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Description of document: Equal Employment Opportunity Commission (EEOC)  
Office of Federal Operations (OFO) FY 2014  
Organizational Assessment

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Source of document: FOIA Request  
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Office of Legal Counsel  
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**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**  
**Office of Legal Counsel**

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Website: [www.eeoc.gov](http://www.eeoc.gov)

July 25, 2019

**Re: FOIA No.: 820-2019-000389 (OFO Assessment and Reports)**

Your Freedom of Information Act (FOIA) request, received on April 29, 2019, is processed. Our search began on April 29, 2019. All agency records in creation as of April 29, 2019 are within the scope of EEOC's search for responsive records. The paragraph(s) checked below apply.

[ X ] Your request is granted in part and denied in part. Portions not released are withheld pursuant to the subsections of the FOIA indicated at the end of this letter. An attachment to this letter explains the use of these exemptions in more detail.

[ X ] You may contact the EEOC FOIA Public Liaison, Stephanie D. Garner, for further assistance or to discuss any aspect of your request. In addition, you may contact the Office of Government Information Services (OGIS) to inquire about the FOIA mediation services they offer.

The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, email at [ogis@nara.gov](mailto:ogis@nara.gov); telephone at (202) 741-5770; toll free 1-877-684-6448; or facsimile at (202)741-5769.

The contact information for the FOIA Public Liaison: (see contact information in the above letterhead or under signature line).

[ X ] If you are not satisfied with the response to this request, you may administratively appeal in writing. Your appeal must be postmarked or electronically transmitted in 90 days from receipt of this letter to the Office of Legal Counsel, FOIA Programs, Equal Employment Opportunity Commission, 131 M Street, NE, 5NW02E, Washington, D.C. 20507, or by fax to (202) 653-6056, or by email to [FOIA@eeoc.gov](mailto:FOIA@eeoc.gov), or online at the following public access link (PAL): <https://publicportalfoiapol.eeoc.gov/palMain.aspx>. Your appeal will be governed by 29 C.F.R. § 1610.11.

[ X ] See the attached Comments page for further information.

Sincerely,

/s/Sdgarner

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Stephanie D. Garner  
Assistant Legal Counsel  
Phone: (202) 663-4634  
[FOIA@eeoc.gov](mailto:FOIA@eeoc.gov)

Applicable Sections of the Freedom of Information Act, 5 U.S.C. § 552(b):

**Exemption(s) Used:** (b)(7)(C)

Exemption (b)(7)(C) to the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(7)(C) (2016), as amended by the FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538, authorizes the Commission to withhold:

records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy . . . .

The seventh exemption applies to civil and criminal investigations conducted by regulatory agencies. *Abraham & Rose, P.L.C. v. United States*, 138 F.3d 1075, 1083 (6th Cir. 1998). Release of statements and identities of witnesses and subjects of an investigation creates the potential for witness intimidation that could deter their cooperation. *National Labor Relations Board v. Robbins Tire and Rubber Co.*, 437 U.S. 214, 239 (1978); *Manna v. United States Dep't. of Justice*, 51 F.3d 1158, 1164 (3d Cir. 1995). Disclosure of identities of employee-witnesses could cause "problems at their jobs and with their livelihoods." *L&C Marine Transport, Ltd. v. United States*, 740 F.2d 919, 923 (11th Cir. 1984).

The Supreme Court has explained that only "[o]fficial information that sheds light on an agency's performance of its statutory duties" merits disclosure under FOIA and noted that "disclosure of information about private citizens that is accumulated in various governmental files" would "reveal little or nothing about an agency's own conduct." *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989).

For the purposes of determining what constitutes an unwarranted invasion of personal privacy under exemption (b)(7)(C), the term "personal privacy" only encompasses individuals, and does not extend to the privacy interests of corporations. *FCC v. AT&T Inc.*, 131 S.Ct. 1177, 1178 (2011).

**DOCUMENTS WITHHELD PURSUANT TO EXEMPTION (b)(7)(C):**

OFO Organizational Assessment – Complainant names

Comments

This is in response to your Freedom of Information Act (FOIA) request. You request a copy of the OFO Organizational Assessment and Federal Sector Reports posted on EEOC Office of Federal Operations (OFO) internal website. Your request is granted in part and denied in part.

OFO Organizational Assessment (109 pages) was granted in part and denied in part. The complainant names were withheld under exemption (b)(7)(C) to the FOIA to protect the personal privacy of the federal complainants.

EEOC OFO does not utilize the Insite link for publication of reports. The link is not accessible. All OFO reports have been completed for publication to our public website. Refer to the link below.

<https://www.eeoc.gov/federal/reports/index.cfm>

For a full description of the exemption codes used please find them at the following URL:  
<https://publicportalfoiapal.eeoc.gov/palMain.aspx>

This response was prepared by Tracy L. Smalls, Government Information Specialist, who may be reached at 202-663-4331.



**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**  
**Washington, D.C. 20507**

October 17, 2014

Memorandum

TO: Claudia A. Withers  
Chief Operating Officer  
*Carlton M. Hadden*

FROM: Carlton M. Hadden  
Director, Office of Federal Operations

SUBJECT: Office of Federal Operations FY 2014 Assessment

As requested in the September 16, 2014 memorandum from Lisa Williams, EEOC's Chief Human Capital Officer, I have attached the organizational assessment for the Office of Federal Operations.

Of course, please let me know if you have questions or need additional information.

cc: Deidre Flippen  
Director, Office of Research and Information Planning

Dexter R. Brooks  
Associate Director, Office of Federal Operations

# **U.S. Equal Employment Opportunity Commission Office of Federal Operations**



## **OFO 2014 Organizational Assessment**

**October, 2014**

## **Vision**

A New Era of Equality and Fairness in the Federal Workplace

## **Mission**

Eradicate unlawful discrimination in federal employment through vigorous enforcement of federal EEO laws and effective oversight of federal agencies

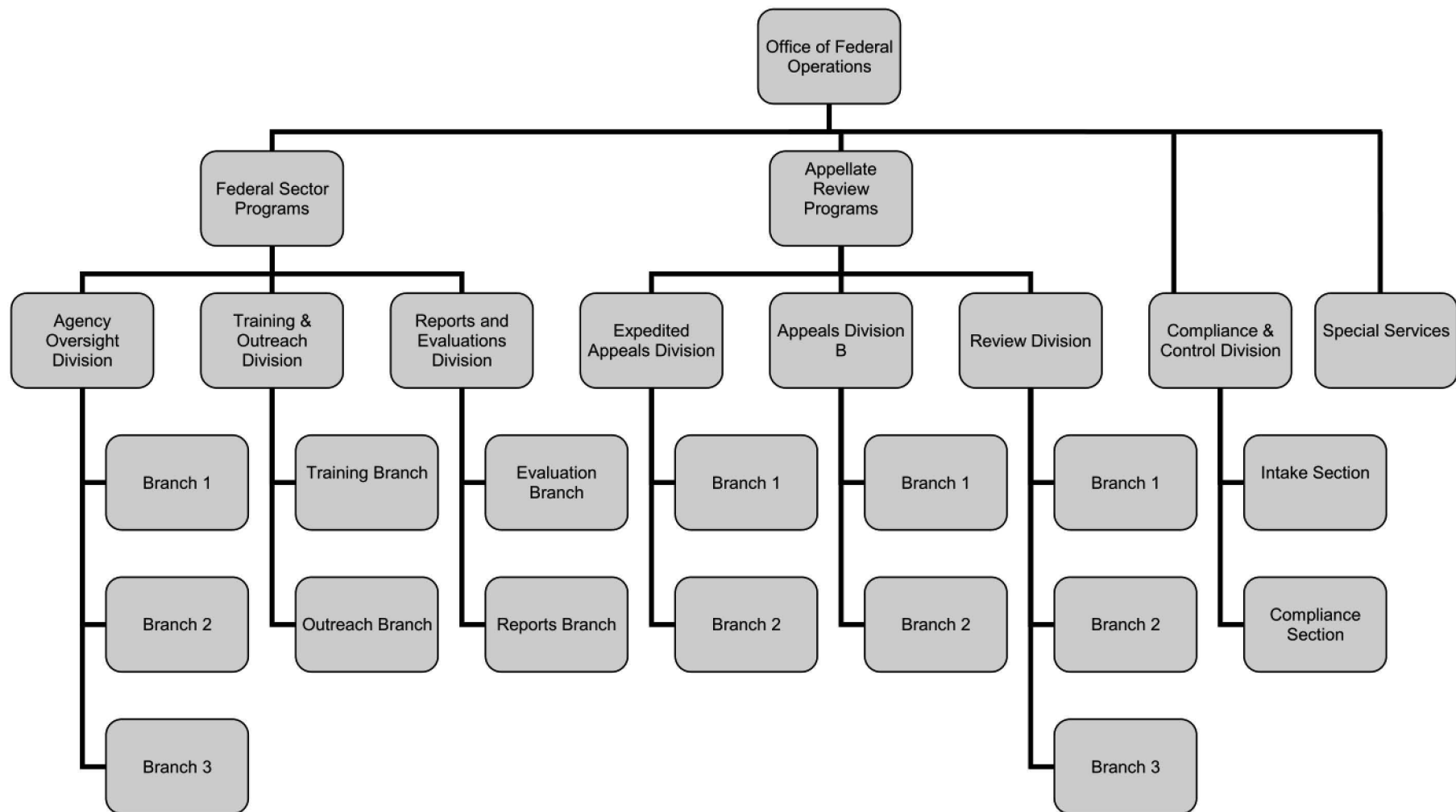
## **Wide-Ranging Responsibilities**

- Provides leadership and guidance to federal agencies on their responsibilities under the federal sector EEO program
- Develops and implements Commission-approved affirmative employment policies
- Ensures that federal agencies comply with the Commission's regulations establishing the fair adjudication of discrimination complaints brought by federal employees and applicants
- Administers the federal sector appeals process
- Provides guidance and leadership for all other Commission activities to effect government-wide EEO processes and programs

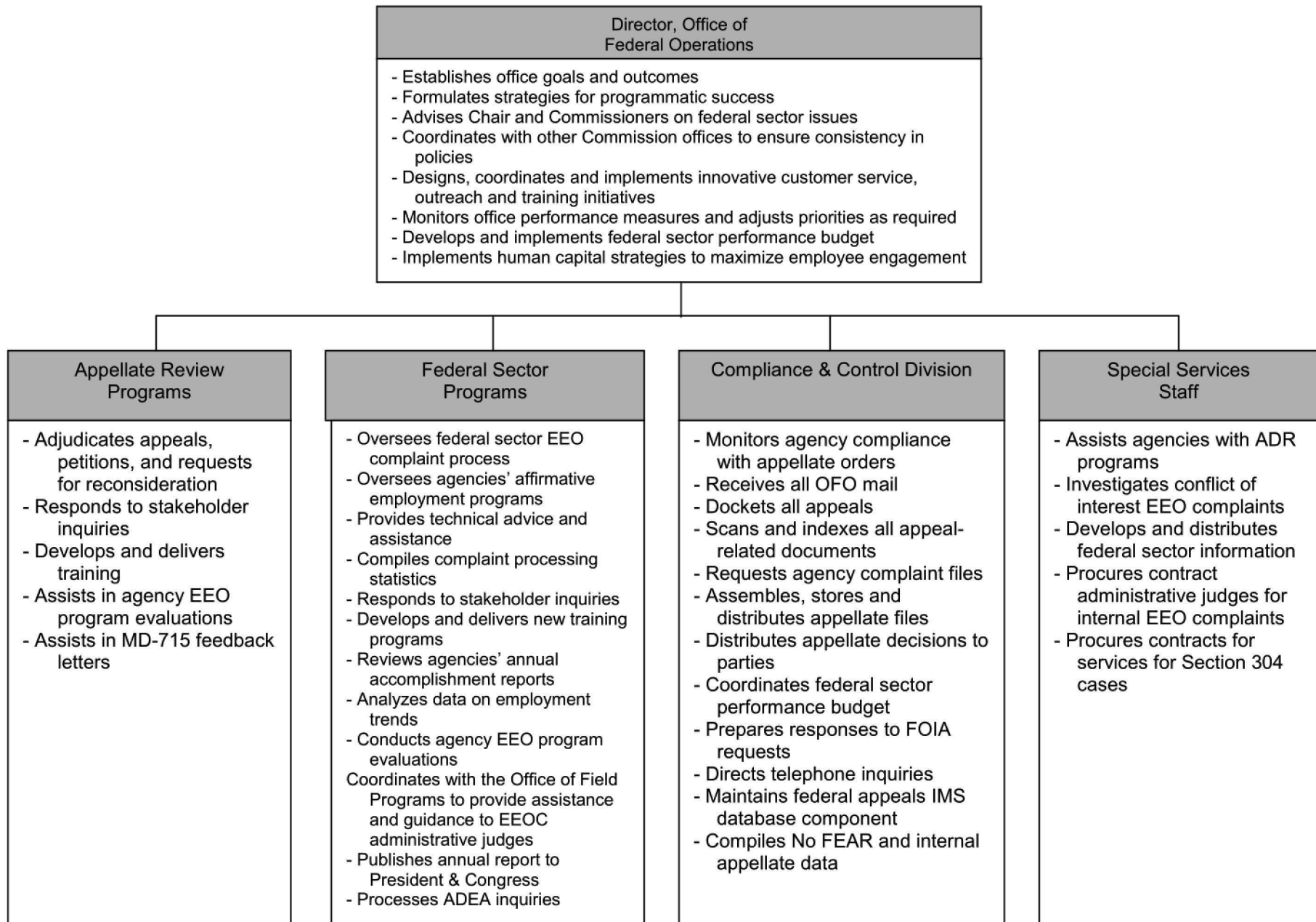
## **OFO's Current Structure for Delivering Services to Stakeholders**

- **Appellate Review Programs (ARP)** - adjudicates appeals from decisions on EEO complaints and collective bargaining agreement grievances alleging discrimination against federal agencies, and reviews decisions by the Merit Systems Protection Board alleging allegations of discrimination in appealable actions, as well as appeals from actions originating under Section 304 of the Government Employees Rights Act of 1991(GERA).
- **Federal Sector Programs (FSP)** - Monitors and evaluates Federal agencies' affirmative employment programs under Title VII and Section 501 of the Rehabilitation Act; provides technical assistance, training and outreach to stakeholders; oversees federal sector EEO complaint process; conducts agency EEO program evaluations; coordinates with Office of Field Programs (OFP) and AJs; publishes the Annual Report on the Federal Workforce; and produces other reports analyzing employment trends and federal sector issues.
- **Compliance and Control Division (CCD)** - functions as the central clerical repository for OFO, assembles, scans and stores appellate case files; receives all OFO mail; docket all appeals; requests complaint files from agencies; monitors the intake of documents received via the EEOC File Exchange (EFX) portal; and mails the decisions issued by OFO. Compliance Officers monitor agency compliance with OFO decisions
- **Special Services Staff (SSS)** - provides technical assistance and advice to Federal EEO stakeholders; provides technical assistance and advice to federal agencies regarding alternative dispute resolution techniques; develops and distributes federal sector legal analysis and review; provides investigative services for agencies with potential conflicts of interest; secures outside attorneys for EEO hearings for EEOC staff; and arranges for ALJs to preside on GERA cases.
- **Immediate Office of the Director (IOD)** - provides oversight and direction for office on a wide array of areas including strategic planning and development, as well as coordination with such offices as Chair, Commissioners, OGC, OLC and OFP, and ORIP on policy issues.

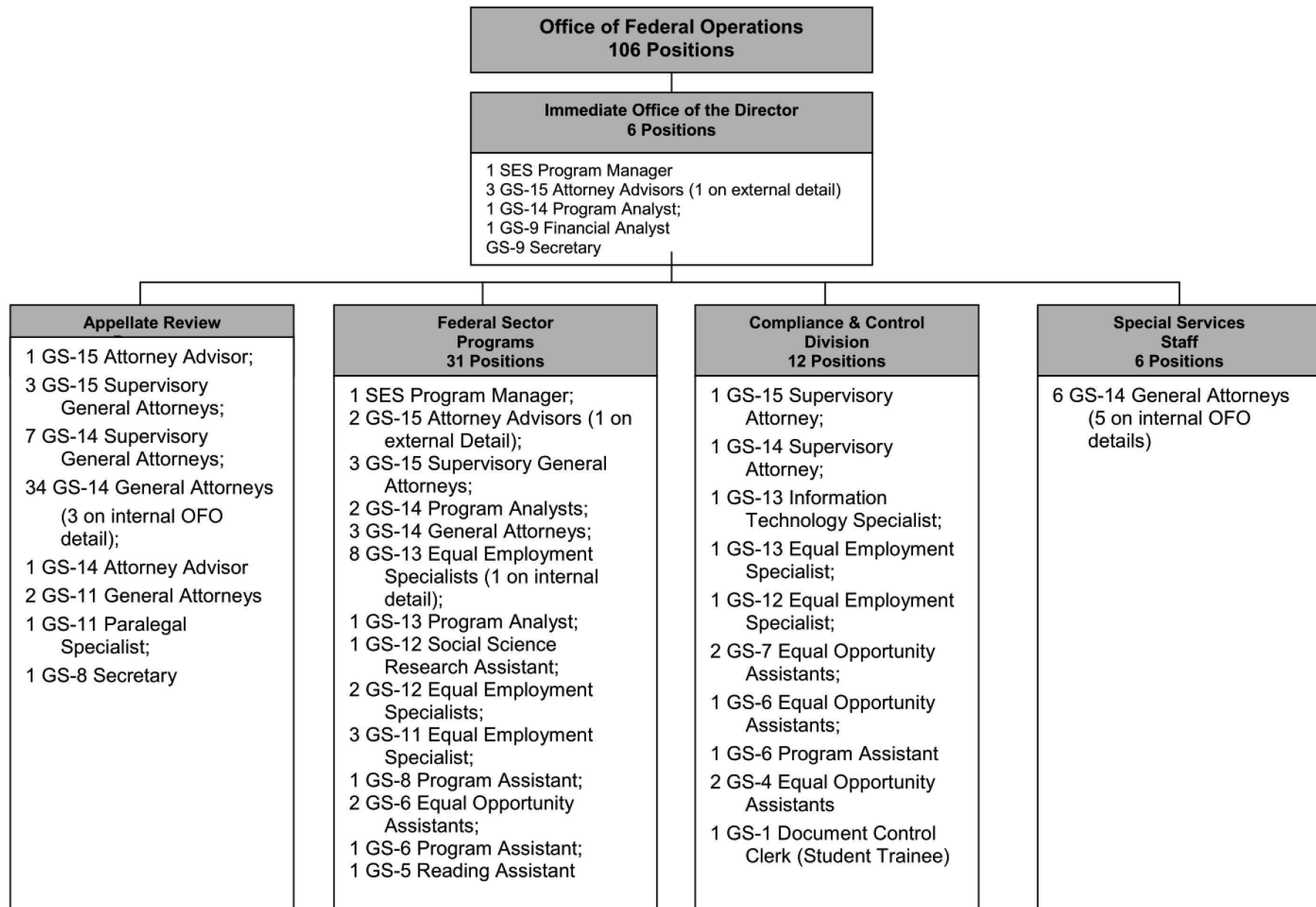
## OFO Organizational Chart



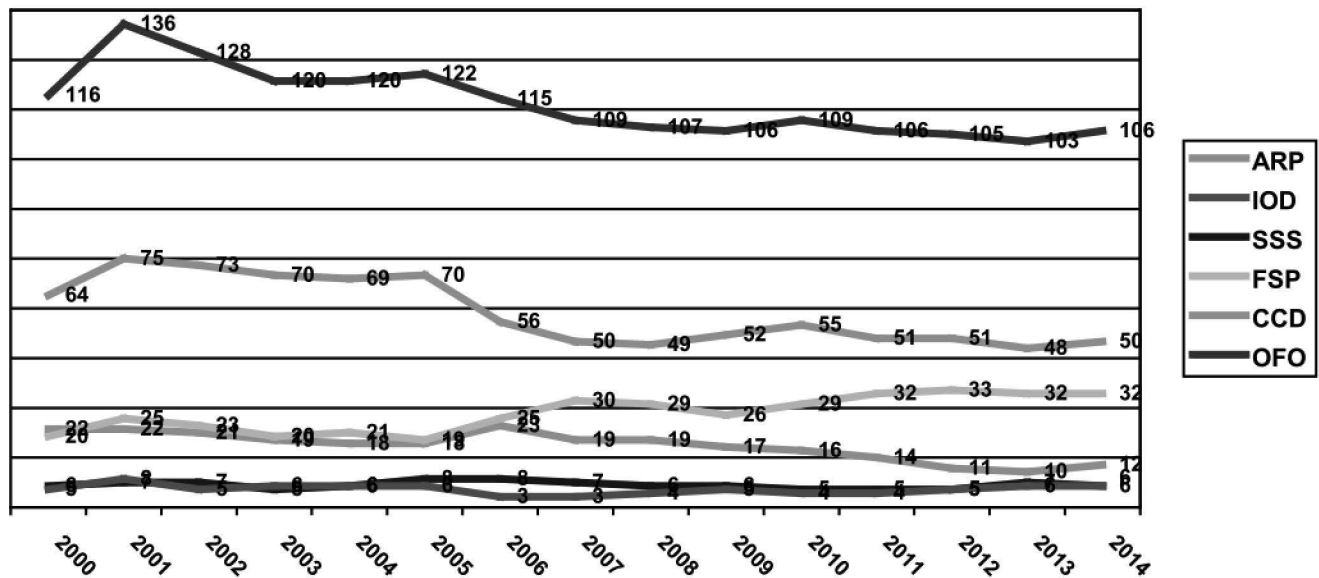
## Existing OFO - Alignment of Functions and Programs



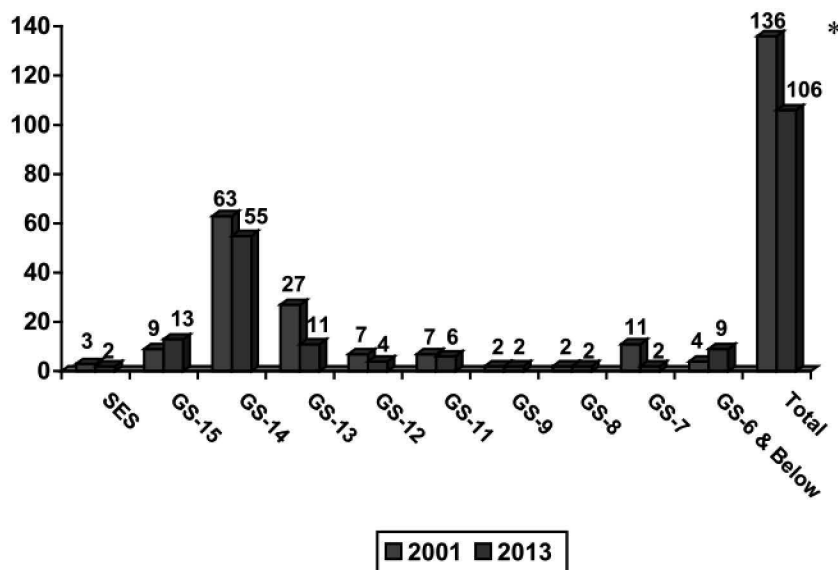
## Existing OFO – Staffing Pattern



## Decreasing OFO Staffing Levels 2000 – 2014



## OFO Staffing (by Grade) 2001 - 2014



\*Note that the FY 2001 total does **not** include **9 Federal Affirmative Action (FAA) Unit Equal Employment Specialists**. In FY 2003 the former EEOC Chief Operating Officer eliminated the FAA units, reassigned existing FAA staff to non-federal duties, and transferred the FAA functions to OFO's Federal Sector Programs (without an increase in staff).

## **OFO Organizational Assessment Executive Summary**

### **Appellate Review Programs**

- *In FY 2014 ARP surpassed the targets for Performance Measure 3 of the Commission's Strategic Plan by using the case management system deployed in FY 2013 to categorize 100% (2,505) of all the incoming appeals for which the record was received during the first three quarters of the fiscal year. ARP also categorized 83% (3,574) of the existing appellate inventory. Notwithstanding this success, ARP will have to evaluate the effectiveness of the 2014 pilot process whereby ARP's first level supervisors primarily categorized new and existing appeals.*
- *The challenge for ARP will be to effectively implement the case management system while continuing to better resolve the newest and oldest appeals. In FY 2011, OFO instituted a "balanced approach" to inventory management: where efforts were made to address the new appeals as well as the aged appeals. However, after three years of implementing the balanced approach, it is apparent that without an increase in the number of annual appellate resolutions (or a significant decrease in appellate receipts), the aged and pending inventories will continue to rise.*
- *A successful adjudicatory process for the federal sector must be coordinated and integrated from the initial hearing request through the issuance of the appellate decision. OFO must ensure that there is inter-office coordination so that cases at both the hearings and appeal stages are categorized in a consistent manner, that cases implicating the SEP/FCP priorities are coordinated with appropriate Commission federal sector staff, and potential discriminatory systemic policies and practices are identified as part of the Commission's oversight responsibilities.*

### **Federal Sector Programs**

- *FSP's vision is to ensure that the federal government is the leader in creating an inclusive, barrier-free workplace that empowers employees to achieve superior results in service to our country. Our mission is to promote a diverse and inclusive federal workforce that is free of discrimination through training, outreach, strategic communication and the review and evaluation of agencies' EEO programs and activities.*
- *Performance Measure 5 of EEOC's Strategic Plan calls for the integration and coordination of the federal sector adjudicatory and oversight functions, resulting in an integrated data system that will support and enhance FSP's oversight and evaluation activities. To meet these Strategic Plan requirements it is critical that FSP continue its close working relationship with OIT to deploy and refine the integrated data system to better track priority issues and uncover hidden barriers to equal opportunity. In addition to leveraging technology to increase FSP staff*

*productivity, FSP must maintain its strategic partnerships with OMB and OPM to address critical workforce issues.*

### **Special Services Staff**

- *Special Services Staff is a small team of experienced attorneys performing a wide variety of duties, including ADR, training and outreach, and EEO investigations involving other agency high-level staff.*
- *One critical issue facing Special Services Staff is assessing its current structure and alignment to ensure that it leverages and maximizes its impact and usefulness with regard to OFO's mission.*

### **Compliance & Control Division**

- *The Compliance and Control Division (CCD) serves as OFO's "Clerk of the Court" in its support of the appellate complaint process. CCD's Intake Unit continues to be at the front line of OFO's efforts to leverage technology to better perform its mission. CCD staff have taken the lead in OFO's efforts, along with the Office of Field Programs and the Office of Information Technology, to implement, track, and report on the SEP/FCP priorities captured in the case management system mandated by the Commission's Strategic Plan.*
- *The Intake Unit will have to re-design many of its intake and support functions as a result of the continued development of OFO's digital infrastructure. Critical to these responsibilities, CCD must ensure that the unit has an appropriate number of staff possessing the necessary competencies to conduct quality control review of digital documentation uploaded by complainants and agencies, perform its other support functions, and identify and report the SEP/FCP priorities captured in the case management system under Performance Measure 3 of the Commission's Strategic Plan.*
- *Additionally, CCD must address the succession planning challenges faced by the Compliance Unit, and more fully integrate the Compliance Unit activities with the office's oversight and enforcement responsibilities.*

### **Immediate Office of the Director**

- *The OFO Director has a critical role in ensuring that OFO's resources, activities, and initiatives are strategically directed toward accomplishing the Commission's priorities in the federal sector as established by the Commission's Strategic Plan, Strategic Enforcement Plan (SEP) and Federal Complement Plan (FCP). In this capacity, he must articulate a clear vision of OFO's mission and strategies for success that is shared by all OFO employees; moreover, he must ensure that OFO's staff remains committed, engaged, and mission focused. The OFO Director must also forge strategic partnerships with stakeholders and other Commission offices to advance the Commission's priorities and Strategic Plan.*

- ***The IOD must ensure that all OFO staff produce the highest quality work possible – from the Officer of the Day who answers phone calls from federal sector stakeholders, to the attorney who prepares a decision that is voted on by the Chair and Commissioners. Additionally, the IOD must ensure that there are clear lines of communication with OFO staff to so that they fully understand buy into the importance of these activities in creating an effective civil rights law enforcement program in the federal sector.***

## **Appellate Review Programs: Organization Assessment**

## **Executive Summary**

***In FY 2014 ARP surpassed the targets for Performance Measure 3 of the Commission's Strategic Plan by using the case management system deployed in FY 2013 to categorize 100% (2,505) of all the incoming appeals for which the record was received during the first three quarters of the fiscal year. ARP also categorized 83% (3,574) of the existing appellate inventory. Notwithstanding this success, ARP will have to evaluate the effectiveness of the 2014 pilot process whereby ARP's first level supervisors primarily categorized new and existing appeals.***

***The challenge for ARP will be to effectively implement the case management system while continuing to better resolve the newest and oldest appeals. In FY 2011, OFO instituted a "balanced approach" to inventory management: where efforts were made to address the new appeals as well as the aged appeals. However, after three years of implementing the balanced approach, it is apparent that without an increase in the number of annual appellate resolutions (or a significant decrease in appellate receipts), the aged and pending inventories will continue to rise.***

***A successful adjudicatory process for the federal sector must be coordinated and integrated from the initial hearing request through the issuance of the appellate decision. OFO must ensure that there is inter-office coordination so that cases at both the hearings and appeal stages are categorized in a consistent manner, that cases implicating the SEP/FCP priorities are coordinated with appropriate Commission federal sector staff, and potential discriminatory systemic policies and practices are identified as part of the Commission's oversight responsibilities.***

## **ARP Mission-Related Critical Functions:**

- ARP adjudicates appeals from decisions on EEO complaints and collective bargaining agreement grievances alleging discrimination against federal agencies, and reviews decisions by the Merit Systems Protection Board raising allegations of discrimination in appealable actions, as well as appeals from actions originating under Section 304 of the Government Employees Rights Act of 1991.
  - ARP supervisors assign appellate cases in accordance with priorities established to fulfill office goals.
  - ARP attorneys first review the entire agency administrative complaint file, including hearing record where available, as well as all appellate briefs and statements submitted by the parties, and then prepare draft decisions on the appeals.
- ARP attorneys provide customer service by responding to legal questions and status calls from stakeholders.
- ARP attorneys assist in the development of training curriculum and serve as instructors in training courses offered through the Commission's Revolving Fund.
- ARP attorneys assist in the design, preparation and implementation of federal sector program evaluations of federal agencies.

- ARP attorneys provide expertise in support of other Commission offices in performing their missions.

### **Alignment of ARP Performance Measures with Organization Goals**

FY 2014 – 2016 Strategic Plan Strategic Objective	Combat employment discrimination through strategic law enforcement
Outcome Goal I.A	Have a broad impact in reducing employment discrimination at the national and local levels.
Strategy I.A.2	Rigorously and consistently implement charge and case management systems to focus resources and enforcement on the EEOC's priorities.
Strategy III.A.2	Rigorously and consistently implement charge and case management systems to deliver excellent service.
Performance Measure 3 for Strategy I.A.2 and III.A.2	By FY 2016, 100% of federal sector case inventory is categorized according to a new case management system, and tbd% of hearings and appeals meet the criteria established in the new federal sector quality control plan.
FY 2014 Target	100% of all incoming hearings requests and appeals, and 50% of old case inventory are categorized. Develop a federal sector quality control plan to establish criteria for the quality of federal sector hearings and appeals.
ARP Managers – FY 2014 Performance Measures	<ol style="list-style-type: none"> <li>1. Contribute substantially to development of Quality Control Plan for Federal Sector.</li> <li>2. Ensure all incoming appeals are assessed (categorized and prioritized) and implement balanced approach of appellate resolution with a focus on ensuring 60% of aged appeals are resolved by end of FY 2014.</li> <li>3. In coordination with other OFO programs, develop and implement internal operating manual for all OFO programs, including use of DMS, EFX, EEOC website, FedSEP, IMS and InSite to enhance shared knowledge, efficiency and implementation of Strategic Enforcement Plan, federal Sector Complement Plan and Case Management Plan.</li> <li>4. Confer periodically, at least quarterly, with OFO's Federal Sector Programs, Compliance &amp; Control Division, OFP, &amp; Hearings Units to identify and resolve issues, including those related to EEOC's FCP &amp; develop recommendations for action for consideration of OFO Director, as appropriate.</li> <li>5. Implement communications plan, including leading periodic (at least quarterly) discussions of legal issues and approaches, sharing information with other divisions in Appellate Review Program, noting developing issues and areas for focus and recommending appropriate actions for consideration of ARP Director.</li> <li>6. Develop and implement communications strategies in consultation and coordination with Federal Sector Programs, Hearings Coordinators and Supervisory Administrative Judges.</li> <li>7. Ensure that the Strategic Enforcement Teams' recommendations for ARP are implemented and coordinated with Federal Sector Complement Plan activities.</li> </ol>

### **ARP: Managing the Appellate Inventory**

Our Appellate Review Program adjudicates appeals of administrative decisions made by federal agencies on complaints of employment discrimination filed by federal employees or applicants for federal employment. The Commission utilizes these appellate decisions to enforce EEO policy in the federal sector. Moreover, the Commission's appellate decisions are relied upon by all federal sector stakeholders because they are the Commission's only published interpretations of EEO law in the federal sector administrative process.

### **Successful Implementation of the Appellate Case Management System Under PM3**

In February 2012, the Commission approved the Strategic Plan for fiscal years 2012-2016. Strategy 1.A.2 of the Strategic Plan provides for "rigorously and consistently implementing charge and case management systems to focus resources and enforcement on the EEOC priorities." Strategy III.A.2. provides for "rigorously and consistently implementing charge and case management systems to deliver excellent service." To implement these strategies in the federal sector, the Plan designed Performance Measure 3 (PM3).

In FY 2013, and pursuant to the targets identified in PM3, OFO, in coordination with OIT and OFP, successfully designed, developed, and deployed a federal sector case management

system by modifying the federal sector components of the Commission's Integrated Mission System (IMS).

The FY 2014 target for PM3 required OFO to use the case management system deployed in FY 2013 to categorize 100% of all incoming appeals and 50% of the existing appeal inventory. OFO surpassed this target. With regard to the new inventory, OFO successfully categorized 100% (2,505) of all the incoming appeals for which the record was received during the first three quarters of the fiscal year. As to the existing appellate inventory, OFO categorized 83% (3,574) of these appeals using the modifications made to IMS, and under the guidance developed by EEOC's federal sector programs. As a result, OFO now has a more complete understanding of its appellate inventory, and can track those appeals that implicate SEP/FCP priorities. This, in turn, provides OFO management the ability to better allocate resources in a manner consistent with the Commission's strategic plan and federal sector priorities.

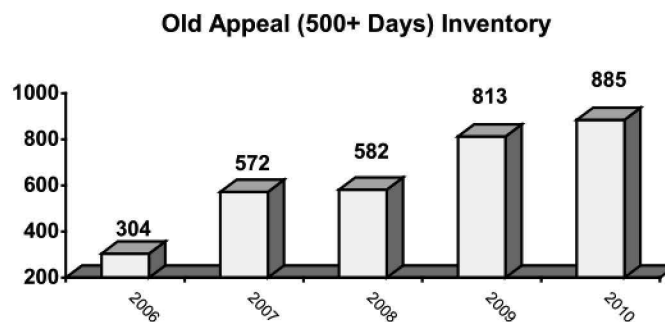
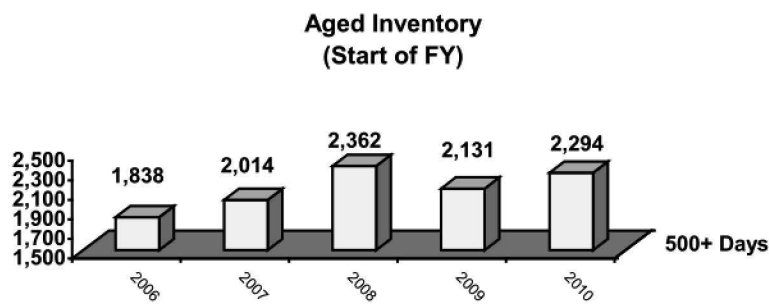
Throughout FY 2014, OFO issued numerous, high-quality decisions that addressed the Commission's priorities, and help educate federal and non-federal stakeholders on Commission policy and our efforts to eliminate discrimination from the workplace. Appendix A contains a summary of these decisions, as well as summaries of decisions finding discrimination.

#### Historical Efforts in Managing the Appellate Inventory

There are two key components of a successful case management system: identifying those appeals that raise matters of keen interest for the Commission; and deploying resources to adjudicate appeals in the most efficient manner. With these key components now in place, OFO can identify appeals and respond to Commission priorities to better remedy unlawful discrimination in the Federal government. While this represents a major advancement in the adjudication of federal sector appeals in coordination with Commission priorities, OFO still is cognizant of the need to be responsive to stakeholders by resolving appeals in a more efficient and timely manner.

For the past 15 years OFO's deployment of resources to adjudicate appeals has been dictated in a large part by the performance targets established by the Commission's various strategic plans and the Government Performance Results Act (GPRA). From FY 1999 through FY 2010, OFO had a performance measure under GPRA that focused on processing the most recently filed appeals. OFO surpassed these escalating goals every year during this time period.

One of the unavoidable consequences of OFO's success in meeting these escalating GPRA targets for the past 10 years was an untenable rise in the aged appellate inventory. The aged appellate inventory consists of those appeals already 500 or more days old at the start of a fiscal year, as well as those that will become 500 or more days old if not resolved during that fiscal year. The charts below illustrate the rise in the aged inventory and the number of actual pending appeals more than 500 days old at the end of the fiscal year.

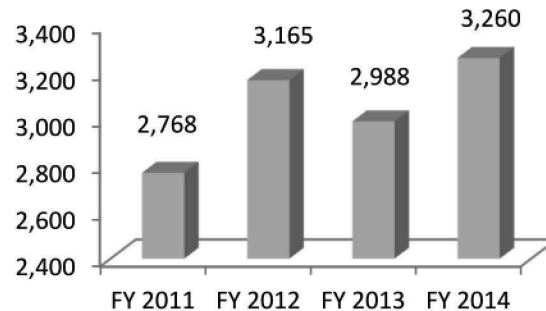


### Looking for the Proper Balance: The Tension Between Resolving Old and New Appeals

In FY 2011, OFO instituted a “balanced approach” to inventory management: where efforts were made to address the new appeals as well as the aged appeals, even with the understanding that it would negatively impact the number of cases OFO could resolve in under 180 days. However, after three years of implementing the balanced approach, it is apparent that without an increase in the number of annual appellate resolutions (or a significant decrease in appellate receipts), the aged and pending inventories will continue to

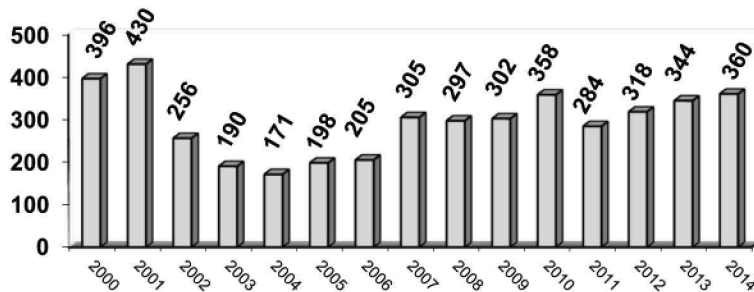
rise. The following chart shows that the aged inventory has not improved since implementation of the balanced approach:

**End of FY Aged Case Inventory**

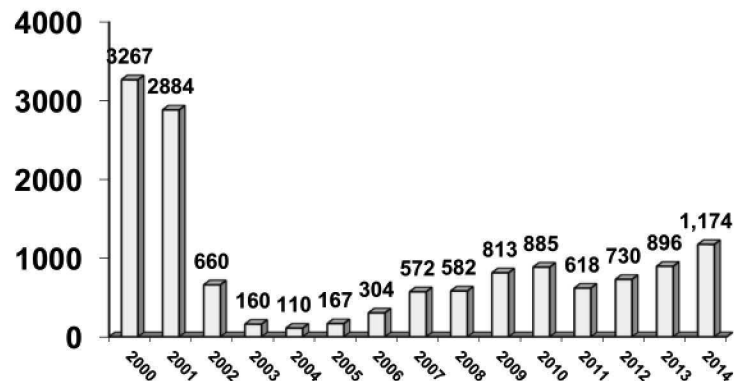


Additionally, and as demonstrated in the charts below, since FY 2004 there has been definite trend towards an “older inventory” as shown by the age of the open inventory and the number of 500+ day old cases.

**Age of Open Inventory**

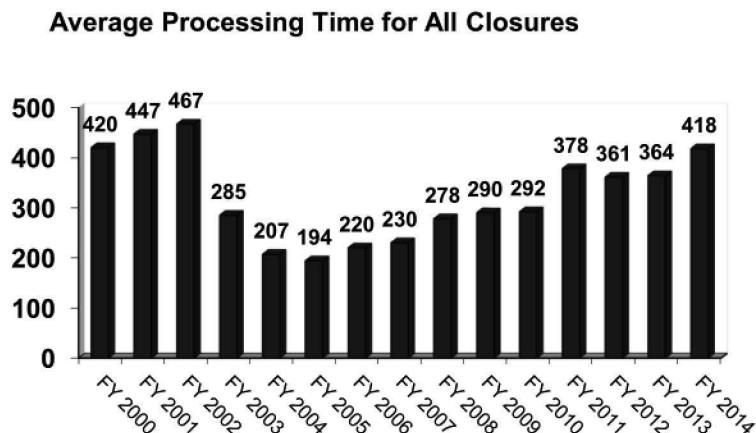
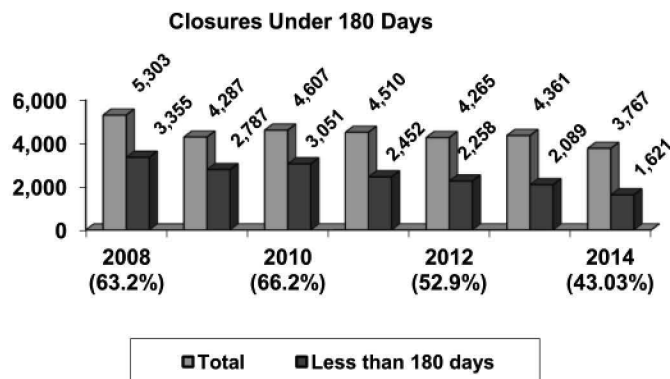


**Old Appeal (500+ Days) Inventory**



When examining the charts and tables concerning appellate resolutions in FY 2014, it is imperative that one understand the challenges faced during the first quarter of the fiscal year. Specifically, OFO's appellate attorneys, along with all EEOC employees, were furloughed for the first 3 weeks of the fiscal year. For more than a week thereafter, OFO's appellate attorneys assisted the Intake Sections in processing the voluminous incoming appeals and related documentation that was collected during the government furlough. Also, OFO's appellate attorneys spent an additional two weeks in November categorizing the existing inventory of cases using the case management system to meet the targets established by PM3.

In FY 2014 OFO continued to apply the balanced approach in an attempt to find the appropriate balance between resolving the newest appeals while ensuring that justice is not denied to those whose appeals were already pending. In addition to resolving cases in the aged inventory as described above, OFO also resolved 43% (1,621) of its 3,767 total closures in 180 days or less. In FY 2014 OFO resolved 1,850 "aged" cases (those that were already, or would become, 500 or more days old in the fiscal year) – a 20% decline from FY 2013. Additionally, in FY 2014 the average processing time for all closures increased by 18.3% (from 364 days in FY 2013, to 418 in FY 2014).



Other key indicators of OFO's appellate adjudication efforts include:

- In FY 2014 OFO resolved 3,767 appeals, a 16.5% decrease in the number of resolutions as compared to FY 2013;
- OFO's appellate inventory rose by 5.5% (4,541), as compared to the prior fiscal year (4,305);
- OFO closed 61.9% (1,850) of the 2,988 cases in the FY 2014 aged inventory, a 20.2% decrease in the number of aged closures resolved;
- OFO's aged inventory (those appeals that were, or would become 500 days old if not resolved during the fiscal year) rose by 9.1% (3,260) from FY 2013 (2,988).

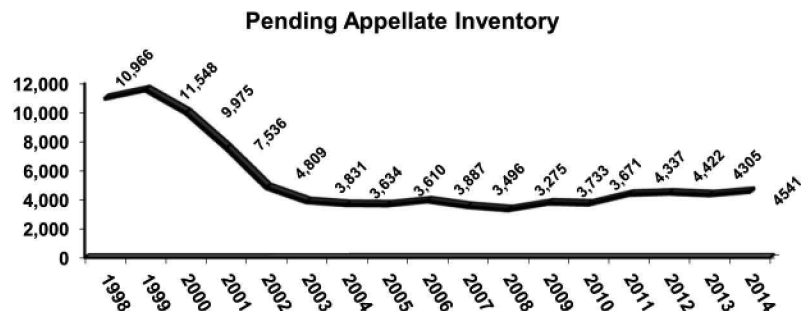
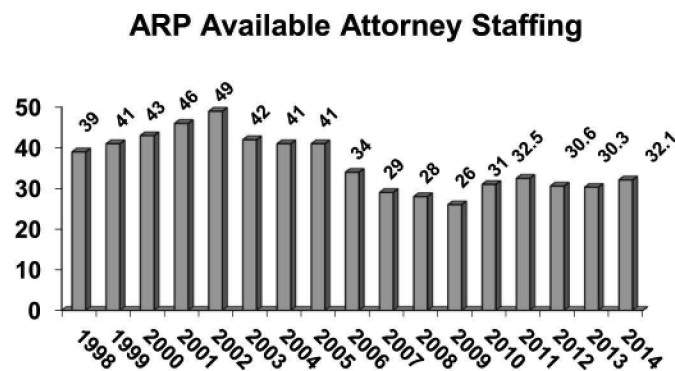
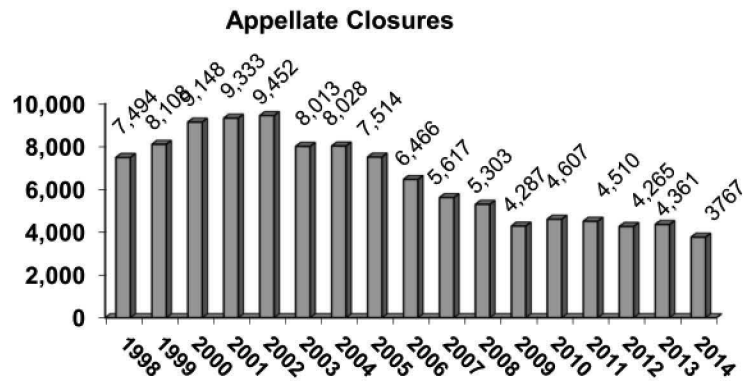
In FY 2014 OFO resolved 3,767 appeals, a 16.5% decrease from FY 2013 (4,361). Of these closures, 1,592 (42.3%) were merits determinations, a decrease of 14.6% from FY 2013's 1,864 merit closures. This coincided with the resolution of 1,831 procedural cases during FY 2014. Procedural resolutions are an important component of OFO's adjudicatory function because these cases have typically not been fully investigated, and history has shown that a significant percentage of procedural cases are reversed by OFO.<sup>1</sup> Accordingly, by getting these complaints back into the system for investigation and processing, delays in investigations can be minimized. FY 2014 was no different, and OFO reversed 433 (23.6%) of the 1,831 procedural appeals we adjudicated.

As mentioned above, OFO issued 1,592 appellate decisions addressing the merits of the underlying discrimination complainant. Such determinations, at the very least, involve a review of a complete report of investigation, and for 723 of these appeals, also required the review of the record developed for hearings before EEOC administrative judges (AJ). OFO affirmed the agency's merits determinations without a hearing 83.9% of the time, and affirmed appeals from agency's final actions implementing AJ decisions 94.1% of the time.

As the charts below demonstrate, there is a general correlation between the number of available ARP attorneys, and OFO's success in managing its appellate inventory. We note that in FY 2014, there was a slight increase in the number of available attorneys, however, this slight increase was offset by the furlough, and case management activities described above.

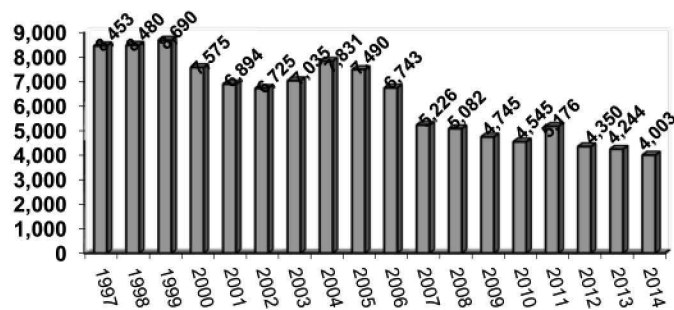
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<sup>1</sup> See below discussion, and "Preserving Access to the Legal System: Common Errors by Federal Agencies in Dismissing Complaints of Discrimination on Procedural Grounds" at <http://www.eeoc.gov/eeoc/newsroom/release/9-15-14.cfm>

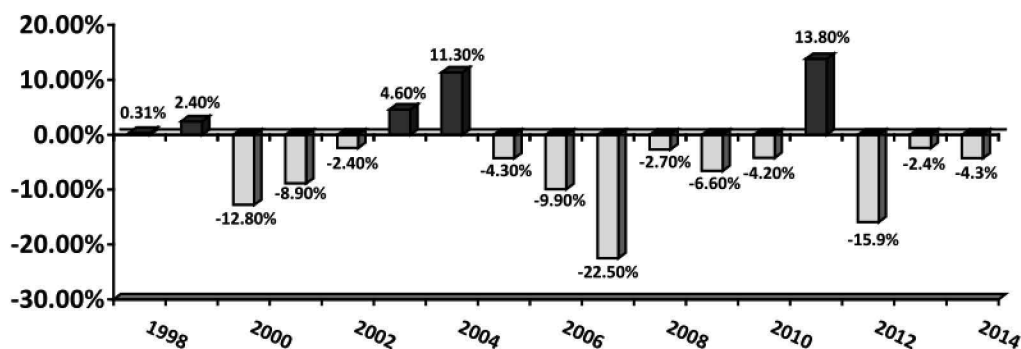


One of the key variables in OFO's success in managing its appellate inventory is the fluctuation of receipts that occur from year to year. With the exception of FY 2011's unusual leap in appellate receipts, those in FY 2014 continued the general trend downward, as receipts fell 5.7% from FY 2013.

Appellate Receipts



Appellate Receipts: Percentage Change from Prior Year



## Future Directions

### Implementing Case Management in the Federal Sector

As noted above, in February 2012, the Commission approved the Strategic Plan for fiscal years 2012-2016. Strategy 1.A.2 of the Strategic Plan provides for “rigorously and consistently implementing charge and case management systems to focus resources and enforcement on the EEOC priorities.” In FY 2013, and pursuant to the targets identified in PM3, OFO, in coordination with OIT and OFP, successfully designed, developed, and deployed a federal sector case management system as part of the Commission’s Integrated Mission System (IMS).

OFO surpassed PM3’s FY 2014 targets because it successfully categorized 100% (2,505) of all the incoming appeals for which the record was received during the first three quarters of the fiscal year, and categorized 83% (3,574) of the existing appellate inventory.

### Critical Challenges

The FY 2015 target for this measure requires OFO to categorize 100% of the incoming appeals, as well as 100% of the pending inventory. In FY 2014 OFO instituted a pilot whereby the ARP 1<sup>st</sup> level supervisors categorized and assessed that year’s appellate receipts. During the 1<sup>st</sup> quarter of FY 2015, OFO will need to evaluate the efficiency and

effectiveness of this pilot, and determine whether these additional supervisory responsibilities resulted in fewer decisions being reviewed and issued. If it is determined that the pilot did negatively impact production, ARP will have to ascertain whether moving the categorization responsibilities to the appellate attorneys would lessen the impact on production. As it is clear that the addition of any new responsibilities on ARP staff will negatively impact the number of resolutions issued by OFO, the challenge will be to determine how to accomplish PM3's mandate with the least possible impact on production.

The case management system is designed to usher in an adjudicatory process that for the first time is coordinated and integrated from the receipt of the hearings request through issuance of the appellate decision. Cases at both the hearings and appeals stages are to be categorized in a similar way to improve consistency and customer service, and to ensure that resources are allocated throughout the process in a manner consistent with the Strategic Plan, the SEP and the federal sector priorities.

In FY 2014, OFO and OFP continued the coordinated approach to staff training and case categorization. Having successfully designed and deployed the CMS at the end of FY 2013, in FY 2014 federal sector hearings and appellate staff continued to coordinate on the refinement and interpretation of SEP/FCP priorities, and how they would be captured and reported to Commission leadership during quarterly SEP/FCP briefings.

The inter-office coordination was not limited solely to the categorization of cases and how they would be captured and reported. A crucial component of the CMS is the concept that a significant number of cases that implicate the SEP/FCP priorities are to be "coordinated" among the Hearings Units, ARP attorneys, and OFO and OFP headquarters staff. To further this successful inter-office coordination, in FY 2014 supervisory AJs, ARP and FSP managers, and other key federal sector staff convened at headquarters for a 2-day workshop that addressed initiatives for coordinating the Commission's oversight and adjudicatory functions in the federal sector. Some of this staff participated in a follow-up session held at the August EXCEL Conference. OFO and OFP now have dedicated staff who are actively coordinating on emerging federal sector issues, refining the interpretation of SEP/FCP priorities in the federal sector, and working with OIT to improve the functionality and reporting capabilities of IMS.

Another critical challenge faced by ARP in FY 2015, will be how to move beyond their traditional stove-pipe adjudicatory role, to one in which ARP understands and embraces their role in the Commission's efforts to eliminate and redress discrimination in the Federal government. The blueprint for creating this expanded role for the Commission's federal sector adjudicatory programs is found in Performance Measure 5 (PM5) of the Commission's Strategic Plan. The Strategic Plan at PM 5 "requires the EEOC to use the various data it already collects from federal agencies to develop an integrated data system that can identify potentially discriminatory policies or practices in the federal agencies and help set priorities for the prevention of discrimination in the federal government."

ARP's implementation of PM3's CMS will provide yet another critical source of federal sector information for the Commission's integrated data system contemplated by PM5. Specifically, OFO can leverage the information provided by the case management system to better identify and address potentially discriminatory policies or practices in federal agencies.

Another way that ARP must move beyond its traditional adjudicatory function is by taking a role in sharing information about discriminatory policies and practices gleaned during the adjudicatory process, as well as identifying questionable agency policies, practices, and procedures that are identified during a review of the record on appeal, regardless of whether a finding of discrimination has been made. Additionally, ARP can share information about questionable agency actions that potentially affect the integrity of the EEO process.

One example of ARP's enhanced oversight role was its examination and reporting of agencies' procedural dismissals of EEO discrimination complaints. ARP examined 5 years' of appellate decisions, identified those agencies with higher than the government-wide average reversal rate, and examined those decisions to ascertain the most common mistakes. OFO shared these results with agency EEO Directors and published the report on the Commission's website.

This report will serve as a model for future initiatives by ARP as they analyze the information available in their review of appeals, and identify possible trends and practices that impact agencies' abilities to be model employers. Further, inclusion of this information in PM5's integrated data collection will broaden ARP's role in the federal sector, help enhance FSP's oversight mission, and contribute to the achievement of the Strategic Plan's goal of having a broad impact in reducing employment discrimination in the federal sector.

#### Fostering the Issuance of High-Quality Appellate Decisions

The FY 2014 target for PM3 required the development of a "Federal Sector Quality Control Plan (federal sector QCP) to establish criteria to measure the quality of federal sector hearings and appeals." One of the key challenges faced by ARP was how to best leverage its adjudicatory expertise while developing the criteria to be used to evaluate federal sector hearings and appeals decisions. In doing so, ARP was fully cognizant that the development of an effective plan will necessarily require full coordination and input by the Hearings Units and OFP headquarters staff.

With regard to the federal sector QCP, in the third Quarter of fiscal year 2014, OFO coordinated with OFP to convene a joint program workgroup to develop outlines of the federal sector QCP. Additionally, senior OFO and OFP staff and supervisory administrative judges participated in a workshop during their headquarters training held on June 4 and 5, 2014, where the broad concepts of the federal sector QCP were analyzed. The group determined that any approved QCP would need to address the effectiveness of efforts to capture Commission priorities, the proper assignment of action categories, an assessment of the application of law to the facts, and the degree of clarity and utility of the Commission's decisions for use by our federal sector stakeholders.

However, the EEOC's Strategic Plan states that the federal sector QCP will parallel its private sector counterpart. Given that the private sector QCP "placed on hold" and not yet approved, OFO and OFP suspended development of the federal sector QCP until FY 2015, after approval of its private sector counterpart is authorized.

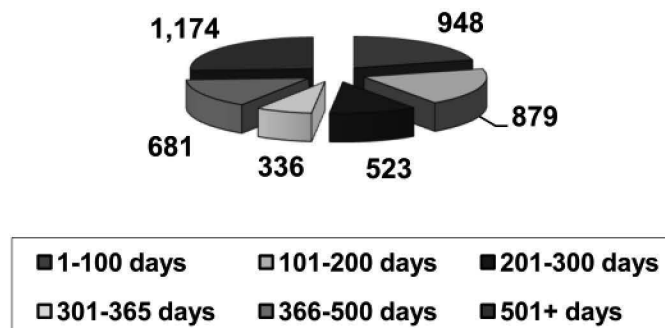
While there has been no official document by which ARP has assessed the quality of its decisions on appeal, OFO has recognized the importance of their quality. OFO decisions serve as vehicles for both educating federal sector stakeholders about their rights to work in inclusive work environments, and disseminating Commission policy. This has been achieved by issuing decisions which fully develop relevant law and precedent, their application to the facts of the particular case, and the full and appropriate relief to which those who have been subjected to discrimination are entitled.

Appendix A contains examples of decisions issued in FY 2014 that implicated the priorities contained in the Commission's Strategic Plan, contained findings of discrimination, or were otherwise notable because they identified complex issues and areas of the law where policy needed to be better articulated or clarified.

### Beyond the Balanced Approach – Developing New Strategies to Manage the Appellate Inventory

OFO is starting FY 2015 with an aged inventory of 3,260 cases, consisting of 1,174 appeals already more than 500 days old, and 2,806 cases that will become 500 or more days old if not adjudicated during the fiscal year. Additionally, as shown in the chart below, there are 948 cases that are between 1 and 100 days old.

**Age of Pending Appellate Inventory - 2014**



The CMS envisioned by PM3 will usher in a new era of appellate inventory management. Prior Commission strategic plans placed an emphasis on the adjudicating appeals in less than 180 days. In recognition of the fact that this approach led to increases in the age of the appellate inventory as more aged cases languished in the open appellate inventory, in recent years OFO began utilizing a balanced approach to inventory management.

However, after more than three years of utilizing OFO's balanced approach to inventory management, it is clear that a new strategy is required. Despite resolving more than 73% of the aged inventory in FY 2013, and 62% in FY 2014, OFO faces an aged inventory of more than 3,200 appeals that are, or will become, aged in the coming fiscal year. The age of the open inventory has risen from 284 at the end of FY 2011, to 360 at the end of FY 2014. Also, the number of 500+ day old appeals has risen from 618 at the end of FY 2011, to 1,174 at the

end of FY 2014. As noted above, the starting FY 2015 aged inventory is 3,260. Based on the foregoing, it is clear that absent an increase in staffing, an increase in the number of resolutions per attorney, or a significant decline in appellate receipts, the office will continue to have an unacceptable aged appellate inventory.

Since 2008, ARP has not had a permanent SES director. OFO was authorized to fill the long-vacant ARP Director position, and the selection process was recently completed. One of the most pressing challenges faced by the selectee will be how to develop new initiatives and strategies for stemming future growth of the aged and/or overall appellate inventory.

This challenge will be made more difficult by the current climate of reduced budgetary resources. OFO experienced a decline in the number of available attorneys in ARP from 49 in FY 2002 to 32.1 at the end of FY 2014, with two of these available attorneys coming on board during the 4<sup>th</sup> quarter of FY 2014. OFO recognizes that this fiscal climate requires exploration of alternatives to hiring full time permanent attorneys, and will therefore continue to explore:

- hiring attorneys in term positions;
- increased use of fellowships;
- utilization of OPM's Federal Pathways intern program;
- expansion of the Commission's existing internship program
- initiation of cross training initiatives for attorneys from other Commission offices

For example, one of OFO's new attorney hires came to OFO under a grant following her graduation from law school. OFO will explore this type of revenue-neutral hiring initiatives, while simultaneously looking for ways of improving overall attorney production.

**Federal Sector Programs: Organization Assessment**

## **Executive Summary**

***FSP's vision is to ensure that the federal government is the leader in creating an inclusive, barrier-free workplace that empowers employees to achieve superior results in service to our country. Our mission is to promote a diverse and inclusive federal workforce that is free of discrimination through training, outreach, strategic communication and the review and evaluation of agencies' EEO programs and activities.***

***Performance Measure 5 of EEOC's Strategic Plan calls for the integration and coordination of the federal sector adjudicatory and oversight functions, resulting in an integrated data system that will support and enhance FSP's oversight and evaluation activities. To meet these Strategic Plan requirements it is critical that FSP continue its close working relationship with OIT to deploy and refine the integrated data system to better track priority issues and uncover hidden barriers to equal opportunity. In addition to leveraging technology to increase FSP staff productivity, FSP must maintain its strategic partnerships with OMB and OPM to address critical workforce issues.***

## **Background of Federal Sector Programs (FSP)**

FSP's mission is to ensure that the federal government is the leader in creating an inclusive, barrier-free workplace that empowers employees to achieve superior results in service to our country. Our mission is to promote a diverse and inclusive federal workforce that is free of discrimination and barriers for all applicants and employees through training, outreach, and the review and evaluation of agencies' EEO programs and activities. FSP performs a wide range of functions in the federal sector, the primary ones being:

- Monitoring and evaluating federal agencies' affirmative employment programs.
- Conducting evaluations of agency EEO programs and providing technical assistance and program training on all aspects of federal agencies' affirmative employment programs.
- Reviewing agencies' annual accomplishment reports and updates for compliance with Commission regulations and directives.
- Tracking federal agencies' employment patterns and producing an annual report for the President and Congress identifying the progress made by agencies.
- Collecting and analyzing data submitted by agencies on Form 462 concerning their pre-complaint counseling, ADR, and the status, processing, and disposition of EEO complaints.
- Delivering training and outreach to federal sector EEO professionals, managers, employees and stakeholders.
- Directing the planning and development of Federal Sector EEO training for delivery to agencies under the auspices of the Commission's Education and Technical Assistance Revolving Fund.
- Providing technical assistance and guidance to federal agencies, federal employees and stakeholder groups, the Commission's administrative judges, and the general public concerning pre-appellate EEO complaint processing.
- Gathering and analyzing data on employment trends and EEO complaint processing from agencies and issuing annual reports.

Currently, FSP is comprised of three divisions with a staff of 30 employees. The divisions are the Agency Oversight Division (AOD), Reports and Evaluation Division (RED), and Training and Outreach Division (TOD). For additional background of FSP, see Appendix B.

The primary responsibilities of AOD include: (1) providing technical assistance to federal agencies in their implementation of affirmative employment obligations; (2) reviewing agencies' comprehensive EEO Management Directive 715 (MD-715) reports with the goal of helping agencies attain Model EEO Programs; (3) providing technical assistance to federal agencies, employees and stakeholders; and (4) providing oversight of federal agency compliance with Executive Order 13164 (reasonable accommodation procedures).

The primary responsibilities of RED include: (1) collecting and compiling Form 462 data (EEO complaint data) from federal agencies; (2) preparing the Annual Report on the Federal Work Force; (3) conducting periodic program evaluations to assess the effectiveness of a selected agency's EEO program, as a whole or in specific part and to ensure compliance with the civil rights laws and regulations enforced by the Commission; and (4) issuing government-wide reports which identify systemic problem areas in federal EEO programs and identify best practices adopted by agencies who have successfully addressed systemic problems.

The primary responsibilities of the Training and Outreach Division include: (1) creating and conducting fee-based training through the Revolving Fund; (2) creating and conducting customized EEO training for EEO professionals, managers, employees and other stakeholders; and (3) participating in free outreach activities, including conferences, summits, meetings, and other events where the Commission's presence would add value.

The Commission has championed the approach of creating a barrier-free, level playing field throughout the federal government. This approach is captured in the MD-715, which was unanimously approved by the Commission and became effective government-wide on October 1, 2003. MD-715 is the roadmap for agencies to identify and remove barriers to equality of employment opportunity so that the American people can have a model federal work force that fully reflects everyone's contributions. Using the guidance and principles contained in MD-715, OFO has an effective tool for evaluating agencies' progress in creating effective equal employment opportunity programs and monitoring plans submitted by agencies to identify and remove barriers to free and open competition in the workplace.

To assist agencies in reporting under MD-715, OFO provides tools and assistance to help analyze their work forces and uncover barriers to equal employment opportunities. Once barriers are identified by agencies, FSP collaborates with them to develop creative strategies to eliminate or reduce the impact of identified obstacles. Further, FSP works with agencies to promote workplace policies and practices that foster an inclusive work culture and prevent employment discrimination. This effort includes working with federal agencies to adopt and successfully implement the attributes of EEOC's Model EEO Program.

**Relevant Federal Sector Data Since the Implementation of MD-715** (From FY 2003 to the most recent validated FY data)

Since the implementation of MD-715, the federal government has seen some positive trends in workforce demographics and EEO complaint activity.

**Fiscal Year 2003**

	Total	Men	Women	Hispanic	White	Black	(Asian NHOPI)	AI/AN	IWTD
<b>Permanent</b>	2,428,330	57.4%	42.6%	7.2%	67.2%	18.6%	5.5%	1.5%	1.05%
<b>Senior Pay</b>	15,308	74.5%	25.5%	3.4%	86.2%	7.1%	2.5%	0.8%	0.4%

**Fiscal Year 2011**

	Total	Men	Women	Hispanic	White	Black	Asian	NHOPI	AI/AN	IWTD
<b>Permanent</b>	2,553,190	56.8%	43.2%	8.2%	64.4%	18.5%	6.0%	0.4%	1.5%	0.9%
<b>1<sup>st</sup> Level Mgmt</b>	70,361	59.6%	40.4%	7.7%	68.9%	15.8%	3.2%	0.45%	2.8%	0.6%
<b>Mid-Level Mgmt</b>	104,286	65.8%	34.2%	8.0%	73.7%	12.3%	3.6%	0.2%	1.3%	0.5%
<b>Senior Pay</b>	14,426	70.4%	29.6%	3.8%	83.0%	8.3%	3.3%	0.2%	0.9%	0.5%

Federal Sector Complaint Activities	Fiscal Year 2003	Fiscal Year 2012	Percentage Change
<b>EEO Counselings Completed</b>	45,030	34,521	-23%
<b>Formal Complaints Filed</b>	20,226	15,837	-22%
<b>Requests for Hearing</b>	9,994	7,090	-29%
<b>Findings of Discrimination - Hearings</b>	341	147	-57%
<b>Requests for Appeals</b>	7,035	4,350	-38%
<b>Findings of Discrimination - Appeals</b>	218	109	-50%

FSP's success in carrying out its outreach, educational, and oversight responsibilities are detailed more fully in the paragraphs that follow. Despite the accomplishments that FSP achieved in recent years, FSP must continue to evolve in order to maintain its role as leader in the efforts to create diverse and inclusive work environments throughout all of the federal government.

FY 2013 – 2016 Strategic Plan Strategic Objective	Combat employment discrimination through strategic law enforcement
Outcome Goal I.A	Have a broad impact in reducing employment discrimination at the national and local levels.
Strategy I.A.4	Use EEOC decisions and oversight activities to target pervasive discriminatory practices and policies in federal agencies.
Performance Measure 5 for Strategy I.A.4	By FY 2016, EEOC uses an integrated data system to identify potentially discriminatory policies or practices in federal agencies and has issued and evaluated TBD number of compliance plans to address areas of concern.
FY 2014 Target	Conduct tbd number (2) onsite program evaluations focused on identified priorities and issue compliance plans
OFO Performance Measure FY 2013	Ensure that federal agencies maintain affirmative programs of equal employment opportunity

## **Federal Sector Program Accomplishments**

Discrimination in the federal sector directly impacts agencies' abilities to perform their core missions. In addition to affecting work force morale and productivity, agencies must devote significant resources to investigate and defend against allegations of discrimination and remedy those found to be meritorious.

It is the policy of the federal government to prohibit discrimination in employment because of race, color, sex, national origin, religion, age or disability, and to promote the full realization of equal employment opportunity for all persons. To implement this policy, each federal agency must maintain a continuing affirmative program to promote equal opportunity and to identify and eliminate barriers to participation by all persons in the full range of employment opportunities. OFO is responsible for the review and evaluation of all federal sector equal employment opportunity (EEO) efforts.

EEOC's Management Directive 715 (MD-715) identifies essential elements for structuring model EEO programs. Attainment of a model EEO program provides an agency with the necessary foundation for achieving a discrimination-free work environment which maximizes the talents of the full labor force.

A discrimination-free work environment, characterized by an atmosphere of inclusion, and free and open competition for employment opportunities, is the ultimate goal of MD-715 and the federal government. MD-715 provides a roadmap for creating effective EEO programs for all federal employees as required by Title VII of the Civil Rights Act of 1964 and Section 501 of the Rehabilitation Act of 1973.

The six essential elements for maintaining model Title VII and Rehabilitation Act programs are:

- Demonstrated commitment from agency leadership
- Integration of EEO into the agency's strategic mission
- Management and program accountability
- Proactive prevention of unlawful discrimination
- Efficiency
- Responsiveness and legal compliance

## **Agency Oversight**

OFO assisted agencies in their implementation of MD-715 by maintaining a series of informational materials on the EEOC website, including MD-715's Implementing Instructions, FAQs, Sample Workforce Data Tables, an OPM/Census Occupation Cross-Classification table (Crosswalk), guidance for 2<sup>nd</sup> level reporting agencies, and multiple versions of the required forms and instructions.

FSP staff analyzes and assesses Federal agencies' annual submission of MD-715 reports to ascertain agencies' progress in creating model EEO programs. OFO provides oversight to over 200 federal agencies and their subcomponents. To facilitate this oversight responsibility, OFO conducts in-person and telephonic remote assistance meetings with the responsible agency employees, as well as provides multi-year trend analysis feedback letters to the agencies.

OFO's success in its oversight role comes not from the mere exercise of collecting data; it comes from what EEOC and the agencies do with that data. Agencies have the responsibility to identify those red flags that are discovered in the MD-715 data and conduct investigations of the anomalies generated by workplace policies, procedures, and practices with an eye toward eliminating barriers to equal employment. If an agency finds a barrier, it has a responsibility to eliminate it. Similarly, EEOC, as the oversight agency, has the ongoing responsibility to provide the technical assistance necessary to accomplish this enormously important task.

The Commission has provided feedback to agencies on their MD-715 submissions via various means, including technical assistance visits, one-year feedback letters, and three-year trend analysis letters. In response to comments from federal agency stakeholders, the Commission continues to provide feedback letters to agencies on a rotating basis. This feedback is designed to provide comprehensive analysis that tracks the agency's progress toward establishing a model EEO program.

Pursuant to the Federal Sector Complement Plan, the Commission also met with the 56 largest agencies as part of several government-wide program evaluations involving anti-harassment programs, reasonable accommodation programs, and diversity within their Senior Executive Service (SES). We asked the agencies to complete a questionnaire on these topics, so we can compare their responses using our business intelligence tool. The Commission subsequently provided feedback to each agency, including recommendations for addressing program deficiencies and conducting barrier analysis of the SES. We informed the agencies that if they do not address their deficiencies in FY 2015, the Commission will issue an order of non-compliance, pursuant to 29 CFR 1614.102(e).

## **Outreach and Training**

EEOC's Federal Training & Outreach Division (Fed T&O) had a robust and productive FY 2014. The Fed T&O division has leveraged relationships with internal and external stakeholders resulting in a cadre of over 40 highly skilled trainers. Fed T&O conducted and/or coordinated over 50 Customer Specific Trainings (CSTs), 28 open - national enrollment courses (courses) through the EEOC Training Institute, and approximately 135 outreach events in FY 2014. The Fed T&O season concluded with the 3<sup>rd</sup> Annual Executive Leadership Training for senior level EEO professionals, both in the private and federal sectors.

## **Outreach**

The outreach events (no-cost public speaking engagements) were provided to federal sector employers, employee/employer stakeholder groups, and in conjunction with various federal conferences. Our outreach events focused on MD-110 updates and the 6 federal sector complement plan (FCP) priorities. OFO also hosted quarterly brown bag events during the fiscal year that were open to the federal community. Some highlights of the outreach efforts included:

- Participation in several affinity organization conferences including:
  - Federally Employed Women (FEW) – Synopsis of the Women Workgroup Report,
  - Examining Conflicts in Employment Laws (EXCEL) – MD-715: Portrait of a 10-Year Landscape,
  - Federal Dispute Resolution (FDR),
  - National Organization for Mexican American Rights (NOMAR) - Counselor Refresher and Updates,
  - Blacks in Government – LGBT Cultural Competency,
  - League of United Latin American Citizens (LULAC) – MD-110 Draft Revisions,
  - IMAGE – Understanding Workplace Harassment,
  - Society of American Indian Government Employees (SAIGE) – Identifying Barriers to American Indian Women in the Senior Grades;
- Development of 6 online videos; “Understanding the EEO Process”
- Brown bag events being recorded and posted to EEOC’s web site, as a resource for those who cannot attend in person; and
- Quarterly meetings with EEO Directors to brief agency officials on federal sector developments.

OFO staff partnered with the Office of Field Programs in organizing the EEOC’s 17<sup>th</sup> Annual EXCEL Conference in San Diego. Keynote speakers included civil rights activist Myrlie Evers-Williams and author Lynn Povich, Author. Additionally, OFO staff resented several workshop sessions covering a variety of EEO topics.

The Commission continues to disseminate federal sector research materials through placement of Commission decisions and other helpful federal sector information (MD-110, MD-715 guidance and instructions the EEO Digest, fact sheets/questions and answers on the Part 1614 regulations) on the EEOC web site.

OFO staff continues to provide informational materials to federal sector employee stakeholder groups by direct mail and through distribution at stakeholder meetings. Additionally, OFO staff keeps the federal sector community informed of recent precedential appellate decisions through speaking engagements, the EEO Digest, and case updates.

The EEO Digest is a quarterly publication, which highlights recent appellate decisions and provides articles on items of interest to the federal sector community. In FY 2014, OFO published quarterly issues of the EEO Digest. Additionally, OFO continues to grow and expand its reach on social media Twitter account (@EEOC\_OFO) to provide information to our stakeholders. We now have nearly 10,000 followers.

## **Training**

In FY 2014, OFO staff, in partnership with approximately 40 collateral duty trainers delivered a wide variety of relevant courses, such as EEO Counselor Training, Investigator Training, EEO for Managers and Supervisors, Drafting of Final Agency Actions, Disability Program Management Basics, and an EEO Laws Refresher course. All courses are provided through the EEOC Training Institute, which is funded through the Revolving Fund. OFO, in partnership with OPM, developed a course entitled “The EEO and HR: Everyday Accountability”. The course provides managers and supervisors with the knowledge necessary to address the various EEO or HR situations that will arise in the federal workplace.

OFO staff also delivered customized training (CSTs) on a variety of subjects. CSTs may be tailored to the unique needs of an agency's EEO program and covers topics such as the Rehabilitation Act, the Basics of MD-715, Barrier Analysis, and EEO for Managers and Supervisors. Also, national courses that were available by open-enrollment were also available as a CST. Trainings were provided to more than 20 different federal agencies in locations across the country.

## **Reports and Evaluations**

One of OFO's most important oversight mechanisms is the authority to conduct evaluations of federal agency EEO programs. To better implement the Commission's focus on establishing effective relationships with federal employers, and in furtherance of our ongoing goal to make the federal government a model EEO employer, FSP plans and conducts several program evaluations each fiscal year. Using targeted evaluations, combined with the new self-assessment tools and checklists in MD-715, OFO has helped federal agencies assess the effectiveness and efficiency of their EEO programs and identify potential barriers to equality of employment opportunity.

In fiscal year 2014, the agency completed two evaluations focused on the Commission's Strategic Enforcement Plan Priority 5 (Preserving Access to the Legal System) and issued one compliance plan. We completed a program evaluation of the Transportation Security Administration (TSA), specifically to assess whether TSA employees have adequate information about how to access the EEO complaint process in compliance with laws, regulations, and other written instructions enforced by the EEOC, and whether employees were discouraged from filing EEO complaints. A compliance plan was issued to TSA on June 18, 2014.

In July of 2012 OFO initiated an evaluation of SSA's EEO program due to a relatively high number of formal and informal harassment complaints and other allegations of unlawful practices as reported by SSA employees. The scope of the program evaluation concerned SSA's EEO reporting structure, its complaint processing program, the processing of conflict of interest cases, and the agency's anti-harassment policy and procedures. EEOC staff

interviewed officials and staff within SSA's EEO office, and reviewed SSA's existing policies and operational procedures.

EEOC identified a number of deficiencies in SSA's EEO program, including problems with its organizational structure, its non-standard approach to processing EEO complaints, its anti-harassment program, and the perceived conflict of interest with SSA's general counsel. As part of its program evaluation, EEOC provided SSA with recommendations for structural changes in its EEO reporting structure, consolidation of authority within a single office, development of standardized operational procedures, and changes to the structure and oversight of its anti-harassment policies and procedures. EEOC further recommended that SSA promote and encourage the use of ADR, improve the consistency, quality, timeliness, and efficiency of the processing of acceptance/dismissal determinations and final agency decisions, and clarify the role of the general counsel during the investigation process to eliminate any perception of conflict of interest. Finally, the EEOC required SSA to submit a Corrective Action Plan and quarterly updates on their progress.

OFO also coordinated the update for Management Directive 110, adding clarifications and incorporating the 29 C.F.R. regulation revisions. This revision is the first comprehensive update of the guidance in 13 years.

Internal components of the EEOC have responsibility for, among other things, evaluating other federal agencies' EEO programs, operations, and activities. Pursuant to these responsibilities, and as part of their federal sector implementation of the EEOC's SEP/FCP priority concerning preserving access to the legal system, the agency issued a Practical Guide containing a compilation of practices and ideas to provide federal agencies with a variety of adequate and appropriate methods of distributing information concerning the EEO complaint process, laws, and regulations to their workforce.

The EEOC continues to collect data for its goals under the agency's SEP priorities. Additionally, OFO issued the FY 2011 Annual Report on the Federal Workforce Part II and FY 2012 Part I.

### **Federal Sector Inter-Agency Initiatives**

FSP staff continued served on the Office of Personnel Management's Hispanic Advisory Council on Federal Employment. As part of this group, OFO staff assisted OPM in identifying areas where the federal could improve opportunities for the Hispanic community. In addition, staff represented the Commission on the following interagency initiatives:

- U.S. Department of Labor, Office of Disability Employment Policy (ODEP) and OPM – to develop new Special Emphasis Program Managers training course;
- White House, U.S. Department of Justice (DOJ), Office of Management and Budget (OMB), ODEP, and OPM – to examine and make recommendations concerning disability data collected in the federal government;
- OPM and OMB – to implement Executive Order 13583 (Establishing a Coordinated Government-wide Initiative to Promote Diversity and Inclusion in the Federal Workforce); and

- U.S. Census Bureau, DOJ, DOL, and OPM – to update and maintain Special EEO Tabulation.
- OPM – to partner federal AAPI affinity groups to find ways to improve opportunity for Asian American federal employees.

### **ADR in the Federal Government**

The Commission continues to promote alternative dispute resolution (ADR). Evidence has shown that using ADR techniques to resolve workplace disputes can have a powerful impact on agencies' EEO complaint inventories and, in turn, the Commission's hearings and appeals inventories. EEOC actively pursued a variety of means to assist federal agencies in improving participation in alternative dispute resolution by identifying and sharing best practices, providing assistance in program development and improvement, providing training to federal employees and managers on the benefits of ADR, and maintaining a web page that serves as a clearinghouse for information related to federal sector ADR.

OFO continues to update the Federal Sector ADR webpage in coordination with the Web Development Team to provide additional federal sector ADR information and make it accessible and more user-friendly. The ADR webpage is a clearinghouse of information, and has links to other internet-based ADR web sites, and to agencies that have produced videos on ADR topics.

OFO maintained a Federal Sector Mediation Services program designed to provide mediation services for small agencies with limited services, allowing them to comply with EEOC regulations and directives.

OFO continued to provide guidance and assistance to the EEOC's administrative judges, who conduct hearings on discrimination complaints filed against federal agencies. OFO's staff attorneys worked closely with the Office of Field Programs in monitoring the workload of the administrative judges, analyzing hearing unit data, evaluating staffing needs, and evaluating the quality of administrative judges' work.

### **Support for the Hearings Program**

OFO continued to provide guidance and assistance to EEOC's administrative judges, who conduct hearings on discrimination complaints filed against federal agencies. OFO's staff attorneys worked closely with the Office of Field Programs in monitoring the workload of the administrative judges, analyzing hearing unit data, evaluating staffing needs, and evaluating the quality of administrative judges' work.

### **Future State: FSP Must Continue to Leverage Technology to Meet Future Challenges**

To meet OFO's myriad future challenges, FSP must maximize the productivity of our existing staff by effectively leveraging technology. EEOC's Strategic Plan calls for the integration and coordination of the federal sector adjudicatory and oversight functions, resulting in an integrated data system that will support and enhance FSP's oversight and evaluation activities. This integration between hearings, appeals and FSP's oversight functions will allow for achievement of the Strategic Plan's goal of having a broad impact in reducing employment

discrimination in the federal sector. The tracking of priority issues and the analysis of data for the identification of future priorities will be enhanced through the integrated federal sector data system. Both statistical and other information gathered during the hearings and appellate process will be combined with agency complaint data, workforce data, and MD-715 reports to create a more complete picture of how agencies are progressing in the development of model EEO programs and to identify possible systemic concerns. Such integration will greatly enhance EEOC's ability to leverage information gleaned from the federal sector adjudicatory process and oversight activities to target and eliminate discriminatory practices and policies in federal agencies.

Pursuant to Performance Measure 5 for Strategy I.A.4 of EEOC's Strategic Plan (FY 2012 – FY 2016), OFO and OIT developed an integrated data system to identify potentially discriminatory policies or practices in federal agencies. In FY 2013, EEOC developed the Federal Sector EEO Portal (FEDSEP) to capture MD-715 data, Form 462 data, and complaint files. In FY 2014, OFO/OIT refined the data capture processes and began implementation of an analytics tool to examine the data for trends. OFO successfully implemented several data capture/reporting sources for the new online data system in fiscal year 2013, and is developing a fully operational, online registration platform for implementation in fiscal year 2015.

In addition, FEDSEP, as envisioned by the Open Government Initiative, will also provide the public with readily accessible federal sector data and will offer practitioners with the opportunity to participate in web-based forums designed to allow federal sector stakeholders to exchange valuable EEO-related information, such as best practices, relevant articles, etc. This will supplement FSP's delivery of relevant and helpful information, training, and EEO solutions to federal agencies, and it will enhance its dissemination of federal sector information through various channels.

Technology is also vital to our training and outreach efforts. Over the past decade, OFO has increased our federal training and outreach efforts (see the accomplishments above). However, to keep pace with the grown demands for more information, OFO must leverage technology to reach large audiences. Over 85% of the federal government is outside of the Washington, DC area (while nearly all of OFO's resources lay within this area). Technologies like web-conferencing and virtual meetings will be vital to our ability to reach our geographically dispersed stakeholders.

Finally, in recent years FSP's staff has played a more prominent role in coordinating with OMB and OPM to address critical federal workforce issues. For example, FSP staff worked in partnership with OMB in the development of an applicant tracking form – the Applicant Background Questionnaire – that improves the collection of demographic information. Most recently, FSP staff worked in concert with staff from OMB and OPM for revising OPM Form 256 for the identification and collection of information regarding employees with disabilities. We often provide key data for decision-making.

These are demonstrative of the importance of maintaining strategic partnerships with these agencies to fulfill the President's mandate and to ensure that the federal government is a Model Employer.

**Special Services Staff: Organization Assessment**

## **Executive Summary**

***Special Services Staff is a small team of experienced attorneys performing a wide variety of duties, including coordinating Government Employee Rights Act hearings, providing ADR services and guidance, conducting training and outreach, and providing internal staff development.***

***The critical issue facing Special Services Staff is assessing its current structure and alignment to ensure that it effectively leverages OFO's broad oversight role in the federal sector.***

## **Critical Functions of Special Services Staff**

Special Services Staff provide technical assistance and advice to Federal agencies as they incorporate alternative dispute resolution (ADR) techniques into the administrative processing of EEO complaints.

Special Services Staff investigates, on a reimbursable basis, EEO complaints that raise potential conflict of issue concerns due to the involvement of sensitive issues, the agency's EEO Office, and/or high-level agency officials.

Special Services Staff provides legal research support and technical assistance to the Commission's federal sector staff.

Special Services Staff develops and distributes federal sector information and publications to federal sector stakeholders by publishing a quarterly EEO Digest, coordinating the placement of Commission appellate decisions on the Commission's website, and distributing the interactive computer based training program "Sailing Through the Federal Sector EEO Process" to the public.

Special Services coordinates the procurement of contract administrative judges for hearings functions for internal EEO complaints filed by Commission employees and applicants.

Special Services coordinates the contracting process for securing ALJ hearings and appeals functions for complaints of discrimination brought by state and local employees who are covered under Section 304 of the Government Employees Rights Act of 1991.

Additionally, Special Services Staff:

- Undertakes special projects and studies at the direction of the Director, Office of Federal Operations.
- On behalf of federal agencies, conducts special EEO investigations of discrimination complaints which concern sensitive matters, involve high agency officials, or where the investigation of the complaint may present the appearance of conflict of interest.

- Plans and provides mediation or other alternative dispute resolution services to resolve complaints of discrimination filed under prevailing statutes prohibiting discrimination in employment within the Federal sector.
- Establishes internal operating procedures for the conduct of administrative adjudication, mediation, or alternative dispute resolution services to resolve employment discrimination complaints filed within the Federal sector.
- Advises Commission officials on the resources, training, guidance and regulatory developments required to support the Commission's responsibilities.
- Distribute quarterly news digest electronically to federal government subscribers.
- Operates as a clearinghouse and contact point for information on Federal sector alternative dispute resolution procedures.

### **Assessment of and Challenges Facing Special Services Staff**

Special Services Staff is a small team of experienced attorneys performing a wide variety of duties, including ADR, training and outreach, and EEO investigations involving other agency high-level staff. This unit ranks high in flexibility and creativity, and provides support throughout the Commission with fast deployment. OFO leveraged this flexibility in FY 2011, by detailing three (3) of the Special Services Staff attorneys as compliance officers in the Compliance & Control Division. As discussed more fully below, the detail of these attorneys resulted from the need to address a growing, and more complex inventory of unresolved compliance matters involving OFO's appellate orders.

Notwithstanding these staff detail assignments, Special Services Staff published four installments of the *EEO Digest*, including editions that contained comprehensive analyses of agencies' procedural dismissals for failure to state a claim, developments in the Equal Pay Act, and the prohibition of retaliation under the anti-discrimination statutes.

For the past three years, three attorneys assigned to Special Services Staff have been detailed to the Compliance Branch to ensure that federal agencies are complying with OFO's appellate orders. The addition of attorneys in this compliance effort has enabled the office to address several legal issues involving remedies and what constitutes full relief. As such, they have provided value-added legal analysis to this function, without any apparent detriment on the operations of the Special Services Staff. OFO will fine-tune the Special Services Staff organization to ensure that it continues to function at a high performance level as a critical resource for OFO, available as needed for various projects.

**Compliance and Control Division: Organization Assessment**

## **Executive Summary**

***The Compliance and Control Division (CCD) serves as OFO's "Clerk of the Court" in its support of the appellate complaint process. CCD's Intake Unit continues to be at the front line of OFO's efforts to leverage technology to better perform its mission. CCD staff have taken the lead in OFO's efforts, along with the Office of Field Programs and the Office of Information Technology, to implement, track, and report on the SEP/FCP priorities captured in the case management system mandated by the Commission's Strategic Plan.***

***The Intake Unit will have to re-design many of its intake and support functions as a result of the continued development of OFO's digital infrastructure. Critical to these responsibilities, CCD must ensure that the unit has an appropriate number of staff possessing the necessary competencies to conduct quality control review of digital documentation uploaded by complainants and agencies, perform its other support functions, and identify and report the SEP/FCP priorities captured in the case management system under Performance Measure 3 of the Commission's Strategic Plan.***

***Additionally, CCD must address the succession planning challenges faced by the Compliance Unit, and more fully integrate the Compliance Unit activities with the office's oversight and enforcement responsibilities.***

## **Critical Functions of the Compliance and Control Division**

The Intake Unit of the CCD serves as the central repository for appellate case files, receives all OFO mail, docketed all appeals, requests complaint files from agencies, assembles and stores appeal files, and mails the decisions issued by OFO. The Intake Unit, when reorganized in FY 2005, worked under the direction of a Supervisory Equal Opportunity Specialist; 1 Lead Equal Opportunity Assistant, 2 Equal Opportunity Assistants, and 9 Document Control Clerks. As discussed more fully below, in recent years the Intake Unit has been reduced to just 2 Document Control Clerks.

Members of CCD's intake staff perform a wide range of critical support functions:

- Receives, processes, and scans (as appropriate) all incoming mail and faxes into EEOC's Document Management System (DMS).
- Monitors agency digital submissions made via EFX for quality control and to denote receipt of the administrative record.
- Indexes DMS documents into appropriate categories for use by all OFO divisions.
- Docketed all new appeals, petitions, and requests for reconsideration.
- Assembles appeal files and acknowledges appeals by parties in the federal sector EEO appeal process.
- Assists ARP in reviewing appeal files to determine completeness, and works with ARP staff to obtain missing records from agencies where appropriate.
- Assigns appeal files to ARP.
- Coordinates circulation of OFO decisions to EEOC's Executive Secretariat.

- Distributes EEOC's appellate decisions to the parties and to the commercial reporting agencies.
- Retains correspondence and closed appeal files, and retires, as appropriate, records to the Federal Records Center.
- Prepares responses to FOIA requests sent by stakeholders.
- Prepares responses to stakeholder inquiries regarding federal sector appellate case processing.

CCD's Compliance Officers monitor agency compliance with the decisions and orders issued under the Commission's appellate jurisdiction. They receive and analyze agencies' submissions of compliance reports and clarify any disputes between agencies and complainants concerning the interpretation of ordered corrective action.

Compliance officers are assigned specific agencies and provide technical assistance to them to secure compliance with Commission decisions and orders. In this context they develop and ensure effective and cooperative working relationships with senior management officials of other federal agencies and departments related to compliance matters.

Additionally, Compliance officers:

- Maintain quality control over decisions and orders issued by the Office of Federal Operations.
- Prepare recommendations for docketing petitions for enforcement.
- Assist with the coordination and tracking of Congressional and White House correspondence and public inquiries where appropriate.
- Prepare for the Office Director, certifications to the Commission of non-compliance, including recommendations for appropriate action to be taken.
- Establish and maintain a system for monitoring and ensuring compliance by Federal agencies with all Commission orders and appellate decisions.

CCD uses IMS to track the status of all open and closed appeals, compile statistical data on the performance of the office, and publish quarterly and annual production reports. On a quarterly basis CCD prepares the appellate NO FEAR data for posting on the Commission website. The CCD Director serves as a liaison between the Federal Sector Programs and the Appellate Review Programs divisions, and coordinates intake and any overlapping responsibilities between the two functions. The CCD Director also prepares the OFO performance budget, and regularly tracks OFO's progress in meeting a variety of internal and external performance measures, including GPRA. Additionally, the CCD Director has been tasked with ensuring OFO's compliance with the Commission's relevant Strategic Enforcement Plan priorities and initiatives.

## **CCD Assessment and Critical Issues**

### CCD's Intake Unit

The Intake Unit is on the front lines of OFO's efforts to leverage technology to more effectively manage the vast flow of the critical documents related to OFO's adjudicatory, oversight, and outreach responsibilities. Recent technological improvements have enabled OFO to better manage and track workflow, improve office efficiency and strategically utilize scarce human resources.

The primary issue for the Control Intake Unit for several years had been CCD's severe shortage in support staff. The Commission's hiring freeze, combined with attrition and internal/external promotions, had also severely impacted the Control Unit's operations. OFO had not been authorized to backfill seven vacant Document Control Clerk positions (responsible for preparing, scanning, and indexing into DMS all incoming OFO federal sector documents), two GS-5 Equal Opportunity Assistants (responsible for indexing documents in DMS), and the GS-6 Lead Equal Opportunity Assistant position. Additionally, since FY 2000, there has been no permanent manager of the Control Unit. Until FY 2012, attorney staff had served in rotational assignments as the Intake Unit Manager. These rotational assignments, while providing some staff with important managerial experience, have negatively impacted continuity within the Unit. Since FY 2012, a GS-13 Equal Employment Specialist has been detailed to perform some of the management functions within the Intake Unit, with others being retained by the CCD Attorney Advisor.

As a result of this shortage of staff, it has become necessary for the CCD Director and his attorney advisors to spend a considerable amount of time performing basic support functions, such as preparing and mailing acknowledgement letters, reviewing and processing incoming mail, and preparing hardcopy appeal files. The CCD Director and his immediate staff have had to perform these basic support functions to ensure that the attorneys in ARP have the necessary documentation to perform their adjudicatory functions.

In the 4<sup>th</sup> quarter of FY 2014, the Control Unit was authorized to fill two critical Control Unit positions: a part-time, GS-1 Student Pathways Intern, and a GS-7 Equal Employment Specialist. The contribution of these employees starting in FY 2015 will help enable the Control Unit to more effectively perform its critical support functions.

In recent years, some of the burden of this staffing shortage was mitigated by changes made in late FY 2012 to the EEOC's federal sector regulations that require agencies to submit appeal-related documentation in digital form. This regulatory change has reduced CCD's scanning workload, as staff do not need to open, prep, and scan documentation from agencies.

For more than three years the primary digital infrastructure for agencies to submit documents in digital form and later comply with this regulatory change, has been the EEOC File Exchange (EFX). EFX is a secure web portal by which documents pertaining to federal sector appeals may be sent to the Commission. Agencies upload the digital investigative record for an appeal utilizing the docket number, and EFX programmatically indexes and associates these

documents with the appropriate appeal in the Commission's document management system (DMS).

While EFX has reduced OFO's document processing support function typically performed by the Control Unit's lower-graded Document Control Clerks, it has become evident that there is a need for CCD staff to perform quality control work to ensure that agencies (and eventually complainants and their representatives) are properly uploading, associating, and indexing their submissions. This realization has occurred as a result of CCD identifying mistakes made by agencies in the identification and format of documentation being uploaded via EFX. When agencies improperly identify or format this appeal-related documentation, inefficiencies occur, and without staff dedicated to Quality Control oversight, errors are often not identified until the appeals are assigned to attorneys for adjudication.

OFO is partnering with OIT to incorporate the functionality of EFX into a more complete system for filing appeals and exchanging relevant documentation, and integrate this functionality within the framework of FEDSEP. In subsequent phases this component of the FEDSEP will allow parties to submit to the Commission all documents, including hearing requests, notices of appeal, motions, exhibits, briefs, etc. by logging on with a user ID and password, and uploading the documents in Adobe Portable Document Format (PDF). As a temporary pilot program, OFO partnered with OIT to roll out in the 4th quarter of FY 2014 a Complainant eFile module - a secure link by which complainants can upload appeal-related documents to the Commission.

Further enhancements to the FEDSEP technological structure will allow the exchange of documents to be two-way, as OFO will be able to issue notices of appeal and acknowledgment letters digitally. Moreover, the migration of EFX within FEDSEP will provide OFO with the framework necessary to effectuate the goals of Performance Measure 5's integrated data system.

OFO will also leverage technology, along with the more coordinated approach to case management with the Office of Field Programs, to implement additional efficiencies. For example, IMS will be modified to query Hearings data to import information about complainant, his/her complaint, the issues, bases and categories identified pursuant to the coordinated Case Management System, to the appellate IMS component. Similarly, DMS will be modified to import all documentation submitted by the parties at hearing to the appellate record, thereby saving agencies from having to resubmit this information. Not only will these improvements serve to better manage the appellate inventory, but they will also serve to alleviate some of the administrative burden of OFO's Intake Unit.

OFO has had a stable, familiar digital infrastructure with DMS for almost 10 years. Accordingly, with the changes being discussed with OIT on the horizon, CCD in particular, and OFO as a whole, will face the inevitable challenges posed by the implementation of an unfamiliar digital infrastructure. Additionally, CCD will need to re-engineer many of its support processes to incorporate some of the efficiencies brought by the new digital environment and file exchange protocol.

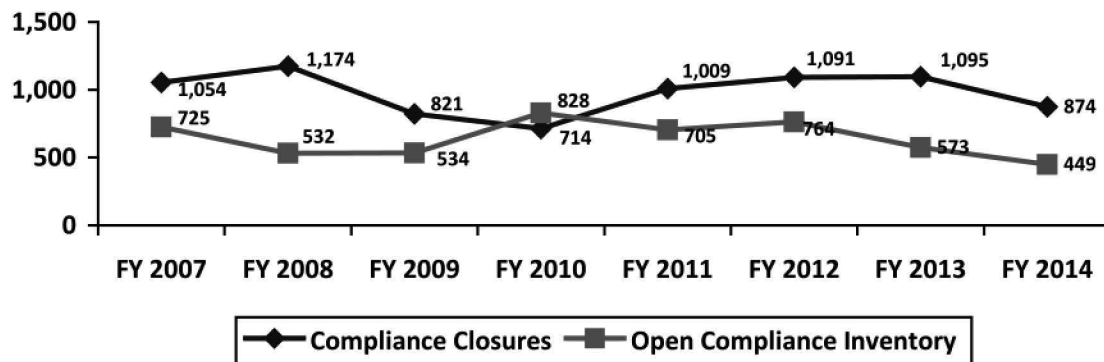
## CCD's Compliance Unit

Throughout FY 2014, the Compliance Unit was comprised of four detailed attorneys, one permanent Equal Employment Specialist, and one collateral duty Equal Employment Specialist. The office recognizes the need to develop a new cadre of compliance officers, however, until there is sufficient funding to recruit and train staff to handle compliance work, the office will rely on having detailed attorneys perform the majority of the compliance function.

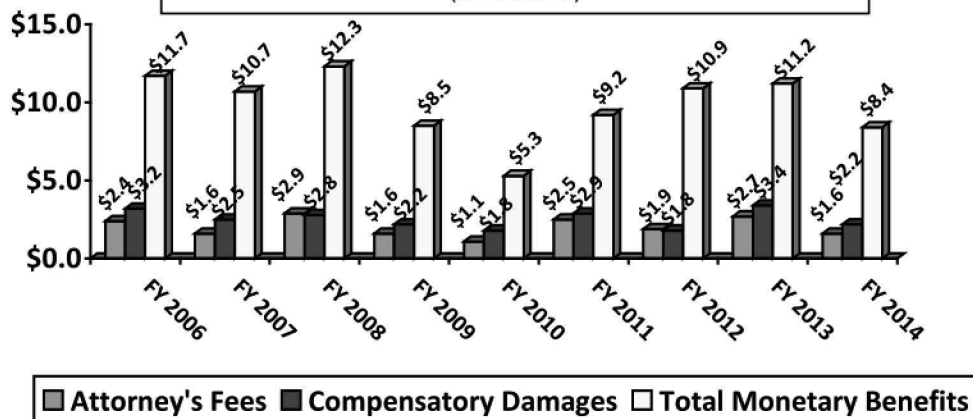
In FY 2014 the Compliance Unit continued to be effective in enforcing OFO's appellate orders. The Compliance Unit closed 874 compliance cases. By doing so, it reduced by 22% the end-of-fiscal-year compliance inventory – from 573 in FY 2013, to 449 in FY 2014.

The unit also made great strides in reducing the age of the compliance inventory. It closed 72% of the open compliance cases that were over 500 days old at the start of FY 2014. It also achieved compliance in more than 83% of the compliance cases concerning determinations on the merits that were pending at the start of the fiscal year. The charts below demonstrate the Compliance Unit's success in effectively managing the compliance inventory and enforcing OFO's appellate orders.

Compliance Metrics



Securing Monetary Relief Through Compliance  
(in Millions)



Compliance officers continue to serve as the primary enforcement officers for the EEOC in working with Federal agencies to fully implement the corrective actions ordered in the Commission's Federal sector appellate decisions. Over the years we have found that agencies are generally forthright and cooperative in the compliance process but require guidance on fulfilling their obligations under our orders. In great measure compliance officers serve to educate and provide technical assistance to Federal agencies and other Federal sector stakeholders. Most often this assistance consists of one-on-one discussions with the parties to address case-specific compliance processing concerns.

In FY 2014, Commission work on Management Directive 110 and the enhanced compliance provisions in the new regulations, brought about a convergence of interest in the implementation of enhanced compliance in Federal sector appellate decisions. With this came a focus on the few agencies that were slow to comply and/or refused to comply with the Commission's appellate orders. Many of our technical assistance efforts in this regard resulted, not in facilitating compliance, but in honing the issues for redress.

In FY 2014 Compliance officers continued to provide technical assistance with individual and multiple EEO staff members in order to address their broad compliance concerns, as well as problems with old and/or complex pending compliance matters. Most of these meetings were conducted by telephone or through teleconferencing.

Throughout the fiscal year Compliance Officers distributed the OFO Compliance Guide to agency staff responsible for monitoring compliance with OFO's appellate orders. The OFO Compliance Guide has been invaluable as a tool for educating and guiding agency EEO staff on the appellate and compliance processes.

OFO's compliance officers continued in their collaboration with FSP staff, as needed, as part of the FSP MD-715 review of agency EEO programs. As timely compliance is an essential element of a model EEO program, the Compliance Officers stand ready to supply any feed back in that regard.

## **Immediate Office of the Director: Organization Assessment**

## **Executive Summary**

***The OFO Director has a critical role in ensuring that OFO's resources, activities, and initiatives are strategically directed toward accomplishing the Commission's priorities in the federal sector as established by the Commission's Strategic Plan, Strategic Enforcement Plan (SEP) and Federal Complement Plan (FCP). In this capacity, he must articulate a clear vision of OFO's mission and strategies for success that is shared by all OFO employees; moreover, he must ensure that OFO's staff remains committed, engaged, and mission focused. The OFO Director must also forge strategic partnerships with stakeholders and other Commission offices to advance the Commission's priorities and Strategic Plan.***

***The IOD must ensure that all OFO staff produce the highest quality work possible – from the Officer of the Day who answers phone calls from federal sector stakeholders, to the attorney who prepares a decision that is voted on by the Chair and Commissioners. Additionally, the IOD must ensure that there are clear lines of communication with OFO staff to so that they fully understand buy into the importance of these activities in creating an effective civil rights law enforcement program in the federal sector.***

## **Critical Functions of the Immediate Office of the Director**

The Immediate Office of the Director (IOD) coordinates the work of the office and consults with and advises the Chair, Commissioners, and senior management staff on issues concerning the administration of the EEO and affirmative employment functions for the federal government.

With the Commission's approval of the EEOC's Strategic Plan, Strategic Enforcement Plan (SEP) and Federal Complement Plan (FCP), the IOD must ensure that OFO's resources, activities, and initiatives are strategically directed toward accomplishing the Commission's priorities in the federal sector.

Additionally, IOD staff is responsible for coordinating customer service efforts, outreach activities, office-wide planning for human capital management, program evaluations, and integration of the federal sector budget and performance accountability.

The IOD consults with a wide array of federal sector stakeholders to exchange ideas, receive input, and initiate citizen-centered programs to assist in the implementation of the Commission's Strategic Plan.

In addition, the IOD staff:

- Provides federal research services to the Chair and individual Commissioners.
- Reviews and makes determinations on recommendations to refer cases back to federal agencies or the Merit Systems Protection Board for additional evidence.
- Recommends proposed decisions and orders to the Commissioners on matters reserved for Commission consideration.
- Manages, coordinates, and directs the Commission's administrative federal enforcement and affirmative employment programs.

- Develops and recommends policy and insures effective implementation regarding administrative Federal enforcement affirmative employment programs.
- Issues orders and instructions on behalf of the Commission, where appropriate, requiring the heads of departments, agencies, units subject to Section 717 of the Civil Rights Act of 1964, as amended, the Civil Rights Act of 1991, the Age Discrimination in Employment Act of 1967, as amended, the Equal Pay Act of 1963, Section 501 of the Rehabilitation Act of 1973, as amended, and the Genetic Information Nondiscrimination Act to comply, as necessary, with the Commission's regulations, procedures and management directives.
- Establishes priorities for the Office of Federal Operations.
- Administers a management reporting system for the Office of Federal Operations to track Office goals, objectives and priorities.
- Provides fiscal and personnel administrative liaison services.
- Ensures provision of Office services including equipment and supplies.
- Coordinates with the Executive Secretariat assignments from the Office of the Chair.
- Oversees budgetary requirements, resource utilization, internal organization, and other areas of office management.
- Takes final action on, and issues on behalf of the Commission, all decisions and orders that are not specifically reserved for Commission consideration.
- Consults with Commissioners and their Special Assistants, providing assistance in the consideration of specific cases and issues, and in consideration of all functions within the jurisdiction of the Office of Federal Operations.
- Reports regularly to the Commission on Office Federal Operations activities, and on Federal agencies' activities related to issues on appeal.
- Coordinates and develops guidelines and manuals on Federal EEO matters.
- Coordinates statistics for the entire Office of Federal Operations. Coordinates impasse cases arising under the Civil Service Reform Act, where the Merit Systems Protection Board has refused to accept an EEOC decision on a petition for review. Provides administrative support to a Special Panel appointed to resolve such disputes.
- Coordinates with other EEOC offices which have areas of responsibility which impact upon the operation of the Office of Federal Operations function, e.g., Office of Field Programs and Office of Legal Counsel, to ensure the development of and adherence to a unified Commission policy on matters within the jurisdiction of the Office of Federal Operations.
- Conducts an on-going program of quality assurance through review of decisions on a sampling basis.
- Identifies and coordinates with the Office of Human Resources training needs and priorities for OFO staff.
- Assures adherence to Commission procedural requirements, including maintenance of an adequate case control and record system.
- Ensures office-wide compliance with requirements arising from EEO programs and collective bargaining agreements.
- Implements Commission policies, instructions, and programs.

## **Fostering a Results-Oriented Culture in OFO**

OFO recognizes that successful organizations require engaged employees who understand their organization's mission and strategy, and what is expected of them as individuals to contribute to this success. OFO's success in recent years has been due, in large part, to its results-oriented culture it has encouraged from the top down. In this regard, OIG sets the broad priorities for the office at the start of the fiscal year and program managers and supervisors collaborate to devise specific goals and strategies for achieving them. Once established, these goals are communicated to all staff, who further provide input and suggestions for their realization. This process helps to ensure that all staff have awareness and ownership of these office goals. Individual performance is then aligned with the organizational goals, and progress toward their achievement is regularly tracked.

This planning effort is encapsulated in the IOD's performance plan. This plan includes accountability metrics related to OFO's varied mission and the EEOC's Strategic Plan.

The following is the FY 2014 performance plan for OFO's office director:

- Performance Requirement 1 – By the end of FY 2014, develop quality control plan, through an assessment of federal sector activity and consultation with stakeholders
- Performance Requirement 2 – Ensure all incoming appeals are assessed (categorized and prioritized) and implement balanced approach of appellate resolution with at least 60% of aged appeals resolved by end of FY 2014.
- Performance Requirement 3 – By end of FY 2014, assess 50% of all appellate compliance cases, identifying those with systemic compliance issues as potential referrals for enhanced enforcement pursuant to regulations and OSC MOU.
- Performance Requirement 4 – Ensure robust oversight of Federal agencies EEO and AE programs, including providing technical assistance and outreach, including conducting 2 program evaluations focused on SEP priorities during FY 2014.
- Performance Requirement 5 – Develop and implement internal operating manual for all OFO programs, including use of DMS, EFX, EEOC website, FedSEP, IMS and InSite to enhance shared knowledge, efficiency and implementation of SEP, FCP and CMP by end of FY 2014.

## **IOD Assessment and Critical Issues**

In FY 2014 the IOD's mission was to implement the priorities of the Commission's Strategic Plan, the Strategic Enforcement Plan, and the Federal Sector Complement Plan. The IOD's responsibility was to champion the successful implementation of these plans throughout all of OFO to ensure the effectiveness of its adjudicatory oversight, education, and outreach functions in the Federal Government. In order to achieve mission success, the IOD must ensure that OFO has a work environment in which employees feel engaged, have sufficient resources to accomplish the office goals, and are supported and valued by management.

The IOD must ensure that all OFO staff produce the highest quality work possible – from the Officer of the Day who answers phone calls from federal sector stakeholders, to the attorney who prepares a decision that is voted on by the Chair and Commissioners.

One of FY 2014's challenges confronting the IOD was how to implement the Case Management System developed pursuant to PM3 of the Commission's Strategic Plan. This was particularly challenging in light of the fact that the IOD was serving dual roles as both the Office Director and Acting Director of OFO's Appellate Review Programs. The IOD had to

ensure that timely and accurate guidance was developed for OFO's attorneys to enable staff to understand the broad principles and nuances of the SEP and FCP priorities. The IOD had to carefully monitor the appellate inventory to ensure that the FY 2014 targets for the categorization of appeals would be met, and that SEP/FCP cases could be identified for appropriate processing and coordination. Throughout these efforts, the IOD communicated to staff the importance of these activities in creating an effective civil rights law enforcement program in the federal sector.

The IOD also recognized that it was critical for OFO staff to collaborate with OFP to remove stovepipes and ensure that the federal sector consistently identified and applied the Commission's adjudicatory priorities at both the hearings and appellate stages of the federal sector EEO process. The IOD further ensured that OFO staff (especially the OFO Hearings Coordinator) regularly met with OFP staff to coordinate the Commission's application of the Commission's priorities in the federal sector. These activities culminated in a 2-day workshop held at EEOC headquarters and attended by OFO and OFP managers, key staff, and supervisory AJs from the field. During the workshop the appellate and hearing staff developed ideas and best practices for implementing the case management system in the federal sector.

The IOD, in recognition of the importance of eliminating artificial silos between OFO programs, convened several cross-program work groups to investigate long-standing issues pertaining to real and perceived discrimination in the federal sector, and provide recommendations for ameliorating these issues. For example, in FY 2014, the work group the IOD convened to examine the challenges faced by women in the federal workplace issued a report entitled "Obstacles Facing Women in the Federal Workplace." This report, found at [http://www.eeoc.gov/federal/reports/women\\_workgroup\\_report.cfm](http://www.eeoc.gov/federal/reports/women_workgroup_report.cfm), has served as the template for the methodology for investigating other pressing EEO issues in the federal work place.

The IOD has always been a champion of leveraging technology to enable staff to better perform the Commission's mission. In FY 2014, and as described above more fully in the ARP and FSP sections, the IOD, in collaboration with ARP and FSP staff, OCH, OFP and OIT, helped define the requirements for designing the new technical infrastructure required to support the Commission's priorities under the Strategic Plan. These efforts reflect the IOD's recognition that this new era requires the active participation and coordination among all Commission offices that have a role in implementing the Commission's federal sector priorities.

Looking forward, the IOD will continue to examine possible solutions to the challenges confronting OFO, including how to:

- Cultivate innovative performance management
- Best utilize technology to facilitate the efficient drafting and issuance of high-quality appellate decisions, while cognizant of the importance of their early categorization in order to more quickly identify Commission priorities;
- Leverage technology to assist in the delivery of high quality customer service;
- Create a robust, business-intelligent digital infrastructure to effectively analyze the myriad of external stakeholder data (e.g., Form 462 and MD-715), along with internal hearings and appeals data, to enable federal sector staff to better focus their oversight resources; and
- Better coordinate strategic partnerships with agencies that also have a federal mandate, such as OPM, OMB, MSPB, OSC, FLRA

## Appendix A

### 1. **ELIMINATING BARRIERS IN RECRUITMENT AND HIRING**

#### ***Decision Summaries for this Category***

(b)(7)(C) **v. FDIC**, 0120110879 (4/2/2014) – Complainant applied for a position through the Agency's Corporate Employee Program (CEP), which utilized a recruitment program approved by the Office of Personnel Management (OPM). Applicants were recruited, and then applied for a position. If they passed the screening process, they were invited to Arlington, Virginia for an interview. The selection process included a panel interview, written and oral assessments, as well as writing and math assessments. The record reveals Complainant was recruited, but was not selected due to his performance on the math and essay assessments.

Complainant filed a class complaint alleging that the CEP selection process was biased based on age. The AJ assigned to the class denied class certification, and Complainant appealed. On appeal, Complainant requested withdrawal of his individual complaint because he only believed there was class wide – not individual - discrimination. The Commission found that the class should not be certified because Complainant failed to establish commonality; in that he failed to identify a centralized Agency policy which was age biased or had a disparate impact on those over 40 years of age. Because Complainant was successfully recruited by the program, the Commission assumed Complainant believed the selection process was discriminatory, but he failed to identify which level of the selection process was discriminatory. The Commission also found Complainant failed to establish his claim was typical of the class, in that he had requested that his individual complaint be withdrawn. The Commission also noted Complainant failed to establish numerosity because he failed to identify how many potential members of the class there were, and that he failed to establish that he had an adequate representative of the class. The Commission denied class certification, and ordered that the Agency process the class member's individual complaints.

(b)(7)(C) **v. State**, 0720110007 (6/6/2014) [**Repeated under Priority 3 below**] – Complainant, an applicant for a Foreign Service position with the Agency, was diagnosed in 1994 with Multiple Sclerosis (MS). In October 2005 she was granted a Conditional Offer of Appointment, which was contingent on her satisfactory completion of the medical, security, and suitability clearance processes. On October 31, 2006, she was issued a "Class 5 – Not Cleared for Medical Assignment Abroad Classification, because her MS rendered her not "Worldwide Available." Specifically, she had a medical condition which limited her assignment overseas. She was simultaneously advised of her right to request a waiver of the Worldwide Availability requirement, which was only rarely granted, and only if it was in the best interest of the Service. On February 14, 2007, the Agency approved Complainant's waiver request. Complainant was placed on the hiring register, and was selected for a position on July 15, 2008.

Complainant contacted an EEO Counselor on November 21, 2006, and then moved to covert her individual complaint to a class complaint on August 21, 2008. Complainant alleged that the Agency's "Worldwide Available" policy both disparately treats and disparately impacts people with disabilities. She further alleged that the policy denies applicants individualized

assessment required as part of a direct threat analysis, and also denies reasonable accommodation to qualified individuals with disabilities.

The AJ granted class certification and the Agency appealed. In its appellate decision, the Commission found the class agent was a qualified individual with a disability, as during periods of her life, she was substantially limited in the major life activity of walking. The Commission redefined the class to account for those who were ultimately hired by stating that the class should include, “[a]ll otherwise qualified applicants to the Foreign Service who were denied employment, or whose employment was delayed pending application for and receipt of a waiver, because the State Department deemed them not “world-wide available” due to their disability.

The Commission found that the class met the requirement for certification. The Commission found that the Agency has a centralized policy and practice which allegedly denies the benefits of employment within the Foreign Service to those with disabilities, without regard to accommodation, and without any individualized assessment into the individual’s specific condition. The Commission found this policy also allegedly has a disparate impact on individuals with disabilities, and is based on stereotypical notions of people with disabilities. The Commission found that the requirement of typicality was also met, even though some class members were granted waivers and some were not because the policy at issue was the initial, centralized “worldwide availability” policy, not the waiver policies of each individual agency. The Commission also found that the requirements of numerosity and adequacy of representation were met. The Commission remanded the matter to an AJ for a hearing, and to address the class agents request to add a new class agent.

**(b)(7)(C) v. Treasury**, 0720140033 (7/30/2014) **[Repeated under Priority #5 below]** – After Complainant’s interview for a Revenue Officer position, the Agency collected the notes Complainant was given to formulate answers about hypothetical scenarios, and destroyed them. The Agency did not select her for the job. After a hearing, an EEOC AJ determined that the Agency violated the recordkeeping regulations when the Agency’s interviewers destroyed Complainant’s interview notes, but declined to draw an adverse inference against the Agency as a sanction because other evidence presented at the hearing, particularly the testimony, notes, and summary narratives of the interviewers, were sufficient to show that Complainant was not selected for non-discriminatory reasons.

Upon review, the Commission found that the Agency violated the ADEA’s recordkeeping requirements. Because the interviewees’ notes were written records of past events that were at issue in this nonselection case, and because the interviewees’ notes were within the Agency’s control, the Commission concluded that the notes constituted “records pertaining to the failure or refusal to hire” under the ADEA’s recordkeeping requirements, which the Agency failed to preserve.

However, the Commission determined that the AJ did not abuse his discretion in declining to draw and adverse inference as a sanction, and instead ordering the Agency to communicate with and train all of its managers and supervisors, who participate in selections, to retain all interview notes.

## **2. PROTECTING IMMIGRANT, MIGRANT AND OTHER VULNERABLE WORKERS**

### ***Decision Summaries for this Category***

(b)(7)(C) **v. DHS**, 0120122912 (4/28/2014) – Complainant worked for private staffing firm serving the Agency as a Technical Instructor. He filed a complaint alleging that he was discriminated against, in part, when he was terminated. The Agency dismissed his complaint for failure to state a claim, reasoning that he was not an employee of the Agency. On appeal, OFO reversed. OFO found that while there was insufficient information in the record on some of the factors used in making a determination on whether the Agency jointly employed Complainant by exercising control over his position, such as who furnished his tools, material, and equipment, set his work hours, and if the Agency had tantamount removal authority, there was enough information in the record to find the Agency was his joint employer. This included that Agency staff provided Complainant with regular on the job training and feedback, gave him the format to use when lecturing, decided if he was the instructional lead for a class, told him not to use some instructional materials he created, insisted that he stand throughout the class period, did not permit him to lecture, had input in the staffing firm's Instructor Improvement Plan Report on Complainant, and he worked on Agency premises.

(b)(7)(C) **v. Navy**, 0120122698 (5/20/2014) – Complainant worked for private staffing firm serving the Agency as a Licensed Vocational Nurse. She filed a complaint alleging that she was discriminated against regarding incidents of harassment, a suspension, and being terminated. Following an investigation, the Agency dismissed the complaint for failure to state a claim, reasoning that Complainant was not an employee of the Agency. On appeal, OFO reversed. OFO reasoned that the Agency provided Complaint day to day supervision, had input into performance appraisals issued by the staffing firm, issued Complainant a reprimand signed by an Agency Unit Head, and the staffing firm informed Complainant that it removed her at the request of the Agency. Accordingly, the Agency exercised sufficient control over Complainant's position to qualify as her joint employer.

(b)(7)(C) **v. Army**, 0120132013 & 0120132339 (5/20/2014) – Complainant worked for private staffing firm serving the Agency as a Senior Electrical Engineer. She filed EEO complaints alleging that the Agency discriminated against her when the Agency withheld funding her projects and terminated her from her position in October 2011. The Agency issued two decisions dismissing the complaints for failure to state a claim, reasoning that Complainant was not an employee of the Agency. In (b)(7)(C) **v. Department of the Army**, EEOC Request No. 0520120566 (January 23, 2013), OFO ordered the Agency to provide Complainant the opportunity to supplement the record and issue a new final decision. Thereafter, the Agency issued two separate final decisions again dismissing Complainant's complaint. On appeal, OFO reversed. OFO reasoned that while Complainant was a highly independent project engineer, which included lobbying to secure funding for her projects, the weight of the evidence showed that the Agency had the right to control when, where, and how Complainant performed her job. The staffing firm had no onsite supervisor, and Complainant was not assigned work by her staffing firm. The Agency provided Complainant her office space. The record suggested that the Complainant asked federal supervisors permission to go on leave, and Agency supervisors had input into her evaluations which were written by her staffing firm. Complainant served the Agency since 1998 or 1999, did not hire or pay assistants, and was not engaged in her own business. OFO found that because this case involves removal, a significant factor in determining whether the Agency employed Complainant was whether it had the power to terminate her. It found that the Agency's termination of funding resulted in

the effective termination by her staffing firm – Complainant not receiving additional work and her effective unemployment (suggesting de facto removal authority). OFO concluded that the Agency exercised sufficient control over Complainant's position to qualify as her joint employer.

(b)(7)(C) **v. State**, 0120132131 (5/20/2014) – Complainant worked for private staffing firm serving the Agency as an Electronic Mechanical Technician II maintaining mail equipment. He filed a complaint alleging that he was discriminated against when from October 12, 2012 through October 18, 2012, the Agency harassed him by putting severe pressure on him, through his onsite staffing firm supervisor, to pouch oversized mail, something not within his duties. The Agency dismissed the complaint for failure to state a claim, reasoning that Complainant was not an employee of the Agency. OFO affirmed. It reasoned that because Complainant's case was about his duties, the most important factor in determining whether the Agency controlled Complainant's position was whether it had the right to assign Complainant work. OFO concluded it did not have this right, since the staffing firm's Regional Manager backed Complainant up and he prevailed in his refusal to pouch mail, and he was not asked to do so again after October 18, 2012. Further, OFO noted that Complainant received his assignments from his onsite direct supervisor, a staffing firm employee, and the record did not show that the Agency got into the details of supervising how Complainant maintained equipment. OFO concluded that the Agency did not exercise sufficient control over Complainant's position to qualify as his joint employer.

(b)(7)(C) **v. Army**, 0120140002 (5/20/2014) – Complainant worked for Private Staffing Firm 1 serving the Agency as a Requirement Analyst. Private staffing firm 2 replaced Private Staffing Firm 1. Complainant filed a complaint alleging that he was discriminated against when the Agency refused to keep his name on the rehire list for Private Staffing Firm 2. The Agency dismissed the complaint for failure to state a claim, reasoning that Complainant was not an employee of the Agency. OFO affirmed. In determining that the Agency did not have sufficient control over his position to qualify as his employer, OFO noted that the Agency stated Private Staffing Firm 1 provided an onsite supervisor who assigned Complainant his work, and Complainant did not counter that the details of his performance were supervised or controlled by the Agency. It noted Complainant's job required a high level of expertise. OFO found that the record did not show that the Agency had control over Private Staffing Firm 2's decision not to hire Complainant, an especially significant factor in this case. It noted that Agency officials denied having any influence on the adding or deleting of names from Private Staffing Firm 2's hiring list, and Complainant did not indicate his belief to the contrary was based on anything other than an assumption.

(b)(7)(C) **v. Army**, 0120141144 (5/29/2014) – Complainant worked for a staffing agency serving the Agency as Project Manager. She filed a complaint alleging that she was discriminated against based on her sex and reprisal for prior EEO activity when the Agency harassed her, and when a new staffing agency took over the Agency told it that Complainant should not be hired, resulting in her separation. The Agency dismissed the complaint for failure to state a claim, finding that Complainant was not an employee of the Agency, and dismissed a portion of the complaint for failure to timely initiate EEO counseling. Complainant filed an appeal. OFO dismissed the appeal on the grounds that it was untimely filed.

(b)(7)(C) **v. Army**, 0120113642 (2/7/2014) – Complainant, an Engineer for the Agency's Future Warfare Division, filed an EEO complaint (with several subsequent amendments) alleging that her supervisor subjected her to a hostile work environment by making lewd and sexually suggestive comments. She claimed that as a result of her complaint of harassment, she was subjected by management officials to various actions such as nonselections, unfair ratings, etc. Complainant also claimed that management retaliated against her when it recommended that her security clearance not be renewed. The complaint was investigated by the Agency, and a hearing was held before an EEOC AJ.

The AJ found that Complainant and her supervisor engaged in sexually suggestive conversations together, and concluded Complainant did not find that they were unwelcome. Further, when Complainant did complain about the comments, the Agency investigated, reassigned the supervisor, and ordered training. The AJ found no further evidence of harassment. The AJ found the Agency presented legitimate, nondiscriminatory reasons for all of Complainant's disparate treatment allegations, and Complainant failed to prove they were a pretext for discrimination. In that regard the AJ noted that Complainant's testimony at the hearing was "wholly lacking in credibility" because she gave evasive and non responsive answers to many questions.

On appeal, Complainant argued the AJ's interpretation of the facts was incorrect. However, the decision on appeal found there was substantial evidence in the record to support the AJ's finding of no discrimination. OFO determined that, contrary to Complainant's claims, her security clearance was up for its normal five year review, and was not ordered by management. Notwithstanding the fact that during the security clearance investigation some members of management recommended that her clearance not be renewed due to Complainant's odd and often disruptive behavior in the workplace, the investigator conducting the security clearance review recommended that her security clearance be renewed. The appellate decision found no discrimination because neither Complainant's version of the facts was persuasive, nor did the evidence show that the Agency's actions occurred as a result of a discriminatory or retaliatory motive.

(b)(7)(C) **v. Army**, 0120123311 (1/30/2014) – Complainant worked for LINC Government Services (LGS) at a Contingency Operating Site in Iraq. He was accused of making a sexually harassing remark to a female soldier, and after an investigation was conducted, the Agency requested that LGS remove Complainant from the Contingency Operating Site. Subsequent to his removal from the site, LGS terminated Complainant's employment, and Complainant filed an EEO complaint against the Agency, alleging violations of Title VII and the ADEA with regard to the termination. The Agency dismissed the complaint for failing to state a claim based on Complainant not being an Agency employee. On appeal, OFO agreed with the Agency that Complainant was not an employee of the Agency and that the Agency was not a joint employer of Complainant. OFO found that LGS clearly had the bulk of control over Complainant's work duties and the other terms and conditions of his employment and made the decision to terminate him.

(b)(7)(C) **v. SSA**, 0120123335 (3/20/2014) – Complainant was eligible to be hired under Schedule A and applied for a Benefits Authorizer position. A three-person panel conducted interviews with all the applicants, reviewed each applicant's responses to seven behavioral

questions, and reached a consensus on the score for each candidate. In addition, the panel rated each candidate as “not recommended,” “recommended,” “recommended plus,” or “highly recommended.” Complainant received a score of 24 out of 35 and a “recommended” rating. Complainant was referred to the selecting official (SO) for consideration under both the competitive and Schedule A certificates. Complainant was not selected and filed an EEO complaint alleging disability and reprisal discrimination. After the investigation and hearing before an EEOC AJ, Complainant withdrew her hearing request, and the AJ remanded the complaint to the Agency for a final decision. On appeal, OFO found that the Agency articulated a legitimate, nondiscriminatory reason for not selecting Complainant, namely that her score and her rating did not make her sufficiently competitive for the position. OFO further concluded that Complainant failed to prove this explanation was untrue or pretext for discrimination.

(b)(7)(C) **v. DOD (AAFES)**, 0120133147 (2/3/2014) – Complainant, a former Store Associate at the Agency’s Kelley AFB Shoppette in Stuttgart, Germany, resigned in December 2012, citing supervisor conflict and discrimination. Before resigning, Complainant had also contacted an EEO Counselor regarding the alleged hostile work environment.

In March 2013, Complainant began working as a sales associate with SIGA telecom, a vendor which contracts to sell cellular phones and equipment at the Agency. Two weeks later, Complainant learned she had been “blacklisted”, meaning she was “not allowed to be employed by any concession company working under AAFES.” Complainant was terminated by SIGA.

In her complaint, Complainant alleged her removal by SIGA was the direct result of correspondence received by SIGA management from the Agency Contracting Officer, saying she was not acceptable to work on Agency concession contracts. The Agency dismissed the complaint for failure to state a claim, reasoning that Complainant was not an Agency employee, but was a contractor employed by SIGA.

The appellate decision reversed the Agency’s decision, finding that Complainant was alleging that the Agency retaliated against her for prior EEO activity she engaged in while an Agency employee, by informing SIGA that Complainant was “no longer acceptable”. The Commission found such action to be akin to refusing to provide post-employment letters or offering negative job references to prospective employers. OFO remanded the complaint to the Agency for further processing.

(b)(7)(C) **v. Army**, 0520130568, (1/8/2014) – The Commission denied the Agency’s request for reconsideration of our decision in EEOC Appeal No. 0120112643, (Jan. 24, 2013), which found that Complainant was an employee of the Agency rather than a contractor for EEO purposes. The Commission remanded the complaint to the Agency for further EEO processing.

(b)(7)(C) **v. DOE**, 0120130998 (1/24/2014) – Complainant filed a complaint alleging that the Agency discriminated against him when it created a hostile work environment, hindered his career growth, and terminated him. He worked for a private staffing firm serving the Agency by reviewing program and office system certification and accreditation packages for acceptability so they could be approved to operate on the Agency’s network. His compensation was paid

by the staffing firm. The Agency dismissed the complaint for failure to state a claim on the grounds that Complainant was not an employee of the Agency. OFO reversed. On appeal, OFO found that the Agency exercised sufficient control over Complainant's position to be deemed his employer. In making this finding, OFO noted that Complainant's purported first line Agency supervisor assigned him his work and assisted him in developing certification and accreditation packages, that he worked on Agency premises using Agency equipment, and he served the Agency for over four years.

(b)(7)(C) **v. State**, 0120132731 (1/24/2014) – Complainant filed a complaint alleging that the Agency discriminated against him based on his sex and national origin when he was terminated. He worked for private staffing firm serving the Agency as a Senior Software Developer. His compensation was paid by the staffing firm. The Agency dismissed the complaint for failure to state a claim on the grounds that Complainant was not an employee of the Agency, and failure to timely initiate EEO counseling. OFO reversed. Regarding timeliness, OFO found that based on the record it was unlikely Complainant was initially aware that the federal EEO process was available to him, let alone its time limits. Regarding failure to state a claim, OFO found that the Agency exercised sufficient control over Complainant's position to be deemed his employer. In making this finding, OFO noted that Complainant worked on Agency premises using Agency equipment, he received his assignments from Agency personnel, the Agency controlled the details of his performance, and there was evidence the staffing firm terminated Complainant after the Agency indicated it no longer wanted his services, suggesting the Agency had de facto removal authority.

(b)(7)(C) **v. Army**, 0120131103 (3/18/2014) – Complainant filed a complaint alleging that the Agency discriminated against her based on her national origin (Italian) when she was terminated. She worked for a private staffing firm serving the Agency as a Visual Information Specialist responsible for creating the visual aspect of print and audiovisual projects. Her compensation was paid by the staffing firm. The Agency dismissed the complaint for failure to state a claim on the grounds that Complainant was not an employee of the Agency. OFO reversed. It found that the Agency exercised sufficient control over Complainant's position to be deemed her employer. In making this finding, OFO found that the Agency had de facto removal authority because the staffing firm hired Complainant to serve the Agency and when it no longer wanted her services the staffing firm immediately terminated her. OFO found that de facto removal authority was an important factor in determining control over a position in a removal case. Other factors which OFO found demonstrated the Agency's control over Complainant's position included its partial or complete control over the staffing firm's decision to hire Complainant, its input into her appraisals, its assigning her work through an Agency ticketing system, and that Complainant served the Agency full time for almost three years.

(b)(7)(C) **v. DOD (TMA)**, 0120133124 (1/23/2014) – Complainant filed a complaint alleging that the Agency discriminated against her based on reprisal and age when she was subjected to a hostile work environment and was terminated. Complainant worked for private staffing firm serving the Agency as a Radiation Therapist. The Agency dismissed the complaint for failure to state a claim, reasoning Complainant was not an employee of the Agency. OFO found that there was insufficient information in the record to make a determination on whether the Agency was a common law employer of Complainant because the Agency did not gather

information on factors used to make this determination. Accordingly, OFO remanded the complaint to the Agency for it to gather information on this and make another determination on whether it was Complainant's employer. OFO advised the Agency that if Complainant's representations were accurate, the record strongly suggested it jointly employed her.

(b)(7)(C) **v. DOT (FAA)**, 0120133049 (1/28/2014) – Complainant filed a complaint alleging that the Agency discriminated against him based on his race/national origin (“not Hispanic”) and reprisal for prior protected EEO activity when he was terminated and thereafter the Agency sent a letter changing the terms of an existing letter of termination to one of “convenience.” He worked for a private staffing firm serving the Agency as a Senior Site Supervisor (Captain) doing security work. The Agency dismissed the complaint for failure to timely initiate EEO counseling, and, alternatively, for failure to state a claim, reasoning that Complainant was not an employee of the Agency. OFO reversed the Agency's dismissal regarding timeliness, reasoning that based on the record it was unlikely Complainant was initially aware that the federal EEO process was available to him, let alone its time limits. OFO found that there was insufficient information in the record to make a determination on whether the Agency was a common law employer of Complainant because the Agency did not gather any information on factors used to make this determination. Accordingly, OFO remanded the complaint to the Agency for it to gather information on this and make another determination on whether it was Complainant's employer.

(b)(7)(C) **v. Army**, 0120111865 (7/9/2014) – An 18-year old summer intern complained to the Agency that her male supervisor engaged in increasingly inappropriate conduct towards her: referring to Complainant as “his girl,” asking her “when were we getting married,” asking her to send him pictures of her in her bathing suit, and kissing her on the neck and mouth four days before the summer internship program ended. After an investigation the Agency issued a final decision, finding the supervisor to be credible in denying that any of the incidents happened as described by Complainant.

Upon review, the Commission found there was sufficient evidence to show that the supervisor engaged in unwelcome verbal and physical sexual conduct toward Complainant in that: (1) Complainant's testimony was more plausible and believable than the supervisor's; (2) Complainant's testimony was corroborated by other student interns and the Agency's director, who either saw Complainant soon after the alleged incidents or discussed the incidents with Complainant around the time that they occurred. These corroborating witnesses testified that Complainant had a visibly upset demeanor around the time or soon after the alleged incidents occurred, which suggest that Complainant was telling the truth. Moreover, the Commission found that Complainant, the student interns, and the Agency's director, did not have motives or reasons to lie.

The Commission further determined that the Agency failed to establish the second prong of the affirmative defense for supervisory harassment that does not result in a tangible employment action. The Commission found it reasonable that Complainant tried to ignore the small number of initial unwelcome verbal comments from the supervisor, hoping that the harassment would stop without resorting to the complaint process. But once the unwelcome conduct escalated to physical sexual conduct in the form of multiple kisses on Complainant's neck and mouth, she immediately reported the incidents to the relevant management official. The Commission determined that the Agency did not establish that Complainant unreasonably failed to take

advantage of any preventive or corrective opportunities provided by the Agency. Therefore, the Agency failed to establish the second prong of the affirmative defense, and was vicariously liable for the supervisor's sexual harassment.

(b)(7)(C) **v. TVA**, 0120122980 (8/13/2014) – Complainant, a Custodian, filed a complaint alleging that she was discriminated against on the basis of race/national origin (Hispanic) and sex (female) when she was harassed. The Agency dismissed the complaint for failure to state a claim, concluding that Complainant was not an agency employee, but was an independent contractor. Complainant filed an appeal and OFO upheld the Agency's dismissal of the complaint. OFO found that a majority of the factors indicated that complainant was not an employee of the agency.

(b)(7)(C) **v. VA**, 0120141104 (8/13/2014) – Complainant worked for private staffing firm serving the Agency as a Nursing Assistant. She filed a complaint alleging that she was discriminated against based on her national origin (Black American) and sex (female) when she was harassed and terminated. In setting forth her claims, OFO clarified that Complainant's complaint included her termination. The Agency dismissed the complaint for failure to state a claim, reasoning that Complainant was not an employee of the Agency. On appeal, OFO reversed because the Agency exercised sufficient control over Complainant's position to qualify as her joint employer. Specifically, Complainant was supervised and evaluated by Agency employees and had a continuing relationship with the Agency for about six months providing health care, the Agency's mission, prior to being terminated. She worked on Agency premises using Agency equipment, and was not in business for herself. After the Agency notified the private staffing firm that it wished to terminate Complainant's services because of inappropriate behavior and refusing to accept tasks given to her, the staffing firm issued Complainant a notice of termination the next day, terminating her from the staffing firm. This demonstrated that the Agency had de facto removal authority.

(b)(7)(C) **v. HHS**, 0120120991 (7/3/2014) – Complainant, a former Technology Information Specialist with the Agency, was eligible for hiring under Schedule A. He applied for multiple GS-13 positions that required "Writing/Editing" skills and was not selected for any of them. He filed a complaint alleging disability discrimination and requested a hearing. The AJ assigned to the case granted the Agency's motion for summary judgment. On appeal, OFO found that for all but two of the positions, Complainant was not referred on the non competitive certificates because he had not indicated in his application materials that he was Schedule A appointment-eligible. With regard to the two positions where he was referred on the non competitive certificate, a selection had been made for one of them a week before Complainant was referred, and with regard to the other, the Agency provided extensive reasons for selecting the selectee over Complainant, including Complainant's lack of experience in producing various written products and the selectee's demonstrated excellent experience in writing a variety of health communication products for different audiences. OFO concluded that all of the selectees had attributes that justified their selections, and Complainant's credentials were not so observably superior so as to warrant a finding of pretext.

(b)(7)(C) **v. SSA**, 0120123070 (7/2/2014) – Complainant filed an appeal from an Agency decision dismissing her complaint for failure to state a claim. Complainant worked as a

Verbatim Hearing Recorder (VHR) at the Agency's Office of Disability Adjudication and Review (ODAR). Complainant applied for and was awarded a Contract/Blanket Purchase Agreement (BPA) to be a VHR for ODAR for a period not to exceed 36 months. Complainant was informed that the BPA was canceled. Complainant filed a complaint alleging that she was discriminated against on the basis of disability when her BPA was canceled. The Agency dismissed the complaint for failure to state a claim. The agency found that Complainant was not an Agency employee, but was an independent contractor. Complainant filed an appeal and OFO upheld the Agency's dismissal of the complaint. OFO found that a majority of the factors indicated that Complainant was not an employee of the Agency.

(b)(7)(C) **v. Army**, 0120140999 (7/15/2014) – Complainant worked for private staffing firm serving the Agency as a facility space planner and alternate on-site lead. She filed a complaint alleging that she was discriminated against based on her race/color (Caucasian) when she was not interviewed about a matter which led to her removal, and was removed. The Agency dismissed the complaint for failure to state a claim, reasoning that Complainant was not harmed by not being interviewed, and was not an employee of the Agency. OFO affirmed the dismissal of the interview issue. It reversed the dismissal of the remaining issue because there was insufficient information in the record to make a determination on whether the Agency had sufficient control over Complainant's position to be ruled a joint employer. Specifically, OFO ruled that there was insufficient evidence on the Agency's right to control how Complainant performed her job. It noted that while the record contained the contract between the staffing firm and the Agency, we could not discern whether it accurately reflected what occurred in practice. Also, there was insufficient evidence on whether the Agency's decision to cut off Complainant's services played a role in the staffing firm's decision to terminate Complainant. A tantamount power to terminate is a significant control in determining joint employment in removal cases. OFO ordered the Agency to conduct a supplemental investigation and either accept the removal issue or issue a new FAD dismissing it.

(b)(7)(C) **v. Army**, 0120141451 (7/25/2014) – Complainant filed an EEO complaint alleging that he was discriminated against based on his disability, age, and reprisal for prior protected EEO activity when his (1) supervisor disclosed to the chain of command and the Agency's Security Manager medical documentation he submitted to qualify for Family and Medical Leave Act leave, secure reasonable accommodation, and return to work, and (2) his security clearance was suspended. The Agency dismissed the complaint for failure to state a claim, reasoning that Complainant's medical information was forwarded to the Agency's Security Manager in accordance with Agency regulations that require it to forward derogatory information regarding eligibility for a security clearance to the Security Manager. The Agency also found that the EEOC does not have authority to review the substance of the underlying security clearance determination. Agreeing with the Agency on its latter point, OFO affirmed the dismissal of issue 2. OFO reversed the dismissal of issue 1, however, finding that while the Agency contends that it properly disclosed Complainant's medical information, this addresses the merits of issue 1, not whether it states a claim.

### **3. ADDRESSING EMERGING AND DEVELOPING ISSUES**

### ***Decision Summaries for this Category***

(b)(7)(C) **v. SSA**, 0720110030 (11/4/2013) – In this circulated case, the Commission reversed the Agency's final order rejecting the discrimination finding by an EEOC AJ. Complainant filed an EEO complaint in which he alleged that that he was discriminated against based on disability (anxiety and attention deficit disorder) when he was subjected to a hostile work environment, denied a reasonable accommodation, and terminated from his position as a GS-11 Claims Representative. The AJ found that Complainant was a qualified individual with a disability, as he was substantially limited in his abilities to concentrate and think, but had been able to perform the essential functions of the position prior to the commencement of the harassment. The AJ also found that Complainant was subjected to a hostile work environment based on his disability when co-workers mocked his inability to quickly pick up aspects of the job and through the generally poor treatment he was accorded. She also found that the Agency failed to reasonably accommodate Complainant, and that the harassment and failure to accommodate resulted in his termination.

The Commission affirmed the AJ's findings that Complainant was an individual with a disability; that the Agency had failed to reasonably accommodate him through its failure to engage in the interactive process; and that the Agency failed to provide an effective accommodation. The Commission also affirmed the AJ's finding that determinations by the VA that Complainant was a 100-percent disabled veteran, and by SSA that Complainant was disabled, were not determinative when deciding whether Complainant was a qualified individual with a disability. The AJ's finding that Complainant was subjected to harassment which culminated in a tangible employment action was affirmed. The decision modified the AJ's award of non-pecuniary compensatory damages, raising the amount awarded to \$40,000. It also ordered the Agency to offer reinstatement of Complainant to his position and engage in the interactive process in order to determine what reasonable accommodation would be necessary, if any; provide back pay; provide training to the discriminatory officials; consider discipline; and post a notice of the findings of discrimination.

(b)(7)(C) **v. Navy**, 0120114151 (11/7/2013) – Complainant, a hearing impaired Office Automation Assistant at the National Naval Medical Center (NNMC) in Bethesda, Maryland, filed a formal complaint alleging that the Agency discriminated against her on the basis of disability when she was not provided an interpreter for two last-minute meetings, one scheduled meeting, and two training classes, and when she was not provided the name or arrival time for an interpreter for a Command Training Day Event. The Agency issued a final decision after Complainant failed to request a hearing within the required time frame. In its decision the Agency concluded that management attempted to accommodate Complainant by providing interpreters, but due to administrative errors and/or problems locating Complainant's office, interpreters were sometimes late, or they did not show up at all. Although some of management's attempts to provide an interpreter were not successful, the Agency found that Complainant had not been denied reasonable accommodation or discriminated against as alleged.

OFO reversed the Agency's final decision and concluded that Complainant had been denied reasonable accommodation when the Agency failed to provide interpreting services on three occasions, including the scheduled meeting and two training classes. OFO remanded the

complaint for an investigation into Complainant's entitlement to compensatory damages and ordered the Agency to provide training to the responsible management officials and to consider disciplinary action.

**(b)(7)(C) v. USPS**, 0120080613 (12/23/2013) – Complainant, a Mail Processing Clerk, filed an EEO complaint alleging, among other things, that the Agency discriminated against her on the basis of disability (left shoulder) when it did not provide her with a reasonable accommodation for a Sales, Services, and Distribution Associate (SSDA) position. Complainant was restricted to lifting no more than 10 pounds.

In its final decision finding that Complainant failed to prove that she was discriminated against as alleged, the Agency found that Complainant was not an individual with a disability because she failed to provide examples of how her lifting restriction affected a major life activity outside of the Agency. In addition, the Agency found that Complainant was not a qualified individual with a disability because an essential function of the position was to be able to lift objects weighing up to 70 pounds.

On appeal, the Commission reversed the Agency's final decision with respect to the SSDA position. First, the Commission found that Complainant was an individual with a disability. Specifically, the Commission determined that Complainant was substantially limited in the major life activity of lifting because she was restricted to lifting no more than 10 pounds. Second, the Commission found that Complainant was a qualified individual with a disability. Specifically, the Commission determined that the 70 pound lifting requirement imposed by the Agency was not an essential function of the position, but rather a qualification standard that the Agency established to ensure that employees could perform the essential function of collecting and distributing mail. In addition, the Commission found that there was no dispute about whether Complainant was able, in some form, to perform that essential function. Third, the Commission found that the Agency used a discriminatory qualification standard that was not job-related and consistent with business necessity. Specifically, the Commission determined that the evidence in the record did not support a finding that the Agency's 70 pound lifting requirement was carefully tailored to measure Complainant's actual ability to perform the essential function of collecting and distributing mail.

The Commission concluded that Complainant was qualified to perform the SSDA position and that the Agency, by utilizing a qualification standard that was not job-related and consistent with business necessity which screened out Complainant, had discriminated against Complainant in violation of the Rehabilitation Act. The Commission ordered the Agency to retroactively place Complainant in the position, pay Complainant front pay and back pay, undertake a supplemental investigation to determine Complainant's entitlement to compensatory damages, and post a notice of the finding of discrimination.

**(b)(7)(C) v. USPS**, 0120123374 (3/6/2014) – Complainant filed an EEO complaint alleging that she was denied reasonable accommodation and retaliated against for requesting one. Specifically, Complainant sought to be temporarily assigned from her EEO Specialist position in Ft. Worth, TX to a position in Tulsa, OK to obtain treatment for high blood pressure. At the conclusion of the investigation, she requested a hearing, and an EEOC AJ entered summary judgment in the Agency's favor. The AJ found that there was no evidence of any medical necessity requiring Complainant to seek medical attention in Tulsa and that the Agency granted Complainant leave so that she could obtain medical attention in Ft. Worth. On appeal,

OFO affirmed the AJ, concluding that although Complainant needed medical treatment, she did not need medical treatment in Oklahoma, thus undermining the nexus between the temporary transfer and her impairment. In addition, there was no evidence to support her claim of reprisal.

(b)(7)(C) **v. Army**, 0120130579 (3/20/2014) – Complainant filed an EEO complaint alleging that she was denied reasonable accommodation when the Agency refused to adjust her start time, and discriminated against on the bases of color, disability and retaliation with regard to an award and discipline. The Agency investigated the claims, and when Complainant did not request a hearing, issued a final decision finding no discrimination. On appeal, OFO found that Complainant suffered from panic attacks due to multiple phobias, including a fear of drowning, and that heavy traffic on bridges exacerbated this fear. After her office relocated, Complainant requested to be allowed to start work at 6:00 am to avoid heavy traffic on the bridge that spanned the Potomac River and over which she had to commute daily. Complainant declined to submit medical documentation to support this request, but the Agency engaged in the interactive process with her anyway and ultimately granted her the 6:00 am starting time. Due to significant distrust between Complainant and her supervisor, and given that Complainant was granted permission to report to work for a period of time where she would be unsupervised, OFO found that the Agency had a legitimate and nondiscriminatory reason for creating an accountability procedure and questioning Complainant about her failure to comply. In addition, Complainant engaged in misconduct, which she blamed on a panic attack. OFO found that the Agency was not required to excuse such misconduct if it would impose the same discipline on an employee without a disability. Finally OFO found that Complainant had been recommended for a higher award but that the recommended awards were reduced, due to budget limitations on awards for civilian employees, and she and her similarly situated co-worker received identical awards.

(b)(7)(C) **v. Treasury**, 0120123107 (3/18/2014) – Complainant filed an EEO complaint alleging that she was subjected to discrimination on the basis of disability (deaf and unclear speech) when the Agency denied her request for a videophone/wireless communication device. The Agency accepted the complaint for investigation, and upon its completion, Complainant requested a hearing before an EEOC AJ.

The AJ issued a decision without a hearing in favor of the Agency. The AJ found that Complainant failed to establish that she was denied a reasonable accommodation, reasoning that Complainant was provided with various tools by the Agency (TTY, email, instant messaging etc). The Agency issued a final order implementing the AJ's decision and Complainant appealed this matter to OFO.

The decision on appeal found that the Agency failed to submit the complete record. Based on the incomplete record, we were unable to determine if the AJ properly issued a decision without a hearing. Thus, we remanded the matter for a hearing. We further noted that several issues warranted further development at the hearing including: whether the various tools provided by the Agency constituted an effective accommodation and whether Complainant had the same privileges as her hearing colleagues, such as making personal calls in accordance with Agency policy.

(b)(7)(C) **v. DOL**, 0520130361 (3/7/2014) – In denying Complainant's request for reconsideration, we found that OFO's previous decision was correct in determining that Complainant did not establish that he was subjected to discrimination on the bases of sex (sexual orientation) or reprisal for prior protected EEO activity, when his former supervisor allegedly gave a negative and inaccurate employment reference to another Agency where his application for employment was being considered. OFO found that assuming arguendo that Complainant established his prima facie cases of discrimination, the Agency articulated legitimate, nondiscriminatory reasons for its actions, and Complainant failed to establish that those reasons were pretext for discrimination. OFO's decision therefore found that Complainant failed to meet the criteria for reconsideration.

(b)(7)(C) **v. VA**, 0520130608 (1/10/2014) – On July 27, 2012, Complainant contacted an EEO Counselor. Subsequently, Complainant filed an EEO complaint alleging that the Agency subjected her to hostile work environment harassment on the basis of sex (sexual orientation). The last event that made up part of Complainant's hostile work environment harassment claim occurred on June 11, 2012. The Agency, in its final decision, dismissed Complainant's complaint for untimely EEO Counselor contact and for failure to state a claim.

OFO, in its appellate decision, affirmed the Agency's dismissal of Complainant's complaint for untimely EEO Counselor contact, finding that Complainant did not initiate EEO Counselor contact until one day beyond the 45-day limitation period. In addition, OFO found that the following was insufficient justification for extending the 45-day limitation period: (a) Complainant's attempt to contact her union representative and Complainant's decision to follow an internal process to address her concerns; (b) Complainant's fear of reprisal; and (c) a Federal holiday fell in the middle of the time period. Finally, OFO found it unnecessary to address the Agency's dismissal for failure to state a claim because it was affirming the Agency's dismissal for untimely EEO Counselor contact.

OFO denied Complainant's request for reconsideration, finding that Complainant's request failed to meet the criteria for reconsideration because Complainant had not put forth any arguments which it did not previously consider in rendering the appellate decision.

(b)(7)(C) **v. Navy**, 0120113694 (4/25/2014) - Complainant was a Medical Records Technician at a California Agency medical center. Complainant filed an EEO complaint alleging that the Agency discriminated against her based on disability (Association with her daughter who has Myasthenia Gravis - a condition that can cause weakness and completely prevent walking at times) when the Agency (1) terminated Complainant's employment for taking time off to care for her children and (2) subjected Complainant to harassment (she alleged that the Agency counseled her several times and denied her a break). The Agency conducted an investigation, and then informed Complainant of the right to request a hearing before an EEOC AJ or an immediate final agency decision. The Agency did not receive an election from Complainant. On June 29, 2011, the Agency issued a final decision finding that Complainant failed to show the Agency discriminated against her. It stated that Complainant did not show her daughter as an individual with a disability, failed to show a comparator who was treated more favorably, and failed to allege actions that rise to the level of a hostile work environment. Complainant filed the instant appeal. The Commission affirmed the final agency decision, finding that Complainant failed to establish that the Agency treated her disparately because of her association with an individual with a disability. The Commission found that Complainant failed

to show pretext, failed to show Agency conduct that was pervasive or severe enough to affect conditions of Complainant's employment, and the Agency did not have an obligation to accommodate Complainant as individuals with a relationship or association with a person with a disability are not entitled to reasonable accommodation.

(b)(7)(C)

**v. DOI**, 0120123031 (4/23/2014) - Complainant was a Geographic Information System Specialist who developed attendance problems, including missing work on Fridays and Mondays; failed to comply with leave policy and procedures; and after ultimately exhausting all of her leave, requested advanced leave. After the Agency suspended her for failing to follow leave procedures and unauthorized absences, Complainant filed an EEO complaint alleging disability (diabetic nerve pain) discrimination when management denied her requests for advanced leave; placed her on leave restrictions; required her to submit a doctor's note for each day she was absent from work; disciplined her; and denied her reasonable accommodation. After the investigation, Complainant requested a hearing but subsequently withdrew her request, and the Agency issued a final agency decision (FAD). The FAD found that management's actions were in response to Complainant's excessive absenteeism and that despite numerous requests, she failed to submit medical documentation in support of her request for reasonable accommodation, i.e., advanced leave. On appeal, OFO agreed with the Agency that its legitimate, nondiscriminatory reasons for monitoring Complainant's leave and disciplining her for failing to comply with procedures were not pretext for discrimination. OFO further found that the Agency engaged in the interactive process with Complainant several times in attempting to gather information about her condition and what accommodations were possibly needed, and Complainant never submitted the requested documentation.

(b)(7)(C)

**v. DOJ**, 0520130125 (4/25/2014) – OFO denied the Agency's request for reconsideration. In the previous decision OFO agreed with an AJ's finding that the Agency violated the Rehabilitation Act when it placed Complainant's medical records in the Human Resources Department's adverse action files, which are not separate confidential medical files and are accessible by anyone in the Human Resources Department. The Agency raised the same contentions in its request for reconsideration that it did on appeal, and failed to meet the criteria of 29 C.F.R. § 1614.405(c). We reiterated our previous award of \$2,500 in compensatory damages, ordered the Agency to expunge all medical information concerning Complainant from non confidential medical files, ordered the Agency to take corrective, curative, or preventative action to ensure similar violations of the law will not occur, and ordered the Agency to provide training on medical confidentiality and post a notice of discrimination.

(b)(7)(C)

**v. USPS**, 0520140035 (4/15/2014) – Complainant was a full time City Carrier at an Iowa postal facility. She filed an EEO complaint alleging that the Agency discriminated against her based on sex (female – pregnancy) when, on June 3, 2010, management informed her that she had to be in full uniform when she reported to work (Complainant asserted that two other pregnant females and three male colleagues were allowed to wear comfortable clothing instead of the full uniform.) Following complaint investigation, when it did not receive a response from Complainant requesting an EEOC hearing or a final agency order, the Agency issued a final decision on March 19, 2013. The Agency found no discrimination, stating that

Complainant failed to show pretext. Complainant filed an appeal with the Commission which was docketed as (b)(7)(C) v. U.S. Postal Service, EEOC Appeal No. 0120132204. On September 10, 2013, in Appeal No. 0120132204, OFO found no discrimination. OFO affirmed the final agency decision, stating that Complainant failed to show by a preponderance of the evidence that discriminatory factors motivated the Agency's actions. Complainant filed the instant reconsideration request. The Commission denied Complainant's request, finding that Complainant was allowed to wear a promotional Agency tee up until her seventh month of pregnancy when a postmaster saw Complainant out of uniform on the workroom floor. The record indicates that males and females were allowed to be out of uniform at the postal facility when the postmaster was not present. The record also reveals that management did not make Complainant leave work, but that Complainant left work after her manager informed her of the requirement to wear the full uniform.

(b)(7)(C) v. VA, 0120133123 (4/16/2014) – Complainant asserted that he was subjected to discrimination based on sex (male) when: 1) on April 4, 2012, Complainant requested that the Shreveport Information Security Officer change his name in the facility's VISTA computer system and it took over a year to make the correction; and 2) on April 19, 2013, he was threatened and his privacy was violated when the Information Security Officer accessed his background investigation. The Agency dismissed the complaint for failure to state a claim noting that Complainant was not harmed by the delay in the name change and alleged violation of the Privacy Act.

OFO reversed the Agency's dismissal of the complaint. OFO found that Complainant alleged sex-based discrimination following his treatment for gender identity disorder and he legally changed his name from "Cynthia M. Drew" to "Cyrus Ethan Drew." As part of his job duties, Complainant needs access to the Agency's VISTA computer system and has to enter his name in order to use the system. Therefore, in April 2012, he submitted a request to the Shreveport Information Security Officer (male) to change user name to his new legal name. In October 2012, Complainant states he made a follow-up contact the Information Security Officer to again request that his name be changed in the VISTA system. Complainant alleges that during this telephone conversation, the Information Security Officer reacted with a lot of hostility, refused to change his name, and threatened to terminate Complainant's access to all Agency computer systems. Complainant also states that he learned that the Information Security Officer improperly accessed Complainant's background investigation, which contained personal information that he had no legitimate reason to know. Complainant noted that his name was listed in the Vista system, as such, when Veterans or Agency employees contacted him, he needed to explain why his name was listed as "Cynthia." The record indicated that the name change was processed over a year after the request was made. OFO determined that Complainant alleged a single claim of sex-based harassment. When viewing the cumulative effect of Complainant's allegations proffered in support of his harassment claim in the light most favorable to him, OFO determined that Complainant has stated a claim of sex discrimination actionable under Title VII. As such, the Agency's dismissal was reversed and the matter was remanded for further processing.

(b)(7)(C) v. USPS, 0120112605 (6/4/2014) – Complainant filed a formal complaint alleging that the Agency discriminated against her on the basis of sex (female-pregnancy) when: (1) on August 19, 2008, she was issued a Letter of Warning; and (2) on September 9, 2008, she was terminated from her employment. The record revealed that from July 17, 2008, to August 9,

2008, Complainant was absent five days and late for work two days for a total of more than 34.85 hours. Based on an investigation regarding Complainant's unsatisfactory attendance, a Letter of Warning was issued on August 19, 2008. On August 21, 2008, Complainant failed to call-in to inform her supervisor that she would be delayed or that she would not be reporting to work. On September 9, 2008, Complainant was issued a letter of termination because she failed to report to work on August 21, 2008, as instructed. As a transitional employee, who had not completed her term of 359 days, Complainant was not entitled to progressive discipline and could be immediately terminated.

The OFO decision upheld the findings of an AJ's summary judgment determination that, among other things, the Agency articulated legitimate, nondiscriminatory reasons for its actions namely, that Complainant had an unsatisfactory attendance record and therefore was issued a Letter of Warning, and she was terminated because she failed to come to work after being requested to do so. The OFO decision noted that Complainant failed to articulate why she believed her pregnancy was at issue. The Acting Attendance Control Supervisor indicated that he issued the Letter of Warning based solely on Complainant's attendance record and not based on her sex or pregnancy because he was not aware that she was pregnant. Further, with regard to her termination on September 19, 2008, Complainant argued that management knew that had she not been pregnant she would have come to work on August 21, 2008; however, she provided no reason why she did not call to advise her supervisor that she would be absent. The OFO decision agreed with the AJ that Complainant provided no evidence which showed that discriminatory animus was a factor in this case or that the Agency's nondiscriminatory reasons were pretext for discrimination.

(b)(7)(C) **v. USPS**, 0120120637 (5/23/2014) – For approximately five months between March and July 2010, Complainant stopped going to work and did not inform his supervisors in advance of his absences. Each time the Agency scheduled an investigation into his absences, Complainant would submit paper work from his doctors excusing his previous absences because of Complainant's mental disability. The last medical documentation that Complainant submitted to the Agency stated that Complainant was cleared to return to work on June 2, 2010. Despite numerous requests, Complainant did not provide medical documentation for his absences after June 2, 2010. On July 28, 2010, almost two months after Complainant was cleared to return to work by his physician, the Agency issued Complainant a Notice of Removal, in which he was charged with unsatisfactory attendance. In our decision, we found that the Agency was put on notice that Complainant requested leave as an accommodation for his disability, and the Agency granted him leave as an accommodation for all of his absences that his physician stated were because of his disability. We also found that Complainant's medical documentation did not support a need for leave after June 2, 2010, and as a result the Agency did not fail to reasonably accommodate him after this date. We also found that Complainant did not establish that he had been subjected to disparate treatment. The Agency articulated a legitimate, nondiscriminatory reason for issuing the Notice of Removal. Specifically, Complainant had been notified numerous times of the leave policy and that he needed to notify the Agency of his absences, and despite this, Complainant failed to notify the Agency that he would not be returning to work and he did not provide the Agency with the requested medical documentation for his absences during this time. Complainant failed to offer any evidence that the Agency's reasons were a pretext for discrimination.

(b)(7)(C) **v. VA**, 0520140135 (5/29/2014) – Complainant alleged that the Agency failed to accommodate his disability and subjected him to harassment based on that disability. The Agency accepted two claims – failure to accommodate and reassignment – but dismissed two additional claims regarding a statement by her Director and a disclosure of medical information to the Chief of Staff.

Following the investigation, Complainant requested a hearing. The AJ reinstated the medical disclosure claim. The AJ thereafter issued partial summary judgment in favor of the Agency regarding the accommodation and reassignment claims, but held a hearing on the medical disclosure claim, resulting in a decision in favor of the Agency. The Agency then issued a final order adopting the AJ's decision.

On appeal, the Commission affirmed the Agency's final order. In relevant part, the Commission found that, while summary judgment was not appropriate with regard to Complainant's accommodation claim, there was no reason to remand the claim for hearing, as the evidence established that, due to unforeseen medical complications, Complainant would not have been able to perform her duties even if the Agency had provided the requested accommodation; further, the Agency did effectively accommodate Complainant once she was able to perform her duties. The Commission further found, with regard to the medical information disclosure claim, that the Chief of Staff was aware only that Complainant had requested medical leave until Complainant herself disclosed the nature of her condition to him. Finally, the Commission found that the events cited by Complainant did not establish a claim of harassment.

On reconsideration, Complainant argued that the appellate decision contained "material misinterpretations of law" because it did not take into account that the events cited in her complaint constituted harassment. Those arguments, however, were submitted to and considered by the Commission at the appellate stage. OFO denied reconsideration.

(b)(7)(C) **v. State**, 0720110007 (6/6/2014) [**Repeated under Priority 1 above**] – Complainant, an applicant for a Foreign Service position with the Agency, was diagnosed in 1994 with Multiple Sclerosis (MS). In October 2005 she was granted a Conditional Offer of Appointment, which was contingent on her satisfactory completion of the medical, security, and suitability clearance processes. On October 31, 2006, she was issued a "Class 5 – Not Cleared for Medical Assignment Abroad Classification, because her MS rendered her not "Worldwide Available." Specifically, she had a medical condition which limited her assignment overseas. She was simultaneously advised of her right to request a waiver of the Worldwide Availability requirement, which was only rarely granted, and only if it was in the best interest of the Service. On February 14, 2007, the Agency approved Complainant's waiver request. Complainant was placed on the hiring register, and was selected for a position on July 15, 2008.

Complainant contacted an EEO Counselor on November 21, 2006, and then moved to covert her individual complaint to a class complaint on August 21, 2008. Complainant alleged that the Agency's "Worldwide Available" policy both disparately treats and disparately impacts people with disabilities. She further alleged that the policy denies applicants individualized assessment required as part of a direct threat analysis, and also denies reasonable accommodation to qualified individuals with disabilities.

The AJ granted class certification and the Agency appealed. In its appellate decision, the Commission found the class agent was a qualified individual with a disability, as during periods

of her life, she was substantially limited in the major life activity of walking. The Commission redefined the class to account for those who were ultimately hired by stating that the class should include, “[a]ll otherwise qualified applicants to the Foreign Service who were denied employment, or whose employment was delayed pending application for and receipt of a waiver, because the State Department deemed them not “world-wide available” due to their disability.

The Commission found that the class met the requirement for certification. The Commission found that the Agency has a centralized policy and practice which allegedly denies the benefits of employment within the Foreign Service to those with disabilities, without regard to accommodation, and without any individualized assessment into the individual’s specific condition. The Commission found this policy also allegedly has a disparate impact on individuals with disabilities, and is based on stereotypical notions of people with disabilities. The Commission found that the requirement of typicality was also met, even though some class members were granted waivers and some were not because the policy at issue was the initial, centralized “worldwide availability” policy, not the waiver policies of each individual agency. The Commission also found that the requirements of numerosity and adequacy of representation were met. The Commission remanded the matter to an AJ for a hearing, and to address the class agents request to add a new class agent.

(b)(7)(C) **v. USPS**, 05-2014-0189 (6/26/2014) – Complainant filed a request for reconsideration of a previous Commission decision. The previous Commission decision affirmed the Agency’s final decision, fully adopting the decision of an EEOC AJ, that Complainant was not subjected to disparate treatment discrimination because of race, national origin, sex, color, disability, age and denied a reasonable accommodation. Complainant was in a limited duty assignment due to a work related injury. The Agency removed her from this position because it was undergoing a cost reduction measure, which required that employees perform only operationally necessary work. The Agency determined that there was no operationally necessary work that Complainant could perform within her medical restrictions, and Complainant was sent home while the Agency located work for the Complainant to perform. The Agency argued that Complainant could not identify a vacant funded position she could occupy, and further, failed to engage in the interactive process since she did not contact the District Reasonable Accommodation Committee (DRAC).

In the previous decision, the Commission affirmed the Agency’s decision to implement the AJ’s finding of no discrimination. In support of her request for reconsideration, Complainant urged that there were available positions, and that she should not have been removed from her position while the Agency accommodated other individuals in the limited duty unit she previously worked. However, there was no indication that the Commission’s previous decision involved a clearly erroneous interpretation of material fact or law or that the decision would have a substantial impact on the policies, practices, or operations of the agency. Therefore, Complainant’s request for reconsideration of the previous decision was denied.

(b)(7)(C) **v. SSA**, 0720130013 (8/14/2014) – Complainant, a Service Representative with the Agency in Atlanta, Georgia filed an EEO complaint alleging that the Agency subjected him to disability discrimination, reprisal for prior EEO activity, and harassment when: (1) he was placed on administrative leave; (2) his picture was posted in the lobby for approximately three months; (3) his supervisor spoke to him in an aggressive, intimidating and humiliating manner;

(4) he was denied representation in a Weingarten meeting; and (5) he was denied a copy of the meeting notes. Additionally, Complainant alleged that the Agency discriminated against him on the basis of reprisal for prior EEO activity when: (6) he was instructed to direct all work-related questions to his supervisor, (7) he was suspended for two days, and (8) he was denied reassignment as a reasonable accommodation.

After a four day hearing was held, the EEOC AJ issued a decision finding that Complainant proved that the Agency subjected him to discrimination on the basis of reprisal with respect to claims 6 and 7. Additionally, the AJ found that Complainant presented sufficient evidence to establish that he was subjected to disability discrimination when he was denied a reasonable accommodation for his symptoms related to post traumatic stress disorder. In so finding the AJ also determined that while making a determination on Complainant's reasonable accommodation request, the Agency committed a per se violation of the Rehabilitation Act by failing to adequately safeguard Complainant's medical records. The AJ's decision found that Complainant failed to present sufficient evidence to satisfy his burden of proof that the Agency subjected him to disability discrimination, reprisal for prior EEO activity, and harassment on claims 1 through 5.

The AJ ordered the Agency to pay \$60,000 in compensatory damages, and \$409.48 in back pay; rescind the directive regarding work-related inquiries; remove the two-day suspension from all official files; transfer Complainant to a position in accordance with the accommodation request; segregate all confidential medical records and files, and restrict access to such records; administer training to responsible management officials; and consider taking disciplinary action against the responsible management officials. The Agency subsequently issued a final order rejecting the AJ's decision, and filed an appeal with the Commission.

The Commission found substantial evidence in the record supported the AJ's findings. On appeal, the Agency also contested the compensatory damages award amount. The Commission determined that the AJ's award of non-pecuniary compensatory damages in the amount of \$60,000 was in line with Commission precedent. The Commission reversed the Agency's final order, and remanded the case back to the Agency to take corrective action in accordance with the AJ's order.

(b)(7)(C) **v. DHS**, 0320110053 (7/10/2014) – Petitioner was a Customs and Border Protection Officer who had sleep apnea. Because of his sleep apnea, he requested to modify his work schedule so he would not have to work the midnight “graveyard” shift.

The Agency found that he was an individual with a disability under the ADAAA, whose sleep apnea substantially limited him in the major life activity of sleeping. But the Agency found that he was not qualified for his current position because he could not perform the “essential functions” of rotating his shifts and performing “substantial” amount of overtime. Therefore, he was not entitled the accommodation of a modified work schedule. The Agency tried to find a vacant-funded position to reassign him, but did not find one. So it removed him.

Petitioner filed a mixed case appeal to the Merits Systems Protection Board (MSPB). The MSPB agreed with the Agency's reasoning and decision. Upon review, the Commission differed with the MSPB's final order. The Commission reemphasized a point made in its Reasonable Accommodation Enforcement Guidance: there is a difference between essential functions, and the time at which essential functions must be performed. Job functions are the duties that a person must perform or the outcomes that must be achieved by the person in the

job. In contrast, attendance and timing are methods by which a person accomplishes the essential functions of a job.

This does not mean that attendance and timing are irrelevant or unimportant considerations. To the contrary, they can be crucial factors in determining whether a request for accommodation imposes an undue hardship on the finances or operations of an agency. The Commission found that Complainant could perform the essential functions of a Customs and Border Protection Officer when he was at work. Therefore, the Commission concluded that Petitioner was a qualified individual with a disability.

Next, the Commission found that allowing Petitioner, as one of 700 officers at the facility, to work between 6:00 am and midnight would not cause undue hardship. The Commission noted that the Agency had previously allowed Petitioner to modify his work schedule without significantly disrupting the facility's operations, and exempted female officers who were pregnant or breastfeeding from working the graveyard shift for up to two years. Therefore, the Commission concluded that the Agency erred in denying Petitioner a reasonable accommodation and removing him.

(b)(7)(C) **v. Education**, 0720130002 (8/27/2014) – Complainant is a deaf individual who submitted applications for an Equal Employment Opportunity Specialist position in the Agency's EEO Services Office. The position was posted under two separate announcements: (1) for all U.S. citizens (which required scoring by the Delegated Examining Unit) and (2) for current and former federal employees, and those eligible for non-competitive appointments (which did not require scoring). Complainant applied under both announcements. Under the first announcement, Complainant was one of the three highest scoring applications, but only the Selectee was interviewed. Under the other announcement, Complainant was included on the Schedule A Appointment certificate, but again not chosen to be interviewed.

Believing that he was subjected to discrimination, Complainant filed a formal complaint regarding his non-selection. Further, he alleged that he was denied a reasonable accommodation when the Agency failed to provide him with a telephonic device and a non-competitive appointment to the position through the Schedule A hiring authority.

The AJ found that the Agency provided a legitimate non-discriminatory reason for the non-selection: namely, that the Selectee had the necessary "hands-on" experience with EEO counseling, while Complainant's resume did not reflect any counseling experience. Complainant did not establish pretext. With respect to Complainant's claim that he was denied a reasonable accommodation, the AJ concluded that there was no evidence that he ever requested the telephonic device or that it was necessary during the selection process. As for Complainant's belief that the Agency should have hired him through Schedule A, the AJ found that Agency's are encouraged but not required to do so.

After reviewing the ROI, however, the AJ chose to add a second claim: whether the Agency engaged in a pre-job offer disability-related inquiry in violation of the Rehabilitation Act. The record reveals that all applicants, including Complainant, were asked:

Do you have a physical or mental impairment that limits one or more major life activities AND has been certified by the State Department of Vocational Services rendering you eligible for the Federal Employment Program for Persons with Disabilities?

The AJ found that the Agency failed to advise candidates that their answers were voluntary and confidential. While the Agency argued that it should not be held liable because the question was part of the USAJOBS federal employment application website, administered by OPM, the AJ was not persuaded. Instead, she found that the Agency knew or should have known that the question was being asked and failed to take corrective action. Agency officials reviewing the applications had a duty to know what questions and information was being sought from candidates.

The AJ found that the Agency was liable for emotional injuries stemming from Complainant's belief that he was not selected because of his response to the disability-related question. Complainant believed that the question was asked in order to screen out individuals with disabilities. The AJ found that Complainant's reasonable (though erroneous) belief that the inquiry led to his non-selection resulted in pain and suffering that was attributable to the unlawful question. OFO upheld the AJ's award of \$5,000 in non-pecuniary compensatory damages.

#### **4. ENFORCING EQUAL PAY LAWS**

##### ***Decision Summaries for this Category***

(b)(7)(C) **v. Navy**, 0120113489 (1/30/2014) – In Mid 2009, the Agency was converting employees into the National Security Personnel System (NSPS). Under the NSPS, an employee could only be promoted when she moved to a higher pay band. However, the NSPS allowed for a discretionary pay increase of 0-5% in conjunction with a reassignment. On July 19, 2009, Complainant accepted a reassignment to a Supervisory Contract Specialist position, and she received a 2% salary increase. Complainant filed an EEO complaint alleging race and sex discrimination with regard to the pay increase as well as having not been compensated for supervising employees for a three year period. After the investigation, Complainant requested and was granted a hearing. The AJ found that Complainant did not have supervisory duties until her July 19, 2009 reassignment. With regard to the pay increase, the AJ noted that two male employees had received 5% salary increases upon their reassignment. However, the AJ found that both individuals had assumed positions with vastly greater responsibilities than Complainant had assumed, as well as having significantly greater experience in their fields. The AJ found no discrimination. On appeal, OFO determined that the AJ's findings of fact were supported by substantial evidence and that the difference in pay increases was attributable to a factor other than sex, i.e., superior qualifications and complexity of work, sufficient to justify the salary differential between Complainant and the comparators.

(b)(7)(C) **v. Navy**, 0120112369 (4/11/2014) – Complainant, a Transition Assistance Management Program Manager, alleged that the Agency discriminated against him on the bases of race, sex, disability and reprisal. The complaint consisted of numerous claims and sub-claims, including an Equal Pay Act claim and a claim of a hostile work environment. After investigation, Complainant requested a hearing. The EEOC AJ granted summary judgment after dismissing some of the claims on procedural grounds. The AJ ultimately concluded that the Agency neither engaged in prohibited discrimination nor violated the Equal Pay Act. Complainant appealed. OFO affirmed the Agency's decision finding no discrimination.

Specifically regarding the EPA claim, Complainant contended on appeal that he performed work substantially equal to work performed by female GS-12s but was paid at the GS-11 grade level. OFO concluded that Complainant failed to establish a prima facie case of discrimination under the EPA because he failed to identify any female performing the same work as he was but receiving pay at a higher grade.

(b)(7)(C) **v. PBGC**, 0120132869 & 0120140772 (6/12/2014) – Complainant worked for the Agency as a Management Analyst. In 2013, she filed Complaints 1 and 2 alleging discrimination based on her race, sex, color, age, and reprisal for EEO activity when she performed substantially the same duties and work, requiring equal skill and effort, but was paid less than male and female employees. In 2012 and 2013, prior to filing her complaints, Complainant filed Grievances 1 and 2. The Agency dismissed Grievance 1 for being untimely filed. It denied Grievance 2 both for being untimely filed and on the merits. Complainant's Union invoked arbitration on Grievance 2, and the parties did not update OFO on its status. OFO affirmed the Agency's dismissal of Complaint 2 on the grounds that it was identical to Complaint 1. The Agency dismissed Complaint 1 on the grounds that Complainant elected to file grievances on the same matter. OFO found that Complaint 1 covered the same matters as Grievances 1 and 2. But, citing a Commission case, it agreed with Complainant's argument that she did not make an election with respect to Grievance 1 because it was untimely filed. It disagreed with this argument regarding Grievance 2 because the Agency made a determination on the merits thereof, effectively waiving its finding of untimeliness. OFO, citing cases, found that the Agency was covered by 5 U.S.C. § 7121(d), and hence the grievance/complaint election regulation applied to Complainant. OFO disagreed with Complainant's argument that the Agency's dismissal of her pay claim should be reversed because it was a position classification matter, and hence not within the scope of negotiated grievance procedures. OFO noted that Grievance 2 may still be in arbitration, and a decision maker could find the pay claim was within the scope of grievance procedures if it was regarded a temporary promotion. OFO advised that if the arbitrator on Grievance 2 or another decision making official declines to make a determination on the merits of the pay matter on the grounds that Grievance 2 was untimely filed, or finds that the negotiated grievance procedure does not have jurisdiction over the pay matter because it involves the classification of a position, the Agency must resume the processing of Complaint 1 from the point processing ceased. OFO affirmed the dismissal of Complainant's complaints.

(b)(7)(C) **v. Navy**, 0120130637 (6/20/2014) – Complainant (female), already an Agency employee, was hired as an Illustrator under the NSPS pay system, and was placed in Pay Band YA-2. The pay band covered three progression ranges, lowest to highest: Investment, Intellectual Capital, and Critical Asset. Placement in a particular range depended on one's prior direct work experience. When hired, Complainant had seven years of work experience, sufficient to be placed in the Intellectual Capital range. Further, Complainant's existing salary at the Agency was within that pay range. Subsequently, the Agency recruited another Illustrator, Coworker (male), who had ten years of work experience at a different agency, sufficient to be placed in the Critical Asset range. Further, Coworker was earning a salary in that pay range when he was hired by the Agency. When Complainant learned that Coworker was being paid in a higher range for performing the same work she was doing, she filed a complaint alleging violations of the EPA and Title VII.

The complaint was investigated, after which Complainant requested a hearing. Following the hearing, the AJ issued a decision in favor of the Agency. The AJ found that the Agency had met its burden to proffer a legitimate, non discriminatory explanation for the pay differential, which Complainant had not shown to be pretext for discrimination, and that the pay differential was based on a factor other than sex, i.e., the NSPS pay system, which dictated how much employees could be paid based on their prior direct work experience. OFO affirmed the Agency's final order implementing the AJ's decision, finding that the AJ's decision was legally sound and supported by substantial evidence of record.

(b)(7)(C) **v. HHS**, 0120122134 (9/24/2014) – Complainant alleged that the Agency discriminated against her on the basis of sex (female) when in early 2010 she learned that she was receiving less pay than a similarly situated male employee. In the Equal Pay Act (EPA) analysis, we found that Complainant established a prima facie case of discrimination under the EPA, however the Agency asserted that the pay differential was based on a factor other than sex. Specifically, the male coworker was able to negotiate a higher starting salary because his resume listed more than two years of relevant work experience between the time he graduated and when he applied for the position, so he was able to start at a GS-12 step 10. In contrast, Complainant's resume and application did not list any relevant work experience after she graduated, which was reflected in her starting grade of GS-9 step 10. Even though Complainant worked for the Agency longer, the pay determination was made at the time of each employee's time of hire, and the male coworker had more experience than Complainant did at their respective times of her hire. As a result, we found that the Agency has established that the pay differential was based on a factor other than sex. We also found that Complainant did not establish that the Agency's legitimate, nondiscriminatory reasons were a pretext for disparate treatment discrimination.

(b)(7)(C) **v. Navy**, 0120122462 (9/11/14) – Complainant alleged that she was discriminated against on the basis of sex, age, and reprisal for prior protected EEO activity with regard to the assignment of duties and equal pay for work performed in comparison to other similarly situated employees outside her protected class. We affirmed an AJ's issuance of a decision without a hearing. We found that Complainant did not establish a prima facie case of an Equal Pay Act violation because Complainant did not perform equal work requiring equal skill, effort and responsibility compared to the comparator employees. We also found that Complainant failed to establish a prima facie case of sex or age disparate treatment, because she did not establish that any similarly situated employees outside of her protected groups were treated differently than she was treated. Finally, we found that Complainant failed to establish a prima facie case of reprisal disparate treatment because Complainant did not establish that she engaged in a protected EEO activity.

## **5. PRESERVING ACCESS TO THE LEGAL SYSTEM**

### ***Decision Summaries for this Category***

(b)(7)(C)

**v. DOI**, 0720120037 (10/31/2013) – Complainant alleged the Agency discriminated against her on the bases of race (Native American), national origin (Santee Sioux), sex (female), and reprisal when she was not selected for the position of GS-13 Supervisory Highway Engineer for the Agency's Great Plains Region, Division of Transportation located in Aberdeen, South Dakota. Complainant had previously been employed by the Agency and had named the selecting official (SO) in the instant complaint as a responsible management official for her prior EEO case. The SO changed the position description such that the vacancy announcement for the first time required that the successful candidate possess a Professional Engineer (PE) certificate. "Indian Preference" was also applicable to the vacancy announcement. The Agency was aware that Complainant was a Native American candidate who did not possess a PE certificate. Complainant was subsequently rated as non-qualified for the position because she did not meet the PE certificate requirement. The Agency selected a non-Native American, male employee with no prior EEO activity.

After a hearing, an EEOC AJ found that Complainant established that the Agency's non-discriminatory reasons for her non-selection were pretext to mask retaliatory animus. The AJ noted that the SO unilaterally changed the PD, knowing that Complainant would apply. The AJ awarded Complainant \$25,000 in non-pecuniary compensatory damages. The Agency subsequently issued a final order rejecting the AJ's decision. The Agency appealed and Complainant filed a cross appeal. On appeal OFO found that the AJ's finding that Complainant was not selected due to her prior protected EEO activity was supported by substantial evidence in the record. We also found that the AJ's award of \$25,000 in non-pecuniary compensatory damages adequately compensated complainant.

(b)(7)(C)

**v. DOD**, 0120132212 (11/08/2013) – Complainant filed a formal complaint alleging that the Agency discriminated against her on the bases of national origin (American), sex (female), age (73), and reprisal for prior protected EEO activity when the District Superintendent (DS) made discriminatory comments. The DS stated in a discussion regarding administrator responsibilities for supervisors, that, "EEOs are crap. Here's what happens. They won't win because there's nothing to support it. They'll drop it because they don't have evidence and don't want to spend money for a lawyer. Senior citizens are afraid to retire, economically afraid. EEO people are crazy people. Don't be afraid of EEO's. They'll go away."

In a decision without a hearing, an EEOC AJ determined that Complainant failed to demonstrate that she was subjected to discrimination. The AJ found that the DS's comments were broad statements made to assure managers that they could take disciplinary action, and her comments regarding the EEO process, were made not to discourage potential complaints but were used to empower managers to take action without fear of an EEO complaint.

OFO found that the AJ erred in finding that Complainant failed to establish that she was subject to unlawful retaliation. OFO noted that comments that, on their face, discourage an employee from participating in the EEO process violate the letter and spirit of EEOC regulations and evidence a per se violation of the law. We further noted that agencies have a continuing duty to promote the full realization of equal employment opportunity in their policies and practices, and that this duty extends to every aspect of agency personnel policy and practice in the employment, development, advancement, and treatment of employees. In the instant case, we found that the logical interpretation of DS's comments is that a

manager should not be afraid of an EEO complaint filed by an employee, and that, he or she, can feel free to take whatever action they want because any allegation of discrimination will simply “go away” having not been proven because the complainant will not have the evidence or resources to proceed. OFO found that DS’s statements were reasonably likely to deter Complainant or any of the other managers from engaging in the EEO process.

The Commission ordered a supplemental investigation regarding Complainant’s entitlement to compensatory damages. DS was ordered to attend eight (8) hours of EEO training. The training was to address management responsibilities with respect to eliminating discrimination in the Federal workplace with a special focus on the anti-retaliation provisions of the law. The Agency was also ordered to consider taking disciplinary action against DS.

(b)(7)(C)

**v. USPS**, 0120132532 (11/19/2013) – Complainant appealed from an EEOC AJ’s decision dismissing the complaint pursuant to 29 C.F.R. § 1614.107(a)(9), for abuse of process. In support of the decision to dismiss the matter, the AJ noted that Complainant had filed 14 EEO complaints – two of which went to hearing and a third pending before another AJ; that in those complaints Complainant failed to establish a prima facie case for her claims of discrimination; that Complainant’s arguments focused on the Agency’s failure to comply with the Collective Bargaining Agreement; and that Complainant raised the same claims with the Union in a grievance. The AJ also pointed to Complainant’s statement during the Agency’s investigation that she believed she was subjected to discrimination on the bases of age and sex. She had stated that, “[b]ecause I am an older experienced woman, management was not concerned about my safety or the fact that I was afraid.”

On appeal OFO reversed the dismissal of the complaint for abuse of process. The appellate decision first noted that Complainant filed her 14 EEO complaints over a 17-year period. Further, the decision found no evidence suggesting that these complaints were frivolous, and instead, noted that one of the complaints resulted in a finding in Complainant’s favor by the Commission. As to the AJ’s finding that Complainant also filed grievances on the same matters, OFO noted that, as an employee of the Postal Service, Complainant is permitted to file both a union grievance and an EEO complaint on the same matter. As such, OFO found Complainant was merely exercising her legal rights by filing both a grievance and the instant EEO complaint. Finally, the decision on appeal found that the Agency failed to provide any evidence that her complaints were designed to frustrate the Agency’s in-house administrative processes or to overburden the EEO complaint system. Accordingly, the decision held that the AJ erred in dismissing the instant complaint pursuant to 29 C.F.R. § 1614.107(a)(9) for abuse of process.

(b)(7)(C)

**v. DOJ (FBI)**, 0120123111 (03/27/2014) – Complainant asserted that he was subjected to discrimination based on sex (male), age, and reprisal. Following the investigation, Complainant requested a final decision by the Agency, which concluded that Complainant failed to establish that the Agency’s actions constituted discrimination. This appeal followed.

On appeal, OFO found that management held a meeting with all members of the squad. During the meeting, the Special Agent in Charge (SAC) began with a profanity laced language and discussed the problems within the squad and threatened that if the problems continued, he would shut down it down. The SAC mentioned, among other things, that EEO complaints had been filed and that he wanted to work out issues within the squad before

going outside. OFO determined that the comments at the meeting constituted per se unlawful retaliation. The SAC threatened and subsequently carried out the threat to disband the squad. OFO found that the SAC's comments had a chilling effect, and would clearly deter employees from exercising their rights.

OFO then determined that Complainant established that unlawful retaliation was the motivation for Complainant's Agency vehicle being taken from him. OFO found that Complainant established a prima facie case of unlawful retaliation and that the Agency's Assistant Special Agent in Charge (ASAC) provided legitimate, nondiscriminatory reason for his action. However, OFO held that Complainant established that the ASAC's reason was pretext for discrimination. The record indicated that ASAC provided reasons for his actions which were inconsistent to other evidence in the record. Further, others testified that the action was purely "vindictive" and Complainant was returned the vehicle upon inquiries by other management officials. Therefore, OFO concluded that Complainant was subjected to unlawful retaliation. The appellate decision ordered the Agency to conduct an investigation into Complainant's entitlement to compensatory damages, conduct training (with a focus on retaliation) to the responsible management officials, and consider disciplinary actions.

(b)(7)(C) **v. USDA**, 0520130611 (1/30/2014) – The Agency requested reconsideration of Appeal No. 0120113021, which vacated and remanded a FAD finding that the Complainant had not established that the Agency discriminated against him on the basis of disability (failure to accommodate). Complainant argued on appeal that he had never been provided with a copy of the Report of Investigation (ROI) or notice of his right to request a hearing. The Agency asserted that he had been, but adduced no proof in support of its assertion. The Agency for the first time on RTR produced the certified-mail return-receipt that it contended proved Complainant's receipt of the ROI and notice. OFO denied the Agency's request, noting that the Agency had possession of the return-receipt at the time of the appeal, but failed to provide the return-receipt to the Commission as part of the complete record. OFO noted that mere reference in the FAD to the date of receipt is insufficient to establish that a complainant has actually received the document in question.

(b)(7)(C) **v. DOD (DIA)**, 0120084008 (6/6/2014) [**Repeated under Priority 6 below**] – After Complainant, the sole EEO Specialist at Redstone Arsenal, notified a Director that some items a coworker had posted on the Agency's intranet were disparaging to Native Americans, and advocated that the Christmas Social be renamed the Holiday Social to be more inclusive, the coworker began harassing Complainant by posting hand-drawn cartoons mocking "Ms. Edna Ethel O'Doofus" (Ms. E.E.O'Doofus), and which contained a number of sexual references which pertained to Complainant. Complainant's subsequent EEO complaint was settled, the coworker was disciplined, and the intranet writings were removed from the network. After a year-long sabbatical, Complainant returned to the Agency as an Intelligence Analyst, with no EEO-related duties.

A few years later, during an EEO training class, the coworker publicized his personal website to the attendees. When they, and other employees not in attendance, visited the website, they discovered the same offensive cartoon and other writings that previously had been removed from the intranet. Complainant notified management, but it took at least two months for the Agency to block access to the coworker's website from the Agency's network. Complainant again filed an EEO complaint on this matter.

The hearing and discovery process was contentious. When the AJ indicated that he was going to issue summary judgment in favor of the Agency, Complainant withdrew her hearing request and asked for a FAD on the record. The Agency took 11 months to issue the FAD, finding that complainant had not been subjected to sexual harassment, that the cartoons were not sexual in nature, nor did they depict Complainant, and that she had not established that the harassment was based on reprisal for her EEO activities.

On appeal, we found the Agency liable for harassment based on sex and reprisal, because it failed to take immediate and appropriate remedial measures when it took over two months to block the website from work computers. We also found that the Agency denied Complainant reasonable official time to process her complaint, as it had informed her that the Agency had a limit of 15 hours for processing EEO complaints. We further found that the Agency's Office of General Counsel had "acted with gross impropriety" in this case when it impermissibly interfered with the development of the record by interviewing the witnesses before the EEO investigator, appeared to represent the employee responsible for harassing Complainant, and threatened to cancel Complainant's pre-approved annual leave in order to schedule her deposition.

We granted Complainant's motion for sanctions, noting that the Agency took 11 months to issue a FAD after the AJ remanded the case, failed to properly conduct the EEO counseling stage, and did not comply with the "spirit or the letter" of the 29 CFR Part 1614 regulations. Its OGC also evidenced "contempt and disrespect for the EEO process." As a sanction, the EEO Office and OGC personnel were ordered to undergo four hours of training on their responsibilities concerning EEO processing and the appropriate role of an OGC in the EEO process.

(b)(7)(C) **v. State**, 0120132236 (May. 16, 2014) [**Repeated under Priority 6 below**] –

Complainant was a contractor, who worked at the Agency's Foreign Service Institute as an Arabic Language and Culture Instructor. She filed an EEO complaint, alleging that (1) a male Arabic Language Training Supervisor sexually harassed her, and (2) similarly situated language instructors of other national origins were given more opportunities for trainings and text examinations, which in turn affected her performance evaluations and ultimately diminished the likelihood of contract renewal. The Agency issued a final decision, finding no discrimination.

Upon review, the Commission found that the Agency improperly defined and fragmented the claims regarding trainings and text examinations. The seemingly different incidents were in reality part of the same claim: management's unlawful discriminatory failure to advance Complainant's career and contract renewal. The Commission found the record was missing comparative evidence showing the extent to which other similarly situated language instructors attended training and tested examinations, and an explanation for how such a disparity may negatively affect the Agency's evaluation of an instructor's performance and chances of contract renewal.

The Commission also found the record to be insufficiently developed to determine if the supervisor sexually harassed Complainant. The record was missing detailed sworn testimony from Complainant and the alleged harasser; evidence that other employees were sexually harassed by the same person; testimony from persons who observed Complainant's demeanor immediately after an alleged incident of harassment, as well as persons with whom she discussed the incident. Furthermore, the investigation failed to

question these people about noticing changes in Complainant's behavior at work or in the alleged harasser's treatment of Complainant.

Finally, the Commission noted that Complainant appeared to have two complaints of discrimination that may be related. Complainant had filed another EEO complaint when the Agency did not renew her contract or select her for a full time teaching position. She alleged that those actions were discriminatory, and that her coworkers subjected her to hostile work environment based on her conversion to Christianity. The Commission vacated the Agency's final decision; remanded the complaint; and ordered the Agency to conduct a supplemental investigation and consolidate the two complaints, if the Agency was still processing the other complaint and had not yet issued a final decision.

(b)(7)(C) **v. Treasury**, 0720140033 (7/30/2014) [**Repeated under Priority #1 above**]- After Complainant's interview for a Revenue Officer position, the Agency collected the notes Complainant was given to formulate answers about hypothetical scenarios, and destroyed them. The Agency did not select her for the job. After a hearing, an EEOC AJ determined that the Agency violated the recordkeeping regulations when the Agency's interviewers destroyed Complainant's interview notes, but declined to draw an adverse inference against the Agency as a sanction because other evidence presented at the hearing, particularly the testimony, notes, and summary narratives of the interviewers, were sufficient to show that Complainant was not selected for non-discriminatory reasons.

Upon review, the Commission found that the Agency violated the ADEA's recordkeeping requirements. Because the interviewees' notes were written records of past events that were at issue in this nonselection case, and because the interviewees' notes were within the Agency's control, the Commission concluded that the notes constituted "records pertaining to the failure or refusal to hire" under the ADEA's recordkeeping requirements, which the Agency failed to preserve.

However, the Commission determined that the AJ did not abuse his discretion in declining to draw and adverse inference as a sanction, and instead ordering the Agency to communicate with and train all of its managers and supervisors, who participate in selections, to retain all interview notes.

## **6. PREVENTING HARASSMENT THROUGH SYSTEMIC ENFORCEMENT AND TARGETED OUTREACH**

(b)(7)(C) **v. USPS**, 0120132144 (11/01/2013) – Complainant, a Mail Processing Clerk at the Agency's Post Office facility in Dothan, Alabama, alleged that he was subjected to harassment on the basis of race (African-American) when, on various dates, Caucasian employees wore T-shirts with the Confederate flag on them and management took no action. The appellate decision reversed an EEOC AJ's decision finding that although Complainant established that he was subjected to discriminatory harassment because of his race, the Agency should not be held liable for the harassment because management took prompt and effective action to end the harassment once informed of the issue.

In finding that the AJ erred, OFO's decision noted that management failed to take any action to prohibit the wearing or displaying of the Confederate flag when it first was notified of the concern in March 2011. While the AJ identified as a corrective step a stand-up talk management convened to discuss work attire, the evidence clearly established that clothing

with Confederate symbols was not specifically discussed at this talk. Further, the Postmaster expressly conceded that employees were never instructed not to wear or display images of the Confederate flag. Moreover, the evidence shows that the Postmaster, in fact, condoned the wearing of the shirts in mid-April 2011. Based on this evidence, the appellate decision concluded that the Agency failed to meet its burden of establishing its affirmative defense against liability in this matter. As such, OFO found that Complainant has established that he was subjected to unlawful harassment based on race and the Agency is liable for the harassment. OFO's decision ordered consideration of compensatory damages, as well as training and consideration of disciplinary action.

(b)(7)(C) **v. DOD (DIA)**, 0120084008 (6/6/2014) **[Repeated under Priority #5 above]** – After Complainant, the sole EEO Specialist at Redstone Arsenal, notified a Director that some items a coworker had posted on the Agency's intranet were disparaging to Native Americans, and advocated that the Christmas Social be renamed the Holiday Social to be more inclusive, the coworker began harassing Complainant by posting hand-drawn cartoons mocking "Ms. Edna Ethel O'Doofus" (Ms. E.E.O'Doofus), and which contained a number of sexual references which pertained to Complainant. Complainant's subsequent EEO complaint was settled, the coworker was disciplined, and the intranet writings were removed from the network. After a year-long sabbatical, Complainant returned to the Agency as an Intelligence Analyst, with no EEO-related duties.

A few years later, during an EEO training class, the coworker publicized his personal website to the attendees. When they, and other employees not in attendance, visited the website, they discovered the same offensive cartoon and other writings that previously had been removed from the intranet. Complainant notified management, but it took at least two months for the Agency to block access to the coworker's website from the Agency's network. Complainant again filed an EEO complaint on this matter.

The hearing and discovery process was contentious. When the AJ indicated that he was going to issue summary judgment in favor of the Agency, Complainant withdrew her hearing request and asked for a FAD on the record. The Agency took 11 months to issue the FAD, finding that complainant had not been subjected to sexual harassment, that the cartoons were not sexual in nature, nor did they depict Complainant, and that she had not established that the harassment was based on reprisal for her EEO activities.

On appeal, we found the Agency liable for harassment based on sex and reprisal, because it failed to take immediate and appropriate remedial measures when it took over two months to block the website from work computers. We also found that the Agency denied Complainant reasonable official time to process her complaint, as it had informed her that the Agency had a limit of 15 hours for processing EEO complaints. We further found that the Agency's Office of General Counsel had "acted with gross impropriety" in this case when it impermissibly interfered with the development of the record by interviewing the witnesses before the EEO investigator, appeared to represent the employee responsible for harassing Complainant, and threatened to cancel Complainant's pre-approved annual leave in order to schedule her deposition.

We granted Complainant's motion for sanctions, noting that the Agency took 11 months to issue a FAD after the AJ remanded the case, failed to properly conduct the EEO counseling stage, and did not comply with the "spirit or the letter" of the 29 CFR Part 1614 regulations. Its OGC also evidenced "contempt and disrespect for the EEO process." As a sanction, the

EEO Office and OGC personnel were ordered to undergo four hours of training on their responsibilities concerning EEO processing and the appropriate role of an OGC in the EEO process.

(b)(7)(C) **v. State**, 0120132236 (May. 16, 2014) **[Repeated under Priority 5 above]**–

Complainant was a contractor, who worked at the Agency's Foreign Service Institute as an Arabic Language and Culture Instructor. She filed an EEO complaint, alleging that (1) a male Arabic Language Training Supervisor sexually harassed her, and (2) similarly situated language instructors of other national origins were given more opportunities for trainings and text examinations, which in turn affected her performance evaluations and ultimately diminished the likelihood of contract renewal. The Agency issued a final decision, finding no discrimination.

Upon review, the Commission found that the Agency improperly defined and fragmented the claims regarding trainings and text examinations. The seemingly different incidents were in reality part of the same claim: management's unlawful discriminatory failure to advance Complainant's career and contract renewal. The Commission found the record was missing comparative evidence showing the extent to which other similarly situated language instructors attended training and tested examinations, and an explanation for how such a disparity may negatively affect the Agency's evaluation of an instructor's performance and chances of contract renewal.

The Commission also found the record to be insufficiently developed to determine if the supervisor sexually harassed Complainant. The record was missing detailed sworn testimony from Complainant and the alleged harasser; evidence that other employees were sexually harassed by the same person; testimony from persons who observed Complainant's demeanor immediately after an alleged incident of harassment, as well as persons with whom she discussed the incident. Furthermore, the investigation failed to question these people about noticing changes in Complainant's behavior at work or in the alleged harasser's treatment of Complainant.

Finally, the Commission noted that Complainant appeared to have two complaints of discrimination that may be related. Complainant had filed another EEO complaint when the Agency did not renew her contract or select her for a full time teaching position. She alleged that those actions were discriminatory, and that her coworkers subjected her to hostile work environment based on her conversion to Christianity. The Commission vacated the Agency's final decision; remanded the complaint; and ordered the Agency to conduct a supplemental investigation and consolidate the two complaints, if the Agency was still processing the other complaint and had not yet issued a final decision.

## **7. ENFORCEMENT – GENERAL**

(b)(7)(C)

**v. USPS**, 0120132572 (12/11/2013) - Complainant alleged that she was discriminated against based on her sex (female) and age (49) when, (1) the agency placed her in an off-duty, non-payment status, and (2) a month later issued her a 14 day suspension. The Agency charged Complainant with making a verbal threat against her supervisor. It dismissed issue (1) for failure to timely initiate EEO counseling and

investigated issue (2). Complainant did not request a hearing. The Agency found no discrimination on issue (2).

On appeal, OFO reversed the Agency's dismissal of the first claim, finding that issues (1) and (2) were intertwined, and that there was sufficient record evidence to make determinations on discrimination on both issues. We then concluded that Complainant was discriminated against based on her sex on issues (1) and (2). In reaching this conclusion OFO relied on evidence in the record showing that a similarly situated older male employee who had engaged in threatening behavior was neither placed in off-duty status, nor suspended. Further, contrary to the statements of the management official responsible for the differing treatment, the record showed that the comparator employee engaged in an incident where the supervisor actually felt threatened, whereas the record suggested that Complainant's supervisor did not feel threatened by Complainant's behavior. OFO found no evidence suggesting that the Agency's actions were based on Complainant's age. OFO ordered the Agency to rescind the disciplinary action, award Complainant back pay, consider any compensatory damages claim, and provide training for, and consider disciplinary action against, the responsible management official.

**(b)(7)(C) v. USPS**, 0120131480 (11/19/2013) – Complainant alleged that the Agency discriminated against him based on reprisal for prior protected EEO activity when it issued him a letter, which was copied to the United States Office of Special Counsel (OSC, a separate Agency), advising him that his efforts to be placed on the ballot as a candidate in the April 2013 special election to fill the vacancy left by a Congressman constituted prohibited political activity under the Hatch Act.

On appeal OFO took administrative notice that in March 2013, OSC filed a Complaint for Disciplinary Action against Complainant with the MSPB for violations of the Hatch Act, that the MSPB found he deliberately violated the Hatch Act with serious violation thereof, and that the MSPB removed Complainant from his federal employment. OFO found that the complaint failed to state a claim because it was a collateral attack on another proceeding. Further, OFO found that the Agency's letter would not likely deter EEO activity in light of OSC's prior notices to Complainant, and the public nature of his campaign.

**(b)(7)(C) v. VA**, 0720130007 (11/02/13) – Complainant, a Structural Firefighter Driver, filed a formal complaint alleging that the Agency discriminated against him on the basis of age when he was not selected for either of two vacant Lead Firefighter positions. Complainant requested a hearing, and at its conclusion the EEOC AJ found that Complainant had demonstrated that the Agency's reasons for not selecting him were pretext for discrimination. For remedial relief, the AJ ordered the Agency to pay Complainant back pay and benefits, and to post a Notice at its facility and on its website stating that a violation of the ADEA occurred at the facility. The Agency subsequently issued a final order accepting the AJ's finding of discrimination, but rejected the AJ's order that it post a Notice on its Agency website.

In affirming the Agency's final order, OFO found that the Agency correctly asserted that 29 C.F.R. § 1614.501(a)(1) usually requires that the Notice only be posted at "the affected facility." In so finding, OFO acknowledged that on a case-by-case basis there may be justification for ordering posting on a wider basis. In the instant case, however, OFO determined that the AJ did not justify the wider posting. As a result, OFO modified the AJ's

Order so that the Notice need only be posted at the affected facility and not on the Agency's website.

(b)(7)(C) **v. DOJ (BOP)**, 0120132467 (10/30/2013) – Complainant filed a formal complaint alleging that the Agency discriminated against her on the basis of her sex, disability, and in reprisal for prior EEO activity when: (1) she was subjected to harassment through an involuntary reassignment, being excluded from meetings, and being treated in a discriminatory manner on a daily basis, (2) received an inaccurate performance evaluation, and (3) was not selected for a transfer into another GS-14 position. The Agency placed the entire complaint in abeyance, asserting it should be subsumed into a class complaint,

(b)(7)(C) **v. DOJ (BOP)**.

On appeal, OFO reversed the Agency's decision and remanded the complaint for further processing as an individual complaint, and specifically providing Complainant the opportunity for a hearing. The appellate decision noted that the certified claim in (b)(7)(C) is that the Agency denied promotions to individuals based upon the Agency's alleged policy or pattern and practice of retaliating against employees because they engaged in Title VII EEO activity. We found that claims (1) and (2) did not fall within the scope of (b)(7)(C), and that Claim (3), which centered on a lateral transfer instead of a promotion, also did not fall within (b)(7)(C).

(b)(7)(C), (b)(7)(C), and (b)(7)(C) **v. USPS**, 0120123252, 0120133064, and 0120132667 (10/24/2013, 11/1/2013, and 11/1/2013) – Complainants alleged that the agency discriminated against them on the basis of disability when it included confidential medical information about Complainants in its Enterprise Resource Management (eRMS) database. In its final decisions the Agency found that Complainants were not discriminated against because they were not qualified individuals with a disability, and did not show that they were treated differently than others not in their protected class. The Agency asserted that the information about Complainants found in the eRMS database – which included references to "fatigue, orthopaedic, and sleep disorder;" "wrist surgery;" and "back" – was not believed by the Family Medical Leave Act Coordinator to be confidential medical information. The Agency further noted that subsequent to the alleged incidents, the Agency changed access rights to the eRMS database.

On appeal, OFO reversed the Agency's decision and found that the presence of this information was a per se violation of the Rehabilitation Act. OFO found that the Agency was obligated to keep certain medical information, like the diagnoses at issue in these cases, confidential. That obligation, OFO found, applied to all employees whether or not disabled. OFO found that the record showed that Complainants' medical diagnoses were available in the eRMS database to all supervisors and temporary supervisors. We found this to be a violation of the Rehabilitation Act and ordered the Agency to: give Complainants the opportunity to submit claims for compensatory damages; consider disciplining the responsible employees; provide training to the responsible employees; ensure that the eRMS database is managed in compliance with the Rehabilitation Act; and post a notice of the findings of discrimination.

(b)(7)(C) **v. Army**, 0120111420 (2/6/2014) – Complainant alleged that the Agency subjected her to harassment and discriminated on the bases of race (African American), sex (female), and reprisal with regard to seven claims. After a hearing before an EEOC AJ, the AJ found that Complainant was subjected to discrimination based on sex and race when she was issued an overall performance rating of “1” on her performance evaluation for the period April 15, 2007, to September 12, 2007. As a remedy, the AJ ordered that all Agency records be changed to reflect that Complainant received a rating of “2.” Further, in addition to eight hours of EEO training for the responsible management officials, the AJ ordered that the agency pay Complainant \$8,000 in nonpecuniary compensatory damages, attorney’s fees in the amount of \$11,860, and reimbursement for the reasonable costs of litigation. With respect to the remaining claims, the AJ found that Complainant failed to show that she was subjected to discrimination. The Agency fully implemented the AJ’s finding of discrimination with respect to the performance appraisal. Complainant however disagreed with the decision. She maintained that the AJ erred in determining that the responsible management officials were credible and erred in not finding discrimination and harassment with regard to her remaining claims.

EEOC Appeal No. 0120111420 affirmed the Agency’s final order which found discrimination with regard to Complainant’s performance appraisal and the remedies, but also found that Complainant had not presented any evidence which remotely suggested that the AJ erred. The decision noted that the incidents described by Complainant could be characterized as common work place interactions (travel voucher errors, denial of compensatory time, receipt of Notification of Unacceptable Performance/Opportunity to Improve, memo regarding expectations of daily conduct, and issuance of memorandum for Record of Counseling Session), and these claims were not severe or pervasive enough to establish a hostile work environment. Moreover, the decision found that the Agency articulated legitimate, nondiscriminatory reasons for its actions with regard to these claims and Complainant failed to show that the reasons were pretext for discrimination.

(b)(7)(C) **v. DOJ (FBP)**, 0720130008 (3/27/2014) – Complainant filed an EEO complaint alleging race (Caucasian) and reprisal discrimination with regard to awards, appraisal ratings and several non selections. Following an investigation, at Complainant’s request, this matter was assigned to an EEOC AJ who held a hearing and found no discrimination with regard to all but one non-selection claim. The AJ concluded that with regard to one of the non-selection claims, the Selecting Official’s testimony was not credible. However, the AJ found that the Agency proved by clear and convincing evidence that in the absence of the race discrimination, Complainant would not have been selected because he was the qualified candidate with the least seniority. The AJ thus determined that Complainant was not entitled to individual relief. The AJ directed the Agency to post a notice, having noted that training was not required because the responsible management officials were no longer employed by the Agency and that Complainant’s representative was not entitled to attorney’s fees. On appeal from both parties, OFO affirmed the AJ’s decision, concluding that the AJ’s findings of fact were supported by substantial evidence and directing the Agency to post a notice consistent with 29 C.F.R. § 1614.501(a).

(b)(7)(C) **v. VA**, 0720130015 and 0120132531 (2/19/2014) – Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of sex, disability, and age when she was denied a reasonable accommodation and subjected to harassment. The matter was before an AJ, and at the same time also pending before the Agency. The Agency issued a final decision which failed to address Complainant's claim of denial of reasonable accommodation. The Agency issued a second decision finding that Complainant was denied a reasonable accommodation. A month later, the AJ granted the Agency's motion and issued a decision without a hearing finding no discrimination which failed to address Complainant's claim of denial of reasonable accommodation. The Agency appealed the decision asking that the Commission affirm its finding of discrimination which was docketed as 0720130015. While the Agency's appeal was pending, the Agency issued a decision modifying Complainant's petition for attorney's fees and costs. Complainant filed an appeal which was docketed at 0120132531.

OFO affirmed the Agency's finding that it violated the Rehabilitation Act when it failed to provide Complainant with an ergonomic workstation and the accommodation was delayed by 11 months. OFO turned to the Agency's decision on attorney's fees. The only issue raised on appeal was the Agency's reduction of the Attorney's hours to two hours expended for work provided prior to the filing of the formal complaint. OFO found that the Attorney failed to substantiate his argument that he should have been paid for work performed prior to the formal complaint. Therefore, OFO affirmed the Agency's award of fees for the Attorney.

(b)(7)(C) **v. VA**, 0120121222 (3/20/2014) – Complainant filed an appeal contesting the amount of compensatory damages awarded to him after a finding of discrimination by an EEOC AJ which was adopted by the Agency. Complainant alleged discrimination on the bases of sex (male) and retaliation when he was given a fully successful performance rating and did not receive an award. The AJ awarded \$5,000 in non-pecuniary, compensatory damages for the discrimination. The findings of no discrimination on other claims were not appealed. Complainant argued on appeal that he should be awarded more in compensatory damages. OFO found that the Agency's decision, and that the AJ's award, were proper. OFO ordered the Agency to pay Complainant \$5,000 in non-pecuniary, compensatory damages.

(b)(7)(C) **v. USPS**, 0120133008 (1/27/2014) – Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of sex (female) and reprisal for prior EEO activity under Title VII when she was subjected to retaliatory harassment. Following an investigation, Complainant initially requested a hearing; however the AJ denied her request on the grounds that she failed to comply with the Commission's orders. The AJ remanded the matter for the issuance of a final agency decision, which it issued on July 24, 2013, and found no discrimination.

Record evidence revealed that Complainant's supervisor was upset that Complainant had identified her as the management official responsible for Complainant's letter of warning, and believed that Complainant's union representative used the letter of warning issued to his "girlfriend" to undermine the Complainant's supervisor's work product. In addition, Complainant's supervisor made a number of derogatory comments about Complainant in front of co-workers at a sales meeting, some of which were related to Complainant's

pending EEO complaint. OFO determined that despite the supervisor's attempts to justify her actions, they were more likely designed by Complainant's supervisor to discredit and embarrass Complainant in an attempt to interfere with the outcome of Complainant's EEO case and/or pressure her to withdraw her EEO complaint. OFO concluded that Complainant demonstrated by a preponderance of the evidence that she was subjected to unlawful interference with the right to pursue the EEO process. OFO ordered the agency to conduct an investigation into Complainant's entitlement to compensatory damages, provide training for the responsible management officials, and consider discipline. As remedial relief, OFO ordered the agency to investigate Complainant's entitlement to compensatory damages, post a notice at Complainant's work facility, and conduct training for the supervisor and responsible Postmaster.

(b)(7)(C) **v. USPS**, 0120140129 (3/25/2014) – Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of disability (Obsessive Compulsive Disorder) and reprisal for prior protected EEO activity under Section 501 of the Rehabilitation Act of 1973 when she was subjected to a hostile work environment, disparate treatment, and denied reasonable accommodation. Following the investigation, Complainant initially requested a hearing but subsequently withdrew the request in favor of a final decision by the Agency. The Agency concluded that Complainant was an individual with a disability but that she failed to establish that the Agency's actions constituted discrimination. This appeal followed.

OFO found that the Agency violated the Rehabilitation Act when it took over five months to decide on Complainant's requested reasonable accommodation, which was merely to allow her to write things down, let her walk around her car to check doors and windows, and let her call in if she is running late. OFO found that the requested accommodations were not complicated and did not require five months for the Agency to respond to the request. OFO then determined that the supervisor subjected Complainant to a hostile work environment based on her disability and in retaliation for requesting reasonable accommodation. The supervisor would single out Complainant; micromanage her route and change her patterns; and make up rules that only applied to Complainant. These actions caused Complainant heightened anxiety, further exacerbating her condition. Finally, OFO held that Complainant was subjected to disparate treatment when the Agency placed a GPS device on her vehicle without explanation.

(b)(7)(C) **v. Navy**, 0720120013 (3/12/2014) – Complainant filed an EEO complaint alleging that he was subjected to disability discrimination and/or retaliation when he was subjected to a hostile work environment. The hostile work environment claim included various incidents including: being denied access to a work area, receiving written counseling as part of a mid-year review, and being denied a reasonable accommodation. The Agency accepted the complaint for investigation and upon its completion, Complainant requested a hearing before an EEOC AJ.

The AJ held a hearing and issued a decision finding that the Agency subjected Complainant to discrimination on the basis of disability and in reprisal for prior protected activity. The AJ ordered the Agency to reimburse Complainant for leave used due to the discrimination, provide EEO training to responsible personnel consisting of 40 hours annually for the next three years, pay Complainant \$145,000 in non-pecuniary compensatory damages, pay

complaint \$1,476.80 for pecuniary damages, and pay Complainant \$156,157.50 in attorney's fees and \$12,731.55 in costs.

The Agency issued a final order implementing the AJ's finding of discrimination but only partially implementing the AJ's corrective action. The Agency stated it would not implement the following remedies: the non-pecuniary damages, the training ordered by the AJ, and the sanctions awarded by the AJ in a prior Order.

The Agency appealed these matters to OFO. We concurred with Complainant that the sanctions issues were now moot because the AJ had already included the sanctions in his final award of attorney's fees and costs and the Agency had implemented these remedies. OFO found that there was substantial evidence in the record to support the AJ's award of \$145,000.00 in non-pecuniary damages. Finally, OFO modified the AJ's training order from 120 hours to 24 hours reasoning that this was consistent with other cases.

**(b)(7)(C) v. DHS (TSA)**, 0120110730 (4/14/2014) – Complainant, a Supervisory Transportation Security Officer, alleged that the Agency discriminated against her on the bases of sex (female), religion (United Methodist), and in reprisal for prior EEO activity when she was asked religious and sex-based inquiries during an interview on September 13, 2006. The Agency investigated the complaint, and at the end of the investigation Complainant requested a hearing before an EEOC AJ. A hearing was held, and the AJ issued a decision finding that Complainant failed to establish that she was subject to discrimination as alleged when she was asked improper sex and religion-based questions during the September 2006 job interview, but that the Agency did discriminate against her on the basis of religion when it denied her request for religious accommodation, i.e., not allowing her to arrange voluntary swaps in schedule.

The Commission found, among other things, that Complainant established discrimination on the basis of religion when her request for religious accommodation on November 3, 2009 was denied. The Commission concurred with the AJ's determination that no effort to accommodate Complainant's request was made, and that the Agency failed to engage in an interactive process with Complainant, and failed to even discuss or suggest the voluntary swap process in an effort to determine whether it would accomplish her goal of being off on Sundays to attend church services.

The Commission ordered the Agency to: restore eight hours of annual leave to Complainant, pay her for the eight hours of leave she would not have taken but for the discrimination; pay her \$4000.00 in non-pecuniary compensatory damages; reimburse her former counsel \$7336.00 in fees and costs; provide Complainant \$244.00 for the consultation fees she paid another legal firm; provide eight hours of training to the responsible management official on the requirements of religious accommodations; and consider taking appropriate disciplinary action against the responsible management officials.

**(b)(7)(C) v. VA**, 0120112074 (4/18/2014) – The Agency counseled Complainant for using the Agency's business envelope to mail EEO correspondence to her EEO representative, because it was inappropriate to use business envelopes for a personal matter, even if Complainant paid for the postage and shipping herself.

The Commission concluded that the Agency erred in counseling Complainant for such EEO participation activity, and such counseling amounted to a per se violation of the anti-retaliatory regulations and guidance.

First, the Commission emphasized that the anti-retaliation provisions' broad protections include the "freedom from discriminatory interference with the EEO process." Next, the Commission found Complainant's EEO participation activity to be reasonable, because it did not appear to explicitly violate the Agency's relevant mail management policy, and did not appear to unduly disrupt the Agency's operations or pose a financial burden on the Agency. And because reprimanding Complainant for exercising a legitimate method of corresponding with her EEO representative was reasonably likely to deter EEO activity, the Commission found the counseling constituted a per se violation of the anti-retaliation provisions.

(b)(7)(C) **v. USPS**, 0120112672 (4/15/2014) – Complainant filed a formal complaint alleging that the Agency discriminated against her on the bases of race (African-American), color (light), and disability (physical) when: on April 17, 2008, she was instructed to clock out and go home, told she could not continue to work her new bid job on Tour 3 and to return to her previous position on Tour 1, and was not paid for the time she had worked her new bid. Following a hearing, the AJ issued a decision, finding that Complainant had established that she was subjected to color and disability discrimination when she was not permitted to report to her new bid assignment on Tour 3. The AJ ordered remedies which included, back pay, non-pecuniary compensatory damages, payment for two days work, removal of all derogatory materials from Complainant's record, EEO training for the managers involved and the consideration of discipline.

On appeal, Complainant argued that the Agency failed to, in large part, comply with the ordered remedies. Complainant acknowledged that the Agency had provided her with a Tour 3 bid and paid her attorney's fees but had not complied with the remainder of the order. As the Agency provided no documentation to refute Complainant's claim, the Commission found that the Agency had not fully complied with its final order and remanded the matter to the Agency for corrective action.

(b)(7)(C) **v. VA**, 0120113877 (5/14/2014) – Complainant applied for an Engineering Technician position. A Human Resources Management Specialist determined that Complainant was not minimally qualified because he lacked the required specialized experience. Complainant believed that this individual was biased against him and that he was more qualified than the selectee. Complainant filed a complaint alleging that the Agency discriminated against him on the bases of age and disability, and an AJ held a hearing and concluded, that while there was no evidence of age discrimination, Complainant established that the Agency's reasons for not selecting him for the Engineering Technician position were pretext for disability discrimination, and also that had he been referred, he would have been selected as he was the clearly superior candidate. Among other remedies, the AJ ordered the Agency to retroactively promote Complainant and provide back pay and any applicable benefits due. The Agency accepted the AJ's decision, and subsequently Complainant appealed, arguing that the Agency had failed to comply with its final action. Specifically, Complainant argues he was due a promotion to a higher grade with appropriate back pay, contributions to his TSP account, compensation for increased tax liability and restoration of annual leave. On appeal, we agreed with Complainant that he

was entitled to the retroactive promotion and attending back pay as well as compensation for increased tax liability. We agreed with the Agency that due to Complainant's decision to stop contributing to his TSP account, the Agency was not required to match any contributions above its automatic one percent and that he had no entitlement to restored leave.

(b)(7)(C)

**v. Treasury (IRS)**, 0120120091 (5/13/2014) – The Commission found that, with regard to three alleged incidents of race and reprisal discrimination, the Agency failed to articulate a legitimate, nondiscriminatory reason for its actions. As such, the Commission found that Complainant was discriminated against with regard to those claims. The Commission affirmed the Agency's finding of no discrimination or reprisal with regard to the remaining 10 claims. The Commission also found that Complainant failed to demonstrate that she was harassed. The Commission ordered the Agency to: conduct a supplemental investigation with respect to any compensatory damages to which Complainant was entitled, provide training to responsible management officials, and consider taking disciplinary action against those management officials.

(b)(7)(C)

**v. TVA**, 0120120140 (5/1/2014) – Complainant filed a formal complaint which alleged that she was subjected to sexual harassment and a hostile work environment on the bases of sex (female) and reprisal (opposition to discriminatory practices) when: (1) an anonymous note about her having an alleged relationship with a coworker was left in her work area on or about October 16, 2010; (2) she was ordered to submit to an alcohol and drug test on or about November 3, 2010; (3) on or about November 14, 2010, she was placed on administrative leave and required to submit to a Fitness for Duty (FFD) evaluation; (4) on or about January 14, 2011, she found a second note about her having an alleged relationship with a coworker; and (5) she learned on or about January 27, 2011, that a third anonymous note about her having an alleged relationship with a coworker had been found in a closet.

The Agency determined that Complainant failed to demonstrate that she was subjected to discrimination, harassment, or reprisal. The Agency found that it had legitimate reasons for requesting a FFD as Complainant had acted irrationally, (yelling, and crying) during the investigation regarding the notes. Further, the Agency found that the incidents alleged were not severe or pervasive enough to establish a hostile work environment and Complainant's claim of reprisal failed because the Agency had a legitimate reason for ordering the FFD evaluation.

The Commission however, reversed and remanded and the Agency's FAD with respect to claims (2) and (3). With regard to claims (1), (4), and (5), OFO affirmed the Agency's FAD. Specifically with regard to claims (2) and (3), OFO found that although Complainant did not allege a violation of the Rehabilitation Act, a determination of whether such a violation occurred was required by the facts. Pursuant to our precedent, we found that this was appropriate. See (b)(7)(C) **v. USPS**, EEOC Appeal No. 0720080044 (January 6, 2009).

In the instant case, the Commission was not persuaded by the Agency's argument that its medical inquiries were in fact job-related and consistent with business necessity. The Agency's sole reason for sending Complainant for a FFD evaluation and placing her on administrative leave was the allegedly "extreme behavior" that she exhibited during the investigation of her complaints about the notes and the November 3rd interview with the

OIG investigator. The Commission noted, that prior to her interview with the OIG investigator there was no evidence of any concerns about Complainant's job performance nor was there any indication that she posed a direct threat to herself or others. Although OFO did not condone Complainant's alleged behavior both before and during the meeting, we did not find that the behavior justified the Agency's medical inquiry almost two weeks later.

With regard to claims (2) and (3), the Commission ordered back pay and other benefits due Complainant, an investigation regarding her entitlement to compensatory damages, eight hours of EEO training with emphasis on the Rehabilitation Act, consideration of discipline for the managers involved, and the posting of a notice.

(b)(7)(C) **v. VA**, 0120121002 (4/10/2014) – Complainant, a physician, filed an appeal from a finding of discrimination and no discrimination by the Agency. Complainant alleged she was discriminated against on the basis of disability (shoulders) and retaliation when she was not reasonably accommodated, training was cancelled, she was sent for a fitness for duty examination, her clinical privileges were renewed for three months rather than two years, her locality pay was removed, and she was threatened with discipline if she did not work beyond her restrictions. The Agency found complainant was not accommodated and was denied training due to disability discrimination. The Agency found no discrimination for the remainder of the complaint. OFO affirmed the findings of discrimination and the finding of no discrimination regarding locality pay and retaliatory harassment. OFO found that the denial of accommodation led to the discriminatory (on the basis of disability) fitness for duty examination, issuance of a Letter of Counseling, and the reduction in the amount of time Complainant's clinical privileges were renewed. OFO also found that all of these acts of discrimination amounted to a discriminatory hostile work environment based on disability. In addition, OFO found that the Letter of Counseling was issued in retaliation the day after Complainant informed management that she intended to file an EEO complaint. Among other remedies, OFO ordered the agency to investigate whether Complainant is entitled to compensatory damages and to expunge the Letter of Counseling from Complainant's personnel file.

(b)(7)(C) **v. DOD**, 0120121062 (5/1/2014) – Complainant filed an appeal from a finding of no discrimination by the Agency. Complainant, an Integrated Supplier Team Lead, alleged he was discriminated against on the basis of disability (confined to a wheelchair) when he was subjected to a hostile work environment when his supervisor repeatedly made insensitive remarks about his disability and when he was removed from a Lean Event. After an investigation, Complainant did not request a hearing and the Agency issued a decision finding no discrimination. OFO noted that the Agency found that complainant was a qualified individual with a disability. OFO found that Complainant was subjected to repeated, unwelcome comments about his disability by his supervisor such as "roll on in here" and "I have a reserved handicap parking space next to my desk". OFO also found that his supervisor failed to assist Complainant in a class he was teaching and when he was removed from the Lean Event. OFO found that the Agency was liable because the acts were committed by Complainant's supervisor. OFO found no discrimination regarding one comment that had nothing to do with Complainant's disability. OFO found that the Agency harassed Complainant based on his disability and ordered the Agency to investigate the issue of whether Complainant was due compensatory damages among other remedies.

(b)(7)(C)

**v. USPS**, 0120121221 (5/14/2014) – Complainant filed an appeal from the Agency's finding of no discrimination. Complainant, a Part-Time Mailhandler, alleged he was discriminated against on the bases of race, color, and disability (deaf), when: he was harassed by management by being yelled at, followed to the bathroom, and picked on for using a pager; he was denied training; denied interpreters at meetings and safety talks; was not given aid in preparing for a test; was charged absent without leave; and was denied leave. After an investigation, Complainant did not request a hearing, and the Agency issued a decision finding no discrimination. The Agency admitted complainant was disabled. OFO found no race or color discrimination for any claim in the complaint. OFO found that Complainant was denied a reasonable accommodation when he was not provided an interpreter at various meetings. OFO found that Complainant was subjected to a hostile work environment due to his disability and that he was denied training due to his disability. OFO found no discrimination for all other claims in the complaint. As a remedy, OFO ordered the Agency, in part, to provide Complainant with a sign language interpreter for all meetings and to investigate the issue of compensatory damages.

(b)(7)(C)

**v. VA**, 0120121920 (6/25/2014) – Complainant worked in the Office of Field Programs as the Chief of the Administrative Services Division for the National Cemetery Administration in Washington, DC. She filed an EEO complaint alleging harassment based on race, sex and age. Included among many incidents of harassment was the failure to promote Complainant. This matter was initially dismissed by an AJ for failure to cooperate. On appeal, that dismissal was vacated and the matter was remanded to the Agency for the issuance of a final decision. See EEOC Appeal No. 0120113908 (Jan. 30, 2012). The Agency found no discrimination. On appeal, OFO found that several Caucasian management officials treated Complainant and other African-American staff members in a significantly disparate, degrading and demeaning manner. Complainant and all four of her witnesses, including the sole Caucasian staff member under her supervision, testified to specific acts of disparate treatment toward the African-American staff members which the highly segregated Caucasian staff did not have to endure. OFO concluded that Complainant had established that she was subjected to racial harassment at the hands of her supervisor(s) and that the Agency failed to satisfy the first prong of its affirmative defense and was thus liable for the harm Complainant suffered. However, OFO concluded that Complainant failed to prove constructive discharge. Among other remedies, OFO ordered the Agency to retroactively promote Complainant and provide back pay as well as investigating and issuing a decision on her entitlement to compensatory damages.

(b)(7)(C)

**v. USPS**, 0120122467 (5/14/2014) – Complainant filed an appeal after the Agency agreed to implement an AJ's decision finding of disability discrimination. In her decision on remedies, the AJ stated that the Agency should return Complainant to work and provide her with reasonable accommodation. The Agency interpreted this to mean that it had discretion whether to return Complainant to work and decided against doing so because Complainant had been removed for her failure to abide by standard leave procedures and to produce acceptable medical documentation supporting her extended absence. Complainant did not raise the removal with the AJ, and prior to the AJ's decision, an arbitrator upheld the removal for just cause. On appeal, OFO agreed with the Agency that Complainant's removal, based on her own actions, was an intervening event which limited the remedy she

is due. OFO also agreed that the date of the removal was the appropriate “cut off” date for the back pay due.

(b)(7)(C) **v. USAF**, 0120130166 (5/7/2014) – Complainant worked as a Management Analyst at Patrick Air Force Base in Florida. He filed an EEO complaint alleging national origin discrimination and retaliation with regard to his performance evaluation and a security clearance investigation. After a hearing, an AJ issued a decision finding no national origin discrimination with regard to both issues and no retaliation with regard to the security clearance investigation. However, the AJ noted that inappropriate remarks about Complainant’s “seeking agreement” with co-workers that management’s decisions were biased or discriminatory constituted protected opposition and should not have been referenced as part of Complainant’s appraisal. On appeal, OFO agreed that the comments amounted to direct evidence of retaliation and modified the AJ’s decision by awarding \$1,500.00 in non-pecuniary compensatory damages and slightly increasing the amount of attorney’s fees originally awarded.

(b)(7)(C) **v. USDA**, 0120131896 (5/22/2014) – Complainant filed an appeal from the Agency’s decision on remedies after a finding of discrimination. The Agency issued a decision finding Complainant was discriminated against on the bases of race (African-American), national origin (African-American), age (52), and in reprisal for prior protected activity when he was not selected for one of four Center Director positions. For relief, among other remedies, the Agency awarded Complainant a promotion to the GS-12 Center Director position, backpay, and \$6,000 in nonpecuniary, compensatory damages. Complainant filed an appeal with OFO arguing that he should be placed in the GS-13 Center Director position and awarded \$125,000 in nonpecuniary, compensatory damages. OFO agreed with Complainant that he should have been placed in the GS-13 Center Director position since the finding of discrimination involved both grade levels. OFO ordered the Agency to place complainant into the GS-13 position and provide backpay based on the GS-13 level. OFO found that the nonpecuniary, compensatory damage award should be raised to \$30,000.

(b)(7)(C) **v. USPS**, 0120140221 (4/8/2014) – Complainant, a letter carrier, filed a complaint alleging that the Agency discriminated against her based on her disability (back) when she was denied the reasonable accommodation of work within her medical limitations, resulting in her not working. Following an investigation Complainant requested a final agency decision (FAD), and the Agency issued a FAD finding no discrimination. Complainant appealed. OFO found that because the Agency conceded that Complainant was an individual with a disability, it did not need to further address that issue. Complainant was assigned to a park and loop route, and OFO found that when she requested reasonable accommodation, it was uncontested that she was medically unable to deliver such a route, and found this was the only work available at her facility. OFO found that the Agency discriminated against Complainant because it failed to reasonably accommodate her with reassignment since a vacant funded letter carrier position and vacant funded light duty carrier assignments which it deemed as positions within Complainant’s medical limitations were available at a nearby facility. OFO found that the discrimination occurred from February 3, 2013, a day after she requested the reasonable accommodation of being

reassigned to the above facility, through March 8, 2013, the last day Complainant was not provided work. It awarded Complainant \$2,000 in non-pecuniary compensatory damages.

(b)(7)(C) **v. VA**, 0120140224 (5/30/2014) – Complainant asserted that she was subjected to discrimination and harassment at the hands of the Chief of Pharmacy (Chief) based on race (African American) and reprisal regarding disciplinary actions, promotional opportunities and harsh treatment. Following the investigation, Complainant requested a hearing before an EEOC AJ.

Following a hearing, the AJ found that Complainant established that the Chief subjected Complainant to harassment based on her race and in reprisal for her prior EEO activity. The AJ noted that the Chief's actions were part of a pattern of removing African-American employees and replacing them with non-African Americans. The AJ ordered that the Agency expunge any references to any investigations or disciplinary actions and awarded \$4,000 in nonpecuniary compensatory damages. The Agency failed to issue a final order within the regulatory timeframe. This appeal followed.

OFO noted that the only issue before the Commission was the issue of remedies. Complainant requested that the Commission provide her with a promotion, however, the decision noted that the AJ did not find that Complainant was denied a promotion. Complainant then asserted that she should have been given a greater amount in compensatory damages. She asserted that she suffered mental anguish during the hearing. OFO found that Complainant failed to substantiate her assertions regarding the extent of her mental anguish. As such, OFO affirmed the AJ's award of \$4,000 in compensatory damages. In addition, OFO ordered that the Agency post a notice regarding the finding, provide training to the Chief and consider taking disciplinary action against the Chief.

(b)(7)(C) **v. DOD (DCMA)**, 0120140428 (4/3/2014) – Complainant (59), an Industrial Property Management Specialist, GS-12, alleged discrimination when he was not selected for one of two advertised Contract Price/Analyst, GS-12, positions. The complaint was accepted for investigation and, in response to Complainant's request, the Agency issues a final decision, in which it found no discrimination.

On appeal, OFO noted that Complainant was ineligible for one position because of its funding source. Complainant was qualified for the other position, and appeared on the best-qualified list, but was not selected in favor of a substantially younger selectee (41). OFO found that, although the selecting official (SO) stated that he did not know Complainant's age when making his selection, the SO had reviewed Complainant's resume, from which it could be discerned that Complainant was above age 40.

While OFO found that the Agency had met its burden of production to articulate legitimate, nondiscriminatory reasons for its selection – that the Selectee had a strong resume in contract/pricing, proposal, and subcontractor experience, had Bachelor of Arts and Master's degrees and strong reference checks – OFO further found that Complainant's qualifications and experience as related to the position at issue were plainly superior to those of the Selectee. OFO noted that Complainant had more experience than the selectee as a GS-12 Contract Price/Cost Analyst for DCMA; possessed an MBA, while the selectee had only a BA in business admin.; that Complainant had a BA in accounting while the selectee's Masters was in Education; that Complainant, unlike the selectee, had received many awards from the Agency; and that Complainant had significantly more overall experience relevant to

the position at issue, as an Auditor, Accountant, Financial Examiner, GS-12 Contract Price/Analyst, and Industrial Property Management Specialist, while the selectee's experience was largely in the education field. OFO ordered the Agency to offer Complainant the position at issue, with back pay and benefits.

(b)(7)(C)

**v. USPS**, 0120140761 (6/13/2014) – The Agency investigated the complaint as a claim of harassment and disparate treatment on the basis of disability (diabetes). The Agency issued a decision conceding that Complainant is an individual with a disability. However, the Agency found that the numerous disciplinary actions and comments about Complainant's performance were not related to his medical condition but his attendance issues.

OFO found that the Agency failed to identify Complainant's request for reasonable accommodation. OFO noted that Complainant needed flexibility when his sugar levels were not controlled. As such, he would need to leave work in order to attend to his medical condition. Instead of recognizing Complainant's need for an accommodation, the Agency counseled him, constantly requested medical documentation for his leave requests, and issued disciplinary actions against him. OFO concluded that the Agency failed to provide him with reasonable accommodation. In addition, OFO determined that Complainant was subjected to harassment. In addition to the issues surrounding Complainant's claim of reasonable accommodation, OFO noted that management made comments about his use of leave and his speed due to his diabetes-induced neuropathy. Based on the finding of discrimination, OFO ordered the Agency to determine compensatory damages due to Complainant, to remove any disciplinary actions taken, to provide training to management, and to consider disciplinary action against the management official involved.

(b)(7)(C)

**v. DOJ**, 0720120032 (5/1/2014) – The Agency filed an appeal from an EEOC AJ's finding of reprisal discrimination. Complainant, a Tool Room Officer, alleged she was discriminated against on the basis of reprisal when a Human Resources employee and a coworker left a voice message on complainant's work voicemail in which they could be heard berating Complainant while discussing the settlement of a prior EEO complaint she filed. After an investigation, a hearing was held and the AJ found Complainant established she was subjected to reprisal and the AJ awarded Complainant \$5,000 in non-pecuniary, compensatory damages. On appeal, OFO affirmed the AJ's findings and found that the telephone message would deter a reasonable person from engaging in the EEO process. OFO also found that the Agency failed to take immediate and appropriate corrective action when notified of the telephone call. OFO found that \$5,000 was an appropriate award for Complainant's non-pecuniary, compensatory damages.

(b)(7)(C)

**v. USPS**, 0720130009 (5/14/2014) – The Agency filed an appeal from an EEOC AJ's finding of sex discrimination. Complainant, a Manager, Distributions Operations, alleged she was discriminated against on the bases of sex and age, when she was not promoted into various positions, she was removed from a detail, the area of consideration of a vacancy announcement was limited, and she was subjected to a hostile work environment. After an investigation, a hearing was held and the AJ found Complainant established she was subjected to sex and age discrimination when she was not promoted and was subjected to age discrimination when the area of consideration of a vacancy

announcement was limited. The AJ found no discrimination for all other claims. The AJ awarded: \$130,000 in nonpecuniary, compensatory damages; restoration and compensation of leave; payment for medical expenses; EEO training for management officials; and back pay. Subsequent to the AJ's decision and prior to the appeal to OFO, Complainant voluntarily retired from the agency. Complainant also filed an appeal requesting an increase in the award of compensatory damages and front pay. OFO affirmed the AJ's findings of discrimination and found that substantial evidence supported the finding that Complainant was discriminated against on the basis of sex when she was not promoted. OFO also found that the compensatory damage award was proper and that Complainant, having voluntarily retired, should not receive front pay.

**(b)(7)(C) v. Army**, 0720130019 (6/25/2014) – Complainant worked as a Supervisory Criminal Investigator at Fort Campbell, Kentucky. She filed an EEO complaint alleging race, sex and reprisal discrimination. After a hearing, an AJ issued a decision finding that Complainant was harassed and terminated based on her race and sex. Complainant's co-workers were angry that Complainant was supervising them and subjected her to several threatening comments. They also yelled at Complainant and were uncooperative in assisting her gain field experience. When Complainant raised her concerns with her supervisor, he responded "Do you blame them?" Further, the co-workers teased Complainant after finding out they she was a single mother of several children, and they falsely accused her of being disruptive and unprofessional at a two-week training course, which ultimately led to her being terminated. Also, the supervisor continuously asked Complainant about her family obligations, whether her family status would affect her job performance, and informed her that he would be keeping a record of how her children interfered with her ability to perform her duties. On appeal, OFO affirmed the AJ's findings as to the existence of a hostile work environment and the liability of the Agency for the harm that resulted. OFO modified in part the AJ's award of remedies with regard to the location of reinstatement, premium pay and discipline and affirmed the awards of compensatory damages and attorney's fees.

**(b)(7)(C)**

**v. DOT (FAA)**, 0720130032 (4/18/2014) – Complainant filed a complaint alleging that the Agency discriminated against her based on reprisal for prior protected EEO activity when she was not selected for the positions of Safety Management System (SMS) Policy Manager and SMS Promotion Manager. The matter was investigated and Complainant requested a hearing. After a three day hearing, the Administrative Judge (AJ) found that Complainant was retaliated against as alleged. The AJ noted that the Agency's selection process "was fraught with inconsistencies which raised questions about the legitimacy of its conclusions." The AJ did not find the selecting official credible with respect to the Policy Manager position. Likewise, for the Promotion Manager position, the AJ found that Complainant's qualifications were plainly superior to that of the selectee. The Agency filed an appeal to the Commission which was found to be untimely filed and dismissed. Nonetheless, the AJ's decision was reviewed. OFO found that substantial evidence supported the AJ's conclusion that Complainant was retaliated against as alleged. OFO ordered the Agency to promote Complainant to one of the positions or a substantially equivalent position; determine the amount of back pay and benefits; pay \$85,000 in non-pecuniary compensatory damages; and pay \$140,406.90 in attorney's fees. OFO also ordered the responsible selecting official to be sent for eight hours of EEO training. The Agency was also required to post a notice.

(b)(7)(C) **v. DOJ**, 0120110291 (7/31/2014) – Complainant filed a formal complaint alleging that the Agency subjected her to a hostile work environment and discriminated against her on the basis of sex (female) when her supervisor (S1) made inappropriate and unwelcome comments of a sexual nature, and made demeaning comments about her to her male coworkers. After the EEO investigation was completed, the Agency raised and addressed another allegation after noting Complainant's comments in her affidavit: (3) in retaliation for engaging in protected EEO activity, her supervisor lowered her annual performance appraisal report (PAR) rating. The FAD found no discrimination regarding claims (1) and (2). With regard to claim (3), the FAD found that Complainant was subjected to reprisal with regard to her November 20, 2007 performance appraisal. It was determined that S1 retaliated against Complainant when she was given a "Successful" rating on her annual Performance Appraisal review and not an "Excellent" rating.

In its decision, the Commission, among other things, found that the evidence supported the finding that Complainant was subjected to reprisal. The Commission ordered the Agency to take the appropriate corrective action to prevent further reprisal, S1 and other managers involved were ordered to attend EEO training, Complainant's rating of "Successful" was rescinded and her rating changed to "Excellent," all Agency records regarding the retaliatory performance appraisal were to be expunged; an investigation into Complainant's eligibility for compensatory damages was ordered, and attorney's fees were awarded.

(b)(7)(C) **v. USPS**, 0120111711 (7/30/2014) – An EEOC AJ issued a decision, after a hearing, finding that the Agency discriminated against Complainant on the bases of disability and reprisal when: (1) for a 17-month period, it failed to provide her with a reasonable accommodation when it refused to allow her to perform work that it had identified as available and suitable for her; and (2) for a 12-month period, it retaliated against her by requiring her to simply sit in a chair (except for breaks and lunch) in an enclosed area on the workroom floor, visible to her fellow employees, without providing her with any work assignments. The AJ relied on Complainant's hearing testimony as objective evidence in awarding her \$2,500 in non-pecuniary compensatory damages for humiliation and emotional distress. The Agency issued a final order fully implementing the AJ's decision.

OFO, in its appellate decision, found that an award of \$7,500 in non-pecuniary compensatory damages was appropriate and modified the Agency's final order. Specifically, OFO noted the AJ's finding that the Agency's discriminatory conduct caused Complainant humiliation and emotional distress over a 17-month period. In addition, OFO found it reasonable to infer that Complainant would suffer humiliation and emotional distress based on the inherently degrading and publicly humiliating nature of being required, for 12 months, to simply sit in a chair (except for breaks and lunch) in an enclosed area on the workroom floor, visible to other employees, without being given any work assignments. Moreover, although Complainant had long-term emotional distress dating back almost 20 years, OFO cited Complainant's testimony that she had experienced additional emotional distress based on the Agency's actions at issue in the complaint. Finally, OFO noted that it had awarded similar amounts for emotional harm such as humiliation and emotional distress.

(b)(7)(C)

**v. HUD**, 0120111827 and 0120113765 (7/16/2014) – Complainant filed two EEO complaints alleging that the Agency discriminated against her on the bases of reprisal, age and disability regarding her appraisal and harassment. The matters were before an AJ who issued a decision without a hearing. OFO in Appeal No. 01A60072 (4/7/2006) remanded the matter, finding that there were material facts in dispute particularly regarding Complainant's claim of reprisal. The Agency issued two different final decisions regarding the two formal complaints. Complainant appealed both decisions to OFO.

Despite requests by OFO for the complaint records for both EEO complaints, the Agency failed to provide them. A show cause order was issued on April 24, 2014. Again, the Agency failed to produce the records. As such, OFO issued this decision finding that, in this circumstance, the most appropriate sanction was default judgment for Complainant. After deciding to issue a default judgment for a complainant, OFO then made a determination of whether there was evidence that establishes Complainant's right to relief. OFO noted that in the previous appeal decision, Complainant provided evidence from her co-workers showing that she was well-known known for her EEO activity. Further, there was evidence establishing that Complainant was subjected to greater scrutiny than others by management. Based on the previous decision, OFO concluded that that Complainant had established a prima facie case of retaliation. As such, OFO found that there was sufficient evidence to support a conclusion, by default judgment, that Complainant is entitled to relief in this case. As remedy, OFO ordered the Agency to remove negative references in Complainant's appraisal, provide training to management, and calculate compensatory damages.

(b)(7)(C)

**v. DHS**, 0120112237 (7/25/2014) – Complainant filed an appeal from the Agency's decision finding no race discrimination. Complainant, a Supervisory Immigration Enforcement Agent, alleged that he was discriminated against on the basis of race (African-American) when he was not selected for the position of Deportation Officer. After an investigation the Agency issued a decision finding no discrimination, finding that the three selectees' work in the Travel Unit made them the best qualified for the position. OFO reversed the agency's decision and found that the Agency discriminated against Complainant on the basis of race. OFO found the Agency's assertion about experience in the Travel Unit was not worthy of belief. OFO further found that Complainant's supervisor stated that the selectees were not all more qualified than Complainant and that two coworkers stated that selections at the facility are based on race. For remedies, OFO ordered the Agency to retroactively promote Complainant, pay back pay, investigate compensatory damages, provide EEO training, consider discipline, and post a notice of the finding of discrimination.

(b)(7)(C)

**v. USPS**, 0120112858 (7/24/2014) – Complainant alleged the Agency subjected her to discrimination and harassment based on disability when she was denied leave and repeatedly asked for a doctor's note. The Agency issued a FAD finding Complainant failed to establish that the Agency's legitimate, nondiscriminatory reasons were pretext for discrimination, and failed to establish that she was subjected to a hostile work environment.

Complainant purchased a postal Long Life Vehicle (LLV) with right-hand drive to perform her modified Rural Carrier duties. Complainant was restricted to working eight hours per day and was limited to driving a LLV with right-hand drive. Complainant subsequently reported to

her supervisor that her personal LLV needed repairs and requested annual leave for that day. Her leave request was denied, as was her request to borrow an agency-owned LLV; Complainant therefore was unable to work that day. Upon returning to work, Complainant presented management with a doctor's note, as she had been instructed. The Supervisor advised Complainant that the doctor's note was insufficient, asked for additional medical information, and threatened Complainant with AWOL. To avoid an AWOL charge, Complainant requested LWOP, which the Supervisor granted.

OFO found that a fair reading of the complaint reflected that Complainant also alleged reprisal for requesting annual leave, a request for reasonable accommodation. OFO found that, by providing Complainant with LWOP instead of allowing her to use accrued leave, the Agency penalized Complainant, and therefore subjected her to reprisal for requesting accommodation. OFO further found that the Supervisor's conduct was sufficiently severe and pervasive to alter the conditions of Complainant's employment and create a hostile work environment. We ordered the Agency, inter alia, to reimburse Complainant for the hours of LWOP and to investigate her entitlement to compensatory damages.

(b)(7)(C) **v. DHS**, 0120113331 (7/1/2014) – Complainant filed a formal complaint alleging that the Agency subjected him to discrimination and harassment on the bases of race (African-American with European ancestry), sex (male), and color (Brown) with respect to twenty incidents involving his co-workers. He subsequently amended the complaint to allege that the Agency subjected him to reprisal for protected EEO activity in connection with four matters, including a performance evaluation and being excluded from a search-warrant operation. After an investigation, the Agency issued a final decision finding that it had not discriminated against Complainant or subjected him to harassment.

On appeal, OFO modified the Agency's final decision. Noting that Complainant did not complain to management officials prior to contacting an EEO Counselor about this complaint, we found that there was no basis for imputing liability to the Agency for the twenty co-worker incidents. We further found that the evidence was insufficient to establish that the Agency retaliated against Complainant with respect to the other matters. Accordingly, OFO affirmed the Agency's finding regarding Complainant's individual claims.

We concluded, however, that the record demonstrated unmistakable hostility toward Complainant's protected activity. For example, in a memorandum raising Complainant's performance rating, Complainant's first-level supervisor stated that Complainant's reprisal allegation was "extremely unprofessional." Further, the colleague who arranged the search-warrant operation asserted in her affidavit that Complainant's allegations of discrimination were "highly offensive" and disrupted the work environment, another colleague stated that he had informed managers that he was uncomfortable working with Complainant and did not trust Complainant because of Complainant's "false accusations," and Complainant's second-level supervisor expressed concern about the stress and frustration that Complainant's allegations had caused his colleagues. Concluding that the record supported a finding of a per se violation of Title VII, OFO ordered the Agency to conduct EEO training for all personnel at the facility where Complainant worked.

(b)(7)(C) **v. DOD (DLA)**, 0120113509 (7/2/2014) – Complainant filed a formal complaint alleging that the Agency discriminated against her on the bases of race (African-American), sex (female), and age (56) when she was not selected for the position of Inventory

Management Specialist, GS-12. An EEOC AJ held a hearing and found that Complainant established that she was better qualified for the position and that discrimination based on race played a role. The AJ found that the selecting official's (SO) testimony was not credible as to why he chose the selectee over Complainant. Following the AJ's finding of discrimination based on race, the AJ issued an Order of Relief which awarded, among other things, back pay, placement of Complainant into an Inventory Management Specialist GS-12 position, attorney's fees, and compensatory damages in the amount of \$10,000.

On appeal, Complainant argued that the AJ erred in not awarding greater compensatory damages. She maintained that, as a result of her nonselection, she experienced stress, humiliation, and embarrassment. She retired because continuing to work in the aftermath of such a public and embarrassing nonselection was intolerable. Complainant provided on appeal a new statement describing the anxiety and depression she experienced. She also provided statements from the EAP Counselors who treated her, statements from a Psychiatrist who treated her and a description of the medication that she was prescribed as a result of her anxiety, sadness, and depression. This evidence was not provided to the AJ. Complainant requested that the damages be increased to between \$200,000 to \$250,000, in order to be consistent with the Commission's precedent and to compensate her for the harm she suffered as a result of the Agency's discriminatory actions.

The Commission as a general rule will not consider new evidence on appeal unless there is an affirmative showing that the evidence was not reasonably available prior to the investigation or during the hearing process. As Complainant did not show that the new information she submitted on appeal was not available at the time of the hearing or when the AJ was considering the remedy in this case, the documents were not considered. Therefore, based on the information provided, the Commission found no reason to question or disturb the AJ's award. Likewise, the Commission did not find the original award to be monstrously excessive or inconsistent with the cases cited by the AJ. Accordingly, the decision found that Complainant failed to submit evidence which demonstrated that the AJ's award of \$10,000 was in error.

(b)(7)(C) **v. DOI**, 0320110050 (7/16/2014) – An EEOC AJ found that a supervisor had engaged in a discriminatory pattern of escalating adverse treatment towards Petitioner from 2006 to 2007, including suspending her for 10 days in August 2007. In 2009, this same supervisor removed Petitioner, based in part on the supervisor's previous disciplinary actions against Petitioner, including the August 2007 10-day suspension.

After a hearing, an MSPB Administrative Judge determined that the removal was not related to the supervisor's preceding discriminatory conduct and found no discrimination. In doing so, the MSPB AJ articulated that Petitioner "must provide evidence showing a 'convincing mosaic' of retaliation against her" in order to show retaliation using circumstantial evidence.

Upon review, the Commission first determined that the MSPB AJ erred in insisting that petitioners "must" provide evidence showing a "convincing mosaic" of retaliation in order to prove retaliation using circumstantial evidence. Rather, it was merely one useful option that a petitioner "may" use to discredit an agency's explanation and demonstrate a causal connection between the prior protected activity and the challenged adverse action. But it was by no means the only way.

Next, the Commission articulated in a footnote its view that the "but for" standard does not apply to retaliation claims by federal sector applicants or employees under Title VII or the

ADEA because the relevant federal sector statutory language does not employ the “because of” language on which the Supreme Court based its holdings in University of Texas Southwestern Medical Center v. (b)(7)(C) 133 S. Ct. 2517 (2013) and (b)(7)(C) v. FBL Fin. Servs., Inc., 557 U.S. 167 (2009) (requiring “but for” causation for ADEA claims brought under 29 U.S.C. § 623).

Finally, the Commission determined that the MSPB AJ erred in finding no discrimination. The Commission found that the Agency’s subsequent disciplinary and removal actions in 2008 and 2009 were related to the previous harassment in 2006 and 2007, because (1) the supervisor discriminatorily harassed Petitioner in 2006 and 2007; (2) the supervisor showed no signs of noticeably improving her behavior or shedding her preexisting discriminatory attitude toward Petitioner and instead continued to engage in similar types of discriminatory acts in 2008 and 2009; (3) supervisor did not undergo any corrective actions or remedial measures that would ensure that the harassment would not recur; (4) the supervisor explicitly relied on her past discriminatory actions to justify removing Petitioner.

**(b)(7)(C) v. Commerce**, 0120120626 (7/11/2014) – Complainant, a Geophysicist, filed a complaint alleging that he was discriminated against on the basis of national origin (Cuban) when he was subjected to harassment in the form of a hostile work environment, and treated differently regarding the terms, benefits, and privileges of his employment, and on the basis of disability when he was denied a reasonable accommodation. At the conclusion of the investigation, Complainant requested a hearing, but the EEOC AJ issued a decision without a hearing in favor of the Agency on all counts.

On appeal, OFO affirmed the AJ’s decision to issue a decision without a hearing as well as his finding of no discrimination regarding Complainant’s disparate treatment and denial of reasonable accommodation claims. However, OFO reversed the Agency’s finding with respect to Complainant’s harassment claim, and found that Complainant had proven he was subjected to a hostile work environment when his supervisors and/or a co-worker repeatedly referred to Complainant as “Fidel” (because Complainant wore a beard), made comments about Cuban babies eating chili peppers for breakfast, displayed a poster depicting an Hispanic hero as a monkey with the words, “Viva La Evolution!” and made statements about the ability of immigrants to speak English. The Commission further found that the Agency could not escape liability for the harassment inflicted upon Complainant by his supervisors and his co-worker.

The Agency was ordered, among other things, to conduct an investigation on the issue of compensatory damages, to train the supervisors and the co-worker on the issue of their responsibilities to prevent and correct harassment, and to consider taking disciplinary action against the supervisors and the co-worker.

**(b)(7)(C) v. DOT**, 0720140023 (7/24/2014) – Complainant and the Agency filed appeals from an EEOC AJ’s decision finding discrimination as to one claim and no discrimination of others. The AJ found that complainant, a Certified Professional Controller, alleged that he was discriminated against on the bases of sex (male and sexual orientation) and in reprisal for prior EEO activity when has subjected to a hostile work environment, his schedule was not changed, and in reprisal for including information that could be linked to Complainant in EEO training. After an investigation, the AJ held a hearing and found that Complainant was discriminated against on the basis of sex (sexual stereotyping) when he was subjected to a

hostile work environment and that he was retaliated against when his schedule was not changed. The AJ found no discrimination on all other claims. The AJ awarded complainant \$50,000 in nonpecuniary, compensatory damages, \$22,625 in attorney's fees, \$1,985.71 in costs, and ordered the agency to provide EEO training.

On appeal OFO found that the Agency's appeal was untimely and that appeal was dismissed. Complainant argued on appeal that the EEO training at issue was retaliatory and that the compensatory damage award should be increased. OFO found that the AJ's decision regarding the EEO training and the compensatory damage award was proper. OFO ordered the Agency to comply with the AJ's order, consider disciplining the responsible management officials, and post a notice of the finding of discrimination.

(b)(7)(C) **v. Smithsonian Institution**, 0720130031 (7/18/2014) – Complainant worked as a Maintenance and Operations Supervisor at the Agency's Office of Facilities, Maintenance, and Reliability at the Museum Support Center in Suitland, Maryland. After filing an affidavit in support of his first line supervisor's EEO complaint, Complainant's previously positive relationship with his second and third line supervisors deteriorated. Thereafter, Complainant filed an EEO complaint alleging that a Letter of Reprimand he received was in retaliation for his prior protected activity. Complainant requested a hearing, and after a hearing, the EEOC AJ found that the Agency's actions were sufficiently inconsistent and implausible to render its articulated reason for the Letter of Reprimand unworthy of credence. In view of those inconsistencies and the third line supervisor's highly-charged emails demonstrating a blatant bias to discipline Complainant, the AJ found that the Agency's reasons were pretextual and that Complainant had shown that the true reason for disciplining him was retaliation for his protected EEO activity. The AJ ordered the Agency to, inter alia, expunge the Letter of Reprimand from all personnel and associated Agency records; to pay \$1,500 in non-pecuniary compensatory damages, \$101,115 in attorney's fees, and \$4,925 in costs. On appeal, OFO affirmed the AJ's decision in its entirety, concluding that her findings of fact were supported by substantial evidence and her credibility determinations were reasonable and not contradicted by objective evidence.

(b)(7)(C) **v. DOJ (FBI)**, 0120141244 (7/22/2014) – Complainant, an employee of the Department of State on detail to the FBI, filed an EEO complaint alleging that the Agency discriminated against him on the bases of race (African-American) and in reprisal for prior EEO activity when he was subjected to a hostile work environment from 2008 to July 2009, characterized by threatening, offensive and hostile acts - including the hanging of nooses in the workplace, derogatory comments being directed at him, and the use of racially inflammatory statements. Following a Commission Order to the Agency to issue a decision regarding its liability for the hostile work environment, the Agency issued a FAD concluding that Complainant was not subjected to conduct motivated by racial animus. The Agency further determined that it took immediate steps to resolve Complainant's concerns and so was not liable for hostile work environment.

OFO found that the Agency had control over the FBI agents and failed to take effective steps to ensure that Complainant was not further exposed to the racially charged atmosphere. OFO also found that the Agency subjected Complainant to retaliatory harassment after he reported the noose incidents. OFO ordered the Agency to conduct training and to consider taking disciplinary action against the offending FBI agents. The

Agency was ordered to allow Complainant to present evidence in support of a claim for compensatory damages and to pay Complainant's attorney's fees.

(b)(7)(C) **v. USPS**, 0120132503 (8/28/2014) – Complainant alleged that the Agency discriminated against him when a Manager (M1) transferred him to another duty station. An EEOC AJ issued a decision without a hearing, in favor of the Agency. The Agency issued a final order adopting the AJ's finding of no discrimination.

On appeal, OFO reversed the Agency's final order and found reprisal discrimination. Specifically, we found that the AJ's issuance of a decision without a hearing was appropriate, but that the AJ erred in finding in favor of the Agency. First, we found that Complainant established a prima facie case of disparate treatment on the basis of reprisal because M1, who was aware of Complainant's protected activity, and transferred him approximately one month after he participated in that protected activity. Second, we found that the Agency failed to meet its burden of articulating a specific, clear, and individualized explanation for Complainant's transfer. Although M1 cited Complainant's modified job offer and averred that Complainant's protected classes had nothing to do with the transfer, we found that M1 did not actually give a reason for the transfer. Moreover, although the Agency cited a grievance decision in arguing that the transfer served the needs of the service, we found that the grievance decision did not explain the transfer and that a blanket statement about the needs of the service was insufficient to satisfy its burden of production.

(b)(7)(C) **v. DHS**, 0720130039 (8/7/2014) – The Agency filed an appeal from an EEOC AJ's finding of sex discrimination. Complainant, an Attorney Advisor (legal instructor), alleged she was discriminated against on the bases of sex (female) when she was terminated. After an investigation, a hearing was held and the AJ found Complainant established she was subjected to sex discrimination. The AJ awarded: \$200,000 in nonpecuniary, compensatory damages; reinstatement; restoration and compensation of leave; EEO training for management officials; \$200,000 in attorney's fees; a purge of all termination related documents; back pay; and posting of notice of finding of discrimination. OFO affirmed the AJ's finding of discrimination and found that substantial evidence supported the finding that Complainant was discriminated against on the basis of sex when she was terminated. OFO noted that Complainant did not have any performance issues. OFO also found that the compensatory damage award was proper. OFO ordered the agency to implement the remedies of the AJ and to consider disciplining the responsible management officials.

(b)(7)(C) **v. Navy**, 0120122475 (8/26/2014) – Complainant filed an EEO complaint alleging that he was discriminated against based on his religion (Christian), race (African-American), color (Black), and in reprisal for protected activity when he did not receive an award. The Agency found reprisal discrimination on this issue. In opposition to Complainant's appeal the Agency's Pacific Area Counsel's Office, which represented the Agency, argued that its Office of the Secretary, which issued the final Agency decision (FAD), should not have found discrimination. In upholding the finding of discrimination OFO reasoned that the FAD was not rescinded by the Agency. It found that if the Agency's argument was to be construed as an appeal from its own FAD, a scenario which our regulations did not list as a type of permissible appeal (see 29 C.F.R. § 1614.401), it would be untimely. OFO reasoned

that the FAD was issued in April 2012, and the Agency's argument was filed in September 2012, long after any appeal deadlines in our regulations. As OFO upheld the finding of reprisal discrimination, it did not address the other bases of discrimination regarding the award issue. The remainder of the decision, which was routine, is not summarized here.

(b)(7)(C)

**v. USPS**, 0120121587 (8/12/2014) – Complainant filed an EEO complaint on the basis of national origin (Hispanic) and in reprisal for prior protected activity when his medical documentation was refused and he was not allowed to return to work. The Agency issued a final decision finding no discrimination.

On appeal, OFO found that the Agency subjected Complainant to unlawful retaliation. We found that Complainant established a prima facie case of reprisal, noting that one of the Agency officials involved in the instant complaint was aware of Complainant's past EEO complaint and was named as a responsible management official. We further found that the Agency failed to establish a legitimate, nondiscriminatory reason to rebut Complainant's prima facie case of reprisal. Therefore, we found that Complainant prevailed without having to make a showing of pretext.

We ordered the Agency to return Complainant to work retroactively, pay back pay, and conduct a supplemental investigation pertaining to compensatory damages. We also ordered the Agency to pay attorney's fees and conduct 8 hours of EEO training to responsible management officials.

(b)(7)(C)

**v. USPS**, 0120141486 (8/15/2014) – Complainant alleged that he was subjected to discrimination based on his religion when (1) he was denied his request in March 2011, to allow him to have Saturdays off as a religious accommodation in order to observe the Sabbath and (2) on October 20, 2012, Complainant was issued a letter of warning (LOW) for failure to maintain regular attendance.

OFO found that the Agency improperly dismissed claim (2) as moot. Further, OFO determined that the Agency failed to identify the claim at hand. OFO held that Complainant alleged a single claim of denial of religious accommodation and as a result, was issued the LOW. OFO found that Complainant established a prima facie case of denial of religious accommodation. However, OFO held that the Agency failed to meet its burden to demonstrate that it made a good faith effort to reasonably accommodate Complainant's religious beliefs, or that to do so would have imposed an undue hardship upon the Agency's operations. Specifically, OFO noted that the Agency did not attempt to obtain voluntary substitutes or swaps for the Saturdays. Accordingly, OFO concluded that Agency violated Title VII when it failed to provide Complainant with a religious accommodation and issued a related LOW. OFO ordered the Agency to provide Complainant with a religious accommodation, to rescind the LOW, to calculate compensatory damages and to provide training to the RMO.

(b)(7)(C)

**v. USPS**, 0120131754 (8/27/2014) – OFO reversed and remanded the Agency's finding of no discrimination. Complainant worked as a Casual Clerk at the Agency's Knoxville, Tennessee Processing and Distribution Center. On June 14, 2012, Complainant became aware that his name was placed on "Do Not Rehire" list which made him ineligible

for Postal Service re-employment. Thereafter, Complainant filed a complaint based on race, national origin, religion, age and reprisal.

After Complainant did not respond to the notice of right to request a hearing before an EEOC Administrative Judge or a final decision, the Agency issued the instant final decision finding no discrimination. The Agency found that, according to the Acting Manager, he placed Complainant on the "Do Not Rehire" list because he did not feel Complainant was a good worker. However, OFO found that the Acting Manager was aware of Complainant's prior EEO complaints, including one that settled with the Agency agreeing to place him at the top of the list to be hired as a casual employee. Based on this settlement, Complainant was hired to work for the Acting Manager. OFO found that this evidence established an adequate nexus between the prior protected activity and the subject claim. Moreover, we found that Complainant established pretext by proving that, despite the Acting Manager's claim that he was not a good employee, during the relevant period, Complainant received satisfactory performance evaluations. Therefore, OFO concluded that a preponderance of the evidence established that retaliatory animus motivated Complainant's placement on the "Do Not Rehire" list.

Consequently, the Agency was ordered to take the following remedial action: remove Complainant from the "Do Not Rehire" list; conduct training for the Acting Manager and other responsible management officials regarding their responsibilities under EEO laws; consider taking disciplinary action against the Acting Manager; and conduct a supplemental investigation of the compensatory damages issue and attorneys fees.

(b)(7)(C)

**v. VA**, 0120114011 (9/12/2014) – Complainant filed two EEO complaints alleging discrimination on the basis of disability when: on August 1, 2008, the Agency subjected him to written psychological testing without cause; on September 12, 2008, Complainant was terminated from his position as a Police Officer at the Togus, Maine facility during his probationary period; on August 1, 2008, the Agency subjected Complainant to psychological testing without cause; on September 8, 2008, the Agency rescinded the offer to transfer Complainant to the Ann Arbor facility to the position of Police Officer GS-6, because of the results of a written psychological tests; and on October 29, 2008, Complainant was not hired for the position of Police Officer GS-6 at the Ann Arbor facility based on the results from the written psychological tests.

Complainant requested a hearing before an EEOC AJ, and following the hearing, the AJ issued a decision finding that the psychological test raised in claims (1) and (3) were in violation of the Rehabilitation Act. Furthermore, due to the Agency's reliance on the unlawful examination, Complainant was terminated as alleged in claim (2). Therefore, the AJ concluded that Complainant had established that the Agency's actions constituted unlawful discrimination in violation of the Rehabilitation Act. As such, the AJ awarded make whole relief and the Agency was ordered to offer to reinstate Complainant to the position of Police Officer in Togus, Maine and in Ann Arbor, Michigan. Based on the selection of position, the Agency was to award back pay to Complainant. The Agency's final order implemented the AJ's decision.

Complainant appealed asserting that the Agency failed to calculate his back pay based on his decision to go to the Michigan position. The Agency argued that Complainant was not entitled to back pay based on the higher locality pay of Michigan. The OFO decision found that the AJ clearly ordered the back pay calculation based on the Complainant's selection

and the Agency adopted the AJ's orders. The OFO decision determined that absent discrimination, the offer to the GS-6 Police Officer position in Ann Arbor, Michigan would not have been rescinded and Complainant would not have been terminated. Based on Complainant's acceptance of the Ann Arbor, Michigan position, Complainant should be provided with back pay based on the pay rate of Ann Arbor, Michigan. As such, the OFO decision ordered the Agency to place Complainant into his position, pay back pay, provide training to management at both facilities, and pay \$ 30,000 in compensatory damages.

(b)(7)(C) **v. DHS (CIS)**, 0120120772 (9/4/2014) –Complainant, a retired Adjudication Officer previously assigned to the Agency's Los Angeles District Office, alleged that the Agency's Los Angeles District Director had subjected her to discrimination based on race and reprisal when she was not selected for the Agency's annuitant re-hiring program. After an investigation and a hearing, the EEOC AJ assigned to the case found that Complainant failed to establish that the Agency's non-discriminatory reasons were pretext for discrimination. The AJ also found that Complainant did not establish a causal nexus between her prior protected EEO activity and her nonselection, and thus failed to establish a prima facie case of discrimination based on reprisal. On appeal, we reversed the Agency's final order, initially finding that the AJ erred as a matter of law when she found that Complainant failed to establish a prima facie case of discrimination based on reprisal. We noted that, although Complainant's nonselection occurred more than three years after her EEO activity, temporal proximity is not the only way to establish a causal nexus. We noted that the District Director was named as the responsible management official in Complainant's previous EEO complaint and was responsible for not recommending her for re-hire. Additionally, we found that the AJ did not consider Complainant's evidence that was offered to establish that the Agency's articulated reasons were unworthy of belief. In particular, we found it unworthy of belief that the Agency would not re-hire Complainant, a former employee with 25 years of adjudications experience, when the District Director specifically stated that all the selectees were required to perform adjudications work. We therefore found that the AJ's decision was not supported by substantial evidence in the record.

(b)(7)(C), (b)(7)(C), (b)(7)(C), (b)(7)(C) & (b)(7)(C) **v. Army**, 0120123054, 0120123055, 0120123056, 0120123057 & 0120123058 (9/9/2014) – The five complainants worked as Nurse Case Managers at the Agency's Ft. Gordon, Georgia facility. In the summer of 2008, two Lead Nurse Case Manager, GS-12, positions became vacant. The Lead Nurse Case Manager (Caucasian) offered one of the positions to a Nurse Case Manager (African American) ("Selectee 1") other than the complainants, but this individual declined the position. In August 2008, the Facility Director (Caucasian), at the recommendation of the Lead Nurse Case Manager, used a non-competitive direct hire process to select two other nurses ("Selectees 2 and 3") (both Caucasian) other than complainants for the Lead Nurse Consultant positions. Selectee 3 began working in her new position effective October 12, 2008, and Selectee 2 started effective January 18, 2009. Based on these events, the complainants (African-American) each contacted the Agency's EEO office alleging, among other things, race-based discrimination. The Complainants also alleged unlawful retaliation when they would no longer be centrally located and, instead, would be assigned to the buildings occupied by their respective companies, namely ALPHA, BRAVO and CHARLIE.

OFO found that the Complainants established a prima facie case of unlawful race-based discrimination. OFO determined that the Agency articulated legitimate, nondiscriminatory reasons for its actions, and that the Complainants failed to show that they were subjected to unlawful retaliation with respect to the work location. However, OFO found that the Complainants established that the Agency's reasons for the selection of Selectees 2 and 3 constituted race discrimination. OFO noted that the record did not support the Agency's assertion that the Positions in question needed to be filled immediately as evidenced by the rotation of employees through the positions and the Agency waiting until Selectee 2 was eligible for the promotion to the GS-12 level. Furthermore, OFO indicated that Selectee 2 was not eligible for the Position at the time she was selected while all of the Complainants were eligible. In addition, the Complainants had more degrees and significant experience as compared with Selectees 2 and 3. Therefore, OFO concluded that the Agency subjected the Complainant to race-based discrimination.

As remedy, OFO remanded the matter back to the Agency for a supplemental investigation and determination as to whom, among the five complainants, would have been selected for the two Lead Nurse Consultant positions but for the discrimination. Based on this determination, OFO ordered the Agency to provide equitable relief to the two Complainants. OFO also remanded the matter for supplemental investigation regarding all five complainants' entitlement to compensatory damages for any harm proven to have resulted from their participation in a discriminatory selection process.

(b)(7)(C) **v. DOJ (FBP)**, 0120130174 (9/5/2014) – The Agency issued a final decision finding that it had discriminated against Complainant on the basis of race (Black) when, on January 12, 2010, he was not selected for a Fabric Worker Supervisor position, because the selecting official failed to articulate a legitimate, nondiscriminatory reason for not selecting Complainant.

The Agency awarded Complainant \$5,000 in non-pecuniary damages for anxiety and frustration over the nonselection. The Agency's award did not take into account the emotional harm Complainant suffered due to white coworkers allegedly treating him negatively after they found out about his EEO activity in February 2010. The Agency reasoned that Complainant failed to show that this additional emotional harm was caused by management's failure to select him for a Fabric Worker Supervisor position. The Agency also denied Complainant's request to restore the sick leave and annual leave he used between July 2010 and August 2011 because he failed to connect his leave usage to harm caused by the Agency's nonselection.

Upon review, the Commission agreed with the Agency that the discriminatory conduct at issue (the non-selection of Complainant in January 2010) did not directly or proximately cause the emotional harm of uses of leave as described by Complainant. Rather, Complainant's statement indicated that a separate source of potential discriminatory conduct (possible coworker retaliatory harassment), was the direct, or proximate cause of emotional harm and his use of sick and annual leave.

However, the Commission modified the Agency's final decision to include orders for the Agency to consider disciplining the responsible management officials and to train them in their EEO responsibilities.

(b)(7)(C)

**v. USAF**, 0120123332 (9/10/2014) – Complainant alleged that the Agency subjected him to harassment on the bases of race (African American), national origin (American), and color (black), citing two particular incidents where a coworker referred to him by the n-word and used other profanity. In granting summary judgment for the Agency, the EEOC AJ failed to assess whether the coworker's conduct constituted harassment, instead finding that the evidence did not show a basis for imputing liability to the Agency. The AJ reasoned that there were no further incidents alleged after Complainant notified the Agency, and the coworker received non-disciplinary counseling. On appeal, the Commission reversed, finding that, based on the undisputed evidence of record, *Complainant* was entitled to summary judgment.

The Commission determined that the coworker's conduct constituted harassment based on race, noting the abundant evidence that, over a period of at least six months, the coworker repeatedly referred to Complainant by the n-word and used profanity toward him, in the presence of witnesses, in a manner that was extremely insulting, demeaning, threatening, and dehumanizing. The Commission further determined that the supervisor was aware of the coworker's conduct, but did nothing to stop it; that the coworker received non-disciplinary counseling only after Complainant initiated the EEO process; and that the Agency reprimanded the coworker only after Complainant resigned under protest and filed a formal EEO complaint. The Commission concluded that the Agency was liable for the harassment because it failed to take immediate and appropriate remedial action.

The Commission also found that the AJ erred when he failed to address Complainant's claim of constructive discharge. The Commission determined that the constructive discharge claim was so firmly enmeshed in the EEO process that it would unduly delay justice to remand it to MSPB, and therefore would rule on the claim. The Commission found that Complainant's resignation resulted from intolerable working conditions created by the harassment and that Complainant therefore was constructively discharged by the Agency. The Commission ordered relief including, among other elements, an offer of reinstatement with back pay and benefits.

(b)(7)(C)

**v. USPS**, 0120130456 (9/22/2014) – Complainant filed an EEO complaint alleging discrimination when the Agency issued him an unwarranted Proposed Notice of Removal. The Agency initially dismissed the complaint, but rescinded its dismissal and accepted the reprisal claim for investigation. As Complainant did not request a hearing, the Agency issued a final decision determining that there was no link between Complainant's prior EEO activity and the proposed removal. On appeal, we reversed the Agency's decision finding. OFO found that Complainant had been actively engaged with the Agency in disputing its compliance with some of the terms of some settlement agreements into which he had entered with the responsible management official. We found that this evidence was sufficient to create an initial inference that the proposed removal was motivated, in part, by retaliatory animus. The responding official stated that the removal was based on Complainant's "misconduct" after Complainant failed to respond to several radio pages. Although we acknowledged that the application of the Agency's misconduct policies would be legitimate, if shown to be warranted, the Agency did not provide any explanation for why it issued Complainant the proposed removal, when the available evidence verified Complainant's explanation (that he was sent on a break and he had informed a supervisor that his radio was defective). We remanded the matter to the agency for relief, which included the restoration of any pay lost as a result of the proposed removal, with interest.

The Agency was also ordered to investigate Complainant's entitlement to compensatory damages.

(b)(7)(C) **v. Energy**, 0120130468 (9/12/2014) – Complainant, a Federal Agent (courier) of nuclear materials for the Agency's Nuclear Security Administration filed a complaint in October 2011 alleging that he was harassed by coworkers and supervisors in retaliation for filing a prior complaint. On appeal from the prior complaint, in *Couch v. Department of Energy*, EEOC Appeal No. 0120131136 (Aug. 13, 2013), OFO found that Complainant was harassed based on his sex (male, gender stereotyping, perceived sexual orientation) and reprisal for prior protected EEO activity. The harassment included co-workers repeatedly calling Complainant "fag" and "gay," telling him he did not belong in the organization, calling him "rat," supervisors warning Agents to be careful around him because of his EEO activity, being ostracized, and culminating around July 2011 with the words "RAT FAG" and "God Loves Rat Fags To" being written on his gun bag and sexually explicit gay and lesbian magazines being left in rental cars on a trip.

In his second complaint, Complainant did not contend that he continued to be subjected to explicit vulgarities, rather he alleged continuing retaliatory harassment in more subtle forms. Following an investigation the Agency issued a FAD finding no reprisal discrimination. On appeal OFO found that while we agreed with the Agency that some of new incidents did not occur as alleged or there were non-retaliatory reasons for them, we disagreed that this was true across the board. OFO found reprisal on incidents such as a supervisor pressing for severe discipline for Complainant breaching a security protocol, on a truck convoy he was pressured to speed and violate other safety protocols and was ridiculed in a prank; a co-worker told him nobody wanted to deal with him, undergoing an inventory conducted in an antagonizing and prolonged manner, and being actively ostracized by co-workers when he used a computer room and being told to leave.

OFO found that Complainant continued to complain to management about the harassment and the Agency did not exercise reasonable care to prevent and promptly correct harassing behavior that was ongoing since May 2010 and had known about for a long time.

(b)(7)(C) **v. USDA (FSIS)**, 0720130006 (9/30/2014) – Complainant, a Veterinarian, filed a complaint alleging that he was discriminated against and harassed on the bases of Race (Asian), Color (Black), Age (61), and in reprisal for prior protected EEO activity when his position was abolished, resulting in his reassignment from Detroit, Michigan to Stanwood, Washington. Following an investigation and a hearing before an EEOC AJ, the AJ found that Complainant was discriminated against on all the above bases when his position was abolished and he was reassigned, but he was not harassed. The AJ ordered equitable remedies, damages, and attorney fees.

The Agency rejected the AJ's decision. OFO conceded that based on prior litigation the AJ was estopped from making some of the factual determinations he used to support his findings of pretext and retaliatory intent, and some other factual determinations he made to support his finding of pretext were not supported by the record. Nevertheless, OFO found that the AJ's finding of reprisal discrimination was supported by substantial evidence, including that the Agency timed the abolishment of Complainant's position at a period of time when there were no nearby Veterinarian positions open to which he could be reassigned. OFO decided that it need not make a determination on race, color, and age

discrimination because this would not affect Complainant's relief. Noting that the parties did not dispute the calculation of damages and attorney fees, OFO affirmed the AJ's findings on these matters.

(b)(7)(C) **v. DOD (DIA)**, 0720120002 (9/19/2014) – Complainant, a Senior Staff Officer in the Agency's Human Capital Organization, filed a complaint alleging retaliation, as well as race and sex discrimination, when she was subjected to a reassignment, poor performance evaluations, counseling, a Performance Improvement Plan, and ultimately a removal from employment. After a hearing, the AJ issued a decision finding discrimination. In support, the AJ relied heavily on the testimony of Agency witnesses, whom she found were evasive, inconsistent and not credible. The AJ noted that Complainant was the only African American in such a high level position, and that management attacked her performance as a means of removing her from office. As relief, the AJ ordered that the Agency expunge all negative appraisals and references to her removal, pay \$75,000 in compensatory damages and \$298,999 in attorney's fees. The AJ also ordered over \$5,000 in sanctions for the failure to respond to a discovery and a Motion to Compel.

The Agency appealed, contending that the AJ's decision was not supported by substantial evidence, and that the sanction and attorney fee were also erroneous. In the Commission's decision, OFO found that the AJ's decision, which specifically credited Complainant's testimony and discounted the testimony of management officials, was supported by substantial evidence. The decision found that the witness's testimony changed throughout the case, which ultimately led to a finding of pretext by the AJ. The decision also found the AJ did not abuse her discretion when she issued a sanction in the support of attorney's fees. As for the large attorney fee award, the decision found that the attorneys' fee award was supported by the attorney fee petition and prevailing market rate as determined by the Laffey Matrix. The Commission ordered that the Agency implement the relief ordered by the AJ.

(b)(7)(C) **v. TVA**, 0720130014 (8/21/2014) – An EEOC AJ issued a decision, after a hearing, finding that the Agency discriminated against Complainant on the basis of sex when she was not selected for a Nuclear Mechanical Technician position. Complainant submitted a request for attorneys fees and costs for a total of \$90,570.83. The AJ issued an Order Entering Judgment which reduced Complainant's attorney's fee award to \$73,060.00 and reimbursable costs to \$5,432.29. The Agency issued a final order implementing the AJ's decision finding discrimination, however, the Agency reduced the Attorney's fees by 50%. Accordingly, the Agency filed an appeal to the Commission. Neither party disputed the costs awarded by the AJ in this case

OFO, in its appellate decision, found that AJ's award of attorney's fees in the amount of \$73,060.00 was supported by the record and the Agency's reduction was not warranted. Specifically, OFO noted the AJ's determination of attorney's fees reduced the attorney's fees for excessive fees or fees unrelated to the case. OFO also found that nothing in the record supported the Agency's request to reduce the attorney's fees across the board by 50%.