EEO Update

Bonneville Power Administration
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Age Discrimination

I. General

Davis v. Potter, Postmaster General, United States Postal Service, 01A54752 (Nov. 7, 2005). The Commission agreed with the agency's FAD that a retired Sales, Service/Distribution Associate failed to establish an inference of discrimination because she and the comparison employee were the same age or to prove a prima facie case as to retaliation. This case involved a complainant who had been given an official discussion due to three unscheduled leave requests within a 90-day period and alleged disparate treatment on the basis of age and retaliation. In addressing the establishment of an inference of age discrimination, the Commission observed that "While there is no bright-line test for what constitutes 'substantially younger,' that term has generally been applied to age differences in excess of five years. See Hammersmith v. Social Security Administration, EEOC Appeal No. 01A05922 (March 6, 2002)." As to retaliation, the Commission noted that "neither the passage of approximately (12) months between the protected activity nor the agency's actions with respect to complainant's work hours and work assignments give rise to an inference of retaliatory motive. We also note that nothing transpired subsequent to complainant filing her prior EEO complaint that would link to her instant complaint."

Tellez v. Brownlee, Acting Secretary, Department of the Army, 05A41133 (March 18, 2005). The Commission found direct evidence of age discrimination where the selecting official "espoused a policy of hiring 'younger blood' within the agency." Complainant, a GS-13 Missile Engineer, alleged that he was discriminated against because of his national origin, age and prior EEO activity when he was not selected for promotion to three GS-14 supervisory positions. An AJ and the Commission's Office of Federal Operations (OFO) found no discrimination, The full Commission reversed the AJ and OFO and found age discrimination. Although there were legitimate reasons for not selecting complainant on two of the three non-selections, and the Commission found no national origin or reprisal discrimination, there was also direct evidence of age discrimination, which included: senior management

considered age as part of their "succession planning" for the future of the agency; a manager stated that younger people are more intelligent and technologically savvy; the selections-at-issue considered succession plans for the future of the agency as most of the agency's senior level managers were retirement-eligible; one selecting official had been heard to espouse a policy of hiring and promoting "younger blood." The agency asserted as a defense that it was engaged in legitimate succession planning. The Commission noted that: "OPM, recognizing that over one third of the federal workforce is currently eligible to retire, has encouraged agencies to engage in succession planning linked to the agency's strategic and program planning efforts and to identify its current and future human capital needs…The agency in this matter provided little proof that it had engaged in the type of sophisticated analysis .. needed for proper succession planning as detailed by OPM guidance.. Rather, the management officials responsible for the selections-at-issue simplistically adopted the view that succession planning meant that younger employees were better than older employees, and used age as a barrier in its promotion decisions. We find that the statements of management officials influential to the selections-at-issue are discriminatory on their face and are linked to the complained of adverse actions. Therefore, the weight of the evidence establishes that unlawful age discrimination occurred in the selections-at-issue rather than legitimate succession planning." As to the remedy, the Commission stated that this was a "mixed motive" age discrimination, involving legitimate as well as discriminatory reasons for complainant's non-selection, and that the agency can avoid liability altogether if it establishes that it would have made the same decision even absent discrimination (the Commission also noted that a different analysis applies to cases decided under Title VII). The Commission held that the agency met its burden on two of the three non-selections but found age discrimination on the third.

II. Older Workers Benefit Protection Act (OWBPA)

Alcivar v. Roche, Secretary, Department of the Air Force, 01A43962 (Sept. 13, 2004). After a review of the record, including the settlement agreement at issue, the Commission found that in the present case the minimum requirements were met, as specified under the OWBPA, for a knowing and voluntary waiver of complainant's ADEA claims. The Commission provided as follows: "We note the

agreement specifically refers to claims under the ADEA. Additionally, complainant was advised in writing to consult with an attorney prior to executing the agreement, was informed that she may revoke the agreement within seven days of her signing, and was given twenty-one days, a 'reasonable' period of time, in which to consider the agreement.

Andujar v. Potter, Postmaster General, United States Postal Service, 01A35343 (Jan. 30, 2004). The EEOC reversed and remanded the agency's decision because of a violation of the Older Workers' Benefit Protection Act and, alternatively, because the complainant did not receive legal consideration. The Commission held that "Here, the settlement agreement of June 11, 2003, does not specifically state that complainant is waiving his rights or claims under the ADEA. Furthermore, the consideration given by the agency in the settlement agreement is not sufficient to constitute valuable consideration." The settlement agreement provided, in pertinent part, that: "Management will recommend reconsideration of [complainant's appointment for] casual employment in the area of mail handler or clerical position."

Black v. Barreto, Administrator, Small Business Administration, 01A42241(Aug. 19, 2004). Because the settlement agreement at issue appeared to be a settlement before the Merit Systems Protection Board, the Commission was without authority to address the breach claim. Moreover, even if it was not an MSPB settlement, there was no violation of the Older Workers' Benefit Protection Act (OWBPA). As noted by the Commission, "Here, the settlement agreement of March 20, 2002, specifically refers to complainant's claims based upon age. Additionally, the agency found, and we agree, that complainant had the benefit of counsel and an opportunity to consult with an attorney prior to executing the settlement agreement. No time limit was placed on complainant to execute the settlement agreement after it was sent to complainant's attorney on March 20, 2002. We therefore find that to the extent that the agreement may not be an MSPB settlement, complainant had been given a reasonable period of time in which to consider the settlement agreement when he signed it on March 22, 2002 and returned it to the agency on March 26, 2002. We therefore find that, to the extent that the agreement may not be an MSPB settlement, complainant's decision to enter into the settlement agreement dated March 20, 2002, was both knowing and voluntary under the OWBPA."

Black v. Department of Agriculture, 01A42294 (Jan. 11, 2005). Although a settlement agreement resolving a case of alleged age discrimination did not contain language waiving the requirements of the Older Workers' Benefit Protection Act ("OWBPA"), the settlement agreement was enforceable because the agency had complied with the substantive requirements of the OWBPA. In his appeal to the Commission, complainant argued that the settlement agreement must be declared void because it did not contain language waiving the requirements of the OWBPA. The Commission noted that: "To meet the standards of the OWBPA, a waiver is not considered knowing and voluntary unless, at a minimum: it is clearly written from the viewpoint of the complainant; it specifically refers to rights or claims under the ADEA; the complainant does not waive rights or claims arising following execution of the waiver; valuable consideration is given in exchange for the waiver; the complainant is advised, in writing, to consult with an attorney prior to executing the agreement and the complainant is given a "reasonable" period of time in which to consider the agreement." The Commission stated that the settlement referred to complainant's age, he was represented by expert legal counsel, he had time to consider the settlement agreement and consult with his attorney, there was no evidence that he wasn't given a reasonable period of time to consider the agreement and he received valuable consideration. Therefore, the complainant's "decision to enter into the settlement agreement was both knowing and voluntary under the OWBPA" and "there is no basis for voiding the settlement agreement or reinstating the settled matter."

Campo v. United States Postal Service, 96 MSPR 418 (MSPB June 25, 2004). The Board determined that the EEOC's prior remand of the case for failure to comply with the OWBPA rendered invalid only the settlement of the age reprisal claim and did not invalidate the settlement of the Title VII and Rehabilitation Act reprisal claims; accordingly, the Board upheld the AJ's finding that the appellant did not prove that he was removed in reprisal for filing age discrimination-based EEO complaints, even though the appellant argued that the entire agreement should be set aside. The EEOC concurred in the Board's decision at EEOC Petition No. 03A40121 (Aug. 25, 2004).

Valencia v. Rumsfeld, Secretary, Department of Defense, (Defense Logistics Agency), 01A40703 (Aug. 10, 2004). The Commission reinstated the complaint because the settlement agreement with the agency did not comply with the

OWBPA. The settlement agreement sought to resolve complainant's claim that he had been discriminated against on the bases of race, sex, national origin, and age, when he was not selected for promotion to a GS-12/13 Weapons Systems Support Manager position. In setting aside the agreement, the Commission made the following findings: the complainant was entitled to the protections of the OWBPA because his formal complaint was based, in part, on his claim of age discrimination; and, the settlement agreement did not make any reference to complainant's ADEA claim, and did not indicate that complainant was waiving his rights under the ADEA by executing the settlement agreement. The Commission additionally found that the complainant's retention of consideration received under the settlement agreement (apparently $3,000.00) "is not an impediment to the reinstatement of his ADEA claim against the agency. See Oubre v. Entergy Operations, Inc., 522 U.S. 422 (1998). However, complainant is advised that if he prevails on his EEO complaint, any monetary award may be subject to an off-set by the consideration that he received from the agency under the settlement agreement."

Attorney's Fees

I. Prevailing Party

Burns v. Gutierrez, Secretary, Department of Commerce, 01A40530 (Aug.2, 2005). The complainant was a prevailing party in an action claiming a breach of a settlement agreement, even though the Commission did not grant the relief requested, reinstatement of the complaint, and instead ordered compliance with the agreement. In the Commission's opinion, "Securing a change in one's job title is not so trivial as to be regarded as de minimis", and, "assignment to a Special Assistant position will carry with it managerial and supervisory duties not associated with the Program Analyst position." The agency had denied complainant's request for fees in the amount of $6,183.50 "primarily on the grounds that complainant, having achieved very little on appeal, was not a prevailing party."

II. Lack of Success Reductions / Across the Board Reductions

Blinick v. Martinez, Secretary, Department of Housing and Urban Development, 07A20079 (Feb. 3, 2004). The Commission reversed the AJ's finding of age discrimination, sustained the compensatory damage award of $13,025.00 and awarded attorney's fees in the amount of $88,197.48 (The AJ had found reprisal, which was accepted by the agency). In finding the AJ's attorney fee award proper, the Commission upheld a 20% across the board reduction based on the degree of success, noting the following "Assuming it is true that complainant's claims are not easily separable, we find that the AJ's 20% reduction is reasonable given that complainant was successful on only a part of her complaint. Even though the Commission does not uphold the findings of discrimination based on age, we find the AJ's award accurately reflects the overall successful effort complainant put forth in proving reprisal."

Brockie v. Principi, Secretary, Department of Veterans Affairs, 01A30187 (Mar. 2, 2004). While the complainant was successful on only one of the two issues in her petition for enforcement, the EEOC found a 20 % reduction in the complainant's

attorney's fees was appropriate and not the 34 percent reduction awarded by the agency, because the successful issue required more time. The Commission had previously found that the agency discriminated against complainant based on sex when she was given a low performance evaluation and her three-year appointment as a Pathologist was not renewed. Thereafter, the complainant filed a Petition for Enforcement, seeking the full cost of replacement health insurance and payment of a $6,000.00 book fund allowance afforded to some medical staff. In EEOC Petition No. 04A20005 (June 19, 2002), complainant was awarded reimbursement for health insurance coverage and reasonable attorney's fees for services in connection with the instant petition. However, the Commission denied the book allowance. This case involved a request for attorney fees for that petition for enforcement.

Gerber v. Ridge, Secretary, Department of Homeland Security, 07A30062 (May 25, 2004). The Commission summarily affirmed the AJ's decision that the complainant, an Intelligence Research Specialist, was retaliated against by the agency when it placed the complainant in an AWOL status shortly after the complainant engaged in protected activity, and that the agency's reason for such action was a pretext for retaliation. The Commission also affirmed the AJ's award of $50,550.00 in attorney's fees, $1,376.04 in costs and, $13,000.00 in non pecuniary damages. The Commission rejected the agency's contention that the award of attorney's fees should be reduced because the complainant did not prevail on all of his claims; the Commission determined that the issues were too intertwined (all related to reprisal by the same individual) to be severable. The Commission also rejected the agency's contention that meal costs of $57.50 and $43.00 were exorbitant.

Jackson v. Norton, Secretary, Department of the Interior (U.S. Fish and Wildlife Service), 07A30126 (Sept. 28, 2004). Complainant, a Fishery Biologist, proved reprisal based on a statement by his supervisor, which was reasonably likely to deter protected activity; the supervisor commented on complainant's EEO activity in a performance appraisal and expressed his intention to inform prospective employers about the complainant's activity. Nonetheless, the Commission reduced the AJ's award of non pecuniary compensatory damages from $10,000.00 to 5,000.00. Similarly, the Commission applied a 50% across the board reduction in attorney fees awarded by the AJ to the complainant's two attorneys, on the basis that the complainant had made two claims, a non promotion and the reprisal claim, that the two claims were distinct and the complainant succeeded on only one of the

two claims. Thus, attorney fees were reduced from $18,271.50 to $9,135.75 for one attorney and from $36,657.60 to $18,328.75 for the other attorney.

Raney v. Principi, Secretary, Department of Veterans Affairs, 01A35131 (July 14, 2004). Concerning attorney fees, the Commission disagreed with the agency's disallowance of certain amounts for pre-complaint activity, and amounts the agency had determined were already considered by the EEOC Administrative Judge in another case. Moreover, as to the 72.72 percent reduction based on what the agency argued was a largely unsuccessful effort, the Commission provided that "Finally, the agency's reduction in fees came, in large part, as a result of what it deemed were two largely unsuccessful complaints which it claimed warranted a 72 percent reduction. In both complaints, however, complainant prevailed in persuading the Commission that the agency failed to prevent and correct the harassment which the Commission had already found to be discriminatory in a previous complaint. We see no basis for the agency's arbitrary formula for reducing the attorney's fees, especially where complainant achieved good results in two separate complaints. Moreover, these were matters he should not have had to re-litigate when the Commission had already decided that the agency's conduct was discriminatory. The Commission also disagrees with the agency's conclusion that the attorney's fees award should be reduced simply because complainant failed to prevail on every contention raised, City of Riverside v. Rivera, 477 U.S. 561 (1986). Therefore, for the foregoing reasons, we conclude that the agency's reasons for reduction of attorney's fee petitions are unfounded and the petitions as submitted are fair and reasonable and must be paid in full."

Taitano v. England, Secretary, Department of the Navy, 01A32834 (Apr. 6, 2004). Because the complainant's one successful claim was distinct from her other five claims, and because the complainant's attorney was not specific with regard to the amount of work performed on each claim, the EEOC awarded fees for one-sixth of the hours claimed. Accordingly, based on the attorney's $175.00 hourly reasonable rate, he was awarded $857.50 in attorney's fees and $1,331.04 in costs.

Troy v. Ridge, Secretary, Department of Homeland Security, 07A20122 (Sept. 29, 2004). The EEOC affirmed the AJ's award of $65,000.00 in non pecuniary compensatory damages for retaliation of the complainant, a Special Agent assigned to the Immigration and Naturalization Service, based on the agency's issuance to him of several "minimally satisfactory" evaluation ratings in 1997 and 1998. At

the same time, the Commission reduced the AJ's award of attorney fees from $42,965.62 to $29,741.20. As to the reduction in attorney fees, the Commission relied principally on the complainant's withdrawal of 60% of the issues on the eve of the hearing, with the Commission then simply reducing the requested hours (except for hearing preparation) up until that time by 60%.

III. Taxation Issues

American Jobs Creation Act of 2004, 118 Stat. 1418 (Public Law 108-357). Section 703 of this law allows a tax deduction for amounts paid for attorney fees and court costs "in connection with any action involving a claim of unlawful discrimination", as defined by the Act. The definition of unlawful discrimination is broad and includes each of the bases under the employment discrimination laws, whistleblower reprisal and payment under laws "regulating any aspect of the employment situation . . . ." Section 703 appears to cover both judgments and settlements and is effective as "to fees and costs paid after the date of the enactment of this Act . . . ." , which is October 22, 2004. As to retroactive payments, please note that this issue has been decided by the Supreme Court in Commissioner of Internal Revenue v. Banks, 125 S. Ct. 826 (2005).

Award Claims

Whitfield v. Harvey, Secretary, Department of the Army, 01A54364 (Nov. 16, 2005). In disagreeing with both the AJ and the agency, the Commission determined that the agency discriminated against the complainant on the basis of race and sex, when she was overlooked for a cash award. In finding that the agency failed to meet this burden, the Commission determined that the agency "merely stated that complainant's ward did not recommend that complainant receive a cash award. This reason is so generalized, conclusory, and vaporous as to offer no substantive explanation for the agency's action. We further note that the NCOIC of complainant's reassigned floor sent a letter to S1, informing him that complainant was doing a good job working on the 4th floor; that before complainant arrived, the 4th floor was "horrible;" and that after complainant was reassigned to her floor, the Colonel inspected the 4th floor and said 'my floor was one of the best in the hospital.'" Further, the Commission noted that the complainant's former Work Supervisor "testified that if S1 had informed her of the cash awards, she would have recommended complainant for a cash award . . . [and] that complainant was more deserving of receiving a cash award than other Custodial Workers."

Class Actions

Cosentine, et al. v. Ridge, Secretary, Department of Homeland Security, 01A23856 (Mar. 24, 2004). The Commission affirmed the Administrative Judge's denial of class certification, finding that the class lacked commonality, typicality and numerosity, where complainant alleged discrimination on the bases of sex, national origin, age, and reprisal, when she was not interviewed and subsequently not selected for a Deputy District Director position, and sought class certification for "all [W]hite, female [Immigration and Naturalization Service] employees who sought promotions above the GS-12 level since 1990 but were not selected."

Martin, et al., v. Potter, Postmaster General, United States Postal Service, 01A24445 (Apr. 22, 2004). The Commission affirmed an AJ's decision denying class certification to a complainant alleging discrimination on the bases of race (Anglo-American), color (white), age, and reprisal, because the named representative failed to meet the requirements of commonality, typicality, numerosity, and adequacy of representation.

Mathias, et al., v. Potter, Postmaster General, United States Postal Service, 01A30838 (Apr. 29, 2004). The Commission affirmed the AJ's rejection of class certification of a complaint of discrimination on the basis of disability (hearing impaired), because the complaint failed to meet the numerosity requirement. The record revealed only three potential class members who were allegedly affected by the agency's failure to provide interpreters for hearing impaired workers during work related meetings, training sessions, safety talks, discussions on work procedures, policies or assignments, and for disciplinary action. In addition, the class agent made no claim that there were more than three potential class members, or that it would be impracticable to consolidate the three individual claims. The Commission noted that since the complaint failed the numerosity requirement, there was no need to evaluate whether it met the typicality, commonality or adequacy of representation requirements, all of which the AJ had found unsatisfied.

May and Perry v. Potter, Postmaster General, USPS, 01A44445 and 01A44564 (May 4, 2005). The Commission affirmed the AJ's decision to approve a class

action settlement agreement under Glover and Albrecht, et al. v. United States Postal Service, EEOC No. 320-A2-8011X, which complainants sought to vacate. The agreement at issue was to settle claims brought by "those persons employed by the agency throughout the United States between January 1, 1992 and the present while in permanent rehabilitation positions who were allegedly denied promotional and/or advancement opportunities allegedly due to discrimination on the basis of disability." Under terms of the agreement, class members are eligible for individual relief through a four phase claims process. During phase one of the claims process, all potential class members are required to submit timely claim forms. During phase two, the parties will exchange extensive discovery on the timely claims of those determined to be class members. In phase three, if both sides agree, individual claims will be mediated. All claims that are not settled or dismissed would then proceed to arbitration. A class member can only receive individual relief if the individual's claim is settled or the individual wins at arbitration. The parties also agreed to a fixed amount of damages for promotional opportunities, compensatory damages, and back pay. The damages are capped per class member at: (a) one advancement opportunity, one detail and one award or training opportunity; or (b) any combination of two promotional opportunities. No individual can recover for more than one advancement opportunity. Class members are also entitled to class-wide injunctive relief and payment of attorney's fees and costs. After the required notice and comment period, seventy-nine objections were received and briefs in support of settlement were filed by class and agency counsel. The AJ found objections concerning the cap on monetary compensation were without merit, concluding "the reasonableness of the monetary settlement was supported by the additional non-monetary provisions of the settlement and that the monetary relief was not so 'grossly inadequate' that it should be disapproved." The AJ also found objections on the basis of claims not raised in the class complaint and concerning the adequacy of representation to be without merit. The Administrative Judge also addressed the fairness of the "distribution-burdens of proof, no "opt out" provisions and the fairness of class agent awards. The AJ addressed the issue of "distribution-burdens of proof" by finding it would be most likely the majority of claims would settle at mediation and "many class members need do no more than fill out a claim form" and that "a simple reading of the settlement agreement reveals that the burdens of proof are in claimants' favor." The AJ also found it appropriate that the only benefit the class agents received was that "if their claims proceeded to arbitration they could argue for the payment of compensatory damages up to the statutory cap." The AJ also

found that the agreement specifically provided for, and fairly considered the interests of deceased claimants. The AJ determined that the amount of fees negotiated for representation leading up to the settlement actually represented a discount from the total lodestar for which class counsel could have sought recovery and was reasonable under the circumstances of the case. On Appeal, complainant May merely submitted a copy of the agreement in support of her notice of appeal. Complainant Perry argued that under the agreement "he was not allowed to bid on either schedules or jobs and further that he was transferred from the carrier craft to the clerk craft where he dropped from a Level 6 to a Level 5 clerk and lost all of his seniority." The Commission stated it was unsure "as to which aspect(s) of the resolution complainant May specifically takes issue" but that she presented "no persuasive argument that the compromises reached in this resolution are not reasonable." Concerning complainant Perry, the Commission found "his claim that the settlement agreement should be of greater value does not involve the fairness of the settlement to the class as a whole but rather concerns the additional individual relief to which he believes he should be entitled due to the loss of his bidding rights."

Yost v. Potter, Postmaster General, United States Postal Service, 07A30017 (Oct. 14, 2004). The Commission affirmed the agency's final order, rejecting complainant's class claim on the basis that there were only 14 "class" members (i.e., all hearing impaired employees at the Main Post Office in Houston, Texas), insufficient to satisfy the numerosity element and the complainant did not establish that he could adequately represent the interests of the class. The AJ had found sufficient numerosity in 27 class members but the Commission disagreed with that number. Moreover, the AJ had conditionally certified the class, providing the complainant an opportunity to obtain an attorney who was familiar with class actions or to show that he had adequate funding to represent the class. While the Commission noted that the Management Directive allows an AJ to "conditionally" certify a class in order to allow the class agent to secure adequate representation, the period of conditional certification is only for a "reasonable period of time" and that there was no evidence that complainant had retained an attorney or funding since the decision or that he had even raised the matter on appeal.

Compensatory Damages

I. In General

Anthony v. Norton, Secretary of the Interior, 01A50189 (July 13, 2005). The Board upheld the agency's award of $5,000.00 in non pecuniary compensatory damages for retaliation because she was subjected to a hostile work environment but rejected the agency's across the board reduction of attorney fees, finding that the "complainant prevailed on her hostile work environment claim based on reprisal, which had the same common core of facts as the hostile work environment claim based on sex and age." In agreeing with the agency as to the amount of compensatory damages, the Commission noted that "Given the limited information in the record of emotional harm, i.e., the finding that hostile work environment occurred over an approximately two year period and the complainant's statement that she found the hostile work environment to be extremely worrisome and upsetting, we find that the FAD's award of $5,000 in non pecuniary compensatory damages was correct by a preponderance of the evidence."

Borchardt v. Harvey, Secretary, Department of the Army, 01A40966 (Nov. 18, 2005). The Commission upheld the AJ's award of $1,500.00 in non pecuniary compensatory damages for proof of retaliation (complainant was retaliated against when her third-line supervisor directed complainant to report to him on the results of complainant's contact with the EEO office).

Boyd v. Department of Defense, Defense Commissary Agency, 07A40029 (Sept. 28, 2005). The Commission decided that where an agency discriminates by interfering with the EEO process and where the complainant, as a result, suffers emotional distress and a severe physical reaction, an award of $3,000 is sufficient to compensate that individual for their loss. The Commission upheld an agency's finding of discrimination but reduced the award of compensatory damages from $5,000 to $3,000.

Christmon v. Nicholson, Secretary, Department of Veterans Affairs, 07A50006 (March 18, 2005). In upholding an AJ's finding of discrimination in complainant's removal the Commission reduced the remedy awarded by the AJ, holding that

complainant, a contract employee, is not entitled to reinstatement and reducing the AJ's award of compensatory damages to $35,000 because the complainant had not provided sufficient proof to justify an award of $95,000.The agency appealed an AJ's finding of discrimination, asserting that the finding of discrimination should be reversed because the AJ compared, complainant, a contract employee, with a career employee who was subject to progressive discipline and the remedy, including $95,000 in compensatory damages and reinstatement of a contract employee, was excessive. The Commission agreed with the agency's assertion that the employee was not a similarly situated employee but held that the finding of no discrimination was supported by other evidence. The agency also maintained that the AJ incorrectly ordered reinstatement of complainant, who was a contract employee. The Commission agreed with the agency and stated that reinstatement of complainant was not a proper component of a make whole remedy. The Commission also found that there was no evidence to support complainant's claims that she suffered from depression and reduced the compensatory damages award to $35,000 from $95,000.

Darland v. Rumsfeld, Secretary, Department of Defense, 01A42280 (May 17, 2005). The Commission increased the agency's award of non-pecuniary compensatory damages to $5,000 but affirmed a denial of a compensatory damages award for costs associated with prosecuting an EEO complaint and for future pecuniary damages because the complainant failed to provide sufficient proof. In a previous decision the commission held that the agency discriminated against complainant, who is a Protestant, when it failed to accommodate his religious beliefs by requiring him to work on Sundays and issuing a Letter of Requirement (LR). The agency then awarded complainant $1,500 on non-pecuniary and $32 for pecuniary damages. The Commission affirmed the award of $32 to cover complainant's co-payment for Paxil, an anti-depressant. The Commission agreed with the agency's denial of complainant's request for $4,100 to pay him for the cost of prosecuting his complaint because complainant failed to submit proof of actual losses and expenses related to this claim. The Commission also agreed with agency's finding that complainant is not entitled to any future pecuniary damages because those alleged damages were unsubstantiated and undocumented. However, although the Commission found complainant's request for $20,000 in non-pecuniary damages to be excessive, the Commission found the agency award of $1,500 to be insufficient. The Commission concluded "that an award of $5,000 is appropriate. In reaching this amount, we note that although complainant contends

that the agency's failure to provide him with a religious accommodation was the proximate cause of three heart attacks, we find that the evidence of record does not support this conclusion. We do find, however, that complainant has provided sufficient evidence to support his contention that the agency's discriminatory actions (requiring him to work on Sundays and the LR) resulted in emotional distress. Complainant submitted an affidavit on his own behalf. He indicated that, as a result of the discriminatory conduct, he suffered from emotional distress, depression, humiliation, intimacy problems with his wife and relationship problems with family and friends. Complainant's wife corroborated his statements, noting that complainant was very upset, and preoccupied with the very negative work situation. Therefore, in light of the evidence, we find that an award of $5,000.00 in non-pecuniary compensatory damages is supported by the record."

Johnson v. Johnson, Chairman, National Credit Union Administration, 07A40123 (March 31, 2005). The Commission upheld an AJ decision that conflicting statements given by agency supervisors supported a finding that the inconsistent reasons given for complainant's transfer (within months of his testifying at an EEOC hearing) were proof of pretext for retaliation discrimination, but changed the AJ's award of 160 hours of annual leave for non-pecuniary compensatory damages to an award of $7,500. The Commission affirmed an AJ finding that the agency retaliated against the complainant when it reassigned him to another division, in the Department of Insurance (DOI), holding that the agency's conflicting explanations for the reassignment were evidence of pretext that warranted a finding of discrimination. Discussions concerning the transfer "took place just months after complainant's EEO hearing." Agency management gave conflicting explanations for the reason that complainant was transferred. There was a conflict between the reason for the transfer given by S-1, the complainant's immediate supervisor ("cross-training") and RD, the Regional Director, ("complainant's skills were better suited to the DOI analyst position"). In addition, there was a conflict between the reasons the RD gave for complainant's transfer to the EEO Investigator, and the reasons she gave at the hearing. Also RD's credibility was lessened regarding the agency's reasons for complainant's transfer, as she testified at the hearing that complainant was transferred to DOI due to his work performance and productivity, but both S1 and the Associate Regional Director testified that neither remembered any discussion of complainant's work performance at the time his transfer was discussed. The Commission also noted that the inconsistencies in the testimony of the agency's witnesses found by the AJ

in her decision are supported by the record, and thus the AJ's holding of a hearing by telephone rather than in person in this case did not lessen her ability to find credibility issues with the testimony of the agency's witnesses. The Commission concluded that the agency's articulated reasons for transferring complainant to the DOI were a pretext for retaliation for complainant's prior EEO activity. The AJ awarded complainant 30 days, or 160 hours, of annual leave for non-pecuniary compensatory damages. The Commission noted that there is no provision for such an award and, instead, awarded complainant $7,500 for non-pecuniary compensatory damages.

Kinnard v. R. James Nicholson, Secretary, Department of Veterans Affairs, 01A44249 (March 25, 2005). The Commission increased the agency's award to $6,000 (the agency had awarded $2,500) for non-pecuniary damages. Complainant alleged reprisal discrimination The agency issued a final decision finding discrimination when management denied her numerous requests for leave. The agency found discrimination and awarded complainant $2,500 in non-pecuniary damages. The Commission noted that the discrimination resulted, over a two-year period, in complainant's emotional distress, depression, anxiety, intimacy problems, deterioration of familial and social relationships, resumption of cigarette smoking, and excess weight gain, agency may be liable for up to $6,000 in compensatory damages. Complainant's doctor indicated that he had treated complainant for several medical problems, including "stress related symptoms." Complainant's coworkers testified that during this two year period, complainant was often angry at work and did a lot of crying and noted her excessive weight gain. The Commission sited comparable cases in which the Commission awarded non-pecuniary damages of $5,000 and $6,000 and awarded complainant "non-pecuniary compensatory damages in the amount of $6,000 since the record shows that for two years, complainant as a result of reprisal experienced stress, physical and emotional pain, and adverse effects on her family and social life."

Lans v. Social Security Administration, 01A46129 (Feb. 17, 2005). Commission affirms $1,000 where harm suffered short term. Ruling: Commission affirmed award of $1,000 in nonpecuniary damages where male supervisor hit her on the buttocks. The agency issued a final decision finding discrimination on complainant's EEO complaint, alleging reprisal. The Commission found that "complainant's testimony did not support her claims of long term harm" and witnesses who testified on her behalf contradicted her testimony that she suffered

long term harm. What it means: The complainant's evidence fell short of supporting a larger award because she did not establish she suffered long-term harm.

Manalo v. Department of the Navy, 01A42334 (May 17, 2005). Navy employee receives $15,000 for religious discrimination. The Commission rejected the agency's decision not to award complainant any compensatory damages, where the agency found discrimination. The agency reasoned that the psychiatrist's report indicated that her emotional distress was related to supervisor's other conduct and not the denial of accommodation. The Commission awarded her $15,000 for her emotional suffering upon finding that the record supported complainant's claims that she had an extreme reaction (hospitalized twice and prescribed medication) to the priest/supervisor's questioning the sincerity of her religious beliefs when they denied her request. The Commission found that her damage claim was credible even though she delayed a few months before seeking medical treatment.

McCoy v. Nicholson, Secretary, Department of Veterans Affairs,. 01A43628 (Sept. 22, 2005). In awarding $7,500.00 in future pecuniary compensatory damages, the agency properly determined that complainant was entitled to only seventy-five (75) percent of the total claimed, because complainant's depression and treatment was caused by other factors not attributable to the agency's discriminatory actions.

Slocum v. Barnhart, Commissioner, Social Security Administration, 07A40062 (Sept. 15, 2005). The Commission increased an AJ's non-pecuniary damages award to an agency Administrative Law Judge discriminatorily denied a hardship transfer to be with his sick wife. An AJ found race and reprisal (prior EEO activity) discrimination when SSA denied complainant, an SSA Administrative Law Judge, a hardship transfer to be with his sick wife, and awarded complainant $20,000 in non-pecuniary damages. The Commission found that non-pecuniary compensatory damages in the amount of $50,000 is more appropriate in light of the mental anguish and hardship complainant endured, and also consistent with the weight of prior Commission decisions.

II. $50,001 to $100,000

Baltimore v. Principi, Secretary, Department of Veterans Affairs, 07A20130 (Mar. 15, 2004). The Commission upheld the AJ's award of past pecuniary damages in the amount of $230.00 for medical visits in 2000 and $60,000.00 for pain and suffering, caused by the agency's racially discriminatory non selection decision. However, the EEOC disagreed with the AJ, finding that complainant was entitled to future earnings losses (i.e., future pecuniary damages) up to $120,000.00 (to be calculated by the agency), rather than $240,000.00 as the AJ awarded.

Brown v. Potter, Postmaster General, United States Postal Service, 01A35278 (Nov. 22, 2004). The Commission, relying on similar cases, increased the FAD's award of $18,000.00 in non pecuniary compensatory damages to $60,000.00 for discrimination against the complainant, the Manager of In-Plant Support, based on his age and sex, when he was involuntarily taken out of his position and detailed to another job 130 miles away for six months.

Carpenter v. Potter, Postmaster General, USPS, 07A50027 (March 18, 2005). Complainant's credible personal and medical evidence of her significant mental and emotional distress after being subjected to race and sex discrimination warranted an award of $75,000 in compensatory damages. The Commission affirmed an AJ's award of $75,000 in compensatory damages based upon a manager discriminating against complainant by unwarranted discipline and the denial of leave. The agency argued that although complainant suffered from anxiety and went to see a psychiatrist a few times, she did not have any relapses or seek further treatment after her condition improved and she was able to resume work at the same location where she had been harassed. The Commission found that although complainant only sought treatment from May 14, 2002 through July 22, 2002, the record was replete with medical documentation supporting her claims of anxiety, victimization, paranoia, lost of weight, loss of trust, crying bouts, and sleep disturbances.

DeJohn v. Potter, Postmaster General, United States Postal Service, 07A20030 (May 6, 2004). The agency discriminated against the complainant on the basis of his disability (deep vein thrombophlebitis), when his Postmaster removed the chair he was using as a reasonable accommodation and forced him to stand while

working. The EEOC also affirmed the AJ's award of $95,000.00 in non pecuniary damages. As to the compensatory damage award, the Commission noted that the harm continued for a year and that complainant was required to take over-the-counter pain pills to remain standing, which caused intestinal bleeding.

Ellis-Balone v. Abraham, Secretary, Department of Energy, 07A30125 (Dec. 29, 2004). The Commission upheld the AJ's finding that the agency had discriminated against the complainant on the basis of race and sex by the way it processed and approved her application for telecommuting and on the basis of sex (pregnancy) by the way in which it treated and processed her request for advance sick leave. Also, the Commission upheld the AJ's award of $100,000.00 in non pecuniary compensatory damages, despite an absence of medical opinion evidence as to harm.

Evanovich v. Potter, Postmaster General, United States Postal Service, 07A20029 (May 13, 2004). The Commission affirmed an AJ's finding that the agency failed to reasonably accommodate complainant's disability by not permitting him to sit occasionally while working in order to alleviate pain in his hip caused by a deteriorated prosthesis implanted more than 15 years previously. The Commission held that this failure to accommodate, and consequent injuries, justified the award of compensatory damages of $70,000.00.

Foti v. Potter, Postmaster General, United States Postal Service, 07A30091 (Oct. 5, 2004). The complainant, a Window Clerk, proved reprisal by the Postmaster, consisting of her placement in an off duty status and then unwarranted removal for alleged shortages. The Commission also awarded non pecuniary compensatory damages of $90,000.00 and fees of more than $79,000.00 (based on reasonable prevailing rates in the San Francisco Bay area of $300.00, $200.00 and $190.00 per hour).

Green v. Potter, Postmaster General, United States Postal Service, 01A44490 (July 19, 2005), recon. den., 05A60234 and 05A51166 (Dec. 21, 2005). The Commission determined that the complainant's request for compensatory damages was timely and that he was entitled to non pecuniary damages in the amount of $100,000.00 (he had requested $225,000.00). The Commission noted that "Although complainant had served in Vietnam, there are no indications in the

record that he had exhibited any signs of PTSD prior" to the discrimination at issue. Thus, the Commission determined that the "evidence of record thus establishes the existence of a nexus between the discriminatory change of complainant's employment status from full-time to part-time on February 27, 1996, the onset of his PTSD, and the exacerbation of his depression and his peripheral neuropathy." It also observed that the "Commission has ordered awards of $150,000 and above where there the harm suffered by the complainant was extremely severe and there was compelling evidence of a nexus between that harm and the agency's acts of discrimination", [citing Glockner and Mack] but that there were "no indications in the record that complainant lost his employment, home, or property, as had the complainants in Mack and Koock . . . [or] exhibited physical symptoms of his emotional distress to the same extent that the complainant in Glockner had. Rather, the facts in this case are similar to those in which the Commission has awarded $100,000 in compensatory damages."

Johnson v. Potter, Postmaster General, United States Postal Service, 07A30112 (Apr. 15, 2004). A non pecuniary compensatory damage award of $22,000.00 was appropriate, as determined by the AJ, for damage caused by not re-appointing complainant as a Casual employee. In making this determination, the Commission observed that "Evidence from a health care provider or other expert is not a mandatory prerequisite for recovery of compensatory damages for emotional harm. A complainant's own testimony, along with the circumstances of a particular case, can suffice to sustain his or her burden in this regard. The more inherently degrading or humiliating the defendant's action is, the more reasonable it is to infer that a person would suffer humiliation or distress from that action." Thus, the Commission found it appropriate to rely solely on the testimony of the complainant and his fiancée, as to the harm suffered.

McTier v. Johnson, Acting Secretary, Department of the Navy, 07A30016 (Mar. 2, 2004). The Commission reduced the AJ's award of non pecuniary compensatory damages from $150,000.00 to $85,000.00 and found that attorney fees should be calculated based on the rate in San Diego (the area where the employer and complainant were located) and not Los Angeles (the office location of the attorney). In finding the award "monstrously excessive", the Commission noted that "In cases where the Commission has awarded non-pecuniary damages of $100,000.00 and above, the evidence of record showed that the emotional or psychological injuries which resulted from the agency's discrimination were so

catastrophic that no inquiry into long-term effects was necessary. [cases omitted]. These cases . . . can be distinguished from the instant case because record evidence does not support a finding that complainant has suffered ruinous financial loss, or permanent or catastrophic injury as a result of the agency's discrimination. Both complainant's psychologist, and the forensic psychiatrist serving as the agency's expert witness, testified that complainant has a good prognosis for recovery . . . . Record evidence also shows that complainant was rehired by the agency in a new position shortly after being subject to the reduction-in-force in 1996, and that complainant had received performance awards and a promotion while serving in the new position. As such, the Commission finds that the AJ's award in not supported by the record."

Offley v. Potter, Postmaster General, United States Postal Service, 07A30053 (Feb. 10, 2004). The agency discriminated against the complainant on the basis of his disability (heart condition), when it abolished his medical accommodation (allowing him to work the day shift) after 2 years, forcing him to resign and, as a result, the complainant was entitled to $75,000.00 in non pecuniary compensatory damages.

Toy v. Ridge, Secretary, Department of Homeland Security, 07A20122 (Sept. 29, 2004). The EEOC affirmed the AJ's award of $65,000.00 in non pecuniary compensatory damages for retaliation of the complainant, a Special Agent, assigned to the Immigration and Naturalization Service, based on the agency's issuance to him of several "minimally satisfactory" evaluation ratings in 1997 and 1998.

Tyler v. Potter, Postmaster General, United States Postal Service, 01A31207 (Feb. 23, 2004). The EEOC increased the agency's award of compensatory damages from $5000.00 to $80,000.00, and allowed $2,959.40 in pecuniary damages, when the agency committed disability discrimination by removing the complainant's accommodation in 1994.

Wiggins v. Barnhart, Commissioner, Social Security Administration, 07A30048 (Jan. 22, 2004). In agreeing with the AJ's finding, the EEOC concluded that the complainant, an African-American Field Office Assistant Manager, was subjected to race discrimination, when she was not selected for a GS-14 Social Insurance Administrator position because she associated with individuals who were white. The EEOC also agreed with the AJ's award of $70,000.00 in non pecuniary

compensatory damages. Complainant was also awarded attorney's fees in the amount of $35,635.20, calculated at the attorneys' current hourly rates of $200.00.

Yasko v. Brownlee, Acting Secretary, Department of the Army, 01A32340 (Apr. 21, 2004). The Commission modified the agency's award of $17,500.00 in non pecuniary compensatory damages for co-worker and supervisor sexual harassment, considered compensatory damage evidence submitted for the first time on appeal and increased the award to $100,000.00 but denied interest on the award.

III. Over $100,000

Durinzi v. Potter, Postmaster General, No. 01A41946 (July 28, 2005), reconsideration denied No. 05A51158 (Oct. 19, 2005). The Commission increased the agency's award of $10,000 in nonpecuniary damages to $120,000 to compensate for pain and suffering over six years due to the agency's failure to reasonably accommodate complainant's disability, although there was no medical evidence to support complainant's claim. After an earlier finding of discrimination by the Commission and a supplementary investigation concerning compensatory damages the agency awarded complainant $10,000 in non-pecuniary damages. Complainant evidence in support of non-pecuniary compensatory damages consisted of statements from her and her husband and sister, including assertions that complainant went from an outgoing and cheerful person to an individual who always seemed worried and an "emotional wreck" who could no longer engage in intimate relations with her husband. Complainant did not provide any supporting medical evidence. The Commission noted that evidence from a health care provider is not a mandatory prerequisite for recovery of compensatory damages and that a complainant's own testimony, along with the circumstances of a particular case, can suffice to sustain his/her burden in this regard. The Commission stated that: "Complainant's testimony, and that of corroborating witnesses, attest to observed severe changes in her habits, personality, and mental state. We also find that a six-year duration period has been established and that there was no indication that the symptoms have diminished. These symptoms, among other things, include a loss of self-esteem, anxiety, and depression…We find that an award of $120,000 is sufficient to compensate complainant for her non-pecuniary losses." The Commission cited three similar Commission cases, in which the awards ranged from $90,000 to $150,000, as support for increasing the

award for non-pecuniary damages to $120,000. The Commission agreed with the agency that complainant is not entitled to receive compensatory damages for the frustration of pursuing her EEO complaint. Although awarding pecuniary damages to reimburse complainant for medical and other expenses, the Commission also agreed that the agency's denial of complainant's request for payment of award of $34,193 in pecuniary damages to compensate complainant for personal loans made by complainant's family, because that money was used to help defray living expenses, such as car and mortgage payments, expenses complainant would have incurred whether or not the agency engaged in discrimination, stating that: "The agency's discrimination was not the cause of complainant's living expenses or the reason she needed to replace her old car."

George v. Thompson, Secretary, Department of Health and Human Services, 07A30079 (July 21, 2004). In sustaining the AJ, the Commission found that the complainant, a former Supervisory Employee Relations Specialist, proved that she was discriminated against by her supervisor on the bases of retaliatory and sex-based harassment that culminated in her reassignment to a non supervisory Health Systems Specialist position, that the reassignment constituted a tangible employment action (so that the agency was automatically liable) and, that she was entitled to $125,000.00 in non pecuniary compensatory damages and reinstatement to her old position, outside the chain of command of the RMO.

Glockner v. Principi, Secretary, Department of Veterans Affairs, 07A30105 (Sept. 23, 2004). The Commission agreed with the AJ and found that the complainant, a Clinical Pharmacist, was entitled to compensatory damages, to include non pecuniary damages in the amount of $200,000.00, for race (Caucasian), religion (Jewish), and reprisal discrimination, when she was continually harassed and degraded for a period of close to five years.

Kloock v. Potter, Postmaster General, United States Postal Service, 01A31159 (Feb. 5, 2004). The EEOC awarded $2,703.46 in pecuniary damages and $150,000.00 in non pecuniary damages for the complainant's discriminatory removal on the basis of disability (herniated disc) and reprisal.

Looney v. Chertoff, Secretary, Department of Homeland Security, 07A40124 and 01A53252 (May 19, 2005). An AJ's award of $195,000 in non-pecuniary damages based upon complainant's suspension and detail to another city in reprisal for her prior EEO activity was upheld by the Commission as supported by the evidence

and consistent with Commission awards in similar cases. The Administrative Judge awarded $195,000 in non-pecuniary compensatory damages after finding that the agency's actions had caused complainant, who worked for the Border Patrol, emotional suffering that would result in permanent and substantially long-term effects. The Commission found that complainant suffered from: bouts of crying, humiliation, depression, loss of self confidence, purposelessness, fluctuating weight problems, rashes, anxiety, nightmares, difficulty coping, and loss of interest in sex. Her medication made her clumsy, shaky, unable to drive, and nervous. The agency appealed the decision contending that the award was excessive since there was no testimony indicating how much longer complainant was expected to suffer, nor was there testimony that complainant was hospitalized, homeless, or suffered dissolution of her marriage which, the agency argued, are common factors in awards of $100,000. The agency also argued that there was no deep emotional trauma and that some of complainant's symptoms were caused by allergies. The agency suggested that the award be reduced to $75,000. The Commission noted that in determining compensatory damages "the Commission strives to make damage awards for emotional harm consistent with awards in similar cases. Insofar as complainant has submitted evidence via testimony of emotional distress, we note that the Commission has awarded compensatory damages in cases somewhat similar to complainant's in terms of harm sustained (citing Commission cases awarding $130,000 and $150,000)." The Commission affirmed the award of $195,000 in non-pecuniary damages, finding that there was extensive testimony of the harm to complainant (from complainant, her husband, friends and psychologist), and that the award was not "monstrously excessive" and was consistent with other awards in similar cases.

Read v. Chertoff, Secretary, Department of Homeland Security, 01A50353 (Mar. 29, 2005). The Commission affirmed an agency award of $130,000 in non-pecuniary damages for a complainant who became pregnant, and had an abortion, after her supervisor coerced her into having sex with him. An agency decision found unlawful sexual harassment in that complainant's supervisor used his position to convince complainant to have sex with him, including two instances of coerced sexual contact in the office. Complainant became pregnant, told her husband, had an abortion but continued to receive unwelcome sexual comments from her supervisor. This continued until complainant accepted a transfer. The agency awarded complainant $130,000 in compensatory damages and complainant appealed to the Commission, asserting that the amount was not sufficient. The

Commission declined to increase the amount, citing a similar Commission case in which the Commission awarded $125,000. Note that the evidence of record cited by the Commission was that: "Complainant suffered from hives, severe stomach problems, heartburn, burning in her stomach and rectal bleeding. She suffered from acid reflux disease, sleep disturbance, weight gain, fatigue, vertigo and feelings of guilt over the abortion. She did not want her husband to touch her and lost desire for intimacy. She also was evaluated as 'suicidal with a concrete plan.' "

Reed v. Mineta, Secretary of the Department of Transportation, on behalf of the United States Department of Transportation, No. 02-1461, 02-1462 (10th Cir. Mar. 12, 2004) (Unpubl.). The circuit upheld the jury's decision of intentional religious discrimination (the plaintiff was terminated for failing to report to work on 5 Saturdays in 1995) and its award of $300,000.00 in non pecuniary compensatory damages. This case involved an ATC, who is a member of the Worldwide Church of God, and whose religious beliefs require him to refrain from working between sundown Friday and sundown Saturday. Among other evidence, the circuit noted the supervisor's reference to Reed's religion as a "scam" and a religion of convenience.

Sanford v. Potter, Postmaster General, United States Postal Service, 01A31818 (May 13, 2004). In a case in which the Commission had previously found that the complainant was subjected to ongoing, long-term sexual harassment by a co-worker and the agency took ineffective steps to end the harassment, the Commission rejected the agency's determination that the complainant's damage request was excessive, finding instead that the complainant presented sufficient evidence in support of awarding $32,000.00 for future medical expenses, $1,542.00 in future transportation expenses for those medical visits, and $115,000.00 for non-pecuniary damages. The Commission provided that the "amount takes into account the severity of the harm suffered, and is consistent with prior Commission precedent."

Turton v. Norton, Secretary, Department of the Interior, 07A50040 (Sept. 28, 2005). The Commission reduced an AJ's non-pecuniary compensatory damages award from $300,000 to $110,000 but affirmed the AJ's sua sponte 20% enhancement in the attorney's fee award because of the exceptional success achieved by the attorney. Complainant was an accountant in the Minerals Management Service Division. Over a period of three years complainant's

supervisor referred to women as “dumb bitches” and made repeated vulgar sexual references. After the supervisor was removed from complainant’s work area he continued to stalk complainant and placed numerous menacing telephone calls to her home. Complainant filed an EEO complaint. An AJ found hostile work environment discrimination and awarded complainant $380,000 (reduced, because of the applicable cap, to $300,000) in non-pecuniary damages. The AJ found that “complainant suffered emotional distress due to the agency's discriminatory actions, with some of the conditions persisting for over five years. Specifically, the AJ found that complainant suffered from: weight gain; loss of self-esteem; vertigo with dizziness; stomach problems including vomiting and diarrhea; feelings of helplessness and being out of control; depression manifested by feelings of sadness and frequent crying; fear of contact with people, particularly older men; social withdrawal; severe swelling in feet; feelings of being aged; adjustment disorder with depressive features; sleeplessness; and nightmares.” The AJ, without being requested to do so by complainant’s attorney, increased by 20% the amount of the attorney’s fee award (complainant had requested $74,767 in attorney’s fees). The agency only appealed the amount of non-pecuniary damages and the AJ’s award of attorney’s fees. The Commission, citing Commission decisions in cases somewhat similar to complainant's in terms of harm sustained, reduced the non-pecuniary damages award to $110,000. The Commission also affirmed the enhanced attorney’s fee award. The Commission noted that a fee award is ordinarily determined by multiplying a reasonable number of hours expended on the case by a reasonable hourly rate, also known as a "lodestar." However, EEOC Regulations provide that in limited circumstances the "lodestar" amount may be "increased in consideration of the degree of success, quality of representation, and long delay caused by the agency." 29 C.F.R. § 1614.501(e)(2)(ii)(B). The Commission noted that the AJ found that complainant's high degree of success was a result of her highly competent attorney and, because the attorney achieved "exceptional success", the attorney's fee award was properly enhanced.

IV. Large Awards without Medical Evidence of Harm

Crear v. Nicholson, Secretary, Department of Veterans Affairs, 07A50079 (Jan. 26, 2006). The Commission summarily sustained the AJ’s award of $70,000.00 in non-pecuniary compensatory damages for reprisal, based almost entirely on the

complainant's testimony and without medical evidence. In terms of harm, it is noteworthy that the complainant was pregnant during the period of the reprisal.

Ellis-Balone v. Abraham, Secretary, Department of Energy, 07A30125 (Dec. 29, 2004). The Commission upheld the AJ's finding that the agency had discriminated against the complainant on the basis of race and sex by the way it processed and approved her application for telecommuting and on the basis of sex (pregnancy) by the way in which it treated and processed her request for advance sick leave. Also, the Commission upheld the AJ's award of $100,000.00 in non pecuniary compensatory damages, despite an absence of medical opinion evidence as to harm.

V. De Novo Court Review of Amount

Farrell v. Principi, 366 F.3d 1066 (9th Cir. 2004). An appeal to court from an agency's final action (a final order accepting the AJ's determination of discrimination and awarding $10,000.00 in emotional distress damages and nothing in pecuniary damages) is subject to de novo review of the remedy - that is, the court may grant "Farrell greater or lesser relief than the agency did in its final order." The court expressed no opinion as to whether the VA's and the AJ's determinations of liability are also subject to a de novo review, noting a conflict in the circuits.

Connor Scott, Personal Representative of the Estate of Harold Connor, Appellant v. Johanns, Secretary of Agriculture, 04-5267, 409 F.3d 466 (D.C. Cir. 2005). The Circuit agreed with the lower court's dismissal and concluded that a court cannot review a final administrative disposition's remedial award (e.g., compensatory damages) without reviewing the disposition's underlying finding of liability. Stated another way, "an employee seeking a greater award must start from scratch, i.e., the employee must file a Title VII suit and prove liability along with entitlement to relief." This case involved a then deceased former employee (Scott) who challenged the sufficiency of his $10,000.00 compensatory award. As stated by the court, "in a federal-sector Title VII case, any remedial order must rest on judicial findings of liability, and nothing in the statute's language suggests that such findings are unnecessary in cases where a final administrative disposition has already found discrimination and awarded relief. This rule, moreover, applies to

Scott's claim even though section 2000e-5(g) says nothing about compensatory damages, for the statute authorizing such damages indicates that section 2000e-5(g)'s requirement of a judicial finding of liability applies to them as well. *See* 42 U.S.C. § 1981a(a)(1) (making compensatory damages available 'in addition to' remedies mentioned in section 2000e-5(g))."

VI. Loss of Earnings Capacity v. Front Pay

Fields v. Rumsfeld, Secretary, Department of Defense, 01A41857 (July 7, 2005), recon. den., 05A51152 (Aug. 29, 2005). While agreeing with the agency's award of $20,000.00 in nonpecuniary damages, as well as $4,361.00 in past and future pecuniary damages for sexual harassment (in the form of "inappropriate touching and sexually tinged remarks" for a five-week period"), it rejected the complainant's claim for loss of earning capacity. The Commission first noted that " the record evidence is inadequate to make an award for any claimed impact on complainant's future earning potential. Although complainant was granted disability retirement and claims that she can never return to work because of the discriminatory conduct, the medical evidence of record does not indicate with reasonable certainty or probability that complainant could not have worked in other federal or non-federal jobs at some point before complainant's planned retirement date." The Commission further observed that **"**The record is also devoid of evidence of the likely duration of complainant's diminished future earning capacity." Accordingly, the Commission concluded that the evidence "does not demonstrate that complainant's injuries have narrowed the range of economic opportunities available to her."

McNabb v. Potter, Postmaster General, United States Postal Service, 01A33116 (Apr. 19, 2004). Because complainant was awarded $40,000.00 in non pecuniary compensatory damages and because lost earning capacity is a form of future pecuniary damages and not front pay and therefore subject to the monetary cap, lost earning capacity damages could not exceed $260,000.00. The complainant had unsuccessfully contended that contrary to the AJ's decision, there was no statutory limit on future lost wages because "front pay is a remedy that is not subject to the monetary limitations." The EEOC first distinguished front pay from the AJ's award, finding that "complainant conflates front pay with lost earning capacity

when stating that there is no statutory cap on future wage losses because it is a form of equitable relief that is not subject to monetary limitations. Front pay is an equitable remedy that compensates an individual when reinstatement is not possible in certain limited circumstances. The Commission has identified three circumstances where front pay may be awarded in lieu of reinstatement: (1) where no position is available; (2) where a subsequent working relationship between the parties would be antagonistic; or (3) where the employer has a record of long-term resistance to anti-discrimination efforts. See Cook v. United States Postal Service, EEOC Appeal No. 01950027 (July 17, 1998). The fact that front pay is awarded in lieu of reinstatement implies that the complainant is able to work but cannot do so because of circumstances external to the complainant. Id." The Commission then determined that because "there is no evidence that complainant is physically able to return to his former position . . . front pay is not appropriate in this circumstance."

Constructive Discharge

McCoy v. Principi, Secretary, Department of Veterans Affairs, 01A33493 (June 28, 2004). The Commission affirmed a final agency decision, rejecting complainant's claim of constructive discharge for failure to reasonably accommodate and finding that the agency reasonably accommodated the complainant's permanent arm disability that made him unable to reach, lift over 10 pounds, push or pull, by providing him with a position as a housekeeping aid (a position that the complainant did not want), rather than placing him in the position of a Motor Vehicle Operator, for which position the complainant lacked the required license. The Commission assumed for purposes of analysis, that the complainant was an individual with a disability. The Commission first observed that the complainant did not assert that the housekeeping position was an ineffective accommodation, rather that he did not want the job. The Commission explained as well that the agency's duty to reasonably accommodate a disabled employee does not entitle the employee to the accommodation of his choice. Because the complainant chose to retire rather than accept the agency's reasonable accommodation, his constructive discharge claim was without merit.

Moon v. Potter, Postmaster General, USPS, 01A41527 (June 10, 2005). A manager who was pressured to resign failed to prove that this was, in effect, a constructive discharge, in part because he failed to show that other individuals, outside of his protected classes who were insubordinate were not pressured into retiring. Complainant was a District Manager. Complainant's supervisor determined that complainant was insubordinate because of complainant's actions towards an agency Manager of Human Resources, who alleged that she was harassed by complainant to the point of her applying for a disability retirement. Complainant's supervisor determined that complainant could not effectively manage his personnel and discussed a move to another district or complainant's retirement. Complainant chose to retire and, subsequently, filed an EEO complaint alleging that his being forced to retire (in effect, a constructive discharge allegation) was discriminatory. An AJ found no discrimination and the Commission affirmed. The Commission noted that: "Complainant failed to submit any evidence showing other District Managers, outside of (complainant's) protected classes, who were insubordinate, were not pressured into retiring. We find that complainant has failed to present

evidence from which a reasonable fact-finder could conclude that the agency's action in pressuring complaint to retire was motivated by discriminatory animus toward complainant's protected classes. We find that the AJ correctly found no discrimination on the bases of race or age."

Silverman v. Ridge, Secretary, Department of Homeland Security, 01A33571 (Feb. 18, 2004). The Commission upheld the AJ's dismissal without a hearing; the complainant, a part-time "Other Than Permanent" (OTP) Immigration Inspector, failed to prove that he was constructively discharged (i.e., forced to retire) on the basis of age (he was 72) because of a change in his schedule, which required him to work a rotational midnight shift. The Commission set out the standards for analyzing a claim of constructive discharge, noting that the "central question in a constructive discharge case is whether the employer, through its unlawful discriminatory behavior, made the employee's working conditions so difficult that any reasonable person in the employee's position would feel compelled to resign. Carmon-Coleman v. Department of Defense, 07A00003 (April 17, 2002). The Commission has established three elements which a complainant must prove to substantiate a claim of constructive discharge: (1) a reasonable person in the complainant's position would have found the working conditions intolerable; (2) conduct that constituted discrimination against the complainant created the intolerable working conditions; and (3) the complainant's involuntary resignation resulted from the intolerable working conditions. See Walch v. Department of Justice, EEOC Request No. 05940688 (April 13, 1995)."

Disability Discrimination

I. Notice to Agency of Disability and Request for Accommodation

Bell v. Natsios, Administrator, AID, 01A40930 (Aug. 16, 2005). While the complainant claimed disability discrimination on the basis of his alcoholism, he did not request reasonable accommodation. The complainant was a Program Analyst, GS-232-11, who alleged discrimination on the bases of disability and others when the agency reprimanded him, charged him AWOL and suspended him. In making this finding, the Commission held as follows: "In the instant case, we concur with the AJ that complainant did not make a request for accommodation. The record establishes that management had known for some time that complainant had a drinking problem although complainant did not admit to it until early 1998. The record further establishes that when confronted with finally being disciplined for his time and attendance problems, complainant stated that his drinking was the cause of his problems. However, the record also clearly establishes that complainant never requested an adjustment or a change at work because of his drinking, and complainant does not contend that he did. He simply conceded that his drinking problem, as opposed to the traffic excuses he had been using, was the cause of his time and attendance problems. As a result, we decline to find that complainant requested accommodation either before or after his conduct problems occurred. See The Americans with Disabilities Act and Psychiatric Disabilities, Question 31, (March 25, 1997)."

Marshall v. Johanns, Secretary, Department of Agriculture, 01A31773 (June 30, 2005). The Commission found that the agency failed to reasonably accommodate a complainant who requested that she be allowed to work at home (telecommute), rejecting the agency's assertion that this was not a request for an accommodation of complainant's disability as "disingenuous at best." Complainant, a Special Projects Representative, filed a formal EEO complaint alleging that she was discriminated against on the basis of disability (multiple sclerosis)when the agency did not permit her to work from home (telecommute) as a reasonable accommodation. The agency found that complainant had made a request simply to participate in the agency's telecommuting program, which was open to all employees and failed to demonstrate that she had submitted a request for

reasonable accommodation. The Commission noted in a footnote, that "the record reflects that complainant advised the agency that she desired to telecommute "due to my Multiple Sclerosis." It emphasized that "A request for reasonable accommodation need not take a particular form. Complainant plainly was requesting a change in her working conditions on account of her medical condition. The agency's assertion that such was not a request for accommodation is disingenuous at best." (citations omitted.) The agency also argued that it was not obliged to allow complainant to telecommute; that is, to allow her to have the accommodation of her choice. The Commission noted that its guidance "allows an agency to choose among possible reasonable accommodations so long as the chosen accommodation is effective; while the preference of the individual with a disability should be given primary consideration, the agency has the ultimate discretion to choose among effective accommodations." The Commission rejected the agency's argument, noting that it does not appear that the agency was offering complainant any accommodation, in the alternative, in the instant case.

Mayo v. USPS, 01A41584 (May 27, 2005). Even though "the agency was aware of a prior psychiatric episode experienced by complainant . . . [there was] no indication that management had knowledge, or should have reasonably known, that complainant required a reasonable accommodation for a psychiatric impairment during the time at issue."

II. Disability or Not

Abbott v. Potter, Postmaster General, United States Postal Service, 01A30479 (Mar. 1, 2004). The Commission upheld the AJ's grant of summary judgment to the agency on the complainant's claim that he was subjected to disability discrimination when the agency delayed in granting his request for a light duty assignment; his "disability" was temporary. The complainant, a Carrier Technician, injured himself playing floor hockey (suffered an ACL tear in his right knee) and consequently requested light duty. Complainant alleged that the Postmaster unduly delayed granting his request for light duty. The Commission concluded, as had the agency, that the complainant failed to show that he was an individual with a disability covered under the Rehabilitation Act, and that he instead had what appeared to be a temporary disability.

Baillow v. Potter, Postmaster General, USPS, 07A40111 (June 6, 2005). A failure to provide an accommodation of change to a day shift for an individual with lupus, who had seizures related to working irregular hours on changing shifts, was disability discrimination, and resulted in an award of $35,000 in compensatory damages. Complainant was an individual with a disability because she could not stand for more than half-hour intervals and her exposure to an irregular sleep schedule was a powerful stimulus for seizures. Complainant was thus substantially limited in the major life activities of standing and sleeping. Complainant requested that the agency allow her to work daytime hours or transfer her to a vacant positions where she could be assigned daytime hours to accommodate her seizure condition which was exacerbated by irregular sleep / wake cycles. The Commission found that the agency failed to properly accommodate complainant when it refused to place her on the day shift. As to compensatory damages, the Commission found "that the AJ's award of $35,000.00 was appropriate. We note that this amount is not being motivated by passion or prejudice, not 'monstrously excessive' standing alone, and is consistent with the amounts awarded in similar cases. See Grady v. United States Postal Service, 01A03194 (March 19, 2003) ($35,000 in non-pecuniary damages where complainant was denied a reasonable accommodation and experienced a loss of sleep and concentration, irritability, mood swings, stomach problems, and depression)."

Bell v. Gonzales, Attorney General, Department of Justice, 398 F. Supp. 2d 78 (D.D.C. 2005) (Bell 1). An FBI photographer with Touretts Syndrome was not an individual with a disability as defined in the Rehabilitation Act because it did not substantially limit him in major life activities, including sleeping and interacting with others. The district court granted partial summary judgment to the agency, on complainant's disability claim. The district court found plaintiff's sleep disturbance to be episodic and periodic and that it did not amount to a substantial impairment of a major life activity. The court also held that an individual who alleges that his or her disability is substantially limiting in the major life activity of "interacting with others" will need to show that the impairment severely limits the fundamental ability to communicate with others. The court noted a split in the circuits over whether "interacting with others" is a "major life activity." The district court agreed with the Second and Ninth Circuits that "interacting with others" is a major life activity because it is an activity of "central importance to daily life" like walking and breathing. [In contrast, the First Circuit has held that the similar activity of "getting along with others" is not a major life activity because such an

ability comes and goes, "triggered by vicissitudes of life which are normally stressful for ordinary people," and to conclude otherwise would require subjective judgments to be made about a person's ability, different in kind from walking and breathing.] The district court also adopted the Second Circuits demanding standard in defining what constitutes a "substantial limitation" on the activity of interacting with others, as when the mental or physical impairment severely limits the fundamental ability to communicate with others. “This standard is satisfied when the impairment severely limits the plaintiff's ability to connect with others, i.e., to initiate contact with other people and respond to them, or to go among other people -- at the most basic level of these activities. The standard is not satisfied by a plaintiff whose basic ability to communicate with others is not substantially limited but whose communication is inappropriate, ineffective, or unsuccessful. Thus, communications marked by hostility, argumentativeness, or a cantankerous manner -- including ill humor, irritability, or a determination to disagree -- are not sufficient to demonstrate a substantial limitation of the activity of interacting with others. Those characteristics go to the subjective quality of the communication, rather than the core question whether the plaintiff has the ability to communicate and thus interact with others."

Cabanillas v. Rumsfeld, Secretary, Department of Defense, 01A30683 (May 13, 2004). The Commission upheld the AJ’s dismissal without a hearing of the complainant’s disability discrimination claim; while the complainant proved that she had Attention Deficit Disorder, she alleged but failed to prove that the ADD condition substantially limited her in the major life activities of learning, concentration, or caring for oneself. Complainant worked as an Accounting Technician. She alleged that the agency discriminated against her in various ways (e.g., denial of training, by failure to accommodate, etc.) on the basis of her disability, Attention Deficit Disorder or ADD. In upholding the AJ’s decision, the Commission first found, based on 2 medical reports, that the complainant had ADD, which affected her ability to take care of herself (because she sometimes becomes so depressed that she loses interest in doing that) and to learn and concentrate. However, the Commission appeared to suggest that the impact of the condition was moderate, except when the complainant was under stress, when she could get angry and confrontational and could become disorganized and overloaded. Because the only evidence of stressors concerned confrontations with her supervisor and there was no evidence of stressors beyond that individual and circumstance, the complainant failed to “demonstrate that the impairment is

substantially limiting in the major life activities of learning, concentration, or caring for oneself."

Cannon-Stokes, v. Potter, Postmaster General, United States Postal Service, No. 03 C 1942 (N.D. Ill. Nov. 3, 2005). The court granted summary judgment to the Postal Service, finding that the complainant, who was diagnosed with Post Traumatic Stress Disorder ("PTSD"), after she was grabbed and sexually assaulted by a postal customer while delivering mail, did not prove that she was a disabled person; she failed to prove that she was significantly limited in her ability to be outside in a residential area, to enjoy life, and to interact or communicate with people while alone, or even that these were major life activities.

Carter v. Potter, Postmaster General, United States Postal Service, No. Civ.A.02-7326 (E.D. Pa. Dec. 21, 2004). As to plaintiff's disability discrimination claim, he failed to show that his arthritis limited a major life activity or that he was regarded as disabled.

Chang v. Ridge, Secretary, Department of Homeland Security, 01A22087 (Jan. 23, 2004). The complainant did not prove disability discrimination in his rejection for a Customs Inspector position; while he had high frequency hearing loss, his hearing was considered within the normal range, and he therefore was not substantially limited in the major life activity of hearing. Further, because complainant failed to prove that he was an individual with a disability, he was not entitled to a reasonable accommodation in the form of a waiver of the agency's medical standard.

Davis v. Potter, Postmaster General, United States Postal Service, 01A42275 (Aug. 26, 2005). The Commission agreed with the agency that an accountant complainant failed to prove that she was an individual with a disability (she alleged fibromyalgia, stress and pseudo-seizures) and thereby rejected her claim that she was discriminated against when management refused to allow her to work at home as recommended by her doctors. The Commission determined that the alleged illnesses were not substantially limiting as to working or any major life activity. Significantly, the Commission cited to the complainant's medical opinion

evidence that the impairments were "fairly well controlled with medication" and the lack of specificity as to their severity.

Fellows-Gilder v. Chertoff, Secretary, DHS, (Immigration and Naturalization Service), 01A33476 (Dec. 9, 2005). The agency discriminated against the complainant, an Immigration Status Verifier, on the basis of her perceived disability (epilepsy) by terminating her without proving a direct threat defense. This is a case involving an employee who was placed in the position as an Immigration Status Verifier, despite concerns about her medical status, and who, during six months in the job, had "approximately three seizure episodes, one of them during her lunch hour, and the other two during work hours." The agency then requested medical information from the complainant's doctors, both of whom provided that she was not a danger to herself or others. Nonetheless, "In a letter dated July 24, 2000, the agency expressed that complainant has a 'chronic, on-going, unresolved medical condition that prevents her from performing the duties of her position in a consistent, timely manner.' The agency also expressed that because the seizures were unpredictable and their severity could not be determined, the agency could find no accommodation that would allow complainant to perform the full range of the duties and responsibilities of the position in a safe and efficient manner. Complainant was separated from employment effective July 29, 2000." In making its decision, the Commission disagreed with the AJ, who had found that the complainant was an individual with a disability but not a qualified individual with a disability, because of her purported inability to perform the essential functions of her position. Instead, the Commission found that she was perceived as disabled (it rejected the agency's claim that she was substantially limited in thinking and concentrating) and was qualified as well ("the hearing transcript shows that complainant was performing her job without an accommodation and in an efficient manner".). Here, the Commission noted that "The record did not reveal that complainant requested accommodation in order to perform her job. Specifically, we note that complainant's physician recommended that complainant could sit aside from other co-workers who might be disturbed by her stammering or her head bobbing or if she actually fell during a seizure; however, this was not a request for an accommodation because it was motivated not by complainant's need to sit alone, but because of the reactions of others to her seizures." Stated another way, " the agency's actions in terminating complainant due to its belief that her abilities to concentrate and think were so limited by her seizures as to lead to

uncontrollable episodes of unconsciousness at any moment, establish that it regarded her as substantially limited in mental and emotional processes such as thinking and concentrating." The Commission also carefully reviewed the essential functions of the ISV position (to "monitor, review and process electronic, telephonic and written inquiries from federal, state and local law enforcement agencies concerning the identification, apprehension, arrest or prosecution of criminal foreign nationals. The material is contained in a variety of complex manual and computerized INS files and other agency information systems"), noted that the seizures were short in duration, that one supervisor had testified "that he reviewed complainant's queries after an episode and they were fine", that she received a fully successful for the relevant rating period, her average inquiries were higher than the office average and the office had an emergency procedure for when an ISV became violently ill, so that any inquiries would go to the next available person. The Commission then addressed the agency's direct threat defense, i.e., "that complainant's seizure-episode could result in injury or harm to herself." The Commission described that "The agency alleged that in the small work area, around 50 square feet of space, when complainant had a seizure-episode, she could hit her head or she could injure herself, even if somebody is sitting beside her. The agency also argued that management became concerned that it was not safe for complainant to drive home after an episode. The record reveals that one of complainant's supervisors testified that she was concerned about the government's liability if she let complainant drive home after an episode. The agency also argued that complainant's seizures are not very long, but a 'few hours where a person might be at physical risk is a lot.' The agency further argued that complainant is at high-risk for seizure-related accidents and that the fact that nothing has happened does not minimize the risk to public safety." Nonetheless, the Commission concluded that the agency had not proven that there was a significant risk of substantial harm. In making that finding, the Commission noted that while the agency "made only vague references to an individual from another agency who had developed seizures following brain surgery" and who "almost died", a, there was nothing "in the record to indicate that the agency made an individualized assessment showing that complainant's seizures would pose a direct threat to herself or to others." Finally, the Commission observed that "the agency was motivated by a concern for the way that co-workers reacted to the seizure-episodes. Specifically, the agency argued that because of complainant's seizures, some employees stop their work to sit with her, and some employees leave because they are uncomfortable, and that affects the agency's productivity. However, the

record shows that complainant never requested any help and that she handled her seizure-episodes by herself. Moreover, nothing in the record shows that either the agency's productivity or its quality was affected by complainant's seizures. We conclude that complainant is not responsible for the reactions of her co-workers or for other employees leaving their work area without authorization. That is a matter which should be handled by management officials, who should implement, if necessary, the proper procedures to remedy that situation."

Harris v. Wynne, Secretary, Department of the Air Force, No. 03A60039 (May 24, 2006). The Commission agreed with the MSPB's finding that a supervisor responsible for inspecting water systems ("petitioner") did not prove that the agency improperly removed him and regarded him as an individual with a disability. Petitioner was a Utility Systems Supervisor at the agency's Beale Air Force Base in California. He told his supervisor his leg was bothering him and he had claustrophobia and fear of heights. The supervisor, concerned about proper inspection of the facility's water system, referred petitioner for a fitness for duty examination conducted in July, 2002, which revealed that petitioner had the following limitations: walking continuously for four hours; repeated bending for two hours; negotiating slippery or uneven walking surfaces; working on ladders or scaffolding; and climbing up to fifty feet. The examining physician also indicated that the petitioner's limitations were not permanent. A physician conducting a second fitness for duty examination in July, 2002 concluded that petitioner did not then "meet all of the functional requirements / environmental factors essential to the duties of this position as specified" and concluded that petitioner was "not medically qualified to maintain this position." The physicians who did the two July, 2002 fitness for duty examinations testified that their concern was with petitioner's safety and his ability to navigate over uneven, slippery surfaces and climbing heights as needed in his job. Petitioner was removed for physical inability to do his job and appealed to the MSPB. However, based upon a third, subsequent fitness for duty examination conducted in February, 2003, seven months after the initial examinations, petitioner was determined to be sufficiently fit to be returned to work (that physician found that, though he had a slight limp, petitioner's health had greatly improved and there was no longer a concern about his balance or safety and thus he was fit for duty), and he was reinstated. An MSPB AJ found disability discrimination in the removal, but the full Board reversed. The Board determined that petitioner's impairments were not substantially limiting in any major life activity and that petitioner had not proven that the agency regarded him as

disabled. Petitioner appealed to the Commission, which agreed with the Board, affirming the rejection of petitioner's disability discrimination claim. The Commission noted that petitioner, in effect, asserted that the agency regarded him as an individual with a disability because of his knee injury. The Commission explained that: "In order to be 'regarded as' disabled, the petitioner must show either that the employer 'mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities,' or that the employer 'mistakenly believes that an actual, non-limiting impairment substantially limits one or more major life activities.' In both cases, it is necessary that a covered entity entertain misperceptions about the individual. ..." Sutton v. United Airlines 527 U.S. 471, 489 (1999). See also 29 C.F.R. §1630.2(1). In the case at hand, petitioner asserted that the agency mistakenly believed that his actual, non-limiting impairment substantially limited him in the major life activity of working. An agency regards an individual as substantially limited in the major life activity of working if the agency believes the individual has an impairment that significantly restricts him or her from currently performing a class of jobs or a broad range of jobs in various classes. An agency, however, does not regard an individual as being substantially limited in working when it merely believes that the individual is unable to perform a single, particular job. 29 C.F.R. § 1630.2(j)(3)(i)." The Commission then stated that petitioner did not prove that he could have performed the essential functions of his position with or without a reasonable accommodation at the time of the two July, 2002 Fitness-for-Duty evaluations or at the time of the agency's removal action, and that: "Additionally, petitioner provided no evidence or testimony that would have shown that, at the time of the removal action, the employer's view of his impairment was mistaken or that it regarded petitioner as substantially limited in working in a class or broad range of jobs. Therefore, petitioner has not met his burden of establishing that he met the definition of an individual 'regarded as' having a disability necessary to support his disability-based discrimination claim."

Housh v. Potter, Postmaster General, USPS, 01A33300 (May 19, 2005). The Commission upheld a finding of no disability discrimination for a complainant with a 10 pound lifting restriction holding that the complainant was not substantially impaired in the major life activity of lifting, or any other major life activity, and was thus not an individual with a disability. Complainant, a city carrier, was working with medical restrictions due to a back injury. His restrictions were: a limit on lifting; no prolonged sitting, standing or walking; no climbing or

driving a commercial vehicle; and no repetitive twisting and turning. The medical documentation indicated that complainant's back pain was either under control with medication and therapy or partially controlled with medication. Complainant refused a direction to drive and deliver mail for about 15 houses. He was also issued a Notice of Proposed Removal when the agency discovered that he had previously failed to disclose his spinal cerebellar degeneration on a Medical Examination and Assessment Form when previously asked about prior trouble with his back. Complainant alleged that the direction to deliver mail, and the Proposed Removal, were disability discrimination, asserting that he was substantially impaired in the major life activity of lifting. An AJ concluded that complainant failed to establish that his condition substantially limited him in any major life activity and he was thus not an individual with a disability pursuant to the Rehabilitation Act. On appeal the Commission agreed, holding that complainant's lifting restriction, including lifting ten pounds continuously and thirty-five pounds intermittently, is not sufficient to establish that he is an individual with a disability.

Kirkland v. Harvey, Secretary, Department of the Army, 01A42874 (Sept. 28, 2005). The Commission reversed the AJ's decision without a hearing in favor of the agency, finding instead that the AJ erred as to his determination that the disability claim was untimely and there were disputed issues of material fact as to whether the complainant was disabled as a result of her Carpal Tunnel Syndrome and whether an accommodation was available. In finding that the complaint was timely, the Commission noted "that complainant viewed the incidents giving rise to her complaint as a failure by the agency to grant a reasonable accommodation, to include an accommodation to allow her to perform her duties in the Claims Assistant position or a reassignment", "that management never definitively granted or denied complainant's request for a reasonable accommodation," and that therefore "this matter constitutes a recurring violation, that is, a violation that recurs anew each day that an employer fails to provide an accommodation." Likewise, the Commission found that there was sufficient evidence suggesting that complainant was substantially impaired in the major life function of performing manual tasks (in that "she must limit her repetitive motion in both hands, to include fingering, pinching, and gripping . . . . [and] testified that she has problems with other functions that are central to daily life such as combing her hair, bathing, and house cleaning") as well as lifting. Similarly, even though "complainant was unable to identify an accommodation other than the removal of some of her duties, in order to determine the appropriate reasonable accommodation, the agency did

not "initiate an informal, interactive process" because "the supervisor failed to seek advice from HRO, and instead relied upon his own limited personal knowledge of what he guessed might be an effective accommodation." In the Commission's view, if the supervisor had sought assistance from HRO, "he likely would have discovered the Department of Defense's Computer/Electronic Accommodation Program (CAP), which provides persons with disabling conditions equipment that allows them to accomplish essential job requirements. We further note that voice activated software is a commonly known technology often used by individuals who cannot type due to their conditions, but for whom typing is an essential function of their job. Therefore, a further investigation needs to be conducted to determine whether complainant could have performed the essential functions of her position with voice activated software. If she could have so been accommodated, then the agency will have failed to provide her with an effective accommodation in violation of the Rehabilitation Act."

Lau v. Ashcroft, Attorney General, Department of Justice, (Federal Bureau of Investigation), 01A32849 (Jan. 3, 2005). Complainant did not prove disability discrimination because he failed to prove that his alleged disability, sleep apnea, substantially limited any major life activity – the therapy complainant used resulted in the "complete resolution of symptoms of daytime somnolence" - and he therefore did not meet the definition of an "individual with a disability" pursuant to the Rehabilitation Act. Complainant was a Special Agent working for the FBI in Sacramento, California. He alleged discrimination: (1) in the delayed response to his Freedom of Information Act (FOIA) request; (2) in the denial of his request for reasonable accommodation for his disability, sleep apnea. (1) The Commission rejected complainant's assertion of discrimination in a delayed response to a FOIA request as there was a large backlog of FOIA requests at the time and the delay in getting to complainant's request was the same as for other FOIA requests. (2) Complainant had been diagnosed as having sleep apnea, the symptoms of which complainant described as "drowsiness, diminished judgment, and lethargy." However, complainant provided medical documentation that stated that he was undergoing therapy for his sleep apnea and that while on this therapy, complainant had "complete resolution of symptoms of daytime somnolence." Complainant did not provide any additional medical documentation that would support a finding that his sleep apnea substantially limits any of his major life activities. Accordingly, the Commission found that complainant is not an individual with a

disability under the Rehabilitation Act, and the agency was, therefore, not obligated to provide him with a reasonable accommodation.

Mclntyre v. Principi, Secretary, Department of Veterans Affairs, 01A31380 (May 26, 2004). The Commission affirmed an AJ's decision that the complainant did not qualify as an individual with disability, because the complainant's ankle condition was short-term and improving and the complainant failed to show how he was substantially limited in any major life activities on a long-term basis.

Nurriddin v. O'Keefe, Administrator, National Aeronautics and Space Administration, 01A23148 (Sept. 30, 2004). The EEOC affirmed the AJ's grant of summary judgment in favor of the agency on the complainant's disability discrimination claims, agreeing with the AJ that "there is no indication from any of . . . [the] evidence that the complainant's depression, stress, and/or anxiety rose to the level of an impairment which substantially limited any major life activity." The EEOC also affirmed the agency's FAD as to the remaining claims (the complainant had withdrawn his request for a hearing after the summary judgment ruling), 42 in all.

Rodewald v. Potter, Postmaster General, United States Postal Service, 01A24935 (Dec. 23, 2003). The AJ properly issued a decision without a hearing, rejecting the complainant Maintenance Mechanic's disability discrimination claim on the basis that he did not prove that he was "disabled" and his Equal Pay claim on the basis that he did not prove that he was improperly paid less than female Electronic Technicians. The complainant alleged that he was denied certain overtime responsibilities and assigned overtime work requiring him to engage in motions beyond his medical restrictions, which discriminated against him on the basis of his disability, an injury to his back and right shoulder. He also asserted that the agency violated the EPA when he was not paid at the same rate as Female Electronic Technicians. In rejecting the complainant's disability claim, the EEOC agreed with the AJ that the complainant had not proven that he was an individual with a disability (i.e., failed to meet his burden of showing an inability to work in either a class or broad range of jobs).

Thompkins v. Potter, Postmaster General, United States Postal Service, 01A24083 (Aug. 19, 2004). While the complainant's request for leave under the FMLA constituted a request for reasonable accommodation of her condition of fibroid tumors under the Rehabilitation Act, the complainant did not prove that she was an

individual with a disability. As to the "disability" issue, the complainant alleged that her medical condition limited her ability to walk. The EEOC recognized that walking was a major life activity, but determined that the "complainant failed to provide any evidence regarding how she was substantially limited in walking compared to the average person. . . . . In particular, the record is devoid of any medical evidence recording the degree and manner in which complainant's walking was limited. Moreover, complainant failed to present any evidence that she was substantially limited in walking beyond the six to eight weeks she was in recovery after her March 20, 1998 surgery. In fact, on her FMLA request, complainant stated that the duration of her incapacity would only last six weeks until after her surgery. Therefore, we find that the record does not indicate that the fibroid tumors had any long-term or permanent impact on complainant's ability to walk or engage in any other major life activity. We further find that the record does not support a finding that complainant had a record of or was regarded as having a substantially limiting impairment. Accordingly, we find that complainant failed to establish that she is an 'individual with disability', within the meaning of the Rehabilitation Act."

Wheeler v. Brownlee, Acting Secretary, Department of the Army, 01A30318 (Sept. 30, 2004). The complainant, a Secretary, proved discrimination on the basis of her disability (pulmonary emboli and hypertension), because the agency improperly denied her a suitable parking space for nearly five years. The issue on appeal of the agency's FAD was whether the complainant was an individual with a disability. The agency argued that the complainant was not because she could function normally with a mitigating device, an oxygen tank. The EEOC rejected that claim, concluding that "We need not determine whether complainant's oxygen tank is a mitigating measure because we find that, even with the oxygen tank, complainant's ability to breathe is significantly restricted compared to that of the average person in the general population. 29 C.F.R. § 1630.2(j). For the average person, the act of breathing is a simple action that is performed unaided, and without difficulty or conscious thought thousands of times a day. But for complainant, the act of breathing requires that she, at all times, have in tow and utilize a tank of pure oxygen weighing several pounds. She must also monitor the tank to ensure that it is functioning properly and contains sufficient oxygen for her needs. And she must, likewise monitor the apparatus that attaches to the tank to ensure that it, too, is functioning properly and providing her with sufficient oxygen." Because the complainant had requested a disability parking space in 1995

and was not provided one until 2000, the agency "unduly delayed" in providing her with a reasonable accommodation.

III. Qualified Individual with a Disability

Castle-Ebright v. Potter, Postmaster General, United States Postal Service, 01A42465 (July 15, 2005). The complainant failed to prove that she was a qualified individual with a disability and therefore the agency did not violate the Rehabilitation Act by failing to reassign her to another facility, and accommodate her request to be separated from an individual "who apparently precipitates complainant's anxiety and perpetuates her depressive episodes." The Commission noted that the agency made several attempts to transfer complainant away from this individual at the facility. It then addressed the issue of reassigning the complainant to a different facility, summarizing the relevant case law, as follows: "The Commission has held that an agency's failure to conduct an appropriate search for a new position for complainant will not, by itself, result in a finding of discrimination. See Barnard v. United States Postal Service, 07A10002 (August 2, 2002). Rather, complainant has an additional evidentiary burden in reassignment cases. Complainant must present sufficient evidence to support a finding that, more likely than not, there was a vacant funded position, for which she was qualified and to which she could have been reassigned. Absent evidence of a particular vacant funded position, the fact that a vacant funded position existed may be inferred based on documentary or testimonial evidence regarding, inter alia: (1) complainant's qualifications; (2) the size of the agency's workforce; and (3) indicia of postings and/or selections during the pertinent time period within classes of jobs for which complainant would have been qualified. Id." Based on those standards, the Commission concluded that "Complainant ultimately did not avail herself of the opportunity to participate in a hearing or otherwise develop this evidence, and the record before us does not establish that, more likely than not, there was an accommodation which would have enabled complainant to perform the essential functions of her position or that there was a vacant funded position, for which she was qualified and to which she could have reassigned."

Cepeda v. Barnhart, Commissioner, Social Security Administration, 01A22974 (June 29, 2004). The Commission affirmed an AJ's decision that the complainant was not a qualified individual with a disability because his frequent unplanned

absences prevented him from helping agency customers on a regular basis, an essential function of his job, and that it was an undue hardship for the agency to accommodate the complainant's frequent unplanned absences. The complainant worked as a Claims Development Clerk, which required him to work at a "walk up" window, meet with applicants for social security and enter their application data into a computer system.

Collier v. Potter, Postmaster General, United States Postal Service, 01A32207 (Mar. 25, 2004), request for reconsideration denied, 05A40697 (Aug. 11, 2004). The agency did not discriminate against the complainant, who worked for the agency as a Mailhandler, on the bases of sex, race (African-American), disability (spinal condition), age (DOB: 01/29/39) and reprisal when it refused to allow him to work overtime in March 2000. The complainant required the accommodation of working while sitting, which the Commission found (in agreeing with the agency) was inconsistent with the nature of the overtime work. Thus, the Commission determined that the complainant failed to show he was qualified to perform the essential functions of the job in the mail prep unit [i.e., the overtime work], even with the specific accommodation she sought.

Dellinger v. Potter, Postmaster General, USPS, 07A40040 (Sept. 29, 2005). While the complainant was not performing the essential functions of the "traditional" Distribution Clerk position at the time of her removal in 1999, she was performing the essential functions of a her longstanding light duty Distribution Clerk position since her return to work following an injury in 1990 and was therefore a qualified individual with a disability at the time of the alleged discrimination. Accordingly, the Commission agreed with the AJ that the agency discriminated against complainant on the basis of her disability when she was placed in an off duty status and "essentially forced her to retire." In its decision, the Commission summarized the relevant history, as follows: "The record reflects that complainant began her employment with the agency in 1979, and in late 1989, she was involved in an off duty automobile accident which left her with permanent partial paralysis on her left side and cognitive impairment. The injury left complainant with impaired memory, difficulty in learning new information and physical difficulties. The record reflects that complainant's brain injury impaired her ability to walk and impacted her balance, but did not affect her right arm. Complainant returned to work in 1990 as a light duty employee, working two (2) hours per day with numerous physical restrictions. In 1994, her physical restrictions were modified to include no lifting

over 15 pounds, no pushing, no pulling, she could stand up to one hour per tour, with no kneeling, bending or climbing. Ultimately, complainant returned to work for eight (8) hours per day sorting mail. The light duty Distribution Clerk position was within her medical restrictions, and she was able to manually sort and throw mail by using her right hand, although she was unable to throw bundles of mail. In 1998, SI became her supervisor and the facility decreased the volume of mail that was to be sorted manually. As a result, complainant's work hours were reduced to less than an eight (8) hour day, and she used annual leave to make up for the hours lost. Complainant's physician then issued new work restrictions stating that she could not lift more than fifty pounds and could drive a vehicle. The agency sought a second opinion, and the agency's physician issued restrictions that were more restrictive than were those issued by complainant's physician. On March 30, 1999, complainant was sent home early after working four (4) hours, as SI stated that mail volume was light that day." As to remedy, the Commission upheld the AJ's award of $10,000.00 in non-pecuniary damages "for pain and suffering and financial losses incurred" and disagreed with "complainant's allegations on cross-appeal that she is entitled to non-pecuniary and pecuniary damages in the amount of $150,000.00."

Encloe v. Rice, Secretary, Department of State, 01A42370 (Aug. 10, 2005). Because the complainant was not available for worldwide posting, an essential element of a Foreign Service position, as a result of not being able to obtain a worldwide medical clearance due to a corneal replacement, he was not a qualified individual with a disability. This case involved an applicant for a Foreign Service position, who received a conditional offer of employment from the Foreign Service but was rejected after the agency "determined that complainant's 2001 corneal replacement surgery rendered complainant unable to work or spend time overseas in 'high-risk' locales, those without access to sophisticated medical care." The Commission additionally determined that the standard relied on by the agency was job related and consistent with business necessity, finding that "To the extent that the worldwide availability is a qualification standard, we note that under the Rehabilitation Act, a qualification standard, test, or other selection criteria that screens out or tends to screen out an individual with a disability or a class of individuals with disabilities, on the basis of a disability, is unlawful, unless it is shown to be job-related and consistent with business necessity. 29 C.F.R. § 1630.10. The purpose of this provision is to ensure that individuals with disabilities are not excluded from job opportunities unless they are actually unable to do the

job. We conclude that the agency has met the 'job-related' standard. It is apparent from the facts in this case that the agency made its determination by conducting an individualized assessment of complainant's condition and concluded that he was not qualified for a worldwide assignment. We find no evidence that the agency's requirement for a medical clearance for worldwide availability screens out individuals with disabilities. The requirement for a medical clearance for worldwide availability is a requirement that does not merely exclude individuals with disabilities from job opportunities, but rather it applies to all applicants for a Junior Officer position in the Foreign Service, whether or not they are individuals with disabilities. The record reveals that a candidate for the Foreign Service must be medically qualified for assignment worldwide at the time of his/her appointment or obtain a waiver of the worldwide availability requirement. As mentioned above, worldwide availability is an essential requirement for employment in the Foreign Service. We further find that this requirement is job-related and consistent with business necessity because, many of the posts are located in areas that offer extremely limited or no medical resources."

Fortin, v. Barnhart, Commissioner, Social Security Administration,. 01A46108 (June 16, 2005). The Commission explained its analysis of "essential job functions" and concluded that the agency acted properly, consistent with the requirements of the Rehabilitation Act, when it attempted to reasonably accommodate, and to reassign (the "reasonable accommodation of last resort") a Service Representative with a serious vocal dysfunction. Complainant was a Service Representative, a position that entails interviewing and orally interacting with customers, with three core functions: answering the telephone, working the service window, and processing the paperwork. A surgical procedure resulted in complainant having a vocal dysfunction that limited her ability to talk to no more than 15 minutes per day. The agency declined to retain complainant in her Service Representative position, which ultimately resulted in her disability retirement and an EEO complaint asserting disability discrimination when the agency refused to provide complainant's requested accommodation. Complainant asserted that the "central function" of the position was to communicate with the public which could be accomplished by written correspondence and, because the position description separates the three core functions with the conjunction "or," performing any one of them would be performing the essential functions of the position. An AJ found that complainant was an individual with a disability because she was substantially limited in a major life activity (presumably speaking) but that she was not a

qualified individual with a disability because she could not perform the essential functions of her Service Representative position, with or without an accommodation. The agency had offered possible accommodations, such as assistive devices (voice enhancement and ergonomic equipment) or reassignment to a larger office that had purely clerical positions, but complainant rejected these offers. Complainant had also failed to prove that "more likely than not" there was a suitable funded vacancy during the relevant time period to which complainant could be reassigned. Complainant asserted that she could perform the essential functions of the Service Representative position by only performing correspondence duties and that the agency failed to prove that this would be an undue hardship. The Commission affirmed the finding of no discrimination, citing to its regulations, at 29 C.F.R. § 1630.2(n)(2), that state that "a function of a position may be essential if: 1. the position exists to perform the function; 2. there are only a limited number of workers who can perform the function; 3. the function is highly specialized, and/or 4. performance of the function requires the expertise of the incumbent." The Commission held that "the evidence of record overwhelmingly demonstrates that the Service Representative position requires oral interaction with customers to provide the services sought, and that this is accomplished by means of waiting on customers via the telephone and face-to-face at the service window..without these functions, the facility would not be operational.. Therefore, we find that the AJ correctly determined that answering the telephones and waiting on customers at the service window are essential functions of complainant's position." Complainant cannot do this and thus cannot perform the essential functions of her position, with or without an accommodation. Since complainant failed to prove that "reassignment was available as a last resort reasonable accommodation" the agency did not violate the Rehabilitation Act when it offered to accommodate complainant but declined to provide the accommodation requested by complainant (a complainant is entitled to an effective accommodation, not the accommodation of his or her choice).

Isaacson v. Potter, Postmaster General, United States Postal Service, 01A30257 (Apr 15, 2004). The agency did not discriminate against the complainant on the basis of her disability (cerebral vascular accident -- stroke), when it removed her from her clerk position for inability to perform the essential functions of that position. As sustained by the EEOC, the AJ determined that the agency articulated a legitimate, nondiscriminatory reason for its action -- the complainant was unable to work 40 hours per week and key at least 4 hours per day, requirements that were

not shown pretextual. And, while the complainant argued that the agency failed to satisfy its reassignment obligation, the Commission disagreed, noting that "if the agency did not offer complainant a 030 [section] prime position, complainant failed to satisfy her burden of identifying any vacancies at the time of her request. Complainant has not provided any evidence to support an assertion that, had the agency searched inside or outside the Clerk craft at the relevant time, it would have found a vacant position to which she could have been reassigned. Moreover, the responsible management officials (RMOs) testified that they considered other positions at or below complainant's level, including mail processor, mail handler, and custodian, but they determined that these positions were much more strenuous than complainant's Clerk position, thus they did not offer any of these positions to her." In sum, the EEOC determined that the complainant was not a qualified individual with a disability.

Kennedy v. Snow, Secretary, Department of the Treasury, 01A41761 (May 20, 2004). The complainant, a Personnel Management Specialist at the agency's Wage & Investment -- Stockholder Partnerships, Education & Communication Business Unit, failed to prove disability discrimination because of the agency's alleged failure to accommodate the complainant's disability (diabetes, kidney failure, eyesight, left arm and hand), when the agency denied him a flexi-place arrangement or a reassignment as a reasonable accommodation; the complainant was unable to perform the essential functions of his position. In agreeing with the agency, the Commission concluded that "Here, complainant's physician submitted a letter stating that complainant is not able to drive to his regular work station in Pittsburgh, 'let alone perform his job duties.' The letter goes on to state that complainant incurred severe injuries from an automobile accident including a 'degloving' injury to his left hand and an amputation of the small finger of the left hand. Complainant's physician further states that he instructed complainant not to return to work until he had received further treatment and evaluation. Based on these statements of complainant's own physician, it is clear that complainant had not been cleared to work and that under these circumstances, the agency was not obligated to investigate and provide a reasonable accommodation."

LaCombe v. Principi, Secretary, Department of Veterans Affairs, 01A23543 (Mar. 24, 2004). The Commission reversed the final agency decision and held that the complainant, formerly a City Carrier, was a qualified individual with a disability because her back injury substantially limited her in the major life activity of lifting

and the agency failed to reasonably accommodate the complainant when (despite that complainant repeatedly provided notes from her doctor setting lifting restrictions due to her back injury), the complainant's supervisor disregarded the medical restrictions and ordered her to perform tasks contrary to such restrictions and even admonished her for failing to perform those tasks.

LeFebvre v. Barnhart, Commissioner, Social Security Administration, 01A32503 (Nov. 29, 2004). The Commission upheld the AJ's decision without a hearing, rejecting the disability (Epilepsy, learning disability) discrimination claim, finding that the complainant was not a qualified individual with a disability and that "the agency attempted to provide complainant with a reasonable accommodation during the training phase of the job, but that, in spite of these efforts, complainant was unable to successfully perform the essential functions of the position."

Millsap v. Loy, Acting Secretary, DHS, 07A30113 (Mar. 3, 2005), recon. den. 05A50775 (May 25, 2005). The Commission reversed the AJ, who had found that the complainant was a qualified individual with a disability on the basis that if he received surgery, he could perform the essential functions of the position; instead, the Commission determined that the complainant was not a QID, observing that an individual "is not required to get medical treatment and the agency does not have to provide it." This case involved a complainant, a former GS-5 immigration record technician, who alleged discrimination on the basis of his disabilities (cervical radiculopathy, thoracic outlet syndrome) when the agency failed to reasonably accommodate him, resulting in his removal. In relation to the essential functions of the complainant's position, the Commission explained that "The complainant, through a former attorney, conceded that by April 1999, he was unable to perform the mail and records clerk part of his job, and these functions were not amenable to reasonable accommodation. This is supported by the record. The crowded records room had files above shoulder level, outside the complainant's overhead work restriction, and shelves down low, which he complained made him reach, and mail and records work involved frequent lifting above the complainant's weight restrictions. Pushing the empty mail cart alone was beyond the complainant's restrictions. The complainant testified that lowering overhead bins for sorting mail was not feasible. These were essential functions of the complainant's job." As suggested above, the Commission disagreed with the AJ's consideration of the possibility of surgery, noting further that "The record had references that if the complainant received surgery, his condition may be

alleviated. This cannot be considered in making the qualification determination." The Commission also held that reassignment was not available. It first noted that the agency had no obligation to create a new position but once it did, as in this instance, "the complainant was entitled to be reassigned to the position, if he was qualified. 29 C.F.R. § 1614.203(g)." However, the Commission determined that the complainant was not qualified for the newly created full-time receptionist position. Here, the Commission concluded that "Even with a new headset, the complainant would still have to use an arm to answer and transfer calls. The complainant testified that the number of calls coming in kept him very busy. The complainant was restricted from repetitive motion with his right arm, activity required for answering and transferring calls with the right hand with the new headset, and at least transferring calls with the old headset. Use of the left hand was very restricted, to the point that it was the goal of the OWCP nurse to avoid any use of the left arm, and lifting a telephone receiver caused pain. Further, if the telephone was at the requested eye level, transferring calls at the telephone would require working with an arm above shoulder level, which the complainant was restricted from doing with the left arm, and possibly the right. Hence, the record shows transferring calls with the left hand was not an option. The complainant's successor supervisor testified that the complainant raised pressing the buttons on the telephone as an issue."

Porter v. Snow, Secretary, Department of the Treasury, Internal Revenue Service, 01A34131 (Nov. 3, 2004). The complainant failed to prove that he was discriminated against on the basis of his disability (blindness), when he was not selected for several clerical/secretarial positions with the agency; reading written materials was an essential function of that position and a reader, the accommodation asserted by the complainant, would impose an undue hardship on the agency.

Prioleau v. Potter, Postmaster General, USPS, 07A40021 (May 9, 2005). The Commission reversed an AJ's finding of disability discrimination, holding that complainant was not a qualified individual with a disability because, as to a possible reassignment (the reasonable accommodation of last resort), he failed to meet his burden of showing that, had the agency done a broader or more thorough search, it would have found a vacant funded position to which he could have been reassigned. Complainant, a mailhandler, was admitted to an outpatient mental health program and diagnosed with post-traumatic stress disorder, anxiety and

depression following "a physical altercation with a female co-worker" during which complainant was kicked in the buttocks. Shortly following complainant's return on assignment to limited duty work performing janitorial duties, complainant was injured on duty when he fell from a dock. Following this incident management offered complainant a modified mailhandler position but complainant declined, asserting that it violated his medical restriction against reaching above his shoulders. After a four month period under the care of a physician, complainant was released to return to part-time/restricted duty work. The agency unsuccessfully attempted to find a position for complainant outside of his duty location. One month later, complainant's physician gave complainant an additional restriction of not lifting over ten pounds, and noted that complainant had reached maximum medical improvement. In response the agency offered complainant a limited duty modified mailhandler position with janitorial duties outside of complainant's duty location. Complainant rejected this job offer. The agency did not subsequently make an additional job offer to complainant. Complainant filed an EEO complaint alleging that he was offered a job requiring him to perform work outside of his medical restrictions and that this was disability discrimination. An AJ issued a decision finding that the agency discriminated against complainant when it ceased engagement in the interactive process, which would have allowed the parties to identify and provide complainant with a reasonable accommodation. The agency's final order declined to implement the AJ's decision. The Commission found the AJ's conclusions to be inconsistent. Specifically, "the conclusion that the agency may have found an effective accommodation had the interactive process continued is speculative, and is not compatible with the AJ's determination that more likely than not, a vacancy existed." The Commission further found a lack of support in the record showing that the complainant met his burden that there were vacancies during the relevant time period into which he could have been reassigned. To meet this burden complainant must have showed "that more likely than not, had the agency searched at the relevant time, it would have found an appropriate vacancy for him." Complainant also failed "to show by a preponderance of the evidence that a funded vacancy for which he satisfied the prerequisites existed." The Commission distinguished the facts of the case from its decision in Rowlette v. Social Security Administration, 01A10816 (August 4, 2003).

Toso v. Mineta, Secretary, Department of Transportation, (Federal Aviation Administration), 01A30167 (Jan. 22, 2004). The Commission upheld the AJ's grant of summary judgment to the agency, with the AJ finding, among others, that

the complainant was not a qualified individual with a disability because he was unable to perform the duties of his Air Traffic Control Specialist position, with or without reasonable accommodation; his medical condition required him to take sedatives, which precluded him from performing air traffic control duties with live aircraft.

Velez v. Brownlee, Acting Secretary, Department of the Army, 01A15424 (Apr. 18, 2004). The complainant, a Licensed Practical Nurse, failed to show that the agency discriminated against her on the basis of a disability (allergy to latex), when it took approximately two years to reassign her to a new position; she did not prove that she was a qualified individual with a disability. In that regard, the Commission first held "that all of complainant's duties, in caring for patients and assisting physicians, involved contact with latex. As such, we find that the AJ's factual finding, that there was no reasonable accommodation available that would have enabled complainant to perform the essential functions of her LPN position, is supported by the record, and the record also supports a finding that complainant was requesting reassignment to another position as a form of reasonable accommodation." It also observed "that an agency's failure to conduct an appropriate search for a new position for complainant will not, by itself, result in a finding of discrimination" and that complainant failed to meet her evidentiary burden in reassignment cases, requiring proof that, more likely than not, there was a vacant funded position, for which she was qualified and to which she could have been reassigned. The Commission noted that absent evidence of a particular vacant funded position, "evidence that a vacant funded position existed may be inferred based on documentary or testimonial evidence regarding, inter alia: (1) complainant's qualifications; (2) the size of the agency's workforce; and (3) indicia of postings and/or selections during the pertinent time period within classes of jobs for which complainant would have been qualified."

IV. Request for Medical Information

Collier v. Potter, Postmaster General, USPS, 01A44289 (May 11, 2005). An agency was entitled to spend a reasonable amount of time – about two months in this case – obtaining and reviewing information concerning a possible reasonable accommodation and it was not discrimination based upon disability for the agency to do so. Complainant, a Mailhandler, filed an EEO complaint asserting that the

agency discriminated against him based upon his disability (back injury) when he was not approved for a bid job award. The position was awarded to complainant on June 14, 2003 but the agency had to seek input from the Union and to obtain medical information from complainant and have the manager of the position agree that complainant could be accommodated. After this was all done the complainant's bid for the position was subsequently approved on August 8, 2003. The Commission, without addressing the question of whether complainant was an individual with a disability, held that: "The agency was allowed to request documentation from complainant regarding his capabilities and it was entitled to spend a reasonable amount of time analyzing such information. We find that there was no denial of accommodation. We find that the delay in awarding complainant the position was not unreasonable and does not constitute discrimination."

Natalie v. Principi, Secretary, Department of Veterans Affairs, 01A35429 (Nov. 4, 2004). The complainant, a Contact Representative, failed to prove either of these consolidated complaints, in which he alleged that he was discriminated against on the basis of his disability (vertigo and inner ear infection), when the agency refused to allow him to continue working from home and discriminated against him on the basis of reprisal and disability, in several other ways, to include not granting requested leave without a doctor's statement, admonishing him for failure to provide medical documentation and placing him on AWOL and ultimately disciplining him for leave violations; the complainant failed to provide adequate medical opinion justification for his work at home accommodation and the agency had properly placed him in a restricted leave status, violated by him.

Parker v. Barnhart, Commissioner, Social Security Administration, 01A44610 (March 24, 2005). The Commission found that a request for updated medical documentation, after two years, concerning an ongoing reasonable accommodation was permissible and not disability discrimination. Complainant alleged the agency harassed her when she was required to sign a form authorizing the release of her medical records in connection with the continuation of her reasonable accommodation. An AJ issued a decision without a hearing finding no discrimination that was upheld by the Commission, which stated that the request was reasonable in that it occurred after complainant had been accommodated for two years and because the agency requested that information from all the employees with accommodations at the facility. The Commission noted that it has "held that the Americans with Disabilities Act allows an employer to ask an

individual for documentation when the individual requests a reasonable accommodation, when the disability and/or the need for accommodation is not obvious. While the Commission has also held that there are limits to the amount of medical documentation an agency may request, we concur with the AJ's finding that here, the request for updated medical documentation after two years, while the reasonable accommodation was ongoing, did not rise to the level of actionable harassment under the Rehabilitation Act. The Commission found "that even viewing the evidence in a light most favorable to complainant, we concur with the AJ's finding that the actions alleged do not constitute discriminatory harassment."

V. Direct Threat / Risk of Harm Defense

Boots v. Potter, Postmaster General, United States Postal Service (Special Panel June 23, 2005) - In a 2-1 vote, with the MSPB Chairman dissenting, the Special Panel found that the EEOC decision on in this case, which concerns the defenses available under the Rehabilitation, is based on discrimination law, and, on that basis, defers to the EEOC's decision; in that decision, the Commission determined that the agency committed disability discrimination by failing to do an individualized assessment as to risk of harm and excluding the complainant, an epileptic, based on a non binding DOD regulation. The employee worked as a Tractor-Trailer Operator for the agency since 1998. He was removed in 2002 for inability to perform his job duties after Department of Transportation regulations were changed to disqualify individuals who take anti-seizure medications from holding a Commercial Drivers' License(CDL), which was necessary to work as a Tractor-Trailer Operator. The Board sustained the removal action and rejected the appellant's allegation of disability discrimination, finding that the appellant was not a qualified individual with a disability because he could not meet the qualification standards for his job. In its decision, the Commission first observed that the agency had voluntarily adopted the DOT regulations at 49 C.F.R. § 391.41(b)(8), which otherwise specifically exclude transportation performed by the Federal government. Under those regulations, a person may operate a heavy vehicle if he or she "has no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause loss of consciousness or any loss of ability to control a commercial motor vehicle." In an accompanying "medical advisory", it was recommended that anyone who has had a non-epileptic seizure should be

evaluated on an individual basis but also recommends disqualification of a person who currently takes anti-seizure medication. The Commission then held that because the appellant was disqualified from operating a commercial motor vehicle (i.e., a class of jobs) he was an "individual with a disability" under the Rehabilitation Act. The Commission went on to address the matter of whether the appellant was a "qualified individual with a disability", noting that the agency may require, as a qualification standard, that an individual not pose a "direct threat," that is, a "significant risk of substantial harm" that cannot be eliminated or reduced by reasonable accommodation. The agency bears the burden of proof on that issue, and that burden is not met merely by the employer's subjective evaluation, or "except in cases of the most apparent nature, merely on medical reports." The Commission further observed that an agency makes a "direct threat" determination, under 29 C.F.R. §1630.2(r), by conducting an individualized assessment of the risk he or she presents. taking into account the duration of the risk, the nature and severity of the potential harm, the likelihood harm will occur, and the imminence of such harm. Evidence relevant to that assessment may include input from the employee, his work history, and medical opinion from experts or physicians familiar with the employee's condition. In that regard, it was relevant that prior to his removal, the appellant had possessed a valid CDL for many years, and he continued to hold one. He used anti-seizure medication, had a problem-free history with the agency, and his personal physician certified that he was qualified to operate a commercial motor vehicle. In any event, the Commission found that the agency here had not performed such an assessment and had relied solely on the DOT regulation, with which it was not required to comply. Because it differed with the MSPB, the Commission referred the case back to the Board for further consideration and issuance of a new decision. Upon referral, "the Board concluded that the USPS was entitled to adopt the DOT standards and once it had done so, it was required to comply with them - thereby making the standards binding on the USPS in the same way that they would apply to a non-government employer." Stated another way, in the MSPB's view, the USPS could rely on the regulations and disqualify the employee solely on the basis if the DOT regulations and without making a direct threat determination. This disagreement between the MSPB and the EEOC necessitated the instant Special Panel decision, in which the Special Panel sided with the EEOC.

Darnell v. Thermafiber, _____ F. 3d _____ (7th Cir. July 29, 2005). The employer proved its direct threat defense to the plaintiff's claim of disability discrimination. The plaintiff was a Type I insulin-dependent diabetic who worked for Thermafiber as a temporary employee for 10 months without problem. He left, and returned, applied for and was offered a full-time job, contingent on passing a physical. The examination was spare and consisted of a urine glucose test and an interview. Based on that, the doctor decided that Darnell's diabetes was not under control, and that he could not perform the physical aspects of the job. The doctor did not review Darnell's medical chart or conduct any other tests. In the court's view this was a sufficient "individualized assessment", revealing that Darnell had a history of poor compliance and failure to seek medical attention, that his blood sugar levels were too high, that he hadn't checked in with a doctor in several months, and that he was disinterested in regulating his condition. Accordingly , in the court's view, it was not necessary to conduct more tests or look into Darnell's prior medical history.

Fernandez-Guerra v. Potter, Postmaster General, USPS, 01A45206 (March 3, 2005), recon. den., 05A50690 (April 29, 2005). A complainant's conduct history and alleged threat against a coworker created a reasonable belief on the part of agency officials that he was a safety threat so the agency did not violate the Rehabilitation Act when it ordered him to undergo a fitness-for-duty examination and required complainant to provide periodic medical updates. The agency sent complainant for a fitness for duty exam after a co-worker reported that complainant had threatened to kill him. Although complainant was found to be fit for duty with no restrictions he was ordered by the agency to provide medical updates every sixty days to his manager. Complainant filed a complaint alleging disability discrimination, an AJ issued a decision without a hearing finding no discrimination that was adopted by the agency and complainant appealed to the Commission. The Commission noted that: "Because the restrictions on employers with regard to disability-related inquiries and medical examinations apply to all employees, and not just to those with disabilities, it is not necessary to inquire whether the employee is a person with a disability. Instead, we focus on the issue of whether the agency's order that complainant undergo a Fitness-for-Duty examination was lawful… The Rehabilitation Act places certain limitations on an employer's ability to make disability-related inquiries or require medical examinations of employees only if it is job-related and consistent with business necessity. Generally, a disability-related inquiry or medical examination of an

employee may be 'job-related and consistent with business necessity' when an employer 'has a reasonable belief, based on objective evidence, that: (1) an employee's ability to perform essential job functions will be impaired by a medical condition; or (2) an employee will pose a direct threat due to a medical condition.' It is the burden of the employer to show that its disability-related inquiries and requests for examination are job-related and consistent with business necessity" (citations omitted). The Commission stated that there was evidence of record that complainant: had previously exposed himself to an agency employee; been issued a 14-day suspension for physically assaulting a mail handler; and involved in an altercation with an agency manager that resulted in another suspension. The Commission noted the valid basis for requiring the medical exam at issue in the instant case and that the medical opinion that the agency received as a result of the examination was that complainant needed to continue with his treatment and his prescribed medications; therefore, management appropriately required documentation from complainant indicating that he was continuing with his treatment. The Commission concluded that that the agency met its burden of showing that the decision to order complainant to undergo the medical examination was job-related and consistent with business necessity and, accordingly, that the agency did not violate the Rehabilitation Act.

Ganson v. Potter, Postmaster General, United States Postal Service, 01A01214 (Feb. 12, 2004). The agency committed disability discrimination when it demoted the complainant from a vehicle Dispatcher to a Mail Processor position because his medical condition, insulin-dependent diabetic, precluded him from driving certain agency vehicles under DOT regulations; the agency failed to prove that the complaint posed a risk of harm, or, alternatively prove that the position could not be modified to remove the marginal driving requirement as a reasonable accommodation. The complainant began work as a dispatcher for the agency in March 1995 (He had been safely driving tractor trailers for the previous 15 years). In October 1995, the complainant went for a physical examination for the Dispatcher position, in accordance with Department of Transportation requirements for issuance of a commercial driver's license (CDL) for operation of vehicles over 10,000 pounds. (In 1994, the agency stopped issuing government licenses to operate motor vehicles and required drivers to obtain a CDL to operate vehicles in excess of 10,000 pounds and .decided that all holders of CDLs would be required to undergo biennial physicals to insure compliance with regulations promulgated by the Department of Transportation (DOT), and voluntarily adopted

by the agency "for reasons of safety."). Because he was an insulin-dependent diabetic, he did not pass the physical (He had not previously informed the agency of his condition) and consequently was precluded from driving tractor trailers over 10,000 pounds. The complainant requested that the Dispatcher position be restructured, as an accommodation, by removing the driving requirements but the agency refused and instead demoted him to the Mail Processor position. In upholding the AJ's finding of disability discrimination, the Commission addressed several issues, to first include whether the complainant was an individual with a disability. Because the evidence did not indicate whether the complainant was substantially limited in other major life activities, the Commission considered whether he was substantially limited in the major life activity of working. The Commission then noted that "To be substantially limited in the major life activity of working, one must be precluded from more than one type of job, a specialized job, or a particular job of choice. Sutton v. United Airlines, Inc., 521 U.S. 471 (1999)." In finding that the complainant met that standard, the Commission concluded that "complainant's diabetes renders him ineligible to drive commercial motor vehicles, subject to the DOT regulations as well as all vehicles to which the Postal Service has voluntarily applied the DOT standards. Consequently, complainant is significantly restricted from working as a driver of commercial motor vehicles as compared to the average person having comparable training, skills, and abilities." Concerning whether the complainant was a qualified individual with a disability, the Commission found that he was, principally relying on the undisputed evidence that the complainant "successfully and safely . . . [drove] commercial motor vehicles for the past 15 years." The next issue – and the focus of this decision - was whether the complainant was a "direct threat", that is, "a significant risk of substantial harm" which cannot be eliminated or reduced by reasonable accommodation. 29 C.F.R. § 1630.2(r)." Here, the Commission noted that the agency "has the burden of proof regarding whether there is a significant risk of substantial harm"; a "determination as to whether an individual poses such a risk cannot be based on an employer's subjective evaluation or, except in cases of the most apparent nature, merely on medical reports"; the employer must conduct an "individualized assessment that takes into account: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm. 29 C.F.R. § 1630.2(r)"; "this assessment must be based on objective evidence, not subjective perceptions, irrational fears, patronizing attitudes or stereotypes about the nature or effect of a particular disability or of disability generally"; and, "[R]elevant

evidence may include input from the individual with a disability, his work history or experiences in previous positions, and opinions of medical doctors who have expertise in the particular disability or direct knowledge of the individual with the disability." The Commission further observed that even it is "determined that an individual does pose a direct threat because of a disability, the employer must determine whether a reasonable accommodation would eliminate the risk of harm or reduce it to an acceptable level." The Commission then determined that the agency had failed to conduct an individualized assessment and had based its exclusion solely on the DOT regulations, which were voluntarily adopted, thereby failing to prove its direct threat defense. (The Commission noted in a footnote that mandatory regulations would have constituted a defense as to the complainant's performance of driving duties). The Commission further found that even if the direct threat defense had been proven, the driving responsibilities were marginal and not essential and that the complainant could be accommodated by the removal of the driving requirement from the dispatcher position. For this finding, the Commission primarily relied on evidence as to the need to perform such driving responsibilities and the failure of the agency to list driving a tractor trailer as a duty/responsibility of the Dispatcher position in the position description or the vacancy announcement. There was also no evidence that such a restructuring would be an undue hardship. In its order, the Commission provided the agency with the option of retroactively reinstating the complainant to his former Dispatcher position or an equivalent position with the reasonable accommodation of removing the driving requirements of the position.

Lewis v. Rumsfeld, Secretary, Department of Defense, (Defense Logistics Agency), 01A24984 (Aug. 10, 2004). In reversing the AJ's decision without a hearing, the Commission determined that the complainant was discriminated against based on his disability (Insulin Dependent Diabetes Mellitus), when he was denied a Temporary Duty (TDY) assignment to Germany and the agency failed to prove its risk of harm defense.

Masteller v. Potter, Postmaster General, United States Postal Service, 01994458 (Feb. 12, 2004). The agency failed to prove its direct threat defense and discriminated against the complainant on the basis of his disability, Multiple Sclerosis, when it disqualified him from driving a tractor trailer.

Mortensen v Roche, Secretary, Department of the Air Force, 01A24231 (Nov. 4, 2005). Concluding that there were material issues of disputed fact, the

Commission reversed the AJ's decision without a hearing that the agency did not discriminate against complainant on the basis of disability (amblyopia ("lazy eye")) when it did not hire him for the position of Equipment Specialist (Airframe). In the Commission's view, there were genuine issues of fact about whether the complainant was an individual with a disability (i.e., that was regarded as or had a record of a disability), whether the agency could have granted complainant a waiver of its requirements, and whether his eye condition would be a threat to safety. There was evidence that the complainant had previously performed "virtually the same job as the position at issue for most of his 21 years of active duty in the Air Force working as a Crew Chief on the same airplane (F-16) and on the flight line, dealing with all types of safety situations, including moving aircraft, ducking under aircrafts, and avoiding trucks." There was also evidence that the complainant had never encountered any medical problems while serving in remote locations, including an extended deployment in the Middle East during Desert Storm."

Spencer v. Ridge, Secretary, Department of Homeland Security (Border and Transportation Security), 05A30898 (Aug. 29, 2005). In this reconsideration decision, the Commission concluded that DHS failed to establish that the EEOC erred in finding that the agency subjected a monocular applicant to disability discrimination by determining that he could not safely perform the essential functions of a customs inspector position, without conducting an individualized assessment of the applicant's abilities. The two principle disputed issues concerned whether the applicant was disabled and, if so, whether the agency had proven its direct threat defense. As to the disability issue, the Commission found, as follows: "As stated in the previous decision, we find that complainant has shown that the effect of his impairment on his life renders him a person with a disability. The evidence shows that complainant had good visual acuity, i.e., complainant's vision in his right eye was 20/15, but, because he had no vision in his left eye, he had less peripheral vision (loss of visual field) and stereopsis (depth of perception). While he testified that he used his sense of hearing to ameliorate the absence of vision in his left eye, particularly to make up for the loss of his peripheral vision, hearing as a mitigating measure does not compensate for the loss of visual ability, in that, it does not allow him to see peripherally. Also, complainant's use of visual clues does not fully compensate his loss of depth perception. Thus, our previous decision correctly concluded that complainant's diminished peripheral vision and depth perception are not mitigated and that complainant's monocularity substantially

limits the major life activity of seeing; thus, complainant is an individual with a disability." Likewise, the Commission, in finding the direct threat defense unproven, noted that "we conclude that the agency failed to show that complainant would pose a direct threat, because it did not make an individualized assessment of the alleged risk posed by complainant and, instead, applied a blanket medical qualification without examining its specific application to the complainant. See Holmes v. USPS, 01977073 (October 20, 2000). Testimony and evidence about the general effect of monocular vision on the performance of the essential functions of the job was not sufficient to demonstrate that complainant's employment in the position posed a direct threat to safety. Complainant's skills, abilities, and experience demonstrated that he could perform the job requirements of the Customs Inspector position; the agency did not show that his disability posed a direct threat to the safety of self or others. See Van Parys v. USPS, EEOC Appeal No. 01991100 (August 22, 2001). The agency has the burden of proof regarding whether there is a significant risk of substantial harm, and the agency did not carry its burden. See Massingill v. Department of Veterans Affairs, EEOC Appeal No. 01964890 (July 14, 2000)."

Steinmetz v. Potter, Postmaster General, United States Postal Service, 01A54837 (Dec. 29, 2005), recon. den., 05A60416 (Mar. 3, 2006). In sustaining the AJ's decision without a hearing, the Commission held that the agency did not commit disability discrimination against the complainant, a Parcel Post Distribution Clerk, who had recurrent major depression, adjustment disorder with anxiety, when it removed him because his mental condition posed a threat to the safety of agency employees. The Commission summarized the evidence, as follows: "In the matter before us, the agency found that complainant was not qualified to return to work at the agency in any capacity. Specifically, the July 27-28, 1999, Fitness for Duty Evaluation conducted by a Psychiatrist, Counselor, and Clinical Psychologist determined that complainant posed a potential risk to the safety and health of others, specifically his supervisor and other postal employees. The report also indicated that complainant had thoughts of violence, owned firearms, was trained in martial arts, and indicated he would not care if he ended up in jail due to his actions. The report concluded that complainant's condition most likely would not change and further psychiatric treatment was unlikely to enable complainant to return to duty with the agency. While complainant states on appeal that Physician B thought he was able to return to work, and he indicates that he was ready willing

and able to start working, the Commission finds that based on the overwhelming weight of the evidence, complainant has failed to support his contentions. The record shows that following Physician B's finding that complainant could return to work, Physician A found that complainant had taken a turn for the worse and maintained that it would be a serious mistake to require complainant to return to work at the Postal Service. The Commission finds that this evidence in addition to the medical evidence provided by the panel demonstrates that complainant was a direct threat and supports the Administrative Judge's finding that complainant was not a qualified individual with a disability since he was unable to perform the essential functions of his duties with or without an accommodation. Accordingly, we find that complainant was not covered by the Rehabilitation Act and find that no discrimination occurred with respect to the agency terminating complainant. Finally, with respect to complainant's contention on appeal that he could have returned to the agency had he been assigned a new supervisor, coworkers and location, we note that even if complainant had been covered by the Rehabilitation Act, according to the Commission's Guidance, an employer does not have to provide an employee with a new supervisor as a reasonable accommodation. See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans With Disabilities Act (Enforcement Guidance), No. 915.002, question 33 (October 17, 2002)."

Surprenant v Potter, Postmaster General, United States Postal Service, 05A11071 (Feb. 12, 2004). The EEOC denied the agency's request for reconsideration, determining that it had correctly decided that the agency discriminated against the complainant on the basis of his disability (diabetes mellitis) when it reassigned him from his position as a Tractor Trailer Operator to the position of Vehicle Operations Assistant, relying on DOT regulations, and without proving that the complainant posed a direct threat.

VI. Reasonable Accommodation / Undue Hardship

Berrios v. Principi, Secretary, Department of Veterans Affairs, 01A31580, (Feb. 17, 2004). Even assuming that the complainant, a Computer Assistant, was an individual with a disability (hearing), the agency properly determined she was offered reasonable accommodation by assigning her a private office, even though she rejected the office based on its size. The complainant had submitted a letter from her doctor explaining that she had a hearing condition, and noting that she

needed a quieter work area. The agency offered her the rejected office, which had been tested by an audiologist, and deemed quieter than her current location. Thus, the agency met any obligations under the Rehabilitation Act.

Bustamonte v. Potter, Postmaster General, USPS, 01A41462 (July 6, 2005). Even assuming that complainant was disabled with an "aggravated adjustment disorder," requiring the agency to eliminate all risk of contact between complainant and the coworker and supervisor constituted an undue hardship. Moreover, even restricting them from "entering complainant's work facility would not be sufficient to eliminate this risk." As concluded by the Commission, "Based on this evidence, we find that the 'absolute' elimination of the risk of any type of contact in 'any way, fashion, or mode' whatsoever, between complainant and M [the coworker] and S[the supervisor] all working within the same district, over the course of time, would constitute an undue hardship for the agency. Therefore, under the circumstances of this case, we find no violation of the Rehabilitation Act."

Cater v. Potter, Postmaster General, United States Postal Service, 01A45638 (Feb. 15, 2005). The complainant failed to prove that there was a nexus between her disability, a lung impairment, and her requested accommodation, granting her a daytime work schedule. Here, the Commission described the medical evidence regarding the complainant's need to work a day schedule as "exceptionally scant." As concluded by the Commission, "The most detailed explanation from her physician was that complainant's 'work at night previously has involved working around machines which generate significant portions of dust and some degree of perhaps some fumes and it is my recommendation that she work day time hours to avoid exposure to these exacerbating factors.' However, there is no evidence in the record that working at night exposed complainant to more dust, fumes, or smoke than working the day shift. Unclear about the reason why complainant's condition made it necessary for her to work the day shift, the OWCP sought input from complainant's physician about the results of the dust analysis, but the physician failed to respond to the request for further information. . . . The most detailed explanation from her physician was that complainant's 'work at night previously has involved working around machines which generate significant portions of dust and some degree of perhaps some fumes and it is my recommendation that she work day time hours to avoid exposure to these exacerbating factors.' However, there is no evidence in the record that working at night exposed complainant to more dust, fumes, or smoke than working the day shift. Unclear about the reason

why complainant's condition made it necessary for her to work the day shift, the OWCP sought input from complainant's physician about the results of the dust analysis, but the physician failed to respond to the request for further information."

Cyr v. Chertoff, Secretary, DHS, 01A43015 (July 13, 2005). Even assuming that complainant, an Immigration Inspector, is a qualified individual with a disability due to side effects of medications taken for post-traumatic stress disorder, the Commission found that complainant's request for a reasonable accommodation would impose an undue hardship because the requested modified work schedule "impermissibly burdens the work schedules of co-workers." There was evidence that "the agency provided complainant with reasonable accommodation when complainant was temporarily assigned to the day shift, permitted to take short walks when he became tired and when he was excepted from the twelve hour shifts." In rejecting the accommodation suggested by the complainant, the Commission held that "providing complainant a permanent day shift would result in all other immigration inspectors having their day shifts eliminated. The record also reflects that all other immigration inspectors would be required to work additional weekend and overtime hours to make up for complainant's modified work schedule."

De John v. Potter, Postmaster General, United States Postal Service, 07A20030 (May 6, 2004). The agency discriminated against the complainant on the basis of his disability (deep vein thrombophlebitis), when his postmaster removed the chair he was using as a reasonable accommodation and forced him to stand while working. The agency initially allowed him to do that but a new postmaster removed the chair, purportedly because it was a safety hazard. The Commission rejected the agency's safety hazard argument.

Dolan and Nelson v. Potter, Postmaster General, USPS, 07A40064 and 07A40104 (April 28, 2005). The Commission noted that the agency adopted an AJ's finding that the agency failed to provide reasonable accommodation for two complainant's disabilities when the agency denied complainants' request for parking spaces within 200-400 feet of their work sites (the agency had provided "handicapped" parking in the employee lot some 700-800 feet away from the worksite), but the Commission reduced the AJ's back pay award to reflect the conflicting evidence regarding how much overtime was lost by the two complaints. The complainant's testified generally as to how much overtime they worked prior to the

discrimination but the agency presented evidence of the actual overtime worked by both complainants. Accordingly, the Commission decided: "In light of the differences, and in order to provide equitable relief in the amount that each complainant would have earned absent the discrimination, the Commission awards complainants the average hours of overtime worked per pay period by the other employees in their particular units" during the time in which the agency was found to have discriminated against complainants.

Eckenrode v. Potter, Postmaster General, USPS, 01A42463 (Jan. 13, 2005). The Commission found that the agency did not discriminate against a deaf complainant when it failed to provide a sign language interpreter for a meeting. Complainant discrimination on the basis of his disability (deafness) when a manager held a meeting with a question and answer session without a certified interpreter present to assist complainant. The meeting was scheduled for 1 a.m. in order to reach the greatest number of employees with the least amount of impact on mail flow and service The agency arranged for an interpreter but the scheduled interpreter did not show up due to car trouble and, due to the time of the meeting, it was not possible to provide a different interpreter at the last minute. The same information was scheduled to be provided at another scheduled meeting where interpreters would be present, complainant was also presented with related information in newsletters and on bulletin boards and the meeting did not involve the discussion of safety issues. Also, not all employees were required to attend as the information was also available at additional meetings and through other sources. The Commission stated: "Under the Rehabilitation Act, the agency's obligation to reasonably accommodate hearing impaired employees includes providing effective interpreter services during work-related activities where hearing impaired employees are expected to be present (citation omitted). The Commission has held that for a severely hearing impaired employee who can sign, reasonable accommodation, at a minimum, requires providing an interpreter for safety talks, discussions on work procedures, policies or assignments, and for every disciplinary action so that the employee can understand what is occurring at any and every crucial time in his employment career, whether or not he asks for an interpreter (citation omitted)." The Commission found that, under these circumstances, complainant had failed to prove that the agency did not provide reasonable accommodation to his disability.

Evanovich v. Potter, Postmaster General, United States Postal Service, 07A20029 (May 13, 2004). The Commission affirmed an AJ's finding that the agency failed to reasonably accommodate complainant's disability by not permitting him to sit

occasionally while working in order to alleviate pain in his hip caused by a deteriorated prosthesis, implanted more than 15 years previously. The Commission disagreed with the agency's argument that the chair posed a safety risk because no safety incident was reported during the three years complainant used the chair, and the agency made no effort to evaluate the risk of potential harm from the use of the chair. The Commission also found meritless the agency's argument that mail processing efficiency increased after removal of the chair; any increase in efficiency was not attributable to the chair's removal but rather to a new machine that was added and increased processing efficiency. The AJ and the Commission also found that the agency failed to accommodate complainant, when it reassigned him to the position of flat sorter, a job performed entirely while standing. While in that position, which caused complainant severe pain, complainant suffered a hernia, which delayed his planned hip replacement surgery by ten months. The Commission held that this failure to accommodate, and consequent injuries, justified the $70,000.00 award of compensatory damages.

Fitzgerald v. Powell, Secretary, Department of Defense, 01A30880 (Feb. 5, 2004). The Commission upheld the AJ's decision without a hearing, rejecting complainant's claim, among others, that the agency, by reassigning him out of Germany and to Japan, failed to accommodate his disability (bi polar disorder) because of "better medical treatment" in Germany. As to this reasonable accommodation claim, the Commission observed, as follows: "Assuming arguendo that complainant is an individual with a disability under the Rehabilitation Act, we find that complainant failed to produce sufficient evidence from which a reasonable fact-finder could conclude that the agency denied complainant reasonable accommodation. In reaching this conclusion and assuming arguendo that remaining in Germany 'for better medical treatment' is a form of reasonable accommodation within the meaning of the Rehabilitation Act, complainant has failed to provide any evidence to support his assertion that the medical treatment he would receive in Japan would be inferior to the treatment he received in Germany. Consequently, we find that the AJ properly issued a decision without a hearing for complainant's reasonable accommodation claim."

Gamelin v. Potter, Postmaster General, United States Postal Service, 01A22307 (Jan. 5, 2004). The complainant proved that she was discriminated against on the basis of her disability (insulin-dependent diabetic), when the agency changed her from a five-day to a six-day schedule. Complainant was employed as a Part-Time

Flexible Clerk. After she was informed that the agency wanted to return her to a 6 day schedule, she requested that the agency permit her to work a 5 day schedule because of her medical condition. In its decision, the EEOC determined that the complainant was an individual with a disability ("We find that complainant's medical condition was severe and permanent. Based on the above, we conclude that complainant is an individual with a disability within the meaning of the Rehabilitation Act because her diabetes substantially limits her ability to eat compared to the average person in the general population."), that she was "qualified" ("there is no evidence that complainant could not perform the essential job functions on a five-day week schedule. "), that a 6 day week was not an essential function of the job, that there was a nexus between the disabling condition and the requested accommodation (among others, medical evidence showed that complainant had to seek emergency medical care at a hospital, due to a severe hypoglycemic reaction and was "under the gun" at work when she previously worked a 6 day schedule), and the agency did not establish that permitting complainant to continue working a five-day work week would cause an undue hardship.

Harris-Noy v. Potter, Postmaster General, United States Postal Service, 07A40035 (Aug. 25, 2004). The complainant, a Clerk/Limited Duty, as found by the AJ and affirmed by the Commission, proved that the agency discriminated against her on the basis of disability (permanent rotator cuff impingement in her left shoulder) when it refused to allow the complainant to keep the plastic shield that she was using to shelter her from the cold air at work. The Commission also agreed with the AJ's award of $10,000.00 in non pecuniary compensatory damages for the 5 year period of the harm.

Heffley v. Potter, Postmaster General, USPS, 07A40138 (Mar. 17, 2005). The complainant was denied a reasonable accommodation because the agency failed to provide an interpreter to apply for Family and Medical Leave Act for complainant's unscheduled leave, which resulted in a letter of reprimand, as well as for safety and/or service training and an interpreter for training on the Flat Sorter Machine 100. The Commission rejected any claimed difficulty in "scheduling the services of an interpreter in a timely manner, " noting that "in the aftermath of the September 11, 2001 attacks, where the physical safety of complainant and her co-workers in the workplace was the subject of discussion, it is uniquely pressing for complainant to have access to the information being conveyed." As to the FMLA-

related discrimination, the Commission rejected the agency's contention that it had acted in good faith: "We also reject the agency's argument that it tried in good faith to reasonably accommodate complainant when requesting the interpretive service of a "really bad" non-qualified interpreter, a hearing impaired co-worker, complainant's boyfriend, and when providing written documentation to complainant. We find that the agency's failure to provide complainant with a qualified interpreter ultimately resulted in the issuance of the N-TOL #3 letter." [i.e., a letter of reprimand]. The Commission also concluded that while the flat sorter claim was outside the limitations period, it was sufficiently interrelated to the other claims that it could be addressed and remedied. And, even though there was no medical evidence, it upheld the AJ's award of $35,000.00 in non pecuniary compensatory damages, determining as follows: "Complainant submitted ample evidence of how she was devastated by the agency's actions. The AJ found that complainant experienced feelings of anger, frustration, unhappiness, depression, and feelings of being ignored by her supervisor. The AJ found that complainant credibly testified that she was very frustrated when the agency utilized employees to interpret for her who were not qualified because she could not understand what the employees were trying to communicate to her. The AJ found that complainant felt fearful of losing her job. Further, the AJ found that complainant experienced stress, headaches, upset stomach, and loss of sleep. Complainant also experienced shortness of breath, loss of appetite, and diarrhea. She took Tylenol on a daily basis because of the headaches cased by the stress. The AJ found that complainant's boyfriend credibly testified that he observed complainant as 'physically, emotionally, stressed out, sick all the time, complaining about her stomach problems. Just hard to live with, okay.' Complainant testified that because she was afraid of losing her job, she did not take leave for over a year and did not seek medical attention for her stress." Here, it also rejected, as suggested above, the agency's good faith defense to compensatory damages, finding that "bringing in complainant's boyfriend and another hearing impaired employee to interpret for complainant is not a good faith effort. Although the record indicates that the agency did, at times, have a staff interpreter available, a qualified interpreter was not consistently made available to complainant to enable her to have access to information that is provided to other similarly-situated employees without disabilities." Finally, the Commission disagreed with the agency's argument for an across the board reduction of attorney fees because the "complainant's claims are so closely intertwined as to be inseparable. The instant case involved a common core of facts and was based upon closely related legal theories."

Hernandez v. Potter, Postmaster General, United States Postal Service, 07A30005 (July 16, 2004). The Commission agreed with the AJ and found that the agency committed reasonable accommodation disability discrimination by failing to provide the complainant, a letter carrier, with the effective reasonable accommodation he had been provided for many years before the arrival of a new supervisor -- assignment to job duties within his medical restrictions; committed disability harassment discrimination by numerous actions, to include persistently refusing to honor the complainant's medical restrictions; and, committed reprisal harassment by making comments to employees, including the complainant, reflecting his "disdain for the EEO process", which constituted attempts to deter employees from participating in the EEO process (e.g., he told complainant that while he can bring an EEO complaint, he will have to prove his claims before a third party who will be more likely to believe management).

Hyche v. Nicholson, Secretary, Department of Veterans Affairs, 01A41471 (Sept. 30, 2005) The Commission found that the agency did not violate the Rehabilitation Act by denying the complainant, a Respiratory Therapist, a permanent daylight shift. As noted by the Commission, "Under the circumstances of this case, where complainant's medical documentation failed to confirm that driving to work at night (or working the night shift) would result in an injury to her eyes, or increase the risk of graft rejection, or that driving at night was unduly dangerous or difficult, we find that the agency did not violate the Rehabilitation Act when it denied complainant's request for a permanent daylight shift as a reasonable accommodation for her vision impairment."

Iftikar-Khan v. Potter, Postmaster General, United States Postal Service, 07A40137 (Dec. 16, 2005). The agency discriminated against the complainant, a mailhandler, on the basis of her disability, Sarcoidosis, (an inflammatory disease that affects multiple organs in the body, but mostly the lungs and lymph glands), by not accommodating her request to be assigned to do work in the cubby hole, the mimeo room or the flat preparation area, which were less dusty. The Commission, as had the AJ, also rejected as ineffective the accommodation of allowing the complainant to use a mask ("complainant testified that she could not use them because they made her feel as if she was suffocating" and "the warnings on the side of the box of masks . . . stated that individuals with breathing conditions should not use the masks.") and inadequate that it provided complainant with a

work environment within OSHA standards ("The OSHA requirements do not take into consideration complainant's specific medical needs and limitations. As such, we concur with the AJ's finding that the OSHA standard is irrelevant as to complainant's environmental needs."). The Commission also determined that the agency failed to prove that it would be an undue hardship to allow the complaint to work where she requested. Here, the Commission concluded that while the agency asserted that it would have been a violation of the CBA to assign complainant to work in those spaces, "the record clearly demonstrated that the agency consistently placed modified mailhandlers, including complainant, in those work stations for years prior to complainant's request. Therefore, we find that the agency has not shown how assigning complainant to the cubby hole, the mimeo room or the flat preparation area would have been an undue hardship." The Commission also agreed with the AJ that complainant was entitled to $9,000.00 based on the agency's failure to provide a reasonable accommodation.

Kelly v. Potter, Postmaster General, United States Postal Service, 01A42499 (Aug. 30, 2004). The complainant, a Mail Processing Clerk, was discriminated on the basis of his disability (deafness) when he was not provided with an interpreter during a service talk on anthrax. This case involved the discovery of white powder on a machine, during complainant's shift, and during which local police and postal inspectors interviewed employees, in an apparent emergency situation. The agency argued that the "unusual" and "emergency" circumstances, were such that a reasonable person could not find that the failure to provide complainant an interpreter constituted a violation of the Rehabilitation Act. The Commission disagreed, concluding that "in this extraordinary circumstance, where the physical safety of complainant and his co-workers in the workplace was the subject of discussion, it was uniquely pressing for complainant to have access to the information being conveyed. We further find that the agency has not persuaded the Commission that the provision of an interpreter to complainant on October 17, 2001 or October 23, 2001, would have caused an undue hardship."

Kendall v. Ashcroft, Attorney General, Department of Justice, 03A50006 (Jan. 31, 2005). The Commission affirmed an MSPB AJ's finding of no disability discrimination for a complainant with a sleep disorder who requested that he be allowed to arrive at work whenever he was able, finding that such an accommodation is not reasonable on its face. Complainant, an Intelligence

Research Specialist at the agency's Drug Enforcement Administration filed a mixed case appeal with the MSPB alleging age and disability discrimination (delayed sleep phase syndrome and sleep apnea) when he was removed him from his position based on a charge of excessive absence without leave (AWOL). Complainant's work schedule had been from 9 a.m. to 5:30 p.m. He requested a change in his work schedule so that he could arrive at work at 11:00 a.m. as a reasonable accommodation for his sleep disorders. Additionally, he requested that in the event he could not arrive by 11 a.m., he be allowed to alter his schedule based on his arrival time and then work a full eight hour day. Management denied both of petitioner's requests but changed his schedule work hours to 10 a.m. until 6:30 p.m. Subsequently complainant rarely reported for duty by 11:00., let alone his 10 a.m. start time. The agency placed him in an AWOL status for his multiple late arrivals and eventually removed him based upon these AWOLs. An MSPB AJ found no age or disability discrimination. Complainant appealed to the Commission, which noted that: "In order to establish disability discrimination, (complainant) must show that: (1) he is an individual with a disability, as defined by 29 C.F.R. § 1630.2(g); (2) he is a qualified individual with a disability pursuant to 29 C.F. R. § 1630.2(m); and (3) the agency failed to provide a reasonable accommodation." The Commission held that complainant failed to prove that the agency failed to provide a reasonable accommodation, stating that a reasonable accommodation must be effective, that the word "accommodation" conveys the need for effectiveness. Second, a reasonable accommodation needs to be reasonable on its face, i.e., plausible or feasible. The Commission held that complainant's request would not have been effective, noting that he rarely reported for duty by 11:00 a.m. The Commission determined that the record indicates that the only effective accommodation would have been to allow complainant to report to work whenever he was able. However, such an accommodation is not reasonable on its face. The Commission stated that: "It is not 'plausible' or 'feasible' for an employer to excuse chronic erratic absenteeism and tardiness by an employee who cannot provide timely notice sufficient to enable the employer to ensure adequate staffing. Thus.. (complainant) failed to show that there was an effective and feasible accommodation that the agency could have provided." As to petitioner's claim of age-based discrimination, the Commission affirmed the MSPB AJ's determination that the agency articulated legitimate, nondiscriminatory reason for its action, namely the excessive absence without leave, and complainant did not prove this reason was pretextual.

McCleese v. Potter, Postmaster General, United States Postal Service, 01A32993 (Apr. 22, 2004). The Commission found that the agency discriminated against complainant, as determined by the AJ, based on disability and age, when it failed to provide him with a reasonable accommodation of a workstation in close proximity to the restroom, and increased the AJ's award of $2,500.00 in non pecuniary damages to $7,500.00.

McNeil v. USPS, 105 LRP 21550 (May 134, 2005). In an emergency, a report is a reasonable alternative to interpreter. The Commission affirmed a finding of no discrimination on complainant's claim that the agency denied her a reasonable accommodation. The Commission found that the agency's failure to provide an interpreter at an emergency town hall meeting was not discriminatory because the event occurred unexpectedly and management made a good faith effort to hire an interpreter for the event. It also attempted to give the complainant written copies of what occurred at the meeting. The Commission found that these efforts constituted reasonable accommodations.

Moos v. Barnhart, Commissioner, Social Security Administration, 01A33798 (June 24, 2004). The complainant, a GS-11 Claims Representative, did not prove that the agency discriminated against him by refusing to provide him with an ergonomic wheelchair; EEOC regulations "generally do not require agencies to provide personal use items such as eyeglasses and wheelchairs." Moreover, even if the complainant was entitled to a wheelchair, the agency offered another reasonable accommodation, use of a personal assistant.

Natalie v. Principi, Secretary, Department of Veterans Affairs, 01A35429 (Nov. 4, 2004). The complainant, a Contact Representative, failed to prove either of these consolidated complaints, in which he alleged that he was discriminated against on the basis of his disability (vertigo and inner ear infection), when the agency refused to allow him to continue working from home and discriminated against him on the basis of reprisal and disability, in several other ways, to include not granting requested leave without a doctor's statement, admonishing him for failure to provide medical documentation and placing him on AWOL and ultimately disciplining him for leave violations; the complainant failed to provide adequate medical opinion justification for his work at home accommodation and the agency had properly placed him in a restricted leave status, violated by him. In relation to the rejection of the requested accommodation, the Commission observed: "[W]e concur with the AJ's finding that complainant failed to present evidence that it was

more likely than not that the agency's articulated reasons for its actions were more likely than not a pretext for disability discrimination. As found by the AJ, regarding complainant's allegations of disability discrimination, the agency did not provide the accommodation initially requested by complainant, as management sought a diagnosis of complainant's illness and he did not provide a document verifying the need for the accommodation he sought. . . The AJ further noted that although complainant sought to work at home full-time, without further credible medical documentation, the agency's requirement that he work at the facility per week from 9:00 a.m. to 2:30 p.m., in a clean and quiet area, so he could leave while there is still light out, with adequate time for breaks when his impairment flairs up, was adequate."

Nutter v. England, Secretary, Navy, 01A51902 (Mar. 28, 2005). The Commission upheld the AJ's decision without a hearing, finding that complainant failed to establish that the agency violated the Rehabilitation Act as to her request for the reasonable accommodation, a disability parking space near the agency's entry; instead the "agency implemented a wheelchair service to wheel complainant from the parking lot to her building" and, "there is no evidence that the wheelchair service was made in bad faith or that the wheelchair service was an ineffective accommodation." The Commission noted "that the agency is not required to provide the reasonable accommodation that the employee wants." This case involved a Human Resources Assistant, who requested a designated parking space in front of the building because of her end stage renal disease and dialysis treatment, with supporting medical information.

Offley v. Potter, Postmaster General, United States Postal Service, 07A30053 (Feb. 10, 2004). The agency discriminated against the complainant on the basis of his disability (heart condition), when it abolished his medical accommodation (allowing him to work the day shift) after 2 years, forcing him to resign and, as a result, the complainant was entitled to $75,000.00 in non pecuniary compensatory damages. (See also Compensatory Damages).

Schrager v. Potter, Postmaster General, USPS, 01A41832 (July 12, 2005). The agency provided a reasonable accommodation to a hearing impaired complainant by providing the same information in a subsequent meeting. This case involved a town meeting at the facility to address "escalating unrest" and other issues as to the

workplace environment. Management held the meeting on all three tours but despite the agency's efforts, a certified interpreter was not available for tour 3. In finding against the complainant, the Commission held, as follows: "Here, we find that the recapping of the meeting at subsequent meetings constitutes a reasonable accommodation under the circumstances. See McNeil v. United States Postal Serv., EEOC Appeal No. 01A40468 (May 13, 2005). We remind complainant that she is not entitled to the accommodation of her choice. See EEOC Enforcement Guidance of Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, question 9 (October 1, 2002). Here, the meetings were called at the last minute, and the agency attempted to secure the services of interpreters, but could not do so. As an alternative, the agency provided the information in a subsequent meeting. Thus, we find the agency, in good faith, attempted to secure a qualified interpreter, and in this case, provided a reasonable accommodation. Because of our disposition, we do not address whether complainant is an individual with a disability under the Rehabilitation Act."

Tate v. Potter, Postmaster General, United States Postal Service, 01A24423 (Apr. 1, 2004), request for reconsideration denied, 05A40756 (June 24, 2004). The agency failed to accommodate the complainant's disability (leg, knee, hip, back, and neck) by not providing her with a "lumbar chair with arm rest" as recommended by her physician. As found by the Commission, "The agency was aware of complainant's limitations and of the need for accommodation, but neither provided the requested chair nor established a defense to doing so, e.g., that providing the chair would entail undue hardship. The Commission therefore finds that the agency failed to provide complainant with reasonable accommodation." The Commission rejected the argument made by the agency that complainant was provided with a "back supported chair, i.e., a chair with a back", noting that "complainant provided a detailed account, unrebutted by the agency, explaining how she was made by management to locate a chair suitable for her use on an ad hoc basis, and how, on at least one occasion, the chair she located was taken away from her and given to another employee." Finally, as to compensatory damages, the Commission held that "the agency did not make a good faith effort to provide complainant with reasonable accommodation [and therefore] complainant may be entitled to compensatory damages."

Taylor v. Norton, Secretary, Department of the Interior, 01A34292 (Apr. 3, 2004). The agency discriminated against the complainant on the basis of her disability

(hearing impairment), when it required her to attend training without a competent note taker. The EEOC also awarded the complainant $3,000.00 in non pecuniary compensatory damages.

Wagner v. Gonzales, Attorney General, Department of Justice, Bureau of Prisons, 01A42734 (July 28, 2005), recon. den., 05A51191 (Sept. 12, 2005). The agency did not commit disability discrimination, when it found that complainant's request to work out of her Cooperstown, N.Y., home, rather than her home in the District of Columbia was not feasible. The complainant worked as a Contract Specialist, GS-1102-12, at the agency's Construction Contracting Section of the Procurement and Property Branch in Washington, D.C. In support of its decision, the Commission cited agency evidence that the move would "damage office productivity, "adversely effect services to customers; "cause the Agency to incur large additional costs", the "Flexiplace Program would not work well with complainant because her requested New York location would be 'highly inconvenient', and, "there would be no way for complainant 'to participate in even a limited number of meetings without the agency having to expend considerable cost for her transportation.'"

VII. Employee Not Entitled to Accommodation of Choice if Otherwise Reasonable

Peluso v. Barnhart, Commissioner, Social Security Administration, 01A34791 (Dec. 17, 2004). While the accommodation offered was not the accommodation desired by the complainant, it was a reasonable accommodation nonetheless. The complainant worked in the agency's Manhattan Office of Hearings and Appeals. She suffered from heart disease, respiratory problems, chronic bronchitis, post traumatic stress disorder, and anxiety attacks. Her doctor provided that "her long commute to work in a high risk-security area is exacerbating her anxious symptoms and having a profoundly negative impact on her treatment", and concluded that she should be "transfered [sic] to a work location closer to her residence." The agency offered complainant a transfer to Jericho, a location closer to her residence, which the AJ found was reasonable and that the commuting distance to Jericho was within complainant's medical restrictions. However, that location was not among the choices identified by the complainant. The EEOC agreed with the AJ and rejected the complainant's claim, noting that the

complainant "has not shown that the transfer offered was beyond her medical limitations", that the accommodation offered to her was reasonable and that an "agency is obligated to supply an individual with a disability a reasonable accommodation, not the accommodation of complainant's choice."

VIII. Inquiry Discrimination

Brady v. Potter, No. Civ. 02-1121 (DWF/SRN), 2004 WL 964264 (D. Minn, Apr. 30, 2004). While an employer may ask applicants if they are able to perform job-related functions, it may make no further medical inquiries under the Rehabilitation Act, prior to making a conditional offer of employment; however, because the parties disputed the material issue of whether the agency had offered the plaintiff a position by the time of its specific medical inquiries, summary judgment was inappropriate. The inquiries concerned questions which elicited responses that the complainant was under the care of a psychiatrist for depression.

Burgos v. Potter, Postmaster General, United States Postal Service, 01A50009 (March 15, 2005). The Commission found that the AJ's issuance of a decision without a hearing was appropriate, rejecting the complainant's claim of reprisal when he was sent for a fitness for duty (FFD) examination. In agreeing, the Commission noted that the AJ determined that "the agency had given complainant an explanation for sending him to a FFD. Specifically, the AJ found that a Maintenance Manager noted in the written request for complainant's FFD that complainant was having problems completing his duties in a timely manner having been away from his air-conditioned work station for over 50 minutes. He stated that complainant told him that he was resting because the heat was getting to him. The AJ noted that complainant was sent to the FFD to determine if he could perform the duties of his position without being a hazard to himself or to others. The results of the FFD were that complainant could not perform the duties without hazard to himself or others. The AJ concluded that the agency provided a legitimate, nondiscriminatory reason for making complainant take the FFD and that the agency's action was not motivated by retaliation."

Cimo v. Rumsfeld, Secretary, Department of Defense, 01A52441 (Aug. 25, 2005). The Commission agreed with the AJ and found that the complainant, a material handler I, did not prove disability discrimination, as to his allegation that an agency

nurse improperly contacted his doctor to ask about his discharge conditions after he was hospitalized for an attempted suicide or an allegation that he was sent for fitness-for-duty examinations on three occasions. As to the first allegation, the Commission concluded that while the "agency contacted the doctor without complainant's consent . . . whether an agency may contact an employee's physician without his or her permission is outside the purview of the Rehabilitation Act." As to the fitness for duty exam allegations, the Commission described the that "it may be job-related and consistent with business necessity for an employer to make disability-related inquiries or require a medical examination . . . when the employer has a reasonable belief, based on objective evidence, that (1) an employee's ability to perform the essential job functions is impaired by a medical condition; or (2) that an employee poses a direct threat due to a medical condition. . . . Objective evidence is reliable information, either directly observed or provided by a credible third party, that an employee may have or has a medical condition that will interfere with his/her ability to perform essential job functions or will result in direct threat." The Commission then concluded that the agency had "objective evidence that complainant may have posed a direct threat due to his mental disability. Complainant became agitated on a number of occasions, had told a supervisor that he was having 'bad thoughts' about other employees and about his wife, and he had attempted suicide. Therefore, the agency was within the bounds of the Rehabilitation Act when it ordered the fitness for duty physicals."

Courtney v. Potter, Postmaster General, United States Postal Service, 01A31508 (Feb. 5, 2004). The complainant did not prove that the agency made an improper medical inquiry or otherwise committed disability discrimination when it requested medical documentation for her 16-month absence, ordered a fitness-for-duty examination, and changed her work schedule. While working, the complainant became depressed, suffered a mental breakdown, which resulted in a sixteen-month absence. As found by the AJ, the medical documentation the complainant provided upon her return to work did not address the work conditions which gave rise to her depression and breakdown, and therefore did not present "a fully reasoned explanation that complainant could perform her job function without a threat to her own health and safety." As a result, the agency required a Fitness for Duty examination, which led to the instant complaint. The Commission first noted that "an agency may only require a medical examination, or make other medical inquiries, of an employee if that examination and/or inquiry is job-related and consistent with business necessity." In finding the Fitness for Duty examination

requirement proper, the Commission determined as follows: "the record reveals that the complainant's extensive absence came about when she suffered a mental breakdown caused by her work at the agency, and particularly by the job position she held, the duties she performed as part of that position, and her relationship with the Postmaster of the facility at which she worked. The record also reveals that the medical documentation provided by the complainant upon her return did not sufficiently address the conditions in the workplace which gave rise to her breakdown, especially in light of the nature and severity of her prior adverse reaction to her working conditions, and that the agency's response to the insufficiency of the provided medical information was reasonable under these circumstances, as well as in keeping with its policy on information required from employees returning to work after an extended medically-related absence."

Darcangelo v. Potter, Postmaster General, United States Postal Service, 01A50399 (Dec. 2, 2005). While the complainant failed to prove that it had an effect on the agency's rescission of the offer to her (she even ultimately got the position), the agency violated the Rehabilitation Act by requiring that the complainant fill out medical assessment forms, during her pre employment interview. Accordingly, the Commission directed agency to review its "pre-employment process, in particular, the use of medical assessment questionnaire(s), . . . [and] revise such pre-employment forms and procedures as necessary to ensure that the inquiries comply with the Rehabilitation Act of 1973 . . . ." The Commission described the medical assessment form process, as follows: "The record indicates that at the time of the interview, complainant was required to complete three (3) medical assessment forms which solicited information about complainant's medical condition and her ability to perform the BEM position. We note that an employer may not ask an applicant disability-related questions until after it makes a conditional job offer to the applicant. See Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act (ADA), EEOC Notice No. 915.002 (July 27, 2000); see also, EEOC Enforcement Guidance: Pre-employment Disability-Related Questions and Medical Examinations, EEOC Notice No. 915.002 (October 10, 1995). Any employee, regardless of whether he or she is an individual with a disability under the Rehabilitation Act, has a right to challenge a disability-related inquiry or medical examination that is not job-related and not consistent with business necessity. See EEOC Enforcement Guidance: Disability-Related Inquiries and

Medical Examinations of Employees Under the Americans with Disabilities Act, EEOC Notice No. 915.002 (July 26, 2000)."

Edwards v. Principi, Secretary, Department of Veterans Affairs, 01A30010 (Feb. 11, 2004). While the complainant did not prove non selection discrimination, he proved that the agency violated the Rehabilitation Act by making an improper inquiry during his interview. The complainant applied for a temporary file clerk job. During the interview, the selecting official asked the complainant "whether he could really do the job since he was 'drawing disability' for his back, flat feet, and bad leg." The Commission initially observed that "Because the restrictions on employers with regard to disability-related inquiries and medical examinations apply to all employees, and not just to those with disabilities, it is not necessary to inquire whether the employee is a person with a disability." It also noted that the employer may make "pre-employment inquiry into whether an applicant can perform any or all job functions." However, it determined that the above-described inquiry was improper and explicitly prohibited by EEOC Regulation 29 C.F.R. § 1630.13. As a remedy, the Commission ordered the agency to revise its pre-employment process to eliminate the prohibited inquiries. It further directed the agency to conduct an investigation as to the complainant's entitlement to compensatory damages.

Gloger v. Potter, Postmaster General, USPS, 01A31462 (Feb. 10, 2005), recon. den., 05A50640 (April 25, 2005). The Commission violated the Rehabilitation Act when it referred complainant for a fitness for duty exam related to complainant's heart condition because the agency failed to prove that the referral was job related and consistent with business necessity. Complainant, a Mailhandler in Portland, Oregon had a history of problems with coworkers and supervisors (including instigating an altercation with a coworker that included physical contact) filed seven EEO complaints with regard to various terms and conditions of his employment. An AJ found no discrimination on the complaints. The Commission generally upheld the AJ's decision but held that the AJ erred as a matter of law when he found no discrimination with regard to the agency's referral of complainant for a fitness-for-duty exam (FFDE). The Commission explained that: "An employer may require medical examination of an employee only if the examination is job-related and consistent with business necessity. This requirement is met when the employer has a reasonable belief, based on objective evidence, that (1) an employee's ability to perform essential job functions is impaired by a

medical condition; or (2) that an employee poses a direct threat due to a medical condition." The stated reason for the FFDE was that complainant was known to have a heart condition, and that his continued "stressing" over minor details and personality conflicts could cause him physical harm. However, the agency did not demonstrate that it possessed a reasonable belief, based on objective evidence, that complainant's heart condition impaired his ability to perform the essential functions of his position, or that complainant posed a direct threat to himself or others on account of his heart condition. At the time complainant was referred for the initial FFDE, the objective evidence before the agency indicated that complainant in fact had no limitations, but that his physician was recommending a four-day work-week because that was what complainant desired. Therefore, the agency did not meet its burden to show that its referral of complainant for the initial FFDE was job-related and consistent with business necessity. Accordingly, the Commission held that the agency discriminated against complainant in violation of the Rehabilitation Act by referring him for the FFDE.

Haviland v. Potter, Postmaster General, United States Postal Service, 01A30375 (May 4, 2004). Although the Commission affirmed the agency's decision that complainant was not qualified for the position of Data Collection Technician because of a health-related work restriction (his physician limited his ability to work a swing shift, as required for the position to which complainant applied), the Commission also held that the agency erroneously required complainant to submit to a medical examination prior to a job offer and not in response to a request for accommodation.

Kelly v. Evans, Secretary, Department of Commerce, 01A30554 (May 11, 2004). Although the Commission found that the agency violated the Rehabilitation Act by making inquiries regarding job applicants' disabilities prior to making a conditional offer, it held that complainant's disability discrimination claim failed because of a lack of causal connection between complainant's nonselection and the disability inquiry; the agency presented evidence that the vacancy announcement was cancelled due to lack of funding, not due to the inquiry. Nevertheless, the Commission stated that complainant may be eligible for compensatory damages for the inquiry violation and remanded for a determination. The Commission also ordered the agency to remedy its job application procedures and consider disciplining the responsible officials. The complainant applied for the position of Production Assistant with the National Institute of Standards and Technology

(NIST), identifying herself as eligible for Schedule A positions, but did not otherwise explain the nature of any disability. Before the interview, all applicants were asked to fill out Standard Form (SF) 177, "Statement of Physical Ability for Light Duty Work." There were three sections, "physical limitations," "physical endurance factors," and "environmental factors." As described by the EEOC "The sections asked the applicant to answer "yes" or "no" to questions. The first section asked the applicant whether they had problems reading (small newspaper print), seeing (distant objects), hearing (telephone conversations), or speaking (person to person, groups, and telephone conversations), using arms, hands or fingers, and whether the applicant had any amputations or other abnormalities to the legs, hands, arms or fingers. The first section also asked the applicant, "do you have any disease or disability which would make your employment in light duty work a hazard to yourself or others?" The second section of the form asked whether the applicant was physically able to perform activities involving sitting, standing, walking, occasional pushing (for example, file drawers), frequent pushing, occasional lifting objects up to 12 pounds and occasionally lifting objects up to 25 pounds (for example, lightweight equipment)." On appeal, the agency asserted that the questions were not improper and that the form only asked questions that were permissibly related to complainant's ability to perform the job functions. The Commission rejected that argument, concluding that "The form did not make a sufficient attempt to narrowly tailor the questions for the Production Assistant position. Indeed, the form explicitly asks whether the applicant has amputations or problems hearing or seeing. Furthermore, the form posed questions about major life activities. Questions about whether an applicant can perform major life activities are almost always disability-related because they are likely to elicit questions about a disability. See Enforcement Guidance: Pre-employment Disability-Related Questions and Medical Examinations, EEOC Notice No. 915.002 (October 10, 1995)." The Commission also rejected a second agency argument that the questions were proper - that the case fell within the exception to the rule that allows for an employer to ask certain limited questions regarding potential reasonable accommodation when an applicant has "voluntarily disclosed that they have a disability. See Enforcement Guidance: Pre-employment Disability-Related Questions and Medical Examinations, EEOC Notice No. 915.002 (October 10, 1995)." Here, as observed by the Commission, "As an initial matter, we do not necessarily find that SF-177 "Statement of Physical Ability for Light Duty Work" was limited to questions regarding complainant's potential accommodation. Indeed, we have already found that the form posed disability-

related questions. Furthermore, we disagree with the agency that complainant disclosed that she had a disability; rather, complainant's application only alerted the agency that she was eligible for a Schedule A appointment. Finally, we do not find the agency's contention credible given that there is no dispute that the agency requested this information of all applicants, not only complainant. To follow the agency's line of reasoning and justify that the form was an attempt to assess the applicants' needs for an accommodation, the agency would have had to establish that all applicants had obvious disabilities, or disclosed disabilities. Here, the agency does not argue or present any evidence that this was the case. Accordingly, we find that by using the SF-177 prior to making an offer of employment, the agency committed a violation of the Rehabilitation Act, and thus a form of prohibited disability discrimination. See, e.g., Kelly v. Department of Commerce, EEOC Appeal No. 01A01247 (June 26, 2001); Dereyna et al. v. Department of the Navy, EEOC Appeal No. 01980077 (Jan. 19, 2001); Nolan v. Department of the Army, EEOC Appeal No. 01975113 (November 1, 2000)."

Leonel v. American Airlines, Inc., No. 03-15890 (9th Cir. Mar. 4, 2005). Because American Airlines had not extended a "real" job offer to appellants at the time the medical examinations took place, since the offers were subject to both medical and non-medical conditions, American could not require applicants to disclose personal medical information about their HIV status until they assured the applicants that they had passed all non-medical stages of the hiring process. Leonel, Branton, and Fusco (three applicant appellants) failed to disclose personal medial information regarding their HIV status during a pre-employment medical examination and on application documents submitted to American Airlines (American). After learning of the appellants' HIV-positive status, American rescinded the appellants' conditional employment offers for failure to disclose such information. The appellants' challenged American's employment policy as a violation of the Americans with Disabilities Act and California's Fair Employment and Housing Act. The district court granted summary judgment in favor of American. On appeal, the Ninth Circuit reversed and remanded.

Mearns v. Potter, Postmaster General, United States Postal Service, 07A20015 (Sept. 29, 2004). While the agency could have asked complainant, who stuttered, if he could perform the essential functions of the Postal Police Officer position, or required him to demonstrate his ability to perform the essential functions of the position, such as de-escalating potentially violent situations, using firearms and

walkie-talkies, and giving directions and information orally, the selecting Inspectors violated the Rehabilitation Act by determining and advising complainant that he would no longer be considered for the position due to his speech impediment and, more than five months later, improperly directing complainant to attend a medical examination, before it provided him with a clear, conditional job offer. The Commission further found, however, that complainant failed to prove that he would have been selected for the Police Officer position. The Commission also summarily upheld the AJ's award of $15,000.00 in non pecuniary compensatory damages. The complainant worked as a Letter Carrier and applied for the position of Postal Police Officer. He took the examination for that position, received a score of 85 and was interviewed by the Officer in Charge (OIC), who wrote "heavy stuttering" on complainant's application folder. Following the interview, the OIC advised the Postal Inspectors involved in the hiring process that complainant had a severe stutter, after which they concluded that complainant was not qualified to perform the essential functions of the position because of his stutter, contacted complainant by telephone and informed him that he would no longer be considered for the position due to his stutter. The complainant then wrote the agency, asking the agency to provide him a written reason for his rejection. About this time, a Human Resources Manager advised one of the selecting Postal Inspectors that "absent a medical assessment that this individual's physical disability prevents him from performing the essential functions of the position, he cannot be disqualified due to his disability." Still, the agency sent complainant a letter indicating that he would not receive further consideration for the Postal Police Officer position but, less than 2 weeks later, sent another letter stating that the previous letter was issued in error, and that it would continue to consider him for the position. Three months later, the agency informed complainant that he was scheduled for a medical examination but he refused to take the examination, withdrew his application, and filed an EEO complaint. Concerning the non selection issue, the Commission noted as follows: "The Commission further finds, however, that complainant failed to prove that he would have been selected for the position. Complainant testified that he refused to continue the hiring process because Inspector-1 had already informed him that he would not get the position, and he believed that he would not be allowed to return to his Letter Carrier position if he failed the required ten-week training or his six-month probationary period. . . . The record reflects that, on September 3, 1996, complainant received a letter from the agency stating that its August 23, 1996 letter was issued in error, and that it would continue to consider him for the position.

Since complainant chose not to continue the hiring process after the agency insured him that they would consider him for the position, we find that complainant has failed to prove by a preponderance of the evidence that he would have been selected for the position." Finally, because of the prohibited pre-employment medical examination, the agency was directed to correct its pre-employment process to comply with Commission Regulations. (More generally, the Commission had found that the position announcement improperly states that "[applicants who qualify on the [written] examination and are in the area of consideration for employment will be scheduled for a drug test and a medical examination," and, similarly, that one of the selecting inspectors "testified that an applicant is not offered a Postal Police Officer position until he or she passes the medical examination and all other areas of background investigation have been fulfilled." (citations to record omitted).

Smithson v. Barnhart, Commissioner, Social Security Administration, 01A31219 (Jan. 20, 2004). The complainant, a Social Insurance Specialist, failed to prove disability, race, age or reprisal discrimination, when the agency failed to promote him to several positions. As to rejection for one of the positions, the complainant alleged that he was improperly asked during the interview whether he would be willing to travel and that this inquiry was directed at his physical infirmities and designed to discourage him from pursuing the position. However, the Commission held that the travel- related inquiry was asked of all of those interviewed and "it was not shown that travel was not required as part of the duties of the job. Questions regarding travel, on their face, are not designed to illicit information regarding an individual's disability."

IX. Confidentiality of Medical Records

Fisher v. Brownlee, Acting Secretary, Department of the Army, 01A32251 (Sept. 28, 2004). While the complainant failed to prove disability-based harassment, he proved a per se violation of the Rehabilitation Act; his supervisor left complainant's sick leave request and attached medical documentation in the break room for four days. Concerning, the disclosure violation, the Commission first noted that ADA regulations provide that information "regarding the medical condition or history of any employee shall... be treated as a confidential medical record, except that: (I) supervisors and managers may be informed regarding

necessary restriction on the work or duties of the employee and necessary accommodation. 29 C.F.R. § 1630.14(c).” (other citations omitted). The Commission further noted that this requirement applies to "any employee," and is not limited to individuals with disabilities.

Shaw v. Mineta, Secretary, Department of Transportation, 01A30273 (Mar. 11, 2004), recon. den., 05A40666 (May 18, 2004). The complainant proved that the agency improperly disclosed her medical condition to a co worker, thereby violating the Rehabilitation Act. The complainant worked as an Equal Opportunity Specialist. The evidence showed that the facility director improperly told one of the complainant’s co workers that she had diabetes. At the same time, the Commission denied several other claims made by complainant. In describing the disclosure violation, the Commission noted first that “the requirement applies to confidential medical information from any employee and is not limited to individuals with disabilities” and “there is no requirement of a showing of harm beyond the violation.” As to the disclosure violation itself, the Commission provided, as follows: “The record indicates that complainant's work site was comprised of six employees, namely the Director, complainant and four other co-workers. In the case at hand, complainant alleged in claim (4) that the Director informed her co-workers of her medical condition. In particular, complainant indicated that two co-workers, CW1 and CW2, were made aware of her condition through the Director. The Director stated that she informed CW1 of complainant's use of sick leave because CW1 was in charge of time and attendance issues. Further, the Director told CW1 that complainant may be telecommuting in conjunction with CWl's administrative duties. She also had CW1 start researching the codes and necessary process for recording complainant's work from home. CW1 did not indicate that she was aware of complainant's actual condition but that she was aware that complainant needed to use sick leave and may telecommute. Based on the affidavits, we find that the Director only informed CW1 of complainant's use of sick leave and of the possibility that complainant would be working from home to the extent CW1 needed in order to perform her administrative duties. Therefore, we find that the Director did not disclose confidential medical information to CW1. As for CW2, the Director averred that one day she mentioned to either CW2 or CW3 that complainant has diabetes. CW2 stated in her affidavit that in spring 2001, the Director told her that complainant has been diagnosed with diabetes. Upon review, the record clearly indicates that the Director improperly disclosed to CW2 complainant's condition. We find that

the Director's disclosure was a violation of the Rehabilitation Act's prohibition against the release of confidential medical information."

Spencer v. Thompson, Secretary, Department of Health and Human Services, 01A30525 (Apr. 19, 2004). As to a complaint alleging disability discrimination and harassment, the Commission affirmed the agency's FAD findings of no discrimination on 3 claims and reversed the finding on the fourth claim, determining instead that the agency violated the Rehabilitation Act when it transmitted the complainant's medical information to a manager. Complainant, a Mining Specialist, with type II diabetes, alleged that the agency improperly disclosed his medical information, improperly contacted his physician, failed to accommodate his disability, and generally "harassed" him. As to the disclosure violation, the Commission first cited to the applicable ADA regulation, 29 C.F.R. § 16130.14(c)(l), which provides that "Information obtained ... regarding the medical condition or history of any employee shall ... be treated as a confidential medical record, except that: (i) supervisors and managers may be informed regarding necessary restriction on the work or duties of the employee and necessary accommodation." The Commission further observed that this "requirement applies to confidential medical information from any employee and is not limited to individuals with disabilities" and requires no "showing of harm beyond the violation." The Commission then determined that the agency violated the Rehabilitation Act when it shared complainant's confidential medical information with someone not in complainant's supervisory chain of command and who had no need for the information. This occurred after the complainant sent an e-mail to the agency's Human Resources Specialist, which contained a diagnosis of the complainant's Type 2 Diabetes and high cholesterol, and to which the HRS replied, ccing the original e-mail and reply to the agency's Supervisory Program Analyst in the Planning and Financial Group (SPA) and the Management Operations Officer (MOO). In finding a violation in the cc disclosure to the SPA, the Commission concluded that "We note that the MOO was arguably involved in the processing of complainant's request for reasonable accommodations in that she is the second line supervisor of the AP [agency physician] who reviewed and commented on complainant's requests and medical documentation. The agency did not provide any reason for including the SPA on the e-mail. Complainant's requested accommodations did not involve procuring equipment or adjustments to duty hours. Further, the SPA is not in complainant's chain of command. The agency has not proffered any specific reason for including the SPA on an e-mail

containing complainant's confidential medical information. Therefore, we find that the HRS's action was a violation of the Rehabilitation Act." As to the accommodation claim, the Commission found in favor of the agency. The complainant requested the following accommodations: no underground assignments; less than twelve hour work days; light to medium physical duty; access to sanitary bathroom facilities; and, no running/fast walking. In response, the agency agreed that it would provide the following: limit work days to twelve hours; provide appropriate time to eat and take medications while on trips; and, provide time and resources in the event complainant required additional days to complete his assignments. While the Commission noted that the agency did not respond to each of complainant's requests, it also noted that complainant did not claim that he was asked to work beyond his limitations. Therefore, the Commission found that the agency did not violate the Rehabilitation Act in failing to reasonably accommodate complainant's disability. As for complainant's claim of harassment because of his disability, the Commission found that complainant failed to show that the incidents alleged, taken as a whole, created a hostile or offensive work environment. Similarly, the Commission found that the agency did not violate the Rehabilitation Act when it contacted complainant's physician for additional information in order to be able to accommodate complainant's medical restrictions. The Commission noted here that the agency had a reasonable belief that complainant's medical condition may impair his ability to perform the essential functions of his job and thus its reason for contacting the physician was job-related and consistent with business necessity.

X. Association Discrimination Claims

Helena v. Rumsfeld, Secretary, Department of Defense, (Defense Logistics Agency), 07A30108 (Sept. 30, 2004). In rejecting the complainant's Rehabilitation Act association claim, and disagreeing with the AJ's summary judgment award in favor of the complainant, the Commission determined that agency did not commit disability discrimination when it denied his request for a shift change, so that he could care for his autistic son. The Commission noted in its decision that "to establish a prima facie case of "association discrimination" under the Rehabilitation Act, a complainant must establish: "(1) that he was subjected to an adverse employment action; (2) that he was qualified for the job at that time; (3)

that his employer knew at that time that he had a relationship with an individual with a disability; and (4) that the adverse employment action occurred under circumstances which raised a reasonable inference that the disability of the individual with whom he had a relationship was a determining factor in [the employer's] decision." (citation omitted). The Commission then concluded that while the complainant met the first three prongs, he did not show that the adverse employment action occurred under circumstances which raised a reasonable inference that his son's disability was a determining factor in the employer's decision; the agency "provided evidence that requests received in response to shift changes from employees without disabled relatives were denied, just as complainant's request was denied. Also, the agency provided a comparator who allegedly has a disabled child, and whose temporary request concerning a delay in the implementation of the new shift was granted, in order to allow the employee to find child care. Further, the record reflects that complainant lacked seniority and thus was not on equal footing when competing for his desired duty shift. We further note that the Rehabilitation Act does not require the agency to provide complainant with reasonable accommodation so that he may care for his son because the obligation to provide reasonable accommodation only applies to qualified applicants or employees with disabilities. Interpretive Guidance on Title I of the Americans With Disabilities Act, Appendix to 29 C.F.R. § 1630.8. Simms v. Department of the Navy, EEOC Appeal No. 01992195 (May 16, 2002)."

Stoltz v. Potter, Postmaster General, 01A53899 (Aug. 31, 2005). The Commission reversed the agency, which had dismissed the complainant's complaint, finding instead that the complainant stated a claim by alleging that he was discriminated against because of his daughter's disability. In describing the complainant's allegation, the Commission stated, as follows: "On appeal, complainant states that his daughter is disabled and unable to speak. He states that when he has occasion to take leave to care for his daughter, management has failed to treat him with respect. He states that his supervisor stated that he was not going to pay complainant sick leave to 'baby-sit' for his daughter and that there are 'institutions' out there to take care of her. Complainant states that over the eleven years working for the agency, he has experienced similar difficulties and comments by agency officials when he requests sick leave to take care of his daughter." In finding this allegation sufficient, the Commission cited to EEOC Regulation 29 C.F.R. § 1630.8, which "provides that it is unlawful for a covered entity to discriminate against a qualified individual because of the known disability

of an individual with whom the qualified individual is known to have a family, business, social or other relationship or association."

XI. Misconduct Exclusion

Hernandez v. England, Secretary, Department of the Navy, 01A41079 (Mar. 30, 2004). The Commission affirmed an AJ's decision without a hearing, finding no discrimination on a complaint alleging the agency discriminated against the complainant on the basis of race (Caucasian and Asian) and disability (alcoholism), when it forced him to resign in lieu of termination during his probationary period because of complainant's conviction for driving under the influence of alcohol. As for complainant's claim of race and disability disparate treatment, the Commission found that the complainant failed to show how the agency's stated reason for terminating him (the DUI conviction) was a pretext for discriminatory animus because of complainant's race or disability. The Commission also addressed the disability discrimination claim as a claim of failure to accommodate, and found that the agency had no duty to accommodate complainant's alcoholism because it had no notice of the alcohol problem until the agency was already in the process of terminating complainant. The Commission noted that since "reasonable accommodation is always prospective, an employer is not required to excuse past behavior even if it is the result of the individual's disability." The Commission further observed that an employer may discipline an employee who violates a "conduct rule that is job-related for the position in question and consistent with business necessity."

West v. Harvey, Secretary, Department of the Army, 01A51287 (May 6, 2005). The Commission held that the removal of an accounting technician with schizophrenia for misconduct was not a violation of the Rehabilitation Act. Complainant filed an EEO complaint alleging that her removal from her term appointment for misconduct was disability (schizophrenia) discrimination. The Commission affirmed an agency decision of no discrimination, noting that the preponderance of the evidence established that complainant had a conduct problem, and engaged in disruptive and rude behavior that included personal attacks on co-workers. The Commission stated that: "Even if the behavior had its roots in complainant's schizophrenia, an employer may discipline an employee with a disability for engaging in misconduct if it would impose the same discipline

on an employee without a disability (citation omitted). The workplace conduct standards complainant violated were completely job-related and consistent with business necessity.. Complainant failed to rebut the agency's reasons for its actions."

Williams v. James, Director, Office of Personnel Management, 01A30903 (Feb. 27, 2004). The complainant, a GS-1 Clerk, failed to prove that she was discriminated against on the basis of race (African-American) and disability (HIV) when the agency denied her training and job assignments and then terminated her because of attendance problems and failure to observe leave requesting procedures. Concerning the termination issue, the Commission held that the complainant was not entitled to reasonable accommodation for her HIV condition because she "accumulated extreme amounts of leave and was on leave restriction before notifying the agency of her medical condition." In that regard, the Commission concluded that "Since reasonable accommodation is always prospective, an employer is not required to excuse past misconduct even if it is the result of the individual's disability. Guidance at Question 36; See also Trujillo v. United States Postal Service, EEOC Appeal No. 01A24065 (June 12, 2003). Without notice of complainant's medical condition, the agency was not required to provide reasonable accommodation." Alternatively, the Commission also cited to its precedent that "An employer may discipline an employee with a disability for engaging in such misconduct if it would impose the same discipline on an employee without a disability. See Guidance at Questions 35, 36. Accordingly, we conclude that the agency was not required by the Rehabilitation Act to retroactively excuse several months of excessive absences and violations of leave procedure."

XII. Interactive Process

Dietch v. Snow, Secretary, Department of the Treasury, 01A42703 (Jul. 19, 2005), recon. den., 05A51181 (Sept. 19, 2005). Agreeing with the AJ, the Commission rejected the complainant Revenue Agent's disability discrimination claims that he was discriminated against on the basis of disability (dysthmymia, bipolar disorder, and attention deficit disorder (ADD)), when his request to engage in an interactive discussion regarding reasonable accommodation was not granted and the agency denied his reasonable accommodation request. In the Commission's view, as to the

first issue, the complainant failed to show that he was subjected to discrimination because when the agency sat down with him to discuss "practical solutions" to coping with his impairment, and asked him about pursuing a reasonable request, he "advised that he was in the process of handling the matter with the EEO Office." As to the complainant's request for reasonable accommodation, the Commission noted that the agency did grant some of the requested accommodations but rejected his request for a job coach. Here, the Commission held "We find that complainant failed to show how a job coach, working at variable times, or reassignment, were necessary to accommodate his purported disability in relation to performing his work functions. Furthermore, on appeal, complainant does not specifically explain how he was not accommodated except to reference, in general terms, the 'job coach' issue. By electronic mail message dated April 15, 2003, the agency denied the 'Coaching Program' for complainant on the grounds that complainant had received sufficient Revenue Agent training and informal training. The Commission finds that complainant has not shown why he needs a job coach to be able to function in his position."

Garvich v. Potter, Postmaster General, USPS, 01A43925 (July 7, 2005). Although the agency denied complainant's specific request for an entirely fragrance-free workplace, the Commission found that the complainant had not proven disability discrimination, noting that the agency "nevertheless engaged in the interactive process with complainant by offering her alternatives." The Commission also found unproven an allegation of harassment and a requirement that complainant undergo a fitness for duty examination. This case involved a Data Conversion Operator who raised the following three issues: (1) On May 3, 2001, she was placed in a non-fragrance free environment which triggered her migraines; (2) On May 3, 2001, complainant was harassed when she was called into a conflict resolution meeting; and, (3) On July 9, 2001, complainant was informed that she would be required to undergo a fitness-for-duty evaluation (FFDE). In relation to issue (1), the Commission described the alternatives, as follows: "the Plant Manager (P1) stated that complainant was allowed to move any time she felt a fragrance was bothering her. . . . Complainant's supervisor (S1) also indicated that complainant was allowed to move freely about the center, in order to accommodate her fragrance sensitivity. S1 additionally stated that safety talks were given in which all employees were educated 'to the sensitivities of others, on the need to be very mindful of wearing strong fragrances.' . . . S1 further stated that employees wearing a scent that is particularly overbearing are asked to wash it off

or go home and change if it is in their clothing. . . . S1 additionally stated that the General Rules of the Chattanooga REC advise employees to avoid strong fragrances. . . . Additionally, S1 stated that complainant was asked whether she would like to try wearing a mask, however, complainant stated that she did not think it would work and felt it would subject her to more ridicule. . . . Finally, complainant herself stated that she was offered, but declined, the opportunity to move to a different site where there was not a smell. . . .” Concerning issue (2), the Commission found that management's action concerning the conflict resolution meeting was not severe enough to rise to the level of unlawful harassment. Similarly, as to issue (3), the Commission determined that “due to complainant's absences from work for medical reasons, and based on her statement to management that her absences were due to her increasing headaches, we find that the agency had a reasonable belief, based on objective evidence, that complainant's ability to perform the essential job functions was impaired by a medical condition. The Commission discerns no improper disability-related inquiry in this case.”

Matthews v. Dominguez, Chair, Equal Employment Opportunity Commission, 07A30060 (Feb. 20, 2004). The Commission reversed the AJ’s summary judgment ruling in favor of the complainant; even though there were mishaps, such as delays and equipment that was not functional, the complainant did not prove disability discrimination because the agency otherwise accommodated the complainant's hand and arm conditions by providing note takers and assignment modifications, all the while working toward making the other accommodations functional. Moreover, the AJ erred in concluding that the agency failure to engage in the interactive process, in itself, constituted a violation of the Rehabilitation Act. Complainant was an Investigator at the EEOC's San Diego Area Office facility. In November 1998, complainant suffered an injury to her right upper extremity caused by repetitive stress from writing and typing. She was diagnosed with tendinitis in her right rotator cuff, epicondylitis in her right elbow, and carpal tunnel in her right hand. Due to her conditions, she was limited in lifting over 5 pounds, typing or writing for more than 5 minutes at a time for a total of 15 minutes an hour, and was allowed no pushing or pulling. She subsequently sustained an injury due to repetitive stress on her left arm and was diagnosed with epicondylitis in her left elbow. Beginning in 1999, the complainant made certain requests for voice recognition software and other accommodations, such as an ergonomic study of her work station, a paraffin treatment machine, and a note

taker. The agency provided these accommodations (except for the paraffin treatment, which complainant's physician did not believe would be helpful), also modified the complainant's duties and provided other accommodations as well, such as advance sick leave. The software, despite training, did not adequately recognize the complainant's voice, though, and there were funding-related delays in accomplishing the ergonomic study. Nonetheless, the complainant alleged that she had not been accommodated and filed a complaint. After a hearing, the AJ concluded that the agency failed to provide complainant with the reasonable accommodations of software and the ergonomic study, even though it had provided significant assistance. On that basis, the AJ granted summary judgment to the complainant. The AJ also concluded that the agency failed to engage in the interactive process, which constituted a violation of the Rehabilitation Act. As to the interactive process finding, the Commission disagreed, providing that "the Commission has recognized that an agency's failure to engage in the interactive process does not, in itself, constitute a violation of the Rehabilitation Act. Doe v. Social Security Administration, Appeal No. 01A14791 (February 21, 2003). Liability depends on a finding that, had a good faith interactive process occurred, the parties could have found a reasonable accommodation." Moreover, even though the agency made certain mistakes, (i.e., "an unwarranted delay in conducting the ergonomic study"), the Commission determined that the agency continued to work with complainant in order to provide other reasonable accommodations.

Disparate Impact

Carter v. Brownlee, Acting Secretary, Department of the Army, 01A30872 (Jan. 30, 2004). The complainant failed to prove disparate impact race discrimination – he claimed that the agency applied the veterans preference procedure in its hiring process so that it had a disparate impact on black disabled veterans. Nor did he prove that the agency discriminated by failing to credit him with veterans preference during the promotions selection process. In rejecting his impact claim, the Commission held that "the only evidence that complainant has presented to support his disparate impact claim are his assertions that 'nearly one half' of Vietnam veterans are black and 'significantly more' males than females have Veterans Preferences. Upon review of the record, the Commission finds that complainant has failed to establish a prima facie case of disparate impact because he has failed to provide sufficient statistical support demonstrating a statistical disparity linked to the agency's policy.

Smith v. City of Jackson, Miss., 44 U.S. _____ (2005). The Supreme Court held that the ADEA authorizes disparate impact theory of proof cases. The Plaintiffs were employed as police officers and dispatchers over the age of 40. They claimed that the public employer's performance-related pay plan gave substantially higher pay increases to employees under age 40. Under that pay plan, employees with five or fewer years of tenure received proportionately greater raises when compared to their former pay than those with more than five years of tenure. Plaintiffs offered statistical proof that average pay increases differed by age and older employees received smaller raises than younger employees. The trial court held that the disparate impact theory could not be used in an ADEA case. The 5th Circuit affirmed. In a 5-4 decision on the disparate impact issue, the Supreme court disagreed (although the decision was 8-0 in favor of the employer). In the Court's lead opinion for five justices, Justice Stevens determined that the ADEA authorizes disparate impact cases, similar to the same way that they are allowed in race and sex discrimination cases, although narrower in scope because age "not uncommonly has relevance to an individual's capacity to engage in certain types of employment."

Equal Pay Act

Antosz, et. al v. Principi, Secretary, Department of Veterans Affairs, 07A3003, et seq (May 13, 2004). Even though a male LPN was hired at a higher salary than three of the complainants, all females, and performed substantially similar work, the EEOC found no violation of the Equal Pay Act because the pay difference was attributable to a factor other than sex – the agency was experiencing difficulty attracting well-qualified LPNs and hired the qualified male LPN at a salary that matched what he was earning in the private sector.

Evidence / Burden of Proof

I. Adequacy of Legitimate, Non Discriminatory Reason

Beasley v. Potter, Postmaster General, USPS, 07A40096 (Mar. 18, 2005). In finding race discrimination non selection, the Commission agreed with the AJ, determining that the agency did not meet its burden to "provide a specific, clear, and individualized explanation for the treatment accorded complainant" (i.e., a legitimate non discriminatory reason). This case involved a acting Retail Specialist complainant, who alleged that she was discriminated against on the basis of race when, she was not selected for the position of Retail Specialist. Finding that the agency had not met its burden, the Commission observed that "the SO's testimony . . . does not contain any reasons for complainant's non-selections. While the SO made reference at the hearing to the performance of the applicants during the interview, the SO also testified that there was no documentation of the applicants' responses to interview questions, nor was there any documentation presented regarding the weight accorded to the educational qualifications of the applicants or their prior work experiences. . . . We concur with the AJ's finding that SO or the agency did not present any interview notes or other written documentation that would have provided some evidence to support the selection of C1. In addition, the AJ found that the SO's statements that C1's selection was based primarily on subjective criteria did not afford complainant a full and fair opportunity to demonstrate pretext. . . Despite the agency's appellate contentions, the ability to conduct a comparative analysis of the applicants was effectively thwarted. We thus find that the evidence presented by the agency is not sufficient to provide that specific, clear, and individualized explanation that is required by the holding in Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981) to explain why complainant was not selected for the RS position for which she was qualified. Instead, the agency's articulation consisted of conclusory statements that complainant was not the best qualified and therefore not selected."

Colbert v. Potter, Postmaster General, United States Postal Service, 07A40107 (August 5, 2005). While the complainant, a mail processing equipment mechanic, established a prima facie case that the agency discriminated against him on the

basis of age and retaliation in denying him Environmental Controls I training by providing evidence that "the training was provided to someone (a painter) for whom it was not intended, and who was outside of complainant's protected classes", the agency failed to provide a legitimate, non discriminatory reason for its action; the agency did not produce a witness at the hearing to explain why complainant was denied the training, the supervisor's affidavit did not address the issue and the agency failed to produce evidence of circumstances or qualifications which made the painter eligible for the training. As to compensatory damages, the Commission concluded that the "Complainant testified that he suffered from high blood pressure, anxiety and depression as a result of the agency's discriminatory conduct. The record also shows that the agency did not rebut complainant's testimony. The Commission finds that the AJ's award of $600.00 in non-pecuniary damages was appropriate."

Fullman v. Potter, Postmaster General, United States Postal Service, 01A31036 (Mar. 18, 2004). The Commission reversed the agency's finding of no discrimination; because complainant established prima facie cases of discrimination on the bases of race/color, sex and age and the agency failed to articulate a reason for its selection decision despite having been ordered to do so on remand, complainant prevailed on his claims. The Commission held that the agency failed to meet its burden because its explanation for choosing the selectee rather than complainant was "neither specific, clear, nor individualized. Instead, it is so generalized, conclusory and vaporous as to offer no substantive explanation of the agency's action. Notably, the agency's final decision likewise did not provide a legitimate, non-discriminatory reason why complainant was not selected for the position, despite complainant's two degrees, long tenure with the agency, and extensive experience in investigations, dispute resolution, and supervision."

Garcia v. Chertoff, Secretary, DHS, 01A32050 (Jan. 17, 2005), recon. den. 05A50685 (Apr. 26, 2005). The Commission found that the complainant, a Supervisory Border Patrol Agent, proved national origin discrimination in non selection for a Supervisory BPA position in another Sector; the agency failed to preserve its records documenting that non selection and consequently failed to articulate a legitimate non discriminatory reason. The Commission described the failure to preserve and obtain the information as follows: "A review of the record reveals that during complainant's EEO counseling session, the EEO counselor

made several attempts to obtain the selection package for the Spokane position from the appropriate sources, but without success. ROI Exhibit F7. While complainant's application materials were provided, the application materials of S3 are missing. As previously noted, EEOC regulations require that any personnel or employment record made or kept by an employer be preserved by the employer for a period of one year from the date of the making of the record or the personnel action involved, whichever occurs later. *See* 29 C.F.R. § 1602.14. The record shows that the selection certificate was dated October 25, 1995, Exhibit F8c, the date of the appointment is unknown, and complainant first contacted the EEO counselor on November 20, 1995. Exhibit B1a. The EEO investigator was able to locate the selection certificate for the position, signed by SO 1. Exhibit F8c. However, the portion of this document intended to provide reasons for the selection was left blank. *Id*. The record contains no other materials relating to the selection. Where a charge of discrimination has been filed, the agency is required to preserve all personnel records relevant to the charge until final disposition of the charge. § 1602.14. Finally, as noted above, the agency reports that SO1 retired from the agency and did not offer a statement." The Commission also found national origin discrimination as to another claim by the complainant, that he was discriminated against when he was not selected to serve as acting Assistant Regional Director in the Central Region. Here, the Commission described the evidence in support of pretext: "Following a review of the evidence, we find that complainant has established pretext. As noted above, the agency did not provide an affidavit from a responsible management official articulating the agency's reason for its action, although such a reason can be discerned from the EEO Counselor's records. As noted above, in non selection cases, pretext may be found where the complainant's qualifications are demonstrably superior to the selectee's. *Bauer,* 647 F.2d at 1048. The record shows that complainant had authored and published an article and a book for the agency, he possesses numerous prestigious awards and letters of commendation, he has participated in several major agency National Programs, and he has been an Assistant Chief after more than 11 years, with 10 years more experience than both S5 and S6. Exhibit F15a. There is nothing in the record demonstrating that either S5 or S6 had comparable credentials. We therefore find that complainant has established that his qualifications were demonstrably superior and has thus demonstrated pretext. Accordingly, we find that complainant was discriminated against on the basis of national origin when he was not selected as acting Assistant Regional Director in the Central Region."

Webb v. Potter, Postmaster General, United States Postal Service, 01A54870 (Dec. 21, 2005). While noting that the agency's burden to articulate a legitimate non-discriminatory reason for its actions is not onerous, the agency failed to meet its burden and presented no independent evidence that explained why complainant was found to have been in violation of her LCA and that terminating her employment was appropriate; thus, the Commission reversed the agency's decision and concluded instead that the complainant letter carrier was subjected to retaliation when she was terminated. Alternatively, the Commission determined that the agency's failure to provide information to the EEO investigator, allowed it to draw an adverse inference, resulting in a retaliation finding. The Commission described the agency's failure as follows: "Despite numerous attempts to reach [Management Official] by letters dated May 28, 2004, and July 16, 2004; by telephone on August 12, 2004, and August 27, 2004; and by e-mail on August 27, 2004, no response to these requests for information was forthcoming. In addition, on these same dates requests for information were made to another manager, [S1], and [S1] was again spoken to again on September 13, 2004, when she promised to provide an Affidavit by the end of the week. It should be noted that no response from [S1] was forthcoming." In relation to drawing an adverse inference, the Commission made clear that its regulations "require any employee of a federal agency to produce documentary and testimonial evidence as the investigator deems necessary. 29 C.F.R. § 1614.108(c)(1). Where the agency's employees fail without good cause to respond fully and in timely fashion to requests for documents, records, affidavits or the attendance of witnesses, the Commission on appeal may draw an adverse inference that the requested testimony of the witness would have reflected unfavorably on the party refusing to provide the requested information, or issue a decision fully or partially in favor of the complainant. 29 C.F.R. §§ 1614.108(c)(3)(i)-(v), 1614.109(e)(3)(i)-(v). Here, neither the record nor the agency's arguments on appeal explain why the management officials did not provide the requested information despite numerous attempts by the investigator."

Harassment (Not Sexual)

I. Disability Harassment Claims

Hernandez v. Potter, Postmaster General, United States Postal Service, 07A30005 (July 16, 2004). The Commission agreed with the AJ and found that the agency committed reasonable accommodation disability discrimination by failing to provide the complainant, a letter carrier, with the effective reasonable accommodation he had been provided for many years before the arrival of a new supervisor -- assignment to job duties within his medical restrictions; committed disability harassment discrimination by numerous actions, to include persistently refusing to honor the complainant's medical restrictions; and, committed reprisal harassment by making comments to employees, including the complainant, reflecting his "disdain for the EEO process", which constituted attempts to deter employees from participating in the EEO process (e.g., he told complainant that while he can bring an EEO complaint, he will have to prove his claims before a third party, who will be more likely to believe management). At the same time, the Commission recharacterized part of the AJ's award as a loss of earning capacity, rather than front pay, as erroneously designated by the AJ.

II. Race Harassment Claims

Bryant and Kelly v. Ashcroft, Attorney General, Department of Justice, (Bureau of Prisons), 07A40108, 07A40098 (Oct. 5, 2004), request for reconsideration denied, 05A40970 (Aug. 3, 2004). In affirming the AJ's summary judgment ruling in favor of the complainants (although the agency had filed the motion), the Commission determined that the agency committed hostile environment race discrimination against the complainants, two senior officers at a correctional facility, when 2 memoranda that "projected a negative racial animus toward them were posted on a bulletin board and placed in several employee mailboxes" and the agency did not take action until after the second memo was distributed. The agency was held liable for compensatory damages in the amount of $5000.00 (for Kelly) and $30,000.00 (for Bryant), which were determined by the AJ after a damages hearing. This case started with a June 23 memorandum to the Warden from the

Union's Vice President, complaining about the non selection of himself, the complainants and one other African-American employee. This memorandum was altered twice, once on June 30 and again sometime before July 3 and put on bulletin boards and in the Union Vice President's and the complainants' mailboxes. Both memorandum referred to the complainants and the Union VP, using language " designed to depict ignorant African-Americans by using stereotypical ebonies" For example, the first altered memorandum provided "I am offering to withdraw any all paperwork I've filed against the Warden and the Captain if you be willin' to promote me to the GS-8 wit full access to porn sites at work and give my partner more comfortable mattress in da SHU. Give Bryant what she wants too or I file more paper on you."

Horton v. Jackson, Acting Secretary, Department of Housing and Urban Development, 07A40014 (June 16, 2004). The complainant, an Equal Opportunity Specialist, proved that she was discriminated against on the bases of race (African-American) and sex, when she was issued a letter of admonishment for hanging up on her supervisor and that she was harassed by that supervisor on the bases of race and sex, through various performance-related actions, and that the agency failed to prove its affirmative defense. As to sex and race harassment, the Commission agreed with the AJ, noting the AJ's findings that the complainant was a good worker, who required little supervision; her supervisor nonetheless never acknowledged her achievements; he was overly critical of her work; he scrutinized her work too closely; he made her perform unnecessary revisions and additional work; he never acknowledged complainant's high production; and, he inappropriately assigned her work to others, in particular, assigning her work to white interns. Moreover, as also found by the AJ, the second level supervisor (S2) "grew so concerned, that he tried to take over [the supervisor's] assignment of cases, apparently without success . . ., viewed S's treatment of complainant to be inappropriate, and attempted to intervene on behalf of complainant, with both S and D[the Office Director], also to no avail, . . . indicated that S tried to send complainant alone on a dangerous investigation, and that he lied to him (S2) about complainant's refusing to sign her performance evaluation." The Commission also noted the AJ's findings that the supervisor did not give proper recognition to the work of black subordinates. Also, the Commission found, as determined by the AJ, that the discriminatory issuance of the LOA, and the events relied on, was further evidence of harassment. Finally, the Commission determined, as additionally found by the AJ, that the agency did not prove an affirmative defense

to the harassment because there was no "evidence of record to show whether the agency had a harassment policy, or established procedure, for reporting harassment. Moreover, we find that the record shows that complainant's actions suffice to effectively report the harassment as a means of addressing the problem. The record shows that complainant directly told S that she considered his treatment to be harassment and requested that he stop, but that he replied that he could do as he pleased because he was the supervisor. Additionally, we note that the record also shows that complainant reported S's conduct to D, as did S2. Although the agency argues that D took action as soon as she 'realized' that complainant believed that S's conduct was 'discriminatory,' we find that this is insufficient to excuse D's delay in making an inquiry." (Because the agency did not challenge the AJ's award of $7,500.00 in non-pecuniary compensatory damages, the Commission left that finding unaddressed and undisturbed). (See also Discipline).

Green v. Ashcroft, Attorney General, Department of Justice, 01A41309 (Mar. 15, 2004). The Commission affirmed the dismissal of complainant's claim that he was discriminated against on the basis of race (African-American), when an agency official outside his supervisory chain yelled at him during a team drill, "get your head out of your ass and do it right"; relying on precedent, the Commission noted that such comments are insufficient to render an individual aggrieved for purposes of Title VII when unaccompanied by a concrete agency action.

Living v. Johnson, Acting Secretary, Department of the Navy, 01A400083 (Feb. 3, 2005). The Commission upheld the AJ's dismissal of a claim – although on the basis of failure to state a claim rather than failure to prove discrimination - finding insufficient an allegation that the complainant, an African-American, was advised by a coworker that another coworker had referred to him using a racial slur ("dumb n_____ "). The Commission explained its ruling, as follows: "Generally, a remark or comment does not rise to the level of a cognizable claim. Henry v. U.S. Postal Service, EEOC Request No. 05940695 (February 9, 1995). However, the Commission has held that, under certain circumstances, a limited number of highly offensive slurs or comments about a federal employee's race or national origin may in fact state a claim or support a finding of discrimination under Title VII. The Commission has previously noted that the use of the racial epithet "nigger" is a "highly charged epithet" which 'dredge[s] up the entire history of racial discrimination in this country.' See Brooks v. Department of the Navy, EEOC Request No. 05950484 (1996); Yabuki v. Department of the Army, EEOC Request

No. 05920778 (June 4, 1993). Nonetheless, upon consideration of the record as a whole, the Commission concludes that the complaint fails to state a claim. Complainant was told by someone else that a coworker had made the alleged slur. In addition, there was only the one identified incident of the alleged racial slur, following which the agency appears to have taken prompt action to insure that further such remarks did not recur."

Parker v. Barnhart, Commissioner, Social Security Administration, 01A43867 (Aug. 23, 2004), request for reconsideration denied, 05A50032 (Oct. 29, 2004). The agency properly dismissed the complaint of harassment discrimination on the bases of race (White), disability (seronegative rheumatoid arthritis) and reprisal for failure to state a claim because the alleged incident was not sufficiently severe or pervasive to constitute harassment. In her complaint, the complainant alleged that she was harassed when the "District Manager improperly disclosed, without complainant's consent, personal and confidential facts regarding her disability during a staff meeting on October 30, 2003."

Richards v. Mineta, Secretary, Department of Transportation, 01A31490 (Mar. 11, 2004). The Commission affirmed an AJ's decision, after a hearing, finding that the complainant was not subjected to racial harassment because of a single incident in which someone placed a derogatory sign on a Black History Month display; the incident was not sufficiently severe or pervasive to create a hostile environment and the agency took prompt corrective action, anyway. The complainant was employed as an Aviation Safety Inspector. He filed his EEO complaint after finding a computer generated message, "ENOUGH OF THIS" posted in the middle of the Black History Month display he had posted on the outside of his cubicle. As noted by the Commission in rejecting the hostile environment claim, the AJ had determined that the incident was the only one of its kind, despite that the complainant and other employees had posted similar cultural displays in the past. In rejecting the complainant's contention that the agency's response was not sufficient, the Commission noted that the agency "took photographs of the display and sign; removed the sign; sent an email informing all facility employees of the incident and of management's unhappiness with the incident, and warning all facility employees that such incidents would not be tolerated and appropriate action would be taken; and had the agency's regional Civil Rights Division Manager come to the facility and provide EEO sensitivity training for all employees."

Whidbee v. England, Secretary, Department of the Navy, 01A40193 (March 31, 2005). The Commission found that the agency was responsible for hostile work environment racial harassment where a supervisor with a history of problems with minority employees referred to complainant as a "stupid n_gger," a word he used as often as "popcorn being cooked at a multi-plex theater." Complainant, a Sheet Metal Mechanic, alleged 13 instances of race based (African-American) harassment over a period of about six months, including: overhearing a supervisor refer to complainant as a "stupid n_gger" and greeting employees using a Nazi hand gesture. The agency issued a final decision finding that the events did not occur as alleged by complainant and, even if they had, they were not sufficiently severe or pervasive to constitute harassment. The Commission reversed the agency decision. The Commission noted that: "Even a limited number of offensive slurs or comments made about an individual's race or national origin can be sufficiently severe and pervasive to constitute harassment under Title VII." The Commission found that "because complainant's supervisor used derogatory racial slurs, treated complainant abusively, treated complainant differently because of his race, purposefully offended complaint because of his race, and had a history of treating racial minorities differently, complainant was subjected to a hostile work environment." The Commission also found that the agency failed to avoid liability by proving the affirmative defense set forth in the Supreme Court's Ellerth and Faragher decisions because the agency failed to exercise reasonable care to correct the harassing behavior and also because the agency failed to take, or attempt to take, any corrective action.

Wilson v. Principi, Secretary, Department of Veterans Affairs, 01A30907 (Feb. 23, 2004). The complainant proved that he was subjected to a hostile work environment due to his race, African-American, when a Caucasian co-worker made racially-charged remarks on June 20, 2001 and the agency failed to prove any defense to the misconduct. The complainant was employed as a Housekeeping Aid, at the agency's Veterans Affairs Medical Center, located in Fayetteville, Arkansas. The Commission relied principally on a single incident, which it described as follows: "the record reflects that on June 20, 2001, complainant reported to work and was in the office with CW [co-worker]1, S1, and three other co-workers. According to complainant's affidavit, CW1, unprompted, asked complainant why Black people are able to call each other n[ ], while CW1, being White, is unable to call complainant n[]. Complainant responded by stating that he did not appreciate when anyone referred to him in that manner. CW1 then raised

his hand and fist, shaking it at his chest and repeated to complainant '[y]ou are my n[ ].' CW1 then asked complainant if he bleached his skin like Michael Jackson. Complainant responded that he did not. CW1 proceeded to ask complainant '[y]ou see my neck? I am a redneck."' CW1 then took out his police badge and flashed it at complainant. A co-worker (CW3) (Caucasian), who was present throughout the incident, testified in his affidavit that the incidents occurred as alleged by complainant. Also, CW3 testified that immediately after the exchange, he went to the vending machine room. CW1 came in soon after, visibly upset and angry. CW3 assumed that this was because S1 spoke to CW1 about his conduct and comments. CW3 testified that CW1 stated that he disliked dealing with 'those coons' in his work as a police officer. CW3 left the room but before leaving overheard CW1 say 'n[ ]' again." Because the offending co-worker was a team leader with supervisory authority over the complainant, the Commission applied the Ellerth / Faragher test but determined that the agency had failed to prove this defense to liability. ("We find that the agency failed to proffer sufficient evidence to establish that at the time CW1 harassed complainant, the agency had a policy and complaint procedure in place" which contained appropriate elements.). The EEOC remanded to the agency for a supplemental investigation on the issue of compensatory damages.

III. National Origin Harassment Claims

Bhella v. England, Nos. 02-2416, 02-2439, 2004 WL 253412 (4th Cir. Feb. 12, 2004). The Fourth Circuit concluded that the District Court erred by submitting the hostile environment claim to the jury and that the evidence did not support the jury's verdict. The complainant worked as a Program Coordinator at the Naval Consolidated Brig. She filed suit, alleging race and national origin discrimination. A jury awarded her $1,500,000.00 on her hostile work environment claim, but the District Court reduced the damages for pain, suffering and injury to professional standing to the statutory limit of $300,000.00. The Circuit concluded that the District Court erred by even submitting the hostile environment claim to the jury and that the evidence did not support the jury's verdict. The court remanded for a trial on the plaintiff's retaliation claim. In sum, as to the hostile environment claim, the Circuit found that the incidents relied on did not reflect a discriminatory animus (statement from the selecting official that he was hesitant to hire her because her education and experience were from India, statements from him that

plaintiff spoke "broken English."), were too remote and not connected to actions complained of (i.e., references to plaintiff as "a mad Sikh", "an Indian causing trouble by making complaints," etc.), or were otherwise insufficient to reflect discriminatory animus. However, the Circuit remanded for trial on the plaintiff's opposition reprisal claim, finding that the plaintiff's detail, "where she languished for more than six months with essentially no job duties" was sufficiently adverse.

Torres v. Chertoff, Secretary, DHS, 01A55221 (Jan. 4, 2006). The complainant proved harassment based on his national origin (Hispanic/Puerto Rican), by his supervisor and the agency failed to establish an affirmative defense. The complainant was a former Supervisory Detention Officer at the agency's Deportation Detention and Patrol facility in San Juan, Puerto Rico. In making its finding of discrimination, the Commission provided, as follows: "we find that complainant established that the former supervisor created a hostile work environment based on complainant's national origin. As noted above, the former supervisor's regular comments regarding the differences between Puerto Rico and other places to which he had been assigned extended beyond a simple comparison. The former supervisor's comments regarding the 'island of criminals,' 'what to expect from a Puerto Rican,' and 'wasn't he Puerto Rican' demonstrate a bias against individuals of the national origin. Further, based on the frequent nature of the comments from November 1993 through March 1995, of which the incidents discussed are only examples, we find that the former supervisor created a hostile work environment for complainant. Finally, we note that an employer is subject to vicarious liability for unlawful harassment if the harassment was 'created by a supervisor with immediate ... authority over the [complainant].' Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors, EEOC Notice No. 915.002 (June 18, 1999) ("Vicarious Liability Guidance"), at 4 (citing Burlington Industries, Inc., v. Ellerth, 524 U.S. 742, 118 S.Ct. 2257, 2270 (1998), and Faragher v. City of Boca Raton, 524 U.S. 775, 118 S.Ct. 2275, 2292-93 (1998)). Accordingly, the Commission concludes that complainant has met his burden of establishing a claim of harassment based on his national origin." The Commission then noted the requirements for establishing an affirmative defense, which the Commission concluded was unproven: "At a minimum, however, the employer must have a policy and complaint procedure against the harassment that contains the following elements: (1) a clear explanation of what constitutes prohibited conduct; (2) assurances that employees who bring complaints of harassment or provide information related to such complaints will be protected

against retaliation; (3) a clearly described complaint process that provides possible avenues of complaint; (4) assurance that the employer will protect the confidentiality of harassment complaints to the extent possible; (5) a complaint process that provides a prompt, thorough, and impartial investigation; and (6) assurance that the employer will take immediate and appropriate corrective action when it determines that harassment has occurred. *Id.* at 17. Based on the Commission's review of the record, it is not apparent that, at the time of the harassment, the agency had a policy and complaint procedure in place which contained these elements. Accordingly, because the agency has not satisfied the affirmative defense, the Commission finds that it is liable for the harassment based on complainant's national origin."

Truong v. Potter, Postmaster General, United States Postal Service, 01A33223 (Mar. 25, 2004). The Commission affirmed the AJ's decision without a hearing, rejecting the complainant's allegations of race (Asian), national origin (Vietnamese), sex, age, and reprisal harassment by an acting supervisor; the allegations concerned a loud argument, after complainant became defensive, when asked about subordinates, and there was no evidence of animus by the manager because of the complainant's protected bases. The complainant worked as a Full Time Clerk. The Commission described its ruling and the incident that led to the instant complaint, as follows: "The record reflects, through the testimonies of all participants at the supervisor's meeting on July 17, 2001, that the confrontation between complainant and the MDO concerned the subject of employee discipline. The record reveals that the MDO asked complainant, as an acting supervisor, whether she could discipline her employees if warranted. In response, complainant questioned why she would need to do so, said she would not do so, became very defensive, and complainant and the MDO argued loudly. There is no evidence in the record to support the conclusion that unlawful animus toward complainant's age, sex, race, national origin or prior EEO activity motivated MDO's actions or words."

IV. Reprisal Harassment Claims

Rytelewski v. Potter, Postmaster General, United States Postal Service, 01A41037 (Mar. 9, 2004). The Commission affirmed the agency's dismissal for failure to state a claim as to 3 of 4 claims because the alleged incidents forming the basis of

such claims of reprisal and other harassment were neither severe nor pervasive. The 3 incidents were that: (1) complainant's supervisor remarked upon complainant's return from the restroom, "Three more minutes and that would have been your break"; (2) complainant's supervisor questioned him about a sign he placed, which read "Donuts from Danny"; and, (3) when complainant requested and took leave, a response was not provided until the following week. On complainant's fourth claim, the Commission reversed the agency's dismissal, finding that complainant effectively stated that he suffered a personal harm with respect to a condition or privilege of employment when he was denied a requested leave change from his originally scheduled vacation week. Specifically, as alleged by complainant, when he requested that his supervisor change his requested leave dates, his supervisor failed to respond, which necessitated having to "go through his union representative 'to cancel the changes and keep my original week so that I would not lose it all.'" Because complainant properly stated a claim as to this allegation, the Commission remanded it for processing.

Waring v. Potter, Postmaster General, United States Postal Service, 01A31209 (Aug. 18, 2004). The Commission reversed the agency's FAD, in part, finding that the agency Postmaster and supervisor committed reprisal harassment against the complainant, a Distribution/Window Clerk over a 5 year period. The Commission relied on evidence that the supervisor yelled at the complainant, frequently followed him outside the facility during his break in order to "badger" him, yelled at him in front of facility customers (a statement that was corroborated by a facility customer) and, frequently told him he was the worst Clerk at the facility. Similarly, the Postmaster called the complainant a "rookie" and questioned his desire to work more hours, until complainant became frustrated; criticized his work at every opportunity; and, made comments about his work in an intimidating demeanor. The Commission also cited to the complainant's evidence that the pressure from the Postmaster regarding the complainant's work was so intense that the complainant could not sleep or think. The Commission noted that the complainant supported his allegations with signed statements from facility employees, providing that between 1994-1999, the Postmaster made disparaging remarks to them about complainant, that the Postmaster forced employees to rewrite statements that were critical of the Postmaster, and that the harassment by both the supervisor and the Postmaster was responsible for complainant's emotional problems. In support of its' finding, the Commission underscored a

statement by the Postmaster to the complainant, after he filed his EEO complaint in 1995, asking him if he was "starting trouble again."

V. Sex (Gender Harassment) Claims

Boyer v. Mineta, Secretary, Department of Transportation (Federal Aviation Administration), 01A24440 (Aug. 24, 2004). Complainant, an Air Traffic Control Specialist, proved that she was harassed based on her sex due to receipt of an anonymous threatening note and that the agency did not take appropriate action, in relation to that harassment. While commuting to work in a private aircraft, the complainant's and her husband's aircraft was disrupted when a fellow controller directed a large jet to descend directly behind the aircraft. This matter was apparently resolved after an apology by a controller. Then, upon returning to work in January 2001, after a one month's absence, the complainant found tampons scattered in her locker. About three weeks later, she received a threatening letter at work, which read as follows: "BITCH BITCH BITCH, YOU EVIL F*CKING BITCH, Watch your ass bitch YOU DONT decide how this sector runs DONT MESS WITH ONE OF US THEY CANT TOUCH US YOU CANT HELP THEM, WONT PUT OUT THEN GET OUT GO HOME TAKE YOUR WEAKASS HUSBAND WITH YOU, YOUR ASS IS MINE!!! NO SUP TO PROTECT YOU NOW, back off. We like our sector the way it is, write your letters have your meetings tell your stories pay the price, TELL NOBODY. REMEMBER WHAT A HEAVY JET LOOKS LIKE UP CLOSE." The Commission found that this letter was sufficiently severe to render complainant's work environment hostile, finding that the contents of the letter were derogatory, specifically related to complainant's sex, was threatening and made reference to the airplane incident, which complainant viewed as a threat to her life. Because the author of the threatening note could not be identified, the Commission analyzed whether the agency was liable for the harassment by using the co-worker standard, whether the agency had taken appropriate corrective action, concluding that it had not. Here, the Commission observed as follows: "In the instant case, complainant received the letter at issue on January 23, 2001. On that same day, the Air Traffic Manager requested an investigation into the threatening letter. A Federal Aviation Administration Special Agent commenced the investigation on January 26, 2001. The Special Agent interviewed complainant and her husband, as well as her co-

workers suspected by complainant to be the author(s) of the letter. The United States Secret Service agreed to take handwriting samples for analysis. Ultimately, the investigation was inconclusive as to who was the author of the threatening letter. Soon thereafter, the agency reassigned complainant from the Newark sector to the Kennedy sector at the New York TRANCON. We find that the agency failed to prove by a preponderance of the evidence that it took appropriate corrective action. In so finding, we note that the agency failed to proffer evidence that it took any corrective steps beyond conducting the inconclusive investigation and reassigning complainant, given the severity of the harassment. Generally, sufficient corrective action includes discipline, posting notices, providing relevant training, taking proactive measures to prevent future incidents of harassment, and reminding employees of their obligations under the laws regarding discrimination. Further, we note that even though the agency conducted an investigation regarding the jet plane incident, two years later complainant received the threatening note referencing the incident."

Connell v. Potter, Postmaster General, United States Postal Service, 01A40588 (Mar. 17, 2004). The agency erroneously dismissed the complaint of harassment based on sex and retaliation; the complainant alleged incidents that were sufficiently severe or pervasive to constitute harassment. The agency had dismissed the complaint for failure to state a claim, holding that the incidents were few and isolated in nature, and not sufficiently severe or pervasive to constitute an actionable claim of harassment. The Commission reversed, based on the following alleged incidents, among others: (1) complainant's supervisor verbally harassed and humiliated her in the presence of five co-workers; (2) complainant's supervisor "instructed a co-worker to send complainant out of the restroom, whereupon he 'cussed,' at her, screamed, threatened her, and threw a chair against the wall, all in the presence of witnesses"; and (3) another supervisor prohibited complainant from talking during her 8-hour work day. The Commission noted that such conduct allegedly caused complainant public humiliation and that the incident in (2) was "physically threatening." Furthermore, the Commission noted that "complainant contends that these incidents were so emotionally upsetting that she was required to seek medical attention for stress, and was forced to take time off of work because of the harassment." Thus, the Commission remanded the complaint for processing.

Crear v. Nicholson, Secretary, Department of Veterans Affairs, 07A50079 (Jan.

26, 2006). The Commission summarily sustained the AJ's award of $70,000.00 in non-pecuniary compensatory damages for reprisal, based almost entirely on the complainant's testimony and without medical evidence. This is a case in which the AJ found hostile envirnment discrimination on the basis of the coplainant's pregnancy, a finding accepted by the agency. The Commission described the harassment as follows: "The [c]omplainant persuasively testified that after she informed Dr. [A] that she was pregnant, Dr.[A] would verbally harass the [c]omplainant by always making an issue of her pregnancy either when Dr. [A] was alone with the [c]omplainant and/or in front of the other two male podiatric residents. For example, the [c]omplainant testified that Dr. [A] verbally harassed her [by] making verbal statements to the effect, 'when [complainant] gets to the point of where she can't do anything or she doesn't want to do anything, you guys are going to have more of the work.' The AJ listed various other incidents where Dr. A continually referred to complainant's pregnancy and one occasion where he yelled at her because she went to her obstetrician. The AJ also found that Dr. A threatened to terminate complainant because of her pregnancy. Regarding the retaliation claim, the AJ found that Dr. A, in retaliation for complainant's protected EEO activity, threatened to terminate complainant's residency at the agency and/or threatened to interfere with complainant's prospects of practicing medicine by providing an unfavorable and unjustified reference regarding complainant."

Seligmann v. Mineta, Secretary, Department of Transportation, 01A43549 (Aug. 17, 2004). The Commission affirmed the agency's dismissal of the sex-based harassment complaint for failure to state a claim. The Commission agreed that the two alleged incidents, even if true, were not sufficiently severe or pervasive. The complainant claimed that her supervisor became belligerent and verbally abusive, loudly berating complainant in the hallway in the presence of co-workers, and, three months later, objected to complainant's presence at a meeting scheduled with another co-worker and a union representative.

VI. Age Harassment Claims

Griffin v. Potter, Postmaster General, United States Postal Service, 356 F.3d 824 (7th Cir. Feb. 3, 2004). In rejecting the complainant - EEO counselor's claims of age discrimination and retaliation and sustaining the trial court's grant of summary judgment to the agency, the circuit determined that the complainant had not proven

that she suffered an adverse action. Among others, the complainant had alleged that she was discriminated and reprised against by her supervisor, who, at staff meetings, over a two-month period, said she was a "bad influence on the office" and she thought she knew everything. While the supervisor's comments may have created an unpleasant environment, the comments were not so severe and pervasive as to be actionable, in the court's view. Other claims, such as changing her shift and assigning hard cases to her, were also determined not to constitute "adverse" treatment.

VII. Affirmative Defenses

Davenport v. Mineta, Secretary, Department of Transportation, 01A44849 (April 28, 2005). An agency avoided liability for hostile environment race and religious harassment – an African-American complainant's co-worker placing a white cloth on the co-worker's head like a Ku Klux Klansman and a picture in complainant's mailbox of the Ku Klux Klan and the confederate flag – because it was able to prove the Farragher defense, that avoiding liability for the harassment because it took prompt remedial action reasonably calculated to end the harassment. Complainant, an African-American and a Muslim, alleged that the agency discriminated against him when it: (1) delayed his selection for an Air Traffic Control Specialist position for ten years; and (2) subjected him to harassment at work when a contract employee placed a white cloth on his head like a Ku Klux Klansman, and when he received a picture in his mailbox containing images of the Klu Klux Klan and the confederate flag. The Commission upheld an agency order implementing an AJ's decision finding no discrimination, noting that: (1) the Complainant had not disproven the agency's legitimate business reason for not hiring complainant, which was that, due to budget cuts and a hiring freeze, the only individuals who were hired for that position were veterans who received a veteran's preference; and (2) the agency avoided liability for the harassment because it took prompt remedial action reasonably calculated to end the harassment. As to the harassment defense, the Commission noted that the incidents were sufficiently severe as to create a hostile work environment but the agency's prompt actions enabled it to avoid liability. The agency and the contracting employer immediately investigated the incident involving the Ku Klux Klan hood, the alleged harassing employee in this incident was disqualified pending the results

of the investigation and eventually, the individual's position was terminated as a result of his alleged conduct. The agency also took prompt corrective action concerning picture in his mailbox, issuing a letter the same day of the incident stating that such behavior would not be tolerated and that the individual responsible would be punished accordingly. The agency agency offered excused leave to complainant and immediately conducted an investigation of the incident but was unable to determine the responsible individual. These actions were sufficient to alow the agency to avoid liability under the defense set forth in Farragher v. City of Boca Raton, 524 U.S. 775, 788 (1998).

George v. Thompson, Secretary, Department of Health and Human Services, 07A30079 (July 21, 2004). In sustaining the AJ, the Commission found that the complainant, a former Supervisory Employee Relations Specialist, proved that she was discriminated against by her supervisor on the basis of retaliatory and sex-based harassment that culminated in her reassignment to a non supervisory Health Systems Specialist position, that the reassignment constituted a tangible employment action (so that the agency was automatically liable) and, that she was entitled to $125,000.00 in non pecuniary compensatory damages and reinstatement to her old position, outside the chain of command of the RMO. At the same time, the Commission reversed the AJ's finding of disability discrimination, determining instead that the agency provided the complainant a reasonable accommodation (assuming that she was an individual with a disability) by allowing her to work from home, at her request, and that her additional request for a reassignment to a new supervisor "does not constitute a request for reasonable accommodation. See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, No. 915.002, Question 33 (rev. Oct. 17, 2002) ("An employer does not have to provide an employee with a new supervisor as a reasonable accommodation.")."

Hopkins and Conerly v. Veneman, Secretary, Department of Agriculture, 01A44613 and 01A44614 (March 25, 2005). The agency took prompt and efficient remedial action and thus avoided liability for hostile environment racial harassment by immediately relocating the offending co-worker to another work area, issuing him a reprimand and directing him to have no contact with complainants. Complainants alleged harassment and race (African-American) and sex (female) discrimination that created a hostile work environment when, over a period of three days: a white male co-worker (C-1) shouted at them with "heated

words" concerning a work matter; C-1 made racial remarks and threats about complainants in a conversation with another co-worker, such as "these black n-----s" and that he would "take care of things in his own way;" and, though C-1 was moved, he was moved to another work area on the same floor as complainants. In a rapid response to complainant's allegations by the agency, C-1 was immediately relocated to another location on the first floor, C-1 was verbally reprimanded and steps were taken to suspend him (but this action was later turned into a letter). Four days after C-l was relocated he was sent a memo instructing him not to enter complainants' office area for any reason and to restrict his contact with complainants and a coworker. Then, about five weeks later, C-l was issued an "Interim Behavior Memo" that placed further stringent restrictions, that barred him from, among other things, contacting complainants and a coworker through any means, making comments about them, looking into or standing by their office, and standing in certain specified common areas. The Commission held that, even assuming that complainants established a hostile work environment based upon race (noting that the use of the racial epithet "n---r" is a "highly charged epithet" which "dredges up the entire history of racial discrimination in this country"), the agency's response to complainants' report of harassment was prompt and appropriately sufficient for the agency to avoid liability. The Commission noted that C-1 did not continue to use racial slurs or comments after the harassing incident was reported and: "While complainants may have preferred that C-1 be moved to another floor in the building, a review of the office floor plan reveals that C-1 was moved to a different section of the first floor that is spatially removed from complainants' work area, separated by walls, offices, a restroom, and hall corridors." The Commission concluded that "the agency fulfilled its obligation to take prompt and appropriate remedial action to end the harassment once it learned of the harassment."

Lonnie v. Norton, Secretary, Department of the Interior, 01A31700 (Nov. 22, 2005). Despite knowledge of race harassment, management did not take prompt and appropriate corrective action as to the harassment of one coworker, CW1, toward the complainant, a Laborer, at the agency's National Park Service, and treated the complainant differently than a Caucasian supervisor, who was harassed by a second coworker, CW 2 (even though that second coworker's motivation was not racial); thus, the Commission reversed the AJ's decision without a hearing in favor of the agency as to the race harassment claim. As to harassment by the first coworker, the conduct found offensive included that "CW1 regularly commented,

for a period of 'months and months,' that the reason complainant was hired by the agency was her race and spat in complainant's direction. We note that complainant was the only person of her race employed at the facility. There is also evidence that he acted in a generally hostile manner towards her over a long period of time. Management was fully aware of the hostile relationship between them, and sent them to a mediation session with an EEO counselor to learn to 'get along.' These efforts, however, were established to be unsuccessful." Concerning the actions of the second coworker, the Commission made clear that "while complainant was undoubtedly subjected to hostility by his actions, and reasonably feared CW2, there is insufficient evidence to establish that CW2's actions were motivated by racial discrimination rather than his anger at complainant because she reported his threats directed at S2's wife." Nonetheless, the Commission found disparate treatment, determining that "agency management treated S2 [a supervisor], who was white, and complainant, who was African American, differently with regard to CW2. The record establishes that S2 was permanently transferred to another park, at least in part, to protect him from potential danger from CW2. Complainant, on the other hand, was briefly sent to another facility, but then returned to Yosemite where she continued to have to work with CW2. Complainant asserted she was fearful for her own safety working with CW2 and had been told by some friends that they heard him say that hoped she was dead. Complainant said she told management she was afraid of CW2, but they did nothing about it. We find that complainant has established a prima facie case of disparate treatment by agency management based on race in this matter, which the agency has failed to rebut with an articulation of a legitimate, nondiscriminatory reason for the different treatment. Therefore, we further find complainant has established an inferential case of race discrimination with regard to agency management's lack of appropriate response to her legitimate fears about having to continue to work with CW2."

Malko v. International Broadcasting Bureau, 01A31986 (Sept. 29, 2004). The complainant failed to prove his claim of sex, age and reprisal hostile work environment based on his allegations that a library supervisor falsely accused him of inappropriately staring at two women and that his co-workers, upon learning about the incident, subjected him to ridicule by jokingly calling him names such as "dirty old man" and "King Leer." In any event, the Commission concluded that the agency took immediate and appropriate action after complainant provided notice. As to the library incident, there was no evidence that it was motivated by

discriminatory animus toward complainant's membership in a protected group. As to the name calling, it was neither severe or pervasive, even though it was "unpleasant and inappropriate", with the Commission noting that the anti-discrimination statutes are not a "general civility code" and that "federal law does not prohibit simple teasing, offhand comments, or isolated incidents that are not 'extremely serious."', citing to EEOC Notice No. 915.002, Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (June 18,1999). In response to the complainant's claim that "dozens" of other staff in the "broader agency" continued to call him "King Leer" for a period of "no less than one year" up to "1 -3 times per day," eventually diminishing to a "few comments per week" and became a determinant in his decision to retire, the Commission disagreed, finding inconsistencies in complainant's assertions and contrary evidence by others. Indeed, the Commission observed that "it strains credulity that the name calling occurred as frequent (1-3 times a day), in an open area (the halls), for such an extended period of time (no less than one year) as complainant contends, but the only evidence of record that the name calling was this pervasive is complainant's bare assertions." Finally, the Commission concluded that the agency took immediate and appropriate action. When the complainant informed the agency of the library incident, management held a meeting with complainant and the library supervisor and a resolution was reached by the parties. Similarly, when the complainant informed his first level supervisor that his co-workers were calling him names such as "King Leer", the supervisor "approached his employees one-on-one and advised them to cease such conduct as it was 'unprofessional and inappropriate."' Then, both the first and the second level supervisor made a similar announcement to Office of Computing Services staff at the next general staff meeting. After that, the name calling ceased.

Nicholas v. Veneman, Secretary, Department of Agriculture, 01A43603 (Nov. 4, 2004). While the complainant proved harassment on the basis of race by a co-worker, the agency avoided liability by showing that it took prompt and appropriate action. The complainant, an African-American, worked as an Office Automation Assistant. In finding race harassment, and rejecting the agency's FAD, in that respect, the Commission determined that the co worker (CW) "made racially charged comments on February 23, 2002, as alleged by complainant. We note that although CW denies he made racial slurs and remarks, another co-worker stated in affidavit testimony that in another workplace incident, CW pointed to a bottle of correction fluid and stated 'this is how black people get rid of people like

you and me, white-out, get it.' Consequently, we are persuaded by complainant's version of the telephone conversation and find that she was subjected to unwelcome conduct related to her race when CW made the racially charged comments and used epithets on February 23, 2002. We also find that complainant established that the incident was sufficiently severe to render her work environment hostile. In so finding, we note that the Commission has held that, under certain circumstances, a limited number of highly offensive slurs or comments about an individual's race may support a finding of discrimination under Title VII. The Commission has previously noted that the use of the racial epithet 'n----r' is a 'highly charged epithet' which 'dredge[s] up the entire history of racial discrimination in this country.' See Brooks v. Department of the Navy, EEOC Request No. 05950484 (June 25, 1996); Yabuki v. Department of the Army, EEOC Request No. 05920778 (June 4, 1993) (single incident of verbal abuse and negative comment concerning Japanese people sufficient to constitute race and national origin discrimination). Due to the especially charged nature of the racist comments made by CW, we find that complainant established that the incident was sufficiently severe to render her work environment hostile." Nonetheless, the Commission found that the agency took immediate and appropriate corrective action, once it was informed of the harassment. More specifically, the Commission observed "that after learning of the harassment on February 25, 2002, agency management immediately moved CW away from complainant's work area. We also note that management officials immediately held a meeting with CW after complainant's report and counseled him on his conduct. Further, the agency issued CW letters on March 6, 2002 and June 27, 2002, barring him from any contact with complainant, and disciplined him by issuing him a letter of warning pursuant to an agency investigation of the matters. Finally, we note that the record does not show, nor does complainant contend, that CW continued to use racial slurs or comments after she reported the harassing incident. While complainant may have preferred that CW be moved to another floor in the building, a review of the office floor plan reveals that CW was moved to a different section of the first floor that is spatially removed from complainant's work area, separated by walls, offices, a restroom, and hall corridors. As such, we find that the agency fulfilled its obligation to take prompt and appropriate remedial action to end the harassment once it learned of the harassment."

Hearings (EEOC) and AJ Authority

I. Nature of

Louthen v. Potter, Postmaster General, USPS, No. 01A44521 (May 17, 2006). The Commission greatly limited the method of telephone testimony by setting forth explicit standards and obligations on its Administrative Judges and the parties. The EEOC AJ ordered that an entire hearing be conducted by telephone testimony despite the fact that the AJ was present in the same city as the hearing location. The Complainant had objected to this from the outset, noting issues of credibility with regard to the actions of the deciding officials. The Commission stated that: "Matters pertaining to the conduct of a hearing are within the discretion of the presiding AJ. See 29 C.F.R. § 1614.109(e). The Commission finds that in this case, the AJ's conduct of the entire hearing by telephone over the objection of one of the parties and with no explanation or indication of exigent circumstances warranting a telephonic hearing constitutes an abuse of discretion. This is particularly true where, as here, the AJ was present in the same city where the parties had convened, cited no reason for her inability to appear before the parties, and cited no explanation for her determination that a telephonic hearing was appropriate in this case. With regard to remedial action, the Commission finds that under the circumstances of this case, complainant is entitled to a full in-person rehearing before a newly assigned AJ. The Commission notes, however, that not all such cases may require so extensive a remedy. Rather, it may be appropriate in other cases to limit the in-person rehearing to certain witnesses; for example, one or more witnesses whose telephonic testimony was improperly taken." The Commission explained its reasoning, in this extended excerpt from the decision: "The Commission notes that it has long been common practice for AJs to conduct pre-hearing matters by telephone, and to take testimony by telephone where a witness would otherwise be unavailable to testify. See, e.g., Mozee and Bailey v. United States Postal Service, EEOC Appeals Nos. 01A34265 and 01A34266 (January 10, 2005) (prehearing conducted by telephone); Freeman v. United States Postal Service, EEOC Appeal No. 01924204 (September 30, 1993) (witness testimony taken by telephone); Davis v. Department of Transportation, EEOC Appeal No. 01883565 (January 18, 1989), req. to reopen, den., EEOC Request No. 05890471 (November 9, 1989) (witness testimony taken by telephone). While the

periodic amendments and revisions to the Commission's statutes and regulations do not expressly authorize use of alternate means of appearance, neither do they expressly prohibit it. The Commission further notes that telephonic testimony allows the AJ first-hand contact with a witness which is not available to an appellate arbiter. Considering the special weight given to an AJ's demeanor-based credibility determinations, however, the Commission is persuaded that the AJ should be afforded the maximum opportunity to observe the demeanor of a witness. To that end, the Commission finds that, with the limited exceptions set forth below, the conduct of an entire hearing by telephone is not appropriate and should not occur. The Commission recognizes that in exigent circumstances it may be necessary to take the testimony of a witness, or to conduct an entire hearing, telephonically. For instance, the parties or witnesses to an action may be at far-flung locations and travel is impractical for reasons other than mere inconvenience or expense to the parties, e.g., a civilian witness has been deployed on military reserve duty. Witnesses who are not Federal employees or who have left Federal service and cannot be compelled to appear in person may nonetheless be willing to testify telephonically. Taking testimony by telephone may be an appropriate reasonable accommodation where a witness or party has a disability that prevents him or her from participating in a hearing in person. This is not an exhaustive list of the limited circumstances in which a telephonic hearing or telephonic testimony may be warranted. A telephonic hearing or testimony is permissible when the AJ determines that such exigent circumstances require it and the AJ documents these circumstances in the record. If exigent circumstances are not present, a telephonic hearing (or telephonic testimony) may be conducted only if the parties submit a joint request to the AJ.5 In such a case, prior to the date of the hearing, the AJ must obtain a statement of consent from both parties to the telephonic hearing or testimony, reflecting that the parties have been informed of the limitations of taking testimony telephonically.6 Further, the AJ must be satisfied that it is unlikely that the credibility of any witness testifying telephonically will be at issue. The parties' joint request as well as the AJ's ruling on them must be documented in the record." In footnotes within the decision the Commission also provided the following additional guidance: The Commission specifically reserves for another occasion the question of when testimony may be taken by video conference. (footnote 4). A request for telephonic hearing or testimony in the absence of exigent circumstances must be voluntary. Any effort by an agency to advertise or promote the availability or use of telephonic hearing or testimony, or to entice or pressure a complainant into requesting or agreeing to a telephonic hearing or

testimony would violate the procedures set forth in 29 C.F.R. §§ 1614.109 (e) and (f). Similarly, it would be an abuse of discretion for an AJ to advertise or promote the availability or use of telephonic hearing or testimony, or to entice or pressure either party into requesting or agreeing to a telephonic hearing or testimony. (footnote 5). Informed consent at a minimum requires either a statement signed by each party, or other such documentation in the record which sets forth their understanding of the limitations of telephonic testimony, including: 1) the AJ would not have me opportunity to observe the witnesses' testimony in person; 2) credibility determinations based on the AJ's observation of the demeanor of a witness may not be possible; 3) credibility determinations based on an AJ's in-person observation of a witness are entitled to greater deference by the Commission on appeal; and 4) technological problems may arise that could interfere with the hearing, for example, by causing delay or difficulties with transmission, that would have to be corrected in some other manner by the AJ. (footnote 6).

II. Bias Claims

Clay v. Snow, Secretary, Department of the Treasury, 01A35231 (Jan. 25, 2005). The Commission upheld an AJ's denial of a motion to recuse himself as impartial and affirmed a decision of no discrimination on complainant's non-selection complaint. The Commission upheld a finding of no discrimination on complainant's complaint alleging non-selection based upon his age and retaliation for prior EEO involvement. The Commission also affirmed the AJ's denial of complainant's motion that the AJ recuse himself because of prior conduct that cast doubt upon the AJ's impartiality. Complainant alleged that the AJ, at a previous hearing involving a co-worker of complainant, approached agency counsel and asked him "Do you think you can get my son a job here?" This was purportedly overheard by the husband of the co-worker on the earlier complaint. The agency submitted an affidavit from the agency representative at the earlier EEO hearing denying that this had happened. The AJ also provided an affidavit denying that he had made any such request, and exercised his discretion to deny the recusal motion as "mere speculation" and "without basis." The Commission affirmed the AJ's denial of the recusal motion, noting that "the question of recusal is a matter entrusted to the discretion of the AJ" and that a review of the record "reveals no

hint of bias or prejudice on the part of the AJ, either in the course of colloquies with the parties or in ruling on objections. "

III. Default Judgments and Sanctions

Barbour v. Potter, Postmaster General, United States Postal Service, 07A30133 (June 16, 2005). The Commission held that an EEOC administrative judge did not err in entering a default judgment against the agency where it persistently and mysteriously failed to respond to discovery requests and orders. Complainant's attorney granted agency counsel two extensions to respond to their interrogatories. Complainant then filed a motion to compel to which the agency failed to respond. The agency also failed to timely respond to complainant's "Motion under Rule 109(g) for Order Determining Liability; or for issue and Evidentiary Sanctions for Discovery Violations." When it did respond, the agency asserted that it had attempted to comply but was low staffed. The agency also argued that default judgment was an extreme sanction that was not merited given that the complainant failed to show "irreparable prejudice." The Commission found that the AJ properly determined that the "agency's dilatory efforts towards discovery and the hearing process, as well as its eleventh-hour explanations, were untenable" and "the agency failure to timely proceed with discovery, failure to comply with the AJ's Orders and directives, and failure to offer adequate justification for its actions warranted an adverse inference against the agency." The Commission granted default judgment and affirmed a $12,000 award of compensatory damages and also an award of attorney's fees, as modified by the Commission.

Bess v. Potter, Postmaster General, United States Postal Service, 07A60001 (Jan. 31, 2006). The AJ did not abuse her discretion when she issued a default judgment in complainant's favor. The Commission explained as follows: "In the instant case, the AJ advised the agency in the acknowledgement letter and Pre-Hearing Scheduling Order that she had the authority to issue a decision in a party's favor for the opposing party's failure to file a Pre-Hearing Statement. Nevertheless, the agency failed to submit such statement. Indeed, the agency's brief on appeal is silent as to the reason for this omission, and only claims that sanctions should not be imposed due to its failure to receive the Notice to Show Cause. In that regard, we note that the agency did not argue that the Notice to Show Cause was mailed to the wrong addressee. While it is not clear why the agency failed to receive the

Notice to Show Cause, it did not establish that this problem was due to an error on the part of the AJ. See Elston, supra. Accordingly, in the absence of any showing of good cause why sanctions should not be imposed for the agency's failure to submit the Pre-Hearing Statement, we find the AJ did not abuse her discretion in finding for complainant."

Burns v. Potter, Postmaster General, United States Postal Service, 01A52445 (Oct. 19, 2005). The AJ properly dismissed complainant's complaint as a sanction for failing to comply with a Discovery Order. In addition to failing to provide the ordered information, the Commission noted that "the complainant, in his responses, treated the AJ in a disrespectful, degrading and insulting manner. . . ." (Complainant accused the AJ of being biased and characterized her ruling as '"tyrannical sightless statements oozing from this administrators' [sic] baseless beliefs' [sic].' Complainant went on to accuse the AJ, who he repeatedly referred to as the 'administrator,' of blocking his complaint, disallowing his witnesses and favoring the agency in her rulings.").

Elston v. Mineta, Secretary, Department of Transportation, 07A50019 (Oct. 18. 2005), reconsideration denied Jan. 5, 2006. The Commission held that the sanction of a finding in favor of complainant was properly imposed on an agency that failed to respond to complainant's discovery requests, failed to participate in a pre-hearing conference and failed to respond to the AJ's orders to do so and the AJ's order to show cause why sanctions should not be imposed. An AJ notified an agency at the beginning of the EEOC hearing process that failure to respond to an order could result in sanctions and further ordered the parties to comply with the applicable discovery time frames. After complainant's attorney filed a Motion for Order Compelling Discovery, the AJ spoke with agency representatives on the telephone, who assured her that the agency would respond to complainant's discovery requests. Despite such assurances the agency did not comply. The AJ then issued an Order to Compel Discovery directing the agency to respond to complainant's discovery request. The AJ also notified the parties that failure to comply with the order would result in sanctions, up to and including a judgment in favor of complainant. Subsequently, complainant filed a Pre-Hearing Conference Report stating that the agency had not provided the requested discovery. Complainant also filed a Motion for Sanctions and requested default judgment against the agency. The agency did not file a Pre-Hearing Conference Report and the agency representative was not available for the scheduled telephonic pre-

hearing conference call. That same day, the AJ issued an Order to Show Cause, ordering the agency to show good cause for its failure to comply with the AJ's orders. The agency did not respond and the AJ entered a default judgment against the agency and ordered relief that included: placing complainant in a Regional Administrator position in Fort Worth, Texas; back pay; $115,000 in non-pecuniary damages; and $111,618 in attorney's fees. The agency rejected the AJ's decision and appealed to the Commission. The Commission noted that: "The Commission has exercised its inherent authority to enforce its Part 1614 Regulations by ordering sanctions in response to various violations" and that its regulations, at 29 C.F.R. §1614.108(c)(3), specifically authorize the sanction of the issuance of a decision in favor of one of the parties. However, before sanctions are imposed, "the Commission requires that the AJ issue an order to the offending party that makes clear that sanction(s) may be imposed and the type of sanctions that could be imposed for failure to comply with the order unless the party can show good cause for its action." The Commission concluded that, under the circumstances of the instant case, the AJ properly imposed the sanction against the agency of a judgment in favor of the complainant. The Commission also affirmed the remedy imposed, though it noted that the agency could put complainant in a Regional Administrator position in Fort Worth or a substantially equivalent position. See also Bess v. Potter, Postmaster General, USPS, No. 07A60001 (Jan. 31, 2006) (The Commission found that the sanction of a default judgment in complainant's favor was appropriate for the agency's failure to file a Pre-Hearing Statement and to respond to a Notice to Show cause why sanctions should not be imposed.).

Harris v. Potter, Postmaster General, USPS, 07A30039 (Sept. 1, 2005). The Commission reversed an AJ's entry of a default judgment against an agency, imposed as a sanction for errors made at the hearing stage, holding that the agency had valid explanations for some of the errors and, although sloppy and careless, the agency's actions were not sufficiently egregious to merit the sanction of a default judgment. The agency did not provide complainant with contact information for witnesses, made errors concerning the attendance of other witnesses at the hearing and failed to provide a court reporter at the commencement of the hearing. The Commission noted that some of the acts were excusable, such as the court reporter not being present because of a mistake by the court reporting service, which offered to have a court reporter available within two hours. The Commission "has held that sanctions, while punitive, also act to prevent similar misconduct in the future and must be tailored to each situation, applying the least sanction necessary

to respond to the party's failure to show good cause for its actions, as well as to equitably remedy the opposing party. Also, the Commission has held that imposition of an excessive sanction, where a lesser one would be more appropriate, may constitute an abuse of discretion. In a recent case, the Commission emphasized that the purpose of a sanction was as a response and a deterrent to the underlying conduct of the non-complying party. (citations omitted)." The Commission held that the agency engaged in poor management and planning for this hearing but did not act to purposely frustrate the hearing process. Addressing a second justification for imposition of sanctions, to remedy any harm to the opposing party caused by the non-complying party's actions, the Commission noted that complainant was returned to work and awarded back pay and thus did not experience any detriment. Accordingly, the complaint was returned for a hearing.

Kelley v. Rumsfeld, Secretary, Department of Defense, (Defense Commissary Agency), 01A45412 (March 23, 2005). The Commission held that an AJ's sanction of a remand for a final agency decision (FAD) was appropriate solely based upon complainant's failure to comply with the requirements of a Scheduling Order, and the Commission also affirmed a FAD finding no discrimination in this non-selection case, holding that the complainant's documented performance and conduct deficiencies were sufficient evidence to refute complainant's undocumented assertions of pretext. Complainant alleged sex discrimination in his non-selection for a Supervisory Sales Store Checker, GS-2091-06. A Scheduling Order from an AJ directed complainant to do a number of things, including providing a witness list and proposed findings of fact, and also informed him that his failure to comply with the order could result in a remand of the case to the agency for a final decision or other sanctions. Complainant did not respond to the requirements of the Scheduling order and the AJ remanded the complaint to the Agency for a final decision and the agency issued a decision finding no discrimination. The Commission held that the AJ's returning of the case back to the agency for a final decision without a hearing was a proper sanction. [See also Simon v. Potter, Postmaster General, USPS, No. 01A51478 (April 21, 2005).] The Commission also upheld the final agency decision of no discrimination because the selecting official's reasons for not selecting the complainant were legitimate and not proven by complainant to be pretextual. The selecting official "cited concerns about complainant's reliability and dependability base on numerous incidents prior

to the selection," and a copy of four letters of concern documenting four such incidents was introduced into the record.

King v. Mineta, Secretary, Department of Transportation, 07A40003 (Sept. 29, 2005), recon. den., 05A60208 (Jan. 4, 2006). The Commission upheld the AJ's sanction of an adverse inference and a consequent finding of discrimination for the apparent destruction and failure to produce interview notes on the bases alleged (race, sex and age) in the complainant's non selection for the Hub Manager / Ontario position. The Commission also agreed with the AJ that complainant "should be awarded a subsequent promotion to a Branch Manager position because she established that had she been awarded the Hub Manager position, she would have been selected for a subsequent promotion to Branch Manager." As for compensatory damages, the Commission disagreed with the AJ, and reduced the award from $25,000.00, to $10,000.00 because of a lack of corroboration. The complainant was employed as a Hub Manager at the agency's Oakland California Airport, Oakland, California facility and applied for but was not selected for the Hub Manager position at the Ontario, California Airport. As to the AJ's sanction, the Commission explained that "In this case, the record reveals that complainant requested that the agency preserve the interview notes that were generated during her interview for the Hub Manager position. Despite this request, the agency failed to preserve the notes or produce them during discovery. In response, the AJ issued a notice to show cause why sanctions should not be imposed. Having found that the agency failed to show cause, the AJ issued an adverse inference sanction against the agency for its only articulated reason for complainant's non-selection. As such, the AJ issued a finding of discrimination in light of the agency's failure to articulate a legitimate, nondiscriminatory reason for its actions. Indeed, the agency stipulated that the only legitimate, nondiscriminatory reason that complainant was not selected was due to poor interview performance." The Commission also rejected the agency's argument that sanctions were inappropriate because the failure to preserve the notes was negligent. Here, the commission noted that "a showing that the noncomplying party acted in bad faith is not required. See Cornell v. Department of Veterans Affairs, EEOC Appeal No. 01974476 (November 24, 1998). . . . [and that] sanctions may be used not only to equitably remedy the opposing party, but also to deter the non-complying party from similar conduct in the future. See Hale, supra. There was no way for complainant to prove that the reason was pretext without the interview notes documenting such alleged poor performances." Likewise, as to remedy, the Commission concluded that the

evidence, to include that the selectee was later selected for a Branch Manager position supported "the AJ's finding that complainant would have likely been selected for a subsequent promotion." Finally, in reducing the AJ's compensatory damage award, the Commission agreed with the agency, determining, as follows: "given the lack of corroborating evidence and the sparse medical file that did not indicate significant emotional distress, we find there is a lack of substantial evidence to support such a large award. Rather, we find an award of $15,000.00 will adequately compensate complainant for her emotional distress and is more in line with Commission precedent."

Matheny v. Department of Justice, 05A30373 (April 21, 2005). The Commission affirmed its previous determination that an AJ did not err in granting judgment as a sanction for the agency's continued failure to respond to the AJ's orders. The agency argued that the Commission did not have the power to impose the sanction of default judgment because of sovereign immunity. However, the Commission found that the authority to do so was contained in Title VII as well as several executive orders. The AJ ordered as a sanction that the agency hire an employee and pay his back pay. The agency argued that this sanction was not available since there was no finding on the merits. Commission found that the sanction which the AJ issued was a finding of discrimination not the order to hire the employee. The order to hire the employee was an equitable remedy that flowed from that finding. Moreover, the AJ specifically found that the limited evidence in the record showed that complainant's claims were supported.

VanDesande v. Potter, Postmaster General, United States Postal Service, 07A40037 (Sept. 28, 2004). The Commission upheld the AJ's default judgment decision, finding hostile environment retaliation discrimination, against the complainant, a letter carrier, during the period November 15, 1995, through his date of termination, effective on October 11, 1996, because the agency "failed to comply with the Commission regulations to investigate complaints, failed to respond to complainant's requests and motions for discovery, failed to respond to the AJ's Orders to investigate the complaints and respond to complainant's requests for discovery, and failed to make good on its own representations that it would comply in these matters." The Commission also affirmed an award of front pay in the amount of $116,733.00 (not subject to the compensatory damage cap and because "a subsequent working relationship between the parties would be

antagonistic" and computing that amount by use of a probability adjusted method discounted by present value, a model proposed by complainant's expert.

IV. Bifurcated Hearings

West v. Potter, Postmaster General, United States Postal Service, 07A30129 (Sept. 30, 2004). In affirming the AJ's award of $1,000.00 in non pecuniary compensatory damages, the Commission disagreed with the complainant's argument that the AJ should have held a separate hearing on damages, with the Commission determining instead that the record contained sufficient evidence for a decision on damages. (See also Reprisal/Retaliation).

Independent Contractors

Adams v. Perry, Administrator, General Services Administration, 01A31252 (March 31, 2004). The Commission reversed the agency's dismissal for failure to state a claim because the complainant was purportedly a contractor and not an agency employee. The Commission noted that "Aside from the agency's bald assertion found in its decision, there is no evidence in the record to determine whether complainant is an employee or independent contractor. The decision makes no attempt to apply the common law of agency test to this situation, nor does it support its decision with facts that may be applied to the test. We find the record insufficient to render a decision on the matter." As to the common law agency test itself, the Commission cited to its precedent Ma v. Department of Health and Human Services, EEOC Appeal No. 01962390 (June 1, l998) and noting that "the Commission will look to the following non-exhaustive list of factors: (1) the extent of the employer's right to control the means and manner of the worker's performance; (2) the kind of occupations, with reference to whether the work is usually done under the direction of a supervisor or is done by a specialist without supervision; (3) the skill required in the particular occupation; (4) whether the 'employer' or the individual furnishes the equipment used and the place of work; (5) the length of time the individual has worked; (6) the method of payment, whether by time or by the job; (7) the manner in which the work relationship is terminated, i.e., by one or both parties, with our without notice and explanation; (8) whether annual leave is afforded; (9) whether the work is an integral part of the business of the 'employer'; (10) whether the worker accumulates retirement benefits; (11) whether the 'employer' pays social security taxes; and (12) the intention of the parties."

Knobel v. Gonzales, Attorney General, Department of Justice, 01A51146 (Nov. 29, 2005). The Commission determined, under its precedent in the Ma case, that the complainant, a Records Examiner/Analyst, was not an employee of the agency at the time of the alleged discrimination. As noted by the Commission, "Complainant does not dispute that he was not supervised by agency employees. Additionally, we note that in both his formal complaint and in his January 19, 2004 affidavit to the investigator, complainant states that he was contracted as a Records Examiner/Analyst to work at the agency. Further, the record reveals that LHC [the contractor] solely had the authority to terminate complainant's employment. Moreover, we find that the agency was not a joint employer of complainant in light

of it not having sufficient control over the means and manner of complainant's work. See Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms, EEOC Notice No. 915.002 (December 3, 1997)."

Mooney v. Chertoff, Secretary, DHS, 01A45921 (Mar. 16, 2005), recon. den., 05A50754 (May 26, 2005). The agency exercised sufficient control over a Systems Technician to qualify as a joint employer with Northrop Grumman. Accordingly, the Commission reversed the agency's dismissal of the Rehabilitation Act complaint for failure to state a claim. This case involved a complainant who began working at the Del Rio Border Patrol office in June 1996, as a System Technician." Throughout eight years of employment "five different contracting companies have held the Legacy/INS contract for this position, and complainant always retained his position. Complainant's duties include, but are not limited to, maintenance of the Del Rio Sector Novell computer network. This includes file servers, computers' installation, maintaining desktop, configuring workstation, desktop maintenance and supporting end-user." As described by the Commission, the record further showed that "S1 directed all the ADP operations for both government employees and contractors", "assigned complainant all work assignments via e-mail or verbal instructions and "initiated a policy whereby any and all computer-related support calls were to be directed exclusively to his office." There was also evidence that "S1 instructed all ADP government and contract employees that he 'personally, would determine who handled what work assignment, in what order, and in what time frame.' For example, complainant alleged that on many occasions S1, either via -- mail or verbally, instructed him what computer to install, where to install it, and when to install it. Complainant further alleged that he never contacted his contracting company regional manager for clarification on work assignments. If he had questions regarding the work assignment, he would immediately contact S1 for further guidance. Furthermore, the record reveals that all work performed by Systems Technician was performed on agency premises using agency equipment and supplies. The record also reveals that S1 submitted his comments and recommendations for complainant's performance appraisal."

Pugliese v. Ashcroft, Attorney General, Department of Justice, 01A34443 (Apr. 15, 2004). The Commission reversed an AJ's dismissal for lack of jurisdiction and remanded the complaint for additional processing, where complainant, a full-time,

active duty Sergeant of the New York National Guard, was detailed to the Drug Enforcement Agency (DEA), and alleged she suffered sex discrimination and harassment by a DEA agent. The AJ had dismissed the complaint because uniformed military personnel of any branch of the armed forces are not covered under Title VII. Nonetheless, as noted in the decision. the Commission has permitted claims from individuals who, although part-time uniformed military personnel, also work in civilian jobs during the week. See Snyder v. Department of the Air Force, EEOC Appeal No. 01A23583 (Mar. 26, 2003); see also Brown v. United States, 227 F.3d 295, 299 (2000), cert. denied, 531 U.S. 1152 (2001). The Commission held that in order to determine whether Title VII extended to complainant's situation, the common law of agency should govern. However, it also determined that the record was insufficient to decide whether complainant's employment situation was such that she could be deemed an agent of the DEA. Therefore, the Commission remanded the complaint for a determination of the "work relationship between complainant and DEA officials, who had authority over complainant for personnel concerns, whether and to what degree complainant continued to report to her Guard chain-of-command as opposed to agency supervisors, [and] whether she had to wear a uniform while on duty at the DEA."

Rutland v. Brownlee, Acting Secretary, Department of the Army, 01A33976 (Aug. 10, 2004). The Commission affirmed the agency's dismissal of the complaint for failure to state a claim; under the common law test of agency, the complainant was not an agency employee. The complainant alleged that she was discriminated against on the bases of national origin (Tunisia), sex (female), and reprisal for prior EEO activity. Complainant, a foreign language instructor, asserted that she was nominally employed by Central Texas College (CTC) but that under the common law of agency, she was an Army civilian employee. The Commission disagreed. Relying on the common law test of agency, set out in Ma v. Department of Health and Human Services, EEOC Appeal No. 01962390 (June 1, 1998), the Commission provided, as follows: "The agency furnished necessary equipment for work-related activities; however the record indicates that CTC, via Person D, was the primary supervisor of complainant. The record further reflects that pay, leave and benefits were provided by CTC. The agency did not provide complainant a performance appraisal during her work at Fort Hood. While we observe that Person A sent a letter to CTC stating that complainant's conduct was inconsistent with the contract and, her continued work as a representative of CTC is no longer wanted, the authority to terminate complainant's employment resided with CTC."

Investigations (EEO)

I. Inadequate

Godoy v. Potter, Postmaster General, United States Postal Service, 01A24157 (Sept. 30, 2004). Because the agency's investigation was insufficient to address the complainant's disability discrimination claim, the Commission reversed the agency's FAD and remanded for a supplemental investigation. In his complaint, the complainant, a supervisor at the agency's Processing & Distribution Center facility, alleged that he was discriminated against on the basis of disability (diabetes), when: he was denied leave under the FMLA; he was denied an accommodation; his manager told him he did not have time to worry about complainant's personal problems; and, another manager told him he was not being sent for training because he was always sick. During the EEO investigation, the investigator sent the complainant a standardized extensive questionnaire, designed to gain more information about the complainant's disability, even though some of the questions were not applicable to the complainant's situation. In response to the EEO investigator's questions, the complainant simply stated that he had diabetes, that it was a permanent and chronic condition, and, that he was limited in driving, indicating that he could not drive for more than 30 minutes at a time. Because he did not request a hearing, the agency denied his claim in its FAD, determining that he was not an individual with a disability because he failed to show that his diabetes substantially limited him in a major life activity. In finding the EEO investigation inadequate, the Commission first observed that at least one of the questions was not relevant (i.e., had to do with hiring) and that "asking complainant in a general manner 'whether' he submitted medical documentation [as provided in the form] is not the same as asking him to actually provide medical documentation to support his allegation of disability status or to indicate where such documentation could be located." Most important, though, the Commission observed that "the questions asked to ascertain the severity of complainant's limitations were wholly unfocused and legally insufficient to accomplish that end. The investigator asked complainant to describe how his condition 'substantially limits [him] in performing one or more of [his] major life activities (i.e. walking, standing, talking, hearing, etc.).' However, this listing of major life activities failed to include some of those most likely to be applicable to complainant's diabetes

impairment, such as eating, and caring for self. Nor was complainant asked how his diabetes impairment affected him in any of his daily activities. The second question directed him to '[E]xplain how the above specific limitation relates to the issue of this complaint.' However, there is no requirement in applicable precedent or law that the complainant's limitations bear any relationship to the accepted issue in the complaint. Moreover, none of the questions posed by the agency's investigator asked whether complainant took medication, or insulin to control his diabetes impairment or inquired about any side effects complainant might have experienced from such mitigating measures. Finally, the investigator never asked complainant to produce medical documentation to support his claim that his diabetes impairment rendered him disabled or placed him on notice that such documentation would be necessary."

Robey v. Potter, Postmaster General, United States Postal Service, 01A41333 (Mar. 15, 2004). The Commission vacated the agency's finding of no discrimination (on the bases of race, color, sex, and retaliation) in the nonselection of complainant for a temporary position, a Self-Service Postal Center (SSPC) Technician, and remanded the complaint for a supplemental investigation because the selecting official's articulated justification for selecting another employee for the position was insufficient. The Commission noted that an affidavit from the selecting official asserted that the selectee was chosen because "[f]rom the business sense, selecting [selectee] for a temporary SSPC technician assignment was the right choice." This was not specific enough, with the Commission concluding "When conducting investigations, agencies are required to develop an 'appropriate factual record' which is a record that 'allows a reasonable fact finder to draw conclusions as to whether discrimination occurred.' The agency's investigator did not ask the selecting official why selecting the selectee was in a 'business sense' the 'right choice.' The selecting official may have relied on a legitimate, non-discriminatory reason for his selection, but he should have been queried further to explain in more specificity why he made his selection. Therefore, we shall remand the matter for supplementation of the record as specified in the Order herein."

II. Refusal to Provide Information

Webb v. Potter, Postmaster General, United States Postal Service, 01A54870 (Dec.

21, 2005). While noting that the agency's burden to articulate a legitimate non-discriminatory reason for its actions is not onerous, the agency failed to meet its burden and presented no independent evidence that explained why complainant was found to have been in violation of her LCA and that terminating her employment was appropriate; thus, the Commission reversed the agency's decision and concluded instead that the complainant letter carrier was subjected to retaliation when she was terminated. Alternatively, the Commission determined that the agency's failure to provide information to the EEO investigator, allowed it to draw an adverse inference, resulting in a retaliation finding. The Commission described the agency's failure as follows: "Despite numerous attempts to reach [Management Official] by letters dated May 28, 2004, and July 16, 2004; by telephone on August 12, 2004, and August 27, 2004; and by e-mail on August 27, 2004, no response to these requests for information was forthcoming. In addition, on these same dates requests for information were made to another manager, [S1], and [S1] was again spoken to again on September 13, 2004, when she promised to provide an Affidavit by the end of the week. It should be noted that no response from [S1] was forthcoming." In relation to drawing an adverse inference, the Commission made clear that its regulations "require any employee of a federal agency to produce documentary and testimonial evidence as the investigator deems necessary. 29 C.F.R. § 1614.108(c)(1). Where the agency's employees fail without good cause to respond fully and in timely fashion to requests for documents, records, affidavits or the attendance of witnesses, the Commission on appeal may draw an adverse inference that the requested testimony of the witness would have reflected unfavorably on the party refusing to provide the requested information, or issue a decision fully or partially in favor of the complainant. 29 C.F.R. §§ 1614.108(c)(3)(i)-(v), 1614.109(e)(3)(i)-(v). Here, neither the record nor the agency's arguments on appeal explain why the management officials did not provide the requested information despite numerous attempts by the investigator."

Labor-Related Issues

International Federation of Professional and Technical Engineers, Local 29, Goddard Engineers, Scientists, and Technicians Association and National Aeronautic and Space Administration, Goddard Space Flight Center, Greenbelt, Maryland, 61 FLRA 382 (FLRA Nov. 15, 2005). In this negotiability appeal, the FLRA rejected, as contrary to the ADR Act, a proposal that "when an employee decides to use the ADR process after filing a grievance, the agency would be bound to participate and rejected another proposal, as contrary to the agency's right to assign work, that "the ADR manager provide the union with any information it requested regarding the ADR process, to include internal management communications and copies of the ADR staff's performance appraisals."

Social Security Administration, Office of Hearings and Appeals, Boston Regional Office, Boston, MA and American Federation of Government Employees, Local 1164, AFL-CIO, 59 FLRA No. 160 (Apr. 30, 2004). The union had a right to representation at EEO investigative interviews with unit employees, conducted by contracted investigators, because those interviews were formal discussions under 5 USC § 7114(a)(2)(A). Chair Dale Cabaniss dissented, contending that EEO complaints are not "grievances" covered by the Labor Relations statute. The majority found that the EEO interviews, after the filing of formal complaints, met the requisite elements for a formal discussion, which are: (1) a discussion; (2) which is formal; (3) between a representative of the agency and a unit employee or the employee's representative; (4) concerning any grievance or any personnel policy or practice or other general condition of employment.

Mixed Cases

Bell v. DHS, 95 MSPR 580 (Mar. 4, 2004). An MSPB AJ may not dismiss a mixed case appeal as untimely filed under 5 CFR Section 1201.154 based on the untimeliness of the appellant's formal EEO complaint, without evidence of a final agency decision dismissing the EEO complaint as untimely that was not appealed to the EEOC, or a decision by the EEOC dismissing the complaint as untimely.

Capitulo v. Potter, Postmaster General, United States Postal Service, 01A43252 (Jan. 14, 2005). Because the MSPB "no longer accepts cases where mixed and non-mixed issues are inextricably intertwined", the Commission vacated and reversed the agency's FAD, and remanded for a hearing on the complainant's claim that he had been denied a reasonable accommodation. This case involved a complainant who filed an EEO complaint, alleging that he was not accommodated because the agency failed to provide him with a light duty assignment. By the time this case reached the EEOC AJ, the complainant was also alleging a constructive discharge, asserting that the failure to accommodate had resulted in his filing for disability retirement and his forced retirement. The agency's motion to dismiss, on the basis that the case was mixed – i.e., that the failure to accommodate was "inextricably intertwined" with the constructive discharge - was granted by the EEOC AJ, who remanded the case back to the agency, which then issued a FAD concluding that the complainant was not a qualified individual with a disability. The complainant appealed the FAD to the Commission, which reversed in this decision. The Commission found that the alleged denial of an accommodation was a non mixed issue and that the MSPB no longer accepted issues that were "inextricably intertwined", noting that it had deleted that part of its' Management Directive that had provided to the contrary in EEO Management Bulletin 100-1. That Bulletin provided that the following section was deleted as a result of notification by the MSPB: "The agency should file with the MSPB a motion to consolidate the non-mixed case claim with the mixed case appeal. Upon filing the motion, the non-mixed case complaints will be held in abeyance pending a decision by the MSPB administrative judge on the agency's motion. If the MSPB administrative judge should fail to consolidate the non-mixed case complaints, they shall be processed pursuant to § 1614.106, et seq. Time for processing will commence to run without notice, fifteen (15) days following the decision denying

jurisdiction. The time periods are to run from the time processing ceased. This means that if processing of the non-mixed claim ceased on the seventieth (70th) day, the count of days will begin with day 71. If the MSPB Administrative Judge consolidates, the mixed case complaint should be dismissed." Footnote 4, now also deleted, provided that: "This provision is specifically meant to address those situations where a series of events, connected in time or type, culminate in an appealable action against a person with standing to appeal to the MSPB. For example: minor discipline, warnings or other claims may form the basis for a non-mixed case, but ultimately lead to suspension in excess of 14 days or termination; similarly, an allegedly discriminatory performance evaluation and subsequent placement on a performance improvement plan are non-mixed claims that may culminate in denial of a within-grade promotion, or even in removal, both of which are appealable to the MSPB."

Frazier v. Johanns, Secretary, Department of Agriculture, 01A42698 (Aug. 24, 2005). Because the MSPB determined that the complainant had not proven that his discharge was involuntary, the entire case was unmixed (the agency had consolidated the third complaint alleging unlawful forced discharge with two others), and the complainant was entitled to a hearing before an EEOC Administrative Judge, if he wanted. Thus, the case was remanded "back to the agency to provide notice to complainant regarding his right to a hearing, pursuant to 29 C.F.R. § 1614.108(f)."

Harris v. England, Secretary, Department of the Navy, 01A50046 (Feb. 8, 2005). If a complainant appeals to the MSPB challenging his removal, and an MSPB AJ dismisses the challenge to the removal for lack of jurisdiction, the agency cannot dismiss a formal EEO complaint filed with the agency challenging the removal, but must hold the complaint in abeyance pending a final decision by the MSPB on the MSPB AJ's jurisdictional dismissal. Complainant filed an appeal of his termination from federal employment with the MSPB on March 7, 2004. An MSPB AJ dismissed the complainant's MSPB appeal for lack of jurisdiction and complainant appealed the dismissal to the MSPB. Complainant filed the instant formal EEO complaint on July 2, 2004 and the agency dismissed the complaint pursuant to 29 C.F.R. § 1614.107(a)(4), on the grounds that it addressed the same matter that complainant previously elected to appeal to the MSPB. The Commission reversed the agency's decision. The Commission noted that a mixed case complaint is a complaint of employment discrimination filed with a federal agency, relating to or

stemming form an action that can be appealed to the MSPB. 29 C.F.R. §1614.302(a)(1). An aggrieved person may elect to file initially file a mixed case complaint with an agency or may file a mixed case appeal directly with the MSPB. Moreover, whichever is filed first shall be considered an election to proceed in that forum. The Commission's regulations provide that where an individual files both an EEO complaint and an appeal to the MSPB regarding the same matter, if neither the agency nor the MSPB AJ questions the MSPB's jurisdiction over the matter, the agency may dismiss the complaint. However, the Commission's regulations provide further that if the agency or the MSPB AJ questions the jurisdiction of the MSPB, the agency shall hold the EEO complaint in abeyance until the MSPB AJ rules on the jurisdictional issue. In this case, after the MSPB AJ issued a decision dismissing complainant's appeal for lack of jurisdiction, complainant stated that he petitioned for review by the full MSPB. Because complainant is contesting the MSPB AJ's determination, the agency may not dismiss the instant complaint pursuant to 29 C.F.R. § 1614.302(c)(2) until either the MSPB rejects complainant's appeal to the full board, or issues a decision affirming the MSPB's lack of jurisdiction. Therefore, the agency's decision to dismiss the instant EEO complaint was improper.

Johnson v. England, Secretary, Department of the Navy, 03A40047 (Mar. 25, 2004). In this mixed case, the EEOC agreed with the MSPB's finding that complainant was not an individual with a disability and thus not entitled to reasonable accommodation for his post traumatic stress disorder with claustrophobia. Petitioner, a Painter at the agency's Intermediate Maintenance Facility in Silverdale, Washington , was removed for physical inability to perform because he was restricted by his medical condition from painting in confined spaces. As a painter, petitioner was required to work, at times, in confined spaces in various tanks on submarines. His medical condition (Post Traumatic Stress Disorder (PTSD) with claustrophobia) resulted from a situation where water came through petitioner's air-fed respirator while working in a tank and he had a panic attack, when he twisted his back attempting to quickly free himself from a tank. In finding that the complainant was not an individual with a disability and therefore not entitled to accommodation, the Commission held, as follows: "Petitioner provided documentation establishing that he has PTSD with claustrophobia and that this condition is permanent. As a result of this condition, P1[a physician] indicated that petitioner is restricted from working in confined spaces where he is required to wear protective gear that can become entangled in pipes and brackets,

such as with non-tethered type respirators. Petitioner did not provide any information on how his restriction extended beyond his specific position as a painter working in a confined space as found in a submarine setting. Nothing in the record shows that petitioner is limited in his ability to perform any job other than the one in which he was engaged. Petitioner failed to produce any evidence to show that his limitation restricts him from performing either a class of jobs or a broad range of jobs in various classes. Upon review, we find that petitioner's restriction regarding confined spaces is not sufficient to establish that he is substantially limited in the major life activity of working. In addition, we find nothing in the record to show that petitioner had a record of having a substantially limiting impairment or that he was regarded as having such an impairment. Accordingly, we concur with the MSPB AJ's determination that petitioner has not established his claim of disability discrimination."

Lucas v. Brownlee, Acting Secretary, Department of the Army, 03A40005 (Jan. 23, 2004). In this mixed case, the EEOC agreed with the MSPB's determination that the appellant's removal for a positive drug test did not constitute disability discrimination. The appellant, formerly an Electrician (High Voltage), WG-10, at the agency's Public Works Business Center, Fort Bragg, North Carolina, alleged that he was discriminated against on the basis of disability when he was removed from employment after testing positive for cocaine in a random drug test. He filed a mixed case appeal with the MSPB. After a hearing, the MSPB Administrative Judge upheld the appellant's removal, finding that the appellant was excluded from coverage under the Rehabilitation Act, as a current user of illegal drugs. The full Board denied the appellant's petition for review. Here, the EEOC agreed with the MSPB's determination.

National Origin Claims

Kim v. Chertoff, Secretary, DHS, 01A51455 (June 3, 2005). The Commission reversed the AJ's decision without a hearing in favor of the agency, finding that there were genuine issues for trial as to the ability of the complainant to express himself and whether complainant's accent would 'materially interfere' with his job performance, in connection with the agency's non selection of the complainant Customs Inspector, for promotion to the position of Supervisory Customs Inspector. In the Commission's view, the AJ had "erred in determining, without first holding a hearing, that based on complainant's written submissions of record and deposition testimony, complainant is unable to convey his thoughts clearly in English. In addition, this case requires further analysis of whether complainant's accent would 'materially interfere' with his job performance. See Daly v. United States Postal Service, EEOC Appeal No. 01933547 (September 14, 1995); EEOC Enforcement Guidance on National Origin Discrimination, at 19-20 (December 3, 2002) ('An employment decision based on foreign accent does not violate Title VII if an individual's accent materially interferes with the ability to perform job duties. This assessment depends upon the specific duties of the position in question and the extent to which the individual's accent affects his or her ability to perform job duties. Employers should distinguish between a merely discernible foreign accent and one that interferes with communication skills necessary to perform job duties.')."

Knezev v. Chertoff, Secretary, Department of Homeland Security, 01A55853 (June 26, 2006). The Commission affirmed a finding of no discrimination in a case where a complainant (a supervisor) asked a subordinate employee to type a personal letter related to complainant's EEO complaint in violation of the agency's code of conduct. Complainant alleged discrimination on bases that include national origin (Serbian) when he was issued a three-day suspension for asking a subordinate to type a personal letter related to his EEO complaint. He provided an affidavit from the subordinate employee stating that the subordinate did so voluntarily, on her own time. However, the Commission noted that this would still be a violation of the Customs Code of Conduct and that complainant "has not provided evidence that he did not ask (the subordinate employee) to type his letter, nor has he shown that the penalty imposed was based on prohibited considerations or that he was treated less favorably than a similarly situated employee.

Non Selection Claims

I. Failure of Agency to Articulate an Adequate Reason

Fullman v. Potter, Postmaster General, United States Postal Service, 01A31036 (Mar. 18, 2004). The Commission reversed the agency's finding of no discrimination; complainant prevailed on his claims because he established prima facie cases of discrimination on the bases of race/color, sex and age and the agency failed to articulate a reason for its selection decision, despite having been ordered to do so on remand. Complainant alleged the agency discriminated against him on the bases of race/color (Caucasian), sex, age, and in reprisal for prior EEO activity, when the agency failed to select him for the position of Labor Relations Specialist. The agency selected instead a black female who was 43 years old at the time of the nonselection, but it gave no reason for its decision, other than the selecting official statement that he "felt the individual I selected was better suited for the position." The Commission reviewed the complainant's and selectee's applications. Complainant had degrees in Criminal Justice and Business Administration; had been an employee with the agency since November 1983; had held the positions of Human Resources Specialist, Supervisor of Mails, and Maintenance Mechanic while with the agency; as Supervisor of Mails, investigated complaints and grievances for the agency; and as a detective with the Birmingham Police Department and Seaboard System Railroad, prepared investigative reports involving alleged violations and crimes. The Commission noted that the selectee's application, in contrast, showed that she attended college, but did not receive a degree; began working with the agency in August 1985; worked in the positions of Window Clerk, Supervisor of Mails, Administrative Supervisor, and Supervisor of Time and Attendance; and, as a supervisor, had years of experience in resolving grievances. The Commission held that the agency failed to meet its burden because its explanation for choosing the selectee rather than complainant was "neither specific, clear, nor individualized. Instead, it is so generalized, conclusory and vaporous as to offer no substantive explanation of the agency's action. Notably, the agency's final decision likewise did not provide a legitimate, non-discriminatory reason why complainant was not selected for the position, despite complainant's two degrees, long tenure with the agency, and extensive experience in investigations, dispute resolution, and supervision." Because the agency failed to

articulate a nondiscriminatory reason for its selection decision, complainant prevailed without having to make any demonstration of pretext.

Garcia v. Ridge, Secretary, Department of Homeland Security, 01A32050 (Jan. 7, 2005), request for reconsideration denied, No 05A50685 (April 26, 2005). The Commission found discrimination because an agency's failure to preserve records related to the EEO complaint (as required by the EEOC's regulations), resulted in the agency's inability to articulate its reason for a non-selection, and nondiscriminatory actions by the same managers in other selections complainant applied for do not indicate nondiscrimination in a different non-selection. Complainant raised allegations of discrimination for five nonselections for various positions, including a Supervisory Patrol Agent (SPA) position in Spokane, Washington. The selecting official for the Spokane position had retired and declined to offer a statement concerning his reasons for not selecting complainant. Also, although complainant's application package was provided, the application materials for the selectee for the position were missing and the selection certificate did not contain a reason for the selection. The Commission noted that the agency failed to comply with EEOC regulations that require that any personnel or employment record made or kept by an employer be preserved by the employer for a period of one year from the date of the making of the record or the personnel action involved, whichever occurs later. Furthermore, where a charge of discrimination has been filed, the agency is required to preserve all personnel records relevant to the charge until final disposition of the charge. See 29 C.F.R. § 1602.14. As a result of the agency failing to preserve records related to complainant's non-selection for the Spokane position, as required, the agency was unable to articulate a legitimate, nondiscriminatory reason for its action. The Commission noted that, although the agency's burden of production to rebut complainant's prima facie case of national origin is not onerous, the agency "must nevertheless provide a specific, clear, and individualized explanation for the treatment accorded the affected employee." The agency did not articulate a reason explaining why the selectee was selected instead of complainant (and thus did not rebut complainant's prima facie case of national origin discrimination and reprisal). As such, the Commission found that the agency failed to articulate a specific, clear, and individualized explanation for its actions, and consequently, complainant was denied a fair opportunity to demonstrate pretext. Accordingly, the Commission held that complainant was discriminated against on the basis of national origin when he was not selected for the Spokane position. Note that the Commission

rejected the agency's assertion that because it was "able to provide evidence that discrimination played no part in the other nonselections at issue…, nonselections that involved the same management officials, 'there [was] no appropriate basis for concluding that complainant was discriminated against.'" The Commission held that there was "no support for the proposition that the absence of evidence in one action is indicative of a legitimate, nondiscriminatory behavior in another action by the same management official." The Commission also determined that complainant was discriminated against on an additional claim, when he was denied the opportunity to serve as acting Assistant Regional Counsel, because complainant had demonstrably superior qualifications. Finally, the Commission held that complainant's allegation that the agency left him off the roster for a training which he received two months later failed to state a claim

Hobaugh v. Ridge, Secretary, Department of Homeland Security, 07A40054 (Dec. 16, 2004). The complainant proved age discrimination in his non selection; the agency failed to even prove a legitimate, non discriminatory reason, relying on an insufficient unsworn statement that the selecting official had relied on the recommendation of the selectee's supervisor.

Robey v. Potter, Postmaster General, United States Postal Service, 01A41333 (Mar. 15, 2004). The Commission vacated the agency's finding of no discrimination (on the bases of race, color, sex, and retaliation) in the nonselection of complainant for a temporary position she requested, a Self-Service Postal Center (SSPC) Technician, and remanded the complaint for a supplemental investigation, because the selecting official's articulated justification for selecting another employee for the position was insufficient. The Commission noted that an affidavit from the selecting official asserted that the selectee was chosen because "[f]rom the business sense, selecting [selectee] for a temporary SSPC technician assignment was the right choice." This was not specific enough, with the Commission concluding "When conducting investigations, agencies are required to develop an 'appropriate factual record' which is a record that 'allows a reasonable fact finder to draw conclusions as to whether discrimination occurred.' The agency's investigator did not ask the selecting official why selecting the selectee was in a 'business sense' the 'right choice.' The selecting official may have relied on a legitimate, non-discriminatory reason for his selection, but he should have been queried further to explain in more specificity why he made his selection.

Therefore, we shall remand the matter for supplementation of the record as specified in the Order herein."

II. Better Qualified Standard

Ash v. Tyson Foods, _____ U.S. _____ (Feb. 21, 2006). In granting certiorari and remanding, without even hearing oral arguments, the Supreme Court rejected the standard used by the 11th Circuit in analyzing non selection cases (i.e., "Pretext can be established through comparing qualifications only when 'the disparity in qualifications is so apparent as virtually to jump off the page and slap you in the face.'"). The Supreme Court noted that this visual image "is unhelpful and imprecise," without suggesting the proper standard. This case involved two African-American superintendents who were denied promotions, and sued claiming race discrimination in violation of Title VII and 42 USC Section 1981. They prevailed in a jury trial but the trial court granted the employer a new trial and the 11th Circuit affirmed in part and reversed in part.

Roy v. United States Department of Agriculture, Ann M. Veneman, Secretary, 04-30480 (5th Cir. Nov. 18, 2004) (Unpubl.). The circuit sustained the trial court's grant of summary judgment to the agency, dismissing the plaintiff's race discrimination non selection claim because she failed to show that she was "clearly better qualified" than the selectee.

III. Challenges to Selections based on Settlement Agreements

Hall v. Mineta, Secretary, Department of Transportation, 01A40884 (Mar. 3, 2004). The Commission affirmed the agency's dismissal of the complaint for failure to state a claim, because the nonselection decision that formed the basis of the complaint was the result of the agency's need to settle another employee's discrimination complaint. In sum, the Commission held that the selection of a particular employee for a position in response to that employee's discrimination complaint does not constitute an independent act of discrimination against those employees not selected for the position, unless there is proof of bad faith in the

making of the agreement. The Commission held further that complainant provided no evidence of such bad faith.

IV. Claims of Non Selection because of Sex

Haver v. Potter, Postmaster General, United States Postal Service, 07A30135 (Mar. 19, 2004). The Commission upheld the AJ's finding that the agency discriminated against complainant based on his sex, when it failed to select him for the position of Manager, Business Service Network and that the complainant suffered harm warranting an award of $10,000.00 in non pecuniary compensatory damages. In sum, the EEOC deferred to the AJ's judgment that the agency's articulated nondiscriminatory reasons were unworthy of belief. In that regard, the agency had asserted that the selectee was chosen pursuant to the agency's RIF-avoidance procedures. However, the AJ found that the selecting official credibly testified that the selectee was chosen through the competitive selection process and that the RIF-avoidance process was not used.

Motley v. Jackson, Secretary, Department of Housing and Urban Development, 05A50146 (August 26, 2005). The Commission granted the agency's reconsideration request and reversed its previous decision, which had found race and sex discrimination, and concluded instead that the AJ had erred in determining that an agency official failed to articulate a legitimate, nondiscriminatory reason for complainant's non-selection (i.e., to adequately explain his decision not to select the complainant for a GS-14 community builder position). The Commission determined that the RMO had testified that, "based on his review of the candidates' applications, references, and most current performance appraisals, he felt that the selectees' qualifications were superior to those of complainant's", which was sufficient to meet the agency's burden. It further concluded, based on "a review of the evidence as to applications, references and appraisals, pretext was not proven."

Simas v. Johanns, Secretary, Department of Agriculture, 01A50718 (Nov. 16, 2005). The complainant proved that the agency's reasons for failure to re-hire her as a firefighter in favor of substantially younger males was a pretext for discrimination on the bases of both sex and age. There were several reasons offered by the agency, which the Commission found were pretextual. These included that she did not want to work on Crew 51 under the SO's supervision

(there was affidavit and other evidence to the contrary) and that she had poor performance/attitude, had a personality conflict with SO, and did not get along with fellow crew members (Almost all crew members and complainant's second-line supervisor presented evidence to the contrary). There was also no "documentary evidence whatsoever to support a finding that complainant had performance or attitude problems during the relevant period." The Commission further concluded that there was "substantial evidence of SO's discriminatory bias toward older women." This included witness testimony that "SO made a statement to the effect that women did not belong in fire fighting duty", testimony from a supervisor, who hired SO, that he observed that SO, who came from a 'hotshot' background, "preferred strong young male crew members, and did not believe that women belonged in the Forestry Service." There was also testimony from the complainant that "SO frequently assigned her, and her older female co-worker, to mundane tasks and clerical duties", which was confirmed by the testimony of a coworker, "who also attested that she was present the day that the crew bosses were reviewing the 2002 summer fire season applications and that "SO stated that he only intended to hire 18-year old boys for his crew", which was mostly supported by the documentary record.

Straughn v. Evans, Secretary, Department of Commerce, 01A24320 (Apr. 21, 2004). While the agency impermissibly considered sex in advancing a female applicant in the selection process for a supervisory position, the complainant was not entitled to personal relief because he would not have been selected anyway.

Williamson v. Snow, Secretary, Department of the Treasury, 07A30116 (Sept. 27, 2004). The Commission upheld the AJ's findings that the complainant, an Estate Tax Attorney, proved that she was discriminated against on the bases of sex (female), national origin (Asian) and reprisal when management failed to select her for a Compliance Field Officer (GS-14) position, and when the agency failed to process routine paperwork related to complainant's employment and that she was entitled to $25,000.00 in non-pecuniary damages and $14,917.49 in attorney fees. The Commission summarily adopted the AJ's findings. As to the non selection discrimination, the AJ had found, contrary to the agency's assertions, that the selectee was not more qualified for the position, that complainant was not uninterested in management, especially because she had applied for the position and complainant was "not afforded the same opportunity to prepare for the

interview as the selectee, and as such, the comparison between their interview performances was not justified." (the agency had claimed that the selectee did better in the interview). The Commission also noted that "A lack of female managers also contributed to the AJ's finding of pretext."

V. Claims of Non Selection because of Disability

Jokela v. Ashcroft, Attorney General, Department of Justice, (Bureau of Prisons), 01A42940 (Sept. 17, 2004). The complainant, who was employed as a Senior Officer in the front lobby of the agency's Federal Corrections Institution, failed to prove that he was discriminated against on the bases of his disability (extensive hearing loss), when he was not selected as a supervisor, Bindery Machine Operator, or reprisal, when he was disciplined and removed from his front lobby position. In relation to the non selection, the complainant primarily relied on statements from agency officials, who told him they did not want "someone like [complainant]" in the bindery machine position. The Commission noted that no one corroborated the comment, or clarified its meaning, with the complainant himself stating in an affidavit that "I don't know what they meant by that [comment] ... it could mean I guess any numerous [sic] things ..." Thus, in the EEOC's view the "comment is too vague to establish discrimination based on complainant's disability." Moreover, in the Commission's view, " the agency has articulated a credible legitimate nondiscriminatory reason for choosing the selectee over complainant. The selectee had vast experience as a Bindery Machine Operator, and had been working as one at the time of his application. Complainant, on the other hand, had some experience in printing, but no demonstrated background as a Bindery Machine Operator. Our job is not to second-guess agency candidate selections, but rather we only inquire into the agency's motivation for its decisions. Burdine, 450 U.S. 248, 256 (1981)." Concerning the reprisal claim, the EEOC concluded that the complainant failed to show "that the agency's reasons for its actions were based on anything other than his unsatisfactory work."

Williams v. Principi, Secretary, Department of Veterans Affairs, 07A30118 (Apr. 21, 2004). The EEOC upheld the AJ's finding that the agency had discriminated against the complainant, an agency physician, on the basis of disability when he was not selected for a part-time Internist position and further determined that the AJ's finding of discrimination and relief were unaffected by the agency's

subsequent discovery that the complainant was not a U.S. citizen. (The AJ ordered relief to include offering complainant a position at the same grade, pay, and benefits scale he would have enjoyed had he been selected for the position, backpay and interest, attorney's fees in the amount of $34,237.00, and non-pecuniary compensatory damages in the amount of $15,000.00). As to the non selection finding, the Commission deferred to the AJ's determinations that "the reasons provided by the agency were a pretext for discrimination. In reaching this conclusion, the AJ found that SO's testimony was not credible. The AJ noted that SO's statements about the requirements of the position changed depending on which candidates he was talking about, his explanations concerning his reasoning during the selection process were contradictory, and he was unable to provide any justification for his contention that complainant's work style would be too expensive and too slow. Finally, the AJ found, SO ended up selecting a candidate who had less experience than complainant, and who did not even meet certain requirements for the position previously articulated by SO." And, while the evidence of complainant's citizenship was after-acquired evidence, it did not bar equitable relief because the evidence showed that there were exceptions to the citizenship requirement, which could have been obtained by the agency.

VI. Claims of Non Selection because of Age

Manset v. Snow, Secretary, Department of the Treasury, 01A24099 (May 20, 2004). The Commission reversed the agency's FAD, which had determined that the complainant failed to state a claim of age discrimination in a non selection, when the agency canceled a vacancy announcement for a Program Manager, GS-14 position. The Commission further held that the agency discriminated against the complainant on the basis of his age when the agency removed him from his temporary GS-14 position detail as Program Manager and then did not select him for that position. In support of its finding that the agency's justifications for ending the detail were a pretext for discrimination, the Commission noted that the responsible official claimed that she removed the complainant because his detail had expired and yet the agency had kept the complainant in the position beyond the expiration date with the initial expectation of his retaining the position permanently; she claimed the position did not need to be filled, but placed a much younger worker in the position; and she gave inadequate explanation as to the

vacancy cancellation. Further, the responsible management official evidenced bias against older workers when she referred to them as "dinosaurs," being "old and out of touch with reality" and "senile" and "holding up progress." Finally, as to the non selection, the Commission held that the complainant established an unrebutted claim of age discrimination "since the evidence shows that complainant was likely to be the selectee for the permanent Program Manager position since he had been doing an excellent job in the position for almost a year at the time of the vacancy announcement and his former supervisor highly recommended him . . . . [and] the vacancy announcement was cancelled by a management official who possessed an age-based animus toward complainant." In this regard, the Commission observed that the "RMO also stated that she cancelled the vacancy announcement because it was advertised as a temporary position . . . . [but] we find no corroborating evidence of this in the record. The vacancy announcement was not supplied by the agency and complainant does not indicate that such announcement was temporary. Moreover, . . . [the complainant's supervisor] stated that the goal was to 'permanently' fill the position." The agency was ordered to retroactively place the complainant in the GS-14 position or its equivalent and pay backpay.

Miller v. Potter, Postmaster General, United States Postal Service, 01A54420 (Sept. 28, 2005). The Commission agreed with the AJ's finding of age discrimination, when the complainant, an Officer in Charge, was not selected for a Postmaster position. The Commission relied on the AJ's finding that pretext was proven, describing those findings, as follows: "complainant's qualifications were superior to those of the selectee. Complainant had worked as either a Postmaster or an Officer in Charge for approximately 30 years, and had approximately 15 years of supervisory experience, while the selectee was working as a Mail Processing Clerk at the time of his selection, and had less than three months of experience as an Officer in Charge. Further, the AJ stated that while the selecting official asserted that complainant experienced performance deficiencies while working as an Officer in Charge, he offered no evidence to corroborate his assertions, and acknowledged that he never raised the concerns with complainant. In addition, complainant received good performance evaluations while working for the selecting official. Finally, the AJ cited several statements made by the selecting official which evidenced age bias. Specifically, complainant indicated that the selecting official stated that he never told her that an office she had worked in previously would be closing because he thought she was going to retire. In addition, when discussing complainant, the selecting official commented that

'There are hardly any Postmasters her age in the Columbus District.' Finally, the selecting official described the selectee as demonstrating 'drive, determination, [and] ambition,' statements which, when considered in light of the candidates' qualifications, offered a convenient pretext for age discrimination."

Tellez v. Brownlee, Acting Secretary, Department of the Army, 05A41133 (March 18, 2005). The Commission found direct evidence of age discrimination where the selecting official "espoused a policy of hiring 'younger blood' within the agency." Complainant, a GS-13 Missile Engineer, alleged that he was discriminated against because of his national origin, age and prior EEO activity when he was not selected for promotion to three GS-14 supervisory positions. An AJ and the Commission's Office of Federal Operations (OFO) found no discrimination, The full Commission reversed the AJ and OFO and found age discrimination. Although there were legitimate reasons for not selecting complainant on two of the three non-selections, and the Commission found no national origin or reprisal discrimination, there was also direct evidence of age discrimination, which included: senior management considered age as part of their "succession planning" for the future of the agency; a manager stated that younger people are more intelligent and technologically savvy; the selections-at-issue considered succession plans for the future of the agency as most of the agency's senior level managers were retirement-eligible; one selecting official had been heard to espouse a policy of hiring and promoting "younger blood." The agency asserted as a defense that it was engaged in legitimate succession planning. The Commission noted that: "OPM, recognizing that over one third of the federal workforce is currently eligible to retire, has encouraged agencies to engage in succession planning linked to the agency's strategic and program planning efforts and to identify its current and future human capital needs…The agency in this matter provided little proof that it had engaged in the type of sophisticated analysis .. needed for proper succession planning as detailed by OPM guidance.. Rather, the management officials responsible for the selections-at-issue simplistically adopted the view that succession planning meant that younger employees were better than older employees, and used age as a barrier in its promotion decisions. We find that the statements of management officials influential to the selections-at-issue are discriminatory on their face and are linked to the complained of adverse actions. Therefore, the weight of the evidence establishes that unlawful age discrimination occurred in the selections-at-issue rather than legitimate succession planning." As to the remedy, the Commission stated that this was a "mixed motive" age

discrimination, involving legitimate as well as discriminatory reasons for complainant's non-selection, and that the agency can avoid liability altogether if it establishes that it would have made the same decision even absent discrimination (the Commission also noted that a different analysis applies to cases decided under Title VII). The Commission held that the agency met its burden on two of the three non-selections but found age discrimination on the third.

VII. Claims of Non Selection because of Race

Peterson v. Leavitt, Secretary, DHHS, 07A40070 (Mar. 18, 2005). The complainant, a Writer-Editor, was discriminated against on the basis of race, African-American, when she was terminated during her probationary period. The Commission agreed with the AJ that the agency's reasons were either inconsistent with treatment provided to a Caucasian predecessor in the position (who also had problems meeting deadlines) or unproven (that she didn't write well). Further, the Commission found evidence of a discriminatory motive, "specifically, that complainant's supervisors contacted three higher ranked officials to inquire about complainant's termination, even though they had no affiliation with complainant's termination, and were not in her supervisory chain. Because these three officials were all members of complainant's protected class, the AJ found that complainant's supervisors contacted these individuals to gain support from African-American employees for complainant's termination." In rejecting the agency's argument that the Caucasian predecessor was a temporary employee and not a permanent employee like the complainant, the Commission wrote: "The cases the agency cited stand for the proposition that temporary and permanent employee positions are not similarly situated; here, as the AJ pointed out, the temporary employee works for the agency for a term appointment and is subject to renewal. Likewise, the probationary employee does not enjoy the full protections of civil service employment until he or she becomes a permanent employee. Although the agency argued that temporary and probationary employees should not be considered similarly situated, it failed to submit any evidence that temporary and probationary employees operate under any substantially different disciplinary rules."

Reed v. Administrator, General Services Administration, 01A34621 (July 15, 2004). The complainant a Supervisory Realty Specialist, failed to prove that he

was not selected for a Deputy Director position on the bases of race (African-American) and sex, when he was not placed on the "Best Qualified" list of individuals who were to be interviewed for the position. Complainant suggested that the selectee was preselected for the position in question and that the reason he was given for not being placed on the "Best Qualified" list (i.e., that he did not provide much detail in his KSAs) was contradicted by information that a co worker was placed on that list, who did not submit any responses in relation to KSAs, and was evaluated solely on the basis of his resume. In disagreeing with the complainant, the Commission concluded that the complainant failed to prove that any preselection was motivated by discrimination and that the co worker who got an interview was of the same race and gender as Complainant, "and his placement on the 'Best Qualified' list undermines Complainant's claim of animus based on his sex and race."

Wiggins v. Barnhart, Commissioner, Social Security Administration, 07A30048 (Jan. 22, 2004). In agreeing with the AJ's finding, the EEOC concluded that the complainant, an African-American Field Office Assistant Manager, was subjected to race discrimination when she was not selected for a GS-14 Social Insurance Administrator position, because she associated with individuals who were white. The EEOC further agreed with the AJ's award of $70,000.00 in non pecuniary compensatory damages. Complainant was also awarded attorney's fees in the amount of $35,635.20, calculated at the attorneys' current hourly rates of $200.00. While the EEOC noted that the AJ had determined that the agency articulated legitimate, nondiscriminatory reasons for choosing the selectee - that she was "stronger" than any of the recommended candidates because of her experience, qualifications, leadership and management philosophy and because the selecting official had known her for 15 years, and he believed that she was an exemplary employee – it also agreed with the AJ that the complainant had proven that the reasons were pretextual. As noted by the Commission, "the record indicates that complainant's qualifications were plainly superior to [the selectee]. Additionally, we note the following evidence of record: One of complainant's White managers (M1) was assigned to make recommendations regarding who should be selected for the subject position. Ml made three recommendations, one of whom was complainant. After receiving the recommendations, S1 [the selecting official] suddenly decided to nullify the selection process (which he had originally ordered), and selected [the selectee] instead of complainant. Substantial evidence of record suggests that S1's decision was likely motivated by his desire to show the White

managers that they were not running the region, and that he was the boss. Substantial evidence of record also indicates that S1 likely had a philosophy of rewarding those Black employees who aligned themselves with himself, instead of with the White managers, and that he disapproved of complainant because he felt she had aligned herself with the White managers. For the above reasons, we conclude that complainant was a victim of race discrimination as to the nonselection in question." The Commission also noted the AJ's finding that "S1 was not a credible witness, that his action was not consistent with agency policy and procedure, and that there were unrebutted allegations that S1 had made racist and derogatory statements about certain White management officials with whom complainant was associated."

Young v. Potter, Postmaster General, United States Postal Service, 07A40051 (July 15, 2004). The Commission summarily agreed with the AJ's findings that the complainant, a Mark II Operator, had been discriminated against on the basis of race (African-American), when the agency failed to interview and select him for a Tour 3 Supervisor of Customer Services position and that the agency was responsible for $2,500.00 in compensatory damages for complainant's emotional distress and loss of confidence. The AJ had rejected the agency's claim that the Postal Service policy was to consider current supervisors before considering any craft employees seeking a promotion. The AJ noted testimony by a Postal Service witness, confirming that there was no such policy. The AJ also determined that the Caucasian selectee failed to submit a timely application and was less qualified than the complainant. Further, the AJ noted that the alleged discriminating official was evasive in his testimony and, based on demeanor, was not as credible as the complainant.

VIII. Disability Inquiries During Selection Process

Kelly v. Evans, Secretary, Department of Commerce, 01A30554 (May 11, 2004) Although the Commission found that the agency violated the Rehabilitation Act by making inquiries regarding job applicants' disabilities prior to making a conditional offer, it held that complainant's nonselection disability discrimination claim failed because of a lack of causal connection between complainant's nonselection and the disability inquiry; the agency presented evidence that the vacancy announcement was cancelled due to lack of funding, not due to the

inquiry. Nevertheless, the Commission provided that complainant may be eligible for compensatory damages, as to the inquiry claim, and remanded for a determination. The Commission also ordered the agency to remedy its job application procedures and consider disciplining the responsible officials. The complainant applied for the position of Production Assistant with the National Institute of Standards and Technology (NIST), identifying herself as eligible for Schedule A positions, but did not otherwise explain the nature of any disability. Before the interview, all applicants were asked to fill out Standard Form (SF) 177, "Statement of Physical Ability for Light Duty Work." There were three sections, "physical limitations," "physical endurance factors," and "environmental factors." As described by the EEOC "The sections asked the applicant to answer "yes" or "no" to questions. The first section asked the applicant whether they had problems reading (small newspaper print), seeing (distant objects), hearing (telephone conversations), or speaking (person to person, groups, and telephone conversations), using arms, hands or fingers, and whether the applicant had any amputations or other abnormalities to the legs, hands, arms or fingers. The first section also asked the applicant, "do you have any disease or disability which would make your employment in light duty work a hazard to yourself or others?" The second section of the form asked whether the applicant was physically able to perform activities involving sitting, standing, walking, occasional pushing (for example, file drawers), frequent pushing, occasional lifting objects up to 12 pounds and occasionally lifting objects up to 25 pounds (for example, lightweight equipment)." On appeal, the agency asserted that the questions were not improper and that the form only asked questions that were permissibly related to complainant's ability to perform the job functions. The Commission rejected that argument, concluding that "The form did not make a sufficient attempt to narrowly tailor the questions for the Production Assistant position. Indeed, the form explicitly asks whether the applicant has amputations or problems hearing or seeing. Furthermore, the form posed questions about major life activities. Questions about whether an applicant can perform major life activities are almost always disability-related because they are likely to elicit questions about a disability. See Enforcement Guidance: Pre-employment Disability-Related Questions and Medical Examinations, EEOC Notice No. 915.002 (October 10, 1995)." The Commission also rejected a second agency argument that the questions were proper - that the case fell within the exception to the rule that allows for an employer to ask certain limited questions regarding potential reasonable accommodation when an applicant has voluntarily disclosed that they

have a disability. See Enforcement Guidance: Pre-employment Disability-Related Questions and Medical Examinations, EEOC Notice No. 915.002 (October 10, 1995).” Here, as observed by the Commission, “As an initial matter, we do not necessarily find that SF-177 "Statement of Physical Ability for Light Duty Work" was limited to questions regarding complainant's potential accommodation. Indeed, we have already found that the form posed disability-related questions. Furthermore, we disagree with the agency that complainant disclosed that she had a disability; rather, complainant's application only alerted the agency that she was eligible for a Schedule A appointment. Finally, we do not find the agency's contention credible given that there is no dispute that the agency requested this information of all applicants, not only complainant. To follow the agency's line of reasoning and justify that the form was an attempt to assess the applicants' needs for an accommodation, the agency would have had to establish that all applicants had obvious disabilities, or disclosed disabilities. Here, the agency does not argue or present any evidence that this was the case. Accordingly, we find that by using the SF-177 prior to making an offer of employment, the agency committed a violation of the Rehabilitation Act, and thus a form of prohibited disability discrimination. See, e.g., Kelly v. Department of Commerce, EEOC Appeal No. 01A01247 (June 26, 2001);

Official Time

Flores v. Potter, Postmaster General, United States Postal Service, 01A34485 (Feb. 11, 2004). The Commission reversed the agency's dismissal of the complaint for the complainant's purported failure to cooperate but upheld the agency's denial of 1 day of official time and refusal to pay travel expenses to the complaint to meet with his out of town representative, finding the agency's grant of 1 hour reasonable and that travel expenses were not required. Concerning the official time matter, the Commission first noted that it "has the authority to remedy a violation of an official time claim without a finding of discrimination. . . . In such cases, the Commission's focus is not the agency's motivation, but rather is whether complainant was denied a reasonable amount of official time." (citations omitted). It then rejected the complainant's claim for a full day of official time to visit with his out-of-town representative in person, observing that: "In the present case, complainant has provided no information to justify his need for more than one hour of official time. At the point complainant requested official time, he was not preparing for an affidavit, a hearing, a meeting with an investigator, or an appeal. On April 9, 2003, the informal counseling process for his complaint was ongoing. The Commission finds that the agency's grant of one hour official time, given the circumstances surrounding complainant's request, was sufficient. Further, the Commission also finds that complainant was not entitled to travel expenses to confer with his representative, pursuant to the express language of EEOC Regulation 29 C.F.R. § 1614.605(b). Therefore, the Commission finds that the agency provided complainant with a reasonable amount of official time on April 9, 2003." The case was thus remanded for further processing.

McGinn v. USPS, 105 LRP 5222 (EEOC 01/28/05). Representative lacks standing to pursue official time. The Commission reversed its previous decision granting complainant permission to pursue a claim that the agency wrongfully denied him overtime pay while working as a representative in an EEO matter. The Commission found that agency properly dismissed his allegation.

Welch v. Potter, United States Postal Service, 01A35334 (Mar. 19, 2004). The Commission affirmed the agency's finding, adopting the AJ's decision, that complainant was not improperly denied official time to meet with her union representation prior to initiating an EEO complaint; the agency's procedures require that complainant initiate the EEO process before requesting official time to

meet with her union representative, and such initiation may be accomplished by a mere telephone call to the EEO counselor. Because complainant had not initiated EEO contact at the time of her request for official time to meet with her representative, her supervisor's denial of her request was reasonable and in accordance with the agency's established policy.

Overtime Claims

Bailey v. Potter, Postmaster General, United States Postal Service, 01A40437 (September 14, 2005). The agency discriminated against the complainant on the bases of race and reprisal when it denied him overtime. The Commission found that the "complainant's prima facie case, combined with persuasive evidence that the agency's articulated reasons are unworthy of belief, establishes that the agency unlawfully discriminated against complainant on the bases of race and reprisal when it denied him overtime." The reasons found not credible included a restriction from driving more than four or five hours a day and that a vehicle was not available for overtime opportunities that would correspond with complainant's work schedule. The Commission also noted that a white employee "worked approximately 60 hours of overtime from late 2002 through 2003 despite not being on the overtime desired list, contradicting the supervisor's assertion that . . . [this employee] worked under 10 hours of overtime in the previous five or six years."

Procedures

I. Not Aggrieved

Chu v. Social Security Administration, 01A51329105 (May 19, 2005). The Commission affirmed the agency's dismissal of complainant's complaint for failure to state a claim because reassignment of complainant's seat did not have a concrete effect on complainant's employment status. The agency had reassigned complainant's seat so that the two Technical Experts could sit in the same area. Complainant states that she needed the quiet space to carry out her work duties. A manager offered complainant the choice of three other seats but the complainant found them either too noisy or too drafty. On appeal complainant contended that she suffered emotional and related physical (such as headaches and gastrointestinal ailments) harm and her reputation in the office was "irreparably tarnished," asserting that this makes her aggrieved because it is proof of harm that affects a term, condition, or privilege of her employment. The Commission responded: "We disagree. Our focus is on the seat reassignment, and we conclude that it does not raise an actionable employment discrimination claim because, although it allegedly affected her emotionally and physically, it did not have a concrete effect on complainant's employment status. We note that the District Manager threatened complainant with disciplinary action if complainant refused to move; however, this discipline never came to fruition and as such it does not raise a justiciable claim. See, e.g., Trevino v. Dep't of Homeland Security, EEOC Appeal No. 01A33896 (Mar. 19, 2004). Thus, the agency decision to move an employee to another seat in order to group employees of like positions together was not an adverse employment action. Any harm to the employee caused by the seat reassignment does not constitute an adverse employment action, that determination is made by determining whether the seat reassignment "had a concrete effect on complainant's employment status."

Copher v. Potter, Postmaster General, USPS, 01A45053 (Jan. 26, 2005), request to reconsider denied, 05A50571 (March 10, 2005). A pre-disciplinary interview concerning inadequate documentation submitted to support the employee's absence was not harm to a term, condition or privilege of employment and thus failed to support an EEO claim. Complainant alleged discrimination on the basis of

disability when she was advised that her documentation to support her absence was insufficient. Although complainant referred to a Letter of Discipline being issued as a result of her absences, the record indicated complainant received a pre-disciplinary interview and not a Letter of Discipline. "Thus, complainant has not shown harm to a term, condition or privilege of employment and thus, fails to state a claim."

Kellum v. Ashcroft, Attorney General, Department of Justice, 01A41403 (Jan. 26, 2005). The Commission affirmed dismissal of three separate EEO claims as: (1) untimely and not tolled by use of the agency's administrative grievance procedure; (2) a claim of noncompliance with an agency final order that was not raised with the agency EEO Director as required by EEOC's regulations; and (3) failing to state a claim after complainant failed to respond to agency requests for clarification of the specific harm. In this case, complainant raised three claims. (1) The first was dismissed as untimely. The Commission noted that: "Although complainant attempted to resolve (this issue) through management, the Commission has held that the use of an agency's administrative procedure does not toll the limitations period for initiating EEO Counselor contact." (2) The second claim alleged noncompliance with the agency's final order. The Commission held that the claim of noncompliance with a final order cannot be raised as a separate claim of discrimination, but instead, it must be timely raised with the agency's EEO Director, as set forth at 29 C.F.R. § 1614.504(a). (3) The third claim alleged that younger individuals were selected for "trainers for trainers." The agency requested clarification on this issue. Complainant failed to provide clarification and the Commission upheld the dismissal of this claim for failure to state a claim "in that complainant failed to identify a specific harm or loss to a term, condition, or privilege of employment."

II. Failure to State a Claim

Ball v. Potter, Postmaster General, United States Postal Service, 01A40996 (Mar. 17, 2004). The Commission held that the complaint was properly dismissed for failure to state a claim because complainant failed to show that she suffered harm or loss with respect to a term, condition, or privilege of employment for which

there is a remedy, when she was verbally reprimanded and interviewed for discipline.

Barnes, et al., v. Potter, Postmaster General, USPS, 01A41498 (Jan. 13, 2005). The Commission upheld an agency's dismissal of a formal complaint that alleged retaliation for union affiliation because it failed to state a claim. Complainant, a supervisor, alleged that his pay was not properly upgraded, and the agency declined to participate in alternative dispute resolution to resolve this issue, in reprisal for his affiliation with a Postal employees union. Complainant did not allege any EEO participation. Although complainant did allege race, sex and age discrimination during the pre-complaint process, the Commission held that, since discrimination based upon union affiliation was the only basis raised in complainant's formal EEO complaint, the EEO bases set forth in the pre-complaint stage were abandoned. The Commission upheld the agency's dismissal for failure to state a claim explaining that affiliation with a union is not covered under Title VII or the EEO regulations and complainant did not allege that he participated in any stage of administrative and judicial proceedings under the EEO statutes.

Brast v. Potter, Postmaster General, United States Postal Service, 01A33257 (Mar. 12, 2004). The Commission held that the agency erroneously dismissed the complaint for failure to state a claim, finding instead that complainant alleged incidents of sufficient severity and duration to constitute a claim of harassment. Complainant alleged the following: (1) he was intimidated and belittled by his 204B supervisor and other officials for not processing mail fast enough, (2) management added additional deliveries to his route, without adjusting the overall delivery time, and (3) after a management ordered route inspection established that he was finishing the delivery route within the expected time frames, management continued to excessively scrutinize him and berate him about his efficiency and work habits.

Brenner v. Potter, Postmaster General, United States Postal Service, 01A35409 (Feb. 25, 2004), request for reconsideration denied, 05A40591 (April 14, 2004). The Commission affirmed the agency, which had dismissed the harassment complaint for failure to state a claim; the two alleged incidents - a letter from the Maintenance Manager informing complainant that he was not excused from training in Norman, Oklahoma due to insufficient information and that he was required to attend and a statement at a meeting that if he failed to attend the training in Norman, he could be disciplined up to and including removal – were

insufficiently severe or pervasive. In his complaint, the complainant, an Electronics Technician, PS-10, alleged harassment discrimination on the bases of religion (Jewish), age (52) and disability (diabetes, hypertension).

Bromberek v. Mineta, Secretary, Department of Transportation, 01A40877 (Mar. 3, 2004). While the agency dismissed the complaint for untimeliness, the complaint was properly dismissable for failure to state a claim; the complaint sought to challenge the noncompetitive promotion of another employee to a Platform Analyst position as a result of an EEO settlement agreement. As noted by the Commission, such selections "may not be considered an independent act of discrimination against those not benefited by the agreement, unless there is proof of bad faith in the making of the agreement. . . . Here, complainant presents no evidence that the resolution of a co-worker's EEO claim was made in bad faith." (citations omitted).

Carter v. Potter, Postmaster General, United States Postal Service, 01A40153 (February 25, 2004), request for reconsideration denied, 05A40559 (April 8, 2004). The agency properly dismissed the harassment complaint for failure to state a claim; a letter from the Postal Service directing the complainant to make an election among returning to work, applying for disability, optional retirement, or resigning (he had been in a LWOP status since 1998) was not sufficiently severe or pervasive to alter the conditions of her employment, as to state a claim of harassment.

Caudill v. Chao, Secretary, Department of Labor, 01A33971 (Mar. 19, 2004). The Commission affirmed the agency's dismissal of the complaint for failure to state a claim because the complainant failed to show that he suffered a legally cognizable harm regarding a term, condition or privilege of employment. The complainant alleged that he was instructed not to return to a mine and that when the instruction was rescinded, he was falsely accused of refusing to go to the mine. The complainant argued that the alleged incidents could negatively affect his future performance appraisal and result in a loss of respect among his fellow workers. The agency found, and the Commission affirmed, that such incidents did not amount to a legally cognizable harm.

Clark v. Potter, Postmaster General, United States Postal Service, 01A41211 (Apr. 14, 2004). The Commission reversed the agency's dismissal for failure to state a claim, finding that the complaint, which asserted that the agency treated

complainant differently because of her weight, in enforcing its dress code, states a claim, as it involves a term, condition, or privilege of complainant's employment. Complainant contended that the dress code applied only if a person is overweight and that it made her look different from everyone else. Complainant further asserted that the dress code had caused her to lose self-esteem and made her depression worse. The Commission remanded the case for processing.

Cobb v. Potter, Postmaster General, United States Postal Service, 01A40383 (Feb. 19, 2004), request for reconsideration denied, 05A40561 (March 31, 2004); the complainant was not entitled to use the EEO process to obtain compliance with a grievance settlement.

Curtis v. Potter, Postmaster General, United States Postal Service, 01A55800 (Jan. 26, 2006). The agency improperly dismissed complainant's complaint for failure to state a claim; in his formal complaint filed on July 7, 2005, the complainant, a clerk in an agency facility in Venice, California sufficiently alleged that he was aggrieved by claiming that he "was subjected to discrimination on the basis of race (African American) when, on February 15, 2005, [a named supervisor, S1] became angry at complainant when his tray of mail was knocked to the floor, accused him of creating a safety hazard, and called him a 'nigger' in Spanish." The Commission explained its decision, as follows: "Generally, a remark or comment does not rise to the level of a cognizable claim. Henry v. United States Postal Service, EEOC Request No. 05940695 (February 9, 1995). However, the Commission has held that, under certain circumstances, a limited number of highly offensive slurs or comments about a federal employee's race or national origin may in fact state a claim or support a finding of discrimination under Title VII. The Commission has previously noted that the use of the racial epithet 'nigger' is a 'highly charged epithet' which 'dredge[s] up the entire history of racial discrimination in this country.' See Brooks v. Department of the Navy, EEOC Request No. 05950484 (June 25, 1996); Yabuki v. Department of the Army, EEOC Request No. 05920778 (June 4, 1993). Therefore, based on the particular racial epithet alleged in this case to have been directed at an African American employee by his supervisor, the Commission concludes that the complaint states a cognizable claim and should be further processed as ordered below."

Devadoss v. Mineta, Secretary, Department of Transportation, No. 01A61909 (May 25, 2006). The Commission reversed the agency's dismissal, as failing to

state a claim and a collateral attack on the agency's security investigation process, of a complaint alleging: (1) discrimination in the agency's investigating whether an employee was conducting a private law practice on agency time; and (2) alleging retaliation when complainant was humiliated in the public seizure of his government computer. Complainant alleged race, national origin and sex discrimination, and also retaliation for prior protected EEO activity when, following an anonymous allegation that complainant was conducting a private law practice on government time, the agency instituted a security investigation into the matter. In its final decision, the agency dismissed the instant complaint for failure to state a claim, finding that complainant had lodged a collateral attack on the agency's security investigation process. The Commission stated that the "Commission's federal sector case precedent has long defined an 'aggrieved employee' as one who suffers a present harm or loss with respect to a term, condition, or privilege of employment for which there is a remedy. Diaz v. Department of the Air Force, EEOC Request No. 05931049 (April 21, 1994). Upon review, the Commission finds that complainant has alleged harm to the terms and conditions of his employment. Specifically, complainant alleges that he was treated differently than similarly situated employees following similar allegations of misconduct. Complainant further alleges that the agency confiscated his computer and floppy discs in front of other staff members in a manner that was humiliating. Complainant alleges that the agency's conduct was harassing and in reprisal for his prior EEO activity. In that regard, the Commission finds that the agency's dismissal of the instant complaint for failure to state a claim in accordance with 29 C.F.R. § 1614.107(a)(1) was improper; the agency's decision, therefore, is reversed and remanded for the reasons set forth herein."

Flagg v. Barnhart, Commissioner, Social Security Administration, 01A35305 (Jan. 9, 2004). The agency properly dismissed the complaint for failure to state a claim; the complainant failed to show that he suffered any harm or that the conduct complained of was sufficiently severe or pervasive, so as to state a claim of harassment. The two claims at issue were that "management implied in front of complainant's peers that complainant was sleeping during a staff meeting" and "management informed complainant about his dress and hygiene, and subsequently tried to send him home to change clothes because he had a stain on his shirt."

Ford v. Potter, Postmaster General, United States Postal Service, 01A41287 (Apr. 14, 2004). The Commission reversed the agency's dismissal of the complaint for failure to state a claim, where complainant asserted he was discriminated against on the bases of race and reprisal when he was told to seek counseling from the Employee Assistance Program. However, because the complainant, on appeal, asserted that he was denied pay while seeking counseling and that other employees were paid for one hour when seeking such counseling, the Commission remanded for a determination of that issue. In sum, while the referral to counseling does not render complainant aggrieved, the alleged denial of pay does.

Gonzalez v. Potter, Postmaster General, United States Postal Service, 01A41293 (Apr. 12, 2004). The Commission affirmed the agency's dismissal for failure to state a claim, where complainant asserted that he was discriminated against on the bases of race, color, national origin, and reprisal, when on 3 days he was denied union time to perform his duties as a union steward and the agency demanded that he submit the names of the employees who filed grievances, the grievance numbers, and a description of the grievances; the Commission held that such matters were outside the purview of the EEO laws because they are subject to the negotiated grievance procedure.

Green v. Ashcroft, Attorney General, Department of Justice, 01A41309 (Mar. 15, 2004). The Commission affirmed the dismissal of complainant's claim that he was discriminated against on the basis of race (African-American), when an agency official outside his supervisory chain yelled at him during a team drill, "get your head out of your ass and do it right"; relying on precedent, the Commission noted that such comments are insufficient to render an individual aggrieved for purposes of Title VII, when unaccompanied by concrete agency action.

Harris v. Potter, Postmaster General, United States Postal Service, 01A40887 (Feb. 19, 2004). The agency properly dismissed the complaint; the complainant was not aggrieved by an official discussion that was not recorded in any personnel or supervisory files, and which cannot be used as a basis for any subsequent disciplinary action.

Jones v. Ashcroft, Attorney General, Department of Justice, 01A41201 (Aug. 16, 2004). The complaint was properly dismissed for failure to state a claim; the alleged placement of complainant's medical records, gathered during the course of an Office of Workers' Compensation Program claim, into complainant's

"performance file" did not establish that he was aggrieved and did not state a claim of harassment.

Jean-Julien v. Powell, Secretary, Department of State, 01A35385 (Feb. 10, 2004). The agency erred in dismissing the complainant's non selection disability claim by making a merits decision and concluding that the complainant was not a qualified individual with a disability because the alleged disability (chemical balance / stress) was controlled by medication. The Commission remanded for an investigation.

Kendrix v. Snow, Secretary, Department of the Treasury, 01A40581 (February 10, 2004). Among other findings, the agency properly dismissed the complaint of race, age, sex and reprisal discrimination for failure to state a claim; the complainant did not show that she was aggrieved by remarks from her manager that "I will never apologize to that woman ... My goal in life is to get her out of the POD (post of duty) ... This is the audit that will finally get her out of here", which were unaccompanied or followed by any concrete action.

King v. England, Secretary, Department of the Navy, 01A40422 (Mar. 17, 2004). The Commission held that the agency erred in dismissing the complaint for failure to state a claim, finding instead that the agency improperly addressed the merits of the disability discrimination claim, without the benefit of an investigation. Complainant alleged discrimination on the basis of her disability (allergic reaction to toxins), when the agency unreasonably failed to accommodate her request to move to a different building. The agency dismissed the complaint because it determined, without an investigation, that complainant did not qualify as an individual with a disability. Specifically, the agency determined that complainant's allergic reaction only limited her ability to work in a building and not in a class of positions, and that complainant's allergy condition was temporary. The Commission noted that "[w]hether complainant can set forth a prima facie case of disability discrimination is irrelevant to the procedural issue of whether she states a cognizable claim for which relief can be granted." The Commission held that complainant did state a claim by identifying a legally cognizable harm in the agency's failure to accommodate her alleged disability.

Macer v. Barnhart, Commissioner, Social Security Administration, 01A35090 (Mar. 4, 2004). The Commission affirmed the agency's dismissal for failure to state a claim and disallowed an amendment on appeal, where complainant failed to

identify any of the legal bases on which a claim of discrimination may be made, despite being fully informed and given the opportunity to do so, when she filed her original complaint, In her original complaint, the complainant alleged the following; she did not receive an award; her manager communicated with her indirectly; and her manager's attitude toward her created a hostile work environment. On appeal, complainant further alleged that her "claim deals with accusations of fraud, abuse and misuse of government contracts"; Hispanic employees receive "preferential treatment"; and, "she has been informed by a 'highly creditable source' that the reason she has not been promoted is because she is over the age of fifty and nearing retirement." The Commission held, however, that although a complainant may amend an already valid complaint on appeal, there was no valid complaint to amend, in this case. Therefore, the Commission affirmed the dismissal and denied the complainant an opportunity to amend her complaint.

Mestayer v. Potter, Postmaster General, United States Postal Service, 01A53124 (July 19, 2005). Because of the severity of a single incident, the Commission reversed the agency's dismissal of the complainant's national origin and disability complaint for failure to state a claim. The Commission described the alleged incident as follows: "The record indicates that the co-worker lunged towards complainant but was stopped by another co-worker from hitting complainant. On appeal, complainant claimed that she was bruised during the incident. In the record, she indicated that she was bruised by the other co-worker trying to protect her from the attacking co-worker. She also indicated on appeal that the incident raised was the most recent incident of harassment by the attacking co-worker."

McGhee v. Potter, Postmaster General, United States Postal Service, 01A40932 (Apr. 14, 2004), request for reconsideration denied, 05A40797 (May 26, 2004). The Commission affirmed the agency's dismissal for failure to state a claim, where complainant asserted he was discriminated against on the basis of race, age and reprisal when two supervisors told him to complete a CA-2 form for an injury he suffered and a supervisor changed his starting time then changed it back again after learning complainant needed his original start time to accommodate his physical therapy schedule. The Commission held that the foregoing incidents did not constitute legally cognizable harm or loss with respect to a term, condition, or privilege of employment. "Nothing in the file indicates complainant lost any wages, received any discipline or otherwise suffered any injury as a result of his

supervisors' requests." In addition, the Commission dismissed two claims that had previously been alleged in a prior complaint.

McNeill v. Roche, Secretary, Department of the Air Force, 01A40366 (Mar. 31, 2004). The Commission affirmed an AJ's grant of summary judgment for failure to state a claim and issued a decision without a hearing, because complainant failed to show that he suffered any personal loss or injury with respect to a term, condition or privilege of employment when agency officials openly mocked his web page through internal agency e-mail. Complainant alleged that such mockery constituted discrimination on the basis of reprisal for prior EEO activity.

McPherson v. Brownlee, Acting Secretary, Department of the Army, 01A50159 (Jan. 6, 2005) Complainant's allegation that the agency failed to upgrade his position to a higher series stated an actionable claim. Complainant alleged three acts of discrimination. The first two acts were dismissed as untimely because the complainant had suspected, or should have reasonably suspected discrimination and should have raised his claim prior to the 45-day period expiring. The third claim alleged that complainant was not graded to a higher position for discriminatory reasons. The agency dismissed this claim for failure to state a claim. The Commission held that this allegation stated a justiciable claim of employment discrimination, finding, in effect, that complainant was an "aggrieved employee" because an allegation of not being graded to a higher position is an allegation of a "present harm or loss with respect to a term, condition, or privilege of employment for which there is a remedy."

Miller v. Powell, Secretary, Department of State, 01A44656 (Oct. 7, 2004). The Commission agreed with the agency, and rejected the complaint by a Foreign Service Officer, who alleged that she was discriminated against on the bases of her sex (female) and religion (non-Muslim), when the agency refused to process her application for a driver's license in Saudi Arabia. The Commission determined that the "agency's refusal to assist complainant in her desire to obtain a driver's license in the Kingdom of Saudi Arabia does not appear to concern a term, condition, or privilege of her employment. Moreover, it is evident that the agency does not have the ability to provide complainant with the remedy that she ultimately seeks, i.e., the right to drive in the Kingdom of Saudi Arabia." Here, the Commission relied on a Saudi Arabia 1991 decree that established that women cannot drive automobiles and evidence that neither Muslim nor non-Muslim women are

permitted to drive and that the agency has no control over whether men and women are treated equally with respect to driving in Saudi Arabia.

Murphy v. Potter, Postmaster General, United States Postal Service, 01A43091 (Sept. 8, 2004). The Commission reversed the agency's dismissal of the complaint for failure to state a claim, concluding that while simply referring an employee to EAP does not affect the terms and condition of the employee's employment, the order to meet with an EAP Counselor, as occurred in the instant case, does impact terms and conditions of employment. As noted by the EEOC, "the record contains a copy of complainant's affidavit, attached to her complaint. In her affidavit, complainant stated that on March 26, 2003, at approximately 2:50 p.m., the Postmaster 'took me aside and told me I would have to make an appointment' with an EAP Counselor. Complainant further stated that the Postmaster 'made a veiled threat' that if I did not go to see the EAP Counselor, that she would take further action against her. A review of the record reflects that complainant was required to see the EAP Counselor, rather than merely being referred for EAP counseling."

Opare – Addo v. Potter, Postmaster General, USPS, 01A51572 (Mar. 13, 2005). Complainant stated a claim of national origin discrimination by alleging that a Vacancy Announcement, applied for by complainant was being re-posted in order to attract a larger pool of qualified applicants. The Commission explained that the "cancellation of a job vacancy announcement generally does not render an applicant aggrieved. *Lall v. Department of Navy*, EEOC Request No. 05A00064 (April 24, 2000). However, if the cancellation was for the ulterior purpose of creating a larger applicant pool so he would ultimately not be selected, then complainant would have stated a cognizable claim. . . . Complainant did assert that the vacancy announcement had been re-posted in order to attract a larger applicant pool and avoid selecting complainant. Thus, he does state a claim, and his complaint was improperly dismissed."

Osby v. Potter, Postmaster General, United States Postal Service, 01A55572 (Dec. 28, 2005). As to issue 2 (that "a hate crime was committed against complainant when he noticed the letters 'KKK' scratched on his timecard while clocking in), the Commission reversed the agency's dismissal for failure to state a claim. The complainant worked as a Custodial Laborer in the agency's Main Branch facility in Oakland, California. The Commission explained that while a "A single isolated incident is usually insufficient to state a claim of racial harassment . . . that under

certain circumstances a limited number of racial epithets or slurs may constitute harassment based on race under Title VII. See Brooks v. Department of the Navy, EEOC Request No. 05950484 (1996). Here, in a manner similar to the use of a racial epithet or slur, the powerful symbol of KKK 'dredge[s] up the entire history of racial discrimination in this country.' . . . We therefore determine that the incident described by complainant, wherein the letters 'KKK' were scratched on his timecard, was sufficiently severe to alter the conditions of his employment and state a claim of harassment. See Cobb v. Department of the Treasury, Request No. 05970077 (March 13, 1997)."

Parker v. Barnhart, Commissioner, Social Security Administration, 01A43867 (Aug. 23, 2004), request for reconsideration denied, 05A50032 (Oct. 29, 2004). The agency properly dismissed the complaint of harassment discrimination on the bases of race (White), disability (seronegative rheumatoid arthritis) and reprisal for failure to state a claim because the alleged incident was not sufficiently severe or pervasive to constitute harassment. In her complaint, the complainant alleged that she was harassed when the "District Manager improperly disclosed, without complainant's consent, personal and confidential facts regarding her disability during a staff meeting on October 30, 2003."

Parrish v. Rumsfeld, Secretary, Department of Defense, 01A33767 (Mar. 31, 2004). The Commission affirmed the agency's dismissal for failure to state a claim, where complainant asserted that she was unlawfully discriminated against during settlement negotiations on another complaint because the agency offered remedies which complainant deemed unreasonable. The Commission held that a complaint that alleges a failure to negotiate settlement agreements in good faith does not state a claim. Complainant asserted that she was subjected to discrimination on the bases of race (Native American), disability (asthma), and reprisal for prior EEO activity.

Polanco v Potter, Postmaster General, USPS, 01A50205 (Jan. 10, 2005). The Commission reversed the agency's dismissal of complainant's allegation that he was denied the opportunity to apply for a position as failing to state a claim. Complainant alleged sex discrimination in that a vacancy notice for an Instructor position was never actually posted. The agency dismissed the case for failure to state a claim after determining that the position was posted. The Commission reversed the agency because the claim was sufficient to render complainant

aggrieved. The Commission explained that "the agency has articulated reasons that [go] to the merits of complainant's complaint, and are irrelevant to the procedural issue of whether he has stated a justiciable claim."

Ramirez v. Potter, Postmaster General, United States Postal Service, 01A40134 (Mar. 17, 2004). The Commission reversed the agency's dismissal for failure to state a claim, where complainant asserted he was discriminated against on the bases of his race and sex when his supervisor required him to complete the unfinished work of a white female relief clerk. Because complainant alleged that he was required to do additional work, the Commission held that he was aggrieved. The Commission remanded the claim for processing. However, the Commission affirmed the agency's dismissal of the complainant's second claim, in which he asserted he was "harmed" when he discovered that the post office branch at which he worked was "still on the Mystery Shopper's List program," although it was not specified what this program entailed or why this discovery upset complainant.

Richardson v. Mineta, Secretary, Department of Transportation, 01A42568 (June 16, 2004), request for reconsideration denied, 05A41090 (Aug. 18, 2004). The Commission sustained the agency's dismissal of a claim of hostile environment sex harassment and another claim of sex discrimination for failure to state a claim. Complainant is an Air Traffic Control Specialist. As to the hostile environment allegation, the complainant alleged that she was subjected to a hostile environment when she witnessed a verbal confrontation, during which the male participant belittled and verbally assaulted a female controller and that male co-workers at her facility do not respect their female counterparts. In essence, the Commission agreed with the agency that the incident was insufficiently severe or pervasive (e.g., it was not even directed at the complainant, no evidence that it affected her work environment, no statements from co workers as to hostility, etc.). Moreover, the Commission noted that the Controller in Charge ordered that the male controller be removed from his position. As to the second claim, the complainant alleged that the agency delayed processing her workers' compensation claim "by requiring her to provide the Personnel Manager with the name of her attending physician prior to submitting the CA-16 form . . . ." and that "this delayed her receipt of treatment by nine (9) days and stalled her return to normal activities." Here, the Commission noted that the complainant did not provide any evidence that "she was harmed by any purported delay."

Riem v. England, Secretary, Department of the Navy, 01A34766 (March 31, 2004), request for reconsideration denied, 05A40673 (May 11, 2004). The Commission sustained the agency's dismissal of the complaint for failure to state a claim; complainant was not aggrieved by the alleged violation of the confidentiality provision of another person's EEO settlement agreement and the complainant's alleged mandatory referral to EAP was not recorded in his Official Personnel File, and not considered as a disciplinary action against complainant.

Roach v. Rumsfeld, Secretary, Department of Defense (Defense Finance & Accounting Service), 01A50373 (Jan. 26, 2005) An allegation that complainant was given a Letter of Warning in reprisal for her EEO participation is sufficient to state a claim, so the Commission reversed the agency's dismissal. Complainant alleged that she was given a Letter of Warning in retaliation for her prior EEO activity. The letter outlined complainant's failure to follow proper procedures and concluded that failure to follow the procedures could result in disciplinary action. The agency dismissed the complaint for failure to state a claim and because the letter was only a proposed action. The Commission held that: "Complainant's claim is sufficient to render her an aggrieved employee. Because the claim alleged an adverse action based on reprisal, she has raised a claim within the purview of the EEOC regulations." Furthermore, the Commission found that the letter was not a proposed action, but a completed action.

Rytelewski v. Potter, Postmaster General, United States Postal Service, 01A41037 (Mar. 9, 2004). The Commission affirmed the agency's dismissal for failure to state a claim as to 3 of 4 claims because the alleged incidents forming the basis of such claims of harassment were neither severe nor pervasive, specifically that: (1) complainant's supervisor remarked upon complainant's return from the restroom, "Three more minutes and that would have been your break"; (2) complainant's supervisor questioned him about a sign he placed, which read "Donuts from Danny"; and, (3) when complainant requested and took leave, a response was not provided until the following week. On complainant's fourth claim, the Commission reversed the agency's dismissal, finding that complainant effectively stated that he suffered a personal harm with respect to a condition or privilege of employment when he was denied a requested leave change from his originally scheduled vacation week. Specifically, as alleged by complainant, when he requested that his supervisor change his requested leave dates, his supervisor failed to respond, which necessitated having to "go through his union representative 'to

cancel the changes and keep my original week so that I would not lose it all.'" Because complainant properly stated a claim as to this allegation, the Commission remanded it for processing.

Seligmann v. Mineta, Secretary, Department of Transportation, 01A43549 (Aug. 17, 2004). The Commission affirmed the agency's dismissal of the sex-based harassment complaint for failure to state a claim. The Commission agreed that the two alleged incidents, even if true, were not sufficiently severe or pervasive. The complainant claimed that her supervisor became belligerent and verbally abusive, loudly berating complainant in the hallway in the presence of co-workers; and, three months later, objected to complainant's presence at a meeting scheduled with another co-worker and a union representative.

Shalow v. Potter, Postmaster General, United States Postal Service, 01A41181 (Apr. 14, 2004). The Commission affirmed the agency's dismissal of the complaint for failure to state a claim, where complainant alleged discrimination on the bases of race, sex, age, disability, and retaliation when he was denied a request for a union steward. The Commission held that a complainant should not use the EEO complaint process to raise a matter more appropriately brought pursuant to the parties' collective bargaining agreement.

Solivan v. Potter, Postmaster General, United States Postal Service, 01A54587 (Oct. 5, 2005). The Commission agreed with the agency's dismissal of the complainant's claims, but for different reasons (The agency dismissed the complaint for untimely EEO contact). In the Commission's view, it had no jurisdiction over the complainant's allegations about a coworker's alleged criminal conduct away from work, no jurisdiction over the coworker's alleged invasion of the complainant's privacy, and, as to two other allegations - that the coworker falsely accused her of misusing leave and forced her to take different routes to the cafeteria -- the actions were not sufficiently severe or pervasive to rise to the level of sexual harassment. As provided by the Commission, the complainant "specifically alleged that (1) her co-worker has demonstrated physical violence while off the job by stalking her; (2) her co-worker follows her while she is driving her car, and has created traffic situations, whereby he slams on the brakes to try and get her to have an automobile accident; (3) her co-worker has robbed her personal information (social security number and credit information); (4) her co-worker has violated her privacy by accessing her clock rings and employment

records; (5) her co-worker has made false accusations against her regarding misuse of her leave; (6) she has to take different routes to go to the cafeteria because management has failed to take action and has not kept her co-worker away from her."

Varthakavi v. Chao, Secretary, DOL, 01A44594 (Jan. 13, 2005). The Commission upheld the AJ's decision without a hearing (although on the basis of failure to state a claim rather than a failure to prove discrimination), dismissing the complainant's non selection claim because he was not aggrieved; the agency did not select any of the applicants from the OPM certificate, but modified the position, changed the requirements and again posted the position. In the Commission's view, "Where no selection is made and complainant does not argue that the vacancy announcement was discriminatorily cancelled, a claim of non-selection fails to state a claim."

Veasley v. Potter, Postmaster General, United States Postal Service, 01A40677 (Apr. 12, 2004). The Commission affirmed the agency's decision dismissing complainant's complaint for failure to state a claim, where complainant alleged that management failed to comply with the provisions of a grievance agreement. The Commission held that it does not have the authority to enforce a grievance settlement.

III. Abuse of Process

Abell v. Norton, Secretary, Department of the Interior, 01A33023 (May 13, 2004). The Commission affirmed an AJ's dismissal of complainant's 10 EEO complaints as an abuse of process because complainant had filed a total of 43 EEO complaints in a way that evidenced a clear intent to overburden the EEO system with duplicate and redundant complaints. Complainant worked as a Management Analyst for the National Park Service from 1967 until he was removed for alleged misconduct in 1993. After his removal in 1993, complainant applied for numerous GS-12/13 and GS-13/14 positions with the agency. For each position, complainant submitted a form in which he stated that he had previously filed several EEO complaints against the agency. Following each of his non selections, complainant filed an EEO complaint against the agency on multiple EEO bases, including reprisal for prior EEO participation. (Complainant filed at least 43 complaints against the agency.). The subject of the instant appeal was complainant's non selection for ten

(10) Administrative Officer (AO) positions in various states. An EEOC AJ issued a decision without a hearing, dismissing these 10 complaints for an abuse of process, pursuant to 29 C.F.R. §1614.107(a). In that decision, the AJ noted that the requirements of 29 C.F.R. §1614.107(a)(9) were met, as follows: (i) Complainant filed 43 EEO complaints, none of which resulted in a finding of discrimination; (ii) each of the complaints was a non-specific "template" regardless of the facts of the EEO complaint; and (iii) complainant's requested relief and his request for 72 witnesses, including the Chairman of the Commission and the Secretary of the Interior, reflected his intent to overburden the EEO process and harass the agency. The agency then issued a final decision, concurring with the AJ's findings and decision. Complainant appealed the agency's final decision to the EEOC. The EEOC first explained its position on dismissal of an EEO complaint for an abuse of process as follows: "This Commission has the inherent power to control and prevent abuse of its orders and processes and procedures. Burne v. United States Postal Service, EEOC Request No. 05850299 (November 18, 1985). The procedures contained in Commission regulations provide the process by which claims of discrimination are processed in the Federal sector, with a goal of eliminating or preventing unlawful employment discrimination. The procedures set forth should not be misconstrued as substitutes for either inadequate or ineffective labor-management relations or an alternative or substitute for labor-management dispute resolution procedures. Sessoms v. United States Postal Service, EEOC Appeal No. 01973440 (June 11, 1998). EEOC Regulations provide for dismissal of complaints that are part of a 'clear pattern of misuse of the EEO process for a purpose other than the prevention and elimination of employment discrimination.' 29 C.F.R. §1614.107(a)(9). The criteria required to justify dismissal for abuse of process, as set forth in Commission decisions, must be applied strictly. Id. These criteria require: (i) Evidence of multiple complaint filings; and (ii) Claims that are similar or identical, lack specificity or involve matters previously resolved; or (iii) Evidence of circumventing other administrative processes, retaliating against the agency's in-house administrative processes or overburdening the EEO complaint system. On rare occasions, the Commission has applied abuse of process standards to particular complaints. Occasions in which application of the standards are appropriate must be rare, because of the strong policy in favor of preserving a complainant's EEO rights whenever possible. See generally Love v. Pullman, Inc., 404 U.S. 522 (1972); Wrenn v. Equal Employment Opportunity Commission, EEOC Appeal No. 01932105 (August. 19, 1993)." In then concurring with the AJ's finding that complainant's multiple EEO filings "evidences a clear intent to

overburden the EEO system with duplicate and redundant complaints", the Commission stated that: "By applying for multiple positions, some of which he likely has no interest in other than as a vehicle to file an EEO complaint, complainant is knowingly filing repetitive complaints and appeals with the intent to 'clog' the EEO system. We concur with the AJ's finding that complainant has blatantly overburdened the administrative system by filing the instant complaints. The Commission cannot permit a party to utilize the EEO process to circumvent administrative processes; nor can the Commission permit individuals to overburden this system, which is designed to protect innocent individuals from discriminatory practices. Thus, this Commission declines to entertain the enumerated matters any further because complainant is clearly abusing the process. Complainant is strongly cautioned as to continuing such practices. Complainant's use of the EEO system has evidenced a pattern of abuse, and he is reminded that the agency may severely limit the amount of official EEO time, if any, for complaints which are filed merely to overburden the system and perpetuate a pattern of abuse. Having found that complainant has engaged in the abuse of the EEO process, the Commission dismisses the instant appeal. See Kessinger v. USPS, EEOC Appeal No. 01976399 (June 8, 1999)."

Beckwith v. Nicholson, Secretary, Department of Veterans Affairs, 01A52531 (July 28, 2005), recon. den. 05A51249 (Oct. 7, 2005). The Commission reversed the agency's dismissal for abuse of process. The Commission noted that "Application of the misuse of the EEO process standard must be rare, because of the strong policy in favor of preserving a complainant's EEO rights whenever possible." It further noted that while "complainant filed four previous EEO complaints, as cited by the agency, and that these complaints basically stated common themes concerning non-selections and pay inequalities related to the Physician Assistant position, the instant complaint concerns a distinct, separate non-selection/pay issue related to the Mental Health Practitioner position. Moreover, we determine that neither the numerosity nor the subject matter of complainant's claims in the five cited EEO complaints evidences a clear intent by complainant to utilize the EEO process for impermissible purposes." At the same time, the Commission determined that the complainant failed to state a claim (i.e., that she was aggrieved) based on her allegation "that the agency should provide a special band with a higher salary for her position (Nurse Practitioner) because of the agency's improper hiring practices for a different position (Mental Health Nurse Practitioner)."

Kessinger v. Potter, Postmaster General, United States Postal Service, 01A50004 (Nov. 22, 2005). The Commission disagreed with the AJ, who had dismissed the complainant's complaints for abuse of process. In making that finding, the Commission held "In this case, although the Commission has found that complainant has a history of abusing the process with multiple duplicative filings, it does not automatically follow that any subsequent filings of his constitute misuse of the EEO process. We note that contrary to the AJ's finding, there were only two complaints, not 10, filed after he had several meetings with an EEO counselor. One of the claims stated in the complaint concerns a 7 day suspension for unsatisfactory performance and failure to follow instructions which involves the agency's disciplinary process, not the EEO process or issues of official time as in previous cases. Complainant also alleges disparate treatment in the manner in which he was given assignments and the time within which he must complete them. Complainant also alleges harassment when he was given 'pre-disciplinary' discussions for various infractions of agency rules. Each of these are legitimate claims that the agency investigated and should be the subject of a determination on the merits." At the same time, the Commission noted that the "claims that allege dissatisfaction with the processing of previously filed complaints are properly dismissed pursuant to 29 C.F.R. §1614.107(a)(8). Those claims that allege dissatisfaction with the processing the instant complaints do not give rise to a cause of action. Rather, complainant should bring his concerns to the AJ's attention. See EEOC Management Directive 110, Ch. 5 § IV(D) (November 11, 1999)." Finally, as to a claim for denial of official time, the Commission cited to MD-110, which provides that "Where the complainant contends that an agency improperly denied him/her official time and the Administrative Judge or OFO finds in the complainant's favor, the Administrative Judge or OFO may order the agency to restore such personal leave as the complainant may have used in lieu of official time."

Wiatr v. Rumsfeld, Secretary, Department of Defense, 01A30752 (Feb. 25, 2004), recon. den. 05A40575 (May 27, 2004). The Commission reversed the agency's abuse of process dismissal, based on the number of cases filed by the complainant, concluding that "The Commission does not find that the amount of cases filed by complainant to be extraordinary" or that there was "a clear intent by complainant to utilize the EEO process for ends other than that which it was designed to accomplish." The Commission explained its' finding as follows: "In the instant case, the agency dismissed the entire complaint for abuse of process, including

claim (1), which was solely dismissed on these grounds. The agency noted in its final decision that, since January 1997, complainant brought over 40 claims of discrimination, many with multiple parts. The agency stated that at least 10 of the claims involve non-selections, over 20 concerned the denial of training opportunities, and a claim has been brought for almost every rating complainant has received since 1996. Further, the agency found that in the instant claims and prior cases complainant names the same management officials. The agency stated that instead of amending prior complaints, to encompass what the agency considers one broad claim of hostile work environment harassment, complainant continues to bring each new matter as a separate claim. The Commission does not find that the amount of cases filed by complainant to be extraordinary. See Kessinger v. United States Postal Service, EEOC Appeal No. 01976399 (June 8, 1999) (over 160 complaints and 150 appeal). Moreover, we do not find that the record shows a clear intent by complainant to utilize the EEO process for ends other than that which it was designed to accomplish. Consequently, we disagree with the agency's dismissal for abuse of process."

IV. Collateral Attack

Howard v Potter, Postmaster General, USPS, 01A50240 (Jan. 11, 2005), request to reconsider denied, EEOC 05A50453 (Feb. 15, 2005). Complaint's allegation of improper processing of his OWCP claim was a collateral attack on the OWCP process and failed to state an EEO claim. Complainant alleged that he was subjected to discrimination when he learned that two letters about his doctor's appointment were misrepresented and falsified, resulting in the suspension of his Office of Worker's Compensation (OWCP) benefits. Complainant alleged that the agency and the OWCP conspired to create the allegedly false and manufactured documents. However, both letters were signed by OWCP Claims Examiners, not by employees of the agency. The Commission noted that it "has held that an employee cannot use the EEO complaint process to lodge a collateral attack on another proceeding. (citations omitted). The proper forum for complainant to raise his challenges to actions which occurred as a result of the OWCP process is through the OWCP procedure itself." Accordingly, the Commission held that the complaint fails to state a claim under the EEOC regulations because complainant failed to show that he suffered harm or loss with respect to a term, condition, or

privilege of employment for which there is a remedy. The agency's final decision dismissing complainant's complaint was affirmed.

V. Raised in MSPB or Negotiated Grievance Process

Flores v. Potter, Postmaster General, United States Postal Service, 01A35149 (Feb. 25, 2004). The agency's decision to dismiss complainant's complaint was improper; the claims raised by complainant were neither "identical" to claims raised in a prior EEO complaint nor "inextricably intertwined" with matters raised in an MSPB appeal.

Zalewski v. Snow, Secretary, Department of the Treasury, 01A34082 (Feb. 19, 2004). Because the complainant raised the same "matter" under a negotiated grievance procedure, which permits claims of discrimination, and, even though the complainant did not actually raise a claim of discrimination in his grievance, the EEO complaint was properly dismissed under 29 C.F.R. § 1614.301(a).

VI. Fragmentation

Chestra v. Potter, Postmaster General, USPS, 01A51383 (March 11, 2005). In a strongly worded decision, the Commission reversed the Agency's three distinct reasons for dismissing complainant's claims. The agency rejected complainant's complaint of discrimination and hostile work environment for investigation because complainant's non-attorney representative, instead of complainant, signed the formal complaint. The agency alternatively dismissed claim one for contacting the EEO counselor two days after the expiration of the requisite 45 day time limit. The agency also dismissed each claim for failure to state a claim. The Commission found the signature of complainant's non-attorney representative sufficient to comply with EEO regulations. The Commission further found complainant's initiation of contact with an EEO counselor, via certified mail within the 45-day period "sufficient to establish initial EEO Counselor contact" because it "exhibit[ed] an intent to begin the process." The Commission also rejected the agency's dismissal of claims (2-8) for failure to state a claim, stating that: "Here, complainant is alleging a series of events that purportedly constituted harassment

which created a hostile work environment. Instead of treating these events as incidents comprising the claim of harassment, the agency treated each incident as a separate claim." The Commission stated that this reflects a mischaracterization and improper fragmentation of complainant's complaint and that the agency should not ignore the "pattern aspect" of the claims and define them in a piecemeal manner where an analogous theme unites the allegedly discriminatory actions challenged in the complaint. The Commission found that: "By piecemealing the claims the agency is engaged in the unacceptable practice of fragmentation, which 'often results from failure to distinguish between the claim the complainant is raising and the evidence...s/he is offering in support of the claim.' EEOC Management Directive (MD) 110, at 5-5."

Guvenir v. Potter, Postmaster General, USPS, 01A52672 (Oct. 21, 2005). The agency dealt with each claim in a piecemeal manner (it first dismissed claims (l)-(8) for untimely EEO counselor contact, then dismissed claims (8)-(12) for failure to state a claim) and improperly fragmented complainant's claim, ignoring the "pattern aspect" of the claims. On that basis the Commission determined that "complainant's claims combined, if taken as true, are severe and pervasive enough for him to state a Title VII claim" and that the claims were timely under Morgan's continuing violation rationale. Here, the Commission noted that "the allegations in the complaint comprise the same unlawful practice, a claim of harassment. Complainant's allegations implicate the same five supervisors who allegedly falsified forms, changed complainant's hours so that he would miss his night classes, stopped complainant from attending doctor visits and conducted disciplinary investigatory interviews."

McGreevy v. Potter, Postmaster General, United States Postal Service, 01A43361 (Oct. 29, 2004). The Commission reversed the agency's dismissal for failure to state a claim and untimeliness, finding instead that the agency misdefined the complaint, fragmenting it into two separate claims and failed to seek clarification from the complainant. The Commission determined that the complainant was alleging a failure to provide him with a reasonable accommodation, a change of craft but the agency looked at the complaint as two separate issues, a reasonable accommodation request and a request for change of craft. Moreover, in response to the agency's claim that the complaint lacked specificity, the agency improperly failed to have the complainant clarify his complaint. As to timeliness, the

Commission observed that the complainant's request for an accommodation was not expressly denied, the requests were a recurring violation and the time limit for timely EEO Counselor contact was therefore not triggered.

Pomier v. Johnson, Secretary, Department of the Navy, 01A33644 (Feb. 10, 2004). While the Commission found that the agency improperly fragmented the complaint's 9 allegations (made in four complaints) of harassment discrimination on the basis of race and reprisal, the complaint's were nonetheless dismissable because they were "not of sufficient severity or pervasiveness to constitute a claim of harassment", even considered together. The complainant, as described by the Commission, made the following allegations: "1. His supervisor informed him that he hung two Chief Cooks from a string and threatened to hang him from the same string. 2. His supervisor said that complainant would stop smiling if he put holes in a pillowcase and placed the pillowcase over his head. 3. His supervisor yelled at him for ten minutes claiming that he heated pasta incorrectly. 4. His supervisor attempted to take his picture without his permission. 5. His supervisor changed schedules and assigned him to the grill during breakfast hour. 6. His supervisor scheduled him to prepare Philly steak sandwiches during lunch. 7. His supervisor quarreled with him because he cooked rice pilaf incorrectly. 8. His supervisor videotaped and audiotaped a counseling session in which he was involved. 9. His supervisor offended him when he said to an Oriental employee 'Don't come back up here unless you order the Oriental tenderloin.'"

VII. Scope of Court Hearing

Farrell v. Principi, 366 F.3d 1066 (9th Cir. 2004). An appeal to court from an agency's final action (a final order accepting the AJ's determination of discrimination and awarding $10,000.00 in emotional distress damages and nothing in pecuniary damages) is subject to de novo review of the remedy - that is, the court may grant "Farrell greater or lesser relief than the agency did in its final order." The court expressed no opinion as to whether the VA's and the AJ's determinations of liability are also subject to a de novo review, noting a conflict in the circuits.

VII. Spin Off Complaints

Tolan v. Brownlee, Acting Secretary, Department of the Army, 01A50918 (Jan. 26, 2005). A claim alleging unfair dismissal of a previously filed EEO complaint was properly dismissed by the Agency. In this case, Complainant filed a claim alleging that his prior EEO complaint was dismissed for discriminatory reasons. The Commission noted that: "EEOC Regulation 29 C.F.R. §1614.107(a)(8) provides that the agency shall dismiss a complaint that alleges dissatisfaction with the processing of a previously filed complaint." The Commission upheld the Agency's dismissal of his instant claim explaining that "[t]he proper recourse for complainant was to appeal the agency's alleged improper dismissal of his prior complaint."

Vaughn-Walker v. Principi, Secretary, Department of Veterans Affairs, 01A30923 (Apr. 26, 2004) request for reconsideration denied, 05A40892 (July 14, 2004). The Commission affirmed the agency's dismissal of the complaint, which alleged that the agency processed one of her previously filed complaints in an untimely manner. The Commission found that the instant complaint involved complainant's dissatisfaction with the processing of her previously filed complaints, and dismissal was proper.

Reassignment and Transfers

Johnson v. Johnson, Chairman, National Credit Union Administration, 07A40123, (Mar. 31, 2005). The Commission agreed with the AJ and found that the agency committed reprisal when the complainant was reassigned from a Credit Union Examiner position in the agency's Division of Supervision, to a Credit Union Examiner position in the agency's Division of Insurance. In making that finding, the Commission noted "that agency management gave conflicting explanations for the reason that complainant was transferred to DOI. The record establishes a conflict between the reason for the transfer given by S1 ('cross-training') and the reason given by the RD ('complainant's skills were better suited to the DOI analyst position'). In addition, the record establishes that there was a conflict between the reasons the RD gave for complainant's transfer to the EEO Investigator, and the reasons she gave at the hearing. In this regard, we concur with the AJ's finding that the RD's credibility was lessened regarding the agency's reasons for complainant's transfer, as she testified at the hearing that complainant was transferred to DOI due to his work performance and productivity, and both S1 and the ARD testified that neither remembered any discussion of complainant's work performance at the time his transfer was discussed. . . . Further, in contrast to the RD's testimony that complainant was transferred in part as his work needed 're-analysis,' S1 testified at the hearing that the work of all facility employees was subject to review and routinely required revisions. . . . The Commission further concurs with the AJ's finding that other factors served to lessen the credibility of agency management, specifically, that the RD and ARD met with the employee being transferred from DOI to DOS, but refused to meet with complainant about his transfer to DOI, and the fact that 'cross-training' was never mentioned as a factor in the transfer of other employees. In addition, we note that there were no other transfers between DOS and DOI between January 1, 2000 and December 31, 2002, and that complainant was the only employee under the supervision of the RD who filed an EEO complaint." However, the Commission reversed the AJ's relief award, finding that there was "no Commission precedent to support the AJ's order of providing annual leave as compensatory damages." Instead, based on the AJ's "factual findings regarding complainant's emotional state following his transfer, we will award complainant non-pecuniary compensatory damages in the amount of $7,500.00. In so finding, we note complainant's hearing testimony wherein he discussed his emotional condition during the month after the transfer, his level of stress and his need to seek medical care."

Regulations and Guidance

Questions and Answers About Blindness and Vision Impairments in the Workplace and the Americans with Disabilities Act (EEOC Oct. 26, 2005). This helpful guidance with numerous examples covers: when a vision impairment is a disability under the ADA, under what circumstances an employer may ask an applicant or employee questions about a vision impairment, what types of reasonable accommodations employees with visual disabilities may need, and how an employer can prevent harassment of employees with visual disabilities or any other disability.

Questions and Answers About the Association Provision of the Americans with Disabilities Act (EEOC Oct. 19, 2005). This guidance, about a little-known provision of the ADA (and Rehabilitation Act) that prohibits discrimination based on one's association with or relationship to a an individual with a disability, addresses the following matters: refusing to hire someone because of an unfounded fear that the individual will be excessively absent or unproductive because of the need to care for a child with a disability; firing or refusing to hire someone based on concerns that the individual will acquire a condition from a family member or other individual with whom he has a relationship; refusing to provide health insurance for an employee's family member with a disability when the employer generally provides health insurance for employee dependents; harassing someone based on the individual's association with a person with a disability; providing lesser benefits to someone who has a relationship or association with an individual with a disability than it provides to all other employees; and, firing, refusing to hire, or denying any benefit or privilege of employment to someone because of concern that the employer's image will be negatively affected by an applicant's or employee's association with individuals with disabilities (for example, discriminating against an employee who provides volunteer services for people with HIV/AIDS or psychiatric disabilities is prohibited).

Religious Discrimination

Brown v. Potter, Postmaster General, United States Postal Service, 01A50280 (Dec. 28, 2005). The agency discriminated against the complainant, a Muslim letter carrier, when it placed him off the clock for refusal to remove his non-postal headgear, a Kufi. For almost 1 1/2 years prior to the incident, the complainant wore a kufi in the station. However, a new postmaster implemented a policy that postal employees were to stay in postal uniform. Headwear such as caps, "do-rags" and the complainant's kufi were considered non-uniform. Consequently, the area manager, enforcing the new policy, ordered "two employees wearing do-rags and the complainant to remove their headwear. The first two employees complied, but the complainant told the manager he was wearing the kufi for religious purposes. The manager again instructed the complainant to remove his headwear. The complainant communicated his reluctance by asking to see something in writing about this, but complied."

Bullock v. Potter, Postmaster General, USPS, 07A40101 (Aug. 2, 2005). The complainant proved that he was discriminated against on the basis of his religion, African Methodist Episcopal, when he requested but was not given Saturdays off and was then terminated. The Commission agreed with the AJ "that complainant has a bona fide religious belief that Saturday is the Sabbath after reading the bible, praying, and talking to others with similar beliefs." Further, as provided by the Commission, "the agency made no good faith effort to accommodate complainant's religious beliefs. For instance, the record indicates that management did not look into the possibility of having other employees voluntarily switch schedules in order to accommodate complainant." The Commission also concluded that the agency had not proven undue hardship, observing first that "there is evidence that, at times, another casual was off work on Saturdays", "that just days after complainant was terminated, two tours were combined so that casuals could be given Saturdays off", a change that the agency was aware of and that the negotiated agreement was not a defense because "the agency has failed to make a good faith effort to accommodate complainant."

Cirami v. Potter, Postmaster General, USPS, 01A33035 (Jan. 13, 2005). The Commission held that an agency's failure to consider reasonable accommodation of a Catholic employees request to use leave to take Good Friday off was

discrimination based upon religion. Complainant, a Motor Vehicle Operator who is Catholic, submitted a leave request for his religious observance of the "holy day" of Good Friday, April 13, 2001. The request was denied because it was not timely submitted, complainant took the day off anyway and was charged with being AWOL on that date. Complainant filed an EEO complaint alleging religious discrimination, and an AJ found no discrimination, using a disparate treatment analysis and the decision was adopted by the agency. The Commission reversed, holding that "the crux of complainant's complaint clearly is that the agency failed to accommodate his religious practices, by its purported refusal to grant him a leave request to observe Good Friday." The Commission noted that complainant had proven a prima facie case based on religious accommodation so that the burden of proof shifted to the Agency to prove the requested day off would be an undue hardship. The agency asserted that allowing complainant Good Friday off would violate a local Memorandum of Understanding that required that a leave request be submitted two weeks in advance and that April 13 was a prime vacation time, with 20% of the Motor Vehicle Operators off duty. The EEOC noted that: "The Commission has found acceptable several alternatives for accommodating conflicts between work schedules and religious practices, including voluntary substitutes and swaps, flexible scheduling or lateral transfer and change of job assignments. See 29 C.F.R. §1605.2(d). With regard to voluntary substitutions or swaps, the Commission believes the obligation to accommodate requires employers to facilitate the securing of a voluntary substitute. Some ways of doing this are publicizing policies regarding accommodation and voluntary substitution, promoting an atmosphere in which substitutions are favorably regarded, or providing a central file, bulletin board, or other means for making voluntary substitutes available. (citation omitted)." The Commission found that "the agency has done nothing to demonstrate that it has attempted to reasonably accommodate complainant's request. For example, the record is devoid of evidence that the agency pursued the possibility that an agency employee might volunteer to substitute for complainant on April 13, 2001; that an employee might similarly volunteer to swap annual leave days; or that complainant might use compensatory time to make up for the time lost when he observed religious practices on April 13, 2001. Accordingly, the EEOC found that complainant was subjected to discrimination based upon his religion and ordered the agency to change the AWOL to annual leave and to provide training and consider disciplinary action for the individuals who denied the leave request.

Cosgrove v. Norton, Secretary, Department of the Interior, 01A34768 (Aug. 25, 2004). The complainant, a Park Ranger, failed to prove that he was discriminated against on the basis of religion (Religious Society of Friends), when he was denied a request to take each Sunday off because it conflicted with the provisions of the CBA and failed to prove that he was retaliated against for prior EEO activity when he was required to request, in writing, access to all sign-in sheets (which was a change from previous policy). Sunday is the complainant's Sabbath. Between 1993 and 1999, the agency accommodated complainant's religious practices by granting him leave without pay on Sunday mornings. However, in 1999, he was informed that he would have to take annual leave in order to attend religious services because of a new union contract. He then filed an EEO complaint, which was settled; it was agreed that he would be the first person asked to come in on a day off so he could accrue compensatory time off. But, the complainant later alleged that the agency breached the agreement and the agency reinstated his EEO case, the basis for this decision. The CBA provided that leave for less than five days is granted on a first come, first served basis. Based on that requirement, the agency would sometimes deny complainant leave on Sunday mornings because co-workers had already requested leave. When the complainant's requests for leave were denied, he was allowed to call in on Sunday mornings to determine if there was sufficient coverage by other employees so that he could be excused. Also, at the time the complainant determined that the settlement agreement was breached, he began to monitor the agency sign-in sheets to find other instances of breach. In response, the agency informed him that he needed to submit written requests to review the sign-in sheets. In addressing the complainant's religious accommodation claim, the Commission first observed that "an employer meets its burden of demonstrating undue hardship where a requested accommodation is shown to be in violation of seniority procedures under a valid CBA" and that "for the agency to accommodate complainant in this situation, it would have been required to remove an individual who was either already on annual leave, and/or violate the collective bargaining agreement by granting complainant a permanent preference for Sunday leave requests, which it is not required to do." The Commission further held that the agency acted in good faith to accommodate complainant's religion by agreeing "that if complainant could not be excused because of staffing considerations, he could 'call in' on the morning before he was scheduled to work in order to see if he was ultimately needed, or whether there was sufficient staffing coverage. The Commission also noted that "the agency was unable to switch complainant to a schedule which enabled him to have Sunday as

his permanent day off from work because the collective bargaining agreement specified that days off were rotated according to seniority." Similarly, as to complainant's retaliation claim, the Commission found that it was not retaliatory to require him to request, in writing, access to all sign-in sheets.; the agency established that it had "valid privacy reasons to limit access to the sign-in sheets" and, moreover, the agency's action was not "reasonably likely to deter protected activity given that complainant was permitted to view the sign in sheets after making a request in writing."

Peterson v. Hewlett-Packard, 358 F.3d 599 (9th Cir. 2004). The court rejected the employee's claim of religious discrimination, holding that religion-based display of anti-gay messages was not protected by Title VII. Peterson sued the employer under Title VII, claiming that the employer refused to accommodate his religious beliefs and discharged him because of his religion. The trial court granted summary judgment for the employer and the 9th Circuit affirmed. The employer had a Workplace Diversity Campaign which included posters showing photos over the captions "Black," "Blonde," "Old," "Gay," "Hispanic." Peterson was a devout Christian who believed that homosexual activities violated Biblical commands. He posted three Biblical scriptures in his work cubicle. They were large and visible to co-workers and customers. The supervisor removed the scriptural passages, after finding that they could be offensive to certain employees and violated the employer's policy prohibiting harassment. In a series of meetings with managers. Peterson said his postings were "intended to be hurtful." He offered to remove the postings only if the employer removed the "gay" posters, otherwise he would not. He was discharged for insubordination. The 9th Circuit affirmed a trial court's grant of summary judgment to the employer, rejecting Peterson's disparate treatment and his failure to accommodate religion claims. The court held that he did not prove a prima facie case of disparate treatment; he could not show that "similarly situated individuals outside his protected class were treated more favorably, or other circumstances . . . giving rise to an inference of discrimination." The court noted that the goal of the employer's program was to increase tolerance of diversity and that even if the employer's program put special emphasis on combating prejudice against homosexuality, that was not unlawful. The Court found that the employer requested that Peterson remove posters that violated the company's harassment policy - a policy that was uniformly applied to all employees. The court further rejected Peterson's attempt to compare himself with other employees who posted religious and secular messages in their cubicles

because there was no evidence that those messages were intended to be "hurtful" or critical of other employees or otherwise in violation of the harassment policy. Turning to the accommodation claim, the court noted that the only two accommodations that Peterson was willing to accept would have imposed an undue hardship upon the employer. Allowing both "gay" and the anti-gay messages to remain would have required the employer to permit an employee to post messages intended to demean and harass co-workers. As to the other accommodation, removing both the "gay" posters and the anti-gay messages, this would have forced the employer to exclude sexual orientation from its diversity program and inhibit its efforts to attract and retain a qualified and diverse work force.

Rolfe v. Potter, Postmaster General, United States Postal Service, 07A40011 (Mar. 26, 2004). The Commission deferred to an EEOC AJ, who had found the agency discriminated against the complainant on the basis of her religion (Catholic), when it denied her request for religious accommodation and instead required her to work on Christmas Day and New Year's Day -- holy days of obligation in the Catholic church. The AJ also properly awarded the complainant $3,000.00 in non pecuniary compensatory damages. The Commission further deferred to the AJ's determination that the supervisor "did not ask the other PTF clerks to work on the holidays at issue. In particular, the AJ provided a detailed explanation for this determination in the decision. We further note that record testimony reflects that [the supervisor] . . . admits that she did not attempt to reschedule complainant as a religious accommodation. . . . Accordingly, we concur with the AJ's finding that the agency failed to undertake any good faith effort to reasonably accommodate complainant's request in this matter. " As to any undue hardship defense, the Commission observed "that the record fails to show that either of the other two PTF clerks could not, in fact, work on either of the days at issue. We note that the agency offers no explanation why [the supervisor] . . . scheduled complainant to work on both Christmas Day and New Year's day rather than either of the other two PTF clerks, except that her 'hard-and-fast"' rule prohibited a change to the schedule once made, apparently even as a reasonable accommodation for a religious belief."

Rosenberg v. Potter, Postmaster General, United States Postal Service, 01A55011 (Nov. 29, 2005). The agency provided complainant with an effective accommodation of his religious beliefs (he was Jewish), when complainant was provided the option to bid for positions that would have permitted him to avoid

working on Saturdays. The Commission cited to its case law that "An agency is not required to provide the specific accommodation preferred by a complainant and need only provide an effective accommodation."

Scott v. Potter, Postmaster General, USPS, 01A43637 (May 26, 2005). The agency did not discriminate against the complainant on the basis of his religion (Jehovah's Witness), when it denied him leave to attend a "Circuit Assembly" and the "Supplemental School for Christian Elders." As explained by the Commission, "The record indicates that complainant is a Jehovah's Witness. Complainant stated that, starting on September 19, 2003, he asked the S to allow him to attend two religious activities. Complainant sought a leave of absence for October 5, 2002, in order to attend the 'Circuit Assembly.' Complainant also asked to use leave in order to attend the 'Supplemental School for Christian Elders' on October 12, 2002. The agency denied complainant's requests for leave. Despite the denials of leave, complainant attended the events. The PM indicated that complainant provided him with documentation in order to support his request for leave. The PM noted that the documentation was for a conference to take place on October 5-6, 2002. He also averred that there was no indication of an event on October 12, 2002. As a result of complainant's failure to report for work as scheduled, the S issued a Letter of Warning on October 8, 2002 for the October 5, 2002 absence. Additionally, he issued complainant a seven-day suspension on October 15, 2002, for failure to report for work as scheduled following his October 12, 2002 absence." In rejecting the complainant's claim, the Commission held, as follows: "We find that attendance at such a religious conference is an optional activity. One attends simply because one desires to do so. Attendance is not compelled by a person's belief in the tenets of a religion. See, e.g., Nesbitt v. United States Postal Service, EEOC Appeal No. 01996248 (September 19, 2000) (finding that agency was not required to provide a religious accommodation to ensure the complainant's ability to attend teaching services and choir practice because participation in these activities occurs as a desire of the participant, and must be distinguished from a church member's belief in the tenets of the religion). As such, the agency was not under an obligation to provide complainant with an accommodation to allow him to attend these events."

Remedy

Connor Scott, Personal Representative of the Estate of Harold Connor, Appellant v. Johanns, Secretary of Agriculture, 04-5267, 409 F.3d 466 (D.C. Cir. 2005). The Circuit agreed with the lower court's dismissal and concluded that a court cannot review a final administrative disposition's remedial award (e.g., compensatory damages) without reviewing the disposition's underlying finding of liability. Stated another way, "an employee seeking a greater award must start from scratch, i.e., the employee must file a Title VII suit and prove liability along with entitlement to relief." This case involved a then deceased former employee (Scott) who challenged the sufficiency of his $10,000.00 compensatory award. As stated by the court, "in a federal-sector Title VII case, any remedial order must rest on judicial findings of liability, and nothing in the statute's language suggests that such findings are unnecessary in cases where a final administrative disposition has already found discrimination and awarded relief. This rule, moreover, applies to Scott's claim even though section 2000e-5(g) says nothing about compensatory damages, for the statute authorizing such damages indicates that section 2000e-5(g)'s requirement of a judicial finding of liability applies to them as well. See 42 U.S.C. § 1981a(a)(1) (making compensatory damages available 'in addition to' remedies mentioned in section 2000e-5(g))."

Daniel v. McCullough, Chairman, Tennessee Valley Authority, 01A52786 (Sept. 26, 2005). As a remedy for discrimination an agency must offer a complainant the position denied as a result of the discrimination or a substantially equivalent position –the Commission ordered the agency to remedy its failure to do so in this case. Complainant was an Industrial Hygienist in the agency's Safety Division of the Chief Operating Officer (COO) Group. He applied for two Consultant COO Safety positions. The agency did not select the complainant for either of two senior level positions to be filled at the Paradise and Cumberland Fossil Plants. Younger, less qualified candidates were selected. The complainant filed a complaint alleging age discrimination (age 51) and reprisal for his prior EEO activity (he had been a witness for another employee). The agency found age, but not reprisal discrimination and, as part of its order of relief for the age claim, the final agency decision directed that complainant be offered the position of "Consultant COO Safety" at either the Paradise or Cumberland Fossil Plants or "an equivalent position." However, complainant was only offered a developmental-level position, at another facility, which the complainant contends was not a substantially

equivalent position. Complainant declined the agency offer and appealed to the Commission. The Commission agreed that the position offered was not the position that complainant would have been in absent age discrimination and directed the agency to offer complainant that specific position or a substantially equivalent position.

Edwards v. Nicholson, Secretary, Department of Veterans Affairs, 07A50067 (Sept. 13, 2005). The Commission modified a remedy provided by an AJ after a finding that complainant had been subjected to discrimination when she was denied an interview for a position, eliminating training for the complainant for the position and adding the requirement that the agency provide training and consider discipline for the agency officials responsible for the discrimination. The Commission modified the remedy awarded by an AJ after a finding that complainant was subjected to race discrimination when she was not certified for an interview for an GS-6 Accounting Technician position. The Commission agreed with the AJ that complainant should be granted interview opportunities for future Accounting Technician, GS-6 vacancies, adding the time limit of two years to this interview remedy. The Commission disagreed with the AJ that complainant should be provided training to allow complainant to successfully perform the duties of an Accounting Technician, GS-6 because the agency was not found to have discriminatorily denied complainant training and such relief is beyond make whole relief. The Commission also added the remedies of: (1) EEO training for the agency officials responsible for the discrimination; and (2) the requirement that the agency consider disciplining the agency officials responsible for the discrimination.

Grigsby v. Gonzales, Attorney General, Department of Justice, 07A50007 (June 30, 2005). A requirement of eight hours of training on discrimination laws for supervisors directly involved in a discriminatory non-selection was found to be reasonable, but a requirement that all managers and supervisors at a facility receive such training was scaled back to cover only those managers within the facility's Human Resources office who were complicit in the discrimination. Complainant was subject to discrimination when he was not selected for a Community Corrections Specialist working for the Bureau of Prisons in Seattle, Washington. The Agency accepted a finding of discrimination by an AJ but rejected the AJ's order to provide training for all management officials and supervisors at the Community Corrections SeaTac office, because no one from that office was named as a responsible management official in the complaint. The agency also rejected

the AJ's order that the selecting official and complainant's first line supervisor should attend eight hours of training in the law prohibiting age and race discrimination, arguing that eight hours was excessive. The Commission modified the AJ's order for all management officials at the Community Corrections Sea Tac office to take training, instead requiring only the Manager, Human Resources at Sea Tac and any other manager within the Human Resources office who were also found by the AJ to have acted in a discriminatory manner towards complainant, to take training as directed by the AJ. However, the Commission upheld the AJ's requirement of eight hours of training as reasonable. The Commission noted that it is guided by the regulations that state that when an agency is found to have discriminated against an employee, it will take corrective, curative and preventative measures that will ensure that similar violations will not recur. 29 C.F.R. §1614.501(a)(2). The Commission held that, based on this policy statement, the AJ's order is reasonably calculated to meet this objective.

Lorenzo v. Rumsfeld, Secretary, Department of Defense (Education Activity), 04A40035 (Sept. 29, 2005). An agency was directed to pay a petitioner's proven increased income tax burden that resulted from a lump sum payment of an EEO complaint, with petitioner having the burden of proof to establish the amount of additional tax liability. This was a Commission ruling on complainant's petition for enforcement of an earlier Commission decision awarding complainant back pay. Petitioner sought reimbursement for the increased federal and state tax liability incurred when the agency paid her lump-sum amounts. The Commission noted that it has "held that where an agency pays back pay and other income payments in a lump sum payment the agency is responsible for a petitioner's proven increased income tax burden. In these cases, the Commission held that an award to cover additional tax liability for receipt of back pay in a lump sum is available and that the petitioner bears the burden to prove the amount to which s/he claims entitlement. We find, therefore, that the agency is liable to petitioner for proven adverse federal income tax consequences as a result of its lump sum payments to petitioner.."….The calculation of additional tax liability must be based on the taxes the Petitioner would have paid had she received the back pay in the form of regular salary during the back pay period, versus the additional taxes she paid due to receiving the back pay lump sum awards. However, the Commission rejected, as too speculative, petitioner's argument that, but for discrimination, she would not have incurred liability for state taxes.

Reprisal / Retaliation

I. Prima Facie Case

Burlington Northern & Santa Fe Railway Co. v. White, U.S. Supreme Court, No. 05-259 (June 22, 2006). The anti-retaliation provision of Title VII of the Civil Rights Act does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace, the provision covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant - which means that the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination. Sheila White (White) was the only woman working in the Maintenance of Way department at the Tennessee yard of the Burlington Northern & Santa Fe Railway Company (Burlington). She was hired as a “track laborer” and assigned to operate a forklift. In September, 1997, White complained that her immediate supervisor, Bill Joiner, made insulting and inappropriate comments and repeatedly told her women should not be working in the department. On September 26, White was told by a senior manager that: (1) Joiner was given a 10-day suspension; and (2) White was to be removed from her forklift duty, and assigned the more rigorous standard track laborer tasks because co-workers complained that a "'more senior man'" should have the "less arduous and cleaner job" of forklift operator. In October, 1997, after White filed a sex and retaliation charge with the EEOC, she was suspended for 37 days for insubordination. White filed another charge with the EEOC. The suspension was reversed in Burlington’s internal grievance procedure. White filed a lawsuit challenging the change in her responsibilities and the 37 day suspension. A jury award of $43,500 was affirmed by the Sixth Circuit. Burlington appealed to the Supreme Court. Title VII's anti-retaliation provision forbids employer actions that "discriminate against" an employee (or job applicant) because he has "opposed" a practice that Title VII forbids or has "made a charge, testified, assisted, or participated in" a Title VII "investigation, proceeding, or hearing." 42 U.S.C. § 2000e-3(a). However, the U. S. Circuit Courts of Appeal came to different conclusions about whether the challenged action has to be employment or workplace related and about how harmful that action must be to constitute retaliation. The Sixth Circuit (the Circuit in the instant case) required that the retaliation must be an adverse employment action (a materially adverse change in

the conditions of employment). The Fifth and Eight Circuits held that the retaliation must involve an ultimate employment decision, such as hiring, promotion, leave or compensation. The Ninth Circuit and the EEOC adopted the most liberal standard, holding that the challenged action, whether or not in an employment context, must only be reasonably likely to deter an individual from engaging in activity protected by Title VII. The Supreme Court adopted the standard applied by the D.C. and Seventh Circuits, stating: "In our view, a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, 'which in this context means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.' (citation omitted)." The Supreme Court stated that: "We speak of material adversity because we believe it is important to separate significant from trivial harms. Title VII, we have said, does not set forth 'a general civility code for the American workplace.' Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 80 (1998). . An employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience. . The anti-retaliation provision seeks to prevent employer interference with 'unfettered access' to Title VII's remedial mechanisms. . It does so by prohibiting employer actions that are likely 'to deter victims of discrimination from complaining to the EEOC,' the courts, and their employers. And normally petty slights, minor annoyances, and simple lack of good manners will not create such deterrence. (citations omitted). . . We phrase the standard in general terms because the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters. 'The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed.' A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children. (citations omitted). . By focusing on the materiality of the challenged action and the perspective of a reasonable person in the plaintiff's position, we believe this standard will screen out trivial conduct while effectively capturing those acts that are likely to dissuade employees from complaining or assisting in complaints about discrimination."

Ceckiewicz v. Gonzales, Attorney General, Department of Justice (Bureau of Prisons), 01A33850105 (Oct. 18, 2005). Complainant failed to prove reprisal discrimination where the agency officials responsible for the challenged action were unaware of complainant's prior EEO activity, and failed to prove disability discrimination because complainant's loss of vision in one eye was correctable and thus complainant was not an individual with a disability as defined under the Rehabilitation Act. The Commission upheld a final agency decision of no discrimination, finding: no reprisal discrimination because some of the allegations of reprisal did not occur prior to the EEO activity and there was no evidence that the responsible agency officials were aware of the complainant's EEO activity; and no disability discrimination claim because complainant's loss of vision in his left eye did not constitute a substantial limitation to the major life activity of seeing because it is correctable and thus complainant was not an individual with a disability.

Coons v. Secretary of the U. S. Dept. of the Treasury (IRS), 383 F.3d 879 (9th Cir. 2004). The 9th Circuit affirmed summary judgment on disability and retaliation claims, strongly suggesting that "traveling" is not a major life activity. As to the reprisal claim, the Ninth Circuit rejected plaintiff's assertion that he was subjected to retaliation for requesting reasonable accommodation when he was demoted. The Ninth Circuit noted that the request for reasonable accommodation "was made a full year before his demotion. This distant time sequence was inadequate to show a causal link between his protected activity of requesting reasonable accommodations and the adverse employment action he suffered (his demotion). Therefore, (plaintiff) did not make out a prima facie case for retaliation."

Gerber v. Ridge, Secretary, Department of Homeland Security, 07A30062 (May 25, 2004). The Commission summarily affirmed the AJ's decision that the complainant, an Intelligence Research Specialist, was retaliated against by the agency when it placed the complainant in an AWOL status shortly after the complainant engaged in protected activity, and that the agency's reason for such action was a pretext for retaliation. The Commission also affirmed the AJ's award of $50,550.00 in attorney's fees, $1,376.04 in costs; and, $13,000.00 in non-pecuniary damages. Although the agency asserted a legitimate, nondiscriminatory reason for placing the complainant on AWOL status for providing insufficient medical documentation for his leave requests, the AJ had properly determined that the reason was a pretext for retaliation because soon after learning of the complainant's EEO complaint, the agency deviated from its prior plan to monitor

the complainant's future leave requests. Specifically, prior to learning of the complainant's EEO activity, the complainant's supervisor wrote a letter recommending an assessment of complainant's use of leave. According to the letter, the complainant would be required to submit medical certification in support of any future sick leave. The letter also recommended placing the complainant on leave restriction if it was determined that he failed to adhere to leave restrictions. The AJ (and the Commission) found that the agency deviated from this "typical and reasonable" proposed course of action, immediately following its notice of complainant's EEO activity. After learning of the EEO activity, the agency repeatedly demanded further medical documentation for the complainant's leave requests without explaining why the documentation received was insufficient. Accordingly, as noted by the Commission, the AJ properly determined that the documentation was sufficient and that the agency's reason for requiring additional documentation "was not reasonable, believable or understandable," and thus was pretextual. The Commission ordered the agency to "expunge from complainant's official employment record all references to AWOL charges at issue."

Knight v. Potter, Postmaster General, USPS, 01A54821 (Jan. 23, 2005). In upholding the agency's FAD as to its finding that the complainant did not prove reprisal, the Commission observed that "there was at least a six (6) month period between complainant's prior EEO activity initiated in May of 2004 and the agency's alleged actions, which occurred between November of 2004 and February of 2005. Clark County School District v. Breeden, 532 U.S. 268,273-74 (2001), citing O'Neal v. Ferguson Constr. Co., 231 F.3d 1248,1253 (10th Cir. 2001) (3-monthperiod insufficient); see also Popovich v. United States Postal Service, EEOC Appeal No. 01986240 (April 26, 2000)."

Neal v. Potter, Postmaster General, USPS, 07A40059 (Aug. 29, 2005). The Commission agreed with the AJ and found reprisal in the complainant's nonselection for an Address Management Systems (AMS) Specialist. However, the Commission reduced the AJ's award of non-pecuniary damages from $40,000.00 to $25,000.00. In relevant part, the Commission determined that the complainant proved a prima facie case of reprisal, despite a nearly 2 year gap between the protected activity and the non selection because "the SO was closely involved with complainant's prior protected activity" and had "ongoing obligations under the EEO settlement agreement" which resolved the complainant's previous participation. In determining that pretext in the non selection had been proven, the

Commission wrote that "We agree with the AJ's assertion that a comparison of the qualifications of complainant and the selectee evidences that complainant had superior detail experience in the AMS Specialist position. The record reflects that the selectee was detailed to the AMS Specialist position for approximately six weeks; however, complainant was detailed to the AMS Specialist position for approximately three years. . . We further agree with the AJ's assertion that "the number and duration of details given to complainant strongly supports and evidences a professional demeanor." [the SO testified that complainant was "unprofessional and possesses an overall negative demeanor."] In addition, the record contained testimony and statements from complainant's co-workers and former supervisor that her attitude was professional and positive. As to the reduction in compensatory damages, the Commission noted the lack of evidence from a health care provider and that the AJ "did not rely on prior Commission precedent in determining the specific amount that was awarded complainant." Finally, as to attorney fees, the Commission found as follows: "the record does not support a finding that the claims (complainant's non-selection and abolishment of complainant's clerk position) were closely intertwined. Therefore, we agree with the agency that the AJ's award of attorney's fees should be reduced. Accordingly, since complainant was only successful on one of her claims, we find that the AJ's award of attorney's fees should be reduced by fifty percent. Therefore, we find that complainant is entitled to $2,499.50 in attorney's fees."

O'Neill v. Potter, Postmaster General, USPS, 01A45916 (Mar. 9, 2005). The complainant failed to prove a prima facie case of retaliation as to 2 of her claims; there was an insufficient nexus of 12 months between the protected activity and the personnel action.

Sarwal v. Principi, Secretary, Department of Veterans Affairs, 01A30061 (Feb. 11, 2004). The complainant proved that the agency retaliated against her by issuing a letter of counseling for failure to comply with the agency's dress code policy, after she wore body-contouring leggings and a short, above- the – thigh jacket. The complainant was employed as a GS-9 Staff Assistant in a health clinic at the agency's Houston, Texas Medical Center. She alleged numerous incidents of reprisal and discriminatory treatment, to include that the agency committed reprisal when it issued her a letter of counseling for failure to comply with the agency's dress code policy. In finding that the agency's articulated reason was false and

pretextual, the Commission determined that the supervisor (S1) "issued complainant a letter of counseling several months after she added claims to her EEO complaint. The evidence reveals that S1 did not issue any other employee a letter of counseling for a dress code violation and the dress code policy is not strictly enforced. In fact, the actual policy indicates that a supervisor should work in good faith to resolve the matter without counseling and discipline. The policy states that management can provide an employee with a garment to cover the inappropriate attire or with administrative leave to change clothes and return. The record shows that S1 did neither but instead resorted to counseling first. We find that the record supports a finding of pretext."

West v. Potter, Postmaster General, United States Postal Service, 07A30129 (Sept. 30, 2004). The Commission agreed with the AJ, finding that the agency retaliated against the complainant by issuing her a notice of removal for AWOL, noting the proximity in time between complainant's protected EEO activity and the adverse action. The AJ had found that the agency's reasons for the adverse action - that complainant had failed to keep the agency aware of her medical condition and the status of her inability to report to work - were not credible; the complainant was on OWCP-approved leave, and there was medical documentation providing that she was unable to work for a specified time period. The Commission also agreed with the AJ's award of $1000.00 in non pecuniary compensatory damages, rejecting the complainant's claim that she was entitled to more. In affirming this award, the Commission disagreed with the complainant's argument that the AJ should have held a separate hearing on damages, with the Commission determining instead that the record contained sufficient evidence for a decision on damages.

II. Participation Reprisal

Agar v. Potter, Postmaster General, United States Postal Service, 07A40034 (Aug. 17, 2004). The Commission summarily affirmed the AJ's determination that the agency committed reprisal by failing to select the complainant, a Bulk Mail Technician, for promotion to a Bulk Mail Technician-Level 6 position and that he was entitled to an award of $3000.00 for emotional distress. As to the non selection reprisal, the AJ found that the agency's articulated reasons were not credible and unproven, as follows: the agency asserted several inconsistent explanations; the complainant was the most senior technician but the agency

denied the complainant the higher level position in favor of a person who had lower seniority and who was not as qualified as the complainant; the official manipulated the reposting of the position to have an excuse not to place the complainant in the position and did this to retaliate against the complainant for his EEO activity. The Commission found that $3,000.00 was an appropriate amount of compensatory damages, for the complainant's "emotional distress."

Aranda v. Ashcroft, Attorney General, Department of Justice, 07A30084 (July 29, 2004). The Commission summarily affirmed the AJ's findings that the agency committed reprisal against the complainant, an Inmate Systems Officer at a Federal Correctional Institution, when it delayed returning him to his former Inmate Services Officer duties and failed to compensate him for overtime work and that the agency was responsible for $9,000.00 in non pecuniary damages and $7,460 in attorney's fees for a 2 day hearing.

Cardozo v. Ridge, Secretary, Department of Homeland Security, 07A30014 (June 2, 2004). The Commission affirmed an AJ's decision, finding the complainant, an agency pilot, was retaliated against for engaging in EEO activity, when he was not promoted to a level GS-13; the agency's articulated reasons for not selecting the complainant for promotion were not supported because the complainant was the most qualified employee, received an "excellent" rating on his performance evaluation immediately prior to the nonselection and had never been informed of any deficiencies in his performance. The complainant established a causal connection between the nonselection and his prior EEO activity by testifying that soon after his nonselection, a supervisor commented that the complainant would never be promoted "because of the 'stink' he 'made to come on board.' The complainant applied for positions with the Customs Service in 1988, 1989 and 1990. After filing an age discrimination lawsuit in 1991, he was hired as a Customs pilot—the apparent "stink" he "made to come on board." The complainant filed the current complaints alleging retaliation and age discrimination when he was not selected for promotion in 1997 and 1998. Five other employees were promoted instead. The selecting official claimed that he made his decision based solely on performance evaluations; however, the Commission found that the record supported the complainant's assertion that he was one of the most qualified applicants, having more law enforcement and flying experience than those selected, as well as the highest civil flight rating available. In further support of its finding that the agency's articulated reason was a pretext for discrimination, the

administrative judge noted and the Commission agreed that although the complainant's supervisors testified that they did not recommend the complainant because of his reluctance to perform surveillance missions, lack of technical skill and knowledge, and problems with operating switches, the complainant had received an "excellent" performance evaluation during the period preceding the selections. In addition, the Commission wrote, “we find it significant that complainant's name was left off the best qualified list submitted to supervisors for evaluation for a second round of GS-13 selections, yet agency officials were unable to explain why.”

Drennon-Gala v. Ashcroft, Attorney General, Department of Justice, 07A20123 (May 13, 2004). The Commission affirmed the AJ’s finding of retaliation, when, without justification, the agency dismissed the complainant from his Case Manager position at a federal corrections institution, less than twelve months after the complainant had engaged in protected activity, holding that the complainant adequately rebutted the agency’s articulated reason for dismissing the complainant by showing it was a pretext for retaliation. As evidence of pretext, the Commission noted that although the agency asserted that it terminated the complainant because of poor performance, the record revealed that the complainant had received several “fully acceptable” performance evaluations and a step increase during the twelve months between his prior EEO activity and his termination. Further, the agency unpersuasively claimed that it terminated the complainant for conduct problems, citing an Office of Internal Affairs report that complainant had submitted a false statement during an investigation. However, the AJ and the Commission noted that the report was not issued until two months after the complainant’s termination, and there was no evidence that the agency acted after receiving a preliminary copy of the report. The Commission and AJ also found that the agency did not give the complainant verbal or written warning that he was in danger of removal from his position due to poor performance or conduct, and that the facility warden failed to discourage negative comments and gestures by facility management, when the subject of complainant's prior EEO activity was brought up at a meeting.

Goodroe v. Potter, Postmaster General, United States Postal Service, 07A40009 (Nov. 4, 2004). The Commission summarily affirmed the AJ, who had found that the agency committed reprisal when it intentionally made 2 important incorrect entries on a workers’ compensation form (Form CA-2) and when it placed

complainant on emergency off-duty status after investigating his theft of post office box rents while in a previous position.

Jokela v. Ashcroft, Attorney General, Department of Justice, (Bureau of Prisons), 01A42940 (Sept. 17, 2004). The complainant, who was employed as a Senior Officer in the front lobby of the agency's Federal Correctional Institution, failed to prove that he was discriminated against on the basis of his disability (extensive hearing loss), when he was not selected as a supervisor, Bindery Machine Operator, or reprisal, when he was disciplined and removed from his front lobby position. Concerning the reprisal claim, the EEOC concluded that the complainant failed to show "that the agency's reasons for its actions were based on anything other than his unsatisfactory work."

Long v. McCullough, Chairman, Tennessee Valley Authority, 01A31805 (Sept. 27, 2004). The agency retaliated against the complainant, a former employee who had filed an age discrimination complaint, by advising General Electric, a contractor employer, that the complainant was "persona non gratis" with the agency, after which the complainant was pulled from his contractor job. While the manager who made the statement denied that he was even aware that the complainant had filed an EEO complaint, the Commission found to the contrary. The evidence showed that the age complaint was based on the agency's attempt to move complainant out of the agency in order to make room for others from Florida, including the manager, and that the agency had settled the complaint. Also, the evidence showed that all other management officials knew of complainant's prior EEO activity, that others not present in the same site as complainant during the relevant time had heard of complainant's prior EEO activity at a meeting and that the manager's secretary stated in her affidavit that "the Manager did say that complainant had already gotten a lot out money of the agency." Further, the secretary's affidavit not only showed that the manager and other management officials at the agency were aware of complainant's prior EEO activity and of his substantial settlement agreement but also suggested a connection between his protected activity and the statement that the complainant was "persona non gratis."

McMillian v. Mineta, Secretary, Department of Transportation, 07A40088 (Sept. 28, 2004), request for reconsideration denied, 05A50171 (Dec.13, 2004). The complainant, an EEO Specialist, proved that the agency discriminated against him on the basis of race, when it failed to select him as an EEO Specialist Mediator and

on the basis of reprisal when it did not award him a Superior Contribution Increase. Concerning the reprisal claim (i.e., that the agency did not award the complainant a Superior Contribution Increase), the complainant alleged that he was denied the award by his acting immediate supervisor, who was angry that he had counseled an employee, who filed an EEO complaint, naming the supervisor. (The evidence even suggested that the complainant had encouraged the EEO complaint, with the Commission observing that "it appears complainant's involvement in the dispute went beyond his official duties."). The agency defended by claiming that the activity in which complainant engaged, counseling an agency employee regarding his EEO rights, was part of complainant's official work duties and therefore not protected. Nonetheless, the Commission disagreed, concurring with the AJ's finding that "the counseling complainant provided to a co-worker was protected activity notwithstanding the fact that the counseling was provided as part of complainant's official work duties.", noting the "exceptionally broad protection" provided by Title VII's anti-reprisal provisions.

III. Opposition Reprisal

Anthony v. Norton, Secretary, Department of the Interior, 01A20111 (Mar. 10, 2004). The agency committed retaliation harassment against the complainant for opposing discrimination; management officials made inappropriate comments, told her not to talk about a plan that she criticized, threatened to take disciplinary action "if she continued to challenge the agency's alleged lack of EEO action", and ostracized her. The complainant was employed as a Program Manager and Attorney-Advisor, GS-905-14 at the Department of Interior, Board of Land Appeals (IBLA), Office of Hearings and Appeals (OHA) in Arlington, Virginia. The Commission described the complainant's protected opposition, as follows: "the record shows that, in response to an invitation to comment on the agency's draft Departmental Diversity Plan 1999, the complainant sent the Deputy Assistant Secretary an analysis of the agency's draft Departmental Diversity Plan. On October 14, 1998, she also provided a copy of her analysis of IBLA's discriminatory practices to the Director of IBLA. The complainant asserted her belief that the agency's past practices reflected discrimination and cronyism in the IBLA which worked to the disadvantage of women and African-Americans. In her comments, the complainant indicated that the IBLA management denied

advancement to women, while favoring the non-competitive promotion of favored white males for the IBLA Docket Clerk position. She pointed out that no woman had served as the docket clerk and that at least three administrative judges sitting on the Board in August 1998 had been promoted to their jobs after serving as the docket attorney. The complainant also submitted two other e-mails and correspondence that addressed the OHA's EEO Plan." Correspondingly, the action found unlawful by the Commission consisted of the RMOs making clear to her at a meeting attended by others that her continuing conduct opposing the EEO practices could result in adverse personnel actions; the Chief Administrative Judge and the Deputy Chief Administrative Judge threatening to take disciplinary action against her if she continued her opposition; and, derogatory remarks (Shortly after the hire of a female judge, RMO2 told the newly-hired Administrative Judge that the complainant was crazy, unstable, and had a bad attitude.). The record also contained evidence that a meeting was called at which an RMO told the complainant that continuing her conduct could result in actions against her and threatened her with a negative personnel action if she did not stop alleging that IBLA management unlawfully discriminated against women. The EEOC concluded that the agency's conduct was "reasonably likely to deter protected activity" and that the complainant suffered an adverse change in the terms of her assignments and her work relationships, when she was shunned, told to stop making the statements, isolated by management officials, reassigned to a manager who had already expressed hostility to her, had derogatory remarks made against her, and her defenders became the target of criticism. The Commission also noted that the agency's actions were "sufficiently close in time to her speaking out regarding the perceived lack of compliance to permit an inference of retaliatory motive." The case was remanded for a supplemental investigation on the issue of the complainant's entitlement to compensatory damages.

Arroyo v. Potter, Postmaster General, United States Postal Service, 07A30065 (Feb. 23, 2004). The complainant, a Casual Clerk, proved that she was retaliated against, after she told a supervisor and the Manager of the Distribution Operation, on February 24, and 25, 2000, that she was sexually harassed by her first-line supervisor and, on March 30, 2000, she was terminated from a casual appointment. The complainant also proved entitlement to $9,000.00 in non-pecuniary damages and $19,100.90 in attorney's fees and costs. In sustaining the AJ's retaliation finding, the Commission observed, as had the AJ, the proximity in time between the protected activity and the adverse action as well as the "inconsistent and

unbelievable", reasons provided by the Acting Manager in not reappointing complainant; he had asserted that the complainant, and two others that were terminated, received unsatisfactory ratings from rating managers, which was not true. The agency also argued that reinstatement was not an appropriate remedy "since it greatly reduced the number of casual employees, especially in the clerk class." Here, the Commission concluded that "the agency failed to provide clear and convincing evidence to demonstrate that complainant would have been terminated absent the discrimination."

Reinard v. Ashcroft, No. Civ.A. 02-1886, 2003 WL 23162322 (E.D. Pa. Dec. 29, 2003). The District Court denied the agency's motion for summary judgment, finding that the plaintiff produced sufficient evidence for a jury to determine whether she was subjected to a hostile work environment and to retaliation for opposing unlawful gender discrimination in the workplace, which resulted in plaintiff's constructive demotion.

IV. Conduct Likely to Deter Protected Activity

Eason v. England, Secretary, Department of the Navy, 01A40247 (Sept. 8, 2005). The Commission found statements by an acting supervisor that complainant had the nerve to bring EEO charges against him and telling complainant to f___ing forget his EEO complaint were per se violations resulting in a finding of retaliation discrimination. The Commission reversed an agency decision implementing an AJ's decision without a hearing finding no reprisal discrimination. On November 11, 2001 an acting supervisor stated, in front of co-workers who assumed the statement applied to complainant, "a certain individual had the nerve to bring EEO charges against me saying that I put his life in danger." Two days later the acting supervisor, in the presence of complainant's first-level supervisor, berated complainant for having filed an EEO complaint and asked why he did not "f_____ing forget this and let it go." The Commission noted that "the actions of a supervisor may be a per se violation where s/he intimidates an employee and interferes with his/her EEO activity in any manner" and that the acting supervisor's actions, which could only have been intended to intimidate complainant and to cause him to withdraw from the EEO process, violated both the letter and spirit of the EEOC Regulations. The Commission also found that the denial of complainant's request to work overtime, within a short time of the acting

supervisor's discriminatory actions, created a prima facie case of retaliation discrimination and that the agency's suggested reason for the denial, the acting supervisor stating that he denied complainant's overtime request because complainant "[d]idn't need any more stress. He had enough stress during the day," was a pretext for discrimination based upon retaliation for complainant's earlier EEO participation.

Eberly v. Potter, Postmaster General, United States Postal Service, 07A30085 (May 20, 2004). The Commission affirmed the AJ's finding of retaliation, where the agency's senior plant manager told complainant's union representative that complainant could be held liable for a $10,000.00 fine under the False Claims Act for filing a complaint of sex discrimination against the agency for its failure to discipline a co-worker who had allegedly defamed her. However, the Commission determined that the AJ's award of $70,000.00 in non-pecuniary compensatory damages was excessive. As to liability, the Commission rejected the agency's assertion that it should not be held liable because the statement was not made directly to the complainant but rather to her union representative. The Commission, relying on the findings of the AJ, found that the plant manager made the statement in an effort to dissuade the complainant from pursuing the EEO complaint and that such a remark could have a "chilling effect" on complainant's exercise of her EEO rights. The Commission thus rejected the agency's contention that the complainant did not suffer any adverse action because of the statement. But, the Commission also agreed with the AJ's rejection of complainant's claim that the agency discriminated against her on the basis of her sex when it refused to discipline a co-worker for writing defamatory statements about her in a union newsletter, even though the agency allegedly disciplined employees for such incidents when a male employee is defamed. As to that claim, the AJ found that the complainant failed to establish a prima facie case of sex discrimination because she provided insufficient evidence of others outside her protected class who were treated more favorably.

Hernandez v. Potter, Postmaster General, United States Postal Service, 07A30005 (July 16, 2004). The Commission agreed with the AJ and found that the agency committed reasonable accommodation disability discrimination by failing to provide the complainant, a Letter Carrier (who had a herniated nucleus pulposis lumbar back injury), with the effective reasonable accommodation he had been provided for many years before the arrival of a new supervisor -- assignment to job duties within his medical restrictions; committed disability harassment

discrimination by numerous actions, to include when the new supervisor persistently refused to honor the complainant's medical restrictions; and, committed reprisal harassment, when the new supervisor, made comments to employees, including the complainant, reflecting his "disdain for the EEO process", which constituted attempts to deter employees from participating in the EEO process (e.g., he told complainant that while he can bring an EEO complaint, he will have to prove his claims before a third party, who will be more likely to believe management).

Jackson v. Norton, Secretary, Department of the Interior (U.S. Fish and Wildlife Service), 07A30126 (Sept. 28, 2004). Complainant, a Fishery Biologist, proved reprisal based on a statement by his supervisor, which was reasonably likely to deter protected activity; the supervisor commented on complainant's EEO activity in a performance appraisal and expressed his intention to inform prospective employers about the complainant's activity. Nonetheless, the Commission reduced the AJ's award of non pecuniary compensatory damages from $10,000.00 to 5,000.00.00. Similarly, the Commission applied a 50% across the board reduction in attorney fees awarded by the AJ to the complainant's two attorneys, on the basis that the complainant had made two claims, a non promotion and the reprisal claim, that the two claims were distinct and the complainant succeeded on only one of the two claims. Thus, attorney fees were reduced from $18,271.50 to $9,135.75 for one attorney and from $36,657.60 to $18,328.75 for the other attorney.

Nurriddin v. O'Keefe, Administrator, National Aeronautics and Space Administration, 01A23148 (Sept. 30, 2004). The EEOC affirmed the agency's FAD as to 42 claims. It is noteworthy, as to a reprisal claim, that the EEOC agreed with the agency, despite evidence that during a meeting about the complainant's performance review, he was berated by his supervisor, who "used profane language in discussing [the complainant's] EEO complaints." There, the EEOC held that "The record does not establish, however, that the supervisor's statement constituted unlawful retaliation. It is the Commission's position that '[t]he statutory retaliation clauses prohibit any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity,' but that 'petty slights and trivial annoyances are not actionable, as they are not likely to deter protected activity.' EEOC Compliance Manual, Section 8 - Retaliation, No. 915.003, at 8-II.D.3 (May 20, 1998). We cannot conclude, under the circumstances of this case, that the single inappropriate

comment made to the complainant, which the supervisor admitted that he made and then promptly apologized for, was either based upon a retaliatory motive, or that it rose above the level of a petty slight or trivial annoyance to the level of actionable retaliatory conduct." (citations omitted).

Silldorff v. Potter, Postmaster General, USPS, 07A50020 (Mar. 18, 2005). A USPS supervisor retaliated against the complainant by misfiling medical records. The Commission found the AJ's credibility determinations were sound and supported by the evidence. Specifically, the "AJ determined that while he would never be certain how the medical records were placed in complainant's employment filed, that complainant ha[d] established beyond a preponderance of the evidence that her supervisor placed the medical records in her employment file." In addition, the Commission held that the "agency's failure to investigator the matter tolerated activity which would have a chilling effect upon the EEO process."

Tramontozzi v. Principi, Secretary, Department of Veterans Affairs, 01A31249 (Apr. 11, 2004). The Commission concluded that the AJ's decision, rejecting the complainant's retaliation claim, was unsupported; more likely than not, the agency's actions in moving complainant's office to less desirable quarters, and involuntarily transferring him out of Rehabilitation Medical Service, were in retaliation for his EEO activity and were reasonably likely to deter complainant and others from participating in EEO activity.The complainant worked as a Vocational Rehabilitation Counselor and collateral duty EEO counselor. The evidence showed that the RMO (Chief, Rehabilitation Medicine Service) disliked the complainant for his EEO counseling activities, believing that he was "coaching" employees in her Service to file complaints against her. Further, there was other evidence that supported a retaliatory motive, such as that the RMO, in her affidavit, repeatedly referred to complainant "spending too much time on EEO counselor duties." Complainant also stated that she told him this directly and that his performance appraisals identified this concern on two occasions. Further, in addressing the reasons for moving complainant out of his office, the RMO stated that priority was given to those who contributed to Rehabilitation Services, referring to her conclusion that complainant spent most of his time engaged in EEO activities, thereby linking, in the Commission's view, her decision regarding office space to her concern that complainant devoted too much time to EEO counseling activities. The Commission further cautioned against viewing the office changes as minor, noting that the first space where complainant was moved was

less desirable because it had no air conditioning and was located above a kitchen vent and the second space complainant was given, was dingy, had poor ventilation and was removed from the patient care area where complainant performed his duties. Moreover, the Commission found that the evidence also established that the RMO's reasons for taking action were a pretext for discrimination. In particular, the RMO complained about complainant's lack of performance in areas other than EEO counseling, but there was no evidence that she ever counseled him either orally or in writing. Additionally, when asked why she did not counsel complainant about his performance, she stated that complainant did not come under her "domain" and she did not have time to deal with him, which was inconsistent with evidence that complainant was required to report to the RMO and to coordinate his collateral EEO counselor duties with her. Finally, there was evidence that the RMO rated complainant's performance "fully successful" in the area of vocational rehabilitation on two occasions during the time period in question.

Security Clearance and Related Matters

Bennett v. Michael Chertoff, Secretary of Homeland Security and Donald H. Rumsfeld, _____ F. 3d _____(D.C. Cir. Oct. 18, 2005). Appellant's lawsuit based upon her EEO complaint alleging discrimination in her removal because of her inability to obtain a security clearance from a federal agency was properly dismissed because courts lack authority to review the substance of a decision to deny or revoke a security clearance in the course of reviewing an adverse employment action – such review is limited to the sole discretion of the applicable federal agency. Appellant, a criminal investigator with a Top Secret Security clearance was employed by the Office of the Inspector General of the Department of Defense ("DoD"). She faced removal because she asked an investigative assistant to search public records limited to official government investigations for the address of an individual in a personal matter, a non-official purpose She filed an EEO complaint and then settled it by withdrawing her complaint in exchange for a "clean paper" resignation, with DoD only allowed to disclose its removal decision in response to a "Giglio" inquiry. Giglio v. United States, 405 U.S. 150, 31 L. Ed. 2d 104, 92 S. Ct. 763 (1972), requires prosecutors to disclose evidence affecting the credibility of a witness when that witness's reliability is likely to determine guilt or innocence. As interpreted by DoD in the instant case, this exception allowed DoD to disclose evidence of appellant 's untrustworthiness to a new employer that might have to rely on her as a witness. Appellant was hired by the Transportation Security Administration ("TSA") but then fired, when TSA received information concerning appellant's prior proposed removal from DoD, for falsifying her Declaration for Federal Employment (she indicated that she had not quit a job after being told that she would be fired and also that she had not left a job by mutual agreement because of specific problems within the last five years), and thus lack of suitability, Appellant filed an EEO complaint alleging that her removal by TSA was discrimination and retaliation for her earlier complaint against DoD. Appellant also alleged that DoD's disclosure was retaliation and a violation of the mediation agreement. The district court granted TSA's motion to dismiss the complaint for lack of jurisdiction on the ground that its termination of appellant was based on her ineligibility for a security clearance and thus was not subject to judicial review under Title VII. The circuit court affirmed this ruling, citing Ryan v. Reno, 168 F.3d 520, 524 (D.C. Cir. 1999), in which the circuit held that an adverse employment action based on the denial or revocation of a security clearance is not actionable under Title VII of the Civil Rights Act of 1964. This

followed, the court concluded, from Department of Navy v. Egan, 484 U.S. 518, 98 L. Ed. 2d 918, 108 S. Ct. 818 (1988), in which the Supreme Court held that the Merit Systems Protection Board lacked authority to review the substance of a decision to deny or revoke a security clearance in the course of reviewing an adverse employment action, because that "sensitive and inherently discretionary judgment call ... is committed by law to the appropriate agency of the Executive Branch."

Sterling v. Tenet, _____ F.3d _____ (4th Cir. Aug. 3, 2005). The court dismissed the case under the "state secrets doctrine" based on a declaration by the CIA Director that pursuing the case would result in disclosure of highly classified information about the identity, location, and assignments of CIA operatives. This case involved a covert CIA agent who sued the CIA Director and 10 CIA employees under Title VII, claiming racial discrimination by CIA management and retaliation for using internal EEO procedures.

Settlement

I. Enforcement

VanDesande v. Potter, Postmaster General, USPS, 07A50025 (Aug. 31, 2005). The Commission did not have jurisdiction over the agency's appeal, claiming a breach of a settlement agreement. The Commission held that while its "regulations expressly provide that a complainant may appeal to the Commission when alleging an agency breached a settlement agreement, the Commission's regulations do not expressly provide for an agency to appeal to the Commission when it alleges that a complainant has failed to comply with a settlement agreement. Specifically, 29 C.F.R. § 1614.504(b) provides, in relevant part, that 'the complainant may appeal to the Commission for a determination as to whether the agency has complied with the terms of the settlement agreement or decision.' (Emphasis added). Based on the foregoing, we find that the Commission lacks jurisdiction over the agency's breach claim."

II. Breach of Agreement

Bhargava v. Potter, Postmaster General, USPS, 01A50721, recon. den. 05A50562 (January 13, 2005). An agency breached a settlement agreement when it imposed additional requirements upon complainant for the complainant to receive benefits that the agency was obligated to provide pursuant to a settlement agreement resolving an EEO complaint. The Commission reversed the agency's finding that it did not breach the settlement agreement. The agreement between the complainant and the agency required the agency to provide work for four hours a day. A supervisor's sending complainant home because of medical restrictions and lack of light duty work was in breach of the agreement.

Blanc v. Potter, Postmaster General, United States Postal Service, 01A42381 (June 16, 2004). The Commission found that the agency had breached a provision of a settlement agreement, which required that a named supervisor "is not to work, or be present, in the Canton OH Plant, Main Post Office, at 2650 Cleveland Ave. N.W., while [Complainant] is employed there." While the agency asserted that a Senior Plant Manager sent the Supervisor to the Canton Post Office to handle a problem, that the Senior Manager was unaware of the settlement agreement, and

that as soon as the Plant Manager became aware of the supervisor's presence, he immediately had the Supervisor escorted out of the building, the Commission found a violation nonetheless. However, the Commission declined to order reinstatement of the underlying complaint, and instead directed the agency to comply.

III. Challenge to or Attempt to Use a Settlement in Another Case

Bromberek v. Mineta, Secretary, Department of Transportation, 01A40877 (Mar. 3, 2004). While the agency dismissed the complaint for untimeliness, the complaint was properly dismissable for failure to state a claim; the complaint sought to challenge the noncompetitive promotion of another employee to a Platform Analyst position as a result of an EEO settlement agreement. As noted by the Commission, such selections "may not be considered an independent act of discrimination against those not benefited by the agreement, unless there is proof of bad faith in the making of the agreement. . . . Here, complainant presents no evidence that the resolution of a co-worker's EEO claim was made in bad faith." (citations omitted).

Dashek v. Potter, Postmaster General, USPS, 01A50145 (Jan. 14, 2005). The Commission affirmed a finding of no discrimination because complainant could not use an individual outside of his protected groups as a comparator when that individual received a benefit as a result of a settlement agreement with the agency and, as a result, complainant did not receive the benefit. A white male applicant alleged discrimination when a younger African-American female was allowed to regularly replace him on his job bid. The agency explained that this was based upon an EEO settlement agreement with the African-American employee. An AJ issued a decision without a hearing finding no discrimination, as the African-American female was not a proper comparator because she was allowed to regularly replace complainant on his job bid as a result of a settlement agreement between the African American employee and the agency. The Commission affirmed the AJ's decision, stating that "settlement agreements may not be considered independent acts of discrimination against those not benefitted by the agreement 'unless there are allegations of bad faith in making the agreement, that is, that the agreement was not a bona fide attempt to conciliate a claim but rather an attempt to bestow unequal employment benefits under the guise of remedying

discrimination' (citations omitted). In the instant case ..complainant did not allege, nor does the record reflect, that the agency entered into the settlement agreement at issue as a means of discrimination against others rather than as a genuine attempt to resolve the other employee's EEO complaint."

Hall v. Mineta, Department of Transportation, 01A40884 (Mar. 3, 2004). The Commission affirmed the agency's dismissal of the complaint for failure to state a claim, because the nonselection decision that formed the basis of the complaint was the result of the agency's need to settle another employee's discrimination complaint. In sum, the Commission held that the selection of a particular employee for a position in response to that employee's discrimination complaint does not constitute an independent act of discrimination against those employees not selected for the position, unless there is proof of bad faith in the making of the agreement. The Commission held further that complainant provided no evidence of such bad faith.

IV. Unenforceable Agreements / Insufficient Consideration

Baker v. Potter, Postmaster General, United States Postal Service, 01A45851 (Dec. 6, 2004). The Commission determined that a settlement agreement was void because it was "too vague to be implemented" and "the terms thereof lack the specificity necessary to permit enforcement." The settlement agreement provision at issue provided as follows: "Complainant] and [agency official] agree that if the workload of the Express Mail Unit requires additional carrier staffing, and after providing adequate coverage for Sundays, the unit supervisor will consider the most senior actively working carrier for Sundays off." When the agency allowed the carrier with the least seniority to have Saturday and Sunday off, the complainant alleged a breach, a claim that the agency rejected, apparently because it was only obligated to "consider" and not required to give days off according to seniority. In striking down the agreement, the Commission held that "The settlement agreement provides for the agency to consider the most senior working carrier for Sundays off, only if the parties agree that the workload of the unit requires additional carriers. The agreement does not specifically obligate the agency to do anything other than consider to make a scheduling change only in the event that the parties are in accord regarding the unit workload. Therefore, the

Commission finds that the settlement agreement is void and we shall order the agency to reinstate the matter from the point at which processing ceased."

Garcia v. Potter, Postmaster General, USPS, 01A44928 (March 4, 2005). The Commission held that two EEO settlement agreements were void for lack of consideration, as the agency had not provided anything of substance to complainant in exchange for complainant withdrawing his two complaints, so complainant's two underlying complaints were reinstated for further processing. The Commission explained that: "EEOC Regulation 29 C.F.R. § 1614.504(a) provides that any settlement agreement knowingly and voluntarily agreed to by the parties, reached at any stage of the complaint process, shall be binding on both parties. The Commission has held that a settlement agreement constitutes a contract between the employee and the agency, to which ordinary rules of contract construction apply…Further, the adequacy or fairness of the consideration in a settlement agreement generally is not at issue, as long as some legal detriment is incurred as part of the bargain. However, when one of the contracting parties incurs no legal detriment, the settlement agreement will be set aside for lack of consideration." In entering into two settlement agreements with complainant the agency did not provide anything of value to complainant. One agreement provided that, in exchange for complainant's dismissal of his EEO complaint "Complainant will be treated in the same manner as any other employee who has an on-the-job injury with medical restrictions." The Commission held "that the provisions of this agreement do not provide complainant with anything that he was not already entitled to receive, i.e, these provisions do not provide any consideration in exchange for the withdrawal of the underlying EEO complaint." The settlement agreement resolving the second EEO complaint provided that Complainant would continue to seek a third opinion regarding the true nature of his back condition and submit it to the Department of Labor for evaluation and adjudication. The Commission stated: "The record reveals that while the settlement agreement obligated complainant to provide specified medical documentation to the agency, the agreement merely obligated the agency to adhere to standard procedure. Consequently, we find that the settlement agreement is void for lack of consideration and therefore reinstate complainant's underlying complaint for further processing.

Martinez v. Potter, Postmaster General, United States Postal Service, 01A41314 (Apr. 26, 2004). The Commission held that a settlement agreement entered into by

complainant and the agency was unenforceable; although it obligated complainant to withdraw her EEO complaint, it merely obligated the agency to take actions which it was legally obligated to do by statute and thus the agreement was without consideration. Specifically, the Commission noted the settlement agreement required the agency to provide complainant with a rehabilitation job offer based on information provided by her physician in a completed Form CA-17, which is what the agency was already legally obligated to do. The Commission thus vacated the agency's finding of no breach of the settlement agreement and remanded the complaint for processing.

V. Claim of Bad Faith in Negotiating Agreement

Parrish v. Rumsfeld, Secretary, Department of Defense, 01A33767 (Mar. 31, 2004). The Commission affirmed the agency's dismissal for failure to state a claim, where complainant asserted that she was unlawfully discriminated against during settlement negotiations on another complaint because the agency offered remedies which complainant deemed unreasonable. The Commission held that a complaint that alleges a failure to negotiate settlement agreements in good faith does not state a claim. The complainant had asserted that she was subjected to discrimination on the bases of race (Native American), disability (asthma), and reprisal for prior EEO activity.

VI. Older Workers Benefit Protection Act (OWBPA)

Alcivar v. Roche, Secretary, Department of the Air Force, 01A43962 (Sept. 13, 2004). After a review of the record, including the settlement agreement at issue, the Commission found that in the present case the minimum requirements were met, as specified under the OWBPA, for a knowing and voluntary waiver of complainant's ADEA claims. The Commission provided as follows: "We note the agreement specifically refers to claims under the ADEA. Additionally, complainant was advised in writing to consult with an attorney prior to executing the agreement, was informed that she may revoke the agreement within seven days of her signing, and was given twenty-one days, a 'reasonable' period of time, in which to consider the agreement.

Andujar v. Potter, Postmaster General, United States Postal Service, 01A35343 (Jan. 30, 2004). The EEOC reversed and remanded the agency's decision because of a violation of the Older Workers' Benefit Protection Act and, alternatively, the complainant did not receive legal consideration. The Commission held that "Here, the settlement agreement of June 11, 2003, does not specifically state that complainant is waiving his rights or claims under the ADEA. Furthermore, the consideration given by the agency in the settlement agreement is not sufficient to constitute valuable consideration." The settlement agreement provided, in pertinent part, that: "Management will recommend reconsideration of [complainant's appointment for] casual employment in the area of mail handler or clerical position."

Black v. Hector v. Barreto, Administrator, Small Business Administration, 01A42241(Aug. 19, 2004). Because the settlement agreement at issue appears to be a settlement before the Merit Systems Protection Board, the Commission is without authority to address the breach claim. Moreover, there was no violation of the Older Workers' Benefit Protection Act (OWBPA). As noted by the Commission, "Here, the settlement agreement of March 20, 2002, specifically refers to complainant's claims based upon age. Additionally, the agency found, and we agree, that complainant had the benefit of counsel and an opportunity to consult with an attorney prior to executing the settlement agreement. No time limit was placed on complainant to execute the settlement agreement after it was sent to complainant's attorney on March 20, 2002. We therefore find that to the extent that the agreement may not be an MSPB settlement, complainant had been given a reasonable period of time in which to consider the settlement agreement when he signed it on March 22, 2002 and returned it to the agency on March 26, 2002. We therefore find that, to the extent that the agreement may not be an MSPB settlement, complainant's decision to enter into the settlement agreement dated March 20, 2002, was both knowing and voluntary under the OWBPA."

Campo v. United States Postal Service, 96 MSPR 418 (June 25, 2004). The MSPB determined that the EEOC's prior remand of the case for failure to comply with the OWBPA rendered invalid only the settlement of the age reprisal claim and did not invalidate the settlement of the Title VII and Rehabilitation Act reprisal claims; accordingly, the Board upheld the AJ's finding that the appellant did not prove that he was removed in reprisal for filing age discrimination-based EEO complaints, even though the appellant argued that the entire agreement should be set aside. The

EEOC concurred in the Board's decision. EEOC Petition No. 03A40121 (Aug. 25, 2004).

Valencia v. Rumsfeld, Secretary, Department of Defense, (Defense Logistics Agency), 01A40703 (Aug. 10, 2004). The Commission reinstated the complaint because the settlement agreement with the agency did not comply with the OWBPA. The settlement agreement sought to resolve complainant's claim that he had been discriminated against on the bases of race, sex, national origin, and age, when he was not selected for promotion to a GS-12/13 Weapons Systems Support Manager position. In setting aside the agreement, the Commission made the following findings: the complainant was entitled to the protections of the OWBPA because his formal complaint was based, in part, on his claim of age discrimination; and, the settlement agreement did not make any reference to complainant's ADEA claim, and did not indicate that complainant was waiving his rights under the ADEA by executing the settlement agreement. The Commission additionally found that the complainant's retention of consideration received under the settlement agreement (apparently $3000.00) "is not an impediment to the reinstatement of his ADEA claim against the agency. See Oubre v. Entergy Operations, Inc., 522 U.S. 422 (1998). However, complainant is advised that if he prevails on his EEO complaint, any monetary award may be subject to an off-set by the consideration that he received from the agency under the settlement agreement."

VII. Confidentiality Clauses

Hillsmith v. Leavitt, Secretary, Department of Health and Human Services, 01A53076 (Sept. 27, 2005). An agency breached the confidentiality provision of a settlement agreement when a Human Resources Specialist and a co-worker discussed an altercation and complainant's proposed suspension with an investigator concerning a security clearance for complainant for another federal agency that was a potential employer of complainant. Complainant, a GS-12 Personnel Management Specialist with HHS, settled an EEO complaint she filed based upon a proposed suspension for an altercation with a co-worker. The settlement agreement provided, in part, that the agency would not inform any potential employers of the proposed suspension and would expunge any references to the proposed discipline. In response to an inquiry. In the course of a background

check interview, one of the agency's Human Resources Specialists discussed in great detail the incident, between complainant and a co-worker that was the basis for the proposed suspension and also revealed that the agency had proposed a suspension, and that complainant had been ordered to visit a mental health professional. The co-worker also discussed the incident and proposed penalties with an interviewer. The Commission held that: "Since the agreement stated that this incident would not be discussed .. we find that the facts before us support complainant's breach claim. An investigation initiated by complainant's current employer and necessitated by complainant's new position falls squarely within one of the situations contemplated by the non-disclosure terms of the Agreement, and the agency's inability to rein-in the comments of pertinent employees is at odds with a plain-reading of the agreement." However, in a footnote, the Commission noted that it "recognizes that a situation may arise where the interests of an individual complainant otherwise subject to legal redress might give way to national security interests. However, given that this matter is not before us on appeal, we do not address whether this scenario applies to the instant complaint." The Commission ordered, as a remedy for the breach, that the agency reinstate complainant's underlying EEO complaint from the point processing ceased.

Williams v. England, Secretary, Department of the Navy, 01A31034 (Mar. 24, 2004). The agency did not breach the confidentiality clause of the parties' settlement agreement; management disclosed the terms of the settlement by e-mail only to agency officials with prior knowledge of the settlement agreement. Further, while a work leader mentioned the settlement agreement to the complainant's co-worker, he did not reveal any details. Additionally, even though agency employees had vague knowledge that the complainant had entered into an agreement, this was attributable to office rumor.

Sex (Gender) Discrimination

Booker v. Chertoff, Secretary, Department of Homeland Security, Immigration and Naturalization Service, 07A30076 (July 13, 2005). The agency discriminated against the complainant, an Immigration Enforcement Officer, on the basis of sex, by ordering her to transport a female detainee to her residence, resulting in the award of $1,500.00 in non pecuniary compensatory damages. The Commission observed that the OIC had stated that "he implemented the preference to use a female officer to escort a female detainee when a female officer was available because, despite the radio contact policy, there had been many allegations of misconduct against male officers by female detainees" and "that this preference was instituted in order to protect the male agents against allegations of misconduct." The Commission also observed that the Supervisor of Special Agents (SSA), the supervisor who issued the order to the complainant, confirmed in his affidavit that the OIC's preference was 'clearly understood and practiced' but that "if a female agent was unavailable to transport a female detainee, then two male officers could escort the female detainee as long as radio contact was made, as described in the formal policy." The Commission found that the complainant was harmed "by the existence of the facially discriminatory policy, and the fact that complainant was affected by the facially discriminatory policy when she was ordered to transport the female detainee solely because she was female." The Commission then noted that "Where there is direct evidence of discrimination, the burden is on the agency to show that the bona fide occupational qualification (BFOQ) was reasonably necessary to the normal operation of business. The BFOQ exception 'was meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex.' Dothard, 433 U.S. at 334." Based on that analysis, the Commission agreed with the AJ that the agency had not proven that sex was a BFOQ reasonably necessary to the normal operation of that particular business or enterprise. More specifically, it found that there "was no evidence that the essence of the business operation would be undermined by the use of armed male officers to transport the female detainee to her residence. Regarding the OIC's contention that he preferred female officers to be present during the escort or transportation of female detainees, we note that his 'preference' for using female escorts stemmed not from a concern regarding the safety of the female detainees, but in order to prevent male officers from being

accused of misconduct. We find that this explanation fails to satisfy the agency's burden of establishing that an all-male escort of a female detainee would undermine the business of the Santa Ana office such that the sex-based assignment of escorts was justified. The agency has not met its burden of showing that alternatives with less discriminatory impact were not available. We find that the official policy regarding radio contact is a reasonable alternative to the 'female required' policy when a female detainee needs transport. The fact that the agency implements the use of radios for male officers to maintain contact while in transport when female officers are unavailable, undermines the agency's argument that there was no less discriminatory alternative available." Finally, the Commission agreed with the agency that the AJ's award of $7,500.00 in non-pecuniary compensatory damages was excessive, finding that, "A review of complainant's testimony shows that a significant portion of the emotional harm to which she testified stemmed from the disciplinary action that she received for her misuse of a government vehicle and the withdrawal of the temporary promotion, which cannot factor into our award of compensatory damages in the instant case. We find that an award of $1,500.00 in non-pecuniary compensatory damages is appropriate in this case."

Ellis-Balone v. Abraham, Secretary, Department of Energy, 07A30125 (Dec. 29, 2004). The Commission upheld the AJ's finding that the agency had discriminated against the complainant on the basis of race and sex by the way it processed and approved her application for telecommuting and on the basis of sex (pregnancy) by the way in which it treated and processed her request for advance sick leave. Also, the Commission upheld the AJ's award of $100,000.00 in non pecuniary compensatory damages, despite an absence of medical opinion evidence as to harm. The complainant worked as a GS-13 Physical Scientist. She sought to telecommute due to a chronic eye condition, uvitus, a condition which caused her severe pain and blurred vision and prevented her from driving and limited her reading. The agency responded by accommodating her condition, changing the lighting in her office and providing her with a computer screen magnifier. In January 1997, complainant was pregnant, had severe medical problems such as fatigue, nausea, cramping, vomiting and an inability to eat. Additionally, she suffered from a flare-up of uvitus in the later months of her pregnancy but was reluctant to take leave because she was a new facility employee. However, her physician recommended that she either work at home or work part-time. HR informed her that she could use a flexi-schedule or telecommute. On May 1, 1997,

she met with her supervisor, who supported her request to telecommute and put together a work at home plan approved by the supervisor. The agency "misplaced" the request for nearly a month, during which the complainant's physical condition became worse; she began to have heart palpitations, necessitating a heart monitor. On May 30 and June 3, 1997, the complainant's team leader advised the complainant that she needed to submit additional information about the care of complainant's children while she worked at home. She then provided the information. But on June 11, 1997, her supervisor, upon advice from HR changed the language of her request by deleting full maternity leave and replacing it with a statement that complainant would be on leave utilizing annual leave and leave without pay and that no advanced sick leave could be granted (The initial telecommuting memo had stated that complainant would be on "full maternity leave."). This led to the complainant's EEO complaint. (It was unclear in the record whether complainant participated in the telecommuting program prior to the birth of her child or after.). In upholding the AJ's finding of sex and race discrimination, the Commission noted that the complainant was treated differently than a White, male employee at the facility as to the processing and approval of his application for telecommuting. The White male had his request to telecommute approved by the Team Leader without further information, even though, like complainant, he had children living at home. This contrasted with the treatment accorded the complainant, whose request to telecommute was not acted upon for 1 month, after which she was required to submit 7 items of additional information and to have her home inspected, a requirement not made of the White male. The Commission also noted evidence that the complainant's request was not initially approved, although "she sought to telecommute from roughly the same area as the facility, while . . . [the White male's] request was approved while he lived 150 miles away from the facility." And, as further noted by the Commission, there was evidence from another female employee at the facility, who testified that the Team Leader and HR had "delayed and questioned her request to telecommute and continually informed her that she could not use telecommuting as a substitute for babysitting or child care", a "line of questioning" that was not employed with the White male. Concerning the finding of sex discrimination in applying unequal standards to pregnant women than others requesting advance sick leave, the Commission agreed with the AJ's finding that the other pregnant female had been discouraged by HR from requesting advance sick leave, and that she "was told that if she was granted advance sick leave she would probably not return to work." Similarly, the Commission agreed with the AJ's finding, despite denials, that the

Team Leader and an HR Specialist made statements to complainant that HR did not grant advance sick leave to pregnant women or to women who wanted to take postpartum leave."

Estate of Linda Petersen v. Mineta, Secretary, Department of Transportation, 07A50016 (Sept. 21, 2005). The Commission agreed with the AJ that the complainant Air Traffic Controller had proven her claim of gender harassment during her training, rejecting the agency's assertion that "both male and female controllers did not like S's style but his style was equally demanding on both male and female controllers." In making its finding that the supervisor's treatment was gender specific, the Commission noted that there was "testimonial evidence from other air traffic controllers, which supported the AJ's finding that S made derogatory comments about complainant stating that 'women controllers did not move traffic well' and 'that's just what the tower needs, another woman controller who can't do the job.' Another controller confirmed that S referred to complainant as 'bitch' and "c**t" and that S never referred to complainant by her first name but instead called her 'that woman.'"

Jespersen v. Harrah's Operating Co., _____ F. 3d _____ (9th Cir Apr. 14, 2006) (en banc). The Ninth Circuit determined that work rules were legal under Title VII because they did not create "unequal burdens" for men and women, and because they did not involve sex stereotypes. This case involved casino work rules that required female bartenders to wear makeup, stockings, and colored nail polish, and to wear their hair teased, curled, or styled. Males were prohibited from wearing makeup or colored nail polish, and were required to maintain short haircuts and neatly trimmed fingernails. In order to prevail in such a case, an employee has to prove that the rule places a greater burden on one gender than the other. Because Jespersen did not submit any evidence on this point, and the court refused to take judicial notice that it takes a good deal of time and money to apply daily makeup, the plaintiff did not meet her burden of proof.

Jespersen v. Harrah's Operating Company, Inc., 392 F.3d 1076 (9th Cir. 2004). The 9th Circuit held that under the "unequal burdens" test – the 9th Circuit's test for evaluating whether an employer's sex differentiated appearance standards constitute sex discrimination in violation of Title VII - plaintiff failed to introduce evidence raising a triable issue of fact as to whether Harrah's "Personal Best" policy, requiring women to wear make up and men not to wear makeup and to

have short, neatly trimmed fingernails and hair, imposes unequal burdens on male and female employees and, accordingly, upheld a grant of summary judgment in favor of Harrah's. Plaintiff, a bartender at Harrah's Casino in Reno, Nevada, alleged that her employer's policy, requiring that certain female employees wear makeup, discriminates against her on the basis of sex in violation of Title VII. The district court granted summary judgment for Harrah's, holding that the employer's policy did not constitute sex discrimination because it imposed equal burdens on both sexes and the 9th Circuit affirmed. Plaintiff worked for Harrah's for 20 years and was an outstanding employee. She despised putting on makeup, feeling that wearing makeup forced her to be feminine and to become dolled up like a sexual object, and that wearing makeup actually interfered with her ability to be an effective bartender, which sometimes required her to deal with unruly, intoxicated guests, because it took away her credibility as an individual and as a person. When Harrah's, under its "Personal Best" program required that she put on make up she refused, was fired and filed a lawsuit alleging that this was sex discrimination. The Personal Best program required that women wear make up (foundation/concealer and/or face powder, as well as blush and mascara) that must be worn and applied neatly in complimentary colors and that lip color must be worn at all times. The Personal Best policy required that men not wear makeup, and have short neatly trimmed hair and fingernails. The 9th Circuit noted that it previously held that grooming and appearance standards that apply differently to women and men do not constitute discrimination on the basis of sex - such as an employer's rule banning men, but not women, from having long hair - because grooming and dress standards were entirely outside the purview of Title VII because Congress intended that Title VII only prohibit discrimination based on "immutable characteristics" associated with a worker's sex. Because grooming and dress standards regulated "mutable" characteristics such as hair length, employers that made compliance with such standards a condition of employment discriminated on the basis of their employees' appearance, not their sex. However, the 9th Circuit also noted that it had held that an employer's imposition of more stringent appearance standards on one sex than the other constitutes sex discrimination, even where the appearance standards regulate only "mutable" characteristics such as weight (i.e., a weight standard for flight attendants in which women were held to more strict weight limitations than were men). Thus, as emphasized by the Circuit, although employers are free to adopt different appearance standards for each sex, they may not adopt standards that impose a greater burden on one sex than the other. In order to evaluate the relative burdens the "Personal Best" policy imposed, the 9th Circuit

determined that it was necessary to assess the actual impact that the policy had on both male and female employees - in doing so, weighing the cost and time necessary for employees of each sex to comply with the policy. In the instant case, the circuit concluded that the plaintiff failed to present evidence to support her assertion that the makeup requirement for women was more onerous – such as more time consuming and costly – than the short hair and short fingernails requirement for men. Plaintiff also cited Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), a case in which the Supreme Court held that an employer may not force its employees to conform to the sex stereotype associated with their gender as a condition of employment, asserting that this was a "classic Price Waterhouse case." The 9th Circuit disagreed, noting that, although Price Waterhouse held that Title VII bans discrimination against an employee on the basis of that employee's failure to dress and behave according to the stereotype corresponding with her gender, it did not address the specific question of whether an employer can impose sex differentiated appearance and grooming standards on its male and female employees. And, while the court recognized - following Price Waterhouse - that it had held that sexual harassment of an employee because of that employee's failure to conform to commonly-accepted gender stereotypes is sex discrimination in violation of Title VII [Nichols v. Azteca Restaurant Enter., Inc., 256 F.3d 864 (9th Cir. 2001); Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061 (9th Cir. 2002) (en banc)], it "has not done so in the context of appearance and grooming standards cases, and we decline to do so here." Accordingly, the 9th Circuit affirmed summary judgment for Harrah's.

McShan v. Potter, Postmaster General, United States Postal Service, 07A40089 (Sept. 15, 2005). The Commission sustained the AJ's determination that the complainant, a Postmaster, had been discriminated against on the basis of sex, when the agency denied his request for a lateral transfer. As had the AJ, the Commission pointed to evidence that two years earlier, the Manager who rejected the complainant's request, had granted the request of a female supervisor, who wanted to be closer to home, the same reason relied on by the complainant. This was sufficient to raise an inference of sex discrimination, which was not rebutted by the agency.

Perry v. Chertoff, Secretary, Department of Homeland Security, (Immigration and Naturalization Service), 01A31055 (Sept. 29, 2005). Because the agency had "a facially discriminatory policy" that only female deportation officers were assigned to the Turner Gilford Knight Correctional Center (TGK), the AJ erred in granting

summary judgment to the agency. Due to certain well-publicized allegations of sexual abuse by male INS employees against detainees at the agency's Krome processing center, (two male employees were eventually convicted of sexual abuse), the agency transferred female detainees from Krome to TGK and began to staff TGK with female DOs only. After the complainant refused an assignment to TGK, she was "involuntarily assigned to TGK on three occasions. Male DOs were not assigned to TGK." The agency argued that "being female is a bona fide occupational qualification (BFOQ) for working at TGK", citing "privacy concerns for the female detainees and the sexual abuse problem at Krome." The Commission concluded that there was a genuine issue of material fact as to whether being female is a BFOQ for working at TGK, and, to avoid liability, "the agency must show that sex was a BFOQ reasonably necessary to the normal operation of the business." In remanding for a hearing, the Commission referred the parties to its recent decisions in Booker v. Department of Homeland Security, EEOC No. 07A30076 (July 13, 2005) and Pratt v. Department of Justice is also instructive. EEOC Appeal No. 01972502 (August 18, 2000).

Smith v. City of Salem, Ohio, et al., 378 F.3d 566 (6th Cir. 2004). A male transsexual treated differently because he began to dress more femininely and was not masculine enough can proceed with an allegation of a violation of Title VII because Title VII's reference to "sex" encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms. Plaintiff was employed by the city of Salem, Ohio, as a lieutenant in the Salem Fire Department. Plaintiff worked for the Fire Department for seven years without any negative incidents until he told his superiors that he was beginning the process of a sex change, and began to dress more femininely, including at work. City officials decided to attempt to fire plaintiff, or force him to resign, and, in the process of doing so, suspended plaintiff for a 24-hour shift for an alleged infraction of a city policy. Plaintiff – biologically and by birth a male – is a transsexual and has been diagnosed with Gender Identity Disorder ("GID"), which the American Psychiatric Association characterizes as a disjunction between an individual's sexual organs and sexual identity. The Circuit found that plaintiff was a member of a protected class; his complaint asserted that he is a male with Gender Identity Disorder, and Title VII's prohibition of discrimination "because of . . . sex" protects men as well as women. Newport News Shipbuilding and Dry Dock Co. v. E.E.O.C., 462 U.S. 669, 682 (1983). The Circuit also held that plaintiff properly alleged a claim of

gender discrimination and sex stereotyping, in violation of the Supreme Court's pronouncements in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), noting that: "By holding that Title VII protected a woman who failed to conform to social expectations concerning how a woman should look and behave, the Supreme Court established that Title VII's reference to 'sex' encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms. See Price Waterhouse, 490 U.S. at 251. (citing 3rd, 7th and 9th Circuit cases reaching a similar conclusion)." As such, discrimination against a plaintiff who is a transsexual – and therefore fails to act and/or identify with his or her gender – is no different from the discrimination directed against Ann Hopkins in Price Waterhouse, who, in sex-stereotypical terms, did not act like a woman. Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as 'transsexual,' is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity. Accordingly, we hold that Smith has stated a claim for relief pursuant to Title VII's prohibition of sex discrimination."

Sexual Harassment

I. Unwelcomeness

Ainsworth v. Snow, Secretary, Department of the Treasury, (Internal Revenue Service), 01A33984 (July 20, 2004). The complainant, a Group Secretary, failed to prove that she was sexually harassed by a co worker; she did not show that the conduct complained about was unwelcome. In making that finding, the Commission noted as follows: "Complainant's own testimony established that she had a friendship with [the co worker] from the beginning of her tenure in the office. She stated she initiated comments in . . . [the co worker's] presence about whether or not she wore panties, about her boyfriend's opinion that she had a 'ghetto ass' and that the two of them commented about other female co-workers' rear ends. Complainant also stated that she raised the subject of getting breast implants in another conversation with [the co worker]. Complainant alleged that she thought [the co worker] was getting too personal and he made her uncomfortable, but at the same time she stated that [the co worker] rubbed her shoulders and head 'so often, it was not unusual.' She did not testify that she rebuffed [the co worker's] actions. She further stated that [the co worker] rubbed her back at one time and she told him to stop, but she continued their friendship." The Commission relied also on testimony by complainant's friend who stated that complainant often smiled at the co worker, and, contrary to complainant's statements, did not tell him to stop as the friend advised. The Commission found that the complainant's allegation was not credible and inconsistent in other respects as well. For example, while denying that she told the co worker that she did not wear panties, she told that to her friend. Moreover, she pulled up a video, on her computer monitor, of a couple having sex, and showed it to her friend, even though she claimed that the co worker showed her the video and that it disgusted her. Further, the complainant provided a statement with her complaint, asserting that another male employee had forcibly kissed her but did not mention that in her affidavit testimony. In addition, complainant attributed all the comments about her "ghetto ass" to the co-worker but also and inconsistently stated that she initiated the phrase in an earlier conversation with the co worker.

Burns v. Snow, Secretary of the United States Department of the Treasury, No. 04-1349, 130 Fed. Appx. 973 (10th Cir. May 16, 2005) (Unpubl). In sustaining the

lower court's grant of summary judgment, the circuit determined that the plaintiff did not prove that the U.S. Mint discriminated against her on the basis of disability, reprisal or sexual harassment in her termination. As to her disability claim, the plaintiff did not prove that she was a disabled person with lupus; any walking, standing and lifting problems, if any, were not severe, long-term or of permanent impact. The plaintiff's quid pro quo sexual harassment allegation was that her supervisors made it "clear to [her] that tangible job benefits would be rewarded for those who dated men in management." In rejecting that allegation, the court concluded that, "While we cannot condone any sexually-oriented or coarse comments Mint supervisors may have made to Ms. Burns, the totality of the circumstances does not show, as Ms. Burns now contends, that either of her supervisors made demands which, if she either accepted or refused, would result in a certain outcome. In other words, she has not shown she was promised tangible job benefits if she dated them or experienced reprisal when she refused to have a relationship with them. In fact, while Mr. Cruz and Mr. Romero made comments Ms. Burns believed meant they were asking her out, she admitted they left her alone when she made it clear she was not interested in dating them. She has also acknowledged Mr. Romero did not make sexually advancing or sexually harassing comments to her." Likewise, as to her hostile or abusive work environment sexual harassment claim, the court determined that "Ms. Burns participated, albeit sometimes less than enthusiastically, in the sexual banter and innuendo which she now complains detrimentally affected her, but which she has not shown affected her performance at work. In so doing, Ms. Burns admits the 'vulgar' sense of humor of her co-workers 'kind of rubbed off on [her].' While she complains Mr. Cruz's comment about her cleavage made her feel like 'a piece of meat,' she similarly told her other supervisor he had a 'tight butt,' evidencing her participation in the same type of sexual banter as her supervisors. While she complains Mr. Cruz discussed his sex life with her, Ms. Burns admits she also volunteered information about her own sex life, including information about her ex-husband. Equally indicative of her acquiescence in such behavior is her admission she asked Mr. Romero for a copy of raunchy jokes and then, astonishingly, passed them on to her teenage son. Viewing Ms. Burns's supervisors' conduct, together with her own behavior and the entire social context in which such conduct occurred, we believe the circumstances presented in this case did not cause Ms. Burns to experience a severely hostile or abusive work environment. See id. at 81-82. Similarly, while we do not condone the viewing of pornographic materials at a government facility, we do not find the circumstances described by

Ms. Burns established an environment 'permeated with discriminatory intimidation, ridicule, and insult that [was] sufficiently severe or pervasive to alter the conditions of [her] employment and create an abusive working environment.' O'Shea, 185 F.3d at 1097 (quotation marks and citations omitted). While Ms. Burns complains about the pornographic materials she saw (Specifically, the items about which Ms. Burns complains included a cartoon of President Bill Clinton engaged in oral sex with a female; a man groping a woman on a couch; a photograph of a vagina with something 'huge' inserted in it; a photograph of topless large-breasted women on a river boat; and a photograph of a walrus with a flipper pointing toward its crotch area) she actually approached a group of men to see one of the pictures; admits some of the pictures were not offensive to her; and acknowledges she participated in their viewing, at times laughing and chuckling or making lewd and crude comments. Thus, we find Ms. Burns's own behavior indicative in defining the social context in which the particular complained-of behavior occurred, and cannot say, with respect to the viewing of the pornographic photographs, that she has shown she experienced a severely hostile or abusive work environment, given her own participation in it. See Oncale, 523 U.S. at 81-82."

Hill v. Potter, Postmaster General, United States Postal Service, 01A31606 (Mar. 4, 2004). The complainant failed to prove that the alleged sexual conduct was unwelcome. In affirming the FAD, the Commission found "that complainant failed to establish a prima facie case of sexual harassment. Specifically, the Commission finds that the preponderance of the evidence does not establish that the conduct was unwelcome. In reaching this conclusion, we note that a large number of complainant's co-workers testified that complainant participated in, enjoyed and initiated some of the sexual bantering in the workplace. There is no evidence that complainant ever communicated \ to anyone, including S1 or S2, that the conduct was unwelcome. We also note that complainant refused to cooperate with the MCS [Manager of Customer Services] when he initiated an investigation. As such, we decline to find that complainant established a prima facie case of hostile work environment sexual harassment."

Newman v. Potter, Postmaster General, United States Postal Service, 01A50165 (Mar. 9, 2005). A USPS supervisor's touch was unwelcome, but not sex-based. The Commission affirmed the agency's finding of no discrimination. The complainant alleged that she was discriminated against on the basis of sex when her supervisor

gave her a forceful massage. However, the Commission found that the complainant failed to show that the incident occurred different than her supervisor explained. As stated by the Commission, "The evidence in the record does not persuasively show that the action of Supervisor 1 touching complainant's shoulder was based on sex or was motivated by anything other than an attempt to get complainant's attention while she was on the telephone. The record contains no evidence from witnesses to the incident other than complainant and Supervisor 1."

Shuler v. Ashcroft, Attorney General, Department of Justice, (Drug Enforcement Administration), 01A42521 (Aug. 5, 2004). The complainant, a Criminal Investigator at the Drug Enforcement Administration, failed to support his claim of hostile work environment sexual harassment and show that the alleged conduct was unwelcome; the evidence, as provided by co-workers without a "stake" in the complaint, showed that complainant participated in, enjoyed, and initiated some of the sexual bantering in the workplace. The Commission also noted that the complainant never complained about the conduct until the complaint. The Commission ignored the testimony of the one witness who claimed that complainant never engaged in sexually oriented discussions, finding that this witness, like the complainant, had " some personal issues against" the supervisor and the testimony was inconsistent with that of the disinterested co-workers.

II. Severe or Pervasive

Bailey v. England Secretary, Department of the Navy, 07A20108 (May 20, 2004). The Commission reversed the agency's final decision and affirmed the AJ's finding of sexual harassment and its award of $25,000.00 in non pecuniary compensatory damages, in a case where complainant complained to the agency of harassment by a co-worker and the agency did not enforce its order to the offending co-worker to stay away from complainant. The AJ found that complainant's co-worker engaged in several incidences of sexual harassment between 1991 and 1994, including sending complainant a fruit basket and other gifts, expressing his desire to engage in a personal relationship with complainant, and consistently paying lavish attention to complainant. The behavior culminated in a November 2, 1994 shouting incident when the co-worker yelled at complainant after discovering that she sought work-related assistance from a different co-worker. The agency rejected the AJ's finding of discrimination on the

basis that the harassment was not severe or pervasive, the complainant's work had not suffered during the 3 years of harassment, and once the agency learned of the harassment it made an effort to stop it. The Commission disagreed with each of the agency's arguments, finding that complainant "credibly testified that she was uncomfortable at the co-worker's behavior, which took place over a period of several years and culminated in an outburst of anger that appears to have been sparked by jealousy." The Commission also disagreed with the agency's determination that it should not be held liable because it told the harassing employee to leave complainant alone. The Commission noted that the agency failed to ensure that the co-worker abided by its order; the harassing co-worker continued to bother complainant. The Commission further affirmed the compensatory damages award, because the AJ found that "complainant credibly testified that she suffered from stress, nervousness, sleeplessness, headaches and fear of retaliation. Before the incidents, complainant stressed that she felt pride in her work, and afterwards lost trust in management for its failure to act appropriately under the circumstances."

Bustamonte v. Potter, Postmaster General, USPS, 01A41462 (July 6, 2005). Among others, the Commission rejected the complainant clerk's sexual harassment allegations on the basis that they were unproven, not sexual in nature and not sufficiently pervasive, even if they occurred. Complainant had alleged that her "immediate supervisor . . . , a female, subjected her to sexual harassment, to include stroking her arms frequently; and a female co-worker made sexual remarks about complainant and female customers."

Choice v. Potter, Postmaster General, USPS, 01A40796 (March 31, 2005). The Commission found no sex discrimination in a case where a female USPS employee alleged hostile environment sexual harassment, noting that the supervisor touched both sexes and also that the supervisor's physical contact fell outside the parameters of sexual harassment as it was not severe or pervasive enough to create a hostile work environment in violation of Title VII.

Heithcock v. Potter, Postmaster General, United States Postal Service, 01A40566 (July 13, 2004). The complainant, a Part-Time Flexible Clerk, failed to prove sexual harassment on the basis of name calling and other disparaging comments; while the alleged conduct was unwelcome, it was not proven sufficiently severe or pervasive. The employee claimed sex-based harassment, because her supervisor called her "Fat Ass," "Big Butt," and "Big Bottomed Girl." The evidence showed

that the employee had often joked about her weight and referred to herself in the same way with the supervisor. However, the employee asked her supervisor to stop calling her names and embarrassing her in front of co-workers but the supervisor's conduct continued. In the view of the EEOC, "By requesting that such conduct stop, the complainant clearly indicated that it was unwelcome." Nonetheless, the Commission ultimately determined that sex harassment was not proven, providing as follows: "Other than the isolated instances mentioned in the record ['"Fat Ass," "Big Butt," "Big Bottomed Girl," and other similar monikers"'], complainant fails to establish that her supervisor's conduct was severe or pervasive. She fails to even estimate how frequently he called her disparaging names or treated her in an offensive manner. Moreover, while complainant lists a few individuals as witnesses to the isolated behavior, many of those witnesses testified that they thought complainant and her supervisor were friends and kidded in jest. While a reasonable person in the complainant's position could find the supervisor's behavior upsetting, we find that it was not severe or pervasive enough to render the environment so intolerable as to alter the conditions of her employment."

Joiner v. Barnhart, Commissioner, SSA, 07A50718 (Feb. 3, 2006). The Commission determined that the complainant proved sexual harassment by co-workers who repeatedly used sexual language next to her work station, even though she complained to the agency, and also proved reprisal, when the coworkers repeatedly insulted her because she objected to their conduct, The Commission also agreed with the AJ's award of $30,000.00 in non pecuniary compensatory damages. The Commission noted that the "AJ properly determined that the matters complained of constituted a hostile work environment, describing the conduct and its findings, as follows: "The complaint mainly involves the conduct of two coworkers discussing sexual issues next to complainant's work station. One of the coworkers' work station was located next to complainant's work station. The AJ generally found that one of the coworkers' had a loud voice and that the conversations and comments heard by complainant occurred as she alleged. The AJ found that complainant repeatedly complained to management about the problems, but management's response was not reasonable and not effective. Furthermore, the AJ found that both coworkers retaliated against complainant when complainant objecting to their conduct by engaging in a constant barrage of insults, some of which were sex-based, including 'fat bitch,' 'elephant,' and 'big-assed bitch.' The AJ found that the environment was hostile

for the following reasons: The harassment by [Coworkers A and B] was pervasive and interfered with Complainant's ability to do her work in part because of the nature of the work at the TSC [teleservice center]. Each representative basically answers the phone all day, providing information to members of the public about Social Security. Each has a phone equipped with a headphone microphone to pick up their voice; a computer; and written materials which they consult to provide the correct information. When a co-worker stands within 5-10 feet of a representative who is talking on the phone, that co-worker's loud conversations are disruptive even if not profane. The degree of interference with the listener's work is even greater when the loud conversations include phrases such as 'jerking off,' 'choking the chicken' [relating to masturbation], and the hostile sex-based terms referenced above. There are even more disturbing effects when the hostile, sexist remarks are directed at one individual personally, causing her individually to feel embarrassment, anger, and sadness. This is what [Coworkers A and B] did when they attacked Complainant because she opposed their inappropriate, sex-based conversations at her work station."

Knox v. Neaton Auto Products Manufacturing, Inc., 375 F.3d 451 (6th Cir. 2004). The Sixth Circuit upheld a trial court's dismissal of an employee's gender discrimination and sex harassment lawsuit despite evidence of "crass and offensive" comments by co-workers and an assertion from a former supervisor that he didn't want women working for him. The Plaintiff began working for Neaton in 1985 as a forklift driver. She claimed that Tony Matlock, her supervisor for the first three years assigned her difficult tasks that he knew she couldn't do and told her he didn't want women working for him. When Tony Matlock learned of her transfer he allegedly said that she would be gone if she ever worked for him again. Years later, in 1999. Tony was promoted and put in charge of Knox's supervisors. Shortly after that, Knox had got into an argument with one of her supervisors and was placed on probation. Knox believed that Tony Matlock was behind her supervisor's actions. She was written up again for unsatisfactory performance the next month. This was a violation of her probation and she was terminated. She then filed a Title VII and state law lawsuit, relying on the matters described above as well as more recent sexually offensive remarks directed at her by co-workers. The trial court granted summary judgment to the former employer. The Circuit, in agreeing with the trial court, first addressed the matters occurring during the beginning of Knox's employment as a claim of gender discrimination, finding, as follows: "The district court properly determined that Knox failed to establish a

prima facie case for several reasons. First, it correctly determined that because Matlock's statements about not wanting women working for him and about Knox 'being gone' if she were ever to work for him again were made ten years prior to Knox's termination, they were not sufficiently close in time to the allegedly discriminatory action. Second, neither the incidents where Matlock made Knox perform tasks that she couldn't handle, nor where Matlock wrote her up for failing to report a fallen fire extinguisher, have been linked in any way to sex-based discrimination – as opposed to sex-neutral animus between Knox and Matlock." As to the purported remarks by co-workers, the court viewed those as involving a claim of sex harassment but found them insufficient, as follows: "Knox alleges in her deposition that she heard co-workers use 'the f-word,' that they 'took the Lord's name in vain,' and that one co-worker, Greg Schaffer, continuously made sex-related comments, such as commenting on different 'women's good looking behind[s],' and talked about 'sleeping with different women and comments about what [they] would be like.' Knox states that she repeatedly asked Schaffer to stop and reported his behavior, but it never ceased. She admits, however, that these comments were usually made during shift meetings and were directed to the group, rather than to her personally. . . . . Thus, because the evidence is insufficient to support a finding that the various comments and behavior complained of by Knox, although crass and offensive, were severe or pervasive enough to create an objectively hostile work environment, the district court correctly denied Knox's sexual harassment claim."

Negron-Oliver v. Ashcroft, Attorney General, Department of Justice, (Bureau of Prisons), 01A35351 (Sept. 30, 2005). Although a co-worker referring to complainant as a "project ho" and having wet dreams about her were isolated incidents not sufficient to create a hostile work environment based on sex, the Commission found that transferring complainant pending an investigation of her allegation was unlawful retaliation in violation of the principal that "you don't transfer the victim." Complainant, formerly a Cook Supervisor, filed a formal EEO complaint claiming sex (female) and reprisal discrimination when: (1) a co-worker commented to complainant that he had been having "wet dreams" about her; (2) a few months earlier, during a Special Operations Response Team ("SORT") training, the co-worker referred to complainant as a "project ho"; and; (3) when complainant was removed from the SORT team training because she reported these matters. The agency contended that the removal from the SORT team was

temporary and that both complainant and the co-worker were removed while complainant's sexual harassment claim was being investigated. An AJ found no discrimination, issuing a decision without a hearing in favor of the agency. The Commission affirmed as to (1) and (2), noting that the Commission: "has repeatedly found that claims of a few isolated incidents of alleged harassment usually are not sufficient to state a harassment claim. Moreover, remarks or comments unaccompanied by a concrete agency action usually are not a direct and personal deprivation sufficient to render an individual aggrieved for the purposes of Title VII. (citations omitted)." Upon review of the record, the Commission determined that the alleged incidents are isolated incidents and are not sufficiently severe or pervasive to state a claim of harassment under Title VII. However, the Commission found that the agency engaged in retaliation when it temporarily removed complainant from the SORT team. The agency asserted that complainant was only temporarily removed and therefore did not suffer an adverse action. The Commission disagreed, noting its position that an adverse actions need not qualify as an "ultimate employment action" or materially affect the terms and conditions of employment to constitute retaliation, but need only be reasonably likely to deter the complainant or others from engaging in protected activity. The Commission concluded that: "We conclude that the agency's temporary removal of complainant from the SORT team is reasonably likely to deter complainant or others from engaging in protected activity." As to the actual retaliation claim, an agency supervisor stated in an affidavit that the agency only had an allegation, it didn't know what had happened so both individuals, complainant and the co-worker, were not allowed to participate in the SORT Team training until the investigation was completed, stating: "We couldn't say, 'Well this person made an allegation so they get to come to training and the other one doesn't.' There was no finding at that point ... we didn't know. So it was prudent to remove both of them during the time of the investigation and that's exactly what happened." The Commission noted that "an employer may need to take intermediate action pending the investigation of a claim, such as transferring the alleged harasser, to ensure further harassment does not occur; however, the Commission has further stated that the complainant should not be involuntarily transferred or otherwise burdened, because such measures could constitute unlawful retaliation." Accordingly, the Commission held that "the agency engaged in unlawful retaliation when it temporarily removed complainant from the SORT team."

Pohlel v. Potter, Postmaster General, United States Postal Service, 01A40343 (Sept. 21, 2004). The female Postmaster's sexual conduct was unwelcome and sufficiently pervasive to constitute a hostile work environment as to the male complainant and the agency failed to prove its affirmative defense, because it delayed in responding to the complainant's claims. The complainant worked as a Supervisor, Customer Services. As described by the Commission, he alleged and proved the following: "In April 2001, the Postmaster brandished a paper bag containing a sex toy; (2) in July/August 2001, the Postmaster performed push-ups in front of complainant, exposing her bare legs and her behind; and (3) on November 20, 2001, the Postmaster adjusted her breasts and shook them at complainant." The Commission rejected the agency's argument that the conduct was unwelcome, noting that while the complainant had paid for a locksmith for the Postmaster's car and offered to assist her after a robbery at her home did "not demonstrate he assented to her actions and is insufficient evidence to defeat complainant's claim." Additionally, the Commission rejected the agency's contention that the incidents were isolated determining instead that "After reviewing complainant's allegations, the record, and the corroborating statements from complainant's co-workers, as well as the agency's internal report on PM's conduct, the Commission finds that complainant showed that PM's conduct was sufficiently severe as to constitute a hostile work environment. Further, we find that the atmosphere at the facility was permeated with talk about sex and other inappropriate matters-sex toys, sex relations, and male anatomy. In this case, contrary to the agency's argument, we find that the three inappropriate incidents over the course of seven months rise to the level required to establish illegal harassment; it is clear from the record that PM's conduct was extreme, causing complainant substantial humiliation and embarrassment, not merely an overreaction to "ordinary tribulations of the work place." Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998). Complainant's co-workers supported his complaints and attested to his disconcertion; complainant was so troubled by PM's behavior that he feared he had sinned against his religion and family merely by witnessing PM's conduct. Although PM attempted to explain her conduct as innocuous action, the Commission does not find PM's version of events supported by the record or credible, as confirmed by the agency's internal report. " Finally, the Commission determined that the agency failed to prove its affirmative defense, observing that the agency "became aware of complainant's concerns in July/August 2001. Nevertheless, it took no action until mid-December and did not issue its report until July 2002, nor discipline PM until. August 2002, leaving her in place a

full year before she moved out of the area. In its statement on appeal, the agency attempted to blame the union for its failure to follow up on complainant's claims, contending that the union did not contact the agency after its initial meeting in August 2001. The obligation to maintain an environment free from illegal harassment rests on the agency, since it is the agency who is responsible for maintaining a work environment free from harassment."

III. Because of Sex

Schramm v. Slater, No. 03-3333, 2004 WL 1595195 (6th Cir. July 14, 2004). The circuit upheld the trial court's grant of summary judgment to the agency, dismissing the plaintiff male's sexual harassment hostile environment and reprisal claims. The plaintiff, a former air traffic controller, claimed that he experienced a hostile work environment because of conduct by female co-workers and disparate treatment because of his gender, complaining several times to the agency that he was being subjected to false accusations by female co-workers, subjected to a stricter standards and singled out as compared to female co-workers and subjected to "inappropriate, sometimes screaming tirades by female co-workers, who were favored. The incidents complained about included a female co-worker screaming at an employee and another female employee tagging an aircraft target with the words "Lick me." In rejecting the hostile environment claim, the circuit determined that none of the incidents had to do with "Plaintiff's being male." For example, the "Lick me" language is offensive to females and males. In sum, the circuit concluded that the plaintiff failed to prove the "because of sex" element of a sexual harassment hostile environment case.

IV. Credibility Issues

Briggs v. Potter, Postmaster General, United States Postal Service, 01A32026 (June 23, 2004). The Commission overturned the agency's decision that the complainant was not discriminated against or harassed because of her sex because it found that, despite inconsistent testimony among witnesses, there was sufficient corroborating evidence to support a finding of sexual harassment and the agency failed to prove an Ellerth / Faragher defense because its harassment policy was not

sufficiently publicized and it did not take prompt and effective action in response to the harassment. The Commission relied on the following evidence to support its decision that a supervisor sexually harassed the complainant: the supervisor told the complainant about a sexual dream he had about her; the supervisor made a vague reference that the complainant was having sex with a co-worker; he stared at her once; he said that the word "brother" could not be used as a nickname for him because then he could not "f_ _ k" her; whenever the complainant asked the supervisor a question, he would caress her arm, which according to a witness was clearly unwelcome; and more than once he brushed up against her backside when passing in a narrow area. There was also testimony by other employees regarding the supervisor's sexually inappropriate behavior toward other female employees. The Commission rejected the agency's finding that the witnesses' testimonies were too inconsistent to support a finding of discrimination. Additionally, the Commission, as part of its hostile environment determination, found disparate treatment by the supervisor when he threatened to fire the complainant for talking on the job but did not threaten the male employee with whom the complainant was talking. Moreover, the Commission found that the agency failed to take corrective action in a timely manner that would allow the agency to avoid liability. (The agency had determined that even if complainant were harassed, the agency was not liable because it had an anti-harassment policy in effect.). The record revealed that, after commencement of the complainant's complaint, the Plant Manager issued a letter of warning to the supervisor and ordered him to attend anti-harassment training. The Commission first cited at length its anti-harassment guidance, noting that: "An anti-harassment policy and complaint procedure should contain, at a minimum, the following elements: (1) a clear explanation of prohibited conduct; (2) assurance that employees who make complaints of harassment or provide information related to such complaints will be protected against retaliation; (3) a clearly described complaint process that provides possible avenues of complaint; (4) assurance that the employer will protect the confidentiality of harassment complaints to the extent possible; (5) a complaint process that provides a prompt, thorough, and impartial investigation; and (6) assurance that the employer will take immediate and appropriate corrective action when it determines that harassment has occurred." The Commission then held that the agency was liable because its anti-harassment policy was inadequate and there was no proof that the policy was posted at the complainant's work site "in a location likely to be seen by employees and managers."

Wilson v. Ashcroft, Attorney General, Department of Justice, 01A23614 (Feb. 3, 2004), request for reconsideration denied, 05A40510 (April 5, 2004). In reversing the AJ and the agency, the Commission determined that the complainant, a Cook Supervisor in the Food Service Department, was sexually harassed by a co-worker, that the agency failed to take prompt and appropriate action, and that complainant had proven entitlement to $25,000.00 in non pecuniary compensatory damages. The sexually harassing incident was preceded by a discussion between the complainant and the co worker, which the Commission described as follows: "On April 17, 2000, complainant and her co-worker, the alleged harasser in the instant complaint, engaged in a conversation in which each described to the other instances in which they had both been raped. The co-worker additionally made a comment regarding a porn star's genitals. The co-worker then told complainant, 'I've got a choreezy,' after which she responded, 'I don't even want to hear that.'' He proceeded, 'Let me tell you, I have a fantasy.'" Thereafter, as described by the complainant, she went into the staff bathroom, was followed by the co worker, who exposed himself, grabbed complainant's hand, and tried to force complainant to touch his exposed genitals as he was masturbating. For the most part, the co-worker denied the allegations, so that the Commission described this as a case "based solely on the credibility of the victim's allegation", citing to its Policy Guidance on Current Issues of Sexual Harassment, EEOC Notice No. N-915-050 (March 19, 1990). In finding in favor of the complainant, the Commission noted that "complainant's account of the events is both sufficiently detailed and internally consistent so as to be considered a credible witness. Moreover, complainant's credibility is supported by other witnesses who testified as to her truthfulness; her discussion of the incident with co-workers, the agency's nurse practitioner, and a psychiatrist, who all described her demeanor shortly after the alleged incident of harassment; her immediate complaint to management; and, a subsequent encounter in the restroom area with the alleged harasser by one of the witnesses." There was also evidence that the harasser called complainant that night to apologize for the incident, and that he was referred to EAP by the Food Services Administrator two days later. The Commission then addressed the agency's claim that it had acted promptly and appropriately, in any event. Here, the agency asserted that it did not have prior knowledge of similar conduct with other female employees; it had a policy regarding sexual harassment, and that employees received annual training courses; upon report of the incident, the agency immediately undertook an internal investigation into the allegations, and properly separated complainant from the accused; and, the Warden confiscated certain booklets that were uncovered during

the inquiry. The Commission disagreed and found the agency's actions insufficient. The Commission was particularly concerned about the inadequacy of the agency's investigation. For example, the Commission described that "According to the Special Agent who conducted the investigation, OIA considered this to be a serious allegation, and expedited the administrative investigation. The Special Agent interviewed complainant and the alleged harasser. According to the Special Agent, 'We really don't look at the credibility issue. We look at the preponderance of the evidence.' Since complainant told one story, and the co-worker told a contrary story, OIA determined that the allegation could not be sustained. No action was taken against the co-worker. He was brought back to work . . . ." In that regard, the Commission determined "that a thorough investigation by OIA into the allegations would have involved a credibility determination, and under the circumstances presented in the instant case, a reasonable fact finder would have found the complainant to be a credible witness, and the alleged harasser's explanation to be a far-fetched explanation tailored to explain his inappropriate behavior, but insufficient to cast doubt on complainant's detailed and consistent explanation of the **events**." The Commission also concluded that the agency failed to take appropriate steps to ensure that the harassment would not recur. Instead, "Despite complainant's pleas and the recommendation of her psychiatrist, complainant's schedule continued to overlap with the harasser's. Due to the agency's failure to keep the harasser away from her completely, complainant was forced to choose between working with the harasser or accepting a demotion. Complainant accepted a demotion with a decrease in pay from the position of Cook Supervisor, WS-08, to the position of Correctional Officer, GS-07, because the agency failed to take adequate measures to ensure that the harassment would not recur. The Commission finds this constructive demotion to be both an unacceptable response by the agency, and in violation of Title VII. Furthermore, testimony by the Senior Officer indicates that several months after complainant's experience, the harasser attempted to walk in on her while she was using the restroom, and yet, despite her requests for locks on the restroom door, it appears that no locks have been installed and there is no evidence that the agency has discontinued the foolhardy practice of maintaining a restroom used by both men and women. Therefore, under the circumstances in this case, we find that the agency is liable for the sexual harassment of complainant by her co-worker." Finally, the Commission concluded that complainant was entitled to $25,000.00 in compensatory damages, based on the following evidence: "Complainant reported the sexual harassment to a psychiatrist, and the agency's nurse

practitioner/physician assistant. Complainant's psychiatrist testified at the hearing that complainant came to him with complaints of extreme anxiety and sleeping problems. He diagnosed her with post-traumatic stress disorder and major depressive disorder. Although complainant experienced trauma many years prior to this incident of harassment, he testified that he believed that complainant had resolved the earlier trauma. The psychiatrist described complainant as very fearful and anxious, and on July 25, 2000, recommended that for health reasons, she not work with that co-worker. By January 3, 2001, however, the psychiatrist documented that 'She currently has no symptoms of depression or anxiety. She is not in need of any psychiatric medications, appears to be doing well. No psychiatric treatment is needed at this time.' Complainant also reported the incident to the agency's nurse practitioner/physician assistant, who testified that after the incident complainant was 'hysterical.' The nurse practitioner became concerned that complainant was suicidal. The Paint Foreman Supervisor testified that he observed complainant following the incident and said that she was very distraught and upset. According to complainant she feared for her life. Complainant worked with inmates in an inherently dangerous environment, but no longer could trust her co-worker. Complainant was taking medication for severe anxiety attacks. She was unable to sleep, had nightmares, and lost about 20 pounds."

V. Sexual in Nature

Goudeau v. Ashcroft, Attorney General, Department of Justice, Bureau of Prisons, 01A41550 (June 24, 2004). The Commission affirmed the AJ's decision finding no liability by the agency on the complainant's claim that he was sexually harassed by a female co-worker, a Physician's Assistant; the complainant, a Chief Pharmacist, failed to show that his co-worker's conduct was sexual in nature and that the conduct was based on his sex. The male complainant claimed that a female co-worker rubbed and brushed against him while in his work area, came into his work area more often than was necessary, made derogatory comments about him, used profanity in reference to him and told him he looked "great" upon return from vacation. After a hearing, the AJ held that the complainant failed to prove that the co-worker's conduct was of a sexual nature or directed at him because he is a man (i.e., because of his sex). The Commission agreed. For example, in relation to

whether the conduct was of a sexual nature, the Commission observed, as follows: "Complainant states that the physical conduct consisted of the PA [Physician's Assistant] rubbing and or grinding her breasts against his shoulders or arms when working alone with him in the pharmacy. If the contact did in fact occur, the question is if it was of a sexual nature. The evidence does not support such a finding. Complainant described the pharmacy work area as 'fairly small', therefore, as the AJ noted in her decision, inadvertent body contact is more likely in such an environment. The AJ was not persuaded by complainant's arguments that the contact was intentional. We agree. Although complainant alleges that the PA was in the pharmacy area far more than necessary, sometimes against facility policy, that fact alone does not tip the evidence back toward a conclusion that any resulting contact was sexual." Similarly, as to whether certain comments and the use of profanity was "sexual in nature", the Commission opined that "Complainant also alleges that the PA referred to him as a 'm----- f-----' and 'that f---ing pharmacist.' Those terms, taken alone, do not necessarily have a sexual connotation, and therefore do not constitute verbal conduct of a sexual nature. Likewise, the PA's comment that he looked 'great" after returning from vacation does not necessarily have a sexual meaning or indicate sexual intent." Moreover, in finding that the conduct was not because of the complainant's sex, the Commission held, as follows: " Complainant also has not established that the PA's alleged harassment was based on his sex. There is no evidence in the record supporting a finding that the PA's conduct was directed toward complainant because he is a man. The PA has been described by complainant as "loud" and "obnoxious," and it has been noted that she used profanity like a "sailor." Complainant also indicated that the PA sometimes made disparaging log entries about other staff members as well. Although he contends that she made many more about him than anyone else, the evidence still does not support a connection between the PA's behavior and complainant's sex." In sum, the Commission determined that the complainant had failed to prove element 2 (conduct of a sexual nature) and 3 (harassment based on sex) of a hostile environment claim.

VI. Affirmative Defense: Co Worker Harassment

Lovett - Noell v. Johnson, Acting Secretary, Department of the Navy, 07A20028 (Jan. 15, 2004). The Commission agreed with the AJ's finding that the complainant was sexually harassed by a co worker for more than 3 years and that

the agency failed to take prompt and appropriate action; a second level supervisor failed to keep track of the matter and that the agency placed the burden on the complainant to notify her managers when she encountered the harasser, inappropriately "leaving complainant looking over her shoulder.". Additionally, the Commission upheld the AJ's award of $15,000.00 for emotional distress. In finding sexual harassment, the Commission relied on the AJ's determinations, which it described, as follows: "Specifically, the AJ found that complainant was subjected to sexual harassment between September 1996 and November 1999 by a co-worker (Mr. X). During the fall of 1996, Mr. X walked by complainant and asked, 'Can I tell you I love you?' Other times he asked, 'What are we going to do about [complainant's husband]?' Mr. X then stuck his tongue out and laughed. Complainant's responses included: 'I'm married;' 'I don't know you;' and 'Stay away.' On September 24, 1996, she asked Mr. X (acting supervisor at the time), what to do with certain papers. Mr. X told her to 'shove them up her ass.' When complainant asked Mr. X if he was familiar with EEO, he explained to her that he was on the EEO committee and could recommend a good EEO Counselor. On September 26, 1996, complainant was wearing ear plugs and kneeling into a cabinet when Mr. X approached her from behind and said 'I' into her ear and then laughed. Later that afternoon, complainant told her supervisor about the events. Complainant's supervisor said he would talk to Mr. X. On another occasion, complainant was wearing ear plugs when Mr. X 'approached her from behind, slid his hands down the front full length pocket of her work apron and grabbed her crotch.' When complainant pushed him away, Mr. X laughed and said he was trying to get a cigarette. On October 2, 1996, Mr. X "hit her across the buttocks with a large water bottle.' Complainant told her supervisor about the incident. The supervisor again said he would talk to Mr. X. The next day, complainant met with her supervisor and her supervisor's supervisor and told them about the above cited incidents. Mr. X was out on sick leave from October 7, 1996 to October 14, 1996, and was reassigned upon his return. Mr. X, at that time, was also taken off the EEO committee."

Wilson v. Ashcroft, Attorney General, Department of Justice, 01A23614 (Feb. 3, 2004), request for reconsideration denied, 05A40510 (April 5, 2004). In reversing the AJ and the agency, the Commission determined that the complainant, a Cook Supervisor in the Food Service Department, was sexually harassed by a co-worker, that the agency failed to take prompt and appropriate action, and that complainant had proven entitlement to $25,000.00 in non pecuniary compensatory damages.

VII. Affirmative Defense: Supervisory Harassment

Briggs v. Potter, Postmaster General, United States Postal Service, 01A32026 (June 23, 2004). The Commission overturned the agency's decision that the complainant was not discriminated against or harassed because of her sex because it found that, despite inconsistent testimony among witnesses, there was sufficient corroborating evidence to support a finding of sexual harassment and the agency failed to prove an Ellerth / Faragher defense because its harassment policy was not sufficiently publicized and it did not take prompt and effective action in response to the harassment. (See Sexual Harassment, Credibility Issues for full summary).

Pennsylvania State Police v. Suders, 124 S. Ct. 2342 (2004). The Supreme Court held that if a supervisor's official acts makes an employee's working conditions so intolerable that a reasonable person would have felt compelled to resign then this is a "constructive discharge" and a tangible employment action and, accordingly, the employer cannot use the affirmative defense to hostile environment sexual harassment set forth in the Supreme Court's Ellerth and Faragher cases. The Supreme Court also clarified the burden of proof when an employee does not allege a tangible employment action, holding that: "Following Ellerth and Faragher, the plaintiff who alleges no tangible employment action has the duty to mitigate harm, but the defendant bears the burden to allege and prove that the plaintiff failed in that regard."Nancy Suders, a Police Communications Operator at a Pennsylvania State Police barracks, alleged sexually harassing conduct by her three male supervisors, officers of the Pennsylvania State Police (PSP), of such severity that she was forced to resign. The conduct included obscene gestures made five to ten times each night throughout Suders' employment and references to oral sex and to sex with animals. Suders had supposedly failed computer-skills exams, but, after finding her exam in a drawer in a locker room, she concluded that it had not been forwarded for grading so she removed the exam. Her supervisors found the exam missing, left a telltale blue powder in the drawer and then arrested Suders for theft after she replaced the exam. Suders then resigned and sued the PSP for sexual harassment and constructive discharge, amongst other things. The District Court granted summary judgment for the PSP, in part because Suders had resigned two days after bringing the matter to the attention of the PSP EEO officer without giving the PSP the opportunity to address the hostile work environment. The Court

of Appeals reversed, finding that there was a question as to the effectiveness of the PSP's program to address sexual harassment allegations, and ruled that "a constructive discharge, when proved, constitutes a tangible employment action," and, under the Supreme Court's guidance in Ellerth and Faragher, such an action renders an employer strictly liable and precludes employer recourse to the affirmative defense announced in those decisions. The Supreme Court granted certiorari to resolve the disagreement among the Circuits on the question of whether a constructive discharge brought about by supervisory harassment ranks as a tangible employment action and therefore precludes assertion of the affirmative defense articulated in Ellerth and Faragher. Under the constructive discharge doctrine, an employee's reasonable decision to resign because of unendurable working conditions becomes the equivalent of a formal discharge for remedial purposes. The Supreme Court noted that Ellerth and Faragher established principles governing employer liability for sexual harassment by supervisors. Those decisions delineate two categories of hostile work environment claims: (1) harassment that "culminates in a tangible employment action," for which employers are strictly liable and (2) harassment that takes place in the absence of a tangible employment action, to which employers may assert an affirmative defense, that "the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and that "the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." Key to this case is the question: "Into which Ellerth/Faragher category do hostile-environment constructive discharge claims fall -- and what proof burdens do the parties bear in such cases?" The Supreme Court answered this question by holding that if a supervisor's official acts makes an employee's working conditions so intolerable that a reasonable person would have felt compelled to resign, then this is a tangible employment action resulting in a "constructive discharge" and the employer thus cannot use the affirmative defense to hostile environment sexual harassment set forth in the Supreme Court's Ellerth and Faragher cases. However, the Supreme Court noted that "the Court of Appeals erred in declaring the affirmative defense described in Ellerth and Faragher never available in constructive discharge cases." An employee must connect his or her constructive discharge to an official act for the constructive discharge to be a tangible employment action and outside of the affirmative defense for employers set forth in Ellerth and Faragher. The Supreme Court cited two Circuit Court cases as correct applications of this doctrine. In Reed v. MBNA Marketing Systems, Inc., 333 F. 3d 27 (1st Cir. 2003), the plaintiff

claimed a constructive discharge based on her supervisor's repeated sexual comments and an incident in which he sexually assaulted her. The First Circuit held that the alleged wrongdoing did not preclude the employer from asserting the Ellerth/Faragher affirmative defense because the supervisor's behavior involved no official actions and was "exactly the kind of wholly unauthorized conduct for which the affirmative defense was designed." In contrast, in Robinson v. Sappington, 351 F.3d 317 (7th Cir. 2003), after the plaintiff complained that she was sexually harassed by the judge for whom she worked, the presiding judge decided to transfer her to another judge, but told her that "her first six months [in the new post] probably would be 'hell,'" and that it was in her "'best interest to resign.'" The Seventh Circuit held that the employer was precluded from asserting the affirmative defense to the plaintiff's constructive discharge claim. The Robinson plaintiff's decision to resign, the court explained, "resulted, at least in part, from [the presiding judge's] official actio[n] in transferring" her to a judge who resisted placing her on his staff. The Supreme Court stated that "[T]he courts in Reed and Robinson properly recognized that Ellerth and Faragher, which divided the universe of supervisor-harassment claims according to the presence or absence of an official act, mark the path constructive discharge claims based on harassing conduct must follow."

Rhoads-Coleman v. Postmaster General, United States Postal Service, 01A42059 (July 13, 2004). Even though the complainant proved hostile environment sexual harassment by a supervisor, the agency proved its affirmative defense under Ellerth / Faragher; on that basis, the Commission upheld the AJ's dismissal without a hearing. The complainant worked as a Mailhandler. She was harassed by her acting supervisor (he supervised complainant's unit periodically 2-3 times a week) through unwelcome comments about what she could do with her tongue. The harassment began in November 2001 but she did not complain to higher-level management until March 2002. The evidence showed that the agency had an anti-harassment policy in place, concerning the obligation of management, when confronted with claims of harassment, and that the agency's policy was publicized through posters displayed on information boards. When the agency was informed in March, it promptly conducted two investigations in the same month, interviewing parties and witnesses and, as a result of the investigations, removing the harassing supervisor from his position and transferring him to another building. While the EEOC concluded that hostile environment discrimination had been

demonstrated, it found that the agency had proven both prongs of the affirmative defense.

VIII. Isolated Instances of Sexual Favoritism Not Covered

Preston v. Wisconsin Health Fund, _____ F. 3d _____ (7th Cir. Feb. 9, 2005). In agreeing with the lower court's summary judgment decision in favor of the employer, the Circuit determined that the plaintiff failed to demonstrate that complained of sexual favoritism violated Title VII. Jay Preston, a male, alleged that he lost his job to a woman who was romantically involved with his supervisor. He claimed that the loss of his job was the result of his supervisor's favoritism toward the replacement, which resulted from the romantic relationship, and that this constituted gender discrimination in violation of Title VII. In relation to this claim, the court held that "[a] male executive's romantically motivated favoritism toward a female subordinate is not sex discrimination even when it disadvantages a male competitor of the woman." The court further determined that "[t]he effect on the composition of the workplace is likely to be nil, especially since the disadvantaged competitor is as likely to be another woman as a man .... Neither in purpose nor in consequence can favoritism resulting from a personal relationship be equated to sex discrimination."

Roy v. Potter, Postmaster General, United States Postal Service, 01A50021(Dec. 21, 2004). The Commission upheld the AJ's decision without a hearing, rejecting the complainant's claim of non selection discrimination; even if the selecting official chose the selectee based on a personal sexual relationship between her and the deciding official, that is not discrimination under Title VII. The complainant worked as a level 4 Data Conversion Operator at the agency's Beaumont Remote Encoding Center. She alleged that she was discriminated against on the basis of sex (female) when she was not selected for the position of Supervisor, Remote Encoding Operations, asserting that she was treated differently than the female selectee whose promotion was based upon a "personal/sexual relationship" that she was having with the selecting official and not on her qualifications. In upholding the AJ's decision without a hearing, the Commission noted that it "has taken the position that sexual favoritism in the workplace which adversely affects the employment opportunities of third parties may, under certain circumstances, constitute sexual harassment prohibited by Title VII. See EEOC's Policy Guidance

on Employer Liability under Title VII for Sexual Favoritism, Notice No. N-915-048 (January 12, 1990) (hereinafter referred to as "EEOC Policy Guidance"). However, the Commission's position on this issue clearly holds that Title VII does not prohibit isolated instances of preferential treatment based upon consensual romantic relationships. While favoritism towards a spouse or friend may be unfair, it does not constitute discrimination in violation of Title VII because both men and women are equally disadvantaged for reasons other than their gender. EEOC Policy Guidance at 2. See also, Miller v. Aluminum Co. of America, 679 F. Supp. 495 (W.D. Pa., aff'd mem., 856 F.2d 184 (3d Cir. 1988); DeCintio v. Westchester County Medical Center, 807 F.2d 304 (2d Cir. 1986), cert. denied, 108 S. Ct. 89 (1987). In the instant case, complainant has alleged a romantic relationship between the selectee and the selecting official, but has made no allegation of any coercion. Moreover, there is no evidence in this case that favoritism based upon the consensual granting of sexual favors was widespread in this workplace which might also have created a hostile work environment in violation of Title VII."

IX. Other

Gillespie v. Nicholson, Secretary, Department of Veterans Affairs, 01A51179 (March 4, 2005), reconsideration denied, 05A50753 (April 25, 2005). The Commission affirmed an AJ's finding of no discrimination on an EEO complaint filed by a male nurse who had been accused of sexual harassment by a female surgeon, noting that the agency's actions were consistent with its legal obligation to investigate a claim of sexual harassment, and that complainant had agreed to a reassignment that did not preclude his return to the facility where he worked at the time of the accusation. Complainant, a male nurse at the VA's Salisbury Medical Center, was accused of sexual harassment by a female agency surgeon. Complainant alleged discrimination when he: (1) met with the Acting Chief of Surgery concerning a fact finding concerning the allegation of sexual harassment: (2) was asked to provide a written response to the allegation; and (3) was reassigned to another agency medical facility as a result of the allegations. The Commission held that the agency articulated legitimate, nondiscriminatory reason for its actions: "The agency was merely responding in a non-discriminatory fashion to the sexual harassment allegations of the female surgeon. The Commission notes that we have held that an agency is legally obligated to investigate a claim of

sexual harassment." Complainant had also agreed to the reassignment, which did not preclude complainant's return to Salisbury.

Summary Judgment (By AJ's)

I. Disability Cases

Abbott v. Potter, Postmaster General, United States Postal Service, 01A30479 (Mar. 1, 2004). The Commission upheld the AJ's grant of summary judgment for the agency on the complainant's claim that he was subjected to disability discrimination when the agency delayed in granting his request for a light duty assignment; his "disability" was temporary. The complainant, a Carrier Technician, injured himself playing floor hockey (suffering an ACL tear in his right knee) and consequently requested light duty. Complainant alleged that the Postmaster unduly delayed granting his request for light duty. The Commission concluded, as had the agency, that the complainant failed to show that he was an individual with a disability covered under the Rehabilitation Act, and that he instead had what appeared to be a temporary disability.

Fitzgerald v. Powell, Secretary, Department of Defense, 01A30880 (Feb. 5, 2004). The Commission upheld the AJ's decision without a hearing, dismissing claims of age, reprisal and disability discrimination and in which the AJ properly found that complainant was not aggrieved as to claim 1 (placement of complainant on a performance improvement plan which did not constitute an adverse action and was a proposal not placed in the complainant's file), did not prove that the agency's reasons as to claim 2 (a letter of reprimand) were pretextual and did not prove that the agency, by reassigning him out of Germany and to Japan, failed to accommodate his disability (bi polar disorder) because of "better medical treatment" in Germany. As to this last reasonable accommodation claim, the Commission observed, as follows: "Assuming arguendo that complainant is an individual with a disability under the Rehabilitation Act, we find that complainant failed to produce sufficient evidence from which a reasonable fact-finder could conclude that the agency denied complainant reasonable accommodation. In reaching this conclusion and assuming arguendo that remaining in Germany 'for better medical treatment' is a form of reasonable accommodation within the meaning of the Rehabilitation Act, complainant has failed to provide any evidence to support his assertion that the medical treatment he would receive in Japan would be inferior to the treatment he received in Germany. Consequently, we find that the AJ properly issued a decision without a hearing for complainant's reasonable accommodation claim."

Glass v. Potter, Postmaster General, United States Postal Service, 01A22601 (Mar. 24, 2004). The AJ erred in issuing a decision without a hearing, finding that the complainant, a City Carrier, failed to prove his disability discrimination involuntary reassignment claim because he was not an individual with a disability; it was unclear whether the complainant's 20 pound lifting restriction substantially limited him. Here, The Commission noted that in addition to the lifting restriction, there was also evidence – an OWCP form - showing that complainant was limited in standing for 3 hours intermittently; walking 1 hour, intermittently; driving up to 3 hours; and working 8 hours a day. (The Commission observed that the form was not clear on whether complainant's limitations referred to a 24 hour day or simply a work day.). Further, the Commission cited to precedent that had previously found that "a long-term medical restriction limiting a complainant's walking ability to 1 hour per day, intermittently, may in fact affect a complainant's daily life to the extent that he is substantially limited in the major life activity of walking. See Barnard v. United States Postal Service, EEOC Appeal No. 07A10002 (August 2, 2002)."

Hernandez v. England, Secretary, Department of the Navy, 01A41079 (Mar. 30, 2004). The Commission affirmed an AJ's decision without a hearing, finding no discrimination on a complaint alleging the agency discriminated against the complainant on the basis of race (Caucasian and Asian) and disability (alcoholism), when it forced him to resign in lieu of termination during his probationary period because of complainant's conviction for driving under the influence of alcohol. As for complainant's claim of race and disability disparate treatment, the Commission found that the complainant failed to show how the agency's stated reason for terminating him (the DUI conviction) was a pretext for discriminatory animus because of complainant's race or disability. The Commission also addressed the disability discrimination claim as a claim of failure to accommodate, and found that the agency had no duty to accommodate complainant's alcoholism because it had no notice of the alcohol problem until the agency was already in the process of terminating complainant. The Commission noted that since "reasonable accommodation is always prospective, an employer is not required to excuse past behavior even if it is the result of the individual's disability." The Commission further observed that an employer may discipline an employee who violates a "conduct rule that is job-related for the position in question and consistent with business necessity."

LeFebvre v. Barnhart, Commissioner, Social Security Administration, 01A32503 (Nov. 29, 2004). The Commission upheld the AJ's Decision without a Hearing, rejecting the disability (Epilepsy, learning disability) discrimination claim, finding that the complainant was not a qualified individual with a disability and that "the agency attempted to provide complainant with a reasonable accommodation during the training phase of the job, but that, in spite of these efforts, complainant was unable to successfully perform the essential functions of the position."

Matthews v. Dominguez, Chair, Equal Employment Opportunity Commission, 07A30060 (Feb. 20, 2004). The Commission reversed the AJ's summary judgment ruling in favor of the complainant; even though there were mishaps, such as delays and equipment that was not functional, the complainant did not prove disability discrimination because the agency otherwise accommodated the complainant's hand and arm conditions by providing note takers and assignment modifications, all the while working toward making the other accommodations functional. Moreover, the AJ erred in concluding that the agency's failure to engage in the interactive process, in itself, constituted a violation of the Rehabilitation Act. Complainant was an Investigator at the EEOC's San Diego Area Office facility. In November 1998, complainant suffered an injury to her right upper extremity caused by repetitive stress from writing and typing. She was diagnosed with tendinitis in her right rotator cuff, epicondylitis in her right elbow, and carpal tunnel in her right hand. Due to her conditions, she was limited in lifting over five pounds, typing or writing for more than five minutes at a time for a total of fifteen minutes an hour, and was allowed no pushing or pulling. She subsequently sustained an injury due to repetitive stress on her left arm and was diagnosed with epicondylitis in her left elbow. Beginning in 1999, the complainant made certain requests for voice recognition software and other accommodations, such as an ergonomic study of her work station, a paraffin treatment machine, and a note taker. The agency provided these accommodations (except for the paraffin treatment, which complainant's physician did not believe would be helpful), also modified the complainant's duties and provided other accommodations as well, such as advanced sick leave. The software, despite training, did not adequately recognize the complainant's voice, though, and there were funding-related delays in accomplishing the ergonomic study. Nonetheless, the complainant alleged that she had not been accommodated and filed a complaint. After a hearing, the AJ concluded that the agency failed to provide complainant with the reasonable accommodations of software and the ergonomic study, despite that it had provided

significant assistance. On that basis, the AJ granted summary judgment to the complainant. The AJ also concluded that the agency failed to engage in the interactive process, which constituted a violation of the Rehabilitation Act. As to the interactive process finding, the Commission disagreed, providing that "the Commission has recognized that an agency's failure to engage in the interactive process does not, in itself, constitute a violation of the Rehabilitation Act. Doe v. Social Security Administration, Appeal No. 01A14791 (February 21, 2003). Liability depends on a finding that, had a good faith interactive process occurred, the parties could have found a reasonable accommodation." Moreover, even though the agency made certain mistakes, (i.e., "an unwarranted delay in conducting the ergonomic study"), the Commission determined that the agency continued to work with complainant in order to provide other reasonable accommodations.

Nurriddin v. O'Keefe, Administrator, National Aeronautics and Space Administration, 01A23148 (Sept. 30, 2004). The EEOC affirmed the AJ's grant of summary judgment in favor of the agency on the complainant's disability discrimination claims, agreeing with the AJ that "there is no indication from any of . . . [the] evidence that the complainant's depression, stress, and/or anxiety rose to the level of an impairment which substantially limited any major life activity." The EEOC also affirmed the agency's FAD as to the remaining claims (the complainant had withdrawn his request for a hearing after the summary judgment ruling), 42 in all.

Robinson v. Potter, Postmaster General, United States Postal Service, 07A30021 (Jan. 23, 2004). The AJ erred by issuing a decision without a hearing and in finding for the complainant; there were genuine issues as to material fact as to whether the complainant qualified as an individual with a disability and whether that disability prevented her from performing the functions of her job or all jobs. The complainant worked as a Rural Carrier. She alleged that the agency discriminated against her on the bases of disability and other bases by issuing a Notice of Removal terminating her employment, charging her with an "Inability to Perform the Functions" of her position. In finding summary judgment discrimination, the AJ determined that the complainant was an individual with a disability as defined ,since she was regarded as substantially limited in the major life activity of working, when the agency terminated her in response to a Fitness for Duty Examination. The Commission disagreed, noting that "Here, there was

no analysis done as to whether complainant was regarded as unable to perform or significantly restricted in her ability to perform either a class of jobs or a broad range of jobs in various classes." Similarly, the Commission found that there was also a genuine issue as to whether the complainant was an otherwise qualified individual with a disability and that the AJ "failed to substantively examine whether complainant is a 'qualified individual with a disability.' Instead, she relied only on the Fitness for Duty Examination as a basis for finding the agency regarded her as an individual with a disability, and proceeded to find that the agency failed to articulate a legitimate, nondiscriminatory reason for its actions. Indeed, the record is replete with allegations that complainant had conduct and performance problems at work, and may not have been qualified to perform the functions of the Carrier position. As such, we find the record contains disputes as to whether complainant is a qualified individual with a disability."

Toso v. Mineta, Secretary, Department of Transportation, (Federal Aviation Administration), 01A30167 (Jan. 22, 2004). The Commission upheld the AJ's grant of summary judgment to the agency, with the AJ finding, among others, that the complainant was not a qualified individual with a disability because he was unable to perform the duties of his Air Traffic Control Specialist position, with or without reasonable accommodation; his medical condition required him to take sedatives, which precluded him from performing air traffic control duties with live aircraft.

II. Race Cases

Bryant and Kelly v. Ashcroft, Attorney General, Department of Justice, (Bureau of Prisons), 07A40108, 07A40098 (Oct. 5, 2004), request for reconsideration denied, 05A40970 (Aug. 3, 2004). In affirming the AJ's summary judgment ruling in favor of the complainants (although the agency had filed the motion), the Commission determined that the agency committed hostile environment race discrimination against the complainants, two senior officers at the correctional facility, when 2 memoranda that "projected a negative racial animus toward them were posted on a bulletin board and placed in several employee mailboxes" and the agency did not take action until after the second memo was distributed. The agency was liable for compensatory damages in the amount of $5000.00 (for Kelly) and $30,000.00 (for Bryant), which was determined by the AJ after a damages hearing. This case

started with a June 23 memorandum to the Warden from the union's Vice President, complaining about the non selection of himself, the complainant's and one other African-American employee. This memorandum was altered twice, once on June 30 and again sometime before July 3 and put on bulletin boards and in the union Vice President's and the complainant's mailboxes. Both memorandum referred to the complainants and the union VP and used language "designed to depict ignorant African-Americans by using stereotypical ebonies" For example, the first altered memorandum provided "I am offering to withdraw any all paperwork I've filed against the Warden and the Captain if you be willin' to promote me to the GS-8 wit full access to porn sites at work and give my partner more comfortable mattress in da SHU. Give Bryant what she wants too or I file more paper on you."

Ramsey v. Brownlee, Acting Secretary, Department of the Army, 07A30022 (May 13, 2004). The AJ erred in issuing a decision without a hearing, finding racial discrimination by the complainant's supervisor, despite that the parties disputed the material issue of whether the supervisor made a racial epithet in reference to the complainant and despite that the AJ did not make a finding that the one remark was severe or pervasive or that the agency failed to establish its affirmative defense. In deciding the case in the complainant's favor without a hearing, the AJ disregarded the agency's contention that the supervisor never referred to the complainant using a racial epithet. As a result, as noted by the Commission, there was a genuine dispute bearing on the credibility of a witness, which could only be resolved in a hearing. In addition, with regard to the hostile work environment claim, the Commission noted that "There is a genuine issue of material fact in dispute regarding whether all of the complained-of harassment, when taken together, affected a term or condition of employment and/or had the purpose or effect of unreasonably interfering with complainant's work environment and/or creating an intimidating, hostile, or offensive work environment." Finally, the AJ did not give the agency the opportunity to raise an affirmative defense as to liability, in the Commission's view. "When, as here, harassment by a supervisor creates an unlawful hostile environment but does not result in a tangible employment action, the employer can raise an affirmative defense to liability, which it must prove by a preponderance of the evidence."

III. Reprisal Cases

McNeill v. Roche, Secretary, Department of the Air Force, 01A40366 (Mar. 31, 2004). The Commission affirmed an AJ's dismissal for failure to state a claim, (the AJ had granted the agency's motion to dismiss and issued a decision without a hearing), because complainant failed to show that he suffered any personal loss or injury with respect to a term, condition or privilege of employment when agency officials openly mocked his web page through internal agency e-mail. Complainant alleged unpersuasively that such mockery constituted discrimination on the basis of reprisal for prior EEO activity.

IV. Sex (Gender) Cases

Harvey v. Potter, Postmaster General, USPS, 01A50210 (March 31, 2005). The Commission reversed an AJ's dismissal of claims on summary judgment and remanded for a hearing citing factual disputes in the record and the failure of the agency to develop an appropriate record. Complainant, a Motor Vehicle Operator, filed a complaint alleging the agency discriminated on the bases of sex, age, and reprisal when the agency promoted junior, male, employees to level 6 operators after receiving more training and familiarization than she did. After investigation the AJ issued a decision without a hearing concluding that complainant failed to establish a prima facie case on all bases because she failed to demonstrate that similarly situated employees not in complainant's protected classes were treated differently. The AJ found persuasive the fact that all of the employees promoted possessed Class-A tractor-trailer driver's licenses, whereas complainant had only a Class-B license and a Class-A learner's permit. The purpose of the training afforded the male employees was to prepare Class-A certified operators to pass the agency's own driving test. The AJ, also found that before an employee could be promoted to level 6 he or she had to possess a Class-A license and pass the agency driver test. On review, the Commission found that grant of summary judgment inappropriate citing a factual dispute regarding the purpose of the provision of agency training and the methods in which the training was provided using employee seniority. The Commission noted the agency policy for providing the familiarization training was to prepare the employee to obtain a Class-A tractor-

trailer driver's licenses as well as pass the agency exam. The Commission further observed that the agency's policy of providing the training according to employee seniority was violated repeatedly when complainant was passed over several times by male co-workers two-years her junior. The Commission also stated that summary judgment was inappropriate since complainant identified eleven comparator drivers to the investigator who were never asked to provide affidavits. In a rare exception to the rules concerning appeals to the Commission, the Commission considered new evidence provided by complainant that six of the eleven coworkers complainant identifies were hired with Class-B licenses and have since been promoted to level-6 tractor trailer drivers. The Commission noted that "[w]hile we will not, generally speaking, consider new evidence submitted on appeal, the lack of this evidence in the record used to rule on summary judgment is disturbing. The investigator should have acquired this information in order to 'develop an impartial and appropriate factual record' and 'thoroughly address the matters at issue.' "

Shaffer v. Potter, Postmaster General, United States Postal Service, 01A31449 (Feb. 17, 2004). The Commission found that the AJ's grant of summary judgment was appropriate, as no genuine dispute of material fact existed; complainant failed to show that the male co-worker involved in the incident at issue, also threatened her with physical violence, such that he too, should have been disciplined. The complainant, a Letter Carrier, unconvincingly alleged that the agency discriminated against her based on sex when she was arrested by the Postal Inspector, placed on an indefinite suspension without pay, and received a notice of dismissal for threatening a co-worker.

V. Age Cases

Silverman v. Ridge, Secretary, Department of Homeland Security, 01A33571 (Feb. 18, 2004). The Commission upheld the AJ's dismissal without a hearing; the complainant, a part-time "Other Than Permanent" (OTP) Immigration Inspector, failed to prove that he was constructively discharged (i.e., forced to retire) on the basis of age (he was 72) because of a change in his schedule, which required him to work a rotational midnight shift. Moreover, even though the instant matter was a mixed case complaint that would normally be referred to the MSPB, it had become "firmly enmeshed in the EEO forum," (the complainant had filed his

formal complaint nearly four years ago, in March 2000, and the record was fully developed), so that the Commission would assume jurisdiction to better serve "the interests of judicial economy."

VI. National Origin Cases

Truong v. Potter, Postmaster General, United States Postal Service, 01A33223 (Mar. 25, 2004). The Commission affirmed the AJ's decision without a hearing, rejecting the complainant's allegations of race (Asian), national origin (Vietnamese), sex, age and reprisal harassment by an acting supervisor; the allegations concerned a loud argument, after complainant became defensive, when asked about subordinates, and there was no evidence of animus by the manager because of the complainant's protected bases. The complainant worked as a Full Time Clerk. The Commission described its ruling and the incident that led to the instant complaint, as follows: "The record reflects, through the testimonies of all participants at the supervisor's meeting on July 17, 2001, that the confrontation between complainant and the MDO concerned the subject of employee discipline. The record reveals that the MDO asked complainant, as an acting supervisor, whether she could discipline her employees if warranted. In response, complainant questioned why she would need to do so, said she would not do so, became very defensive, and complainant and the MDO argued loudly. There is no evidence in the record to support the conclusion that unlawful animus toward complainant's age, sex, race, national origin or prior EEO activity motivated MDO's actions or words."

Timeliness

I. Claims of Misinformation

Amoroso v. Ridge, Secretary, Department of Homeland Security, 01A35379 (March 31, 2004), request for reconsideration denied, 05A40741 (May 11, 2004). The agency properly dismissed the complaint for untimeliness; the complainant's contention that he failed to timely contact an EEO Counselor because he was misinformed by his attorney about EEO law, including the time limit to contact an EEO Counselor, was insufficient to warrant an extension of the applicable time limit.

French v. Potter, Postmaster General, United States Postal Service, 01A41483 (Apr. 15, 2004). The Commission reversed the agency's dismissal for untimely filing; although complainant received the notice of right to file (NORF) on November 7, 2003, and filed his complaint two days late on November 26, 2003, the agency had notified complainant by letter on November 13 that his official receipt date was November 12. The Commission found that the November 13 letter "not only served to mislead complainant as to the date from which he should calculate the 15-day time limit, but also reflects that the NORF was procedurally defective because it contained the incorrect complaint number." The Commission held that such circumstances were sufficient to waive the 15-day filing deadline.

II. Fax as timely

Attwood-Johnston v. Potter, Postmaster General, United States Postal Service, 01A33370 (July 29, 2004). The Commission reversed the agency's dismissal for untimeliness, finding that the complainant filed her complaint within the 15-day period by faxing a letter to the agency which described the facts and circumstances surrounding complainant's separation from the agency, and which concluded with complainant's statement, "I am being discriminated against for reasons of age, race, national origin and possibly sex."

III. Contact but No Intent to File

Miller v. Potter, Postmaster General, USPS, 01A45934 (Jan. 26, 2005), recon. den., 05A5053 (Mar. 16, 2005). Even though the complainant contacted management about alleged ongoing harassment within 45 days, that was insufficient to toll the time period. As explained by the Commission, "The record discloses that complainant alleged that she had been repeatedly sexually harassed and stalked by a subordinate between September 1998 and January 5, 2004. A review of the record reveals complainant did not allege harassment after January 5, 2004. However, complainant did not initiate contact with an EEO Counselor until well after expiration of the forty-five (45) day limitation. On appeal, complainant argues that she notified management about the alleged sexual harassment during the time period hi question and should therefore be deemed to have made timely contact with an official logically connected to the EEO process. We disagree. We find that complainant has failed to present evidence that she contacted an agency official logically connected with the EEO process and exhibited an intent to begin the EEO process prior to March 2004. The record indicates that in March 1999, complainant discussed her situation with an EAP Coordinator and two BMC Supervisors in the context of seeking information about sexual harassment claims involving a supervisor and her subordinate. In December 2003, complainant discussed the behavior of the employee she claimed harassed her with the POOM and Acting POOM, but she did not exhibit an intent to file an EEO complaint at that tune. Furthermore, the record reveals that an EEO poster was on display at complainant's work place, and she failed to provide evidence that she was not aware of the time limit for contacting an EEO Counselor. Complainant has presented no persuasive arguments or evidence warranting an extension of the time limit for initiating EEO Counselor contact. Consequently, we find that the agency properly dismissed claim (1) pursuant to 29 C.F.R. § 1614.107(a)(2) for untimely EEO Counselor contact."

IV. Claims that Not Aware of Time Limits

Bell v. Ridge, v Secretary, Department of Homeland Security, (Transportation Security Administration), 01A40013 (Mar. 31, 2004). The Commission affirmed

the agency's dismissal of the complaint on the basis of untimeliness, rejecting the complainant's claims that he was not aware of the time limit to contact an EEO Counselor and, in any event, that he timely telephoned the EEO office regarding his termination. On August 8, 2002, the complainant was terminated from his Law Enforcement Specialist position and contacted an EEO Counselor on October 26, 2002. The Commission relied on agency affidavits (and a record of the training) indicating that the complainant received orientation training on the EEO complaint process, during which he was informed of the 45-day time limit to contact an EEO Counselor. As to the complainant's claim that he telephoned the EEO office, there was no "persuasive evidence such as a name of the person he purportedly talked to or any other evidence supporting the assertion that he initiated the EEO process at a prior time."

Cochren v. Chao, Secretary, Department of Labor, 01A42296 (June 3, 2005), recon. den., 05A51027 (July 19, 2005). An agency must provide proof that a complainant had actual or constructive knowledge of the 45-day limitation period for EEO Counselor contact to rebut an assertion by a complainant – even one who had filed an earlier EEO complaint – that she was not aware of the 45-day time limit, and failure to do so resulted in a reversal of an agency dismissal of a complaint for untimely contact with an EEO Counselor. The agency dismissed part of complainant's EEO complaint, alleging denial of leave requests, as untimely filed and dismissed the second part of the complaint, alleging harassment, as alleging a proposed action, moot and failing to state a claim. Complainant was denied leave on November 15 and 27, 2002 and on May 28-30, 2003. She had a meeting with an agency manager on August 12, 2003 concerning the denial of leave on May 28-30, 2003. Complainant first contacted an EEO Counselor concerning the denial of leave on September 4, 2003 and the agency asserted that this contact was untimely as to the specific denial of leave. Complainant asserted that she was not aware of the 45-day time frame for initiating EEO Counselor contact. The agency responded that complainant, who had been employed with the agency for 19 years, should have known of the 45-day limitation period because she previously filed an EEO complaint in which the agency, during counseling, notified her of her rights and responsibilities, including time lines. The Commission held that: "The record is lacking any evidence to suggest that complainant had constructive or actual knowledge of the limitation period. Further, the record is devoid of a copy of the rights and responsibilities provided to complainant which indicates she was informed of the 45-day limitation period to

contact an EEO Counselor. Thus, the dismissal for untimely EEO Counselor contact is improper." The Commission also held that the harassment claim was "misdefined" by the agency and, as "one claim of harassment which centers around repeated denials of leave" it was not moot, not a proposed personnel action and did not fail to state a claim so that complainant could proceed with her EEO complaint in its entirety.

Perkins v. Roche, Secretary, Department of the Air Force, 01A35410 (Mar. 12, 2004). The Commission affirmed the agency's dismissal for untimely EEO contact where, despite complainant's contention that he was unaware of EEO procedures and the 45-day limitation period, the record showed that complainant signed an "Election for Alternative Dispute Resolution" document related to a different matter that put him on notice of the 45-day limitation period in January 2003, and complainant received training informing him of the limitation period when he became a supervisor. Complainant first contacted an EEO counselor on April 11, 2003, regarding incidents occurring on October 9, 2002 and November 17, 2002. The Commission held that complainant failed to assert adequate justification for extending the limitation period beyond 45 days and that the agency submitted more than a generalized affirmation that complainant was aware of the limitation period.

Richardson v. England, Secretary, Department of the Navy, 01A40402 (Apr. 12, 2004). The Commission affirmed the agency's dismissal of the complaint for untimely EEO counselor contact, finding that complainant's assertion of ignorance of the 45-day requirement was insufficient justification to extend the deadline because complainant was on constructive notice of the time limits; he had attended an EEO training session a few months prior to the alleged discriminatory event, during which the 45 day time limit was discussed, and the agency provided evidence that several posters informing employees of the EEO requirements were posted throughout the facility where complainant worked. Complainant alleged she was discriminated against on the basis of sex and race when she was removed from a detail position and not selected for a promotion.

Teichman v. Ridge, Secretary, Department of Homeland Security, 01A35163 (Apr. 26, 2004). The Commission held that the agency erroneously dismissed the complaint for untimely EEO contact, where the complainant explained he was unaware of the 45-day deadline, and the agency's claim that complainant had constructive knowledge was without merit. The Commission rejected the agency's contention that by posting the EEO filing information on its website it provided

adequate notice to complainant; the website did not actually state the 45-day deadline. The Commission also rejected the agency's contention that complainant had constructive notice because he received a copy of an orientation manual for new employees, when he attended the first day of training for his job as a security screener. On that day, complainant learned that he was required to attend 28 consecutive days of training, which he explained he could not do because his religious beliefs prohibited him from working on the Sabbath. According to complainant and the agency, he was advised to resign on the spot, which he asserted that he was required to do before leaving the building. Because he was unable to take the orientation manual with him, the Commission rejected the agency's argument that the manual provided constructive notice. The Commission remanded the complaint, which alleged discrimination on the basis of religion, for processing.

Wareham v. Potter, Postmaster General, United States Postal Service, 01A41019 (Mar. 9, 2004). The Commission affirmed the agency's dismissal for untimely EEO contact, where complainant, an applicant for a position as a casual employee at the Dallas Bulk Mail Center, claimed that he was unaware of the EEO time requirements, and the agency provided evidence that several EEO posters outlining the proper procedures for EEO Counselor contact were displayed at the Dallas Bulk Mail Center postal facility. Complainant argued that he was in the facility for no more than 30 minutes, that he did not look at any posters during his interview, and that an employee at the Dallas EEO office told him that "since this was ongoing for several months - should be OK," after he informed her that he was not aware of the 45-day limitation period. The Commission held that the agency offered "more than a generalized affirmation that it has posted EEO information" and that complainant's asserted justifications for extending the time period were inadequate.

White v. Principi, Secretary, Department of Veterans Affairs, 01A41505 (April 26, 2004), request for reconsideration denied, 05A40854 (June 9, 2004). The Commission upheld the dismissal of the complaint for untimely contact (a 6 month delay) with an EEO counselor, rejecting complainant's claim that he did not know that he could file an EEO complaint until he was told by the union; the record established that the agency had conducted sexual harassment training, during which the EEO timelines had been addressed and that the complainant's training

history, showed that he underwent such training, a month before the incident that gave rise to the complaint.

Wilkinson v. Rumsfeld, Secretary, Department of Defense, Defense Finance & Accounting Service, No. 03-1808, 2004 WL 1240540 (4th Cir. June 7, 2004). Relying on National R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002), the circuit reversed the district court's grant of summary judgment to the agency, determining instead that the plaintiff was alleging a continuing violation and sufficiently alleged several incidents during the 45 days before the plaintiff sought EEO counseling. The circuit cited to the plaintiff's complaint, as follows, which it interpreted as alleging a "pattern of conduct": "Top Management has informed her directors and other supervisors that they are not to associate[ ] or communicate with me. This is with the threat of denied promotions. The known fear of retribution from . . . [top management] unfortunately continues to perpetuate this behavior throughout OPLOC Norfolk. This pattern of conduct by . . . [top management] has continued to cause emotional distress to me, having to work in a hostile environment, isolated with fear of retaliation."

V. Claims of Continuing Violations

Anisman v. Snow, Secretary, Department of the Treasury, 01A40496 (May 18, 2004), request for reconsideration denied, 05A40967 (July 28, 2004). The Commission reversed its previous decision and case law, finding that two of the complainant's non promotion allegations were discrete actions and were untimely and could not be considered as part of a continuing violation based on the Supreme Court's Morgan decision. And while these time barred allegations could still be considered as "background evidence", the complainant failed to prove his allegation as to a timely non promotion decision because his qualifications were not shown to be "so plainly superior as to require a finding of pretext." The complainant, a GS-12 Estate Tax Attorney alleged that the agency discriminated against him on the basis of sex (male) when he was not selected for the three GS-13 Attorney positions on or July 14, 1994, May 14, 1995, and in September 1996. The third was timely filed and the complainant alleged that the other two were part of a continuing violation. In its initial, November 1999 decision, the Commission agreed and remanded the dismissal for a determination. Before the case went to hearing, the Supreme Court decided National Railroad Passenger Corp. v. Morgan,

536 U.S. 101 (2002). Accordingly, upon motion by the agency, the AJ dismissed the 1994 and 1995 allegations and found against the complainant on the more recent and timely non promotion allegation. The Commission agreed with the AJ. The Commission first described the Morgan holding as determining that an employee cannot recover for discrete discriminatory or retaliatory acts that fall outside the limitation period for filing a charge, even if they are related to acts that occurred within the time period, that each discrete discriminatory act 'starts a new clock for filing charges. ...' and that failure to promote was specifically listed as an example of a discrete discriminatory act. Then, in applying Morgan to the instant matter, "We find the Morgan ruling regarding the timeliness of filing a charge of discrimination in the private sector to be applicable to the issue of whether EEO Counselor contact was timely in the federal sector. The Court's decision in Morgan, effectively overrules our prior decision in EEOC Request No. 05A00283. Under Morgan, each non-selection constitutes a separate actionable unlawful employment practice and these discrete acts are not actionable if time-barred. See id. at 113. A non-selection that falls within the limitations period, such as the September 1996 non-selection in the instant case, cannot be used to render timely time-barred non-selections, such as those that occurred in 1994 and 1995. Complainant initiated EEO Counselor contact on October 10, 1996, well beyond the forty-five (45) day limitation period for contacting an EEO Counselor for the 1994 and 1995 non-selections under the Commission's regulations. Therefore, we concur with the AJ's determination that complainant's EEO Counselor contact was untimely with respect to his 1994 and 1995 non-selection claims, and we agree that there is insufficient evidence in the record to justify an extension of the limitations period. Accordingly, we find that the AJ and agency properly dismissed complainant's 1994 and 1995 non-selection claims, pursuant to 29 C.F.R. §1614.107(a)(2)." As to the third non promotion, the Commission made clear that under Morgan the time barred actions could still be considered as background evidence in "evaluating whether complainant established that he had been subjected to unlawful sex discrimination with respect to his timely raised 1996 non-selection claim." Nonetheless, the Commission concluded, as had the AJ, that discrimination was not proven as to that third promotion. Here, the Commission noted that complainant's qualifications were not "so plainly superior as to require a finding of pretext." and that "when choosing among highly qualified candidates for a position, employers generally have broad discretion to set policies and make personnel decisions, and should not be second-guessed by a reviewing authority, absent evidence of unlawful motivation."

Bell v. Natsios, Administrator, AID, 01A40930 (Aug. 16, 2005). The Commission agreed with the AJ that that 2 issues – a letter of reprimand and placement in an AWOL status – were discrete actions under Morgan "which cannot be considered to be part of a continuing violation claim because they were untimely brought to the attention of an EEO counselor." Nonetheless, the Commission determined that it would "consider them as background evidence in support of complainant's harassment claim."

Bena v. Potter, Postmaster General, United States Postal Service, 01A33825 (May 19, 2004). Where complainant contacted an EEO counselor on January 31, 2003, regarding incidents of alleged harassment that occurred on that date as well as similar incidents in June and July 2002, the Commission held that the agency should not have dismissed the earlier incidents for untimely contact because a "complainant alleging a hostile work environment will not be time barred if all acts constituting the claim are part of the same unlawful practice and at least one act falls within the filing period", with the Commission citing to National Railroad Passenger Corp. v. Morgan, 122 S. Ct. 2061 (June 10, 2002)).

Bergman v. Potter, Postmaster General, United States Postal Service, No. 01A61204 (May 26, 2006). The Commission held that complainant's allegation that he was not accommodated for his back surgery was a claim of a recurring violation, which is a violation each time as the employee continues to need it, and reversed the agency's dismissal of the denial of reasonable accommodation complaint as untimely and failing to state a claim. Complainant alleged discrimination on multiple issues, including being forced to work next to his ex-wife and when he was not accommodated for his back surgery. The agency dismissed the complaint as untimely and failing to state a claim. The Commission affirmed the dismissal of the other issues, but reversed the agency's dismissal of the alleged failure to accommodate complainant's back surgery. The Commission stated: "Regarding complainant's reasonable accommodation claim, we find that complainant contends that he made several requests for a lighter route, as a reasonable accommodation, but that management ignored his requests. This claim must be characterized as a recurring violation. Specifically, the EEOC's Compliance Manual, Section 2, 'Threshold Issues,' p. 2-73, EEOC Notice 915.003 (July 21, 2005), provides that 'because an employer has an ongoing obligation to provide a reasonable accommodation, failure to provide such accommodation constitutes a violation each time the employee needs it.' Furthermore, the

Commission has specifically held that the denial of a reasonable accommodation constitutes a recurring violation that repeats each time the accommodation is needed. See Harmon v. Office of Personnel Management, EEOC Request No. 05980365 (November 4, 1999). Therefore, viewed as a recurring violation, we find that complainant's EEO Counselor contact is timely as to his reasonable accommodation claim, and that the agency improperly dismissed it. Moreover, complainant's reasonable accommodation claim renders him aggrieved in a term, condition, or privilege of employment, and sets forth a cognizable claim. We find that the agency improperly dismissed it under the alternative grounds of failure to state a claim. See 29 C.F.R. §§ 1614.103, .106(a); Diaz v. Department of the Air Force, EEOC Request No. 05931049 (April 21, 1994)."

Coddington v. Potter, Postmaster General, United States Postal Service, 01A40149 (Jan. 9, 2004). Because the alleged failure to accommodate the complainant continued through the date she sought EEO counseling, the agency improperly dismissed her complaint as untimely filed.

Johnson v. Dominguez, Acting Secretary, Department of the Air Force, 01A53567 (Sept. 26, 2005). The Commission reversed the agency's dismissal of the complainant's claim of age discrimination, interpreting it as a continuing violation and timely under Morgan.

McCrae v. Gutierrez, Secretary, Department of Commerce, 01A53762 (Sept. 9, 2005). Because at least one incident of alleged disparate pay occurred within the time limits for bringing the claim, the complaint was timely. Complainant alleged that she was subjected to discrimination on the basis of sex (female) when the agency paid three male construction managers higher wages for performing the same duties that she performed.

McGreevy v. Potter, Postmaster General, United States Postal Service, 01A43361 (Oct. 29, 2004). The Commission reversed the agency's dismissal for failure to state a claim and untimeliness, finding instead that the agency misdefined the complaint, fragmenting it into two separate claims and failed to seek clarification from the complainant. (See Procedures, Fragmentation for full summary).

Miller v. Johnson, Acting Secretary, Department of the Navy, 01A30879 (February 23, 2004). In sustaining the agency's dismissal of two claims for untimeliness, the

Commission observed that "the continuing violation theory is not applicable here because actions such as promotions and demotions are considered 'discrete actions,' such that a complainant should suspect discrimination at the time of occurrence, and thus are not amenable to analysis as a continuing violation. See National R.R. Passenger Corp. v. Morgan, 122 S. Ct. 2061 (2002)."

Moore v. Potter, Postmaster General, United States Postal Service, 01A34361 (February 19, 2004). As to one of the claims – a claim that complainant was not reasonably accommodated – the Commission reversed the agency's dismissal based on untimeliness; in cases involving the denial of a reasonable accommodation, the violation recurs each day that the agency fails to provide the requested accommodation.

Palombo v. Potter, Postmaster General, United States Postal Service, 01A54261 (Oct. 12, 2005). In reversing the agency's dismissal of this disability discrimination complaint for untimeliness, the Commission noted "that a failure to accommodate may constitute a recurring violation, that is, a violation that recurs anew each day that an employer fails to provide an accommodation. See Mitchell v. Department of Commerce, EEOC Appeal No. 01934120 (March 4, 1994)."

Valdez v. Ridge, Secretary, Department of Homeland Security, 01A33985 (Apr. 6, 2004). Relying on National Railroad Passenger Corp. v. Morgan, the Commission found that the agency erred in dismissing the complainant's claim as untimely. The complainant worked as a Customs Inspector. As interpreted by the Commission, he alleged that the Assistant Port Director made continuous age discrimination remarks and stereotyped "older inspectors" as less productive than younger inspectors, also alleging that the harassment occurred between March 2000 through July 2002 and that he did not reasonably suspect discrimination until March 2002, when he was informed of the Assistant Port Director's alleged comment. In finding that the alleged acts were timely under Morgan, the Commission observed that "The Supreme Court of the United States has held that a complainant alleging a hostile work environment will not be time barred if all acts constituting the claim are part of the same unlawful practice and at least one act falls within the filing period. See National Railroad Passenger Corp. v. Morgan, 122 S.Ct. 2061 (June 10, 2002). In the present case, we find that complainant's complaint consists of one claim that he was subjected to a hostile work environment. Complainant is not alleging any discrete acts of discrimination. This harassment claim was timely

raised with an EEO Counselor, because the alleged incidents of harassment occurred through the time he contacted an EEO Counselor on April 30, 2002. Furthermore, we find that the incidents of alleged harassment are sufficiently severe and pervasive so as to state a claim of harassment."

Witzig v. Thompson, Secretary, Department of Health and Human Services, 01A31398 (Feb. 5, 2004). Agreeing with the agency's dismissal for untimeliness, the Commission found that the non-selection was a discrete act, not part of any alleged pattern of harassment, citing to National Railroad Passenger Corp. v. Morgan, 122 S.Ct. 2061 (June 10, 2002).

VI. Claims that No "Reasonable Suspicion" until Later

Caldwell-Ewart v. Powell, Secretary, Department of State, 01A41512 (Apr. 15, 2004). The Commission affirmed the agency's dismissal of the complaint for untimely EEO contact, where complainant failed to contact an EEO counselor within 45 days of the alleged discriminatory event and complainant's sole justification for her failure was that she did not realize that she may have a legal claim of discrimination under the Rehabilitation Act until a friend sent her an article on a similar situation. On March 14, 2003, Complainant was denied medical clearance for worldwide availability for foreign service employment and, on June 9, 2003, her request for a waiver was also denied. Complainant asserted that she developed a reasonable suspicion of discrimination on September 8, 2003, when she read an article given to her by a friend, and she contacted an EEO counselor on September 9, 2003. However, complainant failed to provide adequate justification for extending the time limit.

Levels-McDavid v. Chao, Secretary, Department of Labor, 01A40344 (Apr. 29, 2004). The Commission affirmed the agency's dismissal for untimely EEO contact because complainant provided insufficient justification for her failure to contact an EEO counselor within 45-days of learning of her nonselection for promotion to two positions. Complainant argued that although she learned of the nonselections on November 8 and 29, 2002, she obtained additional information to support her suspicions of discrimination on January 15, 2003 and January 29, 2003, thereby making her EEO counselor contact on January 29, 2003 timely. Specifically, with regard to one vacancy announcement, the agency had asserted that its pool of

applicants was too small; complainant asserted that she later learned of another vacancy that was filled from a smaller pool. From these facts, the complainant inferred that the agency conspired to prevent her promotion. The Commission found this argument insufficient to warrant extension of the time requirement.

Rivera v. Potter, Postmaster General, United States Postal Service, 01A41559 (Apr. 26, 2004). The Commission reversed the agency's dismissal for untimely EEO contact, finding that complainant contacted the EEO counselor within 45-days of learning that another employee was granted the reassignment he was denied. The Commission noted that although complainant requested reassignment on September 16, 2002, and was notified on October 23, 2002, that his request for reassignment was placed on a list of pending requests, complainant did not learn until early March 2003 that another employee was granted the reassignment he requested. He contacted an EEO counselor on March 28, 2003, which was within 45 days of learning of the reassignment. In addition, the Commission noted that the record contained a letter dated June 26, 2003—after complainant contacted the EEO counselor—that his request was denied. The Commission remanded the complaint, which alleged discrimination on the basis of sex - a female was reassigned in lieu of complainant, a male - for processing.

Scott v. Rumsfeld, Secretary, Department of Defense, 01A30846 (Mar. 3, 2004). The Commission reversed the agency's dismissal for untimely EEO counselor contact; although complainant learned on March 16, 2002 that he was not selected for the position of Supervisory Quality Assurance Specialist, and he contacted an EEO counselor on May 15, 2002, he did not discover that his nonselection might be due to discrimination until April 30, 2002, when he first learned that the person selected for the position had less than one year of experience as a Quality Assurance Specialist. Because the time limitation period commences when a complainant has a "reasonable suspicion" that discrimination occurred and complainant first developed his reasonable suspicion on April 30, the Commission held that the EEO contact on May 15 was timely and remanded the complaint for processing.

Swanigan v. Potter, Postmaster General, United States Postal Service, 01A33469 (Mar. 31, 2004). The Commission reversed the agency's dismissal for untimely EEO counselor contact; although complainant was denied a particular limited duty position in February 2002 because the position exceeded his weight limit

restriction, and he contacted an EEO counselor on January 24, 2002, he did not discover that the individual assigned to that limited duty position had a lower weight limit restriction and less time in permanent limited duty status until December 18, 2002. Because the time limitation period commences when a complainant has a "reasonable suspicion" that discrimination occurred and complainant first developed his reasonable suspicion on December 18, 2002, the Commission held that the EEO contact on January 24, 2002 was timely and remanded the complaint for processing. The Commission noted that nothing in the record indicated that complainant had reason to believe that discrimination had occurred, prior to December 18, 2002.

VII. Claims of Fear of Reprisal as an Excuse

Fowler v. Rumsfeld, Secretary, Department of Defense, (Defense Finance and Accounting Service) 01A31683 (Feb. 19, 2004). The Commission found that the agency properly dismissed complainant's sexual harassment complaint against her supervisor for untimely EEO counselor contact, rejecting her claims that the untimeliness was justified based on her fear of retaliation and justified because she suffered the effect of the harassment during the 45-day counselor contact time period. As to the fear of reprisal, the Commission noted,"complainant indicates that she feared reprisal if she pursued an EEO complaint against her supervisor, the Commission has repeatedly held that mere fear of reprisal is an insufficient justification for extending the time limitation for contacting an EEO Counselor." (citations omitted).

VIII. Claims of Incapacitation

Bourgeois v. Potter, Postmaster General, United States Postal Service, 01A45636 (Dec. 8, 2004). The Commission sustained the agency's dismissal of the complaint for failure to file within 15 days; while the complainant was "incapacitated" from performing work (she was on "stress leave' and diagnosed with major depressive disorder), there was insufficient evidence that she was incapacitated to file a complaint.

Frey v. Wood, Chairman, Federal Energy Regulatory Commission, 01A40974 (Mar. 17, 2004). The Commission affirmed the agency's dismissal of the complaint for untimely EEO counselor contact, where complainant retired from her position on August 13, 2002 and did not contact an EEO counselor until May 1, 2003, regarding a hostile work environment that commenced in 1997 and 1998. The Commission here rejected complainant's assertion that her disability (depression) prevented her from contacting an EEO counselor, because the medical documentation did not show that complainant was so incapacitated that she was unable to contact the EEO office within forty-five days of the alleged discriminatory events. Indeed, as noted by the Commission, despite her claimed incapacity, complainant was nonetheless able to engage in the application process for her disability retirement, including writing a seven-page report detailing her health history, how her health problems interfered with her job performance, and other restrictions imposed by her health problems.

Greco v. Potter, Postmaster General, United States Postal Service, 01A31650 (Mar. 19, 2004). The Commission reversed the agency's dismissal for untimely contact with an EEO counselor, finding that an extension of the 45-day time limit was warranted where complainant was under such stress because of his supervisor's harassment that he was unable to contact an EEO counselor, and the record disclosed that complainant was out of work and under a psychiatrist's care between the date of the most recent alleged incident of harassment and beyond the initial contact. A note from complainant's psychiatrist confirmed complainant's assertions.

Guzzo v. Potter, Postmaster General, USPS,(01A42260 April 27, 2005) The Agency incorrectly dismissed an EEO complaint for failure to prosecute from a complainant whose severe depression subsequent to a diagnosis of cancer made it impossible to respond to agency requests for information concerning her EEO complaint. Complainant did not respond to Agency requests for information made on August 8 and September 17, 2003 until October 17, 2003 when complainant requested a 30-day extension, that was granted by the agency. However, when complainant failed to respond after the 30-day period expired the agency dismissed complainant's complaint for failure to cooperate, pursuant to 29 C.F.R. §1614.107(a)(7). The Commission held that the agency's dismissal for failure to cooperate is improper, because the record indicates that complainant was incapacitated to the extent that despite due diligence, she was unable to respond

within the agreed upon time frame. Complainant, after being diagnosed with cancer, was diagnosed by one doctor as "traumatized and overwhelmed in numerous psychiatric ways making it impossible for her to respond within the prescribed time frames." That doctor indicated that complainant remained incapacitated throughout October, November, and December 2003. Another doctor wrote that complainant, after being diagnosed, "suffered from severe depression" and was "unable to handle paperwork." The Commission stated that" "We find complainant has presented adequate justification to warrant extension of the applicable limitation period for cooperating with the agency's request for information. Thus, we find the agency's dismissal improper."

Harris v. Potter, No. Civ. A. 03-3522, 2004 WL 1613578 (E.D. Pa. July 16, 2004). The district court found that the 45 day period for contacting an EEO counselor was tolled due to the plaintiff's debilitating mental illness and that the Postal Service was put on notice of that illness at least 30 days before terminating plaintiff. In sum, the court concluded that the plaintiff was prevented from exercising her rights due to illness.

Leon v. Ridge, Secretary, Department of Homeland Security, 01A34591 (Mar. 12, 2004). The agency properly dismissed the complaint as untimely, where the complainant failed to file his complaint within the 15-day time period after receiving notice of his right to file and he failed to offer adequate justification to extend the time limit. Complaint's request for a waiver based on "personal hardships" was not sufficient. An extension is permitted only when complainant is "so incapacitated by his condition that he is unable to meet the regulatory time limits."

Le v. Potter, Postmaster General, United States Postal Service, 01A55589, (Dec. 22, 2005). While the complainant was diagnosed as having PSTD, there was nothing "in the statements prepared by her psychiatrist which supports complainant's contention that she was so incapacitated during the applicable period as to prevent her from timely contacting an EEO Counselor."

Matthews v. England, Secretary, Navy, 01A40356 (Jan. 10, 2005). The Commission agreed with the agency and found that the complainant failed to demonstrate good cause because of his "deep depression." As stated by the Commission, the complainant did not "provide any evidence to show that he was so physically or emotionally incapacitated as to be unable to make timely EEO

Counselor contact. See Weinberger v. Department of the Army, EEOC Request No. 05920040 (February 21, 1992)."

Sharpe v. Principi, Secretary, Department of Veterans Affairs, 01A41478 (Apr. 15, 2004). The Commission affirmed the agency's dismissal for failure to file a formal complaint within 15 days of receipt of the Notice of Right to File, finding that complainant did not show that she was so incapacitated at the time she received the Notice that she was unable to meet the filing deadline. Complainant contended that she was "in a deranged mental state and it took a while for me to concentrate and for the medication to work." But the Commission noted that the medical documents provided in support of her late filing did not cover the relevant time period and that the documentation indicated that complainant suffered from depression, and that her "prognosis is fair to good." The Commission stated that "an extension is warranted only where an individual is so incapacitated by his condition that he is unable to meet the regulatory time limits."

Tripp v. Potter, Postmaster General, United States Postal Service, 01A52706 (July 19, 2005). The Commission greed with the agency's dismissal of the complaint based on untimeliness; the complainant should have reasonably suspected discrimination by May of 2004, at the latest, but did not initiate contact with an EEO Counselor until October 25, 2004. In making that finding, the Commission rejected the complainant's argument "that her mental condition in 2003 and 2004 was such that she was not capable of determining if a complaint of discrimination existed . . . ." Here, the Commission noted that "We have consistently held, in cases involving physical or mental health difficulties, that an extension is warranted only where an individual is so incapacitated by her condition that she is unable to meet the regulatory time limits. . . . There is insufficient evidence in the record to prove that complainant was so incapacitated that she was unable to assert her rights."

IX. Claims of Attempts to Resolve as an Excuse

Lynch v. Potter, Postmaster General, United States Postal Service, 01A42064 (June 2, 2004). The Commission affirmed the agency's dismissal of the complainant's hostile work environment harassment complaint against her supervisor, because the complainant did not contact an EEO counselor within 45

days of the supervisor's transfer to another position, and rejected the complainant's assertion that the time limit should be tolled for the period during which the complainant sought to resolve the matter through the agency's internal investigation team. The Commission held that the complainant failed to provide adequate justification for extending the time period for contacting an EEO counselor because the complainant did not assert a lack of knowledge of the time limit until the appeal and did not explain why she finally contacted an EEO counselor.

X. Mailing Presumption or Other Mailing Cases

Brumfield v. Potter, Postmaster General, USPS, 01A51880 (April 7, 2005). The Commission found the Agency improperly dismissed complainant's complaint pursuant to 29 C.F.R. § 1614.107(a)(2) for failure to file a formal complaint within 15 days of receipt of her notice of final interview. The agency mailed the notice to complainant presuming complainant received it within five days and found her filing 18 days past the presumed date of receipt to be untimely. On appeal, complainant indicated that she did not receive the notice of final interview until eight days after the presumed receipt date noting that Hurricane Ivan struck her area that week and consequently delayed mail "for several weeks." The Commission found "that complainant has rebutted the agency's presumption that she received the notice of final interview" on the presumed receipt date and remanded the complaint for further processing.

Green v. Potter, Postmaster General, USPS, 05A60234 (Dec. 21, 2005). The Commission denied the agency's request for reconsideration, again determining that the submission was 1 day late and therefore untimely; even though the 5 day presumed receipt of mail fell on a Sunday, the 30 day period for requesting reconsideration is measured from that Sunday and not, as argued by the agency, from Monday, the next business day.

Nazir v. Potter, Postmaster General, United States Postal Service, 01A40328 (Feb. 25, 2004), request for reconsideration denied, 05A40614 (April 14, 2004). In sustaining the agency's dismissal of the complaint for untimely filing of a formal complaint, the Commission applied the presumption that a properly addressed

envelope is received at the proper address when there is a signed certified return receipt, which the complainant did not rebut.

Smith v. Potter, Postmaster General, United States Postal Service, 01A35368 (Jan. 9, 2004). The agency properly dismissed the complainant's formal complaint as untimely, using the postmark date (May 28) rather than the private postage meter strip date (May 29). The Commission also concluded that the complainant provided no basis for equitably tolling the time limit.

XI. Time Period Tolled

Ulmer v. Potter, Postmaster General, United States Postal Service, 01A45073 (Nov. 16, 2004). The Commission reversed the agency's dismissal for untimely failure to seek EEO counseling; while the complainant reasonably suspected discrimination in December 2003 and ordinarily would have had until mid-January 2004, in which to timely contact an EEO counselor, he was deployed on active duty to Turkey with his National Guard squadron from December 16, 2003, until February 13, 2004 and the time period was tolled during the dates of the deployment.

Lovell v. Gonzales, Attorney General, Department of Justice (FBI), No. 01A41642 (May 26, 2006). The Commission held that the agency discriminated against complainant on the basis of disability (monocular vision) when it withdrew a conditional offer of employment as a Special Agent with the Federal Bureau of Investigation (FBI), holding that complainant was an individual with a disability because, though he was able to compensate for his monocular vision, this did not substantially mitigate his diminished depth perception and field of vision, and the agency had not proven a "direct threat" defense. In the course of applying for a position as an FBI Special Agent, complainant disclosed the fact that he has no vision in his right eye – "monocular vision." Complainant indicated that he uses a variety of visual cues to compensate for his lack of stereopsis (the process of combining two retinal images into one image, through which binocular individuals

gain much of their depth perception), and concomitant decreased depth perception and field of vision. The FBI concluded that complainant was not medically qualified as the absence of vision in his right eye was unacceptable for safe and efficient job performance in the Special Agent position –creating a potentially hazardous situation for himself or other Special Agents during performance of their essential duties. Complainant informed the FBI that, despite the loss of his right eye at age 14, he was the starting quarterback on his junior high school and senior high school varsity football teams; holds a fourth-degree black belt in karate; and consistently scores over 97% in firearms qualification. Nonetheless, the agency issued a final agency decision of no disability discrimination, finding that complainant was not an individual with a disability because of his monocular vision (i.e., that complainant had not proven that he had a substantial impairment of the major life activity of "seeing," as complainant had "compensated for his impairment brilliantly") and, in any event, complaint would be a direct threat to himself or others because of that condition. Complainant appealed to the Commission, which noted that: "While an individual missing an eye has a physiological condition that ordinarily will meet the definition of a disability, consideration of whether complainant's impairment substantially limits or significantly restricts his ability to see must necessarily include any mitigating measures used by complainant to reduce the impact of his impairment. See Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 567 (1999) (individuals with monocular vision must "prove a disability by offering evidence that the extent of the limitation in terms of their own experience, as in loss of depth perception and visual field, is substantial"); also see Sutton v. United Airlines, Inc., 527 U.S. 471, 482 (1999); 29 C.F.R. Part 1630, App. § 1630.2(c) ("The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual"). The Commission finds that complainant has shown that the effects of his impairment on his life render him an individual with a disability. . because complainant has no vision in his right eye, by his account he has a 50 percent loss of peripheral vision (causing a 15 to 20 percent loss of visual field) and lacks stereopsis (causing loss of depth perception). . Complainant's use of sensory cues may compensate for, but does not mitigate, either his diminished depth perception or his diminished field of vision. In other words, while complainant may be assisted in performing visual tasks by the compensating measures he employs, his vision is not improved by them. Because complainant's diminished peripheral vision, field of vision, and depth perception are not

significantly mitigated, complainant's monocularity substantially limits the major life activity of seeing; thus, complainant is an individual with a disability. See Spencer v. Department of the Treasury, EEOC Appeal No. 07A10035 (May 6, 2003), request for reconsideration pending." The Commission concluded that, because complainant met all of the FBI's other job requirements, complainant was otherwise qualified for entrance to the FBI Academy. Cf Ethridge v. State of Alabama, 860 F.Supp. 808 (1994). The Commission also decided that the agency had failed to prove the "direct threat" defense because it did not make an individualized assessment of the alleged risk posed by complainant and, instead, applied a blanket medical qualification without examining the specific application to the complainant. The Commission's rejection of the "direct threat" defense in this case is addressed further at in this section, at IV. Direct Threat; Risk of Harm Defense.

Lovell v. Gonzales, Attorney General, Department of Justice (FBI), No. 01A41642 (May 26, 2006). The Commission held that the agency discriminated against complainant on the basis of disability (monocular vision) when it withdrew a conditional offer of employment as a Special Agent with the Federal Bureau of Investigation (FBI), holding that complainant was an individual with a disability because, though he was able to compensate for his monocular vision, this did not substantially mitigate his diminished depth perception and field of vision, and the agency had not proven a "direct threat" defense. In the course of applying for a position as an FBI Special Agent, complainant disclosed the fact that he has no vision in his right eye – "monocular vision." Complainant indicated that he uses a variety of visual cues to compensate for the decreased depth perception and field of vision caused by his monocular vision. The FBI concluded that complainant was not medically qualified as his monocular vision created a potentially hazardous situation for himself or other Special Agents during performance of their essential duties. Complainant challenged this in a disability discrimination complaint. The agency found no disability discrimination, concluding that complainant was not substantially impaired in his ability to see and, in any event, complainant would be a direct threat to himself or others because of his monocular vision. The Commission concluded that complainant had shown that the effects of his impairment on his life render him an individual with a disability. [This is discussed in greater detail in this section at I. A. 17.] The Commission also decided that the agency had failed to prove the "direct threat" defense. The Commission explained that: "A "direct threat" is a significant risk of substantial harm which cannot be

eliminated or reduced by reasonable accommodation. 29 C.F.R. § 1630.2(r). Where the agency concludes that an individual poses a direct threat as a result of a disability, the agency must determine whether a reasonable accommodation would either eliminate the risk or reduce it to an acceptable level. Id. If no such accommodation exists, the agency may refuse to hire an applicant. Id. In order to exclude an individual on the basis of possible future injury, the agency bears the burden of showing there is a significant risk, i.e., high probability of substantial harm. A speculative or remote risk is insufficient. The agency must show more than that an individual with a disability seeking employment stands some slightly increased risk of harm. Selix v. United States Postal Service, EEOC Appeal No. 01970153 (March 16, 2000). Moreover, such a finding must be based on an individualized assessment of the individual that takes into account: (1) the duration of the risk, (2) the nature and severity of the potential harm, (3) the likelihood that the potential harm will occur, and (4) the imminence of the potential harm. 29 C.F.R. ¶ 1630.2(r). See Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73 (2002); Cook v. State of Rhode Island, Department of Mental Health Retardation and Hospitals, 10 F.3d 17 (1st Cir. 1993). A determination of significant risk cannot be based merely on an employer's subjective evaluation, or, except in cases of a most apparent nature, merely on medical reports. Rather, the agency must gather information and base its decision on substantial information regarding the individual's work and medical history. See Chevron U.S.A. Inc. v. Echazabal, supra; Harrison v. Department of Justice (DEA), EEOC Appeal No. 01A03948 (July 30, 2003) (footnotes omitted)." The Commission concluded that: "The agency's general statements and conclusions are not sufficient to demonstrate that complainant's employment in the position posed a direct threat to safety." As a remedy the Commission ordered that, subject to complainant passing a background check, he was to receive back pay and to be admitted to New Agent training at the FBI Academy.

Mathis v. Nicholson, Secretary, Department of Veterans Affairs, No. 01A40341 (May 31, 2006). The Commission held that an AJ did not abuse his discretion in allowing, with no objection, the telephone testimony of one witness, applying the standards set forth in Louthen v. Potter, Postmaster General, USPS, No. 01A44521 (May 17, 2006) ("Louthen"), quoting Louthen, at footnote 7 of that opinion, as follows: "The Commission promulgated its policy regarding the taking of

telephonic testimony in the future by setting forth explicit standards and obligations on its Administrative Judges and the parties. Louthen requires either a finding of exigent circumstances or a joint and voluntary request by the parties with their informed consent. When assessing prior instances of telephonic testimony, the Commission will determine whether an abuse of discretion has occurred by considering the totality of the circumstances. In particular, the Commission will consider factors such as whether there were exigent circumstances, whether a party objected to the taking of telephonic testimony, whether the credibility of any witnesses testifying telephonically is at issue, and the importance of the testimony given telephonically. Further, where telephonic testimony is improperly taken, the Commission will scrutinize the evidence of record to determine whether the error was harmless, as is found in this case. Sotomayer v. Dept. of the Army, EEOC Appeal No. 01A43440 (May 17, 2006)."

Meza v. Chertoff, Secretary, Department of Homeland Security, No. 01A62862 (June 21, 2006). The Commission affirmed dismissal of an EEO complaint filed after complainant had signed a voluntary withdrawal of his informal EEO complaint, noting that there was no showing of coercion. Complainant told an EEO Counselor that he didn't want to go through the process further and signed a "Withdrawal of Complaint" form that states that he was voluntarily withdrawing his informal EEO complaint and that he was not being coerced to do so. Nonetheless, Complainant, or, more likely, his Union representative, subsequently filed a formal EEO complaint that was dismissed by the agency. In affirming the dismissal, the Commission noted that it "has held that once a complainant has withdrawn an informal complaint, absent a showing of coercion, the complainant may not reactivate the EEO process by filing a formal complaint on the same issue. See Allen v. Department of Defense, EEOC Request No. 05940168 (May 25, 1995) (other citations omitted)." Note that there were at least four other similar cases, all dismissals for individuals who challenged their not being paid under the Foreign Language Award Program as discriminatory.

Peterson v. Gonzales. Attorney General, Department of Justice, No. 07A60040 (May 24, 2006). The Commission found retaliation discrimination, in large part based upon an AJ's finding that a supervisor was not a credible witness. Complainant filed a complaint alleging: (1) race and age discrimination when, in September, 2000, he was hired as a Management Analyst at the U. S. Marshals Service as a GS-13 Step 1

instead of a Step 10; and (2) retaliation discrimination when his supervisor delayed submission of a Quality Step Increase (QSI) until after he left the agency, 11 months later, in August, 2001, denying him the reward. An AJ found no discrimination as to (1) but found retaliation discrimination as to (2). The agency rejected the finding of discrimination and complainant appealed to the Commission, which reversed the agency. The Commission noted that complainant established a prima facie case of reprisal discrimination by establishing a nexus between his EEO participation in June, 2001 and his supervisor's decision to delay the QSI. The Commission also found that complainant had proven the agency's suggested reasons for the delay to be pretextual, largely based upon the AJ's credibility determination – the AJ found the supervisor's "testimony to be 'evasive' and noted that S1's 'memory was wanting' about many key dates regarding the delayed QSI." The Commission explained that: "An AJ's credibility determination based on the demeanor of a witness or on the tone of voice of a witness will be accepted unless documents or other objective evidence so contradicts the testimony or the testimony so lacks in credibility that a reasonable fact finder would not credit it. See EEOC Management Directive 110, Chapter 9, § VLB. (November 9, 1999)."

Vara v. Chertoff, Secretary, Department of Homeland Security, 01A52119 (June 7, 2006). The Commission affirmed, in a summary manner, the agency's final order finding no national origin or reprisal discrimination (an EEOC Administrative Judge had issued summary judgment in favor of the agency), citing the allegations – non-selection, denial of a Quality Step Increase, an involuntary reassignment, attempting to discredit complainant's performance as District Counsel – and then simply stating that the Commission has review the record and concluded that complainant failed to prove that the agency's articulated reasons for its actions were a pretext for prohibited discrimination. The Commission stated: "Accordingly, the Administrative Judge's issuance of a decision without a hearing was appropriate and a preponderance of the record evidence does not establish that discrimination occurred."

Wade v. Gonzales, Attorney General, Department of Justice, No. 07A60057 (May 9, 2006). The Commission required the Bureau of Prisons to provide 16 hours of training to all supervisors and 8 hours of training to all other employees at a facility based upon one supervisor creating a

hostile work environment for an employee based upon her pregnancy, rejecting the agency's assertion that the training requirement was too broad in scope. An AJ found that complainant, a health technician working for the Bureau of Prisons in Lexington, Kentucky, proved hostile environment sex discrimination when agency supervisors failed to take action in response to complainant's assertion that she was being subjected to a hostile environment by an agency supervisor based upon her pregnancy. The AJ awarded complainant $30,000 in compensatory damages and as a "preventative measure, the AJ also ordered the agency to provide training designed to ensure that the 'supervisors, managers, and employees' at complainant's facility understand their obligations, rights, and responsibilities under the civil rights statutes, so as to ensure that individuals who are pregnant are protected against unlawful harassment." The agency accepted all of the AJ's decision except for the training requirement, which it appealed to the Commission. The Commission stated that: "Pursuant to 29 C.F.R. § 1614.501 (a)(2), to remedy a finding of discrimination, the Commission may order the agency to provide full relief, to include corrective, curative or preventive actions to ensure that violations of the law similar to those found will not recur. Based on this regulatory authority, it is well established that the Commission may properly order an agency to provide relevant EEO training to employees as a measure to prevent future occurrences of discrimination. See Wild v. Department of Defense, EEOC Request No. 05 Al 0058 (March 16, 2001). We advise the agency that the purpose of such training is not to punish individuals for past discriminatory conduct, but rather, it is meant to educate employees concerning the requirements of the law in order to avoid future violations." The Commission assumed that the agency was appealing the broad nature of the training requirement. The Commission noted that the offending agency supervisor's "conduct toward complainant was observed by many witnesses, including supervisors, managers, and co-workers. However, no one took any measures whatsoever to address this situation, which took place frequently, over a period of many months. Moreover, record evidence reflects that the (offending supervisor's) treatment of complainant was generally well known at this facility, and yet it continued unabated. Therefore, it appears that the staff at this facility may have been unaware that this treatment of complainant by RMO was unlawful under the Pregnancy Discrimination Act, 42 U.S.C. 2000e(k) (1978), and constituted sex-based harassment. As such, we find that the AJ properly

issued an Order under 29 C.F.R. § 1614.501(a)(2), to require that all personnel at complainant's facility receive pregnancy-based EEO/anti-harassment training. See Horken v. U.S. Postal Service, EEOC Appeal No. 01976837 (April 6, 2000). Finally, while we find that the AJ did not specify the number of hours for this training, we will specify the number of hours in the Order that follows." In that Order the Commission directed the agency to "provide 16 hours of EEO training, with a focus on the Pregnancy Discrimination Act and the agency's anti-harassment policy, to all supervisors and managers at complainant's facility" and that: "All other personnel currently working at the facility are to receive 8 hours of EEO training, explaining rights and obligations under the Pregnancy Discrimination Act, and the agency's anti-harassment policy."