

# 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, (11<sup>th</sup> 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 2<sup>nd</sup>, 5<sup>th</sup>, and 9<sup>th</sup> 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.

**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).

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.

#### **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 WIGIs 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 Masters 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.