

U.S. Equal Employment Opportunity Commission EXCEL Conference 2010

EEO Case Law Update

**Recent Findings of Discrimination & Decisions of Interest from
U.S. Supreme Court, U.S. Court of Appeals
& EEOC Administrative Decisions**

Orlando Florida

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Recent Findings of Discrimination & Decisions of Interest

Retaliation

Retaliation Found

Circuit Court Cases

Pardo-Kronemann v. Department of Housing and Urban Development, Slip No. 08-5155 (D. C. Cir. 2010). Appellant, an attorney, alleged that the agency retaliated against him in violation of Title VII by transferring him to a non-legal position and by declaring him absent without leave (AWOL) when he failed to report to his new job. After partially denying appellant's Rule 56(f) motion, the district court granted summary judgment to HUD on both claims. The Court of Appeals reversed as to the transfer claim, finding that there was sufficient evidence in the record for a reasonable juror to conclude that Appellant was retaliated against. The Court affirmed as to the AWOL claim and found no abuse of discretion in the district court's resolution of the Rule 56(f) motion.

EEOC Cases

Robert S. Litwin v. Department of Health & Human Services, EEOC Appeal No. 0120090174 (February 27, 2009), RTR denied, EEOC Request No.0520090394 (June 16, 2009). Complainant filed an EEO complaint alleging that he was subjected to age-based harassment by a co-worker. Prior to filing the complaint, complainant's supervisor issued him a Direct Order not to talk with the co-worker unless it was work related. The Order stated that complainant would be subject to disciplinary action, including removal, if he did not comply. Complainant alleged that the Order was issued after it became clear that he and the co-worker intended to pursue the EEO process, and the co-worker was only issued a "Guidance Letter" which instructed her on what tone of voice to use when talking to others. The Commission noted that the management official admitted that she issued the Direct Order after she became aware that complainant and the co-worker intended to pursue the EEO process because of a disagreement. The Commission found that the issuance of the Direct Order to complainant, compounded by the fact that the co-worker was only given a "Guidance Letter" is reasonably likely to deter complainant or other employees from pursuing the EEO process. Thus, the Commission concluded that complainant was subjected to reprisal. The agency was ordered to expunge the Direct Order from complainant's personnel records, and provide the management officials at the facility with appropriate EEO training.

Jolean Lablanc v. Department of Justice (FBI), EEOC Appeal No. 0120080166 (July 17, 2009). Complainant alleged that the agency discriminated against her on the basis of age (56) when she was not selected as Acting Administrative Officer and when she was retaliated against when the Special Agent in Charge threatened to file a civil suit against her if she proceeded with her EEO complaint. The agency issued a final agency decision finding that complainant failed to prove age discrimination on her non-selection but did prove that she was retaliated against when her supervisor threatened to sue her. The agency however, declined to award compensatory damages. On appeal, the Commission agreed that complainant failed to prove age discrimination and that complainant had been retaliated against. It also agreed that there is no entitlement to compensatory damages in the administrative process for an ADEA claim, be it for discrimination or retaliation. However, the Commission found the relief inadequate and modified the final

order to direct the agency to consider disciplinary action against the supervisor who threatened complainant, and to provide 32 hours of EEO training to complainant's supervisor.

Marta Fonda-Wall v. Department of Justice, EEOC Appeal No. 0720060035 (July 29, 2009).

Complainant opposed sexual harassment between a manager and co-worker, and as a result, the manager disseminated incorrect information about complainant's mental health, and revealed sensitive information. He also placed complainant on unwarranted leave restrictions, and had complainant's gun confiscated. Eventually, complainant was suspended for 24 days and had her security clearance suspended due to the false allegations that she revealed sensitive information. Complainant was detailed to another state pending the outcome of the security clearance investigation, and subsequently was permanently reassigned to yet another state into a position which did not require a security clearance. The agency then ended the security clearance investigation without issuing a decision on the merits and deactivated complainant's security clearance asserting that complainant no longer needed a security clearance in her reassigned position. On appeal, the Commission found that while it may not second guess an agency's decision to grant, deny, or suspend a security clearance, the Commission does have jurisdiction under Title VII to determine whether the agency was motivated by discriminatory animus when initiating the suspension of a security clearance. Additionally, while the Commission agreed with the agency that it lacks jurisdiction to order an agency to reactivate an individual's security clearance, the Commission does have jurisdiction to order the agency to reactivate the abandoned security clearance investigation. Further, the Commission concluded that complainant established by a preponderance of the evidence that the suspension, detail, and involuntary reassignment were motivated by retaliation. As relief, the Commission ordered the agency to pay proven pecuniary damages, non-pecuniary damages in the amount of \$200,000.00, and attorney's fees. The Commission further ordered the agency to, among other things, reactivate the investigation into complainant's security clearance, and reimburse complainant for all lost pay and/or benefits.

Isaac P. Decatur, Jr. v. Department of Veterans Affairs, EEOC Appeal No. 0120073404 (September 25, 2009). Complainant filed an EEO complaint alleging, among other things, that he was discriminated against on the basis of reprisal for prior protected EEO activity when he was charged with being AWOL. On appeal, the Commission found that the agency's proffered reason for charging complainant as AWOL was pretext for discrimination. The Commission noted that management offered conflicting testimony regarding the reasons for charging complainant AWOL. Most notably, the agency's explanation conflicted with contemporaneous documentary evidence regarding which management official was responsible for the decision. The Commission also found that complainant had satisfactorily abided by the sick leave procedures in place. The agency was ordered to correct complainant's time and attendance records to reflect the use of approved sick leave rather than AWOL. The Commission also ordered a supplemental investigation to determine whether complainant was entitled to compensatory damages as a result of the agency's discriminatory actions.

Duane Shenberger, et al. v. Department of Justice, EEOC Appeal No. 0120081750, 0120081772, 0120081777, 0120081778, 0120081779, 0120081780 (October 27, 2009)

Six complainants filed EEO complaints against the Federal Bureau of Investigation alleging sex discrimination when the agency issued a policy that said only male employees had to remove confidential trash. After they filed their complaints, complainants alleged retaliation when a supervisor told them that the targets on their backs were getting brighter and that they had things very good and things could change, their facility was relocated from New Jersey to Philadelphia, their existing overtime policy was discontinued, their agency vehicles were taken away, and they were subjected to closer supervision. The AJ found that complainants failed to state a claim with regard to the trash policy because they were never actually required to dispose of the confidential trash. Additionally, the AJ found that complainants were not discriminated against when their facility was relocated. However, the AJ found that complainants established retaliation when a supervisor told them they had painted targets on their back, and that they had things good and things could change. Further, complainants were retaliated against when their overtime was discontinued, their vehicles were taken away, and when they were subjected to closer supervision. On appeal, only the facility relocation claim and the damages were contested. We affirmed the AJ's decision, finding that the relocation of the facility was under consideration for two years prior to complainants filing their EEO complaints. We affirmed the AJ's issuance of \$2,500.00 for each complainant in nonpecuniary damages, as similar amounts have been awarded in similar cases. Additionally, we affirmed the AJ's reduction of attorney fees by 50% in the amount of \$83,082.00, as complainants were not successful on their sex discrimination claims. Finally, we affirmed the AJ's denial of complainants' requested costs, as complainants failed to provide receipts for those costs.

David Anderson v. United States Postal Service, EEOC Appeal No. 0720090016 (December 1, 2009). The Agency appealed an AJ's decision finding reprisal when complainant was suspended for 10 days for refusing to attend an EEO deposition as a witness, and when the agency tried to transfer complainant from his position in Minnesota to a position in Mississippi. The AJ awarded \$20,000 in damages. Complainant cross appealed, seeking a finding of discrimination when he was issued a 5 day-suspension, and an award of \$300,000 in damages. On appeal, we affirmed the finding of reprisal with regard to the 10-day suspension, but vacated and remanded the decision to the relevant Hearings Unit with regard to the transfer to Mississippi on the grounds that the matter was inextricably intertwined with another EEO complaint where another AJ had ordered the agency to transfer complainant to Mississippi. As a result, we reduced the compensatory damages award to \$5,000 and affirmed the AJ with regards to no finding of reprisal regarding the 5-day suspension.

Gilbert Amis v. Department of Homeland Security (TSA), EEOC Appeal No. 0720080048 (December 10, 2009). In this case, the Commission reversed the agency's FAD which declined to implement the AJ's decision finding discrimination on the basis of reprisal when complainant was denied light duty. The agency implemented the AJ's finding of no discrimination based on reprisal for the denial of an in-position-increase in pay, and a non-selection, and no discrimination based on disability for all three claims. We affirmed that portion of the FAD which implemented the AJ's decision finding no discrimination, and reversed that portion of the FAD which declined to implement the finding of retaliation. We noted that the agency changed

the policy on light duty the day that complainant put in his request for it, which had the effect of denying his request. We found the AJ's determination that the change was made for discriminatory reasons to be reasonable and supported by substantial evidence in the record, and noted that adverse actions need not qualify as "ultimate employment actions" or materially affect the terms and conditions of employment to constitute retaliation. Complainant was awarded \$10,000.00 in compensatory damages, \$8,750.00 in attorney's fees, and \$47.01 in Sunday premium pay. The agency was ordered to consider discipline of the responsible management official, provide him EEO training and to post a notice.

Direct Evidence

Paul M. St. John v. United States Postal Service, EEOC Appeal No. 0120082828 (June 19, 2009)
The Commission found there was direct evidence that the agency retaliated against complainant when he was placed on Emergency Placement Leave and questioned by a Postal Inspector about statements he made at a hearing before an Administrative Judge. At that hearing complainant gave testimony about the role of his supervisor [S1] in incidents that occurred in 2004. During his testimony under oath on compensatory damages, complainant was asked "How did all this [S1]'s actions] affect you, in what way?" Complainant responded that "I could have throttled [S1]". Complainant further stated that "I could kill him." The Commission found that the agency's actions were reasonably likely to deter individuals from engaging in protected activity. The Commission concluded that complainant's statement in 2007 that in 2004 he had wanted to commit violence against S1 did not support the agency's position that complainant posed a current threat in 2007. The Commission ordered retaliation training for responsible management officials, recommended discipline for management officials, and remanded the issue of compensatory damages to the agency for a supplemental investigation.

Race Discrimination

EEOC Cases

Scott Rodgers v. Department of the Interior (Bureau of Indian Affairs), EEOC Appeal No. 0120071822 (November 20, 2009). In this case, the Commission reversed the agency's FAD finding no discrimination on the basis of race (white), and found that complainant had been discriminated against when he was not selected for a position to which he had applied. We found that the agency's legitimate, nondiscriminatory reason for not selecting complainant was unworthy of credence, and not supported by the evidence in the record. Complainant had shown that two other co-workers (Native Americans), who were similarly situated for the purposes of the non-selection, had been treated more favorably. The agency failed to provide documentary evidence which would support their reason for not selecting complainant, relying instead on the affidavit of the selecting official. The agency was ordered to place complainant in the position, pay back pay, compensatory damages, attorney's fees, post a notice, provide EEO training and to consider discipline of the responsible management officials.

Thalamus Jones v. Department of Energy, EEOC Appeal No. 0720090045 (March 5, 2010). Complainant filed a formal EEO complaint alleging, among other things, that he was discriminated against on the basis of his race (African-American) when the agency terminated his participation in a training program. Following a hearing, an AJ issued a decision finding that complainant was discriminated against on the basis of his race. The Manager who made the decision to terminate complainant conceded that complainant passed all required tests. Further,

the Manager did not consult with the instructors before making the decision, but instead relied upon one individual who was clearly hostile toward complainant and who the AJ found was not credible. In addition, two witnesses testified that they heard someone remark “one down and two to go” when complainant turned in his equipment following his termination. At that time, there were only three Black students in the 31-person class. One week before the class was to graduate, the third and last Black student was removed from the program. On appeal, the Commission affirmed the AJ’s finding of discrimination. The record showed that complainant was not rated as “marginal.” Further, the environment was not favorable to Black recruits. According to the record, it was the agency’s policy to afford remedial training and an opportunity to correct behavior before removing candidates from the training program. The record indicated that the policy was followed with respect to White comparatives, but was not followed in complainant’s case. The agency was ordered to, among other things, offer complainant reinstatement into the next training program, with back pay.

Race and Reprisal

John Linehan v. Marion County Coroner's Office, EEOC Appeal No. 1120080001 (August 24, 2009). This complaint was brought pursuant to the Government Employee Rights Act (GERA). Complainant alleged that he was discriminated against on the bases of race (Caucasian), sex (male), age (53), and in reprisal for prior protected EEO activity when: (1) on November 14, 2005, he was relieved of his duties as Chief Deputy Coroner; and (2) on December 2, 2005, he was terminated. The charge was referred to an Administrative Law Judge (ALJ) in accordance with 29 C.F.R. § 1603.201. The ALJ conducted a two day hearing and issued a decision finding that appellant had discriminated against respondent based on his race and in reprisal for his prior protected activity in violation of the GERA. The ALJ further found that respondent failed to establish that he was discriminated against based on his age or sex with respect to both claims. On appeal, the Commission found that the ALJ had jurisdiction to adjudicate both of respondent's claims under GERA, finding that respondent was an appointee of the Coroner, an elected State official, and that he served in the policymaking position of Chief Deputy Coroner until his actual termination on December 2, 2005. The Commission further found that substantial evidence supported the ALJ's conclusion that appellant's reasons for its actions were a pretext for discrimination. In terms of remedies, the Commission concurred with the ALJ's decision to award \$129,600 in front pay for the salary respondent would have received from the date of his termination through what would have been the end of his term as Chief Deputy Coroner. However, the Commission found that the ALJ's \$34,000 award of front pay for one year of work as a Deputy Coroner after his term ended was unwarranted. The Commission sustained the ALJ's \$200,000 non-pecuniary compensatory damages award. Finally, the Commission awarded respondent \$62,211.95 in attorney's fees and costs, reducing the ALJ's award due to a calculation error.

Kirk E. Webster v. Department of Defense, EEOC Appeal No. 0120080665 (November 4, 2009) The complainant alleged that the agency discriminated against him based on race (African American) and in reprisal for prior EEO activity when: he received a low evaluation, his request to attend training was denied, he was not informed of new mandatory training requirements when given his critical elements, he did not receive a bonus, his request to earn compensatory or overtime hours was denied, and he was threatened when his supervisor confronted him regarding his leave restoration status and the conversation evolved into a “heated discussion,” regarding his

having filed an EEO complaint against his supervisor, and the ill effects it has taken on him. The agency issued a final decision finding that complainant failed to prove that the agency discriminated against him based on race or reprisal. Complainant filed an appeal challenging the agency's finding of no discrimination. OFO's decision found that complainant's supervisor raised his voice at complainant while in complainant's open cubicle and told him that the EEO complaints he was filing stressed him out and that he would leave before allowing complainant to put him through what a previous supervisor had gone through with complainant. The supervisor also told complainant that his EEO activity was currently taking up so much of his time that he did not have time for anybody else in the Branch and told complainant that in all of his 20 years at the agency, no employee had put him through what complainant had put him through. OFO found the comments made by complainant's supervisor, that the EEO complaints complainant was filing was stressing 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. Therefore, OFO's decision reversed the agency's finding of no discrimination based on reprisal with regard to the "heated discussion" between complainant and his supervisor. OFO's decision affirmed the agency's finding of no discrimination with regard to his claim of race discrimination and found that complainant failed to show that any of the other claims he raised was a result of reprisal discrimination. OFO's decision ordered the agency to conduct a supplemental investigation to determine whether complainant is entitled to compensatory damages, ordered training of all responsible agency officials, ordered the consideration of discipline for all responsible agency officials, and ordered a posting notice.

Antonio Regist v. Department of Veterans Affairs, Appeal No. 0120093445 (February 4, 2010).

The Commission affirmed the finding of an Administrative Judge that complainant, a chaplain at a VA hospital, was harassed, based on race (black) and reprisal for prior EEO activity, by the Chief of the Chaplain Service during the course of his one-year temporary employment. The harassment included putting complainant in a 5'X9' former storage room with no ventilation, telling him to stay there and giving him no work for two months; followed by housing him in borrowed space in another service for two more months with no work. In addition, in a staff meeting, complainant was ordered to remove his shirt and Anglican collar. The Chief further undermined complainant's reputation with a headquarters function of the Episcopal Church, USA, which he needed to grant him an endorsement so he could practice as a Chaplain at the agency. Specifically, the Chief told it that complainant was threatening reprisal against the Church, had filed EEO complaints against the agency, was being paid a GS-11 salary to serve as a clerk, and that his behavior was of concern. Complainant testified that he felt isolated and was deeply humiliated, had raised blood pressure and had difficulty sleeping; saw a psychiatrist throughout his employment, and when in the small office got claustrophobic and felt he could not breathe. The appellate decision affirmed the finding of discrimination, and increased the Administrative Judge's award of \$12,000 in nonpecuniary damages to \$75,000 for pain and suffering, and injury to character, professional standing, and reputation.

Joyce Williamson v. Department of Treasury, Appeal No. 0720070056 (February 4, 2010). The Commission affirmed the finding of the Administrative Judge that the agency subjected complainant to a hostile work environment on the bases of race and retaliation when she complained that her co-workers used racial slurs and sexist jokes, and the agency took no action.

The AJ found that that complainant's supervisor called complainant a "c--t" and used other inappropriate vulgarities, and that complainant's supervisor and co-workers retaliated against her by isolating and shunning her after she complained on four occasions about their use of the "N" word and other vulgarities. Further, the AJ found that the office atmosphere was riddled with fear of reprisal from management, noting that senior management openly warned newly hired employees to be careful about whom they "hung out with" in the workplace and to avoid complainant; and agency management took no action in response to complainant's complaints. The Commission rejected the agency's arguments that complainant did not allege race as a basis in her complaint, that being called a "c--t" was not sufficiently severe or pervasive to be illegal harassment, that complainant cannot allege discrimination on account of someone else's race, and that the finding regarding "shunning" was not supported by the record. Further, the Commission found that the conduct of complainant's supervisor constituted a *per se* violation of Title VII's prohibition on retaliation. The Commission affirmed the amount of attorney's fees and costs awarded by the AJ, but increased the award of non-pecuniary compensatory damages from \$5,000 to \$30,000.

Race and Sex

Shawnine D. Sorensen v. Department of the Treasury, EEOC Appeal No. 0120092332 (September 22, 2009). Complainant alleged that she was subjected to a hostile work environment based on her race (African-American), and sex by a Training Coach. Specifically, complainant stated that the Coach cursed at her, pointed a finger in her face and stated that he did not help "you people," and used derogatory terms when referring to her. In addition, complainant stated that the Coach hit her on the arm on one occasion. The Commission noted that the agency, in its final decision, concluded that many of complainant's factual allegations concerning the Coach's conduct were confirmed. Specifically, other employees stated that the Coach frequently cursed, and there was evidence that he used racial epithets and demeaning gender based slang when referring to complainant. The Commission concluded that the Coach harassed complainant based on her race and sex. The Commission stated that the words were not "mere utterances," and a reasonable person in complainant's circumstances would have found the conduct humiliating and hostile. Further, the agency was aware of the conduct, but failed to take appropriate corrective action. The agency merely issued directives to complainant and the Coach to stay out of each other's unit. The Commission noted that this did little to educate the Coach, stating that, at a minimum, the agency should have provided the Coach with sufficient training to ensure that he understood why his conduct violated anti-harassment policies, and considered appropriate discipline. The agency was ordered to determine whether complainant wanted to be reassigned to another location, conduct a supplemental investigation with regard to compensatory damages, and provide training for all involved management officials.

Janie S. Moresi v. Department of Homeland Security, EEOC Appeal No. 0720090049 (March 29, 2010). Complainant filed a formal EEO complaint alleging, among other things, that she was discriminated against on the bases of her race (African-American) and sex (female) when she was not selected for the position of accounts payable chief. Following a hearing, an AJ found that complainant was discriminated against with regard to that matter, and the Commission affirmed the AJ's finding of discrimination on appeal. The Commission initially found that the agency articulated a legitimate, nondiscriminatory reason for the non-selection, that is, the selectee was the best qualified candidate. The Commission, however, ultimately determined that

complainant established pretext. The selecting official conducted no interviews and did not convene a panel to make recommendations for the position. In addition, the selecting official made the selection for the position without consulting with the agency's Command Staff Advisor in connection with the specific crediting plan he intended to use for the position, which was a direct departure from the agency's established merit promotion plan. The record also indicated that while the selecting official claimed that he was looking for a candidate with knowledge of a particular system, he ultimately selected the individual who struggled with that process rather than complainant who had become a recognized leader in that process. Finally, a proposed organization chart for the Accounting Operations Division showed the selectee in the position long before the selection ever took place. The agency was ordered to retroactively appoint complainant to the position, with back pay and benefits, and pay complainant \$25,000 in proven compensatory damages.

Sex Discrimination

Harassment

Angela M. Jean-Louis v. United States Postal Service, Appeal No. 0120064683 (July 23, 2009)

Complainant alleged that she was subjected to sexual harassment. Specifically, complainant stated that the harasser engaged in profanity and lewd gestures directed at complainant. Complainant responded by spitting on the harasser and the harasser then kicked complainant. As discipline, the agency removed both complainant and the harasser. On appeal, the Commission found the agency liable for the harassment since it failed to take appropriate remedial action when it imposed identical punishments on both complainant and the harasser. The agency, which was aware of prior reports of sexual harassment directed at complainant, should have taken some additional remedial action, such as training, to prevent the recurrence of the harassment. As relief for the sexual harassment, the agency was ordered to conduct training for all employees; consider taking disciplinary action against the harasser and responsible management officials; and determine whether complainant is entitled to compensatory damages.

Wendy Lemons v. Department of Justice (Bureau of Prisons), EEOC Appeal No. 0120081287, RTR denied, 0520090501 (August 17, 2009). Complainant was subjected to indecent exposure by a prison inmate on several instances, and ultimately sexually assaulted by the inmate. Rejecting the agency's argument that a reasonable correctional officer would not have found the incidents to be a hostile work environment, the EEOC found that a reasonable person would have found the incidents sufficiently severe to constitute a hostile work environment. The Commission also found that the agency was liable for the non-employee's harassment, as complainant had reported the incidents each time, and the agency's response (instructing the inmate to stop and returning him to complainant's unit) was not sufficiently "prompt, effective or appropriate" to limit the agency's liability. The EEOC specifically rejected the agency's argument that its duty to protect its employees was somehow reduced by the nature of a prison facility.

Carol Marshall v. Department of Justice (FBI), EEOC Appeal No. 0720080008 (November 5, 2009). The Complainant, a former Victim Specialist with the Detroit Field Office, Traverse City Residence Agency, filed a formal complaint alleging that she was discriminated against on the bases of sex (female) and reprisal for prior protected EEO activity [under Title VII] when: (1) she was subjected to discriminatory terms and conditions of employment during her probationary

period; and (2) on July 16, 2004, she was terminated, for unacceptable performance, during her probationary period. After holding a hearing, an AJ found that complainant was subjected to unlawful retaliation when she was terminated, then ordered remedial action. In its final order, the agency accepted the AJ's decision except that it claimed that it proved, by clear and convincing evidence, that it would have terminated complainant, even absent consideration of her protected EEO activity. In addition, the agency argued that the AJ erred in awarding \$92,029.50 in attorney's fees. Complainant cross-appealed the final order, asserting that the award of non-pecuniary compensatory damages should be increased to \$50,000.00. The Commission found that the AJ's determination that the agency failed to show that, absent discrimination, the agency would still have terminated complainant, was supported by substantial evidence. The Commission also found that substantial evidence supported the AJ's award of \$94,373.08 in attorney's fees. The Commission further found that complainant was entitled to \$50,000.00 in non-pecuniary compensatory damages.

Sexual Harassment and Reprisal

Andre Crawford v. United States Postal Service, EEOC Appeal No. 0720070020 (March 5, 2010). Sexual Harassment and Reprisal Found. According to the record, complainant had a consensual relationship with a co-worker for approximately two years. Four years later, complainant was awarded a bid assignment that put him in the proximity of that individual. The co-worker then began to ask complainant out on dates, and, when he refused, made offensive comments to and about complainant. Complainant reported the behavior to his supervisor during the next three months, but no action was taken and the supervisor told complainant to “just give it up.” Complainant asked to have his schedule changed because he was uncomfortable being around the co-worker. Complainant refused the agency’s offer to move him to another building. Nevertheless, he was taken off of his bid assignment and moved despite his objections. Complainant was told that he could not come back to his former location, but the co-worker was allowed to come to the building where complainant now worked. Complainant ultimately filed a formal complaint alleging that he was subjected to sexual harassment. In addition, complainant alleged that management intimidated witnesses by telling them they would not be paid if they testified at an EEO hearing, and that they would go to jail if they lied.

On appeal, the Commission affirmed the AJ’s finding that complainant was discriminated against when he was sexually harassed by a co-worker, taken off of his bid assignment, and not allowed in the building, and when a management official attempted to intimidate witnesses. The Commission noted that complainant reported incidents of sexual harassment to his supervisor, and the incidents had the purpose or effect of unreasonably interfering with complainant’s work performance. The Commission found that the agency’s characterization of the earlier reported incidents as “trivial” was a classic example of “blaming the victim.” Complainant had been romantically involved with a co-worker. When she learned that he had married someone else, she began verbally harassing him on a daily basis. Complainant repeatedly complained of her behavior to management. Management ridiculed his complaints and encouraged complainant to give in to her advances. Following a loud verbal altercation on the workroom floor, an investigation was initiated. As a result of the investigation, complainant was forced to change his work location while the harasser was allowed to come and go as she pleased. The Commission found the agency completely overlooked the substantial evidence that the supervisor was aware of complainant’s allegations of sexual harassment. The agency was

ordered to, among other things, pay complainant \$50,000 in proven compensatory damages, compensate complainant for 20 hours of overtime he lost when he was moved to another building, and provide EEO training for the supervisors and managers involved in this case.

Non-Selection

Constance Carter v. Social Security Administration, EEOC Appeal No. 0720080005 (October 23, 2009). The complainant worked as a Supervisory Staff Attorney at the agency's Office of Hearing and Appeals (OHA) in Boston, Massachusetts. In February 1995, complainant filed an EEO complaint alleging, in pertinent part, that she was discriminated against on the basis of sex (female) when she was not selected for six Administrative Law Judge (ALJ) positions. After a lengthy investigation and hearing process, an AJ found no discrimination with respect to four of the non-selections. However, the AJ found that complainant was subjected to sex discrimination when she was not selected for ALJ positions in Little Rock, Arkansas and New Haven, Connecticut. The agency issued a final order rejecting the AJ's finding of discrimination. On appeal, the agency argued that the AJ erred in finding that complainant was subjected to sex discrimination and contested the size of the AJ's compensatory damages award. The Commission reversed the final order, finding that the AJ properly found that complainant was subjected to sex discrimination. With respect to remedies, the Commission ordered the agency to place complainant into an ALJ position in either Little Rock or New Haven, or a substantially equivalent position, retroactive to the date of the selections. The Commission found that the record supported the AJ's award of \$30,000.00 in non-pecuniary compensatory damages. Finally, the Commission found that the AJ properly awarded complainant \$95,095.80 in attorney's fees and \$6,288.32 for associated costs, noting that the agency stated on appeal that it was not contesting the attorney's fees and costs.

District Court Case

United States v. New York City Dep't of Transp., Slip No. 07 Civ. 2983 (S.D.N.Y. 2010)

The city of New York engaged in a "pattern or practice" of gender discrimination by hiring only men for bridge painter jobs even though qualified female applicants were available.

Circuit Court Case

Schroer v. Billington, 577 F.Supp.2d 293 (September 28, 2008)

An unsuccessful applicant for analyst position with Library of Congress's Congressional Research Service (CRS), a male-to-female transsexual who initially had been offered position after interviewing as male, sued Librarian of Congress alleging sex discrimination under Title VII. Prior to starting work, she told her future boss to lunch to explain that she was in the process of transitioning and wished to start work presenting as female. The following day, the applicant received a call from her future boss rescinding the offer, telling her that she wasn't a "good fit" for the Library of Congress. The court held that in refusing to hire Diane Schroer because her appearance and background did not comport with the decisionmaker's sex stereotypes about how men and women should act and appear, and in response to the Plaintiff's decision to transition, legally, culturally, and physically, from male to female, the Library of Congress violated Title VII's prohibition on sex discrimination. The court awarded the Plaintiff a total of \$491,190, including \$183,653 for back pay and benefits, \$300,000 for emotional pain and suffering, and

\$7,537.80 for other out-of-pocket expenses that were incurred as a result of the library's discriminatory conduct.

Transfer

LaFary v. Rogers Group, Inc., 591 F.3d 903 (7th Cir. 2010). A former employee of a construction supply company alleged that she was discriminatorily transferred to another job site because of her pregnancy. The employer asserted that it was unaware of her pregnancy when it decided to transfer her and that the plaintiff was transferred due to business needs. The evidence showed that the employer made the decision to transfer the plaintiff within 10 days after the plaintiff herself learned that she was pregnant. Without deciding whether the transfer was an adverse employment action, the district court held that the plaintiff was unable to show that the employer knew that she was pregnant at the time of the transfer, and therefore, the employer was entitled to summary judgment.

Equal Pay Act

Bradley J. Gervais v. VA, EEOC Appeal No. 0720070063 (December 15, 2009). Complainant, a male Kinesiotherapist, voluntarily transferred from one VA facility to another, taking a downgrade from GS-11 to GS-9 to do so. Subsequently, a female Kinesiotherapist (CW) transferred to the facility as a GS-11, performing the same work as complainant. Complainant sought a promotion through various channels but, while the agency repeatedly promised to take action, the promotion never materialized. Eventually, he filed a formal EEO complaint alleging sex discrimination with regard to wages under the EPA. During the investigation, it became apparent that complainant was being paid less than CW while performing identical duties to CW's, plus additional duties CW did not have. Following a hearing, an AJ found that complainant established his claims under both the EPA and Title VII. The agency, however, rejected the finding of a Title VII violation. On appeal, the Commission upheld the AJ's determination, rejecting the agency's argument that complainant did not specifically alleged a Title VII violation and noting, as did the AJ, that its regulations provide that a violation of the EPA is also a violation of Title VII. The Commission further found that the violation was willful, as evidenced by the agency's repeated, unfulfilled promises to promote complainant. The Commission rejected the agency's argument that complainant's claims had not been timely raised with an EEO Counselor, noting that the agency specifically waived timeliness at the acceptance stage. The Commission upheld the AJ's award of relief, including three years of back pay and a like amount of liquidated damages, plus all other relief available under the two statutes.

Disability Discrimination

Qualified Individual with a Disability, Disparate Treatment

Anne Lau & Chongsun Tuialuuluu v. United States Postal Service, EEOC Appeal Nos. 0720070065; 0720070066 (October 23, 2009). The complainants, part-time flexible Flat Sorter Machine Clerks (NIXIE Unit) at the San Francisco Processing & Distribution Center, filed EEO complaints alleging that they had been discriminated against on the basis of disability when, on December 14, 2004, their hours were reduced from 8 to 6 per day for a period of nearly one year. After holding a consolidated hearing on both complaints, an Administrative Judge (AJ) found that the agency discriminated against the complainants, and ordered the agency to pay appropriate back pay with interest and lost benefits, and to post a Notice at the agency

concerning the finding of discrimination. The agency subsequently issued a final order rejecting the AJ's finding, arguing on appeal that the AJ ignored the corroborating facts and evidence to support management's decision to cut hours in the NIXIE Unit, substituted her own opinions in the place of management officials, and took management's testimony out of context. In EEOC Appeal Nos. 0720070065; 0720070066, the Commission found that the AJ's determination that the agency's explanation was more likely than not a pretext for disability-based *animus*, was supported by substantial evidence in the record. The Commission instructed the agency to provide back pay, with interest, and all lost benefits to both complainants; provide training for the responsible officials; consider taking disciplinary action against the responsible officials; and post a Notice at the agency concerning the finding of discrimination.

Johnny W. Lovett v. Defense Commissary Agency, EEOC Appeal No. 0120092291 (November 17, 2009). The Commission, based on a de novo review, found the agency liable for retaliating against complainant in violation of the Rehabilitation Act when it declined to select him for a Store Director position at the Arnold Air Force Base Commissary in Tennessee. Complainant Lovett had worked for the agency for thirty years when he was involuntarily reassigned from the Arnold Air Force Base Commissary to the Redstone Arsenal in Alabama. While at Redstone, he was subjected to an abusive work environment and asked to be returned to Arnold due to exacerbation of his medical conditions as a result of both the long commute and the abuse. When his former position at the Arnold Commissary became vacant, he applied for the position but was not selected. Although the agency explained which hiring authority it used to name the selectee, the agency offered no reason for why she was hired or why complainant was not hired. Having found that complainant established a prima facie case of retaliation, the Commission held that the agency did not meet its burden of production when it failed to provide complainant with a full and fair opportunity to demonstrate pretext. The agency was ordered to offer complainant the position, pay appropriate back pay, investigate complainant's entitlement to compensatory damages, train its managers, and consider discipline for those engaged in the retaliatory conduct.

Reasonable Accommodation

Yvonne Hamblin v. Department of Justice, EEOC Appeal No. 0720070041 (September 3, 2009) The Commission affirmed the Administrative Judge's finding that the agency discriminated against complainant on the basis of her disability (Bipolar Disorder) when it failed to provide her with reasonable accommodation and ultimately terminated her from employment. According to the record, complainant had previously been granted an early work schedule so that she could attend medical appointments associated with her condition. In 2002, however, complainant was assigned to a new supervisor who revoked her flexible schedule, and returned her to the later, regular schedule. Subsequently, complainant was rated "Does Not Meet Expectations" on her annual performance appraisal, and ultimately terminated. Following a hearing, the Administrative Judge found that complainant was subjected to disability discrimination. On appeal, the Commission noted that the agency did not contest the Administrative Judge's finding that complainant was an individual with a disability. Further, the Commission noted that the evidence showed that complainant performed the duties of her position in a satisfactory manner before her new supervisor revoked her accommodation. The record showed that management at complainant's facility was aware of complainant's condition and her need to work an early schedule to avoid exhaustion and concentration problems, and attend doctor's appointments. The Commission determined that the agency did not prove that providing complainant with an early

work schedule would have been an undue hardship, especially in light of the fact that the agency granted her an early work schedule for over three years. Finally, the Commission concurred with the Administrative Judge's finding that the agency's failure to provide complainant with reasonable accommodation resulted in her termination. The agency was ordered to, among other things, make an unconditional written offer to complainant to place her into her former position with an early work schedule, pay complainant appropriate back pay, and pay complainant \$10,000 in proven compensatory damages.

Edward E. Sears v. United States Postal Service, EEOC Appeal No. 0120080081 (September 22, 2009). Complainant's refusal to provide medical documentation in response to agency request results in denial of reasonable accommodation. Agency not required to provide accommodation if employee refuses to provide necessary medical documentation. See also *Finley v. VA*, EEOC Appeal No. 0120073873 (September 18, 2009).

Athanasios T. Bitsas v. Department of State, EEOC Appeal No. 0120051657 (September 30, 2009). Complainant applied for a Junior Officer position with the Foreign Service and received a conditional offer of employment. Complainant was required to undergo a medical examination and obtain a Class 1 medical clearance. A treating psychiatrist noted in his report that complainant had a current diagnosis of "Dysthymia" and "Personality Disorder." The agency's Office of Medical Clearances subsequently gave complainant a Class 5 Clearance based on their finding that he was not "worldwide available," that is, the agency deemed complainant not cleared for assignment abroad. Therefore, he was not given a firm employment offer to join the Foreign Service. Complainant requested a waiver and it was denied. The agency found that complainant did not establish that, at the relevant time, he had an actual disability, a record of disability, or was regarded as disabled by agency officials. The agency noted that it is complainant's burden to establish that he is a "qualified" individual under the Rehabilitation Act. Complainant did not consider himself as a person with a disability and contended that agency officials regarded him as disabled because of their prejudgment and misinformation.

On appeal, the Commission noted that the agency found complainant not to be worldwide available because he has two chronic psychiatric conditions which are prone to relapse, he needs to be posted where there is an English-speaking therapist and a provider to monitor his medications, and only 34 percent of the worldwide available posts would be able to meet his medical needs. The Commission found that the calculation of 34 percent of posts being able to meet complainant's needs cannot be accurate given complainant's fluency in six languages and ability to have basic conversations in two others and academic course work in four other languages. The Commission found that complainant is "worldwide available" and qualified for the Junior Officer position. Concerning whether complainant would pose a safety risk if placed in the position, the Commission noted that the agency did not do an individualized assessment and did not consider complainant's language abilities when it concluded that complainant would not have medical resources (English-speaking therapists) available to treat complainant. The Commission found that the agency failed in its burden of establishing complainant represented a significant risk of substantial harm. The Commission ordered the agency to retroactively offer complainant a Junior Foreign Service Officer position with back pay as well as other relief.

Maurice Blount v. Department of Homeland Security, EEOC Appeal No. 0720070010 (October 21, 2009). The agency affirmed an AJ's finding of discrimination based on disability when the

agency denied complainant a reasonable accommodation in bad faith. Complainant suffered a stroke, and while he was recuperating and attending therapy, he asked for the ability to work from home. The agency summarily denied his requests, and the AJ found that it had failed to engage in the interactive process, which resulted in complainant taking a disability retirement, which she found was a constructive discharge. She also found that the agency had discriminated against complainant based on his race and in reprisal for prior EEO activity. In our decision, the AJ's finding with respect to the disability discrimination was affirmed. However, the relief awarded to complainant was modified. We ordered the agency to reinstate complainant, award back pay, \$200,000 in compensatory damages, \$466 in witness costs, training and to consider discipline for the RMOs, and to post a notice. The AJ's award of 21 years of front pay was not affirmed. Complainant did not receive attorney's fees as he was not represented by an attorney, but rather by a non-attorney representative.

Lucille M. Clayton v. United States Postal Service, EEOC Appeal No. 0120071497 (October 22, 2009). OFO reversed an AJ's decision without a hearing in which he found that complainant had not been discriminated against on the basis of disability when it failed to reasonably accommodate her. On appeal, the agency claimed that the case was not ripe for appeal, as the AJ had not addressed any of complainant's other claimed bases (race, color, sex, age and reprisal) or the entirety of the issues in her complaint (such as the Notice of Removal which had been issued to her). As the AJ involved had represented that he would issue a clarification of his decision but never did, on appeal, the entire matter was sent back to the Hearings Unit be adjudicated in its entirety.

Alvin Joseph v. United States Postal Service, EEOC Appeal No. 0720070080 (November 19, 2009). The Commission determined that there was substantial evidence to support the EEOC Administrative Judge's finding that the agency failed to reasonably accommodate complainant's disability when the agency assigned complainant to lift hampers that exceeded his twenty-pound lifting restriction. Even though the agency told complainant to ask other coworkers to lift the hampers and to refrain from lifting the hampers himself, the Commission found that this accommodation did not address the needs of complainant, who was concerned about being held accountable for missed deadlines whenever coworkers were temporarily preoccupied with other tasks and were unavailable to assist him in lifting the hampers. The Commission also determined that the EEOC Administrative Judge's primary reliance on a written admission of a witness in an affidavit, instead of his telephonic testimony, presented no issues of witness credibility that might have been affected by the taking of testimony by telephone such that the agency was deprived of a fair hearing. The Commission ordered training for the relevant management officials and awarded complainant \$23,309.10 for leave; \$25,000 in past, non-pecuniary compensatory damages; and \$11,968.66 in attorney's fees and costs.

Winzair Durr v. Department of the Treasury, EEOC Appeal No. 0120080078 (February 19, 2010). The appellate decision affirmed the agency's finding that it was liable for its delay and ultimate denial of a reasonable accommodation to work from home during complainant's treatment for prostate cancer. The agency did not dispute that complainant was a qualified individual with a disability. However, unlike the agency, the decision also found the agency discriminated against complainant when it failed to also permit him to use four hours of sick leave each day due to his cancer treatments, even though he no longer used the words

"reasonable accommodation." The decision rejected the agency's argument that complainant's choice not to request reconsideration of the initial reasonable accommodation denial absolved the agency of its duty under the Rehabilitation Act to accommodate complainant when he later requested sick leave for his cancer treatments. Further, the decision found that the medical documentation that complainant initially provided was sufficient, as it explained complainant's diagnosis, prognosis, side effects of the treatment, and provided an estimate that the treatments would last two years. Therefore, the decision found that the agency was also liable for failing to reasonably accommodate complainant by denying his requests for sick leave and charging him with AWOL. The decision ordered that agency to, inter alia, conduct a supplemental investigation into compensatory damages, conduct training, consider disciplinary action against responsible management officials, and compensate complainant for pay loss in connection with the AWOL charges.

Direct Threat

Kathryn L. Snyder v. United States Postal Service, EEOC Appeal No. 0720080050 (December 8, 2009). The complainant, a Mail Processing Clerk in Southeastern, Pennsylvania, alleged that she was discriminated against on the basis of disability when she was placed in off-work status from December 19, 2005 until March 2006. After a hearing, an Administrative Judge (AJ) found that the agency violated the Rehabilitation Act by ordering complainant to undergo a fitness-for-duty examination (FFDE), although this issue was not an accepted issue during the investigation. The AJ noted that management did not show that complainant posed a direct threat to herself or others, and therefore, there was no justification for ordering the FFDE. As to the claim that complainant was discriminated against when the agency placed her in an off-duty, non-pay status from December 19, 2005 until April 17, 2006, the AJ found that there was direct evidence that placing complainant off-duty was discriminatory. The AJ ordered the agency to provide remedial action, including back pay and \$31,918.75 in attorney's fees and costs. On appeal, the Commission found that the issue of whether the agency properly required complainant to undergo a FFDE, although not expressly accepted for investigation, was inextricably intertwined with whether the agency discriminated against complainant when it placed her in off-duty status. We found that the agency was not prejudiced by the adjudication of this issue which resulted in the finding of unlawful medical inquiry/examination. We concluded that the AJ's decision was substantial evidence in the record. We reversed the final order and ordered the agency to provide remedial action detailed by the AJ.

Disability-Related Inquiries and Medical Examinations

Ling Choy v. United States Postal Service, EEOC Appeal No. 0120081423 (August 27, 2009). Complainant alleged discrimination based on race (Asian) and disability (shoulder, neck) when she was not selected for transfer to another facility. Following a hearing, the Administrative Judge issued a decision finding that the agency did not discriminate against complainant in regard to her transfer request. The Administrative Judge found, however, that the agency violated the Rehabilitation Act when it improperly disclosed complainants' medical restrictions and workers' compensation status. As relief, the agency was ordered to revise its procedures for disclosure of information relating to workers' compensation claims and medical restrictions, and to consider disciplining the responsible management officials.

McMurtrey v. United States Postal Service, EEOC Appeal No. 0120073957 (December 17, 2009). Following a mediation session in which complainant exhibited disruptive and aggressive behavior, he was ordered to undergo a fitness for duty exam. EEOC found that the exam did not violate the Rehabilitation Act, as the agency had reasonable belief, based on objective evidence, that complainant posed a threat to himself or others.

Disability and Reprisal

James R. Griffin, Jr. v. Department of Homeland Security, EEOC Appeal No. 0120073832 (May 15, 2009), RTR denied, EEOC Request No. 0520090552 (September 17, 2009). The Commission found that complainant was subjected to reprisal when management officials discussed the specifics of his pending EEO complaint on a public chat forum. According to the record, the forum was predominantly visited by agency personnel. The Commission noted that complainant did not invite the comments. The Commission found that the managers' discussion of specific facts of complainant's EEO complaint was inappropriate and reasonably likely to deter complainant from continuing the pursuit of his EEO complaint. The Commission stated that the officials revealed their retaliatory animus when they repeatedly called complainant names that referred to his EEO complaint, taunted him with the facts of his complaint, and said that his complaint was frivolous. In addition, the Commission found that the officials improperly disclosed complainant's confidential medical information on the public chat forum when they mentioned his neck injury and the fact that he had been given reasonable accommodation. The agency was ordered to immediately take action to ensure that this type of behavior cease, and provide training for the management officials at the facility in question.

Alexander Koudry v. Department of Education, EEOC Appeal No. 0120080343 (November 2, 2009). In 2004, complainant, then a Supervisory Information Technology Specialist, GS-14, requested reasonable accommodation of his disability (Crohn's Disease), to consist of being allowed to telecommute and communicate with his first-line supervisor by e-mail and telephone when hospitalized on account of his condition. His request was denied. Subsequently, complainant received a performance appraisal of "successful." Complainant thereafter filed a formal EEO complaint alleging disability discrimination with regard to these matters. The complaint settled, with complainant receiving a performance appraisal of "highly successful," the requested accommodation, and assignment of a new first-line supervisor (S-1). Complainant's former supervisor became his second-line supervisor (S-2). While the investigation into the 2004 complaint was ongoing, complainant was non-selected for the position of Supervisory Management and Program Analyst, GS-15. S-2 was the selecting official for the position. Complainant also received a performance appraisal of "successful." For that appraisal, S-1 was the rating official and S-2 was the approving official. In September 2005, complainant filed a formal EEO complaint alleging disability and reprisal discrimination with regard to these matters. On appeal from a final agency decision finding no discrimination, the Commission reversed, finding that the agency had failed to articulate legitimate, nondiscriminatory explanations for its actions. Regarding the performance appraisal, the Commission noted that S-1 did not address the specific examples of achievement that complainant brought to his attention when challenging his appraisal. Rather, S-1 offered only an explanation of the appraisal standards as well as his unsupported assertion that complainant had performed only at the "successful" level. Regarding the non-selection, the Commission noted that the record did not contain any rating or voting sheets, testimonial evidence, notes taken

contemporaneously with the applicant interviews, sworn declarations, discovery responses, deposition testimony, or signed written statements of any person connected with the selection process that explained the rankings of the candidates and why the selectee was ultimately chosen over complainant. The agency produced only an unsigned, undated, unattributed "Justification for Supervisory Management and Program Analyst, GS-343-15 Position" which outlined the selectee's qualifications. The agency further produced the affidavit of S-1, in which S-1 averred to a discrepancy regarding complainant's project management experience. However, S-1 further averred that he was not involved in the selection process. The Commission found that his affidavit was not probative evidence because it provided no information about what specific criteria weighed in favor of the selectee over complainant. The Commission concluded by awarding complainant various relief, including placement into the position at issue, back pay and benefits, attorney's fees, and compensatory damages.

Sheila J Sullivan v. Department of the Army, Appeal No. 0120082384 (November 19, 2009).

On July 9, 2003, complainant filed an EEO complaint alleging that she was discriminated against on the bases of disability (depression and General Anxiety Disorder) and in reprisal for prior protected EEO activity when: (1) she was charged with absence without leave (AWOL) from August 2002 to February 2003, and her supervisor failed to recognize her medical documentation from her doctor dated August 26, 2003; and (2) she was intimidated, threatened, and harassed with removal from her job from December 2002 to June 2003. Following a hearing, an EEOC Administrative Judge (AJ) issued a decision finding that the agency discriminated and retaliated against complainant when she was placed on AWOL status from August 2002 to December 2002. The AJ also determined, without holding a separate hearing, that complainant was entitled to \$2,000 in compensatory damages. In *Sheila J. Sullivan vs. Department of the Army*, EEOC Appeal No. 0120055812 (October 5, 2007), the Commission remanded the issue of compensatory damages (in excess of \$2,000) to the EEOC Hearing Unit of the New Orleans District Office. The parties scheduled a hearing on compensatory damages, however, complainant failed to appear at the hearing. In the current appellate decision, we found that the AJ was justified in remanding the case to the agency without conducting a hearing on compensatory damages and found that the award of \$2,000 was sufficient in light of the evidence presented concerning the emotional adversity that complainant had experienced due to the discrimination.

Melvin D. Lampkins v. United States Postal Service, EEOC Appeal No. 0720080017 (December 8, 2009). The complainant, a Labor Custodian, filed an EEO complaint alleging that he was discriminated against on the bases of disability and reprisal for prior protected EEO activity when: (1) on May 5, 2005, management breached his medical confidentiality during a pre-disciplinary meeting; and (2) on June 22, 2006, he was issued a fourteen-day suspension for unacceptable conduct. Following a hearing, the AJ found that the agency subjected complainant to unlawful disability and reprisal discrimination. Specifically, the AJ found that the agency violated the Rehabilitation Act by disseminating complainant's private medical information during a pre-disciplinary meeting. The AJ also found that the agency subjected complainant to unlawful reprisal discrimination when complainant's manager issued complainant a fourteen-day suspension for unacceptable conduct. The AJ awarded complainant \$25,000.00 in non-pecuniary, compensatory damages; attorney's fees and costs; restoration of complainant's sick leave; and proven medical expenses. The AJ also ordered the agency to expunge the notice of fourteen-day

suspension from complainant's personnel file; provide 8-hours of EEO training for the responsible management officials; and post a notice. On appeal, we affirmed the AJ's finding of discrimination. We also affirmed the AJ's award of compensatory damages. With respect to attorney's fees, we found that the AJ erred in finding that complainant's attorneys were only entitled to a fee of \$200 per hour. The Commission has held that attorneys who demonstrate that they charged reduced rates to federal employees in discrimination cases, based on public interest motives, are entitled to receive an hourly rate at the prevailing market rate, notwithstanding a fee agreement. Accordingly, we modified the fee award upwards.

Nancy Lee J. Bowers v. Department of Defense, EEOC Appeal No. 0720070012 (March 22, 2010). Disability Discrimination and Retaliation Found. According to the record, complainant was born with the four fingers of her left hand on the same ligament, and she has no dexterity or grasp with regard to those fingers. She is unable to perform any meaningful lifting with her left hand. In addition, because she overuses her right hand to compensate, she experiences bursitis, tendonitis, and neuritis in her right arm. Complainant's job as a personnel security specialist required a substantial amount of typing, which was difficult for her, and, in August 2002, complainant's production standards increased by several units per day. Complainant initially requested several accommodations, including lower production levels and the use of adaptive equipment, in order to keep up with her job responsibilities. The agency denied complainant's request to lower her production quotas, but provided complainant with a one-handed key board. Complainant also applied for a vacant Privacy Act specialist position which involved less typing, and later asked to be reassigned to the position as an accommodation. The agency denied complainant's request for a reassignment, and ultimately offered the Privacy Act specialist position to a former incumbent. After 30 days of using the new keyboard, complainant's performance had increased only slightly, and she did not meet her performance requirements. Complainant was placed in a temporary detail position, and ultimately left the agency on disability retirement.

Complainant filed a formal EEO complaint alleging that she was discriminated against when the agency denied her requests for reasonable accommodation. Complainant amended her complaint to include retaliation as a basis for discrimination. Following a hearing, an AJ found that complainant was subjected to disability discrimination and retaliation, and the Commission affirmed the AJ's decision on appeal. The Commission determined that complainant was an individual with a disability, because she is substantially limited in her ability to carry, perform household tasks, and perform fine manipulation. In addition, she is substantially limited in the ability to work in both a class of jobs and a range of jobs requiring the use of two hands or even one healthy hand. Complainant's physician reported that complainant has very little motion in the fingers of her left hand, decreased mobility in the joints, and essentially has use of only her right hand, which suffers from overuse. Further, in this case, the Commission concluded that the agency should have reassigned complainant to the Privacy Act specialist position. Complainant established that a vacancy existed for which she was qualified, and she requested reassignment into the position on several occasions. The position was vacant at the time the 30-day trial period for the one-handed keyboard ended, and remained vacant for several months after complainant was denied the position. The Commission also found direct evidence of reprisal. The record contained testimony by a supervisor which establishes that efforts to secure the Privacy Act specialist position for complainant ceased as soon as it became known that she had

initiated EEO counseling in connection with her request for accommodation. The Commission concurred with the AJ that the refusal of complainant's supervisors to assist her in securing the reassignment was a materially adverse action that could have deterred her from pursuing her EEO complaint. The Commission found no evidence that the agency would have dropped complainant from consideration for the position in the absence of her EEO activity. The agency was ordered to, among other things, pay complainant \$26,500 in non-pecuniary damages, and \$364.52 in pecuniary damages, and compensate complainant for 12 hours of annual leave used as a result of the discrimination.

Age-Based Discrimination

Circuit Court Case

Martino v. MCI Communication Services., 574 F.3d 447 (7th Cir. 2009). The employer could not be held liable for terminating the plaintiff's employment, because the evidence failed to establish that age-based discriminatory animus affected the layoff decision. The plaintiff, 56, conceded that there was no evidence of age discrimination on the part of the layoff decision-makers. Under the "cat's paw" theory, however, he alleged that the age-based animus of his immediate supervisor, a non-decision-maker who often called the plaintiff "old timer," could be imputed to the decision-makers because they had consulted with the supervisor. Stating that "a decision-maker is not required to be a paragon of independence," the court found that a decision-maker's conferring with the plaintiff's immediate supervisor about the plaintiff did not, by itself, mean that the supervisor's animus should be imputed to the layoff decision. Affirming summary judgment for the employer, the court concluded that no reasonable jury could find for the plaintiff under the cat's paw theory.

Age & Reprisal

Florida Cook v. Department of Labor, EEOC Appeal No. 0720080045 (February 22, 2010). Age Discrimination and Reprisal Found. Complainant filed a formal complaint alleging, among other things, that she was subjected to age (59) discrimination when the agency removed her supervisory duties, and subjected to age and reprisal discrimination when she received a "minimally effective" performance evaluation. Following a hearing, an AJ found discrimination as to these matters. On appeal, the Commission noted that complainant's supervisory duties were reduced, and her position title was changed from supervisory human resources specialist, to human resources specialist. Further, complainant's supervisor made various age-based comments such as "younger people are coming in and they are better with computers," and "young people are taking over and they're the best." Complainant's supervisor also asked her on numerous occasions when she planned to retire. While the agency asserted that some of complainant's supervisory duties were removed in order to streamline its benefits processing function, one witness testified that she was told she was being removed from complainant's supervision because complainant had too many duties. In addition, complainant stated that she was told that the supervisor was reassigning her duties because it was what he wanted to do. Another employee noted that the supervisor stated on numerous occasions that he intended to replace complainant with another employee who was in her 20s. With regard to the performance evaluation, the agency stated that complainant received a "minimally effective" rating for various reasons, including her failure to provide performance standards for two employees and failure to train another named employee. Complainant stated, however, that she did prepare the

performance standards for the two employees, but that they were subsequently reassigned and required new standards. In addition, the record showed that the supervisor conducted complainant's evaluation with his office door open when he normally conducted performance evaluations with his door closed. The agency was ordered to, among other things, place complainant into a supervisory human resource specialist position, with applicable benefits, and correct its records to reflect that complainant received a "highly effective" rating with all applicable benefits.

Religious Discrimination

Damita J. Fulghen v. United States Postal Service, EEOC Appeal No. 0120073130, RTR denied, 0520090601 (September 28, 2009). Complainant, a Customer Service Associate, alleged discrimination on the basis of religion (Jehovah Witness) when she was placed on non-duty status for reading the Bible on the clock. EEOC applied a mixed-motive analysis, finding that the management official acted in part because of complainant's religious activity, and in part for her failure to work (a legitimate and non-discriminatory reason). Citing the Supreme Court's decision in *Desert Palace Inc. v. Costa*, 539 U.S. 90 (2003), the Commission stated that direct evidence was not necessary to prove discrimination was a motivating factor in a mixed-motives case. Based on a finding by an AJ that the management official lacked credibility, the Commission determined that the agency's action was motivated in part by religious discrimination. It also found, however, that the agency had proven, in the mixed-motives analysis, that the management official would have taken the same action even if she had not considered the discriminatory factor. As such, there was a finding of discrimination, but personal relief (damages or back pay) were not available. See 42 U.S.C. 2000e-2(m). See also EEOC's recently-issued guidance on religious discrimination: EEOC Compliance Manual, Section 12 (Religious Discrimination) (7/22/08), which can be found on EEOC's web site at <http://www.eeoc.gov/policy/docs/religion.html>.

Religious Reasonable Accommodation

Theresa White v. Department of Defense, EEOC Appeal No. 0120080191, (May 7, 2010). Complainant, a part-time meat-cutter at the Marine Corps Base in Quantico, VA. alleged discrimination on the basis of race (African American) and religion (Baptist), when the agency denied her request to take Sunday off, and instead offered her a flexible arrangement whereby she could have part of Sunday off to attend services, but would then have to work the remainder of the day. Complainant did not accept the alternative because it only allowed her to attend church services, but not the Sunday school and the meetings, required by her religious beliefs. Complainant requested a hearing, wherein the administrative judge (AJ) issued a decision without a hearing which found that the agency made a reasonable effort to accommodate White's religious beliefs. The AJ pointed out that this type of "flexible scheduling" was an alternative form of reasonable accommodation. The complainant appealed, claiming that the "flexible schedule" of both work and church still forced her to miss Sunday school and meetings, and thus it was not a reasonable accommodation of her religious beliefs. Furthermore, White argued that it was discriminatory, as the "compromise" flexible scheduling was only offered to her by the agency after she wrote to her congressperson, and that Sundays off were offered to other part-time employees. The Commission found that in looking at all the facts, the agency failed to prove that it had reasonably accommodated White or that accommodation of her requests would be an undue burden. The Commission modified the agency's final order accepting the AJ's

decision, and remanded the matter to the agency so that the agency could provide the complainant, a reasonable accommodation of her religious beliefs, conduct a supplemental investigation on whether White deserved compensatory damages, provide at least eight hours of training on Title VII to the management officials responsible for denying White the accommodation, and consider taking disciplinary action against the same management officials.

Multiple Bases

Regina Murray v. General Services Administration, EEOC Appeal No. 0120083575 (December 10, 2009). The complainant alleged that she was discriminated against on the bases of race, color, national origin, disability, and in reprisal for prior protected EEO activity when she was denied the opportunity to work from home, denied the opportunity to have a flexible work schedule and denied reassignment as a reasonable accommodation. Complainant also alleged that she was subjected to discrimination in reprisal for prior protected activity when she received performance counseling by her first level supervisor. Following a hearing, an AJ found complainant failed to show that she was discriminatorily denied the opportunity to work from home, denied the opportunity to have a flexible work schedule or denied a reassignment. The AJ also found complainant failed to show that she was discriminated against when she received performance counseling. However, the AJ found the agency committed a *per se* violation of the Rehabilitation Act when it disclosed complainant’s diagnosed medical condition to unauthorized persons. The AJ did not award any relief for the *per se* violation. The agency fully implemented the AJ’s decision. Complainant filed an appeal. OFO’s decision affirmed the finding of no discrimination with regard to her claims that she was denied the opportunity to work from home, denied the opportunity to have a flexible work schedule, denied reassignment, and received performance counseling. OFO’s decision affirmed the finding that the agency’s disclosure of complainant’s diagnosed medical condition to unauthorized persons was a *per se* violation of the Rehabilitation Act and found the AJ improperly failed to award relief for the violation. OFO’s decision ordered the agency to conduct a supplemental investigation to determine whether complainant is entitled to compensatory damages, ordered training of all responsible agency officials, ordered the consideration of discipline for all responsible agency officials, and ordered a posting notice.

Procedural and Practice Issues

1. Stating a Claim

Supreme Court Case

Lewis v. City of Chicago, Slip No. 08–974 (U.S. May 24, 2010).

The Supreme Court held that an employee who does not challenge the *adoption* of an allegedly discriminatory practice — “here, an employer’s decision to exclude employment applicants who did not achieve a certain score on an examination — may assert a disparate impact claim in a timely charge challenging the employer’s later *application* of that practice.”

EEOC Cases

Richard P. Sheehan v. United States Postal Service, EEOC Appeal No. 0120091633 (July 13, 2009). Complainant alleged discrimination on multiple bases when not selected for a Contract EEO Investigator position. The agency dismissed for failure to state a claim, asserting that he was not a federal employee or applicant for federal employment. The Commission affirmed the dismissal on appeal, after reviewing its case law and guidance on contractors as federal

employees, finding that the complainant had failed to establish that the agency exercised sufficient control over the complainant's position to qualify as either the employer or joint employer of the complainant.

Estrella C. Noda v. Department of Housing and Urban Development, EEOC Appeal No. 0120070309 (July 16, 2009). EEOC dismissed complainant's claim alleging failure to provide a reasonable accommodation as untimely. Complainant submitted two requests for accommodation, both of which were denied on August 9, 2004 and November 8, 2004. Complainant contacted an EEO Counselor on January 21, 2005, beyond the 45-day timeframe to contact an EEO Counselor. While an EEOC AJ found that the denial of accommodation was a "recurring violation" and as such the complainant's EEO Counselor contact was timely, the Commission disagreed, finding that the express denials were "discrete events" that should have triggered complainant's suspicion of discrimination and her duty to contact an EEO Counselor.

Jessie J. Williams v. United States Postal Service, EEOC Appeal No. 0120092247 (July 22, 2009). Complainant, a Distribution Operation Supervisor, filed a formal complainant alleging that a subordinate employee made racial remarks on two occasions. The agency dismissed the claim, stating that, as a supervisor, it was complainant's responsibility to take appropriate action. The Commission disagreed with the agency's assertion, stating that complainant stated a viable claim that he was subjected to the remark and agency management took no action. The Commission noted that the agency's assertion that it was complainant's responsibility to take corrective action goes to the merits of the claim.

Thomas R. Rutherford v. Department of State, EEOC Appeal No. 0120091564 (July 24, 2009). Complainant worked as an Advisor in Iraq as part of a team made up of a combination of permanent and temporary employees of the agency, and employees on detail from other agencies. According to complainant's position description, the team was managed by the agency. Complainant filed a formal EEO complainant alleging that he was subjected to age discrimination and harassment. The agency dismissed the claim, stating that the responsible official was an employee of the Department of Defense. On appeal, the Commission noted that while the official did not appear to work for the agency at issue, the agency did not dispute complainant's contention that the official was supervised and counseled by agency personnel. In addition, the official was serving on a temporary detail in a program run by the agency. Thus, the Commission concluded that the agency and the Department of Defense should be joined in the processing of the underlying complaint.

Jose Feliciano, Jr. v. Department of Homeland Security, EEOC Appeal No. 0120092012 (August 11, 2009). Complainant alleged that the agency subjected him to a hostile work environment on the basis of national origin (Hispanic) when a supervisor called complainant and other Hispanic transportation security officers who were working at a particular security checkpoint into a meeting to instruct them to not speak Spanish at the checkpoint. Complainant acknowledged that there is an agency memo regarding the policy and stated that the policy is "impractical and vague" and subject to improper application. The agency dismissed the claim stating that the action did not rise to the level of a hostile work environment which assertion the Commission held goes to the merits of the complaint. The Commission noted that the merits

assertion is irrelevant to the procedural issue of whether the complainant has stated a justifiable claim.

Deborah Jenkins v. United States Postal Service, EEOC Appeal No. 0120091647 (August 25, 2009). Complainant filed a complaint alleging harassment based on sex (female) when a co-worker threatened her and the co-worker was permitted to return to work nearly 2 months later without management discussing its decision with complainant. The agency dismissed for failure to state a claim. The Commission found the threatening incident together with the decision to return the co-worker without discussing it with complainant was sufficiently severe and pervasive to state a claim of harassment.

Delores Jones v. United States Postal Service, EEOC Appeal No. 0120091907 (August 26, 2009). Complainant alleged reprisal discrimination when he received notice of a seven day suspension, which was rescinded after more than 3 months following a grievance procedure. The Commission found that the notice, along with the supervisor's statement that it had "served its purpose" was sufficient to deter protected activity and therefore stated a claim of reprisal.

Mary Baldwin v. Department of the Air Force, 0120092108 (August, 26, 2009). Complainant claimed reprisal discrimination for, among other things, being issued a "below standard" mid-term evaluation. The Commission noted that any action reasonably likely to deter protected activity states a claim of reprisal, and found that a "below standard" mid-term evaluation is one such action.

Leroy Bell v. United States Postal Service, EEOC Appeal No.0120082317 (August 28, 2009). Complainant, an African American, alleged that for a three and one-half month period the agency required him to hand carry materials when a machine was unavailable, while Caucasian employees in his position were not required to do the same. The agency dismissed the complaint for failure to state a claim arguing that the incidents were not sufficiently severe and pervasive to state a claim of hostile work environment. On appeal, the Commission found, however, that complainant stated a valid claim of disparate treatment with regard to his work assignments.

Matthew Taranto v. Department of Transportation, EEOC Appeal No. 0120092496 (September 9, 2009). Complainant filed a formal EEO complaint, alleging that the agency discriminated against him on the basis of his disability (Aspberger's Syndrome) when his employment was terminated. Complainant also filed a separate charge of discrimination against the rehabilitation services firm, which was assigned to the Commission's Boston Area Office. With regard to that charge, the Commission determined that the agency made the decision to terminate complainant's employment, and the Commission could not conclude that the rehabilitation services firm was causally connected or associated in any capacity with the decision to terminate complaint. On appeal from the agency's dismissal of his EEO complaint, the Commission found that the agency exercised sufficient control over complainant's position to qualify as a joint employer.

Yu Lin v. United States Postal Service, EEOC Appeal No. 0120092308 (September 29, 2009). Complainant alleged that she was subjected to discrimination on the bases of race (Asian), national origin, sex (female) and age when her supervisor told her that he thought she was in love with her male coworker, and repeated the comments to the co-worker in complainant's presence.

In addition, the supervisor stated that the co-worker should give complainant "some sausage" and told complainant that he, the supervisor, liked Asian women and that complainant was "hot." The Commission found that complainant alleged conduct by a management official that may be sufficiently severe so as to create an intimidating or hostile work environment.

Richard H. Crowson v. Department of State, EEOC Appeal No. 0120090923 (April 15, 2009), RTR denied, EEOC Request No. 0520100004 (October 23, 2009). Complainant filed a formal complaint alleging that a co-worker sent him threatening letters at home. Complainant indicated that, after he testified against the co-worker in a prior EEO complaint, the co-worker is now harassing him. Complainant reported the actions to the agency, but complainant stated that the matter was not properly investigated. The Commission determined that complainant's allegation that the agency failed to take action with regard to the alleged harassment and threats from a co-worker stated a viable claim of reprisal.

Willard T. King v. Department of Justice, EEOC Appeal No. 0120093395 (November 24, 2009). One time use of an offensive racial slur by complainant's supervisor is severe enough to constitute a viable claim of discrimination. The Commission highlighted the severity of using the offensive slur, which "dredge[s] up the entire history of racial discrimination in this country."

Katherine J. Stewart v. Department of the Army, EEOC Appeal No. 0120092700 (December 4, 2009). Complainant's participation in an agency "Article 15-6 Investigation into EEO Offenses constitutes protected EEO activity for purposes of stating a claim of retaliation. Complainant described the forum as an investigation into complaints by individuals challenging employment discrimination, and stated that she had close association with the two individuals who brought the charges and provided administrative support to the Investigating Officer.

Allan Goldstein v. Department of Homeland Security, EEOC Appeal No. 0120092772 (December 9, 2009). Complainant stated a viable claim of harassment which included an explicit reference to his religion. The statement, made by someone who knew complainant, was no a general statement made in the abstract, but specifically referred to complainant and his religion. Further, complainant alleged that a management official failed to fully investigate the matter as a hostile work environment.

Bobbie J. Davidson v. Department of the Army, EEOC Appeal No. 0120093553 (December 10, 2009). EEOC affirmed agency dismissal of complaint by contractor, finding that he did not have standing as a federal employee or applicant to file an EEO complaint. Applying "common law" theory of agency, EEOC found Licensed Practical Nurse was independent contractor and not a federal employee.

Mary Parnell v. Department of Veterans Affairs, EEOC Appeal No. 0520100031 (December 17, 2009). Allegation that complainant's co-worker twice referred to complainant's granddaughter, in complainant's presence, as a "big, fat monkey" stated a claim of race discrimination. The remarks contained historically offensive slurs toward complainant's race.

Jerome D. McArthur, Jr. v. Department of Transportation (FAA), EEOC Appeal No. 0120071658 (January 26, 2010). Complainant alleged national origin (Scottish) discrimination

when he was advised that if he came to work wearing a kilt again, he would be disciplined. His outfit included a green Jacobite Ghillie shirt, green kilt hose, black dress shoes, a Sporran and an expensive kilt woven in the traditional Tartan of Irish Heritage. EEOC affirmed the agency's dismissal for failure to state a claim, noting that he had not suffered a present harm

John D. Garvey v. General Services Administration, EEOC Appeal No. 0120093550 (February 19, 2010). Complainant's allegation that a management official referred to complainant as "an EEO, high-risk individual" during a management meeting, and advised other managers "don't say any words [complainant] may find even the slightest bit offensive" stated a viable claim of retaliation. Complainant asserted that his advancement at the agency, as evidenced by a specific selection process, was negatively impacted by the official's remarks, and that the official promoted an atmosphere among other managers that was negative toward employees who utilized the EEO process. If true, these allegations would have a chilling effect on employees making or supporting charges of discrimination.

Yolanda D. Strickland v. United States Postal Service, EEOC Appeal No. 0120093678 (February 24, 2010). Commission found that complainant's allegation that a supervisor shoved open a door with the intention to cause her bodily harm in retaliation for her prior EEO activity stated a viable claim of retaliatory harassment. The agency's assertion that the supervisor did not know that complainant was on the other side of the door goes to the merits of the claim and not to whether the allegation states a claim of discrimination.

Aida L. Mendez v. United States Postal Service, EEOC Appeal No. 0120093716 (February 26, 2010). Complainant's allegation that she was subjected to discrimination when she was issued a letter of removal stated a viable claim of retaliation. The issuance of a letter of removal, even if it is subsequently rescinded, is likely to deter protected EEO activity

Wayne B. Upshaw v. Consumer Product Safety Commission, EEOC Appeal No. 0120101281 (March 3, 2010), RTR denied, EEOC Request No. 0520100290 (April 29, 2010). Complainant, a former employee, alleged that the agency provided negative information to an Investigator conducting a background investigation following his tentative selection for a position at another agency. Complainant was alleging that the agency unlawfully retaliated against him for protected activity he engaged in while an employee of the agency. Thus, complainant's allegation states a viable claim of retaliation.

Gregory Clark v. United States Postal Service, EEOC Appeal No. 0120083817 (March 11, 2010). Complainant's allegation that the agency took various actions that culminated in the agency finalizing his disability retirement and, in effect, terminating his employment states a viable claim of discrimination. Complainant was not raising an improper collateral attack on a decision by the Office of Personnel Management, but, instead, alleged that he had been subjected to a pattern of harassment designed to thwart his efforts to return to work after recovering from an injury.

Albert R. Taber v. Department of Transportation, EEOC Appeal No. 0120100209 (March 18, 2010). Complainant's allegation that he was subjected to race, sex, and age discrimination when he was questioned about e-mails he received from Russia was properly dismissed for failure to

state a claim. Complainant's supervisors questioned him during a private meeting because the e-mails had been flagged "suspicious" based on their country of origin. Complainant was not disciplined or prohibited from using the agency's e-mail system, and, thus, the incident did not constitute a personal loss or harm regarding a term, condition, or privilege of employment.

Westley R. DeBord, Sr. v. United States Postal Service, EEOC Appeal No. 0120100074 (March 18, 2010). Complainant's allegation that he was subjected to race, sex, and age discrimination when he was asked to provide medical documentation in relation to a Family and Medical Leave Act related absence was properly dismissed for failure to state a claim. The record shows that the agency approved complainant's request for leave, and complainant took the leave. Although complainant stated that he was threatened with discipline, the agency did not issue any disciplinary action, and the events, even if true, were not sufficient to establish that complainant was subjected to harassment.

2. Dismissal

James K. Sabourin v. Department of Agriculture, EEOC Appeal No. 0120093032 (December 3, 2009). Complainant filed a formal complaint alleging that he was subjected to harassment because of his disability, age, and prior EEO activity. Following an investigation, complainant requested an administrative hearing in the matter. Complainant retired from the agency prior to the hearing, and in a pre-hearing submission, asserted that his retirement was due to the alleged harassment. The AJ remanded the constructive discharge claim back to the agency, and held the remaining claim of harassment in abeyance. The agency dismissed the constructive discharge claim, stating that complainant failed to raise the matter with an EEO Counselor. On appeal, the Commission found that the claim of constructive discharge was clearly like or related to the claim of hostile work environment harassment. Specifically, in his initial complaint, complainant alleged that his supervisor threatened complainant with disciplinary action, termination, and even jail for filing a complaint against him. Thus, the agency was ordered to process the claim of constructive discharge as a mixed case complaint.

3. Dismissal for Failure to Cooperate Improper

Danny C. Carmon v. United States Postal Service, EEOC Appeal No. 0120092366 (August 18, 2009). Complainant stated that the agency improperly dismissed his complaint alleging that he was required to perform duties that exceeded his medical restrictions. The agency commenced an investigation on the complaint and asserts it sent complainant a request for an affidavit along with instructions and forms. The agency dismissed the complaint for failure to cooperate, arguing that the complainant failed to return the requested affidavit despite a written warning in the affidavit packet sent to him that failure to provide the affidavit could result in the dismissal of his complaint. The Commission found that both complainant and his representative assert that they did not receive any request for information. Although the record in this case contains a receipt showing a delivery date and "Columbus, OH", the Commission determined that there is no further evidence indicating that complainant actually received the request. The Commission noted that where, as here, there is an issue of timeliness, "[a]n agency always bears the burden of obtaining sufficient information to support a reasoned determination as to timeliness."

Cathleen Crews v. Department of Defense (Defense Commissary Agency), EEOC Appeal No. 0720090015 (November 4, 2009). In this decision, the Commission dismissed, under 29 C.F.R.

§ 1614.505, the agency's appeal of an Administrative Judge's (AJ) finding of discrimination with remedies. The AJ found that the agency discriminated against complainant when it denied her reasonable accommodation and instead placed her on leave without pay (LWOP) from April 22, 2005 onward. The AJ ordered the agency to reinstate complainant to her previous position even if it filed an appeal, citing 29 C.F.R. § 1614.505. The agency filed an appeal without providing temporary or conditional restoration (interim relief) required by 29 C.F.R. § 1614.505(a)(1). Because the agency did not comply with the notification requirements in 29 C.F.R. § 1614.505(a)(4) on the provision of temporary or conditional relief, its appeal was dismissed under the dismissal language in that section paragraph. The Commission rejected the agency's argument that 29 C.F.R. § 1614.505 did not apply because complainant alleged she was denied reasonable accommodation and placed on LWOP, and this did not involve a removal, separation or suspension. The Commission found complainant was constructively suspended/removal and ordered relief included a required offer of reinstatement, back pay, compensatory damages of \$65,000, and attorney fees and costs of \$153,999.63.

4. Class Complaints

McConnell, et al. v. United States Postal Service, EEOC Appeal No. 0720080054 (January 14, 2010). The class agent filed a formal complaint alleging that rehabilitation and limited duty employees at the agency were discriminated against when the agency implemented its National Reassessment Program (NRP). According to the agency, the purpose of the NRP was to "standardize" the process used to assign work to employees who were injured on the job. The class agent asserted that the NRP failed to provide reasonable accommodation, created a hostile work environment, wrongfully disclosed medical information, and had an adverse impact on disabled employees. According to the record, the class agent had been satisfactorily performing in a modified position following a work-related injury, but was ultimately told that there was no work available for her under the NRP and separated from her position. An Administrative Judge found that the proposed class met all four of the requirements for class certification, and the Commission concurred on appeal. With respect to commonality and typicality, the class agent showed that the agency had a nationwide practice of targeting employees in rehabilitation or limited duty positions, adversely affecting their reasonable accommodations via the NRP. The Administrative Judge noted that while the specific harm may be different for the various employees involved, there was a common link, that is, all class members were asserting they were negatively affected by the NRP. Further, the class met the numerosity requirement because the NRP was a national program. Finally, the class agent showed that, at this stage, she was a qualified individual with a disability, and her position, as well as some of the other putative class members' positions involved necessary work. The agency was ordered to forward the matter for a hearing on the certified class claim.

Lynette Fitzgerald v. Department of Defense, EEOC Appeal No. 0720090003 (March 26, 2010). Class Action Properly Certified. The class agent, who worked as a store manager, filed a formal complaint alleging that the agency's promotion process discriminated against African-Americans. The class agent asserted that African-American employees were recommended only for "target positions" in a lower pay band. An AJ found that the proposed class met all four of the requirements for class certification, and the Commission concurred on appeal. With regard to the elements of commonality and typicality, the Commission stated that the lack of promotional opportunity, allegedly due to the agency's performance review process, the ability

to fill a position without posting a vacancy, and the ranking done by a central rating board, is a sufficient factual basis to infer a policy or practice of discrimination. In addition, the class claim was supported by affidavits and statistical evidence showing that other African-American employees who were subject to the same agency promotional process had not risen above the lower pay band. With regard to numerosity, the Commission determined that the AJ's finding that the potential class contained over 100 members in diverse locations was supported by substantial evidence. Finally, the agency did not challenge the qualifications of the class representative's attorney, who was experienced in employment law and the litigation of class actions.

5. Timeliness

Ilgen Tesfazion v. Department of State, EEOC Appeal No. 0120091121 (June 16, 2009). Complainant, who was employed by the agency at an overseas facility, filed an EEO complaint alleging that the agency did not pay her the same salary as her predecessor who was deemed an "eligible family member." The agency dismissed the complaint for failure to timely contact an EEO Counselor, noting that complainant had been aware for several years that direct hires for the agency are paid differently than local agency hires. On appeal, the Commission cited the language in the Lilly Ledbetter Fair Pay Act involving discrimination in compensation, stating that complainant contends that the discrimination continues because she is still paid less than her predecessor. The Commission noted that the agency issued its decision prior to the passage of the Act. Therefore, the Commission remanded the matter for the agency to reconsider its dismissal of the complaint in light of the provisions of the Lilly Ledbetter Fair Pay Act.

Darlene Jackson v. Department of Defense, EEOC Appeal No. 0120092427 (August 18, 2009). Complainant alleged that she was subjected to discrimination on the basis of age when her work hours were reduced and student hires were given additional hours. The agency did not state the date of the alleged discriminatory event, but appears to rely on September 21, 2008, the date that complainant was apparently given an SF-50 reducing her work hours. The Commission noted that complainant alleged that the students' hours were increased in November and December 2008, and that she was not likewise given the opportunity to work extra hours. As such, the Commission found that her counselor contact is timely.

Randy D. Rostad v. Department of Defense (Army and Air Force Exchange Service), EEOC Appeal No. 0120092096 (August 18, 2009). Complainant alleged that from April 2003, until the date of his retirement in 2008, his job description and pay did not accurately reflect his duties and he was unable to get his position properly reviewed and upgraded. The agency dismissed the claim for untimely EEO counselor contact, noting that the alleged discriminatory act occurred on April 24, 2003, but complainant did not contact an EEO counselor until November 6, 2008. Regarding the ADEA, the Lilly Ledbetter Fair Pay Act provides: "For purposes of this section, an unlawful practice occurs, with respect to discrimination in compensation in violation of this Act, when a discriminatory compensation decision or other practice is adopted, when a person becomes subject to a discriminatory compensation decision or other practice, or when a person is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice." The Commission noted that complainant was receiving allegedly discriminatory paychecks during the period up to and including 45 days prior to his EEO

counselor contact. Thus, the Commission concluded that complainant's counselor contact was timely.

Mark Griffin v. United States Postal Service, EEOC Appeal No. 0120092429 (October 20, 2009) Complainant filed a formal EEO complaint alleging that he was subjected to harassment and a hostile work environment when his supervisor inappropriately discussed the denial of his leave request, management failed to act appropriately after he reported negative statements made to him by a customer, his schedule was changed, his requests for leave were denied, and management harassed him about his disabilities by constantly telling him to work at a quicker pace, monitoring the speed of his work, and publicly chastising him in the presence of his co-workers. The agency investigated the issue concerning complainant's leave requests, but dismissed the remaining allegations. On appeal, the Commission found that the agency improperly dismissed the first three issues for failure to timely contact an EEO Counselor. The Commission stated that the allegations make up a hostile environment claim, and comprise incidents that are clearly related to each other and to the matter concerning complainant's requests for leave. In addition, the Commission found that the last allegation states a cognizable claim of harassment and is factually tied to the other issues raised.

Jimmie L. Miller v. Department of Veterans Affairs, EEOC Appeal No. 0120093516 (December 10, 2009). Extension of Time Limitation for Contacting EEO Counselor Warranted. Complainant contacted an EEO Counselor on April 28, 2009, alleging discrimination when, among other things, he was removed from employment effective February 20, 2009. In response to the agency's request for additional information regarding his failure to contact an EEO Counselor within the 45-day limitation period, complainant stated that his letter of removal only indicated that he had the right to appeal the action to the Merit Systems Review Board (MSPB) and did not provide EEO complaint rights. The Commission found the agency's subsequent dismissal of the claim concerning complainant's removal was improper. The Commission acknowledged that complainant exceeded the applicable limitation period by approximately three weeks, and that complainant was aware of the limitation period. Nevertheless, the Commission concluded that the circumstances in the case justified extending the limitation period. The Commission found complainant's assertion that he was confused about whether or not his removal could properly be raised in the EEO process to be credible. That rationale, in addition to the relatively short period of time by which he exceeded the regulatory time frame warranted extending the period for initiating contact with the EEO Counselor in this case.

Joi Brown v. United States Postal Service, EEOC Appeal No. 0120093319 (January 13, 2010). Complainant filed a formal EEO complaint alleging discrimination on the bases of race (African American) and sex (female) resulting in a hostile work environment after she was placed on Emergency Placement Off-Duty Status and later issued a 14-day suspension. The agency dismissed the complaint for failure to state a claim and for untimely filing of the formal complaint. With regard to the matter of timeliness, the Commission stated that, in the absence of a legible postmark, as was the case here, the complaint is deemed timely if it is received by mail within five days of the expiration of the applicable filing period. The Commission further found that the agency improperly considered complainant's allegations in piece-meal fashion and held that claims of harassment must instead be assessed based on their cumulative effect. The

Commission concluded that complainant's allegations stated a viable claim of discriminatory harassment. The case was remanded back to the agency for further processing.

Evelyn Houser v. Department of Commerce, EEOC Appeal No. 0120100340 (January 28, 2010). Complainant, an applicant for employment, contacted an EEO Counselor on August 10, 2009, alleging that she was discriminated against when she was denied employment in May 2009. The agency dismissed the complainant for failure to timely contact an EEO Counselor, and, in response to complainant's appeal, asserted that EEO posters including the 45-day limitation period were displayed at the facility where complainant tested for the position. The Commission reversed the agency's dismissal of the complaint. The Commission noted that complainant was at the agency facility for only a brief time, about one hour. Thus, the Commission concluded that, given the circumstances in this case, complainant could not have been expected to have read the posting, thereby having constructive notice of the applicable limitation period.

Vickie D. Thurman v. Department of Justice, EEOC Appeal No. 0120080808 (February 16, 2010). Waiver of Time Limits Warranted for Filing Formal Complaint. Complainant contacted an EEO Counselor, alleging that she was subject to discrimination when the agency denied her promotion pay status, incentive programs and awards. According to the record, the EEO Counselor provided complainant with notice of her right to file a formal complaint on December 20, 2006. The notice apprized complainant that she must file her formal complaint with the agency's EEO Officer in Washington, D.C. within 15 days. The notice also indicated, however, that complainant must notify the Commission if she filed a civil action under the ADEA. Complainant faxed her formal complaint to the EEO Counselor on January 2, 2007, and mailed a copy to the Commission on January 3, 2007. The agency ultimately dismissed complainant's formal complaint as being untimely filed. On appeal, the Commission found that complainant misread the formal complaint form, and that, because complainant's complaint included an age discrimination claim, she apparently confused the procedure for filing a civil action with the procedure for filing a formal complaint. The Commission also noted that the address of the Commission's headquarters was similar to that of the agency's EEO Office, which only compounded the confusion. The Commission concluded that, because complainant sent her formal complaint to the EEO Counselor and the Commission within 15 days of receiving the notice, a waiver of the time limits was warranted in this case.

David V. Butler v. United States Postal Service, EEOC Appeal No. 0120100055 (March 3, 2010). Complainant contacted an EEO Counselor, alleging that he was subjected to discrimination with regard to his performance evaluation. On July 20, 2009, complainant received a Notice of Right to File a Formal Complaint. Complainant submitted his formal complaint on August 7, 2009, three days beyond the 15-day time limitation, and the agency dismissed the complaint as untimely. On appeal, the Commission noted that complainant submitted evidence showing that he was experiencing major depression at the time he received the notice. Complainant's psychologist indicated that complainant was experiencing a number of debilitating symptoms, and opined that complainant was not capable of responding to the EEO Office in a timely manner due to the work-related major depressive illness. The Commission noted that an extension of time to file a complaint is warranted where an individual is so incapacitated by his medical condition that he is unable to meet the regulatory time limits. The

Commission concluded that the documentation in this case was sufficient to warrant an extension of the time period for complainant to file his formal complaint.

James J. Pittelkow v. Department of Homeland Security, EEOC Appeal No. 0120082972 (March 18, 2010). Complainant contacted an EEO Counselor on September 20, 2007, alleging that he was discriminated against when he was terminated from his position in June 2007. The agency dismissed the complaint for failure to timely contact an EEO Counselor. On appeal, the Commission found that the agency failed to provide any evidence showing that complainant had actual or constructive knowledge of the 45-day limitation period for contacting an EEO Counselor. Specifically, there was no evidence that EEO posters were on display at complainant's facility, or evidence that complainant was otherwise notified of the procedures for initiating an EEO complaint. Thus, the Commission concluded that the agency's dismissal of the complaint was improper.

6. Sanctions

Donald Gryder v. Department of Transportation, EEOC Appeal No. 0720070078 (August 13, 2009). The Administrative Judge issued a default judgment as a sanction to the agency, finding that it did not respond to an Order to Show Cause regarding why it was in noncompliance with various prior orders. The agency rejected the default judgment, and appealed the matter. The Commission vacated the default decision, and remanded the case to the agency for further processing. The Commission determined that the Administrative Judge as well as the agency missed opportunities that would have avoided the extreme sanction the Administrative Judge imposed. Regarding the agency, the Commission found that it was not unfamiliar with the imposition of a default judgment as a remedy, having a default judgment imposed approximately one year previously. Moreover, the Commission rejected mail delivery problems as an excuse for non-compliance with various orders. Further, the agency had not shown that it made additional "proactive efforts to ensure that it would receive notifications in the future from the Administrative Judge." The Commission noted that the agency repeatedly failed to respond to numerous filings by the complainant. The Commission also found that the Administrative Judge failed to rule on a motion claiming that a settlement agreement caused complainant to withdraw all his pending EEO complaints, and did not consider that a civil action filed by complainant in Federal Court could be intertwined with matters raised in the instant complaint. The Commission concluded that the situation in this case is an unusual one and that the sanction selected by the Administrative Judge was too harsh.

Dawn Royal v. Department of Veterans Affairs, EEOC Request No. 0520080052 (September 25, 2009). The Commission upheld the Administrative Judge's issuance of a default judgment in favor of complainant as a sanction because the agency had not initiated or completed an EEO investigation within the 180-day regulatory time-frame. The Commission did not find the agency's willful delay justifiable based on complainant's premature hearing request or its budgetary posture, and found to be speculative the agency's claim that complainant was not prejudiced by the delay. In affirming the default judgment, the Commission held that protecting the EEO process was paramount. The Commission affirmed the Administrative Judge's award of promotion to the target position, because complainant was qualified for the position, and stated that the agency was to provide complainant with equal access to developmental details. The

Commission provided additional time for complainant to submit evidence concerning entitlement to compensatory damages.

Terry E. Cox v. Social Security Administration, EEOC Appeal No. 0720050055 (December 24, 2009). Complainant, an attorney advisor, filed a formal complaint alleging that she was subjected to sex (female) and age (51) discrimination when she was not selected for three temporary senior attorney positions and one supervisory attorney advisor position. Following an investigation, complainant requested an administrative hearing, and subsequently amended her complaint to include the bases of disability and reprisal, as well as claims that she was denied official time and “hazard leave.” The AJ issued an Acknowledgment and Order which outlined the procedures to be followed in the hearing process, and noted that the parties were expected to complete discovery within 90 days. Complainant forwarded a Request for Admissions to the agency, but it did not respond as it had not appointed a representative at the time. Complainant then asked the AJ to impose sanctions on the agency based upon what she believed were deficiencies in the report of investigation. Complainant also sought to depose 10 witnesses. Several days later, complainant served notice of her intent to schedule depositions of over 30 witnesses, and instructed the agency to identify the individuals, contact them for scheduling their appearances, and coordinate travel to complainant’s attorney’s office beginning the following Monday. The parties subsequently filed a Joint Request for Rulings on the agency’s contention that it had 30 days to file objections to the depositions, and on a request to extend discovery. The following day, the AJ ordered the agency to produce the 30 employees for deposition. The agency, however, notified complainant’s attorney that it was not ready to do so and would not appear for deposition. In response to a Motion to Compel and Motion for Sanctions, the agency indicated its willingness to work out a mutually agreeable deposition schedule of those individuals relevant to the complaint. Complainant filed an additional Motion to Compel and Motion for Sanctions, to which the agency did not respond. Ultimately the AJ issued a default judgment against the agency, and ordered relief, including placement into the subject positions with back pay. A decision on attorney’s fees and compensatory damages was pending at the time of the 2001 terrorist attack on New York City, and the case records were destroyed. In November 2001, the case was assigned to a second AJ (AJ2), and the case file records were reconstructed. AJ2 issued a decision awarding all relief ordered by the first AJ, as well as \$60,000 in compensatory damages and \$29,025.30 in attorney’s fees.

On appeal, the Commission found that the first AJ’s issuance of a default judgment was proper. The Commission stated that the report of investigation was, as complainant asserted, inadequate given the number of non-selections at issue and the lack of documentation in the record. The Commission rejected the agency’s argument that an outside company conducted the investigation, stating that fact does not absolve the agency of its responsibility to ensure that the report of investigation is adequately developed, and the agency retains control of the outcome of the investigation. In addition, the Commission found that the agency was negligent in responding to discovery requests in a timely manner. The Commission noted that the agency took over two months, or two-thirds of the time allotted for discovery to appoint a representative. In addition, the agency failed to respond to discovery requests both before and after a representative was appointed. Further, the agency refused to even attempt to comply with the order to produce requested witnesses. Given the facts of the case, including the agency’s failure to show good cause with respect to the delay in appointing a representative and its failure to

respond to discovery requests, the Commission concluded that the imposition of a default judgment was appropriate. The Commission affirmed AJ2's decision with regard to compensatory damages and attorney's fees. The Commission also found that complainant established a right to placement into the positions as relief by showing that she was qualified for the positions at issue, applied and was not selected, and individuals outside of her protected class were favored in the selection.

7. Compensatory Damages

Herman Landrum v. Department of Transportation, EEOC Appeal No. 0720080043 (May 29, 2009). Following a finding of discrimination by an Administrative Judge, the agency appealed the decision to award complainant non-pecuniary compensatory damages. The Commission noted that complainant acknowledged that his emotional problems started several months after his discriminatory non-selection. Specifically, complainant stated that the emotional distress began after he returned from a detail assignment and holiday break, and resulted from retaliation and a hostile work environment, issues for which no discrimination was found. Thus, the Commission concluded that complainant failed to establish that the discriminatory non-selection was the proximate cause of the harm suffered, and complainant did not show that he was entitled to non-pecuniary damages. The Commission did, however, find that the complainant was entitled to recover the cost of commuting which resulted from the non-selection.

Patrick J. Rea v. United States Postal Service, EEOC Appeal No. 0120090934 (June 4, 2009). The agency implemented the Administrative Judge's finding that complainant was subjected to disability discrimination when the agency violated his work restrictions. On appeal, the Commission determined that complainant was entitled to an award of \$40,000 in non-pecuniary compensatory damages. The commission noted that complainant worked more than 140 days outside of his eight-hour work restriction. In addition, complainant's sister testified that she noticed significant personality and behavior changes in complainant, as well as physical changes. Complainant lost weight, did not bathe, and did not take care of himself. Complainant's own statement described a significant amount of emotional distress, and reports from his physicians show that work-[place stressed caused intense emotional pain and suffering, anxiety and depression. Thus, the Commission concluded that complainant was entitled to an award of \$40,000 in compensatory damages resulting from the discrimination.

Sandra P. Jenkins v. United States Postal Service, EEOC Appeal No. 0120091289 (June 8, 2009). The Commission determined that complainant was not entitled to an award of non-pecuniary compensatory damages. The Commission had previously found that complainant was subjected to discrimination with regard to her performance appraisal. Nevertheless, the Commission stated that complainant failed to establish the required nexus between the discriminatory conduct and the claimed emotional harm. The evidence showed that the majority of the emotional harm claimed occurred prior to the discrimination and related to other incidents. The Commission did find that complainant was entitled to \$50 in pecuniary damages for an insurance co-payment for a doctor's visit, and postage costs incurred in processing her complaint.

Patricia A. Bilowus-Claar v. Department of Interior, EEOC Appeal No. 0120072583 (June 12, 2009). The Commission found that complainant was entitled to an award of \$2,000 in

compensatory damages following a finding that the agency subjected her to discrimination on the basis of her disability. Complainant and her husband stated that complainant experienced stress, a loss of self-esteem, a deterioration in their marital relationship, sadness, depression and anguish as a result of the agency's failure to provide reasonable accommodation. The Commission noted, however, that complaint did not present any medical evidence to support her claim that the discrimination damaged her vision.

Linda D. Edwards v. Department of Transportation, EEOC Petition No. 0320080101 (June 23, 2009). The Commission differed with a decision of the Merit Systems Protection Board (MSPB) on a claim of disability discrimination. Petitioner, an Air Traffic Controller, appealed the agency's decision to remove her from federal service because of "unavailability for duty." In her appeal to the MSPB, petitioner had alleged, among other things, discrimination on the basis of disability when the agency denied her reasonable accommodation. The MSPB judge upheld the removal and concluded, among other things, that no discrimination had occurred. Petitioner appealed the decision to the full Board, which reversed the removal. The Board restored petitioner to her position, but did not provide her with back pay or compensatory damages. The Board did not address complainant's discrimination claim, observing that "... she does not challenge the administrative judge's findings on her claims of disability discrimination" The Board, however, did give petitioner appeal rights from its decision to the Commission. The Commission reversed the MSPB administrative judge's finding of no discrimination, and stated that petitioner was entitled to the consideration by the MSPB of additional relief, including back pay and compensatory damages. The Commission noted that petitioner had mistakenly bifurcated her appeal from the MSPB administrative judge and had asked for review of the merit system principles decision to the full Board and had appealed the discrimination decision to Commission. The earlier appeal to the Commission was administratively closed as prematurely filed because the full Board had not yet rendered its decision.

Lamont T. Rowan v. Department of Veterans Affairs, EEOC Appeal No. 0120070384 (June 19, 2009). Following a finding by the Commission that complainant was subjected to sex discrimination, the agency conducted a supplemental investigation with regard to the issue of compensatory damages. Complainant offered evidence that as a result of being assigned duties outside of his position, he was irritable, unable to sleep, had nightmares and felt worthless. Complainant submitted affidavits from two doctors, as well as several family members in support of his claim. The Commission found that the discriminatory assignment exacerbated a pre-existing emotional condition. The additional injury that resulted from the discrimination included some amount of complainant's stress, humiliation, anxiety, sleeplessness, and depression. This, the Commission concluded that complainant was entitled to an award of \$10,000 in non-pecuniary damages. The Commission found that complainant failed to show he was entitled to an award of past or future pecuniary damages.

Jeffrey S. Smith v. Social Security Administration, EEOC Appeal No. 0120072400 (July 17, 2009). The Commission determined that complainant was entitled to an award of \$25,000 in non-pecuniary compensatory damages following a finding by an Administrative Judge that complainant had been subjected to reprisal. Complainant submitted several statements confirming that he suffered emotional and psychological harm as a result of the retaliation. Specifically, complainant experienced frustration, feelings of helplessness, humiliation,

sleeplessness, obsessive thoughts, chronic fatigue, and anxiety, and was unable to participate in life activities.

Jose Torres v. Department of Veterans Affairs, EEOC Appeal No. 0120091384 (July 22, 2009).

In a prior decision, the Commission found that complainant was subjected to disability discrimination when the agency made inappropriate medical inquiries. Subsequently, the Commission determined that complainant was entitled to an award of \$10,000 in non-pecuniary damages as a result of the discrimination. Complainant stated that his supervisors' actions caused him daily stress. In addition, he had trouble sleeping, and was angry. Complainant was treated for stress and anxiety, and his wife confirmed that he felt angry and frustrated.

Celeste R. Gray v. Department of the Interior, EEOC Appeal No. 0120072136 (July 24, 2009).

In a prior decision, the Commission determined that complainant was subjected to sexual harassment, and ordered the agency to conduct a supplemental investigation with regard to complainant's claim for compensatory damages. Complainant submitted numerous detailed statements, as well as reports and letters from medical providers outlining the harm she suffered as a result of the harassment. According to the record, complainant's symptoms continued for several years after she left the harassers supervision. She experienced a major depressive episode, and began abusing alcohol. She experienced dysfunction in her work and personal relationships, as well as headaches, nightmares, mental anguish, and humiliation. She also experienced weight gain and high blood pressure. The commission concluded that complainant was entitled to an award of \$100,000 in non-pecuniary damages for emotional distress caused by the harassment. The commission also awarded complainant \$49,459.75 in past and future pecuniary damages for medical treatment.

John Bartolomeo v. Department of Homeland Security, EEOC Appeal No. 0720090013 (November 9, 2009). EEOC finds complainant entitled to \$46,000 for reduced value of his home which he sold as a result of a move precipitated by unlawful discrimination.

Sandra J. Hyde v. Department of Justice, EEOC Appeal No. 0120073964 (November 24, 2009).

The agency found that complainant was subjected to sexual harassment for a period of approximately six months, and awarded complainant \$8,000 in non-pecuniary compensatory damages. On appeal, the Commission increased the award to \$35,000 to adequately compensate complainant for the emotional distress she experienced. Complainant stated that she suffered physical and emotional harm. Complainant's husband indicated that complainant became distant after the harassment began, and that their relationship deteriorated such that, at one point, he moved out of the house. Finally, two co-workers confirmed that complainant experienced stress, and cried on almost a daily basis. The Commission denied complainant's claim for pecuniary damages for physical injuries resulting when a shelf fell on her and gastric bypass surgery, finding no evidence that those claims were related to the discriminatory harassment.

Jannell Smith v. United States Postal Service, EEOC Appeal No. 0720070031 (December 7, 2009). Following a finding that complainant was subjected to sex discrimination and harassment, an AJ awarded complainant \$30,000 in non-pecuniary compensatory damages. The Commission concurred with the award on appeal. The record showed that complainant suffered humiliation, and feelings of uncertainty about her job and career. She also experienced a relapse of

depression. She was anxious, sleep deprived, and unable to concentrate at work. The Commission found that the AJ's award was consistent with prior case law, and took into account "other stressors" in complainant's life.

Estate of Mary L. Chase v. Department of the Navy, EEOC Appeal No. 0120082106 (January 6, 2010). The agency determined that complainant was subjected to disability discrimination when she was denied reasonable accommodation, and that the denial of accommodation was a significant factor in the performance deficiencies that led to her termination. Subsequently, the agency found that complainant was entitled to an award of \$60,000 in compensatory damages, and the Commission affirmed the award on appeal. The Commission noted that statements from complainant, her daughter, and a friend showed that complainant experienced emotional and physical problems, including depression, loss of enjoyment of life, significant weight loss, physical weakness, withdrawal from family and friends, stress and anxiety. The Commission found that the award was consistent with awards in similar cases, and was not "monstrously excessive."

Kevin Bostick v. Department of the Army, EEOC Appeal No. 0120093611 (March 5, 2010). The Commission determined that complainant was entitled to an award of \$76,000 in non-pecuniary compensatory damages resulting from a discriminatory non-selection. The record included statements from complainant, his friends, his psychologist, and a "Behavioral Sciences Team" indicating that complainant exhibited symptoms of Post Traumatic Stress Disorder following the discrimination. Complainant became depressed, suffered a loss of self-esteem, and experienced a variety of physical symptoms, including headaches, nausea and insomnia. Thus, the evidence supported the non-pecuniary award. In addition, the Commission found that complainant was entitled to an award of \$2,250 in pecuniary damages for proven out-of-pocket treatment expenses.

Joseph J. Mulvaney v. United States Postal Service, EEOC Appeal No. 0120091359 (March 9, 2010). Previously, the Commission found that complainant was subjected to retaliation when he was denied a transfer. On appeal from the agency's decision addressing compensatory damages, the Commission found that complainant was entitled to an award of \$4,000. The Commission noted that while complainant stated that he suffered from bruxism and gastritis, there was no medical evidence in the record showing that those conditions were directly or proximately caused by the discrimination. Further, while complainant stated that he experienced much stress, he conceded that his stress was also caused by factors other than the denial of his request for a transfer. The Commission noted that the record did contain statements from family members, friends, and co-workers showing that he suffered some stress as a result of the discrimination.

Toni Champion v. United States Postal Service, EEOC Appeal No. 0720090037 (March 10, 2010). The Commission found that complainant was subjected to harassment based on her disability and prior protected activity for over two years. Complainant testified that, over the course of the harassment, she needed medication to sleep, had nightmares, was uninterested in things she used to do, and experienced severe stress. Complainant was prescribed several medications, was under the care of a psychiatrist and a psychologist, and was placed off work. She was diagnosed with major depressive disorder, anxiety disorder, and panic disorder. Thus, the Commission affirmed the AJ's award of \$125,000 in non-pecuniary compensatory damages.

8. Attorney's Fees

Circuit Court

Porter v. Winter, Slip No. 07-17120 (9th Cir. 2010)

In a case of first impression, the Ninth Circuit held that a former civilian Navy Department employee who won one of two Title VII claims in a proceeding before the EEOC was permitted to subsequently sue in court challenging only the amount of attorneys' fees and costs EEOC awarded him.

EEOC Cases

Garrett T. Donaldson v. Department of Homeland Security, EEOC Appeal No. 0720090032 (December 24, 2009). Complainant, a federal air marshall working in Las Vegas, filed a formal complainant in which he raised six issues of discrimination involving his non-selection for two positions, and four temporary assignments. Following a hearing, an Administrative Judge (AJ) found that complainant was discriminated against when he was not chosen for an assignment to the Joint Terrorism Task Force. As relief, the AJ ordered the agency to, among other things, pay complainant attorney's fees in the amount of \$114,827.82 and costs in the amount of \$7,498.01. The AJ relied upon the current prevailing hourly rates in Washington, D.C. where the attorney was located. On appeal, the Commission found that the AJ did not abuse his discretion in finding that complainant's use of an out-of-state attorney was reasonable. The agency never objected to the location of complainant's counsel during the proceedings. In addition, the Commission noted that some of the actions at issue were handled by agency officials in Washington, some of the agency officials called to testify had Washington duty stations, and agency counsel was permanently located in the Washington area. The Commission also found that it was reasonable for the AJ to apply the current prevailing rate to the entire litigation period in order to compensate complainant's attorney for the delay in payment. Further, the Commission rejected the agency's argument that the fees should be reduced to one-sixth of the amount claimed, and instead found that the AJ appropriately applied a 25 percent across the board reduction to the attorney's fees based upon the fact that complainant did not prevail on all claims. The Commission stated that all of the claims were joined by a common core of facts, and involved overlapping issues, witnesses and discovery. Finally, the Commission noted that the corresponding costs were consistent with reasonable legal representation in this case.

9. Summary Judgment

Court of Appeals

Carver v. Holder, 9th Cir., No. 09-35084 (May 27, 2010). In a case of first impression, the Ninth Circuit held that a former assistant U.S. attorney could not maintain his lawsuit purportedly seeking enforcement of an EEOC determination in his favor because the Department of Justice had already fully complied with the EEOC order for relief.

EEOC Cases

Delores Pritchett v. Department of the Air Force, EEOC Appeal No. 0120081815 (September 25, 2009). Complainant alleged discrimination when the agency rotated her from her more favorable private office situation to another unit at the same location without a private office, albeit the same position, grade and series. The agency indicated it wanted to rotate three persons so that they all could become proficient in others duties, but initially did not rotate one of three

because of lack of experience. The Administrative Judge issued a decision on summary judgment reasoning that complainant failed to show the temporary assignment was materially adverse and complainant's return to her original position was imminent. The Commission found that summary judgment was not appropriate because at the time of the Administrative Judge's decision complainant had not returned to her original position after one and a half years, and the personnel documents did not indicate the reassignment was temporary. Also, there were credibility issues regarding the agency's stated desire to cross-train.

Frederick W. Geary, Jr. v. Department of Agriculture, EEOC Appeal No. 0120071295 (October 22, 2009). Complainant worked for the agency as a Physical Security Specialist and applied for the same position in another division. Complainant was among the top eight candidates and was interviewed for the position. Complainant was among the top three candidates forwarded to the selecting official; however, the interview panel recommended that the selecting official not interview complainant and complainant was not selected for the job. Over complainant's objections, the Administrative Judge granted the agency's motion for a decision without a hearing, and found that complainant failed to prove that he was discriminated against as alleged. On appeal, the Commission determined that there was insufficient evidence in the record to support the issuance of a decision without a hearing. Specifically, because complainant alleged that he was not selected for the position, the applications of the candidates, interview notes, and ranking sheets were critical to the investigation of whether discrimination occurred. The Commission concluded that the record failed to contain the requisite documentation for complainant to demonstrate that his qualifications were of such merit that absent discrimination or retaliation, he would have been selected for the position. The matter was remanded for an administrative hearing.

Daphne Guient v. United States Postal Service, Appeal No. 0120092811 (October 27, 2009). Complainant alleged that the Administrative Judge who issued the decision on her complaint should have recused himself because at one time her agency owned the building where the Commission was a tenant, and she and her coworkers observed Administrative Judges and agency managers talking with each other and having lunch together. Complainant alleged that the Administrative Judge demonstrated bias against her when he disallowed certain evidence and rushed complainant's testimony at the hearing. On appeal, the Commission found this insufficient to demonstrate bias or require the Administrative Judge to recuse himself.

Isaac J. Smith v. Department of the Army, EEOC Appeal No. 0120073300 (December 18, 2009). Grant of Summary Judgment Reversed: Direct Evidence of Reprisal. Complainant filed a formal complaint alleging, among other things, that he was subjected to reprisal when he was suspended for five days. Following an investigation, complainant requested an administrative hearing. The AJ ultimately issued a decision without a hearing. The AJ analyzed the claim under a disparate treatment theory of discrimination, and found that complainant failed to prove that he was discriminated against as alleged. On appeal, the Commission found that the AJ erred in examining the claim using a disparate treatment analysis, because complainant presented direct evidence of discrimination. Specifically, the letter of proposed suspension referenced his EEO activity as a basis for disciplining complainant. The letter of proposed suspension asserted that complainant engaged in insubordination when he refused to follow instructions concerning proper e-mail traffic, and included, as an attachment, a list of complainant's e-mails deemed

“offensive” by complainant’s supervisor. These e-mails included several in which complainant alleged to management that he was being subjected to retaliatory harassment and disparate treatment. Further, in an investigative statement, the supervisor cited complainant’s claim that he was subjected to reprisal and disparate treatment as an example of “insubordination.” The Commission noted that management stated that complainant was suspended because he falsely accused his supervisor of misappropriating funds, and exhibited rude, discourteous behavior toward his supervisor. Thus, the Commission determined that the matter should be reviewed under a mixed motive analysis. The Commission stated, however, that the record was inadequate to determine whether the agency would have suspended complainant absent its retaliatory motive, and the determination depended upon an assessment of the credibility of the responsible officials. Thus, the claim concerning complainant’s suspension was remanded for a hearing.

Jose R. Rivera-Garcia v. Department of Homeland Security, EEOC Appeal No. 0120070931 (January 22, 2010). Complainant filed a formal EEO complaint alleging that he was subjected to discrimination on the basis of perceived disability (“overweight/mobility impaired”) when he was not selected for the position of supervisory transportation security screener in June 2003; subjected to retaliatory harassment including being asked how he found out about a document referencing his weight in the promotion package for the June non-selection, denied an award, and told he would receive a letter of counseling; and subjected to discrimination on the basis of disability and in reprisal for prior EEO activity when he was denied a promotion in April 2005. The AJ assigned to the case ultimately issued a decision without a hearing, finding no discrimination. The Commission affirmed the AJ’s decision on appeal. The Commission found that the AJ appropriately issued a decision without a hearing, as complainant failed to proffer sufficient evidence to establish that a genuine issue of material fact existed, or that there were credibility issues such that a hearing on the merits was warranted. The Commission noted that, with regard to the two non-selections, the agency asserted that complainant did not receive the highest final rating score, and complainant failed to show that the agency’s rationale was a pretext for discrimination. While complainant pointed to an e-mail message from the Administrative Officer referencing his weight, there was no evidence in the record that the interview panel members were aware of the e-mail’s existence, received a copy of the e-mail, or were influenced by its contents when rating the candidates. With regard to the allegation of harassment, the Commission noted there was no evidence confirming the existence of the document regarding complainant’s weight, complainant received the award when Federal Security Director determined that he should not have been denied an award, and complainant was issued a letter of counseling because he had been absent on three consecutive Sundays in conjunction with his scheduled days off. The Commission concluded that there was no evidence the alleged harassment was based on a perceived disability or prior EEO activity, or that the incidents created a hostile work environment.

Dale Armelin v. United States Postal Service, EEOC Appeal No. 0120080530 (February 4, 2010). Complainant alleged that he was subjected to reprisal when he was placed on Emergency Placement Without Pay status, and issued a notice of removal. The Manager of Customer Service indicated that he observed complainant make a dangerous U-turn in rush hour traffic while driving an agency vehicle and that complainant left the keys to his vehicle in the ignition in the auxiliary position. Following an investigation, an AJ issued a decision without a hearing

finding that complainant failed to prove discrimination as alleged. On appeal, the Commission concluded that there were genuine issues of material fact that need to be resolved at a hearing. Specifically, contrary to what the Manager stated in his affidavit, complainant averred that he did not operate his vehicle in an unsafe manner, but made a legal U-turn in order to return to the agency facility. In addition, complainant stated that, on the date in question, he put the key in the ignition in the auxiliary position to allow the fan to run while he was sorting mail, but removed the key from the ignition when he exited the vehicle. Thus, the Commission found that there were genuine issues of material fact over whether complainant operated the agency vehicle in an unsafe manner. The Commission noted that, in this case, management and complainant gave opposing accounts of the incidents, and there was no basis to credit the affidavits of management officials over that of complainant. The matter was remanded for a hearing.

Michael Kronenberg v. United State Postal Service, EEOC Appeal No. 0120073116 (March 19, 2010). According to the record, a supervisor observed that complainant was not complying with written work orders. When the supervisor attempted to discuss this with complainant, a heated exchange ensued, and complainant allegedly made an obscene gesture and mouthed an obscenity. Complainant also allegedly swung his arm at the supervisor, at which point a manager intervened and placed complainant in off duty status. Complainant, who is hearing impaired, filed a formal EEO complaint, stating that he should have been provided with an interpreter. Following an investigation, an AJ issued a decision without a hearing, finding that complainant was not subjected to discrimination as alleged. On appeal, the Commission found that the AJ appropriately issued a decision without a hearing, as complainant failed to proffer sufficient evidence to establish that a genuine issue of material fact existed, or that there were credibility issues such that a hearing was warranted. The Commission noted that, even assuming complainant established a *prima facie* case, complainant failed to show that the agency's articulated reason for the action, that is complainant violated the zero tolerance policy, was a pretext for discrimination. Complainant acknowledged that he was involved in a heated exchange with the supervisor, and did not deny that he made an obscene gesture and mouthed an expletive. Further, complainant did not request an interpreter at the time of the exchange, and was provided with one when he was interviewed regarding the incident the following day.

10. Settlement Agreements

Court of Federal Claims

Greenhill v. United States, Slip No. 07-854 C (Fed. Cl. 2010)

The Department of Education breached an agreement settling an employee's bias complaint when her former supervisor spoke negatively about her to a prospective employer, the U.S. Court of Federal Claims determined in an April 12 decision that was released publicly April 23.

EEOC Cases

Olive Shephard v. United States Postal Service, EEOC Appeal No. 0120090476 (April 21, 2009), RTR denied, EEOC Request No. 0520090437 (June 15, 2009). Complainant and the agency entered into an agreement providing, in pertinent part, that complainant would remain in light duty status until her doctor lifted her restrictions. According to the record, complainant was assigned light duty work for more than six years, after which time she became a full time union president, which was not strenuous work. While complainant served as union president, another employee from a different craft assumed her duties. Complainant returned to her unit after her

term as union president was over, but was placed in a regular position, after which there were several discussions between complainant and the agency as to light duty work. Complainant ultimately notified the agency that it was in breach of the settlement agreement. On appeal, the Commission noted that the agency initially implemented the settlement agreement. Further, given the length of time that passed and change of circumstances, the agency was not required to return complainant to her initial assignment. Nevertheless, the settlement agreement required that complainant remain in light duty status until her doctor lifted her restrictions, which did not occur. The Commission noted that there was no intervening event or change in circumstances that would excuse the agency from recognizing complainant's light duty status, and it was unlikely that there was no productive clerk work available if complainant was accommodated with light duty. Thus, the Commission found that the agency breached the settlement agreement when it did not recognize complainant's light duty status and sent her home.

Valarie Johnson v. Equal Employment Opportunity Commission, EEOC Appeal No. 0120090852 (August 19, 2009). The Commission, with the acting Chairman recused from participation in the decision, found that the agency was in compliance with the terms of a July 20, 2006 settlement agreement into which the parties had entered. Specifically, the decision determined that there is no language in the settlement agreement obligating the agency to pay the fees for mediation training complainant took. In addition, the decision concluded that the agency did not violate complainant's agreed right to priority consideration when it granted another agency employee a hardship transfer to the position of mediator in complainant's office. However, while finding no breach, the Commission concluded that complainant had also alleged reprisal discrimination for pursuing her breach claim which was not addressed. Therefore, the agency was ordered to treat complainant's email to the EEO Director, which contained the reprisal allegations, as a request for EEO counseling, and counsel her in accordance with 29 C.F.R. § 1614.105(b)(1) *et seq.*

Rey G. Salanga v. United States Postal Service, EEOC Appeal No. 0120082454 (September 4, 2009). The parties entered into an agreement which provided that if complainant had problems with his supervisor upon return to work, a named management official would be available to "assist in any dialogue." Complainant subsequently alleged that his supervisor harassed him, and claimed that the named official never informed the supervisor of the agreement. On appeal, the Commission noted that the agreement did not specify the manner by which the official would be available to assist complainant and his supervisor. Thus, the Commission concluded that the terms of the agreement were vague, and the settlement agreement was void and unenforceable. The agency was ordered to resume processing the underlying complaint.

Carlos L. Garcia v. United States Postal Service, EEOC Appeal No. 0120092226 (September 9, 2009). The parties entered into a settlement agreement which provided that complainant would accept the position of Casual Custodian/Laborer, which "shall take effect as soon as possible, approximately two pay periods," and would be subject to a 90 day probationary period. Subsequently, complainant asserted that the agency failed to hire him within two pay periods, and then took two months following his orientation to schedule him for work. In addition, complainant noted that he was scheduled for only a limited number of hours, and, after two weeks, was not scheduled for further hours. The agency asserted that it had difficulty registering complainant for the position and providing orientation, and then no longer needed complainant in the position. On appeal, the Commission found that the agency's actions completely undermined

the purpose and effect of the agreement and suggested bad faith. The agency was ordered to specifically implement the terms of the agreement.

William J. Thomas v. United States Postal Service, EEOC Appeal No. 0120090916 (May 20, 2009), RTR denied, EEOC Appeal No. 0520090634 (October 2, 2009). Complainant notified the agency that it was in breach of a settlement agreement, but did not specify the date thereof. The agency subsequently issued a final decision finding that it was in compliance with a September 12, 2008 document it characterized as a settlement agreement. On appeal, the Commission noted that the document submitted by the agency is not a settlement agreement under the EEOC Regulations, but appears to be a memorandum detailing efforts to settle the matter. The document contained no language about settlement terms and no language addressing the rights and obligations of the parties. Further, the document did not identify the allegations resolved. Thus, the Commission concluded that the document submitted by the agency did not constitute a valid settlement agreement. The Commission remanded the matter to the agency so that the EEO complaint could be reinstated for further processing.

Robinson, aka Calame v. Department of Veterans Affairs, EEOC Appeal No. 0120092289 (October 9, 2009). Complainant and the agency entered into a settlement agreement that provided for the agency to “instruct” two named management officials to refrain from discussing complainant’s work history, and physical and mental well being with other employees or supervisors. Complainant alleged that the agency breached the agreement when one of the named officials discussed her medical information and how to post her time card with her supervisor. The agency noted that the official was complainant’s prior supervisor, and that business necessity required him to discuss complainant’s medical and employment information. On appeal, the Commission noted that it appeared the parties did not come to a meeting of the minds regarding the clause at issue. Specifically, the agency interpreted the clause to mean that the officials may not discuss complainant’s information except when there is a business necessity to do so. Complainant, on the other hand, seemed to believe the officials would never discuss anything about her under any circumstances. The Commission determined that the matter should be remanded to allow complainant the opportunity to void the agreement if she believed the officials were not permitted to discuss her information under any circumstances, including the processing of her workers’ compensation claim. The Commission noted that, should the underlying complaint be reinstated for further processing, the parties would be returned to the status quo, and complainant would be required to return any benefits received pursuant to the settlement agreement.

John B. Cychosz v. United States Postal Service, EEOC Appeal No. 0120093108 (November 12, 2009). The settlement agreement provided that complainant would be reimbursed for a specific number of days claimed. The agency determined that although complainant had not yet been reimbursed, the adjustments were in the process of being made. The Commission found no evidence in the record indicating that complainant has been reimbursed. In addition, on appeal, complainant asserted that he still has not been reimbursed. Thus, the Commission found that the agency breached the settlement agreement and remanded the matter to the agency to implement the terms of the settlement agreement.

Susan M. Kolarich v. Department of Veterans Affairs, EEOC Appeal No. 0120093332 (November 20, 2009). The parties entered into a settlement agreement that provided, in pertinent part, that the agency would expunge an April 2004 Performance Action Plan (PAP) and all related documents from its personnel files regarding complainant. After the agency determined that it was in breach of the agreement, it allowed complainant and her representative to be present to witness the removal of the documents in question from her personnel record. After doing so, the agency issued a new determination finding that it had complied with the agreement. On appeal, however, the Commission found that the agency had breached the agreement. Complainant indicated that she was not permitted to check her complete Official Personnel File. Further, the Commission noted that it took the agency four years to attempt to comply with the agreement.

Lawrence Thrash v. Department of the Army, EEOC Appeal No. 0120092905 (December 24, 2009). The parties entered into a settlement agreement that provided, among other things, that the agency would not proceed with a proposed removal, and would remove two prior suspensions from complainant's personnel records. The agreement also provided that if complainant engaged in "misconduct of any nature," the suspensions would be reinstated and the subsequent misconduct would automatically result in complainant's removal. Within weeks of the execution of the settlement agreement, complainant's supervisor notified complainant that he believed complainant had engaged in misconduct on five occasions, and complaint was removed from the agency. On appeal, the Commission determined that the agency engaged in bad faith in implementing the agreement. The Commission found that the close proximity between the execution of the agreement and the notice that management was proceeding with complainant's removal, the failure to define the critical term "misconduct," the fact that three of the five charges lodged by complainant's supervisor were not upheld by upper-level management, and the relatively minor nature of the misconduct all pointed to the fact that it was more likely than not that the agency intended to continue with complainant's removal and only signed the settlement agreement to dispose of complainant's pending EEO complaint.

Purita Navarro v. United States Postal Service, EEOC Appeal No. 0120093399 (February 26, 2010). The settlement agreement provided that the agency would process a personnel form reflecting a specific date of reassignment to complainant's current position, and that the action would not impact complainant's seniority date. Complainant alleged that, when she returned from her temporary supervisory position following the execution of the settlement agreement, she lost nearly 20 years of seniority. On appeal, the Commission found that the agency breached the agreement. The Commission rejected the agency's argument that it could not comply with the provisions of the settlement agreement because of the results of a step two grievance decision. Specifically, the Commission noted that the grievance decision indicated that management settled the grievance by choosing to change complainant's seniority date, and there was no intervening act by an outside body. Rather, it was the agency's decision to resolve the grievance to complainant's detriment that impacted its compliance with the settlement agreement, and the agency created its own impediment to the agreement's implementation. Further, the Commission found that the agency, by delaying processing of complainant's request to return to her regular position such that complainant remained in the supervisory position beyond the relevant one-year period, had not exercised the requisite good faith in its attempts to

comply with the agreement. The agency was ordered to specifically perform the terms of the settlement agreement.