

U.S. Equal Employment Opportunity Commission EXCEL Conference 2009

EEO Case Law Update

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

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Recent Findings of Discrimination & Decisions of Interest

Retaliation

Supreme Court Case

Protected Activity Defined:

Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee, 129 S.Ct. 846 (January 26, 2009).

In this case, the employer began looking into allegations that one of its supervisors had sexually harassed an employee. The employer asked the petitioner whether she had witnessed any inappropriate behavior, and she described several instances of sexually harassing conduct. The employer took no action against the alleged harasser, but terminated the petitioner soon after finishing its investigation. Petitioner subsequently filed a claim of retaliation. In a unanimous decision, the Supreme Court held that Title VII's anti-retaliation provision extends to an employee who speaks out about discrimination not on her own initiative, but in answering questions during the employer's internal investigation.

EEOC Cases

Marilyn M. Howard v. USPS, EEOC Appeal No. 0720060026 (May 2, 2008).

The Commission affirmed the Administrative Judge's finding that complainant was subjected to reprisal and a hostile work environment. Despite the fact that two years had passed since complainant's prior EEO activity, the record as a whole reflected a retaliatory motive against complainant. Specifically, the responsible official took a special interest in complainant after she accused him of creating a hostile work environment, and purposely stayed apprised of issues concerning complainant even after she left his supervision. Further, the official made it a point to be actively involved in the adverse actions cited in the complaint. The Commission also affirmed the finding that complainant was subjected to hostile work environment harassment based upon her race, national origin, color, and prior EEO activity. The evidence showed the conduct was severe and pervasive. The agency was ordered to purge complainant's records of a letter of warning and performance improvement plan reference, and pay complainant \$50,000 in proven compensatory damages.

John J. Ingham v. Homeland Security, EEOC Appeal No. 0720070034 (June 17, 2008).

The Commission affirmed the Administrative Judge's finding of retaliation when the agency published a news article revealing that complainant and five other district directors had engaged in EEO activity. Despite the fact that complainant's EEO case was still pending, and that the article revealed that complainant had engaged in EEO activity, the agency published a summary of the news article, citing its sources, in a widely distributed agency digest that same month. The Commission concluded that the agency's "re-publication" of the news article constituted the type of activity that is reasonably likely to deter complainant or others from engaging in protected activity. The issues of compensatory damages and attorney's fees were remanded to the agency.

Glenda Ashford v. Department of Army, EEOC Appeal No. 0120082461 (August 26, 2008).

The Commission affirmed an AJ's finding that complainant was unlawfully retaliated against for engaging in prior protected EEO activity when she was not selected for the position of Senior Plan Formulation Specialist. The agency was ordered to retroactively place complainant in the position with an appropriate back pay award. In addition, the Commission affirmed the AJ's award of \$20,000 in compensatory damages, EEO training and the posting of a notice.

Henry Minor v. USPS, EEOC Appeal No. 0120064925 (September 25, 2008).

The Commission found that complainant was subjected to retaliation. Complainant alleged that the agency discriminated against him on the bases of race (Asian) and reprisal for prior protected EEO activity under the Rehabilitation Act when, among other things, on February 3, 2005, complainant's supervisor (S1) rescheduled his appointment with an EEO Counselor, told complainant that he would just have to miss the meeting, and refused to advise him of the change. Complainant requested a hearing before an EEOC Administrative Judge (AJ), and the AJ granted the agency's request for summary judgment and found no discrimination as to all issues. The Commission reversed the finding of no discrimination as to the above claim. We determined that complainant suffered unlawful retaliation when his supervisor interfered with his EEO activity inasmuch as S1 rescheduled the appointment with the EEO Counselor without asking complainant, did not initially have any information for complainant regarding when the new appointment would be, and told complainant that he would just have to miss his EEO appointment. We found that these actions were likely to deter future protected activity. The agency was ordered to: conduct a supplemental investigation regarding entitlement to compensatory damages; provide training to the manager involved; and consider discipline against the manager.

Kalee Medrano v. Homeland Security, EEOC Appeal No. 0120071480 (September 30, 2008), request for reconsideration denied, EEOC Request No. 0520090007 (October 23, 2008).

The Commission found that complainant was subjected to reprisal when the Officer in Charge discussed her EEO complaint and solicited testimony from other employees. The record showed that the Officer in Charge told personnel in the office that complainant had filed an EEO complaint and solicited testimony. The Commission stated that such behavior is reasonably likely to deter protected EEO activity, and constitutes reprisal discrimination. The agency was ordered to conduct a supplemental investigation with regard to compensatory damages, and provide training to the named management official.

Helen Payne v. Department of Veterans Affairs, EEOC Appeal No. 0720080053 (October 27, 2008), request for reconsideration denied, EEOC Request No. 0520090141 (January 13, 2009).

Complainant worked in the telephone scheduling unit at an agency facility. During a conversation, a caller made a reference to "you people." Complainant inquired as to what the caller meant, and explained that the phrase could be used in a racially derogatory manner. The caller subsequently reported complainant, who received a five-day suspension for the incident. Complainant filed a formal EEO complaint alleging that she had been subjected to reprisal with regard to the suspension. The Commission initially noted that the manner in which an individual protests perceived employment discrimination must be reasonable in order for the anti-retaliation provisions to apply. There was no evidence in the record that complainant did not fulfill her major job duty of rescheduling the caller's appointment, nor was there evidence suggesting that

the rescheduling was not done in an accurate and timely manner. While the agency contended that complainant's reaction was "extreme and unwarranted," the Commission found that complainant inquired about the comment in a reasonable manner. While one co-worker stated that she heard complainant raise her voice, another co-worker did not make such an observation, nor did the employee who subsequently spoke with the caller about the matter. Complainant testified that she was not rude or disrespectful, and gave the caller a chance to explain what he had meant by the comment. The Commission ordered the agency to remove and expunge the suspension, and pay complainant back pay.

John Donahue v. Department of Justice, EEOC Appeal No. 0120073680 (February 26, 2009). Complainant filed a formal EEO complaint, and ultimately requested an administrative hearing. The record showed that, during a training session, an agency manager made statements that employees had the right to challenge his recent assignments, and "could file grievances or EEO complaints, but they will lose." The manager acknowledged making the statements. The Commission found that the statements violated Title VII, as they were likely to have a chilling effect and deter employees from exercising their EEO rights. The agency was ordered to provide training for the named manager.

Greg R. Weldon v. USPS, EEOC Appeal No. 0720090017 (March 18, 2009). Complainant alleged that the agency subjected him to reprisal when it denied him reasonable accommodation and required him to ignore his physician's treatment recommendations. Complainant's physician recommended that complainant be allowed to elevate and rest his feet for approximately 2 hours each day. The agency initially allowed him to work a modified schedule, such that he was able to go home for a break, but still work eight hours per day. A new supervisor, however, subsequently reduced his hours. The Commission noted that complainant's physician stated that he could elevate his feet while seated at work, and the agency's medical unit physician concurred with the recommendation. Nevertheless, the agency never informed complainant that he could take a two hour break at work. The Commission found substantial evidence in the record to show a nexus between complainant's prior EEO activity, and the agency's failure to advise complainant that he could take a break. The agency was ordered to allow complainant to return to his position pursuant to the terms and conditioned outlined by the medical unit, pay him appropriate back pay, and pay him \$14,000 in proven nonpecuniary compensatory damages.

Direct Evidence

Joseph J. Mulvaney v. USPS, EEOC Appeal No. 0120071617 (October 9, 2008). Complainant, who had filed a previous EEO complaint, requested consideration for a transfer to another facility. The Manager subsequently sent complainant a letter stating "I understand this is in litigation through the EEO process; therefore I will wait for the results of that process for action, if necessary." Complainant then filed a second EEO complaint alleging that he was subjected to reprisal discrimination. On appeal, the Commission found that the statement was direct evidence of reprisal. The Manager acknowledged that he made his determination because a separate request for a transfer was pending in the EEO process. The Commission determined that the statement demonstrated a connection between complainant's prior EEO activity and the denial of the request at issue. While the agency asserted that the request was merely pending, the Commission found that the inaction was effectively a denial of complainant's request, and there

was nothing in the record showing that a decision was ultimately made. The Commission found that the Manager's action was reasonably likely to have a chilling effect on protected EEO activity. The agency was ordered to offer complainant the position he was seeking, and investigate his claim for compensatory damages.

Daniel L. Chambers v. Department of the Treasury, EEOC Appeal No. 0120064530 (February 27, 2009). The Commission found that complainant was subjected to reprisal when he was issued a three-day suspension. The Commission stated that actions and statements by management reflected a retaliatory attitude toward complainant. The suspension letter specifically referred to several instances of protected EEO activity, including filing a complaint with the Diversity and Equal Opportunity Advisory Committee, and complainant's opposition to alleged disability discrimination and harassment. The Commission found that complainant's actions constituted protected activity, and that complainant was clearly opposing what he believed, in good faith, to be discriminatory treatment. The Commission concluded that, because the suspension letter specifically cited complainant's protected activity, complainant had provided direct evidence that the suspension was based on a retaliatory animus. The agency failed to show that it would have taken the same action absent the discrimination. The agency was ordered to rescind a charge of absent without leave, and restore all pay and benefits to complainant, as well as expunge all references to the suspension, the proposed suspension, and complainant's failure to attend a meeting.

Race Discrimination

Supreme Court

Ricci v. DeStefano, 129 S. Ct. 2658 (June 29, 2009).

The plaintiffs, 17 White firefighters and one Hispanic firefighter sued the city of New Haven, Connecticut and city officials, alleging race discrimination when the city violated Title VII by refusing to certify results of promotional examination, based on the city's belief that its use of results could have disparate impact on minority firefighters. In a 5-4 decision, the Supreme Court held that Title VII prohibits an employer from discarding the results the results of a promotion test that has a racially disparate impact unless the employer can demonstrate a strong basis in evidence to believe that relying on the results would subject the employer to disparate impact liability.

EEOC Cases

Myron Hayes v. USPS, EEOC Appeal No. 0120070965 (January 3, 2008).

The Commission affirmed the Administrative Judge's finding of race (African-American) discrimination when complainant was terminated during his probationary period. The agency asserted that complainant was terminated for poor performance. The Commission noted, however, that complainant did not receive the proper training to meet expectations. Uncontroverted testimony showed that complainant, the only African-American probationary employee at the facility in the last 10 years, was given only 50 days of on-the-job training while every white probationary employee was given a full 90 days of training. The Commission also found it disturbing that the only African-American employee at the facility and the Assistant Union Steward were told not to talk to complainant. The agency was ordered to reinstate

complainant, pay \$28,372.26 in back pay, with interest, and pay \$9,375 in attorney's fees and costs.

Pamela Scott v. USPS, EEOC Appeal No. 0720070044 (March 18, 2008).

The agency appealed from an Administrative Judge's finding that it discriminated against complainant on the basis of race (African-American) when she was terminated as a city carrier during her probationary period prior to her 60-day evaluation. On appeal, the Commission rejected the agency's contentions that complainant's work was deficient, and that the incidents at the facility cited by the Administrative Judge were taken out of context. The Commission determined that the record supported a finding that the agency maintained a racially-hostile atmosphere at the facility, and that complainant did not receive a fair assessment of her performance and was held to a higher standard than both white probationers and permanent employees. Complainant was awarded reinstatement, back pay, compensatory damages, and attorney's fees and costs.

Stanley L. Ferrell v. USPS, EEOC Appeal No. 0120064642 (June 17, 2008).

The Commission found that the agency disparately disciplined complainant based on his race when he was given a Notice of 7-Day Suspension for having an excessive blood alcohol level at work. The Commission determined that complainant established a *prima facie* case of race discrimination even though his first line supervisor was not the same as those of the comparators he identified. The Commission found that it was the second line supervisor who made the decision to discipline complainant as well as the comparators. Thus, complainant and the comparators were similarly situated. The Commission recognized that the agency has the authority to discipline those employees who fail to comply with the agency's prohibition on alcohol use. The Commission found that in this case, however, the agency did so in a discriminatory manner. Complainant received a seven day suspension, whereas neither of the comparators received such severe discipline after their first offense. Given the disparity in the discipline issued to complainant and his comparators, the Commission concluded that complainant's race actually motivated his first and second line supervisors.

Oliver J. Bell III v. Department of the Navy, EEOC Appeal No. 0720080024 (June 25, 2008).

Complainant filed a formal EEO complaint alleging that he was subjected to race (African-American) discrimination when he was not selected for a Traffic Manager position. Following a hearing, an AJ found that discrimination was one of several motivating factors in the nonselection. Specifically, the AJ noted that the selecting panel members improperly discussed and considered the race of complainant and the selectee. Nevertheless, the AJ determined that the panel's recommendation of the selectee as the best qualified candidate was justified and would have been made absent the discrimination. On appeal, the Commission affirmed the AJ's findings. While there was no need for the selection panel to discuss the candidates' race, the record supported the conclusion that the selectee was better qualified and would have been recommended as the top candidate even absent the impermissible discussion. The agency was ordered to pay attorney's fees, which the Commission reduced to reflect those fees directly related to the claim.

Lewis Mallet v. Veterans Affairs, EEOC Appeal No. 0720080058 (January 30, 2009).

The Commission affirmed an AJ's determination that complainant was discriminated against based on his race (black) when not selected for promotion to one of two supervisory housekeeping aide slots. The decision found that the evidence supported the AJ's finding that the selectee and complainant were equally qualified, but rather than promote complainant, the agency discriminatorily withdrew the second slot. The decision further noted that when the selection occurred there were no black supervisory housekeeping aides, and there was testimony from agency employees that black males were routinely denied promotions in the responsible management official's department. The decision ordered the agency to offer to promote complainant to the subject position with all the career ladder promotions he would have received, ordered back pay, EEO training for the responsible agency official, consideration of discipline for the responsible agency official, and posting a notice.

Carl Frazier v. Department of Agriculture, EEOC Appeal No. 0120083270 (June 4, 2009). Complainant alleged he was discriminated against on the bases of race (African-American) and retaliation when not selected for any of four vacant Risk Management Specialist positions. All four selectees were white. The agency found no discrimination and complainant appealed. The Commission found that the agency failed to provide a legitimate, non-discriminatory reason for the non-selection. The agency stated that the selectees were chosen because their skills and qualifications fit the agency's needs. The Commission found that the agency's reasons were not sufficiently clear so that complainant could be given a fair opportunity to rebut the reasons. The Commission also noted that the agency did not produce any rating sheets from the interview panel, and that complainant appeared to possess qualifications similar to the selectees. Thus, the Commission found that the *prima facie* case and complainant's qualifications, combined with the agency's failure to provide a legitimate, nondiscriminatory reason for non-selection, warranted a finding of discrimination. Because of this finding, the decision found it unnecessary to address the retaliation basis. The agency was ordered to place complainant in the Risk Management Specialist position with back pay and consideration of compensatory damages, provide EEO training to responsible agency officials, consider discipline for responsible agency officials, pay attorney's fees, and post a notice.

Sex Discrimination

Supreme Court Case

Pregnancy

AT & T Corp. v. Hulteen, 129 S.Ct. 1962 (May 18, 2009).

Female employees and their union brought Title VII action against employer alleging sex and pregnancy discrimination in connection with the calculation of their pension benefits. In a 7-2 decision, the Supreme Court held that an employer does not violate the Pregnancy Discrimination Act (PDA) by paying pension benefits pursuant to a bona fide seniority plan that provides less service credit for pregnancy leave taken before the enactment of the PDA than for other forms of short-term disability leave.

Court of Appeals

Sexual Stereotyping

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

An unsuccessful applicant for analyst position with Library of Congress's Congressional Research Service (CRS), a male-to-female transsexual who initially had been offered position after interviewing as male, sued Librarian of Congress alleging sex discrimination under Title VII. Prior to starting work, she told her future boss to lunch to explain that she was in the process of transitioning and wished to start work presenting as female. The following day, Schroer received a call from her future boss rescinding the offer, telling her that she wasn't a "good fit" for the Library of Congress. The court held that in refusing to hire Diane Schroer because her appearance and background did not comport with the decisionmaker's sex stereotypes about how men and women should act and appear, and in response to Schroer's decision to transition, legally, culturally, and physically, from male to female, the Library of Congress violated Title VII's prohibition on sex discrimination. The court awarded Schroer a total of \$491,190, including \$183,653 for back pay and benefits, \$300,000 for emotional pain and suffering, and \$7,537.80 for other out-of-pocket expenses that were incurred as a result of the library's discriminatory conduct.

EEOC Cases

Harassment-Sexual

Pamela Weaver v. USPS, EEOC Appeal No. 0120065324 (August 26, 2008), request for reconsideration denied, EEOC Request No. 0520090004 (October 29, 2008).

The Commission found that complainant was subjected to unlawful sexual harassment based on one incident of offensive touching and comments by a co-worker. According to the record, complainant immediately reported the incident to her supervisor, and the co-worker admitted that he acted as complainant claimed. The co-worker received an official discussion and was told to have no further contact with complainant, but was not disciplined for his actions. The supervisor and a manager both testified that they believed it was the other's responsibility to discipline the co-worker. The Commission found that the conduct in question was unwelcome. Further, the conduct, which included simulating a sexual act, was sufficiently severe since it was an extreme violation of complainant's physical person and an inappropriate touching of her intimate body areas. The Commission noted that the official discussion given to the co-worker did not include any sort of admonishment of his behavior or a clear statement that the behavior was inappropriate. Finally, the agency's own policy required that some disciplinary action be taken. The agency was ordered to refer the matter for a hearing on the issue of compensatory damages.

Rhonda G. Henderson v. USPS, EEOC Appeal No. 0120083298 (December 10, 2008).

Complainant alleged that she was subjected to a hostile work environment for a period of 12 years. Complainant stated that male co-workers touched her in an inappropriate manner, kissed her, and made sexually offensive comments. In addition, complainant stated that a supervisor also made offensive comments. Female witnesses corroborated complainant's claim that sexual harassment occurred at the facility. In addition, after complainant reported the harassment to an EEO Counselor, management attempted to dissuade her from filing a complaint. On appeal, the Commission found that complainant was subjected to unwelcome conduct. Complainant

repeatedly reported the harassment to various managers within the agency, yet no action was taken. Thus, the Commission concluded that the agency was liable for the harassment. In addition, the Commission found that complainant was subjected to reprisal when a supervisor asked complainant's co-worker to convince complainant to drop her EEO complaint. The supervisor's request was reasonably likely to deter protected EEO activity. The agency was ordered to investigate complainant's claim for compensatory damages, and provide sensitivity training to employees and managers at the facility.

Stojanka Kessel v. Department of Commerce, EEOC Appeal No. 0120070702 (March 19, 2009). The Commission found that complainant was subjected to harassment based on her sex (female) and denied a promotion. According to the record, complainant was intentionally segregated from her co-workers based on her sex. New employees were told to stay away from complainant and not to talk to her, and co-workers testified that complainant was treated so harshly that they attempted to intervene on her behalf. In addition, complainant's supervisor had a propensity to make sex-based comments whenever complainant had a performance review, and called her a "stupid woman." Complainant and her co-workers reported the harassment to another supervisor on many occasions, but that official failed to take any action. The Commission further found that complainant was subjected to reprisal. According to the record, the second supervisor asked complainant if she realized what a serious thing she had done by filing an EEO complaint, and warned her that if she proceeded, agency attorneys would get involved and she would be considered a troublemaker. The Commission stated that these actions had a chilling effect of the EEO process and were reasonably likely to deter complainant from pursuing her EEO claims. The agency was ordered to pay complainant \$65,000 in proven compensatory damages, and retroactively promote her, with appropriate back pay and benefits.

Wendy Lemons v. Department of Justice (Federal Bureau of Prisons), EEOC Appeal No. 0120081287 (April 23, 2009).

Complainant was the target of a male inmate's indecent exposure on four occasions, culminating in a sexual assault that left her injured and unable to work for weeks. Although complainant immediately reported the inmate's indecent exposure to management, management failed to promptly and appropriately address the brazen indecent conduct toward complainant. The Commission held that the inmate's conduct was severe enough to constitute sexual harassment and the agency failed to demonstrate that it took prompt, effective, and appropriate action to address and correct the inmate's conduct. The Commission rejected the agency's suggestion that its duty to protect employees in this case is somehow reduced by the nature of a prison facility, and found that because the agency failed to keep the harasser away from complainant or properly discipline him, complainant was forced to work with the harasser which culminated in the sexual assault. The Commission ordered the agency to restore leave lost because of the harassment; pay compensatory damages; provide training to all management officials in the facility regarding their Title VII and EEO anti-retaliation responsibilities; consider taking appropriate disciplinary action against the responsible management officials; and post an order at the facility.

Stephanie Woolf v. Department of Energy, EEOC Appeal No. 0120083727 (June 04, 2009). Complainant alleged that she was subjected to sex discrimination by unwanted physical contact by a co-worker, and subjected to retaliation when agency representatives made various statements to her and she was subjected to various agency actions. Complainant appealed to the

Commission upon receipt of the EEOC AJ's finding of no discrimination or retaliation after a hearing. With respect to complainant's unwanted physical contact claim, the Commission reversed the AJ's finding, noting that the AJ credited complainant's testimony with respect to the incident. We also found that the agency response to the incident (an oral warning) was not appropriate for the severity of the incident and the coworker's prior inappropriate conduct toward another female. The Commission also reversed the AJ's finding of no retaliation on a claim that a Labor Management Specialist (L1) stated to complainant that if she filed a sexual harassment complaint it would polarize the office, affect or split the union by its members choosing sides and affect complainant's future. The Commission affirmed the AJ's findings of no discrimination with respect to complainant's remaining claims. The issue of compensatory damages was remanded to the agency. The Commission ordered 8 hours of EEO training for L1 with a focus on retaliation and 8 hours of training on sexual harassment and retaliation for management officials at the facility. The Commission also ordered the agency to consider taking disciplinary action against L1 (the coworker is no longer with the agency) and to post an order.

National Origin Discrimination

Daniel Padilla v. USPS, EEOC Appeal No. 0120063761 (April 8, 2008).

The Commission found that complainant had been subjected to a hostile work environment on a continuing basis over a three-year period because of his national origin (Mexican American), and that the harassment culminated in his removal. The record, including statements of various employees, showed that a supervisor frequently used various slurs toward complainant, and displayed obvious dislike of Hispanic employees. The Commission found that the supervisor's conduct was unwelcome, and was sufficiently severe and pervasive to alter complainant's work environment. In fact, the Commission noted that the harassment was so pervasive that the agency should have had constructive knowledge of the conduct. Finally, complainant was subjected to a tangible employment action when he was terminated. The agency was ordered to offer complainant reinstatement to his position, remove all references to his removal from his personnel records, provide a back pay award, determine complainant's entitlement to compensatory damages, and provide training for the responsible management officials.

Harassment

George DeLos Santos v. Environmental Protection Agency, EEOC Appeal No. 0120061139 (January 11, 2008), request for reconsideration denied, EEOC Request No. 0520080325 (August 4, 2008).

The Commission found that complainant was subjected to a hostile work environment because of his national origin (Hispanic). According to the record, complainant's co-workers made discriminatory comments about his national origin, as well as discriminatory comments toward women and other protected classes. When the harassment was reported to the supervisor, he took no action, and subsequently issued complainant a memorandum of warning. The Commission found that discrimination toward minorities permeated the workforce, and altered the conditions of complainant's employment. Further, many of the offensive comments occurred in front of supervisors immediately after a meeting about EEO issues, yet the agency failed to exercise reasonable care to prevent and promptly correct the harassing behavior. The agency was ordered to ensure complainant was no longer supervised by the responsible official, provide 40 hours of EEO training to managers, provide 40 hours of EEO sensitivity training to

employees, and conduct an investigation into whether complainant is entitled to compensatory damages.

Romulo E. Arcinue v. Department of the Navy, EEOC Request No. 0520051034 (April 15, 2008). The Commission found that complainant was subjected to harassment because of his national origin (Filipino). Specifically, a co-worker addressed complainant using derogatory language and profanity. In addition, two supervisors treated complainant rudely and disrespectfully, and repeatedly gave him “documented discussions.” The Commission noted that the evidence established that the harassment resulted in considerable mental distress to complainant. Further, the Commission found the agency liable for the conduct of the supervisors. In this case, complainant was ultimately removed from the agency. Further, while the agency was placed on notice of the harassment when complainant reported the incidents to upper-level management, the agency failed to show that it exercised reasonable care to prevent and promptly correct the harassing behavior. The agency was ordered to offer complainant reinstatement to his position, with back pay, and pay him \$5,000 in compensatory damages.

Mixed Motives

Lillas Beckford v. Social Security Administration, EEOC Appeal No. 0120061174, (July 17, 2008), request for reconsideration denied, EEOC Request No. 0520080748 (December 8, 2008). Complainant alleged that she was discriminated against on the bases of race (African-American), national origin (Jamaican) and reprisal when she was subjected to harassment and not selected for a Management Assistant position. The AJ issued a partial decision without a hearing finding no discrimination for the harassment claim, and after a hearing issued a decision finding national origin discrimination on the non-selection claim, finding that complainant's accent played a role in her non-selection, but that the agency proved that it would have not selected complainant even in the absence of discrimination. The AJ issued an award \$5,831.60 in attorney's fees and \$65.60 in costs. The agency adopted the AJ's decision and the Commission affirmed the mixed motive finding and agreed that the selectee was more qualified than complainant and would have been chosen even absent national origin discrimination. As a remedy, the Commission awarded attorney's fees and costs, consideration of discipline, posting of a notice, and EEO training.

Religion

Court of Appeals

Religious Accommodation

EEOC v. Southwestern Bell Telephone L.P., d/b/a as AT &T Southwest, and SBC Communications, 550 F.3d 704 (December 19, 2008) The 8th Circuit upheld a jury verdict finding that defendant discriminated against two customer service technicians refused religious accommodations to attend a Jehovah's Witnesses convention. The court also upheld the award of \$765,000 in damages (\$296,000 in back pay and \$460,000 in compensatory damages).

Mixed Motive Analysis

Damita Fulghen v. USPS, EEOC Appeal No. 0120073130 (June 11, 2009).

The Commission affirmed an AJ's finding that the responsible management official (RMO) was motivated, in part, by complainant reading a Bible when she placed complainant off duty and issued her a 14-day suspension. Following a hearing, the AJ concluded that RMO learned from another supervisor that complainant, who was assigned to a remote worksite, was reading her Bible when she should have been working. RMO arrived at the work site with the Postal Police, found complainant reading her Bible, and ordered her to end her tour if she was not going work. Complainant became irate and threatened RMO. RMO thereafter issued a 14-day suspension for the conduct, including specifically the threatening language. Applying a mixed-motive analysis, the AJ concluded that the record supported both legitimate and non-legitimate motives by RMO for placing complainant off the clock (i.e., complainant was not working and was also reading a Bible). With respect to the suspension, the AJ concluded that because the threat was made after RMO had already made her decision to place complainant off duty, such evidence was after-acquired. The AJ also concluded that the preponderance of evidence established that RMO would have taken the same action even if she had not considered the discriminatory factor (i.e., the fact that complainant was reading a Bible) because the record shows that the agency would normally place an employee who makes a threat in a non-duty status. Accordingly, the AJ concluded that while the agency was liable for discriminatory conduct, its liability was limited. On appeal the Commission affirmed the AJ decision and ordered the agency: (1) to provide training to RMO and other responsible management officials; (2) to consider taking disciplinary action against RMO and other responsible management officials; and (3) to post a notice of the finding of discrimination.

Equal Pay Act

Hazel E. Hanley v. Federal Labor Relations Authority, EEOC Appeal No. 0720060033 (June 6, 2008), request for reconsideration denied, EEOC Request No. 0520080677 (September 11, 2008).

Complainant, a GS-13 attorney in agency's Denver Regional Office, alleged that the agency violated the Equal Pay Act (EPA) and Title VII when it paid male attorneys at the GS-14 level more for the same work. After a hearing, an Administrative Judge found the agency violated the EPA and Title VII. Furthermore, the AJ found that the violation was willful, which meant, under the EPA, complainant would be awarded liquidated damages, that is, double the back pay award. The Administrative Judge found that the work performed by complainant and the GS-14 male comparative employee constituted equal work. The agency, on appeal, did not contest the Administrative Judge's finding that complainant and the male comparative GS-14 attorney performed substantially equal work. The agency argued that it had set forth an affirmative defense to the EPA, that the difference in pay was based on a factor other than sex. In Commission, however, found that the job classification system relied upon by the agency was not a *bona fide* merit system. The Commission, as relief, ordered the agency to retroactively promote complainant to the GS-14 level, with back pay, liquidated damages in the amount of the back pay, and attorney's fees and costs.

Age Discrimination

Supreme Court Cases

14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456 (April 1, 2009).

Longstanding employees in commercial office building who were reassigned from positions as night watchmen to less desirable positions as night porters and light duty cleaners, ostensibly because of their age, brought suit against employer and building owners under Age Discrimination in Employment, New York State Human Rights Law, and New York City Human Rights Law. Defendants filed motion to compel arbitration in accordance with collective bargaining agreement. In a 5-4 decision, the Supreme Court held that a collectively bargained mandatory arbitration agreement that includes claims of employment discrimination is enforceable, even though a conflict of interest may exist between the union interests and individuals, concerns for vigorous enforcement of anti-discrimination rights.

Gross v. FBL Financial Services, Inc., 129 S. Ct. 2343 (June 18, 2009).

Employee brought action against employer under Age Discrimination in Employment Act (ADEA), alleging he was demoted because of his age. In a 5-4 decision, the Supreme Court held that a mixed motive jury instruction is never proper under the ADEA. Instead, plaintiffs must show that age was the “but for” cause of discrimination in all circumstances.

EEOC Cases

Disparate Treatment

Steven L. DeForest v. Department of Energy, EEOC Appeal No. 0120070681 (September 30, 2008).

Complainant, a Physical Scientist, applied for a Team Leader position with the agency. Complainant was found to be eligible, but was not selected for the position. The selecting official, who was also complainant’s immediate supervisor, explained that he did not use a ranking or rating plan, and did not review applications. Instead, the selecting official and another consulting official made the selections based on their personal knowledge and experience with the candidates. The selecting official stated that he originally chose complainant for the position based in part on the fact that complainant had previously held the Team Leader position in a temporary capacity. Nevertheless, the consulting official did not support him and believed the selectee should be chosen because he was a “good worker” while complainant was “harder to work with.” On appeal, the Commission noted that the agency conceded that complainant established a *prima facie* case of discrimination. Further, the agency articulated a legitimate, non-discriminatory reason for its action, that is complainant lacked the necessary leadership qualities for the position. The Commission, however, concluded that agency’s stated reason was a pretext for age discrimination. The selecting official referred to complainant as the “strongest Team Leader,” while the selectee had never served as a Team Leader or a supervisor. In addition, the record showed that complainant received high level performance appraisals praising his work and accomplishments, and witnesses testified as to complainant’s superior leadership qualities. The Commission noted that the evidence, taken as a whole, disproved the agency’s claim that complainant lacked leadership skills. Finally, the Commission found that age was a determinative influence on the selection. Specifically, the selecting official stated that he did not feel at liberty to recommend complainant because of age discrimination issues he himself had

with a higher-level official. The agency was ordered to offer complainant a Team Leader or substantially equivalent position, and provide training to all named officials.

Robert E. Johnson v. Homeland Security, EEOC Appeal No. 0120072888 (December 18, 2008), request for reconsideration denied, EEOC Request No. 0520090241 (March 19, 2009).

The Commission found that complainant was subjected to age (67) discrimination when he was not selected for a supervisory position. The selecting official stated that complainant was not recommended for the position. The recommending official noted that he was looking for a writer with good analytical skills who was knowledgeable about the “work we do,” and would be able to represent the agency with the public and other Federal agencies. The recommending official stated that the selectee (35) had a strong background in immigration law, and inspired confidence that he would “represent the agency in the best light.” The recommending official did not feel complainant’s abilities “rose to that level.” On appeal, the Commission found that the agency failed to set forth, with sufficient clarity, the reasons for complainant’s non-selection such that he was given a full and fair opportunity to show pretext. While the recommending official provided various reasons for choosing the selectee, he did not remember complainant’s application when questioned. The record contained no specific information as to how the recommending official believed complainant’s qualifications compared with those of the selectee or why they fell short. The selecting official stated that he made his selection based upon the individuals recommended to him, and could not recall ever reviewing complainant’s application. Thus, the Commission concluded that the record lacked any explanation as to why complainant was not selected for the position or why he was not the best candidate. The agency failed to articulate a legitimate, nondiscriminatory reason for complainant’s non-selection. The agency was ordered to pay complainant appropriate back pay, with interest.

Robert Sinclair v. Homeland Security, EEOC Appeal No. 0720070062 (March 25, 2009). Complainant alleged that he was discriminated against on the bases of age (68) and disability (hearing loss) when not hired to be a Transportation Security Screener in 2002. The AJ issued summary judgment finding no disability discrimination and finding age discrimination. The agency rejected the finding of age discrimination. The disability claim was not appealed to the Commission. On appeal the Commission reversed the agency and found that the AJ properly found age discrimination. The AJ found that nine of the ten people hired were younger than complainant and that the agency did not provide a legitimate, non-discriminatory reason for its selection decision because it failed to show how the selection was made. The decision ordered the agency to place complainant in an entry level TSA position, provide back pay, EEO training, and consider disciplining responsible agency officials. The decision is significant because it involved the relatively rare circumstance where an agency failed to meet its burden of production in a disparate treatment case.

Harassment

John D. Wahnee v. Department of the Interior, EEOC Appeal No. 0120055072 (May 7, 2008). Complainant alleged, among other things, that he was discriminated against on the basis of his age (57) when he was harassed and issued a Letter of Reprimand, in part for not reporting for a detail. According to the record, the responsible management official made comments that complainant needed to retire, asked how old complainant was, and called him “an old fart.” The Commission found that the responsible management official’s age related comments with regard

to complainant's details constituted direct evidence of discrimination. The Commission ordered the agency to expunge the Letter of Reprimand, and provide EEO training to this responsible agency official.

Sally Hamer v. Department of Agriculture, EEOC Appeal No. 0720080061 (January 6, 2009). The Commission affirmed an AJ's decision of age discrimination when a complainant was subjected to a hostile work environment resulting in her forced retirement. The AJ found that the age-based harassment included utilizing a retirement-eligible list to make reductions in the agency's Virginia offices; conducting an unfair review of complainant's office by hand-picking files to be scrutinized during an internal review by the state; launching an unjustified investigation against complainant without informing her; temporarily removing complainant from supervision of an office; and allowing a comparator privileges in complainant's position that complainant was not allowed; and reassigning her 150 miles from her home. The agency was ordered to offer complainant retroactive reinstatement, back pay, training to the relevant management officials, consider disciplinary action, and post a notice of the finding.

Disability

1. *Qualified Individual with a Disability, Disparate Treatment*

Ray Poquiz v. Department of Homeland Security, EEOC Appeal No. 0720050095 (April 11, 2008), request for reconsideration denied, EEOC Request No. 0520080524 (June 19, 2008).

Complainant alleged that he was discriminated against on the basis of disability (vision impairment) when the agency did not hire him for the position of Detention Enforcement Officer. Complainant was found medically ineligible because the vision in his right eye was worse than 20/200. Complainant requested that the agency reasonably accommodate him by waiving the medical qualifications determination and the commercial driver's license requirement. The Commission found that complainant was qualified, because he employed multiple means to compensate for his vision impairment and had successfully participated in shooting competitions. The Commission found that the agency should have waived its vision standard for complainant. The agency failed to make an individualized assessment of the risk posed by complainant and did not show there was a direct threat. The Commission also found that the requirement of a commercial driver's license was pretext for disability discrimination. The complainant was awarded \$9,000 in non-pecuniary compensatory damages and \$46,471 in attorney's fees, and the agency was ordered to place complainant into the position for which he was not selected with back pay, contingent on the results of a current assessment of complainant's present qualifications and abilities.

Christine Dremmel v. Department of Veterans Affairs, EEOC Appeal No. 0720060044 (July 17, 2008).

Complainant alleged that she was discriminated against on the basis of disability (chronic pain) when she was terminated from her temporary position of social worker. After a video hearing, the Administrative Judge found discrimination. The Judge found that the agency regarded complainant as an individual with a disability. According to the record, once the agency discovered that complainant took pain medication, the agency terminated her because the agency

perceived her as a safety threat. On appeal, the Commission found that the Administrative Judge properly determined that the agency regarded complainant as substantially limited in the major life activity of working because she was regarded as unable to do any jobs requiring driving. The Commission found that the agency failed to meet its burden of proving that complainant was a direct threat because it conceded that it erroneously concluded that complainant was unable to drive. The agency also argued that complainant failed to qualify on the OPM certificate for the job. The Commission, however, found that the agency's argument was pretext and concluded that the agency violated the Rehabilitation Act when it terminated complainant. As relief, the Commission ordered back pay, training of managers in EEO law, \$15,000 in non-pecuniary, compensatory damages, and attorney's fees.

2. *Reasonable Accommodation*

William J. Parks v. USPS, EEOC Petition No. 0320070127 (July 29, 2008).

Petitioner, a mail-handler, filed a mixed case complaint alleging that the agency discriminated against him based on disability (diabetes mellitus) when it placed him on enforced leave, and later demoted him by reassigning him to a lower-graded custodial laborer position. Following its investigation, the agency issued a final decision concluding no discrimination occurred. Petitioner appealed the decision to the Merit Systems Protection Board, which upheld the agency's actions, finding, among other things, that petitioner did not show that he was substantially limited in a major life activity, much less was a "qualified" individual with a disability, or that his demotion was involuntary. Therefore, the Board concluded petitioner was unable to establish a violation of the Rehabilitation Act. Petitioner filed a petition for review with the Commission, and the Commission differed with the Board's conclusion that petitioner had not established discrimination on the basis of his disability. The Commission found that the evidence established that petitioner was a qualified individual with a disability as a result of his diabetes, and that the agency denied petitioner reasonable accommodation within the requirements of the Rehabilitation Act. Further, the Commission noted that had the agency acted properly and timely on petitioner's accommodation request for his mail-handler position, it would not have resorted to placing him on enforced leave or in a lower-graded position. The case was remanded to the Board for its consideration and the awarding of relief.

David J. Cruzan v. Department of Defense, EEOC Appeal No. 0120071893 (August 15, 2008).

Complainant, an Intelligence Officer, alleged he was discriminated against on the basis of his disability (hearing impairment) when his request for a full-time sign language interpreter to accompany him on two separate deployments to Iraq was not approved by the agency. On appeal, the Commission concluded that the agency had failed to meet its burden of establishing undue hardship as justification for denying complainant his requested reasonable accommodation. The evidence established that deploying to a war zone was beneficial for career advancement within the agency, and complainant was being denied equal access to this opportunity. As relief, the Commission ordered the agency to provide complainant with a sign language interpreter the next time he is selected for a deployment opportunity and awarded complainant back pay.

Adam Sainz v. Department of the Treasury, EEOC Appeal No. 0720030103 (September 19, 2008).

The Commission found that complainant was subjected to disability discrimination when he was terminated from employment. Complainant, a probationary employee, injured his knee while at work. He underwent surgery, and initially returned to work with certain temporary restrictions. Subsequently, complainant received a letter of termination for “inability to carry out the physical requirements” of his job. The Commission found that the agency regarded complainant as having an impairment that substantially limited the major life activities of lifting, standing, and walking. Further, the evidence supported a finding that the agency viewed complainant’s limitations as being permanent. The record also showed that complainant was qualified for the position, as he had been performing the duties for eight months prior to his injury in a fully satisfactory manner, and was competitively promoted to a higher grade level. The Commission noted that the agency terminated complainant without giving him an opportunity to provide documentation regarding any permanent restrictions. The agency was aware that complainant had an appointment with his physician, and would submit the information within a reasonable period. Nevertheless, the agency terminated complainant prior to receiving that information. The agency was ordered to reinstate complainant, with back pay and benefits, and pay him \$100,000 in proven compensatory damages.

Linda L. Brown v. USPS, EEOC Appeal No. 0720060086 (October 31, 2008), request for reconsideration denied, EEOC Request No. 0520091179 (February 5, 2009).

Complainant, who had previously been diagnosed with Post Traumatic Stress Disorder, was working as an Acting Supervisor when she was informed that a co-worker was suing her for assault. The accusation, which was never substantiated, caused complainant to have a nervous breakdown. Complainant was hospitalized and received various medical treatments. In addition, she was off of work for several periods of time. Complainant ultimately returned to full time work several years later. Complainant alleged that her supervisor verbally harassed her regarding her medical disorder, including telling her that she could be pushing carts at Wal Mart and K-Mart, and assigned her work which aggravated her condition. On appeal, the Commission noted that the agency stipulated that complainant was an individual with a disability. In addition, the record showed that complainant was able to perform the essential duties of her position with reasonable accommodation. The Commission further found that complainant demonstrated that she was subjected to unwelcome conduct. A witness testified that complainant told her about the supervisor’s comment. In addition, the supervisor was aware that complainant was taking medication that would make it difficult to operate certain machines. The Commission found the supervisor’s conduct was severe, interfered with complainant’s conditions of employment, and ultimately resulted in her inability to work for the agency. The Commission also concluded that the agency failed to accommodate complainant when it assigned her to work on certain machines. The Commission ordered the agency to pay complainant back pay, and restore, credit or reimburse complainant for 25 percent of leave used during the period in question. In addition, complainant was awarded \$79,500 in non-pecuniary compensatory damages based upon evidence in the record that the discrimination aggravated complainant’s condition, and caused her to suffer weight gain, extreme fatigue, and weakness, such that she was required to take several medications.

Ryan Long v. Department of Defense (Defense Intelligence Agency), EEOC Appeal No. (April 3, 2009).

Complainant, an Intelligence Officer, alleged that he was discriminated against on the basis of disability (hearing impairment) when the agency denied his request for a full-time sign language interpreter to accompany him on a 180-day deployment to Qatar and an assignment as an acting senior intelligence analyst at the Pentagon. On appeal, the Commission reversed the agency's finding of no discrimination, concluding the agency failed to meet its burden of establishing undue hardship for denying the requested reasonable accommodation. The decision noted that the evidence established that deploying to a war zone, as well as the Pentagon detail, were beneficial for career advancement, and complainant was being denied equal access to this opportunity. The Commission ordered the agency to provide complainant with a sign language interpreter the next time he is selected for a deployment opportunity and awarded complainant back pay, consideration of compensatory damages, and a posting order. Further, the Commission ordered the agency to take necessary steps to ensure that an adequate pool of cleared sign language interpreters is available so agency employees, including those with hearing impairments, are afforded equal access to developmental assignments, details and deployments.

3. *Direct Threat*

Kyle W. Smith v. Department of State, EEOC Appeal No. 0120055349 (January 3, 2008).

The Commission reversed the Administrative Judge's summary judgment decision on complainant's claim that he was discriminated against and not provided a reasonable accommodation when the agency found him not to be qualified for a Foreign Service Officer position. The agency had determined that because complainant was HIV positive, he was medically restricted from world wide placement. The Commission found that genuine issues of material fact existed as to whether the agency made an individualized determination of whether the complainant's HIV status precluded him from performing the essential functions of the position. The Commission found that the agency did not request any further information on his health status, skills, and abilities, nor did it contact him to discuss possible reasonable accommodations for his disability. While the agency proffered voluminous evidence and depositions about the difficulties individuals who are HIV positive may endure in various overseas posts, nothing in the record showed that the agency sufficiently assessed complainant's impairment and associated medical issues to establish that he posed a direct threat to himself and others.

John Reasor v. USPS, EEOC Appeal No. 0720070004 (January 6, 2009).

The Commission affirmed an AJ's finding that the agency violated the Rehabilitation Act by rejecting complainant for a City Carrier position after it determined that he was a threat to himself due to his ankle injury. The AJ found this determination was made without regard to the proper standard required for a direct threat defense, *i.e.*, complainant's medical documentation revealed he could safely perform the duties of a City Carrier. The AJ also found that the agency requested overly-broad medical information from complainant, and utilized an unwritten policy of subjecting veterans to higher scrutiny because of their status as veterans. The AJ awarded relief including an offer of employment, back pay, and training; and provided requirements for future requests for medical information, including that the agency refrain from requesting medical information based on status as a veteran. The Commission modified the AJ's order of

relief, narrowing the training requirement from all employees of the relevant personnel office to those directly connected with complainant's case, and eliminating the provision regarding veteran status, which is outside of the Commission's jurisdiction. The order of personal relief was not modified.

4. *Disability Related Inquiries and Medical Examinations*

Rogelio A. Bernal v. USPS, EEOC Appeal No. 0720080038 (June 17, 2008).

Complainant, who had previously been diagnosed with back pain, sciatica, and lumbar strain, submitted a note from his physician to his immediate supervisor asking that he be excused from work due to an examination for chronic lumbar problems, as well as diabetes, high blood pressure, and depression. Complainant was then told to clock out and go home because the note indicated he was seen for depression. The agency subsequently made several attempts to contact complainant's physician, and complainant remained off of work. After several months, complainant's physician submitted correspondence to the agency diagnosing complainant with adjustment disorder and depression, and the agency's medical director determined that complainant could return to work without limitations. Complainant, however, did not return to work, and later applied for disability retirement. On appeal, the Commission affirmed the Administrative Judge's finding of disability discrimination. Complainant's supervisor and the postmaster testified that they did not believe complainant's medical condition impaired his ability to perform the essential functions of his modified position, or posed a direct threat to the health and safety of complainant or any other employees. Instead, the agency made the inquiry solely because the word "depression" was used by complainant's physician. The agency was ordered to pay complainant all pay and benefits he would have received during the period he was not permitted to return to work.

Roy Spencer v. USPS, EEOC Appeal No. 0120042065 (August 6, 2008).

Complainant, applying for a position as a city carrier, was required to undergo a review of his medical records by an agency physician. After the review the agency characterized complainant as "Moderate Risk/Restriction" and concluded that he would be medically qualified to perform the functions of the position only if certain restrictions could be accommodated. Complainant disputed the agency's medical assessment and submitted additional medical information in an effort to demonstrate that he could perform the duties of without difficulty. Nevertheless, the agency medically disqualified based upon the limitations identified by the medical assessment. On appeal the Commission affirmed the agency's final decision, which, *inter alia*, found that complainant failed to demonstrate that he was an individual with a disability. The Commission noted that because complainant did not claim to have an impairment, he could only proceed under the "regarded as" portion of the disability definition. However, complainant failed to demonstrate that he was regarded as substantially limited in working because he did not prove that the agency believed him to be unable to perform more than one particular job; the carrier position. The Commission found it significant that an agency official had urged complainant to apply for a clerk position that would not have the same requirements, demonstrating that the agency regarded complainant as able to perform other jobs.

Leisha Guilbeaux v. USPS, EEOC Appeal No. 0720050094 (August 6, 2008), request for reconsideration denied, EEOC Request No. 0520080810 (October 15, 2008).

Complainant alleged that she was discriminated against on the bases of age, disability (back injury), and retaliation when she was instructed to go home and change her clothes because she was not in uniform and when she was denied a light duty assignment. The AJ determined that complainant was not aggrieved when she was sent home to change clothes, and found no age or reprisal discrimination for the denial of the light duty assignment. However, the AJ found that the agency failed to accommodate complainant's disability with regard to the light duty assignment and awarded compensatory damages. Both the agency and complainant filed appeals. The Commission affirmed the AJ's findings of no discrimination and finding of disability discrimination, finding that complainant's 15 pound lifting restriction showed that she was substantially limited in the major life activity of lifting. The Commission found that the agency improperly denied complainant's light duty request without making an individualized assessment of her disability and failed to accommodate her lifting restriction in other accommodation offers. The Commission found that there was an absence of substantial evidence to support the AJ's finding that complainant was entitled to compensatory damages. The Commission found that the agency acted in good faith in attempting to accommodate complainant. For relief, the Commission ordered restoration of 93 hours of annual leave, Rehabilitation Act training, consideration of discipline and a posting order.

Willard Grayson v. USPS, EEOC Appeal No. 0720080044 (January 6, 2009).

Complainant worked for the agency as a Custodial Laborer. He noticed a strong odor while mopping the floor, and subsequently reported to his supervisor that he felt sick to his stomach and had a headache. Complainant completed a workers' compensation form, and the agency sent him for a medical evaluation. The examining physician determined that complainant was able to return to full duty; however, he noted that complainant believed he was being retaliated against and possibly poisoned. Several days later, complainant was given a letter by his supervisor advising him to provide medical documentation from his doctor clearing him to return to work. The letter did not specify any medical condition or injury. After complainant submitted a letter from a Licensed Physician Assistant releasing him to return to work, he stated that he was told he needed documentation from a psychiatrist stating that he was not a danger to himself or others before he would be allowed to return to work. Complainant ultimately saw a psychologist, who concluded that he did not appear to be a danger to himself or others. The agency's Medical Unit Director then called the psychologist, and asked complainant to sign a release form so that the report from the initial examining physician could be sent to him. Complainant refused to sign the release, and was given a Notice to Submit Medical Documentation as well as a Notice of Deferred Seven-Day Suspension for failure to follow instructions and being absent without leave. Complainant was ultimately referred for a psychiatric fitness for duty examination.

On appeal, the Commission found that the agency violated the Rehabilitation Act by making a disability related inquiry and not allowing complainant to return to work. While the Commission noted that it was proper for the agency to initially send complainant for a medical evaluation after he filed a workers' compensation form, the Commission stated that the agency had no basis to keep him out of work once the examining physician concluded he was able to return to duty. The Commission noted that there was no evidence that complainant had any problems performing his work or interacting with his co-workers. Further, the agency's response to the

physician's comments about complainant's mental state was extreme and the demands made on him overly burdensome given the circumstances of the situation. The record contained no evidence that complainant engaged in any action that would have led the agency to reasonably believe that he posed a direct threat or could not perform the essential functions of his position. Finally, the agency's Threat Assessment Team itself found that complainant was not a threat. The Commission further found that complainant decided to retire solely because the agency kept him out of work, issued progressive discipline, and considered terminating him. The agency was ordered to offer complainant reinstatement to his prior position, with back pay and appropriate benefits.

Dara Katz v. USAID and State. EEOC Appeal Nos. Lewis & 0720060025 (March 26, 2009).

The Commission upheld an AJ's finding that the agencies discriminated against complainant by denying her a Class 1 Medical Clearance (State) and denying her a waiver of the clearance requirement (USAID). The Commission found that complainant was disabled in the major life activity of eliminating bodily waste. In addition, it rejected the agencies' arguments regarding the proper allocation of the burden of proof. The decision specifically noted that, requiring complainant to establish her worldwide availability would impermissibly alter the burden of proof in light of Commission policy regarding the direct threat affirmative defense. Appropriate relief was granted. The decision is significant because it provides guidance on burden of proof issues arising from agency determinations on "worldwide availability" in the Foreign Service.

Multiple Bases

Race and National Origin

Frederick A. Nyanzi v. Department of Agriculture, EEOC Appeal No. 0120065317 (February 6, 2009).

Complainant filed a formal EEO complaint alleging, among other things, that he was subjected to race (Black) and national origin (African) discrimination when he was not selected for a supervisory position. The selecting official, a Director and another Supervisor interviewed the five candidates on the promotion certificate. Subsequently, the selecting official independently selected the top three candidates. The selecting official then met with the other two interviewing officials, at which time they discussed the three candidates and came up with the traits of an effective supervisor. The selecting official alone selected another candidate (Asian-American, Caucasian) for the position. On appeal, the Commission found that the agency failed to articulate a legitimate, non-discriminatory reason for its action. The evidence of record showed that complainant appeared similar to or better qualified than the selectee. In addition, the selecting official made only vague statements as to why he made his selection. The Commission further noted that the records of the selection process were missing, and there was no reliable documentation explaining the method used by the selecting official to rank the applicants. The record also contained no information concerning the leadership traits developed by the selecting official and the interviewers, or how the candidates were evaluated in relation thereto. The Commission noted that, with regard to claims of non-selection, the EEOC Regulations require that personnel or employment records be kept by the employer for a period of one year. In addition, the agency is required to preserve all personnel records relevant to a claim of discrimination until the disposition of the claim. Thus, the Commission found that complainant

was subjected to discrimination based on his race and national origin. The agency was ordered to offer complainant the position, or a substantially equivalent position, with back pay and benefits.

Brenda Yee v. Department of the Interior, EEOC Appeal No. 0120061381 (July 11, 2008).

The Commission found that the agency discriminated against complainant on the bases of her national origin (Asian) and race (Asian) when it did not select her for one of two Human Resources Assistant positions. The Commission found that complainant established a *prima facie* case of race and national origin discrimination when the agency selected two individuals outside of complainant's protected classes. The Commission further found that the agency failed to articulate a legitimate, nondiscriminatory reason with sufficient clarity such that complainant was afforded the full and fair opportunity to demonstrate that the reason was a pretext for discrimination. Specifically, the selecting official merely stated that she selected the two candidates who were best qualified for the position and who could be trained. The selecting official failed to offer any further clarification as to what specific qualities made those individuals better qualified or more trainable than complainant. Additionally, the Commission found that the record completely lacked any explanation as to why complainant was not selected for the position or why she was not the best candidate. Since the Commission found that the agency failed to provide an articulation of its reasons for not selecting complainant for the positions sufficient to overcome complainant's *prima facie* case of race and national origin discrimination, the Commission concluded that complainant established by the preponderance of the evidence that she was discriminated against on the bases of her race and national origin. The Commission ordered the agency to offer complainant a Human Resources Assistant position, provide training for the responsible management officials, and investigate the issue of compensatory damages.

Song Sibell v. USPS, EEOC Appeal No. 0720080020 (April 16, 2009/April 16, 2009).

Complainant, a mail processing clerk whose first language is not English, alleged that she was made to work outside of her medical restrictions by working on a machine that required her to sort mail and reach overhead for containers, and terminated because of her race (Korean-Asian) and national origin (Korean). Complainant was confronted by a supervisor when she demonstrated difficulty accomplishing her tasks. As the confrontation escalated, complainant, in an attempt to communicate to her supervisor that she was working outside of her restrictions, touched the supervisor's sleeve. The supervisor claimed that the touch was threatening, and had complainant removed from the building and subsequently terminated. After a hearing, the AJ found that no discrimination on the claim about working outside of the medical restrictions. However, the AJ determined that complainant established race and national origin discrimination on her removal, noting that similarly-situated employees were subjected to progressive discipline rather than removal for similar conduct. The agency rejected the AJ's finding of discrimination and, on appeal, argued that the proffered comparators were not similarly-situated to complainant. The Commission found that two of the five individuals complainant presented as comparators were similarly-situated because they had the same supervisors as complainant and had engaged in conduct similar to complainant's, notwithstanding the agency's strenuous efforts to recast the comparators' conduct in a benign light. The Commission reversed the agency's final decision, and ordered the agency to reinstate complainant under different supervision, determine back pay,

determine compensatory damages, expunge personnel documents of the removal, and provide training to all involved management officials.

Mixed Motive

Ozetta Thomas v. Department of Agriculture, EEOC Appeal No. 0120065053 (July 11, 2008), request for reconsideration denied, EEOC Request No. 0520080744 (October 29, 2008).

Complainant, after not being selected for a Program Complaint Specialist position, filed an EEO complaint claiming that the agency discriminated against her based on race (African American) and in reprisal for prior EEO activity. The Administrative Judge issued a decision finding that the agency discriminated against complainant in part in reprisal for prior EEO activity, but that the matter presented a mixed motive case. The Judge found that the agency articulated both discriminatory and nondiscriminatory reasons for complainant's non-selection. Specifically, the agency showed that the selectee was the superior candidate given his educational background, computer skills, and other qualifications, but the agency failed to carry its burden to provide a basis on which complainant could frame her pretext argument. In particular, the Administrative Judge found that the testimony of the selection panel was vague in regard to the scoring of the initial interviews of the best qualified candidates. Further, the available statement from the Director of the Office of Civil Rights, the selecting official, who had retired, was not credible. Ultimately, the Administrative Judge found that the agency showed that complainant would not have been selected even absent the discrimination and awarded injunctive relief and attorney's fees. The Commission found that the Administrative Judge correctly determined that complainant's non-selection presented a mixed motive case and that the agency carried its burden, showing that the selectee's credentials were superior to those of complainant.

Procedural and Practice Issues

1. *Stating a Claim*

Teresa Y. Werkeiser v. United States Postal Service, EEOC No. 0120083367 (November 12, 2008).

EEOC persuaded that complainant alleged hostile work environment based on sex, as opposed to sexual orientation although agency identified sex (Sexual Orientation/Association With), when complainant alleged management treated a male coworker more favorably; and postmaster told her that due to her child's sexual orientation she would always have a stigma attached to her.

2. *Dismissal for Failure to State a Claim*

Tanja L. Rouse v. Department of the Army, EEOC Appeal No. 0120082513 (August 25, 2008).

Complainant, a former student worker with the agency, filed a formal complaint of discrimination. On appeal, the Commission affirmed the agency's dismissal for failure to state a claim. The Commission noted that, according to the record, complainant was employed under a contract for temporary or intermittent services. The contract was for a specific time period with a set rate of pay. Further, the contract specifically stated that the student worker was not a government employee, was not entitled to leave or other benefits, and the government did not pay taxes on behalf of the student. Thus, complainant was not an employee for purposes of the Commission's regulations.

Qudsia Quraishi v. Department of Commerce, EEOC Appeal No. 0120083146 (November 5, 2008), request to reconsider denied, EEOC Request No. 0520090176 (January 16, 2009) Complainant, a graduate student in physics completing research at the agency's facility, was not an employee of the agency: her guidance came from her advisor, who worked at the agency as a physicist and was also an adjunct faculty professor for the university; complainant had considerable autonomy in performing research on projects and was paid by the university, which handled all payroll and benefit issues; agency did not pay social security taxes on complainant's behalf; agency did not exercise sufficient control over complainant to qualify as the employer or joint employer of complainant for EEO purposes.

3. *Dismissal for Failure to Cooperate Improper*

Denise A. Stevens v. USPS, EEOC Appeal No. 0120090879 (March 19, 2009).

The agency initially accepted complainant's complaint of discrimination on the basis of sex (female), and commenced an investigation. The agency sent complainant a request for an affidavit, along with instructions and forms for its completion. The agency ultimately dismissed the complaint for failure to cooperate, stating that complainant failed to return the requested affidavit. On appeal, the Commission found that the dismissal was improper. The record showed that complainant repeatedly contacted the agency asking for the appropriate telephone number for the EEO Counselor in an attempt to find out if the agency received a fax she had sent. In addition, complainant submitted a document containing answers to the agency's questions, as well as several other documents which demonstrated that there was confusion as to whom or to where the documentation was to be sent. Further, complainant spoke with the agency's Dispute Resolution Specialist, and provided extensive information regarding her complaint. Thus, the agency should have continued to adjudicate complainant's claim.

4. *Dismissal for Untimeliness*

Keila Siufanua v. Army, EEOC Appeal No. 0120081802 (May 15, 2008).

The Commission reversed the agency's dismissal of an EEO complaint filed by a seventeen-year-old high school student, who alleged she was sexually harassed and assaulted by a male co-worker while she was working as a temporary employee. The agency had dismissed the complaint for untimely EEO counselor contact, asserting complainant did not contact a counselor until two-and-a-half months after she resigned from the agency, thus missing the 45-day required time limitation. The Commission found that, under the circumstances of this case, equitable tolling of the limitation period was appropriate in light of the fact that complainant was a minor at the time of the incidents in question. While the agency argued that complainant received training related to EEO time frames during her orientation, the Commission was not convinced that, as a minor, she understood the full magnitude of such timeframes or even the events that transpired. Moreover, there was no indication that complainant's parents, who were her legal guardians, had any knowledge of the time frames for EEO processing. The record further showed that complainant sought EEO counseling within 45 days of her parents' learning of the alleged sexual harassment. The agency was ordered to process complainant's claim of hostile work environment/sexual harassment, as well as a claim of constructive discharge, as she

asserted that she was forced to leave the agency because of the alleged sexual harassment before the end of her employment period.

Tracy Graham v. USPS, EEOC Appeal No. 0720030064 (August 16, 2008).

On January 14, 2003, the agency filed an appeal from the AJ's decision served on October 21, 2002, finding that the agency violated the Rehabilitation Act when it destroyed the contents of complainant's locker and created a hostile work environment. In explaining its tardy filing, the agency contended that the decision and record was not received by the agency's designated official until December 5, 2002, although it acknowledged that the attorney representing the agency received a copy of the decision in late October 2002. The agency provided negligible evidence in support, only offering the declaration of an EEO Specialist, who stated that the box "appeared to have been damaged while in transit," without a description of the box, the postmark date, the addressee, or how the damage affected proper delivery of the box. The Commission deemed the agency's explanation incomplete and found it reasonable to conclude that the box was already in the agency's possession prior to December 5, 2002. Consequently, we found that the agency's appeal was filed untimely and without justification for extension of the time limitations period. The agency was ordered to provide complainant back pay, compensatory damages, reasonable attorneys fees and costs, EEO training for involved supervisors and co-workers, and to post a Notice. Complainant also filed a limited cross-appeal with respect to the AJ's denial of front pay and future benefits. We found that the AJ's determination to deny further relief, including front pay, was supported by the evidence in the record and affirmed the AJ's determination regarding complainant's entitlement to additional relief.

Evangelos Moore, Jr. v. Department of the Treasury, EEOC Appeal No. 0120082579 (November 5, 2008).

The agency's EEO Counselor issued the notice of right to file, which complainant received on November 1, 2007. The 15th day from complainant's receipt of the notice was November 16, 2007. The agency received complainant's formal complaint by facsimile transmission on November 17, 2007, at 1:26 a.m. Thereafter, the agency sent complainant a request for additional information inquiring as to why the complaint was filed beyond the 15-day time period. Complainant explained that he sent his complaint by facsimile on November 16, 2007, between 11:57 and 11:58 p.m., but due to the fax dial-up connection, it was likely it was not transmitted until the early morning of November 17, 2007. Complainant also stated that he planned to submit the complaint earlier in the day but was delayed from doing so due to illness. However, complainant submitted no evidence that he was so incapacitated as to be unable to file his complaint in a timely manner. Additionally, even on appeal, complainant submitted no proof of his contention that he had, in fact, timely faxed his complaint on November 16, 2007. The Commission affirmed the agency's decision to dismiss complainant's complaint as untimely.

Court of Appeals

Calculating Timeliness in District Court

Cochran v. Holder, 564 F.3d 318 (May 4, 2009).

Former United States Marshal brought action against his former employer, the U.S. Attorney General, alleging disability discrimination pursuant to the Rehabilitation Act. Employee received an unfavorable decision from the EEOC and then requested reconsideration (RTR) of that decision. The RTR was denied and employee subsequently filed in District Court. Agency argued that the EEOC's decision on the underlying decision tolled the time for filing the appeal because the RTR was not granted. The court held that a federal employee's time holds that a federal employee's timely request to reconsider an EEOC OFO decision tolls the running of the period for filing in court so that a lawsuit can be filed within 90 days of the employee's receipt of the EEOC's decision denying the request for reconsideration.

5. *Jurisdiction and Statutory Interpretation*

Charna Lefton v. Peace Corps, EEOC Appeal No. 0120052341 (February 26, 2009).

Complainant was employed by the agency as a Deputy Country Director when she submitted an application to be selected as a Country Director. After she was informed that she had not been selected for two Country Director vacancies that had arisen complainant filed a formal EEO complaint challenging the non-selections. In her complaint, complainant alleged that she was subjected to discrimination on the bases of sex (female) and in retaliation for prior protected EEO activity when she was not selected. The agency's final decision dismissed the complaint, finding that the EEOC had no jurisdiction because the Peace Corps's enabling legislation imbues the Director of the Peace Corps, with "unlimited authority" over "the unique statutory position" of Peace Corps representative, also known as Country Director. The Commission found that the agency interpretation of the statutory language was overbroad and noted that under established principles of statutory construction, the Peace Corps Act and Title VII must be construed, if possible, consistent with Congressional intent, to eliminate any conflict between the two acts. The Commission found that in this case, the Peace Corps Director's statutory discretion to remove a Country Director for any reason did not necessarily conflict with the Commission's statutory authority to enforce Title VII in the federal workplace and to impose appropriate remedies if discrimination is found. Accordingly the Commission found that it had jurisdiction and the agency decision was reversed and the complaint was remanded for administrative complaint processing consistent with the Commission's decision.

6. *Mixed Case Appeal*

Linda Edwards v. Department of Transportation (Federal Aviation Administration).

EEOC Petition No. 0320080101 (June 23, 2009). The Commission differed with a MSPB decision on a claim of disability discrimination. An Air Traffic Controller appealed her agency's decision to remove her from federal service for "unavailability for duty." In her appeal to MSPB, petitioner alleged, among other things, discrimination on the basis of disability when the agency denied her reasonable accommodation. The MSPB judge upheld the removal and concluded that no discrimination occurred. Petitioner appealed the decision to the full Board,

which overturned the decision and reversed the removal for violation of merit system principles. The Board restored petitioner to her position, but did not provide backpay or compensatory damages. The Board did not address complainant's discrimination claim, observing that ". . . she does not challenge the administrative judge's findings on her claims of disability discrimination . . ." However, the Board did give petitioner appeal rights from its decision to EEOC. EEOC reversed the MSPB administrative judge's finding of no discrimination, and stated that petitioner was entitled to the consideration by MSPB of additional relief, including back pay and compensatory damages. The decision noted that petitioner had mistakenly bifurcated her appeal from the MSPB administrative judge and had asked for review of the merit system principles decision to the full Board and had appealed the discrimination decision to EEOC. The earlier appeal to EEOC was administratively closed as prematurely filed because the full Board had not yet rendered its decision. Unfortunately, by coincidence, this decision was issued the same day that the full Board issued its decision so petitioner never had an opportunity to amend her petition for review before the Board to include her appeal of the judge's finding on the discrimination claim.

Leisha Guilbeaux v. USPS, EEOC Appeal No. 0120091654 (June 11, 2009).

Complainant was issued a letter of removal on March 4, 2008. The agency investigated the complaint and, on December 13, 2008, complainant requested a hearing before an EEOC Administrative Judge (AJ). However, after discovering that complainant had veteran's preference status, the agency viewed this matter was a mixed case complaint, and issued a final decision on December 19, 2008, finding no discrimination, and giving complainant appeal rights to the Merit Systems Protection Board (MSPB). As it appears from the record that the instant complaint is a mixed case, it must be processed pursuant to 29 C.F.R. § 1614.302. Under these procedures, complainant is entitled to appeal the agency's final decision concerning her removal to the MSPB, where she will be provided a hearing by an MSPB AJ. She is not entitled to a hearing before an EEOC AJ unless the MSPB dismisses the matter for lack of jurisdiction. Thus, complainant's current recourse is before the MSPB, and she has no right of appeal to the Commission at this time. Once the MSPB has issued a decision, complainant may file a new appeal with EEOC from the Board's decision on her discrimination claims.

7. *Sanctions: Adverse Inference*

Sandra Jenkins v. USPS, EEOC Appeal No. 0120064579 (July 8, 2008).

The Commission entered a finding of discrimination in favor of complainant on the bases of race, color, sex, age and reprisal. Complainant had filed a complaint claiming that her performance evaluation was lower than warranted. She compared herself to her 3 co-workers and contended that at least 1 had been rated higher than her, although her performance was equal to or better than any of the three. The EEO investigator repeatedly asked the RMO for copies of the co-workers' evaluations, but the RMO refused and testified in her affidavit as to what the ratings for the 3 co-workers were, however, she did not specify which co-worker received which rating. The decision found that complainant had made out her *prima facie* cases for each basis, and found that the agency's legitimate nondiscriminatory reason was not supported by documentary evidence. It drew an adverse inference and sanctioned the agency, citing 29 CFR 1614.108(c)(3), concluding that the requested information would have reflected unfavorably on the RMO and shown what complainant was alleging. As this also negated the agency's legitimate

nondiscriminatory reason, it left complainant entitled to a finding of discrimination based on her having met the *prima facie* case burden for each basis. As a remedy, the agency was ordered to produce the evaluations, recalculate complainant's evaluation for the rating period (including any raises or awards to which she was entitled under the agency's pay for performance system), raising it if necessary, but not lowering it, award compensatory damages, post a notice, consider discipline for the RMO and send the RMO to 8 hours of EEO training. *See also, Jenkins v. USPS*, EEOC Appeal No. 0120091289 (June 8, 2009), *infra* in compensatory damages.

8. *Compensatory Damages*

Gertrude L. Buckner v. Veterans Affairs, EEOC Appeal No. 0720070052 (January 3, 2008).

The Commission awarded complainant non-pecuniary damages in the amount of \$80,000 and pecuniary damages in the amount of \$4,918.75 after a finding that complainant was discriminated against on the bases of race, sex, and disability when she was denied a reasonable accommodation. While the agency asserted that it made efforts to accommodate complainant, witness testimony showed that complainant made repeated requests to two managers for assistance with duties that were outside of her medical restrictions, but the requests were either ignored or met with hostility. Complainant's back condition was exacerbated due to the discrimination, and she sought treatment from a physician.

Paul L. Terban v. Department of Energy, EEOC Appeal No. 0720040117 (April 3, 2008).

The Commission awarded complainant \$130,000 in non-pecuniary compensatory damages following a finding that complainant was subjected to race-based harassment and constructively discharged. Complainant experienced a serious deterioration of his relationship with his young children, and became withdrawn, moody, and depressed. He was hospitalized, considered suicide, was subjected to electro shock treatment, and continued to take medication and see a psychiatrist.

Nancy Sorg v. Department of Commerce, EEOC Appeal No. 0720060065 (July 23, 2008), request for reconsideration denied, EEOC Request No. 0520080765 (December 17, 2008).

Complainant, a Census Bureau Field Representative, alleged that she had been discriminated against because of age, sex, and reprisal when not selected for several promotions and was subjected to a hostile work environment. Following a hearing, the AJ found that complainant was subjected to harassment on all alleged bases, and awarded \$100,000 in compensatory damages, past and future medical expenses, reinstatement of leave, and attorney's fees. The record showed that complainant suffered both severe emotional and physical distress over a period of five years, and was diagnosed with irritable bowel syndrome, chronic depression and anxiety. In addition, complainant was to be treated for these conditions indefinitely. The AJ also found that complainant was not selected for a Senior Field Representative position and awarded her back pay and benefits. While the appellate decision modified the AJ's award of medical expenses and found the non-selection claim untimely, it affirmed the AJ's finding of harassment and the award of compensatory damages, attorney's fees and leave reinstatement.

Clarence Layman v. Veterans Affairs, EEOC Appeal No. 0120063523 (January 7, 2009). Complainant alleged that he was discriminated against based on disability (severe osteoarthritis in both knees) and reprisal when his request for a disabled parking space was denied. The

agency issued a decision finding disability discrimination, but no retaliation. The agency found that it changed complainant's schedule so he could obtain the parking space, but that such an accommodation was ineffective. The agency found that because it made a good faith effort to accommodate complainant, no compensatory damages were awardable. On appeal, complainant argued that the agency did not act in good faith in its attempts to accommodate complainant. The Commission found that there was no evidence that the failure of the agency to accommodate complainant was motivated by retaliation. Our decision found that the agency's change of complainant's schedule, although not sufficient to afford a reasonable accommodation, was sufficient to show good faith. Therefore, we affirmed the agency's decision to deny compensatory damages and finding of disability discrimination. The decision ordered the agency to change complainant's schedule to a particular time that would allow complainant to obtain the parking space, ordered training in Rehabilitation Act law of all responsible agency officials, ordered the consideration of discipline for all responsible agency officials, and ordered a posting notice.

Vandiver Sharma v. USPS, EEOC Appeal No. 0720080056 (January 8, 2009).

The Commission affirmed an AJ's decision that complainant was discriminated against on the basis of national origin (Indian) when not selected for a Maintenance Manager position. In addition to placement in the disputed position and back pay, the AJ awarded \$50,000 in compensatory damages and attorney's fees and costs. On appeal, the agency did not contest the discrimination finding, but argued the compensatory damages were excessive. On appeal, substantial evidence was found to support the AJ's award of the compensatory damages.

Sandra Jenkins v. USPS, EEOC Appeal No. 0120091289 (June 8, 2009).

Complainant appealed the agency's denial of compensatory damages. The Commission modified agency's award of no compensatory damages to award \$50.00 in pecuniary damages for a co-pay for a single doctor's visit and postage expenses incurred by complainant in processing her EEO complaint.

9. Back Pay

Lester Coleman v. Department of Labor, EEOC Appeal No. 0120062552 (June 6, 2008), request for reconsideration denied, EEOC Request No. 0520080675 (January 7, 2009).

The agency found that complainant and another candidate were subjected to discrimination on the basis of age when they were not selected for a position in favor of a younger individual. In addressing the relief to which complainant was entitled, the agency found that it was unable to determine which candidate would have been offered the position in the absence of discrimination. Thus, according to the agency, the proper remedy was the monetary value of the lost promotion divided pro rata for each complainant up until the date at which the complainants no longer suffered the monetary loss. The remedy did not provide a right for either complainant to be retroactively promoted to the disputed position. The Commission concluded that the agency failed to make even a perfunctory attempt to establish who would have been selected for the position. The agency should have at least taken additional evidence on the question of who the selecting officials would have hired. Instead, the agency merely stated that the record did not contain such evidence. The Commission thus inferred, based on the agency's actions and inactions, that complainant would have been selected for the position, and awarded complainant

100 percent of the back pay. The agency was also instructed to offer complainant the position or its substantial equivalent. Because complainant had moved in order to assume a supervisory position, the Commission also directed the agency to pay relocation expenses if complainant accepted an offer to return to where the disputed position was located.

10. Attorney's Fees

Michael P. Watson v. USPS, EEOC Appeal No. 0120071420 (September 30, 2008).

Following a hearing, an Administrative Judge found that complainant was subjected to disability discrimination and reprisal when he was issued a letter of warning and seven day suspension. The agency accepted the Judge's finding of discrimination. In its final decision, however, the agency noted that the Administrative Judge "determined that you had not established that you were discriminated against." Complainant's attorney subsequently drafted a document and contacted the agency with regard to the error. In addition, the attorney contacted the agency when it failed to pay complainant compensatory damages as outlined by the Judge within sixty days. Complainant's attorney submitted a supplemental application for attorney's fees and costs, and, when she did not receive payment for the amount, filed an appeal with the Commission. On appeal, the Commission found that complainant was entitled to additional attorney's fees for the work performed as a result of the misleading statement in the final decision, and for work performed seeking compliance with the Administrative Judge's decision. Complainant's attorney submitted detailed documentation in support of her arguments, and the number of hours and rate were reasonable.

Edward Ferch v. Air Force, EEOC Appeal No. 0720080007 (January 15, 2009).

Complainant alleged that he was discriminated against on the basis of age (40) when he was not selected for the position of Aircraft Work inspector. Following a hearing, an AJ found that age discrimination motivated the agency's decision to select a candidate substantially younger than complainant for the subject position. The AJ ordered the agency to provide relief to complainant, including an award of reasonable attorney's fees and costs. The agency issued a final order accepting the AJ's finding of age discrimination, but rejecting the AJ's award of attorney's fees. On appeal, complainant argued that the Equal Access to Justice Act (EAJA) creates a waiver of sovereign immunity and allows attorney's fees to be awarded to a successful federal employee in an age discrimination case. The Commission affirmed the finding of age discrimination. Furthermore, the Commission held that attorney's fees are not available under the ADEA for work performed in the administrative process. The Commission rejected the argument that attorney's fees are available in ADEA cases under the EAJA. The Commission ordered the agency to offer to promote complainant to the subject position, with back pay, and provide training in the ADEA of all responsible agency officials.

11. Summary Judgment

Thomas A. Chapman v. Homeland Security, EEOC Appeal No. 0120051049 (August 7, 2008), request for reconsideration denied, EEOC Request No. 0520080805 (December 11, 2008).

Complainant, who wears hearing aids, applied for a position as a security screener. He underwent a series of tests during the application process, but he was not selected. He claimed that he was discriminated against on the basis of age and disability when he was denied a

reasonable accommodation for his hearing loss during the testing process. The Administrative Judge granted summary judgment for the agency on the ground, *inter alia*, that complainant was not an individual with a disability because his hearing loss was fully mitigated by his hearing aids. On appeal the Commission held that the Administrative Judge erred in granting summary judgment because there were genuine issues of material fact concerning whether complainant was substantially limited in hearing even while using hearing aides. The Commission noted that, on remand, the Administrative Judge should have the record supplemented on the question of whether, considering his hearing loss, complainant could meet the statutorily imposed requirement that security screeners have the ability “to hear and respond to the spoken voice and to audible alarms generated by screening equipment in an active checkpoint.”

12. Settlement Agreements

James O. Graham v. USPS, EEOC Appeal No. 0120071586 (June 9, 2008)

The parties entered into a settlement agreement which provided that a specific manager would “release complainant to be released” for an Officer in Charge assignment on a certain date. Complainant maintained that the agreement guaranteed the manager would place him into the position, while the agency asserted that the manager would only release complainant once complainant secured the assignment through his own efforts. The Commission noted that there was support for both positions, and no evidence of bad faith on the part of either party. Thus, the Commission concluded there was no meeting of the minds, and found the agreement void. The agency was instructed to reinstate the underlying complaint.

Olga Velazquez-Mateo v. Department of Defense (Army and Air Force Exchange Service), EEOC Appeal No. 0120082631 (August 25, 2008).

The agency agreed to accept complainant’s medical specialist’s opinion as to whether she was totally and permanently disabled from gainful employment so that she could take disability retirement. Complainant submitted a six-page medical report which provided a review of her medical record and a diagnosis of her disabilities. The insurer, which administered the agency’s Managed Disability Program, denied complainant’s application for disability benefits. It found that the provided information was insufficient and failed to “establish and support [complainant’s] inability to perform the essential functions of [her] own occupation as a computer technician.” The Commission found that the agency had expressly agreed that it would accept as sufficient evidence--for the purpose of disability retirement--an expert’s medical opinion provided by complainant that she was totally and permanently disabled,. Regardless of the standards usually applied by the insurer in reviewing disability retirement applications, in this instance the agency agreed that it would be bound by complainant’s secured expert medical opinion. The Commission ordered the agency to reinstate complainant’s disability retirement application and instruct the insurer that complainant’s specialist’s opinion must be accepted as sufficient evidence to support the decision granting complainant’s disability retirement.

13. Class Actions

Harry Wallace, et al. v. Department of Justice, EEOC Appeal No. 0120054012 (August 15, 2008).

Complainant, an Assistant United States Attorney, filed a class complaint, alleging that Black Assistant U.S. Attorneys at the United States Attorney's Office for the Southern District of Florida were subject to racial discrimination and reprisal by being denied equal pay, benefits and opportunities for promotion. After an AJ denied class certification and the agency adopted that decision, complainant appealed. The Commission found that complainant failed to show commonality of the class, because he failed to show any examples of discriminatory use of agency policies and procedures in a subjective decision-making fashion. The Commission remanded the matter to the agency to process the individual complaint.

Complaint That Fits Within Definition of Certified Class Must be Subsumed into the Class Complaint.

Samuel L. Moss v. USPS, EEOC Appeal No. 0120063992 (October 8, 2008).

Complainant, an applicant for employment, was a veteran with a disability rating of 30% or more, who was “tentatively selected” for a position as a part-time flexible mail handler. He was told that he needed to provide additional medical documentation, which he stated he provided to the agency. The agency’s nurse stated that complainant failed to submit the requested medical documentation; the agency notified him that he was ineligible because he failed to provide sufficient documentation to complete the medical assessment. Complainant requested a hearing and the AJ issued a decision, without a hearing, finding no discrimination. The AJ concluded that complainant failed to present any evidence that would support a finding that the agency’s articulated reasons for its action were a pretext for unlawful discrimination. The Commission noted on appeal that the parties had not addressed the existence of a class complaint regarding the instant issue and that complainant’s complaint concerned matters raised in *Clarence M. Hill, et al. v. United States Postal Service*, EEOC Appeal No. 0120045646 (April 18, 2006). In *Hill*, the Commission conditionally certified a class of postal employees who claimed that the agency violated the Rehabilitation Act, when it requested all disabled veteran applicants seeking disabled veterans’ preference to bring medical documentation, in excess of that which was required to verify their entitlement to the preference, to an interview before an offer of employment was made. The Commission determined in the instant case that the agency did not give complainant a firm offer of employment and that his non-selection claim fell within the certified *Hill* class. The Commission vacated the agency’s finding of no discrimination and remanded the complaint to be subsumed within the *Hill* class complaint.

Estate of Spencer, et al. v. Department of Agriculture, EEOC Appeal No. 0120091900 (June 12, 2009).

Complainant, now deceased, acting as class agent, filed a class complaint on the bases of race and color alleging that the agency discriminated against African-American employees by precluding the fair application of selections, promotions, performance appraisals, awards, and training programs, and affecting their equitable career advancement. Complainant filed a second class complaint raising the same allegations but limited those allegations to the actions of the agency's Forest Service sub-agency. An EEOC Administrative Judge denied certification of both class complaints, finding that they lacked commonality and typicality, and the agency issued a

final order fully implementing the AJ's decision. The Commission found that the class agent abandoned his claim with regard to the larger class and therefore only addressed the denial of certification for the Forest Service class. The Commission affirmed the AJ's determination, finding that despite complainant's argument that the Forest Service has a policy of delegating full subjective authority to "ground level offices" for employment decisions, complainant failed to support this claim with "sufficient information of how the alleged policy played out."