Description of document:	Equal Employment Opportunity Commission (EEOC) Office of Federal Operations (OFO) Quarterly Strategic Enforcement Plan Reports, 2015-2019
Requested date:	27-September-2019
Release date:	31-March-2020
Posted date:	13-April-2020
Source of document:	FOIA Request Assistant Legal Counsel Equal Employment Opportunity Commission Office of Legal Counsel FOIA Programs 131 M Street, N.E., Suite 5NW22B Washington, D.C. 20507 Fax: (202) 653-6034 Email: foia@eeoc.gov

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
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March 31, 2020

Re: FOIA No.: 820-2019-019639 (OFO 2015-2019 Strategic Enforcement Plans)

Your Freedom of Information Act (FOIA) request, received on September 27, 2019, is processed. Our search began on October 2, 2019. All agency records in creation as of October 2, 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; 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 Division, 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, or online at the following public access link (PAL): https://publicportalfoiapal.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

Stephanie D. Garner
Assistant Legal Counsel
FOIA Division
Phone: (202) 663-4634
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):

Access to federal complaintant names to which you are not a party, could reasonably constitute a clearly unwarranted invasion of personal privacy should such records be disclosed to the public.

FOIA No.: 820-2019-019639

Comments

This is in response to your Freedom of Information Act (FOIA) request. You request a copy of EEOC FY2015 2nd-4th Quarterly Strategic Enforcement Plan (SEP) through FY2019 for the Office of Federal Operations for each quarter. Your request is granted in part and denied in part, under exemption (b)(7)(C) to the FOIA to protect the personal privacy of all complainants.

The following disclosed records are being forwarded to you separately.
OFO FY2015 Quarterly Strategic Enforcement Plan from 2nd to 4th quarter.

FY2015

- 2nd and 3rd Quarter combined – 68 pages
- 4th Quarter – 39

OFO FY2016 through FY2019 Quarterly Strategic Enforcement Plan from 1st to 4th quarter.

FY2016

- 1st Quarter – 50 pages
- 2nd Quarter – 35 pages
- 3rd Quarter – 35 pages
- 4th Quarter – 41 pages

FY2017

- 1st and 2nd Quarter combined – 61 pages
- 3rd and 4th Quarter combines – 61 pages

FY2018

- 1st and 2nd Quarter combined – 75 pages
- 3rd and 4th Quarter combines – 90 pages

FY2019

- 1st and 2nd Quarter combined – 67 pages
- 3rd and 4th Quarter combines – 91 pages

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.

Quarterly Strategic Enforcement Plan Report
Office of Federal Operations
4th Quarter FY 2015

I. Background: General FY 2015 4th Quarter Appellate Review Program Accomplishments

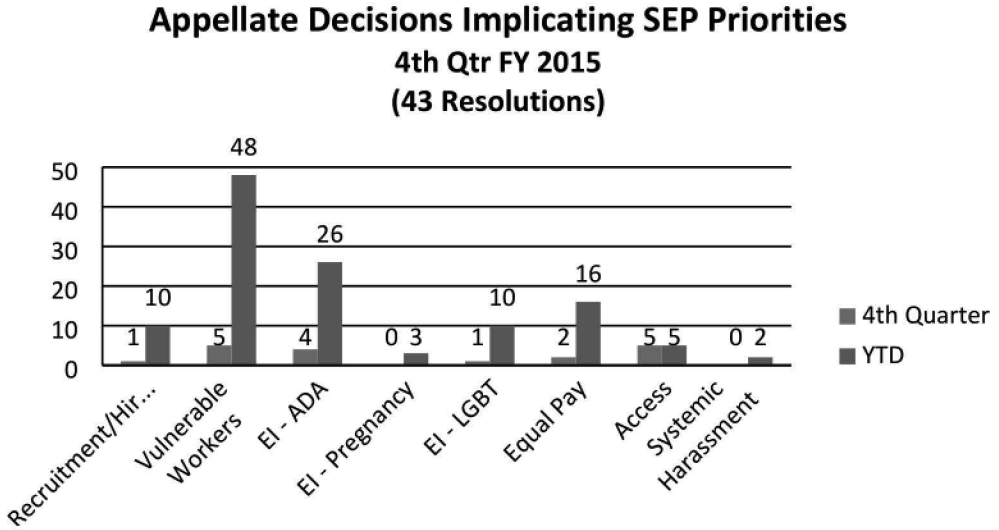
During the 4th Quarter FY 2015, the Office of Federal Operations (OFO) resolved 832 appeals. These resolutions included 409 decisions on the merits and 338 procedural closures. Of the 338 procedural closures, 243 of them involved initial appeals under review by OFO, and we reversed 82 or 33.7% of the agency dismissals. With regard to the merit decisions, OFO issued 35 findings of discrimination during the 4th Quarter. We found discrimination on the basis of retaliation in 18 of the findings, disability in 10 of the findings, sex in 8 of the findings, and age in 3 of the findings. The top three issues involved in the findings included harassment (7), disability accommodation (6) and promotion (5).

Resolution Description	4th Quarter	Year to Date
Resolutions	832	3,850
Merits Resolutions	409	1,677
Findings	35	93
Non-Findings	374	1,584
Procedural Resolutions (all)	338	1,810
Procedural Resolutions (from Initial Appeal)	243	1,180
Affirming Dismissal	160	717
Remanding Dismissal	82	448

With regard to the categorization of the 832 resolutions, OFO identified 17 appeals that implicated one or more SEP/FCP priority.[1] Section II below contains charts breaking down the composition of the individual priorities, summaries of the 17 decisions OFO attorneys categorized as implicating the SEP/FCP priorities, and summaries of the findings of discrimination made in the 4th quarter.

II. Analysis of SEP/FCP Priority Areas

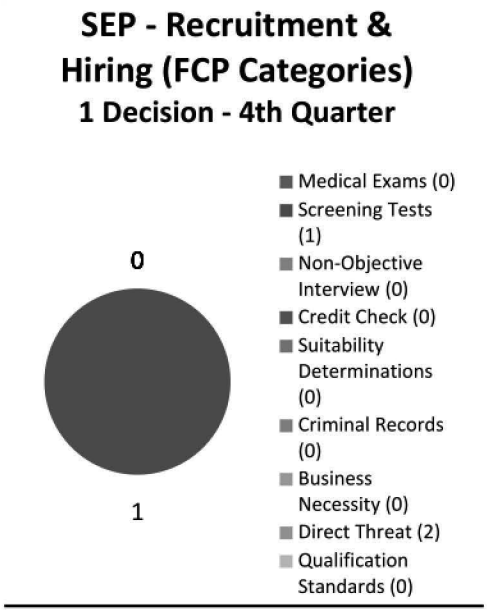
The chart below depicts the distribution of the 18 SEP categories identified in the 17 appellate decisions OFO identified as implicating an SEP/FCP category:



[1] One appellate decision was categorized as implicating two separate SEP priorities, and this is noted in the summaries below.

The numbered sections below provide more information about each of the six SEP priorities. Specifically, these sections start with a chart depicting the related FCP categories under each SEP, as well as summaries of the specific decisions under each SEP/FCP priority. In Section 7, by contrast, we provide summaries of the 35 findings of discrimination issued during the 4th Quarter that did not implicate an SEP/FCP category.

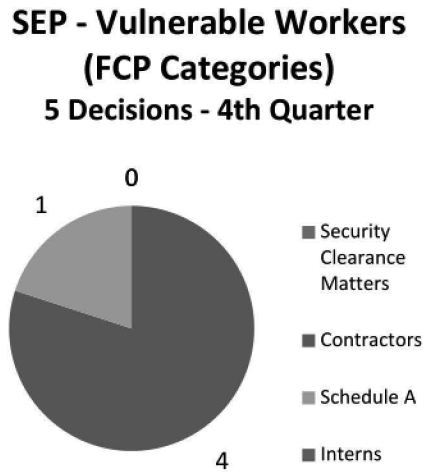
1. ELIMINATING BARRIERS IN RECRUITMENT AND HIRING



Pershing v. DOJ (FBI), 0520150325 (09/02/2015) **[Repeated under Priority 2 below]** – Complainant filed an EEO complaint alleging discrimination based on disability when she was not selected for several positions with the Federal Bureau of Investigation (FBI) that required a top secret security clearance. Complainant had failed a polygraph test required to secure the clearance. In our previous decision [EEOC Appeal No. 0120130689 (March 9, 2015)], OFO affirmed an EEOC AJ's finding that Complainant did not request any accommodation from the Agency due to any alleged disability prior to taking the polygraph examination. Even had she done so, the AJ found that the record did not support the conclusion that Complainant was "qualified" for any relevant positions with the Agency. Specifically, the undisputed record supports the finding that the requirement to pass the polygraph examination is an essential requirement, necessary for national security reasons, which the Agency cannot be compelled to waive. See Dep't of the Navy v. Egan, 484 U.S. 518, 529-30 (1988). Moreover, Complainant conceded in her deposition that no effective accommodation existed. In her request for reconsideration, Complainant essentially raised the same arguments she made in her original appeal. OFO denied the request for reconsideration, emphasizing that reconsideration is not an opportunity for a second appeal, but required Complainant to demonstrate that the appellate decision involved a clearly erroneous interpretation of material fact or law, which she failed to do.

2. PROTECTING IMMIGRANT, MIGRANT AND OTHER VULNERABLE WORKERS

As depicted in the chart below, during the 4th Quarter of FY 2015 OFO resolved 5 decisions under this SEP Priority and its associated FCP priorities.



Decision Summaries for this Category

(b)(7)(C) **v. DOD**, 0120131331 (07/14/2015) – At the time of the events giving rise to the instant complaint, Complainant was a participant in the Naval Postgraduate School's (NPS) Science, Mathematics and Research for Transformation Defense Education Program (SMART), in the Office of the Secretary of Defense (OSD), Assistant Secretary of Defense for Research and Engineering. The program supports students pursuing an undergraduate or graduate degree in Science, Technology, Engineering, or Mathematics by providing a full scholarship and an opportunity for employment with a Department of Defense facility (Agency) upon completion. On November 9, 2012, Complainant filed a formal complaint alleging that the Agency subjected her to discriminatory harassment, and discriminated against her on the basis of disability (mental) between June 2009 and June 2010 when on two different occasions the Deputy Program Manager (DPM) yelled at her accusing her of manipulating her sponsoring facility into requesting a transfer to a new facility and used language during teleconferences that made her feel like she was always wrong; denied her reasonable accommodation request; and placed her on academic probation as her GPA was below the SMART Scholar Program's requirement.

The Agency dismissed the complaint for failure to state a claim, reasoning that Complainant was not an employee covered by EEO regulations.

On appeal, in addition to addressing the underlying merits of her case which the Commission declined to address in the appellate decision, Complainant argued that the common law test of agency supported her contention that she meet the definition of being an employee for the purposes of protection under federal EEO laws and regulations. In addition to her contention that she was an employee, Complainant maintained that she was also an applicant for employment while she was performing her internship at Eglin Air Force Base in Valparaiso, Florida.

Upon review of the record, the Office of Federal Operations (OFO) found that the facts of the instant matter were distinguishable from those in (b)(7)(C) v. Department of the Army, EEOC Appeal No. 0120101877 (Sep. 21, 2010). None of the four allegations in the complaint involved matters that could be specifically attributed to Complainant's interaction with the Agency (Sponsoring Facility), or its personnel. Complainant was a recipient of a scholarship managed by a non-government entity. Neither the Agency, nor the SMART Program were responsible for the academic component of Complainant's participation in this scholarship program. As Complainant was a full-time student during all relevant time periods, the academic component comprised the bulk of this program. Complainant's regular communication with program personnel was never to discuss her job related performance, and while Complainant was a summer intern, the Sponsoring Facility only monitored

her hours of operation. As a full-time student, Complainant completed most of her course-work at her academic institution. While completing the internship component, Complainant would utilize work space and materials from the Agency, but Complainant was not entitled to receive compensation from the Agency, and the work she was performing was not considered an integral part of the business of the Agency, nor was she considered to be performing a job, or rendering advisory or personnel services.

Ultimately, the appellate decision reasoned that much of what Complainant cited to on appeal in support of her contention that she should be considered an employee for EEO purposes related to the academic requirements of which the Agency played no role in imposing. Upon consideration of these factors, OFO agreed with the Agency's position that it did not exercise sufficient control over Complainant to qualify as her employer for purposes of filing an EEO complaint. The appellate decision affirmed the FAD dismissal of the complaint for failure to state a claim.

(b)(7)(C) **v. DOJ (FBI)**, 0520150325 (09/02/2015) – Complainant filed an EEO complaint alleging discrimination based on disability when she was not selected for several positions with the Federal Bureau of Investigation (FBI) that required a top secret security clearance. Complainant had failed a polygraph test required to secure the clearance. In our previous decision [EEOC Appeal No. 0120130689 (March 9, 2015)], OFO affirmed an EEOC AJ's finding that Complainant did not request any accommodation from the Agency due to any alleged disability prior to taking the polygraph examination. Even had she done so, the AJ found that the record did not support the conclusion that Complainant was "qualified" for any relevant positions with the Agency. Specifically, the undisputed record supports the finding that the requirement to pass the polygraph examination is an essential requirement, necessary for national security reasons, which the Agency cannot be compelled to waive. See Dep't of the Navy v. Egan, 484 U.S. 518, 529-30 (1988). Moreover, Complainant conceded in her deposition that no effective accommodation existed. In her request for reconsideration, Complainant essentially raised the same arguments she made in her original appeal. OFO denied the request for reconsideration, emphasizing that reconsideration is not an opportunity for a second appeal, but required Complainant to demonstrate that the appellate decision involved a clearly erroneous interpretation of material fact or law, which she failed to do.

(b)(7)(C) **v. Navy**, 0120131966 (09/25/2015) – Complainant worked for a staffing firm serving the Agency as a Clinical Psychologist. He alleged that the Agency discriminated against him based on his national origin (Egyptian) and age (69 – 70) regarding being harassed, an assignment, a performance counseling, not being paid for 4.5 hours which he did not work, and his Performance Appraisal Review (PAR) and removal. The Agency did not contest that Complainant was an employee thereof for purposes of 29 C.F.R. Part 1614. Following an investigation, an EEOC AJ issued a decision without a hearing finding no discrimination. The AJ found that the record supported Complainant had performance problems recited in his PAR, that he was removed for failing to maintain his medical privileges resulting from his refusal to sign his PAR -- part of his medical credentialing package -- and ongoing not reporting to work; that he did not show he was disparately treated regarding not being paid for 4.5 hours he did not work, and he was not harassed. On appeal, the EEOC affirmed. In affirming summary judgment, the EEOC found that the record was adequately developed by the investigator and Complainant did not show that the AJ abused her discretion in denying his motion to compel discovery.

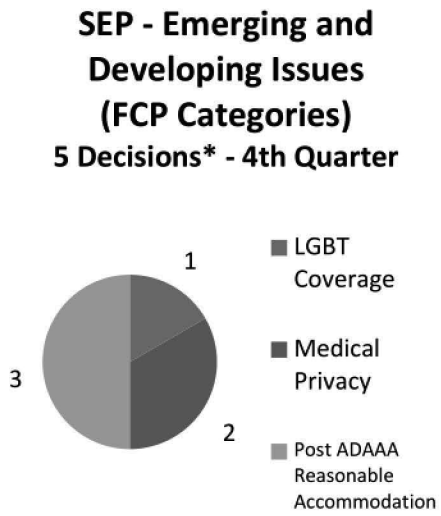
(b)(7)(C) **v. Army**, 0120131840 (08/11/2015) – Complainant worked for a staffing firm serving the Agency as a Senior Logistician. He alleged that the Agency discriminated against him based on his race/color (African-American/Black) when he was terminated in October 2010. In a previous decision, OFO found that under common law, the Agency jointly employed Complainant. On remand, following an investigation, Complainant requested a FAD without a hearing. The Agency found no discrimination, and OFO affirmed. There were conflicting management versions of events in the record. OFO concluded that the Agency's primary reason for cutting off Complainant's services was because of a lack of work in his supply specialty of Logistics – the reason he was brought on board, and the secondary reasons were management's belief that Complainant

engaged in his real estate business on government time and an Agency manager's perception that Complainant was not a strong briefer, not discrimination.

(b)(7)(C) **v. Army**, 0120151632 (08/18/2015) – Complainant worked as a Supply Technician at the Agency's facility in Texarkana, Texas. She filed a formal EEO complaint alleging that she was subjected to unlawful sexual harassment. The Agency issued a final decision dismissing the formal complaint for failure to state a claim reasoning that Complainant was not an Agency employee but a contract employee. On appeal, OFO reversed the Agency's dismissal and remanded the matter for a supplemental investigation. OFO reasoned that the Agency failed to reference the Ma factors and did not include a copy of the contract between the Agency and the contractor or any other documentation. Thus, OFO was unable to ascertain whether the Agency exercised sufficient control over Complainant's position to qualify as her employer for EEO purposes. OFO ordered the Agency to conduct a supplemental investigation focusing on the Ma factors and issue a new final decision dismissing the complaint or accepting the complaint for investigation.

3. ADDRESSING EMERGING AND DEVELOPING ISSUES

As depicted in the chart below, during the 4th Quarter of FY 2015 OFO resolved 5 decisions under this SEP Priority and its associated FCP priorities.



*One decision (Rutland-Cooper v. DHS) implicated 2 FCP priorities.

Decision Summaries for this Category

(b)(7)(C) **v. DOJ (FBP)**, 0120130114 (07/15/2015) – Complainant appealed from an EEOC Administrative Judge's finding that Complainant was not subjected to race (African-American), sex or color discrimination, and a hostile work environment which was issued without a hearing. Complainant worked as a Medical Records Technician with the Agency. Complainant suffered an injury and applied for and subsequently received Office of Worker's Compensation Program (OWCP) benefits, and returned to work with medical restrictions. Upon returning to work, Complainant filed an EEO complaint alleging that she realized that her supervisor provided her medical information to an individual handling her OWCP, that she received an e-mail stating that her request for compensatory time off needed to be submitted when she had previously submitted it, that her light

duty assignment was in room with a shortage of equipment and no air conditioner, and that she was ordered to return to work in a light duty position when she had not been released from her doctor's care.

The Commission found that the AJ's issuance of a decision without a hearing finding no discrimination was correct because Complainant did not demonstrate there were genuine issues of material fact in dispute. In a number of instances, Complainant merely disputed an asserted fact, but did not point to any evidence in the record, aside from mere speculation, which formed the basis for her dispute. For example, Complainant alleged that her manager provided medical information to the Public Safety manager, who was processing Complainant's OWCP claim, regarding Complainant's medical history which was provided in support of leave requests. The Public Safety Manager indicated that he received this information from either Complainant or her doctor, and not Complainant's manager. Complainant disputed this; however, she did not provide any evidence aside from just speculating about where the Public Safety Manager received the information. Also, Complainant's contention that she was ordered to return to work in a light duty position when she had not been released from her doctor's care was consistent with the Agency's explanation that Complainant's medical release was expiring and that she either needed to update the release or return to work.

Therefore, the Commission affirmed the AJ's finding that Complainant was not subjected to discrimination.

(b)(7)(C) **v. DHS**, 0120130319 (07/15/2015) – Complainant alleged that the Agency subjected her to a hostile work environment on the bases of race (African-American), disability (sleep apnea, diabetes, hypertension, high cholesterol), age (42), and reprisal for prior protected EEO activity (this instant complaint) when the Agency failed to reasonably accommodate her disability and failed to safeguard her medical information. The Agency determined that Complainant failed to establish that she was subjected to unlawful harassment or that the Agency violated the Rehabilitation Act.

The record reflects that Complainant requested that she be able to work from home and work alternate weeks from another location as a reasonable accommodation. We agreed with the Agency that Complainant's requested accommodation would not have allowed her to perform the essential functions of the position because she is required to spend approximately 80% of her time working with special needs families who come directly to the office to meet with Complainant. If Complainant teleworked from home or worked from the alternate location, she would be unable to help individuals who come into the office for assistance.

The Agency did offer Complainant an accommodation that would have been in conformance with the medical limitations described by her physician and would have allowed her to perform the essential functions of the position. Specifically, Complainant's physician stated that she needed a "work schedule accommodation that will reduce the number of days she commutes from Sacramento to Alameda." Complainant's supervisor proposed an alternate work schedule which would have allowed Complainant to have an extra day off each week, reducing the amount of time she would need to commute to Alameda. The supervisor also offered to allow Complainant to occasionally work from an alternate location in Sacramento on special projects, such as conducting trainings and other opportunities as they arise. We found the Agency offered an effective accommodation in conformance with her doctor's restrictions.

Complainant contended that her supervisor failed to safeguard her confidential medical information when she placed a letter from Complainant's physician in her desk drawer. However the documentation was only kept in the desk drawer while they were working on finding an accommodation for Complainant and was always locked. We found there was no evidence in the record that the medical records were disclosed in violation of our regulations.

Finally, we found that Complainant failed to establish a prima facie case of a hostile work environment because she did not establish by a preponderance of the evidence that any of the Agency's actions were motivated by an animus towards Complainant's race, age, disability, or protected EEO activity.

(b)(7)(C) **v. DOT (FAA)**, 0120133080 (07/15/2015) – In this circulated decision, the Commission reversed the Agency's dismissal of Complainant's claim of sexual orientation (and reprisal) discrimination. Complainant worked as a Supervisory Air Traffic Control Specialist, in a temporary Front Line Manager (FLM) position, at the International Airport in Miami, Florida. He understood that all temporary FLMs were automatically

considered for any vacant, permanent FLM positions. On July 26, 2012, Complainant learned that he was not selected for a permanent position as a Front Line Manager. He alleged that he was not selected because he is gay. He also alleged that his supervisor, who was involved in the selection process, made several negative comments about Complainant's sexual orientation.

The Agency investigated the complaint and, at Complainant's request, issued a FAD. Rather than address the merits the Agency dismissed the complaint for untimely EEO Counselor contact. The Agency reasoned that Complainant was aware of the discrimination in October 2010 when he was placed in the temporary FLM position, but did not contact an EEO Counselor until August 2012. In addition, the Agency notified Complainant that, pursuant to its policies, the sexual orientation portion of his claim was appealable only through the Agency's internal procedures.

Complainant appealed the Agency's decision to the Commission. Because this was an appeal from the Agency's dismissal, the Commission stated that, at this stage of the proceedings, the inquiry is limited to whether Complainant met the requisites to bring his EEO complaint in the Part 1614 process and if he has the legal right to come before the Commission.

First, the Commission found that Complainant's EEO contact was timely because he could only reasonably have suspected discrimination after he learned that he was not selected for conversion to a permanent position in July 2012. Second, with regard to Complainant's sexual orientation claim, the Commission stated that "we apply the words of the statute Congress has charged us with enforcing." The Commission referenced Title VII's Section 717 requirement that all personnel actions shall be made free of sex discrimination.

In finding that Complainant stated a claim, the Commission concluded that "sexual orientation is inherently a 'sex-based consideration'." The Commission reasserted its position, as stated in Macy, that the question for assessing Title VII coverage is the same for a sexual orientation claim as any other Title VII case involving allegations of sex discrimination: whether the agency has relied on sex-based considerations or taken gender into account when taking the challenged employment action. The Commission concluded that "Complainant's allegations of discrimination on the basis of sexual orientation state a claim of discrimination on the basis of sex within the meaning of Title VII." The Commission added that the ordinary Section 1614 process is the most appropriate method of resolving these claims, and remanded the complaint to the Agency for further processing.

(b)(7)(C) **v. VA**, 0120130805 (08/18/2015) – Complainant alleged discrimination on the bases of race, national origin, disability, age, and reprisal when the Agency allegedly failed to

reasonably accommodate her disability and when she was ultimately sent home because there was no work within her limitations.

We found that assuming that Complainant is an individual with a disability, she was not qualified for the Diagnostic Radiology Technologist position because she cannot perform the essential functions of the position. Complainant was restricted from lifting, reaching, pulling, and pushing, which were all essential functions of the position. We found that Complainant's requested accommodation that a lift be installed and additional staff assigned to help her with all lifting, reaching, pulling, and pushing tasks would not have allowed her to perform the essential functions of the position, because by assigning additional staff to help her with all of these tasks, the Agency would essentially be assigning those staff members to perform the essential functions of the position. We find that the Agency reasonably accommodated Complainant's disability when it put her into a temporary light duty position, and when it offered her a permanent position as an Interventional Radiology Coordinator. The record reflects that this position was in accordance with her medical restrictions and was identical to the light duty position she was performing.

We also found that Complainant failed to establish that she was subjected to disparate treatment because the Agency articulated legitimate, nondiscriminatory reasons for its actions. Specifically, the Agency placed Complainant on administrative leave and told her to stay at home because she was not qualified for her position and she refused to accept a position for which she was qualified. Complainant did not establish that the Agency's reasons were a pretext for discrimination.

(b)(7)(C) **v Navy**, 0120131964 (8/21/2015) - Complainant alleged that the Agency subjected her to a hostile work environment on the bases of race, disability, and reprisal when her request for a reasonable accommodation was denied and when her supervisor followed her, required her to provide medical documentation, and initiated a pre-action investigation against her regarding circumstances related to her medical condition.

We found that the Complainant's physical disability limited her from sitting for more than 10 minutes at a time and that she be able to shift positions in order to avoid back pain. The record established that the Agency granted Complainant's reasonable accommodation request and found that she could be accommodated in her Medical Support Assistant position in the Emergency Room.

Complainant also requested that her mental disability be accommodated in the form of being reassigned out of the Emergency Room. The Agency requested that Complainant provide more specific medical documentation to support her requests for a reasonable accommodation. The Agency also detailed Complainant to the Internal Medicine Clinic, however that detail only lasted a few days because Complainant was allegedly hostile and abusive. The Agency found that Complainant did not provide sufficient medical documentation to support her mental disability and her request to be reassigned out of the Emergency Room. The Agency again requested more medical documentation to support her request. We found that most of the medical documentation Complainant submitted regarding her mental disability was general, vague, and short, and as a result, the Agency's request for more documentation was reasonable and not overly intrusive.

We also found that Complainant did not establish a case of harassment because she did not establish by a preponderance of the evidence that any of the Agency's actions were based on her protected bases.

4. ENFORCING EQUAL PAY LAWS

Neither of the 2 decisions under this priority implicated the associated FCP.

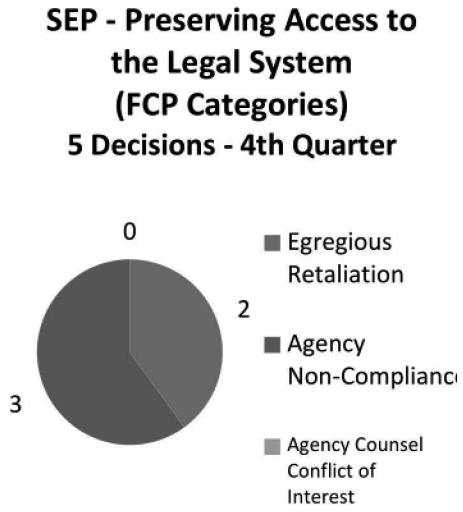
Decision Summary for this Category

(b)(7)(C) **v. TVA**, 0120133148 (09/16/2015) – Complainant, a Unit Supervisor at a nuclear plant, filed an EEO complaint alleging that she was discriminated against on the on the basis of sex (female) when complainant was paid a lower salary than male Senior Reactor Operator Unit Supervisors. An EEOC AJ issued summary judgment finding no discrimination and the agency implemented that decision. Complainant filed an appeal to OFO, and OFO reversed the summary judgment and ordered a hearing. An AJ held a hearing and issued a decision finding no discrimination. The agency issued another decision fully implementing the AJ's finding of no discrimination. Complainant then filed the instant appeal with OFO. OFO issued a decision affirming the agency decision finding no discrimination. Regarding complainant's Equal Pay Act (EPA) claim, OFO found that complainant had established a prima facie case of an EPA violation, but that the agency showed that a factor other than sex explained the pay difference. OFO found that complainant received lower compensation than other supervisors because she had a lower performance rating than other supervisors. For the same reasons, OFO found no discrimination on the basis of sex.

(b)(7)(C) **v. VA**, 0120120682 (08/28/2015) – Complainant, an IT Specialist, filed an EEO complaint alleging that she was discriminated against on the on the bases of race (African-American), sex (female), color (brown), and in reprisal for prior protected EEO activity. The complaint comprised 17 claims including her claim that she was not paid as much as male employees when hired. A portion of the complaint was dismissed as untimely raised with an EEO Counselor. The Agency found no discrimination on the remaining portion of the complaint. Complainant appealed and the OFO decision affirmed the agency decision. OFO found that the dismissed

portion of the complaint was properly dismissed and that the Agency properly found no discrimination on all claims. Regarding Complainant's Equal Pay Act (EPA) claim, OFO found that assuming Complainant established a prima facie case of an EPA violation, the Agency showed that a factor other than sex explained the pay difference. OFO found that Complainant was hired at the GS-5 level based on her experience and education. OFO also found that male employees were also hired at the GS-5 level.

5. PRESERVING ACCESS TO THE LEGAL SYSTEM



(b)(7)(C) **v. Air Force (NGB)**, 0420140014 (07/02/2015) – In this circulated decision on a petition for enforcement, the Commission firmly reasserted its long-standing position that, to the extent that a claim of discrimination arises from a dual-status technician's civilian, not military duties, as determined on a case-by-case basis, such claims are within the Commission's jurisdiction and are subject to processing under 29 C.F.R. Part 1614.

In EEOC Appeal No. 0720110023, the Commission upheld an EEOC AJ's decision finding that the agency discriminated against Petitioner on the basis of sex with regard to work assignments, a performance appraisal, and harassment by both her supervisor and her coworkers. The Agency, on appeal, did not contest the finding of discrimination or the award of relief. Rather, the Agency asserted that the Commission does not have jurisdiction over any claims of discrimination from dual-status technicians because all of their duties are inherently military in nature, and that the Commission cannot order an Adjutant General to take any action. The Commission, however, found that it had jurisdiction over Petitioner's complaint because the discriminatory acts occurred when Petitioner was working in her federal civilian capacity.

Neither party requested reconsideration of the Commission's decision in Appeal No. 0720110023. Nonetheless, after an extended period of fruitless attempts to obtain compliance, the Adjutant General of the Texas National Guard submitted a letter to the Commission stating his intent to not comply with our Order. Specifically, the Adjutant General stated that the Commission does not have jurisdiction over this case, and that neither the National Guard Bureau nor any element of the United States has the authority to direct an Adjutant General to take a particular personnel action with respect to a National Guard technician.

In the decision on the petition for enforcement, the Commission first laid out an explanation of "dual-status technician," along with the history of the Commission's assertion of jurisdiction over claims filed by dual-status technicians, and a review of relevant statutes and federal court decisions addressing the issue. The Commission forcefully rejected the Agency's argument that there is no distinction between Petitioner's

military and civilian duties, such that any conduct occurring while Petitioner was wearing a uniform, working on a military base, and servicing military equipment is military in nature, and thus exempt from Commission jurisdiction. The Commission reiterated that the conduct that formed the basis of Petitioner's claims arose from her civilian employment, and that her complaint therefore was within the Commission's jurisdiction.

The Commission next found that the Adjutant General and the State National Guard are "executive agencies" within the meaning of Title VII of the Civil Rights Act, and Title 5 of the United States Code. Again, the Commission reviewed relevant statutes and federal case law supporting its determination that these entities are subject to the Commission's jurisdiction. The Commission concluded, in relevant part, "When the adjutant general acts through the Secretary of the Army or the Air Force with regard to federal personnel pursuant to 32 U.S.C. §709, the adjutant general is engaging in a federal activity through a military department as defined by Title VII."

Finally, the Commission noted that, under Title VII, "The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions [issued by the Commission] ... Therefore, the Secretary of the Air Force and the Chief of the National Guard Bureau are ultimately responsible for ensuring compliance with the Commission's Orders" (citation and footnote omitted). The Commission reiterated the award of relief to Petitioner, requiring compliance within 30 calendar days of the date its decision becomes final.

(b)(7)(C) **v. DHS (TSA)**, 0720140014 (08/19/2015) **[Repeated under Findngs below]** – Complainant alleged, in pertinent part, that the Agency: (1) subjected him to disparate treatment on the basis of retaliation when it reduced his work hours; and (2) made certain verbal statements that constituted per se retaliation. The AJ, after a hearing, found retaliation (mixed motive retaliation in claim 1 and per se retaliation in claim 2) and ordered the Agency to pay a certain amount in attorney's fees. OFO affirmed the AJ's decision.

First, citing (b)(7)(C) v. Dep't of Interior, EEOC Petition No. 0320110050 (July 16, 2014), OFO rejected the Agency's argument that the "but for" standard discussed in University of Texas Southwestern Medical Center v. Nassar, 133 S.Ct 2517 (2013) applied to claim 1.

Second, OFO found that substantial evidence in the record supported the AJ's findings of retaliation. Regarding claim 1, OFO noted the AJ's finding that the following verbal statements by Agency management – made in response to Complainant's assertion that the Agency's hiring and scheduling practices were discriminatory – demonstrated a retaliatory attitude and were linked to the reduction of his work hours: (a) "If you pursue this, I have no choice but to reduce your hours;" and (b) "If you guys keep pushing this, they won't let me work you guys more than 20 hours per week." Regarding claim 2, OFO noted the AJ's finding that the

following verbal statements by Agency management constituted per se retaliation: (a) a threatening phone call to Complainant asking him "what the – f'ing [he] thought [he] was doing, and that [he] was the most hated person in [the Agency], and that – that they ought to come down there and kill [him]"; and (b) " ... was extremely disappointed that [Complainant] had made a decision to pursue [his EEO]" and that "it was a poor decision and reflected badly on [his] critical thinking skills and decision-making." Although the Agency argued that the AJ erred in crediting the hearing testimony of Complainant and his witnesses about those verbal statements over the hearing testimony of Agency management, OFO found that the Agency did not demonstrate that we should not accept the AJ's credibility determinations – which were based in large part on witness demeanor.

Third, OFO found that the AJ properly awarded Complainant the attorney's fees. Specifically, OFO agreed with the AJ that the number of hours seemed reasonable. In addition, OFO agreed with the AJ that the Agency did not show that Complainant's decision to retain out-of-town counsel was unreasonable. Moreover, OFO agreed with the AJ that a fee reduction for Complainant's unsuccessful sex discrimination claim involving his work hours was unwarranted because it was not "distinct in all respects" from his successful retaliation claim involving his work hours.

(b)(7)(C) **v. DOJ**, 0720110008 (09/15/2015) **[Summary repeated below under Findings]** – Complainant, a Corrections Counselor, contacted an EEO Counselor in 1999 and alleged that the agency had discriminated and retaliated against a class of African Americans with respect to promotions, discipline and other actions since 1994. The AJ assigned to the case denied class certification.

When the claim was remanded for processing as an individual complaint, the class agent attempted to amend the complaint to add class claims again. The agency refused. The class agent again contacted an EEO Counselor, redefined the class, and alleged discrimination and retaliation with respect to promotions, denial of transfers, harassment and other actions since 1994. The AJ assigned to this complaint certified the class. The agency did not implement this decision, and appealed the matter to OFO. In its decision, OFO denied the agency's procedural arguments, but also found the class should not be certified because it lacked a common policy.

The case was remanded for processing as an individual complaint, and again, the class agent redefined the class to promotions only since 1994, and alleged the complaint had class implications. The EEOC AJ assigned to the class complaint found the matter should be certified as a class because all GS-14 promotions and leadership positions were decided by a common group, the Executive Committee, who had knowledge of the applicant's EEO activity. Furthermore, the agency's retaliatory failure to promote was allegedly enforced by its "vouchering" practice, where selecting officials engage in informal discussions about applicants, and allegedly, prior EEO activity is discussed. The AJ described a culture of retaliation based on anecdotal comments contained in the class members' affidavits. The agency did not implement the AJ's decision and filed the instant appeal.

The Agency asserted the class complaint should be dismissed because of several procedural deficiencies. However, OFO denied these arguments and determined that the agency's collateral estoppels argument lacked merit because the prior certification decisions were not decisions on the merits. Furthermore, OFO found no error in certifying a new class with a different defined group, given that the agency refused to allow the class to amend its individual complaint into a class claim.

With respect to the certification requirements, OFO found no reversible error in the AJ's decision, and rejected the agency's arguments with respect to the Walmart case. OFO noted that this class was much smaller than the one in Walmart, and was supported by anecdotal evidence. OFO likewise found sufficient number of potential class members to support the numerosity requirement. Finally, OFO determined the class attorneys were adequate representatives. The class was defined as follows and remanded for a hearing:

> all Agency employees (nationwide), from January 1, 1994 to the present, who have been denied promotions based upon the Agency's policy or pattern and practice of retaliating against employees because they engaged in protected EEO activity.

(b)(7)(C) **v NGB**, 0120083446 (09/28/2015) **[Repeated under Findings below]** – Complainant filed an EEO complaint alleging that the Agency discriminated against him on the basis of age (55) when on or about November 6, 2005, he was not selected for the position of Aircraft Mechanic Supervisor. The complaint went to a hearing before an EEOC AJ, who found that Complainant did not establish that discrimination existed. Complainant filed an appeal.

On August 7, 2008, we notified the Agency of the filing of the appeal and that it was required to submit a copy of the entire complaint file within thirty calendar days. We advised the Agency that failure to submit the entire complaint file within the specified time frame could result in the Commission drawing an adverse inference. The Agency submitted some documentation, but much of the record was missing. Specifically, the record submitted to us by the Agency was missing the complete report of investigation, including all of the affidavits from all of the witnesses, the "fact finding conference" documentation including the testimony of all of the witnesses, resumes and applications of all of the applicants for this position, and the interview notes. Further, the record was devoid of motions, pleadings, and correspondence generated during the hearing process including motions for summary judgment, motions to amend the complaint, discovery materials, and hearing exhibits. Critically, the record did not contain the transcript of the hearing.

We contacted the Agency about this missing documentation on four different occasions. On April 11, 2014, the Commission issued to the Agency a Notice to Show Good Cause Why Sanctions Should Not Be Imposed, and warned that failure to supply the documents could lead to OFO: drawing an adverse inference that the requested information would have reflected unfavorably on the Agency; considering the matters to which the requested information pertains to be established in favor of the Complainant; and issuing a decision fully or partially in favor of the Complainant. The Agency never responded to the Notice, including a follow up phone call on July 14, 2014, to the Agency's EEO office to ensure that it received the Notice.

Based on the conduct of the Agency in this case and its failure to show good cause for why sanction should not have been imposed, we found that the imposition of sanctions was warranted. As a result, we issued a default judgment in favor of Complainant.

We noted that this default judgment was supported by the record that was supplied to us. For example, Complainant alleged in his formal complaint that the selecting official continuously told Complainant every time he applied for a promotion that "war is a young man's game" and that he wanted young men for any open supervisory positions. We drew an adverse inference that the missing documents would have revealed that discriminatory animus existed towards Complainant's age.

We also found that the Agency erred when it did not amend Complainant's complaint to include religion as a basis of discrimination. Complainant alleged that one of the selecting officials provided all of the other selecting officials with Complainant's religious information and related purported conscientious objector status during the selection process. This allegation is supported by information in the EEO Counselor's Report states that a selecting official told the EEO Counselor that Complainant "was not the best choice... because he is a conscientious objector." We drew an adverse inference that the missing documents would have revealed discriminatory animus existed towards Complainant's religion.

We ordered the Agency to offer Complainant the position of Aircraft Mechanic Supervisor, calculate civilian back pay and benefits, conduct a supplementary investigation into compensatory damages, consider taking disciplinary action against the selecting officials, and provide 16 hours of EEO training, and post a notice of discrimination. Additionally, the Agency was ordered evaluate its EEO program and the policy, process and practice it uses to maintain the official EEO record, including the complaint file and hearing record. The Agency was ordered to evaluate the policy, process and practice it uses to supply the record to the Commission and replying to Commission inquiries and Orders. We ordered the Agency to submit a report to the Commission detailing steps that it will take to ensure that the entire official record is supplied to the Commission, and that it will respond to future Commission inquiries for documents and Orders to supply documents.

(b)(7)(C) **v NGB**, 0420150007 (09/28/2015) – Petitioner filed a complaint in which he alleged that the Agency discriminated against him on the basis of reprisal for prior protected EEO activity under Title VII of the Civil Rights Act of 1964 when effective September 12, 2011, he was suspended for two weeks without pay. The Agency subsequently dismissed the complaint finding that the matter was inherently military in nature and not within the jurisdiction of the Commission.

On April 25, 2014, the Commission issued a decision finding the alleged discriminatory acts arose in Petitioner's civilian capacity, and as a result were within the jurisdiction of the Commission. The Commission ordered that the Agency process the remanded claims in accordance with 29 C.F.R. § 1614.108.

After issuance of the appellate decision, neither party requested reconsideration under 29 C.F.R. § 1614.405(c). On August 26, 2014, Petitioner submitted the petition for enforcement and stated that the Agency refused to comply with the Commission's order. In its reply to the Petition, the Agency stated that the state Adjutant Generals have authority over dual status technicians, and the Adjutant Generals are state employees. The Agency stated that as a result, it has no authority to compel compliance from the state employed Adjutant Generals.

We noted our recent decision in Complainant v. National Guard Bureau, EEOC Petition No. 0420140014 (July 2, 2015), in which the Commission reiterated its long held position that it has jurisdiction over complaints of discrimination that arise from a dual status technician's federal civilian capacity, and it is necessary for the

Commission to review the facts in each case to determine whether the alleged discrimination took place in the context of the individual's capacity as a federal civilian employee or in the capacity of a uniformed member of the military. That decision also found that when a state Adjutant General makes personnel decisions for federal employees or take employment actions that affect federal employees, they are acting in their capacity as a federal executive agency. We also noted that the decision stated that the Secretary of the Air Force and the Chief of the National Guard Bureau are ultimately responsible for ensuring compliance with the Commission's Orders.

We found that the Agency failed to comply with our previous order, and directed the Agency to process the remanded claims in accordance with 29 C.F.R. § 1614.108.

6. PREVENTING HARASSMENT THROUGH SYSTEMIC ENFORCEMENT AND TARGETED OUTREACH

No significant decisions to report under this category.

7. ENFORCEMENT – GENERAL

(b)(7)(C) **v. HHS**, 0120132360 (07/08/2015) – Complainant worked as a Public Health Advisor at the Agency's Substance Abuse and Mental Health Services Administration (SAMHSA), Community Assistance, Center for Substance Abuse Treatment (CSAT), Performance Partnership Grant Branch (PPGB) in Rockville, Maryland. Complainant had been diagnosed with Attention Deficit Disorder and Borderline Personality Disorder. In 1999, Complainant's psychologist stated that, due to his mental disabilities, Complainant would function best in an orderly work environment with clear goals and feedback from supervisors. Complainant's psychologist further stated that uneven workloads and stress would negatively affect Complainant. Thereafter, on January 3, 2000, the Agency granted Complainant's request for accommodations for his mental disabilities. Complainant's duties as a Public Health Advisor included serving as a State Project Officer (SPO) for a number of U.S. states and territories.

In April 2011, management received complaints about Complainant's actions from a number of states and territories concerning his duties as a SPO. As a result, pending an investigation into Complainant's behavior, the Agency removed Complainant from his SPO duties and gave him a different assignment. Complainant felt this new assignment was very large, requiring extensive time, effort, and expertise. As a result, Complainant sent his first-level supervisor (S1) at least eight e-mails requesting assistance, direction, and feedback with respect to the new assignment. However, S1 failed to respond to any of Complainant's eight e-mails. Complainant filed an EEO complaint and the Agency issued its FAD. Therein, in its FAD, the Agency found that although Complainant was an individual with a disability under the Rehabilitation Act, he failed to establish that he was subjected to discrimination, harassment, or denied accommodation, as alleged.

On appeal, we modified the FAD, concluding that although Complainant failed to establish disparate treatment when his SPO duties were removed, he did establish that he was denied reasonable accommodation for his mental disabilities, as alleged. We noted that S1 did not provide Complainant, assistance, feedback, and guidance, and therefore failed to provide him with accommodation. We noted that the Agency was aware of Complainant's disability and ongoing need for accommodation dating back to January 3, 2000, when it granted his request. We also found that the Agency acted in bad faith, and we therefore awarded Complainant compensatory damages for the Agency's failure to accommodate him. We lastly found that although the Agency violated the Rehabilitation Act, Complainant did not establish sufficiently severe or pervasive events to show that he was subjected to a hostile work environment.

(b)(7)(C) **v. DOJ (BOP)**, 0120132430 (07/09/2015) – Complainant worked as a GS-11 Supervisory Lieutenant at the Gilmer Federal Correctional Institution (FCI) in Glenville, West Virginia. In early 2010, he began representing an employee who filed an EEO complaint against the Associate Warden (AW1) and the Warden. Complainant subsequently filed an EEO complaint in which he alleged that the Agency retaliated against him when a coworker verbally attacked him about his EEO activity in the presence of staff; the AW1 lowered his "outstanding" rating on his annual performance evaluation; and he was reassigned from the position of Administrative Lieutenant and denied the opportunity to serve as Acting Captain.

After a hearing, an AJ found that Complainant established a prima facie case of reprisal, but Complainant did not prove that the Agency's explanations were pretext for unlawful discrimination. The Agency fully adopted the AJ's findings.

On appeal, the Commission found that the AJ erred as a matter of law with respect to the coworker's verbal attack. The Commission noted that the coworker broadcasted Complainant's EEO activity in the presence of Complainant's coworkers and management; the coworker was a Supervisory lieutenant who served as the Special Investigations Lieutenant; and the coworker was responsible for sensitive staffing maters and worked closely with AW1 and the Warden. The Commission found that, even standing alone, this conduct was prohibited retaliation because it was reasonably likely to deter employees from engaging in EEO activity.

Regarding the performance evaluation, the Commission found that AW1 provided a legitimate explanation when he stated that he lowered Complainant's rating because it was Complainant's first year at the GS-11 level. However, the Commission noted that Complainant maintained that this explanation was pretextual because AW1 never provided Complainant with an explanation for the rating. Further, the Commission noted that Complainant's supervisor (S1) testified that AW1 told her that he lowered Complainant's evaluation solely because Complainant smoked in a non-smoking area and wore improper attire, but when asked about this allegation during the hearing, AW1 stated that he could not recall if he told S1 this. The Commission further noted that AW1 did not specify anything that was lacking in Complainant's work performance, nor did he state what Complainant needed to do to earn an "outstanding" rating. In contrast, the Commission noted that S1 provided specific testimony about Complainant's performance during the relevant time period. For example, S1 testified that Complainant deserved an outstanding rating because he went into an area that was completely in disarray and brought it up to par, worked hard, was the only employee she could rely on to get things done, and excelled at every assignment.

Regarding Complainant's reassignment from Administrative Lieutenant, the Commission noted that AW1 testified that he moved Complainant to evening watch because GS-11 lieutenants are supposed to work all three shifts, and Complainant had been assigned to the day watch most of the time he had been a GS-11 lieutenant. However, the Commission noted that AW1 also testified that he could not recall if he removed Complainant from an Administrative Lieutenant position, or if he told S1 that Complainant could not serve as Acting Captain. The Commission determined that S1 and other witnesses corroborated Complainant's claim that AW1 removed him from his Administrative Lieutenant assignment several months earlier than was normal and denied him the opportunity to serve as Acting Captain. Further, the Commission noted that AW1 curiously testified that he could not recall if he did not allow Complainant to serve as Acting Captain. The Commission concluded that the AJ did not make credibility determinations, but S1's version of the facts was persuasive.

The Commission noted that S1 testified that the Warden once advised her to be careful about Complainant because he filed EEO complaints, and coworkers testified that the Warden and AW1 displayed obvious animosity toward Complainant because of his EEO activity. The Commission found it noteworthy that S1 testified that she perceived that the Warden and AW1 retaliated against Complainant, and his EEO activity harmed his career. The Commission noted that S1's testimony was corroborated by or consistent with the testimony of other witnesses. The Commission concluded that evidence of retaliation was so compelling in this case that no reasonable fact-finder could have concluded that Complainant did not prove that the Agency's explanations are pretext for retaliation. Therefore, the Commission also reversed the AJ's findings of no reprisal with respect to the evaluation and assignments.

The Commission ordered the Agency to revise Complainant's evaluation to "outstanding;" to ensure that the responsible officials are not in Complainant's chain of command; to provide Complainant with proven compensatory damages; to provide at least eight hours of in-person EEO training to supervisors and management at Complainant's work facility; and to consider taking appropriate disciplinary action against responsible management officials.

(b)(7)(C) **v. USPS**, 0120112975 (07/15/2015) – Complainant alleged that the Agency discriminated against him on the bases of race (Caucasian), national origin (Northern European), sex (male), age (58), and reprisal for prior protected EEO activity when: (1) on June 4, 2010, his allegations of sexual harassment were not handled like those of female employees who alleged sexual harassment; and (2) on June 22 and 23, 2010, he was subjected to Investigative Interviews and on June 25, 2010, he was issued a Letter of Warning. Complainant argued that management did not take his complaints of sexual harassment seriously and failed to act according to federal law and Agency regulations. He maintained that the Agency repeatedly ignored his complaints that C-1 a male coworker, for years, sexually harassed him and created a hostile work environment, which included teasing, touching, humiliating, and intimidating him based on his sex. In contrast, Complainant maintained, complaints from female coworkers were taken seriously and acted upon immediately. In each case, the male employee was dealt with in a swift and severe manner, which Complainant maintained was in stark contrast to his situation.

The Commission affirmed the finding of no discrimination with regard to claim (2), as Complainant indicated that he was not contesting the Agency's determination regarding claim 2. With regard to claim (1), however the Commission found that the claim should more properly be analyzed as a claim of whether Complainant was subjected to a hostile work environment because of his sex. Upon review, the Commission found that Complainant was subjected to unwelcome conduct based on his sex. The record showed that Complainant was physically and verbally accosted by C-1 when he made references to Complainant's sexuality, touched Complainant's shoulders and, among other things referred to "Broke Back Lake," when discussing a fishing trip that Complainant and other employees went on years ago. The Commission found that the conduct was sufficiently severe or pervasive as the record showed that C-1's behavior interfered with Complainant's work performance and the situation between Complainant and C-1 had escalated to the point where the employees required separation. Finally, the decision determined that the Agency failed to take immediate and appropriate corrective action in this case and therefore was liable for C-1's conduct. Accordingly, the Commission affirmed in part and reversed in part the Agency's decision and ordered remedial action. The Commission ordered that Complainant was to be given notice of his right to submit evidence in support of a claim for compensatory damages. The Agency was also ordered to provide training to the parties involved, and to consider taking disciplinary action against C-1 and the management official involved.

(b)(7)(C) **v. DOJ**, 0120120012 (07/15/2015) – Complainant alleged that the Agency subjected her to a hostile work environment and discriminated against her on the bases of sex (female) and reprisal for prior protected EEO activity when: she was subjected to sexual harassment; and when she was given a lowered performance appraisal. A hearing before an EEOC Administrative Judge found that she was subjected to sexual harassment by her supervisor from December 2004 to May 2005. With respect to Complainant's assertion that she was subjected to reprisal when she received a lowered performance appraisal, the AJ found no discrimination. The AJ ordered Complainant to submit evidence for her entitlement to compensatory damages.

During the liability phase, Complainant presented evidence that she had panic attacks, was "in tears," and sought help at the medical unit immediately after events with her supervisor in 2005. Complainant also sought medical help from her personal doctor on August 25, 2005, after complaining of constant crying, anxiety, and lack of concentration. She continued to receive treatment and medication on a regular basis. Complainant was hospitalized for depression in 2008 and was referred to a psychiatrist for further treatment in 2009. Complainant and her physicians alleged that the sexual harassment she experienced was the primary cause of her condition. The Agency's physician testified that based on his review of the record, the evidence did not support her psychiatrist assessment that sexual harassment was the primary cause of

Complainant's medical condition as there were too many factors outside of work that Complainant was experiencing including the fact that her nephew committed suicide, two friends also committed suicide, a family member was dying of cancer, and her brother was incarcerated in the federal prison system and was temporarily held at Complainant's worksite while she was there. Furthermore, Complainant's husband lost his job and she was in fear of losing her home.

Among other things, the AJ awarded attorney's fees and compensatory damages, as follows: (a) current pecuniary damages - $1,427.70 less any amount previously paid by workers compensation; (b) future pecuniary damages of $1000.00 for future co-pays and parking costs for medical treatment for the next two years; and (c) non-pecuniary damages in the amount of $75,000.00. The AJ found that multiple causes contributed to Complainant's medical condition.

On appeal, Complainant argued that the AJ erred in finding that her damages were the result of the totality of her life circumstances, rather than solely due to the sexual harassment she experienced and as such the AJ erred in awarding her only $75,000. Complainant sought at least $175,000.00. The Commission agreed with the AJ's findings that Complainant did not show that she was subjected to discrimination on the basis of reprisal and with respect to the amount awarded in the case; the decision found that the AJ properly determined that the totality of the circumstances warranted an award of $75,000.00 which was consistent with previously awarded amounts.

(b)(7)(C) **v. DOD (DLA)**, 0120130238 (07/21/2015) – Complainant, who worked as a Buyer/Planner for the Agency, applied for an Equipment Specialist (GS-11) position, for which there were four vacancies. Complainant was one of three African-American applicants that were not selected, and the Agency determined that Complainant was subjected to discrimination because of his race due to the non-selection. Further, the Agency determined that even though Complainant's non-selection was due to race discrimination, Complainant was not entitled to full relief because it established by clear and convincing evidence that Complainant would not have been selected for one of the positions even absent discrimination. The Agency contended that another African-American candidate, who had consistently been ranked fourth out of ten top candidates by a review panel, would have been selected for the position. The Agency determined this to be the case because the panel had ranked the candidate fourth during two reviews of the applicants, but the selecting official and other supervisors chose a Caucasian candidate who ranked ninth. The Agency indicated that the African-American candidate ranking fourth had already been given full relief pursuant to a settlement agreement. The other African-American candidate had a separate appeal before the Commission. The question on appeal was whether the Agency demonstrated by clear and convincing evidence that Complainant would not have been selected for one of the Equipment Specialist positions, by the mere fact that he was ranked sixth by the panel, and therefore was not entitled to full relief.

The Commission determined that the Agency did not prove by clear and convincing evidence that Complainant would not have been selected for one of the four Equipment Specialist vacancies. The Commission reasoned that the panel's rankings were not determinative of who would be selected because evidence revealed that the panel's recommendation was only one step in the selection process. This was evident by the fact that the selecting official and other supervisors were at liberty to choose a candidate ranking ninth out of the top ten candidates, and testimony by a supervisor that his understanding of the panel's recommendation was that there were three outstanding candidates, and the remainder of the top ten candidates were equally as qualified. Further, in their effort to demonstrate by clear and convincing evidence that Complainant would not have been selected for one of the positions, the Agency did not provide arguments based on an analysis of the resumes, application materials or interview notes, showing that the selectees and the African-American candidate who was ranked fourth by the panel were better qualified for the positions than Complainant.

Regarding relief, the Commission noted that typically when there is more than one candidate against who discrimination is found, the remedy is to order the Agency to re-conduct the selection process free from discrimination. In this circumstance, discrimination was found against three candidates, one of whom has a separate appeal before the Commission regarding the same issue. However, the Commission determined

that even though discrimination was found against both of the candidates in the appeals before us, both of the candidates were entitled to placement into an Equipment Specialist position because there were four vacancies. Complainant was granted full relief.

(b)(7)(C) **v. DOD (DLA)**, 0120130238 (July 21, 2015) – Complainant, who worked as a Buyer/Planner for the Agency, applied for an Equipment Specialist (GS-11) position, for which there were four vacancies. Complainant was one of three African-American applicants that were not selected, and the Agency determined that Complainant was subjected to discrimination because of his race due to the non-selection. Further, the Agency determined that even though Complainant's non-selection was due to race discrimination, Complainant was not entitled to full relief because it established by clear and convincing evidence that Complainant would not have been selected for one of the positions even absent discrimination. The Agency contended that another African-American candidate, who had consistently been ranked fourth out of ten top candidates by a review panel, would have been selected for the position. The Agency determined this to be the case because the panel had ranked the candidate fourth during two reviews of the applicants, but the selecting official and other supervisors chose a Caucasian candidate who ranked ninth. The Agency indicated that the African-American candidate ranking fourth had already been given full relief pursuant to a settlement agreement. The other African-American candidate had a separate appeal before the Commission. The question on appeal was whether the Agency demonstrated by clear and convincing evidence that Complainant would not have been selected for one of the Equipment Specialist positions, by the mere fact that he was ranked sixth by the panel, and therefore was not entitled to full relief.

The Commission determined that the Agency did not prove by clear and convincing evidence that Complainant would not have been selected for one of the four Equipment Specialist vacancies. The Commission reasoned that the panel's rankings were not determinative of who would be selected because evidence revealed that the panel's recommendation was only one step in the selection process. This was evident by the fact that the selecting official and other supervisors were at liberty to choose a candidate ranking ninth out of the top ten candidates, and testimony by a supervisor that his understanding of the panel's recommendation was that there were three outstanding candidates, and the remainder of the top ten candidates were equally as qualified. Further, in their effort to demonstrate by clear and convincing evidence that Complainant would not have been selected for one of the positions, the Agency did not provide arguments based on an analysis of the resumes, application materials or interview notes, showing that the selectees and the African-American candidate who was ranked fourth by the panel were better qualified for the positions than Complainant.

Regarding relief, the Commission noted that typically when there is more than one candidate against who discrimination is found, the remedy is to order the Agency to re-conduct the selection process free from discrimination. In this circumstance, discrimination was found against three candidates, one of whom has a separate appeal before the Commission regarding the same issue. However, the Commission determined that even though discrimination was found against both of the candidates in the appeals before us, both of the candidates were entitled to placement into an Equipment Specialist position because there were four vacancies. Complainant was granted full relief.

(b)(7)(C) **v. DOJ (FBP)**, 0120130364 (07/31/2015) – Complainant was employed at the Agency as a Correctional Counselor. Complainant was asked to provide coverage for a shift due to staff shortage, and she verbally refused. Immediate supervisors reported the incident to the Warden of the facility. Complainant did cover the shift she was instructed to cover later the same day, and her immediate supervisors as well as the Warden were aware of it. Complainant contacted an EEO counselor on the same day seeking counseling on her allegation of being subjected to a hostile work environment based on her race (Caucasian) for the events that had occurred. Approximately ten days after Complainant contacted the EEO counselor, the Warden of the facility referred her for an internal investigation allegedly for her verbal refusal to cover the shift. Complainant alleged that referring her for the internal investigation was done in reprisal for her EEO contact.

The decision found that Complainant established by a preponderance of the evidence that she was subjected to reprisal because there was no explanation for the ten day delay in reporting Complainant for the internal investigation other than the Warden's testimony that he needed to review memoranda and other documents in order to decide whether to refer Complainant. However, the Warden also provided inconsistent testimony that the referral was not an act of reprisal because he decided to refer Complainant immediately after being told of her refusal to cover the shift. Also, there was no articulated standard in the record for when an employee is to be referred for an internal investigation or examples of employees who have been referred in the past. The decision also noted that critical documents, such as a copy of the referral and the memoranda and documents the Warden allegedly relied on, were not included in the record. Complainant also received lowered performance evaluations subsequent to these events and the internal investigation concluded that the allegations against Complainant were "unsubstantiated." However, Complainant did not show that she was subjected to a hostile work environment based on her race in being asked to cover the shift because supervisors stated they asked her due to a staff shortage, and Complainant was not able to show this reason to be pretext.

The Agency was ordered to remove Complainant's referral for the internal investigation, and the subsequent investigation, from her personnel records; provide training to management officials on retaliation; determine whether Complainant is entitled to compensatory damages; post a notice that discrimination was found at the facility; and consider taking disciplinary actions against the responsible management officials.

(b)(7)(C) **v. USPS**, 0120122166 (07/30/2015) – Complainant worked as a Full Time City Carrier at the Agency's Station A in Dallas, Texas. Complainant suffered from multiple work related injuries that caused her to live with significant and chronic pain. She required several accommodations which if provided, enabled her to perform the essential functions of her job. The Agency provided Complainant with modified job assignments that were approved by the Office of Workers Compensation. Complainant accepted these assignments but maintained that they were not completely consistent with her medical restrictions. Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of disability and in reprisal for prior protected EEO activity when she was not accommodated. On appeal from the Agency's final decision finding no discrimination, OFO, noting that the Agency did not contest that Complainant was a qualified individual with a disability within the meaning of the Rehabilitation Act, found that the Agency relied on the OWCP suitability determinations and failed to fully recognize its obligation to provide reasonable accommodation absent undue hardship. OFO found that some of Complainant's restrictions were not accommodated, and as the Agency made no showing that to have accommodated them would have been an undue hardship, found the Agency liable for the denial of reasonable accommodation. As remedy, OFO ordered the provision of reasonable accommodation, restoration of leave, proven compensatory damages, training and the consideration of discipline.

(b)(7)(C) **v. USPS**, 0120132417 (07/02/2015) – Complainant was a former Letter Carrier with the Merchandise Mart Station, located in Chicago, Illinois. In 2001, Complainant filed an EEO claim against her supervisor. In February 2002, Complainant resigned from her employment as part of an EEO settlement. On November 8, 2008, Complainant filed an EEO complaint alleging that the Agency retaliated against her when on August 22, 2008, an employment consulting firm representative, who was hired by Complainant, contacted Complainant's former supervisor, who made the statements: "I really can't recommend her, she [Complainant] sues everyone;" "No, she would not be allowed to come back to the Post Office;" and "She was let go." At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an AJ. Complainant timely requested a hearing. The first AJ assigned to that case issued summary judgment in the Agency's favor. Complainant appealed, and OFO remanded the case for a hearing. EEOC Appeal No. 0120112242 (March 7, 2012). A second AJ held a hearing and issued a decision finding that Complainant's former supervisor gave a poor reference in retaliation for Complainant's prior EEO activity. The AJ ordered the Agency to: pay Complainant $10,000.00 in non-pecuniary compensatory damages, provide training, and post a notice. The Agency adopted the AJ's decision. On appeal, Complainant sought an increase in the damage award, and OFO awarded her $1,150.20 in pecuniary damages.

(b)(7)(C) **v. USPS**, 0120133188 (07/24/2015) – Complainant, a Jehovah's Witness, worked as a Relief Postmaster at the Agency's Post Office in Stockton, Georgia. In July 2012, she requested one week of leave to attend the first week of a religious convention. Complainant was told that she needed to find an employee to cover for her absence. Unable to do so, Complainant postponed attending the first week of the convention and asked for leave to attend the second week. She was again told that she needed to find coverage. This time Complainant identified a Clerk who was willing and able to cover for her. However, the Officer In Charge denied the Clerk permission to cover for Complainant, citing overtime costs. Complainant went to the convention and on the first day of her absence, there was no one to open the Post Office. For the remaining days, the Agency paid various employees overtime to run the facility. Upon her return, the Agency terminated Complainant. On appeal from the Agency's final decision, OFO found no proof that the overtime costs would have been more than *de minimus* and thus concluded that the Agency was liable for denying Complainant a religious accommodation. As remedy, OFO ordered reinstatement, back pay, proven compensatory damages, training and the consideration of discipline.

(b)(7)(C) **v. Veterans Affairs**, 0120120184 (08/06/2015) - We found that a summary judgment decision was appropriate, but we reversed the EEOC AJ's decision in favor of the Agency and instead issued the decision in favor of Complainant.

Complainant alleged that the Agency discriminated against him on the bases of race (Asian), national origin (Taiwan), age (61), and reprisal for prior protected EEO activity when he was not selected for the position of Statistician.

The record established that Complainant was highly qualified for the position. The average score of the panel members' ranking of the original application package resulted in Complainant being ranked highest and tied with the Selectee. Our analysis turned to the question of whether Complainant's EEO activity played a role in the panel's decision not to select Complainant for the position. S1 stated that he became of Complainant's prior protected EEO activity when he conducted a Google search of Complainant and found an OFO decision from a prior complaint filed by Complainant. S1 stated that before the interviews he told the other panel members about Complainant's prior protected EEO activity. After the interviews, Complainant went from being the highest ranked applicant to the lowest ranked applicant.

The AJ stated that mere knowledge of prior EEO activity, without more, is insufficient to establish reprisal discrimination. However the AJ did not refer to S1's sworn affidavit, where S1 stated that the panel took Complainant's EEO activity into consideration and that it was

"impossible to ignore." We found that this established that at least for S1, and more likely than not the whole panel, Complainant's prior protected EEO activity was taken into consideration when the decision was made to not refer Complainant to the selecting official. As a result, we found that the record established by a preponderance of the evidence that the panel was motivated by retaliatory animus when they made the decision not to refer Complainant for the Statistician position.

The Agency asserted that it does not matter if the interview panel knew about Complainant's EEO activity because they did not make the final determination of who to select for the position. We noted that under the "cat's paw" theory, the Agency is still liable for the discrimination based on the discriminatory or retaliatory animus of an individual (or individuals) who greatly influences, but does not make, the ultimate employment decision and the Agency blindly relies on the individual's discriminatory assertions in making the ultimate employment decision. Here, the record shows that the interview panel selected only one applicant to refer to S5; the Selectee. As a result, the panel (including S1) clearly influenced, but did not make, the ultimate employment decision to not select Complainant for the position, and S5's decision to not select Complainant was based on reliance on the panel's biased recommendation. Therefore, the Agency is liable for the discrimination.

Having found discrimination based on prior protected EEO activity, we need not address Complainant's claims of race, national origin, and age discrimination, as it would not change the relief ordered.

We ordered the Agency to: offer Complainant the Statistician position or a substantially equivalent position; calculate and pay back pay and interest; conduct a supplemental investigation into Complainant's compensatory damages and attorney's fees and costs; consider disciplinary action against all of the members of the interview panel and the selecting official; provide at least 16 hours of EEO training; and we ordered the Agency to issue an instruction, to be followed by all personnel involved in its selection actions, that evidence of prior EEO activity on the part of an applicant for employment or promotion is irrelevant, and may not be considered in the selection process, regardless of the source of that information.

(b)(7)(C) **v. Treasury (IRS)**, 0120132563 (08/11/2015) – Complainant alleged she was denied a reasonable accommodation when she returned from a furlough to find her ergonomic chair missing in November 2011. She reported the matter to the Agency who delayed in responding to her request. As a result of the delay, Complainant had to use a replacement chair which did not properly address her back condition. Therefore, her back condition worsened resulting in additional leave usage. Based on her leave usage, Complainant was issued a Leave Counseling memo (Memo) regarding her "excessive absences/irregular attendance" in June 2012.

The Agency found that Complainant established that she is a qualified individual with a disability. The decision determined that the Agency delayed in processing her request for a reasonable accommodation in the form of a replacement ergonomic chair. The Agency argued that it provided Complainant with a temporary chair and that the Vendor delayed providing the chair. However, the Agency failed to support its decision. The decision noted that the Vendor provided a temporary chair, however it was not effective. Also, the Agency did not explain the delay in ordering the chair. The Agency was to order the chair on December 6, 2011, but did not actually do so until January 6, 2012. Therefore, the decision found that the Agency delayed in providing the ergonomic chair resulting in Complainant's leave usage and the issuance of the Memo. The decision ordered the Agency to calculate back pay, restore leave and consider Complainant's claim for compensatory damages.

(b)(7)(C) **v. USPS**. 0120132617 (08/11/2015) – Complainant alleged he was denied a reasonable accommodation when, April 6, 2011, his request for reasonable accommodation (full-time work with daytime hours) was denied. The Agency's final decision determined that Complainant was a qualified individual with a disability but concluded it provided him with work within his limitations when he was offered a temporary position that provided him with 4 hours of work a day. As such, the Agency held that it did not deny Complainant a reasonable accommodation.

OFO found that the Agency failed to properly recognize Complainant's request for a reasonable accommodation. The record indicated that the District Reasonable Accommodation Committee (DRAC) failed to properly understand that Complainant was seeking an accommodation in the form of an assignment during the daylight. OFO concluded that the Agency did not show that absent undue hardship, it could not provide Complainant with a reasonable accommodation in the form of a full time position during day light hours. The decision noted that Complainant was very flexible in his request providing a 12 ½ hour window for work, a variety of positions from supervisory to custodial, and many locations from Richmond to Hampton Roads. Therefore, the decision concluded that the Agency violated the Rehabilitation act. The decision ordered the Agency to provide Complainant with a reassignment, calculate back pay, restore leave and consider Complainant's claim for compensatory damages.

(b)(7)(C) **v. DHS (TSA)**, 0720140014 (08/19/2015) [Repeated under SEP Priority 5 above] – Complainant alleged, in pertinent part, that the Agency: (1) subjected him to disparate treatment on the basis of retaliation when it reduced his work hours; and (2) made certain verbal statements that constituted per se retaliation. The AJ, after a hearing, found retaliation (mixed motive retaliation in claim 1 and per se retaliation in claim 2) and ordered the Agency to pay a certain amount in attorney's fees. OFO affirmed the AJ's decision.

First, citing Petitioner v. Dep't of Interior, EEOC Petition No. 0320110050 (July 16, 2014), OFO rejected the Agency's argument that the "but for" standard discussed in University of Texas Southwestern Medical Center v. Nassar, 133 S.Ct 2517 (2013) applied to claim 1.

Second, OFO found that substantial evidence in the record supported the AJ's findings of retaliation. Regarding claim 1, OFO noted the AJ's finding that the following verbal statements by Agency management – made in response to Complainant's assertion that the Agency's hiring and scheduling practices were discriminatory – demonstrated a retaliatory attitude and were linked to the reduction of his work hours: (a) "If you pursue this, I have no choice but to reduce your hours;" and (b) "If you guys keep pushing this, they won't let me work you guys more than 20 hours per week." Regarding claim 2, OFO noted the AJ's finding that the following verbal statements by Agency management constituted per se retaliation: (a) a threatening phone call to Complainant asking him "what the – f'ing [he] thought [he] was doing,

and that [he] was the most hated person in [the Agency], and that – that they ought to come down there and kill [him]"; and (b) " … was extremely disappointed that [Complainant] had made a decision to pursue [his EEO]" and that "it was a poor decision and reflected badly on [his] critical thinking skills and decision-making." Although the Agency argued that the AJ erred in crediting the hearing testimony of Complainant and his witnesses about those verbal statements over the hearing testimony of Agency management, OFO found that the Agency did not demonstrate that we should not accept the AJ's credibility determinations – which were based in large part on witness demeanor.

Third, OFO found that the AJ properly awarded Complainant the attorney's fees. Specifically, OFO agreed with the AJ that the number of hours seemed reasonable. In addition, OFO agreed with the AJ that the Agency did not show that Complainant's decision to retain out-of-town counsel was unreasonable. Moreover, OFO agreed with the AJ that a fee reduction for Complainant's unsuccessful sex discrimination claim involving his work hours was unwarranted because it was not "distinct in all respects" from his successful retaliation claim involving his work hours.

(b)(7)(C) **v. DHS**, 0720140021 (08/19/2015) – Complainant filed an EEO complaint alleging that the Agency subjected him to unlawful harassment and denial of reasonable accommodation based on his disability and in retaliation for requesting reasonable accommodation. Specifically, he alleged the following events: (1) Complainant was subjected to a hostile work environment from February 2009 to July 28, 2009; (2) he was denied reasonable accommodations following his February 20, 2009 request; (3) on July 28, 2009, Complainant was terminated from his position; and finally, (4), following his termination, Complainant was subjected to additional acts of harassment when four Agency employees accompanied Complainant to his home, parked near Complainant's residence for approximately 45 minutes, and one of the employees warned another to "watch your back" in Complainant's presence.

Following the hearing, the AJ issued a final decision on liability, damages and attorney's fees, concluding that Complainant had established unlawful disability discrimination and retaliation for prior EEO activity. Among other things, the Agency was ordered to reinstate Complainant under specified training conditions with back pay and interest, to compensate him for any tax consequences as a result of his award, to provide him with front pay (up to three years) until his reinstatement, and to expunge all references to his termination from his personnel records. In addition to equitable relief, the AJ determined that Complainant was also entitled to $52,250 dollars in non-pecuniary compensatory damages for pain and suffering commencing in February 2009 and through his period of unemployment that ended in December 2009. Finally, Complainant was awarded attorney's fees in the amount of $33,868.75 and $1,854 in legal costs.

On appeal, the Agency argued that the AJ improperly concluded that the Field Training Officers (FTOs) were Complainant's de facto supervisors and so used the wrong standard for finding it was liable for the harassment. In addition, the Agency claimed that Complainant was not qualified for the Border Patrol Agent position and therefore, not covered by the Rehabilitation Act. Finally, the Agency challenged the AJ's award of compensatory damages and front pay.

OFO upheld the AJ's findings of discrimination and award of remedies. In doing so, OFO determined that the facts supported the AJ's determination that Complainant was a qualified individual for his trainee/intern position and not the border patrol position as argued by the Agency. Further, OFO stated that, that

regardless if the FTOs were supervisors or not, for the actual supervisor engaged in acts of harassment. In addition, the Agency failed to establish its affirmative defense to avoid liability regarding the harassment to which Complainant was subjected. OFO affirmed the AJ's award of relief, including attorneys fees, litigation costs, and compensatory damages.

(b)(7)(C) **v. USPS**, 0120113802 (09/18/2015) – Complainant was employed by the Agency has a Mail Processing Clerk. On or about September 21, 2009, she injured herself by working on the automation machine resulting in a cervical lumbar strain. After being hospitalized, Complainant returned October 7, 2009. On October 13, 2009 Complainant was informed that she was restricted in lifting no more than five pounds. Complainant was also limited in standing and walking intermittently to no more than one hour per day, and any climbing, kneeling, bending, stooping, twisting or pulling.

On February 17, 2010, when Complainant showed up for work, she was told to go home because her limitations prevented her from performing her mail processing duties, namely lifting 10-pound lifting trays and the Plant Manager was concerned she would reinjure herself. Complainant states that she was able to perform her mail processing duties by splitting her lifting trays in the staging area to lighten the load, and then by manually grabbing the mail and carrying it to her duty station where she threw it by hand. Nothing in the record disputes this.

The Commission found that Complainant was substantially limited in the major life activity of lifting because she was unable to lift more than 5 pounds for a period of six months or more. The Commission further found that Complainant was able to perform her mail processing duties by splitting her trays of mail. Based on this, the Commission found that Complainant was covered by the Rehab Act and could be accommodated in her current position by splitting trays and throwing mail. Moreover, the Commission found that the Agency failed to establish a direct threat defense because the Plant Manager's concern was based on his subjective interpretation without the benefit of an individualized assessment.

Upon review, the Commission determined that the Agency discriminated against Complainant on the basis of disability by failing to provide her an accommodation (i.e., splitting trays) and failing to conduct an individualized assessment of whether she posed a direct threat by splitting her trays of mail in the manner described above.

In closing, the Commission directed the Agency to (a) return Complainant to her Mail Processing position, (b) pay Complainant back pay and attorney's fees; (c) conduct a supplemental investigation on compensatory damages, (d) discipline the Plant Manager, and (e) train all of the management and officials at the relevant facility on their obligations under the Rehabilitation Act.

(b)(7)(C) **v. Navy**, 0120123268 (09/01/2015) – Complainant worked as an Electrician at the Agency's Naval Shipyard and Intermediate Maintenance Facility in Pearl Harbor, Hawaii. Complainant filed two EEO complaints alleging discrimination and retaliation with regard to training, non-selections and denial of detail opportunities. Complainant requested a hearing, and the AJ granted summary judgment in the Agency's favor with regard to most of the claims but then held a hearing and concluded that the Agency retaliated against Complainant when he was denied nuclear training. Nuclear training was a requirement for many of the jobs Complainant was subsequently denied, but the AJ found that Complainant's ultimate promotion into these positions was too speculative to warrant an award relief. The AJ awarded back pay for "special nuclear pay," $7500.00 in proven compensatory damages, training and the consideration of discipline. The Agency implemented the AJ's decision as its final order, and on appeal, OFO affirmed the Agency's final order.

(b)(7)(C) **v. Navy**, 0120130704 (09/16/2015) – Complainant is a Heavy Laborer at the U.S. Marine Corps Base in Quantico, Virginia. During the relevant time period, she was the only woman working in her section. In an EEO complaint, she alleged that a male coworker (C1) who sometimes served as acting supervisor over her section put one of his knees between her legs, caressed her hand, and talked softly while telling her to go back to her. Complainant also alleged that the next month, C1 told her loved her while she

requested leave on the telephone. Complainant further alleged that, about a month later, C1 came behind her, put his arms under her arms, gave her a bear hug from behind, moaned, pressed his penis against her behind, grabbed her stomach, and squeezed her. Finally, Complainant alleged that, eight months later, C1 came into the break room and asserted that he could be wherever he wanted to be when Complainant told him to go away.

In a final decision, the Agency found that Complainant established that she had been subjected to sexual harassment by C1. However, with respect to liability, the Agency determined that Complainant did not contact her supervisor or management about the alleged harassment; instead, she informed her union representative about the first incident, and he informed S1 about the incident a few days after it occurred. The Agency further determined that the union representative informed S1 of the second and third incidents shortly after they occurred. The Agency also determined that, immediately after the first incident, management counseled C1, restricted him from having any contact with Complainant, relieved him of informing Complainant's team of daily duties, and subsequently relocated him to another shop. Nonetheless, the Agency noted that when management became aware of the second and third incidents, it permanently reassigned C1 to a shop on the far side of the base so that C1 and Complainant would not have any contact with C1. The Agency concluded that management therefore took prompt remedial action when it learned of the claims against C1, and that the final incident was an isolated incident that arose out a "chance meeting" between Complainant and C1 in a snack area. The Agency concluded that it was not liable for any of the alleged harassment.

In its appellate decision, the Commission noted that Complainant's accounts of the incidents were remarkably consistent and detailed in the record, and corroborated by coworkers who witnessed the incidents. The Commission determined that C1's statements were unworthy of belief, especially his claim that he was performing the Heimlich maneuver on Complainant when he touched her. The Commission noted that not a single witness observed Complainant choking or coughing during the incident wherein he touched Complainant. Thus, the Commission concluded that Complainant's allegations were supported by the weight of the evidence.

The Commission further found that Complainant was subjected to conduct because of her sex, the conduct was unwelcome, and the conduct was severe enough to create a hostile work environment. In so finding, the Commission noted that C1 sometimes served as an acting supervisor over Complainant, which created a power dynamic; C1 subjected Complainant to unwanted bodily contact of a sexual nature; and the outrageous conduct occurred in the presence of coworkers, which was especially humiliating.

With regard to the Agency's liability, the Commission noted that management acknowledged that the union reported the harassment a few days after the first incident. The Commission noted that the Agency had a duty to take immediate and appropriate corrective action after it received notice that Complainant was being harassed, no matter the source of the report. Additionally, the Commission found that, contrary to the Agency's analysis, the last incident could not be viewed in isolation because it involved C1 defiantly asserting that he could still go wherever he wanted despite the Agency's directive for him to stay away from Complainant, and because this incident was part of an ongoing accumulation of harassing actions by C1 toward Complainant. The Commission noted that there was no documentation in the record reflecting that Complainant was disciplined for harassing Complainant, but whatever the Agency's response, it did not stop C1 from harassing Complainant. The Commission further noted that witnesses attested that C1 sometimes visited and lurked in Complainant's work area even after the Agency reassigned him to another shop/building. The Commission determined that Agency's failure to properly address the harassment left Complainant vulnerable to the very type of disturbing confrontation that ultimately occurred in this case; therefore, the Agency's response was inadequate. Consequently, the Commission found that the Agency did not satisfy the affirmative defense and was liable for the harassment of Complainant.

In order to remedy the reprisal, the Commission ordered the Agency to bar C1 from Complainant's work facility and from communicating with her while at work; to ensure that Complainant is not in C1's chain of command and does not act in any supervisory capacity over Complainant, including as acting supervisor; to provide Complainant with proven compensatory damages; to provide at least eight hours of in-person EEO training to the responsible management officials; to consider taking appropriate disciplinary action against the responsible management officials; and to post a notice of discrimination at the Agency's facility.

(b)(7)(C) **v. DOI (NPS)**, 0120132365 (09/11/2015) – Complainant is a Protection Park Ranger/Law Enforcement Ranger at the Blue Ridge Parkway in western North Carolina. Pursuant to an EEO settlement agreement that resolved a previous complaint, Complainant also was appointed to serve as the Field Training Lead (FTL). Complainant subsequently filed an EEO complaint in which he alleged that the Agency subjected him to harassment and discrimination on the basis of race (Hispanic), national origin (Cuban), and in reprisal for prior EEO activity when it issued him a letter of warning and reprimand; denied him training and teaching assignments; downgraded his performance appraisal; a supervisor (S1) filed a grievance that asserted that he should not have been appointed as FTL; and the Chief made negative comments regarding Complainant's integrity.

After a hearing, an EEOC Administrative Judge (AJ) found that Complainant failed to prove that he was subjected to unlawful discrimination because he did not prove that the Agency's non-discriminatory reasons were pretextual. Specifically, the AJ determined that management credibly testified that Complainant was issued the letter of warning and reprimand because he worked for Grandfather Mountain without prior authorization, and used an Agency generator and fuel for personal purposes during a snowstorm. The AJ further found that the Agency provided legitimate, non-discriminatory reasons for denying Complainant's training requests and teaching assignments that were not proven to be pretextual. Regarding Complainant's performance appraisal, the AJ found that management credibly testified that Complainant was initially rated a "4" out of "5" on a critical element, but after meeting with Complainant, raised the valuation to a "5." With regard to S1's grievance allegations, the AJ noted that S1 testified that he filed the grievance because he disagreed with the Agency's decision to place Complainant in an FTL assignment, and Complainant did not prove that S1 filed his grievance in order to harass Complainant.

The AJ further noted that the Chief testified that he was concerned about inconsistencies between Complainant's testimony and his testimony in Complainant's previous discrimination complaint, and the Chief investigated the matter and determined that Complainant had a different perception of the incidents pertinent to the complaint. Nonetheless, the AJ found no evidence of retaliatory animus by the Chief, although she questioned the wisdom of the Chief's candor.

In its appellate decision, the Commission affirmed the AJ's findings with respect to the performance evaluation, reprimand, letter of warning, training, and teaching assignments. The Commission found that the AJ erred as a matter of law when she found no reprisal with regard to the Chief's inquiry into Complainant's previous EEO complaint, as well as regarding S1's filing of a grievance concerning Complainant's FTL appointment pursuant to the EEO settlement agreement. The Commission found that the Chief engaged in actions that are reasonably likely to deter employees from engaging in EEO activity when he subjected Complainant's EEO statements to management's review and scrutiny. The Commission noted that EEO complaints should be investigated and adjudicated within the EEO process by designated EEO officials, not by management. Additionally, the Commission found that by informing Complainant about the inquiry into his previous EEO activity, the Chief engaged in additional conduct that could dissuade employees from participating in the EEO process. Regarding S1's grievance, the Commission found that this was also reprisal because, when a manager files a grievance in response to the terms of an EEO settlement, he has engaged in actions that are reasonably likely to deter employees from engaging in EEO activity.

In order to remedy the reprisal, the Commission ordered the Agency to provide Complainant with proven compensatory damages; to provide at least eight hours of in-person EEO training to the responsible management officials; to consider taking appropriate disciplinary action against the responsible management official; and to post a notice of discrimination at the Agency's Blue Ridge Parkway facilities.

(b)(7)(C) **v. VA**, 0120133158 (09/10/2015) – Complainant filed an appeal from an Agency's remedy upon a finding of discrimination. Complainant alleged discrimination on the bases of sex (female) and age when she received lesser pay due to the mandatory change in her appointment from fee-basis to intermittent status. Complainant requested a hearing before an EEOC AJ. The AJ issued a default finding of discrimination for Complainant as a sanction for the Agency's failure to properly investigate the complaint

and provide documentation to the AJ. Thereafter, the AJ held a hearing for the limited purpose of taking testimony and receiving documents about whether complainant could establish a prima facie case of discrimination and the nature and extent of damages. The AJ issued a decision finding that complainant did not establish a prima facie case of sex or age discrimination and thus ordered no remedies for her complaint. The agency adopted the AJ's decision finding no discrimination and awarding no remedies. Complainant appealed the denial of remedies. OFO found that complainant was entitled to an award of $2,500 in nonpecuniary, compensatory damages. OFO also ordered the agency to post a notice of the finding of discrimination and to consider disciplining and provide training regarding case processing to the responsible agency officials.

(b)(7)(C) **v. DOT**, 0720140022 (09/16/2015) – The agency filed an appeal from an EEOC AJ's finding of discrimination on the bases of race (Asian), age, and reprisal, when Complainant was reassigned and harassed. The AJ, after a hearing, found that the supervisor's reasons for reassigning Complainant were not believable. The Agency issued a decision finding no discrimination and filed the instant appeal. OFO found that substantial evidence supported the AJ's decision finding discrimination. OFO also upheld the award of $60,000 in nonpecuniary, compensatory damages. OFO found that the discrimination resulted in an exacerbation of Complainant's medical conditions including sleeplessness, anxiety, stress, and depression. OFO also upheld the award of $120,819 in attorney's fees and $3,889.04 in costs. OFO found that the AJ's use of the Laffey Matrix was appropriate because the attorney's fee agreement with Complainant for a lower hourly rate was because the attorney knew Complainant would be financially burdened by the customary hourly rate. OFO also ordered the Agency to: offer complainant restoration to the position from which she was discriminatorily reassigned; expunge references to the discriminatory reassignment from agency records; post a notice of the finding of discrimination; and to consider disciplining and provide training regarding Title VII and the Age Discrimination in Employment Act to the responsible agency officials.

(b)(7)(C) **v. USPS**, 0720140025 (09/28/2015) – In November 2009, the Agency's Office of Inspector General received information from the State of Illinois, Office of Inspector General (State IG) regarding suspicion that Complainant was defrauding the State. Specifically, the State IG advised the Agency that Complainant was suspected of altering 24 of her pay stubs from the Agency in order to receive increased child care benefits and food stamps from the State. Subsequently, Complainant admitted to the allegations, and the State decided not to criminally charge Complainant. Complainant had agreed to repay the State for any benefits improperly received. In February 2010, management conducted an interview with Complainant regarding her conduct involving her pay stubs and the State. During this meeting, Complainant admitted to making the alterations so she could receive benefits, explaining that her children's father was delinquent in his child support payments and she needed the money. On July 15, 2010, Complainant received written notification that she was being removed from Agency employment for "Improper Conduct" resulting from Complainant's conduct involving her pay stubs and the State. The removal decision was recommended by the Supervisor and the Plant Manager concurred with the removal action. Complainant was officially terminated on August 21, 2010. Complainant filed an EEO complaint alleging that the Agency subjected her to disability-based discrimination when she was issued the termination.

Following the hearing, the AJ issued a final decision finding discrimination. The AJ found that Complainant established a prima facie case of disability based discrimination. He noted that Complainant provided evidence that two coworkers had engaged in financial misconduct, issued notices of removal, grieved the removal actions and had the charges reduced to 14 day suspensions. The AJ noted that the Plant Manager who issued all the removal actions and reduced the charges for the coworkers was aware of Complainant's medical condition. Further, the AJ found that the coworkers were comparators and Complainant was given a more severe punishment. The AJ then found that the Agency provided legitimate, nondiscriminatory reason for its action. Finally, the AJ determined that Complainant showed that the Agency's disciplinary actions were so inconsistent that the reason for the disparate treatment was Complainant's disability. Therefore, the AJ reduced Complainant's removal to an 18 month suspension, reinstated Complainant, awarded compensatory damages, and ordered back pay.

The Agency rejected the AJ's decision. On appeal, the Agency argued that the AJ failed to make credibility determinations, improperly held that the coworkers were comparators and used his own judgment in lieu of the Agency's business judgment in reducing Complainant's charge. Complainant appealed requesting that the Commission increase her award for non-pecuniary damages and provide her with pecuniary damages.

OFO upheld the AJ's findings of discrimination. OFO noted that the AJ, following a live hearing, believed Complainant's version of the events over that of the testimonies provided by the Plant Manager and the Supervisor. The AJ also noted that there was documentary evidence supporting Complainant's statements. As such, the AJ found Complainant to be credible and that she established that management was aware of her disability. Further, the AJ found that the coworkers were comparators based on the Plant Manager's testimony that he only issued the removal action in order to secure confessions from the coworkers. He intended to reduce the charges to 14 day suspensions for the coworkers. As such, the AJ properly determined that the coworkers were comparators who were given better treatment than Complainant. Finally, OFO found that the record supported the AJ's finding that Complainant established that the Agency's reasons were pretext for discrimination for the Plant Manager was inconsistent in his reasons for issuing the Notice of Removal to Complainant as compared to the coworkers, and that the evidence simply did not support some of his stated reasons.

OFO affirmed the AJ's award of non-pecuniary damages but denied Complainant's request for pecuniary damages. OFO also ordered the Agency reinstate Complainant; calculate back pay; and remove of all references to the removal action from her personnel records. OFO found no reason for the AJ's determination that Complainant should be given an 18 month suspension. Finally, OFO ordered the Agency to consider disciplinary action for the Plant Manager and the Supervisor along with training.

(b)(7)(C) **v. DHS**, 0120131595 (09/25/2015) – The Commission found retaliation when Complainant, a Border Patrol Agent, was placed under investigation for "lack of candor." The Commission found that the named responsible management official (RMO) in a prior EEO complaint, initiated a "lack of candor" investigation against Complainant the day after Complainant sent a memorandum up the chain of command alleging that RMO was creating a hostile work environment and retaliating against Complainant. The Commission found that the only explanation for RMO to initiate such an investigation against Commission was because Complainant named him as a responsible management official in a pending EEO complaint. In addition, the undisputed evidence established that Complainant would have be selected for a temporary detail as a Lead Border Patrol Agent had there not been a lack of candor investigation pending against him at the time. The Commission ordered the Agency, in part, to: (1) temporarily assign Complainant to the detail position; (2) provide back pay and all benefits due, if any; (3) remove any reference to the lack of candor investigation from the complainant's personnel files; and (4) pay proven compensatory damages.

(b)(7)(C) **v. DOJ (BOP)**, 0120122924 and 012132965 (09/11/2015) – Complainant filed two appeals from two Agency final decisions. One appeal was from a final decision dated August 2, 2012 (decision on merits). A second appeal was from a final decision dated May 31, 2013 (on the issue of compensatory damages) and January 9, 2014 (on the issue of attorney fees). For the sake of administrative efficiency, the Commission exercised its discretion and consolidated the two appeals.

Complainant worked as a Correctional Officer at the Agency's Federal Correction Institution in Williamsburg, South Carolina. On November 1, 2009, Complainant filed a complaint alleging that the Agency discriminated against her on the bases of race, disability, and in reprisal for prior EEO activity when her requests for a reasonable accommodation were denied by Human Resources and management.

In its August 2, 2012 final decision, the Agency found no discrimination on the bases of race and reprisal. However, the Agency found discrimination based on disability when Agency management denied Complainant a September 30/October 1, 2009 request for reasonable accommodation. The Agency ordered the following relief: engagement in the interactive process with Complainant to determine a reasonable accommodation; restoration any leave taken by Complainant in connection with her disability; take corrective action to prevent further discrimination; and conduct an investigation to determine Complainant's entitlement to compensatory damages and attorney's fees.

On May 31, 2013, the Agency issued a final decision on compensatory damages, awarding Complainant $12,000. On January 9, 2014, the Agency issued another final decision awarding Complainant attorney's fees and costs in the amount of $3,892.

On appeal, Complainant does not dispute the Agency's finding of discrimination on the basis of disability. However, she argued that the Agency improperly found no discrimination on the bases of race and reprisal. In addition, Complainant challenged the amounts of compensatory damages and attorney's fees awarded.

The Commission affirmed the Agency's August 2, 2012 final decision finding no discrimination based on the bases of race and reprisal, but found a violation of the Rehabilitation Act when Complainant's requests for reasonable accommodation were denied. The Agency's subsequent decisions on compensatory damages and attorney's fees and costs were modified as follows: the Agency was ordered to pay Complainant in the amount of $52,047 in compensatory damages and $5,653.42 in attorney's fees and costs.

(b)(7)(C) **v. DHS**, 0120130053 (09/17/2015) – Complainant filed a formal complaint alleging, among other things, retaliation for having opposed discrimination. Specifically, after complainant wrote a memorandum to her superiors expressing her belief that she was subjected to discrimination, her supervisor advised her that sending the memorandum "was not the best thing to do," and that she had made a "poor choice." In a subsequent email, her supervisor advised that in regards to any possible legal action, "...making demands of myself, the SAC, or anyone else in the chain of command is no way to resolve whatever issues you may have."

The AJ held a hearing and found that Complainant's memorandum of March 17, 2009, constituted protected activity and that the supervisor's subsequent responses to complainant had a potential chilling effect on Complainant's equal employment opportunity. As such, the AJ found Complainant established she was subjected to per se reprisal. With respect to the remaining issues, the AJ found Complainant did not prove she was subjected to retaliation. The AJ ordered $750.00 in nonpecuniary compensatory damages. The AJ did not award attorney fees because she found Complainant's attorney failed to submit a petition for attorney fees by the date required.

On appeal, OFO determined there was substantial evidence in the record supporting the AJ's finding of per se reprisal as well as substantial evidence in the record supporting the AJ's decision of no discrimination as to the remaining claims. As for the damages, OFO affirmed the AJ's award of $750.00 and found that Complainant suffered only a minimal amount of emotional distress that was attributable to the per se violation, which was only short lasting.

OFO noted that following an exchange of emails between complainant and the AJ, complainant's attorney was under the belief that he did not have to file a Petition for Attorney Fees. The record revealed that the AJ advised Complainant's attorney that it was not required, since there was a high likelihood of appeal. On appeal, the agency argued that complainant's attorney had waived his right to any attorney fees by failing to submit a petition. On appeal, OFO noted that although it would have been preferable for the AJ to have addressed the issue of attorney fees personally, Complainant's attorney was under a reasonable belief, based on the emails between himself and the AJ, that his failure to submit am attorney fee petition would not be prejudicial to his client's ability to secure attorney fees before the Office of Federal Operations. OFO noted that this failure unique to this confusing situation only in light of the correspondence between the AJ and Complainant's attorney, and that in the future, parties should adhere to the Regulations which require a Complainant to submit an attorney fee petition to the Agency or AJ. See 29 C.F.R. § 1614.501(e)(2)(i).

OFO also found that the issue of whether attorney fees had been waived was not determinative in this case, as Complainant's attorney failed to file a petition for fees on appeal. OFO noted that the attorney requesting the fee award has the burden of proving, by specific evidence, entitlement to the requested fees and costs and that Complainant's attorney did not meet that burden. Accordingly, OFO awarded $1,370.06; the only documented expenses submitted by complainant.

(b)(7)(C) **v. VA**, 0120130353 (09/09/2015) – Complainant appealed from the Agency's final decision (FAD), which fully implemented an Equal Employment Opportunity Commission Administrative Judge's (AJ) finding

that Complainant was subjected to sexual harassment, and awarded her $50,000 in non-pecuniary compensatory damages and $18,018.82 in past pecuniary damages. Complainant's appealed the damages award asking for $125,000 in non-pecuniary compensatory damages and $36,037.64 in past pecuniary damages (medical expenses medication).

The AJ's conclusion that Complainant was entitled to $50,000 in non-pecuniary compensatory damages was supported by substantial evidence in the record. This is because Complainant had a history of various medical conditions and experienced other stressors in her life, including the litigation against the Agency. Additionally, the award of $50,000 is in line with other cases where a complainant experienced depression, suicidal ideations, anxiety, trouble concentrating, paranoia, insomnia, and stomach problems.

Further, the AJ's decision to reduce Complainant's medical bills, prescription costs and leave usage by half, thereby reducing her award of past pecuniary damages, was warranted given the fact that not all of Complainant's stressors were caused by the sexual harassment she experienced at the Agency.

Therefore, the Agency's FAD, fully implementing the AJ's finding that Complainant was subjected to sexual harassment, along with the award of $50,000 in non-pecuniary compensatory damages and $36,037.64 in past pecuniary damages was affirmed.

(b)(7)(C) **v. TVA**, 0120131406 (09/25/2015) – Complainant worked as a Maintenance Coordinator at the Agency's Electrical Maintenance Department, Shawnee Fossil Plant in Paducah, Kentucky. On April 20, 2009, Complainant filed an EEO complaint alleging the Agency discriminated against him on the basis of race (African-American) when, in February 2009, he was not selected for the position of Maintenance Supervisor at the Shawnee plant.

Complainant later requested that the Agency amend his formal complaint to include the a claim that he was unlawfully retaliated against when he was removed from his Coordinator position and reassigned to another position within days of management being notified that he was pursuing EEO counseling concerning his non-selection. The Agency failed to amend the Complainant's non-selection complaint to include this retaliation/reassignment claim.

Following an investigation on the non-selection, Complainant requested a final decision. On September 30, 2009, the Agency issued a final decision, finding no discrimination on this claim. However, the Agency did not address his reassignment claim.

On appeal, the Commission reversed the Agency's final decision, finding discrimination based on race when Complainant was not selected for the Maintenance Supervisor position. (b)(7)(C) v. TVA, EEOC Appeal No. 0120100344 (December 14, 2011), request for reconsideration denied, EEOC Request No. (November 9, 2012). The Commission ordered the Agency to take various remedial actions, including investigation of the reassignment claim.

Following the investigation of the reassignment claim, the Agency issued a decision on February 7, 2013, finding no discrimination.

On appeal, we reversed and remanded the Agency's finding of no discrimination. Specifically, we found that Complainant has proven that it was more likely than not that his reassignment was not due to operational needs, but was made in retaliation for his EEO challenge to his non-selection. The Agency was ordered to take the following actions: to conduct a supplemental investigation into and determine Complainant's entitlement to compensatory damages; provide EEO training to the responsible management officials; consider taking appropriate disciplinary actions against the responsible management officials involved in the unlawful retaliation; and the posting of notice in its facility.

(b)(7)(C) **v. DOD (DCA)**, 0120132616 (09/25/2015) – Complainant, a Sales Store Cashier at the Peterson Air Force Base Commissary in Colorado, filed an EEO complaint alleging that her supervisor discriminated against her when the supervisor issued Complainant a lower performance rating than the rating given to her non-Filipino coworkers and those who did not have prior EEO activity. The Agency found that no discrimination took place. Complainant filed an appeal to OFO, and we reversed the Agency's decision.

The record revealed that her supervisor was unable to offer a legitimate, non-discriminatory reason for why Complainant was rated lower in one of her critical performance elements. For the three years prior, Complainant consistently had been rated as "Exceeded" with regard to the element at issue. The supervisor claimed that Complainant failed to clean the work areas outside of her work space, but management did not show that this was a requirement for recognition at the higher level. In addition, the supervisor used the same narrative language for Complainant's rating, which the supervisor used to justify the higher rating for the other comparators. OFO remanded the matter to the Agency for remedial relief, including an order to change the Complainant's rating of record from Excellent to Outstanding, to provide the appropriate monetary relief due Complainant, including any award money, to conduct management training, and to post a notice, informing employees that discrimination and retaliation had been found at the facility.

(b)(7)(C) **v. BBG**, 0720140003 (09/11/2015) – Complainant filed a formal complaint alleging that the Agency discriminated against her on the bases of national origin (Iranian), sex (female), and reprisal for prior protected EEO when she was subjected to ongoing harassment because of her gender and national origin from October 2006 until March 2007; and when she was terminated on April 6, 2007. The AJ conducted a hearing and found that Complainant established that she had been subjected to unlawful harassment by her supervisor, from November 2006 to February 2007, because of her sex and in reprisal for previous EEO activity, but not her national origin, as no evidence was presented that her national origin was considered. The AJ found that the harassment affected a term, condition or privilege of employment, had the purpose of or effect of unreasonably interfering with the work environment and/or created an intimidating and/or hostile or offensive environment. The AJ determined that the harassment was severe, pervasive, public and patterned, and that it was frequent, and very humiliating. The AJ also found that the termination was not due to discriminatory reasons.

Complainant was awarded $30,000 in nonpecuniary damages for her pain and suffering. Complainant also sought attorney's fees and costs in the amount of $125,124.44 of which $7,462.10 were for costs. Based on the records submitted and the reduction of fees already taken, the AJ awarded Complainant attorney's fees in the amount of $104,383.50 and $3,365.10 in costs.

On appeal, the Agency issued a final order which indicated that it accepted the finding of no discrimination with respect to the termination claim but would not be implementing the AJ's findings of liability relating to the harassment finding. The final order also indicated that the Agency would not be implementing any award of damages or attorney's fees and costs. The Commission modified the Agency's final order by reversing it in part and affirming it in part. The Commission agreed with the AJ that Complainant was subjected to harassment. The Commission also found no error on the part of the AJ with regard to the attorney's fees claims. Due to the four year delay in this case, the AJ properly adjusted the amount of attorney's fees to the current Laffey Matrix rate. The decision also indicated that Complainant did not demonstrate that the AJ erred in finding that she did not establish that her termination was discriminatory. Finally, the decision noted that Complainant was a probationary employee and therefore progressive discipline was not required.

The Commission ordered the Agency to pay Complainant nonpecuniary compensatory damages in the amount of $30,000.00, attorney's fees in the amount of $104,383.50, costs in the amount of $3,365.10, to provide eight hours of EEO training for the managers involved, and to consider taking appropriate disciplinary action against the managers involved.

(b)(7)(C) **v. DOD (DTRA)**, 0720140009 (09/22/2015) – Complainant worked as a Training Instructor, GS-1712-12, in the Russian Language Training Section of the Agency's Operations Support Division at Fort Belvoir, Virginia. Believing that she was subjected to harassment based on sex, disability (agoraphobia), and reprisal, Complainant filed a formal complaint. Following a five-day hearing, the AJ found discrimination with respect to six of the seven claims.

The AJ determined, for example, that the Agency's reason for Complainant's lower performance evaluation (i.e. her failure to travel by air to Russia) was pretext. There was no evidence that any other Instructor

traveled to Russia after the creation of the new travel requirement. The two male Instructors received higher ratings despite their failure to travel to Russia. Similarly, Complainant's request for a temporary change to her duty hours, to a half-hour later, was denied while similar requests made by male colleagues were readily granted. The AJ also found pretext with respect to the disciplinary claims.

On appeal, the Agency argued that the case should be dismissed because the EEO case was identical to an MSPB appeal and civil action. OFO found that the AJ correctly concluded that the matters were not identical. The MSPB and civil action concerned Complainant's June 2010 termination, while the instant EEO case addressed harassment that occurred in 2009.

The Agency did not dispute, and the Commission upheld the AJ's award of: back pay; $25,000 in non-pecuniary damages; $25,216 in past-pecuniary damages; and attorneys' fees and cost.

(b)(7)(C) **v. DOJ (BOP)**, 0720140035 (09/10/2015) – Complainant alleged that the Agency discriminated against her when it: (1) did not separate her from a co-worker (CW1) after she complained about CW1's harassment, which resulted in CW1 physically assaulting her; (2) denied her advanced sick leave requests on three occasions; and (3) issued her a one-day suspension for being absent without leave for 3.5 hours.

The AJ, after a hearing, found sex discrimination in claim 1 and retaliation in claims 2 and 3. OFO found that substantial evidence in the record supported the AJ's decision.

Regarding claim 1, OFO initially found that Complainant established a prima facie case of disparate treatment by showing that the Agency treated a male co-worker (CW2) more favorably by separating him from CW1 after he complained about CW1's harassment. Although Complainant and CW2 held different positions in different departments under different chains of command, OFO found that they were similarly situated in their complaints about CW1's harassment because: (a) they both complained to the facility head; (b) the facility head was directly involved in responding to both complaints; and (c) the Agency has a duty to address harassment complaints in a uniform manner. Next, OFO found that the Agency articulated a legitimate, nondiscriminatory reason for its actions; namely, Complainant and CW1 had limited contact because it was impossible to separate the staff. Finally, OFO found that Complainant established pretext. Specifically, OFO cited testimonial evidence that, as a result of CW2's complaint, the Agency separated them by assigning them to different shifts or to different locations within the facility when they worked the same shift. Moreover, OFO cited documentary evidence that the Agency had the ability to assign CW1 to a shift which would not overlap at all with Complainant's work schedule.

Regarding claims 2 and 3, OFO agreed with the AJ that Complainant established pretext. In claim 2, the Agency articulated that it denied Complainant's requests because her need for the leave arose from the physical assault, which it considered a non-work-related incident. OFO, however, found that documentary evidence in the record supported the AJ's finding that the Agency had considered the physical assault to be work-related. In claim 3, the Agency articulated that it suspended Complainant because she did not have sufficient leave to cover 3.5 hours of her absence. OFO, however, found that documentary evidence in the record supported the AJ's finding that Complainant had sufficient leave for that day.

(b)(7)(C) **v. DOJ (USMS)**, 0720140036 (09/22/2015) – Prior to the events in question herein, Complainant filed an complaint alleging he was discriminated against on the basis of his sex when he was denied a transfer from Dallas to New York in order to care for his mother. Complainant later withdrew the EEO complaint, but his supervisors were aware of the filing. Shortly thereafter, Complainant requested reinstatement into his former position. Complainant's former supervisors did not recommend Complainant for reinstatement in a questionnaire completed as part of the reinstatement process.

Complainant filed a formal complaint and requested a hearing following an investigation. The AJ bifurcated the hearing. The AJ found the supervisor's testimony was not credible, and determined the Agency's reason for denying Complainant's reinstatement request was a pretext for retaliation. The AJ found that Complainant was not subjected to discrimination on the basis of his association with a person with a disability as there was insufficient credible evidence that Complainant's supervisors considered Complainant's prior attendance when making its decision.

A hearing on damages was scheduled, but later cancelled, over the Agency's objection. The AJ ordered Complainant reinstated into his position, despite the Agency's argument that After Acquired Evidence Rule established Complainant would have been fired even absent the discrimination. The AJ ordered the Agency to pay the requested attorney's fees, and to the extent the Agency disagreed with the amount of attorney fees requested, it was to withhold that amount and appeal to OFO.

In its final order, the Agency rejected the AJ's decision, and also found that the attorney fee award should be reduced. The Agency did not award a specific dollar amount, but found a 30% reduction was appropriate.

On appeal, OFO found there was substantial evidence in the record to support the AJ's decision, and also reiterated the Commission's policy that University of Texas Southwestern Medical Center v. Nassar, 133 S. Ct. 2517 (2013) did not apply to the federal sector.

As for reinstatement, the decision found the Agency failed to present clear and convincing evidence which would have proved that the Agency would have denied reinstatement absent the discrimination. However, the decision did find that Complainant should be required to undergo whatever medical, security or firearms certifications he would have had to undergo if his reinstatement request was recommended by his supervisors.

OFO could not come to a decision on an attorney fee award because it determined the issue was not before it at that time. The Agency has not made a decision awarding attorney fees and there was no fee petition in the record. Citing 29 C.F.R § 1614.501(e)(2)(i), OFO found that the matter should have been addressed by the AJ, and remanded the matter to the AJ for a calculation of attorney fees.

(b)(7)(C) **v. DOJ**, 0720110008 (09/15/2015) **[Summary repeated under Priority 5 above]** – Complainant, a Corrections Counselor, contacted an EEO Counselor in 1999 and alleged that the agency had discriminated and retaliated against a class of African Americans with respect to promotions, discipline and other actions since 1994. The AJ assigned to the case denied class certification.

When the claim was remanded for processing as an individual complaint, the class agent attempted to amend the complaint to add class claims again. The agency refused. The class agent again contacted an EEO Counselor, redefined the class, and alleged discrimination and retaliation with respect to promotions, denial of transfers, harassment and other actions since 1994. The AJ assigned to this complaint certified the class. The agency did not implement this decision, and appealed the matter to OFO. In its decision, OFO denied the agency's procedural arguments, but also found the class should not be certified because it lacked a common policy.

The case was remanded for processing as an individual complaint, and again, the class agent redefined the class to promotions only since 1994, and alleged the complaint had class implications. The EEOC AJ assigned to the class complaint found the matter should be certified as a class because all GS-14 promotions and leadership positions were decided by a common group, the Executive Committee, who had knowledge of the applicant's EEO activity. Furthermore, the agency's retaliatory failure to promote was allegedly enforced by its "vouchering" practice, where selecting officials engage in informal discussions about applicants, and allegedly, prior EEO activity is discussed. The AJ described a culture of retaliation based on anecdotal comments contained in the class members' affidavits. The agency did not implement the AJ's decision and filed the instant appeal.

The Agency asserted the class complaint should be dismissed because of several procedural deficiencies. However, OFO denied these arguments and determined that the agency's collateral estoppels argument lacked merit because the prior certification decisions were not decisions on the merits. Furthermore, OFO found no error in certifying a new class with a different defined group, given that the agency refused to allow the class to amend its individual complaint into a class claim.

With respect to the certification requirements, OFO found no reversible error in the AJ's decision, and rejected the agency's arguments with respect to the Walmart case. OFO noted that this class was much smaller than the one in Walmart, and was supported by anecdotal evidence. OFO likewise found sufficient number of potential class members to support the numerosity requirement. Finally, OFO determined the

class attorneys were adequate representatives. The class was defined as follows and remanded for a hearing:

> all Agency employees (nationwide), from January 1, 1994 to the present, who have been denied promotions based upon the Agency's policy or pattern and practice of retaliating against employees because they engaged in protected EEO activity.

(b)(7)(C) **v NGB**, 0120083446 (09/28/2015) **[Repeated under Findings below]** – Complainant filed an EEO complaint alleging that the Agency discriminated against him on the basis of age (55) when on or about November 6, 2005, he was not selected for the position of Aircraft Mechanic Supervisor. The complaint went to a hearing before an EEOC AJ, who found that Complainant did not establish that discrimination existed. Complainant filed an appeal.

On August 7, 2008, we notified the Agency of the filing of the appeal and that it was required to submit a copy of the entire complaint file within thirty calendar days. We advised the Agency that failure to submit the entire complaint file within the specified time frame could result in the Commission drawing an adverse inference. The Agency submitted some documentation, but much of the record was missing. Specifically, the record submitted to us by the Agency was missing the complete report of investigation, including all of the affidavits from all of the witnesses, the "fact finding conference" documentation including the testimony of all of the witnesses, resumes and applications of all of the applicants for this position, and the interview notes. Further, the record was devoid of motions, pleadings, and correspondence generated during the hearing process including motions for summary judgment, motions to amend the complaint, discovery materials, and hearing exhibits. Critically, the record did not contain the transcript of the hearing.

We contacted the Agency about this missing documentation on four different occasions. On April 11, 2014, the Commission issued to the Agency a Notice to Show Good Cause Why Sanctions Should Not Be Imposed, and warned that failure to supply the documents could lead to OFO: drawing an adverse inference that the requested information would have reflected unfavorably on the Agency; considering the matters to which the requested information pertains to be established in favor of the Complainant; and issuing a decision fully or partially in favor of the Complainant. The Agency never responded to the Notice, including a follow up phone call on July 14, 2014, to the Agency's EEO office to ensure that it received the Notice.

Based on the conduct of the Agency in this case and its failure to show good cause for why sanction should not have been imposed, we found that the imposition of sanctions was warranted. As a result, we issued a default judgment in favor of Complainant.

We noted that this default judgment was supported by the record that was supplied to us. For example, Complainant alleged in his formal complaint that the selecting official continuously told Complainant every time he applied for a promotion that "war is a young man's game" and that he wanted young men for any open supervisory positions. We drew an adverse inference that the missing documents would have revealed that discriminatory animus existed towards Complainant's age.

We also found that the Agency erred when it did not amend Complainant's complaint to include religion as a basis of discrimination. Complainant alleged that one of the selecting officials provided all of the other selecting officials with Complainant's religious information and related purported conscientious objector status during the selection process. This allegation is supported by information in the EEO Counselor's Report states that a selecting official told the EEO Counselor that Complainant "was not the best choice... because he is a conscientious objector." We drew an adverse inference that the missing documents would have revealed discriminatory animus existed towards Complainant's religion.

We ordered the Agency to offer Complainant the position of Aircraft Mechanic Supervisor, calculate civilian back pay and benefits, conduct a supplementary investigation into compensatory damages, consider taking disciplinary action against the selecting officials, and provide 16 hours of EEO training, and post a notice of discrimination. Additionally, the Agency was ordered evaluate its EEO program and the policy, process and practice it uses to maintain the official EEO record, including the complaint file and hearing record. The Agency was ordered to evaluate the policy, process and practice it uses to supply the record to the

Commission and replying to Commission inquiries and Orders. We ordered the Agency to submit a report to the Commission detailing steps that it will take to ensure that the entire official record is supplied to the Commission, and that it will respond to future Commission inquiries for documents and Orders to supply documents.

(b)(7)(C) **v. DOJ (BOP)**, 0120122924 and 012132965 – Complainant filed two appeals from two Agency final decisions. One appeal was from a final decision dated August 2, 2012 (decision on merits). A second appeal was from a final decision dated May 31, 2013 (on the issue of compensatory damages) and January 9, 2014 (on the issue of attorney fees). For the sake of administrative efficiency, the Commission exercised its discretion and consolidated the two appeals.

Complainant worked as a Correctional Officer at the Agency's Federal Correction Institution in Williamsburg, South Carolina. On November 1, 2009, Complainant filed a complaint alleging that the Agency discriminated against her on the bases of race, disability, and in reprisal for prior EEO activity when her requests for a reasonable accommodation were denied by Human Resources and management.

In its August 2, 2012 final decision, the Agency found no discrimination on the bases of race and reprisal. However, the Agency found discrimination based on disability when Agency management denied Complainant a September 30/October 1, 2009 request for reasonable accommodation. The Agency ordered the following relief: engagement in the interactive process with Complainant to determine a reasonable accommodation; restoration any leave taken by Complainant in connection with her disability; take corrective action to prevent further discrimination; and conduct an investigation to determine Complainant's entitlement to compensatory damages and attorney's fees.

On May 31, 2013, the Agency issued a final decision on compensatory damages, awarding Complainant $12,000. On January 9, 2014, the Agency issued another final decision awarding Complainant attorney's fees and costs in the amount of $3,892.

On appeal, Complainant does not dispute the Agency's finding of discrimination on the basis of disability. However, she argued that the Agency improperly found no discrimination on the bases of race and reprisal. In addition, Complainant challenged the amounts of compensatory damages and attorney's fees awarded.

The Commission affirmed the Agency's August 2, 2012 final decision finding no discrimination based on the bases of race and reprisal, but found a violation of the Rehabilitation Act when Complainant's requests for reasonable accommodation were denied. The Agency's subsequent decisions on compensatory damages and attorney's fees and costs were modified as follows: the Agency was ordered to pay Complainant in the amount of $52,047 in compensatory damages and $5,653.42 in attorney's fees and costs.

III. Federal Sector Oversight

- During the 4th quarter of FY 2015, OFO completed a government-wide report on anti-harassment programs in the federal government.
- During the 4th quarter of FY 2015, OFO completed a government-wide report on diversity in the Senior Executive Service.
- During the 4th quarter of FY 2015, OFO drafted the FY 2014 Annual Report on the Federal Work Force Part I, as well as continued work on the FY 2012 - FY 2014 Annual Report on the Federal Work Force Part II.
- During 4th quarter of FY 2015, OFO updated all documents and forms to begin the FY 2015 Form 462 collection in October. This included training new staff for this task.
- During 4th quarter, OFO published two EEO Digests, containing the latest cases and outcomes for the Federal sector and special articles on EEO issues.
- OFO published the MD-110 for stakeholders and the public.
- OFO continued work on its program evaluation into USDA county employees' status to determine whether they should continue to use the federal EEO process where remedies seem unavailable. Staff is coordinating with OLC, OFP and ARP. Staff is looking into the Title VI process as an alternative for these employees (sister agencies -- MSPB, FLRA -- and courts have found these employees are not federal employees).
- During the 4th quarter, in collaboration with the Chair's office, OFO updated its 3rd quarter draft of a symposium article on the EEOC history for its 50th anniversary that the New York School of Law will likely publish this year.
- During the 4th quarter of FY 2015, RED staff assisted with identifying recommendations for an anti-retaliation guidance. Specifically, OFO identified anti-retaliation best practices and provided annotated bibliographies of research supporting each practice and subsequently provided these to the Office of Legal Counsel.
- During the 4th quarter of FY 2015, RED staff coded data and generated tables using the Merit System Protection Board 2010 Merit Principles Survey data for the Senior Executive Service workgroup, as part of the continued work on a government-wide report on diversity in the Senior Executive Service.
- During the 4th quarter of FY 2015, RED staff began to draft a government-wide report on the wage gap between men and women within the federal government.
- During the 4th quarter of FY 2015, RED staff met with the Bureau of Prisons' Union Representatives to discuss concerns regarding the Bureau of Prisons' programs, and subsequently completed a program evaluation on the Bureau of Prisons.
- During the 4th quarter of FY 2015, RED staff updated Part I of the 462 Annual Report for 2014.
- During the 4th quarter of FY 2015, RED staff analyzed data and updated the report entitled, "The Federal Sector Model Employer and its Impact on Employment Civil Rights in America" for the New York University Symposium.
- During the 4th quarter of FY 2015, RED staff issued a draft Notice Letter to Health and Human Services (HHS) to begin the preliminary request for information and initiate a program evaluation.
- During the 4th quarter of FY 2015, RED staff submitted a draft memorandum to the Office of Legal Counsel to provide a legal analysis and review regarding the coverage and jurisdiction related to USDA Farm Service Agency.
- During the 4th quarter of FY 2015, RED staff assisted with the development of a list of recommendations for standing performance metrics workgroup.
- During the 4th quarter of FY 2015, RED staff developed and presented a debriefing PowerPoint presentation to OFO leadership on behalf of the performance metrics workgroup.

- During the 4th quarter of FY 2015, RED staff produced a data table and summary for OFO Associate Director's Commission report on reprisal within the federal sector.
- During the 4th quarter of FY 2015, RED staff produced a data table for OFO Senior Attorney Advisor's EXCEL presentation on religious discrimination.
- During the 4th quarter of FY 2015, RED staff inputted EEO complaints data into the 2013 462 Access Database in preparation for HotDocs, a program used to generate Part 2 of the 2013 Annual Report.
- During the 4th quarter of FY 2015, RED staff produced an inventory of all data sources currently accessible by the Reports and Evaluation Division.

IV. Outreach & Training

1. Eliminating Barriers in Recruitment and Hiring

- T&O Assistant Director presented session on "Equal Employment Opportunity Laws Refresher" at the Federally Employed Women (FEW) Conference in New Orleans, LA.
- Numerous EEOC personnel from Headquarters presented at EEOC's EXCEL Conference in Wash., D.C., including a number of sessions on Disability Hiring, Special Hiring Authorities and Barriers to Diversity in the SES.
- FSP Associate Director spoke to Transportation and Safety Administration (TSA), Office of Professional Responsibility, on "Unconscious Bias" in Arlington, VA.
- T&O staff presented training on LGBT issues and Providing Reasonable Accommodations for USDA/Food Safety and Inspection Service in Beltsville, MD.
- EEOC staff conducted webinar on Reasonable Accommodation for Managers at US Citizenship and Immigration Services (CIS).
- EEOC staff conducted training on Providing Reasonable Accommodations and Preventing Retaliation to Managers at Naval Network Warfare Command in Suffolk, VA.
- OFO staff conducted webinar on Religious Discrimination for Counselors at the Environmental Protection Agency.
- EEOC staff conducted webinar on Providing Reasonable Accommodations for Managers at US Citizenship and Immigration Services (CIS).
- T&O staff conducted webinar on Providing Reasonable Accommodations for Overseas Managers at US Citizenship and Immigration Services (CIS).

2. Protecting Immigrant, Migrant and Other Vulnerable Workers

- T&O staff presented training on LGBT issues and providing Reasonable Accommodations for USDA/Food Safety and Inspection Service in Beltsville, MD.
- T&O staff conducted a session on Reasonable Accommodation for Department of Commerce (DOC), Employee Relations and Office of General Counsel staff, in Wash., D.C.
- T&O Assistant Director and OFO staff presented sessions on "Equal Employment Opportunity Laws Refresher" and "Reasonable Accommodation and the Pregnancy Discrimination Act," at the Federally Employed Women (FEW) Conference in New Orleans, LA.
- Numerous EEOC personnel -- including Commissioners, Directors, and staff from Headquarters and the field -- presented at EEOC's EXCEL Conference in Wash., D.C., including a number of sessions on Reasonable Accommodations and Disability Hiring.

- EEOC staff spoke on "New Case Law, EEO Complaints, and Reasonable Accommodations" at Disability Awareness Training Conference for the Drug Enforcement Administration in Wash. D.C.
- OFO staff presented Reasonable Accommodation for Disability Program Management course for Defense Equal Opportunity Management Institute (DEOMI) at Patrick AFB, FL.
- EEOC staff spoke on Reasonable Accommodation and Pregnancy Disability Accommodations for the Food Safety and Inspection Service, Enforcement Litigation Division, US Dept of Agriculture (USDA), in Wash. D.C.
- EEOC staff spoke on Reasonable Accommodation issues for Intelligence Community (IC), Equal Employment Opportunity and Diversity Professionals Conference, in Springfield, VA.
- FSP Associate Director spoke to Transportation and Safety Administration (TSA), Office of Professional Responsibility, on "Unconscious Bias" in Arlington, VA.
- EEOC staff spoke on "Conduct Issues and Reasonable Accommodations" to Dept of Transportation (DOT), Federal Highway Administration EEO staff, via Webinar.
- T&O Assistant Director and OFO staff presented "Experiencing the EEO Process," for League of United Latin American Citizens (LULAC) at their National Convention and Exposition Salt Lake City, Utah.
- EEOC staff presented an EEOC case update and a Counselor Refresher course at National Organization for Mexican American Rights (NOMAR) national conference in San Diego, CA.
- T&O Assistant Director, OFO and EEOC staff presented "A View from the Bench", EEO Counselor Refresher Course, Special Emphasis Program- Best Practices, and MD-715-Review Process, for National Image, National Training Program, Houston, Texas.
- OFO staff conducted webinar on Religious Discrimination for EEO Counselors at the Environmental Protection Agency.

3. Addressing Emerging and Developing Issues

- OFO staff presented "LGBT" training to U.S. Citizenship and Immigration Services (CIS) employees in Washington, DC.
- OFO staff served as a panelist on LGBT issues presentation for "Diversity Day and Summit" at U.S. Agency for International Development (USAID) in Wash., D.C.
- Numerous EEOC personnel -- including Commissioners, Directors, and staff, from Headquarters and the field -- presented at EEOC's EXCEL Conference in Wash., D.C., including sessions on LGBT legal developments, and Pregnancy Discrimination.
- EEOC staff spoke on LGBT Legal Developments at Blacks in Gov't (BIG) National Conference in Orlando, FL.
- EEOC staff presented an EEOC case update featuring recent LGBT cases to Army EEO staff in Atlanta, GA.
- EEOC staff spoke on LGBT issues as a panelist for Court Services and Offender Supervision Agency (CSOSA), Diversity and Inclusion Symposium, in Wash., D.C.
- OFO staff spoke on LGBT issues for Smithsonian Institution staff in Wash. D.C.
- OFO and EEOC staff presented on "LGBT Discrimination in the Workplace" for Washington Metropolitan Area Transit Authority (WMATA) medical staff in Wash., D.C.
- T&O staff presented training on LGBT issues and Providing Reasonable Accommodations for USDA/Food Safety and Inspection Service in Beltsville, MD.

4. **Enforcing Equal Pay Laws**

- T&O Assistant Director presented multiple sessions of "Federal Workplace Trends" for Micropact Conference in Wash., D.C.
- T&O Assistant Director presented session on "Equal Employment Opportunity Laws Refresher" at the Federally Employed Women (FEW) Conference in New Orleans, LA.

5. **Preserving Access to the Legal System**

- Numerous EEOC personnel -- including Commissioners, Directors, and staff, from Headquarters and the field -- presented at EEOC's EXCEL Conference in Wash., D.C., including multiple sessions concerning retaliation.
- EEOC staff spoke provided an "EEO Counselor Refresher," at Blacks in Gov't (BIG) National Conference in Orlando, Fl.
- EEOC staff provided a Counselor Refresher course at National Organization for Mexican American Rights (NOMAR) national conference in San Diego, CA.
- T&O staff conducted national New Counselor course in Washington, DC.
- T&O and EEOC staff conducted national New Counselor course in Washington, DC.
- OFO and EEOC staff held a "Brown Bag" lunch presentation to federal sector EEO professionals concerning the newly revised Management Directive (MD) 110 at EEOC Headquarters in Wash., D.C.
- T&O and EEOC staff conducted national Counselor Refresher course in Washington, DC.
- OFO staff conducted national Counselor Refresher course in Washington, DC.
- T&O staff conducted national New Investigator course in Washington, DC.
- EEOC and T&O staff conducted national New Counselor course in Dallas, TX.
- T&O and OFO staff conducted Counselor Refresher training for Army in Adelphi, MD.
- T&O Staff conducted training on "Framing Claims" for Department of Energy in Portland, Oregon.
- OFO and EEOC staff conducted national Counselor/Investigator course in Little Rock, AR.
- T&O and OFO staff conducted national New Investigator course in Washington, DC.
- OFO staff conducted webinar on Religious Discrimination for EEO Counselors at the Environmental Protection Agency.
- T&O and EEOC staff conducted national New Counselor course in Washington, DC.
- OFO staff conducted Counselor Refresher training for Department of Transportation in Washington, DC.

6. **Preventing Harassment through Systemic Enforcement and Targeted Outreach**

- EEOC staff spoke on Cultural Diversity and Sexual Harassment at Defense Contract Management Agency in Orlando, FL.
- Numerous EEOC personnel -- including Commissioners, Directors, and staff, from Headquarters and the field -- presented at EEOC's EXCEL Conference in Wash., D.C., including multiple sessions on preventing harassment.
- OFO staff provided half-day session on Workplace Harassment for Employees at EPA in Washington, DC.

- T&O, OFO and EEOC staff conducted four 2-day Harassment Trainings for Investigators for Social Security Administration in Baltimore, MD.

7. Training/Outreach – General

- FSP Associate Director spoke on current EEOC priorities; establishing and maintaining strong partnerships with EEO stakeholders, including the HR community; and developing the Federal EEO workforce to Dept. of Justice (DOJ) staff in Washington, DC.
- OFO staff gave an EEO case update for meeting of the American Bar Association (ABA) government personnel committee at ABA headquarters in Wash., D.C.
- OFO staff gave an EEO case update for Dept of the Navy (DON) EEO personnel at Patuxent River Naval Air Station, Patuxent, MD.
- T&O staff presented sessions on EEO Case Updates, GINA, and MD-715 Barrier Analysis for the EEO Specialist Course at Defense Equal Opportunity Management Institute (DEOMI) Patrick, AFB FL.
- FSP Associate Director provided an "EEOC Update" to EEO staff at the Environmental Protection Agency (EPA) in Wash., D.C.
- Numerous EEOC personnel -- including Commissioners, Directors, and staff, from Headquarters and the field -- presented at EEOC's EXCEL Conference in Wash., D.C., presenting all multiple issues of EEO law and practice.
- EEOC staff presented "AJ View from the Bench" to Dept. of the Navy EEO personnel in Charleston, S.C.
- OFO staff spoke via webinar to EEO practitioners for U.S. Citizenship and Immigration Services (CIS) about OFO operations and processes.
- T&O Assistant Director and EEOC staff spoke on "Workplace Trends" and provided an "EEO Counselor Refresher," and staffed Outreach booth at Blacks in Gov't (BIG) National Conference in Orlando, FL.
- T&O staffed an outreach booth at League of United Latin American Citizens (LULAC) at their National Convention and Exposition Salt Lake City, Utah.
- EEOC staff presented an EEOC case update and a Counselor Refresher course at National Organization for Mexican American Rights (NOMAR) national conference in San Diego, CA.
- T&O Assistant Director presented multiple sessions of "Federal Workplace Trends" for Micropact Conference in Wash., D.C.
- EEOC staff presented on Reports of Investigation at Annual Investigator's Workshop for staff of the Investigations and Resolutions Directorate, Defense Civilian Personnel Advisory Service (DCPAS), in Southbridge, MA.
- OFO staff served as a panelist for "Thorny Issues in Case Processing" for Intelligence Community (IC) Equal Employment Opportunity and Diversity Professionals Conference in Springfield, VA.
- EEOC and T&O staff conducted national New Counselor course in Washington, DC.
- EEOC staff conducted national New Investigator course in Washington, DC.
- T&O staff provided Barrier Analysis training for Department of Interior in Washington, DC.
- OFO staff conducted national Counselor Refresher course in Washington, DC.
- T&O staff conducted national New Investigator course in Washington, DC.
- EEOC and T&O staff conducted national New Counselor course in Dallas, TX.
- T&O, OFO and EEOC staff conducted four 2-day Harassment Trainings for Investigators for Social Security Administration in Baltimore, MD.
- OFO staff provided Barrier Analysis training for Department of Army in Aberdeen, MD.

- T&O and OFO staff conducted Counselor Refresher training for Army in Adelphi, MD.
- EEOC staff conducted national MD-715 course in Washington, DC
- T&O staff conducted national Barrier Analysis course in Washington, DC
- OFO and EEOC staff conducted national Counselor/Investigator course in Little Rock, AR.
- T&O and OFO staff conducted national New Investigator course in Washington, DC.
- T&O and EEOC staff conducted national New Counselor course in Washington, DC.
- T&O Staff conducted training on "Framing Claims" for Department of Energy in Portland, Oregon.
- T&O and OFO Staff conducted two 2-day sessions on Special Emphasis Program Manager training for the Defense Finance and Accounting Services (DFAS) in Columbus, Ohio and Indianapolis, IN.
- OFO staff conducted webinar on Religious Discrimination for EEO Counselors at the Environmental Protection Agency.
- OFO staff conducted Counselor Refresher training for Department of Transportation in Washington, DC.
- OFO and T&O staff conducted New Investigator training for California National Guard in Sacramento, CA.
- OFO staff provided 3 half-day sessions on Barrier Analysis for Department of Army/Detroit Arsenal in Warren, Michigan.
- OFO staff provided Barrier Analysis training for U.S. Postal Service in Washington, DC.
- OFO and EEOC staff conducted Counselor Refresher training for Social Security Administration in New York, NY.
- T&O Assistant Director met with Federal Asian Pacific American Council (FAPAC) to plan FY 2016 EEO courses and Career Day participation.
- Associate Director and FSP leadership met with Council of EEO Executives to plan collaborative EEO initiative in Washington DC.
- T&O staff conducted training on Drafting Letters of Acceptance/Dismissal Decisions for the Transportation Security Administration in Arlington, VA.
- T&O Assistant Director attended monthly telephonic interagency planning meeting for National Civil Rights Conference.
- OFO and EEOC staff made a "Brown Bag" lunch presentation to federal sector EEO professionals concerning the newly revised Management Directive (MD) 110 at EEOC headquarters in Wash., D.C.

8. Technical Assistance Visits

- There are no technical assistance visits to report for this quarter

Quarterly Strategic Enforcement Plan Report
Office of Federal Operations
2nd and 3rd Quarters, FY 2015

I. Background: General FY 2015 2nd and 3rd Quarters Appellate Review Program Accomplishments

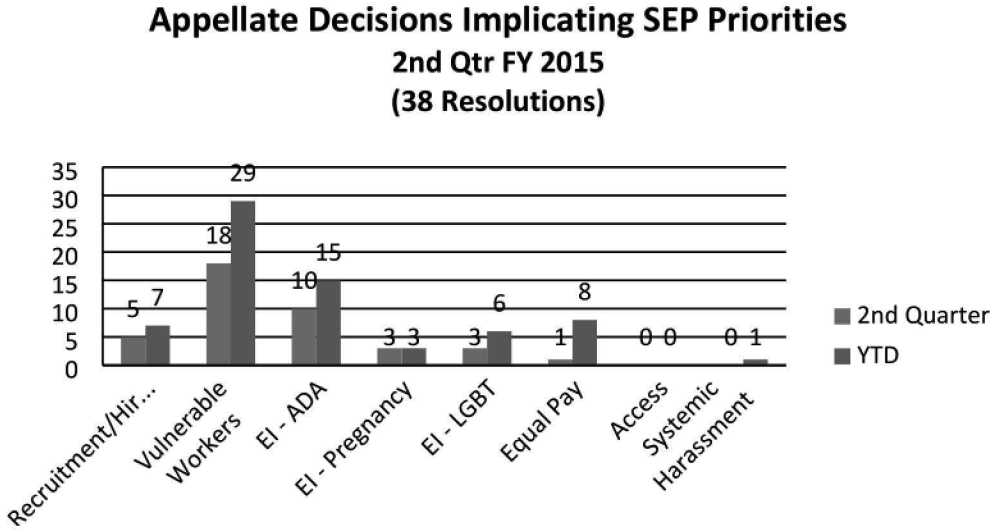
During the 2nd and 3rd Quarters of FY 2015, the Office of Federal Operations (OFO) resolved 1,101 appeals. These resolutions included 429 decisions on the merits and 572 procedural closures. Of the 572 procedural closures, 347 of them involved initial appeals under review by OFO, and we reversed 126 or 36.3% of the agency dismissals. With regard to the merit decisions, OFO issued 20 findings of discrimination during the 2nd Quarter. We found discrimination on the basis of retaliation in 7 of the findings, disability in 7 of the findings, sex in 4 of the findings, and age in 3 of the findings. The top three issues involved in the findings included removal (5), disability accommodation (4), and appraisal (3).

Resolution Description	2nd Quarter	Year to Date
Resolutions	1101	2049
Merits Resolutions	429	768
Findings	20	30
Non-Findings	409	738
Procedural Resolutions (all)	572	1,071
Procedural Resolutions (from Initial Appeal)	347	701
Affirming Dismissal	216	414
Remanding Dismissal	126	278

With regard to the categorization of the 1,101 resolutions, OFO identified 38 appeals that implicated one or more SEP/FCP priority.[1] Section II below contains charts breaking down the composition of the individual priorities, summaries of the 38 decisions OFO attorneys categorized as implicating the SEP/FCP priorities, and summaries of the findings of discrimination made in the 2nd quarter.

II. Analysis of SEP/FCP Priority Areas

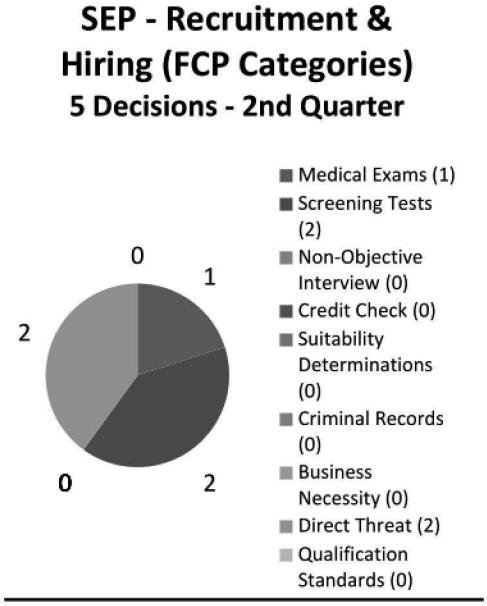
The chart below depicts the distribution of the 40 SEP categories identified in the 38 appellate decisions OFO identified as implicating an SEP/FCP category:



[1] Two appellate decisions were categorized as implicating two separate SEP priorities, and this is noted in the summaries below.

The numbered sections below provide more information about each of the six SEP priorities. Specifically, these sections start with a chart depicting the related FCP categories under each SEP, as well as summaries of the specific decisions under each SEP/FCP priority. In Section 7, by contrast, we provide summaries of the 10 findings of discrimination issued during the 2nd and 3rd Quarters that did not implicate an SEP/FCP category.

1. ELIMINATING BARRIERS IN RECRUITMENT AND HIRING



(b)(7)(C) **v. DHS (TSA)**, 0520130579 (01/22/2015) – Complainant filed an EEO complaint alleging that the Agency discriminated against him on the basis of his Crohn's Disease when, in May 2008, it disqualified him from the position of Transportation Security Officer. An AJ issued a decision, without a hearing, finding no discrimination.

OFO, in its appellate decision, affirmed the AJ's decision. OFO noted Complainant's contentions on appeal that: (1) he did not understand why there was no hearing; and (2) while he is not disabled, he was discriminated against because he takes medication. OFO, however, found that the AJ's issuance of a decision without a hearing was appropriate and noted the AJ's determination that Complainant was not an individual with a disability under the Rehabilitation Act.

In his request for reconsideration, Complainant reiterated the contentions he previously made on appeal. In addition, Complainant asserted that the appellate decision will impact the Agency's future hiring of individuals who take medication.

OFO denied Complainant's request for reconsideration. OFO noted that a request for reconsideration is not a second appeal to the Commission and found that Complainant failed to demonstrate that the appellate decision involved a clearly erroneous interpretation of material fact or law, or will have a substantial impact on the policies, practices, or operations of the Agency.

(b)(7)(C) **v. DOJ (FBI)**, 0420140016 (02/12/2015) – At the time of events giving rise to his complaint, Petitioner was a Special Agent (SA) applicant who had received a conditional offer of employment from the FBI on August 29, 2002. Petitioner's employment with the Agency was conditional upon successfully passing a polygraph examination, a security clearance background investigation, and a medical examination. On June 23, 2003, Petitioner filed an EEO complaint alleging that he was discriminated against on the basis of disability

(monocular vision) when the Agency rescinded its conditional offer of employment because he failed to meet the vision requirement.

Following a two day hearing, an EEOC AJ issued a decision on September 26, 2006, finding that the Agency failed to perform an individualized assessment of Petitioner's impairment regarding whether he could perform the essential functions of the SA position without causing a direct threat to himself or others. The Agency rejected the AJ's decision and appealed the matter to the Commission on November 17, 2006. Among other things, the Agency argued that it had not engaged in unlawful discrimination on the basis of disability. The Commission issued a decision on July 19, 2013 affirming the AJ's decision, but with a modified remedy. See (b)(7)(C) v. Department of Justice, EEOC Appeal No. 0720070014 (July 19, 2013).

The matter was assigned to a Compliance Officer and docketed as EEOC Compliance No. 0620130738 on July 24, 2013. On or around June 4, 2014, a Petition for Enforcement was filed after Petitioner maintained that the Agency had not fully complied with the above order. Specifically, Petitioner contended that the Agency: (1) failed to post a notice informing employees in the workplace of the discrimination finding in a timely manner as mandated by the decision (the Notice); (2) failed to issue an employment offer because it did not provide an employment date, specifically a date for a New Agent Training class; (3) failed to compensate him with a relocation pay bonus; (4) failed to provide appropriate training as mandated in the order; and (5) failed to pay him in a timely manner.

A review of the record and the submissions of the parties showed that the Agency complied with its July 19, 2013 order. Specifically, the evidence established that although there was a delay as a result of the government shutdown from October 1 through October 16, 2013, when the government reopened, the Notice was forwarded for signature via the Agency's internal mail system on October 21, 2013. Additionally, at the time Petitioner was officially provided a conditional offer of employment, he was advised that due to a lack of funding at that time there were no New Agent Training (NAT) classes planned for the remainder of the Fiscal Year (FY 2013) or Fiscal Year (2014); consequently, Petitioner made a decision to decline the offer due to the uncertain nature of the upcoming NAT class. Petitioner was unable to establish that he was entitled to the relocation bonus. A review of the roster for the class Petitioner would have been enrolled indicates that no one in that class received a relocation bonus. Training was provided pursuant to the provisions in the order on December 19, 2013. Regarding allegations of delayed payment, the Commission found that any delay could be directly attributed to Petitioner's concerns regarding the back pay calculation, and tax liability. The Agency took time to address these concerns before issuing the payments.

(b)(7)(C) **v. DOJ (FBI)**, 0120130689 (03/09/2015) **[Repeated under Vulnerable Workers below]**– Complainant was an applicant for employment with the Albuquerque, New Mexico Division of the FBI. Complainant has Supra Ventricular Tachycardia (SVT), a heart condition that causes her heart to sporadically beat faster and at an abnormal rate. Complainant takes various prescribed medications to help control her condition. On December 5, 2007, the Agency gave Complainant a conditional offer of employment as a Summer Honors Intern. The offer of employment was contingent upon the successful completion of a Personnel Security Interview, drug test, fingerprint check, credit check, criminal history check, past and present employment check, residential check, educational check, and the successful completion of a polygraph examination.

The position required a top secret clearance. Agency policy requires that all applicants take and pass a pre-employment polygraph examination as a condition of employment. On January 10, 2008, a polygraph examiner at the Agency (SA1) administered Complainant's pre-employment polygraph examination. The polygraph examination tests an examinee's psychological response to certain questions, and the polygraph machine monitors and records the examinee's physiological responses. The machine records heart rate, respiration, and perspiration, and this data is captured during periods when questioning is not taking place and also while questions are presented.

During the polygraph examination, Complainant told SA1 that she suffers from SVT and takes certain medications to control the condition. SA1's polygraph report stated that Complainant's recorded responses to the "Series I" questions were indicative of deception and her responses to the "Series II" questions were inconclusive. A second trained polygraph examiner in the Agency's Quality Control Review reviewed and

confirmed SA1's report and results. On February 12, 2008, Complainant was informed that she failed the polygraph examination and was no longer eligible for the Summer Honors Intern position.

On February 13, 2008, Complainant, via a letter, appealed the February 12, 2008 decision to the Unit Chief of Applicant Adjudication (SA2) in the FBI Security Division. On February 25, 2008, Complainant interviewed for an Intelligence Analyst position. On February 29, 2008, the Agency gave Complainant a conditional offer of employment for the Intelligence Analyst position. On March 7, 2008, via a letter from SA2, Complainant was informed that the Agency was rescinding the conditional offer of employment. On May 12, 2008, Complainant called and spoke with a Human Resource Specialist who informed her that because she failed the polygraph exam, the Agency had removed her from consideration for the Intelligence Analyst Position.

On May 15, 2008, Complainant sent an appeal letter to SA2. Complainant's appeal and request for a retest was assigned to a polygraph supervisor in the Agency's Polygraph Unit. The polygraph supervisor reviewed Complainant's polygraph examination, and on June 6, 2009, he presented Complainant's appeal at the Appeal Review Committee. The Appeals Review Committee voted to deny Complainant's request for a second polygraph examination.

Complainant filed an EEO complaint alleging that the Agency discriminated against her on the basis of disability when: (1) in June 2008, she was not selected for two positions within the FBI; and (2) on March 16, 2009, she received a letter from a senior FBI official, through her United States Senator, advising that there were no positions for her within the FBI. Complainant requested a hearing, but the AJ granted summary Judgment for the Agency. On appeal, OFO agreed with the AJ that Complainant did not request any accommodation from the Agency due to any alleged disability prior to taking the polygraph examination. Even had she done so, the record does not support the conclusion that Complainant was "qualified" for any relevant positions with the Agency. Specifically, the undisputed record supports the finding that the requirement to pass the polygraph examination is an essential requirement, necessary for national security reasons, which the Agency cannot be compelled to waive. See Dep't of the Navy v. Egan, 484 U.S. 518, 529-30 (1988). Moreover, Complainant conceded in her deposition that no effective accommodation existed.

(b)(7)(C) **v. TVA**, 0120093256 & 0120111968 (02/20/2015) **[Repeated under Category 3, and Findings, below]** – Complainant, who is blind in his left eye, works as a journeyman electrician, alleged that he was discriminated against on the basis of disability when he was not allowed to work as a dual-rate foreman on numerous occasions; not allowed to travel to Sequoyah Nuclear Plant in support of a tanker rebuild; and not selected for a permanent foreman position.

In 2004 the Agency required all employees in the electrician and the electrician foreman positions to possess and maintain a seven-state Class B Commercial Driver's license (CDL) pursuant to Department of Transportation (DOT) Regulations. These regulations require individuals to pass an S5 medical examination which requires, amongst other things, binocular vision (vision in both eyes). Complainant's vision impairment made him unable to pass the S5 medical examination, and therefore Complainant was unable to obtain a Class B CDL pursuant to DOT regulations. The Agency notified Complainant that he would be "grandfathered" into his permanent position as a journeyman electrician even though he couldn't pass the S5 medical examination. Complainant was permitted to serve as a dual-rate foreman on numerous occasions after he was grandfathered into his position, however on December 14, 2007, the Agency notified Complainant that he would no longer be permitted to serve as a dual-rate foreman because the "grandfathering" provision restricted Complainant to his permanent position as an electrician.

In its final decision, the Agency asserted that Complainant's inability to obtain a seven-state CDL resulted in him not being able to perform the essential functions of the dual-rate foreman positions because foremen must be able to respond to emergency situations 24 hours per day and may be required to transport Commercial Motor Vehicles across state lines to the emergency site.

We found that Complainant requested a reasonable accommodation. The Agency did not dispute that Complainant was an individual with a disability. We noted that a review of the record reveals that Complainant met all of the Agency's job requirements for the foreman position except for its requirement that his vision conform to the requirements set forth in the DOT regulations.

To determine whether the Agency's vision standard was job related and consistent with business necessity, we did a direct threat analysis. We noted that the Commission has previously held that an Agency cannot depend solely on the DOT regulations at issue in this complaint to determine that an individual is not qualified for a position, and the Agency must conduct an individualized assessment of the individual to determine if they pose a direct threat. We found that the Agency failed to conduct an individualized assessment of Complainant to determine if he is qualified for the position. The record established that there were no safety concerns with Complainant working as a foreman, and he was able to obtain a Tennessee CDL which allowed him to drive commercial vehicles intrastate.

We next analyzed whether driving a commercial vehicle interstate was an essential function of the position. Complainant and his supervisor both stated that driving interstate was not a regular function of the foreman position, and Complainant never had to drive interstate when he acted in the position.

We found that the Agency failed to establish that Complainant is a direct threat or that providing Complainant with the accommodation of waiving the S5 medical examination or removing the driving requirement altogether would cause an undue hardship. As a result, the Agency violated the Rehabilitation Act when it did not reasonably accommodate his disability.

We also found that the Agency subjected Complainant to disparate treatment in violation of the Rehabilitation Act when it did not allow him to serve as a dual-rate foreman, when it did not select him for the permanent foreman position, and when it did not allow him to perform work at the Sequoyah Nuclear Plant.

We ordered the Agency to offer Complainant a permanent foreman position, accommodate his disability by waiving the S5 medical requirement or waiving the requirement that he drive commercial vehicle interstate, determine back pay, determine compensatory damages and attorney's fees and costs, consider disciplinary action, provide 8 hours of training to all management officials, and post a notice of discrimination.

(b)(7)(C) **v. DHS**, 0520150152 (04/30/2015) – Complainant was an applicant for employment as a Transportation Security Officer (TSO) at Billings Logan International Airport in Montana. Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of race (Not Specified), national origin (Not Specified), sex (male), color (Not Specified), disability (diabetes), age (52), genetic information (Not Specified), sexual orientation (Not Specified), and in reprisal for prior protected EEO activity when he was not selected for the TSO position. The Agency issued a final decision concluding that Complainant's diabetes rendered him unqualified for the TSO position. In Appeal No. 0120140736, OFO agreed with the Agency that "the presence or absence of specific medical conditions" governs the question of a TSO applicant's medical qualification. In this case, Complainant had displayed symptoms of diabetic neuropathy and, therefore, failed to meet the Agency's "Medical Guidelines for Transportation Security Officers" issued pursuant to the Aviation and Transportation Security Act (ATSA), 49 U.S.C. § 40101 et seq. The finding of no discrimination was affirmed. Complainant sought reconsideration, which was denied because he failed to meet the criteria for reconsideration.

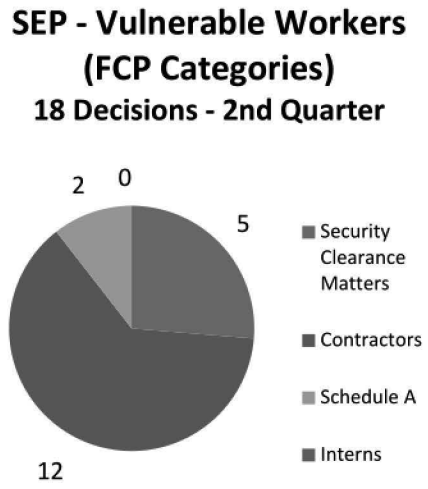
(b)(7)(C) **v. DHS**, 0120133101 (06/10/2015) – Complainant filed an EEO complaint alleging that the Agency discriminated against him on the basis of disability (kidney stones) when it did not select him for a Transportation Security Officer (TSO) position. The Agency medically disqualified Complainant, who had kidney stones surgically removed during the two-year application process, pursuant to medical guidelines that call for the disqualification of individuals who have "symptomatic and/or significant renal dysfunction." Complainant requested a hearing on his complaint, and the Equal Employment Opportunity Commission Administrative Judge (AJ) granted the Agency's Motion for a Decision without a Hearing. The AJ found that Complainant was not a qualified individual with a disability because he could not meet the medical standards mandated by the Aviation and Transportation Security Act (ATSA).

On appeal, OFO found that a decision without a hearing was appropriate because there were no genuine issues of material fact and no need for credibility determinations. We noted that, although the ATSA gave the Transportation Security Administration broad authority to establish the terms and conditions of employment for TSOs, that authority does not include complete exemption from § 501 of the Rehabilitation Act. Citing

Commission precedent, we found that the Commission has authority under the Rehabilitation Act to hear complaints involving TSO positions. See (b)(7)(C) v. Dep't. of Homeland Sec., EEOC Appeal No. 0120051049 (Aug. 6, 2008), req. for recon. denied, EEOC Request No. 0520080805 (Dec. 11, 2008); (b)(7)(C) v. Dep't. of Homeland Sec., EEOC Appeal No. 0120054463 (Aug. 31, 2007); (b)(7)(C) v. Dep't. of Homeland Sec., EEOC Appeal No. 0120053286 (June 26, 2007), req. for recon. denied, EEOC Request No. 0520070839 (Oct. 12. 2007). Where there is a conflict between the qualifications established pursuant to the ATSA and the requirements of the Rehabilitation Act, however, the ATSA standard will supersede any Rehabilitation Act requirements to the contrary. Id. Thus, a complainant must show that he or she meets the standards established pursuant to the ATSA to be qualified under the Rehabilitation Act. In this case, Complainant could not show that he met the Agency's standard concerning renal dysfunction. Complainant, therefore, did not establish that the Agency violated the Rehabilitation Act when it did not hire him.

2. PROTECTING IMMIGRANT, MIGRANT AND OTHER VULNERABLE WORKERS

As depicted in the chart below, during the 2nd and 3rd Quarters of FY 2015 OFO resolved 18 decisions under this SEP Priority and its associated FCP priorities.



Decision Summaries for this Category

(b)(7)(C) **v. Navy**, 0120132837 (01/28/2015) (A2) – Complainant worked with Zeides Entetprises, which contracted with the Agency to provide support in Fleet and Family Counseling at the Naval Air Weapons Station in China Lake, California. Believing that she was subjected to harassment by the Agency supervisor, when she purportedly touched Complainant's breast during a training session, Complainant filed an EEO Complaint. The Agency dismissed the complaint on the grounds that Complainant was not an Agency employee.

OFO applied the Ma factors to the facts and concluded that the record indicated Complainant was not an employee. Although Complainant worked at an Agency facility and used Agency equipment, the majority of factors indicated that Complainant was not a Naval employee. Zeiders designed the program, implemented the services, ensured that personnel met qualifications and performed all necessary functions. Complainant's first line supervisor was a Zeider employee. Further, the services provided were not an integral part of the work done by the Agency. The parties intentions also showed that Complainant was not an Agency employee.

The Agency's dismissal was affirmed.

(b)(7)(C) **v. DOI**, 0120142623 (01/29/2015) (A2) – Complainant independently contracted with the Agency to work as a Translator/Caseworker at the Agency's Federal Ombudsman Office in Saipan, Commonwealth of Northern Mariana Islands. Complainant believed he was discriminated against when: his contract was terminated, the Agency did not pursue an appeal regarding his immigration status, he was required to submit additional documentation to receive his wages, and he was paid in an untimely manner. The Agency dismissed the complaint for failure to state a claim, reasoning that Complainant was not an employee.

Applying the factors set forth in (b)(7)(C) v. Dep't of Health and Human Service, EEOC Appeal No. 01962390 (May 29, 1998), OFO concluded that Complainant was an Agency employee for the purpose of utilizing the 29 CFR Part 1614 complaint process. The Agency entered a personal services contract directly with Complainant and set the terms including Complainant's duties and responsibilities. The Agency monitored Complainant performance, provided office space and equipment. Further, the Agency's own Statement of Work indicated that Complainant's services "play a critical role for the mission of the Ombudsman's Office." While the contract provided for only one year of services, the parties do not dispute that it was renewed over 13 times. Working for the Agency for over a decade would tend to indicate an employer/employee relationship.

The Agency's decision was reversed and remanded.

(b)(7)(C) **v. DOJ (FBI)**, 0120130689 (03/09/2015) **[Repeated under Recruitment and Hiring above]**– Complainant was an applicant for employment with the Albuquerque, New Mexico Division of the FBI. Complainant has Supra Ventricular Tachycardia (SVT), a heart condition that causes her heart to sporadically beat faster and at an abnormal rate. Complainant takes various prescribed medications to help control her condition. On December 5, 2007, the Agency gave Complainant a conditional offer of employment as a Summer Honors Intern. The offer of employment was contingent upon the successful completion of a Personnel Security Interview, drug test, fingerprint check, credit check, criminal history check, past and present employment check, residential check, educational check, and the successful completion of a polygraph examination.

The position required a top secret clearance. Agency policy requires that all applicants take and pass a pre-employment polygraph examination as a condition of employment. On January 10, 2008, a polygraph examiner at the Agency (SA1) administered Complainant's pre-employment polygraph examination. The polygraph examination tests an examinee's psychological response to certain questions, and the polygraph machine monitors and records the examinee's physiological responses. The machine records heart rate, respiration, and perspiration, and this data is captured during periods when questioning is not taking place and also while questions are presented.

During the polygraph examination, Complainant told SA1 that she suffers from SVT and takes certain medications to control the condition. SA1's polygraph report stated that Complainant's recorded responses to the "Series I" questions were indicative of deception and her responses to the "Series II" questions were inconclusive. A second trained polygraph examiner in the Agency's Quality Control Review reviewed and confirmed SA1's report and results. On February 12, 2008, Complainant was informed that she failed the polygraph examination and was no longer eligible for the Summer Honors Intern position.

On February 13, 2008, Complainant, via a letter, appealed the February 12, 2008 decision to the Unit Chief of Applicant Adjudication (SA2) in the FBI Security Division. On February 25, 2008, Complainant interviewed for an Intelligence Analyst position. On February 29, 2008, the Agency gave Complainant a conditional offer of employment for the Intelligence Analyst position. On March 7, 2008, via a letter from SA2, Complainant was informed that the Agency was rescinding the conditional offer of employment. On May 12, 2008, Complainant called and spoke with a Human Resource Specialist who informed her that because she failed the polygraph exam, the Agency had removed her from consideration for the Intelligence Analyst Position.

On May 15, 2008, Complainant sent an appeal letter to SA2. Complainant's appeal and request for a retest was assigned to a polygraph supervisor in the Agency's Polygraph Unit. The polygraph supervisor reviewed Complainant's polygraph examination, and on June 6, 2009, he presented Complainant's appeal at the Appeal

Review Committee. The Appeals Review Committee voted to deny Complainant's request for a second polygraph examination.

Complainant filed an EEO complaint alleging that the Agency discriminated against her on the basis of disability when: (1) in June 2008, she was not selected for two positions within the FBI; and (2) on March 16, 2009, she received a letter from a senior FBI official, through her United States Senator, advising that there were no positions for her within the FBI. Complainant requested a hearing, but the AJ granted summary Judgment for the Agency. On appeal, OFO agreed with the AJ that Complainant did not request any accommodation from the Agency due to any alleged disability prior to taking the polygraph examination. Even had she done so, the record does not support the conclusion that Complainant was "qualified" for any relevant positions with the Agency. Specifically, the undisputed record supports the finding that the requirement to pass the polygraph examination is an essential requirement, necessary for national security reasons, which the Agency cannot be compelled to waive. See Dep't of the Navy v. Egan, 484 U.S. 518, 529-30 (1988). Moreover, Complainant conceded in her deposition that no effective accommodation existed.

(b)(7)(C) **v. Army**, 0120142750 (01/28/2015) (A2) – Complainant was employed by Booz Allen Hamilton (BAH), which contracted with the Agency to provide support at the National Ground Intelligence Center in Charlottesville, Virginia. She worked at the Agency for approximately 18 months, as a Project Watch Manager. Believing that she was subjected to inappropriate sexual jokes and comments, Complainant reported the harassment to both Agency and BAH management. She also contacted an EEO Counselor. Complainant filed a formal complaint based on sex and reprisal, regarding the harassment and the subsequent reduction in scope of her contract which she believes resulted in her termination by BAH. The Agency issued a decision dismissing the complaint for failure to state a claim, concluding that she was a contract employee that was "not authorized to file a complaint."

As an initial matter, OFO noted that in its decision the Agency failed to even reference the Ma factors. Applying the Ma analysis to the instant case, OFO found that some factors indicated Complainant was not an employee: the relatively short time Complainant worked for the Agency, BAH provided Complainant with leave and benefits, BAH withheld taxes, and the parties own intentions. Complainant herself refers to BAH as her employer and to herself as a contractor. Nonetheless, OFO went on to find that many factors indicated the Agency is a Joint Employer. Complainant was the member of a team comprised of both Agency and BAH employees. She performed her duties in a top secret "government controlled facility" and used tolls, equipment and materials provided by the Agency. Complainant was permitted access to classified government systems. OFO found that with respect to who controlled the means and manner of Complainant's performance, the parties proffered conflicting accounts.

The particular facts of alleged harassment in this case indicate that the comments and behavior, perpetuated by the Agency supervisor and an Agency colleague, "set the tone" for Complainant's employment and was witnessed by most of her team (comprised of both Agency and BAH employees). OFO found that the Agency knew or should have known of the behavior, and the allegations themselves reflect a measure of control over Complainant's work environment by Agency officials. Consequently, OFO found that the Agency exerted sufficient control to be considered a joint employer. The Agency's dismissal was reversed and remanded.

(b)(7)(C) **v. DOJ**, 0120141963 & 0120141762 (01/28/2015) – Both Complainants worked for private staffing firm serving the Agency as law enforcement advisors in Bosnia-Herzegovina. They filed separate complaints alleging discrimination when they were terminated. The Agency dismissed the complaints for failure to state a claim, finding that the Complainants were not employees of the Agency. The EEOC joined the appeals, and reversed because the Agency exercised sufficient control over the Complainants positions to qualify as their joint employer. Specifically, contrary to the language in the contract between the Agency and staffing firm and the assertions of the Agency, the realities on the ground were that the Agency controlled when, where, and how the Complainants performed their jobs (routinely assigned them projects and duties, established their priorities, limited their contacts when working, and set their schedules). The Agency recruited one of the Complainant's, they served the Agency for six years prior to the termination of their services, and their work went directly to the mission of the Agency – to professionalize law enforcement in Bosnia-

Herzegovina. The EEOC found that since this was a removal case, a significant factor of control is the power to discharge the worker. The Agency decided to cut off their services, and the record suggested this resulted in their termination by the staffing firm. For this reason, the EEOC found that the Agency's action amounted to a de facto removal. While the staffing firm provided the premises in which the Complainants worked, took care of their compensation, and the Agency did not believe it was creating an employee-employer relationship, this was outweighed by factors above showing it controlled the Complainants' positions.

(b)(7)(C) **v. NRC**, 0120142033 (01/28/2015) – Complainant worked for a private staffing firm serving the Agency initially as a supervisory Project Manager and later as a Working Foreman doing warehouse work. He filed a complaint regarding harassment, demotion, and his service to the Agency ceasing along with a second demotion and being moved by the staffing firm to serve other clients. The Agency dismissed the complaint for failure to state a claim, reasoning it did not employ Complainant. The EEOC affirmed because the Agency did not exercise sufficient control over the Complainant's position to qualify as his joint employer. The EEOC conceded that some factors pointed to joint employment -- the Agency controlled when, where, and how Complainant performed his job, he worked on Agency premises using Agency equipment, his job did not require a high level of expertise, and he served the Agency for over four years, a continuing relationship. In finding that the Agency did not jointly control Complainant, the EEOC noted that the thrust of Complainant's complaint regarded his demotions and cessation of service at the Agency, and the harassment claim was minor – disrespectful comments which Complainant did not identify, and his once not being greeted with an acknowledgment. The EEOC found that the record showed that the staffing firm was the force behind Complainant's demotions and being moved to other clients. It found that an especially significant factor in determining whether the Agency was Complainant's joint employer was whether it had the tantamount power to terminate him since the thrust of his claim regarded his demotion and the termination of his services. It found, in effect, that the Agency had this power, and retained full power over Complainant's employment.

(b)(7)(C) **v. DHS (ICE)**, 0120142302 (01/28/2015) (**Repeated under Findings below**) – Complainant worked for a private staffing firm serving the Agency as an Administrative Assistant. She filed a complaint alleging that she was discriminated against based on reprisal when on April 14, 2011, at the direction of the Agency, she was notified by the staffing firm that she was terminated. Following an investigation, Complainant requested a decision without a hearing. The Agency found no discrimination. It found that Complainant did not establish a prima facie case of reprisal discrimination because she was not an employee of the Agency. The EEOC reversed. It found that the Agency exercised sufficient control over the Complainant's position to qualify as her joint employer. Specifically, the EEOC found that the Agency supervised Complainant's daily activities, the Agency had significant input into Complainant's evaluation which was signed by a remote staffing firm supervisor, Complainant worked on Agency premises using Agency equipment, her job of setting up medical appointments went directly to the Agency's mission of caring for immigrants in detention, and the record showed that after the Agency asked the Agency to terminate Complainant's services the staffing firm removed Complainant, evidencing the Agency's de facto removal authority. The EEOC found that the factors the Agency did not control – paying and taking care of Complainant's compensation, were outweighed by the above factors.

In finding discrimination, the EEOC noted that very shortly after Complainant participated as a witness in a sexual harassment investigation against an Agency manager, the manager told the staffing firm it did not want Complainant's services. The record indicated that the Agency manager told the staffing firm Complainant was creating a hostile work environment, albeit she did not provide a statement. Another manager, who was in a position to know, stated the above manager's complaints were unjustified and unfounded. As remedy, the EEOC ordered in part back pay and the calculation of compensatory damages. It did not order the Agency to attempt to restore Complainant's joint employment by requesting that the staffing firm rehire Complainant to continue serving the Agency, or to pay front pay. It reasoned that shortly after a private sector EEOC Mediation Agreement with her staffing firm, Complainant entered into a supplemental agreement therewith waiving any right to re-employment or future referral with or through the staffing firm. It also cited some case law.

(b)(7)(C) **v. Air Force**, 0120142407 (01/28/2015) – Complainant worked for a private staffing firm serving the Agency as a Pharmacist. She filed a complaint regarding harassment, reassignment, and her work hours being reduced to zero, an effective termination. The Agency dismissed the complaint for failure to state a claim, reasoning it did not employ Complainant. The EEOC reversed because the Agency exercised sufficient control over the Complainant's position to qualify as her joint employer. (The Agency also dismissed the complaint on other grounds, which the EEOC reversed and are not addressed in this summary). Regarding control, the EEOC observed that Complainant worked under the sole supervision of Agency personnel, and the Agency issued an assessment on Complainant which it provided the staffing firm. The Agency set Complainant's schedule, reassigned her twice, and she worked on Agency premises using Agency equipment. She served the Agency for 2½ years, a continuing relationship. While not making a determination on the merits, for purposes of demonstrating joint employment, the EEOC found that the record suggested that the Agency had some control over Complainant's effective termination by her staffing firm. The factors militating against the Agency being a joint employer -- the staffing firm took care of Complainant's compensation, her job required a high level of expertise, and the Agency did not believe it was creating an employment relationship were outweighed by the factors pointing to joint employment.

(b)(7)(C) **v. Army**, 0520140444 (01/29/2015) – Complainant was placed by a private contractor to work with the Agency as a Visual Information Specialist with its U.S. Army Corps of Engineers. Complainant subsequently filed an EEO complaint, alleging that the Agency discriminated against her based on national origin when she was terminated from her position. The Agency thereafter dismissed Complainant's complaint for failure to state a claim, finding that Complainant was a government contractor and not an Agency employee. In reversing the Agency's dismissal, we found that based on "Ma Factors" 1, 3-7, 9, 11, and 14, the Agency exercised sufficient control over Complainant's position to qualify as her employer for the purposes of the EEO complaint process. The Agency requested reconsideration, asserting that our previous decision erred in finding that it exercised sufficient control over Complainant. In denying its request, we noted that the Agency largely reiterated arguments raised it its dismissal and on appeal. We found that the Agency failed to demonstrate the standard necessary pursuant to 29 C.F.R. § 1614.405(c) in order to grant reconsideration. We reminded the Agency that a request for reconsideration is not a second appeal to the Commission.

(b)(7)(C) **v. Air Force**, 0120133317 (02/12/2015) – Complainant stopped working for the Agency on August 30, 2005. She filed a complaint, alleging in relevant part, that she was discriminated against based on reprisal for prior EEO activity when in April 2013, she learned that that the notation "access suspended" was placed in her security and employment records on August 31, 2005, and at that same time she was also charged with a security violation. This notation was added to Complainant's Joint Personnel Adjudication System (JPAS) Joint Clearance and Verification System (JCAVS) computerized record, which is normally applicable to security clearances, and is accessible to other agencies. Complainant contended that this triggered her firing by another federal employer in March 2012.

The Agency dismissed the complaint, in relevant part, for failure to state a claim. It found that the EEOC cannot review an agency's determination regarding the substance of a security clearance decision. OFO reversed, finding that if a determination was made to deny Complainant a clearance, the merits of this determination would not be reviewable by the EEOC. However, the record in this instance showed that because Complainant's former Agency position was non-sensitive, she did not require access to classified material and did not have a security clearance, and there was no indication in the record of a security clearance investigation. The notation "access denied" could be unrelated to a security clearance (or access to sensitive information). Given this, OFO likened the situation to that of a negative reference accessible to outside agencies, and found Complainant's complaint stated a claim.

(b)(7)(C) **v. DOD (DISA)**, 0120133393 (02/19/2015) – Complainant alleged that he was discriminated against based on his disability, age, and in reprisal when he was removed effective August 7, 2009. Following an

investigation, an EEOC AJ dismissed the complaint, finding that EEOC lacked jurisdiction to adjudicate a removal claim based on the employee's failure to maintain a security clearance (it was revoked). The Agency implemented the decision.

On appeal, OFO found that the Commission will not review an agency's determination with regard to the substance of security clearance decision or the validity of the security requirement itself. Citing Department of the Navy v. Egan, 484 U.S. 518, 530 (1987), OFO recounted that the Supreme Court limited the Merit Systems Protection Board's (MSPB) review, when an employee is removed for cause because his required clearance is denied, to whether such cause existed, whether in fact the clearance was denied, and whether transfer to a non-sensitive position was feasible. Noting that all positions at DISA require a security clearance, OFO affirmed the Agency's final order. OFO ruled that while Complainant alleged that non-security management discriminatorily told security professionals that he should undergo a psychiatric evaluation for alleged violent tendencies, we did not need to rule on whether such a claim was independently actionable because Complainant did not raise it as an issue in his complaint.

(b)(7)(C) **v. CIA**, 0120143172 (02/05/2015) – Complainant worked for a staffing firm that had a subcontract with a private company, and served the Agency as a Network Engineer. He filed a complaint alleging harassment and disparate treatment based on his race (African-American) and reprisal for EEO activity when he was harassed, denied travel duty, and was told by his contractor Program manager that he should start looking for a new job because the Agency was trying to get rid of him. The Agency dismissed the complaint, in part, for failure to state a claim, reasoning it did not employ Complainant.

The EEOC reversed this dismissal because the Agency exercised sufficient control over Complainant's position to qualify as his joint employer. Complainant performed his work under the supervision of Agency staff who defined for him the tasks to be performed, and in most instances the manner to perform them. The Agency set some of his work hours. The evidence showed that contrary to procedures, in practice the Agency named staffing firm workers it wanted for travel duty, and while not making a decision on the merits, the EEOC found that for purposes of making this procedural determination, the Agency controlled whether Complainant would obtain travel duty in several instances. The Agency provided feedback on contract personnel performance for award fee purposes. The Agency provided Complainant the equipment he used and the facilities where he worked, and he served the Agency for nearly four years, a continuing relationship. The record also suggested that the Agency had de facto authority to discharge Complainant – meaning a termination of his services would result in discharge from his staffing firm. The factors which pointed away from Agency control -- Complainant's job required a high level of expertise, the staffing firm took care of Complainant's compensation and benefits, and the Agency did not believe it was creating an employment relationship, were outweighed by the factors indicating Agency control of Complainant's position. The EEOC also addressed the Agency's dismissal of some claims for failure to timely initiate EEO counseling. This is not addressed in this summary.

(b)(7)(C) **v. DOT**, 0120150318 (02/27/2015) – Complainant worked for a staffing firm serving the Agency as a Program Analyst conducting outreach, and helping to create and process packages for loan guarantees to businesses so they could obtain Agency funds or Agency assisted contracting opportunities to fund transportation projects. He filed a complaint alleging that he was harassed based on his race (Asian Indian) and color (Brown) during the entire length of his six month employment, and was terminated in July 2014. The Agency dismissed the complaint for failure to state a claim, reasoning it did not employ Complainant.

On appeal, the EEOC reversed the Agency, finding that it exercised sufficient control over Complainant's position to qualify as his joint employer. The Agency assigned Complainant his projects which he performed under the supervision of an Agency Senior Advisor. Some incidents of the alleged harassment were tied to the Agency's supervision, e.g., reprimands for errors. Complainant worked on Agency premises using Agency equipment. His work was part of the Agency's mission. Complainant contended that the staffing firm did not recruit him, interview him, or vet his qualifications, and the Agency made the decision to cut off his services. The factors which pointed away from Agency control -- Complainant's job required a high level of expertise and

the staffing firm took care of his compensation were outweighed by the factors indicating that the Agency controlled of Complainant's position.

(b)(7)(C) **v. DOL**, 0120123388 (03/11/2015) – Complainant was an applicant for employment as a Workforce Development Program Specialist with the Agency's Employment and Training Administration in Philadelphia, Pennsylvania. Complainant was one of three Schedule A applicants and three internal applicants, for a total of six applicants, interviewed. The Selecting Official (SO) asked questions related to the applicants' resumes and ranked the candidates based on their interviews. Ultimately, SO ranked Complainant third and did not recommend him for selection in part because his resume and interview answers indicated more experience level with direct student services and less experience overseeing the programs that deliver those services. SO's first choice declined the offer, and SO then selected an internal candidate who accepted. Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of race (African-American), disability, and age (51). Complainant declined the opportunity to have a hearing, and the Agency issued a decision finding no discrimination. On appeal, OFO found that Complainant failed to prove his qualifications were plainly superior to those of the selectees and failed to proffer any other evidence from which a reasonable fact finder could conclude that the Agency's decision was unlawfully motivated.

(b)(7)(C) **v. DOJ (DEA)**, (03/11/2015) – Complainant worked as a Diversion Investigator at the Agency's New Jersey Field Division in Newark, New Jersey. On May 12, 2008, Complainant did not report for work and instead went to DEA Headquarters in Virginia, where she unsuccessfully tried to meet with high level DEA executives. The next day, she returned to her office in New Jersey, openly talked about getting a gun and questioned whether she needed to "get a gun" to "get things straight" or to "get a promotion." This incident led to Complainant being placed on administrative leave and an investigation by the Office of Professional Responsibility (OPR). During the OPR investigation, Complainant admitted that on May 13, 2008, while in the office, she had talked about getting a gun, but could not remember what she said or to whom she was talking. In the fall of 2008, a Deputy Chief Inspector in DEA's Office of Security Programs (DCI) who was responsible for decisions to grant, deny, or revoke security clearances, learned about Complainant's statements that had led to the OPR investigation and placement on administrative leave. DCI also soon learned that this was not the first time that Complainant had exhibited volatile and threatening conduct, including an incident in March 2008, when Complainant made a loud verbal threat to kill a member of DEA's Career Board. On October 14, 2008, DCI notified Complainant that she had suspended her security clearance pending further investigation.

DCI investigated whether to reinstate or revoke Complainant's security clearance. She reviewed the OPR investigative files and other documents and listened to the audio-tapes and read the transcripts of voluntary interviews of employees who worked with Complainant, which were taken under oath. Employees who had worked in the Diversion Unit for years, as well as some who had recently joined, had witnessed incidents where Complainant yelled loudly, ranted and raved, talked and acted irrationally, interrupted others' work and conversations, talked loudly about personal and sexual matters, was confrontational, aggressive and out of control. Employees reported hearing Complainant make threats and some stated that they did not trust her. Two co-workers so distrusted Complainant that they hung mirrors in their cubicles so they could see when she was approaching. Another employee moved her workstation three times because of Complainant's outbursts. Co-workers also described Complainant as out of control and compared her to a "ticking time bomb" and an "emptying volcano." Others said she would slam doors, scream, rant and rave, and move around, had "extreme" mood swings; some days came into the office "crazed" and other times she was "just as sweet as pie, just like two different people."

DCI concluded that over the years, Complainant had exhibited confrontational and volatile conduct, including a pattern of enraged outbursts, threats, and other disruptive, bizarre and belligerent conduct in the workplace, that had worsened and indicated questionable judgment and an inability to control her emotions and conduct. This conduct raised concern under Guideline E of the Adjudicative Guidelines concerning her ability to protect classified information. Accordingly, on September 2, 2009, DCI notified Complainant that she had made a preliminary decision to revoke her security clearance. On January 6, 2010, DCI notified Complainant that she

had sustained the Preliminary Decision, set forth the reasons for the decision and notified Complainant of her appeal rights.

Complainant appealed to the Agency's Access Review Committee, the only body with jurisdiction to review the merits of the revocation of a security clearance. After holding a hearing, the Access Review Committee sustained the revocation. The Agency removed Complainant from her position on March 2, 2011, on the ground that a security clearance was required for her position. The Merits System Probation Board affirmed Complainant's removal.

Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of race (Asian), sex (female), disability, and in reprisal for prior protected EEO activity when: inter alia, on December 5, 2008, the Agency suspended Complainant's security clearance. Complainant requested a hearing, but the AJ granted summary Judgment for the Agency. On appeal, OFO agreed with the AJ that that although there was a prima facie case of reprisal in connection with suspension of the security clearance, Complainant did not offer evidence to refute the Agency's reasons for its actions or otherwise prove that the reasons were pretext for retaliation.

(b)(7)(C) **v. VA**, 0120150307 (03/27/2015) – Complainant was an applicant for the position of housekeeping aid at an Agency facility. He was selected on April 2, 2014, but as of the time of his appeal in October 2014, still had not been brought on board on the ground that he was not cleared by the Agency. The Agency cited complications with clearing Complainant, including a recent arrest. The Agency dismissed the complaint for failure to state a claim. It found that Complainant was not aggrieved because his offer was not withdrawn, and his coming on board was awaiting a "security adjudication." The Agency found Complainant would not endure an "injury in fact" until and if he is subjected an action -- not being selected (rejected) for the position. Complainant contended that the Human Resources Officer said bringing him on board was awaiting the outcome of his EEO complaint. OFO reversed the Agency's dismissal. It reasoned that given the long delay in bringing Complainant on board, he suffered an "injury in fact."

(b)(7)(C) **v. Air Force**, 0120150351 (03/11/2015) – Complainant worked for a staffing firm serving the Agency as a paid summer intern at a research lab. He filed a formal complaint alleging that the Agency discriminated against him based on his national origin (Iran) and age (55) when, on May 15, 2014, his job offer to be a summer intern was rescinded by the staffing firm because the Agency failed to complete a security check which would allow him to come on board. The Agency dismissed the complaint for failure to state a claim, reasoning that Complainant was not an applicant for employment with the Agency. The EEOC reversed the dismissal because there was insufficient information in the record to show whether the Agency exercised sufficient control over Complainant's position to qualify as his joint employer. The staffing firm generally wrote that intern work is done under staffing firm supervision which controls the means and manner of intern performance, and the Agency provides technical guidance over intern work and feedback to the staffing firm. The Agency gave a similar general account, and added it had no control over the hiring of interns by the staffing firm. The EEOC found that the record contained insufficient facts to allow an independent determination on the level of Agency control over the intern position which was offered to Complainant, and ordered the Agency to gather such facts, and then accept or dismiss the complaint.

(b)(7)(C) **v. DOT**, 0120133111 (04/30/2015) – Complainant applied for the position of Transportation Assistant at the Agency's Headquarters in Washington, DC, but was notified that she had not been selected. She filed an EEO complaint in which she alleged that her non-selection was due to her disability. The Agency investigated the complaint and provided Complainant with a copy of the investigative report and notice of her right to request a hearing before an AJ. Complainant timely requested a hearing, but over her objections, the AJ assigned to the case granted the Agency's motion for summary judgment. The AJ found it undisputed that Complainant was disqualified from consideration for the position because her resume lacked the information needed to verify that she possessed the one year of specialized experience required by the position. The Agency subsequently issued a final order adopting the AJ's finding that Complainant failed to present a genuine issue of material fact as to whether the Agency discriminated against her as alleged. On appeal, OFO

affirmed the AJ's decision because there was insufficient evidence of unlawful motivation with regard to the disqualification.

(b)(7)(C) **v. VA**, 0520150141 (04/07/2015) – In our previous decision [EEOC Appeal No. 0120141772 (November 21, 2014)], OFO affirmed the Agency's finding that Complainant failed to prove the Agency's failure to consider him for a Temporary Cemetery Caretaker position was motivated by unlawful considerations of his race, national origin, disability or age. The Human Resource employee who failed to refer Complainant's application admitted she misread Complainant's resume because he put his most recent experience on page two instead of at the top of page one and so she initially rejected his application, thinking he had no relevant experience at all. When Complainant asked her to look again, she realized her mistake, but by then, the selection had already been made. [Complainant and the Selectee both applied under Schedule A authority.] In his request for reconsideration, Complainant claims that we should reverse our prior decision because of direct evidence of discrimination. However, what he described as direct evidence was not direct, nor did it appear to be anything more than assertion. Accordingly, OFO denied the request for reconsideration.

(b)(7)(C) **v. DOD (DTRA)**, 0120141849 (04/01/2015) – Complainant was a Research Assistant Professor at the Department of Health Policy, at George Washington University (GW), in Washington, D.C. Starting in December 2011, and pursuant to an Intergovernmental Personnel Agreement (IPA), Complainant worked in the Agency's Cooperative Threat Reduction Directorate, Biological Threat Reduction Program as the Regional Lead for Southeast Asia. Approximately two years later, Complainant was terminated effective November 30, 2013.

Believing that her termination was discriminatory, Complainant filed a formal complaint based on race, national origin, and sex. In addition to her removal, the Agency framed her claim to also include demotion, reassignment, and harassment. The Agency issued a decision dismissing the complaint for failure to state a claim, reasoning that Complainant was not an Agency employee and therefore lacked standing to file an EEO complaint.

In our decision, the Commission noted that while the Agency referenced (b)(7)(C) v. Department of Health and Human Services in its decision, it did not analyze each factor. Instead, the Agency simply stated that Complainant received pay, benefits, social security taxes, and health benefits from GWU. Contrastingly, on appeal Complainant addressed each factor. We agreed with Complainant's analysis, concluding that the majority of factors indicated that the Agency was a joint employer. For example, when Complainant traveled for the Agency she used a government credit card and a government laptop with access to Agency servers. Complainant was placed on furlough status in October 2013, along with Agency employees. The Agency's dismissal was reversed and the case was remanded back for further processing.

(b)(7)(C) **v. DOT**, 0520150186 (05/07/2015) – The Agency requested reconsideration of the decision in v. DOT, EEOC Appeal No. 0120141746 (Nov. 25, 2014). OFO's prior decision found that Complainant was jointly employed by the Agency and a contractor for purposes of the statutes enforced by the Commission and reversed the Agency's dismissal of Complainant's complaint for failure to state a claim pursuant to 29 C.F.R. § 1614.107(a)(1). After reviewing the previous decision and the entire record, OFO found that the request failed to meet the criteria of 29 C.F.R. § 1614.405(c), and OFO denied the request. OFO ordered the Agency to process the remanded complaint.

(b)(7)(C) **v. DOD (DCA)**, 0120143217 (05/13/2015) – Complainant worked as a Sales Representative, with Highplains Marketing Services (HMS), Inc., which contracted with the Agency to provide support at the Randolph Air Force Base Commissary in Fort Sam Houston, Texas. Complainant claimed that, from April 24, 2014 through July 23, 2014, she was subjected to harassment and hostile work environment by the Grocery

Manager. On July 31, 2014, Complainant filed a formal complaint based on race, sex, age, and in reprisal for prior EEO activity.

In its final decision, the Agency dismissed the formal complaint for failure to state a claim. Without elaboration, the Agency simply concluded that Complainant was a contract employee and found, therefore, that it "does not have jurisdiction over the alleged discriminatory claims you have articulated."

In the EEO Counselor's Report, Complainant was asked if a contract describing the work relationship between her and the Agency existed, and she responded "I will have to look into this and I will get back to you."

The appellate decision determined that the Agency provided no analysis whatsoever in finding that Complainant was a contractor. In addition, decision determined that the record does not contain a copy of the contract between the Agency and HMS. Therefore, the decision reversed and remanded the Agency's dismissal of the instant complaint for a supplemental investigation in order to determine whether the Agency was a joint employer for EEO purposes.

(b)(7)(C) **v. Navy**, 0120143162 (05/20/2015) – Complainant worked for a staffing firm serving the Agency as a Principal Lead Managing Technician, a warehouse inventory management support function. He filed a complaint alleging that he was discriminated against based on his age (66) when he was terminated in May 2014. The Agency dismissed the complaint for failure to state a claim, reasoning it did not employ Complainant. The EEOC reversed this dismissal because the Agency exercised sufficient control over Complainant's position to qualify as his joint employer. His staffing firm supervisor was not located onsite, and Agency officials acknowledged that they directly assigned Complainant work. The record suggested that the Agency had input into Complainant's annual appraisal which was written by the staffing firm. While Complainant kept his staffing firm supervisor informed of his comings and goings, not the Agency, his regular work schedule was set by agreement between the Agency and the staffing firm. Complainant worked on Agency premises using Agency equipment, and served the Agency for over 13 years. Further, the record showed that the Agency had input into the staffing firm's decision to cut off Complainant's service, and after this Complainant was terminated. The factors which pointed away from Agency control – the staffing firm paid and took care of Complainant's compensation and his work was a support function, not part of the Agency's mission, were outweighed by the factors indicating that the Agency controlled Complainant's position.

(b)(7)(C) **v. Navy**, 0120142542 (05/01/2015) – Complainant was an indefinitely suspended Marine Machinery Mechanic at an Agency shipyard. He filed a complaint alleging that he was discriminated against based on his religion (Islam) when in October 2013, he received his final notice by the Department of the Navy Central Adjudication Facility (DoNCAF) revoking his security clearance, resulting in his termination in January 2014. OFO affirmed the Agency's dismissal of the complaint. It observed previously, in EEOC Appeal 0120122970 (Dec. 18, 2012), the EEOC affirmed DoNCAF's August 2012 initial decision to revoke Complainant's security clearance for failure to state a claim because the EEOC will not review an agency's determination on the substance of a security clearance decision. OFO found that DoNCAF's October 2013 final notice merely dismissed Complainant's appeal of the initial DoNCAF decision because he did not attend an appointment in his appeal process. OFO held that for the same reasons as in EEOC's previous decision, the Agency's decision to uphold its decision failed to state a claim. Complainant was removed because he no longer had a security clearance, which was required by his position. OFO found that as long as the Agency nondiscriminatorily applied the requirement of a security clearance for Complainant's position, he failed to state a claim on his removal. OFO found that a review of the complaint and counselor's report did not reveal that Complainant alleged the Agency discriminatorily applied the requirement of a security clearance to his position.

(b)(7)(C) **v. Treasury**, 0120133272 (05/28/2015) – Complainant was hired on March 15, 2010, as a Revenue Agent for the Internal Revenue Service. Due to a hearing impairment, Complainant was eligible to be hired under Schedule A authority and was subject to a two-year probationary period. Complainant filed an EEO complaint alleging that the Agency discriminated against him on the basis of disability when he was denied reasonable accommodation and terminated during his probationary period, effective March 7, 2011. In

a decision issued August 15, 2013, an AJ, grating summary judgment in the Agency's favor, found that the Agency provided Complainant with effective accommodations in the form of headphones, amplifiers, and a TTY device to assist Complainant in using the phone. The AJ further found that despite an extended training period, Complainant's performance never reached an acceptable level. On August 21, 2013, the Agency adopted the AJ's decision, finding no discrimination. On appeal, OFO, noting that Complainant could not meet four out of five critical job elements and failed to suggest a connection between the deficiencies in his work performance and his hearing impairment, discerned no basis to disturb the AJ's findings of fact and conclusions of law.

(b)(7)(C) **v. State**, 0120132816 (05/19/2015) – Complainant was an Information Technology Specialist with the Agency. He filed a complaint alleging that he was discriminated against based on his race (Black), color (Brown), and reprisal for prior EEO activity when his security clearance was suspended and then revoked, and his employment was indefinitely suspended. Following an investigation, the Agency issued a decision finding no discrimination. The Agency explained that it suspended and revoked Complainant's security clearance because he refused to cooperate with the clearance process – submit to a medical exam, and it suspended his employment because his job required a clearance. OFO affirmed. It found the Agency's explanation was legitimate, and Complainant did not show pretext.

(b)(7)(C) **v. Army**, 0120130498 (05/13/2015) – Complainant applied for an Information Technology Specialist position at the Medical Information Technology Center (MITC) at Fort Sam in Houston, Texas. On April 1, 2011, he was offered the position but was notified that the position required a "secret" level security clearance. Complainant entered on duty on April 25, 2011, after his security investigation had begun. On May 3, 2011, the Security and Intelligence Branch Chief recommended that Complainant not be given access to the local area network until the security investigation had been completed. The basis for his recommendation was that the security investigation had uncovered derogatory information regarding Complainant's employment history. That information included issues in the areas of personal conduct, financial considerations, psychological conditions, and allegations of criminal conduct. That same day, Complainant was placed on administrative leave, pending the outcome of the investigation. One week later, on May 10, 2011, Complainant was terminated by the MITC Commander. The stated reason for the termination was that Complainant was unable to obtain a "secret" security clearance due to the derogatory information in his record. Complainant filed an EEO complaint in which he alleged that the MITC Commander terminated him because of his race. He later added reprisal as a basis, contending that the MITC Commander hastened his termination when she found out that he had contacted an EEO counselor. In its final decision, the Agency found no discrimination. On appeal, OFO found that the MITC Commander's testimony at the fact finding conference was amply corroborated by and was consistent with testimony from the IAS Chief and his Security Assistant, and the Security Branch Chief. The MITC Commander's testimony is also consistent with the emails and contemporaneously prepared memoranda documenting Complainant's security investigation and its outcome. OFO concluded that Complainant failed to establish unlawful motivation on the part of the responding management officials by a preponderance of the evidence.

(b)(7)(C) **v. DHS (TSA)**, 0120122094 (05/21/2015) – Complainant, a Transportation Security Officer (TSO), filed a formal complaint on the bases of national origin (Hispanic) alleging she was subjected to a hostile work environment by a co-worker. Complainant alleged that the co-worker, also a TSO, degraded her, called her names, commented on the way she dressed and suggested she did not know English. Complainant claimed that she advised management of the harassment, but they did nothing to protect her. Ultimately, Complainant states she was constructively discharged due to the harassment. Complainant did not request a hearing and the Agency issued a final decision finding no discrimination. On appeal, OFO affirmed. OFO found insufficient evidence that Complainant actually heard the statement about whether she spoke English. Furthermore, if the comment was made, it occurred months before her resignation. OFO determined the preponderance of the evidence revealed that both women exchanged unkind comments towards each other, and there was insufficient evidence that this was based on Complainant's national origin. Moreover, there was evidence that

management did take action to try and resolve the situation and even went so far as to ask Complainant if she wanted to switch shifts. Finally, the evidence revealed that Complainant resigned to obtain a job in Human Resources, and not due to intolerable working conditions or harassment based on her national origin.

(b)(7)(C) **v. Energy**, 0120151101 (06/17/2015) – Complainant worked as a Senior Quality Assurance Specialist for the American Centrifuge Plant (ACP), owned by a private company. She performed some services for the Agency, albeit the nature and extent of them was unclear from the record. The Agency's relationship with ACP and its owner was also unclear, as was the Agency's relationship with all of them. Complainant filed a complaint alleging that she was discriminated against based on her race/color (Black) and reprisal for prior protected EEO activity when the Agency denied her security clearance, resulting in her removal by the private company in August 2013. The Agency dismissed the complaint for failure to state a claim, reasoning Complainant was not an employee thereof. On appeal, OFO reversed. It found that there was insufficient information in the record to make a determination on whether the Agency had sufficient control over the means and matter of Complainant's performance to be deemed a joint employer. OFO remanded the complaint for the Agency and ordered it to gather additional information on this and then accept the complaint or issue a new FAD dismissing it.

(b)(7)(C) **v. Education**, 0120130564 (06/04/2015) – Complainant, who worked for a staffing firm serving the Agency as a Visitor Service Center Specialist, filed an EEO complaint against the Agency. The Agency found that Complainant was not an Agency employee and dismissed her complaint for failure to state a claim.

OFO, in its appellate decision, found that the Agency jointly employed Complainant and reversed the Agency's dismissal. After examining all the incidents of the working relationship between the parties as specified in (b)(7)(C) v. Dep't of Health & Human Servs., EEOC Appeal No. 01962390 (May 29, 1998), OFO found that the Agency exercised sufficient control over Complainant's position to establish a de facto employer-employee relationship.

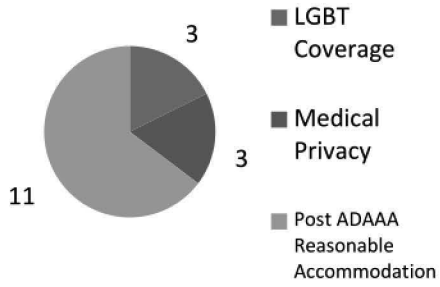
First, OFO found that the Agency had the right to control the means and manner of Complainant's work performance and that her work was done under the direction of an Agency on-site supervisor. Specifically, OFO cited evidence that: (a) the staffing firm provided suitable candidates to the Agency for interview and selection; (b) the offer was contingent upon Complainant's successful completion of the Agency's background screening process and the Agency's approval; (c) Complainant's duties included processing individuals entering the building in accordance with Agency procedures and reporting any issues to the Agency; (d) the Agency provided feedback to the staffing firm about Complainant's performance; and (e) the Agency had the authority to hire and promote Complainant. Second, OFO found that Complainant's position did not require a high level of skill or expertise because her duties included processing individuals entering the building, assisting visitors, answering phone calls, and maintaining log books. Third, OFO found that Complainant worked at the Agency using Agency equipment. Fourth, OFO found that Complainant worked at the Agency for 17 months. Fifth, OFO found that the Agency had the authority to terminate its work relationship with Complainant. Specifically, OFO cited evidence that the Agency, and not the staffing firm, made the decision to terminate her employment.

3. ADDRESSING EMERGING AND DEVELOPING ISSUES

As depicted in the chart below, during the 2nd and 3rd Quarters of FY 2015 OFO resolved 16 decisions under this SEP Priority and its associated FCP priorities.

SEP - Emerging and Developing Issues (FCP Categories)

16 Decisions* - 2nd Quarter



*Two decisions implicated 2 FCP categories, and one decision did not implicate an FCP priority

Decision Summaries for this Category

(b)(7)(C) **v Navy**, 0120122278 (01/08/2015) – Complainant alleged the Agency subjected him to discrimination on the basis of disability when he was issued a notice of proposed suspension, when he was not reasonably accommodated, when he was issued letters of reprimand, and when the Agency requested more detailed medical documentation.

With regard to the request for a reasonable accommodation, Complainant requested as a reasonable accommodation: a part time schedule of 24 hours per week in the form of 6 hours 4 days a week; telework two days a week; parking at the worksite; and a work station ergonomic evaluation. Since Complainant's need for an accommodation was not obvious, the Agency requested documentation that we found was reasonable and not overly intrusive or burdensome. Complainant provided vague medical documentation that did not discuss how Complainant's limitation impact his ability to perform the essential functions of his job, how the requested accommodations will allow him to perform his job, whether Complainant can safely perform the essential functions of the position, or whether his condition is permanent or temporary. We found that Complainant failed to provide the reasonable documentation requested by the Agency, and as a result the Agency is not held liable for failure to provide the requested accommodation.

With regard to Complainant's disparate treatment claim, we found that the Agency articulated legitimate, nondiscriminatory reasons for its actions. Many of the actions against Complainant were because of his excessive use of leave. Complainant's failed to provide medical documentation that sufficiently established a nexus between the absences and his disability. Additionally, Complainant was only charged AWOL when he did not give notice of his absence within two hours after the start of his shift or when he did not provide medical certification for the absence. There is no evidence in the record that Complainant was disciplined for his absences because of a discriminatory motivation towards his disability.

Complainant was also disciplined for his repeated disrespectful behavior. While Complainant blamed his behavior on his medication, we noted that the side effects of Complainant's prescription do not immunize him from being held responsible for misconduct that other employees would also be held accountable for if they committed. There is no evidence in the record that individuals who did not have disabilities were not held responsible for similar misconduct.

(b)(7)(C) **v. VA**, 0120120387 (01/28/2015) – Complainant filed an appeal from an Agency decision finding no discrimination on part and dismissing part of Complainant's complaint based on sexual orientation, disability, and reprisal. Complainant's complaint had approximately 30 claims including a claim of hostile work environment based on sexual orientation. Complainant requested a hearing and an EEOC AJ dismissed 14 of

the claims for failure to state a claim because they were based on sexual orientation. After a hearing on the remaining claims, the AJ found no discrimination. The Agency issued a decision adopting the AJ's decision. On appeal, Complainant stated that he wanted to add the basis of sex discrimination because the hostile work environment was based on sex-stereotyping. OFO found that Complainant had stated a plausible claim of sex-stereotyping discrimination and that these claims should not have been dismissed for failure to state a claim. OFO found that Complainant alleged comments and actions that Complainant was harassed when he did not conform to gender stereotypes of masculinity. Because sex stereotyping was not considered by the AJ, we remanded the entire complaint so that the Agency could request the claims be considered by the Hearings Unit.

(b)(7)(C) **v Treasury (IRS)**, 0120110248 (02/06/2015) – Complainant, a special agent who has law enforcement duties, has hearing loss in his right ear. In a medical examination in 2008, he failed to meet the Agency's hearing requirements in his right ear, and he was not permitted to wear a hearing aid during the examination. Complainant requested to take the test with his hearing aid, but was denied. Complainant was placed on temporary restricted duty, was relieved of his government-issued weapon, and was restricted from performing certain duties such as executing search warrants and arrest warrants. In 2009 Complainant took and passed an independent functional hearing test under similar guidelines as the Agency administered test, but with his hearing aid.

Complainant alleged he was subjected to discrimination on the basis of disability when he was placed in the temporary restricted duty status, and when he received a lower annual performance rating for this period of time. An EEOC AJ issued a decision without a hearing adopted the Agency's motion verbatim, and found that Complainant failed to establish that discrimination existed. The Agency adopted the AJ's decision. On appeal we found that there are genuine issues of material fact that remain in dispute and that a hearing is necessary.

The Agency did not dispute that Complainant was disabled and requested a reasonable accommodation. To determine whether Complainant was qualified for the position, we noted that the Agency may require, as a qualification standard, that an individual not pose a direct threat. The Agency stated that Complainant posed a direct threat due to his hearing loss, and a Special Agent's hearing ability is essential to his ability to carry out his law enforcement duties without endangering himself, his fellow Special Agents, and/or the public.

We noted that the Agency must establish that a reasonable accommodation will not eliminate the risk of harm or reduce it to an acceptable level. Complainant requested that he be allowed to wear a hearing aid during the audiogram and functional hearing tests to meet the hearing requirement. Complainant provided evidence that showed that he was able to pass an audiogram similar to the Agency's examination with the assistance of a hearing aid. Additionally, the Agency allows Special Agents to wear hearing aids in the field.

The Agency stated that Special Agents must meet the hearing requirement without a hearing aid because hearing aids may break or become dislodged in the field. We noted that there was evidence in the record that may undermine the Agency's assertions. Specifically, the Agency allows Agents to wear glasses as a mitigating measure during the vision portion of the medical examination and also while out in the field. Similar to hearing aids, glasses could also break or become dislodged while a Special Agent is in a law enforcement scenario. Evidence in the record established that the Agency acknowledged the conflicting vision and hearing policies, but was not able to come to a decision that would rectify the conflict.

We found that a hearing is necessary to determine whether a hearing aid would be a reasonable accommodation during the hearing test and in the Special Agent position, and if so, would it eliminate the risk of harm or reduce it to an acceptable level. Therefore, we vacated the Agency's final order and remanded Complainant's reasonable accommodation claim to an AJ for a hearing. Additionally, in order to avoid fragmentation of the complaint, we remanded Complainant's performance evaluation claim for a hearing as well.

(b)(7)(C) **v. Navy**, 0120120645 (02/6/2015) – Complainant had a lengthy history of pain related to his legs and back. In February 2005 Complainant requested a change in his schedule so he could work from home in the morning, attend physical therapy, and then work in the office in the afternoon. The Agency denied his requests,

finding that his duties as a submarine program manager required him to have extensive face to face contact with other management officials and coworkers, frequent and irregular need for access to sensitive/classified material that cannot be removed from the office, and scheduled and emergency overnight work-related travel. Complainant also notified his supervisor that he was having trouble finding a disability parking spot near the building. Complainant also alleged that he was subjected to harassment by a coworker when the coworker spread rumors about Complainant's medical condition and threatened to kill Complainant. Complainant also alleged that when he reported this behavior to management, they did not address the situation and instead told Complainant to "grow up."

An EEOC AJ issued a decision without a hearing finding that Complainant did not establish that he was subjected to discrimination. The Agency issued a FAD adopting the AJ's decision.

This case arose before the ADA Amendments Act of 2008. While the AJ found that Complainant did not establish that he was an individual with a disability, we noted that documentation in the record indicated that there may be material facts in dispute with regard to whether Complainant was substantially limited in a major life activity. Consequently, we found that a hearing was necessary to make that determination.

We also found that if Complainant is able to establish that he is a qualified individual with a disability, and that his request to work from home is a plausible reasonable accommodation because the Agency allowed him to work from home previously because of his medical condition. Additionally, there was no evidence in the record that this accommodation would have caused an undue hardship on the Agency because there is no evidence as to why the Agency believed Complainant had to be face-to-face to interact with individuals instead of via email, why meetings could not be scheduled in the afternoon, and whether there were tasks that Complainant could perform at home in the mornings that did not involve sensitive or classified material. Further, there is no evidence in the record that Complainant's supervisor took effective steps to ensure that Complainant received a disability parking spot.

We also found that the AJ's decision did not address Complainant's harassment claim, and that there are genuine issues of material fact in dispute as to whether Complainant was subjected to harassment based on a protected basis, and if so, whether the Agency is liable for the harassment. We remanded the complaint for a hearing.

(b)(7)(C) **v. USPS**, 0120132250 (02/20/2015) **[Repeated under Findings below]** – Complainant, a mail carrier, appealed the Agency's decision finding that he was not denied reasonable accommodation or subjected to disparate treatment disability discrimination because of his race (Arabic), religion (Muslim), national origin (Syrian), or disability (high blood pressure and anxiety). Complainant alleged discrimination because he was ordered to stop casing his mail prior to delivering it, which was an accommodation he was previously provided to help manage his anxiety. Further, Complainant alleged discrimination in not being provided with eight hours of light duty work per day while his request for reasonable accommodation was pending.

The Commission found that Complainant established he was denied a reasonable accommodation because the Agency did not show that Complainant could not perform the essential functions of his job if he were provided a reasonable accommodation of casing his mail prior to delivering it, nor that providing the accommodation would create an undue hardship. However, the Commission found that Complainant did not establish that he was denied reasonable accommodation when denied eight hours of light duty work because the Agency was not obligated to create work for Complainant.

Also, the Commission found that Complainant failed to establish that he was subjected to disparate treatment discrimination because he offered no rebuttal to the Agency's legitimate, nondiscriminatory reasons for ordering him to stop casing mail prior to delivering it, and denying him eight hours of light duty work per day. The Agency stated that casing mail is generally not allowed and other carriers were also prohibited from casing their mail prior to delivering it. Further, the Agency stated that they did not provide Complainant with eight hours of light duty work per day while his reasonable accommodation request was pending because Complainant's medical documentation did not stipulate his medical limitations such that the agency could find suitable work, and eight hours of light duty work was not available.

The Agency was ordered to provide Complainant with a reasonable accommodation to allow him to perform the essential functions of his carrier position and provide him with back pay and benefits, in addition to other remedies.

(b)(7)(C) **v. State**, 0520140506 (02/19/2015) – Complainant filed a formal complaint alleging that she had been discriminated against on the basis of disability with regard to the Agency's Worldwide Availability policy. During discovery, she filed a Motion for Class Certification, alleging that the State Department's Worldwide Availability policy, as administered, disparately treated and disparately impacted qualified individuals with disabilities. Complainant further maintained that the policy denied the class the individualized assessment required for a direct threat determination, which resulted in the Agency basing hiring decisions on stereotypical notions regarding medical conditions. Complainant asserted that the worldwide availability requirement required every candidate to be able to work wherever the Foreign Service had a post, without the possibility of reasonable accommodation. The Class Agent also claimed that the policy disparately impacted those over the age of 40.

An EEOC AJ found that the Agency's policy requiring worldwide availability affected all members of the purported class because individuals who were unable to work in all locations were denied positions without any reasonable accommodation being considered or individualized assessments being conducted. The Agency issued a final order rejecting the AJ's finding that the class should be certified. The Agency then filed an appeal to the Commission from the AJ's decision. In EEOC Appeal No. 0720110007, the Commission, among other things, found that the Class Agent demonstrated that she was a qualified individual with a disability, and that she had established that the proposed class met the requirements of numerosity, commonality, typicality, and adequacy of representation. The decision upheld the certification of a class comprised of "all qualified applicants to the Foreign Service beginning on October 7, 2006, 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."

With regard to the Agency's request for reconsideration, the Commission found that the Agency simply reiterated the arguments previously made in the appellate decision. While the Agency clearly disagreed with the appellate decision, it failed to present persuasive evidence which supported its contention that the decision clearly erred. Moreover, the Commission noted that because the appellate decision directed the Agency to continue processing the complaint, it could raise appropriate arguments and concerns to the AJ assigned to this matter. Accordingly, the Commission denied the request for reconsideration and held that EEOC Appeal No. 0720110007 remained the Commission's decision.

(b)(7)(C) **v. Education**, 0520150011 (02/25/2015) – Complainant requested reconsideration of OFO's decision in EEOC Appeal No. 0720130002. In our decision on that appeal, OFO found that Complainant was not discriminated against on the bases of sex (male), national origin (Nigerian), disability (deaf), and age, when he was not selected for an EEO Specialist position and denied a reasonable accommodation. However, the prior decision found that the Agency violated the Rehabilitation Act by making an improper disability related inquiry on the job announcement by asking applicants if they had "a physical or mental impairment" that rendered them eligible for the Federal Employment Program for Persons with Disabilities. In relief, the prior decision ordered the Agency to: review its pre-employment process and revise such pre-employment forms to comply with the Rehabilitation Act; provide training to Agency officials regarding pre-employment inquiries; pay Complainant $5,000 in nonpecuniary, compensatory damages; post a notice of the finding of discrimination; and pay appropriate attorney's fees. In the decision on Complainant's request for reconsideration, OFO dismissed the request on the grounds that it was untimely filed. The dismissal restated the order from the prior OFO decision finding discrimination.

(b)(7)(C) **v. HUD**, 0720130029 (02/12/2014) **[Repeated under Findings below]** – Complainant is a GS-13 Financial Analyst assigned to the Agency's Minneapolis, Minnesota Field Office diagnosed with Ankylosing Spondylitis, a permanent inflammatory disease that that can cause some of the vertebrae in the spine to fuse together, making the spine less flexible and resulting in a hunched-forward posture. Complainant moved from

the Twin Cities area to Madison, Wisconsin, which is approximately a five hour drive from the Minneapolis Field Office. Complainant commuted the distance from his home to the Minneapolis office for 44 weeks but the long commute exacerbated his medical condition. Consequently, Complainant requested that the Agency provide him with a reasonable accommodation by allowing him to telework 100 percent of the time, or alternatively, to report to the Agency's Milwaukee office one day per week and telework three days per week. Complainant worked ten hours per day. Complainant supported his request with medical documentation that revealed that his medical condition rendered him unable to commute the very long distance from his Madison home to Minneapolis on a regular basis.

The Agency denied Complainant's request on the basis that not all of the essential functions of Complainant's job could be performed from a remote location; Complainant's requested accommodation would require removal of essential job functions; and commuting to work is not a major life activity. Nevertheless, the Agency assigned Complainant to a detail assignment at the Office of Field Operations Energy Center in Milwaukee, Wisconsin, which was within a reasonable commuting distance from Complainant's home. While on detail, Complainant worked a schedule that featured teleworking three times per week and working in the office once a week, with 10-hour workdays. Eventually, the Agency ordered Complainant to return to work at the Minneapolis office once a week, but Complainant used leave on those days instead of reporting to the Minneapolis office. Complainant then filed an EEO complaint in which he alleged that the Agency discriminated against him on the basis of disability (Ankylosing Spondylitis) when beginning on August 27, 2010, the Agency denied him a reasonable accommodation for his disability.

At the hearing, the parties stipulated that Complainant is an individual with a disability. The AJ determined that Commission precedent has established that a request for a shorter commuting time because of a disability triggers the Agency's responsibility to provide a reasonable accommodation. The AJ further concluded that the Agency's partial accommodation of allowing Complainant to telework three days a week and report to the Minneapolis once per week was ineffective because requiring Complainant to report to Minneapolis required him to drive a long distance each week, which caused additional damage to his spine. The AJ also found that, contrary to the Agency's assertion, the accommodations requested by Complainant would not have eliminated essential functions of his job. The AJ concluded that the record demonstrated that Complainant was able to perform his job duties without reporting to the Minneapolis office, as reflected by his "fully successful" rating for the period November 1, 2010, through September 30, 2011. The AJ reasoned that, while working collaboratively with colleagues on projects, training and mentoring other employees, and attending meetings may be essential functions of the job, doing so in-person is not an essential function. The AJ noted that meetings can be attended by telephone, videoconferencing, or desktop sharing. Thus, the AJ found that the Agency failed to provide Complainant with a reasonable accommodation for his disability.

The AJ ordered the Agency to provide Complainant with a reasonable accommodation of telecommuting 100 percent of the time, or alternatively, teleworking three days per week and working one day per week at the Milwaukee office; pay Complainant's $15,000 in non-pecuniary compensatory damages; restore all leave Complainant took to avoid driving to Minneapolis; provide EEO training to all managerial and supervisory employees at its Minneapolis office; and remove a reprimand related to the denial of reasonable accommodation from all personnel files.

On appeal, the Commission determined that substantial evidence supported the AJ's finding and affirmed the Agency's final order. In so finding, the Commission noted that the fact that Complainant received a "fully successful" annual evaluation while telecommuting 100 percent of the time greatly undermined the Agency's contention that his inability to report to the Minneapolis office created an undue burden on the Agency. The Commission also reminded the Agency that the federal government is charged with the goal of being a "model employer" of individuals with disabilities, which may require it to consider innovation, fresh approaches, and technology as effective methods of providing reasonable accommodations.

(b)(7)(C) **v. TVA**, 0120093256 & 0120111968 (02/20/2015) **[Repeated under Category 1 above, and Findings below]** – Complainant, who is blind in his left eye, works as a journeyman electrician, alleged that he was discriminated against on the basis of disability when he was not allowed to work as a dual-rate foreman on

numerous occasions; not allowed to travel to Sequoyah Nuclear Plant in support of a tanker rebuild; and not selected for a permanent foreman position.

In 2004 the Agency required all employees in the electrician and the electrician foreman positions to possess and maintain a seven-state Class B Commercial Driver's license (CDL) pursuant to Department of Transportation (DOT) Regulations. These regulations require individuals to pass an S5 medical examination which requires, amongst other things, binocular vision (vision in both eyes). Complainant's vision impairment made him unable to pass the S5 medical examination, and therefore Complainant was unable to obtain a Class B CDL pursuant to DOT regulations. The Agency notified Complainant that he would be "grandfathered" into his permanent position as a journeyman electrician even though he couldn't pass the S5 medical examination. Complainant was permitted to serve as a dual-rate foreman on numerous occasions after he was grandfathered into his position, however on December 14, 2007, the Agency notified Complainant that he would no longer be permitted to serve as a dual-rate foreman because the "grandfathering" provision restricted Complainant to his permanent position as an electrician.

In its final decision, the Agency asserted that Complainant's inability to obtain a seven-state CDL resulted in him not being able to perform the essential functions of the dual-rate foreman positions because foremen must be able to respond to emergency situations 24 hours per day and may be required to transport Commercial Motor Vehicles across state lines to the emergency site.

We found that Complainant requested a reasonable accommodation. The Agency did not dispute that Complainant was an individual with a disability. We noted that a review of the record reveals that Complainant met all of the Agency's job requirements for the foreman position except for its requirement that his vision conform to the requirements set forth in the DOT regulations.

To determine whether the Agency's vision standard was job related and consistent with business necessity, we did a direct threat analysis. We noted that the Commission has previously held that an Agency cannot depend solely on the DOT regulations at issue in this complaint to determine that an individual is not qualified for a position, and the Agency must conduct an individualized assessment of the individual to determine if they pose a direct threat. We found that the Agency failed to conduct an individualized assessment of Complainant to determine if he is qualified for the position. The record established that there were no safety concerns with Complainant working as a foreman, and he was able to obtain a Tennessee CDL which allowed him to drive commercial vehicles intrastate.

We next analyzed whether driving a commercial vehicle interstate was an essential function of the position. Complainant and his supervisor both stated that driving interstate was not a regular function of the foreman position, and Complainant never had to drive interstate when he acted in the position.

We found that the Agency failed to establish that Complainant is a direct threat or that providing Complainant with the accommodation of waiving the S5 medical examination or removing the driving requirement altogether would cause an undue hardship. As a result, the Agency violated the Rehabilitation Act when it did not reasonably accommodate his disability.

We also found that the Agency subjected Complainant to disparate treatment in violation of the Rehabilitation Act when it did not allow him to serve as a dual-rate foreman, when it did not select him for the permanent foreman position, and when it did not allow him to perform work at the Sequoyah Nuclear Plant.

We ordered the Agency to offer Complainant a permanent foreman position, accommodate his disability by waiving the S5 medical requirement or waiving the requirement that he drive commercial vehicle interstate, determine back pay, determine compensatory damages and attorney's fees and costs, consider disciplinary action, provide 8 hours of training to all management officials, and post a notice of discrimination.

(b)(7)(C) **v. USPS**, 0120120413 (02/11/2015) – Complainant, a Homeland Security Coordinator, filed a formal complaint alleging discrimination and harassment due to her race, sex, religion, disability, reprisal and sexual orientation. The Agency did not conduct an investigation into the sexual orientation allegation. Complainant also raised the claim that the Agency inappropriately released confidential medical information to other employees. Following an investigation, an EEOC AJ issued a decision without a hearing finding no discrimination. Specifically, the AJ found the Agency articulated legitimate nondiscriminatory reasons for its

actions, which Complainant failed to dispute. The AJ also found there was no adverse change in Complainant's employment when rumors concerning her circulated the office. As to the medical confidentiality claim, the AJ found the EEOC lacked jurisdiction to hear a Privacy Act claim.

In the appellate decision, the Commission found that the AJ erred when she failed to consider Complainant's evidence, which if believed, could prove the Agency's reasons for its actions were a pretext for discrimination. Furthermore the Commission found that the AJ should have addressed Complainant's claims of harassment and discrimination based on sexual orientation and the medical disclosure claim. In that regard, the Commission noted that although the AJ found Complainant was the one who fueled the rumors, there was a dispute in the record as to who initiated them. Questions of credibility and an outstanding motion to compel required a hearing where an AJ could assess the credibility of the witnesses and ensure Complainant had full access to discovery.

(b)(7)(C) **v. USPS**, 0120122709 (02/05/2015) – Complainant filed a formal complaint alleging that the Agency discriminated against her on the basis of sex (female/pregnancy) when she was not provided light duty work on December 15, 16, and 17, 2010. Complainant testified that on December 15, 2010, she requested Light Duty for December 15, 16, and 17, 2010 "until her Doctor released her from work." Complainant's physician wrote that Complainant was diagnosed with "pregnancy, uterine fibroids, bilateral lower extremity varicosities, pelvic pain." Her work restrictions included: no lifting/carrying, driving, operating machinery; sitting 8 hours; and standing, walking, bending, twisting, climbing, and reaching above the shoulder up to 1 hour. Further instructions indicated that Complainant needed "to be primarily sitting, with minimal ambulation." After Complainant was told that there were no duties that fit within these restrictions, on the following day, her restrictions were changed to lifting/carrying 1 to 20 pounds; and standing, walking, bending, twisting, climbing, and reaching above the shoulder - 8 hours. Complainant was still restricted from driving, operating machinery, and reaching above her shoulders.

Upon receipt of these new restrictions, Complainant was allowed to work in Mail Processing. Complainant maintained that three other employees were treated more favorably than she was when they requested light duty work. The FAD found that Complainant failed to establish a prima facie case of discrimination as she failed to show that any comparators were treated more favorably. The Agency noted that two of the comparators offered by Complainant were not similarly situated to her as they had been injured on the job and were limited duty employees. The third comparator was given the same light duty assignment that Complainant received.

Notwithstanding, the FAD found that assuming arguendo that Complainant established a prima facie case of sex/pregnancy discrimination, the Agency articulated legitimate, nondiscriminatory reasons for its actions, namely that the first medical restrictions that Complainant submitted prohibited her from doing practically everything. However, once she submitted amended medical restrictions which allowed her to do considerably more work, she was assigned duties within those restrictions. The appellate decision affirmed the Agency's final decision. The decision found that, even assuming arguendo that Complainant established a prima facie case of sex/pregnancy discrimination, the record showed that the Agency articulated legitimate, nondiscriminatory reasons for its actions. Moreover, the record demonstrated that Complainant was offered light duty work once her restrictions were clarified. According to the decision, Complainant provided no evidence which suggested that discriminatory animus was involved with regard to the Agency's actions. The Agency's FAD was therefore affirmed.

(b)(7)(C) **v. Air force**, 0520140092 (02/13/2015) **[Repeated under Findings below]** – Complainant, an HR Assistant, alleged that her supervisor subjected her to discrimination and harassment based on her sex and pregnancy; namely, that upon staring her position, her supervisor threatened her with termination, denied her leave for pre-natal care, disabled her government e-mail account, and ultimately terminated her. Complainant stated that that the Agency subsequently rescinded her termination months later, but did not assign her to a different supervisor. Complainant stated that because the Agency refused to grant her request to be assigned to a different supervisor, she was had no choice but to resign, resulting in a constructive discharge. After an

investigation and hearing, the AJ assigned to the case found that Complainant failed to establish discrimination.

Complainant filed an appeal to the Commission, which was dismissed for failing to meet the 30-day time limitation. On reconsideration, Complainant argued that our previous decision erred in dismissing her appeal. We found that Complainant's request failed to meet the criteria of 29 C.F.R. § 1614.405(c). However, upon our own motion, we reopened our previous decision, finding that Complainant's appeal was timely as the record currently reflected. We therefore vacated our previous decision.

In addressing the merits, we found that the supervisor's reasons for Complainant's termination were unworthy of belief and pretext for discrimination based on Complainant's sex and pregnancy. In so finding, we noted that the supervisor denied Complainant leave for pre-natal appointments and sickness, and several employees attested that the supervisor did not treat women as well as men. We also noted that Complainant was threatened with termination even on her first day, and a coworker was coerced into accusing Complainant of wrongdoing. We additionally found that Complainant established that she was subjected to a hostile work environment and subsequently constructively discharged when the Agency canceled her termination, but failed to assign her to a different supervisor. We concluded the AJ's decision was not supported by substantial evidence in the record. As a result, we found that the Agency violated Title VII as well as the Pregnancy Discrimination Act.

(b)(7)(C) **v. VA**, 0120112544 (03/19/2015) – Complainant appealed from an agency final decision (FAD) finding that she was not subjected to disparate treatment disability discrimination, denied a reasonable accommodation for her alleged disability or subjected to a hostile work environment. Complainant was formerly employed with the Agency as a Nurse and sustained a back injury. Pursuant to her Office of Worker's Compensation (OWCP) claim, the Agency offered her a Medical Assistant position, which she occupied at the time of her complaint. Complainant filed an EEO complaint alleging discrimination due to the following: (1) Agency's decision to place her in a Medical Support Assistant rather than a Nursing position pursuant to her OWCP claim; (2) various non-selections to nursing positions; (3) denial of tuition reimbursement; (4) not being allowed to perform CPR; and (5) failure to decide Complainant's request for reasonable accommodation to a Nursing position as of January 20, 2010; (6) offering to remove a termination action from her record if she withdrew her OWCP claim.

The OFO decision found that the Agency stated legitimate non-discriminatory reasons for the adverse actions. First, Complainant was placed in a Medical Assistant position because the duties of the position she was required to perform were within her OWCP approved medical restrictions. Second, other candidates were selected for the various nursing positions Complainant applied to due to their qualifications and Complainant did not show that her qualifications were plainly superior to those of the selectees. Third, Complainant was denied tuition reimbursement because she was not a practicing Nurse. The Agency explained that tuition funds were available to raise the education level of practicing nurses at the facility. Fourth, Complainant was not allowed to attend CPR classes because the classes were reserved for individuals with positions requiring the ability to perform CPR. Complainant was asked to review her position description to see if it had a CPR requirement. Complainant did not show the Agency's reasons for the alleged adverse actions to be pretext for discrimination.

Regarding Complainant's claim that the Agency failed to provide her reasonable accommodation in not deciding the request in a timely manner, the OFO decision found that Complainant was not denied an accommodation. Complainant did not request any accommodation for the Medical Support Assistant position, and was performing the duties of that position within her medical restrictions. Rather, Complainant wanted to be reinstated to a Nursing position, but such reassignment would not be a reasonable accommodation since Complainant was already terminated from the Nursing position and currently occupied the new Medical Support Assistant position.

Finally, Complainant alleged that the Agency subjected her to a hostile work environment due to the adverse actions in question, and the allegation that Human Resources (HR) offered to remove a termination action from her record if she withdrew her OWCP claim. Since the Agency stated legitimate, nondiscriminatory, reasons for the adverse actions, Complainant was unable to show that they were based on her protected class.

Further, the one incident of HR allegedly offering to remove Complainant's termination action from her record is not sufficient to support a claim of hostile work environment.

The Agency's FAD was affirmed because Complainant did not show by a preponderance of the evidence that she was subjected to the alleged discrimination.

(b)(7)(C) **v USPS**, EEOC Appeal No. 0120130220 (03/20/2015) – This appeal was one of three complaints filed and on appeal with the Commission. Other appeals were 0120131091(no discrimination) and 0120122504 (finding reprisal). Complainant, a Mail Handler, has chronic Sarcoidosis, which causes "flare ups" of eye problems, lung inflammation and difficulty walking up stairs, or any inclined surface. The Agency was aware of the condition when he was hired in 2005. In January 2010, Complainant sporadically used leave for flare ups and depleted his FMLA leave by September 2010. Complainant continued to have unscheduled absences but would bring in a doctor's note when he returned, explaining that he had been seen by a physician on the day he was absent. In November and December 2010, Complainant was issued discipline for his failure to be regular in attendance and this complaint followed.

After a hearing, an AJ found that although the Agency failed to engage in the interactive process, no accommodation would have enabled Complainant to perform the essential function of the job. The AJ found Complainant's request; namely, that he be permitted 4-6 unscheduled absences per month was not a reasonable request.

On appeal, OFO found that Complainant was requested to bring in not only documentation supporting his absence, but also medical documentation supporting his disability. OFO found Complainant was required to do this, because his disability was not obvious. OFO found that because of Complainant's failure to provide medical documentation supporting his disability, he was not entitled to an accommodation. Furthermore, OFO found that even if he was entitled to an accommodation, Complainant failed to indentify or request any other accommodation. OFO determined that Complainant's request of 4-6 hours of unscheduled, periodic leave would cause an undue hardship on the Agency. Specifically, the Agency had previously provided Complainant with over 400 hours of leave pursuant to his rights under the Family and Medical Leave Act. Furthermore, the Agency was having financial problems and its busiest season was quickly approaching, so Complainant's unpredictable leave required the Agency to use overtime. Finally, the Agency could not replace Complainant until the position was vacant.

OFO found the AJ's decision was supported by substantial evidence in the record and affirmed.

(b)(7)(C) **v. Treasury**, 0520140363 (03/04/2015) – Complainant alleged, that the Agency discriminated against him when: 1) his request for general program training was denied; 2) he received a negative workload review; 3) he received a "minimally successful" mid-year appraisal; 4) his manager rescinded his approval to work on information gathering projects; and 5) he was issued a lowered annual performance appraisal. Complainant requested a hearing before an EEOC AJ. The AJ granted the Agency's request for summary judgment in part. The AJ dismissed Complainant's harassment claim finding that he failed to state a claim of harassment. The AJ also dismissed Complainant's allegation of sex discrimination. Complainant maintained that claims 1 through 5 were rooted in gender stereotypes because his supervisor referred to his work space as "his closet." However, Complainant acknowledged that he never informed his supervisor that he was gay, and the supervisor denied that he knew of Complainant's sexual orientation. Moreover, Complainant did not provide any evidence from which it could be concluded that his supervisor knew about his sexual orientation or viewed him as not conforming to gender stereotypes. Regarding the basis of reprisal, the AJ found that Complainant could not establish a prima facie case of reprisal for claims 1 and 2 because these actions occurred before he engaged in EEO activity. The AJ held a hearing on Complainant's reprisal allegations with regard to claims 3, 4, and 5. The AJ issued a decision finding that Complainant failed to establish discrimination based on reprisal with regard to these claims. The Agency adopted the AJ's decision. OFO, in its appellate decision, affirmed the Agency's final order.

Complainant requested that the Commission reconsider its appellate decision. In his request, Complainant requested only that the Commission appoint him counsel since he no longer had an attorney. OFO denied

Complainant's request for reconsideration finding that Complainant's request failed to meet the criteria for reconsideration.

(b)(7)(C) **v. DOD**, 0120133229 (03/19/2015) – Complainant, a Police Officer in the Agency's Pentagon Police Department, Pentagon Force Protection Agency (PFPA), alleged that the Agency discriminated against her on the basis of her sex (pregnancy) when she was forced to take leave while awaiting approval of her light duty request. Complainant's light duty request was subsequently approved and Complainant returned to work after having to use 48.5 hours of leave.

After an investigation, Complainant did not request a hearing before an EEOC Administrative Judge. Neither party submitted briefs on appeal.

The record indicates that it was Complainant's contention that right after informing the Agency that she was pregnant, she was given alternate, light duty work but, subsequently, she was made to take leave. She also alleged that other employees were allowed to perform light duty work without having to take leave.

We found that Complainant had established a prima facie case because she was a member of a protected group and suffered an adverse action when she lost leave. The Agency's reasoning for its action was that all light duty requests were processed pursuant to PFPA Regulation No. 5007, Light Duty Program. Under Agency policy, employees were required to take a minimum of five days of leave until all documentation was received and a light duty assignment made. Other than Complainant's assertions, there was no evidence that men were treated more favorably in the Agency's administration of its light duty approval policy.

Complainant asserted that because she was already performing alternate, light duty work but later had to use leave, this was evidence of pretext. We found that, although Complainant may have been allowed to continue working at first by the Chief of the Contract Operations Division (COD), his affidavit reflected his disagreement with Agency policy requiring an employee to use leave while awaiting medical or other documentation before approval of a light duty request. The COD's action explained why Complainant was permitted to continue working and, also, there was no evidence that the COD Chief applied the policy disparately.

OFO concluded that the Agency had not discriminated against Complainant.

(b)(7)(C) **v. USPS (Southeast)**, 0120112516 (Apr. 2, 2015) **(This summary is repeated in the Findings section below)** – Complainant alleged, in pertinent part, that the use and retention of his confidential medical information by the Acting Supervisor (S1) and the Manager (S2) violated the Rehabilitation Act. The AJ found the following facts: Complainant's union representative gave S2 Complainant's psychological evaluation as an attachment to Complainant's workers' compensation form. S2 performed a cursory review of the documentation, drafted a controversion of the claim, and forwarded the documentation to the Medical Unit. S2 kept a copy of the documentation in her locked office. S1 also reviewed the documentation and kept a copy of it in an unofficial personnel file he believed he was required to maintain as a supervisor. When his supervisory detail ended, S1 took the documentation home and kept it in his personal possession. The AJ issued a decision, after a hearing, finding that S1's actions – but not S2's actions – violated the Rehabilitation Act. The AJ ordered the Agency to provide EEO training to the management officials assigned to the station. The AJ, however, found that an award of damages was not warranted because there was no evidence of harm. The Agency issued a final order implementing the AJ's decision.

OFO, in its appellate decision, found that substantial evidence in the record supported the AJ's finding that S1's actions – but not S2's actions – violated the Rehabilitation Act. Regarding S1, OFO found that the record reflected that S1 failed to maintain Complainant's medical information in a non-medical file. Regarding S2, OFO found that Complainant failed to demonstrate that S2 disclosed his medical information to an unauthorized person or placed his medical information in a non-medical file.

OFO modified the AJ's remedies. Specifically, OFO remanded the issues of compensatory damages and attorney's fees to the AJ after finding that Complainant established his claim of disability discrimination and that Complainant did not have an opportunity to present evidence on damages at the hearing. In addition, OFO ordered the Agency to remove all documentation containing Complainant's confidential medical information

from any non-medical file in S1's possession. Finally, OFO ordered the Agency to provide EEO training to S1 and to consider taking appropriate disciplinary action against S1.

(b)(7)(C) **v. DOJ (BOP)**, 0120120560 (04/02/2015) – Complainant, a Correctional Officer, appealed from an EEOC Administrative Judge's (AJ) decision, which found that she was not denied reasonable accommodation of sedentary duties, or subjected to sex discrimination in being denied a light duty assignment. The AJ's decision was affirmed.

First, the AJ concluded that Complainant was disabled because she was limited in the major life activities of walking, standing and climbing. Second, the AJ concluded that Complainant was not subjected to disparate treatment sex discrimination in being denied a light duty assignment even though male co-workers were given such assignments. This was because the male comparators Complainant referenced could return to full duty while Complainant was not expected to return to full duty. Third, the AJ concluded that Complainant was not a qualified individual with a disability because she could not perform an essential function of the Correctional Officer position, responding to emergencies, due to her physical limitations.

The record indicates that Correctional Officers were required to respond to emergency situations at the facility, such as "escape, fog patrols, riots, major disturbances," and given her substantial medical restrictions, Complainant did not produce evidence to show that she could respond to emergencies at the institution. The decision examined whether "responding to emergency situations" was indeed an essential function of the Correctional Officer position, and found that it was given the Agency's judgment, job description, consequences of not being able to respond to emergencies, testimony of Agency witnesses, and Complainant's testimony that it was the responsibility of individuals within the correctional facility to respond to emergencies. While reassignment could have been an effective reasonable accommodation, Complainant did not identify any vacant, funded, positions within the Agency, and the record indicated that she did not want to be reassigned.

Therefore, the AJ's decision, finding that Complainant was not subjected to disparate treatment sex discrimination, or denied reasonable accommodation, was affirmed.

(b)(7)(C) **v. Navy**, 0120130653 (4/17/2015) – At the time of the events in this complaint, Complainant, a Vending Machine Attendant, was on leave restrictions for previous attendance issues and was required to provide medical documentation for any sick leave that she used. Complainant requested as a reasonable accommodation that she be assigned to a snack or cold food route in order to comply with her medical weight lifting restrictions. Beginning on February 18, 2011, Complainant did not show up for work, did not request leave, and did not inform her supervisor that she was going to be absent. Complainant did not return to work. Because of her excessive and unauthorized absences, on April 11, 2011, Complainant was issued a 14 Day Advance Notice of Proposed Disciplinary Action, which proposed Complainant's termination 14 days from the date she received the letter. On May 20, 2011, Complainant was issued a "Notice of Decision of Disciplinary Action" which informed her that she would be terminated from her position based on her unavailability for duty effective May 28, 2011. Complainant alleged discrimination on the basis of disability, sex, and age when she was not reasonably accommodated and when she was terminated.

Complainant requested as a reasonable accommodation that she be assigned to a snack or cold food route in order to comply with her medical weight lifting restrictions. We found that the medical documentation that Complainant provided to support her request for a reasonable accommodation was not sufficient because the documentation was not current and did not list any of Complainant's medical restrictions or that she needs a reasonable accommodation. The Agency requested updated medical documentation, and Complainant did not provide it. Accordingly, we found that Complainant did not demonstrate that she was denied a reasonable accommodation.

With regard to Complainant's disparate treatment claim, we found that the Agency articulated legitimate, nondiscriminatory reasons for its actions. Specifically, Complainant could not be placed on a snack or cold food only route because those routes had been abolished due to declining sales. Complainant was terminated because she stopped showing up for work and did not notify her supervisors about her absences, despite

being previously placed on leave restrictions. Complainant failed to establish that these reasons were pretext for discrimination.

(b)(7)(C) **v. Army**, 0120133395 (04/01/2015) **(Repeated under General Enforcement below)** – During the relevant time period, Complainant was employed as a Software Quality Assurance Lead with the Department of the Army at Redstone Arsenal in Huntsville, Alabama. Complainant is a transgender woman who began the process of transitioning her gender presentation/expression in 2010. In April 2010, Complainant obtained a decree from an Alabama court that changed her name from a traditionally male name to a traditionally female name. At that time, Complainant also requested that the Agency change her name and sex on all personnel records, which was done. In October 2010, management met with Complainant to discuss the process of transitioning from presenting herself as a man to living and working in conformance with her gender identity as a woman.

The Agency and Complainant agreed in a written plan that Complainant would use a single-user restroom rather than the multi-user "common women's restroom" until she underwent undefined surgery. In late 2010, Complainant notified the Agency of her transition and began presenting as a woman. Complainant used the single-user restroom, except on three occasions. On those occasions, Complainant used the woman's multi-user common restroom because the single-user restroom was being cleaned or out of order. After each incident of using the common women's restroom, Complainant was confronted by a supervisor who told her that she had been observed using the women's restroom, coworkers were uncomfortable with this, and she had to use the single-user restroom until she could provide proof of having undergone the "final surgery." Additionally, during this time period, a team leader repeatedly referred to Complainant by her former traditionally male name, by male pronouns, and as "sir." The team admitted to using male signifiers in reference to Complainant even after he was aware of her gender transition but maintained that his actions were a "slip of the tongue."

Complainant filed an EEO complaint in which she alleged that she was subjected to disparate treatment and a hostile work environment based on her sex when the Agency restricted her from using the common female restroom, and a team leader repeatedly referred to her by her former traditionally male name and called her "sir." After an investigation, the Agency found that Complainant was not subjected to unlawful discrimination or harassment. The Agency reasoned that it had provided legitimate, non-discriminatory reasons for its requirement that Complainant use the single-user restroom, and Complainant failed to show that the explanations were pretext for unlawful discrimination. The Agency maintained that Complainant had agreed to use the single-user restroom, and therefore, management did not deny her access to equal facilities. The Agency further concluded that the team leader's comments were not severe or pervasive enough to constitute a hostile work environment.

In its appellate decision, the Commission noted that the Agency acknowledged that Complainant's transgender status was the motivation for its decision to prevent her from using the common women's restroom. The Commission also noted that its decision in (b)(7)(C) v. Department of Justice, EEOC Appeal No. 0120120821 (April 20, 2012) clearly established that discrimination against transgender individuals because of their gender identity is unlawful sex discrimination. Therefore, the Commission found that there was direct evidence of sex discrimination in this case. The Commission held that when an individual has transitioned to the gender that reflects her or his gender identity, denial of equal access to the restroom consistent with her or his gender identity is sex discrimination under Title VII. The Commission further held that Title VII does not require any particular medical procedure as a prerequisite for equal opportunity and access to facilities. The Commission also held that coworker discomfort, confusion, or anxiety may not justify discriminatory terms and conditions of employment, including the denial of access to particular restrooms.

Regarding Complainant's transition plan with the Agency, the Commission found that any plan with a transitioning employee related to facility access cannot prospectively waive Title VII rights, and the employee retains the right under Title VII to use facilities consistent with her or his gender. Therefore, the Commission found that the Agency subjected Complainant to disparate treatment because of her sex.

Regarding Complainant's harassment claim, the Commission determined that based on witness testimony, the team leader intentionally called Complainant traditionally male names, pronouns, and "sir." The Commission

noted that in emails, the team leader sometimes used male names and pronouns to insult Complainant or convey sarcasm, and witnesses stated that the team leader sometimes laughed when mentioning Complainant in groups and would say her female name with a smirk. The Commission also noted that it has held that supervisors and coworkers should use the name and gender pronoun that corresponds to the gender identity with which the employee identifies, and the failure to use the employee's correct name may constitute unlawful sex-based harassment. (b)(7)(C) v. U.S. Postal Serv., EEOC Appeal No. 0120130992 (May 21, 2013). The Commission found that while inadvertent and isolated slips of the tongue likely would not constitute harassment, in this case, the team leader's conduct was intended to humiliate and ridicule Complainant. As such, the Commission found that the alleged conduct was sufficiently severe and pervasive to subject Complainant to a hostile work environment.

The Commission further found that although Complainant did not report the team leader's harassment to management, the conduct was so pervasive, well-known, and openly practiced in the workplace the Agency should have known about it. Moreover, the Agency negligently failed to take prompt and effective correction action to address the harassment. Therefore, the Agency is liable for the harassment. The Commission further noted that the Office of Special Counsel (OSC) also found that the Agency's actions had discriminated against Complainant based on conduct not adverse to work performance, but the OSC's report specifically noted that it did not make any finding regarding Complainant's entitlement to recover damages under Title VII. The Commission ordered the Agency to immediately grant Complainant equal and full access to common female facilities; to take meaningful and effective measures to ensure that coworkers and supervisors cease and desist from all discriminatory and harassing conduct toward Complainant; to provide Complainant with proven compensatory damages; to provide at least eight hours of EEO training to all civilian personnel and contractors at Complainant's work facility; to provide at least 16 hours of in-person EEO training to all management officials at Complainant's work facility; and to consider taking appropriate disciplinary action against responsible management officials.

(b)(7)(C) **v. SSA**, 0120131593 (04/09/2015) – In February 2013, Complainant filed an EEO complaint alleging that the Agency subjected him to a hostile work environment on the bases of race (African-American) and sex ("gay male") when:

1. On November 28, 2012, a manager told Complainant that one of Complainant's coworkers had told the manager not to speak to Complainant because he is gay. Complainant stated that he became so upset by this incident that he had to leave work early. Complainant stated that later that day he received a text message from the manager apologizing for "getting management twisted with being a friend."

2. On November 29, 2012, the same manager asked him about his relationship status, inquiring whether or not he and another male employee of the Agency were still a couple. Complainant stated that the question made him uncomfortable and he believed it was inappropriate.

On February 19, 2013, the Agency issued a final decision dismissing the formal complaint, pursuant to 29 C.F.R. § 1614.107(a)(1), for failure to state a claim. Complainant appealed.

Citing (b)(7)(C) v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993), we found that harassment is actionable if it is sufficiently severe or pervasive to alter the conditions of the complainant's employment. In this case, we found that a fair reading of Complainant's formal complaint and related EEO counseling materials showed that his complaint was limited to the two incidents that occurred on November 28-29, 2012, as described above. Complainant did not allege that these incidents were part of a larger pattern of harassment, provide a more detailed description of these events, or describe why he was upset with the manager as a result of the incidents. We further noted that Complainant did not submit any argument on appeal to support reversing the Agency's dismissal decision. We concluded that Complainant's allegations, as he presented them, were simply insufficient to state a viable hostile work environment claim and affirmed the Agency's dismissal.

(b)(7)(C) **v. DHS (TSA)**, 0120133009 (05/21/2015) – Complainant was a Transportation Security Officer alleging that she was subjected to discrimination on the basis of disability and denied reasonable accommodation when the Agency did not remove Absent Without Leave (AWOL) indications from her record,

and issued her Letters of Leave Restriction and Reprimand. Complainant appealed an AJ's finding that she was not subjected to disability discrimination or denied reasonable accommodation, which was issued without a hearing.

The OFO decision found that Complainant was issued AWOLs because after returning to work from leave, she did not submit required medical documentation. Next, Complainant was issued Letters of Leave Restriction and Reprimand because she did not follow leave policies on several occasions, including not calling-out a minimum of sixty (60) minutes prior to the scheduled start of her shift. Also, the OFO decision confirmed the AJ's finding that even if Complainant requested reasonable accommodation, she still had to follow the appropriate leave request and justification procedures.

Therefore, the decision concluded that Complainant did not prove by a preponderance of the evidence that she was subjected to disability discrimination or denied reasonable accommodation, and that the AJ properly issued a decision without a hearing.

(b)(7)(C) **v. SSA**, 0120123279 (05/29/2015) – At the time of events giving rise to this complaint, Complainant worked as a Claims Representative at the Agency's Walnut Creek, California, District Office. On April 19, 2009, she filed an EEO complaint alleging discrimination on the bases of race, age, and disability when the Agency denied her request to transfer to a facility closer to her home. The Agency accepted the complaint for investigation. Upon completion of the investigation, Complainant requested a hearing. The AJ assigned to the case issued a summary judgment ruling finding no discrimination. The Agency adopted in full the Agency's decision. Complainant thereafter appealed.

On appeal, the Commission found that the AJ's summary judgment ruling was proper. Regarding the bases of race and age, the Commission found that the Agency proffered a legitimate, nondiscriminatory reason for denying Complaint's request to transfer, that is, Complainant was not transferred because she requested to be assigned to a smaller office whereas the Agency needed her services at an office frequented by more visitors. The Commission found that the Complainant's attempt to prove pretext was supported by nothing more than her own beliefs that the Agency's action constituted race and sex discrimination, which the Commission found insufficient to establish pretext.

Regarding the basis of disability and being denied a reasonable accommodation (Complainant's request to be transferred to an office nearer to her home so she could be closer to her treating sources), the Commission presumed, without so finding, that Complainant was an individual with a disability. The Commission then noted, despite the Agency's denial, the record reflected that Complainant performed at a high level without an accommodation.

The Commission closed by finding that, even though Complainant was not allowed to transfer to an office closer to her home, the Agency expressed a willingness to allow Complainant to use liberal leave on days she believed commuting would be problem. In so doing, the Commission, citing EEOC precedent, noted that liberal leave could be a form of reasonable accommodation. Finally, the Commission reminded Complainant that while she may have been entitled to a reasonable accommodation, she was not entitled to her accommodation of choice.

(b)(7)(C) **v. USPS**, 0120140202 (06/03/2015) – Complainant alleged that the Agency discriminated against her based on her race (African-American), color (light brown), sex (female) (sexual orientation) and reprisal for prior EEO activity regarding her rate of pay and being terminated, and sexual orientation regarding two incidents of harassment. The Agency accepted and investigated Complainant's complaint, except her sexual orientation claims, which it dismissed for failure to state a claim. The Agency reasoned that the EEO process does not have jurisdiction over sexual orientation claims. Following the investigation, in accordance with Complainant's request, the Agency issued a FAD. It found no discrimination. On appeal, OFO reversed the Agency's dismissal of the sexual orientation claims. Citing its precedent, OFO found that Complainant's claim that management took action against her because she had a same sex partner, thus not conforming to her sex stereotype, states a claim within the purview of Title VII. OFO remanded Complainant's case to the Agency for a supplemental investigation on her sex-stereotyping claims. OFO ruled that because the supplemental

investigation could potentially uncover new facts, OFO at this point would not rule on the merits of any of Complainant's claims, and ordered the Agency on remand to provide Complainant the right to request a hearing (on all her remanded bases and claims).

(b)(7)(C) **v. USPS**, 0120140480 (06/10/2015) **[Repeated under Findings below]** – Complainant appealed the Agency's final decision finding no discrimination. Complainant, a Supervisor – Distribution Operations, filed a formal complaint alleging race, sex, and age discrimination and reprisal when, among other things, she was subjected to a hostile work environment by her supervisor. Complainant alleged that she was placed on Emergency Placement and issued other discipline, made to go to EAP and had her confidential medical information disclosed to others. The OFO decision found Complainant failed to establish she was subjected to a hostile work environment, but did establish that management disclosed her confidential medical information when it informed others that Complainant had suffered a breakdown. The OFO decision ordered the Agency to conduct a supplementary investigation into Complainant's entitlement to compensatory damages, and other equitable relief.

(b)(7)(C) **v. USPS**, 0120130043 (06/04/2015) – Complainant, a Data Collection Technician, appealed from an EEOC AJ's decision, issued without a hearing, finding that he was not subjected to disparate treatment race (African-American), sex, disability (carpel tunnel syndrome) or reprisal discrimination.

Complainant's first allegation was that the Agency discriminated against him by not allowing him a 100% extension of time, and a scribe to mark answers for him, in order to complete a data entry exam required for two positions for which he applied. The Agency stated that it provided a more narrowly tailored accommodation, to modify its policy and allow Complainant to reschedule or retake the examination, without penalty, if the pain in his hand prevented him from taking the test. A decision without a hearing on this claim was appropriate because the Agency did provide an effective accommodation.

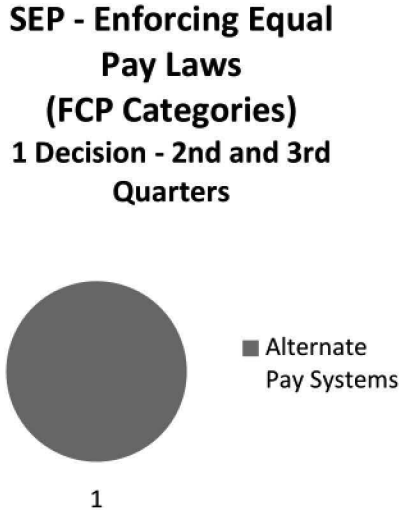
Complainant's second allegation was that the Agency sought to reassign him to a position with undesirable working hours. Complainant was previously removed from the unit in which he worked because some positions were eliminated within that unit. The Collective Bargaining Agreement (CBA) provided that Complainant would need to return to the unit upon the first vacancy, but Complainant did not want to take the position due to working hours; he was informed that his grade and pay would be reduced. The AJ concluded that the circumstances of the reassignment appear to be consistent with the CBA and that Complainant did not show the Agency's reasons to be pretext.

Complainant's third allegation was that he was denied the reasonable accommodation of having a schedule adjustment at work to care for his daughter. The AJ reasoned that the Agency was correct in concluding that the disability of a child did not entitle Complainant to reasonable accommodation. Complainant did not provide arguments or evidence showing that he was subjected to disparate treatment disability discrimination by association with his daughter

Finally, Complainant alleged that his advance request for sick leave, for a medical appointment, was denied due to discrimination. Complainant was initially denied his request for an entire day of sick leave due to staffing needs, but management approved him for 40 minutes of sick leave at the end of his shift to attend the appointment. However, Complainant did not show up for his shift, and instead, reported to work at the end of his shift with a note indicating that he needed to take the entire day off due to dizziness caused by fasting prior to the medical appointment. The AJ concluded that since Complainant was asked to submit prior medical documentation to substantiate an entire day of leave and did not, and was only approved for 40 minutes, the leave was properly marked as "unscheduled."

Complainant did not demonstrate that the Agency's reasons were pretext for discrimination, or that there were genuine issues of material fact in dispute which would require a hearing. Therefore, the AJ's decision, to issue a decision without a hearing, finding no discrimination, was affirmed.

4. ENFORCING EQUAL PAY LAWS



Decision Summary for this Category

(b)(7)(C) **v. Navy**, 0520150044 (03/17/2015) - At the time of events giving rise to the underlying complaint, Complainant worked as a Supervisory Education and Training Technician, Student Control, within the Personnel Management Division in the Agency's Naval Air Technical Training Center in Pensacola, Florida. Complainant filed an EEO complaint alleging that the Agency discriminated against her on the basis of sex (female) and age (52) with regard to the assignment of duties and equal pay for work performed in comparison to other similarly situated employees outside her protected class.

Our prior appellate decision (Appeal No. 0120122462) affirmed the EEOC SJ's decision by summary judgment in favor of the Agency, concluding Complainant failed to prove her discrimination claims. The AJ found that Complainant failed to establish a prima facie case of discrimination under the Equal Pay Act because Complainant could not establish that she had the same or substantially similar job duties as the male supervisors, but was paid less.

The instant decision denied Complainant's request for reconsideration finding that she expressed her disagreement with the previous decision and presented some of the same arguments that she had made on appeal.

(b)(7)(C) **v. USDA**, 0120140620 (06/17/2015) – Complainant, a Loan Specialist, filed an appeal alleging that she was discriminated against on the basis of sex, in violation of the Equal Pay Act, when she received less pay than a male coworker who previously worked in the same office. The Agency found no discrimination. The OFO decision affirmed the agency's decision finding no discrimination. Complainant was at a GS-9 level when a male employee who was at a GS-12 level transferred to a different office. Complainant argued that she assumed the duties of the GS-12 position and should be paid at the GS-12 level. OFO found that the male employee who transferred out of the office performed additional duties that Complainant did not perform and thus Complainant failed to show that she was being paid less than the rate paid to male employees for equal work on jobs that require equal skills and responsibilities.

(b)(7)(C) **v. USDA**, 0120132749 (06/17/2015) – Complainant, an Area Specialist, filed an appeal alleging that she was discriminated against on the basis of sex, in violation of the Equal Pay Act, when she received less

pay than a male coworker. The Agency found no discrimination. The OFO decision affirmed the agency's decision finding no discrimination. Complainant was at a GS-9 level when a male employee was transferred into the office at a GS-12 level. OFO found that the male employee performed additional duties that Complainant did not perform and thus Complainant failed to show that she was being paid less than the rate paid to male employees for equal work on jobs that require equal skills and responsibilities.

(b)(7)(C) **v. TVA**, 0120130592 (06/11/2015) – Complainant, a Performance Analyst, filed an appeal alleging that she was discriminated against on the bases of sex (female) and age (49) when she was not selected for the Program Manager position. Complainant also alleged that she was discriminated against on the basis of sex, in violation of the Equal Pay Act (EPA), when the pay scale for the male Performance Analysts exceeded her pay scale. The Agency asserted that complainant was not selected due to her poor performance in the interview. Regarding the EPA claim, the agency found no EPA violation. The OFO decision affirmed the Agency decision finding no discrimination on either claim. OFO found that Complainant had not rebutted the Agency's reasons regarding not selecting Complainant. OFO noted that the selectee performed well during the interview. Regarding the EPA claim, OFO found that Complainant failed to show that her work was equal to that of the Program Manager or that she was paid less than male Performance Analysts.

(b)(7)(C) **v. NASA**, 0120130493 (06/04/2015) – Complainant, an EEO Specialist, filed an appeal alleging that he was discriminated against on the bases of race (Black), sex (male), age (61), and in reprisal for prior protected EEO activity, when, since September 28, 2008 through December 31, 2010, he was continuously denied a promotion from the GS-13 level to the GS-14 level and above. Complainant also alleged that he was discriminated against on the basis of sex, in violation of the Equal Pay Act (EPA), when he received less pay since September 28, 2009, through December 31, 2010, than a similarly situated female employee. The Agency asserted that Complainant was not promoted due to poor performance including submitting work product with errors. Regarding the EPA claim, Complainant argued that he was denied equal pay when he was not paid what the coworker was paid when she was promoted. The OFO decision found no discrimination on either claim. OFO found that Complainant had not rebutted the Agency's reasons regarding not promoting Complainant and OFO found that Complainant failed to show that he was being paid less than the rate paid to female employees for equal work on jobs that require equal skills and responsibilities.

(b)(7)(C) **v. DOJ**, 0120122928 (06/24/2015) – Complainant, an Electronics Technician Trainee, filed an EEO complaint alleging that she was discriminated against on the bases of race (African American), sex (female), and retaliation when she received a proposal for a suspension, she was denied travel expenses, she was not paid the same rate as male employees, and she was assigned duties of scanning. The Agency issued a decision dismissing the claims regarding the proposed suspension and travel expenses. The Agency found no discrimination on the remainder of the complaint. Complainant appealed and the OFO decision affirmed the Agency decision. OFO found that even if Complainant was appealing the dismissal of a portion of the complaint, the claims were properly dismissed because the suspension was never issued and it merged into a reprimand claim being considered in another complaint. Regarding travel expenses, OFO found Complainant was not aggrieved because she had been reimbursed for those expenses. Regarding Complainant's Equal Pay Act (EPA) claim, OFO found that assuming Complainant established a prima facie case of an EPA violation, the Agency showed that a factor other than sex explained the pay difference. OFO found that Complainant was hired as a trainee at the GS-9 level, but the male employees who were paid at the GS-11 level were in permanent positions. OFO found that Complainant was promoted to the GS-10 level, but that there were only two permanent positions and that there was no permanent GS-11 position open for her. Regarding the work assignments claim, OFO found that Complainant failed to show that other employees were treated more favorably.

5. PRESERVING ACCESS TO THE LEGAL SYSTEM

No significant cases to report under this priority during these quarters.

6. PREVENTING HARASSMENT THROUGH SYSTEMIC ENFORCEMENT AND TARGETED OUTREACH

(b)(7)(C) **v. DOJ (BOP)**, 0720140032 (05/29/2015) – The Agency filed an appeal with the Commission, concurrent with its Final Order, which declined to implement an AJ's decision that the proposed class should be certified. Complainant had filed an EEO complaint in which she alleged that she and all other former and current female employees at the Agency's Federal Correctional Complex (FCC) in Victorville, California had been subjected to a hostile work environment based on sex, due to the extreme inmate harassment that the Agency failed to stop. She also claimed that female employees had been denied "use of force" training. Complainant moved for class certification.

The AJ determined that the proposed class should be certified. The AJ found that the "use of force" training claim identified a specific matter of training, during a specific time period, and was not overly broad, as had been argued by the Agency. She noted that the claim could be further refined in discovery, if necessary. The AJ also found that the class had submitted detailed information to support allegations of widespread, extreme harassment by inmates (consisting of sexually explicit statements, actions (including masturbation), and assault at the hands of inmates housed at the facility), and that the Agency had notice of the hostile work environment and had failed to take sufficient corrective action. The AJ noted that many of the Agency's arguments in opposition to class certification spoke to the merits of the claim, and not to the issue of whether class certification was proper.

The AJ then found that Complainant had established all of the prerequisites for class certification pursuant to 29 C.F.R. § 1614.204(a)(2). There was a common basis of discrimination, sex, and the claims of the class agent were typical of that of the class as a whole. The class complaint met the requirement of numerosity, because at least 87 members had been identified. The class also satisfied the adequacy of representation requirement. The Agency appealed.

The decision affirmed the AJ's finding that the class should be certified. It found that Complainant alleged a sufficiently tailored class comprised of current and former female employees at FCC Victorville, who were subjected to a hostile work environment and who were denied "use of force" training. The decision concurred with the AJ's finding that numerosity was met in that potentially thirteen job classifications were covered, and at least 87 class members had been identified at that point, while Complainant asserted that "well over" 100 class members were possible. The class representative was also found to have the requisite skills and experience to prosecute a class action. The complaint was remanded for further processing by an EEOC AJ.

7. ENFORCEMENT – GENERAL

(b)(7)(C) **v. DHS (ICE)**, 0720140012 (01/28/2015) (A2) – Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of race (Arab), national origin (Lebanese), and in reprisal for prior protected activity with respect to various issues.

Upon completion of an investigation, Complainant requested a hearing before an EEOC AJ. The AJ found that the Agency engaged in unlawful discrimination on the bases of race, national origin, and retaliation with respect to various issues, including Complainant being denied a transfer, being blocked from applying for various positions, and receiving a "minimally successful" rating on four elements in his performance appraisal.

The AJ ordered the Agency to take various actions, including paying Complainant $50,000 in compensatory damages. The Agency issued a final order adopting the AJ's findings of discrimination but rejecting the AJ's amount of compensatory damages. The Agency found $50,000 to be excessive and found $25,000 to be a proper award.

We found that there was substantial evidence to support the AJ's award of $50,000. We noted that in a detailed analysis, the AJ found that the Agency's discriminatory actions negatively affected Complainant's marriage and that Complainant became angry and withdrawn.

Based on the foregoing, we remanded the instant matter to the Agency to pay Complainant $50,000 in non-pecuniary compensatory damages.

(b)(7)(C) **v. DHS (ICE)**, 0120142302 (01/28/2015) (**Repeated under SEP Priority 3 above**) – Complainant worked for a private staffing firm serving the Agency as an Administrative Assistant. She filed a complaint alleging that she was discriminated against based on reprisal when on April 14, 2011, at the direction of the Agency, she was notified by the staffing firm that she was terminated. Following an investigation, Complainant requested a decision without a hearing. The Agency found no discrimination. It found that Complainant did not establish a prima facie case of reprisal discrimination because she was not an employee of the Agency. The EEOC reversed. It found that the Agency exercised sufficient control over the Complainant's position to qualify as her joint employer. Specifically, the EEOC found that the Agency supervised Complainant's daily activities, the Agency had significant input into Complainant's evaluation which was signed by a remote staffing firm supervisor, Complainant worked on Agency premises using Agency equipment, her job of setting up medical appointments went directly to the Agency's mission of caring for immigrants in detention, and the record showed that after the Agency asked the Agency to terminate Complainant's services the staffing firm removed Complainant, evidencing the Agency's de facto removal authority. The EEOC found that the factors the Agency did not control – paying and taking care of Complainant's compensation, were outweighed by the above factors.

In finding discrimination, the EEOC noted that very shortly after Complainant participated as a witness in a sexual harassment investigation against an Agency manager, the manager told the staffing firm it did not want Complainant's services. The record indicated that the Agency manager told the staffing firm Complainant was creating a hostile work environment, albeit she did not provide a statement. Another manager, who was in a position to know, stated the above manager's complaints were unjustified and unfounded. As remedy, the EEOC ordered in part back pay and the calculation of compensatory damages. It did not order the Agency to attempt to restore Complainant's joint employment by requesting that the staffing firm rehire Complainant to continue serving the Agency, or to pay front pay. It reasoned that shortly after a private sector EEOC Mediation Agreement with her staffing firm, Complainant entered into a supplemental agreement therewith waiving any right to re-employment or future referral with or through the staffing firm. It also cited some case law.

(b)(7)(C) **v. Education**, 0120120836 (01/09/2015) – Complainant worked as an Education Program Specialist, GS-13 at the Agency's Office of Elementary and Secondary Education located in Washington, DC. On March 26, 2009, she filed an EEO complaint alleging discrimination alleging discrimination on the bases of sex, age, and reprisal when she was given a lowered performance appraisal in 2007, not selected for two GS-14 positions; one a Education Program Specialist position, the other a job as an Analyst, and was given a new position description. She requested a hearing; the AJ found no discrimination. The Agency adopted in full the AJ's findings. On appeal, the Commission affirmed in part and reversed in part the Agency's decision.

Specifically, the Commission found that Complainant failed to prove discrimination regarding her performance appraisal because she herself admitted that the work she submitted in 2007 could have used some improvement. The Commission further found that Complainant failed to prove discrimination regarding the Analyst position because the Selectee had relevant experience in four of the databases used by the Agency whereas Complainant had experience in only one. The Commission also found that Complainant's position description was changed because the Agency had undergone a re-organization. In so doing, the Commission noted that everyone in Complainant's office except one had their position description changed.

The Commission also found, however, that Complainant did prove discrimination based on sex, age, and reprisal when she was not selected for the Education Program Specialist position. The Commission reasoned that because (1) the Agency had destroyed its interview notes, (2) Complainant was rated more qualified than Selectee by almost ten percentage points, and (3) two of the four members on the interview panel expressed concern about age discrimination and retaliation with a third expressing ambivalence, it was more likely than not Complainant's nonselection was motivated by discriminatory animus.

Based on its findings, the Commission ordered the Agency to offer Complainant a substantially equal position, pay attorney fees and back pay, conduct a supplemental investigation regarding compensatory damages, and provide training to the selecting official on his obligations under Title VII and the ADEA.

(b)(7)(C) **v. DOJ**, 0120123408 (01/16/2015) – Complainant filed an appeal from an Agency decision finding that Complainant was discriminated against on the basis of age when she was transferred and was not discriminated against on the bases of race (African-American) and sex (female) for the same claim. The Agency found that the responsible management official's explanation was inconsistent and that the reasoning appeared to be a pretext for age discrimination. On appeal, Complainant argues that she was also discriminated against on the bases of race and sex. OFO affirmed the finding of age discrimination and OFO noted that Complainant was not challenging the remedies for the finding of age discrimination. OFO affirmed the finding of no race and sex discrimination. OFO found no indication that the transfer was motivated by sex or race. OFO ordered the Agency to restore Complainant to the position from which she was transferred, provide EEO training to responsible management officials, consider disciplining the responsible management officials, and post a notice of the finding of discrimination.

(b)(7)(C) **v. USPS**, 0120132873 (01/28/2015) – Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of sex (female), disability, age (51), and in reprisal for prior protected EEO activity when she was denied a lateral transfer and placed in emergency placement status. Post hearing, an EEOC AJ determined that Complainant had not been subjected to sex discrimination or retaliation but that the Agency failed to provide Complainant reasonable accommodation from August 6, 2011 to October 21, 2011 by denying her request for a lateral transfer to a vacant Postmaster position. The AJ awarded Complainant $20,000.00 in non-pecuniary compensatory damages. In addition, the AJ ordered that the Agency provide training to the responsible management officials and post a notice. When the Agency did not issue a final order within 40 days of receipt of the AJ's decision, the AJ's decision became the final action of the Agency. Complainant appealed, petitioning the Commission to enforce the Agency's final action. On appeal, OFO determined that there was no evidence that the Agency had complied and therefore ordered the Agency to do so.

(b)(7)(C) **v. DHS**, 0120140085 (01/15/2015) – Complainant filed an appeal from an Agency decision finding that Complainant was not discriminated against on the basis of race (African-American) and sex (male) when management changed his job duties and job title and moved his work site. The Agency found that the responsible management official (RMO) did not provide an affidavit during the investigation because the RMO had left the Agency. The Agency found that the EEO Counselor's report reflected that the RMO had taken the action because of the needs of the Agency and because the special project to which Complainant was moved was more important to the Agency than the duties he had been performing. OFO reversed the Agency and found race and sex discrimination. OFO found that Complainant had been replaced by a White, female employee and that the Agency had not articulated a legitimate, nondiscriminatory reason. OFO also noted that affidavits in the record by coworkers supported Complainant's belief that the Agency actions were motivated by race and sex discrimination. OFO ordered the Agency to investigate whether Complainant is due compensatory damages, offer Complainant the same position from which he was removed if he was still employed by the Agency, provide EEO training to responsible management officials, consider disciplining the responsible management officials, and post a notice of the finding of discrimination.

(b)(7)(C) **v. USPS**, 0120132250 (02/20/2015) **[Repeated under SEP #3]** – Complainant, a mail carrier, appealed the Agency's decision finding that he was not denied reasonable accommodation or subjected to disparate treatment disability discrimination because of his race (Arabic), religion (Muslim), national origin (Syrian), or disability (high blood pressure and anxiety). Complainant alleged discrimination because he was ordered to stop casing his mail prior to delivering it, which was an accommodation he was previously provided to help manage his anxiety. Further, Complainant alleged discrimination in not being provided with eight hours of light duty work per day while his request for reasonable accommodation was pending.

The Commission found that Complainant established he was denied a reasonable accommodation because the Agency did not show that Complainant could not perform the essential functions of his job if he were provided a reasonable accommodation of casing his mail prior to delivering it, nor that providing the accommodation would create an undue hardship. However, the Commission found that Complainant did not establish that he was denied reasonable accommodation when denied eight hours of light duty work because the Agency was not obligated to create work for Complainant.

Also, the Commission found that Complainant failed to establish that he was subjected to disparate treatment discrimination because he offered no rebuttal to the Agency's legitimate, nondiscriminatory reasons for ordering him to stop casing mail prior to delivering it, and denying him eight hours of light duty work per day. The Agency stated that casing mail is generally not allowed and other carriers were also prohibited from casing their mail prior to delivering it. Further, the Agency stated that they did not provide Complainant with eight hours of light duty work per day while his reasonable accommodation request was pending because Complainant's medical documentation did not stipulate his medical limitations such that the agency could find suitable work, and eight hours of light duty work was not available.

The Agency was ordered to provide Complainant with a reasonable accommodation to allow him to perform the essential functions of his carrier position and provide him with back pay and benefits, in addition to other remedies.

(b)(7)(C) **v. HUD**, 0720130029 (02/12/2014) **[Repeated under SEP #3 above]** – Complainant is a GS-13 Financial Analyst assigned to the Agency's Minneapolis, Minnesota Field Office diagnosed with Ankylosing Spondylitis, a permanent inflammatory disease that that can cause some of the vertebrae in the spine to fuse together, making the spine less flexible and resulting in a hunched-forward posture. Complainant moved from the Twin Cities area to Madison, Wisconsin, which is approximately a five hour drive from the Minneapolis Field Office. Complainant commuted the distance from his home to the Minneapolis office for 44 weeks but the long commute exacerbated his medical condition. Consequently, Complainant requested that the Agency provide him with a reasonable accommodation by allowing him to telework 100 percent of the time, or alternatively, to report to the Agency's Milwaukee office one day per week and telework three days per week. Complainant worked ten hours per day. Complainant supported his request with medical documentation that revealed that his medical condition rendered him unable to commute the very long distance from his Madison home to Minneapolis on a regular basis.

The Agency denied Complainant's request on the basis that not all of the essential functions of Complainant's job could be performed from a remote location; Complainant's requested accommodation would require removal of essential job functions; and commuting to work is not a major life activity. Nevertheless, the Agency assigned Complainant to a detail assignment at the Office of Field Operations Energy Center in Milwaukee, Wisconsin, which was within a reasonable commuting distance from Complainant's home. While on detail, Complainant worked a schedule that featured teleworking three times per week and working in the office once a week, with 10-hour workdays. Eventually, the Agency ordered Complainant to return to work at the Minneapolis office once a week, but Complainant used leave on those days instead of reporting to the Minneapolis office. Complainant then filed an EEO complaint in which he alleged that the Agency discriminated against him on the basis of disability (Ankylosing Spondylitis) when beginning on August 27, 2010, the Agency denied him a reasonable accommodation for his disability.

At the hearing, the parties stipulated that Complainant is an individual with a disability. The AJ determined that Commission precedent has established that a request for a shorter commuting time because of a disability triggers the Agency's responsibility to provide a reasonable accommodation. The AJ further concluded that the

Agency's partial accommodation of allowing Complainant to telework three days a week and report to the Minneapolis once per week was ineffective because requiring Complainant to report to Minneapolis required him to drive a long distance each week, which caused additional damage to his spine. The AJ also found that, contrary to the Agency's assertion, the accommodations requested by Complainant would not have eliminated essential functions of his job. The AJ concluded that the record demonstrated that Complainant was able to perform his job duties without reporting to the Minneapolis office, as reflected by his "fully successful" rating for the period November 1, 2010, through September 30, 2011. The AJ reasoned that, while working collaboratively with colleagues on projects, training and mentoring other employees, and attending meetings may be essential functions of the job, doing so in-person is not an essential function. The AJ noted that meetings can be attended by telephone, videoconferencing, or desktop sharing. Thus, the AJ found that the Agency failed to provide Complainant with a reasonable accommodation for his disability.

The AJ ordered the Agency to provide Complainant with a reasonable accommodation of telecommuting 100 percent of the time, or alternatively, teleworking three days per week and working one day per week at the Milwaukee office; pay Complainant's $15,000 in non-pecuniary compensatory damages; restore all leave Complainant took to avoid driving to Minneapolis; provide EEO training to all managerial and supervisory employees at its Minneapolis office; and remove a reprimand related to the denial of reasonable accommodation from all personnel files.

On appeal, the Commission determined that substantial evidence supported the AJ's finding and affirmed the Agency's final order. In so finding, the Commission noted that the fact that Complainant received a "fully successful" annual evaluation while telecommuting 100 percent of the time greatly undermined the Agency's contention that his inability to report to the Minneapolis office created an undue burden on the Agency. The Commission also reminded the Agency that the federal government is charged with the goal of being a "model employer" of individuals with disabilities, which may require it to consider innovation, fresh approaches, and technology as effective methods of providing reasonable accommodations.

(b)(7)(C) **v. TVA**, 0120093256 & 0120111968 (02/20/2015) **[Repeated under Hiring and ADA SEP categories above]** – Complainant, who is blind in his left eye, works as a journeyman electrician, alleged that he was discriminated against on the basis of disability when he was not allowed to work as a dual-rate foreman on numerous occasions; not allowed to travel to Sequoyah Nuclear Plant in support of a tanker rebuild; and not selected for a permanent foreman position.

In 2004 the Agency required all employees in the electrician and the electrician foreman positions to possess and maintain a seven-state Class B Commercial Driver's license (CDL) pursuant to Department of Transportation (DOT) Regulations. These regulations require individuals to pass an S5 medical examination which requires, amongst other things, binocular vision (vision in both eyes). Complainant's vision impairment made him unable to pass the S5 medical examination, and therefore Complainant was unable to obtain a Class B CDL pursuant to DOT regulations. The Agency notified Complainant that he would be "grandfathered" into his permanent position as a journeyman electrician even though he couldn't pass the S5 medical examination. Complainant was permitted to serve as a dual-rate foreman on numerous occasions after he was grandfathered into his position, however on December 14, 2007, the Agency notified Complainant that he would no longer be permitted to serve as a dual-rate foreman because the "grandfathering" provision restricted Complainant to his permanent position as an electrician.

In its final decision, the Agency asserted that Complainant's inability to obtain a seven-state CDL resulted in him not being able to perform the essential functions of the dual-rate foreman positions because foremen must be able to respond to emergency situations 24 hours per day and may be required to transport Commercial Motor Vehicles across state lines to the emergency site.

We found that Complainant requested a reasonable accommodation. The Agency did not dispute that Complainant was an individual with a disability. We noted that a review of the record reveals that Complainant met all of the Agency's job requirements for the foreman position except for its requirement that his vision conform to the requirements set forth in the DOT regulations.

To determine whether the Agency's vision standard was job related and consistent with business necessity, we did a direct threat analysis. We noted that the Commission has previously held that an Agency cannot depend

solely on the DOT regulations at issue in this complaint to determine that an individual is not qualified for a position, and the Agency must conduct an individualized assessment of the individual to determine if they pose a direct threat. We found that the Agency failed to conduct an individualized assessment of Complainant to determine if he is qualified for the position. The record established that there were no safety concerns with Complainant working as a foreman, and he was able to obtain a Tennessee CDL which allowed him to drive commercial vehicles intrastate.

We next analyzed whether driving a commercial vehicle interstate was an essential function of the position. Complainant and his supervisor both stated that driving interstate was not a regular function of the foreman position, and Complainant never had to drive interstate when he acted in the position.

We found that the Agency failed to establish that Complainant is a direct threat or that providing Complainant with the accommodation of waiving the S5 medical examination or removing the driving requirement altogether would cause an undue hardship. As a result, the Agency violated the Rehabilitation Act when it did not reasonably accommodate his disability.

We also found that the Agency subjected Complainant to disparate treatment in violation of the Rehabilitation Act when it did not allow him to serve as a dual-rate foreman, when it did not select him for the permanent foreman position, and when it did not allow him to perform work at the Sequoyah Nuclear Plant.

We ordered the Agency to offer Complainant a permanent foreman position, accommodate his disability by waiving the S5 medical requirement or waiving the requirement that he drive commercial vehicle interstate, determine back pay, determine compensatory damages and attorney's fees and costs, consider disciplinary action, provide 8 hours of training to all management officials, and post a notice of discrimination.

(b)(7)(C) **v. DOT**, 0120120933 (Feb. 20, 2015) – After Complainant became medically disqualified from her Air Traffic Control position, the Agency sought to place her in different positions but ultimately terminated her employment. Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of race (African-American), sex (female), disability, age (51), and in reprisal for prior protected EEO activity. A hearing was held before an EEOC AJ, who found the Agency liable for disability discrimination for failing to reasonably accommodate Complainant by transferring her into a secretarial position. The AJ ordered remedies, including back pay, attorney's fees and $45,000.00 in non-pecuniary compensatory damages. In its final order, the Agency fully implemented the AJ's decision.

Complainant appealed arguing that she was entitled to $300,000.00 in compensatory damages and more back pay. On appeal, OFO increased the compensatory damage award to $60,000.00 due to Complainant's acute exacerbation of severe anxiety and depression, hair loss, weight gain, sleeplessness, and migraines, as evidenced by her medical records. However OFO agreed with the AJ and the Agency that Complainant had failed to prove she was entitled to back pay for a J-Level position.

(b)(7)(C) **v. Air force**, 0520140092 (02/13/2015) **[Repeated under SEP #3 above]** – Complainant, an HR Assistant, alleged that her supervisor subjected her to discrimination and harassment based on her sex and pregnancy; namely, that upon staring her position, her supervisor threatened her with termination, denied her leave for pre-natal care, disabled her government e-mail account, and ultimately terminated her. Complainant stated that that the Agency subsequently rescinded her termination months later, but did not assign her to a different supervisor. Complainant stated that because the Agency refused to grant her request to be assigned to a different supervisor, she was had no choice but to resign, resulting in a constructive discharge. After an investigation and hearing, the AJ assigned to the case found that Complainant failed to establish discrimination.

Complainant filed an appeal to the Commission, which was dismissed for failing to meet the 30-day time limitation. On reconsideration, Complainant argued that our previous decision erred in dismissing her appeal. We found that Complainant's request failed to meet the criteria of 29 C.F.R. § 1614.405(c). However, upon our own motion, we reopened our previous decision, finding that Complainant's appeal was timely as the record currently reflected. We therefore vacated our previous decision.

In addressing the merits, we found that the supervisor's reasons for Complainant's termination were unworthy of belief and pretext for discrimination based on Complainant's sex and pregnancy. In so finding, we noted that the supervisor denied Complainant leave for pre-natal appointments and sickness, and several employees attested that the supervisor did not treat women as well as men. We also noted that Complainant was threatened with termination even on her first day, and a coworker was coerced into accusing Complainant of wrongdoing. We additionally found that Complainant established that she was subjected to a hostile work environment and subsequently constructively discharged when the Agency canceled her termination, but failed to assign her to a different supervisor. We concluded the AJ's decision was not supported by substantial evidence in the record. As a result, we found that the Agency violated Title VII as well as the Pregnancy Discrimination Act.

(b)(7)(C) **v. DHS**, 0720130024 (02/12/2015) – Complainant, a long term federal employee, worked as an Investigative Assistant at the Texas Service Center under the auspices of the Federal Career Internship Program. She filed an EEO complaint in which she alleged that the Agency discriminated against her on the basis of age (61) by not converting her into career status and terminating her employment. A hearing was held before an EEOC AJ, and on September 23, 2011, the AJ issued a decision finding in Complainant's favor and ordering remedies, including $14,000.00 in compensatory damages. In its final order, the Agency fully implemented the AJ's finding of discrimination but not the complete remedy. The Agency contends that the AJ erred in awarding compensatory damages. On appeal, OFO agreed with the Agency, noting that Complainant is not entitled to compensatory damages since her claim was brought exclusively under the Age Discrimination in Employment Act of 1967.

(b)(7)(C) **v. DOC (NOAA)**, 0120120157 (03/24/2015) – Complainant alleged that the Agency discriminated against him on the bases of age and reprisal for prior protected activity when his supervisor issued him a letter of counseling (LOC). Complainant also alleged that the LOC was part of a pattern of harassment. Following an investigation of his complaint, Complainant requested issuance of a decision by the Agency.

In its decision, the Agency determined that Complainant established a prima facie case of reprisal because the LOC was issued three months after his protected activity of which the responsible officials were aware. The Agency also determined, however, that Complainant failed to establish a prima facie case of age-based disparate treatment. In so finding, the Agency noted that Complainant failed to show that similarly situated employees who were younger than he was were not issued an LOC.

The Agency found that Complainant failed to show that he was subjected to a hostile work environment by failing to show that he was subjected to severe and pervasive conduct. The Agency also concluded that it had articulated a legitimate, nondiscriminatory reason for its issuance of the LOC, i.e., Complainant's conduct and Complainant failed to show pretext.

We reversed the decision in part. We found discrimination on the basis of reprisal and also found that Complainant failed to show by a preponderance of the evidence that he was not subjected to age-based discrimination or to a hostile work environment.

In finding discrimination, we found that the reason for issuing the LOC was pretextual. We reasoned that Complainant was an outspoken employee who was not timid about voicing his opinion and that the Agency used Complainant's outspokenness to mask its real reason for disciplining him. We found the incidents identified by the Agency as evidence of Complainant's alleged misconduct were pretextual. We noted that regarding one of the incidents, only Complainant was disciplined and not the other employee who was involved. We also noted that in issuing the discipline, the Agency had failed to follow its own Resource Guide concerning misconduct. The Agency's portrayal of Complainant's conduct was also at odds with his personnel evaluations.

(b)(7)(C) **v. USPS**, 0120122130 (03/11/2015) – Complainant filed an appeal from an agency decision finding that Complainant was not discriminated against on the basis of disability (deaf) and retaliation when Complainant was terminated and when she was not reasonably accommodated by being provided a sign

language interpreter for meetings including safety talks. The Agency found that Complainant was terminated because she failed to timely deliver the mail, did not inform management of her failure to deliver the mail, and apparently deliberately hid the mail. The Agency found that although Complainant was a qualified individual with a disability, the Agency did not believe it was necessary to provide complainant with an interpreter because Complainant did not request one and the Agency thought she understood the content of the talks. OFO affirmed the finding of no discrimination on the termination claim and reversed the finding of no disability discrimination for the reasonable accommodation claim. OFO found that Complainant did not rebut the reasons for the termination, but that the Agency was obligated to provide an interpreter for work meetings as a reasonable accommodation even if Complainant did not request an interpreter. OFO ordered the Agency to investigate whether Complainant is due compensatory damages, provide Complainant with sign language interpreter at meetings and safety talks, provide EEO training to responsible management officials, consider disciplining the responsible management officials, and post a notice of the finding of discrimination.

(b)(7)(C) **v. DOJ**, 0120122878 (03/27/2015) – Complainant, a Legal Administrative Specialist working for the FBI in Winchester, Virginia, alleged the Agency subjected him to religious discrimination. Specifically, Complainant alleged that his supervisor failed to assist him with his Performance Improvement Plan (PIP), gave him excessive work, gave him an unacceptable performance rating, and improperly recommended him for termination. Complainant also alleged that his supervisor made disparaging comments about his Christianity and that he was forced to resign, amounting to a constructive discharge. At the conclusion of the investigation, the Agency issued its final decision, finding that Complainant failed to establish he was subjected to discrimination based on his religion as alleged. On appeal, we found that the supervisor had made a statement to Complainant which established that Complainant's Christian faith was a motivating factor in the decision to give him an unacceptable rating and recommending his termination. We found the supervisor's statement to Complainant to be direct evidence of a discriminatory motive. We conducted a "mixed motive" analysis, finding that Complainant was not entitled to personal relief because the Agency would have given him his performance rating and recommended him for termination, among other things, even if it had not considered his religion. Additionally, we found that Complainant failed to establish intolerable working conditions that amounted to a constructive discharge. We reversed the Agency's final decision, finding that Complainant established that he was subjected discrimination as alleged. However, we found that Complainant was not entitled to compensatory damages, and ordered the Agency to provide EEO training and to consider disciplining the responsible management official due to the mixed-motive finding.

(b)(7)(C) **v. DOJ (DEA)**, 0120123094 (03/09/2015) – Complainant filed an appeal from an Agency decision finding that Complainant was not discriminated against on the basis of sex (male) and retaliation (for the Criminal Investigator position only) when Complainant was not reassigned per the Married Core Series Transfer Policy and was not selected for the positions of Supervisory Special Agent and Criminal Investigator (Group Supervisor). The Agency found that although no reason was provided for the denial of reassignment, other circumstances indicated that discrimination did not occur including the fact that the Career Board included representatives from Human Resources, Inspector General, and Equal Employment Opportunity Offices. Regarding the nonselections, the Agency found that Complainant was not plainly superior to the selectees and that his expertise was in technology rather than in day to day operations. OFO affirmed the findings of no discrimination on the nonselections and reversed the finding of no sex discrimination for the reassignment claim. OFO found that Complainant has established a prima facie case of sex discrimination for the denial of the reassignment and that the Agency did not provide any legitimate, nondiscriminatory reason that Complainant could rebut. OFO ordered the Agency to investigate whether Complainant is due compensatory damages, offer Complainant the denied reassignment, provide EEO training to responsible management officials, consider disciplining the responsible management officials, and post a notice of the finding of discrimination.

(b)(7)(C) **v. DOC (NOAA)**, 0120130553 (Mar. 24, 2015) – Complainant, a Physical Scientist, filed a complaint alleging harassment based on his race (African-American/Black), and regarding latter incidents, also reprisal for prior EEO activity. Following an investigation, and five day hearing before an AJ, the AJ issued a decision which was adopted by the Agency. On Complainant's racial claim the AJ found that Complainant's supervisor's (S1) behavior, much of which was heated yelling, was motivated by irritation with Complainant not doing his work (often intentionally) and not race discrimination, except one incident where the supervisor went too far and said things with racial overtones. OFO found this was supported by substantial evidence, and affirmed the AJ's finding that the incident with racial overtones -- comments about Complainant's ability to read and write, standing alone did not rise to the level of actionable harassment. Regarding Complainant's reprisal claim, the AJ found that on November 14, 2008, another supervisor pressured Complainant to withdraw his complaint in a conversation by, among other things, telling him someone else who filed a complaint was completely shunned, and the same thing would happen to him. The AJ found that S1 asked the other supervisor to talk to Complainant about his complaint, and found both were perpetrators of this reprisal. OFO did not disturb this finding.

(b)(7)(C) **v. USPS**, 0720120041 (03/12/2015) – Complainant filed an EEO complaint in which he claimed discrimination based on sex, age, and reprisal when he was terminated from his position as a Carrier Technician for violating a Last Chance Agreement (LCA). Complainant missed a collection box when delivering his route, and the Agency cited this infraction as grounds to invoke termination under the terms of the LCA. After holding a hearing, the AJ found no discrimination on sex or age, but found that Complainant had established discrimination based on reprisal. The AJ found that Complainant had shown the Agency's reasons for his termination to be pretext for discrimination. Complainant demonstrated that a missed collection box was not the type of infraction to incur discipline, that neither of the involved supervisors had ever issued so much as a letter of warning for a missed collection box, that in 16 years the union steward had never heard of anyone being disciplined for a missed collection box, and that the Agency exaggerated its concern over the potentially delayed mail in order to terminate Complainant.

The decision affirmed the AJ's findings that Complainant had been discriminated against based on reprisal. The decision also rejected the Agency's arguments that the U.S. Supreme Court's decision in University of Texas Southwestern Medical Center v. Nassar, 570 U.S. ___, 133 S.Ct. 2517 (2013) necessitated reversal of the decision. It noted that, under prior Commission precedent, the Commission has held that that the "but for" standard discussed in Nassar 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 contain the "because of" language on which the Supreme Court based its holdings in Nassar and in Gross v. FBL Financial Services, Inc., 557 U.S. 167 (2009). The decision affirmed the AJ's award of non-pecuniary compensatory damages in the amount of $10,000. It also ordered the Agency to offer reinstatement to his position (to the extent it had not already done so under the interim relief provisions); provide back pay and benefits; provide training to the discriminatory officials; consider discipline; and post a notice of the finding of discrimination.

(b)(7)(C) **v. SSA**, 0720130027 (03/04/2015) – Complainant worked as a Service Representative Trainee, GS-7, at the Agency's Field Office in Dothan, Alabama. In spite of positive observations by his mentor, who reviewed all of Complainant's work and interacted with him daily, the Operations Supervisor held an "optional performance discussion" with Complainant. The discussion noted that Complainant failed to take notes as recommended, made errors that could be minimized with an increased reliance on reference materials, responded defensively to feedback, and did not exhibit a positive relationship with his work unit. Complainant's mentor was not consulted for the discussion. Complainant refused to sign the discussion, and believing he was subjected to discrimination, he spoke with a union representative who provided him with EEO information. The Operations Supervisor observed their conversation and was aware that the union rep assisted employees with EEO matters. Days later, the Operations Supervisor met with Complainant for another performance discussion, finding Complainant was not fully meeting the two elements for his position. Complainant was then placed on a Training Assistance Plan (TAP).

Approximately two weeks after filing his EEO complaint, Complainant was terminated. Believing the termination was retaliatory, Complainant added the issue to his complaint.

The case went before an EEOC AJ and a hearing was held. The AJ found that, more likely than not, Complainant was terminated in reprisal for having filed an EEO complaint. Throughout his decision, the AJ noted that she did not find the Operations Supervisor to be credible.

On appeal, the Commission affirmed the AJ's finding of discrimination. OFO awarded Complainant the opportunity to complete the remainder of his probationary period (with different managers) or receive two years of front pay; back pay; $25,000 in non-pecuniary compensatory damages; and approximately $40,000 in attorney's fees.

(b)(7)(C) **v. Army**, 0120111132 (04/10/2105) – Complainant worked as a Supervisory Health Systems Technician (HST) in the Administrative Support Division, Department of Preventative Medicine (PM Department), Womack Army Medical Center (WAMC), Fort Bragg, North Carolina. She filed a complaint that alleged she was discriminated against based on race, sex and reprisal when: on January 17, 2008, she was issued a rating of "1" on her National Security Personnel System (NSPS) Appraisal; and on June 13, 2008, she was changed to a lower grade. After a hearing, an EEOC Administrative Judge (AJ) found discrimination regarding claim (1), but not claim (2). The Agency adopted the AJ's decision. Complainant filed an appeal concerning claim (2).

On appeal, Complainant argued that the AJ erred in making credibility determinations and in finding that she was not discriminated against. The Commission affirmed the AJ's determination that Complainant failed to establish that she was discriminated or retaliated against when she was changed to a lower grade. The AJ found that Complainant failed to establish a prima facie case of discrimination based on race or sex. However, the AJ found that Complainant established a prima facie case of reprisal, and that that the Agency met its burden of providing a legitimate nondiscriminatory reason for its actions, i.e., Complainant received a lower grade for failing to satisfactorily meet her performance standards. The AJ found that a management official credibly testified that she did not believe that Complainant was qualified for the HST position.

In its decision, OFO found that Complainant did not offer sufficient evidence to show that the AJ's credibility determination should not have been accepted. Further, the Commission noted that nothing in the record demonstrated that the AJ's credibility determinations represented an abuse of discretion. Additionally, the Commission concluded that the AJ's finding of no retaliation with regard to claim 2 was supported by substantial evidence in the record.

(b)(7)(C) **v. USPS (Southeast)**, 0120112516 (04/02/2015)**(This summary is repeated under SEP 3 above)** – Complainant alleged, in pertinent part, that the use and retention of his confidential medical information by the Acting Supervisor (S1) and the Manager (S2) violated the Rehabilitation Act. The AJ found the following facts: Complainant's union representative gave S2 Complainant's psychological evaluation as an attachment to Complainant's workers' compensation form. S2 performed a cursory review of the documentation, drafted a controversion of the claim, and forwarded the documentation to the Medical Unit. S2 kept a copy of the documentation in her locked office. S1 also reviewed the documentation and kept a copy of it in an unofficial personnel file he believed he was required to maintain as a supervisor. When his supervisory detail ended, S1 took the documentation home and kept it in his personal possession. The AJ issued a decision, after a hearing, finding that S1's actions – but not S2's actions – violated the Rehabilitation Act. The AJ ordered the Agency to provide EEO training to the management officials assigned to the station. The AJ, however, found that an award of damages was not warranted because there was no evidence of harm. The Agency issued a final order implementing the AJ's decision.

OFO, in its appellate decision, found that substantial evidence in the record supported the AJ's finding that S1's actions – but not S2's actions – violated the Rehabilitation Act. Regarding S1, OFO found that the record reflected that S1 failed to maintain Complainant's medical information in a non-medical file. Regarding S2, OFO found that Complainant failed to demonstrate that S2 disclosed his medical information to an unauthorized person or placed his medical information in a non-medical file.

OFO modified the AJ's remedies. Specifically, OFO remanded the issues of compensatory damages and attorney's fees to the AJ after finding that Complainant established his claim of disability discrimination and that Complainant did not have an opportunity to present evidence on damages at the hearing. In addition, OFO ordered the Agency to remove all documentation containing Complainant's confidential medical information from any non-medical file in S1's possession. Finally, OFO ordered the Agency to provide EEO training to S1 and to consider taking appropriate disciplinary action against S1.

(b)(7)(C) **v. VA**, 0120123044 (04/10/2015) – Complainant, a Patient Services Assistant for the West Los Angeles VA Medical Center, filed a complaint alleging that the Agency harassed her and retaliated against her when the Human Resources Specialist asked Complainant to rewrite a Report of Contact in a sex harassment investigation and threatened to reinstate Complainant's Last Chance Agreement, if Complainant refused to redo her witness statement. The Agency found that Complainant failed to establish her claim of harassment; but the Agency did determine that the Agency committed a per se reprisal violation when the Human Resources (HR) Specialist insisted that the complainant rewrite her statement with regard to a pending sex harassment investigation. On appeal, OFO affirmed the finding of a per se violation with regard to three of Complainant's six claims. OFO found that the HR Specialist's actions were reasonably likely to deter Complainant and others from engaging in the EEO process. We found the finding of a per se violation was supported by the evidence, because the Agency failed to take steps earlier to effectively address the workplace claims of sex harassment. This evidence was buttressed by the HR Specialist's interference in the wording of Complainant's statement, and the Agency's acknowledged unlawful disclosure of Complainant's EEO claims. OFO determined that it was unnecessary for us to further address Complainant's alternative claim of a hostile work environment. Based on the found discrimination, OFO ordered the Agency to provide Complainant with full, make-whole relief, to conduct a supplemental investigation to determine the amount of compensatory damages due to the complainant and to provide training to identified managers.

(b)(7)(C) **v. DOJ**, 0120123467 (04/03/2015) – Complainant filed an appeal from an Agency decision finding that Complainant was discriminated against on the basis of disability and retaliation when the Agency failed to accommodate Complainant's disabilities, disclosed confidential medical information about Complainant, and denied Complainant a within grade increase. Complainant's also appealed the Agency's decision finding that Complainant was not discriminated against on the bases of disability and retaliation when the Agency failed to accommodate Complainant's disabilities (in part), disclosed confidential medical information about Complainant (in part), subjected Complainant to a hostile work environment, and denied Complainant a promotion. A hearing was held by an EEOC Administrative Judge (AJ). The AJ found discrimination in part and the Agency adopted the AJ's decision. On appeal, Complainant argues that the AJ erred in finding no hostile work environment, erred in the damage award, and erred in denying leave restoration. OFO affirmed the findings of discrimination and no discrimination and noted that the Agency did not argue that Complainant was not disabled. OFO affirmed the AJ's award of $50,000 for nonpecuniary, compensatory damages. OFO found that Complainant should be awarded 50% of the claimed past, pecuniary damages because only half of the claimed damages were attributable to the findings of discrimination. OFO awarded $1,944.48 in past pecuniary damages. OFO agreed with the AJ that Complainant failed to show a nexus between her request for future pecuniary damages (for treatment) and the discrimination. OFO denied Complainant's request to restore leave because OFO found that she failed to show that she took leave because of the discrimination. OFO ordered the Agency to pay $50,000 in nonpecuniary, compensatory damages, pay $1,944.48 in past pecuniary damages, provide back pay for the denied within grade increase, provide EEO training to and consider disciplining responsible management officials, and post a notice of the finding of discrimination.

(b)(7)(C) **v. USPS**, 0120131897 (04/15/2015) – Complainant worked as a Mail Processing Equipment Mechanic at the Processing and Distribution Center located in Palatine, Illinois. In a decision issued January 31, 2013, an AJ found that the Agency discriminated against Complainant on the basis of religion

when he was rated ineligible for an Electronics Technician, ET-10 position. The AJ awarded retroactive placement, back pay and other benefits due and $500.00 in non-pecuniary compensatory damages. On March 5, 2013, the Agency took final action, fully adopting the AJ's findings and order for remedial relief. Complainant appealed, petitioning the Commission to enforce the Agency's final order. On appeal, OFO determined that there was no evidence that the Agency had complied and therefore ordered the Agency to do so.

(b)(7)(C) **v. USDA (OCFO)**, 0120132105 (04/24/2015) – Complainant alleged that the Agency discriminated against her when it did not select her for the position of Financial Management Assistant, GS-0503-07. The Agency issued a final decision finding no discrimination.

OFO, in its appellate decision, reversed the Agency's final decision and found discrimination. Initially, OFO found that Complainant established a prima facie case of discrimination on the bases of race, color, and age because she was on the list of best qualified employees referred to the selecting officials, she was not selected for the position, and the two selectees were Caucasian, had lighter complexions, and were under 40 years of age. Moreover, OFO found that the Agency failed to meet its burden of articulating a legitimate, nondiscriminatory reason for its actions. Specifically, OFO found that the selecting officials' affidavits set forth no objective facts to support the following vague, generalized conclusions: (1) the selectees were better qualified for the position than Complainant based on the application, the interview process, and the timeliness and accuracy of work assignments performed in the unit; and (2) Complainant was on the bottom tier of the applicants. OFO determined that the affidavits provided no specific examples of how or why the selectees were better qualified than Complainant based on the application, how or why the selectees were better qualified than Complainant based on the interview, how or when Complainant did not process her work timely and accurately, and how or why Complainant was deemed to be on the bottom tier of the applicants. Based on the above, OFO found that the Agency failed to articulate a specific, clear, and individualized explanation for Complainant's non-selection and, consequently, Complainant was denied a fair opportunity to demonstrate pretext.

OFO ordered the Agency to offer Complainant the position or a substantially equivalent position, to determine the appropriate amount of back pay and other benefits, to conduct a supplemental investigation on compensatory damages, to provide eight hours of EEO training to the selecting officials, and to consider taking appropriate disciplinary action against the selecting officials.

(b)(7)(C) **v. USDA (OCFO)**, 0120132107 (04/29/2015) – Complainant alleged that the Agency discriminated against her when it did not select her for the position of Financial Management Assistant, GS-0503-07. The Agency issued a final decision finding no discrimination.

OFO, in its appellate decision, reversed the Agency's final decision and found discrimination. Initially, OFO found that Complainant established a prima facie case of discrimination on the bases of race, color, and age because she was on the list of best qualified employees referred to the selecting officials, she was not selected for the position, and the two selectees were Caucasian, had lighter complexions, and were under 40 years of age. Moreover, OFO found that the Agency failed to meet its burden of articulating a legitimate, nondiscriminatory reason for its actions. Specifically, OFO found that the selecting officials' affidavits set forth no objective facts to support the following vague, generalized conclusions: (1) the selectees were better qualified for the position than Complainant based on the application, the interview process, and the timeliness and accuracy of work assignments performed in the unit; (2) Complainant was on the bottom tier of the applicants; (3) Complainant did not get a very strong reference from her supervisor regarding her work ethics; and (4) Complainant might have exaggerated her capabilities in her application. OFO determined that the affidavits provided no specific examples of how or why the selectees were better qualified than Complainant based on the application, how or why the selectees were better qualified than Complainant based on the interview, how or when Complainant did not process her work timely and accurately, how or why Complainant was deemed to be on the bottom tier of the applicants, what Complainant's supervisor said about her work ethics, and how or where Complainant might have exaggerated her capabilities in her application. Based on the above, OFO found that the Agency failed to

articulate a specific, clear, and individualized explanation for Complainant's non-selection and, consequently, Complainant was denied a fair opportunity to demonstrate pretext.

OFO ordered the Agency to offer Complainant the position or a substantially equivalent position, to determine the appropriate amount of back pay and other benefits, to conduct a supplemental investigation on compensatory damages, to provide eight hours of EEO training to the selecting officials, and to consider taking appropriate disciplinary action against the selecting officials.

(b)(7)(C) **v. Army**, 0120133395 (04/01/2015) **(Repeated under SEP Priority 3 above)** – During the relevant time period, Complainant was employed as a Software Quality Assurance Lead with the Department of the Army at Redstone Arsenal in Huntsville, Alabama. Complainant is a transgender woman who began the process of transitioning her gender presentation/expression in 2010. In April 2010, Complainant obtained a decree from an Alabama court that changed her name from a traditionally male name to a traditionally female name. At that time, Complainant also requested that the Agency change her name and sex on all personnel records, which was done. In October 2010, management met with Complainant to discuss the process of transitioning from presenting herself as a man to living and working in conformance with her gender identity as a woman.

The Agency and Complainant agreed in a written plan that Complainant would use a single-user restroom rather than the multi-user "common women's restroom" until she underwent undefined surgery. In late 2010, Complainant notified the Agency of her transition and began presenting as a woman. Complainant used the single-user restroom, except on three occasions. On those occasions, Complainant used the woman's multi-user common restroom because the single-user restroom was being cleaned or out of order. After each incident of using the common women's restroom, Complainant was confronted by a supervisor who told her that she had been observed using the women's restroom, coworkers were uncomfortable with this, and she had to use the single-user restroom until she could provide proof of having undergone the "final surgery." Additionally, during this time period, a team leader repeatedly referred to Complainant by her former traditionally male name, by male pronouns, and as "sir." The team admitted to using male signifiers in reference to Complainant even after he was aware of her gender transition but maintained that his actions were a "slip of the tongue."

Complainant filed an EEO complaint in which she alleged that she was subjected to disparate treatment and a hostile work environment based on her sex when the Agency restricted her from using the common female restroom, and a team leader repeatedly referred to her by her former traditionally male name and called her "sir." After an investigation, the Agency found that Complainant was not subjected to unlawful discrimination or harassment. The Agency reasoned that it had provided legitimate, non-discriminatory reasons for its requirement that Complainant use the single-user restroom, and Complainant failed to show that the explanations were pretext for unlawful discrimination. The Agency maintained that Complainant had agreed to use the single-user restroom, and therefore, management did not deny her access to equal facilities. The Agency further concluded that the team leader's comments were not severe or pervasive enough to constitute a hostile work environment.

In its appellate decision, the Commission noted that the Agency acknowledged that Complainant's transgender status was the motivation for its decision to prevent her from using the common women's restroom. The Commission also noted that its decision in (b)(7)(C) v. Department of Justice, EEOC Appeal No. 0120120821 (April 20, 2012) clearly established that discrimination against transgender individuals because of their gender identity is unlawful sex discrimination. Therefore, the Commission found that there was direct evidence of sex discrimination in this case. The Commission held that when an individual has transitioned to the gender that reflects her or his gender identity, denial of equal access to the restroom consistent with her or his gender identity is sex discrimination under Title VII. The Commission further held that Title VII does not require any particular medical procedure as a prerequisite for equal opportunity and access to facilities. The Commission also held that coworker discomfort, confusion, or anxiety may not justify discriminatory terms and conditions of employment, including the denial of access to particular restrooms.

Regarding Complainant's transition plan with the Agency, the Commission found that any plan with a transitioning employee related to facility access cannot prospectively waive Title VII rights, and the

employee retains the right under Title VII to use facilities consistent with her or his gender. Therefore, the Commission found that the Agency subjected Complainant to disparate treatment because of her sex.

Regarding Complainant's harassment claim, the Commission determined that based on witness testimony, the team leader intentionally called Complainant traditionally male names, pronouns, and "sir." The Commission noted that in emails, the team leader sometimes used male names and pronouns to insult Complainant or convey sarcasm, and witnesses stated that the team leader sometimes laughed when mentioning Complainant in groups and would say her female name with a smirk. The Commission also noted that it has held that supervisors and coworkers should use the name and gender pronoun that corresponds to the gender identity with which the employee identifies, and the failure to use the employee's correct name may constitute unlawful sex-based harassment. (b)(7)(C) v. U.S. Postal Serv., EEOC Appeal No. 0120130992 (May 21, 2013). The Commission found that while inadvertent and isolated slips of the tongue likely would not constitute harassment, in this case, the team leader's conduct was intended to humiliate and ridicule Complainant. As such, the Commission found that the alleged conduct was sufficiently severe and pervasive to subject Complainant to a hostile work environment.

The Commission further found that although Complainant did not report the team leader's harassment to management, the conduct was so pervasive, well-known, and openly practiced in the workplace the Agency should have known about it. Moreover, the Agency negligently failed to take prompt and effective correction action to address the harassment. Therefore, the Agency is liable for the harassment. The Commission further noted that the Office of Special Counsel (OSC) also found that the Agency's actions had discriminated against Complainant based on conduct not adverse to work performance, but the OSC's report specifically noted that it did not make any finding regarding Complainant's entitlement to recover damages under Title VII. The Commission ordered the Agency to immediately grant Complainant equal and full access to common female facilities; to take meaningful and effective measures to ensure that coworkers and supervisors cease and desist from all discriminatory and harassing conduct toward Complainant; to provide Complainant with proven compensatory damages; to provide at least eight hours of EEO training to all civilian personnel and contractors at Complainant's work facility; to provide at least 16 hours of in-person EEO training to all management officials at Complainant's work facility; and to consider taking appropriate disciplinary action against responsible management officials.

(b)(7)(C) **v. DOJ (DEA)**, 0720140029 (04/22/2015) – Complainant worked as a Group Supervisor in the Agency's New York Field Division. On March 16, 2011, Complainant filed an EEO complaint in which he alleged that the Agency discriminated against him on the bases of race (African-American) and in reprisal for prior protected EEO activity in connection with six incidents involving the terms and conditions of his employment. At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before an AJ. Complainant timely requested a hearing, which the AJ held on June 6 and July 31, 2013. On April 3, 2014, the AJ issued a decision finding that the Special Agent in Charge of the New York Field Division, Complainant's third-line supervisor, had retaliated against him for filing two previous EEO complaints by awarding credit for a drug seizure to another field office in April 2010, and by publicly criticizing Complainant for not submitting a significant activity report on an arrest that had occurred in March 2011. The AJ awarded attorney's fees in the amount of $5,085 as well as compensatory damages of $1,000. The Agency subsequently issued a final order rejecting the AJ's decision and alternatively requesting that the attorney's fee award be reduced to $3,150. On appeal, OFO affirmed the AJ's finding of retaliation, noting that the AJ found Complainant's third-line supervisor not be a credible witness. OFO did however modify the award of attorney's fees as requested by the Agency, agreeing that travel time is only compensable at half an attorney's normal hourly rate.

(b)(7)(C) **v. USDA**, 0120132476 (04/29/2015) – Complainant worked as the Area Director of the Agency's Rural Development Office in Mason, Michigan. Complainant filed an EEO complaint in which he alleged that the former Michigan State Director discriminated against him on the bases of race (Native American) and age (52) when in October 2010, he learned that the former Michigan State Director had not conducted a

Civil Rights Impact Analysis (CRIA) before implementing a reorganization plan that resulted in a loss of locality pay. Pursuant to this reorganization plan, Complainant and other employees were reassigned from Howell, Michigan, which is in the Detroit-Warren-Flint Area Pay Locality to Mason, which is in the Pay Locality Area designated, "Rest of the United States." The reassignment took effect on November 23, 2008, and resulted in Complainant's annual salary being reduced from $106,514 to $98,386, due to the locality pay differential. A CRIA had been approved for the reorganization plan, but had not taken into consideration the impact on older employees. In its final decision, the Agency found that the reorganization plan had a disparate impact on older employees, and ultimately concluded that it had discriminated against Complainant on the basis of age. The Agency also admitted that it had discriminated against Complainant on the basis of race. However, the Agency determined that Complainant was not entitled to compensatory damages, back pay, reimbursement for lost locality pay, or any other monetary relief because it would have made the same decision to relocate him from Howell to Mason. On appeal, Complainant contended that he is entitled to reimbursement for lost compensation. Consistent with the decision in (b)(7)(C) v. Department of Agriculture (Rural Development), EEOC Appeal No. 0120120958 (May 23, 2012), OFO determined that that the evidentiary record was not sufficient to adjudicate the issue of remedies and consequently remanded the matter for a supplemental investigation.

(b)(7)(C) **v Dep't of Treasury (IRS)**, 0120110248 (05/8/2015) – Complainant alleged that the Agency subjected her to a hostile work environment on the basis of reprisal for prior protected EEO activity under Title VII of the Civil Rights Act of 1964 when, amongst other things, she received a leave concern letter, she was not selected for a GS-11 position, she received an unwarranted evaluation, she was denied a reassignment, she was denied advanced sick leave, and she was assigned work outside her position description, and she was subjected to verbal counselings, Counseling Memorandums, and a 10 day suspension. After a hearing an EEOC Administrative Judge found that Complainant failed to establish that she was subjected to retaliatory harassment. The Agency subsequently issued a final order adopting the AJ's finding that Complainant failed to prove that the Agency subjected her to discrimination as alleged.

On appeal, we found that there was no evidence of retaliatory motivation with regard to the leave concern letter, the non-selected for a GS-11 position, the evaluation, the reassignment, the denial of advanced sick leave, and the assignment of work outside her position description.

However, we did find that a preponderance of the evidence established that Complainant was subjected to reprisal discrimination when she was issued a Counseling Memorandum, verbally counseled, and issued a 10 day suspension for bringing her EEO concerns to Agency leadership and outside of her immediate chain of command.

The record established that every time Complainant raised her EEO concerns with Agency leaders she was subjected to varying forms of discipline. For example, Complainant sent an email to the Commissioner of the Agency regarding her EEO claims, and as a result, she was issued a Counseling Memorandum directing her to follow her immediate chain of command instead of bringing these issues to Agency leadership. Complainant subsequently brought her EEO concerns to the attention of the Wage & Investment Operating Division Commissioner, and as a result Complainant was verbally counseled about the necessity of following the chain of command. A few days later, Complainant again emailed the Wage & Investment Operating Division Commissioner and other Agency executives regarding the same EEO matters, and as a result she was issued a 10 day suspension.

We noted that employees should not be disciplined for reporting EEO matters, as such discipline could be a per se violation of our EEO laws' prohibition on retaliation, and could certainly have a chilling effect on the EEO process as it could reasonably deter employees from pursuing the EEO process. This includes reporting EEO matters to Agency leadership.

We noted that each time that Complainant brought to Agency leadership's attention her EEO concerns, she was engaging in a protected EEO activity because she was opposing discrimination by explicitly communicating to her employer a belief that the Agency's activities constitute employment discrimination. We found that disciplining an individual for raising EEO concerns with Agency leadership has a chilling effect on the EEO process as it is reasonably likely to deter others from opposing discrimination by bringing

EEO concerns to the attention of Agency leadership. This may also have a chilling effect on the EEO process by deterring individuals who believe they are being subjected to harassment by individuals in their chain of command from raising these matters to higher level officials.

We ordered the Agency to take immediate steps to ensure that all reprisal ceases and desists in the facility, expunge Complainant's records, pay Complainant backpay for the 10 day suspension, conduct a supplemental investigation into compensatory damages, provide 8 hours of training to all management officials, consider taking disciplinary action, and post a Notice of Discrimination.

(b)(7)(C) **v DHS (CBPA)** 0720140037 (05/29/2015) – Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of race (African-American), disability (back injury), age (61), and reprisal for prior protected EEO activity when: 1) he was directed to prepare memoranda regarding his leave requests; 2) he learned that he was not selected for the position of Supervisory Sector Enforcement Specialist; 3) he was verbally counseled regarding creating work schedules and daily work assignments; 4) he was notified that he would be suspended for five days; and 5) he was issued a counseling memorandum.

An AJ issued a partial summary judgment decision for claims 1-3 and 5, finding that there was no evidence in the record that would establish that Complainant was subjected to discrimination. The AJ ordered that Complainant's claim 4 go to a hearing, as the record needed to be further developed with respect to this claim and credibility determinations needed to be made.

The AJ found that Complainant was suspended for five days based on his alleged comment to his supervisor that he intended to file an EEO complaint and the supervisor would be hearing from Complainant's lawyer. The Notice of Proposed Suspension specifically mentioned the supervisor's version of Complainant's comments regarding filing an EEO complaint and contacting his lawyer, and higher level management officials determined that this conduct was unprofessional based on the tone Complainant used and they considered Complainant's statement regarding his intention to file an EEO complaint to be an "aggressive threat." During the hearing an upper-level management official compared Complainant's EEO statement to what he considered equivalent hypothetical statements such as if Complainant had threatened to slice his supervisor's tires or if he threatened to lie about the supervisor. The upper level management official also testified that Complainant's threats to sue the Agency showed insubordination, and since the statement was made in an open doorway anyone could have witnessed the insubordinate behavior.

On appeal, Complainant did not appeal the AJ's partial summary judgment decision. We affirmed the AJ's decision without a hearing for claims 1-3 and 5.

The Agency argued that the AJ erred when he did not identify the causation standard he applied in finding retaliation. The Agency asserts that the Supreme Court's decision in University of Texas Southwestern Medical Center v. Nassar should apply. We noted that in Petitioner v. Dep't of Interior, EEOC Petition No. 0320110050 (July 16, 2014), the Commission found that the "but for" standard discussed in Nassar 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 contain the "because of" language on which the Supreme Court based its holdings in Nassar.

We affirmed the AJ's finding of reprisal discrimination for claim 5, finding that Complainant engaged in protected activity when he made statements to S1 indicating that he opposed the Agency's alleged discriminatory practices and that he intended to file an EEO complaint. Complainant was then subjected to an adverse action when he was suspended for five days. There is a causal nexus between the two because Notice of Proposed Suspension and the Notice of Suspension specifically reference Complainant's remarks to his supervisor about his intention to file an EEO complaint and to contact a lawyer based on his perception of harassment by the Agency.

We also noted that the Agency mentioned a few times in its brief that "Complainant is an admitted frequent filer of EEO complaints…". We found that this fact is not dispositive and has no bearing on the facts of this case.

We ordered the Agency to pay Complainant $3,000 in compensatory damages, back pay for the five days of suspension, expunge Complainant's records, provide 16 hours of EEO training to all managers, consider taking disciplinary action against the responsible management officials, and post a notice of discrimination.

(b)(7)(C) **v. DOD**, 0120140624 (05/21/2015) – Complainant, an Information Technology (IT) Specialist, working for the Defense Information Systems Agency, in Fort Mead, Maryland, alleged that the Agency subjected her to hostile work environment harassment based on her disability and reprisal for her EEO counselor contact. Specifically, Complainant alleged that that her supervisors ridiculed her, dismissed her from a special project, delayed her workers compensation claim, and required her to take sick leave in lieu of annual leave. Complainant further alleged that her supervisors commented and confronted her about her EEO counselor contact. At the conclusion of the investigation, the Agency issued its final decision, finding that Complainant failed to establish that she was subjected to discrimination as alleged. On appeal, we found that Complainant's supervisors' comments to Complainant constituted *per se* Reprisal. We noted that Complainant's supervisors expressed to Complainant that she should have come to them first before going to the EEO counselor. We found that the supervisors' comments intimidated Complainant and were reasonably likely to deter her from engaging in the EEO process. Therefore, although we found that the conduct of Complainant's supervisors constituted *per se* reprisal, we found, however, that Complainant failed to establish disability or retaliatory harassment. We found that the supervisors' actions were insufficiently severe or pervasive enough to unreasonably interfere with Complainant's work performance. We therefore reversed the Agency's final decision in part, and ordered the Agency to provide Complainant with proven compensatory damages. We further ordered the Agency to provide EEO training and to consider disciplining Complainant's supervisors.

(b)(7)(C) **v. USPS**, 0120133300 (05/12/2015) – Complainant, a part-time Flexible Carrier, filed an EEO complaint alleging that the Agency harassed and discriminated against her on the bases of race, sex, and in reprisal for prior protected EEO activity under Title VII when the Agency switched her from a mounted route to a walking route; subjected her to excessive supervision; did not allow her to leave work early to attend her baby's funeral; subjected her to investigative interviews; issued her a letter of warning and a seven-day "no time off" suspension; refused to recognize her medical restrictions documentation; management used profanity in her presence on one occasion; and a supervisor yelled at her. Additionally, Complainant alleged that a supervisor placed a note about her EEO appointment on a time card in a public space that could be seen by coworkers.

In a final decision, the Agency found that the Agency provided legitimate, non-discriminatory reasons for its actions, but Complainant did not prove that these reasons were pretext for unlawful discrimination. The Agency further found that the alleged actions were not severe or pervasive enough to constitute a hostile work environment.

In its appellate decision, in relevant part, the Commission noted that, Complainant alleged, and management did not deny, that a supervisor placed a "post-it note" on her time card that stated that she had an EEO appointment, and the note was placed in a public space and could be seen by coworkers. The Commission rejected the Agency's contention that this does not constitute reprisal because Complainant has not shown that other employees saw the note. Instead, the Commission concluded that placing information about Complainant's EEO activity in such a public, exposed place was inappropriate and could have revealed her EEO activity to numerous other employees. Consequently, the Commission found that the supervisor's conduct is reasonably likely to deter employees from engaging in EEO activity, and therefore violates Title VII's prohibition on retaliation.

Regarding the improper disclosure of Complainant's EEO activity, the Commission ordered the Agency to provide Complainant with proven compensatory damages; to provide at least eight hours of EEO training to the responsible management official; and to consider taking appropriate disciplinary action against the responsible management official.

(b)(7)(C) **v DOD (DCA)**, 0120130331 (05/29/2015 – Complainant alleged that she had been sexually harassed by a male coworker for over a year when the male coworker made inappropriate comments to her about sex, would ask her for sexual favors in the form of oral sex, and would ask her to let him come to her house in order to have sex with her. Additionally, the male coworker allegedly touched her buttocks 2 or 3 times a day. Complainant stated that this conduct was offensive to her and she told him "no" and to "stop" after every comment and every time he touched her.

Complainant requested a hearing, but the AJ dismissed the hearing request on the grounds that Complainant failed to submit a Prehearing Report in accordance with the AJ's orders. The AJ remanded the complaint to the Agency, and the Agency issued a final which concluded that Complainant failed to prove that the Agency subjected her to discrimination as alleged.

We found that despite the fact that the complaint did not go to a hearing, there was sufficient evidence in the record to establish a prima facie case of sexual harassment. The record revealed that another female coworker reported to management that she had been subjected to similar sexual harassment from the male coworker, such as similar sexual comments, requests for sexual favors, and sexual touching of the buttocks or threats of sexual touching of the buttocks.

We found that the conduct was severe and pervasive, as the evidence established by a preponderance of the evidence that the male coworker engaged in a pattern of offensive conduct towards Complainant, which included frequent touching and constant sexual comments and requests for sexual favors. The evidence in the record also established by a preponderance of the evidence that this harassment was not isolated to Complainant and included other women in the facility as well.

We also found that the Agency was liable for the harassment. The record revealed that the Agency was not put on notice until a year after the harassment began. However, the record does establish that once the Agency learned of the harassment, it failed to take prompt and effective action to address the harassment. Once management became aware of the harassment, it took management 11 days to speak to Complainant about the harassment and 21 days to talk to the male coworker about the harassment. Between the date that management spoke to Complainant and when it finally spoke to the male coworker, the male coworker continued to harass Complainant and the other female coworker.

We also found that management not act promptly or effectively when he did not separate Complainant and the male coworker immediately after management learned of the allegations of sexual harassment, and it erred when it eventually did separate them by forcing Complainant to change her shift against her will, while the male coworker was allowed to keep his shift. While Complainant did not raise this as a claim in her formal complaint, we noted that this could have stated a claim of reprisal for her protected EEO activity.

Finally, we found that while the Agency ultimately suspended the male coworker for three days, it did not provide any evidence to demonstrate why management thought a three day suspension was reflective of the severity of the conduct. We also found that there is no evidence in the record that would indicate that the Agency took any steps to ensure the harassment would not occur again, and since the record indicates that this harassment likely affected more than just Complainant, the Agency should have provided the whole facility with anti-harassment training.

We ordered the Agency to take steps to cease and desist all sexual harassment at the facility, to undertake a supplemental investigation to determination Complainant's entitlement to compensatory damages, provide 8 hours of EEO training to all management officials, provide 8 hours of EEO training to all non-supervisory employees, consider taking disciplinary action against management officials, consider taking disciplinary action against the male employee, and post a Notice of Discrimination.

(b)(7)(C) **v. TVA**, 0120123132 (05/15/2005) – Complainant alleged that the Agency subjected him to a hostile work environment on the basis of race (African American) regarding the presence of a hangman's noose in the bed of a truck at work and the Agency's failure to take action, although he had reported its presence. Complainant also alleged that the Agency retaliated against him for having opposed discrimination by issuing him an ePOP after reporting the incident.

After an investigation, Complainant requested that the Agency issue a decision. After receipt of the Agency's July 9, 2012 decision, Complainant filed an appeal with OFO.

In its decision, the Agency found that Complainant had established a prima facie case of a hostile work environment based on race and reprisal. The Agency determined that it was not liable because it had taken immediate and appropriate corrective action to address the alleged harassment. Regarding reprisal, the Agency explained that it had issued the ePOP because Complainant had not reported the noose immediately as required by the Agency's Code of Conduct. The Agency also concluded that Complainant had not shown that its reason for issuing the ePOP was pretextual.

OFO found that the presence of the noose was an objectively hostile event based on its symbolism in African American history. The noose had remained in the truck even after Complainant reported the incident to his supervisor. The supervisor dismissed the incident because he determined it was not a legal hangman's noose because it did not contain the required number of knots. OFO concluded that even though it was a single event, it was sufficiently severe to alter the conditions of Complainant's employment and to create a hostile work environment. OFO addressed the actions that the Agency took concerning the noose's presence and concluded that the Agency did not take appropriate action.

OFO concluded that the Agency's articulated reason for issuing the ePOP was pretextual. Complainant was the only employee who was issued an ePOP for not reporting the noose and the ePops appeared to be designed to be issued for work injuries and observance of safety measures. There was no evidence that ePOPs had been used previously for an employee's failure to report harassment timely.

The Agency was ordered to conduct a supplemental investigation on compensatory damages because Complainant alleged a loss as a result of the Agency's discrimination.

(b)(7)(C) **v. VA**, 0120123071 (05/28/2015) – Complainant, a Rating Service Veterans Representative, filed an appeal from an Agency decision finding that she was discriminated against on the basis of disability when she was not reasonably accommodated by being provided a space heater. Complainant also appealed the Agency's decision finding that she was not discriminated against on the bases of disability, retaliation, sex (female), and race (Black) when the Agency harassed her, assigned her to a different team, did not provide her a space heater, and did not select her for the position of Decision Review Officer. The Agency issued a decision finding no discrimination on all claims apart from finding that Complainant was denied a reasonable accommodation from May 7, 2008 to March 2, 2010. OFO affirmed the findings of no discrimination, but modified the finding of discrimination. OFO found that the period of denial of accommodation was larger than what the Agency found and was from May 7, 2008 to August 10, 2011. OFO ordered the Agency to: investigate and decide whether Complainant is due compensatory damages; provide a reasonable accommodation to Complainant (she was terminated then reinstated); consider disciplining and provide EEO training to responsible management officials; and post a notice of the finding of discrimination.

(b)(7)(C) **v Treasury (IRS)**, 0120110248 (05/08/2015) – Complainant alleged that the Agency subjected her to a hostile work environment on the basis of reprisal for prior protected EEO activity under Title VII of the Civil Rights Act of 1964 when, amongst other things, she received a leave concern letter, she was not selected for a GS-11 position, she received an unwarranted evaluation, she was denied a reassignment, she was denied advanced sick leave, and she was assigned work outside her position description, and she was subjected to verbal counselings, Counseling Memorandums, and a 10 day suspension. After a hearing an AJ found that Complainant failed to establish that she was subjected to retaliatory harassment. The Agency subsequently issued a final order adopting the AJ's finding that Complainant failed to prove that the Agency subjected her to discrimination as alleged.

On appeal, we found that there was no evidence of retaliatory motivation with regard to the leave concern letter, the non-selection for a GS-11 position, the evaluation, the reassignment, the denial of advanced sick leave, and the assignment of work outside her position description.

However, we did find that a preponderance of the evidence established that Complainant was subjected to reprisal discrimination when she was issued a Counseling Memorandum, verbally counseled, and issued a 10 day suspension for bringing her EEO concerns to Agency leadership and outside of her immediate chain of command.

The record established that every time Complainant raised her EEO concerns with Agency leaders she was subjected to varying forms of discipline. For example, Complainant sent an email to the Commissioner of the Agency regarding her EEO claims, and as a result, she was issued a Counseling Memorandum directing her to follow her immediate chain of command instead of bringing these issues to Agency leadership. Complainant subsequently brought her EEO concerns to the attention of the Wage & Investment Operating Division Commissioner, and as a result Complainant was verbally counseled about the necessity of following the chain of command. A few days later, Complainant again emailed the Wage & Investment Operating Division Commissioner and other Agency executives regarding the same EEO matters, and as a result she was issued a 10 day suspension.

We noted that employees should not be disciplined for reporting EEO matters, as such discipline could be a *per se* violation of our EEO laws' prohibition on retaliation, and could certainly have a chilling effect on the EEO process as it could reasonably deter employees from pursuing the EEO process. This includes reporting EEO matters to Agency leadership.

We noted that each time that Complainant brought to Agency leadership's attention her EEO concerns, she was engaging in a protected EEO activity because she was opposing discrimination by explicitly communicating to her employer a belief that the Agency's activities constitute employment discrimination. We found that disciplining an individual for raising EEO concerns with Agency leadership has a chilling effect on the EEO process as it is reasonably likely to deter others from opposing discrimination by bringing EEO concerns to the attention of Agency leadership. This may also have a chilling effect on the EEO process by deterring individuals who believe they are being subjected to harassment by individuals in their chain of command from raising these matters to higher level officials.

We ordered the Agency to take immediate steps to ensure that all reprisal ceases and desists in the facility, expunge Complainant's records, pay Complainant backpay for the 10 day suspension, conduct a supplemental investigation into compensatory damages, provide 8 hours of training to all management officials, consider taking disciplinary action, and post a Notice of Discrimination.

(b)(7)(C) **v. DOJ**, 0120121339 (05/08/2015) – Complainant worked as a Security Specialist at the Agency's Security Unit of the Records Management Division (RMD) in Winchester, Virginia. Complainant had been diagnosed with Cerebral Palsy, and as a result walked using crutches with forearm braces and had trouble with fine motor skills. While experiencing physical difficulties, Complainant was issued an unacceptable performance appraisal and was placed on a Performance Improvement Plan (PIP). Management alleged that Complainant had difficulty performing her duties, was rude, and her behavior was disruptive in the workplace, citing an incident where Complainant approached the Agency Director regarding difficulties she was having at work. The Agency's Human Resources subsequently revoked the unacceptable rating, replacing it with a successful rating, canceling the PIP.

Notwithstanding, management thereafter gave Complainant an unacceptable rating again, placing Complainant on a second PIP. According to Complainant, she had difficulties performing the duties of her position because the Agency revoked certain accommodations when it placed her on the second PIP. After the 90-day PIP period ended, Complainant received a letter notifying her that she would be terminated based on her performance and attitude. However, rather than immediately terminating Complainant, management reassigned Complainant to a 90-day trial assignment in its Document Laboratory (DocLab), supposedly in an attempt to give her another chance to succeed. The Agency nevertheless terminated Complainant, asserting that she failed to meet the metric standards of the DocLab assignment.

Complainant filed an EEO Complaint, and the Agency subsequently issued its final decision, finding no discrimination. On appeal, we reversed the FAD, concluding that Complainant established that she was denied reasonable accommodation. We also found that Complainant was subjected to disparate treatment and a hostile work environment in retaliation for her requests and ongoing need for accommodation. In so

finding, we noted that management alleged that Complainant's legal matters and her personal, *i.e.*, EEO, complaints were disruptive. We further noted that the Assistant Section Chief (ASC) felt that Complainant was not given a fair chance during the trial assignment and averred that Complainant was unjustly terminated. The ASC noted that Complainant was assigned only the most difficult tasks performed in the DocLab, instead of the mix of assignments other employees received, and opined that Complainant would have performed successfully had she been given a fair mix of assignments. We noted that Complainant was not asserting that the performance metrics should have been waived, but only that she should have been given a fair chance to meet the metrics. We lastly found that management's actions against Complainant were severe and pervasive enough to establish a hostile work environment, and we held the Agency liable for its conduct. Because we determined that the Agency acted in bad faith, we found Complainant eligible for compensatory damages.

(b)(7)(C) **v. DOD (DCA)**, 0120150382 (05/01/2015) – OFO affirmed the AJ's dismissal of Complainant's hearing request and reversed the Agency's finding of no discrimination. The Agency was found to have failed to provide Complainant with a religious accommodation.

Complainant worked as a Commissary Contractor Monitor, GS-1101-06, assigned to the Quality Assurance Evaluators (QAE) department at the Agency's Redstone Arsenal Commissary in Huntsville, Alabama. Believing that she was denied a religious accommodation when her supervisor did not allow her to have every Saturday off to observe her Sabbath, Complainant filed a complaint based on religion, race, (Caucasian), and color (white). In response to Complainant's request for every Saturday off, to observe the Sabbath, her supervisor stated that the current rotation provided her with some Saturdays off. Management asserted that to ask the other two QAEs to work the other Saturdays "would be unfair". The Director suggested that *Complainant* ask her colleagues to swap or trade schedules. Further, Complainant attested that the instant supervisor's predecessor was able to provide her with every Saturday off.

OFO found that the Agency did not make a good faith effort to provide Complainant with a religious accommodation. Moreover, the Agency's perception of "unfairness" did not constitute an undue hardship. The Agency was ordered to provide Complainant with a religious accommodation, train management officials, and conduct a supplemental investigation regarding compensatory damages.

(b)(7)(C) **v. VA**, 0120123232 (05/21/2015) – At the time of events giving rise to this complaint, Complainant worked as an Assistant Human Resources Officer, GS-13 at the Agency's Human Resources Management Service at the Veteran's Affairs Medical Center in Ann Arbor, Michigan. On August 22, 2011, Complainant filed a formal complaint alleging that the Agency discriminated against her on the basis of sex (female) when she was sexually harassed from February 2011 through July 19, 2011 by another employee. The employee responsible for the harassment (H1) was a housekeeper whose area of responsibility included Human Resources (HR) where Complainant worked. He came into her office daily to clean, and frequently made explicit comments about Complainant's body, clothing, and general appearance.

In response to Complainant's formal complaint, following an investigation, the Agency issued a final decision (FAD) that found it was not liable for the actions that occurred because it took prompt, appropriate, and effective action in response to Complainant's reports. Specifically, the FAD found that while Complainant's first level supervisor (S1) did not initially respond appropriately to Complainant's allegations of sexual harassment, upon completion of a subsequent internal investigation, which confirmed the harassment had occurred and that S1 failed to act appropriately, appropriate action was taken. In this regard, the Agency noted that S1 was issued a written counseling for his failure to take action when Complainant first advised him of her complaint. H1's supervisors decided that he should be suspended for his conduct, and proposed a five-day suspension on September 12, 2011. On September 16, 2011, H1 tendered his resignation and did not serve the suspension. According to the Agency, there was nothing in the record that suggested H1 continued to harass Complainant after July 19, 2011. With respect to the ultimate corrective actions that were taken, the FAD determined that these actions were sufficient.

On appeal, Complainant argued that her complaint had not been handled properly and taken seriously because she was a woman. The appellate decision held that the only matter at issue on appeal was

whether there was a basis for imputing liability to the employer. Upon review of the record, the decision found that the Agency failed to take immediate and appropriate corrective action in this case and therefore, found the Agency liable for H1's conduct. The decision reasoned that although the matter of S1's inaction was acknowledged and addressed by Agency management, that initial inaction by S1 was enough to attach liability to the Agency. The decision held that the Agency was not permitted to argue that it took immediate corrective action to end the harassment when its own investigation shows that S1 failed to follow the Agency's established sexual harassment protocol, and that although the Agency subsequently responded in an appropriate manner, the response was not immediate. The Agency may not remove the effect of this initial inaction, i.e., avoiding liability, by its subsequent actions.

The Agency was ordered to provide Complainant notice of her right to submit evidence in support of her claim for compensatory damages. Additionally, the Agency was ordered to conduct training for S1 regarding his obligations under Title VII with special emphasis on management responsibilities with regard to claims of discriminatory harassment/hostile work environment. Finally, the decision suggested the Agency consider taking disciplinary action against S1 above what was issued previously, and report its decision regarding this suggestion to the Commission.

(b)(7)(C) **v. DOJ (BOP)**, 0120132393 (06/25/2015) – Complainant, a Correctional Counselor at the Agency's Metropolitan Detention Center in Puerto Rico, alleged that the Agency subjected her to sexual harassment and reprisal, when on May 30, 2012, a male Lieutenant (C1) invaded her personal space, breathed heavily on her neck area, and made sexual noises. Complainant and C1 retired from the Agency in late 2012.

In its final decision, the Agency noted that the Special Investigative Agent (SIA) reviewed videotape of the alleged incident of harassment. However, the Agency maintained that the record did not "originally contain" the results of SIA's investigation of the incident, but the Agency considered the information from that investigation in the preparation of its decision. The Agency further contended that SIA reported that he reviewed the videotape of the incident and did not observe any harassing conduct. The Agency concluded that there was therefore no evidence that Complainant was subjected to a hostile work environment because the video did not corroborate Complainant's assertions.

In its appellate decision, the Commission noted that the record did not contain a copy of the videotape, nor were there any screencaps from the videotape. Additionally, the Commission noted that there was no statement in the record regarding SIA's observations from the videotape. The Commission stated that the Agency cannot just assert that evidence exists somewhere in the universe; it must place such evidence the record. Consequently, the Commission determined that the Agency's assertions about the purported content of the videotape and SIA's observations were not evidence in this case.

The Commission further noted that Complainant's account of C1's conduct was remarkably consistent and detailed throughout the record, and witnesses stated that Complainant told them that she had been harassed in a manner consistent with her accounts in the record. The Commission also noted that an Agency official stated that C1 had a history of similar harassing behavior toward women, and the Associate Warden previously made similar allegations against C1. Taking these considerations into account, the Commission concluded that Complainant's allegations were supported by the weight of the evidence.

Further, the Commission found that C1's actions were based on sex, unwelcome, and severe enough to constitute a hostile work environment. In so finding, the Commission noted that the conduct occurred when Complainant was confined with C1 in a locked, isolated area, which heightened the physically threatening nature of the behavior. Regarding the Agency's liability for the harassment, the Commission found that the Agency knew about C1's propensity to sexually harass employees, including Complainant, because Complainant previously reported similar allegations of sexual harassment by C1 to management.

The Commission noted that Complainant immediately reported the incident at issue in this case to management, and reporting harassment is protected EEO activity. In response, the Agency issued Complainant and C1 cease and desist letters that ordered them to stay away from each other. The Commission determined that the Agency essentially rebuked Complainant for reporting the harassment when it issued her the cease and desist letter, and this constituted reprisal because it is likely to deter

employees from engaging in EEO activity. Finally, the Commission noted that the cease and desist letter issued to C1 disavowed that that Agency was disciplining C1, and the Agency denied Complainant's pleas to be reassigned to another shift so that she could avoid contact with C1. The Commission concluded that the Agency was liable for the harassment because it clearly failed to take immediate and appropriate corrective action in this case.

The Commission ordered the Agency to expunge the cease and desist letter issued to Complainant from its records and files; rescind/expunge any Absent without Leave (AWOL) charges Complainant incurred because of the harassment; pay Complainant the monetary value of leave she took because of the harassment; provide Complainant with proven compensatory damages; provide at least eight hours of in-person EEO training to all supervisors and management at its facility in Guaynabo, Puerto Rico; and consider taking appropriate disciplinary action against the Warden.

(b)(7)(C) **v. DOJ**, 0720150006 (06/15/2015) – The Agency filed an appeal from an EEOC administrative judge's (AJ) finding of reprisal when Complainant, a criminal investigator, was given an unacceptable performance rating. After a hearing, the AJ ordered the Agency to change Complainant's rating to successful and ordered an award of nonpecuniary, compensatory damages of $35,000 and attorney's fees and costs of $142,167.07. The Agency appealed the finding of discrimination, the award of compensatory damages, and the award of attorney's fees. OFO found substantial evidence supported the AJ's finding of reprisal. OFO agreed with the AJ that $35,000 for nonpecuniary, compensatory damages due to Complainant's emotional distress was appropriate. OFO also found that the AJ's award of attorney's fees and costs was also proper. OFO ordered the Agency to comply with the AJ's order to change complainant's performance rating to successful, to pay $35,000 in nonpecuniary, compensatory damages, to pay $142,167.07 in attorney's fees and costs, to provide EEO training to responsible management officials, to post a notice of the finding of discrimination, and to also consider taking disciplinary action against the responsible management officials.

(b)(7)(C) **v. USAF**, 0720090009 (06/05/2015) – The Agency filed an appeal with the Commission contesting the AJ's issuance of a default judgment against it as a sanction for failure submit the complaint file in a timely fashion. The Agency also appealed the amount of compensatory damages awarded to Complainant.

Complainant, a Maintenance Mechanic Supervisor at Seymour Johnson Air Force Base, filed an EEO complaint in which she alleged that she had been subjected to harassment and discrimination based on her sex and in reprisal for prior EEO complaints. Complainant had previously prevailed in two non-selection complaints against the Agency, also based on sex and reprisal.

The AJ issued a default judgment in favor of Complainant when the Agency failed to submit the complaint file to the AJ in a timely manner. Citing the "history of problems with the Agency producing the complaint file for this same complainant in April 2004," the AJ found that a sanction to deter the Agency from similar conduct in the future was appropriate. The AJ awarded attorney's fees and costs, past medical expenses, and future pecuniary damages, among other remedies. The AJ found that an award of $25,000 in non-pecuniary compensatory damages would be consistent with other awards issued by the Commission in similar cases, but awarded $100,000 in non-pecuniary damages to "take into account the severity and duration of the harm done to Complainant by the Agency's repeated discriminatory conduct and lack of good faith effort in the EEO process" and the "aggravation of her anxiety and depression" caused by the Agency's discriminatory actions. The Agency appealed both the default judgment and the award of $100,000 in non-pecuniary compensatory damages.

Our decision affirmed the AJ's finding that a default judgment was an appropriate sanction to impose on the Agency for its failure to comply with the AJ's Order and timely submit the complaint file. The decision modified the remedies ordered by the AJ, and lowered the award of $100,000 in non-pecuniary compensatory damages to $25,000. It found that the AJ had awarded the higher amount as a form of punitive damages, which are not allowable in federal sector EEO complaints. The complaint was remanded for further processing by the Agency.

(b)(7)(C) **v SSA**, 0720140001 (06/01/2015) – Complainant worked as a Hearing Office Chief Administrative Law Judge (HOCALJ). OFO previously found that Complainant's comments in a meeting had a chilling effect on a subordinate's (E1) ability to pursue an EEO complaint.

After the finding in his favor, E1 declared to his coworkers that he was the office hero and he made disparaging remarks about management. He and another witness in his case (E2) told everyone that they had it out with management and they won. E1's behavior toward management officials became aggressive, his words often did not make sense, and he and E2 would work into the conversations discussions about their guns and their permits to carry concealed weapons. Vandalism of management cars began occurring in the parking lot, and another employee angrily confronted the Office Manager and other management officials had to intervene. Two Administrative Judges reported to Complainant and the Office Manager that E1 was raising the tension in the office and they were concerned that there was going to be a workplace violence incident. Complainant and the Office Manager reported it to the Regional Chief Administrative Judge (RCAJ). The RCAJ told Complainant and the Office Manager to call Federal Protective Service to look into the concerns, and that she would hold meetings with all of the staff. When Federal Protective Services arrived, they conducted searches of E1 and E2, including their persons, their offices, and their cars.

The RCAJ met with numerous judges who expressed concern that Complainant may not be able to continue to lead the office because it appeared that the office staff was divided, the staff was not responding as desired, and it was getting harder for the judges to do their work. Some judges noted an increase in absences after the Federal Protective Service officers were there, and believed it was an intentional work slow down by the staff. The RCAJ met with Complainant and told her that "this is the way these people are… they are not going to change. They're going to keep filing [EEO complaints]. What do you want me to do? It's easier for me to get rid of you than to deal with them." As a result, the RCAJ removed Complainant as the HOCALJ of the Albuquerque office, and instead offered her a position as a HOCALJ who would work on special projects and hear cases. In this position, Complainant would no longer manage any of the employees in the Albuquerque office.

Complainant ultimately accepted the new position and was given until May 21, 2007, to vacate her office for her replacement. RCAJ heard from someone in the Albuquerque office that an employee saw Complainant talking to the Office Manager and other management officials, and the employee speculated that Complainant may still be managing the employees. The RCAJ never contacted the Office Manager or other management officials to find out the context of their discussions with Complainant. Additionally, the RCAJ learned that as of the morning of May 21, 2007, Complainant had not completely moved out of the office, which an employee stated gave the appearance that she was still managing. Even though the RCAJ knew that Complainant completely moved out of the office a few hours later, she decided that "she wanted the Complainant out of management altogether" and informed Complainant that she was being removed as HOCALJ for special projects.

Complainant filed an EEO complaint alleging that the Agency discriminated against her on the basis of reprisal for prior protected EEO activity under Title VII of the Civil Rights Act of 1964 when on May 21, 2007, she was removed from her position as HOCALJ for special projects. An EEOC AJ found that Complainant was more credible than the Agency's witnesses, and found that Complainant established by a preponderance of the evidence that she was subjected to retaliatory discrimination as alleged. Additionally, the AJ found that the RCAJ made comments about the EEO process which constituted a per se reprisal violation.

On appeal, the Agency contends that it articulated a legitimate, nondiscriminatory reason for removing Complainant from her position. Specifically, the RCAJ testified that she removed Complainant from the special projects position because of reports that she was still involved in management activities in the office and because she had not moved out of her office.

We found that Complainant established that these reasons were a pretext for discrimination. While the RCAJ testified that she removed Complainant from the position because of allegations that Complainant was still managing employees, the RCAJ admitted that she never took any steps to verify whether

Complainant was still managing employees and she based her decision completely off the speculation of another employee. Further, we agree with the AJ that the RCAJ was not credible when she stated that she also removed Complainant because she did not move out of the office by May 21, 2007, as the record reflects that the Complainant did, in fact, move out on that date. Instead, we found that the record supports the AJ's finding that the RCAJ removed Complainant 18 days after she found out that Complainant filed an EEO complaint in which she was named as the responsible management official, and that was more likely than not the reason for Complainant being removed from the position. We also found that the RCAJ's comments about the EEO process created a chilling effect on the EEO process.

For the first time on appeal, the Agency asserted that Complainant was removed because the Federal Protective Service's search of E1 and E2 was construed as retaliatory harassment from Complainant because of the Commission's previous finding in favor of E1. We stressed that nothing in this decision should be construed to indicate that an Agency cannot take corrective action against discriminatory managers or respond to allegations of a hostile work environment. We concluded that simply put, the facts in this case do not support the assertion that Complainant was removed from her position because the Agency was responding to discrimination

We ordered the Agency to reinstate Complainant to the HOCALJ special projects position, pay Complainant backpay, pay $95,000.00 in non-pecuniary damages, pay $76,888.00 in attorney's fees, pay an award of $5,382.00 for the gross receipts tax, and pay costs in the amount of $4,912.00.

(b)(7)(C) **v. USPS**, 0720130028 (06/10/2015) – On March 31, 2010, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of race (Caucasian), sex (female), and reprisal for prior protected EEO activity when she was subjected to sexual harassment from mid October 2009 until January 2010.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an EEOC AJ. Complainant timely requested a hearing and the AJ held a hearing on June 5 and 6, 2012, and issued a decision on May 9, 2013.

The AJ found Complainant established a prima facie case of sexual harassment because she credibly testified about unwelcome comments and advances that were of a sexual nature. The AJ found the conduct was severe, pervasive and caused a hostile work environment.

The AJ analyzed the Agency's liability and found, inter alia, that the Agency was liable for the harassment because once it learned of the harassment, it failed to take prompt effective remedial relief. The appellate decision found the AJ's decision finding sexual harassment discrimination was supported by substantial evidence in the record. In so finding, we noted that the only matter appealed and before us was the Agency's Notice of Final Action dated June 20, 2013, which "partially implement[ed]...the portion of the decision of the AJ awarding certain remedies." Although the Agency included arguments related to its liability for sexual harassment in its brief on appeal, it had already issued its Notice of Final Action implementing the AJ's liability finding, and thus, waived its right to appeal the AJ's liability finding. With respect to the AJ's ruling on remedies issues, the decision upheld the AJ's award of $120,000.00 in non-pecuniary damages, finding that it was not excessive given the length of time during which the Complainant suffered distress (3 years), also upholding the award of pecuniary damages and the undisputed attorney's fee award.

(b)(7)(C) **v. USPS**, 0120140480 (06/10/2015) **[Repeated under SEP #3 above]** – Complainant appealed the Agency's final decision finding no discrimination. Complainant, a Supervisor – Distribution Operations, filed a formal complaint alleging race, sex, and age discrimination and reprisal when, among other things, she was subjected to a hostile work environment by her supervisor. Complainant alleged that she was placed on Emergency Placement and issued other discipline, made to go to EAP and had her confidential medical information disclosed to others. The OFO decision found Complainant failed to establish she was subjected to a hostile work environment, but did establish that management disclosed her confidential medical information when it informed others that Complainant had suffered a breakdown. The OFO decision

ordered the Agency to conduct a supplementary investigation into Complainant's entitlement to compensatory damages, and other equitable relief.

(b)(7)(C) **v. DHS**, 0720130017, 0120131861 (06/30/15) – Complainant alleged that the Agency violated the Rehabilitation Act on June 30, 2006, when it disqualified her during the application process for an appointment as a Transportation Security Officer at Philadelphia International Airport in Philadelphia, Pennsylvania because she was a liver transplant recipient who regularly took immunosuppressant drugs. The Agency based the disqualification on the Aviation and Transportation Security Act (ATSA), and its promulgated Medical Guidelines for Transportation Security Screeners (Medical Guidelines), as interpreted by contract physicians. While the ATSA and the Medical Guidelines did not reference liver transplants or immune suppressant medications specifically; the Agency argued that there were several references to immunosuppressant medications in the Medical Guidelines, even though none explicitly ruled out the use of immunosuppressants in all circumstances or in conjunction with liver transplants.

Complainant's complaint was initially dismissed for failure to state a claim because the Agency argued she did not meet the medical requirements of the position under the ATSA. On appeal, the Commission reversed the dismissal and remanded the case to the Agency for processing in accordance with (b)(7)(C) v. Department of Homeland Security, EEOC Appeal No. 0120053286 (June 26, 2007). The Commission further held that a determination of whether a complaint by a security screener states a claim under the Rehabilitation Act must be made on a case-by-case basis, and will depend on whether there is a conflict between the ATSA-mandated qualifications and the complainant's Rehabilitation Act claim.

After an EEO investigation, Complainant requested a hearing before an EEOC AJ. Subsequently, the AJ granted summary judgment in favor of Complainant after concluding that she was discriminated against under the Rehabilitation Act. At the outset, the AJ found that the ATSA did not supersede the Rehabilitation Act under the unique circumstances of this case. Specifically, the AJ relied on the language in Getzlow that the Agency "must comply with the requirements of the Rehabilitation Act where there is no conflict between the ATSA-mandated qualification standards and the requirements of the Rehabilitation Act."

The AJ rejected the Agency's position that "[e]ven when the ATSA and its Medical Guidelines are silent, it may go further, without invoking the Rehabilitation Act, and deny Rehabilitation Act protections with impunity." The AJ went on to find that Complainant, because she had recovered from her liver transplant in 1999 and used immunosuppressant drugs, was not substantially limited in a major life activity under the Rehabilitation Act, but that the Agency regarded her as being disabled. The AJ further determined that the Agency failed to meet its burden regarding the establishment of a "direct threat" defense. The AJ found that the Agency's termination of the employment process with regard to Complainant was the result of its improper reliance on the ATSA and its failure to properly assess the nature of Complainant's condition under the Rehabilitation Act. Accordingly, the AJ found that the Agency discriminated against Complainant due to her disability.

The AJ held a separate hearing regarding damages. At that time, he ordered that Complainant be retroactively placed in a Transportation Security Screener position, with back pay, given $5,000.00 in compensatory damages, and attorney's fees.

On appeal, the Agency indicated that the only matter at issue was its contention that the AJ erred in finding that there was no conflict between the ATSA and it Medical Guidelines and Complainant's allegation of disability discrimination. Consequently, the Commission found that the Agency was not contesting the AJ's determinations that: Complainant was an individual with a disability; Complainant was otherwise qualified for the position at issue but for the Agency's interpretation of the ATSA and its Medical Guidelines; and that the Agency did not establish that hiring Complainant would have posed a direct threat to her safety or that of others. The Commission also found that the Agency was not contesting the AJ's corrective action.

The Commission found that the AJ properly issued a decision without a hearing because there were no genuine issues of material fact in dispute. The sole matter in contention was a legal determination regarding whether or not the AJ erred in finding that there was no conflict between Complainant's disability discrimination claim and the ATSA and the Agency's Medical Guidelines. Like the AJ, the Commission found that the record simply did not support the Agency's position. Given that neither the ATSA nor the

Agency's promulgated Medical Guidelines addressed the specific situation set forth in the Agency's appeal, the Commission found that no conflict existed with Complainant's disability claim and therefore, the AJ was correct. The Commission further found that the Agency's argument that its "notwithstanding any provision of law" authority to set employment qualifications for screeners should control in this case was nothing more than an attempt to implicitly overturn the Getzlow decision. To find otherwise would allow the Agency, as noted by the AJ, to deny Rehabilitation Act protections with impunity.

The Agency was ordered to offer Complainant a Transportation Security Screener position, or a substantially equivalent position, to pay back pay with interest, to pay Complainant compensatory damages in the amount of $5,000.00, to provide EEO training to the parties involved, to consider taking appropriate disciplinary action against the parties involved, and to pay attorney's fees as was previously determined by the AJ.

III. Federal Sector Oversight

- During the 2nd quarter of FY 2014, OFO issued a feedback letter to one federal agency that participated in the FCP program evaluation. The feedback letter included a fact sheet describing the process for converting Schedule A hires to the competitive service.
- During the 2nd quarter of FY 2015, OFO continued to review FY 2014 Form 462 reports from 308 agencies and sub-components.
- During the 2nd quarter of FY 2015, OFO continued to monitor the progress of the Social Security Administration's (SSA) efforts to comply with the program evaluation report issued in FY 2014.
- During the 2nd quarter of FY 2015, OFO began gathering data on Department of Health and Human Services as it begins a new program evaluation.
- During the 2nd quarter of FY 2015, OFO began compiling data for the FY 2013 Annual Report on the Federal Work Force Part I as well as the data for the FY 2012 and FY 2013 Annual Report on the Federal Work Force Part II.
- OFO in collaboration with OIT continues to generate and quality check the statistical tables for the FY 2014 Form 462 Reports it collected from 308 federal agencies and sub-components (utilizing the new collection tool through the Federal Sector portal) for publication.
- OFO continued to discuss the comments on MD-110 received from stakeholders and the public, as clarifications continue to be drafted and incorporated into the Management Directive.
- OFO continued work on its program evaluation into USDA county employees' status to determine whether they should continue to use the federal EEO process where remedies seem unavailable. Staff is coordinating with OLC, OFP and ARP. Staff is looking into the Title VI process as an alternative for these employees. (Sister agencies -- MSPB, FLRA -- and courts have found these employees are not federal employees.)
- OFO began to draft a government-wide report on anti-harassment programs in the federal government.
- OFO began to draft a government-wide report on diversity in the Senior Executive Service.
- OFO continued to monitor the progress of the Social Security Administration's (SSA) efforts to comply with the program evaluation report issued in FY 2014.
- During the 3rd quarter of FY 2015, OFO began analyzing data on Department of Health and Human Services as it begins a new program evaluation.

- During the 3rd quarter of FY 2015, OFO drafted the FY 2013 Annual Report on the Federal Work Force Part I as well as collected the data for the FY 2012 and FY 2013 Annual Report on the Federal Work Force Part II.
- OFO in collaboration with OIT continues to generate and quality check the statistical tables for the FY 2014 Form 462 Reports it collected from 308 federal agencies and sub-components (utilizing the new collection tool through the Federal Sector portal) for publication.
- OFO submitted a new draft of the MD-110 to the Commission for a vote that incorporated the comments received from stakeholders and the public.
- OFO continued work on its program evaluation into USDA county employees' status to determine whether they should continue to use the federal EEO process where remedies seem unavailable. Staff is coordinating with OLC, OFP and ARP. Staff is looking into the Title VI process as an alternative for these employees. (Sister agencies -- MSPB, FLRA -- and courts have found these employees are not federal employees.)
- During the 3rd quarter, in collaboration with the Chair's office, OFO drafted a symposium article on the EEOC history for its 50th anniversary that the New York School of Law will likely publish this year.

IV. Outreach & Training

1. Eliminating Barriers in Recruitment and Hiring

- TOD staff provided 'Reasonable Accommodation for Managers' webinar training for US Citizenship and Immigration Services (CIS).
- TOD staff provided Reasonable Accommodation for Employees webinar training for US Citizenship and Immigration Services (CIS).
- TOD staff presented 'Reasonable Accommodation' for Disability Course at Patrick Air Force Base, FL, for Defense Equal Opportunity Management Institute.
- TOD conducted 'Reasonable Accommodation Discussion for Userra/Ombusdman Mediators' for National Guard in Crystal City, VA.
- EEOC staff conducted "Best Practices for Complying with Section 501 of the Rehabilitation Act" webinar for Job Accommodation Network (JAN).
- FSP Associate Director presented "2015 Lecture/Conversation Series, Ask the Experts: Unconscious Bias" for Transportation Security Administration (TSA) in Washington, DC.
- EEOC staff conducted 3-Half Day session on Disability and Religious Accommodations for Army in Fort Stewart, GA.
- EEOC staff presented 2-Half Day sessions on Disability Accommodations for Army at Fort Bragg, Fayetteville, NC.
- TOD staff conducted Reasonable Accommodation for Managers webinar for US Citizenship and Immigration Services (CIS).
- EEOC staff provided Reasonable Accommodation for Managers training for Department of Defense Inspector General (DODIG) in Alexandria, VA.
- OFO staff presented Reasonable Accommodation for Disability Program Management course for Defense Equal Opportunity Management Institute (DEOMI) at Patrick AFB, FL.
- TOD Assistant Director presented "Army Trends for Complaints: What are the Issues, Solutions and Recommendations." "Forming Collaborative Partnerships between Managers,

Supervisors and Employees"; Reasonable Accommodation and Disability Issues," for the Army at Fort Detrick, Frederick, MD.

- TOD staff conducted "What Not to Do/Best Practices" when dealing with Reasonable Accommodations, for Office of Naval Intelligence (ONI) at New Executive Conference Center, NMIC, Suitland, MD.
- EEOC staff presented "How the Rehabilitation Act/ADA is affected by FMLA and Worker's Compensation Requests" for DOD Office of Inspector General (DODOIG) in Washington, D.C.
- EEOC staff presented "Raising Issues on Settlement, Summary Judgment, Hostile Work Environment and Disability" for Navy at Patuxent River Naval Air Station, Patuxent, MD.
- EEOC staff presented to Senior Managers and EEO professionals on "Reasonable Accommodations, Reprisal and Harassment Issues" at the Health Resources and Services Administration in Rockville, MD.

2. Protecting Immigrant, Migrant and Other Vulnerable Workers

- OFO staff presented "Federal Government Opportunities" for League of United Latin American Citizens (LULAC) in Ponce, PR.
- OFO staff presented "EEOC Women's Work Group Report" for National Hispanic Women's Leadership, Diversity & Inclusion Training Program in Rosslyn VA.
- TOD Assistant Director and OFO staff presented Case Updates for Society of American Indian Government Employees (SAIGE) in Red Wing, MN.

3. Addressing Emerging and Developing Issues

- OFO staff conducted 'LGBT Issues' webinar for EEO staff for Internal Revenue Service (IRS).
- EEOC staff conducted 'LGBT Issues' webinar for US General Services Administration (GSA).
- TOD staff conducted 90-Minute webinar on "Sex Discrimination" for Environmental Protection Agency (EPA).
- OFO staff presented "LGBT" training for Employee Assistance Professional Association (EAPA) in Washington, DC.
- EEOC staff presented on Transgender & Gender Identity Panel for US Department of Defense (DOD) at Joint Base Andrews, MD.
- EEOC staff conducted "LGBT/ Sex Discrimination" training for Bureau of Reclamation (BOR) in Denver, CO.
- EEOC staff presented "Protections for LGBT Persons in the Federal Workplace" for Department of Veterans Affairs (VA) in Denver, CO.
- OFO staff presented at the "LGBT Awareness Event" for Defense Contract Audit Agency (DCAC); Defense Logistics Agency (DLA); Defense Threat Reduction Agency (DTRA) and Defense Technical Information Center (DITC) at HQC McNamara Complex, Fort Belvoir, VA.
- OFO Director was Keynote speaker for "June Pride Month Observance Program" for US Department of Agriculture (USDA) in Washington, DC.

- OFO staff presented "LGBT 101 for Supervisors and Managers" for Pride Month at Defense Contract Management Agency (DCMA), Fort Meade, MD.

4. **Enforcing Equal Pay Laws**

   - OFO has no outreach/training activities regarding this priority to report.

5. **Preserving Access to the Legal System**

   - TOD staff provided 4-Hour Letters of Acceptance and Dismissal (LOAD) training for Bureau of Indian Affairs in Shepherdstown, WVA.
   - EEOC staff conducted MD -110 Revisions training for US Department of Agriculture (USDA) in Washington, DC.
   - FSP Associate Director and TOD Director presented for 2015 DOT Civil Rights Virtual Symposium "The Role of Civil Right in the Federal Workplace of the Future" "Data Collection: Analyzing Data to Meet Program Requirements in EEO" for Department of Transportation (DOT).
   - TOD staff conducting "Fundamentals of Framing Claim" for Transportation Security Administration in Washington, DC.
   - TOD staff conducted national New Counselor course in Washington, DC.
   - EEOC and OFO staff conducted national Counselor Refresher course in Washington, DC.
   - TOD and OFO staff conducted national LOAD course in Washington, DC.
   - TOD and EEOC staff conducted national New Counselor course in Washington, DC.
   - TOD and EEOC staff conducted national Counselor Refresher course in Washington, DC.
   - Chair Yang, TOD Assistant Director and OFO staff presented "Glass and Bamboo Ceilings," "Beyond Words: Accents & Their Impact," "C-Suite 2.0 Identifying Barriers & Creating Strategies to Increase C-Suite Potential," and Counselor Refresher session for Federal Asian Pacific American Council (FAPAC) in Rockville, MD.
   - OFO staff presented Brown Bag on - "Procedural Dismissals" for Federal Sector EEO personnel in Washington, DC.

6. **Preventing Harassment through Systemic Enforcement and Targeted Outreach**

   - EEOC staff provided "Harassment/Bullying" presentation for US Mint in Denver, CO.
   - EEOC staff presented for 2015 DOT Civil Rights Virtual Symposium "Harassment: Guard Your Words and Actions" for Department of Transportation (DOT).
   - EEOC staff provided "Harassment/Bullying" presentation for Office of Surface Mining Reclamation and Enforcement in Denver, CO.
   - EEOC staff provided 3 Half Day sessions on Workplace Harassment for Managers for Army at Fort Polk, LA.
   - TOD, OFO and EEOC staff conducted eight (8) 2-Day Harassment Trainings for Investigators for Social Security Administration (SSA) in Baltimore, MD.

- EEOC staff provided Harassment training via VTC for US Citizenship and Immigration Services (CIS) in FL.
- OFO staff conducted Harassment training for US Customs and Border Protection (CBP) in Washington, DC.
- OFO staff presented Harassment training at FEDS/FEDQ New Perspectives National Training Conference in Washington, DC.
- OFO staff presented EEO Case Updates/w emphasis on Harassment/Hostile Work Environment cases for US Department of Justice (DOJ) in Columbia, SC.

7. Training/Outreach – General

- TOD staff provided 4-Hour LOAD training for Bureau of Indian Affairs in Shepherdstown, WVA.
- TOD staff provided training materials to US Department of Agriculture – Forest Service in Portland, OR.
- EEOC staff presented on 'Religious Garb and Grooming Standards' to Transportation Security Administration (TSA) in Washington, DC.
- EEOC staff conducted Barrier Analysis training for U.S. Department of Agriculture (USDA) in Riverdale, MD.
- EEOC staff conducted MD -110 Revisions training for US Department of Agriculture (USDA) in Washington, DC.
- FSP Associate Director presented at "Black History Month Program" for Department of Labor (DOL) in Washington, DC
- FSP Associate Director conducted FEDTALK radio promotional(s) for Federal Managers Associations '77th National Convention EEO and Effective Leadership Presentation'.
- Director of Office of Federal Operations and EEOC staff presented panel discussion on "Race in the Federal Government" for American Bar Association Section of Labor and Employment Laws Federal Sector Labor and Employment Law Committee 2015 Midwinter Meeting in Washington, DC.
- TOD Director conducted "Case Updates; GINA and Barrier Analysis" training for Defense Equal Opportunity Management Institute (DEOMI) in Patrick Air Force Base, FL.
- EEOC staff conducted Barrier Analysis training for US Department of Agriculture (USDA) in Charleston, SC.
- FSP Associate Director presented "Federal Managers Association's 77th National Convention – EEO and Effective Leadership" for FED Managers Association in Crystal City, VA.
- EEOC staff conducted "Religious Accommodation" webinar for Federal Highway Administration.
- EEOC staff presented "Unconscious Bias" for US Postal Service (USPS) in Phoenix, AZ.
- EEOC staff conducted Case Updates webinar training for Veterans Affairs (VA).
- EEOC staff presented "EEOC Case Updates" remotely from EEOC Headquarters for the Department of Energy (DOE).
- TOD Director conducted "Case Updates; GINA and Barrier Analysis" training for Defense Equal Opportunity Management Institute (DEOMI) in Patrick Air Force Base, FL.

- EEOC staff presented "EEOC Case Law Updates" teleconference for US Department of Transportation DEEP Lawyers Networking Group.
- OFO staff conducted national MD-715 course in Washington, DC.
- TOD Assistant Director and OFO staff conducted national Barrier Analysis course in Washington, DC.
- TOD staff conducted national New Counselor course in Washington, DC.
- TOD and OFO staff conducted national New Investigator course in Washington, DC.
- TOD and OFO staff conducted national Letters of Acceptance and Dismissal course in Washington, DC.
- TOD staff conducted national New Counselor course in Washington, DC.
- EEOC and OFO staff conducted national Counselor Refresher course in Washington, DC.
- TOD and EEOC staff conducted national Investigator Refresher course in Washington, DC.
- TOD staff conducted national Final Agency Actions course in Washington, DC
- TOD and EEOC staff conducted national New Investigator course in Atlanta, GA.
- TOD and EEOC staff conducted national Counselor Refresher course in Washington, DC.
- TOD and OFO staff presented 2-Day Manager training for Consumer Financial Protection Bureau (CFPB) in Washington, DC.
- OFO staff provided MD-715 and Barrier Analysis training for Army at Fort Bragg, Fayetteville, NC.
- TOD and OFO staff presented 8-Hour Manager Refresher training for Federal Mine Safety and Health Review Commission (FMSHRC) in Washington, DC.
- TOD Assistant Director presented Case Updates webinar for US Department of Veterans Affairs (VA).
- TOD and EEOC staff conducted eight (8) 2-Day Harassment Trainings for Investigators for Social Security Administration (SSA) in Baltimore, MD.
- EEOC staff presented 6-Hour Final Agency Action training for Defense Equal Opportunity Management Institute (DEOMI) at Patrick AFB, FL.
- OFO staff conducted Barrier Analysis training for US Environmental Protection Agency (EPA) in Washington, DC.
- OFO staff presented 2-Day Manager training for Consumer Financial Protection Bureau (CFPB) in Washington, DC.
- EEOC staff provided Reasonable Accommodation for Managers training for DOD/ Inspector General (DODOIG) in Alexandria, VA.
- TOD and EEOC staff conducted 3-Day Investigator training for Florida Office of Insurance Regulations in Tallahassee, FL.
- EEOC staff presented Case Updates webinar for US Department of Veterans Affairs (VA).
- TOD Assistant Director and OFO staff presented Barrier Analysis training for Army at Fort Belvoir, VA.
- OFO staff presented Brown Bag on - "Procedural Dismissals" for Federal Sector EEO personnel in Washington, DC.
- EEOC staff presented "AJ View from the Bench" for DoD Defense Contract Management Agency's (DCMA) General Counsel Annual Training Symposium in Sterling, VA.

- EEOC staff conducted "Effective Representation in the EEOC Hearings Process" Teleconference for US Department of Transportation (DOT) DEEP Lawyers' Networking Group in Washington, DC.
- OFO staff conducted a Case Update presentation for Society of Federal Labor & Employee Relations Professionals (SFLERP) in Arlington, VA.
- EEOC staff presented "AJ View from the Bench" for Defense Equal Opportunity Management Institute (DEOMI) at Patrick AFB. FL.
- FSP Director presented "EEOC Hot Topics" during Leadership Lightning Talks for Office of Personnel Management (OPM) Employee Resource Group (ERG) Summit in Washington, DC.
- FSP Director conducted EEOC Update/Diversity and Inclusion, Special Emphasis Program Manager training for US Department of Agriculture in Washington, DC.
- FSP Director presented "10 Years of MD-715 Lessons Learned" for EEO/Diversity Manager's Meeting, at the Department of Energy (DOE), in Washington, D.C..
- FSP Director and OFO staff conducted "New Directions in which Government-Wide EEO and Diversity & Inclusion Are Moving," and Case Updates for National Aeronautics and Space Administration (NASA) EO Directors/ Diversity Manager's Meeting in Washington, DC.
- EEOC staff presented "How the Rehabilitation Act/ADA is affected by FMLA and Worker's Compensation Requests" for DOD Office of Inspector General (DODOIG) in Washington, DC.
- TOD Assistant Director moderated sessions for "EEO/Diversity Conference" for US Department of Housing and Urban Development (HUD) in Washington, DC.
- OFO staff conducted EEOC Update for Counselors for Federal Mediation & Conciliation Service (FMCB) in Washington, DC.
- OFO staff presented a Case Update at FEDS/FEDQ New Perspectives National Training Conference in Washington, DC.
- OFO staff presented EEOC Legal Updates and Changes in EEOC Regulations/ Procedures for DOD at Joint Base Andrews, MD.
- FSP Director spoke on "What we need to know about the MD-10 Revisions," for US Postal Service (USPS) National EEO meeting in Potomac, MD.
- EEOC staff provided Case Updates for Senior Leaders at the US Army Research, Development and Engineering Command at Aberdeen Proving Ground, Aberdeen, MD.
- EEOC staff provided Brown Bag on – "Procedures at Hearings and Questions of Substantive Law" for Attorneys appearing before the Commission in Baltimore, MD.

8. Technical Assistance Visits

- FSP staff conducted TA visits with the following agencies (FCP denotes TA visit on the Federal Sector Complement Plan):
  - Federal Aviation Administration (01/27/15)
  - Bureau of Engraving and Printing (01/14/15)
  - Office of Comptroller and Currency (01/14/15)
  - USDA-FSIS (01/15/15)
  - Immigration Customs Enforcement (01/15/15)
  - Western Area Power Administration (01/15/15)

- National Institutes of Health (01/20/15)
- Food and Drug Administration (01/21/15)
- USDA HQ (01/22/15)
- Federal Motor Safety Carriers Administration (01/27/15)
- HHS/CMS (01/27/15)
- USDA Forest Service – FCP (01/28/15)
- DHS Federal Law Enforcement Training Center (01/28/15)
- HHS/IHS (02/03/15)
- HHS/HRSA (02/04/15)
- DHS/CIS – FCP (02/04/15)
- HHS Administration for Children and Families (02/06/15)
- IRS Chief Counsel (02/10/15)
- USDA Forest Service (02/11/15)
- Bureau of Alcohol, Tobacco and Firearms (02/11/15)
- FEMA – FCP (02/11/15)
- DHS Secret Service (02/12/15)
- USDA Agricultural Marketing Service (02/12/15)
- Bureau of Indian Affairs (02/25/15)
- DOT Federal Motor Safety Carrier Administration (02/25/15)
- DOI Fish & Wildlife Service (03/04/15)
- Department of Interior, Office of the Secretary (03/10/15)
- DOI U.S. Geological Survey (03/10/15)
- USDA, Office of Chief Financial Officer – FCP (03/17/15)
- Centers for Disease Control (03/18/15)
- National Park Service (03/20/15)
- USDA/NRCS (03/25/15)
- USDA/NASS (03/25/15
- Bureau of Reclamation (04/07/15)
- National Park Service (04/08/15)
- DOI Bureau of Land Management (04/15/15)
- Securities and Exchange Commission (04/18/15)
- DOJ, Executive Office for United States Attorneys (04/29/15)
- Department of Interior, Office of the Secretary (05/08/15)
- FBI (06/10/15)

Quarterly Strategic Enforcement Plan Report
Office of Federal Operations
1st Quarter FY 2016

I. Background: General FY 2016 1st Quarter Appellate Review Program Accomplishments

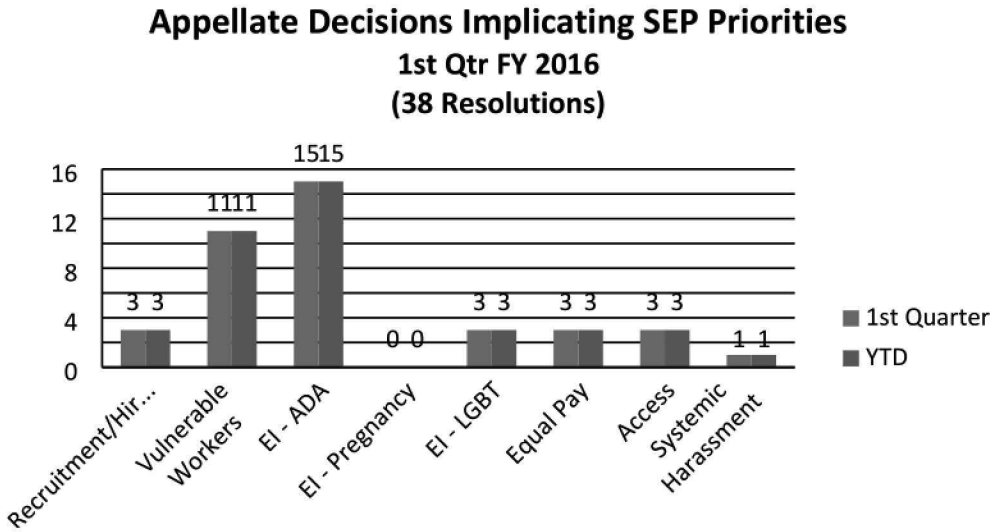
During the 1st Quarter FY 2016, the Office of Federal Operations (OFO) resolved 819 appeals. These resolutions included 313 decisions on the merits and 400 procedural closures. Of the 400 procedural closures, 291 of them involved initial appeals under review by OFO, and we reversed 101or 34.7% of the agency dismissals. With regard to the merit decisions, OFO issued 35 findings of discrimination during the 1st Quarter. We found discrimination on the basis of retaliation in 20 of the findings, disability in 17 of the findings, race in 3 of the findings, and sex in 2 of the findings. The top three issues involved in the findings included disability accommodation (14), harassment (8) and removal (6).

Resolution Description	1st Quarter	Year to Date
Resolutions	819	819
Merits Resolutions	313	313
Findings	35	35
Non-Findings	278	278
Procedural Resolutions (all)	400	400
Procedural Resolutions (from Initial Appeal)	291	291
Affirming Dismissal	189	189
Remanding Dismissal	101	101

With regard to the categorization of the 819 resolutions, OFO identified 38 appeals that implicated one or more SEP/FCP priority.[1] Section II below contains charts breaking down the composition of the individual priorities, summaries of the 38 decisions OFO attorneys categorized as implicating the SEP/FCP priorities, and summaries of the findings of discrimination made in the 1st quarter.

II. Analysis of SEP/FCP Priority Areas

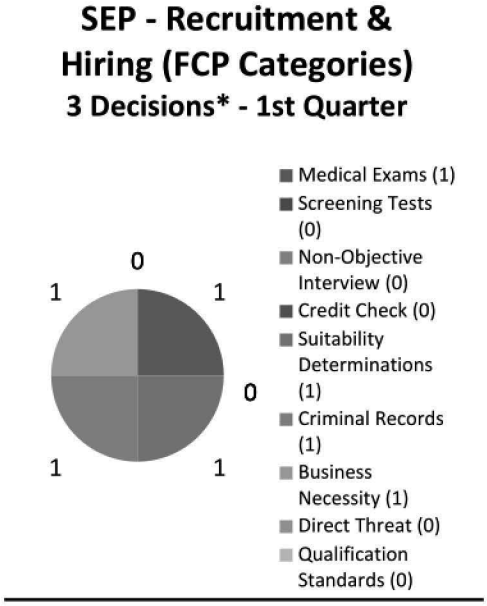
The chart below depicts the distribution of the 39 SEP categories identified in the 38 appellate decisions OFO identified as implicating an SEP/FCP category:



[1] One appellate decision was categorized as implicating two separate SEP priorities, and this is noted in the summaries below.

The numbered sections below provide more information about each of the six SEP priorities. Specifically, these sections start with a chart depicting the related FCP categories under each SEP, as well as summaries of the specific decisions under each SEP/FCP priority. In Section 7, by contrast, we provide summaries of the 35 findings of discrimination issued during the 1st Quarter, whether or not they implicated an SEP/FCP category.

1. ELIMINATING BARRIERS IN RECRUITMENT AND HIRING



*One decision did not implicate an FCP category, and one decision implicated 3 FCP categories.

Fogg v. DOJ, (USMS), 0520120575 (11/17/2015) – The Class Agent, a former Criminal Investigator, GS-1811-13, with the U.S. Marshal's Service (USMS) filed a complaint on or about July 12, 1994, alleging discrimination on the bases of race (African-American), and reprisal for prior EEO activity on behalf of a "Class of employees, former employees, applicants and/or potential employees." The defined Class was later clarified to include African-American individuals who were subjected to discrimination in (1) promotions, (2) training, (3) assignments; (4) discipline, (5) recruitment, (6) hiring, and (7) delayed processing of EEO complaints. In 2007, an AJ dismissed the Class complaint, but the Commission determined the Class should be certified. See Fogg v. Dept. of Justice, EEOC Appeal No. 0120073003 (July 11, 2012).

The Agency filed the instant request for reconsideration arguing, among other things, that the Supreme Court case Walmart Stores v. Dukes, 131 S. Ct. 2541 (2011) prohibited the certification of the Class because the Class lacked commonality. OFO disagreed with the Agency's arguments and found the appellate decision was not clearly erroneous. Rather, OFO found the "glue" holding recruitment, promotions, assignment, and training claims together was found in the formal complaint, and other anecdotal evidence contained in the declarations, as well as the evidence of an Agency-wide policy of discrimination.

The decision noted that there was centralized control over promotions of many law enforcement positions which provided the kind of evidentiary support needed under Walmart. The decision also noted that Walmart case did not foreclose Class certification where subjective decision making was alleged, but it directed courts to examine whether that decision making was exercised in a common way. Moreover the size of the Class was also a distinguishing factor from the Walmart Class.

However, OFO did find some modification of the Class was necessary and determined that the Class should also be limited to recruitment, promotions, training, and assignments of law enforcement or operational

personnel. Additionally, OFO found that a new Class Agent should be substituted, and the Class should be limited to a relevant date range.

Walker v. Selective Service System, 0120113421 (11/03/2015) – In July 2008, Complainant applied for an entry-level Contact Representative position in the Agency's Chicago, Illinois office, under a disabled Veteran's preference status. Complainant was interviewed for the position by the selecting official. After the interview, Complainant called the selecting official to inform her of a misdemeanor battery conviction that Complainant had not previously disclosed. On October 16, 2008, Complainant was tentatively offered the position. However, after the tentative offer was made, the selecting officials were provided with a copy of Complainant's arrest record which disclosed that, through a plea of no contest, Complainant was convicted of misdemeanor battery. After reviewing the arrest record, the selecting officials and the Agency's Human Resources Officer decided that they no longer wanted to hire Complainant. The Agency withdrew the tentative offer of employment because the Agency believed that the conviction was unbecoming of a former police officer and potential federal employee. The Agency subsequently hired another applicant (White), who also had a criminal record of a conviction of misdemeanor battery.

On April 4, 2009, Complainant filed an EEO complaint alleging that the Agency subjected her to disparate treatment and disparate impact on the basis of race (African-American) when the Agency failed to hire her because of her arrest/conviction record.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an EEOC AJ. Complainant timely requested a hearing. The AJ subsequently issued a decision without a hearing finding no discrimination. The Agency implemented the AJ's finding that Complainant failed to prove that the Agency subjected her to discrimination as alleged. On appeal, the appellate decision vacated the AJ's summary judgment decision and the Agency's final order, finding that the record was insufficient to support the decision and that there were genuine issues of material fact still unresolved. Specifically, the record showed that the Agency hired a White employee who was convicted of misdemeanor battery, the same offense of which Complainant was convicted. The decision noted that Commission Guidance states that an employer may be liable under Title VII where evidence shows that an employer rejected an African-American applicant based on her criminal record but hired a similarly-situated White applicant with a comparable criminal record, as was possible in the present case. See EEOC Enforcement Guidance: Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, No. 915.002, Section IV (Apr. 25, 2012) (Arrest and Conviction Guidance). The decision found that there was insufficient evidence in the record to compare Complainant's arrest record with that of the similarly situated white applicant. Further, the decision found that the record was not sufficiently developed for EEOC to determine whether there was a disparate impact on African-Americans by the Agency's background check policies or practices. The appellate decision remanded the matter to the hearing level, stating that the record must be further developed through additional discovery and a hearing to determine exactly what the Agency's policies and practices are for background checks regarding criminal arrests and convictions, and the impact those policies and practices have on African-American employees and applicants for employment.

Cooper (Milford R.) v. DOD, 0120120081 (12/03/2015) **[Repeated under Priority 3 below]** – Complainant worked as a Police Officer at the Pentagon. During the course of his September 2008 medical examination, Complainant self-disclosed his positive HIV status. The Agency requested additional information from his medical provider to ascertain whether his condition would present an undue risk to himself or others in the performance of his duties. Complainant failed to provide the requested information; thus, the Agency requested that he undergo an Independent Medical Examination (IME). In the interim, Complainant was assigned a light-duty position because he failed a prescribed medical standard which provided for additional screening and light duty if an officer is HIV positive. Complainant attempted to schedule his IME but had difficulty doing so.

Complainant filed a formal complaint alleging discrimination on the bases of disability and reprisal when he was placed into a light duty status, forced to undergo repeated medical and psychiatric a neuropsychiatric

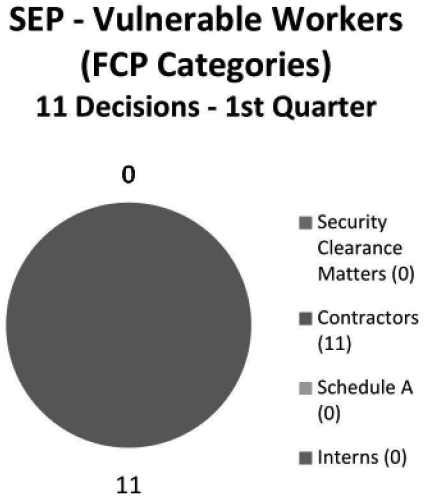
examinations as well as periodic blood monitoring. The complaint also alleged an unlawful medical disclosure and harassment.

The AJ assigned to the case issued a decision finding no discrimination without a hearing. On appeal, OFO found the AJ erred in his analysis of the case, which only focused on whether Complainant had presented evidence of pretext. The decision found that the Agency relied on the application of a medical qualification standard which resulted in repeated medical inquiries and reassignment due to the diagnosis of HIV, and there was a dispute in the record as to whether a simple diagnosis of HIV required additional screening and reassignment in the absence of objective evidence that the employee was having problems performing the essential functions of the job. OFO found no analysis was performed addressing whether this medical standard was job-related and consistent with business necessity and remanded the complaint for a hearing.

OFO further found a dispute in the record as to whether the Agency conducted medical inquiries that were job-related and consistent with business necessity, and whether those inquiries were based on objective evidence. OFO questioned whether the inquiries were reasonable given the lack of objective evidence that Complainant experienced any issues related to the performance of his essential job functions. Moreover, there was evidence in the record from Complainant's physician cleared him to work. The decision found the AJ failed to respond to Complainant's allegation that he was forced to undergo a neuropsychiatric examination and periodic blood testing, which should be addressed at a hearing. Because the Agency's investigation did not secure a meaningful affidavit from the individual whom Complainant alleged had subjected him to harassment, it was also unable to assess Complainant's allegation of harassment. The matter was remanded to the Hearings Unit for the scheduling of a hearing.

2. PROTECTING IMMIGRANT, MIGRANT AND OTHER VULNERABLE WORKERS

As depicted in the chart below, during the 1st Quarter of FY 2016 OFO resolved 11 decisions under this SEP Priority and its associated FCP priorities.



Decision Summaries for this Category

Sandoval v. DOD (DCA), 0120151418 (10/02/2015) – Complainant was self-employed at a Commissary store as a Head Bagger serving patrons by bagging and carrying out their groceries. The Agency dismissed the complaint for failure to state a claim, reasoning Complainant was not an employee thereof. On appeal, OFO

affirmed. In affirming, OFO found baggers worked solely for tips from patrons, the Agency was not involved in compensating Complainant, baggers were not supervised by Agency staff, the Head Bagger created bagger schedules and made assignments, and Complainant exercised a high degree of independence and control apart from the Agency. Further, in a prior case, OFO ruled that a bagger in another Commissary was not an employee of the Agency.

Quarles v. DOD (DCA), 0120152159 (10/14/2015) – Complainant worked as a Head Bagger at the Agency's Fort Bragg North Commissary in North Carolina. On February 19, 2015, Complainant was terminated from his position as Head Bagger. Thereafter, Complainant filed a formal complaint alleging that the Agency subjected him to discrimination based on race and sex when it terminated him from his position.

The Agency dismissed the complaint for failure to state a claim, pursuant to 29 C.F.R. § 1614.107(a)(1). The Agency determined that Complainant was an independent contractor, and therefore not an employee of the Agency with standing to pursue a complaint.

On appeal, the Commission affirmed the Agency's dismissal. We determined that Complainant was self-employed and exercised a high degree of independence and control in performing his duties and conducting himself. We determined that the Agency did not exercise sufficient control over Complainant's position to qualify as his employer for the purpose of the 29 C.F.R. Part 1614 EEO complaint process.

Wilkins v. DHS (ICE), 0120152032 (10/28/2015) – Complainant worked for a staffing firm serving the Agency as a contract assistant with the Agency's Chief of Procurement Office closing out inventory files in a centralized file room. She filed a complaint alleging that she was discriminated against based on her age (49) when she was harassed by an Agency employee and terminated on July 21, 2014. The Agency dismissed the complaint for failure to state a claim, reasoning it did not employ Complainant. The EEOC reversed because the Agency exercised sufficient control over Complainant's position to qualify as her joint employer. In finding that it did not exercise control over Complainant's position, the Agency pointed to language in its contract with Complainant's staffing firm going to some control factors. OFO found that this language, without more, did not actually show what occurred in Complainant's workplace – who on a day to day basis assigned and oversaw her work. OFO found that Complainant's contentions pointed to Agency control and were not rebutted by anyone familiar with what actually occurred in her workplace. She contended that an Agency employee was assigned to set her up and train her refused to do so and directed her to lift heavy boxes. OFO found that Complainant's contention that she was terminated because this Agency employee communicated she was uncomfortable working with her is especially significant - the Agency's de facto ability to terminate Complainant pointed in the direction of it controlling her position.

Stanton v. Army, 0120152150 (10/29/2015) – Complainant worked as a Marine Observer on board U.S. Dredge Wheeler, while it was dredging the Galveston District Waterways. She was to live and work on the Wheeler for the next three months. After less than a month, she was forced to leave the vessel. Complainant filed a formal complaint alleging she was sexually and non-sexually harassed and physically assaulted between December 1 and 22, 2014 while working on board the Wheeler. She also claimed that after reporting the harassment she was subjected to reprisal.

The Agency dismissed the complaint for failure to state a claim and untimely counselor contact. Without any analysis, nor mention of Ma, the Agency concluded that Complainant was a contractor, employed by East Coast Observers (ECO), and therefore lacked standing to file a complaint. Alternatively, the Agency reasoned that Complainant's counselor contact was beyond the forty-five day time limit.

The Commission found the Agency exerted sufficient control over Complainant to be a joint employer. Complainant not only worked on the vessel, but resided there. The harassment transpired on the Agency vessel, by Agency employees, and therefore the Agency knew or should have known of the alleged behavior. When Complainant notified Agency officials, they forced her to leave the vessel with threat of arrest.

With respect to the timeliness of her counselor contact, the record reflects that Complainant reported the harassment to the Captain, Assistant Captain, and New Orleans office. Further, because Complainant was considered a contractor, she was likely without the benefit of EEO information and training. Lastly, while the Agency submitted an affidavit regarding the display of EEO posters, we found it lacked specificity. Moreover, the affidavit was from the Captain who had been accused of reprisal. The time limit was waived.

Kowsari v. BBG, 0120150913 (11/19/2015) – Complainant served the Agency under a direct contract as a Writer-Researcher-Reporter-Producer at its Voice of America (VOA), Persian Service. She filed a complaint alleging that she was discriminated against based on her sex and reprisal for prior EEO activity when she was denied equal pay, was not selected for the contract position of Broadcast Journalist, was harassed, and was terminated. The EEO Counselor's report relayed that like Complainant, her Agency Contracting Officer Representative (COR) referred to herself as Complainant's supervisor (S1). In various emails to Complainant, S1 set deadlines, made suggestions on how to improve her work product, and advised she gave her complete instructions and to follow them. S1 also assigned Complainant work. Complainant worked on Agency premises using its equipment, and did so for over four years. The Agency terminated Complainant based on performance and conduct, an especially significant factor since this case involved a termination. Based on Complainant relaying to the EEO counselor that the Broadcast Journalism job had the same duties she was already performing, OFO found she was a de facto applicant for what she alleged was her own position.

Moore v. Office of the Director of National Intelligence, 0120151373 (11/19/2015) – Complainant worked for a staffing firm serving the Agency as an FOIA/PA Analyst at the Agency's Review & Release Office, processing FOIA cases. She filed a complaint alleging that she was discriminated against based on her sex (pregnant/female) when she was terminated on or about September 24, 2013. The Agency dismissed the complaint for failure to state a claim, reasoning it did not employ Complainant. The EEOC reversed because the Agency exercised sufficient control over Complainant's position to qualify as her joint employer. While the Agency Branch Chief relayed to the EEO counselor that Complainant received guidance and work assignments from a contract lead as outlined in the contract statement of work, she did not illustrate what this meant in practice. Complainant wrote that the above Agency Chief assigned cases to her, and that while her staffing firm offered a compressed work week schedule, the Chief would not permit her to work on a compressed schedule. The Agency COTR conceded that Complainant's work was done under the review of the above Chief. Significantly, Complainant was terminated because the Agency requested the staffing firm to cease her services to the Agency – it indicated she had poor performance.

Smith v. Office of the Director of National Intelligence, 0120143059 (11/17/2015) – Complainant worked for a staffing firm serving the Agency as an Operations Officer working on cases at its Information Management Office. She filed a complaint alleging that she was discriminated against based on her color/race/sex (Black/African American/female) when she was terminated on March 1, 2013, an Agency manager made negative comments preventing her from being reassigned to another Agency component prior to her termination, and she was not hired by another staffing firm to serve the Agency in July 2013, based on the perceived attitude of this Agency manager. The Agency dismissed the complaint for failure to state a claim, reasoning it did not employ Complainant. The EEOC reversed because the Agency exercised sufficient control over Complainant's position to qualify as her joint employer. While the Agency found the staffing firm assigned Complainant work, it gave no specifics, and Complainant provided specific information on assignments she received directly from the Agency. Further, Complainant worked on Agency premises using Agency equipment, and stated the Agency took away her compressed schedule. Significantly, Complainant was terminated because the Agency requested the staffing firm to cease her services to the Agency – it indicated she had performance problems.

Jernigan v. Treasury, 0120152477 (11/19/2015) – Complainant worked with Automated Resource Management Associates (ARMA), Inc., which contract with the Agency to provide support at the Agency's Washington D.C. facility. On February 6, 2015, Complainant filed an EEO complaint alleging the Agency

discriminated against him on the bases of race (African-American) and color (black) when, on or about September 30, 2014, he was terminated from his position as a contractor due to the actions of the Department of Treasury.

On June 24, 2015, the Agency issued a final decision, dismissing the formal complaint for failure to state a claim. Specifically, the Agency determined that Complainant was not a Federal employee, and that he was instead a contractor, not covered by Title VII.

On appeal, we reversed and remanded the Agency's dismissal. Specifically, we noted in his unsworn declaration, Complainant stated that prior to his termination, his main duty was maintaining the Agency's telecommunications system, including responding to and addressing service orders and trouble tickets from Agency employees. Complainant stated that he was "generally supervised" by two named managers at another subcontractor, Communication Services.

Further, Complainant stated "in general, Treasury officials did not directly supervise me or direct my work. However, [a named Agency manager], who is a manger in the Office of the Chief Information Officer, oversaw the telecommunication contractors and was in charge of the DTS program…it is also my understanding that [Agency manager] and/or other Treasury employees working with him and/or under his supervision determined where the contract employees were assigned to work…" Complainant stated that he was not certain whether the Agency rated his performance, and that 100% of his work week was spent at the Agency facility.

We noted that the record contained a declaration from the Agency manager stating that the Agency does not have a contract directly with ARMA, and that Complainant was supervised by ARMA and Verizon. However, despite the presence of this declaration in the record, we found that this declaration, alone, was not determinative of whether Complainant is an Agency employee for EEO purposes or whether the Agency was involved in terminating Complainant. We also noted that the record did not contain a copy of the contract between the Agency and ARMA and/or Verizon or affidavits from other Agency officials addressing the Ma factors. Therefore, we remanded the matter to the Agency for a supplemental investigation in order to determine whether the Agency was a joint employer for EEO purposes.

Carr v. DOC (NOAA), 0120151782 (11/17/2015) – Complainant worked as a Biologist at the Agency's Southeast Fisheries Science Center in the Beaufort Laboratory on Pivers Island in Beaufort, North Carolina. From 2003 to 2007, Complainant was employed by Alpha Solutions, a contractor that provided services with the Agency. In 2007, the Agency contracted with JHT, and Complainant continued to work in the same position at the same location, now as a JFT employee, until his termination in December 2014.

In 2014, Complainant began experiencing labored breathing, shortness of breath and a cough. He was prescribed inhalers, and Agency management was aware of his condition. In December of 2014, Complainant learned of the Agency's plans to move the Harmful Algae Bloom labs close to his lab. Complainant contacted his Project Lead (an Agency employee) regarding his concerns. The email was forwarded to the Pivers Island Deputy Director, who did not address Complainant's concerns but stated that he should have communicated with JHT instead. Complainant's email was then sent to the JHT Program Manager, located in South Carolina. The next Monday, Complainant was terminated.

Complainant filed an EEO complaint regarding his removal and the denial of a reasonable accommodation. The Agency dismissed the complaint on the ground that Complainant was not an Agency employee. It reasoned that Complainant was hired, fired, paid, and granted benefits by JHT.

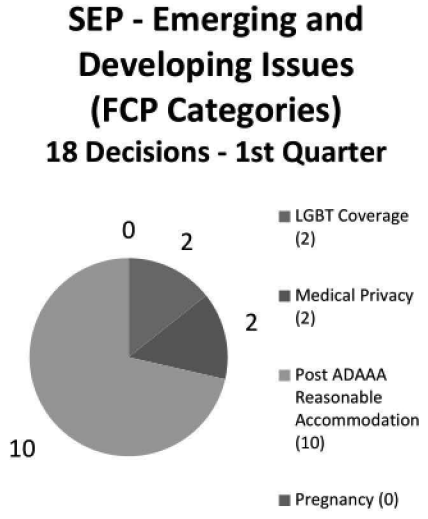
The Commission found that the Agency exerted sufficient control over Complainant to be considered a joint employer. The record indicated that Complainant worked at the Agency's laboratory, with Agency materials and equipment, and performed duties that were a regular part of the Agency's business. Further, Complainant worked in the position at the Agency's facility for over a decade. While the Agency argues that JHT retained ultimate supervisory authority, the record showed that the nearest JHT supervisor was located in Charleston, South Carolina and Complainant had little direct contact with her. The Agency also held Complainant out as an Agency employee to the public.

Escander (Spencer T.) v. Army, 0120151245 (12/3/2015) – Complainant worked for a staffing firm serving the Agency as an Arabic Language Instructor. He filed a complaint alleging that the Agency discriminated against him based on his national origin (Egyptian), religion (Coptic Christian), and reprisal for his association with a co-worker who engaged in prior protected EEO activity when he learned, on July 2, 2014, that he was suspended from further service for the Central Asian and Middle Eastern Languages Department at Fort Bragg. The Agency dismissed the complaint for failure to state a claim, reasoning it did not employ Complainant. OFO reversed because the record contained insufficient information to make a determination on whether the Agency exercised sufficient control over Complainant's position to qualify as his joint employer. It ordered the Agency on remand to gather this information, and then issue a letter accepting the complaint or a FAD dismissing it.

Vengua (Shelia D.) v. Army, 0120152371 (12/01/2015) – Complainant worked for a staffing firm serving the Agency as a Senior Security Specialist and Information Assurance Analyst. She filed a complaint alleging that the Agency discriminated against her based on her sex (female) and reprisal when she was terminated on December 19, 2014 The Agency dismissed the complaint for failure to state a claim, reasoning it did not employ Complainant. The EEOC reversed because the Agency exercised sufficient control over Complainant's position to qualify as her joint employer. While the scope of Complainant's work was generally defined by the contract, her daily operational requirements were set, prioritized, and monitored by an Agency manager. The record contained specific examples of the Agency assigning Complainant work. While an Agency manager denied that he set contractor hours, the record showed that in practice the contrary was true, and that the Agency monitored Complainant's whereabouts. Complainant served the Agency for over three years on Agency premises using Agency equipment. Significantly, Complainant was terminated by her staffing firm after the Agency advised Complainant must be terminated for cause.

3. ADDRESSING EMERGING AND DEVELOPING ISSUES

As depicted in the chart below, during the 1st Quarter of FY 2016 OFO resolved 18 decisions under this SEP Priority and its associated FCP priorities.



*Four decisions did not implicate an FCP category

Decision Summaries for this Category

Price v. VA, 0120090181 (10/13/2015) **[Repeated under Findings below]** – Complainant, a Publications Supply Clerk, GS-3, alleged that the Agency failed to provide her with a reasonable accommodation for her physical disability. Complainant suffered from chronic pain from bilateral carpal tunnel syndrome, among other conditions. Complainant primarily experienced difficulties doing repetitive work with her hands and had to wear braces on her hands. Upon returning from sick leave due to surgery, management assigned Complainant duties that required her to photocopy service medical records for reproduction. In an attempt to accommodate Complainant, the Agency provided her with an electric stapler and a chair to operate the photocopy machine. Complainant was not satisfied with this attempt at accommodation, saying that that the repetitive and fast nature of the photocopying aggravated her medical conditions. Management subsequently told Complainant that her production rate with respect to her photocopying duties was unacceptable. Management thereafter placed Complainant on a Performance Improvement Plan, and thereafter removed her from employment. The Agency's final Decision found no discrimination. On appeal, in modifying the Agency's final decision, we found that Complainant established that she was a qualified individual with a disability who had been denied reasonable accommodation in violation of the Rehabilitation Act. We noted that Commission precedent clearly established that Complainant's Carpel Tunnel syndrome, among her other conditions, clearly substantially limited her ability to perform manual tasks. We noted that while Complainant could not perform the essential functions of her photocopying position, she did identify other Agency positions that were available. We indicated that the Agency did not dispute and/or address Complainant's statement that there were other vacant positions which she was capable of performing, to which she could have been reassigned. We therefore found that Complainant established that she was denied reasonable accommodation for her disability as alleged. We further found the Agency liable for compensatory damages, writing that the Agency's removal of Complainant rather than make any further attempt to accommodate her clearly constituted bad faith. In addition to compensatory damages, we ordered the Agency to indentify a vacant funded position for Complainant, and also provide her with back pay and/or other benefits.

Fresh v. DOJ (FBI), 0120081848 (10/13/2015) **[Repeated under Findings below]** – Complainant worked as an Equal Employment Opportunity Program Manager, GS-13, with the Agency's Office of Equal Employment Opportunity Affairs (OEEOA), at the J. Edgar Hoover FBI Building in Washington, D.C. Complainant's position required her to manage Equal Employment Opportunity Special Emphasis Programs.

Complainant's doctor diagnosed her with Degenerative Disk Disease (DDD) in her lower back, which was caused by an accident while Complainant was on active military duty. Complainant was also diagnosed with Fibromyalgia. Complainant's Fibromyalgia condition causes chronic widespread musculoskeletal pain with symptoms of fatigue. Complainant also had knee impairments in both knees, which required injections, physical therapy, and arthroscopy surgery. Complainant was assigned to the Acting Unit Chief of the OEEOA Special Programs Unit, who served as Complainant's first-level supervisor (S1). Complainant was also assigned to an EEO Officer who became her second-level supervisor (S2). In meetings and e-mails with both S1 and S2, Complainant discussed, in great detail, her treatment, pain, and doctor visits with respect to her medical conditions.

After notifying S1 and S2 of her conditions, Complainant became aware that the Agency's J. Edgar Hoover Building was scheduled to have a fire drill. Six days prior to the drill, Complainant sent a memorandum to S1 and/or S2, reminding them of her knee and back problems. The morning of the scheduled fire drill, Complainant asked the Safety Warden that she be allowed to use the elevator, instead of the stairs. Complainant however was not allowed to do so, and had to traverse down seven flights of stairs with a coworker who was also prohibited from using the elevator. After descending down the stairs, the coworker noticed that Complainant's knee was extremely swollen and advised Complainant that they should not try to walk to the meeting point that was three blocks away. Complainant severely injured her knee(s) as a result.

Various employees provided affidavits, asserting their beliefs that S1 and S2 were intentionally subjecting Complainant to discriminatory reprisal. Specifically, S1 and S2 denied Complainant training and imposed extremely short unreasonable deadlines on her work. Also, S1 and S2 were unwilling to allow Complainant to strictly use e-mail communication with them and frequently required Complainant to meet with them in their

offices. Complainant reportedly, on some days, had to walk as many as 10 to 15 times a day to their offices even though she visibly had trouble walking.

The Agency's final decision found that Complainant was not subjected to discrimination as alleged. On appeal, in reversing the Agency's decision, we found that Complainant was a qualified individual with a disability who had clearly been denied reasonable accommodation. We further found that S1 and S2 subjected Complainant to retaliatory disparate treatment and a hostile work environment. We found that contrary to 29 C.F.R. § 1614.102, the Agency's OEEOA failed to conduct itself in a manner necessary to effectuate the elimination of discrimination in the workplace. We ordered the Agency to provide compensatory damages to Complainant, and also provide S1 and S2 with a minimum of 24 hours of training.

Adams v. DHS, 0720110018 (10/22/2015) **[Repeated under Findings below]** – Complainant, who has rheumatoid arthritis, worked as an Adjudication Officer, where he reviewed applications for citizenship and interviewed applicants for citizenship. Complainant alleged that he was denied an accommodation, which caused him significant pain and ultimately had to apply for disability retirement. He initially alleged to an EEO Counselor that he was denied an accommodation and constructively discharged. He then filed a mixed appeal when he was referred to the MSPB. Complainant withdrew his constructive discharge claim from the MSPB, and asked for the EEOC to take jurisdiction over the remainder of the complaint.

An EEOC AJ held a hearing and determined that the Agency had ignored Complainant's repeated requests for accommodation over a several year period, which was done in bad faith. The AJ noted that even after the Agency ordered its own independent medical evaluation, it ignored the physician's order that Complainant be accommodated. The AJ ordered front pay until Complainant's 65th birthday, back pay, $250,000.00 in nonpecuniary compensatory damages and attorney fees. The Agency did not implement the decision and appealed to OFO.

In its decision, OFO rejected the Agency's timeliness and jurisdictional arguments, finding that the EEOC could take jurisdiction over the complaint because Complainant's retirement resulted from the denial of accommodation and was not a constructive discharge. OFO found there was substantial evidence in the record to support the AJ's findings, and noted that much of the AJ's decision was based on the credibility of the witnesses. OFO awarded back pay, $250,000.00 in nonpecuniary compensatory damages, as well as an attorney fee enhancement of 20% due to the exceptional results obtained. OFO declined to award front pay because complainant was unable to return to work, even if accommodated.

Gale v. USPS, 0520140559 (10/27/2015) – Complainant requested reconsideration (RTR) of the Commission's decision in EEOC Appeal No. 0120122896 (August 8, 2014), which found that she was not denied reasonable accommodation since she did not provide medical documentation which specifically addressed how her requested accommodation was related to her colon cancer, and that she was not subjected to disparate treatment disability discrimination. On RTR, Complainant urged that her medical notes were sufficient and that the Agency denied her requested accommodations of: 1) maximum 8 hour workday; (2) hours between 8:00 am until 5:00 pm; and (3) only administrative duties. The decision on RTR concluded that the previous decision was not clearly erroneous in its determination that the medical notes were vague and did not establish a sufficient connection between Complainant's disability and the requested accommodations. The decision also, concluded that the previous decision was not clearly erroneous in its determination that Complainant was not subjected to disability discrimination because Complainant did not point to any vacant funded positions between the hours of 8am and 5pm in which she could be placed. Therefore, the decision in EEOC Appeal No. 0120122896 was affirmed.

Herrera v. USPS, 0120141711 (10/15/2015) – Complainant suffers from conditions related to a work-related leg injury and an unrelated gastrointestinal condition. Complainant's primary duties included working the window as the lead and only retail clerk at this small post office. By 2011, Complainant would spend a total of two hours in the restroom including her breaks due to her condition. Complainant was referred to the District Reasonable Accommodation Committee (DRAC). Around the same time, Complainant filed a claim with the

Office of Workers' Compensation (OWCP) claiming that she suffered stress due to a hostile work environment and harassment. Complainant's stress claim was later denied, and she subsequently filed for disability retirement.

After meeting with the DRAC, the Agency offered Complainant reasonable accommodations including: Complainant could attend to her bathroom needs during her breaks at 10:15 a.m. and 12:45 p.m., as well as during her lunch hour from 2:00 p.m. to 3:00 p.m.; Complainant could come in 20 minutes prior to clocking in every morning in order to attend to her bathroom needs prior to clocking in; and Complainant would be granted flexibility in taking breaks to attend to her actual bathroom needs, but with active communication with her supervisor to allow management to arrange coverage for her absences from the window. In addition, the DRAC and Complainant discussed that Complainant may need an occasional additional restroom break after her lunch hour. Complainant appealed the offered accommodations claiming that she required immediate and unlimited access to the bathroom at any time throughout the day and that her bowel movements were completely unpredictable.

Complainant filed a formal complaint alleging that the Agency discriminated against her and subjected her to a hostile work environment on the bases of disability and in reprisal for prior protected EEO activity when her request for reasonable accommodation to leave the window daily at 4:00 p.m. instead of 4:30 p.m. was denied; and she was forced to leave the Post Office following the filling of PS Form CA-2 claiming stress and was told to provide medical documentation clearing her to return to duty. The AJ assigned to the case granted summary judgment in favor of the Agency finding that Complainant had not been denied reasonable accommodation as the Agency engaged in the interactive process and offered her reasonable accommodations which she refused. In addition, the AJ found that had not been subjected to unlawful discrimination or reprisal.

The Commission affirmed the AJ's decision finding that the Agency offered Complainant several accommodations to address her need for frequent restroom breaks including Complainant's agreement to address her needs during her regular rest and lunch breaks and before her scheduled begin time. Additionally, the Agency showed willingness to be flexible in granting additional breaks as long as Complainant actively communicated with her supervisor to arrange coverage during her absences from the window. Furthermore, the Commission found that Complainant had not been subjected to discrimination, reprisal, or a hostile work environment as the record showed that the Postmaster placed Complainant off the clock because she failed to provide medical documentation related to her new condition and ignored management's attempts to contact her concerning returning to work.

Rineer v. Air Force, 0120081812 (10/14/2015) **[Repeated under Findings below]** – Complainant worked as an Electronics Mechanic, WG-2604-11, at the Agency's Aerospace Maintenance and Regeneration Group (AMARG) in Tucson, Arizona. Complainant was injured while working, resulting in restrictions from twisting, standing more than 30 minutes per day, walking more than one hour per day, kneeling more than five minutes per day, and bending/stooping more than five minutes. Complainant stated that he was detailed to work in the Technical Order Library until September 2006, and that he performed mostly sedentary work in this detail assignment. However, on September 5, 2006, the Agency assigned him to work as a Security Guard, and in this position, he worked "on his feet all day," which violated his medical restrictions. Complainant further stated that he began taking Vicodin to cope with the pain caused by working in a Security Guard position that violated his medical restrictions. Complainant filed an EEO complaint in which he alleged that the Agency discriminated against him on the basis of disability when the Agency failed to accommodate him.

In a summary judgment decision, an AJ concluded that Complainant failed to prove that he was an individual with a disability entitled to coverage under the Rehabilitation Act. The AJ further found that Complainant was not denied a reasonable accommodation because the Agency offered him a modified position in May 2007 within his restrictions as a Production Controller, which Complainant accepted.

On appeal, the Commission found that the AJ erred as a matter of law with respect to the issue of whether Complainant was an individual with a disability. The Commission noted that Complainant had long-term knee and ankle impairments that restricted him from standing more than 30 minutes per day and walking more than one hour per day. Additionally, the Commission noted that Complainant's knee impairment restricted him from

kneeling and bending more than five minutes per day and precluded him from twisting. Consequently, the Commission found that Complainant's physical impairments substantially limited him in the major life activities of standing and walking, and consequently, he is an individual with a disability.

Regarding Complainant's reasonable accommodation claim, the Commission noted that no reasonable fact-finder could conclude that Complainant could continue to perform the essential functions of his previous Electronics Mechanics position after he was injured because the duties of this position were outside his restrictions. The Agency noted that the Agency reassigned Complainant to a Security Guard position that required him to stand on his feet essentially all day, although he was restricted from working on his feet from working more than 30 minutes per day. Thus, the Commission found that the Agency failed to reasonably accommodate Complainant when it placed him into a Security Guard position that clearly violated his medical restrictions. However, the Commission found that the Agency later accommodated Complainant when it offered him a Production Controller position within his restrictions in May 2007.

In order to remedy the Rehabilitation Act violation, the Commission ordered the Agency to provide Complainant with proven compensatory damages; to provide training to all AMARG management officials on providing reasonable accommodation under the Rehabilitation Act; and to consider taking appropriate disciplinary action against responsible management officials.

Williams v. USPS, 0120073428 (10/14/2015) – Complainant worked as a Mail Processing Clerk at the Agency's Cincinnati, Ohio Processing and Distribution Center. Complainant has Lupus, which causes fluid to accumulate in her lungs. Consequently, Complainant suffers from coughing and problems associated with the regulation of her body temperature. Complainant also experiences heat and cold at the same time in different parts of her body. Additionally, Complainant suffers from Raynaud's Disease, which is a circulatory disease that causes numbness, pain, weakness, and stiffness in the middle finger of her right hand. Further, repetitive motion or vibration causes stiffness in her right hand. Complainant's physician has restricted her from peeling labels, repetitive motions, and working in cold environments.

Complainant filed an EEO complaint in which she alleged that she was discriminated against on the basis of disability when, in April 2006, management assigned her to work in a cold area and required her to operate a vibrating machine, which exacerbated her medical conditions. Complainant maintained that her mail case was too close to the air conditioning vent, which made her cold, but immediately after she reported this matter to her supervisor (S1), she was moved away from the vent. Complainant also maintained that she normally did not operate the Delivery Bar Code Sorter (DBCS) because of her medical restrictions; however, on an unspecified date in April 2006, S1 told her to run the machine for a few minutes, although Complainant told her that she could not operate the machine. Complainant stated that she operated the machine for less than ten minutes and continued stamping mail thereafter. S1 stated that although Complainant provided a note that said that she could not "jog" mail, she did not inform S1 that her condition was exacerbated by working on the vibrating DBCS machine. The Manager stated that Complainant told him that her condition prevented her from working in the cold or on machines because of the vibration, but Complainant did not provide him with any medical documentation regarding her condition.

In a summary judgment decision, an AJ concluded that Complainant was not an individual with a disability entitled to coverage under the Rehabilitation Act. The AJ did not address whether the Agency failed to provide Complainant with a reasonable accommodation for her medical conditions because the AJ determined that Complainant was not an individual with a disability.

On appeal, the Commission found that the AJ erred as a matter of law with respect to the issue of whether Complainant was an individual with a disability. The Commission determined that the evidence reflected that Complainant suffered from Lupus and Raynaud's Disease, which resulted in Complainant experiencing body temperature regulation problems and numbness and pain in her fingers and hands. The Commission noted that Complainant's condition severely restricted her ability to do housework and chores because of the pain she experienced in her hands. Consequently, the Commission found that Complainant is substantially limited in the major life activity of performing manual tasks. Additionally, the Commission found that Complainant was also substantially limited in the major life activity of working because she was restricted from working the broad class of jobs that involve using a machine.

Regarding Complainant's reasonable accommodation claim, the Commission noted that Complainant acknowledged that she did not inform management that her work area was too cold, and therefore, the Agency did not deny her a reasonable accommodation with respect to this matter. However, the Commission noted that Office of Workers' Compensation Programs documentation from Complainant's physician informed the Agency that Complainant was restricted from working on any machinery because of her medical conditions, and S1 did not deny that he ordered Complainant to work on the DBCS machine in April 2006. Consequently, the Commission found that the Agency failed to provide Complainant with a reasonable accommodation when it insisted that she work on machines in violation of her restrictions.

In order to remedy the Rehabilitation Act violation, the Commission ordered the Agency to ensure that Complainant is provided with a reasonable accommodation for her disability at all times; to provide Complainant with proven compensatory damages; to provide at least eight hours of EEO training to the responsible management officials; and to consider taking appropriate disciplinary action against the responsible management officials.

Slye-Cody v. USPS, 0120090617 (10/13/2015) **[Repeated under Findings below]** – Complainant worked as a Modified Sales and Services Associate at the Palm Coast, Florida Post Office pursuant to a December 2005 permanent rehabilitation position offer. This position featured a schedule wherein Complainant did not work on Sundays and Mondays. Complainant's medical restrictions precluded her from lifting more than 15 to 20 pounds with her right hand; standing unsupported for more than 15 minutes at a time; and sitting for more than 30 minutes at a time. In June 2005, Complainant requested an accommodation by having Sundays and Mondays off work, and the Agency granted the request. Complainant stated that the accommodation was necessary because she made most of her medical appointments for Mondays. On June 19, 2007, the Agency gave Complainant another job offer that changed her days off to Saturdays and Sundays and did not include her sitting/standing restrictions. Management did not discuss any alternative accommodations with Complainant, and she was forced to use her leave and take leave without pay in order to attend medical appointments

Complainant was subsequently injured while working, which resulted in restrictions that precluded her from lifting, pushing, or pulling more than 10 pounds; bending more than one hour per day; and walking more than 30 minutes. Additionally, Complainant was advised to change positions frequently when sitting and standing and to take precautionary measures in grasping, fine manipulation, and reaching above the shoulder. On October 9, 2007, Complainant asked her supervisor (S1) to cover her on the window because she had been standing and walking for over an hour. In response, the Postmaster ordered her to return to the lobby to work. Complainant then told the Postmaster that she needed to sit for a few minutes, but the Postmaster told her that she should go home if she could not do her job. Complainant submitted three requests for light duty with medical documentation in October and November 2007, but management denied her requests on the basis that her medical restrictions were not updated and there was no work available.

Complainant filed an EEO complaint in which she alleged that the Agency discriminated against her on the basis of disability and in reprisal for prior EEO activity when, on October 10, 2007, the Agency denied her request for light duty.

In its final decision, the Agency concluded that Complainant failed to prove that the Agency subjected her to discrimination as alleged. Specifically, the Agency found that Complainant was not an individual with a disability. The Agency further found that there was no prima facie case of reprisal in this case because there was no nexus between Complainant's EEO activity and the Agency's denial of light duty. The Agency also found that Complainant failed to prove that the Agency's articulated non-discriminatory reasons explanation for its actions were pretext for unlawful discrimination. .

On appeal, the Commission found that the Agency erred in finding that Complainant is not an individual with a disability. The Commission noted that Complainant could not lift more than 10 pounds intermittently, which made her substantially limited in the major life activity of lifting under Commission precedent.

Regarding Complainant's reasonable accommodation claims, the Commission found that Complainant failed to show why Monday was the specific day of the week she needed to attend her medical appointments instead of

other days of the week. The Commission therefore found that Complainant failed to establish a nexus between her requested accommodation and her medical condition.

Regarding the light duty requests, the Commission noted that, despite the Postmaster's claim that Complainant did not submit updated medical documentation until she made a fourth light duty request, the record revealed that Complainant had submitted such documentation since her first light duty request. The Commission further noted that although the Postmaster stated that there was no work available within Complainant's restrictions, the Manager stated that Complainant was already performing work within her restrictions after she was injured, there was work Complainant could continue to perform within her light-duty job offer, and Complainant's light-duty request would probably have been approved before the new Postmaster arrived at Palm Coast. Consequently, the Commission found that the Agency denied Complainant a reasonable accommodation because the evidence demonstrated that there was work within Complainant's restrictions from the time she first requested and was denied light duty (October 10, 2007) until the date the Postmaster finally granted her request for work within her restrictions (November 24, 2007).

With regard to reprisal, the Commission found that Complainant established a prima facie case of reprisal, and the Agency articulated legitimate, non-discriminatory reasons for denying Complainant's light duty requests. Specifically, the Postmaster asserted that Complainant did not submit updated medical documentation until her fourth request, and there was no work available within her medical restrictions. However, the Commission stated that this explanation by the Postmaster was unworthy of belief because it was contradicted by other management officials and Complainant. Additionally, the Commission noted that in a letter to the Injury Compensation Office, the Postmaster wrote that Complainant was "very upset with this schedule and filed an EEO against me as the Postmaster due to this change. The Commission found that Postmaster's unnecessary mention of Complainant's EEO activity was not only evidence of his retaliatory motive with regard to Complainant's light duty claim, but was itself an action that is reasonably likely to deter employees from engaging in EEO activity, and as such, violated EEO regulations.

In order to remedy the Rehabilitation Act violation, the Commission ordered the Agency to ensure that Complainant is provided with a reasonable accommodation for her disability; to restore any leave Complainant used from October 10, 2007, through November 24, 2007, and to reimburse Complainant for any Leave without Pay used because of its unlawful failure to provide her with a reasonable accommodation; to provide Complainant with proven compensatory damages; to provide Complainant back pay for any pay she lost that is attributable to the unlawful denial of a reasonable accommodation; to provide training to all management officials at its Palm Coast facilities on providing reasonable accommodation under the Rehabilitation Act; and to consider taking appropriate disciplinary action against the responsible management officials involved in this case.

Torres v. USPS, 0120142154 (11/18/2015) – Complainant, a City Carrier at the Agency's Brooklyn, New York, Post Office, had an unblemished disciplinary record for sixteen years of her employment with the Agency. In October 2012, soon after a new supervisor (S1) and manager (S2) joined the station, Complainant asserts that a coworker (female, no prior EEO complaint activity) (CW1) informed S1 and S2 that Complainant was a lesbian, and that CW1 began to make derogatory remarks about gay individuals. Complainant alleged that management grinned and laughed at the remarks, and by not stopping CW1 from making the remarks showed that they condoned the remarks. Complainant also alleged that based on her sex (sexual orientation) and in reprisal for her prior EEO activity, she was treated disparately in the workplace, subjected to improper scrutiny and unwarranted disciplinary action. Complainant also stated that she was subjected to many anti-gay and sexual remarks by CW1. For example, on March 5, 2013, CW1 and S1 were having a conversation within a foot of Complainant and CW1 stated, "You know, if you were a lesbian I would lick you." Complainant stated that S1 laughed at the statement and did not correct CW-1's sexually-offensive behavior. After conducting an investigation, the Agency dismissed Complainant's sexual orientation claim finding that it did not fall under Title VII and could only be processed through the Agency's internal procedures. Additionally, the Agency dismissed Complainant's second claim as untimely, and concluded that Complainant failed to prove that the Agency subjected her to discrimination as alleged. In the appellate decision, the OFO affirmed the dismissal of claim 2 as untimely, but found, pursuant to the recently issued Baldwin v. DOT, EEOC Appeal No. 0120133080 (July 15, 2015) decision, that Complainant's allegations stated a sex discrimination claim, and that the Agency's

investigation of the matter was deficient. The decision noted that there were allegations in the record that, if true, could establish that Complainant was subjected to sexual harassment, sex-based harassment, and reprisal-based harassment from CW1 and others, who were not interviewed. The decision reversed the Agency's dismissal of Complainant's sexual orientation allegations, vacated the findings of the Agency on the merits, and remanded the complaint for a supplemental investigation, ordering the Agency to obtain statements from witnesses identified by Complainant.

Phelps v. DHS (TSA), 0120131704 (11/24/2015) – Complainant appealed the Agency's final decision which fully implemented an EEOC AJ's finding that Complainant did not establish that the Agency discriminated against her on the bases of sex (female), disability (back strain), age (52), and reprisal for prior protected EEO activity when it denied her light duty request and terminated her employment.

Regarding Complainant's disparate treatment claim, the Agency stated that it disapproved Complainant's request for light duty because she had been accommodated in a limited duty position for over a year, and according to her medical documentation, there was no indication that her condition would improve in the foreseeable future. The Agency explained that light duty requests may be offered to employees who sustained an injury outside of work and whose medical restrictions are temporary, while it is not available to employees who cannot return to full duty in the foreseeable future. Subsequently, Complainant was issued a letter of proposed removal and eventually removed from federal service because she was unable to perform several essential functions of her position, even with accommodation. Complainant did not show these reasons to be pretext for discrimination because she in fact could not return to full duty in the foreseeable future. Also, Complainant did not demonstrate that she could perform the essential functions of her job, even with an accommodation. Complainant took issue with the fact that alleged similarly situated comparators were allowed to remain on light duty until they were approved for disability retirement, but Complainant did not point to genuine issues of material fact on this issue.

Next, the decision concluded that Complainant is not a qualified individual with a disability because she could not perform the essential functions of her job even with accommodation, and she did not show there were any vacant, funded, positions to which she could be reassigned within her restrictions. Therefore, Complainant did not prove by a preponderance of the evidence that she was denied reasonable accommodation.

Finally, Complainant did not establish that any of the adverse actions were based on a protected class making her hostile work environment claim unsuccessful.

The Agency's final decision, fully implementing the AJ's finding that Complainant was not subjected to discrimination was affirmed.

Lydon v. DOJ (USMS), 0120121887 (11/03/2015) – Complainant, a decorated veteran of the U.S. Marine Corp was diagnosed with PTSD and received a 30% disability rating following his service in Iraq. In 2009, Complainant applied for a position as a Deputy U.S. Marshall, which requires him to carry a handgun. Complainant received a conditional offer and was provided with the opportunity to submit additional medical documentation, which he did. Complainant submitted documentation from his licensed clinical social worker who diagnosed Complainant with possible anxiety disorder Not Otherwise Specified–mild (History of PTSD), and reported she had no concern about Complainant's ability to perform the essential functions of the job. The Agency referred the matter to its Contract Psychiatrist who opined that Complainant's PTSD was not fully in remission and Complainant was likely to "suffer sudden or subtle incapacitation." The Agency found Complainant was not fit for duty, and OPM agreed with the Agency's decision. Complainant returned to treatment and submitted updated medical documentation, but again, the Agency's Contract Psychiatrist reported that because Complainant was not cured or fully stabilized, his disability would place himself and others at risk. Complainant filed a formal Complainant and received a final Agency decision. On appeal he argued that the Agency failed to establish that he was a direct threat to himself or others because it failed to do an individualized assessment.

OFO's decision concluded there was insufficient evidence in the record to determine whether the Agency had met its burden of establishing Complainant was a direct threat. OFO noted that the Agency failed to secure an

affidavit from the Agency's psychiatrist who did not even examine Complainant personally, or contact Complainant's own physicians. OFO remanded the complaint to the Agency to conduct an individualized assessment on Complainant. The decision also noted that even the Agency's own decision found this case represented a "close call" and reminded the parties of the opportunity to conciliate the complaint in light of Complainant's service to the country.

Serrano v. DHS, 0520150431 (11/13/2015) – Complainant worked for the Agency as a Transportation Security Officer in Puerto Rico. She filed a formal EEO complaint alleging that the Agency discriminated against on the basis of her disability (fibromyalgia) when, in December 2010 – January 2011, she was charged with being absent without official leave (AWOL) for absences she informed management were due to her disability, she was issued a letter of reprimand for the same absences, and she was placed on leave restrictions. Our prior appellate decision (EEOC Appeal No. 0120133009) had affirmed the Agency's final decision fully implementing the EEOC AJ's decision finding Complainant failed to prove her discrimination and denial of reasonable accommodation claims. Complainant requested reconsideration of that decision. In the instant decision, her request was denied for failure to meet the regulatory criteria for reconsideration, noting that reconsideration is not an opportunity for a second appeal to the Commission.

Satterlee v. DHS (TSA), 0120112139 (11/20/2015) **[Repeated under Findings below]** – The appellate decision reversed a final agency decision and held that Complainant established that the Agency discriminated against him on the bases of disability and/or reprisal when it did not select him for a detail position and when it failed to maintain Complainant's confidential medical information in a separate medical file. Complainant worked as a Lead Transportation Security Officer, grade F Band, at the Orlando International Airport (MCO) in Florida. When Complainant was required to attain recertification for his position, he submitted a letter to the Federal Security Director (S1) from his psychiatrist, which stated: "[Complainant] has been under my care since April 12, 2000 for the condition of depression and anxiety. [Complainant] also suffers from Attention Deficit Disorder and Hyperactivity. [Complainant] is currently on a regimen of medications, which have allowed him to complete tasks with minimal difficulties. Recently, [Complainant] brought to my attention that he will be undergoing a yearly performance review and is very concerned that his medical conditions might prohibit him from performing to the best of his ability. Since [Complainant] has difficulties with performing under pressure, I would like to ask that you take this under consideration during his yearly performance review. Any consideration you would provide to my patient will be appreciated." Complainant asked S1 that this letter be put into his medical file. Instead, S1 placed the letter into Complainant's official personnel file.

Subsequently, when Complainant applied for one of multiple (20) detail positions for Operations Center Specialists in the airport's Operations Center, he was not selected for any of the vacancies based on the information in the letter. The appellate decision found that he was regarded as having a disability and not selected based upon direct evidence of disability discrimination. The evidence in the record also established that the Agency did not maintain Complainant's confidential medical information in a separate medical file and that this was a per se violation of the Rehabilitation Act. For relief, the decision ordered backpay for the detail assignment and any proven potential promotion that would have resulted from it, proven compensatory damages, training of agency officials, consideration of disciplinary action, and posting of a notice. We noted that Complainant was terminated from his position in 2007, and as a result, ordering the Agency to retroactively place him in the detail position now would not be appropriate.

Hartley (Harland B.) v. Treasury, 0120130672 (12/10/2015) **[Repeated under Findings below]** – Complainant appealed from the Agency's final decision (FAD), which found that he was not subjected to disparate treatment or a hostile work environment based on race (Caucasian), sex (male), disability (restricted or limited ambulation), and reprisal when, among other things, he was charged with Absent Without Leave on a continuous basis.

The decision concluded that Complainant did not prove by a preponderance of the evidence that he was subjected to discrimination on the bases specifically alleged in the complaint. However, the decision

determined that the complaint could fairly be interpreted as alleging denial of reasonable accommodation, and the Agency was on notice of this given the investigation and information in the FAD and the Agency's brief in opposition to the appeal. The decision concluded that because Complainant requested accommodation, identified possible accommodations, and the Agency did not effectively respond to any of them, much less demonstrate that any of them would have posed an undue hardship, Complainant demonstrated by a preponderance of the evidence that he was denied reasonable accommodation.

Further, the decision determined that that an EEO official spoke to Complainant on at least one occasion, advising him that he could not get a reasonable accommodation for additional time during breaks, and for arrival and departure, because reasonable accommodation "was to help employee[s] do their job and not to change their TOD [time on duty]." This apparently resulted in Complainant not filing a formal request for reasonable accommodation through the Agency's established channels, and led Complainant to believe that he did not in fact request a reasonable accommodation, and moreover, that one could not be granted for him. The decision concluded that this constituted reprisal because it interfered with participation in the protected activity of requesting reasonable accommodation.

Tolliver (Adina P.) v. VA, 0120132450 (12/11/2015) **[Repeated under Findings below]** – Complainant appealed aspects of the Agency's final decision (FAD), which concluded that she was denied reasonable accommodation for her disability (back impairment) and subjected to reprisal in being terminated because of her disability-related absences. However, the FAD concluded that Complainant did not prove that: (1) her left knee impairment constituted a disability; (2) the Agency subjected her to a hostile work environment based on her disability or in reprisal for her EEO activity; and (3) she was subjected to disparate treatment disability discrimination. The Agency awarded Complainant $1,009.00 in past pecuniary losses, and $60,000 in non-pecuniary compensatory damages.

The Agency challenged the timeliness of Complainant's appeal because it issued one FAD on liability and another FAD on damages, but Complainant only timely appealed the damages FAD. The decision concluded that the FAD on liability did not contain a determination of the amount of back pay or compensatory damages that Complainant would be awarded, and therefore, was not final because it did not make a determination on all the issues in the complaint. Therefore, Complainant's appeal on both liability and damages were timely.

Regarding Complainant's contention that she was denied reasonable accommodation for her left knee condition, the decision determined Complainant suffered from a "medial meniscus knee tear," a condition which she initially claimed to have developed pursuant to a work-related injury, and which she testified limited her ability to walk, stand, climb, kneel or bend for prolonged periods of time. However, there was no other evidence in the record to establish that this left knee condition substantially limited any major life activities or what the restrictions were resulting from the condition. Therefore, Complainant did not prove that she was denied reasonable accommodation for the left knee condition.

Regarding Complainant's contention that she was subjected to a hostile work environment based on her disability and in reprisal for her EEO activity, the decision concluded that the FAD did not apply an incorrect legal standard as Complainant argued. Management's conduct centered upon evaluating Complainant's various leaves of absences and reasonable accommodation request in conjunction with her initial one-year probationary period. There was no indication of abusive language accompanying the adverse actions. While the Agency violated the Rehabilitation Act by denying her leave as an accommodation, and terminating her employment for utilizing disability-related leave, the conduct surrounding these decisions did not constitute a hostile work environment.

Regarding Complainant's contention that she was subjected to reprisal in being denied leave for her left knee condition, the decision noted that prior to the issuance of a letter of counseling and termination, but subsequent to Complainant's use of leave for her back and right knee condition, Complainant requested leave for surgery to her left knee, but the Agency never responded to this leave request. Instead, supervisors informed Complainant that the leave without pay request would probably not be granted. It appeared that management did not want to approve further leave for Complainant because she had extensive prior disability-related leave usage, the very same reason they issued her a letter of counseling and terminated her. The decision concluded that the Agency's denial of subsequent leave, admittedly because Complainant utilized prior leave

as a reasonable accommodation, also constitutes reprisal. Such conduct is reasonably likely to deter protected activity.

Regarding damages, the decision concluded that $1,009.00 in past pecuniary losses, and $60,000 in non-pecuniary compensatory damages for discrimination that the Agency awarded was appropriate.

In addition to the relief the Agency awarded, the decision ordered the Agency to calculate additional compensatory damages for denying Complainant's request for leave for her left knee condition. The decision also ordered the Agency to provide Complainant with a plain language explanation for how her back pay was calculated, and to consider taking disciplinary action against the management officials involved in the discrimination.

Cooper (Milford R.) v. DOD, 0120120081 (12/03/2015) **[Repeated under Piority 1 above]** – Complainant worked as a Police Officer at the Pentagon. During the course of his September 2008 medical examination, Complainant self-disclosed his positive HIV status. The Agency requested additional information from his medical provider to ascertain whether his condition would present an undue risk to himself or others in the performance of his duties. Complainant failed to provide the requested information; thus, the Agency requested that he undergo an Independent Medical Examination (IME). In the interim, Complainant was assigned a light-duty position because he failed a prescribed medical standard which provided for additional screening and light duty if an officer is HIV positive. Complainant attempted to schedule his IME but had difficulty doing so.

Complainant filed a formal complaint alleging discrimination on the bases of disability and reprisal when he was placed into a light duty status, forced to undergo repeated medical and psychiatric a neuropsychiatric examinations as well as periodic blood monitoring. The complaint also alleged an unlawful medical disclosure and harassment.

The AJ assigned to the case issued a decision finding no discrimination without a hearing. On appeal, OFO found the AJ erred in his analysis of the case, which only focused on whether Complainant had presented evidence of pretext. The decision found that the Agency relied on the application of a medical qualification standard which resulted in repeated medical inquiries and reassignment due to the diagnosis of HIV, and there was a dispute in the record as to whether a simple diagnosis of HIV required additional screening and reassignment in the absence of objective evidence that the employee was having problems performing the essential functions of the job. OFO found no analysis was performed addressing whether this medical standard was job-related and consistent with business necessity and remanded the complaint for a hearing.

OFO further found a dispute in the record as to whether the Agency conducted medical inquiries that were job-related and consistent with business necessity, and whether those inquiries were based on objective evidence. OFO questioned whether the inquiries were reasonable given the lack of objective evidence that Complainant experienced any issues related to the performance of his essential job functions. Moreover, there was evidence in the record from Complainant's physician cleared him to work. The decision found the AJ failed to respond to Complainant's allegation that he was forced to undergo a neuropsychiatric examination and periodic blood testing, which should be addressed at a hearing. Because the Agency's investigation did not secure a meaningful affidavit from the individual whom Complainant alleged had subjected him to harassment, it was also unable to assess Complainant's allegation of harassment. The matter was remanded to the Hearings Unit for the scheduling of a hearing.

Granados (Susie K.) v. DOL, 0120130410 (12/03/2015) – Complainant, an investigator with the agency's Wage and Hour Division, alleged she was subjected to harassment on the bases of her sex and national origin. She claims she was subjected to harassment based on her sexual orientation when she was denied information on same sex benefits which had just been offered to government employees. Complainant also alleged she was harassed when she was asked to remove a Mexican flag from her office, limited in the use of Spanish in the office, yelled at, not selected for the Assistant District Director position, and when other offensive comments were made by her supervisor (S1).

The AJ in this case held a hearing for two days and determined complainant failed to establish she was subjected to harassment. The AJ found that complainant was requested to remove the flag from her office because there was a history of exclusion in the office. Complainant alleged she was subjected to an illegal English only rule when she learned that she was limited to using Spanish in the cafeteria and break rooms. However, the AJ found that complainant's supervisor initiated the "policy" after a complaint was made by a co-worker when complainant and another employee switched to speaking Spanish while in front of the co-worker. The individual speaking with complainant frankly testified that she switched to Spanish so that the third employee could not understand their conversation. The AJ found that this request that complainant be mindful about using Spanish in front of other employees was not an English only rule, and did not violate Title VII. Nevertheless, the record revealed that S1 was formally counseled on such conduct, as it violated an internal agency policy meant to address conduct which did not rise to the level of actionable harassment.

The AJ found the remaining incidents did not rise to the level of creating a hostile or offensive work environment. The AJ found no persuasive evidence that complainant was treated differently because of her sexual orientation, and noted that S1 referred complainant to an appropriate individual for the benefit question. The AJ found the comments suggested by complainant as harassing were not objectively offensive. As for the nonselection, the AJ found complainant failed to establish that the agency's reason for not selecting her for the position was a pretext for discrimination. Specifically, the AJ found complainant was not selected because she was did not respect management, or describe good leadership abilities during her interview. The AJ found complainant had been described as "harsh" and "aggressive" and had hung up the phone on her supervisor only days prior to the selection at issue.

On appeal, OFO found the AJ's decision was well supported by substantial evidence in the record. OFO found insufficient evidence that there was a "policy" against speaking Spanish, as opposed to advice to be thoughtful of others. Indeed, the complaint at issue was well deserved, given the testimony that the coworker intended to exclude others. OFO found the incident involving the Mexican flag did not rise to the level of harassment, especially in light of the fact that complainant's second level supervisor (S2) offered to allow complainant to keep the flag up for the remainder of Hispanic Heritage Month. The AJ's decision was well written, complete, and based on credibility determinations of the witnesses. OFO found no reason to overturn the AJ's decision.

Wallace (Shela O.) v. Army, 0120113826 (12/18/2015) – Complainant was a Plan and Operations Specialist at the Army Community Services (ACS), Directorate of Morale, Welfare and Recreation in Fort Sam Houston, Texas. She alleged that the Agency discriminated against her on the bases of national origin (Hispanic) and sex (female) when she was terminated on September 14, 2009 during her probationary period for "unacceptable and unprofessional behavior."

Complainant filed her EEO complaint on January 11, 2010. After the investigation, she timely requested a hearing, which was held on February 23, 2011. On June 13, 2011, the EEOC AJ issued a decision finding that Complainant did not establish a prima facie case of discrimination because the record shows that others outside of Complainant's protected bases were not treated differently. Complainant provided three comparators and the record shows that two were also terminated during their probationary periods and the third was not similarly situated to Complainant.

With regard to Complainant's sex discrimination claim, she stated that she confided to her first-line supervisor that she is a lesbian and was discriminated against because of her sexual orientation. The AJ noted in the decision that sexual orientation was not a protected class under Title VII.

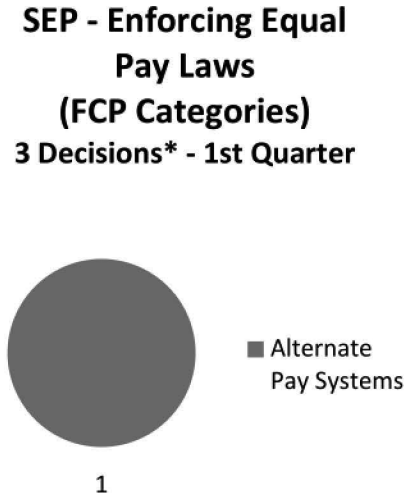
Additionally, the AJ found that Complainant did not establish that the Agency's proffered reasons for her termination were pretext for discrimination. On July 18, 2011, the Agency issued a final order that adopted the AJ's decision and Complainant filed her appeal July 26, 2011.

On appeal, the Commission concurred with the AJ's determination that Complainant had not established a prima facie case of discrimination based on her national origin and sex. Additionally, assuming that Complainant had established a prima facie case, the Commission found that Complainant had not demonstrated that the Agency's reasons for her termination were because of her national origin and sex. Specifically, the Commission agreed with the AJ that Complainant's issues in the workplace were more likely related her efforts to implement higher work standards and not her national origin or sex.

With regard to Complainant's allegations concerning sexual orientation, the decision noted that since the time that the AJ issued the decision the Commission has held that claims of discrimination based on sexual orientation are valid claims of sex discrimination. The Commission found that the record was adequately developed to proceed without remanding for further investigation and determined that nothing in the record indicates that Complainant's sexual orientation was related to her termination.

The Commission found that Complainant did not show that the Agency's reasons were pretext for discrimination. Accordingly, the Commission affirmed the Agency's final order.

4. ENFORCING EQUAL PAY LAWS



Two (2) decisions did not implicate an FCP category.

Decision Summary for this Category

Tanner (Alycia R.) v. DHS (ICE), 0120132311 (12/11/2015) – Complainant worked as a Personnel Security Specialist at the Agency's Threat Management Branch, Adjudication Section, Federal Protective Services (FPS) facility in Chicago, Illinois. On March 22, 2007, Complainant filed a formal EEO complaint alleging that the Agency discriminated against her on the bases of race (African American), sex (female), color (black), and age (over 40).

On April 30, 2007, the Agency accepted the formal complaint for investigation. The Agency framed the accepted issue as follows:

> on or about January 25, 2007, Complainant became aware that Personnel Security Specialists in other Agency offices, who have responsibilities and perform duties commensurate with hers, were paid at higher grades, and the Agency refused to upgrade her position.

On February 19, 2010, the Agency issued a final decision finding no discrimination. Specifically, the Agency found that management did not upgrade Complainant's position because it determined, after conducting a desk audit of the PSS positions in a variety of locations, including those with the most complex work, that the position only supported a GS-09 classification. The Agency noted that while some PPSs were paid at higher grades, management decided to "redline" those GS-11 positions (flagging the positions for review when they

became vacant), as opposed to downgrading those employees, based on past management practice and to minimize the impact on employee morale.

On appeal, we vacated the Agency's finding of no discrimination and remanded the matter to the Agency for further processing based on a determination that the Agency had failed to investigate Complainant's EPA claim. Tanner v. Department of Homeland Security, EEOC Appeal No. 0120101776 (September 20, 2011). We were unable to determine from the record whether Complainant and a male comparator, a PSS GS-0081-11, from Region 8, whom Complainant had cited, had indeed performed "equal work."

In compliance with the September 20, 2011 EEOC decision, the Agency conducted a supplemental investigation and issued a new final decision on May 3, 2013. Therein, the Agency again found no discrimination on the basis of sex in violation of the EPA. In reaching this decision, the Agency acknowledged that Complainant has demonstrated that she was paid less than the male PSS. However, the Agency found that Complainant has not demonstrated that she performed equal work under similar working conditions. The Agency acknowledged that both Complainant and C1 performed background investigations. However, the Agency found that the male comparator's position description stated that he was responsible for "complex and unusual investigations." The male comparator was asserted to have served as a principal contact for other government agencies seeking personnel information and provided guidance to management and lower graded security specialists. The Agency determined that these duties were not what Complainant was responsible for as a GS-0080-09.

Complainant, on appeal, noted that the Agency had acknowledged that she was paid less than an employee identified as "C1, but that Complainant had not demonstrated that she performed substantially equal work under similar working conditions as C1, and that Complainant therefore, did not demonstrate that she was treated less favorably than an appropriate comparable.

Upon review, we determined there was a considerable degree of confusion by the Agency in identifying the male comparator identified in our previous decision as "C1," who was a principal subject in the supplemental investigation previously ordered by the Agency. Given the apparent confusion regarding Complainant's ability to choose her comparator, we determined that another remand is in order. We emphasized, however, in no uncertain terms, that during this additional supplemental investigation, the "C1" party identified in the Order below is the male employee previously identified by Complainant with the initials of CP, and not AP.

On remand, the Agency was ordered to conduct an additional supplemental investigation to develop an adequate factual record regarding Complainant's EPA claim regarding (a) the actual duties of C1 (identified as a male employee with the initials of CP, and not employee AP) performed as a GS-0080-11 PSS, including the skill, effort, and responsibility required; (b) the actual duties Complainant performed as a GS-0080-09 PSS, including the skill, effort, and responsibility required; and (c) the reasons for the pay difference between Complainant and C1 (identified as a male employee with the initials of CP, and not employee AP), both before and after the desk audit.

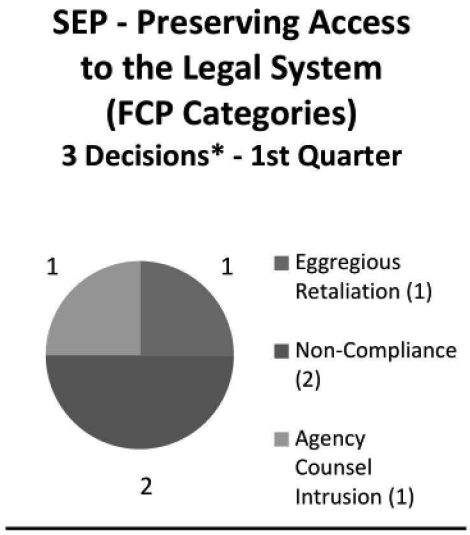
Perry (Debbra R.) v. USDA, 0520150465 (12/02/2015) – Complainant requested reconsideration of a prior decision, EEOC Appeal No. 0120132749 (June 17, 2015), affirming the Agency's final decision finding no discrimination. Complainant had filed an EEO complaint alleging that she was subjected to discrimination based on sex when she had not been compensated at the same wage level as her male counterparts.

We denied Complainant's request for reconsideration. We noted that our prior decision found that we were not persuaded that Complainant performed the same duties as her male comparative.

Plante v. Administrative Office of the U.S. Courts, 0120120996 (10/16/2015) – The Commission found that it is undisputed that the Agency is part of the judicial branch. As such, the Commission determined that the Agency was required to comply with the Commission's regulations. In this case, the Commission found that the Agency failed to provide Complainant the opportunity to choose between a hearing before an EEOC AJ or a final agency decision. Nothing in the record showed that Complainant was notified at the conclusion of the supplemental investigation of these options. The Commission noted that although the investigation was a supplemental one, the Commission ordered that Complainant be provided with "appropriate rights." As a

result, the Commission vacated the Agency's FAD that was issued after the supplemental investigation and ordered the Agency to provide Complainant with the requisite rights.

5. PRESERVING ACCESS TO THE LEGAL SYSTEM



One (1) decision implicates two (2) FCP categories.

Decision Summary for this Category

Koppe v. DOJ (EOUSA), 0720130036 (11/24/2015) **[Repeated under Findings below]** – Complainant's attorneys and the Agency appealed various portions of an EEOC AJ's decision on a complaint of sex discrimination and reprisal, issued after a hearing, finding that: (1) Complainant was denied a time-off award because of sex discrimination and reprisal (2) Complainant was denied a transfer request because of reprisal for her EEO activity, but not because of her sex; and (3) comments by management officials regarding Complainant's EEO activity constituted reprisal. In reaching her conclusion, the AJ struck the Agency's legitimate, nondiscriminatory, reason for not giving Complainant the time-off award as a sanction for failure to comply with oral and written discovery orders. Prominent portions of the AJ's remedial order included: (1) $33,000.00 in non-pecuniary compensatory damages; (2) $228,170.50 in attorneys' fees and $26,827.59 in costs; (3) that the Agency consider permanently removing the responsible management officials from their managerial positions; and (4) that the Agency consider convening all employees during working time and have one of the responsible management officials read the notice of discrimination to employees.

The Agency rejected the AJ's finding that Complainant was subjected to sex discrimination and reprisal in being denied the time-off award; that she was subjected to reprisal in being denied her transfer request; the AJ's award of compensatory damages in excess of $10,000; attorneys' fees in excess of $152,121.27; and costs in excess of $17,885.95. Also, the Agency argued that the AJ abused her discretion by issuing a sanctions order that struck the Agency's evidence of a legitimate nondiscriminatory reason for not issuing Complainant a time-off award; and erred by issuing a relief order that exceeded the scope of her authority.

Complainant's attorneys argued that she was entitled to more than the $228,170.50 in attorney's fees and $26,827.59 in costs. Complainant's attorneys filed the appeal without participation of Complainant because Complainant and her attorneys entered into a contractual agreement, which ended their lawyer-client relationship, and purportedly assigned to the attorneys the right to pursue an appeal of attorneys' fees.

The decision on appeal concluded that there was substantial evidence in the record to support the AJ's conclusion that Complainant was subjected to sex discrimination and reprisal for her EEO activity in not receiving a time-off award for her job performance. In reaching this conclusion, the decision also upheld the

AJ's striking of the Agency's legitimate, nondiscriminatory, reason from the record as a sanction for the Agency's failure to follow discovery orders. The AJ indicated repeatedly during the hearing that a particular item was not produced, and the Agency finally produced it on the third day of the hearing, which was improper because certain witnesses had already testified and neither Complainant's counsel nor the AJ had the documents for use at the time of the testimony.

Second, the AJ's finding that a supervisor "decided to deny Complainant's request for reasons directly related to Complainant's EEO conduct: so that people in the office would not think that there was any validity to Complainant's EEO discrimination allegations against him," was supported by substantial evidence in the record. The supervisor's conduct constituted reprisal for Complainant's EEO activity.

Next, the decision found that Complainant's former attorneys could not pursue the appeal on their own because they were not the prevailing parties in the case and therefore lacked standing to pursue an appeal on the sole issue of attorneys' fees without the participation of Complainant. The decision concluded that $33,000.00 in non-pecuniary compensatory damages, $228,170.50 in attorney's fees and $26,827.59 in costs was supported by substantial evidence in the record. Finally, the decision struck the AJ's order to have the responsible management officials read a notice of the finding of discrimination out loud to staff.

Turner v NGB, 0520120426 (11/13/2015) – In our previous appellate decision in Turner v. Department of the Air Force, EEOC Appeal No. 0120120871 (April 18, 2012), the Commission upheld the dismissal of Complainant's May 22, 2011, complaint of discrimination. Based on the record that was before us at the time, this determination was not in error. As a result, Complainant has not demonstrated that the appellate decision involved a clearly erroneous interpretation of material fact or law based on the record that was provided to us. We therefore denied Complainant's request for reconsideration. However, we noted that, once we consolidated this request with appeal 0120130467, additional documents in the record for Appeal No. 0120130467 further clarified the claims that were raised in Appeal No. 0120120871. Therefore, on our own motion, we addressed our jurisdiction over the claims raised in Appeal No. 0120120871.

The Agency dismissed the claims in these complaints, finding that the allegations were irreducibly military in nature and, as a result, the Commission lacked jurisdiction and the federal-sector EEO process under 29 C.F.R. § 1614 does not apply. On appeal, the Agency contended that all claims from dual-status technicians are inherently military in nature, and therefore such complaints should be processed in the military equal opportunity process.

In Complainant v. National Guard Bureau, EEOC Petition No. 0420140014 (July 2, 2015), the Commission reiterated its long-standing position that dual-status technicians are both considered uniformed military personnel as well as federal civilian employees. The decision reiterated that each National Guard dual-status technician complaint must be analyzed on a case-by-case basis to determine whether the Commission has jurisdiction.

With regard to the claims raised in these complaints (discrimination based on age and reprisal when Complainant was, inter alia, detailed without locality pay; relieved of duties as a wing commander; placed on LWOP: placed under investigation for fraud; notified of debt owed; and recommended for non-retention), the appellate decision in 0520120426 analyzed each one individually to determine whether it fell within the Commission's jurisdictional authority.

The decision ordered the agency to process those claims found to be within the Commission's jurisdictional authority through the 29 C.F.R. Part 1614 EEO Complaint Processing Procedures.

Zaste (Zenia M.) v. HHS, 0120121845 (12/18/2015) **[Repeated under Findings below]** – Complainant filed an EEO complaint alleging, among other things, that she was subjected to retaliation when the EEO Complaints Manager provided her EEO records pertaining to prior cases and emails to management officials. During the investigation, the EEO Complaints Manager indicated that the documents were part of a formal investigation and could be used by management if there was a reason to believe that other issues or violations may exist. Complainant, according to the EEO Complaints Manager, was being investigated for possible violations HIPPA, the Privacy Act and for going outside of her chain of command; therefore, he felt that it was

appropriate to review her EEO files in order to determine if there were other possible violations contained within those documents. The record also indicated that an email sent by Complainant to the Deputy Director complaining of "continued harassment" was the reason that Complainant came under investigation.

The Commission found that there was a blatant mishandling of Complainant's EEO complaint files that constituted a per se violation as these actions were reasonably likely to deter employees from engaging in protected EEO activity. Consequently, we found that Complainant demonstrated that she was subjected to reprisal. The Commission ordered the Agency to conduct a supplemental investigation on the issue of Complainant's entitlement to compensatory damages, managers involved in discriminating against Complainant were ordered to take eight hours of EEO training, and the Agency was ordered to consider taking disciplinary action against them.

6. PREVENTING HARASSMENT THROUGH SYSTEMIC ENFORCEMENT AND TARGETED OUTREACH

Patil v. DOJ, 0120132089 (11/19/2015) **[Repeated under Findings below]** – Complainant appealed from the Agency's final decision, which concluded that he was not subjected to reprisal because of his opposition to sex discrimination. Complainant alleged that the reprisal consisted of subjecting him to a hostile work environment and that the responsible management officials aggressively attempted to damage his career and professional reputation after he voiced opposition about mistreatment of women in his office. On appeal, the Agency argued that Complainant could not prove essential elements of his claim, mainly that he engaged in protected opposition and that management was aware of his protected activity.

The decision concluded that the set of circumstances supported a conclusion that Complainant communicated a belief that management's treatment of women constituted unlawful discrimination, and given the testimony of the numerous employee witnesses at the Agency, Complainant had a reasonable and good faith belief that such conduct constituted unlawful sex discrimination. Therefore, the decision concluded that Complainant engaged in protected opposition EEO activity.

Next, the decision concluded that management subjected Complainant to adverse treatment by making disparaging comments about Complainant, excluding him from meetings, and finding issues with his work. While the Agency stated as its legitimate, nondiscriminatory, reason that these issues were a result of personality conflicts, Complainant was able to demonstrate pretext because other employees testified that management increased their mistreatment of Complainant subsequent to his protected activity, management had no issues with Complainant's work product prior to the protected activity, Complainant's performance evaluations were outstanding and thus contradicted management's assertions about his written work product, and employee testimony regarding the comments that management officials made about Complainant were probative of discriminatory animus.

Therefore, the decision concluded that Complainant was subjected to reprisal for his protected opposition activity. As relief, the decision ordered that the Agency offer Complainant a new one-year detail, provide relevant back pay with benefits and interest, calculate compensatory damages, provide training to management officials, consider disciplinary action against the responsible management officials, and post a notice of the finding of discrimination.

7. ENFORCEMENT – GENERAL

Bustamante v. Army, 0120131314 (10/29/2015) – Complainant filed an EEO complaint alleging that the Agency subjected her to sexual and non-sexual harassment on the bases of race (Native American), sex (female), age (50), and reprisal for prior protected EEO activity under when she was subjected to a hostile

work environment sand issued a Letter of Reprimand. In its final decision, the Agency concluded that the Letter of Reprimand was issued in part because of Complainant's behavior during a meeting with her supervisor, and in part due to an email she had sent on the same day, wherein she had complained of sexual comments. As a mixed motive case, the Agency found relief would not include damages; rather, Complainant's remedies were limited to training and attorney's fees. The Agency also concluded that Complainant failed to establish she had been subjected to harassment on any bases.

On appeal, complainant claimed the Agency erred with respect to its hostile work environment claim. Complainant also claimed that the agency's award of attorney's fees was not correct. Specifically, she asserted that she had requested $64,395.00 in fees (143.10 work hours at $450.00 per hour), and $740.30 in costs. However, the agency had only awarded her $13,880.70 in fees (71.55 hours at $194.00 per hour) and no costs.

In its appellate decision, OFO affirmed the agency's liability findings. However, it found the Agency's attorney fee award was miscalculated using the local market rate of complainant's work facility; not the attorney's local market rate. Furthermore, OFO found the agency failed to produce any evidence which could establish that Complainant's decision to retain out-of-town counsel was unreasonable. Accordingly, OFO awarded fees by using the requested hourly rate; however it did reduce the fees awarded to account for the unsuccessful claims. Finally, OFO awarded only some of the requested costs due to insufficient documentation of such expenditures.

Anmuth v. DHS, 0120132637 (10/30/2015) – Complainant filed a formal complaint on the basis of reprisal when he was not selected for two positions in 2009. After an investigation, an EEOC AJ found Complainant proved he was subjected to discrimination. Among the relief ordered was back pay from the date of the nonselection until the date the agency offered Complainant reinstatement into the position. The Agency implemented the AJ's decision in 2012.

Soon after the AJ issued his order, Complainant contacted the AJ to inquire about his increased tax liability due to his back pay award. Specifically, Complainant asserted that he incurred additional tax liability in 2012, when he received the back pay award, as opposed to if he had incurred the money as part of his salary. Complainant was unable to amend the AJ's order.

Complainant appealed to the Commission and OFO found that the Agency was liable to Complainant for proven adverse federal income tax consequences as a result of its lump sum payments. OFO found that Complainant has the burden of establishing the amount of his increased federal income tax liability to the Agency. OFO further found that Complainant had not had the opportunity to prove his entitlement to money for increased tax consequences. The decision ordered the Agency to comply with the AJ's order and to provide Complainant with the opportunity to prove his increased tax liability.

Ling v. VA, 0720070027 (10/13/2015) – Complainant alleged that she was discriminated against on the bases of disability (migraine headaches), sex, and in reprisal for prior EEO activity when she was denied a reasonable accommodation of appropriate lighting in order to prevent her migraines from occurring.

Complainant requested a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). The AJ held a hearing and found that the Agency failed to provide Complainant a reasonable accommodation. Specifically, the AJ held that the Agency did not provide Complainant the effective reasonable accommodation requested by her physicians from March 2003 onward with regard to the lighting in her office. The AJ further found that the Agency improperly disclosed her confidential medical information.

The Agency issued a final order (FO) adopting the AJ's finding of discrimination regarding the improper release of confidential medical information. The Agency, however, declined to implement the AJ's finding that the Agency failed to provide a reasonable accommodation, and rejected all relief awarded. Complainant appealed the Agency's FO to the Commission.

The Commission determined that there was substantial evidence to support the AJ's finding that Complainant was an individual with a disability under the Rehabilitation Act. Based on the evidence and testimony,

Complainant established that the nature and severity of her impairment was such that she was substantially limited in the major life activities of eating, sleeping, and caring for herself due to her migraines. The Commission also found that Complainant was qualified for her position.

The Commission also found that the Agency failed to offer Complainant a reasonable accommodation. The record revealed that Complainant repeatedly requested an accommodation in her workspace such that her migraine headaches would not be triggered or exacerbated by the lighting. The Agency argued on appeal that it made a good faith effort to accommodate Complainant. However, the Commission found that the Agency unduly delayed providing Complainant with an effective accommodation. Specifically, the Agency failed to show that it took appropriate action after Complainant's April 21, 2003, and July 9, 2004 requests for changes in lighting in her workspace.

The Agency also argued on appeal that Complainant declined to use the appropriate lighting because of the heat produced by the lamps, and that caused the delay in her being accommodated. The Commission was not persuaded by the Agency's position. The Commission found that Complainant complained to the Agency that the lamps provided were excessively hot and caused her second degree burns. The Commission also found that the Agency failed to prove that it was an undue hardship to provide Complainant the appropriate lighting and shades to accommodate her disability.

The Commission affirmed the AJ's award of $60,000 in non-pecuniary compensatory damages, $3,544.80 in pecuniary damages, and attorney's fees in the amount of $57,784, and $755.21 for costs and witness fees.

McCree v. DHS (TSA), 0720100011 (10/14/2015) – Complainant was a Transportation of Security Officer (TSO) who screened baggage. She filed a complaint alleging that she was discriminated against based on her disability (back) when she was denied reasonable accommodation. Following an investigation, and hearing before an EEOC AJ, the AJ found that Complainant was an individual with a disability and was discriminated against when was not reasonably accommodated with employment during certain periods. The AJ ordered relief. The Agency rejected the AJ's decision, finding no discrimination. On appeal, OFO modified the AJ's decision. OFO affirmed the AJ's finding that Complainant was an individual with a disability because of her restrictions on lifting, bending, stooping, and the need to alternate sitting and standing. Citing case law, OFO found that Getzlow v. Department of Homeland Security, EEOC Appeal No. 0120053286 (June 26, 2007), which held under another statute the Agency could establish qualification standards for TSOs that might not otherwise pass muster under the Rehabilitation Act applied not only to applicants, but also to employees. The Rehabilitation Act requires that qualification standards be job-related and consistent with business necessity. OFO found that while Complainant's medical documentation showed she met the TSO qualification standards, which included lifting up to 50 pounds, from January 19, 2007 through July 17, 2007, the Agency without explanation did not return her to work then. OFO found that the AJ's finding that Complainant was discriminated against during this period was supported by substantial evidence, but outside this period she was not qualified for the TSO position due to her medical restrictions. OFO found that Complainant failed to meet her burden of showing she was discriminatorily denied the reasonable accommodation of reassignment - she did not point to a vacant position where she could have worked. Also, under the Rehabilitation Act the Agency was not required to employ her in a modified set of duties which cut out some TSO essential functions even though after the Office of Workers' Compensation approved her claim the Agency later provided her such an assignment pursuant thereto labeled "Recovering Employee's Limited Duty Assignment." OFO found the Agency was not required to create a job for Complainant.

Adams v. DHS, 0720110018 (10/22/2015) **[Repeated under Priority 3 above]** – Complainant, who has rheumatoid arthritis, worked as an Adjudication Officer, where he reviewed applications for citizenship and interviewed applicants for citizenship. Complainant alleged that he was denied an accommodation, which caused him significant pain and ultimately had to apply for disability retirement. He initially alleged to an EEO Counselor that he was denied an accommodation and constructively discharged. He then filed a mixed appeal when he was referred to the MSPB. Complainant withdrew his constructive discharge claim from the MSPB, and asked for the EEOC to take jurisdiction over the remainder of the complaint.

An EEOC AJ held a hearing and determined that the Agency had ignored Complainant's repeated requests for accommodation over a several year period, which was done in bad faith. The AJ noted that even after the Agency ordered its own independent medical evaluation, it ignored the physician's order that Complainant be accommodated. The AJ ordered front pay until Complainant's 65th birthday, back pay, $250,000.00 in nonpecuniary compensatory damages and attorney fees. The Agency did not implement the decision and appealed to OFO.

In its decision, OFO rejected the Agency's timeliness and jurisdictional arguments, finding that the EEOC could take jurisdiction over the complaint because Complainant's retirement resulted from the denial of accommodation and was not a constructive discharge. OFO found there was substantial evidence in the record to support the AJ's findings, and noted that much of the AJ's decision was based on the credibility of the witnesses. OFO awarded back pay, $250,000.00 in nonpecuniary compensatory damages, as well as an attorney fee enhancement of 20% due to the exceptional results obtained. OFO declined to award front pay because complainant was unable to return to work, even if accommodated.

Trussel v NGB, 0720120031 (10/20/2015) – Complainant filed an EEO complaint alleging that the Agency discriminated against him on the basis of race (African-American) when he was not selected for a Powered Support Systems Mechanic position, WG-5378-08/10. An EEOC AJ issued a decision finding that Complainant established that he had been subjected to disparate treatment on the basis of his race. The AJ found that the Agency articulated reason for not selecting Complainant was unworthy of belief and was a pretext for discrimination. The AJ further found that Complainant was the best qualified, and that many of the selecting officials were not credible and were contradicted by the evidence in the record.

The AJ ordered the Agency to pay Complainant all monetary benefits, including back pay, and Cost of Living Adjustments, that he would have received had he been selected to the position, with interest. The Agency was also ordered to pay all retirement contributions and related benefits from the date of the selection to the date Complainant would reach age 60. The Agency was ordered to pay Complainant $5,000 in non-pecuniary compensatory damages, $11,242.65 in attorney's fees and costs, and to provide training to all managers and supervisors.

With respect to jurisdiction, a review of the record established that the position Complainant applied for, the Powered Support Systems Mechanic position, was a civilian position. The duties of this position were to be performed during the work week when Complainant was in his civilian capacity, and not during the weekends when he is on duty in his military capacity as a Guardsman. As a result, this claim arose under Complainant's federal civilian capacity, and was determined to be within the jurisdiction of the Commission.

The Agency also asserted that this complaint should be dismissed because Complainant raised the complaint against the wrong Agency. Specifically, the Agency asserts that Complainant raised the Complaint against the Army National Guard and not the Air National Guard. A review of the record makes it clear that Complainant raised his complaint against the correct Agency, the Air National Guard. Complainant references the Air National Guard base as the location of the discrimination in the formal complaint filed on a generic "National Guard" form, and throughout the record he references the Air National Guard. We note that the caption in the AJ's decision refers to the Army National Guard, however that innocuous mistake can be explained by the confusing and ambiguous language the Agency uses in its documentation throughout the record. For example, the Agency often refers to itself as the "Mississippi Army/Air National Guard." The AJ clearly says in the transcripts that this case is against the Air Guard, and in the body of his decision the AJ refers to the Air National Guard. Therefore, after a review of the record, we find that Complainant correctly filed his complaint against the correct Agency.

Additionally, the Agency asserts that this complaint should be dismissed pursuant to 29 C.F.R. 1614.107(a)(1) because Complainant simultaneously filed a military complaint which was adjudicated and dismissed by his commander. We noted that the regulation the Agency refers to states that "*Prior to a request for a hearing in a case*, the agency shall dismiss an entire complaint that ... states the same claim that is pending before or has been decided by the Agency or Commission." [emphasis added]. The record revealed here that despite its knowledge that Complainant simultaneously filed a military complaint, the Agency issued Complainant a right to file a formal EEO complaint, investigated the EEO complaint, and issued the Complainant a right to a

hearing before an EEOC AJ. The decision found that the record did not contain evidence that would establish that the Agency filed a motion to dismiss prior to the AJ's determination on the merits, and so could not do so.

Disparate Treatment Analysis: We agreed with the AJ that Complainant established pretext. The AJ found the primary purpose of the position at issue was to work on Aerospace Ground Equipment, which Complainant has experience with for over twenty years. In contrast, the selectee has no such comparable experience. Further, an "AFSC code" was required for the position. Complainant had an AFSC code, while the selectee did not. The AJ found that of all the individuals on the selecting panel, only one was credible when he testified that Complainant's performance was superior to the performance of the selectee, and that his testimony was supported by documentation in the record. Documentation in the record established that the Agency had strong concerns about the selectee's performance that often put the lives of pilots in danger, while Complainant had excellent performance. Further, the credible panel member testified that Complainant's leadership skills were "second to none." The record established that that the selectee was substantially less qualified than Complainant for the position. The AJ did not find the other panel members credible. The AJ found that one panel member in particular had "unfavorable animus" towards Complainant. Additionally, he found that this panel member's description of Complainant's work ethic was an "outright fabrication."

The decision found that in order to provide make-whole relief, the Agency must provide Complainant with back-pay and benefits until the date of his voluntary resignation from the Agency. However, we noted that the Commission cannot force the Agency to provide relief that is irreducibly military in nature, such as military back pay. Daniel v. National Guard Bureau, EEOC Appeal No. 0120083464 (October 9, 2012). Therefore, the back pay and benefits awarded to Complainant will only include civilian back pay and benefits.

Trahan v. DOJ, 0720130022 (10/02/2015) – The Agency filed an appeal from an EEOC AJ's finding of discrimination, after a hearing, on the bases of disability (injury to left wrist) when Complainant was not reasonably accommodated and when Complainant was terminated. The AJ also found no discrimination on other issues. The Agency issued a decision implementing the findings of discrimination and no discrimination, but rejecting the portion of the AJ's remedy that as part of the interactive process for reasonable accommodation, it provide Complainant with a list of all vacant positions in the geographic area specified by Complainant on an ongoing basis for a period of 90 days. The Agency filed the instant appeal. Complainant also filed an appeal. OFO found that the AJ's order was proper and that the Agency should engage in the interactive process as specified by the AJ regarding vacant funded positions. OFO also found that the AJ erred as a matter of law when it found that Complainant had not engaged in prior protected activity when she requested a reasonable accommodation for her disability. OFO found that the Agency retaliated against her for making that request when it subjected her to a hostile work environment (including pressuring her to accept work assignments that violated her medical restrictions). In relief, OFO ordered the Agency to: reinstate Complainant and engage in the interactive process; pay back pay; pay attorneys fees in the amount of $82,339.00 and costs in the amount of $4,194.77; pay nonpecuniary, compensatory damages in the amount of $18,000.00; post a notice of the finding of discrimination; and to consider disciplining and provide training regarding the Rehabilitation Act to responsible Agency officials.

Coimbre v. DHS, 0720130035 (10/20/2015) – The appellate decision upheld an EEOC AJ conclusion that Complainant was subjected to retaliatory harassment, finding that the Supreme Court's decision in University of Texas Southwestern Medical Center v. Nassar, 570 U.S. ___, 133 S.Ct. 2517 (2013) did not affect the causation underpinning the ruling. Complainant alleged that when he initiated the EEO complaint in 2005, the Assistant Federal Security Director of Operations (S1) called Complainant into his office and told him to "drop his EEO case" against another manager (S2). Complainant alleged in the instant complaint that between 2005 and 2008, both S1 and S2 engaged in a pattern of harassment against him for filing his 2005 EEO complaint. The harassment allegedly intensified in July 2008 when Complainant learned that the office supervisory structure was reorganized and S1 would now be his first-level supervisor. Complainant expressed concern to S2 regarding having S1 as his direct supervisor, but S2 told him, "That's how it is going to be." The decision expanded the time period of the retaliatory harassment found to be from 2005-2009, upheld the AJ's denial of an agency witness at the hearing, upheld the AJ's dismissal of Complainant's allegation of constructive

discharge raised on appeal, and expanded the $55,000 compensatory damages awarded to $125,000.00. The expansion of damages ruling was based on the length of time of the harassment, its severity, and the severe affect it had on Complainant and his family. Complainant's wife testified that she feared that Complainant would commit suicide after he was taken in for questioning at the Reno Police Department and that during the Agency's harassment Complainant often feared for his life, has severe digestive problems and believed that if he and his family did not flee the area they would be in danger because the Agency would not give up until they destroyed him. Complainant's wife also testified that the Agency's retaliatory actions brought their marriage to the brink of divorce. The decision also modified the AJ's across the board reduction of the attorneys' fees award from 75% to 20%, and awarded costs.

Pyun v. SSA, 0720140026 (10/29/2015) – Complainant, a Service Representative, filed an EEO complaint alleging, in relevant part, that she was discriminated against based in reprisal for prior EEO activity when the Agency subjected her work to consistent unwarranted scrutiny which resulted in her being placed on a Performance Assistance Plan (PAP) effective January 9, 2006, and, consequently, on a Performance Enhancement Plan (PEP) in May 2006. Following an investigation, Complainant had a hearing before EEOC AJ 1. After the fourth day of the hearing, the AJ sanctioned the Agency pursuant to 29 C.F.R. § 1602.14 on the grounds that three management officials destroyed their handwritten notes of their observations of Complainant's interviews of beneficiaries and her performance. As sanction, AJ 1 ruled that the typewritten observation logs and corresponding memoranda used against Complainant would be construed to support her allegations, and one of the management officials could not testify. AJ 1 found that this sanction was sufficient to support a finding of discrimination, but regardless there was sufficient evidence to prove reprisal, i.e., the lead responsible manager turned two subservient managers against Complainant, evidenced in part by his asking to see his two subservient manager affidavits before they were submitted to "make sure they were on the same page," the second subservient manager the Agency relied on in assessing Complainant's performance recanted virtually every allegation of poor performance she made, an expert witness testified that Complainant was more productive than a comparative employee, etc. After a remedies hearing, AJ 1 recused himself, and AJ 2 issued a decision on remedies. In only awarding $15,000 in nonpecuniary damages, AJ 2 reasoned that Complainant was impeached in part because she failed to mention a significant car accident relevant to her damages claim in her deposition. AJ 2 awarded $348,814.78 in attorney fees. Complainant appealed her removal, which grew out of the PAP and PEP, to the MSPB. In May 2009, the MSPB upheld her removal and gave her appeal rights to the EEOC. Complainant argued that in June 2009, she timely filed a petition therefrom to the EEOC. AJ 2 awarded Complainant provisional remedies contingent on OFO accepting the petition. The provisional remedies included additional compensatory damages and attorney fees, and reinstatement with backpay. OFO affirmed the AJs' sanction, finding of discrimination, and non-provisional remedies. OFO found that if Complainant filed a petition to review the MSPB's decision laches applied – our office never sent the parties any letters acknowledging receipt of a petition, and Complainant did not get in touch with OFO in an attempt to get her petition docketed or acknowledged until four years past. OFO found that it would not consider Complainant's removal claim or award any remedies associated with the removal because the MSPB sustained the removal and laches applied to her petition therefrom.

Belle (Karry S) v. Air Force, 0720140038 (10/09/2015) – The Agency and Complainant both filed appeals from an EEOC AJ's finding of discrimination. Complainant, a Coordinator, School Age Program, filed a complaint alleging she was discriminated against on the bases of race (African-American) and retaliation when she was subjected to a hostile work environment, was removed from her supervisory position, and was terminated. The AJ found that the Agency failed to abide by the AJ's orders and issued a default judgment of discrimination for Complainant on all issues and bases. Complainant was also sanctioned for not abiding by the AJ's discovery orders. The AJ did not allow Complainant to present evidence of damages. The Agency issued a final order rejecting the AJ's findings. Complainant appealed the sanction regarding evidence on damages and the attorney's fee award. OFO found that the Agency had not provided interim relief and dismissed the Agency's appeal. Regarding Complainant's appeal, OFO found that the AJ's sanction was appropriate. OFO rejected Complainant's arguments that the AJ improperly reduced the attorney's fees. OFO found that the AJ properly determined that many of the descriptions of the hours billed were vague. OFO did

allow an additional award, however, for precomplaint attorneys services spent determining whether to represent Complainant. In relief, OFO ordered the Agency to: reinstate Complainant; expunge references to Complainant's job performance during the relevant time and references to the removals at issue in the complaint; pay attorneys fee's in the amount of $43,280.00 and costs in the amount of $651.71; post a notice of the finding of discrimination; and to provide EEO training to responsible Agency officials.

Feder (Edmund L) v. DOJ, 0520150391 (10/30/2015) – The Agency requested reconsideration of OFO's decision in EEOC Appeal No. 0720150003. In EEOC Appeal 0720110014, OFO found that Complainant was retaliated against when he was removed from his position of a Contract Linguist. Subsequently, an EEOC AJ awarded back pay, compensatory damages, and attorney's fees. The Agency appealed the decision on damages and in EEOC Appeal No. 0720150003, OFO modified the Agency's order. OFO found that the parties agreed that the AJ had made a mathematical error and that Complainant was due additional back pay because the Agency had failed to reinstate him as ordered in EEOC Appeal No. 0720110014. OFO also found that Complainant's business expenses should not be deducted from back pay. The parties did not contest the compensatory damage award. The Agency requested reconsideration and argued that Complainant was not due additional back pay due to the delay in reinstatement and that the back pay award should have been reduced by Complainant's business expenses. In the decision on the Agency's request for reconsideration, OFO found that the prior decision was proper and denied the request. OFO restated the prior order which was for the Agency to pay Complainant: $55,000 in nonpecuniary, compensatory damages; $363,200 in back pay; and $168,966 in attorney's fees.

Price (Geraldine B) v. VA, 0120090181 (10/13/2015) **[Repeated under Priority 3 above]** – Complainant, a Publications Supply Clerk, GS-3, alleged that the Agency failed to provide her with a reasonable accommodation for her physical disability. Complainant suffered from chronic pain from bilateral carpal tunnel syndrome, among other conditions. Complainant primarily experienced difficulties doing repetitive work with her hands and had to wear braces on her hands. Upon returning from sick leave due to surgery, management assigned Complainant duties that required her to photocopy service medical records for reproduction. In an attempt to accommodate Complainant, the Agency provided her with an electric stapler and a chair to operate the photocopy machine. Complainant was not satisfied with this attempt at accommodation, saying that that the repetitive and fast nature of the photocopying aggravated her medical conditions. Management subsequently told Complainant that her production rate with respect to her photocopying duties was unacceptable. Management thereafter placed Complainant on a Performance Improvement Plan, and thereafter removed her from employment. The Agency's final Decision found no discrimination. On appeal, in modifying the Agency's final decision, we found that Complainant established that she was a qualified individual with a disability who had been denied reasonable accommodation in violation of the Rehabilitation Act. We noted that Commission precedent clearly established that Complainant's Carpel Tunnel syndrome, among her other conditions, clearly substantially limited her ability to perform manual tasks. We noted that while Complainant could not perform the essential functions of her photocopying position, she did identify other Agency positions that were available. We indicated that the Agency did not dispute and/or address Complainant's statement that there were other vacant positions which she was capable of performing, to which she could have been reassigned. We therefore found that Complainant established that she was denied reasonable accommodation for her disability as alleged. We further found the Agency liable for compensatory damages, writing that the Agency's removal of Complainant rather than make any further attempt to accommodate her clearly constituted bad faith. In addition to compensatory damages, we ordered the Agency to indentify a vacant funded position for Complainant, and also provide her with back pay and/or other benefits.

Fresh (Iliana S) v. DOJ (FBI), 0120081848 (10/13/2015) **[Repeated under Priority 3 above]** – Complainant worked as an Equal Employment Opportunity Program Manager, GS-13, with the Agency's Office of Equal Employment Opportunity Affairs (OEEOA), at the J. Edgar Hoover FBI Building in Washington, D.C. Complainant's position required her to manage Equal Employment Opportunity Special Emphasis Programs.

Complainant's doctor diagnosed her with Degenerative Disk Disease (DDD) in her lower back, which was caused by an accident while Complainant was on active military duty. Complainant was also diagnosed with Fibromyalgia. Complainant's Fibromyalgia condition causes chronic widespread musculoskeletal pain with symptoms of fatigue. Complainant also had knee impairments in both knees, which required injections, physical therapy, and arthroscopy surgery. Complainant was assigned to the Acting Unit Chief of the OEEOA Special Programs Unit, who served as Complainant's first-level supervisor (S1). Complainant was also assigned to an EEO Officer who became her second-level supervisor (S2). In meetings and e-mails with both S1 and S2, Complainant discussed, in great detail, her treatment, pain, and doctor visits with respect to her medical conditions.

After notifying S1 and S2 of her conditions, Complainant became aware that the Agency's J. Edgar Hoover Building was scheduled to have a fire drill. Six days prior to the drill, Complainant sent a memorandum to S1 and/or S2, reminding them of her knee and back problems. The morning of the scheduled fire drill, Complainant asked the Safety Warden that she be allowed to use the elevator, instead of the stairs. Complainant however was not allowed to do so, and had to traverse down seven flights of stairs with a coworker who was also prohibited from using the elevator. After descending down the stairs, the coworker noticed that Complainant's knee was extremely swollen and advised Complainant that they should not try to walk to the meeting point that was three blocks away. Complainant severely injured her knee(s) as a result.

Various employees provided affidavits, asserting their beliefs that S1 and S2 were intentionally subjecting Complainant to discriminatory reprisal. Specifically, S1 and S2 denied Complainant training and imposed extremely short unreasonable deadlines on her work. Also, S1 and S2 were unwilling to allow Complainant to strictly use e-mail communication with them and frequently required Complainant to meet with them in their offices. Complainant reportedly, on some days, had to walk as many as 10 to 15 times a day to their offices even though she visibly had trouble walking.

The Agency's final decision found that Complainant was not subjected to discrimination as alleged. On appeal, in reversing the Agency's decision, we found that Complainant was a qualified individual with a disability who had clearly been denied reasonable accommodation. We further found that S1 and S2 subjected Complainant to retaliatory disparate treatment and a hostile work environment. We found that contrary to 29 C.F.R. § 1614.102, the Agency's OEEOA failed to conduct itself in a manner necessary to effectuate the elimination of discrimination in the workplace. We ordered the Agency to provide compensatory damages to Complainant, and also provide S1 and S2 with a minimum of 24 hours of training.

Daniels (Collin R) v. USPS, 0120113831 (10/14/2015) – Complainant was a Carrier Technician for the Agency and filed an appeal from a final decision issued by the Agency on his complaint of discrimination. Complainant had filed a complaint on the bases of race (Caucasian) and reprisal when he was harassed, and not allowed to start his tour of duty early. He amended his complaint and claimed discrimination on the bases of physical disability (bilateral osteochrondral defects to the medial talar domes to both ankles, soft tissue stress and moderate tendonitis) and reprisal when management would not accommodate his medical restrictions, he was not accommodated with a stool at his work station, and his request for a temporary schedule change was disapproved.

The Agency issued a decision in which it found that Complainant had not been discriminated against. It noted that in a previous complaint, an EEOC AJ had found that Complainant had not established that he was an individual with a disability. The Agency found that Complainant had not provided medical evidence to support that he was an individual with a disability. It also concluded that Complainant had not established that he had been subjected to discrimination.

The appellate decision reversed the Agency and found that Complainant is an individual with a disability, and that he is substantially limited in the major life activity of standing. Complainant's doctor recommended the use of a stool at Complainant's work station when casing mail. The decision found that he was entitled to a reasonable accommodation at the times of the requests at issue in his complaint. Complainant was an otherwise qualified individual with a disability, and was able to perform the essential functions of his position. Complainant asked to have a stool at his work station, and not to have to go retrieve it from elsewhere in the facility, unlike the other Carriers. The Agency did not show that it was an undue hardship. Although the

Postmaster agreed that Complainant could use a stool when assigned to that work station, Complainant was required to go to the register room, sign out the stool, and carry it across the work area in order to use it. The decision found that this was not an effective accommodation for Complainant, given his limitations in standing and walking, given that his disability affected his ankles. We found that forcing Complainant to walk to obtain his own accommodation, in the face of the fact that his disability affected his standing and walking abilities, was not an action done in good faith. Complainant therefore was entitled to compensatory damages due to the Agency's failure to accommodate him. The decision affirmed the Agency's finding of no discrimination or harassment.

The Agency was ordered to provide a reasonable accommodation to Complainant and to conduct a supplemental investigation into compensatory damages.

Rineer (Harold M) v. Air Force, 0120081812 (10/14/2015) **[Repeated under Priority 3 above]** – Complainant worked as an Electronics Mechanic, WG-2604-11, at the Agency's Aerospace Maintenance and Regeneration Group (AMARG) in Tucson, Arizona. Complainant was injured while working, resulting in restrictions from twisting, standing more than 30 minutes per day, walking more than one hour per day, kneeling more than five minutes per day, and bending/stooping more than five minutes. Complainant stated that he was detailed to work in the Technical Order Library until September 2006, and that he performed mostly sedentary work in this detail assignment. However, on September 5, 2006, the Agency assigned him to work as a Security Guard, and in this position, he worked "on his feet all day," which violated his medical restrictions. Complainant further stated that he began taking Vicodin to cope with the pain caused by working in a Security Guard position that violated his medical restrictions. Complainant filed an EEO complaint in which he alleged that the Agency discriminated against him on the basis of disability when the Agency failed to accommodate him.

In a summary judgment decision, an AJ concluded that Complainant failed to prove that he was an individual with a disability entitled to coverage under the Rehabilitation Act. The AJ further found that Complainant was not denied a reasonable accommodation because the Agency offered him a modified position in May 2007 within his restrictions as a Production Controller, which Complainant accepted.

On appeal, the Commission found that the AJ erred as a matter of law with respect to the issue of whether Complainant was an individual with a disability. The Commission noted that Complainant had long-term knee and ankle impairments that restricted him from standing more than 30 minutes per day and walking more than one hour per day. Additionally, the Commission noted that Complainant's knee impairment restricted him from kneeling and bending more than five minutes per day and precluded him from twisting. Consequently, the Commission found that Complainant's physical impairments substantially limited him in the major life activities of standing and walking, and consequently, he is an individual with a disability.

Regarding Complainant's reasonable accommodation claim, the Commission noted that no reasonable fact-finder could conclude that Complainant could continue to perform the essential functions of his previous Electronics Mechanics position after he was injured because the duties of this position were outside his restrictions. The Agency noted that the Agency reassigned Complainant to a Security Guard position that required him to stand on his feet essentially all day, although he was restricted from working on his feet from working more than 30 minutes per day. Thus, the Commission found that the Agency failed to reasonably accommodate Complainant when it placed him into a Security Guard position that clearly violated his medical restrictions. However, the Commission found that the Agency later accommodated Complainant when it offered him a Production Controller position within his restrictions in May 2007.

In order to remedy the Rehabilitation Act violation, the Commission ordered the Agency to provide Complainant with proven compensatory damages; to provide training to all AMARG management officials on providing reasonable accommodation under the Rehabilitation Act; and to consider taking appropriate disciplinary action against responsible management officials.

Williams (Mckenzie L) v. USPS, 0120073428 (10/14/2015) **[Repeated under Priority 3 above]** – Complainant worked as a Mail Processing Clerk at the Agency's Cincinnati, Ohio Processing and Distribution

Center. Complainant has Lupus, which causes fluid to accumulate in her lungs. Consequently, Complainant suffers from coughing and problems associated with the regulation of her body temperature. Complainant also experiences heat and cold at the same time in different parts of her body. Additionally, Complainant suffers from Raynaud's Disease, which is a circulatory disease that causes numbness, pain, weakness, and stiffness in the middle finger of her right hand. Further, repetitive motion or vibration causes stiffness in her right hand. Complainant's physician has restricted her from peeling labels, repetitive motions, and working in cold environments.

Complainant filed an EEO complaint in which she alleged that she was discriminated against on the basis of disability when, in April 2006, management assigned her to work in a cold area and required her to operate a vibrating machine, which exacerbated her medical conditions. Complainant maintained that her mail case was too close to the air conditioning vent, which made her cold, but immediately after she reported this matter to her supervisor (S1), she was moved away from the vent. Complainant also maintained that she normally did not operate the Delivery Bar Code Sorter (DBCS) because of her medical restrictions; however, on an unspecified date in April 2006, S1 told her to run the machine for a few minutes, although Complainant told her that she could not operate the machine. Complainant stated that she operated the machine for less than ten minutes and continued stamping mail thereafter. S1 stated that although Complainant provided a note that said that she could not "jog" mail, she did not inform S1 that her condition was exacerbated by working on the vibrating DBCS machine. The Manager stated that Complainant told him that her condition prevented her from working in the cold or on machines because of the vibration, but Complainant did not provide him with any medical documentation regarding her condition.

In a summary judgment decision, an AJ concluded that Complainant was not an individual with a disability entitled to coverage under the Rehabilitation Act. The AJ did not address whether the Agency failed to provide Complainant with a reasonable accommodation for her medical conditions because the AJ determined that Complainant was not an individual with a disability.

On appeal, the Commission found that the AJ erred as a matter of law with respect to the issue of whether Complainant was an individual with a disability. The Commission determined that the evidence reflected that Complainant suffered from Lupus and Raynaud's Disease, which resulted in Complainant experiencing body temperature regulation problems and numbness and pain in her fingers and hands. The Commission noted that Complainant's condition severely restricted her ability to do housework and chores because of the pain she experienced in her hands. Consequently, the Commission found that Complainant is substantially limited in the major life activity of performing manual tasks. Additionally, the Commission found that Complainant was also substantially limited in the major life activity of working because she was restricted from working the broad class of jobs that involve using a machine.

Regarding Complainant's reasonable accommodation claim, the Commission noted that Complainant acknowledged that she did not inform management that her work area was too cold, and therefore, the Agency did not deny her a reasonable accommodation with respect to this matter. However, the Commission noted that Office of Workers' Compensation Programs documentation from Complainant's physician informed the Agency that Complainant was restricted from working on any machinery because of her medical conditions, and S1 did not deny that he ordered Complainant to work on the DBCS machine in April 2006. Consequently, the Commission found that the Agency failed to provide Complainant with a reasonable accommodation when it insisted that she work on machines in violation of her restrictions.

In order to remedy the Rehabilitation Act violation, the Commission ordered the Agency to ensure that Complainant is provided with a reasonable accommodation for her disability at all times; to provide Complainant with proven compensatory damages; to provide at least eight hours of EEO training to the responsible management officials; and to consider taking appropriate disciplinary action against the responsible management officials.

Slye-Cody (Kylee C) v. USPS, 0120090617 (10/13/2015) **[Repeated under Priority 3 above]** – Complainant worked as a Modified Sales and Services Associate at the Palm Coast, Florida Post Office pursuant to a December 2005 permanent rehabilitation position offer. This position featured a schedule wherein Complainant did not work on Sundays and Mondays. Complainant's medical restrictions precluded her from

lifting more than 15 to 20 pounds with her right hand; standing unsupported for more than 15 minutes at a time; and sitting for more than 30 minutes at a time. In June 2005, Complainant requested an accommodation by having Sundays and Mondays off work, and the Agency granted the request. Complainant stated that the accommodation was necessary because she made most of her medical appointments for Mondays. On June 19, 2007, the Agency gave Complainant another job offer that changed her days off to Saturdays and Sundays and did not include her sitting/standing restrictions. Management did not discuss any alternative accommodations with Complainant, and she was forced to use her leave and take leave without pay in order to attend medical appointments

Complainant was subsequently injured while working, which resulted in restrictions that precluded her from lifting, pushing, or pulling more than 10 pounds; bending more than one hour per day; and walking more than 30 minutes. Additionally, Complainant was advised to change positions frequently when sitting and standing and to take precautionary measures in grasping, fine manipulation, and reaching above the shoulder. On October 9, 2007, Complainant asked her supervisor (S1) to cover her on the window because she had been standing and walking for over an hour. In response, the Postmaster ordered her to return to the lobby to work. Complainant then told the Postmaster that she needed to sit for a few minutes, but the Postmaster told her that she should go home if she could not do her job. Complainant submitted three requests for light duty with medical documentation in October and November 2007, but management denied her requests on the basis that her medical restrictions were not updated and there was no work available.

Complainant filed an EEO complaint in which she alleged that the Agency discriminated against her on the basis of disability and in reprisal for prior EEO activity when, on October 10, 2007, the Agency denied her request for light duty.

In its final decision, the Agency concluded that Complainant failed to prove that the Agency subjected her to discrimination as alleged. Specifically, the Agency found that Complainant was not an individual with a disability. The Agency further found that there was no prima facie case of reprisal in this case because there was no nexus between Complainant's EEO activity and the Agency's denial of light duty. The Agency also found that Complainant failed to prove that the Agency's articulated non-discriminatory reasons explanation for its actions were pretext for unlawful discrimination. .

On appeal, the Commission found that the Agency erred in finding that Complainant is not an individual with a disability. The Commission noted that Complainant could not lift more than 10 pounds intermittently, which made her substantially limited in the major life activity of lifting under Commission precedent.

Regarding Complainant's reasonable accommodation claims, the Commission found that Complainant failed to show why Monday was the specific day of the week she needed to attend her medical appointments instead of other days of the week. The Commission therefore found that Complainant failed to establish a nexus between her requested accommodation and her medical condition.

Regarding the light duty requests, the Commission noted that, despite the Postmaster's claim that Complainant did not submit updated medical documentation until she made a fourth light duty request, the record revealed that Complainant had submitted such documentation since her first light duty request. The Commission further noted that although the Postmaster stated that there was no work available within Complainant's restrictions, the Manager stated that Complainant was already performing work within her restrictions after she was injured, there was work Complainant could continue to perform within her light-duty job offer, and Complainant's light-duty request would probably have been approved before the new Postmaster arrived at Palm Coast. Consequently, the Commission found that the Agency denied Complainant a reasonable accommodation because the evidence demonstrated that there was work within Complainant's restrictions from the time she first requested and was denied light duty (October 10, 2007) until the date the Postmaster finally granted her request for work within her restrictions (November 24, 2007).

With regard to reprisal, the Commission found that Complainant established a prima facie case of reprisal, and the Agency articulated legitimate, non-discriminatory reasons for denying Complainant's light duty requests. Specifically, the Postmaster asserted that Complainant did not submit updated medical documentation until her fourth request, and there was no work available within her medical restrictions. However, the Commission stated that this explanation by the Postmaster was unworthy of belief because it was contradicted by other management officials and Complainant. Additionally, the Commission noted that in a letter to the Injury

Compensation Office, the Postmaster wrote that Complainant was "very upset with this schedule and filed an EEO against me as the Postmaster due to this change. The Commission found that Postmaster's unnecessary mention of Complainant's EEO activity was not only evidence of his retaliatory motive with regard to Complainant's light duty claim, but was itself an action that is reasonably likely to deter employees from engaging in EEO activity, and as such, violated EEO regulations.

In order to remedy the Rehabilitation Act violation, the Commission ordered the Agency to ensure that Complainant is provided with a reasonable accommodation for her disability; to restore any leave Complainant used from October 10, 2007, through November 24, 2007, and to reimburse Complainant for any Leave without Pay used because of its unlawful failure to provide her with a reasonable accommodation; to provide Complainant with proven compensatory damages; to provide Complainant back pay for any pay she lost that is attributable to the unlawful denial of a reasonable accommodation; to provide training to all management officials at its Palm Coast facilities on providing reasonable accommodation under the Rehabilitation Act; and to consider taking appropriate disciplinary action against the responsible management officials involved in this case.

Williams (Amina W) v. DOE, 0120113823 (11/17/2015) – The Commission reversed the Agency's final order adopting an AJ's decision finding no discrimination after a hearing. The AJ found that Complainant failed to demonstrate that she was discriminated against or harassed as alleged. On appeal, however, the Commission issued a default judgment against the Agency for failing to provide Complainant's entire complaint file, including the hearing transcripts and the AJ's decision, despite numerous requests from the Commission.

The Commission noted that although numerous requests for the documents had been submitted to the Agency no explanations were provided for its failure to comply. The Commission found that "[i]In the absence of the hearing record, including the hearing transcripts, we are simply unable to properly review whether the record supports the AJ's determination that Complainant failed to establish discrimination or that she was subjected to a hostile work environment." The Commission also found that Complainant was profoundly prejudiced by the Agency's failure to provide the hearing transcript and other hearing documents.

The Commission, as a remedy, ordered the Agency, among other things, to offer Complainant a retroactive promotion to the position of Management Analyst, GS-343-11, or to a substantially equivalent position, to provide back pay, conduct a supplemental investigation on compensatory damages, and provide training to its management officials.

Koppe (Zoila P) v. DOJ (EOUSA), 0720130036 (11/24/2015) **[Repeated under Priority 5 above]** – Complainant's attorneys and the Agency appealed various portions of an EEOC AJ's decision on a complaint of sex discrimination and reprisal, issued after a hearing, finding that: (1) Complainant was denied a time-off award because of sex discrimination and reprisal (2) Complainant was denied a transfer request because of reprisal for her EEO activity, but not because of her sex; and (3) comments by management officials regarding Complainant's EEO activity constituted reprisal. In reaching her conclusion, the AJ struck the Agency's legitimate, nondiscriminatory, reason for not giving Complainant the time-off award as a sanction for failure to comply with oral and written discovery orders. Prominent portions of the AJ's remedial order included: (1) $33,000.00 in non-pecuniary compensatory damages; (2) $228,170.50 in attorneys' fees and $26,827.59 in costs; (3) that the Agency consider permanently removing the responsible management officials from their managerial positions; and (4) that the Agency consider convening all employees during working time and have one of the responsible management officials read the notice of discrimination to employees.

The Agency rejected the AJ's finding that Complainant was subjected to sex discrimination and reprisal in being denied the time-off award; that she was subjected to reprisal in being denied her transfer request; the AJ's award of compensatory damages in excess of $10,000; attorneys' fees in excess of $152,121.27; and costs in excess of $17,885.95. Also, the Agency argued that the AJ abused her discretion by issuing a sanctions order that struck the Agency's evidence of a legitimate nondiscriminatory reason for not issuing Complainant a time-off award; and erred by issuing a relief order that exceeded the scope of her authority.

Complainant's attorneys argued that she was entitled to more than the $228,170.50 in attorney's fees and $26,827.59 in costs. Complainant's attorneys filed the appeal without participation of Complainant because Complainant and her attorneys entered into a contractual agreement, which ended their lawyer-client relationship, and purportedly assigned to the attorneys the right to pursue an appeal of attorneys' fees.

The decision on appeal concluded that there was substantial evidence in the record to support the AJ's conclusion that Complainant was subjected to sex discrimination and reprisal for her EEO activity in not receiving a time-off award for her job performance. In reaching this conclusion, the decision also upheld the AJ's striking of the Agency's legitimate, nondiscriminatory, reason from the record as a sanction for the Agency's failure to follow discovery orders. The AJ indicated repeatedly during the hearing that a particular item was not produced, and the Agency finally produced it on the third day of the hearing, which was improper because certain witnesses had already testified and neither Complainant's counsel nor the AJ had the documents for use at the time of the testimony.

Second, the AJ's finding that a supervisor "decided to deny Complainant's request for reasons directly related to Complainant's EEO conduct: so that people in the office would not think that there was any validity to Complainant's EEO discrimination allegations against him," was supported by substantial evidence in the record. The supervisor's conduct constituted reprisal for Complainant's EEO activity.

Next, the decision found that Complainant's former attorneys could not pursue the appeal on their own because they were not the prevailing parties in the case and therefore lacked standing to pursue an appeal on the sole issue of attorneys' fees without the participation of Complainant. The decision concluded that $33,000.00 in non-pecuniary compensatory damages, $228,170.50 in attorney's fees and $26,827.59 in costs was supported by substantial evidence in the record. Finally, the decision struck the AJ's order to have the responsible management officials read a notice of the finding of discrimination out loud to staff.

Patil (Jeramy R.) v. DOJ, 0120132089 (11/19/2015) **[Repeated under Priority 6 above]** – Complainant appealed from the Agency's final decision, which concluded that he was not subjected to reprisal because of his opposition to sex discrimination. Complainant alleged that the reprisal consisted of subjecting him to a hostile work environment and that the responsible management officials aggressively attempted to damage his career and professional reputation after he voiced opposition about mistreatment of women in his office. On appeal, the Agency argued that Complainant could not prove essential elements of his claim, mainly that he engaged in protected opposition and that management was aware of his protected activity.

The decision concluded that the set of circumstances supported a conclusion that Complainant communicated a belief that management's treatment of women constituted unlawful discrimination, and given the testimony of the numerous employee witnesses at the Agency, Complainant had a reasonable and good faith belief that such conduct constituted unlawful sex discrimination. Therefore, the decision concluded that Complainant engaged in protected opposition EEO activity.

Next, the decision concluded that management subjected Complainant to adverse treatment by making disparaging comments about Complainant, excluding him from meetings, and finding issues with his work. While the Agency stated as its legitimate, nondiscriminatory, reason that these issues were a result of personality conflicts, Complainant was able to demonstrate pretext because other employees testified that management increased their mistreatment of Complainant subsequent to his protected activity, management had no issues with Complainant's work product prior to the protected activity, Complainant's performance evaluations were outstanding and thus contradicted management's assertions about his written work product, and employee testimony regarding the comments that management officials made about Complainant were probative of discriminatory animus.

Therefore, the decision concluded that Complainant was subjected to reprisal for his protected opposition activity. As relief, the decision ordered that the Agency offer Complainant a new one-year detail, provide relevant back pay with benefits and interest, calculate compensatory damages, provide training to management officials, consider disciplinary action against the responsible management officials, and post a notice of the finding of discrimination.

Fischer (Evelyn S) v. VA, 0120130486 (11/24/2015) – Complainant alleged that the Agency discriminated against her on the bases of disability (regarded as having ADHD), race (White), sex (female), and reprisal for prior protected EEO activity when her supervisor issued her a fully successful year end performance appraisal and denied her a cash performance award. Complainant also alleged that she was subjected to a hostile work environment on the bases of race, sex, disability and reprisal.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an EEOC AJ. Complainant timely requested a hearing and the AJ held a hearing. The AJ subsequently issued a decision finding that Complainant established that the Agency "interfered with the EEO process" when the Interim Medical Center Director stated that he wondered if he could trust her because she filed an EEO complaint. The AJ also found that based on the record and on her credibility determinations, Complainant failed to establish that she was subjected to disparate treatment or harassment based on race, sex, reprisal, or disability. The AJ found that Complainant did not establish that she suffered any damages related to the Agency's interference with the EEO process, and as a result did not award her compensatory damages. The AJ also found that because Complainant did not prevail on either her disparate treatment or her harassment claim, she was not a prevailing party and therefore was not entitled to attorney's fees. The AJ ordered that the Agency post a notice of discrimination at the facility and provide 8 hours of EEO training to the Interim Medical Center Director.

The Agency subsequently issued a final order adopting the AJ's finding that Complainant proved that the Agency subjected her to reprisal discrimination as alleged. On appeal, the appellate decision affirmed the AJ and Agency rulings on the discrimination issue, but found that since Complainant prevailed on the retaliation issue, she was a prevailing party and should also be awarded proven attorney's fees, in addition to the consideration of disciplinary action and training for the responsible management officials, and the posting of a notice.

Borne (Clayton C) v. DOT, 0120120350 (11/17/2015) – Complainant, who is totally blind and suffers from sleep apnea, worked for the Agency's Office of Civil Rights as an EEO Specialist. Complainant asserted he previously was permitted to telework, as needed, or change his telework day during inclement weather. After he was diagnosed with sleep apnea in 2009, he brought in a note from his physician stating that he should telework "to the fullest extent possible." A new supervisor permitted Complainant to telework for 2 days a week, for three months. Complainant disputed that this was a temporary arrangement, and Complainant continued to telework, as needed, for the next several months without problems.

Complainant was assigned a new supervisor, who reevaluated the arrangement after he learned that the arrangement had "expired" after a period of three months. When the Agency reduced his telework to only one day per week, Complainant eventually left the Agency's employ and filed this complaint.

The Agency found Complainant was an individual with a disability, but only analyzed the claim as a disparate treatment claim. The Agency found no evidence that Complainant ever requested a reasonable accommodation, and therefore did not address whether Complainant was denied a reasonable accommodation.

OFO found that Complainant, a qualified individual with a disability, had in fact requested a reasonable accommodation separate from the Agency's existing telework policy. The decision noted there was no evidence that Complainant's obvious need for an accommodation was eliminated after three months, and thus, OFO was persuaded that Complainant's request as a reasonable accommodation had not "expired."

The decision also found the Agency failed to consider whether Complainant's request for two telework two days per week, with the option of changing days, would cause an undue hardship. Finding that an increase in moral problems would not satisfy its burden, the decision found Complainant established he had been denied an accommodation. The decision ordered a supplemental investigation into Complainant's entitlement to compensatory damages, and other remedial relief. The decision found no discrimination with respect to the remaining claims.

Satterlee v. DHS (TSA), 0120112139 (11/20/2015) **[Repeated under Priority 3 above]** – The appellate decision reversed a final agency decision and held that Complainant established that the Agency discriminated against him on the bases of disability and/or reprisal when it did not select him for a detail position and when it failed to maintain Complainant's confidential medical information in a separate medical file. Complainant worked as a Lead Transportation Security Officer, grade F Band, at the Orlando International Airport (MCO) in Florida. When Complainant was required to attain recertification for his position, he submitted a letter to the Federal Security Director (S1) from his psychiatrist, which stated: "[Complainant] has been under my care since April 12, 2000 for the condition of depression and anxiety. [Complainant] also suffers from Attention Deficit Disorder and Hyperactivity. [Complainant] is currently on a regimen of medications, which have allowed him to complete tasks with minimal difficulties. Recently, [Complainant] brought to my attention that he will be undergoing a yearly performance review and is very concerned that his medical conditions might prohibit him from performing to the best of his ability. Since [Complainant] has difficulties with performing under pressure, I would like to ask that you take this under consideration during his yearly performance review. Any consideration you would provide to my patient will be appreciated." Complainant asked S1 that this letter be put into his medical file. Instead, S1 placed the letter into Complainant's official personnel file.

Subsequently, when Complainant applied for one of multiple (20) detail positions for Operations Center Specialists in the airport's Operations Center, he was not selected for any of the vacancies based on the information in the letter. The appellate decision found that he was regarded as having a disability and not selected based upon direct evidence of disability discrimination. The evidence in the record also established that the Agency did not maintain Complainant's confidential medical information in a separate medical file and that this was a per se violation of the Rehabilitation Act. For relief, the decision ordered backpay for the detail assignment and any proven potential promotion that would have resulted from it, proven compensatory damages, training of agency officials, consideration of disciplinary action, and posting of a notice. We noted that Complainant was terminated from his position in 2007, and as a result, ordering the Agency to retroactively place him in the detail position now would not be appropriate.

Pennington (Elbert H) v. VA, 0120140032 (11/13/2015) – Complainant alleged discrimination based on race, sex, color, age, and reprisal when he was terminated from his position as a Telecommunications Specialist at a VA hospital. Complainant requested a hearing and the AJ granted a full hearing, finding that he established a prima facie case of reprisal only. The AJ further found that Complainant established that the Agency's articulated reason for its action was a pretext for retaliation. The AJ ordered that Complainant be reinstated and awarded back pay, benefits and non-pecuniary compensatory damages. The Agency issued an order adopting the AJ's finding of reprisal and the remedies ordered by the AJ. Complainant appealed but did not explain what aspects of the AJ's Decision and the Agency's Final Order he disagreed with. On appeal, we affirmed the AJ's decision in its entirety, including the compensatory damages award. We ordered the Agency to pay the award, reinstate Complainant in a Telecommunications Specialist position or a substantially similar position, provide the discriminating official with training, and consider disciplinary action against him. We also issued a posting order.

Shumate, Jr. (Arnold C) v. USPS, 0120093856 (11/03/2015) – Complainant alleged discrimination based, in relevant part, on disability in connection with a series of events including, among others, a proposed reassignment, a fitness-for-duty examination, and failure to provide reasonable accommodation leading to constructive discharge. The Agency issued a final decision finding no discrimination. On appeal, the Commission found discrimination with regard to these claims, find that Complainant was a qualified individual with a disability who was denied reasonable accommodation, and that the Agency failed to establish its affirmative defenses.

The Agency advised Complainant, who has been diagnosed with a depressive disorder, that it would reassign him from his duty-station in Florida to a duty-station in Mississippi. The gist of Complainant's complaint was that this action exacerbated his depressive condition to the point that he could not report for work. As a reasonable accommodation, Complainant requested reassignment to a less-demanding position within his Florida duty-station, and identified two vacant, funded positions for which he was qualified. Despite definitive

medical evidence from Complainant's attending psychiatrist, the Agency did not provide accommodation and ceased engaging in the interactive process, but sent Complainant for a fitness-for-duty examination. In finding that the Agency discriminated against Complainant, the Commission found that the Agency did not establish undue hardship such that it could not provide reasonable accommodation, and did not establish that the fitness-for-duty examination was job-related and consistent with business necessity. The Commission further found that the Agency's failure to provide reasonable accommodation amounted to constructive discharge.

The Commission ordered relief including, among other elements, an offer of reinstatement with back pay and benefits and, because the Agency had not evidenced good faith, a supplemental investigation on compensatory damages.

Griffin v. DOJ, 0120132758 (11/10/2015) – Complainant worked as an Assistant United States Attorney prosecuting criminal cases. In a previous FAD on a prior complaint, the Agency found that Complainant's supervisor (S1) and other management officials perpetrated retaliatory harassment against Complainant for EEO activity starting around April 2009 to at least November 2010. In the previous FAD the Agency found that the harassment took the form, among other things, of S1 not trusting Complainant and hence only speaking to her with a witness present and cutting off most communication, twice referring her to the Agency's Office of Professional Responsibility, a very serious matter, and verbally and in writing harshly criticizing her for having issues with performance, integrity, and candor. In her subsequent complaint, Complainant alleged, in relevant part, reprisal discrimination when management gave her a lengthy memorandum dated July 27, 2011, harshly criticizing her performance, integrity, and candor. Following an investigation, the Agency issued a FAD finding no discrimination. While conceding that several charges in the memorandum were suspect, the Agency found it highly significant it was not placed in Complainant's official personnel file, and found it was not so disturbing as to create a hostile work environment. OFO reversed. It found that S1 was the primary perpetrator of the harassment in the previous case and this one, it took a similar form, and the memorandum arose from efforts by S1 starting in February 2011, the same time she gave a transcribed statement in Complainant's prior complaint. OFO found that when the memorandum was viewed in isolation, the Agency's finding it not rise to the level of retaliatory harassment was somewhat plausible, however we viewed the memorandum as part of the hostile work environment starting in April 2009. OFO found reprisal discrimination, and ordered relief.

Zaste (Zenia M) v. HHS, 0120121845 (12/18/2015) **[Repeated under Priority 5 above]** – Complainant filed an EEO complaint alleging, among other things, that she was subjected to retaliation when the EEO Complaints Manager provided her EEO records pertaining to prior cases and emails to management officials. During the investigation, the EEO Complaints Manager indicated that the documents were part of a formal investigation and could be used by management if there was a reason to believe that other issues or violations may exist. Complainant, according to the EEO Complaints Manager, was being investigated for possible violations HIPPA, the Privacy Act and for going outside of her chain of command; therefore, he felt that it was appropriate to review her EEO files in order to determine if there were other possible violations contained within those documents. The record also indicated that an email sent by Complainant to the Deputy Director complaining of "continued harassment" was the reason that Complainant came under investigation.

The Commission found that there was a blatant mishandling of Complainant's EEO complaint files that constituted a per se violation as these actions were reasonably likely to deter employees from engaging in protected EEO activity. Consequently, we found that Complainant demonstrated that she was subjected to reprisal. The Commission ordered the Agency to conduct a supplemental investigation on the issue of Complainant's entitlement to compensatory damages, managers involved in discriminating against Complainant were ordered to take eight hours of EEO training, and the Agency was ordered to consider taking disciplinary action against them.

Gryder, (Gerald L.) v. DOT (FAA), 0120123187 (12/17/2015) – From 1989 to 1997 Complainant worked as a GS-12 Railroad Safety Inspector. He was terminated for poor performance in 1997, which was later found unlawful by a federal district court. Starting in 1999 and continuing, Complainant began applying for various

positions within the Federal Railroad Administration (FRA). Despite applying through numerous avenues and for numerous jobs, he was not selected. As a result of numerous non-selections, Complainant filed several EEO complaints and MSPB appeals.

Partial default judgment was issued against the Agency because of its failure to produce the Report of Investigation (ROI) and untimely submission of the hearing transcript during the appellate stage of this complaint after considering the Agency's extensive history of failing to comply with the Commission's orders and directives, including a previous sanction issued against the Agency in this matter and a sanction awarded against the Agency in a similar matter.

In our decision we concluded that given the inexplicable failings of the Agency, along with its history of sanctions for similar non-compliance issues, the appropriate sanction for the Agency's non-compliance was to issue a decision partially in favor of Complainant. Specifically, the Commission found sufficient evidence of a prima facie case of reprisal and that a complete ROI would have shown that the Agency failed to select Complainant for the position of GS-13 Deputy Regional Administrator in or about October 2000 because of his prior EEO activity.

Accordingly, we ordered the Agency to: (1) offer Complainant reinstatement; (2) determine and award back pay and compensatory damages, if any; (3) establish a policy whereby all of the documents that make up the entire complaint file are in fact delivered to the Commission in a timely manner on appeal; and (4) post a notice of our findings.

Hartley (Harland B.) v. Treasury, 0120130672 (12/10/2015) **[Repeated under Priority 3 above]** – Complainant appealed from the Agency's final decision (FAD), which found that he was not subjected to disparate treatment or a hostile work environment based on race (Caucasian), sex (male), disability (restricted or limited ambulation), and reprisal when, among other things, he was charged with Absent Without Leave on a continuous basis.

The decision concluded that Complainant did not prove by a preponderance of the evidence that he was subjected to discrimination on the bases specifically alleged in the complaint. However, the decision determined that the complaint could fairly be interpreted as alleging denial of reasonable accommodation, and the Agency was on notice of this given the investigation and information in the FAD and the Agency's brief in opposition to the appeal. The decision concluded that because Complainant requested accommodation, identified possible accommodations, and the Agency did not effectively respond to any of them, much less demonstrate that any of them would have posed an undue hardship, Complainant demonstrated by a preponderance of the evidence that he was denied reasonable accommodation.

Further, the decision determined that that an EEO official spoke to Complainant on at least one occasion, advising him that he could not get a reasonable accommodation for additional time during breaks, and for arrival and departure, because reasonable accommodation "was to help employee[s] do their job and not to change their TOD [time on duty]." This apparently resulted in Complainant not filing a formal request for reasonable accommodation through the Agency's established channels, and led Complainant to believe that he did not in fact request a reasonable accommodation, and moreover, that one could not be granted for him. The decision concluded that this constituted reprisal because it interfered with participation in the protected activity of requesting reasonable accommodation.

Finlay (Isabelle G.) v. DOJ (BOP), 0120130362 (12/03/2015) – Complainant appealed from an EEOC AJ's finding that she was not subjected to disparate treatment sex discrimination (female/caregiver) in being terminated during her probationary year as a Correctional Officer with the Agency. The AJ concluded that Complainant did not show that similarly situated comparators were treated more favorably because she was terminated for a different pattern of leave usage. The AJ granted the Agency's motion for summary judgment.

The decision reasoned that Complainant established a prima facie case of sex discrimination because she was female and performing her job at a "satisfactory" level at the time she was terminated. Similarly situated comparators, including probationary and non-probationary employees, were treated more favorably in that they did not receive a Leave Audit Letter like the Complainant did, and were not subjected to any other discipline.

Complainant also raised an inference of discrimination because a male employee was slated to receive a Leave Audit Letter advising him that the pattern of his leave usage could indicate abuse of sick leave, however, the letter was removed from his file after he provided a medical explanation. Complainant provided medical notes for her absences, but was still issued the Leave Audit Letter.

Further, the decision concluded that even though the Agency stated a legitimate, nondiscriminatory, reason for terminating Complainant's employment, mainly that she abused her sick leave, Complainant demonstrated the reason to be pretext for discrimination. The decision reasoned that Complainant demonstrated pretext for a number of reasons. First, subsequent issuing the initial Leave Audit Letter to Complainant, management monitored and issued memoranda about Complainant's use of sick leave, but never approached her about the issue until approximately six months later on the date of her termination. Second, management did not follow two applicable Agency policies, one of which required that they ask an employee for medical documentation when they believed that an employee was abusing sick leave. Complainant informed management at least twice that she had medical reasons for her use of sick leave, and she also submitted medical notes. According to another Agency policy, Complainant did not have to submit medical notes for the type of leave she used. Finally, similarly situated male employees engaged in a similar pattern of leave use, but they were not issued Leave Audit Letters nor were they terminated.

Therefore, Complainant proved by a preponderance of the evidence that she was subjected to disparate treatment sex discrimination. No genuine issues of material fact remained for a hearing.

Amis III (Devon H.) v. DHS (TSA), 0120131083 (12/03/2015) – Complainant, a Federal Air Marshal (FAM) at the Agency's Charlotte, North Carolina Field Office, alleged that he was discriminated on the basis of disability and in reprisal for prior EEO activity when the Agency changed his assignment on an international mission; did not select Complainant for a J-Band supervisory Federal Air Marshal position; did not give Complainant an in-band pay increase (IPI); and did not give Complainant the opportunity to apply and/or receive consideration for any leadership/supervisory training courses.

After a hearing, an EEOC Administrative Judge (AJ) found that Complainant was clearly an individual with a disability, but he failed to show that the Agency's legitimate, non-discriminatory explanations for its actions were pretext for unlawful discrimination. On appeal, the Commission affirmed the AJ's finding with respect to all allegations, except for the J-Band non-promotion claim.

With regard to the J-Band non-promotion claim, the Commission found that Complainant established a prima facie case of reprisal by showing that he applied for and was deemed qualified for a J-Band promotion, he had ongoing EEO complaints during the relevant time period, and SAC was aware of his EEO activity during the time of his non-promotion. The Commission further found that the AJ committed legal error when he found that the Agency met its burden of production by merely stating that the selectee was chosen because he had served on the National Naval Criminal Investigation Service, was involved in all types of criminal investigations, and was one of the first investigators at the prison facility of Guantanamo Bay. The Commission explained that in order to meet its burden of production, the Agency must specifically explain its evaluation of Complainant's qualifications. The Commission found that the Agency's claim that Complainant was ranked last among qualified candidates was insufficient to meet its burden of production because the Agency did not specifically explain why Complainant was assigned those scores and ratings. Consequently, the Commission concluded that the Agency failed to overcome Complainant's prima facie case of reprisal for this claim, and Complainant prevailed without having to prove pretext. The Commission declined to review whether Complainant was also subjected to disability discrimination for this claim because no further relief would be available to Complainant even if he were to also prevail on this basis.

In order to remedy the reprisal, the Commission ordered the Agency to retroactively offer Complainant the J-Band supervisory Federal Air Marshal position to which he applied, effective to the date on which the selectee was effectively promoted; determine the appropriate amount of back pay with interest to which Complainant is entitled; pay Complainant compensation for the adverse tax consequences of receiving back pay as a lump sum; provide Complainant with proven compensatory damages; to provide at least eight hours of in-person EEO training to all selecting officials involved in Complainant's non-promotion; to consider taking appropriate disciplinary action against SAC; and to post a notice of discrimination at the Agency's Charlotte Field Office.

Amis III (Devon H.) v. DHS (TSA), 0120131649 and 0120131684 (12/18/2015) – Complainant is a Federal Air Marshal (FAM) at the Agency's Charlotte, North Carolina Field Office. During the relevant time period, Complainant filed two EEO complaints. One of the complaints alleged that Complainant was harassed and discriminated against in reprisal for previous EEO activity under the Rehabilitation Act when: 1) management gave him a low rating and ranking during the J-Band promotion process; 2) management did not assign Complainant to an Acting Assistant to the Special Agent in Charge (ATSAC) position; 3) an ATSAC (SFAM1) stated that Complainant would be the last person to be promoted in the office; 4) a Federal Air Marshal (FAM1) informed Complainant that SFAM1 had entered into a bet over the outcome of Complainant's previously-filed EEO complaint; 5) management gave Complainant a low rating and ranking score for the 2008 J-Band promotion process; 6) Complainant overheard an ATSAC tell a civilian that he was going to be fired; and 7) Complainant was informed that the Special Agent in Charge (SAC) consulted with other staff concerning the J-Band ratings of FAMs assigned to the Charlotte Field Office. In the second complaint, Complainant alleged that he was harassed and discriminated in reprisal for previous EEO activity when: 8) he was not selected to act as ATSAC; 9) when Complainant informed his supervisor of his intent to file an EEO complaint, SAC leaped out of his chair, reached toward Complainant, began shouting at him, told Complainant not to threaten him, and said that Complainant's communications skills "suck;" 10) SFAM1 told some of Complainant's coworkers that Complainant would not be promoted because he was now "outside the circle of trust;" and 11) Complainant learned that he was under an internal investigation.

After requesting a hearing with an EEOC Administrative Judge (AJ), Complainant submitted a motion to amend one of his complaints to include two claims that allege that the Agency violated his medical confidentiality. Complainant subsequently withdrew his hearing request, and the AJ remanded Complainant's complaints to the Agency for a final decision. However, neither the AJ nor the Agency addressed Complainant's motion to amend. In a final decision that addressed both of Complainant's complaints, the Agency found that Complainant did not prove that he was subjected to unlawful discrimination or harassment.

In an appellate decision, the Commission first found that because the Agency had notice of Complainant's notion to amend, it had an obligation to respond to it after Complainant withdrew his hearing request. The Commission found that Complainant's medical confidentiality claims were like or related to those raised in his complaint, and therefore, the Agency erred when it did not amend Complainant's complaint. Accordingly, the Commission remanded the medical confidentiality claims to the Agency for further processing.

Regarding Complainant's complaints, the Commission found that for claims 1, 2, 3, 5, 6, 7, 8, and 10, Complainant did not prove that the Agency's non-discriminatory reasons for its actions were pretext for reprisal as to Claims 1, 2, 3, 5, 6, 7, 8, and 10. In so finding, the Commission noted that for claims 3 and 10, Complainant acknowledged that he did not know if these conversations were about him and a coworker attested that the term "circle of trust" was not used in reference to Complainant.

Regarding claim 4, the Commission noted that FAM2 acknowledged that he and SFAM1 bet a beer that the former SAC would not lose any lawsuits, and FAM1 affirmed that he heard SFAM1 and FAM2 talking about Complainant's EEO complaint and betting about whether Complainant would win his case. The Commission further noted that this discussion occurred in the same year as an EEOC AJ's decision that found that the former SAC subjected Complainant to reprisal, which was affirmed on appeal. SFAM1 acknowledged that FAM2 called him at his home and advised him that Complainant had won a lawsuit. Accordingly, the Commission found that SFAM1 and FAM2 were accustomed to discussing Complainant's EEO activity. Therefore, the Commission was persuaded that SFAM1 made a bet about Complainant's EEO complaint(s), as well as discussed his EEO activity with FAM2, which the Commission found constituted reprisal because such conduct is reasonably likely to deter employees from engaging in EEO activity.

Regarding claims 9 and 11, the SAC maintained that Complainant entered his office to protest the selection of C1 as Acting ATSAC, demanded that he justify why C1 had been selected, and said that he intended to file a formal complaint against SAC. The SAC immediately filed a report of misconduct against Complainant regarding the incident, which resulted in a formal investigation of Complainant by the Agency. The Commission explained that an employee is protected against retaliation for opposing perceived discrimination if he has a reasonable and good faith belief that the opposed practices were unlawful. The Commission

concluded that although Complainant's manner of opposition was rather direct and bold, it was not unduly disruptive or insubordinate, or otherwise unreasonable. Additionally, the Commission found that Complainant engaged in protected EEO activity when he questioned SAC's selection decision, told SAC that he had been treated differently than other FAMs, and asserted that he would file an EEO complaint about the matter. Further, the Agency acknowledged that it investigated Complainant because of the oppositional activity, which the Commission found constituted reprisal because it is reasonably likely to deter EEO activity.

In order to remedy the reprisal, the Commission ordered the Agency to provide Complainant with proven compensatory damages; to provide at least eight hours of in-person EEO training to the responsible management officials; to consider taking appropriate disciplinary action against the responsible management officials; and to post a notice of discrimination at the Agency's Charlotte Field Office.

Tolliver (Adina P.) v. VA, 0120132450 (12/11/2015) **[Repeated under Priority 3 above]** – Complainant appealed aspects of the Agency's final decision (FAD), which concluded that she was denied reasonable accommodation for her disability (back impairment) and subjected to reprisal in being terminated because of her disability-related absences. However, the FAD concluded that Complainant did not prove that: (1) her left knee impairment constituted a disability; (2) the Agency subjected her to a hostile work environment based on her disability or in reprisal for her EEO activity; and (3) she was subjected to disparate treatment disability discrimination. The Agency awarded Complainant $1,009.00 in past pecuniary losses, and $60,000 in non-pecuniary compensatory damages.

The Agency challenged the timeliness of Complainant's appeal because it issued one FAD on liability and another FAD on damages, but Complainant only timely appealed the damages FAD. The decision concluded that the FAD on liability did not contain a determination of the amount of back pay or compensatory damages that Complainant would be awarded, and therefore, was not final because it did not make a determination on all the issues in the complaint. Therefore, Complainant's appeal on both liability and damages were timely.

Regarding Complainant's contention that she was denied reasonable accommodation for her left knee condition, the decision determined Complainant suffered from a "medial meniscus knee tear," a condition which she initially claimed to have developed pursuant to a work-related injury, and which she testified limited her ability to walk, stand, climb, kneel or bend for prolonged periods of time. However, there was no other evidence in the record to establish that this left knee condition substantially limited any major life activities or what the restrictions were resulting from the condition. Therefore, Complainant did not prove that she was denied reasonable accommodation for the left knee condition.

Regarding Complainant's contention that she was subjected to a hostile work environment based on her disability and in reprisal for her EEO activity, the decision concluded that the FAD did not apply an incorrect legal standard as Complainant argued. Management's conduct centered upon evaluating Complainant's various leaves of absences and reasonable accommodation request in conjunction with her initial one-year probationary period. There was no indication of abusive language accompanying the adverse actions. While the Agency violated the Rehabilitation Act by denying her leave as an accommodation, and terminating her employment for utilizing disability-related leave, the conduct surrounding these decisions did not constitute a hostile work environment.

Regarding Complainant's contention that she was subjected to reprisal in being denied leave for her left knee condition, the decision noted that prior to the issuance of a letter of counseling and termination, but subsequent to Complainant's use of leave for her back and right knee condition, Complainant requested leave for surgery to her left knee, but the Agency never responded to this leave request. Instead, supervisors informed Complainant that the leave without pay request would probably not be granted. It appeared that management did not want to approve further leave for Complainant because she had extensive prior disability-related leave usage, the very same reason they issued her a letter of counseling and terminated her. The decision concluded that the Agency's denial of subsequent leave, admittedly because Complainant utilized prior leave as a reasonable accommodation, also constitutes reprisal. Such conduct is reasonably likely to deter protected activity.

Regarding damages, the decision concluded that $1,009.00 in past pecuniary losses, and $60,000 in non-pecuniary compensatory damages for discrimination that the Agency awarded was appropriate.

In addition to the relief the Agency awarded, the decision ordered the Agency to calculate additional compensatory damages for denying Complainant's request for leave for her left knee condition. The decision also ordered the Agency to provide Complainant with a plain language explanation for how her back pay was calculated, and to consider taking disciplinary action against the management officials involved in the discrimination.

Ford (Maryanne S.) v. DOJ (BOP), 0720140028 (12/30/2015) – Complainant filed an EEO complaint alleging that the Agency discriminated against her in reprisal for prior protected activity with respect to various issues.

Upon completion of an investigation, Complainant requested a hearing before an EEOC AJ. The AJ found that the Agency subjected Complainant to unlawful retaliation with respect to various issues included being referred for numerous Internal Affairs investigations and being required to attend "training" with the Agency's Chief Psychologist.

The AJ ordered the Agency to take various actions, including paying Complainant $174,500 in non-pecuniary compensatory damages and $136,652.50 in attorney's fees. The Agency issued a final order adopting some of the AJ's findings of retaliation but appealing the AJ's findings of retaliation with respect to three claims. The Agency also appealed the AJ's award of non-pecuniary compensatory damages and attorney's fees.

We found that there was substantial evidence to support the AJ's findings of retaliation with respect to the three issues that the Agency challenged. In addition, we found that there was substantial evidence to support the AJ's award of $174,500 for non-pecuniary compensatory damages. We noted that in a detailed analysis, the AJ found that the Agency's actions resulted in Complainant experiencing panic attacks, anxiety and depression and that Complainant continued to experience harm beyond the 18 month period of the events. Finally, we affirmed the AJ's award of attorney's fees.

Aquino (Alma F.) v. Army, 0720150032 (12/11/2015) – Complainant filed an EEO complaint alleging that the Agency subjected her to disability based discrimination when, the Agency terminated her from her position during her probationary period effective March 9, 2012. Following a hearing, the AJ issued a decision finding discrimination. The AJ issued remedial action to return Complainant to the position she would have been in absent discrimination. As remedy, the AJ ordered that the Agency reinstate Complainant into her prior position. The AJ noted that, based on the reinstatement, Complainant was entitled to back pay for lost wages plus interest, as well as benefits such as, but not limited to, leave, health benefits, and Thrift Savings Program participation. The AJ noted that upon receipt of her decision, the Agency would issue a decision with its calculation of these costs. The AJ also awarded Complainant $55,000 in non-pecuniary compensatory damages and $ 16,675.87 in fees and costs for Complainant's attorney. The AJ ordered the Agency to take corrective action to ensure that similar violations of the law did not recur, to provide disability training for the responsible management official, and to post notice of the finding of discrimination in the facility.

The Agency subsequently issued a final order adopting the AJ's finding that Complainant proved that the Agency subjected her to discrimination as alleged. The Agency filed an appeal stating that it did not challenge the AJ's finding as to liability, but solely the issue of pecuniary damages. The Agency noted that the AJ ordered it to pay Complainant "past pecuniary damages" including back wages, back benefits and lost benefits. The Agency asserted that this constituted an incorrect interpretation of the law. The decision found that the Agency was correct and stated that back pay is not compensatory damages, and complaining parties may recover equitable relief without limitation. As such, the decision ordered the Agency to take corrective action as stated by the AJ including the calculation of back pay and benefits.

III. Federal Sector Oversight

- During the 1st quarter of FY 2016, the Agency Oversight Division (AOD) conducted 11 technical assistance visits with federal agencies. These meetings focused on FCP topics including Schedule A (hiring and conversion), reasonable accommodation program, anti-harassment program, barrier analysis of the senior executives, and general non-compliance.
- During the 1st quarter of FY 2016, the Special Operations Division (SOD) of OFO published the FY 2013 and 2014 Annual Report on the Federal Work Force Part I, and continued work on the FY 2012 - FY 2014 Annual Report on the Federal Work Force Part II.
- During 1st quarter of FY 2016, SOD collected, reviewed and provided feedback for the FY 2015 Form 462 Reports from over 300 agencies and sub-components.
- During 1st quarter, SOD published its first quarter FY 2016 EEO Digest, containing recent Commission and federal court decisions. This Digest included a special year end selection of notable EEOC decisions issued in FY 2015.
- SOD began drafting additional guidance for internal and external stakeholders for several new areas included in the Management Directive (MD)-110 as required by the 29 C.F.R. Section 1614. Guidance for the newly allowed pilot programs will be published in 2nd quarter and additional guidance on the newly created Compliance Enforcement initiative will be published in the 3rd quarter of FY 2016.
- RED staff issued an initial Program Evaluation Request for Information from HHS regarding two issues: Direct reporting of the EEO Office to the Agency Head including subcomponents and Review of its Reasonable Accommodation Program.
- RED staff presented on pay gaps and retaliation to the Council of Federal EEO and Civil Rights Executives Meeting.
- RED staff met twice with the Department of Veterans Affairs regarding their proposed RCLF computational methodology, and provided them with guidance.
- RED staff participated in OPM's Applicant Flow Data Summary Report Design.
- RED staff participated in the Data User's Group (DUG3) Meeting—Human Capital Analytics.
- RED staff led numerous meetings for the OFO Performance Metrics Committee Meeting to discuss the Committee Charter.
- RED staff presented on Performance Metrics during the EEO Directors Meeting: Office of Federal Operations Performance Metrics Workgroup: Assessing the Impact of OFO on the Federal Workforce.
- RED staff completed a draft literature review for an EEOC report on retaliation.
- RED staff assessed the availability of federal data for analysis on retaliation. This involved several tasks to review surveys (FEVS and MPS) as well as FSP and Fedscope data.
- RED staff also produced preliminary analytic findings on retaliation.
- RED staff completed a reading list for the literature review of pay equity for an EEOC report on pay equity.
- RED staff began working on an annotated bibliography for the EEOC pay equity report.
- RED staff attended a BIRT On Demand demo provided by OIT.
- RED staff produced a Finance Industry Relevant Civilian Labor Force (RCLF) table for the Security and Exchange Commission (SEC).
- RED staff provided feedback on OCHCO's Workforce Data Tool Report.

- RED staff updated the RED data inventory.
- RED staff created new Vision and Mission statements for the Reports and Evaluation Division.
- RED staff met with Dr. Eden King from George Mason University regarding pending collaborations on anti-harassment and pay equity.
- RED staff attended four webinars on data analytics tools presentation software (Tableau, Research Analytics and Business Intelligence, Sisense, and ADaM).
- OFO continued work on its program evaluation into USDA county employees' status to determine whether they should continue to use the federal EEO process where remedies seem unavailable. Staff is coordinating with OLC, OFP and ARP. Staff is looking into the Title VI process as an alternative for these employees (sister agencies -- MSPB, FLRA -- and courts have found these employees are not federal employees).

IV. Outreach & Training

1. Eliminating Barriers in Recruitment and Hiring

- EEOC staff conducted Disability Program Managers- Basic National Course
- Assistant Director to Training and Outreach and EEOC staff presented "Barrier Analysis" training for Federal Deposit Insurance Corporation in Arlington, VA
- EEOC staff served on the Military Equal Opportunity Panel for Department of Defense: "LGBT Discrimination in the Federal Workplace"
- OFO staff discussed developments under TitleVII/LGBT Law at the Transgender Law Center in Washington, D.C.
- EEOC Staff presented "Promoting Disability Employment, Disability Rights and Executive Order 13548 for Washington Headquarters Services (DOD) in Washington DC.
- Associate Director, Federal Sector Programs served on panel for Department of the Navy Annual EEO Training: Celebrating EEOC at 50 and Americans with Disabilities Act at 50.
- OFO staff provide information about federal sector EEO at Federal Asian Pacific American Council (FAPAC) Federal Employment Career Fair, in Takoma Park, MD
- Associate Director of Appellate Review Programs spoke on the EEO process to students at UDC David Clark School of Law in Washington, DC
- EEOC staff presented at the National Civil Rights Civil Rights Conference in Washington DC "LGBT Right in the Workplace"

2. Protecting Immigrant, Migrant and Other Vulnerable Workers

- EEOC staff conducted Disability Program Managers- Basic National Course in Washington DC
- Assistant Director to Training and Outreach and EEOC staff presented "Barrier Analysis" training for Federal Deposit Insurance Corporation in Arlington, VA
- EEOC Staff presented "Promoting Disability Employment, Disability Rights and Executive Order 13548 for Washington Headquarters Services (DOD) in Washington DC.
- OFO staff provide information about federal sector EEO at Federal Asian Pacific American Council (FAPAC) Federal Employment Career Fair, in Takoma Park, MD

- Associate Director of Appellate Review Programs spoke on the EEO process to students at UDC David Clark School of Law in Washington, DC

3. Addressing Emerging and Developing Issues

- EEOC staff presented a webinar on Pregnancy Discrimination to the Office of Management and Budget
- EEOC staff made a presentation on Pregnancy Discrimination to the National Transit Safety Board (NTSB) in Washington, D.C.
- EEOC staff presented LGBT Training at Department of Defense Office of Inspector General
- Associate Director, Federal Sector Programs served on panel for Dept of the Navy Annual EEO Training: Celebrating EEOC at 50 and Americans with Disabilities Act at 50.
- EEOC staff served on the Military Equal Opportunity Panel for Department of Defense: "LGBT Discrimination in the Federal Workplace"
- OFO staff discussed developments under TitleVII/LGBT Law at the Transgender Law Center in Washington, D.C.
- EEOC staff presented "Emerging LGBT Issues" at the U.S. Department of Transportation: DEEP Lawyers" Networking Group in Washington DC.
- EEOC staff served on a panel on "Issue of Dignity at Work and the LGBT Community" in Shippensburg, PA.
- EEOC staff presented on LGBT issues for the National Black Justice Coalition/Human Rights Campaign in Washington, D.C.
- EEOC staff presented "Emerging LGBT Issues" at the National Civil Rights Civil Rights Conference in Washington DC
- EEOC staff conducted "LGBT Employees" training for DOD Inspector General in Alexandria, Va.

4. **Enforcing Equal Pay Laws**

- OFO has no outreach/training activities regarding this priority to report.

5. Preserving Access to the Legal System

- TOD staff conducted Letters of Acceptance and Dismissal (LOAD) National Course in Washington, DC.
- TOD staff conducted New Counselor National Course in Washington, DC.
- TOD staff conducted New Investigator National Course in Washington, DC.
- TOD staff conducted Counselor Refresher National Course in Washington, DC.
- TOD conducted Investigator Refresher Training in Washington, DC.
- TOD conducted EEO Laws Refresher Course in Washington, DC.
- TOD conducted Disability Program Managers Basic Course in Washington, DC.
- EEOC staff presented "MD-110 Revisions" for Veterans Administration

- EEOC staff presented EEO Case Updates for Veterans Administration in Washington DC
- EEOC staff presented "Emerging LGBT Issues" at the U.S. Department of Transportation: DEEP Lawyers" Networking Group in Washington DC
- EEOC staff served on a panel on "Issue of Dignity at Work and the LGBT Community" in Shippensburg, PA
- OFO staff discussed developments under TitleVII/LGBT Law at the Transgender Law Center in Washington, D.C.
- EEOC staff presented on LGBT issues for the National Black Justice Coalition/Human Rights Campaign in Washington, D.C.
- EEOC staff presented "What's New in Federal Sector" and "Emerging LGBT issued in the Workplace" at the National Civil Rights Conference in Washington DC
- OFO Director presented "EEOC Updates and Best Practices" for National Security Executives and Professionals Association African American Career Development Session.
- OFO staff provide information about federal sector EEO at Federal Asian Pacific American Council (FAPAC) Federal Employment Career Fair, in Takoma Park, MD
- EEOC staff presented "MD-110 Revisions Overview" at American Bar Association Section on Administrative Law and Regulatory Practice in Washington DC

6. Preventing Harassment through Systemic Enforcement and Targeted Outreach

- TOD and EEOC staff presented eleven (11) 'Workplace Harassment for Managers" training for Environmental Protection Agency (EPA) in Washington, DC
- TOD and EEOC staff presented three (3) 'Workplace Harassment for Managers" training for Environmental Protection Agency (EPA) in Dallas,TX
- EEOC staff presented five (5) 'Workplace Harassment for Managers" training for Environmental Protection Agency (EPA) in Chicago, IL
- TOD and WFO staff presented five (5) 'Workplace Harassment for Managers" training for Environmental Protection Agency (EPA) in Potomac Yards, VA
- EEOC staff served on a panel on "Issue of Dignity at Work and the LGBT Community" in Shippensburg, PA.
- EEOC staff conducted "Harassment Prevention "at the National Civil Rights Conference in Washington DC
- EEOC staff conducted "Workplace Harassment for Managers" training for the Environmental Protection Agency (EPA) in Las Vegas, NV
- EEOC staff conducted two (2) "Workplace Harassment for Managers" training for the Environmental Protection Agency (EPA) in Ann Arbor, MI
- EEOC staff conducted two (2) "Workplace Harassment for Managers" training for the Environmental Protection Agency (EPA) in Kansas City, KS
- EEOC staff conducted four (4) "Workplace Harassment for Managers" training for the Environmental Protection Agency (EPA) in RTP, NC
- TOD staff presented "Harassment Prevention" at Privacy and Civil Liberties Oversight Board in Washington DC
- EEOC staff conducted three (3) "Workplace Harassment for Managers" training for the Environmental Protection Agency (EPA) in New York, NY

- EEOC staff conducted three (3) "Workplace Harassment for Managers" training for the Environmental Protection Agency (EPA) in Denver, CO
- TOD conducted four (4) "Workplace Harassment for Managers" training for the Environmental Protection Agency (EPA) in Washington, DC
- EEOC staff conducted three (3) "Workplace Harassment for Managers" training for the Environmental Protection Agency (EPA) in Boston, MASS
- EEOC staff conducted three (3) "Workplace Harassment for Managers" training for the Environmental Protection Agency (EPA) in Philadelphia, PA
- EEOC staff conducted "Workplace Harassment for Managers" training for the Environmental Protection Agency (EPA) in Edison, NJ
- EEOC staff conducted two (2) "Workplace Harassment for Managers" training for the Environmental Protection Agency (EPA) in Raleigh, RTP
- T&O staff presented "Anti-Harassment for Non-Supervisor" training for Chemical Safety Board in Washington DC
- EEOC staff presented "Religious Accommodation" at Court Services and Offender Supervision Agency in Washington DC

7. Training/Outreach – General

- EEOC Staff presented "Promoting Disability Employment, Disability Rights and Executive Order 13548 for Washington Headquarters Services (DOD) in Washington DC
- Associate Director of Federal Sector Programs presented "MD-110 Revisions" for WHS in Washing DC
- EEOC staff presented EEO Case Updates for Veterans Administration in Washington DC
- Associate Director, Federal Sector Programs served on panel for Dept of the Navy Annual EEO Training: Celebrating EEOC at 50 and Americans with Disabilities Act at 50 in Washington DC.
- EEOC staff presented "Emerging LGBT Issues" at the U.S. Department of Transportation: DEEP Lawyers" Networking Group in Washington DC.
- EEOC staff served on a panel on "Issue of Dignity at Work and the LGBT Community" in Shippensburg, PA.
- EEOC staff served on the Military Equal Opportunity Panel for Department of Defense: "LGBT Discrimination in the Federal Workplace"
- Associate FSP Director spoke on "EEOC Lessons Learned and Best Practices" at the Consumer Product Safety Commission in Bethesda, MD.
- OFO staff conducted national Counselor Refresher course in Washington, DC.
- TOD staff conducted national New Investigator course in Washington, DC.
- EEOC and TOD staff conducted national New Counselor course in Dallas, TX.
- TOD, OFO and EEOC staff conducted four 2-Day Harassment Trainings for Investigators for Social Security Administration in Baltimore, MD.
- OFO staff provided Barrier Analysis training for Department of Army in Aberdeen, MD.
- TOD and OFO staff conducted Counselor Refresher training for Army in Adelphi, MD.

- EEOC staff presented "Harassment Prevention", Religious Accommodation", "What's New in Federal Sector", Emerging LGBT Issues and "LGBT Right in the Workplace" workshops at the National Civil Rights Conference in Washington DC
- OFO Director presented "EEOC Updates and Best Practices" for National Security Executives and Professionals Association African American Career Development Session.
- OFO staff provide information about federal sector EEO at Federal Asian Pacific American Council (FAPAC) Federal Employment Career Fair, in Takoma Park, MD
- OFO staff spoke to the Council of Federal EEO Executives on the new OFO Reports and Evaluations Division.
- EEOC staff presented "MD-110 Revisions Overview" at American Bar Association Section on Administrative Law and Regulatory Practice in Washington DC
- TOD staff presented "Anti-Harassment for Non-Supervisor" training for Chemical Safety Board in Washington DC
- Associate Director of Federal Sector Programs provided a Federal Sector update to Federal Asian Pacific American Council Congressional Seminar in Washington, DC
- Associate Director of Appellate Review Programs spoke on the EEO process to students at UDC David Clark School of Law in Washington, DC
- EEOC staff presented "Religious Accommodation" at Court Services and Offender Supervision Agency in Washington DC.

Quarterly Strategic Enforcement Plan Report
Office of Federal Operations
2nd Quarter FY 2016

I. Background: General FY 2016 2nd Quarter Appellate Review Program Accomplishments

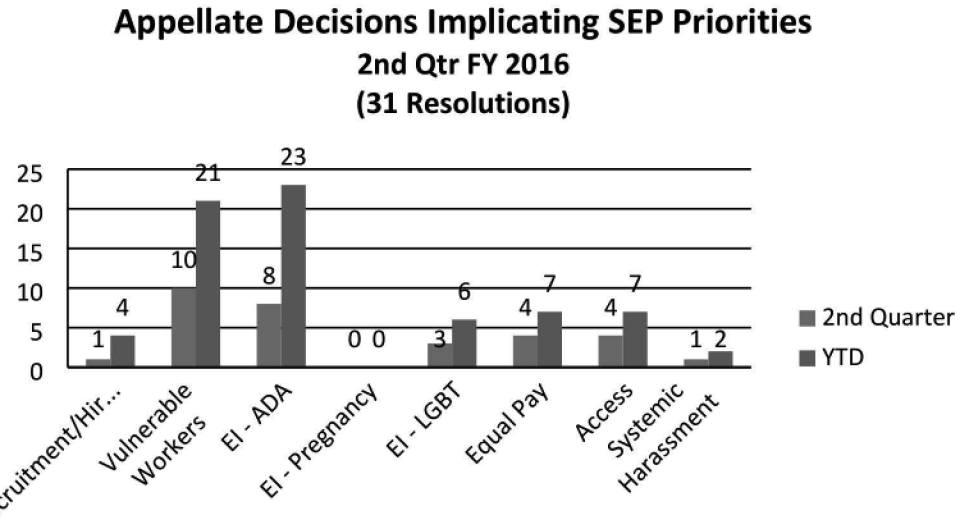
During the 2nd Quarter FY 2016, the Office of Federal Operations (OFO) resolved 980 appeals. These resolutions included 328 decisions on the merits and 581 procedural closures. Of the 581 procedural closures, 455 of them involved initial appeals under review by OFO, and we reversed 129 or 28.3% of the agency dismissals. With regard to the merit decisions, OFO issued 26 findings of discrimination during the 2nd Quarter. We found discrimination on the basis of retaliation in 7 of the findings, disability in 19 of the findings, and sex in 3 of the findings. The top three issues involved in the findings included, disability accommodation (7), harassment (5), and promotion (4).

Resolution Description	2nd Quarter	Year to Date
Resolutions	980	1799
Merits Resolutions	328	641
Findings	26	61
Non-Findings	302	580
Procedural Resolutions (all)	851	981
Procedural Resolutions (from Initial Appeal)	455	746
Affirming Dismissal	324	513
Remanding Dismissal	129	230

With regard to the categorization of the 980 resolutions, OFO identified 31 appeals that implicated one or more SEP/FCP priority. Section II below contains charts breaking down the composition of the individual priorities, summaries of the 31 decisions OFO attorneys categorized as implicating the SEP/FCP priorities, and summaries of the findings of discrimination made in the 2nd quarter.

II. Analysis of SEP/FCP Priority Areas

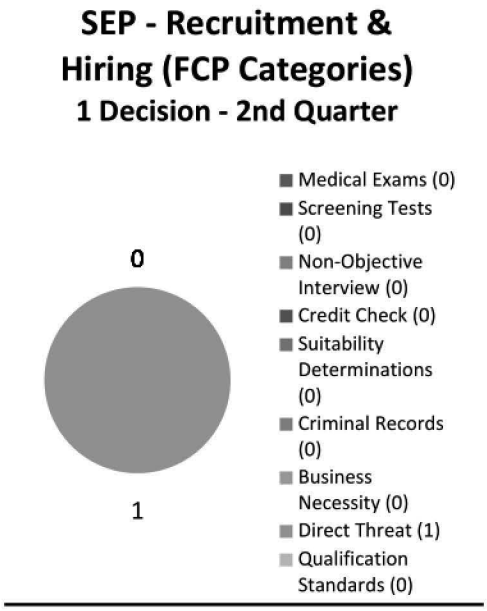
The chart below depicts the distribution of the 31 SEP categories identified in the 31 appellate decisions OFO identified as implicating an SEP/FCP category:



The numbered sections below provide more information about each of the six SEP priorities. Specifically, these sections start with a chart depicting the related FCP categories under each SEP, as well as summaries of the specific decisions under each SEP/FCP priority. In Section 7, by contrast, we provide summaries of the

26 findings of discrimination issued during the 2nd Quarter, whether or not they implicated an SEP/FCP category.

1. ELIMINATING BARRIERS IN RECRUITMENT AND HIRING



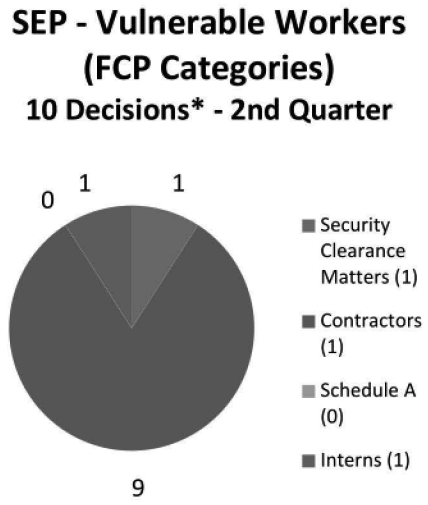
Riggins (Harley S.) v. HHS, 0120140833 (03/24/2016) – At the time of events giving rise to this complaint, Complainant worked as a Lead Customer Service Representative, GS-07, at the Agency's Supply Service Center in Perry Point, Maryland. The Agency hired Complainant for a Lead Customer Service Representative on a one-year probationary period beginning February 27, 2011.

Following a series of incidents in which Complainant alleged the Agency: neglected to train him properly; falsely accused him of sexual assault in an attempt to remove him from his supervisory position; placed a camera in his work area to record his activities; placed him on administrative leave for allegedly "increasingly volatile conduct"; and ultimately terminated him, Complainant filed an EEO complaint. Complainant requested a hearing, and over his objections, the AJ assigned to the case granted the Agency's motion for a decision without a hearing and issued a decision finding that Complainant did not establish that he was discriminated against as alleged. Complainant appealed the Agency's final order implementing the AJ's decision.

The appellate decision affirmed the Agency's final order implementing the AJ's decision. The appellate decision found that the AJ properly issued a decision without a hearing. Additionally, assuming that Complainant is a qualified individual with a disability, and that he established a prima facie cases of discrimination based on disability, the decision found that the Agency articulated legitimate, non-discriminatory reasons for each of the employment decisions Complainant alleged were discriminatory. The decision found no evidence that any Agency conduct was based on discriminatory animus. Along the same lines, with respect to Complainant's allegations of reprisal, the decision found that although Complainant established that he engaged in prior EEO activity, he could not demonstrate a nexus because the allegations Complainant asserts to establish his claim of retaliation were mere personnel decisions that were within the Agency's authority to make. A finding of a hostile work environment was precluded by our determination that Complainant failed to establish that any of the actions taken by the Agency were motivated by discriminatory animus.

2. PROTECTING IMMIGRANT, MIGRANT AND OTHER VULNERABLE WORKERS

As depicted in the chart below, during the 2nd Quarter of FY 2016 OFO resolved 10 decisions under this SEP Priority and its associated FCP priorities.



*One decision implicated 2 FCP categories

Decision Summaries for this Category

Luna (Mario K) v. DHS (ICE), 0120151817 (01/21/2016) – Complainant filed an EEO complaint with nine allegations, including issue 4 - that he was discriminated against based on his national origin (himself – Mexican-American, and by association - his father, a Mexican citizen with legal permanent residency in the United States) and reprisal for prior EEO activity when on or about May 28, 2014, he was suspended from handling and/or processing National Security Classified Information, in accordance with Executive Order 12968. The Agency dismissed issue 4 on the grounds that Complainant filed a civil action on the same matter. On appeal, the Agency clarified that issue 4 should have been dismissed as constituting a collateral attack on the OIG investigative process. OFO affirmed the Agency's dismissal for failure to state a claim – but for a different reason. It found that by the explicit wording of this allegation (only involving the suspension in accordance with Executive Order 12968), the affirmative defense that the Commission does not have jurisdiction to review an Agency's determination with regard to the substance of a security clearance decision was raised by the Agency. Citing EEOC's Policy Guidance on the Use of the National Security Exception Contained in § 703 (g) of the Civil Rights Act of 1964, as Amended, EEOC Notice No. N-915-041 (May 1, 1989), OFO found that the Commission was precluded from reviewing the substance of the security clearance decision.

Maple (Wilda M) v. USDA (USFS), 0120143016 (01/05/2016) – Complainant was an intern with the University of Hawaii on the Hawaii Permanent Forest Plot Network (HIPPNET) project serving the Agency's Forest Service as a Field Crew Intern with the Institute of Pacific Island Forestry in Hilo, Hawaii. She filed a formal complaint alleging discrimination based on sex and reprisal for prior EEO activity when she was harassed, including sexual harassment, suspended, and constructively discharged. According to her first line Forest Supervisor, Complainant's internship on the HIPPNET project required that she become a Forest Service volunteer. The Agency dismissed the complaint for failure to state a claim, reasoning Complainant was a volunteer. According to Complainant, she was paid a monthly stipend of $2,000, albeit the Agency asserted it did not pay the stipend. After setting forth the legal standards for determining whether Complainant was an uncovered volunteer or a covered employee and for joint employment, OFO reversed because the record contained insufficient information to make determinations on Complainant's status with the Agency. It ordered

the Agency on remand to gather this information, and then issue a letter accepting the complaint or a FAD dismissing it.

McAlister (Helen G) v. Army, 0120150262 (02/11/2016) – Complainant worked as a Financial Analyst for the Pharmaceutical Systems Project Management Office (PSPMO) in the Agency's Medical Material Development Activity (USAMMDA) in Frederick, Maryland. She was placed at the Agency by General Dynamics Information Technology (GDIT), a contractor providing services to the Agency. Complainant was subsequently terminated from her position, allegedly after she reported the sexual harassment of a coworker to the Commander of USAMMDA.

The Agency issued a decision dismissing the complaint pursuant to 29 C.F.R. § 1614.107(a)(1), for failure to state a claim, finding that Complainant was not an Agency employee, and therefore lacked standing to pursue a claim of discrimination through the 29 C.F.R. Part 1614 complaint process.

We reversed the dismissal. We found that the Agency exercised sufficient control over Complainant's position, and especially in her termination, to qualify as her joint employer for the purpose of the 29 C.F.R. Part 1614 EEO complaint process. The complaint was remanded to the Agency for further processing.

Jones (Nicki B) v. Education, 0120151697 (02/09/2016) – Complainant worked with the Agency as an Information Technology (IT) Specialist through a private corporate entity identified as Amyx. Amyx provides IT services to the Agency by contract. Complainant worked as an IT Specialist at the Agency's Federal Student Aid program in Washington, District of Columbia. Complainant was subsequently terminated from this position. Complainant then filed a formal complaint alleging the Agency subjected her to discrimination on the basis of disability and in reprisal for prior protected EEO activity when she was terminated.

The Agency dismissed the formal complaint for failure to state a claim pursuant to 29 C.F.R. § 1614.107(a)(1). The Agency determined that Complainant did not have standing to pursue a claim of discrimination as a contract employee. The Agency also dismissed the formal complaint on alternative grounds, pursuant to 29 C.F.R 1614.107(a)(l). The Agency stated that Complainant had previously filed a formal complaint in the private sector EEO process, and that therefore her claim was one that was already pending or had been decided by the Commission.

We reversed the dismissal. We found that the Agency exercised sufficient control over Complainant's position, and especially regarding her termination, to qualify as her joint employer for the purpose of the 29 C.F.R. Part 1614 EEO complaint process. We also determined that the Agency's alternative dismissal grounds were improper. While Complainant did file such a private sector charge, it was solely against Amyx. We determined that the filing was a separate and distinct discrimination claim as it was filed against the private company, Amyx, and that Complainant's instant complaint was regarding a government entity, the Agency. The complaint was remanded to the Agency for further processing.

Wilson (Shon T) v. Army, 0520160001 (02/04/2016) – Complainant requested reconsideration of the decision in EEOC Appeal No. 0120131840 (August 11, 2015). OFO's prior decision affirmed the Agency final decision finding that Complainant had not been subjected to discrimination when he was terminated. Complainant reiterated the argument he previously raised on appeal. After reviewing the previous decision and the entire record, OFO found that the request failed to meet the criteria of 29 C.F.R. § 1614.405(c), and OFO denied the request.

Abulsaad (Alonso T.) v. Navy, 0520160063 (03/29/2016) – Complainant requested reconsideration of the decision in Abulsaad v. Navy, EEOC Appeal No. 0120131966 (Sept. 25, 2015). In the complaint, Complainant alleged that he was harassed on the bases of national origin (Egyptian) and age, by various incidents. One of the alleged incidents was that a private company terminated its contract with Complainant as a Psychologist assigned to the Agency. OFO's prior decision found no discrimination. After reviewing the previous decision

and the entire record, OFO found that the request failed to meet the criteria of 29 C.F.R. § 1614.405(c), and OFO denied the request.

Perry (Breanna S) v. DOD (DTRA), 0120142256 (03/23/2016) – Complainant worked for a staffing firm serving the Agency as a Site Manager providing supervision of physical security services. She filed a complaint alleging that the Agency discriminated against her based on her race (African-American) and sex (female) when on November 1, 2013, it harassed her by unfairly targeting her for having an unauthorized electronic device (a cell phone) which she did not have, and strip searching her down to her bra and panties. The Agency dismissed the complaint for failure to state a claim, reasoning it did not employ Complainant. OFO reversed because the Agency exercised sufficient control over Complainant's position to qualify as her joint employer. While the contract between the Agency and the staffing firm specified that Complainant was responsible for all day to day operations and coordinating onsite training and personnel requirements, the record generally reflected that the Agency's Contracting Officer's Representative (COR) was responsible her daily activities, and Complainant averred she worked under the COR's close daily supervision. Further, language in the above contract suggested that the Agency, through evaluation of work, had some control over Complainant's work, and the contract required staffing firm employees wear specified uniforms, refrain from casual conversations of a personal nature, not eat or drink within their work area, and that the Site Manager be on call 24 hours a day for emergency situations. This, combined with some other factors, outweighed factors pointing away from joint employment – the staffing firm taking care of Complainant's compensation and her not performing Agency mission duties.

Buultjens (Clement D) v. DOI, 0120142894 (03/08/2016) – Complainant worked as Translator/Caseworker at the Agency's Federal Labor Ombudsman Office in Saipan, Commonwealth of the Northern Mariana Islands. Believing that he was subjected to discrimination based on race, national origin, color and age, Complainant filed a formal complaint.

The Agency dismissed the complaint for failure to state a claim, reasoning that Complainant was not an Agency employee and therefore lacked standing to utilize the EEO complaint process. Referencing the factors set forth in Ma v. Dep't of Health and Human Services, EEOC Appeal No. 01962390 (May 29, 1998), the Agency concluded that it did not control the means and manner of Complainant's work; did not provide him with leave, retirement benefits, or social security payments; and paid him $30,000 a year based on a fixed-price contract.

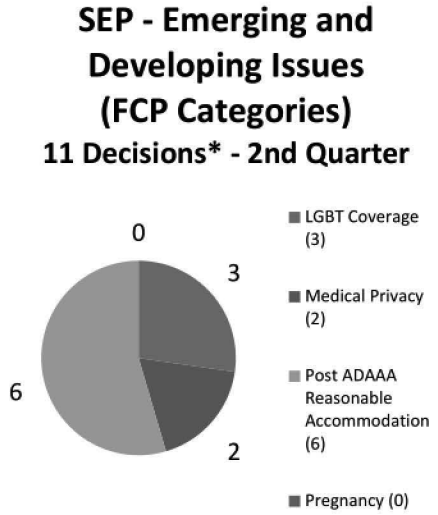
On appeal, the Commission found that three Ma factors indicated Complainant may not be an Agency employee: his payment based on a fixed-price one-year contract (factor (6)), lack of retirement benefits (factor (10)), and lack of social security tax payments (factor (11)). A greater number of factors indicated an employer/employee relationship. The record reflected that the Agency controlled the means and manner (factor (1)) of Complainant's performance (Agency officials monitored Complainant's performance, set the standards, and terminated him.) The Agency acknowledged providing the office space, supplies and equipment for his job (factor (4)). Complainant's one-year contract was repeatedly renewed, resulting in fourteen years of service (factor (5)). Lastly, the record reveals that Complainant's work was an integral part of the Agency's business (factor (9)). The Commission concluded that, for EEO purposes, the balance of factors established that Complainant is a de facto employee of the Agency.

Van Dalen (Cortez J) v. Navy, 0520150430 (03/11/2016) – Complainant requested reconsideration of the decision in Van Dalen v. Navy, EEOC Appeal No. 0120143162 (05/20/2015). In the complaint, Complainant alleged that he had been discriminated against on the basis of age when he was terminated. The Agency found that Complainant was not an employee of the Agency and dismissed the complaint for failure to state a claim. Complainant appealed to OFO. OFO reversed the Agency's dismissal of the complaint. OFO found that the Agency exercised sufficient control over Complainant to be considered a joint employer. After reviewing the previous decision and the entire record, OFO found that the request failed to meet the criteria of 29 C.F.R. §1614.405(c), and OFO denied the request.

Lofy (Latricia P) v. Air Force, 0120160769 (March 10, 2016) – Complainant alleged discrimination and harassment on the bases of sex and in reprisal for her EEO protected activity. The Agency dismissed the complaint for failure to state a claim. The Agency stated that, based on common law tests, Complainant is not an Agency employee. The Agency asserted that it did not exert sufficient control over Complainant to be considered a "joint employee" of the Agency. The Agency then summarily dismissed the matter for failure to state a claim. OFO reversed the Agency's final decision because it failed to perform any analysis of the Ma factors. The Agency, in one brief sentence in its decision, simply concluded that Complainant was not an Agency employee. OFO was unable to ascertain from the record whether the Agency exercised sufficient control over Complainant's position to qualify as his employer for the purpose of the 29 C.F.R. Part 1614 EEO complaint process.

3. ADDRESSING EMERGING AND DEVELOPING ISSUES

As depicted in the chart below, during the 2nd Quarter of FY 2016 OFO resolved 11 decisions under this SEP Priority and its associated FCP priorities.



*One decisions implicated two FCP categories.

Decision Summaries for this Category

Rutland-Cooper (Myrna S) v. DHS (USCG), 0520150475 (01/08/2016) – At the time of events giving rise to this complaint, Complainant was employed as a Family Resource Specialist, GS-0101-11, in the Health and Safety Work-Life Center, located at Base Alameda in Alameda, California. Complainant filed an EEO complaint alleging that the Agency subjected her to a hostile work environment on the bases of race (African American), disability, age, and reprisal when: (1) on June 28, 2011, management offered an unsolicited diagnosis of her medical condition; (2) from June 29 through August 4, 2011, management disregarded her request for a copy of the Health, Safety, and Work-Life Enterprise Policy; (3) from August 4, 2011 through the present, she was denied a personal Agency computer and the computer support needed to work from home or from an alternative worksite; (4) from August 4, 2011, through present, she was denied the opportunity to telework as a reasonable accommodation; 5) from August 4, 2011, through present, management failed to safeguard her personal medical information; (6) on August 31, 2011, management ignored her request to allow the newly hired Work-Life Generalist or the Program Analyst to assist her with increased work demands that were

assigned by management; (7) on September 4, 2011, her request for reasonable accommodation was denied; (8) from September 14, 2011, through November 14, 2011, and (9) on approximately December 1, 2011, management indicated that her medical condition was not a disability.

Our prior appellate decision (Appeal No. 0120130319) affirmed the Agency's final decision, based on the evidence gathered during the investigation that concluded that Complainant failed to prove her discrimination claims. The decision found that the record supported the Agency's claims that Complainant could not telework because her position required her to spend 80% of her time meeting with special needs families that came directly to the office to meet with Complainant. The Agency also offered Complainant an alternate work schedule which would allow her to be off an extra day each week. The prior decision also found that no confidential medical information was disclosed. Finally, the decision found that Complainant did not establish a prima facie case of hostile work environment.

The instant decision denied Complainant's request for reconsideration finding that she expressed her disagreement with the previous decision and presented some of the same arguments that she had made on appeal. It emphasized that a request for reconsideration is not a second appeal to the Commission and required Complainant to demonstrate that the appellate decision involved a clearly erroneous interpretation of material fact or law, which she failed to do.

Almodovar (Mathew R) v. Navy, 0120152376 (02/09/2016) - Complainant worked as an Office Administrative Assistant, GS-08, at the Agency's Naval Air Station Joint Readiness Base (NASJRB) Fire and Emergency Services (F&ES) Department, in Fort Worth, Texas. On April 20, 2015, Complainant filed a formal complaint alleging that the Agency subjected him to ongoing discriminatory harassment on the basis of sex (sexual orientation, male).

The Agency dismissed the formal complaint, pursuant to 29 C.F.R. § 1614.107(a)(1), for failure to state a claim, reasoning that Complainant was actually alleging discrimination based on his sexual orientation, not his gender, and therefore had not asserted an actionable claim under Title VII. In the alternative, the Agency dismissed the complaint, pursuant to 29 C.F.R. § 1614.105(a)(1), for untimely EEO Counselor contact.

We reversed the dismissal. We noted that the Commission has previously held that claims of discrimination based on sexual orientation are valid claims of sex discrimination under Title VII, and should be processed in the 29 C.F.R. Part 1614 EEO complaint process. We determined that Complainant, through his factual allegations, asserted an ongoing pattern of harassment sufficient to state a viable hostile work environment claim. We also determined that Complainant's hostile work environment claim was timely raised because at least one allegation occurred within 45 days of the date he initiated EEO counselor contact. The complaint was remanded to the Agency for further processing.

Kobey (Harvey G) v. DOI, 0120132052, 0120150844 (02/04/2016) **[Repeated under Findings below]** – Complainant worked as an Engineering Technician, GS-09, with the Agency's Bureau of Reclamation in Billings, Montana. Complainant's neurologist diagnosed him with Myasthenia Gravis, a chronic neuromuscular disease that has debilitating symptoms, causing double vision, slurred speech, stumbling, difficulty chewing and swallowing, and which causes periods of total incapacitation. Complainant's Engineering Technician position, in addition to working in an office environment, required travel almost every working day/night to dams and power plants, among other locations, to conduct on-site investigations.

Complainant's Myasthenia Gravis disease worsened, which impacted his ability to travel and meet the physical demands of the on-site investigations. As result, Complainant requested reasonable accommodation in the form of telework and/or less travel, among other accommodations. However, Complainant's first-level supervisor (S1) felt that Complainant could not perform the essential functions of his position in Billings, Montana with or without accommodation. Thereafter, S1 offered Complainant the choice of two different Engineering Technician positions for reassignment. Complainant declined the reassignments because they were hours outside of the commuting area with regard to his home, and the Agency did not offer relocation costs. As a result, because Complainant declined the reassignment offers, the Agency terminated him from employment due to medical reasons.

Complainant filed two separate EEO complaints. The Agency thereafter issued final decisions, finding that Complainant did not establish that he was subjected to discrimination as alleged. In the consolidated appeal, we reversed the Agency, finding that Complainant established that he was denied reasonable accommodation. In finding so, we noted that the Agency improperly terminated the interactive process with Complainant when it removed him from employment, which resulted in its failure to provide him with accommodation. We found that had the Agency not given Complainant the ultimatum to accept one of the reassignments, and instead had continued with the interactive process in good faith, it would have clearly found an accommodation suitable to Complainant's restrictions within his geographical location. We ordered the Agency to reinstate Complainant, provide telework, back pay, and issue compensatory damages to him for its failure to provide reasonable accommodation.

Lurensky (Latarsha A) v. FERC, 0120123215 & 0120131079 (03/15/2016) **[Repeated under Findings below]** – Complainant works as a GS-15 Trial Attorney at the Agency's Office of Administrative Litigation (OAL) in Washington, D.C. In May 2010, the Agency changed Complainant's duty station from its Headquarters building at 888 First Street, NE, to 1101 First Street, NE.

Complainant has been diagnosed as having the following physical impairments: psoriasis, arthritis, gout, degenerative disc disease (stenosis), cardiomyopathy, congestive heart failure, embolic cerebral vascular accident (CVA/stroke), tachycardia, sensitivity to non-incandescent lighting, allergies, migraine headaches, hypersensitivity to sensory stimuli, Irritable Bowel Syndrome (IBS), compromised immune system, infections (cellulitis), hernia, Sjögren's Syndrome, Baker's Cyst, torn meniscus, fractures, and foot impairments. Complainant maintains these conditions substantially limit her in the major life activity of walking, and evidence reflects that she sometimes uses a cane.

Complainant filed EEO complaints alleging that she was subjected to discrimination on the basis of disability when the Agency failed to provide disability access for entering and exiting its facilities at its First Street location; blocked the disabled entrance of Complainant's duty station at the First Street location; subjected her to ongoing loud noise, such as hammering and drilling in the First Street location; did not provide her with assistance with packing and transporting her belongings to the new office at First Street; did not provide automatic doors at the garage level where the shuttle van arrives; and required Complainant to work in hearing rooms at HQ that had fluorescent lights that made her ill. The Agency addressed Complainant's complaints in two final decisions. In those decisions, the Agency found that Complainant did not prove that she was denied reasonable accommodations for her disabilities.

In an appellate decision, the Commission found that Complainant was a qualified individual with a disability because she was substantially limited in walking and major bodily functions/systems, and successfully performed the essential functions of her position as reflected in her "fully successful" performance evaluations. The Commission further found that medical documentation from physicians informed the Agency that Complainant had various medical conditions and needed to avoid fluorescent light in hearing rooms because those lights induced headaches and seizure-like episodes. Medical documentation also informed the Agency that Complainant needed to use automatic doors and avoid loud sounds because they can precipitate migraines and allergies, and revealed that Complainant is limited in her range of motion and ability to ambulate because of arthritis and degenerative conditions.

The Commission concluded that that Complainant's considerable difficulty in walking and her mobility impairments made it difficult for her to open the doors in her workplace, and the Agency did not provide Complainant with an effective accommodation when it required her to seek assistance in opening doors from security guards and coworkers because there were many times from 2010 until 2012 when she could not obtain assistance from coworkers and security guards. The Commission determined that Complainant was at the mercy of coworkers and security guards to provide her with access to her workplace, which was unacceptable. The Commission noted that the Agency did not install automatic doors at Complainant's work suite until March 2012, almost two years after she notified the Agency of her difficulty in using non-automatic doors. Additionally, the Agency shuttle arrived at the garage level, but there was no evidence that the Agency ever installed an automatic door at that entrance. The Commission found that Complainant proved that she was denied a reasonable accommodation with respect to this matter.

The Commission also found that Complainant proved that she was denied a reasonable accommodation when it blocked the disabled access door near the lobby with maintenance equipment, which presented a significant hazard or impediment to Complainant because of her walking impairments. The Commission further found that the Agency denied Complainant a reasonable accommodation when it did not assist her with packing and moving her belongings to the new office; did not allow her to telework during a 10-week period of construction on her building; and did not replace the fluorescent bulbs in the hearing room in which Complainant worked with non-fluorescent lighting.

The Agency was reminded that it has a responsibility to make sure that its facilities are accessible. The decision noted that the Agency facility at 1100 First Street NE is all new construction, and that the Agency and the GSA are on notice that Federal government physical facilities must comport with the applicable physical accessibility standards. Complainant was advised that, while the Commission cannot enforce the accessibility standards contained in the ABA, she may wish to separately pursue filing a complaint with the U.S. Access Board for the failure of the Agency to ensure its compliance with these standards.

As to remedy the Commission ordered the Agency to install automatic doors at Complainant's work facility, including the entrances/exits to the garage area and suites; ensure that all accessible entrances and passageways are clear and unobstructed; henceforth grant Complainant assistance with packing and transport related to office moves; henceforth allow Complainant to telework during any prolonged periods of loud office construction noise; and replace fluorescent lighting in hearings rooms in which Complainant works with non-fluorescent lighting. The Commission also ordered the Agency to provide eight hours of in-person EEO training to all Washington, D.C. OAL management officials and supervisors and to pay Complainant proven compensatory damages. The Agency was further advised that it may wish to consider utilizing a neutral, independent, certified mediator to help resolve Complainant's numerous EEO complaints, and the issues leading to her near-constant complaints. It was also advised to conduct training for Agency staff about the experiences of individuals with disabilities, as well as Agency obligations under the Rehabilitation Act.

Turnage, (Jamey M) v. Navy, 0120130913 (03/15/2016) **[Repeated in Findings below]** – Complainant filed a complaint of discrimination alleging discrimination when he was harassed, subjected to retaliation, and was the victim of an improper medical disclosure. The Agency accepted the complaint for investigation. Complainant requested a hearing. The AJ issued a decision without a hearing finding that Complainant did not establish his harassment or retaliation claims. However, the AJ found that the Agency impermissibly disclosed Complainant's medical information. Pursuant to her finding, the AJ ordered the Agency to train all management officials and supervisors at Complainant's facility as to their responsibilities pursuant to the Rehabilitation Act including reasonable accommodation, medical disclosure, and record-keeping. The Agency fully adopted the AJ's decision.

On appeal, the Commission affirmed the AJ's issuance of a decision without a hearing as proper and affirmed the finding of no discrimination based on race and reprisal. The AJ found discrimination on the basis of disability when the Agency impermissibly disclosed Complainant's medical condition to a co-worker, and when his supervisor made an inquiry into the basis for Complainant's parking permit. The AJ found that it constituted a per se violation of the Rehabilitation Act's prohibition against unnecessary medical inquiry. Neither party challenged the AJ's finding on appeal. However, the Commission found the remedy awarded by the AJ insufficient to make Complainant whole.

After examining Complainant's evidence of non-pecuniary compensatory damages, the Commission ordered the Agency to pay Complainant $5,000 in non-pecuniary damages. The Commission also ordered the Agency to train all management officials and supervisors at Complainant's facility as to their responsibilities under the Rehabilitation Act, if such action had not already been taken pursuant to the AJ's order, and to pay Complainant's attorney's fees if he was represented by a licensed attorney. Finally, the Commission ordered the Agency to post a notice of discrimination at the facility at which Complainant worked and consider taking discipline against the individual found to have improperly disclosed Complainant's medical information.

Fresh (Illiana S.) v. DOJ (FBI), Request No. 0520160061 (03/22/2016) – The Agency requested reconsideration of the decision in Fresh v. Dept. of Justice (FBI), EEOC Appeal No. 0120081848 (March 22,

2016). In the complaint, Complainant alleged she was discriminated against on the bases of disability and reprisal when (1) her request for advanced sick leave was denied September 14 and 16, 2004, and on November 2, 2004; (2) she was denied training that was required in her performance work plan in September 2004; (3) in October 2004, she was given unrealistic deadline for projects that imposed extra requirements and her work product was overly scrutinized; (4) her disability was not accommodated and she was required to walk back and forth to her supervisors' offices rather than being permitted to communicate through e-mail; and (5) management failed to accommodate her disability on or about November 16, 2004, by denying her the use of an elevator during a fire and evacuation drill. OFO's prior decision found that the Agency subjected Complainant to disparate treatment based on reprisal, found that Complainant was a person with a disability, found that the agency failed to provide Complainant with reasonable accommodation for her disability, and subjected her to a hostile work environment. After reviewing the previous decision and the entire record, OFO found that the request failed to meet the criteria of 29 C.F.R. § 1614.405(c), and OFO denied the request.

Rineer (Harold M) v. Air Force, 0520160085 (03/23/2016) – The Agency requested reconsideration of the decision in Rineer v. Dept. of The Air Force, EEOC Appeal No. 0120081812, (March 23, 2016). Complainant filed an EEO complaint alleging he was discriminated against based on his disability when he was denied reasonable accommodation when he was reassigned to a Security Guard position with duties outside his medical restrictions and was denied his request to return to his Electronics Mechanic position. OFO's prior decision reversed the EEOC Administrative Judge's decision by summary judgment in favor of the Agency. We concluded that the AJ erred as a matter of law, and that Complainant was a qualified individual with a disability within the meaning of the Rehabilitation Act. The decision went on to conclude that the evidence established that the Agency failed to provide him with reasonable accommodation for his disability for 8 months. After reviewing the previous decision and the entire record, OFO found that the Agency's request failed to meet the criteria of 29 C.F.R. § 1614.405(c), and denied the request.

Simpson (Kenny C) v. VA, 0320140050 (03/16/2016) – Petitioner worked as a Social Worker, Suicide Prevention Counselor, at the Agency's Central Texas Veterans Health Care System facility in Temple, Texas. Petitioner alleged that the Agency discriminated against him on the basis of his sexual orientation (homosexual) when it removed him on October 29, 2010.

On June 4, 2010, the Agency instructed Petitioner to report for a Fitness of Duty Examination. Petitioner's managers determined that he needed to be evaluated due to Petitioner's allegations that his coworkers were trying to kill him; that listening devices were planted in his home and office; that many of his coworkers were Federal Bureau of Investigation agents; and that a pipe in his office was being used as a conduit for feeding poisonous gas into his office. Petitioner was diagnosed with a "Delusional or Psychotic Disorder." On July 28, 2010, the Agency's Physical Standard Board met and determined that Petitioner was unable to meet the established guidelines for mental fitness as a Clinical Worker and that he was incapable of providing adequate professional care. The Agency removed him on October 29, 2010.

Petitioner appealed his removal to the MSPB and the MSPB AJ issued an initial decision on September 7, 2012, affirming the removal. On October 4, 2012, Petitioner filed a petition for review with the full MSPB. On December 16, 2013, the MSPB issued a Remand Order reversing Petitioner's removal. The MSPB found that the Agency did not have the authority to order Petitioner to undergo the Fitness for Duty Examination because the Agency could not show that the position that Petitioner occupied had medical standards or physical requirements, or was part of an established medical evaluation. However, the MSPB affirmed the Initial Decision's finding that Petitioner did not prove his discrimination claim based on sexual orientation. The MSPB held that Petitioner did not provide any new evidence or argument demonstrating that the Agency treated employees who were not homosexual and were unable to perform the duties of their positions more favorably than Petitioner.

The Commission concurred with the MSPB when it found that the Agency articulated a legitimate, nondiscriminatory reason for removing Petitioner. The Agency removed Petitioner based on his inability to perform the clinical functions of his position. While the MSPB later found that the Agency should not have ordered Petitioner to undergo the Fitness for Duty Examination, at the time that the Agency removed him, it did

so based on the Physical Standards Board determination that Petitioner was incapable of providing adequate professional care. Additionally, Petitioner did not demonstrate that any conduct on the part of the Agency was based on any discriminatory animus.

Hardy (Simonne J) v. USPS, 0320150017 (3/16/16) – Petitioner worked as a Mail Handler Equipment Operator at the Agency's Incoming Processing and Distribution Center in Baltimore, Maryland. Petitioner alleged that the Agency discriminated against her on the basis of disability (bad knees) when it failed to reasonably accommodate her and on the bases of race (African-American), sex (female, sexual orientation), and age (over 40), when it removed her on February 7, 2014. The Agency decided to remove Petitioner for Unsatisfactory Attendance based on seven instances of unscheduled absences.

Petitioner filed a timely appeal with the MSPB. In an initial decision, an MSPB AJ (AJ) affirmed the removal and found that Petitioner had not proven her affirmative defenses of disability discrimination for failure to accommodate and discrimination based on race, sex, and age for her removal. The AJ did not address Petitioner's claim that she was discriminated against based on sexual orientation stating that the MSPB has held that a claim of discrimination based on sexual orientation is not cognizable discrimination under Title VII as incorporated into the Civil Service Reform Act, nor as any other prohibited personnel practice under 5 U.S.C. § 2302(b).

On July 4, 2014, Petitioner submitted a Petition for Review and the full MSPB issued its Final Order on November 7, 2014. The MSPB denied the petition for review and affirmed the initial decision. While noting that the AJ did not address Petitioner's claim of discrimination based on her sexual orientation, the MSPB found that it was unnecessary for it to establish a precedent with this case and further noted that there was insufficient evidence to support a violation under any view of the statute. Although Petitioner alleged that several Agency officials were aware of her sexual orientation, the MSPB found that this fact alone, without any corroborative evidence, was insufficient to establish that the Agency discriminated against Petitioner based on her sexual orientation.

The Commission agreed with the MSPB that the Agency removed Petitioner based on her history of unacceptable attendance since 2012, and that Petitioner did not demonstrate that any conduct on the part of the Agency was based on any discriminatory animus. While she alleged that the official who decided to remove her had "a certain disdain for gay individuals," Petitioner did not provide any evidence to support this assertion.

4. ENFORCING EQUAL PAY LAWS

The four decisions in this SEP category did not implicate an FCP category.

Decision Summary for this Category

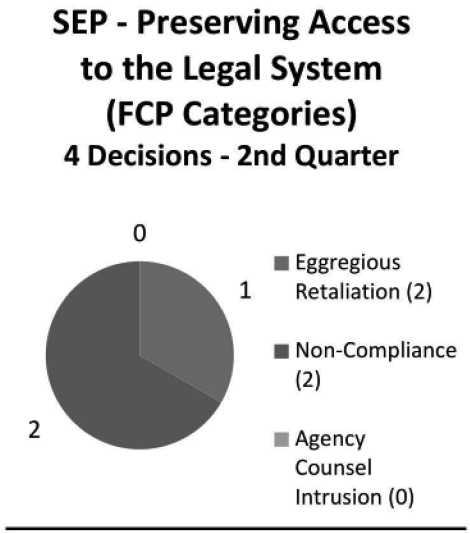
Davidson (Delfina Y) v. VA, 0120142899 (02/25/2016) – Complainant, Chief of Transportation, Management and Program Analyst, filed an EEO complaint alleging that she was discriminated against on the on the bases of race (African-American), sex (female), and color (black) when she was denied compensatory time from 1999 – 2011. An Equal Employment Opportunity Commission Administrative Judge (AJ) issued a decision without a hearing finding no discrimination. The agency issued a decision implementing the AJ's decision finding no discrimination. OFO issued a decision affirming the agency's decision finding no discrimination. Regarding complainant's Equal Pay Act claim, OFO found that the agency was justified in offering different pay to complainant and a male coworker due a factor other than sex. OFO found that the male coworker, unlike complainant, was hired in order to fix a specific problem in the agency. Also, OFO found no race, sex, or color discrimination, because complainant had been paid all compensatory time that was requested at the time it was earned. OFO found that no other employees were granted retroactive compensatory time as complainant was requesting.

Hutchins (Shara D) v. State, 0120141398 (02/03/2016) – Complainant, an Information Technology Specialist, filed an EEO complaint alleging that she was discriminated against on the on the bases of race (African-American), sex (female), and religion (Christian) when she received lower pay for equal work by the opposite sex, she was given an inaccurate performance appraisal, the Agency recommended her position be reclassified, and she was subjected to a hostile work environment. The Agency issued a decision finding no discrimination. OFO issued a decision affirming the Agency decision finding no discrimination. Regarding Complainant's Equal Pay Act (EPA) claim, OFO found that the identified comparatives did not perform equal work requiring equal skill, effort, and responsibility as compared to Complainant. OFO found no indication the appraisal was incorrect or discriminatory. OFO found that the actions surrounding the desk audit were nondiscriminatory. Regarding the hostile work environment claim, OFO found no actions that rose to the level of a hostile work environment or any actions motivated by discrimination.

Stahlman (Janeen S) v. DOT, 0120142929 (02/19/2016) – Complainant, a Technical Support Specialist, filed an EEO complaint alleging that she was discriminated against in violation of the Equal Pay Act when a similarly situated male coworker who performed the same duties was paid more than she was paid. An EEOC AJ issued a decision without a hearing finding no discrimination. The Agency issued a decision fully implementing the AJ's decision finding no discrimination. OFO issued a decision affirming the Agency decision finding no discrimination. OFO found that the identified comparatives did not perform equal work requiring equal skill, effort, and responsibility compared to Complainant. Thus, OFO found that Complainant failed to establish a violation of the Equal Pay Act.

Payne (Zandra N) v. DOJ, 0120142854 (02/09/2016) – Complainant, a Case Manager, filed an EEO complaint alleging that she was discriminated against in violation of the Equal Pay Act (EPA) when she was hired at the GS-9 level, although other male Case Managers were paid at the GS-11 level. An EEOC AJ, after a hearing, issued decision finding no discrimination. The Agency issued a decision fully implementing the AJ's decision finding no discrimination. OFO issued a decision affirming the Agency decision finding no discrimination. OFO found that the difference in pay was justified based on a factor other than sex. OFO found that the Agency advertised the position at a lower grade in order to attract a large applicant pool. Also, OFO found substantial evidence to support the AJ's finding that the Agency wanted to be able to verify that Complainant could perform at the GS-11 level. OFO noted that Complainant was moved to the GS-11 level within six months, instead of the standard 12 months, because she showed she could handle the work.

5. PRESERVING ACCESS TO THE LEGAL SYSTEM



Decision Summary for this Category

DeChambeau (Hayden R) v. DHS (TSA), 0520160043 (02/05/2016) – At the time giving rise to this complaint, Complainant worked as a Transportation Security Officer (TSO) at the Agency's Southwest Oregon Airport in North Bend, Oregon. Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of sex (male) and reprisal when, in October 2009, it reduced his full time schedule to part time.

Following a hearing, an Equal Employment Opportunity Commission Administrative Judge (AJ) found that reprisal was a motivating factor in his work hours reduction. The AJ also found that management engaged in per se reprisal when comments were made to Complainant which interfered with his right to engage in protected EEO activity. The AJ did not find that Complainant was discriminated against based on his sex. The AJ, however, found that Complainant's hours would have been reduced even absent the reprisal, and Complainant was not entitled to back pay. The Agency did not adopt the AJ's decision concerning the finding of reprisal, and appealed the matter to the Commission. Our prior decision (0720140014) affirmed the findings of the AJ.

In its request for reconsideration, the Agency expressed its disagreement with the previous decision, and argued that we failed to properly apply the Supreme Court's decision in University of Texas Southwestern Medical Center v. Nassar, 133 S. Ct. 2517 (2013). We noted that this same argument was raised in the initial appeal and fully and properly addressed in 0720140014.

The decision found that the Agency did not meet the criteria for reconsideration, and affirmed the initial appeal decision.

The Agency was ordered to pay Complainant $5,000 in non-pecuniary compensatory damages in connection with the finding of per se retaliation; pay Complainant $67,181.50 in attorney's fees and $1,109.20 in costs; provide eight (8) hours of EEO training to the responsible individuals: and consider taking appropriate disciplinary action against the responsible management officials.

Turner, et al. (Simon V) v. DOJ, 0520160037 (02/11/2016) – The Agency requested reconsideration of the decision in EEOC Appeal No. 0720110008 (September 15, 2015). OFO's prior decision affirmed an EEOC AJ's certification of a class claim alleging: Whether Agency employees from January 1, 1994 to the present have been denied promotions based upon the Agency's policy and practice of retaliating against employees because they engaged in protected Title VII EEO activity. The Agency argued in its request that there was no commonality and that the class should not be certified. After reviewing the previous decision and the entire record, OFO found that the request failed to meet the criteria of 29 C.F.R. § 1614.405(c), and OFO denied the request. OFO ordered the Agency to process the remanded class complaint.

Baker (Glynda S) v. DOJ (BOP), 0120133361 (02/23/2016) **[Repeated under Findings below]** – Complainant was born with a cleft palate and lip, which affects the manner in which she speaks. Complainant worked as a Unit Manager, GS-12, at the Agency's Federal Correctional Center in Tucson, Arizona. In December 2011, Complainant filed an EEO complaint in which she alleged that she was subjected to harassment and disparate treatment on the bases of sex, disability (facial anomaly), age, and in reprisal for previous EEO activity. One of Complainant's claims included the allegation that someone placed a picture of a five-year old boy with a cleft palate and lip on her office door. Complainant stated that she immediately reported this incident to management, and she believed that the Warden posted the picture. However, the Agency's investigation never identified the person who posted the picture.

After the complaint was investigated, Complainant requested on December 1, 2012, that the Agency issue a final decision. The case was received by the Agency's adjudication office on December 5, 2012, for a final decision. On December 7, 2012, the Agency issued Complainant a letter that stated that her case was among a number of cases being reviewed, and a final decision would be issued "as soon as possible." On September 13, 2013, Complainant submitted a motion to the Commission to sanction the Agency for failing to timely issue a final decision. On February 10, 2014, the Agency issued a final decision that found that Complainant did not

prove that she was subjected to unlawful discrimination or harassment. On February 25, 2014, Complainant appealed the final decision to the Commission.

In an appellate decision, the Commission cited EEO Regulation 29 C.F.R. § 1614.110(b), which provides that an agency shall issue its final decision within 60 days of receiving notification that a complainant has requested an immediate decision from the agency. The Commission noted that in this case, Complainant requested a final agency decision on December 1, 2012, and the Agency acknowledged that it received Complainant's request by December 5, 2012, which meant that it was required to issue a final decision by February 4, 2013. Nevertheless, the Agency did not issue its final decision until February 10, 2014, or 432 days after the Agency received Complainant's request, which was 371 days past the regulatory time frame to do so.

The Commission noted that the Agency did not provide any explanation for its extraordinary delay in issuing the final decision, despite receiving notice of Complainant's motion for sanctions. The Commission explained that it has exercised its inherent authority to enforce its regulations by ordering sanctions in response to violations, and the Agency's conduct in this case warranted sanctions. In considering the appropriate sanction for this case, the Commission noted that Complainant was stranded in a "procedural no man's land" wherein she had no recourse within the administrative process until the Agency issued a final decision. The Commission further noted that its regulations require action in a timely manner throughout the EEO process, and the Commission had previously warned the Agency/sub-agency that its lengthy delay in issuing final decisions was a serious matter. Therefore, the Commission determined that default judgment in favor of Complainant was warranted as a sanction in this case.

With regard to the appropriate remedy, the Commission found that Complainant only established a prima facie case of discrimination or harassment with regard to her claim that she was harassed on the basis of disability because of the inappropriate photograph posted on her door. The Commission found that Complainant is an individual with a disability because she is substantially limited in speaking; she was qualified because she successfully performed the essential functions of her position; someone posted a picture of a child with a cleft palate and lip on her door; she was singled out for ridicule related to her medical condition by a picture placed in a prominent place; and she was so upset by the ridicule that she had to take leave. The Commission noted that photographs can be particularly effective at intimidating and ridiculing employees on a protected basis because of the potency of the visual medium, and therefore, the conduct in this case was serve enough to create a hostile work environment. The Commission concluded that there was enough evidence to entitle Complainant to relief because there is a prima facie case of disability harassment in this case.

In order to remedy the harassment, the Commission ordered the Agency to provide Complainant with proven compensatory damages; to provide at least eight hours of in-person EEO training to all management and supervisory officials at its Federal Correctional Center in Tucson, Arizona; and to post a notice of discrimination at the Agency's Tucson facility.

Gary (Miles W) v. NGB, 0720120030 (03/22/2016) **[Repeated under Findings below]** – Complainant worked as a dual-status technician for the Wisconsin National Guard in Wisconsin Rapids, Wisconsin. In his federal civilian position Complainant worked as a Surface Maintenance Repair Technician, WG-8, in the Field Maintenance Shop.

On September 11, 2008, after seven months of employment, Complainant's supervisor gave him a "fully successful" performance appraisal and told him he was doing a good job and had no unacceptable repairs. Complainant alleged that beginning in October 2008, Complainant's supervisor's son-in-law made bullying sexual comments about Complainant, even after Complainant told him to stop. Complainant reported the behavior to his supervisor. Subsequently, Complainant contacted an EEO Counselor. When the supervisor learned that Complainant contacted an EEO Counselor, he told the EEO Counselor that he was upset that Complainant went outside the chain of command. When Complainant returned to the shop, his supervisor called him into his office to talk about Complainant filing an EEO complaint. The supervisor raised his voice and threatened that if the investigation showed that Complainant lied about anything he would be terminated. Other supervisory officials told Complainant that the supervisor was angry that he went "behind his back" to the EEO Counselor, and that he was in danger of losing his job. On January 5, 2009, the supervisor terminated Complainant for "failure to follow directives and shop procedures."

Complainant filed a complaint raising these allegations. After investigation, Complainant requested an administrative hearing. After the hearing, the EEOC AJ issued a decision on the merits finding that Complainant established that he was terminated from his position in retaliation for having raised an allegation of sexual harassment with the EEO Counselor. After the liability decision was issued, the Agency filed a motion to dismiss the matter for lack of jurisdiction due to Complainant's dual status. The Agency appealed the decision to the Commission, which affirmed the AJ's ruling, finding that although the Agency raised the jurisdictional issue in an untimely manner, the Commission found, citing Kori S. v. National Guard Bureau, EEOC Petition No. 0420140014 (July 2, 2015), that each National Guard dual-status technician complaint must be analyzed on a case-by-case basis to determine whether the Commission has jurisdiction. Analyzing the facts of the present case, the Decision found that the AJ correctly found that the circumstances of the Agency's violation occurred when Complainant was in his civilian capacity and that, therefore, the case was within the Commission's jurisdictional authority. Therefore, the decision upheld the AJ's discrimination finding and the relief ordered, including back pay, correction of personnel records, training, notice posting and the consideration of disciplinary action against the responsible management official.

6. PREVENTING HARASSMENT THROUGH SYSTEMIC ENFORCEMENT AND TARGETED OUTREACH

Pyun, (Kerrie F.) v. SSA, 0520160098 (03/09/2016) – In the previous decision in Appeal No. 0720140026, OFO upheld the finding of discrimination by the AJ (AJ1). AJ1 determined that the Agency subjected Complainant to discriminatory harassment based on her prior EEO activity pursuant to Title VII. Specifically, AJ1 found that the Agency subjected Complainant to consistent unwarranted scrutiny which resulted in her being placed on a Performance Assistance Plan effective January 9, 2006, and, consequently on a Performance Enhancement Plan which she learned of on May 9, 2006, and was effective May 23, 2006. The issue of damages was addressed by a second AJ (AJ2). AJ2 awarded Complainant $ 15,000 in non-pecuniary damages, $ 404.88 in pecuniary damages, $348,814.78 in fees for her attorney and $ 36,711.52 in costs. The previous decision affirmed the finding of discrimination by AJ1 and the award of remedies issued by AJ2. OFO ordered the Agency to take corrective action based on the finding of discrimination. The previous decision noted that Complainant's removal action was before the MSPB and was not before OFO.

Complainant filed a request for reconsideration asked for review of the previous decision's denial of her petition following the MSPB decision regarding the removal action. The request for reconsideration was dismissed finding that Complainant had filed a civil action on January 28, 2016, in the U.S. District Court for the District of Maryland. In her civil action, Complainant alleged discrimination when she was removed from her position effective October 4, 2006. As such, the request was denied; however, the findings in Appeal No. 0720140026 still stood. Therefore, OFO reissued the orders from the previous decision.

7. ENFORCEMENT – GENERAL

Williams (Freddie M) v. DOD (DODEA), 0120140976 (01/08/2016) – Complainant filed an EEO complaint alleging that the Agency subjected him to harassment based on race (African-American), sex (male), disability (knee), and/or reprisal. Complainant alleged several events in support of his claim of harassment including a claim that he was denied a reasonable accommodation in the form of handicap parking at the worksite. The Agency subsequently issued a final decision finding no discrimination asserting that Complainant failed to allege a separate claim of denial of reasonable accommodation. The decision upheld the Agency's decision finding no discrimination regarding his claims of harassment and unlawful termination. However, the decision

found that Complainant in fact raised a separate claim of denial of reasonable accommodation and the decision addressed this claim.

The decision found that Complainant was an individual with a disability. Further, the decision held that Complainant requested a handicap parking spot or parking with easy access to the worksite. The Supervisor responded to Complainant's request by stating that parking was provided to the School Counselor (not disabled) but that there were no designated spaces for disabled employees like Complainant. The parking lot at the school was gravel and the Supervisor asked that it be paved and a section designated for disability parking. He indicated that the request was not supported by the Safety Office and he tasked Complainant with the assignment to investigate and obtain a designated parking space. The decision found that the Supervisor and the Agency failed to provide Complainant with a reasonable accommodation. The decision noted that Complainant did not seek paving of the gravel lot, but requested a regular parking spot with easier access to the school. Complainant noted that there was an area that would allow him to park and provide him with a short, easy walk to work. The Supervisor noted that this location was "first come, first serve." Rather than designating the area as reserved and allowing only Complainant access to that parking area, the Supervisor tasked Complainant with the assignment to figure out a solution for making a disability parking area. As a result, Complainant's request for accommodation went unresolved for over seven months. Based on the record, the decision concluded that the Agency violated the Rehabilitation Act when it failed to provide Complainant with a reasonable accommodation for his disability in the form of a designated parking space with easy access to the school

The decision remanded the matter to the Agency for a determination on compensatory damages. The decision ordered that the Agency to provide training on reasonable accommodation requests for the Supervisor and to consider disciplining the Supervisor.

Gurule (Kandi M) v. DHS (ICE), 0120141615 (01/29/2016) – Complainant filed a formal complaint alleging that the Agency discriminated against her and subjected her to a hostile work environment on the basis of race/national origin (Hispanic) when: she was threatened with discipline, required to empty out her desk and move her belongings, accused of misappropriating office supplies, given strict deadlines to perform her duties, and accused of poor performance; she was charged as Absent Without Leave (AWOL) after failing to provide a doctor's note for a three-day absence; her request for advanced sick leave was denied; she was suspended for five days; and management delayed her entry on duty date for a position for which she was selected with the Office of Detention and Removal.

At the conclusion of the investigation, Complainant requested a final Agency decision (FAD). In the FAD, the Agency determined that Complainant had not been subjected to discrimination or a hostile work environment as to all of her claims except her claim that she was denied advanced sick leave. Management officials denied Complainant's request for 88 hours of advanced sick leave for her incapacitation and doctor's appointments, but there was no evidence that officials ever provided a reason. As a result, the Agency concluded that management failed to articulate a legitimate, nondiscriminatory reason for denying Complainant's request for advanced sick leave, and found that Complainant was discriminated against based on her race/national origin as to this claim.

To remedy the discrimination, the Agency instructed Complainant to submit evidence in support of her entitlement to compensatory damages and attorney's fees and costs. Additionally, the Agency ordered training and consideration of disciplinary action for the responsible management officials and to post a notice. Complainant subsequently filed the instant appeal requesting that the Commission find in her favor as to all claims.

On appeal, the Commission affirmed the FAD finding that Complainant had not established that she was subjected to a hostile work environment or discrimination as to all of her claims except the advanced sick leave claim. In so finding, the Commission found that the Agency had not articulated a legitimate, nondiscriminatory reason for denying Complainant's request for advanced sick leave. In addition, the Commission upheld the FAD's order for the Agency to pay proven compensatory damages and attorney's fees; consider disciplining the responsible management officials; provide training to the responsible management officials; and to post a notice.

Cramer, (Haydee A) v. DHS (FEMA), 0120132668 (01/19/2016) – Complainant was an Attorney in the Agency's Office of Chief Counsel. She filed an EEO complaint alleging discrimination on the basis of disability (knee/difficulty walking) when her medical information was impermissibly disclosed, and when her request for reasonable accommodation was denied. Complainant later amended her complaint to add the basis of reprisal when she learned that, during a Department of Defense (DOD) security investigation into her background, someone at the Agency raised a false allegation about her writing skills.

Complainant sent her first-level supervisor (S1) an email indicating that she would be taking leave on May 7, 2012, to see an orthopedic surgeon to discuss knee surgery. Upon receiving the email, S1 forwarded the information to two Deputy Associate Chief Counsels. S1 wanted them to be aware of Complainant's absence as it might affect their assignment or processing of work during the day on which Complainant was unavailable. The appellate decision found that the Agency had violated Complainant's medical confidentiality when S1 communicated the reason for Complainant's use of sick leave. S1 could have informed D1 and D2 of Complainant's unavailability without revealing information regarding Complainant's medical condition or surgical needs. There was no indication that Complainant's medical condition restricted her work or duties, and therefore no need for the Deputy Associate Chief Counsels to be informed of Complainant's condition, only that Complainant would be absent from work on a particular day. The decision concluded that the Agency violated the Rehabilitation Act when S1 revealed Complainant's medical information regarding her need for surgery to unauthorized persons and when it failed to collect and maintain such information in separate and appropriate medical files.

The decision also concluded that Complainant had not shown that she had been denied a reasonable accommodation when D1 requested that Complainant come to his office to discuss a matter which Complainant was assigned to litigate, and Complainant requested that the meeting be moved to her office due to an intermittent knee condition that made it difficult to walk. D1 responded that he was too busy and that Complainant needed to come to him. The decision found that Complainant failed to show that she was substantially limited in walking. Even had she established that D1 regarded her as disabled, that would not have entitled her to a reasonable accommodation.

Finally, Complainant alleged discrimination on the basis of reprisal when she was informed during a DOD security investigation into her background (for a position which she had accepted with the Department of the Air Force) that someone told the DOD investigator that Complainant left her position at the Agency because of her "poor writing skills." The appellate decision affirmed the Agency's dismissal of this claim for failure to state a claim.

The decision ordered the Agency to maintain Complainant's medical information in separate files, conduct a supplemental investigation into her entitlement to compensatory damages, and provide training on the Rehabilitation Act and medical confidentiality.

Porter (Edgardo D) v. USDA, 0120131723 (01/15/2016) – Complainant has a diagnosis of schizophrenia and applied for three positions with the Agency under the Schedule A Hiring Authority. Complainant was found eligible for the positions, and his name was placed on the Special Hiring Authority selection certificate, but he was not selected for any of the three positions. Complainant filed a formal complaint in April 2007 and the Agency initiated an investigation, but it was not completed until 2010.

The Agency issued a final decision finding that Complainant was subjected to age and disability discrimination because the Agency's reasons for not selecting Complainant were not credible. The Agency directed Complainant to submit a Claim for Damages, placed him back into the Loan Specialist position and paid him back pay and benefits. The Agency determined that the back pay period should commence on September 8, 2009, and continue until Complainant was reinstated.

In his Claim for Damages, Complainant requested additional monies for back pay or past pecuniary damages from March 2007 until March 2011, additional leave, student loan repayment, lost retirement benefits and non-pecuniary damages. In its final decision on damages, the Agency denied Complainant's request for any additional back pay from 2007 until September 8, 2009, stating that only two years of back pay from the filing

of the complaint were permitted. The Agency also noted that Complainant had been employed since September 8, 2009 and thus was only owed the difference in salary between what he earned and what his federal pay should have been. The Agency denied any losses related to the loan repayment, lost retirement, and lost Thrift Savings Plan (TSP) funds, but did agree to restore Complainant's accrued leave. Finally, the Agency awarded Complainant $10,000.00 in non-pecuniary compensatory damages.

On appeal, Complainant maintained that he was not placed into a promotional eligible position, did not receive the appropriate amount of back pay, and requested that his creditable service date be reset to 2007.

In its decision, OFO determined that the Agency failed to provide Complainant with "make whole" relief because it failed to pay him back pay from the discriminatory event, the first of which occurred on January 17, 2007. Instead, the Agency calculated the start of the back pay period as September 8, 2009, which was the day Complainant was hired by another employer and mitigated his damages. The Agency provided varying and confusing reasons for using September 8, 2009 as the start date of Complainant's back pay period. OFO also determined that complaint was denied retroactive benefits such as TSP, retirement and leave. OFO also agreed that Complainant's creditable service date should be recalculated and that he be provided with additional money for adverse tax consequences from his lump sum back pay award. As for compensatory damages, OFO found the Agency's award of $10,000.00 was not sufficient and ordered that Complainant be awarded $30,000.00 for an increase in his paranoia, depression, and inability to perform life's daily tasks. OFO also ordered a supplemental investigation be conducted to determine whether Complainant was placed into a "substantially equivalent position. The OFO decision also awarded other remedial relief.

Tostige (Arnoldo P) v. USPS, 0120123216 (01/08/2016) – Complainant, who has hearing loss and Meniere's disease which affect his vestibular functioning, stated that his hearing aid is useless when he is exposed to loud noises, such as the noise in the PDC. Furthermore, Complainant further states that, as a result of the loud noise, he has serious vertigo and hearing loss. Complainant submitted a medical note informing his supervisor that Complainant "would be better suited" in a low noise environment. The Agency took no action to relocate Complainant. Complainant also alleged that his medical documentation was left out in the open and when he was placed on AWOL.

Complainant filed a complaint and initially requested a hearing, but the AJ cancelled the hearing due to Complainant's conduct during discovery. Specifically, the record revealed that video depositions of at least four management officials were uploaded onto the "YouTube" website with the username "us_postal service." Through his then attorney, Complainant neither admitted nor denied uploading the videos. The AJ ordered that Complainant remove the video depositions from YouTube, and provide written confirmation that he had done so. When Complainant failed to respond, the AJ cancelled the hearing and the Agency subsequently issued a final decision finding no discrimination.

On appeal, OFO found the AJ properly sanctioned Complainant by dismissing his complaint from the hearing process because Complainant failed to abide by the AJ's Order. On appeal, Complainant also raised a claim of dissatisfaction with the EEO process. Specifically, he claimed that he was threatened by his Senior Manager when he was sent a letter ordering him to comply with the AJ's order to remove the videos. However, OFO did not find the letter harassing or threatening.

With respect to the substantive claims, OFO fund no dispute that Complainant was a qualified individual with a disability. OFO determined that Complainant was mistakenly placed in an AWOL status, but the error was corrected by the Agency. OFO further found that Complainant's reasonable accommodation request was not acted upon for months, and the undisputed evidence revealed that management officials erroneously believed Complainant was required to present his request for accommodation only to the District Reasonable Accommodation Committee. OFO also found that the Agency did not maintain Complainant's confidential medical information in a separate medical file, as it is required to do. As relief, OFO ordered that Complainant be provided a reasonable accommodation, and that the Agency ensure confidential medical documentation is kept in a separate medical file. The Agency was also ordered to conduct a supplemental investigation into Complainant's entitlement to compensatory damages and other relief.

Smith (Grant A), Herbin (Val L) v. USDA, 0120132145 and 0120132146 (01/08/2016). – Both Complainants Smith (Complainant 1) and Herbin (Complainant 2) filed complaints in which they alleged that they were subjected to unlawful discrimination and harassment on the bases of race/color (African-American/black), age (over 40 years old), sex (male), and in reprisal for prior EEO activity when they were not promoted to the GS-13 level. Additionally, Complainant 2 claimed that he was subjected to reprisal when the Regional Inspector General (RIG) referred him to the Office of Compliance in August 2010.

After a hearing, an EEOC AJ found that Complainants were not promoted because of race and sex discrimination, and Complainant 2 was referred by the RIG to the Office of Compliance because of retaliation. However, the AJ also found that Complainants were not subject to unlawful harassment.

The AJ subsequently conducted a hearing on damages. Complainants claimed $122,294.75 in attorney's fees. After this hearing, the AJ ordered the Agency to pay Complainants a combined total of $105,000 in attorney's fees and $109.33 in costs. The AJ also ordered the Agency to retroactively promote both Complainants to GS-13 effective July 10, 2008, and provide them back pay with interest and step increases. Additionally, the AJ ordered the Agency to pay Complainant 1 $65,000 in non-pecuniary compensatory damages and out of pocket expenses, and to pay Complainant 2 $50,000 in non-pecuniary compensatory damages and out-of-pocket expenses. On April 1, 2013, the Agency issued a final order fully implementing the AJ's decisions.

On appeal, Complainants maintained that they were only appealing the AJ's award of attorney's fees, and the AJ's finding that Complainant 1 was not subjected to harassment. In its appellate decision, the Commission found that the AJ's finding on harassment was supported by substantial evidence because the alleged actions were not severe or pervasive enough to create a hostile work environment. The Commission further found that the AJ erred as a matter of law when he applied the hourly attorney's rate that prevailed at the time legal services were provided, instead of the $355 per hour rate that prevailed at the time Complainants submitted their fee petitions to the AJ. The Commission further noted that Complainants conceded that all travel charges should be compensated at half the attorney's rate; therefore, Complainants' attorney should be compensated for travel at the "half rate," or $177.50 per hour. Consequently, the Commission reduced Complainant's request for attorney's fees by $8,342.50 because travel charges were not properly calculated at the "half rate" of $177.50 per hour. Finally, the Commission found that the AJ's finding that the attorney's fees award should be further reduced because some of the charges were duplicative or excessive was not supported by substantial record evidence, especially in light of the complexity of the case, number of witnesses, and the fact that there were two complainants. After reducing Complainants' travel charges to reflect the correct hourly rate, the Commission concluded that Complainants are entitled to $113,952.25 in attorney's fees and $109.33 in costs.

Hollingsworth (Faustino M) v. USPS, 0120160319 (02/25/2016) – Complainant filed an EEO complaint alleging that the Agency subjected him to discrimination on the basis of disability (back) and reprisal when, in August 2014, he was denied a reasonable accommodation. Complainant indicated that from March 2014, he was permitted by his supervisor (Supervisor) to shift his computer on his desk from the "standard" position into a position that lessened his back pain. When his manager (Manager) saw him on August 28, 2014, she ordered him to return his computer to the "standard" position. The matter was forwarded to the District Reasonable Accommodation Committee (DRAC) which closed the request when Complainant did not provide supporting documentation for his request to shift his computer on his desk. The Agency issued a final decision finding that Complainant failed to provide medical documentation as requested. Therefore, the Agency concluded that it did not violate the Rehabilitation Act.

The Agency found that Complainant was a qualified individual with a disability. The decision noted that the Supervisor had permitted Complainant to make the adjustment to the computer as a reasonable accommodation. This de minimus accommodation was provided to Complainant from March 11, 2014 to August 28, 2014. On August 28, 2014, the Manager entered the workspace and saw Complainant. The record indicated that the Manager was also aware of Complainant's back condition. Without discussing the matter with Complainant, the Manager determined that Complainant had taken it upon himself to move the equipment without permission from management. The decision found that the record did not support the Manger's actions. Complainant had been provided with a reasonable accommodation as authorized by the

Supervisor. The accommodation was merely a shift of a monitor on the desk. When the Manager saw Complainant's computer at an angle, rather than asking him about the situation, she contacted a union representative so that she can order him to move the computer back to "standard" position. The Manager alleged it was a safety concern. Despite being aware of his condition, she did not consider the fact that it was a safety issue for Complainant to have the computer in the "standard" position due to his back condition. When the Manager was informed that the shift of the computer was allowed by the Supervisor, she required Complainant to obtain further authorization for his requested accommodation by going before the DRAC. The decision found no support for the Manager's actions. As such, it concluded that the Manager violated the Rehabilitation Act.

The decision remanded the matter to the Agency for a determination on compensatory damages. The decision ordered that the Agency to provide training on reasonable accommodation requests for the Manager and to consider disciplining the Manager.

Deberry (Elvera S) v. USPS, 0120141452 (02/23/2016) – Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of race, sex, color, and age. Upon completion of an investigation, Complainant requested a hearing before an EEOC AJ. The AJ found that Complainant was subjected to unlawful sexual harassment when a male co-worker brushed against her body on two occasions. The AJ further found that the Agency failed to take effective action to end the harassment.

The AJ ordered the Agency to take the following actions: pay $12,000.000 in non-pecuniary compensatory damages, pay Complainant $4.01 in pecuniary damages, provide 8 hours of training to responsible management officials, consider disciplining the harasser, and post a notice at the facility regarding the finding. The Agency implemented the AJ's decision.

On appeal, Complainant requested $300,000 in non-pecuniary compensatory damages. OFO found that there is substantial evidence to support the AJ's award of $12,000 in non-pecuniary compensatory damages. Complainant testified that she was taking medication for depression and anxiety and that she was under the care of a therapist. OFO found that this award was consistent with its decisions in similar cases. Based on the foregoing, OFO affirmed the Agency's final order implementing the AJ's decision.

Baker (Glynda S) v. DOJ (BOP), 0120133361 (02/23/2016) **[Repeated under Priority 5 above]** – Complainant was born with a cleft palate and lip, which affects the manner in which she speaks. Complainant worked as a Unit Manager, GS-12, at the Agency's Federal Correctional Center in Tucson, Arizona. In December 2011, Complainant filed an EEO complaint in which she alleged that she was subjected to harassment and disparate treatment on the bases of sex, disability (facial anomaly), age, and in reprisal for previous EEO activity. One of Complainant's claims included the allegation that someone placed a picture of a five-year old boy with a cleft palate and lip on her office door. Complainant stated that she immediately reported this incident to management, and she believed that the Warden posted the picture. However, the Agency's investigation never identified the person who posted the picture.

After the complaint was investigated, Complainant requested on December 1, 2012, that the Agency issue a final decision. The case was received by the Agency's adjudication office on December 5, 2012, for a final decision. On December 7, 2012, the Agency issued Complainant a letter that stated that her case was among a number of cases being reviewed, and a final decision would be issued "as soon as possible." On September 13, 2013, Complainant submitted a motion to the Commission to sanction the Agency for failing to timely issue a final decision. On February 10, 2014, the Agency issued a final decision that found that Complainant did not prove that she was subjected to unlawful discrimination or harassment. On February 25, 2014, Complainant appealed the final decision to the Commission.

In an appellate decision, the Commission cited EEO Regulation 29 C.F.R. § 1614.110(b), which provides that an agency shall issue its final decision within 60 days of receiving notification that a complainant has requested an immediate decision from the agency. The Commission noted that in this case, Complainant requested a final agency decision on December 1, 2012, and the Agency acknowledged that it received Complainant's request by December 5, 2012, which meant that it was required to issue a final decision by February 4, 2013.

Nevertheless, the Agency did not issue its final decision until February 10, 2014, or 432 days after the Agency received Complainant's request, which was 371 days past the regulatory time frame to do so.

The Commission noted that the Agency did not provide any explanation for its extraordinary delay in issuing the final decision, despite receiving notice of Complainant's motion for sanctions. The Commission explained that it has exercised its inherent authority to enforce its regulations by ordering sanctions in response to violations, and the Agency's conduct in this case warranted sanctions. In considering the appropriate sanction for this case, the Commission noted that Complainant was stranded in a "procedural no man's land" wherein she had no recourse within the administrative process until the Agency issued a final decision. The Commission further noted that its regulations require action in a timely manner throughout the EEO process, and the Commission had previously warned the Agency/sub-agency that its lengthy delay in issuing final decisions was a serious matter. Therefore, the Commission determined that default judgment in favor of Complainant was warranted as a sanction in this case.

With regard to the appropriate remedy, the Commission found that Complainant only established a prima facie case of discrimination or harassment with regard to her claim that she was harassed on the basis of disability because of the inappropriate photograph posted on her door. The Commission found that Complainant is an individual with a disability because she is substantially limited in speaking; she was qualified because she successfully performed the essential functions of her position; someone posted a picture of a child with a cleft palate and lip on her door; she was singled out for ridicule related to her medical condition by a picture placed in a prominent place; and she was so upset by the ridicule that she had to take leave. The Commission noted that photographs can be particularly effective at intimidating and ridiculing employees on a protected basis because of the potency of the visual medium, and therefore, the conduct in this case was serve enough to create a hostile work environment. The Commission concluded that there was enough evidence to entitle Complainant to relief because there is a prima facie case of disability harassment in this case.

In order to remedy the harassment, the Commission ordered the Agency to provide Complainant with proven compensatory damages; to provide at least eight hours of in-person EEO training to all management and supervisory officials at its Federal Correctional Center in Tucson, Arizona; and to post a notice of discrimination at the Agency's Tucson facility.

Hou (Genny L) v. DOD (DCAA), 0120122795 (02/23/2016) – Complainant, an Auditor, filed an EEO complaint on May 17, 2011, alleging that the Agency discriminated against her on the bases of race (Asian) and national origin (Taiwan) when, from January 2011 through February 28, 2011, her immediate supervisor notified her of a possible language barrier that she was having with a contractor. Specifically, she alleged that she was instructed by her supervisor to go through either her immediate supervisor or a senior auditor for all future information requests from the contractor; she received an e-mail from her immediate supervisor informing her a second time that all interface and document requests with the contractor were to be made by either her supervisor or a senior auditor; and she received another e-mail message from her immediate supervisor informing her that she had a language barrier with the contractor and that she was prohibited from interfacing with the contractor. After the complaint was investigated, the Agency issued a final decision that found that Complainant did not prove that she was subjected to unlawful discrimination on the basis of race or national origin. Complainant appealed the final decision to the Commission.

In the appellate decision, the Commission noted that Complainant's supervisor stated in an e-mail that the contractor claimed not to understand what Complainant was requesting and that this "may or may not have been true." We found that the supervisor's statements established that the Agency took the actions at issue because of Complainant's linguistic characteristics, and constituted direct evidence that Complainant's national origin motivated the Agency's actions. We found that the Agency imposed the restrictions on Complainant without taking any steps to determine whether Complainant's communications with the contractor in fact were not understandable. The evidence of record did not establish that there existed a "language barrier" that justified the Agency's actions. The Agency did not identify any specific data requests or other communications that the contractor claimed it could not understand. Complainant's supervisor did not identify any specific problems with Complainant's language skills and did not claim that she could not understand Complainant. There was no evidence that anyone could not understand Complainant. Assuming that Complainant's

probationary status/experience level was a factor in the Agency's decision to require her to communicate with the contractor through a supervisor or senior auditor, we found that the Agency had not shown that it would have taken the same action absent consideration of the discriminatory factor. In order to remedy the discrimination, the Commission ordered the Agency to provide Complainant with proven compensatory damages; to provide 8 hours of EEO training; and to post a notice of discrimination.

Kobey (Harvey G) v. DOI, 0120132052, 0120150844 (02/04/2016)**[Repeated under Priority 3 above]** – Complainant worked as an Engineering Technician, GS-09, with the Agency's Bureau of Reclamation in Billings, Montana. Complainant's neurologist diagnosed him with Myasthenia Gravis, a chronic neuromuscular disease that has debilitating symptoms, causing double vision, slurred speech, stumbling, difficulty chewing and swallowing, and which causes periods of total incapacitation. Complainant's Engineering Technician position, in addition to working in an office environment, required travel almost every working day/night to dams and power plants, among other locations, to conduct on-site investigations.

Complainant's Myasthenia Gravis disease worsened, which impacted his ability to travel and meet the physical demands of the on-site investigations. As result, Complainant requested reasonable accommodation in the form of telework and/or less travel, among other accommodations. However, Complainant's first-level supervisor (S1) felt that Complainant could not perform the essential functions of his position in Billings, Montana with or without accommodation. Thereafter, S1 offered Complainant the choice of two different Engineering Technician positions for reassignment. Complainant declined the reassignments because they were hours outside of the commuting area with regard to his home, and the Agency did not offer relocation costs. As a result, because Complainant declined the reassignment offers, the Agency terminated him from employment due to medical reasons.

Complainant filed two separate EEO complaints. The Agency thereafter issued final decisions, finding that Complainant did not establish that he was subjected to discrimination as alleged. In the consolidated appeal, we reversed the Agency, finding that Complainant established that he was denied reasonable accommodation. In finding so, we noted that the Agency improperly terminated the interactive process with Complainant when it removed him from employment, which resulted in its failure to provide him with accommodation. We found that had the Agency not given Complainant the ultimatum to accept one of the reassignments, and instead had continued with the interactive process in good faith, it would have clearly found an accommodation suitable to Complainant's restrictions within his geographical location. We ordered the Agency to reinstate Complainant, provide telework, back pay, and issue compensatory damages to him for its failure to provide reasonable accommodation.

Gregerson (Bok T) v. SSA, 0720150014 (03/30/2016) – Complainant filed a formal EEO complaint on October 10, 2011 alleging that she was discriminated against based on reprisal (prior protected EEO activity) when she was not selected for the Claims Representative positions and when she was subject to harassment by her supervisors. Complainant requested a hearing before an EEOC AJ and a hearing was conducted from May 23-25, 2014. Among other things, the AJ found that Complainant was discriminated against based on reprisal when she was not selected for any of the Claims Representative positions, and ordered a number of remedies. The AJ also instructed Complainant to submit a petition for attorney's fees and costs. On October 24, 2014, the AJ awarded attorneys' fees in the amount of $189,785 and costs in the amount of $4,792.22.

The Agency issued a Final Order partially rejecting the AJ's decision and filed an appeal on December 4, 2014. In its Final Order, the Agency decided that it would not fully implement the AJ's decision with respect to the award of the attorneys' fees and costs. On appeal, the Agency argued that the AJ should not have awarded attorneys' fees for work on Complainant's dismissed hostile work environment claim because she did not prevail on that claim. Additionally, the Agency argued that the AJ erred in awarding an hourly rate of $450 to one of Complainant's attorneys and when awarding Complainant costs based only on an itemized list.

The Commission affirmed the AJ's award of attorney's fees in the amount of $189,785 and costs because the AJ did not make a mistake as a matter of law or abuse her discretion and because Complainant's

dismissed retaliatory hostile work environment claim was not truly fractionable from her non-selection claim. Additionally, the Commission found that the AJ did not make a mistake as a matter of law or abuse her discretion when awarding an hourly rate of $450 for one of Complainant's attorneys and that Complainant's costs were compensable and reasonable.

Boyack, (Melani F) v. DHS (TSA), 0720150027 (03/15/2016) – Complainant worked as a Transportation Security Officer (TSO or Screener) at the Agency's International Airport facility in Salt Lake City, Utah. Pursuant to its authority under the Aviation and Transportation Security Act of 2001 (ATSA), the Agency developed a screener recertification process and tests for evaluating screen proficiency. One test, referred to as the "OMA," was provided to TSOs annually for recertification. The OMA test asks true/false and multiple choice questions about baggage-screening scenarios. Complainant took her first OMA exam on July 3, 2011, and failed. She took the exam a second time and failed again. Prior to the third OMA exam, on July 17, 2011, Complainant informed her supervisor ("Supervisor") that she wanted someone to read the questions on the OMA exam to her. The Supervisor contacted the Training Manager to request a reader for Complainant. The Training Manager denied the request citing Agency policy. The Supervisor informed Complainant of the denial that same day and Complainant asked for reconsideration, indicating her request was motivated because she had dyslexia. The request for the reader was denied again. The Training Manager sent the Supervisor an email dated July 18, 2011, stating that she had received a similar reader request in the past and that the Agency "has indicated that reading English is a requirement of the TSO job function, thus she must read the questions herself." As such, Complainant's request for a reader was denied. On July 18, 2011, Complainant took the exam a third time and failed again. She alleged discrimination, among other issues, on the basis of disability when, on July 18, 2011, Complainant's requested accommodation – to have someone read the test questions to her – was denied. The EEOC AJ held a hearing on the matter. Following the hearing, the AJ determined that the Agency violated the Rehabilitation Act when it denied Complainant a reader for the OMA test.

This appeal followed. The decision determined that the EEOC had jurisdiction over the issue. The decision held that Complainant did not challenge an ATSA-mandated standard and requested an accommodation in the administration of the exam. As such, the ATSA did not preempt Complainant's reasonable accommodation claim under the Rehabilitation Act and review of this matter is within the Commission's jurisdiction. The decision then found that Complainant is an individual with a disability based on her dyslexia and that she was qualified to perform the Screener position. The decision held that the Agency failed to provide Complainant with a reasonable accommodation.

The decision affirmed the AJ's award of attorney's fees and costs as well as $5,000 in non-pecuniary damages. The decision required the Agency to provide training to the Supervisor and the Training Manager regarding their obligations in providing reasonable accommodation under the Rehabilitation Act and to consider taking disciplinary action against the Supervisor and the Training Manager.

Martin (Meghann M) v. SSA, 0720150028 (03/15/2016) – This matter was before us from the Agency's appeal of the EEOC Administrative Judge's decision which found that the Agency discriminated against Complainant on the basis of sex and reprisal. The Agency argued that the Commission should affirm its rejection of the Administrative Judge's liability decision and order of relief. Complainant filed a cross-appeal to sustain the AJ's decision on liability, and Complainant asked for additional relief. On appeal, the Agency argued that the AJ erred in finding that Complainant was similarly situated to her male comparator, erred by substituting his judgment for that of the Agency, and asserted that the Agency had legitimate reasons for demoting Complainant.

A hearing was held. The record at hearing showed that Complainant worked as the Director of the Division of Retirement, Survivors, Disability Insurance Statistics and Analysis, in a GS-15 level position. She had 30 years of service as a manager. Following a single interaction with a male co-worker, the Agency detailed Complainant out of her managerial position. After Complainant contacted an EEO counselor to challenge the reassignment, the Agency initiated an investigation of Complainant's "management style" and replaced her with another GS-14 male employee who had worked under Complainant's supervision. The AJ

concluded that the "heart of this case is the disparate treatment claim" with regard to the 2008 demotion of Complainant and the Agency's investigation of her after Complainant contacted an EEO Counselor. The AJ found that Complainant had been unlawfully forced to leave her managerial position, while the Agency took no action against the male coworker, who had exhibited inappropriate speech and conduct toward Complainant. The AJ ordered the Agency to reinstate Complainant and awarded Complainant $75,000 in non-pecuniary damages. OFO reversed the Agency's decision rejecting the AJ decision and affirmed the AJ's decision in its entirety, reasoning that the preponderance of the evidence supported the AJ's decisions on liability and relief. We remanded the matter to the Agency for the remedial relief.

Bonnett (Buster D.) v. USDA, 0120141171 (03/11/ 2016) – Complainant filed an appeal from an Agency decision finding no discrimination. Complainant worked as a Landscape Architect and alleged that he was discriminated against on the bases of disability and retaliation when his confidential medical information was disclosed to another employee. OFO affirmed the finding of no retaliation and found a per se violation of the Rehabilitation Act. OFO found that an Employee Relations Specialist sent information about the proposed discharge of Complainant to a union representative. That union representative, although representing Complainant in other matters, did not represent Complainant in the proposed discharge matter. Among the materials sent to the union representative was a diagnosis of Complainant's medical condition. OFO found this to be a per se violation of the requirement to keep medical information confidential. In relief, OFO ordered the Agency to: consider whether Complainant should receive compensatory damages; provide EEO training to responsible Agency officials; pay attorney's fees; and post a notice of the finding of discrimination.

O'Reilly (Bryan T) v. DHS (TSA), 0120132110 (03/18/2016) – Complainant, a Behavior Detection Officer at Chicago O'Hare Airport, alleged that his supervisor failed to select him for a promotion, and subjected him to a hostile work environment because of his age and national origin. For example, Complainant alleged that his supervisor (S1) referred to him as "that old guy," and asked him "can you find your way there?" or "do you remember that?" Complainant further alleged that S1's comments increased after a complaint was made by a co-worker, and that S1 continued to refer to Complainant and say, "was he able to stay awake," "did he find the checkpoint," "you're working with the old guy," "help the old guy," "the old Irish man" and other comments similar in nature. Although Complainant's supervisor denied making these and other comments, the preponderance of the evidence in the record supported Complainant's testimony. Several individuals provided affidavits for the record corroborated that S1 made derogatory statements about Complainant's age and national origin from 2007-2009, with some frequency. Witnesses stated these comments continued approximately "once or twice weekly," and "almost daily." Accordingly, OFO found Complainant was subjected to a hostile work environment based on his age and national origin. Further, OFO found the Agency failed to establish its affirmative defense, as the evidence revealed Complainant repeatedly contacted an EEO Counselor in order to complain about the harassment, but the Agency did not respond to his request for assistance. Accordingly, OFO found the Agency failed to exercise reasonable care to prevent and correct the harassing behavior, and was liable for S1's harassment.

OFO also found the Agency's reasons for not selecting Complainant for Expert behavior Detection Officer positions were limited, vague and included subjective reasoning. Accordingly, OFO found Complainant established those reasons were a pretext for discrimination on the bases of his age and national origin. Ultimately, we found the Agency's failure to articulate specific reasons for Complainant's nonselection, coupled by the pervasive and offensive name calling which existed at this facility proved more likely than not that Complainant subjected to discrimination on the bases of his age and national origin when he was not selected for either position.

OFO ordered the agency to retroactively promote Complainant, pay him back pay and all benefits, conduct an investigation into Complainant's entitlement to compensatory damages and other remedial relief including attorney's fees.

Criss (Daniell F) v. State, 0120140403 (03/18/2016) – Complainant, a Management Officer at the Agency's Embassy in Freetown, Sierra Leone, filed a complaint claiming discrimination when she was subjected to a hostile work environment. The Agency accepted the complaint for investigation. At the conclusion thereof, Complainant requested a hearing. A hearing was held and the AJ assigned to the case issued a decision finding that Complainant had not established her claim of harassment, but also found that the Agency impermissibly discussed Complainant's EEO activity.

The AJ observed that an Agency Information Management Specialist testified that the Charge d'Affaires at the Embassy in Sierra Leone commented to him that Complainant filed an EEO complaint against him and that he was disturbed by it. The AJ stated that this testimony supported a prima facie violation of the anti-reprisal law by the Charge d'Affaires when he discussed Complainant's EEO filing in view of there being no business purpose for doing so and that the Information Management Specialist was Complainant's subordinate. The AJ further stated that if the Charge d'Affaires is an employee of the Agency, he should receive training on the responsibility to protect the confidentiality of a subordinate's EEO activity against unnecessary disclosure. The Agency subsequently decided to fully implement the AJ's decision but stated it would not take any steps to ensure that the Charge d'Affaires received training because he is no longer an Agency employee.

Upon review of the appeal, this decision affirmed that no hostile work environment existed and that reprisal had occurred based on the Charge d'Affaires' remark. This decision ordered the Agency to post a notice at its Freetown, Sierra Leone Embassy stating that reprisal had occurred there. Training was not ordered because the Charge d'Affaires responsible for the breach of confidentiality is no longer employed by the Agency.

Gary (Miles W) v. NGB, 0720120030 (03/22/2016) **[Repeated under Priority 5 above]** – Complainant worked as a dual-status technician for the Wisconsin National Guard in Wisconsin Rapids, Wisconsin. In his federal civilian position Complainant worked as a Surface Maintenance Repair Technician, WG-8, in the Field Maintenance Shop.

On September 11, 2008, after seven months of employment, Complainant's supervisor gave him a "fully successful" performance appraisal and told him he was doing a good job and had no unacceptable repairs. Complainant alleged that beginning in October 2008, Complainant's supervisor's son-in-law made bullying sexual comments about Complainant, even after Complainant told him to stop. Complainant reported the behavior to his supervisor. Subsequently, Complainant contacted an EEO Counselor. When the supervisor learned that Complainant contacted an EEO Counselor, he told the EEO Counselor that he was upset that Complainant went outside the chain of command. When Complainant returned to the shop, his supervisor called him into his office to talk about Complainant filing an EEO complaint. The supervisor raised his voice and threatened that if the investigation showed that Complainant lied about anything he would be terminated. Other supervisory officials told Complainant that the supervisor was angry that he went "behind his back" to the EEO Counselor, and that he was in danger of losing his job. On January 5, 2009, the supervisor terminated Complainant for "failure to follow directives and shop procedures."

Complainant filed a complaint raising these allegations. After investigation, Complainant requested an administrative hearing. After the hearing, the EEOC AJ issued a decision on the merits finding that Complainant established that he was terminated from his position in retaliation for having raised an allegation of sexual harassment with the EEO Counselor. After the liability decision was issued, the Agency filed a motion to dismiss the matter for lack of jurisdiction due to Complainant's dual status. The Agency appealed the decision to the Commission, which affirmed the AJ's ruling, finding that although the Agency raised the jurisdictional issue in an untimely manner, the Commission found, citing Kori S. v. National Guard Bureau, EEOC Petition No. 0420140014 (July 2, 2015), that each National Guard dual-status technician complaint must be analyzed on a case-by-case basis to determine whether the Commission has jurisdiction. Analyzing the facts of the present case, the Decision found that the AJ correctly found that the circumstances of the Agency's violation occurred when Complainant was in his civilian capacity and that, therefore, the case was within the Commission's jurisdictional authority. Therefore, the decision upheld the AJ's discrimination finding and the relief ordered, including back pay,

correction of personnel records, training, notice posting and the consideration of disciplinary action against the responsible management official.

Gibbs (Porter H) v. DHS, 0720140018 (03/11/2016) – Complainant, a Lead Transportation Security Officer (LTSO) at the McCarran International Airport in Clark County (Las Vegas), Nevada, filed an EEO complaint in which he alleged that the Agency discriminated against him on the basis of disability when it terminated him on July 23, 2009. After a hearing, an AJ found that the Agency failed to provide Complainant with a reasonable accommodation, which resulted in his termination from the Agency. The AJ also ordered the Agency to provide Complainant with several remedies, including an offer to reinstate him into a light-duty position (Checkpoint Ticket and Document Checker or Exit Lane Monitor; Checked Baggage Office Administrative Assistant; or a substantially equivalent light-duty position), and payment of back pay and benefits, compensatory damages, and attorney's fees. The AJ also ordered the Agency to cease terminating employees instead of providing them with reasonable accommodations; to provide the Agency's Director of Worker's Compensation Programs with at least two hours of Rehabilitation Act training; and to inform all managers and supervisors at the Las Vegas airport that they can be disciplined for terminating employees based on disability.

The Agency issued its final order rejecting the AJ's decision and filed its appeal on January 17, 2014, but did not simultaneously offer reinstatement to a position as ordered by the AJ. On appeal, the Agency requested that the Commission affirm its rejection of an AJ's finding that it failed to provide Complainant with a reasonable accommodation for a disability, which culminated in Complainant's termination from the Agency. The Agency also appealed the AJ's ordered remedies.

On February 18, 2014, Complainant submitted a motion to the Commission to dismiss the Agency's appeal because the Agency did not comply with 29 C.F.R. § 1614.505 by offering him interim placement into a position at the same time it appealed the AJ's decision. EEO Regulation 29 C.F.R. § 1614.505(b) provides that if the agency files an appeal and has not provided required interim relief, the complainant may request dismissal of the agency's appeal, as long as the request is filed with the Commission within 25 days of the date of service of the agency's appeal.

The Commission dismissed the Agency's appeal and noted that the Agency did not present Complainant with an offer of reinstatement until February 28, 2014, after it filed its appeal. The Commission further found that Complainant's attorney timely filed his motion to dismiss on the 25th day after receiving the agency's final order. Additionally, the Commission rejected the Agency's argument that, because it eventually offered Complainant interim reinstatement, its failure to comply should be excused as mere oversight and lack of communication between Agency offices. Consequently, the Commission upheld the AJ's decision and ordered relief.

Traynham (Hannah C) v. DOJ (BOP), 0720150004 (03/10/2016) – Complainant, a Corrections Officer in the Agency's Bureau of Prisons at the time of her complaint, alleged she was subjected to discriminatory reprisal for prior protected activity when she was issued a proposed suspension and a letter of reprimand for unprofessional conduct and, also, when she was referred for an internal investigation for bringing contraband, i.e., a recording device, into the corrections facility.

Following a three-day hearing, the Administrative Judge (AJ), issued two decisions, one finding discrimination with remedies, and the other awarding attorney's fees and costs. The AJ concluded that Complainant had established a prima facie case of reprisal. Although the AJ found that the Agency had articulated legitimate, nondiscriminatory reasons for its actions, the AJ concluded that Complainant had established that the Agency's reasons were motivated by retaliatory animus. The AJ found that Complainant had provided credible evidence of disparate responses to complaints brought by her concerning treatment received from other employees; credible evidence of disparate disciplinary treatment towards her; and credible evidence of management deviation from standard procedure regarding its investigation of her.

Regarding the procedural issue of timeliness of EEO Counselor contact, we determined that the Agency was estopped from raising timeliness because it had not done so prior to the AJ's finding of discrimination.

We affirmed the AJ's finding of reprisal as being based on substantial evidence. The decision found the Agency could not impose discipline disparately or conduct an investigation with a discriminatory motivation present. We agreed with the training ordered by the AJ as not being overly broad as contested by the Agency.

We reversed the determination of the AJ that Complainant should be awarded a promotion and back pay with interest and benefits. We declined upholding the award of a promotion and back pay as speculative because Complainant had provided no documentary evidence that there were jobs available; that she had applied for the jobs; that she was qualified for the jobs; and that the jobs had promotion potential.

We affirmed the AJ's award of $50,000 in non-pecuniary compensatory damages, $117,045 in attorney's fees and $888.80 in costs.

Jessup (Ervin B) v. USPS, 0720150029 (03/15/2016) – Complainant, a City Carrier, filed an EEO complaint alleging harassment. Following an investigation and hearing, an AJ issued a decision finding that in retaliation for his prior EEO activity, Agency management subjected Complainant to severe harassment. The harassment took the form of the Postmaster falsely accusing Complainant of stalking and later physically assaulting her at a 7-Eleven, and then stalking her again, with connected actions of emergency off-duty status and removal, and the filing of a sworn criminal complaint against in the Arlington County Criminal Courts. The Agency reinstated Complainant about five months later pursuant to an Arbitrator's decision.

After taking testimony and viewing a video of the incident at the 7-Eleven, the EEOC AJ found no stalking or assault occurred, and the accusations and connected actions were motivated by reprisal. The AJ, in relevant part, awarded Complainant $192,500 in nonpecuniary damages and $122,847 in attorney fees and costs. The Agency implemented the AJ's finding of discrimination, but rejected the referenced relief. In opposition to the appeal, Complainant asked that the AJ's award be affirmed. In arguing for a lower award of damages, the Agency contended that the AJ improperly admitted the depositions of Complainant's primary care physician and licensed clinical social worker (LCSW), the discrimination did not cause Complainant's diabetes to be uncontrolled, and the AJ wrongly connected Complainant's later separation with the discrimination.

OFO found that the AJ did not abuse her discretion in admitting the depositions. It conceded that the discrimination was only one factor causing Complainant's diabetes to be uncontrolled, and that the evidence did not show Complainant's later separation was caused by the discrimination – he was still on Agency rolls during the EEOC hearing. But, as described in the decision, Complainant's pain and suffering and damage to his reputation supported the award of $192,500. Among other things, when Complainant was arrested, he was invasively stripped searched and put in a holding cell, and then had repeated hysterical crying spells and feared losing everything while waiting for his criminal hearing – resulting in a finding of not guilty. Further, he was humiliated, his sense of himself was damaged, and he sustained extreme anxiety, despondency, sleeplessness, nightmares, depression, PTSD, and a lessening of control of his diabetes as a result of the discrimination. OFO also summarily affirmed the award of attorney fees.

Lurensky (Latarsha A) v. FERC, 0120123215 & 0120131079 (03/15/2016) **[Repeated under Priority 3 above]** – Complainant works as a GS-15 Trial Attorney at the Agency's Office of Administrative Litigation (OAL) in Washington, D.C. In May 2010, the Agency changed Complainant's duty station from its Headquarters building at 888 First Street, NE, to 1101 First Street, NE.

Complainant has been diagnosed as having the following physical impairments: psoriasis, arthritis, gout, degenerative disc disease (stenosis), cardiomyopathy, congestive heart failure, embolic cerebral vascular accident (CVA/stroke), tachycardia, sensitivity to non-incandescent lighting, allergies, migraine headaches, hypersensitivity to sensory stimuli, Irritable Bowel Syndrome (IBS), compromised immune system, infections (cellulitis), hernia, Sjögren's Syndrome, Baker's Cyst, torn meniscus, fractures, and foot impairments.

Complainant maintains these conditions substantially limit her in the major life activity of walking, and evidence reflects that she sometimes uses a cane.

Complainant filed EEO complaints alleging that she was subjected to discrimination on the basis of disability when the Agency failed to provide disability access for entering and exiting its facilities at its First Street location; blocked the disabled entrance of Complainant's duty station at the First Street location; subjected her to ongoing loud noise, such as hammering and drilling in the First Street location; did not provide her with assistance with packing and transporting her belongings to the new office at First Street; did not provide automatic doors at the garage level where the shuttle van arrives; and required Complainant to work in hearing rooms at HQ that had fluorescent lights that made her ill. The Agency addressed Complainant's complaints in two final decisions. In those decisions, the Agency found that Complainant did not prove that she was denied reasonable accommodations for her disabilities.

In an appellate decision, the Commission found that Complainant was a qualified individual with a disability because she was substantially limited in walking and major bodily functions/systems, and successfully performed the essential functions of her position as reflected in her "fully successful" performance evaluations. The Commission further found that medical documentation from physicians informed the Agency that Complainant had various medical conditions and needed to avoid fluorescent light in hearing rooms because those lights induced headaches and seizure-like episodes. Medical documentation also informed the Agency that Complainant needed to use automatic doors and avoid loud sounds because they can precipitate migraines and allergies, and revealed that Complainant is limited in her range of motion and ability to ambulate because of arthritis and degenerative conditions.

The Commission concluded that that Complainant's considerable difficulty in walking and her mobility impairments made it difficult for her to open the doors in her workplace, and the Agency did not provide Complainant with an effective accommodation when it required her to seek assistance in opening doors from security guards and coworkers because there were many times from 2010 until 2012 when she could not obtain assistance from coworkers and security guards. The Commission determined that Complainant was at the mercy of coworkers and security guards to provide her with access to her workplace, which was unacceptable. The Commission noted that the Agency did not install automatic doors at Complainant's work suite until March 2012, almost two years after she notified the Agency of her difficulty in using non-automatic doors. Additionally, the Agency shuttle arrived at the garage level, but there was no evidence that the Agency ever installed an automatic door at that entrance. The Commission found that Complainant proved that she was denied a reasonable accommodation with respect to this matter.

The Commission also found that Complainant proved that she was denied a reasonable accommodation when it blocked the disabled access door near the lobby with maintenance equipment, which presented a significant hazard or impediment to Complainant because of her walking impairments. The Commission further found that the Agency denied Complainant a reasonable accommodation when it did not assist her with packing and moving her belongings to the new office; did not allow her to telework during a 10-week period of construction on her building; and did not replace the fluorescent bulbs in the hearing room in which Complainant worked with non-fluorescent lighting.

The Agency was reminded that it has a responsibility to make sure that its facilities are accessible. The decision noted that the Agency facility at 1100 First Street NE is all new construction, and that the Agency and the GSA are on notice that Federal government physical facilities must comport with the applicable physical accessibility standards. Complainant was advised that, while the Commission cannot enforce the accessibility standards contained in the ABA, she may wish to separately pursue filing a complaint with the U.S. Access Board for the failure of the Agency to ensure its compliance with these standards.

As to remedy the Commission ordered the Agency to install automatic doors at Complainant's work facility, including the entrances/exits to the garage area and suites; ensure that all accessible entrances and passageways are clear and unobstructed; henceforth grant Complainant assistance with packing and transport related to office moves; henceforth allow Complainant to telework during any prolonged periods of loud office construction noise; and replace fluorescent lighting in hearings rooms in which Complainant works with non-fluorescent lighting. The Commission also ordered the Agency to provide eight hours of in-person EEO training to all Washington, D.C. OAL management officials and supervisors and to pay Complainant proven

compensatory damages. The Agency was further advised that it may wish to consider utilizing a neutral, independent, certified mediator to help resolve Complainant's numerous EEO complaints, and the issues leading to her near-constant complaints. It was also advised to conduct training for Agency staff about the experiences of individuals with disabilities, as well as Agency obligations under the Rehabilitation Act.

Turnage, (Jamey M) v. Navy, 0120130913 (03/15/2016) **[Repeated under Priority 3 above]** – Complainant filed a complaint of discrimination alleging discrimination when he was harassed, subjected to retaliation, and was the victim of an improper medical disclosure. The Agency accepted the complaint for investigation. Complainant requested a hearing. The AJ issued a decision without a hearing finding that Complainant did not establish his harassment or retaliation claims. However, the AJ found that the Agency impermissibly disclosed Complainant's medical information. Pursuant to her finding, the AJ ordered the Agency to train all management officials and supervisors at Complainant's facility as to their responsibilities pursuant to the Rehabilitation Act including reasonable accommodation, medical disclosure, and record-keeping. The Agency fully adopted the AJ's decision.

On appeal, the Commission affirmed the AJ's issuance of a decision without a hearing as proper and affirmed the finding of no discrimination based on race and reprisal. The AJ found discrimination on the basis of disability when the Agency impermissibly disclosed Complainant's medical condition to a co-worker, and when his supervisor made an inquiry into the basis for Complainant's parking permit. The AJ found that it constituted a per se violation of the Rehabilitation Act's prohibition against unnecessary medical inquiry. Neither party challenged the AJ's finding on appeal. However, the Commission found the remedy awarded by the AJ insufficient to make Complainant whole.

After examining Complainant's evidence of non-pecuniary compensatory damages, the Commission ordered the Agency to pay Complainant $5,000 in non-pecuniary damages. The Commission also ordered the Agency to train all management officials and supervisors at Complainant's facility as to their responsibilities under the Rehabilitation Act, if such action had not already been taken pursuant to the AJ's order, and to pay Complainant's attorney's fees if he was represented by a licensed attorney. Finally, the Commission ordered the Agency to post a notice of discrimination at the facility at which Complainant worked and consider taking discipline against the individual found to have improperly disclosed Complainant's medical information.

III. Federal Sector Oversight

- OFO conducted 40 Technical Assistance (TA) Visits with federal agencies, which exceeds the 19 visits in the 1st quarter. These meetings focused on FCP topics including Schedule A (hiring and conversion), reasonable accommodation program, anti-harassment program, barrier analysis of the senior executives, and general non-compliance.
- OFO participated in numerous meetings involving OPM's Diversity and Inclusion Steering Committee and the Hispanic Council on Federal Employment's Subcommittee on Barrier Analysis.
- OFO continued work on its program evaluation into USDA county employees' status to determine whether they should continue to use the federal EEO process where remedies seem unavailable. Staff is coordinating with OLC, OFP and ARP. Staff is looking into the Title VI process as an alternative for these employees (sister agencies -- MSPB, FLRA -- and courts have found these employees are not federal employees).
- OFO continued work on the FY 2012 - FY 2014 Annual Report on the Federal Work Force Part II and began drafting FY 2015 Annual Report Part I.
- OFO published its second quarter FY 2016 EEO Digest, containing recent Commission and federal court decisions. This Digest included an article on determining the status of a complainant, as either a federal employee or contractor as well as notable EEOC decisions issued in FY 2016. OFO staff coordinated with OCLA to issue a national press release, which is featured on the home page of eeoc.gov with a "Big Box" image at the top of the page. Staff also conducted social media outreach on Twitter and GovDelivery.
- OFO continued drafting additional guidance for internal and external stakeholders for several new areas included in the Management Directive (MD)-110 as required by the 29 C.F.R. Section 1614. A Tool Kit for the newly allowed pilot programs was published in 2nd quarter and additional guidance on the newly created Compliance Enforcement initiative will be published in the 3rd quarter of FY 2016.
- OFO staff participated in a program evaluation on HHS and its subcomponents; and assisted with the creation of a new harassment coordinator course for EEOC Training Institute.
- OFO began drafting a new format for the federal page on the external site with the goal of making it more user-friendly for stakeholders and providing additional resources for them. Additionally, OFO continued to provide hearing coordination with OFP.
- OFO developed mock tables based on the Form 462 data. These tables will serve as templates for the profile of federal sector retaliation portion of the retaliation report. These templates were submitted to RED management and feedback is being incorporated.
- OFO staff assisted with development of OFO Quality Control Workgroup's survey and managed survey responses on behalf of the group.
- OFO finalized the data collection strategy, developed the Performance Metrics Workgroup focus group interview schedule, and drafted an informed consent form through a series of meetings and digital discussions.
- WHAAPI: In support of the White House Asian American and Pacific Islander Initiative (WHAAPI), OFO identified and tested several software with the goal of selecting a program that would allow OFO to analyze MD-715 reports and determine which agencies have identified barriers to hiring and promoting Asian American and Pacific Islanders. NVivo Software was the final recommendation. A written demonstration using actual MD-715 data was provided.
- Data Reformat: In support of the OFO-ACT Digital Work Group, OFO provided the workgroup with a list of data and technology needs for the unit.

- OFO staff attended the U.S. Census Webinar entitled "Using American Community Survey (ACS) Estimates and Margins of Error" (4/6/16).
- OFO staff provided data analytics and visualization to the Intake and Case Management Workgroup's Analysis of the Appellate Lifecycle: Docketing to Compliance.
- OFO staff began work on a root cause analysis tool to assist agencies in identifying barriers to equal employment opportunities.
- OFO staff continued to work on a pay equity analytic report, which will focus on parenthood and the gender pay gap.
- OFO staff worked on a crosswalk associating federal agencies with NAICS and Census industry categories.

IV. Outreach & Training

1. Eliminating Barriers in Recruitment and Hiring

- OFO staff presented "Reasonable Accommodation for Managers" training for United States Citizenship and Immigration Services (USCIS) by Webinar.
- EEOC staff provided outreach on "Disability/RA/EEO process" to USDA in Charleston, SC.
- Associate Director, Federal Sector Programs, participated in CAP's 25th Anniversary Symposium in Arlington, VA.
- OFO staff presented on "Reasonable Accommodation" for Defense Equal Opportunity Management Institute (DEOMI) in Ft. Patrick AFB, FL.
- OFO staff provided outreach on "LGBT" to the Census Bureau in Washington D.C.
- OFO provided outreach on "LGBT Inclusion in the Workplace" to Social Security Administration (SSA) in Washington D.C.
- EEOC staff attended "Transgender Issues" for EEO Action Committee Meeting at FAA in Washington D.C.
- OFO staff provided a Q&A session on the "501 NPRM" for Disability Employment Committee for DHS in Washington D.C.
- Assistant Director for TOD conducted "Barrier Analysis" training for Federal Deposit Insurance Corporation (FDIC) in Arlington, VA.
- OFO staff provided Barrier Analysis training to Dept. of Agriculture (USDA) in Riverdale, MD.
- OFO staff provided "Case Update/Gina/Barrier Analysis" for EEO Specialist Course for Defense Equal Opportunity Management Institute (DEOMI) in Ft. Patrick AFB, FL.
- OFO staff conducted MD-715 overview to Federal Aviation Administration (FAA) in Washington D.C.

2. Protecting Immigrant, Migrant and Other Vulnerable Workers

- OFO staff presented "Reasonable Accommodation for Managers" training for United States Citizenship and Immigration Services (USCIS) by webinar.
- EEOC staff provided outreach on "Disability/RA/EEO process" to USDA in Charleston, SC.
- Associate Director, Federal Sector Programs, participated in "Addressing Workplace Harassment" (disabilities) for Job Accommodation Network (JAN), as a webinar.

- Associate Director, Federal Sector Programs, participated in CAP's 25th Anniversary Symposium in Arlington, VA.
- OLC staff presented at OFO "Train the Trainer" NPRM for Persons with Disabilities
- EEOC staff presented on "Reasonable Accommodation" for Defense Equal Opportunity Management Institute (DEOMI) in Ft. Patrick AFB, FL.

3. Addressing Emerging and Developing Issues

- Assistant Director for TOD was keynote speaker for GPO's 2016 National Women's History Month Observance in Washington D.C. "Pay Equity"
- EEOC staff conducted "LGBT & Harassment in the Workplace" training for the National Reconnaissance Office (NRO) in Chantilly, Virginia.
- OFO staff provided outreach on "LGBT" to the Census Bureau in Washington D.C.
- OFO provided outreach on "LGBT Inclusion in the Workplace" to Social Security Administration (SSA) in Washington D.C.
- EEOC staff attended "Transgender Issues" for EEO Action Committee Meeting for FAA in Washington D.C.

4. **Enforcing Equal Pay Laws**

- Assistant Director for TOD was keynote speaker for GPO's 2016 National Women's History Month Observance in Washington D.C. "Pay Equity."

5. Preserving Access to the Legal System

- EEOC staff conducted "Counselor Refresher" training for the National Guard Bureau (NGB) series in New Orleans, Louisiana.
- EEOC staff conducted MD-715 overview to Federal Aviation Administration (FAA) in Washington D.C.
- Assistant Director for TOD participated in the Senior Executive Leadership Equal Opportunity Seminar" for the United States Coast Guard in Ft. Patrick, FL.
- OFO staff provided outreach on "LGBT" to the Census Bureau in Washington D.C.
- OFO provided outreach on "LGBT Inclusion in the Workplace" to Social Security Administration (SSA) in Washington D.C.
- EEOC staff attended "Transgender Issues" for EEO Action Committee Meeting for FAA in Washington D.C.
- OFO staff conducted training on MD-110 via 2 sessions of conference calls to Air Force EEO staff.
- EEOC staff conducted sessions on "Best Practices for Reviewing Reports of Investigations" and an "MD-110 overview" for USDA in Washington D.C.
- OFO staff conducted an update session on MD-110 to to Navy Exchange Service Command (NEXCOM) by teleconference.
- OFO staff presented at "Train the Trainer" on MD:110: What's New?

- OFO staff presented at "Train the Trainer" on EEO Case Updates.
- OLC staff presented at "Train the Trainer" on NPRM for Persons with Disabilities.
- OFO staff presented at "Train the Trainer" on Religious Discrimination and Accommodation.

6. Preventing Harassment through Systemic Enforcement and Targeted Outreach

- OFO and EEOC staff presented 4 half-day sessions on 'Workplace Harassment for Managers" training for Environmental Protection Agency (EPA) series in Atlanta, GA.
- OFO and EEOC staff presented 'Workplace Harassment for Managers" training for Environmental Protection Agency (EPA) series in Puerto Rico.
- EEOC staff presented 4 half-day sessions on 'Workplace Harassment for Managers" training for Environmental Protection Agency (EPA) series in San Francisco, CA.
- OFO and WFO staff presented 2 half-day sessions on 'Workplace Harassment for Managers" training for Environmental Protection Agency (EPA) series in Seattle, WA.
- OFO provided "Workplace Harassment for Managers" training for the Environmental Protection Agency (EPA) series in Cincinnati, OH.
- OFO and EEOC staff provided 3 half-day sessions of "Workplace Harassment for Managers" training for the Environmental Protection Agency (EPA) series in Washington, DC.
- EEOC staff conducted "Workplace Harassment for Managers" training for the Environmental Protection Agency (EPA), as a webinar.
- EEOC staff conducted "EEO Laws" training for the Department of Homeland Security (DHS) in La Palma, California.
- EEOC staff conducted "LGBT & Harassment in the Workplace" training for the National Reconnaissance Office (NRO) in Chantilly, Virginia.
- Associate Director, Federal Sector Programs, participated in "Addressing Workplace Harassment" (disabilities) for Job Accommodation Network (JAN), as a webinar.
- OFO staff conducted outreach on "Sexual Harassment" at the Udall Foundation in Washington D.C.

7. Training/Outreach – General

- During the 2nd quarter of FY 2016, OFO staff finalized an anti-harassment education video for use on EEOC's You Tube Channel.
- OFO staff worked in coordination with Office of Field Programs (OFP) to craft and finalize the FY 2016 EXCEL agenda which includes three pre-conference courses, two specialty tracks and 96 courses for federal and private sector audiences.
- OFO hosted its annual "Train the Trainer" for approximately 60 collateral duty trainers to include both field and headquarter personnel. Topics included Religious accommodation, EEO Case Updates, MD-110 and NPRM for Persons with Disabilities updates, and Enhancing Presentations through the use of video and animation.
- OFO introduced its National Training Course Calendar which includes two new courses: "Unlawful Harassment: an Agency Responsibility" and "Special Emphasis Program Management." Additionally, OFO staff coordinated with OCLA to issue a national press releases, which is featured on the home page of eeoc.gov with a "Big Box" image at the top

of the page (also issued via GovDelivery). Staff also continues daily social media outreach on Twitter to boost registration of individual courses.

- Assistant Director for TOD conducted (Barrier Analysis) training for FDIC in Arlington, Va.
- OFO staff conducted MD-715 overview to Federal Aviation Administration (FAA) in Washington D.C.
- Assistant Director for TOD participated in the "Senior Executive Leadership Equal Opportunity Seminar" for the United States Coast Guard in Ft. Patrick, FL.
- Associate Director, Appellate Review Division, conducted "OFO Overview and Case Updates" for Department of Housing and Urban Development (HUD) in Washington D.C.
- Assistant Director for TOD was keynote speaker for GPO's 2016 National Women's History Month Observance in Washington D.C.
- OFO staff conducted "Case Updates" for Transportation Security Administration (TSA) in Washington D.C.
- EEOC staff presented on "Case Law Updates" and "Best practices Litigating Federal Sector Complaints" for the Veterans Administration (VA) via VTC from Miami, FL.
- Associate Director, Federal Sector Programs, participated in CAP's 25th Anniversary Symposium in Arlington, VA.
- Associate Director, Federal Sector Programs, participated in "Addressing Workplace Harassment" for Job Accommodation Network (JAN), as a webinar.
- EEOC staff conducted sessions on "Best Practices for Reviewing Reports of Investigations" and an "MD-110 overview" for USDA in Washington D.C.
- EEOC staff provided outreach on "LGBT" to the Census Bureau in Washington D.C.
- EEOC provided outreach on "LGBT Inclusion in the Workplace" to Social Security Administration (SSA) in Washington D.C.
- OFO Director was guest speaker at "MLK Observance" at Defense Health Agency (DHA) in Falls Church, VA.
- EEOC staff attended "Transgender Issues" for EEO Action Committee Meeting for FAA in Washington D.C.
- EEOC staff presented a "MLK Keynote Address" at the Veterans Administration (VA) in Dublin, GA.
- OFO staff presented on "Reasonable Accommodation" for Defense Equal Opportunity Management Institute (DEOMI) at Ft. Patrick AFB, FL.
- OFO Director presented at the Office of Special Counsel (OSC) on "OFO Organization" in Washington D.C.
- OFO staff conducted an update session on MD-110 to Navy Exchange Service Command (NEXCOM) by teleconference.
- Associate Director, Federal Sector Programs, provided a Black History Month presentation for NASA in Hampton, VA.
- Associate Director, Federal Sector Programs was the keynote speaker at a Black History Month event for Federal Maritime Commission (FMC) in Washington D.C.
- Associate Director, Appellate Review Division, presented an "EEOC Update" for ABA Federal Sector Labor and Employment Law Committee in Washington D.C.
- EEOC staff was "Black History Month Program" keynote speaker for the Center for Center for Disease Control (CDC) in Atlanta, GA.

- OFO staff provided Barrier Analysis training to Dept. of Agriculture (USDA) in Riverdale, MD.
- OFO staff member was keynote speaker at John Jay College of Justice at CUNY in New York, NY.
- OFO staff conducted training on MD-110 via 2 sessions of conference calls to Air Force EEO staff.
- OFO staff provided a Q&A session on the "501 NPRM" for Disability Employment Committee for DHS in Washington D.C.
- EEOC staff provided outreach on the "Overview of EEO Laws" to Managers at Customs and Immigration Services (CIS) in Houston, TX.
- OFO staff provided "Case Update/Gina/Barrier Analysis for EEO Specialist Course" for DEOMI in Ft. Patrick AFB, FL.
- OFO Director made a Black History Month presentation at the Office of Government Ethics in Washington D.C.
- EEOC staff provided outreach on "Disability/RA/EEO process to Dept. of Agriculture (USDA) in Charleston, SC.
- OFO staff responded to an OPM query by providing written guidance for how to calculate the relevant civilian labor force (RCLF) and use American Fact Finder to develop trigger tables.
- OFO staff conducted a presentation on Barrier Analysis to OPM's Applicant Data Flow workgroup.
- OFO staff attended the U.S. Census Bureau and the National Academies of Sciences, Engineering, and Medicine for the Workshop on Respondent Burden in the American Community Survey on March 8-9, 2016.
- OFO staff participated in the EEO Tabulation Consortium meeting to discuss various issues related to the next iteration of the Census EEO Tabulation (2018).

Quarterly Strategic Enforcement Plan Report
Office of Federal Operations
3rd Quarter FY 2016

I. Background: General FY 2016 3rd Quarter Appellate Review Program Accomplishments

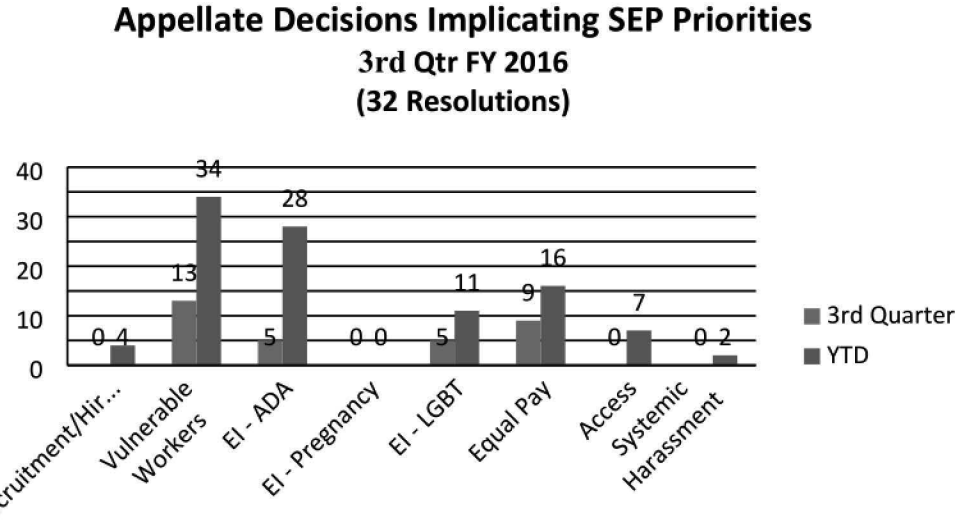
During the 3rd Quarter FY 2016, the Office of Federal Operations (OFO) resolved 979 appeals. These resolutions included 392 decisions on the merits and 494 procedural closures. Of the 494 procedural closures, 346 of them involved initial appeals under review by OFO, and we reversed 120 or 34.7% of the agency dismissals. With regard to the merit decisions, OFO issued 23 findings of discrimination during the 3rd Quarter. The top three bases under which we found discrimination were retaliation in 8 of the findings, disability in 7 of the findings, and sex in 3 of the findings. The top three issues involved in the findings included, disability harassment (6), accommodation (3), and promotion (3).

Resolution Description	3rd Quarter	Year to Date
Resolutions	979	2,778
Merits Resolutions	392	1,033
Findings	23	85
Non-Findings	368	948
Procedural Resolutions (all)	494	1,477
Procedural Resolutions (from Initial Appeal)	346	1,093
Affirming Dismissal	226	739
Remanding Dismissal	120	350

With regard to the categorization of the 979 resolutions, OFO identified 33 appeals that implicated one or more SEP/FCP priority. Section II below contains charts breaking down the composition of the individual priorities, summaries of the 31 decisions OFO attorneys categorized as implicating the SEP/FCP priorities, and summaries of the findings of discrimination made in the 3rd quarter.

II. Analysis of SEP/FCP Priority Areas

The chart below depicts the distribution of the 32 SEP categories identified in the 32 appellate decisions OFO identified as implicating an SEP/FCP category:



The numbered sections below provide more information about each of the six SEP priorities. Specifically, these sections start with a chart depicting the related FCP categories under each SEP, as well as summaries of the specific decisions under each SEP/FCP priority. In Section 7, by contrast, we provide summaries of the

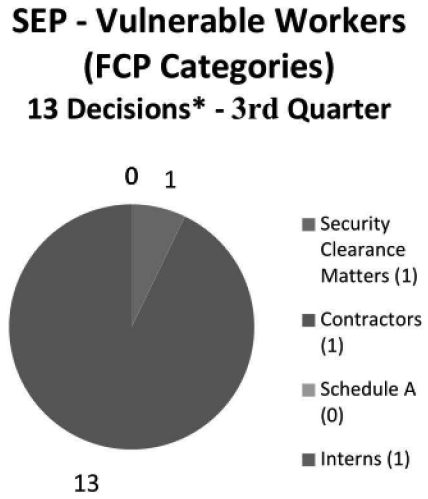
23 findings of discrimination issued during the 3rd Quarter and additional cases of note, whether or not they implicated an SEP/FCP category.

1. ELIMINATING BARRIERS IN RECRUITMENT AND HIRING

No decisions implicating this priority were issued during this reporting period.

2. PROTECTING IMMIGRANT, MIGRANT AND OTHER VULNERABLE WORKERS

As depicted in the chart below, during the 3rd Quarter of FY 2016 OFO resolved 10 decisions under this SEP Priority and its associated FCP priorities.



*One decision implicated 2 FCP categories

Decision Summaries for this Category

Taha (Daisy W) v. HHS, 0120160511 (04/05/2016) - Complainant was hired by Astrix Technology Service Corporation (Astrix), to work as a Biologist Trainee at the Agency's National Eye Institute in Bethesda, Maryland. Believing that she was subjected to discriminatory harassment and termination, Complainant filed a formal complaint based on race, national origin, sex, age, and reprisal.

Although it initially accepted some of Complainant's claims, after the investigation, the Agency issued a final decision dismissing the complaint for failure to state a claim. The Agency cited Ma v. HHS, EEOC Appeal Nos. 01962389 & 01962390 (May 29, 1998), but failed to conduct any analysis of the factors. Instead, it simply noted that the inquiry into the employer/employee relationship, completed during the investigation, supported its determination that Complainant was not an employee.

On appeal, Complainant addressed each of the Ma factors, arguing that the majority indicate that she should be treated an Agency employee. The Agency did not submit an opposing brief.

The Commission found that four Ma factors indicated Complainant is an Agency employee: she worked at the Agency's NEI facility (factor (4)), she used materials and equipment furnished by the Agency (factor (3)); and her work was in line with the Director's vision for his lab (factor (10)). The record also reflected that the Agency

controlled the means and manner of Complainant's work (factor (1)). Complainant's supervisors were Agency officials, and they provided Complainant with instructions regarding her assignments, and required her to report and coordinate her work with the Director (an Agency employee). In the instant case, Complainant alleged her termination was discriminatory. We concluded that, while Astrix issued the actual Notice of Termination, it was the Agency that notified Astrix to do so.

Three factors indicated the Complainant may not be an Agency employee: Astrix provided payment (factor (8)), benefits (factor (12)), and taxes (factor (13)) to Complaint.

The Commission concluded that, for EEO purposes, the balance of factors established that Complainant is a de facto employee of the Agency.

Lyman (Regina M) v. CIA, 0120160662 (04/14/2016) – Complainant, who was incorporated as a company of one, served the Agency as a contract Technical Subject Matter Expert (Systems Engineering Technical Assistance). She filed a complaint alleging discrimination against based on her sex and reprisal for prior EEO activity when the Agency perpetrated and subjected her to a hostile work environment, including sexual harassment, denied her attendance at a conference, and terminated her. The Agency dismissed the complaint for failure to state a claim, reasoning that it did not employ Complainant. OFO reversed because the Agency exercised sufficient control over Complainant's position to qualify as her common law employer. Complainant served the Agency full-time. The Agency frequently assigned her projects, and provided her feedback on her work if it needed revision. Complainant served the Agency since 2006, and worked on Agency sponsored premises using Agency equipment. The Agency conceded that Complainant performed Agency mission work. Significantly, it was uncontested that the Agency terminated Complainant's services.

Ballou v. VA, 0120160808 (04/21/2016) – Complainant was hired by Sterling Heritage Corporation (SHC), a contractor with the Agency, to work as an Academic Consultant at the Agency's Learning Standards Office. Believing that she was subjected to discrimination when her request for reasonable accommodations was denied and she was subsequently terminated, Complainant filed a formal complaint.

The Agency dismissed the complaint for failure to state a claim, reasoning that Complainant was not an Agency employee and therefore lacked standing to utilize the EEO complaint process. Citing the contract between the Agency and SHC, the Agency noted that SHC was obligated to provide services for one year, as well as manage the personnel and financial resources used to perform such services. Further, the Agency noted that the contract specifically stated that it would not supervise contractor personnel. The Agency stated that it did not hold the authority to grant Complainant leave, did not withhold taxes, and had not input in the decision to terminate her.

On appeal, the Commission found that three Ma factors indicated Complainant may not be an Agency employee: her monthly payments by SHC based on a fixed-price one-year contract (factor (8)), lack of benefits (factor (12)) from the Agency, and the Agency's failure to treat her as an employee for tax purposes (factor (13)). A greater number of factors indicated an employer/employee relationship.

Complainant argued, and the record reflected that the Agency controlled the means and manner (factor (1)) of Complainant's performance (An Agency official interviewed her and directed SHC to hire her, Complainant reported directly to Agency management for daily assignments and oversight, her work was submitted exclusively to the Agency for review). The Agency acknowledged providing the office space, supplies and equipment for her job (factors (3) and (4)). The record reflected that Complainant had little discretion over when and how long she worked (factor (7)). Complainant argued that her work was integral to the Agency's mission, explaining that she was named by the Agency as the "School's Training Coordinator". She was the point of contact for the Agency's logistics community. Lastly, the Commission found that the Agency exerted influence over Complainant's termination.

The Commission concluded that, for EEO purposes, the balance of factors established that Complainant is a de facto employee of the Agency.

Stanton (Kendra W.) v. Army, 0520160113 (04/14/2016) – Complainant requested reconsideration of the decision in Stanton v. Department of the Army, 0120152150 (Oct. 29, 2015). Therein Complainant alleged that she was harassed sexually and non-sexually, and then subsequently retaliated against for complaining about the harassment. The Agency found that Complainant was not an employee of the Agency and dismissed the complaint for failure to state a claim. The Agency also dismissed the complaint for untimely EEO Counselor contact. On appeal OFO reversed the Agency's dismissal of the complaint. OFO found that the Agency exercised sufficient control over Complainant to be considered a joint employer. OFO also found that the Agency failed to provide persuasive evidence that Complainant had constructive knowledge of the time limit for contacting an EEO Counselor. The Agency filed a request for reconsideration. After reviewing the previous decision and the entire record, OFO found that the request failed to meet the criteria of 29 C.F.R. § 1614.405(c), and OFO denied the request.

Carr (Kyle S.) v. Commerce, 0520160122 (04/14/2016) – Complainant requested reconsideration of the decision in Carr v. Commerce, 0120151782 (11/17/2015). In the complaint, Complainant alleged that he had been discriminated against on the bases of disability and in retaliation when he was not reasonably accommodated and subsequently terminated. The Agency found that Complainant was not an employee of the Agency and dismissed the complaint for failure to state a claim. On appeal OFO reversed the Agency's dismissal of the complaint. OFO found that the Agency exercised sufficient control over Complainant to be considered a joint employer. After reviewing the previous decision and the entire record, OFO found that the request failed to meet the criteria of 29 C.F.R. §1614.405(c), and OFO denied the request.

Ashbourne (Eryn M.) v. DHS (USCG), 0120160989 (04/14/2016) – Complainant worked for a staffing firm serving the Agency as an Auditor. She alleged that she was discriminated against based on her race (African-American) and sex (female) when in April 2015, she was notified that the Agency determined she was not suitable for employment under contract because she failed a background investigation, was removed from Agency premises for this reason, and was harassed. The Agency dismissed the complaint for failure to state a claim, reasoning that Complainant was not an employee of the Agency. With reference to its determination that she was not suitable for employment, the Agency found that the EEOC is precluded from reviewing the substance of a security clearance determination or the security clearance requirement. OFO reversed. It found that the record was insufficiently developed to make a determination on whether the Agency jointly employed Complainant. Regarding suitability for employment, OFO found that the Title VII provision on which the Agency relied is an affirmative defense, and only applies where employers refuse to hire or discharge persons who are unable to obtain a required security clearance. OFO found that the record was insufficient to make a determination on this because the suitability determination on its face did not involve a security clearance and the Agency did not identify the Executive Order and statute that imposed on it national security requirements which would justify its affirmative defense, as required. OFO remanded the complaint to the Agency to supplement the record and either accept or dismiss the complaint.

Samis (Otis B.) v. HHS (FDA), 0120152305 (05/20/2016) - Complainant worked for a Staffing Firm 1 serving the Agency as Lead – Contingency Planning & Disaster Recovery, and Acting Project Coordinator. He filed a complaint alleging that the Agency discriminated against him based on his age (63) when after terminating its contract with Staffing Firm 1, it instructed successor Staffing Firm 2 not to hire him, resulting in his being terminated upon the elapse of Staffing Firm 1's contract in January 2015. Complainant alleged that he applied for a position with Staffing Firm 2 that was nearly identical to the one he held with Staffing Firm 1. The Agency dismissed the complaint for failure to state a claim, finding in a conclusory fashion that it did not employ Complainant. OFO reversed because the record contained insufficient information to make a determination on whether the Agency exercised sufficient control over Complainant's position to qualify as his common law employer. The Agency did not gather information on the common law control factors. While Complainant on his own volition provided such information, and it showed the Agency jointly employed him with Staffing Firm 1, the record did not show that the Agency retained sufficient control over the position to be a joint employer when Staffing Firm 2 took over. Also, citing Baker v. Army, 01A45313 (3/16/2006), OFO directed the Agency

to develop the record on the extent of its control over the hiring process, if any, by Staffing Firm 2 – a significant common law control factor.

Simpson (Emma B.) v. Navy, 0120160878 (05/3/2016) – Complainant worked for a staffing firm serving the Agency as a Management Assistant – handling email and telephone requests at an Agency call center. She filed a complaint alleging discrimination based on her sex and reprisal when she was harassed by an Agency co-worker; and by an Agency manager who directed that she move her desk away from the co-worker, warned that if she complained of harassment again she would get an unfavorable shift and if she complained thereafter would be terminated, confronted her about her EEO activity and denied her an award, and was discriminated against when she was not hired for an Agency vacancy and was terminated. The Agency dismissed the complaint for failure to state a claim, reasoning that it did not employ Complainant. OFO reversed because the Agency exercised sufficient control over Complainant's position to qualify as her common law employer. OFO found that the Agency assigned Complainant work daily, gave her awards, set her daily schedule, had final approval authority on when she took leave, and she worked on Agency premises using Agency equipment. OFO found that because this case involved a termination, it was especially significant that the record showed the Agency had joint or de facto authority to terminate Complainant – almost immediately after the Agency advised the staffing firm that Complainant was unacceptable and asked for a replacement, she was terminated by the staffing firm.

Morning (Chrystal S.) v. Navy, 0120160889 (05/11/2016) - Complainant served the Agency as a trainer vendor by conducting onboarding (orientation) team building sessions for new employees. In her formal arrangements with the Agency, Complainant used a business name – "[Complainant's name] Enterprises." She filed a complaint alleging discrimination based on her sex, age, disability, and reprisal, as applicable, when in May 2015 the Agency terminated use of her training services and advised that hopefully bridges would not be burned on either side. The Agency dismissed the complaint for failure to state a claim, reasoning that it did not employ Complainant. OFO affirmed because the Agency did not exercise sufficient control over Complainant's "position" to qualify as her common law employer. Complainant provided her own materials for her training sessions, and the Agency was not involved in creating her presentations. The Agency did not supervise Complainant's team building sessions, and did not assign her additional work. While Complainant provided the Agency team building training sessions since 2010, she only did so episodically for short training sessions – 6 to 12 times a year - and negotiated her charge. Also, the Agency was one of a number of Complainant's clients.

Buck (Kenneth M.) v. Air Force, 0120161245 (05/11/2016) - Complainant worked for a staffing firm serving the Agency as a Physical Therapist. He filed a complaint alleging discrimination based on his race (Caucasian) when he was terminated in June 2015. The Agency dismissed the complaint for failure to state a claim, reasoning that it did not employ Complainant. OFO reversed because the Agency exercised sufficient control over Complainant's position to qualify as his common law employer. Complainant served the Agency full-time for almost a year. He had a direct Agency supervisor, who interacted with him daily and provided him regular feedback. He worked on Agency premises using Agency equipment. Complainant interacted with his staffing firm supervisor only once every one to two months – via the telephone. Complainant submitted his leave requests to the Agency for initial approval. The Agency had de facto power to terminate Complainant.

May (Shakia H.) v. CIA, 0120161007 (05/26/2016) – Complainant worked for Staffing Firm 1 serving the Agency as an overt Mail Courier. She filed a complaint alleging, in relevant part, that in July 2015 the Agency cut off her service to the Agency; and in September 2015, Staffing Firm 2, which succeeded Staffing Firm 1, rescinded its offer of employment to her to continue serving the Agency because her services were previously cut off. The Agency dismissed the complaint for failure to state a claim, reasoning that it did not employ Complainant. OFO affirmed because the Agency did not exercise sufficient control over Complainant's position to qualify as her common law employer. Staffing Firm 1 had an active onsite supervisor (S1) – Complainant's first line supervisor – who was in charge of the day to day supervision of contract couriers,

including giving out daily route assignments and other tasks. S1 assigned routes to Complainant without input from the Agency, and set her work hours. Complainant made her leave requests to S1, who handled them without input from the Agency. Complainant directed a request for reasonable accommodation to S1, who handled it without Agency input. Staffing Firm 1 handled Complainant's pay and compensation. Serving as an overt courier was not part of the Agency's mission. After S1 advised the Agency that Complainant had performance/conduct problems, the Agency requested Staffing Firm 1 to cut off her services, and Staffing Firm 1 immediately did so and terminated her employment. This showed that the Agency had joint or de facto power to terminate Complainant – which points in the direction of joint employment. S1 advised Staffing Firm 2 about Complainant's behavioral and performance issues, not the Agency. On balance, the Agency did not exercise sufficient control over Complainant's position to be her joint employer.

Wilmer (Herb L.) v. DOD (NGIA), 0120150989 (05/12/2016) - Complainant worked for a staffing firm serving the Agency as a Principle Program Analyst (Budget). He filed a complaint alleging discrimination based on his disability when he was terminated in July 2014. The Agency dismissed the complaint for failure to state a claim, finding in a conclusory fashion that it did not employ Complainant. OFO reversed because the record contained insufficient information to make a determination on whether the Agency exercised sufficient control over Complainant's position to qualify as his common law employer. It ordered the Agency to gather this information, and then accept the complaint or dismiss it with appeal rights to the Commission. OFO advised the Agency that at this point there were some common law control factors which pointed to joint employment, and identified them.

McBratnie (Beth G.) v. VA, 0120143174 (05/06/2016) – Complainant was an applicant for a Nurse Practitioner position with CR Associates, Inc. which contracted with the Agency to provide health care resources at the Agency's North Texas Veterans Healthcare System, Community Based Outpatient Clinic in Bridgeport, Texas. As part of the application process, the Agency required Complainant to complete a "Credentialing Packet" and a "VetPro" file online. An Agency official contacted Complainant requesting missing documents, including the Declaration of Health (i.e. a physical examination). Complainant, in turn, contacted CR Associates and explained that she was willing to complete the exam as soon as she was told what the physical requirements of the position were, received an offer, and learned who would cover the cost of the exam. Later that day, CR Associates notified Complainant they would "cease your credentialing". Thereafter, Complainant filed a formal complaint based on disability.

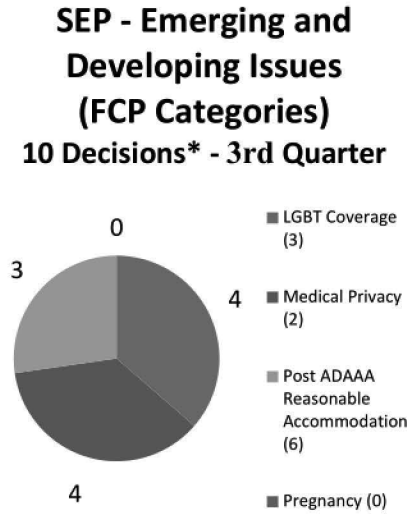
The Agency issued a decision dismissing the complaint for failure to state a claim. The Agency reasoned that Complainant had sought employment with a contractor and therefore lacked standing to file an EEO complaint. The Agency cited Ma v. Department of Health and Human Services, EEOC Appeal Nos. 01962389 & 01962390 (May 29, 1998), but failed to conduct any analysis of the factors. Instead it cited its contract with CR Associates which specifically provided that CR Associate's employees and subcontractors would not be considered Agency employees for any reason.

The Commission found that four Ma factors indicated Complainant is an Agency employee: she was to work at the Agency's facility (factor (4)); using Agency materials and equipment (factor (3)); and her position was part of the regular business of the Agency (factor (10)). Moreover, the record reflected that both Complainant's Michigan license and the Agency's own bylaws required that she be supervised by an Agency physician. Therefore, we found that the Agency controlled the means and manner by which her work was accomplished (factor (1)).

While the record did reflect that CR Associates provided Complainant with benefits (factor (12)) and was her employer for tax purposes (factor (13)), the Commission concluded that the balance of factors established that the Agency was a joint employer for EEO purposes.

3. ADDRESSING EMERGING AND DEVELOPING ISSUES

As depicted in the chart below, during the 3rd Quarter of FY 2016 OFO resolved 10 decisions under this SEP Priority and its associated FCP priorities.



Decision Summaries for this Category

Hillier (Jacki A.) v. Treasury (IRS), 0120150248 (04/20/2015) – Complainant, a transgender female who works as a Revenue Officer in the Agency's Richmond, Virginia facility, is a member of an Agency employee organization named Christian Fundamentalist Internal Revenue Employees (CFIRE) that meets weekly on Agency property to conduct Bible-study discussions. According to the record, CFIRE formed in response to employees' disagreement with the Agency allowing an employee organization forum for gay, lesbian, or bisexual employees. See "CFIRE - Our History." On an unknown date, Complainant informed the CFIRE leadership officials that she was transgender and identified as a female, but that when she attended the group meetings, she presented as a male.

On June 10, 2014, Complainant sent the President of CFIRE an email stating that she believes Jesus wants her to be honest with herself and her coworkers, and asking if she could attend their weekly meetings "in the attire of the gender I believe I am: female." Complainant proposed first doing this during the last June meeting when she was scheduled to give a presentation on verses from the New Testament. The CFIRE President responded via email on June 18, 2014, stating, "I will have to stand that I cannot allow you to speak dressed as a woman." The President stated that this is the consensus of the Board of CFIRE.

On July 1, 2014, the President of CFIRE sent out a calendar for the Bible Studies and presentations, and asked if anyone was willing to present the next day. Complainant replied that she would like to present on a play she recently saw and discuss Judas' role in God's plan, and what it means for Christians today. The President responded "… at this point I cannot allow you to present" and "I cannot allow the CFIRE platform to be used to promote your transgender lifestyle. That may not be what you want to present but I have to err on the side of caution." Complainant responded that she was not planning to present on anything related to transgender issues nor would she present dressed as a woman. Complainant's request to present was still denied.

On August 7, 2014, Complainant filed a formal complaint alleging that the Agency subjected her to harassment on the basis of sex (female) when the President of CFIRE refused to allow her to give a presentation to a Bible study meeting dressed as a woman.

On September 18, 2014, the Agency dismissed the complaint for failure to state a claim. The Agency found that the CFIRE President, not Agency management, prevented Complainant from attending meetings and

presenting as a woman; therefore, his actions were not the acts of the Agency. The Agency concluded that the complaint must be dismissed for failure to state a claim in accordance with 29 C.F.R. § 1614.107(a)(1).

On appeal, the OFO found that a fair reading of the record reveals that Complainant alleged that she was subjected to a hostile work environment when the President of CFIRE would not allow her to attend meetings and give presentations dressed as a woman, consistent with her gender. Complainant alleged that she was subjected to harassment when on June 18, 2014, the CFIRE President informed her that she will not allow Complainant to attend meetings or present to the group dressed as a woman. Further, on July 1, 2014, the CFIRE President told Complainant that she could not present to the group at all, even on non-transgender related topics and dressed as a man, because she did not want the CFIRE platform to be used to promote a "transgender lifestyle."

The decision held that not allowing someone to dress as the gender with which they identify is severe enough to constitute a hostile work environment, as a reasonable person would find it hostile or abusive. Not allowing an employee to dress as the gender with which they identify and forcing them to dress as a gender with which they do not identify can be humiliating and dehumanizing, and it certainly unreasonably interferes with an employee's work environment. Further, not allowing an individual to present on any topic simply because that individual is transgender causes further alienation and reasonably interferes with an employee's work environment. The decision also noted that the CFIRE President's use of the term "transgender lifestyle" could reasonably be perceived as offensive, as it is indicating that transgender people somehow are different from others and have a different lifestyle than others, and as a result, they should be treated differently. Therefore, the decision found that this complaint states a claim of sex based harassment.

With respect to the agency's assertion the actions of CFIRE were not the actions of the agency, the decision did find that they were related to Complainant's employment as CFIRE is an employee organization created and recognized under the Agency's Employee Organization Policy, and sponsored by an executive member of the Agency. In accordance with this policy, employees of the Agency were permitted to organize as a group and use Agency facilities, meeting rooms, interoffice mail, and Agency newsletters. CFIRE members were also permitted to attend conferences and receive compensation by the Agency for travel expenses. As a result, any alleged discrimination from CFIRE and its officers or members was found to be reasonably related to Complainant's employment with the Agency. The decision held that this complaint states a viable claim of harassment and dismissal was not appropriate, therefore, it was remanded for continued processing under the Part 1614 regulations.

Liboff (Cary R) v. State, 0120133366 (04/22/2016) – Complainant, a Management Officer at the Agency's U.S. Consulate in Guayaquil, Ecuador, filed an EEO complaint in which he alleged that he had been discriminated against based on sex (gay male) and retaliation when he was harassed, and reprisal (prior EEO activity) when his same-sex partner was first removed and then constructively discharged from his position at the Agency. Complainant requested a final agency decision on the record. The Agency found that it had not discriminated against Complainant.

The appellate decision first noted that although the Agency stated that Complainant's sexual orientation claim could only be processed internally, Commission decisions since-issued had found that a claim of sexual orientation discrimination was a claim of sex discrimination, and that the Commission had jurisdiction over the claim. During the investigation, six officials, including Complainant, acknowledged tensions between the U.S. Consulate in Guayaquil, Ecuador, and the U.S. Embassy in Quito, Ecuador. Complainant stated there was an atmosphere of pronounced hostility between the Embassy and the Consulate. He also stated that he and the Consulate did not receive appropriate recognition for improvements in customer scores because, according to the Embassy, such improvements were the result of extra support from the Embassy. He further stated that he was yelled at by his second-level supervisor who claimed that family members should have no expectation of employment. Finally, Complainant stated that he received a furious phone call from his second-level supervisor for contacting the Agency in Washington, D.C., regarding his request for a special rate of pay for his partner. The decision found that none of the testimony provided a sufficient nexus between Complainant's sexual orientation and the acrimonious tensions which existed between the two offices. It found that

Complainant did not establish that the harassment was based on sex or retaliation because it was not based on his protected classes.

Complainant believed he was subjected to third-party reprisal when the Agency removed his partner after Complainant opposed what he believed to be illegal discrimination. The Agency found that Complainant's partner's appointment was put on hold while the Agency investigated whether its nepotism policy was violated in hiring Complainant's partner. The Agency determined there was an appearance of nepotism because the HR member who transacted Complainant's partner's hire reported to Complainant and handled the paperwork flow as the post's HR staff member. Upon the request of the Embassy, Complainant's partner was removed from his position and the employment process was redone in order to remove any appearance of impropriety. The decision found that Complainant proffered no credible information linking his prior EEO activity to the Agency's decision to redo the employment process and remove his partner from employment. It noted that once the employment process was redone, Complainant's partner was again selected for the position. After being re-selected, Complainant's partner resigned because he had not been paid for work performed from May 7 to May 10, 2012. Complainant characterized his partner's decision to leave the Agency as a constructive discharge. The decision found that Complainant's allegation that his partner was constructively discharged when the partner resigned after being re-selected failed to state a claim. The Agency's decision was affirmed.

Wiley (Marilyn W.) v. USPS, 0120140433 (04/08/2016) **[Repeated under Findings below]** – Complainant filed a formal complaint alleging that the Agency discriminated against her and subjected her to a hostile work environment on the bases of race (African-American), sex (female), color (Black), disability, and in reprisal for prior protected EEO activity as evidenced by multiple incidents including, inter alia, management rotated her work assignment and changed her break and lunch times; her request for two hours of OWCP pay was charged as two hours of LWOP (Leave Without Pay); she was taken off of her bid, worked outside of her restrictions and instructed to hit operation 340 and go to room 42 every night.

At the conclusion of the investigation, Complainant requested a hearing. The EEOC AJ partially granted the Agency's motion for summary judgment on Complainant's race, color, sex, and reprisal-based discrimination and hostile work environment claims, finding no discrimination. The AJ held a hearing as to Complainant' disability discrimination claims. The AJ found that the majority of the actions of Complainant's Supervisor (S1) in making work assignments, instructions, requests for medical information and admonishments were well within the purview of her position. Further, the AJ found that the Agency was reasonably accommodating Complainant with a modified job offer within her restrictions. However, the AJ determined that S1 clearly violated the medical records and disclosure provisions of the Rehabilitation Act when she spoke to the Union Steward regarding Complainant's pregnancy/miscarriage. The AJ noted that it was a per se violation of the law to disclose confidential medical information regarding an employee. As a result, the AJ determined that Complainant was entitled to $1,000 in compensatory damages based on the length, severity and circumstances of Complainant's emotional distress resulting from the release of her very personal business through her medical information and resulting comments by her co-workers for a brief period of time. In addition, the AJ ordered the Agency to provide training to S1 regarding the confidential medical documentation provisions of the Rehabilitation Act, to consider disciplining S1, and to post a notice. The Agency issued its final action fully implementing the AJ's decision.

On appeal, the Commission found that the AJ properly issued partial summary judgment as to Complainant's race, color, sex, and reprisal claims. Further, the Commission affirmed the finding of no discrimination with regard to S1's work assignments, instructions, requests for medical information and admonishments, as well as the finding that the Agency reasonably accommodated Complainant. Since the Agency did not dispute the AJ's finding of a per se violation of the Rehabilitation Act, the Commission confined its review to the order of relief. Noting Complainant's testimony that she was upset because people were coming up to her and asking her questions about it and one employee made a gesture to her of being pregnant. Complainant testified that these actions were upsetting, because she did not want to keep reliving the situation that she was no longer with child. The Commission found that an award of $2,000 in non-pecuniary compensatory damages was more appropriate. In addition, the Commission upheld the order for the Agency to consider disciplining the responsible management officials; provide training to the responsible management officials; and to post a notice.

Connor-Stokes (Denese L.) v. DOI, 0120130297 (05/13/2016) **[Repeated under Findings and Enforcement below]** – Complainant filed an EEO complaint that alleged, in pertinent part, that she was denied a reasonable accommodation for her disability (breast cancer) when she was not reassigned to another position and denied use of the Agency's leave share program for treatment related to cancer. Additionally, Complainant alleged that she was subjected to disability discrimination and reprisal when the Agency issued her a "leave usage" letter that threatened her with adverse action because she had requested leave as a reasonable accommodation, and the Agency failed to maintain information obtained pursuant to a medical inquiry on separate forms and in separate medical files. The Agency found that Complainant failed to prove that she was subjected to unlawful discrimination or denied reasonable accommodations as alleged.

In its appellate decision, OFO first found that Complainant was an individual with a disability because she was substantially limited in the major life activity of walking. In so finding, OFO noted that Complainant used a scooter for mobility and was restricted from walking or standing for more than 10 minutes per hour. The Commission further found that although Complainant was unable to perform the essential functions of her Drug Program Specialist position because she was medically restricted from handling urine samples, there were two vacant, funded positions that were available to which she was qualified to be reassigned.

Additionally, OFO found that the Agency failed to provide Complainant with a reasonable accommodation in July 2008 when it denied her access to the leave share program on the basis that her Carpal Tunnel Syndrome and swollen knees were unrelated to cancer. OFO noted that on July 1, 2008, Complainant submitted documentation from her physician that indicated that she had undergone extensive chemotherapy for breast cancer that resulted in side effects, including swollen/painful knees, peripheral neuropathy, and Carpal Tunnel Syndrome. OFO further found that Complainant was medically restricted from the essential functions of handling and collecting urine specimens associated with her Drug Position Specialist position, which meant that the Agency had a duty to explore whether she could be reassigned to another position. OFO concluded that there was a vacant, funded Administrative Assistant position to which Complainant was qualified to be reassigned, but the Agency improperly did not reassign her to this position because she would not withdraw her EEO complaint in exchange for this reassignment. Further, OFO found that the Agency retaliated against Complainant when it issued her a letter threatening her with adverse action because of her leave share requests, which were related to her disability. Finally, OFO found that management violated the Rehabilitation Act when it placed documentation containing Complainant's medical condition in a file that contained other documents, including emails regarding her work history, her performance plan, and awards and training certificates.

In order to remedy the Rehabilitation Act violation, OFO ordered the Agency to offer Complainant with a reasonable accommodation by offering her a GS-11 Administrative Assistant position; determine the appropriate amount of back pay and interest due to Complainant; provide Complainant with proven compensatory damages; expunge all documentation pertaining to the leave usage letter; remove any medical documentation about Complainant from any file that is not exclusively dedicated to her medical information; pay Complainant proven attorney's fees and costs; provide eight hours of in-person EEO training to the responsible management officials; and to consider taking appropriate disciplinary action against the responsible management officials.

Kershner (Michelle G.) v. Treasury, 0120132463 (05/13/2016) **[Repeated under Findings and Enforcement below]** - Complainant, a Correspondence Examination Technician, alleged that the Agency discriminated against her on the basis of disability (attention deficit disorder) by denying her requests for reasonable accommodation. She also alleged that the Agency subjected her to a hostile work environment by, among other things, issuing Opportunity to Improve letters, giving her negative performance feedback, and violating her right to privacy by leaving performance-counseling information in an open area where other employees could see it. After Complainant withdrew her hearing request, the Agency issued a final decision finding that it had not discriminated against her.

We found that it was undisputed that Complainant was an individual with a disability. We further found that the Agency discriminated against Complainant on the basis of disability when it did not provide her with certain

requested accommodations. In October 2008, Complainant submitted documentation supporting her need to have a quiet work area. Although the Agency at some point permitted Complainant to work from a remote location, it moved her to a new cubicle in a high-traffic area in November or December 2008 and did not move her back to a quiet area until June 2010. We concluded that the record was devoid of any justification for the Agency's delay in providing Complainant with an effective accommodation. Complainant requested several other reasonable accommodations in August 2010. We found that the Agency did not establish that it would have been an undue hardship to modify the manner in which Complainant handled telephone calls, to adjust the manner in which cases were assigned to Complainant by assigning fewer cases at once, to give Complainant specific directions regarding performance expectations, to allow her to communicate with her Lead or manager several times per week about priorities and work, and to allow her to have an alternative work schedule. Noting that the denial of reasonable accommodation resulted in the denial of an equal opportunity to attain an acceptable level of performance, we found that the Agency discriminated against Complainant on the basis of disability when it issued the Opportunity to Improve letters and gave her negative feedback.

Because we found that the performance-feedback matters were related to the denial of reasonable accommodation and ordered an appropriate remedy, we did not address whether they also created a hostile work environment. We concluded that Complainant did not establish that the other incidents raised in her harassment claim occurred because of her disability.

The performance-counseling information that Complainant's supervisor left in an open area did not contain any confidential medical information. The supervisor, however, stated in her affidavit that an evaluation and progress note from Complainant's psychiatrist as well as a letter from Complainant's therapist were in Complainant's "EPF" file. Given Complainant's allegations that the Agency violated the statutory confidentiality provisions, and in light of the supervisor's statement that Complainant's medical documents were in her personnel file, we found that the Agency violated the Rehabilitation Act by keeping Complainant's confidential medical information in her non-medical personnel file.

Elphick (Ronny S.) v. VA, 0120132198 (05/17/2016) **[Repeated under Findings and Enforcement below]** – Complainant, a Health Science Specialist for the Agency's Veterans Crisis Line at the National Call Center, filed an EEO complaint in which he alleged that he had been discriminated against based on sex (male) (sexual orientation), age, and reprisal (prior EEO activity) when he was not selected for 4 supervisory positions, was denied leave, and was subjected to harassment. Complainant did not request either a hearing or a final agency decision on the record. The Agency issued a decision in which it found that it had not discriminated against Complainant.

The appellate decision noted that although the Agency stated that Complainant's sexual orientation claim could only be processed internally, Commission decisions since-issued had found that a claim of sexual orientation discrimination was a claim of sex discrimination, and that the Commission had jurisdiction over the claim.

The decision assumed that Complainant had established his prima facie cases of disparate treatment on his claimed bases. It found that the Agency had provided legitimate, nondiscriminatory reasons for the nonselections and the denial of leave, which Complainant had not shown to be pretext for discrimination. However, Complainant had claimed that he was denied leave to observe Easter vigil and therefore had alleged a denial religious accommodation. In response to his request for leave for this purpose Complainant was told he could voluntarily swap schedules with another employee if he could find someone who was willing to trade. We found that the Agency did nothing to facilitate the swap, did not discuss any alternatives with Complainant and did not offer any other options, and that therefore the Agency had failed to engage in a good faith effort to reasonably accommodate Complainant's religious beliefs.

It further found that Complainant did not establish a claim of harassment as he had not shown that any of the many incidents he listed were based on sex, sexual orientation, age, or retaliation, nor had he shown that the incidents were severe or pervasive. The Agency's decision was affirmed in part and reversed in part.

Robinson (Colleen M.) v. USDA, 0120130552 (05/25/2016) – Complainant, a Realty Specialist at the Agency's Farm Service Agency in Washington, D.C., filed an EEO complaint in which she alleged that she had been discriminated against based on sex (female) (sexual orientation) and reprisal (prior EEO activity) when she was placed on a performance improvement plan, reprimanded, issued a notice of proposed suspension, was the subject of a personnel misconduct investigation, and when her supervisor referred to her by a male name (Eric) in his emails to her. Complainant requested a final agency decision on the record. The Agency found that it had not discriminated against Complainant.

The appellate decision determined that Complainant's complaint stated one claim of harassment, as well as 5 separate claims of disparate treatment, and it reversed the Agency's procedural dismissal regarding her supervisor using the incorrect name. It also noted that although the Agency stated that Complainant's sexual orientation claim could only be processed internally, Commission decisions since-issued had found that a claim of sexual orientation discrimination was a claim of sex discrimination, and that the Commission had jurisdiction over the claim.

The decision assumed that Complainant had established her prima facie cases on her claimed bases. It found that the Agency had provided legitimate, nondiscriminatory reasons for its actions, which Complainant had not shown to be pretext for discrimination. It further found that Complainant did not establish a claim of harassment as she had not shown that any of the Agency's actions were based on sex, sexual orientation, or retaliation. Finally, the decision noted that we were not persuaded that Complainant's supervisor intentionally called her by a male name in his emails. The supervisor explained that it was an error and when it was brought to his attention, he had gone to the union and Complainant and offered an apology, and had no malicious intent. However, the decision noted that "repeatedly and intentionally referring to an individual by the wrong gender or name may create a hostile work environment based on sex."

Additionally, Complainant had made broad allegations that there were rumors in the workplace about her relationship with a coworker and her sexual orientation, but as she had not specified how frequently these matters were discussed in the office, the identity of the persons making the allegations, or the specific content of the rumors, we could not conclude that the alleged actions constituted unlawful harassment because she had not established that the alleged actions were severe or pervasive enough to constitute a hostile work environment. The Agency's decision was affirmed.

Shaw (Melani F) v. VA, 0120142156 (06/23/2016) **[Repeated in Findings and Enforcement section below]** – On January 29, 2013, Complainant filed the instant EEO complaint alleging that the Agency discriminated against her on the bases of race (African-American), color (Black), and age (48) when she was subjected to nine instances of harassment between January 2012 and January 2013, including when two of her coworkers accessed her medical records without her consent.

Complainant, who was a patient of the Agency facility where she worked, claimed that she learned on January 11, 2013, that two coworkers accessed her medical records without a valid reason for doing so. According to the record, the Agency conducted an investigation into the coworkers' accessing Complainant's medical records and determined that the coworkers had no valid reason for doing so. The Agency issued a finding of no discrimination and Complainant appealed.

On appeal, the Commission found that coworkers accessing Complainant's confidential medical records when the access was not job-related and consistent with business necessity constituted a per se violation of the Rehabilitation Act. Specifically, we found that the Agency is charged with maintaining any information obtained regarding the medical condition or history of an employee as a confidential medical record. OFO also found that there is no distinction between whether the medical information is obtained in relation to the Complainant's status as an employee and the Complainant's status as a patient.

As relief, the Agency was directed to conduct a supplemental investigation into Complainant's entitlement to compensatory damages and other relief.

Carlson (Barrett V) v. USDA, 0520160233 (06/17/2016) – Complainant requested reconsideration of the decision in EEOC Appeal No. 0120142775 (January 12, 2016). The previous decision affirmed the Agency's

implementation of the finding of an AJ that Complainant had not established that he had been discriminated against. Complainant had filed a complaint against the USDA's Animal and Plant Health Inspection Services on the bases of disability and age when he was not selected for a Supervisory Plant Protection and Quarantine Officer position and two Plant Protection Technician positions. Complainant asserted that the Agency should have hired him under the noncompetitive Schedule A hiring authority for persons with certain disabilities. The decision noted that, even when applying under Schedule A, Complainant still needed to demonstrate that he was minimally qualified for the positions at issue. Because Complainant lacked the relevant experience and necessary academic credits for the positions, he did not meet the positions' minimum qualifications.

In his request for reconsideration, Complainant argued that he is a "qualified individual with a disability" because he meets the statutory definition of "disability" and can perform the essential functions of the positions at issue with or without reasonable accommodation. The request for reconsideration decision denied Complainant's request, and noted that Complainant had not established that he possessed the requisite experience and academic credits for the positions at issue, and had not shown that he was qualified for those positions.

Prince v. OPM, 0120161469 (06/23/2016) – During the relevant time, Complainant worked for the Federal Railroad Administration as a Trial Attorney in the Office of the Chief Counsel, Safety Branch in Alexandria, Virginia. Believing that she was discriminated against when her Federal Employee Health Benefits (FEHB) insurance provider excluded coverage for transgender related medical services, Complainant filed a formal complaint based on sex (transgender-female).

Following an investigation, Complainant requested an Agency final decision in September 2015. Thereafter, on March 25, 2016, Complainant filed an appeal with the Commission contending that the Agency has failed to provide a timely decision in accordance with 29 C.F.R. 1614.110(b).

The Commission dismissed the appeal as premature. The Agency, however, was ordered to issue its final decision within sixty days.

4. ENFORCING EQUAL PAY LAWS

The eight decisions in this SEP category did not implicate an FCP category.

Decision Summaries for this Category

Jacobsen (Selene M.) and Taft (Waneta F.) v. Navy, 0120150370 and 0120150371 (04/20/2016) – Complainants filed their appeals from an Agency decision determining attorney's fees awarded as a result of a finding of discrimination. Complainants, both Country Program Directors, alleged that they were discriminated against on the bases of sex (female) when they were not paid equal to male employees. An EEOC AJ held a hearing and found both Complainants proved that they were discriminated against in violation of the Equal Pay Act (EPA) and Title VII. The AJ awarded $409,320.90 in attorney's fees associated with Selene M.'s claim and $288,279.07 in attorney's fees associated with Waneta F.'s claim. The Agency issued a final order adopting the finding of discrimination, but modifying the amount of attorney's fees awarded. OFO issued a decision agreeing in part with the Agency regarding attorney's fees. OFO reduced the attorney's fees award to: Selene M. - $368,388.81; and Waneta F. - $259,451.17. Complainant's requests for reconsideration were denied by OFO. Thereafter, Complainants filed a petition for attorney's fees for work done at the appellate stage which only concerned attorney's fees litigation. Complainants requested a total of $136,896.00 in attorney's fees for appellate work (294.4 hours x $465/hour). The Agency issued a decision awarding an aggregate amount of $27,715 in attorney's fees, which was determined by the hourly rate of $465/hour x 51 hours (= $23,715) + $4,000 for preparing the attorney fee petition. Complainants filed the instant appeal from the Agency decision regarding attorney's fees for the work done on appeal of attorney's fees. OFO affirmed the Agency's decision.

OFO found that the Agency's determination was sufficient to encompass a reasonable amount of time to have spent on the prior appeal. OFO ordered the Agency to pay Complainants $27,715 in attorney's fees.

Garcia (Candace C.) v. GSA, 0120151046 (04/29/2016) – Complainant, a student/trainee at the Agency's Federal Acquisition Service, filed an EEO complaint alleging that she was discriminated against: on the on the bases of race (Pacific Islander), color (non-white), and national origin (Filipino), when she was not converted into a full-time employee; on the basis of sex (female), when despite being a GS-5 employee, she performed duties of a GS-11 and GS-12 employee; on the basis of disability and in retaliation for prior EEO activity she was accused of cursing by her supervisor; and on the basis of retaliation, Agency counsel requested not to participate in mediation for the instant complaint. The Agency accepted the first two claims for processing and procedurally dismissed the last two claims. Complainant requested a hearing and an EEOC AJ issued a decision without a hearing finding no discrimination regarding the first two claims and finding that the last two claims were properly dismissed. The Agency issued a decision implementing the AJ's decision and OFO issued a decision affirming the Agency's decision. Regarding the dismissed claims, OFO found that neither of these claims stated a claim. Regarding the Agency's decision not to convert Complainant into a full-time employee, OFO found that Complainant failed to show that the Agency's reasoning for terminating Complainant (conduct and performance issues) was a pretext for discrimination. Regarding Complainant's Equal Pay Act claim, OFO found that the Agency was justified in offering different pay to Complainant and a male coworker due a factor other than sex. OFO found that any pay difference was justified under a differential based on a factor other than sex - it was based on participation in the Student Intern Program.

Perez (Gabriele G.) v. DHS, 0120141757 (05/13/2016) **[Repeated under Findings and Enforcement below]** – Complainant, a Supervisory Transportation Security Officer (STSO), filed an EEO complaint alleging that she was discriminated against on the basis of sex when she was not given the same opportunity to negotiate her entry salary as a male STSO and when she earned a lower salary than a male STSO. The Agency issued a decision finding that it violated Title VII regarding the entry salary claim and that it violated the Equal Pay Act (EPA) regarding the unequal pay claim. The Agency was ordered to increase Complainant's starting base salary to $46,400. The Agency also awarded Complainant back pay for two years prior to the filing of the complaint. The Agency found the Agency failed to show that the EPA violation was committed in good faith. Thus, Complainant was awarded liquidated damages in the amount equal to the back pay award. The Agency determined Complainant failed to show that the Agency's EPA violation was willful. The Agency found that Complainant did not provide evidence showing she was entitled to pecuniary damages or attorney's fees. The Agency found that Complainant was entitled to $2,000 in nonpecuniary, compensatory damages. Complainant filed an appeal, but filed no brief. OFO affirmed the findings of discrimination, the award of two years of backpay, and the denial of pecuniary damages and attorney's fees (no fee petition submitted). OFO also found that although the liquated damage award as being equal to the back pay award (not yet calculated) was appropriate and the $2,000 in nonpecuniary damages was appropriate, that (as the Agency also found) double recovery is not allowed. OFO ordered the Agency to implement the remedies, including providing EEO training and considering discipline for responsible Agency officials and to post a notice of the finding of discrimination.

Morris (Jessica E.) v. DOJ, 0120150908 (05/06/2016) – Complainant, a former FOIA specialist, filed an EEO complaint alleging that she was discriminated against on the on the bases of race (African-American) and sex (female) when she was paid less than White, male FOIA specialists. The Agency issued a decision finding no discrimination and OFO issued a decision affirming the Agency's decision. Regarding Complainant's Equal Pay Act (EPA) claim, OFO found that when comparing Complainant against other FOIA Specialists in their first year, there is no indication of disparate treatment. OFO found that Complainant, her White, male colleagues, and other FOIA hires began as GS-7s, were paid the same salary, and performed the same work. OFO found that those FOIA Specialists with grades higher than GS-7 achieved those grades through lawful performance and time-in-grade promotions unrelated to sex or race. OFO found that Complainant did equal work for equal pay and that Complainant failed to establish that she was subjected to discrimination under Title VII or the EPA.

Holm (Audrea L.) v. VA, 0120151628 (05/13/2016) – Complainant, a Clinical Coordinator, filed an EEO complaint alleging that she was discriminated against on the on the basis of sex (female) she was paid less than a male counterpart in violation of the Equal Pay Act (EPA) and Title VII. The Agency issued a decision finding no discrimination which OFO affirmed. Regarding Complainant's EPA claim, OFO found that the Agency was justified in offering different pay to Complainant and a male coworker due a factor other than sex. OFO found that the Agency showed that the pay of the Clinic Coordinators was determined by the grade and step assigned by the Nurse Professional Standards Board, the award of additional steps, locality pay, specialty schedules, and relocation incentives. Regarding the Title VII claim, OFO found that the Agency presented a legitimate, nondiscriminatory reason for the pay difference. The Agency stated that a male comparative received a higher salary because his pay was based in part on the location of his office which was different than Complainant's office location.

Brandon (Melani F.) v. VA, 0520160102 (5/3/2016) – In its previous decision, OFO affirmed the Agency's final order which implemented an EEOC AJ's decision by summary judgment that Complainant was not discriminated against based on her race (African-American) and sex (female) in violation of Title VII when the Agency repeatedly classified her position of Supervisory Recreational Therapist as GS-11, not GS-12. On request, OFO denied Complainant's request because there was no evidence of intentional discrimination regarding the classification determinations. But on the Commission's own motion, OFO reopened the decision because OFO found that Complainant's allegation of unequal wages also raised an Equal Pay Act (EPA) claim, which does not require proof of intentional discrimination. We noted that there were several statements by former management officials that Complainant's work was the same, substantially equivalent, or even contained additional responsibilities to the work of her male predecessor, who was at the GS-12 level, and Complainant submitted evidence that her position is at the GS-12 level at other Agency facilities. We ordered the Agency to investigate Complainant's EPA claim, and thereafter notify her of the appropriate rights.

Szenfeld (Heidi B) v. HHS, 0120152308 (06/03/2016) **[Repeated in Findings and Enforcement section below]** – Complainant, a Human Resource Specialist, filed an EEO complaint alleging that she was discriminated (among other claims) against on the basis of sex (female) when she was paid less than a male counterpart in violation of the Equal Pay Act (EPA) and Title VII. The Agency issued a decision finding no discrimination. OFO issued a decision reversing the finding of no discrimination. Regarding Complainant's EPA claim, OFO found that Complainant established a prima facie case of discrimination by showing that she earned less wages than a comparative male employee who performed substantially equal work. OFO found that the Agency did not argue and did not show that it had an affirmative defense for the pay inequity. OFO examined whether the purported legitimate, nondiscriminatory reasons constituted an affirmative defense and OFO found they did not. OFO found that the Agency failed to show that there was any merit system to justify the pay difference and that there was no factor other than sex to show there was a lawful pay differential. OFO found that because there was an EPA violation and the jurisdictional prerequisites had been met for Title VII, there was also a Title VII violation. For remedies, OFO awarded Complainant back pay, ordered the Agency to provide EEO training and consider disciplining responsible Agency officials, and to post a notice of the finding of discrimination.

Lucas-White (Terrie M.) v. Air Force, 0120152627 (06/16/2016) **[Repeated in Findings and Enforcement section below]** – Complainant, a Human Resource Specialist, filed an EEO complaint alleging that she was discriminated against (among other claims) on the basis of sex (female) when she was paid less than male counterparts in violation of the Equal Pay Act (EPA) and Title VII. Complainant alleged that she was paid a lower percentage of revenue from sports camps than other male coaches were paid. After a hearing an EEOC AJ issued a decision finding discrimination under the EPA and Title VII and ordering the Agency to pay Complainant: (1) a higher percentage of revenue for the sports camps for the three years; and (2) a portion of the proceeds of the camps for which she was not compensated. The AJ also ordered the Agency to pay Complainant an additional equal amount as liquidated damages for its violation of the EPA, pay Complainant's

counsel $94,218.64 in attorney's fees, and pay Complainant $1,402.98 in costs. The Agency issued a decision fully implementing the AJ's decision. Complainant filed an appeal requesting remedies for more years and for pecuniary damages. OFO issued a decision affirming the finding of discrimination and the remedies provided. OFO found that three years of back pay award was proper and that substantial evidence supported the AJ's decision not to award pecuniary damages. OFO noted that Complainant had stated she received all monies ordered to be paid by the AJ. OFO ordered the Agency to provide EEO training and consider disciplining responsible Agency officials, and to post a notice of the finding of discrimination.

5. PRESERVING ACCESS TO THE LEGAL SYSTEM

No decisions implicating this priority were issued during this reporting period.

6. PREVENTING HARASSMENT THROUGH SYSTEMIC ENFORCEMENT AND TARGETED OUTREACH

No decisions implicating this priority were issued during this reporting period.

7. ENFORCEMENT – GENERAL

Lewis (Jimmy C) v. VA, 0120140908 (04/01/2016) – Complainant filed an appeal from an Agency decision finding no discrimination in part and finding discrimination in part. Complainant, a Frozen Food Ingredient Control Room/Cook alleged that he was discriminated against on the bases of race (African-American), age (50), and retaliation when he was terminated during his probationary period and when he was harassed by various actions. An EEOC AJ held a hearing and found that the termination was motivated by retaliation for Complainant's prior protected EEO activity. The AJ found no discrimination on the remainder of the complaint. The Agency issued a final order fully implementing the AJ's findings. Complainant appealed the decision but filed no brief. OFO affirmed the AJ's finding of discrimination and found substantial evidence supported the findings of no discrimination. In relief, OFO restated the AJ's relief and ordered the Agency to: reinstate Complainant; provide training and a mentor to Complainant if he accepts the offered position; pay back pay; pay attorney's fees; post a notice of the finding of discrimination; provide EEO training to responsible Agency officials; consider disciplining responsible Agency officials; and pay Complainant $5,000 in nonpecuniary, compensatory damages.

Preston (Scarlet M.), Harmon (Maxima R.), & Miller (Sharolyn S.) v. Navy, 0120150940, 0120150940, & 0120151220 (04/13/2016) – All three complainants worked at the Army Ammunition Plant, Building 567, located in McAlester, Oklahoma. Two of the complainants worked for, and in the same building as, the Director, who was the senior Agency official at McAlester. The third was a clerk who, as part of her duties as a clerk, would enter Building 567 three to four times a month to stock the vending machines. On August 14, 2013, a female employee walked into the Director's office and noticed that the television in his office had the image of one of the women's bathrooms within Building 567. When the Director left the building, the employees went into bathroom and found a camera placed in a smoke detector with wires running from the camera to the television in the Director's office. That evening, the event was reported to the McAlester Security office. The Agency's Department Head located in Maryland was informed of the situation. Within days, the Department Head left Maryland and travelled to the McAlester facility to deal with the situation. The Agency also contacted the FBI. The Department Head placed the Director on unpaid administrative leave on

August 21, 2013, and barred him from the facility and from contacting any employees at the facility. The Department Head held meetings with employees to inform them of the matter and offer counseling to anyone who needed it. Complainants learned of the Director's actions through these meetings. The Agency started the process to remove the Director, however he retired prior to the removal action. The Director was charged with video voyeurism between July 1, 2013 and August 14, 2013, and pled guilty to the charges in February 2014.

The three complainants filed separate complaints alleging sex-based harassment. The Agency issued three separate final decisions finding that they had been subjected to harassment as alleged. The Agency held that as soon as management was informed of the Director's actions, it took prompt, effective action to prevent the offensive conduct from continuing, as well as providing counseling to the involved employees. Therefore, the Agency concluded that it avoided liability for the offensive environment created by the Director's actions. The appeals followed. Since all three Complainants alleged the same events, the appeals were consolidated into a single decision.

The Agency conceded that the three women were subjected to harassment based on sex and that the Director's actions created a hostile work environment. The only issue on appeal was whether or not the Agency is liable for the Director's actions. The Agency asserted that it took prompt action to correct the actions of the Director. However, OFO found that this only satisfied one prong of the Agency's affirmative defense. OFO noted that the second prong of the affirmative defense requires a showing by the employer that the aggrieved employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." The harm began as soon as the Director placed the camera in the women's bathroom in July 2013. Within hours of the discovery, the Base Security was informed of the camera in the bathroom. As such, OFO could not find that the affected employees unreasonably failed to take advantage of any preventative or corrective opportunities. Accordingly, because the Agency cannot establish its affirmative defense, OFO concluded that it is liable for the harassing conduct of the Director.

Bowers (Nannie D.) v. Army, 0720150021 (04/28/2016) – The Agency and Complainant both filed appeals from an EEOC AJ's finding of discrimination. Complainant, a Labor Attorney, filed a complaint alleging in part that she was discriminated against on the bases of retaliation for prior EEO activity when she was subjected to a hostile work environment. The AJ found that the Agency retaliated against Complainant as alleged. The Agency filed an appeal but withdrew it prior to a decision being issued. The AJ had awarded $35,000 in nonpecuniary, compensatory damages and reduced attorney's fees and costs by 25% because Complainant did not prevail on her claims of hostile work environment on other bases. Complainant filed the instant appeal requesting an increase in nonpecuniary, compensatory damages and full attorney's fees. The Agency argues that the AJ was correct in the compensatory damage award and in reducing attorney's fees. OFO found that the compensatory damage award was appropriate, but that the attorney's fees and costs should not have been reduced because the retaliation claim was not distinct from the other claims in the complaint. In relief, OFO ordered the Agency to: pay attorney's fees in the amount of $121,745.00 and costs in the amount of $8,367.53; pay $35,000 in nonpecuniary, compensatory damages; provide training to employees at the facility regarding retaliation; consider disciplining the responsible agency officials responsible for the discrimination; post a notice of the finding of discrimination; and reinstate sick and annual leave.

Wiley (Marilyn W.) v. USPS, 0120140433 (04/08/2016) **[Repeated under Priority 3 above]** – Complainant filed a formal complaint alleging that the Agency discriminated against her and subjected her to a hostile work environment on the bases of race (African-American), sex (female), color (Black), disability, and in reprisal for prior protected EEO activity as evidenced by multiple incidents including, inter alia, management rotated her work assignment and changed her break and lunch times; her request for two hours of OWCP pay was charged as two hours of LWOP (Leave Without Pay); she was taken off of her bid, worked outside of her restrictions and instructed to hit operation 340 and go to room 42 every night.

At the conclusion of the investigation, Complainant requested a hearing. The EEOC AJ partially granted the Agency's motion for summary judgment on Complainant's race, color, sex, and reprisal-based discrimination and hostile work environment claims, finding no discrimination. The AJ held a hearing as to Complainant'

disability discrimination claims. The AJ found that the majority of the actions of Complainant's Supervisor (S1) in making work assignments, instructions, requests for medical information and admonishments were well within the purview of her position. Further, the AJ found that the Agency was reasonably accommodating Complainant with a modified job offer within her restrictions. However, the AJ determined that S1 clearly violated the medical records and disclosure provisions of the Rehabilitation Act when she spoke to the Union Steward regarding Complainant's pregnancy/miscarriage. The AJ noted that it was a per se violation of the law to disclose confidential medical information regarding an employee. As a result, the AJ determined that Complainant was entitled to $1,000 in compensatory damages based on the length, severity and circumstances of Complainant's emotional distress resulting from the release of her very personal business through her medical information and resulting comments by her co-workers for a brief period of time. In addition, the AJ ordered the Agency to provide training to S1 regarding the confidential medical documentation provisions of the Rehabilitation Act, to consider disciplining S1, and to post a notice. The Agency issued its final action fully implementing the AJ's decision.

On appeal, the Commission found that the AJ properly issued partial summary judgment as to Complainant's race, color, sex, and reprisal claims. Further, the Commission affirmed the finding of no discrimination with regard to S1's work assignments, instructions, requests for medical information and admonishments, as well as the finding that the Agency reasonably accommodated Complainant. Since the Agency did not dispute the AJ's finding of a per se violation of the Rehabilitation Act, the Commission confined its review to the order of relief. Noting Complainant's testimony that she was upset because people were coming up to her and asking her questions about it and one employee made a gesture to her of being pregnant. Complainant testified that these actions were upsetting, because she did not want to keep reliving the situation that she was no longer with child. The Commission found that an award of $2,000 in non-pecuniary compensatory damages was more appropriate. In addition, the Commission upheld the order for the Agency to consider disciplining the responsible management officials; provide training to the responsible management officials; and to post a notice.

Butler (Selma D.) v. Dep't of Ed., 0720150015 (04/22/2016) – In claim (1), Complainant, a Management and Program Analyst in the Agency's Office for Civil Rights, applied for a Supervisory Management and Program Analyst position. Complainant was interviewed and ranked by a three-person interview panel, but was not rated high enough to be recommended for a second interview. The ultimate selectee declined the position, so it was re-advertised eight months later.

In claim (2), Complainant suffers from Adult Attention Deficit Hyperactivity Disorder (ADHD), and her doctor recommended that she work in a private office or quiet cubicle, work from home or utilize a flexible work schedule as reasonable accommodation. On December 19, 2007, Complainant wrote a memorandum requesting reasonable accommodation, including the ability to work from home, the necessary equipment to work from home, a private office, and a modified work schedule. Agency officials subsequently requested more information. In February 2008, Complainant's doctor provided more information and stated that Complainant needed to work from home and on a modified or flexible work schedule, Complainant needed to work in the most distraction-free environment possible (e.g., a private office or quiet cubicle away from noise and/or distractions), and that she may need other necessary reasonable accommodations.

On March 20, 2008, the Employee Relations Specialist requested that the Federal Occupational Health Division of the U.S. Public Health Service review the medical documentation related to Complainant's accommodation request. Doctor 1 was assigned to review Complainant's reasonable accommodation request and interviewed Complainant's doctor regarding Complainant's diagnosis, treatment, and prognosis. Complainant's doctor shared with Doctor 1 that Complainant had other conditions including Bipolar Disorder and Obsessive Compulsive Personality Disorder and paranoid thinking. On April 2, 2008, Doctor 1 recommended that the Agency deny the reasonable accommodation request finding it was not adequately supported. Doctor 1, however, recommended that the Agency offer Complainant an Independent Medical Examination.

Two additional doctors confirmed Complainant's ADHD diagnosis and her concentration and focus difficulties. Complainant's supervisor instituted interim arrangements; however, she subsequently retired and Complainant's second-level supervisor discontinued some of the interim arrangements.

On September 22, 2008, Doctor 1 concluded that Complainant's reasonable accommodation request was not supported after reviewing all of the available medical evidence. On October 7, 2008, the Reasonable Accommodation Coordinator informed Complainant that her reasonable accommodation request was not supported and denied her request. Complainant retired in December 2011.

Complainant filed a formal complaint alleging that the Agency discriminated against her on the bases of disability and in reprisal for prior protected EEO activity when she was not selected for the position of Supervisory Management and Program Analyst; and she was denied a reasonable accommodation (telecommuting).

At the conclusion of the investigation, Complainant timely requested a hearing before an EEOC AJ. The AJ partially granted the Agency's motion and issued a summary judgment decision regarding claim (1) finding that Complainant failed to show that the Agency discriminated or retaliated against her by not selecting her for the position at issue. The AJ held a hearing as to claim (2) and issued a decision finding that while the Agency did not subject Complainant to reprisal, it was liable for failing to accommodate Complainant beginning on October 7, 2008. The AJ awarded Complainant $40,000 in non-pecuniary compensatory damages, $2,523 in pecuniary compensatory, $66,823 in attorney's fees, and $272.83 in costs. In addition, the AJ ordered the Agency to post a notice. The Agency subsequently issued a final order rejecting the AJ's decision and the relief ordered.

The Commission initially found no basis to disturb the AJ's summary judgment decision in claim (1) finding that Complainant was not subjected to discrimination or reprisal when she was not selected for the Supervisory Management and Program Analyst position as alleged. With respect to claim (2), the Commission found that substantial record evidence supported the AJ's finding that the Agency failed to accommodate Complainant in violation of the Rehabilitation Act, but affirmed the AJ's finding that Complainant was not subjected to reprisal. The Commission determined that Complainant was entitled to $60,000 in non-pecuniary compensatory damages, the awarded $2,523 in pecuniary damages, and the awarded $66,823 in attorney's fees and $272.83 in costs. In addition, the Commission ordered the Agency to provide Complainant's second-level supervisor training, to consider disciplining the responsible management officials, and to post a notice. The Commission denied Complainant's request for additional relief.

Connor-Stokes (Denese L.) v. DOI, 0120130297 (05/13/2016) **[Repeated under Priority 3 above]** – Complainant filed an EEO complaint that alleged, in pertinent part, that she was denied a reasonable accommodation for her disability (breast cancer) when she was not reassigned to another position and denied use of the Agency's leave share program for treatment related to cancer. Additionally, Complainant alleged that she was subjected to disability discrimination and reprisal when the Agency issued her a "leave usage" letter that threatened her with adverse action because she had requested leave as a reasonable accommodation, and the Agency failed to maintain information obtained pursuant to a medical inquiry on separate forms and in separate medical files. The Agency found that Complainant failed to prove that she was subjected to unlawful discrimination or denied reasonable accommodations as alleged.

In its appellate decision, OFO first found that Complainant was an individual with a disability because she was substantially limited in the major life activity of walking. In so finding, OFO noted that Complainant used a scooter for mobility and was restricted from walking or standing for more than 10 minutes per hour. The Commission further found that although Complainant was unable to perform the essential functions of her Drug Program Specialist position because she was medically restricted from handling urine samples, there were two vacant, funded positions that were available to which she was qualified to be reassigned.

Additionally, OFO found that the Agency failed to provide Complainant with a reasonable accommodation in July 2008 when it denied her access to the leave share program on the basis that her Carpal Tunnel Syndrome and swollen knees were unrelated to cancer. OFO noted that on July 1, 2008, Complainant submitted documentation from her physician that indicated that she had undergone extensive chemotherapy for breast cancer that resulted in side effects, including swollen/painful knees, peripheral neuropathy, and Carpal Tunnel

Syndrome. OFO further found that Complainant was medically restricted from the essential functions of handling and collecting urine specimens associated with her Drug Position Specialist position, which meant that the Agency had a duty to explore whether she could be reassigned to another position. OFO concluded that there was a vacant, funded Administrative Assistant position to which Complainant was qualified to be reassigned, but the Agency improperly did not reassign her to this position because she would not withdraw her EEO complaint in exchange for this reassignment. Further, OFO found that the Agency retaliated against Complainant when it issued her a letter threatening her with adverse action because of her leave share requests, which were related to her disability. Finally, OFO found that management violated the Rehabilitation Act when it placed documentation containing Complainant's medical condition in a file that contained other documents, including emails regarding her work history, her performance plan, and awards and training certificates.

In order to remedy the Rehabilitation Act violation, OFO ordered the Agency to offer Complainant with a reasonable accommodation by offering her a GS-11 Administrative Assistant position; determine the appropriate amount of back pay and interest due to Complainant; provide Complainant with proven compensatory damages; expunge all documentation pertaining to the leave usage letter; remove any medical documentation about Complainant from any file that is not exclusively dedicated to her medical information; pay Complainant proven attorney's fees and costs; provide eight hours of in-person EEO training to the responsible management officials; and to consider taking appropriate disciplinary action against the responsible management officials.

Matthews (Mitchell H.) v. VA, 0120141025 (05/27/2016) – The record revealed that on or about December 22, 2011, an EEOC AJ issued a finding of race discrimination in Complainant's favor regarding his FY 2009 performance rating, which was issued by Complainant's then first level supervisor. The AJ found that the Agency failed to articulate a legitimate, nondiscriminatory reason for issuing Complainant the rating because the Agency's justification for the rating raised at the hearing involved matters which occurred after the rating was issued. The Agency implemented the AJ's decision and there was no appeal. At some subsequent point, complainant's first line supervisor became his second line supervisor (hereinafter referred to as "S2").

On March 11, 2013, Complainant filed the instant EEO complaint alleging that the Agency discriminated against him on the bases of race (African-American) and reprisal for prior protected activity when, on November 6, 2012, he was rated "Fully Successful" for his FY 2012 performance rating based on input from the Assistant Hospital Housekeeping Officer (S2) while under nomination for "Housekeeper of the Quarter."

Complainant claimed that his former first level supervisor, now second level supervisor (S2) retaliated against him by rating him "Fully Successful" on his FY 2012 rating. The Agency denied that S2 contributed to the FY 2012 rating, and asserted that Complainant's first level supervisor (S1), was responsible for the rating. Management explained that S2 only signed the rating because S1 was out on leave due to surgery at the time the ratings were issued. S1 averred that the rating was based on his and the Work Leader's perceptions of Complainant's performance and denied that S2 contributed to the FY 2012 rating. The Agency issued a finding of no discrimination and Complainant appealed.

On appeal, the Commission again found the agency failed to articulate a legitimate, nondiscriminatory reason for its action. Specifically, OFO found management's testimony largely addressed who authored the performance appraisal, and failed to provide an explanation for the rating itself. OFO also found that Complainant's third level supervisor, who was named in the prior complaint, remarked that Complainant's EEO activity was "threatening," "hostile," and "not conducive to a collaborative work environment." Accordingly, OFO found these statements reasonably likely to deter EEO activity and indicated a retaliatory bias.

As relief, the Agency was directed to conduct a supplemental investigation into Complainant's entitlement to compensatory damages, reissue the rating, pay any award and back pay as required and other relief.

Perez (Gabriele G.) v. DHS, 0120141757 (05/13/2016) **[Repeated under Priority 4 above]** – Complainant, a Supervisory Transportation Security Officer (STSO), filed an EEO complaint alleging that she was discriminated against on the basis of sex when she was not given the same opportunity to negotiate her entry

salary as a male STSO and when she earned a lower salary than a male STSO. The Agency issued a decision finding that it violated Title VII regarding the entry salary claim and that it violated the Equal Pay Act (EPA) regarding the unequal pay claim. The Agency was ordered to increase Complainant's starting base salary to $46,400. The Agency also awarded Complainant back pay for two years prior to the filing of the complaint. The Agency found the Agency failed to show that the EPA violation was committed in good faith. Thus, Complainant was awarded liquidated damages in the amount equal to the back pay award. The Agency determined Complainant failed to show that the Agency's EPA violation was willful. The Agency found that Complainant did not provide evidence showing she was entitled to pecuniary damages or attorney's fees. The Agency found that Complainant was entitled to $2,000 in nonpecuniary, compensatory damages. Complainant filed an appeal, but filed no brief. OFO affirmed the findings of discrimination, the award of two years of backpay, and the denial of pecuniary damages and attorney's fees (no fee petition submitted). OFO also found that although the liquated damage award as being equal to the back pay award (not yet calculated) was appropriate and the $2,000 in nonpecuniary damages was appropriate, that (as the Agency also found) double recovery is not allowed. OFO ordered the Agency to implement the remedies, including providing EEO training and considering discipline for responsible Agency officials and to post a notice of the finding of discrimination.

Sylvester (Nadene M.) v. DOJ, 0720150018 (05/20/2016) – The Agency filed an appeal from an EEOC AJ's finding of discrimination. Complainant, a Unit Secretary, filed a complaint alleging in part that she was discriminated against on the basis of retaliation when her supervisor posted a bible verse in her office directed at Complainant. After a hearing, the AJ found that the Agency retaliated against Complainant as alleged. The Agency filed an appeal. The Agency argued that the finding on the merits was incorrect, but that if the finding was upheld, the remedies ordered by the AJ were correct. OFO found that the supervisor's actions were reasonably likely to deter Complainant or others from engaging in protected EEO activity and that the AJ's decision was supported by substantial evidence. OFO affirmed the AJ's finding of discrimination and affirmed the AJ's award of remedies. In relief, OFO ordered the Agency to: pay attorney's fees in the amount of $4,263 and costs in the amount of $3,087.63; pay $1,000 in nonpecuniary, compensatory damages; provide training to employees at the facility regarding retaliation; consider disciplining the responsible agency officials responsible for the discrimination; and post a notice of the finding of discrimination.

Wilson (Herta R.) v. USPS, 0720150020 (05/06/2016) – The Agency filed an appeal from an EEOC AJ's award of nonpecuniary and pecuniary, compensatory damages upon a finding of discrimination. Complainant, a Letter Carrier, filed a complaint alleging that she was discriminated against on the basis of retaliation when she was subjected to a hostile work environment including disciplinary action. The AJ, after a hearing, found that the Agency retaliated against Complainant as alleged. The AJ awarded $70,000 in nonpecuniary damages and $300 in pecuniary damages. The Agency filed an appeal challenging the award of pecuniary damages and requesting that the nonpecuniary damages be lowered to $10,000. The Agency did not challenge the finding of discrimination. OFO found that no pecuniary damages should have been awarded because Complainant presented no documentary evidence of damages. OFO found that the nonpecuniary damage award by the AJ was appropriate given the symptoms detailed by Complainant which included headaches and social impairment. In relief, OFO ordered the Agency to: pay $70,000 in nonpecuniary, compensatory damages; provide training to employees at the facility regarding retaliation; and consider disciplining the responsible agency officials responsible for the discrimination.

Kershner (Michelle G.) v. Treasury, 0120132463 (05/13/2016) **[Repeated under Priority 3 above]** - Complainant, a Correspondence Examination Technician, alleged that the Agency discriminated against her on the basis of disability (attention deficit disorder) by denying her requests for reasonable accommodation. She also alleged that the Agency subjected her to a hostile work environment by, among other things, issuing Opportunity to Improve letters, giving her negative performance feedback, and violating her right to privacy by leaving performance-counseling information in an open area where other employees could see it. After Complainant withdrew her hearing request, the Agency issued a final decision finding that it had not discriminated against her.

We found that it was undisputed that Complainant was an individual with a disability. We further found that the Agency discriminated against Complainant on the basis of disability when it did not provide her with certain requested accommodations. In October 2008, Complainant submitted documentation supporting her need to have a quiet work area. Although the Agency at some point permitted Complainant to work from a remote location, it moved her to a new cubicle in a high-traffic area in November or December 2008 and did not move her back to a quiet area until June 2010. We concluded that the record was devoid of any justification for the Agency's delay in providing Complainant with an effective accommodation. Complainant requested several other reasonable accommodations in August 2010. We found that the Agency did not establish that it would have been an undue hardship to modify the manner in which Complainant handled telephone calls, to adjust the manner in which cases were assigned to Complainant by assigning fewer cases at once, to give Complainant specific directions regarding performance expectations, to allow her to communicate with her Lead or manager several times per week about priorities and work, and to allow her to have an alternative work schedule. Noting that the denial of reasonable accommodation resulted in the denial of an equal opportunity to attain an acceptable level of performance, we found that the Agency discriminated against Complainant on the basis of disability when it issued the Opportunity to Improve letters and gave her negative feedback.

Because we found that the performance-feedback matters were related to the denial of reasonable accommodation and ordered an appropriate remedy, we did not address whether they also created a hostile work environment. We concluded that Complainant did not establish that the other incidents raised in her harassment claim occurred because of her disability.

The performance-counseling information that Complainant's supervisor left in an open area did not contain any confidential medical information. The supervisor, however, stated in her affidavit that an evaluation and progress note from Complainant's psychiatrist as well as a letter from Complainant's therapist were in Complainant's "EPF" file. Given Complainant's allegations that the Agency violated the statutory confidentiality provisions, and in light of the supervisor's statement that Complainant's medical documents were in her personnel file, we found that the Agency violated the Rehabilitation Act by keeping Complainant's confidential medical information in her non-medical personnel file.

Elphick (Ronny S.) v. VA, 0120132198 (05/17/2016) **[Repeated under Priority 3 above]** – Complainant, a Health Science Specialist for the Agency's Veterans Crisis Line at the National Call Center, filed an EEO complaint in which he alleged that he had been discriminated against based on sex (male) (sexual orientation), age, and reprisal (prior EEO activity) when he was not selected for 4 supervisory positions, was denied leave, and was subjected to harassment. Complainant did not request either a hearing or a final agency decision on the record. The Agency issued a decision in which it found that it had not discriminated against Complainant.

The appellate decision noted that although the Agency stated that Complainant's sexual orientation claim could only be processed internally, Commission decisions since-issued had found that a claim of sexual orientation discrimination was a claim of sex discrimination, and that the Commission had jurisdiction over the claim.

The decision assumed that Complainant had established his prima facie cases of disparate treatment on his claimed bases. It found that the Agency had provided legitimate, nondiscriminatory reasons for the nonselections and the denial of leave, which Complainant had not shown to be pretext for discrimination. However, Complainant had claimed that he was denied leave to observe Easter vigil and therefore had alleged a denial religious accommodation. In response to his request for leave for this purpose Complainant was told he could voluntarily swap schedules with another employee if he could find someone who was willing to trade. We found that the Agency did nothing to facilitate the swap, did not discuss any alternatives with Complainant and did not offer any other options, and that therefore the Agency had failed to engage in a good faith effort to reasonably accommodate Complainant's religious beliefs.

It further found that Complainant did not establish a claim of harassment as he had not shown that any of the many incidents he listed were based on sex, sexual orientation, age, or retaliation, nor had he shown that the incidents were severe or pervasive. The Agency's decision was affirmed in part and reversed in part.

Estate of Myerchin (Wilbert W.) v. VA, 0120160204 (05/11/2016) – Complainant filed a formal complaint alleging that he was subjected to ongoing harassment sufficient to create a hostile work environment on the basis of sex (transgender). After Complainant filed his complaint, on July 4, 2015, Complainant committed suicide. The Agency dismissed the complaint as moot pursuant to 29 C.F.R. § 1614.107(a)(5). This appeal was filed by the attorney for his estate.

The estate moved to amend the complaint requesting compensatory damages. In the alternative, the attorney argued the "very nature" of Complainant's allegations put the Agency on notice that he had suffered non-pecuniary damages. The estate provided incident reports and Family Medical Leave Act forms filed by Complainant with the Agency in which he noted treatment, especially by the Chief that he characterized as hostile and intimidating, and indicated that he suffered humiliation and anxiety as a result of these actions. In addition, the estate produced an affidavit from Complainant's mother stating that, after his death, Complainant's psychiatrist told her that the harassment at work may have contributed to his suicide. OFO reversed the Agency's final decision dismissing the matter as moot for the estate demonstrated that Complainant alleged harm he experienced which can be construed as a request for compensatory damages or in the alternative that the estate amended the complaint to include an explicit request for compensatory damages.

Cole (Millicent H) v. USPS, 0120140089 (06/23/2016) – Complainant filed an appeal with the Commission in which she alleged that the Agency had failed to comply with its final order. Complainant filed an EEO complaint on the bases of sex (female) and in reprisal for previous EEO activity when on April 13, 2010, she was issued a notice of removal for unsatisfactory attendance/Absent without Leave (AWOL). Complainant further alleged that the Agency subjected her to discrimination on the bases of sex, disability, and in reprisal for previous EEO activity when, on June 19, 2010, she was sent home and told not to return until her doctor updated her form CA-20. Following a hearing, the AJ found that Complainant had proved that the Agency discriminated against her on the basis of reprisal when, from December 2009 until January 1, 2010, and from June 19, 2010, until October 30, 2010, the Agency sent her home and charged her AWOL. The Agency implemented the AJ's decision.

Complainant claimed in her appeal that the Agency had not complied with the AJ's orders. Complainant generally alleged that her case "has been neglected and mishandled" by the Agency and requested "restitution" in the amount of $50,000. The decision found that the brief statement Complainant submitted to the Commission in support of her appeal did not appear to pertain to any specific remedies ordered by the AJ. In the interest of ensuring compliance with Commission orders and the efficient processing of the allegations, the matter was remanded to the Agency so that it could demonstrate compliance with the AJ's orders.

Frase (Dong F) v. DOI (NPS), 0120140109 (06/03/2016) – Complainant worked as a seasonal Law Enforcement Agent with the National Park Service in Indiana. Complainant had a color vision deficiency. After being hired as a temporary employee on several occasions and meeting and exceeding the Agency's expectations in the performance of his duties, the Agency discovered that they inadvertently forgot to have Complainant submit to a medical/physical examination. Complainant was then required to undergo a physical examination which he failed due to his color vision deficiency and Complainant's request for a waiver was denied.

We reversed the Agency's finding of no discrimination. Specifically, we concluded that the Agency did not dispute the conclusion that Complainant was regarded as an individual with a disability. However, the record shows that the Agency failed to conduct an individualized assessment to determine how Complainant's vision deficiency affected his job performance. We also concluded that the preponderance of the record establishes that Complainant has adapted to his color deficiencies and can distinguish between red and green during real world settings and his eye deficiency has no impact on his job performance. The also record shows that the Agency was capable of performing an individualized assessment in the form of a "functional color test" but failed to do so against one of the medical review board member's recommendation. We also note that the undisputed record establishes that Complainant had been performing his job duties in an exemplary fashion for more than three years and the Agency failed to take this into consideration during the waiver process. Since

the Agency failed to meet its burden under the direct threat standard as required by the Rehabilitation Act, we concluded that the evidence supports the finding that the Agency violated the Rehabilitation Act.

We ordered the Agency to: (1) offer Complainant reinstatement; (2) determine and award back pay and compensatory damages, if any; (3) provide training for the responsible management officials; and (4) post a notice of discrimination.

Arrellano (Ivan V) v. VA, 0120141416 (06/09/2016) - On January 13, 2013, Complainant filed the instant EEO complaint alleging that the Agency discriminated against him on the bases of national origin (Hispanic/Latino) and reprisal for prior protected activity when, between September 26, 2012, and November 30, 2012, he was subjected to harassment, including when his supervisors asked him if he planned to "play the Latino card."

Complainant claimed that on September 26, 2012, his first- and second-line supervisors called him into an office and informed Complainant that they were investigating a coworker's complaint that Complainant regularly gossiped about patients and Agency employees. The supervisors asked Complainant if he made a number of statements, including whether he said he planned to "play the Latino card" if he did not get a position with another Agency. The Agency issued a finding of no discrimination, and Complainant appealed.

On appeal, the Commission found that the majority of the alleged harassment was not connected to Complainant's national origin or prior protected activity. However, the Commission found that the "Latino card" comment constituted per se reprisal. Specifically, OFO found that two supervisors pulling Complainant into an office and asking if he said that he planned to "play the Latino card" in the context of investigating a complaint from another employee constitutes a per se violation. OFO found that such behavior could have a chilling effect on the use of the EEO process because it was reasonably likely to deter EEO activity and indicated a retaliatory bias.

As relief, the Agency was directed to conduct a supplemental investigation into Complainant's entitlement to compensatory damages and other relief.

Shaw (Melani F) v. VA, 0120142156 (06/23/2016) **[Repeated in Priority 3 section above]** – On January 29, 2013, Complainant filed the instant EEO complaint alleging that the Agency discriminated against her on the bases of race (African-American), color (Black), and age (48) when she was subjected to nine instances of harassment between January 2012 and January 2013, including when two of her coworkers accessed her medical records without her consent.

Complainant, who was a patient of the Agency facility where she worked, claimed that she learned on January 11, 2013, that two coworkers accessed her medical records without a valid reason for doing so. According to the record, the Agency conducted an investigation into the coworkers' accessing Complainant's medical records and determined that the coworkers had no valid reason for doing so. The Agency issued a finding of no discrimination and Complainant appealed.

On appeal, the Commission found that coworkers accessing Complainant's confidential medical records when the access was not job-related and consistent with business necessity constituted a per se violation of the Rehabilitation Act. Specifically, we found that the Agency is charged with maintaining any information obtained regarding the medical condition or history of an employee as a confidential medical record. OFO also found that there is no distinction between whether the medical information is obtained in relation to the Complainant's status as an employee and the Complainant's status as a patient.

As relief, the Agency was directed to conduct a supplemental investigation into Complainant's entitlement to compensatory damages and other relief.

Szenfeld (Heidi B) v. HHS, 0120152308 (06/03/2016) **[Repeated in Priority 4 section above]** – Complainant, a Human Resource Specialist, filed an EEO complaint alleging that she was discriminated (among other claims) against on the basis of sex (female) when she was paid less than a male counterpart in

violation of the Equal Pay Act (EPA) and Title VII. The Agency issued a decision finding no discrimination. OFO issued a decision reversing the finding of no discrimination. Regarding Complainant's EPA claim, OFO found that Complainant established a prima facie case of discrimination by showing that she earned less wages than a comparative male employee who performed substantially equal work. OFO found that the Agency did not argue and did not show that it had an affirmative defense for the pay inequity. OFO examined whether the purported legitimate, nondiscriminatory reasons constituted an affirmative defense and OFO found they did not. OFO found that the Agency failed to show that there was any merit system to justify the pay difference and that there was no factor other than sex to show there was a lawful pay differential. OFO found that because there was an EPA violation and the jurisdictional prerequisites had been met for Title VII, there was also a Title VII violation. For remedies, OFO awarded Complainant back pay, ordered the Agency to provide EEO training and consider disciplining responsible Agency officials, and to post a notice of the finding of discrimination.

Lucas-White (Terrie M.) v. Air Force, 0120152627 (06/16/2016) **[Repeated in Priority 4 section above]** – Complainant, a Human Resource Specialist, filed an EEO complaint alleging that she was discriminated against (among other claims) on the basis of sex (female) when she was paid less than male counterparts in violation of the Equal Pay Act (EPA) and Title VII. Complainant alleged that she was paid a lower percentage of revenue from sports camps than other male coaches were paid. After a hearing an EEOC AJ issued a decision finding discrimination under the EPA and Title VII and ordering the Agency to pay Complainant: (1) a higher percentage of revenue for the sports camps for the three years; and (2) a portion of the proceeds of the camps for which she was not compensated. The AJ also ordered the Agency to pay Complainant an additional equal amount as liquidated damages for its violation of the EPA, pay Complainant's counsel $94,218.64 in attorney's fees, and pay Complainant $1,402.98 in costs. The Agency issued a decision fully implementing the AJ's decision. Complainant filed an appeal requesting remedies for more years and for pecuniary damages. OFO issued a decision affirming the finding of discrimination and the remedies provided. OFO found that three years of back pay award was proper and that substantial evidence supported the AJ's decision not to award pecuniary damages. OFO noted that Complainant had stated she received all monies ordered to be paid by the AJ. OFO ordered the Agency to provide EEO training and consider disciplining responsible Agency officials, and to post a notice of the finding of discrimination.

Jensen (Geraldine G) v. USPS, 0720140039 (06/03/2016) – The Agency filed an appeal with the Commission from the finding of discrimination issued by an EEOC AJ. The AJ found that the Agency discriminated against Complainant based on her age (50) when she was not selected for a Postal Inspector Team Leader position. Complainant had applied for a position as a Postal Inspector Team Leader, in St. Paul, Minnesota, but was not selected. Postal Inspectors have a mandatory retirement age of 57. The AJ found that Complainant testified that the selecting official said to her in the interview, "I don't think you are supposed to ask this, but how many years of eligibility do you have left before you retire?" Complainant responded with her age and the statement that she would retire in less than seven years. The AJ found that Complainant possessed more experience than the selectee (34 years of age). He found that Complainant had presented direct evidence of age discrimination, and had shown that age animus permeated the selection process. He found that the selecting official had made statements during the interview process that indicated that he did not think employees close to retirement were applying for promotions for the good of the Agency. In the alternative, the AJ found that Complainant had put forth enough evidence to prevail under the McDonnell Douglas burden-shifting method.

The decision affirmed the AJ's finding that Complainant had presented direct evidence of age discrimination, in the form of the question asked during the interview on how many years until Complainant retired. It noted that given that the Postal Inspection Service, as a law enforcement agency, has a mandatory retirement age of 57, a question regarding retirement is inextricably linked to an employee's age. The selecting official admitted asking the question, and although the Agency tried to characterize it as "innocuous," we found that it was anything but. The decision also affirmed the AJ's finding that Complainant had shown discrimination using the McDonnell Douglas burden-shifting method, and had shown that the Agency's legitimate, nondiscriminatory reasons were pretext for discrimination.

The decision ordered: back pay and other benefits; Complainant to be offered a position as a Postal Inspector Team Leader, Level 14, in St. Paul, Minnesota, or to a substantially equivalent position at a mutually agreed upon Agency location; training to the management officials involved; the Agency to consider taking appropriate disciplinary action; and a notice to be posted.

Knox (Kenyatta S) v. DOJ (FBP), 0720150016 (06/03/2016) – Complainant filed an EEO complaint in which she alleged that her managers discriminated against her on the basis of disability (residual effects of back injury) by ordering her off the clock and refusing to allow her to return to work until her doctor cleared her. After an agency investigation, the matter was referred to an EEOC AJ who issued a bench decision finding in Complainant's favor. During discovery, the Agency had submitted a motion to compel, upon which the AJ did not rule before the hearing. After the AJ issued her decision, the Agency's representative reminded her that she had still not ruled on its motion to compel discovery, and that some of the items within the scope of the underlying discovery request were relevant to the Complainant's claim for damages. The AJ then granted the Agency's motion to compel so that damages could be ascertained.

The Agency contended that when it received Complainant's responses, it found out that the Complainant had filed a union grievance on the same matter over a week before filing her EEO complaint on the same matter, whereupon it filed a motion with the AJ to reopen the case and dismiss the complaint. Without responding to the Agency's motion, the AJ awarded the Complainant $8,000 in compensatory damages. The Agency refused to implement the AJ's decision and appealed, arguing that the AJ abused her discretion in not dismissing the complaint after it became known that the Complainant had previously filed a grievance on the same matter. We rejected this contention, pointing that while dismissals for initiating grievances on the same matter are mandatory prior to the hearing request, it falls within the AJ's discretion to do so once the hearing request is granted. We emphasized that the party charging an AJ with abuse of discretion faces a very high bar, and found that in this case, the Agency did not clear it. We affirmed the damages award and directed the Agency to conduct a supplemental investigation as to whether Complainant was entitled to compensation for lost annual leave.

Quintana (Tyrone D) v. DOD, 0720160005 (06/06/2016) – Complainant filed a formal complaint alleging that the Agency discriminated against him on the bases of national origin (Hispanic) and in reprisal for prior protected EEO activity when he learned that his chain of command did not support his classification appeal to convert his position to the GS-14 level; he learned that his supervisor was emailing Mexican jokes about feeding Mexicans to alligators to his co-workers; and he was verbally reprimanded for missing a meeting due to his participation in the investigation of his EEO complaint. An EEOC AJ held a hearing and determined that Complainant's supervisors subjected him to national origin discrimination and reprisal by not supporting his grade appeal to a higher level. The AJ found, however, that record evidence showed that Agency management did not retaliate against Complainant by verbally reprimanding him and that the single instance of an offensive email was insufficiently severe or pervasive to establish a hostile work environment. To remedy the discrimination, the AJ ordered the Agency to pay Complainant $50,000 in compensatory damages, to retroactively place Complainant in the GS-14 General Engineer position, to pay Complainant back pay plus interest and other benefits due, and to post a notice. In addition, the AJ awarded Complainant $24,501.39 in attorney's fees, and $1,562.47 in costs. The Agency subsequently issued a final order rejecting the AJ's finding of discrimination and reprisal as to Complainant's grade appeal claim and the relief ordered. On appeal, the Commission reversed the Agency's final order and affirmed the AJ's finding of discrimination and reprisal and the relief ordered.

CIRCULATED CASES

Harding (Hannah C.) v. Army, 0520150436 (05/05/2016) – Complainant requested reconsideration of EEOC Appeal No. 0120150905 (06/17/2015). The Commission's prior decision affirmed the Agency's dismissal of

two claims in its final decision, but reversed the Agency's dismissal of one claim finding that the Agency failed to meet its burden of showing that Complainant's EEO counselor contact was timely. After reviewing the previous decision and the entire record, the Commission found that it inadvertently overlooked the Agency's submission of documents demonstrating that the Agency met its burden of showing that Complainant's EEO counselor contact was untimely as to that claim. Accordingly, the Commission found that the request met the criteria of 29 C.F.R. § 1614.405(c), and granted the request. As a result, the decision of the Commission in Appeal No. 0120150905 was reversed, and the Agency's final decision dismissing the complaint was affirmed.

III. Federal Sector Oversight/Evaluation Activities

- OFO conducted 16 Technical Assistance (TA) Visits with federal agencies to discuss FCP topics, including Schedule A (hiring and conversion), reasonable accommodation program, anti-harassment program, barrier analysis of the senior executives, and general non-compliance.
- OFO participated in numerous meetings involving OPM's Diversity and Inclusion Steering Committee and the Hispanic Council on Federal Employment's Subcommittee on Barrier Analysis. In addition, OFO attended meetings concerning OMB's Federal Interagency Working Group for Measuring Sexual Orientation and Gender Identity in federal statistics.
- OFO continued work on the FY 2012 - FY 2014 Annual Report on the Federal Work Force Part II and continued drafting FY 2015 Annual Report Part I.
- OFO published its 3rd quarter FY 2016 Digest of EEO Law, containing recent Commission and federal court decisions. This Digest included an article on compensatory damages. OFO staff coordinated with OCLA to issue a national press release, which is featured on the home page of eeoc.gov with a "Big Box" image at the top of the page. Staff also conducted social media outreach on Twitter and GovDelivery.
- OFO continued drafting additional guidance for internal and external stakeholders for the newly created Compliance Enforcement Initiative which is scheduled to be published in the 4th quarter of FY 2016.
- OFO continued drafting a new format for the federal page on the external site with the goal of making it more user-friendly for stakeholders and providing additional resources for them. Additionally, OFO continued to provide hearing coordination with OFP.
- RED attended the White House Initiative on Asian Americans and Pacific Islanders Interagency Workgroup Meeting at the Eisenhower Executive Office Building on the White House campus.
- RED continued work on the Federal Sector Report on Retaliation Project, including writing an introduction and completed all tables needed for the "Profile of Federal Sector Retaliation Complaints and Findings" section of the report.
- RED designed the focus group registration portal using Survey Monkey and scheduled all five focus groups related to small, mid and large level Agencies as well as EEO Directors and non-EEO Directors.
- RED conducted all five focus groups necessary for completing the Performance Metrics Committee Report on attitudes towards the impact of OFO on the federal sector stakeholders.
- OFO generated a report comparing the advantages and disadvantages of PowerPDF to NVivo before finally deciding on NVivo for the software of choice in analyzing MD-715 WHAAPI data.
- In support of OCH, RED generated reports of Federal Sector Discrimination Age Complaints and Findings for the years 2013, 2014, and 2015.
- In support of Sharon Masling and her "Select Task Force on the Study of Harassment Report" RED generated reports of federal sector harassment complaints alleged on the bases of race, sex, national origin, religion, disability, and age for the year 2015.
- OFO designed a Trigger Identification Tool that allows agencies to identify statistically significant disparities in the demographic distributions of their workforces.
- OFO continued work on a Root Cause Analysis Application that will provide agencies a list of potential barriers to equal employment opportunities based on their answers to a thorough set of yes/no questions. This application will also provide agencies with recommended next steps for their efforts to drill down to the root causes of inequalities. In the future, using data from this application, OFO will analyze and track agencies' progress in eliminating barriers to equal employment opportunities.

- OFO staff continued work on an analytic report on the gender and motherhood pay gaps in the Federal Government.
- OFO staff continued drafting a literature review on the best ways to prevent workplace harassment.
- OFO worked on an analytic report that will identify agencies that incorrectly made determinations of no discrimination in harassment appellate cases. This report will also correlate prevalence of incorrect harassment cases with 1) rate of formal complaints filed 2) rate of improper procedural dismissals.
- OFO staff drafted a job description for future Social Science Research Interns.
- OFO staff created a workplace harassment knowledge assessment and a post-training evaluation form to be used in TOD's Anti-Harassment Training for Managers.
- RED staff contributed to the Intake and Case Management Workgroup's report, Analysis of the Appellate Lifecycle: Docketing to Compliance, which was submitted to the commissioners' office.
- OFO staff continued work on a program evaluation of HHS's EEO program by conducting numerous interviews of staff in 10 subcomponents and reviewing volumes of documents.
- OFO staff began work on a program evaluation of VBA's EEO program by issuing to the Under Secretary for Benefits a notice and request for information

IV. Outreach & Training

1. Eliminating Barriers in Recruitment and Hiring

- Assistant Director for TOD conducted Barrier Analysis training for federal stakeholders in Rockville, MD.
- Assistant Director for TOD conducted Barrier Analysis training for NIH in Rockville, MD.
- OFO staff presented three training sessions by webinar on Reasonable Accommodation for Managers to the US Citizenship and Immigration Services (USCIS).
- OFO staff conducted MD-715 Overview to NIH in Washington, DC.
- OFO staff conducted MD-715 Overview for federal stakeholders in Rockville, MD.
- OFO staff conducted Barrier Analysis training for Navy in Washington, DC.
- OFO staff conducted two trainings, Navigating EEO for Managers and Supervisors, for the Consumer Finance Protection Bureau (CFPB) in Washington, DC.
- Assistant Director TOD presented a Federal OFO Update to Army at Redstone Arsenal (Huntsville), AL.
- OFO staff presented on Barrier Analysis to USDA, Agricultural Research Service, in Oakland, CA.
- Associate Director FSP spoke on a panel presentation to EEOC and Federal sector invitees concerning EEO and Diversity-Inclusion collaboration in Washington, DC.
- OFO staff presented on Workplace Harassment, Religious Accommodation, EEO Essentials for Managers and Supervisors, and on EEO SES Forum panel, at FAPAC conference in Orlando, FL.
- Associate Director FSP spoke on Diversity and Inclusion SES Panel for FAA in Washington, DC.
- Associate Director FSP presented EEOC's latest initiative on Developing Performance Measures for EEO Directors to the Small Agency Council in Washington, DC.
- OFO staff provided Reasonable Accommodation (RA) presentation for disability course at the Defense Equal Opportunity Management Institute (DEOMI) at Ft Patrick, FL.
- EEOC staff provided RA presentation for NASA at Kennedy Space Center, FL.

- EEOC staff spoke to USDA on 501 Disability NPRM in Riverdale, MD.
- OFO staff spoke on RA to the Department of Interior (DOI) in Washington, DC.

2. Protecting Immigrant, Migrant and Other Vulnerable Workers

- EEOC staff conducted two Counselor Refresher trainings for federal stakeholders in Washington, DC.
- OFO staff presented three RA for Managers trainings by webinar for USCIS.
- OFO staff conducted two trainings Navigating EEO for Managers and Supervisors for the CFPB in Washington, DC.
- OFO staff conducted Framing Claims training for USDA in Beltsville, MD.
- OFO staff conducted Navigating EEO for Managers training for federal stakeholders in Washington, DC.
- OFO staff provided RA presentation for DEOMI at Ft Patrick, FL.
- Assistant Director TOD and OFO staff provided 8-hour EEO Counselor Refresher to Region IV Blacks in Government (BIG), Annual Regional Training Conference, in Atlanta, GA.
- OFO staff presented on Workplace Harassment, Religious Accommodation, EEO Essentials for Managers and Supervisors, and on EEO SES Forum panel, at FAPAC conference in Orlando, FL.
- Associate Director FSP spoke on Diversity and Inclusion SES Panel for FAA in Washington, DC.
- Associate Director FSP presented EEOC's latest initiative on Developing Performance Measures for EEO Directors to Small Agency Council in Washington, DC.
- OFO staff provided training to the Department of Commerce on LGBT issues in Alexandria, VA.
- Associate Director FSP spoke to the American Association of People with Disabilities (AAPD), Careers in Public Policy Panel for AAPD's Summer Interns, in Washington, DC.
- OFO staff provided RA presentation for disability course at DEOMI at Ft Patrick, FL.
- EEOC staff provided RA presentation for NASA at Kennedy Space Center, FL.

3. Addressing Emerging and Developing Issues

- EEOC staff conducted two Investigator Refresher trainings for federal stakeholders in Washington, DC.
- OFO staff conducted Navigating EEO for Managers training for federal stakeholders in Washington, DC.
- EEOC staff conducted Framing Claims training for USDA in Beltsville, MD.
- OFO staff conducted Navigating EEO for Managers trainings for the CFPB in Washington, DC.
- Assistant Director TOD presented an OFO Update to Army at Redstone Arsenal in Huntsville, AL.
- Associate Director FSP spoke on the new MD-110 to MSPB in Washington, DC.
- OFO staff presented an EEO Case Law Update to DOT legal staff via teleconference.
- OFO staff presented an EEO Case Law Update to DOD personnel at Joint Base Andrews, MD.
- OFO staff spoke to HUD managers on Disability RA in Minneapolis, MN.

- OFO staff spoke on LGBT Issues at the IRS in Washington, DC.
- Associate Director FSP spoke on Retaliation as a panel member at Army SHARP Summit in Aberdeen, MD.
- OFO staff presented on Workplace Harassment, Religious Accommodation, EEO Essentials for Managers and Supervisors, and EEO SES Forum panel, at the FAPAC conference in Orlando, FL.
- OFO staff presented an EEO Case Law Update to NASA in Leesburg, VA.
- OFO staff presented an EEO Case Law Update to the American Bar Association (ABA), Section on Administrative Law and Regulatory Practice, Government Personnel Committee in Washington, DC.
- Associate Director FSP spoke on Diversity and Inclusion SES Panel for FAA in Washington, DC.
- Associate Director FSP presented EEOC's latest initiative on Developing Performance Measures for EEO Directors at the Small Agency Council in Washington, DC.
- OFO and EEOC staff provided training to counselors and investigators regarding EEO Case Updates, MD-110 revisions, and AJ perspective on EEO Process in Columbia, S.C.
- OFO staff provided training to Department of Commerce on LGBT Issues in Alexandria, VA.
- Associate Director FSP spoke to AAPD, Careers in Public Policy Panel, for AAPD's Summer Interns in Washington, DC.
- EEOC staff spoke to USDA on 501 Disability NPRM in Riverdale, MD.
- OFO staff spoke on Reasonable Accommodation to Department of Interior (DOI) in Washington, DC.
- OFO staff spoke to Citizenship & Immigration Services (CIS) on LGBT Issues in Washington, DC.

4. **Enforcing Equal Pay Laws**

- There were no activities to report under this priority during this reporting period.

5. Preserving Access to the Legal System

- EEOC staff conducted three New Counselor trainings for federal stakeholders in Washington, DC, and Rockville, MD.
- EEO staff conducted four New Investigator trainings for federal stakeholders in Washington, DC, and Rockville, MD.
- EEOC staff conducted Letter of Acceptance and Dismissal training for federal stakeholders in Rockville, MD.
- EEOC staff conducted two Investigator Refresher trainings for federal stakeholders in Washington, DC.
- EEOC staff conducted Framing Claims training for USDA in Beltsville, MD.
- EEOC staff conducted two Counselor Refresher trainings for federal stakeholders in Washington, DC.
- OFO staff conducted Counselor Refresher training for the SEC.
- OFO staff conducted Navigating EEO for Managers training for federal stakeholders in Washington, DC.
- OFO staff presented three RA for Managers trainings by webinar for USCIS.
- EEOC staff presented Drafting Final Agency Actions training at DEOMI at Patrick AFB, FL.

- OFO staff conducted two EEO Laws and EEO Complaints Processing trainings for EX-IM Bank in Washington, DC.
- OFO staff conducted two trainings on Navigating the EEO Process for Managers and Supervisors to CFPB in Washington, DC.
- OFO staff conducted Navigating EEO for Managers training for federal stakeholders in Washington, DC.
- Assistant Director TOD presented an OFO Update to the Army at Redstone Arsenal, Huntsville, AL.
- Associate Director FSP presented a Retaliation Brown Bag lunch presentation to federal sector EEO personnel at EEOC HQ.
- Associate Director FSP spoke about the new MD-110 to MSPB in Washington, DC.
- OFO staff provided RA presentation to DEOMI at Ft Patrick, FL.
- OFO staff presented an EEO Case Law Update to DOD personnel at Joint Base Andrews in MD.
- Assistant Director TOD and OFO staff provided 8-hour EEO Counselor Refresher training to Region IV BIG, Annual Regional Training Conference, in Atlanta, GA.
- OFO staff presented an EEO Case Law Update to the 2016 Annual Symposium of the Society of Federal Labor & Employee Relations Professionals (SFLERP) in Arlington, VA.
- OFO staff spoke to HUD managers on Disability RA in Minneapolis, MN.
- OFO staff spoke on LGBT Issues to the IRS in Washington, DC.
- Associate Director FSP spoke on Retaliation as a panel member at Army SHARP Summit in Aberdeen, MD.
- OFO staff presented an EEO Case Law Update to NASA in Leesburg, VA.
- OFO staff presented an EEO Case Law Update to the ABA, Section on Administrative Law and Regulatory Practice, Government Personnel Committee, in Washington, DC.
- Associate Director FSP spoke to the National Park Service on EEO Challenges in Washington, DC.
- OFO and EEOC staff provided training to Counselors and Investigators regarding EEO Case Law Update, MD-110 Revisions, and AJ perspective on EEO Process, in Columbia SC.
- TOD staff provided No Fear Act training to the U.S. African Development Foundation in Washington, DC.
- EEOC staff spoke on Effective Representation in the EEOC Hearings Process to DOT attorneys via teleconference.
- EEOC staff provided an Ask the AJ session for Navy EEO personnel at Patuxent River NAS, MD.
- Associate Director FSP spoke on Retaliation to NASA personnel at Ames Research Center in Moffett Field, CA.

6. Preventing Harassment through Systemic Enforcement and Targeted Outreach

- OFO staff conducted two EEO Laws and EEO Complaints Processing trainings for EX-IM Bank in Washington, DC.
- OFO staff conducted two trainings on Navigating EEO for Managers and Supervisors to CFPB in Washington, DC.
- OFO staff conducted Navigating EEO for Managers training for federal stakeholders in Washington, DC.
- EEO staff conducted four New Investigator trainings for federal stakeholders in Washington, DC, and Rockville, MD.

- EEOC staff conducted three New Counselor trainings for federal stakeholders in Washington, DC, and Rockville, MD.
- OFO staff presented an EEO Case Law Update to DOT legal staff via teleconference.
- OFO staff presented an EEO Case Law Update to DOD personnel at Joint Base Andrews in MD.
- Assistant Director TOD and OFO staff provided 8-hour EEO Counselor Refresher training to Region IV BIG, Annual Regional Training Conference, in Atlanta, GA.
- OFO staff presented an EEO Case Update to 2016 Annual Symposium of the Society of Federal Labor & Employee Relations Professionals (SFLERP) in Arlington, VA.
- OFO staff presented on Workplace Harassment, Religious Accommodation, EEO Essentials for Managers and Supervisors, and EEO SES Forum panel at FAPAC conference in Orlando FL.
- OFO staff presented an EEO Case Law Update to NASA in Leesburg, VA.
- OFO staff presented an EEO Case Law Update to the ABA, Section on Administrative Law and Regulatory Practice, Government Personnel Committee, in Washington, DC.
- OFO and EEOC staff provided training to counselors and investigators regarding EEO Case Updates, MD-110 Revisions, and AJ Perspective on EEO Process in Columbia, SC.
- OFO staff provided training to Department of Commerce staff on LGBT Issues in Alexandria, VA.
- Associate Director FSP spoke to AAPD, Careers in Public Policy Panel for Summer Interns, in Washington, DC.
- EEOC staff spoke on Effective Representation in the EEOC Hearings Process to DOT attorneys via teleconference.
- EEOC staff provided an Ask the AJ session for Navy EEO personnel at Patuxent River NAS, MD.

7. Training/Outreach – General

- Finalized EEOC participation at the National Civil Rights Conference.
- OFO TOD staff initiated a retaliation education video for use on EEOC's YouTube Channel. Release date is scheduled for 4th Quarter.
- OFO TOD News Flash e-article "Religious Accommodation" issued to federal stakeholders through e-blast.
- Executive Leadership Conference date, venue and location have been finalized. Conference scheduled for 4th Quarter.
- EEOC staff conducted three New Counselor trainings for federal stakeholders in Washington, DC, and Rockville, MD.
- EEO staff conducted four New Investigator trainings for federal stakeholders in Washington, DC, and Rockville, MD.
- EEOC staff conducted two Investigator Refresher trainings for federal stakeholders in Washington, DC.
- Assistant Director for TOD conducted Barrier Analysis training for federal stakeholders in Rockville, MD.
- Assistant Director for TOD conducted Barrier Analysis training for NIH in Rockville, MD.
- OFO staff conducted Navigating EEO Process for Managers training for federal stakeholders in Washington, DC.
- OFO staff conducted two EEO Laws and EEO Complaints Processing trainings for the EX-IM Bank in Washington, DC.

- OFO staff conducted an MD-715 Overview to NIH in Washington, DC.
- OFO staff conducted an MD-715 Overview for federal stakeholders in Rockville, MD.
- OFO staff presented on Barrier Analysis to USDA, Agricultural Research Service, in Oakland, CA.
- Associate Director FSP conducted a Retaliation Brown Bag lunch presentation to federal sector EEO personnel at EEOC HQ.
- Assistant Director TOD presented an OFO Update to Army at Redstone Arsenal in Huntsville, AL.
- Associate Director FSP spoke on the new MD-110 to MSPB in Washington, DC.
- Associate Director FSP spoke on a panel presentation to EEOC and federal sector invitees concerning EEO and Diversity-Inclusion Collaboration in Washington, DC.
- OFO staff presented an EEO Case Law Update to DOT legal staff via teleconference.
- OFO staff provided RA presentation to DEOMI at Ft Patrick, FL.
- OFO staff presented an EEO Case Law Update to DOD personnel at Joint Base Andrews in MD.
- Assistant Director TOD and OFO staff provided 8-hour EEO Counselor Refresher to Region IV BIG, Annual Regional Training Conference, in Atlanta, GA.
- OFO presented an EEO Case Law Update to 2016 Annual Symposium of the Society of Federal Labor & Employee Relations Professionals (SFLERP) in Arlington, VA.
- Associate Director FSP delivered remarks at the Asian American Government Executives Network, SES graduation, in Washington, DC.
- OFO staff spoke to HUD Managers on Disability and RA in Minneapolis, MN.
- OFO staff spoke on LGBT Issues at the IRS in Washington, DC.
- Associate Director FSP spoke on Retaliation as a panel member at Army SHARP Summit in Aberdeen, MD.
- OFO staff presented on Workplace Harassment, Religious Accommodation, EEO Essentials for Managers and Supervisors, and on EEO SES Forum panel at FAPAC conference in Orlando FL.
- OFO staff presented an EEO Case Law Update to NASA in Leesburg, VA.
- OFO staff presented an EEO Case Law Update to the ABA, Section on Administrative Law and Regulatory Practice, Government Personnel Committee, in Washington, DC.
- Associate Director FSP spoke on Diversity and Inclusion SES Panel for FAA in Washington, DC.
- Associate Director FSP presented EEOC's latest initiative on Developing Performance Measures for EEO Directors to the Small Agency Council in Washington, DC.
- Associate Director FSP spoke to the National Park Service on EEO Challenges in Washington, DC.
- OFO and EEOC staff provided training to counselors and investigators regarding EEO Case Law Updates and MD-110 Revisions, as well as AJ Perspective on EEO Process in Columbia, SC.
- OFO staff provided training to the Department of Commerce staff on LGBT Issues in Alexandria, VA.
- Associate Director FSP spoke to AAPD, Careers in Public Policy Panel for AAPD's Summer Interns, in Washington, DC.
- TOD staff provided No Fear Act training to the U.S. African Development Foundation in Washington, DC.
- OFO staff provided RA presentation for a disability course at DEOMI at Ft Patrick, FL.
- EEOC staff provided RA presentation for NASA at Kennedy Space Center, FL.

- EEOC staff spoke on Effective Representation in the EEOC Hearings Process to DOT attorneys via teleconference.
- EEOC staff provided an Ask the AJ session for Navy EEO personnel at Patuxent River NAS, MD.
- EEOC staff spoke to USDA on the 501 Disability NPRM in Riverdale, MD.
- Associate Director FSP spoke on Retaliation to NASA personnel at Ames Research Center in Moffett Field, CA.
- OFO staff spoke on Reasonable Accommodation (RA) to DOI in Washington, DC
- OFO staff spoke to CIS on LGBT Issues in Washington, DC.

Quarterly Strategic Enforcement Plan Report

Office of Federal Operations

4th Quarter FY 2016

I. Background: General FY 2016 4th Quarter Appellate Review Program Accomplishments

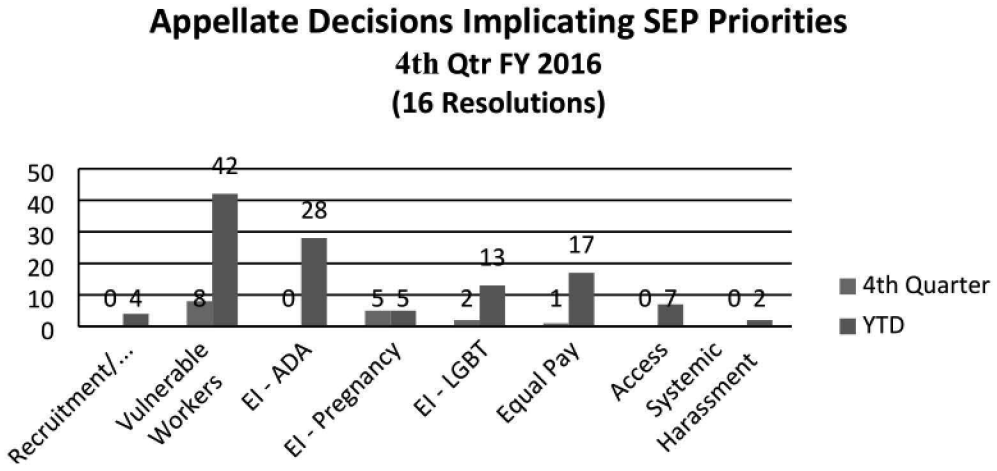
During the 4th Quarter FY 2016, the Office of Federal Operations (OFO) resolved 973 appeals. These resolutions included 440 decisions on the merits and 460 procedural closures. Of the 460 procedural closures, 263 of them involved initial appeals under review by OFO, and we reversed 85 or 32.3% of the agency dismissals. With regard to the merit decisions, OFO issued 28 findings of discrimination during the 4th Quarter. We found discrimination on the basis of disability in 11 of the findings, sex in 8 of the findings, age in 6 of the findings, and retaliation in 5 of the findings. The top three issues involved in the findings included, harassment (8), disability accommodation (5), promotion (3) and sexual harassment (3).

Resolution Description	4th Quarter	Year to Date
Resolutions	973	3,751
Merits Resolutions	440	1,472
Findings	28	111
Non-Findings	412	1,359
Procedural Resolutions (all)	460	1,938
Procedural Resolutions (from Initial Appeal)	263	1,356
Affirming Dismissal	175	914
Remanding Dismissal	85	435

With regard to the categorization of the 973 resolutions, OFO identified 16 appeals that implicated an SEP/FCP priority. Section II below contains charts breaking down the composition of the individual priorities, summaries of the 16 decisions OFO attorneys categorized as implicating the SEP/FCP priorities, and summaries of the findings of discrimination made in the 4th quarter.

II. Analysis of SEP/FCP Priority Areas

The chart below depicts the distribution of the 16 SEP categories identified in the 16 appellate decisions OFO identified as implicating an SEP/FCP category:



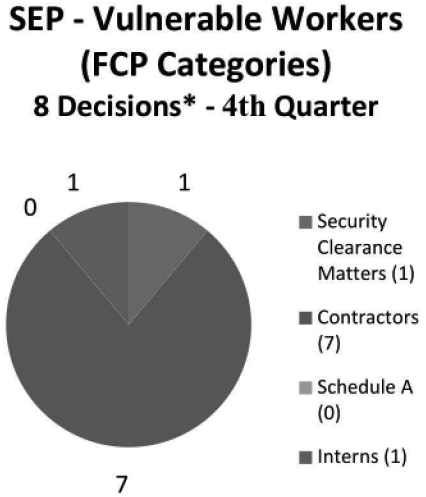
The numbered sections below provide more information about each of the six SEP priorities. Specifically, these sections start with a chart depicting the related FCP categories under each SEP, as well as summaries of the specific decisions under each SEP/FCP priority. In Section 7, by contrast, we provide summaries of the 28 findings of discrimination issued during the 4th Quarter, whether or not they implicated an SEP/FCP category.

1. ELIMINATING BARRIERS IN RECRUITMENT AND HIRING

No decisions implicating this priority were issued during this reporting period.

2. PROTECTING IMMIGRANT, MIGRANT AND OTHER VULNERABLE WORKERS

As depicted in the chart below, during the 4th Quarter of FY 2016 OFO resolved 8 decisions under this SEP Priority and its associated FCP priorities.



*One decision implicated 2 FCP categories

Decision Summaries for this Category

Kereem (Blanca B.) v. State, 0120151876 (07/07/2016) **[Repeated under Findings/Enforcement below]** – Complainant served the Agency as a contract Language & Culture Instructor at its School of Language Studies in Arlington, Virginia. The Agency dismissed the complaint, and the Commission reversed, finding that Complainant was a common law employee. EEOC Request No. 0520110069 (Apr. 26, 2012). Following an investigation, which was supplemented, the Agency issued a FAD finding no discrimination. Complainant alleged that she was sexually harassed, both verbally and physically, by one of her government supervisors (S2). She accused S2 of the following: making a pass, unwarranted attention, unwanted sex talk, touching her buttocks, trying to put her hand on his penis, and repeatedly asking her go to a hotel with him. A co-worker complained that S2 also sexually harassed her, alleging numerous specific incidents, some similar to Complainant's. Both confided to co-workers, and another supervisor stated that she heard S2 tell sexual jokes, and he said he loved her. In finding no discrimination, the Agency determined that the harassing incidents did not occur.

OFO relied on the Commission's guidance on sexual harassment which discusses how to evaluate evidence of harassment. While acknowledging S2's strong denials and staff and management providing powerful character references and supportive statements about S2's behavior, OFO found that what tipped the balance in Complainant's favor was that a coworker also complained that she was a victim of S2's sexual harassment, they both confided to coworkers about being victimized by him, and the other supervisor's statement. OFO found that the harassment was unwelcome, and severe and pervasive. As the harassment did not result in a tangible employment action, the Agency was free to raise an affirmative defense to avoid liability, but OFO found the Agency did not raise an affirmative defense. OFO ordered various remedies. It found no discrimination on the remainder of the complaint.

Lofy (Latricia P.) v. Air Force, 0520160277 (08/04/2016) – In the underlying complaint, Complainant alleged that Complainant filed a formal complaint alleging that the Agency subjected her to discrimination when: (1) on the bases of sex (female), she was harassed by a Lieutenant Colonel who asked her, "Did you get your Tramp Stamp?" and (2) on the basis of reprisal for reporting her claim of sexual harassment.

Our previous decision reversed the Agency's dismissal which concluded that Complainant was not an employee of the Agency but an independent contractor. We concluded that the Agency failed to perform any analysis of the factors espoused in Ma v. Dep't of Health and Human Serv., EEOC Appeal Nos. 01962389 & 01962390 (May 29, 1998). We also noted in our previous decision that we are unable to ascertain from the record whether the Agency exercised sufficient control over Complainant's position to qualify as her employer for the purpose of 29 C.F.R. Part 1614. Accordingly, we remanded the matter to the Agency to conduct a supplemental investigation and analysis regarding this issue.

In its request to reconsider, the Agency attempted to put forth a more detailed argument in favor of concluding that Complainant was an independent contractor without supplementing the record with affidavits and/or additional evidence. After reviewing the previous decision and the entire record, we found that the request failed to meet the criteria of 29 C.F.R. § 1614.405(c), and accordingly, we denied the request.

Vick (Hannah C.) v. Army, 0120140349 (09/16/2016) – Complainant, a GS-07 Business Development Specialist (Intern), alleged that the Agency discriminated against her: (1) on the bases of national origin, disability, and age, when S1 did not promote to her a GS-09 position; and (2) on the basis of reprisal for prior protected EEO activity in connection with eight incidents involving S1 in a one-month period. According to Complainant, S1: stated that an unauthorized commitment on her government

credit card was her fault; forced her to undergo an unofficial workload analysis; removed her from a project; denied her request for a developmental assignment; initially refused to give her a copy of a CA-1 form; orally counseled her; took away her keys to the filing cabinet; and gave her assignments with unrealistic due dates.

The Agency, in its FAD, concluded that Complainant did not prove that the Agency subjected her to discrimination as alleged. OFO, in its appellate decision, affirmed the FAD.

Regarding her non-promotion, OFO found that Complainant did not establish her claim of disparate treatment on the bases of national origin, disability, or age. Assuming, arguendo, that Complainant established a prima facie case, OFO found that S1 articulated a legitimate, nondiscriminatory reason for her non-promotion; namely, her unacceptable performance in developing a customer survey brief. Moreover, OFO found that Complainant did not prove, by a preponderance of the evidence, that S1's reason was pretextual. Citing documentary evidence in the record, OFO found that customer survey tasks were Complainant's top priority and that S1 had concerns about her performance.

Regarding the eight incidents involving S1, OFO found that Complainant did not establish her claim of retaliatory harassment. Specifically, OFO found that the evidence in the record was insufficient to support a finding that S1's conduct as based on Complainant's prior protected EEO activity. Citing S1's fact-finding conference testimony, OFO found that S1 provided non-retaliatory explanations for the incidents. Citing Complainant's fact-finding conference testimony, OFO found that Complainant and S1 had a contentious work relationship that predated her protected EEO activity.

McIver (Brook V.) v. DOJ, 0120142967 (09/22/2016) – Complainant, a contract employee with the Agency, filed an appeal from an Agency decision finding no discrimination. Complainant alleged that she was discriminated against on the bases of race (African-American), sex (female), religion (Muslim), and age (42) and subjected her to a hostile work environment which culminated in her removal from the Agency contract with Project Support Services (PSS). An EEOC AJ issued a summary judgment decision finding no discrimination. The Agency fully implemented the AJ's decision. Complainant filed an appeal from that decision. OFO agreed with the AJ that the Agency provided legitimate, nondiscriminatory reasons which Complainant failed to rebut. OFO found that the record showed that Complainant's contract expired and there was no more funding from the Agency for that contract. OFO noted that PSS was not precluded by the Agency from keeping Complainant working in a different capacity with the Agency. OFO also found that no alleged incidents of harassment were shown to be based on her protected classes. OFO affirmed the Agency and AJ's finding of no discrimination.

Calhoun (Enriqueta T.) v. Army, 0120143049 (09/02/2016) **[Repeated under Findings & Enforcement below]** - Complainant worked for a staffing firm serving the Agency as an Instructor. The Agency dismissed the complaint, and the Commission reversed, finding that under common law the Agency jointly employed Complainant. EEOC Appeal No. 0120113542 (Aug. 21, 2013).

Following an investigation the Agency issued a FAD finding no discrimination. Complainant alleged, in part, that she was discriminated against based on her age (51) when she did not get a raise after her December 2009 90 day performance review. She was hired on August 3, 2009. S3, an Agency manager, advised Complainant at her job interview that after 90 days she would be evaluated and if she did a good job she would get a raise. S3 signed the 90 day review as the supervisor, which was very positive. It was actually drafted by Complainant's direct Agency supervisor (not S3), who thereafter recommended her for a raise, but the Agency did not make this recommendation to the staffing firm. S3 played a role in this. Comparison 2 (age 25) was hired on May 10, 2010, by the same staffing firm to serve the Agency as an Instructor. Complainant and Comparison 2 worked on the same Agency Team, Section and Branch, but had different first line Agency supervisors. After Comparison 2's similarly positive 90 day review, which was signed by the Section Lead, S3, who by now became Branch Chief, recommended to the staffing firm that Comparison 2 get a raise, even though the Section

Lead did not make this recommendation. Based on this, the staffing firm gave Comparison 2 a raise. It did not give Complainant a raise because it did not receive a raise recommendation from the Agency.

While OFO conceded that Comparison 2 was not similarly situated to Complainant in all respects, we found all the above evidence was sufficient to raise an inference of age discrimination. The Agency did not explain why Complainant did not receive a pay raise after her 90 day evaluation. But we found that to the extent S3's contention that Complainant's performance was mediocre was the Agency's explanation, the record showed this was not true - in fact, the Agency conceded this in its FAD. Accordingly, OFO found discrimination. We did not find discrimination on the remaining claims. As remedy, we ordered that the Agency pay back pay with interest, citing Commission guidance for authority to do so.

Gaston (Marc L.) v. VA, 0120143078 (9/26/2016) – Complainant, who worked for a staffing firm serving the Agency as an Administrative Resource or Telecommunications Specialist, filed a complaint alleging that he was harassed based on his race (African-American), color (Black) and reprisal for prior protected EEO activity when the Agency constricted his work and authority; communicated and treated him in a stark and harsh matter; did not permanently hire him or retain him on contract; required him to have a security clearance; advised him that the contract provision for his service to the Agency would not be renewed; and terminated him. Following an investigation, Complainant requested a hearing. The AJ issued a decision without a hearing finding that Complainant failed to state a claim because he was not employed by the Agency, and assuming arguendo that he was, failed to prove discrimination. The AJ's decision became the Agency's final action.

For purposes of analysis, OFO assumed that the Agency jointly employed Complainant. OFO found that the complaint was suitable for summary judgment. It found that while the parties disagreed on whether some examples of Complainant's work and authority being constricted occurred, the record as a whole showed the constriction occurred for non-discriminatory reasons – differing views on Complainant's scope of work under the contract, Complainant's Agency supervisor (S1) was a hands on manager who tended to perform front line duties, and the Agency used backups when Complainant was not available. OFO found that what Complainant viewed as harsh treatment, S1 viewed as businesslike, direct and professional. On not being hired permanently or retained on contract, OFO found that Complainant did not shown he was disparately treated, and his contract provision was allowed to lapse because his administrative function was being taken over internally. On the security clearance matter, OFO found that while there was some delay in a comparative employee also being required to obtain a clearance, not long after coming on board S1 initiated the clearance process for the comparative employee. Regarding Complainant being terminated prior to the expiration of the contract provision for his services, OFO found that the record showed this occurred because Complainant refused the direction of an Agency manager to perform a task, got very upset with the manager when he sought to discuss the matter with Complainant, hung up the telephone, and ignored the manager's follow up calls.

Felactu (Britt S.) v. Navy, 0120152847 (09/13/2016) – Complainant worked for Staffing Firm 1 serving the Agency as a Test and Certification Coordinator from November 2006 to late January 2015. His Common Access Card (CAC) to gain access to Agency premises was revoked on January 30, 2015, and he was terminated on February 23, 2015. On March 19, 2015, he was hired by Staffing Firm 2 to serve the Agency, and on April 17, 2015, again his CAC Card was revoked and he was terminated. He filed a complaint alleging that the Agency discriminated against him based on his religion (Ascetic Greek Orthodox Christian) and reprisal for prior EEO activity beginning in 2013 when government personnel mocked his faith and ostracized him for wearing beads and black clothing, and when working for both Staffing Firms 1 and 2 he was placed on administrative leave, his CAC was revoked, and he was terminated. The Agency dismissed the complaint for failure to state a claim, finding that it did not employ Complainant. Regarding the allegations which arose when Complainant worked for Staffing

Firm 1, OFO reversed because the record showed the Agency exercised sufficient control over Complainant's position to qualify as his common law joint employer. Among other things, the Agency oversaw and assigned Complainant his work, when it determined he had performance problems it asked him to work on Agency premises to provide him constant monitoring and guidance, he received Agency training, the Agency made the decision to cut off his services and he was separated by Staffing Firm 1 for this reason. OFO found that the record did not show that the Agency retained sufficient control over the position to be a joint employer with Staffing Firm 2. OFO ordered the Agency to investigate the issues which arose while Complainant was working for Staffing Firm 1, and gather information on whether it jointly employed Complainant with Staffing Firm 2.

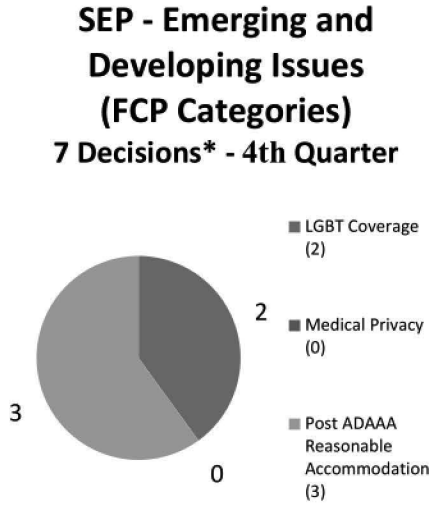
Howard (Tianna D.) v. VA, 0120161155 (09/13/2016) – Complainant worked as a Cashier for the Agency's Canteen Service of the Central Alabama Veterans Healthcare System in Montgomery, Alabama. She filed an EEO complaint, based on sex, alleging that her termination and the failure to re-hire her were discriminatory. The Agency dismissed the complaint for failure to state a claim, reasoning that Complainant was a contractor and not an employee. Additionally, the complaint was dismissed for untimely counselor contact.

In our decision we noted that the Agency did not reference Ma in its decision, nor conduct an analysis of the Ma factors. Based on a review of the employment contract entered by the parties, we concluded that the Ma factors indicated the Agency exerted sufficient control to be considered an employer regarding Complainant's termination. Regarding the re-hire claim, we found that Complainant was an applicant.

We also reversed the Agency's dismissal for untimely counselor contact, finding no evidence that Complainant had actual or constructive knowledge of the time limits.

3. ADDRESSING EMERGING AND DEVELOPING ISSUES

As depicted in the chart below, during the 4th Quarter of FY 2016 OFO resolved 7 decisions under this SEP Priority and its associated FCP priorities.



*Two decisions did not implicate an FCP priority.

Decision Summaries for this Category

Ortiz (Roxane C.) v. USPS, 0120131635 (07/19/2016) – Complainant worked as a Mail Handler at the Agency's Processing & Distribution Center in Fort Worth, Texas. Complainant's position description required that she load, unload, and move bulk mail and perform other duties incidental to the movement and processing of mail, and requires that she lift 25 to 70 pounds. Complainant filed a formal EEO complaint on January 25, 2012, alleging that the Agency discriminated against her on the bases of race (Hispanic) and sex (female/pregnancy) when commencing October 11, 2011, Complainant was denied reasonable accommodation and sent home with no work available.

At the conclusion of an investigation into the allegations, Complainant was provided a copy of the ROI and requested a hearing before an EEOC AJ. The AJ issued a decision without a hearing finding no discrimination. The AJ concluded that Complainant did not establish a prima facie case of sex discrimination because she did not identify any employees outside of her protected class who sustained an off-the-job injury and were provided with light-duty work. The AJ also concluded that the Agency stated a legitimate, nondiscriminatory reason for denying Complainant the accommodation of light-duty work. According to the AJ, the Agency stated that it could not provide Complainant light-duty work because there was none available within her medical restrictions, and Complainant was unable to show this reason was pretext for discrimination. On appeal, The Commission vacated the AJ's summary judgment ruling, finding, inter alia, that in light of the decision of the U.S. Supreme Court in Young v. United Parcel Service, 575 U.S. ___, 135 S. Ct. 1338, 1354 (2015) a hearing was appropriate since the framework for analyzing a pregnancy discrimination denial of accommodation claim was solidified in Young while Complainant's case was pending. Particularly important to this framework was the Agency's contention that it did not need to provide light-duty work to Complainant as it did for employees who sustained on-the-job injuries. In remanding, the Commission noted that existence of such a distinction, work-related versus non-work-related injury, does not absolve the Agency of liability under the Young framework.

The Commission observed that the Agency has proffered as a legitimate, nondiscriminatory, reason that it did not have an obligation to accommodate Complainant with light duty because she did not sustain an on-the-job injury and, further, that there were no light-duty positions in which to safely accommodate Complainant's request for 15-minute breaks each hour and her 15-pound lifting restriction. However, the Commission instructed that on remand, the Agency will need to further articulate a justification for its stated policy of not having to accommodate pregnant workers while accommodating other categories of workers.

Further, the Commission instructed the AJ to facilitate developing the record to determine whether Complainant can show pretext by demonstrating that such a policy imposes a significant burden on pregnant workers, and that the Agency's legitimate, nondiscriminatory reason is not sufficiently strong to justify the burden imposed. Complainant has pointed to the fact that the Agency accommodates workers injured on the job and employees who are granted reasonable accommodations for disabilities, yet her request for light duty was denied. However, the record needs to be developed on this issue to determine whether the Agency's justifications to accommodate others but not a pregnant worker are sufficiently strong to avoid liability under Title VII. The matter was remanded to the Hearings Unit for the scheduling of a hearing.

Morgan (Roxane C.) v. DOD (DIA), 0120142863 (07/19/2016) **[Repeated under Findings/Enforcement below]** – Complainant, a Regional Desk Officer at the Office of Controlled Operations, Middle East/Africa Division, in Washington, D.C., was selected for a position as a Defense Liaison Officer in Country X and needed to complete Joint Military Attaché School (JMAS) training prior

to reporting for her assignment. Complainant was scheduled to attend the JMAS training from April 29 to July 29, 2011.

On February 22, 2011, Complainant informed the Chief of Training Management (CTM) that she was pregnant and expected to deliver "within a couple of days of the final graduation exercise." On February 22, 2011, the CTM told Complainant that attending the April training would be an issue because she was pregnant and because the training is physical in nature. At that time, Complainant had not presented the Agency with any medical documentation disclosing any medical restrictions. The CTM suggested that Complainant wait to take the training until the next offering in late August 2011. Complainant suggested several alternative ways for her to complete the April 2011 course, which the CTM and upper management rejected. Complainant submitted an official request for reasonable accommodation on March 2, 2011, to allow her to attend the April training. The request for accommodation was denied on grounds that Complainant was not a qualified individual with a disability, because Complainant's medical notes did not reveal that she was experiencing any complications with her pregnancy.

On May 2, 2011, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of sex (female) and perceived/actual disability (pregnancy/child birth), and subjected her to harassment when: (1) On February 22, 2011, the Program Manager rejected three alternative suggestions Complainant offered that would allow her to complete the last two weeks of training for the JMAS course that was scheduled to begin on April 29, 2011 and end July 29, 2011; (2) On February 29, 2011, Complainant was informed that she would not be allowed to attend the scheduled training class "due to her condition." She was told, "We just don't feel comfortable with someone in your condition going through this training"; (3) On March 3, 2011, the Assistant Program Manager told Complainant that her pregnancy was a liability that prevented her from attending the training; (4) On March 15, 2011, Complainant was approached by several persons who congratulated her that she had reached a settlement agreement and had been placed in the August 2011 training class; and (5) On March 14, 2011, Complainant's request for reasonable accommodation was denied.

Complainant's name was not placed on the list for the August 2011 training. The Agency did not provide an explanation as to why Complainant's name did not appear on the August 2011 roster. As a result of not attending JMAS training, Complainant was not able to assume the JMAS position. Complainant also alleged that that the Agency discriminated against her on the bases of perceived/actual disability and retaliation for prior EEO activity when on August 22, 2011, which was Complainant's first day back to work after returning from maternity leave, she was directed to report to another office and denied her admission into the JMAS training course beginning in late August 2011.

At the conclusion of an investigation into the allegations, the Agency provided Complainant with a copy of the ROI and notice of her right to request a hearing before an EEOC AJ. Complainant timely requested a hearing. Over Complainant's objections, the AJ assigned to the case granted the Agency's November 25, 2013, motion for a decision without a hearing and issued a decision without a hearing on June 13, 2014. Specifically, the AJ found that, because Complainant told the Agency she could not complete the course because of her due date, the Agency did not discriminate against her; it was Complainant herself who determined she could not finish the course, and she was never told that she could not participate because of her pregnancy. The AJ also found that Complainant's name was removed from the August roster because she declined to attend the August course. The AJ concluded that Complainant did not prove that she was subjected to sex, disability, or reprisal discrimination. The Agency subsequently issued a FAD adopting the AJ's finding that Complainant did not prove that the Agency subjected her to the alleged discrimination. The Commission affirmed the AJ's issuance of a decision without a hearing, but the Commission determined that the AJ made legal and factual errors and reversed in part the AJ's decision finding no discrimination.

The Commission found that there was direct evidence that the Agency did not allow Complainant to attend the April 2011 training because of unlawful reasons related to her pregnancy. Complainant did not experience any complications due to her pregnancy that would have prevented her from safely completing the April training. Concerns voiced by management officials regarding the nature of the

training in relation to the health and safety of Complainant and her child are not rooted in any factual determination that Complainant could not complete the exercises due to her condition. Rather, management's concerns were rooted in speculation that Complainant could not complete the course because it was unsafe for her to do so while pregnant. Whether it was actually unsafe is unsubstantiated; Complainant did not state or provide evidence to the Agency that she would be unable to perform the activities in the course due to her pregnancy.

Further, in management being concerned that Complainant would not safely be able to complete the last few weeks of the training, they do not point to any specific activity that is part of the training that Complainant would not be able to complete or what specifically would prohibit Complainant from being able to complete the activity. While management testified that the final two weeks involve aggressive driving, there is no evidence that Complainant could not complete the activity or that she refused to do so. The evidence also reveals that Complainant offered to "sign a waiver" in order to attend the April training, which can only be explained by the fact that management officials denied her the opportunity to attend the April training. In totality, management's concerns about Complainant reflect speculation that Complainant could not safely complete the course just because she was pregnant without any supporting evidence; the kind of stereotyping, even when benevolent, that is prohibited by the Pregnancy Discrimination Act. See, e.g., Peralta v. Chromium Plating & Polishing, 2000 WL 34633645 (E.D.N.Y. Sept. 15, 2000) (unpublished) (employer violated Title VII when it instructed plaintiff that she could not continue to pack and inspect metal parts unless she provided letter from doctor stating that her work would not endanger herself or her fetus); see also, EEOC v. Catholic Healthcare West, 530 F. Supp. 2d 1096, 1105-07 (C.D. Cal. 2008) (hospital's policy prohibiting pregnant nurses from conducting certain medical procedures was facially discriminatory).

Further, the Commission found by a preponderance of the evidence that Complainant was subjected to reprisal when she was removed from the August 2011 training. The management officials involved in this case were aware of the fact that Complainant had engaged in EEO activity. Complainant was subjected to adverse treatment in being removed from the August training she was scheduled to attend after returning from maternity leave. A nexus was established because Complainant was removed from the training, scheduled to commence in August 2011, within three months of her EEO activity in April 2011. Therefore, the Commission found that Complainant established a prima facie case of reprisal discrimination.

The Agency's legitimate, nondiscriminatory, reason for removing Complainant from the August training seemed to be that management was not sure whether Complainant was interested in attending the training, and that Complainant refused to attend the training. However, the Agency conceded that it is an open question concerning who removed Complainant's name from the August 2011 training. The Chief of the Office of Field Operations said, "[F]rom my perspective, she was given that opportunity and then once she went to EEO and got a lawyer, we were told to remain—to go through any future working relationship with her through the EEO office. So she quickly, after she didn't like my answer, went to the EEO office and made a complaint and so from my perspective, she was offered the next class, she was scheduled to attend and, quite frankly, I was surprised she wasn't in the class." When asked whether Complainant was informed that she was enrolled in the August training, the Chief of the Office of Field Operations explained that he did not know because he did not have any contact with her and indicated that, upon her filing an EEO complaint, "we were advised not to have discussions with her and that the EEO office would handle the interactions with her." This testimony provided no insight into why Complainant was removed from the August training except that management ceased communication with Complainant after she filed an EEO complaint.

Therefore, the Commission affirmed in part and reversed in part the AJ's decision and ordered as relief that the Agency offer Complainant a Defense Liaison Officer position in Country X, or a substantially equivalent position, award Complainant back pay, with interest, and any lost benefits, and conduct an investigation into Complainant's entitlement to compensatory damages.

Smith (Reina D.) v. USPS, 0120151738 (07/19/2016) – Complainant, a Mail Processing Clerk at the Agency's Processing & Distribution Center in Oakland, California, informed management in March 2014 that she was pregnant. On April 11, 2014, Complainant submitted a request for light duty due to a high-risk pregnancy. Later on April 11, 2014, Complainant was told that there was no work available for her and sent home. On April 23, 2014, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of race (African-American), sex (female and pregnancy), color (black), disability (knees, back, and shoulder), and reprisal for prior protected EEO activity under Title VII of the Civil Rights Act of 1964 when: (1) On unspecified dates, management garnished her checks to recover funds that she never received; (2) On January 1, 2014, she was issued a Notice of Removal for Failure to Report for Duty as Required and Failure to Follow Instructions; and (3) On April 11, 2014, and ongoing, she was denied accommodation when she was told there was no light or limited duty available in the building and sent home.

At the conclusion of an investigation into the allegations, Complainant was provided a copy of the ROI and requested a final Agency decision (FAD). The Agency issued a decision, finding no discrimination. On appeal, the Commission vacated the Agency's final decision. The Agency's legitimate, nondiscriminatory reason for not providing Complainant with a light-duty position was that she did not engage in the interactive process with the Agency's Disability Reasonable Accommodation Committee to determine whether she was a qualified individual with a disability, and to identify an effective accommodation, which deals solely with the issue of reasonable accommodation for a disability. The record needed further development on the issue of accommodation for Complainant's pregnancy, aside from reasonable accommodations under the Rehabilitation Act. The record discloses management stating that light-duty work was not available for employees who did not sustain on-the-job injuries.

Further, the Commission noted that the record should be developed to allow for a determination as to whether the Agency's legitimate, nondiscriminatory, reasons are pretext for discrimination. For example, Complainant can show pretext by demonstrating that the Agency's policy of accommodating workers injured on the job, but not pregnant employees, imposes a significant burden on pregnant workers, and that the Agency's legitimate, nondiscriminatory reason is not sufficiently strong to justify the burden imposed. The matter was remanded to the Agency for a supplemental investigation.

Mikerina (Latoya D.) v. USPS, 0120151750 (July 19, 2016) – Complainant, a Mail Handler at the Agency's Network Distribution Center in Federal Way, Washington, had pregnancy-related restrictions and asked for light-duty work to accommodate these restrictions, and she was apparently provided with accommodations for some time, but she was subsequently denied work within her medical restrictions. Complainant was not provided with light-duty work from June 3, 2014, until June 26, 2014, and again beginning on October 22, 2014. Complainant identified other employees who were provided with light-duty work, including pregnant employees from the Clerk craft. On July 26, 2014, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of sex (pregnancy) and reprisal for prior protected EEO activity under Title VII of the Civil Rights Act of 1964 when: (1) On June 3, 2014 and ongoing, her request for light-duty work was not granted; and (2) Beginning October 22, 2014, she was not provided light-duty work.

At the conclusion of an investigation into the allegations, Complainant was provided a copy of the ROI and failed to request a hearing with an EEOC AJ or a final Agency decision (FAD). The Agency issued a decision finding no discrimination. On appeal, the Commission vacated the Agency's final decision. The Agency stated that Complainant was not provided with any light-duty work because none was available within her medical restrictions. However, it appears that a search was not conducted irrespective of the mandates of the Agency's Collective Bargaining Agreement(s), by which the Agency distinguished between employee crafts. Further development of the record was needed to determine other categories of employees, similar in their ability or inability to work, who were provided accommodations.

Further, the Commission noted that the record should be developed to allow for a determination of whether such a policy imposes a significant burden on pregnant workers, and whether the Agency's legitimate, nondiscriminatory reason is sufficiently strong to justify the burden imposed. The record discloses that the Agency accommodates workers in different crafts with light-duty work within their medical restrictions, but denied Complainant light duty due to the alleged non-availability of Mail Handler work within her medical restrictions. Management explained that they could not offer Complainant light-duty work in a different craft, such as the Clerk craft. The record needed to be developed on this issue to determine whether the Agency's justifications for accommodating others but not Complainant were sufficiently strong to avoid liability under Title VII.

Finally, the Commission noted that it was not clear from the record whether Complainant is a qualified individual with a disability. However, the results of Complainant's request for accommodation seemed to be a denial of accommodation. Therefore, the Commission noted that, if Complainant agreed, the complaint should be amended to include a claim of denial of reasonable accommodation under the Rehabilitation Act. The matter was remanded to the Agency for a supplemental investigation.

Jefferson (Andera P.) v. USPS, 0120152639 (07/19/2016) – Complainant, a Postal Support Employee (PSE) Mail Processing Clerk at the Agency's Processing & Distribution Center (PDC) in Tacoma, Washington, was serving in a probationary period, and, approximately one and one-half months after beginning her employment with the Agency, after Complainant had received her initial satisfactory performance review, Complainant informed management of her pregnancy and the fact that she would require accommodation, including additional time off. Subsequently, management became dissatisfied with Complainant's work performance and reportedly spoke to Complainant about her performance and her attendance; Complainant's absences were all due to illness. Complainant was terminated during the probationary period as a result of a subsequent unsatisfactory evaluation, which stated that Complainant had unsatisfactory performance and attendance. Complainant subsequently became aware that she was not hired for another PSE position for which she had applied at the Seattle, Washington Network Distribution Center (NDC). A reviewing official indicated that Complainant was going to be hired but that, during the processing of her final hiring paperwork, they discovered that she was terminated from the Tacoma PDC with a record of attendance and performance issues as a probationary PSE. Complainant filed a formal EEO complaint on January 30, 2015, alleging that the Agency discriminated against her on the basis of sex (female/pregnancy) when: (1) On October 6, 2014 she was separated during probation; and (2) On or about November 4, 2014, she became aware that she would not be hired for a position at the Seattle NDC.

At the conclusion of an investigation into the allegations, Complainant was provided a copy of the ROI and failed to request a hearing before an EEOC AJ or a final Agency decision (FAD). The Agency issued a decision finding no discrimination. On appeal, the Commission vacated the Agency's final decision, finding, inter alia, that in light of the decision of the U.S. Supreme Court in Young v. United Parcel Service, 575 U.S. ___, 135 S. Ct. 1338, 1354 (2015). In remanding, the Commission noted that the record is not sufficiently developed to make a determination as to what requests for accommodation Complainant was denied, or what her medical restrictions were. Further, the record required further development on whether other employees, similar in their ability or inability to work, were allowed use of leave without being terminated.

The Commission also noted that the Agency should have accepted disability discrimination as a basis because Complainant indicated that she experienced numerous complications during her pregnancy, claimed that she was denied an accommodation for her medical restrictions, and utilized sick leave as a result of her pregnancy. The matter was remanded to the Agency for a supplemental investigation.

Davis (Scarlet M.) v. DOJ (BOP), 0120141789 (09/23/2016) – Complainant worked as an Education Technician at the Agency's Federal Correctional Institution (FCI) in Talladega, Alabama. On December 31, 2012, Complainant filed an EEO complaint alleging that the Agency discriminated against her on

the bases of race (African-American), sex (female, lesbian), and reprisal for prior protected EEO activity when: 1) from August 20, 2012, through November 9, 2012, she was subjected to a hostile work environment in the form of a lack of training and lack of direction regarding duties and assignments; and 2) as a result of requesting a meeting for clarity of tasks, she was the subject of a complaint and threat assessment. Following the investigation, Complainant requested a hearing before an EEOC AJ. The AJ issued a decision on the record in favor of the Agency finding that Complainant had not established that she had been discriminated against or subjected to harassment.

In its final order implementing the AJ's decision, the Agency stated that it neither agreed nor disagreed with the AJ's acceptance of jurisdiction over Complainant's claim of discrimination based on sexual orientation. At the time of the Agency's final order, the Commission had not yet issued Baldwin v. Dep't of Transportation, EEOC Appeal No. 0120133080 (July 15, 2015). Complainant appealed the final order.

The appellate decision found that the AJ properly issued a decision without a hearing. The decision assumed for the purposes of analysis that Complainant had established prima facie cases of discrimination based on race, sex, and reprisal for prior protected EEO activity, and that the Agency articulated legitimate, nondiscriminatory reasons for its actions. We found that Complainant had not shown the Agency's reasons to be pretext for discrimination on any of her claimed bases. There was no evidence in the record that the Agency denied Complainant training or gave her less direction because of her protected bases. On the contrary, the Teachers who provided training to Complainant stated that Complainant received more training than other employees received. Similarly, we found no evidence in the record that the Agency conducted a threat assessment because of Complainant's race, sex, or protected EEO activity.

Wallace (Shela O.) v. Army, 0520160188 (09/01/2016) – In the underlying complaint, Complainant alleged that the Agency discriminated against her on the bases of her national origin (Hispanic) and sex (female and sexual orientation) when she was terminated during her probationary period. Our previous decision concluded that substantial evidence supports the AJ's decision that found insufficient evidence of discrimination. Specifically, the AJ noted that Complainant's hearing testimony supported extensive tension in the workplace. However, the AJ also found no persuasive evidence to support a claim of national origin or sex discrimination. To the contrary, the AJ found that the identified incidents were more likely related to poor management and a lax workforce that resented Complainant's efforts to implement higher work standards, not to her race or sex.

After reviewing the previous decision and the entire record, the Commission concluded that the request failed to meet the criteria of 29 C.F.R. § 1614.405(c), and denied the request.

4. ENFORCING EQUAL PAY LAWS

The decision in this SEP category did not implicate an FCP category.

Decision Summary for this Category

Garcia v. GSA, 0520160352 (08/30/2016) – Complainant, a GS-05 Student Trainee filed an EEO complaint alleging that the Agency discriminated against her on the bases of her color, sex, and national origin, in violation of the Equal Pay Act and Title VII when it failed to convert her to a permanent employee following her employment as an Agency intern. The prior appellate decision affirmed the Agency's final order implementing the EEO AJ's decision by summary judgment finding no discrimination.

In her request for reconsideration, Complainant argues that the previous decision erred in its development of the record and interpretation of the facts. Complainant restates some of the same arguments she raised on appeal. In her request for reconsideration, Complainant continues to contend that her supervisor held animosity towards her because she possessed more education than he did. Complainant argues again that the Agency failed to pay her in accordance with the Equal Pay Act.

OFO found that the AJ properly issued a summary judgment decision. The OFO decision found no reason to disagree with the AJ's finding that Complainant failed to set forth sufficient facts showing that there was a genuine issue still in dispute. Moreover, OFO found that Complainant presented some of the same arguments she raised on appeal. In accordance with EEO MD-110, Ch. 9, § VII.A, OFO emphasized that a request for reconsideration is not a second appeal to the Commission. Finally, OFO determined that Complainant's request failed to demonstrate that the appellate decision involved a clearly erroneous interpretation of material fact or law, or that it will have a substantial impact on policies, practices, or operations of the Agency.

5. PRESERVING ACCESS TO THE LEGAL SYSTEM

No decisions implicating this priority were issued in this reporting period.

6. PREVENTING HARASSMENT THROUGH SYSTEMIC ENFORCEMENT AND TARGETED OUTREACH

No decisions implicating this priority were issued in this reporting period.

7. ENFORCEMENT – GENERAL

Illiana S. v. EEOC, 0120123242 (07/11/2016) **[Repeated under Circulated Cases below]** – Complainant was an Investigator at the Commission's Louisville Area Office. She filed an EEO complaint on the bases of disability and reprisal (requesting a reasonable accommodation, (2 days a week of telework)) when: 1. management interfered with her work productivity by not reviewing and signing her "cause" cases in a timely manner; and 2. management provided her with a "Fully Successful" rating for her FY2010 performance evaluation, as a result of management's failure to review and sign her "cause" cases.

Complainant claimed that her supervisor did not review her cause cases in a timely manner, required her to make multiple revisions to documents, did not require other Investigators to make multiple revisions, and subjected her to disparate treatment. The Supervisor stated that such factors as the need for corrections or modifications, discussion, attorney review, or review by the District Director may delay the review of a case. The appellate decision found that Complainant had not shown the Agency's explanation to be pretext for discrimination.

Complainant's supervisor stated that she "earned a rating of Fully Successful on her performance evaluation" and that Complainant's lack of cause cases was "partially" the reason that Complainant did not receive a higher rating, as she had in previous FY evaluations. In the narrative portion addressing the "Operational Efficiency and Effectiveness" element of the evaluation, S2 wrote that Complainant was "below the office average in several categories." In her affidavit, S2 acknowledged that she told the EEO Counselor that Complainant's absences had a negative impact on the office. The District Director stated that Complainant's work productivity had been impacted by her "extensive absences."

The decision found that the Agency relied upon Complainant's absences and their effect on her productivity as a reason for the "Fully Successful" rating, which constituted direct evidence of retaliatory motivation. Complainant engaged in protected activity when she took FMLA and other leave because of her disability. It noted that the Agency may not use Complainant's disability-related absences, which were a form of reasonable accommodation, against Complainant when evaluating her performance. It also found that the Agency discriminated against Complainant on the basis of disability when, by penalizing her for missing work, it failed to provide an effective accommodation. The decision concluded that the sole motivation for the issuance of the lower performance rating was the effect of Complainant's disability-related absences on her work productivity. The decision order the Agency to provide compensatory damages, raise Complainant's FY2010 evaluation, and provide training to the management officials involved.

Nichols (Johana S.) v. USDA, 0120131804 (07/01/2016) – Complainant worked as a full-time Criminal Investigator with the Agency's Forest Service in California. Complainant's duties involved working with local law enforcement in order to conduct drug operations/investigations dealing with illegal marijuana gardens. Complainant's duties were separated into two functions: the investigation stage and the eradication stage. During the investigation stage, Complainant would do computer work and make telephone calls to contact local law enforcement in order to construct an operations plan. Once the investigation stage was complete, the eradication stage would commence, requiring on-site inspections of illegal marijuana gardens with teams of local law enforcement. The eradication stage required crawling, walking, and running to catch armed suspects hiding and evading from law enforcement. While performing these duties, Complainant suffered an on-the-job injury to her lower back. As a result, she was temporarily unable to perform moderate to arduous physical activities, unable to stand greater than 10 to 15 minutes, or walk long distances.

During this time, management allowed Complainant to run marijuana site operations from the helicopter or landing zone, so she would not have to go into gardens with law enforcement teams. Complainant's supervisor subsequently received a verbal complaint from local law enforcement that Complainant's running of operations from the helicopter was a safety concern for team members on the ground. Complainant thereafter received a lower performance appraisal than she had in the previous year, and which was lower than other Criminal Investigators. Complainant's supervisor admitted lowering Complainant's performance rating because she could not fully participate in the marijuana garden eradication stage. S1 also assigned Complainant's duty of writing operations plans to another employee.

On appeal, we found that the AJ properly issued a decision without a hearing, but erred in finding no discrimination in the Agency's favor. In so finding, we noted that when the Agency accommodated Complainant's injury, requested medical documentation, assigned her to administrative duties, and lowered her performance rating due to her injury, it treated her as if she were substantially limited in the major life activities of walking and standing. As a result, we found that the Agency "regarded" Complainant as having an impairment that substantially limits a major life activity. We further found that Complainant was a "qualified" individual with a disability because a majority of Complainant's duties required desk work, as on-site marijuana garden eradication operations only occurred at most once a week and sometimes only once a month. We additionally found that the supervisor's admission that he did not give Complainant the higher performance rating because she did not fully participate in operations to be direct evidence of disability discrimination. We ordered the Agency to change Complainant's performance appraisal, expunge from Complainant's Official Personnel File all documentation mentioning the lower appraisal, and to pay Complainant compensatory damages.

Paek (Frank R.) v. DOD (DCA), 0120141307 (07/29/2016) – At the time of events giving rise to this complaint, Complainant worked as a Materials Handler Foreman, WS-6907-06 at the Agency's Youngsan Central Distribution Center in Youngsan, South Korea.

Following a series of incidents in which Complainant alleged: (1) he was mandated to attend an organizational event at the last minute without regard to his prior commitments; (2) his credibility as a supervisor was questioned and undermined by management; and (3) he was continually singled out and verbally abused by management in the presence of other employees, Complainant filed an EEO complaint. At the conclusion of the investigation, in accordance with Complainant's request, the Agency issued a final decision. The decision concluded that Complainant failed to prove that the Agency subjected him to discrimination as alleged with respect to claims 1 and 2, but found that witness testimony corroborated Complainant's allegations of discrimination with respect to claim 3. Complainant appealed the Agency's final decision.

The appellate decision affirmed the Agency's decision with respect to all claims, but remanded Complainant's allegation of reprisal and constructive discharge that was raised on appeal but was not included in his original complaint, and therefore was not investigated by the Agency. In addition to remanding the new claim, the appellate decision found that the Agency did not provide appropriate relief based on its finding. The appellate decision ordered the Agency to: process the remanded reprisal claim within one-hundred eighty (180) calendar days from the date of the decision; conduct an investigation into the appropriate amount of compensatory damages to be paid to Complainant; administer training to the responsible management officials on Title VII, the ADEA, and harassment. Also, the Agency was ordered to consider disciplining the responsible management officials if still employed by the Agency.

Baird (Trent A.) v. NSF, 0120141343 (07/29/2016) – In the instant case, an EEOC AJ issued a decision finding that the Agency's actions created an actionable hostile work environment based on reprisal. The AJ issued a Liability Decision (LD) which included non-pecuniary damages and medical expenses. The AJ indicated that she would issue a separate order to address attorney's fees and costs. Complainant submitted his attorney's fees to the AJ and the Agency verbally opposed them. The Agency argued that it would not pay any of the remedies ordered by the AJ until a final decision was made by the AJ regarding attorney's fees. Complainant immediately filed an appeal to the Commission seeking enforcement of the AJ's LD. There was no dispute that at the time Complainant filed his appeal to the Commission, the AJ had not issued a final decision on the issue of attorney's fees and costs. However, a final decision was issued approximately two (2) months later. Consequently, OFO found that although Complainant's appeal may have been premature, that defect was cured and this matter was properly before us. We found no persuasive evidence that the Agency issued a final order within 40 days after receipt of the AJ's LD and attorney's fees decisions. Therefore, the AJ's decision became the Agency's final order and the Agency was order to comply with both AJ's Orders.

Honanie (Isidro A.) v. DOI, 0120141458 (07/21/2016) – Complainant worked as a School Bus Driver at the Agency's Tuba City Boarding School, Western Navajo Agency, Office of Indian Education in Tuba City, Arizona. On October 15, 2008, Complainant filed a formal EEO complaint alleging that he was discriminated against on the basis of his national origin (Hopi) when he was subjected to a hostile work environment when other bus drivers made discriminatory remarks, including their desire to "kill" and "bomb" Hopis; and on the basis of reprisal for complaining about the discrimination, when he was suspended for five days on December 19, 2007. The Agency issued a final agency decision (FAD) on September 25, 2010, finding that Complainant was discriminated against on the basis of his national origin when he was subjected to a hostile work environment. The Agency found that even after reporting the harassment to management officials, they took no action to stop the harassing behavior.

On November 1, 2013, the Agency issued a FAD awarding Complainant $50,000 in non-pecuniary damages. However, the Agency denied Complainant's requests for $72.75 in costs, and $15,268.75 in attorney's fees. Complainant's appeal on the attorney's fees was dismissed for being untimely. However, despite the dismissal, OFO ordered the Agency to: take corrective action by paying

Complainant's compensatory damages award; provide 40 hours of EEO training to the responsible management officials; consider taking disciplinary action against the responsible management officials; and post a notice of the finding of discrimination.

Morgan (Roxane C.) v. DOD (DIA), 0120142863 (07/19/2016) **[Repeated under Priority 3 above]** – Complainant, a Regional Desk Officer at the Office of Controlled Operations, Middle East/Africa Division, in Washington, D.C., was selected for a position as a Defense Liaison Officer in Country X and needed to complete Joint Military Attaché School (JMAS) training prior to reporting for her assignment. Complainant was scheduled to attend the JMAS training from April 29 to July 29, 2011.

On February 22, 2011, Complainant informed the Chief of Training Management (CTM) that she was pregnant and expected to deliver "within a couple of days of the final graduation exercise." On February 22, 2011, the CTM told Complainant that attending the April training would be an issue because she was pregnant and because the training is physical in nature. At that time, Complainant had not presented the Agency with any medical documentation disclosing any medical restrictions. The CTM suggested that Complainant wait to take the training until the next offering in late August 2011. Complainant suggested several alternative ways for her to complete the April 2011 course, which the CTM and upper management rejected. Complainant submitted an official request for reasonable accommodation on March 2, 2011, to allow her to attend the April training. The request for accommodation was denied on grounds that Complainant was not a qualified individual with a disability, because Complainant's medical notes did not reveal that she was experiencing any complications with her pregnancy.

On May 2, 2011, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of sex (female) and perceived/actual disability (pregnancy/child birth), and subjected her to harassment when: (1) On February 22, 2011, the Program Manager rejected three alternative suggestions Complainant offered that would allow her to complete the last two weeks of training for the JMAS course that was scheduled to begin on April 29, 2011 and end July 29, 2011; (2) On February 29, 2011, Complainant was informed that she would not be allowed to attend the scheduled training class "due to her condition." She was told, "We just don't feel comfortable with someone in your condition going through this training"; (3) On March 3, 2011, the Assistant Program Manager told Complainant that her pregnancy was a liability that prevented her from attending the training; (4) On March 15, 2011, Complainant was approached by several persons who congratulated her that she had reached a settlement agreement and had been placed in the August 2011 training class; and (5) On March 14, 2011, Complainant's request for reasonable accommodation was denied.

Complainant's name was not placed on the list for the August 2011 training. The Agency did not provide an explanation as to why Complainant's name did not appear on the August 2011 roster. As a result of not attending JMAS training, Complainant was not able to assume the JMAS position. Complainant also alleged that that the Agency discriminated against her on the bases of perceived/actual disability and retaliation for prior EEO activity when on August 22, 2011, which was Complainant's first day back to work after returning from maternity leave, she was directed to report to another office and denied her admission into the JMAS training course beginning in late August 2011.

At the conclusion of an investigation into the allegations, the Agency provided Complainant with a copy of the ROI and notice of her right to request a hearing before an EEOC AJ. Complainant timely requested a hearing. Over Complainant's objections, the AJ assigned to the case granted the Agency's November 25, 2013, motion for a decision without a hearing and issued a decision without a hearing on June 13, 2014. Specifically, the AJ found that, because Complainant told the Agency she could not complete the course because of her due date, the Agency did not discriminate against her; it was Complainant herself who determined she could not finish the course, and she was never told that she could not participate because of her pregnancy. The AJ also found that Complainant's name was removed from the August roster because she declined to attend the August course. The AJ concluded that Complainant did not prove that she was subjected to sex, disability, or reprisal discrimination. The

Agency subsequently issued a FAD adopting the AJ's finding that Complainant did not prove that the Agency subjected her to the alleged discrimination. The Commission affirmed the AJ's issuance of a decision without a hearing, but the Commission determined that the AJ made legal and factual errors and reversed in part the AJ's decision finding no discrimination.

The Commission found that there was direct evidence that the Agency did not allow Complainant to attend the April 2011 training because of unlawful reasons related to her pregnancy. Complainant did not experience any complications due to her pregnancy that would have prevented her from safely completing the April training. Concerns voiced by management officials regarding the nature of the training in relation to the health and safety of Complainant and her child are not rooted in any factual determination that Complainant could not complete the exercises due to her condition. Rather, management's concerns were rooted in speculation that Complainant could not complete the course because it was unsafe for her to do so while pregnant. Whether it was actually unsafe is unsubstantiated; Complainant did not state or provide evidence to the Agency that she would be unable to perform the activities in the course due to her pregnancy.

Further, in management being concerned that Complainant would not safely be able to complete the last few weeks of the training, they do not point to any specific activity that is part of the training that Complainant would not be able to complete or what specifically would prohibit Complainant from being able to complete the activity. While management testified that the final two weeks involve aggressive driving, there is no evidence that Complainant could not complete the activity or that she refused to do so. The evidence also reveals that Complainant offered to "sign a waiver" in order to attend the April training, which can only be explained by the fact that management officials denied her the opportunity to attend the April training. In totality, management's concerns about Complainant reflect speculation that Complainant could not safely complete the course just because she was pregnant without any supporting evidence; the kind of stereotyping, even when benevolent, that is prohibited by the Pregnancy Discrimination Act. See, e.g., Peralta v. Chromium Plating & Polishing, 2000 WL 34633645 (E.D.N.Y. Sept. 15, 2000) (unpublished) (employer violated Title VII when it instructed plaintiff that she could not continue to pack and inspect metal parts unless she provided letter from doctor stating that her work would not endanger herself or her fetus); see also, EEOC v. Catholic Healthcare West, 530 F. Supp. 2d 1096, 1105-07 (C.D. Cal. 2008) (hospital's policy prohibiting pregnant nurses from conducting certain medical procedures was facially discriminatory).

Further, the Commission found by a preponderance of the evidence that Complainant was subjected to reprisal when she was removed from the August 2011 training. The management officials involved in this case were aware of the fact that Complainant had engaged in EEO activity. Complainant was subjected to adverse treatment in being removed from the August training she was scheduled to attend after returning from maternity leave. A nexus was established because Complainant was removed from the training, scheduled to commence in August 2011, within three months of her EEO activity in April 2011. Therefore, the Commission found that Complainant established a prima facie case of reprisal discrimination.

The Agency's legitimate, nondiscriminatory, reason for removing Complainant from the August training seemed to be that management was not sure whether Complainant was interested in attending the training, and that Complainant refused to attend the training. However, the Agency conceded that it is an open question concerning who removed Complainant's name from the August 2011 training. The Chief of the Office of Field Operations said, "[F]rom my perspective, she was given that opportunity and then once she went to EEO and got a lawyer, we were told to remain—to go through any future working relationship with her through the EEO office. So she quickly, after she didn't like my answer, went to the EEO office and made a complaint and so from my perspective, she was offered the next class, she was scheduled to attend and, quite frankly, I was surprised she wasn't in the class." When asked whether Complainant was informed that she was enrolled in the August training, the Chief of the Office of Field Operations explained that he did not know because he did not have any contact with her and indicated that, upon her filing an EEO complaint, "we were advised not to have discussions with her and that the EEO office would handle the interactions with her." This testimony provided no insight into

why Complainant was removed from the August training except that management ceased communication with Complainant after she filed an EEO complaint.

Therefore, the Commission affirmed in part and reversed in part the AJ's decision and ordered as relief that the Agency offer Complainant a Defense Liaison Officer position in Country X, or a substantially equivalent position, award Complainant back pay, with interest, and any lost benefits, and conduct an investigation into Complainant's entitlement to compensatory damages.

Kereem (Blanca B.) v. State, 0120151876 (07/07/2016) **[Repeated under Priority 1 above]** – Complainant served the Agency as a contract Language & Culture Instructor at its School of Language Studies in Arlington, Virginia. The Agency dismissed the complaint, and the Commission reversed, finding that Complainant was a common law employee. EEOC Request No. 0520110069 (Apr. 26, 2012). Following an investigation, which was supplemented, the Agency issued a FAD finding no discrimination. Complainant alleged that she was sexually harassed, both verbally and physically, by one of her government supervisors (S2). She accused S2 of the following: making a pass, unwarranted attention, unwanted sex talk, touching her buttocks, trying to put her hand on his penis, and repeatedly asking her go to a hotel with him. A co-worker complained that S2 also sexually harassed her, alleging numerous specific incidents, some similar to Complainant's. Both confided to co-workers, and another supervisor stated that she heard S2 tell sexual jokes, and he said he loved her. In finding no discrimination, the Agency determined that the harassing incidents did not occur.

OFO relied on the Commission's guidance on sexual harassment which discusses how to evaluate evidence of harassment. While acknowledging S2's strong denials and staff and management providing powerful character references and supportive statements about S2's behavior, OFO found that what tipped the balance in Complainant's favor was that a coworker also complained that she was a victim of S2's sexual harassment, they both confided to coworkers about being victimized by him, and the other supervisor's statement. OFO found that the harassment was unwelcome, and severe and pervasive. As the harassment did not result in a tangible employment action, the Agency was free to raise an affirmative defense to avoid liability, but OFO found the Agency did not raise an affirmative defense. OFO ordered various remedies. It found no discrimination on the remainder of the complaint.

Mahon (Emiko S.) v. DOT (FAA), 0120161130 (07/19/2016) – On April 28, 2008, Complainant received a tentative job offer from the Agency as an Air Traffic Control Specialist, contingent on her passing a medical evaluation. Complainant was deemed ineligible for the position because of her monocular vision. She requested a reasonable accommodation in the form of a waiver of the Agency's vision requirement. The Agency denied her request and determined that there was no accommodation that would eliminate the safety risks attributable to Complainant's condition. Complainant filed a formal EEO complaint, and requested a hearing. An EEOC AJ issued a decision without a hearing finding that Complainant was not "medically qualified" for the position, and that the Agency had not discriminated against her when it failed to accommodate her. Complainant appealed the decision, and OFO found that the AJ erred in issuing a decision without a hearing because there was a genuine dispute as to whether Complainant posed a direct threat to safety because the Agency had not conducted an individualized assessment of Complainant, but instead, had applied a blanket medical qualification. The matter was remanded back for a hearing on the sole issue of whether Complainant would pose a direct threat to safety.

A second AJ also issued a decision without a hearing which this time found that the Agency discriminated against Complainant because it failed to show that Complainant posed a direct threat to safety. The AJ ordered the Agency to conduct an individualized assessment and, if Complainant passed, to put her in the next training class. The AJ also awarded $50,000 in non-pecuniary damages, and over $88,000 in attorney's fees. On appeal, OFO found that the AJ erred in requiring Complainant to undergo an individualized assessment, and ordered the Agency to simply reinstate Complainant's

conditional offer of employment. OFO also increased the award of non-pecuniary damages to $150,000, and the attorney's fees to over $119,000.

Peterson (Yvette H.) v. DOD (DCA), 0120140365 (08/29/2016) – Complainant worked as a Sales Store Checker at the Commissary. Complainant alleged, in pertinent part, that the Agency denied her a reasonable accommodation when it did not provide her with a 10-minute sit down break for every hour she worked. Complainant stated that she had provided the Agency with supporting medical documentation.

The Agency, in its FAD, found that it did not deny Complainant a reasonable accommodation. Although Complainant was an individual with a disability, the Agency found that she did not put it on notice that she needed the break as a reasonable accommodation because: its files did not contain a request from her; the medical documentation was insufficient; and she elected to go through the OWCP process.

OFO, in its appellate decision, found that the Agency denied Complainant a reasonable accommodation. First, OFO noted that the Agency conceded in its FAD that Complainant was an individual with a disability. Second, OFO found that Complainant was "qualified" because the record did not contain any evidence indicating that she, with or without reasonable accommodation, could not perform the essential functions of her position. Third, OFO found that Complainant had requested a reasonable accommodation. Specifically, OFO found that Complainant provided the Agency with the medical documentation, as evidenced by the fact that the medical documentation was located in the section of the ROI consisting of documents given to the EEO Investigator by the Agency. In addition, OFO found that Complainant providing the Agency with the medical documentation constituted a request for reasonable accommodation. Fourth, OFO found that the Agency ultimately did not provide Complainant with the requested accommodation or with an alternative effective accommodation (such as a stool). OFO noted that, if the Agency believed it could not make an informed decision about the request, it should have obtained relevant information from Complainant through the interactive process; the Agency, however, failed to engage in the interactive process. Fifth, OFO found that the Agency did not provide specific evidence proving that providing Complainant with the requested accommodation (or an alternative, such as a stool) would cause an undue hardship in the particular circumstances. OFO noted that Agency policy explicitly allowed the use of a stool in the work area if required as a reasonable accommodation and a coworker had used a stool for many years.

OFO ordered the Agency to provide Complainant with a reasonable accommodation (following the parties engaging in the interactive process to determine Complainant's current needs), conduct a supplemental investigation on compensatory damages, provide EEO training to Complainant's supervisor, consider taking appropriate disciplinary action against Complainant's supervisor, and post a notice of discrimination.

Lyle (Leonarda S.) v. VA, 0120141533 (08/23/2016) – Complainant worked as a Clinical Pharmacy Specialist at the Agency's Veterans Affairs Hospital in Portland, Oregon. The Agency provided Complainant with a reasonable accommodation in the form of computer-aided-real-time translation (CART) services during meetings. In the spring of 2010, Complainant's second line supervisor (S1) stated that Complainant did not need the CART service for small meetings, and stopped providing her with transcripts of meetings.

Complainant filed an EEO complaint alleging that she was denied a reasonable accommodation and subjected to harassment based on her disability. After a hearing, the AJ found that the Agency discriminated against Complainant on the basis of disability when it failed to accommodate her by refusing to provide printouts of the captioning between April 15 and May 21, 2010; it subjected her to a hostile work environment from March through May 2010; and when it failed to engage in the interactive accommodation process. With regards to the finding of a hostile work environment, the AJ found that S1's statement that the CART service was optional, and unnecessary in small meetings, was stated to

harass her because it would reasonably create apprehension. Additionally, the AJ found that denying Complainant copies of the transcripts was also harassment.

As part of the remedy, the AJ awarded $25,607.39 in attorney's fees. Complainant filed an appeal on the attorney's fees, but did not provide any arguments on appeal. OFO affirmed the AJ's award because we found that Complainant was not entitled to the requested hourly rate of $475, but rather $300 per hour; travel time should be computed at 50% of the rate; and the AJ's reduction in of the hours billed for work on the attorney's fees statement was reasonable.

Tran (Keri C.) v. DHS (USCG), 0120142707 (08/25/2016) – On January 29, 2013, On January 3, 2013, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of sex (female), disability (Adjustment Disorder with Mixed Anxiety, Depressed Mood, and Occupational Problem) and reprisal for prior protected EEO activity under Title VII of the Civil Rights Act of 1964 when: management required Complainant to provide a urine sample; management diminished Complainant's supervisory authority by directly assigning tasks to her staff members; management revoked prior approval excusing Complainant from attending meetings and events where US Coast Guard members involved in Complainant's prior EEO complaint would be in attendance, and management ordered Complainant to attend such meetings; management asked Complainant to consider a GS-13 position; and management denied Complainant's reasonable accommodation request and declined to reconsider its denial of her reasonable accommodation request..

After investigation and Complainant's withdrawal of her request for a hearing the Agency issued a final agency decision (FAD) concluding that Complainant did not prove that the Agency subjected her to the alleged hostile work environment, but finding that the Agency denied Complainant reasonable accommodation. Specifically, the FAD concluded that the Agency was responsible for a breakdown of the interactive process due to the fact that management did not consider the possibility of Complainant dialing into meetings as a potential accommodation, an option Complainant suggested to management officials. The FAD concluded that the Agency did not demonstrate that allowing Complainant to participate in "tactical and strategic planning meetings," which were "likely to be attended by individuals who triggered Complainant's psychiatric symptoms" would cause an undue hardship. Complainant accepted the FAD's disposition of the reasonable accommodation claim, but appealed the FAD's conclusion regarding her hostile work environment allegation.

On appeal, the appellate decision affirmed the FAD, finding that Complainant failed to prove that the Agency subjected her to hostile work environment, accepting the Agency's finding that it failed to provide her with reasonable accommodation and directing the Agency to provide relief, including reasonable accommodation, proven compensatory damages, consideration of disciplinary action, notice posting and training.

Manning (Sara S.) vs. USPS, 0120152270 (08/05/2016) – Complainant worked as a City Carrier in Chicago, Illinois. Complainant's second line supervisor (S2) informed her that since she was on light duty, she could not return to work. S2 also instructed Complainant to submit a request for light duty. Complainant submitted her request for light duty, and with her request, Complainant provided a statement from her doctor (DR) noting that she was restricted in, among other things, lifting (25 pounds); walking (30-50 minutes); and climbing (10-20 minutes). The Executive Manager, Post Office Operations (EMPOO), informed Complainant that her request for light duty had been denied because she had not provided information about her restrictions or updated medical documentation.

Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of disability (back injury), and in reprisal for prior protected EEO activity when she was sent home; and on multiple dates, her requests for "Light Duty" were denied. The Agency issued a final decision, concluding that Complainant failed to prove that the Agency subjected her to discrimination as alleged. On appeal, OFO reversed the Agency's final decision, finding that Complainant was discriminated

against on the basis of disability when she was informed that she was unable to work; and when she was denied light duty. OFO found that Complainant had established a prima facie case of disability discrimination because she was a qualified individual with a disability; she was subject to adverse action; and the circumstances surrounding these adverse actions gave rise to an inference of discrimination because they were related to her disability.

OFO then found that Complainant had shown pretext for the management officials' proffered legitimate, non-discriminatory reasons. For claim 1, S2 stated that she had not sent Complainant home, but that Complainant stated that she was going home. However, the record shows, that on her leave request form, she wrote that she was requesting leave because she was "sent home," and that her first line supervisor (S1) signed and approved her leave. As such, Complainant had presented evidence to show that S2's claim that Complainant was not sent home was inconsistent with S1's approval of her leave request, which specifies that she was "sent home." For claim 2, the EMPOO claimed that the reason she denied Complainant's request was because she did "not provide any restrictions or updated medical information from [her] Physician;" however, we note that the record shows that Complainant did provide a note from the DR, listing her numerous restrictions. We also found that the EMPOO contradicted her stated reason for denying Complainant's request for light duty, when she stated twice that Complainant had provided documentation noting her restrictions.

deBaettencourt (Matt A.) v. DHS, 0120161100 (08/17/2016) – Complainant worked for the Agency as a Licensed Practical Nurse in North Carolina. He filed a formal EEO complaint alleging the Agency discriminated against on the basis of retaliation when Agency management reassigned him, effective March 9, 2015, from the Rural Health program to the Tele-health unit. Complainant claimed that the Agency reassigned him in retaliation for his sending a letter, expressing concerns about the operations of the facility's Rural Health program to the Secretary of the agency and the Director of the Office of Rural Health on November 25, 2014. In its final decision, the Agency found that, along with the claim identified above, the record further reflected another claim, of per se reprisal, regarding Complainant's second line supervisor making hostile comments to Complainant's first line supervisor about Complainant's involvement in the EEO process. Further, the Agency concluded that Complainant failed to prove that the Agency subjected him to discrimination as alleged.

On appeal, we affirmed the Agency's finding of no discrimination in claim 1, described as a clam of reprisal but reversed the Agency's finding of no per se reprisal in claim 2 and remanded it to the Agency for further processing. Regarding claim 1, we determined while Complainant had suspicions that discriminatory reasons may also have motivated the Agency to reassign him, Complainant has not shown that a discriminatory reason more likely motivated the agency or that the proffered explanation is unworthy of credence. Regarding claim 2, the record reflects that Complainant's supervisor reported the comments by his second line supervisor to Complainant, as well to the EEO Counselor, the Director of the Hospital and the Chief of Staff. Therefore, the Agency engaged in per se reprisal.

Cellemme (Shanti N.) v. DOD (FBI), 0720150026 (08/03/2016) – Complainant worked as a Special Agent in Las Vegas, Nevada. On October 8, 2006, while on personal travel in Austin, Texas, Complainant was arrested for public intoxication, resisting arrest, and criminal mischief. The incident was reported to the Agency's headquarters as part of routine information sharing between the Agency and the Austin Police Department, and the Agency initiated an investigation into Complainant due to the incident.

On October 10, 2006, the Agency issued Complainant a notice of proposed removal for a lack of candor under oath charge, and a 60-day suspension for the misconduct at a holiday party. The Agency upheld Complainant her removal; determining that the evidence supported the lack of candor under oath charge. Complainant appealed her removal to the Agency, which reversed the removal, finding that the lack of candor charge was not substantiated. The Agency issued her a 15-day suspension, and Complainant was reinstated.

On August 15, 2007, the Agency notified Complainant that she was indefinitely suspended pending the outcome of the investigation into the Austin incident. On May 15, 2008, the Agency issued Complainant a notice of removal based on her misconduct and arrest in Austin, effective May 20, 2008. The Agency upheld Complainant's appeal of her second removal.

Complainant filed an EEO complaint. After conducting a hearing, the AJ did not find that Complainant was discriminated against when the Agency removed her both times; upheld her second removal; and when it did not ask for, or consider, her input for the Douglas Factors analysis for her second removal action. However, the AJ found that the Agency discriminated against Complainant on the basis of sex when it suspended her from August 15, 2007, through May 20, 2008, without pay. The AJ held a hearing on the issue of damages, and asked the parties to submit written briefs solely regarding damages for the period of the indefinite suspension. The AJ issued a Final Decision on Liability and Damages awarding, among other things, back-pay for the time of the suspension at the GS-12 level. The AJ rejected Complainant's argument that she should be awarded back pay at the GS-13 level because Complainant had not met her burden of establishing that she would have been granted a promotion, absent the discriminatory suspension.

The Agency issued its final order accepting the AJ's finding that Complainant was discriminated against when the Agency indefinitely suspended her. However, the Agency did not accept the award of back pay, and filed an appeal. Complainant filed an appeal on the Agency's final order on June 19, 2015.

OFO found that the Agency has not shown that the AJ erred when awarding back pay for the discriminatory suspension. The Agency argued that Complainant was not entitled to back pay because she earned more from her outside job than she would have working for the Agency during the time of her suspension. However, we noted that as a matter of law, Complainant is entitled to an award of back pay for the time of her suspension to make her whole; and reversed the Agency's final order with respect to its decision to not implement the AJ's award concerning back pay. OFO also found that there was substantial evidence in the record to support the AJ's conclusion that Complainant did not establish that it was likely she would have been promoted. The Agency was ordered to calculate, and pay, any appropriate back-pay award for the discriminatory suspension period.

OFO also found that substantial evidence in the record showed that the Agency did not discriminate against her on the bases of sex, disability, and in reprisal for EEO activity when it failed to consider Complainant's statement submitted in response to her second proposed removal; it conducted a Douglas Factors analysis without asking Complainant for input; it removed her; and it upheld her removal.

Stuckey (Shanel G.) v. PBGC, 0720160001 (08/10/2016) – Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of race (African-American), sex (female), age (52) and in reprisal for prior protected activity.

Upon completion of the investigation, Complainant requested a hearing before an EEOC AJ. The AJ found that Complainant was subjected to retaliation and a hostile work environment with respect to multiple claims pertaining to Complainant's supervisor's failure to approve her training requests and the failure of Complainant's supervisor to timely respond to Complainant's communication. The AJ ordered the Agency to pay $37,625 in non-pecuniary compensatory damages, pay $31,113.05 in attorney's fees, provide a minimum of eight hours of EEO training to responsible management officials, and post a notice at the facility regarding the finding. The Agency issued a final order rejecting the AJ's findings of retaliation.

OFO found that there was substantial evidence in the record to support the AJ's findings of retaliation. OFO also found that there was substantial evidence in the record to support the AJ's award of $37,625 in non-pecuniary damages. OFO noted that this amount was not monstrously excessive and consistent with other cases. OFO remanded this matter to the Agency to implement the ordered remedies.

Anthony (Donna W.) v. DOT, 0720160002 (08/17/2016) – Complainant was the Parents Program Director for the Agency's Maritime Administration at the U.S Merchant Marine Academy in Kings Point, New York. After creating the position, Complainant worked in it for twelve years.

When the position was turned into a two-year term position, Complainant applied to the vacancy. She was not selected. Instead, a twenty-four year old female, with less than three years of experience (as a Logistics Data Specialist) at the Department of Defense, was chosen. Complainant filed a complaint based on age, sex, and reprisal.

The Agency's proffered legitimate, non-discriminatory reason was that the selectee was given priority based on an interagency transfer program. The AJ found the Agency's reasons to be implausible and unbelievable.

OFO upheld the AJ's finding of age discrimination, but modified the remedies awarded. We found the AJ improperly awarded front pay. The award of backpay, in the amount of $194,694.00 was upheld.

Harwood (Kristy D.) v. DOI (BIA), 0720160003, (08/10/2016) – Complainant claimed discrimination based on sex and age when she was reassigned from the position of Deputy Regional Director – Trust Services to the position of Deputy Regional Director – Indian Services. Complainant received a full hearing and the AJ issued a decision finding discrimination. The Agency declined to adopt the AJ's finding and appealed. Specifically the AJ found that the Agency articulated a legitimate nondiscriminatory reason for the action when the RMO said that the reason for the transfer was because Complainant had done such an excellent job heading Trust Services that management felt that Complainant's "leadership was crucial to the success" of the Indian Services program, which up till then had been in disarray. The AJ further found that the Agency's articulated reason was a pretext to mask discrimination. Specifically, the AJ noted that the reassignment letter threatened to terminate Complainant's employment if she declined the reassignment. The Agency argued that despite the language in the letter, it had no intention of terminating Complainant's employment. The AJ found such a claim to be not credible and concluded that the Agency's articulated reason was pretext. Because Complainant had retired from the Agency the AJ awarded $15,000 in nonpecuniary compensatory damages. We affirmed the AJ's finding of discrimination and the damages award.

Jarmon (Cletus W.) v. Treasury, 0720160008 (08/03/2016) – Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of race (African-American), color (black), and age (56) when, on February 17, 2011, he was not selected for the position of Electro-Machinist Trainee. Following a hearing, the AJ concluded that the Agency's articulated legitimate, non-discriminatory rationale for its decision not to select Complainant for the trainee program was a pretext for age and race discrimination.

Our previous decision agreed with the AJ's conclusion that pretext was established by the fact that the selecting official, without reasonable justification, rejected the expert ranking panel's recommendation, changed the qualification requirements of the position in order to select applicants substantially less qualified than Complainant, including one who lacked both machinist and electrician specialties (i.e., who objectively did not fit the purpose of the EM Training Program to cross train electricians and machinists). We also found that substantial evidence supported the AJ's conclusion that race and age were motivating factors given the fact that no African-American in Complainant's age bracket was selected. In addition, contrary to the Agency's assertion we found sufficient evidence exists in the record that the selecting official was aware of Complainant's age and race.

With respect to remedies, we found that the record supports the Agency's assertion that Complainant earned more during the back pay period than what he would have earned had he been selected to participate in the training program. Accordingly, we concluded that he is not entitled to back pay. With respect to non-pecuniary damages, the record contains testimony from Complainant that he "felt hurt" by the discriminatory non-selection. Contrary to the Agency's assertions, we found sufficient evidence

in the record to support the finding that Complainant suffered emotional distress as a direct result of the discriminatory non-selection. However, we disagreed with the AJ's award of $25,000. Upon review of similar case law, we find that the non-pecuniary damages award should be reduced to $5,000. We affirmed the AJ's award of attorneys' fees and rejected the Agency's argument that the attorney's rate should be reduced since the proper rate should be measured by current, rather than historical, hourly rates.

Accordingly, we ordered the Agency to: (1) promote Complainant to the Electro-Machinist Trainee position retroactive to February 17, 2011; (2) pay Complainant $5,000.00 for non-pecuniary damages; (3) pay $58,762 in attorney's fees; (4) give 8 hours of EEO training for the responsible management officials; and (5) consider taking disciplinary action against the Agency officials found to have discriminated against Complainant.

Stephenson (Candance C.) v. GSA, 07201600013 (08/08/2016) – On May 25, 2013, Complainant filed the instant EEO complaint alleging that the Agency discriminated against her on the bases of race (Caucasian), sex (female), disability (physical), and age (59) when she was not selected for a Leasing Specialist position, when she was denied a training opportunity, and when her supervisor denied her leave request.

Complainant timely requested a hearing before an AJ. On September 11, 2014, the AJ sent the Agency an Order Directing Agency to Produce Complaint File, to which the Agency failed to respond. On November 20, 2013, the AJ issued an Order to Show Cause to the Agency for failing to produce the complaint file, to which the Agency failed to respond. On January 26, 2015, Complainant filed a Motion for Default Judgment or Other Sanction. Although the Agency failed to respond to Complainant's motion, the Agency forwarded the complaint file to the AJ on February 9, 2015. On May 8, 2015, the AJ issued a default judgment in Complainant's failure because the Agency repeatedly disregarded the AJ's orders and failed to respond to or oppose Complainant's motion for sanctions. The AJ awarded Complainant attorney's fees and costs, non-pecuniary damages, and back pay, as well as ordering the Agency to provide EEO training and post a notice of a finding of discrimination. The Agency issued a final order rejecting the AJ's decision and filed the instant appeal with the Commission.

On appeal, the Agency contended that its failure to respond to the AJ's orders or Complainant's motion was due to a "mail room issue." The Agency raised the mail room issue for the first time on appeal. According to the Agency, the mail room issue was good cause for failing to comply with the AJ's orders, so issuing a default judgment constituted an abuse of discretion.

The Commission found the AJ's decision to sanction the Agency was proper because the Agency failed to respond to the AJ's orders and did not demonstrate good cause or provide any reason or explanation for its failure to do so to the AJ. The decision also noted that the Commission has previously held that mail room issues do not demonstrate good cause for failing to comply with an AJ's order. It concluded that the issuance of default judgment in Complainant's favor was not an abuse of discretion. Because neither of the parties contested the AJ's award of non-pecuniary damages, back pay, attorney's fees, or other remedies, OFO affirmed the AJ's awards.

Gomez (Leif S) v. Army, 0120142064 (09/26/2016) – Complainant alleged discrimination based on his national origin (Hispanic), color (Brown), and in reprisal for prior EEO activity alleging discrimination in violation of Title VII when: he was subjected to a hostile work environment during the period of April 2010 through March 23, 2011; and he was placed on administrative leave on February 16, 2011, and terminated from his position effective March 23, 2011.

The AJ found that Complainant established that he was subjected to harassment based on his national origin and color. The AJ stated that the record was replete with evidence that the Lieutenant subjected Complainant to a hostile work environment starting in April 2010, when Complainant began working on the same shift as the Lieutenant. For example, when Complainant began working, the Lieutenant

announced, "Now, we have a Beaner on our shift." This comment was followed by other names such as "Spick," "Spicandian" (to reference Complainant's Canadian grandfather); "Wetback," "border jumper" and "Carabeaner." The Lieutenant would introduce Complainant to new employees by these names, as well as using them with management and other Agency employees while on training. He was told several times by Complainant and coworkers about the inappropriate nature of the name calling. However, it persisted. When the Lieutenant's threats were raised at a work meeting in August 2010, the Lieutenant stated to the room, "if anyone in this room ever, ever goes above my head again or if you have an issue with me, if you think...you're going to fuck with me or fuck with my career or fuck my personal life, or fuck my paycheck...I will fuck you back. If you have a fucking problem with me, you come to me." Complainant's other coworkers testified in support of Complainant. They indicated additional events such as one time they walked into a local Mexican restaurant and the Lieutenant called it "[Complainant's] people restaurant" and "we'll have him translate the menu for us."

The AJ determined that Complainant clearly had established that the Lieutenant created a hostile work environment for him based on his national origin and color. The AJ also noted that the Agency treated the Lieutenant as a supervisor and that he was in charge of the employees. However, the AJ noted that the status of the Lieutenant as a supervisor was irrelevant. The AJ held that the record showed that the Lieutenant engaged in his discriminatory conduct in an open manner such that Agency management was clearly aware of it and took no effective action to address the problem. As such, the AJ found that the Agency was liable for the harassment Complainant experienced based on his color and national origin.

As to Complainant's claim of disparate treatment when he was placed on administrative leave and terminated, the AJ held that AJ noted that Complainant had a history of being counseled, orally and in writing, for attendance issues. This culminated when, on February 16, 2011, Complainant was issued a Sick Abuse Letter placing him on administrative leave. The letter indicated that Complainant had requested sick leave on February 12, 2011. However, he was then seen at 11:00 pm by the Chief at a night club. Based on the Chief's sighting of Complainant at a night club while he was on sick leave the same day, Complainant was issued the memorandum for the record for abuse of sick leave and the Agency determined that it would place Complainant on administrative leave pending disciplinary action. Management then issued Complainant a notice of removal on March 23, 2011. The AJ determined that the Agency provided legitimate, nondiscriminatory reason for its action which Complainant failed to show was pretext for discrimination.

The AJ ordered remedy for Complainant for the harassment. The AJ determined that Complainant was entitled to $ 35,000 in compensatory damages; $31,482 in attorney fees; and $236.25 in legal costs. The AJ also ordered the Agency to provide training to the Lieutenant and management regarding their responsibilities regarding hostile work environment.

The Agency implemented the AJ's decision. Complainant appealed asserting that the AJ erred in finding no discrimination as to the termination action. As such, Complainant argued that the award of compensatory damages should be enlarged to include the termination action. Therefore, the only issue before OFO was the AJ's finding of no discrimination with respect to claim (2).

OFO affirmed the AJ's decision finding that claim (2) was separate from the claim of harassment. Further, OFO upheld the AJ's conclusion that Complainant failed to establish that he was subjected to discrimination as to the termination action. Therefore, the decision restated the AJ's award of non-pecuniary damages, the calculation of attorney's fees and costs, and the order for the Agency to consider disciplinary action for the Lieutenant along with training.

McCraney (Trina C.) v. USPS, 0120142617 (09/13/2016) – Complainant, a Clerk on the night shift, alleged that the Manager of Distribution Operations (MDO) sexually harassed her by grabbing her around the waist and kissing her on the neck on February 11, 2010. In accordance with its anti-harassment policy, the Human Resources Office conducted a fact-finding inquiry and concluded that Complainant was unable to establish that the incident had actually occurred. The fact-finders reported

that no one had seen the incident occur, and that Complainant and the MDO were equally credible witnesses. The Agency later conducted a formal investigation pursuant to the EEO complaint that Complainant had filed on the matter and thereafter referred the matter for a hearing. The Administrative Judge (AJ) entered judgment in favor of the Agency, basing his finding that the incident did not occur on the credibility of the MDO, notwithstanding that the MDO was not present at the hearing to give testimony. The Agency thereafter issued a final order fully implementing the AJ's decision.

The Commission reversed. We found at the outset that the AJ abused his discretion in judging the credibility of a witness whose tone and demeanor he could not personally observe. Consequently, we accorded the AJ's credibility determination no evidentiary weight. Next, we found, as a factual matter, that the incident did occur as Complainant had described it. We based our finding on the fact that Complainant had told four of her coworkers what had happened both immediately after the incident and in the days and weeks that followed. One of her coworkers testified that Complainant appeared very upset after the night in question and another testified that Complainant's countenance had gone from outgoing to withdrawn. We noted that even though the coworkers' testimony was hearsay, it nevertheless had some probative value and should not have been disregarded completely. Complainant also presented a note from a psychiatrist indicating that she began seeking treatment approximately one month after the incident occurred and that her symptoms were being managed through medication and supportive therapy. Ultimately, we found that even though there were no witnesses and Complainant's story was not without its own inconsistencies, the MDO's version of events that the AJ had credited was not supported by substantial evidence of record. As a matter of law, the Commission concluded that the MDO's act of grabbing Complainant around the waist and kissing her constituted overt sexual bodily contact that was severe and pervasive enough to rise to the level of sexual harassment even though it was only a single occurrence.

Calhoun (Enriqueta T.) v. Army, 0120143049 (09/02/2016) **[Repeated under Priority 2 above]** - Complainant worked for a staffing firm serving the Agency as an Instructor. The Agency dismissed the complaint, and the Commission reversed, finding that under common law the Agency jointly employed Complainant. EEOC Appeal No. 0120113542 (Aug. 21, 2013). Following an investigation the Agency issued a FAD finding no discrimination. Complainant alleged, in part, that she was discriminated against based on her age (51) when she did not get a raise after her December 2009 90 day performance review. She was hired on August 3, 2009. S3, an Agency manager, advised Complainant at her job interview that after 90 days she would be evaluated and if she did a good job she would get a raise. S3 signed the 90 day review as the supervisor, which was very positive. It was actually drafted by Complainant's direct Agency supervisor (not S3), who thereafter recommended her for a raise, but the Agency did not make this recommendation to the staffing firm. S3 played a role in this. Comparison 2 (age 25) was hired on May 10, 2010, by the same staffing firm to serve the Agency as an Instructor. Complainant and Comparison 2 worked on the same Agency Team, Section and Branch, but had different first line Agency supervisors. After Comparison 2's similarly positive 90 day review, which was signed by the Section Lead, S3, who by now became Branch Chief, recommended to the staffing firm that Comparison 2 get a raise, even though the Section Lead did not make this recommendation. Based on this, the staffing firm gave Comparison 2 a raise. It did not give Complainant a raise because it did not receive a raise recommendation from the Agency.

While OFO conceded that Comparison 2 was not similarly situated to Complainant in all respects, we found all the above evidence was sufficient to raise an inference of age discrimination. The Agency did not explain why Complainant did not receive a pay raise after her 90 day evaluation. But we found that to the extent S3's contention that Complainant's performance was mediocre was the Agency's explanation, the record showed this was not true - in fact, the Agency conceded this in its FAD. Accordingly, OFO found discrimination. We did not find discrimination on the remaining claims. As remedy, we ordered that the Agency pay back pay with interest, citing Commission guidance for authority to do so.

Beebe (Mike G.) v. USDA, 0120152027 (09/08/2016) – Complainant filed an appeal from an Agency decision awarding no nonpecuniary, compensatory damages. Complainant, a Food Inspector, alleged that he was discriminated against on the basis of disability when he was not provided a reasonable accommodation. The Agency issued a decision finding discrimination. The Agency, after Complainant submitted evidence on nonpecuniary harm, did not award damages. Complainant submitted supporting statements from medical professionals, family members, and friends. In these statements, Complainant indicated that he experienced exacerbation of his depression, anxiety, and post-traumatic stress disorder. He further stated that he experienced weight gain, diminished quality of life, a strain on his relationships, financial difficulties, and sleeplessness. OFO issued a decision finding that $10,000 was the appropriate amount to award to Complainant in nonpecuniary, compensatory damages. OFO ordered the Agency to make that payment.

Landry (Chau O.) v. VA, 0720150023 (09/08/2016) – Complainant filed a formal complaint alleging discrimination on the bases of race, sex and reprisal for her prior EEO activity when she was not selected for a position, counseled and issued a "Fully Successful" performance appraisal rating. The AJ assigned to the case held a hearing and issued a decision in Complainant's favor. As relief, the AJ ordered reinstatement, back pay, compensatory damages, and attorney's fees. The AJ also ordered that the responsible management officials undergo training by one of three trainers supplied by Complainant, and paid at the trainers' standard rate. Additionally the AJ ordered the agency to issue a memorandum to all managers and supervisors reminding them that they can be disciplined for discrimination.

In its final order, the Agency implemented the AJ's order, except with respect to training and discipline. In its appeal, the Agency contended that the AJ abused her discretion because the orders were unduly restrictive and intended to punish the agency. Complainant did not respond to the appeal.

In its decision, OFO ordered the Agency to provide a minimum of 16 hours of training by one of its routine trainers. Likewise, OFO found the memorandum was unnecessary given the lack of evidence of a culture of discrimination at the facility.

Ashley (Anne C.) v. HUD, 0720160017 (09/09/2016) – Complainant alleged that the Agency discriminated against her: (1) on the bases of sex, race, and color, when she was not selected for a position; and (2) on the basis of reprisal for prior protected EEO activity when she was subjected to harassment involving eight incidents, including one pertaining to a performance rating.

An EEOC AJ found that the Agency discriminated against Complainant on the basis of reprisal for prior protected EEO activity in connection with the one incident pertaining to a performance rating. The AJ awarded Complainant $60,626.40 in attorney's fees. Although Complainant had initially requested $136,694 in attorney's fees, the AJ reduced the requested fees by $76,067.60 in the following manner: (1) $35,650 reduction for hours billed for pre-complaint processing and vague billing entries ("work on file," "review file," review emails," "conference call," "work on motions," "motion work"); and (2) an additional 40 percent reduction to the lodestar to eliminate any excessive and redundant time (including clerical time), and to account for the fact that Complainant only prevailed on a portion of her claims.

The Agency issued a final order rejected the AJ's decision on attorney's fees and filed an appeal to reduce the attorney's fees to $13,795. Complainant filed an appeal to increase the attorney's fees to $80,951.40.

OFO, in its appellate decision, modified the Agency's final order to award Complainant $20,042.33 in attorney's fees. First, OFO removed $19,600 from the AJ's deduction of the vague billing entries. Specifically, OFO found that the AJ erred in determining that the "work on motions" and "motion work" entries were too vague; instead, OFO found that there was enough information provided to know the

subject matter of the work. Second, OFO changed the AJ's reduction of the lodestar from 40 percent of the lodestar to five-sixths of the lodestar. Specifically, OFO found that the AJ erred in not properly accounting for Complainant's low degree of success or for the fractionability of the claims.

Purcell (Joana C.) v. VA, 0120141685 (09/01/2016) – Complainant alleged that she was subjected to sexual harassment by a co-worker. Following a hearing before an EEOC AJ, the AJ found that discrimination had occurred and ordered relief. The Agency issued a decision, accepting the AJ's finding of discrimination and setting forth the relief. Complainant alleged noncompliance with the relief ordered.

The Agency argued that Complainant should have first filed a petition for enforcement pursuant to 29 C.F.R. § 1614.503. We determined that 29 C.F.R. § 1614.504 was the applicable regulation because the Commission had not issued a decision.

The Agency did not present any documentation evidencing whether it was in compliance. Other than a broad statement of noncompliance, Complainant did not identify specifics. Accordingly, we ordered the Agency, to the extent that it had not done so, to perform remedial action, including the offer of a transfer to a vacant position and the payment of back pay, compensatory damages, and attorney's fees.

Hankins v. DHS (TSA), 0720150036 (09/26/2016) – Since 2002, Complainant worked as a Transportation Security Office (TSO) at the Colorado Springs Municipal Airport, in Colorado Springs, Colorado. She has had epilepsy since she was fourteen years old. In January 2010, she experienced a seizure off-the-job, and reported it to the Agency. She was placed on administrative leave to conduct a medical fitness review. The Agency concluded it was an isolated incident and she returned to work. Approximately six months later, Complainant again had an off-duty seizure and reported the incident to management. Thereafter, Complainant was terminated due to this medical disqualification. Complainant filed an EEO complaint.

Following a hearing, the EEOC AJ found that the Agency violated the Rehabilitation Act when it refused to accommodate her, after finding her unfit for TSO duty after having two seizures within one year. The AJ found that the Agency failed to conduct an individualized analysis of Complainant's condition under its own policy. The Agency's physician did not articulate why Complainant's two seizures were deemed "severe" or how the seizures impacted "activities of daily living".

On appeal, the Agency does not dispute that Complainant is disabled. We found that the AJ's determination that she was "qualified" for the position is supported by the record. To the extent that her condition might result in injury to herself or the traveling public, we agreed that the Agency failed to conduct an individualized assessment in violation of the Rehab Act.

The AJ's award of $75,000 in non-pecuniary compensatory damages was upheld, as well as an award of attorney's fees and costs.

LeClaire (Mindy O.) v. DHS (TSA), 0720150010 (09/02/2016). – Complainant worked as a Supervisory Transportation Security Officer at the Pullman-Moscow Regional Airport in Pullman, Washington. In an EEO complaint filed on September 30, 2009, and subsequently amended, Complainant alleged that the Agency discriminated against her on the basis of sex (female) and in reprisal for prior protected EEO activity with respect to various matters including hostile work environment, placement on leave restriction, performance evaluation, issuance of a Notice of Proposed Removal, and termination of her employment.

After the complaint was investigated, Complainant requested a hearing before an EEOC AJ. The AJ held a hearing at which 14 witnesses testified. The AJ issued a decision in which she concluded that Complainant did not prove that the Agency subjected her to discrimination or harassment on the basis

of sex. The AJ also concluded that Complainant did not prove that the Agency took the alleged actions in reprisal for Complainant's prior protected EEO activity. The AJ found that the Agency articulated legitimate, nondiscriminatory reasons for Complainant's removal and that Complainant did not show that the reasons were a pretext for reprisal.

The AJ found, however, that Complainant established that the Agency subjected her to per se reprisal when the TSM made retaliatory statements during a meeting. Relying on witness testimony, the AJ concluded that the TSM's statements "were specifically intended to deter the employees from engaging in EEO activity." The AJ found that, the TSM paid "lip service" to employees' rights to pursue EEO complaints or grievance procedures. She concluded that TSM's "stated commitment to pursuing disciplinary action over months or years, despite EEO complaints, was intended to convince the employees of the futility of exercising their EEO rights." Accordingly, the AJ found that the TSM's comments constituted per se reprisal. The AJ ordered the Agency to pay Complainant $8,000.00 in non-pecuniary compensatory damages, pay $20,148.52 in attorney's fees and costs, provide training for the TSM regarding the Agency's duties under Title VII, and to post a notice informing employees of the finding of reprisal. The Agency appealed the AJ's decision to the Commission.

In the appellate decision, the Commission affirmed the Agency's acceptance of the AJ's finding that Complainant did not prove that the Agency subjected her to discrimination or harassment on the basis of sex or in reprisal for protected EEO activity with respect to several actions between April 2009 and February 2010. We reversed the Agency's rejection of the AJ's finding of per se reprisal discrimination, finding that the Agency subjected Complainant to per se reprisal and remanded the matter to the Agency for implementation of the remedies ordered by the AJ.

CIRCULATED CASES

Illiana S. v. EEOC, 0120123242 (07/11/2016) **[Repeated under Findings/Enforcement above]** – Complainant was an Investigator at the Commission's Louisville Area Office. She filed an EEO complaint on the bases of disability and reprisal (requesting a reasonable accommodation, (2 days a week of telework)) when: 1. management interfered with her work productivity by not reviewing and signing her "cause" cases in a timely manner; and 2. management provided her with a "Fully Successful" rating for her FY2010 performance evaluation, as a result of management's failure to review and sign her "cause" cases.

Complainant claimed that her supervisor did not review her cause cases in a timely manner, required her to make multiple revisions to documents, did not require other Investigators to make multiple revisions, and subjected her to disparate treatment. The Supervisor stated that such factors as the need for corrections or modifications, discussion, attorney review, or review by the District Director may delay the review of a case. The appellate decision found that Complainant had not shown the Agency's explanation to be pretext for discrimination.

Complainant's supervisor stated that she "earned a rating of Fully Successful on her performance evaluation" and that Complainant's lack of cause cases was "partially" the reason that Complainant did not receive a higher rating, as she had in previous FY evaluations. In the narrative portion addressing the "Operational Efficiency and Effectiveness" element of the evaluation, S2 wrote that Complainant was "below the office average in several categories." In her affidavit, S2 acknowledged that she told the EEO Counselor that Complainant's absences had a negative impact on the office. The District Director stated that Complainant's work productivity had been impacted by her "extensive absences."

The decision found that the Agency relied upon Complainant's absences and their effect on her productivity as a reason for the "Fully Successful" rating, which constituted direct evidence of retaliatory motivation. Complainant engaged in protected activity when she took FMLA and other leave because of her disability. It noted that the Agency may not use Complainant's disability-related absences, which were a form of reasonable accommodation, against Complainant when evaluating

her performance. It also found that the Agency discriminated against Complainant on the basis of disability when, by penalizing her for missing work, it failed to provide an effective accommodation. The decision concluded that the sole motivation for the issuance of the lower performance rating was the effect of Complainant's disability-related absences on her work productivity. The decision order the Agency to provide compensatory damages, raise Complainant's FY2010 evaluation, and provide training to the management officials involved.

Tamara G. v. EEOC, 0120150734 (08/04/2016) – Complainant filed a formal complaint alleging discrimination on the bases of race, sex and disability when she was denied an accommodation, subjected to a hostile work environment denied a Within Grade Increase, and in July 2004, was constructively discharged. The Agency issued a final decision on the mixed case issues, as well as the non-mixed issues. She appealed her mixed case issues to the MSPB. However, in 2006, she withdrew her constructive discharge claim and the MSPB dismissed her appeal. She appealed the remaining non-mixed claims to the Office of Federal Operations and reiterated her belief that she was subjected to a constructive discharge. In its decision, OFO found Complainant had been denied an effective accommodation between July 2003 and April 2004. As relief, the Commission awarded Complainant reinstatement in to her prior position with reasonable accommodation, but specifically denied retroactive placement or back pay in light of her failure to prove constructive discharge. OFO also ordered the Agency to conduct a supplementary investigation into Complainant's entitlement to compensatory damages and issue a FAD.

In its Final decision, the Agency awarded Complainant $75,000.00 in non-pecuniary damages for loss of health, exacerbation of cumulative stress, depression, inconvenience and loss of familial relations as a result of the Agency's failure to accommodate her disability from July 2003 until her resignation on July 9, 2004. The Agency concluded that the effects of the discrimination would likely continue for 6 months. Finally, the Agency found Complainant was entitled to $329.65 in past pecuniary damages for harm incurred between July 2003 and December 2004.

OFO was persuaded by Complainant's testimony and that of her family, which supported that Complainant suffered from Depression following the agency's failure to accommodate. Further justifying the award, Complainant submitted medical evidence from 2003-4 regarding the effects of the discrimination. Less persuasive was an undated letter from a social worker who stated he started seeing complainant as a patient in 2011. Further, Complainant submitted a 2011 letter from a psychologist who Complainant saw for a psychological assessment. OFO declined to augment Complainant's award because the medical evidence did not link the agency's failure to accommodate with the emotional distress suffered past the end of 2004, and did not account for multiple other stressors suffered by Complainant during this time period. Accordingly, the Commission declined to award any damages for emotional distress suffered from the end of 2004 until 2011 because complainant had not proven causation with respect to the failure to accommodate. Rather, much of Complainant's emotional distress during this time could be attributed to her resignation from the agency which was not at issue. The Commission also found the Agency's calculation of pecuniary damages was correct based on documentation submitted by complainant. However, the Commission declined to make any further award for pecuniary damages which was not supported by reliable evidence or related to the discrimination.

Katina R. v. EEOC, 0520160272 (08/03/2016) – In the previous decision, the Commission dismissed Complainant's appeal of the Agency's Final Order. The Agency's Final Order implemented the AJ's decision, in which the AJ granted the Agency's Motion for Findings and Conclusions without a Hearing. On January 17, 2013, the AJ issued a decision finding that Complainant had not shown that she was discriminated against or subjected to a hostile work environment on the basis of disability (asthma, lung disease and association with a disabled mother) when it denied her a reasonable accommodation (move to a vacant office and telework) from January 20, 2011, through August 1, 2011, and when

Complainant was forced to take a demotion, in lieu of a reasonable accommodation in June 2011. She also alleged that the Agency discriminated against her on the basis of reprisal (requesting a reasonable accommodation and her association with her disabled mother) when her supervisor subjected her to a hostile work environment when her supervisor failed to assign duties commensurate with Complainant's position and denied her training to perform her functions in April 2011.

Upon learning that Complainant had filed a civil action before the United States District Court for the District of Columbia (Case No. 1:13-cv-01181-ABJ), the Commission dismissed her appeal on February 12, 2016.

In her request for reconsideration, Complainant argued that the allegations in the civil action were narrowed when the District Court granted the Agency's motion to dismiss Complainant's claims that the Agency had retaliated against her because of her requests for reasonable accommodation and had subjected her to a hostile work environment. In addition, the court granted the Agency's motion for summary judgment on Complainant's claim that the Agency failed to provide her with a reasonable accommodation when it did not provide her with a private office or reassign her to a vacant Mediator position. Complainant argued that that only the telework claim was to be considered. In addition, Complainant asserted that the previous decision condones discrimination and will have a negative impact on compliance with the laws prohibiting employment discrimination. In response, the Agency argues that the Commission properly dismissed Complainant's appeal pursuant to 29 C.F.R. § 1614.409. The Agency contends that Complainant's filing of a civil action precludes consideration of her appeal and that the court's dismissal of some of Complainant's claims is immaterial to whether the appeal was properly dismissed.

The request for reconsideration decision denied Complainant's request and affirmed the previous decision's dismissal of Complainant's appeal.

Noriega (Salvatore B.) v. USPS, 0520160186 (09/30/2016) – Complainant requested reconsideration of the decision in EEOC Appeal No. 0120152826. The Commission's prior decision affirmed the Agency's dismissal of one claim for failure to state a claim, but reversed the Agency's dismissal of one claim for untimely EEO Counselor contact finding that the Agency failed to show that Complainant had actual or constructive knowledge of the 45-day limitation period for timely EEO counselor contact. After reviewing the previous decision and the entire record, the Commission found that it mistakenly overlooked the Agency's submission of an affidavit affirming that the Agency had EEO Poster 72 on display in conspicuous locations and a copy of the poster which explicitly advises employees of relevant EEO counseling contact information. Accordingly, the Commission found that the request met the criteria of 29 C.F.R. § 1614.405(c), and granted the request. As a result, the decision of the Commission in Appeal No. 0120152826 was reversed, and the Agency's final decision dismissing the complaint was affirmed.

Lashure (Terica R.) v. USPS, 0520160334 (09/29/2016) – Complainant claimed that she was discriminated against on the bases of her sex (female), disability (sciatica) and age (40) when she was not selected for the position of Maintenance Manager Secretary. The Agency dismissed the complaint on the grounds of failure to state a claim. In the previous decision in EEOC Appeal No. 0120161084 (April 15, 2016), the Commission affirmed the Agency's final decision. We stated that when an agency cancels a vacancy announcement without making a final selection, we have found that the Complainant suffered no harm that would render her aggrieved.

Complainant filed a request for reconsideration. Upon review, we granted the request. We observed that our previous decision did not consider Complainant's statement that the selectee was being returned to the Maintenance Manager Secretary position; that the vacancy had never been canceled or rescinded; nor was the position reposted. Complainant submitted a document that did not exist when

she filed her appeal. The document showed that the Agency informed the selectee that she would be returned to the Maintenance Manager Secretary position on which she successfully bid.

The Commission reasoned that in light of the fact that the Agency never canceled the vacancy announcement and also did not rescind the position and repost the vacancy announcement, but rather proceeded to a final selection by returning the selectee to the bid position, that Complainant alleged facts sufficient to establish that she was and remains aggrieved. We found that the complaint states a claim.

III. Federal Sector Oversight

- OFO issued 37 feedback letters to federal agencies concerning the following FCP topics: Schedule A (hiring and conversion); reasonable accommodation program; anti-harassment program; barrier analysis of the senior executives; and general non-compliance.
- OFO continued work on the FY 2012 - FY 2014 Annual Report on the Federal Work Force Part II and continued drafting FY 2015 Annual Report Part I.
- OFO published its 4th quarter FY 2016 Digest of EEO Law, containing recent Commission and federal court decisions. This Digest included an article on Mental Health Conditions and EEO Laws. OFO staff coordinated with OCLA to issue a national press release, which is featured on the home page of eeoc.gov. Staff also conducted social media outreach on Twitter and GovDelivery.
- OFO completed the Performance Metrics Committee report entitled, "Attitudes Toward the Effectiveness of OFO Amongst Federal Sector Stakeholders," and submitted the final draft to OFO management.
- OFO completed a white paper entitled, "Proposal for Investigating Form 462/MD-715 Reporting Structure for Improved Efficiency," and submitted the final draft to OFO management.
- OFO staff completed a report, "An Examination of Appeals of Harassment Allegations within the Federal Sector."
- OFO staff worked on a criminological commentary on The Report of the Co-Chairs of the EEOC Select Task Force on the Study of Harassment in the Workplace. This commentary assesses what criminology can add to what we know about effective harassment prevention.
- OFO staff continued working with OPM in order to obtain Enterprise Human Resources Integration – Statistical Data Mart (EHRI-SDM) personnel data.
- OFO staff continued work on a program evaluation of HHS's EEO program by conducting numerous interviews of staff in 10 subcomponents and reviewing volumes of documents. An 83-page draft report was completed which is in final review.
- OFO staff continued work on a program evaluation of VBA's EEO program by reviewing responses to an RFI and conducting an entrance conference with VBA Officials including the agency head.
- OFO staff generated a report on the rate of Harassment and Sexual Harassment for the Department of Interior, National Park Service. This report compared the rate of retaliation complaints at National Park Service to the government-wide rate over a five year period (2011-2015).
- OFO participated in a one-day ACS Respondent Burden Testing Briefing session conducted by U.S. Census Bureau.
- OFO participated in an ACS Respondent Burden Cognitive Testing – Group 2 meeting.

IV. Education & Outreach

1. Eliminating Barriers in Recruitment and Hiring

- OFO continued work on computerized Barrier Analysis Tools that will provide agencies a list of potential barriers to equal employment opportunities based on their answers to a thorough set of yes/no questions. These tools will also provide agencies with recommended next steps for their efforts to drill down to the root causes of inequalities. In the future, using data from these tools, OFO will analyze and track agencies' progress in eliminating barriers to equal employment opportunities.
- OFO participated in an Applicant Flow Data Redesign Session workshop held at OPM Headquarters.
- OFO began working on a project to identify barriers for Asian Americans and Pacific Islanders as indicated by Federal agencies in their MD-715 reports (2015).
- OFO presented "Providing Reasonable Accommodation for Managers" training for United States Citizenship and Immigration Services by (USCIS) Webinar.
- EEOC staff conducted "Disability/Accommodation Claims" training for the Environmental Protection Agency (EPA), in Washington, DC.
- OFO staff presented an overview and explanation of the EEOC and EEO process for the Office of Personnel Management (OPM) in Washington, DC.
- EEOC staff participated in the "Senior Executive Leadership Equal Opportunity Seminar" for the United States Coast Guard at Ft. Patrick, FL.
- EEOC staff participated in National Association of the Blind (NAB) 2016 Conference in Phoenix, AZ.
- OFO and EEOC staff presented on "LGBT Civil Rights" issues the EXCEL Conference in San Francisco, CA.
- EEOC staff presented "Specialized Reasonable Accommodation Issues" and "Essential Functions v. Qualification Standards" at the EXCEL Conference in San Francisco, CA.
- EEOC Staff presented to Foreign Service Officers on disability issues during US State Department training in Arlington, VA.
- EEOC staff gave a "Disability Legal Update" during a webinar for the Job Accommodation Network.
- EEOC staff provided outreach on "Reasonable Accommodation & Disability" for the Social Security Administration (SSA) in New Orleans, LA.
- EEOC staff presented a session on "Reasonable Accommodation and Disability" for the Department of the Army in Huntsville, AL.
- EEOC staff participated in a Diversity Training Conference for USDA in Washington, DC.
- EEOC staff conducted a "Reasonable Accommodation" webinar for the US Department of Agriculture (USDA) in Washington DC.
- EEOC staff presented training on "National Origin and the EEO Process" for the US Department of Agriculture (USDA) in Washington, DC.
- EEOC staff conducted "Barrier Analysis" training for the Defense Equal Opportunity Management Institute at Ft. Patrick Air Force Base, FL.

- EEOC staff conducted training on "Reasonable Accommodation" issues for the Department of the Interior (DOI) in Jacksonville, FL.
- TOD Assistant Director conducted training on "Barrier Analysis" for the DHS National EEO Conference in Washington, DC.
- TOD staff conducted "Reasonable Accommodation" training for the Defense Equal Opportunity Management Institute at Ft. Patrick Air Force Base, FL.
- OFO staff presented on "LGBT Issues and Developments" at the National Civil Right Conference in Washington, DC.
- OFO staff presented on "A Model EEO Program" at the National Civil Right Conference in Washington, DC.
- OFO staff presented on "Religious Issues in Employment" at the National Civil Right Conference in Washington, DC.
- OFO staff presented on "Barrier Analysis" panel at the National Civil Right Conference in Washington, DC.
- OFO staff presented on "Developing Transgender Policies" at the Intelligence Community EEOD Professionals' Conference in Arlington, VA.
- OFO staff presented on "National Origin Guidance" at the Intelligence Community EEOD Professionals' Conference in Bethesda. MD.
- EEOC staff presented session on "Unconscious Bias and Hiring" at the EXCEL Conference in San Francisco, CA.
- EEOC staff spoke on "LGBT issues in the Workplace" at Federal Partners in Equality Conference in San Antonio, TX.
- EEOC staff spoke on "LGBT Rights" at Federally Employed Women (FEW) meeting in San Antonio, TX.
- OFO staff participated on "A Model EEO Program" at LULAC Conference 2016 in Washington D.C.
- OFO staff presented "Barrier Analysis, in San Francisco, CA.
- OFO staff presented MD-715 training in San Francisco, CA.
- OFO staff presented Disability Program Manager the Basics in Washington, DC.
- OFO staff presented Barrier Analysis Training at EPA in Washington, DC.

2. Protecting Immigrant, Migrant and Other Vulnerable Workers

- OFO presented "Providing Reasonable Accommodation for Managers" training for United States Citizenship and Immigration Services (USCIS) by Webinar.
- EEOC staff conducted "Disability/ Accommodation Claims" training for the Environmental Protection Agency (EPA) in Washington, DC.
- EEOC staff conducted "Counselor Refresher" training for the National Guard Bureau (NGB) series.
- EEOC staff conducted MD-715 Basic overview to Federal Aviation Administration (FAA) in San Francisco, CA.

- EEOC staff participated in National Association of the Blind (NAB) 2016 Conference in Phoenix, AZ.
- EEOC Staff presented to Foreign Service Officers on "Disability" issues during the US State Department training in Arlington, VA.
- EEOC staff gave a "Disability Legal Update" during a webinar for the Job Accommodation Network.
- EEOC staff provided outreach on "Reasonable Accommodation & Disability" for the Social Security Administration (SSA) in New Orleans, LA.
- EEOC staff provided "LGBT" training for Defense Media Activity (DMA) in Ft. Meade, MD.
- OFO staff provided Reasonable Accommodation and Disability training for Fish and Wildlife Service in Washington, DC.
- OFO and EEOC staff presented concerning "LGBT Civil Rights" issues at the EXCEL Conference in San Francisco, CA.
- EEOC staff conducted a session on "Reasonable Accommodation and Disability" for the Department of Army in Huntsville, AL.
- EEOC staff presented "LGBT" training to the Securities and Exchange Commission (SEC) in Washington, DC.
- EEOC staff conducted a "Reasonable Accommodation" webinar for the US Department of Agriculture (USDA) in Washington, DC.
- EEOC staff presented training on "National Origin Discrimination" and the "EEO Process" for the US Department of Agriculture (USDA) in Washington, DC.
- EEOC staff conducted training on "Reasonable Accommodation" issues for the Department of the Interior (DOI) in Jacksonville, FL.
- TOD staff conducted "Reasonable Accommodation" training for the Defense Equal Opportunity Management Institute at Ft. Patrick Air Force Base, FL.
- OFO staff presented on "Religious Issues in Employment" at the National Civil Rights Conference in Washington, DC.
- OFO staff presented on "National Origin Guidance" at the Intelligence Community EEOD Professionals' Conference in Bethesda. MD.
- OFO staff presented "Barrier Analysis, in San Francisco CA.
- OFO staff presented MD-715 training in San Francisco CA.
- OFO staff presented on "National Origin Discrimination" at LULAC Conference 2016 in Washington DC.
- OFO staff presented Disability Program Manager the Basics in Washington, DC.

3. Addressing Emerging and Developing Issues

- Retaliation Project: OFO completed the retaliation report entitled, "Retaliation in the Federal Sector: A Psychosocial Approach to Understanding Revenge," and submitted the final draft to OFO management.
- OFO and EEOC staff presented "LGBT Civil Rights" issues at the EXCEL Conference in San Francisco, CA.

- EEOC staff provided training on MD-110 to Federal Aviation Administration (FAA) in Atlantic City, NJ.
- EEOC staff provided MD-110 training for EEO Counselors to Administrative Office of US Courts in Washington, DC.
- EEOC staff provided "LGBT" training" for Defense Media Activity (DMA) in Ft. Meade, MD.
- OFO staff conducted EEO Laws for Managers and Supervisors for Bureau of Reclamation in Denver, CO.
- EEOC staff participated in a Diversity Training Conference for US Department of Agriculture (USDA) in Washington, DC.
- EEOC staff presented "LGBT" training to the Securities and Exchange Commission (SEC) in Washington, DC.
- EEOC staff participated on a "Workforce Cultural Competency" and "Workplace Etiquette" panel for Dept. of Veterans Affairs (VA) in Washington, DC.
- OFO Director participated in the "Whistle Blower Summit for Civil and Human Rights" panel for Federally Employed Women (FEW) in Washington, DC.
- OFO participated on a "Retaliation" panel for Federally Employed Women (FEW) in Washington, DC.
- OFO staff presented on "Religious Issues in Employment" at the National Civil Rights Conference in Washington, DC.
- OFO staff presented on "Developing Transgender Policies" at the Intelligence Community EEOD Professionals' Conference in Bethesda, MD.
- EEOC staff spoke on "LGBT" issues in the Workplace" at Federal Partners in Equality Conference in San Antonio, TX.
- EEOC staff spoke on "LGBT Rights" at Federally Employed Women (FEW) meeting in San Antonio, TX.
- OFO staff presented New Counselor training in Washington, DC.
- OFO staff presented New Investigator training Washington, DC.
- OFO staff presented Complaint Processing training for Federal Energy Regulatory Commission in Washington, DC.

4. **Enforcing Equal Pay Laws**

- OFO staff completed a report, "The Gender and Motherhood Wage Gaps among Federal Government Employees."

5. **Preserving Access to the Legal System**

- EEOC staff participated in the "Senior Executive Leadership Equal Opportunity Seminar" for the United States Coast Guard at Ft. Patrick, FL.
- EEOC staff conducted session on "EEO Complaint Processing" for Federal Energy Regulatory Commission (FERC), in Washington, DC.

- OFO staff presented an "Overview and Explanation of the EEOC and EEO Process" for Office of Personnel Management (OPM) in Washington, DC.
- OFO staff presented on "Procedural Acceptance and Dismissal" at the EXCEL Conference in San Francisco, CA.
- EEOC staff provided training on MD-110 to Federal Aviation Administration (FAA) in Atlantic City, NJ.
- EEOC Staff provided MD-110 training for EEO counselors to Administrative Office of US Courts in Washington, DC.
- EEOC staff presented training on "National Origin and the EEO Process" for the US Department of Agriculture (USDA) in Washington, DC.
- OFO participated on a "Retaliation" panel for Federally Employed Women (FEW) in Washington, DC.
- OFO Director participated in the "Whistle Blower Summit for Civil and Human Rights" panel for Federally Employed Women (FEW) in Washington, DC.
- EEOC staff presented on the "EEO Pre-Complaint Process" at Blacks in Government (BIG) National Conference in Atlantic City, NJ.
- EEOC staff presented on "Retaliation" at Social Security Administration (SSA) in Media, PA.
- OFO staff presented on "A Model EEO Program" at the National Civil Rights Conference in Washington, DC.
- OFO staff participated on a panel concerning "EEO Complaint Process Essentials" at the National Civil Rights Conference in Washington, DC.
- OFO staff presented New Counselor training in Washington, DC.
- OFO staff presented New Investigator training Washington, DC.
- OFO staff conducted Drafting Final Agency Action training in Washington, DC.
- OFO staff conducted Final Agency Action training in Washington, DC.
- OFO staff conducted EEO Laws Training in Bar Harbor, Maine.
- OFO staff conducted EEO Laws Training for Federal Executive Board in Long Beach, CA.
- OFO staff presented EEO Manager and Supervisor training for FMCSA in Washington, DC.
- OFO staff conducted EEO Laws for Managers and Supervisors for Consumer Finance Protection Board in Washington, DC.
- OFO staff conducted EEO Laws for Managers and Supervisors for Bureau of Reclamation in Denver, CO.

6. Preventing Harassment through Systemic Enforcement and Targeted Outreach

- OFO met with MSPB for a discussion regarding new approaches to studying Harassment (August 18th).
- OFO and EEOC staff presented "Sexual Harassment and Prevention" for the US Bureau of Reclamation (USBR) in Washington, DC.

- OFO and EEOC staff presented sessions on harassment and anti-harassment policies, and investigating sexual harassment, at the EXCEL Conference in San Francisco, CA.
- EEOC staff conducted outreach on "Harassment and Retaliation" for the Department of Army in Aberdeen, MD.
- TOD provided "Workplace Harassment for Managers" training for the Environmental Protection Agency (EPA) series in Cincinnati, Ohio.
- TOD provided "Workplace Harassment for Managers" training for the Environmental Protection Agency (EPA) series in Washington, DC.
- EEOC staff conducted "Workplace Harassment for Managers" training for the Environmental Protection Agency (USCIS) as a Webinar.
- OFO staff presented to DOD investigators on "Hostile Work Environment Claims" in Southbridge, MA.
- OFO staff presented Unlawful Harassment training to Fish and Wildlife Service in Falls Church, VA.
- OFO staff presented on "An Effective Anti-Harassment Program" at IMAGE Conference in Albuquerque, NM.
- OFO Staff conducted Preventing Workplace Harassment for EPA in Guyabano, Puerto Rico.
- OFO staff presented EEO Manager and Supervisor training for FMCSA in Washington, DC.
- OFO staff presented on "Religious Issues in Employment" at the National Civil Rights Conference in Washington, DC.
- EEO Staff delivered training on harassment and bullying to procurement staff at Dept. of Defense MedCom/Joint Base San Antonio, TX.
- OFO staff conducted EEO Laws for Managers and Supervisors for Bureau of Reclamation in Denver, CO.

7. Training/Outreach – General

- EEOC staff participated in National Association of the Blind (NAB) 2016 Conference in Phoenix, AZ.
- OFO Director and FSP Associate Director and OFO staff participated in EEO Director's meeting at LULAC conference 2016 in Washington DC.
- OFO staff conducted "Case Updates" for Transportation Security Administration (TSA) in Washington DC.
- EEOC staff conducted "Case Law Updates" and "GINA" training for the Defense Equal Opportunity Management Institute at Ft. Patrick Air Force Base, FL.
- OFO staff participated in the Federally Employed Women (FEW) conference, conducting an "EEO Laws Overview" in Dallas, TX.
- EEOC staff presented an "EEO Overview" to OPM in Washington, DC.
- OFO and EEOC staff presented on numerous EEO issues at the EXCEL Conference in San Francisco, CA.

- EEOC staff gave a "Disability Legal Update" during a webinar for the Job Accommodation Network.
- EEOC staff conducted "FMLA Claims" for the Department of the Interior (DOI) in Jacksonville, FL.
- EEOC staff provided training on MD-110 to Federal Aviation Administration (FAA) in Atlantic City, NJ.
- EEOC Staff provided MD-110 training for EEO counselors to Administrative Office of US Courts in Washington, DC.
- EEOC staff provided a presentation on "EEO Laws" to the Social Security Administration (SSA) in Chicago, IL.
- EEOC staff participated in an EEOC mock hearing for Department of Defense (DOD) at Joint Base Andrews, MD.
- EEOC staff conducted outreach on "Harassment and Retaliation" for the Department of Army in Aberdeen, MD.
- OFO Director, FSP Associate Director and OFO staff presented and moderated at OFO's Executive Leadership Training Conference in Washington, DC.
- EEOC staff participated in a Diversity Training Conference for the US Department of Agriculture (USDA) in Washington, DC.
- EEOC staff presented training on "National Origin and the EEO Process" for the US Department of Agriculture (USDA) in Washington, DC.
- OFO Director and staff, and EEOC staff, participated in multiple sessions of the Federal Dispute Resolution Conference (FDR) in New Orleans, LA.
- EEOC staff provided a Legal Update at State Department's Civil Society Consultation with Non-Governmental Organizations, in Washington, DC.
- OFO staff presented on "Being an Effective Special Emphasis Program Manager" at IMAGE Conference in Albuquerque, NM.
- FSP Associate Director spoke on leadership panel for the African American Federal Executive Association's 12th Annual Professional Development Workshop in Washington, DC.
- OFO staff presented on "A Model EEO Program" at the National Civil Rights Conference in Washington, DC.
- OFO staff participated on a panel concerning "EEO Complaint Process Essentials" at the National Civil Rights Conference in Washington, DC.
- OFO staff presented on "EEOC Form 462 Preparation" at the National Civil Rights Conference in Washington, DC.
- EEOC staff spoke with members of American Federation of Gov't Employees (AFGE) about various federal EEO topics in Dallas, TX.
- OFO Director, FSP Associate Director and OFO staff, presented and moderated at FY 2016 EXCEL conference in San Francisco, CA.
- OFO staff presented EEO Manager and Supervisor training for FMCSA in Washington, DC.

- OFO staff met with the Department of Veteran's Affairs Office of Resolution Management staff to discuss the potential of their new designed case management software as a replacement for iComplaints as a complaints case management and reporting tool.
- OFO conducted Diversity and Inclusion Council work in assisting transition to new leadership in HQ Sub-council and taking on the role as Disability Employee representative on National D&I Council.
- OFO staff spoke at Cultural Competency Webinar regarding Disability Etiquette.

Quarterly Strategic Enforcement Plan Report
Office of Federal Operations
1st and 2nd Quarters FY 2017

I. Background: General FY 2017 1st and 2nd Quarters Appellate Review Program Accomplishments

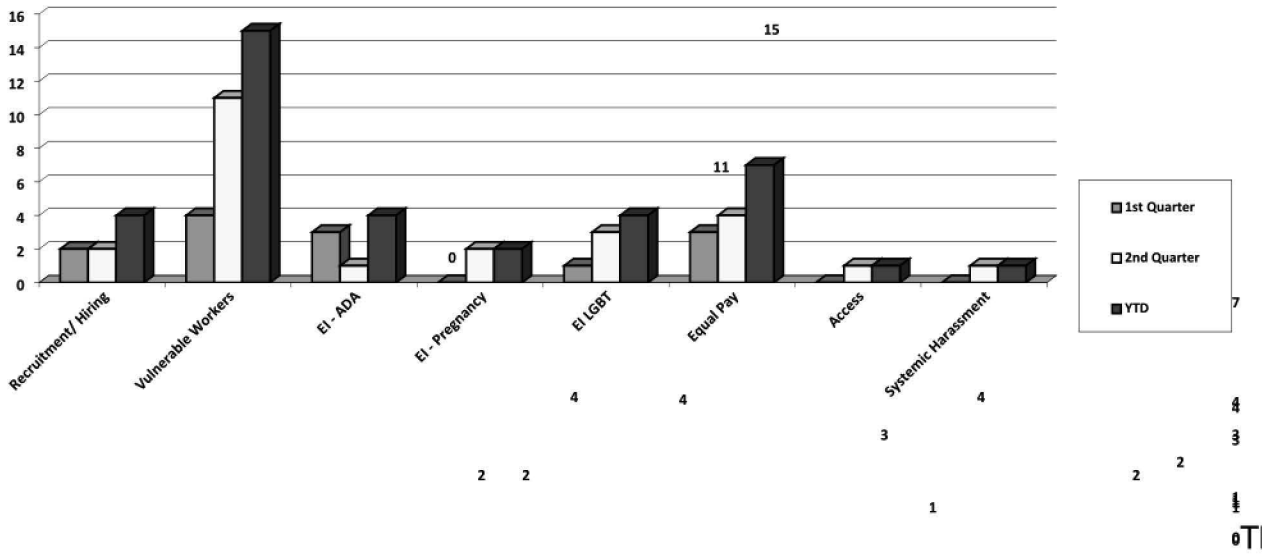
During the 1st and 2nd Quarters of FY 2017, the Office of Federal Operations (OFO) resolved 1,844 appeals, including 901 decisions on the merits and 804 procedural closures. Of the 804 procedural closures, 502 of them involved initial appeals under review by OFO, and we reversed 193 or 38.4% of the agency dismissals. Of the 901 merit decisions, OFO issued 41 findings of discrimination during the 1st and 2nd Quarters. We found discrimination on the basis of disability in 20 of the findings, retaliation in 14 of the findings, and age in 9 of the findings. The top two issues involved in the findings included promotion (10) and harassment (10).

Resolution Description	1st Quarter	2nd Quarter	Year to Date
Resolutions	813	1,031	1,844
Merits Resolutions	408	493	901
[redacted] Findings	11	30	41
[redacted] Non-Findings	397	463	860
Procedural Resolutions (all)	348	456	804
Procedural Resolutions (from Initial Appeal)	216	286	502
[redacted] Affirming Dismissal (excluding denials)	140	167	307
[redacted] Reversing Dismissal	75	118	193

With regard to the categorization of the 1,844 resolutions, OFO identified 38 appeals that implicated one or more SEP/FCP priority. Section II below contains charts breaking down the composition of the individual priorities, summaries of the 38 decisions OFO attorneys categorized as implicating the SEP/FCP priorities, and summaries of the findings of discrimination made in the 1st and 2nd quarters.

II. Analysis of SEP/FCP Priority Areas

The chart below depicts the distribution of the 38 appellate decisions OFO identified as implicating an SEP/FCP category:



The numbered sections below provide more information about each of the six SEP priorities. Specifically, these sections start with a chart depicting the related FCP categories under each SEP, as well as summaries of the specific decisions under each SEP/FCP priority. In Section 7, by contrast, we provide summaries of the findings of discrimination issued during the 1st and 2nd Quarters, whether or not they implicated an SEP/FCP category.

1. ELIMINATING BARRIERS IN RECRUITMENT AND HIRING

Of the four decisions implicating this SEP Priority, one (1) decision implicated three FCP Priorities - medical exams, the relationship between "business necessity" and "direct threat, and the appropriate allocation of burdens in qualification standards cases.

*One decision did not implicate an FCP category, and one decision implicated 4 FCP categories.

Mahon (Emiko S.) v. DOT (FAA), 0520160466 (11/02/2016) - Complainant, who has monocular vision, was an applicant for the position of Air Traffic Controller (ATC). In 2008, she received a tentative offer of employment pending the results of a medical evaluation. She provided medical and other evidence that she could safely perform as an ATC. Following the evaluation, the Agency ultimately disqualified Complainant because she did not meet the Agency's vision standard requirement since she had monocular vision. The Agency denied Complainant employment, reasoning that hiring her as an ATC would risk operational errors and degrade public safety. Complainant filed a complaint alleging discrimination based on disability. She requested a hearing. On summary judgment the AJ found that the Agency violated the Rehabilitation Act because it failed to demonstrate that Complainant posed a direct threat to safety since it medically disqualified her without an individualized assessment of her for the ATC position. The AJ ordered the Agency to conduct an individualized assessment, and if Complainant passed reinstate her with back pay and enroll her into the ATC training academy, and other relief. The Agency fully implemented the AJ's decision.

On appeal, OFO upheld the finding of discrimination, but substantially changed the relief. Since the Agency failed in its burden to prove direct threat by not conducting an individualized assessment, rather than order the Agency to conduct one, OFO simply ordered the Agency to reinstate Complainant's conditional offer of employment with back pay from 2008, and if she accepted the offer to enroll her in the ATC Academy. In so doing, OFO relied on Nathan v. Justice (FBI), EEOC Appeal No. 0720070014 (July 19, 2013). OFO also increased the AJ's award of attorney fees and compensatory damages. On request, the Agency argued that its failure to conduct an individualized assessment cannot substitute for a finding of no direct threat to safety, and the Commission filled this evidentiary gap by ignoring it. OFO rejected this argument, relying on Nathan. In finding that the appellate decision will not have a substantial impact on Agency operations, we noted that Complainant still had to pass all Agency training requirements, including the training Academy, and the Agency argued that it can assess Complainant's ability to perform as an ATC based on her performance in the training Academy. OFO upheld the previous decision, modifying it slightly to add additional attorney fees and costs, and to ensure Complainant was enrolled in the Academy before her 31st birthday, which she argued was required by statute.

Candemeres (Candice B.) et al. v. DHS, 0520160429 (11/02/2016) – The Commission denied the Agency's request for reconsideration. Complainant was an applicant for a Customs and Border Protection Officer vacancy. The position required candidates to complete three separate fitness tests, each containing a progressively more difficult push-up requirement. While Complainant passed the first and second tests, and was hired, she failed the final test given during her probationary period. Believing her termination was based on sex, Complainant filed a complaint. While the case was pending before an AJ, Complainant sought class certification. The AJ denied certification, finding that the requirements of typicality, commonality, and numerosity were not met.

In our prior decision (EEOC Appeal No. 0120160714), OFO found that the AJ erred in not certifying the class. Specifically, we found that commonality and typicality were met, as Complainant alleged discrimination regarding the Agency's policy of administering a "set of tests" rather than simply the final level test. When the class included women who not only failed the last test, but either of the other two tests, the potential class was over 350 individuals.

On RTR, the Agency argues that interpreting the scope to include the first two tests was an erroneous interpretation of material fact. Further, contends the Agency, the prior decision used the "erroneous expanded scope to bootstrap the number of individuals who did not pass [the first two tests] as a basis to establish numerosity..."

In denying the Agency's request, we found that the complaint was not "amended" by our prior decision, but instead "reframed" based on the instant record. Such practices are reflected in prior Commission decision, in reversing Agency dismissals for failure to state a claim. Lastly, we were not persuaded by the Agency's reiterated argument that individuals who were not counseled could not serve as class agents.

Noel (Cristobal A.)v. DOT (FAA), 0120133248 (02/24/2017) – Complainant was an applicant for an Air Traffic Control Specialist position at the Mike Monroney Aeronautical Center in Oklahoma City, Oklahoma. Complainant received a letter from the Agency stating that Complainant was tentatively being offered an Air Traffic Control Specialist position, "subject to a pre-employment clearance process that included a medical evaluation and a background investigation." Relevant to Complainant's medical evaluation is an Agency regulation which provides that individuals hired as Air Traffic Controllers, "must have no neuroses, personality disorder, or mental disorder that the Federal Air Surgeon determines clearly indicates a potential hazard to safety in the air traffic control system."

AJ Decision, p. 7 (citing, FAA Order 3930-3A). Complainant needed to complete a psychological evaluation pursuant to this regulation. The first step in the psychological evaluation is for the applicant to take the Minnesota Multiphasic Personality Inventory-2 (MMPI-2). The test involves over 500 "true or false" questions. A number of questions included in the test are designed to act as safeguards to determine whether the subject is making a conscious or unconscious attempt to make a favorable impression. Complainant was initially administered an abbreviated version of the test by the Agency, but the results of the test were found to be unreliable because Complainant had elevated scores on the questions that were designed to ensure that the test-taker was not adjusting his answers to align with what he thought would be most acceptable. Complainant was sent for further evaluation to an independent psychologist who again administered the MMPI-2 to Complainant and also conducted a personal interview. The MMPI-2 interpretative report indicates in the synopsis: "Scores on the substantive scale indicate thought and interpersonal dysfunction. Dysfunctional thinking findings relate to ideas of persecution. Interpersonal difficulties relate to over-assertiveness." The report recommended that Complainant be evaluated for thought disorders i.e., "disorders involving persecutory ideation." Further, the report noted that Complainant may have been perceived by his peers as gay in the context of Complainant's explanation that he was bullied in school, and that Complainant had a lisp.

These conclusions were forwarded to the Agency's doctors, and Complainant was disqualified from the position for having a neurosis which is prohibited under FAA regulations for the Air Traffic Controller position. Complainant filed an EEO complaint alleging that he was discriminated against based on race (African-American), sex (male, perceived sexual orientation) and reprisal. Complainant requested a hearing and an EEOC Administrative Judge found that Complainant did not prove by a preponderance of the evidence that he was subjected to the alleged discrimination.

The appellate decision reasoned that the psychologist relied heavily on test results to disqualify Complainant, and statements in his report regarding Complainant possibly being perceived as gay related to Complainant explaining that he was bullied in school, and therefore, provided context for Complainant's experiences. The appellate decision also examined the process Agency officials went through to medically disqualify Complainant, and found that there was no evidence of bias tainting the process.

Therefore, the AJ's decision finding that Complainant was not subjected to race, sex and reprisal discrimination was affirmed.

Solomon (Lashawna L.) v. HUD, 0120151196 (03/30/2017) – Complainant was an Applicant for employment at the Office of Fair Housing and Equal Opportunity. Complainant appealed the agency's final decision which fully implemented an EEOC AJ's finding, issued on summary judgment, that Complainant was not subjected to race (African-American), sex (female) and reprisal discrimination. Complainant alleged that the Agency engaged in a practice of not promoting African-American females to GS-13/14 positions, and cited her non-selection to two such positions. The decision concluded that the Agency stated legitimate, nondiscriminatory, reasons for not selecting Complainant to the two positions. The Agency stated that the selectees had skills and experience that were more suitable than Complainant's skills and experience. The decision noted that Complainant did not offer additional claims or evidence in support of her claim that the Agency had a practice of not selecting African American females to higher-graded position, and that the selectee for one of the positions at issue was an African American female. The decision concluded that Complainant did not demonstrate that the Agency's legitimate, nondiscriminatory, reasons were pretext, and therefore did not prove that she was subjected to the alleged discrimination. The Agency's final decision which implemented the AJ's finding of no discrimination was affirmed.

2. PROTECTING IMMIGRANT, MIGRANT AND OTHER VULNERABLE WORKERS

All fifteen decisions that implicated this SEP Priority concerned the FCP Contractors.

Decision Summaries for this Category

Bagwell (Serita B.) v. Army, 0120150846 (11/10/2016) **[Repeated below under Circulated Decisions]** - This decision was circulated, and contains new legal language for joint employment cases. Complainant worked for a staffing firm serving the Agency as a Special Security Representative at its Joint Special Operations Command (JSOC), J2, Special Security Office. In her complaint, Complainant alleged that the Agency discriminated against and harassed her based on her sex (female/pregnancy) and disability (pregnancy/severe morning sickness) when her Agency supervisor asked her intrusive questions about her birth plan and medical treatment and expressed disapproval thereof, added Complainant's husband to the supervisor's contact list, and she was terminated. The Agency dismissed the complaint for failure to state a claim, reasoning that Complainant was not an employee of the Agency.

The Commission reversed because the Agency had a sufficient right to and/or actual control over Complainant's position to qualify as her common-law employer. Specifically, the Agency controlled how Complainant performed her job – her Agency supervisor assigned her work, set deadlines, advised her on her performance and demeanor, and assigned her additional projects. Complainant served the Agency from July 2013 until her termination in August 2014, a significant duration. She worked on Agency premises using Agency equipment, and the Agency set her working hours. Significantly, shortly after the Agency requested the staffing firm to cut off Complainant's services, the staffing firm expressed its belief that it was "required" to comply with the request and then terminated Complainant. As such, the Commission concluded that the Agency had de facto or joint power to terminate Complainant.

Escander (Spencer T.) v. Army, 0120162010 (11/18/2016) - Complainant worked for Staffing Firm 2 serving the Agency as an Arabic Language Instructor at its Special Warfare Center and School. He alleged in his complaint that he was discriminated against based on his national origin (Egyptian), religion (Coptic Christian), and reprisal for his association with a co-worker who engaged in prior protected EEO activity when he learned, on July 2, 2014, that he was "suspended" from further service, meaning the Agency blocked him from being hired by Staffing Firm 3 to resume serving the Agency. The Agency dismissed the complaint for failure to state a claim, reasoning that Complainant was an employee of Staffing Firm 2, not the Agency.

The Commission reversed because the Agency had a sufficient right to and/or actual control over Complainant's position to qualify as his common-law employer. Specifically, there was evidence that the Agency Chair of the language department in which Complainant served at least once very negatively assessed Complainant's performance and passed this along to his Staffing Firm 2 supervisor, that he threatened contract instructions that if there any complaints he would immediately fire the instructor, that he worked in collaboration with the management of each vendor who then took action on behalf of the employee, implying he had some de facto control over their employment; and that the Agency told Staffing Firm 3 that they could not put Complainant back in the classroom because he had been banned by the Agency – which was especially significant given the subject of the complaint. Further, Complainant worked on Agency premises using Agency equipment, served

the Agency as an instructor on and off since at least August 2012 for stints of at least about two to five months, a significant duration, and the Agency had input into when he worked since it identified the days and hours students attend class, and Staffing Firm 2 was required to meet this requirement.

Perrin-Thompson (Eve E.) v. DOD (WHS), 0120162250 (11/22/2016) - Complainant worked for a staffing firm serving the Agency as an Information Assurance Engineer. She filed a complaint alleging discrimination based on her race (African-American), sex (female), age (60), and reprisal when (1) over an almost three month period, some of the Agency's reactions, feedback, and assessments of her performance was negative and she was subjected to some slights, (2) her service to the Agency was cut off and then her staffing firm offered her two positions at significantly lower pay, and (3) an attorney retained by her staffing firm investigated her EEO claims by interviewing Agency staff who provided negative information, and because of Complainant's complaints against Agency employees she was terminated by her staffing firm. The Agency dismissed the complaint for failure to state a claim, reasoning that Complainant was an employee of the staffing firm, not the Agency. OFO affirmed.

OFO found that some common-law factors in determining right to control Complainant's position pointed to the Agency jointly employing her - Agency staff gave Complainant assignments, reviewed and gave her feedback on her performance, had input into her staffing firm performance appraisal, and she worked on Agency premises using Agency equipment. OFO found that a fair reading of Complainant's complaint was that it was mostly about her service to the Agency being cut off and her termination. After Complainant complained about discrimination by the Agency, the staffing firm decided to take prompt action by moving her from the Agency during the pendency of its investigation. There was no indication that anyone from the Agency was involved in this decision. The staffing firm gave Complainant the option of reporting to the staffing firm or being placed on administrative leave, and Complainant, on a temporary call in basis, continued to do some work for the staffing firm. Shortly thereafter, the staffing firm advised Complainant that she would not return to serving the Agency, and offered her two alternative positions, both of which she rejected. On March 21, 2016, the staffing firm terminated Complainant on the ground that she was not employed in any position. OFO found that the Agency did not have de facto power to terminate Complainant, as evidenced by the staffing firm continuing to employ her and offering her two alternative positions, and that this was especially significant since her complaint was mostly about her service to the Agency being cut off and her termination. Citing case law in similar situations, OFO concluded that the Agency did not jointly employ Complainant.

Broeckelmann (Tabetha M.) v. VA, 0120150813 (12/19/2016) – During the relevant time, Complainant worked as a Research Assistant at the VAMC in Nashville, Tennessee. She stated that she was employed by Vanderbilt University Medical Center and held a "WOC" (Without Compensation) appointment at the Agency in order to access Agency labs to conduct research. In June 2014 she was denied access to the Agency, as a result of complaints from Agency employees. Complainant believed the complaints related to perceptions about her disability. The next month, she was terminated from her Research Assistant position. In her termination letter, Vanderbilt noted that her denied access to Agency labs prevented her from performing duties that can only be done at the Agency site and are required for her position. Complainant filed a complaint alleging a hostile work environment based on disability. The Agency dismissed the complaint on the grounds that Complainant lacked standing, as she was neither an applicant nor employee of the Agency.

In affirming the Agency's dismissal, we "reaffirmed [our] long-standing position on 'joint employers'", referencing several prior decisions and guidance documents. Numerous factors are considered, yet

no one factor is considered to be decisive nor is it necessary to satisfy a majority of those factors. Instead, the proper analysis considers all the circumstances in the individual's relationship to the Agency. In addition to considering many factors, we reiterated that the "language of the contract between the agency and the staffing firm is not dispositive as to whether a joint-employment situation exists." Instead the focus is on what actually occurs in the workplace, even if it contradicts contract language.

In the instant case, Complainant was hired and paid by Vanderbilt. Most significantly, she was supervised by an Assistant Professor at Vanderbilt and not Agency personnel. It was the Assistant Professor who provided her performance plans, assignments, evaluations, discipline and termination. While Agency employees expressed concerns about her behavior, it was Vanderbilt that banned her from the Agency site and investigated their concerns. The Commission concluded that the Agency did not exercise sufficient control over Complainant's position to qualify as a joint employer for the purposes of the EEO complaint process.

Knox (Lu T.) v. DOE, 0120150914 (01/13/2017) – Based on the evidence of record and the Agency's dismissal of Complainant's complaint for failure to state a claim, we determined that the Agency did not exercise sufficient control over Complainant, a contractor Secretary, to qualify as her joint employer for the purpose of the 29 Part 1614 EEO complaint process. The thrust of Complainant's complaint was related to her assignment to a different facility. Per the terms of the contract between Complainant's contractor employer and the Agency, Agency management is able to move Contractor employees as needed to support different teams as needed and as long as the work remains administrative in nature. We determined that the Agency's control over Complainant's position was limited to where she performed her duties. Under the facts of this case, this alone is insufficient to confer join employer status on the Agency. Moreover, we affirmed the Agency's dismissal finding that Complainant was not a Federal employee, and that she was instead a contractor, not covered by Federal sector complaint process.

Walton (Candice B.) v. HHS, 0120162186 (01/24/2017) – Based on the evidence of record and the Agency's dismissal of Complainant's complaint for failure to state a claim, we determined that the Agency did not exercise sufficient control over Complainant, a contractor Business Systems Analyst I, to qualify as her joint employer for the purpose of the 29 Part 1614 EEO complaint process. In her complaint, Complainant alleged that she was discriminated against on the basis of race when a contractor employee made an inappropriate comment to her, and she was thereafter terminated from her position with her contractor employer. According to the contractor employer, Complainant was terminated because her services were no longer required because there had been changes in the staffing and work requirements for the task order under which she was assigned. We found that the Agency's control over Complainant was essentially limited to defining the tasks and type of personnel it needed to perform under its contract with the contracting company. Under the facts of this case, this alone is insufficient to confer join employer status on the Agency. Moreover, we affirmed the Agency's dismissal finding that Complainant was not a Federal employee, and that she was instead a contractor, not covered by Federal sector complaint process.

Lam (Terrence H.) v. DOD, 0120170295 (01/18/2017) – During the period at issue, Complainant was placed by a contracting information technology company ("Contractor 1") at the Agency as a Network Administrator. Complainant worked with Contractor 1 at various Agency sites. Complainant routinely reported to an Agency official while performing IT support functions and activities for Agency auditors and other staff members. In September 2015, Complainant learned that the Agency was awarding the

IT support services contract to another contracting company ("Contractor 2"). Complainant also learned that current Contractor 1 employees were not guaranteed a position with Contractor 2.

Complainant filed a formal EEO complaint when he became aware that Agency officials did not recommend him for a position with Contractor 2, resulting in the loss of his job; and, when a Contractor 1 official told Complainant that change could be good and that he should consider looking for a new job. Complainant interpreted that statement as meaning that Agency management (the Regional IT Administrator in particular) had provided negative feedback on his work performance. The Agency dismissed the complaint for failure to state a claim, reasoning that Complainant was an employee of Contractor 1, and not the Agency.

The Commission reversed because the Agency had a sufficient right to and/or actual control over Complainant to qualify as his joint employer. The Agency's IT Support Coordinator operated as Complainant's first-line supervisor, set working hours, kept a personnel file on Complainant which listed the pros and cons of his work, provided input to his performance appraisals, and approved of Complainant's time cards. Complainant served the Agency from October 2000 for about fifteen years. Complainant worked on Agency premises using Agency equipment. Significantly, Complainant alleged discrimination when he was not recommended for the position with Contractor 2, which subsequently led to the loss of his job. The Commission concluded that the Agency had de facto control of Complainant's job prospects.

Hogans (Liz M.) v. DOJ, 0120162835, 0120170199 (02/02/2017) – Complainant was placed by a contracting security staffing company as a Lead Special Security Officer at the U.S. Attorney's Office (USAO) for the Southern District of New York. As a Special Security Officer, Complainant was deputized by the U.S. Marshal's Service (USMS) to act as a law enforcement officer at the USAO with arrest powers and the authority to carry firearms. Complainant had a kidney transplant and went on medical leave, but was later cleared by her physician to work with no medical restrictions. However, the Agency determined that Complainant was not medically qualified to return to work. The contacting company terminated Complainant's employment because she was not medically cleared to return to her position. Complainant filed EEO complaints with the Agency against both the USAO and the USMS. The Agency dismissed the complaints for failure to state a claim, reasoning that Complainant was an employee of staffing company, and not the Agency.

The Commission reversed because the Agency had a sufficient right to and/or actual control over Complainant's position to qualify as her joint employer. Specifically, the record reflected that the Agency, and not the staffing company, had the sole authority to provide Complainant with a medical clearance to return to work. When Complainant was denied that clearance, her termination followed.

Shelburne (Melissa M.) v. SI, 0120170287 (02/28/2017) – Pursuant to successive direct purchase order contracts with the Agency, Complainant served as an Interceptor at its various museums in the Washington, DC metropolitan area. She surveyed visitors using an Agency iPad and counted visitor flow. Complainant alleged that the Agency discriminated against her based on her disabilities and in reprisal for requesting reasonable accommodation when she was harassed, denied reasonable accommodation, and stopped using her services. The Agency dismissed the complaint for failure to state a claim. It reasoned that Complainant was an independent contractor, not its employee. Concluding that the Agency controlled or had the right to control Complainant's position, OFO reversed. Specifically, OFO found that the Agency had the right to control when and where Complainant worked, directly assigned all her work, instructed her in detail how to conduct and facilitate surveys at various locations, required that she conform to a specified dress code, required her to submit her invoices for payment at specified intervals using an Agency template, provided the

locations and equipment she used to perform her duties, and gave her a memorandum detailing problems with her performance. Also, the Agency directly paid Complainant based on the hours she worked, not the work she performed, and her job was low skilled. While Complainant worked part-time and sometimes intermittently, overall she frequently served the Agency from approximately March 2015 to January 2016, a significant duration. Also, the Agency had the right to discharge Complainant and otherwise stop using her services. OFO found all this outweighed the factors pointing towards Complainant being an independent contractor – her not doing Agency mission work and the Agency not paying her benefits nor withholding her taxes.

Allen (Priscilla F.) v. Navy, 0120170656 (02/22/2017) – At the time of events giving rise to her complaint, Complainant worked for a staffing firm serving the Agency as an Aviation Electrician. She alleged in her complaint that her staffing firm discriminated against her based on her sex (female) when (1) she was terminated, and (2) it contested her application for unemployment insurance. The Agency dismissed the complaint for failure to state a claim. It reasoned that the staffing firm employed Complainant, not the Agency. Concluding that the Agency had insufficient control over Complainant's employment to be deemed her joint employer, OFO affirmed. OFO reasoned that Complainant was assigned her tasks by her onsite staffing firm supervisor who supervised her everyday work, and her schedule was set by her staffing firm (which could be on any of three shifts). Complainant's allegations supporting her claim that her removal was discriminatory all pointed to staffing firm control – that it did not give her progressive discipline in violation of its policy, and she was disparately treated by her staffing firm supervisor regarding the incidents recited in its letter discharging her. Her wages and benefits were paid by the staffing firm and it also provided workers' compensation insurance. While Complainant worked on Agency premises using Agency tools, the weight of the evidence showed the Agency had insufficient control over her employment to be deemed her joint employer.

Leighton (Eric M.) v. DOJ (FBI), 0120161722 (03/03/2017) – At the time of events giving rise to his complaint, Complainant worked for a staffing firm serving the Agency as an Investigative Analytical Consultant investigating FBI contract and employee staff to ensure they did not pose a security risk. He alleged that the Agency discriminated against him based on his race (African-American), age (63) and reprisal for prior EEO activity when (1) it terminated him, (2) did not hire him using its Annuitant Program, and (3) placed derogatory comments in his Facility Security System record. The Agency dismissed issue 1 for failure to state a claim. It reasoned that the staffing firm employed Complainant, not the Agency. It dismissed issues 2 and 3 by omission – not addressing them. Concluding that the Agency had sufficient control over Complainant's employment to be deemed his joint employer, OFO reversed the Agency's dismissal of issue 1. It reasoned that the Agency controlled Complainant's job by assigning him his work, giving him comprehensive and detailed on-the-job training and step-by-step guidance, providing him daily feedback on his work, and reviewing all work he submitted into an online system for approval. Further, the Agency had significant input into who was permitted to serve in Complainant's job; and had de facto or joint power to terminate Complainant, which it exercised. OFO also reversed the Agency's dismissal of issues 2 and 3.

Santiago (Hortencia R.) v. Army, 0120170723 (03/09/2017) – At the time of events giving rise to her complaint, Complainant worked for a staffing firm serving the Agency as a Dental Assistant. She alleged that the Agency subjected her to a hostile work environment based on her race (Puerto Rican), sex (female), religion (Christian), color (Brown), and age (54), and discriminated against her on the above bases when she was terminated. The Agency dismissed the complaint for failure to

state a claim. It reasoned that Complainant was not an employee of the Agency, and later argued she was employed by the staffing firm. Concluding that the Agency controlled Complainant's position, OFO reversed. It reasoned that the Agency controlled how Complainant performed her job – it assigned her which dentists to assist, when an Agency dentist treated patients the dentist directed Complainant how to assist, the staffing firm did not have an on-site supervisor, after becoming concerned about Complainant's performance the Agency gave Complainant a comprehensive step by step medical procedure manual with its expectations of her, and it verbally counseled her. Complainant worked on Agency premises using Agency equipment, and she served there for over two years, a significant duration. Agency personnel wrote three memos where they detailed Complainant's behavioral, competency, and performance problems and asked that she be removed from the dental clinic. The Agency gave some or all of these memos to the staffing firm. Within days after the final memo which communicated that Complainant was endangering patients, she was removed from the clinic, and there was no evidence that the staffing firm placed her elsewhere. This indicated that the Agency had de facto or joint power to terminate Complainant.

Levine (Gerald K.) v. Army, 0120150250 (03/23/2017) – During the relevant time, Complainant worked with and for the Agency in numerous positions. Between June 2008 and January 2010, Complainant was employed by a private company (L-3 MPRI). In February 2010, Complainant was hired by the Agency but then terminated two months later. The next year, in April 2011, the Agency hired Complainant as a Training Instructor with the Counter-insurgency Training Center at Fort Leavenworth, Kansas.

Believing that he was subjected to discrimination based on religion, disability, and reprisal, Complainant filed a formal complaint comprised of several claims. In a prior decision, we affirmed the dismissal of four claims, but remanded two claims for further processing. In claim 3, the subject of the instant appeal, Complainant alleged that an Agency official disclosed to the private company confidential medical information, which was then widely disseminated by the company to create the impression that he was mentally unstable and unreliable.

In a prior decision, OFO ordered the Agency to conduct a supplemental investigation regarding whether it jointly employed Complainant while he worked with the private company. Following a complex procedural history, the Agency issued a decision dismissing claim 3(b) for failure to state a claim, concluding that Complainant was not jointly employed. The Agency only stated generally that the private company was "the one controlling all the matters of Complainant's employment including disciplining and evaluating performance."

In reversing the Agency's dismissal, we "reaffirmed [our] long-standing position on 'joint employers'", referencing several prior decisions and guidance documents. Numerous factors are considered, yet no one factor is considered to be decisive nor is it necessary to satisfy a majority of those factors. Instead, the proper analysis considers all the circumstances in the individual's relationship to the Agency. In addition to considering many factors, we reiterated that the "language of the contract between the agency and the staffing firm is not dispositive as to whether a joint-employment situation exists." Instead the focus is on what actually occurs in the workplace, even if it contradicts contract language.

In the instant case, the private company issued Complainant's evaluations and discipline, set the salary and paid Complainant. On appeal, the Agency's brief included an analysis of Ma factors. The parties presented conflicting evidence regarding who controlled the means and manner of Complainant work. The Commission concluded that the Agency exercised sufficient control over the position to qualify as a joint employer.

Holmes (Corie E.) v. DOE, 0120160842 (03/23/2017) – At the time of events giving rise to her complaint, Complainant worked for a private company that leased from the Agency the American Centrifuge Plant to facilitate the deployment of new nuclear enrichment technology. The Agency funded research, which the company performed under Agency "Work Authorizations." Complainant was a company Quality Assurance Specialist, meaning it was her job to ensure that the company complied with Nuclear Regulatory Commission and to a lesser extent Agency regulations. She also briefed the Agency on its non-conformances on services it provided the company via contractors such as security, fire protection, and decontamination, and worked with the Agency to bring it into compliance. Complainant alleged in her complaint that she was discriminated against based on her race/color (Black) and reprisal when the Agency denied approval of her security clearance, resulting in the company terminating her. The Agency dismissed the complaint for failure to state a claim. It reasoned that Complainant was an employee of the company, not the Agency. On appeal, OFO affirmed. We reasoned that Complainant did not perform services for the Agency, she received all her assignments from her company supervisor and worked under his direction, she worked on company leased premises, and was paid by the company.

3. ADDRESSING EMERGING AND DEVELOPING ISSUES

As depicted in the chart below, during the 1st and 2nd Quarters of FY 2017 OFO resolved 10 decisions under this SEP Priority and its associated FCP priorities.

Of the ten (10) decisions implicating this SEP Priority, four (4) concerned LGBT coverage, three (3) concerned Medical Privacy, and five (5) concerned post-ADAAA reasonable accommodation.

Decision Summaries for this Category

Cumbie (Vito E.) v. VA, 0120142334 (11/30/2016) – Complainant was a Nurse at the Medical Intensive Care Unit, Central Alabama Veterans Health Care System in Montgomery, Alabama. After suffering a mental breakdown while working, the Agency provided him with a temporary assignment in another unit, the Patient Safety Section, as a reasonable accommodation. Complainant was diagnosed with Major Depressive Disorder and Severe Anxiety Disorder and estimated that his condition could last anywhere from three years to his entire life. Complainant alleged denial of accommodation after the Agency informed him that he would have to return to the Medical Intensive Care Unit after he had been accommodated in the Patient Safety Section for approximately nine months. In response, Complainant requested a permanent reassignment to the Patient Safety Section, however, the Agency explained that there were no vacant funded positions in Patient Safety, but kept Complainant in the position during a search for a vacant funded position for Complainant which met his medical restrictions.

The decision concluded that the Agency did not deny Complainant reasonable accommodation in not providing him a permanent position in the Patient Safety Section because there were no vacant funded positions in that section. Further, the decision concluded that Complainant continued to receive accommodation in that section while the Agency searched for a permanent vacant position.

Naranjo (Charlene S.) v. USPS (Pacific), 0120162204 (11/22/2016) - On February 25, 2015, Complainant filed the instant EEO complaint alleging that the Agency discriminated against her on the bases of disability (heart condition, cervical radiculopathy, cervical myelopathy), age (50), and reprisal for prior protected EEO activity when she denied reasonable accommodations and when, on January 27, 2015, "she became aware that her medical information was being made available to unauthorized people." The Agency accepted both claims for investigation as framed above. However, the investigation focused on claim as articulated by the Agency, not the claim as articulated by Complainant in her formal complaint and in the EEO Counselor's report.

In its final decision, the Agency dismissed the second claim for failure to state a claim. The Agency found that Complainant was not aggrieved because on January 27, 2015, she was provided with a coworker's medical record; the record did not indicate that Complainant's medical records were provided to her coworkers. In the alternative, the Agency determined that Complainant did not establish that she was subjected to discrimination with respect to this claim by a preponderance of the evidence.

On appeal, Complainant contended the Agency added its "spin" to the way it framed this claim, stating that her claim was that the Agency improperly safeguarded her confidential medical information. The Commission found the Agency improperly dismissed claim 2 pursuant to 29 C.F.R. § 1614.107(a)(1) for failure to state a claim because Complainant's claim, as articulated in the EEO Counselor's report and Complainant's formal complaint, concerned the Agency's failure to properly maintain her confidential medical records, which does state a claim under the Rehabilitation Act. We reversed in part the Agency's final decision because claim 2 was improperly dismissed for failure to state a claim, remanding claim 2 for further processing.

Dorch (Lenny W.) v. VA, 0120140073 (12/30/2016) – Prior to the initiation of his EEO complaint, Complainant served as a volunteer at the Agency and presumably while still serving as a volunteer, he filed a Health Insurance Portability and Accountability Act complaint against an Agency employee. The employee had allegedly accessed Complainant's medical records to see why he was entering a particular building he had previously been barred from entering. The Agency found that the access constituted a HIPPA violation. Approximately one year later, Complainant applied for a position as Vocational Rehabilitation Specialist and was not selected for the position. He filed an EEO complaint alleging that the Agency discriminated against him on the bases of disability (addiction) and reprisal when the Agency did not select him for any of five Rehabilitation Therapy Specialist positions.

An EEOC AJ granted summary judgment in favor of the Agency finding that Complainant did not show that the Agency's legitimate, nondiscriminatory, reasons for the nonselection were pretext for discrimination. Specifically, the AJ found that Complainant received a lower score than the selectees from an evaluation panel. Further, the AJ noted that Complainant alleged reprisal for his prior HIPPA complaint, which did not constitute protected EEO activity. The Agency's final order fully implemented the AJ's finding that Complainant was not subjected to discrimination.

The OFO decision vacated the Agency's final order and remanded the complaint for a hearing for the following reasons. First, the decision concluded that the HIPPA violation could have also constituted violations of the Rehabilitation Act in being an unlawful disability related inquiry and breach of medical confidentiality. 29 C.F.R. § 1630.14. However, an AJ would first need to clarify Complainant's employment status at the time of the violation. If Complainant was a volunteer, the AJ would need to determine whether Complainant could be considered an employee in order to be protected under the Rehabilitation Act. Second, the decision concluded that genuine issues of material fact remained about whether the employee's access of Complainant's medical records influenced Complainant's non-selection. Evidence indicated that Complainant's medical records contained information about a

past addiction, and that the employee made comments during a discussion about the vacancy regarding Complainant not having completed a drug-related test in months. There was also a dispute of fact about whether the employee informed a management official about Complainant's addiction, which ultimately led to the management official not recommending Complainant for selection to the vacancy.

Therefore, the complaint was remanded for a hearing on the following issues: whether Complainant could be considered an employee at the time an Agency employee accessed his medical records, and if so, whether the employee's actions constituted an unlawful disability-related inquiry and breach of confidentiality; and (2) whether the employee's and management official's knowledge of Complainant's past addiction unlawfully influenced the selection process.

Gross (Kiara R.) v. State, 0120141103 (12/20/2016) – Complainant, a Mail Clerk at the U.S. Consulate in Munich, Germany, alleged that the Agency subjected her to discrimination on the bases of sex (female and sexual orientation), age, and reprisal when her position was only part-time, and she was subsequently terminated from her position. Complainant applied to a full-time Mail Clerk position, but upon arriving to work for her first day, she was told the position was only part-time. According to management, the vacancy announcement noting that the position was full-time was a clerical error and the position was instead only part-time. Management also reportedly told Complainant that her position was only part-time due to budget cuts. As a result, Complainant thereafter contacted a Human Resources Officer (HRO) with the Agency and exchanged several e-mails with her. Therein, Complainant explained why she thought management's reasons of a clerical error were not true and asked if it was legal for management to reduce her hours. The HRO forwarded her e-mails with Complainant to consulate management who recommended her termination. In an internal memorandum, management cited Complainant's contact with the HRO as a reason for her recommended termination and fired her.

Complainant filed an EEO complaint. During the investigation, Complainant expressed her belief that management reduced her hours due to sexual orientation because, unlike heterosexual couples, partners of gay employees had been left off of the Consulate directory. After the investigation, the Agency issued its final decision, finding that Complainant failed to establish that its actions amounted to discrimination.

On appeal, we found that Complainant did not establish that the Agency's legitimate, non-discriminatory reasons were pretext for discrimination based on sex (female, sexual orientation), age, and reprisal. In so finding, we noted that all management officials collectively explained to Complainant that a clerical error was made when the Mail Clerk position was posted as full-time instead of part-time. We further noted that other than Complainant's unsupported assertions, there was no evidence to support Complainant's contention that the position was meant to be full-time. We also found that Complainant did not show that the Agency was motivated by retaliatory animus in terminating her for her complaining to the HRO about her part-time status. In so finding, we noted that Complainant did not communicate any belief to the HRO that management was motivated by discrimination in classifying her position as part-time. We further noted that Complainant also did not address her belief to the HRO that management had intentionally left out the names of same-sex partners from the Consulate directory. Lastly, we found that Complainant did not show that she was subjected to hostile work environment harassment based on her protected classes as alleged.

Barr (Everette C.) v. VA, 0120142107 (01/26/2017) – Complainant applied for the position of Supervisory Contact Representative position and was not selected. He filed an EEO complaint alleging discrimination on the bases of his sex (male/sexual orientation) and reprisal for prior EEO

activity. In its final decision, the Agency determined that Complainant failed to prove the Agency's reasons for not selecting him for the position were a pretext for discrimination. With regard to the sexual orientation claim, the Agency concluded that Complainant did not allege that he was subjected to discrimination due to his failure to conform to gender stereotypes. The Agency also found no causal nexus between Complainant's sexual orientation and his nonselection. Finding that the EEOC lacked jurisdiction of this claim, the Agency gave Complainant appeal rights to the Office of Special Counsel for this claim. Complainant appealed.

On appeal, OFO determined that Complainant's claim of sexual orientation discrimination did in fact allege that the Agency relied on sex-based considerations and took his sex into account in its employment decision to reject his application for the position. Accordingly, OFO determined the appeal of this claim was properly before the Commission. However, OFO found that Complainant did not prove, more likely than not, that the agency's reason for its action was a pretext for discrimination. It noted that the three-member panel averred that Complainant was nervous, and provided incomplete or outdated examples of supervisory experience during his interview. OFO found Complainant did not rebut this testimony, failed to prove that his qualifications rendered him "observably superior" to the selectees, and failed to provide evidence of a discriminatory motive. The final decision was affirmed.

Hansen (Elden R.) v. DOI, 0120122672 (02/24/2017) **[Repeated under Findings below]** – Complainant suffers from an injury to his neck and back, which he received on active duty military. His injury restricts his ability to sit on the floor with his legs held straight together, calves remaining on the floor, and reach to extend his fingers beyond his toes. Complainant applied and was selected for a Wildlife Refuge Specialist position includes law enforcement duties on a collaterally-assigned basis. In order to perform his law enforcement duties, he was required to pass a physical examination and a subsequent Physical Efficiency Battery examination (PEB) before he could go for law enforcement training at the Federal Law Enforcement Training Center (FLETC) in Glynco, Georgia.

As part of the selection process, an agency physician observed Complainant's ability to bend over while standing and touch his toes. Complainant passed the examination and the physician cleared Complainant for the position, stating that Complainant was qualified to perform the duties of the position in accordance with Agency standards and guidelines. Complainant started working in the position in October 2010. In December 2010 and January 2011, Complainant tested and was retested for the PEB, and on both occasions, passed all requirements except for the "sit and reach" requirement. As a result, Complainant was terminated from the position.

The Agency found no discrimination in its Final Decision. On appeal, OFO determined Complainant was terminated from the position because he could not meet the Agency's PEB "sit and reach" standard due to his back impairment. By doing so, Complainant established he was perceived as disabled because the Agency took prohibited action by applying a qualification standard and terminating him as a result of his back impairment, and proved he was an "individual with a disability."

OFO then determined that Complainant was a qualified individual with a disability because the evidence revealed he was qualified to perform all of the physical demands described for the position. Indeed, Complainant had been performing the duties for the position at the time and receiving Fully Successful performance ratings.

OFO then examined whether the qualification standard was job related and consistent with business necessity, and determined there was nothing in the record which could support this. The decision noted that no Agency witness was able to articulate how a Wildlife Refuge Specialist's ability to reach over his toes while sitting down with his legs outstretched was related to any of the functions of the position. Furthermore, there was evidence that the standard had been applied differently in other

regions, which cast doubt on its necessity. Accordingly, because OFO found the Agency did not carry its burden of establishing that the "sit and reach" flexibility standard was job-related and consistent with business necessity, the Agency also failed to establish that it terminated Complainant for a legitimate, nondiscriminatory reason. It ordered that Complainant be reinstated and other appropriate relief.

Harvey (Jules H.) v. SSA, 0120130874 (02/28/2017) – Complainant worked as a Senior Case Technician at the Agency's Office of Disability Adjudication and Review facility in San Jose, California. On September 13, 2012, Complainant filed a formal complaint alleging that the Agency subjected him to discrimination on the basis of sex (male, sexual orientation) when on June 15, 2011, he was terminated during his probationary period after he was accused of inappropriately touching a male coworker (CW1).

Subsequently the Agency investigated the complaint and provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before a U.S. Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing. On January 12, 2012, the Agency submitted a Motion to Dismiss to the AJ, stating that sexual orientation claims are not within the jurisdiction of Title VII. On September 13, 2012, the AJ granted the Agency's Motion, stating that the Commission does not have jurisdiction over claims of sexual orientation discrimination. On October 10, 2012, the Agency issued a final decision adopting the AJ's dismissal.

In the appellate decision, the OFO found, pursuant to Baldwin v. Dept. of Transportation, EEOC Appeal No. 0120133080 (July 15, 2015 decision, that Complainant's allegations stated a sex discrimination claim. The decision found that a reasonable reading of the record results in a finding that the complaint stated a viable claim of sex discrimination. Specifically, the record indicated that there was an allegation that sex stereotyping played a role in the alleged discrimination. The decision, therefore remanded the complaint to the appropriate hearings unit for continued processing.

Cohee (Doloris W.) v. USAF, 0120150932 (02/10/2017) – Complainant, a Bartender at the Agency's Club 5/6 facility at Luke Air Force Base (AFB), Arizona, was on Leave Without Pay (LWOP) starting April 28, 2011. Complainant provided the Agency with doctor's notes excusing her from work through July 18, 2011, for hypertension, depression, severe headaches, anxiety, and fatigue. At the Agency's request, Complainant also provided the Agency with a July 13, 2011, Return to Work form releasing her to work with no restrictions starting July 18, 2011. After Complainant submitted the Return to Work form, Complainant was added to the schedule, and her first shift was scheduled for July 20, 2011. On July 18 or 19, 2011, Complainant found out that she was pregnant and provided the Agency with a July 19, 2011, doctor's note informing the Agency of Complainant's pregnancy and excusing her from work on July 19 and 20, 2011. Complainant also called her supervisor on July 19 or 20, 2011, and informed her that she was pregnant.

According to Complainant, her primary care provider's office was supposed to fax the Agency a July 20, 2011, note excusing Complainant from work until September 15, 2011. Complainant texted her supervisor the morning of July 21, 2011, that a doctor's note was being faxed over. The supervisor subsequently called Complainant and left her a voicemail asking for Complainant to call her back, but Complainant never called her supervisor or anyone else at the Agency. Complainant testified that she did not return her supervisor's call because she "felt [she] had done everything [she] needed to do at that point." Complainant did not report to work on July 21, 2011, July 22, 2011, or July 27, 2011, although she was on the schedule for those days. On August 2, 2011, HR processed a SF-50 Notice of Personnel Action for Complainant for Resignation – Abandonment, effective July 28, 2011.

Complainant's union representative provided HR with a copy of the July 20, 2011, note from PC1 on August 16, 2011. According to a HR representative, August 16, 2011, was the first time that anyone at the Agency received the July 20, 2011, note.

On October 14, 2011, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of sex (female/pregnancy) and disability (pregnancy-related complications) when she received mail on or around August 11, 2011, informing her that she was terminated as a regular employee for abandoning her position as a Bartender. The Agency accepted sex as a basis but dismissed disability as a basis for the complaint. At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an AJ. Complainant timely requested a hearing.

Complainant filed a motion to reinstate the dismissed claim, which the AJ granted. The parties agreed that the claims for the hearing would be as follows:

1. Did the Agency terminate Complainant based on sex, female and pregnancy, when it terminated her for abandoning her position as a Bartender at a club at Luke Air Force Base? and
2. Did the Agency discriminate against Complainant based on disability when it failed to provide a reasonable accommodation of leave for her disability (pregnancy-related complications)?

After the hearing, the AJ issued a decision on November 6, 2014. The Agency subsequently issued a final order adopting the AJ's finding that Complainant failed to prove that the Agency subjected her to discrimination as alleged. The instant appeal followed.

Regarding Complainant's disparate treatment claim, the Commission found that the Agency provided a legitimate, nondiscriminatory reason for terminating Complainant because she did not report for three consecutive shifts. Although Complainant texted her supervisor that a doctor's note was forthcoming, she did not request leave or specifically inform the supervisor that she would not be reporting to work as scheduled. Moreover, when her supervisor called Complainant to ask for more information, Complainant did not answer the phone or respond to the voicemail. OFO found that the preponderance of the evidence in the record did not establish pretext.

In regards to Complainant's reasonable accommodation claim, the Commission determined that the record was clear that the Agency accommodated Complainant with LWOP between April 28, 2011, and July 20, 2011, after receiving numerous notes from her doctors excusing her absence from work on those dates. The issue was whether the Agency failed to accommodate Complainant on July 21, 22, and 27, 2011, and the AJ had determined that the Agency did not receive the doctor's note referenced in the July 21, 2011, text message until August 16, 2011. The Commission decided that this factual determination is supported by substantial evidence in the record. On appeal, Complainant alleged that the Agency failed to engage in the interactive process. We found that Complainant bore responsibility for the breakdown in the interactive process because Complainant failed to return her supervisor's call or otherwise ensure that her doctor's note was received. Therefore, the Agency neither failed to engage in the interactive process nor bore responsibility for the breakdown, and the Agency was not liable for failing to provide Complainant with a reasonable accommodation. Accordingly, OFO affirmed the Agency's final order.

Rego (Waneta F.) v. USPS, 0120151508 (02/10/2017) – Complainant worked as a City Carrier Assistant and as a City Carrier at the Agency's Creston Station in Portland, Oregon. In June 2013, Complainant notified management that she was pregnant. Documentation from Complainant's physician established Complainant's due date as December 31, 2013, and listed her restrictions as

lifting, carrying, pushing, or pulling no more than 15 pounds for no longer than eight minutes per hour and working no more than eight hours per day. Complainant was told that she would be accommodated if possible but that first priority of light duty work was reserved for employees who were injured on the job.

On July 11, 2013, Complainant was issued a Letter of Warning for failure to be regular in attendance. According to the Letter, Complainant took unscheduled Leave Without Pay (LWOP) and unscheduled LWOP in lieu of sick leave. The Letter stated, "In the investigative interviews held on July 6, 2013 with your shop steward present, you stated that you were absent from work due to medical issues. . . . When asked if you have any reason why you can[]not be regular in attendance, you stated 'Doctor appointments.'" On October 30, 2013, S1 issued Complainant a Notice of a Seven-Day (No-Time-Off) Suspension for unsatisfactory attendance. According to the Notice, Complainant took unscheduled LWOP and unscheduled LWOP in lieu of sick leave, and was tardy on one occasion. The Notice stated, "In the investigative interviews held on October 25, 2013 with your shop steward present, you stated that your abs[enc]es were caused by illness due to pregnancy. . . . None of the above absences were FMLA protected. When asked if you have any reason you can[]not be regular in attendance you stated 'I can be regular in attendance, unless complications come up due to pregnancy unable ling [sic] me to work.'"

On November 12, 2013, Complainant's physician updated her restrictions as follows: standing and walking intermittently (up to 50% of shift), bending at the waist and torso/spine twisting occasionally (up to 25% of shift), lifting/carrying/pushing/pulling no more than 20 pounds, and working no more than six hours per workday, with the following note, "Please modify work duties to inside work where [patient] can void when needed and can rest with feet elevated for 15 minutes twice shift." In November 2013, Complainant requested to be an acting supervisor. Complainant's second-line supervisor did not recommend Complainant to be an acting supervisor because she had a poor attitude, "[n]ot to mention the live corrective action in her file." Complainant's fourth-line supervisor stated that she denied Complainant's request because acting supervisors were required to work more than eight hours per day, which would have violated her medical restrictions.

On March 15, 2014, Complainant filed the instant EEO complaint, alleging that the Agency discriminated against her based on sex (female and pregnancy) and disability (pregnancy) when: (1) she was issued the Letter of Warning on July 11, 2013, (2) she was issued the Notice of Seven-Day Suspension on October 30, 2013, (3) her request to be an acting supervisor was denied, and (4) from June 2013 until December 27, 2013, she was provided with minimal light duty work. The Agency dismissed claim 1 for untimely EEO Counselor contact. Complainant requested a hearing before an AJ, but the AJ dismissed the hearing request on the grounds that Complainant failed to respond to the AJ's orders and the Agency's discovery requests. The Agency issued a final decision finding no discrimination.

On appeal, the Commission vacated the Agency's final decision. OFO determined that the record needed further development on the issue of accommodation for Complainant's pregnancy, including whether other employees, similar in their ability or inability to work, were allowed use of leave or LWOP in lieu of sick leave without being terminated. We reversed the Agency's procedural dismissal of Complainant's first claim for untimely EEO Counselor contact, noting that the Agency's duty to reasonably accommodate is ongoing and that, at the time Complainant contacted the EEO Counselor, she was alleging that the Agency remained unwilling to provide her with the accommodations she still needed. The Commission also determined that further development of the record was required regarding Complainant's disability discrimination allegations. The Agency remanded the matter for a full investigation into the dismissed claim and a supplemental investigation regarding the deficiencies identified with the record.

Manning (Darin B.) v. OPM, 0120161068 (03/06/2017) **[Repeated below under Circulated Cases]** – OFO held that the transgender male Complainant stated a cognizable claim of sex discrimination when he alleged that his Federal Employee Health Benefits (FEHB) insurance plan, Aetna, denied pre-authorization for nipple-areola reconstruction. This procedure is a type of gender reassignment surgery commonly used to treat gender dysphoria in transgender persons transitioning from female to male. Additionally, OFO noted that the Agency maintained that Complainant's disability discrimination claim regarding this matter should be dismissed under Section 705 of the Rehabilitation Act, which provides that "the term 'disability' shall not include "transvestism, transsexualism . . . gender identity disorders not resulting from physical impairments...." OFO concluded that dismissal of Complainant's disability claim under this provision of the Rehabilitation Act would be improper at this juncture because, without an investigation, Complainant had not had the opportunity to adduce evidence, and accordingly the record was silent, as to whether, Complainant's gender dysphoria resulted from a physical impairment. Accordingly, OFO remanded the complaint to the Agency for an investigation under EEO Regulations.

4. ENFORCING EQUAL PAY LAWS

Of the seven (7) decisions that implicated this SEP Priority, one (1) decision implicated the associated FCP – Alternate pay systems that allow for subjective pay determinations.

Decision Summaries for this Category

Rosado (Clement M.) v. Navy, 0120140861 (10/19/2016) – Complainant worked as an Information Technology (IT) Specialist at the Agency's Naval Engineering Facilities Command, Command Information Office, IT Division in Jacksonville, Florida. The IT Division was divided into two groups, Technical Support and Network Support. Technical Support was comprised of IT Specialists, such as Complainant. Network Support was comprised of Assistant Contract Technical Representatives (ACTRs). Except for the Lead IT Specialist who was a grade level GS-12, IT Specialists were paid at grade level GS-11. ACTRs were grade level GS-12 employees. In his complaint, filed October 14, 2011, Complainant alleged that the Agency discriminated against him on the basis of sex (male) when it paid him at grade level GS-11 for performing the same or similar work as women who were being paid at the higher-grade level of a GS-12.

Following an investigation of his complaint, Complainant requested a hearing before an AJ. A hearing was held on July 30, 2013, by video-conference. The AJ issued a decision finding no discrimination. Regarding his claim of not being paid substantially the same as women performing the same work, the AJ concluded that the Agency did not violate the Equal Pay Act (EPA). It was Complainant's claim that he was performing duties of the ACTRs who were paid at the higher GS-12 grade level. In concluding that Complainant did not perform the duties of an ACTR, the AJ examined the duties and responsibilities of an ACTR and those of an IT Specialist. He found that the main responsibility of ITs in Technical Support was to provide service and support for computers and computer-related equipment, including printers, copiers, scanners, telephones and other multi-media equipment. The AJ found that the main responsibility of ACTRs was to serve as a liaison in the administration of the Navy Marine Corps Intranet (NMCI) contract. As such, the ACTRs addressed contractual issues regarding equipment, payment processing, ordering equipment and services associated with equipment, validate monthly premiums, assign equipment and submit task orders.

In finding no EPA violation, the AJ found that Complainant was not responsible for performing, nor did he perform, ACTR work except for submitting task orders for telephones on occasion. The Agency issued a final decision implementing the AJ's decision. The appellate decision found that the AJ did not abuse his discretion regarding the videoconference or witness rulings and that the AJ's finding, that Complainant did not substantially perform higher graded duties was based on substantial evidence.

Lewis-Jackson (Lacey T.) v. DOJ, 0120160254 (11/01/2016) – Complainant, a Quality Assurance Manager at an Agency Federal Correctional Complex, filed an EEO complaint alleging that she was discriminated against on the bases of sex (female), age, race (African-American), and in retaliation when she was subjected to a hostile work environment. Complainant also alleged a violation of the Equal Pay Act (EPA) when she was paid less than a male employee. After a hearing, an EEOC AJ issued a decision finding no discrimination on all claims. The Agency issued a decision finding no discrimination and Complainant filed an appeal from that decision.

OFO affirmed the Agency's finding of no discrimination. OFO found that substantial evidence supported the AJ's findings. Regarding harassment, OFO found that some of the incidents were not proven as having occurred by Complainant and that regarding other incidents, the Agency provided legitimate, nondiscriminatory reasons. OFO found that Complainant failed to show that any of the alleged harassing incidents were motivated by sex, age, race, or in retaliation for prior protected activity. Regarding Complainant's EPA claim, OFO found that substantial evidence supported the AJ's finding that Complainant did not perform equal work to the comparative male employee. OFO also found that a factor other than sex (in part due to pay retention) explained why the comparative male employee had a higher salary than Complainant.

Jacobs (Keri C.) v. VA, 0120160503 (11/02/2016) – Complainant, a Cook, filed an EEO complaint alleging that she was discriminated against on the bases of sex (female) and race (African-American) when she in 2009-2010, the Agency failed to return her to her WG-06 pay grade, and in 2000, she was downgraded from a WG-06 position to a WG-04 position rather than a WG-05 position. Complainant requested a hearing. An EEOC AJ issued a decision without a hearing finding no discrimination on all claims. The Agency issued a decision finding no discrimination and Complainant filed an appeal from that decision. OFO affirmed the Agency's finding of no discrimination, finding that Complainant failed to show that similarly situated persons were treated differently when downgraded. OFO found that all Cook employees were downgraded to a WG-04 position and that there was no evidence that a WG-05 position ever existed for a Cook. OFO found that other employees were returned to a WG-06 grade prior to Complainant based on seniority. Regarding Complainant's EPA claim, OFO found that a factor other than sex (pay retention) explained why any comparative male employees had a higher salary than Complainant.

Amis III (Gino T.) v. DHS (TSA), 0120152087 (01/26/2017) **[Repeated under Broad Impact Cases below]** – Complainant, a Federal Air Marshall at the Federal Air Marshall Service, Charlotte Field Office, in Charlotte, North Carolina, initially filed an individual complaint alleging race, sex, age and reprisal discrimination, however, he sought to amend his individual complaint at the EEOC hearing stage to a class complaint, and sought class certification.

Complainant alleged that the Report of Investigation (ROI) revealed that female Federal Air Marshalls were being paid more than male Federal Air Marshalls at the Agency. In support of his request to amend his complaint into a class complaint, Complainant offered the following: twenty-two other

Federal Air Marshalls informed him that they also believed they were being subjected to discrimination affecting their salaries, and that they wanted to be part of a class complaint; that the total number of class members was unknown due to lack of information provided in the ROI but that there were possible national implications; the Agency's "pay band" system "created a glass ceiling for [a] large number of male Federal Air Marshalls, paying them an equivalent annual salary to a GS-12 rather than the equivalent GS-13 annual salary it is paying all female Federal Air Marshalls." In response to the Agency's opposition to class certification, Complainant requested additional discovery, particularly on the issue of numerosity, in order for the class to be certified. The AJ denied Complainant's request for class certification finding that the record supported the Agency's position that Complainant did not precisely specify the scope of the class he sought to certify nor did he specify the policy or practice he was contesting.

The decision concluded that the AJ erred in denying class certification on grounds that Complainant did not satisfy the prerequisites for class certification. This was because no pre-certification discovery was allowed in the case. The record revealed that Complainant asked for discovery specifically on the issue of numerosity because he alleged that there was a potential worldwide class, but the AJ did not order any discovery. Therefore, the decision concluded that the AJ abused her discretion in denying class certification, and the complaint was remanded for an AJ to seek clarification on the complaint as necessary, allow the parties to engage in precertification discovery, and issue a decision on the class complaint. Further, because there was some indication that Complainant may not be able to serve as class agent due to a retroactive promotion, the decision ordered for the AJ to seek clarification on the issue and possibly have Complainant and the class attorney identify and provide the AJ with a newly designated class agent.

Surman (Harriet M.) v. DOD (DLA), 0120141484 (01/30/2017) **[Repeated under Findings below]** – Complainant alleged that the Agency discriminated against her on the bases of sex and race when it: (1) threatened to transfer some work duties from her facility to another facility; (2) assigned her on a part-time basis to assist with a backlog; (3) did not document her assistance as an official detail and did not give her a cash award for her assistance; (4) allowed another employee to work more overtime; and (5) compensated her as a GS-6 and a coworker as a GS-7 even though they performed the same work.

An AJ issued a decision, after a hearing, finding no discrimination. The Agency issued a final order fully implementing the AJ's decision. Complainant then filed an appeal. On appeal, Complainant requested that OFO sanction the Agency, for failing to conduct a timely investigation of her complaint, by issuing a default judgment in her favor.

OFO, in its appellate decision, issued a default judgment in Complainant's favor. Specifically, OFO found that the Agency failed to conduct a timely investigation of the complaint. Although the Agency was required to complete the investigation in or before March 2012, OFO found that the Agency only began its investigation in July 2012 after Complainant requested a hearing before an AJ. In addition, OFO found that the Agency did not provide any documentation or explanation for its failure to investigate the complaint in or before March 2012. Moreover, OFO noted that the Commission has previously issued default judgments in response to an agency's failure to conduct a timely investigation of a complaint.

OFO, however, found that Complainant did not establish an individual right to relief because the record did not support a determination that she established a prima facie case of disparate treatment, a claim of harassment, or a prima facie case of compensation discrimination. In reaching that conclusion, OFO relied on the documentary evidence in the record as well as the AJ's factual findings after the hearing. OFO ordered the Agency to provide training to the responsible EEO management

officials regarding their obligations in processing EEO complaints, consider taking appropriate disciplinary action against the responsible EEO management officials, and to post a notice in the workplace regarding its determination.

Plante (Berenice R.) v. AOUSC, 0420160011 (02/23/2017) – Petitioner alleged that the Agency failed to comply with the Order set forth in EEOC Appeal No. 0120120996 (October 16, 2015). In our decision, found that the Agency failed to offer Petitioner the choice between a hearing with an EEOC AJ or an immediate final Agency decision (FAD). The Order also specified that the Agency was to provide Petitioner with a notice of her right to a hearing pursuant to 29 C.F.R. § 1614.108(f). In its untimely contentions on petition for enforcement, the Agency maintains that its employees have no legal right to a hearing before the EEOC. According to the Agency, certain Agency employees have the right to choose between a final Agency decision with appeal rights to the EEOC and the Fair Employment Practices System (FEPS), the Agency's alternative complaint processing system, which includes a hearing but no appeal rights.

The FEPS process involves a hearing in front of an impartial hearing officer who is not an employee of the Agency, but employees who elect to participate in the FEPS process have no right to appeal the Agency's final decision to the EEOC or to file a case in federal court. The Agency contended that because pre-Act employees can choose between a FAD with appeal rights and the FEPS process, which includes a hearing, pre-Act employees need not be given the option of a hearing with an EEOC AJ. According to the Agency, the choice between a FAD with appeal rights and the FEPS process meets the Agency's obligation under 29 C.F.R. § 1614.108(f) and § 1614.108(g), which requires the Agency to inform a complainant that "the complainant has the right to request a hearing and decision from an administrative judge or may request an immediate final decision pursuant to § 1614.110 from the agency with which the complaint was filed." This particular regulatory provision does not specify that the hearing and decision must come from an EEOC AJ.

However, the Commission found that reading § 1614.108(f) and § 1614.108(g) in concert with other sections of 29 C.F.R. Part 1614 indicated that the Agency was required to provide pre-Act employees with the right to a hearing with an EEOC AJ, as other sections of Part 1614, such as § 1614.106(e) and § 1614.110(a), specifically mention the EEOC. Further, OFO noted that the note to the Act to itself and the Committee Report both stated that the rights of pre-Act employees were not to be diminished by the passage of the Act. We determined that these rights included the right to a request a hearing and the right to appeal to the EEOC and that the FEPS process infringed on these rights. Accordingly, the Commission granted the Petitioner's petition for enforcement and ordered the Agency to resume processing of Petitioner's complaints by issuing Petitioner a copy of the investigative files and notification of the appropriate rights to request a hearing or an immediate final Agency decision. The Commission also directed the Agency to pay Petitioner attorney's fees for the petition of enforcement on which she was successful.

Newberry (Foster B.) v. FDIC, 0120151045 (03/30/2017) – Complainant began working for the Agency in July 2007 as an entry-level CG-7 Financial Institution Specialist, and he was given four years to complete the requirements to become a commissioned Financial Institution Examiner. Complainant completed the requirements in August 2010 and became a CG-11 Examiner. In August 2011, Complainant was promoted to CG-12 and received a 10 percent salary increase. Complainant alleged that he was given less compensation than his female coworkers who performed substantially the same duties. Complainant cited two coworkers who were hired in 2009 as CG-11 Mid-Career Examiners with significant banking and managerial experience and were given two years to become commissioned. Complainant alleged that he was given more difficult assignments than his female

coworkers, but the record reflected that his female coworkers routinely handled more difficult examinations.

On October 18, 2013, Complainant filed the instant EEO complaint, alleging, among other claims, that the Agency discriminated against him based on sex (male) when beginning in 2012, his compensation was lower than that of his female coworkers who performed substantially the same duties. Complainant requested a hearing before an AJ but subsequently withdrew his hearing request. The Agency issued a final decision finding no discrimination.

On appeal, the Commission affirmed the Agency's final decision. We found that Complainant failed to establish a prima facie case of Equal Pay Act discrimination. Although Complainant established that he was being paid less than his female colleagues, he did not establish that he was being paid less for equal work, requiring equal skill, effort, and responsibility. We further determined that even if Complainant had established a prima facie case of discrimination under the EPA, any difference in pay was justified by a factor other than sex. Complainant was hired at a different initial pay grade and for an entry-level position, whereas his female coworkers were hired at a higher pay grade as Mid-Career Examiners due to their banking experience. The difference between the positions at hire was demonstrated through the commissioning requirements.

5. PRESERVING ACCESS TO THE LEGAL SYSTEM

The decision listed for this SEP Priority also implicated the FCP Priority Improving Federal employees' faith in the integrity of agency EEO programs.

Decision Summary for this Category

Estate of Holt (Jeremy S.) v. VA, 0120142917 (02/09/2017) **[Repeated under Findings below]** – Complainant filed a formal complaint alleging that the Agency discriminated against him and subjected him to a hostile work environment on the bases of race (African-American), sex (male), and disability when his supervisor deliberately misplaced his application for Family Medical Leave Act (FMLA); his supervisor questioned his co-workers about his patient appointments; his supervisor denied his request for 30 minutes of compensatory time for working past his tour of duty to care for a patient; his supervisor began closely monitoring his activities and overly scrutinizing his work; his supervisor gave him several Reports of Contact; and he was escorted by the VA Police and referred for psychiatric evaluation.

Complainant passed away during a lengthy delay in the Agency's commencement of an investigation into his complaint. Following Complainant's death, the EEO Investigator initiated the investigation – 322 days after Complainant originally filed his formal complaint. The Agency subsequently completed the investigation well beyond the regulatory timeframes, an initial extension period, and its own target completion date. Thereafter, at Complainant's mother's request, the Agency issued a FAD in which it found that Complainant had not been subjected to discrimination or a hostile work environment as alleged.

In its appeal, Complainant's Estate requested that the Commission reverse the FAD and issue default judgment in favor of Complainant as a sanction for the Agency's flagrant failure to timely initiate or complete its investigation. In its response, the Agency argued that Complainant suffered no prejudice by its delay in completing the investigation. The Commission found that the Agency failed to comply

with its obligation to timely initiate and complete an investigation under 29 C.F.R. § 1614.108(e). Further, the Commission found that the Agency's extraordinary tardiness undermined the integrity and effectiveness of the EEO process and, sadly, deprived Complainant of the opportunity to participate in the investigation of his claims. As a result, the Commission imposed the severe sanction of a default judgment in favor of Complainant. The decision noted that the Agency has been subject to default judgment no less than three prior times for the same infraction of failing to initiate the investigation within 180 days.

The Commission found, however, that there was sufficient evidence establishing a right to relief only for Complainant's claim that he was denied compensatory time. Accordingly, the Commission reversed the FAD and remanded the matter to the Agency with orders to conduct a supplemental investigation as to Complainant's entitlement to compensatory damages; provide training to its EEO managers and staff regarding their case-processing procedures; consider disciplining the responsible EEO officials; and to post a notice.

6. PREVENTING HARASSMENT THROUGH SYSTEMIC ENFORCEMENT AND TARGETED OUTREACH

Decision Summary for this Category

McGruder (Darlene F.) v. USPS, 0120151195 (03/30/2017) – Complainant was a Mail Processing Clerk at the time of events giving rise to her EEO complaint. Complainant appealed from a final agency decision which fully implemented an EEOC AJ's finding, issued on summary judgment, that Complainant did not prove that the Agency subjected her to a hostile work environment based on race (African American). Complainant alleged various supervisors did not give her a partner to work with, suspended her for 7 days, belittled her and made a race-based comment. The decision affirmed the AJ's finding of no discrimination because Complainant did not demonstrate that the alleged conduct was based on a protected class, and a single comment referencing race was not severe or pervasive enough to constitute a hostile work environment. The decision affirmed the Agency's FAD, which implemented the AJ's finding that Complainant was not subjected to race discrimination.

7. BROAD IMPACT DECISIONS

Amis III (Gino T.) v. DHS (TSA), 0120152087 (01/26/2017) **[Repeated under Priority 4 above]** – Complainant, a Federal Air Marshall at the Federal Air Marshall Service, Charlotte Field Office, in Charlotte, North Carolina, initially filed an individual complaint alleging race, sex, age and reprisal discrimination, however, he sought to amend his individual complaint at the EEOC hearing stage to a class complaint, and sought class certification.

Complainant alleged that the Report of Investigation (ROI) revealed that female Federal Air Marshalls were being paid more than male Federal Air Marshalls at the Agency. In support of his request to amend his complaint into a class complaint, Complainant offered the following: twenty-two other Federal Air Marshalls informed him that they also believed they were being subjected to

discrimination affecting their salaries, and that they wanted to be part of a class complaint; that the total number of class members was unknown due to lack of information provided in the ROI but that there were possible national implications; the Agency's "pay band" system "created a glass ceiling for [a] large number of male Federal Air Marshalls, paying them an equivalent annual salary to a GS-12 rather than the equivalent GS-13 annual salary it is paying all female Federal Air Marshalls." In response to the Agency's opposition to class certification, Complainant requested additional discovery, particularly on the issue of numerosity, in order for the class to be certified. The AJ denied Complainant's request for class certification finding that the record supported the Agency's position that Complainant did not precisely specify the scope of the class he sought to certify nor did he specify the policy or practice he was contesting.

The decision concluded that the AJ erred in denying class certification on grounds that Complainant did not satisfy the prerequisites for class certification. This was because no pre-certification discovery was allowed in the case. The record revealed that Complainant asked for discovery specifically on the issue of numerosity because he alleged that there was a potential worldwide class, but the AJ did not order any discovery. Therefore, the decision concluded that the AJ abused her discretion in denying class certification, and the complaint was remanded for an AJ to seek clarification on the complaint as necessary, allow the parties to engage in precertification discovery, and issue a decision on the class complaint. Further, because there was some indication that Complainant may not be able to serve as class agent due to a retroactive promotion, the decision ordered for the AJ to seek clarification on the issue and possibly have Complainant and the class attorney identify and provide the AJ with a newly designated class agent.

8. ENFORCEMENT – GENERAL

Mock (Minnie M.) v. HUD, 0520160439 (10/25/2016) – The Commission denied Complainant's request for reconsideration. The underlying appeal, upholding the AJ's denial of class certification, remained in effect (EEOC Appeal No. 0120113119). In the appeal, we agreed that Complainant failed to establish numerosity and adequacy of representation. Complainant only cited five potential class members and provided no evidence showing that consolidation would be impractical. She was not an attorney and did not identify an attorney or law firm that would assist her. In her request, Complainant simply reiterated her belief that she was subjected to discrimination.

Vasquez (Madelaine G.) v. State, 0120141877 (10/25/2016) – Complainant was an Administrative Officer at the Agency's Embassy in Kabul, Afghanistan. She filed a formal complaint alleging that the Agency discriminated against her on the basis of disability when her "Return to Post Authorization" was not reinstated and she was prevented from returning to work at the U.S. Embassy in Kabul. Specifically, the Agency denied Complainant a Class 2 medical clearance (Kabul – approved) because of a perceived risk of harm she posed due to her use of the drug Leflunomide for her medical condition.

The Agency's final decision found that Complainant was a qualified individual with a disability and that the medical opinions supported Complainant's claim the she was able to return to Kabul. The Agency held that this medical evidence was given little weight during the medical clearance determination. As such, the Agency concluded that it improperly denied Complainant a Class 2 medical clearance (Kabul-approved). Based on the Agency's findings, it determined that the appropriate remedy was for

the Office of Medical Services conduct the required individualized assessment to determine if Complainant could return to her post.

Complainant appealed asserting that based on the Agency's findings, it failed to provide her with full relief. The decision noted that there was no dispute that Complainant is an otherwise qualified individual with a disability. The Agency's own final decision determined that Complainant's medical documentation supported her contention that she was qualified for the position in Kabul. The decision turned to the Agency to prove that Complainant posed a direct threat to herself or others. The decision pointed to the Agency's own findings which concluded that it failed to conduct a sufficiently individualized assessment of the risk posed by Complainant's medical condition, and its impact on her ability to return safely to Kabul. As such, the decision held that the Agency did not establish its defense of direct threat and is liable under the Rehabilitation Act.

Based on the finding of a violation of the Rehabilitation Act, the decision ordered make whole relief. The decision ordered the Agency: to offer the Complainant the assignment in Kabul if she chooses to return; to calculate back pay including any difference in locality pay and benefits to Complainant including but not limited to promotions or other incentives for an assignment in Kabul, Afghanistan; to investigate Complainant's claim for compensatory damages; to determine an award of reasonable attorney's fees and costs; and to provide training to the responsible management officials.

Ross (Will K.) v. VA, 0120142904 (10/18/2016) – This matter was before us on appeal from the Agency's Final Order adopting an Administrative Judge's (AJ's) decision finding no discrimination. On appeal, Complainant argued that the AJ's decision was not supported by the record. Complainant worked as a Medical Supply Technician at the Agency's Sterile Processing Department in Decatur, Georgia. He alleged that the Agency discriminated against him when he was not permitted to return to duty until his medical restrictions were lifted after he was released by a doctor to return to work following two heart attacks. In this case, while not analyzed by the AJ or the Agency, the record showed that Complainant made two separate reasonable accommodation requests. First, Complainant asked to be returned to the night shift in order to accommodate his frequent medical appointments necessitated by his disabling conditions. Second, he asked to be allowed to work with his medical restriction which prevented him from lifting more than 20 pounds. Agency management denied both requests.

In our decision, although we disagreed with the AJ's analysis, we concurred with the ultimate conclusion that Complainant failed to prove his race and sex claims. With regard to his disability claims, however, we found that the AJ's factual and legal conclusions were contradicted by the record evidence. Here, the Agency conceded it took action against him based on its perceptions that he could not perform the essential duties of his position due to his medical condition. With regard to the reasonable accommodation requests, we found that any Agency claim of undue hardship was significantly undermined by the fact that the Agency permitted other similarly situated employees with similar lifting restrictions to work. Therefore, we reversed the decision with regard to the Rehabilitation Act claims. We remanded the matter to the Agency with an order to allow Complainant to work the night shift, restore any lost back pay, restore any lost leave, post an order, conduct training, conduct a supplemental investigation and issue a decision with regard to Complainant's entitlement to compensatory damages.

Murphy (Selene M.) v. TVA, 0720150024 (10/18/2016) – Complainant, a foreman, filed a complaint in March 2011, alleging that she was subjected to a hostile work environment and terminated on February 28, 2011, based on her sex and reprisal.

After an investigation of her complaint, Complainant requested a hearing before an EEOC AJ. Following the hearings, the AJ issued an Interim Decision, dated December 17, 2014, finding sex and reprisal discrimination and issuing an Order Entering Judgment, dated February 13, 2015. In the AJ's Notice to the Parties accompanying his Order Entering Judgment, the AJ informed the Agency of the 40-day time limitation period for issuance of an Agency final order. The AJ also informed the Agency in the Notice to the Parties that if its final action did not fully implement the AJ's decision, the Agency had to simultaneously file an appeal with the Office of Federal Operations (OFO). The parties were provided with addresses where an appeal had to be filed.

In a letter, dated April 7, 2015 to the OFO, the Agency stated that it had received the AJ's February 13, 2015 decision on February 18, 2015. The Agency, therefore, had until March 30, 2015, to issue its final order and to simultaneously file an appeal with the Commission. 29 C.F.R. § 1614.110(a). The Agency's final action is dated March 30, 2015. The Agency's appeal, dated April 7, 2015, was mailed in a franked envelope to OFO and it bore no postmark. The metered date on the envelope was April 9, 2015. The appeal was received in the OFO on April 13, 2015. OFO found that the appeal was filed on the date of its receipt, i.e., April 13, 2015. The Agency noted that it had "inadvertently" omitted mailing its March 30, 2015 final order to the Commission when it mailed Complainant the final order. In its opposition to Complainant's motion to dismiss the appeal on timeliness grounds, the Agency asserted that its appeal was timely because the final order was issued on March 30, 2015, and it had corrected its omission immediately by mailing it later to the OFO.

The decision found the Agency's appeal to be untimely, finding that the Agency knew when and where to file its appeal and failed to do so. The decision further found that the Agency had not offered adequate justification for an extension of the applicable time limit for filing its appeal on April 13, 2015, 13 days beyond the requisite 40 days. The decision implemented the relief ordered by the AJ, including placement in a management position with back pay and benefits, compensatory damages and attorney's fees, training and consideration of disciplinary action against responsible management officials, and notice posting.

Flory (Marybeth C.) v. HHS, 0120162505 (10/20/2016) – Based on the evidence of record and the Agency's own concessions in its final decision, we determined that management violated the Rehabilitation Act when it delayed and ultimately denied Complainant, a Human Resources Specialist, reasonable accommodation for her disabilities, mainly surrounding the denial of her request for increased telework, as well as her supervisor's interaction with her while she was teleworking. The matter was remanded to the Agency to: issue a decision determining the compensatory damages due Complainant after allowing her to submit objective evidence in support of her damages claim; restore Complainant's telework privileges as part of her reasonable accommodation; and provide training to the supervisors who were found to have failed to provide Complainant with reasonable accommodation.

Jane Coffey wrote the decision and summary.

Rizzo (Odilia M.) v. VA, 0120150311 (11/03/2016) - On February 13, 2013, Complainant filed the instant EEO complaint alleging that the Agency discriminated against her based on race (African-American), national origin (Hispanic), sex (female), and reprisal for prior protected EEO activity when, among other allegations, she was issued a proposed 30-day suspension for inter alia, sending an e mail in which she expressed that she perceived that her supervisor was "discriminatory and disrespectful towards African-American Females."

The Agency Table of Examples of Offenses and Penalties recommended a reprimand as the minimum penalty to removal as the maximum penalty for a first offense involving "[d]isrespectful conduct, use of insulting, abusive, or obscene language to or about other personnel, patients, or visitors."

Complainant timely requested a hearing before an AJ, and the AJ held a three-day hearing. The AJ determined that Complainant failed to establish a prima facie case of harassment, and that did not establish a prima facie case of retaliation because she did not establish a causal connection between her prior protected activity and the issuance of the proposed 30-day suspension. The Agency subsequently issued a final order adopting the AJ's finding that Complainant failed to prove that the Agency subjected her to discrimination as alleged. The instant appeal followed.

The Commission found that Complainant's supervisor issuing a proposed 30-day suspension for sending him six emails, including one with the subject RE: RESPONSE TO [S1] perceived Workplace Bullying and Harassment, another that "was confrontational and disrespectful while accusing your supervisor of discrimination," and a third in which Complainant stated, "I expressed that I perceived that you were discriminatory towards African-American females," constituted per se reprisal. Although the supervisor said that he issued the proposed suspension because of the "confrontational and disrespectful" tone of Complainant's emails, rather than their content, specifically citing Complainant's allegations of harassment and discrimination in a disciplinary proposal has a chilling effect on the EEO process. We also noted that when employees accuse their supervisors of harassment and discrimination, it inherently involves confrontation, so it would have been difficult for Complainant to avoid a "confrontational and disrespectful" tone. Further, OFO noted that although the Agency's table of penalties recommended between a reprimand and removal for a first offense of this type of charge, the length of the proposed suspension appeared excessive, given Complainant's alleged conduct.

Therefore, the Commission affirmed in part and reversed in part the AJ's decision and ordered as relief that the Agency conduct a supplemental investigation on the issue of Complainant's entitlement to compensatory damages, expunge all Agency records related to the retaliatory proposed suspension, provide training, consider disciplinary action against the responsible management officials, and post a notice.

Bush (Darius C.) v. USPS, 0120160004 (11/01/2016) – Complainant worked as a Mail Handler at the Agency's Northern Virginia Processing and Distribution Center in Merrifield, Virginia. On February 23, 2015, Complainant filed an EEO complaint alleging the Agency discriminated against him on the basis of disability (deafness) when, in October 2014, management failed to provide an interpreter during a service talk.

On June 24, 2015, the Agency issued a final decision of Complainant's denial of reasonable accommodation claim, finding no discrimination. The Agency determined that Complainant was a qualified individual with a disability. The Agency then acknowledged that Complainant had requested an interpreter for the service talk. However, the Agency determined it did not violate the Rehabilitation Act because management made attempts to secure an interpreter for the alternative October 12, 2014 service talk, but the interpreter did not appear.

The record reflects that Supervisor 2 acknowledged no interpreter was provided to Complainant for the service talk on October 11, 2014, but said that the service talk was not scheduled in advance and that it was a last-minute arrangement. Supervisor 2 stated that the normal procedure was for each pay location to have a service talk on a designated day and an interpreter is provided. Supervisor 2 further stated that on October 12, 2014, an interpreter was scheduled for Complainant but the interpreter never showed up.

On appeal, we reversed and remanded the Agency's finding of no discrimination. Specifically, we determined that the Agency's tepid assurance to Complainant that a second service talk on October 12, 2014, would have an interpreter available was not backed by any action. The Agency asserts that it made the effort to secure interpreter services, despite the non-appearance on an interpreter. We find that under the circumstance of this case, the Agency's actions provided mere "lip service" to Complainant's clear request for reasonable accommodation, and the Agency has not demonstrated it made good faith efforts to comply with that request.

Further, we ordered the Agency to take the following remedial actions: to ensure that Complainant is provided with a qualified sign language interpreter when required during his employment, including at a minimum for safety talks, discussions on work procedures, policies or assignments, for performance evaluations and for every pre-disciplinary and disciplinary action so that the employee can understand what is occurring at any and every crucial time in the employee's employment career; to provide training to all involved managers and supervisors at its Northern Virginia P&DC regarding the Agency's obligation to provide reasonable accommodation under the Rehabilitation Act; to conduct a supplemental investigation of Complainant's entitlement to compensatory damages; and to consider taking disciplinary action against the responsible management officials.

Ocampo (Denese G.) v. Treasury, 0120141118 (December 29, 2016) – Complainant worked as a GA-11 Revenue Officer within the Agency's Small Business/Self-Employed (SBSE) Division in Miami, Florida. In this case, Complainant has been diagnosed with Title 1 Diabetes (Juvenile Diabetes) and uses an insulin pump to regulate her blood sugar. Complainant asked the Agency to be able to excuse herself from meetings to adjust her insulin pump, check her blood sugar, and eat if necessary to avoid a hypoglycemic or hyperglycemic reaction. At that time, Complainant also provided medical documentation from her physician that verified that Complainant must be allowed to regularly check her blood sugar, adjust her insulin pump settings, and consume food because of her diabetes. Additionally, Complainant asked the Agency to allow her to use a private area and to have time to check her blood sugar levels as needed, along with the ability to leave meetings, discussions, conferences, events in order to do the same; to have time to adjust her insulin pump or inject insulin as needed as well as the ability to leave meetings and events to do the same; and to eat as necessary during meetings, discussions, conferences, events so that she could avoid hypoglycemic or hyperglycemic reactions. On appeal, the decision found that the Agency improperly gave Complainant a Counseling memo and added the information to her performance rating for texting during a meeting, when evidence showed instead that she was adjusting her insulin pump. The decision further found that the Agency was well aware of the risk of harm to Complainant if it did not provide her with the requested accommodations in an expeditious mature. Yet, the Agency delayed even responding to her request until after Complainant suffered negative medical consequences and had no choice but to take extended leave. Further, the Agency still had not provided Complainant with reasonable accommodations upon her return to work several months later. As such, the decision concluded that the Agency failed to reasonably accommodate Complainant and also did not act in good faith in this case, and is therefore liable for Complainant's compensatory damages.

Therefore, the Commission reversed in part the Agency's decision and ordered as relief that the Agency immediately provide Complainant with reasonable accommodation, conduct a supplemental investigation on the issue of Complainant's entitlement to compensatory damages, expunge all Agency records related to the discriminatory counseling, restore leave taken by Complainant as a result of the Agency's failure to accommodate her, provide training, consider disciplinary action against the responsible management officials, and post a notice.

Combs (Myrtie P.) v. DHS, 0120141732 (12/30/2016) - On November 28, 2011, Complainant was injured in a car accident, which caused a lumbar sprain/strain, a thoracic sprain/strain, a cervical sprain/strain, and muscle spasms. From November 29, 2011, through January 19, 2012, Complainant teleworked full time as an accommodation for her resulting medical restrictions. On January 19, 2012, Complainant's supervisor revoked her telework arrangement, writing, "Telework is not intended to be a long-term solution to a medical situation, and the benefit extended to you thus far has run the course of what can be reasonably expected. . . . If it is that you cannot work in the workplace, the expectation is that you turn your responsibilities over to a colleague in the Strategic Sourcing Branch, use sick leave, annual leave or whatever comp time you may have . . . If you[r] medical conditions persist beyond your leave balances, the [Agency] has a voluntary leave transfer program." Complainant requested a reasonable accommodation consisting of full-time telework on January 20 or 21, 2012, again on February 9, 2012, and again in March 2012. At a February 9, 2012, meeting, Complainant alleged that her supervisor said that she "needed to be at 100% capacity" or she "should file for disability." On June 20, 2012, Complainant's request for full-time telework as a reasonable accommodation was approved, effective July 2, 2012.

Complainant also alleged that she made numerous reasonable accommodation requests for equipment, software, and training beginning in March 2012, including USB storage, Dragon Naturally Speaking (DNS) Premium or Professional version software, and training, as well as the replacement of her Agency air card. According to Complainant, the Agency initially provided her with the Home version of DNS, which was not compatible with the programs she needed to use for her job duties. As of August 2013, Complainant said that she has not received recommended DNS training, the USB storage, or authorization to use her Agency air card. Complainant also asserted that she was removed from her flexible work schedule that enabled her to attend her medical appointments. Complainant's supervisor responded that no employees were allowed to telework and have a flexible schedule at the same time.

On December 19, 2012, Complainant filed the instant EEO complaint alleging that the Agency discriminated against her based on sex (female), disability (physical), and reprisal for prior protected EEO activity when, among other allegations, the Agency: revoked her telework without justification; denied her required equipment, hardware, software, and formal training; denied Complainant a flexible schedule; issued her a written warning; and issued her a Letter of Reprimand. Complainant requested a final decision, and the Agency subsequently issued a final decision finding that Complainant failed to prove that the Agency subjected her to discrimination as alleged. The instant appeal followed.

The Commission found that the Agency discriminated against Complainant when it did not provide requested accommodations and/or unnecessarily delayed providing certain accommodations. We noted that, contrary to what Complainant's supervisor wrote in his January 19, 2012, email, telework can constitute a reasonable accommodation and thus a "long-term solution to a medical situation." OFO also observed that an Agency policy that requires an employee with a disability to be at 100 percent capacity with no medical restrictions violates the Rehabilitation Act. The Commission determined that the record was devoid of justification for the Agency's four-month delay in providing Complainant with an effective accommodation or any explanation as to why Complainant's January and February 2012 requests were ignored. With respect to Complainant's request for equipment and training, we observed that employees are not required to use "magic" words when requesting reasonable accommodation. In regard to Complainant being removed from her flexible work schedule because no employees were permitted to telework and have a flexible work schedule, we noted that a reasonable accommodation is defined as a change or modification to a policy that applies to all employees.

Further, the Commission determined that the Agency issued Complainant a written warning, a written reprimand, and a written counseling memorandum as a direct result of the Agency's failure to provide Complainant with reasonable accommodation. We also found that the Agency failed to make good faith efforts to reasonable accommodate Complainant because abruptly revoked Complainant's telework accommodation, inexplicably delayed restoring Complainant's telework for four months, failed to respond to Complainant's requests for assistive technology, software, and training, and subsequently penalized Complainant for its own failure to reasonably accommodate her. Because we found that the Agency's failure to accommodate Complainant led to the issuance of discipline and that the Agency failed to make good faith efforts to accommodate Complainant, we determined that Complainant established a prima facie case of a hostile work environment based on disability. OFO found that the Agency was liable for the harassment because it resulted in a tangible employment action.

Therefore, the Commission affirmed in part and reversed in part the Agency's decision and ordered as relief that the Agency immediately provide Complainant with reasonable accommodation, conduct a supplemental investigation on the issue of Complainant's entitlement to compensatory damages, expunge all Agency records related to the discriminatory warning, reprimand, and counseling, restore leave taken by Complainant as a result of the Agency's failure to accommodate her, provide training, consider disciplinary action against the responsible management officials, and post a notice.

Reece (Joey B.) v. VA, 0720160023 (12/21/2016) – Complainant filed a formal complaint alleging that he was subjected to discrimination and a hostile work environment on the basis of race (African-American) and in reprisal for prior protected EEO activity when his supervisor changed his tour of duty from the evening shift to the day shift; his supervisor asked him "Who is going to hire a black man as a nurse;" Complainant was not paid his overtime pay in a timely manner; and he was terminated during his probationary period. Following a hearing, an EEOC AJ determined that Complainant failed to show that the change in his tour of duty was based on discrimination or reprisal. The AJ found, however, that Complainant had been subjected to race-based discrimination and a hostile work environment as evidenced by his supervisor's racially-charged comment and his supervisor's failure to timely process his overtime. In addition, the AJ found that the Agency retaliated against Complainant by terminating him. To remedy the discrimination, the AJ ordered the Agency to reinstate Complainant; pay Complainant back pay and $10,000 in compensatory damages; provide training to all employees at the facility; and to post a notice. The Agency subsequently issued a final order in which it affirmed the AJ's finding of discrimination and implemented the remedies ordered with the exception of the AJ's training order. On appeal, the Agency argued that the AJ's order of EEO training for all employees was overly broad as the evidence established that the discrimination was isolated to one supervisor, not facility-wide. The Commission affirmed the Agency's final order finding that there was no evidence of a facility-wide culture of discrimination and that it was sufficient under the circumstances to require eight hours of training to only the management officials in Complainant's chain-of-command and to the Human Resources Specialist regarding their obligations and responsibilities under Title VII

Oyerinde (Renato K.) v. DHS (ICE), 0120141861 (12/16/2016) – Complainant worked as an Immigration Enforcement Agent, GS-1801-9, in the Enforcement and Removal Operations Division of the El Paso Field Office in El Paso, Texas.

After Complainant's co-worker advised him that his former supervisor had discussed his former EEO complaint with her, and left documents regarding that complaint on his desk in plain view where anyone could see them, Complainant filed an EEO complaint. At the conclusion of the investigation,

upon Complainant's request, the Agency issued a final agency decision finding that Complainant did not establish that he was discriminated against as alleged. Complainant appealed the Agency's FAD.

The appellate decision affirmed in part and reversed in part the Agency's FAD. Specifically, the appellate decision affirmed the Agency's finding of no discrimination with regard to the claims of harassment and race discrimination. Alternatively, the appellate decision reversed the FAD with respect to the claim of reprisal discrimination, finding that a per se violation of the Commission's regulations had occurred. The appellate decision found that by discussing Complainant's EEO activity, and leaving documents pertaining to his EEO complaint in plain view, Complainant's supervisor was engaging in activity that would be reasonably likely to deter Complainant, and others, from engaging in protected EEO activity. Among other things, the Agency was ordered to provide Complainant's supervisor with EEO training with a special emphasis on avoiding retaliation, and to consider taking disciplinary action against him.

Harvey (Neil M.) v. USDA (NRCS), 0720140005 (12/09/2016) – Complainant alleged, in pertinent part, that the Agency discriminated against him on the bases of race and age when it did not select him for a Contracting Officer position.

After conducting a telephonic hearing, an AJ issued a decision finding discrimination and awarding Complainant $5,000 in non-pecuniary compensatory damages for mental anguish. The Agency issued a final order rejecting the AJ's decision.

OFO, in its appellate decision, affirmed the AJ's decision. First, OFO found that the AJ did not abuse his discretion in conducting a telephonic hearing. Specifically, OFO found that: (1) the parties convened for an in-person hearing, but the AJ was unexpectedly absent (and in another city) because of a scheduling error; and (2) before the AJ proceeded with the telephonic hearing, he specifically asked the parties if they had any objections and neither party did. Based on the above, OFO found that exigent circumstances existed such that the AJ was warranted in conducting a telephonic hearing. Second, OFO found that substantial evidence in the record supported the AJ's finding of pretext. Specifically, the AJ relied on the applicants' resumes in finding that Complainant's qualifications were plainly superior to the selectee's qualifications. In addition, the AJ relied on the applicants' KSA responses, the absence of interviews during the selection process, Complainant's performance appraisal, and the applicants' references in finding that the selecting official was not credible when he testified that the selectee had better KSA responses, better communication skills, and better references. Moreover, the AJ relied on the differences between the selecting official's affidavit and hearing testimonies in finding that the selecting official was not credible when he testified at the hearing that his first-hand knowledge of Complainant's performance deficiencies impacted his selection decision. Third, OFO found that the AJ properly awarded Complainant $5,000 in non-pecuniary compensatory damages. Specifically, the AJ relied on Complainant's hearing testimony that he was frustrated, discouraged, and pained by the discriminatory non-selection.

Johnson (Matilde M.) v. SSA, 0120140147 (01/17/2017) – Complainant, a Service Representative at the Agency's Colorado District Office, has major depression and anxiety disorder, mental disabilities that she alleged began in or around June 2010 as a result of working conditions at the Agency. Complainant worked a reduced 30-hour weekly work schedule between November 1, 2011, and February 1, 2012, during which time her first-line supervisor, the Operations Manager, stated that Complainant's workload was reduced by 25 percent. Complainant returned to a regular full-time work schedule on February 1, 2012.

Complainant's two therapists sent the Agency's Area Director generic letters recommending that Complainant be transferred from her job. On November 14, 2011, the Area Director responded to the therapists, requesting more information because moving Complainant to another office would require her to perform the same basic job functions. On December 5, 2011, one of Complainant's therapists wrote to the Area Director to request that Complainant be permanently transferred because Complainant could not get along with management. The Area Director stated that he had not received a reasonable accommodation request from Complainant and noted that he could not act on a request received from an outside third party.

Complainant kept a religious symbol, a Crown of Thorns, in her cubicle. On May 6, 2012, the District Manager asked Complainant to remove the Crown of Thorns because coworkers had complained. According to Complainant, other employees have religious symbols at their desks. The Operations Manager stated that several employees complained about the Crown of Thorns, noting that Complainant allegedly told one coworker that the Crown of Thorns "draws blood" and that other coworkers told her that they feared the Crown of Thorns could be used as a weapon because Complainant was "unstable."

On February 29, 2012, Complainant filed the instant EEO complaint, which she subsequently amended, alleging that the Agency discriminated against her based on religion (Christian), disability (mental), age (50) and reprisal for prior protected EEO activity when, among other allegations, the Agency: did not approve her medical provider's recommendation that she be reassigned due to stress; and asked Complainant to take home her Crown of Thorns because it upset other employees.

The Commission found that the Agency did not deny Complainant a reasonable accommodation when it did not approve her request to transfer to a location with different supervisors. Although Commission guidance indicates that a request for reassignment to a new supervisor generally does not constitute a request for reasonable accommodation, we noted that agencies nonetheless are required to undertake an individualized assessment as part of the reasonable accommodation process, even when the accommodation requested amounts to a request for a different supervisor. In the instant case, we found that the Agency reasonably accommodated Complainant by reducing her schedule and reducing her workload while she was working a reduced schedule, and that the record did not indicate that the provided accommodation was ineffective, as Complainant was rated as "Satisfactory" in all elements of her performance reviews. Under the circumstances of this case, we therefore found that Complainant was not entitled to a transfer to a different supervisor as a reasonable accommodation. However, we noted that the Area Director's statement that he could only act on reasonable accommodation requests received directly from Complainant herself was patently incorrect and in direct conflict with the Commission's guidance.

The Commission determined that the Agency discriminated against Complainant based on disability when it asked her to remove the Crown of Thorns from her cubicle based on complaints from her coworkers and the perception that Complainant was "unstable" and would use the Crown as a weapon. The record did not contain any statements from Complainant's coworkers to corroborate the Agency's contention that her coworkers complained about the Crown of Thorns. Based on the record before the Commission, the District Manager had no more reason to believe that Complainant would become violent than any other employee would. We found that the District Manager's decision was grounded in stereotypes against people with mental illnesses and noted that the Rehabilitation Act is designed to protect against unsupported myths, fears, stereotypes, and other attitudinal barriers about disability. The Commission found that the Agency asked Complainant to remove the Crown based on alleged perceptions by coworkers that directly related to Complainant's disability. Because we found that the Agency discriminated against Complainant on disability, we did not consider whether the Agency discriminated against Complainant based on religion when it asked her to remove her Crown of Thorns, as a finding on that basis would afford Complainant no additional relief.

Therefore, the Commission affirmed in part and reversed in part the Agency's decision and ordered as relief that the Agency conduct a supplemental investigation on the issue of Complainant's entitlement to compensatory damages, take steps to ensure that all disability discrimination ceases and desists in the facility, permit Complainant to display the Crown of Thorns in her workspace, provide training, consider disciplinary action against the responsible management officials, and post a notice.

Burton (Cher B.) v. VA, 0120140445 (01/09/2017) – Complainant alleged that Agency management subjected her to harassment on the bases of race and reprisal when, from December 2006 to July 2007, it issued her written counseling, scrutinized her work, reprimanded her, placed her on a performance improvement plan, informed her that she would not receive a within-grade increase, and issued her a three-day suspension.

An AJ issued a decision, after a hearing, finding retaliatory harassment but no racial harassment. The AJ awarded Complainant $95,000 in non-pecuniary compensatory damages for retaliatory harassment. The Agency issued a final order fully implementing the AJ's decision.

Complainant filed an appeal contending that the AJ erred in finding no racial harassment and disputing the amount of compensatory damages for retaliatory harassment.

OFO, in its appellate decision, affirmed the AJ's decision. First, OFO found that substantial evidence in the record supported the AJ's finding of no racial harassment. Specifically, OFO noted that, in finding that discriminatory intent on the basis of race did not exist, the AJ credited testimonial evidence that Agency management had hired several African-Americans employees just before the events at issue and that Agency management treated an African-American coworker more favorably than Complainant. In addition, OFO found that the AJ reasonably inferred that Agency management's ambiguous comment that Complainant did not "fit the image of a government attorney," without more, was insufficient to show discriminatory intent on the basis of race. Moreover, OFO found that Complainant's mere speculation about the reason behind Agency management's negative perception of her was not enough to show that the events at issue were based on her race. Second, OFO found that substantial evidence in the record supported the AJ's award of $95,000 in non-pecuniary compensatory damages for retaliatory harassment. Specifically, OFO noted that the AJ found that, for approximately 18 months, Complainant experienced embarrassment, stress, loss of professional standing, one panic attack, and the exacerbation of her lupus symptoms. Moreover, OFO found that the amount awarded was consistent with Commission precedent.

Surman (Harriet M.) v. DOD (DLA), 0120141484 (01/30/2017) **[Repeated under Priority 4 above]** – Complainant alleged that the Agency discriminated against her on the bases of sex and race when it: (1) threatened to transfer some work duties from her facility to another facility; (2) assigned her on a part-time basis to assist with a backlog; (3) did not document her assistance as an official detail and did not give her a cash award for her assistance; (4) allowed another employee to work more overtime; and (5) compensated her as a GS-6 and a coworker as a GS-7 even though they performed the same work.

An AJ issued a decision, after a hearing, finding no discrimination. The Agency issued a final order fully implementing the AJ's decision. Complainant then filed an appeal. On appeal, Complainant requested that OFO sanction the Agency, for failing to conduct a timely investigation of her complaint, by issuing a default judgment in her favor.

OFO, in its appellate decision, issued a default judgment in Complainant's favor. Specifically, OFO found that the Agency failed to conduct a timely investigation of the complaint. Although the Agency

was required to complete the investigation in or before March 2012, OFO found that the Agency only began its investigation in July 2012 after Complainant requested a hearing before an AJ. In addition, OFO found that the Agency did not provide any documentation or explanation for its failure to investigate the complaint in or before March 2012. Moreover, OFO noted that the Commission has previously issued default judgments in response to an agency's failure to conduct a timely investigation of a complaint.

OFO, however, found that Complainant did not establish an individual right to relief because the record did not support a determination that she established a prima facie case of disparate treatment, a claim of harassment, or a prima facie case of compensation discrimination. In reaching that conclusion, OFO relied on the documentary evidence in the record as well as the AJ's factual findings after the hearing. OFO ordered the Agency to provide training to the responsible EEO management officials regarding their obligations in processing EEO complaints, consider taking appropriate disciplinary action against the responsible EEO management officials, and to post a notice in the workplace regarding its determination.

Charlie K. v. EEOC, 0120142315 (01/24/2017) **[Repeated under Circulated Cases below]** – Complainant, an Investigator, filed an EEO complaint alleging that the Agency discriminated against him on the bases of national origin (Hispanic/Mexican), color (brown), and reprisal for prior protected EEO activity when it did not select him for training and when it subjected him to a hostile work environment involving seven incidents. He filed a second complaint alleging that the Agency discriminated against him on the bases of race (Hispanic/Latino), national origin (Mexican), color (brown), disability, and reprisal for prior protected EEO activity when it subjected him to a hostile work environment involving nine additional incidents. In a third complaint that was dismissed and incorporated into the instant matter, Complainant alleged that the Agency delayed the processing of his second complaint and that the investigation was biased and conducted improperly.

On appeal, the Commission found that the Agency subjected Complainant to per se reprisal when Complainant's supervisor told him that managers had spent half of a management meeting discussing Complainant's EEO complaint. Although the supervisor asserted that he was just joking when he made the comment, the Commission found that the "joke" was reasonably likely to deter a reasonable employee from engaging in protected activity and had a potentially chilling effect on the EEO process. The Commission emphasized that managers should never joke about or criticize an employee's EEO activity and should never discuss an employee's EEO activity at a management meeting. Although specific managers might appropriately discuss an EEO complaint in furtherance of processing or resolving the complaint, it is never appropriate for an employee's EEO activity to be the topic of general discussion.

With respect to Complainant's other claims, the Commission found that Complainant had not shown that discriminatory animus motivated his non-selection for training or the alleged harassing incidents. The Commission also found that the record did not support Complainant's allegation that the Agency improperly processed his complaints. There was no evidence that the investigation was biased, Complainant had ample opportunity to submit information, and the Commission reviewed and considered the several hundred pages of documents that Complainant submitted. Although the two-month delay in responding to Complainant's request for counseling was unacceptable, the record disclosed no evidentiary deficiencies resulting from the delay. Nonetheless, the Commission cautioned the Agency to ensure that such "inadvertent errors" do not occur in the future.

Edmonds (Nicole T.) v. DOD (DCA), 0120143019 (01/11/2017) – Complainant filed an appeal from an Agency decision awarding remedies after a finding of discrimination. Complainant, a Cashier, filed an EEO complaint alleging, in part, that the Agency discriminated against her on the basis of disability (back) when the Agency failed to accommodate her disability and sent her home from work based on her disability. After a hearing, an AJ issued a decision finding that Complainant was discriminated against on the basis of disability. The Agency issued a decision finding discrimination on the basis of disability and accepting the AJ's ordered remedies. OFO issued a decision finding disability discrimination. OFO found that the AJ and Agency properly awarded Complainant $8,000 in nonpecuniary, compensatory damages. OFO determined that the AJ and Agency properly determined the period of time for backpay. OFO found that Complainant did not establish that she was entitled to front pay. OFO ordered the Agency to: pay $8,000 in nonpecuniary, compensatory damages; pay backpay; provide EEO training to responsible Agency officials; consider disciplining responsible Agency officials; and post a notice of the finding of discrimination.

Layssard-Brown (Starr R.) v. GSA, 0120143031 (01/12/2017) – Complainant filed an appeal from an Agency decision awarding remedies after a finding of discrimination. Complainant, a Financial Management Analyst, filed an EEO complaint alleging, in part, that the Agency discriminated against her on the bases of race (African American) and disability (epilepsy) when the Agency failed to accommodate her disability when it failed to allow her to telework full time. No hearing was requested. The Agency issued a decision finding discrimination on the bases of race and disability. The Agency awarded $12,000 in nonpecuniary, compensatory damages and other relief. Complainant requested a larger award of nonpecuniary, compensatory damages and an award of pecuniary damages. OFO issued a decision affirming the finding of race and disability discrimination and affirming the remedies awarded by the Agency. OFO found that the Agency properly awarded Complainant $12,000 in nonpecuniary, compensatory damages and noted that some of Complainant's evidence of harm referred to incidents for which there was no finding of discrimination. OFO found that the Agency properly denied pecuniary damages because insufficient evidence was provided to the Agency at the proper time to show any past or future pecuniary damages resulting from the discrimination. OFO found that the Agency properly determined the period of time for back pay. OFO ordered the Agency to: pay $12,000 in nonpecuniary, compensatory damages; pay $23,384.80 in backpay; restore 46 hours of annual leave and 30 hours of sick leave; provide EEO training to responsible Agency officials; consider disciplining responsible Agency officials; and post a notice of the finding of discrimination.

Erlendson (Jackqueline G.) v. DOJ (FBI), 0720160022 (01/11/2017) – The Agency filed an appeal from an AJ's finding of discrimination. Complainant, an Intelligence Analyst, filed her complaint alleging discrimination in reprisal for prior EEO activity when she received a "poor" rating on her annual Performance Appraisal Report and her Alternative Work Schedule (AWS) was rescinded. After a hearing, the AJ found that the Agency retaliated against Complainant as alleged. The Agency issued a final order accepting the finding of discrimination, but challenging some of the remedies. OFO affirmed the finding of discrimination and modified some of the remedies. Although the AJ awarded monetary compensation for leave on Mondays taken by Complainant as a result of having her AWS rescinded, OFO agreed with the Agency that this would amount to double compensation for the days in question. OFO instead ordered the Agency to restore the leave. OFO affirmed the AJ's award of $65,000 in nonpecuniary, compensatory damages and rejected the Agency's argument that the award should be $45,000. OFO found that the AJ improperly awarded $2,358 as part of attorney's costs for interest on a loan to obtain legal services. OFO upheld all other awarded attorney's costs, attorney's fees, and remedies concerning training, consideration of discipline, and

notices. In relief, OFO ordered the Agency to: pay attorney's fees in the amount of $81,600 and costs in the amount of $3,700.48; pay $65,000 in nonpecuniary, compensatory damages; restore leave; provide training and notice of prohibition of retaliation to employees at the facility regarding retaliation; consider disciplining the responsible agency officials responsible for the discrimination; and post a notice of the finding of discrimination.

Hansen (Elden R.) v. DOI, 0120122672 (02/24/2017) **[Repeated under Priority 3 above]** – Complainant suffers from an injury to his neck and back, which he received on active duty military. His injury restricts his ability to sit on the floor with his legs held straight together, calves remaining on the floor, and reach to extend his fingers beyond his toes. Complainant applied and was selected for a Wildlife Refuge Specialist position includes law enforcement duties on a collaterally-assigned basis. In order to perform his law enforcement duties, he was required to pass a physical examination and a subsequent Physical Efficiency Battery examination (PEB) before he could go for law enforcement training at the Federal Law Enforcement Training Center (FLETC) in Glynco, Georgia.

As part of the selection process, an agency physician observed Complainant's ability to bend over while standing and touch his toes. Complainant passed the examination and the physician cleared Complainant for the position, stating that Complainant was qualified to perform the duties of the position in accordance with Agency standards and guidelines. Complainant started working in the position in October 2010. In December 2010 and January 2011, Complainant tested and was retested for the PEB, and on both occasions, passed all requirements except for the "sit and reach" requirement. As a result, Complainant was terminated from the position.

The Agency found no discrimination in its Final Decision. On appeal, OFO determined Complainant was terminated from the position because he could not meet the Agency's PEB "sit and reach" standard due to his back impairment. By doing so, Complainant established he was perceived as disabled because the Agency took prohibited action by applying a qualification standard and terminating him as a result of his back impairment, and proved he was an "individual with a disability."

OFO then determined that Complainant was a qualified individual with a disability because the evidence revealed he was qualified to perform all of the physical demands described for the position. Indeed, Complainant had been performing the duties for the position at the time and receiving Fully Successful performance ratings.

OFO then examined whether the qualification standard was job related and consistent with business necessity, and determined there was nothing in the record which could support this. The decision noted that no Agency witness was able to articulate how a Wildlife Refuge Specialist's ability to reach over his toes while sitting down with his legs outstretched was related to any of the functions of the position. Furthermore, there was evidence that the standard had been applied differently in other regions, which cast doubt on its necessity. Accordingly, because OFO found the Agency did not carry its burden of establishing that the "sit and reach" flexibility standard was job-related and consistent with business necessity, the Agency also failed to establish that it terminated Complainant for a legitimate, nondiscriminatory reason. It ordered that Complainant be reinstated and other appropriate relief.

Vital (Herb S.) v. USDA (RD), 0120141055 (02/28/2017) – Complainant worked as a Business Program Specialist at the Agency's Rural Development Office in Raleigh, North Carolina. Complainant filed two EEO complaints alleging that the Agency discriminated against him on the bases of race (African-American), sex (male), and in reprisal for prior protected EEO activity when: 1) on December 8, 2009, the State Director did not select him for the position of Director of the Business

and Cooperative Programs Division, GS-13; 2) on December 2009, the State Director forced Complainant to accept the position of Area Director at the Rural Development Office in Henderson, North Carolina; 3) on November 4, 2010, the State Director chose not to return him to his previous position as a Business Development Specialist, GS-12, after he had applied for that position; and 4) on June 21, 2011, the State Director subjected Complainant to a hostile work environment.

Following the investigation, Complainant requested a hearing before an EEOC AJ. The AJ held a hearing and issued a decision in which she found that Complainant had established that he had been discriminated against with respect to claim 1. The AJ found that Complainant had established a mixed motive on the part of the State Director in not promoting him to Director of Business and Cooperative Programs, noting that although the State Director's concerns about how Complainant's prior EEO activity had caused dissension within the office had factored into his decision, the Selectee for that position was highly qualified. On appeal, Complainant challenged the AJ's finding of mixed motive, arguing that the Agency had not met its burden to show it would have otherwise selected the Selectee, and challenged the AJ's conclusion that he had not established discrimination with respect to claim 3.

The appellate decision found that the AJ properly concluded that Complainant demonstrated that discrimination was a motivating factor in the Agency's decision not to select him for the position in claim 1, and that the Agency had met its burden to show that that it would have made the same selection even if it had not considered the discriminatory factor. The AJ found that Complainant had not established that his qualifications were plainly superior to those of the Selectee. The decision also affirmed the AJ's finding that Complainant had not established that he had been discriminated against with respect to claim 3. The Agency was ordered to pay attorney's fees, provide EEO training, to "take corrective, curative, or preventative action to ensure that similar violations of the law will not recur" and to post a notice.

Estate of Michael Holt (Jeremy S.) v. VA, 0120142917 (02/09/2017) **[Repeated under Priority 2 above]** – Complainant filed a formal complaint alleging that the Agency discriminated against him and subjected him to a hostile work environment on the bases of race (African-American), sex (male), and disability when his supervisor deliberately misplaced his application for Family Medical Leave Act (FMLA); his supervisor questioned his co-workers about his patient appointments; his supervisor denied his request for 30 minutes of compensatory time for working past his tour of duty to care for a patient; his supervisor began closely monitoring his activities and overly scrutinizing his work; his supervisor gave him several Reports of Contact; and he was escorted by the VA Police and referred for psychiatric evaluation.

Complainant passed away during a lengthy delay in the Agency's commencement of an investigation into his complaint. Following Complainant's death, the EEO Investigator initiated the investigation – 322 days after Complainant originally filed his formal complaint. The Agency subsequently completed the investigation well beyond the regulatory timeframes, an initial extension period, and its own target completion date. Thereafter, at Complainant's mother's request, the Agency issued a FAD in which it found that Complainant had not been subjected to discrimination or a hostile work environment as alleged.

In its appeal, Complainant's Estate requested that the Commission reverse the FAD and issue default judgment in favor of Complainant as a sanction for the Agency's flagrant failure to timely initiate or complete its investigation. In its response, the Agency argued that Complainant suffered no prejudice by its delay in completing the investigation. The Commission found that the Agency failed to comply with its obligation to timely initiate and complete an investigation under 29 C.F.R. § 1614.108(e). Further, the Commission found that the Agency's extraordinary tardiness undermined the integrity

and effectiveness of the EEO process and, sadly, deprived Complainant of the opportunity to participate in the investigation of his claims. As a result, the Commission imposed the severe sanction of a default judgment in favor of Complainant. The decision noted that the Agency has been subject to default judgment no less than three prior times for the same infraction of failing to initiate the investigation within 180 days.

The Commission found, however, that there was sufficient evidence establishing a right to relief only for Complainant's claim that he was denied compensatory time. Accordingly, the Commission reversed the FAD and remanded the matter to the Agency with orders to conduct a supplemental investigation as to Complainant's entitlement to compensatory damages; provide training to its EEO managers and staff regarding their case-processing procedures; consider disciplining the responsible EEO officials; and to post a notice.

Barber (Bernardo C.) v. VA, 0120150213 (02/16/2017) – Complainant alleged that he was subjected to discrimination and a hostile work environment on the bases of disability and reprisal when the Agency did not provide him with a reasonable accommodation for his disability. Following a hearing, the AJ issued a bench decision in favor of Complainant. The AJ awarded Complainant $15,000 in nonpecuniary compensatory damages.

On appeal, Complainant maintained that the AJ erred in not consolidating his constructive discharge claim with the instant complaint. Complainant also argued that as part of "make whole" relief he should have been returned to his prior position. Additionally, Complainant argued that the AJ erred in awarding him only $15,000. He maintained that a nonpecuniary award in the $150,000.00 - $200,000.00 range would be more appropriate and in line with other cases.

OFO determined that Complainant was not entitled to reinstatement as part of make whole relief or consolidation of his constructive discharge claim because the record contained substantial evidence that Complainant resigned his position due to fear of termination as a result of matters that were unrelated to the Agency's failure to provide a reasonable accommodation. Finally, we found that Complainant provided no persuasive evidence establishing that the AJ erred by only awarding him $15,000 in compensatory damages as the cases he cited were not analogous to his complaint or his damages.

Accordingly, Complainant was awarded $15,000 in nonpecuniary compensatory damages and the Agency was ordered to post a notice, and to provide training for the managers involved.

Federick (Lois G.) v. USPS (Great Lakes), 0120150672 (02/28/2017) – Based on the evidence of record, we concurred with the AJ's decision finding that the Agency discriminated against Complainant based on her disability by denying her two of the bid positions where her disability could have been reasonably accommodated. The matter was remanded for the Agency to take the following action: return Complainant to work, and retroactively place her in one of the bid positions with accommodation, as well as award her with back pay.

Complainant was also awarded $10,000 in non-pecuniary compensatory damages. Complainant, on appeal, argued that she should be awarded $100,000 in non-pecuniary compensatory damages. We found, however, the AJ's award of $10,000 in non-pecuniary compensatory damages was consistent with what the Commission has awarded in cases where complainants have suffered emotional harm similar in severity and duration to the emotional harm Complainant suffered in the instant case.

Kohler (Heidi B.) v. DHS (FEMA), 0720140004 (02/02/2017) – Complainant alleged that the Agency discriminated against her: (1) on the basis of sex when her first-level supervisor (S1) exposed her to a full-frontal nudity color photo of himself on her work computer; and (2) on the basis of reprisal for prior protected EEO activity (complaining to management about sexual harassment) when her second-level supervisor (S2) refused to issue her a performance evaluation and otherwise created a hostile work environment.

After conducting a hearing, an AJ issued a decision finding sexual harassment (clam 1) and retaliation (claim 2). The Agency issued a final order rejecting the AJ's decision. On appeal, the Agency contended that the AJ did not properly apply the Supreme Court's rulings in Vance v. Ball State University, 133 S. Ct. 2434 (2013) and University of Texas Medical Center v. Nassar, 133 S. Ct. 2517 (2013). Regarding claim 1, the Agency argued that S1 did not meet the definition of "supervisor" under Vance, that S1 was considered a coworker rather than a supervisor, and that it was not liable for S1's conduct because it took immediate and appropriate corrective action. Regarding claim 2, the Agency argued that Complainant did not establish a prima facie case of reprisal under the "but for" standard in Nassar.

OFO, in its appellate decision, affirmed the AJ's decision. Regarding claim 1, OFO found that substantial evidence in the record supported the AJ's finding that there was a basis for imputing liability for sexual harassment to the Agency. Assuming, arguendo, that S1 was a coworker rather than a supervisor, OFO found that the Agency was still liable for S1's actions because it knew about S1's conduct and did not take immediate and appropriate corrective action. Specifically, OFO found that the Agency took remedial measures to stop the harassment, but did not take any remedial measures to correct its effects on Complainant or ensure that similar sexual harassment by another employee did not take place. Regarding claim 2, OFO rejected the Agency's argument that the "but for" standard in Nassar applied to Complainant's Title VII reprisal claim. Specifically, OFO referenced the Commission's decision in Nita H. v. Department of Interior, EEOC Petition No. 0320110050 (July 16, 2014), which held that the "but for" standard in Nassar did not apply to reprisal claims by federal sector applicants or employees under Title VII or the ADEA.

Kellner (Lashawna C.) v. DOL, 0720160020 (02/10/2017) – Complainant filed an EEO complaint in which she alleged that she was subjected to religious harassment when, during an email conversation about Complainant's work hours and schedule, her supervisor stated the following:

> Wow . . . then I must be a damn fool . . . 'cause I've been working like a Hebrew slave the last 9 years and don't have enough time to take off . . . at least somebody got it right.

After a hearing, an AJ issued a decision in which she found that Complainant proved that she was subjected to religious harassment. In so finding, the AJ determined that Complainant credibly testified that members of her family were executed by the Nazis during the Holocaust; that she was named after one of her executed family members; and she was offended, saddened, and impacted by S1's use of the term "Hebrew slave." The AJ concluded that federal supervisors should know that Jews have been subjected to genocide, anti-Semitism, and slavery, and workplace jesting regarding slavery with reference to a specific protected group which has experienced slavery is "profoundly inappropriate." The AJ found that the Agency was liable for the harassment, and ordered the Agency to pay Complainant $10,000 in non-pecuniary compensatory damages, provide the harassing supervisor with mandatory EEO training, to post a notice of the Title VII violation, and to pay Complainant $10,980 in attorney's fees. The Agency simultaneously issued a final order that did not adopt the AJ's finding of harassment, and appealed the matter to the Commission.

In an appellate decision, OFO noted that it was undisputed that the supervisor sent the email with the comment to Complainant. OFO found that Complainant is a member of a statutorily protected class because she is a member of the Jewish faith. OFO further found that the use of the term "Hebrew slave" was unwelcome because the term "Hebrew" sometimes is considered archaic or offensive when used to generally refer to contemporary Jewish persons, and coupled with the word "slave," is particularly negative and offensive when talking directly to a Jewish person. Further, OFO found that there was no evidence Complainant welcomed such a comment. Additionally, OFO found that the term "Hebrew slave" pertains specifically to Jewish persons, and as such, is inherently based on religion. OFO further found that the supervisor's actions were severe enough to constitute harassment. In so finding, OFO noted that the supervisor's comment was made to Complainant; the supervisor knew she is Jewish; the comment was especially personal for Complainant because it dredged up painful memories of how her family was targeted for systematic murder, incarceration, and deportation during the Holocaust; and Complainant testified about how the comments made her "incredibly sad." Therefore, OFO concluded that the AJ properly found that Complainant was subjected to religious harassment.

With regard to liability, OFO noted that the anti-harassment policy in the record was issued months after the email incident, and there was no evidence detailing how the policy was disseminated, or that Complainant was specifically provided with a copy of the policy. Thus, under the standards of vicarious liability, OFO concluded that that the Agency was liable for the supervisor's harassment because there was no evidence that the Agency exercised reasonable care to prevent and correct the harassment, or that Complainant unreasonably failed to take advantage of any preventive or corrective opportunities provided by the Agency or to avoid harm otherwise.

OFO affirmed the AJ's determinations with respect to remedies and ordered the Agency to pay Complainant $10,000 in non-pecuniary compensatory damages; provide the harassing supervisor with eight hours of in-person EEO training; pay Complainant $10,980 in attorney's fees; and to post a notice regarding the Title VII violation in the workplace.

Torrence (Celine D.) v. USPS, 0120150178 (03/02/2017) – Complainant worked as a Part-Time Flexible City Carrier. Complainant alleged, in pertinent part, that the Agency discriminated against her based on reprisal for prior protected EEO activity when the Postmaster, during a work meeting, accused her of providing false information to the EEO Counselor.

After conducting a hearing, an AJ issued a decision finding per se reprisal. Specifically, the AJ found that the incident occurred as alleged by Complainant. In addition, the AJ found that it was not appropriate for the Postmaster to question an employee about the truthfulness of her discrimination allegations during a work meeting and that such an issue was more appropriately determined through the EEO complaint process. Moreover, the AJ found that the Postmaster's accusation during the work meeting could potentially chill an employee from participating in the EEO complaint process. The AJ awarded Complainant $500 in non-pecuniary compensatory damages. The AJ did not award Complainant, who was represented by an attorney, any attorney's fees because she did not file an attorney's fees petition in response to the AJ's order.

OFO, in its appellate decision, found that substantial evidence in the record supported the AJ's decision and affirmed the AJ's decision.

Santanelli (Eileen S.) v. USPS, 0120150199 (03/24/2017) – Complainant worked as a City Carrier. Complainant alleged, in pertinent part, that the Agency discriminated against her based on disability (herniated neck discs) when it denied her request to not carry the mail satchel, did not allow her to

perform street duties, and sent her home after she completed her office duties. The Agency, in its FAD, found no discrimination.

OFO, in its appellate decision, found discrimination. First, OFO found that Complainant was an individual with a disability because she had a physical impairment that substantially limits her in the major life activity of carrying. Specifically, OFO found that medical documentation reflected that: (1) Complainant, who had herniated neck discs, was unable to carry any type of shoulder bag, including the satchel; and (2) Complainant's condition was permanent/indefinite. Second, OFO found that the Agency conceded in its FAD that Complainant was otherwise qualified, i.e., she could perform the essential functions of her position, with or without reasonable accommodation. Third, OFO found that the Agency denied Complainant a reasonable accommodation when it denied her request to not carry the satchel. Specifically, OFO found that Complainant requested a reasonable accommodation when she submitted medical documentation stating she was unable to carry the satchel due to a neck injury. In addition, OFO found that the Agency did not provide Complainant with the requested accommodation or with an alternative accommodation. Although Agency policy required carriers to carry the satchel, OFO found that the Agency could have modified the policy. Although Complainant offered alternative suggestions (using a push cart, carrying the satchel on her arm, wearing the satchel around her hips), OFO found that the Agency insisted she carry the satchel on her shoulder. Although the Agency offered Complainant the alternative of carrying the empty satchel on her shoulder, OFO found that it was not an effective accommodation because her medical documentation explicitly stated she was unable to carry the satchel due to a neck injury. Moreover, OFO found that the Agency did not provide specific evidence proving that allowing Complainant to not carry the satchel on her shoulder would cause an undue hardship. OFO cited affidavit testimony from the Agency that Complainant's request would not have created an undue hardship. OFO noted that Agency policy explicitly allowed for the use of a double satchel, which could be worn around the waist. OFO found that previous management had, for a five-year period, allowed Complainant to deliver mail without carrying a satchel.

Marable (Joi J.) v. VA (VHA), 0120150921 (03/03/2017) – Complainant worked as a Certified Registered Nurse Anesthetist on the Surgical Service at the Agency's Martinsburg, West Virginia VAMC. Complainant has idiopathic hypersomnolence, which causes excessive daytime sleepiness, interfering with activities such as working and driving. Complainant takes medication, which she must take in the morning, as it would keep her up all night if she took it later in the day. Complainant's supervisor averred that Complainant was hired in January 2011 under a job announcement that explained that the selectee would need to perform on-call duties, but the record did not contain the job announcement. According to Complainant's supervisor, on-call duty is supposed to be rotated among the Anesthesia Department, which consists of Complainant, three staff Anesthesiologists, and a contract anesthesia provider. Complainant did not have on-call duties between January 2011 and March 2013.

In early 2013, Complainant's supervisor wanted to add Complainant to the on-call rotation. On March 20, 2013, Complainant requested that she not be required to be on-call as a reasonable accommodation for her disability. Complainant submitted documentation from her physician to substantiate her request. Complainant's supervisor stated that Complainant's request was denied because the on-call duties were considered an essential function of the position and no reasonable accommodation was identified through the interactive process. According to the supervisor, because the Anesthesia Department is small, it places a burden on the other anesthesia providers to have to rotate on-call duties more frequently.

On September 23, 2013, Complainant filed the instant EEO complaint, alleging that the Agency discriminated against her based on, among other bases, disability (idiopathic hypersomnolence)

when on June 7, 2013, her request for reasonable accommodation was denied. When Complainant did not request a hearing before an AJ, the Agency issued a final decision finding no discrimination. In its final decision, the Agency determined that Complainant established a prima facie case of failure to accommodate, and the Agency noted that management had erred in determining that performing on-call duties was an essential function of Complainant's position. However, the Agency found that exempting Complainant from on-call duties would cause an undue hardship for the Agency.

On appeal, the Commission affirmed in part and reversed in part the Agency's final decision. We found that the Agency did not establish that exempting Complainant from on-call duties constituted an undue hardship. Complainant did not perform on-call duties during the first two years of her employment, and there was no evidence in the record that this arrangement created an undue hardship during that time. Accordingly, we found that the Agency failed to provide Complainant with a reasonable accommodation in violation of the Rehabilitation Act. We further found that the Agency failed to act in good faith, noting the unexplained delay between the submission of Complainant's request and the Agency's denial and that the Agency failed to consider reassignment as an accommodation.

Dunn (Minna Z.) v. USAF, 0720160009 (03/10/2017) – The Agency filed an appeal from an EEOC AJ's finding of discrimination. Complainant filed her complaint alleging discrimination in reprisal for prior EEO activity and disability when: her office was not moved, she was assigned duties not commensurate with her medical restrictions, she was denied union representation, and she was not reasonably accommodated. After a hearing, the AJ found that the Agency discriminated against Complainant when it assigned her duties not commensurate with her disability and when her disability was not accommodated. The AJ found no discrimination on all other claims. The AJ awarded $25,000 in nonpecuniary, compensatory damages. The Agency issued a final order accepting the finding of no discrimination, but challenging the finding of discrimination. For the first time, in its appeal, the Agency argued that the finding of discrimination had been the subject of a prior OFO decision finding discrimination. OFO affirmed the finding of discrimination in the instant appeal and the remedies provided by the AJ. OFO found that the Agency failed to show that the claims that were found to be motivated by discrimination in the instant complaint were the same as decided by OFO in a prior decision. In relief, OFO ordered the Agency to: pay $25,000 in nonpecuniary, compensatory damages; provide EEO training to responsible management officials; consider disciplining responsible management officials responsible for the discrimination; and post a notice of the finding of discrimination.

Alamo (Marine V.), et al v. SSA, 0720170001, 0720170002, 0720170003, 0720170004, 0720170005, 0720170006, 0720170007 and 0720170008 (03/20/2017) – Complainants worked as Service Representatives, Teleservice Representatives, or Senior Case Technicians for the Agency located throughout the New York and New Jersey area. In early 2009, the Agency announced that it would be hiring Claims Representatives in certain district offices in New Jersey. The Agency advertised and opened the positions for external candidates as well as internal Agency employees. Each vacancy announcement specified that each applicant must pass a written test called the Administrative Careers with America (ACWA) exam in order to be found to be minimally qualified and eligible. Complainants, all internal employees over the age of 40, applied and were made to take the ACWA exam just like external applicants. All Complainants, except for two, failed the exam, and therefore were marked as ineligible for the vacant Claims Representative positions. The two Complainants who passed the exam were nevertheless not interviewed, and therefore not selected. The Agency then selected 16 external applicants for the positions. In making its 16 selections, 12 of the candidates selected by the Agency were under the age of 40. In September 2009, Complainants

filed EEO complaints alleging that the Agency discriminated against them on basis of age when they were not selected for the Claims Representatives positions. The Agency subsequently conducted its investigation, and Complainant requested a hearing. After holding a hearing, the Administrative Judge found that Complainants established that the Agency's legitimate, nondiscriminatory reasons were pretext for age discrimination. In finding that Complainants established pretext, the AJ reasoned that the Agency solely evaluated Complainants based on their ACWA exam score and did not consider their qualifications, job performance, appraisals, or experience with the Agency. On appeal, we found that substantial evidence in the record supported the AJ's finding of age discrimination. In so finding, we noted that the Agency used the ACWA exam as way to screen out internal employees and recruit younger external hires for Claims Representative positions. We also noted that the Agency later hired younger external applicants from local colleges noncompetitively without using the ACWA exam.

Moore-Wilcher (Caitlyn H.) v. USDA, 0120150231 (03/14/2017) – Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of race (Caucasian), sex (female), age (53), and reprisal for prior protected EEO activity when she learned that she was not selected for the Assistant to the State Director position. The Agency issued a FAD which found that Complainant did not demonstrate that she was subjected to discrimination or reprisal. The Commission upheld this determination. However, we noted that the Selectee testified that the RMO told him that Complainant had previously filed an EEO complaint against her. The Commission's decision found that the disclosure of Complainant's EEO activities in the manner described by the Selectee was reasonably likely to deter Complainant and others, including the Selectee, from engaging in protected EEO activity.

Consequently, we MODIFIED the Agency's FAD finding of no discrimination and found that Complainant demonstrated that she was subjected to retaliation. We ordered the Agency to investigate Complainant's entitlement to compensatory damages. We also ordered training for the RMO, and for the Agency to consider disciplining her.

Pratas (Phoebe O.) v. SSA, 0120150304 (03/30/2017) – Complainant filed an EEO complaint alleging that: (1) the Agency illegally failed to reasonably accommodate her disability (herniated disc and tendonitis) when on April 12, 2013, her request for reasonable accommodation was denied due to lack of medical evidence; (2) she was subjected to harassment (non-sexual) on the bases of disability and reprisal (prior request for reasonable accommodation) when in addition to the incident set forth in Claim 1: (a) since November 2011, management has constantly reminded her that she was not performing to the full scope of her job; and (b) on March 19, 2013, Complainant's management told her that she would be undergoing Generalist cross-training and would be subject to disciplinary action if she refused job assignment duties, including working the front window. The Agency issued a FAD in which it found it had not discriminated against Complainant.

Complainant was a Claims Representative for the Agency. She claimed that the configuration of the workstation at the visitors' screening area aggravated her condition because she had to get up and down on a constant basis to access the printer. In addition, the width of her desk was a problem because it caused her to reach/stretch excessively and turn her neck on a constant basis. In her November 2012 request for an accommodation, Complainant requested: (1) a personal printer at her desk so that she did not have to repeatedly get up and down to retrieve documents; (2) an adjustable chair; (3) a desk configured so that she could sit facing the computer; and (4) to be exempt from screening at the reception window because the desk was too wide and caused undue reaching/stretching. Upon receiving her request for accommodations, the Agency immediately moved Complainant's screening duties to a different screening area, limited her time on screening

assignments, and provided her a printer at her desk. After 6 months however, the Agency finally denied Complainant's request for a narrower desk which would minimize reaching. Complainant submitted a second request for accommodations in June 2013, in which her physician wrote that Complainant's neck and right shoulder pain had "worsened due to her repetitious reaching overhead to get or give paperwork at the window station." He recommended that her desk not be "more than 20 inches wide" to reduce the shoulder and neck strain. The Agency's Reasonable Accommodation Coordinator approved the request for the narrower desk, but the Agency decided to defer changing Complainant's work station. In December 2013, the Agency informed her that her request for a shorter desk would be evaluated once plans were made for renovating their office sometime in 2014.

The Commission found that Complainant was provided with effective accommodations with respect to all of her requests except for one: a narrower desk. Although she had not supported her initial request with medical documentation, her second request in June 3013 provided updated medical information which clearly supported her request for a desk no wider than 20 inches. Although the Agency Reasonable Accommodation Coordinator approved the request, the Agency decided not to implement any changes until renovations were undertaken at some later unspecified date. We found that the Agency failed to meet its obligation to accommodate Complainant. The Agency's finding of no discrimination was affirmed on the other claims.

Accordingly, the Commission reversed the FAD and remanded the matter to the Agency with orders to provide Complainant a desk no wider than 20 inches; restore leave used; conduct a supplemental investigation as to compensatory damages; provide training to its EEO managers and staff regarding the Agency's obligations under the Rehabilitation Act; consider disciplining the responsible management officials; and to post a notice.

Smith (Clemente M.) v. Army, 0720140015 (03/16/2017) – On December 27, 2011, Complainant filed the instant EEO complaint, alleging, among other claims, that the Agency discriminated against him based on reprisal when on December 2, 2011, DCA and/or SO notified Complainant's current employer of the verdict on criminal charges against him. Complainant timely requested a hearing before an AJ. Over Complainant's objections, the AJ granted the Agency's motion for a decision without a hearing. In her decision, the AJ determined that Complainant established a prima facie case of reprisal, finding that Complainant established a temporal nexus between his EEO activity and an Agency Official's December 2, 2011, email. Addressing the Agency's argument that DCA was required to report this derogatory information to Complainant's new duty station, the AJ determined that DCA had no obligation to follow up with Fort Belvoir and that she contacted Fort Belvoir in order to interfere with Complainant's employment. The AJ awarded Complainant $2,000 in non-pecuniary damages and ordered the Agency to provide training to the responsible management officials and to post a notice. The Agency subsequently issued a final order rejecting the AJ's finding that Complainant proved that the Agency subjected him to discrimination as alleged.

On appeal, we affirmed in part and reversed in part the Agency's final order. Under the facts of this case, including DCA's significant personal involvement in Complainant's prior EEO activity, we determined that Complainant established a prima facie case of reprisal. The Agency's legitimate, nondiscriminatory reason was that DCA believed that she was obligated to report Complainant's criminal conviction to Fort Belvoir. Two Agency officials testified at the investigative fact-finding conference that the obligation to report on Complainant's conduct ended when that information was reported to CCF in November 2011. Further, one official testified that he could see no reason for the responsible management official to send the email through unofficial channels. Therefore, we found that Complainant established by a preponderance of the evidence in the record that the Agency's legitimate, nondiscriminatory reason was pretext designed to mask the more likely explanation, that DCA was motivated by unlawful retaliatory animus. We found that the AJ's award of $2,000 in non-

pecuniary compensatory damages was consistent with Commission precedent and would adequately compensate Complainant for the emotional distress he suffered as a result of the Agency's discrimination.

Aguirre (Eleanore M.) v. SSA, 0720160024 (03/02/2017) – Based on the evidence of record, we concurred with the decision of the EEOC AJ, finding that the Agency subjected Complainant to discriminatory harassment on the bases of national origin (Hispanic), sex (female), disability (association with a son with disability), and in reprisal for prior EEO activity, centering on her requests for leave related to medical care for her 2-year old son.

The matter was remanded to the Agency for the following remedies: pay Complainant $50,000 in non-pecuniary compensatory damages; conduct a supplemental investigation to determine lost pay and other applicable loss employment benefits and expenses, and interest which Complainant was denied; provide two hours of training to the responsible management officials concerning their responsibilities under the Rehabilitation Act with a special emphasis on the prohibition against disability-based harassment, including but not limited to parents of disabled children or persons associated with someone with a disability, consider taking disciplinary action against the responsible management officials.

8. CIRCULATED CASES

Hester S. v. EEOC, 0120121983 (October 24, 2016) – Beginning in 2010, Complainant requested several reasonable accommodations for her disabilities, and in April 2011. On April 21, 2012, the Agency presented Complainant with a proposed agreement and resignation letter for her to consider. On April 25, 2011, Complainant initiated EEO Counselor contact and alleged discrimination on the basis of disability and reprisal. On May 11, 2012, the union president presented Complainant with a settlement agreement, which stated that it resolved any pending or anticipated claims Complainant had regarding actions that occurred on or before the signing of the agreement. Complainant signed the agreement on May 11, 2012. On June 10, 2011, during a follow-up interview with an EEO Counselor, Complainant expanded her bases to include race, national origin, sex, and age. Subsequently, Complainant filed an EEO Complainant alleging discrimination on the bases of age, race, sex, national origin, disability and reprisal with respect to the Agency's failure to provide her with a reasonable accommodation.

In its final decision, the Agency dismissed Complainant's complaint on the basis that it was moot, or alternatively, failed to state a claim because it was resolved by a settlement agreement. On appeal, the Commission first noted that although the agreement was reached outside the EEO process, it constituted a purported waiver or release of Complainant's EEO complaint. The Commission further found that the agreement constituted a valid waiver of Complainant's non-age claims because the Complainant expressly affirmed that she had a reasonable time to consider the agreement's terms and consult with counsel, and she had the option not to sign the agreement.

With regard to Complainant's age claim, the Commission noted that the Older Workers Benefit Protection Act (OWBPA) sets up its own regime for waiving Age Discrimination Employment Act (ADEA) claims. The Commission noted that contrary to previous cases in which we have applied the

requirements of OWBPA, this case involved a situation wherein a complainant had not yet filed an age claim when she entered into the settlement agreement that purported to waive her claims against the Agency. The Commission held that a settlement agreement that does not comply with the enumerated requirements of the OWPBA does not constitute a valid waiver of age claims even if the age claim is first asserted after the settlement agreement is executed. The Commission noted that to the extent it has ruled differently in the past, it no longer will follow those previous cases. Applying OWBPA's requirements to this case, the Commission determined that the waiver at issue in this case did not state that Complainant was advised in writing to consult with an attorney prior to executing the agreement; Complainant was not given at least 21 days within which to consider the agreement; and Complainant was not given as seven-day period in which she could revoke the agreement. Consequently, the Commission found that Complainant had not waived her age discrimination claims because the Agency did not comply with OWBPA requirements, but Complainant validly settled her claims of discrimination on the bases of race, national origin, sex, disability, and reprisal through the agreement. The Commission remanded the age claim to the Agency for further processing.

Pedro C. v. EEOC, 0120151043 (10/11/2016) – Complainant filed a complaint with the Agency alleging that he was discriminatorily forced to retire from federal service. The Agency processed the complaint as a "mixed case," and thereafter issued its final agency decision (FAD), finding no discrimination. The FAD erroneously advised Complainant that he could appeal its decision to the Commission's Office of Federal Operations (OFO) rather than the Merit Systems Protection Board (MSPB). Following the Agency's instructions, Complainant timely filed an appeal with the OFO. The Agency subsequently notified Complainant via letter that the incorrect Appeal Rights were enclosed at the time of the mailing of the FAD. Enclosed with its letter, the Agency attached the corrected Appeal Rights, explaining Complainant's right to appeal its mixed-case FAD to the MSPB, and not to the OFO. We noted that, pursuant to 29 C.F.R. § 1614.302(d)(1)(ii), if a complainant is dissatisfied with the agency's final decision on a mixed-case complaint, a complainant may appeal the matter to the MSPB (not the EEOC) within 30 days of receipt of the agency's final decision. We noted that the Agency first advised Complainant that the instant complaint was a mixed case complaint when it issued Revised Notice of Acceptance, Notice of Amendment, and Notice of Mixed Case Complaint in a letter. We further noted that although the Agency initially provided Complainant with the incorrect appeal rights to the Commission, it subsequently corrected its instructions to Complainant, advising him of his right to appeal its FAD to the MSPB and not to the EEOC. As such, we found that the Commission lacked jurisdiction over his appeal. In so finding, we noted that after Complainant properly was advised of his appeal rights, he timely filed an appeal with the MSPB. We therefore dismissed his appeal.

Christopher (Bill A.) v. Army, 0120131989 (10/26/2016) – Complainant, a Welder who sustained on-the-job injuries to his back, alleged that the Agency discriminated against him on the bases of race and disability when it assigned him to menial tasks in the break room and did not permit him to perform his Welder duties. He also alleged that the Agency denied him overtime, hazard-duty pay, and other opportunities when it did not assign him to work in the Welding Components section. Complainant argued that he could perform the essential functions of his position with or without reasonable accommodation and that the Agency treated him less favorably than it treated other injured Welders. Agency managers asserted that they assigned Complainant to the break room because he could not perform the essential functions of his Welder position. The Selective Placement Coordinator stated that Complainant was eligible for selective placement in a vacant position but that Complainant's supervisor had not submitted a memorandum asking her to find another position for Complainant.

An EEOC AJ granted the Agency's motion for a decision without a hearing. The AJ found that Complainant did not establish a prima facie case of disparate treatment. In that regard, the AJ found that the Agency treated other employees differently from the way that it treated Complainant because their medical restrictions were different from Complainant's restrictions. In addition, the AJ found that the Agency fulfilled its reasonable-accommodation obligations by assigning Complainant to the break room.

The Commission concluded that the AJ erroneously issued a decision without a hearing. Noting that the record did not contain information about other employees' restrictions and the extent to which the employees' positions were restructured, the Commission found that there existed a genuine issue of material fact concerning whether the Agency treated Complainant less favorably than it treated similarly employees. The Commission also found that there were issues of credibility regarding discriminatory animus and pretext.

Further, the Commission found that there were genuine issues of material fact about whether the Agency could have provided Complainant with a reasonable accommodation that would have enabled him to perform the essential functions of his Welder position and, if not, whether the Agency could have reassigned Complainant to a vacant equivalent position. The record, which contained no information about vacancies, was not adequately developed. Given that the Agency had a duty to develop a thorough, impartial record, the Commission found the lack of information regarding vacancies to be particularly troublesome. The Commission clarified that, as part of the federal-sector investigative process, an investigator must obtain information about vacancies from an agency and should give a complainant the opportunity to explain whether she or he can perform the essential functions of the vacant positions with or without reasonable accommodation. The Commission remanded the matter to the AJ for further development of the record.

Bagwell (Serita B.) v. Army, 0120150846 (11/10/2016) **[Repeated above under Priority 2]** - This decision was circulated, and contains new legal language for joint employment cases. Complainant worked for a staffing firm serving the Agency as a Special Security Representative at its Joint Special Operations Command (JSOC), J2, Special Security Office. In her complaint, Complainant alleged that the Agency discriminated against and harassed her based on her sex (female/pregnancy) and disability (pregnancy/severe morning sickness) when her Agency supervisor asked her intrusive questions about her birth plan and medical treatment and expressed disapproval thereof, added Complainant's husband to the supervisor's contact list, and she was terminated. The Agency dismissed the complaint for failure to state a claim, reasoning that Complainant was not an employee of the Agency.

The Commission reversed because the Agency had a sufficient right to and/or actual control over Complainant's position to qualify as her common-law employer. Specifically, the Agency controlled how Complainant performed her job – her Agency supervisor assigned her work, set deadlines, advised her on her performance and demeanor, and assigned her additional projects. Complainant served the Agency from July 2013 until her termination in August 2014, a significant duration. She worked on Agency premises using Agency equipment, and the Agency set her working hours. Significantly, shortly after the Agency requested the staffing firm to cut off Complainant's services, the staffing firm expressed its belief that it was "required" to comply with the request and then terminated Complainant. As such, the Commission concluded that the Agency had de facto or joint power to terminate Complainant.

Charlie K. v. EEOC, 0120141109 (11/17/2016) - Complainant, an Investigator, filed an EEO complaint alleging that the Agency discriminated against him on the bases of race (Latino), national

origin (Mexican), sex (male), color (brown), disability (physical), sexual orientation ("traditional non-LGBT"), and reprisal for prior protected EEO activity. He previously had filed two EEO complaints alleging discrimination on the bases of race, color, national origin, disability, and reprisal with respect to several matters, including an alleged shoving incident involving a co-worker. In the instant complaint, Complainant again addressed the shoving incident and also alleged that the Agency improperly processed the prior complaints. The Agency dismissed the instant complaint on the grounds that it raised the same claims as those in the previous complaints and alleged dissatisfaction with the processing of a previously filed complaint.

On appeal, the Commission affirmed the Agency's dismissal of the complaint. Although the complaint raised a new basis, it stated the same facts as those set forth in the previous complaints. Accordingly, the Commission found that the Agency properly dismissed the complaint on the ground that it stated the same claim as the previous complaints. The Commission also found that the Agency properly dismissed the complaint on the ground that it alleged dissatisfaction with the processing of a previously filed complaint. The Commission noted that the Agency had issued a final decision on the previous complaints, that the final decision addressed Complainant's dissatisfaction with the processing of the complaints, that Complainant's appeal of that decision was pending before the Commission, and that his concerns about the processing of his complaints would be addressed in that appeal.

Iliana S. v. EEOC, 0520160482 (12/13/2016) – Complainant alleged that that the Agency discriminated against her on the bases of disability and reprisal when: (1) management interfered with her work productivity by not reviewing and signing five of her "cause" cases in a timely manner; and (2) management provided her with a "Fully Successful" rating for her FY 2010 performance appraisal.

The Agency issued a final decision finding no discrimination. The Commission, in its previous decision, affirmed the Agency's final decision regarding claim 1 but reversed the Agency's final decision regarding claim 2. Regarding claim 1, the Commission found that management articulated the following legitimate, nondiscriminatory reasons for its actions: (a) factors such as the need for corrections or modifications, discussion, attorney review, or management review could delay review of a case; (b) the evidence that Complainant submitted for several cases did not support a "cause" finding; and (c) it returned one of Complainant's cases because it believed that there were problems with the case. Moreover, the Commission found that Complainant did not prove pretext. Regarding claim 2, the Commission found that the following management affidavit testimony constituted direct evidence of retaliatory motivation: (a) Complainant's absences had a negative impact on the office; and (b) Complainant's work productivity had been impacted by her extensive absences. Moreover, the Commission found that management did not provide Complainant with an effective accommodation because it penalized her for missing work during her leave which was taken as a reasonable accommodation.

Complainant requested reconsideration of the previous decision regarding claim 1. The Commission denied Complainant's request. Specifically, the Commission found that Complainant's request did not show that the previous decision clearly erred in finding no pretext. Although Complainant argued that management treated her differently than a coworker, she did not show that the coworker's cases were similar to hers in scope and complexity. Although Complainant questioned how the previous decision could find discrimination regarding claim 2 but not regarding claim 1, the Commission noted that they were two separate claims entailing different analyses.

Charlie K. v. EEOC, 0120142315 (01/24/2017) **[Repeated under Findings above]** – Complainant, an Investigator, filed an EEO complaint alleging that the Agency discriminated against him on the

bases of national origin (Hispanic/Mexican), color (brown), and reprisal for prior protected EEO activity when it did not select him for training and when it subjected him to a hostile work environment involving seven incidents. He filed a second complaint alleging that the Agency discriminated against him on the bases of race (Hispanic/Latino), national origin (Mexican), color (brown), disability, and reprisal for prior protected EEO activity when it subjected him to a hostile work environment involving nine additional incidents. In a third complaint that was dismissed and incorporated into the instant matter, Complainant alleged that the Agency delayed the processing of his second complaint and that the investigation was biased and conducted improperly.

On appeal, the Commission found that the Agency subjected Complainant to per se reprisal when Complainant's supervisor told him that managers had spent half of a management meeting discussing Complainant's EEO complaint. Although the supervisor asserted that he was just joking when he made the comment, the Commission found that the "joke" was reasonably likely to deter a reasonable employee from engaging in protected activity and had a potentially chilling effect on the EEO process. The Commission emphasized that managers should never joke about or criticize an employee's EEO activity and should never discuss an employee's EEO activity at a management meeting. Although specific managers might appropriately discuss an EEO complaint in furtherance of processing or resolving the complaint, it is never appropriate for an employee's EEO activity to be the topic of general discussion.

With respect to Complainant's other claims, the Commission found that Complainant had not shown that discriminatory animus motivated his non-selection for training or the alleged harassing incidents. The Commission also found that the record did not support Complainant's allegation that the Agency improperly processed his complaints. There was no evidence that the investigation was biased, Complainant had ample opportunity to submit information, and the Commission reviewed and considered the several hundred pages of documents that Complainant submitted. Although the two-month delay in responding to Complainant's request for counseling was unacceptable, the record disclosed no evidentiary deficiencies resulting from the delay. Nonetheless, the Commission cautioned the Agency to ensure that such "inadvertent errors" do not occur in the future.

Manning (Darin B.) v. OPM, 0120161068 (03/06/2017) **[Repeated above under Priority 3]** – OFO held that the transgender male Complainant stated a cognizable claim of sex discrimination when he alleged that his Federal Employee Health Benefits (FEHB) insurance plan, Aetna, denied pre-authorization for nipple-areola reconstruction. This procedure is a type of gender reassignment surgery commonly used to treat gender dysphoria in transgender persons transitioning from female to male. Additionally, OFO noted that the Agency maintained that Complainant's disability discrimination claim regarding this matter should be dismissed under Section 705 of the Rehabilitation Act, which provides that "the term 'disability' shall not include "transvestism, transsexualism . . . gender identity disorders not resulting from physical impairments...." OFO concluded that dismissal of Complainant's disability claim under this provision of the Rehabilitation Act would be improper at this juncture because, without an investigation, Complainant had not had the opportunity to adduce evidence, and accordingly the record was silent, as to whether, Complainant's gender dysphoria resulted from a physical impairment. Accordingly, OFO remanded the complaint to the Agency for an investigation under EEO Regulations.

Lewis (Mike T.) v. DHS (CBP), 0520140553 (03/15/2017) – On March 26, 2012, Complainant alleged that the Agency violated the terms of a settlement agreement. Specifically, he argued that the Agency failed to remove references to his termination from Agency records and publicized the terms of the agreement. The Agency issued a letter of determination finding no breach of the settlement

agreement on May 10, 2012. Complainant appealed the Agency's determination to the Commission. In the appellate decision, the Commission found that the Agency did not comply with the settlement agreement because the record did not support the Agency's claim that it replaced Complainant's SF-50 as of March 2011. Additionally, the Commission found that the Agency had not met its burden to show that the release of Complainant's information was consistent with the terms of the settlement agreement.

The Agency requested reconsideration. The Commission granted the request upon finding that that the appellate decision clearly erred when it found that the Agency had not replaced Complainant's SF-50 with one that stated that he resigned for personal reasons as of March 2011. Moreover, the Commission found that the appellate decision clearly erred when it found that the Agency breached the non-disclosure provision of the settlement agreement. The plain language of the agreement, the Commission concluded, allowed its terms to be publicized when, among other things, it was required by law or regulation. The record indicated that Complainant had signed a release as part of the application process for a new position that he was seeking with the Agency. The release gave the Agency permission to disclose pertinent information to determine his suitability for the position. As part of a suitability determination, an investigation was conducted, and one of the factors considered was prior misconduct or negligence in employment. The Commission found that the Agency merely provided information related to Complainant's prior misconduct, as required by federal regulations and the terms of the agreement itself.

III. Federal Sector Oversight

- OFO conducted three technical assistance visits with federal agencies concerning non-compliance with laws, regulations or directives, and leading practices in federal EEO programs.
- OFO completed work on the FY 2012 - FY 2014 Annual Report on the Federal Work Force Part II.
- OFO published a special edition of the Digest of EEO Law (FY 2017, Volume 1) containing summaries of noteworthy select decisions issued in FY 2016. Staff also issued a press release and conducted social media outreach, in coordination with OCLA.
- OFO staff completed the FY 2016 Form 462 data collection as submitted by over 300 agencies and sub-components.
- OFO staff has conducted an internal assessment of the Form 462 data collection. Staff is also in the process of gathering stakeholder input regarding the utility of each of the tables contained in the current report (for possible revision).
- OFO staff submitted a final draft of the HHS program evaluation and recommendations to HHS for feedback, which will be incorporated into the final report. OFO has also contacted HHS to schedule an exit conference.
- OFO staff continued work on a program evaluation of VBA's EEO program by conducting interviews with VBA officials, including the agency head. OFO staff continued work on a program evaluation of VBA's EEO program by conducting three interviews and reviewing additional documents submitted, as well as planning for travel to Philadelphia, PA, and St. Petersburg, FL. Staff also drafted survey questions for distribution to VBA's EEO managers and local Reasonable Accommodation Coordinators.
- OFO staff drafted and launched an internal survey to determine which additional agencies should receive a program evaluation during FY 2017.
- OFO staff began rolling out its new Compliance Enforcement Program.
- OFO completed a final draft report by the Performance Metrics Committee titled, "Attitudes Toward the Effectiveness of OFO Amongst Federal Sector Stakeholders."
- OFO completed a final draft White Paper titled, "Proposal for Investigating Form 462/MD-715 Reporting Structure for Improved Efficiency."
- OFO staff completed a report titled, "An Examination of Appeals of Harassment Allegations within the Federal Sector."
- OFO staff worked on a criminological commentary for "The Report of the Co-Chairs of the EEOC Select Task Force on the Study of Harassment in the Workplace." The commentary assesses what criminology can add to what we know about effective harassment prevention.
- OFO staff continued working with OPM in order to obtain Enterprise Human Resources Integration – Statistical Data Mart (EHRI-SDM) Personnel Data.
- OFO staff continued work on a program evaluation of HHS's EEO program by conducting numerous interviews of staff in 10 subcomponents and reviewing volumes of documents. An 83-page final draft report was completed.

- OFO staff continued work on a program evaluation of VBA's EEO program by reviewing responses to an RFI and conducting an entrance conference with VBA officials, including the agency head.
- OFO staff generated a report on the Rate of Harassment and Sexual Harassment for the Department of Interior, National Park Service. This report compared the rate of retaliation complaints at the National Park Service to the government-wide rate over a five-year period (2011-2015).
- OFO participated in a one-day ACS Respondent Burden Testing Briefing session conducted by the Census Bureau.
- OFO is collaborating with the Performance Metrics Committee report to develop OFO impact measures.
- OFO conducted 63 Technical Assistance Visits with federal agencies concerning non-compliance with laws, regulations or directives, and leading practices in federal EEO programs.
- OFO staff drafted the Digest of EEO Law (FY 2017, Volume 2), an accompanying press release, and disseminated both to federal sector stakeholders via GovDelivery and Twitter, in coordination with OCLA. This edition of the Digest – featured on the eeoc.gov home page -- contains summaries of noteworthy select decisions issued in FY 2017.
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- OFO is collaborating with the Performance Metrics Committee to develop OFO impact measures.
- OFO staff continued work on a Program Evaluation of VBA by conducting on-site interviews of leaders in its St. Petersburg, FL, and Philadelphia, PA, regional offices. Staff reviewed documents and reasonable accommodation findings involving VBA. In addition, staff conducted a survey of approximately 100 VBA Reasonable Accommodation Coordinators and 50 EEO Managers across VBA's 56 offices.
- OFO staff submitted a draft Program Evaluation report to HHS in connection with a Program Evaluation begun during the prior year, and conducted an exit interview regarding that report.
- OFO staff began the planning stage of an evaluation that will analyze the participation of women in traditionally male-dominated public safety positions across the federal sector. This is a data-driven evaluation reviewing the past five years to determine gender disparities in recruitment and hiring. We are in the first stages of data gathering and estimate that the evaluation will be completed by the end of September 2017.
- OFO staff completed a computerized Barrier Analysis Tool for the recruitment phase of the employment lifecycle. An early version of this tool was presented to the National Council of Hispanic Employment Program Managers in January 2017.
- OFO staff continued work on a computerized Barrier Analysis Tool for the promotions phase of the employment lifecycle.
- OFO staff laid the groundwork for establishing an IPA agreement with Dr. Ellen Rubin, Associate Professor of Public Administration & Policy at the University of Albany – State University of New York. Dr. Rubin plans to collaborate with OFO to produce a report on EEO retaliation in the federal government.
- OFO staff completed the first draft of a report titled "Harassment as a Crime: A Criminological Perspective on Harassment in the Workplace."
- OFO staff continued work on an empirical report about the "Fatherhood Pay Bonus" in the federal and non-federal sectors.
- OFO staff has continued work on modifying Form 462 and the Annual Report on the Federal Workforce. The performance metrics committee has continued to make progress toward the formation of an OFO Impact Measures database. The Committee has assigned each group member to an OFO unit for which they are tasked with the goal of identifying the following: (a) an OFO activity; (b) the immediate, intermediate, and/or long-term impacts of this activity; (c) the data points

that can be used to measure each activity and the associated impacts; (d) and the databases that house these data points.

- OFO staff tested and confirmed that the alternative coding system for Form 462 provides a more efficient data retrieval process over the current coding system. We have assigned a unique code to each data point and filter option, significantly reducing the code needed to generate flat files and data requests and reducing OFO's dependency on OIT for data querying.
- OFO has studied the format of the current Annual Report, surveyed stakeholder opinions on the content of the current report, and revised the content of the report based on these assessments. We developed a new theme for the report, a logic model, and started formatting the tables for the revised report.
- OFO staff continued to work towards developing an alternative data collection tool for Form 462. We are seeking to identify a platform that is user friendly and flexible so that OFO can create the data collection tool in-house, with reduced dependency on OIT. We have identified software as possible alternatives and are testing the utility of each.
- OFO produced a report on the federal government-wide rate of timely counseling, investigations and FADS for the years 2015 and 2016.
- OFO produced a report on the distribution of sex, sexual harassment, PDA, and EPA complaints for FY2016. OFO also developed a report on the distribution of women by GS-14, GS-15 and SES Grades.
- OFO staff produced a report on the government-wide rate of ADR offerings and acceptances for FY2016.
- OFO staff reviewed the data analysis techniques presented in Appeal No. 0120130554 and provided feedback on the validity of the techniques used.

IV. Outreach & Training

1. Eliminating Barriers in Recruitment and Hiring

- OFO continued work on computerized Barrier Analysis Tools that will provide agencies a list of potential barriers to equal employment opportunities based on their answers to a thorough set of yes/no questions. Staff produced an alpha version of the computerized Recruitment and Promotions Barrier Analysis Tools. After answering all questions, a report appears that lists triggers, associated possible barriers and recommendations.
- EEOC staff presented on Reasonable Accommodation and Disability Issues to the General Accounting Office in Washington, DC.
- EEOC staff spoke on "Preventing Retaliation" at the Bureau of Land Management in Lakewood, CO.
- EEOC staff spoke on EEOC's new Retaliation Guidance at NASA Headquarters in Washington, DC.
- EEOC staff presented on LGBT Issues for Department of Transportation attorneys via teleconference.

- EEOC staff presented on Disability Issues, Harassment Prevention and Generational Differences at the Federal Executive Board in Philadelphia, PA.
- OFO staff presented on LGBT Issues for the Department of Housing and Urban Development in Washington, DC.
- OFO and EEOC staff provided a presentation on LGBT Workplace Issues for Defense Equal Opportunity Management Institute (DEOMI) 45th Anniversary conference at Ft Patrick, FL.
- Dexter Brooks, OFO Associate Director, spoke on "The Future of EEO and Discrimination Practices" to the National Black Coalition of Federal Aviation Employees in Washington, DC.
- EEOC staff made a webinar presentation on "Recent Federal Sector Reasonable Accommodation Cases" to the U.S. Forest Service in Washington, DC.
- EEOC staff made a presentation on "Addressing Performance and Conduct Issues Involving Persons with Disabilities" at the Food and Drug Administration in Rockville, MD.
- EEOC staff spoke as part of a training video on Reasonable Accommodation for the Department of Housing and Urban Development in Washington, D.C.
- EEOC staff made a presentation titled, "Small Acts of Inclusion" at the Government Publishing Office in Washington, D.C.
- EEOC staff participated in a panel discussion marking the hiring of more than 100,000 federal employees with disabilities pursuant to Executive Order 13548, at a White House event in Washington, D.C.
- OFO staff presented the Disability Program Management course at DEOMI, Patrick Air Force Base in Florida.
- OFO and EEOC staff presented Case Updates and Barrier Analysis training for the Department of Homeland Security (DHS).
- OFO staff presented to the Hispanic Employment Council on new Barrier Analysis requirement for the Hispanic federal workforce.
- OFO staff presented on Unconscious Bias to the Patent and Trademark Office.
- OFO staff presented to the Department of Defense (DOD) on MD-715 requirements and updates on Section 501 of the Rehabilitation Act (Rehab Act).
- OFO staff, Commissioner Feldblum, and the Office of Legal Counsel hosted a panel on Section 501 of the Rehab Act to explain the updated regulations.
- OFO staff hosted a Disability Program Manager meeting and provided an overview on the updated Section 501 regulations.
- EEOC staff held a webinar with the Department of Labor and the Employee Access Network to discuss the updated Section 501 regulations.
- EEOC staff presented a webinar on Disability Disclosure at the Rising Leaders Mentoring Program, Disability Disclosure Training.
- OFO staff presented on Non-Discriminatory Hiring and the Selection Process for the Federal Election Commission.

2. Protecting Immigrant, Migrant and Other Vulnerable Workers

- EEOC staff presented on Reasonable Accommodation and Disability Issues to the General Accounting Office in Washington, DC.
- OFO staff spoke on Preventing Harassment to the US/China Commission in Washington, DC.
- EEOC staff spoke on Preventing Retaliation at the Bureau of Land Management in Lakewood, CO.
- OFO staff presented on Reasonable Accommodation at the Consumer Finance and Trade Commission in Washington, DC.
- EEOC staff spoke about the agency's new Retaliation Guidance at NASA Headquarters in Washington, DC.
- EEOC staff presented on LGBT Issues to Department of Transportation attorneys via teleconference.
- EEOC staff presented on Disability Issues, Harassment Prevention, and Generational Differences to the Federal Executive Board in Philadelphia, PA.
- OFO staff presented on LGBT Issues for the Department of Housing and Urban Development in Washington, DC.
- OFO and EEOC staff provided a presentation on "LGBT in the Workplace" for the Defense Equal Opportunity Management Institute (DEOMI) 45th Anniversary conference at Ft. Patrick, FL.
- OFO staff presented on "Contractor Issues in Federal Sector" to EEO counselors at the Federal Mediation and Conciliation Service in Washington, DC.
- EEOC staff made a webinar presentation on Recent Federal Sector Reasonable Accommodation Cases to the U.S Forest Service in Washington, DC.
- EEOC staff made a presentation on LGBT-related Sex Discrimination under Title VII to U.S. Department of Justice in Washington, DC.
- OFO staff delivered a series of webinars on Reasonable Accommodation for the USCIS/DHS.
- EEOC staff participated in part of a training video on Reasonable Accommodation for the Department of Housing and Urban Development in Washington, DC.
- EEOC staff delivered a presentation titled, "Small Acts of Inclusion" at the Government Publishing Office in Washington, D.C.
- OFO staff presented the Disability Program Management course to DEOMI at Patrick Air Force Base, Florida.
- OFO staff presented to DOD on MD-715 requirements and updates to Section 501 of the Rehab Act.
- OFO Associate Director, Commissioner Feldblum and the Office of Legal Counsel hosted a panel on Section 501 of the Rehab Act explaining the updated regulations.
- OFO staff hosted a Disability Program Manager meeting providing an overview on updates to the Section 501 regulations.
- Associate Legal Counsel presented to the Federal EEO Civil Rights Council on Employer Obligations to Pregnant Workers.

- OFO staff presented to USDA on enforcement protections for LGBT employees.
- OFO Associate Director conducted a radio interview on EEO Best Practices in Reasonable Accommodation and Complaint Processing.
- EEOC staff held a webinar with the Department of Labor and the Employee Access Network to discuss the updated Section 501 Rehab Act regulations.
- EEOC staff presented a webinar on Disability Disclosure at the Rising Leaders Mentoring Program, Disability Disclosure Training.
- Associate Legal Counsel presented to the Federal EEO Civil Rights Council on Employer Obligations to Pregnant Workers.
- OFO staff presented to USDA on enforcement protections for LGBT employees.
- OFO and EEOC staff presented multiple sessions on Preventing Workplace Harassment and Providing Reasonable Accommodation for Managers at the Department of Interior, Bureau of Reclamation, in Nevada, California and Arizona.

3. Addressing Emerging and Developing Issues

- EEOC staff presented on Reasonable Accommodation and Disability Issues to the General Accounting Office in Washington, DC.
- OFO staff presented an Overview of EEO Laws at the Department of Homeland Security, Federal Emergency Management Agency, in Washington, DC.
- OFO Associate Director Dexter Brooks spoke on Conflict Resolution at USDA in Washington, D.C.
- EEOC staff spoke on Preventing Retaliation at the Bureau of Land Management in Lakewood, CO.
- EEOC staff spoke about the agency's new Retaliation Guidance at NASA Headquarters in Washington, DC.
- EEOC staff presented on LGBT issues for Department of Transportation attorneys via teleconference.
- EEOC staff presented on Disability Issues, Harassment Prevention, and Generational Differences at Federal Executive Board in Philadelphia, PA.
- OFO staff presented on LGBT Issues for the Department of Housing and Urban Development in Washington, DC.
- OFO and EEOC staff presented on LGBT in the Workplace for the Defense Equal Opportunity Management Institute (DEOMI) 45th anniversary conference at Ft. Patrick, FL.
- OFO staff presented on Contractor Issues in Federal Sector to EEO counselors at the Federal Mediation and Conciliation Service in Washington, DC.
- OFO Associate Director Dexter Brooks spoke on "The Future of EEO and Discrimination Practices" for the National Black Coalition of Federal Aviation Employees in Washington, DC.
- EEOC staff conducted a webinar on Recent Federal Sector Cases on Reasonable Accommodation at the U.S. Forest Service.
- EEOC staff presented on "Addressing Performance and Conduct Issues Involving Persons with Disabilities" at the Food and Drug Administration in Rockville, MD.

- EEOC staff presented on LGBT-related Sex Discrimination under Title VII to the Department of Justice in Washington, DC.
- EEOC staff participated in a training video on Reasonable Accommodation for the Department of Housing and Urban Development in Washington, DC.
- EEOC staff presented on Small Acts of Inclusion to the Government Publishing Office in Washington, DC.
- EEOC staff participated in a panel discussion marking the hiring of more than 100,000 federal employees with disabilities pursuant to Executive Order 13548, at a White House event in Washington, DC.
- OFO staff presented on LGBT Related Discrimination under Title VII to the Department of Interior, Fish and Wildlife Services.

4. **Enforcing Equal Pay Laws**

- OFO staff completed a reading list for, and began the process of, drafting a literature review of the Parenthood and Pay analytic report. OFO staff has also continued preliminary analyses of ACS data.
- OFO staff presented on Overview of EEO Laws to the Department of Homeland Security, Federal Emergency Management Agency, in Washington, DC.

5. **Preserving Access to the Legal System**

- EEOC staff spoke on Preventing Retaliation at the Bureau of Land Management in Lakewood, CO.
- OFO staff presented on EEO Laws for Managers and Supervisors at FMCSA, in Arlington, VA.
- EEOC staff spoke on EEOC's new Retaliation Guidance at NASA Headquarters in Washington, DC.
- OFO staff presented an Overview of EEO Laws to the Department of Homeland Security, Federal Emergency Management Agency, in Washington, DC.
- EEOC staff presented on LGBT issues to Department of Transportation attorneys via teleconference.
- OFO staff presented on LGBT Issues to the Department of Housing and Urban Development in Washington, DC.
- OFO and EEOC staff presented on LGBT in the Workplace at the Defense Equal Opportunity Management Institute (DEOMI) 45th anniversary conference at Ft. Patrick, FL.
- OFO staff presented on Contractor Issues in the Federal Sector to EEO counselors at the Federal Mediation and Conciliation Service in Washington, DC.
- OFO Associate Director Dexter Brooks spoke on "The Future of EEO and Discrimination Practices" at the National Black Coalition of Federal Aviation Employees in Washington, DC.
- EEOC staff presented on LGBT-related Sex Discrimination under Title VII to the Department of Justice in Washington, DC.

- OFO staff presented an Overview of EEO Laws to the Department of Homeland Security, Federal Emergency Management Agency, in Washington, DC.
- OFO staff and an Administrative Judge presented an overview on Retaliation and Hostile Work Environment at the National Advocacy Center in Columbia, South Carolina.
- Administrative Judge presented an overview of EEO Laws, Remedies and the EEO Complaint Process.
- OFO staff presented to USDA on EEOC's updated Retaliation Enforcement Guidance.
- OFO staff presented the Investigator Refresher course to the Center for Medicaid Services in Baltimore, MD.
- OFO staff presented an EEO Overview on Harassment Prevention and Retaliation to the Food and Drug Administration in San Juan, Puerto Rico.
- OFO staff hosted a webinar on the updated Enforcement Guidance on Retaliation.
- OFO staff hosted a webinar on Federal Sector Pilot Guidance for Complaint Processing.
- OFO staff hosted a Brown Bag session on Federal Sector Pilot Guidance for Complaint Processing.

6. Preventing Harassment through Systemic Enforcement and Targeted Outreach

- OFO staff spoke on Preventing Harassment to the US/China Commission in Washington, DC.
- OFO Associate Director Dexter Brooks spoke on Conflict Resolution to USDA in Washington, DC.
- EEOC staff presented on LGBT Issues for Department of Transportation attorneys via teleconference.
- EEOC staff presented on Disability Issues, Harassment Prevention, and Generational Differences to the Federal Executive Board in Philadelphia, PA.
- OFO staff presented on LGBT Issues for the Department of Housing and Urban Development in Washington, DC.
- OFO staff presented on EEO Laws for Managers and Supervisors at FMCSA in Arlington, VA.
- OFO and EEOC staff presented on LGBT in the Workplace at the Defense Equal Opportunity Management Institute (DEOMI) 45th anniversary conference at Ft. Patrick, FL.
- OFO Associate Director Dexter Brooks spoke on "The Future of EEO and Discrimination Practices" for the National Black Coalition of Federal Aviation Employees in Washington, DC.
- EEOC staff presented on LGBT-related Sex Discrimination under Title VII to the Department of Justice in Washington, DC.
- OFO staff presented multiple trainings on Preventing Harassment to the Environmental Protection Agency in New York City, NY, and Edison, NJ.
- OFO staff presented training on Preventing Workplace Harassment to DTIC in Washington, DC.

- OFO staff presented training on Preventing Workplace Harassment to the Federal Energy Regulatory Commission.
- OFO staff presented training on Unlawful Workplace Harassment to the Department of Justice.
- OFO staff presented to DOD on MD-715 Requirements and Updates to the Section 501 Rehab Act regulation.
- OFO staff hosted a Brown Bag session on Federal Sector Pilot Guidance for Complaint Processing.
- OFO staff presented to senior leaders of DHS on Sexual Harassment Prevention.
- EEOC staff provided training on Preventing Workplace Harassment to the Bureau of the Fiscal Service (Treasury Department) in Kansas City, MO.
- EEOC staff presented at the Association for the Improvement of Minorities in Emeryville, CA, on the Evolution of Civil Rights in the Workplace to Ensure Nondiscriminatory and Hostile-Free Work Environments.
- OFO staff presented an EEO Overview on Harassment Prevention and Retaliation to the Food and Drug Administration in San Juan, Puerto Rico.
- OFO staff presented on Conflict of Interest, MD-110 and OFO Operations to the Small Agency General Counsel.
- OFO staff presented to DHS on Preventing Sexual Harassment for Managers.
- OFO and EEOC staff presented multiple sessions to the Department of Justice (DOJ) on Preventing Workplace Harassment for Supervisors.
- OFO staff conducted a webinar on Rebooting Harassment Prevention.
- OFO and EEOC staff presented multiple sessions to DOJ on Preventing Workplace Harassment for Employees.
- OFO staff hosted a panel at the Bureau of Land Management on Preventing Workplace Harassment.

7. Training/Outreach – General

- OFO Associate Director Dexter Brooks spoke on Conflict Resolution at USDA in Washington, DC.
- EEOC staff presented on Disability Issues, Harassment Prevention, and Generational Differences at the Federal Executive Board in Philadelphia, PA.
- OFO staff presented on Contractor Issues in Federal Sector to EEO counselors at the Federal Mediation and Conciliation Service in Washington, DC.
- OFO Associate Director Dexter Brooks spoke on "The Future of EEO and Discrimination Practices" for the National Black Coalition of Federal Aviation Employees in Washington, DC.
- EEOC staff presented on Small Acts of Inclusion at an event for employees of the Government Publishing Office in Washington, D.C.
- OFO Associate Director presented on Unconscious Bias to the Patent and Trademark Office.
- OFO Director presented at the Department of Education for Black History Month, addressing this year's theme: Crisis in Black Education.

- OFO Associate Director presented on Policy-Driven EEO Laws at the Senior Executive Leadership Officer Seminar for U.S. Coast Guards in Fort Patrick, Florida.
- EEOC staff presented to the Association for the Improvement of Minorities in Emeryville, CA, on the Evolution of Civil Rights in the Workplace to Ensure Nondiscriminatory and Hostile-Free Work Environments.
- OFO staff presented on Non-Discriminatory Hiring and the Selection Process for the Federal Election Commission.
- OFO staff conducted an interview with Federal News Radio on EEOC federal sector training courses and the 2017 EXCEL conference.
- OFO Associate Director presented to the Treasury Department for Black History Month.
- EEOC staff presented to the U.S. Marshall Service on EEO Laws, Remedies and the EEO Complaint Process in Los Angeles, CA.
- EEOC staff presented to the EPA on Religious Expression and Accommodation for Employees in Atlanta, GA.
- OFO staff hosted a webinar on Pilot Guidance for the EEO Complaint Process.
- OFO staff hosted a Brown Bag session on Pilot Project Guidance for the EEO Complaint Process.
- OFO staff presented multiples sessions to CFPB on EEO Laws for Managers.
- OFO staff conducted the Investigator Refresher course for the Center for Medicaid Services in Baltimore, MD.

Quarterly Strategic Enforcement Plan Report
Office of Federal Operations
3rd and 4th Quarters FY 2017

I. Background: General FY 2017 4th Quarter Appellate Review Program Accomplishments

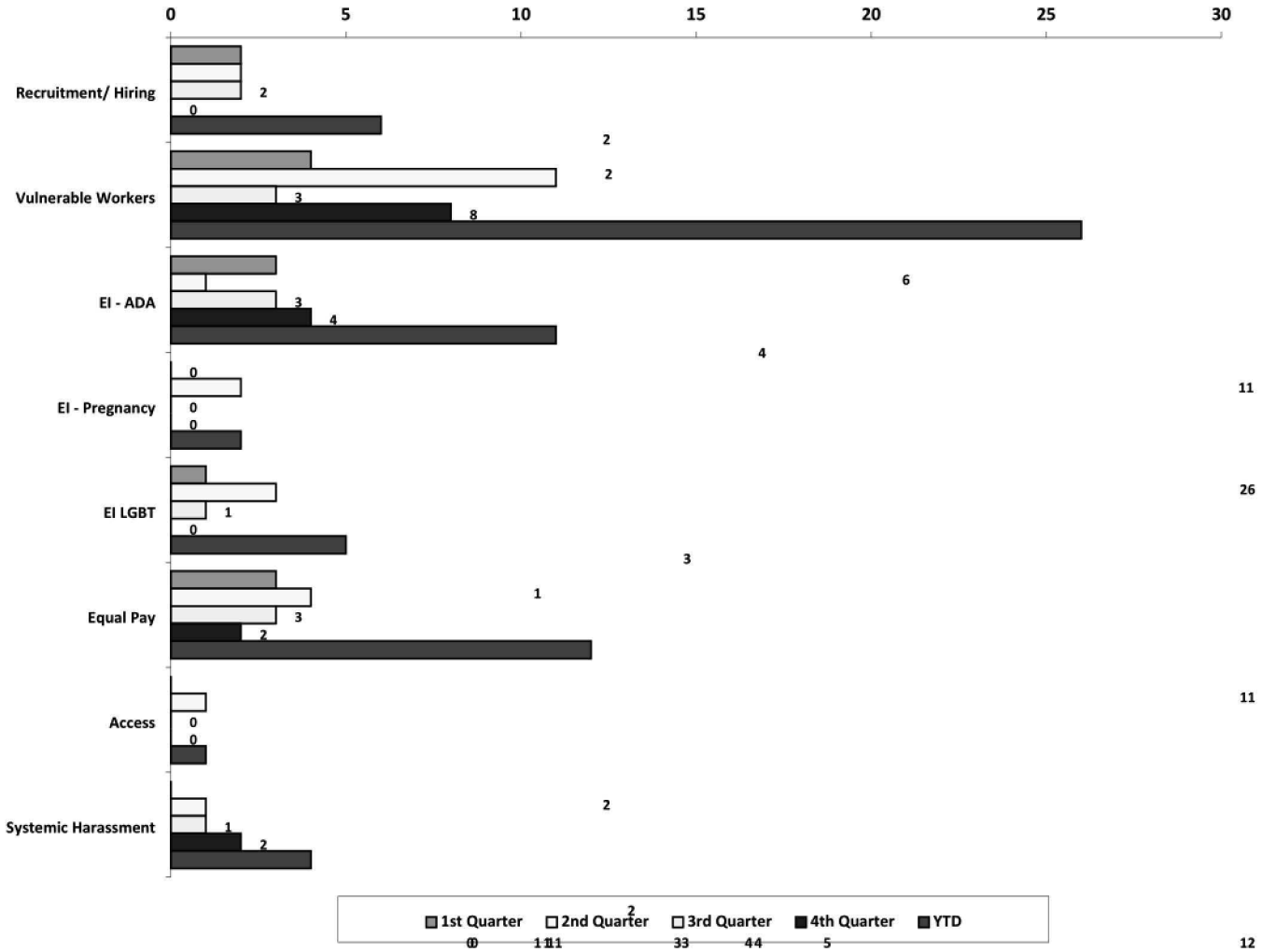
During the 3rd and 4th Quarters of FY 2017, the Office of Federal Operations (OFO) resolved 2,440 appeals, including 1,429 decisions on the merits and 877 procedural closures. Of the 877 procedural closures, 518 of them involved initial appeals under review by OFO, and we reversed 179 or 34.6% of the agency dismissals. Of the 1,429 merit decisions, OFO issued 27 findings of discrimination during the 3rd and 4th Quarters. We found discrimination on the basis of retaliation in 12 of the findings, sex (Female) in 4 of the findings, physical disability in 3 of the findings, and race (Black) in 3 of the findings. The top three issues involved in the findings included harassment (7), disability accommodation (5), terms/conditions of employment (4), and assignment (3).

Resolution Description	1st Quarter	2nd Quarter	3rd Quarter	4th Quarter	Year to Date
Resolutions	813	1,031	1,161	1,279	4,284
Merits Resolutions	408	493	663	766	2,330
Findings	11	30	14	13	68
Non-Findings	397	463	649	753	2,262
Procedural Resolutions (all)	348	456	415	462	1,681
Procedural Resolutions (from Initial Appeal excluding denials)	215	285	250	267	1,017
Affirming Dismissal	140	167	175	163	645
Reversing Dismissal	75	118	75	104	372

With regard to the categorization of the 2,440 resolutions, OFO identified 19 appeals that implicated one or more SEP/FCP priority. Section II below contains charts breaking down the composition of the individual priorities, summaries of the 19 decisions OFO attorneys categorized as implicating the SEP/FCP priorities, and summaries of the findings of discrimination made in the 3rd and 4th Quarters.

II. Analysis of SEP/FCP Priority Areas

The chart below depicts the distribution of the 19 appellate decisions OFO identified as implicating an SEP/FCP category:



The numbered sections below provide more information about each of the six SEP priorities. Specifically, these sections start with a paragraph summarizing the related FCP categories under each SEP, as well as summaries of the specific decisions under each SEP/FCP priority. In Section 7, by contrast, we provide summaries of the findings of discrimination issued during the 3rd and 4th Quarters, whether or not they implicated an SEP/FCP category.

1. ELIMINATING BARRIERS IN RECRUITMENT AND HIRING

Neither decision under this SEP priority implicated an FCP category.

Davidson (Tyree L.) et al. v. DHS (CIS), 0120102908 (04/06/2017) **[Repeated under Circulated Decisions below]** – Complainant filed a class complaint alleging the Agency had a "long established

practice of not hiring African-Americans above the GS-13 level in [the] Central Region, and its legacy organization (Southern Region)." Complainant indicated that several selections involving GS-14 and above positions have been made where "highly qualified and referred" African-American candidates were not selected in favor of less-qualified non-African-American candidates. Complainant, as the class agent, alleged he was the victim of this discrimination when, on October 13, 2009, he was not selected for a Supervisory Management and Program Analyst, GS-14 position.

The case was forwarded to an EEOC AJ for processing as a class complaint. On June 24, 2010, the AJ issued her decision denying class certification. The AJ determined that Complainant established the prerequisites of commonality and typicality. However, the AJ held that numerosity was not established as there was no evidence in support of Complainant's claims concerning the number of selections made during the relevant time period. Further, the AJ noted that Complainant was not an attorney and had not retained counsel. As such, the AJ held that Complainant did not establish the prerequisite of adequacy of representation. Complainant appealed.

The Commission affirmed the AJ's decision denying class certification. However, the appellate decision held that Complainant failed to establish all of the four prerequisites for class certification. Complainant failed to provide any evidence to support his estimate for the number of class members even on appeal. Even among the ten purported members of the class, Complainant failed to show that any of them had applied, or been eligible, for promotion to the GS-14 level. The decision also found that Complainant failed to establish commonality and typicality as Complainant had not shown that there was a common Agency practice or policy in effect resulting in discrimination, or that he had been subjected to that policy or practice. Finally, as to adequacy of representation, while Complainant provided a name of counsel, the law firm failed to provide any evidence to show it had sufficient legal training and experience to pursue a class action of this type. Class certification was denied and Complainant's individual complaint of discrimination was remanded for further processing.

Chambers (Brenton W.) v. DOT, 0120130554 (06/29/2017) **[Repeated under Broad Impact Decisions, Enforcement – General, and Circulated Decisions, below]** – Complainant was previously a GS-14 Air Traffic Control Specialist (ATC). He and other ATCs were removed from employment by presidential order during the Professional Air Traffic Controllers Organization (PATCO) strike in 1981. In November 1997, Complainant filed an EEO complaint in which he alleged that the Agency discriminated against him because of his age (born in 1947) when it did not select him for a GS-12/13/14 ATC position.

Ultimately, an EEOC AJ found that Complainant proved age discrimination on the theory of disparate treatment but failed to prove that the Agency's selection policy disparately impacted applicants over 40 years old. On appeal, OFO determined that the agency articulated legitimate, non-discriminatory reasons for its actions, i.e., that Complainant was excluded from eligibility for the GS-12/13/14 position because Agency officials thought ex-PATCO controllers such as Complainant could only be hired at the GS-9 level from a separate ex-PATCO applicant list.

Nevertheless, OFO noted that there was compelling evidence that the Agency's explanations were pretext for age discrimination. Specifically, OFO noted that the Agency issued a Question and Answer (Q & A) document that stated that the age of ex-PATCO applicants partly justifies the Agency's decision to only hire them at the GS-9 level, which is a glaring contradiction of the ADEA's mandate that all personnel actions in the federal sector "shall be free from any discrimination based on age." OFO further noted that the Agency's policy of excluding ex-PATCO candidates from consideration for GS-12/13/14 positions almost exclusively affected workers who were 40 years of age or older. Additionally, OFO noted that a witness testified that a selecting official mentioned that the Agency had "some age concerns" about ex-PATCO controllers. As such, OFO found that the Agency used ex-PATCO status as a proxy for age, which ultimately resulted in Complainant's nonselection for a GS-12 ATC position. Consequently, OFO found that substantial evidence supported the AJ's finding that Complainant proved he was subjected to disparate treatment because of his age.

OFO declined to review the AJ's finding regarding disparate impact because no additional remedies would be available for Complainant if he prevailed on this theory. However, OFO noted that a claim of disparate impact may be made under the ADEA against federal agency employers, and agencies may avoid liability by establishing that the policy at issue was job-related and consistent with business necessity.

In order to remedy the discrimination, OFO ordered the Agency to retroactively place Complainant into the GS-12 ATC position effective October 31, 1996, until the date on which he would have reached mandatory retirement; to tender to Complainant applicable back pay with interest; to provide in-person EEO training to responsible Agency officials; and to post a notice of the finding of discrimination.

2. PROTECTING IMMIGRANT, MIGRANT AND OTHER VULNERABLE WORKERS

All eleven decisions that implicated this SEP Priority concerned the FCP Contractors.

Decision Summaries for this Category

Whitfield (Luvenia S.) v. ODNI, 0120170733 (05/19/2017) – During the relevant time, Complainant worked for two private companies that contracted with the Agency to provide administrative and technical support. First, in October 2012, Complainant was hired by General Dynamics Information Technology (GDIT) as a Human Resources Generalist. She was terminated approximately a year later, in September 2013. Second, in May 2015, Complainant was hired by TekMasters, a subcontractor of GDIT, as a Business Support Specialist until she was terminated in June 2016. Complainant filed a formal complaint alleging discrimination based on race (African American), color (Black), sex (female), and reprisal concerning her 2013 termination from GDIT, allegations of harassment in 2016, and her 2016 termination from TekMasters. The Agency dismissed the complaint, determining Complainant lacked standing as she was neither an applicant nor employee of the

Agency. The Agency also dismissed the claim concerning the 2013 termination from GDIT as untimely raised.

As an initial matter, we affirmed the Agency's dismissal of the claim concerning the 2013 termination as untimely raised, noting she pursued this claim well beyond the 45-day limitation period. In affirming the Agency's dismissal of the remaining claims for lack of standing, we "reaffirmed [our] long-standing position on 'joint employers'," referencing several prior decisions and guidance documents. We noted that numerous factors are considered, yet no one factor is considered decisive and it is not necessary to satisfy a majority of those factors. Instead, the proper analysis considers all the circumstances in the individual's relationship to the agency based on what actually occurs in the workplace, even if the contract between the agency and the staffing firm contains contradictory language.

In the instant case, we found that the evidence of record established that Complainant performed her duties at an Agency facility, using Agency equipment and that an Agency supervisor provided her with most of her assignments. However, the record also showed that Complainant's work was directly supervised by a TekMasters Project Manager, who prepared her performance evaluations, and approved her schedule, absences and leave requests. The evidence also showed that, despite the Agency supervisor's expression of satisfaction with Complainant's work, TekMasters terminated Complainant, at least in part, because of complaints from GDIT that she had problematic communications with GDIT managers. Complainant, herself, indicated that she was really challenging the actions of GDIT. Based on this evidence, our decision concluded that the Agency did not exercise sufficient control over Complainant's position to qualify as a joint employer for the purposes of the EEO complaint process.

Deshpande (Michal G.) v. VA, (06/27/2017) – At the time of events giving rise to her complaint, Complainant was a physician and a candidate to be in an Agency pool to serve when requested as a Medical Officer of the Day. Medical Officers of the Day generally work intermittently and provide medical coverage during non-administrative hours, e.g., nights and weekends. Complainant filed an EEO complaint alleging discrimination based on his age and reprisal when the Agency denied him entry into the pool. Following an investigation, Complainant requested a hearing. The AJ dismissed the complaint, summarily ruling that Medical Officers of the Day are independent contractors. The Agency fully implemented the AJ's decision. OFO reversed. It reasoned that the Agency controlled or had the right to control the Medical Officer of the Day position. Specifically, Medical Officers of the Day are supervised by Agency management, the Agency decides both whether to include someone in the pool and to utilize him, it creates individualized proficiency reports for them, and can revoke or suspend privileges, i.e., authority to practice/work at the VA. Also, Medical Officers of the Day work on Agency premises using its equipment, they perform mission work and can work on an ongoing basis, and while they receive no benefits are paid on an hourly basis.

Caminiti (Millicent H.) v. Army, 0120171215 (06/22/2017) – In 2014, after nine years of service, Complainant retired from the U.S. Army. Thereafter, she worked as a contractor with CACI-Wexford,

Inc. assigned to the Agency's Joint Improvised Threat Defeat Organization in Washington D.C. While deployed in Germany, Complainant was sexually assaulted by her supervisor. In July 2015, she checked herself into a month-long treatment facility for post-traumatic stress disorder and later went to a second treatment facility for two months. Both CACI and her Agency supervisors were aware of Complainant's post-assault treatments.

In May 2016, CACI directed Complainant to notify the contractor's Facility Security Officer (FSO) about her mental health treatment. The FSO questioned Complainant about the assault, her treatment, and the investigation. In mid-July 2016, the resulting Incident Report was placed in Complainant's Joint Personnel Adjudication System – a master repository for the personnel security management of all Dept. of Defense employees and contractors. After the Agency's Security Officer reviewed the Incident Report, he concluded that Complainant should no longer be "read-on to TS/SCI information" (Sensitive Compartmented Information). As a result, her access to the Agency's facility, classified IT systems and information ceased. CACI placed Complainant on administrative leave for 12 weeks, and then terminated her due to the Agency's suspension of her SCI access.

Believing that the Agency's use of her non-reportable information to suspend her SCI access was discriminatory, Complainant filed a formal complaint based on sex and disability. The Agency dismissed the complaint on the grounds that Complainant was not an Agency employee.

In reversing the Agency's dismissal, we "reaffirmed [our] long-standing position on 'joint employers'", referencing several prior decisions and guidance documents. Numerous factors are considered, yet no one factor is considered to be decisive nor is it necessary to satisfy a majority of those factors. Instead, the proper analysis considers all the circumstances in the individual's relationship to the Agency. In addition to considering many factors, we reiterated that a significant factor is whether the Agency has the power to terminate an employee. In the instant case, we found that the Agency held de facto power to terminate.

Yarbough (Bobbye C.) v. NASA, 0120171370 (07/18/2017) – At the time of events giving rise to her complaint, Complainant worked for a staffing firm serving the Agency as a Deputy Project Scientist. She alleged in her complaint that the Agency discriminated against her based on her race (African-American) and sex (female) when in December 2014, she assumed the duties of a former Project Scientist, but not the classification, title and pay, instead retaining her old title. The Agency dismissed the complaint for failure to state a claim. It reasoned that under common law it was not Complainant's employer because the staffing firm had supervisory control over the means and manner of her performance and paid her compensation. On appeal, OFO reversed. We found that the Agency had the right to exercise sufficient control over Complainant to be her employer. In holding this, we found that the Agency assigned some of Complainant's work, supervised and reviewed her work, gave her advice, Complainant worked on Agency premises using Agency equipment to perform mission work for years, and she was required to work during Agency core hours.

Clark (Reuben D.) v. DOD (DCA), 0120171263 (08/02/2017) - At the time of events giving rise to his complaint, Complainant worked for a staffing firm serving the Agency as a Lead Stocker at a

Commissary. Complainant alleged in his complaint that the Agency discriminated against him based on his race (Black) when in September 2016, the Agency banned him from working at the Commissary. The Agency dismissed the complaint, in relevant part, for failure to state a claim. It reasoned that Complainant was an employee of his staffing firm, not the Agency.

On appeal, OFO affirmed. OFO reasoned that under common law, the Agency had insufficient control over his position to qualify as his joint employer. Complainant conceded that his onsite first line supervisor was provided by the staffing firm and assigned his work, set his hours and schedule, and approved his leave. When asked who did his performance evaluation and what input Agency officials provided, Complainant wrote that the staffing firm did his evaluation without indicating the Agency had input. Complainant was hired by the staffing firm, his compensation was not paid by the Agency, and Complainant wrote that after being banned, he was demoted, suggesting he was retained by the staffing firm which indicated additional control by it.

Parker (Alvaro M.) v. DOD (DCA), 0120171459 (08/11/2017) - Complainant worked for a staffing firm serving the Agency as a Material Handler in a Commissary warehouse. He was a client of the staffing firm's vocational rehabilitation program. He filed a complaint alleging, in relevant part, that the Agency discriminated against him based on disability when (1) in October 2016 he was suspended and in November 2016 he was terminated, and (2) he was not reasonably accommodated. The Agency dismissed the complaint, in relevant part, for failure to state a claim. It reasoned that Complainant was an employee of the staffing firm, not the Agency. OFO reversed because the record contained insufficient information to determine if the Agency exercised sufficient control over Complainant's position to qualify as his common-law employer. OFO ordered the Agency to gather information on control factors including whether the staffing firm offered Complainant other specified employment (as was suggested in the record), whether Complainant had an onsite staffing firm first line supervisor and if so what supervision/review that supervisor gave, and whether the staffing firm ran the Commissary's warehouse when Complainant worked there and if so, what this means or did it simply provide staff. OFO ordered the Agency to then accept the complaint or issue a FAD dismissing it.

Ingels (Melina K.) v. Navy, 0120171386 (08/09/2017) – During the relevant time, Complainant worked as a Data Housing and Reporting Tool Program Manager for the Agency, through a contract entered with the Agency by Homeland Security Solutions Inc (HSSI). The position was located at Camp Johnson, in Jacksonville, North Carolina, but Complainant teleworked and traveled to the client-site as needed. Complainant filed an EEO complaint alleging she was subjected to a hostile work environment, which culminated in her constructive discharge, because she had earlier filed a sexual harassment claim against an Agency manager. The Agency dismissed the complaint on the grounds that Complainant was not an Agency employee.

In response to the appeal, the Agency, for the first time, addressed some of the Ma factors, and disputed it had control over Complainant's daily responsibilities or the decision to relocate her position. However, the appellate decision concluded that the Agency presented only bare assertions,

many for the first time on appeal, without any supporting evidence. The record did not contain any affidavits or even a copy of the Agency's contract with HSSI. As such, the decision concluded that the Agency failed to substantiate the reason for its dismissal decision. The dismissal was reversed and the complaint remanded to the Agency for investigation and further processing.

Chartier (Maximo L.) v. USPS, 0120171565 (08/29/2017) – During the relevant time, Complainant worked as a Highway Contract Route Supplier, transporting and delivering mail for the Agency. The Agency dismissed the complaint on the grounds that Complainant was not an Agency employee, but rather a contractor, and therefore lacked standing to utilize the EEO process. After referencing the factors set forth in Ma v. Dep't of Health and Human Servs., EEOC Appeal Nos. 01962389 & 01962390 (May 29, 1998), and reviewing the contract between the parties, the Agency decision noted that: Highway Contract Routes are awarded by solicitation and bid; local postal officials oversee duties but have no right to terminate the contract; the contractor provides the vehicle; taxes and retirement benefits are the contractor's responsibility; and, the Agency does not provide sick leave or annual leave. Alternatively, the Agency dismissed the complaint as a collateral attack on Complainant's appeal to the Postal Service Board of Contract Appeals.

Our decision, found that while the Agency referenced the appropriate Ma factors and listed aspects of the parties' contract, it failed to conduct a proper analysis. A thorough analysis of the record revealed that the Agency exerted sufficient control to be considered the joint employer of Complainant. For example, Complainant worked for the Agency for over ten years, he performed the core function of the Agency, he was held to the standards of regular employees, and was required to follow Agency mandated routes and time limits. Further, his claim of discriminatory termination followed the Agency's removal of his access to its facilities.

As for the alternative dismissal ground, the Commission found the record did not support the conclusion that the complaint was a collateral attack. The dismissal was reversed and the complaint was remanded to the Agency for further processing.

Turner (Elene K.) v. VA, 0120171365 (08/16/2017) – During the relevant time, Complainant was a Medical Technician, employed by Coastal Clinical and Management Services (hereinafter "CCMS"), which contracted with the Agency to provide phlebotomists to work for the Pathology and Laboratory Medicine Product Line, at Edward Hines, Jr. VA Hospital in Illinois. She filed an EEO complaint alleging discrimination when, in September 2016, she was terminated from her position, and although subsequently reinstated about a month later, was never paid for the time she was out of work. She also alleged she was subjected to a hostile work environment following her reinstatement, and applied for another position with the Agency, but never received a decision on her application.

The Agency dismissed the complaint for failure to state a claim. Regarding the termination and hostile work environment claims, the Agency reasoned that Complainant was not an Agency employee, but was solely an employee of its contactor CCMS. Regarding the non-selection for an Agency position, the Agency acknowledged that as an applicant for Agency employment Complainant did have standing. However, the Agency reasoned that Complainant was not rendered

"aggrieved" by the event as "no harm has yet occurred." According to the Agency, no selections were made due to a hiring freeze.

Our decision found that, while the Agency referenced the appropriate Ma factors, it failed to conduct a proper analysis of those factors. A thorough analysis of the record revealed that the Agency exerted sufficient control to be considered Complainant's joint employer. The decision found that the Agency had to approve the employees hired by CCMS, CCMS employees had to abide by all Agency policies and procedures, and Complainant alleged she had limited contact with CCMS management and received day-to-day supervision from the Agency. By the terms of the contract, the Agency reserved the right to restrict the work of any CCMS employee or terminate their services, and Complainant claimed the Agency initiated her discriminatory termination.

As for the dismissal of the non-selection claim, the decision reversed because the Agency failed to substantiate its claim that no selection had been made, noting that there was evidence in the record indicating that at least some selections had been made.

Basilone (Annie F.) v. Navy, 0120171794 (09/21/ 2017) - At the time of events giving rise to her complaint, Complainant was employed in succession by Staffing Firm 1 (October 2006 – June 2015), Staffing Firm 2 (February 2016 – May 2016), and Staffing Firm 3 (May 2016 – November 2016) serving the Agency as a Support Technician. She alleged that the Agency discriminated against her based on her sex (female) and age (54) when she was harassed from December 2008 into November 2016, and was terminated on November 30, 2016. The Agency dismissed the complaint for failure to state a claim. Applying common law, it reasoned that Complainant was not an employee of the Agency.

OFO reversed. It found that the Agency exercised and had the right to exercise sufficient control over Complainant's employment to be deemed her joint employer. OFO reasoned as follows. Complainant received her daily direction from the Agency, and for a short period it assigned her the mandatory task of attending daily meetings. While at times Complainant with the backing of Staffing Firm 3 declined assignments by the Agency for being outside her contract scope of work, the weight of the evidence was that the Agency supervised Complainant in the performance of her duties, albeit not exclusively. Complainant served the Agency for years. She worked on Agency premises using an Agency laptop, the Agency relocated her to a different building, and it set her schedule. Further, while explicitly not making a finding on the merits, for purposes of ruling on failure to state a claim, OFO found that the Agency had input into whether Complainant's employment continued.

Murphy (Corrina M.) v. DOD (DHA), 0120171798 (09/22/2017) - At the time of events giving rise to her complaint, Complainant worked for a staffing firm serving the Agency as a Senior Program Manager. She alleged that the Agency discriminated against her based on her age (65) and reprisal when in September 2016, she was terminated by her staffing firm. The Agency dismissed the complaint, in relevant part, for failure to state a claim. It reasoned that Complainant was employed by the staffing firm, not the Agency. On appeal, OFO reversed. OFO found that the Agency had the right to control, and in fact controlled, sufficient factors of Complainant's employment to be deemed under common law to be her joint employer. In holding this, OFO found that Complainant served the

Agency for 8½ years, worked on Agency premises using Agency equipment, and the record suggested the Agency had constructive power to terminate Complainant – she contended that she had superior performance appraisals and was fired by her staffing firm without explanation after the Agency expressed concerns to it about her.

OFO found that while the contract between the staffing firm and the Agency generally required the staffing firm to supervise its staff and designate a manager to oversee the performance of tasks, the Agency did not gather any information concerning how this part of the contract was actually implemented. For example, the record did not show if the staffing firm provided an onsite supervisor, who assigned Complainant her daily tasks and projects, who she went to for guidance on her work, did she need to get informal consent from Agency staff before being out of the office, and so forth. OFO found that while these are missing pieces of the puzzle in determining whether the Agency has sufficient control to be deemed Complainant's joint employer, the Agency, which has the burden of supporting its dismissal decision, had the opportunity to gather evidence on relevant control factors, but failed to do so.

3. ADDRESSING EMERGING AND DEVELOPING ISSUES

Of the eight (8) decisions implicating this SEP Priority, six (6) concerned post-ADAAA reasonable accommodation, and two (2) concerned the FCP for cases where the agency failed to keep medical and other personal information private.

Decision Summaries for this Category

Bigelow (Danita S.) v. USPS, 0120150912 (04/05/2017) – Complainant worked as a City Carrier at the Oxon Hill Station in Oxon Hill, Maryland. Complainant appealed the Agency's final decision that it did not discriminate against her on the bases of sex (female), disability (right arm injury), and reprisal when she was denied the opportunity for a supervisory detail. The decision concluded that there was evidence contrary to the Agency's conclusion that Complainant did not prove a prima facie case of disability discrimination because she was not substantially limited in any major life activity. The decision pointed to Complainant's testimony that she could not reach above her shoulders; carry, lift, push or pull more than 10 pounds; or drive a postal vehicle for more than six hours. Next, the decision concluded that additional information was needed regarding whether Complainant was a qualified individual with a disability. This was especially pertinent given the Agency's legitimate, nondiscriminatory, reason for denying Complainant the detail-- that Complainant had restrictions including the inability to work a full 8-hour day.

The Agency was ordered to conduct a supplemental investigation into Complainant's disability discrimination claim because the factual record was not sufficient to conclude whether Complainant was subjected to discrimination. Specifically, the Agency was ordered to investigate: (1) whether

Complainant was an individual with a disability; (2) what the essential functions of the supervisor position was for which Complainant was denied the detail; (3) comparative employees who were permitted to go on detail in Complainant's unit with special emphasis on the disability status of these employees; and (4) whether the Agency conducted an assessment of whether Complainant could perform the supervisor detail either with or without a reasonable accommodation prior to denying her detail because of her restrictions. Complainant's sex and reprisal discrimination claims were not addressed given the need for development of the record for Complainant's disability discrimination allegation.

Austin (Concha R.) v. DOL, 0120151185 (04/11/2017) – Complainant was a Senior EEO Specialist at the Agency's Civil Rights Center, Office of the Assistant Secretary for Administration and Management in Washington, DC. Complainant took issue with her work assignments believing that the assignments aggravated her medical condition and were given to her because of her physical disability and prior EEO activity. Evidence indicated that Complainant asked management to allow her to continue working on the assignments until her disability retirement was approved with reasonable accommodations. Management accommodated her disability by allowing full-time telework, equipment and provided administrative assistance for Complainant to be able to complete the work. When management followed up about the status of the assignments, Complainant told management to stop contacting her because she could not do the work and that it was aggravating her disability. Complainant was issued a notice of proposed removal. The decision concluded that the Agency accommodated Complainant's disability and that Complainant did not prove disability discrimination because she could not perform essential job functions.

Parham (Kevin B.) v. HHS, 0720170014 (04/24/2017) **[Repeated under Findings below]** – Complainant filed a formal complaint alleging denial of reasonable accommodation on the bases of race, color, age, and disability. He subsequently requested to amend the complaint to include a claim of reprisal when he was not given an "outstanding" rating on February 15, 2013 for performance year 2012. The Agency took no action on his formal complaint. Complainant requested a hearing before an EEOC AJ. The Agency failed to produce the record upon request by the AJ. Complainant filed a Motion for Sanctions noting that the Agency failed to investigate the matter. The Agency responded to the AJ's order nearly four months after the AJ ordered the Agency to produce the file. Complainant then moved to amend his claim of reprisal to include his appraisals for year 2014 which he received on February 2, 2015.

The AJ issued a decision entering a default judgment against the Agency noting that Complainant filed a motion for sanctions for which the Agency failed to oppose. The AJ noted that the Agency failed to complete the investigation and to produce a Report of Investigation. As such, the AJ ordered Complainant to provide a statement of relief and allowed the Agency the opportunity to respond to Complainant's request. The AJ determined that Complainant establish a prima facie case of denial of reasonable accommodation from September 21, 2012 to October 25, 2013, and of retaliation for the performance appraisals of 2012 and 2013. Based on the statements, the AJ

concluded that Complainant was entitled to relief. The AJ ordered the Agency to change Complainant's performance appraisals for 2012 and 2013; to pay past pecuniary damages in the amount of $ 350.00; to pay non-pecuniary damages in the amount of $ 60,000.00; to restore Complainant's sick leave for 2012 and 2013; and to provide training for management regarding reasonable accommodation requests. The Agency implemented the AJ's decision finding no discrimination but appealed the award of compensatory damages and the increase of the appraisals to the "outstanding" level for 2012 and 2013. The Agency argued that Complainant was not entitled to the increase in his appraisals; that his award of compensatory damages was too high; and that the AJ erred in awarding restoration of leave. Complainant appealed asserting that he should have received more in compensatory damages, restoration of all leave from 2012 – 2015, and the "outstanding" level for the appraisals received from 2012 to 2015.

The decision noted that the only issues before the Commission involved the remedies awarded by the AJ. The parties did not challenge the AJ's default judgment. The decision clarified that Complainant alleged and the AJ found that the Agency subjected Complainant to unlawful retaliation regarding two performance appraisals, namely the 2012 and 2014 appraisals received on February 1, 2013, and February 2, 2015. The AJ concluded that Complainant established a prima facie case of unlawful retaliation with respect to the performance appraisals raised by Complainant in his complaint. As such, the appropriate remedy would be for the appraisals to reflect an "Outstanding" rating. In addition, the decision found that the AJ correctly indicated that Complainant is entitled to any awards or quality step increases that were associated with the "Outstanding" rating for performance appraisals for years 2012 and 2014.

The Agency argued that the AJ's award was excessive and that an award of $ 25,000.00 would be more appropriate. Complainant asked that the Commission increase the amount awarded to $ 270,000.00. The decision found that Complainant's request was excessive. Further, the decision found that the AJ's award was appropriate based on the worsening of Complainant's medical condition, his sleeping problems, anxiety, pain and suffering. As such, the decision upheld the AJ's award of $ 60,000.00 in compensatory damages. The decision found that the AJ properly awarded past pecuniary damages and denied future pecuniary damages based on Complainant's failure to provide support for his request. As to leave restoration, the decision found that Complainant did not support his claim that annual leave for 2012-2013 and any leave taken in 2014-2015. Finally, Complainant sought additional relief in the form of an alternative work schedule and telework which the decision found were outside of the scope of the finding of discrimination. As such, the decision affirmed the AJ's decision and finding of relief and ordered the Agency to take appropriate corrective action.

Rogers (Murray C.) v. Army, 0120130671 (06/09/2017) – Complainant, a Staff Accountant at the 175th Financial Management Support Center in Seoul, South Korea, appealed the Agency's finding of no discrimination on his EEO complaint alleging that he was discriminated against and subjected to a hostile work environment on the bases of race (Caucasian), sex (male, sexual orientation), disability, and reprisal. The OFO decision concluded that the Agency stated legitimate, nondiscriminatory, reasons for issuing Complainant a letter of counseling for leave usage-- Complainant used 72 hours

of sick leave within a short time period, but had only accrued 24 hours of sick leave. Next, the OFO decision concluded that there was insufficient evidence to support a finding that managers made inappropriate comments toward Complainant. Therefore, the Agency's FAD concluding that Complainant was not subjected to disparate treatment or a hostile work environment was affirmed.

Soucie (Mac K.) v. DHS (USCG), 0120161905 (07/05/2017) – Complainant alleged that he was subjected to harassment, disability discrimination, and reprisal when he was forced to provide a written statement to an investigator on the status of his disability; the investigator suggested his security clearance was in jeopardy without proof of his disability; his new supervisor requested that he provide proof he has a disability although he had not requested a reasonable accommodation; he was removed from his team lead position and isolated from the team; and was treated in a hostile manner by his supervisor after he disclosed he has ADHD.

An EEOC AJ issued summary judgment in favor of the Agency. On appeal, OFO found that there was no genuine issue of material fact, and the AJ correctly determined that the evidence did not establish that Complainant was discriminated against or harassed as alleged.

Painter (Mickie B.) v. USPS, 0120161642 (08/08/2017) – Complainant, a Mail Processing Clerk, appealed from the Agency's final decision which found that she was not subjected to discrimination on the bases of disability (lumbar disc disease) and age (D.O.B. March 9, 1930) when on August 29, 2013 she was not permitted to return to work, and subsequently, she felt forced to retire. The decision found that the Agency stated legitimate, nondiscriminatory, reasons for not providing Complainant with work. Complainant's restrictions did not allow her to perform the duties of her position, and there were no vacant funded positions Complainant could occupy. To the extent Complainant alleged denial of reasonable accommodation, the decision concluded that Complainant was not a qualified individual with a disability.

McConnell (Velva B.) et al. v. USPS, 0720160006, 0720160007 (09/22/2017) **[Summary repeated under Broad Impact Decisions, Findings, and Circulated below]** – The Commission affirmed the AJ's determination, on summary judgment, that USPS violated the Rehabilitation (Rehab) Act on a class-wide basis (affecting thousands of employees) with regard to its National Reassessment Program (NRP). The NRP was ostensibly designed to save money by eliminating "make work" positions. However, the true purpose was to get limited-duty (Injured on Duty-IOD) and Rehabilitation employees off the agency's rolls, without regard to their rights and the Agency's obligations under the Rehab Act. The decision affirmed the finding of the AJ on summary judgment that the USPS Senior Officials who devised and implemented the NRP had engaged in a pattern and practice of discrimination against the Agency's disabled employees through class-wide disparate treatment.

Moreover, the Commission found, based upon testimony from approximately 20 anecdotal witnesses, that the Agency accomplished its aim of purging employees with medical restrictions from the workplace by removing existing accommodations and/or by failing to engage in the interactive

process. No showing of undue hardship was made by the Agency; instead, anecdotal witnesses and other evidence illustrated that taking class members abruptly out of their jobs resulted in decreased operational efficiencies and increased costs. The Agency illegally failed to provide reasonable accommodations for the known limitations of otherwise qualified individuals with disabilities and denied employment opportunities to qualified IOD employees with disabilities because of the need for reasonable accommodation.

The Commission further found that the Agency subjected its IOD employees assessed under the NRP to a discriminatory hostile work environment through numerous and pervasive hostile actions (i.e., on the spot dismissals of IOD employees who were escorted out of the building in a humiliating manner, constant pressure to provide more medical documentation, derogatory and threatening remarks made in the workplace, and agency management repeatedly stoking the fears that these employees would lose their jobs). Additionally, it deemed Phase 1 of the NRP to be an unlawful disability-related medical inquiry that was not job-related and consistent with business necessity. Moreover, the Agency violated the medical confidentiality provisions of the Rehab Act by its failure to redact employee medical documentation, as well as through the reports from all over the country of medical files containing confidential medical information being left in open, freely accessible areas such as supervisors' desks, copy machines, and the work room floor.

Most significantly, the Commission explained in this decision that expecting every potential class member to undertake the individualized inquiry that the Rehabilitation Act requires during the liability phase is inherently impractical, unworkable in practice, and would effectively bar the use of class complaints as a means of challenging workplace policies that discriminate against individuals with disabilities. It held that a far more efficient and effective way to resolve the individualized-inquiry dilemma is to require prospective class members to prove that they are qualified individuals with disabilities during the remedies phase of the proceeding, because that is where proof of one's status as a qualified individual with a disability under the Rehabilitation Act naturally aligns with proof of one's membership in a class. The decision ordered the Agency to notify class members and allow them to file claims.

4. ENFORCING EQUAL PAY LAWS

Of the five (5) decisions that implicated this SEP Priority, one (1) decision implicated the associated FCP – Alternate pay systems that allow for subjective pay determinations.

Decision Summaries for this Category

Montavon (Stefan C.) v. DHS (TSA), 0120132211 (04/21/2017) – Complainant worked as a Test and Evaluation (T&E) Lead over the Passenger Screening Program (PSP) at the Office of Security

Technology (OST) located at the Washington Regan International Airport in Washington, DC. After a series of personnel changes starting in September 2004, Complainant, in September 2008, was transferred to the position of General Engineer, J-Band as a T&E Lead over the PSP in the OST. On October 12, 2008, E2, a Black female employee, was reassigned from a Supervisory General Engineer position to a General Engineer position over the Electronic Baggage Screening Program (EBSP) in OST. Due to her prior work experience, E2 retained her K-Band salary even after the reassignment. The TSA used a graded Pay Band system, not the General Scale (GS) system used by most Federal agencies. An employee in the K-Band made more money than one in the J-Band. In August 2009, the Agency conducted desk audits of the two positions and determined that they were appropriately classified at J-Band and K-Band pay levels.

On October 12, 2010, Complainant filed a formal complaint alleging that he was discriminated against because of his sex and race when he was paid less than E2. After the investigation, Complainant requested a hearing, but subsequently filed a motion for summary judgment. The AJ issued a decision without a hearing finding that Complainant was unable to establish that the Agency subjected him to discrimination as alleged. Specifically, the AJ found that: (1) Complainant and E2 worked in different programs in distinct locations and were supervised under different management; (2) there were distinct differences in the technology used to perform the duties of each position; and (3) the positions were classified differently because of the varying complexity of the machinery used in each.

The appellate decision affirmed the AJ's decision, finding that Complainant was unable to establish a prima facie case of discrimination under the EPA. Specifically, the decision reasoned that the Agency component that employed Complainant and E2, the OST, was not a single unit and that it was clear Complainant and E2 were essentially performing substantially different jobs in two different locations, and were supervised under different management chains. Alternatively, even if Complainant could establish a prima facie case of discrimination under the EPA, the decision found that the Agency successfully articulated a legitimate non-discriminatory reason other than sex for the pay disparity – E2's position was classified at the K-Band pay level because the technology she utilized was more complex, and because prior to this lateral transfer she was previously being paid at that level after earning a promotion in 2004. The decision also found no discrimination based on race and sex.

Meyer (Brant E.) v. DHS (TSA), 0120150760 (05/18/2017) – The Agency employed Complainant as an Administrative Assistant at O'Hare Airport in Chicago, Illinois, where he was responsible for oversight of the process through which security badges were issued to Agency personnel. He had been diagnosed with Tourette Syndrome, a condition characterized by repetitive facial tics and compulsive utterances, and had been taking medication to control the symptoms. Because of the condition, Complainant had called a newly-hired African-American Transportation Security Officer (TSO) a "nigger girl," to her face, during her on-boarding process, which caused her extreme stress and prompted her to file a complaint of discriminatory harassment. In response to the incident, Complainant's first-line supervisor, the Logistics Manager (S1), issued him a letter of reprimand and had him reassigned to an off-site facility. At the same time, Complainant became aware that he was

making approximately $5,000 per year less than a female Administrative Assistant whose job description was identical to his. He identified his second-level supervisor, the Assistant Director for Mission Support (S2) as being responsible for the salary discrepancy. He filed an EEO complaint in which he alleged that S1 had harassed and discriminated against him because of his disability and that S2 had caused him to be paid less than a female co-worker in violation of the Equal Pay Act (EPA).

In addressing Complainant's disability claim, the Commission noted that for nearly twenty years, Tourette Syndrome had been recognized as a disability. The Commission initially found that S1 based her decision to reprimand and reassign Complainant on behavior that was caused by his condition. Next, the Commission found that S1 had initially decided not to take disciplinary action, but had done so after consulting with the Human Capital Office, who advised her that such action was warranted notwithstanding Complainant's lack of responsibility, in order to avoid conveying the impression that the Agency would tolerate racial epithets. Third, the Commission found that S1 had imposed the lightest discipline possible in recognition of the fact that Complainant was unable to control his behavior. As to the reassignment, the Commission found that S1 had decided to reassign Complainant in order to minimize his contact with people who did not know him and were unaware of his condition, noting that his title, compensation, and benefits did not change and that he was given additional program responsibilities beyond those he had at his original duty station. Ultimately, the Commission concluded that S1's actions constituted neither disparate treatment nor discriminatory harassment.

Regarding Complainant's EPA claim, the Commission found that Complainant and his female Coworker were hired on the same day at the same base salary into positions with identical levels of accountability, which satisfied the EPA's equal work requirement. Nevertheless, the Commission determined that the Agency successfully raised an affirmative defense by establishing that the pay differential resulted from numerous adjustments made to the compensation rates of both employees. Those adjustments were made at the discretion of their supervisors under the Agency's pay-banding compensation system. For example, the Coworker had received two performance-based pay increases that Complainant did not receive.

Evans (Belia A.) v. USDA, 0120160403 (05/10/2017) – Complainant, a Guaranteed Loan Specialist, filed an EEO complaint alleging that she was discriminated against on the bases of sex (female) when she performed work as an Area Specialist at the GS-11 level but was only paid at the GS-9 level. Complainant did not request a hearing. The Agency issued a decision finding no discrimination and Complainant filed an appeal from that decision. OFO affirmed the Agency's finding of no discrimination. OFO found that Complainant failed to show that similarly situated persons were treated differently and that the pay differences at issue were due to the "grandfathering" in of existing salaries after a reorganization. Regarding Complainant's Equal Pay Act claim, OFO found that a factor other than sex explained why any comparative male employees had a higher salary than Complainant. OFO found that the Agency "grandfathered" in employees to their existing salary upon the reorganization. Thus, comparative male employees received higher pay than Complainant after

the reorganization because they had been at a higher level pay than Complainant immediately prior to the reorganization.

McMullen (Josephine S.) v. Army, 0120151324 (07/26/2017) – Complainant, a Training Technician, filed a formal complaint alleging that the Agency discriminated against her and subjected her to a hostile work environment on the bases of race (African-American), sex (female), disability, age, and reprisal when, inter alia, management non-competitively promoted her from the GS-7 to GS-8 level after promising to promote her to the GS-9 level; management appointed a White male to a GS-9 position with the same or similar duties as she; management placed her promotion on hold; management informed her that her leave was denied because she had exhausted all her leave; management placed her on absence without leave (AWOL) after she had submitted the proper documentation and leave request form to management; and her supervisor left a voice message for her that stated she was being placed on AWOL after she had hand-carried her leave request to her supervisor.

Complainant requested a hearing; however, the AJ dismissed the hearing request and remanded the complaint for a FAD after Complainant failed to appear for the scheduled hearing. The FAD found that Complainant had not been subjected to discrimination, reprisal, or a hostile work environment.

In the appellate decision, the Commission initially found that the AJ did not abuse his discretion by dismissing Complainant's hearing request as a sanction given that she was represented by an attorney (who appeared at the hearing) and that she had notice of the date, time, and location of the hearing. Additionally, the Commission found Complainant's arguments regarding ineffective assistance of counsel unpersuasive. Next, the Commission found that Complainant had not been subjected to discrimination, reprisal, or a hostile work environment. In so finding, the Commission found that management officials received and communicated incorrect information to Complainant regarding being promoted to the GS-9 level. Complainant was subsequently promoted to the GS-8 level following the lifting of a hiring freeze. Additionally, management selected an individual for a temporary GS-9 position after learning that it could not incorporate the duties into Complainant's position. Complainant did not apply for the announced position based on its temporary nature. With respect to the leave issues, the Commission found that management informed Complainant that she would be placed on AWOL because she had not contacted management or produced medical documentation in support of her absence. After receiving the proper medical documentation, management placed Complainant on advanced sick leave status.

Finally, the Commission noted that Complainant had alleged a violation of the Equal Pay Act. The Commission found, however, that Complainant failed to establish a prima facie case of discrimination under the Equal Pay Act. Most notably, the Commission determined that Complainant was paid more at the GS-8, Step 9 level ($54,412) than her co-worker at the GS-9, Step 1 level ($47,448). Nonetheless, the Commission found that Complainant and her co-worker did not perform equal work requiring equal skill, effort, and responsibility. Complainant's duties were largely "administrative assistant" in nature and record management-related while her co-worker's duties included evaluating the training materials used in the classroom, understanding and interpreting regulations, and issuing surveys to students and supervisors. The Commission noted

that the co-worker used his institutional knowledge to evaluate an academic course's performance while Complainant had no experience as an instructor. Finally, the Commission noted that approximately 25 percent of the co-worker's duties were concurrent with Complainant's administrative duties only to allow him step in when Complainant was out of the office. Accordingly, the Commission found no Equal Pay Act violation.

Amis (Devon H.) v. DHS (TSA), 0520170354 (08/10/2017) – Complainant worked as a Federal Air Marshall at the Agency's Field Office in Charlotte, North Carolina. On March 21, 2014, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of race (Caucasian), age (born 1967), sex (male) and reprisal when, on January 3, 2014 and continuing, he became aware that he was being paid a lower salary than his coworkers who were performing the same duties as him. Before the AJ, Complainant sought to amend his individual complaint to raise class claims, alleging that the investigation revealed that females Federal Air Marshalls were being paid more than their male counterparts at the Charlotte Field Office. The Agency opposed Complainant's request, arguing Complainant failed to meet the four prerequisites for class certification. In response to the Agency's opposition, Complainant requested additional discovery. However, the AJ issued a decision denying Complainant's request to change his individual complaint to a class complaint.

In EEOC Appeal No. 0120152087, we determined that the AJ denied Complainant's request for class certification prior to precertification discovery or clarification on the class complaint. The decision noted that parties are entitled to development of the evidence as to the matters pertaining to class certification. The decision indicated that the record did not reveal that any precertification discovery was allowed by the AJ. Based on the lack of information, the decision found that the AJ erred in deciding the issue of class certification without seeking clarification or allowing for precertification discovery. As such, the decision vacated the AJ's findings and remanded the matter back to the hearings unit for clarification, precertification discovery, and issuance of a decision on class certification in accordance with 29 C.F.R. § 1614.204(d).

The Agency requested reconsideration. In its request for reconsideration, the Agency expressed its disagreement with the previous decision and reiterated arguments it previously made. The decision on reconsideration found that the Agency failed show that the pervious decision involved a clearly erroneous interpretation of material fact or law or that it would have a substantial impact on the policies, practices, or operations of the Agency. As such, the reconsideration decision denied the Agency's request as it failed to meet the criteria of 29 C.F.R. § 1614.405(c). Therefore, the request restated the order remanding the matter to the AJ for clarification of the class, precertification discovery, and a decision on class certification by the AJ.

5. PRESERVING ACCESS TO THE LEGAL SYSTEM

No cases reported under this category during this reporting period.

6. PREVENTING HARASSMENT THROUGH SYSTEMIC ENFORCEMENT AND TARGETED OUTREACH

Decision Summaries for this Category

McCormick (Trina C.) v. DOJ, 0120131971 (05/12/2017) **[Repeated under Enforcement - General below]** – Complainant worked as a Trial Attorney serving in a one-year detail as an Attorney Advisor at the Office of the Rule of Law Coordinator at the U.S. Embassy in Baghdad, Iraq where events surrounding her EEO complaint that she was subjected to reprisal discrimination and a hostile work environment based on sex took place. Complainant appealed to the Commission from the Agency's finding that she was not subjected to discrimination. The decision on appeal concluded that Complainant was subjected to a hostile work environment based on her sex because she was subjected to pervasive unwelcome conduct involving her statutorily protected class. Examples included management's belittlement of Complainant in connection with her assignments and work product, reassignment of work, and comments referencing Complainant's manner of dress and her cooking skills. Other examples of management's discriminatory conduct involved the general treatment of women in the office which included yelling at female staff members, exclusion and more favorable treatment of male staff members in a number of ways. The decision also concluded that Complainant was subjected to reprisal discrimination in being denied an extension of her detail, given a negative job reference, and given a negative performance appraisal because she demonstrated that the Agency's legitimate, nondiscriminatory, reasons were pretext. For example, the rating official preparing Complainant's evaluation explained that he based his performance evaluation of Complainant's work on his own observations, however, evidence revealed that the rating official was told to lower Complainant's rating in the "Accountability for Professional Responsibilities and Development" section based on her interaction with the management officials responsible for the hostile work environment sex discrimination. Complainant was awarded remedies which included a new detail opportunity or back pay which was lost because of Complainant being denied the opportunity to extend her original detail for one year, compensatory damages, and a revised performance evaluation.

St. Fleur (Alexandria S.) v. VA, 0120160363 (09/14/2017) – Complainant appealed from the Agency's final decision finding that she was not subjected to a hostile work environment based on reprisal when an employee made a false report that Complainant hit her; Complainant was arrested and

jailed for two days; Complainant was removed from federal employment; and the Agency had Complainant re-arrested and jailed overnight on the same charges. The decision concluded that an Agency investigation revealed that Complainant hit another employee for which Complainant was arrested and eventually terminated. Therefore, the decision concluded that Complainant did not prove she was subjected to a hostile work environment.

McConnell (Velva B.) et al. v. USPS, 0720160006, 0720160007 (09/22/2017) **[Summary repeated under Priority 3 above, and Broad Impact Decisions, Findings, and Circulated below]** – The Commission affirmed the AJ's determination, on summary judgment, that USPS violated the Rehabilitation (Rehab) Act on a class-wide basis (affecting thousands of employees) with regard to its National Reassessment Program (NRP). The NRP was ostensibly designed to save money by eliminating "make work" positions. However, the true purpose was to get limited-duty (Injured on Duty-IOD) and Rehabilitation employees off the agency's rolls, without regard to their rights and the Agency's obligations under the Rehab Act. The decision affirmed the finding of the AJ on summary judgment that the USPS Senior Officials who devised and implemented the NRP had engaged in a pattern and practice of discrimination against the Agency's disabled employees through class-wide disparate treatment.

Moreover, the Commission found, based upon testimony from approximately 20 anecdotal witnesses, that the Agency accomplished its aim of purging employees with medical restrictions from the workplace by removing existing accommodations and/or by failing to engage in the interactive process. No showing of undue hardship was made by the Agency; instead, anecdotal witnesses and other evidence illustrated that taking class members abruptly out of their jobs resulted in decreased operational efficiencies and increased costs. The Agency illegally failed to provide reasonable accommodations for the known limitations of otherwise qualified individuals with disabilities and denied employment opportunities to qualified IOD employees with disabilities because of the need for reasonable accommodation.

The Commission further found that the Agency subjected its IOD employees assessed under the NRP to a discriminatory hostile work environment through numerous and pervasive hostile actions (i.e., on the spot dismissals of IOD employees who were escorted out of the building in a humiliating manner, constant pressure to provide more medical documentation, derogatory and threatening remarks made in the workplace, and agency management repeatedly stoking the fears that these employees would lose their jobs). Additionally, it deemed Phase 1 of the NRP to be an unlawful disability-related medical inquiry that was not job-related and consistent with business necessity. Moreover, the Agency violated the medical confidentiality provisions of the Rehab Act by its failure to redact employee medical documentation, as well as through the reports from all over the country of medical files containing confidential medical information being left in open, freely accessible areas such as supervisors' desks, copy machines, and the work room floor.

Most significantly, the Commission explained in this decision that expecting every potential class member to undertake the individualized inquiry that the Rehabilitation Act requires during the liability phase is inherently impractical, unworkable in practice, and would effectively bar the use of

class complaints as a means of challenging workplace policies that discriminate against individuals with disabilities. It held that a far more efficient and effective way to resolve the individualized-inquiry dilemma is to require prospective class members to prove that they are qualified individuals with disabilities during the remedies phase of the proceeding, because that is where proof of one's status as a qualified individual with a disability under the Rehabilitation Act naturally aligns with proof of one's membership in a class. The decision ordered the Agency to notify class members and allow them to file claims.

7. BROAD IMPACT DECISIONS

Chambers (Brenton W.) v. DOT, 0120130554 (06/29/2017) **[Repeated under SEP Priority 1, above, Enforcement – General, and Circulated Decisions, below]** – Complainant was previously a GS-14 Air Traffic Control Specialist (ATC). He and other ATCs were removed from employment by presidential order during the Professional Air Traffic Controllers Organization (PATCO) strike in 1981. In November 1997, Complainant filed an EEO complaint in which he alleged that the Agency discriminated against him because of his age (born in 1947) when it did not select him for a GS-12/13/14 ATC position.

Ultimately, an EEOC AJ found that Complainant proved age discrimination on the theory of disparate treatment but failed to prove that the Agency's selection policy disparately impacted applicants over 40 years old. On appeal, OFO determined that the agency articulated legitimate, non-discriminatory reasons for its actions, i.e., that Complainant was excluded from eligibility for the GS-12/13/14 position because Agency officials thought ex-PATCO controllers such as Complainant could only be hired at the GS-9 level from a separate ex-PATCO applicant list.

Nevertheless, OFO noted that there was compelling evidence that the Agency's explanations were pretext for age discrimination. Specifically, OFO noted that the Agency issued a Question and Answer (Q & A) document that stated that the age of ex-PATCO applicants partly justifies the Agency's decision to only hire them at the GS-9 level, which is a glaring contradiction of the ADEA's mandate that all personnel actions in the federal sector "shall be free from any discrimination based on age." OFO further noted that the Agency's policy of excluding ex-PATCO candidates from consideration for GS-12/13/14 positions almost exclusively affected workers who were 40 years of age or older. Additionally, OFO noted that a witness testified that a selecting official mentioned that the Agency had "some age concerns" about ex-PATCO controllers. As such, OFO found that the Agency used ex-PATCO status as a proxy for age, which ultimately resulted in Complainant's nonselection for a GS-12 ATC position. Consequently, OFO found that substantial evidence supported the AJ's finding that Complainant proved he was subjected to disparate treatment because of his age.

OFO declined to review the AJ's finding regarding disparate impact because no additional remedies would be available for Complainant if he prevailed on this theory. However, OFO noted that a claim of disparate impact may be made under the ADEA against federal agency employers, and agencies

may avoid liability by establishing that the policy at issue was job-related and consistent with business necessity.

In order to remedy the discrimination, OFO ordered the Agency to retroactively place Complainant into the GS-12 ATC position effective October 31, 1996, until the date on which he would have reached mandatory retirement; to tender to Complainant applicable back pay with interest; to provide in-person EEO training to responsible Agency officials; and to post a notice of the finding of discrimination.

McConnell (Velva B.) et al. v. USPS, 0720160006, 0720160007 (09/22/2017) **[Summary repeated under Priorities 3 and 6 above, and Findings and Circulated below]** – The Commission affirmed the AJ's determination, on summary judgment, that USPS violated the Rehabilitation (Rehab) Act on a class-wide basis (affecting thousands of employees) with regard to its National Reassessment Program (NRP). The NRP was ostensibly designed to save money by eliminating "make work" positions. However, the true purpose was to get limited-duty (Injured on Duty-IOD) and Rehabilitation employees off the agency's rolls, without regard to their rights and the Agency's obligations under the Rehab Act. The decision affirmed the finding of the AJ on summary judgment that the USPS Senior Officials who devised and implemented the NRP had engaged in a pattern and practice of discrimination against the Agency's disabled employees through class-wide disparate treatment.

Moreover, the Commission found, based upon testimony from approximately 20 anecdotal witnesses, that the Agency accomplished its aim of purging employees with medical restrictions from the workplace by removing existing accommodations and/or by failing to engage in the interactive process. No showing of undue hardship was made by the Agency; instead, anecdotal witnesses and other evidence illustrated that taking class members abruptly out of their jobs resulted in decreased operational efficiencies and increased costs. The Agency illegally failed to provide reasonable accommodations for the known limitations of otherwise qualified individuals with disabilities and denied employment opportunities to qualified IOD employees with disabilities because of the need for reasonable accommodation.

The Commission further found that the Agency subjected its IOD employees assessed under the NRP to a discriminatory hostile work environment through numerous and pervasive hostile actions (i.e., on the spot dismissals of IOD employees who were escorted out of the building in a humiliating manner, constant pressure to provide more medical documentation, derogatory and threatening remarks made in the workplace, and agency management repeatedly stoking the fears that these employees would lose their jobs). Additionally, it deemed Phase 1 of the NRP to be an unlawful disability-related medical inquiry that was not job-related and consistent with business necessity. Moreover, the Agency violated the medical confidentiality provisions of the Rehab Act by its failure to redact employee medical documentation, as well as through the reports from all over the country of medical files containing confidential medical information being left in open, freely accessible areas such as supervisors' desks, copy machines, and the work room floor.

Most significantly, the Commission explained in this decision that expecting every potential class member to undertake the individualized inquiry that the Rehabilitation Act requires during the

liability phase is inherently impractical, unworkable in practice, and would effectively bar the use of class complaints as a means of challenging workplace policies that discriminate against individuals with disabilities. It held that a far more efficient and effective way to resolve the individualized-inquiry dilemma is to require prospective class members to prove that they are qualified individuals with disabilities during the remedies phase of the proceeding, because that is where proof of one's status as a qualified individual with a disability under the Rehabilitation Act naturally aligns with proof of one's membership in a class. The decision ordered the Agency to notify class members and allow them to file claims.

8. ENFORCEMENT – GENERAL

Parham (Kevin B.) v. HHS, 0720170014 (04/24/2017) **[Repeated under Priority 3 above]** – Complainant filed a formal complaint alleging denial of reasonable accommodation on the bases of race, color, age, and disability. He subsequently requested to amend the complaint to include a claim of reprisal when he was not given an "outstanding" rating on February 15, 2013 for performance year 2012. The Agency took no action on his formal complaint. Complainant requested a hearing before an EEOC AJ. The Agency failed to produce the record upon request by the AJ. Complainant filed a Motion for Sanctions noting that the Agency failed to investigate the matter. The Agency responded to the AJ's order nearly four months after the AJ ordered the Agency to produce the file. Complainant then moved to amend his claim of reprisal to include his appraisals for year 2014 which he received on February 2, 2015.

The AJ issued a decision entering a default judgment against the Agency noting that Complainant filed a motion for sanctions for which the Agency failed to oppose. The AJ noted that the Agency failed to complete the investigation and to produce a Report of Investigation. As such, the AJ ordered Complainant to provide a statement of relief and allowed the Agency the opportunity to respond to Complainant's request. The AJ determined that Complainant establish a prima facie case of denial of reasonable accommodation from September 21, 2012 to October 25, 2013, and of retaliation for the performance appraisals of 2012 and 2013. Based on the statements, the AJ concluded that Complainant was entitled to relief. The AJ ordered the Agency to change Complainant's performance appraisals for 2012 and 2013; to pay past pecuniary damages in the amount of $ 350.00; to pay non-pecuniary damages in the amount of $ 60,000.00; to restore Complainant's sick leave for 2012 and 2013; and to provide training for management regarding reasonable accommodation requests. The Agency implemented the AJ's decision finding no discrimination but appealed the award of compensatory damages and the increase of the appraisals to the "outstanding" level for 2012 and 2013. The Agency argued that Complainant was not entitled to the increase in his appraisals; that his award of compensatory damages was too high; and that the AJ erred in awarding restoration of leave. Complainant appealed asserting that he should have received more in compensatory damages, restoration of all leave from 2012 – 2015, and the "outstanding" level for the appraisals received from 2012 to 2015.

The decision noted that the only issues before the Commission involved the remedies awarded by the AJ. The parties did not challenge the AJ's default judgment. The decision clarified that Complainant alleged and the AJ found that the Agency subjected Complainant to unlawful retaliation regarding two performance appraisals, namely the 2012 and 2014 appraisals received on February 1, 2013, and February 2, 2015. The AJ concluded that Complainant established a prima facie case of unlawful retaliation with respect to the performance appraisals raised by Complainant in his complaint. As such, the appropriate remedy would be for the appraisals to reflect an "Outstanding" rating. In addition, the decision found that the AJ correctly indicated that Complainant is entitled to any awards or quality step increases that were associated with the "Outstanding" rating for performance appraisals for years 2012 and 2014.

The Agency argued that the AJ's award was excessive and that an award of $ 25,000.00 would be more appropriate. Complainant asked that the Commission increase the amount awarded to $ 270,000.00. The decision found that Complainant's request was excessive. Further, the decision found that the AJ's award was appropriate based on the worsening of Complainant's medical condition, his sleeping problems, anxiety, pain and suffering. As such, the decision upheld the AJ's award of $ 60,000.00 in compensatory damages. The decision found that the AJ properly awarded past pecuniary damages and denied future pecuniary damages based on Complainant's failure to provide support for his request. As to leave restoration, the decision found that Complainant did not support his claim that annual leave for 2012-2013 and any leave taken in 2014-2015. Finally, Complainant sought additional relief in the form of an alternative work schedule and telework which the decision found were outside of the scope of the finding of discrimination. As such, the decision affirmed the AJ's decision and finding of relief and ordered the Agency to take appropriate corrective action.

Sherman (Lewis Z.) v. USAF, 0720170013 (04/06/2017) – During the period at issue, Complainant, a Journeyman Electrician, filed a formal EEO complaint concerning his reassignment to a different team. Based on the evidence of record, we denied the Agency's request that we reject the AJ's finding of unlawful retaliation and the relief ordered by the AJ.

The AJ found that the actions by management reassigning Complainant just seven days after he filed a earlier EEO complaint against his supervisor constituted unlawful retaliation. The AJ ordered the Agency to expunge related disciplinary action from Complainant's personnel file as well as any other files within the Agency's control, make an unconditional offer to Complainant to return to his prior facility as an Electrician at the same pay rate, pay Complainant compensatory damages and reimbursement of related costs, and pay attorney fees.

In its final order, the Agency argued that there was no factual evidence supporting the finding of retaliation, and that the AJ's award of non-pecuniary compensatory damages was not fully warranted. We reversed the Agency's final order rejecting the AJ's finding, and ordered the Agency to take the remedial actions set by the AJ.

McCormick (Trina C.) v. DOJ, 0120131971 (05/12/2017) **[Repeated under Priority 6 above]** – Complainant worked as a Trial Attorney serving in a one-year detail as an Attorney Advisor at the Office of the Rule of Law Coordinator at the U.S. Embassy in Baghdad, Iraq where events surrounding her EEO complaint that she was subjected to reprisal discrimination and a hostile work environment based on sex took place. Complainant appealed to the Commission from the Agency's finding that she was not subjected to discrimination. The decision on appeal concluded that Complainant was subjected to a hostile work environment based on her sex because she was subjected to pervasive unwelcome conduct involving her statutorily protected class. Examples included management's belittlement of Complainant in connection with her assignments and work product, reassignment of work, and comments referencing Complainant's manner of dress and her cooking skills. Other examples of management's discriminatory conduct involved the general treatment of women in the office which included yelling at female staff members, exclusion and more favorable treatment of male staff members in a number of ways. The decision also concluded that Complainant was subjected to reprisal discrimination in being denied an extension of her detail, given a negative job reference, and given a negative performance appraisal because she demonstrated that the Agency's legitimate, nondiscriminatory, reasons were pretext. For example, the rating official preparing Complainant's evaluation explained that he based his performance evaluation of Complainant's work on his own observations, however, evidence revealed that the rating official was told to lower Complainant's rating in the "Accountability for Professional Responsibilities and Development" section based on her interaction with the management officials responsible for the hostile work environment sex discrimination. Complainant was awarded remedies which included a new detail opportunity or back pay which was lost because of Complainant being denied the opportunity to extend her original detail for one year, compensatory damages, and a revised performance evaluation.

Angeles (Marcel M.) v. USPS, 0120151062 (05/17/2017) – Complainant filed a formal complaint alleging that the Agency discriminated against him and subjected him to a hostile work environment on the bases of race (Asian), sex (male), color (Brown), and in reprisal for prior protected EEO activity when 1) on January 22, 2007, Complainant received a Letter of Warning (LOW) for Failure to Follow Instructions and Unacceptable Conduct/Delay of Mail; 2) the Postmaster subjected him to gossip and insults on the workroom floor; and 3) he was not considered for training and denied opportunities to serve as a 204B acting supervisor. Complainant filed a grievance over the Letter of Warning. The grievance settlement provided that the Letter of Warning would be removed from Complainant's personnel file after one year if Complainant received no other discipline. Complainant did not receive any additional discipline following the Letter of Warning; however, it was not removed until October 18, 2011. Complainant believed that the Letter of Warning was issued based on discrimination and allowed to remain in his personnel folder beyond its expiration date based on discrimination and reprisal.

Following an investigation, Complainant requested a hearing and an AJ issued summary judgment in favor of the Agency as to claims 2 and 3. The AJ held a hearing on claim 1 and found that Complainant had shown the Agency's legitimate, nondiscriminatory reasons to be pretext for reprisal

discrimination. The AJ found that while the Agency was justified in issuing the Letter of Warning, the Agency was under an affirmative obligation to remove the Letter of Warning from Complainant's personnel file in January 2008, and failed to do so. Once management became aware that the discipline was still in Complainant's official personnel file, it still refused to remove it. The AJ found that the record supported a finding that Complainant suffered humiliation and embarrassment because of the Letter of Warning remaining in his file longer than warranted. The AJ awarded Complainant $500.00 in non-pecuniary compensatory damages.

The appellate decision found that the AJ properly issued summary judgment as to claims 2 and 3. It further found that the AJ properly found that Complainant had not established that he was subjected to discrimination or reprisal as to the issuance of the Letter of Warning. Neither party challenged the finding of reprisal as to the Agency's failure to remove the Letter of Warning from Complainant's personnel file after one year, as it was required to do.

The Commission found, however, that the AJ's award of $500 in non-pecuniary compensatory damages was insufficient, and raised the award to $1,500. Accordingly, the Commission ordered the Agency to pay Complainant $1,500 in compensatory damages; provide EEO training to the responsible management official; consider disciplining the responsible EEO officials; and to post a notice.

Paige (Damion L.) v. VA, 0720170015 (05/26/2017) – The Agency filed an appeal from an AJ's finding of discrimination. Complainant, a Maintenance worker, filed his complaint alleging discrimination on the basis of religion (Jewish) when he was harassed. After a hearing, the AJ found that the Agency discriminated against Complainant, when, among other actions, a coworker sprinkled "holy" water on Complainant and said, "now you are one of us." For remedies, the AJ ordered nonpecuniary, compensatory damages in the amount of $25,000, attorney's fees in the amount of $29,545, costs in the amount of $189.96, posting of a notice of discrimination, an injunction enjoining the Agency from discriminating, and a notice to managers and supervisors in a facility that they could be disciplined for discrimination. The Agency issued a final order accepting the finding of discrimination, but challenging some of the remedies. The Agency also added the remedies of EEO training and consideration of discipline for responsible employees. OFO affirmed the finding of discrimination and modified some of the remedies. OFO agreed with the Agency that injunctive relief was not necessary since the Agency was already forbidden from violating EEO laws. OFO also agreed with the Agency that the notice to managers and supervisors was overly broad and not necessary because the discrimination was not facility-wide. In relief, OFO ordered the Agency to pay Complainant nonpecuniary, compensatory damages in the amount of $25,000, attorney's fees in the amount of $29,545, and costs in the amount of $189.96. OFO also ordered the Agency to provide EEO training to employees at the facility, consider disciplining the individuals responsible for the discrimination, and post a notice of the finding of discrimination.

Sloper (Mindy O.) v. VA, 0120152068 & 0120160586 (05/31/2017) – Complainant filed a formal complaint alleging that she was subjected to harassment, disparate treatment and constructive

discharge based on race (White, association with Black employees) in violation of Title VII. The Agency issued a decision finding that she was subjected to harassment and a suspension based on her association with Black employees. However, the Agency held that Complainant did not show that she was subjected to disparate treatment involving her performance appraisal. In addition, the Agency concluded that Complainant did not show that the work environment was so severe to result in her resignation. Subsequently, the Agency issued a final decision regarding Complainant's entitlement to compensatory damages awarding her non-pecuniary damages in the amount of $25,000.

Complainant filed two appeals with the Commission. The first requested that the Commission find that she was subjected to a constructive discharge based on the race-based harassment. The second appeal was based on the Agency's award of compensatory damages. Complainant asserted that she should have received pecuniary and non-pecuniary damages for the constructive discharge claim.

The appeals were consolidated into a single decision. The decision found that Complainant did not establish that she was subjected to a constructive discharge. The decision noted that Complainant resigned to take a promotion with another Agency. Complainant also gave notice of her resignation prior to one of the events raised in her claim of harassment. As such, the decision concluded that Complainant was forced to involuntarily resign because of her working conditions. Since the decision affirmed the Agency's decision finding no constructive discharge, the decision found no reason to modify the Agency's award of compensatory damages. Therefore, the decision reissued the remedies awarded by the Agency including removal of a suspension from Complainant's personnel record; consider discipline for the Agency officials who created a hostile work environment; provide training to the Agency on harassment; and pay Complainant $25,000 in compensatory damages.

Lemus (Erwin B.) v. DHS (TSA), 0120151276 (05/15/2017) – Complainant worked as a Transportation Security Inspector (TSI) at the Sacramento International Airport in Sacramento, California. Complainant filed a formal EEO complaint alleging that the Agency subjected him to a hostile work environment and discriminated against him on the bases of race (Hispanic), disability (dyslexia), and age (57). Following an investigation, and a requested final decision, the Agency found no discrimination.

For most the claims, the Commission affirmed the Agency's determination that management had articulated legitimate, non-discriminatory reasons to which Complainant had failed to demonstrate was pretext for discrimination. However, the Commission determined that Complainant was treated less favorably than other employees outside of his protected classes when he was issued a Letter of Counseling for unprofessional conduct, and a Letter of Counseling for missing a duty call. In those two claims, the Commission determined that the Agency's articulated non-discriminatory reason was pretextual as the record demonstrated a lack of uniformity in how discipline was issued, and that the disciplinary action was disproportionate to Complainant's actions.

The Commission reversed the Agency's determination of no discrimination in those two claims. A variety of remedies was ordered, including rescission and removal of any references to the two disciplinary actions; adjustment of any personnel actions that had referenced the two disciplinary

actions; consideration of Complainant's claim for compensatory damages; training for the responsible management official; and consideration of disciplinary action against the responsible management official; as well as attorney fees.

Gavens (Roy F.) v. HHS, 0720170018 (06/06/2017) – The Agency filed an appeal from an EEOC AJ's finding of discrimination. Complainant, a Senior Policy Advisor, filed his complaint alleging discrimination on the basis of reprisal for prior protected activity when the Agency issued a report with false statements about Complainant. After a hearing, the AJ found that the Agency discriminated against Complainant. For remedies, the AJ ordered nonpecuniary, compensatory damages in the amount of $8,000 and attorney's fees in the amount of $20,000. The Agency issued a final order rejecting the AJ's decision. The Agency filed an appeal arguing that there was no retaliation and that Complainant suffered no adverse action. OFO affirmed the finding of discrimination. OFO found that substantial evidence supported the AJ's finding that the responsible Agency officials knew of Complainant's prior protected EEO activity and that reprisal was the motivation for including false statements about Complainant in the report. OFO also found that Complainant was aggrieved because the Agency's actions were reasonably likely to deter a reasonable person from engaging in protected activity. In relief, OFO ordered the Agency to pay Complainant nonpecuniary, compensatory damages in the amount of $8,000, pay attorney's fees in the amount of $20,000, provide EEO training to responsible employees, consider disciplining the individuals responsible for the discrimination, and post a notice of the finding of discrimination.

Chambers (Brenton W.) v. DOT, 0120130554 (06/29/2017) **[Repeated under Priority 1, above, and Circulated Decisions, below]** – Complainant was previously a GS-14 Air Traffic Control Specialist (ATC). He and other ATCs were removed from employment by presidential order during the Professional Air Traffic Controllers Organization (PATCO) strike in 1981. In November 1997, Complainant filed an EEO complaint in which he alleged that the Agency discriminated against him because of his age (born in 1947) when it did not select him for a GS-12/13/14 ATC position.

Ultimately, an EEOC AJ found that Complainant proved age discrimination on the theory of disparate treatment but failed to prove that the Agency's selection policy disparately impacted applicants over 40 years old. On appeal, OFO determined that the agency articulated legitimate, non-discriminatory reasons for its actions, i.e., that Complainant was excluded from eligibility for the GS-12/13/14 position because Agency officials thought ex-PATCO controllers such as Complainant could only be hired at the GS-9 level from a separate ex-PATCO applicant list.

Nevertheless, OFO noted that there was compelling evidence that the Agency's explanations were pretext for age discrimination. Specifically, OFO noted that the Agency issued a Question and Answer (Q & A) document that stated that the age of ex-PATCO applicants partly justifies the Agency's decision to only hire them at the GS-9 level, which is a glaring contradiction of the ADEA's mandate that all personnel actions in the federal sector "shall be free from any discrimination based on age." OFO further noted that the Agency's policy of excluding ex-PATCO candidates from consideration for GS-12/13/14 positions almost exclusively affected workers who were 40 years of age

or older. Additionally, OFO noted that a witness testified that a selecting official mentioned that the Agency had "some age concerns" about ex-PATCO controllers. As such, OFO found that the Agency used ex-PATCO status as a proxy for age, which ultimately resulted in Complainant's nonselection for a GS-12 ATC position. Consequently, OFO found that substantial evidence supported the AJ's finding that Complainant proved he was subjected to disparate treatment because of his age.

OFO declined to review the AJ's finding regarding disparate impact because no additional remedies would be available for Complainant if he prevailed on this theory. However, OFO noted that a claim of disparate impact may be made under the ADEA against federal agency employers, and agencies may avoid liability by establishing that the policy at issue was job-related and consistent with business necessity.

In order to remedy the discrimination, OFO ordered the Agency to retroactively place Complainant into the GS-12 ATC position effective October 31, 1996, until the date on which he would have reached mandatory retirement; to tender to Complainant applicable back pay with interest; to provide in-person EEO training to responsible Agency officials; and to post a notice of the finding of discrimination.

Pullman (Shayna P.) v. DHS (FEMA), 0120141506 (06/02/2017) – The Commission reversed the Agency's final order fully implementing an AJ's decision finding no discrimination, concluding that Complainant was subjected to discrimination based on race and sex when she was not selected for a GS-11/12 Disability Integration Communication Specialist position in the Office of Disability Integration and Coordination (ODIC). Complainant was a medical doctor and had completed a 12-month detail in an ODIC position that was similar to the Disability Integration Communication Specialist position. We found that the AJ properly decided the case without a hearing, but we concluded that the AJ issued a decision without a hearing in favor of the incorrect party because the preponderance of the evidence in the record established that the Agency discriminated against Complainant. Complainant established a prima facie case of discrimination and the preponderance of the evidence in the record established that the Agency's legitimate, nondiscriminatory reason for not selecting Complainant was pretextual because the proffered reason was directly contradicted by the evidence in the record and because of procedural irregularities in the selection process. Because there was no clear and convincing evidence that Complainant would not have been selected for the position absent discrimination, we ordered the Agency to offer Complainant the position at the GS-12 level or a substantially similar position, determine the appropriate amount of back pay, with interest, and other benefits due Complainant, conduct a supplemental investigation pertaining to Complainant's entitlement to compensatory damages, provide the individuals responsible for the selection decision with training, consider discipline against the responsible management officials, and post a notice of the finding of discrimination.

Velez (Julius C.) v. Air Force, 0120151295 (06/16/2017) – We found that Complainant was denied a reasonable accommodation for his skin disability. Complainant worked as a Materials Handler Supervisor on the Patrick Air Force Base in Florida. As a Materials Handler Supervisor, Complainant

was assigned to work and supervise employees in Warehouse Building No. 822. Therein, Complainant was responsible for items, such as batteries, weapons, mobility bags, aircraft parts, and hazardous material. Shortly after Complainant was assigned to work in Warehouse Building No. 822, he began to develop contact dermatitis on his skin, which was diagnosed by his Dermatologist. Complainant believed that his skin was sensitive and allergic to some unknown material/substance in Warehouse Building No. 822. Complainant's Supervisor and other employees observed that Complainant had rashes on his face, arms, and body. Complainant thereafter requested, as a reasonable accommodation, to be reassigned away from Warehouse Building No. 822 due to his rashes, and presented a doctor's note to his supervisor. The Agency did not grant Complainant's request for accommodation, but instead offered to limit his exposure to the warehouse by attempting to offer him with three alternative accommodations. The offered accommodations however still would have required Complainant to frequently enter the warehouse. On appeal, we noted that although the Agency offered Complainant with three alternative accommodations, none were effective. In so finding, we noted that all three proposed accommodations still would have required Complainant to enter Warehouse Building No. 822, the area that was continuing to aggravate his skin condition. We therefore found that Complainant was denied a reasonable accommodation for his disability when the Agency failed to completely reassign him away from Warehouse Building No. 822.

Vinson (Lois G.) v. DHS (ICE), 0120151972 (06/08/2017) – Complainant worked as worked as a Legal Assistant at the Agency's Office of Principal Legal Advisor in San Diego, California. She filed a formal complaint alleging sexual harassment by a coworker (CW1) and retaliatory harassment by other coworkers (CW2, CW3, and CW4). The matter was investigated. Following the investigation, Complainant requested a hearing before an EEOC AJ who held a hearing on October 21 and 22, 2014. Following the hearing, the AJ concluded that Complainant was subjected to sexual harassment and sexual assault by CW1. Further, the AJ held that, despite informing her supervisor of the interactions with CW1, the harassment did not stop until a coordinator became involved almost a year after the events began. At that point, CW1 was transferred to another building and the harassment stopped. The AJ concluded that the Agency was liable for the sexual harassment experienced by Complainant. However, the AJ found that Complainant failed to show that the alleged lack of civility by CW2, CW3, and CW4 were taken in retaliation for Complainant's complaints of sexual harassment.

Following the finding of sexual harassment, with regard to compensatory damages, the AJ noted that Complainant testified that due to the harassment, she experienced feelings of depression, fear and hopelessness. She also experienced anxiety, sleep problems, weight loss, avoidant behavior, inability to concentrate, hypervigilance, and exaggerated startle response. She also expressed suicidal thoughts, but the AJ noted that she was inconsistent in her testimony about whether she experienced them on more than one occasion and did not disclose this information in her deposition. Complainant noted that the symptoms began in August 2010 and continued until she left the Agency in November 2012. Complainant indicated that she sought professional medical help, but provided no evidence on the length of treatment or if it continued. The AJ noted that Complainant attributed half of the emotion distress to the retaliatory harassment and half to the sexual harassment. Based on

the evidence provided by Complainant and the Commission's awards in similar cases, the AJ awarded Complainant $55,000, but reduced the award in half to reflect the harm related to CW1 as opposed to the retaliatory harassment. Therefore, the AJ concluded that Complainant was entitled to $ 27,500 in non-pecuniary damages. The AJ also awarded attorney's fees and costs to both Complainant's attorneys.

The Agency implemented the AJ's decisions and relief. Complainant appealed asserting that she should have received more in compensatory damages than what was awarded by the AJ. The Agency responded to Complainant's appeal asking that the Commission affirm the AJ's award.

The decision noted that the AJ correctly indicated that Complainant claimed that her emotional harm was in part due to the alleged retaliatory harassment but the decision found that the greater harm was caused by the sexual harassment Complainant experienced. The retaliatory harassment alleged involved isolated events which, accordingly to Complainant's testimony demonstrated of lack of civility on the part of CW2, CW3 and CW4. However, the decision indicated that the sexual harassment caused by CW1 included sexual assault, kissing, and physical touching which was more reasonable to find were related to Complainant's experience with anxiety, exaggerated startle response, avoidant behavior, hypervigilance, and thoughts of suicide. As such, the decision held that the AJ's award of $55,000 is supported by the record without a reduction.

Armstrong (Velva B.) v. Navy, 0120152226 (06/08/2017) – Complainant worked as an Electrician Helper at the Agency's Bangor Naval Base in Bremerton, Washington, when she alleged that she was subjected to disparate treatment and harassment based on her race, sex, and/or her prior EEO activity. The matter was investigated. Following the investigation, Complainant requested a hearing before an EEOC AJ who held a hearing on September 12 and 17, 2014.

The AJ found, regarding the disparate treatment claims, that the Agency provided legitimate, nondiscriminatory reasons for which Complainant failed to show were pretext. As to Complainant's claim of AJ found that she was subjected to a hostile work environment based on sex. The AJ determined that comments made by Complainant's coworkers were objectively offensive and excessively sexual. The AJ recounted the lewd comments the coworkers made about their girlfriends and their sexual relationships. Despite the Supervisor's attempts and Complainant's request that the comments stop, the language in the workplace did not get cleaned and had the opposite effect of stigmatizing Complainant. In addition, the AJ determined that Complainant was subjected to retaliatory harassment. The AJ held that Complainant was made fun of for filing EEO complaints and was told by a coworker that "snitches get stitches" and "normally we don't tell on each other." In addition, management officials engaged in retaliatory harassment by making comments to other workers warning them about Complainant and her propensity to complain. The AJ held that that the Agency could not avoid liability for the retaliatory and sexual harassment.

The AJ ordered the Agency to take remedial action, including paying Complainant for reasonable attorney's fees, conducting training for management, and posting a notice of the finding of discrimination. The AJ also determined that Complainant was entitled to compensatory damages. The AJ indicated that Complainant testified that she has suffered for over three years and has been

treated for generalized anxiety disorder and work-related stressors. Complainant also stated that she suffered from depression, anxiety, constant panic attacks, hopelessness and low self-esteem. Complainant also purported that she could not sleep at night, had a hard time sleeping; and experienced an exacerbation of her chronic pain disorder. The AJ took notice of Complainant's physician who supported Complainant's diagnosis and connected the exacerbation of her condition to the workplace environment. Finally, Complainant noted that her relationships with friends and family were strained. Taking Complainant's testimony and medical evidence into consideration, as well as awards in similar cases, the AJ determined that Complainant was entitled to $32,500 in compensatory damages.

The Agency implemented the AJ's decisions and relief. Complainant appealed asserting that she should have received more in compensatory damages than what was awarded by the AJ. Specifically, Complainant argued that she should have been awarded $125,000, not the $32,500. The Agency responded to Complainant's appeal asking that the Commission affirm the AJ's award of $ 32,500.

Upon review, the decision found that the AJ's determination that Complainant was entitled to $ 32,500 in compensatory damages is supported by the record as a whole. The decision held that the AJ took into consideration Complainant's medical documentation, as well as the testimony Complainant provided regarding the emotional and physical harm she experienced due to the harassment she experienced. Furthermore, the decision noted that the AJ's findings of fact concerning the harm Complainant suffered due to the discrimination is entitled to deference as there was a hearing in this case. Based on a review of the record, the decision concluded that the AJ's award was consistent with the Commission's decisions in comparable cases. As such, the decision upheld the AJ's award of $ 32,500 in compensatory damages. The decision reissued the AJ's remedial orders.

Johnson (Elliot J.) v. VA, 0120151804 (07/13/2017) – Complainant filed three discrimination complaints that were subsequently consolidated. In his first complaint, Complainant alleged that he was subjected to a hostile work environment based on reprisal. He identified six incidents of discrimination. In his second complaint, Complainant also alleged that he was subjected to a hostile work environment based on reprisal when he was not selected for a position. In his third complaint, Complainant also alleged a hostile work environment based on reprisal. The third complaint identified seven incidents of discrimination.

Complainant requested a hearing before an EEOC AJ. While the matter was pending before the AJ, the AJ granted summary judgment in part and denied it in part on the first complaint. The AJ denied summary judgment on the nonselection, the subject of the second complaint. The AJ granted partial summary judgment on the third complaint.

The AJ held a hearing on the remaining claims of the complaints. In his decision, the AJ ultimately found that Complainant was subjected to reprisal regarding his claims of a proposed suspension and being placed on authorized absence. For relief, the AJ awarded back pay and other benefits and, also, the payment of $8,000 in compensatory damages. The AJ denied the remaining claims and explained his rationale.

The Agency issued a decision, adopting the AJ's decision. Complainant appealed his nonselection and the amount of compensatory damages that were awarded. In our decision, we concluded that the AJ's finding that Complainant's nonselection was supported by substantial evidence. In so finding, we determined that Complainant had not shown that his qualifications were plainly superior to the qualifications of the selectees and, even if he were equally qualified for the position, that the Agency had discretion to choose among equally qualified candidates. We also noted that the selecting officials found that the selectees possessed other skills deemed more valuable than the skills of Complainant.

Addressing the compensatory damages award, we concluded that the amount of the award was supported by the record, noting that the AJ had taken into consideration Complainant's testimony and medical documentation regarding the harm that he had experienced as a result of the discrimination. We also noted that although Complainant had urged an increase in the award, he had not identified an amount to which the award should be increased.

To the extent that it had not done so, we ordered the Agency to take remedial action that had already been ordered.

Cho (Iesha P.) v. DOD, 0120170878 (07/20/2017) – Complainant filed an appeal with the Commission in which he alleged that the Agency had not complied with its November 2016 final order that fully adopted an EEOC AJ's finding that he was subjected to unlawful discrimination on the bases of national origin, race, age, and reprisal. The AJ ordered the Agency to pay Complainant $40,000 in non-pecuniary compensatory damages and $6,138.70 in pecuniary damages; to consider disciplining the responsible management official; to provide EEO training to two management officials; to post a notice of the discrimination finding; and to pay Complainant reasonable costs, subject to her submitting to the Agency acceptable documentation of her costs of copying, postage, parking, and other recoverable costs.

On appeal, OFO found that the Agency did not violate the AJ's order to consider disciplining the responsible management official because the record reflected that the official retired before the AJ's decision. Additionally, OFO also found that the Agency complied with the AJ's notice to post a notice of the discrimination finding. However, OFO found that the Agency failed to prove it paid Complainant $6,138.70 in pecuniary compensatory damages or provided training to the management official still employed by the Agency. Finally, regarding payment of reasonable costs, OFO noted that the AJ did not specify a deadline by which Complainant had to submit documentation regarding her request for costs to the Agency, and there was no evidence the Agency provided Complainant with a deadline for submitting her request, or any specific information about how to submit such a request. Further, OFO noted that the record reflected that Complainant and her representative attempted to dialogue with the Agency regarding costs immediately after the AJ's decision, but there was no evidence that the Agency provided them with guidance. OFO concluded that in the absence of clear direction about how and when to submit documentation regarding costs, and in the interest of fundamental fairness, Complainant should be given another opportunity to provide documentation substantiating her request for costs.

Consequently, OFO ordered the Agency to pay Complainant's pecuniary compensatory damages; to supplement the record with affidavits and other documentation from Human Resources officials or other Agency officials specifically addressing whether it had provided one of the management officials the ordered EEO training; and to issue a final decision determining Complainant's entitlement to costs after she was given 30 days to submit documentation regarding her request for costs.

Williams (Peggy T.) v. USPS, 0120171898 (7/20/2017) – Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of race (African-American), color, (Black), and in reprisal for prior protected activity.

Upon completion of the investigation, Complainant requested a hearing before an EEOC AJ. The AJ found that Complainant was subjected to discrimination based on race and color and unlawful retaliation when the Agency issued two Notices of Removal. The AJ ordered the Agency to take corrective action such as paying back pay, providing EEO training and removing the Notices of Removal from Complainant's personnel file.

The Agency issued a final order adopting the AJ's finding of discrimination and agreeing to implement the relief ordered.

Complainant filed an appeal with OFO that the Agency had not provided certain forms of relief ordered in the AJ's decision, such as paying back pay, posting a notice regarding the discrimination, and providing EEO training.

OFO found that there was no evidence that the Agency fully complied with the remedies ordered by the AJ. Thus, OFO ordered the Agency to fully comply with the relief ordered by the AJ to the extent it had not already done so.

Davison (Sang G.) v. DHS (ICE), 0120151360 (07/28/2017) – Complainant was terminated from his position during his probationary period. He alleged that his termination was based on race, color, and reprisal discrimination. The Agency issued a FAD finding that Complainant was subjected to reprisal with respect to two of his thirteen claims.

> 12. By letter dated December 27, 2010, he was placed on administrative leave, his authority to carry a firearm was suspended, and he was directed to surrender his government-issued firearm and credentials; and
>
> 13. By letter dated January 11, 2011, his probationary employment as an Immigration Enforcement Agent (IEA) was terminated.

The Agency awarded Complainant $15,000.00 in nonpecuniary damages and attorney's fees and costs in the amount of $6,379.35. Complainant argued the Agency's offer was too low. He requested $80,000 in nonpecuniary damages and $27,398.89 in attorney's fees and costs.

Upon review, the Commission found that based on the duration of Complainant's harm, an award of $25,000 was supported by the evidence. Complainant demonstrated that, because of the Agency's

conduct, he endured emotional distress which affected not only him but his family relationships (separation from his wife and loss of respect from his son). Moreover, Complainant persuasively established that due to his inability to gain employment, his depression worsened and he was unable to afford healthcare for treatment.

The Commission also awarded attorney's fees in the amount of $24,517.39. Complainant's award was adjusted by $1,881.50 to deducted the attorney's travel expenses. Even though Complainant only prevailed on 2 out of the 13 claims, the Commission found that Complainant's hostile work environment claim was not truly fractionable from his successful claims because they arose out of a common core of facts which took place during his approximately nine months of employment. In fact, the Agency found that direct evidence of retaliation took place regarding issues 12 and 13 when Complainant complained to the FBI about race-based and threatening comments made in his workplace and his fear of potential race-based violence in his workplace.

Outland (Lloyd E.) v. DOT (FAA), 0120150325 (08/17/2017) – Complainant, a probationary Airway Transportation Systems Specialist (ATSS), alleged that the Agency discriminated against him on the basis of disability when it denied him a reasonable accommodation and subsequently fired him for tardiness. He was late to work four times during his first two months of employment. After the fourth instance of tardiness, Complainant told his supervisor (S1) that he was a disabled veteran, that he was having a problem obtaining his medication, and that this was causing him to lose sleep and come to work late. He asked to change his start time from 7:00 a.m. to 8:00 a.m. S1 denied the request and, as an alternative, suggested that Complainant arrive at 8:00 a.m. and use one hour of leave. Complainant rejected the alternative because he was afraid that he would run out of leave. He reported to work on time for the next month. S1 then gave Complainant a letter that asked whether Complainant was requesting a reasonable accommodation, demanded medical documentation to support the request, inquired about the status of Complainant's medication, and stated that the information would be shared with the Flight Surgeon's Office to determine whether the medication prevented Complainant from performing safety-sensitive duties. The next day, Complainant gave S1 a doctor's note stating that Complainant was being treated for depression and was taking two identified medications. Complainant told S1 that he was back on his medication and was not asking for an accommodation. He was late again on following day, and the Agency fired him because of tardiness.

After a hearing, an EEOC AJ found that Complainant did not prove that the Agency discriminated against him on the basis of disability. He concluded that the Agency offered Complainant an effective accommodation when S1 suggested that Complainant take leave and that Complainant could not show that his termination resulted from a failure to accommodate.

On appeal, OFO found that the Agency unlawfully denied Complainant a reasonable accommodation from the date that he requested a change in schedule until the date that he told S1 that he was not asking for an accommodation. Citing Denese G. v. Dep't of the Treasury, EEOC Appeal No. 0120141118 (Dec. 29, 2016), OFO noted that it is not an effective accommodation to require an employee to take leave when another accommodation would allow the employee to

continue working. There was no evidence that the Agency would have incurred an undue hardship if it had given Complainant a modified work schedule that began at 8:00 a.m. The Agency was not required to accommodate Complainant by forgiving the tardiness that occurred before he requested reasonable accommodation, and its obligation to provide reasonable accommodation ended when Complainant told S1 that he no longer was having problems. Accordingly, OFO found that the Agency's termination of Complainant's employment did not constitute a denial of reasonable accommodation.

Southard (Octavio C.) v. DOI, 0120150460 (08/16/2017) – Complainant, a Hydrologist, GS-1315-12 at the Agency's Missouri Water Science Center facility in Rolla, Missouri, alleged, among other things, that he was discriminated against when, on October 24, 2013, his first level supervisor, S-1, made remarks to him about his EEO activity. Complainant maintained that S-1 approached him after he learned Complainant had contacted an EEO Counselor about a non-selection. According to Complainant, S-1 asked him, "What is the pre-complaint email that I got all about, why now, if you have filed something, was this about this announcement?" Complainant further stated that S-1 indicated that: 1) he should not have done it and he "pulled the trigger" too fast; 2) his work has been outstanding and maybe in six months they could try to get him a GS-13 position; 3) he should not have filed; and 4) this will only make everyone mad and no one will win, if this continues. S-1 admitted to having a conversation with Complainant about his EEO activity. S-1, however, maintained that the statements attributed to him by Complainant were not accurate, were misquoted, or were "extracted from other conversations."

On appeal, OFO found that even if S-1's version of the conversation was 100% accurate, the evidence indicated that he sought to interfere with Complainant's EEO activity. S-1 admitted that when he spoke to Complainant, the email he had received about a pre-EEO complaint was "weighing on his mind." S-1 acknowledged asking Complainant why he had filed "now." S-1 recalled stating that the EEO process was probably not "the most enjoyable path for anyone involved." He also appeared to have offered Complainant an incentive for withdrawing from the EEO process, by telling him that, if rumors of changes in management occurred and if Complainant had a good evaluation in hand, he, S-1, would have another conversation with senior management about a technical GS-13 position. OFO found that this was not inconsistent with Complainant's testimony that he was told that he should not have engaged in EEO activity; and his work had been outstanding and maybe in six months they could try to get him a GS-13 position. Likewise, OFO noted that Complainant's testimony that he was told he should not have filed; and this would only make everyone mad and no one would win was not inconsistent with S-1's testimony that he told Complainant, during a conversation that he described as, honest and heartfelt, that the EEO process was probably not "the most enjoyable path for anyone involved." He also admitted telling Complainant that he pulled the trigger too soon by engaging in EEO activity.

After finding that S-1 comments would be reasonably likely to deter an employee from exercising their rights under the EEO statutes, and that the actions and comments by S-1 were clearly in violation of the anti-retaliation provisions of our regulations, OFO ordered the Agency, among other

things, to conduct an investigation into Complainant's entitlement to compensatory damages, to provide training to S-1, and to consider taking disciplinary actions against him.

Cox (Wilda M.) v. USPS (Southern Area), 0120160472 (08/25/2017) – Complainant was a Mail Handler Equipment Operator and alleged that she was subjected to discrimination based on sex and race (Caucasian) when she was put off the clock by her manager (M1). Following a hearing, the AJ determined that Complainant established that she was subjected to sex discrimination but not race discrimination. Complainant testified at the hearing that she experienced weight loss, anxiety, depression, stress, and low libido as a result of being put off the clock by M1. The AJ awarded Complainant $10,000 in nonpecuniary compensatory damages and ordered the Agency to provide the manager with training, to post a notice, and to ensure that Complainant and M1 do not work on the same tour as long as they work at the same facility. We affirmed the AJ's finding that Complainant failed to establish that she was subjected to discrimination based on race. Taking into account the evidence submitted by Complainant, we affirmed the AJ's award of $10,000 in non-pecuniary compensatory damages. On appeal, Complainant had presented evidence that M1 had been present in the workplace during her tour. Accordingly, we ordered the Agency to ensure that Complainant and M1 were not assigned to the same tour as long as they work at the same facility. We also ordered the Agency to consider discipline against M1.

Lopez (Leon B.) v. USPS, 0120171062 (08/10/2017) – Complainant previously worked as a City Carrier Assistant at the Agency's Lynwood, California Post Office. Complainant filed an appeal with the Commission challenging an EEOC AJ's finding that he was not subjected to unlawful discrimination on the bases of national origin, race, and age when it terminated him from the Agency. Complainant did not appeal the AJ's finding that he was subjected to age, national origin, and race discrimination when it did not provide him with proper work equipment. The AJ concluded that testimony from Complainant and coworkers established that Complainant's equipment was often delayed or missing when he reported to work, and these equipment problems were more often experienced by Complainant than by other employees. The AJ further found that, based on testimony, Complainant's supervisor told a union official that Complainant was slower and older than other employees, and Complainant credibly testified that S1 had told him to "just grab a burrito and learn to eat while you deliver the mail." In order to remedy the discrimination, the AJ awarded Complainant $2,500 in non-pecuniary compensatory damages associated with the finding of age, race, and national origin discrimination. The AJ's determinations were fully adopted by the Agency in a final order.

On appeal, OFO found that the Agency provided legitimate, nondiscriminatory reasons for terminating Complainant. Specifically, OFO noted that the Agency stated that Complainant was removed during his probationary period for telling a supervisor to leave him alone so he could do his "fu*king job;" telling the supervisor his job was the "worst fu*king job" he had ever had; putting his middle finger up at his supervisor, blowing his vehicle horn, and screaming and yelling in the office parking lot; and ripping his postal shirt and shredding it into pieces. The Commission found that

Complainant did not prove that the Agency's explanations were pretext for unlawful discrimination. In so finding, the Commission noted that Complainant acknowledged that he engaged in the conduct the Agency cited as the basis for his termination, and it was reasonable for the Agency to find his conduct unacceptable and inconsistent with federal service that involved interacting with customers.

In order to remedy the discrimination associated with the work equipment claim, OFO ordered the Agency to pay Complainant's $2,500 in non-pecuniary compensatory damages; to provide eight hours of in-person EEO training to all current management and supervisory officials at Complainant's work facility; to consider taking disciplinary actions against Complainant's supervisors; and to post a notice of discrimination at Complainant's work facility.

Shaw (Kenny C.) v. DOD, 0720150030 (08/29/2017) – Complainant, among other things, alleged that the Agency discriminated against him on the bases of race (African-American) when he was not selected for an Assistant Special Agent in Charge/Supervisory Criminal Investigator, which was a promotion to GS-13 position. The vacancy announcement stipulated that the "incumbent must take and pass annual medical and physical fitness examinations." Complainant was rated qualified and referred for further consideration. Complainant's second-line supervisor (S2) served as the selecting official for the position. Complainant and another employee C-2 (white) were both referred to the Director (S3) for final approval. Complainant was S2's choice for the position.

Thereafter, S2 was told by S3 that he could not select Complainant because he had not passed his annual physical fitness exam (PFE) during the prior performance year. S3 suggested another candidate C-1 (white). C-1 had not applied for the position but it was known that he was interested in promotion. After C-1 submitted an application, it was determined that he did not meet the numerical qualification; however, S3 suggested that the number be lowered so that C-1 could be referred for selection. S3 argued that C-1 was only three points below the established cut-off point, and an arbitrary cutoff score should not be applied. The record indicated, however, that there were a number of other candidates who fell below the cut off, but no other candidates were added for consideration as a result of the lowered acceptable numerical standard.

After a hearing, the EEOC AJ found that the Agency did not provide a legitimate, non-discriminatory reason for Complainant's non-selection. According to the AJ, C-1 was pre-selected by S3. Although pre-selection is generally not problematic, here the AJ found that it supported Complainant's contention about being bypassed due to racial bias. In this regard, the AJ noted the arbitrary waiver of the qualifications standards concerning C-1, who initially was not even a candidate for the position, but the rigid application of qualification standards when it came to Complainant.

The Commission's decision agreed with the AJ that the Agency did not articulate a legitimate, non-discriminatory reason for its actions, but even if it had, we found that Complainant established pretext because he was better qualified than C-1 and discriminatory animus could be inferred by his non-selection. Complainant was considered the best candidate by S2, who described his work performance as "spectacular," and who often placed him in a supervisory capacity. Upon finding discrimination, the Agency was ordered to pay Complainant $38,750 in compensatory damages. The Agency was also ordered, among other things, to place Complainant in the same or similar position

as the Assistant Special Agent in Charge/Supervisory Criminal Investigator position that he was denied, and to pay him full back pay, including any and all benefits that he would have received, should he have been selected for this position on June 1, 2011.

McConnell (Velva B.) et al. v. USPS, 0720160006, 0720160007 (09/22/2017) **[Summary repeated under Priorities 3 and 6, and Broad Impact Decisions above, and Circulated below]** – The Commission affirmed the AJ's determination, on summary judgment, that USPS violated the Rehabilitation (Rehab) Act on a class-wide basis (affecting thousands of employees) with regard to its National Reassessment Program (NRP). The NRP was ostensibly designed to save money by eliminating "make work" positions. However, the true purpose was to get limited-duty (Injured on Duty-IOD) and Rehabilitation employees off the agency's rolls, without regard to their rights and the Agency's obligations under the Rehab Act. The decision affirmed the finding of the AJ on summary judgment that the USPS Senior Officials who devised and implemented the NRP had engaged in a pattern and practice of discrimination against the Agency's disabled employees through class-wide disparate treatment.

Moreover, the Commission found, based upon testimony from approximately 20 anecdotal witnesses, that the Agency accomplished its aim of purging employees with medical restrictions from the workplace by removing existing accommodations and/or by failing to engage in the interactive process. No showing of undue hardship was made by the Agency; instead, anecdotal witnesses and other evidence illustrated that taking class members abruptly out of their jobs resulted in decreased operational efficiencies and increased costs. The Agency illegally failed to provide reasonable accommodations for the known limitations of otherwise qualified individuals with disabilities and denied employment opportunities to qualified IOD employees with disabilities because of the need for reasonable accommodation.

The Commission further found that the Agency subjected its IOD employees assessed under the NRP to a discriminatory hostile work environment through numerous and pervasive hostile actions (i.e., on the spot dismissals of IOD employees who were escorted out of the building in a humiliating manner, constant pressure to provide more medical documentation, derogatory and threatening remarks made in the workplace, and agency management repeatedly stoking the fears that these employees would lose their jobs). Additionally, it deemed Phase 1 of the NRP to be an unlawful disability-related medical inquiry that was not job-related and consistent with business necessity. Moreover, the Agency violated the medical confidentiality provisions of the Rehab Act by its failure to redact employee medical documentation, as well as through the reports from all over the country of medical files containing confidential medical information being left in open, freely accessible areas such as supervisors' desks, copy machines, and the work room floor.

Most significantly, the Commission explained in this decision that expecting every potential class member to undertake the individualized inquiry that the Rehabilitation Act requires during the liability phase is inherently impractical, unworkable in practice, and would effectively bar the use of class complaints as a means of challenging workplace policies that discriminate against individuals with disabilities. It held that a far more efficient and effective way to resolve the individualized-

inquiry dilemma is to require prospective class members to prove that they are qualified individuals with disabilities during the remedies phase of the proceeding, because that is where proof of one's status as a qualified individual with a disability under the Rehabilitation Act naturally aligns with proof of one's membership in a class. The decision ordered the Agency to notify class members and allow them to file claims.

Reed (Chara S.) v. DHS (FEMA), 0120161925 (09/21/2017) – Complainant alleged that the Agency discriminated against her on the bases of race (African American) and color (brown) when it failed to select her for the position of Public Assistance Closeout Specialist for which she had been deemed qualified.

Following a hearing, an EEOC AJ concluded that the Agency had discriminated against Complainant when it did not select her for the position. In so concluding, the AJ found that Complainant's qualifications exceeded the qualifications of the two Caucasian selectees. The AJ noted that Complainant had an undergraduate and a graduate degree whereas the two selectees had no college degrees; that she had more extensive work experience in the position than the selectees, one of whom did not have any experience in the position while the other had limited experience; and she had a lengthier and more relevant work history with the Agency.

Having found discrimination, the AJ ordered make whole relief and other remedies. The Agency adopted the AJ's decision. Complainant appealed, alleging that Agency had failed to comply with the order of relief.

We remanded the matter because the record was inadequately developed and needed clarification to determine whether the Agency was in compliance with the relief ordered. In addressing the offer of employment and noting that the Agency had closed its operations where Complainant worked, we found that we could not determine from the record whether the position offered was consistent with the AJ's decision. We also found that the record was not complete and clear so as to enable a determination regarding the proper amount of back pay, thrift savings plan contributions, and overtime. Because there was a lump sum back pay award, we ordered the Agency to provide Complainant with the opportunity to provide evidence concerning any adverse tax consequences.

Shafford (Lauralee C.) v. DHS (FPS), 0720150002 (09/25/2017) – Complainant worked as a Deputy Regional Director (DRD) and a Senior Instructor/Law Enforcement Specialist for the Federal Protective Service in Washington, DC. On March 2, 2011, Complainant filed a formal complaint alleging non-sexual harassment based on sex (female). She later amended the complaint to include the additional basis of reprisal for prior EEO activity, and additional incidents in support of her hostile work environment claim. After the investigation, Complainant requested a hearing. On August 13, 2013, the AJ issued a default judgment in favor of Complainant and an order to Complainant to submit evidence regarding damages.

The AJ cited the Agency's consistent, willful disregard of the AJ's orders by failing to timely produce responsive discovery, and providing inaccurate and incomplete responses to discovery requests. The

AJ opined that the Agency failed to offer good cause for its "complete administrative failure" and that Complainant had in fact suffered prejudice as a result of the Agency's delays. Complainant filed a brief in support of damages on September 30, 2013, requesting non-pecuniary compensatory damages at the cap amount of $300,000.00, and pecuniary compensatory damages in the amount of $1,903,163.02. In a decision issued on September 5, 2014, the AJ determined that Complainant was entitled to $200,000.00 in non-pecuniary compensatory damages, and $223,116.35 in pecuniary compensatory damages. Additionally, the AJ awarded a total of $131,262.50 in fees to four attorneys. The Agency declined to implement the AJ's decision with respect to remedies, and filed an appeal.

The appellate decision affirmed the AJ's decision with respect to the non-pecuniary and pecuniary compensatory damages amounts, finding that a review of the record in the case offered no basis on which to disturb the AJ's decision with respect to these two awards. Specifically, with respect to the non-pecuniary compensatory damages award, the appellate decision found that the AJ had taken account of several factors that limited Complainant's award, and that the Agency was not the sole cause of Complainant's emotional and psychological harm. With respect to the pecuniary compensatory damages award, the appellate decision agreed with the AJ's reasoning that the award should be limited to the amounts contained in "legitimate receipts." Finally, the appellate decision agreed with the Agency's arguments that there was no basis to support an overage of $9112.50 reflected in the AJ's award on attorney's fees, and revised this portion of the decision as a result, limiting the attorney's fee award to the amount reflected in the fee petition.

8. CIRCULATED CASES

Davidson (Tyree L.) v. DHS (CIS), 0120102908 (04/06/2017) **[Repeated under Priority 1 above]** – Complainant filed a class complaint alleging the Agency had a "long established practice of not hiring African-Americans above the GS-13 level in [the] Central Region, and its legacy organization (Southern Region)." Complainant indicated that several selections involving GS-14 and above positions have been made where "highly qualified and referred" African-American candidates were not selected in favor of less-qualified non-African-American candidates. Complainant, as the class agent, alleged he was the victim of this discrimination when, on October 13, 2009, he was not selected for a Supervisory Management and Program Analyst, GS-14 position.

The case was forwarded to an EEOC Administrative Judge (AJ) for processing as a class complaint. On June 24, 2010, the AJ issued her decision denying class certification. The AJ determined that Complainant established the prerequisites of commonality and typicality. However, the AJ held that numerosity was not established as there was no evidence in support of Complainant's claims concerning the number of selections made during the relevant time period. Further, the AJ noted that Complainant was not an attorney and had not retained counsel. As such, the AJ held that Complainant did not establish the prerequisite of adequacy of representation. Complainant appealed.

The Commission affirmed the AJ's decision denying class certification. However, the appellate decision held that Complainant failed to establish all of the four prerequisites for class certification. Complainant failed to provide any evidence to support his estimate for the number of class members even on appeal. Even among the ten purported members of the class, Complainant failed to show that any of them had applied, or been eligible, for promotion to the GS-14 level. The decision also found that Complainant failed to establish commonality and typicality as Complainant had not shown that there was a common Agency practice or policy in effect resulting in discrimination, or that he had been subjected to that policy or practice. Finally, as to adequacy of representation, while Complainant provided a name of counsel, the law firm failed to provide any evidence to show it had sufficient legal training and experience to pursue a class action of this type. Class certification was denied and Complainant's individual complaint of discrimination was remanded for further processing.

Jones (Michel S.) v. DOD (DCA), 0520160349 (04/27/2017) – The Agency requested reconsideration of the decision in Jones v. Dep't of Def., 0120160948. The Commission's prior decision reversed the Agency's dismissal of Complainant's complaint because he failed to timely file his complaint within the regulatory filing period. Complainant argued on appeal that the time limit for filing his formal complaint should have been extended because the Agency twice denied his requests for official time. In the prior decision, the Commission found that Complainant had provided adequate justification for extending the filing period because, the Agency failed to rebut or even address Complainant's allegations regarding the denial of official time.

The Commission, upon reconsideration, found that due to a "clerical error" it had mistakenly overlooked the fact that the Agency did respond to Complainant's contentions regarding the denial of official time. The Commission further determined that the Agency provided evidence that Complainant's requests for official time were not connected to the EEO complaint at issue. Additionally, record evidence showed that Complainant acknowledged in an email to the Agency's EEO Office that he erroneously "mentally noted" receiving the Notice of Right to File a Formal Complaint three days later than when he actually received it. Accordingly, the Commission found that the Agency's request met the criteria of 29 C.F.R. § 1614.405(c), and granted the request. As a result, the decision of the Commission in Appeal No. 0120160948 was reversed, and the Agency's final decision dismissing the complaint was affirmed.

Randolph A. v. EEOC, 0120162408 (04/26/2017) – On April 29, 2016, Complainant filed an EEO complaint alleging that the Agency denied him a reasonable accommodation on the basis of disability when, on February 5, 2016, the Disability Program Manager (DPM) denied his November 3, 2015, request for the flexibility to use his 60 minutes of break time (two 15-minute breaks and one 30-minute lunch break) at the beginning or end of his shift to go to the gym.

The Agency, in its FAD, dismissed Complainant's complaint pursuant to 29 C.F.R. § 1614.107(a)(1), for stating the same claim that is pending or has been decided by the agency or Commission.

The Commission, in its appellate decision, found that the Agency properly dismissed the complaint because the matter at issue, the DPM's February 5, 2016, decision to deny Complainant's November 3, 2015, reasonable accommodation request, had been resolved by a February 19, 2016, settlement agreement. Specifically, the Commission found that provision 4 stated that the parties agreed "to accept as final the decision by [the DPM] regarding Complainant's reasonable accommodation request." In addition, the Commission found that Complainant acknowledged on appeal that provision 4 related to his November 3, 2015, reasonable accommodation request. Moreover, although Complainant asserted that he did not notice the language in provision 4, the Commission found that he presented no evidence (other than his bare assertion) that he did not knowingly and voluntarily enter into the settlement agreement. Further, although Complainant asserted that a prior settlement agreement on the same matter contained different language, the Commission found that provision 7 stated that the settlement agreement "fully supersedes any and all prior agreements" on the same matter. Finally, the Commission found that provision 10 stated that Complainant could not institute any other complaint "with respect to any matter or issue raised in this action occurring prior to the date of execution of this agreement."

Mohar (Lara G.) v. USPS, 0520130618 (06/09/2017) – In 2009, following a hearing, an EEOC AJ determined that the Agency had subjected Complainant to retaliatory harassment. The AJ awarded relief that included "back pay, with interest, and all other benefits (leave restoration, health insurance, retirement benefits) due [C]omplainant for the period of time she was absent from work ...." The AJ also awarded Complainant $29,000 in past and future pecuniary damages, and $100,000 in non-pecuniary damages. The award of non-pecuniary damages was supported by reference to the amount awarded in a 2003 decision in a case involving similar injuries. The Agency accepted the AJ's finding of liability, but not the award of relief. Both parties appealed. The Commission modified the award of equitable relief, but declined to increase the amount of pecuniary damages, finding no legal basis for Complainant's argument on appeal that the award of damages should be increased over the amount awarded in past cases involving similar injury to reflect the present value of the dollar. The Commission denied Complainant's subsequent request for reconsideration for failure to meet the criteria to reconsider.

The Commission had cause to review its decisions in this case while adjudicating Complainant's subsequent Petition for Enforcement of its previous order of relief. The Commission thereafter, on its own motion, reopened the case for reconsideration. Overruling its contrary precedent, the Commission stated, in pertinent part:

> [W]hen determining an award of non-pecuniary compensatory damages, the Commission may consider the present-day value of comparable awards. Thus, an AJ [or Agency] who is awarding damages should consider the amounts that the Commission awarded in any prior cases involving similar injuries and should determine whether circumstances justify a higher or lower award. The AJ [or Agency] should adjust the award upward or downward according to the relative severity of the complainant's injury. The AJ [or Agency] may then take into consideration the age of the comparable awards and adjust the current award accordingly. (Footnote omitted.)

The Commission then determined that the amount of non-pecuniary damages awarded to Complainant should be increased by $10,000 to account for the change in value of the dollar between the date of the comparable award and the date of Complainant's award.

This decision also contains a useful discussion of determining the proper amount of leave restoration when the complainant's injury was not entirely attributable to the discrimination found.

Dino B. v. EEOC, 0720150039 (06/05/2017) – Complainant filed an EEO complaint alleging, in pertinent part, that the Agency discriminated against him on the basis of disability when, from December 2012 to March 2013, it denied/delayed his reasonable accommodation for an office that provided "a reduced distractive environment." The AJ issued a decision without a hearing, finding disability discrimination. The Agency appealed the AJ's decision.

The Commission, in its appellate decision, found that the AJ erred in issuing a decision without a hearing.

First, the Commission found that there was a genuine issue of material fact regarding whether the accommodations offered by the Agency, i.e., a cubicle located in a supposedly less-trafficked area and noise-canceling headphones, were effective in providing Complainant with "a reduced distractive environment." Specifically, regarding the effectiveness of the offered accommodations, the Commission determined that the record contained no documentary evidence and contained conflicting affidavit testimony.

Second, the Commission found that the record had not been adequately developed for summary disposition regarding whether the Agency improperly delayed Complainant's reasonable accommodation request. Specifically, the Commission noted that the Agency did not officially respond to Complainant's December 2012 request until March 2013. The Commission, however, determined that the record was not clear as to what caused the gap in the Agency's processing of Complainant's request, especially the time between his December 2012 request to the Agency and his February 2013 submission of a medical questionnaire to the Agency.

The Commission vacated the Agency's final order and remanded the complaint for a hearing.

Chambers (Brenton W.) v. DOT, 0120130554 (06/29/2017) **[Repeated under Priority 1 and Enforcement – General, above]** – Complainant was previously a GS-14 Air Traffic Control Specialist (ATC). He and other ATCs were removed from employment by presidential order during the Professional Air Traffic Controllers Organization (PATCO) strike in 1981. In November 1997, Complainant filed an EEO complaint in which he alleged that the Agency discriminated against him because of his age (born in 1947) when it did not select him for a GS-12/13/14 ATC position.

Ultimately, an EEOC AJ found that Complainant proved age discrimination on the theory of disparate treatment but failed to prove that the Agency's selection policy disparately impacted applicants over 40 years old. On appeal, OFO determined that the agency articulated legitimate, non-discriminatory reasons for its actions, i.e., that Complainant was excluded from eligibility for the GS-

12/13/14 position because Agency officials thought ex-PATCO controllers such as Complainant could only be hired at the GS-9 level from a separate ex-PATCO applicant list.

Nevertheless, OFO noted that there was compelling evidence that the Agency's explanations were pretext for age discrimination. Specifically, OFO noted that the Agency issued a Question and Answer document that stated that the age of ex-PATCO applicants partly justifies the Agency's decision to only hire them at the GS-9 level, which is a glaring contradiction of the ADEA's mandate that all personnel actions in the federal sector "shall be free from any discrimination based on age." OFO further noted that the Agency's policy of excluding ex-PATCO candidates from consideration for GS-12/13/14 positions almost exclusively affected workers who were 40 years of age or older. Additionally, OFO noted that a witness testified that a selecting official mentioned that the Agency had "some age concerns" about ex-PATCO controllers. As such, OFO found that the Agency used ex-PATCO status as a proxy for age, which ultimately resulted in Complainant's nonselection for a GS-12 ATC position. Consequently, OFO found that substantial evidence supported the AJ's finding that Complainant proved he was subjected to disparate treatment because of his age.

OFO declined to review the AJ's finding regarding disparate impact because no additional remedies would be available for Complainant if he prevailed on this theory. However, OFO noted that a claim of disparate impact may be made under the ADEA against federal agency employers, and agencies may avoid liability by establishing that the policy at issue was job-related and consistent with business necessity.

In order to remedy the discrimination, OFO ordered the Agency to retroactively place Complainant into the GS-12 ATC position effective October 31, 1996, until the date on which he would have reached mandatory retirement; to tender to Complainant applicable back pay with interest; to provide in-person EEO training to responsible Agency officials; and to post a notice of the finding of discrimination.

Bishop (Ria T.) v. CIA, 0120152758 (08/02/2017) – On May 8, 2013, Complainant filed a formal complaint naming herself as the class agent challenging the Agency's decision to: (1) eliminate support positions, and reassign employees to a Transition Center in an alleged effort to force retirements from the Agency; (2) give a performance objective to apply for internal vacancy positions; and (3) direct Complainant to take assignments with no regard for promotion potential or work location in order to discriminate against employees aged 40 and older.

An EEOC AJ recommended that the Agency deny class certification, and dismiss the class complaint of discrimination. Specifically, the AJ found that Complainant's class claims failed because she did not meet the requirements of numerosity, typicality, commonality, and adequacy of representation. Additionally, the AJ found that Complainant failed to demonstrate that assignment to the Transition Center constituted an adverse action. The Agency issued a final order adopting the AJ's decision. Complainant filed an appeal with the Commission.

The Commission's decision on appeal affirmed the Agency's final order.

McConnell (Velva B.) et al. v. USPS, 0720160006, 0720160007 (09/22/2017) **[Summary repeated under Priorities 3 and 6, Broad Impact Decisions, and General Enforcement above]** – The Commission affirmed the AJ's determination, on summary judgment, that USPS violated the Rehabilitation (Rehab) Act on a class-wide basis (affecting thousands of employees) with regard to its National Reassessment Program (NRP). The NRP was ostensibly designed to save money by eliminating "make work" positions. However, the true purpose was to get limited-duty (Injured on Duty-IOD) and Rehabilitation employees off the agency's rolls, without regard to their rights and the Agency's obligations under the Rehab Act. The decision affirmed the finding of the AJ on summary judgment that the USPS Senior Officials who devised and implemented the NRP had engaged in a pattern and practice of discrimination against the Agency's disabled employees through class-wide disparate treatment.

Moreover, the Commission found, based upon testimony from approximately 20 anecdotal witnesses, that the Agency accomplished its aim of purging employees with medical restrictions from the workplace by removing existing accommodations and/or by failing to engage in the interactive process. No showing of undue hardship was made by the Agency; instead, anecdotal witnesses and other evidence illustrated that taking class members abruptly out of their jobs resulted in decreased operational efficiencies and increased costs. The Agency illegally failed to provide reasonable accommodations for the known limitations of otherwise qualified individuals with disabilities and denied employment opportunities to qualified IOD employees with disabilities because of the need for reasonable accommodation.

The Commission further found that the Agency subjected its IOD employees assessed under the NRP to a discriminatory hostile work environment through numerous and pervasive hostile actions (i.e., on the spot dismissals of IOD employees who were escorted out of the building in a humiliating manner, constant pressure to provide more medical documentation, derogatory and threatening remarks made in the workplace, and agency management repeatedly stoking the fears that these employees would lose their jobs). Additionally, it deemed Phase 1 of the NRP to be an unlawful disability-related medical inquiry that was not job-related and consistent with business necessity. Moreover, the Agency violated the medical confidentiality provisions of the Rehab Act by its failure to redact employee medical documentation, as well as through the reports from all over the country of medical files containing confidential medical information being left in open, freely accessible areas such as supervisors' desks, copy machines, and the work room floor.

Most significantly, the Commission explained in this decision that expecting every potential class member to undertake the individualized inquiry that the Rehabilitation Act requires during the liability phase is inherently impractical, unworkable in practice, and would effectively bar the use of class complaints as a means of challenging workplace policies that discriminate against individuals with disabilities. It held that a far more efficient and effective way to resolve the individualized-inquiry dilemma is to require prospective class members to prove that they are qualified individuals with disabilities during the remedies phase of the proceeding, because that is where proof of one's status as a qualified individual with a disability under the Rehabilitation Act naturally aligns with proof of one's membership in a class. The decision ordered the Agency to notify class members and allow them to file claims.

III. Federal Sector Oversight

- OFO staff completed all but one of the 116 Technical Assistance Visits with federal agencies concerning non-compliance with laws, regulations or directives, and leading practices in federal EEO programs. Following the visits, OFO issued feedback letters to 22 federal agencies.
- OFO staff drafted the Digest of EEO Law (FY 2017, Volume 3) containing summaries of noteworthy select decisions issued in FY 2017, and coordinated with OCLA to issue press release.
- OFO staff collaborated with OLC on drafting a guidance document on Personal Assistant Services.
- OFO staff drafted a reformat the Federal Sector page of EEOC's external website in collaboration with OCLA.
- OFO staff processed one pilot request for Commission vote.
- OFO staff submitted a final draft of the HHS program evaluation and recommendations to HHS for feedback, which will be incorporated into the final report. OFO has also contacted HHS to schedule an exit conference.
- OFO staff continued work on a program evaluation of VBA's EEO program by conducting interviews with VBA officials, including the agency head. OFO staff continued work on a program evaluation of VBA's EEO program by conducting three interviews and reviewing additional documents submitted, as well as planning for travel to Philadelphia, PA, and St. Petersburg, FL. Staff also drafted survey questions for distribution to VBA's EEO managers and local Reasonable Accommodation Coordinators.
- OFO staff drafted and launched an internal survey to determine which additional agencies should receive a program evaluation during FY 2017.
- OFO staff revised and continued rolling out its new Compliance Enforcement Program and reduced in half the open compliance inventory.
- OFO staff completed a final draft report by the Performance Metrics Committee entitled, "Attitudes Toward the Effectiveness of OFO Amongst Federal Sector Stakeholders."
- OFO staff completed a final draft White Paper entitled, "Proposal for Investigating Form 462/MD-715 Reporting Structure for Improved Efficiency."
- OFO staff completed a report entitled, "An Examination of Appeals of Harassment Allegations within the Federal Sector."
- OFO staff worked on a criminological commentary for "The Report of the Co-Chairs of the EEOC Select Task Force on the Study of Harassment in the Workplace." The commentary assesses what criminology can add to what we know about effective harassment prevention.

- OFO staff continued working with OPM in order to obtain Enterprise Human Resources Integration – Statistical Data Mart (EHRI-SDM) Personnel Data.
- OFO staff continued work on a program evaluation of HHS's EEO program by conducting numerous interviews of staff in 10 subcomponents and reviewing volumes of documents. An 83-page final draft report was completed.
- OFO staff continued work on a program evaluation of VBA's EEO program by reviewing responses to an RFI and conducting an entrance conference with VBA officials, including the agency head.
- OFO staff generated a report on the Rate of Harassment and Sexual Harassment for the Department of Interior, National Park Service. This report compared the rate of retaliation complaints at the National Park Service to the government-wide rate over a five-year period (2011-2015).
- OFO participated in a one-day ACS Respondent Burden Testing Briefing session conducted by the Census Bureau.
- OFO is collaborating with the Performance Metrics Committee to develop OFO impact measures.
- OFO staff traveled to St. Louis to conduct interviews and is finalizing the VBA program evaluation report and anticipates its completion by September 2017.
- OFO Staff produced the final HHS program evaluation report, incorporating agency comments. Currently in process for submission for editing and printing services.
- OFO staff conducted a focus group discussion with EEO directors and HR professionals in order to help gain a better picture of the recruitment and hiring processes and/or any issues within public safety occupations. Staff conducted a second focus group on July 11th, 2017, to gain more personal insights from those employed in the selected occupations. Staff anticipates completion of this report by September 2017.
- After review by external EEO programs, OFO staff finalized the recruitment module of the tool and is ready for review by OFO management. OFO staff continued work on the promotions and hiring model.
- OFO staff continued work on a computerized barrier analysis tool for the promotions phase of the employment lifecycle.
- Retaliation report is currently underway by SUNY researchers in collaboration with OFO staff. SUNY IPA researchers are using Form 462 data to investigate the impact of the form of complaint filed (issues), EEO staffing, EEO training, agency EEO reporting structure (whether the EEO Director reports directly to the agency head), and FEVS indicators of a "just climate" on rates of retaliation complaints among federal employees. OFO staff provided IPA researchers with multiple years of Form 462 data and created an accompanying codebook for use with these data.

- OFO staff completed the final draft report entitled "Harassment as a Crime: A Criminological Perspective on Harassment in the Workplace" (now awaiting approval by OFO management).
- OFO staff evaluated the soundness and feasibility of the methodology for the fatherhood pay bonus report in the federal and non-federal sectors and began analyses.
- OFO staff applied the alternative coding system to the existing Form 462 database and tested the efficiency of the new system. Our tests suggest that the new system requires significantly less code for running queries than the previous system due to the elimination of string-based filters. We are in the process of applying this new coding system to all years of data stored on the cloud server (FY2013-2016). The alternative coding system and associated codebook will allow OFO to create flat files from the currently stored relational tables.
- OFO's Performance Metrics Committee identified impact measures and data sources for five of six units of interest. Once we have identified measures for the remaining unit then we will bring the various databases together and draft guidance for how to use the database to assess the impact of OFO on agency stakeholders and/or the workforce.
- OFO staff created two databases (and associated codebooks) for training and outreach. One database for the customer specific training and the other for the anti-harassment training.
- OFO staff submitted an article to Federal Manager entitled, "Retaliation: 7 Reasons We Seek Revenge".
- In pursuit of improving the retrievability of OFO data, OFO staff completed the data dictionary for the FY2015/2016 Form 462 Annual Report databases.
- OFO staff developed a timeline for the special topics report on discrimination and retaliation complaints among public safety professionals. OFO staff also began querying the data and gathering the literature needed for this report.
- OFO staff fulfilled a data request for Dr. Ellen Rubin in support of the above referenced report on EEO retaliation in the Federal Government. OFO staff also continued to provide technical support to Dr. Rubin for this project.
- OFO staff fulfilled a data request from the Department of Labor in which we provided the agency with Form 462 and MD-715 workforce and Parts data for the years 2013 to 2016.
- OFO staff fulfilled a data request for OCH in which we provided complaints, settlements, and findings data for the years 2013 to 2016.
- OFO staff completed all of the 116 Technical Assistance Visits with federal agencies concerning non-compliance with laws, regulations or directives, and leading practices in federal EEO programs. Following the visits, OFO issued feedback letters to 97 federal agencies.

- OFO staff drafted the Digest of EEO Law (FY 2017, Volume 4) containing summaries of noteworthy select decisions issued in FY 2017, and coordinated with OCLA to issue press release.
- RED staff completed a report titled, "Fatherhood and Pay in the Federal and Private Sectors." (SEP 4: Ensuring Equal Pay Protections for All Workers)
- RED fulfilled a data request from the Department of Veterans Affairs, delivering data on settlements with monetary benefits.
- RED fulfilled a data request from EEOC's Birmingham District Office, delivering data on federal sector complaints.
- RED completed the Federal Sector Job Group section of the Census EEO Tabulation Occupation Codes Crosswalk.
- RED researched potential form-builders for the future of collecting federal sector complaints data.
- RED released a computerized barrier analysis tool covering the recruitment phase of the employment lifecycle on FedSEP and continued developing tools covering the other phases of the employment lifecycle. (SEP 1: Eliminating Barriers in Recruitment and Hiring)
- RED staff fulfilled a data request for Dexter Brooks, providing the total number of counselings and complaints filed for FY 2015-2016.
- RED staff fulfilled a data request for Acting AOD Branch Chief, Virginia Andreau, providing the distribution of Hispanics in the federal workforce by GS level for FY 2003, 2013-2016.
- RED staff attended four weeks of Lean Six Sigma Black Belt Training.
- In pursuit of improving the availability of OFO data, RED staff used PowerBI to develop a sample public-use dashboard for Form 462 data.
- RED staff used PowerBI to develop a sample dashboard for a sample of Appellate Review Program performance data.
- RED staff completed and submitted a draft of the revised Annual Report on the Federal Workforce.
- RED completed and submitted a draft of the Performance Metrics Committee Year 3 report entitled, "The Office of Federal Operations Impact Database: History and Database Design".
- OFO Director submitted the Final HHS Program Evaluation to HHS and the compliance phase has begun. The first Corrective Action Plan was received by OFO in late September.
- RED Staff drafted initial draft report for VBA Program Evaluation for submission to leadership for approval. Draft is 53 pages. It is now under final review to submit to VBA for comment in first quarter FY2018.

- RED staff continued work on analysis and writing of report analyzing females in public safety occupation in the federal sector with recommendations for the recruitment and hiring phases of employment. Daft submitted for review to management in late September.
- RED completed and submitted a draft of the Annual Report Special Topics report entitled, "Predicting EEO Complaint Activity: Are Public Safety Agencies Different from non-Public Safety Agencies?"
- RED facilitated completion of a report titled, "Understanding the Link between Retaliation Claims and Agency EEO Resources in the Federal Government" via collaboration with Dr. Ellen Rubin from SUNY-University at Albany. (SEP 5: Preserving Access to the Legal System)
- RED computerized post-training surveys by putting them on Survey Monkey.
- RED Staff presented at EXCEL Conference in Chicago, IL on Retaliation and Form 462 Updates.
- RED staff met with GSA and OMB to discuss an electronic EEO Case Management system.

IV. Outreach & Training

1. Eliminating Barriers in Recruitment and Hiring

- OFO staff presented Disability Program Management course at DEOMI, Patrick Air Force Base, FL.
- OFO and EEOC staff presented case updates and barrier analysis for the Department of Homeland Security.
- OFO staff presented at the Hispanic Employment Council on new barrier analysis requirement for the Hispanic workforce at EEOC Headquarters.
- OFO Associate Director, presented on Unconscious Bias for the Patent and Trademark Office.
- OFO staff presented MD-715 Requirements and 501 Regulations at the Pentagon.
- OFO Associate Director, Commissioner and Associate Legal Counsel hosted panel on Section 501 explaining updated regulations at EEOC Headquarters.
- OFO staff hosted a Disability Program Manager meeting providing an overview on 501 regulations at EEOC Headquarters.
- EEOC staff held a webinar with Department of Labor and the Employee Access Network to discuss 501 Regulations
- EEOC Staff presented a webinar on disability disclosure at Rising Leaders Mentoring Program, Disability Disclosure Training.

- OFO staff presented on non-discriminatory hiring and the selection process for the Federal Election Commission.
- OFO staff hosted seven open-enrollment Refresher Courses which provided an overview on the 501 Regulations, Preventing Workplace Harassment, Retaliation and National Origin.
- OFO staff hosted open enrollment Special Emphasis Program Management course to provide overview of hiring, recruitment and advancement in the workplace.
- OFO staff hosted open enrollment Disability Program Management course for federal agency employees and stakeholders.
- OFO staff provided Reasonable Accommodation training for the Consumer Finance Protection Board.
- OFO staff provided Counselor Refresher training to the Defense Intelligence Agency.
- OFO staff provided Barrier Analysis training to the Army in Fort Belvoir, VA.
- TOD staff conducted a session on Reasonable Accommodation for Department of Commerce (DOC) Employee Relations and Office of General Counsel staff in Wash., D.C.
- TOD Staff conducted national course for both MD715 and Barrier Analysis training
- EEOC Staff conducted national EEO Counselor Refresher course
- T&O Assistant Director and OFO staff presented sessions on "Equal Employment Opportunity Laws Refresher" and "Reasonable Accommodation and the Pregnancy Discrimination Act," at the Federally Employed Women (FEW) Conference in New Orleans, LA.
- Numerous EEOC personnel, including Commissioners, Directors, and staff from Headquarters and the field, presented at EEOC's EXCEL Conference in Wash., D.C., including a number of sessions on Reasonable Accommodations and Disability Hiring.
- EEOC staff spoke on "New Case law, EEO Complaints, and Reasonable Accommodations" at Disability Awareness Training Conference for the Drug Enforcement Administration in Wash. D.C.
- OFO staff presented Reasonable Accommodation for Disability Program Management course for Defense Equal Opportunity Management Institute (DEOMI) at Patrick AFB, FL.
- EEOC staff spoke on Reasonable Accommodation and Pregnancy Disability Accommodations for the Food Safety and Inspection Service, Enforcement Litigation Division, US Dept. of Agriculture (USDA), in Wash. D.C.
- EEOC staff spoke on Reasonable Accommodation issues for Intelligence Community (IC) Equal Employment Opportunity and Diversity Professionals Conference in Springfield, VA.

- FSP Associate Director spoke to Transportation and Safety Administration (TSA) Office of Professional Responsibility on "Unconscious Bias" in Arlington, VA.
- EEOC staff spoke on "Conduct Issues and Reasonable Accommodations" to Dept. of Transportation (DOT) Federal Highway Administration EEO staff via Webinar.
- OFO Staff conducted 3 separate sessions of national New Investigator course
- OFO Staff conducted national Disability Program Management Course.
- TOD Staff conducted Barrier Analysis training for ICE/DHS in Washington DC
- TOD Staff conducted 3 EEO Training for Managers for HUD in Washington DC
- TOD Staff conducted Barrier Analysis training for HRSA in Washington DC
- TOD Staff conducted MD 715 and Barrier Analysis training for USDA in Washington DC
- TOD Staff conducted MD 715 training for Dept. of Defense Education Activity in Washington DC
- TOD Staff conducted Barrier Analysis training for NRO in Chantilly, VA

2. Protecting Immigrant, Migrant and Other Vulnerable Workers

- OFO staff presented Disability Program Management Course DEOMI Patrick Air Force Base, FL.
- OFO staff presented MD-715 Requirements and 501 Regulations at the Pentagon.
- OFO Associate Director, Commissioner and Associate Legal Counsel hosted a panel on Section 501 explaining updated regulations at EEOC Headquarters.
- OFO staff hosted a Disability Program Manager meeting providing an overview on 501 Regulations at EEOC Headquarters.
- Associate Legal Counsel presented on employer obligations involving pregnant workers to the Federal EEO Civil Rights Council.
- OFO staff presented on enforcement protection for LGBT at USDA.
- OFO Associate Director conducted radio interview on EEO Best Practice in Reasonable Accommodations and Processing Complaint.
- EEOC staff Held webinar with Department of Labor and Employee Access Network to discuss 501 Regulations.
- EEOC Staff presented webinar on disability disclosure at Rising Leaders Mentoring Program, Disability Disclosure Training.
- Associate Legal Counsel presented on employer obligations involving pregnant workers to Federal EEO Civil Rights Council.
- OFO staff presented on enforcement protection for LGBT at USDA.

- OFO and EEOC staff presented multiple sessions of Preventing Workplace Harassment and Providing Reasonable Accommodations for Managers at Department of Interior, Bureau of Reclamation, in Nevada, California and Arizona.
- EEOC hosted seven open-enrollment Refresher Courses which provided an overview on Section 501, Preventing Workplace Harassment, Retaliation and National Origin.
- OFO hosted open enrollment Disability Program Management course for federal agency employees and stakeholders.
- OFO staff attorney provided Reasonable Accommodation training for Consumer Finance Protection Board.
- OFO staff provided Counselor Refresher training to Defense Intelligence Agency.
- OFO staff provided Case Updates for five open enrollment courses which included following topics: EPA, Reasonable Accommodation, National Origin, Harassment and Retaliation.
- T&O Assistant Director and OFO staff presented "Experiencing the EEO Process," for League of United Latin American Citizens (LULAC) at their National Convention and Exposition Salt Lake City, Utah.
- EEOC staff presented an EEOC case update and a Counselor Refresher course at National Organization for Mexican American Rights (NOMAR) national conference in San Diego, CA.
- T&O Assistant Director, OFO and EEOC staff presented "A View from the Bench," EEO Counselor Refresher Course, Special Emphasis Program – Best Practices, and MD-715-Review Process, for National Image, National Training Program, Houston, Texas.
- OFO Staff conducted 3 separate sessions of national New Investigator course
- OFO Staff conducted national Disability Program Management Course in Washington DC
- OFO Staff conducted Special Emphasis Program Management Course in Washington DC
- TOD Staff conducted 3 EEO Training for Managers for HUD in Washington DC
- TOD Staff conducted Rehab Act and Reasonable Accommodation training for DOI/OSMRE in Stonewall Jackson, WV
- TOD Staff conducted MD 715 and Barrier Analysis training for USDA in Washington DC
- TOD Staff conducted MD 715 training for Dept. of Defense Education Activity in Washington DC

3. Addressing Emerging and Developing Issues

- OFO staff presented "LGBT" training to U. S. Citizenship and Immigration Services (CIS) employees in Washington, DC.
- OFO staff served as a panelist on LGBT issues presentation for "Diversity Day and Summit" at US Agency for International Development (USAID) in Wash., D.C.
- Numerous EEOC personnel, including Commissioners, Directors, and staff, from Headquarters and the field, presented at EEOC's EXCEL Conference in Wash., D.C., including sessions on LGBT legal developments, and Pregnancy Discrimination.
- EEOC staff spoke on LGBT Legal Developments at Blacks in Gov't (BIG) National Conference in Orlando, Fl.
- EEOC staff presented an EEOC case update featuring recent LGBT cases to Army EEO staff in Atlanta, GA.
- EEOC staff spoke on LGBT issues as panelist for Court Services and Offender Supervision Agency (CSOSA) Diversity and Inclusion Symposium, in Wash., D.C.
- OFO staff spoke on LGBT issues for Smithsonian Institution staff in Wash. D.C.
- OFO and EEOC staff presented on "LGBT discrimination in the workplace" for Washington Metropolitan Area Transit Authority (WMATA) medical staff in Wash., D.C.
- OFO Staff conducted national Disability Program Management Course.\
- OFO Staff conducted one session of Reasonable Accommodation Law for USCIS via webinar
- TOD Staff conducted 3 EEO Training for Managers for HUD in Washington DC

4. Enforcing Equal Pay Laws

- OFO staff provided Case Updates for five open enrollment courses which included the following topics: EPA, Reasonable Accommodation, National Origin, Harassment and Retaliation.
- OFO Staff conducted 3 New Investigator courses in Washington DC
- OFO Staff conducted 3 New Counselor courses in Washington DC
- OFO Staff conducted national EEO Laws Refresher course in Washington DC
- TOD Staff conducted 3 EEO Training for Managers for HUD in Washington DC

5. **Preserving Access to the Legal System**

- OFO staff and Administrative Judge presented overview on retaliation and hostile work environment at National Advocacy Center in Columbia, SC.
- Administrative Judge presented overview of EEO laws Remedies and the EEO complaint process.
- OFO staff presented on EEOC's updated Reprisal Enforcement at USDA.
- OFO staff provided Investigator Refresher course at Center for Medicaid Services in Baltimore, MD.
- OFO staff presented an EEO Overview, Harassment and Retaliation at Food and Drug Administration in San Juan, PR.
- OFO staff hosted webinar on updated Enforcement Guidance on Retaliation and Related Issues
- OFO staff hosted webinar on agency Pilot Guidance.
- OFO staff hosted "Brown Bag" event providing guidance for agency Pilot Projects.
- EEOC hosted seven open-enrollment Refresher Courses which provided an overview on Section 501, Preventing Workplace Harassment, Retaliation and National Origin.
- OFO staff hosted open enrollment Drafting Letters of Acceptance and Dismissal for federal agencies.
- OFO staff provided Counselor Refresher training to Security Exchange Commission.
- OFO staff provided Counselor Refresher training to National Nuclear Safety Administration in Albuquerque, NM.
- OFO staff provided Case Updates for five open enrollment courses which included following topics: EPA, Reason accommodation, National Origin, Harassment and Retaliation.
- Numerous EEOC personnel, including Commissioners, Directors, and staff, from Hdqtrs and the field, presented at EEOC's EXCEL Conference in Wash., D.C., including multiple sessions concerning retaliation.
- EEOC staff spoke provided an "EEO Counselor Refresher," at Blacks in Gov't (BIG) National Conference in Orlando, Fl.
- EEOC staff provided a Counselor Refresher course at National Organization for Mexican American Rights (NOMAR) national conference in San Diego, CA.
- EEOC Staff conducted 3 separate national EEO Counselor Refresher course
- OFO Staff conducted 3 national EEO Investigator Refresher courses in Washington DC
- OFO Staff conducted 3 national New Investigator courses in Washington DC
- OFO Staff conducted national Drafting Final Agency Action course in Washington DC
- OFO Staff conducted national Letter of Accept and Dismiss course in Washington DC

- OFO Staff conducted two sessions of Letter of Acceptance and Dismissal for NAVYSEA
- OFO Staff conducted one session of MD110 for HUD in Washington DC
- TOD Staff conducted 3 EEO Training for Managers for HUD in Washington DC
- TOD Staff conducted Letter of Acceptance and Dismissal for DHS/ICE in Washington DC
- TOD Staff conducted EEO Laws training for Dept. of Defense Education Activity in Washington DC

6. Preventing Harassment through Systemic Enforcement and Targeted Outreach

- OFO staff presented MD-715 Requirements and 501 Regulations at the Pentagon.
- OFO staff hosted "Brown Bag" event on Providing Guidance for Pilot Projects.
- OFO staff presented on preventing sexual harassment to senior leaders at Department of Homeland Security.
- EEOC Staff provided training on Preventing Workplace Harassment for Bureau of the Fiscal Service, Treasury Department, in Kansas City, MO.
- EEOC hosted seven open-enrollment Refresher Courses which provided an overview on Section 501, Preventing Workplace Harassment, Retaliation and National Origin.
- EEOC staff presented at Association for the Improvement of Minorities in Emeryville, CA, on the evolution of civil rights in the workplace to ensure nondiscriminatory and hostile free work environments.
- OFO staff presented an EEO Overview, Harassment and Retaliation at Food and Drug Administration in San Juan, PR.
- OFO staff presented on Conflict of Interest, MD-110 and OFO operations to Small Agency General Counsel.
- OFO staff presented Preventing Sexual Harassment for Managers at Department of Homeland Security.
- OFO and EEOC Staff presented multiple sessions of Preventing Workplace Harassment for Supervisors for Department of Justice.
- OFO and EEOC Staff presented multiple sessions of Preventing Workplace Harassment for Employees for Department of Justice.
- OFO staff hosted Reboot Harassment webinar.
- OFO staff hosted panel on Preventing Workplace Harassment at Bureau of Land Management.
- OFO hosted open enrollment Disability Program Management course for federal agency employees and stakeholders.

- OFO staff hosted a series of Preventing Workplace Harassment for Department of Justice.
- OFO hosted a series of Preventing Workplace Harassment for Department of Interior, Bureau of Reclamation.
- OFO staff provided Reasonable Accommodation training for Consumer Finance Protection Board.
- OFO staff provided Anti-Harassment Program Management training to NAVAIR in Patuxent, MD.
- OFO staff provided Anti-Harassment Program Management training to National Reconnaissance Office in Virginia.
- OFO staff provided Case Updates for five open enrollment courses which included following topics: EPA, Reason Accommodation, National Origin, Harassment and Retaliation.
- EEOC staff spoke on Cultural Diversity and Sexual Harassment at Defense Contract Management Agency in Orlando, Fl.
- Numerous EEOC personnel, including Commissioners, Directors, and staff, from Hdqtrs and the field, presented at EEOC's EXCEL Conference in Wash., D.C., including multiple sessions on preventing harassment.
- EEOC Staff conducted national EEO Counselor Refresher course in Washington DC
- OFO Staff conducted 3 separate national EEO Investigator Refresher course in Washington DC
- OFO Staff conducted 3 separate national EEO Investigator Refresher course in Washington DC
- OFO Staff conducted 3 sessions of national New Investigator course
- OFO Staff conducted national Anti-Harassment Program Management course
- OFO Staff conducted Anti-Harassment Program Management training for DHS/FEMA in Washington DC
- OFO Staff conducted two sessions of Preventing Workplace Harassment for FDA in Irvine CA
- OFO Staff conducted Anti=Harassment Program Management Training for Defenses Media Activity in Fort Meade, MD
- TOD Staff conducted 3 EEO Training for Managers for HUD in Washington DC

7. Training/Outreach – General

- OFO Associate Director presented on Unconscious Bias for Patent and Trademark Office.

- OFO Director presented at the Department of Education for Black History Month addressing the Crisis in Black Education.
- OFO Associate Director presented on policy-driven EEO Laws at Senior Executive Leadership Officer Seminar for US Coast Guards in Fort Patrick, FL.
- EEOC staff presented at Association for the Improvement of Minorities in Emeryville, CA, on the evolution of civil rights in the workplace to ensure nondiscriminatory and hostile free work environment
- OFO staff presented on non-discriminatory hiring and the selection process for the Federal Election Commission.
- OFO staff conducted a radio interview on EEO training and outreach.
- OFO Associate Director presented at Treasury Department during Black History Month on Crisis in Black Education.
- EEOC staff presented on EEO Laws Overview, Remedies and the EEO Complaint Process in Los Angeles, CA, for US Marshall Service.
- EEOC staff presented on Religious Expression and Accommodation for employees for Environmental Protection Agency in Atlanta, GA
- OFO staff hosted a webinar on agency Pilot Guidance.
- OFO hosted a "Brown Bag" event on Providing Guidance for Pilot Projects.
- OFO staff presented multiples session on Overview of EEO Laws for Managers at CFPB.
- OFO staff provided Investigator Refresher course at Center for Medicaid Services in Baltimore, MD.
- EEOC hosted three open-enrollment courses for new investigators, which provided an overview of Commission Laws and the Administrative Process.
- EEOC hosted two open-enrollment courses for new counselors, which provided an overview of Commission Laws and the Administrative Process.
- OFO hosted open enrollment Special Emphasis Program Management course providing overview of hiring, recruitment and advancement in the workplace.
- OFO hosted open enrollment on Drafting Letters of Acceptance and Dismissal for federal agencies.
- OFO hosted open enrollment Disability Program Management course for federal agency employees and stakeholders.
- OFO staff hosted a series of Preventing Workplace Harassment for Department of Justice.
- OFO staff hosted a series of Preventing Workplace Harassment for Department of Interior, Bureau of Reclamation.
- EEOC Administrative Judge provided Manager and Supervisor training for Naval Surface Warfare in Philadelphia, PA.

- OFO staff provided Anti-Harassment Program Management training to NAVAIR in Patuxent, MD.
- OFO staff provided Counselor Refresher training to Security Exchange Commission.
- OFO staff conducted EEO for Managers training for Consumer Finance Protection Bureau.
- OFO staff provided Counselor Refresher training to Defense Intelligence Agency.
- OFO staff provided Barrier Analysis training to Army in Fort Belvoir, VA.
- OFO staff provided Case Updates for five open enrollment courses which included following topics: EPA, Reasonable Accommodation, National Origin, Harassment and Retaliation.
- FSP Associate Director spoke on current EEOC priorities; establishing and maintaining strong partnerships with EEO stakeholders, including the HR community; and developing the Federal EEO workforce to Dept. of Justice (DOJ) staff in Washington, DC.
- OFO staff gave an EEO case update for meeting of the American Bar Association (ABA) government personnel committee at ABA headquarters in Wash., D.C.
- OFO staff gave an EEO case update for Dept. of the Navy (DON) EEO personnel at Patuxent River Naval Air Station, Patuxent, MD.
- TOD staff presented sessions on EEO Case Updates, GINA, and MD-715 Barrier Analysis for the EEO Specialist Course at Defense Equal Opportunity Management Institute (DEOMI) Patrick, AFB FL.
- FSP Associate Director provided an "EEOC update" to EEO staff at the Environmental Protection Agency (EPPA) in Wash., D.C.
- Numerous EEOC personnel, including Commissioners, Directors, and staff, from Headquarters and the field, presented at EEOC's EXCEL Conference in Wash., D.C., presenting all multiple issues of EEO law and practice.
- EEOC staff presented "AJ View from the Bench" to Dept. of the Navy EEO personnel in Charleston, S.C.
- OFO staff spoke via webinar to EEO practitioners for U. S. Citizenship and Immigration Services (CIS) about OFO operations and processes.
- TOD Assistant Director and EEOC staff spoke on "Workplace Trends" and provided an "EEO Counselor Refresher," and staffed Outreach booth at Blacks in Gov't (BIG) National Conference in Orlando, Fl.
- EEOC staff presented an EEOC case update and a Counselor Refresher course at National Organization for Mexican American Rights (NOMAR) national conference in San Diego, CA.
- TOD Assistant Director presented multiple sessions of "Federal Workplace Trends" for Micropact Conference in Wash., D.C.

- EEOC staff presented on Reports of Investigation at Annual Investigator's Workshop for staff of the Investigations and Resolutions Directorate, Defense Civilian Personnel Advisory Service (DCPAS), in Southbridge, MA.
- OFO staff served as a panelist for "Thorny Issues in Case Processing" for Intelligence Community (IC) Equal Employment Opportunity and Diversity Professionals Conference in Springfield, VA.

Quarterly Strategic Enforcement Plan Report
Office of Federal Operations
1st and 2nd Quarters FY 2018

I. Background: General FY 2018 1st and 2nd Quarters Appellate Review Program Accomplishments

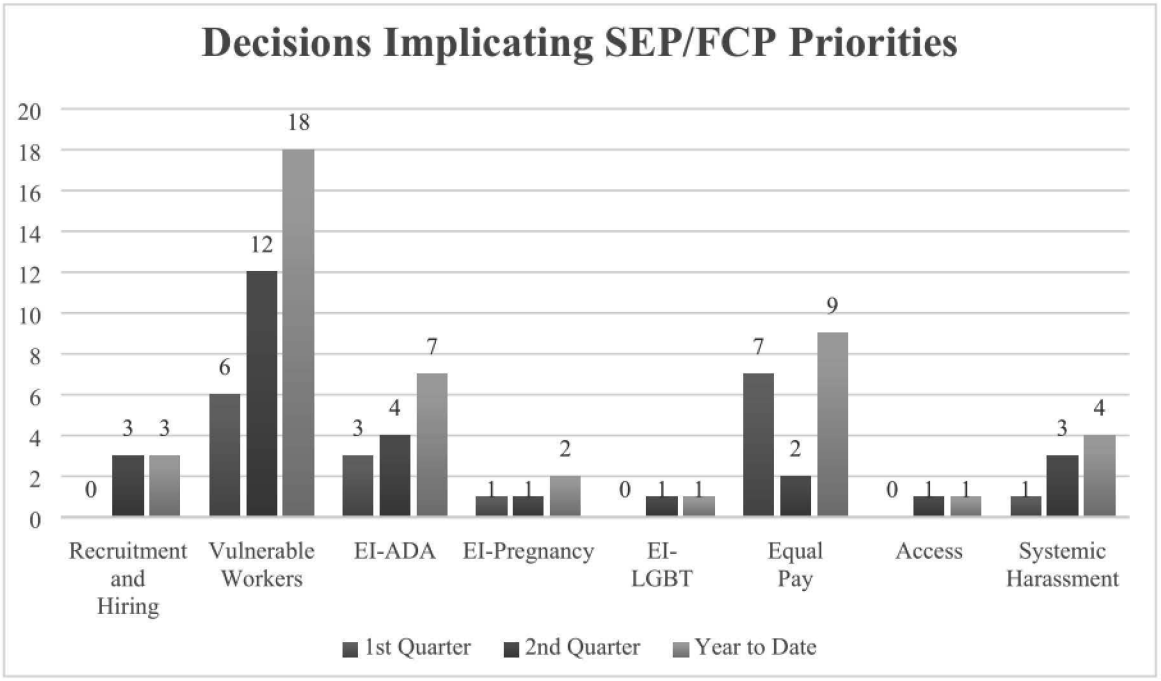
During the 1st and 2nd Quarters of FY 2018, the Office of Federal Operations (OFO) resolved 1,980 appeals, including 964 decisions on the merits and 891 procedural closures. Of the 891 procedural closures, 497 of them involved initial appeals under review by OFO, and we reversed 212 or 42.7% of the agency dismissals. Of the 964 merit decisions, OFO issued 58 findings of discrimination during the 1st and 2nd Quarters. We found discrimination on the basis of disability in 30 of the findings, retaliation in 22 of the findings, and sex (female) in 9 of the findings. The top three issues involved in the findings included reasonable accommodation (17) and harassment (11), and promotion (6).

Resolution Description	1st Quarter	2nd Quarter	Year to Date
Resolutions	926	1054	1,980
Merits Resolutions	408	556	964
Findings	25	33	58
Non-Findings	383	523	906
Procedural Resolutions (all)	420	471	891
Procedural Resolutions (from Initial Appeal)	248	249	497
Affirming Dismissal (excluding denials)	135	150	285
Reversing Dismissal	113	99	212

With regard to the categorization of the 1,980 resolutions, OFO identified 42 appeals that implicated one or more SEP/FCP priority. Section II below contains charts breaking down the composition of the individual priorities, summaries of the 42 decisions OFO attorneys categorized as implicating the SEP/FCP priorities, and summaries of the findings of discrimination made in the 1st and 2nd quarters.

II. Analysis of SEP/FCP Priority Areas

The chart below depicts the distribution of the 42 appellate decisions OFO identified as implicating an SEP/FCP category:



The numbered sections below provide more information about each of the six SEP priorities. Specifically, these sections start with a chart depicting the related FCP categories under each SEP, as well as summaries of the specific decisions under each SEP/FCP priority. In Section 7, by contrast, we provide summaries of the findings of discrimination issued during the 1st and 2nd Quarters, whether or not they implicated an SEP/FCP category.

1. ELIMINATING BARRIERS IN RECRUITMENT AND HIRING

Of the three decisions implicating this SEP Priority, two (2) implicated medical exams, and one (1) implicated medical exams, the relationship between "business necessity," medical exams, improper use of suitability determinations, and pre- and post-offer hiring/screening tests.

Decision Summaries for this Category

Bailey (Iona A.) v. DHS (TSA), 0720160019 (01/09/2018) **[Repeated under Priority 5 and Enforcement - General below]** – Complainant was given a conditional offer of employment, subject to a medical examination, for a Transportation Security Officer position. Complaint reported that she was taking medication for arthritis, but had no lifting restrictions. Complainant underwent a physical examination and passed all tests and screening including a test to examine decreased sensation in her hands. A nurse then reviewed Complainant's results to determine whether she was qualified pursuant to the agency's medical Guidelines and determined her application required additional review. The Medial Review Director reviewed the documentation, and determined that no further examination was

necessary because she was medical disqualified for the position because of her two decades old diagnosis of rheumatoid arthritis, which still "flared up" on occasion.

Complainant filed a formal complaint alleging disability discrimination and requested a hearing before an EEOC AJ. The AJ determined that Complainant was disqualified under the agency's Guidelines which disqualified for rheumatoid arthritis in the following situations: "With active disease under chronic treatment with functional capacity limited with muscle atrophy, moderate and severe pain, and multiple joint involvement." Because Complainant did not suffer from any limited functional capacity, muscle atrophy, of moderate and severe pain, and passed all tests conducted in the medical examination, the AJ found Complainant established she could perform the essential functions of the job without accommodation. The AJ further found the Agency did not establish she was a direct threat and ordered appropriate relief.

On appeal, the Agency maintained that the case should be dismissed for failure to state a claim because the Aviation Transportation Security Act (ATSA) preempts the Rehabilitation Act as noted in Getzlow v. DHS, EEOC Appeal No. 0120053286 (6/26/07). However, OFO found no Getzlow issue here because the Complainant was not challenging the guidelines themselves, rather, she was challenging the Agency's finding that she was not qualified under the Guidelines. OFO determined there was substantial evidence in the record to support the AJ's finding that Complainant met or exceeded the agency's own Medical Guidelines. Furthermore, the decision found the Agency had not satisfied its burden to prove direct threat because it failed to conduct an individualized assessment. The decision ordered appropriate relief including a retroactive offer to the TSO position with back pay.

Tuaua (Valentine F.) et. al. v. DOJ, 0120152623 (01/09/2018) **[Repeated under Broad Impact Decisions below]** – Putative class agent worked as a Detention Enforcement Officer (DEO) and sought certification of a class of individuals who are members of certain racial and ethnic minority groups; over forty and have qualifying disabilities. In his decision, the AJ identified the class' four claims: the class alleged that the Agency assigned Aviation Enforcement Officers (AEOs) new job series with higher promotional opportunities but did not similarly do so for DEOs; the Agency's Fitness in Total (FIT) program created a disparate impact of DEOs; the Agency's requirement that DEOs supervise three employees prevents DEOs from advancing in their career, and the finally, the Agency removed duties from the DEO position descriptions, but continued to require DEOs to perform them, for less pay. The AJ also found the class alleged an "across the board" claim that they were treated less favorably with respect to promotion, pay, training, assignment of duties, benefits, failure to accommodate, retaliation, demotion, performance ratings and threats of discipline, pay, promotion, training, duties,

The AJ denied class certification based on each of the identified policies, as well as the across the board claim. Specifically, the AJ found no evidence which would demonstrate that there was an improper classification of the AEO position, or that it resulted in a disparate impact on any bases. Furthermore, the AJ found the class failed to provide factual evidence supporting the notion that members applied for DUSM positions, but were rejected due to the Agency's FIT standards. The AJ found that there was no evidence regarding the final two policies. Finally, the AJ examined the "across the board" discrimination claim and found no unifying common question of fact.

On appeal, OFO determined that the AJ erred when he denied class certification because of a lack of proof that class members applied, but were rejected from positions because of their FIT scores. OFO found that the class requested that information during discovery but it was not provided by the

Agency. OFO determined that instead of denying certification, the AJ should have conducted additional discovery. Accordingly, OFO vacated the agency's decision and ordered that additional discovery be undertaken.

Donaldson (Jeannie T.) v. SSA, 0120162439 (01/31/2018) – Complainant, an Attorney Adviser, appealed from the Agency's finding that she was not subjected to a hostile work environment and disparate treatment discrimination based on race and sex. The appellate decision found that Complainant was not selected for a GS-13 position because they sought recommendations from supervisors and Complainant was not recommended. Specifically, the selecting officials considered the fact that Complainant's second line supervisor had concerns with Complainant's ability to mentor new analysts. Further, there was insufficient evidence to conclude that Complainant was subjected to a hostile work environment based on alleged denials of training opportunities or comments made by a previous supervisor.

2. PROTECTING IMMIGRANT, MIGRANT AND OTHER VULNERABLE WORKERS

Of the eighteen (18) decisions that implicated this SEP Priority, four (4) concerned only security clearances, eleven (11) concerned only contractors, and three (3) concerned security clearances and contractors.

Decision Summaries for this Category

Michell (Alisa M.) v. State, 0120171892 (10/11/2017) - At the time of events giving rise to her complaint, Complainant was employed by a staffing firm working with the Agency's Diplomatic Security Service. Complainant filed an EEO complaint alleging she was discriminated against based on her disability and reprisal for prior EEO activity when (1) the Agency denied her for the reasonable accommodation of telework, and (2) she was terminated by her staffing firm on October 3, 2016. The Agency dismissed the complaint for failure to state a claim. It reasoned that she was an employee of the staffing firm, not the Agency.

OFO reversed. It found that the Agency possessed sufficient control over Complainant's position to be her joint employer under common law. Specifically, the Agency referred the staffing firm to Complainant which hired her at the Agency's request, she was supervised by and received her assignments from the Agency, the Agency had substantial input into her appraisals, Complainant was required to get permission by her Agency supervisor before taking leave, and the Agency set the parameters of her work schedule. The Agency argued that Complainant's writings indicated the staffing firm made the decision to terminate her, and she submitted no evidence that the Agency was involved. OFO found that while this was relevant to determining if the Agency was a proper party on issue 2, Complainant alleged that the Agency was involved in her termination and could have stopped it, so issue 2 will go forward against the Agency.

Chase (Lenny W) v. DHS (TSA), 0120152418 (11/28/2017) – Complainant, a Transportation Security Inspector (Canine Handler), filed a complaint alleging discrimination based on disability (PTSD) and reprisal when (1) from December 24, 2013 through January 24, 2014, his security clearance was suspended and he was prohibited from performing duties that required access to classified information (restricted to desk work), and (2) on January 10, 2014, he was directed to undergo a psychological exam. Previously, the Agency requested that OPM do a periodic background investigation on

Complainant so the Agency could maintain/update his security clearance. Complainant contended that in his interview OPM made improper inquiries and in its report misrepresented what he said. OPM wrote that Complainant said his PTSD made him jumpy and overreact to stresses at work and home, and because he found his medical treatment by the military and VA ineffective and did not like it, he treated himself by drinking nightly until he felt relaxed, calm, and his speech is slightly slurred - about four to five mixed drinks. Based on OPM's report and government wide Guidelines for determining eligibility for access to classified information, the Agency suspended Complainant's clearance while the Agency further evaluated him – including directing him to undergo a psychological examination. The Guidelines provide that when there is a concern that emotional and mental conditions can impair judgment, reliability, or trustworthiness, a qualified mental health professional should be consulted when evaluating potentially disqualifying or mitigating information. After the exam, the Agency reactivated Complainant's clearance and restored all his duties.

The AJ issued a decision without a hearing. Citing Department of the Navy v. Egan, 484 U.S. 518, 529 (1988) and Schroeder v. Dep't of Defense, EEOC Request No. 05930248 (April 14, 1994), the AJ found that the Commission does not have jurisdiction over Complainant's allegations that he was discriminated against when his security clearance was suspended and OPM misrepresented what he said in its report. The AJ found that, assuming arguendo, the Commission had jurisdiction, the Agency articulated a legitimate, nondiscriminatory reason for doing so, i.e., receipt of OPM's background investigation, and Complainant did not prove pretext. OFO affirmed. OFO added that the Agency articulated legitimate, nondiscriminatory reasons for restricting Complainant to desk and directing him to have a psychological exam – his clearance was suspended and the Agency was following the government wide Guidelines. OFO also found that directing Complainant to have the exam did not violate the Rehabilitation Act because this was job-related and consistent with business necessity – Complainant needed a security clearance to perform essential functions of his job.

Fuller (Joette R.) v. VA, 0120172218 (11/08/2017) – Complainant is a small business owner who sells catalogue items to an Agency VAMC. She filed an EEO complaint alleging that the Agency discriminated against her based on race (African-American), sex (female), and age (over 40) when she was denied access and information to enable her to bid on contracts (sales of catalog items), shutting her out from fairly competing and obtaining contracts, and a comparative Caucasian vendor was given computer access to pull information on other vendors, including her, giving that vendor an unfair advantage over her. The Agency dismissed the complaint for failure to state a claim. It reasoned that Complainant was an independent business owner, not an employee of the Agency. OFO affirmed. OFO set out the factors in the test it uses to ferret out whether a worker's service to an Agency constitutes common law employment because the Agency has sufficient control or right to control the means and matter of the work. OFO found that the Agency does not control the means and manner of how Complainant performs her work because she is not a worker, she is a small business owner who sells catalog items to the Agency.

Lacey (Michael R.) v. DOE, 0120172243 (11/14/2017) – Complainant was employed by a staffing firm consisting of the University of California and private companies, including Bechtel National, at the Lawrence Livermore National Laboratory, which is owned by the Agency. The staffing firm manages and operates the Laboratory, employing some 7,200 people there, including Complainant, and had expertise in the Agency's nuclear weapons complex. Initially, Complainant was a High Explosive Assembly Technician. He alleged that he was discriminated against by the Agency when the staffing

firm banned him from handling explosives because it believed he might drop one due to his disability (epilepsy) causing a catastrophic event, and discriminated against him based on his disability and reprisal when it reassigned and subsequently terminated him (for not performing well in another position). The Agency dismissed the complaint for failure to state a claim. It reasoned that he was not an Agency employee.

OFO affirmed. It found the Agency did not have sufficient control, or right to control Complainant's position to be deemed his common law joint employer. Rebutting Complainant's argument, OFO found that whether the staffing firm should be deemed an agent of the Agency or benefitted from his work is not relevant to determining if the Agency had control. Complainant was hired by the staffing firm to the Laboratory, he indicated that he never dealt with a federal employee there, the Agency did not have the right to assign him additional projects, and he was terminated by the staffing firm with no alleged involvement by the Agency. While the contract between the Agency and the staffing firm set out some general parameters for the workforce in terms of pay and so forth, this was insufficient control to amount to joint employment.

Parks (Buck S.) v. Army, 0120172248 (11/09/2017) – At the time of events giving rise to his complaint, Complainant was employed by the Agency as an Engineering Technician. He filed a complaint that he was subjected to a hostile work environment based on reprisal when a supervisor (S2) was the catalyst for the Department of Defense making a preliminary decision in September 2016, revoking his eligibility for access to classified information. The Agency dismissed the complaint for concerning a preliminary step to take a personnel action and mootness. On mootness, it reasoned that in February 2017, the preliminary decision was reversed, an interim event that completely and irrevocably eradicated the effects of the alleged discrimination, and there was no reasonable expectation that the revocation would occur again.

OFO reversed. OFO pointed to explicit language in the applicable regulation that it does not apply to complaints alleging the preliminary step was retaliatory, and citing other authority that the applicable regulation also does not apply to harassment claims. In concluding that the complaint was not moot, OFO found it cannot be said with assurance that there is no reasonable expectation that the alleged violation will not recur. Specifically, Complainant alleged that he previously was subjected to an Agency Criminal Investigation Division investigation based on S2's asserted lies in 2012, causing his clearance to be suspended until the investigation closed in May 2014, and S2 again fabricated information which caused the investigation to be reopened, attempting to get his security clearance revoked a second time – the subject of the instant complaint. Moreover, S2 runs a private website which is still active with a page accusing Complainant of theft, inappropriately touching a female employee, and acts or omissions that indicate he is unreliable and untrustworthy. Further, Complainant requested compensatory damages, which was not addressed.

Bowen (Bertie T.) v. DHS (CBP), 0120172371 (11/20/2017) – During the relevant time, Complainant was employed by Airways Cleaners, which contracted with the Agency to perform aircraft cleaning services at JFK International Airport. In September 2016, her application for the renewal of a Customs and Border Protection Access Seal (an identification card which granted her access to CBP facilities within the airport) was denied. Believing she was subjected to disparate treatment, Complainant filed an EEO complaint. The Agency dismissed the complaint on the grounds that she was a contractor, not an Agency employee, and lacked standing.

Complainant argued that issuance of the access seal was a pre-requisite to employment with Airways Cleaners, and therefore the Agency exhibited sufficient control to be considered a joint employer. The Agency countered that Complainant applied for the access card in March 2016, and the decision was not made for six months. During that time, Complainant did not have access and was still employed by Airways Cleaners.

Complainant did not dispute the Agency's assertion, nor did she contend that she was terminated from Airways Cleaners as a result of the denied access. Therefore, while the work was performed on the Agency's premises and the Agency controlled access to a secure area, we did not find any additional factors suggested an employee/employer relationship. The Agency's dismissal was affirmed.

Chowdhuri (Samual C.) v. DOC (NOAA), 0120171101 (01/19/2018) – Complainant was employed as a Scientific Software Developer with Earth Resources Tech Corp. (ERT), which contracted with the Agency's National Centers for Environmental Information. Believing he was subjected to discrimination, Complainant filed an EEO complaint based on national origin and reprisal. The Agency dismissed the complaint on the grounds that he was a contractor and not an Agency employee.

In our decision, we noted that the Agency did not conduct a thorough analysis of the factors enunciated by the Commission in Serita B. v. Dep't of the Army, EEOC Appeal No. 0120150846 (November 10, 2016), but instead simply noted that Complainant "was hired, paid, and granted employee benefits by ERT". Without explanation, it concluded ERT "retained ultimate supervisory authority over Complainant...." The Agency failed to address the daily relationship with Complainant, or challenge his assertion that he received assignments and was supervised by Agency employees.

After reviewing the entire record and analyzing the remaining factors, we concluded that the agency's decision was not substantiated. The record showed that Complainant worked at an Agency facility, used Agency equipment, followed Agency procedures, worked a schedule set by the Agency, received assignments from Agency employees, and was removed pursuant to Agency input. We reversed, and the complaint remanded for further processing.

Buchanan (Chara S.) v. DOD (DCA), 0120172859 (01/09/2018) – During the relevant time, Complainant worked as a Bagger at Eglin AFB Commissary in Florida. Baggers are "self-employed licensees" who are given permission, or license, to enter the AFB for the specific purpose of soliciting Commissary customers to bag and carry out their groceries in the hopes of receiving a tip. In addition to a license from the AFB, the Commissary Store Director must also grant the individual license to enter the store.

Believing that she was being subjected to sexual harassment by a fellow bagger, Complainant reported the behavior to the Commissary Store Director. He, in turn, advised Complainant to speak to the Head Bagger (elected by baggers to create their work schedule). When the alleged harassment continued, the Store Director concurred with the Head Bagger's decision to revoke store access to both the alleged harasser and Complainant. Complainant filed a formal EEO complaint. The Agency dismissed the complaint on the grounds that Complainant was not an Agency employee.

On appeal, we affirmed the Agency's dismissal, finding that the Agency exercised insufficient control over Complainant to qualify as her employer. Complainant was self-employed and exercised a high degree of independence and control in the performance of her duties.

Lawrence (Michell B.) v. ODNI, 0120172545 (01/05/2018) – Complainant was an applicant in with a staffing firm to serve the Agency at its National Counterterrorism Center. She alleged that the Agency discriminated against her based on her sex and reprisal for EEO activity when it denied the staffing firm's October 2016, request, on her behalf, for a "crossover" clearance (reciprocal acceptance of access eligibility determinations under the Department of Defense and/or Intelligence Community Policy Guidance), resulting in her not being able to serve at the Agency's facility, thus denying her employment.

The Agency dismissed the complainant for failure to state a claim. It reasoned in part that the Commission does not have jurisdiction to review the substance of a security clearance determination. OFO reversed. OFO agreed that while the Commission does not have jurisdiction to review an agency's determination on the substance of a security clearance decision, we were not being asked to do so. Rather, Complainant contended that she already had the security clearance required to work at the Agency, but the Agency would not apply reciprocity to utilize it based on her sex and reprisal for prior EEO activity. OFO found that based on what was currently in the record, this went to procedure, not substance.

The Agency also reasoned that Complainant was not an applicant to be an Agency employee. OFO found that while the record was scant, for purposes of determining whether Complainant at this point stated a claim, it was more likely than not that the Agency had and would have sufficient control over her employment to be her common law joint employer. Specifically, the staffing firm offered Complainant a position serving the Agency with a monthly salary and benefits contingent on her obtaining the security clearances required to serve the Agency. The Agency had the power to deny this, which was necessary for Complainant to be hired into the position in question. OFO found that Complainant's unrebutted claim at this point was that the Agency would require her to work onsite, and more likely than not with a level of clearance, secrecy and security that the Agency would need to have control over her work.

Ussery (Jarrett C.) v. DOJ (ATF), 0120172705 (01/17/2018) – Complainant was an applicant for the position of Criminal Investigator (Special Agent). Under the theories of disparate treatment and impact, he alleged that the Agency discriminated against him based on his race (African-American) when it rejected him for failing an Agency polygraph examination without giving him an opportunity to retake it, nor using alternate methods to assess his background. The Agency dismissed the complaint, reasoning it was not actionable under Title VII because it regarded the denial of a security clearance and an adverse employment action based thereon. OFO reversed.

OFO agreed that while the Commission does not have jurisdiction to review an agency's determination on the substance of a security clearance decision, the Agency did not show its action was pursuant to national security requirements imposed by statute or Executive Order, an affirmative defense. While the Agency sent a letter to Complainant prior to his taking the polygraph that he must complete a background investigation to be eligible for a Top-Secret clearance, the letter did not explicitly reflect that such a clearance is a requirement for the position, and even it did, there was no documentation in the record identifying the statute or Executive Order under which the position was designated a national security position with a requirement of a clearance, nor that the Agency so designated it. Also, in a letter to a Congressman the Agency advised Complainant passed the "National Security portion" but he failed the "suitability portion" of the polygraph examination. Thus, the Agency failed to show that the polygraph results were related to its affirmative defense that Complainant was denied

employment because he did not meet national security requirements (as opposed to suitability requirements).

In his complaint, Complainant claimed that the ATF has allowed other applicants who fail the polygraph to retake the test, and indicated it should do the same for him. OFO found this allegation goes to something over which the EEOC has jurisdiction – procedures, not the substance of a security clearance determination, and the EEOC had jurisdiction over this matter.

Fernandez (Angelica P.) v. VA, 0120172789 (01/24/2018) – Complainant was employed by a staffing firm serving the Agency as a Subject Matter Expert (Team Lead) in its Office of Small and Disadvantaged Business Utilization. She filed an EEO complaint alleging that she was subjected to a hostile work environment by the Agency based on her race (Hispanic) and religion (non-Christian) when the Director, a federal employee, at meetings repeatedly shot down her ideas and told her to be quiet, excluded her from meetings, removed her from the team lead position, asserting she was a "bottle neck" who slowed down work, and so on. The Agency dismissed the complaint for failure to state a claim. It reasoned that Complainant was an employee of the staffing firm, not the Agency.

OFO reversed. It found that the Agency possessed sufficient control over Complainant's position to be her joint employer under common law. Specifically, the Agency set the qualification requirements for her position, demanding experience of at least 20 years, experience managing large complex multi-day, multi-hotel large conference events with at least 4,000 participants, and so on. Except if Complainant committed a criminal act or violation of staffing firm policy, the staffing firm was not permitted to replace her without notifying the Agency. The staffing firm was required to provide the Agency with a written explanation for any circumstances necessitating substituting Complainant for approval by the Agency. Complainant worked on Agency premises using Agency equipment. She contended that while reviewing the "EMS" system, she provided daily in-depth reports of her findings and progress to her "direct supervisor," a Deputy Director (a federal employee). The Agency did not dispute this, which suggested close review of her work. The EEO counselor relayed that the Director said the decision to remove Complainant as Team Lead was made in a conversation between the Deputy Director and the staffing firm.

Smith (Jared F.) v. State (Bureau of Overseas Bldgs. Operations), 0120180030 (01/09/2018) – Complainant worked as a contract Security Technician for the U.S. Embassy in Brussels, Belgium. Under his staffing contract, the Agency supervised him and provided his lodging in Brussels. Following an Agency investigation into Complainant traveling to London without authorization and sending an email disparaging his federal civilian supervisor, the Agency revoked Complainant's security clearance. Without a security clearance as required under the staffing contract, the Agency had effectively terminated Complainant and forced him to return home in December 2015. It was not until April 2017 that Complainant initiated contact with an EEO counselor regarding the investigation that ultimately resulted in his termination. The Agency made no attempt to dispute its status as a joint-employer. Instead, the Agency dismissed the formal complaint for untimely EEO Counselor contact. On appeal, Complainant claimed that he had timely mailed, faxed and emailed copies of his challenge to the security clearance revocation to EEOC and the Agency's EEO director. However, we found that Complainant had no evidence whatsoever to prove his efforts to timely contact the Agency's EEO office or EEOC. Therefore, we found proper the Agency's dismissal and affirmed.

Ruifang Hu (Karleen R.) v. DHS (CBP), 0120173075 (02/22/2018) – At the time of events giving rise to her complaint, Complainant was employed by a staffing firm serving the Agency as a customer service representative at an Agency call center. Complainant filed a complaint alleging that she was subjected to discrimination and harassment based on her race/national origin (Asian/China), sex and reprisal when she was paid unequally by her staffing firm, it revoked an offered promotion serving at the call center, it denied her pay increases and promotions, she was monitored by an on-site staffing firm supervisor, her hours were cut more than 50%, and she was terminated on March 18, 2017. The Agency dismissed the complaint for failure to state a claim. It reasoned that she was an employee of the staffing firm, not the Agency.

OFO reversed. It found that the Agency possessed sufficient control over Complainant's position to be her joint employer under common law. Specifically, according to Complainant, the Agency provided a list of employees to the staffing firm it recommended be terminated, including two it said had insufficient Chinese language skills, an Agency officer scolded another staffing firm employee saying "I can fire you. But I will give you one more chance," another staffing firm employee was terminated immediately after a confrontation with an Agency officer, and her staffing firm told her it and the Agency decided to terminate her. Complainant also contended that her work was assigned by Agency duty officers and she was supervised closely by Agency officials regarding technical knowledge and professional issues. Also, Complainant worked on Agency premises using Agency equipment. OFO advised that the Agency's involvement and/or responsibility for various matters, e.g., unequal pay, revoked offer of promotion, denial of pay increases, and reduction in hours will only be seen after an EEO investigation.

Stephens (Alan F.) v. USDA, 0120161089 (03/05/2018) – The Agency contracted with Panum Group LLC, to perform investigative services, primarily reviewing Reports of Investigation for legal sufficiency. Complainant was hired by Panum Group, LLC as an Equal Opportunity Specialist, and assigned to work in the Agency's Office of the Assistant Secretary for Civil Rights, of the Employment Investigations Division in Washington D.C. Believing that he was subjected to discriminatory harassment based on his race and in reprisal for prior protected EEO activity, Complainant filed a formal complaint on July 27, 2015.

The Agency dismissed the complaint for failure to state a claim. The Agency reasoned that Complainant was not an employee and therefore lacked standing to utilize the EEO process. According to the Agency, Panum hired Complainant, paid him, and provided him with numerous benefits. Further, the Agency noted that when Complainant engaged in undesired behavior or had attendance issues, it contacted Panum. Alternatively, the Agency also dismissed approximately half of the 43 claims for not affecting a term, condition or privilege of his employment.

In our decision, the Commission affirmed the dismissal of claims (1) through (5) and (43) for failure to state a claim. As for the remainder of the complaint (claims (6) – (42)), the Agency's decision was vacated and remanded for a supplemental investigation. We determined that the instant record was inadequate for a proper analysis of the employer/employee relationship. The Agency's decision was solely based on the contract between Complainant and Panum. The record was devoid of information regarding the day-to-day interactions and control over Complainant.

Sewell (Evelina M.) v. DHS (CBP), 0120180056 (03/05/2018) – Complainant was either an applicant to be a direct contractor with the Agency or an employee of a staffing firm serving the Agency. She

alleged that she was discriminated against based on her race (African-American) and reprisal when in March 2017, she learned that her Public Trust "security clearance" was denied, resulting in her being denied employment.

The Agency dismissed the complaint for failure to state a claim because the record was insufficient to determine whether Complainant under common law for the purposes of EEO process applied to be an employee of the Agency, and the Commission does not have jurisdiction to review the validity of the requirement for a security clearance nor the substance of a security clearance determination. OFO reversed.

OFO found that the Agency failed to prove its affirmative defense that the denial of the security clearance was because of national security requirements imposed by statute or Executive Order. The only record evidence indicated that the Agency did a background investigation on "suitability factors" on Complainant (as opposed to national security requirements), it contained no information on the meaning of a Public Trust "security clearance," and there was no documentation identifying the statute or Executive Order under which the unidentified position for which Complainant applied was designated a national security position with a requirement of a clearance nor that the Agency so designated it. OFO agreed with the Agency that the record was insufficient to determine whether Complainant applied for employment for which it could be deemed the common-law employer, i.e., the record contained no information about the position, i.e., its name, function, location, the Agency's relationship thereto, etc. OFO ordered the Agency to gather evidence so a determination could be made on whether Complainant applied to be a common-law employee of the Agency, and then accept the complaint or dismiss it with appeal rights to OFO.

Nguyen (Filiberto H.) v. DOD (NSA), 0120180108 (03/20/2018) – Complainant was employed by the Agency as a Cryptologic Liaison Officer in Seoul, Korea. He was in Korea on a permanent change of station (PCS) (meaning expected to be two to three years). He alleged that he was discriminated against based on his race/national origin (Asian/Vietnam) and age (70) when in March 2017, his Top Secret/Sensitive Compartmented Information clearance was suspended and he was returned to the United States.

The Agency dismissed this issue for failure to state a claim. It reasoned that the EEOC does not have jurisdiction over the merits of a security clearance decision. OFO affirmed this dismissal, finding that the Agency proved its affirmative defense. The Agency identified the statutory and Agency policy (which was in the record) under which Complainant was required to have a clearance, and his claim centered on his dispute about the merits of the Agency's reasons for suspending his clearance, i.e., the Agency explained that it suspended his clearance because he had a Counterintelligence incident on a private trip to Vietnam which he failed to report, while on a prior PCS he had another prior Counterintelligence incident, combined with his refusal to pay an outstanding debt to the Agency. Complainant disputed much of these facts.

The Agency failed to identify and address four other issues Complainant alleged in his complaint. Because it was difficult to discern at the time that the Agency issued the FAD whether Complainant intended these to be actionable issues rather than background or information relevant to remedy on the clearance issue, OFO gave the Agency the opportunity to gather further information, and accept and/or dismiss these issues, with appeal rights as appropriate.

Lara (Michal J.) v. DOC (NOAA), 0120180169 (03/27/2018) – Complainant worked for a staffing firm serving the Agency as a part-time on call Captain and Mate on the Agency's Research Vessel *Shearwater*. He alleged that he was discriminated against by the Agency based on his race (Hispanic/Latino), color (dark complexion), and age (47) when he was terminated in October 2016. The Agency dismissed the complaint for failure to state a claim. It reasoned that Complainant was an employee of the staffing firm, not the Agency. OFO affirmed. While finding significant factors pointed to the Agency having control over Complainant's employment, OFO held the control was insufficient for it to be deemed his common law joint employer. OFO reasoned that the power to terminate an employee is a significant factor, and the record, which included a report of investigation, showed the staffing firm made an independent decision to terminate Complainant for misconduct after getting information from two other staffing firm employees on the *Shearwater*, and others. Further, the record suggested that the staffing firm could have assigned Complainant elsewhere, but chose not to do so.

Rouillard (Gloria D.) v. USDA, 0120180762 (03/22/2018) – During the relevant time, Complainant worked as a Chief Pilot, Check Airman, and Director of Safety for Mountain Aviation in Santa Maria, California. The company entered an Exclusive Use contract with the Forest Service (Los Padres National Forest), with Complainant serving as a pilot at the Santa Maria Air Tanker Base. Believing that she was subjected to harassment (sexual and non-sexual) by two Agency employees ("Supervisor" and "Technician"), Complainant filed a formal complaint on October 26, 2017. The Agency dismissed the complaint for failure to state a claim, reasoning that Complainant was a contractor and lacked standing to bring an EEO complaint. Citing Ma v. Dept. of Health and Human Services, EEOC Appeal No. 01962389 & 01962390 (May 29, 1998), the Agency concluded that eight factors indicated Complainant was not an Agency employee (i.e. Mountain Aviation provided the plane and fuel, paid Complainant and provided her benefits, determined when and how long to conduct flight operations).

In our decision, we found the Agency's cursory analysis improperly concluded Complainant was not an employee. Instead, upon closer examination, the Commission found that the Agency exerted sufficient control over Complainant to be considered her joint employer. The Agency required particular skills of Mountain Aviation pilots, including a "pilot fire card" from the Agency which certified her ability to fly Agency missions. While Mountain Aviation provided the planes, the contract reflected that the Agency dictated the requirements for such planes and the equipment on board. Further, the contract expressly stated that pilots shall only use Agency approved flight plans. The record also revealed that the Agency held the ability to terminate individuals. Lastly, we noted that the nature of Complainant's claims illustrates the control exerted by the Agency, not Mountain Aviation, over the workplace. The Tanker Base was the Supervisor's duty station, and the record did not reflect the presence of any Mountain Aviation management onsite. Consequently, the allegedly sexually harassing actions and remarks went unchecked. OFO reversed the Agency's dismissal and remanded the complaint for further processing.

3. ADDRESSING EMERGING AND DEVELOPING ISSUES

As depicted in the chart below, during the 1st and 2nd Quarters of FY 2018 OFO resolved ten (10) decisions under this SEP Priority and its associated FCP priorities. Of these decisions implicating this SEP Priority, one (1) concerned LGBT coverage, five (5) concerned post-ADAAA reasonable

accommodation, once concerned pregnancy accommodation, and two (2) concerned Medical Privacy as well as accommodation.

Decision Summaries for this Category

Baty (Pamala L.) v. USPS, 0120152493 (11/21/2017) **[Repeated under Enforcement - General below]** – Complainant, a Mail Processing Clerk at the Post Office in Crewe, Virginia, appealed from the Agency's final decision (FAD) which fully implemented an EEOC AJ's finding on summary judgment that Complainant was not denied a reasonable accommodation. Complainant suffered from chronic discogenic and vertebrogenic problems, which limited her in the major life activities of sitting, standing, carrying, pushing and pulling. Complainant could perform the essential functions of her job, which included sorting letter and package mail, with reasonable accommodations of modifications to the front counter where she worked, an ergonomic chair, and a schedule allowing her to work continuous 8-hour shifts with a break of no more than 30-minutes. Therefore, the appellate decision concluded that Complainant was a qualified individual with a disability.

In defense of Complainant's denial of accommodation claim, the Agency contended that Complainant did not submit a form requested by its District Reasonable Accommodation Committee (DRAC). However, the appellate decision observed that Complainant submitted medical documentation, consisting of a letter from her doctor stating that she had a permanent condition with permanent restrictions, and a CA-17 duty status report also stating those restrictions. The decision reasoned that the medical documentation the Agency already had within its possession established the need for the reasonable accommodations Complainant requested, and that the DRAC form the Agency requested was asking for redundant information.

Therefore, the appellate decision concluded that Complainant proved by a preponderance of the evidence that she was denied a reasonable accommodation, and that the AJ incorrectly issued a decision on summary judgment in favor of the Agency. Complainant was awarded relief which included her requested accommodations and compensatory damages.

Sibert (Alejandrina L.) v. State, 0120152145 (11/16/2017) **[Repeated under Enforcement - General below]** – Complainant, a Financial Management Analyst in Washington, DC, appealed from the Agency's final decision (FAD), which found that she was not denied a reasonable accommodation or subjected to reprisal discrimination. Complainant suffered from mixed connective tissue disease, which manifests with features of systemic lupus erythematosis and inflammatory myositis. Complainant experienced symptoms such as pain in her hands, wrists, knees, shoulders and other joints, and "debilitating fatigue," making it extremely difficult for her to do routine things such as her basic hygiene routine. Stress and physical exertion could cause a flare-up of her disease. Specifically, her physician explained that her minimum daily commute of approximately two hours and twenty minutes was expected to "exacerbate many manifestations of her underlying [mixed connective tissue disease]... due to the physical and emotional stresses involved with this extensive travel." The physician recommended that Complainant be allowed "to work at home 2 days a week."

Upon receipt of Complainant's reasonable accommodation request to telecommute two days a week, the Agency's reasonable accommodation committee engaged in extensive discussions with management regarding the ability to grant two days of telecommuting as an accommodation. During the pendency of Complainant's accommodation request, the Agency moved Complainant to a newly created team and included that her work commitments consisted of "face to face" customer service,

and that she needed to be "physically available." Complainant's reasonable accommodation request was initially denied with the Agency only allowing one day a week of telework, but subsequently the Agency granted a second day of situational telework. However, the record indicated that there were occasions where Complainant would be denied the second day of situational telework when she requested it with her manager.

The appellate decision concluded that Complainant was denied reasonable accommodation because Complainant provided documentation showing that she needed two days of consistent telework to manage her stress and keep her disease in remission. The accommodation the Agency provided was not adequate. Further, the decision concluded that Complainant was subjected to reprisal discrimination when her team and work commitments were changed to include elements of "face to face" and "physically available" in direct contravention of her reasonable accommodation request.

Thomas (Davina W.) v. DOJ (FBI), 0120152757 (12/08/2017) **[Repeated under Circulated Cases below]** – Complainant, a Management & Program Analyst at the Mission Support Unit, High Value Detainee Interrogation Group, National Security Branch, appealed from the Agency's finding that she was not denied a reasonable accommodation for her Major Depressive Disorder and Anxiety Disorder. Complainant was suffering from attendance issues, mainly lateness, due to not being able to consistently wake up on time. The Agency proposed terminating Complainant, but agreed to give her a 90-day period during which to improve her attendance as a result of her disclosing her disability and requesting a reasonable accommodation. During that period, the Agency implemented a gliding schedule for Complainant which required her to report to work between 8:00 am – 9:30 am, and that she would need to contact her manager if she would be arriving to work beyond 9:30 am. Complainant explained that she thought her arrival to work beyond 9:30 am would be allowed if she informed her supervisor. According to the Agency, Complainant was late from several minutes to several hours on twenty-one occasions during the 90-day period, and therefore, the Agency terminated her employment. The Agency did not excuse Complainant's arrival to work beyond 9:30 am, even though she called in to inform her supervisor that she would be late on all but three occasions. An examination of the Agency's documentation supporting the termination revealed that Complainant's arrival at work beyond 9:30 am on the occasions in question were due to her oversleeping, which was a direct result of her disability. Complainant asked the Agency for a maximum flexible schedule, and the Agency did not offer arguments on why it would be an undue hardship for it to have provided Complainant with such a schedule. Therefore, the decision concluded that the Agency did not provide Complainant with an effective reasonable accommodation, and then terminated her employment because of the ineffective accommodation. Complainant was awarded remedies in the form of a reasonable accommodation, compensatory damages and reinstatement.

Morgan (Roxane C.) v. DOD (DIA), 0120170899 (12/29/ 2017) – In Roxane C. v. DOD, EEOC Appeal No. 0120142863 (July 19, 2016), the Commission found that Complainant established that she was discriminated against based on sex (pregnancy) when she was not allowed to attend an April 2011 training that was required for a Defense Liaison Officer position abroad that she had been offered, and based on reprisal when she was removed from an August 2011 session of the same training. As part of the relief, we ordered the conduct an investigation into Complainant's entitlement to compensatory damages.

On remand, the Agency conducted a supplemental investigation regarding compensatory damages. In an unsigned, undated statement, Complainant requested $30,000 in past pecuniary losses because the

cost of living was higher in Washington D.C. than in the country where the Defense Liaison Officer position was located, $20,000 in future pecuniary losses due to lost promotion potential, and $250,000 in non-pecuniary compensatory damages. Complainant averred that since February 2011 she had been ostracized at work and that after giving birth in 2011 she underwent a tubal ligation because she felt she needed to choose between her career and continuing to have children. Complainant also stated that she was constantly under stress, making her short-tempered, and that her stress had caused a strain on her marriage from February 2011 to the present. Complainant's attorney indicated that Complainant was unable to execute an affidavit during the supplemental investigation because of security concerns, but the attorney did not respond to the investigator's request for an affidavit from the attorney explaining the circumstances.

In its final decision on damages, the Agency awarded Complainant $21,000 in non-pecuniary compensatory damages, finding that she was only subjected to seven months of harm, and denied her request for pecuniary damages. Complainant appealed, requesting that the matter be remanded for a supplemental investigation or that the amount of compensatory damages be increased.

On appeal, we rejected Complainant's request for a supplemental investigation on compensatory damages, noting that neither Complainant nor her attorney provided an affidavit or other evidence explaining the circumstances during the supplemental investigation or on appeal. The Commission also found that Complainant failed to provide any evidence to show that she was entitled to pecuniary damages. We modified the Agency's award of non-pecuniary compensatory damages to $35,000, finding that the Agency erred in determining that Complainant's harm was limited to the seven months of her pregnancy and her subsequent maternity leave. Although we did not find that Complainant established causation between the discrimination to which she was subjected and her decision to undergo tubal ligation, we found that Complainant established that she was subjected to emotional harm that lasted longer than seven months.

Layne (Octavio C.) v. VA, 0120151095 (01/04/2018) – Complainant, a Registered Nurse at the Central Alabama Veterans Healthcare System in Tuskegee, Alabama, was in a relationship with his male partner, the then-Associate Director of Patient Care Services. In October 2013, Complainant submitted a request for reassignment to another Registered Nurse position on the Montgomery campus. Several management officials signed off on the request, but with notations indicating possible conditions. The request contained a signature space for the Human Resources (HR) Chief to sign; however, she instead noted on form that HR did not have authority to approve or disapprove the request. In November 2013, Complainant submitted a second request for reassignment with the same management officials' signatures and notations. The HR Staffing Specialist questioned Complainant's eligibility for the position as he was at the Nurse 1 level and was seeking a reassignment to a Nurse 2 position. The HR Chief acknowledged receiving the request in December 2013. The reassignment was never fully processed and the position was later announced through a vacancy announcement. Complainant applied, but later withdrew from consideration.

Complainant filed a formal complaint alleging that the Agency discriminated against him on the bases of race (Caucasian), sex (male), sexual orientation, and color (White) when, on or about November 7, 2013, the HR Chief stopped his reassignment to the CAVHCS East Campus in Montgomery, Alabama. In the FAD, the Agency found that Complainant had not been subjected to discrimination.

In the Commission's appellate decision, the Commission initially noted its jurisdiction over Complainant's sexual orientation discrimination claim pursuant to the Commission's finding in

Baldwin v. Dep't of Transp., EEOC Appeal No. 0120133080 (July 15, 2015), which held that a claim of sexual orientation discrimination is a claim of sex discrimination. Next, the Commission found that the Agency had articulated legitimate, nondiscriminatory reasons for its actions. In particular, the Staffing Specialist stated that there were concerns about Complainant's eligibility to be reassigned into the position at issue because, pursuant to the Agency's policy, he needed to go through all three levels of Nurse 1 before being promoted to Nurse 2. The question was ultimately not resolved and Complainant was encouraged to apply through the vacancy announcement as the selecting official could consider his work toward a Bachelor's degree as meeting the eligibility requirement. The HR Chief confirmed that she was never involved in the matter until December 2013, and that, generally, the Nursing Service would only forward personnel action paperwork to HR to code and enter in the system. Management later offered Complainant the position, but he informed officials that he was not interested because he did not want to work at the same campus as the HR Chief.

Despite Complainant's arguments, the Commission found that there was no evidence demonstrating that the HR Chief knew Complainant or was aware of his relationship with the Associate Director. Additionally, Complainant's claim that the Staffing Specialist called his partner on his personal cell phone and stated that the HR Chief was holding up Complainant's reassignment because of their relationship were unsupported and denied by the Staffing Specialist As a result, the Commission found that Complainant had not been subjected to discrimination as alleged.

Mahaffey (Lynne E.) v. VA (VHA), 0120162578 (01/31/2018) – Complainant was a Pharmacy Technician and subject to a one-year probationary period. When she was hired in December 2012, she was four months pregnant with twins. Complainant's pregnancy was a high-risk pregnancy and caused a number of symptoms, so Complainant was placed on light duty in February 2013, and she took leave without pay in March 2013. Complainant gave birth in April 2013 and returned to work in July 2013. Complainant's first- and second-level supervisors (S1 and S2) counseled Complainant in October 2013 after she was tardy on three occasions. On October 31, 2013, Complainant left a voicemail that she could not report for her scheduled shifts on November 2 or 3, 2013, and that she was not sure when she could return to work because someone who was "like a mother" to her was terminally ill. When Complainant returned to work on November 12, 2013, S2 terminated her for "undependability" based on her time and attendance after she returned from maternity leave. However, a Human Resources Specialist (HR1) noted the total number of hours that Complainant was not on duty and stated that the Agency "considered all absences from February 25, 2013, through November 1, 2013" in issuing the termination.

Complainant alleged that she was discriminated against based on race, national origin, sex, color, and disability when she was terminated during her probationary period. Complainant requested a hearing, and the AJ granted the Agency's motion for summary judgment over her objections. On appeal, Complainant noted that the AJ overlooked evidence in the record that the Agency considered absences related to her high-risk pregnancy, childbirth, and postpartum recovery in terminating her.

The Commission found that the AJ erred in determining that there was no genuine issue of material fact. The AJ relied on S1 and S2's affidavits, which indicated that Complainant was terminated based on attendance issues after she returned from maternity leave, but appeared to have ignored HR1's contradictory affidavit, which indicated that the Agency indicated Complainant's attendance during the entire length of her employment. There were also time and attendance records that indicated that the Agency had examined all of Complainant's absences in deciding to terminate her. We found that

HR1's affidavit and the time and attendance records created a genuine issue of material fact and remanded the matter for a hearing because an assessment as to the credibility of S1, S2, and HR1 was required.

Stern (Romaine H.) v. GSA, 0120160308 (02/15/2018) – Complainant, a Secretary at the Federal Acquisition Service, appealed from the Agency's decision to fully implement an AJ's decision on summary judgment that it did not deny her reasonable accommodation or discriminate against her on the bases of sex (female), religion (Jewish), disability (gastritis, stress), and reprisal. Based on documentation and testimony, Complainant did not produce preponderant evidence or genuine issues of material fact demonstrating that she was substantially limited in any major life activity in order for her to be considered an individual with a disability. As a result, Complainant did not prove that she was denied accommodation for her gastritis and stress. Further, evidence indicated that Complainant was provided with the religious accommodation of leave in order to depart early on Fridays. Finally, the Agency suspended Complainant for several days because she did not appropriately record her time. Therefore, the appellate decision concluded that Complainant was not subjected to discrimination, and that there were no genuine issues of material fact in dispute requiring a hearing.

Samuels (Minnie W.) v. VA, 0120140003 (03/20/2018) – Complainant, an Informational Technology (IT) Specialist with the Agency in Hines, Illinois, gave birth to her first child in 2009. Complainant worked in a cubicle office space and complained that management had failed to provide her adequate breast feeding accommodations in the form of an appropriate lactation room from September 2009 through June 2010. In response, management created a lactation room program to accommodate nursing mothers, designating an office for nursing mothers to breast pump. Complainant was designated as the point of contact for the program, responsible for cleaning, scheduling, and reporting problems about the designated lactation room. Complainant subsequently gave birth to her second child and again went out on maternity leave. In May 2011, when she returned from her second maternity leave, she found that management had changed the lactation room to a storage room without her knowledge. The storage room contained several large paint cans that had once been opened, old computer equipment, and tools possibly related to painting. Ants also later began to infest the room. Complainant immediately informed management that the room was unsanitary and not appropriate for the needs of a nursing mother. But management did not listen, and Complainant had no choice but to pump breast milk in the storage room despite the conditions of it.

Complainant subsequently filed an EEO complaint, alleging discrimination based on sex, race (African-American), and reprisal. The EEOC AJ assigned to the case thereafter issued a decision without a hearing in the Agency's favor. In finding that the Agency accommodated Complainant's needs as a nursing mother, the AJ observed that the storage room looked neat and carpeted with a refrigerator and chairs. The AJ also found that Complainant could lock and put an occupied sign on the door, and management did not learn that ants had been infesting the storage room until mediation.

On appeal, we found that the AJ erred in issuing a decision without a hearing in the Agency's favor. In so finding, we noted that while storage room may have contained carpeting and a refrigerator, pictures of the room showed that it contained large industrial sized paint cans and unidentified equipment stacked in the corner. We also noted that pictures of the storage room showed ants infesting Complainant's breast pump equipment. We further noted that while Complainant was made to breast pump in the storage room, the office previously designed for the nursing mother's program apparently remained vacant. Moreover, management also reportedly made special arrangements to have an

employee vacate his/her office for a Caucasian mother whenever she needed to breast pump. As such, we found there were too many unresolved issues on whether the Agency accommodated Complainant's needs as a nursing mother and whether the Agency's reasons for not doing so were pretext for discrimination. We therefore found that judgment as a matter should not have been granted in the Agency's favor.

4. ENFORCING EQUAL PAY LAWS

Of the nine (9) decisions that implicated this SEP Priority, one (1) decision implicated the associated FCP – Alternate pay systems that allow for subjective pay determinations.

Decision Summaries for this Category

Meier (Herman F.) v. DHS, 0120150832 (10/19/2017) – Complainant, a GS-14 Deputy Assistant Director/Supervisory Contract Assistant, filed an EEO complaint alleging that he was discriminated against on the bases of race (White), sex (male), age, and in reprisal for prior protected activity when he was not paid at the same level as other Deputy Assistant Directors (DADs) in other offices who were paid at the GS-15 level. Complainant did not request a hearing. The Agency issued a decision finding no discrimination and Complainant filed an appeal from that decision. OFO affirmed the Agency's finding of no discrimination. OFO found that Complainant failed to show that similarly situated persons were treated differently and that the pay differences at issue were due to historical reasons. Complainant was in Dallas, Texas while the people receiving higher pay were in Washington, D.C. and one person was in Laguna Nigel, California. Regarding Complainant's Equal Pay Act claim, OFO found that a factor other than sex explained why comparative female employees had a higher salary than Complainant. OFO found that when the Agency had hired people in Washington, D.C. in 2003 (when the Agency was created), it needed to have higher grades (GS-15) to compete with other agencies and civilian employers. There was no such need for higher grades in Dallas. OFO found that the Laguna Nigel position was different than the Dallas positions in that there was only one person in that position in that office and there was no onsite Assistant Director in that California office. OFO found no evidence that discrimination motivated the lower grade level in Dallas, Texas.

Morigeau (Brenton O.) v. DHS, 0120150956 (10/19/2017) – Complainant, a GS-14 Deputy Assistant Director/Supervisory Contract Assistant, filed an EEO complaint alleging that he was discriminated against on the bases of race (Caucasian), sex (male), age, and in reprisal for prior protected activity when he was not paid at the same level as other Deputy Assistant Directors (DADs) in other offices who were paid at the GS-15 level. Complainant did not request a hearing. The Agency issued a decision finding no discrimination and Complainant filed an appeal from that decision. OFO affirmed the Agency's finding of no discrimination. OFO found that Complainant failed to show that similarly situated persons were treated differently and that the pay differences at issue were due to historical reasons. Complainant was in Dallas, Texas while the people receiving higher pay were in Washington, D.C. and one person was in Laguna Nigel, California. Regarding Complainant's Equal Pay Act claim, OFO found that a factor other than sex explained why comparative female employees had a higher salary than Complainant. OFO found that when the Agency had hired people in Washington, D.C. in 2003 (when the Agency was created), it needed to have higher grades (GS-15) to compete with other agencies and civilian employers. There was no such need for higher grades in Dallas. OFO found that

the Laguna Nigel position was different than the Dallas positions in that there was only one person in that position in that office and there was no onsite Assistant Director in that California office. OFO found no evidence that discrimination motivated the lower grade level in Dallas, Texas.

Rybarczyk (Alberto S.) v. DHS, 0120150958 (10/19/2017) – Complainant, a GS-14 Deputy Assistant Director/Supervisory Contract Assistant, filed an EEO complaint alleging that he was discriminated against on the bases of race (Caucasian), national origin (Polish/European), sex (male), age, disability (cluster and migraine headaches, hypertension, and back), and in reprisal for prior protected activity when he was not paid at the same level as other Deputy Assistant Directors (DADs) in other offices who were paid at the GS-15 level. Complainant did not request a hearing. The Agency issued a decision finding no discrimination and Complainant filed an appeal from that decision. OFO affirmed the Agency's finding of no discrimination. OFO found that Complainant failed to show that similarly situated persons were treated differently and that the pay differences at issue were due to historical reasons. Complainant was in Dallas, Texas while the people receiving higher pay were in Washington, D.C. and one person was in Laguna Nigel, California. Regarding Complainant's Equal Pay Act claim, OFO found that a factor other than sex explained why comparative female employees had a higher salary than Complainant. OFO found that when the Agency had hired people in Washington, D.C. in 2003 (when the Agency was created), it needed to have higher grades (GS-15) to compete with other agencies and civilian employers. There was no such need for higher grades in Dallas. OFO found that the Laguna Nigel position was different than the Dallas positions in that there was only one person in that position in that office and there was no onsite Assistant Director in that California office. OFO found no evidence that discrimination motivated the lower grade level in Dallas, Texas.

Volkmer (Kristy E.) v. DHS, 0120150959 (10/19/2017) – Complainant, a GS-14 Deputy Assistant Director/Supervisory Contract Assistant, filed an EEO complaint alleging that she was discriminated against on the bases of race (White), sex (female), age, and in reprisal for prior protected activity when she was not paid at the same level as other Deputy Assistant Directors (DADs) in other offices who were paid at the GS-15 level. Complainant did not request a hearing. The Agency issued a decision finding no discrimination and Complainant filed an appeal from that decision. OFO affirmed the Agency's finding of no discrimination. OFO found that Complainant failed to show that similarly situated persons were treated differently and that the pay differences at issue were due to historical reasons. Complainant was in Dallas, Texas while the people receiving higher pay were in Washington, D.C. and one person was in Laguna Nigel, California. Regarding Complainant's Equal Pay Act claim, OFO found that a factor other than sex explained why comparative male employees had a higher salary than Complainant. OFO found that when the Agency had hired people in Washington, D.C. in 2003 (when the Agency was created), it needed to have higher grades (GS-15) to compete with other agencies and civilian employers. There was no such need for higher grades in Dallas. OFO found that the Laguna Nigel position was different than the Dallas positions in that there was only one person in that position in that office and there was no onsite Assistant Director in that California office. OFO found no evidence that discrimination motivated the lower grade level in Dallas, Texas.

Stephens (Roman B.) v. DHS, 0120150960 (10/19/2017) – Complainant, a GS-14 Deputy Assistant Director/Supervisory Contract Assistant, filed an EEO complaint alleging that he was discriminated against on the bases of race (African-American), sex (male), age, disability (diabetes, hypertension, and back), and in reprisal for prior protected activity when he was not paid at the same level as other Deputy Assistant Directors (DADs) in other offices who were paid at the GS-15 level. Complainant did

not request a hearing. The Agency issued a decision finding no discrimination and Complainant filed an appeal from that decision. OFO affirmed the Agency's finding of no discrimination. OFO found that Complainant failed to show that similarly situated persons were treated differently and that the pay differences at issue were due to historical reasons. Complainant was in Dallas, Texas while the people receiving higher pay were in Washington, D.C. and one person was in Laguna Nigel, California. Regarding Complainant's Equal Pay Act claim, OFO found that a factor other than sex explained why comparative female employees had a higher salary than Complainant. OFO found that when the Agency had hired people in Washington, D.C. in 2003 (when the Agency was created), it needed to have higher grades (GS-15) to compete with other agencies and civilian employers. There was no such need for higher grades in Dallas. OFO found that the Laguna Nigel position was different than the Dallas positions in that there was only one person in that position in that office and there was no onsite Assistant Director in that California office. OFO found no evidence that discrimination motivated the lower grade level in Dallas, Texas.

Rhynes (Harriet J.) v. USDA, 0120152130 (10/12/2017) – Complainant, a Forestry Prevention Technician, filed an EEO complaint alleging that she was discriminated against on the bases of sex (female) and age when she was not provided appropriate compensation for her work. Complainant did not request a hearing. The Agency issued a decision finding no discrimination and Complainant filed an appeal from that decision. OFO vacated the Agency's finding of no discrimination. OFO found that the record was not adequately developed regarding Complainant's equal pay claim. Complainant alleged that two male employees who preceded her were paid at a higher rate than she received for doing the same position. OFO found the Agency did not provide sufficient information regarding the positions held by the two comparative employees, the work done by the comparatives, or the pay provided to the comparatives during the relevant time. OFO vacated the Agency's decision and remanded the complaint to the Agency for further investigation concerning the work and pay done by the identified comparative employees.

Ward (Kenneth H.) v. DOJ, 0120160581 (12/20/2017) – Complainant, a Sex Offender Management Program Coordinator, filed an EEO complaint alleging that he was discriminated against on the bases of sex (male) and in reprisal for prior protected activity when he became aware he was not paid as much as a female Clinical Psychologist. Complainant requested a hearing. An EEOC AJ issued a decision without a hearing finding no discrimination regarding the pay claim and dismissing a portion of the complaint for untimely EEO Counselor contact. The Agency issued a decision fully implementing the AJ's decision. Complainant filed an appeal from that decision. OFO affirmed the Agency's finding of no discrimination regarding the pay claim and the Agency's dismissal of a portion of the complaint. Regarding Complainant's Equal Pay Act claim, OFO found that a factor other than sex explained why a comparative female employee had a higher salary than Complainant. OFO found that when the Agency hired the comparative female employee, they had the authority to hire her at a salary higher than the normal salary because the comparative employee had superior qualifications and because she was leaving a job that was higher paying than the normal salary. Regarding the non-EPA pay claim (sex and retaliation), OFO found no evidence that discrimination motivated the pay difference between Complainant and the female comparative. There was no evidence that Complainant was in the same situation when hired as the comparative employee.

Deters (Isidro A.) v. DHS (TSA), 0720170026 (02/06/2018) **[Repeated under Enforcement - General, below]** – The Agency filed an appeal from an EEOC AJ's finding of discrimination. Complainant, a

Program Analyst with the Transportation Security Administration, filed his complaint alleging that he was discriminated against in his compensation on the basis of sex in violation of Title VII of the Civil Rights Act and the Equal Pay Act (EPA). After a hearing, the AJ found that the Agency violated the Equal Pay Act and Title VII. The AJ found no intentional sex discrimination. For remedies, the AJ ordered back pay, liquidated damages, attorney's fees, costs, and posting of a notice of discrimination. The Agency issued a final order rejecting the finding of discrimination (and objecting to the remedies) and also filed an appeal with the Commission.

OFO found that the AJ's decision finding a violation of the EPA was supported by substantial evidence. OFO agreed with the AJ that the Agency failed to meet its burden (after the establishment of a prima facie case) that the pay differential between Complainant and two other female employees was based on a factor other than sex. OFO found that the although an award of attorney's fees was proper, it should be reduced by 25% for work done for the EPA claim. OFO also found that the triggering of the back pay should be two years prior to the filing of the complaint and not two years prior to the commencement of EEO counseling as the AJ found. In relief, the AJ ordered back pay, liquidated damages, attorney's fees in the amount of $60,918, costs in the amount of $16.75, and posting of a notice of discrimination. OFO also ordered the Agency to provide EEO training to employees at the facility and consider disciplining the individuals responsible for the discrimination.

Garrison (Wade K.) v. DOE, 0120160449 (03/14/2018) – Complainant, a GS-12 Accountant, filed an EEO complaint alleging that he was discriminated against on the bases of race (African-American) and sex (male) when he was not paid at the same level as a higher graded female Accountant; and that he was harassed; and was not selected for a team lead position (based on retaliation). After a hearing before an EEOC AJ, the AJ issued a decision finding no discrimination. The Agency subsequently issued a decision finding no discrimination and Complainant filed an appeal from that decision. OFO affirmed the Agency's finding of no discrimination. Regarding Complainant's Equal Pay Act claim, OFO found that Complainant did not establish a prima facie case because Complainant failed to show that the comparative female employee and Complainant performed substantially equal work. OFO found no Title VII discrimination regarding the pay claim. OFO found that substantial evidence supported the AJ's finding that there was no evidence of disparate treatment regarding the pay claim. OFO found substantial evidence supported the finding of no discriminatory hostile work environment and no discriminatory nonselection. OFO found that Complainant failed to show that he was as qualified as the selectees.

5. PRESERVING ACCESS TO THE LEGAL SYSTEM

The decision listed for this SEP Priority did not implicate the FCP Priority Improving Federal employees' faith in the integrity of agency EEO programs.

Decision Summary for this Category

Bailey (Iona A.) v. DHS (TSA), 0720160019 (01/09/2018) **[Repeated under Priority 1 Above, and Enforcement - General below]** – Complainant was given a conditional offer of employment, subject to a medical examination, for a Transportation Security Officer position. Complaint reported that she was taking medication for arthritis, but had no lifting restrictions. Complainant underwent a physical examination and passed all tests and screening including a test to examine decreased sensation in her

hands. A nurse then reviewed Complainant's results to determine whether she was qualified pursuant to the agency's medical Guidelines and determined her application required additional review. The Medial Review Director reviewed the documentation, and determined that no further examination was necessary because she was medical disqualified for the position because of her two decades old diagnosis of rheumatoid arthritis, which still "flared up" on occasion.

Complainant filed a formal complaint alleging disability discrimination and requested a hearing before an EEOC AJ. The AJ determined that Complainant was disqualified under the agency's Guidelines which disqualified for rheumatoid arthritis in the following situations: "With active disease under chronic treatment with functional capacity limited with muscle atrophy, moderate and severe pain, and multiple joint involvement." Because Complainant did not suffer from any limited functional capacity, muscle atrophy, of moderate and severe pain, and passed all tests conducted in the medical examination, the AJ found Complainant established she could perform the essential functions of the job without accommodation. The AJ further found the Agency did not establish she was a direct threat and ordered appropriate relief.

On appeal, the Agency maintained that the case should be dismissed for failure to state a claim because the Aviation Transportation Security Act (ATSA) preempts the Rehabilitation Act as noted in Getzlow v. DHS, EEOC Appeal No. 0120053286 (6/26/07). However, OFO found no Getzlow issue here because the Complainant was not challenging the guidelines themselves, rather, she was challenging the Agency's finding that she was not qualified under the Guidelines. OFO determined there was substantial evidence in the record to support the AJ's finding that Complainant met or exceeded the agency's own Medical Guidelines. Furthermore, the decision found the Agency had not satisfied its burden to prove direct threat because it failed to conduct an individualized assessment. The decision ordered appropriate relief including a retroactive offer to the TSO position with back pay.

6. PREVENTING HARASSMENT THROUGH SYSTEMIC ENFORCEMENT AND TARGETED OUTREACH

Decision Summaries for this Category

Lawrence (Tommy R.) v. DOL, 0120152960 (11/03/2017) – Complainant, a Management Analyst at the Center for Program Planning and Results in Washington, DC appealed from an Agency's final decision (FAD) finding that he was not subjected to a hostile work environment based on race (African American), color (brown) and sex (male) by at least two management officials. The appellate decision concluded that Complainant's allegations were not based on a protected class because the record revealed that much of the alleged conduct related to work issues. Further, Complainant's allegations that African American employees were subjected to harassment was not substantiated by the record. Therefore, the appellate decision affirmed the FAD's conclusion that Complainant was not subjected to a hostile work environment based on race, color or sex.

Bartholdt (Felipa A.) v. DOD (AAFE), 0120162432 (01/12/2018) – Complainant, a Data Security Analyst, appealed from the Agency's finding that she was not subjected to discrimination or a hostile work environment based on disability (degenerative bone disease in knees) and reprisal, and that she was not denied a reasonable accommodation. The appellate decision found that the Agency stated

legitimate, nondiscriminatory, reasons for the alleged adverse actions, which included explaining that Complainant was issued three reprimands because she was asked to submit leave slips for breaks she took pursuant to her reasonable accommodation, but Complainant refused to submit the slips. Regarding Complainant's accommodation requests, the appellate decision found that the Agency accommodated Complainant's need for frequent movement by allowing her four 15-minute breaks, and by allowing her to take additional breaks, but stipulated that additional breaks would require submission of a leave slip. Further, Complainant requested a raised desk as a reasonable accommodation, however, she did not submit the medical documentation the Agency asked for in support of the desk. Finally, there was insufficient evidence to conclude that management spoke loudly about Complainant's EEO activity or shared it with other staff. Therefore, the Agency's decision finding no discrimination was affirmed.

McConnell (Velva B.) et al. v. USPS – 0520180094 & 0520180095 (03/09/2018) **[Repeated under Broad Impact Decisions below]** – In its decision in the underlying appeals 0720160006 & 0720160007 (9/25/2017), the Commission reversed the Agency's final order rejecting the AJ's summary judgment decision in favor of the class consisting of rehabilitation and limited-duty injured-on-duty (IOD) employees whose positions were assessed by the Agency's National Reassessment Program (NRP) (a nationwide program) between May 5, 2006 and July 1, 2011. The Commission decision also affirmed the AJ's findings that the Class Agent showed that the NRP subjected qualified rehabilitation and limited-duty IOD employees to disparate treatment and withdrawal of their reasonable accommodations, disability-based harassment, and unauthorized persons accessing their confidential medical information. The decision further found, based on a de novo review of the record, that Phase 1 of the NRP (the process used to identify all IOD employees who were either in limited-duty or rehabilitation status) constituted an unlawful medical inquiry to which the class was subjected. Finally, the initial decision determined that the Class Agent, as an individual, was eligible for immediate relief for disparate treatment, withdrawal of reasonable accommodation, hostile work environment, illegal medical inquiry, and breach of confidentiality because she established, as applicable, that she was a qualified individual with a disability who was subjected to a tangible employment action, an unlawful disability-related medical inquiry, and the compromise of the confidentiality of her medical records via Phase 1 of the NRP.

On request, the Agency made many of the same arguments previously addressed by the Commission, and some new ones. OFO did not find any of the arguments persuasive, and denied the Agency's request. In the request decision, OFO included the order the Commission made in the previous decision, which included individual relief for the Class Agent and the procedures for class members to file claims for individual relief.

7. BROAD IMPACT DECISIONS

Burger (Tessa L.) v. USDA, 0720170021 (11/09/2017) – Our decision affirmed the AJ's conditional certification of a class action, reversing and remanding the Agency's final decision. The AJ concluded that the class had not shown that adequacy of representation had been met, but conditionally certified the class, under the condition that the class present evidence of representation, if and when the litigation resumes before the AJ.

The class was certified as follows: From May 9, 2014, and continuing, all deaf and hard of hearing employees in USDA's National Capital Region (NCR) who, based on their physical disability (hearing impairment), have been or will be subjected to discrimination (the denial of a reasonable accommodation, specifically, qualified sign language interpreting services) resulting from the Agency's implementation of its decision to decentralize the system for the provision and funding of such services.

Our decision affirmed the AJ's conclusion that the class agent and the putative class members consist of a uniform group of individuals, in that they are all deaf or hard of hearing employees employed by the Agency in the NCR who suffered the same or similar injury (i.e., the lack of consistent, reliable, or any sign language interpreter services at all). The Agency argued that commonality was not shown because since the decentralization, the sub-agency policies and practices regarding interpreter administration do not have a common administrator, a common standard, a common process, a common policy, or a common outcome. We disagreed with this analysis and concluded that commonality is established where, as in this case, a high-level centralized administration's decision to dismantle the centralized interpreting fund has been applied to the class as a whole, which allegedly caused a systematic failure to provide consistent and qualified interpreting services for deaf and hard of hearing employees to perform essential functions and to access the benefits and privileges of employment both at the sub-agency level and at Department-wide events.

We also found the typicality requirement was met. Specifically, we found that the basic premise underlying the class agent's claim and the class members' claim is the same (i.e. the very same act of dismantling the centralized fund allegedly caused everyone to suffer lack of reasonable accommodations in the form of consistent, qualified interpreting services for essential functions of their respective employment and Department-wide functions).

Lastly, we concluded that the numerosity requirement was met because the class agent established that there were 40 deaf and hard of hearing USDA NCR employees who possibly could have been affected by Agency's decision to decentralize interpreting services and who, thus, may assert claims.

Tuaua (Valentine F.) et. al. v. DOJ, 0120152623 (01/09/2018) **[Repeated under Priority 1 above] –** Putative class agent worked as a Detention Enforcement Officer (DEO) and sought certification of a class of individuals who are members of certain racial and ethnic minority groups; over forty and have qualifying disabilities. In his decision, the AJ identified the class' four claims: the class alleged that the Agency assigned Aviation Enforcement Officers (AEOs) new job series with higher promotional opportunities but did not similarly do so for DEOs; the Agency's Fitness in Total (FIT) program created a disparate impact of DEOs; the Agency's requirement that DEOs supervise three employees prevents DEOs from advancing in their career, and the finally, the Agency removed duties from the DEO position descriptions, but continued to require DEOs to perform them, for less pay. The AJ also found the class alleged an "across the board" claim that they were treated less favorably with respect to promotion, pay, training, assignment of duties, benefits, failure to accommodate, retaliation, demotion, performance ratings and threats of discipline, pay, promotion, training, duties,

The AJ denied class certification based on each of the identified policies, as well as the across the board claim. Specifically, the AJ found no evidence which would demonstrate that there was an improper classification of the AEO position, or that it resulted in a disparate impact on any bases. Furthermore, the AJ found the class failed to provide factual evidence supporting the notion that members applied

for DUSM positions, but were rejected due to the Agency's FIT standards. The AJ found that there was no evidence regarding the final two policies. Finally, the AJ examined the "across the board" discrimination claim and found no unifying common question of fact.

On appeal, OFO determined that the AJ erred when he denied class certification because of a lack of proof that class members applied, but were rejected from positions because of their FIT scores. OFO found that the class requested that information during discovery but it was not provided by the Agency. OFO determined that instead of denying certification, the AJ should have conducted additional discovery. Accordingly, OFO vacated the agency's decision and ordered that additional discovery be undertaken.

McConnell (Velva B.) et al. v. USPS – 0520180094 & 0520180095 (03/09/2018) **[Repeated under Priority 6 above]** – In its decision in the underlying appeals 0720160006 & 0720160007 (9/25/2017), the Commission reversed the Agency's final order rejecting the AJ's summary judgment decision in favor of the class consisting of rehabilitation and limited-duty injured-on-duty (IOD) employees whose positions were assessed by the Agency's National Reassessment Program (NRP) (a nationwide program) between May 5, 2006 and July 1, 2011. The Commission decision also affirmed the AJ's findings that the Class Agent showed that the NRP subjected qualified rehabilitation and limited-duty IOD employees to disparate treatment and withdrawal of their reasonable accommodations, disability-based harassment, and unauthorized persons accessing their confidential medical information. The decision further found, based on a de novo review of the record, that Phase 1 of the NRP (the process used to identify all IOD employees who were either in limited-duty or rehabilitation status) constituted an unlawful medical inquiry to which the class was subjected. Finally, the initial decision determined that the Class Agent, as an individual, was eligible for immediate relief for disparate treatment, withdrawal of reasonable accommodation, hostile work environment, illegal medical inquiry, and breach of confidentiality because she established, as applicable, that she was a qualified individual with a disability who was subjected to a tangible employment action, an unlawful disability-related medical inquiry, and the compromise of the confidentiality of her medical records via Phase 1 of the NRP.

On request, the Agency made many of the same arguments previously addressed by the Commission, and some new ones. OFO did not find any of the arguments persuasive, and denied the Agency's request. In the request decision, OFO included the order the Commission made in the previous decision, which included individual relief for the Class Agent and the procedures for class members to file claims for individual relief.

8. ENFORCEMENT – GENERAL

Falcon (Mario G.) v. USAF, 0120150193 (10/18/2017) – Complainant, an Aircraft Sheet Metal Mechanic at the Randolph Air Force Base in Texas, requested light duty after he was injured while performing heavy duty metal work on the fuselage of a C-17 Globemaster aircraft. In evaluating Complainant's request for light duty, Complainant's first-level supervisor (S1) emailed the second-level supervisor (S2) and the Civilian Personal Office. In the email, S1 noted that Complainant had knee surgery, listed Complainant's medical restrictions, and asked what options for light duty were available for Complainant. Thereafter, a Machinist entered S2's office to use the shared hard drive that everyone uses, and saw a hard copy of the email sitting face-up on the table next to the hard drive. The Machinist mentioned that employees regularly entered S2's office for items and was concerned that

Complainant's personal medical information was out-in-the open for everyone to see. After reading the email, the Machinist reported to Complainant that he saw an email left on S2's desk regarding Complainant's light duty medical information. Complainant stated that the email caused rumors within the office about his medical condition and how he could possibly be disqualified from employment. Complainant subsequently filed an EEO complaint, alleging discrimination based on national origin, disability, and reprisal. After the investigation, an EEOC AJ held a hearing and subsequently issued a decision finding that Complainant did not show he was subjected to discrimination and a hostile work environment as alleged. On appeal, we modified the AJ's decision, finding that the Agency improperly disclosed Complainant's confidential medical information, which amounted to a violation of the Rehabilitation Act. We noted that although such disclosure may have been inadvertent, it nevertheless constituted a violation of the Rehabilitation Act.

Daugharty (Karol K.) v. State, 0120151671 (10/27/2017) - Complainant was employed by the Agency as a Foreign Affairs Officer, GS-13. She alleged discrimination in violation of the ADEA, Title VII, and the Rehabilitation Act when she was not selected for promotion to specified GS-14 positions in 2011, was not sent to some overseas meetings, and received a letter of warning. Prior to the completion of the EEO investigation, Complainant timely requested an EEOC hearing. As sanction for the Agency long untimely completing the investigation, the AJ entered a default judgment in favor of Complainant. Following a "damages hearing," the AJ ordered the Agency, in relevant part, to (1) place Complainant in one of the positions she was denied or a comparable position at the GS-13 level (not GS-14 level) effective May 23, 2011; (2) pay back pay with interest and benefits (the AJ noted it may be nil); (3) pay $10,000 in non-pecuniary damages; and (4) pay $19,723.50 in attorney fees. The Agency issued a final order fully implementing the decision, and Complainant appealed the ordered relief.

OFO modified the Agency's final order. First, it ordered the Agency to place Complainant, effective May 23, 2011, in one of the denied positions, or a comparable position at the GS-14 level, with back pay, interest, and other benefits. OFO reasoned that the AJ's default judgment constituted a finding of discrimination in favor of Complainant, and as a prevailing party she was entitled to make whole relief. Since the Agency found during the selection process that Complainant was qualified for the denied GS-14 positions, make whole relief was at the GS-14 level. OFO declined to order training for involved management officials, citing a Commission case where training explicitly was not ordered in a default judgment because no findings were made identifying the responsible management officials. OFO found that the AJ's award of $10,000 in nonpecuniary damages was supported by substantial evidence.

Complainant's law firm requested $44,726.50 in fees. OFO awarded $42,289.50, less what the Agency already paid. First, OFO noted that Complainant's law firm submitted a supplemental fee petition to the AJ for subsequent work that was not addressed by the AJ, and awarded additional fees based on this. Second, OFO reversed the AJ's decision to reduce by 25% all fees requested in the initial fee petition. Because the time expended by Complainant's law firm was well documented and all entries were reasonable, OFO reversed the AJ's finding that the overall fees requested was excessive since Complainant's case did not proceed to discovery nor beyond the motion for default judgement and related relief. OFO also disagreed with the AJ's finding that fees should be reduced since Complainant did not prevail on her disability claim, reasoning time spent thereon was not "truly fractionable" from the claims or issues on which she did prevail. OFO awarded all costs requested, which were not addressed by the AJ. OFO slightly reduced fees because Complainant's law firm requested the Agency to pay hourly fees based on the Laffey matrix, but had a fee agreement with Complainant at lower

hourly rates, and there was no evidence that the law firm agreed to these lower rates for public interest reasons.

Shaw (Judson G.) v. VA, 0120151916 (11/22/2017) – Complainant filed an EEO complaint alleging that the Agency subjected him to discrimination and a hostile work environment on the bases of religion (Muslim) and in reprisal for prior protected EEO activity as evidenced by multiple incidents. Following an investigation Complainant requested a hearing and acted pro se throughout the proceedings. The AJ conducted a hearing and subsequently issued a sanction in the form of default judgment in favor of Complainant, as well as disqualification of the Agency's attorney from the matter, for the Agency's repeated failure to comply with the AJ's orders. Prior to a damages hearing, Complainant sought the removal of the AJ, accusing the AJ of being biased against him despite receiving a default judgment in his favor. In addition, Complainant failed to comply with the AJ's Scheduling Order by not submitting a proposed witness list or any documentation related to his entitlement to damages. Instead of responding to the AJ's Order to Show Cause for his failure to submit these items, Complainant again accused the AJ of being corrupt and favoring the Agency. The AJ then issued a memorandum opinion dismissing Complainant's hearing request as a sanction for his conduct and for failure to adhere to the damages hearing Scheduling Order. The AJ determined that Complainant's conduct and behavior was so contumacious that an immediate sanction was warranted. As a result, the AJ dismissed Complainant's hearing request, and the default judgment, and remanded the complaint to the Agency for a final agency decision. The Agency issued a final agency decision finding that Complainant had not been subjected to discrimination, reprisal, or a hostile work environment as alleged.

In the Commission's appellate decision, the Commission concluded that the AJ erred in imposing overly harsh sanctions. The Commission noted that it was clear that Complainant engaged in a pattern of disruptive and defiant conduct which warranted a sanction. That conduct included ignoring the AJ's rulings (including default judgment in his favor), abusive personal attacks on the AJ, repeated challenges to the AJ's authority, and willful failure to comply with or to show good cause for non-conformity with the AJ's orders. The Commission found, however, that his actions did not nullify the Agency's prior sanctionable conduct which resulted in the original default judgment sanction. The Commission determined that the AJ abused his discretion by dismissing Complainant's hearing request and that a less harsh, more tailored sanction in the form of dismissing the damages hearing would have been more appropriate. Accordingly, the Commission vacated the final agency decision finding no discrimination, reinstated the default judgment in Complainant's favor, and remanded the matter to the Agency for a supplemental investigation regarding Complainant's entitlement to compensatory damages.

Maxwell (Danielle H.) v. DOD (DHA), 0120152515 (10/19/2017) – Complainant worked for the Agency as a Medical Records Technician at the Walter Reed National Military Medical Center in Bethesda, Maryland. Complainant filed a formal EEO complaint claiming she was discriminated against based on her race (African-American) when she did not receive her Quality Step Increase (QSI), and was denied a GS-7 promotion. The Agency accepted the complaint for investigation, and determined that Complainant had failed to demonstrate that management had discriminated against her as alleged.

OFO reversed the Agency's finding of no discrimination. Our decision determined that Complainant had established a prima facie case of race discrimination by establishing: (1) that despite the fact that she was approved for a QSI, upper level management effectively denied it to her while granting QSIs to

other Caucasian employees; and (2) that although she was selected over two other employees for a promotion to GS-7, upper level management refused to place her in the position. We determined that the Agency failed to meet its burden to rebut this presumption of discrimination. Therefore, the decision concluded that Complainant prevailed in establishing that she was discriminated against on the basis of her race when she was denied the QSI and the promotion to GS-7.

A variety of remedies was ordered, including: retroactively providing Complainant with the QSI and the GS-7 promotion, along with an award of back pay with interest for both; consideration of Complainant's claim for compensatory damages; training for the responsible management officials; consideration of disciplinary action against the responsible management officials; and attorney fees.

Watts (Victor S.) v. USPS, 0120160739 (10/18/2017) – Complainant worked as a Mail Processing Clerk at the Agency's Waco, Texas Processing and Distribution Facility (P&DF). Complainant has several physical impairments including degenerative joint disease, a left rotator cuff tear, a partially fused left wrist, an inflexible right wrist, and ankle instability. According to Complainant, he could perform all of his Mail Processing Clerk duties without any accommodation. On August 6, 2013, Complainant was notified that the P&DF was closing and that effective September 7, 2013, he was being reassigned to a City Carrier position. Complainant submitted medical documentations showing his limitations with respect to the City Carrier position, and, after a September 2013 District Reasonable Accommodation Committee (DRAC) meeting, he was assigned temporary "Dock Tech" duties at the P&DF, which Complainant stated that he could perform without accommodation.

On November 15, 2013, the Postmaster notified Complainant that effective November 30, 2013, he was being reassigned to a City Carrier position at Highlander Station in Waco, Texas. Complainant averred that he reminded management of his limitations and of the DRAC determination but that he was directed to report to Highlander Station. The Acting Manager of Highlander Station sent Complainant home because his impairments were not related to an on-the-job injury and because there was no work that he could perform in the carrier craft. The DRAC reconvened and again determined that Complainant could not perform the City Carrier position duties, with or without accommodation. On December 17, 2013, the District Labor Relations Manager (LR1) offered Complainant a Part-Time Flexible (PTF) Sales and Service Distribution Assistant position in Meridian, Texas, with variable hours between 6:30 a.m. and 10:30 a.m. and 2:30 p.m. and 4:30 p.m., Monday through Saturday, as a reasonable accommodation. According to Complainant, a PTF employee is only guaranteed two hours of work per day, and Meridian is about 48 miles from his home, so he could spend as much time driving as he would working per day. Complainant also alleged that accepting the Meridian position would have eliminated his retreat rights to return to the clerk craft and to the Waco area and also would have eliminated his protections under the collective bargaining agreement.

Complainant averred that a Waco P&DF Mail Processing Clerk (C1) who did not have a driver's license remained in the clerk craft after the P&DF closed because she did not have a driver's license and was reassigned to a Clerk position at the Agency's Downtown Station in Waco, Texas. LR1 stated that in order to be reassigned, an employee must meet the qualifications for the position and that C1 did not meet the City Carrier qualifications because she did not have a driver's license.

We found that the Agency denied Complainant a reasonable accommodation when it involuntarily reassigned him to a position that he was unable to perform because of his medical restrictions in November 2013, as the Agency did not establish that it would have constituted undue hardship to reassign Complainant to a position that he could perform with his known medical restrictions. We

noted that a clerk craft position was located for C1 because she did not have a driver's license, which indicated that there was at least one clerk craft position in Waco to which the Agency could have reassigned Complainant. With respect to the offer of the PTF position, we found that the Agency did not establish that it searched for equivalent vacant funded positions within Complainant's restrictions before offering him the part-time position, which was not equivalent to his Mail Processing Clerk position in pay or status.

We further found that the Agency's proffered legitimate, nondiscriminatory reason for the November 2013 reassignment of Complainant to a position that it already knew that he could not perform because of his disability was pretext for disability discrimination. We also concluded that the Agency's reasons for sending Complainant home in December 2013 were not legitimate, nondiscriminatory reasons, because the Agency has obligations under the Rehabilitation Act that are independent of its obligations with respect to employees injured on the job and because the statement that there was no work available within the carrier craft implied that there may have been work available within Complainant's restrictions in another craft.

Accordingly, we reversed the Agency's final decision finding no discrimination. As relief, the Commission ordered the Agency to identify vacant, funded positions with equivalent pay and status to Complainant's full-time Mail Processing Clerk Position, restore leave used by Complainant due to the Agency's failure to provide an effective reasonable accommodation, conduct a supplemental investigation into Complainant's entitlement to compensatory damages, provide training, consider discipline, and post a notice.

Gwin (Detra S.) v. SSA, 0720170025 (10/12/2017) – The Agency filed an appeal from an EEOC Administrative Judge's (AJ) finding of discrimination. Complainant, a Service Representative, filed her complaint alleging, in part, discrimination on the basis of disability when she was denied her request for accommodation for a parking space and not to perform eServices duties. After a hearing, the AJ found that the Agency discriminated against Complainant on the basis of disability. For remedies, the AJ ordered nonpecuniary, compensatory damages in the amount of $25,000, attorney's fees in the amount of $30,239.40, costs in the amount of $933.96, posting of a notice of discrimination, and 33% of the leave Complainant used during a specified period. The Agency issued a final order rejecting the finding of discrimination and also filed an appeal with the Commission. OFO found that the Agency's appeal was untimely and dismissed the appeal. OFO found that the Agency had sent their appeal to an incorrect Commission address and had never submitted an appeal to the correct address within the time limit for filing an appeal. In relief, OFO ordered the Agency to pay Complainant nonpecuniary, compensatory damages in the amount of $25,000, attorney's fees in the amount of $30,239.40, costs in the amount of $933.96, posting of a notice of discrimination, and 33% of the leave Complainant used during a specified period. OFO also ordered the Agency to provide EEO training to employees at the facility and consider disciplining the individuals responsible for the discrimination.

Schumacher (Gilda M.) v. USDA, 0120140791 (11/28/2017) – Complainant, a Natural Resources Planner at the Spring Mountain National Recreation Area in Las Vegas, was recommended for a cash award by her first-level supervisor (S1). S1 submitted the award request for Complainant because she was told by the Deputy Regional Forester that the Regional Office was putting awards together for the Spring Mountain staff. S1, however, left the Spring Mountain Area shortly after recommending the award for Complainant and was no longer in Complainant's supervisory chain. Complainant never

received the cash performance award recommended by S1 even though other employees had been receiving cash awards during the same time period. Both S1 and the Deputy Regional Forester were unaware as to why Complainant never received her recommended cash award. Complainant subsequently filed an EEO complaint, alleging discrimination based on reprisal, among other bases. At the conclusion of the investigations, in accordance with Complainant's request, the Agency issued its final decision. Therein, the Agency found that Complainant failed to establish that she was subjected to discrimination as alleged. On appeal, we found that Complainant established a prima facie case of discrimination based on reprisal, but the Agency failed to meet its burden of articulating a legitimate, nondiscriminatory reason as to why Complainant never received the recommended cash award. In so finding, we noted that no management official provided a specific, clear, and individualized explanation as to why Complainant was not issued the award.

Gue (Dominica H.) v. HHS, 0120150971 (11/22/2017) – Complainant, a Management Analyst, filed an EEO complaint alleging that she was discriminated against on the bases of disability, sex (female), age, and in reprisal when she was denied a reasonable accommodation, harassed, denied a transfer, denied leave, and denied telework. Complainant also alleged that she was disciplined and issued a memorandum regarding computer use expectations because she raised EEO concerns to a high level official. Complainant did not request a hearing. The Agency issued a decision finding no discrimination and Complainant filed an appeal from that decision. OFO affirmed the Agency's finding of no discrimination with regard to disability, sex, and age. OFO reversed the Agency's finding no reprisal regarding the discipline and memorandum regarding computer use expectations. OFO found that the Agency had disciplined Complainant for not following the chain of command when she raised EEO concerns to a high level official. OFO found that the discipline and subsequent computer use monitoring all stemmed from Complainant's raising EEO concerns with that high level official. OFO found that the Agency's actions had a chilling effect and deterred persons from using the EEO process. OFO ordered the agency to: expunge discipline, expunge the computer use memorandum, expunge an email about returning to work expectations, determine if Complainant is due back pay for the extension, determine if Complainant is due compensatory damages, pay attorney's fees, provide EEO training and consider discipline for responsible management officials, and post a notice of the finding of discrimination.

Stinson (Freddy V.) v. DOI, 0120152121(11/29/2017) – Complainant alleged that the Agency subjected him to harassment on the bases of disability (Cystic Fibrosis) when, among other allegations, in the summer of 2012, an Agency official divulged his personal medical information to a coworker. The Agency's FAD concluded that Complainant failed to prove that the Agency subjected him to harassment and reprisal as alleged.

The Commission affirmed the Agency's FAD in part, but found that the Agency official had made an improper medical disclosure of confidential information about Complainant to the coworker. The Commission ordered the Agency official to attend eight hours of EEO training with attention to the Agency's obligations under the Rehabilitation Act to not disclose confidential medical information. The Agency was also directed to consider disciplining its official and to conduct an investigation into Complainant's entitlement to compensatory damages.

Sibert (Alejandrina L.) v. State, 0120152145 (11/16/2017) **[Repeated under Priority 3 above]** – Complainant, a Financial Management Analyst in Washington, DC, appealed from the Agency's final decision (FAD), which found that she was not denied a reasonable accommodation or subjected to

reprisal discrimination. Complainant suffered from mixed connective tissue disease, which manifests with features of systemic lupus erythematosis and inflammatory myositis. Complainant experienced symptoms such as pain in her hands, wrists, knees, shoulders and other joints, and "debilitating fatigue," making it extremely difficult for her to do routine things such as her basic hygiene routine. Stress and physical exertion could cause a flare-up of her disease. Specifically, her physician explained that her minimum daily commute of approximately two hours and twenty minutes was expected to "exacerbate many manifestations of her underlying [mixed connective tissue disease]... due to the physical and emotional stresses involved with this extensive travel." The physician recommended that Complainant be allowed "to work at home 2 days a week."

Upon receipt of Complainant's reasonable accommodation request to telecommute two days a week, the Agency's reasonable accommodation committee engaged in extensive discussions with management regarding the ability to grant two days of telecommuting as an accommodation. During the pendency of Complainant's accommodation request, the Agency moved Complainant to a newly created team and included that her work commitments consisted of "face to face" customer service, and that she needed to be "physically available." Complainant's reasonable accommodation request was initially denied with the Agency only allowing one day a week of telework, but subsequently the Agency granted a second day of situational telework. However, the record indicated that there were occasions where Complainant would be denied the second day of situational telework when she requested it with her manager.

The appellate decision concluded that Complainant was denied reasonable accommodation because Complainant provided documentation showing that she needed two days of consistent telework to manage her stress and keep her disease in remission. The accommodation the Agency provided was not adequate. Further, the decision concluded that Complainant was subjected to reprisal discrimination when her team and work commitments were changed to include elements of "face to face" and "physically available" in direct contravention of her reasonable accommodation request.

Maxwell (Lacy R.) v. DOJ (FBI), 0120152260 (11/22/2017) – Complainant, a Special Agent at the Agency's San Antonio Division, Austin Resident Agency in Austin, Texas, experienced a work-related injury in February 2008. Beginning in February 2008, Complainant submitted requests for reasonable accommodation to the Agency's Human Resources Specialist who forwarded the requests to Agency Headquarters and the Department of Labor (DOL). Complainant requested voice recognition software and received it around May 2008, but it was not effective until November 2009 due to lack of training. From April 2008 through December 2008, Complainant's doctor made several requests on behalf of Complainant for an ergonomic evaluation of Complainant's workspace and an ergonomic chair. Instead of acting on the requests, the Agency forwarded the requests to Headquarters and DOL.

In March 2009, Complainant submitted an Agency form requesting a specialized workstation and equipment. In July 2009, Complainant underwent an ergonomic evaluation which recommended that he receive speech recognition software on one of his computers and training on the software, a microphone headset, an ergonomic chair, adjustable keyboard/mouse platforms, and a headset for his cell phone. The Agency ordered an ergonomic workstation and it was delivered and installed by October 2009. Most of the requested accommodations were installed by November 2009. Complainant later requested a Bluetooth/handsfree device for his cell phone and typing pool transcription services. Complainant received a wired handsfree headset for his phone in March 2010, a wireless headset in April 2010, and keyboard tray/mouse accommodations in June 2010. Complainant requested

permission to obtain his quarterly firearms qualification by using a firearm simulator; however, management determined that the simulator was both unavailable and unsuitable for that purpose and excused Complainant from firearms qualification until his restrictions permitted him to operate a firearm.

Complainant filed a formal complaint alleging that the Agency discriminated against him and subjected him to a hostile work environment on the bases of disability and in reprisal for prior protected EEO activity when, inter alia, his requests for reasonable accommodation from February 2008 through December 2009 were delayed; he did not receive a response to his requests for an accommodation for firearms qualifications by using a simulator; he was ordered to surrender his Agency-issued and personally-owned firearms as well as his alias identification after being placed on restrictions; he received minimally successful ratings on his mid-term Performance Appraisal Report and on a file review; and management officials yelled at him using profanity-laced language, instructed him to provide daily updates, reprimanded him for violating policy, and did not respond to request to conduct a surveillance and interview an individual.

Complainant requested a hearing after the investigation; however, the AJ denied the hearing request because Complainant failed to comply with her orders and remanded the complaint to the Agency for a FAD. In the FAD, the Agency found that management did not delay providing Complainant reasonable accommodation as Complainant made his accommodation requests through DOL for specific equipment, and made no direct effort to seek accommodation from the Agency until March 2009. Further, the Agency found that Complainant's requests from October-November 2009, involved purchasing specialized equipment and management needed several weeks for approval, purchase, and installation. For all other reasonable accommodation requests, the Agency found that it had provided the requested or alternative accommodations. Finally, the Agency found that Complainant was not subjected to discrimination, reprisal, or a hostile work environment as to his remaining claims.

In the Commission's appellate decision, the Commission rejected the Agency's finding that Complainant did not officially request reasonable accommodation until he submitted a form in March 2009. The record was clear that Agency officials were aware of Complainant's requests for accommodation beginning in February 2008. While Agency officials worked with Complainant to request accommodations through DOL, the Commission reminded the Agency that it had a duty to provide reasonable accommodation to Complainant irrespective of any decision or actions by DOL. Therefore, the Commission found that the Agency unreasonably delayed addressing and implementing the reasonable accommodations Complainant requested beginning in February 2008. The Commission reversed the Agency's finding of no denial/delay of reasonable accommodation as to this claim.

As to Complainant's accommodation requests in January and May 2010, the Commission found that the requested accommodations (qualification through a firearms simulator and transcription services) were unavailable and/or unsuitable. Instead, Complainant was excused from firearms qualification until his restrictions permitted him to operate a firearm and was provided speech recognition software on his secure and non-secure computers. Complainant presented no evidence that the provided alternative accommodations were ineffective. Finally, the Commission found that incidents comprising Complainant's hostile work environment claim were insufficiently severe or pervasive and not based on discriminatory or retaliatory animus. The Commission affirmed the Agency's finding of no discrimination, reprisal, or hostile work environment as to these claims.

To remedy the discrimination, the Commission ordered the Agency to restore any leave Complainant used due to the Agency's failure to provide him with reasonable accommodation from February 2008 through December 2009, conduct a supplemental investigation into his entitlement to compensatory damages, provide training to the identified officials, consider disciplining the identified officials, and to post a notice.

Golian (Leonarda S.) v. VA, 0120152303 (11/17/2017) – At the time of events giving rise to this complaint, Complainant worked as a GS-6 Pharmacy Technician at the VA Medical Center facility in Portland, Oregon. On September 18, 2013, Complainant filed an EEO complaint in which she alleged that the Agency discriminated against her on the bases of national origin (Russian), sex (female), religion ("Jewish Christian"), disability, and in reprisal for prior protected EEO activity when, inter alia: in Spring and August 2011, the Pharmacy Service Inpatient Supervisor (S1) repeatedly called Complainant "KGB" because she is Russian. The Office of Federal Operations was persuaded S1 referred to Complainant as "KGB" on at least one occasion. The decision noted that the remark is clearly a reference to Complainant's Russian national origin, however OFO was not persuaded it was uttered pervasively based on the statements of witnesses who said they heard it uttered once. Further, although the use of this term in this manner was inappropriate, the decision did not find that it was the type of "highly charged epithet" or term that "dredges up the entire history" of oppression and bigotry. Therefore, it did not find that the term was used here in a manner that reasonably would create a hostile work environment, nor did it find that use of the term here was persuasive evidence that the alleged actions occurred because of discriminatory animus. Nevertheless, OFO emphasized that the Agency should discourage such conduct through counseling and comprehensive EEO training.

The decision found that Complainant did not prove that the Agency's nondiscriminatory explanations for its actions on 10 of the 11 alleged incidents of harassment were pretext for unlawful discrimination. Additionally, it did not find that the alleged actions were severe or pervasive enough to constitute a hostile work environment. Consequently, it held that Complainant was not subjected to unlawful harassment or disparate treatment with regard to all claims except claim 11. With respect to claim 11, the Assistant Chief of Pharmacy Services (S2) acknowledged that he reassigned Complainant to Operative Care because she had alleged she was subjected to harassment by S1 in her EEO complaint. The decision found that S2 clearly acknowledged that he reassigned Complainant because she filed an EEO complaint, and that such an action is reasonably likely to deter Complainant and other employees from engaging in EEO activity. Therefore, it held that S2 retaliated against Complainant. OFO ordered that Complainant be offered reinstatement to her previous assignment. It also ordered that the Agency conduct a supplemental investigation into compensatory damages, conduct training, consider disciplinary action for the responsible management official (S2) and post a notice.

Rainney (Mac O.) v. USPS, 0120152431 (11/29/2017) – The Agency hired Complainant, a Seventh-Day Adventist, as a probationary City Carrier Assistant, a non-career position with flexible work hours and a requirement to be on call to fill in for the regular carriers when needed. Shortly after he completed his orientation and training, Complainant requested management to allow him to take Saturdays off so that he could observe the Sabbath in accordance with the tenets of his religious faith. Management refused, asserting that if they granted Complainant's request, they would incur an undue hardship by being forced to pay overtime to employees that were already on the clock. The Commission reversed.

Agencies are required to provide accommodations for religious observances unless the Agency can demonstrate that doing so would impose upon it an undue hardship. This requirement applies to

probationary as well as permanent employees. Therefore, in order for the agency to claim that it would be forced to pay overtime if it granted Complainant's request to take Saturdays off, it would have to show that it had made an effort to provide an accommodation but was ultimately unsuccessful. Our guidelines on religious accommodations include voluntary substitutes, swaps, and flexible scheduling.

Management in this case did none of these things, nor did they even attempt to find Complainant an accommodation. One of the managers admitted as much. Consequently, the Commission concluded that the Agency had failed to prove that allowing Complainant to take Saturdays off for religious observances would have resulted in an undue hardship. As a remedy, the Commission ordered the Agency to award Complainant compensatory damages, provide training to the responsible management officials, and consider disciplining those individuals.

Complainant also raised five other incidents of alleged disparate treatment, including termination during his probationary period. The Commission affirmed the Agency's finding of no discrimination with respect to these incidents.

Baty (Pamala L.) v. USPS, 0120152493 (11/21/2017) **[Repeated under Priority 3 above]** – Complainant, a Mail Processing Clerk at the Post Office in Crewe, Virginia, appealed from the Agency's final decision (FAD) which fully implemented an EEOC AJ's finding on summary judgment that Complainant was not denied a reasonable accommodation. Complainant suffered from chronic discogenic and vertebrogenic problems, which limited her in the major life activities of sitting, standing, carrying, pushing and pulling. Complainant could perform the essential functions of her job, which included sorting letter and package mail, with reasonable accommodations of modifications to the front counter where she worked, an ergonomic chair, and a schedule allowing her to work continuous 8-hour shifts with a break of no more than 30-minutes. Therefore, the appellate decision concluded that Complainant was a qualified individual with a disability.

In defense of Complainant's denial of accommodation claim, the Agency contended that Complainant did not submit a form requested by its District Reasonable Accommodation Committee (DRAC). However, the appellate decision observed that Complainant submitted medical documentation, consisting of a letter from her doctor stating that she had a permanent condition with permanent restrictions, and a CA-17 duty status report also stating those restrictions. The decision reasoned that the medical documentation the Agency already had within its possession established the need for the reasonable accommodations Complainant requested, and that the DRAC form the Agency requested was asking for redundant information.

Therefore, the appellate decision concluded that Complainant proved by a preponderance of the evidence that she was denied a reasonable accommodation, and that the AJ incorrectly issued a decision on summary judgment in favor of the Agency. Complainant was awarded relief which included her requested accommodations and compensatory damages.

Gorman (Dorian R.), Estate of v. NSF, 0120152916 (11/09/2017) – Complainant, a GS-13 Grants Officer, alleged in an EEO complaint that the Agency failed to provide her with a reasonable accommodation for her disability. In January 2010, Complainant asked the Agency to temporarily reduce her workload because of breast cancer and the effects of its treatment. Complainant's physician also informed the Agency that Complainant took medication with the side effects of back pain and fatigue, and her three-hour commute was difficult because she was forced to stand for long periods on the Metro public transportation system, which threatened to aggravate her injured spine. In February 2010,

Complainant was injured in an automobile accident, which aggravated her spinal injuries. Consequently, Complainant asked the Agency to provide her with a five-day per week telework schedule, which was beyond the two days per week she teleworked under the Agency's general telework agreement with employees. Additionally, Complainant's physician informed the Agency that her condition had deteriorated, and she should avoid excessive travel and continue to work from home. Over the next several months, the Agency did not provide Complainant with additional telework, and repeatedly asked her to provide more documentation to substantiate her request. The Agency did not provide Complainant with additional telework until November 2010, and Complainant died in November 2013.

In its final decision, the Agency found that Complainant did not prove that she was subjected to unlawful discrimination. On appeal, the Commission found that Complainant was a qualified individual with a disability because cancer substantially impacts the operation of the major bodily function of normal cell growth, and she successfully performed the essential functions of her position during the relevant period. The Commission determined that in February 2010, Complainant submitted adequate medical documentation from her physician to substantiate her need for additional telework. The Commission noted that in the submitted documentation, Complainant's physician stated that Complainant was at "definite risk" of paralysis after her car accident and to avoid excessive travel by continuing to work from home. The Commission further determined that the Agency did not prove that providing Complainant additional telework would have constituted an undue hardship on its missions or operations, and the Agency's ultimate approval of Complainant for an additional telework day reflected the plausibility of providing Complainant with additional telework days. Consequently, the Commission found that the Agency failed to provide Complainant with a reasonable accommodation for her disability. In so finding, the Commission noted that Complainant needed additional telework immediately, and each day the Agency failed to provide her with additional telework threatened to exacerbate her serious medical condition, to the point of paralysis.

The Commission ordered the Agency to pay Complainant's estate proven compensatory damages; provide eight hours of in-person training to all management officials, supervisors, and EEO personnel at its Arlington, Virginia facility; pay Complainant's $3,051 in transcript costs; and to post a notice of the discrimination finding.

Newbill (Marcelina Q.) v. Treasury (IRS), 0120160430 (11/28/2017) – In its final decision, the Agency found that it discriminated against Complainant based on reprisal when it issued her a counseling memorandum in August 2014, and, as part of the ordered relief, conducted an investigation into Complainant's entitlement to compensatory damages. Complainant requested the restoration of 46 hours of sick leave, that she be paid for 75 hours of leave without pay (LWOP) and 90 hours that she had been furloughed since June 2015, and $60,000 in nonpecuniary compensatory damages. The Agency awarded Complainant $2,000 in nonpecuniary compensatory damages, finding that much of the evidence presented by Complainant attributed her depressed mood to harassment that took place after August 2014 and to the June 2015 furlough and that the lost wages, sick leave, and use of LWOP were not related to the issuance of the retaliatory August 2014 memo. We found that the record did not support the restoration of Complainant's sick leave or payment for her LWOP because she failed to establish that she used the identified leave in order to seek medical treatment and/or seek emotional and psychological relief from the stress and emotional anguish caused by the Agency's discrimination. We further found that Complainant failed to establish a nexus between the discrimination and the June 2015 furlough, also noting that the furlough itself was at issue in a separate pending appeal. We

modified the Agency's award of compensatory damages to $5,000 to compensate Complainant for the emotional distress and worsening of her condition that she suffered as a result of the discrimination.

Thomas (Roxane C.) v. DOE, 0120162423 (11/17/2017) – Following a hearing, an EEOC AJ found that Complainant established that she was subjected to discrimination based on race, color, and reprisal as alleged in four of her 32 claims. As part of the relief, the AJ ordered the Agency to pay Complainant $8,000 in nonpecuniary compensatory damages. The AJ also ordered the Agency to pay Complainant $21,352.20 in attorney's fees, which the AJ reasoned was appropriate because Complainant was successful on 1/8 of her claims and this amounted to a reduction by 7/8 of the requested attorney's fees, and $1,412.63 in costs. In our decision, we found that an award of $12,000 in nonpecuniary compensatory damages was more in line with amounts awarded in similar cases. With respect to attorney's fees, the Commission found that the AJ erred in applying a ratio to reduce attorney's fees across the board by 7/8. However, we agreed with the AJ that the claims upon which Complainant prevailed were not clearly intertwined with the remaining 28 and found that the attorney's fees should be reduced by 50 percent. Finally, the Commission found that the AJ erred in deducting some expenses, including photocopying expenses that were documented by a verified statement of costs. We therefore ordered the Agency to pay Complainant attorney's fees in the amount of $80,837.00 and costs in the amount of $1,988.86.

Brown (Terica W.), v. DOJ (FBI), 0720160014 (11/14/2017) – Complainant alleged that she was subjected to discrimination and a hostile work environment because of her race (African American), sex (female), disability (Repetitive Stress Injuries Bilateral Upper extremities) and in retaliation for engaging in protected activity with regard to a list of 15 workplace incidents. Following a hearing, the AJ ruled in favor of Complainant with respect to all of her claims but one. The AJ also found that Complainant was denied a reasonable accommodation, in violation of the Rehabilitation Act.

Among other remedies, the AJ awarded Complainant reinstatement to her position as Financial Analyst, GS-12, or a substantially equivalent position; and interim relief in the event the Agency filed an appeal. The Agency adopted some findings by the AJ but rejected others.

The Commission dismissed the Agency's appeal pursuant to 29 C.F.R. § 1614.505(4) because although it was instructed by the AJ to provide interim relief, the Agency provided no evidence that it had complied with the AJ's order or the Commission's regulations. The Agency was directed to comply with the entire AJ's Order.

Gelvezon (Margorie L.) v. VA, 0720170028 (11/16/2017) – The Agency filed an appeal from an EEOC AJ's finding of discrimination. Complainant, a Lead Medical Technologist, alleged discrimination on the basis of national origin (Filipino) when she was reprimanded for speaking in her native language. Complainant also alleged retaliation when management interfered with the EEO process (by attempting to steer Complainant to local EEO Counselor rather than national hotline) and assigned her additional work. After a hearing, the AJ found that the Agency discriminated against Complainant for those three claims and found no discrimination on other claims not at issue in the appeal before OFO. For remedies, the AJ ordered: nonpecuniary, compensatory damages in the amount of $15,000; reasonable attorney's fees; costs for such expenses as travel and copying; posting of a notice of discrimination; and EEO training for Complainant's supervisor and all managers, supervisors, and employees at the American Lake Campus regarding EEO law. The Agency issued a final order fully implementing the findings of discrimination and all remedies except for training which it found too

broad. Complainant filed an appeal arguing that the training remedy was correct, that she should be awarded pecuniary damages and other relief, and that the nonpecuniary, compensatory damage award should be increased to $70,000.

OFO found that Complainant was properly denied pecuniary damages as she did not present evidence of such damages. OFO also found that the AJ's award of nonpecuniary, compensatory damages was proper and Complainant was not due any additional relief. OFO agreed that the AJ's order for training beyond the immediate supervisor who was found to have discriminated against Complainant was overly broad. OFO found that the AJ did not provide a reason for ordering training to anyone but the one individual who discriminated against Complainant. OFO ordered the Agency to pay Complainant nonpecuniary, compensatory damages in the amount of $15,000, costs, reasonable attorney's fees, eight hours of EEO training to Complainant's supervisor, consideration of discipline for Complainant's supervisor, and posting of a notice of discrimination.

Lynch (Vickie P.) v. VA, 0120150493 (12/19/2017) – Complainant worked as a Nurse Post-Doctoral Fellow with the Center for Health Care Organization Implementation and Research in Boston, MA. Complainant filed her first EEO complaint (Claim A) alleging that the Agency subjected her to sexual (and sex-based) harassment (female) when: (1) her research mentor (MENTOR 1) referred to her as "girl" in a patronizing and demeaning manner in emails and conversations; (2) throughout their mentoring relationship, MENTOR 1 would get dressed in front of her; (3) throughout their mentoring relationship, MENTOR 1 made sexually inappropriate comments to her; (4) in May 2013, MENTOR 1 asked her to have an affair with him; (5) in May and June 2013, MENTOR 1 attempted to take credit for her research work and undermine her research efforts; (6) on June 2, 2013, MENTOR 1 told her that she had to work with him if she wanted to continue her work, and (7) in June 2013, and the following months, MENTOR 1 discouraged other employees at BEDFORD from working with her on her research.

On December 20, 2013, Complainant filed a second EEO complaint (Claim B) alleging that she was discriminated against and subjected to a hostile work environment based on her prior protected activity (reprisal) when: (1) on July 3, 2013, the Director discouraged a Research Health Scientist (MENTOR 2) from mentoring Complainant; and (2) on September 9, 2013, MENTOR 2 terminated her mentoring relationship with Complainant.

Complainant did not request a hearing with an AJ, and the Agency issued a FAD finding that Complainant had not been discriminated against.

The appellate decision found that Complainant had not shown that she had been subjected to harassment by MENTOR 1, in that the incidents were not sufficiently severe or pervasive. It found that while MENTOR 1 may have been unprofessional and inappropriate, when considering each incident individually and together as a whole, MENTOR 1's conduct did not have the effect of unreasonably interfering with the work environment. There was insufficient evidence in the record that the "girl" comments were intended to be patronizing or demeaning, and the decision noted rather that the emails in the record showed that the "you go girl" type comments were intended to sound hip and be supportive. As to MENTOR 1 getting dressed in front of Complainant, the record showed that he was caught in his office bare-foot with his belt not fully buckled because he had just returned from a run/exercise, and was simply not ready when Complainant arrived.

However, the appellate decision found that Complainant had been subjected to reprisal when MENTOR 2 terminated her mentoring relationship with Complainant after the Director discouraged her from working with Complainant following Complainant filing her EEO complaint about MENTOR 1. While the Director was initially supportive, the decision found that the only possible reason for his abrupt turn-around was a desire to support MENTOR 1 by not working with Complainant following her allegations of sexual harassment against him. The decision awarded compensatory damages, ordered training and for the agency to consider discipline.

Jain (Marquis K.) v. VA, 0120150648 (12/20/2017) – Complainant, a physician at the VA hospital in Philadelphia, Pennsylvania filed a complaint alleging discriminatory harassment and disparate treatment on the bases of race, national origin, sex, age, and reprisal. He identified ten incidents in support of his claims. The Agency found discrimination only with respect to the tenth incident, in which Complainant had not been awarded his physician performance pay for Fiscal Year 2013. In his appeal to the Commission, Complainant did not challenge the merits of this finding.

On appeal, the Commission affirmed the Agency's findings and conclusions. With respect to the tenth incident, the Commission noted that once the two management officials who had been named in his complaint became aware that he had filed a formal EEO complaint, they caused his performance award to be delayed. In accordance with the Commission's affirmation of the Agency's finding of discrimination, the Commission directed the Agency to conduct a supplemental investigation on Complainant's entitlement to compensatory damages and other remedies.

Ellis (Foster M.) v. Energy, 0120152280 (12/27/2017) - Complainant was employed by the Agency as Federal Agent (Nuclear Materials Courier) in its Office of Secure Transportation (OST). He is part of specialized force responsible for safely and securely transporting nuclear weapons. His duties include executing para-military tactical responses to repel or attack a hostile force while ensuring the safety of the cargo and the public. Complainant alleged discrimination, in part, based on disability (regarded as having a heart condition) when the Agency released his medical information (meaning breach of confidentiality). The Agency issued a final Agency decision finding no discrimination.

OFO affirmed in part, and reversed in part. While part of a vehicle road convoy, Complainant's two codrivers reported that he drove erratically, exhibited signs of confusion and lack of alertness, and fell into a deep sleep in the vehicle from which he had difficulty awaking. At different times, they made this report to two Convoy Commanders. One Convoy Commander called OST's Medical Director, a physician, who advised that Complainant's vitals be taken. Heeding the advice, two convoy medics took Complainant's vitals. They did so in the cab of Complainant's vehicle with his Vehicle Lead/co-driver present. OFO found that medically examining Complainant in the presence of one of his codrivers did not violate the confidentiality requirements of the Rehabilitation Act because the situation was sufficiently exigent to be considered an emergency – Complainant could have had a serious medical condition such as a stroke or brain bleed.

Next, OST maintained a binder in Complainant's office located in Texas annotating the medications couriers took. Medications had to be approved by OST's medical director, who was in New Mexico, and these approvals/disapprovals were placed in the binder. OFO found that a preponderance of the evidence showed that when other couriers used the binder concerning their own medical information they could view the information on other employees, and any supervisor who properly reviews the binder for medical restrictions on a subordinate employee could also see information on employees

who were not under the supervisor's chain of command. OFO found that this violated the Rehabilitation Act, and ordered the Agency to make the binder comply with the confidentiality requirements of the Rehabilitation Act, train to those responsible for the binder on confidentiality requirements, and determine compensatory damages, if any.

Delesline (Augustine S.) v. USDA (Forest Service), 0120152598 (12/08/2017) – Complainant, a GS-12 Deputy Center Director, filed an EEO complaint alleging that he was subjected to discrimination on the basis of race (African American) and disability (diabetes and malignant hypertension).

Upon completion of the investigation, Complainant requested a hearing before an EEOC AJ. The AJ found that the Agency failed to provide Complainant with a reasonable accommodation, and failed to address Complainant's request to return to his former GS-11 position. The AJ, in pertinent part, ordered the Agency to return Complainant to his former GS-11 position and pay Complainant $50,000 in non-pecuniary damages. The Agency issued a final order adopting the AJ's decision.

Complainant filed an appeal with OFO that the AJ should have placed him in a GS-12 position. Complainant was also seeking an increase of the AJ's non-pecuniary damages award. OFO found that the AJ properly ordered the Agency to return Complainant to his former GS-11 position reasoning that this position was vacant when Complainant requested to return to this position. OFO further found that Complainant did not establish, through a preponderance of evidence, that there were other GS-12 vacancies during the period in question for which he was qualified.

Regarding the issue of non-pecuniary damages, OFO found that there was substantial evidence in the record to support the AJ's award of $50,000 in non-pecuniary damages. Thus, OFO affirmed the Agency's final order implementing the AJ's decision.

Thomas (Davina W.) v. DOJ (FBI), 0120152757 (12/08/2017) **[Repeated under Priority 3 above]** – Complainant, a Management & Program Analyst at the Mission Support Unit, High Value Detainee Interrogation Group, National Security Branch, appealed from the Agency's finding that she was not denied a reasonable accommodation for her Major Depressive Disorder and Anxiety Disorder. Complainant was suffering from attendance issues, mainly lateness, due to not being able to consistently wake up on time. The Agency proposed terminating Complainant, but agreed to give her a 90-day period during which to improve her attendance as a result of her disclosing her disability and requesting a reasonable accommodation. During that period, the Agency implemented a gliding schedule for Complainant which required her to report to work between 8:00 am – 9:30 am, and that she would need to contact her manager if she would be arriving to work beyond 9:30 am. Complainant explained that she thought her arrival to work beyond 9:30 am would be allowed if she informed her supervisor. According to the Agency, Complainant was late from several minutes to several hours on twenty-one occasions during the 90-day period, and therefore, the Agency terminated her employment. The Agency did not excuse Complainant's arrival to work beyond 9:30 am, even though she called in to inform her supervisor that she would be late on all but three occasions. An examination of the Agency's documentation supporting the termination revealed that Complainant's arrival at work beyond 9:30 am on the occasions in question were due to her oversleeping, which was a direct result of her disability. Complainant asked the Agency for a maximum flexible schedule, and the Agency did not offer arguments on why it would be an undue hardship for it to have provided Complainant with such a schedule. Therefore, the decision concluded that the Agency did not provide Complainant with an effective reasonable accommodation, and then terminated her employment because of the

ineffective accommodation. Complainant was awarded remedies in the form of a reasonable accommodation, compensatory damages and reinstatement.

Perhach (Alline B.) v. SSA, 0120162182 (12/08/2017) – Complainant, a Customer Service Technician, alleged that she was subjected to age discrimination when the Agency did not select her for a Supervisory Customer Service Technician position. Complainant was 57-years old at the time of her nonselection. In its final decision, the Agency found that Complainant did not prove that she was subjected to age discrimination.

In an appellate decision, the Commission found that Complainant established a prima facie case of age discrimination because she was 57 years old during the relevant time period; she was deemed "best qualified" by the Agency for the position; selecting officials were aware she was over 40 years old; and the selectees were significantly younger than Complainant. The Commission further found that the Agency did not meet its burden of production to articulate a legitimate, nondiscriminatory reason for not selecting Complainant. The Commission noted that the Agency stated that it did not select Complainant because she only received 20 out of 40 points on her interview, and the selectees were more qualified for the position. However, the Commission noted that it has previously held that merely stating a complainant was not selected because she was not as qualified as the selectees does not meet an agency's burden of production to explain a nonselection. Regarding the Agency's claim that Complainant only scored 20 points on her interview, the Commission noted that its precedent has established that stating that a complainant was not selected because she received a lower score than selectees does not meet an agency's burden of production, unless the agency explained the specific reasoning for the score, which it did not do here. Therefore, the Commission concluded that the Agency discriminated against Complainant on the basis of age when it failed to select her for a Supervisory Customer Service Technician position.

To remedy the discrimination, the Commission ordered the Agency to offer Complainant the position of Supervisory Customer Service Technician, or a substantially equivalent positon; to provide eight hours of in-person EEO training to all selecting and responsible management officials; to consider taking disciplinary action against responsible management officials; and to post a notice of this finding of discrimination.

Harvey (Thomas M.) v. DOE (WAPA), 0120152584 (12/14/2017) – Complainant worked as a Contract Specialist at the Agency's Desert Southwest Region, Western Area Power Administration in Phoenix, Arizona. On September 10, 2014, Complainant filed a formal EEO complaint alleging the Agency discriminated against him on the bases of disability (PTSD) and in reprisal for prior EEO activity when on or about August 6, 2014, his warrant authority removal was removed by the Executive Vice President and the warrant authority removal was signed by the Executive Vice President and Chief Operations Officer. Complainant further alleged that the Vice President of Procurement accused him of exceeding his warrant limit, submitting poor work products, and authorizing an unprofessional email to a contractor.

On June 29, 2015, the Agency issued a final decision finding no discrimination based on retaliation. The Agency found, however, Complainant demonstrated that consideration of his disability may have been one of the motivating factors in the Agency's adverse action.

We found that the evidence of record supports the Agency's finding that it has met its burden of proving, by clear and convincing evidence, that it would have taken the same action despite

Complainant's disability. The evidence of record shows that Complainant was legitimately questioned about significantly exceeding his warrant authority, was unable to properly answer the questions posed, and responded angrily that he no longer wanted the warrant. Management proposed reducing his warrant and providing him with more supervision and training, but Complainant refused. For these reasons, Complainant would have lost the warrant regardless of his disability disclosure. We agreed with the Agency that Complainant is not entitled to personal relief, including non-pecuniary compensatory damages as requested.

On remand, we ordered the Agency to take the following actions: to ensure that Complainant is provided a written notice of his right to submit documentation of legal costs related to pursuant of his disability claim in the EEO complaint process; provide at least four hours of training to relevant management officials regarding their responsibilities under the Rehabilitation Act; and the posting of notice.

Cochran (Natalie S.) v. VA, 0120140815, 0120142049 (01/26/2018) – Complainant worked as a Rating Veterans Service Representative and has post-traumatic stress disorder (PTSD), which is connected to her military service. In May 2011, Complainant requested to work from home 40 hours per week as a reasonable accommodation for her disability. Complainant stated that she worked in an open area with approximately 200 employees, which exacerbated her PTSD symptoms. In October 2011, Complainant's request to work from home was denied because of conduct and performance issues. According to the Agency, Complainant had performance issues because she was not meeting the productivity standards for her position. In December 2011, Complainant resubmitted her request.

In August 2011 and December 2011, Complainant had provided the Agency with medical documentation stating that Complainant could self-medicate for PTSD for up to three days but needed to visit her doctor for absences longer than four days. The medical documentation indicated that Complainant's PTSD was chronic and "likely unremitting." In February 2012, the Agency requested updated medical documentation regarding Complainant's need to self-medicate at home for PTSD. The Agency's Master Agreement states, in relevant part, "An employee with a chronic medical condition that does not require medical treatment but does result in periodic absences from work will not be required to furnish a healthcare provider's certificate on an ongoing basis if the employee provides, if requested, an administratively acceptable medical certificate every six months which clearly states the continuing need for periodic absences."

On appeal, the Commission noted that the Agency could not withhold a reasonable accommodation, such as telework, from an employee with a disability as a punishment. We found that the Agency failed to provide Complainant with a reasonable accommodation when the Agency failed to consider whether the telework guidelines could be modified as a reasonable accommodation, or whether Complainant was eligible for alternative telework arrangements as a reasonable accommodation. For example, the Agency could have afforded Complainant a trial period of no less than 30 days to determine whether full-time telework was an effective accommodation that allowed Complainant to meet her productivity standards and whether her conduct continued to be an issue. If the accommodation was ineffective after the trial period, then the Agency would not have to offer full-time telework to Complainant, as it would not have been an effective accommodation. Moreover, there was no evidence in the record that the Agency undertook an individualized assessment that providing Complainant with the effective reasonable accommodation would have caused the Agency an undue hardship. Although the Agency cited Complainant's productivity and conduct as the reasons for

denying the requested accommodation, the Agency did not establish that providing Complainant with full-time telework would have imposed an undue hardship on its operations. We therefore found that Complainant met her burden that the Agency failed to provide her with a reasonable accommodation.

The Commission further found that the Agency should not have required Complainant to provide additional documentation regarding her PTSD because Complainant had provided sufficient documentation to substantiate her disability and the need to self-medicate for her PTSD for up to three days at a time. Under the circumstances of this case, there was a history of Complainant's communication with the Agency regarding her medical condition and restrictions, and the Agency was fully apprised of the permanent nature of the disability and restrictions. Accordingly, it was incorrect to seek more documentation to continue accommodating Complainant's restrictions.

As relief, we ordered the Agency to offer Complainant full-time telework as a reasonable accommodation for a trial period of not less than 30 days, conduct a supplemental investigation concerning compensatory damages, post a notice, provide training, and consider discipline against the responsible management officials.

Marbut (Leonard H.) v. DODEA, 0120150843 (01/19/2018) – Complainant worked as a Substitute Teacher at the Agency's Bechtel Elementary School in Okinawa, Japan. Complainant's Japanese wife also taught at the school under the provisions of the Host Nation program funded by the Japanese government. Complainant claimed that on November 8, 2013, his wife contacted an Agency EEO Counselor. Complainant claimed that although he had a busy schedule teaching in the early segment of the school year, he was no longer called to substitute teach following his wife's EEO contact. Complainant filed an EEO complaint wherein he claimed that the Agency discriminated against him on the bases of his race (Caucasian), sex (male), color (white), age (48), and in reprisal for his wife's prior protected EEO activity when from November 8, 2013 to January 29, 2014, the Principal at the Bechtel Elementary School prohibited him from working there. The Agency issued a final agency decision in which it found it had not discriminated against Complainant.

The Commission found that Complainant established a *prima facie* claim of reprisal as his wife had engaged in EEO activity of which the Principal was aware, and Complainant was not called as a substitute following her EEO contact. We found that the Agency articulated legitimate, nondiscriminatory reasons for its decision not to issue Complainant substitute teacher assignments during the relevant period. Complainant did show that the Agency's reasons were in part pretext for discrimination, and the decision noted that that the Agency-Pacific Chief of Staff had issued a memorandum finding that there was evidence to support Complainant's allegation that the Principal directed her staff not to call Complainant for work in retaliation for the November meeting between his wife and the Agency administrators. However, we found that under a mixed motive analysis, the Agency presented legitimate reasons for its decision not to issue Complainant substitute teaching assignments and that the same decisions to award teaching assignments to other substitute teachers rather than Complainant would have been made even absent discrimination. Finally, the Commission found that Complainant had not been subjected to discrimination on the bases of race, color, age, and sex.

The Commission ordered the Agency to: take action to ensure that similar violations would not recur; conduct EEO training; consider discipline for the Principal; and post a notice.

Foster (Hayden K.) v. DODEA, 0120151347 (01/24/2018) – Complainant worked as a Teacher at the Agency's CT Joy Elementary School at a Naval station in Chinhae, South Korea. Complainant was hired on September 3, 2010, and had a two-year probationary period. On May 24, 2012, Complainant filed an EEO complaint wherein he claimed that the Agency discriminated against him on the bases of his race (Caucasian), sex (male), and in reprisal for his prior protected EEO activity when he was terminated from his position on March 23, 2012, during his probationary period.

Complainant requested a hearing before an AJ. The AJ held a hearing and found that Complainant had not been discriminated against. The Agency issued a final agency decision implementing the AJ's decision.

The Commission found that contrary to the AJ's findings, Complainant set forth a prima facie case of race and sex discrimination with regard to his termination, and was not strictly required to provide evidence of a similarly situated individual. The decision found that the Agency articulated legitimate, nondiscriminatory reasons for Complainant's termination, namely deficiencies in his performance. The decision further found that sufficient persuasive testimony was presented to establish that the Principal was biased against Complainant based on his race and that the reasons she articulated for Complainant's termination were pretext intended to hide discriminatory motivation. The decision found that the Principal pursued any actual or fabricated deficiency in Complainant's teaching methods that she could detect or create. In light of the testimony that Complainant was generally well-regarded as a teacher and that the Principal was biased against Caucasians, it called into question the validity of the Principal's criticisms of Complainant's teaching ability. There was testimony to support a finding that there was nothing substantial enough to justify termination. The decision found that the AJ's findings regarding the race discrimination claim were not supported by substantial evidence and that Complainant's termination was attributable to the Principal's intent to discriminate against him on the basis of his race. However, the decision found that there was insufficient evidence to support Complainant's claim that his sex was a factor in his termination.

The Commission ordered the Agency to: make Complainant an offer of placement into a probationary teacher position, either at the Chinhae, South Korea school or a substantially equivalent position; award backpay; award compensatory damages; conduct EEO training; consider discipline for the Principal; and post a notice.

Paylor (Nathan S.) v. DOJ, 0120151282 (01/09/2018) – Complainant worked as a Senior Officer Specialist, GS-8, at the Agency's Low Security Correctional Institution (LSCI) in North Carolina. While Complainant (African-American) and another coworker (African-American) were working, a Caucasian Officer reportedly said to them as they were walking away, "See you, boys," and said to Complainant on another occasion, "See you tomorrow boy." Complainant felt that the Caucasian Officer's comments calling him "boy" were highly inappropriate and derogatory. Meanwhile, the Former Security Officer attempted to get Complainant approved for certain trainings, so Complainant would have the opportunity to be promoted into a Security Officer Locksmith position. Management, however, denied Complainant the opportunity to the attend trainings, citing budgetary reasons. During the same period, management nevertheless allowed two similarly situated Caucasian Officers to take the trainings at issue, and, shortly thereafter, noncompetitively promoted both Caucasian Officers to Security Officer Locksmith positions at the GS-9 and the GS-10 grade levels, respectively. Complainant subsequently filed an EEO complaint, alleging race discrimination. Following the investigation, the AJ assigned to the case issued summary judgment in the Agency's favor. The Agency

subsequently issued its final order, but requested that the Commission remand Complainant's case for hearing. Therein, the Agency noted, among other things, that the AJ did not consider the Former Security Officer's assertion that racial discrimination influenced management's actions in denying Complainant the trainings at issue.

On appeal, the Commission found, inter alia, that summary judgment was appropriate, but that Complainant established that he subjected to disparate treatment based on his race, though a hostile work environment was not proven. In so finding, the Commission noted that several witnesses subscribed to Complainant's view that management intentionally foreclosed minorities from career advancement. To remedy the discrimination, the Commission ordered the Agency to provide Complainant the trainings at issue, and to noncompetitively promote him in a similar fashion to the two cited Caucasian comparators.

Swearson (Jody L.) v. USAF, 0120151351 (01/17/2018) – Complainant was an Engineering Technician (Drafting) in the Civil Engineering Technical Services Center (CETSC), Operations Division, Installations and Mission Support Directorate, National Guard Bureau (NGB), located in Minot, North Dakota. Complainant filed an EEO complaint alleging that the Agency discriminated against him on bases of disability and reprisal when: (1) on January 29, 2013 and three other occasions, his first-level supervisor (S1) denied his request to work on a situational work schedule due to inclement weather days or when the temperature is twenty-below zero or lower, and as a result he was forced to use 30 hours of leave; and (2) on or about April 3, 2013, his second-level supervisor (S2) asked S1 to contact Human Resources Command (HRC) to remove the 109 Voluntary Leave Transfer Program hours that were donated to Complainant in case of a medical emergency. The Agency issued a final agency decision in which it found it had not discriminated against Complainant.

Complainant has been paralyzed from the chest down since an accident in 2001. Beginning in 2003, Complainant has been permitted to telework from home several days per week to accommodate his medical restrictions and challenges. Complainant's impairment is visually apparent because he is in a wheelchair. S2 became aware of his impairment in November 2001 and S1 became aware in June 2012 when he first became Complainant's supervisor. Complainant requested situational telework on several occasions because it is too dangerous during extremely cold temperatures to be out because his wheelchair lift freezes and he often cannot get into his vehicle. He also explains that it is very difficult and exhausting for him to transfer from wheelchair to vehicle, then drive 50 miles, transfer from vehicle to wheelchair, push through the snow or severe cold to get into the building, and then repeat this process to go home. In addition, it is prohibitively dangerous to commute in extreme cold weather because he could develop frostbite without knowing it as he cannot feel anything below his chest.

Complainant's previous supervisor permitted him to work from home on inclement weather days, however, S1 denied Complainant's requests to situationally telework and requested medical documentation stating what weather conditions warranted Complainant working from home. S1 wanted to establish some tangible bad weather conditions that the doctor said would make it hard for Complainant to come to work because of his physical disabilities, not because of the condition of Complainant's equipment. Complainant consistently affirmed that he requested flexibility when the temperatures were below negative 20 degrees.

The Commission found that the Agency failed to reasonably accommodate Complainant when it did not allow him to telework outside of his usually scheduled telework days when the weather in North Dakota was extreme. We found that any request S1 may have made for additional documentation was

improper as Complainant's disability was obvious, and it was certainly obvious that extreme weather would increase the level of difficulty in Complainant's commute, as Complainant explained to S1 that the lift on his motor vehicle freezes in temperatures below -20 degrees. When this occurs, Complainant is unable to get into his vehicle. Complainant also explained to S1 that there is a substantial risk of frostbite. We found that a situational telework accommodation was an effective accommodation and that such an accommodation did not present an undue burden on the Agency as the record showed that Complainant had been provided this accommodation for years prior to the time-frame at issue and Complainant had been performing the duties of his position in a satisfactory manner throughout his tenure with the Agency. We found that permitting Complainant to take annual leave on those days was not an effective accommodation. As there was no evidence in the record that the Agency engaged in the interactive process we found that there was no good faith and that Complainant was entitled to compensatory damages. Finally, the Commission found that Complainant had not been subjected to reprisal as to claim 2.

The Commission ordered the Agency to: permit Complainant to telework on days where the temperatures are below negative twenty degrees, or when other extreme and hazardous commuting conditions exist, as a reasonable accommodation for his disability; restore Complainant's leave used on the days he was denied situational telework he requested due to extreme weather conditions; award compensatory damages; conduct EEO training; consider discipline for S1 and S2; and post a notice.

Tierney (Alvina S.) v. EPA, 0120151681 (01/17/2018) – Complainant, a Remedial Project Manager, filed an EEO complaint alleging that she was discriminated against on the bases of disability (chronic major depression and sleep disorder) when she was denied a reasonable accommodation (leave/attendance) and harassed. After a hearing, an EEOC Administrative Judge (AJ) issued a decision finding discrimination. The AJ awarded $40,000 in nonpecuniary, compensatory damages, attorney's fees and costs, reimbursement for AWOL, medical costs, restoration of 2/3 of leave used, provide EEO training, and post a notice of finding of discrimination. The Agency issued a decision fully adopting the AJ's decision. Complainant filed an appeal from that decision requesting an increase in nonpecuniary, compensatory damages, restoration of all leave used, and a consideration of a longer period of time for the pecuniary damage award. OFO affirmed the Agency's finding of no discrimination and the remedies awarded by the AJ and Agency. OFO found that the AJ properly considered that some of the stress felt by Complainant was in part due to the death of family members and that therefore the nonpecuniary, compensatory damage award properly took that into consideration. OFO found that the time period used to calculate the pecuniary damage award was correct and that the leave restoration was properly reduced by 1/3 because of the stress caused by a family member's death. OFO ordered the Agency to: pay Complainant $40,000 in nonpecuniary, compensatory damages; pay $6,526.25 in pecuniary damages; reimburse Complainant for AWOL; pay $97,197.50 in attorney's fees and $2,802.10 in costs; restore 2/3 of all requested leave to Complainant; provide EEO training and consider discipline for responsible management officials; and post a notice of the finding of discrimination.

Rose (Margaret M.) v. VA, 0120151790 (01/11/2018) – Complainant worked as a Sales Clerk under a temporary appointment at the Agency's Veterans' Canteen Service in St. Louis, Missouri. Her tenure in the position began in April 2013 and was due to terminate on September 8, 2013. According to Complainant, during the course of her employment she was repeatedly subjected to sexually harassing behavior by a coworker, CW1. She did not report these incidents until mid-August 2013, when she revealed to another coworker, CW2, how she had been harassed. CW2 reported Complainant's

allegations to his supervisor, S1, who also supervised Complainant. In response, S1 informed the local Agency EEO office of Complainant's allegations. The EEO office dispatched its Program Manager (PM1) to interview witnesses, including Complainant and CW1. PM1 determined that Complainant had not been harassed by CW1 as she claimed.

After the interviews had taken place, in the course of discussing what actions to take in response to Complainant's allegations, S1 disclosed to PM1 that the Agency had decided not to extend Complainant's employment beyond her "not to exceed" date of September 8, 2013. In order to prevent Complainant from having any further contact with CW1, S1 decided to place Complainant on administrative leave with pay immediately. Her employment was terminated on October 19, 2013. In light of PM1's conclusion that CW1 had not harassed Complainant, the Agency took no corrective action with respect to CW1, although PM1 and S1 saw fit to warn CW1 that, due to the Agency's "zero tolerance" for sexual harassment, he would have been subject to immediate removal if he had committed the acts of which Complainant accused him.

Complainant filed an EEO complaint on the bases of race (African-American), sex (female), and in reprisal for prior protected EEO activity when: 1) between April 2013 and August 2013 she was subjected to sexual harassment by a co-worker; 2) on August 22, 2013, she learned that the Agency intended to terminate her employment effective September 7, 2013; and 3) between April 2013 and August 2013, she was subjected to hostile workplace harassment.

The Agency issued a final agency decision finding that Complainant failed to prove that the Agency was liable for having discriminated against her. With respect to the sexual harassment claim, the Agency, contrary to the harassment investigator's conclusion, found that Complainant had proven sexual harassment by demonstrating she was "subjected to conduct that was overtly sexual in nature" at the hands of a co-worker which was "severe or pervasive enough to constitute an objectively hostile work environment based on sex." However, the Agency found that it should not be held vicariously liable because it proved that it had taken "prompt and effective remedial action" upon learning of the harassment.

The Commission found that the Agency did not take appropriate corrective action. CW1, the alleged harasser, was not disciplined in any manner. Nor was he reassigned or required to undergo remedial training. The decision found that the only "corrective" action the Agency took was to remove Complainant from the workplace by placing her on administrative leave. The Commission has held that reassigning the person targeted for harassment is not appropriate corrective action. However, the decision also concluded that Complainant had not shown that her termination was discriminatory in nature.

The Commission ordered the Agency to: award compensatory damages; conduct EEO training; consider discipline for the responsible officials; and post a notice.

Dimet (Spencer T.) v. USPS, 0120162002 (01/25/2018) – Complainant, a Mail Handler/Equipment Operator, filed a discrimination complaint alleging that he was subjected to discrimination based on a hearing disability and in reprisal for prior protected activity when the Agency failed to accommodate him.

The Agency did not dispute that Complainant was a qualified person with a disability. He had a significant hearing loss with a history of bilateral ear canal atresia and a history of bilateral, moderate to severe, conductive hearing loss. Complainant was born deaf but wore a hearing aid.

We found that the Agency failed to accommodate Complainant on the basis of his hearing disability when it did not provide him with an accommodation which would have allowed him to hear pages over the loudspeaker in his workplace. Although the Agency identified devices that it had considered concerning providing an accommodation, the Agency had not taken action in a timely manner designed to provide Complainant with an accommodation. We noted the attempts made by the District Reasonable Accommodation Committee (DRAC) Chair in finding an accommodation. However, her efforts in working with management to do so were to no avail. In the meantime, Complainant had not heard pages, had to receive paged information from co-workers and his supervisor would have to call Complainant when the supervisor became aware that Complainant had not responded to a page.

We remanded the matter to the Agency for consideration of compensatory damages.

Shupilova (Soo C.) v. State, 0120162417 (01/09/2018) – Complainant worked as a Facility Manager at the U.S. Embassy in Bishkek, Kyrgyzstan. Complainant, who was born in Russia, is a Russian citizen as well as a naturalized citizen of the United States. Complainant's mother and half-sisters live in Russia. According to the record, Russian law requires that Russian citizens use their Russian passports when entering the country. In October 2014, Complainant's second-line supervisor told her that if she used her Russian passport for personal travel to Russia, the Ambassador would lose confidence in her judgment, and her assignment to Bishkek would be cancelled. According to Complainant, she took this statement to mean that she should travel to Russia using her diplomatic U.S. passport. According to Agency guidance in the record, diplomatic passports must be used "when entering or exiting their country of assignment abroad and for return to the United States. Regular (tourist) passports must be used for personal travel except when entering or exiting the country of assignment abroad."

Complainant averred that she consulted the Regional Security Officer in mid-June 2015 and that he told her that Diplomatic Security regulations were unchanged, meaning that there were no restrictions on the use of her Russian passport as long as she complied with the Agency's standard travel notification requirements. Complainant scheduled a trip to Russia to visit her family for July 3-15, 2015. On July 2, 2015, Complainant received an undated letter from the Director of the Bureau of Diplomatic Security's Office of Personnel Security and Suitability, which stated, in relevant part, "Exercise of your foreign citizenship without prior authorization . . . as the case is here, may raise security concerns under Adjudicative Guideline C of the Adjudicative Guidelines for Determining Eligibility for Access to Classified Information and negatively affect your ability to maintain your access to classified information." Complainant averred that the loss of her security clearance would mean the loss of her job. Complainant stated that as a result of the letter, as well as the October 2014 warning, she cancelled her trip to Russia. Complainant's airfare was nonrefundable.

Complainant alleged that she was subjected to discrimination based on national origin (Russian) and requested a final decision. The Agency found that Complainant proved that she was subjected to discrimination when she was repeatedly told that she would be involuntarily curtailed if she used her Russian passport for personal travel to Russia, and on July 2, 2015, when she was presented with a Diplomatic Security letter stating that her security clearance could be affected if she chose to travel to Russia using her Russian passport. As relief, the Agency ordered that Complainant be reimbursed for the cancellation of her nonrefundable airfare and stated that it would refer "this matter to the appropriate Diplomatic Security administrative office and urge clearer guidance on the use of foreign passports for personal travel. This guidance should clarify whether the use of such passports –

especially when required by the country to which an employee is traveling – constitutes exercise of foreign citizenship."

On appeal, Complainant argued that she was entitled to non-pecuniary compensatory damages in addition to the pecuniary damages and requested that the undated letter be expunged from her record. The Commission found that the Agency failed to order declaratory relief, in the form of posting a notice, and equitable relief, in the form of providing training to and considering discipline against the responsible management officials and in the form of expunging the undated letter that was presented to Complainant on July 2, 2015, from Agency records. The Agency also failed to conduct a supplemental investigation into Complainant's entitlement to compensatory damages. Accordingly, we modified the Agency's final decision and ordered that the Agency conduct a supplemental investigation concerning Complainant's entitlement to compensatory damages, expunge the undated letter from all official records, post a notice, provide training, and consider discipline against the responsible management officials.

Ayuso-Rodriguez (Kristofer E.) v. USPS, 0120170557 (01/25/2018) – Complainant worked as a Mail Handler, and his duties included operating a tow truck and lifting flat tubs of mail that weighed up to 70 pounds. Complainant has intervertebral disc syndrome and degenerative disc disorder. Complainant stated that his Mail Handler duties aggravate his chronic back pain. On April 13, 2016, Complainant's physician determined that Complainant's restrictions were no bending, twisting, kneeling, squatting, pulling, pushing, lifting over 20 pounds, or operating motor vehicles. On April 21, 2016, Complainant submitted a request for light duty along with his doctor's statement regarding his medical restrictions. Complainant's light duty was request was denied because there was no work available within his restrictions. Complainant alleged that he was subjected to disability discrimination and requested a final decision from the Agency.

In its final decision, the Agency determined that Complainant was an individual with a disability protected by the Rehabilitation Act. However, the Agency determined that Complainant failed to establish that he was a "qualified" individual with a disability because he could not perform the essential functions of his Mail Handler position with or without accommodations. The Agency also determined that Complainant did not establish that he was denied accommodation because "[t]here was no accommodation for the complainant other than reassigning him to other areas and duties that are light in nature and limited." Therefore, the Agency concluded that Complainant failed to establish that he was denied a reasonable accommodation.

The Commission found that because of his restrictions, Complainant was not qualified for his Mail Handler position, raising the issue of reassignment. We determined that the Agency failed to consider whether Complainant could be reassigned to a different position, so the Agency failed to establish that providing reasonable accommodation would cause an undue hardship under the circumstances. As a result of the finding of discrimination, OFO ordered the Agency to immediately identify vacant, funded positions or assignments, restore leave used by Complainant as a result of the Agency's failure to provide him with an effective reasonable accommodation, conduct a supplemental investigation on compensatory damages, provide training, and consider discipline against the responsible management officials.

Bailey (Iona A.) v. DHS (TSA), 0720160019 (01/09/2018) **[Repeated under Priorities 1 and 5 above]** – Complainant was given a conditional offer of employment, subject to a medical examination, for a Transportation Security Officer position. Complaint reported that she was taking medication for

arthritis, but had no lifting restrictions. Complainant underwent a physical examination and passed all tests and screening including a test to examine decreased sensation in her hands. A nurse then reviewed Complainant's results to determine whether she was qualified pursuant to the agency's medical Guidelines and determined her application required additional review. The Medial Review Director reviewed the documentation, and determined that no further examination was necessary because she was medical disqualified for the position because of her two decades old diagnosis of rheumatoid arthritis, which still "flared up" on occasion.

Complainant filed a formal complaint alleging disability discrimination and requested a hearing before an EEOC AJ. The AJ determined that Complainant was disqualified under the agency's Guidelines which disqualified for rheumatoid arthritis in the following situations: "With active disease under chronic treatment with functional capacity limited with muscle atrophy, moderate and severe pain, and multiple joint involvement." Because Complainant did not suffer from any limited functional capacity, muscle atrophy, of moderate and severe pain, and passed all tests conducted in the medical examination, the AJ found Complainant established she could perform the essential functions of the job without accommodation. The AJ further found the Agency did not establish she was a direct threat and ordered appropriate relief.

On appeal, the Agency maintained that the case should be dismissed for failure to state a claim because the Aviation Transportation Security Act (ATSA) preempts the Rehabilitation Act as noted in Getzlow v. DHS, EEOC Appeal No. 0120053286 (6/26/07). However, OFO found no Getzlow issue here because the Complainant was not challenging the guidelines themselves, rather, she was challenging the Agency's finding that she was not qualified under the Guidelines. OFO determined there was substantial evidence in the record to support the AJ's finding that Complainant met or exceeded the agency's own Medical Guidelines. Furthermore, the decision found the Agency had not satisfied its burden to prove direct threat because it failed to conduct an individualized assessment. The decision ordered appropriate relief including a retroactive offer to the TSO position with back pay.

Williamson (Carmina E.) v. DOJ (BOP), 0720150011 (01/09/2018) – The issue presented in this case is whether the AJ erred in granting Complainant front pay and future pecuniary damages. A hearing was held regarding this matter and the AJ determined that Complainant was subjected to discriminatory harassment and that the Agency was liable for the coworker's actions as the Agency did not take prompt and immediate action to stop the harassment. On appeal, the Agency maintained that the AJ's finding that Complainant was entitled to front pay and loss of future earning capacity was not supported by substantial evidence in the record. Specifically, the Agency maintained that the AJ improperly concluded that Complainant was entitled to an award of front pay because her medical documentation showed that she would not be able to work for the foreseeable future.

We found that there was substantial evidence in the record to support the AJ's findings with respect to the AJ's award of front pay. We agreed with the AJ's determination that Complainant was prevented from returning to work by circumstances beyond her control, i.e., the undisciplined harasser was still working at the facility, and secondly, the Agency had not completed an investigation into Complainant's allegations for almost three years, which indicated a record of long-term resistance to antidiscrimination efforts.

Moreover, we found support in the record for the AJ's determination that Complainant was entitled to an award reflecting her loss of future earning capacity and benefits because it was unlikely that she would be able to return to working in a job with comparable wages within commuting distance of her

home due to her lingering mental and emotional impairments caused by the Agency's discriminatory actions. As for the Agency's contention that it was being made to provide evidence that Complainant should be providing, we noted that the Commission often directed Agencies to calculate the amount of a complainant's entitlement to monetary relief such as back pay, benefits and, in this case, future earnings and benefits because the Agency was in a better position to determine what a complainant was entitled to and therefore what they had lost.

Accordingly, we ordered the Agency to determine the appropriate amount of back pay, with interest, and other benefits including overtime. We also ordered front pay for two year and compensatory and non-compensatory damages.

Milan (Denise Y.) v. VA, 0120150665 (02/28/2018) – Complainant was hired for a three-year term in June 2009 as a Podiatry Resident at the Agency's Medical Center in Baltimore, Maryland. In June 2011, despite allegedly being put on the new rotation schedule, she was told there was no work for her to do. She was then charged with AWOL and despite her efforts to obtain a placement at a different hospital she did not report to work at the Agency again. Complainant filed an EEO complaint in which she alleged that the Director of Podiatric Medical Education (Director S1), her first-line supervisor, and the Chief of Podiatry, her second-line supervisor (S2), had retaliated against her for her prior EEO activity when: 1) she was terminated from the Podiatry Resident's Program, effective February 13, 2012; and 2) she was terminated from employment, effective March 30, 2012. The Agency issued a FAD in which it found it had not discriminated against Complainant. The Commission reversed and found that Complainant had been retaliated against for her prior EEO activity.

The decision found that Complainant had prior EEO activity through her earlier complaints to Director S1 concerning her claim of harassment by a co-worker and discrimination based on her national origin, as well as a previously initiated EEO complaint which Director S1 became aware of June 6, 2011. She also claimed that Director S1 created a hostile work environment by encouraging such discrimination in the workplace. In * * * v. VA, EEOC Appeal No. 0120120703 (April 10, 2012), the Commission reversed the Agency's dismissal of the complaint for failure to state a claim, and remanded the matter for processing. Director S1 and S2 were aware of Complainant's EEO activity. We found the necessary nexus between Complainant's prior EEO complaint and the two termination actions existed, in that the reason given for the terminations was Complainant's "unauthorized absences" from the workplace, which were due to her not being given assignments, and not being placed in the rotation schedule which was sent out on June 15, 2011, within 2 weeks of Director S1 becoming aware of her protected EEO activity.

The decision found that Complainant had shown the Agency's reasons for her termination to be pretext, in that she was the only podiatry resident who did not receive a schedule and her supervisory chain refused to assign her any clinical or surgical work. We found that the Agency had failed to produce a copy of the 2011-2012 academic year work/rotation schedule when requested by the EEO Investigator, and therefore had not shown that Complainant had actually been assigned work. Complainant claimed that she reported to work several times after completing a research project she was assigned, namely after June 22, 2011. She was told there was no work for her. The Agency did not provide any convincing reason why Complainant was not simply informed of the rotation schedule at these times and sent to perform her duties. The Agency did not provide any convincing reason why Complainant's self-arranged assignment at Hospital A was not permitted and why she was told to report to the Baltimore Medical Center instead but then not given any assignments. We found that

Complainant had shown that the Agency's reasons for her removal from the Podiatry residency program and from the Agency, that she had been in an unauthorized leave status and refused to report to work, were pretext for discrimination based on reprisal.

As a remedy, the Commission ordered the Agency to award Complainant back pay from the date she was placed in AWOL status until the date her residency was to end, compensatory damages, provide training to the responsible management officials, and consider disciplining those individuals, and to post a notice.

Ramsey (Janet B.) v. USPS, 0120151126 (02/15/2018) – Complainant worked as a City Carrier at the Agency's Post Office in Bullhead City, Arizona. She filed an EEO complaint wherein she claimed that the Agency subjected her to a hostile work environment on the bases of her race (Caucasian), sex (female), disability (physical and mental/obsessive-compulsive disorder and anxiety), age (56), and reprisal when she was subjected to a hostile work environment, as evidenced by 25 incidents. The Agency issued a FAD in which it found it had not discriminated against Complainant. The Commission reversed and found that Complainant had been discriminated against.

The Agency did not dispute that Complainant is considered a qualified individual with a disability as Complainant has obsessive-compulsive disorder, and as a result she tends to get anxious when things are out of normal routine. Complainant's therapist stated that Complainant's disorder results in her continually checking and rechecking if she completed tasks.

The decision found that as to six claims, Complainant established that the Agency's actions were based on her disabilities and that the actions were severe or pervasive enough to create a hostile work environment. Agency officials considered Complainant's routines to be a time-wasting practice. We found that the Agency's claims on Complainant's work habits reflected the Agency's insensitivity toward her obsessive-compulsive disorder and that the Agency's actions constituted harassment against Complainant based on her disability.

The record showed that Agency officials were aware of and/or on notice of Complainant's medical conditions. The Agency noted that Complainant has been diagnosed with obsessive compulsive disorder since at least November 1999. The Postmaster stated that Complainant had informed her supervisors than she has an anxiety disorder and cannot be given direction and cannot handle change. Agency officials were clearly aware that changing Complainant's routines caused her anxiety and exacerbated her obsessive-compulsive disorder. Nevertheless, the Agency micromanaged Complainant's route and subjected her to excessive street scrutiny by conducting three street observations within a three-week period and four observations over a two-month period. Agency officials overwhelmed her with instructions that were frequently petty, changed her case in a manner that could adversely impact her shoulder injury, and unnecessarily humiliated her by sending her to the carrier academy for new employee training.

We found that the Agency overlooked the fact that what it considered to be time wasting practices were rather strategic mechanisms utilized by Complainant to address her obsessive-compulsive disorder while still performing her job. The Agency's disparagement of the symptoms of Complainant's obsessive compulsive disorder and the methods employed by Complainant to deal with her condition reflected an insensitivity and hostility toward her based on her disability.

The decision noted a previous finding of discrimination for Complainant in EEOC Appeal No. 0120140129 (March 25, 2014). In that case we found that for events which took place not more than a

year before those in the instant complaint, Complainant had been discriminated against when her request for reasonable accommodation was unnecessarily delayed, when management gave her instructions not allowing her to engage in certain behaviors they regarded as "time wasting," when her Supervisor's actions in changing Complainant's routines and singling her out for harsher treatment showed an insensitivity to her medical condition and caused her significant and foreseeable anxiety sufficient to constitute a hostile work environment based on her disability (obsessive compulsive disorder), and when she was subjected to disparate treatment and retaliatory harassment.

As a remedy, the Commission ordered the Agency to award Complainant compensatory damages, provide training to the responsible management officials, and consider disciplining those individuals, and to post a notice.

Solomon (Wilmer M.) v. State, 0120160352 (02/22/2018) – Complainant, a Passport Specialist at the Passport Agency in Detroit, Michigan, filed an EEO complaint alleging disability (PTSD) discrimination.

The Agency was found to have violated the Rehabilitation Act when it failed to show that providing any of the many requested reasonable accommodations would cause an undue hardship. The Agency's broad rejections did not reflect the specificity required of an individualized assessment, nor a consideration of the factors comprising an undue hardship. Further, the Commission noted its concern with the Agency's lack of participation in the interactive process. The Agency not only rejected Complainant's numerous suggestions, but it failed to suggest any alternatives and proceeded to blame Complainant for the alleged breakdown in the interactive process.

In failing to provide a reasonable accommodation, Complainant's "unsuccessful" rating was also found to be discriminatory. While the record contained evidence of Complainant's ongoing performance problems throughout the year, including numerous emails from his supervisor, the Commission observed that some of the emails followed Complainant's request for a reasonable accommodation. Moreover, the major life activities that were impacted by Complainant's PTSD, for which he was seeking a reasonable accommodation, were the same skills identified by management as needing improvement (i.e. focus, concentration, avoiding distractions).

Among other things, the Agency was ordered to immediately take all steps necessary in accordance with Commission regulations to provide Complainant with reasonable accommodation, to rescind and expunge the unsuccessful rating and to determine Complainant's entitlement to compensatory damages.

Simpkins (Toshia F.) v. Army, 0120160388 (02/28/2018) – Complainant worked as a permanent hire, Supply Technician, GS-2005-06, at the Agency's Dwight D. Eisenhower Army Medical Center in Fort Gordon, Georgia. Complainant filed an EEO complaint alleging that the Agency discriminated against her based on race and age when Complainant was not selected for the position of Supply Technician, GS-2005-07, advertised under Vacancy Announcement Number SCDZ11034274. Following an investigation, and a requested final decision, the Agency found no discrimination concluded that Complainant failed to prove that the Agency subjected her to discrimination as alleged.

Upon review of the record, no affidavits from any of the responsible management officials explaining the selection decision were found. The Investigator detailed numerous failed attempts to obtain sworn affidavits. Ultimately, the Investigator came to reply on the EEO Counselor's report which contained interview notes with the responsible management officials.

The Commission determined that Complainant established a prima facie case of age and race. The Commission next determined that the Agency did not establish legitimate, nondiscriminatory reasons for the selection decision. Specifically, the investigation obtained no sworn affidavits or other testimony from the selecting official or any of the three panel members. The Commission found that, without the appropriate affidavit or other evidentiary documents clearly demonstrating the specific reasons why Complainant was not selected, there is no legitimate, nondiscriminatory reason that has been set forth which Complainant can rebut.

The Commission found discrimination regarding the subject non-selection. The Commission ordered a variety of remedies including, placing Complainant in a substantially equivalent position; to determine the appropriate back pay, with interest, and other benefits due to Complainant; and, to consider Complainant's claim for compensatory damages.

Chan (Erline S.) v. DOJ (USMS), 0120160618 (02/22/2018) – Complainant, a Management Program Analyst, appealed from the Agency's decision that she was not subjected to discrimination and a hostile work environment on the bases of race (Asian), national origin (United States of America), sex (female), disability (partial blindness), age (55), and reprisal. Complainant experienced an incident of unwanted touching by her supervisor, the Chief Deputy U.S. Marshall in 2008. Complainant reported the incident to other management, but there was no indication that the Agency took action to prevent further harassment. Instead, the Chief Deputy's actions toward Complainant became aggressive as it related to everyday interactions. This continued for approximately two years. The appellate decision concluded that the evidence was sufficient to conclude that the Chief Deputy's actions toward Complainant amounted to the creation of a hostile work environment based on sex and reprisal. The Agency was directed to award Complainant remedies such as an investigation into Complainant's entitlement to compensatory damages and a posting notice.

Pompey (William G.) v. DOD (DLA), 0120160837 (02/14/2018) – Complainant worked as an Information Technology (IT) Specialist, GS-12, at the Agency's Aviation Richmond facility in Richmond, Virginia. Complainant filed a formal EEO complaint alleging discrimination based on race, sex, and age when he was not selected for the position of Supervisory Information Technician Specialist, GS-13. Following an investigation, the Agency found no discrimination.

Our decision concluded that the Agency failed to articulate legitimate, nondiscriminatory reasons for the selection made. Specifically, we determined that the record contained no sworn affidavits from the Selecting Official, or from any other Agency official, with actual participation in, or knowledge of, the selection decision.

The decision reversed the Agency's determination of no discrimination. The decision ordered a variety of remedies including, placing Complainant in a substantially equivalent position; providing appropriate back pay, with interest, and other benefits due to Complainant; and issuing a decision on Complainant's claim for compensatory damages. The decision that as the Selecting Official was no longer employed by the Agency, orders to provide him with training or consideration of disciplinary action against him were impractical.

Antangana (Marlin K.) v. VA, 0120161288 (02/23/2018) – Complainant, a Claims Assistant, filed an EEO complaint alleging that he was subjected to discrimination based on disability (Post Traumatic Stress Disorder and Traumatic Brain Injury) when he was terminated from his position. Upon completion of the investigation, Complainant requested a final agency decision.

The Agency found that it violated the Rehabilitation Act because the evidence did not show that it conducted an individualized medical assessment of Complainant's condition and that the record did not reflect that it considered whether Complainant's impairment posed a direct threat before it decided to terminate him. However, the Agency analyzed this matter under a mixed motive analysis finding that, in part, Complainant was terminated for nondiscriminatory reasons (lack of candor in the application process) and that it still would have terminated him absent the discrimination. Thus, the Agency found that Complainant was not entitled to personal relief. The Agency ordered the following corrective action: attorney's fees, training on disability law for the responsible management official, and the posting of a notice regarding the discrimination. Complainant filed an appeal with OFO.

OFO found that the Agency provided clear and convincing evidence that it would have terminated Complainant for his lack of candor in the application process, even absent the discrimination. Thus, OFO found that the Agency's decision not to award Complainant personal relief was proper, and affirmed the Agency's final decision.

Brandenburg (Elliot J.) v. SSA, 0120161848 (02/22/2018) – Complainant previously worked as a Social Security Specialist, GS-13, with the Agency in Baltimore, Maryland until he retired on July 31, 2015. Before his retirement, Complainant applied for the position of Supervisory Social Insurance Specialist at the GS-14 grade level. Complainant made the Best Qualified List for the position, and he was interviewed by a four-member panel. The selecting official (SO) thereafter made three selections for the position, but Complainant was not one of the selectees. In making the selections, the SO only stated that she chose the three selectees she felt were the most highly qualified candidates, would be the most effective leaders, and had the best interpersonal skills. Complainant subsequently filed an EEO complaint, alleging discrimination based on race, national origin, age, sex, and reprisal. Following its investigation, after Complainant failed to request a hearing, the Agency issued its final decision, finding no discrimination as alleged. On appeal, we found that Complainant established a prima facie case of discrimination based on his protected classes, but the Agency failed to meet its burden of articulating a legitimate, nondiscriminatory reason as to why Complainant was not selected for the position at issue. In so finding, we noted that the SO provided no examples on why she believed the selectees possessed superior leadership and interpersonal skills than Complainant. We also noted that the SO contended that the selectees possessed superior qualifications even though two of the three selectees were ranked lower than Complainant by the interview panel. We therefore found that the SO failed to provide a specific, clear, and individualized explanation as to why Complainant was not selected for the position at issue. We therefore found that Complainant was subjected to discrimination based on his protected classes, as alleged.

Deters (Isidro A.) v. DHS (TSA), 0720170026 (02/06/2018) **[Repeated under Priority 4, above]** – The Agency filed an appeal from an EEOC AJ's finding of discrimination. Complainant, a Program Analyst with the Transportation Security Administration, filed his complaint alleging that he was discriminated against in his compensation on the basis of sex in violation of Title VII of the Civil Rights Act and the Equal Pay Act (EPA). After a hearing, the AJ found that the Agency violated the Equal Pay Act and Title VII. The AJ found no intentional sex discrimination. For remedies, the AJ ordered back pay, liquidated damages, attorney's fees, costs, and posting of a notice of discrimination.

The Agency issued a final order rejecting the finding of discrimination (and objecting to the remedies) and also filed an appeal with the Commission.

OFO found that the AJ's decision finding a violation of the EPA was supported by substantial evidence. OFO agreed with the AJ that the Agency failed to meet its burden (after the establishment of a prima facie case) that the pay differential between Complainant and two other female employees was based on a factor other than sex. OFO found that the although an award of attorney's fees was proper, it should be reduced by 25% for work done for the EPA claim. OFO also found that the triggering of the back pay should be two years prior to the filing of the complaint and not two years prior to the commencement of EEO counseling as the AJ found. In relief, the AJ ordered back pay, liquidated damages, attorney's fees in the amount of $60,918, costs in the amount of $16.75, and posting of a notice of discrimination. OFO also ordered the Agency to provide EEO training to employees at the facility and consider disciplining the individuals responsible for the discrimination.

Nelson (Jenna P.) v. VA, 0120150825 (03/09/2018) – Complainant worked as a GS-11 Management Analyst in the Office of Information and Technology at the Agency's National Service Desk in Austin, Texas. In the first few weeks of her employment, Complainant claimed that her first-level supervisor (S1) began making comments about her appearance and clothing. Soon thereafter, S1's comments became more sexual in nature. S1 began asking Complainant to have sex with him and/or have sex with him and another Agency management official. S1 later sent Complainant links to videos containing sexual acts involving him and another Agency manager. Complainant alleged that S1 talked about his sexual feelings for her, exposed himself to her, groped her, and once took a video of her walking down the hall and later told her that he masturbated while looking at it. Complainant stated that S1 made it clear to her that she could be terminated without any reason as she was still in a probationary period and that he was close to her second-level supervisor (S2). Complainant attempted to avoid S1 as much as possible and expressed to him that what he was doing was not right. Complainant and her fiancée, an Agency employee, subsequently reported S1's conduct. S2 immediately placed S1 on administrative leave, ordered an investigation, granted Complainant indefinite telework, and arranged for workplace harassment training for all management officials.

After S2 assumed direct supervision over Complainant, she informed S2 that she would complete her one-year probationary period in August 2013 and requested a promotion. S2 responded that he needed more time to evaluate Complainant's performance. S2 later advised Complainant of her observed performance deficiencies and scheduled weekly meetings to address those deficiencies. A few months later, S2 determined that Complainant had demonstrated the ability to perform at the next grade level and recommended Complainant for a promotion to the GS-12 level.

Complainant filed a formal complaint alleging that the Agency discriminated against her on the bases of sex (female) and in reprisal for prior protected EEO activity when: her supervisor subjected her to sexual harassment; and her second-level supervisor informed her that she was not going to be promoted to GS-12, as part of her career ladder. Complainant withdrew her hearing request, and the Agency issued a FAD. In the FAD, regarding Complainant's sexual harassment claim, the Agency concluded that Complainant unreasonably delayed reporting S1's conduct, and that once management learned of the conduct, it took immediate action resulting in the complete cessation of the harassment. Accordingly, the Agency found that there was no basis for imputing liability to the Agency for S1's harassing conduct. Next, the Agency determined that Complainant failed to show that she was discriminated or retaliated against when she was not initially promoted to GS-12.

In the Commission's appellate decision, the Commission found that Complainant established that she was subjected to unwelcome sexual conduct from S1 which created an offensive and hostile work

environment. Despite the Agency's arguments otherwise, the Commission determined that the Agency should be held liable for S1's harassment. The Commission found that while no further harassment occurred, the Agency had not fully corrected the effects of the harassment on Complainant. For example, the Agency failed to restore the sick leave and leave without pay that Complainant used as a result of S1's harassment. Consequently, the Agency could not establish its affirmative defense and was therefore liable for the hostile and offensive work environment created by S1.

The Commission ordered the Agency to conduct a supplemental investigation into Complainant's entitlement to compensatory damages, restore any leave or compensate for any leave without pay Complainant used because of the discriminatory harassment, provide eight hours of training to all management staff in the National Service Desk's Office of Information and Technology, and to post a notice.

Finally, the Commission found that the Agency had articulated legitimate, nondiscriminatory reasons for Complainant's delayed promotion. S2 explained that Complainant was not yet performing at the level necessary to be promoted. S2 set up weekly meetings to address her identified performance deficiencies and, within a few months, he recommended her promotion based upon her improved work performance. The Commission found that Complainant failed to show that those reasons were pretextual. As a result, the Commission found that Complainant had not been subjected to discrimination and reprisal with regard to her delayed promotion.

Burton (Queen L.) v. USDA (FS), 0120160554 (03/22/2018) – In its final decision regarding her complaint, the Agency determined that Complainant was subjected to discrimination based on disability when the Agency failed to engage Complainant in the interactive process regarding her reasonable accommodation request and when the Agency demoted her. During a supplemental investigation into her entitlement to compensatory damages, Complainant requested $500 in past pecuniary damages and an unspecified amount of non-pecuniary damages. Complainant stated that she experienced depression, anxiety, chronic diarrhea, nausea, sleeplessness, and night sweats, that she was no longer able to work, and that she had filed for bankruptcy. The Agency awarded Complainant $500 in pecuniary damages, $15,000 in non-pecuniary damages, and the amount of lost Agency matching contributions to her TSP as a result of her demotion. The Agency found that Complainant's expenses related to her financial difficulties and filing for bankruptcy were not compensable because the evidence did not establish that the discrimination caused Complainant's financial problems, as Complainant had retired prior to the effective date of her demotion. In determining the amount of non-pecuniary damages, the Agency's final decision considered the lack of medical documentation regarding Complainant's pre-existing conditions or the severity, nature, and duration of those conditions. On appeal, Complainant requested $120,000 in non-pecuniary damages. The Commission affirmed the Agency's award of non-pecuniary damages, noting that Complainant provided no medical evidence from a provider who treated her before October 2014 and that the provided medical evidence did not address the severity, nature, or expected duration of her medical evidence.

Gray (Roderick P.) v. VA, 0120161268 (03/23/2018) – Complainant worked as a Medical Service Assistant in the Outpatient Window Office at the VA Medical Center in Fort Harrison, Montana. The decision partially affirmed the Agency's conclusion that Complainant failed to prove discrimination on a number of allegations, but determined that the Agency erred when it failed to find coworker harassment based on race. Complainant (African American male) alleged, most significantly, that his coworker (Caucasian female), when confronting him about returning late from break, hit a panic

button, and summoned Agency police to their workstation in July 2012 because she was "afraid" of him. Witnesses identified the coworker as the "instigator," describing Complainant, who remained seated throughout the exchange, as nonthreatening. The record, which contained the police report for the panic button incident, multiple affidavits, and a transcript of Complainant's testimony, reveals, among other things, that Complainant was the only African American employee in the unit and the coworker had negatively referenced Complainant's race in front of witnesses multiple times, including previously stating she was afraid of him because he was "a big black man." The Commission found sufficient evidence that the coworker acted with discriminatory motive, citing to Ferebee v. Dep't of Homeland Sec., EEOC Appeal No. 0720100039 (April 24, 2012) (a coworker's decision to call the police on the complainant, without evidence that the complainant threatened to physically or verbally harm her, could not be explained by anything other than her fear of him because of his race and sex). Here, Complainant's supervisor, by multiple accounts, did not respond promptly and effectively to Complainant's allegations of harassment by the coworker, giving rise to Agency liability for coworker harassment. The Agency was ordered to issue a decision on Complainant's claim for compensatory damages, to provide training to and consider discipline of the responsible individuals, to provide attorney's fees if applicable, and to post a notice of the finding.

Carter (Elly C.) v. DOD (DCAA), 0120161750 (03/14/2018) – Complainant, a Senior Auditor, filed a discrimination complaint in which she alleged that the Agency had discriminated against her on the bases of her physical disability and in reprisal when it denied her request to telework as a reasonable accommodation; subjected her to a hostile work environment consisting of 14 alleged incidents of alleged harassment; charged her with absence without leave; did not select her for a position; and disclosed medical information during the selection process that she was working part-time for medical reasons.

An EEOC AJ held a hearing and issued a decision which dismissed a part of the complaint on the grounds that the claims were time-barred because they were discrete actions and Complainant failed to initiate EEO Counselor contact within the requisite 45 days. On the complaint's merits, the AJ found that the Agency had discriminated against Complainant, a qualified person with a disability, on some claims and found no discrimination on others. The AJ found that the Agency did not make a good faith effort to work to provide Complainant with an accommodation. The Agency's reason for its denial of telework was that Complainant's work was sensitive and therefore not suitable for telework. The AJ found that the Agency failed to demonstrate that the request to telework would cause undue hardship. The AJ also found that the Agency had made an unlawful disclosure of Complainant's medical information during the selection process because the disclosure did not fall within the recognized exception to the confidentiality requirement. Regarding her findings of no discrimination, the AJ explained that the Agency had articulated legitimate, nondiscriminatory reasons for its actions and, also, that an unlawfully hostile work environment did not exist. The AJ awarded relief for the unlawful discrimination.

Complainant appealed the decision. The Agency adopted the AJ's decision but challenged its own adoption on appeal. We rejected the Agency's belated challenge to the AJ's decision which the Agency had previously adopted and, also, decided to fully implement, pursuant to 29 C.F.R. § 1614.110(a). We affirmed the AJ's decision but modified it as explained below.

We found that the AJ's procedural dismissal of a part of the complaint on the grounds of untimely EEO Counselor contact was improper. We determined that the incidents dismissed were not, as the AJ had

found, discrete actions for which the Agency would have been separately liable and for which Complainant would have had to initiate EEO Counselor contact within 45 days. Instead, the incidents were part of an unlawful employment practice of alleged harassment, one incident of which had occurred within 45 days of Complainant's EEO Counselor contact. Nonetheless, we concluded that the error was harmless because the AJ considered the dismissed claims in reaching her ultimate findings.

We left undisturbed the AJ's findings of a denial of a reasonable accommodation to telework and of the Agency's failure to establish undue hardship.

Regarding the medical disclosure, we pointed out that the disclosure of medical information was prohibited from disclosure to a person interviewing an employee-applicant. Even if a disclosure may have been inadvertent, it constituted a violation of the Rehabilitation Act.

The AJ did not consider, in her decision, whether the Agency had engaged in reprisal. The Agency official warned Complainant in an email that her continued requests for telework as an accommodation would result in personnel action because her continued requests constituted misconduct. We concluded that when Complainant requested a reasonable accommodation, she was engaging in a form of protected activity and, as such, she was protected from retaliation in the exercise of her rights granted under the Rehabilitation Act. Based thereon, we found that the Agency had engaged in reprisal. We also increased the AJ's award of nonpecuniary compensatory damages from $50,000 to $52,000.

Frye (Letitia C.) v. AID, 0120162501 (03/07/2018) – Complainant worked as an Administrative Support Specialist at the Agency's Audit Performance and Compliance Division in Washington, D.C. In December 2014, Complainant was diagnosed with a variety of medical conditions. Complainant averred she has difficult care for herself, performing manual tasks, walking, and breathing. As of December 31, 2014, Complainant was placed on 100% telework due to her disabilities. On April 3, 2015, Complainant filed a formal EEO complaint alleging the Agency violated the Rehabilitation Act by discriminating against her based on disability when, in pertinent part, it denied her access to a meeting scheduled on January 28, 2015.

On June 23, 2016, the Agency issued a final decision conceding management violated the Rehabilitation Act when it failed to reasonably accommodate Complainant's disabilities by denying her the opportunity to ask questions and participate in discussions during the January 28, 2015 meeting.

Our decision affirmed the Agency's finding that it violated the Rehabilitation Act. We ordered the Agency to take the following actions: to ensure that Complainant was given the opportunity to submit objective evidence in support of her claim of compensatory damages and issue a decision on that claim; provide EEO training for the responsible management officials regarding their responsibilities under the Rehabilitation Act; and the posting of a notice.

Scoon (Miriam B.) v. VA, 0720150022 (03/20/2018) – Complainant worked as an EEO Manager/Team Leader at the Agency's Central Office in Washington, D.C. Complainant alleged in her EEO complaint that she was subjected to discrimination and a hostile work environment based on reprisal. After a hearing before an EEOC AJ, Complainant prevailed and was awarded remedies. While the Agency accepted the AJ's finding of discrimination, it did not accept all portions of the AJ's award of remedies. This was the subject of the Agency's appeal. The appellate decision affirmed the AJ's award of attorney's fees in the amount of $102,839.18, $7,500 in non-pecuniary compensatory damages and restoration of leave. However, the appellate decision found that having the Agency post a notice of the

finding of discrimination to the entire Agency rather than the office where the discrimination occurred was not correct. Further, the appellate decision found that Complainant was also entitled to restoration of any duties that were removed because of the reprisal discrimination.

Howard (Mirta Z.) v. SSA, 0720150035 (03/14/2018) – Complainant, a Case Technician/Legal Assistant, alleged that she was harassed and discriminated based on her race (African American) and in reprisal for EEO activity when she was subjected to several actions by the Agency, including a reprimand, a leave restriction interview, a suspension, and denial of union representation. An EEOC AJ sanctioned the Agency with default judgment in favor of Complainant on all claims on the basis that the Agency failed to comply with his Order to Show Cause why it should not be sanctioned for failing to produce documents it claimed were protected by the attorney-client privilege. In order to remedy the discrimination, the AJ ordered the Agency to rescind the reprimand, suspension, and leave restriction, and to pay Complainant back pay and interest for any pay Complainant had lost, plus interest, because of her suspension from the date she suffered the loss of pay until the date she returned to work.

Additionally, the AJ ordered the Agency to post a notice of discrimination at its Seattle offices; to review and revise EEO policies and practices to comply with Commission regulations that provide that complainants are entitled to a fair and impartial investigation of their complaints; and to ensure Agency counsel took steps to refrain from intruding into the investigative phase of the EEO process, and/or did not give the impression of intruding into the investigative phase of the process prior to the submission of a request for a hearing. Further, the AJ found that Complainant was not entitled to an award for attorney's fees because her representative was not admitted to practice law in any jurisdiction. The AJ also awarded Complainant $6,000 in non-pecuniary compensatory damages.

On appeal, OFO found that the Agency had not demonstrated that it properly asserted the attorney-client privilege because the "privilege log" it submitted to the AJ to justify its assertion of privilege was "nothing more than a cryptic list of titles of documents and senders/recipients that does not reveal the validity of the Agency's assertion of the attorney-client privilege." OFO further found that the AJ properly sanctioned the Agency with default judgment in favor of Complainant because the Agency's failure to comply with the AJ's order without good cause is a serious matter that threatened the integrity of the EEO process and impaired the ability of the Commission to remedy violations of EEO law. OFO noted that withholding potentially relevant evidence from the record deprives complainants of the opportunity for a full and fair adjudication of their claim

Additionally, OFO determined that Complainant established a prima facie case of retaliation, and therefore, established her entitlement to personal relief. OFO found that the remedies ordered by the AJ were supported by substantial evidence and ordered the Agency to undertake those remedial actions.

Callahan (Dionne W.) v. USAF, 0720150040 (03/27/2018) – Complainant alleged in her EEO complaint that she was subjected to a hostile work environment based on sex, which included allegations that she was denied several opportunities to compete for promotion and upward mobility positions. The Agency appealed from an EEOC Administrative Judge's (AJ) issuance of default judgment against the Agency. Complainant's cross appeal, in which she argued for additional remedies, was consolidated with the Agency's appeal. The appellate decision found that the AJ's issuance of default judgment was not an abuse of discretion, considering the fact that the Agency did not attend a status conference, and that there were various discovery-related failures on behalf of the Agency. Further, the appellate

decision affirmed the AJ's award of $185,000.00 in non-pecuniary compensatory damages and $155,050.00 in attorney's fees. However, the appellate decision reduced costs by $41.12 for Complainant's counsel taking a shuttle ride to the airport, the purpose of which was not clear. Also, the appellate decision found that the AJ's award of a Senior Executive Service (SES) position to Complainant did not constitute make-whole relief because Complainant was allegedly discriminatorily non-selected to a GS-15 position, and attainment of an SES promotion was not guaranteed.

Anderson (Henry S.) v. DOD (DIA), 0720170020 (03/28/2018) – Complainant was assigned to the Agency's Human Capital Directorate in early 2011 while he was an active duty Colonel in the Air Force. Complainant's supervisor (S1) was notified that Complainant was out of the office very frequently. Upon review, S1 learned that Complainant had been taking extended absences of up to a week at a time that were neither documented nor approved. S1 counseled Complainant, who responded that he was struggling with post-traumatic stress disorder (PTSD) and preparing for his 2012 retirement from the Air Force. To remove himself from workplace triggers, Complainant requested a transfer out of the Agency, which S1 approved. A Commander Directed Investigation subsequently determined that Complainant had unauthorized absences and that Complainant's PTSD was not a mitigating factor because the absences were not due to PTSD-related appointments or PTSD symptoms.

In summer 2012, Complainant was approached about working for the Agency's Vision 2020 initiative. On September 27, 2012, after being deemed suitable for employment by the Agency's Security Office, Complainant received a conditional job offer. On October 3, 2012, a HR Specialist sent an email to various HR personnel, including S1, notifying them that Complainant would be reporting on October 9, 2012. Later that day, S1 emailed the Vision 2020 Executive (V2E), stating that she needed to discuss Complainant's impending hire. S1 told V2E that Complainant had been investigated for time card fraud and that the charges had been substantiated. V2E requested Complainant's military records and the Commander Directed Investigation report. An Agency Personnel Security Specialist re-reviewed Complainant's civilian application packet and determined that Complainant was no longer eligible for hire under the Agency's Conditions of Employment based on personal conduct issues that raised concerns with respect to reliability, trustworthiness, judgment, and ability to comply with rules and regulations. On October 4, 2012, the Agency withdrew Complainant's conditional job offer.

Complainant filed an EEO complaint alleging that he was subjected to discrimination based on disability and reprisal when the Agency withdrew his conditional job offer. After determining that the Commission had jurisdiction to hear Complainant's claim under Dep't of the Navy v. Egan, 484 U.S. 518 (1988), the EEOC AJ assigned to the case held a hearing. The AJ found that, under a cat's paw theory, S1, motivated by retaliatory animus, had significant influence over the rescission of Complainant's job offer. However, the AJ found that S1 was also motivated by a nonretaliatory reason, her concern about Complainant's unauthorized absences. Applying mixed-motive analysis, the AJ determined that S1 would have interfered in the process notwithstanding Complainant's protected activity. The AJ ordered the Agency to post a notice and to provide training and consider taking discipline against S1. The AJ awarded $239,589.40 in attorney's fees and costs. The Agency subsequently issued a final order rejecting the AJ's decision. The Agency filed an appeal, and Complainant filed a cross appeal.

The Commission determined that it had jurisdiction over Complainant's complaint. Although Complainant was not protected by the Rehabilitation Act in 2011 as a uniformed servicemember, we

found that Complainant was protected by Title VII's opposition clause because he had a reasonable, good faith belief that he requested reasonable accommodation when he requested a transfer to alleviate his PTSD. Because of credibility determinations made by the AJ and a number of examples of S1 doubting the severity of Complainant's PTSD and the timing of the diagnosis, OFO found that S1 was motivated, in part, by both disability-based and retaliatory animus when she intervened in the hiring process. OFO found that the AJ's finding that S1 would have interfered even absent an impermissible motive was supported by substantial evidence given Complainant's unauthorized leave issues. Accordingly, Complainant was not entitled to personal relief, but he was entitled to declaratory relief, injunctive relief, and reasonable attorney's fees and costs. OFO affirmed the AJ's award of attorney's fees and costs.

Hall (Jade R.) v. DOI, 0720170032 (03/23/2018) – The Agency filed an appeal from an EEOC AJ's finding of discrimination. Complainant, a Surface Mining Reclamations Specialist, GS-12, filed a complaint alleging in part that she was discriminated against on the basis of disability (bipolar disorder) when she was not reasonably accommodated. The findings of no discrimination were not at issue on appeal. Complainant was forced to move positions after her husband became a supervisor in her office. Complainant alleged she was not accommodated in her new position. After a hearing, the AJ found that the Agency violated the Rehabilitation Act. For remedies, the AJ ordered payment of $90,000 in nonpecuniary, compensatory damages and EEO training for the responsible officials. The Agency issued a final order rejecting the finding of discrimination and also filed an appeal with the Commission. OFO affirmed the AJ's decision. OFO found that Complainant made repeated requests to management for assistance with the new position, but that the Agency failed to engage in the interactive process to determine whether there was a reasonable accommodation available that would have allowed her to effectively perform the essential functions of the new position. In relief, OFO ordered $90,000 in nonpecuniary, compensatory damages, consideration of discipline and EEO training for the responsible officials, and posting of a notice of discrimination.

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8. CIRCULATED CASES

Brantley (Joel P.), et al. v. USPS, 0120120181 (10/13/2017) **[Repeated under Priority 1 above]** – Complainant, the putative class agent, alleged in an EEO complaint that between August 2005 and December 2009, many African-American employees were disqualified from the Associate Supervisor Program (ASP) for various reasons, including not meeting attendance requirements, failing to pass the test, and failing to pass the 16-week classroom requirements. Complainant had filed a previous EEO complaint on this same issue and received a decision in his favor from an EEOC AJ that resulted in his placement into the ASP in December 2010.

In this case, the AJ determined that the class complaint should not be certified on the grounds that it did not meet the criteria set forth in the Commission's regulations at 29 C.F.R. § 1614.204(a)(2). On appeal, the Commission affirmed the AJ's determination. Specifically, the Commission found that Complainant had not met the class certification requirements of commonality and typicality because his entry into the ASP and promotion to the position of Supervisor of Customer Service distinguished his interest and injury from that of the other members of this putative class. The Commission further found that the numerosity requirement was not met because, although Complainant identified 33

individuals in the potential class, the record revealed that only of three of the 33 potential class members were disqualified from the ASP for attendance issues. The Commission further determined that although Complainant claimed that the number of class members could be in the thousands, he provided no evidence to support this assertion, and therefore, the total number in the class could not be approximated to establish numerosity. Further, the Commission determined that Complainant, who is not an attorney, had not retained counsel to establish adequacy of representation for the putative class.

Additionally, the Commission also found that the Agency properly dismissed Complainant's individual complaint on the basis that it stated the same claim he raised in previous EEO complaints.

Miles (Lee R.) v. NRC, 0120122705 (12/04/2017) – Complainant, an Information Technology (IT) Specialist at the Agency's Regional Office/Region III in Lisle, Illinois, filed a class complaint as the class agent. Complainant sought to represent a group of African-American male employees, former employees, and applicants affiliated with the Agency's Regional Office/Region III in Lisle, Illinois. Complainant specifically alleged that the proposed class was subjected to discrimination when, from November 4, 2005, and continuing, the class was adversely impacted by the hiring, promotion, and performance rating policies and practices by the Agency's Regional Office/Region III location. Complainant's complaint was subsequently forwarded to the EEOC Chicago District Office for a decision on class certification. The Administrative Judge (AJ) assigned to the case found that Complainant failed to establish each of the prerequisites necessary for class certification pursuant to 29 C.F.R. § 1614.204(a)(2). Complainant appealed. On appeal, we first found that Complainant failed to meet the numerosity prerequisite for certification, as the record reflected that the prospective class would contain no more than six members at best. We secondly found no evidence that a policy or practice of discrimination existed, and therefore Complainant did not meet the commonality and typicality prerequisites necessary for certification. Lastly, we found that Complainant, who was without an attorney, did not establish adequacy of representation. We therefore affirmed the Agency's final order implementing the AJ's denial of class certification for failure to satisfy the requirements set forth at 29 C.F.R.
§ 1614.204(a)(2).

Charlot (Shela O.), et al., v. Army, 0120130186 (12/21/2017) – Complainant, an employee of the Department of the Air Force on a joint base, asserted a class-wide discrimination claim based on sex (female) and reprisal for prior protected activity, alleging that females were being subjected to a hostile work environment and that males and females were subjected to reprisal for supporting the females being subjected to harassment. An AJ dismissed the class complaint, finding that the complaint filed to meet the class certification requirements set out at 29 C.F.R. § 1614.204(a)(2). On appeal, the Commission found that it was inappropriate for the AJ to deny class certification based on the existing record, as the record required further development. The underdeveloped record contains indicia of past female civilian employees being subjected to a hostile work environment, from 2007 and continuing, and of male and female civilian employees being subjected to retaliation for supporting the female employees who were being subjected to harassment. The alleged harassment included a supervisor permitting male soldiers to shower in a female latrine even after female employees complained that they had walked in on the soldiers, disrespectful comments to female employees, preferential treatment of attractive female employees, and a supervisor allegedly hitting a female employee on her rear end and allowing a female employee to sit on his lap. We found that precertification discovery was required, in the form of affidavits from the identified class members, to

determine whether the proposed class meets the prerequisites of numerosity, commonality, and typicality, and remanded for a discovery period of not less than 90 days. We directed that if, after discovery, the AJ found that Complainant satisfied the commonality, typicality, and numerosity requirements, but not the adequacy of representation requirement, the AJ would grant conditional certification of the class and allow Complainant 60 days to obtain adequate representation. OFO also joined the Department of the Army to the matter, as at least one of the responsible management officials and a number of the putative class members were employed by the Department of the Army.

Mae P. v. EEOC, 0120170218 (12/21/2017) – Complainant alleged that she was subjected to continuing harassment and discrimination. On December 18, 2015, she contacted the Agency's EEO Office. Because Complainant's concerns were not resolved during EEO counseling, on March 17, 2016, her EEO Counselor provided her and her representative, by both electronic and postal mail, a Notice of Right to File a Formal Complaint of Discrimination (Notice). The Notice informed Complainant of her right to file a formal complaint of discrimination, and noted that the failure to do so within 15 calendar days would result in the dismissal of her complaint. Therefore, Complainant's formal complaint was due on April 1, 2016 (or 15 days after receipt of the Notice). Complainant, however, never filed a formal complaint.

On September 7, 2016, after five months with no response from Complainant, the Agency notified her that, pursuant to 29 C.F.R. § 1614.107(a)(7), her informal complaint had been dismissed, her complaint file was being closed, and that there would be no further action taken on the matter. Complainant was given rights to file an appeal to the Office of Federal Operations. On October 6, 2016, she filed an appeal.

On December 21, 2017, the Commission vacated the Agency's final decision. According to the Commission, the 15-day regulatory time frame to file a formal complaint had long since elapsed at the time the Agency purported to dismiss Complainant's complaint. Therefore, it was unnecessary for the Agency to issue a final decision of any kind in order to close the informal complaint file. If the Agency determined that it should advise Complainant that no further action would be taken on her informal complaint, the Commission found that a simple letter would have sufficed. If Complainant thereafter were to file a formal complaint, the Agency would still have the ability to dismiss the complaint as untimely pursuant to 29 C.F.R. § 1614.107(a)(2), subject to the waiver, estoppel, and equitable tolling provisions of 29 C.F.R. § 1614.604(c).

Angelica P. v. EEOC, 0120170446 (12/18/2017) – Complainant, an Investigative Support Assistant (GS-7), appealed from the Agency's dismissal of her complaint on grounds that Complainant failed to respond to a written request for information from the EEO investigator under 29 C.F.R. § 1614.107(a)(7). The Agency's EEO Office had referred the case to the EEO Investigator in May 2016. Following the referral, the Investigator determined that additional information, aside from the EEO Counselor's report and the formal complaint, was needed to draft a Notice of Acceptance. After a series of follow-ups, the EEO investigator, acting under instruction of the EEO office, sent Complainant a declaration to be signed under "penalty of perjury" within 15 calendar days of receipt. The declaration was sent to complainant's personal email, therefore tracking was not possible. Complainant did not respond to the e-mail, and the Agency subsequently dismissed the complaint.

The appellate decision concluded that the Agency did not present sufficient evidence to conclude that Complainant purposely has engaged in delay or contumacious conduct in support of its dismissal for

failure to respond. The appellate decision further concluded that information from the EEO Counselor's report and Complainant's formal complaint was sufficient to issue a notice accepting or dismissing the claims. The Investigator also had detailed responses from a June 15, 2016 e-mail from Complainant, which aligned closely with the claims that were initially captured by the EEO Counselor. Complainant provided names of management officials, specific allegations, and relevant time frames, which was sufficient to proceed with the notice of acceptance and begin the investigation. The decision noted that in accordance with Management Directive 110, if the Investigator obtained further information after interviews to clarify and add detail to the claims, this information could have been incorporated into the notice of acceptance, which allows for Complainant's response. Therefore, the Agency's FAD dismissing the complaint was reversed.

Charlie K. v. EEOC, 0520170235 (12/19/2017) – Complainant worked as an Investigator at the Agency's Denver, Colorado Field Office. Complainant filed an EEO complaint in which he alleged that he was subjected to unlawful discrimination and harassment on the bases of disability, race, national origin, color, and in reprisal for previous EEO activity through several actions, including non-selections, discipline, and the processing of his EEO complaint. Complainant also alleged that he was subjected to reprisal when his supervisor stated that managers spent half of a meeting talking about Complainant and his EEO complaint.

The Agency found that Complainant did not prove he was subjected to unlawful discrimination or harassment. On appeal, in Charlie K. v. EEOC, Appeal No. 020142315 (January 24, 2017), the Commission's Office of Federal Operations (OFO) reversed the Agency's finding that Complainant had not been subjected to reprisal when the supervisor stated that managers spent half a meeting talking about Complainant and his EEO complaint. In so finding, OFO found that the supervisor's comments were reasonably likely to deter a reasonable employee from engaging in protected EEO activity and could have a potentially chilling effect on the EEO process. OFO found that Complainant did not prove that he was subjected to unlawful harassment or discrimination regarding his remaining claims.

Complainant requested reconsideration of the decision, which OFO denied. Therefore, in order to remedy the reprisal, OFO ordered the Agency to provide in-person EEO training to the responsible management official on the topic of reprisal and to post a notice of the finding of discrimination at Complainant's workplace.

Illa S. v. EEOC, 0120172769 (12/14/2017) – Complainant, the putative class agent, worked as a GS-12 Bilingual Investigator at the Agency's Minneapolis, Minnesota Area Office. Complainant filed a formal EEO complaint in which she alleged that the Agency engaged in national origin discrimination ("foreign national origin) when it treated her and "bilingual employees" nationwide in a disparate manner with respect to assignment of duties, terms and conditions of employment, and pay. The matter was assigned to a contract Administrative Judge (AJ) not employed by the Commission, and Complainant filed a Motion for Class Certification with the AJ. In that Motion, Complainant alleged that Bilingual Investigators are often assigned additional tasks because they speak more than one language, including performing intake duties outside their scheduled rotational time when the charging party speaks only Spanish.

The AJ denied Complainant's Motion for Class Certification because she failed to establish that the class met the numerosity and typicality class certification requirements. The AJ also remanded Complainant's individual complaint for further processing. In an appellate decision, the Commission's

Office of Federal Operations (OFO) affirmed the AJ's denial of class certification of the complaint. Specifically, OFO found that Complainant did not establish the class certification requirement of numerosity because, although she maintained that all 142 Bilingual Investigators employed nationwide by the Agency comprised the potential class, she did not provide any information regarding the national origins of the proposed class. OFO further found that Complainant did not provide an estimate of the number of Bilingual Investigators that are of a particular national origin. OFO noted that a bilingual individual is not necessarily bilingual in a language associated with that individual's national origin, and Bilingual Investigators can be of various national origins, including the United States. OFO further found that Complainant did not establish the class certification requirements of commonality and typicality because although Bilingual Investigators have identical official position descriptions, the actual duties of Bilingual Investigators vary depending upon the internal practices and procedures of the field office. Therefore, OFO found that there was no evidence that the same action or policy affected all members of the proposed class. Additionally, OFO found that Complainant did not satisfy the adequacy of representation class certification requirement because although she asserted that she retained counsel for the class complaint, she did not provide any information about her attorney's legal training and experience in class-action cases.

Finally, OFO noted that there was no evidence that the Agency issued a final order or continued processing Complainant's individual complaint. Accordingly, OFO remanded Complainant's individual complaint for further processing.

Annie F. v. EEOC, 0120170377 (01/09/2018) – Annie F. v. EEOC, 0120170377 (Jan. 9, 2018) – This decision circulated with the Commission. Complainant was employed by the Agency. She filed an EEO complaint on September 16, 2016. The Agency dismissed the entire complaint, in salient part, for failure to file it within 15 days of receipt of the notice of right to file her complaint (NRF). The Commission affirmed.

The Commission found that the time limit to file the complaint began to run when her designated representative, a union Chief Steward who is an attorney (R1), received it by email on January 28, 2016, as documented by the Agency's email program which showed R1 read the email on January 28, 2016 and in February 2016, and deleted and undeleted it twice, thereby showing he did not overlook the email. Complainant implicitly suggested that R1 disregarded the NRF because the EEO counselor, at the November 12, 2015 initial interview, advised them of the option to participate in Alternative Dispute Resolution/mediation (ADR) and indicated to them that the EEO complaint process was stayed during this. She contended that she filed her EEO complaint after being formally advised on September 14, 2016, that ADR was complete because her complaint (unbeknown to her) was closed in February 2016. The Commission found this explanation unpersuasive. The Commission found that it was unclear whether Complainant and/or R1 perceived what the EEO Counselor told them regarding a stay to mean that the time-limit to file the EEO complaint was tolled until the conclusion of the ADR process, no matter how long it took. But it reasoned that nevertheless, the NRF unequivocally informed R1 in writing that after receipt of the notice, "you have the right to file a formal complaint of discrimination within 15 calendar days" (emphasis in original), and in the email accompanying the NRF, the EEO counselor wrote it was issued to preserve Complainant's right to file a formal complaint, there was a 15-day time limit, that this did not interfere with mediation proceedings, she should continue working on ADR, and to call her with any questions.

III. Federal Sector Oversight

- RED completed Form 462 filing season for the mandated reporting by agencies concerning EEO complaints for FY 2017.
- RED staff monitored compliance of HHS to EEOC's recommendations in a program evaluation. Second compliance report received in January.
- OFO Director submitted the Final VBA Program Evaluation Report to VBA following an opportunity to comment on the draft report. Final report issued March 7, 2018.
- RED began part two of its government wide program evaluation of public safety occupations with a focus on the promotion and retention of women.
- RED staff worked on revisions to the FY 2015 Annual Report on the Federal Workforce in accordance with requests from OCLA.
- RED staff made substantial progress on designing a dashboard of FY 2015 federal workforce participation data.
- RED staff drafted a literature review and began data analysis for an OFO report on work-life programs, job satisfaction, and opportunities for advancement in the federal sector.
- RED staff successfully collected FY 2017 Form 462 complaints data.
- RED began revisions to clarify the Form 462 User Instruction Manual.
- RED and CCD staff fulfilled a data request from Commissioner Feldblum's office on OFO appellate data.
- RED staff fulfilled a data request from FEMA's Office of Equal Rights on alternative dispute resolution.
- RED developed a timeline and Year 3 charter for the Performance Metrics Workgroup.
- RED Completed the FY2016 Complaints tables and figures to be included in the FY2016 Annual Report.
- RED, in partnership with TOD and AOD, developed a template for the Trend Analysis Report and developed a plan for developing a TAR dashboard.
- RED developed a charter for the Form 462 LSS project.
- RED fulfilled 8 data requests this quarter.
- OFO staff issued two editions of the Digest of EEO Law (FY 2017, Volume 4, and FY 2018, Volume 1) containing summaries of noteworthy select decisions issued in FY 2018, and coordinated with OCLA to issue press release.
- Following the issuance of the revised MD-715 instructions, OFO successfully modified FedSEP's MD-715 module in January 2018, so agencies can automatically generate their affirmative action plans when their certify their MD-715 report. Of the 57 affirmative action plans received by March 31, 2018, OFO has timely issued three feedback letters to agencies, concerning their efforts to comply with the new 501 regulations. OFO staff are working to issue the 54 remaining letters, as well as those for recently-received plans, in a timely manner.
- Of the 83 reasonable accommodation procedures received by March 31, 2018, OFO staff timely issued 90% of 71 feedback letters to agencies, concerning their compliance

with the new 501 regulations. OFO staff are working to issue the 12 remaining letters, as well as those for recently-received procedures, in a timely manner.

IV. Outreach & Training

1. Notable Accomplishments:

- Revised Overview of MD 715 Training
- Revised Barrier Analysis Training
- Revised New Investigator Training
- Introduced new Counselor Refresher Training
- Completed EXCEL Agenda
- Introduced no cost outreach "1st Fridays with OFO"
- Hosted 2 Brown Bags on Affirmative Employment
- Hosted Federal Sector "Train the Trainer" for 50 EEOC collateral duty trainers
- Attended Respectful Workplace Train the Trainer
- Introduced Leading for Respect and Respectful Workplace Training to Federal Agencies. Training Division has delivered 14 Leading for Respect" trainings (560 total attendees); 3 "Respectful Workplace" training (115 total attendees)
- Increased Twitter Followers by 946%
- Facebook Post Engagement increased by 70%

2. Eliminating Barriers in Recruitment and Hiring

- OFO Policy Advisor spoke at Dept. of Homeland Security for National Disability Employment Awareness Month panel presentation in Wash., D.C.
- OFO Policy Advisor presented on Section 501 regulations to the U.S. Army Communications Electronics Command, Aberdeen Proving Ground, MD.
- Associate Director, FSP, made presentation on Unconscious Bias to the Army at Fort Bragg, NC.
- OFO Staff provided Reasonable Accommodations Training Webinar for USCIS
- OFO Director spoke on "Unconscious Bias vs Conscious Inclusion" to Dept. of Agriculture at USDA Hdqtrs in Wash., D.C.
- OFO Policy Advisor acted as panel moderator for National Disability Employment Awareness Month event at Dept. of Education in Wash., D.C.
- OFO ARP Attorney presented on Reasonable Accommodation to Army Corp of Engineers supervisors in Omaha, Neb.
- OFO Policy Advisor presented on Section 501 regulations to Dept. of Defense Office of Inspector General personnel, in Alexandria, VA.
- Associate Director, FSP, spoke on panel concerning individuals with disabilities who are in leadership positions at Fed. Hwy. Admin. (Dept. of Transportation) National Disability Employment Awareness Month program. in Wash., D.C.

- OFO Assistant Director, Agency Oversight Division, and OFO Policy Advisor presented, via 3 separate webinars, "MD-715 Instructions 2.0," concerning changes to MD-715 instructions and reporting requirements.
- OFO Associate Director, FSP, gave Keynote address at NOAA's Annual Diversity and Inclusion Summit, in Silver Spring, MD.
- OFO Assistant Director, Agency Oversight Division, and OFO Policy Advisor presented to Federal Exchange on Employment and Disability (FEED) group on new MD-715 instructions and new reporting requirements at EEOC Hdqtrs, in Wash., D.C.
- OFO Policy Advisor presented on Section 501 regulations to the Small Agency Council EEO, Diversity and Inclusion Committee, in Wash., D.C.
- OFO Policy Advisor presented on Section 501 regulations and Personal Assistant Services to the Defense Disability Program Managers Working Group, by teleconference.
- OFO Policy Advisor presented on Section 501 regulations to Philadelphia Federal Executive Board's annual EEO/Diversity Day of Training, in Philadelphia, PA.
- OFO ARP Attorney presented an EEOC Case Update and session on Barrier Analysis for the Defense Equal Opportunity Management Institute (DEOMI) EEO Specialist's class, at Patrick AFB, FL.
- OFO Associate Director, FSP, spoke on panel discussing promotion of diversity, and OFO ARP Attorney presented on Commission's E-race initiative, at National Coalition for Equity in Public Service conference, in Wash., D.C.
- OFO Associate Director, FSP, spoke at Dept. of Health and Human Services EEO Director's quarterly meeting concerning implementation of EEOC guidance on a myriad of issues, in Wash., D.C.
- EEOC staff spoke on Religious Discrimination to Internal Revenue Service, in Wash., D.C.
- OFO Policy Advisor presented on Section 501 regulations to Fish and Wildlife Service, in Alexandria, VA.
- TOD staff presented on Reasonable Accommodation for Disability Program Manager's at the Defense Equal Opportunity Management Institute (DEOMI) EEO Specialist's class, at Patrick AFB, FL.
- OFO Policy Advisor presented on Section 501 regulations for Job Accommodations Network webinar.
- OFO FSP staff presented on "Special Emphasis Program Managers" to National Transportation Safety Board, in Wash., D.C.
- OFO Associate Director, FSP spoke on new MD-715 instructions and new reporting requirements to National Council for Hispanic Employment Program Managers, in Wash., D.C.
- OFO Associate Director, FSP, OFO Associate Director, ARP, and EEOC staff members, spoke on retaliation, case updates, and disability issues, at Federal Sector Labor & Employment Law Committee Mid-Winter meeting, in Wash., D.C.
- EEOC staff spoke to Federal Employment Lawyers Group on new Personal Assistance Services, in Wash., D.C.

- OFO ARP Attorney presented an EEOC Case Update for the Defense Equal Opportunity Management Institute (DEOMI) EEO Specialist's class, at Patrick AFB, FL.
- OFO staff presented on "Statutory, Regulatory, and Policy-Driven Equal Opportunity Laws Governing Compliance" for Coast Guard Senior Leaders at Defense Equal Opportunity Management Institute (DEOMI), Patrick AFB, FL.
- OFO ARP Attorney presented an EEOC Case Update, and sessions on Section 501 regulations, and Barrier Analysis for the Defense Equal Opportunity Management Institute (DEOMI) EEO Specialist's class, at Patrick AFB, FL.
- EEOC Staff presented the "Rehab Act & Reasonable Accommodations" to the Social Security Administration, in Philadelphia, PA.
- RED and AOD staff continued work on barrier analysis tools for the promotions and hiring phases of the employment life-cycle.
- RED and AOD staff met with the Massachusetts Office on Disability to provide advice on a report on Schedule A hiring.

3. Protecting Immigrant, Migrant and Other Vulnerable Workers

- OFO Policy Advisor spoke at Dept. of Homeland Security for National Disability Employment Awareness Month panel presentation, in Wash., D.C.
- OFO Policy Advisor presented on Section 501 regulations to the U.S. Army Communications Electronics Command, Aberdeen Proving Ground, MD.
- Associate Director, FSP, made presentation on Unconscious Bias to the Army, at Fort Bragg, NC.
- OFO Director spoke on "Unconscious Bias vs Conscious Inclusion" to Dept. of Agriculture at USDA Hdqtrs, in Wash., D.C.
- OFO Policy Advisor acted as panel moderator for National Disability Employment Awareness Month event at Dept. of Education, in Wash., D.C.
- OFO ARP Attorney presented on Reasonable Accommodation to Army Corp of Engineers supervisors, in Omaha, Neb.
- OFO Policy Advisor presented on Section 501 regulations to Dept. of Defense Office of Inspector General personnel, in Alexandria, VA.
- Associate Director, FSP, spoke on panel concerning individuals with disabilities who are in leadership positions at Fed. Hwy. Admin. (Dept. of Transportation) National Disability Employment Awareness Month program, in Wash., D.C.
- OFO Assistant Director, Agency Oversight Division, and OFO Policy Advisor presented, via 3 separate webinars, "MD-715 Instructions 2.0," concerning changes to MD-715 instructions and reporting requirements.
- TOD staff provided Anti-Harassment Program Management Training to NAVAIR EEO Staff
- OFO Associate Director, FSP, gave Keynote address at NOAA's Annual Diversity and Inclusion Summit, in Silver Spring, MD.

- OFO Assistant Director, Agency Oversight Division, and OFO Policy Advisor presented to Federal Exchange on Employment and Disability (FEED) group on new MD-715 instructions and new reporting requirements at EEOC Hdqtrs, in Wash., D.C.
- OFO Policy Advisor presented on Section 501 regulations to the Small Agency Council EEO, Diversity and Inclusion Committee, in Wash., D.C.
- OFO Policy Advisor presented on Section 501 regulations and Personal Assistant Services to the Defense Disability Program Managers Working Group by teleconference.
- OFO Policy Advisor presented on Section 501 regulations to Philadelphia Federal Executive Board's annual EEO/Diversity Day of Training, in Philadelphia, PA.
- OFO Staff provided Reasonable Accommodations Training Webinar for USCIS
- OFO ARP Attorney presented an EEOC Case Update and session on Barrier Analysis for the Defense Equal Opportunity Management Institute (DEOMI) EEO Specialist's class, at Patrick AFB, FL.
- OFO Associate Director, FSP, spoke on panel discussing promotion of diversity, and OFO ARP Attorney presented on Commission's E-race initiative, at National Coalition for Equity in Public Service conference, in Wash., D.C.
- OFO Associate Director, FSP, spoke at Dept. of Health and Human Services EEO Director's quarterly meeting concerning implementation of EEOC guidance on a myriad of issues, in Wash., D.C.
- EEOC staff spoke on Religious Discrimination to Internal Revenue Service, in Wash., D.C.
- EEOC Staff provided Special Emphasis Program Management training to Army in Little Rock AK
- OFO Policy Advisor presented on Section 501 regulations to Fish and Wildlife Service, in Alexandria, VA.
- TOD staff presented on Reasonable Accommodation for Disability Program Manager's at the Defense Equal Opportunity Management Institute (DEOMI) EEO Specialist's class, at Patrick AFB, FL.
- OFO Policy Advisor presented on Section 501 regulations for Job Accommodations Network webinar.
- OFO Associate Director, FSP spoke on new MD-715 instructions and new reporting requirements to National Council for Hispanic Employment Program Managers, in Wash., D.C
- OFO Associate Director, FSP, OFO Associate Director, ARP, and EEOC staff members, spoke on retaliation, case updates, and disability issues, at Federal Sector Labor & Employment Law Committee Mid-Winter meeting, in Wash., D.C.
- EEOC staff spoke to Federal Employment Lawyers Group on new Personal Assistance Services, in Wash., D.C.
- OFO ARP Attorney presented an EEOC Case Update for the Defense Equal Opportunity Management Institute (DEOMI) EEO Specialist's class, at Patrick AFB, FL.
- OFO staff presented on "Statutory, Regulatory, and Policy-Driven Equal Opportunity Laws Governing Compliance" for Coast Guard Senior Leaders at Defense Equal Opportunity Management Institute (DEOMI), Patrick AFB, FL.

- OFO ARP Attorney presented an EEOC Case Update, and sessions on Section 501 regulations, and Barrier Analysis for the Defense Equal Opportunity Management Institute (DEOMI) EEO Specialist's class, at Patrick AFB, FL.
- OFO Associate Director, ARP, presented case updates at Federal Sector Labor & Employment Law Committee Mid-Winter meeting, in Wash., D.C.
- EEOC Staff presented the "Rehab Act & Reasonable Accommodations" to the Social Security Administration, in Philadelphia, PA.

4. Addressing Emerging and Developing Issues

- EEOC Staff spoke on Social Media in the Workplace to Dept. of Homeland Security,
- In Wash., D.C.
- OFO ARP Attorney presented a Sex Discrimination Overview to Dept. of Transportation DEEP lawyers group via teleconference.
- OFO FSP staff presented on Anti-Harassment for Blacks in Gov't (BIG) regional roundtable, in Silver Spring, MD.
- TOD staff spoke on sexual harassment to Administration for Children and Families at Dept. of Health and Human Services, in Wash., D.C.
- EEOC staff presented on sexual harassment at Federal Sector Labor & Employment Law Committee Mid-Winter meeting, in Wash., D.C.
- TOD staff spoke on Anti-Harassment to African Development Foundation, in Wash., D.C.
- OFO Staff provided Reasonable Accommodations Training Webinar for USCIS
- EEOC Staff presented a session on sexual harassment to the Dept. of Labor, in Philadelphia, PA.
- TOD staff provided Anti-Harassment Program Management Training to NAVAIR EEO Staff
- OFO Staff presented a session on Anti-Harassment to EEO Counselors at Court Services and Offender Supervision Agency, Wash., D.C.
- OFO Policy Advisor presented on Section 501 regulations to the U.S. Army Communications Electronics Command, Aberdeen Proving Ground, MD.
- Associate Director, FSP, made presentation on Unconscious Bias to the Army, at Fort Bragg, NC.
- OFO Director spoke on "Unconscious Bias vs Conscious Inclusion" to Dept. of Agriculture at USDA Hdqtrs, in Wash., D.C.
- OFO Policy Advisor presented on Section 501 regulations to Dept. of Defense Office of Inspector General personnel, in Alexandria, VA.
- Associate Director, FSP, spoke on panel concerning individuals with disabilities who are in leadership positions at Fed. Hwy. Admin. (Dept. of Transportation) National Disability Employment Awareness Month program, in Wash., D.C.
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- OFO Policy Advisor presented on Section 501 regulations and Personal Assistant Services to the Defense Disability Program Managers Working Group by teleconference.
- OFO Policy Advisor presented on Section 501 regulations to Philadelphia Federal Executive Board's annual EEO/Diversity Day of Training, in Philadelphia, PA.
- EEOC staff spoke on Religious Discrimination to Internal Revenue Service, in Wash., D.C.
- OFO Policy Advisor presented on Section 501 regulations to Fish and Wildlife Service, in Alexandria, VA.
- OFO Policy Advisor presented on Section 501 regulations for Job Accommodations Network webinar.
- OFO Associate Director, FSP spoke on new MD-715 instructions and new reporting requirements to National Council for Hispanic Employment Program Managers, in Wash., D.C
- EEOC staff spoke to Federal Employment Lawyers Group on new Personal Assistance Services, in Wash., D.C.
- OFO ARP Attorney presented on Section 501 regulations for the Defense Equal Opportunity Management Institute (DEOMI) EEO Specialist's class, at Patrick AFB, FL.
- OFO Associate Director, ARP, presented case updates at Federal Sector Labor & Employment Law Committee Mid-Winter meeting, in Wash., D.C.
- RED Staff is completing a research study on diversity and inclusion for Information Technology workers in the Federal Sector.

5. **Enforcing Equal Pay Laws**

- OFO ARP Attorney presented an EEOC Case Update for the Defense Equal Opportunity Management Institute (DEOMI) EEO Specialist's class, at Patrick AFB, FL.
- OFO staff presented on "Statutory, Regulatory, and Policy-Driven Equal Opportunity Laws Governing Compliance" for Coast Guard Senior Leaders at Defense Equal Opportunity Management Institute (DEOMI), Patrick AFB, FL.
- OFO ARP Attorney presented an EEOC Case Update for the Defense Equal Opportunity Management Institute (DEOMI) EEO Specialist's class, at Patrick AFB, FL.
- OFO ARP Attorney presented an EEOC Case Update, for the Defense Equal Opportunity Management Institute (DEOMI) EEO Specialist's class, at Patrick AFB, FL.

- OFO Associate Director, ARP, presented case updates at Federal Sector Labor & Employment Law Committee Mid-Winter meeting, in Wash., D.C.
- OFO Staff provided New Counselor Training to Peace Corp employees.

6. Preserving Access to the Legal System

- OFO Staff provided LOAD training to Army EEO Staff in Arlington VA
- EEOC Staff provided Preventing Workplace Harassment Training to National Park Services
- EEOC staff provided EEO Counselor refresher training to Dept. of the Navy, in Santa Fe, N.M.
- OFO Associate Director, FSP, spoke at Dept. of Health and Human Services EEO Director's quarterly meeting concerning implementation of EEOC guidance on a myriad of issues, in Wash., D.C.
- OFO Associate Director, FSP, OFO Associate Director, ARP, and EEOC staff members, spoke on retaliation, case updates, and disability issues, at Federal Sector Labor & Employment Law Committee Mid-Winter meeting, in Wash., D.C.
- OFO ARP Attorney presented an EEOC Case Update for the Defense Equal Opportunity Management Institute (DEOMI) EEO Specialist's class, at Patrick AFB, FL.
- OFO staff presented on "Statutory, Regulatory, and Policy-Driven Equal Opportunity Laws Governing Compliance" for Coast Guard Senior Leaders at Defense Equal Opportunity Management Institute (DEOMI), Patrick AFB, FL.
- OFO Associate Director, ARP, presented case updates at Federal Sector Labor & Employment Law Committee Mid-Winter meeting, in Wash., D.C.
- OFO ARP Attorney presented an EEOC Case Update for the Defense Equal Opportunity Management Institute (DEOMI) EEO Specialist's class, at Patrick AFB, FL.
- OFO ARP Attorney presented an EEOC Case Update for the Defense Equal Opportunity Management Institute (DEOMI) EEO Specialist's class, at Patrick AFB, FL.
- OFO ARP Attorney presented Drafting Final Agency Action training for Environmental Protection Agency.
- OFO Staff provided New Counselor Training to Peace Corp employees

6. Preventing Harassment through Systemic Enforcement and Targeted Outreach

- OFO ARP Attorney presented a Sex Discrimination Overview to Dept. Of Transportation DEEP lawyers group via teleconference.
- OFO FSP staff presented on Anti-Harassment for Blacks in Gov't (BIG) regional roundtable, in Silver Spring, MD.
- OFO Staff provided New Counselor Training to Peace Corp employees

- EEOC Staff provided Preventing Workplace Harassment training to National Park Services
- TOD staff spoke on sexual harassment to Administration for Children and Families at Dept. of Health and Human Services, in Wash., D.C.
- OFO ARP Attorney presented an EEOC Case Update for the Defense Equal Opportunity Management Institute (DEOMI) EEO Specialist's class, at Patrick AFB, FL.
- OFO Staff delivered Respectful Workplace training for several federal government agencies.
- OFO Associate Director, ARP, presented case updates, and EEOC staff presented on sexual harassment at Federal Sector Labor & Employment Law Committee Mid-Winter meeting, in Wash., D.C.
- TOD staff spoke on Anti-Harassment to African Development Foundation, in Wash., D.C.
- TOD staff provided Anti-Harassment Program Management Training to NAVAIR EEO Staff
- EEOC Staff presented a session on sexual harassment to the Dept. Of Labor, in Philadelphia, PA.
- OFO Staff presented a session on Anti-Harassment to EEO Counselors at Court Services and Offender Supervision Agency, Wash., D.C.
- OFO ARP Attorney presented an EEOC Case Update for the Defense Equal Opportunity Management Institute (DEOMI) EEO Specialist's class, at Patrick AFB, FL.
- OFO ARP Attorney presented an EEOC Case Update for the Defense Equal Opportunity Management Institute (DEOMI) EEO Specialist's class, at Patrick AFB, FL.
- OFO staff presented on "Statutory, Regulatory, and Policy-Driven Equal Opportunity Laws Governing Compliance" for Coast Guard Senior Leaders at Defense Equal Opportunity Management Institute (DEOMI), Patrick AFB, FL.

7. Training/Outreach – General

- EEOC Staff spoke on Social Media in the Workplace to Dept. of Homeland Security,
- In Wash., D.C.
- EEOC staff spoke on ADR at Federal Sector Labor & Employment Law Committee Mid-Winter meeting, in Wash., D.C.
- EEOC staff presented on Non-Government Organizations in connection with International Visitors Program at State Department, in Wash., D.C.
- EEOC staff provided EEO Counselor refresher training to Dept. of the Navy, in Santa Fe, N.M.
- OFO Associate Director, FSP, spoke at the first Annual EEO Forum for the Center for Disease Control, in Atlanta, GA.
- Associate Director, FSP, made presentation on Unconscious Bias to the Army, at Fort Bragg, NC.

- OFO Director spoke on "Unconscious Bias vs Conscious Inclusion" to Dept. of Agriculture at USDA Hdqtrs, in Wash., D.C.
- Associate Director, FSP, spoke on panel concerning individuals with disabilities who are in leadership positions at Fed. Hwy. Admin. (Dept. of Transportation) National Disability Employment Awareness Month program, in Wash., D.C.
- OFO Associate Director, FSP, gave Keynote address at NOAA's Annual Diversity and Inclusion Summit, in Silver Spring, MD.
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- OFO FSP staff presented on "Special Emphasis Program Managers" to National Transportation Safety Board, in Wash., D.C.
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- OFO staff presented on "Statutory, Regulatory, and Policy-Driven Equal Opportunity Laws Governing Compliance" for Coast Guard Senior Leaders at Defense Equal Opportunity Management Institute (DEOMI), Patrick AFB, FL.
- OFO ARP Attorney presented an EEOC Case Update, and session on Barrier Analysis for the Defense Equal Opportunity Management Institute (DEOMI) EEO Specialist's class, at Patrick AFB, FL.
- RED completed the development of a customer service survey for TOD.
- RED staff designed a customer satisfaction survey for stakeholders who make inquiries to TOD.

Quarterly Strategic Enforcement Plan Report
Office of Federal Operations
3rd and 4th Quarters FY 2018

I. Background: General FY 2018 3rd and 4th Quarters Appellate Review Program Accomplishments

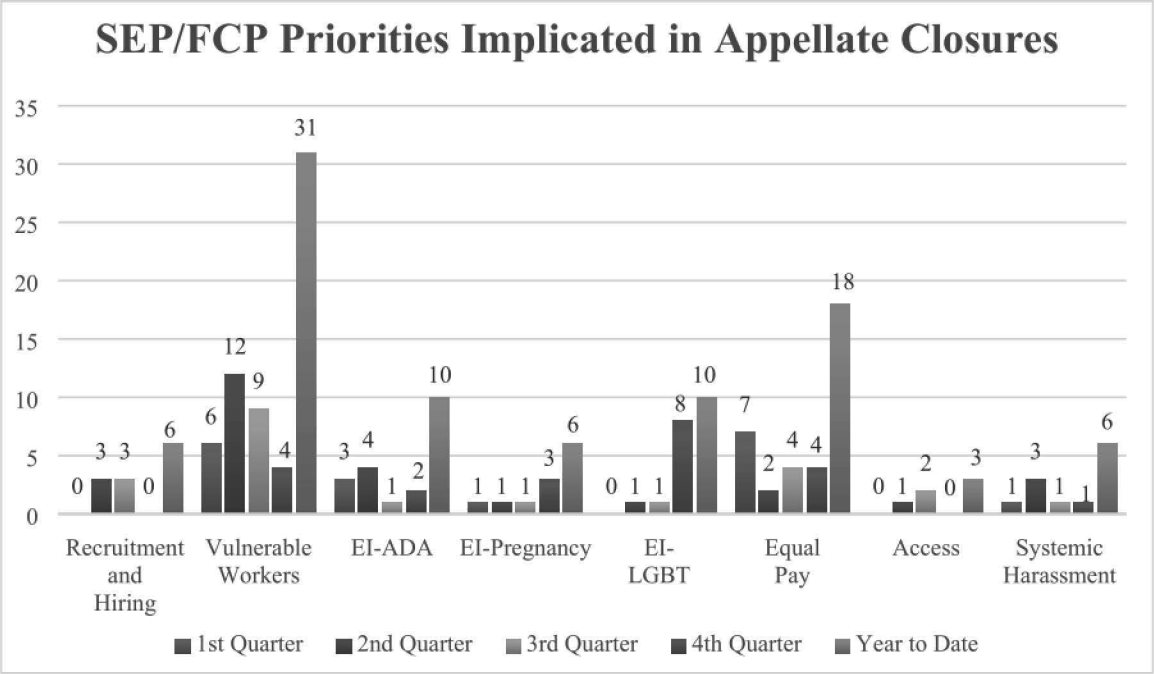
During the 3rd and 4th Quarters of FY 2018, the Office of Federal Operations (OFO) resolved 2,340 appeals, including 1,398 decisions on the merits and 850 procedural closures. Of the 850 procedural closures, 480 of them involved initial appeals under review by OFO, and we reversed 171 or 35.6% of the agency dismissals. Of the 1,398 merit decisions, OFO issued 64 findings of discrimination during the 3rd and 4th Quarters. We found discrimination on the basis of retaliation in 31 of the findings, disability in 19 of the findings, and sex (female) in 13 of the findings. The top three issues involved in the findings included reasonable accommodation (14), harassment (13), and promotion (11).

Resolution Description	1st Quarter	2nd Quarter	3rd Quarter	4th Quarter	Year to Date
Resolutions	926	1054	1,178	1,162	4,320
Merits Resolutions	408	556	749	649	2,362
[redacted] Findings	25	33	33	31	122
[redacted] Non-Findings	383	523	716	618	2,240
Procedural Resolutions (all)	420	471	377	473	1,741
Procedural Resolutions (from Initial Appeal)	248	249	190	290	977
[redacted] Affirming Dismissal (excluding denials)	135	150	120	189	594
[redacted] Reversing Dismissal	113	99	70	101	383

With regard to the categorization of the 2,340 resolutions, OFO identified 42 appeals that implicated one or more SEP/FCP priority. Section II below contains charts breaking down the composition of the individual priorities, summaries of the 42 decisions OFO attorneys categorized as implicating the SEP/FCP priorities, and summaries of the findings of discrimination made in the 3rd and 4th quarters.

II. Analysis of SEP/FCP Priority Areas

The chart below depicts the distribution of the 42 appellate decisions OFO identified as implicating an SEP/FCP category:



The numbered sections below provide more information about each of the six SEP priorities. Specifically, these sections start with a chart depicting the related FCP categories under each SEP, as well as summaries of the specific decisions under each SEP/FCP priority. In Section 7, by contrast, we provide summaries of the findings of discrimination issued during the 3rd and 4th Quarters, whether or not they implicated an SEP/FCP category.

1. ELIMINATING BARRIERS IN RECRUITMENT AND HIRING

Of the three decisions implicating this SEP Priority, two (2) implicated the FCP "business necessity" defense in response to allegations of discrimination.

Decision Summaries for this Category

Hudson-Crosby (Aurore C.), et al. v. PBGC, 0120150342 (05/18/2018) **[Repeated under Priority 6 and Broad Impact Decisions, below]** – Complainant filed an EEO complaint alleging class-wide discrimination and harassment on the bases of race, color, sex, age, and reprisal when (1) employees in the Benefits Administration and Pay Department (BAPD) were targeted to have their duties stripped down so their positions could be reclassified and downgraded, (2) the position description for BAPD Auditors was changed and written such that current BAPD Auditors would not be qualified for

positions in the new Asset Evaluation Division (AED), and (3) the announcement for Auditor positions in the AED had educational requirements that would result in the majority of the BAPD Auditors not being qualified for the position. An EEOC AJ dismissed the class complaint on the ground that it did not meet all of the prerequisites for certification, and the Agency issued a final order implementing the AJ's decision.

On appeal, OFO affirmed the denial of certification of the class complaint. OFO found that Complainant did not establish typicality because she did not establish that all of the class members have the same discriminatory bases as she has. OFO also found that Complainant did not establish commonality. There was no evidence that all of the class members have the same interests and suffered the same harm as Complainant. Complainant provided only broad, conclusory allegations of class-wide harm, and the proposed class consisted of employees at various grade levels, in various positions, and under various supervisors in various divisions. Because Complainant did not identify which class members have bases and issues similar to Complainant's, the size of the class could not be determined. Accordingly, OFO found that Complainant did not meet the numerosity requirement. Finally, OFO found that Complainant, who was represented by a coworker who was a licensed attorney and union representative, met the adequacy-of-representation requirement.

Starks (Emelda F.) and Foster (Natalya B.), et al., v. Navy, 0120121347 and 0120121348 (06/19/2018) **[Repeated under Broad Impact Cases, and Circulated Cases, below]** – In 1990, the Class Agents filed an EEO complaint alleging that the Naval Education and Training Command Consolidated Personnel Office encouraged the use of minimal areas of consideration (AOCs) in merit staffing at Newport, Rhode Island Naval Station, which had an adverse impact on the hiring of Black individuals. AOCs consist of three components: (1) geographical; (2) organizational; and (3) who may apply. Agency witnesses testified that the goal of setting AOCs was to obtain a pool of three to five qualified candidates to refer to the selecting official.

In 2000, the Commission determined that there was sufficient evidence to warrant provisional certification of the Class and remanded the matter to an AJ to define the Class. The AJ held a hearing in 2007 and heard testimony from the Class's expert witness (Expert 1) and three expert witnesses for the Agency (Expert 2, Expert 3, and Expert 4). On November 1, 2011, the AJ issued a decision finding no discrimination.

Expert 1 used a t-test to analyze the data and concluded that the proportion of Black individuals outside the AOC was greater than the proportion of Black individuals within the AOC. Expert 2 used a Fishers Exact test and found that a statistically significant result of 2.33 standard deviations. However, Expert 2 found that the adverse impact ratio was 93.7 percent, which did not raise an inference of discrimination under the EEOC's four-fifths, or 80 percent, rule. Expert 2 also found that the statistically significant disparity was limited to one job family, the FWS-4700 Maintenance Mechanic family. Expert 2 stated that once this job family was removed from the equation, no statistically significant disparity remained. Expert 3 presented labor market data.

The AJ credited the Agency's experts' reports, finding that Expert 1's report contained errors and that his testimony was not credible because he gave "brief and vague" testimony at the hearing, because he was a graduate student who had not previously published in the statistics field or been admitted as an expert before a court, and because he admitted to "moving quickly" to complete his statistical analysis. The AJ cited four specific errors made by Expert 1 in analyzing the data. The AJ found that there was

insufficient statistical or anecdotal evidence to support an inference of discrimination based on a disparate impact theory. The Agency issued a final order fully implementing the AJ's decision.

The Commission found that substantial evidence supported the AJ's conclusion that the Class did not meet its burden of establishing a prima facie case, in light of Expert 1's vague testimony and errors. With respect to the statistical disparity presented by Expert 2, the Commission found that it was not erroneous to consider subset data because Expert 3 testified that there was great variation among AOCs and that they varied according to position. Finally, the Commission noted that the AJ relied on the labor market data presented by Expert 3 in finding no discrimination, as the labor market statistics revealed a higher proportion of Black individuals such that expanding the AOCs would result in a lower percentage of Black representation. Therefore, the Class failed to establish a prima facie case of disparate impact discrimination because it did not prove with persuasive statistical evidence that the Agency's policy or practice caused a Class-wide disparate impact. Accordingly, the Commission affirmed the Agency's final order.

2. PROTECTING IMMIGRANT, MIGRANT AND OTHER VULNERABLE WORKERS

Of the thirteen (13) decisions that implicated this SEP Priority, five (9) concerned contractors, and four (4) concerned security clearances.

Decision Summaries for this Category

OuldMohamed (Rolf R.) v. State, 0120162194 (04/30/2018) – Complainant is a Language Testing Specialist at the Agency's Foreign Service Institute. He filed a complaint alleging that he was discriminated against based on his religion (Islam) when his security clearance investigation was delayed and conducted in a biased manner. Following an investigation, Complainant requested a decision without a hearing. The Agency found no discrimination. OFO affirmed. The Agency explained that the delay in adjudicating Complainant's clearance was caused by the receipt of derogatory information from more than one person implicating the Adjudicative Guidelines for Determining Eligibility for Access to Classified Information that required further review and mitigation, specifically on the factors on foreign influence and personal conduct. OFO found that Complainant did not prove this explanation was pretext to mask discrimination, or otherwise prove discrimination.

Parker (Alvaro M.) v. DOD (DCA), 0120180260 (04/05/2018) – Complainant worked for a staffing firm serving the Agency as a Material Handler at a Commissary. He alleged that he was discriminated against based on disability (ADHD) by the Agency when (1) he was suspended and thereafter terminated on November 10, 2016, and (2) he was not reasonably accommodated from distraction when it did not stop people from unnecessarily talking in areas he worked in the warehouse. The Agency dismissed the complaint for failure to state a claim because Complainant was an employee of the staffing firm, not the Agency. OFO affirmed. It found that while some common-law control factors pointed to the Agency being Complainant's joint employer, its control was insufficient to be deemed such. OFO reasoned that the power to terminate an employee is a significant factor, especially since Complainant's claim largely regarded his termination. OFO found that the record showed that the

staffing firm, after gathering facts on a Frito-Lay stocker's complaints that Complainant sexually and otherwise harassed her, made an independent decision to offer Complainant a reassignment to a different position at another Commissary, and when he declined, to terminate him. The Store Director telling the staffing firm that if it determined the Frito-Lay stocker's complaints to be true, Complainant should not work around her (meaning different shifts) did not tip the balance to joint employment.

Leszczyszyn (Venetta S.) v. Treasury (BEP), 0120180708 (04/06/2018) – During the relevant time, Complainant worked as a Tour Guide at the Agency's Bureau of Engraving and Printing facility in Washington, D.C. She was hired by Ruchman and Associates (RAI), which contracted with the Agency to provide staffing and management of the Agency's Tour and Visitor Center. Believing that she was subjected to sex discrimination when she was not selected for promotion to a Lead Tour Guide position, Complainant filed a formal complaint. The Agency dismissed the complaint for failure to state a claim, reasoning that Complainant was a contractor and lacked standing to bring an EEO complaint.

In our decision, we found that the Agency's dismissal was proper. While the Agency provided her with written materials for visitors and an ID badge, indicating a possible employer relationship, the majority of elements support the conclusion that Complainant was not an Agency employee. RAI hired Complainant and provided her with pay, benefits, and a uniform. Complainant was supervised by an RAI employee and the Project Manager (also an RAI employee) was responsible for hiring and firing Tour Guides. Further, the non-selection at issue was a decision made by RAI. Complainant herself identified RAI employees as the responsible management officials. Although Complainant argued that the Contract Office Representative (an Agency employee) negatively influenced her possibility for promotion, we found that the decision was made by RAI and the alleged remarks made by COR did not rise to the level of exhibiting sufficient control over Complainant to suggest a joint employer relationship. As a result, OFO affirmed the Agency's decision.

Sanders (Myrna S.) v. DOI (BIA), 0120161414 (04/30/2018) – The Agency contracted with Arrow Ventures Enterprises, LLC ("Arrow) to provide support to the Agency's information systems. Complainant worked as a Program Manager/Lead of Risk Management Framework Team at the Agency's Division of Information Security/Office of Information Management Technology in Reston, Virginia. Believing that she was subjected to a hostile work environment that resulted in her removal, Complainant filed a formal EEO complaint based on race and sex on November 30, 2015.

The Agency dismissed the complaint for failure to state a claim. The Agency reasoned that Complainant was not an employee and therefore lacked standing to utilize the EEO process. According to the Agency, Arrow assigned Complainant's work, established her working hours, approved her leave requests, and held the ability to hire/fire her. Further, the Agency did not pay Complainant, provide her with benefits, or withhold taxes on her behalf.

In our decision, we noted that the Agency's dismissal failed to reflect a thorough analysis of many of the factors to be considered in contractor cases. However, the record was sufficiently developed to conduct a proper analysis. The record showed that Complainant worked at an Agency facility, with Agency equipment. The Agency also provided her with an e-mail account, telephone number, and access badge. More significantly, Complainant contended that the Agency controlled her daily work. She received assignments from the Agency's Chief Information Security Officer (CISO), who also

monitored her and evaluated her performance. In fact, it was the CISO that Complainant alleged was largely responsible for the alleged hostile work environment. Complainant's removal, she alleged, was done at the Agency's request. The Commission found that Complainant's assertions were supported by the record. The Agency was found to exercise sufficient control over Complainant to qualify as her joint employer for the purposes of the EEO process.

The Agency's dismissal was reversed and the matter was remanded for further processing.

Keeler (Delphia F.) v. DOD (DCA), 0120181098 (05/16/2018) – During the relevant time, Complainant worked as a Bagger at Ord Military Community Commissary in Presidio of Monterey, California. Baggers are "self-employed licensees" who are given permission, or license, to enter the installation for the specific purpose of soliciting Commissary customers to bag and carry out their groceries in the hopes of receiving a tip.

Believing that she was "assaulted" by a fellow bagger, Complainant reported the behavior to the Commissary Store Director. Thereafter, Complainant was suspended for seven days by the Store Director, in order to "maintain safety, security, and good order." The next month, Complainant experienced another incident, she describes as "assault" by the Head Bagger, which resulted in her termination. Complainant filed a formal EEO complaint. The Agency dismissed the complaint on the grounds that Complainant was not an Agency employee.

In our decision, we found that the Agency did not exercise sufficient control over Complainant to qualify as her employer. Complainant was self-employed and exercised a high degree of independence and control in the performance of her duties. The Agency's dismissal was affirmed.

Miles (Sherman H.) v. NRC, 0120180660 (05/10/2018) – Complainant is an IT Specialist with the Agency. He filed a complaint alleging that he was discriminated against based on his race (Black), sex (male), disability (Diabetes), and reprisal for prior EEO activity when, in relevant part, on January 30, 2017, the Agency suspended his security clearance and proposed indefinitely suspending him (the clearance was required to perform his duties), and on March 16, 2017, it issued a decision sustaining the proposal. The Agency dismissed these allegations for failure to state a claim. It reasoned that the Commission does not have jurisdiction to review the substance of a security clearance determination. OFO affirmed. OFO supported the Agency's recitation of the law with legal citations. Complainant contended that he was challenging the procedures by which his security clearance was revoked, which is reviewable by the Commission, not the substance of the Agency's security clearance decision. OFO found that Complainant's contentions showed he was contesting the substance of the Agency's decision to suspend his security clearance. It also found that Complainant did not contend that others whose clearances were indefinitely suspended were permitted to continue working in their positions or were reassigned.

Arbas v. Army, 0120180868 (05/09/2018) – During the relevant time, Complainant was placed by PhyAmerica, a healthcare staffing firm, in an Art Therapist position at the Agency's Womack Army Medical Center in Fort Bragg, North Carolina. In November 2017, Complainant filed a formal EEO

complaint alleging Agency management had subjected her to a hostile work environment culminating in her termination in retaliation for complaining that she had been sexually harassed.

The Agency dismissed the formal complaint for failure to state a claim. Without any analysis, the Agency simply concluded that Complainant was not an Agency employee.

The appellate decision reversed the dismissal, reasoning the Agency has failed to meet its burden of providing evidence in support of its final decision. By contrast, Complainant contended that in the sixteen months she worked at the Agency, the Agency provided her with an office, supplies, and patients. Complainant also stated that Agency officials evaluated her performance, included her in meetings, and had her as part of the treatment team to the point where "the line between [myself] and [the Agency's] other employees was obscured." Further, she alleged that the Agency used its discretion to have her terminated from her position by PhyAmerica. In support of her contentions, Complainant provided email exchanges reflecting the Agency's control over her schedule, as well as its ability to assign her additional work. Finally, the September 29, 2017 termination letter expressly stated that her removal resulted from "a very detailed complaint" from the Agency. Based on this evidence, the Agency was found to exercise sufficient control over Complainant to qualify as her joint employer for the purposes of the EEO complaint process.

The Agency's dismissal was reversed and the matter was remanded for further processing.

Bourgeois (Willa B.) v. State, 0120162798 (06/29/2018) – Complainant, a Foreign Affairs Officer, filed two complaints alleging, in relevant part, that she was discriminated against based on her sex (female) and reprisal for prior EEO activity when (1) around January 2008, the Agency's Diplomatic Security's (DS) Professional Responsibility office forwarded its criminal report of investigation involving her to the DS Personnel Security and Suitability office, which upon receipt reviewed her for continued eligibility for a security clearance, and on February 21, 2008, as part of its review instructed her to contact the Medical Services office for an evaluation, and (2) on December 8, 2008, the Personnel Security and Suitability renewed its request that she submit to a mental evaluation with Medical Services and implied that failure to cooperate could result in the suspension of her security clearance. Following separate investigations, Complainant separately requested hearings, and an AJ consolidated the complaints. Personnel Security and Suitability forwarded information on Complainant to Medical Services, which after reviewing the information decided it wanted to do a diagnostic interview and perform psychological testing on Complainant so it could determine whether she had medical issues that might cause a significant defect in her judgment or reliability – factors relevant to continuation of the security clearance. Complainant refused to go to Medical Services, and sometime later Personnel and Security and Suitability closed its review on her and she retained her security clearance.

The AJ dismissed the issues 1 and 2 for failure to state a claim. Citing to cases and EEOC policy guidance, the AJ found that the Commission is precluded from reviewing the substance of a security clearance decision. The AJ found that the legal distinction between the initiation of a security clearance and substance of the security clearance review was inapplicable here because the Agency (a likely reference to DS) did both, and the requirement that Complainant submit to a mental health evaluation involved both the initiation of the review process and the substance of the review. The Agency implemented the AJ's decision. OFO reversed. Citing EEOC cases, OFO found that the acts of forwarding information, initiating a review, and requesting a medical examination go to process, not substance, and is reviewable by the Commission.

Drew (Jaqueline L.) v. DHS (ICE), 0120172270 (07/31/2018) – The Agency contracted with Stewart County, Georgia for the housing, detention and care of non-citizen detainees. In turn, the County contracted with a staffing firm for the full scope of detainee services from the Warden down. Complainant worked for a staffing firm serving as a detainee unit manager. She alleged discrimination based on reprisal when in 2015 Agency Inspectors 1 and 2 scrutinized her work and attempted to have her fired and she was moved to non-supervisory administrative duties. Following the investigation, an AJ dismissed the complaint for failure to state a claim because Complainant was not an employee of the Agency. The Agency's final order adopted the AJ's decision. OFO affirmed.

Detainees complained that Complainant was abusive. The staffing firm conducted independent investigations of detainee complaints, and the Agency investigated some. OFO found that the Agency did not have sufficient right to control or control over Complainant's employment to be deemed her common law joint employer. The staffing firm ran the operation at the detention center with a robust presence. Complainant reported to a deep staffing firm management structure at the facility, including her first, second and third line supervisors. The Agency's investigations were in response to detainee complaints – they did not equate to supervising Complainant's performance under the guise of oversight. While the Warden supported Complainant's claim that Inspector 1 met with him seeking to get Complainant fired, the Warden refused, and Complainant continued to work at the facility until leaving of her own accord more than a year later. OFO credited the Warden's statement that he reassigned Complainant to administrative duties because of detainee complaints and the recommendation of a staffing firm investigator that she be moved from her position pending the investigation.

Simon (Joanna G.) v. Army, 0120180957 (07/17/2018) – Complainant worked for a staffing firm serving the Agency first as Counseling Support, and then as a Test Examiner. She filed an EEO complaint alleging discrimination based on her race/color (African-American/Black), sex (female), disability, and/or reprisal for prior protected EEO activity regarding multiple matters, including harassment, denial of reasonable accommodation, constructive discharge, and not being permitted to rescind her resignation. The Agency dismissed the complaint for failure to state a claim because Complainant was an employee of the staffing firm, not the Agency. OFO reversed. It found that the Agency gathered insufficient information to allow a determination on whether the Agency had sufficient control or right to control Complainant's employment to be deemed her common law joint employer. On control factors the Agency only interviewed an Education Services Officer whose responses were cryptic and contained little information thereon. The Agency did not interview anyone else on control factors, including Complainant and onsite staffing firm supervisor(s). OFO also found that the Agency's definition of the complaint lacked specificity, appeared to miss allegations, and should not include allegations for which Complainant contended only the staffing firm was responsible. OFO ordered the Agency to gather more information on control factors, to redefine the complaint, and then accept the complaint in whole or part, or dismiss the entire complaint.

Su (Mitchell H.) v. Army, 0120181023 (07/17/2018) – Complainant was an Electronics Engineer. He alleged that the Agency discriminated against him based on his race/national origin (Asian/born in mainland China) when in February 2015, his Command suspended his security clearance without a

meaningful explanation, and it took 13 months for the Agency's Department of Defense Central Adjudication Facility (DoD CAF) to arrive at a decision to revoke his clearance and issue its Statement of Reasons (SoR). The Agency investigated the complaint, and Complainant did not request a hearing. The Agency then issued a FAD finding no discrimination. OFO affirmed. It found that it was not uncommon for a person whose clearance is suspended by his command not to be informed of the reasons, especially when they are classified (which they were). On the delay by DoD CAF, OFO credited statements that the SoR reflected a very complex process that required cross checking and the range of time it takes for DoD CAF to issue an SoR is 6 to 24 months – Complainant's took 13 months.

Wallace (Teddy D.) v. DOD (DCA), 0120181409 (07/18/2018) – During the relevant time, Complainant was a Bagger at the Joint Base Myer-Henderson Hall Commissary in Arlington, Virginia. Baggers are "self-employed licensees" who are given permission to enter the base for the specific purpose of soliciting Commissary customers to bag and carry out their groceries in the hopes of receiving a tip. Believing that his termination was discriminatory, Complainant filed a formal complaint based on race, national, origin, color, disability and age. The Agency dismissed the complaint on the grounds that Complainant was not an Agency employee. On appeal, the decision affirmed the Agency's dismissal.

Noting that the Agency did not provide Complainant with pay, benefits or leave, nor set his schedule, supervise him, or evaluate his performance, we found that the Agency did not exert sufficient control over Complainant's position to qualify as a joint employer for EEO purposes. Further, we noted that on several recent occasions the Commission had already considered whether Baggers were de facto employees and determined that they are not.

Paul (Brenton W.) v. DOJ (USMS), 0120182156 (09/12/2018) – Complainant worked for a staffing firm serving the Agency as a Court Security Officer. He alleged that he was subjected to a hostile work environment based on his race (Black) and reprisal when he was harassed, demoted, and was advised that he could not transfer to another federal court without taking a cut in hours, pay and seniority. In its FAD, the Agency conceded that it jointly employed Complainant (under common law) with his staffing firm. The Agency dismissed the complaint for failure to state a claim because none of the alleged discriminatory actions were taken by an Agency official, it had no reason to know about the harassing behavior of staffing firm supervisors and employees, and thus was not liable. OFO reversed.

OFO found that that where it is alleged that the staffing firm engaged in discrimination and an Agency that is a joint employer knew or should have known about the discrimination and failed to take prompt corrective action within its control, the Agency may also be liable for the discrimination. OFO found that the Agency's contention that it did not know of the alleged hostile work environment went to the merits of the complaint, something which must be investigated. Complainant contended that he informed Agency staff that he was being harassed on the job by a staffing firm supervisor and co-worker.

3. ADDRESSING EMERGING AND DEVELOPING ISSUES

Of the fourteen (14) decisions identified under this SEP Priority during the 3rd and 4th Quarters, one (1) concerned both FCP LGBT coverage, and post-ADAAA reasonable accommodation, four (4) concerned pregnancy accommodation, three (3) concerned the FCP LGBT coverage, and two (2) concerned the FCP post-ADAAA reasonable accommodation.

Decision Summaries for this Category

Jacquin (Belia A.) v. USPS, 0120170822 (04/20/2018) – Complainant worked as a Homeland Security Coordinator at the Agency's Inspection Services office in Macon, Georgia. In May of 2008, Complainant advised her supervisor that her mother was having surgery, and she requested to work from her parents' home from June 3 to June 6 to care for her mother and father. She was permitted to identify Agency locations that she could work out of which would make it easier for her to access her parents during her mom's recovery. On August 17, 2008, Complainant was hospitalized after attempting suicide. After her meeting in preparation for her return to work, she noticed the reaction of others who saw her exiting the building. Complainant assumed that these reactions were due to other employee's knowledge of her suicide attempt because her medical record had been shared.

On March 26, 2009, Complainant filed a formal complaint alleging discrimination and harassment on the bases of race, sex, age, disability, sexual orientation and reprisal for prior EEO activity when she was subjected to a series of incidents including: denial of an alternate worksite and schedule, denial of access to agency databases, and sharing of her private medical information. After the investigation, the Agency filed a motion for summary judgment. The AJ subsequently issued a decision granting the Agency's Motion, and which the Agency subsequently implemented. Complainant appealed, and on February 11, 2015, OFO issued a decision vacating the Agency's final action, finding that summary judgment was improper and remanded the matter back to the AJ for a hearing. A hearing was held, and the AJ issued a decision finding that Complainant failed to establish discrimination as alleged. The Agency subsequently issued a final order adopting the AJ's finding that Complainant did not establish that the Agency subjected her to discrimination as alleged.

The appellate decision affirmed the AJ's decision, finding that Complainant was unable to establish a prima facie case of discrimination under any protected categories. Specifically, while not permitted to work from her parents' home, Complainant was permitted to work from a location that allowed her to readily access her parents. Complainant also admitted that she was effectively accommodated. The appellate decision concluded that several of Complainant's other allegations were simply not supported by the record. The Commission reasoned that the Agency actions complained of were not based on any discriminatory animus, or taken because of Complainant's prior EEO activity, and that a finding of a hostile work environment was precluded by this determination.

Wright (Dollie T.) v. USPS (Great Lakes Area), 0120161743 (06/14/2018) – Complainant worked as a probationary Rural Carrier Associate. In May 2015, Complainant informed her supervisor (S1) that she was pregnant. On July 15, 2015, Complainant provided medical documentation that indicated that she had hyperemesis gravidarum and could not lift, push, or pull more than 10 pounds and that she could only drive the truck for two hours per day. On July 16, 2015, S1 informed Complainant that there was

no productive work available within her medical restrictions. On August 7, 2015, S1 terminated Complainant for unavailability during her probationary period. Complainant filed a complaint alleging discrimination based on sex (female/pregnancy) and disability (complications of pregnancy) when she was not provided work within her restrictions and when she was terminated. The Agency only accepted sex as a basis and issued a final decision finding no discrimination.

The Commission found that although the framework for pregnancy discrimination was solidified in Young v. United Parcel Service, 575 U.S. ___, 135 S.Ct. 1338 (2015) prior to the filing of Complainant's complaint, the Agency failed to investigate and analyze her complaint using this framework. We also found that the Agency erred in not accepting Complainant's disability claim for investigation. OFO vacated the Agency's final decision and remanded the matter for a supplemental investigation of Complainant's disability discrimination claim and her pregnancy discrimination claim.

Koskovich (Damion M.) v. Treasury (IRS), 0120150049 (07/192018) – Complainant identified his sexual orientation as homosexual. Complainant filed an EEO complaint, alleging, among other issues, that he was subjected to a hostile work environment based on sexual orientation when he overheard his supervisor say about him, "He is nuts! Well, you know he doesn't like girls." His supervisor denied making the statement, and there were no witnesses to corroborate that the statement was made as alleged. The Agency issued a final decision finding no discrimination. On appeal, we noted that Complainant did not request a hearing at which credibility could be assessed by an AJ, and the Commission found that the preponderance of the evidence in the record did not establish that the supervisor made the comment, so Complainant failed to establish that he was subjected to unlawful harassment.

Mantie (Aldo B.) v. EPA, 0120151961 (07/19/2018) – Complainant is a White, Native American gay male with HIV. Complainant had previously worked as an attorney but closed his practice in 2005 due to an HIV-related illness. Complainant filed an EEO complaint while working in the private sector in 2007. At the time of his complaint, Complainant was working as a GS-13 Human Resources Specialist for another agency and applied for a GS-14 Human Resources Director position. Complainant interviewed for the position by phone, and the selecting official (SO) indicated that, because Complainant's first-round interview was the strongest, he immediately contacted his references and scheduled a second interview. Complainant averred that one of his references told SO that he was gay.

According to SO, Complainant performed well in the second interview, and he was considering hiring Complainant for a vacancy in the Office of Regional Counsel because of his legal background. SO contacted the Florida Bar and learned that Complainant had been subjected to a disciplinary resignation that was tantamount to disbarment. SO also contacted Complainant's private sector employer, who confirmed Complainant's dates of employment but would not provide additional information. SO hired another candidate for the Human Resources because he had glowing references from a 30-year military career, whereas Complainant had been forced to resign from the Florida Bar, and his private sector employer could not provide substantive information. According to Complainant, SO told him over the phone that he selected the other candidate because he was a "military man," and SO also said that one of Complainant's references mentioned that he was gay. SO stated that he referenced the selectee's military background as evidence of his qualifications.

Complainant filed a EEO complaint based on race, sex, disability, and reprisal. On appeal, the Commission found that the Agency provided legitimate, nondiscriminatory reasons for not selecting Complainant. Complainant alleged that SO's comment that the selectee was a "military man" was pretext for sexual orientation discrimination because the stereotypical military man is a "testosterone-driven" or "alpha" male, "the polar opposite" of a stereotypical gay man. Noting that Complainant failed to request a hearing at which credibility determinations could be made, we found that Complainant failed to establish pretext because the preponderance of the evidence in the record did not establish that SO referenced his sexual orientation when discussing his nonselection and because SO mentioned the selectee's military career as evidence of his superior qualifications.

Hollansworth (Eric S.) v. DHS (TSA), 0120152640 (07/19/2018) – Complainant worked as a Federal Air Marshall (FAM), at the Agency's Tampa Resident in Charge Office. He was on a Visible Intermodal Prevention and Response (VIPR) assignment, along with an Assistant Federal Security Director – Law Enforcement (AFSD-LE). On April 26, 2014, AFSD-LE stated that Complainant, and two other FAMs (CW1 and CW2), were "all whores and sluts for chasing the high locality money of San Francisco," and that they "could all get their dick sucked by all the gays out there." Complainant reported the incident to his first line supervisor (S1), who then reported the incident to Complainant's second line supervisor, the Acting Special Agent in Charge (ASAC).

ASAC instructed S1 to ensure that the parties did not work together, and to prevent any reoccurrences. ASAC also met with AFSD-LE, and instructed him not contact to Complainant. On May 6, 2014, AFSD-LE forwarded an email to Complainant, CW1, and CW2, praising the team for a job well done. ASAC instructed AFSD-LE to not have any contact with the three, and issued him a written cease and desist order, with instructions to filter emails though the Supervisory FAM in Tampa.

Complainant filed an EEO complaint alleging that he was subjected to harassment based on his sex, and sexual orientation. Complainant requested a hearing with an EEOC AJ, but his request was dismissed for failing to proceed with a scheduled Pre-Hearing Conference. The AJ remanded the matter back to the Agency to issue a final decision. The Agency found that Complainant had not established that he was subjected to harassment because the offensive incident was isolated, and not severe to constitute a hostile work environment. Additionally, since the Agency acted quickly to remedy the harassment, Complainant had not shown that the Agency subjected him to discrimination as alleged.

Complainant filed the instant appeal arguing that he was wrongfully denied a hearing, and that the harassing conduct was severe. With regards to the dismissed hearing, the appellate decision found that the AJ did not abuse his discretion because Complainant had not provided adequate justification for his non-compliance with the Initial Conference Order. For the harassment claim, the appellate decision found that the preponderance of the evidence supports the Agency's final decision. Specifically, the one comment related to Complainant's sex was not severe or pervasive enough to create an intimidating, hostile, or offensive work environment. Additionally, the email AFSD-LE sent was not objectionable or hostile to Complainant. Accordingly, the appellate decision affirmed the Agency's final decision finding that Complainant had not shown that he was subjected to a hostile work environment based on his sex or sexual orientation.

Gnahoua (Stefan C.) v. DOC, 0120170040 (07/13/2018) – Complainant worked as a Patent Examiner at the U.S. Patent and Trademark Office in Alexandria, Virginia. Complainant alleged discrimination on the bases of his race (African American), national origin (not specified), sex (male, sexual orientation), and age (over 40), when he was removed during his probationary period on November 20, 2015.

During the EEO investigation, the Agency attempted to contact Complainant on at least five occasions to obtain an affidavit, but he did not respond. After receiving a copy of his report of investigation, Complainant did not request a hearing, and the Agency issued a final decision. The Agency found that Complainant's performance was below the fully successful level, and had not improved with mentoring and counseling. The Agency further noted that Complainant had exceeded the Agency's bandwidth limit, violating its policy on personal use of the internet. The Agency concluded that Complainant had not shown that the Agency subjected him to discrimination as alleged.

Complainant filed the instant appeal, but did not provide any arguments in support of his appeal. The appellate decision found that the preponderance of the evidence in the record supports the Agency's legitimate, nondiscriminatory reasons for its actions. Further, Complainant did not participate in the instant complaint, and did not dispute the evidence or testimony. Accordingly, the appellate decision affirmed the Agency's final decision finding that Complainant had not shown that he was discriminated against based on his race, national origin, sex, or age, when he was removed from the Agency.

Ortiz (Coralee H.) v. SSA, 0120170952 (07/13/2018) – Complainant worked as Claims Representative in Leesburg, Florida. She alleged that she was discriminated against based on race (Hispanic), national origin (Hispanic/Puerto Rican), sex (female/sexual orientation), age (54), and in reprisal for prior EEO activity, when on February 2, 2015, she was placed on an Opportunity to Perform Successfully (OPS) Plan. Complainant initially requested a hearing, but later withdrew her request. The Agency issued a final decision finding that Complainant had not shown that the Agency discriminated against her as alleged.

Complainant filed the instant appeal and contends that she should not have been placed on the OPS plan because she always received satisfactory performance appraisals. She further alleges that she was subjected to heightened performance standards, in comparison to other employees. The appellate decision found that the Agency articulated legitimate, nondiscriminatory reasons for placing Complainant on an OPS plan. Specifically, Complainant had performance issues in meeting performance goals, as compared to other employees. For example, Complainant completed twelve cases from October 24, 2014, through January 16, 2015, while the average was 37 cases.

Complainant argued that other employees were treated more favorably in terms of their performance standards, but this was not supported by the record. Accordingly, Complainant did not demonstrate that the Agency's legitimate, nondiscriminatory reasons were pretext for discrimination. The appellate decision affirmed the Agency's final decision finding that Complainant was not discriminated against based on race, national origin, sex, age, or in reprisal for her EEO activity.

Foster (Lydia W.) v. USPS, 0120162131 (07/20/2018) – Complainant, a full-time City Carrier, alleged that she was subjected to harassment, based on her race and physical and mental disability, when, among other claims, she was not provided with a reasonable accommodation. She identified physical

restrictions and alleged that she requested that she be allowed to wear different work pants while pregnant, serve as a temporary supervisor in an open position, and that she be provided with an ergonomic chair,

The appellate decision assumed that Complainant was an individual with a disability. However, it concluded that Complainant had not shown, and the record did not support, that she was able to perform the essential functions of her work as a full-time letter carrier, with or without an accommodation. The decision noted that Complainant had submitted several Forms CA-17, Department of Labor's Duty Status Reports concerning a work injury; that the Agency had offered her several modified assignments; and that her supervisor had gone to great lengths to make sure offers were within her medical restrictions.

Complainant alleged that she requested that she be allowed to wear different work pants while she was pregnant as an accommodation. The appellate decision indicated that although the EEOC AJ had informed Complainant that she could add sex and or pregnancy as a basis for her claim, it was not apparent that she did so. However, it treated the claim as discrimination based on sex, noting that the Pregnancy Discrimination Act of 1978 prohibited sex discrimination on the basis of pregnancy. The decision found that the record did not support the claim that Complainant made a request to use other work pants as an accommodation; when any such request was made; and when Agency officials were aware that she was pregnant. There was also no evidence that Agency maternity uniforms were not available for use by Complainant as a pregnant employee without her having to first request use of the Agency's uniforms or why she should have been excused from wearing a maternity uniform when the Agency had maternity uniforms available. Complainant had also not provided evidence that similarly situated letter carriers were allowed to work without a uniform and she was not allowed to do so.

Regarding her request for an ergonomic chair, Complainant provided no evidence that she had requested one and the medical records before the Commission did not address or mention the need for an ergonomic chair. The decision also noted that Complainant chose not to go to the Agency's Reasonable Accommodations Committee where the parties could have engaged in the interactive reasonable accommodation process.

With respect to Complainant's request that she work as a supervisor as an accommodation, the decision determined that the Agency was not required to place Complainant in a higher position or to reassign her to another position as an accommodation. It found that Complainant had not shown that she could perform the essential functions of work as a supervisor. She did not meet the physical requirements for the position because her restrictions limited her from working more than three hours a day and virtually no walking.

Pretlow (Jackie C.) v. GSA, 0120162489 (08/09/2018) – Complainant, a Contract Specialist, GS-1102-12, with the Agency's Public Buildings Service, Office of the Regional Commissioner, Acquisition Management Division in Brooklyn, New York, applied for a Supervisory Contract Specialist position. Complainant was interviewed telephonically by a three-person interview panel. Following the interviews, the interview panel referred its top three candidates to the selection panel for additional interviews and consideration. The interview panel did not rate Complainant as one of the top three candidates, and she was not referred for further consideration. Complainant filed a formal complaint alleging that the Agency discriminated against her on the bases of race (African-American), sex (female, sexual orientation), color (Black), and age (55) when on September 21, 2015, she was not selected for the

position of Supervisory Contract Specialist, GS-1102-13, under Vacancy Announcement No. 1502111ABMP.

Following an investigation, Complainant requested a final agency decision (FAD). In the FAD, the Agency determined that management had articulated legitimate, nondiscriminatory reasons for its actions. Specifically, the panel did not recommend Complainant for further consideration because her interview question responses did not provide an impression of experiential or technical preparedness for the position. Further, the panel's consensus opinion was that there were at least three other candidates whose answers provided a stronger impression as to their readiness to take on the position. The Agency concluded that Complainant failed to rebut management's reasons for her non-selection as pretextual. As a result, the Agency found that Complainant had not been subjected to discrimination as alleged.

On appeal, Complainant argued that the interview panelists conspired to pre-select the eventual selectee by using "excessively subjective and demonstrably biased evaluations." The Commission found that Complainant presented no evidence rebutting the interview panelists' explanation that the top three candidates referred for consideration demonstrated during their interviews that they were the best qualified candidates. Further, even if preselection had occurred as Complainant alleged, the Commission concluded that Complainant presented no persuasive evidence that her protected classes were a factor in any of the Agency's actions. As a result, the Commission found that Complainant failed to establish that she was subjected to discrimination as alleged.

Wehry (Ricky S.) v. DOJ (BOP), 0120162536 (08/09/2018) – Complainant, a Physician Assistant, GS-0603-11, at the Agency's Federal Correctional Institution-Schuylkill facility in Minersville, Pennsylvania, alleged that his co-workers subjected him to slurs and offensive comments including, "Just don't sleep with the inmates!" Complainant stated that he felt unsafe with his co-workers based on their conduct and management's implicit approval. Complainant further claimed that he feared that the inmates would learn of his sexual orientation from his co-workers and felt he was in danger of sexual assault or physical harm by the inmates. Additionally, Complainant alleged that correctional officers delayed releasing him through a secure entryway upon leaving the segregation unit with the intent to "delay, annoy, harass, frighten, and humiliate" him. Complainant subsequently resigned.

Complainant filed a formal complaint alleging that the Agency discriminated against him and subjected him to a hostile work environment on the basis of sex (male, sexual orientation) when on July 3, 2014, as a result of being subjected to sexually inappropriate and offensive comments, he submitted his resignation.

Following the investigation, the Agency subsequently issued a final agency decision (FAD). In the FAD, the Agency determined that there was no corroborating evidence supporting Complainant's allegations. Complainant alleged that his co-workers harassed him with offensive and derogatory comments based on his sexual orientation; however, none of the witnesses nor management officials heard any of the comments alleged. In addition, several witnesses stated they were not aware of Complainant's sexual orientation. In the FAD, the Agency determined that the alleged incidents were insufficiently severe or pervasive to establish a hostile work environment and that there was no evidence that the conduct at issue was based on Complainant's protected classes. The Agency concluded that Complainant had not been subjected to a discriminatory hostile work environment.

Furthermore, the Agency found that Complainant's voluntary resignation did not constitute a constructive discharge.

On appeal, the Commission found that Complainant failed to show that the alleged conduct actually occurred, as he failed to produce any corroborating evidence demonstrating that he was subjected to any inappropriate conduct. Even assuming that Complainant established that the incidents occurred as alleged, there was no evidence that Complainant reported the conduct to any management official prior to his resignation. Thus, the Commission found that Complainant had not demonstrated that he was subjected to a discriminatory hostile work environment as alleged. Additionally, as Complainant failed to show that the Agency's actions were discriminatory, he could not establish the necessary elements to prove constructive discharge.

Quamina (Cher B.) v. SSA, 0120172510 (09/20/2018) – Complainant, an IT Specialist, GS-12, in the Quality Assurance Systems Branch, Office of Applications and SSI Systems, filed a formal complaint alleging discrimination based upon disability (mental - anxiety; panic and major depressive disorders) and reprisal (prior EEO activity) based upon poor performance reviews, discipline and failure to accommodate (reassignment) issues.

Following an investigation, Complainant requested a hearing before an EEOC Administrative Judge (AJ). The AJ held a hearing and subsequently issued a decision in favor of the Agency. The Agency issued its final order adopting the AJ's conclusion that Complainant failed to prove discrimination as alleged.

In the Commission's appellate decision, the Commission found that substantial evidence supported the AJ's decision which concluded that Complainant was not credible and that the Agency's actions were "warranted and reasonable responses to Complainant's performance, insubordination and behavior issues." With respect to Complainant's reasonable accommodation claims, the AJ appropriately determined that Complainant was not qualified for her position or any other position with the Agency.

Chacko (Sharonda M.) v. USPS, 0120180910 (09/27/2018) – Complainant, an Asian and Indian female, returned to work from maternity leave on December 9, 2013, and began a detail in In-Plant Support that lasted until May 3, 2014. From December 9, 2013, to May 28, 2014, Complainant used the In-Plant Support Conference Room to express breast milk. On May 15, 2014, the Acting In-Plant Support Manager (S1) noticed Complainant near the conference room and asked Complainant why she was there. Complainant told her that she was still using the space to pump. On May 29, 2014, S1 removed Complainant's access to the area because she no longer worked in In-Plant Support. Complainant alleged that a Caucasian coworker of European descent who did not work in In-Plant Support (C1) retained access to the area. Complainant stated that, from May 29 to June 12, 2014, S1 told Complainant to use the bathroom to pump breast milk. According to Complainant, the union repeatedly asked S1 and other managers for a more private and sanitary place for Complainant to pump. S1 averred that, when she learned that Complainant needed a private space, she arranged for Complainant to use an alternate room. Complainant's first-level supervisor (S3) stated that Complainant was provided with a private, sanitary room "immediately" after asking. On June 12, 2014, S1 permitted Complainant to start using the supervisor's locker room for expressing breast milk. Complainant alleged that a Caucasian

coworker of European descent (C2) was always provided with a sanitary locked room for pumping breast milk. S1 stated that C2 worked in In-Plant Support and therefore retained access to this area.

Complainant filed an EEO complaint alleging, in part, that she was discriminated against based on race, national origin, and sex when her access to the conference room she was using to pump breast milk was taken away. Complainant requested a hearing, and the AJ granted the Agency's motion for summary judgment. The AJ found that Complainant failed to establish a prima facie case of disparate treatment because she did not have any valid comparators and also found that Complainant failed to rebut the Agency's legitimate, nondiscriminatory reason for removing access to the In-Plant Support area. On appeal, the Commission found that the AJ should have analyzed Complainant's claim as a failure to accommodate her pregnancy-related condition, lactation. The Commission stated that the record required development regarding the delay in providing a space other than the restroom and that the AJ should assess the credibility of S1 and S3. We also found that the record required further development as to whether the Agency accommodates other employees for medical conditions that require accommodation with private spaces other than the restroom. The record also required further development of whether Complainant's access to In-Plant Support had to be removed, in light of Complainant's assertion that C1 retained access and the fact that there was a 26-day delay in removing Complainant's access to the area. The Commission vacated the Agency's final order and remanded the matter for a hearing.

Noys (Jarvis R.) v. DHS (TSA), 0120172819 (09/21/2018) – Complainant was employed by the Agency as a Transportation Security Officer, SV-1802 (E-Band), at Chicago Midway International Airport in Chicago, Illinois. Complainant filed an EEO complaint alleging discrimination by the Agency on the basis of disability when his request to be assigned a split shift as a reasonable accommodation was denied. The EEOC AJ assigned to the case granted the Agency's motion for summary judgment on the ground that Complainant was not a qualified individual with a disability under Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. The Agency's final order fully implemented the AJ decision.

On appeal, the Commission affirmed the Agency's final order on the ground that Complainant failed to show that a genuine issue of material fact requiring a hearing existed.

Dukes (Joanna V.) v. VA, 0120170771 (09/18/2018) – Complainant worked as a Pharmacy Technician, GS-6, at the Agency's Medical Center in Durham, North Carolina. Shortly after Complainant began her employment with the Agency, Complainant notified management of her pregnancy. After receiving Complainant's request for accommodation, management assigned Complainant to the Unit Dose Section of the pharmacy where she only performed seated duties with no patient interactions. Complainant also requested a hardship transfer to Atlanta, Georgia where her family lived, but management stated there was no formal process for assisting employees with hardship transfers. Complainant was subsequently placed on bed rest by her doctor for the remainder of her pregnancy, but she had exhausted all of her sick leave. Management denied Complainant's request for advanced sick leave and placed her in a Leave without Pay (LWOP) status. As a result, Complainant applied for the Agency's Voluntary Leave Transfer Program (VLTP), but did not receive any leave under the program. However, an HR Specialist averred that Complainant's VLTP request was received and

forwarded to the Agency's payroll office. Thereafter, at Complainant's request, she was eventually transferred to another position at the Agency's Atlanta, Georgia Medical Center.

Complainant subsequently filed an EEO complaint, alleging discrimination based on her sex (pregnancy) when she was subjected to disparate treatment and denied accommodation. Following its investigation, after Complainant withdrew her hearing request, the Agency issued its final decision, finding no discrimination as alleged. On appeal, we found that Complainant did not establish that she was denied accommodation, given that she was assigned to a seated position and was liberally allowed to take leave whenever she wanted. We further found that Complainant did not show that the Agency's legitimate, nondiscriminatory reasons were a pretext for discrimination. In so finding, we noted Complainant was only given LWOP when she exhausted all her sick and annual leave, and she received a position in Atlanta as she requested. We lastly found that Complainant did not establish a prima face case of discrimination based on sex with respect to her claim that she did not receive any leave under the VLTP.

Ray (Ardell B.) v. USPS, 0120160357 (09/06/2018) **[Also included under Priority 4, below]** – Complainant, a Postal Inspector, ISLE-10, Step 2, with the Agency's San Francisco Inspection Service Division in Richmond, California, filed a formal complaint alleging that the Agency discriminated against her on the bases of race (African-American), sex (female and sex stereotyping due to sexual orientation), color (Light Brown), and in reprisal for prior protected EEO activity when: (1) she was paid at a lower rate than most of the male Postal Inspectors who trained with her at the academy; (2) she was removed effective December 26, 2012; (3) in early October 2012, shortly after being posted in California, her Team Leader (TL) disclosed her sexual in the presence of several staff members; and (4) in December 14, 2012, TL directed her to take a male co-worker (CW-1) to her home to check her Verizon wireless coverage there, and this suggested to her that she was to perform sexual favors for CW-1.

Following an investigation, Complainant requested a final agency decision. In the decision, the Agency determined that Complainant had not been subjected to discrimination or reprisal as alleged.

In the Commission's appellate decision, the Commission affirmed the Agency's final decision finding that the Agency had articulated legitimate, nondiscriminatory reasons for its actions of which Complainant had not rebutted as pretextual. Specifically, as to claim (1), the Program Specialist acknowledged that he set the incoming Postal Inspectors' pay. He explained that he calculated their pay by reviewing the pay stubs from each of the candidates, entering the candidates' current pay information into the worksheet, adding in the applicable locality pay and Law Enforcement Availability Premium, and calculating the figures based on the information entered. PS stated that Complainant's submitted pay stubs indicated that her most recent prior salary was below the minimum basic salary for an entry level Postal Inspector ISLE-10 Step 1, so her basic salary was increased to match that level. Complainant was then given credit for her advanced degree and then was increased to an ISLE 10 Step 2, plus locality pay. The Commission found that Complainant's Equal Pay Act claim regarding this issue failed as well as the Agency met its burden of establishing its affirmative defense that the pay differentials in this case occurred because of a factor other than sex (i.e. Complainant's salary was set based on information received regarding her most recent salary history). Regarding claim (2), Complainant was removed based on numerous instances of performance and conduct issues. With respect to her non-sexual harassment hostile work environment claim, the

Commission found that there was no corroborating evidence that TL or any other official disclosed Complainant's sexual orientation at any time. Finally, as to Complainant's sexual harassment claim, the Commission concluded that Complainant failed to establish that she was subjected to unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature as there was no evidence to support Complainant's belief that TL suggested that she perform sexual favors for CW-1.

4. ENFORCING EQUAL PAY LAWS

Of the four (8) decisions that implicated this SEP Priority, none concerned an associated FCP.

Decision Summaries for this Category

Herman (Belia B.) v. USPS, 0120160469 (04/26/2018) – Complainant, a Casual Tractor Trailer Operator, filed an EEO complaint alleging that she was discriminated against on the basis of sex (female) when she became aware that she was not paid as much as another male employee in the same position. After Complainant requested a hearing, an EEOC Administrative Judge issued a decision without a hearing finding no discrimination. The Agency then issued a decision finding no discrimination. Complainant appealed. OFO affirmed the Agency's finding of no discrimination. Regarding Complainant's Equal Pay Act claim, OFO found that the Agency established the affirmative defense of justifying the pay difference due to a factor other than sex. OFO found that the Agency showed that the comparative employee was hired at a different time (when salaries were higher) and under a different posting than Complainant. OFO also found no disparate treatment. OFO found that the wages were lowered because of the economic climate.

Tanner (Alycia R.) v. DHS, 0120162020 (04/18/2018) – Complainant, a GS-9 Personnel Security Specialist, filed an EEO complaint alleging that she was discriminated against on the bases of race (African-American), sex (female), color (black), and age when she became aware that she was not paid as much as other Personnel Security Specialists. After Complainant requested a hearing and then withdrew the request, the Agency issued a decision finding no discrimination. Complainant appealed and OFO vacated the Agency's decision. In EEOC Appeal No. 0120101776 (September 20, 2011), OFO found that the Agency failed to investigate Complainant's Equal Pay Act (EPA) claim. Subsequently, the Agency issued another decision finding no discrimination. Complainant filed an appeal from that decision. OFO affirmed the Agency's finding of no discrimination for the entire complaint. Regarding Complainant's EPA claim, OFO found that Complainant did not perform substantially equal work to the comparative male employee and that the comparative employee had numerous additional duties that Complainant did not have.

Mazurek (Berry K.) v. VA, 0120180967 (05/25/2018) – Complainant, a Physician Assistant, VN-0603 Chief Grade, Step 10, filed an EEO complaint alleging that he was discriminated against on the basis of sex (male) when he became aware that Physician Assistants were not paid as much as Nurse Practitioners. After Complainant requested a hearing, an EEOC Administrative Judge issued a

decision without a hearing finding no discrimination. The Agency then issued a decision finding no discrimination. Complainant appealed. OFO affirmed the Agency's finding of no discrimination. Regarding Complainant's Equal Pay Act claim, OFO found that the Agency established the affirmative defense of justifying the pay difference due to a factor other than sex. OFO found that the Agency showed that it was required by statute to have different pay scales for Physician Assistants and Nurse Practitioners. The Agency showed that it had to increase Nurse Practitioner pay in order to achieve parity with private sector employees and to meet a need for Nurse Practitioners at the Medical Center. The Agency not have similar difficulty in attracting, hiring, or retaining Physician Assistants and did not have unfilled Physician Assistant vacancies. OFO also found no evidence of retaliation.

Harris-Reid (Karin C.) v. Ed., 0120161208 (06/15/2018) – Complainant was a Loan Analyst, GS-11, at the Agency's Office of Federal Student Aid-Borrower Services facility in Atlanta, Georgia. While the GS-11 level was the top of the Agency's Career Ladder Loan Analyst position, the Agency created and advertised GS-12 Loan Analyst positions. After Complainant applied for the GS-12 position several times, and was not promoted to one of the higher-grade positions, she filed an EEO complaint. In her formal complaint, Complainant alleged that she had been discriminated against on the bases of sex and reprisal because she was receiving significantly less pay than male co-workers performing substantially similar work. After the investigation, Complainant requested a hearing before an EEOC AJ. The hearing was held and the AJ concluded that Complainant did not prove that the Agency subjected her to unlawful discrimination.

The AJ determined that, assuming for the purpose of argument, Complainant established a prima facie case of a violation of the Equal Pay Act, the Agency had an affirmative defense under the merit system exception. Specifically, the male GS-12 comparators were successfully promoted to the GS-12 level, hence their higher pay grade. While Complainant applied for a promotion to the GS-12 level, she was not successful. The record indicated that there were other female applicants to the GS-12 level who were successful. Moreover, while the GS-11 and GS-12 positions shared significant similarities, the GS-12 position had a "comprehensive knowledge" expectation, as opposed to the "working knowledge" expectation of the GS-11 position. Additionally, the GS-12 positions entailed an expectation that the Analyst would serve as a team/project leader, responsible for scheduling, coaching, mentoring and training staff.

Complainant's reprisal claim was found lacking because she failed to show that she was subjected to an adverse action, subsequent to the alleged discriminatory act. In this regard, Complainant was paid at the GS-11 level before she filed her complaint, and continued to be paid at the GS-11 level after she filed her complaint. Also, she made no allegation that she was being paid less than her male, GS-11 counterparts.

The Agency's subsequently issued final order, adopting the AJ's decision, was appealed to the Commission. The record was thoroughly reviewed and the determination was made that substantial evidence supported the AJ's finding of no discrimination. The appellate decision affirmed the Agency's final order.

Jones (Soila R.) v. FDIC, 0120162324 (09/12/2018) – Complainant, an Accountant, CG-12, filed an EEO complaint alleging that she was discriminated against on the bases of sex (female), race (African-

American), and reprisal for protected EEO activity, when she became aware that beginning in 2008, she has performed the duties and responsibilities of a CG-13 Senior Accountant, but has remained in the position and pay grade of a CG-12 Accountant. After Complainant requested a hearing, an EEOC AJ issued a decision without a hearing finding no discrimination. The Agency then issued a decision finding no discrimination. Complainant appealed. OFO affirmed the Agency's finding of no discrimination. On appeal, Complainant only challenged the finding no Equal Pay Act violation. Regarding Complainant's Equal Pay Act claim, OFO found that Complainant failed to establish a prima facie case. OFO found that Complainant failed to show that she performed work that was substantially equal to a male comparative employee who earned more pay than Complainant earned.

Dunams (Daniell F.) v. HHS, 0120162561 (09/13/2018) – Complainant, a GS-13 Health Scientist, filed an EEO complaint alleging that she was discriminated against on the bases of sex (female) and in reprisal for protected EEO activity, when a person was placed over her in authority, she was denied access to some meetings, she was not allowed on some site visits, she was given a critical performance review and non-Outstanding appraisal, and she was not provided the same pay as her male coworkers. After Complainant requested a hearing, an EEOC Administrative Judge held a hearing and then issued a decision finding no discrimination. The Agency then issued a decision finding no discrimination. Complainant appealed. OFO affirmed the Agency's finding of no discrimination. OFO found that there was substantial evidence to support the AJ's finding that the Agency provided legitimate, nondiscriminatory reasons for its actions which Complainant failed to show were a pretext for discrimination. Regarding Complainant's Equal Pay Act claim, OFO found that Complainant failed to establish a prima facie case of discrimination. OFO found that Complainant failed to show that she performed work that was substantially equal to male comparative employees who earned more pay than Complainant earned.

Adamson (Miguelina S.) v. DOE, 0120161704 (09/25/2018) – Complainant, an Accountant, NQ-02, filed an EEO complaint alleging that she was discriminated against on the bases of sex (female) and reprisal for protected EEO activity, when she was harassed, issued a notice of reprimand, not provided a career ladder promotion, not selected or referred for an accountant position, not selected for another accountant position, and received less pay than NQ-03 Budget Analysts. Complainant did not request a hearing before an EEOC Administrative Judge. The Agency issued a decision finding no discrimination. Complainant appealed. OFO affirmed the Agency's finding of no discrimination. On appeal, Complainant presents new evidence. OFO did not consider this new evidence on appeal because Complainant failed to make an affirmative showing that the evidence was not reasonably available previously.

Ray (Ardell B.) v. USPS, 0120160357 (09/06/2018) **[Also included under Priority 3, above]** – Complainant, a Postal Inspector, ISLE-10, Step 2, with the Agency's San Francisco Inspection Service Division in Richmond, California, filed a formal complaint alleging that the Agency discriminated against her on the bases of race (African-American), sex (female and sex stereotyping due to sexual orientation), color (Light Brown), and in reprisal for prior protected EEO activity when: (1) she was paid at a lower rate than most of the male Postal Inspectors who trained with her at the academy; (2)

she was removed effective December 26, 2012; (3) in early October 2012, shortly after being posted in California, her Team Leader (TL) disclosed her sexual in the presence of several staff members; and (4) in December 14, 2012, TL directed her to take a male co-worker (CW-1) to her home to check her Verizon wireless coverage there, and this suggested to her that she was to perform sexual favors for CW-1.

Following an investigation, Complainant requested a final agency decision. In the decision, the Agency determined that Complainant had not been subjected to discrimination or reprisal as alleged.

In the Commission's appellate decision, the Commission affirmed the Agency's final decision finding that the Agency had articulated legitimate, nondiscriminatory reasons for its actions of which Complainant had not rebutted as pretextual. Specifically, as to claim (1), the Program Specialist acknowledged that he set the incoming Postal Inspectors' pay. He explained that he calculated their pay by reviewing the pay stubs from each of the candidates, entering the candidates' current pay information into the worksheet, adding in the applicable locality pay and Law Enforcement Availability Premium, and calculating the figures based on the information entered. PS stated that Complainant's submitted pay stubs indicated that her most recent prior salary was below the minimum basic salary for an entry level Postal Inspector ISLE-10 Step 1, so her basic salary was increased to match that level. Complainant was then given credit for her advanced degree and then was increased to an ISLE 10 Step 2, plus locality pay. The Commission found that Complainant's Equal Pay Act claim regarding this issue failed as well as the Agency met its burden of establishing its affirmative defense that the pay differentials in this case occurred because of a factor other than sex (i.e. Complainant's salary was set based on information received regarding her most recent salary history). Regarding claim (2), Complainant was removed based on numerous instances of performance and conduct issues. With respect to her non-sexual harassment hostile work environment claim, the Commission found that there was no corroborating evidence that TL or any other official disclosed Complainant's sexual orientation at any time. Finally, as to Complainant's sexual harassment claim, the Commission concluded that Complainant failed to establish that she was subjected to unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature as there was no evidence to support Complainant's belief that TL suggested that she perform sexual favors for CW-1.

5. PRESERVING ACCESS TO THE LEGAL SYSTEM

Of the two (2) decisions listed for this SEP Priority, once concerned egregious retaliation, and the other concerned agency non-compliance resulting in decreased faith in the integrity of the agency's EEO program.

Decision Summary for this Category

Sam (Michale V.) v. DOI, 0120143043 (04/20/2018) **[Repeated under Findings below]** – Complainant, a Rangeland Technician at the Agency's Division of Natural Resources, appealed from an AJ's finding of race and reprisal discrimination issued on default judgment. Default judgment was issued because the Agency did not begin its investigation until 288 days after Complainant's filing of his EEO complaint. Further, the Agency did not produce a copy of the Report of Investigation to the AJ consistent with his

orders. However, the AJ concluded that Complainant was not entitled to any remedies because he did not prove a prima facie case of race and reprisal discrimination. The appellate decision concluded that Complainant demonstrated evidence of a hostile work environment based on reprisal. The decision reasoned that several of the Agency's actions occurred shortly Complainant's EEO activity and were sufficient to deter a reasonable employee from engaging in EEO activity. Further, the appellate decision found that Complainant was also entitled to remedies for the remainder of his claims, pointing to cases stating that failure to establish a prima facie case does not preclude all remedies. Therefore, Complainant was awarded compensatory damages, a posting notice, training of Agency EEO officials regarding their obligation to conduct timely EEO investigations, for the Agency to consider disciplinary action against EEO officials, and reinstatement into a Forestry Technician position.

Rowe (Susann G.) v. VA, 0120162437 (05/25/2018) **[Repeated under Findings below]** – Complainant worked as a Medical Support Assistant (GS-5) at the Bay Pines VA Medical Center in Bay Pines, Florida. Complainant appealed from the Agency's FAD which concluded that she was not subjected to reprisal discrimination. As background, Complainant previously reported that her supervisor sexually harassed her, and the supervisor was terminated from federal employment. However, the supervisor returned to the Agency for matters before the MSPB and Complainant requested to be transferred to a more secure location out of fear that he would confront her. Management made the transfer to a new location. Subsequently, Complainant was not given a promotion she would have been previously eligible for. The appellate decision noted that Complainant inquired about her ability to receive the promotion prior to the transfer and at least one manager responded that it would not be an issue. Evidence indicates that management discussed where to place Complainant and memoranda and e-mails regarding these deliberations were notably absent from the record. A few months later when the promotions were formally announced, Complainant was informed that she would not be promoted because she was not in an eligible position after the transfer. The appellate decision concluded that Complainant was subjected to reprisal discrimination in that she was reassigned to a less desirable position after a report of harassment, which is sufficient to deter a reasonable person from engaging in EEO activity. Complainant demonstrated pretext by showing that management deliberately transferred her to the position and insisted that she did not receive the promotion as a mere technicality. The decision pointed to the fact that according to Complainant's SF-50 she was still assigned to a position that would qualify her for the promotion.

Complainant was awarded remedies which included promotion, back pay and an investigation into her entitlement to compensatory damages.

6. PREVENTING HARASSMENT THROUGH SYSTEMIC ENFORCEMENT AND TARGETED OUTREACH

Decision Summaries for this Category

Hudson-Crosby (Aurore C.), et al. v. PBGC, 0120150342 (05/18/2018) **[Repeated under Priority 1 above, and Broad Impact Decisions below]** – Complainant filed an EEO complaint alleging class-wide discrimination and harassment on the bases of race, color, sex, age, and reprisal when (1) employees in the Benefits Administration and Pay Department (BAPD) were targeted to have their duties stripped

down so their positions could be reclassified and downgraded, (2) the position description for BAPD Auditors was changed and written such that current BAPD Auditors would not be qualified for positions in the new Asset Evaluation Division (AED), and (3) the announcement for Auditor positions in the AED had educational requirements that would result in the majority of the BAPD Auditors not being qualified for the position. An EEOC AJ dismissed the class complaint on the ground that it did not meet all of the prerequisites for certification, and the Agency issued a final order implementing the AJ's decision.

On appeal, OFO affirmed the denial of certification of the class complaint. OFO found that Complainant did not establish typicality because she did not establish that all of the class members have the same discriminatory bases as she has. OFO also found that Complainant did not establish commonality. There was no evidence that all of the class members have the same interests and suffered the same harm as Complainant. Complainant provided only broad, conclusory allegations of class-wide harm, and the proposed class consisted of employees at various grade levels, in various positions, and under various supervisors in various divisions. Because Complainant did not identify which class members have bases and issues similar to Complainant's, the size of the class could not be determined. Accordingly, OFO found that Complainant did not meet the numerosity requirement. Finally, OFO found that Complainant, who was represented by a coworker who was a licensed attorney and union representative, met the adequacy-of-representation requirement.

Whitney (Ross R.) v. DHS, 0120162491 (07/25/2018) – Complainant, a Criminal Investigator/Special Agent, GS-1811-13, at the Agency's Office of Investigations in Norfolk, Virginia, filed a formal complaint alleging that the Agency discriminated against him and subjected him to a hostile work environment on the bases of race (African-American) and in reprisal for prior protected EEO activity as evidenced by multiple incidents including, inter alia, he and his spouse were assigned to different Virginia offices; he was made aware that his second-level supervisor (S2) gave an African-American employee malt liquor; he heard about an employee referring to an African-American Agent as "the big Black shiny guy;" a co-worker commented that she did not expect his spouse to be married to an African-American man; his theories about an "international fraudulent document organization" were dismissed and not acted upon, but six months later, management pursued investigation of just such an organization; between March 16 and 18, 2011, management did not "give appropriate attention" to his case involving a corrupt agency official and exhibited no faith in his investigative and decision-making abilities; he learned of a racially inappropriate photograph on a co-worker's personal cell phone; he was told that he and his wife could not be control and second agents on a confidential file nor could married agents be designated as the primary and secondary contact agents for a source; he was reassigned from Newport News, Virginia, to Norfolk, Virginia; and he became aware that he was not advised of an investigation into the alleged theft of informant-related money.

Following an investigation, Complainant requested a hearing before an EEOC Administrative Judge. Initially, the AJ granted the Agency's motion for summary judgement and issued a decision finding that Complainant failed to show that the Agency subjected him to discrimination. On appeal, the Commission remanded the matter for a hearing finding that material facts remained in dispute. The AJ held a hearing and issued a decision finding that Complainant had not been subjected to discrimination, reprisal, or a hostile work environment. In so finding, the AJ noted that Complainant

did not observe the offensive racial conduct and was not even employed at the facility when it occurred. The AJ further commented that it was clear that the Norfolk Office was wrought with racial insensitivity, racial stereotyping, office gossip, personality conflicts and, perhaps, discriminatory behavior. The Agency issued a final order fully implementing the AJ's decision.

In the Commission's appellate decision, the Commission affirmed the Agency's final order. The Commission found that substantial record evidence supported the AJ's finding that Complainant had not shown that he was subjected to a discrimination, reprisal, or a hostile work environment. The Commission, however, agreed with the AJ that the atmosphere at the Norfolk Office was clearly rife with offensive and racially-hostile behavior. The record demonstrated that employees at the Norfolk Office used racial epithets and engaged in racial stereotyping. While most of the conduct alleged occurred prior to Complainant's arrival and none of the conduct was directed at him, substantial record evidence showed that other African-American employees were subjected to the conduct based on their race. In addition, the management official (S2) responsible for some of the conduct at issue was in Complainant's chain-of-command. As a result, the Commission modified the final order to require the Agency to conduct training for the Norfolk Office's employees regarding race-based harassment, to consider disciplining the responsible employees and officials, and to post a notice.

7. BROAD IMPACT DECISIONS

McDargh (Casie S.), et al. v. HUD, 0120100672 (05/18/2018) – Complainant filed a class complaint alleging that the Agency discriminated against Hispanic employees based on national origin by denying them promotions and other opportunities for growth within the Agency. She sought certification of a class comprised of "[c]urrent and retired HUD employees who have been denied promotions, training, and/or details starting May 21, 2015 and continuing until the date a final determination is made on the class claim."

On appeal, OFO affirmed the Agency's final order implementing an EEOC AJ's dismissal of the class complaint on the ground that it did not meet all of the prerequisites for certification. OFO agreed with the AJ, who refused Complainant's request for an adverse inference against the Agency, that EEO MD-715 does not require the Agency to keep promotion applications or Best Qualified Lists categorized by national origin.

OFO also agreed that the class complaint met the prerequisite of adequacy of representation but did not meet the prerequisites of numerosity, commonality, and typicality. Complainant's law firm had more than 25 years of experience in the area of employment law and had litigated more than 20 class actions or group grievances. Although Complainant argued that the potential class could include all 595 Hispanic employees at the Agency, she identified only 16 potential class members. She presented no evidence showing how many of the potential 595 class members applied for and were denied promotions, training, or details. In addition, Complainant did not present sufficient evidence of a common policy or practice or show that her claims are typical of the claims of Hispanic employees who were denied promotions, training, and details. She did not identify a specific written policy or centralized practice that affected a nationwide class of Hispanic employees. Further, she provided no evidence from which one could reasonably infer that the Agency had an overriding policy or practice of discrimination against Hispanic employees. The 16 affidavits in the record were from employees

who had five different salary grades, held 15 different positions, worked in 13 different cities, and challenged the actions of different decision-makers.

Bailey (Aleshia C.), et al. v. VA, 0120132664 (05/18/2018) – Complainant, a Supervisory Nurse Manager, originally had been a member of a class of all African American employees, past and present, who worked at a specific Agency facility and alleged discrimination with respect to the selection and distribution of monetary and non-monetary awards since 1996. After an EEOC AJ granted the Agency's motion to exclude supervisors from the class, Complainant filed a new class complaint on behalf of herself and all other African American supervisors alleging that the Agency discriminated against them on the basis of race with respect monetary and non-monetary awards. The AJ granted class certification, and the Agency issued an order implementing the AJ's class-certification decision. Subsequently, following discovery, the Agency moved to dismiss the class because of conflicts of interest among the supervisory class members. The AJ issued a decision decertifying the class based on a lack of commonality and typicality, and the Agency issued a final order implementing the AJ's decision.

On appeal, OFO found that the Agency was not bound by its initial order implementing the class-certification decision. OFO noted that class procedures contemplate that AJs may review certification decisions after discovery and have authority to redefine or decertify a class.

OFO further found that Complainant did not meet the requirement of commonality because the different levels of supervisors in the purported class have conflicting interests. The record indicated that the receipt of an award depended entirely upon the recommendation of an employee's immediate supervisor; there was no evidence that a supervisor's recommendation ever was not approved. As a result, class members who are first-level supervisors could be in the position of raising discrimination allegations against class members who are second-level supervisors. Because of the inherent conflicts of interests, the class did not meet the commonality requirement. Further, given that most of Complainant's immediate supervisors during the relevant period were members of the class, her claim is not typical of the claims of class members whose supervisors were not class members. OFO affirmed the Agency's final order adopting the AJ's decision that Complainant did not meet the requirements of class certification.

Hudson-Crosby (Aurore C.), et al. v. PBGC, 0120150342 (05/18/2018) **[Repeated under Priorities 1 and 6, above]** – Complainant filed an EEO complaint alleging class-wide discrimination and harassment on the bases of race, color, sex, age, and reprisal when (1) employees in the Benefits Administration and Pay Department (BAPD) were targeted to have their duties stripped down so their positions could be reclassified and downgraded, (2) the position description for BAPD Auditors was changed and written such that current BAPD Auditors would not be qualified for positions in the new Asset Evaluation Division (AED), and (3) the announcement for Auditor positions in the AED had educational requirements that would result in the majority of the BAPD Auditors not being qualified for the position. An EEOC AJ dismissed the class complaint on the ground that it did not meet all of the prerequisites for certification, and the Agency issued a final order implementing the AJ's decision.

On appeal, OFO affirmed the denial of certification of the class complaint. OFO found that Complainant did not establish typicality because she did not establish that all of the class members

have the same discriminatory bases as she has. OFO also found that Complainant did not establish commonality. There was no evidence that all of the class members have the same interests and suffered the same harm as Complainant. Complainant provided only broad, conclusory allegations of class-wide harm, and the proposed class consisted of employees at various grade levels, in various positions, and under various supervisors in various divisions. Because Complainant did not identify which class members have bases and issues similar to Complainant's, the size of the class could not be determined. Accordingly, OFO found that Complainant did not meet the numerosity requirement. Finally, OFO found that Complainant, who was represented by a coworker who was a licensed attorney and union representative, met the adequacy-of-representation requirement.

Starks (Emelda F.) and Foster (Natalya B.), et al., v. Navy, 0120121347 and 0120121348 (06/19/2018) **[Repeated under Priority 1 above, and Circulated Cases below] – In** 1990, the Class Agents filed an EEO complaint alleging that the Naval Education and Training Command Consolidated Personnel Office encouraged the use of minimal areas of consideration (AOCs) in merit staffing at Newport, Rhode Island Naval Station, which had an adverse impact on the hiring of Black individuals. AOCs consist of three components: (1) geographical; (2) organizational; and (3) who may apply. Agency witnesses testified that the goal of setting AOCs was to obtain a pool of three to five qualified candidates to refer to the selecting official.

In 2000, the Commission determined that there was sufficient evidence to warrant provisional certification of the Class and remanded the matter to an AJ to define the Class. The AJ held a hearing in 2007 and heard testimony from the Class's expert witness (Expert 1) and three expert witnesses for the Agency (Expert 2, Expert 3, and Expert 4). On November 1, 2011, the AJ issued a decision finding no discrimination.

Expert 1 used a t-test to analyze the data and concluded that the proportion of Black individuals outside the AOC was greater than the proportion of Black individuals within the AOC. Expert 2 used a Fishers Exact test and found that a statistically significant result of 2.33 standard deviations. However, Expert 2 found that the adverse impact ratio was 93.7 percent, which did not raise an inference of discrimination under the EEOC's four-fifths, or 80 percent, rule. Expert 2 also found that the statistically significant disparity was limited to one job family, the FWS-4700 Maintenance Mechanic family. Expert 2 stated that once this job family was removed from the equation, no statistically significant disparity remained. Expert 3 presented labor market data.

The AJ credited the Agency's experts' reports, finding that Expert 1's report contained errors and that his testimony was not credible because he gave "brief and vague" testimony at the hearing, because he was a graduate student who had not previously published in the statistics field or been admitted as an expert before a court, and because he admitted to "moving quickly" to complete his statistical analysis. The AJ cited four specific errors made by Expert 1 in analyzing the data. The AJ found that there was insufficient statistical or anecdotal evidence to support an inference of discrimination based on a disparate impact theory. The Agency issued a final order fully implementing the AJ's decision.

The Commission found that substantial evidence supported the AJ's conclusion that the Class did not meet its burden of establishing a prima facie case, in light of Expert 1's vague testimony and errors. With respect to the statistical disparity presented by Expert 2, the Commission found that it was not erroneous to consider subset data because Expert 3 testified that there was great variation among AOCs and that they varied according to position. Finally, the Commission noted that the AJ relied on

the labor market data presented by Expert 3 in finding no discrimination, as the labor market statistics revealed a higher proportion of Black individuals such that expanding the AOCs would result in a lower percentage of Black representation. Therefore, the Class failed to establish a prima facie case of disparate impact discrimination because it did not prove with persuasive statistical evidence that the Agency's policy or practice caused a Class-wide disparate impact. Accordingly, the Commission affirmed the Agency's final order.

Paz-Chow (Shad L.) v. CFPB, 0120162565 (06/15/2018) – Complainant worked as a Consumer Response Specialist at the Agency's Consumer Response Division in Washington, DC. Complainant was responsible for reviewing the regulatory compliance of large financial institutions in response to complaints filed against them. On July 25, 2014, Complainant filed a formal complaint alleging that the Agency had engaged in a pattern and practice of unlawful conduct against minority employees, and maintained policies and practices that had a disparate impact on these employees. Specifically, Complainant alleged that the Agency:

1. Employed a quota system to measure employee productivity that weighed investigation assignments without regard to complexity while assigning minorities the majority of longer-term, more complex investigations;
2. Excluded minorities from training opportunities that were regularly offered to white employees;
3. Employed bureau-wide performance evaluation policies that disproportionately resulted in high performance ratings for white employees and average (or lower) performance ratings for minority employees;
4. Failed to credit minorities for their experience on the same basis as white employees and failed to consider minorities for timely promotions and title changes on the same basis as whites;
5. Systematically paid minorities lower wages and/or denied minorities opportunities to increase their earnings;
6. Failed to grant minority employees conversions from "straight term" or from "term to perm" to permanent status on the same basis as white employees; and
7. Retaliated against minority employees who complained of discrimination including by subjecting them to further discrimination, harassment, retaliation, and constructively discharging or discharging them.

On May 31, 2016, the AJ assigned to the case dismissed the class complaint finding that Complainant as putative class agent, failed to establish that the class met the commonality and typicality requirements. The appellate decision affirmed the AJ's decision dismissing the class complaint, finding that Complainant was unable to establish the commonality or typicality requirements. Specifically, Complainant offered nothing more than a general claim that all Consumer Response Specialists work within the same unit and were therefore harmed by the Agency's uniform performance management policies. Additionally, Complainant was unable to establish that each allegation happened to every class member.

Jones (Eura B.) v. CFPB, 0120161851 (06/15/2018) – Complainant worked as a Consumer Response Specialist at the Agency's Consumer Response Division in Washington, DC. On November 12, 2014, Complainant filed a formal complaint alleging that the Agency had engaged in a pattern and practice of unlawful conduct against minority employees, and maintained policies and practices that had a disparate impact on these employees. Specifically, Complainant alleged that the Agency:

1. Excluded women and minorities from training opportunities, details, projects, and other assignments;
2. Employed a Bureau-wide performance evaluation policy that disproportionately resulted in high performance ratings for White and male employees;
3. Employed a quota system to measure employee productivity that weighed investigation assignments without regard to complexity while assigning women and minorities the majority of the longer-term, more complex investigation
4. Failed to credit women and minorities for their experience on the same basis as White or male employees and failed to consider women and minorities for timely promotions and title changes on the same basis as White or male employees;
5. Failed to grant women and minority employees conversion from "straight term" or from "term to perm" to permanent status on the same basis as White or male employees;
6. Systemically paid women and minorities lower wages and/or denied minorities opportunities to increase their earnings; and
7. Retaliated against women and minority employees who complained of discrimination including by subjecting them to further discrimination, harassment, retaliation and constructively discharging or discharging them.

On February 24, 2016, the AJ assigned to the case dismissed the class complaint finding that Complainant, as putative class agent, failed to establish that the class met the commonality, typicality, and adequacy of representation requirements. The appellate decision affirmed the AJ's decision dismissing the class complaint, finding that Complainant was unable to establish the commonality or typicality requirements, and that she was unable to establish adequacy of representation. Specifically, the appellate decision found that Complainant did nothing more than raise "broad, across-the-board allegations of discriminatory policies and practices covering a variety of personnel processes" and that she was unable to establish that each allegation happened to every class member. The appellate decision also concurred with the AJ's determination that counsel's actions raised concerns that the class's interests would not be protected.

8. ENFORCEMENT – GENERAL

Mayorga (Adina P.) v. USPS (Pacific Area), 0720110016 (04/25/2018) **[Repeated under Priority 3 above]** – The Agency hired Complainant as a Letter Carrier in 1986. The Agency began accommodating Complainant's disability in 1992 with administrative duties and in 1995 with a position in the Agency's Operation Program Support (OPS) Unit. In 2008, the Agency removed Complainant from the OPS Unit and offered her a Letter Carrier position. The Agency did not place Complainant in a position that complied with her medical restrictions, and Complainant did not return to work. Complainant filed a complaint alleging that the Agency failed to reasonably accommodate

her disability, and she timely requested a hearing. In 2009, Complainant filed a petition for Chapter 13 bankruptcy due to her lack of income.

Following a hearing, the AJ issued a decision finding that the Agency failed to reasonably accommodate her disability and ordered the Agency to reinstate Complainant ordered the Agency to pay Complainant back pay, pecuniary damages in the amount of $3,054.54, non-pecuniary damages in the amount of $125,000, attorney's fees in the amount of $57,098.75, and costs in the amount of $624.20. The Agency issued a final order rejecting the AJ's decision and appealed to the Commission. The Agency did not contest the finding of discrimination but argued that Complainant did not have standing to litigate her claims through the hearing and/or receive damages because her assets reside with the trustee of her bankruptcy estate, that the AJ erred in not applying the doctrine of judicial estoppel to Complainant because she did not claim her EEO complaint as an asset with the bankruptcy court, and that the AJ acted with passion or prejudice because she was biased against the Agency.

We found that the Commission was not judicially estopped from seeking back pay and compensatory damages on behalf of Complainant. The Commission's authority under Title VII and the Rehabilitation Act dictates that it remedy the discrimination herein without regard to Complainant having filed for bankruptcy, a circumstance that was more than likely caused by Agency's discriminatory failure to accommodate her. However, the Commission did not make a finding as to the rights or interests of third parties with respect to the monetary relief ordered. Finally, the Commission found that the AJ was not motivated by bias or prejudice. Accordingly, we reversed the Agency's final order that rejected the relief ordered by the AJ.

Hann (James R.) v. DOI, 0120122981 (04/04/2018) – Complainant worked as a Criminal Investigator at the Agency's Office of Criminal Enforcement, Forensics, and Training. Complainant filed a formal EEO complaint alleging that the Agency discriminated against him on the disability (hypertension) and reprisal for prior protected EEO activity when: (1) his supervisor denied his request for reasonable accommodation; and (2) he was subjected to harassment by his second-level supervisor (S2) because of his disability.

After the investigation, Complainant was provided a copy of the investigative file and requested a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). On April 28, 2011, the Agency filed a Motion for Summary Judgment, and Complainant responded in opposition. The AJ issued a decision without a hearing finding no discrimination.

After reviewing the record, the appellate decision found the Agency failed to carry its burden of proof as to whether Complainant's inability to fly in his position created an undue hardship on the Agency's operations. Agency management's own testimony revealed that, over the course of ten years, there were only a few times when Complainant's inability to fly created a disruption for the office. Such generalized conclusions did not suffice to meet the individualized analysis of undue hardship.

S2 also averred that, at times, he has had to rearrange work assignments because of Complainant's issue with flying, stating that this was "not fair" to other Special Agents who had to assume those duties because of Complainant's refusal to fly. The appellate decision noted that Enforcement Guidance on Reasonable Accommodation makes clear that an employer cannot claim undue hardship "based on the fact that provision of a reasonable accommodation might have a negative impact on the

morale of other employees." EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act, EEOC Notice 915.002 at Q. 32 (Oct. 17, 2002).

There was also evidence in the record establishing that management saw Complainant's refusal to fly as an attitude problem, rather than based on his hypertension, which the decision found to be evidence of both discriminatory and retaliatory animus connected to his disability status and request for reasonable accommodation. Although S2 concurred that Complainant's situation was different than that of other coworkers who simply preferred not to fly, he was unable to reconcile his disapproval of Complainant's travel with a purported concern for Complainant's health. The appellate decision concluded that the AJ erred in summarily concluding that Complainant's accommodation request posed an undue hardship without requiring the Agency to satisfy its burden of proof, which it did not. Therefore, Complainant was awarded reasonable accommodation, leave restoration, compensatory damages, a posting notice, training of Agency EEO officials regarding their obligation to conduct timely EEO investigations, for the Agency to consider disciplinary action against EEO officials, and notice posting.

Sam (Michale V.) v. DOI, 0120143043 (04/20/2018) **[Repeated under Priority 5 above]** – Complainant, a Rangeland Technician at the Agency's Division of Natural Resources, appealed from an AJ's finding of race and reprisal discrimination issued on default judgment. Default judgment was issued because the Agency did not begin its investigation until 288 days after Complainant's filing of his EEO complaint. Further, the Agency did not produce a copy of the Report of Investigation to the AJ consistent with his orders. However, the AJ concluded that Complainant was not entitled to any remedies because he did not prove a prima facie case of race and reprisal discrimination. The appellate decision concluded that Complainant demonstrated evidence of a hostile work environment based on reprisal. The decision reasoned that several of the Agency's actions occurred shortly Complainant's EEO activity and were sufficient to deter a reasonable employee from engaging in EEO activity. Further, the appellate decision found that Complainant was also entitled to remedies for the remainder of his claims, pointing to cases stating that failure to establish a prima facie case does not preclude all remedies. Therefore, Complainant was awarded compensatory damages, a posting notice, training of Agency EEO officials regarding their obligation to conduct timely EEO investigations, for the Agency to consider disciplinary action against EEO officials, and reinstatement into a Forestry Technician position.

Patel (Kori S.) v. USPS (Great Lakes Area), 0120161126 (04/24/2018) – In December 2013, Complainant requested three weeks of annual leave, for January 1 through 21, 2014. On December 31, 2013, Complainant travelled to India. According to Complainant, she got sick in India and was unable to return to the United States in time to report for work as scheduled on January 22, 2014. Complainant called her supervisor (S1) and stated that she would bring medical documentation upon her return to work. On February 5, 2014, Complainant provided a February 1, 2014, note from a family physician in India, which stated: "This is to certify that [Complainant] was under my treatment for fever and cold from 22/1/14 to 1-2-14. She is now fit to travel from 2/2/14." On February 8, 2014, her second-level supervisor (S2) rejected her sick leave request because the medical documentation was unacceptable and because the doctor was not licensed to practice in the U.S. When Complainant asked S1 why the note was not acceptable, she responded "that it was not a note from a medical doctor practicing in the United States, so we have no idea who it is" and that the note indicated that she did not see the doctor

until February 1, 2014, and that the note did not establish that Complainant was incapacitated and unable to work. The Agency charged Complainant AWOL from January 22, 2014, to February 2, 2014.

S2 conducted a PDI with Complainant and subsequently contacted the Agency's Office of the Inspector General (OIG) because Complainant's answers to the PDI questions were evasive and because Complainant had requested sick leave under questionable circumstances. The OIG investigated and obtained Complainant's reservation information, which indicated that Complainant's nonrefundable roundtrip tickets for travel departing the United States on December 31, 2013, and departing India on February 2, 2014, was purchased on October 11, 2013. When asked by OIG Investigators when she purchased her airfare, Complainant stated that she purchased her tickets online approximately 15 days before flying to India. The OIG Investigators twice asked Complainant how long her trip was booked for, Complainant answered that she booked the trip for three weeks both times. The OIG Investigators then showed Complainant a copy of her itinerary and asked why the tickets were purchased for five weeks when she only had three weeks of approved annual leave. Complainant then stated that it was cheaper to book a five-week trip than a three-week trip and that the departure date could be changed at any time for a low fee. The Agency subsequently removed Complainant from federal service for requesting sick leave under false pretenses and for proffering false statements during the OIG investigation.

Complainant filed a complaint alleging, among other issues, that she was subjected to discrimination based on race (Asian) and national origin (India) when she was removed. The Agency issued a final decision finding no discrimination. On appeal, the Commission found that the Agency has articulated two legitimate, nondiscriminatory reasons for terminating Complainant. Specifically, Complainant was AWOL for 80 hours after requesting sick leave under suspicious circumstances, and she lied to OIG investigators. However, the Commission found that race and national origin were factors in Complainant's termination. Complainant's doctor's note was written in English and indicated the physician's credentials and license number, so there was no legitimate reason to question the validity of the note any more than a note submitted from a non-Asian, non-Indian physician practicing in the United States.

Although we found that discrimination occurred, we found that the same decision to terminate her would have been made even absent discrimination. Although questioning the legitimacy of the physician based on his national origin and/or race was neither legitimate nor nondiscriminatory, the doctor's note was vague and did not establish that Complainant was incapacitated and unable to work. Moreover, the record established that Complainant lied multiple times to OIG investigators about the circumstances of her trip and sick leave request. Therefore, Complainant was not entitled to personal relief, but we ordered that the Agency post a notice, conduct training, and consider discipline against the responsible management officials.

Killeen (Minda W.) v. Navy, 0120162040 (04/24/2018) – Complainant identified her race as Filipino and her national origin as the Philippines. Her native language is Tagalog. The Agency issued Complainant a non-disciplinary Letter of Expectations, which outlined five concerns with Complainant's performance, including the "[u]se of language, other than English, with employees when discussing work related tasks and issues." Complainant's supervisor stated that, because Complainant's non-Tagalog-speaking subordinates felt left out when she did not use English, he directed her to only speak English when discussing work topics. Although the Agency subsequently

reissued the Letter of Expectations and removed the direction not to use a language other than English, the record indicated Complainant's supervisors continued to monitor her use of Tagalog in the workplace.

Complainant filed a complaint alleging that she was subjected to discrimination based on race, national origin, and reprisal when, among other issues, she was issued the Letter of Expectations. The Agency issued a final decision finding no discrimination. On appeal, we found that the instruction not to use Tagalog when discussing work topics was an English-only rule on its face. We further found that the rule was not justified by business necessity because there was no evidence in the record that the rule was necessary for the safe or efficient operation of the Agency. Therefore, we concluded that the Agency discriminated against Complainant based on national origin. As relief, we ordered the Agency to review and revise its policy, conduct a supplemental investigation into her entitlement to compensatory damages, expunge the Letter of Expectations, conduct training, consider discipline against the responsible management officials, and post a notice.

Lacey (Stefany D.) and Mitchell-Thomas (Alena C.) v. VA, 0720180002 and 0720180003 (04/12/2018) – Both Complainants worked as Human Resources Specialists, GS-12, at the Agency's Michael E. DeBakey Medical Center in Houston, Texas. They filed EEO complaints alleging discrimination based on race (African American) and sex (female) when, on June 12, 2014, the Complainants learned that they were each not selected for a Supervisory Human Resources Specialist position under Vacancy Announcement 13HRW-924152. Their appeals were consolidated.

Following hearing on both complaints, an EEOC AJ determined that both Complainants were found eligible for the position. However, the Selecting Official decided to expand consideration to locate other acceptable candidates, and provided Human Resources with a folder including a copy of the eventual selectee's resume and that of another applicant. Both Complainants were again determined to be qualified for this second round of consideration. The eventual selectee was a Caucasian male. The AJ concluded that the Agency subjected both Complainants to discrimination based on race and sex when the selectee was chosen. She then determined that, absent discrimination, Complainant Stefany D. would have been selected for the position due to her higher rating. Following her finding of discrimination, the AJ then ordered remedial relief for both Complainants. She provided Complainant Stefany D. with the postion and back pay in addition to compensatory damages in the amount of $50,000. Regarding Complainant Alena C., the AJ ordered $50,000 in compensatory damages. The Agency appealed the remedial orders, but did not challenge the AJ's finding of discrimination.

In EEOC Appeal No. 0720180002, the decision found that Complainant Stefany D. was entitled to the remedies ordered by the AJ including the award of $50,000 in compensatory damages. In EEOC Appeal No. 0720180003, the decision determined that although Complainant Alena C. was not entitled to the position in question, she was still entitled to compensatory damages for any harm proven to have resulted from her participation in a discriminatory selection process. The decision found that the record supported the AJ's award of $50,000 in non-pecuniary damages for Complainant Alena C.

Smith (Tanya P.) v. USPS, 0120160846 (04/30/2018) – The decision found that Complainant was discriminated against based on sex in violation of Title VII when Agency management denied her a light duty assignment during her regular shift, forcing her to change her start time from 5:00 p.m. to

7:55 p.m. to have her medical restrictions accommodated. By contrast, various male employees, all also Mail Handlers, obtained approval during this period to perform light duty work and retained their normal starting times.

The Agency argued that the male comparators were not similarly situated to Complainant because they did not have the same medical restrictions as Complainant. However, we were unpersuaded by the Agency's argument. Complainant and her comparators were substantially similar in all aspects relevant to her disparate treatment claim. Like Complainant, the four male comparators were Mail Handlers who worked on the same tour as Complainant and reported to the same supervisor and Officer-In-Charge. Complainant and the four males were all subject to the same collective bargaining agreement for mail handlers. Complainant and each of the male comparators experienced physical restrictions during the same period of time that prevented them from performing their regular duties and were provided a light duty assignment. Of the five, Complainant, the only female, had her normal start time significantly altered. While the Agency argues that all five may have had different physical restrictions, it was undisputed that the light duty assignments (flat sorter, culling belt, empty sleeves) given to all four of the male comparators were work within Complainant's restrictions. Moreover, the males performed these light duty assignments during the same hours as Complainant's regular shift.

The Agency was ordered to investigation and issue a decision on Complainant's compensatory damages claim, as well as conduct training and consider disciplinary action against the responsible management officials, post a notice, and provide attorney's fees. Other equitable relief was not necessary because Complainant had already been returned to her regular shift and paid for lost wages due as a result of a successful union grievance on the matter.

Anderson (Brendon L.) v. VA, 0120160256 (04/20/2018) – The issue presented in this case was whether the AJ properly awarded Complainant $3,000.00 in non-pecuniary compensatory damages after the issuing a default judgment against the Agency finding liability. A hearing on damages was conducted. The damages hearing included evidence provided by Complainant's family, friends and colleagues. Complainant alleged that the retaliation that he experienced exacerbated his problems with cluster headaches and pain. The AJ found that Complainant's testimony regarding his damages was confusing, vague, and unclear. The AJ also found that Complainant's testimony was not credible in some respects but his testimony was credible with respect to how the discrimination affected his family and work life. Therefore, the AJ, among other things, awarded Complainant $3,000.00 in non-pecuniary compensatory damages.

On appeal, the OFO decision affirmed the Agency's final order finding Complainant had not presented any persuasive evidence which suggested that the AJ erred with regard to the award of compensatory damages. The decision further found that the $3,000.00 amount awarded was consistent with similar amounts awarded.

Ahmad (Ramon L.) v. DOJ (ATF), 0120161017 (5/29/2018) – The issue presented was whether the AJ properly reduced Complainant's attorney's fees and costs by 40%, after finding that the Agency discriminated against him on the bases of reprisal. The AJ found, however, that Complainant only established that the Agency retaliated against him with regard to one of his five claims.

A hearing was held regarding damages. Complainant requested $100,000 nonpecuniary compensatory damages and $146.411.19 in attorney's fees. Complainant was awarded $20,000.00 in nonpecuniary damages, and, $87,846.72 in attorney's fees and costs, which was a 40% reduction in the total lodestar amount requested by Complainant. In reducing the amount, the AJ took into consideration the following factors: (1) Complainant's limited success on his claims, (2) Complainant's Fee Petition contained numerous instances which might be considered excessive, duplicative, or unreasonable time expended; (3) Complainant's case was a retaliation claim, and did not offer a complex or novel issue; and (4) attorney travel time was subject to an automatic reduction of 50% of the regular rate charged. The Agency fully implemented the AJ's finding of discrimination and the AJ's damages award.

Complainant appealed only the attorney's fees decision. Complainant argued that the AJ's reduction in attorney's fees was contrary to law and a violation of public policy. Complainant also maintained that the AJ abused her discretion in finding that Complainant had limited success; and, the decision if it were allowed to stand would discourage advocates from seeking full relief for victims of retaliation.

The Commission found that the AJ's award was supported by the evidence in the record. Complainant, other than presenting conclusory arguments, provided no persuasive evidence which demonstrated that the AJ abused her discretion in reducing his attorney's fees by 40% across the board. The evidence showed that Complainant was only successful with regard to one of his five claims and attorney fees are not recoverable for work on unsuccessful claims. Further, the case did not present novel issues, nor was the one successful claim so inextricably intertwined with the unsuccessful claims that Complainant would be entitled to an award of full attorney's fees. With regard to compensation for travel time, the Commission found the fees for travel time were properly reduced in accordance with the Commission's longstanding precedent and guidance, and other than disagreeing with the Commission's policy, Complainant did not establish that the AJ erred in her application of the policy. Finally, the Commission found no persuasive evidence that the AJ erred in finding that the Fee Petition contained numerous instances which might be considered excessive, duplicative, or unreasonable time expended.

Ip (Danita S.) v. DOT (FAA), 0120161096 (5/17/2018) – Complainant, an Air Traffic Control Specialist, filed an EEO complaint alleging that she was subjected to discrimination based on her National Origin (Chinese American), sex (female) and in reprisal for prior protected activity when a co-worker (C1) made sexual comments about her and management failed to remove C1 from the control room.

Upon completion of the investigation, Complainant requested a final agency decision. The final decision found that Complainant established that she was subjected to unwelcome conduct based on her national origin and sex. In addition, the Agency found that the graphic nature of the comments made in front of other co-workers unreasonably interfered with her work performance. However, the Agency found that there was no basis for imputing liability to the Agency because it took prompt remedial action when it initiated an internal investigation and issued C1 a letter of reprimand. Complainant filed an appeal with OFO.

We found that Complainant established that she was subjected to unlawful harassment based on her sex and national origin. OFO noted that the Agency conceded in its final decision the first four elements of the case. OFO further found that Complainant established that there is a basis for imputing liability to the employer. Specifically, OFO found that the Agency failed to take appropriate corrective

action when it failed to remove C1 from the control room floor during the course of the investigation, which resulted in Complainant having to request leave and/or a reassignment.

OFO also found that Complainant established that she was subjected to unlawful retaliation. OFO reasoned that Complainant had informed management of the offensive comments by C1, which constituted protected activity. OFO found that the Agency's inaction of removing C1 during the investigation was reasonably likely to deter Complainant or others from engaging in protected activity. Finally, OFO found that the Agency failed to articulate a legitimate, nondiscriminatory reason for not removing C1 from the control room floor during the investigation.

OFO ordered the Agency to offer Complainant the opportunity to retroactively restore her to her former position, conduct a supplemental investigation pertaining to Complainant's entitlement to compensatory damages, provide training to the responsible management officials, and pay Complainant reasonable attorney's fees and costs.

Ho (Huong A.) v. USPS (Western Area), 0120161249 (05/09/2018) – Complainant worked as a Mail Handler. In late 2013, Complainant was diagnosed with cervicalgia and requested light duty. The record contained various doctor's notes that were provided to the Agency between April 2014 and December 2014, which indicated that Complainant should be allowed to wear a neck brace when necessary. Beginning in December 2014, management began telling Complainant that her medical documentation did not support her need to wear a neck brace. On February 8, 2015, Complainant's supervisor told her that she could not work while wearing her neck brace and that she could either take the brace off or take LWOP for the remainder of her shift. Complainant filed an EEO complaint alleging that the Agency discriminated against her based on race (Asian), national origin (Vietnamese), and disability when: (1) on various dates she worked less than eight hours per day; and (2) on February 8, 2015, she was sent home. The Agency issued a final decision finding no discrimination.

On appeal, the Commission found that the Agency denied Complainant a reasonable accommodation when it told her that she could not wear her neck brace and, on at least one occasion, sent her home because she was wearing her neck brace. The preponderance of the evidence established that the Agency was aware of Complainant's need to wear the brace, and the Agency made no showing that permitting her to wear a neck brace was an undue hardship. We found that Complainant did not establish that she was denied a reasonable accommodation when she was provided less than eight hours of work or that she was subjected to disparate treatment based on race, national origin, or disability. The Commission ordered the Agency to calculate the amount of back pay and other benefits due to Complainant, to conduct a supplemental investigation regarding compensatory damages, to provide training to and consider discipline against the responsible management officials, and to post a notice.

Teeias (Ronnie R.) v. HHS (IHS), 0120161406 (05/31/2018) – Complainant was an Accountant Lead at the Agency's Portland Area Office. Complainant suffered from a knee impairment which also caused back pain. Complainant was on muscle relaxers for the pain. He explained that on one occasion, he experienced such intense pain that he was unable to move for 8 hours and had to take several days off from work. Complainant had trouble with sitting in his chair at work due to the back pain, and requested reasonable accommodation on December 1, 2014. However, the Agency's department which

was responsible for processing the accommodation request experienced extreme delay in doing so for reasons that were not legitimate. For example, Agency employees took months to schedule a meeting to iron out their reasonable accommodation process, which they should have already had in place. Complainant was not provided with a chair until March 25, 2015, four months after he requested it. Complaint filed an EEO complaint alleging denial of a reasonable accommodation due to the delay in receiving a new chair. The Agency's FAD concluded that Complainant was not denied accommodation. The appellate decision concluded that Complainant demonstrated that he was an individual with a disability and that the Agency denied him a reasonable accommodation due to the delay in securing an ergonomic chair for his use. The decision reasoned that the accommodation was simple and that the delay was caused solely by the Agency. Complainant was awarded remedies which included compensatory damages.

Rowe (Susann G.) v. VA, 0120162437 (05/25/2018) **[Repeated under Priority 5 above]** – Complainant worked as a Medical Support Assistant (GS-5) at the Bay Pines VA Medical Center in Bay Pines, Florida. Complainant appealed from the Agency's FAD which concluded that she was not subjected to reprisal discrimination. As background, Complainant previously reported that her supervisor sexually harassed her, and the supervisor was terminated from federal employment. However, the supervisor returned to the Agency for matters before the MSPB and Complainant requested to be transferred to a more secure location out of fear that he would confront her. Management made the transfer to a new location. Subsequently, Complainant was not given a promotion she would have been previously eligible for. The appellate decision noted that Complainant inquired about her ability to receive the promotion prior to the transfer and at least one manager responded that it would not be an issue. Evidence indicates that management discussed where to place Complainant and memoranda and e-mails regarding these deliberations were notably absent from the record. A few months later when the promotions were formally announced, Complainant was informed that she would not be promoted because she was not in an eligible position after the transfer. The appellate decision concluded that Complainant was subjected to reprisal discrimination in that she was reassigned to a less desirable position after a report of harassment, which is sufficient to deter a reasonable person from engaging in EEO activity. Complainant demonstrated pretext by showing that management deliberately transferred her to the position and insisted that she did not receive the promotion as a mere technicality. The decision pointed to the fact that according to Complainant's SF-50 she was still assigned to a position that would qualify her for the promotion.

Complainant was awarded remedies which included promotion, back pay and an investigation into her entitlement to compensatory damages.

Rice (Giselle W.) v. DOJ (FBP), 0120162671, 0120162673 (05/14/2018) – Complainant worked as the Warden's Secretary, GS-8, at the Agency's Edgefield Federal Correctional Institution (FCI) in South Carolina. Complainant believed that new carpet recently installed in the Warden's Office area caused her to experience asthma. Complainant was unable to enter the FCI building in the Warden's Office area because whenever she entered the building, it triggered an asthma attack. Complainant went to a total of 12 doctor visits. Therein, Complainant visited a Pulmonologist and an Allergist. As a result, the Agency assigned Complainant away from the FCI to the Satellite Prison Camp on a Temporary Alternative Duty Assignment (TAD). Meanwhile, the Agency sent a letter to Complainant's doctor,

asking for a series of information, including her diagnosis, expected recovery, and the impact her condition has on her duties of her position. Before Complainant could make another visit to her doctor, the Associate Warden sent a letter to Complainant, instructing her to report for a Fitness-For-Duty Examination (FFDE). The letter directed Complainant to report for the exam, at an address in Atlanta, Georgia, approximately 160 miles away from the Edgefield FCI. Id. According to Complainant, upon arriving to the doctor's office for the FFDE, she observed there was a large "For Sale" sign on the property and no cars in the parking lot. Complainant stated that the building was deserted with no other patients except for her, and she saw no functional medical equipment there in the office. After the FFDE, Complainant's supervisor issued Complainant with her annual performance rating of "Achieved Results," instead of her normal "Outstanding" rating that she had received every year since she became the Warden's Secretary. Complainant thereafter filed three EEO complaints alleging discrimination on the bases of disability and reprisal for prior protected EEO activity. Following the investigation, the Agency issued three separate final decisions, each finding that Complainant did not establish that she was subjected to discrimination as alleged. We consolidated Complainant's three appeals, finding that the FFDE violated the Rehabilitation Act's prohibition against disability-related inquiries which are not "job-related and consistent with business necessity." In so finding, we noted that prior to its request that Complainant submit to the FFDE, the Agency had already received extensive medical documentation from Complainant regarding her medical condition. We further found that Complainant established that the Agency's reasons for her lowered performance appraisal were pretextual based on reprisal. We found that the Agency lowered Complainant's appraisal in response to her request for accommodation, and noted that the Commission has held that an agency may not punish a complainant for requesting or using reasonable accommodation. As a result of the finding of discrimination, we ordered the Agency to retroactively raise Complainant's yearly performance rating, pay compensatory damages, and train and consider disciplining the responsible management officials.

O'Brien (Ross H.) v. USPS, 0720180001 (05/17/2018) – Complainant filed a formal complaint alleging that the Agency discriminated against him on the bases of race (Caucasian), sex (male), age (53), and in reprisal for prior protected EEO activity when: he was not selected for the Manager Customer Services, EAS-18, position located in Norfolk, Virginia; he was not selected for the Manager Customer Services, EAS-20, position located in Norfolk, Virginia; and, he was not selected for the Postmaster, EAS-22, position located in Portsmouth, Virginia.

Following an investigation, Complainant requested a hearing before an EEOC Administrative Judge (AJ). Complainant submitted a Motion for Sanctions claiming that the Agency had failed to develop a complete and impartial record. Complainant noted that the Agency failed to include in the record application materials and qualifications of the candidates selected for two positions at issue, failed to identify the candidate selected for a third position, and failed to include interview notes for all three positions. Complainant requested default judgment in his favor as a sanction. The Agency responded, acknowledging that the record did not include the documents and information Complainant cited, but asserted that "pertinent information related to the selection" was included; that Complainant was not prejudiced by the missing documentation; and that the omissions could be cured during discovery.

The AJ issued a Notice of Intent to Grant Complainant's Motion for Sanctions and Notice of Intent to Issue a Default Judgment based on the Agency's failure to provide any persuasive reason for its failure to include basic information regarding its selections. The AJ noted that it was equally disturbing that

the Agency would suggest that the proper resolution of an inadequate investigation was the discovery process – clearly at the cost of Complainant – which was a blatant violation of the Commission's regulations. The AJ ordered the Agency to discontinue any supplemental investigations as it violated the Commission's regulations, would taint the EEO process, and was mounted as an attempt to backtrack and remedy a matter currently under review by the AJ without prior approval. The Agency opposed the Notice; however, the AJ subsequently scheduled a damages hearing after finding default judgment was an appropriate sanction and that Complainant had established an entitlement to relief. Following a two-day hearing, the AJ awarded Complainant, inter alia, $25,000.00 in non-pecuniary compensatory damages; placement in an EAS-20 Customer Services Manager position or a mutually agreed-upon position; back pay with interest and other benefits; $91,328.30 in attorneys' fees; and $3,756.11 in costs. The Agency issued a final order rejecting the AJ's default judgment decision and the relief ordered.

In the Commission's appellate decision, the Commission reversed the Agency's final order. The Commission determined that the AJ properly determined that default judgment in favor of Complainant was an appropriate sanction based on the Agency's egregious failure to conduct an appropriate investigation and that Complainant had established an entitlement to relief by establishing a prima facie case of discrimination. The Commission, however, modified the AJ's remedies order by increasing the award of compensatory damages to $30,000.00, but reducing the award of attorney's fees to $90,040.90 after finding non-compensable tasks reflected in the fee petition.

Preston (Valentin G.) v. Army, 0120162246 (05/31/2018) – Complainant filed a formal complaint alleging that the Agency discriminated against him on the bases of his race (African-American, Native-American) and age (53) when he was suspended for four days, and his performance evaluations were modified without his knowledge. Complainant also claimed that he was treated differently and disciplined more harshly than others in similar situations. Complainant filed a second complaint in which he claimed that the Agency discriminated against him in reprisal for his prior protected EEO activity when he was not selected for a Lead Security Guard position, and when, as a result of an email, he was temporarily disqualified from chemical personnel reliability duties.

Following a consolidated investigation, Complainant requested a hearing before an EEOC AJ. The AJ held a hearing and found that Complainant was discriminated against on the bases of his race and age when he was suspended for four days. The AJ found that Complainant did not establish that someone improperly added his signature to his performance evaluation, or that he was treated differently and disciplined more harshly than others in similar situations. The AJ also found that Complainant failed to establish that reprisal occurred when he was not selected for a Lead Security Guard position. However, the AJ found that the Agency engaged in reprisal when it placed him on a temporary medical restriction, and that the reprisal that occurred constituted a per se violation.

The AJ ordered the Agency to rescind the Notice of Four-Day Suspension and delete from all official and unofficial files, both electronically and non-electronically, all documents pertaining to the four-day suspension, including the Notice of Proposed Suspension, the Notice of Suspension, all of the supporting material, and any reference to the suspension contained in all subsequent documents pertaining to Complainant. The AJ ordered that Complainant be awarded back pay and applicable benefits for the period of the four-day suspension. The AJ also awarded Complainant $35,000 in non-pecuniary damages, and pecuniary compensatory damages of $129.63. The AJ ordered EEO training

for the responsible management officials, the Agency to consider discipline, and to post a notice of the finding of discrimination.

Complainant filed an appeal, claiming that the Agency had failed to issue a final Agency decision within the 40 days following its receipt of the AJ's decision. The Agency responded to the appeal by noting that the appeal was premature and that its final action implemented the AJ's decision in full.

In the Commission's appellate decision noted that Complainant did not appeal any other aspects of the AJ's decision, and was petitioning the Commission to enforce the AJ's decision in his favor. The decision ordered the Agency to implement the remedies ordered by the AJ to the extent it had not already done so as modified and delineated again in the Order in the decision.

Klingesmith (Anglea R.) v. DOD (DIA), 0120160762 (06/28/2018) – Complainant alleged that the Agency discriminated against her based on reprisal when she was subjected to an ongoing hostile work environment that included a lowered performance appraisal, and an opened security investigation. Complainant also alleged two other claims which were dismissed for failure to state a claim.

The Agency found that Complainant proved that she was subjected to discriminatory harassment as alleged when her supervisor lowered her performance rating after she filed an EEO complaint. The Agency also found that Complainant proved that she was subjected to a hostile work environment when false performance rating information was added to her record. The Agency ordered relief that included training, possible discipline for management, and $3,000.00 in nonpecuniary compensatory damages.

On appeal, Complainant argued that the Agency erred in dismissing claims for failure to state a claim, and for not finding discrimination with regard to both of her accepted claims.

With respect to the dismissed claims, the Commission found that Complainant did not show how she was aggrieved, as the incidents were not severe or pervasive enough to establish a hostile work environment. Moreover, the Commission found that the dismissed claims involved isolated incidents, that included management directions, hurt feelings, and concerns about what could happen in the future. The Commission, however, held that the Agency correctly found discrimination with regard to one of the accepted claims as was described above.

The Commission ordered training, consideration of discipline, a revision of Complainant's performance appraisal and personnel records, and $3,000.00 in compensatory damages.

Detar (Pamila R.) v. USPS, 0120160810 (06/18/2018) – Complainant worked as a Mail Processing Clerk at the Agency's Post Office in Greensburg, Pennsylvania. As a Mail Processing Clerk, Complainant was assigned to the Tour 2 shift, working between the hours of 4:00am and 12:00pm. Complainant placed her name on the Overtime Desired List (ODL), writing that she was available for overtime before and after her scheduled tour. On multiple days, Complainant began her tour at approximately 4:00am and was not scheduled for overtime unlike two other male employees on the Tour 1 shift. Complainant's first-level supervisor (S1) initially responded, in the EEO Counselor's Report, that it was simply his error and make-up overtime had been provided for Complainant. S1 also stated to the EEO Counselor that an ODL tracker had been since used to correct the errors in the assignment of overtime. S1 however later stated for the EEO investigation that there was no reason to offer make-up overtime for

Complainant, and therefore he did not do so. Complainant's second-level supervisor (S2) also however stated that there was no ODL tracker put in place as S1 maintained to the EEO Counselor.

In the interim, Complainant filed an EEO complaint, alleging discrimination based on race and sex when she was denied the overtime. Following the investigation, in accordance with Complainant's request, the Agency issued its final decision. The decision found that Complainant did not show that she had been subjected to discrimination, as alleged.

On appeal, we found that Complainant established a prima facie case of discrimination based on reprisal. In so finding, we noted that S1 untruthfully attested that he had no knowledge of Complainant's prior EEO activity. We specified that it was very unlikely that S1 would have no knowledge of Complainant's prior EEO complaint wherein he was named as the responsible management official. We further found that Complainant established a prima facie case of discrimination based on sex, and that Complainant established that the Agency's reasons for not assigning her the overtime were pretextual. In this regard, we found that S1's credibility was especially undermined, given that he untruthfully attested for the EEO investigation that he had no knowledge of Complainant's prior EEO activity. We additionally noted that S1 initially stated to the EEO Counselor that it was his error and that make-ups for overtime were provided for Complainant, but later stated the opposite for the EEO investigation.

As such, we found that S1's explanations were inconsistent and contradictory and were therefore unworthy of belief. We moreover noted that another employee expressed her belief that male employees were favored for overtime, and that a Union Steward believed that the Agency had been assigning overtime in violation of its policy. In sum, we found that Complainant established that she had been subjected to discrimination, as alleged.

Stayton (Jefferey G.) v. DOD (DODEA), 0120160923 (06/22/2018) – Complainant was notified that his tour as a School Support Assistant at an Agency Elementary School in England was expiring. Upon completion of the tour, he was eligible for registration in the Priority Placement Program (PPP), an independent outplacement program operated by the Agency, designed to place employees within the Agency who have been adversely affected (i.e., lost employment) through no fault of their own. Complainant promptly registered for the PPP and received a tentative job offer to a GS-06 Administrative Support Assistant (ASA) with the Army Corp of Engineers (ACE) in Sacramento, California.

Complainant's physician advised by letter dated September 29, 2014 that a move would be "deleterious to his health" and that it would be wise to delay relocation for some time until his health improved. This letter was forwarded to the PPP Civilian Transition Program (CTP) Deputy Administrator, as well as, ACE on October 2, 2014. Upon review, Complainant's start date was pushed back to October 31, 2014. Subsequently, Complainant's physician wrote that he was not able to work from October 13 through December 8, 2014. As a result, the CTP Administrator rescinded the ACE job offer and Complainant was removed from the PPP on November 15, 2014, since he was not medically able to travel. Two weeks later, Complainant's physician cleared him to return to work at FES for 4 hours per day on a flexible schedule.

On December 31, 2014, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of disability and reprisal for prior protected EEO activity when he was removed from the PPP and his job offer was rescinded. The Agency issued a decision concluding that Complainant did not prove that the Agency subjected him to discrimination as alleged.

The appellate decision modified the Agency's final decision, finding that Complainant was denied a reasonable accommodation. The decision found that the Agency could have delayed Complainant's start date, and that the failure to do so was a denial of a reasonable accommodation. The Agency did not establish that delaying Complainant's start date would have caused an undue hardship, nor did it present Complainant with any alternative that would have enabled him to accept the ASA position. Although the Agency was not required to accept an indefinite start date from Complainant, had the Agency engaged in an interactive process with him it would have discovered that Complainant had a definitive date that his physician identified he would have been able to report for duty. Among other things, the Agency was ordered to: (1) conduct a supplemental investigation on the issue of compensatory damages; (2) provide eight hours of in-person EEO training to RMO regarding responsibilities under the Rehabilitation Act, with special emphasis on providing reasonable accommodations.

Laber (King W.) v. DOD (DCMA), 0120160925 (06/19/2018) – Complainant was an applicant for employment at various agency locations. Each of the positions had different selection procedures and different selecting officials, however, Complainant was not selected for any of the positions. Complainant filed an EEO complaint alleging that he was subjected to sex, religion, age, and reprisal discrimination, and he appealed the Agency's finding that he was not subjected to discrimination. On appeal, the Agency's FAD was affirmed on all claims, except for one.

Complainant applied and interviewed for a Contract Administrator position at the Defense Contract Management Agency's Central Region in Milwaukee, Wisconsin. A member of the panel which interviewed Complainant recalled that he previously worked with Complainant for a short time and performed a "google" search of Complainant after the interview. The panel member reported to others that Complainant had engaged in EEO activity in relation to a reasonable accommodation claim with the Department of the Army. The panel member expressed concern to others that Complainant may have other opportunities to pursue claims if he were hired again and that he was "high risk". The panel member stated that others on the panel may have been influenced by this information. Other panel members testified that they were influenced by the fact that Complainant may have had performance issues in the past, but this information was relayed by the same panel member who reported about Complainant's EEO activity. Further, there was no information about Complainant's previous performance. The reports about Complainant were based solely on his EEO activity. The appellate decision found that this information constituted direct evidence of reprisal discrimination. Complainant was awarded remedies such as an investigation into compensatory damages, training for the selecting officials, and a posting notice. However, he was not awarded the Contract Administrator position because there was evidence that Complainant would not have been selected even if discrimination did not enter into the selection process. This is because other candidates performed better on interviews and the selecting official did not think any of the candidates were a good fit for the position.

Burns, (Anya F.), v. DOD (DCA), 0120160945 (06/21/2018) – Complainant worked as a Sales Store Checker, GS-03 at the Agency's McGuire Air Force Base Commissary at the McGuire Air Force Base, New Jersey. In October 2011, Complainant injured her right knee (Degenerative Joint Disease). The injury affected Complainant's ability to pivot on that knee. Complainant requested that she not be assigned to the self-checkout lane as performing this fast-paced assignment caused pain to her knee. The result of working at the self-checkout was that Complainant had to take leave the day after she worked to seek medical attention. Complainant's supervisor (S1) requested documentation and approved Complainant's request in October 2011. The accommodation remained in place until March 2013, when a new supervisor (S2) took over. S2 questioned Complainant's need for the accommodation and requested new medical documentation.

Following the submission of new medical documentation, which supported Complainant's need to not perform self-checkout duties, S2 still denied Complainant's accommodation request after consulting with the Disability Program Manager (DPM). Contrary to Complainant's physician, the DPM did not find that Complainant's injury was a disability and S2 agreed with him. They further agreed that Complainant could be taught to perform self-checkout duties without pivoting. Moreover, S2 told Complainant that as she was a good worker and valued employee, she would limit the amount of time she would assign her to work at the self-checkout. S2 indicated that because she denied Complainant's accommodation request, she only assigned her to work at the self-checkout lane in fifteen minute increments. She also indicated that Complainant only served three times in the self-checkout lane since February 10, 2013.

Complainant filed an EEO complaint alleging that the Agency discriminated against her and subjected her to harassment on the bases of disability (Degenerative Joint Disease) (DJD) and reprisal for prior protected EEO activity when, on April 25, 2013, she was denied a reasonable accommodation. The Commission found, among other things, that the Agency denied Complainant a reasonable accommodation because prior to S2's arrival, Complainant had been accommodated by not having to perform self-checkout duties and had successfully performed the duties of her position. Furthermore, the Commission found no persuasive evidence that not assigning Complainant self-checkout duties would have resulted in an undue hardship to the Agency.

The Commission ordered the Agency to provide an effective reasonable accommodation that would allow Complainant to perform the essential functions of her position, including excusing her from self-checkout lane duties. Also, the Agency was ordered to send the managers involved to training and to consider taking disciplinary action against said managers. Complainant was also given the opportunity to submit evidence for compensatory damages.

Gilbert (Clay W.) v. Army, 0120161031 (06/21/2018) – Complainant worked as a Social Services Assistance Coordinator with a two-year term. Complainant filed an EEO complaint alleging that he was subjected to discrimination based on sex (male) and reprisal for prior protected EEO activity when his term position was not converted to permanent, when his term position was not extended, when he was subjected to a hostile work environment, and when he was denied training. Complainant

requested a hearing before an AJ, and, when the Agency failed to provide the complaint file, the AJ issued a default judgment against the Agency. The AJ held a hearing on damages. In an interim bench decision on damages, the AJ found that Complainant mitigated his damages by finding a new job within five months of his term position not being extended that paid about 80 percent of the salary that he was paid by the Agency.

On November 30, 2015, the AJ issued a decision on attorney's fees and damages and ordered the Agency to do the following: (1) pay Complainant $49,000 in back pay, (2) pay Complainant $100,000 in nonpecuniary compensatory damages, (3) pay Complainant $3,025 for past pecuniary damages, (4) pay Complainant $6,000 in future pecuniary damages, (5) pay Complainant a negotiated amount of money to offset increased tax liability, and (6) pay attorney's fees in the amount of $63,150, including $7,500 for fees paid by Complainant to a previous law firm for pre-complaint work, pay expert witness fees in the amount of $6,393.85, and pay costs in the amount of $671.13. With respect to the attorney's fees claimed by the previous law firm's pre-complaint, pre-representational work, the AJ found that the hours claimed were excessive and reduced them by about 50 percent. On January 15, 2016, the Agency issued a final order fully implementing the relief ordered by the AJ. The Agency provided documentation indicating that the Agency inputted the damages and back pay award into its payment system on February 4, 2016, and inputted the attorney's fees and costs payment into the system on February 8, 2016. According to the Agency, because of the administrative processing time required by the Defense Finance and Accounting Service (DFAS), the damages and back pay payment posted on February 22, 2016, and the attorney's fees and costs payment posted on February 16, 2016. The Agency and Complainant proposed a $38,000 payment to offset Complainant's increased tax liability as a result of the lump sum back pay, but the Agency did not input a payment for this amount.

On appeal, Complainant contended that he was entitled to back pay through the date of the damages hearing, which would be an additional $27,620, plus interest. Complainant also requested five to ten years of front pay or reinstatement to a comparable position with the Agency. Complainant contended that he should have received interest on his back pay award and cited 9 percent as the relevant interest rate, derived from a Colorado statute. Complainant also requested interest on the past pecuniary damages and nonpecuniary damages awards. Complainant also contended that the Agency was late in paying the awarded amounts, as Complainant did not receive the funds until February 22, 2016. Complainant argued that the Agency incorrectly calculated the tax penalty offset. According to Complainant, the AJ erred in not awarding Complainant the full requested $14,432.67 in attorney's fees for the firm that advised him prior to filing his complaint. Complainant also requested reimbursement for expert witness fees that were not presented to the AJ with his petition for attorney's fees and costs as "an oversight."

The Commission found that the AJ erred in failing to reinstate Complainant to the term position that he held when he was separated from the Agency. We found that the circumstances did not meet the criteria for an award of front pay.

With respect to back pay, we found that the AJ's conclusion that Complainant adequately mitigated his damages was supported by substantial evidence in the record. We therefore found that the AJ erred in limiting Complainant's back pay award through December 31, 2013, and ordered the Agency to pay Complainant additional back pay until the effective date of his reinstatement or the date on which he declines the Agency's offer of reinstatement.

Regarding interest on the back pay award, we found that the AJ's omission of the words "with interest" was harmless error, as the Agency already had an obligation to calculate interest on Complainant's back pay. However, we found that the rate or rates used to compute the interest payment on a back pay award shall be the annual percentage rate or rates established by the Secretary of the Treasury as the overpayment rate under Internal Revenue Service Regulation 26 U.S.C. §6621(a), for the period or periods of time for which interest is payable, not the 9 percent figure proposed by Complainant.

The Agency failed to pay Complainant a negotiated sum to offset increased tax liability, allegedly because Complainant failed to provide his tax returns to demonstrate that he incurred increased tax liability. The Commission ordered Complainant and the Agency to cooperate to calculate his back pay and the appropriate amount to offset his tax consequences for any lump sum back pay award.

OFO found that the delay in paying Complainant compensatory damages was de minimis and unintentional and that Complainant was therefore not entitled to prejudgment interest or interest for late payments by the Agency.

Regarding attorney's fees for the pre-complaint process, we found that the AJ's determination that the hours spent by the firm in determining whether to represent him before he filed his complaint were excessive is supported by substantial evidence in the record. Specifically, the AJ noted that this firm apparently spent more time determining whether to represent Complainant than the attorney who actually represented him did in the course of representing him.

Finally, the Commission declined to order reimbursement of the expert witness fees not presented to the AJ or the Agency due to an oversight, as Complainant made no argument that this documentation was unavailable to him when he submitted his fee petition.

Murray (Josephine S.) v. DHS (CBP), 0120161196 (06/26/2018) – In a consolidated complaint, Complainant, a Mission Support Specialist Vehicle Officer, alleged that she was subjected to discrimination based on disability and retaliation when, among other claims, management failed to provide a reasonable accommodation, including denying and revoking telework; requiring her, during a mediation session, to provide updated medical documentation; and not allowing her official time to process her complaint.

Complainant was involved in a car accident and did not return to her duty station after the accident. Prior to the car accident, Complainant had requested an accommodation with respect to her fibromyalgia, post-traumatic stress disorder, attention deficit disorder, and secondary sleep disorder. Following the automobile accident, Complainant described her disabilities as traumatic brain injury, cervical and lumbar spine injuries, and rib, lung, leg, knee and hand injuries from the automobile accident.

The Agency issued a decision making a partial finding of disability discrimination regarding a failure to accommodate and ordered the payment of back pay, interest, and other benefits. Complainant subsequently appealed.

We rejected the Agency's argument on appeal that we should reverse its partial finding of failure to provide an accommodation. We agreed with the Agency's dismissal of one claim because it concerned a matter that had occurred during mediation.

As an accommodation, Complainant requested full-time telework with flexible hours and, also, challenged the Agency's revocation of telework. We found that the request was not effective because she could not perform the essential functions of her position even if she teleworked; that providing the requested accommodation would create an undue hardship; and, also, that Complainant had not established that she was a qualified person with a disability.

We found that when Complainant was allowed to telework, the Agency had to reallocate her functions between Complainant's supervisor and her co-workers. Flexible hours affected the workplace and her supervisor's work days. Staff also had to assume essential duties which was an added burden and caused staff to balk. Agency officers and agents had to wait longer for services because the employees were overburdened. A work backlog also developed because Complainant was not attending to her work. The workload of Complainant's supervisor increased and she had to perform some of Complainant's essential functions. We noted that the Agency was not required to transform a light or limited duty assignments into a permanent position as an accommodation; that the Agency was not required to lower performance standards; and that the Agency did not have to come up with "make do" work or create "make work" positions.

We also determined that Complainant had not shown that she was a qualified person with a disability. Complainant had maintained that she could not work in the workplace and could only work from at home. Commuting to work was not an option because of her medical conditions and she had to take prescribed narcotics twice daily which had an effect on her awareness whether she was at home or in the workplace. Cognitive impairments made Complainant vulnerable to distraction as did her chronic pain. Most of her telework assignments depended on use of a lap top and keyboard but permanently damaged fingers, joint pain, and swelling limited her manual dexterity.

Regarding official time, we found that the Agency did approve one request. A second request was not approved because Complainant did not obtain prior approval consistent with official policy and she had not established that she was in duty status for the hours for which she requested official time.

On the partial finding, we ordered the Agency to provide back pay and other benefits, leave restoration and attorney's fees. The Agency was ordered to conduct a supplemental investigation on compensatory damages.

Estes (Retha W.) v. USDA, 0120161254 (06/21/2018) – Complainant, an Area Specialist, alleged that the Agency harassed and discriminated against her on the bases of sex and disability. Additionally, Complainant alleged that the Agency failed to grant her request for a reasonable accommodation when it directed her to return to work after an extended medical absence in a building that she believed is unsafe. Specifically, Complainant maintained that as a result of working in that building with mold and other safety hazards, she developed acute asthma and lung damage that nearly caused her death. Additionally, she stated that she developed mobility issues, damaged kidney function, and atrial

fibrillation because the Agency made her work in the mold-infested building. The Agency's final decision found that Complainant did not prove that she was subjected to unlawful discrimination or harassment, nor denied a reasonable accommodation.

On appeal, OFO found that Complainant was a qualified individual with a disability because she had allergies, asthma, and sinusitis, and successfully performed the essential functions of her position. OFO further determined that in December 2013, Complainant informed the Agency that she had allergies and sensitivity to the building's air quality, and could smell mold in the office. OFO also determined that in January 2014, Complainant informed the Agency that she experienced watering eyes, coughing, sneezing, and headaches because of mold growing outside her office window, and "desperately needed something to be done." The Commission further noted that on January 14, 2014, Complainant requested fulltime telework because the mold in her office was exacerbating her conditions.

The Commission concluded that it was undisputed that Complainant's office had mold and other conditions that made employees sick, including Complainant, and as such, fulltime telework was the only appropriate accommodation in this case, unless the Agency could move Complainant to another building. The Commission further determined that although management approved telework agreements for Complainant in January 2017, there was no evidence that the Agency allowed her to telework fulltime until March 5, 2014. The Commission found that the fact that Complainant and other employees were allowed to telework fulltime after March 5, 2014 indicated that fulltime telework was not an undue hardship on the Agency, and therefore, the Agency unreasonably delayed accommodating Complainant with fulltime telework.

Additionally, OFO determined that Complainant did not prove that she was subjected to unlawful sex and disability harassment, and that the Agency's actions were more appropriately viewed as a denial of a reasonable accommodation for her disability. To remedy the Rehabilitation Act violation, OFO ordered the Agency to restore any leave Complainant took because of its failure to provide her with a reasonable accommodation; to consider taking disciplinary action against the responsible management official; to provide eight hours of in-person EEO training to specific management officials as well as staff charged with processing and responding to reasonable accommodation requests for the office; to provide Complainant with proven compensatory damages; and to post a notice of this discrimination finding in the office at issue.

Bryant (Jaunita W.) v. USDA, 0120161304 (06/15/2018) – Complainant worked as a GS-13 Equal Employment Opportunity Specialist and filed a complaint alleging discrimination based on race (African-American), sex (female), and reprisal for prior protected EEO activity. Complainant requested a hearing before an AJ, who issued a default judgment against the Agency for failing to produce the complaint file as ordered. Complainant requested retroactive promotion to the GS-14 level and corresponding back pay and $35,000 in nonpecuniary compensatory damages for "significant concern and anguish" and because she was diagnosed with hypertension in 2007 and had to start taking medication for hypertension in 2008. Complainant's attorney requested $63,221.61 in attorney's fees and $528.40 in costs, justifying his hourly rate by noting that he graduated from law school in 1977 and had worked almost exclusively in civil rights and EEO law. The Agency contended that Complainant

was only entitled to $43,843.70 in attorney's fees because her attorney had only started representing clients in 2003 and because fees for pre-complaint processing were disallowed. Prior to 2003, Complainant had worked in the Agency's Office of Civil Rights.

The AJ found that Complainant failed to establish a prima facie case with respect to her non-promotion to the GS-14 level and was therefore not entitled to retroactive promotion or back pay. The AJ awarded Complainant $3,500 in nonpecuniary compensatory damages because she provided limited evidence for her claim. The AJ awarded $44,372.10 in attorney's fees and costs. He found that Complainant's attorney's years of experience should be determined based on when he began representing clients in 2003 and awarded Complainant $435 for 1.65 hours of reasonable pre-complaint representational work. The Agency issued a final order fully implementing the AJ's decision on remedies.

The Commission agreed with the AJ that Complainant failed to establish a prima facie case of discrimination with respect to her non-promotion. We determined that an award of $8,500 in nonpecuniary compensatory damages was more in line with Commission precedent. With respect to the attorney's fee award, OFO found that the AJ properly denied Complainant's claim for attorney's fees prior to the filing of her formal complaint, with the exception of the 1.65 hours spent determining whether to represent Complainant. Regarding the hourly rate for Complainant's attorney, we found that the AJ erred in excluding Complainant's attorney's years of employment discrimination legal experience working for the Agency. We modified the attorney's fees award to $51,322.16 in attorney's fees and costs.

Chaney (Colleen M.) v. DOJ (USMS), 0120161381 (06/26/2018) – Complainant worked as a Deputy United States Marshall at the U.S. Marshall Service, Southern District of Ohio in Cincinnati, Ohio. Complainant appealed from the Agency's finding that she was not subjected to a hostile work environment based on sex and reprisal. The appellate decision concluded that Complainant proved that she was subjected to a hostile work environment based on reprisal when she reported that her manager was harassing her based on her sex. Specifically, the manager issued Complainant a letter of counseling and lowered her performance evaluation when she went to upper management about her complaints. Complainant's manager stated that he issued the letter of counseling because Complainant went "outside the chain of command," however, the only reason Complainant did so was to report what she believed to be harassment. Complainant was awarded an investigation into compensatory damages, a posting notice of the finding of discrimination, training for the responsible management official, removal of the letter of counseling from personnel records, modification of her performance appraisal, and for the Agency to consider disciplinary action against the responsible management official.

Jackson (Jazmine F.) v. DOD (SecDEF), 0120162132 (06/22/2018) – Complainant was employed as a Program Analyst, GS-0343-14 in the Agency's Program Budget Division, Financial Management Directorate (FMD) facility in Washington, DC. Beginning on January 24, 2011, and at the time of events giving rise to the underlying complaint, Complainant was working in a detail position as a Senior Staff Accountant, GS-0510-15, in the Agency's Office of the Under Secretary of Defense (OUSD). On or

around April 27, 2012, during the EEO counseling of a previous complaint, the Director of FMD contacted Complainant's detail supervisor (S2), and informed her that Complainant was engaged in settlement discussions for an EEO complaint.

On July 27, 2012, Complainant filed an EEO complaint alleging that the Agency discriminated against her based on reprisal (prior EEO activity) when the Director spoke to S2 about her previous EEO activity. Complainant timely requested a hearing but subsequently withdrew her request, and the complaint was remanded to the Agency for the issuance of a final decision. The Agency issued a final decision concluding that Complainant failed to prove the Agency subjected her to discrimination. Specifically, the Agency determined that Complainant was unable to establish a nexus between the prior protected activity and any adverse employment action.

The appellate decision reversed the Agency's final decision, finding that Complainant was subjected to adverse treatment and that there was a nexus between the protected activity and the adverse treatment at issue. Specifically, the decision reasoned that the conversation between the Director and S2 occurred only because Complainant had engaged in prior protected EEO activity. While the appellate decision agreed that the Director raised Complainant's previous EEO complaint in an effort to find a permanent reassignment as settlement in a previous case, the decision found that at the moment the Director was advised that there were no vacant positions for Complainant in S2's office no additional conversation was necessary. The Director's decision to mention Complainant's prior EEO complaint to S2 was retaliatory because it would have deterred a reasonable person from engaging in protected activity. Nothing in the record supported the Director's position that it was necessary to mention Complainant's prior EEO complaint to S2 when inquiring about a vacant position.

The Agency was ordered to: (1) conduct a supplemental investigation on the issue of compensatory damages; (2) provide eight hours of in-person EEO training to the Director regarding her responsibilities under Title VII with a special emphasis on avoiding retaliation; and (3) consider taking appropriate disciplinary action against the Director.

Bishop (Felisha A.) v. DHS (CBP), 0120162314 (06/05/2018) – Complainant, a GS-12 Customs and Border Protection Officer, alleged that she was discriminated against on the bases of sex (female), age (born in 1961), and in reprisal for prior EEO activity, when in April 2013, the Agency did not select her for a GS-13 Supervisory Customs and Border Protection Officer position. The Agency's final decision concluded that Complainant did not prove she was subjected to unlawful discrimination.

On appeal, OFO found that Complainant established prima facie cases of age and sex discrimination because she was a female born in 1961, the Agency deemed Complainant qualified for the position, and the Agency selected two males for the position, one of whom is significantly younger than Complainant. Additionally, OFO found that the recommending official was aware of Complainant's age and sex because he is her third-level supervisor.

Regarding its burden to provide a legitimate, nondiscriminatory reasons for Complainant's nonselection, OFO noted that the selecting official merely stated that he solely relied upon the recommending official's recommendation, and that the selectees had the two highest promotional

assessment test score rankings on the Merit Promotion Certification of Eligibles. OFO noted that the Commission has held that an agency does not meet its burden of production when it merely states that a complainant was not selected because she received lower scores than the selectees, without explaining the specific reasoning for the scores. OFO concluded that without evidence in the record that revealed Complainant's and the selectees' specific scores, the manner in which the scores were derived, and the pertinence of scores to the position at issue, the assertion that Complainant scored/ranked lower than the selectees was meaningless. Thus, OFO concluded that the Agency had not met its burden of production to articulate a legitimate, nondiscriminatory explanation for its actions, and therefore, did not rebut the prima facie inference of race and sex discrimination.

Additionally, OFO determined that even if it assumed arguendo that the Agency provided a legitimate explanation for not selecting Complainant, its explanation was unworthy of belief because the Agency did not place the purported promotional assessment test scores in the record, and Complainant possessed plainly superior qualifications for the position at issue. Finally, the Commission declined to address Complainant's reprisal claim because, even if she were to prevail on this basis, she would not be entitled to any further relief.

To remedy the Title VII and ADEA violations, OFO ordered the Agency to retroactively appoint Complainant to the position of GS-13 Supervisory Customs and Border Protection Officer; to pay Complainant appropriate back pay and interest for any pay lost from the date of her retroactive appointment until the date she was actually placed into the GS-13 position; to pay Complainant proven compensatory damages under Title VII; to provide eight hours of in-person EEO training to responsible management officials; to provide Complainant with proven compensatory damages; to consider taking disciplinary action against the responsible management officials; to pay attorney's fees and costs under Title VII; and to post a notice of this discrimination finding in the office at issue.

Wood (Marx H.) v. Navy, 0120162333 (06/19/2018) – Complainant, a Secretary at the Agency's Navy Medical Center, alleged, in pertinent part, that the Agency discriminated against her on the basis of disability when on August 26, 2014, it issued her a Notice of Proposed Five-Day Suspension for untimely completion of assignments. Complainant maintained that she was diagnosed with Dementia in May 2014, which caused her to experience hand-eye coordination deficit, impacts on thinking processes and communication, and to take a longer period of time to complete tasks. She further maintained that she informed her supervisors about her condition on May 23, 2013, and June 2, 2014 when she verbally told them about her condition and submitted written documentation about her condition from her physician. On August 11, 2014, Complainant submitted a reasonable accommodation form on which she revealed that she has Dementia and needed additional time to complete assignments. The Agency's final decision found that Complainant failed to prove that the Agency subject her to unlawful discrimination as alleged.

On appeal, OFO found that Complainant was an individual with a disability because her Dementia substantially limited her in the major life activity of thinking and had a condition that impacted her brain, which is a major bodily function or system. The Agency also found that Complainant was qualified because received satisfactory performance evaluations during the relevant period.

Regarding the suspension, OFO found that Complainant established a prima facie case of disability discrimination because the Agency acknowledged that Complainant was reprimanded only a couple of weeks after management learned she had a mental condition and requested accommodation of that condition by giving her more time to complete assignments. OFO noted that the Agency maintained that it suspended Complainant because she did not complete assignments in a timely manner and made errors in her work products. However, OFO determined that on August 11, 2014, Complainant informed the Agency that her Dementia affected her thinking processes, which caused her to take much longer to complete tasks.

OFO reasoned that while an agency may discipline an individual with a disability for violating a conduct standard, work product errors and untimely completion of work assignments are not matters of misconduct; they are matters of performance. OFO held that when, as here, an agency is aware that performance problems are caused by a disability, but disciplines an employee for those performance problems, the agency's actions are punitive against the employee's status as an individual with a disability. Therefore, OFO found that suspending Complainant for five days was tantamount to suspending her because she has a disability, and as such, the Agency had not provided a legitimate, nondiscriminatory reason for suspending Complainant. Therefore, OFO found that the Agency discriminated against Complainant on the basis of disability when it suspended her.

Nevertheless, OFO determined that Complainant did not prove she was denied reasonable accommodations because the Agency significantly extended deadlines for Complainant's assignments on several occasions, as well as provided her with model templates, a new desk location, supervisory feedback, and a tape recorder.

To remedy the Rehabilitation Act violation, OFO ordered the Agency to remove any reference to Complainant's suspension from all personnel files; to reimburse Complainant for any pay lost because of the suspension; to provide eight hours of in-person EEO training to all management and Human Resources officials within Complainant's Department; to consider taking appropriate disciplinary action against the responsible management officials; to pay Complainant proven compensatory damages; and to post a notice of this discrimination finding at Complainant's workplace.

Drummond (Timothy M.) v. Navy, 0120162429 (06/28/2018) – Complainant appealed regarding remedies from an Administrative Judge's (AJ) finding that he was not subjected to race and sex discrimination when he was not selected for an Industrial Engineering Technician position. The AJ awarded Complainant remedies for his harassment allegations, however, the AJ did not award remedies for a non-selection allegation that was part of the complaint on grounds that Complainant did not request such relief. The appellate decision concluded that Complainant was entitled to make-whole relief because of the AJ's issuance of default judgment against the Agency. Further, the appellate decision concluded that Complainant established his entitlement to remedies by establishing a prima facie case of race discrimination as it relates to the non-selection. Therefore, Complainant was awarded remedies including an offer for an Industrial Engineer position.

Redeaux (Beatriz L.) v. USPS, 0720150009 (06/12/2018) – Complainant worked as a Letter Carrier, at the Agency' s Post Office in Mt. Prospect, Illinois. Before Complainant began her employment for the Agency, she had been employed by an electric utility company wherein she filed a worker's compensation claim against the company. During that time, Complainant had been diagnosed with physical impairments as well as depression and anxiety. Complainant thereafter submitted her employment application for the position of Letter Carrier with the Agency and was aware that the position required extensive walking, lifting, among other physical activities. After receiving an offer of employment, Complainant completed the Agency's pre-employment medical history questionnaire administered to all applicants after a conditional offer of employment has been extended. Complainant however answered, under penalty of perjury, that she did not have any mental disorder or physical impairment which would interfere with her ability to fully perform the duties of the Letter Carrier position.

After Complainant was hired as a Letter Carrier, she reportedly suffered severed on-the-job injuries. As a result, Complainant's doctor eventually restricted Complainant to sedentary work with no walking, standing, and no driving. However, another limited-duty employee reportedly advised the Postmaster that Complainant had bragged that she was "scamming" the Agency. As a result, the Office of Inspector General (OIG) opened an investigation to determine if Complainant was engaged in possible health care fraud by exaggerating the severity of her injuries in order to continue to receive worker's compensation. As part of their investigation, the OIG conducted secret video surveillance of Complainant on 21 occasions. Therein, the OIG witnessed Complainant driving to the mall, Target, among other locations, moving and lifting items outside her sedentary medical restrictions. The OIG's investigation found that the surveillance showed that Complainant had been misrepresenting her medical condition to the Agency. Shortly after receiving the OIG's investigation and being notified that Complainant had a high-risk pregnancy, the Postmaster issued Complainant with a Notice of Termination. Therein, the Postmaster cited to the OIG investigation as well as Complainant's false answers in her medical history questionnaire.

Complainant thereafter filed an EEO complaint based on race, color, sex, disability, sex (pregnancy), disability, and reprisal. Following the investigation, the AJ held a hearing finding that Complainant established that she was subjected to discrimination based on her disability. The AJ found that the Agency violated the Rehabilitation Act when it used Complainant's false answers in her medical history questionnaire as a reason for her termination. The AJ further found that the video surveillance did not show that Complainant had violated her restrictions, and noted that the Agency cannot order Complainant to refrain from activities once she leaves the work premises. To remedy the discrimination, the AJ ordered the Agency to reinstate Complainant and pay her $2,000 in compensatory damages, among other things. The Agency subsequently issued a final order declining to implement the AJ's finding of discrimination and appealed to the Commission.

On appeal, we found that the AJ improperly implicated the OIG for its actions. We noted that claims challenging the actions taken during an OIG investigation are a collateral attack to the investigation and the proper forum for raising such claims is with the OIG, not the EEO process. We therefore found that the AJ erred in finding that the Agency's legitimate nondiscriminatory reason, that Complainant was terminated due the OIG investigation, was pretext for discrimination. We however found that Complainant's pregnancy was taken into consideration in her firing, and found that Complainant's complaint should be addressed as a mixed motive case. Nevertheless, we found that the same decision

to terminate Complainant would have been made even absent discrimination, and therefore Complainant was not entitled to personal relief.

We further found that the AJ erred in finding that the Agency improperly used Complainant's false answers in her medical history questionnaire as a reason for her termination. As an offer of employment had already been extended to Complainant when the inquiry was made. We lastly disagreed with Complainant's assertion that management committed a per se violation of the Rehabilitation Act in sharing the OIG's investigative report, containing her medical records with her supervisors, HR, and other management officials. In so finding, we noted that these officials "needed to know" Complainant's medical history in order to address the OIG's investigative report discussing Complainant' s physical restrictions or lack thereof.

Price (Lois G.) v. VA, 0720170034 (06/15/2018) – Complainant worked as a Registered Nurse at the Agency's Central Arkansas Veterans Healthcare Center, John McClellan VA Medical Center in Little Rock, Arkansas. On April 8, 2014, Complainant filed a formal complaint alleging that she was subjected to hostile work environment, on the bases of age (51) and reprisal. After the investigation, Complainant requested a hearing, which was held on April 26 and 27, 2017. On June 29, 2017, the AJ issued a decision finding that Complainant proved that the Agency subjected her to discrimination. The Agency's subsequent final order accepted the AJ's discrimination findings, but rejected the AJ's decision to award back pay, interest on back pay and the payment of $1,942.76 in pecuniary damages.

On appeal, the Agency argued that interest on back pay was not available as a remedy when the basis for finding discrimination is age or reprisal, where the underlying claim is based on age. The Agency further contended that back pay was not appropriate, as the AJ failed to expressly state that the Agency took an "unjustified or unwarranted personnel action." Finally, the Agency submitted that compensatory damages were not recoverable on an age based claim under the ADEA or on a reprisal complaint based on prior EEO activity arising under the ADEA. Complainant conceded that interest on back pay was precluded for cases brought under the ADEA.

The appellate decision affirmed the AJ's decision with respect to the award of back pay, finding that there was no merit to the Agency's position that the Back-Pay Act required the express use of the magic words "unjustified or unwarranted personnel action" when finding that Complainant had been subjected to a hostile work environment. However, with respect to interest on back pay and compensatory damages, the appellate decision agreed with the Agency that the AJ erred in awarding these remedies.

In this regard, the appellate decision referenced the Commission's consistent position that: back pay is not available as a remedy under the ADEA; compensatory damages are not available in federal sector complaints brought under the ADEA; and, compensatory damages are not available in retaliation complaints arising solely out of prior EEO activity related to the ADEA.

The Agency's final order was modified, and the matter was remanded to the Agency to implement the remedies ordered by the AJ, as modified.

Weaver (Shanel G.) v. USPS, 0120140468 (07/06/2018) – Complainant filed a complaint alleging that she was discriminated against based on disability and in retaliation when, on September 21, 2010, she was issued a Notice of Termination, effective October 5, 2010. After an investigation, she requested a hearing before an Equal Employment Opportunity Commission AJ. After the hearing, on June 25, 2012, the AJ found that Complainant had been subjected to discrimination when she was denied a reasonable accommodation and ordered, among other remedies, that the Agency must award the Complainant back pay, with interest, from October 10, 2010 (when her contract would have been renewed and she had not been discriminated against) to the date when she is reinstated minus the payments she received from OWCP. The Agency issued a final order that adopted the AJ's finding of discrimination. Complainant was reinstated as of December 23, 2012. Subsequently, it was determined that Complainant's lost wages were in the amount of $112,050.91, and that her OWCP compensation was $72.077.11.

The record indicates that, prior to filing her EEO complaint, Complainant was bitten by a dog while working, i.e., delivering the mail. Her injury resulted in a reduced range of motion in her right hip as well as sciatic nerve pain. This is why she requested the reasonable accommodation that was denied by the Agency and which resulted in the AJ finding discrimination. Complainant subsequently brought a third-party lawsuit against the dog's owner under the Federal Employees Compensation Act (FECA). While her EEO complaint was pending, Complainant reached a settlement in the lawsuit for $115,000. From that amount, in May 2012, she paid OWCP the sum of $40,376.94. Subsequently, the Agency, in calculating Complainant's back-pay entitlement, maintained that the money she paid in May 2012, should not be credited to her because it was unrelated, i.e., not intended to reimburse the Agency for its contribution to her OWCP wage replacement benefits as provided for by the AJ.

Complainant filed an appeal arguing that the Agency was not complying with its final order. OFO issued a decision that supported Complainant's position. In reaching that conclusion, OFO noted two documents in the record. There was a February 7, 2013 statement made by the Agency's Labor Relations Specialist on the Agency's Back Pay Decision/Settlement Worksheet. She indicated that, "[t]he amount of $40,376.94 that was repaid was applied to total compensation paid . . .." The record also contained a letter from the Agency's representative where he indicated that the May 2012 payment to OWCP by Complainant constituted the "tortious dog-owner's share of the compensation paid to [Complainant]. Accordingly, of the $72,077.11 paid through OWCP, $40,376.94 was paid by the dog-owner, and the Postal Service paid the remaining $31,700.17." Accordingly, OFO found that make whole relief required that the Agency credit the amount Complainant already paid to OWCP, i.e., $40,376.94, and return that amount to Complainant.

Rivera (Reita M.) v. AID, 0120161608 (07/17/2018) – Complainant worked as a Senior Fellow at the Agency's Democracy and Governance Office in Washington, D.C. On or about January 27, 2010, Complainant informed her supervisor (S1), that she was pregnant. Immediately following this, S1 began to scrutinize Complainant's telework requests, her hours while teleworking, and her task lists on the days she teleworked. In March 2010, S1 asked Complainant to take leave for days when he knew that she had worked from home.

On April 16, 2010, S1 removed Alternate Work Schedules (AWS) for everyone in the office. However, this only affected three employees, including Complainant. The other two employees had also recently complained about S1, and engaged in mediation with him on April 15, 2010. In July 2010, Complainant began her maternity leave. While Complainant was under the impression that her fellowship would be renewed through March 2011, she was instructed to come into the office to retrieve her belongings in September 2010 because her fellowship ended. Complainant was still on maternity leave at the time, and had planned to return to work in October 2010.

Complainant filed an EEO complaint alleging that she was discriminated against based on sex (pregnancy), and reprisal, when S1 made disparaging remarks about her pregnancy, and subjected her to increased scrutiny and reporting requirements related to her telework; Complainant was required to apply leave retroactively to dates and times when S1 knew she worked; S1 terminated her AWS; and she was notified that her fellowship would not be extended. Complainant requested a final agency decision. The Agency found that Complainant had not shown that the Agency subjected her to discrimination as alleged, and Complainant filed the instant appeal.

The appellate decision found that Complainant had established a prima facie case of sex and reprisal discrimination, and then demonstrated that the Agency's reasons were pretext for discrimination. With regard to Complainant's telework reports, the record shows that she submitted extensive narratives, and despite clearly meeting the reporting requirements, she was accused of not meeting them. Additionally, emails between Complainant and S1 showed that he knew she was working more than eight hours a day, but still asked her to take leave, and did not approve all her work hours.

S1 stated that he denied Complainant AWS due to a lack of coverage. However, the record showed that Complainant was meeting her work requirements, and that she was responsive and accountable while using workplace flexibilities. The appellate decision found that the Agency did not articulate a legitimate, nondiscriminatory reason for not renewing her fellowship because S1's assertion that Complainant had performance problems was not supported by any documentation. Regardless, Complainant had shown pretext because the management's responses were inconsistent when Complainant's second line supervisor stated that her fellowship was not renewed due to office needs. Accordingly, the appellate decision concluded that the preponderance of the evidence supported Complainant's claim that she was subjected to sex and reprisal discrimination, and reversed the Agency's final decision.

Among the remedies, the Agency was ordered to provide Complainant with a fellowship, or similar position, with an opportunity to extend on a yearly basis (similar to other fellows); conduct a supplemental investigation to determine compensatory damages; and provide training to the responsible management officials.

Baxter (Mafalda H.) v. DHS (TSA), 0120170996 (07/27/2018) – Complainant, a Senior Federal Air Marshal, alleged that she was not promoted to a Transportation Security Inspector-Surface (TSI-S) position in 2015 because of her sex and age (born in 1973). In a final decision, the Agency found that Complainant did not prove she was subjected to unlawful discrimination.

On appeal, OFO found that Complainant established a prima facie case of discrimination based on sex and age because she is a female born in 1973; she applied for and was deemed qualified for the TSI-S position; and a male born in 1982 was selected for the position. Nonetheless, the Commission found that the Agency articulated legitimate, non-discriminatory reasons for Complainants' nonselection. Specifically, a selection panelist indicated that Complainant was ranked last for the position because she failed to provide outcomes to situations presented by the interview panel. Additionally, another panelist stated that Complainant answered questions briefly with "little details" on many of her responses, and a third panelist stated that Complainant was rated last because, at times, she did not understand the question or did not have relevant answers to them.

However, the Commission noted that Complainant had been a Senior Air Marshal with the Agency since 2002; worked as Federal Police Officer for the Federal Bureau of Investigation from 1996 until 2002; and had a Bachelor's Degree and Criminal Justice and completed substantial work on a Master's Degree in Organizational Leadership. In contrast, the selectee began his career with the Agency as a part-time Transportation Security Officer, and previously worked in the military and National Guard, not civilian law enforcement. There was no evidence the selectee had a college degree. As such, the Commission concluded that Complainant possessed superior qualifications for the TSI-S position.

Additionally, OFO determined that the panelists' explanations were suspiciously thin and vaporous and not supported by the record because they did not specify what Complainant purportedly said that did not provide outcomes to situations, was too brief, or lacked detail, nor did panelists specify how she should have answered questions to receive a higher ranking. OFO also noted that interview notes did not reflect that Complainant's responses were deficient. Finally, the Commission noted that all seven TSI-I employees were male during the relevant time period, although four of these employees were over 40 years old. Consequently, OFO found that the Agency's explanations were unworthy of belief and pretext for age and sex discrimination. To remedy the finding of age and sex discrimination, OFO ordered the Agency to offer Complainant retroactive appointment to the position of TSI-I; to pay Complainant back pay and benefits with interest; to provide Complainant with proven compensatory damages; to consider taking disciplinary action against the selection panelists; to provide eight hours of in-person EEO training to the selection panelists; and to post a notice of this discrimination finding in the office at issue.

Stitcha (Denise Y.) v. DOI, 0120160694 (07/31/2018) – Complainant, a Park Police Officer, filed an EEO complaint alleging the Agency discriminated against her on the bases of sex and reprisal for prior protected activity when she was subjected to harassment and termination during her probationary period. An EEOC AJ sanctioned the Agency by entering a default judgment for its failure to initiate and complete its investigation within the time frame established by EEOC regulations and the AJ's orders, which significantly prejudiced Complainant. Following receipt of Complainant's Statement of Relief, the AJ issued a decision finding that Complainant had established that she was subjected to sex-based harassment, but failed to establish a prima facie case of discrimination with respect to her termination. The AJ ordered the Agency to pay Complainant $5,000 in non-pecuniary compensatory damages, pay attorney's fees, provide training and post a notice. This appeal followed.

The appellate decision affirmed the AJ's default judgment, but disagreed with the AJ concerning the termination, and found that Complainant presented evidence sufficient to establish a prima facie case that her termination was based on retaliatory animus for her opposition to the sex-based harassment she experienced. The evidence showed that she was terminated for trivial infractions for which others were not disciplined. As such, the decision concluded that Complainant was entitled to equitable relief following the default judgment, to include retroactive reinstatement to her position and back pay, as well as an increase in the compensatory damages award to $50,000.

Ho (Eleni M.) v. DOT, 0720160021 (07/23/2018) – In or around June 2011, an investigation involving Complainant's co-worker uncovered evidence of an inappropriate text sent to Complainant by her immediate supervisor. Complainant was advised that this discovery would be evaluated for appropriate action and she was asked to prepare a statement. As part of the investigation, both the supervisor and Complainant's computers were subjected to forensics examination. Multiple inappropriate emails on both computers were identified, the supervisor was reassigned away from his manager's position, and subsequently resigned. The investigation closed, and several months later, a new supervisor was hired.

The new supervisor inherited the investigation of Complainant and the previous supervisor's inappropriate communication, as well as, all the decisions made surrounding the investigation. The new supervisor took measures to ascertain whether inappropriate images discovered on Complainant's computer during the investigation had been removed, but discovered that the images remained. Complainant was subsequently issued a Letter of Counseling, and advised to remove the images. While the letter was not considered formal discipline, and was not retained as part of the Official Personnel File, Complainant was advised that it would be kept indefinitely in case it was ever necessary to establish that Complainant was on notice of the fact that possession of these images was in violation of the Agency's internet and media policy. Additionally, she was advised that "future incidents of this nature may result in disciplinary action."

On November 13, 2012, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of sex and reprisal for prior protected EEO activity under Title VII and subjected her to a hostile work environment when she was subjected to at least seven incidents including issuance of the Letter of Counseling at. Complainant requested a hearing. After a three-day hearing, the AJ assigned to the case issued a decision finding that the evidence did not establish that any of the allegations, except for the issuance of the Letter of Counseling, occurred as a result of Complainant's sex or in retaliation for prior EEO activity. The Agency issued a decision rejecting the AJ's finding that Complainant proved that the Agency subjected her to discrimination with respect to the issuance of the letter.

The appellate decision discerned no reason to disturb the AJ's finding of discrimination. The decision reasoned that the findings of fact were supported by substantial evidence, and the AJ correctly applied the appropriate regulations, policies, and laws. The examination of Complainant's computer stemmed from the investigation of her supervisor. During the investigation, the Agency also discovered inappropriate material on Complainant's computer. Both Complainant and the Deputy Director testified that while there were other people involved in sending inappropriate email exchanges, as well

as storing inappropriate material on their computers, Complainant was the only person to receive a Letter of Counseling. While the Agency articulated a legitimate reason for issuing a Letter of Counseling to Complainant, the appellate decision found it problematic that no explanation was given for why the investigation and issuance of a Letter of Counseling stopped with Complainant. Among other things, the Agency was ordered to: (1) pay Complainant $5000.00 in non-pecuniary compensatory damages; (2) pay Complainant $6950.00 in attorney fees; (3) consider issuing discipline to the responsible management officials; and (4) ensure that all responsible management officials participate in 8 hours of in-person training on their obligations, and responsibilities under Title VII.

Clinkscales (Charles E.) v. DOJ (BOP), 0720180006 (7/19/2018) – During the relevant time, Complainant was an employee at the Agency's Federal Correctional Complex in Beaumont, Texas. Believing that his non-selections for two positions were discriminatory, Complainant filed a formal complaint based on race and sex. Following a hearing, the AJ found that Complainant was subjected to racial discrimination regarding the non-selection of one position, and sex discrimination with respect to the other position. The AJ awarded Complainant $90 in non-pecuniary compensatory damages, retroactive placement in either position, two years of front pay, back pay, restoration of leave, and attorney's fees. The Agency issued a final order, rejecting the finding of sex discrimination, as well as the compensatory damages, restoration of leave, and attorney's fees awarded. The Agency also filed an appeal. Complainant sought to uphold the AJ's decision, but appealed the AJ's failure to award him the differential lost in TSP contributions.

On appeal, the Commission upheld the AJ's finding of sex discrimination. The AJ, who presided over the hearing and was in the best position to make credibility determinations, found the reference checking process to be "a sham to conceal discrimination." The AJ's finding of pretext is supported by substantial evidence.

While the Agency argued that $90,000 in non-pecuniary damages should be reduced to $25,000, we found no basis to disturb the AJ's award. Regarding interest for the damages award, the Commission found that Complainant was not entitled because the Agency had not delayed in paying him. We also determined that Complainant was entitled to the lost differential in TSP. The number of hours worked by the attorney was reduced by 4.5 hours, to properly reflect payment at 50% of the regular hourly rate during travel (the attorney had sought and been awarded payment at the full rate). Costs were also reduced by $450, because Complainant did not provide any documentation for those expenditures. Lastly, the matter of leave restoration was remanded to the Agency for a supplemental investigation regarding the amount of leave lost by Complainant.

Brandon (Danita P.) v. VA, 0120172149 (07/18/2018) – During the relevant time, Complainant worked as a Claims Assistant for the VAMC in Salem, Virginia. She filed a complaint of harassment based on color, disability, and reprisal.

At the hearing, the AJ granted Complainant's Motion for Sanctions, following the Agency's repeated failure to respond to her discovery requests. The Agency was denied the opportunity to present

witnesses at the hearing. The AJ found discrimination with respect to two claims. Complainant was awarded $7,500 in compensatory damages, in light of the "limited evidence provided by Complainant. She was also granted attorney's fees, a parking space close to her worksite, and quarterly meetings to assess her needs for reasonable accommodations. The Agency issued a final order fully implementing the AJ's decision. Complainant filed an appeal challenging the award of compensatory damages.

On appeal, the decision affirmed the finding, but increased the award of compensatory damages to $50,000. Complainant has Systemic Lupus Erythematosus, but also suffers from Lichen Scherosus. Complainant testified to her necessary routine to treat this skin condition affecting the private parts of her body. By working from home she could more easily and frequently reapply necessary ointments and creams, thereby relieving some of her pain. Further, working at the Agency facility, sitting for many hours, exacerbated her condition and required her to take additional medications. The decision concluded the damages she suffered by being denied a reasonable accommodation for a year supports an award of $50,000 in non-pecuniary compensatory damages.

Parker v. USPS, 0120172103 (07/18/2018) – Complainant, a City Letter Carrier in Waterbury, Connecticut, claimed he was subjected to a series of harassing incidents in retaliation for his prior EEO activity. After a hearing, an EEOC AJ found that Complainant's supervisor had violated Title VII by threatening to "get" Complainant if he filed an EEO complaint, as well as denying his leave requests shortly after this conversation. As a remedy, the AJ ordered the Agency to provide Complainant $750 in compensatory damages, pay attorney's fees, provide EEO training to responsible management and post a notice of the finding. The Agency accepted the AJ's decision. Complainant appealed, but did not submit any brief or arguments explaining what he was contesting. As such, the appellate decision affirmed the AJ's decision, including the remedies.

Hart (Mark D.) v. DOJ (FBI), 0120162225 (7/27/2018) – Complainant received a conditional offer for the position of Electronics Technician (ET) position (Grade 7/9), and was deemed by the Agency as qualified for every facet of the ET position except with respect to passing the physical fitness requirement of the position, which requires strenuous physical exertion, at times. Complainant filed an EEO complaint alleging that the Agency (FBI) discriminated against him based on disability (ventricular arrhythmia) when, on October 30, 2014, the FBI rescinded its job offer for the Electronics Technician (ET) position (Grade 7/9) in the St. Louis Division, and on December 11, 2014, Complainant's appeal of that rescission was denied. The Agency issued a final Agency decision on the record in which it determined that it had not discriminated against Complainant.

The appellate decision concludes that the Agency violated the Rehabilitation Act when it disqualified Complainant because of the preexisting medical condition of ventricular arrhythmia, which is an irregular heart-beat (i.e., sinus rhythm) originating in one of the ventricles of the heart. An arrhythmia can reduce the blood flow to the brain and cause feelings of dizziness. In 2010, Complainant was prescribed the beta-blocker Metoprolol Tartrate (MT). The record shows that MT improved Complainant's ventricular function and suppressed his ventricular arrhythmia.

The decision concludes that the responsible management officials (RMOs) failed to conduct an individualized assessment of the risk of potential future injury and relied upon medical records that do not present an accurate reflection of Complainant's current state of health, which is that Complainant can safely perform "strenuous physical exertion" with the support of MT. Accordingly, we found that the Agency failed to show that Complainant's future performance of ET work poses a significant risk of substantial harm to the health or safety of himself or others.

Our decision reverses the Agency's decision and orders the Agency to: (1) offer Complainant reinstatement; (2) determine and award the appropriate amount of back pay, with interest, and other benefits due to Complainant; (3) conduct a supplemental investigation on the question as to whether Complainant is entitled to compensatory damages; (4) provide training for the RMOs; (5) consider taking disciplinary action against the RMOs; and (6) post a notice of our findings.

McMillon (Heath P.) v. Navy, 0120162808 (07/17/2018) – Complainant worked as a Helper Trainee (Marine Machinery Mechanic), at the Agency's Puget Sound Naval Shipyard and Intermediate Maintenance Facility Shop 38 in Bramerton, Washington. Complainant participated in a vanpool to commute to and from work which was independently operated. The other riders were Agency employees; however, they worked in different shops or offices than Complainant. Complainant alleged that several passengers in the vanpool made derogatory comments and slurs about homosexuals on numerous occasions. On one occasion, Complainant used a racial slur toward an African-American passenger, who filed an EEO complaint regarding the incident. Complainant's second-level supervisor (S2) met with Complainant after learning of the complaint and Complainant reported that he felt harassed by the passengers as well and disclosed his sexual orientation to S2 for the first time. S2 sent an email on Complainant's behalf to the Agency's EEO Office. Approximately 30 minutes later, however, S2 began the process of removing Complainant from employment based on purported work performance issues and ultimately submitted supporting documentation and his termination recommendation to Human Resources. An investigation into the vanpool incidents revealed that inappropriate language was commonplace, but there was no evidence that homosexual slurs were specifically directed at Complainant or that Complainant was subjected to sexual harassment. Furthermore, the investigative report concluded that Complainant had engaged in several instances of inappropriate and/or intimidating conduct toward the vanpool passengers. M1 received S2's termination recommendation and the investigative report from Human Resources, but not S2's supporting documentation. Based on the investigative report and S2's recommendation, the Production Workforce Manager (M1) issued Complainant a notice terminating his employment during his probationary period.

Complainant filed a formal complaint alleging that the Agency discriminated against him on the bases of sex (male) when he was subjected to sexual harassment in a vanpool from September 2013 through March 21, 2014. In addition, Complainant alleged that he was subjected to reprisal for prior protected EEO activity when his employment was terminated on March 21, 2014, during his probationary period.

At the conclusion of the investigation, Complainant requested a hearing before an EEOC AJ. The AJ granted summary judgment in favor of the Agency as to Complainant's hostile work environment claim and held a hearing regarding Complainant's removal claim. In the decision, the AJ initially

determined that Complainant failed to show that he was subjected to a hostile work environment. The AJ noted that the vanpool passengers used offensive slurs and Complainant himself engaged in offensive language; however, there was no evidence that the slurs were directed at Complainant or that any of the passengers were even aware of Complainant's sexual orientation. When Complainant complained, his fellow passengers stopped using the offensive language. Nonetheless, the AJ found that there was no basis to impute liability to the Agency as the conduct at issue occurred outside of work hours in a voluntary vanpool operated by a third party.

With respect to his removal. S2 testified that he recommended Complainant's termination solely for conduct issues while at work. M1, the deciding official, was unaware of the performance and conduct issues and made the determination solely on information contained in the investigation into the vanpool incident. The AJ determined that there was no direct communication between S2 and M1 and S2's supporting documentation was never given to M1. Even so, the AJ found that S2's reasons for his actions were pretextual as there was no evidence to support his reasons for deciding to terminate Complainant approximately 30 minutes after he made the EEO appointment for Complainant and after he learned of Complainant's sexual orientation. The AJ concluded that the Agency established that it would have nonetheless terminated Complainant absent the retaliation based on his conduct in the vanpool. The investigative report contained statements from employees who said that Complainant made them feel extremely uncomfortable when he used racist and sexist language repeatedly and when he displayed anger while driving in such a way as to make some of the passengers feel physically unsafe. As a result, the AJ found that Complainant was entitled to declaratory and injunctive relief, but not personal relief or reinstatement. The Agency issued a final order fully implementing the AJ's decision and the relief ordered.

On appeal, the Commission affirmed the final order. First, the Commission found that Complainant failed to show that he was subjected to a hostile work environment. The Commission noted that the Agency did not operate the vanpool and that there was no evidence that the passengers knew of Complainant's sexual orientation or directed the offensive language at Complainant directly. Further, the investigation determined that all of the vanpool passengers engaged in offensive conduct, including Complainant. The Commission found that the Agency took prompt, corrective action following the report of offensive conduct and no additional similar behavior recurred. Therefore, the Commission found no basis to hold the Agency liable.

With respect to his removal, the Commission concurred with the AJ and found that S2's explanation for his actions was pretextual. The record showed that S2 made the decision to recommend Complainant's termination 30 minutes after Complainant requested an appointment to meet with an EEO Counselor. In addition, while M1 was the deciding official for Complainant's termination and was unaware of Complainant's protected EEO activity at the time, the termination recommendation would not have been presented to M1 without S2's actions. The Commission found, however, that substantial record evidence established that Agency management would have made the same decision to terminate absent retaliation. The Commission affirmed the declaratory and injunctive relief ordered. The Commission ordered the Agency to pay Complainant all costs incurred in connection with the complaint; provide Complainant a neutral reference to any potential employer; provide eight hours of EEO training to all management officials at the facility; consider disciplining S2; and to post a notice.

Dyactishin (Michelle N.) v. VA, 0120162415 (08/09/2018) – Complainant, a Medical Administrative Specialist/Administrator of the Day (AOD), GS-9, at the Agency's Northern California Healthcare System, in Mather, California, filed a formal complaint alleging that the Agency discriminated against her on the bases of disability (aplastic anemia and migraine headaches) and reprisal (prior protected EEO activity) when: (1) from April 14, 2014 to the present, her supervisor (S1) failed to act upon her requested reasonable accommodation; and (2) on October 29, 2014, S1 lowered her annual performance evaluation from Exceptional to Fully Successful. Following an investigation, the Agency issued a final Agency decision on the record finding no discrimination.

In February 2012, Complainant fainted during her shift and was diagnosed with aplastic anemia, an autoimmune deficiency that can cause seizures or migraines. Complainant's physicians told her that her condition was likely produced by her irregular work schedule, which caused lack of sleep and lowered her hemoglobin count. AOD shifts rotated between daytime shift, evening shift, and nighttime shift. Complainant notified her supervisors that she needed a set schedule, and eventually requested assignment to the evening shift. In April 2014, Complainant submitted a request for a reasonable accommodation to the Agency, requesting a permanent assignment to the day shift. The parties engaged in the reasonable accommodation process, and on June 3, 2014, the Agency granted Complainant an accommodation to remain on the day shift from June 15, 2014 until September 21, 2014 when Complainant would have to resubmit additional medical documentation. In November 2014, Complainant was permanently assigned to the evening shift, and did not provide medical documentation which demonstrated that the day shift was medically necessary.

On October 29, 2014, Complainant received her 2013-2014 yearly performance rating which dropped two levels from Outstanding (the highest rating possible) to Fully Successful. The undisputed record shows that Complainant had received a rating of Outstanding for every rating period she had worked as an AOD, except for her first year serving as an AOD, when she was rated Excellent.

In the Commission's appellate decision, the Commission reversed the Agency's final order in part. It found that Complainant had not established that the Agency failed to provide her with a reasonable accommodation when it did not give her the accommodation of choice, the day shift. However, the decision concluded that the Agency subjected Complainant to discrimination based on reprisal when her performance rating was lowered 2 levels. It found that the evidence established that S1's non-retaliatory reasons articulated for rating Complainant Fully Successful were a pretext for retaliatory animus based upon the following: (1) the inexplicable change in S1's behavior toward Complainant around the time of her prior EEO activity; (2) S1's lack of credibility with respect to the bases for the dramatic reduction of Complainant's performance rating; (3) the evidence establishing that Complainant is an outstanding employee who consistently performs well beyond what is expected; (4) the fact that S1's change in behavior occurred shortly after Complainant engaged in EEO protected activity; and (5) the fact that S1's performance rating decision occurred less than a month after Complainant complained about the EEO related "hostile work environment" by requesting mediation with S1.

As a result, the Commission modified the final order to require the Agency to: raise Complainant's 2013-14 performance rating to Outstanding; issue any awards that would have been received due to an Outstanding rating; award compensatory damages; conduct EEO training for the rating official and the approving official; consider disciplining the responsible employees and officials; and to post a n

Akker (Raylene S.) v. USPS, 0120162680 (08/09/2018) – Complainant, a City Carrier, G-01, at the Agency's Carrier Annex in Seattle, Washington, filed a formal complaint alleging that the Agency discriminated against her on the bases of sex (female) and disability when: on May 2, 2014, management informed her that her new bid assignment would be postponed or canceled due to her medical restrictions; and on various dates, management did not provide her with assistance regarding the bidding process.

Following an investigation, an EEOC AJ held a hearing and subsequently issued a decision finding that the Agency discriminated against Complainant based on her disability when her bid assignment was canceled and when management did not provide her assistance regarding the bidding process. To remedy the discrimination, the AJ ordered the Agency to provide Complainant reasonable accommodation and restore all of her rights (including bidding rights); pay Complainant $35,000.00 in non-pecuniary compensatory damages; pay attorney's fees and costs Complainant may have incurred; conduct EEO training for all managers, supervisors, and employees at the Seattle Carrier Annex; and to post a notice. The AJ determined, however, that Complainant had not established an entitlement to pecuniary damages or restoration of leave. The Agency issued a final action fully implementing the AJ's decision and the relief ordered.

On appeal, Complainant only challenged the AJ's denial of her requests for restoration of leave; reimbursement of $15,3580.00 she was forced to withdraw from her husband's 401(k) retirement account; $375.00 in out-of-pocket counseling costs; and her postage and copying costs. In the appellate decision, the Commission found that substantial evidence supported the AJ's finding that Complainant presented insufficient evidence to support awarding her restoration of leave as she failed to show what amount of leave taken was proximately caused by the Agency's discriminatory acts and what leave may have been used for other reasons. Further, the Commission determined that the AJ properly denied Complainant's request for reimbursement for withdrawals from her husband's 401(k) retirement account. The Commission found, however, that the AJ erred in denying Complainant reimbursement for counseling sessions Complainant needed for workplace stress as Complainant established a connection between the counseling visits with her psychologist and the Agency's discrimination. Finally, the Commission concluded that Complainant had not established an entitlement to the claimed postage and copy costs because she failed to submit a verified request for these costs as required under 29 C.F.R. § 1614.501(e)(2)(i). Accordingly, the Commission modified the Agency's final order regarding remedies to order (in addition to all remedies previously ordered) the Agency to pay $375.00 in pecuniary compensatory damages and to consider disciplining the Station Manager.

Thomas (Roxane C.) v. DOE, 0120170551 (08/24/2018) – Prior to filing the instant complaint, Complainant had filed three EEO complaints alleging discrimination based on race, sex, color, and reprisal. When Complainant's supervisor (S1) asked her to work on a project with a coworker from another office (C1) in October 2014, Complainant emailed S1 and her second-level supervisor (S2) to say that she did not want to work with C1 because she was racist and a central figure in a pending EEO complaint. Complainant alleged that S1 verbally counseled her about this "inappropriate" email, and

the record contained an email from S1 to S2, which states that he counseled Complainant that "references to race and racially motivated actions, calling another employee a racist, or a bully, referencing her pending EEO complaint, and making accusations of inappropriate conduct or illegal activities" were unprofessional and would not be tolerated. In March 2015, a coworker (C3) accused Complainant of calling a contractor "racist," "a bigot," and "an asshole." Complainant responded to C3, stating that the accusations were false, that C3 was not professional, and that C3 was not qualified for her position. Complainant emailed S1 to accuse C3 of "screwing up" the contract and lying about her qualifications to manage the contract. S1 contacted Human Resources, noting that Complainant's email to C3 was "not the first racially motivated or personal attack" from Complainant. A Human Resources Specialist (HR1) questioned the basis for counseling Complainant but not C3 and recommended that S1 verbally counsel Complainant but not issue a formal Letter of Reprimand. In April 2015, S1 issued Complainant a Letter of Reprimand for her unprofessional March 2015 emails to C3 and to S1, noting that this was not the first time that Complainant had sent an unprofessional email and specifically citing her October 2014 email to S1 and S2 as an unprofessional email.

Complainant filed an EEO complaint alleging that she was subjected to discrimination based on race (African-American), sex (female), color (dark-skinned), age (54), and reprisal when, among other issues, (1) she was counseled by S1 in October 2014 for sending the email that she did not want to work with C1 because she was racist and involved in her pending EEO complaint, and (2) in April 2015 she was issued a Letter of Reprimand for sending inappropriate emails. The Agency issued a final decision concluding that Complainant failed to prove that the Agency subjected her to discrimination as alleged. On appeal, the Commission found that counseling Complainant for referencing race and her pending EEO activity was reasonably likely to deter a reasonable person from participating in EEO activity. We therefore concluded that Complainant established that she was subjected to reprisal when she was counseled. Regarding the Letter of Reprimand, we found that, because the October 2014 counseling was retaliatory, the issuance of the Letter of Reprimand based on the counseling as a form of progressive discipline was also retaliatory. The Commission found that Complainant failed to establish that she was subjected to discrimination based on race, sex, color, age, or as alleged in her remaining claims. As relief, the Commission ordered the Agency to provide training to S1 and S2, to consider discipline against S1, to expunge the Letter of Reprimand from Complainant's personnel records, to conduct a supplemental investigation concerning Complainant's entitlement to compensatory damages, and to post a notice.

Benjamin (Jasmine Y.) v. Army, 0120171163 (08/14/2018) – Complainant, a Lead Child and Youth Program Assistant, alleged that she was subjected to harassment based on her race, national origin, and reprisal. Her complaint, consisting of 11 claims, was heard by an EEOC Administrative Judge (AJ). The AJ found that the Agency had discriminated against Complainant as to some of the claims but that the Agency had not discriminated as to other claims. The AJ's decision was adopted by the Agency. On appeal, Complainant sought an increase in pecuniary and non-pecuniary compensatory damages.

Regarding the award of pecuniary losses, the award was not disturbed on appeal. Complainant had either failed to show that the claimed pecuniary losses for which she sought an increase were either caused by the Agency's discriminatory conduct or the documentation was inadequate to support her request.

OFO increased the AJ's non-pecuniary compensatory damages from $20,000.00 to $30,000.00. One of the claims raised by Complainant, whose position placed children under her care, was that after initiating EEO Counselor contact, she was wrongfully accused of force feeding a child in her care.

The force-feeding claim was considered child abuse by Agency policy. However, the video of the force-feeding claim was individually viewed by other Agency witnesses and none of them agreed with the accusation made. Various reviewers of the video also testified that they had never seen Complainant mistreat a child; that she was well trained and functioned professionally; that she was loved by the children; and that they would leave their child in her care. There was also testimony that Complainant underwent an extensive investigation unlike others. The Military police, the Criminal Investigation Command, Social Work Services and the Judge Advocate General's office also reviewed the video. Testimony also clearly established that the child had a genetic disorder and his mother had spoken to other workers about the need to assist the child with eating so that he could receive sufficient nutrition. The record also revealed that other employees who were accused of a policy violations regarding children did not lose time from work for more than a day while Complainant was placed on leave for 90 days. There was also evidence that co-workers were solicited to submit complaints concerning Complainant after she began participating in protected activity.

Because of this incident and other incidents of harassment, Complainant, who had no prior history of depression was so diagnosed. She also suffered anxiety, had suicidal thoughts, had to attend therapy and take prescribed medication. Complainant lost interest in participating in activities with her two children, who were under 10, and her marriage suffered. Complainant also felt humiliated and embarrassed when she encountered parents of children and her work colleagues at the military commissary.

Patterson (Kristofer D.) v. Army, 0720170019 (08/03/2018) – Complainant worked as Machinist, WG-314-10, at the Agency's Anniston Army Depot facility in Anniston, Alabama. On January 17, 2013, Complainant filed a formal complaint alleging that the Agency discriminated against him on the basis race (Black/African-American) as the result of the promotion of two White employees to higher grade Machinist positions. After the investigation, Complainant requested a hearing, which was held on October 4 and 5, 2016. On November 2, 2016, the AJ issued a decision finding that Complainant established that the Agency subjected him to discrimination as alleged.

The Agency's subsequent final order accepted the AJ's discrimination findings, but rejected one of the AJ's remedies, which required the Agency to develop and adopt policies and procedures concerning the recruitment and selection of employees for non-competitive, temporary positions, to ensure equal opportunity and consideration in the selection process.

On appeal, the Agency argued that the order was not appropriate, not specific to Complainant and inconsistent with OPM rules on the administration of personnel for temporary positions.

The appellate decision affirmed the AJ's decision and concluded that the Agency mischaracterized the AJ's order. Consequently, the appellate decision determined that the Agency's position was mere speculation and failed to establish that adhering to the AJ's order would violate OPM rules.

Specifically, the appellate decision concluded that the AJ's Order merely required the Agency to adopt policies and procedures to ensure that the implementation of management's employment discretion was done in a non-discriminatory fashion, and that the policies and procedures were shared with employees.

The Agency's final order was modified, and the matter was remanded to the Agency to implement the remedies ordered by the AJ.

Mbenque (Sol W.) v. DOD (DCA), 0720180018 (08/15/2018) – Complainant, a Sales Store Checker at the Minot Air Force Base Commissary, alleged that the Agency discriminated against him because of his race (Black) when it terminated his employment, during his probationary period. Following a hearing, the Administrative Judge (AJ) found that the decision to terminate Complainant was based on his race. In its final Order, the Agency rejected the AJ's decision and appealed to the Commission.

On appeal, OFO reversed the Agency's Order rejecting the AJ's decision. We found that the record contained substantial evidence that supported the AJ's determination that Complainant had proven the alleged race discrimination. First, the AJ's determination was supported by 22 findings of fact, which were not disputed. Second, the AJ based her determination on credibility findings. The AJ found the testimony of Complainant to be more credible and she found the Agency's stated reasons to be unbelievable. The Agency's stated reason for the termination was that, following an altercation with a Caucasian bagger, Complainant had thrown items on the conveyor belt, bruising the hand of the bagger. The record showed that this reason was false. In addition, the evidence showed that those terminated during their probationary period were predominantly African-Americans and that a Caucasian employee who also had an altercation with the bagger did not receive any disciplinary action. We found that the Agency failed to show that it made all of its personnel actions free of race discrimination. To remedy the finding of race discrimination, OFO ordered the Agency to retroactively reinstate Complainant to the Sales Store Checker position he held prior to the discrimination, to expunge from his record any adverse materials relating to his termination, to pay him back pay with interest, to provide training for the managerial employees involved, and to post a notice of this discrimination finding in the facility at issue.

Douglas (Bret E.) v. USPS, 0720180017 (08/31/2018) – Complainant, a city carrier, filed two EEO complaints alleging the Agency discriminated against him on the bases of race (African-American), age (51), and in reprisal for prior protected activity.

Upon completion of the investigations, Complainant requested a hearing before an EEOC AJ. The AJ consolidated the complaints. The AJ issued a decision without a hearing in favor of the Agency on one claim, Complainant being issued a Notice of Removal. However, the AJ held a hearing on the remaining claims. The AJ found that the Agency subjected Complainant to unlawful discrimination on the bases of race and in reprisal for prior protected activity with respect to the following claims: receiving a seven-day suspension, being charged with leave without pay on various dates, and issuing a letter of warning. The AJ ordered various remedies for Complainant including an award of $50,000 in non-pecuniary damages.

The Agency implemented the liability portion of the AJ's decision but appealed the amount of $50,000 in compensatory damages. The Agency asserted the award should not exceed $10,000. Complainant filed a cross appeal regarding the Notice of Removal claim.

We found that the AJ properly issued a decision without a hearing regarding Complainant's removal claim and found that the Agency articulated a legitimate, nondiscriminatory reason for its actions (repeated violation of a last chance agreement). We further found that the Complainant failed to establish that the Agency's reason was pretext for discrimination.

Regarding the AJ's award of $50,000 in non-pecuniary compensatory damages, we found that this amount was supported by substantial evidence in the record and was consistent with prior Commission precedent. Specifically, the Complainant testified that he was angry, stressed, and irritable. He further testified that he felt anxious and had difficulty sleeping.

We ordered the Agency to implement the relief, as set forth in the AJ's decision.

Stump (Ciera B.) v. VA, 0120161961 (09/20/2018) – Complainant, a Vocational Rehabilitation Specialist, filed an EEO complaint alleging that she was discriminated against on the bases of disability (post-traumatic stress disorder, Attention Deficit Hyperactivity Disorder, dyslexia, and anxiety disorder) and in reprisal for prior protected EEO activity, when was harassed and when her supervisor made comments discouraging EEO participation. After a hearing, an EEOC Administrative Judge (AJ) issued a decision finding no harassment and finding per se retaliation. The AJ ordered the Agency to: pay Complainant $500.00 in nonpecuniary, compensatory damages and $12,286.00 in attorney's fees and costs; provide eight hours of EEO training to the responsible management official; and post a Notice of the finding of discrimination. The Agency issued a decision fully adopting the AJ's decision and remedies. Complainant filed an appeal from that decision finding no discrimination. Complainant also requested an increase in nonpecuniary, compensatory damages. OFO affirmed the Agency's finding of no discrimination and the remedies awarded by the AJ and Agency. OFO ordered the Agency to: pay Complainant $500 in nonpecuniary, compensatory damages; pay $12,286.00 in attorney's fees and costs; provide EEO training and consider discipline for responsible management officials; and post a notice of the finding of discrimination.

Wells (Norberto G.) v. DOD, 0120160311 (09/14/2018) – Complainant filed an EEO complaint wherein he claimed that the Agency discriminated against him on the bases of his sex (male), disability (paralyzed and utilizes a wheelchair for mobility), age (52), and in reprisal for his prior protected EEO activity when on October 6, 2014, he learned that he had not been selected for the position of Supervisory Strategic Sourcing Chief, GS-1101-14. Following an investigation, the Agency issued a final decision after Complainant failed to request a hearing. In the decision, the Agency concluded that Complainant failed to show that he was subjected to discrimination or reprisal as alleged.

On appeal, the Commission reversed the Agency's decision in part and affirmed in part. We found that reprisal occurred and that no discrimination occurred with regard to the other alleged bases. We noted that the Commission had previously issued a discrimination finding in favor of Complainant against the Agency. We observed that at the time of the instant selection, the issue of damages for the prior complaint was pending before the Agency as well as the ordered EEO training and posting notice

were being effectuated. We found that Complainant established that his qualifications for the position were superior to those of the selectee. Our decision noted that Complainant clearly had more program management experience, a significant amount of supervisory experience, strong communication skills, and Complainant also had impressive interviews. We further stated that Complainant had significantly more experience overall at the Agency. In contrast to the Agency's assertion, Complainant demonstrated that he was not lacking in competitive sourcing experience. We determined that the downgrading of Complainant's credentials, upgrading of the selectee's qualifications and inconsistency from the selecting official and Director about the importance of supervisory experience were unwarranted and indicative of retaliatory motivation. Thus, the Commission found that Complainant had established that he was subjected to reprisal. The Commission ordered the Agency to offer Complainant placement into Supervisory Strategic Sourcing Chief or a substantially similar position; pay Complainant back pay and compensation for any adverse tax consequences for the lump sum back payment; provide training to the responsible management officials; consider disciplining the responsible management officials; and to post a notice.

Gainer (Taryn S.) v. VA, 0120162172 (09/14/2018) – Complainant, a Medical Support Assistant at the VA, Chico Outpatient Clinic in Chico, California filed a formal EEO complaint Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of race (Caucasian), sex (female), disability (Bi-Polar Disorder), and reprisal (opposing sexual harassment and participation in the present EEO complaint) based on several instances of sexual harassment and retaliatory harassment that created a hostile work environment. Complainant was sexually assaulted by her treating physician/gynecologist (GYN) who was also a co-worker at the Agency. We found that over a span of two office visits occurring on the same day, GYN's act of hugging Complainant then forcibly grabbing her neck, kissing her with his tongue, grabbing the belt loops of her pants, telling her she was turning him on and persistently asserting that he wanted to have sex with her constituted overt sexual bodily contact that rose to the level of a hostile work environment.

We also found that the Agency had constructive knowledge of the sexual harassment. Specifically, we found that responsible management officials were aware of numerous complaints against GYN regarding acts of sexual misconduct and harassment starting at least a year prior to the incident with Complainant and was on notice that GYN was a danger to patients and employees and had a propensity for sexual misconduct.

We concluded that the record established that the Agency failed to take immediate and appropriate corrective action. Specifically, the record shows that the Agency settled a sexual harassment complaint involving GYN in or about April 2014. GYN was required to apologize for his behavior and attend sensitivity training. After participating in sensitivity training GYN's sexual misconduct continued. A responsible management official thereafter verbally counseled GYN and instructed him not be in a room alone with female patients. He was also instructed to stop doing "manipulative" pelvic exams and breast exams. Soon after the Agency's second attempt at corrective action, responsible management officials learned of more incidents of sexual misconduct. The Agency's next attempt at corrective action was to issue GYN written counseling. This third attempt at corrective action was not effective because GYN continued to engage in sexual misconduct including the sexual assault of Complainant. Accordingly, our decision concluded that the Agency's inadequate attempts at corrective action failed to prevent the sexual harassment that Complainant endured.

We also found that even after learning of GYN's actions toward Complainant on April 14, 2015, the Agency failed to take immediate and appropriate corrective action. The Agency "counseled" GYN, took him off the Women's Health Panel and required him to have a nurse chaperone for every patient until the "issue" was resolved. However, GYN was not instructed to stay away from Complainant and was not removed from the workplace. GYN's previously scheduled reassignment to the Department of the Army on May 20, 2015 was unaffected by Complainant's sexual harassment complaint. The record shows that GYN continued to treat patients as usual until April 29, 2015. After such time, he stopped seeing patients but continued his normal tour of duty in the Women's Health Clinic until his departure on May 20, 2015.

Moreover, we found the record devoid of evidence that the disciplinary counseling made its way to GYN's personnel file. The undisputed record also shows that GYN left the Agency without incident; free to continue performing his work in women's healthcare at the Department of the Army with a clean slate. Our decision found that despite the numerous complaints against GYN at the Agency (and complaints even before his employment at the Agency), he was, nevertheless, free to repeat the same pattern of sexual misconduct towards his patients and coworkers at the Department of the Army. Given these facts, we concluded that the Agency's attempt to address the sexual harassment was woefully inadequate to correct the conduct and ensure it did not recur. Accordingly, we found the Agency liable for the sexual harassment Complainant endured on April 14, 2015.

We also found the Agency liable for co-worker retaliatory harassment. Specifically, we found that numerous false and denigrating rumors circulating in the workplace and the nurse manager's efforts to threaten Complainant with discipline were designed to damage Complainant's reputation, discredit her sexual harassment allegations and protect GYN. Given the purpose behind the rumors and threats, in addition to the fact that these events occurred within days after Complainant reported the sexual harassment, we concluded that Complainant had sufficiently established that the harassing conduct was motivated by Complainant's protected EEO activity. We also found the retaliatory harassment sufficiently severe to dissuade a reasonable person from making or supporting a sexual harassment complaint. We further concluded that the record established that Complainant reported the retaliatory harassment to different management officials, to no avail. Not one management official investigated or otherwise addressed Complainant's complaints about the false and derogatory rumors being spread by her coworkers or threats of discipline by the nurse manager. Accordingly, we found sufficient evidence in the record to conclude that the Agency engaged in unlawful retaliatory harassment.

Finally, we also found the Agency violated the Rehabilitation Act when Complainant's supervisor retrieved and viewed her confidential medical records to corroborate Complainant's claim of sexual harassment without first obtaining Complainant's authorization for such information.

We ordered the Agency to: (1) place the Commission's decision in GYN's official personnel file; (2) conduct a supplemental investigation on the question as to whether Complainant is entitled to compensatory damages and restoration of leave; (3) provide training for the responsible management officials and coworkers; (4) consider taking disciplinary action against the responsible management officials and coworkers; and post a notice of discrimination/retaliation.

Farrar (Erich A.) v. NASA, 0120161456 (09/21/2018) – Complainant, an Equal Opportunity Assistant, filed an EEO complaint alleging that he was discriminated against on the bases of disability (Attention Deficit Disorder, memory loss, and depression) and in reprisal for prior protected EEO activity, when

he was not reasonably accommodated and he was terminated. There was no hearing before an EEOC Administrative Judge (AJ). The Agency issued a decision finding no retaliation and finding disability discrimination. The Agency ordered the Agency to: pay Complainant $3,000.00 in nonpecuniary, compensatory damages and $1,375.00 in attorney's fees; reimburse 24 hours of annual leave and 24 hours of sick leave; restore 20 hours of annual leave and 20 hours of sick leave; prepare a letter for Complainant's creditors; pay Complainant $8,440.18 in back pay; post a notice of the discrimination finding; and provide Complainant with reinstatement and a reasonable accommodation. Complainant filed an appeal from that decision requesting more compensatory damages. OFO affirmed the finding of discrimination and all of the remedies except for the award of nonpecuniary, compensatory damages. OFO noted that the responsible Agency official was no longer employed by the Agency. OFO also found that Complainant had not accepted the offer of reinstatement. OFO found that the award of nonpecuniary, compensatory damages was insufficient because of the harm suffered by Complainant. OFO increased the nonpecuniary, compensatory damage award to $25,000.

Bennett (Doria D v. USPS, 0720180011 (09/25/2018) – Complainant worked for the Agency as a Mail Handler. Following her EEO complaint, an Agency investigation thereon, and an EEOC hearing on liability and damages, an AJ found that Complainant's supervisor (S1) sexually harassed her for seven months by repeatedly asking her out on dates, telling her boyfriend at the facility your "time is up now, it's my time," twice telling her boyfriend when he was with her at work "what are you doing with my woman?" and "I thought I told you to stay away from my woman," and culminating in S1 trying to forcibly remove her shoe so he could see her toes. The AJ awarded $90,000 in nonpecuniary damages. The Agency implemented the AJ's finding of discrimination, but found that the compensatory damages award should be $40,000. OFO affirmed the AJ's award. While acknowledging that $90,000 in nonpecuniary damages was at the high end of the range, OFO found it was consistent with Commission cases. S1's harassment initially caused Complainant great discomfort and upset, and later she could not sleep, did not know what to do, got stressed to the point of tears, became depressed, lost her appetite, had spiked blood pressure, hair loss, and as of the time of the hearing about 1½ years after the sexual harassment ended, the thought of going to work still made her anxious and feel physically sick. Citing EEOC caselaw, OFO affirmed the Agency's reversal of the AJ's award of pre-judgment interest on compensatory damages.

Mitskog (Miguelina S.) v. DOJ, 0720160012 (09/27/2018) – Complainant, a Trial Attorney, filed an EEO complaint in which she alleged that the Agency discriminated against her on the bases of sex (female), disability, age (born in 1963), and in reprisal for protected EEO activity when the Agency terminated her. After the Agency notified Complainant of its decision to terminate her, Complainant resigned in lieu of termination.

An EEOC Administrative Judge (AJ) granted Complainant's Motion for Default Judgment on the basis that it took the Agency 330 days to complete the investigation. The AJ reasoned that default judgment was the appropriate sanction because the delay was significant; the Agency's duty to timely investigate complaints is mandated by EEO regulations; the loss of a single EEO staff member by the Agency was not the type of extraordinary or unforeseen circumstance that justifies the noncompliance; the prejudice to Complainant was substantial because the noncompliance increases the likelihood witnesses will not be available; and missing the time limit has a negative effect on the integrity of the EEO process.

Regarding damages, the AJ noted that Commission precedent has held that a complainant is entitled to relief for default judgment if she demonstrates that there is sufficient evidence to establish a prima facie case of discrimination. The AJ concluded that Complainant had established a prima facie case of constructive discharge based on age, sex, and disability.

After his initial decision, the AJ issued a Hearing Order on Damages, which provided that the Agency had 60 days to conduct discovery on damages. After the Agency motioned for sanctions against Complainant for failing to cooperate with discovery, the AJ sanctioned Complainant for failing to provide any responses to the Agency's discovery requests and failing to appear at a duly-noticed deposition. The AJ noted that Complainant's conduct during the entire hearing process had been "combative and contumacious." The AJ sanctioned Complainant by rescinding his previous finding that Complainant had established a prima facie case of discrimination based on sex, age, and disability regarding her constructive discharge claim. Nevertheless, the AJ determined that Complainant was entitled to attorney's fees and compensatory damages.

On appeal, OFO determined that the AJ properly found that the Agency violated EEO regulations when it took 330 days to complete the investigation, and did not abuse his discretion when he issued default judgment in favor of Complainant as a sanction. However, OFO also determined that the AJ abused his discretion when he canceled the damages hearing as a sanction for Complainant's conduct. OFO found that that the AJ's initial finding that Complainant established a prima facie case of discriminatory constructive discharge was the proper legal conclusion based on the evidence in this case, and therefore, it was inappropriate for the AJ to rescind this legal finding as a sanction against Complainant. OFO concluded that Complainant was entitled to personal relief. Specifically, OFO ordered the Agency to offer Complainant reinstatement into her former Trial Attorney position; pay her appropriate back pay and benefits; pay her proven compensatory damages; pay her attorney's fees and costs; and to post a notice of discrimination in the work facility. Additionally, OFO ordered the Agency to provide at least two hours of training to all EEO officials regarding their case processing responsibilities, with a special emphasis on the importance of abiding by regulatory mandates and time limits.

Weiss (Emery S.) v. DOT (FAA), 0120180727 (09/27/2018) – Complainant, an Air Traffic Control Specialist, wrote to Congress in 2004, raising allegations of mistreatment of minorities and women by the Air Traffic Manager (S1). In February 2005, S1 and Complainant were involved in an incident. Complainant alleged that S1 hit him on the arm and, in March 2005, filed an EEO complaint alleging discrimination based on reprisal. The Agency dismissed this complaint for failure to state a claim. Subsequently, the Agency determined, following an investigation, that the subject incident of Complainant's EEO complaint had not occurred as alleged and, in December 2005, suspended Complainant for 30 days on a charge of making false statements. On July 16, 2006, an arbitrator upheld the suspension.

On or about February 13, 2007, a coworker (C1) lost separation between two planes while they were in his responsibility. The planes subsequently became Complainant's responsibility, and Complainant told a supervisor that proper spacing could not be maintained. Complainant was subsequently assigned three operational errors, decertified, placed on an Opportunity to Demonstrate Acceptable Performance (ODAP) plan, and ultimately required to accept a transfer to a lower-paying position

when he did not successfully complete the ODAP. C1, who had not participated in EEO activity prior to the events in question in February 2007, was not assigned any operational errors.

Complainant filed an EEO complaint alleging discrimination based on reprisal when he was assigned an operational error, he was decertified, he was not recertified, he was assigned an ODAP, and he was demoted. An AJ held a four-day hearing and found that S1 was not credible when he testified that there was no personal motivation or discriminatory motive behind his actions. In his decision, the AJ found that Complainant's quick decertification, his placement on an ODAP, the failed ODAP, and the "voluntary" transfer followed his protected EEO activity within such a period of time that a reprisal motive was inferred. The AJ concluded that the severity of the disciplinary options chosen by the Agency and the fact that C1 was not disciplined for his involvement in the same incident were further evidence of reprisal. Accordingly, he found that the Agency retaliated against Complainant. However, the AJ found that the case was a mixed-motive case, which precluded awarding personal relief such as compensatory damages. Specifically, the AJ cited S1's personal dislike for Complainant as the alternate motive. The AJ ordered the Agency to post a notice and pay Complainant reasonable attorney's fees and costs.

Complainant appealed the Agency's final order fully implementing the AJ's decision. On appeal, the Commission found that substantial evidence supported the AJ's finding that S1 was motivated by reprisal. However, the Commission found that substantial evidence in the record did not support the AJ's finding that there were multiple motivating factors for the employment actions because S1's personal dislike for Complainant was so intertwined with his prior protected EEO activity as to be indistinguishable. Because S1's intense personal dislike for Complainant stemmed directly from his EEO activity, this was not a lawful reason for taking the employment actions, and mixed-motive analysis did not apply. The Commission found that Complainant was entitled to personal relief, including reinstatement, back pay, and compensatory damages, and remanded the matter to the Hearings Unit for a determination on Complainant's entitlement to compensatory damages and additional attorney's fees.

Glowacki (Candi R.) v. EPA, 0120171394 (09/14/2018) – Complainant, an Associate Regional Counsel, filed an EEO complaint alleging age discrimination on August 20, 2015. On November 12, 2015, the Region 5 Regional Counsel (RC) sent an email to all attorneys in the region regarding a vacant position that contained two attachments. The first attachment was the job description, but the second attachment was the signed November 10, 2015, affidavit of a Branch Chief (BC) for Complainant's pending EEO complaint, which contained facts pertinent to her EEO complaint, as well as her personally identifiable information. RC stated that he had sent a draft email and the correct attachments to the Administrative Officer (AO) for distribution, but she accidentally included BC's affidavit instead of one of the attachments. AO had BC's affidavit saved on her computer because he had asked her to send it to the EEO Investigator on his behalf. On November 13, 2015, one of Complainant's union representatives sent an email to the Area Director of the Office of Civil Rights (AD), which described the situation, mentioned that Complainant was experiencing stress and anxiety as a result of the situation, and asked for advice. On November 18, 2015, AD forwarded the union representative's email to a colleague and all attorneys in Region 5. According to AD, he entered the Region 5 Attorneys group into the "To:" line of the email to see who received RC's November 12, 2015, email and forgot to remove it before sending the email.

Complainant filed an EEO complaint alleging discrimination based on reprisal when RC and AD sent emails to all attorneys in Region 5 containing confidential information concerning her age discrimination complaint. The Agency issued a final decision finding no discrimination, finding that management articulated legitimate, nondiscriminatory reasons for sending the emails and that Complainant failed to establish that the proffered reasons were pretextual. The cited legitimate, nondiscriminatory reasons were errors. On appeal, the Commission found that, despite the asserted inadvertent nature of the disclosures, the sending of these emails disclosing her confidential EEO information to all attorneys in the region was reasonably likely to deter an employee from engaging in EEO activity and constituted reprisal. The Commission ordered the Agency to post a notice, to provide training and consider discipline against AO, RD, BC, and AD, and to conduct a supplemental investigation concerning Complainant's entitlement to compensatory damages.

Williams (Demarcus I.) v. USPS, 0120171336 (09/21/2018) – Complainant worked as a full-time Carrier in Hurst, Texas. In 2012, Complainant requested an accommodation, and received an auxiliary route to accommodate his disability. In 2015, a new Acting Station Manager (ASM) arrived, and "forced" Complainant to give up that route. ASM also contacted the Disability Reasonable Accommodation Committee (DRAC), who requested that Complainant provide updated medical documentation.

From April 4, through May 6, 2016, Complainant was put on a light duty assignment, but was only provided a few hours of work each day, and had to take sick leave for the remainder of the hours. Complainant resumed a full-time schedule after he started taking "mini-bids." On May 13, 2016, the Agency offered Complainant a temporary, light duty assignment, but did not guarantee an eight-hour assignment or a forty-hour workweek. The offer letter also noted that Complainant was already accommodated with his mini-bids, and that the DRAC would not consider further action.

Complainant filed an EEO complaint alleging that the Agency discriminated against him on the basis of his disability when it provided a light duty assignment of less than eight hours per day; and since May 2016, he had not received a written decision letter from the DRAC for his request for a reasonable accommodation. The Complainant requested, and the Agency issued, a final decision. The Agency concluded that Complainant had not subjected him to discrimination, as alleged. Complainant filed the instant appeal.

On appeal, the Commission found that the Agency discriminated against Complainant based on disability when it failed to provide him with a reasonable accommodation. Complainant had shown that he was an individual with a disability based on his medical documentation; and that he was a qualified individual with a disability because he successfully performed his job with an accommodation since 2012. The Commission found that the Agency failed to accommodate Complainant because the initial light duty assignment was not effective since it did not provide him with enough work, and Complainant was essentially forced to use his sick leave. Additionally, the Agency did not discuss other possible accommodations, including placing Complainant back on his previous auxiliary route. Finally, the Commission found that the Agency did not show that providing Complainant with an effective accommodation would have posed an undue hardship.

The Commission ordered the Agency to restore Complainant's sick leave used in April and May 2016; provide Complainant with an accommodation of a full-time assignment; provide training to, and consider taking discipline against, the responsible management officials; and conduct a supplemental investigation to determine compensatory damages.

Anderson (Aileen C.) v. AID, 0120170399 (09/18/2018) – Complainant, a Senior Legislative Technical Specialist for the Agency's Office of Strategic Planning and Operations, Asia and Middle East Bureaus, alleged discrimination based on age (67) and disability (Parkinson's Disease) when the Agency terminated her contract position. The appellate decision in EEOC Appeal No. 0120170399 applied an evidentiary sanction against the Agency based on the refusal of an alleged responsible management official to cooperate during the investigation by providing a statement. The decision reasoned that there was ample indication that the manager's testimony was highly relevant to Complainant's case. Specifically, Complainant had alleged that when she found out that her position would be terminated, the manager explained to her that, "[g]iven your state of health, this is a demanding job and we need someone who is stronger to do it." Complainant's immediate supervisor testified that he "consulted with [the manager] to seek concurrence for the termination of [Complainant's] position." The decision further reasoned that the Agency did not show good cause for its failure to make additional efforts to obtain the manager's testimony, as she was still a federal employee and obligated to cooperate with EEO investigations under the Commission's regulations. The appellate decision made a finding of discrimination based on the assumption that the manager's testimony would have yielded evidence favorable to Complainant. The Agency was ordered to provide Complainant with back pay, an offer for an equivelant position, and compensatory damages. The Agency was also ordered to obtain technical assistance from EEOC for its EEO office regarding how to handle a management witness who would not cooperate with an investigation.

Peralta (Ahmad S.) v. USPS, 0120170386 (09/25/2018) – Complainant worked as a Sales Service and Distribution Clerk at the Agency's Kingsbridge Station in Bronx, New York, until he was reassigned to another facility. Complainant had been diagnosed with Irritable Bowel Syndrome (IBS), and he suffered from stomach bloating and chronic gas due to his condition. He reported to management that coworkers were laughing and taunting him over his condition, which he said amounted to a hostile work environment. Days after reporting the harassment to his manager, Complainant was unwillingly reassigned to another facility. The alleged harasser, however, was not reassigned as well, and he was allowed to remain at the Kingsbridge Station facility, unlike Complainant. Complainant subsequently filed an EEO complaint, alleging discrimination and harassment based on his disability (IBS) when he reassigned to the other postal facility. Following its investigation, after Complainant failed to request a hearing, the Agency issued its final decision, finding no discrimination as alleged.

On appeal, we initially noted that Complainant did not allege reprisal as a basis in his complaint. We nevertheless considered reprisal as a basis in the interest of judicial economy, as there was adequate evidence in the record reflecting that Complainant had been reassigned in reprisal for reporting that he had been subjected to a hostile work environment. We noted that reassigning Complainant instead of the alleged harasser essentially punished Complainant for reporting the harassment. In sum, we found that Complainant proved by a preponderance of the evidence that he was subjected to reprisal discrimination.

Thorps (Darcy F.) v. USPS, 0120162782 (09/19/2018) – Complainant worked as a Full-Time Carrier Technician at the Agency's Florissant Post Office in Florissant, Missouri. On July 26, 2012, Complainant became aware that her co-worker (CW1) had posted, in her workspace, offensive

materials invoking the history of slavery and other racially inflammatory issues. CW1 was temporarily suspended from the workplace but, after successfully challenging the suspension, was returned to the workplace. Complainant filed an EEO complainant contending that she was discriminated against, on the basis of race, when the Agency returned CW1 to the workplace. In its final decision, the Agency found that Complainant failed to prove that the Agency subjected her to discrimination as alleged.

On appeal, the Commission found that, in light of the racially offensive nature of the material CW1 had displayed in the workplace, the Agency's act of returning CW1 to the workplace was itself racially hostile and abusive. The Commission found the Agency vicariously liable for the discrimination, because, by failing to reassign CW1 to a different facility, the Agency did not exercise reasonable care to prevent future harassment and failed to establish the affirmative defense available under Burlington Industries, Inc., v. Ellerth, 524 U.S. 742 (1998) and Faragher v. City of Boca Raton, 524 U.S. 775 (1998).

The Commission ordered the Agency to: award compensatory damages; conduct EEO training; consider discipline for the responsible officials; and post a notice.

McKelvin (Maxine C.) v. USPS, 0120162531 (09/12/2018) – Complainant, a Postal Support Employee (PSE) Lockmaker, P-06/A, at the Agency's Mail Equipment Shop in Washington, D.C., filed a formal complaint alleging that the Agency discriminated against her and subjected her to a hostile work environment on the basis of sex (female) when her supervisor (S1) sexually harassed her on multiple occasions. In addition, Complainant alleged that the Agency subjected her to discrimination and a hostile work environment on the bases of sex (female) and in reprisal for prior protected EEO activity as evidenced by multiple incidents including, inter alia, her co-workers spread rumors about her; her lock-making was audited; she was issued a suspension; and she was not selected for two City Carrier Assistant positions.

Following an investigation, Complainant initially requested a hearing, but subsequently withdrew the request. The Agency issued a final decision finding that Complainant had not been subjected to discrimination, reprisal, or a hostile work environment as alleged.

In the appellate decision, the Commission found that it was clear that that S1 engaged in numerous instances of unwelcome sexually-related conduct toward Complainant, including sending her inappropriate and sexually-charged text messages; making sexually-explicit comments and sexual advances toward her; and engaging in unsolicited, nonconsensual touching which created an offensive and hostile work environment. Next, the Commission found that the Agency could not establish its affirmative defense to avoid liability as it did not take sufficient remedial and corrective action. For example, the Agency failed to restore sick leave and leave without pay Complainant used as result of S1's harassment. Accordingly, the Commission found the Agency liable for the hostile and offensive work environment created by S1.

As to the remaining claims, the Commission found that Complainant failed to rebut the Agency's asserted legitimate, nondiscriminatory reasons for its actions. As a result, the Commission reversed the Agency's final decision as to Complainant's sexual harassment claim and affirmed the Agency's final decision as to her non-sexual harassment hostile work environment, discrimination, and reprisal claims. The Commission ordered the Agency to conduct a supplemental investigation into Complainant's entitlement to compensatory damages; restore any leave and compensate any leave

without pay taken as a result of the unlawful discriminatory harassment; provide training to all management staff at the Mail Equipment Shop in Washington D.C.; and to post a notice.

Johnson (Ciera B.) v. SSA, 0120162308 (09/19/2018) – Complainant, a contact representative who utilized a wheelchair, filed a complaint in which she alleged that she was discriminated against on the basis of disability when her work-unit supervisor (S1) and her manager (S2) denied her request for reassignment as a reasonable accommodation, made on August 10, 2015. On July 10. 2015, Complainant injured herself when she lost control of her wheelchair while attempting to access the building via a service ramp. While she was on leave, she had made a number of inquiries regarding whether the ramp was compliant with the requirements of the Americans with Disabilities Act (ADA), but had received no response. On August 10, 2015, she requested a request for reassignment as a reasonable accommodation. The Agency responded by offering Complainant the option of using the garage elevator on the opposite side of the building from the ramp. Complainant regarded this as unacceptable, and on January 10, 2016, she resigned.

Following an investigation, the Agency issued a final decision after Complainant failed to request a hearing. In the decision, the Agency concluded that Complainant failed to show that she was subjected to discrimination as alleged.

In her appeal, Complainant stated that because her request for reassignment had been denied, she felt she had no choice but to resign, stating that she could not risk getting hurt again.

On appeal, the Commission reversed the Agency's final decision, finding that in not acting on Complainant's request for reassignment, the Agency had failed to provide a reasonable accommodation that would enable her to access her workplace. We noted that although reasonable accommodation was normally the accommodation of last resort, it was appropriate in this case because Complainant did not have reassurances that she would not get hurt again using the ramp. In support of its finding, the Commission emphasized that the Agency did not demonstrate that the ramp was ADA-compliant, and that having to access the elevator opposite from the ramp would have exposed Complainant to unsafe conditions and inclement weather. We also rejected the Agency's argument that it could not grant Complainant a reassignment until she was able to return to work because she clearly was able to perform all of the duties of position and there was no reason why possible reassignments could not be discussed with her while she was on leave. To remedy the discrimination, the Commission ordered the Agency to offer Complainant reinstatement to her former position at an accessible facility; award appropriate back pay and benefits; provide training to the responsible management officials; and to post a notice.

8. CIRCULATED CASES

Bryant (Sol W.) v. Army, 0520160455 (05/15/2018) – Complainant and the Agency entered into a settlement agreement that provided, in relevant part, that the Agency's 1st Sustainment Command (Theater) (1st TSC) would provide the Civilian Personnel Advisory Center (CPAC) with the answers to five pending questions concerning a review for position classification. The agreement further provided that the answers should allow CPAC to determine position classification within 60 days of their receipt.

In an e-mail, CPAC notified the 1st TSC that it had received the answers, had completed the position classification, was attaching a position description for final review of the changes, and "[i]f in agreement," would create the position. The word "UNCLASSIFIED" appeared in the e-mail's subject line, right after the subject line, and right after the signature line. Complainant subsequently sent a letter to the Agency's EEO Office alleging that the Agency had breached the agreement, and the EEO Office initially concluded that the Agency had not complied with the provision. The EEO Office notified the 1st TSC of its determination through an e-mail in which the word "UNCLASSIFIED" again appeared in the subject line, right after the subject line, and right after the signature line. After the 1st TSC provided the EEO Office with additional information, the EEO Office concluded that the 1st TSC had met its obligation under the settlement agreement.

Complainant appealed the Agency's determination that it had not breached the settlement agreement. On appeal, OFO found that the Agency had not established that it took the actions required by the agreement. Citing CPAC's e-mail to the 1st TSC, OFO stated that the position description was identified as "UNCLASSIFIED" and that further action was required to complete the process.

The Commission granted the Agency's request for reconsideration on the ground that the appellate decision involved a clearly erroneous interpretation of material fact or law. The Commission found that the 1st TSC provided CPAC with answers to the five questions and that the answers were sufficient to allow CPAC to determine position classification. Noting that CPAC explicitly stated in its e-mail that it had completed the classification for the position, the Commission found that the word "UNCLASSIFIED" did not refer to the classification status of the position. The EEO Office's similar use of the word in its e-mail substantiated the Agency's argument that the word referred to the security classification of the e-mail, not to the classification status of the position. Although the appellate decision noted that CPAC's e-mail to the 1st TSC indicated that further action was necessary, the Commission found no language in the settlement agreement requiring the 1st TSC or CPAC to finalize the position classification by a certain date.

Starks (Emelda F.) and Foster (Natalya B.), et al., v. Navy, 0120121347 and 0120121348 (06/19/2018) **[Repeated under Priority 1, and Broad Impact Cases, above]** – In 1990, the Class Agents filed an EEO complaint alleging that the Naval Education and Training Command Consolidated Personnel Office encouraged the use of minimal areas of consideration (AOCs) in merit staffing at Newport, Rhode Island Naval Station, which had an adverse impact on the hiring of Black individuals. AOCs consist of three components: (1) geographical; (2) organizational; and (3) who may apply. Agency witnesses testified that the goal of setting AOCs was to obtain a pool of three to five qualified candidates to refer to the selecting official.

In 2000, the Commission determined that there was sufficient evidence to warrant provisional certification of the Class and remanded the matter to an AJ to define the Class. The AJ held a hearing in 2007 and heard testimony from the Class's expert witness (Expert 1) and three expert witnesses for the Agency (Expert 2, Expert 3, and Expert 4). On November 1, 2011, the AJ issued a decision finding no discrimination.

Expert 1 used a t-test to analyze the data and concluded that the proportion of Black individuals outside the AOC was greater than the proportion of Black individuals within the AOC. Expert 2 used a Fishers Exact test and found that a statistically significant result of 2.33 standard deviations. However, Expert 2 found that the adverse impact ratio was 93.7 percent, which did not raise an inference of

discrimination under the EEOC's four-fifths, or 80 percent, rule. Expert 2 also found that the statistically significant disparity was limited to one job family, the FWS-4700 Maintenance Mechanic family. Expert 2 stated that once this job family was removed from the equation, no statistically significant disparity remained. Expert 3 presented labor market data.

The AJ credited the Agency's experts' reports, finding that Expert 1's report contained errors and that his testimony was not credible because he gave "brief and vague" testimony at the hearing, because he was a graduate student who had not previously published in the statistics field or been admitted as an expert before a court, and because he admitted to "moving quickly" to complete his statistical analysis. The AJ cited four specific errors made by Expert 1 in analyzing the data. The AJ found that there was insufficient statistical or anecdotal evidence to support an inference of discrimination based on a disparate impact theory. The Agency issued a final order fully implementing the AJ's decision.

The Commission found that substantial evidence supported the AJ's conclusion that the Class did not meet its burden of establishing a prima facie case, in light of Expert 1's vague testimony and errors. With respect to the statistical disparity presented by Expert 2, the Commission found that it was not erroneous to consider subset data because Expert 3 testified that there was great variation among AOCs and that they varied according to position. Finally, the Commission noted that the AJ relied on the labor market data presented by Expert 3 in finding no discrimination, as the labor market statistics revealed a higher proportion of Black individuals such that expanding the AOCs would result in a lower percentage of Black representation. Therefore, the Class failed to establish a prima facie case of disparate impact discrimination because it did not prove with persuasive statistical evidence that the Agency's policy or practice caused a Class-wide disparate impact. Accordingly, the Commission affirmed the Agency's final order.

Matilda C. v. EEOC, 0720140027 (07/31/2018) – Complainant, an investigator at the Agency's San Francisco District office, filed an EEO complaint alleging that the Agency discriminated against her on the bases of race (Caucasian), sex (female, Lesbian), and reprisal for prior protected EEO activity when:

1. In July 2011, it issued her a 14-day suspension for using a racial slur;
2. In May or June 2011, it stopped assigning her to investigate discrimination charges filed by African-American male charging parties; and
3. In August 2011, it did not give her a larger time-off performance award or a monetary performance award.

The facts relevant to Issues 1 and 2 arose out of two investigations conducted simultaneously on behalf of the Agency: One investigation was about Complainant's allegation that a co-worker had called her a bigot and used a sexist slur (the C-word) toward her; the other investigation arose out of a different co-worker's allegation that Complainant herself had used a racial slur (the N-word). After a hearing, an Administrative Judge found that Complainant proved disparate treatment on the bases of race and sex (not reprisal) with respect to the claims relating to the suspension. The AJ found that the Agency articulated a legitimate, nondiscriminatory reason for suspending Complainant; namely, her supervisor believed, after his investigation, that Complainant had referred to a black male coworker using a racial slur. The AJ, however, found that Complainant proved, by a preponderance of the evidence, that the Agency's reason was pretextual because, among other things, her supervisor disregarded evidence that corroborated Complainant's assertion that she was subjected to a sexual slur, and that the two investigations were conducted under disparate standards that appeared to favor the statements made

by two black employees while disregarding evidence that supported Complainant. The AJ found no discrimination regarding claims 2 and 3.

On appeal, the Commission found that substantial evidence in the record did not support the AJ's finding of race and sex discrimination when the Agency issued Complainant a 14-day suspension for using a racial slur. Assuming, arguendo, that Complainant established a prima facie case of discrimination on the alleged bases, the Commission found that the Agency articulated a legitimate, nondiscriminatory reason for its action; namely, her supervisor believed that she had used a racial slur to refer to a black male coworker. Regarding Complainant, her supervisor testified that he did not believe her for "many" reasons, including that she was "defensive" and "couldn't explain why [her co-worker] would suddenly make up this allegation," and that it was "more that [he] believed [her co-worker]'s story than disbelieved [Complainant]." The Commission found that the issue was not whether Complainant actually used a racial slur, but whether her supervisor reasonably believed her co-worker's allegation that Complainant used a racial slur. The AJ, according to the Commission, substituted her own judgment for that of the supervisor without concluding that he was not credible or that his acceptance of the co-worker's statement was so unreasonable that one could only conclude he was masking discriminatory animus based on race or sex.

With respect to the Agency's investigation of Complainant's allegation that she was subjected to a sexual slur, the Commission found, among other things, that any evidence her supervisor may have disregarded in his investigation of the alleged use of a sexual slur against Complainant did not show that he unreasonably believed Complainant used a racial slur. The AJ's focus on the investigation of the alleged use of the sexual slur, the Commission found, was misplaced because the issue was not whether the supervisor correctly determined or reasonably believed that a sexual slur was not used; the issue was whether the supervisor reasonably believed that Complainant used a racial slur.

The Commission reversed the AJ's finding of discrimination regarding claim 1, and affirmed the finding of no discrimination regarding claims 2 and 3.

III. Federal Sector Oversight

- RED staff monitored HHS's compliance with EEOC's recommendations in a program evaluation. Third and fourth compliance reports received in April and July; feedback provided to HHS following each report.
- RED began the monitoring phase of the VBA program evaluation following report issuance. We received the agencies first quarterly compliance report in June and provided feedback in August.
- RED continued part two of its government-wide program evaluation of public safety occupations with a focus on the promotion and retention of women by conducting interviews of senior leaders and issuing and analyzing a survey to women in federal law enforcement positions.
- OFO staff began program evaluations of DSS per request of a federal district court judge in May 2018. The focus of the evaluation is, in part, EEO program reporting structure, affirmative employment plan for people with disabilities, anti-harassment program, and EEO complaint processing efficiency.
- OFO staff began a program evaluation of DOI and its subcomponents in June 2018 to review, in part, DOI's anti-harassment program, reporting structure, oversight of the EEO program by senior leadership, and efficiency of the EEO complaint process.
- RED staff completed revisions to the FY 2015 Annual Report on the Federal Workforce in accordance with requests from OCLA, and the report was published on eeoc.gov.
- RED staff finished dashboards of FY 2015 and FY 2016 federal workforce participation data for the corresponding Annual Reports; the FY 2015 data was published on eeoc.gov.
- RED finished writing the FY 2016 Annual Report on the Federal Workforce.
- RED produced an internal report on gender and work-life programs in the federal government.
- RED worked with a contractor to improve the data checks in the Form 462 complaints data collection tool.
- RED conducted an instructional webinar to improve federal EEO programs' abilities to complete Form 462.
- RED worked with SOD to publish in the EEO Digest research comparing harassment and crime prevention methods.
- RED presented research comparing harassment and crime prevention methods in a webinar targeted to federal EEO programs as well as at the EEOC Federal Sector Conference.
- RED and AOD staff provided federal EEO programs with computerized barrier analysis tools to assist in identifying and reducing barriers to EEO in the promotions and hiring phases of the employment lifecycle.
- RED staff completed a supplemental report on the Information Technology workforce for the FY 2016 Annual Report on the Federal Workforce.
- RED staff completed a special projects report concerning EEO data information management capabilities, policies, and practices of federal agencies for MD-715 and Form 462 annual reporting.

- RED completed Phase 4 of the Performance Metrics Workgroup Impact Measures Report and submitted it to OFO management for review.
- RED completed the FY 2016 Annual Report on the Federal Workforce Annual Report and submitted it to OFO management for review.
- RED, in partnership with TOD and AOD, developed a Trend Analysis Report dashboard using Form 462 complaint data.
- RED completed a Form 462 LSS project and submitted to report to OFO management for review.
- RED fulfilled 18 data requests for quarters 3 and 4.
- RED presented research on The Social Science of Retaliation for external and internal stakeholders.
- RED presented the result of OFO's Form 462 Lean Six Sigma project at the EEOC Federal Sector Conference.
- RED conducted a debriefing on OFO's recent research on retaliation during the EXCEL Conference
- OFO staff issued two editions of the Digest of EEO Law (FY 2018, Volume 2, and FY 2018, Volume 3) containing summaries of noteworthy decisions issued in FY 2018, and coordinated with OCLA to issue press release.

IV. Outreach & Training

1. Notable Accomplishments:

- **Hosted inaugural meeting of EEO Education Consortium for Federal Agencies.**
- **Announced FY 2019 Federal Sector EEO calendar 4 months ahead of schedule.**
- **Secured training agreement for Respectful Workplace training and Leading for Respect training to train all of FEMA (approximately 15000 employees) and all of NLRB (approximately 1600 employees).**
- **Secured training agreement for FHFA representative to conduct a series of Respectful Workplace and Leading for Respect trainings (approximately 700 employees).**
- **Piloted a successful virtual EEO Counselor Refresher Course.**
- **Partnered with OFP to deliver a successful EXCEL Conference; attracting approximately 1000 paid attendees and offering 19 courses on preventing workplace harassment and creating civil/respectful workplaces.**
- **Partnered with OFP on Technical Evaluation Team to identify EXCEL locations for FY 2019 and FY 2020.**
- **OFO TOD staff partnered with OFP staff to offer a Federal Sector Track during Baltimore TAPS.**
- **OFO TOD staff formed internal and external partnerships resulting in 86 fee-based and no-cost events on preventing workplace harassment and creating respectful workplaces.**

2. Conference Attendance

Provided outreach and education on preventing workplace harassment, creating a more civil work environment, preserving access to the legal system, affirmative employment, processing requests for reasonable accommodations, and removing workplace barriers at the following stakeholder conferences:

- Blacks in Government, Atlantic City, NJ
- Federal Employee Women, Atlanta, GA
- League of Latin American United Citizens, Phoenix, AZ
- Department of Homeland Security EEO Conference, Washington, DC
- NASA Anti-Harassment Coordinator Training Conference, Houston, TX
- Federal Dispute Resolution, Orlando FL
- Federal Asian Pacific Confederate, Crystal City, VA
- Society of American Indian Government Employees, Green Bay, WI

EEOC's EXCEL Conference

In July 2018, the agency held its 21th annual EXCEL Conference for both federal sector and private sector EEO practitioners. This year's conference offered separate and combined tracks for approximately1000 attendees from the federal sector and private sector. The conference offered over 70 workshops that covered a wide array of subjects of interest to EEO practitioners. Among the highlights of conference, which had as its theme "Inspiration, Innovation, Action!," were presentations by several notable keynote speakers, including Dusty Baker.

3. Eliminating Barriers in Recruitment and Hiring

- OFO staff provided Disability Program Management training to federal employees in Washington, DC
- OFO staff provided 2 MD -715 trainings to federal employees in Washington, DC
- OFO staff provided Barrier Analysis training to Army employees in Fort Belvoir, VA
- OFO staff provided Reasonable Accommodation training to DOI in Washington, DC
- OFO staff provided Special Emphasis Program Management training to Air Force employees on Vandenberg AFB, CA
- OFO staff provided 2 Barrier Analysis trainings to federal employees in Washington, DC
- OFO staff provided Special Emphasis Program Management training to federal employees in Washington, DC
- Associate Director OFO presented EEOC Strategic Plan 2018—2022 to FAA in Washington, DC
- EEOC staff presented an Overview of MD-715 to BIG members in Silver Spring, MD
- OFO staff presented an Overview of Section 501 to Consortium for Citizens with Disabilities in Washington DC
- OFO Associate Director presented Using Special Hiring Authorities to internal EEOC staff

- OFO Associate Director presented Importance of EEO Complaints in Developing Sustainable Diversity and Inclusion Initiatives.
- RED and AOD staff provided federal EEO programs with computerized barrier analysis tools to assist in identifying and reducing barriers to EEO in the promotions and hiring phases of the employment lifecycle.

4. Protecting Immigrant, Migrant and Other Vulnerable Workers

- OFO staff provided Disability Program Management training to federal employees in Washington, DC
- OLC staff provided an update on Reasonable Accommodation for persons with psychiatric disabilities
- OFO staff provided 4 New Counselor trainings to federal employees in Washington, DC
- OFO staff provided EEO Case Updates to DOT employees in Washington, DC
- OFO Associate Director presented Importance of EEO Complaints in Developing Sustainable Diversity an Inclusion Initiatives.
- OFO staff provided Counselor Refresher training to SSA employees in New York, NY
- OFO staff provided Counselor Refresher training to DIA in Washington, DC
- OFO staff presented Section 501 and MD-715 Updates to Navy in Alexandria, VA
- OFO staff provided New Counselor training to FEMA employees in San Juan, Puerto Rico
- EEOC staff provided EEO Overview of Section 501 to Consortium for Citizens with Disabilities in Washington, DC
- OFO staff provided 4 Counselor Refresher courses to federal employees in Washington, DC
- OFO staff provided 4 Investigator Refresher courses to federal employees in Washington, DC
- OFO staff provided New Investigator training to DHS employees in Washington, DC
- OFO staff provided 4 New Investigator trainings to federal employees in Washington, DC
- OFO staff provided EEO Case Updates to Airforce employees at Andrews Airforce Base, MD
- OFO staff provided 2 MD -715 Trainings to federal employees in Washington, DC
- OFO staff provided Barrier Analysis Training to Army employees in Fort Belvoir, VA
- OFO staff provided 2 Barrier Analysis Trainings to federal employees in Washington, DC
- Associate Director OFO presented EEOC Strategic Plan 2018—2022 to FAA in Washington, DC
- OFO Associate Director presented Using Special Hiring Authorities to internal EEOC staff
- EEOC staff presented an Overview of MD-715 to BIG members in Silver Spring, MD

5. **Addressing Emerging and Developing Issues**

- OFO staff provided 4 New Counselor Trainings to federal employees in Washington, DC
- OLC staff provided an update on Reasonable Accommodation for persons with psychiatric disabilities
- OFO staff provided EEO Case Updates to DOT employees in Washington, DC
- OFO staff provided 4 New Investigator trainings to federal employees in Washington, DC
- OFO staff provided 2 MD -715 trainings to federal employees in Washington, DC
- OFO staff provided Barrier Analysis training to Army employees in Fort Belvoir, VA
- OFO staff provided Letter of Acceptance and Dismissal training to FEMA employees in Washington, DC
- OFO staff provided EEO Laws training to DOE employees in Washington, DC
- OFO staff provided New Investigator training to DHS employees in Washington, DC
- EEOC and OFO staff provided Drafting Final Agency Action training to DEOMI attendees in Miami, FL
- OFO staff provided New Counselor training to FEMA employees in San Juan, Puerto Rico
- OFO staff provided 2 Barrier Analysis trainings to federal employees in Washington, DC
- OFO staff provided Letter of Acceptance and Dismissal training to DIA in Washington, DC
- OFO staff provided Drafting Final Agency Actions training to federal agency employees in Washington, DC
- OFO staff provided Drafting Letter of Acceptance and Dismissal training to federal agency employees in Washington, DC
- OFO staff provided EEO Case Updates to Airforce employees at Andrews Airforce Base, MD
- Associate Director, OFO presented EEOC Strategic Plan 2018—2022 to FAA in Washington, DC
- RED staff completed a supplemental report on the Information Technology workforce for the FY 2016 Annual Report on the Federal Workforce.

6. **Enforcing Equal Pay Laws**

- OFO staff provided 4 New Counselor trainings to federal employees in Washington, DC
- EEOC staff provided EEO Overview and Case Updates to FWS in West Virginia
- OFO staff provided EEO Case Updates to DOT employees in Washington, DC
- OFO staff provided 4 New Investigator trainings to federal employees in Washington, DC

- OFO staff provided New Investigator training to FEMA employees in San Juan, Puerto Rico
- OFO staff provided EEO Case Updates to Air Fforce employees at Andrews Airforce Base, MD
- Associate Director, OFO presented EEOC Strategic Plan 2018—2022 to FAA in Washington, DC
- Associate Director OFO presented Breaking Down Barriers at BIG conference in Silver Spring, MD
- RED continued part two of its government-wide program evaluation of public safety occupations with a focus on the promotion and retention of women by conducting interviews of senior leaders and issuing and analyzing a survey to women in federal law enforcement positions.

7. Preserving Access to the Legal System

- OFO staff provided Disability Program Management training to federal employees in Washington, DC
- EEOC staff presented Fact Finding and Handling Medical Information to DOD in Southbridge, MA
- EEOC staff provided EEO Overview and Case Updates to FWS in West Virginia
- OFO staff provided EEO Case Updates to DOT employees in Washington DC
- OFO staff provided New Investigator training to DHS employees in Washington DC
- OFO staff provided 4 New Counselor trainings to federal employees in Washington, DC
- OFO staff provided 4 New Investigator Trainings to federal employees in Washington, DC
- OFO staff provided New Counselor training to FEMA employees in San Juan, Puerto Rico
- OFO staff provided 4 Counselor Refresher courses to federal employees in Washington, DC
- OFO staff provided Counselor Refresher training to DIA in Washington, DC
- OFO staff provided 4 Investigator Refresher courses to federal employees in Washington, DC
- OFO staff provided Drafting Final Agency Actions training to federal agency employees in Washington, DC
- OFO staff provided Letter of Acceptance and Dismissal training to DIA in Washington, DC
- OFO staff provided Drafting Letter of Acceptance and Dismissal training to federal agency employees in Washington, DC
- OFO staff provided Anti-Harassment Program Management training to federal employees in Washington, DC

- OFO staff provided EEO Case Updates to Air Force employees at Andrews Airforce Base, MD
- Associate Director, OFO presented two sessions on EEOC Strategic Plan 2018—2022 to FAA in Washington, DC
- RED presented research on The Social Science of Retaliation for external and internal stakeholders.
- RED conducted a debriefing on OFO's recent research on retaliation during the EXCEL Conference.

6. Preventing Harassment through Systemic Enforcement and Targeted Outreach

- OFO staff provided harassment training and case updates to DEOMI personnel at Patrick AFB, FL.
- EEOC staff provided Anti-Harassment training to Navy personnel
- OFO staff provided EEOC Specialist training to DEOMI personnel at Patrick AFB, FL.
- OFO staff provided New Counselor training to Peace Corp employees
- EEOC Staff provided Sexual Harassment training to DOL personnel in Philadelphia, PA.
- OFO staff provided Anti-Harassment training to CSOSA staff in Washington, D.C.
- TOD staff provided Anti-Harassment training to FCC staff in Washington, DC.
- OFO Staff provided case updates to Andrews AFB, MD staff as part of the Air Force Advanced Labor and Employment Law Course.
- OFO staff provided case updates to DOT's employment lawyers group in Washington, DC.
- TOD staff provided Civility and Respectful Work Environments Training to attendees of the Federal Asian Pacific American Council (FAPAC) national training conference in Arlington, VA.
- TOD staff provided Anti-Harassment training to the African Development Foundation in Washington, D.C.
- EEOC personnel provided Harassment Prevention and Workplace Civility training to U.S. Army civilian personnel at Fort Hood, TX.
- Associate Director, OFO presented EEOC Strategic Plan 2018—2022 to FAA in Washington, DC
- OFO staff provided training Anti-Harassment training to FHFA personnel in Washington, DC.
- OFO staff provided Case Updates to DOJ personnel in Washington, DC.
- OFO staff provided an overview of EEOC's Strategic Plan for 2018-2022, to include a discussion of the task force on harassment, task force findings, and resulting targeted training and enforcement efforts, to U.S. Army civilian personnel in Washington, DC.
- OFO staff provided an EEO Overview and Case Updates to Federal Employed Women (FEW) national training conference attendees in Atlanta, GA.
- OFO staff provided an EEO Overview, Harassment Update, and Workplace Civility training to League of United Latin American Citizens (LULAC) national training conference attendees in Phoenix, AZ.

- OFO staff hosted an online information session titled "A Review of Federal Sector Sexual Harassment Case Decisions."
- OFO staff hosted an online information session titled "Addressing Conflict in Diverse Organizations"
- OFO staff hosted an online information session titled "Let's Talk Respect in The Workplace and Why It Matters at All Levels of Your Organization."
- OFO staff hosted a webinar titled "A Criminological Perspective on Preventing Harassment in The Workplace."
- OFO staff provided an EEO Overview, training on harassment, a harassment update, and participated in a panel discussion on matters falling within the purview of the EEOC at the Blacks in Government (BIG) national training conference in Atlanta, GA.
- OFO staff provided an EEO Overview to Kennedy Center federal employees in Washington, DC.
- EEOC staff provided Sexual Harassment training to City of Miami staff in Miami, FL.
- EEOC staff conducted a Respectful Workplaces Training teaser at the Blacks in Government (BIG) Department of Justice (DOJ) chapter meeting.
- OFO staff provided Title VII Compliance training to USDA, Forest Service staff in Washington, DC.
- OFO staff provided training on Prevailing Issues in EEO to NRO personnel in Washington, DC.
- OFO staff provided Unconscious Bias training to U.S. Army Special Operations Command personnel in Fort Bragg, NC.
- OFO staff provided training to EEO and HR practitioners on The Social Science of Reprisal Discrimination in Washington, DC.
- EEOC staff provided EEO Overview training to U.S. Bankruptcy Court personnel in Phoenix, AZ.
- EEOC staff provided Anti-Harassment training and a Harassment Update to League of Latin American Citizen Youth Leadership Seminar attendees in Washington, DC.
- EEOC staff provided training on the following topics at EEOC's EXCEL Conference in Washington, DC:
    - ✓ Pride or Prejudice? Symbols and Workplace Discrimination
    - ✓ Basic Theories of Discrimination
    - ✓ Establishing an Effective Federal Agency Anti-Harassment Program
    - ✓ Turning Barriers into Bridges: Innovative Techniques to Accelerate D&I Outcomes
    - ✓ Harassment 2018: An Update
    - ✓ Hot Topics in Sex Discrimination
    - ✓ Why We Found Discrimination
    - ✓ Harassment Investigations 101
    - ✓ Implicit Bias and Microaggressions
    - ✓ Legal Update: The ADA Edition
    - ✓ Understanding and Addressing Sexual Harassment in the Federal Workplace
    - ✓ What EEO Counselors Should Do When Harassment is Alleged
    - ✓ A Guide to the Compliance Process
    - ✓ The Benefits of Tailoring Implicit Bias Training for Your Organization

- ✓ The (Social) Science of Reprisal Discrimination: An Overview
- ✓ Negative Workplace Culture: A Diagnostic Approach
- ✓ In the Eye of The Stormy Conflict: Mindfully Maintaining Control
- ✓ National Origin Discrimination Issues 2018
- ✓ Federal Sector Case Updates
- ✓ Let's Talk About Race
- ✓ Conflict Resolution for Leaders: Blending Benevolence with Authority

- EEOC staff conducted its Disability Program Management course in Washington, DC.
- EEOC staff conducted 4 New EEO Counselor courses in Washington, DC.
- EEOC staff conducted 4 New EEO Investigator courses in Washington, DC
- EEOC staff conducted one New EEO Investigator Course in Kansas City, KS.
- EEOC staff conducted 4 Counselor Refresher Courses in Washington, DC.
- EEOC staff conducted 1 Counselor Refresher Course online.
- EEOC staff conducted 3 Investigator Refresher Courses in Washington, DC.
- EEOC staff provided 2 Anti-Harassment Program trainings in Washington, DC.
- EEOC staff provided 2 EEO Overview and Case Updates sessions to Department of Interior, Fish and Wildlife Services (DOI, FWS) in West Virginia.
- EEOC staff provided 1 Reasonable Accommodation and Personal Assistance Service webinar trainings to DOI, FWS
- EEOC staff conducted 1 New EEO Counselor Training for FEMA in San Juan, PR.
- EEOC staff conducted 1 Counselor Refresher training for DIA staff in Washington, DC.
- EEOC staff conducted 1 Counselor Refresher training for SSA staff in New York, NY.
- EEOC staff conducted 1 Two-Day Manager/Supervisor Training for CFPB staff in Washington, DC.
- EEOC staff conducted 1 New EEO Investigator Course for FEMA staff in Washington, DC
- EEOC staff conducted 1 EEO Laws training for DOE staff in Washington, DC.
- EEOC staff conducted 1 Special Emphasis Program Manager training for Air Force personnel in Little Rock, AR.
- EEOC staff conducted 1 Special Emphasis Program Manager training for Air Force personnel at Vandenberg AFB, CA.
- EEOC staff provided one 1 Barrier Analysis training to Army civilian personnel at Fort Belvoir, VA.
- EEOC staff provided 2 Leading for Respect trainings to HUD staff in Washington, DC.
- EEOC staff provided 3 Leading for Respect trainings to PBGC personnel in Washington, DC
- EEOC staff provided 1 Leading for Respect training to NASA personnel in Houston, TX.
- EEOC staff provided 2 Leading for Respect trainings to CFPB personnel in Washington, DC.
- EEOC staff provided 2 Leading for Respect trainings to Navy personnel in San Diego, CA.

- EEOC staff provided 2 Leading for Respect trainings to DOJ personnel in Washington, DC.
- EEOC staff provided Leading for Respect training to FTC personnel in Washington DC.
- EEOC staff provided Leading for Respect training to NRO personnel in Washington, DC.
- EEOC staff provided 2 Leading for Respect trainings to SSA personnel in Denver, CO.
- EEOC staff provided 1 Working in a Respectful Work Environment training to HUD personnel in Washington, DC.
- EEOC staff provided 1 Working in a Respectful Work Environment training to USCIS personnel in Washington, DC.
- EEOC staff provided 4 Working in a Respectful Work Environment trainings to FHFA personnel in Washington, DC.
- EEOC staff provided 1 Working in a Respectful Work Environment training to Navy personnel in San Diego, CA.
- EEOC staff provided 2 Working in a Respectful Work Environment trainings to PBGC personnel in Washington, DC.
- EEOC staff provided 2 Working in a Respectful Work Environment trainings to NLRB personnel in Washington, DC.
- EEOC staff provided 1 Working in a Respectful Work Environment training to DOJ personnel in Washington, DC.
- EEOC staff provided 1 Working in a Respectful Work Environment training to NRO personnel in Washington, DC.
- RED worked with SOD to publish research comparing harassment and crime prevention methods in the EEO Digest.
- RED presented research comparing harassment and crime prevention methods in a webinar targeted to federal EEO programs as well as at the EEOC Federal Sector Conference.

7. Training/Outreach – General

- EEOC staff presented on Federal Sector EEO to members of the Better Business Bureau
- EEOC staff presented an Overview of MD-715 to BIG members in Silver Spring MD
- Associate Director presented EEOC Updates to DOC employees in Washington DC
- Associate Director delivered Unconscious Bias Webinar to DHS, USCIS
- OFO staff presented EEO Case Updates to DOJ staff in Washington, DC
- OFO Associate Director presented Delivering High Impact Training for Managers to DHS in Washington, DC
- OFO Assistant Director presented EEOC Strategic Plan 2018-2022, MD-715 Reporting Requirements to Army staff
- OFO Associate Director presented Unconscious Bias to Army Special Operations Command in Fort Bragg, NC

- OFO Associate Director presented Importance of EEO Complaints in Developing Sustainable Diversity and Inclusion Initiatives.
- RED presented research comparing harassment and crime prevention methods in a webinar targeted to federal EEO programs as well as at the EEOC Federal Sector Conference.
- RED presented research on The Social Science of Retaliation for external and internal stakeholders.
- RED presented the result of our Form 462 Lean Six Sigma project at the EEOC Federal Sector Conference.
- RED conducted a debriefing on OFO's recent research on retaliation.

Quarterly Strategic Enforcement Plan Report
Office of Federal Operations
1st and 2nd Quarters FY 2019

I. Background: General FY 2019 1st and 2nd Quarters Appellate Review Program Accomplishments

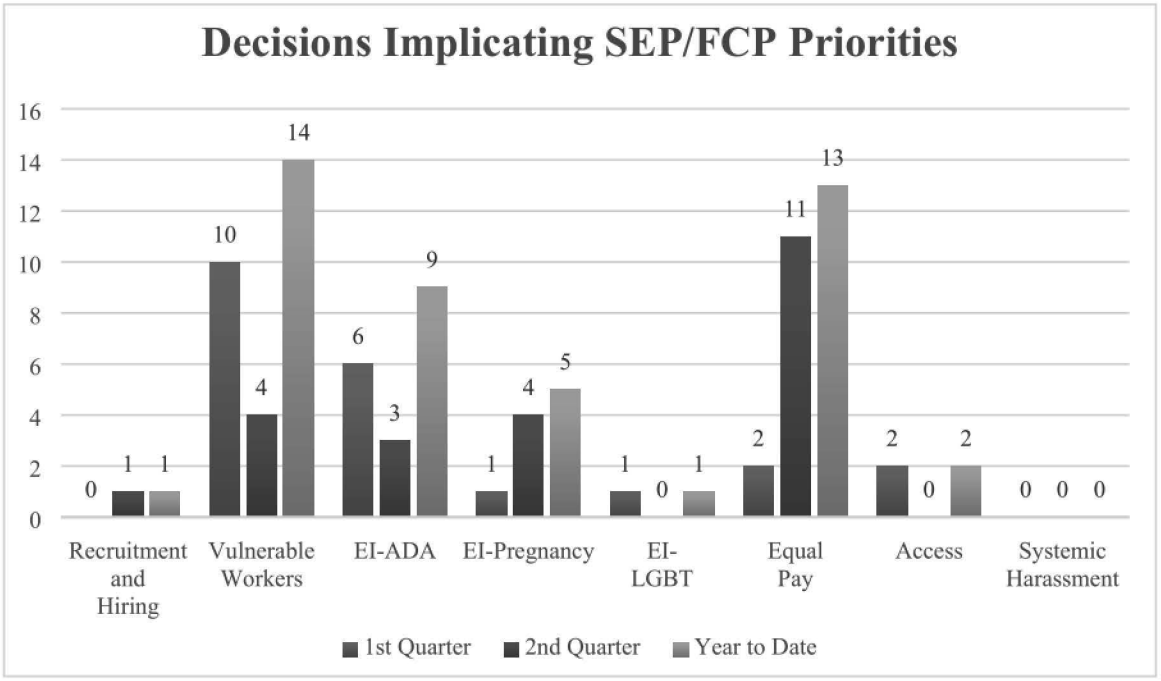
During the 1st and 2nd Quarters of FY 2019, the Office of Federal Operations (OFO) resolved 1,801 appeals, including 1,078 decisions on the merits and 605 procedural closures. Of the 605 procedural closures, 277 of them involved initial appeals under review by OFO, and we reversed 97 or 35.02% of the agency dismissals. Of the 1,078 merit decisions, OFO issued 48 findings of discrimination during the 1st and 2nd Quarters. We found discrimination on the basis of disability in 23 of the findings, retaliation in 15 of the findings, and race (Black) in 9 of the findings. The top three issues involved in the findings included reasonable accommodation (10), harassment (9), and assignment (4).

Resolution Description	1st Quarter	2nd Quarter	Year to Date
Resolutions	1,035	766	1,801
Merits Resolutions	619	459	1,078
[redacted] Findings	24	24	48
[redacted] Non-Findings	595	435	1,030
Procedural Resolutions (all)	345	260	605
Procedural Resolutions (from Initial Appeal)	150	127	277
[redacted] Affirming Dismissal (excluding denials)	99	81	180
[redacted] Reversing Dismissal	51	46	97

With regard to the categorization of the 1,801 resolutions, OFO identified 44 appeals that implicated one or more SEP/FCP priority. Section II below contains charts breaking down the composition of the individual priorities, summaries of the 44 decisions OFO attorneys categorized as implicating the SEP/FCP priorities, and summaries of the findings of discrimination made in the 1st and 2nd quarters.

II. Analysis of SEP/FCP Priority Areas

The chart below depicts the distribution of the 44 appellate decisions OFO identified as implicating an SEP/FCP category:



The numbered sections below provide more information about each of the six SEP priorities. Specifically, these sections describe the related FCP categories under each SEP, as well as summaries of the specific decisions under each SEP/FCP priority. In Section 7, by contrast, we provide summaries of noteworthy decisions, findings of discrimination, and decisions that were circulated during the 1st and 2nd Quarters, whether or not they implicated an SEP/FCP category.

1. ELIMINATING BARRIERS IN RECRUITMENT AND HIRING

The decision implicating this SEP Priority concerned the FCP of use of suitability determinations.

Decision Summary for this Category

Beyers (Foster W.) v. State, 0120132304 (02/08/2019) – At the age of 59, Complainant, a veteran, applied to the Agency's Foreign Service program for the position of Diplomatic Security Engineering Officer. The advertisement for the position noted that candidates must be appointed to the Foreign Service prior to the month in which they reach the age of 60. The 60-year age restriction, however, did not apply to candidates receiving veteran's preference. After Complainant turned 60, the Agency presented him with a conditional offer of appointment as a Foreign Service career-candidate. The conditional offer noted that the appointment would be contingent upon Complainant's satisfactory completion of the security, medical, and suitability clearance-processes. The Final Review Panel (FRP) subsequently issued a Denial Report, finding that Complainant was not suitable for the Foreign Service program. The Denial Report disapproved Complainant's candidacy on the grounds that Complainant's background

demonstrated misconduct in prior employment, a lack of financial responsibility, and conduct that showed poor judgment or a lack of discretion. The Agency's Appeals Committee then issued a report finding that Complainant did not establish that the FRP's decision was in error.

Complainant filed an EEO complaint, alleging that the Agency subjected him to age discrimination when he was not selected to the Agency's Foreign Service program. Following its investigation, the Agency issued its final decision finding that Complainant failed to establish that he was subjected to discrimination as alleged.

On appeal, the Commission initially issued an Interim Order, which directed the Agency to perform a supplemental investigation. The Agency thereafter completed its supplemental investigation and Complainant responded. Upon review of the complete, supplemented record, the Commission noted that the Agency's background suitability investigations contained references from Complainant's prior employers and colleagues, some of whom provided negative references for him. The Commission therefore found that Complainant did not establish that the Agency's reasons for his nonselection were pretext for discrimination based on his age.

2. PROTECTING IMMIGRANT, MIGRANT AND OTHER VULNERABLE WORKERS

Of the fourteen (14) decisions that implicated this SEP Priority, four (4) concerned the FCP related to security clearances, and ten (10) concerned the FCP concerning contractors.

Decision Summaries for this Category

Contractors

Atkinson (Glynda S.) v. Navy, 0120181708 (10/16/2018) – Complainant was employed by a staffing firm serving the Agency as a Supply Technician. She filed a complaint alleging that the Agency subjected her to discrimination and harassment based on her sex (female) and reprisal when after returning from maternity leave an Agency supervisor: (1) denied her a private place and breaks to pump her breast milk, (2) made harassing comments to her multiple times a day, including, "can I get milk with my coffee?", "you do one and I'll do the other," and many like others, (3) after she stopped pumping her milk at work, the Agency supervisor continued to harass her, causing her constructive suspension and/or discharge in June 2017. The Agency dismissed the complaint for failure to state a claim. It reasoned that Complainant was an employee of the staffing firm, not the Agency. OFO reversed because the Agency gathered insufficient information on its control and right to control Complainant's employment to allow a determination on whether it was her common law joint employer. The Agency had limited its inquiry to requesting the staffing firm's onsite supervisor to give feedback via email on control factors, who gave generalized conclusive responses, with no follow-up questions. The matter was remanded to the Agency to gather further information on whether or not it was Complainant's joint employer and, based on this information, to either accept the complaint for processing or issue another dismissal decision.

Hawk (Virginia T.) v. DOE, 0120181738 (10/16/2018) – Complainant was employed by a staffing firm serving the Agency as a Desktop Technical Customer Support 3. She filed a complaint alleging discrimination by the Agency based on her disability (myoptonia congenita) and reprisal when: (1) it penalized her for absences by complaining about them to her staffing firm, (2) unreasonably delayed

acting on her request to telework, and then denied her request, and (3) terminated her by not renewing her contract. The Agency dismissed the complaint for failure to state a claim. It reasoned that Complainant was employed by the staffing firm, not the Agency.

OFO found that the overwhelming evidence was that the Agency was Complainant's common law joint employer because it retained sufficient control over her employment, including: the Agency selected Complainant from candidate applications forwarded to it by staffing firms in response to the Agency's job announcement; the Agency assigned her work via methods it created for tasks to come from customers and via an Agency Team Leader; an Agency Team Lead gave Complainant day-to-day direction on how to perform her work; her staffing firm supervisor worked off-site and only had contact with Complainant monthly; she had to run her leave requests by the Agency which set her work hours; her request for reasonable accommodation was forwarded by the staffing firm to the Agency for consideration, which denied the request; she served the Agency for four years until the Agency decided to cut off her service, and the record did not show the staffing firm found her another position. OFO reversed the Agency's dismissal and ordered it to process her complaint.

Plaza (Oliver N.) v. DOD (SECDEF), 0120181836 (10/30/2018) – Complainant worked for a staffing firm serving the Agency as a Project Manager, and then as the Senior Disability Expert in its Office of Diversity Management. Complainant started working for the staffing firm on May 1, 2017, first as an employee therewith, and from November 3, 2017 until his termination on December 22, 2017, under contact as the only employee of his newly created sole proprietorship company. During this entire span, he was assigned by the staffing firm to service the Agency. He stopped serving the Agency on December 8, 2017, and his relationship with the staffing firm ceased on December 22, 2017. Complainant filed a complaint alleging that he was discriminated against based on reprisal when he was terminated. The Agency dismissed the complaint for failure to state a claim. It found that Complainant was not an employee of the Agency. OFO reversed.

OFO found that this case was not a close call. The Agency retained sufficient control over Complainant's employment to be his common law joint employer. It directly assigned Complainant his work; set his deadlines; he worked on Agency premises using Agency equipment; the Agency acted on his vacation requests; he was expected to adhere to a specified work schedule, unless otherwise approved by the Agency; the Agency directed that he telework during his last few service weeks; he served the Agency for over seven months, a significant duration, until the staffing issued him a termination letter at the Agency's request for misconduct.

OFO found that there was insufficient information in the record to determine whether Complainant was an employee or an independent contractor of the staffing firm after he switched from being an employee of the staffing firm to a subcontractor sole proprietor, so he could continue serving the Agency rather than be terminated. It found that the Agency continued to have sufficient control to be deemed Complainant's common law joint employer until his termination, in part, because his short-lived change in status flowed from the Agency telling the staffing firm that it wanted Complainant to stop serving the Agency, the Agency still controlled where he worked, and most significantly, the staffing firm terminated him because the Agency decided not to permit him to serve the Agency. OFO ordered the Agency to investigate Complainant's complaint.

Davis (Odis S.) v. CIA, 0120182112 (10/23/2018) – Complainant was employed by the Agency as an Information Review & Release Manager. He was responsible for the declassification of records. He filed a complaint alleging that he was discriminated against based on his race (African-American), sex (male), age (63), and reprisal when management referred him to a Personnel Evaluation Board (PEB) in July 2011. Following an investigation, an EEOC AJ issued a decision without a hearing finding no discrimination, which the Agency implemented. OFO affirmed. To maintain his security clearance, Complainant was directed to participate in polygraph sessions from time to time. A Security Manager referred him to the PEB in part because during polygraph examinations, Complainant slowed his breathing rate (which is considered a countermeasure) dispute numerous warnings not to do so, and failed to upload his foreign national contacts to an electronic base, despite being told to do so on multiple occasions. The AJ found, in part, that Complainant did not dispute that he was asked to upload his foreign national contact information to an Agency database and failed to do so in 2008 and 2009. OFO found that while Complainant disputed that he breathed in such a way to throw off the polygraphs, the AJ correctly found that the Agency believed he did.

Jones (Nicki B.) v. Ed, 0120172829 (11/28/2018) – Complainant was employed by a staffing firm serving the Agency as a Software Configuration Manager, and was terminated. She filed an EEO charge against the staffing firm with Labor, Office of Federal Contract Compliance Programs (OFCCP), and an EEO complaint against the Agency alleging discrimination based on disability (bipolar) and reprisal for EEO activity (requesting reasonable accommodation) when she was terminated. OFCCP found that Complainant did not have performance problems and requested reasonable accommodation to reduce distractions. It found that the staffing firm tried to work with the Agency to accommodate Complainant at the work site via telework and alternate methods, but the Agency refused and insisted that Complainant be removed from the contract. However, it found that the staffing firm failed to reasonably accommodate Complainant by not reassigning her to an open position serving other clients. Thereafter, Complainant and the staffing firm reached a settlement agreement.

Following an investigation of Complainant's EEO complaint, Complainant requested a FAD. The Agency found that Agency management improperly denied Complainant's request for reasonable accommodation out of hand because it was concerned this might lead to similar requests from other contractors, and terminated its relationship with Complainant because of her disabling condition and her request for reasonable accommodation. As relief, the Agency ordered, in part, that Agency management determine the appropriate amount of back-pay. Thereafter, the Agency issued a FAD denying all back-pay. It reasoned that assuming Complainant was entitled to back-pay, it was unable to calculate the off-set for back-pay she received from the staffing firm because Complainant would not disclose the amount, citing a settlement agreement confidentiality clause. OFO reversed the Agency's determination on back-pay.

OFO recounted that after the Agency's FAD denying back-pay, Complainant obtained permission from the staffing firm to disclose the amount of back-pay she received, and advised the Agency of the amount. OFO rejected the Agency's appellate argument that because Complainant was a common-law employee of the Agency, she was not entitled to back-pay, ruling the Agency was jointly and severally liable for the full amount of the back-pay owed, citing relevant Commission guidance and cases. OFO rejected the Agency's argument that paying back-pay would violate federal contracting regulations prohibiting overpayments, holding that back-pay stems from a finding of discrimination, not the

Agency's contract with the staffing firm. OFO ordered the Agency to determine the wages and cash value of wage-related benefits Complainant would have received from the staffing firm had she continued to serve the Agency in her position for the duration of the relevant contract, and use this amount to calculate her back-pay award, with interest.

Williams (Keenan O.) v. FDIC, 0120181998 (11/06/2018) – Complainant was employed by a staffing firm serving the Agency as a Staffing Specialist. He alleged that the Agency subjected him to sexual and non-sexual harassment based on his race (African-American), sex (male), color (light skinned), and reprisal when his effective Agency supervisor (S1), engaged in multiple abusive and explicit acts of sexual and retaliatory harassment over an extended period. Incidents included S1 inviting Complainant, in various ways, often coarse, to talk about sex and coming onto him, repeatedly cursing him out, and calling him epithets targeting light skinned African-Americans. The Agency dismissed the complaint for failure to state claim. It reasoned that Complainant was not an employee of the Agency. Finding that the Agency possessed sufficient control over Complainant's position to qualify as his common law joint employer, OFO reversed. Prior to filling a positon serving the Agency the staffing firm was required to submit the resume of the proposed candidate thereto for its review and approval, and prior to being hired by the staffing firm the Agency interviewed Complainant. Agency management assigned Complainant his work and reviewed his work product for approval, and he served the Agency for a significant duration working on Agency premises using Agency equipment.

Crawford (Yun C.) v. ODNI, 0120182012 (11/06/2018) – Complainant was employed by a staffing firm serving the Agency as a Resource Analyst. She alleged that the Agency subjected her to a hostile work environment, and terminated her service in October 2017, based on her race/color (Black), disability, and sex (female). Incidents included an Agency manager touching her even though she asked her not to do so, and the Agency repeatedly reporting to her staffing firm derogatory information about her, resulting in a bad rating by her staffing firm and termination of her Agency service. The Agency dismissed the complaint for failure to state claim. It reasoned that Complainant was an employee of the staffing firm, not the Agency. Finding that the Agency possessed sufficient control over Complainant's position to qualify as her common law joint employer, OFO reversed. Before Complainant started serving the Agency, the staffing firm forwarded her resume thereto for its review and approval. Complainant had an Agency supervisor, and the Agency assigned her work. She took direction from Agency personnel for her day-to-day tasks. Complainant worked on Agency premises using Agency equipment, and while her performance evaluation was prepared by her staffing firm, it incorporated input from the Agency. Both the Agency and the staffing firm controlled or had the right to control aspects of Complainant's schedule. The staffing firm cut off Complainant's service with the Agency because the Agency asked it to do so for time and attendance issues, and thereafter Complainant took a job with another staffing firm.

Hayavi (Chasity C.) v. Army, 2019000440 (12/18/2018) – Complainant, working for DS Federal Incorporated, was a Project Manager (Pathology) at the U.S. Army Medical Research Instituted of Infectious Diseases in Fort Detrick, Maryland. Believing that her termination was due to her race (Middle Eastern), national origin (Iranian), and religion (Muslim), Complainant filed a formal

complaint on July 25, 2018. The Agency dismissed the complaint on the grounds that Complainant was an independent contractor, not an Agency employee.

In our decision, we observed that the Agency's decision lacked any analysis regarding Complainant's employment status. The final decision failed to make even passing reference to the numerous factors to be considered, let alone the relevant time. Instead the Agency simply concluded that Complainant was not an Agency employee. The documents provided on appeal by the Agency were also limited and did not even include the contract between DSF Inc. and the Agency. The most detailed inquiry was contained within the EEO Counselor's Report.

The record did contain a few email exchanges between Agency officials, which revealed communication problems between Complainant and an Agency employee, as well as discussions about Complainant's assignments. The emails, which were purportedly included in the record to support a legitimate, non-discriminatory reason for Complainant's termination, were found to support our conclusion that the Agency was a joint employer. The emails showed that Complainant worked closely with Agency employees; Agency officials assigned her to units and duties beyond what her job title indicated; and that Agency managers were involved with the decision to remove her. Complainant's purported DSF Inc. supervisor was notably absent from these email discussions. These factors, along with working at an Agency facility with Agency equipment and materials during Agency core hours, indicated an employer/employee relationship.

Lastly, the Agency's attempt to submit arguments reflecting the type of analysis that was missing from its decision, for the first time on appeal, was unpersuasive. The Commission noted that the Agency was responsible for supporting its dismissal in its final decision. To permit the Agency to provide new evidence or change its arguments after Complainant appealed, would be unfair.

Sewell (Evelina M.) v. DHS (FEMA), 2018000036 (02/25/2019) – Complainant was an applicant with a staffing firm to serve the Agency in locations where declared disasters occur. Housing Inspectors provide home inspections for disaster applicants who request emergency grants from FEMA. The staffing firm hires Housing Inspectors as independent contractors. Complainant alleged discrimination based on her race (African-American) and reprisal when in March 2017, she was informed that her Public Trust "security clearance" was denied by the Agency, resulting in her being denied employment. The Agency dismissed the complaint for failure to state a claim. It reasoned that under common law, Complainant did not apply to be an employee of the Agency. OFO reversed.

OFO found that because this is a hiring case, it was especially significant that the Agency could veto a Housing Inspector's hiring, i.e., deny them a Public Trust security clearance. Also, after a Housing Inspector is hired by a staffing firm, the Agency could stop them from serving the Agency if it deemed their service contrary to the public interest or the best interests of the Agency - de facto power to terminate Housing Inspectors. Further, the Agency had the right to control the manner and means by which Housing Inspectors accomplished their work, i.e., they must undergo annual training on the mandated topics on the specifics of the FEMA repair program, inspection guidelines, customer service and so forth, inspections must be done using a FEMA Android Tablet loaded with FEMA's Automated Construction Estimator software, they must get an ID Badge from FEMA and have it "remain" with them, and they must comport themselves in accordance with an Agency Handbook, i.e., drug and smoke free workplace, dress code, etc. The Housing Inspector controls when they are willing to go on deployment since they are required to register with a "Contractor Deployment Database" monthly to

indicate they are available, which points to independent contractor status, but once on deployment are expected to work seven days a week, often more than ten hours a day, which points to employee status. OFO found that the Agency exercised sufficient control over Complainant's position to qualify as her employer for the purpose of the 29 C.F.R. Part 1614 EEO complaint process.

Dankovchic (Marine V.) v. NASA, 2019000184 (02/08/2019) – Complainant was employed by a subcontractor staffing firm on the "SMASS" II contract that a prime contractor staffing firm (prime) had with the Agency serving the Agency as a Safety Engineer. She alleged that when the SMASS II contract expired, she was not hired onto or otherwise assigned to the successor SMASS III contract, resulting in her being laid off. When Complainant took a job on the SMASS II, she expected to continue onto a successor contract. The Agency dismissed the complaint for failure to state a claim. It reasoned that Complainant was an employee of the subcontractor staffing firm, not the Agency.

Finding that the Agency possessed sufficient control over Complainant's position to qualify as her common law joint employer, OFO reversed. OFO emphasized it was not making any determinations on the merits. Complainant alleged that at a team meeting she attended shortly prior to the expiration of SMASS II, her staffing firm advised that for SMASS III the Agency decided to downgrade two of five team positions to "college entry level/fresh-outs", and the Agency relayed to it that team members could not apply for the two and "fresh ideas" were wanted. Complainant alleged her position was one of the two. She further alleged that shortly prior to the expiration of SMASS II, the prime advised her that the Agency told it Complainant would be laid off. OFO found that because Complainant's complaint is about her being laid off after not being able to secure a position on the SMASS III contract, the Agency's alleged ability to control or partially control these aspects of her employment was especially significant, and Complainant served the Agency for a long duration and worked on Agency premises using Agency equipment, other indicia of Agency control of her employment.

Williams (Broderick D.) v. Navy, 2019001343 (03/21/2019) – Complainant worked for a staffing firm serving the Agency as a Program Analyst (Maintenance). He alleged that he was subjected to discrimination and harassment based on his disabilities and reprisal for prior EEO activity when he: (1) was harassed by the Agency personnel from March 23, 2018 through the effective date of his termination on September 1, 2018, and (2) was terminated effective September 1, 2018. The Agency dismissed the complaint for failure to state a claim. It reasoned that Complainant was not an Agency employee. OFO reversed.

OFO found that the Agency possessed sufficient control over Complainant's position to qualify as his common law employer for the purpose of the 29 C.F.R. Part 1614 EEO complaint process. Specifically, he started serving the Agency in April 2014 (a long duration), worked on Agency premises using Agency equipment, Agency management assigned Complainant his day-to-day work, he was instructed by his staffing firm to follow the direction of Agency management, was only permitted to use his staffing firm leave with the approval of Agency personnel, and he stopped serving the Agency because it decided to shift his function to a newly established government civil service position. Complainant was terminated by the staffing firm the day after the Agency cut off his service. OFO found this indicated that the Agency had de facto power to terminate Complainant, which was especially significant since this case involved his termination.

Security Clearance

Verma (Herman F.) v. State, 0120172059 (11/29/2018) – Complainant was employed by the Agency via direct services contract as an Acquisition Management Analyst who reviewed and processed incoming invoices on a contract with annual expenditures of $550 million. He alleged that he was discriminated against based on his national origin (Asian-Indian) and age (66) when the Agency terminated him in September 2015. Following an investigation, Complainant requested a hearing, which was denied by an AJ as a sanction. Thereafter, the Agency issued a FAD finding no discrimination, which OFO affirmed. The Agency removed Complainant after it learned he was disbarred in 1998 by the Indiana Supreme Court for chronically deceptive behavior, a willingness to knowingly falsify legal documents, and a serious lack of candor, which occurred over a six-year period and was detailed in the Court's published decision. Management believed the actions for which Complainant was disbarred showed that he could not be entrusted with acquisition activity on an over $550,000. In affirming the Agency, OFO found Complainant's job was a position of trust, so the deeply deceptive behavior was relevant, even though it was dated.

Dunbar (Paul D.) v. DOJ (FBI), 0120172253 (11/06/2018) – Complainant was an applicant with the Agency for the position of Electronics Technician. He alleged that he was discriminated against based on his disability and reprisal when after the Agency notified him that he was conditionally hired for the above position, subject to obtaining a Top-Secret security clearance, it denied him a clearance. Following an investigation, Complainant requested a hearing before an AJ, who after receiving an Agency motion to dismiss because the Commission is precluded from reviewing the substance of a security clearance decision. Thereafter, the AJ, citing authority supporting the Agency's argument, issued a decision dismissing Complainant's complaint for failure to state a claim, which the Agency implemented. OFO affirmed. OFO found that while Complainant contended a polygraph examiner misrepresented what he said and did, resulting in the denial of his clearance, even if true, once statements or other information gathered during the investigation are included in the security clearance report, they are beyond the Commission's jurisdiction.

Litton (Emil L.) v. DOJ (FBI), 0120182707 (02/05/2019) – Complainant alleged that he was discriminated against based on his sex (male), disability and reprisal when (1) after the Merit Systems Protection Board reversed his 2014 removal in 2017, the Agency initiated a security clearance investigation against him, and (2) in 2018, the Agency revoked his Top-Secret security clearance. The Agency dismissed the complaint for failure to state a claim. It reasoned that the Commission does not have jurisdiction to review an agency's determination on the substance of a security clearance determination. OFO affirmed.

Citing authority, OFO found that the Commission does not have jurisdiction to review an agency's determination on the substance of a security clearance decision, but can review an agency's action to initiate review of a security clearance because this is not the result of any substantive decision- making process. OFO found that while issue 1 was couched differently, it regarded the Agency's decision to finalize the prior suspension of Complainant's security clearance, which like issue 2 went to the merits of the decision to deny his clearance.

3. ADDRESSING EMERGING AND DEVELOPING ISSUES

During the 1st and 2nd Quarters of FY 2019, OFO resolved fifteen (15) decisions under this SEP Priority and its associated FCP priorities. Of these decisions implicating this SEP Priority, one (1) concerned the FCP sexual orientation, four (4) concerned the FCP post-ADAAA reasonable accommodation, three (3) concerned the FCP pregnancy accommodation, and two (2) concerned the FCP Medical Privacy.

Decision Summaries for this Category

Sexual Orientation

Nelson (Vince D.) v. VA, 0120171501 (11/30/2018) – Complainant worked as a Housekeeping Aide Supervisor at the Agency's Eisenhower VA Medical Center in Leavenworth, Kansas. On April 17, 2015, the Environmental Management Services (EMS) Assistant Chief issued Complainant a Proposed Suspension for 10 days, charging Complainant with Inappropriate Conduct and the Failure to Follow Supervisory Instructions. Management subsequently sustained the charges against Complainant and the EMS Line Manager issued Complainant a Letter of Suspension on May 18, 2015. On July 8, 2015, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the basis of sex (male, sexual orientation) when on May 18, 2015, he was suspended for 10 days effective May 31, 2015, through June 9, 2015. Complainant withdrew his request for a hearing with an EEOC AJ and the Agency issued a FAD finding no discrimination.

The appellate decision affirmed the Agency's FAD. Assuming, arguendo, that Complainant established a prima facie case of discrimination based on his sexual orientation, the Agency articulated legitimate, nondiscriminatory reasons for suspending Complainant. The Agency found that Complainant approached a patient in a loud manner, and issued his subordinate discipline without union representation. Complainant was cited with raising his voice at a veteran patient, that the patient could not be in the waiting room and needed to be in isolation because of his methicillin-resistant staphylococcus aureus (MRSA) infection. Complainant allegedly made statements to the patient in a loud tone, such as "You are going to contaminate the entire room and the water fountain . . ." The Proposed Suspension also noted that Complainant's "voice was of such a volume and tone that a Nurse Manager had to physically interject into the conversation to get it to stop." Complainant was further cited with the failure to follow management's instructions when he issued a suspension to a subordinate without the presence of the subordinate's representative. The EMS Assistant Chief noted that the suspension was compromised, as Complainant issued it without the presence of the representative, contrary to instruction.

In an attempt to show pretext, Complainant contended that both the Assistant Chief and Service Line Manager issued him the suspension shortly after learning of his sexual orientation. The decision found that Complainant did not establish that the Agency's reasons for his suspension were pretextual. Nearly a year had passed between the time Complainant alleges management first became aware of his sexual orientation and his suspension. Complainant also did not dispute that he confronted the patient in the manner described in the proposed suspension. While Complainant argued that he was ensuring the safety of the public, the decision noted that Complainant worked as a Housekeeping Aide and was neither a nurse nor a doctor with medical expertise. The record reflected that management felt that Complainant should have notified them instead of confronting the patient in the way he did. The

decision also noted that in EEOC Petition No. 0320170017 (March 2, 2017), the Commission concurred with a Merit Systems Protection Board's (MSPB) decision finding that Complainant did not demonstrate that he was subjected to discrimination based on his sexual orientation when he was removed from his position.

Post-ADAAA Reasonable Accommodation

Lougee (Nida R.) v. USPS, 0120172580 (11/08/2018) **[Repeated under Priority 5 and Findings below] –** Complainant, a City Letter Carrier at the Agency's Bellevue Station in Richmond Virginia, filed an EEO complaint alleging that the Agency discriminated against her on the bases of sex (female), disability, and in reprisal for prior protected EEO activity when (1) her request for her reasonable accommodation was denied; and (2) her request for light duty was denied and she was not allowed to work. The AJ assigned to the case held a hearing and found that Complainant had proven disability-based discrimination as alleged in claim (1) of the complaint, but failed to prove claim (2). When the Agency failed to issue a final order within 40 days of receipt of the AJ's decision, the AJ's decision became the Agency's final action pursuant to 29 C.F.R. § 1614.109(i).

Complainant appealed, stating that she was "filing an appeal not against the Judge's decision but to enforce the Judge's decision." The Commission held that, in light of Complainant's statement and the Agency's failure to issue a final order, "[t]here is no occasion to further review the merits of the claim. We need only affirm the AJ's decision as incorporated in the Agency's final action and order the Agency to comply with it."

The Commission ordered the Agency to: pay $42,750 in compensatory damages; restore sick and annual leave to Complainant; complete the interactive process to determine a reasonable accommodation for Complainant; conduct EEO training; take appropriate preventative steps to ensure that no employee is subjected to any form of discrimination or denied a reasonable accommodation when appropriate; consider discipline for the responsible officials; and post a notice.

Barta (Theo B. and Cathie K.) v. OPM, 0520080057 & 0520080067 (12/21/2018) and **Lawrence (Willia M. and Alonzo N.) v. OPM**, 0120132419 & 0120132420 (12/21/2018) [Repeated under Findings and Circulated Decisions below] – In two companion decisions the Commission determined that OPM violated the Rehabilitation Act when it contracted with two insurance carriers for health insurance plans that categorically excluded in vitro fertilization (IVF) from coverage from about 1997 to 2000. The Commission found that the health insurance provisions were disability-based distinctions, and that OPM failed to provide adequate justifications for these disability-based distinctions. But the Commission cautioned that it was taking no position on the question of whether a similar blanket exclusion of IVF, as that practice may exist currently, would violate the Rehabilitation Act.

First, the Commission found that complainants' infertility constituted a disability. This was an important finding because it marked the first time that the Commission had determined that infertility met the definition of "disability" under the Rehabilitation Act.

Second, the Commission determined that excluding IVF from health insurance constituted a "disability-based distinction" because the evidence showed that IVF was nearly exclusively utilized for the treatment of medically diagnosed infertility from 1997 to 2000.

OPM attempted to argue that excluding IVF was not disability-based because IVF was treated in a manner consistent with other treatments that were not "medically necessary," i.e., treatments that did not cure the condition at issue. But the Commission rejected this argument, pointing out that the health insurance plans paid for various treatments and services that did not correct or cure the underlying impairment, including insulin for diabetes, durable medical equipment like wheel chairs and prosthetic legs for missing limbs, artificial insemination for infertility, and prescription drugs for erectile dysfunction.

Third, the Commission determined that the health insurance provisions at issue did not fall within the "safe harbor" provision of the Americans with Disabilities Act, as applied to the Rehabilitation Act. OPM attempted to justify excluding IVF from coverage by providing actuarial studies done during the course of litigation to try to predict what would have happened to the insurance plans had they covered IVF from 1997 to 2000. But the Commission found these studies to be inadequate because they came into being after the exclusion of IVF had gone into effect—OPM and the insurance carriers could not have relied on these actuarial data and calculations when deciding to exclude IVF from 1997 to 2000. Therefore, the Commission concluded that OPM failed to provide sufficient evidence to show that the disability-based distinctions were attributable to any application of legitimate insurance risk classification, underwriting procedures, or verifiable actuarial data.

Cogdell (Ollie N.) v. GSA, 0120172259 (03/14/2019) – Complainant, a GS-13 Marketing Specialist at the Agency's Office of Communications and Marketing in Washington, D.C., filed an EEO complaint alleging that the Agency discriminated against him and subjected him to a hostile work environment on the bases of disability (cognitive, intellectual), genetic information, and in reprisal for prior protected EEO activity as evidenced by multiple incidents including, inter alia, he was not notified about a vacancy announcement; his requests for reasonable accommodation were denied; he was denied advanced sick leave; management summoned the police to Complainant's residence; and he received a Level 3 duty performance evaluation for Fiscal Year 2014.

Following an investigation, Complainant requested a hearing before an EEOC AJ. The AJ held a hearing and issued a decision finding that Complainant had not been subjected to discrimination or reprisal as alleged. The Agency issued a final order fully implementing the AJ's decision.

In our appellate decision, we noted that Complainant raised discrimination based on genetic information. We found this claim failed as the record was devoid of any allegations or facts regarding genetic tests, the genetic tests of Complainant's family members, or his family medical history. Next, we determined that substantial record evidence supported the AJ's finding that the Agency had articulated legitimate, nondiscriminatory reasons for its actions for which Complainant had not rebutted as pretextual. With regard to his denial of reasonable accommodation claim, the Commission found that the Agency had provided all requested accommodations except for a reassignment and a "job coach." The Commission found that the provided accommodations allowed Complainant to perform the essential functions of his position rendering reassignment unnecessary. Further, the Agency offered Complainant online resources as a substitute for a job coach, but Complainant refused to consider the potential effectiveness of the alternative accommodation. Accordingly, Complainant was not denied reasonable accommodation.

Finally, the Commission noted that Complainant included an allegation that management summoned the police to his house. The record revealed that Complainant sent an email to his supervisor stating

that he was "extremely upset" and in a "fragile state of mind" which suggested that Complainant may have been suicidal. Federal Protective Service subsequently contacted local police who initiated contact with Complainant at home for a "well check." The Commission concluded that this action was undertaken for Complainant's protection and was not based on discriminatory or retaliatory animus. Accordingly, the Commission found that Complainant failed to establish that he was subjected to discrimination, reprisal, or a hostile work environment as to all claims alleged.

McCarthy (Brad M.) v. Navy, 0120172252 (03/29/2019) – Complainant, a Civilian Mariner, Chief Radio Electronics Technician (CRET), WM-9995-10, with the Military Sealift Command in Norfolk, Virginia, filed an EEO complaint alleging that the Agency discriminated against him and subjected him to a hostile work environment on the bases of disability (morbid obesity) and in reprisal for prior protected EEO activity when: (1) his requests for reasonable accommodation were denied; (2) he received a Proposed Notice of Removal; (3) he was repeatedly sent to various training knowing in advance he would be unable to complete the training because they did not have the necessary safety equipment in his size; and (4) he was placed in "Pending Disciplinary Status" for not completing mandatory training.

Following an investigation, the Agency issued a final decision after Complainant failed to request a hearing within the regulatory timeframe. The decision concluded that Complainant failed to prove that the Agency subjected him to discrimination or reprisal.

In our appellate decision, we found that the Agency granted one of Complainant's reasonable accommodation requests (two adjacent airplane seats) and that he withdrew a second request (no direct sunlight). Complainant requested reassignment as a third reasonable accommodation due to his inability to meet the Agency's weight standard. Because Complainant did not identify any accommodations that would have enabled him to meet the weight standard necessary to perform the essential functions of his position, the only possible accommodation in this case would have been to reassign Complainant to another position. The record demonstrated, however, that management made good faith efforts to find Complainant a suitable position for which he was qualified. Complainant was informed that he could remain on site in a duty status or use paid/unpaid leave while the search was conducted. The record was devoid of evidence that there was a vacant, funded position for which Complainant was qualified to be reassigned during this time period. When a position was located, Complainant informed management that he had accepted a position at another agency. In light of the foregoing, we found that the Agency did not deny Complainant reasonable accommodation in violation of the Rehabilitation Act.

For the remaining issues, we found that the Agency had articulated legitimate, nondiscriminatory reasons for its actions of which Complainant had not rebutted as pretextual. Furthermore, Complainant's hostile work environment claim failed due to Complainant's failure to establish that any of the Agency's actions were motivated by discriminatory or retaliatory animus. As a result, the Commission found that Complainant had not been subjected to discrimination, reprisal, or a hostile work environment as alleged.

McConnell (Velva B.), et al. v. USPS, 0120182505 (11/07/ 2018) **[Repeated under Broad Impact Cases and Findings below]** – On August 7, 2007, Complainant initiated a class complainant alleging that the Agency discriminated against employees based on their disabilities when it conducted its National

Reassessment Program. On June 4, 2015, an EEOC AJ found that the Agency discriminated against rehabilitation and limited-duty employees based on disability when they were subjected to: (1) withdrawals of their reasonable accommodations; (2) hostile work environments; and (3) disclosures of confidential medical information.

The Agency rejected the AJ's finding, and appealed the decision. The Commission reversed the Agency. The Agency requested reconsideration, which was denied. The Commission ordered the Agency to notify class members, and to issue decisions on individual claims of relief within 90 calendar days of receipt.

On June 26, 2018, the Class Agent submitted an Emergency Petition for Enforcement of Final Order, arguing that the Agency issued premature final decisions on individual claims before class members had their disputed claims reviewed by an AJ. On July 12, 2018, the Class Agent filed an appeal on all Agency final decisions issued on Class Members' claims for individual relief, alleging that the final decisions were issued in error. Due to the size of the class, the Class Agent requested the appointment of a Special Master(s) to assist the AJ. The Agency argued that it fully complied with the Commission's earlier order to issue final decisions within 90 days, and had issued 28,931 final decisions.

The Commission found that the Agency's final decisions on disputed claims for individual relief were premature because an AJ retains jurisdiction, and is responsible for resolving disputed claims for individual relief. We ordered the Agency do vacate all final decisions issued on disputed claims for individual relief where an AJ had not issued a decision resolving the dispute; and remanded the disputed claims for further processing. The Agency was ordered to notify the EEOC AJ of its intent to dispute a claim for individual relief. The Commission also denied the request for the appointment of a Special Master.

Pregnancy Accommodation

Monterroso (Ashlee P.) v. SSA, 0720180016 (12/11/2018) – Complainant filed an EEO complaint alleging discrimination based on sex (female and pregnancy) and reprisal for prior protected EEO activity. An AJ held a hearing on the merits and a hearing on damages and on December 11, 2017, issued a decision finding that Complainant was subjected to discrimination based on reprisal. The AJ's decision ordered the Agent to post a notice, to provide training and consider discipline against the responsible management official, to pay Complainant $22,500 in nonpecuniary compensatory damages, to calculate the appropriate amount of back pay and other benefits due Complainant, and to pay Complainant $100,817.44 in attorney's fees and costs. The AJ's certificate of service informed the parties that the Commission presumed receipt within five calendar days, and service was made on the Office of Civil Rights and Equal Opportunity (OCREO) at the Agency's headquarters at the address designated by the Agency. The AJ also emailed copies of the decision to the Agency representatives on December 11, 2017. On January 19, 2018, the Agency issued a final order rejecting the AJ's decision and an accompanying appeal, but the Agency sent a copy of its final order and notice of appeal to the AJ instead of to the Office of Federal Operations. On January 30, 2018, the Agency sent a copy of its final order and appeal to OFO. On appeal, the Commission found that the Agency was required to take action on the AJ's decision on or before 45 days from its issuance (including the five days for mailing), or on or before January 25, 2018. Noting that the Agency failed to show that it received the AJ's decision beyond the presumed five days, that the Agency failed to seek waiver, estoppel, or equitable

tolling, and that the Agency failed to offer adequate justification for an extension of the applicable time period, OFO dismissed the Agency's appeal as untimely.

Taylor (Georgianne B.) v. DHS (TSA), 0120172317 (02/28/2019) – Complainant worked as a part-time Transportation Safety Officer (TSO) in North Carolina. During the relevant time period, Complainant was pregnant and informed the Agency of her pregnancy. Additionally, Complainant sought light duty because of her pregnancy, but the Agency did not provide her with light duty, resulting in her having to take leave for an extended period.

Complainant filed an EEO complaint in which she alleged she was harassed and discriminated against on the basis of sex (pregnancy) when the Agency removed her from her normal work duties as a dual function TSO and informed her that she could not return to work until she had medical restrictions that reflected that she had no restrictions.

In an appellate decision, the Commission found that the Agency provided legitimate, non-discriminatory reasons for its actions, namely, that Complainant was not removed from her job but could not work as a TSO because of her 25-pound lifting restriction. The Commission noted that all TSOs must be able to lift 70 pounds in accordance with qualification standards derived from the Aviation and Transportation Security Act (ATSA). Further, the Commission noted that the Agency stated that Complainant was not given a light-duty assignment because there were no such assignments within her restrictions, and the HR Specialist stated that she did not recall telling Complainant she had to present medical documentation reflecting she had no restrictions to return to work, but employees are told they must be able to perform the functions of their position to return to work.

The Commission noted that the record reflected that anyone who could not perform TSO duties was not allowed to continue working as a TSO while they had such restrictions. Therefore, the Commission concluded that Complainant did not provide any evidence that proved that the Agency's nondiscriminatory explanations for its actions were pretext for discrimination based on pregnancy. To the extent that Complainant contended that the Agency's actions constituted harassment, the Commission concluded that its actions were not based on Complainant's sex or pregnancy; instead, they were based on Complainant's inability to perform TSO duties.

Szenfeld (Heidi B.) v. HHS, 0120171750 (02/28/2019) - Prior to taking maternity leave, Complainant told her supervisor (S1) that she would need a space to pump breastmilk when she returned. When Complainant returned from maternity leave, S1 told Complainant that she had arranged for Complainant to use a storage room in another part of the building for lactation. Complainant alleged that she had to take an elevator down from her workspace on the 36th floor to the lobby, take another elevator up to the 13th floor to sign out a key, then take an elevator down to the fourth floor to the designated space. Complainant reported to S1 that the designated room was small, dusty, and cluttered, and S1 arranged to have the room cleaned. According to Complainant, the room was not in better condition after it was cleaned. Complainant occasionally used the empty offices of teleworking employees or vacant conference rooms to lactate on an ad hoc basis to avoid using the designated room. According to S1, she permitted Complainant to use vacant offices and conference rooms and did

not make alternate arrangements because Complainant did not tell her she had an issue finding an appropriate space to express breast milk.

Complainant filed an EEO complaint alleging that the Agency discriminated against her on the basis of sex (pregnancy-related condition) when beginning in April 2013, she was denied a reasonable accommodation consisting of an appropriate space for lactation. In accordance with Complainant's request, the Agency issued a final decision, which concluded that Complainant failed to prove that the Agency subjected her to discrimination as alleged. On appeal, the Commission found that Complainant failed to establish a prima facie case of failure to accommodate her pregnancy-related condition because the preponderance of the evidence in the record established that the Agency provided Complainant with an appropriate space other than a restroom to use to express breastmilk. The decision noted that there was no evidence in the record that Complainant followed up with S1 or anyone else to notify the Agency that the storage room was not an effective accommodation after it was cleaned and that S1 permitted Complainant to use vacant conference rooms or offices instead of the storage room. The Commission affirmed the Agency's final decision.

Hardy (Michelina C.) v. USPS, 0120171009 (03/28/2019) – Complainant worked as Part-time Flexible Letter Carrier in Redondo Beach, California. In April 2012, Complainant submitted a request for light duty based on her medical restrictions. Complainant's supervisor denied her request stating that there was no work available within her restrictions. In May 2012, Complainant submitted a letter to the management officials alleging discrimination when she was not paid for leave that she had available.

Complainant filed an EEO complaint alleging that she was discriminated against based on her race, disability, and sex when she was denied a reasonable accommodation, and when she was not properly paid for her leave. The Agency accepted Complainant's complaint for investigation but dismissed her disability claim stating that pregnancy is not considered a disability. Complainant requested a hearing; the AJ dismissed her hearing request and remanded the complaint back to the Agency to issue a final decision.

The Agency found that Complainant had not established a prima facie case of discrimination based on race or sex because she had not shown that similarly situated employees, outside of her protected categories, were treated differently. The Agency also noted that the management officials provided legitimate, nondiscriminatory reasons for their actions, and that Complainant had not shown that the reasons were pretext for discrimination. Complainant appealed the Agency's decision.

The Commission found that Complainant had not established a prima facie case of discrimination based on race or sex/pregnancy because she had not shown that the Agency accommodated those who were similar in their ability or inability to work. While Complainant named three comparators, the record showed that one was not accommodated, and the other two had less severe restrictions as compared to Complainant. Additionally, for the claim related to Complainant's payment for her leave, the Commission found that she had not alleged that any other employee was treated more favorably, nor shown any evidence that would give rise to an inference of discrimination.

Regarding Complainant's disability claim, the Commission reversed the procedural dismissal of this claim because Complainant's request may be construed as a request for reasonable accommodation because she identified her exact medical restrictions and requested an accommodation of a light duty assignment. While the Agency did not investigate Complainant's allegation of disability

discrimination, there was sufficient information in the record to make a determination on this claim. The Commission found that Complainant had not shown that she suffered from limitations resulting from pregnancy-related conditions that constitute a disability or limitations resulting from the interaction of the pregnancy with an underlying impairment because her medical documentation only listed her condition/diagnosis as pregnancy.

Accordingly, the Commission concluded that Agency did not discriminate against Complainant based on her race, sex, or disability when it did not provide her with an accommodation and when it did not properly pay her using available leave.

Mikerina-Gueb (Renee P.) v. USPS, 0120171648 (03/28/2019) – Complainant worked as Mail Handler in Federal Way, Washington. On June 3, 2014, she requested a temporary light duty assignment, which was granted on June 19, 2014. In October 2014, Complainant provided medical documentation with updated restrictions. The Agency conducted a job search but was unable to find available duties within Complainant's new restrictions. Complainant filed an EEO complaint alleging discrimination based on sex (female/pregnancy) and reprisal when she was denied her requests for a light-duty assignment on June 3, 2014, and October 22, 2014.

The Agency found that Complainant did not establish a prima facie case of discrimination based on sex, but she had established a prima facie case of reprisal discrimination. The Agency then found that her manager provided a legitimate, nondiscriminatory reason for his actions, and that Complainant had not shown that his reasons were pretext for discrimination. Complainant filed an appeal and the Commission remanded the matter back for a supplemental investigation to determine if other employees, similar in their ability or inability to work, were provided accommodations. Further, the Commission determined that additional information was needed to allow for a determination of whether a policy imposed a significant burden on pregnant workers, and whether the Agency's legitimate, nondiscriminatory reason is sufficiently strong to justify the burden imposed.

The Agency conducted a supplemental investigation and issued another final decision finding that Complainant had not shown that she was discriminated against based on her sex/pregnancy, or in retaliation for her prior EEO activity. The Agency also found that Complainant was not an individual with a disability because she did not show that she had a disability, and that her restrictions were solely the result of her pregnancy. The Agency determined that Complainant had not established a prima facie case of sex/pregnancy discrimination because the named female comparators were similarly pregnant when their requests for light-duty assignments were granted. The Agency further found that male employees were also denied light-duty assignments due to the unavailability of work within their restrictions. Complainant appealed the Agency's decision.

Regarding Complainant's claim that she was denied light duty in June, the Commission found that the time between Complainant's request and the effective date of her light duty assignment was reasonable, and that there was no indication that any delay was motivated by discrimination. For the claim that Complainant was denied light duty in October, the Commission found that the Agency did not grant a light-duty assignment to any comparable employee with a similar ability or inability to work and that Complainant had not established a prima facie case of sex/pregnancy discrimination.

With regards to Complainant's reprisal claim, the Commission assumed that Complainant had established a prima facie case of reprisal discrimination. The Commission then found that the Agency

articulated a legitimate, nondiscriminatory reason for denying Complainant's request for a light-duty assignment, and that Complainant has not shown that PM's reason was pretext for discrimination. Regarding Complainant's disability discrimination claim, the Commission found that she had not shown that she is an individual with a disability because she not shown that she had any pregnancy-related condition, or that her pregnancy interacted with another impairment resulting in her limitations.

Medical Privacy

Clifton (Dixie B.) v. VA (VHA), 0120170175 (03/26/2019) **[Repeated under Findings, below] –** Complainant worked at the St. Louis, Missouri VAMC and, as a veteran, received care at the same facility for her disabilities, including degenerative disc disease, major depression, and anxiety. Complainant's supervisor (S1) and four coworkers accessed her VAMC patient medical records, and the VAMC Privacy Officer (PO1) investigated and determined that the access was neither job-related nor consistent with business necessity. Another supervisor (S3) directed Complainant to provide medical documentation substantiating her need tor FMLA leave on the day of a sick out and thereafter on a monthly basis. S3 subsequently contacted HR and told Complainant that she did not need to provide additional documentation or certify her need for FMLA on a monthly basis.

Complainant filed two EEO complaints alleging, among other issues, that the Agency failed to protect her confidential medical records and made an impermissible medical inquiry in violation of the Rehabilitation Act. Complainant requested a hearing on both of her complaints, which were consolidated by an AJ. Complainant subsequently withdrew her hearing request, and the Agency issued a final decision finding no discrimination.

On appeal, the Commission reversed the Agency in part. With respect to the medical records claim, the Commission found that it was undisputed that S1 and the four coworkers accessed Complainant's confidential medical records and that the access was neither job-related nor consistent with business necessity in violation of the Rehabilitation Act. Regarding S3's request for medical documentation, we found that Complainant had provided sufficient information to substantiate her chronic disabilities and her need for leave as a reasonable accommodation for disability-related flare ups and that the Agency subjected Complainant to an unlawful disability inquiry when it requested additional medical documentation. As relief, OFO ordered a supplemental investigation concerning Complainant's entitlement to compensatory damages, training for S3, S1, and the coworkers who accessed Complainant's medical records, consideration of discipline against all employees found to have accessed Complainant's records, and posting of a notice. Because S3 withdrew his request for additional medical documentation after consulting HR, we did not order the Agency to consider disciplinary action against S3.

4. ENFORCING EQUAL PAY LAWS

None of the thirteen (13) decisions that implicated this SEP Priority concerned the associated FCP – Alternate pay systems that allow for subjective pay determinations.

Decision Summaries for this Category

Koeppel (Jenna P.) v. DHS (HQ), 0120180917 (10/17/2018) – Complainant, a female, worked as a GS-14 Program Analyst alongside a GS-15 male colleague (C1) and a GS-13 male colleague (C2). According to Complainant, she was performing GS-15 level work because of her high-level projects, some of which had been worked on by GS-15 employees in the past. Complainant noted that on one project she shared duties with a male GS-15 Branch Chief (C3). As a Branch Chief, C3 was responsible for a team, managed a million-dollar budget, and was considered a subject matter expert. Complainant's second- and third-level supervisors indicated that C3 performed more advanced, technical work than Complainant. Complainant's first-level supervisor, a male GS-15 Division Director, stated that 80 percent of Complainant's work was GS-15 level work, and he drafted a promotion justification for Complainant to be promoted to GS-15. The request to promote Complainant was rejected because the Office in which she worked was very top-heavy, with many GS-15 employees, and because Complainant was a generalist who did not supervise employees or manage a budget. A desk audit was subsequently completed, and the auditor determined that Complainant's position was properly classified as a GS-14 position.

Complainant filed an EEO complaint alleging that the Agency discriminated against her based on sex when she was required to perform GS-15 work but was denied promotion to the GS-15 level. Complainant subsequently elected to withdraw her Title VII claim and proceed only under the Equal Pay Act. An EEOC AJ held a hearing and determined that Complainant failed to establish a prima facie case of discrimination under the EPA because she failed to establish that her work was substantially equal to the work of GS-15 male employees at the Agency. The AJ noted that Complainant did not have the same responsibilities as her GS-15 comparators because she was not a supervisor, did not have budget authority, did not speak for the Agency the way higher-level employees did, and did not have the technical expertise of higher-level employees. On appeal, the Commission found that the AJ's finding that Complainant was not performing equal work requiring equal skill, effort, and responsibility as her GS-15 male comparators was supported by substantial evidence in the record. We affirmed the Agency's final order fully implementing the AJ's decision finding no discrimination.

Idahosa (Marcos S.) v. Army, 0120172258 (12/13/2018) – Complainant worked as a Disability Program Manager/EEO Specialist, GS-0260-11 at Fort Benning, Georgia. Complainant filed an EEO complaint contending that he was discriminated against, on the basis of sex (male), disability, age (54), and in reprisal for prior protected EEO activity when 1) he was denied equal pay; 2) he was denied higher level pay; 3) he was subjected to a hostile work environment; and 4) he was not selected for a GS-12 EEO Specialist position. In its final decision, the Agency found that Complainant failed to prove that the Agency subjected him to discrimination as alleged.

On appeal, the Commission found that Complainant did not establish a prima case claim under the Equal Pay Act or an entitlement to higher level pay because the work he performed did not require skill, effort and responsibility equal to that performed by his female comparators on the G2-12 level.

The Commission concluded that Complainant did not show that he was subjected to a hostile work environment because he did not show that the allegedly harassing acts were sufficiently severe or pervasive or based on his protected classes. With respect to the non-selection claim, the Commission found no discrimination because Complainant failed to establish that his qualifications for the position were superior to those of the selectee.

McSweeney (Margeret M.) v. VA, 0120170362 (02/21/2019) **[Repeated under Findings below]** – Complainant, a GS-15 General Surgeon, filed an EEO complaint alleging that she was discriminated against on the basis of sex (female) when she was paid less than her male counterparts and when a tentative job offer was withdrawn. Complainant did not request a hearing. The Agency issued a decision finding no discrimination. OFO reversed the part of the Agency's decision finding no discrimination in violation of the Equal Pay Act and Title VII for the pay discrepancy when Complainant was working as a General Surgeon. OFO affirmed the remainder of the Agency's decision finding no discrimination. OFO found that based on the vague references to possible reasons for the pay disparity and lack of information reflecting how the salary of Complainant or the comparatives was set, the Agency failed to satisfy its burden by a preponderance of the evidence to show that the pay differential was based on a factor other than sex. Regarding the Title VII violation, OFO found that the Agency failed to set clearly forth reasons for the pay disparity between Complainant and the two named comparatives such that she had been given a fair opportunity to demonstrate that those reasons were pretext for discrimination. For the remaining EPA claim, OFO found that the Agency showed there was a factor other than sex that justified Complainant being paid less when she was in an Acting capacity. OFO found that the withdrawal of the job offer was because of Complainant's performance problems. For remedies, OFO ordered back pay, liquidated damages, an investigation of whether compensatory damages were due, EEO training to and consideration of discipline for the responsible officials, and posting of a notice of discrimination.

Asfaw (Mahalia P.) v. U.S. Agency for Global Media, 0120171003 (02/22/2019) – Complainant, a contractor producing radio programs, filed an EEO complaint alleging that she was discriminated against on the bases of sex (female), race (African-American), and reprisal for protected EEO activity, when she was harassed, not selected for a position, her contract was not renewed, and the Equal Pay Act was violated when she was not paid more after an increase in the scope of work. After Complainant requested a hearing, an EEOC AJ issued a decision without a hearing finding no discrimination. The Agency then issued a decision finding no discrimination. Complainant appealed. OFO affirmed the Agency's finding of no discrimination. Regarding Complainant's Equal Pay Act claim, OFO found that Complainant failed to establish a prima facie case. OFO found that Complainant failed to show that she performed work that was substantially equal to a male under similar working conditions.

Thomas-Jackson (Mercedez A.) v. USDA, 0120170574 (03/07/2019) **[Repeated under Findings below]** – Complainant, an Associate Chief Information Officer (SES), filed an EEO complaint alleging that she was discriminated against when she was subjected to a hostile work environment on the bases of her

sex (female), age (over 40), race (African American), color (brown), and in retaliation for protected EEO activity. Complainant also alleged she was discriminated against on the bases of race and sex when she did not receive equal pay. Complainant requested a hearing before an EEOC AJ. The AJ held a hearing and issued a decision finding no discrimination on the entire complaint. The Agency adopted the AJ's decision. Complainant appealed. OFO affirmed the finding of no discrimination on the hostile work environment claim. OFO reversed the part of the Agency's decision finding no discrimination in violation of the Equal Pay Act and Title VII for the pay discrepancy between Complainant and a male employee. OFO found no evidence explaining the reasoning for the pay disparity. OFO found that the Agency failed to satisfy its burden by a preponderance of the evidence to show that the pay differential was based on a factor other than sex. For remedies, OFO ordered back pay, liquidated damages, an investigation of whether compensatory damages were due, EEO training to and consideration of discipline for the responsible officials, and posting of a notice of discrimination.

Brooks (Sheryl S.) v. Army, 0120172477 (03/08/2019) – Complainant, a GS-9 Statistics Assistant, filed an EEO complaint alleging that she was discriminated against on the basis of sex (female) when she learned that she would not be promoted to the position of Program Analyst, GS-1531-11, although she had been performing the same duties as a male coworker. After Complainant requested a hearing, an EEOC AJ issued a decision without a hearing finding no discrimination. The Agency then issued a decision finding no discrimination. Complainant appealed. OFO affirmed the Agency's finding of no discrimination. Regarding Complainant's Equal Pay Act claim, OFO found that Complainant failed to establish a prima facie case. OFO found that Complainant failed to show that she performed work that was substantially equal to a male under similar working conditions.

Heard III (James S.) v. VA, 0120171997 (03/05/2019) – Complainant, who worked as the Executive Director, Center for Acquisition Innovation at VA Central Office in Washington, D.C., filed an EEO complaint alleging that the Agency discriminated against him on the bases of sex (male) and age (over 40) when his December 2015 request to have his pay level increased to SES pay band level 2 for the period of FY 2010 through FY 2016 was denied. Complainant did not request a hearing before an EEOC AJ. The Agency issued a decision finding no discrimination. Complainant appealed. OFO affirmed the Agency's finding of no discrimination. Regarding Complainant's Equal Pay Act (EPA) claim, OFO found that Complainant failed to establish a prima facie case. OFO found that Complainant failed to show that he performed work that was substantially equal to a female under similar working conditions. Regarding his non-EPA claim, OFO found that Complainant did not show that he was treated less favorably than other similarly-situated employees, because OFO found that the Agency failed to provide updated position descriptions and pay bands for all of the relevant SES employees.

Krug (Casandra N.) v. DHS, 0120171485 (03/14/2019) – Complainant, a Criminal Investigator, GS-1811-13 in the Office of the Inspector General (OIG) at the Agency's Headquarters in Washington, D.C., filed an EEO complaint alleging that she was discriminated against on the basis of sex (female) when she was not paid a GS-14 salary despite performing GS-14 duties. Complainant requested a hearing before an EEOC AJ but withdrew that request. The Agency issued a decision finding no discrimination.

Complainant appealed. OFO affirmed the Agency's finding of no discrimination. Regarding Complainant's Equal Pay Act claim, OFO found that Complainant failed to establish a prima facie case. OFO found that Complainant failed to show that she performed work that was substantially equal to a male under similar working conditions. OFO also found no Title VII violation. OFO found no comparators similarly situated to Complainant.

Crosby (Matilda C.) v. USDA, 0120171795 (03/22/2019) – Complainant, a Human Resources Assistant (HRA), GS-0203-7, Complainant filed an EEO complaint alleging that the Agency discriminated against her and subjected her to a hostile work environment on the bases of race (not specified), sex (female), disability (association with son with autism), age (55), genetic information (not specified), and in reprisal for prior protected EEO activity based on numerous incidents including, inter alia, she was assigned to perform higher-level duties and was denied promotions or a raise in pay; she was issued a satisfactory mid-year performance review; she was denied a promotion to a GS-0203-08, HR Assistant position, despite the results of a completed desk audit, due to her status as a Potentially Affected Employee; she was not provided an accurate or updated position description; she was not given a copy of her 2015 performance appraisal, and then was provided an incomplete document; and her disability was discussed during a training session, she was singled out and made an example of for her disability and she was type-cast as indifferent to hugs.

Following an investigation, Complainant requested a final agency decision. In the decision, the Agency determined that Complainant had not been subjected to discrimination, reprisal, or a hostile work environment. In our appellate decision, we affirmed the Agency's final decision. First, the Commission found that Complainant's GINA claim failed as she failed to show that the Agency had any knowledge of her protected genetic information or that such information played a role in any of the incidents at issue. Next, the Commission found that the Agency articulated legitimate, nondiscriminatory reason for its actions which Complainant had not rebutted as pretextual. For example, despite Complainant's perception that she was performing higher-level work, the record revealed that everyone's workload increased due to changes in the Agency's process and systems. Further, the record was devoid of evidence demonstrating that Complainant was denied promotions based on her protected classes; rather, the record showed that Complainant was either not qualified for the desired positions or was deemed not as not among the top candidates. In addition, Complainant was not eligible for an accretion of duties promotion. The Commission found that Complainant was not subjected to a hostile work environment as the alleged conduct was not sufficiently severe or pervasive nor based on her protected classes.

Finally, the Commission found that Complainant failed to establish a prima facie case of discrimination under the EPA as she failed to specifically identify a male employee who received higher pay for the same duties. We noted that Complainant only identified female employees who reportedly were performing higher-level duties and not receiving higher-level pay for the same duties and that the record evidence showed that all of the employees working in the Region 5 Service Center were female.

Coffman (Genie S.) v. DHS (CBP), 0120171456 (03/22/2019) – Complainant, an Assistant Commissioner, ES-0201-00, in the Office of Human Resources Management at the Agency's

headquarters in Washington, D.C., filed an EEO complaint alleging that the Agency discriminated against her on the basis of sex (female) when she was paid less than her Senior Executive Service colleagues. After Complainant requested a hearing, an EEOC AJ issued a decision without a hearing finding no discrimination. The Agency then issued a decision finding no discrimination. Complainant appealed. OFO affirmed the Agency's finding of no discrimination. Regarding Complainant's Equal Pay Act claim, OFO found that Complainant failed to establish a prima facie case. OFO found that Complainant failed to show that she performed work that was substantially equal to a male under similar working conditions. OFO found that Complainant's duties were clearly distinct and substantially dissimilar to the primary job duties of her Senior Executive Service colleagues at other program offices. OFO also found no Title VII violation on the unequal pay claim.

Soler (Isabel F.) v. VA, 0120171550 (03/19/2019) – Complainant, a Physician (Infectious Diseases), VM-0602-15, at the Veterans Affairs Healthcare System facility in Sioux Falls, South Dakota, filed an EEO complaint alleging that the Agency subjected her to discrimination on the bases of national origin (Hispanic) and sex (female) when: 1) on February 26, 2015, she became aware that from 2006 to 2015, she was not receiving the same pay while performing the same duties as other male physician-medical officers at her facility and across the United States; and 2) when the Agency subjected her to a hostile work environment on the bases of national origin and sex. Complainant did not request a hearing before an EEOC AJ. The Agency issued a decision finding no discrimination. Complainant appealed. OFO affirmed the Agency's finding of no discrimination. Regarding Complainant's Equal Pay Act claim, OFO found that Complainant failed to establish a prima facie case. OFO found that Complainant failed to show that she performed work that was substantially equal to a male under similar working conditions in the same establishment. OFO found that the comparators listed by Complainant were not working in the same establishment as Complainant. OFO also found no discrimination regarding the hostile work environment claim.

Kinsman (Arleen L.) v. DOC, 0120172018 (03/21/2019) – Complainant, a Geodesist, ZP-1372-IV, with the Agency's Office of National Geodetic Survey, National Ocean Service, filed an EEO complaint alleging that she was discriminated against on the basis of sex (female) when she was paid less than a male employee performing the same duties. Complainant did not request a hearing before an EEOC AJ. The Agency issued a decision finding no discrimination. Complainant appealed. OFO vacated the Agency's finding of no discrimination. Regarding Complainant's Equal Pay Act claim, OFO found that although the Agency in part relied on Comparative 1's (male) prior salary in setting Comparative 1's salary with the Agency, the record did not include evidence establishing Comparative 1's prior salary. OFO also found that although the Agency stated it relied on a particular salary rule to set Complainant's salary, the record was unclear as to whether the Agency also applied that same salary rule when setting Comparative 1's salary. Furthermore, OFO found that the Agency's final decision only addressed the initial salary decision at hiring and did not address the discrepancy in salaries subsequent to the initial pay setting decision. Thus, OFO remanded the matter to the Agency for further development of the record.

Byrd (Justine R.) v. DOJ (BOP), 0120172967 (03/21/2019) – Complainant, a Correctional Program Specialist (Discipline Hearing Officer), GS-0006-12, at the Federal Correctional Complex in Victorville, California, filed an EEO complaint alleging that the Agency discriminated against her on the bases of race (Native American) and sex (female) when: (1) male Discipline Hearing Officers in her office received pay at the GS-13 level in comparison to her GS-12 pay; and (2) she was subjected to a hostile work environment. Complainant requested a hearing before an EEOC AJ. Over Complainant's objections, the AJ granted the Agency's motion for a decision without a hearing and issued a decision without a hearing finding no discrimination. For claim (1), the AJ found that Complainant could not establish a prima facie case of disparate treatment in pay because the named comparators were not similarly-situated to her. As for claim (2), the AJ found no discrimination. The Agency subsequently issued a final order adopting the AJ's findings. On appeal, Complainant contended that the AJ failed to address her Equal Pay Act (EPA) claim, which involves a significantly different legal standard and burden of proof than the standard for intentional discrimination. OFO vacated the Agency's finding of no discrimination. Regarding Complainant's Equal Pay Act claim, OFO found that the AJ erred when she failed to address Complainant's EPA claim in her decision without a hearing. Because OFO remanded claim (1), OFO declined to adjudicate the remainder of the complaint. OFO remanded the entire complaint to the Agency to request that the AJ hold a hearing on the complaint.

5. PRESERVING ACCESS TO THE LEGAL SYSTEM

One of the decisions listed for this SEP Priority implicated the FCP of improving employees' faith of the agency's EEO program.

Decision Summaries for this Category

Conerly (Alda F.) v. EPA, 0120171676 (11/29/2018) – Complainant, an Environmental Protection Specialist, GS-12, at the Agency's National Center for Radiation Field Operations (NCRFO), Las Vegas, Nevada, filed an EEO complaint alleging discrimination based on race (African-American) and retaliation when the Agency subjected her to disparate treatment and a hostile work environment regarding work assignments, training, and communication issues. Complainant did not request a hearing, the Agency issued a decision finding no discrimination, and Complainant filed an appeal from that decision. OFO affirmed the Agency's decision finding no discrimination. OFO, however, imposed a sanction on the Agency for failing to issue its decision until more than two years after Complainant's request (well beyond the 60-day time limit). OFO found that the most appropriate sanction to address the Agency's conduct was to order the Agency to post a notice at its Office of Civil Rights regarding its failure to comply with the Commission's regulatory timeframes and to provide training to its EEO personnel who failed to comply with our regulatory timeframes.

Lougee (Nida R.) v. USPS, 0120172580 (11/08/2018) **[Repeated under Priority 5 and Findings below]** – Complainant, a City Letter Carrier at the Agency's Bellevue Station in Richmond Virginia, filed an EEO complaint alleging that the Agency discriminated against her on the bases of sex (female), disability, and in reprisal for prior protected EEO activity when (1) her request for her reasonable accommodation was denied; and (2) her request for light duty was denied and she was not allowed to work. The AJ assigned to the case held a hearing and found that Complainant had proven disability-based

discrimination as alleged in claim (1) of the complaint, but failed to prove claim (2). When the Agency failed to issue a final order within 40 days of receipt of the AJ's decision, the AJ's decision became the Agency's final action pursuant to 29 C.F.R. § 1614.109(i).

Complainant appealed, stating that she was "filing an appeal not against the Judge's decision but to enforce the Judge's decision." The Commission held that, in light of Complainant's statement and the Agency's failure to issue a final order, "[t]here is no occasion to further review the merits of the claim. We need only affirm the AJ's decision as incorporated in the Agency's final action and order the Agency to comply with it."

The Commission ordered the Agency to: pay $42,750 in compensatory damages; restore sick and annual leave to Complainant; complete the interactive process to determine a reasonable accommodation for Complainant; conduct EEO training; take appropriate preventative steps to ensure that no employee is subjected to any form of discrimination or denied a reasonable accommodation when appropriate; consider discipline for the responsible officials; and post a notice.

6. PREVENTING HARASSMENT THROUGH SYSTEMIC ENFORCEMENT AND TARGETED OUTREACH

Decision Summaries for this Category

No cases reported under this priority during this reporting period.

7. BROAD IMPACT DECISIONS

McConnell (Velva B.), et al. v. USPS, 0120182505 (11/07/ 2018) **[Repeated under Priority 3 above and Enforcement-General below]** – On August 7, 2007, Complainant initiated a class complainant alleging that the Agency discriminated against employees based on their disabilities when it conducted its National Reassessment Program. On June 4, 2015, an EEOC AJ found that the Agency discriminated against rehabilitation and limited-duty employees based on disability when they were subjected to: (1) withdrawals of their reasonable accommodations; (2) hostile work environments; and (3) disclosures of confidential medical information.

The Agency rejected the AJ's finding, and appealed the decision. The Commission reversed the Agency. The Agency requested reconsideration, which was denied. The Commission ordered the Agency to notify class members, and to issue decisions on individual claims of relief within 90 calendar days of receipt.

On June 26, 2018, the Class Agent submitted an Emergency Petition for Enforcement of Final Order, arguing that the Agency issued premature final decisions on individual claims before class members had their disputed claims reviewed by an AJ. On July 12, 2018, the Class Agent filed an appeal on all Agency final decisions issued on Class Members' claims for individual relief, alleging that the final decisions were issued in error. Due to the size of the class, the Class Agent requested the appointment of a Special Master(s) to assist the AJ. The Agency argued that it fully complied with the Commission's earlier order to issue final decisions within 90 days, and had issued 28,931 final decisions.

The Commission found that the Agency's final decisions on disputed claims for individual relief were premature because an AJ retains jurisdiction, and is responsible for resolving disputed claims for individual relief. We ordered the Agency do vacate all final decisions issued on disputed claims for individual relief where an AJ had not issued a decision resolving the dispute; and remanded the disputed claims for further processing. The Agency was ordered to notify the EEOC AJ of its intent to dispute a claim for individual relief. The Commission also denied the request for the appointment of a Special Master.

8. ENFORCEMENT – GENERAL

Williams (Garret W.) v. USPS, 0120173051 (10/30/2018) – Complainant worked as a Building Equipment Mechanic at the Agency's Little Rock Processing and Distribution Center. He alleged discrimination based on race (African-American), color (black), and age (54) when he was not selected for a supervisor position. We found the Agency failed to provide a specific, clear, and individualized explanation as to why Complainant was not selected for the position for which he was deemed qualified. As a result, we concluded the Agency did not meet its burden of production, and Complainant's initial inference of race/color discrimination remained unrebutted. In reaching this conclusion, we found that while the selecting official asserted that the two selectees scored higher than Complainant on the matrix he applied, only conclusory statements without sufficient detail concerning the reasons for the scoring were proffered, including no explanation for why Complainant was scored much higher than one of the selectees and tied with the other by an earlier rating panel. In addition, there was no explanation for why Complainant was not the superior candidate based on serving in an acting supervisory capacity far longer than either of the two selectees, with no concerns about his performance in this role provided by any witness. The Agency was ordered to retroactively promote Complainant to the supervisory position with a back pay award, to adjudicate his claim for compensatory damages, to provide training to and consider disciplining the selecting official, provide attorney's fees and costs, and post a notice of the finding.

Archer (Elbert H.) v. DOJ (BOP), 0120170676 (10/31/2018) – Complainant, a Correctional Officer, alleged that the Agency discriminated against him on the basis of disability and in reprisal for protected EEO activity when it sent him correspondence regarding a fitness-for-duty evaluation. He filed a prior EEO complaint regarding a request for reasonable accommodation and requested a hearing before an EEOC AJ. In response to the Agency's motion for summary judgment, Complainant stated that his condition was not transitory, that he had performed his duties with pain for more than 11 years, and that he used his non-dominant arm to complete his duties. Approximately two weeks later, the attorney representing the Agency in the hearing process asked the Human Resources Manager to send a reasonable-accommodation letter to Complainant and another letter to Complainant's physician. He told the HR Manager to order a fitness-for-duty examination if the physician did not respond. The HR Manager sent Complainant an email stating that the Agency needed to determine Complainant's fitness for duty and asked for the name and address of his treating physician. In other correspondence, the HR Manager informed Complainant that it appeared that he could not perform the essential functions of his position, suggested that he complete a reasonable-accommodation request form, and stated that the Agency would look for vacant positions for him. She

subsequently asked him to sign a medical release. Complainant responded that he had been working on full duty for almost three years, was performing his essential functions safely, and did not need a reasonable accommodation. The HR Manager forwarded Complainant's response to the Agency attorney, who asked the HR Manager to order a fitness-for-duty examination. The HR Manager asked the National Employee Health Coordinator to schedule the examination, but the Coordinator determined that the examination was not necessary. One month after the Coordinator's determination, Complainant's supervisor notified him that the Agency would not send him for a fitness-for-duty examination.

In our decision, we found that the Agency discriminated against Complainant in reprisal for prior protected EEO activity when it sent him correspondence requesting the name of his treating physician, asked him to sign a medical release, and proposed conducting a fitness-for-duty examination. Complainant engaged in protected activity when he filed his prior EEO complaint and submitted his pleading to the AJ, and the Agency subjected Complainant to a materially adverse action when it sent him the correspondence. We found that there was direct evidence that the Agency took the materially adverse action because of Complainant's protected EEO activity. In that regard, we noted that the Agency's actions arose directly from Complainant's participation in the EEO process; the attorney representing the Agency in Complainant's prior EEO complaint instigated the actions based on statements that Complainant made in the prior EEO proceeding. We ordered the Agency to determine whether Complainant was entitled to compensatory damages, to provide training to the attorney and HR Manager, to consider discipline, and to post a notice.

Wilkerson (Ethan M.) v. USDA, 0120170519 (10/12/2018) – Complainant worked as the Civil Rights Director, GS-15 at the Agency's RD, USDA facility in Washington, D.C. On May 10, 2013, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of race (African-American), sex (male), color (Black), and reprisal for prior protected EEO activity under Title VII of the Civil Rights Act of 1964, with regard to nine workplace incidents. The Agency's FAD, found that Complainant proved that he was subjected to reprisal when his first-line supervisor denied him a Performance award for his "Superior" Performance rating in or around February 2013.

Complainant was awarded make whole relief, and compensatory damages. On appeal, Complainant maintained, that the Agency had not made him whole. He maintained that the Agency had purposefully delayed processing his case, lowered the award that he deserved, failed to issue an award for his worsening medical conditions, omitted affidavits in support of his request for compensatory damages, and misrepresented testimonies in order to justify the analysis in the FAD on damages. Complainant requested that the Commission vacate the FAD and remand the matter to the Agency with an Order to award proper compensation as correctly quantified by the EEOC. Complainant also indicated that management was still harassing and retaliating against him, based on the instant complaint, by choosing to single him out and substantially delaying the EEO processing of his case, while continuing to adjudicate other FADs. Finally, he argued that he was owed interest on the performance award because the Agency had colluded to extend the amount of time to process his case.

Based on a thorough review of the record and the contentions on appeal, the Commission affirmed, the Agency's finding of discrimination with regard to the denial of a performance award, and found Complainant was entitled to a performance award that was the same amount awarded to similarly

situated managers. We also affirmed the Agency's finding of no discrimination regarding claims 1 – 8. The Commission, however, modified the Agency's FAD regarding nonpecuniary compensatory damages after finding that Complainant had demonstrated that he suffered damages in the amount of $15,000 as a result of the Agency's discrimination. The Agency was also ordered to provide training to the managers involved, and was to consider taking appropriate disciplinary action against Complainant's supervisors.

Moore Gomori (Liz M.) v. USPS, 0720180020 (10/18/2018) – Complainant, an EAS-16 Postmaster, at the Post Office in Diamond, Ohio, was stalked by a postal customer between September 2008 and August 2009. Management's attempts to stop the customer failed and Complainant was diagnosed with anxiety and Post-Traumatic Stress Disorder because of the threatening conditions. Complainant's symptoms were so severe that they kept her out of work between August 2009 and July 2010. Complainant used sick and annual leave to cover the absences. During that time, Complainant made multiple requests to transfer to another post office. Complainant's supervisor (S1) failed to respond to requests until June 2010, and Complainant was transferred to the New Middletown, Ohio Post Office effective July 31, 2010. Complainant filed an EEO complaint alleging that the Agency subjected her to discrimination on the bases of race (Caucasian), sex (female), age, disability, and in reprisal for prior protected EEO activity when she was forced to use sick leave waiting for her supervisor to offer her reassignment.

Following a hearing, an EEOC AJ found that Complainant had not been subjected to race, sex, and age discrimination or reprisal. The AJ did find, however, that S1 had failed to reasonably accommodate Complainant's PTSD by not reassigning Complainant until July 31, 2010. As relief, the AJ ordered the restoration of all annual and sick leave that Complainant had used while she remained out of work and awarded Complainant $80,000.00 in non-pecuniary compensatory damages. In its final order, the Agency implemented the portion of the AJ's decision finding no discrimination, but rejected the AJ's award of compensatory damages for its failure to reasonably accommodate Complainant.

In the appellate decision, the Commission affirmed the Agency's final order finding that Complainant had not been subjected to race, sex, and age discrimination or reprisal. Additionally, the Commission affirmed the AJ's finding that in not reassigning Complainant from the Diamond Ohio Post Office for nearly a year after she made her initial request, S1 had failed to reasonably accommodate her PTSD in violation of the Rehabilitation Act. To remedy the discrimination, the Commission found that, based on the submitted medical evidence and testimony from family members, Complainant was entitled to $100,000.00 in non-pecuniary compensatory damages and $77.76 in pecuniary compensatory damages. The Commission further ordered the Agency to restore all annual and sick leave Complainant took as a result of S1's delay in reassigning her; to provide training to S1 regarding reasonable accommodation under the Rehabilitation Act; to consider disciplining S1; and to post a notice.

Ingram (Sallie M.) v. USPS, 0120172430 (10/16/2018) – Complainant alleged that she was subjected to sexual harassment when her supervisor made vulgar and graphic sexual comments to her on a daily basis. She indicated that she complained to management about the supervisor, but nothing was done. On August 5, 2016, the supervisor came up to Complainant while she was on her route and grabbed

her bare foot and shoved it in his mouth. Following the incident, the supervisor called her several times threatening her not to tell management about the event. She told another supervisor who did nothing, but warned her that the supervisor was dangerous. A Union Steward finally took the issue to upper management.

When management placed the supervisor on administrative leave pending an investigation, Complainant indicated that she did not feel safe at the facility and asked for a reassignment. She said she would take any assignment except to the Carson Post Office located near the supervisor's home. Despite this request, she was reassigned to the Carson Post Office. On November 1, 2016, the supervisor was issued a Notice of Proposed Removal. Pursuant to a settlement agreement, the removal action was rescinded and the supervisor retired from the Agency.

Complainant filed her EEO complaint alleging that she was subjected to sexual harassment by the supervisor and when she complained, she was reassigned to the post office located near the supervisor's home in retaliation. In its final decision, the Agency held that Complainant had been subjected to sexual harassment by the Supervisor. However, the Agency determined it was not liable for his actions because management had taken prompt and effective action by placing the supervisor on administrative leave, conducting an investigation, and issuing the removal action. In addition, the Agency found Complainant failed to show that she had been subjected to unlawful retaliation because that it provided Complainant with the reassignment she had requested.

The appellate decision in 0120172430 found that the issue on main appeal was whether the Agency had established its affirmative defense in order to avoid liability for the sexual harassment. The decision determined that management was liable because it initially failed to assist Complainant and then delayed taking disciplinary action against the supervisor even after it had conducted an investigation which established the sexual harassment had occurred. In addition, the decision determined that unlawful retaliatory animus played a role in the decision to reassign Complainant to the Carson Post Office. The decision remanded the matter to the Agency for a determination on Complainant's entitlement to compensatory damages, for training for management, and consideration of disciplinary action against the management officials who subjected Complainant to retaliation.

Harrison (Isidro A.) v. USPS, 0120182263(10/16/2018) – Complainant filed an EEO complaint alleging that the Agency subjected him to harassment on the basis of race (African-American) when: (1) on July 15, 2017, the Manager (White) used offensive words – "nigger" and "you people" – during a service talk. Subsequently, Complainant amended his complaint to include a claim of unlawful retaliation in violation of Title VII when: (2) on or about November 10, 2017, he was reassigned from the Elmwood station to another station. The Agency issued a final decision finding that it had avoided liability regarding the harassment claim and that Complainant failed to establish that he had been subjected to unlawful retaliation.

The decision in 0120182263 affirmed the Agency's finding of no retaliation with respect to claim (2). As for the harassment claim, the decision noted that the Agency conceded Complainant was subjected to harassment when the Manager used racially offensive language during a service talk. Unlike the Agency, however, the appellate decision concluded the Agency was liable for the Manager's actions because it failed to take prompt and effective action once it learned of the harassment. The decision

remanded the matter to the Agency for a determination of Complainant's entitlement to compensatory damages, for training for management, and to consider disciplinary action against the responsible management officials.

Watson (Lelah T.) v. USPS, 0120172533 (10/24/2018) – Complainant filed an EEO complaint alleging that the Agency subjected her to harassment on the bases of sex (female) and reprisal for complaining about sexual harassment when: (1) since May 2013 and ongoing, Complainant was subjected to sexual harassment by her manager (2) on June 23, 2014, Complainant was informed that her detail as acting manager was cancelled. The Agency issued a final decision finding that Complainant failed to establish that she had been subjected harassment and/or to unlawful retaliation.

The decision in 0120172533 found that Complainant established that she had been subjected to harassment finding from May 2013 through June 2014, the Manager made repeated sexual advances towards her, that included frequent remarks of a sexual nature or containing sexual innuendo, as well as contacting her outside of work and asking her on a date or to come to his house. She had complained of this conduct to coworkers and management officials. Moreover, even after the Plant Manager spoke to the offending manager in January 2014, the harassment continued. Based on the record as a whole, the decision determined that Complainant established that she had been subjected to sexual harassment by the manager. The decision also concluded that Complainant established that she had been subjected to unlawful retaliation when the manager removed Complainant from her detail to a managerial position. Finally, the decision determined that the Agency is liable for the unlawful acts of the manager.

The decision remanded the matter to the Agency to provide Complainant with a return to the managerial detail she lost, to determine Complainant's entitlement to compensatory damages, to train management, and to consider disciplinary action against the management officials who subjected Complainant to harassment and retaliation and who failed to effectively address her claims of harassment.

Jones (Chere S.) v. GSA, 0720180012 (11/30/2018) – Complainant was terminated from her position as a Procurement Analyst in January 2012. She filed a grievance on her removal which eventually made its way to an Arbitrator, who ordered that she be reinstated. She contacted an EEO counselor and thereafter filed an EEO complaint on the dismissal because the Arbitrator's opinion and award did not address her entitlement to compensatory damages. The Agency dismissed the complaint for mootness, but on appeal, we vacated the dismissal and remanded the complaint for processing finding that the possibility of Complainant's entitlement to compensatory damages precluded a finding of mootness. In accordance with our order, the Agency investigated the complaint and thereafter referred the complaint to an EEOC AJ.

Following Complainant's return to work, she filed a second complaint of discrimination in connection with a number of incidents that occurred both before and after her termination. Following an investigation, the complaint was referred to the same AJ who accepted the first complaint. During discovery, the Agency filed a motion to have the venue of a deposition moved from Queens to

Manhattan and a few weeks later filed a motion to have the first complaint dismissed for untimely EEO Counselor contact. The AJ denied the motions and warned the Agency that any further attempts to procedurally dismiss the complaints would be considered frivolous and could result in sanctions against the Agency.

Several months later, the Agency again filed a motion to dismiss the first complaint arguing that the first complaint was barred by res judicata. Complainant opposed the motion and moved that the Agency be sanctioned. The AJ granted Complainant's motion, entered default judgment on both complaints, and ordered the Agency to award Complainant compensatory damages and attorney's fees. The Agency issued a final order declining to implement the AJ's decision and appealed contending that the AJ abused her discretion in entering default judgment and that she erred in awarding damages and attorney's fees.

On appeal, the Commission found that the AJ did not abuse her discretion. We determined that the Agency was on notice from prior pleadings that it could be sanctioned and what the sanction could be. The Commission also noted that the Agency had four months to explain why it should not be sanctioned, but did not do so. The Commission also found that it was not necessary for Complainant to establish a prima facie case of discrimination in order to obtain relief on a default judgement because the Agency's attack on the integrity of the process was sufficient to justify the imposition of sanctions, and because the effect of a default judgment was a finding of liability on all elements of the claim. Next, we found that the AJ's award of $180,000 was appropriate and consistent with damages awarded in similar cases based on Complainant's demonstration that she suffered severe mental and emotional distress for six years after her termination, and that her reinstatement did not alleviate her condition. Finally, we ordered the Agency to pay attorney's fees using the appropriate rates charged by attorneys in the Manhattan legal community.

Buckingham (Chi E.), Williams (Polly P.), Harris (Preston B.) v. USPS, 0120170068, 0120170290, 0120171304 (11/29/2018) – Complainants worked as letter carriers at the Agency's Post Office in Florissant, Missouri. In July 2012, Complainants became aware that one of their co-workers (CW1) had posted, in her workspace, offensive materials invoking the history of slavery and other racially inflammatory issues. CW1 was temporarily suspended from the workplace, but after successfully challenging the suspension, was allowed to return. Complainants each filed separate EEO complaints contending that they were discriminated against on the basis of race (African-American), when the Agency returned CW1 to the workplace. In its final decisions in each of those cases, the Agency found that Complainants failed to prove that the Agency subjected them to discrimination as alleged.

Complainants separately appealed, and in three separate appellate decisions, the Commission found that, in light of the racially offensive nature of the material CW1 had displayed in the workplace, the Agency's act of returning CW1 to the workplace was itself racially hostile and abusive. The Commission found the Agency vicariously liable for the discrimination, because, by failing to reassign CW1 to a different facility, the Agency did not exercise reasonable care to prevent future harassment and failed to establish an affirmative defense.

With respect to each Complainant, the Commission ordered the Agency to: award compensatory damages; conduct EEO training; consider discipline for the responsible officials; and post a notice.

McLemore (Dalton E.) v. HUD, 0720170038 (11/30/2018) – The Agency filed an appeal from an EEOC AJ's finding of discrimination. Complainant, an EEO Complaints Division Director, GS-15, filed an EEO complaint alleging that the Agency discriminated against him on the bases of his race (African-American), sex (male), and in reprisal for prior protected EEO activity regarding work assignments, exclusion from meetings, allowing a lower graded person to manage his performance, and nonselection. Complainant requested a hearing before an AJ. When the Agency failed to produce the report of investigation (ROI) or otherwise respond to the order, the AJ issued default judgment against the Agency, dated June 1, 2016. The AJ ordered the Agency to: (1) pay Complainant $60,000.00 in nonpecuniary, compensatory damages; (2) pay $16,800.00 in attorney's fees; (3) provide at least four hours of training to all supervisors and managers of the Agency's Office of Departmental Equal Employment Opportunity; and (4) post a Notice regarding the AJ's decision.

The Agency issued a final order rejecting the finding of discrimination and also filed an appeal with the Commission. In affirming the AJ's decision, OFO found that the AJ properly imposed sanctions and that default judgment was an appropriate sanction. OFO noted that the Agency failed to provide any response to the AJ's order or to otherwise respond to telephone inquiries by the AJ. OFO found that the remedies awarded by the AJ were appropriate. OFO added the additional remedy of consideration of discipline for the responsible EEO officials.

Keenan-Harte (Harold M.) v. USDA, 0120171791 (11/07/2018) – Complainant, an Information Technology Specialist, GS-2210-13 at the Agency's Office of the Chief Information Officer (OCIO) facility in Fort Collins, Colorado, filed an EEO complaint alleging that the Agency discriminated against him on the basis of sex (male) when management disapproved his request to extend his work-related travel by one day, but granted the same request to a similarly situated female colleague. Complainant did not request a hearing. The Agency issued a decision finding no discrimination and Complainant filed an appeal from that decision. OFO reversed the Agency's decision. OFO found that the Agency's reason for denying the extension of travel was too vague to constitute a legitimate, nondiscriminatory reason. Although the Agency relied on a changed training schedule for its denial of Complainant's request, OFO found that there was no specific indication how the training schedule was changed or the relevance of any purported change. OFO found that a female employee was allowed to delay departure, while Complainant, a male employee, was not allowed to delay departure. OFO found that the Agency did not provide a persuasive reason for treating them differently. OFO ordered the Agency to: determine if Complainant is due compensatory damages, pay attorney's fees, provide EEO training and consider discipline for responsible management officials, and post a notice of the finding of discrimination.

Lougee (Nida R.) v. USPS, 0120172580 (11/08/2018) [Repeated under Priorities 3 and 5 above] – Complainant, a City Letter Carrier at the Agency's Bellevue Station in Richmond Virginia, filed an EEO complaint alleging that the Agency discriminated against her on the bases of sex (female), disability, and in reprisal for prior protected EEO activity when (1) her request for her reasonable accommodation was denied; and (2) her request for light duty was denied and she was not allowed to work. The AJ

assigned to the case held a hearing and found that Complainant had proven disability-based discrimination as alleged in claim (1) of the complaint, but failed to prove claim (2). When the Agency failed to issue a final order within 40 days of receipt of the AJ's decision, the AJ's decision became the Agency's final action pursuant to 29 C.F.R. § 1614.109(i).

Complainant appealed, stating that she was "filing an appeal not against the Judge's decision but to enforce the Judge's decision." The Commission held that, in light of Complainant's statement and the Agency's failure to issue a final order, "[t]here is no occasion to further review the merits of the claim. We need only affirm the AJ's decision as incorporated in the Agency's final action and order the Agency to comply with it."

The Commission ordered the Agency to: pay $42,750 in compensatory damages; restore sick and annual leave to Complainant; complete the interactive process to determine a reasonable accommodation for Complainant; conduct EEO training; take appropriate preventative steps to ensure that no employee is subjected to any form of discrimination or denied a reasonable accommodation when appropriate; consider discipline for the responsible officials; and post a notice.

McConnell (Velva B.), et al. v. USPS, 0120182505 (11/07/ 2018) **[Repeated under Priority 3 and Broad Impact Decisions above]** – On August 7, 2007, Complainant initiated a class complainant alleging that the Agency discriminated against employees based on their disabilities when it conducted its National Reassessment Program. On June 4, 2015, an EEOC AJ found that the Agency discriminated against rehabilitation and limited-duty employees based on disability when they were subjected to: (1) withdrawals of their reasonable accommodations; (2) hostile work environments; and (3) disclosures of confidential medical information.

The Agency rejected the AJ's finding, and appealed the decision. The Commission reversed the Agency. The Agency requested reconsideration, which was denied. The Commission ordered the Agency to notify class members, and to issue decisions on individual claims of relief within 90 calendar days of receipt.

On June 26, 2018, the Class Agent submitted an Emergency Petition for Enforcement of Final Order, arguing that the Agency issued premature final decisions on individual claims before class members had their disputed claims reviewed by an AJ. On July 12, 2018, the Class Agent filed an appeal on all Agency final decisions issued on Class Members' claims for individual relief, alleging that the final decisions were issued in error. Due to the size of the class, the Class Agent requested the appointment of a Special Master(s) to assist the AJ. The Agency argued that it fully complied with the Commission's earlier order to issue final decisions within 90 days, and had issued 28,931 final decisions.

The Commission found that the Agency's final decisions on disputed claims for individual relief were premature because an AJ retains jurisdiction, and is responsible for resolving disputed claims for individual relief. We ordered the Agency do vacate all final decisions issued on disputed claims for individual relief where an AJ had not issued a decision resolving the dispute; and remanded the disputed claims for further processing. The Agency was ordered to notify the EEOC AJ of its intent to dispute a claim for individual relief. The Commission also denied the request for the appointment of a Special Master.

Martin (Becki P.) v. DOT (FAA), 0720180004 (11/15/2018) – Complainant, a Real Estate Contracting Officer at the Agency's Renton, Washington facility, filed a formal EEO complaint alleging the Agency discriminated against her based on sex (female), disability, age, and in reprisal for prior protected activity when it subjected her to a hostile work environment encompassing numerous incidents. Following an investigation, Complainant requested a hearing before an EEOC AJ.

The AJ issued a decision without a hearing finding discrimination with respect to one claim. The AJ found that the Agency improperly disclosed Complainant's medical information in violation of the Rehabilitation Act when a supervisor told one of Complainant's co-workers that she was "on medication". The AJ ordered the Agency to take various actions including paying Complainant $1,000 in non-pecuniary compensatory damages. The AJ found no discrimination on the remainder of the complaint.

The Agency filed an appeal contesting the AJ's finding of discrimination. The Agency argued that the supervisor did not disclose a specific diagnosis.

Complainant filed a cross appeal.

We affirmed the AJ's finding that the Agency violated the Rehabilitation Act. We acknowledged that the supervisor did not disclose a specific diagnosis pertaining to Complainant. However, we concurred with the AJ that the specific circumstances of this case, along with the supervisor's statement (to a co-worker who did not have a need to know) that Complainant is "on medication", implied that Complainant had a psychiatric or mental health condition. The supervisor stated he made the statement in question to explain Complainant's behavior to a co-worker because Complainant was acting "out of control and hysterical." The record reflected that prior to this disclosure, Complainant had informed the supervisor that her doctor had given her medication and she provided a doctor's note to the supervisor that she was being treated for "reactive depression/and family grievance/stress."

We modified the AJ's award of non-pecuniary compensatory damages from $1000 to $2000 finding that this award was more consistent with the awards given in similar cases. We also ordered the Agency to pay any applicable attorney's fees and costs and provide the supervisor in question with training.

Finally, we affirmed the AJ's finding of no discrimination on the remainder of Complainant's complaint.

Madriz (Pamela L.) v. USPS, 0120171070 (11/09/2018) – Complainant, a Rural Carrier, alleged that the Agency discriminated against her on the basis of disability and in reprisal for prior protected EEO activity when it reduced her work hours and forced her to relinquish her assigned rural route. OFO found that Complainant established a prima facie case of reprisal, that the Agency articulated legitimate, non-discriminatory reasons for its actions, and that the articulated reasons were a pretext for reprisal. The Postmaster stated that he reduced Complainant's hours and required her to relinquish her route because her medical restrictions limited her to six hours of work and only three hours on the street. According to the Postmaster, the Agency was concerned that Complainant was working outside of her restrictions, and casing mail was the only available work. OFO noted that Complainant had

been working on modified duty for several years, that her unrefuted testimony established that she spent 2-3 hours casing her route and 2-3 hours carrying it, and that it was not until Complainant engaged in protected EEO activity that the Agency changed this arrangement. Less than one month after Complainant and the Agency settled her prior complaint, the Postmaster offered Complainant a limited-duty assignment that involved six hours of delivery. The record did not explain why the Postmaster made that particular offer at that particular time.

After Complainant rejected the offer and submitted a report stating that she should not be "delivering more than 3 hours on the street," the Postmaster offered her an assignment that involved 2.50 hours of casing mail. He asserted that gave her as much work as was available, but he did not explain why the Agency did not permit her to continue to deliver her route for three hours per day. There was no evidence that the 2-3 hours that Complainant had spent carrying her route exceeded her work limitations. OFO also found that to the extent that the Agency, in its final decision, relied on a Memorandum of Understanding from the collective bargaining agreement, its reliance was misplaced. The Postmaster did not state that he took the actions at issue because of the Memorandum, and nothing in the Memorandum explained why the Agency allowed Complainant to retain her route for several years while on modified duty but required her to relinquish the route after she participated in protected EEO activity. The Agency, among other things, was ordered to return Complainant to her former route and to provide her with back pay and other benefits for lost earnings.

Barta (Theo B. and Cathie K.) v. OPM, 0520080057 & 0520080067 (12/21/2018) and **Lawrence (Willia M. and Alonzo N.) v. OPM**, 0120132419 & 0120132420 (12/21/2018) **[Repeated under Priority 3 above, and Circulated Decisions below]** – In two companion decisions the Commission determined that OPM violated the Rehabilitation Act when it contracted with two insurance carriers for health insurance plans that categorically excluded in vitro fertilization (IVF) from coverage from about 1997 to 2000. The Commission found that the health insurance provisions were disability-based distinctions, and that OPM failed to provide adequate justifications for these disability-based distinctions. But the Commission cautioned that it was taking no position on the question of whether a similar blanket exclusion of IVF, as that practice may exist currently, would violate the Rehabilitation Act.

First, the Commission found that complainants' infertility constituted a disability. This was an important finding because it marked the first time that the Commission had determined that infertility met the definition of "disability" under the Rehabilitation Act.

Second, the Commission determined that excluding IVF from health insurance constituted a "disability-based distinction" because the evidence showed that IVF was nearly exclusively utilized for the treatment of medically diagnosed infertility from 1997 to 2000.

OPM attempted to argue that excluding IVF was not disability-based because IVF was treated in a manner consistent with other treatments that were not "medically necessary," i.e., treatments that did not cure the condition at issue. But the Commission rejected this argument, pointing out that the health insurance plans paid for various treatments and services that did not correct or cure the underlying impairment, including insulin for diabetes, durable medical equipment like wheel chairs and prosthetic legs for missing limbs, artificial insemination for infertility, and prescription drugs for erectile dysfunction.

Third, the Commission determined that the health insurance provisions at issue did not fall within the "safe harbor" provision of the Americans with Disabilities Act, as applied to the Rehabilitation Act. OPM attempted to justify excluding IVF from coverage by providing actuarial studies done during the course of litigation to try to predict what would have happened to the insurance plans had they covered IVF from 1997 to 2000. But the Commission found these studies to be inadequate because they came into being after the exclusion of IVF had gone into effect—OPM and the insurance carriers could not have relied on these actuarial data and calculations when deciding to exclude IVF from 1997 to 2000. Therefore, the Commission concluded that OPM failed to provide sufficient evidence to show that the disability-based distinctions were attributable to any application of legitimate insurance risk classification, underwriting procedures, or verifiable actuarial data.

Rogers (Candice B.) v. USPS, 0120171229 (12/11/2018) – Complainant injured her right knee while delivering mail. Complainant received a 14-Day Suspension for Failure to Perform Duties in a Safe Manner because Complainant's supervisor (S1) determined that Complainant's assertion that the accident that injured her knee was unavoidable was not credible. Complainant's right knee began hurting again, and on October 6, 2014, she told her second-level supervisor (S2) that her knee was hurting again and provided S2 with medical documentation, which indicated that Complainant could only work inside. According to Complainant, on October 7, 2014, S2 sent her home from work after a while because her medical restrictions were not documented on the proper Light Duty Request Form. Between October 7, 2014, and November 7, 2014, Complainant either took eight hours of sick leave per day or worked part of the day and requested sick leave when there was no additional work available within her restrictions. On October 15, 2014, Complainant returned the completed Light Duty Request Form, which noted her medical restrictions, including no driving. S2 told Complainant that she could not park her car in the Agency parking lot because Complainant's medical restrictions indicated that she could not drive, and she was worried that the Agency could be liable if Complainant injured herself or others while driving on Agency property. Complainant's doctor subsequently clarified that she could drive to and from work but not during the workday.

Complainant filed two EEO complaints, alleging discrimination based on race, sex, and reprisal. The AJ found that Complainant failed to establish discrimination based on race or sex with respect to her suspension but found that Complainant was subjected to discrimination based on disability when she was suspended. The AJ also found that Complainant failed to establish that she was discriminated against when she was sent home for allegedly not having her medical restrictions on the right form or when she was instructed not to park her car in the Agency parking lot. Finally, the AJ found that the Agency denied Complainant a reasonable accommodation from October 6, 2014, to November 7, 2014. The AJ ordered the Agency to expunge the suspension, to restore 66.43 hours of sick leave she used between October 6, 2014, and November 7, 2014, to provide training to S1 and S2, and to consider discipline against S1 and S2. For compensatory damages, the AJ awarded Complainant $733.30 in out-of-pocket medical costs, but the AJ denied Complainant's request for nonpecuniary compensatory damages, noting that "[t]he remainder of Complainant's claimed damages [is] viewed as a request for punitive damages, which are unavailable in federal sector relief." According to the record, the AJ did not conduct a hearing on damages or request that Complainant submit evidence concerning her entitlement to compensatory damages, relying on Complainant's pre-hearing submissions in determining the appropriate amount of damages.

On appeal, OFO disagreed with the AJ's assessment that Complainant was not entitled to nonpecuniary compensatory damages. Although the AJ was correct that Complainant's non-attorney representative used language in a pre-hearing submission that expressed a desire to punish the Agency for discriminating against Complainant, we found that Complainant stated a claim for nonpecuniary compensatory damages by describing her mental anguish and remanded this issue to the Hearings Unit for a determination on Complainant's entitlement to nonpecuniary compensatory damages. On appeal, the Commission also found that the AJ incorrectly calculated the amount of sick leave that should be restored and ordered the Agency to restore 129.84 hours of sick leave to Complainant. Finally, the Office of Federal Operations also slightly modified the AJ's order by ordering the Agency to post a notice.

Gould (Ira P.) v. DOT, 0720180007 (12/11/2018) – Complainant, an Air Traffic Control Specialist in Columbus, Georgia, supported two coworkers in their EEO complaints against his first-line supervisor (S1) and also reported S1's discrimination to upper management. Complainant applied for an Employee Requested Reassignment to Asheville, North Carolina, and his application was submitted to the selecting official (SO) when a vacancy opened. The Assistant District Manager (S3) subsequently came to Columbus to discuss Complainant's allegations about S1's discriminatory conduct with Complainant. After meeting with Complainant, S3 debriefed S1 about Complainant's concerns. Less than 24 hours after S3's meeting with Complainant, S1 gave a reference to SO for Complainant. SO selected two candidates other than Complainant. Complainant called the SO to ask why he had not been selected, and Complainant averred that SO told him that he was not selected because he had received an unfavorable reference from S1. SO testified that he did not select Complainant because of the reference from S1 and because Complainant had failed to certify in radar while training in Greer, South Carolina.

Complainant filed an EEO complaint alleging discrimination based on reprisal when he was not selected for the vacancy in Asheville, and an AJ (AJ1) held a hearing on the merits and a hearing on damages. At the conclusion of the hearing on the merits, AJ1 stated on the record that she was "going to find in favor of Complainant in this case." At the beginning of the damages hearing, AJ1 stated on the record that "what I had found in the hearing was in regards to the negative job reference that was given to [Complainant]'s job application, but that was what I had found to be retaliatory, and so the damages portion of the hearing will be related to that claim and that claim only." AJ1 retired from the Commission prior to issuing a decision on liability or relief. The case was assigned to a second AJ (AJ2), who simultaneously issued a decision on liability and a decision on relief on September 28, 2017. AJ2 found that Complainant established that he was subjected to discrimination based on reprisal when he was not selected for the Asheville vacancy. As relief, AJ2 ordered the Agency to pay Complainant $65,000 in nonpecuniary compensatory damages and to post a notice.

On appeal, the Agency contended that AJ1 verbally ruled that the Agency was liable for the negative job reference but not the nonselection and that AJ2 improperly disregarded this ruling. The Commission found that AJ2 was not bound by AJ1's statement on the record, which was not a bench decision or other decision, and that AJ2 was responsible for fully reviewing the record, adjudicating the merits of Complainant's complaint, and ordering relevant relief. We found that AJ2's conclusion that Complainant was subjected to discrimination based on reprisal when he was not selected for the

Asheville vacancy was supported by substantial evidence in the record. We also found that AJ2's award of compensatory damages was supported by substantial evidence and was consistent with Commission precedent.

Cockrell (Isadora G.) v. USDA, 0720170029 (12/14/2018) – In the underlying case, an EEOC AJ found that the Agency subjected Complainant (age 50), to age-based discrimination when she was not selected for a GS-9 Loan Specialist (Realty) Guaranteed Housing Specialist position. The Agency appealed the AJ's decision, and argued that the AJ used the wrong standard of review in analyzing the case. The Agency maintained that the AJ should have applied McDonnell Douglas instead of Fuller v. Gates, 2010 WL 774965 E.D. Tx. March 1, 2010), mixed-motive analysis. The Agency also maintained that the AJ incorrectly found that a September 17, 2015 email was direct evidence of discrimination.

Additionally, the Agency asserted that it articulated a legitimate, nondiscriminatory reason for its selection and Complainant did not demonstrate that the reason was pretext for discrimination. Finally, the Agency argued that the AJ erroneously found that one of the panel member's testimony was inconsistent, and erroneously found that the selecting official exhibited age bias.

The Commission found, however, that the Agency had misstated the AJ's findings and conclusions. Our review of the AJ's decision found that he applied the McDonnel Douglas analysis, as was illustrated in several areas of the AJ's analysis. Specifically, the AJ noted that "[t]he McDonnell Douglas framework, although developed in the context of a Title VII case, is equally applicable to cases alleging harm by a federal government employer under the Age Discrimination in Employment Act…"

We also found that the Agency mistakenly concluded that the AJ determined that the September 27th email was direct evidence of age discrimination. On the contrary, the AJ merely found that the panel member's email was reflective of her thoughts about older workers and their potential value in the future of the Agency, and that she labored under an unfounded bias that only thirty something year old employees understood technology and how to possibly leverage such technology in delivering the organization's services in the future. We found that a fair reading of the AJ's decision indicated that the Agency's explanation for its selection decision was a pretext for age discrimination.

With respect to the AJ's discussion of the Fuller mixed-motive analysis, we found that the AJ appeared to be indicating that the Agency could not escape liability simply by arguing that it had a legitimate, non-discriminatory reason for selecting the selectee and that even absent a discriminatory motive the same decision would have been made because all personnel actions in federal employment "shall be made free from any discrimination based on age." We did not read the AJ's decision as indicating that the instant case was a mixed-motive case, however.

Finally, we found that while the Agency clearly disagreed with the AJ's decision, there was no persuasive evidence that the AJ's decision was not support by the record. We reversed the Agency's final order.

Among other things, the Agency was ordered to retroactively offer Complainant a GS-9 Loan Specialist (Realty) Guaranteed Housing Specialist position, or a substantially equivalent position, which was in a mutually agreeable location to both Complainant and the Agency with back pay.

Johns (William G.) v. USDA, 0120171754 (12/19/2018) – Complainant, a Financial Management Specialist, GS-6, in the Agency's Office of the Chief Financial Officer (OCFO), National Financial Center, in New Orleans, Louisiana, filed an EEO complaint alleging that the Agency discriminated against him on the bases of race (African-American), sex (male), color (black), and in reprisal for prior protected EEO activity when: Agency officials refused to allow him a reasonable amount of official time in order to work on EEO cases for himself and for others that he represents; and when his requests for official time were not handled in the same manner as those of other employees. Complainant requested a hearing before an EEOC AJ. The AJ issued a decision finding retaliation and finding no discrimination on all other bases. The AJ awarded Complainant $1,000 in nonpecuniary, compensatory damages, EEO training for Washington, D.C. employees, consideration of discipline, and posting of a notice of the finding of discrimination. The Agency failed to timely issue a decision, so the AJ's decision became the Agency's decision. Complainant filed an appeal but did not challenge the remedies or the finding of no discrimination. OFO affirmed the Agency's decision and modified the relief to include EEO training for the New Orleans, Louisiana employees. OFO noted that the Agency had already paid compensatory damages, trained the Washington, D.C. employees, and posted the notice of finding of discrimination.

Winns (Stanton S.) v. USPS, 0120172696 (02/05/2019) – Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of race (African-American), religion (Methodist), and/or reprisal for prior protected EEO activity under Title VII of the Civil Rights Act of 1964 when his request for religious accommodation was denied and his employment was terminated.

The decision found that Complainant has a bona fide religious belief that he must not work on Sundays. The Agency sought to assign Complainant to work on Sundays as a backup to another employee in order to complete Amazon package deliveries. In addition, the Agency instructed Complainant to attend training on September 7, 14, and 21, 2014, which were Sundays. Complainant clearly provided the Agency with a letter indicating his belief and that he could not be tasked with the Sunday work assignment. In response, the Agency indicated that they found another employee to take on the regular Sunday assignment. However, the Agency still required Complainant to come to work on three consecutive Sundays to attend training, and told him that he would be expected to work some Sundays as a backup. The decision determined that the Agency failed to provide any reason for why the training could only occur on Sundays. In addition, the Agency did not provide any evidence regarding the availability of other employees who could be used rather than Complainant as a Sunday backup for the Amazon deliveries. As such, the decision concluded that Agency violated Title VII by failing to provide Complainant with religious accommodation.

The decision then found that the termination was in retaliation for Complainant's request for religious accommodation. The Agency contended that the removal was issued because of Complainant's conduct when he used profanity and walked out of a meeting with management about his failure to come in on Sundays. However, the decision determined that the evidence of record did not support a finding that this conduct would have resulted in a removal action had it not been for the conflict over Complainant's requests for religious accommodation. As such, the decision concluded that the removal was also issued in violation of Title VII.

The decision remanded the matter to the Agency for reinstatement of Complainant with back pay, a determination on Complainant's entitlement to compensatory damages, for training for management, and consideration of disciplinary action against the responsible management officials.

Nill (Aldo B.) v. HHS, 0120172838 (02/21/2019) – Complainant filed an EEO complaint alleging discrimination on the basis of disability (deafness and back/neck condition with pain) and reprisal for requesting reasonable accommodation when he was denied reasonable accommodations, including interpreting services from unqualified interpreters, a reduction in access to interpreter services, denial of his request to telework while waiting for an accommodation to be provided; and denial of the opportunity to move to the new office space with his team members due to a lack of strobe lighting for emergency and safety notifications for him.

The decision found that the Agency failed to address Complainant's request for qualified sign language interpreters for over two months. In addition, the Agency's management subsequently failed to adequately use those services appropriately to maximize communication with Complainant, especially at meetings. As such, the decision held that the Agency denied Complainant of reasonable accommodation regarding interpreting services. The decision then held that, when the Agency reduced the availability of interpreting services, it negatively impacted his work and limited his ability to attend meetings. The record also indicated that Complainant was excluded from projects and team gatherings due to management's failure to comprehend Complainant's needs and its obligation to provide him with reasonable accommodation. The decision found that the Agency violated the Rehabilitation Act when it failed to provide Complainant with office space with his office with strobe emergency lighting.

The decision also determined that the Agency improperly denied Complainant's request for telework pending his request for an ergonomic chair

The decision remanded the matter to the Agency for a determination on Complainant's entitlement to compensatory damages, for training for management focusing on receiving, processing, and providing reasonable accommodations in the workplace, and consideration of disciplinary action against the management officials who denied Complainant's requested reasonable accommodations.

Maddox (Anne W.) v. SSA, 0120172935 (02/26/2019) – Complainant worked as an IT Specialist, GS-12, at the Agency's National Computer Center in Baltimore, Maryland. She alleged discrimination based on race (African-American), sex (female), disability (chronic migraines and fibromyalgia), and age (mid-50s). Complainant requested an additional telework day per week as a reasonable accommodation for her known physical disabilities. It was undisputed that she was "qualified" and could perform the essential functions of her job while teleworking, and she provided her supervisor with medical documentation, and a narrative explaining how an additional day of telework would accommodate her disabilities. Her supervisor determined Complainant's request was not "valid" because, among other things, Complainant's health conditions were "manageable" and episodic in nature. The Commission noted that merely because Complainant's conditions were episodic, and at times manageable, did not exempt the Agency from its responsibility to provide reasonable

accommodation. It also found that by denying Complainant's expressly made accommodations request, her supervisor failed to initiate the interactive process to arrange a reasonable accommodation for Complainant's known physical disabilities, even if not the one she specifically requested. The Agency was ordered to consider Complainant's request for compensatory damages, pay Complainant's attorney's fees and costs, consider disciplining Complainant's supervisor and provide him with training on the Agency's obligations with respect to reasonable accommodations, and post a notice of the EEOC's finding.

Barnes (Lauralee C.) v. VA, 0120170883 (02/28/2019) – Complainant worked as a Health System Specialist, GS-12 at the Agency's Policy Planning and Analysis facility in Washington, D.C. She was a Presidential Management Fellow (PMF) appointee. As a PMF, Complainant was given a two-year temporary appointment. At the end of the two years, a PMF is either converted to a permanent career conditional position or is terminated. Complainant completed her two-year requirement and was granted a 120-day extension. She was not, however, converted to a career conditional appointment. Among the reasons cited by the Agency for not converting her was that Complainant complained to the VA Secretary about alleged harassment, both sexual and non-sexual, by a manager, S2. After an investigation, management determined that Complainant's assertions to the Secretary were not true. Subsequently, Complainant was issued a letter of admonishment for making untrue accusations against S2, placed on administrative leave, and was not converted to a permanent position which resulted in her termination.

Complainant filed an EEO complaint alleging discrimination based on sex and retaliation when, among other things, she was issued a letter of admonishment, placed on administrative leave and not converted to permanent status. The Agency decision finding no discrimination was reversed in part by OFO. We found that the actions of management, especially S2 who made the ultimate decision not to convert Complainant to permanent status, were clearly in violation of the anti-retaliation provisions of our regulations and were reasonably likely to deter protected EEO activity by Complainant or other employees. In finding direct evidence of discrimination with regard to the Agency's admission that Complainant was not converted because she raised allegations of discrimination with the VA Secretary, OFO's decision acknowledged that this matter should be reviewed under a mixed-motive analysis because S2 also provided a non-retaliatory reason for not converting Complainant, i.e., poor performance.

Although OFO found that the record contained a legitimate justification for the Agency to have not converted Complainant for performance-based reasons, we could not look at this matter in a vacuum. We could not find, based on the record before us, that the Agency would have taken the same action, i.e., non-conversion of her position to a permanent position, absent the retaliatory motivation of Complainant's managers. The fact that S2 was the deciding official played a key role in the decision.

With respect to Complainant's allegations of harassment and sexual harassment, OFO found that the record did not support her claims.

Based on the finding of discrimination, OFO ordered the Agency to retroactively reinstate and convert Complainant to a permanent position, award her back pay, conduct a supplemental investigation on compensatory damages, remove the letter of admonishment from any personnel record or file, provide

training to S2 and other responsible managers and to consider taking disciplinary action against the managers.

Ross (Hung P.) v. USPS, 0120171054 (02/21/2019) – Complainant filed an appeal alleging that the Agency was not in compliance with its final order, which adopted an EEOC AJ's finding of discrimination. Among other things, the AJ ordered the Agency to "return Complainant to work in the same position he held prior to being placed off work in November of 2013."

Complainant argued that the Agency did not comply with the AJ's Order as he was restored to a position on Tour 3 instead of Tour 2, which was the position that he originally had with his scheduled off days being Saturday and Sunday. Complainant argued that the AJ's order indicated that he be returned to the "same position," that he held in November 2013. Complainant further maintained that being on Tour 3 caused a hardship for him.

The Commission found that the Agency fully complied with the AJ's order and that the AJ's order constituted full relief. The record indicated that Complainant unsuccessfully tried to return to work on November 18, 2013, to his Tour 2 position, and that on November 22, 2013, he was reassigned to Tour 3, but was still unable to return to work. The AJ did not specify whether Complainant should be provided a position on either Tour 2 or Tour 3. However, OFO noted that not only did Complainant not raise the reassignment to Tour 3 as an allegation of discrimination, but he requested as damages to be awarded the overtime and nighttime premium pay he would have only earned as a Supervisor on Tour 3, and he was awarded those damages by the AJ. Consequently, OFO found that the Agency, by retroactively offering Complainant a position on Tour 3, as of November 2013, complied with the AJ's order. We also found that the AJ's order constituted full make whole relief.

McReynolds (Vena H.) v. DOD (DCA), 0120172589 (02/08/2019) – Complainant, a Store Worker, at the Agency's Hunter Army Airfield Commissary in Georgia, filed a formal EEO complaint alleging the Agency subjected her to a hostile work environment. Complainant alleged her supervisor commented that she hated Complainant and wished she would get into a car accident and die. In addition, Complainant alleged that her supervisor wrote the word "white" on a bag of white potatoes laughed and said "white power" while extending out her arm, as if making a salute. Following an investigation, the Agency issued a final decision.

The Agency found that Complainant was subjected to a hostile work environment based on race (African-American) and in reprisal for prior protected activity. The Agency awarded Complainant $4,000 in non-pecuniary compensatory damages.

Complainant filed an appeal.

OFO limited its review to whether the Agency awarded the appropriate remedies. We found that an award of $6,000 (rather than $4,000) was more consistent with the awards given in similar cases and not monstrously excessive. We reasoned that Complainant asserted that she felt depressed, stressed and had elevated blood pressure due to the work environment. The record also contained medical

documentation indicating that Complainant sought medical assistance due to stress from her work environment.

Fauver (Henry L) v. Army, 0120172820 (02/25/2019) – Complainant worked as a Lead Physical Evaluation Board Liaison Officer ("PEBLO") at the Agency's Integrated Disability Evaluation System (IDES), Bayne-Jones Army Community Hospital, U.S. Army Medical Command in Louisiana.

On June 16, 2015, Complainant filed a formal EEO complaint claiming he had been subjected to ongoing harassment/a hostile work environment in reprisal for participating in prior EEO activity.

On August 9, 2017, the Agency issued a final decision finding no discrimination. Complainant, on appeal, argued that his case "mirrors" that of another Lead PEBLO under the same management ("ML"), who experienced that same hostile work environment as him. Complainant indicated that an EEOC AJ determined that ML was the victim of unlawful retaliation for a virtually identical complaint and ordered the Agency to remedy her.

We determined that Complainant has provided adequate evidence to support his claim that management allowed a subordinate employee (Employee C), to act in an ongoing rude, disrespectful and bullying manner to toward him, which also served to undermine Complainant's authority as a Lead with other staff. Complainant and ML brought their claims of discriminatory harassment by Employee C to the attention of management, but the misconduct appears to have continued unchecked. Moreover, following his participation in the complaints brought by ML, Complainant was often treated in an angry and hostile manner by the Supervisor, who was again unchecked by the Chief.

On remand, we ordered the Agency to take the following actions: unless Complainant expressly consents, he shall no longer work in a supervisory chain involving the Supervisor and he may be reassigned to a comparable position only with his consent; ensure that Complainant is provided his right to submit objective evidence in support of his claim of compensatory damages; restore any annual leave and sick leave used by Complainant as a result of the hostile work environment; provide EEO training for the management officials regarding their responsibilities with a specific emphasis on the prohibition of discriminatory harassment and retaliatory action; to consider appropriate disciplinary action; and the posting of notice.

Garcia (Thomasina B.) v. DOJ (FBP), 0120173008 (02/26/2019) – Complainant was a Health Information Technician at the Agency's Devens Federal Medical Center in Ayer, Massachusetts. Complainant applied for a position through an Agency program which allowed Federal Bureau of Prisons employees, like Complainant, to convert and become U.S. Public Health Service (PHS) Officers. The position would have been a promotion and Complainant would have had equal or greater authority than her supervisor (S1). The position would have also allowed Complainant to remain working at the prison facility. Complainant testified that she met all qualifications for the positions and she was the only person qualified for the position in her department. However, Complainant stated that PHS headquarters informed her that she was selected for the position because of a "bad reference" from S1. Complainant alleged that S1 discriminated against her based on race (Hispanic) and sex (female) when S1 provided a negative reference to the PHS and Complainant believed that S1's reference prevented

the PHS from hiring her. The Agency issued a final decision finding no discrimination. The Agency also determined that there was no evidence to support a claim that Complainant was constructively discharged from the Agency even though this claim was not accepted for investigation.

OFO determined that the job reference at issue was the sole claim accepted for investigation and limited review of the record and analysis to this claim. OFO reversed, finding that there was no legitimate explanation for S1's negative reference. OFO found that Complainant established a prima facie case of disparate treatment based on race and sex. OFO reasoned that it was undisputed that S1's negative reference resulted in Complainant's non-selection for the PHS position despite her qualifications for the position, outstanding recommendations from other Agency references, and favorable performance ratings from S1 both before and after the negative reference. OFO determined that the questionable nature of the negative reference under these circumstances was sufficient to raise an initial inference of discrimination. Although S1 articulated a legitimate, non-discriminatory reason for the negative reference – that Complainant's own actions, including a questionable attendance issue, resulted in the negative reference – OFO found this argument was insufficient to legitimize the negative reference and did not negate the fact that S1's PHS reference included unfounded critical statements against Complainant.

OFO ordered that the Agency designate a management official other than S1 to provide any needed references for Complainant for any future positions for which Complainant may apply. OFO also ordered that the Agency conduct a supplemental investigation to determine compensatory damages, and OFO ordered that the Agency consider taking appropriate disciplinary action against S1.

Peterson (Mario K.) v. USPS, 0120172206 (02/15/2019) – Complainant (a union representative) worked as a Building Maintenance Custodian at the Rochester, Michigan Post Office and alleged that the Agency subjected him to a hostile work environment on bases of based on race (Caucasian), sex (male), color (white), disability (back and knee impairment), age (50), and in reprisal for prior protected EEO activity when: (1) he was made to work outside his medical restrictions; (2) the Postmaster refused to communicate with him; (3) on February 3, 2016, PM read a Veteran's Day Appreciation letter that was dated three months earlier and he believes that she purposely waited to do this; (4) a co-worker refused to move out of his way when he walked by her; (5) on March 2, 2016, his supervisor cursed at him; (6) on April 19, 2016, he returned to work and his work route was a mess because the custodian assigned to clean in his absence refuses to and management does nothing; (7) on May 16, 2016, co-workers harassed him about his work performance and management did nothing; (8) the Postmaster harassed him about his work performance; (9) on May 18, 2016, the Postmaster would not allow his supervisor to give him help with a task; (10) on May 19, 2016, he was accused of stealing; (11) he was not given copies of forms that he requested; (12) on May 20, 2016, the Postmaster harassed him about using the training room; (13) on May 24, 2016, a letter carrier purposely walked into him; and (14) his coworkers told the Postmaster things about him and she immediately had him investigated.

On appeal, we reversed the final agency decision finding that the record showed that every time the responsible management officials received affidavits regarding Complainant's EEO complaints, they would display displeasure with Complainant by "eyeballing him or totally ignor[ing] him." The record also established that the Postmaster was disturbed by Complainant's EEO activity and raised her concern with one of the union representatives on numerous occasions. The record showed that

both management officials felt Complainant was spending too much time on his EEO matters and that the Postmaster stated that all "this EEO business" needed to be dropped. The record also showed that despite the Postmaster's denials, Complainant was forced to perform an unrealistic amount of physical labor before he was permitted to work on his EEO complaints to punish him and make it difficult for him to do any EEO work. In addition to loading Complainant with twice the amount of work that his predecessor was expected to perform, management and others would complain about his work performance and give him a hard time in general. As a result, we found that Complainant had been subjected to a retaliatory hostile work environment.

We ordered the Agency to: (1) conduct a supplemental investigation into Complainant's entitlement to compensatory damages; (2) provide training for the responsible management officials; (3) consider taking disciplinary action against the responsible management officials; and (4) post a notice.

Adams (Candi R.) v. DOD (SECDEF), 0120172238 (02/28/2019) – Complainant worked as a Police Officer, AD-0083-5, with the Pentagon Force Protection Agency located in Arlington, Virginia. Complainant alleged that the Agency discriminated against her based on her disability or perceived disability (allergies) when: (1) from December 3, 2009 to present, she has been on light duty status; (2) on August 27, 2010, she was notified by the Deputy Chief who provided a written Notice of Determination that she was deemed not medically qualified to perform her duties as a Police Officer; and (3) on or about October 14, 2010, she was informed by her third-line supervisor that her request for a transfer to the Command Center dated September 30, 2010, was denied.

We concluded that the Agency violated the Rehabilitation Act when it failed to make an individualized assessment of the alleged risk posed by Complainant and, instead, applied a blanket medical qualification standard without examining the specific application to Complainant when it found exercise/mold-induced anaphylaxis disqualified her for the Police Officer position.

The Agency argued that Complainant was not a qualified individual with a disability based upon the possibility of future injury to herself or others. We disagreed, finding that the only certified Allergist-Immunologist to evaluate Complainant's medical condition found Complainant qualified to perform all essential tasks without restrictions. In addition, both of Complainant's supervisors affirmed that Complainant could perform every aspect of her Police Officer duties and continued to perform the same activities after she was diagnosed in November 2009 without incident until she reassigned in March 2011.

We also found that the Agency placed unwarranted reliance on management's non-expert/non-specialist opinion with respect to Complainant's medical condition who did not personally examine Complainant but instead heavily relied upon generic medical journals to form her recommendation. Further, we found that the record evidence demonstrated that there was only a remote likelihood of Complainant being a significant risk to herself or others. In the event of an anaphylaxis reaction, Complainant would have time to self-administer an EpiPen injection and call an ambulance on her own. The only requirement was that she carry one with her. We further found that while the risk of an anaphylaxis event could not be eliminated, it could be minimized by avoiding exposure to mold, especially during strenuous exercise and the Agency could minimize Complainant's risk by removing the excessive mold found in its athletic center.

Accordingly, we held that Complainant was fully qualified to perform her position without an accommodation and that the Agency discriminated against Complainant based on her perceived disability by excluding her from continued employment as a Police Officer. The Agency was ordered to: (1) offer Complainant reinstatement to the Police Officer position; (2) determine and award the appropriate amount of back pay, with interest, and other benefits due to Complainant; (3) conduct a supplemental investigation on the question as to whether Complainant is entitled to compensatory damages; (4) provide training for the responsible management officials; (5) consider taking disciplinary action against the responsible management officials and (6) post a notice.

Benitez-Thomas (Cathy V.) v. USPS, 0120172200 (02/06/2019) - Our decision held that the Agency discriminated against Complainant, a City Carrier Assistant who was temporarily assigned to the Country Lakes (Miami) Post Office based on color (Black) when: (1) on September 30, 2015, she was placed on emergency placement in a non-duty, non-pay status; and (2) on October 27, 2015, she was issued a notice of removal for unacceptable conduct, that was later reduced to a 14-day suspension, because undelivered mail was discovered at Complainant's workspace after she had clocked out for the day.

Contrary to the Agency, we found numerous instances of similarly situated comparison employees, outside of Complainant's protected class who were treated substantially better. The comparison employees all had the same second-line supervisor and engaged in the act of failing to deliver a portion of a mail bundle assigned to them at the facility. Neither Complainant nor the comparison employees had a record of discipline. Accordingly, we found all relevant aspects of Complainant's employment identical to the comparison employees. Moreover, we found that none of the White employees who failed to deliver mail received discipline while Complainant and a Rural Carrier Associate (both Black employees) who were charged with such behavior were placed off duty and received removal notices. Accordingly, we found that the record evidence established a clear pattern of disparate treatment.

We also found that Complainant established that the Agency's articulated explanation for disciplining Complainant was a pretext for discrimination. Specifically, the record showed that disciplining only Black employees for violations that were commonplace by White employees established that the Agency's articulated explanation was not credible. We also found Complainant's first and second-line supervisors were not credible given the multiple witnesses who contradicted their statements with detailed supporting documentation. We also found it incredible that management officials could not recall numerous events and could not produce relevant information about the White employees who failed to return mail during the relevant time-frame using the Agency's computer-generated Workload Status report. The record also contained evidence that a supervisor may have falsified Agency records to make it appear that such mail was undeliverable when in fact it was deliverable. Accordingly, for such reasons, we found that the Agency's explanation for the imposed discipline was a pretext for discriminatory animus based on Complainant's color.

Accordingly, we reversed the FAD and ordered the Agency to: (1) remove the discipline from Complainant's personnel file; (2) determine the amount of backpay due to Complainant; (3) conduct a supplemental investigation into Complainant's entitlement to compensatory damages; (4) provide training for the responsible management officials; (5) consider taking disciplinary action against the responsible management officials; and (6) post a notice of discrimination in the workplace.

Meeks (Carroll R.) v. Navy, 0120170064 (02/08/2019) – Complainant worked as a Mechanical Engineer at the Ocean Engineering (OE) department at the Puget Sound Naval Shipyard and Intermediate Maintenance Facility in Bremerton, Washington. Complainant had obtained a transfer from the Agency's Air Systems Branch. At the time of his transfer, Complainant was being treated for multiple sclerosis. Complainant was required to take a polygraph test for the position, however, the Polygraph Examiner assigned to conduct the polygraph declined to administer the test based on Complainant stating that he had a medical condition. The Polygraph Examiner believed that medications Complainant was taking could interfere with polygraph results. Complainant's doctor was asked to submit a letter about the issue. Complainant's doctor drafted a letter stating that "he was unable to find any published information in peer reviewed literature on the effect of MS on the validity of polygraph testing" and that he had "no evidence that MS or the medication used by [Complainant] for MS treatment, either affect or do not affect the validity of polygraph results ... I have no reason to believe that polygraph testing, per se, is contraindicated by his having MS." Complainant's supervisor did not allow him to take the polygraph because the doctor had not provided a yes or no answer. He offered to find Complainant another position. Complainant decided to move back to his previous department at the Air Systems Branch.

Complainant filed an EEO complaint alleging that the Agency discriminated against him based on disability (multiple sclerosis) when, on November 23, 2015, Complainant was informed that he would not be granted a polygraph waiver which denied him the opportunity to be employed by OE. In accordance with Complainant's request, the Agency issued a final decision, which concluded that Complainant failed to prove that the Agency subjected him to discrimination as alleged.

On appeal, the Commission found that Complainant was an individual with a disability and was subjected to an adverse employment action when he was not permitted to take the polygraph exam. The Agency set forth legitimate, nondiscriminatory reasons in that that a polygraph was a requirement for all new employees of the Ocean Engineering department and that there was no waiver of polygraphs for employees. Complainant's doctor did not unequivocally clear him for the polygraph. Management explained that the main concern was that Complainant's medication would cause false inputs. Depending on what Complainant disclosed, it could cause him to lose his employment with the government altogether. The decision concluded that the Agency's reasons were pretext for disability discrimination because despite Complainant's doctor writing that there was no reason to believe that Complainant's MS and medication would affect the validity of the polygraph result, managers determined that Complainant would not be allowed to take the polygraph because Complainant's doctor had not provided a simple "yes" or "no" answer. We also noted that after reviewing the doctor's letter, the Polygraph Examiner believed Complainant should have been allowed to take the test. Additionally, we noted that Complainant's supervisor and the Security Specialist decided on their own that Complainant would not be referred to the take the polygraph again. Comments made by the Security Specialist showed that the Security Specialist had an issue with Complainant's medical condition and perceived Complainant's condition to be a risk, in the complete absence of medical evidence to support that conclusion. The Security Specialist and S1 denied Complainant the opportunity to take the polygraph for no reason other than the fact that he has MS.

The decision ordered the Agency to offer Complainant the opportunity to return to the OE department, allow him to take a polygraph exam, award compensatory damages, conduct training, consider discipline and to post a notice of discrimination. However, the decision noted that to the extent that Complainant requested a "waiver" of the polygraph as a reasonable accommodation, the Agency established that it would be an undue hardship for it to waive the polygraph requirement. The position in question required a top-secret clearance, which in turn involved passing a polygraph examination. As the Agency explained, all new employees to Ocean Engineering were required to take a polygraph and there was no evidence in the record to support a different conclusion.

McSweeney (Margeret M.) v. VA, 0120170362 (02/21/2019) [Repeated under Priority 4 above] – Complainant, a GS-15 General Surgeon, filed an EEO complaint alleging that she was discriminated against on the basis of sex (female) when she was paid less than her male counterparts and when a tentative job offer was withdrawn. Complainant did not request a hearing. The Agency issued a decision finding no discrimination. OFO reversed the part of the Agency's decision finding no discrimination in violation of the Equal Pay Act and Title VII for the pay discrepancy when Complainant was working as a General Surgeon. OFO affirmed the remainder of the Agency's decision finding no discrimination. OFO found that based on the vague references to possible reasons for the pay disparity and lack of information reflecting how the salary of Complainant or the comparatives was set, the Agency failed to satisfy its burden by a preponderance of the evidence to show that the pay differential was based on a factor other than sex. Regarding the Title VII violation, OFO found that the Agency failed to set clearly forth reasons for the pay disparity between Complainant and the two named comparatives such that she had been given a fair opportunity to demonstrate that those reasons were pretext for discrimination. For the remaining EPA claim, OFO found that the Agency showed there was a factor other than sex that justified Complainant being paid less when she was in an Acting capacity. OFO found that the withdrawal of the job offer was because of Complainant's performance problems. For remedies, OFO ordered back pay, liquidated damages, an investigation of whether compensatory damages were due, EEO training to and consideration of discipline for the responsible officials, and posting of a notice of discrimination.

Ryan (Coralee H.) v. USPS, 0120172277 (02/15/2019) – Complainant, a Full-time General Clerk at the Agency's Northern Virginia Processing and Distribution Center in Merrifield, Virginia, filed a formal complaint alleging that the Agency discriminated against her on the basis of disability (deafness) when: she was instructed not to enter the Manager, Distribution Operations' office; her request for an interpreter was denied; her job assignments were eliminated; she failed to receive a response to her request to speak with the Manager of Human Resources; she was not scheduled to meet with the Disability Coordinator; and she was required to perform an assignment that management never used. The Agency issued a final decision finding no discrimination.

In the appellate decision, the Commission affirmed the Agency's final decision in part and reversed in part. The Commission determined that the Agency articulated legitimate, nondiscriminatory reasons for its actions related to Complainant's disparate treatment claims which Complainant had not rebutted as pretextual. However, the Commission found that the Agency failed to provide Complainant with a reasonable accommodation in violation of the Rehabilitation Act when she was not

provided an interpreter at a safety talk meeting. Management explained that they provided handouts in lieu of an interpreter at some point; however, management was aware that she needed and was entitled to such a reasonable accommodation. As a result, the Commission found that the Agency failed to provide Complainant a reasonable accommodation in violation of the Rehabilitation Act. The Commission ordered the Agency to ensure that Complainant was provided with a qualified sign language interpreter when required during her employment, including at a minimum for safety talks, discussions on work procedures, policies or assignments, for performance evaluations and for every pre-disciplinary and disciplinary action. The Agency was further instructed to provide training to all managers and supervisors at its facility regarding the Agency's obligation to provide reasonable accommodation under the Rehabilitation Act, to consider discipling the responsible management officials, and to conduct a supplemental investigation into Complainant's entitlement to compensatory damages.

Gonzalez-Cordero (Eric S.) v. DOD (DLA), 0120171646 (02/08/2019) – Complainant, a Distribution Process Worker at the Agency's Defense Distribution Susquehanna facility in New Cumberland, Pennsylvania, is from Puerto Rico and identified his race as Hispanic. According to Complainant, he was in his work area working on labels when a temporary Supervisor (C1) who is also Puerto Rican came to his work area. Complainant stated that they greeted each other in Spanish and were talking when Complainant's supervisor (S1; Caucasian) approached and loudly said, "English, English!" S1 stated that he said, "English, English!" to C1 because C1 was in S1's shop "speaking Spanish during working hours," and because S1 "need[s] to know and understand what's going on." When asked whether the Agency had an English-only policy, S1 responded, "The Navy has a policy to speak English during duty hours. I believe it is the same for all government agencies."

Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of national origin (Hispanic), age (44), and reprisal for prior protected EEO activity when he was instructed to speak in English while in the workplace. In accordance with Complainant's request, the Agency issued a final decision, which concluded that Complainant failed to prove that the Agency subjected him to discrimination as alleged. The Agency reasoned that Complainant failed to show that he suffered tangible harm with respect to a term, condition, or privilege of employment when S1 told him to speak only English in the workplace. Complainant filed an appeal.

In response to Complainant's appeal, the Agency contended that the Agency clearly established business necessity because S1 saw someone who did not work in his area and was trying to determine why he was there. On appeal, the Commission found that S1's instruction, on its face, constituted an English-only rule. The Commission further found that the English-only rule was not justified by business necessity because there was no evidence in the record that requiring employees to speak only English while exchanging pleasantries in the work environment was necessary for the safe or efficient operation of the Agency. Although the Agency argued on appeal that C1's presence in S1's area constituted a "clear" safety risk, S1 stated during the investigation that he recognized C1 as a supervisor from a different area of the facility, undercutting the alleged safety concerns. We found that the Agency subjected Complainant to discrimination based on national origin. Because a finding of discrimination based on age or reprisal would not entitle Complainant to any additional relief, we declined to analyze whether Complainant was subjected to discrimination based on age or reprisal. As

relief, the Commission ordered the Agency to review and revise the English-only rule at issue, to conduct a supplemental investigation concerning Complainant's entitlement to compensatory damages, to post a notice, to provide training to all employees of the facility, and to consider discipline against S1.

Thomas-Jackson (Mercedez A.) v. USDA, 0120170574 (03/07/2019) **[Repeated under Priority 4 above]** – Complainant, an Associate Chief Information Officer (SES), filed an EEO complaint alleging that she was discriminated against when she was subjected to a hostile work environment on the bases of her sex (female), age (over 40), race (African American), color (brown), and in retaliation for protected EEO activity. Complainant also alleged she was discriminated against on the bases of race and sex when she did not receive equal pay. Complainant requested a hearing before an EEOC AJ. The AJ held a hearing and issued a decision finding no discrimination on the entire complaint. The Agency adopted the AJ's decision. Complainant appealed. OFO affirmed the finding of no discrimination on the hostile work environment claim. OFO reversed the part of the Agency's decision finding no discrimination in violation of the Equal Pay Act and Title VII for the pay discrepancy between Complainant and a male employee. OFO found no evidence explaining the reasoning for the pay disparity. OFO found that the Agency failed to satisfy its burden by a preponderance of the evidence to show that the pay differential was based on a factor other than sex. For remedies, OFO ordered back pay, liquidated damages, an investigation of whether compensatory damages were due, EEO training to and consideration of discipline for the responsible officials, and posting of a notice of discrimination.

Tucker (Sang G.) v. VA, 0120170604 (03/20/2019) – Complainant, a Legal Administrative Specialist, filed three formal EEO complaints alleging that the Agency subjected him to a hostile work environment based on race, disability, and reprisal for prior protected EEO activity with respect to 30 incidents. The Agency dismissed Complainant's allegation that his supervisor discriminatorily denied him official time to speak with an EEO Counselor on the ground that it failed to state a claim. With respect to the other claims, the Agency found that Complainant had not established that the Agency subjected him to discrimination or harassment.

OFO modified the Agency's final decision by affirming in part and reversing in part. We noted that, although the Agency did not need to investigate the claim regarding the denial of official time to determine whether it was discriminatory, it should have determined whether the denial was justified. Because we could not determine from the record whether Complainant received an appropriate amount of official time to speak with an EEO Counselor, we remanded the matter to the Agency for an investigation and determination on this issue.

In addition, we found that a manager engaged in a per se act of retaliation when she told Complainant that his "primary duty is not to file EEO complaints, it's to serve veterans and [his] job duties are to serve veterans." This comment, on its face, discouraged participation in the EEO process. We further found that telling an employee who has requested official time to amend their EEO complaint that his or her primary duty is not to file EEO complaints is likely to deter a reasonable employee from engaging in protected activity and has a potentially chilling effect on the EEO process. We ordered the Agency to determine whether Complainant was entitled to compensatory damages, to post a notice of

the finding, to provide EEO training to the manager, and to consider whether to discipline the manager.

Finally, we found that the evidence did not establish that the other incidents alleged by Complainant occurred because of his race, disability, or protected EEO activity. Because the one incident of per se reprisal was not severe or pervasive, we concluded that Complainant did not demonstrated that the Agency subjected him to a discriminatorily hostile work environment.

Felton (Kiera H.) v. USPS, 0120172032 (03/21/2019) – Complainant, a City Carrier at the Detroit-Brightmoor Station in Detroit, Michigan, filed an EEO complaint alleging that she was subjected to discrimination on the bases of disability (knee tendonitis) and in reprisal for prior protected EEO activity when the Agency withdrew her reasonable accommodation. Following an investigation, Complainant requested a final agency decision. In the decision, the Agency determined that Complainant had not been subjected to discrimination or reprisal as alleged.

In our appellate decision, we reversed the Agency's decision. The Commission found that the record was undisputed that the Agency previously granted Complainant an ergonomic chair as a reasonable accommodation. Complainant indicated that she had one in the past, and that the Agency perhaps lost the chair during a move to a new facility. When Complainant submitted a renewed request for an ergonomic, adjustable chair in April 2013, the District Reasonable Accommodation (DRAC) Committee granted the request. The record did not show that she ever received the chair, however. Complainant's supervisor stated that she provided Complainant a chair that had "a cushion in the back area and seat area." The provided alternative accommodation was not effective because it was not adjustable as requested by Complainant's doctor. Thus, we found that Complainant was not provided with an effective reasonable accommodation following a May 2013 DRAC meeting until her return to full duty in April 2014. We ordered the Agency to conduct a supplemental investigation into Complainant's entitlement to compensatory damages; to provide training to management officials at the facility emphasizing the Agency's obligations regarding reasonable accommodation; to consider disciplining Complainant's supervisors; and to post a notice.

Lempia (Jordon S.) v. DOJ, 0120171870 (03/20/2019) – Complainant worked as a Case Manager at the Agency's Federal Correctional Institute Sandstone facility in Minnesota. Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of disability (torn rotator cuff, bilateral knee pain, type 2 diabetes), age (49), and in reprisal for prior protected EEO activity when the Agency did not select him for the position of Senior Officer Specialist, Vacancy Announcement No. SST-2015-0009.

The Agency subsequently issued a final decision after Complainant failed to request a hearing within the regulatory timeframe for doing so. In the decision, the Agency found that Complainant had not been subjected to discrimination or reprisal as alleged.

In our appellate decision, we initially noted that the Agency issued the report of investigation and notified Complainant of his right to request a hearing on March 9, 2016; however, even though Complainant did not request a hearing within the regulatory timeframe, the final decision was not

issued until July 31, 2017. The Agency failed to provide a valid reason for the late issuance of the final decision. As a result, the Commission determined that a sanction was appropriate in this matter. Based on the specific circumstances of this case, we found the most appropriate sanction to address the Agency's conduct was to order the Agency to: (1) post a notice at its Complaint Adjudication Office in Washington, D.C. regarding its failure to comply with the Commission's regulatory timeframes and orders; and (2) provide training to its EEO personnel who failed to comply with our regulatory timeframes.

With regard to the merits of the complaint, the Commission found that the Agency had articulated legitimate, nondiscriminatory reasons for not selecting Complainant. Specifically, the Warden (the selecting official) explained that the five selectees for the position at issue scored higher on their integrity/reference check and all had critical correctional services training. In addition, the Warden affirmed that she saw attributes in the five selectees' background that made them best qualified for the position. The Commission found that Complainant failed to show that those reasons were pretextual. As a result, the Commission affirmed the Agency's finding of no discrimination or reprisal, but remanded the matter for the remedial action discussed above.

Stuck (Porter P.) v. USPS, 0120171893 (03/27/2019) – Complainant, a PS-08 Tractor Trailer Operator (TTO), at the Agency's Processing and Distribution Center in Indianapolis, Indiana, filed an EEO complaint alleging that the Agency discriminated against him on the basis of disability (neck, back, and ADHD) when: (1) on an unspecified date, Complainant's confidential medical information was disclosed to unauthorized individuals; and in August 2015, Complainant's driving privilege was suspended.

Following an investigation, Complainant requested a hearing before an EEOC AJ. The AJ assigned to the matter granted the Agency's motion and issued a summary judgment decision finding that Complainant had not been subjected to discrimination as alleged.

In our appellate decision, we noted that Complainant additionally raised discrimination based on genetic information. We found this claim failed as the record was devoid of any allegations or facts regarding genetic tests, the genetic tests of Complainant's family members, or his family medical history. Next, we determined that the Agency had articulated legitimate, nondiscriminatory reasons for its actions. Namely, management officials affirmed that Complainant's driving privilege was suspended following a failed drug screen and management's belief that Complainant failed to disclose all his prescribed medication. The Commission concluded that Complainant failed to show that the Agency's reasons for its actions were pretextual. As a result, the Commission found that Complainant had not been subjected to discrimination as alleged.

The Commission found, however, that the record revealed that the Agency violated the Rehabilitation Act when it placed Complainant's confidential medical information in his driver's personnel folder and that Complainant was entitled to relief. The Commission ordered the Agency to expunge all medical information concerning Complainant from non-medical files and to ensure that Complainant's medical information was maintained in a separate and appropriate medical file. Further, the Commission ordered the Agency to conduct a supplemental investigation into Complainant's entitlement to

compensatory damages; to provide training to the responsible management officials; to consider disciplining the responsible management officials; and to post a notice.

Combs (Phillis W.) v. DHS, 0120172637 (03/26/2019) – Complainant worked for the Department of Homeland Security as a Management and Program Analyst/Contracting Officer Representative (COR), GS-14, at the Agency's Acquisition Management Branch in Washington, D.C. Complainant alleged the Agency failed to reasonably accommodate her disabilities, as well as subjecting her to discrimination and harassment based on disability and reprisal for prior protected EEO activity.

Due to a car accident, Complainant was diagnosed with long-term back and neck injuries and pain. As a result, Complainant's physician recommended that she telework from home full-time with proper accommodations because the "mobility, distance, time of actions and travel required [for Complainant to work in the office] all exceed her current medical limitations."

In an EEO complaint filed before the one at issue, Complainant had already claimed that management officials failed to provide her reasonable accommodations. On appeal, we reversed the Agency's finding of no discrimination and found that the Agency "abruptly revoked Complainant's telework accommodation and inexplicably delayed restoring this accommodation for four months, failed to respond to Complainant's request for assistive technology, software, and training, and penalized Complainant for its own failure to accommodate her." EEOC Appeal No. 0120141732 (December 30, 2016).

The instant complaint is a continuation of the allegations Complainant raised in her prior complaint. Here, we again concluded that the Agency failed in its duty to reasonably accommodate Complainant's disabilities by either not providing Complainant with adequate equipment, software and training, or unreasonably delaying the provision of necessary technologies, to support her accommodation of full-time telework which, in turn, negatively impacted Complainant's work performance. We further find that a performance counseling memorandum and placement on a performance improvement plan (PIP) for performance issues directly resulted from the Agency's failure to provide Complainant with adequate technologies required to effectively telework from home as a reasonable accommodation to her disabilities.

To remedy Complainant, we ordered the Agency to undertake a variety of remedies, including determining Complainant's entitlement to compensatory damages; expunging the performance counseling memorandum and the PIP from Complainant's personnel file and other official Agency records; providing training to and considering discipline of the responsible management official; providing payment of attorney's fees; and the posting of a notice.

we ordered the Agency to provide Complainant with a reasonable accommodation, expunge from Complainant's personnel file all written warning, reprimand, and counseling issued since November 28, 2011, adjudicate her claim for compensatory damages, provide EEO training and consider disciplinary action against S1 and M1, an award of attorney's fees, and the posting of a notice.

Clifton (Dixie B.) v. VA (VHA), 0120170175 (03/26/2019) **[Repeated under SEP Priority 3, above]**– Complainant worked at the St. Louis, Missouri VAMC and, as a veteran, received care at the same facility for her disabilities, including degenerative disc disease, major depression, and anxiety. Complainant's supervisor (S1) and four coworkers accessed her VAMC patient medical records, and the VAMC Privacy Officer (PO1) investigated and determined that the access was neither job-related nor consistent with business necessity. Another supervisor (S3) directed Complainant to provide medical documentation substantiating her need tor FMLA leave on the day of a sick out and thereafter on a monthly basis. S3 subsequently contacted HR and told Complainant that she did not need to provide additional documentation or certify her need for FMLA on a monthly basis.

Complainant filed two EEO complaints alleging, among other issues, that the Agency failed to protect her confidential medical records and made an impermissible medical inquiry in violation of the Rehabilitation Act. Complainant requested a hearing on both of her complaints, which were consolidated by an AJ. Complainant subsequently withdrew her hearing request, and the Agency issued a final decision finding no discrimination.

On appeal, the Commission reversed the Agency in part. With respect to the medical records claim, the Commission found that it was undisputed that S1 and the four coworkers accessed Complainant's confidential medical records and that the access was neither job-related nor consistent with business necessity in violation of the Rehabilitation Act. Regarding S3's request for medical documentation, we found that Complainant had provided sufficient information to substantiate her chronic disabilities and her need for leave as a reasonable accommodation for disability-related flare ups and that the Agency subjected Complainant to an unlawful disability inquiry when it requested additional medical documentation. As relief, OFO ordered a supplemental investigation concerning Complainant's entitlement to compensatory damages, training for S3, S1, and the coworkers who accessed Complainant's medical records, consideration of discipline against all employees found to have accessed Complainant's records, and posting of a notice. Because S3 withdrew his request for additional medical documentation after consulting HR, we did not order the Agency to consider disciplinary action against S3.

Segal (Ruben T.) v. DOJ (FBI), 0120171405 (03/22/2019) – Complainant worked as a Government Information Specialist in Winchester, Virginia. In September 2012, Complainant initiated his request for an accommodation to accommodate his dyslexia. His request included a speech-to-text software, a text reading software, and grammar software. In July 2013, Complainant received his requested accommodations, and his performance improved.

In October 2013, the Agency informed Complainant that his software was not approved and removed them from his workstation. Complainant requested alternative software the following month. In May 2014, Complainant requested a status update from the Agency's Reasonable Accommodation Program Manager, who responded that he "lost track" of Complainant's request. Complainant and his supervisors then worked with Agency IT representatives to try to identify Agency-approved software that would accommodate Complainant. Complainant received his accommodations in February 2015. Complainant's performance improved, and he was promoted on July 26, 2015.

Complainant filed an EEO complaint alleging, in part, that he was discriminated against when the Agency withdrew his accommodations and failed to provide him with a reasonable accommodation. The Agency issued a final decision finding that while it took approximately one year to provide Complainant with software, it was due to "security issues," and it made a good faith effort in keeping Complainant apprised of the status of his request. The Agency also noted that Complainant was responsible for some of the delay because he changed one of his requests, which caused a three-month delay. Complainant appealed the Agency's decision, arguing that there was an undue delay in providing him an accommodation, which delayed his promotion.

The Commission found that Complainant was a qualified individual with a disability, and that the Agency accommodated him after an unnecessary delay. While the Agency argued that there were "security reasons," it did not provide any details describing the concerns. Further, the Commission found that Complainant actively worked to try to get accommodations, but that the Agency "lost track" of his request for approximately five months; pushed back when he requested a list of Agency-approved software; and blamed him for a delay when he requested a change in the brand of software, even though the Reasonable Accommodation Program Manager was aware of the change and did not act to get that software vetted when he learned of change.

The Commission found that the Agency discriminated against Complainant based on his disability when it failed to provide him with a reasonable accommodation in a timely manner, and when it delayed his promotion. Among other remedies, the Commission ordered the Agency to provide a retroactive promotion, with back pay and other benefits; and to conduct a supplemental investigation for any compensatory damages for Complainant.

Ward (Rochelle F.) v. USPS, 0120171406 (03/05/2019) – Complainant, a Mail Processing Clerk, alleged, in pertinent part, that the Agency denied her the reasonable accommodation of an "ergonomically correct" chair for her bad back and swollen extremities. Complainant maintained the Agency provided her with a chair that was "overstuffed" and could only be adjusted up or down, which resulted in horrible swelling in her legs and feet.

The Agency found that Complainant was not denied a reasonable accommodation. On appeal, OFO determined that Complainant was an individual with a disability because her back condition rendered her unable to lift more than five pounds. OFO further concurred with the final agency decision's determination that Complainant was qualified. Additionally, OFO determined that the Agency was aware that Complainant needed an ergonomic chair for her back condition, and Complainant reported that the chair the Agency provided did not meet the needs of her condition. OFO found that the record supported the finding that an ergonomic chair was the accommodation that Complainant needed for her disability, but Complainant still had not received an ergonomically-correct chair that is appropriate for her body and impairment.

OFO further determined that the Agency's failure to provide Complainant with a reasonable accommodation was largely attributable to the fact that it did not engage in the interactive process with Complainant, and the Agency should have worked with Complainant to conduct an individualized ergonomic assessment that would have determined Complainant's specific needs. OFO determined that the Agency had not shown that providing Complainant with a properly fitting ergonomic chair

would have imposed an undue hardship on the Agency. Therefore, the Agency denied Complainant a reasonable accommodation. To remedy the violation of the Rehabilitation Act, OFO ordered the Agency to conduct an individualized assessment of Complainant's need for an ergonomic chair, and thereafter, provide her with a chair in accordance with that need; pay proven compensatory damages; provide EEO training and consider discipline for the responsible management officials; and post a notice about the violation in the workplace.

Gray (Elene K.) v. SSA, 0120170703 (03/27/2019) – The Agency's final agency decision found that the Agency failed to provide Complainant with reasonable accommodations for her disability such as full-time telework and alternative duty stations on five occasions from September 2014 to February 2015. Because Complainant was unable to procure a reasonable accommodation, she moved her family from the Philadelphia, Pennsylvania area to the Baltimore, Maryland area. After an investigation regarding Complainant's entitlement to compensatory damages, the Agency found that Complainant was entitled to $40,000 in non-pecuniary compensatory damages and $5,332.14 in pecuniary compensatory damages for medical expenses, medical appointment costs, leave taken to attend medical appointments, parking expenses, and startup relocations expenses.

On appeal, OFO rejected Complainant's claim for additional pecuniary compensatory damages associated with lost child support payments she claimed were related to her relocation, and her need for future surgery. OFO determined that these claims were too speculative and not supported by evidence, and therefore, affirmed the Agency's determination that Complainant was entitled to $5,332.14 in pecuniary damages. Additionally, OFO determined that Complainant was entitled to $65,000 in non-pecuniary compensatory damages and noted that Complainant reported that she endured severe pain daily because of the Agency's actions and could no longer run, although she previously participated in half-marathons.

8. CIRCULATED CASES

Blount (Iris D.) v. DOD (DODEA), 0720150013 (10/24/2018) – Complainant started working as a Principal in Laurel Bay, South Carolina in the fall of 2010. Soon after she started, she hired a new Kindergarten teacher. In January 2011, Complainant met with her supervisor, the District Superintendent (DS), for her mid-year performance appraisal. DS raised concerns about Complainant's performance, and suggested that Complainant return to an Assistant Principal position to gain additional experience. Soon after, Complainant sent DS a letter requesting the reassignment to a lower-graded Assistant Principal position. In June 2011, Complainant and DS met to discuss Complainant's end-of-year performance rating.

Complainant's tenure as Principal ended on July 25, 2011, and Complainant initiated EEO counseling on July 28, 2011, alleging discrimination based on her sex, race (African American), color (brown), age (49), and in reprisal for confronting teachers exhibiting behavior that could be perceived as racist, when she received her June 2011 performance rating.

Complainant transferred to a school in Fort Bragg, North Carolina. She also filed a discrimination complaint for additional issues at the new school, and requested hearings. The AJ consolidated the hearing requests, and held a hearing. While not specified as a claim, the AJ determined that

Complainant was "essentially forced to transfer" in retaliation for filing her first EEO complaint. The AJ stated that the EEO complaint, and subsequent conflict, was the "catalyst" for the transfer, and found that DS retaliated against Complainant. The AJ found no discrimination on the other claims. The Agency issued a final order rejecting the AJ's finding of discrimination, and appealed the AJ's decision. Complainant conceded that the request for a transfer occurred prior to her filing her EEO complaint, but alleged that DS retaliated against her for opposing discrimination against the Kindergarten teacher.

The Commission found that the AJ erred in finding that the coerced transfer occurred in January 2012, when it actually occurred in January 2011. We also found that the AJ erred when she advised parties that she would only take evidence on the transfer claim as background information, but then made a finding of discrimination, without giving the parties the opportunity to fully develop the factual record on this matter. The Commission vacated the Agency's final order, in part, and remanded the reprisal claim on the alleged forced transfer for a hearing.

Barta (Theo B. and Cathie K.) v. OPM, 0520080057 & 0520080067 (12/21/2018) and **Lawrence (Willia M. and Alonzo N.) v. OPM**, 0120132419 & 0120132420 (12/21/2018) **[Repeated under Priority 3 and Findings above]** – In two companion decisions the Commission determined that OPM violated the Rehabilitation Act when it contracted with two insurance carriers for health insurance plans that categorically excluded in vitro fertilization (IVF) from coverage from about 1997 to 2000. The Commission found that the health insurance provisions were disability-based distinctions, and that OPM failed to provide adequate justifications for these disability-based distinctions. But the Commission cautioned that it was taking no position on the question of whether a similar blanket exclusion of IVF, as that practice may exist currently, would violate the Rehabilitation Act.

First, the Commission found that complainants' infertility constituted a disability. This was an important finding because it marked the first time that the Commission had determined that infertility met the definition of "disability" under the Rehabilitation Act.

Second, the Commission determined that excluding IVF from health insurance constituted a "disability-based distinction" because the evidence showed that IVF was nearly exclusively utilized for the treatment of medically diagnosed infertility from 1997 to 2000.

OPM attempted to argue that excluding IVF was not disability-based because IVF was treated in a manner consistent with other treatments that were not "medically necessary," i.e., treatments that did not cure the condition at issue. But the Commission rejected this argument, pointing out that the health insurance plans paid for various treatments and services that did not correct or cure the underlying impairment, including insulin for diabetes, durable medical equipment like wheel chairs and prosthetic legs for missing limbs, artificial insemination for infertility, and prescription drugs for erectile dysfunction.

Third, the Commission determined that the health insurance provisions at issue did not fall within the "safe harbor" provision of the Americans with Disabilities Act, as applied to the Rehabilitation Act. OPM attempted to justify excluding IVF from coverage by providing actuarial studies done during the course of litigation to try to predict what would have happened to the insurance plans had they covered IVF from 1997 to 2000. But the Commission found these studies to be inadequate because they came into being after the exclusion of IVF had gone into effect—OPM and the

insurance carriers could not have relied on these actuarial data and calculations when deciding to exclude IVF from 1997 to 2000. Therefore, the Commission concluded that OPM failed to provide sufficient evidence to show that the disability-based distinctions were attributable to any application of legitimate insurance risk classification, underwriting procedures, or verifiable actuarial data.

III. Federal Sector Oversight

- RED staff monitored HHS's compliance with EEOC's recommendations in a program evaluation completed in FY 2017. The fifth and sixth compliance reports were received in November 2018 and February 2019.
- RED staff monitored VBA's compliance with EEOC's recommendations in a program evaluation completed in FY 2018. VBA's second compliance report was received in October 2018.
- RED completed part two of its government-wide program evaluation of public safety occupations with a focus on the promotion and retention of women. The report is currently being reviewed by the Chair's office.
- RED continued the program evaluations of DOI and DSS it began in FY 2018
- RED began reviewing and evaluating federal agency EEO reports to identify model EEO employers. MD-715's Essential Elements for maintaining a model Title VII and Rehabilitation Act Program were the standard by which each agency was evaluated. These Essential Elements are: 1) Demonstrated Commitment from Agency Leadership, 2) Integration of EEO into the Agency's Strategic Mission, 3) Management and Program Accountability, 4) Proactive Prevention of Unlawful Discrimination, 5) Efficiency, and 6) Responsiveness and Legal Compliance.
- RED staff conducted a survey of federal sector EEO programs requesting their feedback on the FY 2015 Annual Report on the Federal Workforce.
- RED staff completed the FY 2016 Annual Report on the Federal Workforce.
- RED staff completed first draft of the FY 2017 Annual Report on the Federal Workforce.
- RED staff began the Special Topics Report for the FY 2017 Annual Report, entitled: "Special Topics: The State of the Federal Sector Workforce: Employees Age 40 and Over, FY2017."
- RED staff began the Special Topics Report for the FY 2018 Annual Report, entitled: "Persons with Disabilities in the Federal Workforce in FY 2018."
- RED staff successfully collected FY 2018 Form 462 complaints data.
- RED staff continued to revise the Form 462 User Instruction Manual for improved clarity.
- As part of our Lean Six Sigma (LSS) efforts, RED analyzed the impact of our FY 2018 Form 462 data collection process improvement and wrote up results.
- As part of our LSS efforts, RED established the Form 462 Data Reduction Workgroup and convened regularly to identify data items to be removed/consolidated on Form 462.
- RED fulfilled 23 data requests in quarters one and two.
- RED presented to management the FY 2018 Impact Measures Committee report.
- RED, in partnership with TOD and AOD, developed a template for the Trend Analysis Report (TAR) and developed a plan for developing a TAR dashboard.
- RED and AOD began work on a report on the adequacy of staffing levels and skillsets in federal EEO programs.
- Using PowerBI, RED created an interactive dashboard that allows agencies to view their performance on key EEO indicators. It is currently under revision. Once complete, this dashboard will be available on the public website and will replace the static profile tables of previous years.

- RED reviewed and provided feedback to the State University of New York IPA's on the report tentatively titled, "Understanding the Link between Perceived Harassment and Harassment Complaints in the Federal Government."
- RED, in collaboration with SOD, began mapping the flow of external correspondence throughout OFO by interviewing key members of OFO responsible for processing these correspondences.
  - SOD staff issued two editions of the Digest of EEO Law (FY 2018, Volume 4, and FY 2019, Volume 1) containing summaries of noteworthy select decisions issued in FY 2018 and FY 2019, and coordinated with OCLA to issue press releases.
  - SOD staff identified stakeholder needs from previous focus groups conducted and from internal discussions regarding common problems in appellate briefs and began preparing an upcoming Guide to Appellate Brief Writing for *pro se* brief writers to increase and facilitate access to the appellate process.
  - As part of an ongoing Lean Six Sigma project targeting the Appellate Review process, an OFO team collected key data points from 300 FY 18 appellate cases during the project's "measure" phase.
  - SOD staff initiated an overhaul of the compliance enforcement program to better reflect OFO's organic compliance enforcement efforts.
  - An OFO team mapped compliance activities in various divisions to find points of intersection and then proposed and implemented streamlined measures to facilitate compliance monitoring and responses.
  - SOD staff reviewed quarterly progress reports and conducted ongoing monitoring of two agency pilot programs, which are testing ways to expedite and otherwise improve the EEO complaint process.
  - SOD staff initiated drafting a guide for complainants and agencies to assist them in navigating the EEOC hearings process, with an eye to streamlining the process and making it more accessible, understandable and expeditious.
- Following the issuance of the revised MD-715 instructions, AOD implemented the new Part forms in FedSEP's MD-715 module in April 2019.
- Of the 85 agencies selected for technical assistance visits, AOD has met with 40 agencies. AOD has timely issued one feedback letter to an agency concerning their efforts to achieve a model EEO program. AOD staff are working to complete the remaining visits and timely issue the remaining feedback letters.
- To ensure that 55% of the federal agencies have a compliant anti-harassment policy, AOD staff addressed this topic during technical assistance visits. Moreover, AOD referred seven agencies with deficient policies to ARP for inclusion in future appellate decisions. Currently, 63% of agencies have a compliant anti-harassment policy.
- To ensure that 45% of federal agencies have compliant reasonable accommodation procedures, AOD staff have addressed this topic in the relevant technical assistance visits. Moreover, AOD staff conducted separate meetings with agencies to provide detailed feedback on their procedures. Currently, 18% of agencies have compliant reasonable accommodation procedures.

IV. Outreach & Training

1. Notable Accomplishments:

- Revised New Investigator Refresher Training.
- Revised New Counselor Refresher Training.
- Revised Respectful Workplaces Training for Managers and Employees.
- Staffed and Began Work with EEO Education Consortium Certification Subcommittee.
- Completed EXCEL agenda.
- Hosted Federal Sector "Train the Trainer" for 50 EEOC collateral duty trainers.
- Attended OFP-Sponsored Respectful Workplace Train the Trainer.
- OFO's Training Division (TOD) has delivered 35 Leading for Respect" trainings (1050 total attendees) and 35 "Respectful Workplace" training (875 total attendees).
- Social Media Engagement increased by 48%.

2. Eliminating Barriers in Recruitment and Hiring

- OFO staff spoke on disability inclusion in the federal government at the Naval Sea Systems (NAVSEA) Command Warfare Center's Leadership in a Diverse Environment event, Washington., D.C.
- OFO Policy Advisor spoke on Reasonable Accommodations at Army National Guard Bureau.
- OFO Policy Advisor spoke on Disability Awareness at BIG Region XI, Silver Spring, MD.
- OFO Policy Advisor spoke on Disability Awareness at DOI, BLM, Washington, D.C.
- OFO Policy Advisor spoke on Disability Awareness at BIG Region XI, Silver Spring, MD.
- OFO Policy Advisor spoke on Disability Awareness at NIH, Washington, D.C.
- OFO Policy Advisor spoke on People with Disabilities at NOAA, Web Based.
- OFO Policy Advisor spoke on People with Disabilities at Department of Naval Sea Systems, Washington, D.C
- TOD staff spoke on Reasonable Accommodation at Department of Defense, Webinar.
- TOD staff spoke on Reasonable Accommodations and Pitfalls at EEOC, OFO and TOD, Webinar.
- Associate Director, FSP, spoke on SEPM With A Small Budge to National Labor Relationship Board (NLRB), Washington, D.C.
- OFO FSP staff presented on "Special Emphasis Program Managers" to Small Agency Council (SAC), Washington., D.C.
- RED analyst provided expert witness consultation and analysis for three federal sector cases on appeal to EEOC.

3. Protecting Immigrant, Migrant and Other Vulnerable Workers

- TOD staff provided Anti-Harassment Program Management Training to NAVAIR EEO staff.
- Associate Director, FSP, spoke on SEPM With A Small Budge to National Labor Relationship Board (NLRB), Washington, D.C.
- OFO FSP staff presented on "Special Emphasis Program Managers" to Small Agency Council (SAC), Washington., D.C.
- OFO staff spoke on disability inclusion in the federal government at the Naval Sea Systems (NAVSEA) Command Warfare Center's Leadership in a Diverse Environment event, Washington, D.C.
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- OFO Policy Advisor spoke on People with Disabilities at NOAA, Web Based.
- OFO Policy Advisor spoke on People with Disabilities at Department of Naval Sea Systems, Washington, D.C
- TOD Staff spoke on Reasonable Accommodation at Department of Defense, Webinar.
- TOD Staff spoke on Reasonable Accommodations and Pitfalls at EEOC, OFO and TOD, Webinar.

4. Addressing Emerging and Developing Issues

- TOD staff provided Anti-Harassment Program Management Training to NAVAIR EEO staff
- OFO Associate Director, FSP, met with the French Parliament, which is working on "psychosocial issues and harassment (both psychological and sexual) affecting individuals working at the National Assembly (civil servants and contract workers, parliamentary staffers covered by labor laws, deputies, outside contractors including cleaning staff, etc.), Washington, D.C.
- RED staff is completed a research study on diversity and inclusion for Information Technology workers in the federal sector.
- OFO Associate Director, FSP, spoke on EEO Topics and Compliance to NOAA.
- EEOC staff spoke on Best Practices at Hearing at Department of Airforce, Washington, D.C.
- EEOC staff presented case updates at Society Federal Labor and Employee Relations Professionals (SFLERP), Washington, D.C.
- EEOC presented case updates at Department of Justice (DOJ), Washington, D.C.

- OFO Associate Director, FSP, spoke on Prevailing Issues in EEO at US Army Corp of Engineer, Vicksburg, AL.
- EEOC staff spoke on Reasonable Accommodations at Army National Guard Bureau.
- EEOC staff spoke on SEP Management at Small Agency Counsel (SAC).
- RED staff is completing a research study to determine how to improve the effectiveness of EEO federal sector training in reducing complaint activity.
- RED staff provided a review of proposed regulatory changes to OLC regarding the Bureau of Labor Statistics sponsored information collection request titled, "Current Population Survey Disability Supplement," and DOL Employment and Training Administration's ETA proposed extension for the authority to conduct the information collection request ICR titled, "Occupational Code Assignment."
- RED staff responded to OLC's request for review of Executive Order 13859 (Maintaining American Leadership in Artificial Intelligence on the likely impact of the order on EEOC's operations).
- SOD attorney delivered training on anti-harassment, the Rehabilitation Act, retaliation and a general EEO overview to Department of Housing and Urban Development managers, Washington, D.C.

5. **Enforcing Equal Pay Laws**

- OFO ARP Attorney presented an EEOC Case Update for the Defense Equal Opportunity Management Institute (DEOMI) EEO Specialist's class, Patrick AFB, FL.
- OFO Supervisory EEO Specialist provided New Counselor Training to Defense Intelligence Employees, Washington, DC.
- OFO TOD Contract Trainer provided Counselor Refreshers Training to Defense Logistics Agency employees, Washington, DC.
- OFO TOD Assistant Director provided New Counselor Training to Texas Military Department employees, Austin, TX.
- OFO TOD provided Counselor Refresher Training to Treasury employees, Washington, DC.
- OFO TOD provided Counselor Refresher Training to SSA employees, Washington, DC.
- OFO TOD provided EEO Laws Training to Department of the Army employees, Fort Belvoir, VA.
- OFO TOD provided New Investigator Training to Florida Housing Finance Corporation employees, Tallahassee, FL.
- OFO TOD provided New Counselor Training to Indian Health Service employees, Portland, Oregon.
- OFO TOD provided EEO Laws for Employees Training to Defense Nuclear Facilities Safety Board employees, Washington, DC.
- OFO TOD Attorney provided Case Updates to HUD employees, Washington, DC.

6. Preserving Access to the Legal System

- OFO ARP Attorney provided Case Updates to the Society of Federal Labor and Employee Relations Professions (SFLRP), Arlington, VA.
- OFO ARP Attorney and OFO TOD provided Case Updates and best practices at hearing training to DOJ employees, Columbia, SC.
- OFO TOD provided training on ROI Sufficiency online via First Fridays, OFO.
- OFO TOD provided Dealing with Workplace Conflict Training via no-cost webinar.
- OFO TOD and OFO, FSP Associate Director met with the Senior Executive Association (SEA) to discuss what senior leaders can do prevent sexual harassment in the workplace.
- OFO TOD provided New EEO Counselor Training to National Institutes of Health employees, Rockville, MD.
- OFO TOD provided New Investigator Training to USDA employees, Washington, DC.
- OFO TOD provided Investigator Refresher Training to USDA employees, Washington, DC.
- OFO Staff provided Barrier Analysis Training to Bureau of Reclamation employees, Sacramento, CA.
- OFO TOD provided Drafting Letters of Acceptance and Dismissal (LOAD) Training to Department of Army employees, Arlington, VA.
- OFO TOD provided Barrier Analysis Training to Department of the Army employees, Fort Worth, TX.
- OFO Attorney provided Case Updates GSA attorneys at their national training conference, Washington, DC.
- OFO Workforce Analyst presented on the topic of opportunities and challenges for persons with disabilities in the workplace to NAVSEA Warfare Center employees, Washington, DC.
- OFO staff provided Barrier Analysis training the National Guard Bureau, Arlington, VA.
- OFO TOD provided training on the federal sector EEO process to EEO practitioners and the general public at no cost online via First Fridays with OFO
- OFO TOD provided training on Common Reasonable Accommodation Pitfalls and FAQs to EEO practitioners and the general public at no-cost online via First Fridays with OFO.
- OFO TOD provided Barrier Analysis Tool training at no cost online via webinar.
- OFO TOD provided customized Counseling Interview Training to Department of Treasury, IRS employees, Dallas, TX.

- OFO ARP Attorney presented an EEOC Case Update for the Defense Equal Opportunity Management Institute (DEOMI) EEO Specialist's class, Patrick AFB, FL.
- OFO Supervisory EEO Specialist provided New Counselor Training to Defense Intelligence employees, Washington, DC.
- OFO TOD Contract Trainer provided Counselor Refreshers Training to Defense Logistics Agency employees, Washington, DC.

- OFO TOD Assistant Director provided New Counselor Training to Texas Military Department employees, Austin, TX.
- OFO TOD provided Counselor Refresher Training to Treasury employees, Washington, DC.
- OFO TOD provided Counselor Refresher Training to SSA employees, Washington, DC.
- OFO TOD provided EEO Laws training to Department of the Army employees, Fort Belvoir, VA.
- OFO TOD provided New Investigator Training to Florida Housing Finance Corporation employees, Tallahassee, FL.
- OFO TOD provided New Counselor Training to Indian Health Service employees, Portland, Oregon.
- OFO TOD provided EEO Laws for Employees Training to Defense Nuclear Facilities Safety Board employees, Washington, DC.
- OFO TOD Attorney provided Case Updates to HUD employees, Washington, DC.
- OFO TOD provided Drafting Letters of Acceptance and Dismissal training to Immigration and Customs Enforcement employees, Washington, DC.
- OFO TOD provided No Fear Act training to Defense Nuclear Facilities Safety Board employees, Washington, DC.
- OFO TOD provided EEO Laws training to Defense Nuclear Facilities Safety Board employees, Washington, DC.

- OFO FSP Associate Director presented on the topic of Barrier Analysis - How to Identify Diversity Gaps and Shape Diversity Strategies, at the Joint Minority and Women Inclusion Symposium, Washington, DC.
- OFO FSP Associate Director provided Unconscious Bias Training to FEMA employees, Washington, DC.
- OFO staff hosted and presented at quarterly Federal Exchange on Employment and Disability (FEED) meetings with stakeholders, Washington, DC.
- OFO TOD staffed and conducted meetings with the EEOC Education Consortium Certification Subcommittee to develop certification standards to both standardize EEO practice and professionalize the field of EEO.

7. Preventing Harassment through Systemic Enforcement and Targeted Outreach

- OFO TOD and OFO FSP Associate Director met with the Senior Executive Association (SEA) to discuss what senior leaders can do prevent sexual harassment in the workplace.

- OFO staff delivered Respectful Workplace training for several federal government agencies.
- OFO staff provided Anti-Harassment Training to HUD employees, Washington, DC.

- OFO FSP Associate Director spoke on harassment and prevailing issues in EEO at Department of Air Force's Advance Labor and Employment Law Course (ALEC), Joint Base Andrews, MD.
- OFO ARP Attorney provided Case Updates for the Defense Equal Opportunity Management Institute (DEOMI), Patrick AFB, FL.
- OFO staff presented on "Statutory, Regulatory, and Policy-Driven Equal Opportunity Laws Governing Compliance" for Coast Guard Senior Leaders at Defense Equal Opportunity Management Institute (DEOMI), Patrick AFB, FL.
- OFO FSP Associate Director spoke on harassment and prevailing issues in EEO at U.S. Army Corp of Engineer's EEO Symposium, Vicksburg, MS.
- OFO Staff provided anti-harassment training to Federal EEO Civil Rights Council members, Washington, DC.
  - OFO TOD provided EEO Laws for Employees Training to Defense Nuclear Facilities Safety Board employees, Washington, DC.
  - OFO TOD provided No Fear Act Training to Defense Nuclear Facilities Safety Board employees, Washington, DC.
  - OFO TOD provided Investigator Refresher Training (focused on harassment) both virtually and traditionally in Washington, DC.
  - OFO staff provided anti-harassment training to USCIS employees, Washington, DC.

7. Training/Outreach – General

- EEOC Staff spoke on disability inclusion in the federal government at the Naval Sea Systems (NAVSEA) Command Warfare Center's Leadership in a Diverse Environment event, Washington, DC.
- EEOC staff conducted webinar live Demonstration of Barrier Analysis.
- EEOC staff provided New Investigator training to the United States Department of Agriculture(USDA), Washington, D.C.
- EEOC staff provided New Counselor training to National Institute of Health (NIH), Rockville, MD.
- OFO Associate Director, FSP, spoke to NOAA on EEO Topics and Compliance.
- EEOC staff spoke on Best Practices at Hearings at Department of Airforce, Washington, D.C.
- EEOC staff presented case updates at Society Federal Labor and Employee Relations Professionals (SFLERP), Washington, D.C.
- EEOC staff presented case updates at Department of Justice (DOJ), Washington, D.C.
- OFO Associate Director, FSP, spoke on Prevailing Issues in EEO at US Army Corp of Engineer, Vicksburg, AL.
- EEOC staff spoke on Reasonable Accommodations at Army National Guard Bureau.
- EEOC staff spoke on SEP Management at Small Agency Counsel (SAC).
- OFO Associate Director, FSP, met with the French Parliament, which is working on "psychosocial issues and harassment (both psychological and sexual) affecting individuals working at the National Assembly (civil servants and contract workers,

parliamentary staffers covered by labor laws, deputies, outside contractors including cleaning staff, etc.), Washington, DC.

- RED is co-leading the EEOC Education Consortium Certification Committee with TOD; the committee has begun work on identifying possible certification program parameters and possible pathways to certification.

Quarterly Strategic Enforcement Plan Report
Office of Federal Operations
3rd and 4th Quarters FY 2019

I. Background: General FY 2019 3rd Quarter Appellate Review Program Accomplishments

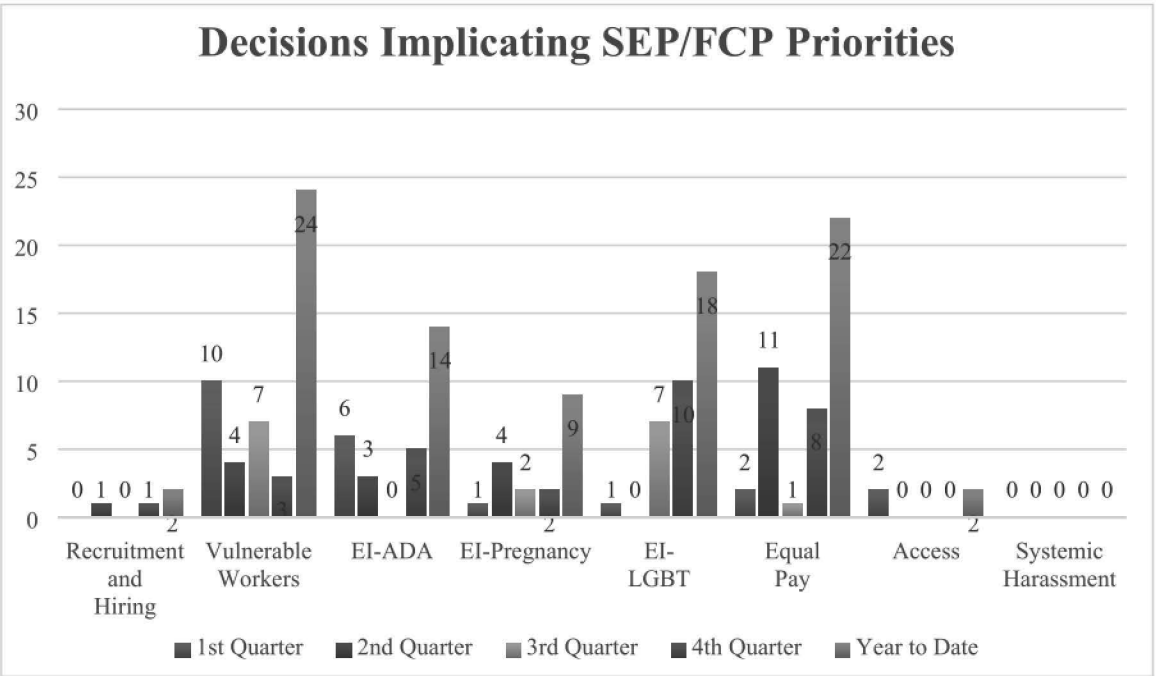
During the 3rd and 4th Quarters of FY 2019, the Office of Federal Operations (OFO) resolved 2,293 appeals, including 1,281 decisions on the merits and 875 procedural closures. Of the 875 procedural closures, 485 of them involved initial appeals under review by OFO, and we reversed 189 or 38.9% of the agency dismissals. Of the 1,281 merit decisions, OFO issued 53 findings of discrimination during the 3rd and 4th Quarters. We found discrimination on the basis of retaliation in 24 of the findings, disability in 22 of the findings, race (Black) in 7 of the findings, and sex (female) in 7 of the findings. The top three issues involved in the findings included harassment (15), reasonable accommodation (14), and promotion (6).

	1st Quarter	2nd Quarter	3rd Quarter	4th Quarter	Year to Date
Resolutions	1,035	766	1,172	1,121	4,094
Merits Resolutions	618	459	696	585	2,358
Findings	24	24	26	27	101
Non-Findings	595	435	670	558	2257
Procedural Resolutions (all)	346	260	414	461	1,481
Procedural Resolutions (from Initial Appeal)	150	127	196	289	762
Affirming Dismissal (excluding denials)	99	81	129	167	476
Reversing Dismissal	51	46	67	122	286

With regard to the categorization of the 2,293 resolutions, OFO identified 46 appeals that implicated one or more SEP/FCP priority. Section II below contains charts breaking down the composition of the individual priorities, summaries of the 46 decisions OFO attorneys categorized as implicating the SEP/FCP priorities, and summaries of the findings of discrimination made in the 3rd and 4th Quarters.

II. Analysis of SEP/FCP Priority Areas

The chart below depicts the distribution of the 46 appellate decisions OFO identified as implicating an SEP/FCP category in the 3rd and 4th Quarters of FY 2019:



The numbered sections below provide more information about each of the six SEP priorities. Specifically, these sections describe the related FCP categories under each SEP, as well as summaries of the specific decisions under each SEP/FCP priority. In Section 7, by contrast, we provide summaries of noteworthy decisions, findings of discrimination, and decisions that were circulated during the 3rd Quarter, whether or not they implicated an SEP/FCP category.

1. ELIMINATING BARRIERS IN RECRUITMENT AND HIRING

The decision implicating this SEP Priority concerned the FCP of use of screening tests.

Decision Summary for this Category

Hodges (Malcom N.) v. USPS, 0120181499 (09/20/2019) – Complainant alleged that the Agency discriminated against him on the basis of race when he was notified that he was not select for a Mail Handler Assistant (MHA) position. A1, the Operations Support Specialist, at the Processing and Distribution Center was the selecting official for the MHA position at issue. The record indicates that 25 applicants applied for the MHA vacancy. Each applicant was required to take a test prior to being offered an interview, and the test scores were ranked. The Agency utilized the "rule of three," meaning that the selectee had to be one of the top 3 recommended candidates. Complainant took the test, and

scored 79.3, which ranked him 13th out of the 25 applicants. 14 applicants were scheduled for interviews in order of their test scores. Complainant was included because he ranked 13th.

As part of its process, the Agency also conducted a criminal background check for all applicants for all positions. Complainant was deemed not suited for hiring because, in addition to his test score ranking, A1 considered his recent criminal convictions. The convictions were for harassment and interference. According to the Agency, MHAs handle packages of value and must be able to follow instructions from supervisors and cooperate with other employees. C1, a Caucasian male, was selected for the position. He had the highest test score of the interviewed candidates (83.20). Complainant was notified that he was not selected for the position of MHA because he did not meet the eligibility or suitability requirements of the position. Complainant argued that his criminal history did not show violent crimes or felonies, and that the charges were in existence when he was previously selected as a temporary holiday position with the Agency.

An EEOC AJ granted summary judgment in the Agency's favor noting the Agency's stated clear intention to hire someone from the top three candidates. There was no dispute that Complainant's test score was too low for him to have been ultimately selected. OFO affirmed the Agency's final order adopting the AJ's decision. OFO found no evidence to support Complainant's contention that his test score was merely a pretext to discriminate against him.

Regarding Complainant's argument that the Agency's reliance on his criminal conviction record was discriminatory, OFO found that the record indicated that the Agency considered several factors in making its decision, i.e., the nature of his most recent convictions and how it applied to the position at issue, and that its policy, as articulated in the record, was consistent with the principles set forth by the Commission in its Enforcement Guidance.

2. PROTECTING IMMIGRANT, MIGRANT AND OTHER VULNERABLE WORKERS

Of the 10 (10) decisions that implicated this SEP Priority, one (1) concerned the FCP related to security clearances, and nine (9) concerned the FCP concerning contractors.

Decision Summaries for this Category

Contractors

Graham (Colene R.) v. VA, 0120180435 (04/17/2019) – Up through December 26, 2016, Complainant worked as a contract fee-based Medical Instrument Technician (Polysomnographic - Sleep) in Houston, Texas. Thereafter, she was converted to an intermittent federal employee doing the same function. She alleged that she was discriminated against based on her race (African-American) when: (1) two coworkers (CW1 and CW2) were chosen, without competition, as full-time federal employees, (2) starting in April 2016, her weekly hours were reduced from 40 to 30, and (3) on December 27, 2016, her status was converted to intermittent employee who was paid by the hour, not by fee-based procedures, resulting in a reduction in pay.

On appeal, OFO affirmed the Agency's final decision concluding no discrimination was established. The appellate decision recounted that CW1 was chosen because he was accredited to score sleep studies and Complainant did not have this accreditation, and CW2 was converted from being a contract fee-based worker to a full-time employee because the Agency believed, for specified reasons, that CW2 showed she could cover when the Sleep Lab supervisor was absent, and Complainant's

performance did not inspire such confidence. Complainant did not show the Agency violated recruiting procedures by not competing these positions. The appellate decision also determined that Complainant's hours were reduced because the Sleep Lab was required to prioritize the schedules of its full-time employees, and Complainant was an as-needed contractor with no guaranteed hours. Finally, it was determined that the evidence established that Complainant was converted to an intermittent employee because the Agency eliminated the contractor fee-based system in the Sleep Lab, and the same thing occurred with four other contract fee-based technicians. Complainant did not show these reasons were pretextual for unlawful discrimination.

Browne (Felton Z.) v. BCFP, 2019001255 (04/09/2019) – The Agency entered a contract with Smartronix, to provide Network Engineer Support. In fulfilling its services, Smartronix executed a sub-contract with staffing firm BigR.io. BigR.io, in turn, recruited and interviewed Complainant (through his company, F2F Communications), to fill an AWS Cloud Engineer position. Complainant was selected and assigned to a team, comprised of Agency employees and contractors, in the Agency's Office of Technology and Innovation, in Washington, D.C. Several months after he began his position, Complainant agreed to go out to lunch with a male colleague from Smartronix. While walking outside, the colleague "suddenly grabbed [Complainant]." When Complainant became upset, the colleague apologized and said he was joking. Complainant returned to the facility and reported the incident to his supervisor, the Project Manager, a Smartronix employee. Months later, Complainant contacted the EEO Counselor and filed a complaint based on sex.

The Agency dismissed the complaint asserting that Complainant was not an Agency employee and therefore lacked standing. Complainant appealed the decision to the Commission. In considering the many factors used to determine whether an employee/employer relationship exists, we noted that Complainant worked at an Agency facility, with Agency equipment, on a team which included Agency employees, and Agency officials were able to approve occasional telework. The record, however, reflected more of a contractor relationship. Complainant was recruited and paid by BigR.io. As the owner of his own company, Complainant was responsible for his tax withholdings. The Project Manager, a Smartronix employee, was Complainant's supervisor. It was the Project Manager who Complainant reported the incident to, conducted a follow-up meeting with the colleague, and purportedly informed the Agency. Lastly, we noted that the allegation of sexual harassment itself does not reflect control by the Agency. Complainant alleges he was off-site, during his lunch hour, when a Smartronix employee inappropriately touched him.

Owusu (Terrie M.) v. DOD, 2018000063 (05/02/2019) – Complainant worked for a staffing firm serving the Agency as a Licensed Practical Nurse at Walter Reed Medical Center. She alleged that she was subjected to discrimination and harassment based on her race/color (African-American/Black) when from August 2017 to December 2017, a coworker repeatedly directed race-based stereotypical remarks at her. The Agency dismissed the complaint for failure to state a claim. It reasoned that Complainant was not an Agency employee. OFO reversed.

OFO found that the Agency possessed sufficient control over Complainant's position to qualify as his common law employer for the purpose of the 29 C.F.R. Part 1614 EEO complaint process based on the factual findings in the FAD alone. Specifically, the Agency acknowledged that Complainant worked on Agency premises using Agency equipment, and served the Agency as an LPN since March 2014, a long

duration. The Agency acknowledged that the contract between it and the staffing firm requires Complainant to have two years of prior experience, advanced life support certification, and fulfill continuing education, pointing to joint control over Complainant's employment. The Agency conceded that it exercised control over Complainant's work product by daily patient assignments and feedback to her based on her work, and that it monitored her time and attendance.

Ahmad (Art B.) v. State, 0120180799 (05/14/2019) - Complainant worked for a staffing firm serving the Agency as Language and Culture Instructor at its School of Foreign Language. He alleged that he was discriminated against based on his age (66) and religion (Ahmadi Sect) when effective August 23, 2012, the Agency did not renew his contract assignment. The Agency initially dismissed the complaint for failure to state a claim because he was not a federal employee. The Commission reversed, finding that under common law Complainant was an employee of the Agency. EEOC Appeal No. 0120131112 (Oct. 17, 2014). On remand, the Agency conducted an EEO investigation and Complainant requested a hearing. By summary judgment, an EEOC AJ found no discrimination. The AJ found that the Agency did not renew Complainant's contract assignment because his Agency supervisor rated his performance as "fair," too low to merit a renewal, and Complainant did not prove this reason was pretext. OFO affirmed.

Matheson (Eugenia C.) v. Navy, 2019000953 (05/09/2019) – Complainant worked for a staffing firm serving the Agency as a Program Analyst. She alleged that she was subjected to harassment and/or discrimination based on her age (59 - 61) and reprisal for prior protected EEO activity when from August 2015 – June 2018, she was harassed (primarily by staffing firm employees), received a negative performance appraisal by her staffing firm supervisor who worked onsite (S1), was assigned too much work, and was not selected at various times for promotion to staffing firm jobs serving the Agency. The Agency dismissed the complaint for failure to state a claim. It reasoned that Complainant was not an employee of the Agency. OFO affirmed.

OFO found that the Agency did not have sufficient control over Complainant's position to qualify as her common law joint employer. The staffing firm took care of Complainant's compensation. While Complainant worked on Agency premises, she acknowledged that S1 and her staffing firm Program Manager controlled when, where, and how she performed her job and that she received most of her direction from the staffing firm. While the Agency set the overall hours when the staffing firm provided administrative services, the record showed S1 controlled Complainant's day to day schedule. The staffing firm actively investigated Complainant's allegations of discrimination, implying it retained its authority to act on its findings, another significant factor in pointing to the staffing firm controlling Complainant's employment.

Koo (Regina M.) v. Army, 2019001613 (06/05/2019) – Complainant worked for a staffing firm serving the Agency as a Conference Planner. She alleged that she was subjected to discrimination and harassment based on her race (Asian) and sex (female) when: (1) between November 2017 to her discharge on August 17, 2018, her Agency supervisor harassed her by screaming at her and belittling and insulting her and restricting her interactions with higher level Agency management, and (2) cutting off her service to the Agency on August 17, 2018, resulting in her termination a month later. The

Agency dismissed the complaint for failure to state a claim. It reasoned that Complainant was not an Agency employee. OFO reversed.

OFO found that the Agency possessed sufficient control over Complainant's employment to qualify as her common law joint employer. Specifically, the Agency assigned projects to her directly and reviewed products and deliverables, provided individualized assessment of staffing firm personnel to their staffing firm team leads, reviewed their vacation requests, and asked the staffing firm to cut off Complainant's access to the Agency site, resulting in the cessation of her service to it and the staffing firm terminating her one month later for lack of assignment.

Patel (Irvin M.) v. GSA, 2019001878 (08/15/2019) – Complainant was employed by Artech Contracting Company, a sub-contractor for Leidos Contracting Company who contracted directly with the Agency. He worked for the Agency as a Strategic Capital Planner. Believing that his termination was due to his race (Asian), national origin (Indian), color (brown), and/or sex, he filed an EEO complaint. The Agency dismissed the complaint for failure to state a claim, finding that Complainant was not an Agency employee. In its decision the Agency noted that Complainant was hired and supervised by a Leidos employee, the pay rate was set by Leidos, he was paid by Artech, he worked at Leidos offices, leave was processed by Artech and Leidos, and the Agency did not provide retirement or health benefits. Complainant appealed the dismissal, and contended that the Agency provided him with a laptop, an Agency credential, and an Agency systems account.

The Commission found that the Agency provided insufficient evidence to support its dismissal. The complaint file simply contained a copy of the final decision, the EEO Counselor's Report, and emails between the EEO Counselor and Complainant. The Agency failed to even provide a copy of the contract, let alone affidavits addressing the daily conditions of Complainant's job. The Agency did not meet its burden to provide evidence to substantiate its dismissal. The decision was reversed and remanded for further processing.

Robinson (Helen G.) v. USPS, 2019002503 (08/23/2019) – Complainant worked for Staffing Firm 1 serving the Agency as a post office Cleaner, and as a subcontractor for Staffing Firm 2 serving the Agency as a carrier via a Highway Contract Route (HCR) contract. Complainant represented that since 1999, she had direct HCR contracts with the Agency, but in 2015, after her left leg was amputated, she novated her contract to her daughter. Nevertheless, Complainant continued to work on the contract. Complainant alleged that she was subjected to discrimination based on her disability (amputee) when: (1) on February 7, 2018, her cleaning contract was terminated, (2) on May 15, 2018, and continuing, her reasonable accommodation request for a spot closer to the dock was denied; and (3) on October 17, 2018, November 14, 2018, and November 15, 2018, the Postmaster wrote her up using Contract Route Irregularity Reports postal form 5500, criticizing her conduct and performance. The Agency dismissed the complaint for failure to state a claim. It reasoned that Complainant was not an Agency employee. OFO reversed.

Regarding Complainant's carrier work (issues 2 and 3), the decision found that under common law Complainant was an employee who was employed by the Agency because it possessed sufficient control over Complainant's employment, e.g., via the HRC contract the Agency had the right to control the means and manner of Complainant' performance via various requirements – the precise begin and

end times for casing her route, turn by turn directions on the route she traveled to deliver mail, and requirements on personal appearance, including precise uniform requirements. Further, Complainant worked on Agency premises as a carrier for nearly 20 years, and the Agency retained the right to terminate the contract. Also, the facts on issue 2 indicated the Agency controlled whether to provide Complainant reasonable accommodation for parking, and the facts in issue 3 indicated the Agency corrected her conduct and performance.

Regarding Complainant's cleaner work (issue 1), the decision found there was insufficient information in the record to determine whether under common law or otherwise Complainant was an employee who under common law was jointly employed by the Agency and reversed the dismissal of issue. 1. The Agency was ordered to gather the missing information and accept for investigation issue 1 or issue a FAD dismissing issue 1.

The Agency also dismissed the entire complaint because contract disputes are governed by the Contract Disputes Act of 1978, which provides they may be appealed to the Postal Board of Contract Appeals, making her EEO complaint a collateral attack on the contracts dispute process. Citing Commission case law, the decision reversed.

Moore (Glenna O.) v. Air Force, 0720180030 (08/20/2019) **[Repeated under General Enforcement below]** – Complainant worked for Staffing Firm 1 serving the Agency as an Outreach Manager (social worker). She filed an EEO complaint alleging that she was discriminated against by the Agency: (1) based on her sex when her Agency supervisor subjected her to harassment by making three denigrating sexual comments over a number of days, (2) she was retaliatorily harassed as evidenced by 23 incidents, and (3) was constructively discharged.

Following an investigation and hearing, an AJ found discrimination on issues 1, 2 and 3, and ordered Complainant be instated to higher paying contract clinical social worker position the Agency retaliatorily blocked, back pay in accordance with 5 C.F.R. § 550.805, 10 years of front pay if Complainant was not instated, $125,000 in nonpecuniary damages, a specified amount of attorney fees and costs, and training for responsible management officials. The Agency rejected the AJ's decision, and appealed. OFO affirmed the AJ because her findings were supported by substantial evidence, but modified some of the ordered relief.

As an initial matter, OFO disagreed with the Agency's appellate argument that it was not Complainant's common law joint employer. OFO found that the Agency has sufficient control over the Complainant's employment to be her joint employer, e.g., the Agency chose her for hiring, she reported to Agency management which assigned her work with detailed expectations and deadlines, controlled her schedule, and blocked her promotion.

OFO found that that EEOC did not have authority to order the staffing firm to hire Complainant to serve the Agency, but since the practice of local Agency management was to choose a candidate for a position and hire her through a staffing firm, it ordered the Agency to choose Complainant for instatement, unequivocally ask the appropriate staffing firm to hire her, and if the staffing firm refused, to pay Complainant 10 years front pay. OFO found the front pay award was supported, in part, by the AJ's finding that while employed Complainant had a reasonable expectation of continued employment by a staffing firm serving the Agency indefinitely, and the Agency did not contest this on appeal. OFO found that 5 C.F.R. § 550.805 did not apply since Complainant received her pay from a staffing firm,

and ordered the Agency to pay the back pay, with interest, and benefits she would have received from the applicable staffing firm(s), and use 29 C.F.R. § 1614.501 as a general guide. OFO modified the training to include a Workplace Civility and Bystander Intervention component, and retroactively updated the award of attorney fees to take account of Complainant's attorney current hourly rate and the hours expended drafting Complainant's appellate opposition brief.

Security Clearance

Enright (Al H.) v. State, 0120181043 (06/18/2019) – Complainant was employed by the Agency as a Foreign Service Officer. He alleged that he learned on April 15, 2015, that he was discriminated against based on his disability and reprisal when he did not receive a promotion since 2011, by Promotion Boards which met annually and the processing of the renewal of his security clearance was delayed. Complainant wrote that on April 15, 2015, he learned that false and discriminatory information was put in his security clearance investigative file. Following an investigation, Complainant requested a hearing. An AJ with the EEOC dismissed the complaint for failure to state a claim because Complainant claimed his non-promotions and delay were predicated on the inclusion of statements and information in his security clearance investigative file, and hence outside the Commission's jurisdiction. The AJ relied on a Commission case and its progeny holding that once statements gathered during a security clearance investigation are included in a security clearance investigative report, they are "squarely within the rubric of a security clearance determination and, accordingly, beyond the Commission's jurisdiction." The Agency's final order fully implemented the AJ's decision. OFO reversed.

OFO explained that the holding in cases cited by the AJ was narrowly construed. It added that the rule was designed to prevent Commission review of the substantive determinations in the security clearance process, which include what to put in a security clearance file and what to rely on therein to make the determination. But while what is put in security file and relied on to make a security clearance determination are outside the Commission's jurisdiction, the Commission may review claims that promotions were denied and processing a security clearance was delayed because of discrimination. The complaint was remanded for continued processing.

3. ADDRESSING EMERGING AND DEVELOPING ISSUES

During the 3rd and 4th Quarters of FY 2019, OFO resolved 26 decisions under this SEP Priority. Of the 17 decisions implicating the LGBT component of this SEP Priority, three (3) concerned the FCP LGBT coverage. Of the 5 decisions implicating the ADA component of this SEP Priority four (4) concerned the FCP post-ADAAA reasonable accommodation, and one (1) concerned the FCP Medical Privacy. Of the 4 decisions implicating the pregnancy limitations SEP Priority, two (2) concerned the FCP pregnancy accommodation.

Decision Summaries for this Category

LGBT

Simpson (Claud S.) v. VA, 0120170251 (04/02/2019) – Complainant worked as a Social Worker, Suicide Prevention Counselor at the Agency's Central Texas Veterans Health Care System in Temple, Texas.

On or about May 26, 2010, Complainant alleged that a coworker made a death threat against him, which was investigated by the police. Complainant informed the police detective that he was being harassed. For example, when discussing the possible repeal of the military's "Don't Ask, Don't Tell" policy, a coworker allegedly stated that he "would hate for a tire to fall on [Complainant]", which Complainant perceived as a death threat. Complainant also alleged that the Federal Bureau of Investigations was spying on him; and that there was a conspiracy against him. On June 4, 2010, Agency officials met with Complainant to instruct him to report for a Fitness for Duty Examination, based on the detective's investigation.

Complainant filed an EEO complaint alleging that he was discriminated against, and harassed, based on his sexual orientation, disability, and in reprisal for his EEO activity. Complainant requested a hearing, which was held in August 2016. The AJ determined that the Agency's decision to instruct Complainant to take a mental fitness for duty exam was not based on his sexual orientation, but due to his allegations that his coworkers were making death threats against him. Regarding Complainant's allegation that he was harassed based on his sexual orientation, the AJ found that the record did not support his allegation that many of the incidents occurred as alleged. The AJ determined that even assuming that the incidents occurred as alleged, only one was related to Complainant's sexual orientation, but a one-time incident did not meet the definition of harassment.

The Commission found that the AJ's decision was supported by substantial evidence in the record, and affirmed the Agency's final order adopting the AJ's finding that Complainant was not discriminated against, nor subjected to a hostile work environment, based on sexual orientation, disability, or in reprisal for his EEO activity.

Turnbo (Celeste P.) v. DHS (TSA), 0120171593 (04/02/2019) – Complainant is a White, Caucasian, lesbian female and worked as a Federal Air Marshal. Complainant alleged that her supervisor (S1) began treating her differently after she told her about her female partner, but S1 denied knowledge of Complainant's sexual orientation. Complainant alleged that she was subjected to discrimination based on race, sex, sexual orientation, and color when her supervisors subjected her to harassment, when she was reassigned to flight status, when a supervisor asked for a doctor's note, and when her performance was rated as "Achieved Expectations." Complainant initially requested a hearing, but she withdrew her hearing request. The Agency issued a final decision finding no discrimination. On appeal, the Commission affirmed the FAD, finding that Complainant failed to establish by the preponderance of the evidence that the Agency's legitimate, nondiscriminatory reasons were pretextual or that she was subjected to harassment that was based on her membership on a protected class or was sufficiently severe or pervasive to constitute a hostile work environment.

Grishom (Jon M.) v. USPS, 0120171828 (04/11/2019) – Complainant worked as a Mail Handler at the Agency's Chicago Metro Logistics and Distribution Center in Elk Grove Village, Illinois. Complainant filed an EEO complaint alleging that the Agency discriminated against him based on sex (male, perceived sexual orientation) and in reprisal for prior EEO activity when he was not permitted to act as a supervisor; and when he was not selected for positions as a supervisor or a Network Specialist. Complainant also alleged that he was harassed by his coworkers when they called him homophobic sterotypes.

When Complainant did not request a hearing, the Agency issued a final decision finding that Complainant was not discriminated against, nor harassed. Complainant appealed the Agency's decision, and the Commission affirmed the Agency's final decision.

Regarding Complainant's harassment allegation, we found that the record was inconsistent in showing that the coworkers made the alleged statements. For most of the comments, there was no evidence to support Complainant's assertions. We assumed that the incident in which Complainant was called Tinkerbell and a fairy occurred as alleged. However, we found that this one-time occurrence did not rise to the level of unlawful harassment.

With regards to the claim that Complainant was not allowed to act as a supervisor, the management officials stated that he was permitted to act, until he "displayed a lack of dependability." Complainant did not show pretext for discrimination. For the non-selection claims, the Commission found that Complainant's applications did not show that his qualifications were plainly superior to those of the selectees. The Commission concluded that the Agency did not discriminate against, nor harass Complainant, based on his sex or in reprisal for protected EEO activity.

Baker (Dallas L.) v. SSA, 0120172071 (04/16/2019) – Complainant worked as a Claims Representative at the Agency's Huntington Park District Office in Huntington, California. Complainant alleged that the Agency subjected him to harassment based on his race, sexual orientation, and disability when his managers singled him out; chastised him for socializing with his coworkers; unevenly assigned work to him; instructed him to not ask his coworkers for help; subjected him to remarks regarding his sexual orientation and race; accused him of making inappropriate comments regarding religion and his sex life; suggested that he leave the Agency; and stated that he would never be promoted.

Complainant timely requested a hearing; the AJ issued a decision without a hearing in June 2010. The AJ dismissed Complainant's sexual orientation claim based on the law at the time. Regarding Complainant's harassment allegation, the AJ found that the incidents, taken together, did not meet the standard for a hostile work environment. The Agency issued a final order adopting the AJ's decision, which Complainant appealed.

The Commission vacated the Agency's final order finding that there were material facts in genuine dispute regarding Complainant's allegation that he was subjected to a hostile work environment based on sex. Complainant ultimately withdrew his hearing request, and the Agency issued a final decision finding that Complainant had not proven that he was subjected to harassment. Complainant appealed the Agency's decision.

The Commission affirmed the Agency's final decision. We found that many of the allegedly harassing incidents were not based on Complainant's protected classes. While we found that the record supported Complainant's assertion that he was subjected to offensive terms; we determined that these incidents did not rise to the level of unlawful harassment. Accordingly, the Commission concluded that the Agency did not subject Complainant to a hostile work environment based on disability, race, or sexual orientation.

Phillips (Colby S.) v. Treasury, 0120172604 (04/02/2019) – Complainant, a Tax Specialist, alleged that the Agency discriminated against him on the basis of sex (gay male) and in reprisal for prior protected

EEO activity when the Group Secretary (C1) made him the punchline of her sexual jokes; C1 yelled at him when he asked her about his timesheet; C1 incorrectly input Complainant's time into the bookkeeping system; C1 failed to process Complainant's cases into the Audit Information Management System (AIMS); and Complainant received an unwarranted Memorandum from his manager (S1).

The Agency's final decision focused on its liability for the conduct and concluded that the Agency was not liable for the conduct because it took immediate and appropriate corrective action after it learned of the conduct. In an appellate decision, OFO assumed arguendo that Complainant established that he was subjected to harassment because of his sex/sexual orientation and EEO activity. Nevertheless, OFO found that the Agency was not liable for harassment because immediately after Complainant reported the harassing comments on October 6, 2009, management began an investigation into the matter by interviewing Complainant, C1, and witness C3. OFO further noted that, in the meantime, an EEO Counselor was brought in to speak to employees at a meeting to go over EEO guidelines; a Power Point on sexual harassment was presented at a group meeting; the Treasury Inspector General for Tax Administration (TIGTA) spoke to the group about the matter, and the union president was made available for counseling. Additionally, on March 3, 2010, C1 was issued a letter of reprimand regarding the comments she made about Complainant's sexual orientation.

OFO also noted that there were no allegations or evidence that C1 made any comments about Complainant's sexual orientation after he reported the matter to management on October 6, 2009. Therefore, OFO concluded that the Agency took immediate and appropriate corrective action. Additionally, OFO found that Complainant was not subjected to disparate treatment because of his sex/sexual orientation or EEO activity.

Rodriguez (Michell B.) v. DHS (CBP), 0120172765 (04/02/2019) – Complainant, a Border Patrol Agent, filed an EEO complaint alleging that she was improperly counseled and given a record of discussion for being seen with her same-sex partner who also worked for the Agency. Complainant claimed that her supervisor told her that she was being closely watched, to keep her sexual orientation quiet, and to keep a low profile because of her relationship with her same-sex partner. Following the investigation, the Agency issued its final decision finding that Complainant did not establish that she was subjected to discrimination as alleged.

On appeal, the Commission found the investigative record to be inadequate to make a reasoned determination on the merits of the complaint. In so finding, the Commission noted that the EEO investigator only obtained affidavits from two management officials and did not seek affidavits from any coworkers or other employees of the Agency. The Commission also found that Complainant provided the investigator with two specifically named employees who she believed could support her claim of disparate treatment, but the investigator improperly did not obtain their affidavits. In further finding the record to be inadequate, the Commission noted that Complainant attached a statement from an employee who expressed his belief that Complainant was treated differently than heterosexual agents who also worked with spouses. The Commission therefore ordered the Agency to conduct a supplemental investigation to develop an accurate factual record regarding Complainant's disparate treatment claim.

Pizarro-Flynch (Lashawn C.) v. DOJ, 0120180119 (06/12/2019) – Complainant worked as a Teacher at the Agency's Federal Corrections Complex Coleman Low Security Facility (Coleman Low) in Coleman, Florida. Prior to her position at Coleman Low, Complainant worked at the Agency's Metropolitan Correctional Center (MCC) in New York. One of Complainant's duties was to monitor inmate phone calls. Complainant listened to 193 calls from an inmate (I1), who was housed at the Agency's Federal Corrections Complex Coleman Medium Security Facility (Coleman Medium). I1 formerly had been an inmate at MCC, and during this time, he entered into a relationship with a former Agency Case Manager (CM).

On or about January 28, 2014, I1 filed a complaint with the Warden of Coleman Medium requesting an investigation into an Agency employee making harassing telephone calls and sending copies of his emails to his girlfriends and ex-wife. The Warden contacted the Agency's Office of Internal Affairs, which then referred the matter to Coleman Low for investigation. I1 also filed a civil lawsuit against Complainant, and other Agency employees. In his lawsuit, I1 alleged that Complainant harassed his loved ones. After CM changed her telephone number, she emailed it to I1; however, on the same day, CM received another harassing call from the unknown woman at the new phone number.

On January 26, 2015, an Agency attorney (A1) emailed Complainant to inform her that the Agency was currently unable to provide her with legal representation due to the allegations in I1's complaint. A1 stated that future representation would depend on the outcome of the investigation into the allegations.

On October 28, 2015, the Agency concluded its investigation, finding that the charges of Unauthorized Release of Information and Improper Contact with Inmate/Inmate's Family were not sustained because the person who mailed copies of I1's emails and made the harassing telephone calls could not be identified. However, the charge of Conducting an Unauthorized Investigation was sustained. The evidence showed that Complainant "singled out" I1's telephone calls because, out of the total 192 phone calls that she monitored, 152 were I1's telephone calls. Additionally, Complainant admitted that she monitored I1's telephone calls because she was "intrigued" by the relationship between I1 and CM, and initiated conversations with colleagues to discuss CM.

Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of disability (mental), race (Afro-Hispanic), national origin (Puerto Rico), sex (female, sexual orientation), religion (Muslim), and age (49), and in reprisal for prior protected EEO activity under Title VII when she learned that the Agency would not provide legal representation in the civil action filed against her; and when she learned that she was the subject of an investigation, and then interviewed regarding allegations of staff misconduct. Complainant did not request a hearing, and the Agency issued a final decision finding that Complainant was not discriminated against based on her age, national origin, race, religion, or sex, or for her prior EEO activity. Complainant appealed the Agency's final decision.

Assuming, arguendo, that Complainant established a prima facie case of discrimination based on her age, national origin, race, religion, and sex, and in reprisal for prior EEO activity, the Commission found that the Agency proffered legitimate, nondiscriminatory reasons for its actions. For claim 1, A1 stated that the Agency took the position that individual capacity representation was not necessary given the claims in I1's complaint, and that immunity for federal employees is available as long as the employee was acting within the scope of the office or employment at the time of the incident. However, in this case, the Agency could not confirm that Complainant was acting within the scope of her employment, as the investigation was ongoing. While monitoring telephone calls was one of

Complainant's duties, A1 stated that there was no particular reason why she reviewed the telephone calls of an inmate who was housed at a different location. Further, A1 stated that the supervisors of the other employees named in the civil action were able to certify that the employees were acting within the scope of their employment. Regarding claim 2, the Agency conducted a misconduct investigation based on I1's allegations.

The Commission then found that Complainant had not provided any evidence proving pretext for discrimination. We concluded that Complainant had not established that the Agency discriminated against her based on her age, national origin, race, religion, or sex, or in reprisal for prior EEO activity, when it declined to provide legal representation to her, and when it investigated allegations of misconduct against her.

Durant (Marielle L.) v. USPS, 0120181415 (08/27/2019) – Complainant worked as a Supervisor, Distributions Operations at the Agency's Ybor City Processing and Distribution Center in Ybor, Florida. On August 9, 2017, Complainant filed an EEO complaint alleging that the Agency discriminated against, and harassed her, on the bases of race (African-American), sex (female, sexual orientation), and color (Black), and in reprisal for prior protected EEO activity when on January 21, 2017, her schedule was changed; on February 9, 2017, she was issued a Letter of Warning (LOW); on May 10, 2017, she was issued a Proposed LOW; and beginning on an unspecified date, she was supervised by someone who she alleged had previously called her a racial slur.

The Agency issued a final decision, and it determined that Complainant did not establish that she was discriminated against, or harassed, based on her color, race, or sex, or in reprisal for prior EEO activity. Complainant appealed the Agency's final decision.

The Commission assumed that Complainant established a prima facie case of discrimination based on color, race, or sex, or in reprisal for prior EEO activity, and found that the Agency provided legitimate, nondiscriminatory reasons for their actions. We then found that Complainant made bare assertions that management officials discriminated against her based on her color, race, or sex, or in reprisal for prior EEO activity, which were insufficient to prove pretext, or that their actions were discriminatory. Regarding the harassment claim, we found that Complainant belongs to statutorily protected classes, and that she was subjected to unwelcome verbal conduct; however, we found that she did not show that the complained of conduct was based on any of her protected classes. Additionally, we found that there was no evidence in the record to support Complainant's assertion that her supervisor previously called her a racial slur. Accordingly, the Commission affirmed the Agency's final decision.

Mack (Clinton C.) v. Smithsonian Institution, 0120182118 (09/30/2019) **[Repeated under Priority 4 below]** – Complainant worked as an Advancement Specialist, IS-1001-11-2, in the Office of Development at the Agency's National Museum of Natural History in Washington, D.C. Complainant filed an EEO complaint, alleging discrimination based on race (African-American), sex (male), sexual orientation (gay), color (black), disability (HIV positive and neuropathy), age (born in 1970), and reprisal for prior protected EEO activity when, among other allegations, he was denied a promotion and a step increase, he was denied equal pay for equal work, and he was subjected to a hostile work environment.

According to Complainant, in April 2014 a Senior Campaign Manager/Development Officer (C1) had failed to respond to his emails about a webpage. Complainant stated that he reported C1's failure to respond to management so he would not be blamed for any delays with the completion of the webpage. Complainant alleged that, around this time, he overheard C1 discussing his sexual orientation with some of her female colleagues.

According to Complainant, his new supervisor, the Associate Director of Development (S3) made discriminatory comments on two occasions in August 2014. In one conversation, S3 described her missionary work with people with HIV/AIDS in Africa. In the other conversation, S3 mentioned that her former employer had gradually become more accepting of LGBT individuals and that she had attended a christening at the home of a gay former colleague. On September 30, 2014, Complainant emailed S3 because he believed that the comments indicated that she had problems with him as an African-American gay male who was HIV positive. In the email, Complainant asked S3 to keep future conversations professional and related to the business of the museum. Complainant alleged that, after he complained, S3 reduced her communication with him. S3 averred that her comments were "innocent" and had nothing to do with Complainant or his membership in any protected class.

Complainant alleged that he was denied a promotion to an IS-12 Confidential Assistant position and denied a step increase. Complainant's IS-11 position did not have promotion potential and, unlike in the GS system, step increases in the IS system are not guaranteed based on performance or tenure benchmarks. According to S3, the IS-12 Confidential Assistant position only existed at the level of the Secretary of the Agency, and S3 stated that she did not give any subordinates step increases during the period at issue. Complainant alleged that S3 noncompetitively promoted a younger White female coworker (C2) early in her tenure, but the record reflected that C2 applied for a competitive posting and was promoted to IS-11-1, a lower step than Complainant.

Complainant also alleged that he performed substantially equal work for less pay than C1, C2, a female Development Specialist (C3), and a female Advancement Associate (C4). According to the record, Complainant was paid more than C2, an IS-11-1, and he was paid the same as C3, an IS-11-2. C1 was paid more than Complainant, but her duties included supervising other employees. According to the Acting Chief Development Officer (S2), C4 received a step increase to IS-11-3 because of her extensive work with donors. S2 stated Complainant did not have as much contact with donors as C4.

Complainant requested a hearing. An EEOC AJ granted the Agency's motion for summary judgment, and the Agency issued a final order fully implementing the AJ's decision finding no discrimination. On appeal, we found that the AJ correctly determined that there were no genuine issues of material fact or credibility that merited a hearing. We further concluded that the preponderance of the evidence in the record did not establish that Complainant was subjected to discrimination as alleged.

Regarding his disparate treatment claim, the Agency's legitimate, nondiscriminatory reasons for not promoting him or awarding him a step increase were that Complainant's position did not have promotion potential, so he was ineligible for noncompetitive promotion, and that S3 did not award any step increases during her initial tenure with the Agency. We found that Complainant failed to establish that these legitimate, nondiscriminatory reasons were a pretext designed to mask discrimination or retaliation.

With respect to the alleged Equal Pay Act violation, we concluded that Complainant failed to establish that he performed equal work that required equal skill, effort, and responsibility as his higher-paid female colleagues. C1, an IS-13 employee, was a supervisor, and C4, who was received a step increase

to IS-11-3, had extensive donor contacts, whereas Complainant performed primarily executive assistant functions.

We also found that there was no evident connection between Complainant's membership in any protected class and the alleged harassment. To the extent that S3's remarks about her prior employer becoming more accepting of LGBT individuals and her work with people with HIV/AIDS in Africa were related to Complainant's race, color, sex, sexual orientation, or disability, we found that the cited remarks did not affect a term or condition of employment, did not have the purpose or effect of unreasonably interfering with the work environment, and did not create an intimidating, hostile, or offensive work environment. Although the record only contained sparse description of C1's alleged comments regarding Complainant's sexual orientation, we found that the preponderance of the evidence failed to establish that the alleged comments were sufficiently severe or pervasive to constitute a hostile work environment.

Gonzalez-Gonzalez (Jess P.) v. DHS (TSA), 0120132186 (09/17/2019) **[Repeated under Findings below]** – Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of sex (male, sexual orientation), age, and in reprisal for prior protected EEO activity when he was not selected for two positions, a Transportation Security Inspector position and a Lead Transportation Security Officer position, and when he was subjected to harassment by a coworker. The Agency found no discrimination.

The decision found that the Agency erred when it held that sexual orientation was not prohibited under anti-discrimination laws and when it did not process this claim in the 29 C.F.R. Part 1614 process. However, the decision noted that the investigation was adequately developed to address Complainant's claim of harassment. Assuming Complainant established that he was subjected to harassment, the decision concluded that the Agency's satisfied its affirmative defense and avoided liability, as following a report of the presumed harassment, the Agency promptly and effectively addressed the issue. Accordingly, the decision held that Complainant was not subjected to sexual harassment.

The decision then addressed Complainant's claims of non-selection with respect to the Transportation Security Inspector position and for a Lead Transportation Security Officer position. The decision found that Complainant failed to establish a prima facie case of disparate treatment with respect to the Transportation Security Inspector position as he failed to make the best qualified list and was not considered for the position. The decision held that Complainant established a prima facie case of sex-based discrimination with respect to the Lead Transportation Security Officer, noting that one of the selectees was a female. The decision turned to the Agency to produce a legitimate, nondiscriminatory reason for not selecting Complainant. The decision noted that the selecting official stated that Complainant was not selected because he did not score high enough to be selected for one of the eight positions filled. The decision found that the Agency did not provide specific, clear, and individualized explanation as to why Complainant was not selected for the position for which he was deemed qualified. The Agency only provided the general mechanics of the selection process but did not provide an individualized explanation for Complainant's specific situation. As the Agency failed to overcome Complainant's prima facie case of sex discrimination, Complainant prevailed in his claim without having to provide pretext with respect to the Lead Transportation Security Officer position.

The decision remanded the matter to the Agency for corrective action including: offering Complainant a Lead Transportation Security Officer position; calculation of Complainant's entitlement to back pay; determination on Complainant's entitlement to compensatory damages; and providing training and consider disciplinary action against the management officials who subjected Complainant to disparate treatment.

Beeman (Lynwood R.) v. VA, 0120171820 (09/30/2019) – At the time of events giving rise to this complaint, Complainant worked as a Materials Handler at the Atlanta Veterans Affairs Medical Center in Decatur, Georgia. On September 9, 2014, Complainant filed an EEO complaint alleging that the Agency subjected him to a hostile work environment on the basis of sex (male/sexual orientation), and in reprisal for prior protected EEO activity. Examples of the alleged harassment include managers denying Complainant the proper tools (a GPS and Blackberry) to perform his assigned duties and a coworker stating that it was a "plantation" and using the n-word during a meeting.

Complainant timely requested a hearing. The AJ issued a decision without a hearing finding that that there was no genuine issue of material fact as to whether Complainant was subjected to unlawful harassment as alleged. The Agency subsequently issued a final order adopting the AJ's finding that Complainant did not prove that the Agency subjected him to discrimination as alleged, and Complainant appealed the Agency's final order.

The Commission found that a decision without a hearing was inappropriate in this case because the record was not fully developed; it did not contain statements from management officials and relevant witnesses. Additionally, there were genuine issues of material fact. For example, a manager stated that "none of the other drivers are issued a government cell phone or GPS"; however, three witnesses contradicted this assertion.

We also found that additional information was needed to determine if there was a hostile work environment based on Complainant's sex, or in retaliation for his prior EEO activity, because witnesses provided statements that the environment was "very hostile" for Complainant; that hostility was directed at Complainant by coworkers due to his sex, and in reprisal for his EEO activity; and that it was "obvious" that management was retaliating against Complainant for his prior EEO activity. We remanded the complaint back for a hearing.

Myles (Alden G.) v. USPS, 0120172196 (09/27/2019) – Complainant, a Mail Handler, alleged that the Agency discriminated against him on the basis of sex/sexual orientation (male) and in reprisal for prior EEO activity when his Manager subjected him to homophobic name calling. Complainant also alleged that his Manager said he would cut off Complainant's arms. On appeal, the Commission affirmed the Agency's finding that Complainant did not prove he was subjected to unlawful harassment because the Manager denied using the homophobic language and threating to cut off Complainant's arms and offered an alternative account of events devoid of anti-gay utterances. The Commission determined that Complainant's account was uncorroborated by any evidence or witnesses, and Complainant did not avail himself of the opportunity to request a hearing before an EEOC AJ who could have assessed credibility. Additionally, the Commission found no evidence that the Manager's conduct was related to Complainant's EEO activity.

Washington (Cary R.) v. USPS, 0120180002 (09/26/2019) – Complainant, a City Carrier with the Agency, filed an EEO complaint alleging that the Agency discriminated against him on the basis of sex (male, sexual orientation) when management disseminated his cell phone information to coworkers, resulting in harassment from his coworkers about his sexual orientation. According to Complainant, his first-level supervisor found his lost cell phone and disseminated pictures on his phone to his coworkers. Complainant alleged that after he received his cell phone back, employees started subjecting him to homophobic name calling, bullying, and taunting based on his sexual orientation.

Following the investigation, the Agency issued its final decision finding that, even if it were established that the events occurred as Complainant stated, the actions alleged by Complainant did not rise to the level necessary to establish a hostile, offensive, or abusive work environment.

On appeal, the Commission vacated the Agency's decision, finding an inadequate investigative record. In so finding, the Commission observed that the EEO Investigator requested affidavits from three of Complainant's coworkers, but none responded to these requests. The Commission noted that the EEO Investigator apparently failed to follow-up with these three individuals after the initial request for an affidavit. The Commission determined that the Investigator did not obtain affidavits from all of Complainant's coworkers, including from the individuals who looked at Complainant's phone and disseminated his private information. The Commission additionally observed that Complainant was sent a request to provide an affidavit for the investigation but failed to do so as well. But, as with the three coworkers mentioned above, the record did not reflect whether the EEO Investigator followed-up with Complainant after the initial request for an affidavit. The Commission ultimately found that the record was inadequate for it to make a determination on the merits of Complainant's complaint, and therefore ordered the Agency to conduct a supplemental investigation.

Bidon (Herb E.) v. VA, 0120180323 (09/10/2019) – At the time of events giving rise to this complaint, Complainant worked as a Registered Nurse at the Agency's West Haven Veterans Affairs Hospital in West Haven, Connecticut. Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of race (Asian), national origin (Filipino), and sex (male, gay) when on September 10, 2014, he learned that the reason for his non-selection for a position as an Assistant Nurse Manager was not accurate. Complainant filed a second formal EEO complaint alleging that he was retaliated against for filing his earlier EEO complaint when he was issued a letter of counseling and reprimand, and subjected to harassment. Examples of the harassing conduct include Complainant's supervisor assigning Complainant to "float" to other wards, not assigning him "charge nurse" responsibilities, and hovering over him.

Complainant timely requested a hearing. The AJ issued a consolidated decision without a hearing on September 19, 2017. For the non-selection, the AJ found that Complainant had not shown that the Agency's reason for his non-selection was pretext for unlawful discrimination because he did not offer any facts to indicate that the reason was unworthy of belief, and Complainant had not shown that his qualifications were plainly superior to those of the selectee. The AJ also found that Complainant only offered his perceptions, and his claim of a hostile work environment failed. The Agency subsequently issued a final order adopting the AJ's finding that Complainant did not establish that the Agency subjected him to discrimination as alleged, and Complainant appealed the Agency's final order.

The Commission affirmed the Agency's final order adopting the AJ's decision without a hearing, finding that Complainant did not establish that he was discriminated against, or harassed, based on his

national origin, race, or sex, or in reprisal for protected EEO activity. On appeal, Complainant argued that there was a dispute regarding the credibility of the managers who stated that they were not aware of Complainant's sexual orientation. However, Complainant only argued that the managers were aware due to "stereotypes," and he did not offer any evidence to show that there was a genuine dispute. The Commission found that the AJ correctly determined that there were no genuine issues of material fact or credibility that merited a hearing, and that Complainant did not establish that he was discriminated against, or harassed, as alleged.

Henderson (Alfredo S.) v. VA, 0120180616 (09/26/2019) – Complainant is male and worked as a WS-3566-02 Housekeeping Aid Leader at the Agency's Kansas City, Missouri, VA Medical Center (VAMC). According to Complainant, he engaged in protected EEO activity in or around September 2010 when he provided an affidavit as a witness for an EEO complaint filed by a coworker (C1). C1's complaint named the Environmental Management Services Chief (S1) as a responsible management official, and S1 was Complainant's first-line supervisor at all times relevant to his complaint.

Complainant alleged that beginning in or around March 2008, S1 began making frequent derogatory remarks about Complainant's sex and his perceived sexual orientation, referring to him by homophobic terms and making homophobic references. According to Complainant, he did not report S1's remarks to higher-level management, Human Resources (HR), or any other entity identified in the VAMC anti-harassment policy because he "tried not to let it bother" him and because he "didn't really take it to heart." Two witnesses (C2 and C3) agreed that, although S1 was not particularly respectful towards any of his subordinates, S1 singled Complainant out for frequent derogatory comments based on sexual orientation.

Complainant stated that in July 2016 he went to HR and stated that he wanted to retire as soon as possible. Complainant averred that he had decided to retire because the harassment by S1 became unbearable in June 2016, but he did not tell anyone in HR why he was retiring. The record contained a Request for Personnel Action for Complainant's voluntary retirement effective July 31, 2016, which stated that the reason for retiring was "to obtain retirement benefits."

Complainant filed an EEO complaint alleging that he was subjected to discrimination based on sex (male, perceived sexual orientation) and reprisal for prior protected activity when he was harassed by S1 beginning in 2008 and when he was constructively discharged when he was forced to retire on July 31, 2016. The Agency issued a final decision finding no discrimination, noting that, although C2 and C3 corroborated Complainant's claim that S1 subjected him to sex- and sexual-orientation-based remarks, the Agency was not liable for any workplace harassment because the Agency had an anti-harassment policy and Complainant unreasonably waited to report S1's conduct until after he retired.

On appeal, the Commission found that there was abundant evidence in the record that S1 subjected Complainant to unwelcome harassment consisting of comments based on Complainant's sex and perceived sexual orientation on a regular basis between 2008 and 2016. We assumed for the purposes of the decision that Complainant established that he was subjected to a hostile work environment based on sex and sexual orientation and that S1, Complainant's direct supervisor, subjected Complainant to harassment that did not result in a tangible employment action. Therefore, the Agency would be subject to vicarious liability for S1's unlawful harassment unless it could establish by the preponderance of the evidence in the record (1) that it exercised reasonable care to prevent and correct promptly any harassing behavior and (2) that Complainant unreasonably failed to take advantage of

any preventive or corrective opportunities provided by the Agency or to avoid harm otherwise. With respect to prong (1), we found that the Agency established that it exercised reasonable care to prevent and correct promptly any harassing behavior through its workplace harassment policy.

Regarding prong (2) of the affirmative defense, Complainant stated that he did ask S1 why he was harassing him, but that he did not report S1's harassment to HR, the EEO Program, or anyone else in management until after he retired because he "tried not to let it bother" him and because he "didn't really take it to heart." Accordingly, we found that the Agency met its burden of establishing that Complainant unreasonably failed to take advantage of the preventive or corrective opportunities provided by the Agency or to avoid harm otherwise, and the Agency was not liable for S1's harassment.

With respect to the constructive discharge claim, we found that, although Complainant found his employment situation difficult and upsetting, a reasonable person under such circumstances would have remained on the job and tried to rectify the situation. Accordingly, we affirmed the Agency's final decision.

Ballance (Elise S.) v. State, 0120181142, 2019004850 (09/26/2019) – The Commission consolidated two appeals in which Complainant alleged discrimination based on race (Caucasian), national origin (American), sex (female, sexual orientation), color (White), disability (physical), age (53), reprisal for prior protected activity (prior EEO complaints and opposing discriminatory policies and practices), and genetic information. The Commission's appellate decision affirmed both of the Agency's final decisions finding no discrimination.

Complainant did not specify her sexual orientation, but she stated that she was a member of the LGBT community. Complainant stated that her physical impairment, Non-Hodgkin's Lymphoma, was in remission at the time of these complaints. Complainant's prior protected activity included an EEO complaint filed in May 2013, which she amended several times. In a separate appellate decision, the Commission reversed in part the Agency's FAD finding no discrimination, concluding that Complainant established that she was subjected to a hostile work environment based on reprisal and disability and that she was denied a reasonable accommodation. See EEOC Appeal No. 0120170164 (Sep. 25, 2019).

Complainant alleged that she was discriminated against based on reprisal when she did not receive an award in late 2016. Complainant's supervisor stated that he did not nominate her for the award because she had been suspended in April 2016. Complainant had alleged discrimination with respect to the 2016 suspension in a previous EEO complaint. However, the Commission found in EEOC Appeal No. 0120170164 that Complainant failed to establish that the April 2016 suspension was discriminatory, and the preponderance of the evidence in the record did not otherwise establish pretext for discrimination.

Complainant alleged that she was subjected to a hostile work environment. On appeal, the Commission noted that the alleged instance of harassment concerned conflicts in witness testimony and that Complainant had not requested a hearing.

Complainant also alleged that she was denied a reasonable amount of official time to work on EEO matters. The Commission noted that the Agency had erred in dismissing a 2018 denial of official time claim for failure to state a claim, but we found that there was sufficient evidence in the record to assess

the Agency's reason for denying Complainant's request for official time. The Commission found that the Agency did not deny Complainant a reasonable amount of time as alleged.

McDaniels (Rosita R.) v. DOJ (BOP), 0120181357 (09/04/2019) – Complainant, a Health Information Technician, at the Federal Transfer Center in Oklahoma City, Oklahoma filed an EEO complaint in which she alleged that the Agency discriminated against her and subjected her to a hostile work environment on the bases race (African-American), disability (back, bilateral knee, and bilateral foot conditions), sex (female/sexual orientation) and in reprisal for prior protected EEO activity between February 2015 and July 2016, as identified by the following incidents: (1) at morning staff meetings between February and November 2015, Complainant's second-level supervisor (S2) made homophobic and sex-based comments to Complainant's coworkers; (2) on unspecified dates, Complainant's supervisor (S1) inequitably distributed work between Complainant and her co-workers; (3) on unspecified dates, S1, S2, and Complainant's third-level supervisor (S3) unfairly excluded Complainant from developing a tracking program; (4) S1 unfairly scrutinized Complainant's request for sick leave; (5) in March 2016, Complainant's management chain micromanaged her duty-free lunch hour; (6) in March and July 2016, S1 gave Complainant an unfavorable quarterly progress review and made unfavorable comments regarding her 2015 annual performance evaluation; (7) in April 2016, one of Complainant's coworkers placed a picture of Marilyn Monroe with a caption that Complainant characterized as offensive on a fax machine near Complainant's workspace; and (8) from June 23 through July 22, 2016, S2 informed Complainant that her coworkers had alleged that she had committed conduct violations.

Following an investigation, Complainant requested a final agency decision. The Agency issued a final decision finding that Complainant had not been subjected to discrimination or reprisal as alleged.

On appeal, the Commission affirmed the final decision finding that the totality of the conduct alleged was insufficiently severe or pervasive to establish a hostile work environment. We noted, specifically as to claim (1), that S2's comments were clearly offensive and vile; however, Complainant failed to show that most of the comments were directed toward her or that she had a sufficient personal connection to the offensive behavior that would constitute third-party harassment. Even assuming that the alleged conduct was sufficiently severe or pervasive, the Commission found that there was no basis to impute liability on the Agency. In this case, the Warden took immediate and appropriate corrective action following Complainant's report of the comments by authorizing an investigation into S2's comments and referring the matter to the Office of Internal Affairs for disciplinary action. A decision regarding discipline for S2 had not yet been reached at the time of the instant EEO investigation; nonetheless, there was no evidence that of any similar incidents recurring. Regarding the remaining claims, the Commission found that there was no evidence that the alleged conduct was motivated by discriminatory or retaliatory animus. As a result, the Commission found that Complainant had not been subjected to discrimination, reprisal, or a hostile work environment as alleged.

ADA

D'onofrio (Vincent V.) v. USPS, 2019003381 (07/23/2019) – The Agency hired Complainant as an entry-level letter carrier. In his initial training course, Complainant struggled academically, especially with reading out-loud in front of the class. The Agency required Complainant to re-accomplish the training.

After finishing the letter carrier training on his second attempt, the Agency assigned Complainant to a delivery route. Complainant had problems completing the route on-time and he made erroneous deliveries. Complainant stated that supervision frequently insulted him as "retarded" and "too slow."

Later, Complainant requested reasonable accommodations. Specifically, Complainant asked for another employee to help with deliveries or, as an alternative, that the Agency transfer him to custodial work. The Agency was nonresponsive to Complainant's requests. At one point, a manager said, "the Post Office doesn't have time for people like you." Complainant sought intervention from the union steward who advised Complainant to resign in order to avoid having a termination in his employment record. Complainant did so immediately.

Approximately four months thereafter, Complainant contacted an EEO Counselor. The Agency procedurally dismissed Complainant's formal complaint for untimely EEO Counselor contact. The Agency also asserted that Complainant had failed to state a claim with respect to the union recommending his resignation.

On appeal, Complainant that he was unaware of the 45-day time limit for EEO counselor contact. We reversed the Agency dismissal a remanded both claims. Even if the Agency had posted the EEO Counselor contact time-limit, there was no evidence that Complainant comprehended the import of the EEO Poster 72. The Agency never provided Complainant EEO training for purposes of constructive notice. Despite the union role in his decision to resign, Complainant stated a viable discrimination claim of a Rehabilitation Act violation; the Agency constructively discharged Complainant by refusing him reasonable accommodations.

Louis (Madeleine C.) v. VA, 0120181168 (07/10/2019) **[Repeated under Privacy sub-priority below]** – Complainant, a Loan Technician at the Agency's Veterans Benefits Administration (VBA), VA Regional Office in Georgia, filed a formal EEO complaint claiming she had been discriminated against based on disability when her supervisor did not approve her request for Leave Without Pay (LWOP) and instead, she was charged Absent Without Official Leave (AWOL); management had not approved her requested reasonable accommodation; the Human Resources (HR) Specialist violated Health Insurance Portability and Accountability (HIPPA) protocol when she released Complainant's medical information to the Loan Guaranty Officer; management did not inform her of the leave donor program; her request for hardship transfer was denied; and she became aware that management intentionally gave her the wrong form to file her worker's compensation claim.

On December 27, 2017, the Agency issued a final decision finding no discrimination. On appeal, we affirmed the Agency's decision. The record reflects that Complainant invoked Family Medical Leave Act (FMLA) to begin on December 30, 2013, and the request was approved for twelve (12) weeks. Complainant's FMLA was set to expire on March 21, 2014, and she was advised to return to duty on March 24, 2014. On March 20, 2014, Complainant requested 178 hours of additional LWOP. According to Complainant's supervisor, he instructed the timekeeper on how to code Complainant's absence and he signed the letter notifying of her AWOL status. The supervisor stated that on March 21, 2014, the Acting Loan Guaranty Officer sent a letter to Complainant stating that they had satisfied their requirement to approve leave under the FMLA and that her FMLA had been utilized for 480 hours and expired on March 21, 2014. Subsequently, Complainant's request for 178 hours of LWOP was disapproved. Complainant was advised that if she did not return to duty on March 24, 2014, further

disciplinary action could be taken, and a letter was sent to her on April 14, 2014, notifying her that she was on AWOL status.

Regarding Complainant's allegation that the HR Specialist violated the HIPPA protocol when she released Complainant's medical information, the HR Specialist denied violating HIPPA protocol when she released her medical information to her supervisor. The HR Specialist explained that Complainant had filed a Workers Compensation claim which contained medical information, through the Department of Labor's Office of Workers' Compensation Program. As a result, a portion of the Workers' Compensation form had to be completed by her supervisor. The HR Specialist also noted that Complainant had shared her medical information with loan guaranty managers.

The HR Specialist asserted that Complainant was informed about the Leave Donor Program during the new employee orientation. Further, the HR Specialist explained after Complainant inquired about the procedures for requesting a transfer to another office, she provided her with the VBA policy that outlines the procedures. The HR Specialist noted that the Atlanta facility director recommended approval to the Southern Area Director but the Central Area (CAREA) director denied Complainant's request due to staffing levels in the Houston Regional Office.

Regarding Complainant's allegation that she became aware that management intentionally gave her the wrong form to file her worker's compensation claim, the HR Specialist stated that she was not was not aware of this issue until Complainant filed the instant complaint. She stated that Complainant was given the CA-1 form after indicating that she had suffered an injury and that the form was provided to her, as it would have been provided to any employee who indicated the same.

With respect to Complainant's allegation that she was denied reasonable accommodation, we noted that the record evidence supports the Agency's finding that Agency management attempted to accommodate Complainant by offering her a private office so her interactions with co-workers would be reduced, but lacked medical documentation that she needed to work full time telework.

Patrick (Deangelo C.) v. DOJ (BOP), 0120180010 (09/26/2019) – Complainant, a Correctional Officer with the Agency, filed an EEO complaint alleging that the Agency denied him a reasonable accommodation after he developed a blood clot while on duty. Complainant specifically alleged that the Associate Warden informed him that he would not be able to return to work until he submitted medical documentation showing that he could perform the full duties of his Correctional Officer position. Complainant believed that the Associate Warden should have allowed him to work in a limited duty position, instead of making him accumulate Leave without Pay (LWOP) for his three-month absence.

Following the investigation, the Agency issued its final decision finding that Complainant did not establish that he was denied accommodation, as alleged. The Agency found that Complainant did not show that he was a qualified individual with a disability, and it therefore did not violate the Rehabilitation Act.

On appeal, the Commission assumed, without finding, that Complainant was a qualified individual with a disability, but nevertheless determined that Complainant did not establish that he was denied accommodation. In so finding, the Commission noted that the Agency allowed Complainant to return to his position after he submitted medical documentation showing that he could perform the full duties of his Correctional Officer position. The Commission noted that Complainant was provided with

LWOP and that permitting the use of accrued paid leave or unpaid leave is a form of reasonable accommodation when necessitated by an employee's disability. The Commission further observed that Complainant did not show that there was another accommodation available that he could have been provided. As such, the Commission determined that Complainant did not establish that the Agency violated the Rehabilitation Act, as alleged.

Morter (Ward B.) v. DOD (DIA), 0120180397 (09/30/2019) – At the time of events giving rise to this complaint, Complainant worked as an Intelligence Analyst at the U.S. Special Operations Command (USSOCOM), Joint Intelligence Center Special Operations Command in Tampa, Florida. When the successful completion of a Polygraph Credibility Assessment (PCA) became a requirement for his position, Complainant took a PCA five times and the results were inconclusive each time. Complainant met with the Staff Psychologist to discuss his issues with the polygraph examinations and he stated that he had been diagnosed with generalized anxiety disorder.

On February 6, 2014, Complainant received a memo regarding his continued access to sensitive information, and he was informed that his diagnosis of an Adjustment Disorder with Anxiety and his seeking mental health care would not adversely affect his ability to obtain and maintain a security clearance. Rather, Complainant's decision to seek treatment was viewed as a positive sign that he was willing to take steps to recognize and resolve a problem, which resulted in a favorable security clearance determination. On May 12, 2014, Complainant was informed that his services were no longer required at USSOCOM because he could not pass a PCA, and Complainant was reassigned to the Agency's Headquarters.

Complainant filed a formal EEO complaint, alleging that the Agency discriminated against him on the basis of disability (anxiety disorder) when he was informed that his services would not be retained at USSOCOM due to his inability to successfully complete PCA examinations and he received notice of a reassignment. Complainant timely requested a hearing. The AJ issued a decision without a hearing, finding that Complainant was an individual with a disability, but that Complainant was not able to perform the essential functions of his position, with or without an accommodation, because the position required that Complainant successfully complete PCAs to maintain a security clearance. The Agency subsequently issued a final order adopting the AJ's finding, and Complainant appealed the Agency's final order.

The Commission found that a decision without a hearing was not appropriate because the record was inadequately developed, and the AJ improperly determined that there were no genuine issues of material fact or credibility that merited a hearing. Specifically, the record was not sufficiently developed regarding Complainant's security clearance, and his subsequent transfer out of USSOCOM; and the record did not clearly show why Complainant was no longer permitted to work at USSOCOM, after years of working at that location without having passed a PCA. The Commission also noted that Complainant's claims were disparate-treatment claims based on disability, and not failure-to-accommodate claims. The complaint was remanded back to the AJ to further develop the record and issue a new decision.

Baty (Pamala L.) v. USPS, 0120181511 (09/27/2019) – Complainant, a Mail Processing Clerk, PS-06, at the Agency's Post Office in Crewe, Virginia, filed an EEO complaint alleging that the Agency

discriminated against her on the basis of disability (lumbar strain/sprain, lumbar herniated nucleus pulposus, and lumbar degenerative disease) when, on July 11, 2013, management denied her requests for accommodation, including modifying the front counter; providing an ergonomic chair; and permitting Complainant to work a continuous eight-hour shift.

At the conclusion of the investigation, Complainant requested a hearing before an EEOC AJ. The AJ assigned to the case granted the Agency's motion for summary judgment and issued a decision finding that Complainant failed to show that the Agency denied her reasonable accommodation. The Agency subsequently issued a final order fully implementing the AJ's decision.

Complainant appealed and, in Pamala L. v. USPS, EEOC Appeal No. 0120152493 (Nov. 21, 2017), the Commission reversed the Agency's final order and found that the Agency had denied Complainant reasonable accommodation. To remedy the discrimination, the Commission ordered the Agency to provide Complainant with the necessary reasonable accommodations; conduct a supplemental investigation into Complainant's entitlement to compensatory damages; provide training to the responsible management officials; consider taking discipline against the responsible management officials; to pay attorney's fees as appropriate; and to post a notice.

Following a supplemental investigation, the Agency awarded Complainant $20,000.00 in non-pecuniary compensatory damages finding that Complainant provided little evidence to support her claim that the exacerbation of her conditions was directly attributable to the Agency's discriminatory actions. In addition, regarding attorneys' fees, the Agency deducted hours from the two submitted fees petitions it determined were performed prior to Complainant filing her EEO complaint, duplicative or not in furtherance of Complainant's case, and excessive. As a result, the Agency awarded Complainant $29,223.00 in attorneys' fees and costs.

On appeal, the Commission found that the Agency's compensatory damages award was insufficient and awarded Complainant $25,000 in non-pecuniary compensatory damages based on her submission of evidence demonstrating that she experienced physical pain, severe emotional distress, and exacerbation of her pre-existing conditions. With respect to attorneys' fees, the Commission found that Complainant could recover for services performed during the pre-complaint process shown to be connected to the processing or determination to file the present complaint. In addition, the Commission found that a smaller across-the-board reduction was warranted for duplicative work and that the Agency improperly deducted time that was shown to be spent advancing Complainant's case. Finally, the Commission agreed with the Agency that Complainant's attorney had not submitted sufficient evidence in support of claimed costs. As a result, the Commission awarded Complainant $25,000.00 in non-pecuniary compensatory damages and $35,625.92 in attorneys' fees and costs.

Pregnancy Limitations

Buckley-Beason (Joellyn L.) v. DOJ (FBI), 0120170274 (04/05/2019) – Complainant, a Management and Program Analyst, alleged that the Agency subjected her to discrimination based on her pregnancy and reprisal for prior protected EEO activity when she received the rating of Unacceptable on her Performance Appraisal Report (PAR) and subjected to a hostile work environment. After the investigation, over Complainant's objections, the AJ assigned to the case granted the Agency's motion summary judgment and issued a decision in the Agency's favor. The Agency subsequently issued a

final order adopting the AJ's finding that Complainant failed to prove that the Agency subjected her to discrimination as alleged.

The AJ specifically found that the Agency articulated legitimate, nondiscriminatory reasons for giving Complainant the unacceptable rating on her PAR. Namely, that Complainant's performed unsatisfactory work and a project had to be reassigned to another employee for lack of progress. The AJ found that Complainant's performance deficiencies were well documented and determined that Complainant's many excuses for why projects were not completed properly did not show that her rating was motivated based on discriminatory or retaliatory animus. The AJ additionally determined that the Agency's actions were not severe or pervasive enough to establish a hostile work environment.

On appeal, the Commission however found that the AJ erred in granting summary judgment in the Agency's favor. In so finding, the Commission cited to the affidavits and depositions of Complainant's coworkers who believed that Complainant in fact performed very well and did not deserve the unacceptable rating she received. The Commission noted that Complainant's coworkers raised doubts as to the credibility of the evidence provided by the Agency to support Complainant's unacceptable rating. The Commission also found that the AJ erred by fragmenting Complainant's claim of a hostile work environment, and further erred by improperly failing to address Complainant's additional allegations of harassment. The Commission therefore found that judgment as a matter of law should not have been granted and remanded the case for a hearing.

Eudy (Sherrill S.) v. Air Force, 2019001468 (06/05/2019) – After a finding in a previous appeal decision that Petitioner's termination was based on her sex/pregnancy and that she was subjected to a hostile work environment that culminated in her constructive discharge, the Commission ordered the Agency, in relevant part, to offer Petitioner restatement to her Human Resources Assistant position and to provide her with the appropriate amount of back pay and benefits, with interest. Petitioner subsequently petitioned for enforcement of the Commission's decision, contending that the Agency improperly failed to pay her back pay on the basis that she earned more wages while on military orders than she would have received as a federal civilian employee.

In its decision on the petition for enforcement, the Commission noted that, although Petitioner was entitled to back pay as a component of her make-whole relief, she was not entitled to a sum greater than what she would have earned but for her constructive discharge. From her 2007 constructive discharge until her 2016 reinstatement, Petitioner received $587,334.48 in interim earnings while in active duty military service, whereas she would have earned $388,755.58 in her civilian Agency position. The Commission determined Petitioner could not have worked full-time in her civilian job while also working full-time in active-duty military status; therefore, her earnings while on active duty were not "moonlighting earnings," but rather were interim earnings which must be deducted from any back-pay award.

The Commission concluded that, because Petitioner's interim earnings greatly exceeded her civilian back pay, awarding Petitioner back pay and benefits would amount to a windfall. Thus, the Commission found that the Agency properly concluded that Petitioner was not entitled to back pay and denied Petitioner's petition for enforcement.

Swedersky (Gloria D.) v. USPS, 0120171433 (09/27/2019) – Complainant, a City Carrier, filed an EEO complaint alleging that the Agency subjected her to unlawful harassment against her on the bases of sex (female/pregnant), disability (left ankle ligament rupture), and in reprisal for prior protected EEO activity when: 1) On February 3, April 19, April 20, and May 9, 2016, the Agency denied Complainant's request to see a union steward; 2) On February 11, 2016, the Manager of Customer Services (MCS) refused to look at her medical documentation; 3) On unspecified days in February and March 2016, Complainant was given bi-weekly investigative interviews and told she needed to have her doctor move faster; 4) On March 30, April 19, April 20, May 2, and May 9, 2016, the manager attempted to make her work outside her medical restrictions; and 5) On June 2, 2016, the Agency issued Complainant a Letter of Warning (LOW).

The Agency dismissed claim 1, finding that it failed to state a claim. As to the remaining claims, the Agency concluded that Complainant failed to prove that the Agency had subjected her to discrimination as alleged.

Claim 2 concerns the MCS's alleged refusal to look at Complainant's medical documentation, based on her sex, her pregnancy, and her disability. Complainant stated in her affidavit that she was harassed over her medical restrictions and that being pregnant made the MCS mad at her. She also stated that the harassment worsened after the MCS became aware of her pregnancy. She claimed that MCS refused to look at a letter from Complainant's obstetrician regarding her upcoming ankle surgery. The letter also asks that Complainant be allowed to use the bathroom as needed and "to work at her own pace to help maintain a healthy pregnancy and help reduce strain on the ankle." The record shows that when the MCS received the letter, he submitted it to the Manager of Health & Resource Management (MHRM). Therein, he asked for advice on proceeding with the limitation requests in Complainant's documentation and how to obtain additional clarifying information from the OB/GYN. The MHRM consulted with the Occupational Health Nurse Administrator (OHNA).

The appellate decision found that the evidence did not support a finding that the MCS refused to look at the letter. Rather, the MCS forwarded the letter for advice and clarification as to how he should proceed. There is no evidence that the MCS or the SCS did not follow the OHNA's clarification with restroom breaks. Accordingly, we found that Complainant did not establish a prima facie case of discrimination with respect to this allegation, as she did not show that she suffered an adverse action. The decision further found that Complainant had not established that she was discriminated against or harassed with respect to any of her other claims, and it affirmed the Agency's FAD.

Peguero-Mota (Irina T.) v. USPS, 0120181844 (09/10/2019) – At the time of events giving rise to this complaint, Complainant worked as a Postal Support Employee Mail Processing Clerk at the Agency's Detail Mail Distribution Unit, Catano Annex, in Catano, Puerto Rico. Starting on February 11, 2015, Complainant informed Agency officials that she needed a place to express breast milk. Complainant was informed that she could use the union office during the week, and a different office on the weekends. On February 26, 2015, a coworker (CW) accidentally walked into the union office, unaware that Complainant was using it. Complainant stated that, after this incident, she used the restroom to express breast milk. On March 7, 2015, the Agency settled Complainant's grievance and agreed to provide two 30-minute breaks and a clean office, free from intrusion, to express breast milk. On June 11, 2015, Complainant found the designated office filled with boxes. Complainant's supervisor

explained that new managers were unaware that Complainant was using the office, and once informed, they identified an alternative office while the designated office was cleaned and painted.

On May 5, 2015, Complainant filed an EEO complaint alleging, in part, that the Agency discriminated against her on the basis of sex (female, pregnancy) when, since February 13, 2015, she was not provided with a reasonable amount of time and a private, sanitary area to express breast milk. Complainant timely requested a hearing. On April 4, 2018, the AJ issued a decision without a hearing. The AJ determined that Complainant had not established a prima facie case of discrimination based on sex because she was not aggrieved because the Agency granted her request for a private room to express breast milk. The AJ noted that the incident with CW was an accidental and isolated event. The Agency issued a final order adopting the AJ's decision.

Complainant filed the instant appeal and submitted a statement in support of her appeal, stating that she did not receive the AJ's decision, and that she only received the Agency's final order adopting the AJ's decision. The Commission vacated the Agency's final order adopting the AJ's decision, and ordered the Agency to reissue its final order because Complainant did not receive a copy of the AJ's decision. The Commission noted that without a copy of the AJ's decision, Complainant was unable to argue with specificity about the findings and conclusions of the AJ, which the Agency implemented.

4. ENFORCING EQUAL PAY LAWS

Of the nine decisions that implicated this SEP Priority, none implicated the associated FCP – Alternate pay systems that allow for subjective pay determinations.

Decision Summary for this Category

Williams (Glenna D.) v. Air Force, 0720180026 (06/06/2019) **[Repeated under Enforcement – General below]** – The Agency filed an appeal from an EEOC AJ's finding of discrimination. Complainant was a GS-12, General Engineer. Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of race (Black) and sex (female) when from March 2, 2015 to the present, she has been performing higher graded duties as a GS-0819/0801-13, but not paid at that level. Complainant requested a hearing before an AJ. After a hearing, an AJ found race discrimination. The AJ also found no sex discrimination and no violation of the Equal Pay Act. Complainant did not challenge the findings of no discrimination. For relief the AJ ordered: back pay; $5,000.00 in nonpecuniary, compensatory damages; and EEO training and consideration of discipline to responsible Agency officials. The Agency issued a final order rejecting the finding of discrimination and also filed an appeal with the Commission. OFO affirmed the AJ's decision finding race discrimination. OFO found that substantial evidence supported the finding of discrimination. OFO found that Complainant performed the same duties as a Caucasian employee but was paid less. OFO found that the Agency's reason for the difference in pay was a pretext for discrimination. OFO affirmed the remedies and also required the Agency to post a notice regarding the finding of discrimination.

Rhynes (Lovella S.) v. USDA, 0120181290 (07/11/2019) – Complainant, who worked as a Forestry Prevention Technician in San Bernardino National Forest, California, filed an EEO complaint alleging that the Agency discriminated against her on the bases of sex (female) and age (over 40) when the

Agency failed to pay her appropriate compensation for Logistics Center duties assigned to her, the Agency prevented her from performing the duties of her GS-0462-07, Forestry Prevention Technician position, and she was not promoted to a GS-0462-09 Logistics position. Complainant did not request a hearing before an EEOC AJ. The Agency issued a decision finding no discrimination. Complainant appealed. OFO affirmed the Agency's finding of no discrimination. Regarding Complainant's Equal Pay Act (EPA) claim, OFO found that Complainant failed to establish a prima facie case. OFO found that Complainant failed to show that she performed work that was substantially equal to males under similar working conditions. OFO further found that Complainant was not paid less than the male comparators. Regarding her non-EPA claim, OFO found that Complainant did not show that discrimination motivated the wages she was given. OFO also found that Complainant was not prevented from performing her duties. Regarding the non-promotion, OFO found that there was no GS-9 position for which she could apply.

Washington (Carly O.) v. VA, 0120180750 (08/07/2019) – Complainant, who worked as an EEO Program Manager, GS-12, at the Agency's Veterans' Administration Regional Office (VARO) in Philadelphia, Pennsylvania, filed an EEO complaint alleging that the Agency discriminated against her on the bases of race (African-American), sex (female), and in reprisal for prior protected EEO activity when she became aware that an Employee Relations Specialist, GS-12 in Human Resources was only performing the reasonable accommodation (RA) duties of his position description, whereas she performed the RA duties in addition to her EEO Manager functions as the EEO Program Manager. Complainant did not request a hearing before an EEOC AJ. The Agency issued a decision finding no discrimination. Complainant appealed. OFO issued a decision finding no discrimination. Regarding Complainant's Equal Pay Act (EPA) claim, OFO found that Complainant did not establish a prima facie case because Complainant failed to show she earned less pay than the only identified comparative employee. Regarding her non-EPA claim, OFO found that Complainant did not show that discrimination motivated the wages she was given.

Jacobs (Alise A.) v. DOT, 0120180885 (08/07/2019) – Complainant, who worked as a Support Manager in Phoenix, Arizona, filed an EEO complaint alleging that the Agency discriminated against her on the basis of sex (female) when the Agency gave her only a five percent increase in salary when she was selected for the Support Manager position. Complainant also alleged that she discriminated against on the basis of sex when the Agency advertised a prior position she held, Air Traffic Manager in Scottsdale, Arizona, as permanent rather than temporary (which allegedly effectively resulted in her not receiving pay retention for the Air Traffic Manager position). Complainant requested a hearing before an EEOC AJ. The Agency submitted a motion for summary judgment. The AJ granted the Agency's motion and issue a decision without a hearing finding no discrimination. Complainant appealed. OFO issued a decision finding no discrimination. Regarding Complainant's Equal Pay Act (EPA) claim, OFO found that the difference in pay was justified by a factor other than sex (pay rule came into effect after Complainant had started her position). Regarding her non-EPA claim, OFO found that Complainant did not show that discrimination motivated the wages she was given or the decision to advertise a position as permanent.

Barnhart (Aida E), Cheung (Juliette K.), Choi (Juanita K.), and Chirby (Yvette H.) v. USDA, 0120181052, 53, 55, 56 (09/10/2019) –Three Complainants worked as Program Specialists, and one worked as a Management Services Specialist. All Complainants were a GS-9. Complainants filed separate complaints alleging that the Agency discriminated against them on the basis of sex (female) when: two similarly-situated male colleagues were hired as a GS-9 Program Specialist and they were hired as GS-7 Program Specialists for essentially the same position; and in violation of the Equal Pay Act (EPA), they were being paid less than a similarly-situated male colleague for performing a Program Specialist position that required substantially equal skill, effort, and responsibility under similar working conditions. The accepted claims were consolidated. Complainants did not request a hearing before an EEOC AJ, and the Agency issued a decision finding no discrimination. Complainants appealed. OFO issued a decision vacating the Agency's decision and remanding the complaints for further development. OFO found that the record needed further development because it was unclear who made the qualification determinations for Complainants and a comparative employee for hiring. Regarding the EPA claim, OFO found that the record was inadequately developed. OFO found that the record was unclear as to the actual duties performed by a comparative employee.

Mack (Clinton C.) v. Smithsonian Institution, 0120182118 (09/30/2019) **[Repeated under Priority 3, sub-priority "LGBT" above]** – Complainant worked as an Advancement Specialist, IS-1001-11-2, in the Office of Development at the Agency's National Museum of Natural History in Washington, D.C. Complainant filed an EEO complaint, alleging discrimination based on race (African-American), sex (male), sexual orientation (gay), color (black), disability (HIV positive and neuropathy), age (born in 1970), and reprisal for prior protected EEO activity when, among other allegations, he was denied a promotion and a step increase, he was denied equal pay for equal work, and he was subjected to a hostile work environment.

According to Complainant, in April 2014 a Senior Campaign Manager/Development Officer (C1) had failed to respond to his emails about a webpage. Complainant stated that he reported C1's failure to respond to management so he would not be blamed for any delays with the completion of the webpage. Complainant alleged that, around this time, he overheard C1 discussing his sexual orientation with some of her female colleagues.

According to Complainant, his new supervisor, the Associate Director of Development (S3) made discriminatory comments on two occasions in August 2014. In one conversation, S3 described her missionary work with people with HIV/AIDS in Africa. In the other conversation, S3 mentioned that her former employer had gradually become more accepting of LGBT individuals and that she had attended a christening at the home of a gay former colleague. On September 30, 2014, Complainant emailed S3 because he believed that the comments indicated that she had problems with him as an African-American gay male who was HIV positive. In the email, Complainant asked S3 to keep future conversations professional and related to the business of the museum. Complainant alleged that, after he complained, S3 reduced her communication with him. S3 averred that her comments were "innocent" and had nothing to do with Complainant or his membership in any protected class.

Complainant alleged that he was denied a promotion to an IS-12 Confidential Assistant position and denied a step increase. Complainant's IS-11 position did not have promotion potential and, unlike in the GS system, step increases in the IS system are not guaranteed based on performance or tenure

benchmarks. According to S3, the IS-12 Confidential Assistant position only existed at the level of the Secretary of the Agency, and S3 stated that she did not give any subordinates step increases during the period at issue. Complainant alleged that S3 noncompetitively promoted a younger White female coworker (C2) early in her tenure, but the record reflected that C2 applied for a competitive posting and was promoted to IS-11-1, a lower step than Complainant.

Complainant also alleged that he performed substantially equal work for less pay than C1, C2, a female Development Specialist (C3), and a female Advancement Associate (C4). According to the record, Complainant was paid more than C2, an IS-11-1, and he was paid the same as C3, an IS-11-2. C1 was paid more than Complainant, but her duties included supervising other employees. According to the Acting Chief Development Officer (S2), C4 received a step increase to IS-11-3 because of her extensive work with donors. S2 stated Complainant did not have as much contact with donors as C4.

Complainant requested a hearing. An EEOC AJ granted the Agency's motion for summary judgment, and the Agency issued a final order fully implementing the AJ's decision finding no discrimination. On appeal, we found that the AJ correctly determined that there were no genuine issues of material fact or credibility that merited a hearing. We further concluded that the preponderance of the evidence in the record did not establish that Complainant was subjected to discrimination as alleged.

Regarding his disparate treatment claim, the Agency's legitimate, nondiscriminatory reasons for not promoting him or awarding him a step increase were that Complainant's position did not have promotion potential, so he was ineligible for noncompetitive promotion, and that S3 did not award any step increases during her initial tenure with the Agency. We found that Complainant failed to establish that these legitimate, nondiscriminatory reasons were a pretext designed to mask discrimination or retaliation.

With respect to the alleged Equal Pay Act violation, we concluded that Complainant failed to establish that he performed equal work that required equal skill, effort, and responsibility as his higher-paid female colleagues. C1, an IS-13 employee, was a supervisor, and C4, who was received a step increase to IS-11-3, had extensive donor contacts, whereas Complainant performed primarily executive assistant functions.

We also found that there was no evident connection between Complainant's membership in any protected class and the alleged harassment. To the extent that S3's remarks about her prior employer becoming more accepting of LGBT individuals and her work with people with HIV/AIDS in Africa were related to Complainant's race, color, sex, sexual orientation, or disability, we found that the cited remarks did not affect a term or condition of employment, did not have the purpose or effect of unreasonably interfering with the work environment, and did not create an intimidating, hostile, or offensive work environment. Although the record only contained sparse description of C1's alleged comments regarding Complainant's sexual orientation, we found that the preponderance of the evidence failed to establish that the alleged comments were sufficiently severe or pervasive to constitute a hostile work environment.

5. PRESERVING ACCESS TO THE LEGAL SYSTEM

Decision Summaries for this Category

No decisions implicating this priority were issued during this reporting period.

6. PREVENTING HARASSMENT THROUGH SYSTEMIC ENFORCEMENT AND TARGETED OUTREACH

Decision Summaries for this Category

No cases reported under this priority during this reporting period.

7. BROAD IMPACT DECISIONS

Taylor (Elly C.) et al. v. SSA, 0720140019 (06/26/2019) **[Repeated under Enforcement – General and Circulated Cases below]** – Two African-American female employees filed a class complaint against the Agency alleging that it discriminated against a class of employees on the bases of race (African-American), sex (female), and in reprisal for prior EEO activity with respect to promotional opportunities.

Subsequently, an EEOC AJ recommended acceptance of the formal complaint and certified the class. The Agency declined to fully implement the AJ's decision on certification and filed an appeal to the Commission. On May 5, 2006, the Commission, in EEOC Appeal No. 07A50060, upheld the certification but slightly modified the class as follows:

All African-American females who were employed at the Agency's headquarters in Baltimore, Maryland, including employees working in the Security West and Metro West facilities, but excluding those in the Office of [the] General Counsel and the Office of the Inspector General, in general schedule grades seven through thirteen (GS-7 through GS-13) who have not been promoted during the period of time beginning on December 9, 2000, and continuing to the date a final determination is rendered on the class complaint claim.

Thereafter, the AJ issued an Interim Decision on Liability in which she concluded that the Class did prevail in showing class-wide discrimination against non-supervisory GS-11 African-American female employees who were denied promotions to the GS-12 grade level from December 9, 2000, to the present based on the Agency's statistical evidence of disparity in promotions. The AJ further found that neither Complainant established that she was discriminated against in obtaining promotions in their individual complaints.

The Agency filed an appeal after declining to implement the AJ's decision. On June 26, 2019, the Commission issued a decision finding, among other things, that the evidence supported the AJ's conclusion that there was unlawful discrimination with respect to the promotion of GS-11 African American females to the GS-12 grade level.

The Agency was ordered, among other remedial actions, to identify all affected African-American female employees who were part of the class, provide them with copies of the decision, and inform them of their right to secure attorney or non-attorney representation of their own choosing to assist in securing relief in accordance with 29 C.F.R. §1614.204. The Agency was also ordered to conduct an inquiry pursuant to §717(b) of Title VII to determine what factors are responsible for the significant

statistical disparity in the promotion of Black females beyond the GS-11 level and to propose solutions for eliminating such disparities in the future. Finally, the Agency was directed to pay attorneys' fees in the amount of $762,659.19 and costs in the amount of $23,571.73.

8. ENFORCEMENT – GENERAL

Thornsberry (Alexia D.) v. USPS, 0120170451 (04/24/2019) – Complainant, a Rural Carrier, filed an EEO Complaint alleging that she was discriminated against on the basis of her sex when she was sent home and charged with Leave without Pay (LWOP) after her Long-Life Vehicle mistakenly hit the mailbox of a home. Complainant also alleged that she was subjected to a hostile work environment when the Postmaster berated her over the incident. The EEOC AJ assigned to the case held a hearing and subsequently issued a partial finding of discrimination. Therein, the AJ found that Complainant established that she was subjected to disparate treatment based on her sex when she was sent home, but she did not establish that she was subjected to a hostile work environment when she was berated by the Postmaster. As a prevailing party, the AJ found that Complainant was entitled to compensatory damages and a reasonable amount of attorney's fees and costs. Complainant's attorney thereafter requested fees for 207.74 hours of work all totaling $103,238.70 and an additional $1,395.20 in costs.

The AJ subsequently determined that Complainant was entitled to $10,000 in non-pecuniary compensatory damages and only $21,756.27 in attorney's fees and costs. In calculating Complainant's request for attorney's fees, the AJ initially found that the Washington, D.C. hourly rate charged by Complainant's attorney was unreasonable because Complainant did not perform a diligent search in the Atlanta, Georgia area for an attorney. The AJ also noted that Complainant's attorney almost entirely focused her time on Complainant's claim of a hostile work environment, a claim upon which she ultimately did not prevail. The AJ made further deductions from Complainant's attorney's fee request, reducing the amount requested by over 75%.

On appeal, the Commission found that the record supported the AJ's findings with regard to the partial finding of discrimination and Complainant's award of non-pecuniary compensatory damages. The Commission however found that the AJ erred in his calculation of attorney's fees for Complainant. In so finding, the Commission determined that Complainant acted reasonable in obtaining her Washington, D.C. attorney, and therefore the Laffey Matrix should have been used to determine Complainant's attorney's hourly rate. The Commission further found that the AJ's reduction of the fee petition by over 75% was excessive and found that an across-the-board reduction of 15% to be more appropriate. The Commission therefore modified the AJ's decision, finding that Complainant was instead entitled to $86,300.93 in combined attorney's fees and costs.

Biasco (Irvin M.) v. DHS (FEMA), 0120170498 (04/25/2019) – Complainant alleged that the Agency subjected him to unlawful discrimination when it did not select him for a Deputy Regional Administrator position in 2011. After the investigation, Complainant initially requested a hearing before an EEOC Administrative Judge (AJ), but subsequently withdrew this request. Therefore, on March 22, 2016, the AJ ordered the Agency to issue a final decision in accordance with EEOC regulation 29 C.F.R. § 1614.110(b), which provides that agencies must issue a final decision within 60 days.

The Agency did not issue its final decision until October 18, 2016, or 210 days after the AJ's March 22, 2016 order. In its final decision, the Agency found that Complainant did not prove she was subjected to unlawful discrimination. On appeal, Complainant requested that the Commission sanction the Agency for not issuing a final decision in a timely manner.

In an appellate decision, OFO noted that the Agency issued its final decision 150 days late and did not provide an explanation or justification for its tardiness. OFO further noted that our regulations require agency action in a timely manner throughout the EEO process, and any delays in complying with the time frames in the regulations can impact the outcome of a complainant's claims or undermine the integrity of the EEO process. Therefore, OFO concluded that the Agency's significant delay in this case warranted the severe sanction of granting default judgment in favor of Complainant.

Additionally, OFO determined that Complainant was entitled to personal relief associated with this default judgment because he established a prima facie case of sex discrimination for his nonselection claim. Thus, the Agency ordered the Agency to offer Complainant placement into the Deputy Regional Administrator position at issue in this case; pay Complainant back pay and benefits with interest; pay proven compensatory damages; and to provide at least two hours of in-person training to all EEO officials involved in processing complaints regarding their case processing responsibilities, with a special emphasis on the importance of abiding by regulatory mandates and time limits.

Owens (Stanton S.) v. VA, 0120170582 (04/16/2019) – Complainant is an African-American plumber at the Agency's facility in Pittsburgh, Pennsylvania. He alleged, in pertinent part, that the Agency subjected him to racial harassment when coworkers (C1 and C2) took his toolbox, misplaced his tools, and left negative notes; C1 attempted to restrain him in a chair with a metal hose and clamp; C1 showed him a picture of a ceiling beam on his telephone and told Complainant that someone wrote that African Americans smell like goats; and C1 and C2 duct-taped and restrained him to a chair and took pictures of him.

In its final decision, the Agency concluded that Complainant's allegations of harassment were supported by witnesses and corroborated by a fact-finding investigation, but it was not liable for the harassment because it promptly and effectively responded to the reported harassment by placing the harassers on administrative leave, granting Complainant administrative leave, and ultimately terminating C1 and Complainant's supervisor (S1), and suspending C2.

In an appellate decision, OFO found Complainant's allegations to be wholly credible, noting that coworkers generally attested that Complainant's toolbox was moved or tampered with; that C1 attempted to restrain him in a chair with a metal hose clamp; that C1 referred to Complainant as a goat; and that C1 and C2 duct-taped Complainant to a chair. Additionally, the Commission found it significant that C1 admitted that he hid Complainant's toolbox, which was not unusual, and a Human Resources Official testified that she believed the duct-tape incident occurred similarly to what Complainant had reported.

OFO further noted that Complainant suffered severe psychological trauma because of these incidents that resulted in his inability to return to the workplace for an extended period, and these incidents were particularly intimidating and offensive because Complainant was singled out to receive such conduct.

Consequently, OFO concluded that Complainant was subjected to conduct that created a hostile work environment based on race.

OFO further determined that the Agency became aware of the racial harassment when Complainant told his supervisor (S1) that coworkers took his toolbox and showed S1 derogatory notes left for him about African-Americans, but the Agency did not take any action to respond to the harassment until the duct tape incident five or six months later. OFO concluded that the Agency's inadequate response after the toolbox incident likely emboldened C1 and C2 to further target Complainant for harassment. Consequently, OFO found that the Agency did not take immediate and appropriate corrective action after the harassment was initially reported and was therefore liable for the racial harassment.

In order to remedy the harassment, the Commission ordered the Agency to offer Complainant reassignment to a plumber position at a nearby facility, as requested by Complainant; to pay him back pay and benefits with interest; to restore any leave Complainant took because of the harassment; to pay Complainant proven compensatory damages; to provide at least eight hours of in-person EEO training to all managers and supervisors who oversee plumbers in the Agency's Pittsburgh Veterans Healthcare System; to consider taking disciplinary action against C2 with regard to his participation in the duct tape incident and to report its ultimate decision on the discipline of C1 and Complainant's supervisor; and to pay Complainant attorney's fees and costs.

Ballard-Collins (Barbie W.) v. Army, 0120171302 (04/09/2019) – Complainant, an Information Technology Specialist, alleged that the Agency discriminated against her and subjected her to a hostile work environment based on race, sex, the intersectional basis of race and sex, and reprisal for prior protected EEO activity with respect to 18 incidents. The AJ who conducted the hearing on Complainant's complaints left the Commission before issuing a decision. A different AJ (AJ2) reviewed the hearing transcript, hearing exhibits, and reports of investigation and decided that she could issue a decision in this matter because credibility determinations based on the demeanor of witnesses were not necessary. She concluded that Complainant established that the Agency subjected her to reprisal with respect to one incident: a supervisor drafted a request for a disciplinary action (CPAC-25 form) against Complainant and sent it to one of Complainant's coworkers for review. AJ2 further concluded that Complainant did not establish discrimination or reprisal regarding the other claims. She directed the Agency to provide Complainant with $2,000.00 in nonpecuniary compensatory damages and $625.62 (60% of the requested $1,042.70) in pecuniary damages. The Agency fully implemented AJ2's decision.

On appeal, we found that AJ2, who made factual determinations based on the entirety of the record and did not make any credibility determinations based on witness conduct and demeanor, properly issued a decision. Based on an independent, de novo review of the entire record, we found that Complainant did not establish discrimination with respect to claims other than the CPAC-25 incident. We affirmed the awards of pecuniary and nonpecuniary compensatory damages. Because AJ2's decision and the Agency's final action did not address the issue of attorney's fees, we remanded the matter to the Agency for a determination on that issue.

Carlton (Leon B.) v. DOJ (BOP), 0120171352 (04/03/2019) – Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of race (African-American), disability (back), age (44), and reprisal for prior protected EEO activity with respect to nine (9) separate issues, among them, that his 2015 performance appraisal was rated as Minimally Successful. The Agency issued a FAD finding that Complainant did not establish that he had been discriminated against with respect to issues 1 – 8, but the Agency found discrimination regarding issue 9, i.e., the lowering of Complainant's FY-2015 performance appraisal. The Agency acknowledged that the reason that Complainant's rating was lowered was because he had been off work for an extended period due to his disability. The Agency indicated that normally an employee would be given the same rating they previously received, or there would be some indication that there was not enough information to rate the employee. Accordingly, the Agency found that Complainant demonstrated that he was subjected to disability discrimination with regard to his performance appraisal. The Agency ordered that Complainant's rating be changed, he be given the opportunity to establish an entitlement to compensatory damages, provided attorney's fees, if applicable, and that a notice be posted in the workplace regarding the finding of discrimination.

Complainant did not provide a statement on appeal indicating what his specific concern was regarding the FAD. Based on a thorough review of the record, however, we affirmed the Agency's FAD which found no discrimination regarding claims 1 - 8, as Complainant did not provide any evidence that the Agency erred in this finding. We also affirmed the Agency's finding that Complainant was subjected to disability discrimination when his FY-2015 performance appraisal was lowered to Minimally Successful. In addition to the remedies ordered by the Agency, the Commission ordered training for the responsible managers regarding the Agency's obligations under the Rehabilitation Act; and ordered the Agency to consider taking appropriate disciplinary action against all responsible management officials.

Smith (Shameka M.) v. VA, 0120172281 (04/04/2019) – Complainant, a Health Technician in the Pathology Laboratory at the VA Medical Center in Cleveland, Ohio, filed an EEO complaint alleging that the Lead Technician (TL2) subjected her to sexual harassment on the bases of sex (female) and in reprisal for prior protected EEO activity based on numerous incidents occurring from October 22, 2010 to June 24, 2012. Following numerous delays in obtaining a hearing date, Complainant requested a final agency decision (FAD1). FAD1 found the Agency liable for sexual harassment and retaliation. As the Agency was investigating and calculating damages and attorney's fees, Complainant appealed FAD1. Thereafter, the damages award and attorney's fees were issued in two separate decisions which Complainant appealed as well. On appeal, we consolidated the matters for one decision.

The parties dispute when the period of sexual harassment liability began and ended. Complainant asserted that sexual harassment liability began in October 2010 and continued to February 2013. The Agency contended that the sexual harassment liability took place during a far shorter time-period beginning in January 2012 and ending on June 4, 2012, when TL2 was temporarily reassigned. The parties also disputed the amount of compensatory damages and attorney's fees awarded.

Statements provided by witnesses revealed a workplace without oversight where inappropriate and offensive sexually-motivated behavior took place on a regular basis as early as 2009 and continued to June 4, 2012. We also found that the record supported the conclusion that Complainant endured

conduct that was sufficiently severe and pervasive to alter the conditions of her employment and created an abusive work environment.

Contrary to the Agency's assertion, we concluded that the Agency had constructive knowledge of the sexual harassment as early as October 2010 and failed to take remedial and corrective action until February 2013. The record established that in October 2010, Complainant notified management that she was being sexually harassed but did not want to pursue a complaint and did not name the harasser. However, the record also established that management officials generally knew who Complainant was referring to and attempted to address it by requiring TL2's entire team to undergo sexual harassment training in December 2010. The sexual harassment continued, and Complainant sought help from management on a weekly basis in a distraught, sometimes even in a suicidal state. We also found management had constructive knowledge by the fact that the inappropriate and offensive sexually-related conduct was pervasive in the second shift (i.e., it was practiced openly in the workplace as far back as 2009 and such conduct was well-known among the employees).

We also agreed with Complainant that the Agency failed to take effective corrective action until February 2013. The record established that the sexual harassment continued until TL2 and Complainant were permanently separated on June 4, 2012. However, by reassigning Complainant to the third shift, the Agency had not fully corrected the effects of the harassment or taken effective remedial measures until she was placed back in the position she was prior to the harassment, which was in February 2013.

To remedy the discrimination, we found the Agency's award of $30,500.00 in non-pecuniary damages wholly inadequate to remedy the significant harm that the 28-month sexual harassment and retaliation caused over a lengthy duration. Complainant provided her own affidavit, in addition to affidavits from her adult children, a long-time friend, her estranged husband and a clergy member at her church who knew her well. The statements clearly demonstrated that Complainant substantially started to deteriorate when the sexual harassment began. In addition, the statements by family and friends consistently connect the sexual harassment to Complainant's deterioration at that time.

In addition, the record contained the expert opinions of a forensic psychologist (FP) who conducted an extensive examination and review of Complainant and her medical history and concluded that the sexual harassment and retaliation caused a significant aggravation of Complainant's pre-existing condition and the development of new disorders, including a Panic Disorder without Agoraphobia, Alcohol Abuse, and Alcohol Induced Mood Disorder, with Depressive Features. FP also concluded that Complainant's symptoms included: an almost constant depressed mood; low energy; frequent crying; decreased interest in most activities; and feelings of worthlessness, helplessness and hopelessness. Additionally, FP noted that Complainant suffered with panic attacks whenever she went to work or thought about work at home and had intrusive thoughts of work and being molested. In addition, objective assessments of Complainant's cognitive functioning showed severe impairment of concentration, and moderately severe impairment of memory.

The record also established that Complainant suffered severe emotional and physical distress as a direct and proximate cause of the sexual harassment and retaliation in the following ways: (a) substantial aggravation of RMDD; (b) she suffers with suicidal thoughts; (c) she has withdrawn from family, friends and co-workers; (d) she has had flashbacks to when she was molested and raped as child; (e) she suffers bouts of crying at work and home: (f) she is constantly anxious; (g) she often has

difficulty concentrating, is confused and forgetful; (h) she often is unable to function at home; (i) she often feels embarrassed and ashamed; (j) she often feels helpless; (k) she has low energy; (l) she has trouble sleeping; (m) she suffers with nightmares; (n) she suffers with mood swings; (o) she is often irritable and angry; (p) she suffers with low self-esteem; (q) she has lost her religious faith; (r) she abuses alcohol; (s) she suffers with migraines; (t) she suffers with blisters from scratching skin due to stress; (u) she suffers with stomach aches; (v) she suffers with muscle tension; (w) panic attacks; (x) accelerated heart rate; (y) shortness of breath; and (z) chest pain.

The record further established that to get Complainant back to her baseline (pre-harassment health levels) she will require extensive treatment, including four to five years of psychotherapy and medication management. Considering the evidence in the record establishing that Complainant's harm to be severe and extensive in duration, we concluded that an award of $225,000.00 in non-pecuniary damages was warranted in this case. Further, we found that the record contained sufficient evidence to support Complainant's claim for future pecuniary damages and awarded $51,787.60 in pecuniary damages. Additionally, we found that Complainant was entitled to restoration of 697.95 hours of annual leave and 413.70 hours of sick leave. Further, we awarded Complainant $262,413.08 in attorneys' fees and costs. Finally, we ordered the Agency to provide training to the responsible management officials and employees, to consider disciplining the responsible management officials and employees, and to post a notice.

Sales (Irina T.) v. VA, 0120180568 (April 3, 2019) – Complainant was employed by the Agency as a Pharmacy Technician. She alleged in part that she was discriminated against based on her disabilities (diabetes, gastroparesis disease) when: (1) in January 2016, the Agency ordered her to return to work or face discipline, and (2) in March 2016, it reprimanded her for being AWOL. Following an investigation, Complainant did not request a hearing. The Agency then issued a final decision finding no discrimination. OFO reversed.

Due largely to symptoms of her diabetes, some of which required hospitalization, Complainant had repeated and periodic absences from work, although she or her husband consistently and timely notified Complainant's supervisor of the absences, including the reasons. After Complainant's earned leave, donated leave, and protective FMLA coverage ran out, her management charged her AWOL and ordered her to return to work. Complainant did so, but her absences continued, and she was then reprimanded for continued AWOL. Complainant's management explicitly did not dispute the validity of Complainant's illness but, applying the Medical Center's blanket attendance policy, charged her with AWOL because she was out of available leave and her FMLA coverage ran out.

OFO found that while Complainant requested a reasonable accommodation – unpaid excused absences - there was no indication that management initiated or engaged in any sort of interactive process with Complainant to explore means of accommodating her disability. OFO found that this resulted in the Agency being unable to meet its burden of proving that granting Complainant additional excused absences (LWOP) would have created an undue hardship on its operations. OFO explained that 2016 EEOC guidance on leave indicated that employers may need to modify general leave policies when providing accommodation and emphasized that engagement in the interactive process with the employee is specifically designed "to enable the employer to obtain relevant information to determine the feasibility of providing the leave as a reasonable accommodation without causing an undue

hardship." Moreover, OFO observed that in her October 2017 appeal brief, Complainant wrote that she now works in the Pharmacy Service three hours a day, and her attendance has been good because she is experiencing less symptoms from her disability due to the changed schedule. OFO found that had the Agency engaged in the interactive process with Complainant, it might have discovered this other viable accommodation – part-time work. OFO ordered the Agency to expunge the AWOL charges and resulting reprimand, to revise its leave policy to allow for leave as a reasonable accommodation, to provide Complainant with appropriate back pay, compensatory damages and attorney's fees, to provide training to the responsible Agency officials, and the posting of a notice of the finding.

Williams (Rick G.) v. DHS (ICE), 0720180009 (04/26/2019) – Complainant, a Management Program Analyst, filed an EEO complaint alleging that Agency subjected him to discrimination based on race (African-American), color (black), age, and in reprisal for prior protected activity.

An EEOC AJ issued a decision after conducting a three-day hearing. The AJ found that the Agency subjected Complainant to race and color discrimination when the Agency confiscated his credentials which authorized him to receive firearms training. The AJ also found that the Agency subjected Complainant to race and color discrimination, and unlawful retaliation when the Unit Chief conducted an inventory of Agency badges, the Unit Chief opened a mail parcel addressed to Complainant, and when the Unit Chief contacted the Employee Assistance Program (EAP) and inquired about Complainant. The Agency rejected the AJ's findings and appealed. Complainant filed a cross appeal seeking to increase the award of compensatory damages.

We found that there was substantial evidence to support the AJ's finding of race and color discrimination regarding the Agency taking away Complainant's credentials and not allowing him to train at the Agency firing range. While the Agency articulated a legitimate, nondiscriminatory reason for its action – that the training Complainant received did not authorize him to receive law enforcement credentials – we concurred with the AJ that Complainant established that the Agency's reason was pretext for race and color discrimination. We noted that Complainant's training included instruction on the safe handling of firearms and that there was testimony that non-law enforcement personnel were permitted to take familiarization training at the firing range. The record also contained testimony that Complainant told the Agency official who took away his credentials that he obtained them after completing training. In our decision, we set forth that the AJ made numerous credibility determinations in favor of Complainant with respect to this claim and that we found no basis to disturb the AJ's credibility determinations.

We further found that there was substantial evidence in the record to support the AJ's finding of retaliation with respect to the other three claims. In reaching this finding, we noted that Complainant established a prima facie case of retaliation based on his prior ongoing EEO activity. We further found that there was substantial evidence in the record to support the AJ's finding that Complainant established that the Agency's articulated reasons for its actions with these claims were pretext for retaliation.

Regarding remedies, we found that there was substantial evidence to support the AJ's award of $20,000 in non-pecuniary compensatory damages. Complainant testified he was afraid he would lose his job,

and had difficulties sleeping and eventually sought help from the EAP. We found that this award was not monstrously excessive and was consistent with the amounts awarded in similar cases.

Finally, we found the AJ's award of attorney's fees was proper. While the Agency sought to decrease the hourly rate to the historical rate at the time the work was performed, we found that Complainant (through a retainer agreement) was being provided legal services at a reduced rate due to public interest minded reasons. Thus, we concurred with the AJ that the properly hourly rate was the prevailing rate at the time of the fee petition rather than the historical rate. We also ordered to the Agency to implement the other corrective action set forth in the AJ's decision including: reinstating Complainant's Law Enforcement Badge and Credentials and permitting him entry to the Agency's firing range to train, providing EEO training to the responsible management officials, consideration of disciplinary action, and posting a notice regarding the discrimination.

Dunaway (David T.) v. USPS, 2019001172 (04/09/2019) – Complainant, a Postmaster, was advised by his medical providers to obtain a regular work schedule with less stress that would allow him to attend therapy sessions at least twice a month. Consequently, Complainant applied to a vacancy announcement for a District Safety Specialist position, a downgrade from his postmaster job. He initially applied through the competitive process, along with approximately forty-three other applicants. A Review Committee, comprised of three panel members, reviewed and scored the candidates. Those with the top eight scores were recommended to the selecting official for interviews. Complainant, with a score of 5 out of 10, did not make the interview list. Complainant also, as advertised in the job posting, contacted the selecting official directly and requested a non-competitive downgrade. In response, the selecting official granted Complainant an interview, but he was ultimately not selected through either process.

Complainant did not request a hearing and the Agency found Complainant failed to prove his claims of discrimination and unlawful retaliation. On appeal, OFO concluded that Complainant proved retaliatory animus played a role in his non-selection. While we reasoned that some panel members were unaware of Complainant's prior EEO complaint, we noted that Complainant also contacted the selecting official directly for non-competitive consideration. The selecting official attested that she was named in Complainant's prior EEO case, adjudicated about a year before. In evaluating the legitimate reasons proffered by the Agency for not selecting Complainant, we found the Review Committee failed to provide any specificity as to why certain candidates were recommended to the selecting official and why Complainant was not. Further, they did not retain their notes. The panel members utilized a matrix but failed to describe the five "requirements" that comprised the applicants' scores. Moreover, the matrix did not support the panelists' assertions that the highest scores were recommended. Most successful candidates received a score between 7 and 10, but two individuals recommended for an interview scored a 2 and 0. Complainant had earned a score of 5.

While the selecting official provided some details for not choosing Complainant, her reasons were not supported by evidence. For example, she cited the "underperformance" of the safety program at Complainant's post office. However, documentation presented by Complainant illustrated that, compared to approximately twenty other facilities, his post office did not stand out as underperforming. In response to Complainant's assertion that the selectee had no safety experience, the selecting official admitted this was true but argued that "all of the Safety Specialists that I have hired . .

. had no previous safety experience. . .". We found this reasoning to be counter-intuitive in choosing an individual that would be responsible for safety in a District comprised of thirty facilities. In conclusion, we found that Complainant met his burden of showing pretext, through the weaknesses, implausibilities, and contradictions of the Agency's proffered reasons. To remedy Complainant, we ordered retroactive placement in the position in question, adjudication of his compensatory damages claim, attorney's fees, training for the selecting official and Review Panel, consideration of disciplinary action for the selecting official, and the posting of a notice.

Biasco (Wyatt W.) v. DHS (FEMA), 2019001257 (04/17/2019) – Complainant, a FEMA employee, was detailed to an SES position at EPA. While on detail his basic pay and benefits continued to be paid by FEMA. When Complainant's advance request for compensatory time for travel was denied, Complainant believed it was reprisal and filed an EEO complaint. When the Agency failed to timely conduct an investigation, Complainant requested a hearing. While the matter was pending before an AJ, the Agency was ordered to complete an investigation and issue a Report of Investigation. It failed to do so. A year later, the AJ issued a default judgment against the Agency for its "extraordinary failure to investigate [Complainant's] claim of discrimination as required by regulation." After receiving briefs from the parties, the AJ determined that a hearing on relief was not necessary. Complainant was found to have established a prima facie case of reprisal based on the temporal proximity between Complainant's prior activity and the denial of comp time. Complainant was awarded $5,000 in non-pecuniary damages. Although on appeal Complainant attempted to obtain relief for years of retaliatory harassment, the Commission found that the complaint and matter before the AJ was comprised of the single instance of denied comp time. We found the award of $5,000 was proper.

Curcio (Lazaro G.) v. DOC (PTO), 0120170802 (05/17/2019) – Complainant alleged that the Agency discriminated against him on the basis of disability and in reprisal for prior protected EEO activity when it did not select him for a Patent Examiner position under five vacancy announcements. In a Declaration for Federal Employment form (OF-306 form) that he submitted in connection with his first application, Complainant stated that his previous employer discharged him from a position as a criminal defense attorney. He alleged that the discharge resulted from disability-based discrimination. An Agency representative notified Complainant that the Agency had selected him for a position under the first vacancy announcement. Subsequently, however, the representative notified him that the Agency would not hire him because of information on the OF-306 form. A Human Resources Specialist (HRS1) had told the selecting official that Complainant was "unsuitable for hire" because Complainant's previous employer, a state agency, had fired him. In his affidavit, HRS1 stated that he "did not believe [Complainant] was being honest about his termination, . . . did not believe that a federal agency or state government would discriminate against him due to his disability," and thought that the Office of Personnel Management "may have considered his application as material and intentional falsification because he was not terminated for the disability or for requesting reasonable accommodations. He was terminated for the reasons provided by" Complainant's previous employer.

After Complainant withdrew his request for a hearing, the Agency issued a final decision finding that it "retaliated against Complainant when conducting its suitability determination." The Agency found

that statements that HRS1 made in his affidavit and in deposition testimony constituted direct evidence of a retaliatory motive, which it imputed to the selecting official. Although it noted that it sometimes hired applicants whom the Human Resources Office had deemed unsuitable because of OF-306 disclosures, the Agency stated that it was not required to credit Complainant's reason for his discharge over that of his former employer. It ordered the Agency to conduct a new suitability determination after Complainant submitted a new, current OF-306 form and to offer Complainant a position if it found him suitable for employment. It also ordered the Agency to determine an award of "other damages" after receipt of Complainant's request for such damages.

On appeal, we found that the Agency did not establish that it would not have placed Complainant in the Patent Examiner position absent the discrimination. There was no evidence that a prior termination automatically disqualified an applicant, and the Agency acknowledged that it had hired individuals who received unfavorable suitability reviews. Accordingly, we ordered the Agency to place Complainant in the position retroactively with back pay and any step increases or career-ladder promotions that he would have received absent the discrimination. In response to the Agency's argument that federal regulations require it to investigate the suitability of employees at least once every five years, we stated that it could conduct a reinvestigation of Complainant to the extent that it had reinvestigated the suitability of other Patent Examiners whom it had hired under the vacancy announcement at issue.

Smith (Pamula W.) v. VA, 0120171387 (05/02/2019) – Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of sex (female) and reprisal for prior protected EEO activity when she was subjected to sexual harassment and retaliation by her team leader. A hearing was held, and an EEOC AJ found that Complainant established that she was discriminated against based on her sex, and in retaliation for engaging in protected EEO activity when she was subjected to sexual harassment as early as October 2011. The AJ, however, limited the Agency's liable for damages to the period beginning after April 18, 2012, the date upon which management became aware of the sexual harassment and failed to take prompt remedial action. Specifically, the AJ found that the Agency failed to remove her co-worker, who was a team leader, from second shift and thereby enabled him to treat Complainant less favorably than other coworkers in the laboratory regarding her assignments and the assistance provided to her for a period of seven (7) weeks. Complainant requested a monetary award of $150,000.00 in non-pecuniary damages. The request was based on her experiencing sexual harassment and reprisal beginning in at least October 2011 through June 4, 2012. Disagreeing with Complainant's liability time line, the AJ awarded Complainant only $25,000 in non-pecuniary compensatory damages.

On appeal, OFO found that the Agency's liability extended back to the beginning of the harassment. We found that Complainant was entitled to compensatory damages beginning in October 2011, when the discrimination started, to June 4, 2012, when it ended. The fact that Complainant did not report the sexual harassment until April 18, 2012, was inconsequential to the harm that she suffered because of the discriminatory harassment to which she was subjected. OFO therefore found that the AJ's award of $25,000 in non-pecuniary compensatory damages was inadequate. We found that an award of $50,000.00 was more consistent with the Commission's cases where a Complainant had established these types of damages.

Accordingly, we ordered the Agency to, among other things, issue a check to Complainant in the mount of $51,480.50 for nonpecuniary and past pecuniary damages.

Battle (Melania U.) v. USPS, 0120180092 (May 15, 2019) – Complainant worked as a Supervisor, Distribution Operations at the Agency's Lehigh Valley Processing and Distribution Center in Bethlehem Pennsylvania. Starting on September 26, 2016, Complainant requested a change in her work schedule to be off on Sundays because Sunday was her day of worship and Sabbath. Complainant's supervisor denied her request because of "the needs of the service."

Among other things, Complainant alleged that she was discriminated against based on her religion when she was not given Sundays off to observe her religious beliefs. Upon request for a final decision, the Agency found that Complainant had a bona fide religious belief that conflicts with an employment requirement, and that she informed the Agency. The Agency then found that Complainant's supervisor denied her request because he was unable to cover operations with three, out of four, supervisors off on Sundays since two other supervisors already had Sundays off, which was determined by seniority. The Agency then determined that granting Complainant's request would have created an undue burden and/or caused the Agency to violate the collective bargaining agreement. Complainant appealed the Agency's decision.

On appeal, the Commission found that the Agency discriminated against Complainant when it failed to provide her with a religious accommodation. In this case Complainant's managers did not make a good faith effort to reasonably accommodate her request because they did not ask for a voluntary change in work schedule from other supervisors or explore any other type of accommodation. Additionally, the Agency did not adequately demonstrate undue hardship because it was mere speculation that they could not manage operations with only one supervisor on Sundays. Accordingly, the Commission reversed the Agency's decision and ordered it to take corrective action.

Ritz (Kerry B.) v. VA, 0120180317 (05/31/2019) – Complainant worked as a Ratings Veterans Service Representative at the Agency's Regional Office in Winston-Salem, North Carolina. On or about April 23, 2013, Complainant submitted a request for a reasonable accommodation to work from home. On July 8, 2013, an Agency employee contacted Complainant's physician's office to discuss his medical information. On August 9, 2013, Complainant's request to telework as a reasonable accommodation was granted.

Among other things, Complainant alleged that he was discriminated based on disability when from April 21, 2013, through August 2013, management denied his reasonable accommodation request to telework; and on August 9, 2013, the Agency granted his request to telework, but did not implement the request. Complainant requested a hearing. The EEOC AJ held a hearing and issued a decision on August 25, 2017.

The AJ found that Complainant was a qualified individual with a disability, and that the Agency did not promptly begin the interactive process because Complainant submitted his request on April 23, 2013, and it remained unacknowledged for approximately three weeks, and this delay was unjustified. The AJ determined that the Agency did not make a good faith effort to accommodate Complainant

from April 23, through July 8, 2013. From July 8, 2013, through August 1, 2013, the AJ found that the Agency properly sought clarification from Complainant and granted his request on August 9, 2013. From August 9, through September 10, 2013, the Agency worked to secure the IT portal, license, and bandwidth to allow for telework, which the AJ found was not an unnecessary delay. The AJ concluded that the Agency discriminated against Complainant based on disability when it failed to participate in the interactive process and accommodate him from April 23, through July 8, 2013, and awarded Complainant $16,000 in non-pecuniary compensatory damages, $30,373.44 in attorneys' fees, and $693.04 in costs.

The Agency issued a final order fully adopting the AJ's decision. On appeal, Complainant only challenged the AJ's award of non-pecuniary compensatory damages, arguing that the AJ erred in not awarding greater damages because the Agency's actions caused additional physical and emotional pain. The Commission affirmed the Agency's final order because substantial evidence in the record supported the AJ's award of $16,000 for non-pecuniary compensatory damages. Additionally, the $16,000 award for Complainant's pain and suffering for two and a half (2½) months was in line with similar Commission cases.

Miller (Jess P.) v. DOD, 0120180553 (05/31/2019) – Complainant worked as a Human Resources Assistant at the Agency's Pacific Human Resources Division, Pacific Area Office, in Okinawa, Japan. Among other things, Complainant alleged that he was discriminated against based on his race, color, and in reprisal for prior EEO activity when his supervisor issued him a Memorandum for Record of Pre-Action Investigation Meeting on July 23, 2013. Complainant requested a hearing. The EEOC AJ held a hearing and issued a decision on September 28, 2017.

The AJ found that Complainant was harassed based on his race, color, and retaliation when the Agency issued the memorandum to Complainant on July 23, 2013. The AJ determined that the memorandum was sufficiently severe to create a hostile work environment because the supervisor falsely stated that Complainant "consistently remarks that he cannot and will not get ahead because he is a Black man." As such, the AJ determined that Complainant was entitled to non-pecuniary compensatory damages for the discrimination and awarded him $15,000. The Agency issued a final order fully adopting the AJ's decision. Complainant appealed the amount of the award, and he requested that the Commission award him non-pecuniary compensatory damages in an amount between $50,000 and $150,000.

The Commission affirmed the Agency's final order fully adopting the AJ's decision. The record contained substantial evidence when Complainant and his wife provided testimony regarding Complainant's harm. The record also showed that there were other causes of Complainant's harm, apart from the Agency's discrimination. Additionally, we found that $15,000 was consistent with prior Commission decisions, even accounting for the need to adjust the award for inflation. Accordingly, the Commission found substantial evidence to support the AJ's non-pecuniary compensatory damages award of $15,000 for 25 months of harm.

Pollitt (Deon C.) v. DOC, 0120180586 (05/07/2019) – Complainant, an applicant for employment with the National Oceanographic and Atmospheric Administration (NOAA), filed an EEO complaint

alleging that the Agency discriminated against him on the basis of age (72) when: (1) he was not selected for the position of General Vessel Assistant, as advertised under Vacancy Announcement Number OMAO-SHIPS-GVA-2016-01-EX; and (2) he was not selected for the position of Able Bodied Seaman, as advertised under Vacancy Announcement Number OMAO-SHIPS-AB-2016-01-EX.

Following an investigation, Complainant requested a final agency decision (FAD). In the FAD, the Agency concluded that Complainant had been subjected to discrimination as to claim (2). As relief, the FAD ordered, among other things, that the Agency offer Complainant "the position of Able Seaman (Day), or a substantially equivalent position" and to pay Complainant backpay and benefits. The Agency made an offer of employment to Complainant with the following position description: Able Seaman(D), WM-9924-02 with NOAA's Office of Marine and Aviation Operations, aboard the NOAA Ship Fairweather, located in Kodiak, Alaska. The Agency gave Complainant 15 days to respond. Complainant did not accept the offer stating that he was neither accepting nor declining the offer because it was "not part of a precisely defined remedy."

In his appeal, Complainant argued that the relief awarded was legally insufficient because it did not specify what monetary and other relief he was to receive. Additionally, Complainant objected to the job offer as not substantially equivalent to the position for which he was discriminatorily denied. Finally, Complainant contended that the time for accepting or rejecting the offer of employment had not yet run because the FAD did not specify the nature and amount of back pay and benefits he would be awarded.

In the appellate decision, the Commission initially determined that any appeal regarding the specific terms of the relief ordered was untimely. With respect to Complainant's contentions related to backpay, the Commission found that the record was insufficient so as to enable a decision regarding the proper amount of back pay and benefits due. The Commission reminded Complainant of his obligation to cooperate with the Agency in its efforts to determine the appropriate amount of back pay. Next, the Commission found that the offered position was substantially similar to the position for which he originally applied. Finally, the Commission noted that Commission regulations do not provide for an applicant to defer responding to an offer of employment made by the Agency until he or she is satisfied with other aspects of the remedy to be provided. Nonetheless, the Commission determined that the Agency engaged in negotiations with Complainant about the relief to which he was entitled after making the offer and also informed Complainant that he could "preserve [his] rights" by filing an appeal with the EEOC. Based on these circumstances, the Commission found that Complainant may have been led to believe that he could delay his acceptance or declination until his other disputes regarding relief were resolved either by the Agency or on appeal to the Commission. Accordingly, the Commission found that Complainant should be afforded an additional period of time to respond to the offer of employment. As a result, the Commission ordered the Agency to immediately offer the previously offered Able Seaman (Day) position or a substantially equivalent position and that Complainant had 15 days to accept or decline the offer. In addition, the Commission ordered the Agency to determine and pay the appropriate amount of back pay and benefits; to provide training to the responsible management officials; to consider disciplining the responsible management officials; and to post a notice.

Gandara (Ashlea P.) v. DHS (CBP), 0120182299 (May 28, 2019) – On May 22, 2017, Complainant learned that the Agency did not select her for the position of Supervisory Border Patrol Agent, GS-1896-15, assigned to the National Frontline Recruitment Command (NFRC), advertised under Job Opportunity Announcement (JOA) Number MHCBPMP-1733020-ERB (ERB position), located in Washington, D.C.; and on July 7, 2017, Complainant learned that the Agency did not select her for the position of Patrol Agent in Charge, GS-1896-15, advertised under JOA MHCBP-1923889-MCM (MCM position), located in El Paso, Texas. On September 25, 2017, Complainant filed an EEO complaint alleging that the non-selections were because of her sex, national origin and in reprisal for prior EEO activity. The Agency issued a decision concluding that Complainant did not prove that the Agency subjected her to discrimination as alleged.

The appellate decision modified the Agency's final decision, finding that Complainant was subjected to discrimination based on reprisal for engaging in prior EEO activity with respect to her non-selection for the ERB position. The appellate decision found that Complainant established a prima facie case of reprisal discrimination, but that the Agency did not articulate a legitimate, non-discriminatory reason for its action. The decision found that while Complainant was included on the Certificate of Eligibles (COE), she was not recommended or selected for an interview. Seven of the 23 candidates on the COE were selected for an interview. The appellate decision found that the Agency did not indicate how it determined which seven candidates would be interviewed, or why Complainant was not one of the seven although all 23 were deemed qualified and included on the COE. The appellate decision found that it was not enough for the Agency to simply state that the selecting official, or their designee, had the discretion to interview any applicants referred as best qualified – especially in a case were all the interviewees, unlike Complainant, had never engaged in protected EEO activity.

Among other things, the Agency was ordered to: (1) place Complainant in the ERB position; (2) pay Complainant backpay with interest from the date she would have started in the position; (3) conduct a supplemental investigation on Complainant's entitlement to compensatory damages; (4) provide eight hours of in-person EEO training to the RMO regarding responsibilities under Title VII, with special emphasis on the duty of managers to avoid retaliating against employees; and (5) consider taking discipline against the RMO.

Cross (Marquis K.) v. Navy, 0720180014 (05/10/2019) – The Agency filed an appeal from an EEOC AJ's finding of discrimination. Complainant was a probationary employee working as a Shipfitter Apprentice at the Norfolk Naval Shipyard in Portsmouth, Virginia. Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of race (African-American) and sex (male) when on June 20, 2014, his employment was terminated. Complainant requested a hearing before an AJ. After a hearing, an AJ found race and sex discrimination. For relief the AJ ordered: back pay from June 20, 2014, until the date Complainant is returned to work at the Agency; $62,750.00 in nonpecuniary, compensatory damages; attorney's fees in the amount of $13,385.00; placement of Complainant in the position of a Naval Shipfitter, non-apprentice, non-probationary employee; restoration of sick and annual leave Complainant would have earned; and posting of a notice of the finding of discrimination. The Agency issued a final order rejecting the finding of discrimination (and challenging the remedies) and also filed an appeal with the Commission. OFO affirmed the AJ's decision. OFO found that substantial evidence supported the finding of

discrimination. OFO affirmed the remedies except to modify the position to which Complainant was being restored. OFO ordered the Agency to restore Complainant to his apprenticeship position rather than to a non-apprenticeship position because he had not completed the apprenticeship when he was terminated. OFO also ordered the Agency to provide training to and consider discipling the responsible Agency personnel.

Wimbish (Wanita Z.) v. VA, 0120171549 (05/17/2019) – Complainant, an Assistant Coach with the Agency, filed an EEO complaint alleging that the Agency subjected her to reprisal and denied her a reasonable accommodation for her disability, among other things. Complainant specifically alleged, in pertinent part, that she received an unsatisfactory monthly progress review and she was issued a notice that her telework agreement was under review and could be revoked due to her unsatisfactory monthly progress review. Following the investigation, the Agency issued its final decision finding that Complainant did not establish that she was subjected to discrimination or denied accommodation as alleged.

On appeal, the Commission modified the Agency's decision, finding that Complainant established that she was subjected to reprisal for requesting accommodation. The Commission specifically observed that Complainant was working from home five days per week per her request for accommodation and pursuant to the Agency's settlement of her EEO complaint. The Commission also noted that while Complainant was working from home, the Agency issued her the unsatisfactory monthly progress review, assessing her performance as being unsatisfactory in her interpersonal skills, among other performance elements. The Commission found that the Agency's determination that Complainant lacked interpersonal skills, clearly penalized Complainant for not being in the office, as it is a given that teleworking affects social interaction. The Commission further considered that Complainant received the unsatisfactory review during a period when her team production numbers were high, and observed that she had never received an unsatisfactory rating until she began to telework. The Commission therefore found that the unsatisfactory rating was motivated by Complainant's telework agreement, which was given to her as an accommodation.

The decision ordered the Agency to remove any reference to the August 2015 unsatisfactory monthly progress review from all personnel records, including her official personnel files, determine compensatory damages, provide training to the responsible management officials, consider disciplining the responsible management officials, and post a notice.

Weaver (Ludie M.) v. USPS, 0120170459 (05/09/2019) – Complainant, a Mail Recovery Clerk, alleged that she was subjected to a hostile work environment based on her participation in prior protected activity. Complainant identified six incidents of alleged harassment, i.e., a suspension for attendance, two suspensions for improper conduct; emergency placement off duty; and being threatened, yelled at, and put out of the Agency's facility. Complainant amended her complaint during the hearing to include a claim of per se reprisal based on a letter issued to her by the Manager.

The EEOC AJ held a three-day hearing. The AJ concluded that the Agency had not subjected Complainant to retaliatory harassment and that the Agency had articulated legitimate,

nondiscriminatory reasons for its actions for which Complainant had had not established discriminatory animus. The AJ found, however, that the Agency had engaged in per se reprisal based on the letter that the Agency Manager had sent to Complainant. The AJ noted that although the letter did not specifically mention the discrimination complaints, the letter did mention that the Manager would not permit Complainant to "bully" or "intimidate" the management team through her practice of filing various complaints; that her complaints slandered the names of management with "infinite untrue stories;" and that if Complainant spent more time working and less time filing complaints, she would not have to worry about any actions. The Agency adopted the AJ's decision, including the AJ's finding of per se reprisal.

Although Complainant requested compensatory damages, past and future pecuniary damages and back pay to compensate for her loss of use of leave related to the per se reprisal, the AJ awarded only $4,500 in nonpecuniary, compensatory damages and compensation for leave taken. The AJ noted that Complainant was not entitled to an attorneys' fee award because she was not a prevailing party. The AJ explained that Complainant had failed to succeed on any significant issue; that per se reprisal was not the real catalyst in achieving limited relief; and that her success was technical or de minimis.

We concluded that the AJ's findings were based on substantial evidence. We noted that because Complainant engaged in protected activity, that fact did not immunize her from appropriate disciplinary action. We upheld the AJ's award of compensatory damages, reasoning, as did the AJ, that the Agency was only responsible for loss caused by the discrimination and Complainant had been suffering from the same symptoms for a workers' compensation claim dating back to 2009, three years prior to her formal complaint. Regarding an attorney's fee, we noted that the Commission has held that per se violations do not necessarily entitle a complainant to individual relief. We agreed with the AJ that Complainant was not a prevailing party for purposes of demonstrating entitlement to a fee; that she did not succeed on any significant issue in her complaint; and that it was not until the AJ discussed the Manager's letter at the hearing, that Complainant treated the letter as an independent basis of recovery.

Williams (Glenna D.) v. Air Force, 0720180026 (06/06/2019) **[Repeated under Priority 4 above]** – The Agency filed an appeal from an EEOC AJ's finding of discrimination. Complainant was a GS-12, General Engineer. Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of race (Black) and sex (female) when from March 2, 2015 to the present, she has been performing higher graded duties as a GS-0819/0801-13, but not paid at that level. Complainant requested a hearing before an AJ. After a hearing, an AJ found race discrimination. The AJ also found no sex discrimination and no violation of the Equal Pay Act. Complainant did not challenge the findings of no discrimination. For relief the AJ ordered: back pay; $5,000.00 in nonpecuniary, compensatory damages; and EEO training and consideration of discipline to responsible Agency officials. The Agency issued a final order rejecting the finding of discrimination and also filed an appeal with the Commission. OFO affirmed the AJ's decision finding race discrimination. OFO found that substantial evidence supported the finding of discrimination. OFO found that Complainant performed the same duties as a Caucasian employee but was paid less. OFO found that the Agency's reason for the difference in pay was a pretext for discrimination. OFO affirmed the remedies and also required the Agency to post a notice regarding the finding of discrimination.

Lombardo (Alonzo N.) v. DHS (ICE), 0120180739 (06/21/2019) – Since 2009, Complainant worked as a federal Border Patrol Agent in Deming, New Mexico, a law enforcement position. He alleged that he was discriminated against in violation of the Rehabilitation Act when, after being tentatively offered the job of Deportation Office with ICE, he was medically disqualified from the position because he had an aortic valve replacement which required he take anti-blood clotting medication. An ICE Medical Review Board refused to waive the medical standards for the position, although he had obtained a similar waiver to work as a Border Patrol Agent. Following an investigation, Complainant requested a FAD. The Agency found Complainant was denied a medical waiver because of an increased risk of severe injury or death from trauma as a result of taking anti-blood-clotting medication when performing law enforcement duties. OFO reversed, finding a violation of the Rehabilitation Act.

OFO found that that the Agency failed to meet its burden of showing, under the direct threat analysis, that Complainant's medical condition posed a significant risk of substantial harm to the health and safety of himself or others which cannot be eliminated or reduced to an acceptable level by reasonable accommodation. OFO found that the Chair of the Medical Review Board expressed the belief that agencies can choose to allow or not allow different levels of risk and there was no Agency guidance on how the degree of risk of injury should be considered. OFO found that the Board made a blanket determination that Complainant's medication created a potential risk of injury while performing Deportation Officer's duties, while ignoring his work history in a similar strenuous law enforcement position and discounting the opinion of his cardiologist. OFO ordered the Agency to offer to hire Complainant with back pay, if any; to conduct a supplemental investigation into Complainant's entitlement to compensatory damages; and to request technical assistance from OFO/FSP on revising its applicable Medical Standards to include language regarding the direct threat standard.

Turner (Salvatore B.) v. USPS, 0120180949 (06/13/2019) – Complainant, a City Carrier, at the Agency's South Columbus, Ohio post office filed an EEO complaint alleging management improperly disclosed his medical information on a teleconference.

OFO found that the Agency committed a violation of the Rehabilitation Act. The record reflects that, during a management teleconference, a supervisor stated that Complainant had medical restrictions and was in a particular position due to his workers' compensation claim. The supervisor was on speaker phone and one of Complainant's coworkers walked by and overhead the conversation. The coworker relayed the conversation to Complainant.

OFO found that the Agency violated the Rehabilitation Act when it disclosed Complainant's medical restrictions and OWCP status/position to his co-worker who did not have a need to know this information. OFO ordered the Agency to conduct a supplemental investigation pertaining to Complainant's entitlement to compensatory damages, provide EEO training to the officials responsible for disclosing Complainant's medical information, consider taking disciplinary action against the responsible management officials, and post a notice regarding the discrimination.

Fleming (Lisa T.) v. VA, 0120180962 (06/28/2019) – Complainant, a GS-8 Registered Respiratory Therapist at the Charles George VA Medical Center in Asheville, North Carolina, filed an EEO complaint alleging that the Agency discriminated against her on the basis of disability when: (1) a supervisor (S1) told two of Complainant's coworkers that he could have her fired in 60 days and would buy the department a steak dinner; (2) S1 told two of complainant's coworkers, "I can't believe you even like her. If you don't like her, I can get her fired;" (3) Complainant received a proposed 14-day suspension that was later mitigated to a seven-day suspension; (4) S1 made inappropriate comments about Complainant and another employee; and (5) within Complainant's hearing, S1 stated to another employee to file an EEO on him and it would make him run away and quiver.

Following an investigation, Complainant requested a hearing. The EEOC AJ assigned to the matter held a hearing and issued a bench decision finding that Complainant established that she had been subjected to a hostile work environment based on her disability regarding claims (1), (2), and (4). The AJ determined that Complainant had not established discrimination as to claim (5) and that the parties entered into a settlement agreement regarding claim (3).

To remedy the discrimination, the AJ ordered relief including $17,750 in nonpecuniary compensatory damages and $15,500 in attorney's fees and costs. The Agency subsequently issued a final order fully adopting the AJ's decision and the relief ordered. Complainant filed an appeal; however, neither party submitted any arguments either in support of or opposing the instant appeal.

In the appellate decision, the Commission affirmed the final order finding that substantial record evidence supported the AJ's determination that Complainant was subjected to a hostile work environment as to claims (1), (2), and (4). Further, the Commission found no basis to disturb the AJ's findings regarding claims (3) and (5). With respect to the relief ordered, the Commission found that the $17,750 in nonpecuniary compensatory damages awarded was reasonable and consistent with awards in similar cases. In addition, the Commission concluded that $15,500 awarded in attorney's fees correctly represented a 40 percent reduction in the award requested by Complainant's counsel on the theory that a reduction in that amount was required because Complainant did not prevail on two of the five claims set forth in the complaint.

Taylor (Elly C.) et al. v. SSA, 0720140019 (06/26/2019) **[Repeated under Broad Impact Cases above, and Circulated Cases below]** – Two African-American female employees filed a class complaint against the Agency alleging that it discriminated against a class of employees on the bases of race (African-American), sex (female), and in reprisal for prior EEO activity with respect to promotional opportunities.

Subsequently, an EEOC AJ recommended acceptance of the formal complaint and certified the class. The Agency declined to fully implement the AJ's decision on certification and filed an appeal to the Commission. On May 5, 2006, the Commission, in EEOC Appeal No. 07A50060, upheld the certification but slightly modified the class as follows:

All African-American females who were employed at the Agency's headquarters in Baltimore, Maryland, including employees working in the Security West and Metro West facilities, but excluding those in the Office of [the] General Counsel and the Office of the Inspector General, in general schedule

grades seven through thirteen (GS-7 through GS-13) who have not been promoted during the period of time beginning on December 9, 2000, and continuing to the date a final determination is rendered on the class complaint claim.

Thereafter, the AJ issued an Interim Decision on Liability in which she concluded that the Class did prevail in showing class-wide discrimination against non-supervisory GS-11 African-American female employees who were denied promotions to the GS-12 grade level from December 9, 2000, to the present based on the Agency's statistical evidence of disparity in promotions. The AJ further found that neither Complainant established that she was discriminated against in obtaining promotions in their individual complaints.

The Agency filed an appeal after declining to implement the AJ's decision. On June 26, 2019, the Commission issued a decision finding, among other things, that the evidence supported the AJ's conclusion that there was unlawful discrimination with respect to the promotion of GS-11 African American females to the GS-12 grade level.

The Agency was ordered, among other remedial actions, to identify all affected African-American female employees who were part of the class, provide them with copies of the decision, and inform them of their right to secure attorney or non-attorney representation of their own choosing to assist in securing relief in accordance with 29 C.F.R. §1614.204. The Agency was also ordered to conduct an inquiry pursuant to §717(b) of Title VII to determine what factors are responsible for the significant statistical disparity in the promotion of Black females beyond the GS-11 level and to propose solutions for eliminating such disparities in the future. Finally, the Agency was directed to pay attorneys' fees in the amount of $762,659.19 and costs in the amount of $23,571.73.

Nash (Geraldine B.) v. USDA (Forest Service), 0720180025 (06/05/2019) – Complainant worked as a GS-6 Administrative Support Assistant in the Republic Ranger District in Republic, Washington. Complainant was a permanent, seasonal, part-time employee employed during fire season. Among other administrative duties, Complainant provided back-up coverage for the office's Front Desk receptionist.

In 2011, Complainant was diagnosed with Post-Traumatic Stress Disorder (PTSD) and began therapy. One symptom of her PTSD was panic attacks. Notably, Complainant felt trapped when she worked the front desk which was separated from the rest of the office by a locked door. In 2011-12, Complainant had three major panic attacks while covering the front desk and asked her first and second level supervisors to no longer work the front desk. Starting in the fall of 2012, both approved her request and assigned her other tasks in lieu of front desk coverage. Also, when necessary, Complainant answered phone calls and printed forest permits from her desk in the back of the office.

However, in the summer of 2014, Complainant got a new second level supervisor (S3). Complainant submitted updated medical documentation from her therapist and her physician stating that she should not work the front desk due to her disability. Complainant then was in her annual (seasonal) non-pay status from November 2014 to April 2015. After Complainant returned to work, on April 29, 2015, S3 told Complainant that she would have to work the front desk, provided Complainant a

calendar for the next two months with her scheduled to work the front desk daily, and told Complainant that she did not look at her medical documentation and did not want to do so.

Complainant had a panic attack during the April 29 meeting and said that she felt like slamming S3 into the wall. Complainant then left the meeting in a haste shoving her chair under the table and almost knocking over a flip chart on an easel. S3 contacted her supervisor, Employee Relations, and local law enforcement alleging that Complainant threatened her and threw furniture so she felt unsafe. S3 placed Complainant on administrative leave. When Complainant did not leave the premises as quickly as S3 wanted, S3 had local police escort her from the premises. Complainant did not return to work until the next season, after S3 had moved to another location.

An EEOC AJ, after holding a hearing, found Complainant and other witnesses be credible, but did not find S3 a credible witness. The AJ found that S3 unlawfully rescinded Complainant's long-standing reasonable accommodation and subjected her to discriminatory harassment, and found mixed motive as to the discipline issued. The AJ awarded Complainant $250,000 in nonpecuniary compensatory damages, $11,118.80 in pecuniary, compensatory damages, and ordered training and consideration of discipline. The AJ found that Complainant had pre-existing PTSD, but had made significant improvement before the April 2015 incident and the incident triggered a panic attack that put Complainant in a downward spiral with PTSD and depression that required long-term regular therapy.

The Agency appealed. The appellate decision reversed the final agency decision, concluding that substantial evidence of record supported the AJ's finding of discrimination and order of relief.

Gembero (Lenny W.) v. HHS, 0120170311 (07/26/2019) – Complainant was hired by the Agency as a Biologist in Phoenix, Arizona and was subject to the satisfactory completion of a two-year probationary period. During his interview for the position, Complainant revealed to the Agency that he had been deaf since infancy and his primary language is American Sign Language. Complainant's duties as a Biologist encompassed working in a lab, testing and processing food and urine samples, among other things.

Complainant's supervisor eventually fired him only five months after he was hired, writing that Complainant had failed to master the basic functions of his position. Complainant thereafter filed a formal EEO complaint, alleging that his requests for Video Remote Interpreting (VRI) were denied and he was subjected to harassment by a coworker. Complainant specifically maintained that his supervisors denied his requests for VRI in the laboratories where he worked, and they only attempted to instruct him through frustrated hand gestures and scribbled notes. Complainant also alleged that his coworker was abusive towards him due to his disability. Following the investigation, the Agency found that Complainant did not show that he was subjected to discrimination based on his disability, as alleged.

The Commission reversed on appeal, finding that Complainant established that he was denied reasonable accommodation for his disability. In so finding, the Commission noted that Complainant was not provided with any form of interpreting service while being trained on lab protocols and on other occasions. The Commission also noted that the record contradicted the supervisor's assertions that VRI could not be provided for Complainant in the laboratories where he worked. The Commission

found that VRI could have been installed, but his supervisor simply chose not to for reasons other than what she elaborated.

The Commission further determined that Complainant was subjected to coworker harassment in addition to supervisory harassment. With respect to the finding of coworker harassment, the Commission noted that Complainant's coworker was observed throwing and hitting inanimate objects and slamming things down over his frustration with his communication barrier with Complainant. In finding supervisory harassment, the Commission observed that Complainant's supervisor would tell him to "hush and stop" when he would try and speak through his interpreter, and that one employee expressed his opinion that the supervisor treated Complainant "like an animal, like you would treat a dog." The Commission further addressed Complainant's case under a disparate treatment theory, finding that he established that the Agency's reasons for his firing were pretext for discrimination based on his disability. To remedy the finding of discrimination, the Commission ordered the Agency to reinstate Complainant and provide him with compensatory damages and backpay, among other relief.

Lopez (Bryant F.) v. DHS (CBP), 0120171192 (07/02/2019) – Complainant, a Special Agent, broke his right wrist while attending training in April 2012. He was out of work until November 2012, when his doctor stated that he could only complete desk work. Complainant was never released to full duty, which entailed field work and the use of a firearm, and he had multiple surgeries on his wrist, including a February 2015 surgery that fused all of the bones in his wrist, resulting in the complete loss of ability to move his right wrist and hand. Complainant filed two EEO complaints, alleging unlawful discrimination, including: (1) that he was denied a reasonable accommodation when he was assigned work outside of his medical restrictions; and (2) that he was subjected to unlawful retaliation when a Labor and Employee Relations Specialist (HR1) contacted an EEO Counselor (EEO1) to ask why she was meeting with Complainant. The Agency issued a final decision, concluding that Complainant failed to establish that he was subjected to discrimination as alleged in his complaints.

The Commission found that, although the Agency attempted to reasonably accommodate Complainant with light duty office work, this was not an effective accommodation because his supervisors (S1 and S2) repeatedly assigned him field work despite clear medical documentation that he could not perform the assigned work. We determined that Complainant could not be accommodated in his Special Agent position, so the Agency should have considered reassigning him. The Agency did not do so, and it did not provide any evidence that reassigning him would have constituted undue hardship. We concluded that the Agency was liable for compensatory damages for its failure to accommodate Complainant based on the repeated nature of assignments outside of his restrictions and the unambiguous medical documentation. We found that the preponderance of the evidence in the record established that HR1 contacted EEO1 to ask about the purpose of her meeting with Complainant, and we concluded that this conduct was reasonably likely to deter a reasonable employee from engaging in protected activity, in violation of the Commission's regulations. We ordered the Agency to provide Complainant with a reasonable accommodation, to investigate his entitlement to compensatory damages, to provide training and consider disciplinary action against S1, S2, and HR1, and to post a notice.

Lai (Augustine V.) v. USPS, 0120180469 (07/24/2019) – Complainant worked as a City Carrier at the Agency's Oxnard Post Office in Oxnard, California. In November 2016, Complainant stated that the then-Postmaster (PM1) granted him an informal accommodation to allow him to take restroom breaks as needed. Complainant stated that another Postmaster (PM2) took over PM1's duties, and that she did not allow him to continue this informal accommodation, only allowing him to take breaks at regularly scheduled intervals.

Complainant stated that his first-line supervisor (S1) gave him a direct order to note his medical condition, a "bladder problem," as a reason for returning late on his Form 3996, which are posted on their desks, and can be viewed by others. On March 3, 2017, Complainant attended a fact-finding meeting with two Acting Supervisors (AS1) and (AS2), and he was asked to explain his street and office "expansion," and the duration and frequency of his restroom breaks due to his bladder problem. Complainant stated that PM2, through AS2, then ordered him to go home and not return to work until he had medical documentation for a light-duty assignment. On May 18, 2017, Complainant submitted a written request for a reasonable accommodation for additional time to use the restroom, as needed, which was still pending at the time of the EEO investigation.

Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of disability (incontinence), and in reprisal for prior protected EEO activity of requesting a reasonable accommodation when: (1) on March 3, 2017, he was forced to disclose his medical information during a fact-finding interview and; (2) since March 3, 2017, he was denied a reasonable accommodation when he was sent home and told that there was no work available.

The Agency issued a final decision finding that Complainant did not prove that the Agency subjected him to discrimination as alleged. For claim 1, the Agency determined that it was Complainant's decision to include his medical issue on his 3996 forms, and that management had not required him to do so. The Agency assumed, for the sake of argument, that Complainant was a qualified individual with a disability, and found that the record did not support that he could perform the essential functions of his position, or that the Agency denied him a reasonable accommodation. Complainant appealed the Agency's final decision.

The Commission reversed the Agency's final decision, finding that Complainant established that the Agency discriminated against him based on his disability. In claim 1, Complainant alleged that he was forced to disclose his medical condition to AS1 and AS2 during the investigatory meeting on March 3, 2017. However, we found that Complainant was made to disclose his medical condition even prior to this meeting. Complainant stated that S1 directed him to include his medical condition on his 3996 forms, and that he complied because he was concerned about being disciplined for disobeying an order. We determined that the Agency violated the Rehabilitation Act because S1's instruction to Complainant to include his medical information on his publicly displayed 3996 forms breached the Agency's obligation to keep an employee's medical information confidential, and the circumstances did not fall within one of the given exceptions.

We found that Complainant was a qualified individual with a disability because he has an impairment which substantially limits one of his major bodily functions, and he was able to perform the essential functions of his position. We then found that the Agency failed to provide Complainant with a reasonable accommodation. Complainant's request to take additional breaks, as needed, was a reasonable request, and the record showed that PM1 previously granted this request. The Agency

failed to accommodate Complainant starting on March 3, 2017, when it stopped allowing him to work with unscheduled breaks and ordered him to go home. Complainant had to take sick leave for over two months until May 10, 2017, when the Agency offered him a light-duty assignment. However, we did not find that the light-duty assignment, which only provided up to two hours of work a day, was an effective accommodation. Despite being a full-time carrier, Complainant's light-duty assignment did not provide him with full-time employment, and he had to use approximately six hours of sick leave each day to make up the difference. We also found that the Agency did not provide any evidence showing that it would be an undue hardship to provide Complainant with an effective accommodation. We concluded that the Agency discriminated against Complainant based on his disability when it failed to provide him with an effective reasonable accommodation since March 3, 2017.

We further found that the Agency did not act in good faith in this case because PM2 failed to engage in the interactive process when a reasonable accommodation was available; placed Complainant on involuntary leave status until the Agency offered him a light-duty assignment; and then failed to provide Complainant with full-time work, forcing him to use his sick leave. Therefore, Complainant was entitled to compensatory damages from the Agency's discrimination against him.

As a remedy, we ordered the Agency to restore Complainant's sick leave; provide him with a reasonable accommodation which allows him to work a full-time schedule; conduct a supplemental investigation with respect to Complainant's claim of compensatory damages, attorney's fees, and costs; provide appropriate training to relevant management officials; consider taking discipline against relevant management officials; and post a notice of the finding of discrimination.

Welcome (Trey M.) v. USPS, 0120180781 (07/23/2019) – Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of race (African-American), sex (male), and in reprisal for prior protected EEO activity arising under Title VII when he was subjected to harassment. In support of his claim of harassment, he indicated that a female coworker left a note indicating her interest in pursuing a romantic relationship with him. When he rejected her advance, Complainant indicated that she began harassing him, that her boyfriend became hostile with him, and that management failed to stop the harassment and, in fact, threatened him when he complained. Complainant noted that he raised the claims of harassment with the Agency's Office of Inspector General. However, he asserted that the matter was not addressed. He also indicated that his personal vehicle was vandalized by the coworker's boyfriend. After he reported the harassment, management assigned the coworker to assist him on his route. The Agency found no discrimination.

The appellate decision noted that the Agency improperly dismissed two of Complainant's claims as they were related events to his claim of harassment. However, the record indicated that there was sufficient information to consider these events as part of his claim. The decision also noted that Complainant had claimed an event, namely when management assigned the coworker to assist Complainant on his route, which should have been considered as a separate claim of retaliation for alleging he was subjected to sexual harassment.

The decision found that Complainant established that he was subjected to sexual harassment when the coworker texted Complainant six times from June 2016 to August 2016. When he rejected her advances

and informed management of the harassment, the coworker continued to pursue him. In addition, her boyfriend threatened Complainant, harassed Complainant, and vandalized Complainant's car. The coworker wrote a letter to Complainant stating she was upset how the boyfriend was harassing Complainant. The decision noted that the only action taken by management was to provide the coworker with EAP information in August 2016. The decision found that the actions by the coworker and her boyfriend continued through March 2017. Based on the record before the Commission, the decision held that Complainant established that he had been subjected to harassment. The decision then determined that Complainant made management aware of the coworker's action. Management erroneously found that this was a "personal" matter and did not want to get involved. The decision concluded that the Agency's response was inadequate and that the Agency failed to satisfy its affirmative defense. Accordingly, the decision held that Complainant was subjected to sexual harassment.

The decision then turned to Complainant's claim of unlawful retaliation. The decision found that Complainant established a prima facie case of retaliation when the coworker was assigned to help him on his route based on his reporting of the coworker's harassment. The decision found that the Agency failed to provide legitimate, nondiscriminatory reason for its assignment of the coworker. Management stated that they provided the coworker with work within her medical restrictions during her pregnancy. However, the decision indicated that management provided no evidence regarding the other routes available at the Agency's facility. Based on the lack of specificity and the claims of harassment raised by Complainant, the decision found no reason for assigning the coworker to Complainant's route. Accordingly, the decision concluded that the Agency subjected Complainant to unlawful retaliation.

The decision remanded the matter to the Agency for a determination on Complainant's entitlement to compensatory damages, for training and consideration of discipline for the co-worker, for training for management focusing on addressing harassment and retaliation in the workplace, and for consideration of disciplinary action against the management officials who failed to respond to Complainant's claims of harassment and subjected him to retaliation.

Moore (Glenna O.) v. Air Force, 0720180030 (08/20/2019) **[Repeated under Priority 2 above]** – Complainant worked for Staffing Firm 1 serving the Agency as an Outreach Manager (social worker). She filed an EEO complaint alleging that she was discriminated against by the Agency: (1) based on her sex when her Agency supervisor subjected her to harassment by making three denigrating sexual comments over a number of days, (2) she was retaliatorily harassed as evidenced by 23 incidents, and (3) was constructively discharged.

Following an investigation and hearing, an AJ found discrimination on issues 1, 2 and 3, and ordered Complainant be instated to higher paying contract clinical social worker position the Agency retaliatorily blocked, back pay in accordance with 5 C.F.R. § 550.805, 10 years of front pay if Complainant was not instated, $125,000 in nonpecuniary damages, a specified amount of attorney fees and costs, and training for responsible management officials. The Agency rejected the AJ's decision, and appealed. OFO affirmed the AJ because her findings were supported by substantial evidence, but modified some of the ordered relief.

As an initial matter, OFO disagreed with the Agency's appellate argument that it was not Complainant's common law joint employer. OFO found that the Agency has sufficient control over the Complainant's employment to be her joint employer, e.g., the Agency chose her for hiring, she reported to Agency management which assigned her work with detailed expectations and deadlines, controlled her schedule, and blocked her promotion.

OFO found that that EEOC did not have authority to order the staffing firm to hire Complainant to serve the Agency, but since the practice of local Agency management was to choose a candidate for a position and hire her through a staffing firm, it ordered the Agency to choose Complainant for instatement, unequivocally ask the appropriate staffing firm to hire her, and if the staffing firm refused, to pay Complainant 10 years front pay. OFO found the front pay award was supported, in part, by the AJ's finding that while employed Complainant had a reasonable expectation of continued employment by a staffing firm serving the Agency indefinitely, and the Agency did not contest this on appeal. OFO found that 5 C.F.R. § 550.805 did not apply since Complainant received her pay from a staffing firm, and ordered the Agency to pay the back pay, with interest, and benefits she would have received from the applicable staffing firm(s), and use 29 C.F.R. § 1614.501 as a general guide. OFO modified the training to include a Workplace Civility and Bystander Intervention component, and retroactively updated the award of attorney fees to take account of Complainant's attorney current hourly rate and the hours expended drafting Complainant's appellate opposition brief.

Zank-Rehwaldt (Cassandra L.) v. DOD (DODEA), 0720180029 (08/20/2019) – Complainant worked as a teacher at the Agency's Patch High School located in Stuttgart, Germany. Complainant filed three formal complainants claiming that the Agency subjected her to a hostile work environment based on age, sex, and in reprisal for prior protected EEO activity. An EEOC AJ conducted a four-day hearing. The AJ determined that Complainant engaged in prior protected oppositional activity when she reported an April 2010 incident involving two male students sexually harassing other students. Complainant reported the matter to the school principal and later the Garrison Commander after she believed that school officials would not take any action. Complainant also sent a letter to West Point because one of the male students involved had been admitted to the academy. Consequently, the male student lost his scholarship and was required to attend one year of preparatory school before he could enter the academy. The AJ determined that it was reasonable for Complainant to view the April 2010 matter as a potential EEO/Title VII violation because the incident violated the Agency's anti-harassment policy which covered both students and teachers. The AJ further determined that Complainant reasonably acted when she reported the incident to the school, the Commander, and to West Point.

The AJ found that the Agency subjected Complainant to retaliatory harassment after she reported the April 2010 incident. The AJ explained that since this incident, Complainant was removed from teaching AP English classes even though Complainant had taught AP English classes for 20 years. During the period at issue, the principal reassigned Complainant to teach French classes even though Complainant had only taught English classes for the past 30 years. Complainant was also removed from her classroom of 20 years, subjected to disciplinary actions, interrogations, investigations, and unannounced classroom visits by the principal during the period she was required to teach French prompting Complainant's retirement.

The AJ ordered that the Agency offer to reinstate Complainant to an AP English position, remove disciplinary actions from Complainant's record, and awarded Complainant $16,125 in past-pecuniary damages and $200,000 in non-compensatory damages.

On appeal, we reversed that Agency's final order rejecting the AJ's finding of discrimination and retaliation. We concluded that substantial evidence fully supported the AJ's determination that Complainant engaged in prior protected oppositional activity when she reported the April 2010 incident which resulted in an ongoing retaliatory hostile work environment that led to Complainant's involuntary retirement. We ordered the Agency to offer Complainant retroactive reinstatement with back pay to an AP English teaching position at Patch High School or a substantially equivalent position, to expunge certain disciplinary actions from her personnel records, to reimburse her litigation costs amounting to $31,232.53, to provide training to, and consider discipline of, the responsible management office, and to post a notice.

We also affirmed the AJ's determination that Complainant was entitled to $200,000 in non-pecuniary compensatory damaged and $16,126 in pecuniary damages. Substantial evidence supported the AJ's conclusion that Complainant suffered emotional harm from the Agency's retaliatory actions which triggered Complainant's PTSD symptoms to resurface. Complainant's psychologists testified that she was previously diagnosed with PTSD after she was raped at 10 years old. The psychologists further testified that Complainant's PTSD symptoms had remained dormant for several years but were reactivated during the period Complainant was subjected to the retaliatory hostile work environment. One psychologist also diagnosed Complainant with acute stress disorder, which was a new diagnosis directly related to the effects of the hostile work environment.

Lambert (Terrie M.) v. DOD (DCA), 01201081358 (08/14/2019) – Complainant, a Store Associate at the Agency's Bridgeport Commissary facility in Coleville, California, filed an EEO complaint alleging the Agency's Store Manager, her second-line supervisor, subjected her to sexual harassment based on gender (female), from May 17 to October 19, 2016. The Agency investigated the claim which produced evidence in support of the allegation.

Complainant cited numerous instances of alleged sexual harassment. While many of them were not witnessed, a co-worker corroborated Complainant's allegation. Two co-workers also provided statements in support of Complainant's allegations. The appellate decision found the record was sufficient to establish that the store manager subjected Complainant to unwelcome verbal and physical conduct involving her sex and that the actions complained of were based on sex.

The decision also found that the store manager's actions were sufficiently severe or pervasive to create an abusive working environment, noting that his placing his hand on Complainant's leg at her thigh, in and of itself, is sufficiently severe to constitute a hostile work environment, as an unwelcome, intentional touching of an intimate body area. Complainant's co-workers also attested to the store manager's unwanted physical touches and conversations about his relationships with women. Therefore, the decision found that the store manager's conduct was both severe and pervasive and was sufficiently offensive to alter the conditions of Complainant's working environment and the Agency was subjected to vicarious liability for the store manager's sexual harassment.

The Agency was ordered to ensure that the Complainant was removed from the Store Manager's supervisory/managerial authority, to investigate and determine Complainant's entitlement to compensatory damages, and to consider disciplining and provide sexual harassment prevention training to the store manager. A posting notice and attorney's fees were also ordered.

Gross (Darell C.) v. USPS, 0120181789 (08/20/2019) – Complainant filed an EEO complaint alleging that the Agency discriminated against him on the basis of reprisal when: 1. he received a letter advising him to report to work, effective April 20, 2011, at the Derwood Branch, not his regular bid assignment at the Rockville Center Annex; 2. the Postmaster at Rockville Center took pictures of his mail case; 3. the Postmaster followed him to the loading dock area and took pictures of him loading his delivery vehicle; 4. on July 21, 2011, he was directed to submit to a Psychiatric Fitness for Duty Examination, scheduled for August 8, 2011 and 5. on August 19, 2011, he was issued a Notice of Removal. Following a hearing, an AJ found the Agency liable for unlawful retaliation in relation to issues 1, 4, and 5. The AJ ordered that Complainant receive: (1) Reinstatement to a substantially equivalent position; (2) front pay; (3) $35,000 in non-pecuniary compensatory damages; (4) $9,430 in pecuniary compensatory damages; (5) $97,932.75 in attorney's fees, and; (6) $1,104 in litigation costs. Complainant was not awarded back-pay, however, because the AJ found that he failed to mitigate his damages. The Agency fully implemented the AJ's decision.

On appeal, Complainant argued that the AJ's erred in finding that he was not entitled to an award of back pay. The Commission's decision found that other than Complainant's conclusory statements, he simply did not establish that there was no substantial evidence in the record to support the AJ's decision. Like the Agency, we found that Complainant's testimony at the hearing was, for the most part, the primary reason the AJ found that he did not mitigate his damages and therefore was not entitled to a backpay award. At the hearing, Complainant was not able to produce a single job application that he submitted during the entire six-year period after he was terminated; he also admitted that if he had undertaken a job search, it would only have been the two years after he was terminated; and he admitted that the jobs he would have applied for were not jobs he would have accepted. Additionally, the AJ noted other inconsistencies in Complainant's testimony regarding his income during the period he was discriminatorily unemployed. Based on a totality of the record, the Commission's decision found that there was substantial evidence to support the AJ's finding that Complainant was not entitled to back-pay.

Inurrigarro (Kelsie T.) v. USPS, 0120181746 (08/21/2019) – Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of race (Caucasian), sex (female), disability (knee and back), age (49), and reprisal for prior protected EEO activity when: the route inspectors went on her route with her; she was issued three Letters of Warning; she was issued a 7-day suspension; her begin tour time was changed from 8:30 am to 10:00 am; and on September 10, 2013, she was issued a 14-day suspension. An EEOC AJ issued a decision following a hearing. The AJ found that the Agency articulated legitimate, nondiscriminatory reasons for its actions and Complainant did not demonstrate that she was subjected to discrimination. Despite finding that Complainant did not demonstrate that she was subjected to discrimination, harassment, or denied a reasonable accommodation with regard to the allegations in her complaint, the AJ found that the Agency violated

the Rehabilitation Act by interfering with Complainant's rights with respect to certain language in both the 7- and 14-day suspension letters. Specifically, the AJ found that the Agency violated the Rehabilitation Act with respect to the language used in the suspension letters and when some managers made certain frequent comments about Complainant's inability to deliver the mail. The AJ found that Complainant was entitled to $7,000.00 in non-pecuniary compensatory damages. The Agency issued a final action adopting the AJ's findings and conclusions.

On appeal, Complainant contested the AJ's findings of no discrimination. The Agency also attempted to appeal the AJ's findings of discrimination even though it had issued a final order agreeing to fully implement the AJ's order. The Commission's decision rejected the Agency's attempt to appeal its own final order and informed the Agency that it could have filed an appeal and not implement the AJ's decision. The decision also affirmed the AJ's findings of no discrimination with respect to Complainant's claims and upheld the award of $7,000.00 in compensatory damages. In addition to the remedies ordered by the AJ, the Commission ordered the Agency to train the responsible managers regarding the Agency's obligations under the Rehabilitation Act and to consider taking appropriate disciplinary action against them.

Shaffer (Joshua F.) v. VA, 0120181309 (08/30/2019) – In October 2016, Complainant applied for the position of Motor Vehicle Operator (MVO), WG-07, in the Health Administration Service at the VA Medical Center (VAMC) in Marion, Illinois. The MVO position transported Veteran patients within a 150-mile radius of the VAMC. Complainant stated that he held a commercial driver's license and worked as a state mass transit bus operator.

Complainant filed a formal EEO complaint alleging that the Agency discriminated against him on the basis of disability (perceived – color perception deficiency) when, on January 24, 2017, it rescinded a tentative offer of employment for an MVO position following his pre-employment medical examination. The pre-employment physical found that Complainant "failed color vision" (is unable to recognize the colors of traffics signals and devices showing standard red, green, and amber (yellow)). It found further that he could distinguish basic colors. The Agency cited a VAMC hiring policy requiring the ability to recognize the colors of traffic signals and devices showing standard red, green, and amber colors as justification. Following an EEO investigation and the Agency's notice of election, Complainant requested a final agency decision (FAD).

The Agency issued a FAD finding no discrimination. The Agency assumed that Complainant established a prima facie case of discrimination based on perceived disability, but found that Complainant failed to show the Agency's action was not job-related and consistent with business necessity. The Agency stated that management rescinded the tentative offer due to Complainant's difficulty in distinguishing the standard colors of traffic signals, which is needed for an Agency MVO position. The Agency stated that it is VAMC policy to test for color blindness and Complainant did not show that said test was flawed. Further, the Agency stated that it hired three MVOs in the prior two years and those candidates were not required to undergo a preemployment physical because they were internal and transferred within the same occupation.

The Commission found that the Agency failed to perform an individualized assessment of whether Complainant could perform the essential functions of the MVO position without posing a direct threat

to himself or others. The Commission found the Agency assumed Complainant would be unable to see traffic signals while driving, but failed to conduct inquiry into how, based on his vision, Complainant obtained and continued to hold his commercial driver's license and performed successfully in his mass transit Bus Operator position. The Commission found the results of the visual examination alone are insufficient to establish that there would be a high probability of substantial harm to Complainant or others. We found an assessment should consider any special qualifications that might allow an applicant to successfully perform the essential functions of a position without posing a direct threat to himself or others. We found the Agency failed to meet its burden under the direct threat standard as required by the Rehabilitation Act, and thereby violated the Rehabilitation Act.

As remedial relief, the Commission ordered reinstatement of Agency's tentative offer of employment to MVO position; an individualized assessment of direct threat; pending individualized assessment results, an offer of retroactive placement to an MVO position; if retroactive placement appropriate, determination of appropriate backpay and benefits; a supplemental investigation for entitlement to compensatory damages; and training of Human Resources staff regarding hiring and qualification standards under the Rehabilitation Act.

Loveless (Leota F.) v. USPS, 0120180717 (08/22/2019) – Complainant, a Supervisor, Customer Services, at the Agency's Harrison Post Office facility in Harrison, Ohio, filed a complaint alleged numerous instances of harassment and discrimination. Following a hearing, an EEOC AJ concluded Complainant had proven discrimination as alleged. The Agency subsequently issued a final order adopting the AJ's finding that Complainant proved that the Agency subjected her to discrimination and a hostile work environment, as well as the remedies ordered.

Complainant appealed, seeking higher non-pecuniary compensatory damages and asking that the Agency be specifically required to post notice of the finding of discrimination.

The appellate decision found the AJ's award of $10,400 in nonpecuniary compensatory damages underrepresented the severity of Complainant's emotional harm caused by the discrimination. Complainant was subjected to numerous instances of harassment and discrimination over a protracted period of time. The record shows that the resultant mental anguish was manifested by symptoms due to stress and anxiety, including anxiety attacks, crying spells, diarrhea, neck pain, headaches. She received treatment from a doctor for stress and anxiety and was prescribed medication for treatment. She sought treatment from a chiropractor for the neck pain caused by the stress and anxiety. Complainant described feelings of humiliation and embarrassment because of her experience and was concerned for the loss of her job. The decision noted several cases involving similar symptoms of mental anguish where the complainant was awarded $65,000 in non-pecuniary compensatory damages and, therefore, awarded Complainant $65,000 in non-pecuniary compensatory damages. The decision also ordered a posting notice and attorney's fees.

Robinson (Leora R.) v. HHS, 0120180736 (08/30/2019) – Complainant, a GS-09 Clinical Nurse at the Kayenta Health Center located in Kayenta, Arizona, filed an EEO complaint alleging that the Agency discriminated her and subjected her to a hostile work environment on the bases of race (African-

American), color (Black), and in reprisal for prior protected EEO activity as evidenced by multiple incidents including, inter alia: she inquired about a deduction on her paycheck and was incorrectly told she did not have any leave to use so Family Medical Leave Act (FMLA) and Leave without Pay (LWOP) were posted for both days; she was charged LWOP and AWOL on several occasions; she was told to be quiet about the EEO talk and told she was not being discriminated against; a co-worker gossiped about her; she was verbally degraded by other staff members; she was denied overtime; and she was reprimanded for socializing with three other African-American co-workers.

Following an investigation, Complainant requested a final agency decision. The Agency issued a final decision finding that Complainant had not been subjected to discrimination, reprisal, or a hostile work environment.

On appeal, the Commission affirmed the Agency's finding that Complainant had not been subjected to discrimination or a hostile work environment on the bases of race or color. The Commission found, however, that Complainant had been subjected to reprisal for protected opposition activity. The record revealed that Complainant approached her supervisor (S1) to raise a complaint of racial discrimination. In response, S1 made several statements including: "You sent me an email saying you were being discriminated against with regard to [co-worker's] leave. That was none of your business, and this had nothing to do with race okay?" Additionally, S1 reminded Complainant that she was still on probation. S1 also told Complainant: "I don't think we're discriminating against you," and, "You need to calm down on that." S1 also mentioned that Complainant's co-workers may be filing an EEO complaint against Complainant. S1 further discouraged Complainant from making "jokes" or comments on the floor to other employees accusing them of having an issue with her race. These statements resulted in Complainant emailing the Regional EEO Manager that same day stating that she felt threatened and questioned whether she should file the discrimination complaint. Complainant also told the Regional EEO Manager that she wanted to transfer to a different facility and that she was concerned for her wellbeing. S1 acknowledged that she had not been a supervisor for very long, that she had not received adequate training, but was learning from her errors.

The Commission found that the evidence clearly established that S1's conduct toward Complainant in that incident was sufficiently material to deter protected activity in the given context. The record also showed that S1's conduct had the effect of deterring Complainant from pursuing an EEO complaint at that time. As a result, the Commission found that Complainant established that she was subjected to a retaliatory hostile work environment. The Commission ordered the Agency to conduct an investigation into Complainant's entitlement to compensatory damages; provide 16 hours of training to S1; consider disciplining S1; and to post a notice.

Ikossi (Marybeth C.) v. DOD (DTRA), 0120180749 (08/08/2019) – Complainant, a Science and Technology Manager at the Agency's Diagnostic, Detect, and Disease Surveillance Division facility in Fort Belvoir, Virginia, filed an EEO complaint alleging numerous cases of discrimination and harassment. The Agency investigated the claims and provided Complainant a report of the investigation.

Complainant timely requested a hearing with an EEOC AJ, which was held on November 1, 2016. The AJ issued a decision on August 15, 2017, finding that, of her numerous claims, Complainant had only

proven her claims that (1) the Agency subjected her to discrimination on the basis of her disability when it held her telework in abeyance for three months and (2) the Agency retaliated against her for participation in prior EEO activity when Agency officials had a general discussion about her prior EEO activity.

The Agency issued a final order adopting the AJ's finding and ordering the Agency to pay $1,991.14 in past pecuniary compensation damages, $2,500 in non-pecuniary compensatory damages for each of the successful claims, $28,622.00 in attorney's fees, and $361.70 for expenses. Complainant appealed, seeking higher attorney's fees and compensation damages and arguing that several of her claims were improperly denied.

The Commission affirmed the denial of all the claims that the AJ denied and her claim for greater past pecuniary compensation. However, the Commission found greater non-pecuniary damages were warranted and awarded Complainant $5,000 for each instance of alleged discrimination. In so doing, the Commission found that, in similar cases where the complainant was denied a reasonable accommodation to alleviate the impact of orthopedic symptoms, $5,000 has been found to be an appropriate award of damages. The Commission also found that, in comparison to similar cases involving a finding that management's statements about a complainant constituted a per se violation, an award of $5,000 is appropriate.

The Commission denied the appeal for higher attorney's fees, finding that the Agency's discriminatory actions were not inextricably intertwined with the other issues in the complaint to warrant fees for the unsuccessful claims. However, the Commission ordered the Agency to advise Complainant to submit supporting documentation as to attorney's fees and expenses relating to the appeal, as it was partially successful.

Gonzalez-Gonzalez (Jess P.) v. DHS (TSA), 0120132186 (09/17/2019) [Repeated under Priority 3, sub-priority "LGBT" above] – Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of sex (male, sexual orientation), age, and in reprisal for prior protected EEO activity when he was not selected for two positions, a Transportation Security Inspector position and a Lead Transportation Security Officer position, and when he was subjected to harassment by a coworker. The Agency found no discrimination.

The decision found that the Agency erred when it held that sexual orientation was not prohibited under anti-discrimination laws and when it did not process this claim in the 29 C.F.R. Part 1614 process. However, the decision noted that the investigation was adequately developed to address Complainant's claim of harassment. Assuming Complainant established that he was subjected to harassment, the decision concluded that the Agency's satisfied its affirmative defense and avoided liability, as following a report of the presumed harassment, the Agency promptly and effectively addressed the issue. Accordingly, the decision held that Complainant was not subjected to sexual harassment.

The decision then addressed Complainant's claims of non-selection with respect to the Transportation Security Inspector position and for a Lead Transportation Security Officer position. The decision found that Complainant failed to establish a prima facie case of disparate treatment with respect to the

Transportation Security Inspector position as he failed to make the best qualified list and was not considered for the position. The decision held that Complainant established a prima facie case of sex-based discrimination with respect to the Lead Transportation Security Officer, noting that one of the selectees was a female. The decision turned to the Agency to produce a legitimate, nondiscriminatory reason for not selecting Complainant. The decision noted that the selecting official stated that Complainant was not selected because he did not score high enough to be selected for one of the eight positions filled. The decision found that the Agency did not provide specific, clear, and individualized explanation as to why Complainant was not selected for the position for which he was deemed qualified. The Agency only provided the general mechanics of the selection process but did not provide an individualized explanation for Complainant's specific situation. As the Agency failed to overcome Complainant's prima facie case of sex discrimination, Complainant prevailed in his claim without having to provide pretext with respect to the Lead Transportation Security Officer position.

The decision remanded the matter to the Agency for corrective action including: offering Complainant a Lead Transportation Security Officer position; calculation of Complainant's entitlement to back pay; determination on Complainant's entitlement to compensatory damages; and providing training and consider disciplinary action against the management officials who subjected Complainant to disparate treatment.

Ballance (Elise S.) v. State, 0120170164 (09/25/2019) – Complainant filed an EEO complaint alleging that the Agency subjected her to a hostile work environment and disparate treatment based on disability and reprisal and that the Agency denied her a reasonable accommodation. Complainant filed the instant appeal from the Agency's final decisions finding no discrimination.

In January 2012, Complainant requested an alternate work schedule (AWS) as a reasonable accommodation to attend ongoing medical appointments for hypertension, Non-Hodgkin's Lymphoma, and neuropathy, and the Agency approved her request in March 2012. On December 7, 2012, Complainant's second-line supervisor (S2) allegedly sent her an email that told her not to "screw me over" and that she was not the "poster girl" for AWS because of a prior EEO complaint. On December 13, 2012, Complainant was informed that her AWS would expire at the end of the year and that she would need to provide additional medical documentation if she required a non-traditional schedule. On January 2, 2013, S2 emailed Complainant, stating, "The way that you were using [AWS] was causing a real burden in the office." S2 stated that her AWS was a burden because Complainant moved her scheduled day off within the pay period and modified leave requests and because other staff occasionally had to cover her work while she was on scheduled leave. On January 30, 2013, S2 emailed Complainant, stating that no one had advocated harder for her to be accommodated than he had. Complainant responded that no one had helped her, and S2 replied, discussing at length how someone had filed six EEO complaints against him in 2002. According to S2, as a result of the EEO complaints, he was suspended for 120 days, transferred to Baghdad for 26 months without leave, and "lost a house, kennel of dogs that I loved, a car and a pick-up truck and a wife." He concluded, "You think you can beat that? The complainant always gets some consideration. No matter how diligently you manage, you will always get smacked. I don't have another 10 years to go off to some nasty place and lose what little I have left."

On February 7, 2013, Complainant emailed S2 and asked to be excused from office kitchen cleaning duties because of health concerns. S2 sent an email to all staff stating that the rotating cleaning schedule would be terminated immediately and that employees would be responsible for cleaning up after themselves. On February 8, 2013, S2 sent another email to all staff stating that employees who volunteered to clean the kitchen on Fridays would be able to leave work 20 minutes early. Complainant asked if she could water a plant in order to be afforded the same opportunity to leave 20 minutes early, and S2 responded that she could not use the kitchen area because she would not clean it and that, "Should you disagree, I am aware that you know the many offices who will hear your views." S2 also told Complainant that she would not be able to leave early for watering the plant. On March 25, 2013, S2 sent Complainant an email that stated that she could use the kitchen area as long as she cleaned up after herself.

On March 11, 2013, S2 sent out a staff email that omitted Complainant, which stated that annual leave required 24 hours advanced notice and would be granted at the discretion of the manager. S2 denied intentionally excluding Complainant from the email. On March 13, 2013, Complainant requested annual leave, and S2 informed Complainant that policy required 48 hours advanced notice for annual leave but that he would defer approval of the leave to her first-line supervisor (S1). Although S2 denied having a different annual leave policy for Complainant, S2 averred that Complainant had been requesting leave multiple times per week, changing her leave requests, and trying to combine her leave with her lunch break, which was a burden for the timekeeper.

On February 20, 2013, S2 issued Complainant a "Memo of Expectations," which accused Complainant of engaging in "disruptive" behavior and failing to comply with management directives by contacting managers outside of her chain of command and devoting a considerable amount of time to matters unrelated to her work. On March 25, 2013, the Executive Director of the Bureau of Administration (S3) issued Complainant a Letter of Reprimand for displaying disrespectful behavior towards management by continuously circumventing her chain of command. The cited examples included Complainant contacting upper level management about being singled out and excluded from S2's email regarding the annual leave policy.

On April 9, 2013, Complainant submitted updated medical documentation in support of her reasonable accommodation request for a flexible AWS, as well as the ability to change her lunch hour on days when she had medical appointments. The Agency initially denied her request, stating that the provided medical documentation did not establish a connection between her disability and the requested accommodation and offering FMLA leave as an alternate accommodation. On May 29, 2013, the Director of Medical Clearances/Medical Officer (HR2) stated that he reviewed additional medical documentation, which established a connection between Complainant's disability and her request for a flexible AWS as an accommodation.

On May 7, 2013, a Supervisory Human Resources Specialist (HR3) issued Complainant a proposed three-day suspension. The two charges were: (1) inappropriate conduct towards her supervisor; and (2) failure to follow instructions. HR3 cited Complainant sending an email to her supervisor in which she accused management of discriminating against her by denying her the same benefits afforded to her coworkers. HR3 also cited seven emails between March 27 and April 2, 2013, in which Complainant copied the Deputy Assistant Secretary for the Bureau of Human Resources and alleged that she was being subjected to discrimination, retaliation, and/or harassment. On July 3, 2013, S3 suspended

Complainant for one day, sustaining the first charge but not the second. S3 found that Complainant failed to establish that the proposed suspension was retaliatory or discriminatory.

The Commission, which affirmed in part and reversed in part the Agency's final decisions, found that Complainant established that the Agency subjected her to a hostile work environment based on reprisal and disability and that the Agency denied her a reasonable accommodation.

We found that Complainant established that she was subjected to a hostile work environment based on reprisal and disability and that the Agency was vicariously liable for the harassment. S2 sent Complainant emails stating that her reasonable accommodation was a burden and complaining about EEO complaints that had been filed against him. Requesting a reasonable accommodation constitutes protected EEO activity, and informing an employee that her reasonable accommodation for her disability was a burden is reasonably likely to deter a reasonable employee from engaging in protected activity. We further found that an email from a supervisor to a subordinate complaining at great length about the negative consequences he experienced after someone filed EEO complaints against him would be reasonably likely to deter a reasonable employee from engaging in protected activity.

Further, Complainant was disciplined (the Memo of Expectations, the Letter of Reprimand, and the proposed three-day suspension, which was subsequently mitigated to a one-day suspension) for contacting upper management and/or management officials outside of her chain of command to report allegations of discrimination, retaliation, and/or harassment by her first- and second-level supervisors. Each time Complainant brought her EEO concerns about her supervisors to Agency leadership, she was engaging in protected EEO activity. Disciplining an individual for raising EEO concerns with Agency leadership could have a chilling effect on the EEO process, leading employees not to report instances of discrimination or harassment by their supervisors.

We also found that Complainant was an individual with a disability and that she was subjected to harassment based on disability. S2 told her to request annual leave 48 hours in advance, despite allowing other employees to request annual leave 24 hours in advance. On February 12, 2013, S2 told Complainant that she could not use the kitchen at all, even if she cleaned up after herself, and he did not reverse course until March 25, 2013, when he informed her that she could use the kitchen as long as she cleaned up after herself. We found that these incidents constitute harassment based on disability.

The alleged harassment clearly affected the terms and conditions of Complainant's employment, as she was subjected to discriminatory disciplinary actions and held to different standards than her coworkers when it came to leave usage. Considered as a whole, we found that these incidents of harassment were sufficiently severe to constitute a hostile work environment. S2, Complainant's second-level supervisor, was responsible for the disability- and reprisal-based harassment, and we found that the Agency was vicariously liable for S2's harassment and that the Agency did not establish an affirmative defense.

Complainant alleged that beginning on December 31, 2012, she was denied a reasonable accommodation consisting of a flexible AWS and the ability to move her lunch break to minimize her leave usage. Complainant's January 2012 medical documentation indicated Complainant's medical conditions were ongoing and that the duration of the medical conditions was unknown. We noted that the Agency is permitted to periodically ask for updated medical information where the chronic nature of a disability is not established. Complainant provided updated medical documentation on April 9, 2013, but the Agency found that the updated documentation did not establish a nexus between her

disability and the requested accommodation. We disagreed, as the nexus between Complainant's disability and the need for accommodation was as evident in the 2013 medical documentation as it was in the original 2012 medical documentation. The record suggested that Human Resources personnel erroneously believed, at least initially, that attending medical appointments related to a disability was not something the Agency was required to accommodate.

We further found that the Agency's May 10, 2013, proposal of FMLA as an alternative accommodation that would permit her to attend her medical appointments did not fulfill its obligation to reasonably accommodate Complainant, because she would be required to take unpaid leave or use sick or annual leave when she had medical appointments. With a flexible AWS she could have minimized her leave usage by moving her AWS "off" day within the pay period. Given that Complainant was permitted to utilize a flexible AWS and move her lunch break to minimize her leave usage in 2012, we found that the Agency did not establish that maintaining Complainant's accommodation constituted an undue hardship. Finally, we found that the Agency failed to make good faith efforts to reasonably accommodate Complainant because the Agency subjected her to unlawful harassment based on disability and disciplined Complainant for requesting that the Agency reasonably accommodate her.

Perkins (Ashely H.) v. NTSB, 0120180038 (09/17/2019) – Complainant, a Contract Specialist, alleged that the Agency subjected her to various acts of sexual harassment by a male coworker. On appeal, the Commission determined that Complainant was subjected to sexual harassment when the coworker engaged in sexually harassing conduct from 2011 until late November 2013, including incidents wherein the coworker made comments about Complainant body and denigrating sexual remarks. The Commission noted that Complainant's accounts of the coworker's conduct were largely documented in the record in emails and corroborated by several coworkers who attested that Complainant reported the conduct at the time of the incidents.

The Commission further found the Agency was liable for the sexual harassment because at least four to five women previously had reported the coworker had engaged in sexual conversations with them throughout his 12 years at the Agency, and the Agency had issued him a letter of counseling after an employee complained that he had made sexual comments to her and recommended a lewd website featuring women engaged in sexual acts. The Commission concluded that the Agency should have known about the coworker's propensity to harass employees but did not take effective action to address his conduct until it reassigned him to another facility in January 2017. Additionally, the Commission found that the Agency denied Complainant the requested reasonable accommodation of telework or administrative leave until it provided her with a workplace that guaranteed no contact with the perpetrator. In so finding, the Commission determined that Complainant experienced Major Depression and Post-Traumatic Stress Syndrome because of the sexual harassment, and the Agency did not prove that providing her with telework or administrative leave would have imposed an undue hardship.

To remedy the EEO violations, the Commission ordered the Agency to provide Complainant with reasonable accommodation by allowing Complainant to telework on days the harasser worked in her office building or to provide her with administrative leave on those days; to ensure the harasser did not work in or come to Complainant's work facility while Complainant was assigned to that building; to provide Complainant with compensatory damages associated with the sexual harassment; to provide

eight hours of EEO training to officials charged with responding to harassment allegations and reasonable accommodation requests; to restore leave taken because of the Agency's failure to provide Complainant with a reasonable accommodation; to pay Complainant's attorney's fees and costs; to post a discrimination notice, and to consider disciplining responsible management officials.

Suzuki (Jeffry R.) v. USPS, 0120180058 (09/06/2019) – Complainant, a City Letter Carrier, filed an EEO complaint alleging that he was discriminated against on the basis of disability (stroke, hemiparesis) when he was denied a reasonable accommodation. Complainant requested a spinner knob (to be put on the steering wheel) to drive a postal vehicle. Ultimately, years after his initial request, due a grievance, Complainant was awarded the accommodation. Complainant also alleged he was subjected to a hostile work environment on the bases of disability and in retaliation for protected EEO activity. Complainant requested a hearing before an EEOC AJ. The AJ held a hearing and issued a decision finding no discrimination on the entire complaint. The Agency adopted the AJ's decision. Complainant appealed. OFO affirmed the finding of no discrimination on the hostile work environment claim. OFO reversed the part of the Agency's decision finding no discrimination regarding the reasonable accommodation claim. OFO found that Complainant was a qualified individual with a disability and that the Agency (via the District Reasonable Accommodation Committee) improperly denied Complainant a reasonable accommodation. OFO also found that the denial of accommodation was not in good faith. For remedies, OFO ordered back pay, an investigation of whether compensatory damages were due, a copy of the OFO decision to be provided to the DRAC, and posting of a notice of discrimination.

Turley (Sharon M.) v. DOT, 0120180192 (09/25/2019) – Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of race (African-American) and color (black), when on November 11, 2016, she was subjected to harassment by a coworker. Complainant indicated that the coworker who also was the president of the local union sent her an email with derogatory language.

The Agency found no discrimination.

The decision found that Complainant was subjected to harassment when she received the email from the coworker. The decision then determined that the Agency erred finding that it took prompt action. The decision noted that the Agency took six months to engage in an internal investigation and issue the coworker a proposed 30-day suspension. The Agency failed to inform the Commission what, if any, final disciplinary action was issued against the coworker. Accordingly, the decision held that the Agency failed to take prompt action to meet its affirmative defense. As such, the decision concluded that Complainant had been subjected to harassment based on her race and color.

The decision remanded the matter to the Agency for a determination on Complainant's entitlement to compensatory damages, for training and reconsideration of discipline for the co-worker, for training for management focusing on addressing harassment, and for consideration of disciplinary action against the management officials who failed to respond to Complainant's claims of harassment in a prompt manner.

McDowell (Rigoberto A.) v. EPA, 0120180363 (09/13/2019) – Complainant, a Criminal Investigator with the Agency, filed an EEO complaint alleging that the Agency subjected him to retaliation and harassment when he was issued a "minimally satisfactory" appraisal rating and a Notice of Proposed Removal, among other things. Complainant further maintained that the Agency improperly provided to Department of Justice (DOJ) U.S. Attorney's Offices copies of the Proposed Removal with his medical records attached.

Following the investigation, the Agency issued its final decision, finding that it articulated legitimate, nondiscriminatory reasons for its actions, which Complainant did not establish were pretextual. The Agency found that it issued Complainant the minimally satisfactory rating and the Notice of Proposed Removal because of Complainant's complaints to investigators and employees wherein he lied and spread false rumors about his supervisor. The Agency also determined that it was obligated to disclose Complainant's discipline and attached medical documentation in accordance with the DOJ's "Giglio policy," which requires government disclosure of exculpatory material and impeachment evidence to defendants.

On appeal, the Commission observed that the Agency, in the Notice of Proposed Removal, cited to Complainant's EEO activity in specifically writing that Complainant made false and misleading statements in his affidavit for his coworker's EEO investigation. The Commission found that the Agency's specific reference to Complainant's prior EEO affidavit in the Notice of Proposed Removal constituted direct evidence of reprisal discrimination. The Commission further found, however, that the Agency also provided non-retaliatory reasons for taking action against Complainant. Therefore, the Commission addressed the matter under a mixed-motive analysis. Therein, the Commission determined that the Agency would have taken the same actions against Complainant even absent retaliation and denied Complainant personal relief for his claim of retaliation.

The Commission did determine that the Agency violated the Rehabilitation Act's confidentiality provisions when the Agency disclosed Complainant's medical documentation to DOJ U.S. Attorney's Offices. The Commission found no evidence that the medical records themselves contained Giglio relevant material, as the Agency maintained. The Commission therefore instructed the Agency to conduct a supplemental investigation concerning Complainant's entitlement to compensatory damages as a result of the Agency's disclosure of Complainant's medical documentation.

Louden (Wade K.) v. HHS, 0120180367 (09/25/2019) – Complainant, a Supervisory Maintenance Mechanic with the Agency, filed an EEO complaint alleging that the Agency denied him a reasonable accommodation for his disability. Complainant specifically claimed that he was denied accommodation when the Agency made him work the night shift, despite his medical documentation noting that his work restrictions limited him to the morning shift. Complainant timely requested a hearing and the AJ held a two-day hearing ultimately finding that Complainant did not establish that he was subjected to discrimination as alleged. The AJ found that although Complainant established that he was an "individual with a disability," he nevertheless did not establish a prima facie case of discrimination. The AJ found that Complainant did not connect his disability with the actions of his supervisor, and

that similarly-situated employees were not treated differently than he as no one was given a reasonable accommodation for shift work at the time.

On appeal, the Commission found that the AJ erred in not determining that Complainant was denied a reasonable accommodation for his disability as alleged. The Commission specifically noted that Complainant had presented the Agency with more than enough medical documentation connecting his disability with the requested accommodation. Further, the Agency had previously accommodated Complainant with day shift work the previous year, which weakened the Agency's argument that Complainant's medical documentation was insufficient. The Commission ultimately found that Complainant was denied reasonable accommodation, and therefore ordered the Agency to conduct a supplemental investigation on Complainant's entitlement to compensatory damages. The Commission also ordered the Agency to train and consider disciplinary action of Complainant's supervisor.

Zheng (Terisa B.) v. DOD (DFAS), 0120180570, 0120181692, 2019002121 (09/04/2019) – Complainant, an Internet Technology (IT) Specialist with the Agency, filed an EEO complaint alleging that the Agency, among other things, subjected her to retaliatory harassment when her supervisor verbally threatened her due to her EEO activity. Following the investigation, the Agency issued its final decision finding that Complainant did not establish that she was subjected to discrimination as alleged. On appeal, the Commission modified the Agency's decision, finding that the supervisor's comments amounted to a per se violation of Title VII. In so finding, the Commission observed that Complainant's supervisor attested that he told Complainant that her complaining about EEO issues was causing him a lot of extra work and stress, and that he did not feel her complaints constituted real EEO complaints. The Commission noted that the supervisor further said to Complainant that management sees her as someone who does not work well with others due to her verbal EEO complaints to them. The Commission therefore found that the supervisor labeled Complainant as someone who does not work well with others due to her EEO activity. The Commission further observed that Complainant, a probationary employee, was threatened with termination due to her EEO activity. The Commission ultimately found that the supervisor's comments to Complainant constituted reprisal per se with regard to Appeals Nos. 0120180570 and 0120181692. The Commission therefore ordered the Agency to conduct a supplemental investigation on Complainant's entitlement to compensatory damages, among other things, with respect to those appeals. The Commission however found that Complainant did not establish that she was subjected to discrimination with regard to Appeal No. 2019002121.

Watson (Alonzo N.) v. USPS, 0120181502 (09/17/2019) – Complainant, a Mail Handler at the Processing and Distribution Center in Norfolk, Virginia, is deaf and communicates through sign language. His condition was known to management officials in his workplace. Agency officials, however, failed to provide Complainant a sign language interpreter (SLI) on four occasions, including during training and safety meetings and during two emergency meetings. Complainant could not participate in these meetings without a SLI, and he and other hearing-impaired employees were subsequently provided written copies of the safety talks and emergency meetings. While Complainant's manager did not remember the instances raised by Complainant, she did explain that management was often required to give service safety talks on short notice which did not give management any time to set up for interpreting services.

Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of disability (deaf) and in reprisal for prior protected EEO activity when: (1) on or about March 9, 2017, and May 19, 2017, he was not provided with a certified interpreter during training and safety meetings; (2) on June 8, 2017, he was not provided a certified interpreter during an emergency tour safety training; (3) on June 8, 2017, he was not provided a certified interpreter during an emergency tour meeting; and (4) on September 14, 2017, he was not provided a certified language interpreter or video relay during an emergency hurricane meeting.

Following an investigation, the Agency issued a final agency decision after Complainant failed to request a hearing. The decision concluded that Complainant failed to prove that the Agency subjected him to discrimination or reprisal as alleged.

On appeal, the Commission reversed the final decision finding that Complainant established that he was denied a reasonable accommodation with respect to the Agency's failure to provide a SLI on the dates at issue. The Commission noted that the Agency could not avoid its obligation to provide Complainant a reasonable accommodation simply because of the difficulty of scheduling the services of an SLI in a timely manner. As we have previously held, in the extraordinary circumstance where the physical safety of employees in the workplace is the subject of discussion, it was uniquely pressing for Complainant to have access to the information being conveyed. Under these circumstances, full participation in safety meetings and training was a benefit and a privilege of employment for which a reasonable accommodation should have been provided, and the Agency failed to show that providing it would have been an undue hardship. As a result, the Commission concluded that the Agency failed to provide Complainant reasonable accommodation in violation of the Rehabilitation Act. To remedy the discrimination, the Commission ordered the Agency to ensure that Complainant was provided a qualified sign language interpreter when necessary to ensure that he has access to information communicated in the workplace equal to that of non-disabled employees; to conduct a supplemental investigation into Complainant's entitlement to compensatory damages; to provide the managers and supervisors at the facility training; to consider disciplining the responsible management officials; and to post a notice.

Kerner (Israel F.) v. USPS, 0120181863 (09/26/2019) – At the time of events giving rise to this complaint, Complainant worked as a Carrier Technician at the Agency's Loch Raven Branch in Baltimore, Maryland. Complainant stated that, in February 2016, he submitted a request for three (3) weeks of annual leave, from August 15 through September 3, 2016, which was approved. However, Complainant was charged with eight (8) hours of absence without leave (AWOL) for September 3, 2016. Complainant noted that he had 7.59 hours of annual leave available, and he should have been charged .41 units of leave without pay, and not charged AWOL.

On August 11, 2016, Complainant filed an EEO complaint alleging, in part, that the Agency subjected him discriminatory harassment in reprisal for filing his current EEO complaint when he was denied annual leave for 120 hours, which was pre-approved in February. In its final decision, the Agency found that Complainant established a prima facie case of discrimination based on reprisal. However, the Agency found that his supervisor stated that Complainant was "short" and did not have three weeks of annual leave available, and that Complainant did not provide sufficient evidence to show that management's reason was pretextual. Complainant appealed the Agency's final decision.

The Commission found that Complainant established that he was retaliated against when he was charged with eight (8) hours of AWOL on September 3, 2016. Specifically, Complainant's supervisor's statements were unworthy of credence because they were inconsistent with another manager's statement and a prior settlement agreement. As a remedy, the Commission ordered the Agency to remove the AWOL charge, conduct a supplemental investigation into Complainant's damages, provide training to Complainant's supervisor, consider disciplining the supervisor, and post a notice of the finding of discrimination.

Peterson (Erik S.) v. DOJ (BOP), 0120181994 (09/25/2019) – Complainant worked as a GL-0007-07 Correctional Officer at the Agency's Federal Correctional Complex (FCC) in Coleman, Florida (FCC Coleman). Within FCC Coleman, Complainant was assigned to the medium-security facility (the Medium). Complainant alleged that he was subjected to unlawful discrimination based on race (Caucasian), national origin (American, perceived as Arab), sex (male), religion (Muslim), and disability (physical and mental) when he was not selected for promotion to a GL-0007-08 Correctional Officer position in 2015 and in 2016.

With respect to the 2015 nonselection, we found that Complainant established a prima facie case of discrimination based on national origin and religion, but not based on race, sex, or disability. Complainant established that: (1) he was a Muslim, Caucasian male with a disability whose national origin was perceived as Arab; (2) he was referred for consideration on the merit promotion certificate as well as on the exception certificate for 30-percent or more disabled veterans; (3) he was not selected for the position; and (4) the Agency selected 24 candidates for the position, including 21 males, five individuals who self-identified as Caucasian, and one individual with a self-identified disability. Although the record was not clear on this point, the selecting official appeared to be the Warden of the Medium (S5), who had since retired. The EEO Investigator was unable to contact S5, and none of the other responsible management officials or witnesses interviewed had any direct or indirect knowledge of the selection process or S5's reasons for not selecting Complainant. Moreover, although a Human Resources employee told the EEO Investigator that no reference checking or vouchering had been conducted for Complainant, the Agency's appellate brief stated that vouchering was conducted on all referred candidates and that the vouchers were forwarded to the selecting official. We found that the Agency had not met its burden of production and therefore had failed to overcome Complainant's prima facie cases of national origin and religion discrimination. Accordingly, we found that the Agency discriminated against Complainant on the bases of national origin and religion when it did not select him for the GL-0007-08 Correctional Officer position in 2015.

With respect to the 2016 nonselection, the Agency's legitimate, nondiscriminatory reason for not referring Complainant to the selecting officials or selecting him was that Complainant applied through the 30 percent or more disabled veterans' special hiring authority, and FCC Coleman did not use this optional special hiring authority for the 2016 vacancy. To the extent that Complainant attempted to establish pretext by arguing that not using this special hiring authority constituted disability-based animus, we did not find that the preponderance of the evidence in the record established this to be the case. Moreover, the record reflected that Complainant was eligible for consideration under merit promotion procedures, that he was warned that his application would not be considered if he only applied through the 30 percent or more disabled veterans' special hiring authority, and he did not

modify his application. We concluded that Complainant did not establish discrimination with respect to the 2016 nonselection.

The decision ordered the Agency to place Complainant in the GL-0007-08 Correctional Officer position, award back pay and benefits, determine compensatory damages, provide training to the responsible management officials, consider discipline, and to post a notice of the finding of discrimination.

Jackson (Cleveland C.) v. Treasury, 0120182460 (09/24/2019) – Complainant, a Tax Examining Technician, filed three formal EEO complaints alleging that the Agency subjected him to disparate treatment and harassment based on race, sex, disability, and reprisal for prior protected EEO activity with respect to nine incidents. The Agency, in a consolidated decision, dismissed six claims. With respect to the remaining claims, the Agency found that Complainant had not established that he was subjected to discrimination or harassment based on race, sex, and reprisal; but found disability discrimination for two claims, i.e., when the Agency failed to provide Complainant with a reasonable accommodation during training in February 2014, and when the Agency unreasonably delayed his request for Dragon software.

OFO affirmed the Agency's final decision. We ordered the Agency, to the extent that it had not already done so, to conduct a supplemental investigation on compensatory damages, including providing Complainant an opportunity to submit evidence of pecuniary and non-pecuniary damages; to ensure that the two management officials responsible for denying him a reasonable accommodation receive at least eight hours of EEO training on the Rehabilitation Act and processing requests for reasonable accommodations; and to consider taking disciplinary actions against these managers.

Melvin (Taunya P.) v. USPS, 0720180022 (09/27/2019) – Complainant filed an EEO complaint alleging, among other things, that the Agency subjected her to a hostile work environment and failed to reasonably accommodate her physical disability (back) when she was reassigned to a position whose duties exceeded her medical restrictions, was threatened with being sent home, and was subsequently sent home. After a hearing, an AJ found that Complainant established that the Agency failed to accommodate her physical disabilities from late November 2011 through June 22, 2012. The AJ also found that Complainant established that she was subjected to a hostile work environment. The AJ determined that Complainant was entitled, among other things, to non-pecuniary compensatory damages in the amount of $250,000.00, pecuniary compensatory damages in the amount of $958.00, and attorney's fees and costs in the amount of $131,791.04.

On appeal, the Agency argued that the AJ erred in awarding excessive amounts of compensatory damages and attorney's fees and costs. The Agency argued that the compensatory damages awarded should be mitigated and reduced. The Agency also argued that the AJ erroneously relied on the conclusory testimony of Complainant's orthopedist, who opined that Complainant could never carry a child because of the exacerbation of her back problems caused by the Agency's actions. Additionally, the Agency maintained that Complainant relied primarily on her mother for emotional support instead of seeing a psychiatrist or a psychologist for her emotional harm. Further, the Agency argued that the compensatory damages awarded were based on the AJ's passion and prejudice, as evidenced by her

saying that Complainant's supervisor was "clueless" about reasonable accommodation. Finally, with regard to attorney's fees, the Agency argued that Complainant's attorney spent excessive time communicating with Complainant and drafting her post hearing brief.

OFO found that the AJ's findings of fact were supported by substantial evidence in the record and that the AJ's decision properly summarized the relevant facts and referenced the appropriate regulations, policies, and laws. We also found that the Agency provided no relevant evidence to show that the AJ erred in awarding $250,000.00 in nonpecuniary compensatory damages other than its conclusory statements. For the most part, the Agency simply disagreed with the AJ but did not established any error. Given the nature, severity and duration of the harm suffered by Complainant, and the ample documentation in the record supporting the AJ's decision, OFO's decision found that $250,000.00 was not monstrously excessive, and was in line with amounts awarded in other cases. Further, while the AJ's use of the term, "clueless," could not be condoned, we found that one word did not indicate that the AJ's decision was the product of passion or prejudice. Likewise, with respect to the AJ's award of attorney's fees and costs, other than the Agency's conclusory statements, the Agency did not show that the AJ erred in the amount awarded. Therefore, we found no basis to disturb the AJ's decision.

8. CIRCULATED CASES

Taylor (Elly C.) et al. v. SSA, 0720140019 (06/26/2019) **[Repeated under Enforcement - General and Broad Impact Cases above]** – Two African-American female employees filed a class complaint against the Agency alleging that it discriminated against a class of employees on the bases of race (African-American), sex (female), and in reprisal for prior EEO activity with respect to promotional opportunities.

Subsequently, an EEOC AJ recommended acceptance of the formal complaint and certified the class. The Agency declined to fully implement the AJ's decision on certification and filed an appeal to the Commission. On May 5, 2006, the Commission, in EEOC Appeal No. 07A50060, upheld the certification but slightly modified the class as follows:

All African-American females who were employed at the Agency's headquarters in Baltimore, Maryland, including employees working in the Security West and Metro West facilities, but excluding those in the Office of [the] General Counsel and the Office of the Inspector General, in general schedule grades seven through thirteen (GS-7 through GS-13) who have not been promoted during the period of time beginning on December 9, 2000, and continuing to the date a final determination is rendered on the class complaint claim.

Thereafter, the AJ issued an Interim Decision on Liability in which she concluded that the Class did prevail in showing class-wide discrimination against non-supervisory GS-11 African-American female employees who were denied promotions to the GS-12 grade level from December 9, 2000, to the present based on the Agency's statistical evidence of disparity in promotions. The AJ further found that neither Complainant established that she was discriminated against in obtaining promotions in their individual complaints.

The Agency filed an appeal after declining to implement the AJ's decision. On June 26, 2019, the Commission issued a decision finding, among other things, that the evidence supported the AJ's

conclusion that there was unlawful discrimination with respect to the promotion of GS-11 African American females to the GS-12 grade level.

The Agency was ordered, among other remedial actions, to identify all affected African-American female employees who were part of the class, provide them with copies of the decision, and inform them of their right to secure attorney or non-attorney representation of their own choosing to assist in securing relief in accordance with 29 C.F.R. §1614.204. The Agency was also ordered to conduct an inquiry pursuant to §717(b) of Title VII to determine what factors are responsible for the significant statistical disparity in the promotion of Black females beyond the GS-11 level and to propose solutions for eliminating such disparities in the future. Finally, the Agency was directed to pay attorneys' fees in the amount of $762,659.19 and costs in the amount of $23,571.73.

III. Federal Sector Oversight

- RED staff monitored VBA's compliance with EEOC's recommendations in a program evaluation completed in FY 2018. VBA's third compliance report was received in August 2019.
- RED completed part two of its government-wide program evaluation of public safety occupations with a focus on the promotion and retention of women. The report is currently under review by the Chair's office.
- RED continued the program evaluations of DOI and DSS it began in FY 2018 and issued surveys to its employees in FY 2019.
- RED continued the work on choosing an agency candidate for model employer status it began in early FY 2019. IRS and the IRS Office of Chief Counsel were selected and the initial report was drafted.
- RED staff began a program evaluation of the USPS west region that covers the issues of reasonable accommodation, direct reporting, and anti-harassment program. A request for information was issued in FY 2019.
- RED staff began a government-wide program evaluation to gather best practices in management of EEO conflict cases. A survey was issued to all agency EEO Directors.
- RED staff completed the FY 2017 Annual Report on the Federal Workforce.
- RED staff completed the Special Topics Report for the FY 2017 Annual Report, entitled: "Special Topics: The State of the Federal Sector Workforce: Employees Age 40 and Over, FY 2017."
- RED staff presented Form 462 Preparation & Submission Review training at the EXCEL Training Conference.
- RED staff completed revisions to the Form 462 User Instruction Manual.
- As part of our Lean Six Sigma (LSS) efforts, RED analyzed the impact of our FY 2018 Form 462 data collection process improvement and wrote up results.
- As part of our LSS efforts, RED completed the Form 462 Data Reduction Project and submitted the revised Form 462 template and companion document to OFO management for review.
- RED fulfilled 28 data requests in quarters three and four.
- RED presented to management the FY 2019 Impact Measures Committee report.
- RED, in partnership with SOD and the OFO Director's Office completed the OFO correspondence project, created the process maps, and submitted the maps and companion document to OFO management.
- RED and AOD completed a report on the adequacy of staffing levels and timeliness in federal EEO programs.
- RED submitted the FY 2019 State University of New York IPA report titled, "Understanding the Link between Perceived Harassment and Harassment Complaints in the Federal Government."
- SOD issued quarterly editions of the Digest of EEO Law containing summaries of noteworthy select decisions and coordinated with OCLA to issue press releases. The EEO Digest included an article on the remedies available when there is a finding of discrimination in a federal sector EEO claim, as well as an article addressing the factors

considered when making a determination as to whether a complainant timely initiated a complaint.

- SOD staff completed a Guide to Appellate Brief Writing for *pro se* brief writers to increase and facilitate access to the appellate process.
- SOD staff completed an overhaul of the compliance enforcement program to better reflect OFO's organic compliance enforcement efforts.
- An OFO team mapped incoming and outgoing correspondence to find points of intersection and duplication that could be modified to increase efficiency and consistency of message.
- An OFO team attended custom training on Sharepoint site development and then began reviewing and modifying OFO Sharepoint sites to maximize our use of the platform and better coordinate our federal sector oversight activities.
- An OFO team coordinated with OSC leadership on ways to improve our referral process of cases for OSC investigation, including referrals re: possible discipline of responsible management officials pursuant to findings of discrimination/ harassment.
- SOD staff reviewed quarterly progress reports and continued monitoring two agency pilot programs that are testing ways to expedite and otherwise improve the EEO complaint process.
- SOD staff completed a guide for complainants and agencies to assist them in navigating the EEOC hearings process, with an eye to streamlining the process and making it more accessible, understandable and expeditious.
- Following the issuance of the revised MD-715 instructions, AOD implemented the new Part forms in FedSEP's MD-715 module in April 2019. With the assistance of OIT, AOD will implement the new workforce data tables in FY 2020.
- In FY 2019, FSP established a goal to conduct 85 technical assistance visits with agencies and issue a feedback letter within 180 days of each visit. During FY 2019, AOD conducted 93 technical assistance visits with agencies and timely issued 50 feedback letters to all of the agencies. The deadline for issuing the remaining letters will fall during the first two quarters of FY 2020.
- FSP established a goal to ensure that 55% of agencies have a compliant anti-harassment policy by the end of FY 2019. During technical assistance visits, AOD discussed with agencies the status of their anti-harassment policies and the feedback letters included recommendations. As of September 30, 2019, 62.69% of the 193 agencies that have received AOD feedback have compliant anti-harassment policies.
- AOD further referred to ARP seven agencies that had not made meaningful progress in correcting the procedures, thereby initiating a new process to leverage different areas of oversight to achieve meaningful compliance.
- FSP established a goal that 45% of agencies have compliant reasonable accommodation procedures by the end of FY 2019. To meet this goal, AOD has discussed the status of the procedures with agencies during technical assistance meetings and provided written feedback to agencies, upon request. As of September 30, 2019, 52.94% of the 102 agencies that have received AOD feedback have compliant reasonable accommodation procedures.
- RED completed a training effectiveness research study to understand the effect of training on the reduction of EEO complaints in the federal sector; the study sought to

provide important information about the value of training in reducing workplace discrimination and harassment in federal agencies. The goal of this research was to identify specific training program elements which could potentially reduce discrimination, harassment, and/or retaliation when incorporated into training programs. The major implications of these findings are that agencies should continue their training programs, but that a long view of training should be adopted as a part of agencies' on-going strategic plans.

- RED and TOD completed a feasibility study regarding the EEOC creating a professional credential for EEO practitioners. RED conducted a job analysis, a work force analysis, and a market analysis (which involved the creation of a questionnaire). The report describes the process of developing a certification program, including the identification of the necessary elements to support such a program. The study details the steps in the certification development and the pathways in which EEO staff could become certified, in addition to the special considerations regarding the on-going management of a testing program. The Educational Consortium Certification Committee were relied upon throughout this project and were the ultimate decision makers regarding the recommendations included in the report. The Committee recommended the development of a credential.
- RED partnered with National Guard's Form 462 Program Manager to develop a webinar for SEEM/EEO Directors.
- RED participated in a meeting with members of the French congress to discuss the EEOC's anti-harassment priorities.
- RED conducted several policy reviews for OLC, including review of: OEDA NORC feedback, OMB reporting requirement, OEDA Federal Data Strategy, and the Evidence-Based Policymaking Act of 2018.
- RED, at the request of OLC, reviewed GAO's methodology for their study on the rate of grade promotion at the State Department.
- RED reviewed proposed EEO metrics for NOAA.
- RED represented EEOC/OFO on the 2021 Census ACS Disability Committee.
- RED represented EEOC/OFO and acted as a back-up for OEDA on the EEO Tab Consortium.

IV. Outreach & Training

1. Notable Accomplishments:

- During FY 2020, TOD staff conducted, facilitated and organized more than 350 outreach, education, and training events and provided more than 14,000 federal sector employees and EEO professionals with information about employment discrimination and their rights and responsibilities in the workplace.
- TOD staff delivered over 170 federal courses with over 7,000 attendees focused on Respectful Workplace and Leading for Respect, which address preventing harassment in the federal workplace.

- TOD staff exceeded the Revolving Fund goals, despite the federal government shutdown. TOD earned $1,477,230.00 in Fiscal Year 2019 from CSTs and national courses. FSP exceeded the Revolving Fund goal from fiscal year 2019 by $657,476.5 -- an 80% increase -- due to Respectful Workplace and Leading from Respect as well as the national courses. National courses reached 95% participation due to changing the training to fiscal year (October thru September) instead of calendar year (January thru December) to accommodate the training space challenge.
- In August 2019, TOD staff, in partnership with OFP staff, held its 22nd annual EXCEL Training Conference directed at both federal sector and private sector EEO practitioners. We received mostly outstanding reviews from over 300 completed evaluations for the overall conference. This year's training conference offered separate tracks for federal sector and for private sector attendees (the latter group includes state and local governments). Overall, the event attracted more than 900 conference attendees, 301 pre-conference attendees, and 39 specialty track attendees that included EEO managers, HR professionals, attorneys, union officials, and other EEO professionals. Seventy-two percent of attendees were federal sector employees and the remaining attendees were state, local and private sector employers. The training conference offered plenary sessions and over 80 workshops that covered a wide array of subjects. In addition to the general plenary and workshops, there were preconference sessions consisting of Counselor Refresher, Investigator Refresher, Litigation Before the MSPB and EEOC, ADR Refresher, Respectful Workplace (Employees), and Leading for Respect (Supervisors). Among the highlights of the conference, which had as its theme "Respect, Opportunity, Inclusion," were presentations by Rev. Dr. Bernice King, Chief Executive Officer of the Martin Luther King, Jr. Center for Nonviolent Social Change; Doris Kearns Goodwin, New York Time's Best Seller author, public speaker and Pulitzer Prize winner; Paula Gris, Holocaust Survivor; Ram Ramachandran, Program Director at IBM, and the EEOC's Chris Haffer and Dr. Morgan Walls-Dines.
- TOD and OFO staff provided EEO training at the following stakeholder training conferences: Federal Dispute Resolution Conference, Blacks in Government, Federally Employed Women, Society of American Indian Government Employees, IMAGE, Federal Asian Pacific American Council and League of United Latin American Citizens.

2. Eliminating Barriers in Recruitment and Hiring

- EEOC staff provided Barrier Analysis training to a Federal Sector audience in Washington, DC.
- OFO staff provided Barrier Analysis training to a US ARMY audience in Fort Worth, TX.
- OFO staff provided Barrier Analysis training to a Bureau of Reclamation audience in Sacramento, CA.
- EEOC staff provided Disability Program Manager (Basic) training to a federal sector audience in Washington, DC.
- EEOC staff provided EEOC Laws Refresher (Virtual) training to a federal sector audience in Washington, DC.
- EEOC staff provided three Refresher Trainings for Investigators to federal sector audiences in Washington, DC.
- EEOC Staff provided two Virtual Refresher Trainings for Counselors to federal sector audiences in Washington, DC.

- EEOC staff provided EEOC Laws Refresher (virtual) to a federal sector audience in Washington, DC.
- OFO staff provided EEOC Laws to a US ARMY audience in Langley, Virginia.
- OFO staff provided two MD-715 trainings to a CIA audience in Langley, VA.
- OFO staff provided MD-715 and Barrier Analysis training to a CIA Headquarters staff in Langley, VA.
- OFO staff provided MD-715 (Basic) and Barrier Analysis training to an EPA audience in Washington, DC.
- OFO staff provided an DR-MD 110 Case Update to a DOE audience in Washington, DC.
- OFO staff provided Disability Program Management training to a Naval Sea Command audience in Washington, DC.
- OFO staff provided Disability Program Management training to a Naval Sea Command audience in Washington, DC.
- OFO staff provided MD-715 and Barrier Analysis training to a USPS audience in Potomac, MD.
- OFO staff provided SEPM, Basic MD-715 and Barrier Analysis to a VA audience in Iowa.
- TOD staff provided EEO Topics and Compliance training to a NOAA audience in Washington, DC.
- OFO-TOD staff provided Online EEO Processing training to a virtual audience, nationwide.
- TOD staff provided Best Practices at Hearings training to a Department of Air Force audience in Washington, DC.
- TOD staff provided training to a Society of Federal Labor & Employee Relations Professionals (SFLERP) audience in Arlington, VA.
- TOD staff provided Case Updates, Social Science of Retaliation, and Best Practices at Hearing (virtual) training to a DOJ audience in Columbia, SC.
- TOD staff provided a nationwide virtual Lunch & Learn Webinar, MD-175 2.0 Part Forms.
- TOD staff provided EEOC Presence training at the FAPAC National Training Conference in Huntsville, AL.
- TOD staff provided Hiring PWD training to a federal EEO Civil Rights Council audience in Washington, DC.
- TOD staff provided Disability Awareness, Reasonable Accommodations and DPMS training to a NASA audience in Washington, DC.
- TOD staff provided Case Update training to a GSA audience in Washington, DC.
- TOD staff provided Reasonable Accommodation training to VA in Washington, DC.
- TOD staff provided SEPM training to an Air Force audience at Joint Base Andrews Air Force Base, MD.
- TOD staff provided Reasonable Accommodation training to a US Trade & Department Agency audience in Arlington, VA.
- TOD staff provided Harassment/EEOC Jurisdiction training for Blacks in Government in Dallas, TX.
- TOD staff provided Anti-Harassment training to an NIGC audience in Washington, DC.
- TOD staff provided MD-715 and Barrier Analysis training to a Bureau of Prisons audience in Washington, DC.

- TOD staff provided teleconference FedSEP training to a DOE audience in Washington, DC.
- TOD staff conducted a nationwide webinar: Harassment Avoidance in the Age of #MeToo - Lessons from the Private Sector.
- TOD staff provided a brown bag training: EEOC Case Update, to EEOC staff in Washington, DC.
- TOD staff provided Reasonable Accommodation training to an FAA audience in Memphis, TN.
- TOD staff provided training to the Sr. Exec. Association in Washington, DC.
- TOD staff conducted a webinar training: Opioids, in Columbia, SC.
- TOD staff provided a nationwide Lunch & Learn webinar on MD-175 2.0 Part Forms.
- TOD staff provided EEOC Presence training at the FAPAC National Training Conference in Huntsville, AL.
- TOD staff provided Hiring PWD training to the federal EEO Civil Rights Council in Washington, DC.
- TOD staff provided Disability Awareness, Reasonable Accommodation and DPMS trainings to a NASA audience in Washington, DC.
- TOD staff provided Case Update training to a GSA audience in Washington, DC.
- TOD staff provided Reasonable Accommodations training to VA in Washington, DC.
- TOD staff provided SEPM training to an Air Force audience at Andrews Air Force Base, MD.
- TOD staff provided Reasonable Accommodation training to a US Trade audience in Arlington, VA.
- TOD staff provided Harassment/EEOC Jurisdiction training for Blacks in Government in Dallas, TX.
- TOD staff provided Anti-Harassment training to an NIGC audience in Washington, DC.
- TOD staff provided MD-715 and Barrier Analysis training to a Bureau of Prisons audience in Washington, DC.
- TOD staff provided FedSEP training (teleconference) to a DOE audience in Washington, DC.
- TOD staff provide a nationwide webinar: Harassment Avoidance in the Age of #MeToo - Lessons from the Private Sector.
- TOD staff provided a brown bag lunch training -- EEOC Case Updates -- to EEOC staff in Washington, DC.
- TOD staff provided Reasonable Accommodation training to an FAA audience in Memphis, TN.
- TOD staff provided training at the Sr. Exec. Association meeting on Sexual Harassment in Workplace-What Senior Leaders Can Do, in Washington, DC.
- TOD staff provided EEO Presence training to an AAGEN audience in Washington, DC.
- TOD staff provided SEPM and Barrier Analysis training to a SAIGE audience in Niagara Fall, NY.
- TOD staff provided Authority Influence training to LULAC in Milwaukee, WI.
- TOD staff provided Emotional Intelligence in the Workplace training to FAPAC in Huntsville, AL.

- TOD staff provided Harassment, SEPM, Barrier Analysis and Retaliation trainings to FEW in Philadelphia, PA.
- TOD staff provided EEO Protected Bases and Retaliation trainings to BIG in Dallas, TX.
- TOD staff provided Anti-Harassment Program and MD-715 training to FDR in Philadelphia, PA
- TOD staff provided Hispanic BA and SEPM-BA trainings to an IMAGE audience in Las Vegas, NV.
- TOD staff provided Reasonable Accommodation training to a DOD audience in Washington, DC.

3. Addressing Emerging and Developing Issues

- EEOC staff provided two Drafting Final Agency Actions trainings to federal sector audiences in Washington, DC.
- OFO staff provided Drafting Letters of Acceptance and Dismissal training to a US ARMY audience in Ft. Belvoir, Virginia.
- EEOC staff provided five New Counselor trainings to federal sector audiences in Washington, DC.
- EEOC staff provided five New Investigator trainings to federal sector audiences in Washington, DC.
- EEOC staff provided two Refresher for Counselors trainings to federal sector audiences in Washington, DC.
- EEOC staff provided two virtual Refresher for Counselors trainings to federal sector audiences in Washington, DC.
- EEOC staff provided a virtual EEOC Laws Refresher training federal sector audiences in Washington, DC.
- OFO staff provided EEO Laws for Employees training to an DNFSB audience in Washington, DC.
- OFO staff provided EEOC Laws training to a US ARMY audience in Ft. Belvoir, VA.
- OFO staff provided New Investigator training to a Florida Housing audience in Tallahassee, FL.
- OFO staff provided LOAD training to an ICE audience in Washington, DC.
- OFO staff provided New Counselor training to an Indian Health Service audience in Portland, OR.
- OFO staff provided Counselor Refresher training to a Social Security Administration audience in New York, NY.
- OFO staff provided Counselor Refresher training to a DIA audience in Washington, DC.
- OFO staff provided New Counselor training to the Texas Military Department -- state EEO audience -- in Austin, TX.
- OFO staff provided Counselor Refresher training to a US Treasury audience in Washington, DC.
- OFO staff provided two trainings -- LOAD and FAD -- to a USDA audience in Washington, DC.
- OFO staff provided customized training, Counseling Interview-Stating a Claim, to Treasury/IRS in Dallas, TX.

- OFO staff provided EEO for Managers and EEO for Supervisors trainings to a CFPB audience in Washington, DC.
- OFO staff provided Retaliation and Harassment and Reasonable Accommodation trainings to CFPB in Washington, DC.
- TOD staff provided EEO Presence training to an AAGEN audience in Washington, DC.
- TOD staff conducted a webinar on Opioids in Washington, DC.

4. Enforcing Equal Pay Laws

- EEOC staff provided two Drafting Final Agency Actions trainings to federal sector audiences in Washington, DC.
- OFO staff provided Drafting Letters of Acceptance and Dismissal training to a US ARMY audience in Virginia.
- EEOC staff provided five New Counselor trainings to federal sector audiences in Washington, DC.
- EEOC staff provided five New Investigator trainings to federal sector audiences in Washington, DC.
- EEOC staff provided two virtual Refresher for Counselors trainings to federal sector audiences in Washington DC.
- EEOC staff provided two Refresher for Counselors trainings to federal sector audiences in Washington, DC.
- EEOC staff provided EEOC Laws Refresher training (virtual) to a federal sector audience in Washington, DC.
- OFO staff provided EEOC Laws training US ARMY in Ft. Belvoir, VA.
- OFO staff provided New Investigator training to a Florida Housing audience in Tallahassee, FL.
- OFO staff provided LOAD training to ICE in Washington, DC.
- OFO staff provided New Counselor training to an Indian Health Service audience in Portland, OR.
- OFO staff provided Counselor Refresher training to a Social Security Administration audience in New York, NY.
- OFO staff provided Counselor Refresher training to DIA in Washington, DC.
- OFO staff provided New Counselor training to the Texas Military Department--state EEO audience -- in Austin, TX.
- OFO staff provided Counselor Refresher training to a US Treasury audience in Washington, DC.
- OFO staff provided LOAD and FAD training to USDA audiences in Washington, DC.
- OFO staff provided customized training: Counseling Interview - Stating a Claim -- to Treasury/IRS in Dallas, TX.
- OFO staff provided EEO for Managers and EEO for Supervisors trainings to CFPB audiences in Washington, DC.
- OFO staff provided Retaliation and Harassment and Reasonable Accommodation training to CFPB audiences in Washington, DC.
- TOD staff provided EEO Presence training to an AAGEN audience in Washington, DC.

5. **Preserving Access to the Legal System**

- EEOC staff presented Anti-Harassment Program -- Beyond CFR 1614, training to a federal sector audience in Washington, DC.
- EEOC staff provided two Drafting Final Agency Actions trainings to federal sector audiences in Washington, DC.
- OFO staff provided Drafting Letters of Acceptance and Dismissal training to a US ARMY audience in Virginia.
- EEOC staff provided five New Counselor trainings to federal sector audiences in Washington, DC.
- EEOC staff provided five New Investigator trainings to federal sector audiences in Washington, DC.
- EEOC staff provided two virtual Refresher for Counselors trainings to federal sector audiences in Washington, DC.
- EEOC staff provided two Refresher for Counselors trainings to federal sector audiences in Washington, DC.
- EEOC staff provided three Refresher for Investigators trainings to federal sector audiences in Washington, DC.
- OFO staff provided Leading for Respect training to an DNFSB audience in Washington, DC.
- OFO staff provided two Respectful Workplace trainings to NFSB audiences in Washington, DC.
- OFO staff provided Leading for Respect trainings to EPA audiences in San Francisco, CA.
- OFO staff provided two trainings -- MD-715 (Basic) and Barrier Analysis -- to EPA audiences in Washington, DC.
- OFO staff provided two Leading for Respect trainings to EPA audiences in Atlanta, GA.
- OFO staff provided Respectful Workplace training to an EPA audience in Atlanta, GA.
- OFO staff provided Respectful Workplace training to an EPA audience in Region 9, San Francisco, CA.
- OFO staff provided Leading for Respect training to an EPA audience in Region 5, Chicago, IL.
- OFO staff provided Leading for Respect training to an EPA audience in Region 5-Water Division, Chicago, IL.
- OFO staff provided three Respectful Workplace trainings to Federal Maritime Commission audiences in Washington, DC.
- OFO staff provided fourteen Leading for Respectful Workplace trainings to FEMA audiences in Washington, DC.
- OFO staff provided fourteen Respectful Workplace trainings to FEMA audiences in Washington, DC.
- EEOC staff provided virtual EEOC Laws Refresher training to a federal sector audience in Washington, DC.
- OFO staff provided EEOC Laws training to a US ARMY audience in Ft. Belvoir, VA.
- OFO staff provided New Investigator training to a Florida Housing audience in Tallahassee, FL.

- OFO staff provided Leading for Respect training to a GSA audience in Washington, DC.
- OFO staff provided Respect for Workplace training to a GSA audience in Washington, DC.
- OFO staff provided LOAD training to an ICE audience in Washington, DC.
- OFO staff provided New Counselor Training to an Indian Health Service audience in Portland, OR.
- OFO staff provided Leading for Respect training to a Naval Special Warfare Command audience in Coronado, CA.
- OFO staff provided Respectful Workplace training to a Naval Special Warfare Command audience in Coronado, CA.
- OFO staff provided 37 Leading for Respect trainings to NLRB audiences in Minneapolis, MN; Chicago, IL; Detroit, MI; Grand Rapids, MI; Milwaukee, WI; Overland Park, KS; Indianapolis, IN; Atlanta, GA; Hartford CT; Newark, NJ; New York, NY; Brooklyn, NY; Buffalo, NY; Winston-Salem, NC; Nashville, TN; Washington, DC; Memphis, TN; Birmingham, AL; San Antonio, TX; Albuquerque, NM; Fort Worth, TX; Houston, TX; Cleveland OH, Albany, NY; Hartford, CT; Boston, MA; Miami FL; Philadelphia, PA; Seattle, WA; Portland, OR; San Diego, CA; Baltimore, MD; Pittsburgh, PA; Tulsa, OK; and Denver, CO.
- OFO staff provided 37 Respectful Workplace trainings to NLRB audiences in Minneapolis, MN; Chicago, IL; Detroit, MI; Grand Rapids, MI; Milwaukee, WI; Overland Park, KS; Indianapolis, IN; Atlanta, GA; Hartford CT; Newark, NJ; New York, NY; Brooklyn, NY; Buffalo, NY; Winston-Salem, NC; Nashville, TN; Washington, DC; Memphis, TN; Birmingham, AL; San Antonio, TX; Albuquerque, NM; Fort Worth, TX; Houston, TX; Cleveland OH, Albany, NY; Hartford, CT; Boston, MA; Miami FL; Philadelphia, PA; Seattle, WA; Portland, OR; San Diego, CA; Baltimore, MD; Pittsburgh, PA; Tulsa, OK; and Denver, CO.
- OFO staff provided Counselor Refresher training to a Social Security Administration audience in New York, NY
- OFO staff provided DPM training to an Army audience in Fort Belvoir, VA.
- OFO staff provided Counselor Refresher training to a DIA audience in Washington, DC.
- OFO staff provided Leading for Respect training to a DMA audience in Riverside, CA.
- OFO staff provided No Fear (4 Hour) training to a DNFSB audience in Washington, DC.
- OFO staff provided Respect for Workplace training to a DOI/Land Buy-Back Program audience in Denver, CO.
- OFO staff provided Leading for Respect and Respectful Workplace trainings to STB audiences in Washington, DC.
- OFO staff provided New Counselor training to the Texas Military Department -State EEO audience - in Austin, TX.
- OFO staff provided Leading for Respect training to a US Treasury audience in Washington, DC.
- OFO staff provided Counselor Refresher training to a US Treasury audience in Washington, DC.
- OFO staff provided Leading for Respect and Respectful Workplace trainings to USAID in Washington, DC.

- OFO staff provided Leading for Respect training to a USCIS audience in Washington, DC.
- OFO staff provided Leading for Respect and Respectful Workplace trainings to USCIS audiences in Buffalo, NY.
- OFO staff provided Leading for Respect and Respectful Workplace trainings to USCIS audiences in Omaha, NE.
- OFO staff provided Leading for Respect training to USCIS-VER in Los Angeles, CA.
- OFO staff provided LOAD and FAD trainings to USDA in Washington, DC.
- OFO staff provided customized training: Counseling Interviews - Stating a Claim, to Treasury/IRS in Dallas, TX.
- OFO staff provided EEO for Managers and EEO for Supervisors training to CFPB audiences in Washington, DC.
- OFO staff provided Retaliation and Harassment and Reasonable Accommodation trainings to CFPB audiences in Washington, DC.
- TOD staff provided EEO Presence training to an AAGEN audience in Washington, DC.
- TOD staff conducted an ROI Sufficiency webinar to a virtual audience in Washington, DC.
- TOD staff conducted a Dealing with Workplace Conflict webinar to virtual audience in Washington, DC.
- TOD staff conducted a brown bag training on EEO and Workplace Conflict to an EEOC audience in Washington, DC.

6. Preventing Harassment through Systemic Enforcement and Targeted Outreach

- EEOC staff presented Anti-Harassment Program -- Beyond CFR 1614, to a federal sector audience in Washington, DC.
- EEOC staff provided five New Counselor trainings to federal sector audiences in Washington, DC.
- EEOC staff provided five New Investigator trainings to federal sector audiences in Washington, DC.
- EEOC staff provided three Refresher for Investigators trainings to federal sector audiences in Washington, DC.
- EEOC staff provided two virtual Refresher for Counselors trainings to federal sector audiences in Washington, DC.
- EEOC staff provided two Refresher for Counselor trainings to federal sector audiences in Washington, DC.
- EEOC staff provided EEOC Laws Refresher to federal sector audiences in Washington, DC.
- OFO staff provided Leading for Respect training to an DNFSB audience in Washington, DC.
- OFO staff provided two Respectful Workplace trainings to DNFSB audiences in Washington, DC.
- OFO staff provided Leading for Respect trainings to EPA audiences in San Francisco, CA.

- OFO staff provided two trainings -- MD-715 (Basic) and Barrier Analysis -- to EPA audiences in Washington, DC.
- OFO staff provided Leading for Respect training to an DNFSB audience in Washington, DC.
- OFO staff provided two Respectful Workplace trainings to DNFSB audiences in Washington, DC.
- OFO staff provided Respectful Workplace training to an EPA audience in Atlanta, GA.
- OFO staff provided Respectful Workplace training to an EPA audience in Region 9, San Francisco, CA.
- OFO staff provided Leading for Respect training to an EPA audience in Region 5, Chicago, IL.
- OFO staff provided Leading for Respect training to an EPA audience in Region 5-Water Division, Chicago, IL.
- OFO staff provided three Respectful Workplace trainings to Federal Maritime Commission audiences in Washington, DC.
- OFO staff provided fourteen Leading for Respect trainings to FEMA audiences in Washington, DC.
- OFO staff provided fourteen Respectful Workplace trainings to FEMA audiences in Washington, DC.
- OFO staff provided New Investigator training to a Florida Housing audience in Tallahassee, FL.
- OFO staff provided Leading for Respect training to a GSA audience in Washington, DC.
- OFO staff provided Respectful Workplace training to a GSA audience in Washington, DC.
- OFO staff provided Leading for Respect training to a Naval Special Warfare Command audience in Coronado, CA.
- OFO staff provided Respectful Workplace training to a Naval Special Warfare Command audience in Coronado, CA.
- OFO staff provided 37 Leading for Respect trainings to NLRB audiences in Minneapolis, MN; Chicago, IL; Detroit, MI; Grand Rapids, MI; Milwaukee, WI; Overland Park, KS; Indianapolis, IN; Atlanta, GA; Hartford CT; Newark, NJ; New York, NY; Brooklyn, NY; Buffalo, NY; Winston-Salem, NC; Nashville, TN; Washington, DC; Memphis, TN; Birmingham, AL; San Antonio, TX; Albuquerque, NM; Fort Worth, TX; Houston, TX; Cleveland OH, Albany, NY; Hartford, CT; Boston, MA; Miami FL; Philadelphia, PA; Seattle, WA; Portland, OR; San Diego, CA; Baltimore, MD; Pittsburgh, PA; Tulsa, OK; and Denver, CO.
- OFO staff provided 37 Respectful Workplace trainings to NLRB audiences in Minneapolis, MN; Chicago, IL; Detroit, MI; Grand Rapids, MI; Milwaukee, WI; Overland Park, KS; Indianapolis, IN; Atlanta, GA; Hartford CT; Newark, NJ; New York, NY; Brooklyn, NY; Buffalo, NY; Winston-Salem, NC; Nashville, TN; Washington, DC; Memphis, TN; Birmingham, AL; San Antonio, TX; Albuquerque, NM; Fort Worth, TX; Houston, TX; Cleveland OH, Albany, NY; Hartford, CT; Boston, MA; Miami FL; Philadelphia, PA; Seattle, WA; Portland, OR; San Diego, CA; Baltimore, MD; Pittsburgh, PA; Tulsa, OK; and Denver, CO.
- OFO staff provided Leading for Respect training to a DMA audience in Riverside, CA.

- OFO staff provided Respectful Workplace training to a DOI/Land Buy-Back Program audience in Denver, CO.
- OFO staff provided two Leading for Respect and Respectful Workplace trainings to STB audiences in Washington, DC.
- OFO staff provided New Counselor training to the Texas Military Department --State EEO audience --in Austin, TX.
- OFO staff provided Leading for Respect training to a US Treasury audience in Washington, DC.
- OFO staff provided two Leading for Respect and Respectful Workplace trainings to USAID in Washington, DC.
- OFO staff provided Leading for Respect training to a USCIS audience in Washington, DC.
- OFO staff provided two Leading for Respectful and Respectful Workplace trainings to USCIS audiences in Buffalo, NY
- OFO staff provided two Leading for Respectful and Respectful Workplace trainings to USCIS audiences in Omaha, NE.
- OFO staff provided Leading for Respectful training to USCIS-VER in Los Angeles, CA.
- OFO staff provided customized training: Counseling Interviews -- Stating a Claim, to Treasury/IRS in Dallas, TX.
- OFO staff provided EEO for Managers and EEO for Supervisors training to CFPB audiences in Washington, DC.
- OFO staff provided Retaliation and Harassment and Reasonable Accommodation training to CFPB audiences in Washington, DC.
- TOD staff conducted a webinar on Dealing with Workplace Conflict to a virtual audience in Washington, DC.
- TOD staff conducted a brown bag training on EEO and Workplace Conflict to an EEOC audience in Washington, DC.

8. Training/Outreach – General

- OFO staff provided Leading for Respect training to a DNFSB audience in Washington, DC.
- OFO staff provided two Respectful Workplace trainings to DNFSB audiences in Washington, DC.
- OFO staff provided Leading for Respect trainings to EPA audiences in San Francisco, CA.
- OFO staff provided Leading for Respect training to a DNFSB audience in Washington, DC.
- OFO staff provided two Respectful Workplace trainings to DNFSB audiences in Washington, DC.
- OFO staff provided two Leading for Respect trainings to EPA audiences in Atlanta, GA.
- OFO staff provided Respectful Workplace training to an EPA audience in Atlanta, GA.
- OFO staff provided Respectful Workplace training to an EPA audience in Region 9, San Francisco, CA.

- OFO staff provided Leading for Respect training to an EPA audience in Region 5, Chicago, IL.
- OFO staff provided Leading for Respect training to an EPA audience in Region 5-Water Division, Chicago, IL.
- OFO staff provided three Respectful Workplace trainings to Federal Maritime Commission audiences in Washington, DC.
- OFO staff provided fourteen Leading for Respect trainings to FEMA audiences in Washington, DC.
- OFO staff provided fourteen Respectful Workplace trainings to FEMA audiences in Washington, DC.
- EEOC staff provided three Refresher for Investigators trainings to federal sector audiences in Washington, DC.
- EEOC staff provided virtual EEOC Laws Refresher training to federal sector audiences in Washington, DC.
- OFO staff provided EEOC Laws training to a US ARMY audience in Ft. Belvoir, VA.
- OFO staff provided Leading for Respect training to a GSA audience in Washington, DC.
- OFO staff provided Respectful Workplace training to a GSA audience in Washington, DC.
- OFO staff provided New Counselor Training to an Indian Health Service audience in Portland, OR.
- OFO staff provided Leading for Respect training to a Naval Special Warfare Command audience in Coronado, CA.
- OFO staff provided Respectful Workplace training to a Naval Special Warfare Command audience in Coronado, CA.
- OFO staff provided 37 Leading for Respect trainings to NLRB audiences in Minneapolis, MN; Chicago, IL; Detroit, MI; Grand Rapids, MI; Milwaukee, WI; Overland Park, KS; Indianapolis, IN; Atlanta, GA; Hartford CT; Newark, NJ; New York, NY; Brooklyn, NY; Buffalo, NY; Winston-Salem, NC; Nashville, TN; Washington, DC; Memphis, TN; Birmingham, AL; San Antonio, TX; Albuquerque, NM; Fort Worth, TX; Houston, TX; Cleveland OH, Albany, NY; Hartford, CT; Boston, MA; Miami FL; Philadelphia, PA; Seattle, WA; Portland, OR; San Diego, CA; Baltimore, MD; Pittsburgh, PA; Tulsa, OK; and Denver, CO.
- OFO staff provided 37 Respectful Workplace trainings to NLRB audiences in Minneapolis, MN; Chicago, IL; Detroit, MI; Grand Rapids, MI; Milwaukee, WI; Overland Park, KS; Indianapolis, IN; Atlanta, GA; Hartford CT; Newark, NJ; New York, NY; Brooklyn, NY; Buffalo, NY; Winston-Salem, NC; Nashville, TN; Washington, DC; Memphis, TN; Birmingham, AL; San Antonio, TX; Albuquerque, NM; Fort Worth, TX; Houston, TX; Cleveland OH, Albany, NY; Hartford, CT; Boston, MA; Miami FL; Philadelphia, PA; Seattle, WA; Portland, OR; San Diego, CA; Baltimore, MD; Pittsburgh, PA; Tulsa, OK; and Denver, CO.
- OFO staff provided Counselor Refresher training to a Social Security Administration audience in New York, NY
- RED is co-leading the EEOC Education Consortium Certification Committee with TOD; the committee has begun work on identifying possible certification program parameters and possible pathways to certification.

- RED staff presented "Diving into Social Science and EEO" at the EXCEL Training Conference.
- RED staff presented "Behind the Scenes in the Reports and Evaluations Division's Data Team" at the EXCEL Training Conference.
- OFO staff provided Counselor Refresher training to a DIA audience in Washington, DC.
- OFO staff provided Leading for Respect training to a DMA audience in Riverside, CA.
- OFO staff provided No Fear (4 Hour) training to a DNFSB audience in Washington, DC.
- OFO staff provided Respectful Workplace training to the DOI/Land Buy-Back Program in Denver, CO.
- OFO staff provided two Leading for Respect and Respectful Workplace trainings to STB audience sin Washington, DC.
- OFO staff provided Leading for Respect training to a US Treasury audience in Washington, DC.
- OFO staff provided Counselor Refresher training to a US Treasury audience in Washington, DC.
- OFO staff provided two Leading for Respect and Respectful Workplace trainings to USAID in Washington, DC.
- OFO staff provided Leading for Respectful Workplace training to a USCIS audience in Washington, DC.
- OFO staff provided Leading for Respectful and Respectful Workplace trainings to USCIS audiences in Buffalo, NY
- OFO staff provided Leading for Respect and Respectful Workplace trainings to USCIS audiences in Omaha, NE.
- OFO staff provided Leading for Respect training to USCIS-VER in Los Angeles, CA.
- OFO staff provided EEO for Managers and EEO for Supervisors training to CFPB audiences in Washington, DC.
- OFO staff provided Retaliation and Harassment and Reasonable Accommodation training to CFPB audiences in Washington, DC.
- TOD staff provided EEO Topics and Compliance training to a NOAA audience in Washington, DC.
- OFO-TOD staff provided nationwide virtual Online EEO Processing training.
- TOD staff provided Best Practices at Hearings training to a Department of Air Force audience in Washington, DC.
- TOD staff provided training to the Society of Federal Labor & Employee Relations Professionals (SFLERP) in Arlington, VA.
- TOD staff provided Case Updates, Social Science of Retaliation, and Best Practices at Hearing training (virtual) to DOJ audiences in Columbia, SC.
- TOD staff provided a nationwide virtual Lunch & Learn webinar on MD-175 2.0 Part Forms.
- TOD staff provided EEOC Presence training at FAPAC's National Training Conference in Huntsville, AL.
- TOD staff provided Hiring PWD training to the federal EEO Civil Rights Council in Washington, DC.
- TOD staff provided Disability Awareness, Reasonable Accommodation and DPMS training to NASA in Washington, DC.

- TOD staff provided Case Update training to a GSA audience in Washington, DC.
- TOD staff provided Reasonable Accommodation training to VA in Washington, DC.
- TOD staff provided SEPM training to an Air Force audience at Andrews Air Force Base, MD.
- TOD staff provided Reasonable Accommodation training to a US Trade & Department Agency audience in Arlington, VA.
- TOD staff provided Harassment/EEOC Jurisdiction training for Blacks in Government in Dallas, TX.
- TOD staff provided Anti-Harassment training to an NIGC audience in Washington, DC.
- TOD staff provided MD--715 and Barrier Analysis training to a Bureau of Prisons audience in Washington, DC.
- TOD staff provided teleconference FedSEP training to a DOE audience in Washington, DC.
- TOD staff conducted a nationwide webinar: Harassment Avoidance in the Age of #MeToo -- Lessons from the Private Sector.
- TOD staff provided a brown bag training -- EEOC Case Updates -- to EEOC staff in Washington, DC.
- TOD staff provided Reasonable Accommodation training to an FAA audience in Memphis, TN.
- TOD staff provided training at a Sr. Exec. Association meeting participants on Sexual Harassment in Workplace - What Senior Leaders Can Do, in Washington, DC Headquarters.
- TOD staff provided EEO Presence training to an AAGEN audience in Washington, DC.
- TOD staff conducted a webinar -- Dealing with Workplace Conflict to a virtual audience in Washington, DC.
- TOD staff conducted a webinar: Opioids, to a virtual audience in Washington, DC.
- TOD staff conducted a brown bag training -- EEO and Workplace Conflict -- to an EEOC audience in Washington, DC.
- TOD staff conducted a webinar Electronic Filing to EEOC virtual audience in Washington, DC.
- TOD staff provided SEPM and Barrier Analysis trainings to a SAIGE audience in Niagara Fall, NY.
- TOD staff provided Authority Influence trainings to LULAC audiences in Milwaukee, WI.
- TOD staff provided Emotional Intelligence in the Workplace training to FAPAC in Huntsville, AL.
- TOD staff provided Harassment, SEPM, Barrier Analysis and Retaliation training to FEW audiences in Philadelphia, PA.
- TOD staff provided EEO Protected Bases and Retaliation to BIG in Dallas, TX.
- TOD staff provided Anti Harassment Program and MD-715 training at an FDR Town Hall in Philadelphia, PA
- TOD staff provided trainings on Hispanic BA and SEPM-BA to IMAGE audiences in Las Vegas, NV.
- TOD staff provided Reasonable Accommodation training to a DOD audience in Washington, DC.

- A RED analyst provided expert witness consultation and analysis for three federal sector cases on appeal to the EEOC.