Appellant only worked in the position for seven days before encountering medical difficulties related to his diabetic condition. Based on this record, the Commission concluded that Appellant failed to establish that he was a qualified individual with a disability. Therefore, the Commission affirmed the Agency's final order which rejected the AJ's finding of discrimination.

UNDER THE PRE-ADA AMENDMENTS ACT, THE COMMISSION MUST DETERMINE WHETHER AN INDIVIDUAL'S IMPAIRMENT IS

SUBSTANTIALLY LIMITING BY TAKING INTO ACCOUNT THE NATURE OF THE CONDITION AFTER CORRECTIVE OR MITIGATING MEASURES ARE USED TO COMBAT THE IMPAIRMENT

TO ESTABLISH THAT AN INDIVIDUAL WAS PERCEIVED AS SUBSTANTIALLY LIMITED IN THE MAJOR LIFE ACTIVITY OF WORKING, HE OR SHE MUST SHOW THAT THE AGENCY PERCEIVED HIM OR HER AS SUBSTANTIALLY LIMITED IN PERFORMING EITHER A CLASS OF JOBS OR A BROAD RANGE OF JOBS IN VARIOUS CLASSES

TO ESTABLISH THAT AN APPLICANT OR EMPLOYEE IS A DIRECT THREAT, AN AGENCY MUST MAKE AN INDIVIDUALIZED ASSESSMENT OF WHETHER THE INDIVIDUAL POSES SUCH A DIRECT THREAT, TAKING INTO ACCOUNT: (1) THE DURATION OF THE RISK; (2) THE NATURE AND SEVERITY OF THE POTENTIAL HARM; (3) THE LIKELIHOOD THAT THE POTENTIAL HARM WILL OCCUR; and (4) THE IMMINENCE OF THE POTENTIAL HARM

Ward v. Dep't of the Navy, EEOC Appeal No. 0720070029 (Apr. 26, 2012)

Appellant was offered a position at the Agency which was conditioned on passing a pre-employment physical examination. During the examination, Appellant was diagnosed with hearing loss and did not meet an Agency rule which required him to be able to hear above a certain decibel level. After further medical examinations, and despite the fact that the Agency's Occupational Health Physician cleared Appellant to work as long as he obtained hearing aids, the Agency decided to withdraw Appellant's conditional offer of employment. Appellant filed a formal EEO complaint, and ultimately, an AJ issued a finding of discrimination via summary judgment. The AJ issued a subsequent decision addressing damages and fees. The Agency did not implement the AJs finding of discrimination.

- The Commission concluded that Appellant was not a qualified individual with a disability because, under the applicable pre-ADA Amendments Act standard, he was not substantially limited in hearing as long as he had hearing aids.
- The Commission next concluded that the Agency regarded Appellant as substantially limited in the major life activity of working. The Commission

noted evidence in the record that various Agency officials viewed Appellant as unable to occupy any shipyard, dry dock, or roaming work, because industrial sounds would worsen his pre-existing hearing loss.

- The Commission found that based on such evidence, the Agency regarded Appellant as unable to work any shipyard position or position in an industrial environment. This is sufficient to establish a perception on the part of the Agency that Appellant was viewed as unable to work in a class of jobs.
- The Commission further found that Appellant was qualified for the position since he received a conditional offer of employment and was only excluded from the position because he needed to wear hearing aids in the workplace.
- The Commission noted that the Agency made no showing of a direct threat and did not analyze any of the above enumerated factors. The only evidence produced by the Agency was their perception that individuals who wear hearing aids in an industrial environment could be harmed. The Commission noted that the Agency should have measured the noise levels and assessed whether Appellant's risk of harm was less or more than other individuals. The Agency also could have inquired about whether or not any hearing protective devices would have been available to an individual like Appellant, who would be wearing hearing aids.
- The Commission also referenced additional evidence in the record that Agency officials did not want to hire such an individual, and thus, that the relevant Agency officials were motivated by stereotypes about individuals with impairments.

**A FIFTEEN POUND LIFTING RESTRICTION SUBSTANTIALLY LIMITS
AN INDIVIDUAL IN THE MAJOR LIFE ACTIVITY OF LIFTING**

**A QUALIFIED INDIVIDUAL WITH A DISABILITY IS AN INDIVIDUAL
WHO, WITH OR WITHOUT REASONABLE ACCOMMODATION, CAN
PERFORM THE ESSENTIAL FUNCTIONS OF THE POSITION THAT
THE INDIVIDUAL HOLDS OR DESIRES**

**ESSENTIAL FUNCTIONS ARE "THOSE FUNCTIONS THAT THE
INDIVIDUAL WHO HOLDS THE POSITION MUST BE ABLE TO**

PERFORM UNAIDED OR WITH THE ASSISTANCE OF A REASONABLE ACCOMMODATION”

ACCURATE IDENTIFICATION OF ESSENTIAL FUNCTIONS IS CRITICAL BECAUSE SUCH AN INQUIRY IS “NOT INTENDED TO SECOND GUESS AN EMPLOYER’S BUSINESS JUDGMENT WITH REGARD TO PRODUCTION STANDARDS, WHETHER QUALITATIVE OR QUANTITATIVE, NOR TO REQUIRE EMPLOYERS TO LOWER SUCH STANDARDS”

REINSTATEMENT TO A POSITION MAY BE APPROPRIATE EVEN WHERE APPELLANT FILED FOR WORKERS COMPENSATION BENEFITS AND ULTIMATELY DISABILITY RETIREMENT WHEN THE AGENCY’S FAILURE TO PROVIDE A REASONABLE ACCOMMODATION IS CAUSALLY CONNECTED TO THESE SUBSEQUENT ACTIONS

Small v. U.S. Postal Serv., EEOC Appeal No. 0720100031 (April 5, 2012)

After a hearing, an AJ found disability discrimination, reprisal and harassment when Appellant was denied an accommodation of a push cart based on a fifteen pound lifting restriction (among other restrictions) and was instead required to carry a satchel over his shoulder which exacerbated his injuries and forced him to apply for and accept disability retirement. The AJ concluded that Appellant was a victim of both reprisal and a hostile work environment. The AJ awarded Appellant, among other things, \$100,000 in compensatory damages, back pay and reinstatement. The AJ’s decision was not implemented and subsequently appealed by the Agency.

- The Commission reversed the Agency’s final order and implemented the AJ decision with a few minor modifications. First, the Commission agreed with the AJ’s conclusion that Appellant was substantially limited in the major life activity of lifting.
- The Commission noted, however, that the AJ’s definition of what functions were essential was not precise. Casing and delivering mail, as argued by the Agency, is the essential function for a Part Time Flexible Mail Carrier. The AJ’s conclusions as to what job functions constituted “essential functions” were more akin to skills that would be useful in performing the essential functions of the job. The Commission noted, however, that this error did not change the ultimate outcome that the Agency’s

accommodations were not effective and the stated excuses for refusing to provide a push cart were belied by the evidence and thus insufficient to establish that it would have caused an undue hardship on the Agency.

- The Commission further agreed with the AJ's conclusions that Appellant was subjected to reprisal and a hostile work environment.

Other noteworthy principles from this Decision:

- The Commission noted that an Agency must provide Appellant with an equitable remedy that constitutes full, make-whole relief to restore him/her as nearly as possible to the position s/he would have occupied absent the discrimination. Citations Omitted.
- The burden of limiting any remedy potentially due to a party rests with the Agency.
- The Commission found a causal connection between the denial of accommodation and the actions Appellant took to sustain his livelihood (filing for OWCP and ultimately disability retirement). As such, a remedy of reinstatement is appropriate under these facts.
- On this basis, the Commission concluded that Appellant should also be compensated for approximately 400 hours of leave without pay after Appellant exhausted his sick and annual leave benefits.

AN AJ'S AUTHORITY TO DISMISS CLAIMS UNDER 29 C.F.R. SECTION 1614.109(b) IS PERMISSIVE, NOT MANDATORY, AND THUS WITHIN THE REALM OF AN AJ'S DISCRETION

A FINDING THAT COMPLAINANT IS DISABLED DOES NOT REQUIRE IN ALL CASES THAT COMPLAINANT PRODUCE MEDICAL DOCUMENTATION OR TESTIMONY BY A PHYSICIAN

AN AJ HAS BROAD DISCRETION TO GRANT OR DENY A MOTION BY A PARTY TO QUALIFY A WITNESS AS AN "EXPERT"

THE REHABILITATION ACT DOES NOT PRECLUDE AN INDIVIDUAL FROM REQUESTING A REASONABLE ACCOMMODATION EVEN IF THE INDIVIDUAL DID NOT REQUEST AN ACCOMMODATION AT THE

TIME A JOB WAS OFFERED OR WHEN HE OR SHE FIRST STARTED WORKING IN THE POSITION

THE COMMISSION'S ENFORCEMENT GUIDANCE DOES NOT CATEGORICALLY PROHIBIT EMPLOYERS FROM PROVIDING PERSONAL-USE ITEMS AS REASONABLE ACCOMMODATIONS, AND ITEMS THAT MIGHT OTHERWISE BE CONSIDERED AS PERSONAL-USE MAY STILL BE REQUIRED AS A REASONABLE ACCOMMODATION IF SPECIFICALLY INTENDED TO MEET A JOB-RELATED NEED

AGENCIES ARE NOT REQUIRED TO PROVIDE PERSONAL-USE ITEMS THAT ARE NEEDED TO ACCOMPLISH DAILY TASKS BOTH ON AND OFF THE JOB (e.g., hearing aids, wheel chairs, glasses, etc.)

Hunter v. Social Security Admin., EEOC Appeal No. 0720070053 (Feb. 16, 2012)

Appellant, who had Chron's disease, used a space heater at her workstation to alleviate certain symptoms and complications associated with the disease. The Agency subsequently issued a memo restricting the use of such items for safety reasons. Appellant submitted medical documentation substantiating her need for a space heater. The Agency approved use of a specific kind of space heater, but advised her that she had to purchase her own heater and specifically denied her reasonable accommodation request for the Agency to purchase a heater because the Agency viewed such an item as a personal use item. The Agency also refused to grant her administrative leave because the temperature in her workspace was within contract guidelines. Thus, without a space heater from the Agency, Appellant had to bring in blankets, coats and gloves to work in order to be able to work.

Appellant filed a Class Complaint under the Rehabilitation Act which was ultimately dismissed by an AJ for failing to meet the prerequisites for Class certification. The AJ also dismissed Appellant's individual EEO complaint for failing to provide medical documentation sufficient to demonstrate that Appellant was an individual with a disability.

Appellant subsequently sought EEO counseling and filed a formal, individual complaint of disability discrimination. The Agency only accepted one of four claims, and in so doing, dismissed her failure to accommodate claim (among others) for untimely EEO counselor contact. After Appellant requested a hearing, she challenged the Agency's

dismissal. The AJ reinstated the denial of reasonable accommodation claim and subsequently denied a Motion to Dismiss filed by the Agency wherein the Agency argued that the first AJ (who adjudicated the Class certification complaint) also recommended dismissal of Appellant's individual EEO complaint.

Ultimately, an AJ concluded that Appellant was an individual with a disability who was denied a reasonable accommodation of a space heater. The AJ awarded relief but the Agency did not implement the AJ decision.

- The Commission first examined 29 C.F.R. Section 1614.109(b) and noted that an AJ has discretion whether or not to dismiss a complaint based on the language of that section. In this case, a failure to accommodate is a recurring violation based on Commission precedent. The Commission thus concluded that the AJ did not abuse his/her discretion in reinstating the dismissed claim and denying the Agency's Motion to Dismiss.
- The Commission agreed with the AJ's conclusion that there was substantial evidence in the record to demonstrate that Appellant's diagnosis of Chron's disease substantially limited her in several major life activities. In reaching this conclusion, the Commission rejected the Agency's interpretation of Commission guidance and precedent in arguing that an employee must present contemporaneous medical documentation or testimony to support a conclusion that he or she is an individual with a disability.
- The Commission noted that in its Enforcement Guidance on Reasonable Accommodation and Undue Hardship, an "entitlement to know" about a covered disability does not amount to an "entitlement to receive medical documentation." The Commission noted that the relevant precedent and Enforcement Guidance stand for the proposition that "...if an individual's disability or need for reasonable accommodation is not obvious, and the person refuses to provide the reasonable documentation requested by the employer, then the individual is not entitled to reasonable accommodation."
- The Commission also concluded that an AJ has broad discretion in the conduct of a hearing and, thus, did not abuse his/her discretion when the AJ denied the Agency's Motion to qualify its medical director as an expert witness. Given that the medical director testified that he was not a specialist in autoimmune diseases and he had not treated individuals with

Chron's disease unless they appeared in an emergency room, such a conclusion by an AJ was not an abuse of discretion.

- The Commission observed that the Rehabilitation Act does not preclude a person from requesting a reasonable accommodation when that person did not initially request an accommodation when receiving a job offer or first started in a position. A person may request a reasonable accommodation when he or she identifies a workplace barrier that is preventing equal access to a benefit of employment. In this case, the barrier did not arise until after the Agency changed its policy vis-à-vis the use of space heaters in the workplace.
- The Commission also agreed with the AJ's conclusion that Appellant was a qualified individual with a disability, and that she was denied a reasonable accommodation. The Commission rejected the Agency's argument that a space heater is a personal use item. In reaching this conclusion, the Commission explained that employers are not categorically prohibited from providing personal use items as reasonable accommodations. The Enforcement Guidance only provides that an Agency is not duty bound to provide as a reasonable accommodation a personal use item (e.g., glasses, hearing aid, wheelchair, etc.) that would assist an employee both on and off the job. Items that may otherwise be considered as personal use may still be required as reasonable accommodations when specifically designed to meet a job-related rather than a personal need.
- In this case, there was no evidence presented that the space heater was a personal item used off the job. Rather, it was an item designed to meet a specific need to warm a workspace and alleviate symptoms associated with Chron's disease which would allow her to perform the essential functions of her job while at work.

**A REASONABLE ACCOMMODATION MUST BE EFFECTIVE AND
A CHANGE IN SUPERVISOR WHO HAS A DIFFERENT VIEW OF
HOW THE JOB SHOULD BE PERFORMED IS NOT SUFFICIENT
TO JUSTIFY A DENIAL OF A SCHEDULE ADJUSTMENT AS A
REASONABLE ACCOMMODATION ABSENT A SHOWING OF
UNDUE HARDSHIP OR DIRECT THREAT**

Lamb v. Social Security Admin., EEOC Appeal No. 0120103232 (March 21, 2012)

Appellant worked in an administrative position and suffered from depression and other medical conditions to include a congenital missing right forearm/hand. To combat the depression, she exercised in the morning pursuant to her physician's instructions. Appellant's prior supervisor allowed her to earn credit time and use compensatory time, thereby allowing her time to exercise, get dressed, and report to work at 10:00 a.m. (instead of 9:30 a.m.) and stay 30 minutes later (until 6:30 p.m. in the evening). This arrangement existed from 2004 to 2008, when Appellant's supervisor assumed another position. Appellant's new supervisor did not permit such an arrangement and insisted that Appellant report to work by 9:30 a.m. The new supervisor denied Appellant's request for a reasonable accommodation to arrive to work at 10:00 a.m. under the theory that she could exercise in the evening and that she had a three hour flexible window to report to work. The supervisor also believed that staying after 6:00 p.m. would be unsafe since others would have left the building by then.

After Appellant filed a formal complaint alleging both disparate treatment (not discussed here) and a failure to accommodate, the Agency ultimately issued a Final Agency Decision finding no discrimination. On appeal, the Commission reversed the Agency FAD as to the denial of reasonable accommodation.

- The Commission noted that the Agency did not analyze whether or not Appellant was disabled. The Commission concluded that Appellant's congenital missing right hand constituted a targeted disability. The Commission further concluded that she was a qualified individual with a disability because she could perform the essential functions of the position.
- The Commission then concluded that the Agency failed to provide an effective reasonable accommodation. Appellant needed to report to work at 10:00 a.m. as provided by her reasonable accommodation request. Denying her that accommodation, which she effectively was granted between 2004 and 2008, and instead requiring she to report by 9:30 and allowing her to use leave was not an effective accommodation.
- The Agency also failed to establish it was either an undue hardship or a direct threat to do so. The alleged safety concerns did not meet the direct threat standard (see discussion of standards in the *Ward* decision) and it could not have been an undue hardship if Appellant had the accommodation provided to her by the Agency between 2004 and 2008.

THE PROCESS OF OBTAINING MEDICAL EVIDENCE DURING AN INVESTIGATION OR DISCOVERY SHALL NOT BE LIMITED TO ONLY OBTAINING MEDICAL DOCUMENTATION CONCERNING A PARTY'S CONDITION THAT THE AGENCY HAS IN ITS POSSESSION

A PARTY CAN PROVIDE MEDICAL DOCUMENTATION THAT DESCRIBES THE CONDITION OR THAT CONTAINS A DIAGNOSIS OF THE CONDITION

OTHER INFORMATION, SUCH AS A PARTY'S DESCRIPTION OF THE CONDITION AND STATEMENTS FROM FRIENDS, FAMILY OR CO-WORKERS MAY ALSO BE RELEVANT IN DETERMINING THE NATURE OF THE IMPAIRMENT

IF SUBSEQUENT DISCIPLINE IS PROXIMATELY CAUSED BY A FAILURE TO PROVIDE A REASONABLE ACCOMMODATION, THEN SUCH ACTS COULD PROPERLY BE VIEWED AS BEING UNLAWFULLY RELATED TO A PARTY'S STATUS AS DISABLED

Harden v. Social Security Admin., EEOC Appeal No. 0720080002 (Aug. 12, 2011)

Appellant, who suffered from depression and anxiety, had problems managing sleep and chronic fatigue. This impacted her ability to function early in the morning. She requested three accommodations, including flexibility in arriving to work, which the Agency rejected based on the lack of any nexus between the requested accommodations and her impairments. Appellant filed a complaint of discrimination when she was denied reasonable accommodations and then charged as Absent without Leave (AWOL), issued a Letter of Reprimand and suspended for two days. Appellant submitted additional medical documentation, which the Agency also rejected as not justifying flexibility in an arrival time after 9:00 a.m. The Agency did not allow Appellant to submit additional medical documents and instead invited her to challenge the Agency's determination through a grievance or EEO process.

During discovery, Appellant provided additional medical documents. The Agency then determined that the documentation was sufficient and granted a reasonable accommodation to Appellant by extending her flexible time band to arrive at work no later than 9:30 a.m. After a hearing, an AJ found disability discrimination and reprisal

when the Agency failed to accommodate Appellant and subsequently disciplined her. The Agency did not implement the AJs finding of discrimination.

- The Commission first concluded that based on testimony by Complainant and the Agency Medical Director, part of which was based on documents not available to the Agency at the time it first decided to deny Complainant a reasonable accommodation, that Complainant was an individual with a disability.
- In reaching this conclusion, the Commission rejected the Agency's argument that such a legal conclusion must be limited to documents submitted to the Agency before discovery commenced. The Commission cited to Section 902 of its Compliance Manual which discusses the definition of the term disability. In this Compliance Manual, the Commission states that:
 - "Investigation or discovery is not limited to only obtaining the medical documentation concerning the complainant's condition that the agency has in its possession. A complainant can provide medical documentation that describes the condition or that contains a diagnosis of the condition. Other information, such as the complainant's description of the condition and statements from friends, family or co-workers, may also be relevant to determining the nature of the impairment. Such statements or document may not necessarily have been presented to the agency at the time it declined to provide a complainant's request for reasonable accommodation. But they constitute relevant evidence that serve the purpose of the investigatory and discovery process; to help the fact finder determine whether complainant is an individual with a disability."
- The Commission further concluded that based on evidence the Agency had during the relevant time, Appellant was a qualified individual with a disability and that she submitted requests for reasonable accommodation related to her disability sufficient to establish that she was a qualified individual with a disability.
- The Commission further concluded that the subsequent discipline would not have occurred if the reasonable accommodation (flexible arrival) had been provided and the AJs conclusion that these acts were related to her disability was supported by substantial evidence in the record.

Other noteworthy principles:

- If a party does not find counsel readily available in that locality with the degree of skill required to represent that party, it is reasonable that the party go elsewhere to find an attorney.
- However, if a high-priced out-of-town attorney renders the same services that could have been obtained by a local attorney just as well, then it may be appropriate to limit the hourly rate to that which a local attorney would charge.
- The burden is on the Agency to show that a party's decision to retain out-of-town counsel was not reasonable.
- In this case, Appellant's decision to utilize the services of a free attorney from AFGE, who specializes in EEO matters, in lieu of spending money on a local attorney, was not unreasonable. Accordingly, the Agency is liable to pay attorneys' fees based on the hourly fee charged by the AFGE attorney from the District of Columbia (which the Commission found to be a reasonable hourly rate).
- Attorney travel time should be compensated at 50% of the attorney's normal hourly rate. Citations omitted. However, as Appellant's attorney's fee petition contained information that the attorney was actually working during travel, it was not unreasonable to award such travel time at 100% of the hourly rate.

V. Class Action Decisions

AN INDIVIDUAL AWARD OF RELIEF TO A CLASS AGENT BEFORE A CLASS CASE IS RESOLVED DOES NOT DISQUALIFY THAT CLASS AGENT AS LONG AS HIS INTERESTS ARE NOT ANTAGONISTIC TO THE CLASS

ANECDOTAL EVIDENCE OF A PATTERN OR PRACTICE AGAINST AFRICAN-AMERICANS BASED ON SUBJECTIVE AGENCY PRACTICES MAY BE SUFFICIENT TO ESTABLISH AN ACROSS-THE-BOARD CLAIM OF CLASS WIDE DISCRIMINATION

Fogg v. Dep't of Justice (U.S. Marshal Service), EEOC Appeal No. 0120073003 (July 11, 2012)

The Class Agent filed a Class complaint wherein he alleged that: (1) the USMS has not met its Affirmative Action obligation required by section 501 of Title 5 of the Rehabilitation Act of 1973; (2) USMS is not hiring Black employees at a rate comparable to the recruitment of White employees; (3) the penalties for infractions applied to Black employees in USMS disciplinary proceedings are frequently greater and more severe than those applied to White employees; (4) the USMS purposely delays processing of EEO complaints filed by Black employees; and (5) White USMS employees receive preferential treatment with respect to special assignments.

The Class Complaint had a lengthy procedural history dating back to the mid-1990's which will not be summarized here. For purposes of this summary, the AJ denied class certification finding insufficient evidence of a common policy or practice of discrimination affecting a class of individuals. The Agency implemented the AJ decision.

- The Commission found sufficient evidence of a common policy or practice of an entirely subjective decision-making process at the Agency. The Commission noted that there must be an affirmative showing, beyond individual claims and general class allegations, that the Class experienced discrimination. Here, with 22 affidavits from African-Americans holding similar positions to that of the Class Agent, and which detailed a similar pattern of alleged disparate treatment based on race, the Class satisfies the prerequisites for an across-the-board claim.
- The Commission also noted that with the existence of 22 affidavits and the Class Agent indicating the present Class consists of 50, perhaps more, individuals, that the Class satisfied the numerosity requirement. The Commission also found that the Class had an attorney representative and therefore had adequate representation.
- The fact that the Class Agent resolved his individual claims with the Agency in Federal District Court does not necessitate a conclusion that he cannot be the Class Agent. As long as his interests are not antagonistic to the Class, he can still be qualified to be a Class Agent.

FAILURE TO IDENTIFY AN AGENCY-WIDE POLICY OR PRACTICE THAT INDICATED THAT MEN SHOULD BE PAID LESS THAN WOMAN RESULTS IN A CONCLUSION THAT A CLASS COMPLAINT LACKS COMMONALITY

IN LIMITED CIRCUMSTANCES AN APPELLANT MAY REMAIN ANONYMOUS IN FEDERAL SECTOR PROCEEDINGS

Doe v. Dep't of Justice, EEOC Appeal No. 0120070816 (Feb. 10, 2012)

The Class Agent sought to certify a Class of males under the Equal Pay Act who were paid less than females for performing similar Witness Security Inspector positions. The AJ denied certification because the Class Agent failed to identify a centralized policy or practice that discriminated against GS-12 males or benefitted GS-13 females. The AJ noted the lack of evidence that the GS-13 employees receiving higher wages were all female, and further, that the lack of such evidence lead to a conclusion that the Class Agent could not establish numerosity. The Agency implemented the AJ decision.

- The Commission affirmed the AJ decision implementing the AJs conclusions. In so doing, the Commission agreed that the Class Agent was unable to establish commonality or typicality without any evidence of an overriding Agency policy or practice of discrimination.
- The Commission also agreed that the Class Agent failed to present sufficient evidence of the number of people purportedly impacted by a policy or practice of wage discrimination.
- The Commission recognized, in limited circumstances, that parties can remain anonymous in appropriate cases. In this case, the Commission concluded there was sufficient evidence of potential physical harm toward the Class Agent or innocent third parties to justify anonymity.

AN IMPRECISE DEFINITION OF A CLASS, WHICH IS VAGUE AND VARIED, PERMITS A CONCLUSION THAT NEITHER COMMONALITY NOR NUMEROSITY CAN BE ESTABLISHED.

THE MERE EXISTENCE OF VARIOUS PROGRAMS OR COMMENTS BY HIGH LEVEL OFFICIALS, WITHOUT MORE, CANNOT ESTABLISH A POLICY OR PRACTICE SUFFICIENT TO ESTABLISH COMMONALITY

Footland v. Dep't of Commerce, EEOC Appeal No. 0120071973 (Nov. 14, 2011).

The Class Agent sought to certify a Class of Caucasian males who were denied promotions since 1994 at the Patent and Trademark Office. The AJ denied Class certification, noting a vague and imprecise definition of both the Class and the policies

or practices that were allegedly discriminatory. The Agency implemented the AJ decision.

- The Commission, in upholding the Agency's final order, noted that the Class Agent had a varied and vague definition of the Class. The Class Agent merely noted the existence of programs (such as affirmative employment) or statements and failed to identify precisely what is discriminatory beyond bald assertions or supporting evidence.
- The Commission also observed that with an imprecise definition of the Class, it becomes impossible to identify members of the Class and thus impossible to establish numerosity.

VI. Remedies

THE PURPOSE OF A BACK PAY AWARD IS TO RESTORE TO THE COMPLAINANT THE INCOME HE OR SHE WOULD HAVE OTHERWISE EARNED BUT FOR THE DISCRIMINATION

BACK PAY SHOULD INCLUDE ALL FORMS OF COMPENSATION AND MUST REFLECT FLUCTUATIONS IN WORKING TIME, OVERTIME RATES, PENALTY OVERTIME, SUNDAY PREMIUM AND NIGHT WORK, CHANGING RATE OF PAY, TRANSFERS, PROMOTIONS, AND PRIVILEGES OF EMPLOYMENT TO WHICH A PARTY WOULD HAVE BEEN ENTITLED BUT FOR THE DISCRIMINATION

TO DEMONSTRATE NON-PECUNIARY DAMAGES, A PARTY CAN SUBMIT OBJECTIVE AS WELL AS OTHER TYPES OF EVIDENCE, INCLUDING: A STATEMENT BY A PARTY EXPLAINING HOW THE DISCRIMINATION AFFECTED HIM/HER; STATEMENTS FROM OTHERS, INCLUDING FAMILY MEMBERS, FRIENDS, AND HEALTH CARE PROVIDERS, THAT ADDRESS THE OUTWARD MANIFESTATIONS OF THE IMPACT OF THE DISCRIMINATION ON HIM/HER; AND DOCUMENTATION OF MEDICAL OR PSYCHIATRIC TREATMENT RELATED TO THE EFFECTS OF THE DISCRIMINATION

Coopwood v. Dep't of Transportation, EEOC Appeal No. 0120083127 (May 2, 2012)

Appellant appealed a FAD which awarded her \$35,000 in compensatory damages. In a previous decision, the Commission concluded that Appellant had been subjected to a hostile work environment for two-and-a-half years, and the Commission remanded the case to the Agency to calculate Appellant's entitlement to compensatory damages. The Agency justified its award based on conclusions that some of the affidavits submitted by Appellant's attorney were suspect based on alleged identical information and a suggestion that the attorney may have impacted the language in the affidavits. The Agency also found evidence of only moderate emotional distress, and further, that she should not have rationally feared for her life given no evidence of any specific threat by any co-worker. As to back pay, the Agency offered reinstatement to a particular position with no back pay award.

- As to the back pay award, the Commission noted that the proper place to challenge a back pay award would be through a petition for enforcement or clarification. However, the Commission accepted this appeal given the passage of time and administrative economy. The Commission then noted that it needed to clarify its original back pay order because the original Commission order failed to encapsulate all back pay and benefits possibly due to Appellant.
- After determining that "but for" harassment, Appellant would have completed training sooner and encumbered a position within the Agency, the Commission remanded the question of back pay to the Agency, noting that it needed to consider, among other things, increases to base pay based on the labor agreement existing at the time, any entitlement to increases in pay due to night work and/or overtime, and the loss of future earning capacity resulting from the delayed completion of training (to include step increases and promotions).
- Regarding the Agency's non-pecuniary damages award, the Commission disagreed with the Agency's conclusions regarding the alleged questions surrounding the affidavits, the level of emotional harm experienced by Appellant and a conclusion that she could not have rationally feared for her safety.
- The Commission rejected the Agency's argument that Appellant could not have feared for her safety after learning about the presence of two "hangman nooses" in the workplace because she did not receive a specific threat from a particular coworker or supervisor.

- The Commission noted that the presence of a “hangman's noose” evokes an image, particularly among African-Americans, of extreme racial violence and a direct threat to life (citation omitted). Where unknown persons in her workplace specifically targeted her twice by displaying an inherently violent symbol, the Commission found it reasonable to conclude that the “hangman’s nooses” caused Appellant to fear for her safety.
- Based on the breadth and depth of physical and emotional anguish (not summarized here, but set forth in the decision), the Commission modified the compensatory damages award from \$35,000 to \$150,000.

2011 EXCEL CONFERENCE

August 16-18, 2011

Baltimore, MD

EEOC CASE UPDATE

I. Procedural Decisions

A. Commission Jurisdiction Generally

EEOC LACKS JURISDICTION OVER CLAIMS OF DISCRIMINATION BASED ON SOCIAL SECURITY NUMBER

Olsen v. Dep't of the Treasury, EEOC Request No. 0520110335 (May 5, 2011).

Appellant alleged discrimination based on her social security number. The Agency dismissed the EEO complaint for failing to state a claim.

- The Commission affirmed the Agency's dismissal and thereafter denied reconsideration. The Commission noted that it is an agency of limited jurisdiction, tasked with enforcing a specific set of laws.

EEOC LACKS JURISDICTION OVER MSPB APPEALABLE MATTERS AND CLAIMS BASED ON VETERAN'S PREFERENCE OR STATUS

Chaves, Jr. v. Equal Empl. Opp. Comm., EEOC Pet. No. 0320100050 (May 9, 2011)

Petitioner filed a Merit Systems Protection Board (MSPB) claim alleging that his veteran's preference rights were violated. Petitioner then provided copies of his MSPB filings to the Commission for no apparent reason. The record also demonstrated that Petitioner withdrew his claim before an MSPB AJ.

- The Commission concluded that it did not have jurisdiction over procedural matters at the MSPB.
- In a footnote (n.2), the Commission also re-affirmed the principle that it does not have jurisdiction over claims based on veteran's preference or status.

{**Author Note:** Mixed Case Jurisdiction is also discussed in the *Shealey v. Equal Empl. Opp. Commission* decision, found in the Rehabilitation Act Section (Section IV) of this handout}.

CLAIMS RAISING DISSATISFACTION WITH THE EEOC'S OWN PROCESS ARE NOT COGNIZABLE

Ransom v. Equal Empl. Opp. Comm., EEOC Appeal No. 0120100024 (Sept. 23, 2010)

Appellant filed an EEO complaint against the State Department. The Agency dismissed the EEO complaint. The Office of Federal Operations (OFO) affirmed the dismissal. After writing several letters to the Commission, Appellant filed an EEO complaint against *the Commission* arguing that the Commission itself failed to properly process his EEO complaint.

- The Commission concluded that a challenge to the manner in which it processed an appeal is not an employment action. Moreover, the Commission explained that Appellant's allegations are more properly considered allegations alleging dissatisfaction with the manner in which his EEO complaint was processed. Such claims alleging dissatisfaction fail to state a cognizable claim of employment discrimination.

B. Stating a Claim

i. States a Cognizable Claim

FAILING TO ALLEGE A BASIS OF DISCRIMINATION DURING EEO COUNSELING DOES NOT JUSTIFY DISMISSAL OF AN EEO COMPLAINT WHEN BASES ARE SUBSEQUENTLY IDENTIFIED

Goff v. Dep't of Housing and Urban Dev., EEOC Appeal No. 0120101712 (June 24, 2011)

Appellant sought EEO counseling, and throughout the counseling process, admittedly could not identify any bases of discrimination. Ultimately, Appellant filed a formal complaint and alleged gender discrimination and reprisal. The Agency, however, dismissed the complaint based on the fact that no bases were identified in the EEO Counselor's report even though Appellant was provided several opportunities during EEO counseling to identify bases of discrimination. The Agency also argued that Title VII is not a general civility code, and that discontent with her work environment, without more, is not cognizable.

- The Commission concluded that the agency improperly dismissed Appellant's EEO complaint. Citing precedent, the Commission explained that it gives latitude to parties to add or clarify bases of discrimination even after filing charges. In this case, Appellant identified gender and reprisal in her formal EEO complaint.
- The Commission also noted that the Agency is correct in asserting that Title VII is not a general civility code. However, the Commission explained that such an argument goes *to the merits of the complaint* and is *irrelevant* to the procedural issue of whether Appellant has set forth a cognizable claim under Title VII.

A WRITTEN WARNING NOT IN AN OPF, BUT STORED ELSEWHERE IN THE AGENCY IS SUFFICIENT TO AGGRIEVE AN EMPLOYEE

Jordan v. Dep't of Health & Human Serv., EEOC Appeal No. 0120103744 (Feb. 24, 2011)

Appellant alleged that the Agency discriminated against him when it issued him a letter of warning for not wearing his identification according to established regulations. The letter of warning stated that it would not be placed in Appellant's personnel folder, but would be kept in a departmental file to memorialize the fact that he had been warned about the infraction.

- The Commission reversed the Agency's dismissal and concluded that Appellant's claim that the Agency discriminated against him when it issued him a letter of warning stated a viable claim. The letter of warning was in writing, placed in a department file, and the Agency did not provide any evidence that it would *not* be considered in future disciplinary actions.

**DENIAL OF REASONABLE ACCOMMODATION CLAIMS ARE
COGNIZABLE BASED SOLELY ON VERBAL REQUESTS, AND
WHETHER OR NOT APPELLANT COMPLIED WITH AN AGENCY
REASONABLE ACCOMMODATION PROCESS IS MORE PROPERLY
ADDRESSED ON THE MERITS**

Brensinger v. Dep't of the Navy, EEOC Appeal No. 0120103675 (Jan. 14, 2011)

Appellant alleged that she was denied a reasonable accommodation to work the morning shift. The Agency stated that Appellant was asked to complete a reasonable accommodation request and update her resume. When she did not, the Agency dismissed her EEO complaint for failing to state a claim.

- The Commission concluded that Appellant's allegation that the Agency denied her reasonable accommodation stated a viable claim of disability discrimination.
- The Agency's assertions regarding Appellant's failure to complete a reasonable accommodation request and failure to update her resume went *to the merits* of the EEO complaint and *were not relevant* to the procedural issue of whether Appellant stated a cognizable claim.

ii. Does NOT state a Claim

**BEING REQUIRED TO UNDERGO A MEDICAL EXAMINATION AFTER
REQUESTING AN INCREASE IN VETERAN'S BENEFITS IS NOT
COGNIZABLE AS A CLAIM OF DISABILITY DISCRIMINATION**

Revills v. Dep't of Veterans Affairs, EEOC Appeal No. 0120103617 (Jan. 19, 2011)

Appellant alleged that the Agency subjected him to disability discrimination when he was asked to take a medical examination related to his request for increased veteran's benefits. The Agency dismissed Appellant's EEO complaint for failure to state a claim.

- The Commission affirmed, concluding that Appellant did not state a viable claim under the EEOC Regulations. Appellant's claim concerned the Agency's general administration of veterans' disability benefits, and did not relate to an employment policy or practice. The proper forum for Appellant to challenge the

Agency's actions was through the Agency's appeal process for veterans benefits.

C. Intersection of Hostile Work Environment and Retaliation Claims and Stating a Claim – post *Burlington Northern v. White*

i. *Does NOT State a Claim*

WITHOUT MORE, A THREAT OF DISCIPLINE BY SUPERVISOR IS NOT MATERIALLY ADVERSE AND IS INSUFFICIENT TO ESTABLISH A COGNIZABLE RETALIATORY HOSTILE WORK ENVIRONMENT CLAIM

Wood v. Dep't of Housing and Urban Dev., EEOC Appeal No. 0120110467 (June 21, 2011)

Appellant filed a complaint alleging harassment by her supervisor. Appellant alleged four hostile acts, the fourth of which was based on her prior EEO activity, as follows: (1) In April of 2010, she received an email from her supervisor that was demeaning, denigrating and accusatory; (2) In the winter of 1999, her supervisor made a surprise, unannounced visit, which she viewed as a lack of trust; (3) In June of 2009, her supervisor verbally reprimanded her in front of the Field Office Director; and (4) In retaliation for prior EEO activity, on July 9, 2010, her second-line supervisor threatened her with disciplinary action.

The Agency dismissed Appellant's complaint for failure to state claim.

- The Commission affirmed the final agency decision dismissing Appellant's hostile work environment and reprisal claims for untimely contact and failure to state a cognizable claim under either a hostile work environment or reprisal theory.
- Regarding the last (reprisal) claim, the Commission set forth the following important legal principle:
 - "The anti-retaliation provisions of the employment discrimination statutes seek to prevent an employer from interfering with an employee's effort to secure or advance enforcement of the statutes' basis guarantees, and are not limited to actions affecting employment terms and conditions. *Burlington Northern & Santa Fe Railroad, Co. v. White*, 548 U.S. 53, 126 S. Ct. 2405 (2006). **To state a viable claim of retaliation, complainant must allege that; 1) she was subjected to an action which a reasonable employee would have found materially adverse, and 2) the action could dissuade a reasonable employee from making or**

supporting a charge of discrimination. *Id.* While trivial harms would not satisfy the initial prong of this inquiry, the significance of the act of alleged retaliation will often depend upon the particular circumstances.” {emphasis added}

- The Commission then concluded that claims one and four **do not** state a viable claim of harassment. The Commission observed that, while Claim four would possibly dissuade a reasonable employee from making or supporting a charge of discrimination (element 2 above), it does not detail action which a reasonable employee would have found *materially* adverse (element 1 above) {emphasis in original}.
- The Commission noted that, while she “may have been annoyed by her second-line supervisor’s actions, the alleged conduct of [her] supervisor does not constitute a substantive claim of reprisal.”

**WITHOUT MORE, VERBAL STATEMENTS BY A CO-WORKER, WILL
NOT BE CONSIDERED SEVERE OR PERVASIVE, NOR WILL THEY
DETER AN EMPLOYEE FROM ENGAGING IN EEO ACTIVITY**

Davis v. Dep’t of Homeland Security, EEOC Appeal No. 0120110492 (Mar. 22, 2011)

Appellant filed a formal complaint alleging that the Agency subjected him to discrimination and retaliation when: 1) he was subjected to on the job harassment by a co-worker in FPS Management, who undermined his authority with his subordinates and attempted to interfere with his performance and development in his new position as Area Commander; 2) this co-worker actively created a hostile work environment by attempting to intimidate him and his subordinates, and exposing them to violent and obtrusive behavior; and 3) he was subjected to retaliation for his prior EEO activity involving persons to which the co-worker has allegiance and/or perceived obligations and in which the co-worker was mentioned and directly involved. The Agency dismissed the EEO complaint for failure to state a claim.

- Applying the principles stated above in *Wood*, the Commission affirmed the Agency’s dismissal. In reaching this conclusion, the Commission concluded that even if true, Appellant’s allegations were not sufficiently severe or pervasive, nor were they reasonably likely to deter EEO activity.

ii. Does State a Claim

WRITTEN PERFORMANCE MEMORANDUM COUPLED WITH HOSTILE COMMENTS BY A SUPERVISOR SUFFICIENT TO STATE A CLAIM OF RETALIATION

Sayre v. Dep't of Veterans Affairs, EEOC Appeal No. 0120111372 (June 17, 2011)

Appellant filed a claim alleging reprisal by her supervisor. She alleged that 1) on September 30, 2010, her supervisor issued Appellant a notice of unacceptable performance and opportunity to improve; and 2) on October 7, 2010, her supervisor followed her around and made hostile comments to her, including telling her to quit. The Agency dismissed her complaint for failure to state a cognizable claim.

- The Commission reversed the agency's dismissal of the EEO complaint and concluded that the allegations stated a viable harassment claim based on reprisal.
- In reaching this conclusion, the Commission concluded, based on the standards summarized above in *Wood* that Appellant's receipt of a Notification of Unacceptable Performance/Opportunity to improve, coupled with hostile comments from a supervisor including telling her to quit, are clearly adverse (element 1) and would dissuade a reasonable employee from making or supporting a charge of discrimination (element 2).

CO-WORKER HARASSMENT, ALONG WITH FAILING TO RESPOND TO SUCH ALLEGATIONS OF HARASSMENT, STATES A COGNIZABLE CLAIM OF RETALIATION

IT IS IMPROPER TO DISMISS CLAIMS AS DISCRETE ACTS THAT MORE PROPERLY COMPRISE BACKGROUND EVIDENCE OF A HOSTILE WORK ENVIRONMENT CLAIM

Arciniega v. U.S. Postal Serv., EEOC Appeal No. 0120111101 (May 25, 2011)

Appellant (female) filed a complaint of discrimination and harassment, alleging that: 1) in February 2010, a co-worker made a comment suggesting a sexual relationship between her and another female co-worker; 2) on May 22, 2010, the co-worker bumped

into her right arm from behind; and 3) On June 24, 2010, Appellant was interviewed without representation (management gave her an investigative interview without Union representation when she complained about the co-workers actions). The Agency dismissed claim one as untimely, considered it background to the other claims, and found the environment did not state a cognizable claim of harassment.

- The Commission reversed the agency's dismissal of the EEO complaint. First, the Commission noted that under the standard set forth in *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 117 (2002), the first claim is part of Appellant's overall hostile work environment claim and should not have been dismissed as a distinct claim.
- Next, the Commission concluded that Appellant's allegations that she was harassed by a co-worker and management failed to respond to her claim of harassing behavior by her co-worker stated a viable claim of reprisal.
- In reaching this conclusion, the Commission concluded (based on the standards summarized above in *Wood*) that the Agency's actions were materially adverse to Appellant (element 1) and could have dissuaded a reasonable employee from filing a charge of discrimination (element 2).

FAILING TO RESPOND TO A CLAIM OF HARASSMENT BECAUSE OF APPELLANT'S PRIOR EEO ACTIVITY, THEREBY ALLOWING A HOSTILE WORK ENVIRONMENT TO DEVELOP, STATES A COGNIZABLE CLAIM OF HARASSMENT

Barr v. U.S. Postal Serv., EEOC Appeal No. 0120100775 (Apr. 26, 2011)

Appellant filed a hostile work environment claim, alleging that because he is a gay male, a co-worker referred to another worker as a "faggot" in front of him. Appellant also alleges that when he reported this to his supervisor, the agency took no action because he had previously filed EEO complaints, and thus the Agency continued to allow harassment to occur. The Agency dismissed the claim for failure to state a cognizable hostile work environment claim, arguing that what was alleged constituted nothing more than petty workplace disputes.

- The Commission reversed the Agency's dismissal. In reaching its conclusion, the Commission cited the law of harassment and reprisal (cited above in *Wood*) and concluded that because management had allowed a hostile work environment to develop at the facility, Appellant had stated a cognizable hostile work environment claim.

**UNFOUNDED MANAGEMENT SCRUTINY, EVEN IF RELATED TO
WORK DUTIES AND ASSIGNMENTS, CAN STILL STATE A
COGNIZABLE HOSTILE WORK ENVIRONMENT CLAIM IF THE
ALLEGED SCRUTINY IS MATERIALLY ADVERSE**

Patel v. U.S. Postal Serv., EEOC Appeal No. 0120110308 (Apr. 12, 2011)

Appellant, a letter carrier, alleged that the Agency subjected him to discrimination and retaliation when: 1) On May 6, 2010, he was directed to “pull down” Rt. 2402; 2) On May 13, 2010, he was falsely accused of walking and talking instead of pulling DPS errors; 3) On June 11, 2010, he was lectured by his supervisor about Operation 722; 4) On June 22 & June 23, 2010, he was subjected to monitoring of his office performance; 5) On August 9, 2010, he was refused a Form 13 and; 6) On August 10, 2010, his supervisor took away 1 hour and 30 minutes of his route. The Agency dismissed Appellant’s EEO complaint, stating that directing employees to ensure the efficiency of the operation is within the realm of managerial authority, and therefore not hostile.

- The Commission, in citing the principles summarized above in *Wood*, reversed the Agency’s decision and concluded that Appellant stated a viable hostile work environment claim when, taken together, the claims are adverse (element 1) and would dissuade a reasonable employee from making or supporting a charge of discrimination (element 2).

D. Fragmentation

{**Author Note:** Fragmentation is defined in the Commission’s Management Directive 110 as the “breaking up” of a legal claim during EEO complaint processing. See EEOC Management Directive 110 (EEOC MD-110) (Nov. 9, 1999) at Ch. 5, Section III}.

IMPROPERLY IDENTIFYING A CLAIM AS A NUMBER OF DISCRETE ACTS, AND SUBSEQUENTLY FRAGMENTING THE CLAIM TO DISMISS THE ALLEGATIONS, IS IMPROPER WHERE THE ALLEGATIONS TAKEN TOGETHER ALLEGE A HOSTILE WORK ENVIRONMENT

Farrow v. Dep’t of Def., EEOC Appeal No. 0120111776 (Jul. 18, 2011)

Appellant alleged race and color discrimination based on actions by a co-worker. In framing the complaint, the Agency identified four distinct discrete acts, dismissed three of them as untimely and the fourth as moot.

- The Commission reversed, noting that the Agency “misconstrued the nature” of Appellant’s claims. Upon review of the EEO Counselor’s Report, the Commission determined that Appellant alleged discrimination when he was subjected to a pattern of hostile conduct by a co-worker of a different race. Among other things, the co-worker discredited him, gave him poor service, enlisted others to do the same, and did not give him information so he could perform his job.
- The Commission concluded that taken together, such allegations were sufficient to state a claim of hostile work environment harassment.
- The Commission specifically cited to the EEOC MD-110’s language concerning fragmentation, and also cited the Supreme Court’s decision in *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), to explain how the otherwise untimely claims comprise background evidence to Appellant’s hostile work environment claim.

PIECEMEAL FRAGMENTATION AND DISMISSAL OF INDIVIDUAL CLAIMS IN COMPLAINT ALLEGING HOSTILE WORK ENVIRONMENT NOT PROPER

Chatman v. Dep't of Defense, EEOC Appeal Not 0120110698 (Apr. 14, 2011)

Appellant filed an EEO complaint alleging a hostile environment based on his race and prior EEO activity. He set forth seven allegations: as follows:

- a. his supervisor made negative remarks about him. This includes after the conclusion of one phone call, he heard her utter and refer to him as "that black guy in Atlanta," before the phone was completely disengaged;
- b. he was not allowed to perform meaningful duties and he was given an unfair performance rating;
- c. his supervisor indicated that he, Complainant, showed her no respect;
- d. he was not allowed to perform other duties including not being able to participate on a selection panel;
- e. every year that he had been on the OCM team, he had been asked to permanently move to the Huntsville, Alabama area;
- f. on April 29, 2010, he received a proposed Letter of Suspension for travel violation and attendance issues; and
- g. he was "subjected to" several cases where DCMA-OCB was in violation of the Fair Labor Standards Act.

The Agency dismissed claims a and d, arguing that he failed to state a claim. The Agency dismissed claim b for untimely counselor contact. The Agency dismissed claim f because it constituted a proposal to take a personnel action. Finally, the Agency dismissed claims c, e and g because Appellant had not previously raised them during EEO counseling.

- The Commission reversed the Agency's dismissal. In reaching this conclusion, the Agency noted, pursuant to *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 117 (2002), the dismissed claims are part of the overall claim of harassment since some of the allegations were timely raised. Similarly, the three claims not specifically brought to the EEO counselor were like or related to the

other claims. Furthermore, proposed actions can be part of a viable hostile work environment claim. Finally, those two claims dismissed for failure to state a claim, when viewed in the context of a hostile work environment claim, are sufficient to state a cognizable claim of harassment.

E. Amendment and Consolidation

WHEN AN AJ DENIES A MOTION TO AMEND, THE PERIOD OF TIME FOR PURPOSES OF CALCULATING TIMELINESS COMMENCES FROM THE DATE APPELLANT FILED HIS/HER MOTION TO AMEND

{**Author Note:** This case is also an example of a cognizable claim of retaliatory harassment}.

Buckner v. Dep't of the Treasury, EEOC Appeal No. 0120103052 (Feb 4, 2011)

The Commission summarized the salient issues for this case summary as follows:

1. Whether the Agency erred in dismissing the EEO complaint for failure to state a claim when Appellant alleged a pattern of retaliatory harassment by an agency official who (1) previously had tried to meet with her after a town hall meeting to discuss with her a pending EEO complaint; (2) required her to attend another town hall meeting, which was later cancelled, days before a hearing presided over by an EEOC Administrative Judge (AJ).
2. Whether Appellant timely contacted an EEO counselor within 45 days of at least one of the incidents she cited as evidence in support of her retaliatory harassment claim.

Regarding claim 2, the AJ denied Appellant's Motion to Amend her claim to include another allegation related to a later town hall meeting because that incident was raised only days before the hearing in Appellant's first EEO complaint. As such, Appellant sought EEO counseling to proceed with a new complaint. After filing a formal complaint, the Agency dismissed it, arguing that her EEO Counselor contact was untimely.

- The Commission reversed, noting that "When an AJ considers a motion to amend a complaint, and ultimately "concludes that the new claim is not like or related to any claims pending in the complaint, he/she should deny the motion

and order the agency to commence processing the new claim as a separate EEO complaint. The order should instruct the agency that the filing date of the motion to amend the complaint is the date to be used to determine if initial EEO counselor contact was timely under 29 C.F.R. 1614.105(a).” U.S. Equal Employment Opportunity Commission Handbook for Administrative Judges July 1, 2002, Chapter 1, Section II(B)(2).”

- Regarding claim 1, the Commission reversed the Agency’s dismissal, noting that Appellant alleged a pattern of retaliatory harassment by the Area Director, who used Town Hall meetings with all staff as a guise to approach her about her EEO complaint, and to potentially intimidate witnesses since one of the meetings was scheduled days before her first hearing before an AJ.

F. Timeliness

WHEN THERE IS CONFLICTING EVIDENCE REGARDING TIMELINESS, THE AGENCY WILL NOT MEET ITS BURDEN TO ESTABLISH UNTIMELY EEO COUNSELOR CONTACT

{**Author Note:** This case is also an example of a cognizable claim of sexual harassment}.

Robinson v. Dep’t of the Army, EEOC Appeal No. 0120111526 (July 28, 2011)

Appellant alleged that she was sexually assaulted and harassed by her supervisor. She filed a formal complaint alleging sexual harassment by her supervisor occurred between November of 2009 and September 17, 2010, and 2) On November 13, 2010, her supervisor filed a civil suit against her. The Agency dismissed the first claim by stating that Appellant did not timely seek EEO counseling when, during her initial contact in September of 2010, she did not wish to proceed with an EEO complaint. The Agency dismissed the second claim, arguing that it did not state a cognizable claim.

On appeal, Appellant alleged that the EEO Specialist told her that she could not file a complaint because her sexual assault allegation against her supervisor was being investigated by criminal prosecutors. Appellant also alleged that the EEO Specialist did not indicate to her when the forty-five day period would begin to run. The Agency argued that the September meeting between the EEO Specialist and Appellant was nothing more than an informational inquiry, and she did not exhibit any intent to

commence the EEO process during that meeting. The Agency also denied that the EEO Specialist gave Appellant misleading information about when the forty-five day period begins to run.

- The Commission reversed the Agency's dismissal of the first claim. The Commission, citing precedent, noted that when there is an issue of timeliness, the burden is on the Agency to obtain sufficient information to support a reasoned determination as to timeliness.
- The Commission noted that Appellant's sworn statement conflicts with the EEO Specialist's unsworn statement, and it gave more weight to Appellant's statement because it was sworn. The Commission also observed from the record that Appellant never intended on abandoning her EEO complaint since she contacted the EEO Specialist only five days after the alleged sexual assault occurred, and took a series of other actions that displayed her intent to complain about what allegedly occurred.
- The Commission also reversed the Agency's dismissal of the second claim, noting that the supervisor's act of filing a civil action could be construed as another act in support of Appellant's overall hostile work environment claim.

G. Post-Sanction Agency Processing

IF AN AJ DISMISSES A HEARING REQUEST AS A SANCTION, AN AGENCY SHALL RULE ON THE MERITS OF THE EEO COMPLAINT

Cox v. Dep't of Agriculture, EEOC Appeal No. 0120103149 (July 22, 2011)

After Appellant requested a hearing, her representative failed to submit a prehearing statement and did not provide good cause. As a sanction, the AJ dismissed Appellant's hearing request and remanded the case to the Agency for further processing according to applicable regulations. The Agency issued a final decision fully implementing the AJ's decision. The Agency, however, summarily dismissed Appellant's EEO complaint without addressing the merits.

- The Commission concluded that the Agency committed error by dismissing Appellant's EEO complaint without addressing the underlying merits of her allegations.

- The Commission noted that “[i]t is well-settled that when we find that a complainant has not cooperated in the hearings process, absent a finding of contumacious conduct, the appropriate sanction is to dismiss the hearing request, and remand the complaint to the Agency to issue a final agency decision on the record.”
- Here, the Agency conducted a full investigation and Appellant should have received a decision on the merits of her claims of discrimination.

H. Summary Judgment

AN AJ’S DECISION TO CONVENE TELEPHONIC ORAL ARGUMENT ON A SUMMARY JUDGMENT MOTION, WHICH WAS TRANSCRIBED BY A COURT REPORTER, IMPROPERLY RESULTED IN CREDIBILITY DETERMINATIONS BASED ON STATEMENTS MADE DURING THE CONFERENCE CALL

Cole v. Dep’t of Transportation, EEOC Request Nos. 0520110147, 0520110151 (May 27, 2011) “Cole II”

In Cole I, the Commission found that the AJ abused his discretion by conducting an “Oral Summary Judgment Hearing” telephonically. Specifically, the Commission noted, citing *Louthen v. U.S. Postal Serv.*, EEOC Appeal No. 01A44521 (May 17, 2006), that AJs should not conduct telephonic hearings or take testimony by telephone, absent exigent circumstances or a joint and voluntary request by both parties, and then found that no such circumstances were contained in the record under consideration. The Commission remanded the EEO complaint to the hearings unit for further processing.

In its request for reconsideration, the Agency argued that the Commission’s decision in Cole I contained a mistake of fact, namely, that the telephonic hearing conducted in Cole I amounted to a full hearing rather than a teleconference to decide whether a hearing should be held. The Agency also argued that there was a mistake of law based on the erroneous application of the *Louthen* rule to the hearing held in the underlying case.

- The Commission denied the Agency’s request for reconsideration, noting that although, from a procedural standpoint, the AJ’s actions appear to be more consistent with summary disposition rather than a hearing on the merits, the

reality is that the AJ's actions amounted to much more. The Commission noted how the AJ determined, via telephone testimony after the teleconference closed, that "...[Appellant] (1) did not show that she was subjected to harassment/hostile work environment or experienced an adverse action in regard to the events identified; (2) gave testimony that amounted to "speculation...without... substance," (3) failed to establish a prima case on any of the bases (sex, age, disability, and reprisal) alleged, and (4) did not identify any events that rise to the level of adverse employment actions." The Commission also observed that the AJ's decision was an "Oral Order" issued immediately following the telephonic proceedings.

- The Commission noted that while it is not improper for an AJ to collect information by telephone, "it has stated that an "AJ's post-hearing decision [which results in a] finding of discriminatory intent will be treated as a factual finding subject to the substantial evidence review standard." See *Louthen* at 4. The Commission has also stated, "Plainly, such deference to the factual findings of the AJ [is] premised on the expectation that the AJ [will] have the opportunity to personally observe the witness." *Id.* This illustrates the Commission's policy that EEO hearings which result in factual findings as to discriminatory intent, regardless of the name used to describe them or the procedures followed to make them happen, are regarded no differently than other AJ hearings held to determine whether discrimination occurred."

I. Independent Contractor/Employee

DOCUMENTATION ESTABLISHING AN EMPLOYER-EMPLOYEE RELATIONSHIP IN OFFICIAL MEMORANDA ESTABLISHED THAT THE AGENCY WAS A JOINT EMPLOYER

Hansen-Schoolderman & Sanders v. Dep't of the Army, EEOC Appeal Nos. 0120103075 & 0120103055 (Oct. 12, 2010), request for reconsideration denied EEOC Request Nos. 0520110060 & 0520110063 (Dec. 17, 2010)

Appellants were employed as nurses at an Agency facility through a government contractor. They filed EEO complaints alleging discrimination and harassment. The Agency dismissed their complaints for failure to state a claim, arguing that Appellants were independent contractors, not employees.

- The Commission concluded that the Agency improperly dismissed Appellants' claims on the grounds that they were not Agency employees. The evidence, including a statement in the Handbook outlining the relationship between the Agency and the contractor which provided that Appellants would "work within the same employer-employee relationship that exists for government employees," was sufficient to show that Appellants should be treated as Agency employees for purposes of filing an EEO complaint.

II. Class Certification Decisions

A. Denial of Class Certification Upheld

{**Author Note:** a Class Agent seeking certification of a class complaint is first required to establish that the class complaint meets the prerequisites of numerosity, commonality, typicality, and adequacy of representation set forth at 29 C.F.R. § 1614.204(a)(2). This section, which is an adoption of Rule 23(a) of the Federal Rules of Civil Procedure, provides that a class complaint may be rejected if any one of these prerequisites is not met. 29 C.F.R. § 1614.204(d)(2).}

A CLASS AGENT CANNOT ESTABLISH COMMONALITY AND TYPICALITY IF S/HE DID NOT EXPERIENCE THE SAME ADVERSE TREATMENT AS OTHER CLASS MEMBERS

Jones v. U.S. Postal Serv., EEOC Appeal No. 0120083637 (Sept. 10, 2010)

Appellant was a Class Agent, and he alleged that the Agency discriminated against and retaliated against a class of employees when it posted a list on a bulletin board containing confidential medical information about eleven employees. The AJ did not certify the class, noting that the Class Agent's name was not even on the list, and that only eleven individuals were affected. Therefore, the AJ found that the Class Agent failed to establish Commonality, Typicality or Numerosity.

- The Commission concluded that Appellant, as Class Agent, failed to meet the prerequisites of commonality and typicality when his name did not appear as one of eleven names mistakenly posted on a bulletin board listing workplace injuries on an OSHA 300 form. Therefore, his claims were not common or typical to the others whose names did appear on the list.
- The Commission concluded that the class complaint also failed to meet the prerequisites of numerosity and adequacy of representation. There were only

eleven individuals affected by the Agency's mistake, and the claims could be processed and consolidated without having to obtain status as a class complaint. Finally, Appellant's designated representative did not provide information that was sufficient to show he or she has the skills, experience, time and resources to represent a class of individuals.

A CLASS WILL NOT BE CERTIFIED WITH NO EVIDENCE OF A COMMON AGENCY POLICY OR PRACTICE IMPACTING A SUFFICIENT NUMBER OF CLASS MEMBERS

AGENCIES MUST ADDRESS HOW THE UNDERLYING INDIVIDUAL COMPLAINT WILL BE PROCESSED; AND DISMISSAL MAY BE APPROPRIATE UNDER ANY SECTION 107 BASIS

Baney v. Dep't of Justice, EEOC Appeal No. 0120082902 (Sept. 10, 2010)

Appellant was a Class Agent. He alleged that the Agency discriminated against him and a class of workers, stating that there was a racial work environment in the food service where he is employed. The Class Agent asked the AJ to recuse the Agency representative, but the AJ refused this request. Ultimately, the AJ denied class certification. The AJ only identified some common issues between the Class Agent and one other co-worker, and the Class Agent provided no other information regarding commonality or typicality to others. In addition, the AJ found no evidence of forty class members as so alleged, noting that the Class Agent provided nothing such as names, locations, jobs, grade levels, etc. in order to identify these individuals. Finally, Appellant's individual EEO complaint was also dismissed because it alleged matters raised in a previous EEO complaint.

- The Commission affirmed the AJ's conclusion that Appellant, as Class Agent, failed to establish commonality and typicality. These prerequisites were not established because he failed to identify a policy or practice affecting more than himself and one other co-worker.
- The Commission also affirmed the AJ's conclusion that Appellant, as Class Agent, failed to meet the numerosity prerequisite, noting that although the Class Agent alleged there were forty members of the purported class, he only came forward with affirmative evidence of one other member.
- Commission regulations provide that an agency's final action must inform the former class agent either (a) that his complaint is accepted and filed as an

individual complaint of discrimination, or (b) that the complaint is also dismissed as an individual complaint. See 29 C.F.R. § 1614.207(d)(7).

- Appellant’s individual EEO complaint was properly dismissed because it raised matters previously set forth in a prior EEO complaint. Because a hostile work environment claim is ongoing in nature, the period of time in the new complaint was encompassed in the time period of the prior EEO complaint that also alleged a hostile work environment.
- The Commission noted that, although Appellant may have added a new basis, disability, to his Class Complaint alleging a hostile work environment, “[i]t is well settled that a complaint which states the same facts as a previous complaint, but alleges discrimination on additional bases, will be deemed identical to the earlier complaint and dismissed. *Robbins v. U.S. Postal Serv.*, EEOC Request No. 01830664 (Nov. 9, 1983).
- In a footnote, the Commission also agreed with the AJs decision to deny the Class Agent’s request to have the Agency representative disqualified due to a conflict of interest. Citing to 29 C.F.R. § 1614.605(c), the conflict of interest regulation, the Commission concurred with the AJ’s conclusion that because the Agency representative was named as a respondent in a federal district court case this would not, in fact, interfere with that representative’s official or collateral duties.

III. Retaliation

A. Former Employees

FORMER EMPLOYEES MAY ALLEGE REPRISAL AGAINST THEIR FORMER AGENCY BASED ON A NEGATIVE REFERENCE

THE FACT THAT THE NEGATIVE REFERENCE OCCURRED DURING A BACKGROUND INVESTIGATION DOES NOT INSULATE REVIEW BY THE COMMISSION SINCE SUCH A CHALLENGE DOES NOT ADDRESS THE MERITS OF A SECURITY CLEARANCE DETERMINATION

Upshaw v. Executive Office of the President, Office of Mgmt. and Budget,
EEOC Appeal No. 0120102241 (June 15, 2011)

Appellant applied for a position with DHS and received a conditional job offer. Thereafter, during a background investigation, DHS contacted Appellant's former employer (OMB) and as a result of information provided by OMB, withdrew its job offer to Appellant. As a result, Appellant filed an EEO complaint alleging that OMB made false and derogatory remarks about him during the background investigation. The Agency dismissed these allegations, arguing that the alleged remarks were made during a background security investigation, and therefore, the Commission does not have the authority to review the substances of an agency's security clearance determination.

- The Commission reversed the agency's dismissal of the EEO complaint and concluded that Appellant's claim that because of his prior EEO activity, his prior employer (OMB) provided a negative reference to DHS after he received a tentative job offer from DHS during the background investigation stated a viable claim of reprisal. The Commission noted that Appellant is not challenging the security clearance determination rather, he was challenging actions and motivations of OMB officials when providing what he believes was false information to DHS.
- The Commission noted that "[a] former employee may state a viable retaliation claim for protected activity that arose from his or her employment with the agency, even if the disputed agency action occurred after the termination of the employment relationship."

FORMER EMPLOYEE MAY STATE A COGNIZABLE RETALIATION CLAIM FOR ACTIONS BY AN AGENCY AFTER THE TERMINATION OF THE EMPLOYMENT RELATIONSHIP

Khatami v. Dep't of Health and Human Services, EEOC Appeal No. 0120110001 (Feb. 4, 2011)

As part of settling an EEO complaint, Appellant retired from the Agency. Appellant then attempted to enter Agency facilities to attend various meetings and conferences but was either denied admission or escorted off of Agency property. Appellant filed an EEO complaint as a result of these actions, which the Agency dismissed for failure to state a claim since she was no longer employed by the Agency.

- The Commission reversed the Agency's dismissal, noting that Appellant alleged that the Agency was attempting to intimidate her and interfere with her right to attend professional conferences on Agency grounds, open to the public. Appellant argued that the Agency took such actions because of her prior EEO activity.
- The Commission explained that "[a] former employee may state a viable retaliation claim for protected activity that arose from his or her employment with the agency even if the disputed agency action occurred after the termination of the employment relationship." See, e.g., *Doyle v. Dep't of Justice*, EEOC Request No. 0520070207 (Oct. 12, 2007)(complainant stated a viable claim of retaliation when, as a former employee who had engaged in protected EEO activity, he was not selected for a contract position with the agency after his retirement); *Machlin v. U.S. Postal Serv.*, EEOC Appeal No. 0120070788 (Mar. 29, 2007) (complainant stated a viable claim of retaliation when, as a former employee who had engaged in protected EEO activity, he was not selected for a contract position with the agency); *Bimes v. Dep't of Def.*, EEOC Appeal No. 01990373 (April 13, 1999) (allegation of retaliation involving agency's refusal to provide a former employee with post-employment letters of reference states a viable claim).

B. Third Party Retaliation

A SPOUSE IS WITHIN THE “ZONE OF INTEREST” BUT A CO-WORKER IMPACTED BY REPRISAL AGAINST ANOTHER IS NOT WITHIN THE “ZONE OF INTEREST”

Smith v. Dep’t of Agriculture, EEOC Appeal No. 0120110535 (Apr. 25, 2011)

Williams v. Dep’t of Agriculture, EEOC Appeal No. 01020110364 (June 6, 2011)

Bertrand v. Dep’t of Agriculture, EEOC Appeal No. 0120110365 (June 6, 2011)

Appellants raised claims of discrimination and reprisal regarding the same Agency actions to relocate and restructure offices. For purposes of this case update, the gravamen of these complaints concern an allegation that the Agency intentionally relocated the Howell Area office to Mason not for business reasons, but to engage in retaliation because the Area Director (Appellant Smith)’s wife had engaged in prior EEO activity and Smith had testified as a witness.

- One question the Commission had to address is whether claims of third party retaliation are cognizable. The Commission articulated the current state of the law, noting that:

“...the Supreme Court recently held that Title VII provides a cause of action to an employee who suffers an adverse action in retaliation for another individual’s protected EEO activity. In providing a cause of action to a “person claiming to be aggrieved,” Title VII enables suit by “any plaintiff with an interest ‘arguably [sought] to be protected by the statute [.]’” *Thompson v. North American Stainless, L.P.*, ___ U.S. ___, 131 S. Ct. 863, 869-70 (2011). The Court adopted a “zone of interests test,” under which a complainant may not sue unless he “falls within the ‘zone of interests’ sought to be protected by the statutory provision whose violation forms the legal basis for his complaint.” *Thompson*, 131 U.S. at 870 (citing *Lujan v. National Wildlife Federation*, 497 U.S. 871, 883 (1990)).

- Applying the above-stated principle, the Commission concluded that Smith, as the husband who testified in the wife’s EEO complaint, fell within the zone of interests and therefore established a *prima facie* reprisal claim. However, neither Williams nor Bertrand fell within the zone of interests as co-workers impacted by

the relocation of the Howell office. Rather, they were “accidental victims” [of] or were “collateral[ly] damage[d]” by the employer’s lawful act. *Citing Thompson*, 131 S. Ct. at 870.

REQUIRING SPOUSE TO UNDERGO DRUG TEST IN RETALIATION FOR FILING EEO COMPLAINT IS COGNIZABLE

AN AGENCY DECISION NOT TO ENGAGE IN ADR OR MAKE IT AVAILABLE IN A PARTICULAR CASE CANNOT BE THE SUBJECT OF AN EEO COMPLAINT

Battle v. U.S. Postal Serv., EEOC Appeal No. 01020110487 (March 24, 2011)

Appellant filed a formal complaint alleging that the Agency subjected her to discrimination and reprisal when: 1) she was not given the same job opportunities as Whites; 2) she was not given training per her request; 3) her family was retaliated against; 4) she was subject to unfair labor practices; 5) she had a grade salary loss due to discrimination. The Agency dismissed her complaint for failure to state a claim with specificity. On appeal, Appellant also argued that she was denied an opportunity to participate in mediation.

- Concerning claim 3, the Commission reversed the Agency’s dismissal. In reaching this conclusion, the Commission cited relevant case law for the principle that the anti-retaliation provisions are construed broadly, and retaliatory acts are not limited to those which affect Appellant’s terms and conditions of employment. In this case, Appellant alleges that her spouse was forced to undergo a drug test as a result of her filing an EEO complaint, and such action is reasonably likely to deter Appellant from engaging in EEO activity.
- Concerning Appellant’s argument on appeal, the Commission noted that an Agency decision not to engage in ADR or make it available in a particular case cannot be the subject of an EEO complaint. See EEOC MD-110 at 3-3.

C. Per se Interference

PER SE VIOLATION FOUND WHEN A MANAGER INFORMS AN EMPLOYEE IT WOULD NOT BE IN HIS/HER BEST INTEREST TO FILE AN EEO COMPLAINT

Williams v. Dep't of the Army, EEOC Appeal No. 0120090596 (Apr. 29, 2011)

Appellant filed a complaint of discrimination concerning a non-selection and lowered appraisal score. After conducting a hearing, the AJ found no discrimination. During the hearing, a supervisor testified as follows:

“Well I asked [Appellant], I said [Appellant], I understand you are going to file an EEO complaint. And I said, well, I don't think it would be in your best interest. I'm not trying to discourage him, I'm telling him that he's got to work with these guys on the floor Co-workers have come to me and said, “I don't want to work with the guy.” I don't trust him. There's a division in that control room right now. How to cure it, I don't know. I even brought that up to [Appellant] last week, and his response was, “well, when this is all settled, done, and over with, you'll see it wasn't about what you think it is, [another supervisor].” He said we can bring this to an end, and I said it's not “we.” I wasn't the one that created the racial strife in there, [Appellant] himself has.”

The AJ concluded that a manager's comment that filing an EEO complaint would not be in Appellant's best interest was “highly inappropriate” and could have had a chilling effect on his rights to pursue the EEO process, but this comment did not have such a chilling effect because he sought EEO counseling, filed a complaint, and “adamantly continued” in the EEO process. Therefore, Appellant was not harmed by the remarks.

- The Commission concluded that the manager's comment constituted *per se* interference with the EEO process.
- In reaching this conclusion, the Commission first noted that “[a]n employee may suffer unlawful retaliation if his supervisor interferes with his EEO activity. See *Binseel v. Dep't of the Army*, EEOC Request No. 05970584 (Oct. 8, 1998); see also *Marr v. Dep't of the Air Force*, EEOC Appeal No. 01941344 (June 27, 1996); *Whidbee v. Dep't of the Navy*, EEOC Appeal No. 0120040193 (Mar. 31, 2005).”

- The Commission then concluded that: “[the manager’s] actions violated the letter and spirit of EEO regulations and constitute an impermissible *per se* interference with the EEO process. By approaching Complainant and stating that he did not think it would be in Complainant's best interest to file an EEO complaint, [the manager] improperly injected himself into the EEO process. Moreover, we construe [the manager’s] comments as a flagrant attempt to dissuade Complainant from engaging in the EEO process by suggesting or threatening that he could suffer unpleasant consequences if he pursued his EEO claims. Furthermore, [the manager] compounded his interference with Complainant's EEO activity by telling Complainant that his EEO activity impaired his relationship with co-workers, was divisive, and created racial strife in the workplace.”
- Finally, regarding the AJ’s conclusion that Appellant was not harmed, the Commission stated that “[c]ontrary to the AJ's finding, it does not matter that Complainant continued to pursue his EEO claims despite [the manager’s] interference. The Commission has found that even if a complainant successfully initiates the EEO process in spite of such interference, the complainant is still aggrieved. *Boyd v. Dep’t of Transportation*, EEOC Appeal No. 01955276 (Oct. 10, 1997) (“[t]he mere fact that the Appellant filed the instant formal complaint does not defeat her claim of unlawful interference with the EEO process.”) We find that [the manager’s] comments clearly are reasonably likely to deter employees from engaging in EEO activity, and as such, violate EEO regulations. *See Kirk E. Webster v. Dep’t of Defense*, EEOC Appeal No. 0120080665 (Nov. 4, 2009) (comments made by complainant's supervisor that the EEO complaints complainant filed stressed him out and that in his 20 years at the agency no one had done anything like what complainant had done to him constituted a *per se* violation of Title VII since such comments are likely to have a chilling effect and deter employees from full exercise of their EEO rights).

COMMISSION AFFIRMS AJ FINDING A *PER SE* VIOLATION ON HIS OWN MOTION, BASED ON TESTIMONY IN THE RECORD

Brostrand v. Dep’t of Veterans Affairs, EEOC Appeal No. 0120103653 (Feb. 10, 2011)

During a hearing, an AJ found, on his own motion, a *per se* violation when a supervisor ordered a co-worker to “not assist [Appellant] in any kind of way with respect to any appeal or anything of that sort.” The AJ ordered relief solely as to the *per se* violation, as the AJ found no discrimination or hostile work environment. The Agency fully implemented, and thus did not challenge the AJs decision. However, the Commission

reviewed the AJ's decision because Appellant challenged the AJ's other conclusions finding no discrimination.

- The Commission concluded that the AJ properly found, on his own motion, a *per se* violation, as such a comment would likely have a chilling effect and deter employees from exercising their EEO rights.

D. Stating a Claim of Reprisal

PLACEMENT ON A PIP IS SUFFICIENTLY ADVERSE AND COULD DISSUADE AN INDIVIDUAL FROM ENGAGING IN EEO ACTIVITY, THUS STATING A CLAIM OF REPRISAL

Brown v. Dep't of Def., EEOC Appeal No. 0120103139 (Dec. 8, 2010)

Appellant alleged that the Agency discriminated against him when it placed him on a performance improvement plan (PIP) in reprisal for engaging in prior EEO activity. The Agency dismissed the complaint for failure to state a claim.

- The Commission reversed the Agency's dismissal and concluded that Appellant stated a viable claim of retaliation.
- The Commission noted that in most cases, placement on a PIP does not constitute an adverse action sufficient to render an employee aggrieved. Generally, a proposal to take a personnel action or preliminary step to taking a personnel action is not sufficient to render an employee aggrieved. Indeed here there was no evidence the PIP was included in Complainant's personnel record.
- However, the Commission has a policy of considering reprisal claims with a broad view of coverage. For this reason, the Commission concluded that the action could dissuade an employee from engaging in protected EEO activity.

IV. Rehabilitation Act

A. Findings of Discrimination

i. Failure to Accommodate

**A TWENTY POUND LIFTING RESTRICTION WILL SUBSTANTIALLY
LIMIT THE MAJOR LIFE ACTIVITY (MLA) OF LIFTING**

**OFFICE OF WORKER'S COMPENSATION PROGRAM (OWCP)
DETERMINATION OF JOB SUITABILITY DOES NOT ABROGATE AN
AGENCY'S RESPONSIBILITY TO ENSURE THAT EMPLOYEE IS
PROVIDED A REASONABLE ACCOMMODATION**

**TELEPHONIC TESTIMONY OF FORMER EMPLOYEES UNABLE TO
APPEAR AT A HEARING ACCEPTABLE**

**AJ CREDIBILITY DETERMINATIONS BASED ON WITNESS
DEMEANOR ACCEPTED UNLESS OBJECTIVE EVIDENCE SO
CONTRADICTS THE CREDIBILITY DETERMINATION**

**DISCIPLINING EMPLOYEE WHO IS A "THORN IN THE SIDE" FOR
ATTENDANCE PROBLEMS ASSOCIATED WITH FLARE-UPS CAUSED
BY WORKING BEYOND MEDICAL RESTRICTIONS DEEMED
RETALIATORY**

Huddleston v. U.S. Postal Serv., EEOC Appeal No. 0720090005 (Apr. 4, 2011)

Appellant, working in a non-career Casual postal position, was accommodated for a few years in a modified duty position after a workplace injury, until this position was abolished. Thereafter, the new position Appellant ultimately received, as a result of an Office of Worker's Compensation Program (OWCP) review, caused Appellant pain and he so informed his managers that this new position was beyond his physical restrictions. The Agency took no action and ultimately, Appellant became unable to work. Appellant filed a complaint alleging a failure to accommodate.

- The Commission concluded that Appellant's 20 pound lifting restriction substantially limited the major life activity of lifting and that Appellant was

qualified because he could perform a modified mail processing clerk job assignment with accommodations.

- The Commission then concluded that the Agency did not engage in an interactive process and that it failed to show it would be an undue hardship to accommodate his disability.
- The Commission further concluded that Appellant was retaliated against when the supervisor, who stated that Appellant was a “thorn in his side,” issued a letter of warning for attendance even though 90% of his absences were due to flare-ups caused by his working beyond his medical restrictions.
 - Other noteworthy principles from this decision:
 - Telephonic testimony of a witness who is no longer a federal employee who cannot be compelled to appear in person, but who is willing to testify telephonically, is a permissible exigent circumstance as set forth in *Louthen v. U.S. Postal Service*.
 - Regarding an AJ’s credibility determination, the Commission stated that: “[a]n AJ’s credibility determination based on the demeanor of a witness or the tone of voice of a witness will be accepted unless documents or other objective evidence so contradicts the testimony or the testimony so lack[ing] in credibility that a reasonable fact finder would not credit it.”
 - OWCP’s approval of a job offer does not bar denial of a reasonable accommodation claim under the Rehabilitation Act, and the fact that OWCP approved the offer of a job with modified duties does not absolve the Agency of its duty to ensure that Appellant is reasonably accommodated. As such, challenging the job duties under a failure to accommodate theory is not a collateral attack on a worker’s compensation proceeding.

**UNREASONABLE DELAY IN PROVIDING A REASONABLE
ACCOMMODATION WILL RESULT IN LIABILITY UNDER THE
REHABILITATION ACT**

**NEITHER AN AGENCY'S DECISION NOT TO ENGAGE IN ADR, NOR
ANY STATEMENTS MADE DURING ADR, CAN FORM THE BASIS OF
AN EEO COMPLAINT**

**THE COMMISSION HAS NO JURISDICTION OVER MIXED CASE
COMPLAINTS, WHICH ARE APPEALABLE TO MSPB, NOT EEOC**

Shealey v. Equal Empl. Opp. Comm., EEOC Appeal No. 0120070356 (April 18, 2011)

Appellant, a former Agency Investigator, alleged claims of disparate treatment, hostile work environment, failure to accommodate, and MSPB appealable matters such as denial of WIGs and constructive discharge. These claims stemmed from her diagnosis as having cumulative stress, and whether the Agency's actions in disciplining her, harassing her, and not reassigning her to another position and taking other actions were discriminatory.

- The Commission concluded that Appellant's cumulative stress and its impact on her daily life substantially limited her in the major life activity of concentrating.
- The Commission then concluded that the Agency's nine-month delay in providing her reasonable accommodations was unjustified, and that Appellant therefore established a Rehabilitation Act violation. The Commission then cited other cases for the proposition that delays in providing accommodations result in liability.
 - Noteworthy principles from this decision:
 - The Commission concluded there was insufficient evidence of disparate treatment, or that the work environment was sufficiently severe or pervasive to alter conditions of employment and create a hostile work environment.
 - The Commission concluded that neither the Agency's decision not to engage in ADR, nor any statements made during ADR, can form the basis of an EEO complaint based on language in the MD-110.

- The Commission did not have jurisdiction over Appellant's mixed case complaint alleging constructive discharge and denial of WIGI claims, noting that the Agency's FAD was appealable to the MSPB pursuant to 29 C.F.R. §1614.302(d)(1)(ii).
- The Commission noted that in this case, as Complainant had resigned, full relief would be placement back into her Investigator position with accommodations, but not with back pay or benefits since she did not establish a constructive discharge by the Agency's failure to accommodate. Such relief would therefore exceed make-whole relief.

ii. *Improper Disclosure of Medical Documentation*

**IMPROPER DISCLOSURE OF CONFIDENTIAL MEDICAL RECORDS,
EVEN IN RESPONSE TO A SUBPOENA ISSUED IN A CIVIL ACTION,
CAN VIOLATE THE AMERICANS WITH DISABILITIES ACT (ADA)
CONFIDENTIALITY PROVISIONS**

Bennett v. U.S. Postal Serv., EEOC Appeal No. 0120073097 (Jan. 11, 2011)

Appellant injured his back while working, had surgery, and ultimately had to stop working. Appellant filed a civil action against Union Carbide Corporation apparently unrelated to his employment at the Postal Service. Thereafter, the Agency received a subpoena in civil action case from Union Carbide, seeking among other things, Appellant's medical information. The Agency's Human Resources Department proceeded to gather documents from his Official Personnel File, including documents pertaining to communications about Appellant's physical injuries, limited duty job offers, etc., and sent them to Union Carbide. Appellant filed a Rehabilitation Act claim that he was discriminated and retaliated against when the Agency turned over confidential medical documents in this civil action involving Union Carbide without first obtaining a release from him permitting the Agency to release his confidential medical documents.

- The Commission first concluded that the Agency improperly dismissed Appellant's EEO complaint for failure to state claim (see below discussing legal principals).
- The Commission then concluded that the Agency violated the Rehabilitation Act by failing to comply with the ADA's confidentiality provision and disclosing

confidential medical information in a manner inconsistent with the ADA (see below discussing legal principals).

- Noteworthy principles from this decision:
 - In accepting or dismissing an EEO complaint, “[t]he only questions for an agency to consider in determining whether a complaint states a claim are: (1) whether the complainant is an aggrieved employee; and (2) whether the complainant alleges employment discrimination on a basis covered by EEO statutes. If these questions are answered in the affirmative, an agency must accept the complaint for processing regard[less] of its judgment on the merits.”
 - An allegation of improper agency disclosure of medical information states a valid claim of discrimination. *See Valle v. U.S. Postal Serv.*, EEOC Request No. 05960585 (Sept. 5, 1997) (concluding that an improper agency disclosure of medical information would constitute a *per se* violation of the Rehabilitation Act, and that no showing of harm other than the violation is necessary to state a cognizable claim).
 - “Documentation or information concerning an individual’s diagnosis is without question medical information that must be treated as confidential except in those circumstances described in 29 C.F.R. Part 30.” *Citing Lampkins v. U.S. Postal Serv.*, EEOC Appeal No. 0720080017 (Dec. 8, 2009).
 - The decision summarizes an Agency’s obligations vis-à-vis confidential medical documentation, explaining that:
 - All information obtained regarding the medical condition or history of an applicant or employee must be maintained on separate forms, in separate files, and treated as confidential medical documents.
 - This requirement also applies to information voluntarily provided by the employee to the employer.
 - These confidentiality duties apply regardless of whether an applicant is hired or the employment relationship ends.

- The confidentiality duty extends to any medical information from any employee or applicant, and it is not limited solely to individuals with disabilities.
- There are limited exceptions to the confidentiality requirements:
 - supervisors and managers in order to comply with necessary restrictions/accommodations;
 - first aid and safety personnel may be notified, where and when appropriate, if the disability may require emergency treatment;
 - government officials investigating compliance.
- The Commission has also interpreted the ADA to permit disclosure to:
 - state workers' compensation offices,
 - state second injury funds,
 - workers' compensation insurance carriers,
 - health care providers when seeking advice on how to reasonably accommodate an employee or applicant
 - for insurance purposes.
- The Decision notes that responding to a District Court subpoena pursuant to a discovery request in a civil action does not fit into one of the above-enumerated exceptions to the ADA's confidentiality requirement, notwithstanding the fact that the ADA allows employers to comply with other federal statutes or rules, even if such rules conflict with the ADA.
- In this case, a subpoena is not considered an Order of a court of competent jurisdiction so therefore, the Privacy Act's language permitting disclosure pursuant to an order of a court of competent jurisdiction does not apply.
- Pursuant to the Civil Rights Act of 1991, Appellant is entitled to equitable remedies, compensatory damages for past and future

pecuniary losses and non-pecuniary losses. Appellant is also entitled to reasonable attorney's fees and costs pursuant to 29 C.F.R. §1614.501(e).

V. Equal Pay Act

THE COMMISSION DECLINES TO EXTEND LEDBETTER TO RECEIPT OF PENSION BENEFITS

Brakenall v. Environmental Protection Agency, EEOC Appeal No. 0120093805 (Nov. 30, 2010)

Appellant filed a complaint of discrimination approximately twelve years after retiring from the Agency. Appellant alleges that she was not properly paid when she was employed, as compared with her male counterparts. She also alleges that her pension benefits were therefore not fairly calculated due to the pay discrimination.

- The Commission concluded that the Agency properly dismissed Appellant's claim, as a now former employee, that she was not paid equally to males, noting that she reasonably suspected discrimination years ago, and did not contact an EEO counselor within 45 days of receiving a discriminatory paycheck.
- The Commission also concluded that a series of discriminatory payment of pension benefits is distinguishable from receipt of paychecks and is exempted from coverage under the Lilly Ledbetter Fair Pay Act of 2009.

SALARY DISPUTE UPON COMMENCING EMPLOYMENT IS A COMPENSATION DISPUTE THAT CAN BE TIMELY RAISED UPON RECEIPT OF EACH PAYCHECK

Duff v. Dep't of the Army, EEOC Appeal No. 0120111566 (June 24, 2011)

Appellant was promised a salary of \$70,000, but was only paid \$62,752 when he entered on duty on July 22, 2010. Appellant did not initiate EEO Counselor contact until September 16, 2010, thus prompting the Agency to dismiss his claim of discrimination for untimely counselor contact when he was not paid as promised in his original offer letter.

- In its Decision, the Commission noted that “On January 29, 2009, the President signed the Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat 5 (“the Act”). The Act applies to all claims of discrimination in compensation, pending on or after May 28, 2007, under Title VII, the Rehabilitation Act, and the ADEA. Section 3 of the Act provides that:

... an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by the application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or part from such a decision or other practice.

- Applying the above principle, the Commission reversed the Agency’s decision to dismiss for untimely counselor contact, noting that Appellant is arguably discriminated against each time he receives a paycheck, and he received a paycheck within the forty-five day time frame to contact an EEO counselor.

PROMOTION DECISIONS VIA REASSIGNMENT CHARACTERIZED AS IMPROPER PAY MATTERS CAN BE TIMELY RAISED UPON RECEIPT OF EACH PAYCHECK

LILLY LEDBETTER FAIR PAY ACT OF 2009 LIMITS BACK PAY UP TO TWO YEARS PRECEDING THE FILING OF A COMPLAINT

Maddox v. Environmental Protection Agency, EEOC Appeal No. 0120101237 (May 12, 2011)

Appellant, a Webmaster at the Agency’s facility in Atlanta, alleged that: 1. On July 20, 2008, Appellant was reassigned into the Regional Web Master position as a GS-12 instead of at the GS-13 grade level; and 2. On August 12, 2009, Appellant was promoted to a GS-13 Regional Web Master position; however, she should have been promoted to a GS-13 Regional Web Master in May 2004 since she has been serving and performing as a GS-13 Regional Web Master since May 2004. The Agency dismissed the complaint for untimely counselor contact.

- Applying the principles set forth above in *Duff*, the Commission reversed the Agency's dismissal.
- In recognition of Appellant's claim that she was not properly paid as far back as 2004, the Commission also noted that:

“Section 3 of the Act also provides that back pay is recoverable for Title VII violations up to two years preceding the “filing of the charge,” or the filing of a complaint in the federal sector, where the pay discrimination outside of the filing period is similar or related to pay discrimination within the filing period.”

**A PAY-FOR-PERFORMANCE BASED CLAIM IS PROPERLY
CONSIDERED A COMPENSATION CLAIM THAT THEREFORE CAN BE
TIMELY RAISED UPON RECEIPT OF EACH PAYCHECK**

Nash v. U.S. Postal Serv., EEOC Appeal No. 0120110082 (Feb. 25, 2011)

Appellant filed a formal complaint alleging that the Agency discriminated against him on the basis of sex (male) when on April 23, 2010, he learned that female co-workers received a higher fiscal year 2009 Pay-for-Performance rating. The EEO Counselor's report indicates that Appellant claimed a favorable rating would result in a pay increase. The Agency dismissed the complaint for failure to timely initiate EEO counseling because he learned about his rating on February 5, 2010, but did not contact an EEO counselor until April 28, 2010, beyond the 45 calendar day time limit.

- Applying the principles set forth above in *Duff*, the Commission reversed the Agency's dismissal. In so doing, the Commission viewed Appellant's claim as being subjected to unlawful compensation discrimination and seeking back pay. Accordingly, Appellant was affected by the application of an allegedly discriminatory compensation decision or practice each time he received a paycheck and thus timely contacted an EEO Counselor within 45 days of receiving a paycheck.

**DIFFERENCES IN PAY RESULTING FROM APPLICATION OF SAVED
PAY DURING RESTRUCTURING ARE COMPENSATION DECISIONS
WHICH ARE THEREFORE TIMELY EACH TIME AN EMPLOYEE
RECEIVES A PAY CHECK**

Rollolazo v. U.S. Postal Serv., EEOC Appeal No. 0120110066 (Feb. 25, 2011)

Appellant learned that other employees received saved grade and/or saved pay status or both when they took lower-level positions and he did not receive either saved-grade or saved-pay status when he took a lower-level position of Customer Service Analyst, EAS-17, due to a restructuring. After filing an EEO complaint, the Agency dismissed his EEO complaint pursuant to 29 C.F.R. § 1614.107(a) for failure to state a claim, concluding that Appellant was given the opportunity in October 2009 to accept a directed reassignment with saved-salary/saved-grade status; however, he declined the offer after receiving his October 15, 2009 directed reassignment letter. The Agency noted that at that time, Appellant was informed that he would not receive saved-grade/saved-pay status should he accept a lower-level position. Subsequently, Appellant applied for a lower-level position. The Agency concluded that because he was voluntarily declining the directed reassignment and applying for the lower level position, he was not aggrieved and had not suffered an adverse action. The Agency dismissed Appellant's EEO complaint for untimely EEO Counselor contact, finding that he received the directed reassignment letter in October 2009, but did not contact an EEO Counselor until April 9, 2010.

- Applying the principles set forth above in *Duff*, the Commission reversed the Agency's dismissal. In reaching this conclusion, the Commission noted that a discriminatory pay decision states a valid claim, and further, that his claim of compensation discrimination was timely.

VI. Age Discrimination in Employment Act (ADEA)

GROSS DOES NOT APPLY TO FEDERAL SECTOR ADEA CLAIMS, SO MIXED MOTIVE CLAIMS BASED ON AGE SURVIVE AND PERSONNEL ACTIONS MUST BE FREE FROM ANY AGE DISCRIMINATION

Alotta, Jr. v. Dep't of Transp., EEOC Appeal No. 0120093865 (June 17, 2011)

Appellant filed an EEO complaint alleging, (*for purposes of this case update*), that the Agency discriminated against him on the basis of age (58) when he was not selected for a position. The Agency issued a final agency decision finding no discrimination.

- On appeal, the Commission stated that:

“The Commission has long held that the rules laid down by the U.S. Supreme Court in *McDonnell Douglas Corp.* in proving a Title VII claim are also applicable in proving an age discrimination claim. See *Carver v. Dep't of Justice*, EEOC Appeal No. 07A50025 (Aug. 8, 2005); *Brown v. Dep't of the Navy*, EEOC Request No. 05970009 (Apr. 20, 1998). In *Gross v. FBL Financial Services, Inc.*, 557 U.S. ___, 129 S. Ct. 2343 (2009), the Supreme Court reviewed the statutory language of the ADEA's prohibition of discrimination “because of” age, set forth in 29 U.S.C. § 623(a)(1), which applies to private sector employers. Based on this language, the Court concluded that for a plaintiff to ultimately prevail in a private sector ADEA claim, he or she must demonstrate that “but for” age the alleged discriminatory employment action would not have occurred. The Court then concluded that this “but for” causation requirement precludes application of a mixed motive analysis to claims arising under 29 U.S.C. § 623(a)(1).

However, another section of the ADEA applies to the prohibition of age discrimination in the **federal sector**. See 29 U.S.C. § 633a(a) (all personnel actions in federal employment “shall be made free from any discrimination based on age”) {Emphasis Added}. Contrary to the holding in *Gross*, *Fuller v. Gates, Secretary of Defense* concluded that *Gross* applied to private employment, and not employment by the federal government. See *Fuller v. Gates, Secretary of Defense*, 2010 WL 774965 (E.D. Tx. March 1, 2010). The court in *Fuller* found that the different language in the two sections of the ADEA demonstrated that Congress intended different meanings. *Id.* Further, the *Fuller* court determined that based on its plain meaning, “free from any” must be construed as being broader than “because of,” such that the “mixed motive

analysis” continues to apply in age discrimination claims against the federal government. *Id.*”

- Applying the more liberal standard, the Commission still found no age discrimination, noting that the selecting official was only two years older, and Appellant’s only evidence of age discrimination was based on Appellant’s contention that the selecting official knew that he was eligible for retirement. The Commission noted that the three panelists presented evidence that the selectee did much better in the interview than Appellant, and that “[i]n the absence of **any clear evidence** that age was a factor in the panelists’ recommendation to the selecting official, or in the selecting official’s decision to concur with the interview panel’s choice of the selectee, we cannot find that **age played any part** of the Agency’s decision not to select Complainant for the position in question. (emphasis added).

{**Author Note:** Two prior Commission decisions set forth the same ADEA analysis for federal sector claims, and reached similar no ADEA violation conclusions. See *Goblirsch-Erickson v. U.S. Postal Serv.*, EEOC Appeal No. 0120110390 (Mar. 31, 2011), *Henry v. Dep’t of the Army*, EEOC Appeal No. 0120103221 (Dec. 23, 2010)}.

VII. Remedies

A PREVAILING PARTY IS NOT ENTITLED TO COMPENSATORY DAMAGES OR FEES WITHOUT DEMONSTRATING A NEXUS BETWEEN HARM AND DISCRIMINATION, AND WITHOUT SUBMITTING PROPER SUPPORT FOR A FEE AWARD

COMPENSATORY DAMAGES ARE NOT AVAILABLE FOR STRESS ASSOCIATED WITH PARTICIPATION IN THE EEO PROCESS

Medrano v. Dep’t of Homeland Security, EEOC Appeal No. 0120093015 (May 18, 2011)

Appellant, after establishing that she was a victim of reprisal, and after the Commission Ordered the Agency to investigate her entitlement to damages and fees, submitted a request for damages seeking hundreds of thousands of dollars and attorney’s fees of \$5,000. The Agency awarded no compensatory damages or fees.

- On Appeal, the Commission upheld the Agency's decision awarding no relief.
- In reaching its conclusion, the Commission cited relevant law noting how a prevailing party must establish a proximate cause between the harm caused and the discriminatory conduct. Here, all the harm alleged by Appellant appeared to be caused by her termination, which was part of her EEO complaint, but for which there was a finding of no liability.
- In addition, Appellant's attorney provided no supporting documents justifying a \$5,000 fee award.
- The Commission also re-affirmed a principle that compensatory damages are unavailable for stress related to participating in the EEO process.

VII. SANCTIONS

A. Dismissal of Hearing Request

DISMISSAL OF HEARING REQUEST UPHELD AS SANCTION FOR FAILING TO FOLLOW AJ ORDERS

Whitman v. U.S. Postal Serv., EEOC Appeal No. 0120092150 (Mar. 31, 2011)

During discovery, Appellant failed to follow the AJ's Orders. As a sanction, the AJ dismissed Appellant's hearing request and remanded the case to the Agency to issue a Final Agency Decision.

- The Commission concluded that the AJ did not abuse her discretion by dismissing the hearing request as a sanction.
- The Commission noted that an AJ has broad discretion in the conduct of a hearing pursuant to 29 C.F.R. § 1614.109 and the Management Directive 110 (EEO MD-110), Chapter 7 at 9-10 (Nov. 9, 1999).

DISMISSAL OF HEARING REQUEST UPHELD AS SANCTION FOR FAILING TO FOLLOW AJ ORDERS

SHOW CAUSE ORDER NOT REQUIRED IF PARTY IS PUT ON NOTICE OF POSSIBLE SANCTIONS FOR FAILING TO RESPOND TO DISCOVERY OR AN ORDER OF AN AJ

Hailey v. U.S. Postal Serv., EEOC Appeal No. 0120110260 (Mar. 30, 2011)

During discovery, Appellant failed to respond to discovery or the Agency's Motion to Compel. The AJ granted the Agency's Motion to Compel. When Appellant still failed to respond, the Agency filed a Motion for Sanctions. Appellant did not respond to the Agency's Motion for Sanctions. The AJ granted the Agency's Motion, dismissing Appellant's hearing request.

- The Commission concluded that the AJ did *not* abuse her discretion in imposing this sanction, noting that contrary to Appellant's argument, the AJ properly placed Appellant on notice that she could be sanctioned with the dismissal of her hearing request if she did not obey AJ orders, and thus the AJ did not need to issue a show cause order prior to imposing this sanction.
- The Commission cited authority supporting its conclusion: *Sanders v. United States Postal Service*, EEOC Appeal No. 01A00214 (February 10, 2000) (finding that the AJ acted within her discretion when she cancelled a hearing and remanded the matter to the agency after complainant failed to submit a timely pre-hearing statement); *Grant v. Department of the Navy*, EEOC Appeal No. 0120064456 (January 7, 2009) ("dismissing a hearing request is an appropriate sanction for failure to comply with an AJ's Order").

B. Default Judgment

**DEFAULT JUDGMENT FOR FAILURE TO COMPLETE AND SUBMIT
ROI WITHIN REASONABLE TIME UPHELD**

**APPELLANT ESTABLISHED A *PRIMA FACIE* CLAIM OF
DISCRIMINATION, A PREREQUISITE TO OBTAINING RELIEF BASED
ON A DEFAULT JUDGMENT**

Giza v. Dep't of Justice, EEOC Appeal No. 0720100051 (Apr. 1, 2011)

After Appellant requested a hearing, the Agency failed to produce the Report of Investigation to the Commission when ordered by an AJ. The AJ issued a default judgment decision in favor of Appellant. A few months later, the Agency submitted a letter seeking reconsideration and arguing that the Agency never received the AJ order to produce the file, which was allegedly sent to an incorrect address.

A second AJ (who replaced the first AJ) rejected the arguments in this letter, finding that the Agency made several omissions and misstatements. The second AJ also observed that because all of its arguments were contained in a letter as opposed to its Motion, the submission was not acceptable. The second AJ was guided by the Federal Rules of Civil Procedure for the principle that a signature on a motion, unlike a signature on a letter, indicates that the factual contentions stated therein have evidentiary support. Fed. R. Civ. P. 11(b). The second AJ therefore interpreted the letter as nothing more than unsupported assertions.

Applying the standards set forth in *Royal v. Dept. of Veterans' Affairs*, EEOC Request No. 0520080052 (Sept. 25, 2009), the second AJ concluded that Appellant set forth sufficient evidence to establish a *prima facie* sex discrimination claim. Accordingly, the AJ awarded damages and fees, among other relief. The Agency did not implement the AJ's decision.

- The Commission reversed the Agency's decision not to implement the AJ decision, and concluded that neither AJ abused his/her discretion in finding that default judgment was appropriate. The Commission specifically noted that the issue of the correct address was never adequately explained by the Agency. The Commission also agreed with the second AJ that the Agency's response to the first AJs default judgment was woefully legally inadequate. The Commission agreed with the second AJ, who stated that its submission sent "the message that the Agency considers the administrative process to be one in which it can make material misrepresentations and omissions to

explain its conduct in support of its request that a sanction be set aside, and to do so via documents that are not signed under oath and do not constitute evidence, thereby limiting the potential legal consequences of its misrepresentations and omissions.”

- The Commission also reiterated the standard by which it assesses the viability of a sanction, noting that:

“A default judgment is a serious sanction. Factors pertinent to “tailoring” a sanction, or determining whether a sanction is, in fact, warranted, include the extent and nature of the non-compliance, the justification presented by the non-complying party; the prejudicial effect of the non-compliance on the opposing party; the consequences resulting from the delayed injustice, if any; and, the effect on the integrity of the EEO process. See *Gray v. Department of Defense*, EEOC Appeal No. 07A50030 (March 1, 2007); *Hale v. Department of Justice*, EEOC Appeal No. 01A03341 (December 8, 2000). A sanction should be used to both deter the non-complying party from similar conduct in the future, as well as to equitably remedy the opposing party.”

- In applying these principles, the Commission upheld the sanction noting both the attitude demonstrated by the Agency toward responding to AJ Orders and submitting documents to the AJ, as well as testimony regarding the suffering Appellant endured as a result of a suspension. Based on such testimony, the Commission concluded that the consequences of delayed injustice would have been especially severe for Appellant.

C. Appellate Sanctions

FAILURE OF AN AGENCY, AFTER REPEATED REQUESTS, TO SUBMIT COMPLETE APPELLATE RECORD, JUSTIFIED SANCTION OF REMAND AND SHIFTING COSTS FOR DISCOVERY AND A HEARING

Vu v. Soc. Sec. Admin., EEOC Appeal No. 0120072632 (Jan. 20, 2011)

Appellant’s EEO complaint was decided in the Agency’s favor via summary judgment. The Agency failed to issue a Final Order pursuant to 29 C.F.R. § 1614.109(i). Therefore, the AJ decision became the Agency’s final action.

On appeal, the Agency failed to submit the full and complete complaint file pursuant to 29 C.F.R. § 1614.403. Specifically, the Agency’s Motion and its Supplemental brief, supporting summary disposition, were not contained in the appeal record. The Commission submitted four requests for the complete complaint file, The Agency did

not respond. The Commission then issued a Show Cause Order. Again, the Agency failed to respond.

- The Commission concluded that "... the Agency's failure to submit a complete complaint file and its failure to issue a final order has rendered the record before us insufficient for a determination on the merits. In deciding an appeal on an AJ decision without a hearing it is imperative that we have a copy of the parties' motions in support and in opposition to the decision. See *Hill v. Department of Labor*, EEOC Appeal No. 01A42143 (July 19, 2006).
- The Commission further determined that based on the Agency's repeated failures in this case, that the imposition of a sanction was warranted.
- On appeal, the Commission noted that Appellant requested an attorney be appointed to represent her. The Commission explained in its decision that the Commission does not appoint attorneys to represent Appellants during an appeal. The Commission further advised Appellant that in the event she filed a civil action, she could ask the District Court to appoint an attorney for her.
- In reviewing the record, the Commission determined that two sanctions were appropriate:
 - First, to vacate the AJ decision granting summary judgment to the Agency and remand to an AJ for a full hearing, and
 - Second, to require the Agency to notify Appellant of her right to retain an attorney for the hearing at the Agency's expense.

VIII. Title VII Findings of Discrimination

GENDER DISCRIMINATION FOUND IN RECEIPT OF AWARDS

Rodriguez v. Soc. Sec. Admin., EEOC Appeal No. 0720100032 (Mar. 16, 2011), *Request for Reconsideration Denied*, EEOC Request No. 0520110382 (June 16, 2011)

Appellant, a Claims Representative, alleged that the agency discriminated against him on the bases of gender (male) and in reprisal for prior EEO activity when he was denied an Exemplary Contribution of Service Award (ECSA) in 2007; and a criterion was added to his 2007 performance appraisal plan. After a hearing, an AJ concluded that Appellant was discriminated against based on gender when he did not receive an ECSA.

The AJ noted that five other female Claims Representatives received awards, and he did not. The AJ also found that the Agency's reason for not issuing him an award was not worthy of belief. The deciding official testified that Complainant did not perform any special act or service that merited an award; however, the AJ found undisputed evidence that Appellant performed duties outside of his Claims Representative position. The AJ also found that two of the five recipients received awards for performing the duties of their routine job descriptions. The AJ noted the subjective nature of the criteria used to determine who received an award.

The Agency appealed the matter to the Commission, but failed to submit the complaint file to the Commission with its appeal. One year later, the Commission issued a Show Cause Order granting the agency twenty (20) days in which to submit the complaint file or show good cause why it had not yet done so. The Commission ultimately issued a decision finding substantial evidence in the record to support the AJ's decision, and ordered appropriate relief which included receipt of the award and \$1,500 in compensatory damages. The Commission denied reconsideration, noting there was no clearly erroneous interpretation of material law or fact.

RACE DISCRIMINATION AND REPRISAL FOUND IN A NON-SELECTION CLAIM

Pierre v. Dep't of the Interior, EEOC Appeal No. 0720100045 (Feb. 3, 2011)

Appellant filed a formal EEO complaint alleging, among other things, that the Agency discriminated against him on the bases of his race and prior EEO activity when he was

not selected for a Supervisory IT Specialist position. Following a hearing, an AJ concluded that the Agency discriminated against him.

The AJ found that the Selecting Official assisted in the development of the vacancy announcement and selected panelists to interview the candidates. Additionally, during Appellant's interview, the Selecting Official repeatedly interfered while he was answering questions by cutting him off and informing the panel members that he would not know the answer. The Selecting Official also allowed an additional individual with whom Appellant had a dispute to sit in during the interview.

The Selecting Official was present during the panel's deliberations and took the scoring sheets to develop a matrix to establish the overall scores. Appellant received the lowest score. The record established that Appellant possessed both a Bachelors and a Master's degree in Computer Science, while the Selectee did not possess any advanced degrees. In addition, Appellant was selected as the Employee of the Year, and had earned several awards related to his job performance. Appellant had also worked for the Agency in positions of significant responsibility, in multiple computer disciplines, had an in-depth knowledge of the Agency's computer systems, and excelled in his job performance as demonstrated by his evaluations.

The Commission concluded that there was substantial evidence in the record to support the AJ's conclusion that the Selecting Official harbored both discriminatory and retaliatory animus. Appellant previously filed an EEO complaint against the Selecting Official. In addition, the AJ noted that Appellant and a co-worker credibly testified that the Selecting Official referred to Help Desk employees, all of whom were African-American, as "monkeys," and stated that Appellant, the co-worker, and another African-American employee were "somewhat incompetent and not skillful." The AJ also noted that, after the Selecting Official became the Chief Information Officer, four African-American employees under his supervision, including Appellant, were moved out of the headquarters office and away from daily contact with the Selecting Official.

The Commission further concurred with the AJ that the vacancy announcement and interview questions were specifically written for the Selectee, and the entire selection process was impermissibly tainted by the Selecting Official. The Commission stated that there was no evidence from which a reasonable fact finder could conclude that the selection process was fair and neutral such that Appellant would have scored as poorly as he did absent the Selecting Official's discriminatory and retaliatory motives. The Agency was ordered, among other things, to retroactively promote Appellant to the Supervisory IT Specialist position with appropriate back pay and benefits, and pay Appellant \$10,000 in proven compensatory damages.