



The DIGEST Of Equal Employment Opportunity Law

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RACE DISCRIMINATION IN THE 21ST CENTURY WORKPLACE

The **Digest of EEO Law** is a quarterly publication of EEOC's Office of Federal Operations (OFO)

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The Digest is now available online through EEOC's homepage at www.eeoc.gov/federal/digest/index.cfm.

(The Commission will now redact Complainants' names when it publishes decisions. Beginning on October 1, 2015, all federal sector appellate decisions issued for publication will use a randomly generated name as a substitute for the name of the complainant, rather than the generic term "Complainant." This randomly

generated name will consist of a first name and last initial, and will be assigned using a computer program that selects names from a list of pseudonyms bearing no relation to the complainant's actual name.)

SELECTED EEOC DECISIONS

Agency Processing

Agency Failed to Conduct Adequate Investigation. The Commission found that the Agency's investigation was inadequate and lacked the thoroughness required for the fact finder to address whether discrimination occurred. Specifically, the record contained inadequate documentary evidence for the Commission to determine whether the Agency's legitimate, nondiscriminatory reason was pretextual. While the Agency's burden of production is not onerous, it must provide a specific, clear, legitimate, and individualized explanation that provides an opportunity for Complainant to satisfy her ultimate burden of proof of pretext. Agency officials testified that Complainant was not selected for the vacancy because her performance evaluation rating was lower than the Selectee's and because her responses to the interview questions were not as good as the Selectee's. The record, however, did not contain the Selectee's performance evaluation. The record also did not contain contemporaneous interview notes or scoring sheets summarizing the interview panelists' impressions of the candidates, or the testimony of one interview panelist. Further, the copy of the Selectee's resume in the record was illegible. Therefore, the Commission found that Complainant did not have a full opportunity to demonstrate that the Agency's legitimate, nondiscriminatory reason was a pretext for discrimination, and remanded the matter for a supplemental investigation. [Gena C. v. Dep't of Health & Human Serv., EEOC Appeal No. 0120151764 \(June 7, 2017\).](#)

Agency Improperly Fragmented Claim. Complainant filed a formal complaint alleging that the Agency subjected him to discrimination when he was not given an office key as were other managers, and the County Executive Director called him "lazy." The Agency dismissed the second claim for failure to state a claim, and issued a decision finding no discrimination in regard to the first incident. On appeal, the Commission noted that in his complaint, Complainant cited a series of events that allegedly occurred during or around the same time period, and Complainant alleged that he was subjected to harassment by a co-worker and two managers, which created a hostile work environment. Instead of treating these events as incidents of the claim of harassment, the Agency looked at them individually. Thus, the Agency acted improperly by treating the matters raised in Complainant's complaint in a piecemeal manner. When Complainant's claims were viewed in the context of Complainant's complaint of harassment, they stated a claim and the Agency's dismissal of one incident for failure to state a claim was improper. The Commission remanded Complainant's entire hostile work environment claim for investigation. [Murray C. v. Dep't of Agric., EEOC Appeal No. 0120151332 \(May 18, 2017\).](#)

Agency Failed to Conduct Adequate Investigation. Complainant filed an EEO complaint alleging that the Agency discriminated against her and subjected her to discriminatory harassment. Complaint included 10 incidents in support of her complaint. While the Commission did not find that a sanction against the Agency was appropriate in this case, the Commission concluded that the investigation was lacking in some critical respects. Specifically, the investigation did not contain sufficient evidence to ascertain whether Complainant's conflicts with management resulted from Complainant acting in an inappropriately contentious and challenging manner towards management, as the Agency contended, or because of sexist attitudes towards assertive women like Complainant, especially in light of her complaints about her treatment. Complainant provided the Investigator with a list of witnesses who Complainant believed would support her claims of discrimination and retaliation. The record, however, indicated that an affidavit was obtained from only one of the ten proposed witnesses. The Investigator chose not to contact the other individuals on Complainant's witness list, because he believed doing so "was not deemed probative." The Commission found that this decision by the Investigator unfairly restricted Complainant's ability to prove her case. There was no evidence that attempting to contact all of Complainant's witnesses would have been burdensome to the investigation. The Commission remanded the matter to the Agency for a supplemental investigation. [Emiko S. v. Dep't of Commerce, EEOC Appeal No. 0120170543 \(Apr. 27, 2017\).](#)

Agency Cannot Rescind Dismissal Decision and Force Complainant to Amend Pending Complaint. The Agency dismissed the instant complaint as being identical to a previously filed EEO complaint. In its dismissal decision, the Agency inadequately described the claims and the record did not include the complete formal complaint or a copy of the prior complaint for comparison. Thereafter, the Agency informed the Commission of its intent to rescind its dismissal and requested that the appeal be dismissed. At the same time, the Agency stated that despite its rescission, it would not process the complaint. Rather, the Agency directed Complainant to amend the prior pending complaint to include the additional claims. The Commission reversed the Agency's dismissal and remanded the complaint for processing. The Commission held that the Agency may not avoid its responsibility to process a properly filed EEO complaint by forcing Complainant to amend another pending complaint. The Commission was unable to determine the claims raised by Complainant because of the inadequate record, and ordered the Agency to clarify the claims and process them pursuant to the regulations. [Joey B. v. Dep't of the Army, EEOC Appeal No. 0120171144 \(Apr. 21, 2017\).](#)

Agency Improperly Denied Complainant's Request for Hearing. Complainant filed a formal EEO complaint alleging discrimination based on race, age, sex, disability and prior EEO activity. The Agency initially processed the complaint pursuant to the Commission's regulations. Following an investigation, however, the Agency advised Complainant that since her allegations involved conduct that did not adversely affect performance, she

did not have the right to a hearing. Nevertheless, Complainant timely contacted the Commission and filed a request for a hearing, as well as an appeal. On appeal, the Commission found that it was improper for the Agency to switch to an internal process after completing an investigation under the Commission's regulations. Complainant filed an EEO complaint alleging discrimination on protected bases, and the Agency was required to continue processing the complaint. Given that Complainant exercised her right to request a hearing, the Commission ordered the Agency to submit the matter for an administrative hearing. [Laurice S. v. Soc. Sec. Admin., EEOC Appeal No. 0120171260 \(Apr. 6, 2017\)](#).

Attorney's Fees

Commission Affirmed Agency's Award of Attorney's Fees. The Agency found that Complainant was discriminated against based on sex and in reprisal for prior EEO activity but not on the basis of disability. The Agency awarded Complainant attorney's fees and costs. The Agency accepted the hourly rates for Complainant's attorney and a paralegal, but reduced the number of hours claimed for time spent prior to the time Complainant filed her complaint. On appeal, the Commission agreed with the Agency. The Agency properly excluded all pre-complaint services except for two hours, which was consistent with prior Commission precedent. The Commission modified the Agency's award of costs to include time spent by an expert attorney preparing an affidavit in support of the claimed hourly rate. [Nenita S. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120151925 \(May 23, 2017\)](#).

Class Complaints

Class Certification Properly Denied. Complainant filed a class complaint alleging the Agency discriminated against him on the basis of race when he was not selected for a GS-14 position and that the Agency discriminated against African-American employees based on its practice of not hiring African-Americans above the GS-13 level in every regional office over the last 20 years. The AJ denied class certification finding that the class failed to meet the prerequisites of numerosity, commonality, typicality, and adequacy of representation. The Commission affirmed the AJ's decision to deny class certification but directed the Agency to process Complainant's individual complaint. The Commission found that the numerosity prerequisite for a class complaint was not met because Complainant did not provide support for his estimate of the number of class members, but only speculated that other African-Americans applied for GS-14 positions in all the other regions over a 20-year period. The Commission also found that the prerequisite of commonality and typicality were not met because Complainant did not identify any practice or policy that was common to the class and that prevented the class from selection for GS-14 positions. Finally, Complainant failed to provide any evidence to establish the prerequisite of adequacy of representation because Complainant did not demonstrate that the law

firm retained had sufficient legal training and experience to pursue the claim as a class action. [Tyree L., et al. v. Dep't of Homeland Sec., EEOC Appeal No. 0120102908 \(Apr. 6, 2017\)](#).

Compensatory Damages

(See, also, "Findings on the Merits," and "Remedies" this issue.)

Commission Increased Award of Compensatory Damages to \$110,000 to Adjust for Change in Dollar

Value. The Commission reopened the case on its own motion to address Complainant's argument that her award of compensatory damages should be adjusted upward to account for inflation and reflect the present-day dollar value of comparable awards. An AJ had previously awarded Complainant \$100,000 in non-pecuniary damages. In the instant decision, the Commission stated that it may consider the present-day value of comparable awards, and an AJ, when considering the amounts that the Commission awarded in prior cases involving similar injuries, should determine whether circumstances justify a higher or lower award. The AJ should adjust the award upward or downward according to the relative severity of the complainant's injury, and may then consider the age of the comparable awards and adjust the current award accordingly. The Commission determined that the amount of non-pecuniary damages awarded to Complainant should be increased by \$10,000 to account for the change in value of the dollar between the date of the comparable award cited by the AJ and the date of Complainant's award. [Lara G. v. U.S. Postal Serv., EEOC Appeal No. 0520130618 \(June 9, 2017\)](#).

Commission Increased Award of Compensatory Damages to \$100,000, and Found Complainant Entitled to Pecuniary Damages.

The Commission previously found that the Agency subjected Complainant to discrimination based on his disability when the Agency failed to prevent and promptly correct any harassing behavior. The Agency awarded Complainant \$25,000.00 in non-pecuniary damages. On appeal, the Commission increased the award of non-pecuniary damages to \$100,000, and found that Complainant was entitled to pecuniary damages for therapy and medication. The Commission stated that since the record showed that Complainant will continue to incur these costs, he should be given the opportunity to submit objective evidence of pecuniary damages. The evidence in the record clearly established a nexus between Complainant's medical bills and the discriminatory actions. Complainant's health care providers confirmed that Complainant suffered from PTSD, anxiety, stress, and sleeplessness directly and proximately caused by the discrimination and harassment he endured. The Commission also found sufficient evidence that the unlawful harassment caused Complainant to suffer extreme emotional turmoil based on testimony of marital and familial strain, severe anxiety and stress, extreme humiliation and embarrassment, feelings of dread, insomnia, feelings of isolation and other PTSD symptoms necessitating weekly therapy sessions and medication. Therefore, the

Commission increased the award of non-pecuniary damages to \$100,000. [Demarcus I. v. Dep't of Def., EEOC Appeal No. 0120150529 \(May 4, 2017\)](#).

Commission Affirmed AJ's Award of \$75,000 in Non-Pecuniary Damages. The Agency accepted an AJ's finding that it retaliated against Complainant, but appealed the AJ's award of \$75,000 in non-pecuniary compensatory damages. The Commission affirmed the AJ's award of damages on appeal. Complainant provided sufficient evidence of fear for her and her family's economic security through loss of employment, mental anguish, stomach disorders, emotional distress, and stress because of the Agency's retaliatory conduct. The Commission found that the AJ's award considered the severity of the harm suffered and was consistent with prior Commission precedent. [Ileana H. v. Dep't of Justice, EEOC Appeal No. 0720170016 \(Apr. 21, 2017\)](#).

Non-Pecuniary Compensatory Damages Increased to \$75,000. In its prior decision, the Commission determined that the hostile work environment in Complainant's workplace was so severe as to support a claim for constructive discharge, and directed the Agency to conduct a supplemental investigation of Complainant's entitlement to compensatory damages. After an investigation, the Agency determined Complainant was entitled to an award of \$10,000 in non-pecuniary damages. Complainant stated that she was subjected to a pattern of harassment because of her pregnancy for more than eleven months, which caused her to suffer significant emotional distress, ongoing digestive problems, headaches, difficulties with pregnancy, and overall stress and concern for her job. Considering the nature, severity, and duration of Complainant's suffering, the Commission found the award of damages should be increased to \$75,000. [Sherill S. v. Dep't of the Air Force, EEOC Appeal No. 0120160115 \(Apr. 5, 2017\)](#).

Commission Affirmed AJ's Award of \$55,000 in Compensatory Damages. An AJ concluded that Complainant was subjected to sexual harassment, but not retaliatory harassment, and awarded Complainant \$55,000 in damages. The AJ then reduced the award by half citing Complainant's assertion that the retaliatory harassment contributed to the emotional harm she experienced. On appeal, the Commission acknowledged that Complainant claimed her emotional harm was due in part to the alleged retaliatory harassment. The Commission found, however, that greater harm was caused by the sexual harassment Complainant experienced. While the alleged retaliatory harassment involved isolated events which, accordingly to Complainant's testimony, demonstrated a lack of civility on the part of three co-workers, the proven sexual harassment included sexual assault, kissing, and physical touching. The Commission stated that it was more reasonable to find that Complainant's experience with anxiety, exaggerated startle response, avoidant behavior, hypervigilance, and thoughts of suicide were related to the sexual harassment. In addition, the cases cited by the AJ in which the Commission awarded \$45,000 to \$65,000 involved similar harm and types of harassment as that experienced by Complainant. Therefore, the Commission found that the AJ's award of

\$55,000 was supported by the record without a reduction. [Lois G. v. Dep't of Homeland Sec., EEOC Appeal No. 0120151972 \(June 8, 2017\)](#).

Commission Affirmed AJ's Award of \$32,500 in Compensatory Damages. Following a finding of harassment based on sex and retaliation, an AJ determined that Complainant was entitled to compensatory damages in the amount of \$32,500. Complainant testified that she suffered for over three years and was treated for generalized anxiety disorder and work-related stress. Complainant also stated that she suffered from depression, anxiety, constant panic attacks, hopelessness and low self-esteem, could not sleep at night, and experienced an exacerbation of her chronic pain disorder. Complainant's physician supported Complainant's diagnosis and connected the exacerbation of her condition to the workplace environment. Finally, Complainant noted that her relationships with friends and family were strained. Taking Complainant's testimony and medical evidence into consideration, as well as awards in similar cases, the Commission found that the AJ's determination that Complainant was entitled to \$32,500 in compensatory damages was supported by the record. [Velva B. v. Dep't of the Navy, EEOC Appeal No. 0120152226 \(June 8, 2017\)](#).

Commission Increased Compensatory Damages Awarded to \$10,000. An AJ found that the Agency discriminated against Complainant because of her disability when it denied Complainant permission to drive a motorized vehicle, denied her request for a temporary change of schedule, and directed her to submit her leave requests to her immediate supervisor. The AJ awarded her \$3,500, finding that the Agency's discrimination contributed to Complainant's stress and anxiety, but noting that some Agency actions that caused stress were not discriminatory in nature. The Commission held that \$10,000 was a more appropriate award of damages, as such an award was more consistent with amount of compensatory damages the Commission has awarded to complainants suffering emotional harm similar in severity and duration. Complainant stated that she suffered anxiety, anger, and depression, withdrew from normal activities, and was unable to enjoy life. [Desire M. v. U.S. Postal Serv., EEOC Appeal No. 0120150824 \(Apr. 21, 2017\)](#) .

Commission Increased Award of Non-Pecuniary Damages to \$7,500. The Commission found that the Agency erred in its calculation of Complainant's non-pecuniary compensatory damages after finding that it discriminated against Complainant when it failed to select her for a position. The Agency awarded Complainant \$5,000 in non-pecuniary compensatory damages, noting that while Complainant provided her own testimony in support of her pain and suffering, she failed to submit medical documentation or witness testimony for the assessment of damages. Holding that Complainant's own testimony, along with the circumstances of the case, were enough to establish Complainant's burden, the Commission found that \$7,500 was a more appropriate award based on the evidence in the record and damages awarded in cases with similar fact patterns. Complainant, through her attorney, claimed that she experienced mental anguish and humiliation after not

receiving the promotion, felt helpless, suffered diminished self-esteem, and developed migraines, elevated blood pressure and weight gain. [Fidelia F. v. Dep't of Agric., EEOC Appeal No. 0120150584 \(Apr. 11, 2017\)](#).

Commission Increased Award of Compensatory Damages to \$1,500. An AJ found that the Agency retaliated against Complainant when it failed to remove a Letter of Warning from his personnel file, and awarded Complainant \$500.00 in non-pecuniary compensatory damages. On appeal, the Commission concluded that the AJ's award was insufficient to remedy the harm the Agency's action caused Complainant. Complainant presented evidence establishing that he was embarrassed and humiliated because the Letter of Warning remained in his file longer than warranted. Additionally, Complainant claimed that he was deterred from further career advancement for fear that hiring officials would review his personnel file and find the letter. The Commission found \$1,500 to be an appropriate award. [Marcel M. v. U.S. Postal Serv., EEOC Appeal No. 0120151062 \(May 17, 2017\)](#).

Dismissals

(See also by category, this issue.)

Complaint Improperly Dismissed for Raising Same Matter in Grievance. The Commission reversed the Agency's dismissal of Complainant's EEO complaint on the grounds that Complainant had first raised the matter in a grievance. While an agency may dismiss an EEO complaint where the matter was first raised in a negotiated grievance procedure that permits claims of discrimination, the record in this case did not contain a copy of the grievance or the collective bargaining agreement to substantiate the Agency's final decision. [Myrna S. v. Dep't of the Army, EEOC Appeal No. 0120171471 \(June 2, 2017\)](#).

Complaint Improperly Dismissed. Complainant filed a formal EEO complaint alleging that the Agency harassed him over a five-month period, including denying his request for reasonable accommodation, issuing him a 30-day suspension, and denying his attorney the right to appeal the suspension on Complainant's behalf. On appeal, the Commission reversed the Agency's dismissal of the complaint for failure to timely contact an EEO Counselor and failure to state a claim. The duty to reasonably accommodate employees is ongoing and constitutes a violation each time the employee needs it. Therefore, Complainant's allegation that he was denied reasonable accommodation was timely raised. Further, while the suspension occurred outside the 45-day period preceding Complainant's EEO Counselor contact, the matter was part of Complainant's claim of hostile work environment. The Agency asserted that Complainant's claim that he was not permitted to employ private counsel to defend him at a grievance procedure involving the 30-day suspension failed to state a claim because only a union representative could represent Complainant in this circumstance. The Commission stated, however, that the Agency's determination went to the merits of Complainant's claim and was irrelevant

to the procedural issue of whether Complainant stated a justiciable claim. [Renato K. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120171357 \(May 31, 2017\)](#).

Spin-off Complaint Properly Dismissed. Complainant filed a formal complaint raising matters regarding the Agency's actions during the hearing process in his prior complaint. The Agency dismissed the complaint for failure to state a claim, and the Commission affirmed the dismissal on appeal. The Commission agreed with the Agency that, to the extent Complainant was alleging that his previous EEO complaints were improperly processed by both Agency EEO officials and EEOC AJs, the complaint should be viewed as a spin-off complaint subject to dismissal. Complainant should have raised any claims regarding the processing of a complaint while that complaint was being processed, not in a new complaint. The Commission noted that if a final Agency decision is issued on a prior complaint, Complainant may raise his concerns regarding complaint processing in an appeal. [Wayne C. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120171303 \(May 18, 2017\)](#).

Complaint Improperly Dismissed. Complainant filed a formal complaint alleging that she was subjected to ongoing inappropriate sexual remarks by her co-worker, who continued the harassing behavior for several months; and, after she complained about being subjected to sexual remarks, she was retaliated against when a manager disclosed her written report of contact to several co-workers. The Agency dismissed Complainant's complaint for failure to state a claim and untimely EEO Counselor contact. On appeal, the Commission stated that Complainant was alleging that she has been subjected to an ongoing pattern of discrimination and reprisal. While the Agency asserted that Complainant failed to produce evidence to substantiate her hostile environment claim, that rationale addressed the merits of the claim without a proper investigation. In addition, some of the incidents Complainant cited occurred within 45 days of the date on which she contacted the EEO Counselor. Therefore, the Commission found that the Agency failed to meet its burden of establishing that Complainant failed to timely initiate her complaint. [Lexie T. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120171268 \(May 16, 2017\)](#).

Complaint Improperly Dismissed for Mootness. Complainant filed a formal complaint alleging that the Agency subjected her to discrimination when it charged her Leave Without Pay (LWOP) when she was on jury duty. The Agency dismissed the claim on grounds that the matter was moot because Complainant's LWOP was changed to Court Leave. The Commission reversed the Agency's dismissal of the complaint on the grounds of mootness because Complainant requested compensatory damages. The Commission has held that an agency must address the issue of compensatory damages when a complainant shows objective evidence that she incurred compensatory damages and that the damages are related to the alleged discrimination. Therefore, the Agency should have requested that Complainant provide some objective proof of the alleged

damages incurred and objective evidence linking those damages to the adverse actions at issue before dismissing the complaint. [Glenna D. v. U.S. Postal Serv., EEOC Appeal No. 0120170914 \(May 4, 2017\)](#).

Complaint Improperly Dismissed on Grounds It Raised Same Matter as Prior Complaint. Complainant filed a formal EEO complaint alleging that the Agency discriminated against him based on race, sex, and age when it removed him from a specific program that the Agency ran and assigned job functions related to the program to another employee. The Agency asserted that the instant complaint concerned Complainant's non-selection for a promotion, which Complainant addressed in a prior complaint that was settled. While Complainant indicated that only white engineers were awarded these positions, the Commission stated that this appeared to be background information. The Commission found that the crux of the complaint was Complainant's exclusion from the Agency's program, not his non-selection for any of the specific positions. Therefore, the Agency failed to establish that the instant matter was raised in a prior complaint, and its dismissal was improper. [Monroe A. v. Dep't of the Army, EEOC Appeal No. 0120170861 \(Apr. 20, 2017\)](#).

Complaint Improperly Dismissed for Being Moot. Complainant filed a formal complaint alleging that the Agency discriminated against him when it issued him two letters of warning for failure to follow instructions and failure to perform the duties of his position. The Agency dismissed the complaint for failure to state a claim, stating that Complainant's two letters of warning were settled during the grievance process. On appeal, the Commission found that the more proper inquiry was whether the complaint had been rendered moot. The Commission held that the complaint had not been rendered moot because Complainant alleged that the Agency's discriminatory actions taken against him were ongoing, and the Agency defined the complaint as one of harassment. [Donovan O. v. U.S. Postal Serv., EEOC Appeal No. 0120170521 \(Apr. 14, 2017\)](#).

Complaint Improperly Dismissed for Stating Identical Claim. The Agency dismissed the complaint on grounds that Complainant filed an earlier complaint on the same claim. The Commission reversed the Agency's dismissal, finding that although the two complaints were similar, they were not the same. The claims were not identical because of the significant time difference (2 years) as well as the alleged change in circumstances (Complainant's restoration to career status) in the intervening time. [Jarrod W. v. U.S. Postal Serv., EEOC Appeal No. 0120171024 \(Apr. 14, 2017\)](#).

Complaint Properly Dismissed as Stating the Same Claim Raised in a Grievance. The Agency dismissed Complainant's formal complaint alleging that the Agency subjected her to discrimination when it gave her a lower evaluation because Complainant had previously raised the same complaint in a negotiated grievance procedure. The Commission's regulations provide that when a person is covered by a collective bargaining agreement that permits claims of discrimination to be raised in a negotiated grievance procedure, such as in

Complainant's case, a person wishing to file a complaint of alleged employment discrimination must elect to raise it under either the EEO process or the negotiated grievance procedure, but not both. On appeal, Complainant argued that her grievance and her EEO complaint did not address the same matter because the grievance addressed the performance rating she was given on her evaluation and the EEO complaint addressed the Agency's failure to respond to her written narrative after the evaluation. The Commission noted that in her complaint, Complainant stated that she was discriminated against during her performance appraisal and, as a remedy, requested that her performance appraisal be changed. Complainant's statements, therefore, supported the Agency's assertion that the complaint concerned Complainant's evaluation and not the Agency's failure to address her written narrative after her evaluation. In addition, while Complainant argued that she did not raise the issue of discrimination during her grievance, the relevant issue was whether the collective bargaining agreement permitted such claims to be raised during the grievance process. [Eugenia C. v. Dep't of the Treasury, EEOC Appeal No. 0120170422 \(Apr. 6, 2017\)](#).

Complaint Improperly Dismissed for Failure to State a Claim and Being Moot. The Agency dismissed Complainant's complaint alleging unlawful employment discrimination for failure to state a claim. After a review of the record, the Commission found that the Agency improperly framed Complainant's claim, and failed to recognize Complainant's claim of a hostile work environment. Complainant stated, among other things, that he was denied training courses on multiple occasions, given a lower salary after receiving a promotion, and threatened with removal. The Commission noted that, to the extent the Agency was asserting that Complainant attended the training he initially requested, the matter had not been rendered moot. Complainant asserted that a supervisor repeatedly challenges his training requests, and there remains a possibility that the alleged violation will recur. In addition, Complainant was seeking compensatory damages. [Filiberto H. v. Dep't of Navy, EEOC Appeal No. 0120170924 \(Apr. 05, 2017\)](#).

Findings on the Merits and Related Decisions

(See by statute, as well as multiple bases, this issue.)

Under the Age Discrimination in Employment Act

Age Discrimination Found Regarding Non-selection. Following a hearing, an AJ found that Complainant was discriminated against based on age when he was not selected for an Air Traffic Control Specialist, GS-12/13/14, position. The Commission affirmed the AJ's findings on appeal. The Commission found that the Agency articulated legitimate, nondiscriminatory reasons for hiring Complainant at a lower GS-9 grade because of certain reemployment regulations applicable to former employees such as Complainant who had been fired due to a strike. The Commission, however, concurred with the AJ that Complainant established that the

Agency's stated reasons were a pretext for age discrimination. While the Agency cited a concern over uniformity in hiring, the AJ found that the Agency's actions demonstrated that they were uninterested in rehiring former Controllers at or near their former grade levels. In addition, the record showed that Complainant continued to work as a Controller until he was rehired by the Agency and remained qualified for the position. The AJ found further evidence of pretext in the form of an Agency memorandum on rehiring that specifically mentioned potential issues with a Controller's ability to perform his duties due to age as a reason for hiring candidates at a lower grade. The Agency's policy of excluding employees who participated in the strike from consideration for higher-level positions almost exclusively affected workers who were 40 years of age or older, and the Selecting Officials acknowledged considering candidates' proximity to "retirement age." Therefore, the Commission concluded that the AJ properly found that the Agency discriminated against Complainant based on his age. The Agency was ordered, among other things, to retroactively place Complainant in a GS-12 level Air Traffic Control Specialist position until the date on which he would have reached mandatory retirement, and pay him appropriate back pay, interest, and benefits. [Brenton W. v. Dep't of Transp., EEOC Appeal No. 0120130554 \(June 29, 2017\)](#).

Under the Equal Pay Act

Summary Judgment Affirmed in Equal Pay Act Complaint. The Commission affirmed the AJ's issuance of a decision on summary judgment finding that the Agency did not discriminate against Complainant. Complainant alleged that he was discriminated against based on sex and race when he was paid less than a black, female co-worker who served in the same position. The Commission initially found that the AJ properly issued a decision on summary judgment because there were no genuine issues of material fact or credibility which required a hearing. The Commission concurred with the AJ's finding that Complainant was unable to establish a prima facie case under the EPA, because Complainant and his co-worker worked in different programs in different locations, and were supervised by different managers. Further, Complainant and the co-worker performed substantially different job duties. The Commission noted that even if Complainant established a prima facie case of discrimination, the Agency successfully articulated a legitimate non-discriminatory reason other than sex for the pay disparity between Complainant and his co-worker, specifically the co-worker's position involved working with more complex technology, and Complainant failed to present evidence of pretext. The Commission also found that Complainant failed to prove that he was subjected to sex or race discrimination. [Stefan C. v. Dep't of Homeland Sec., EEOC Appeal No. 0120132211 \(Apr. 24, 2017\)](#).

Under the Rehabilitation Act

Agency Failed to Provide Reasonable Accommodation. The Commission found that the Agency discriminated against Complainant on the basis of disability when it denied Complainant a reasonable accommodation. The Agency did not contest that Complainant was a qualified individual with a disability. The Commission found that Complainant established a nexus between his disability (allergic reaction-skin rash dermatitis) and his requested accommodation (switching his work area) because Complainant's doctor advised he switch areas to avoid the allergic reactions. In addition, several management officials observed Complainant's rash, and the Agency did not dispute Complainant's assertion that his work area contained potentially toxic allergens. The Commission stated that the Agency ignored Complainant's first request for accommodation when he submitted his doctor's letter. The Commission held that the Agency's request for further documentation was improper where, as here, the disability and need for accommodation were obvious and Complainant had already provided sufficient information on the disability and the need for accommodation. The Commission also rejected Complainant's supervisor's unsupported statement that she had seen rashes on Complainant's body prior to him working in the affected area. The Commission found that although Complainant's supervisor may have engaged in the interactive process, the Agency failed to provide effective alternative accommodations because the three options offered by the Agency involved some exposure in the affected area. The Agency submitted no evidence showing that reassigning Complainant would have resulted in an undue hardship. The Agency was ordered, among other things, to identify all vacant funded positions with equivalent pay and status, and with Complainant's input, determine which Complainant is qualified for, and then place Complainant in that position. [Julius C. v. Dep't of the Air Force, EEOC Appeal No. 0120151295 \(June 16, 2017\)](#).

Under Title VII

Race Discrimination Found. Complainant filed an EEO complaint alleging, among other things, that the Agency discriminated against him based on race when it issued him Letters of Counseling for unprofessional conduct and missing a duty call. In reversing the Agency's decision finding no discrimination, the Commission found that the issuances of the disciplinary actions giving rise to these claims was motivated by discriminatory animus based on Complainant's race. Specifically, the Commission found that the discipline issued was disproportionate and lacked uniformity, and the record showed that other employees were not disciplined for engaging in similar conduct. The Agency was ordered, among other things, to rescind the Letters and remove them from Complainant's personnel record, as well as adjust any subsequent discipline that was based on the Letters. The Commission affirmed the Agency's finding of no discrimination with respect to other matters raised in the complaint. [Erwin B. v. Dep't of Homeland Sec., EEOC Appeal No. 0120151276 \(May 15, 2017\)](#).

Under Multiple Bases

Race & Sex Discrimination Found Regarding Non-selection. The Commission reversed the AJ's finding of no discrimination by summary judgment, which the Agency adopted, regarding Complainant's claim that the Agency discriminated against her on the bases of race and sex when it failed to select her for a promotion. The Commission instead found that summary judgment in favor of Complainant was appropriate. The Selecting Official stated that she did not select Complainant for the position because Complainant did not demonstrate experience relevant to the job description, while the Selectee did demonstrate relevant experience and received the highest interview score. The record, however, showed that Complainant specifically listed relevant experience in all areas identified by the Selecting Official, and that the Selectee's application failed to establish relevant experience in two areas. In addition, one of the individuals on the interview panel stated that the Selectee was not completely qualified for the position. The record also showed that the Agency appeared to have violated its Merit Promotion Plan by having a lower-level employee participate in the interview panel. Therefore, the Commission found that Complainant established that the Agency's stated reasons for her non-selection were a pretext for race and sex discrimination. The Agency was ordered, among other things, to offer Complainant the position or a substantially similar position, and pay her appropriate back pay, interest, and benefits. [Shayna P. v. Dep't of Homeland Sec., EEOC Appeal No. 0120141506 \(June 2, 2017\)](#).

Hostile Work Environment Based on Sex & Retaliation Found. Complainant alleged that she was subjected to reprisal discrimination and a hostile work environment based on sex when she worked as a Trial Attorney serving in a one-year detail at the U.S. Embassy in Iraq. Complainant appealed to the Commission from the Agency's finding that she was not subjected to discrimination. The Commission concluded that Complainant was subjected to a hostile work environment based on her sex because she was subjected to pervasive unwelcome conduct involving her statutorily protected class. Examples included management's belittlement of Complainant regarding her assignments and work product, reassignment of work, and comments referencing Complainant's manner of dress and her cooking skills. In addition, the record contained other examples of management's discriminatory conduct toward women in the office which included yelling at female staff members, exclusion of female staff members, and more favorable treatment of male staff members regarding work assignments. The Commission also found that Complainant was subjected to reprisal when she was denied an extension of her detail, given a negative job reference, and given a negative performance appraisal. Complainant demonstrated that the Agency's legitimate, nondiscriminatory reasons were pretextual. For example, while the rating official who prepared Complainant's evaluation explained that he based his evaluation of Complainant's work on his own observations, the evidence revealed that the rating official was told to lower Complainant's rating in the "Accountability for Professional Responsibilities and Development" section based on her interaction with the management officials responsible for the hostile work environment. The Agency was ordered, among other things, to offer Complainant a new detail opportunity or pay her

appropriate back pay and benefits resulting from the denial of the opportunity to extend her original detail for one year, and to investigate Complainant's claim for compensatory damages. [Trina C. v. Dep't of Justice, EEOC Appeal No. 0120131971 \(May 12, 2017\)](#).

Retaliation

Retaliation Found. Complainant filed an EEO complaint alleging that the Agency retaliated against him based on his participation as a witness in another employee's EEO matter. Following a hearing, an AJ issued a decision finding that the Agency retaliated against Complainant when two managers reported false information about him to an external auditor. On appeal, the Commission affirmed the AJ, finding that named management officials were clearly aware of Complainant's prior EEO activity. Specifically, the two named managers knew that Complainant made statements regarding one manager's alleged discriminatory treatment during the co-worker's complaint. Further, the record did not support the Agency's reasons for providing the information, and there was substantial evidence in the record supporting the AJ's finding. [Roy F. v. Dep't of Health & Human Serv., EEOC Appeal No. 0720170018 \(June 6, 2017\)](#).

Retaliation Found Regarding Reassignment. Complainant filed a formal complaint alleging the Agency subjected him to reprisal when it reassigned him after he filed an informal complaint of discrimination against his supervisor. The Commission affirmed the AJ's decision that Complainant established that he had been subjected to unlawful reprisal, finding that when Complainant was reassigned to a different group, both the Captain and the Deputy Chief were aware of Complainant's complaint. In addition, prior to Complainant's reassignment all of his performance appraisals had been positive and the Agency failed to prove that it had a legitimate, non-retaliatory reason for the disputed actions. Complainant was reassigned just seven days after he filed the informal complaint against his supervisor, and the record showed that the supervisor encouraged Complainant's co-workers to complain about Complainant and then recommended that he be disciplined and reassigned. The Commission ordered the Agency, among other things, to make an unconditional offer to Complainant to return to his prior duty location at the same rate of pay at the time of his reassignment or his current pay rate, whichever was greater; to expunge Complainant's disciplinary action from his personnel file and any other files within the Agency's control and/or possession; and pay Complainant \$10,000 in proven non-pecuniary compensatory damages, and proven attorney's fees. [Lewis Z. v. Dep't of the Air Force, EEOC Appeal No. 0720170013 \(Apr. 6, 2017\)](#).

Official Time

Official Time Discussed. The Commission agreed with the AJ and found that the Agency complied with the Commission's regulations regarding official time. The actual number of hours to which a complainant and his

representative are entitled will vary, depending on the nature and complexity of the complaint and considering the mission of the agency and the agency's need to have its employees available to perform their normal duties on a regular basis. The Agency did not violate the Commission's regulations by requesting that Complainant's representative use official time on certain days, and the record showed that the Agency considered Complainant's need for representation when things were pressing. The Commission rejected Complainant's assertion that, as the union president, his representative was not expected to perform any Agency work. The Commission affirmed the AJ's finding of no discrimination. [Rayford H. v. Soc. Sec. Admin., EEOC Appeal No. 0120152022 \(June 8, 2017\)](#).

Remedies

(See also "Findings on the Merits" in this issue.)

Agency Failed to Offer Substantially Equivalent Position. The Commission previously affirmed an AJ's finding that the Agency subjected Petitioner to discrimination based on age when she was not selected for the position of Postal Inspector Team Leader, Level 14, after being questioned regarding her years of eligibility and retirement during the interview. Subsequently, the Commission ordered the Agency, among other things, to offer Petitioner a Postal Inspector Team Leader, Level 14, position at a specific facility or a substantially equivalent position and pay Petitioner back pay and other benefits. In response to Petitioner's petition for enforcement, the Commission ordered the Agency to offer Petitioner a Postal Inspector Team Leader, Level 14, position at the facility even if that meant bumping an incumbent employee from the position. The Commission rejected the Agency's assertion that it offered Petitioner six Team Leader Level 14 positions in other cities because a position was no longer available in St. Paul. The Commission has consistently held that a substantially equivalent position is one that is similar in duties, responsibilities, and location (reasonable commuting distance) to the position for which the individual originally applied and the Commission found that the positions offered Petitioner were not in geographic locations remotely close to the position that Petitioner was discriminatorily denied. Further, the Commission recognizes the bumping of an incumbent employee as a possible remedy for discrimination when there is no substantially equivalent position available. The Commission instructed the Agency to re-calculate and pay Petitioner the appropriate amount of back pay, and noted that Petitioner was not entitled to an award of attorney's fees because discrimination was found solely based on age. [Geraldine G. v. U.S. Postal Serv., EEOC Appeal No. 0420170001 \(May 4, 2017\)](#).

Back Pay Discussed. In a prior decision, the Commission found that the Agency discriminated against Petitioner when it terminated her from employment, and ordered the Agency, among other things, to pay Petitioner back pay. The Commission issued a second decision instructing the Agency to calculate Petitioner's back pay based on the average salary of similarly situated employees who, like Petitioner, consistently sought

work and regularly accepted assignments. Petitioner challenged the Agency's back pay calculation a second time, and the Commission found that the Agency had not fully complied with its prior decision, which specifically directed that the Agency provide a clear and concise "plain language" statement of the methods used to calculate back pay. The Commission remanded this matter for clarification and explanations concerning back pay, and documentation to support the Agency's explanations because, from the record, the Commission could not determine the amount of back pay, interest, and other benefits due Petitioner. The Commission specifically advised the Agency to include all appropriate supporting documents and/or statements with an analysis including but not limited to, a clear explanation of how back pay was calculated, what amounts were deducted and for what periods, how back pay was determined for each year, and mitigation adjustments and benefits applied. [Chanelle B. v. Dep't of Justice, EEOC Petition No. 0420150013 \(Apr. 27, 2017\)](#).

Commission Modified AJ's Order of Relief. While working as a Human Resource Specialist, Complainant alleged discrimination when the Agency failed to act on his request for reasonable accommodation. Complainant filed an EEO complaint, and later sought to amend his complaint to include alleged reprisal after he received a lower performance appraisal than expected. Complainant asserted that the denial of accommodation hindered his ability to achieve a higher rating. An AJ ultimately issued a default judgment against the Agency as a sanction for the Agency's failure to timely complete the investigation, and the Agency did not challenge the AJ's decision on appeal. The Agency did appeal the AJ's order to increase Complainant's performance appraisal and award him \$60,000 in non-pecuniary damages, asserting that the increase in performance rating was inappropriate and the award was excessive. The Commission affirmed the AJ's award of an "Outstanding" performance rating, noting that the Agency adopted the AJ's decision finding that Complainant established a prima facie case of retaliation regarding his appraisal ratings. The Commission also concluded that the AJ properly awarded Complainant \$60,000 in non-pecuniary compensatory damages based on evidence that Complainant experienced a worsening of his medical condition, sleeping problems, anxiety, pain and suffering. The Commission also found that the AJ correctly determined that Complainant failed to prove he was entitled to future pecuniary damages. [Kevin B. v. Dep't of Health & Human Serv., EEOC Appeal No. 0720170014 \(Apr. 24, 2017\)](#).

Sanctions

Commission Reversed AJ's Order Dismissing Hearing Request as Sanction. Complainant, through her attorney, timely filed a hearing request with the Commission's Los Angeles District Office instead of the North Carolina District Office in Charlotte as instructed by the Agency. Complainant explained that she was stationed in California and received all of her assignments from the Agency's San Diego office. An AJ in Charlotte ultimately issued an Order of Sanction dismissing Complainant's hearing request. On appeal, the Commission

reversed the AJ's order, finding that the AJ erred in imposing sanctions against Complainant. There was no evidence that Complainant or her attorney violated any order or directive of the AJ. Complainant timely filed her hearing request and presented a colorable argument as to why the hearing should be held in California where Complainant worked and where the alleged discrimination occurred. In addition, Complainant asserted that Agency officials in California were at least partly responsible for the discrimination. The Commission found no evidence that the Agency was harmed by Complainant's actions. The Commission's Los Angeles District Office agreed with the Agency and transferred the case to Charlotte. Therefore, the Commission found no negative effect on the hearings process. The Commission remanded the matter for an administrative hearing. [Jennifer K. v. Dep't of the Navy, EEOC Appeal No. 0120171630 \(June 26, 2017\)](#).

Commission Sanctioned Agency for Failing to Submit Entire Complaint File. The Commission issued a notice to show cause why sanctions should not be issued against the Agency for failing to submit the complete complaint file. The Agency was notified that if it failed to submit the entire record within 20 days or show good cause why it could not do so, the Commission could issue a decision in favor of Complainant or take such other action as appropriate. The Agency failed to respond to the notice but did ultimately submit the complete complaint file with no accompanying explanation for its delay. The Commission stated that the Agency's repeated and continued failure to timely comply with the Commission's regulations was inexplicable and inexcusable. The regulations require that the Agency act in a timely manner at many points in the EEO process, and compliance with these timeframes is not optional. Based on the specific circumstances of the case, the Commission found that the most appropriate sanction to address the Agency's conduct was to order the Agency to: (1) post a notice at its Office of Adjudication in Washington, D.C. regarding its failure to comply with the Commission's regulatory timeframes and orders; (2) provide training to its EEO personnel who failed to comply with the Commission's regulatory timeframes and orders; and (3) consider taking disciplinary action against these EEO personnel. Also, the Commission affirmed the Agency's determination that Complainant had not been subjected to a hostile work environment or denied a reasonable accommodation. [Crysta T. v. Dep't of Agric., EEOC Appeal No. 0120151930 \(May 17, 2017\)](#).

Commission Affirmed AJ's Award of Attorney's Fees as Sanction for Failure to Properly Process Complaint. Complainant filed a motion for sanctions with the AJ, alleging she was entitled to compensation for attorney's fees and costs incurred as a result of the Agency's failure to properly process her informal and formal complaint which ultimately caused a delay of five months. It was clear that the Agency improperly failed to process Complainant's informal EEO complaint, and the Agency's continued failure to process Complainant's informal and formal EEO complaints caused her to incur additional attorney's fees and costs. The Commission found that the AJ correctly reduced the requested fees by 50 percent because some of the requested hours

included work that that was not related to the Agency's failure to properly process Complainant's complaint. The Commission found that the AJ properly granted summary judgment in favor of the Agency and found no discrimination with regard to the underlying issues in the complaint. [Emelda F. v. Dep't of Homeland Sec., EEOC Appeal No. 0720170024 \(May 4, 2017\)](#).

AJ Properly Dismissed Hearing Request as Sanction. Complainant filed a formal complaint alleging that the Agency discriminated against her on the bases of race and disability regarding her performance appraisal and request for advanced sick leave. Complainant requested an administrative hearing, but the AJ denied the hearing request as a sanction for Complainant's failure to fully respond to the Agency's discovery requests and AJ's Order. On appeal, the Commission found that the AJ did not abuse her discretion when she dismissed Complainant's hearing request, noting that an AJ has the authority to sanction either party for failure to fully comply with an order. The Commission also affirmed the Agency's decision, finding it provided legitimate, nondiscriminatory reasons for the alleged actions. Specifically, the Agency stated that Complainant did not go above and beyond what was expected of her, and stated that she wanted her response filed with her appraisal and did not request a response from her supervisor. The Agency also provided a legitimate, nondiscriminatory explanation for the delay in the approval of her request of advanced sick leave, specifically that Complainant did not provide specific medical documentation with her request and the Human Resources representative was on extended leave, which delayed the approval of the request. There was nothing in the record to establish that these reasons were pretextual. [Nakesha D. v. Dep't of Health & Human Serv., EEOC Appeal No. 0120151012 \(Apr. 18, 2017\)](#).

Commission Sanctions Agency for Failure to Timely Issue Final Decision. The Commission found that Complainant failed to establish a prima facie case of reprisal because he did not show that the alleged responsible official knew about his prior EEO activity. The Commission, however, sanctioned the Agency for its failure to timely issue a final decision. On May 15, 2013, an AJ ordered the Agency to issue its final decision within 60 days. The Agency did not issue its final decision until November 1, 2013, beyond the 60-day period. Citing the Agency's repeated failure to comply with EEOC's regulations in this case, including its failure to complete the investigation within 180 days, and the untimely issuance of the final decision, and failure to show good cause for its actions, the Commission ordered the Agency, among other things, to post a notice regarding its failure to comply with the regulatory timeframes and an AJ's order; to provide training to its EEO personnel who failed to comply with the regulatory timeframes and AJ's order; and to pay Complainant's attorney's fees associated with the appeal. [Truman B. v. Dep't of the Army, EEOC Appeal No. 0120140418 \(Apr. 10, 2017\)](#).

Settlement Agreements

Settlement Agreement Void for Lack of Consideration. The Commission found that the settlement agreement that the parties entered into was void for lack of consideration. Complainant agreed to submit a request for a light duty assignment and the Agency would assign duties based upon Complainant's medical restrictions. The agreement also provided that the assignment would be modified to meet Complainant's medical restrictions and available work. The Commission stated that these provisions did not provide Complainant with anything more than she was already entitled to as an employee. [Willa B. v. U.S. Postal Serv., EEOC Appeal No. 0120170768 \(May 23, 2017\)](#).

Settlement Agreement Void. Complainant and the Agency entered into a settlement agreement, which provided that the Agency would meet and review Complainant's current military records with her by March 1, 2014 and help Complainant prepare the necessary documentation to make any corrections. Complainant claimed that the Agency breached the agreement when it failed to meet with her by March 1, 2014 and failed to assist her in correcting her records. The Commission found that the settlement agreement was void for lack of consideration because Complainant was already able to review her personnel records, and the Agency essentially agreed only to tell Complainant who to contact to address any errors. The Agency did not promise that any alleged error would be corrected. Therefore, Complainant received no consideration for withdrawing her complaint. The Commission ordered the Agency to resume processing of Complainant's underlying EEO complaint. [Celine D. v. Dep't of Homeland Sec., EEOC Appeal No. 0120152838 \(May 4, 2017\)](#).

Settlement Agreement Invalid. Complainant attended a mediation session seeking to enter into a settlement agreement. The agreement was never formalized, but was merely placed in email format. Complainant asserted she was not advised that she needed a written agreement, and argued the verbal agreement was breached when she was reassigned. The Commission affirmed the Agency's finding that the parties did not enter into a valid settlement agreement. An oral settlement agreement is valid only when it is reached during a hearing before an AJ and is transcribed by a court reporter. In this case, there was no such oral agreement. [Reita M. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120171138 \(Apr. 21, 2017\)](#).

Breach of Settlement Found. Complainant and the Agency entered into a settlement agreement which provided, among other things, that the Agency would provide neutral references for employment inquiries on behalf of Complainant. Complainant alleged that the Agency was in breach of the settlement agreement after he unsuccessfully applied for a position with the Agency 19 times. The Agency concluded that it did not breach the settlement agreement, because it was only required to provide outside employers with neutral references. On appeal, the Commission found that the Agency breached the agreement. While the agreement did not guarantee that Complainant would be rehired, the provision at issue plainly stated that the Agency would provide neutral references. The Agency's obligation to provide neutral references was not limited to

employment inquiries from outside the Agency. The Commission concluded that if the Agency wanted to exclude internal inquiries, it should have expressly set forth that exception in the settlement agreement. [Eldon P. v. U.S. Postal Serv., EEOC Appeal No. 0120171074 \(Apr. 18, 2017\)](#).

Settlement Agreement Void for Lack of Consideration. In its decision, the Agency held it was not in breach of the settlement agreement and any alleged breach had been adequately cured. The Commission reversed the Agency's decision and reinstated the underlying complaint, finding the settlement agreement void for lack of consideration. The settlement agreement as written was too vague to determine whether the Agency complied with its terms. The agreement stated that Complainant would receive assistance at the front window "as warranted," but failed to specify what circumstances warranted assistance. Further, interpreting the provision to mean that such a determination was left to the Agency's discretion would mean the agreement lacked consideration. The settlement agreement was devoid of any substantive benefit to Complainant that she was not already entitled to receive. [Goldie S. v. U.S. Postal Serv., EEOC Appeal No. 0120171073 \(Apr. 17, 2017\)](#).

Breach of Settlement Found. Complainant alleged that the Agency was in breach of a settlement agreement because the Agency failed to provide her with a modified job offer within the specified time frame and the manager refused to discuss Complainant's concerns with the job offer as stated in the agreement. The Agency concluded that it cured the breach in a timely manner by sending the offer after notice from Complainant. The Commission reversed the Agency's final decision, finding that the record established that Complainant did not receive the modified job offer by the date required in the agreement. Further, Complainant had expressed her belief to management that the modified job offer did not comply with her restrictions and the Agency failed to respond to Complainant's assertions as required under the agreement. Therefore, the Agency breached the agreement and the Commission ordered the reinstatement of Complainant's EEO complaint. [Alisia M. v. U.S. Postal Serv., EEOC Appeal No. 0120170478 \(Apr. 6, 2017\)](#).

Stating a Claim

Complainant Stated Viable Claim of Sex Discrimination. The Commission found that Complainant's complaint alleging that the Agency discouraged her from applying for a position stated a viable claim of sex discrimination. The record contained an email which an Agency manager sent to Complainant notifying her that he would be posting an advertisement for a temporary position but that the Agency hoped a named male employee would apply. While the Commission has generally held that complainants who do not apply for positions are not sufficiently aggrieved to state a valid claim, in this case Complainant asserted that she was essentially foreclosed from applying for the position. [Adah P. v. Dep't of the Interior, EEOC Appeal No. 0120170966 \(June 20, 2017\)](#).

Complainant Stated Viable Claim of Discriminatory Hostile Environment & Retaliation. The Commission reversed the Agency's dismissal of Complainant's complaint, finding that she stated a viable claim of discriminatory hostile work environment and retaliation. Complainant referenced several allegedly discriminatory incidents, and alleged that co-workers were treated more favorably by the Agency in comparison to her. In addition, Complainant's assertion that her previous termination, settlement, and back pay award were raised by management and disclosed to co-workers was sufficient to state a claim of retaliation. [Lavonne F. v. U.S. Postal Serv., EEOC Appeal No. 0120171157 \(May. 10, 2017\)](#).

Complaint of Retaliation Improperly Dismissed. Complainant filed a formal complaint alleging she was unlawfully retaliated against for engaging in prior protected EEO activity after her second line supervisor (S2) threatened her with possible disciplinary action because S2 believed Complainant made false statements in her original complaint. The AJ dismissed the complaint for failure to state a claim, holding that to permit such a claim would have a chilling effect on the EEO process. The Commission reversed the AJ's decision and concluded Complainant's complaint stated a viable claim of retaliation because Complainant alleged that S2 made direct threats against her, far beyond disputing Complainant's claims as false or untruthful, and it would be reasonable to conclude that S2's comments would likely deter EEO activity. [Giselle W. v. Dep't of Justice, EEOC Appeal No. 0120152281 \(May 2, 2017\)](#).

Complainant Stated Viable Claim of Hostile Environment Harassment. Complainant filed an EEO complaint alleging that the Agency discriminated against her based on sex when it subjected her to an investigation by the Office of the Inspector General (OIG). Complainant stated that she was harassed and intimidated by the OIG Investigator, and added that her male co-workers engaged in the same leave practices yet were not accused or investigated by the Agency. Complainant noted that the Agency issued a report reiterating that Complainant misused Agency time, and insinuating it had damaged her reputation. Complainant also indicated that the OIG previously investigated other female employees, but no male employees had been accused of misconduct. The Agency dismissed the complaint stating that Complainant failed to state a viable claim of harassment. On appeal, the Commission reversed the Agency's decision and ordered the Agency to process the formal complaint. The Commission found that Complainant's allegations, when considered together, stated a viable claim of hostile work environment harassment. Further, contrary to the Agency's assertions, Complainant was alleging that the Agency's OIG engaged in a pattern and practice of gender discrimination. Therefore, the complaint was not a collateral attack on the OIG investigative process. The Commission advised Complainant to raise her additional allegations of retaliation with an EEO Counselor. [Cassandra S. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120170829 \(Apr. 28, 2017\)](#).

Complainant Stated Viable Claim of Harassment. The Agency determined that Complainant's formal complaint raised one incident of a Physician complaining about Complainant, and dismissed the complaint for failure to state a claim. The Commission reversed the Agency's dismissal of Complainant's claim because the EEO Counselor's report and the complaint showed that Complainant alleged many incidents of alleged harassment, including the Physician's ongoing complaints about Complainant, which were spread over a longer period. [Lois G. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120171106 \(Apr. 17, 2017\)](#); see also [Norbert K. v. U.S. Postal Serv., EEOC Appeal No. 0120171310 \(June 26, 2017\)](#) (examination of the formal complaint and EEO Counselor's report showed that Complainant raised many incidents of alleged harassment that occurred over a longer period of time than that identified by the Agency. Given the breadth of Complainant's allegations the Commission found that he asserted a cognizable claim of harassment).

Dismissal of Complaint for Failure to State a Claim Was Improper. The Agency dismissed Complainant's complaint alleging reprisal and age discrimination for failure to state a claim, and the Commission reversed the Agency's decision on appeal. Complainant claimed that management, including a supervisor named in his prior EEO complaint, tried to intimidate him and his witnesses by harassing him, asking him to drop the EEO complaint, asking where he was while on his break, and asking one of Complainant's witnesses about the hearing in his prior complaint. The Commission found that these instances fall under the anti-retaliation provisions of the employment discrimination statutes and allege sufficient facts that could lead to a finding of unlawful interference with the EEO process. The complaint was remanded for further processing. [Valentin G. v. U.S. Postal Serv., EEOC Appeal No. 0120170434 \(Apr. 14, 2017\)](#).

Complaint Stated Viable Claim of Harassment. The Agency dismissed Complainant's claim alleging unlawful employment discrimination for failure to state a claim, and the Commission reversed the decision on appeal. Complainant claimed that she was subjected to harassment over a six-month period, including a supervisor making comments about Complainant's physical appearance, yelling at and threatening Complainant, and denying Complainant assistance. The Commission found that Complainant's allegations were sufficient to state a claim of a hostile work environment. [Matilde M. v. U.S. Postal Serv., EEOC Appeal No. 0120170850 \(Apr. 07, 2017\)](#); see also [Nieves P. v. U.S. Postal Serv., EEOC Appeal No. 0120171477 \(June 9, 2017\)](#) (a fair reading of the record showed that Complainant alleged that she was subjected to sexual harassment by her supervisor including the supervisor leering at her, staring, and following her to the restroom. Complainant asserted that the supervisor's conduct had been going on for approximately 10 months, and the Commission found that she stated a cognizable claim); [Arnold C. v. Dep't of the Navy, EEOC Appeal No. 0120171001 \(May 25, 2017\)](#) (a fair reading of the pre-complaint documentation showed that Complainant was essentially raising a claim of harassment. Complainant noted that his supervisor made a number of comments regarding his hearing

impairment over a period of time); [Cruz M. v. Soc. Sec. Admin., EEOC Appeal No. 0120151259 \(May 9, 2017\)](#) (Complainant's allegation that, over a span of eight days, he was subjected to racially charged comments, including criticism of his accent and comments regarding employees with accents, was sufficient to state a viable claim of race discrimination. Taking the allegations in the light most favorable to Complainant, he clearly stated a claim of harassment).

Complaint Involving Grievance Settlement Properly Dismissed. The Commission found that Complainant's complaint alleging that the Agency failed to abide by a grievance settlement was properly dismissed for failure to state a claim. The Commission has held that an employee cannot use the EEO process to lodge a collateral attack on another adjudicatory proceeding. The complaint clearly concerned a matter addressed by the collective bargaining agreement, and Complainant must raise his claims in that process. [Terrance S. v. U.S. Postal Serv., EEOC Appeal No. 0120171198 \(June 30, 2017\)](#).

Complaint Properly Dismissed as Agency Was Not Joint Employer. The Commission found that the Agency did not exercise sufficient control over Complainant's position to qualify as her joint employer for purposes of the EEO complaint process. Complainant performed her duties at an Agency facility, using Agency equipment. She also received assignments from an Agency supervisor. However, the record reflected that Complainant was hired by the contractor, which ensured not only that she was qualified for the position but also that she held the necessary security clearances. The contractor paid Complainant on a weekly basis, and withheld taxes, and provided her with health benefits and the opportunity to participate in a retirement plan. Complainant earned sick leave and annual leave with the contractor. The contractor evaluated her performance and Complainant was terminated by the contractor due in part to her problematic communication with contract managers. Complainant's statements on appeal reflected that while her government supervisor "liked her work ethic" her claims of discrimination primarily concerned the contractor. [Luvenia S. v. Nat'l Intelligence Agency, EEOC Appeal No. 0120170733 \(May 19, 2017\)](#).

Complaint Regarding OWCP Process Properly Dismissed for Failure to State a Claim. Complainant filed a formal complaint alleging that the Agency subjected her to discrimination on the basis of disability when she received a letter from the Department of Labor stating that her salary was not correctly reported by the Agency. The Agency dismissed the complaint for failure to state a claim, determining that the matter was outside of the Commission's jurisdiction and should have been raised with the Department of Labor. The Commission affirmed the Agency's dismissal of Complainant's complaint, finding that there is no remedial relief to Complainant through the EEO complaint process. Complainant should have raised challenges to actions which occurred during the Department of Labor's Office of Workers' Compensation Programs (OWCP) proceeding at the proceeding itself since any remedial relief available to Complainant would be through the OWCP process.

[Tricia B. v. U.S. Postal Serv., EEOC Appeal No. 0120171239 \(May 2, 2017\)](#); see also [Peggie T. v. U.S. Postal Serv., EEOC Appeal No. 0120170753 \(May 5, 2017\)](#) (Complainant alleged she was subject to discrimination when her injury compensation form was sent back to her and her workers' compensation/continuation of pay was delayed. The Commission affirmed the Agency's dismissal for failure to state a claim, finding the EEO process was not the proper forum for adjudicating a worker's compensation claim. Complainant must instead raise such matters with the Department of Labor); [Heidi B. v. U.S. Postal Serv., EEOC Appeal No. 0120170887 \(Apr. 6, 2017\)](#) (Complainant claimed discrimination on the bases of disability and age when the Agency failed to properly process her OWCP claim. The Commission affirmed the Agency's dismissal, finding that Complainant should have raised the matter with the Department of Labor, and cannot use the EEO complaint process to collaterally attack actions that occurred during the OWCP claim process).

Complaint Properly Dismissed for Failure to State a Claim. Complainant filed a formal EEO complaint alleging that the Agency subjected her to discrimination based on race when, on August 7, 2014, the Agency issued Complainant a proposed suspension that was later rescinded and, on September 10, 2014, when her manager yelled at her to "stop her yakking." The Commission affirmed the agency's decision to dismiss the complaint for failure to state a claim. Any harassment that took place was too isolated or minor to rise to an actionable level. In addition, the proposed suspension was ultimately revoked, and Complainant did not allege that she was subjected to any disciplinary action. [Bobbie C. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120150226 \(Apr. 22, 2016\)](#).

Complaint Failed to State a Viable Hostile Environment Claim. Complainant filed a formal complaint alleging that a co-worker made negative comments about her, and a supervisor yelled at Complainant for taking a long break. The Agency dismissed the complaint for failure to state a claim. The Commission affirmed the Agency's dismissal on appeal, finding that Complainant did not state a viable claim of discriminatory hostile work environment. The Commission found that the supervisor's actions, without more, were insufficiently severe or pervasive to state a valid claim. In addition, while the Commission acknowledged that the co-worker's comments regarding Complainant's driving and her English were offensive, management required the co-worker to apologize when Complainant reported the comments, and Complainant did not allege that similar conduct occurred beyond the one incident. [Marguerite W. v. U.S. Postal Serv., EEOC Appeal No. 0120170436 \(Apr. 14, 2017\)](#).

Complaint Properly Dismissed for Failure to State a Claim of Retaliation. Complainant alleged the Agency advised him to seek new employment after he expressed his opposition to a colleague's personal decision to seek a wife through an arrangement coordinated by a private company. The Commission affirmed the Agency's dismissal of the complaint for failure to state a claim. The sole basis of the complaint was retaliation, however,

Complainant failed to allege he was retaliated against for opposing an employment policy or practice which he reasonably believed violated Title VII, and Complainant did not show that he engaged in prior EEO activity.

[Bertram K. v. Dep't of State, EEOC Appeal No. 0120170834 \(Apr. 11, 2017\).](#)

Complaint of Reprisal Properly Dismissed for Failure to State a Claim. Complainant filed a formal complaint alleging that the Agency engaged in discrimination when it falsified her mid-year performance review and subjected her to a hostile work environment. Reprisal was the only basis of discrimination identified by the Complainant. The Commission found that the Agency properly dismissed the complaint for a failure to state a claim because Complainant's allegation of reprisal was only based on her filing of a previous grievance. There was no evidence that Complainant engaged in any protected EEO activity. [Josefina P. v. Dept. of Commerce, EEOC Appeal No. 0120170328 \(Apr. 10, 2017\).](#)

Summary Judgment

Summary Judgment Affirmed in Part and Vacated in Part. Complainant alleged discrimination and retaliation when she received unfavorable performance reviews and was suspended for five days. The AJ issued a decision without a hearing, finding that Complainant failed to establish disparate treatment or a hostile work environment based on her protected classes, and further failed to establish retaliation as five years had passed between Complainant's prior EEO activity and the events set forth in the instant complaint. The Commission held that the AJ properly issued a decision without a hearing with respect to the claims of disparate treatment and harassment based on race and age, but erred with respect to the claims of reprisal. Specifically, the Commission found material facts were in dispute as to whether the responsible official, who the Commission described as untruthful, was aware of Complainant's EEO activity. The Commission stated that the responsible official's false statement that she had no knowledge of Complainant's prior EEO activity also raised an issue of credibility regarding her explanation for the alleged discrimination. Therefore, the Commission remanded the claim of retaliation for an administrative hearing. [Leanne H. v. Soc. Sec. Admin., EEOC Appeal No. 0120140090 \(Apr. 21, 2017\).](#)

Summary Judgment Affirmed. Complainant filed a formal complaint alleging that the Agency discriminated against her on the bases of race and sex when the Agency denied Complainant the opportunity for three detail assignments. The AJ issued a decision by summary judgment in favor of the Agency, finding that the Agency articulated a legitimate, non-discriminatory reason for its action and that Complainant failed to provide any evidence to contradict these statements or demonstrate how anything other than the Manager's need for manpower at Complainant's current facility motivated the Manager to deny Complainant's request for details to other locations. The Commission affirmed the AJ's decision, finding that Complainant failed to identify any disputed facts, and even construing any inferences raised by the undisputed facts in favor of Complainant, a

reasonable fact-finder could not find in her favor that the Agency's actions were a pretext for discrimination.

[Corie E. v. U.S. Postal Serv., EEOC Appeal No. 0120150453 \(Apr. 5, 2017\).](#)

Summary Judgment Affirmed. Complainant alleged she was discriminated against on the bases of race and sex when she was denied an interview for a vacant position. The Commission affirmed the AJ's grant of summary judgment in favor of the Agency, finding Complainant had ample opportunity to engage in discovery prior to the decision and no genuine issue of material fact existed. The Commission noted that the proper time for Complainant to have addressed discovery deficiencies was during the hearing stage, and there was no evidence that Complainant raised the matter with the AJ. Complainant failed to identify any similarly situated employee who was treated more favorably, and the Agency provided legitimate, nondiscriminatory reasons for its actions. [Verlie S. v. U.S. Postal Serv., EEOC Appeal No. 0120150984 \(Apr. 4, 2017\).](#)

Summary Judgment Reversed. The Commission found the grant of summary judgment improper because there were genuine issues of material fact concerning whether Complainant was subjected to a hostile work environment. The AJ cited management's affidavit testimony that it required Complainant to remain in the break room for four hours daily because there was not enough work to support the two employees who had regular bid assignments where Complainant worked. Although Complainant asserted that these employees worked overtime, the AJ found that they were not similarly situated because they had no medical restrictions. The AJ also found that another employee was not similarly situated because the Supervisor of Distribution Operations stated that he did not supervise that individual. The Commission determined that the record did not contain any documentary evidence pertaining to the volume of mail in Complainant's section, the amount of overtime worked by the named co-workers, or the supervision of one of the named co-workers. To resolve the conflicting affidavit testimony from management and Complainant, the AJ improperly weighed the affidavit testimony and made credibility determinations. In view of the interrelated nature of the claims in Complainant's complaint, and to avoid fragmentation, the Commission remanded the entire complaint for a hearing. [Iris D. v. U.S. Postal Serv., EEOC Appeal No. 0120150251 \(June 6, 2017\).](#)

Timeliness

Complainant Timely Contacted Individual Logically Connected with EEO Process. The Commission reversed the Agency's dismissal of Complainant's complaint for failure to timely contact an EEO Counselor, finding that Complainant timely contacted an Agency manager logically connected to the EEO process. It was undisputed that Complainant contacted a named EEO Manager within 45 days of the alleged discrimination and discussed the matter with her. The Agency asserted that Complainant was provided with a document explaining that the EEO Manager was not an EEO Counselor and that Complainant needed to contact a Counselor in order to pursue her complaint. The Commission has consistently held, however, that an individual

may satisfy the requirement for timely EEO contact by initiating contact with any Agency official logically connected with the EEO process even if that official is not a Counselor. [Nia G. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120170943 \(June 23, 2017\)](#).

Commission Exercised Discretion to Excuse Delay in EEO Contact. The Commission reversed the Agency's dismissal of Complainant's complaint for failure to timely contact an EEO Counselor. The record showed that Complainant, a probationary employee, was not aware of her EEO rights or who she needed to contact to initiate the EEO complaint process. While Agency managers confirmed that EEO posters including the 45-day limitation period were on display at the facility during the relevant period, Complainant asserted that a manager instructed her not to go to a "higher authority" and stated that she, the manager, made final decisions for Complainant's branch. Therefore, Complainant was led to believe that the only avenue of recourse was through the manager. The Commission exercised its discretion to excuse Complainant's relatively brief delay in seeking EEO counseling, and remanded the matter for processing. [Hannah C. v. U.S. Postal Serv., EEOC Appeal No. 0120171151 \(June 22, 2017\)](#).

Complaint Improperly Dismissed for Failure to Timely Contact EEO Counselor. The Commission reversed the Agency's dismissal of Complainant's complaint alleging discriminatory non-selection for untimely EEO Counselor contact. The Agency claimed it emailed notice of the selections on a certain date, but provided no documentation that Complainant received the emails on that date. Furthermore, the emails did not indicate the official start date for the Selectees, nor did the record contain other documentation such as personnel action forms indicating when the Selectees assumed the positions. Therefore, the Commission accepted the start date proffered by Complainant as the date when the 45-day period began and found that he timely contacted the EEO Counselor. [Gerald M. v. Dep't of Agric., EEOC Appeal No. 0120171178 \(June 2, 2017\)](#).

Commission Found Justification to Waive Time Limit for EEO Counselor Contact. The Commission reversed the Agency's dismissal of Complainant's complaint for untimely EEO Counselor contact. The Commission noted that Complainant's delay was relatively brief (two weeks beyond the 45-day deadline), and found the circumstances of the case warranted an extension of the limitation period. Despite evidence of EEO posters setting forth the time limitations on display in the Agency's facility and evidence of Complainant's attendance to No Fear Act training, evidence which would usually constitute constructive knowledge, the Commission found Complainant sufficiently demonstrated she was not aware of the time limitations. Complainant directly asked the Field Chief about the time limitations, but the Field Chief responded that he had no knowledge of the EEO process or the time limitations, and the Field Chief failed to make any effort to provide any information to Complainant. [Sandra H. v. Dep't of the Treasury, EEOC Appeal No. 0120170999 \(May 5, 2017\)](#).

Complaint Improperly Dismissed for Failure to Timely Contact EEO Counselor. Complainant alleged that she was subjected to a hostile environment when she and several African American co-workers were subjected to racial epithets by Agency management. Complainant indicated that a supervisor participated in the acts and allowed the harassment to continue for several months. The Agency ultimately dismissed Complainant's formal complaint on the grounds she failed to timely contact an EEO Counselor. On appeal, the Commission found that the entire claim was actionable since various incidents included in the claim occurred within the filing period. Thus, the Commission found that the Complainant timely initiated EEO contact and the Agency's dismissal was improper. [Shayna P. v. Dep't of Veterans Affairs., EEOC Appeal No. 0120160452 \(Apr. 27, 2017\).](#)

Complaint Improperly Dismissed for a Failure to Timely Contact an EEO Counselor. The Agency dismissed Complainant's complaint asserting that Complainant failed to allege any incidents that occurred within the 45-day limitation period. The Commission held that Complainant's complaint was improperly dismissed. Incidents that make up a hostile work environment claim collectively constitute one unlawful employment action, and the entire claim is actionable if at least one of the incidents took place within the 45-day contact period. This includes incidents that occur outside the filing period for which the Complainant knew or should have known were actionable. Here, Complainant alleged that at least one incident took place within the 45-day contact period, so Complainant timely initiated contact with an EEO Counselor with respect to her harassment claim. [Jenee W. v. Soc. Sec. Admin., EEOC Appeal No. 0120170580 \(Apr. 14, 2017\)](#); see also [Gwendolyn G. v. Dep't of the Air Force, EEOC Appeal No. 0120171633 \(June 30, 2017\)](#) (various incidents comprising Complainant's claim of hostile work environment occurred within 45 days of the date she initiated contact with the EEO Counselor, and, therefore, she timely initiated her complaint).

Dismissal of Claim for Failure to Timely Contact an EEO Counselor Was Improper. The Agency dismissed Complainant's complaint alleging unlawful employment discrimination for failure to timely contact an EEO Counselor. The Commission reversed the decision on appeal, finding that Complainant timely raised her claim that she was denied accommodation. Complainant filed a prior complaint alleging that management refused to accommodate her hearing condition and removed the devices that she was using to accommodate her condition from her office. Complainant stated that management refused her request for accommodations multiple times, and she contacted the EEO Counselor when management still had not accommodated her disability. The Commission stated that since the duty to reasonably accommodate is ongoing, the failure to provide such accommodation constitutes a violation each time the employee needs it. Therefore, Complainant timely initiated her complaint. [Judie D., v. U.S. Postal Serv., EEOC Appeal No. 0120170835 \(Apr. 6, 2017\).](#)

Complaint Properly Dismissed for Untimely EEO Counselor Contact. Complainant contacted an EEO Counselor in November 2016, and subsequently filed a formal complaint raising various incidents of alleged discrimination from February 2014 through August 2016. The Commission affirmed the Agency's dismissal of the complaint for failure to timely contact an EEO Counselor. The record showed that Complainant previously contacted the Agency's EEO Office in August 2016, but Complainant abandoned the matters, as evidenced by a memorandum from an EEO Counselor. In addition, the Agency sent Complainant a Notice of Right to File a Formal Complaint to his address of record by certified mail in September 2016, but Complainant failed to claim the package. The Commission has consistently held that first contact with an EEO Counselor does not constitute initial contact for purposes of timeliness when the complainant withdraws from counseling and then subsequently re-initiates EEO contact on the same matter. [Virgilio W. v. Dep't of the Army, EEOC Appeal No. 0120171194 \(June 22, 2017\)](#).

Complaint Properly Dismissed for Untimely EEO Counselor Contact. Complainant filed a complaint of discrimination alleging that the Agency placed her in "emergency placement" in December 2015, and issued her a Notice of Removal that became effective in January 2016. The Agency dismissed the claim for failure to contact an EEO Counselor within the 45-day limitation period, and the Commission affirmed the dismissal. While Complainant asserted that the limitation period should be tolled because she was awaiting an arbitration decision, the Commission has consistently held that the use of internal agency procedures, union grievances and other remedial processes does not toll the time limit for contacting an EEO Counselor. The record showed that EEO posters with the applicable time limit were on display at Complainant's facility. The Commission further noted that, to the extent Complainant was alleging dissatisfaction with the Arbitrator's decision, the claim was properly dismissed for failure to state a claim because it was a collateral attack on the grievance process. [Dollie T. v. U.S. Postal Serv., EEOC Appeal No. 0120171110 \(May 9, 2017\)](#).

Complaint Properly Dismissed for Untimely Contact with EEO Counselor. Complainant initiated EEO Counselor contact on July 15, 2016 alleging that the Agency subjected him to discrimination on the basis of age when he was denied the opportunity to participate in the Technical Career Field Program in 2010 and 2012 and when he was not selected for an advertised position in 2012. The EEO Counselor's report revealed that Complainant specifically indicated he was not alleging discrimination regarding his 2016 non-selection. The Agency dismissed the complaint on the grounds of untimely EEO counselor contact since Complainant did not initiate contact with the EEOC Counselor within 45 days of the alleged discrimination. Complainant argued that he did not develop reasonable suspicion of age discrimination until he contacted his union representative regarding the 2016 non-selection and told he might have a claim. The Commission affirmed the Agency's dismissal of Complainant's complaint on the grounds of untimely EEO Counselor contact, noting that it has

previously found that ignorance of the law does not excuse the failure to raise a claim in a timely manner because a complainant has a duty to take reasonable efforts to ascertain his legal rights. [Porter P. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120171225 \(May 2, 2017\)](#).

Complaint Properly Dismissed for Untimely Contact with EEO Counselor. Complainant filed an appeal with the Commission from the Agency's dismissal of his complaint alleging discrimination on the basis of disability when he was terminated from his position. The Commission affirmed the Agency's dismissal of Complainant's complaint because Complainant did not initiate contact with an EEO Counselor within 45 days of the discriminatory action and did not present any persuasive arguments or evidence warranting an extension of this time limit. The facility where Complainant was employed had EEO posters posted that included the time limit, and Complainant received EEO training that included information regarding the time limit. While Complainant asserted that he did not timely contact an EEO Counselor because of his disability, nothing in the statements provided by Complainant supported a finding that he was so incapacitated throughout the applicable period as to prevent him from timely contacting an EEO counselor. [Samuel D. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120170568 \(Apr. 14, 2017\)](#).

Complainant Failed to Timely Contact EEO Counselor. Complainant filed a formal complaint in March 2016 alleging that the Agency subjected her to harassment. Specifically, she alleged that her manager created a hostile work environment by denying her multiple promotions and by sending her degrading emails. Complainant also cited her manager's failure to promote her in August 2014. The Commission found that Complainant had a reasonable suspicion to believe that a discriminatory action took place in August 2014, more than 45-days prior to EEO contact, as she alleged that she became "very uneasy" that her manager cited her maternity leave as one reason for awarding a promotion to a less experienced male. Similarly, the most recent email from Complainant's manager was sent more than 45 days before Complainant contacted an EEO counselor. Complainant did not provide any explanation for the delay to warrant a tolling of the contact period and the record supported that Complainant was aware of limitation period. Therefore, the Commission found that Complainant's complaint was properly dismissed for untimely contact with an EEO counselor. [Kayce L. v. Soc. Sec. Admin., EEOC Appeal No. 0120170736 \(Apr. 14, 2017\)](#).

Commission Found Sufficient Justification to Toll Limitation Period for Filing Complaint. The Commission reversed the Agency's dismissal of Complainant's complaint finding sufficient justification to toll the limitation period. Specifically, the record showed that the EEO Counselor mistakenly informed Complainant to submit a signed copy of the Notice of Right to File instead of a signed formal complaint. Complainant provided a copy of an email chain to support her assertion, and the Agency presented no evidence or affidavit from the EEO Counselor to refute Complainant's contentions. Therefore, the Commission found that the delay

in filing resulted from the Agency's misinformation. [Aline A. v. Dep't of State, EEOC Appeal No. 0120171615 \(June 28, 2017\)](#).

Complaint Improperly Dismissed as Untimely. The Agency dismissed Complainant's complaint as untimely, stating that it was not filed within 15 days of receipt of the Notice of a Right to File an Individual Complaint. The Commission reversed the Agency's dismissal on appeal. The return receipt certificate was signed by an unidentified individual at Complainant's address. Complainant stated that she did not personally receive the notice on the date the Agency claimed because it was signed by an employee of the apartment complex where she lived. The certificate contained a notation that supported Complainant's assertion, and Complainant stated that an Agency EEO Specialist later helped her to locate the Notice. [Herta K. v. U.S. Postal Serv., EEOC Appeal No. 0120171524 \(June 28, 2017\)](#).

Complaint Improperly Dismissed as Untimely. Complainant filed a formal complaint alleging that the Agency discriminated against her when it issued her a letter of warning. The Agency dismissed the complaint as untimely, stating that she did not submit her complaint within the 15-day limitation period. On appeal, the Commission found that the Agency failed to meet its burden of providing evidence to support its final decision. While the Agency asserted that Complainant received the notice of right to file on September 29, 2016, the information provided stated only that the item was "in transit." Complainant stated that she never received the notice to file a formal complaint and had to contact the EEO Counselor to have the notice faxed to her on October 3, 2016. Complainant submitted a receipt showing she mailed her formal complaint within 15 days of receiving the fax. [Jade R. v. U.S. Postal Serv., EEOC Appeal No. 0120170760 \(May 10, 2017\)](#).

Complaint Improperly Dismissed for Untimely Filing. The Commission reversed the Agency's dismissal of the claim for untimely filing on grounds that the Agency failed to meet its burden of providing sufficient evidence reflecting Complainant's receipt of the Notice of Right to File (NRF) on the date alleged by the Agency. The Agency alleged that the record included a USPS tracking number, which sufficiently established Complainant's receipt of the NRF on the claimed date. The Commission found that such evidence was insufficient as the tracking number provided a "status not available" message when entered onto the appropriate USPS tracking webpage, and the record further failed to include alternative evidence of proof of receipt. [Sierra P. v. Soc. Sec. Admin., EEOC Appeal No. 0120160031 \(Apr. 20, 2017\)](#).

ARTICLE

(The following article is not intended to be an exhaustive or definitive discussion of a complex area of law, nor is it intended as legal advice. The article is generally based on EEOC documents available to the public at the

Commission's website at <https://www.eeoc.gov/>, as well as on Commission case law and court decisions. Some EEOC decisions cited may have appeared in previous editions of the Digest.)

RACE DISCRIMINATION IN THE 21ST CENTURY WORKPLACE by Paula Rene' Bruner¹

Title VII of the Civil Rights Act of 1964 prohibits discrimination based on race.² Specifically, Title VII provides in relevant part: "[i]t shall be an unlawful employment practice for an employer ... to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race[.]"³

In *General Dynamics Land Systems, Inc. v. Cline*,⁴ the Supreme Court observed that the motivation behind the enactment of the Civil Rights Act of 1964 was "to prevent invidious discrimination against racial minorities, especially [B]lacks."⁵ Legislative history reveals that one U.S. Senator stated that the goals of the Civil Rights Act were simple ones: "To extend to Negro citizens the same rights and the same opportunities that [W]hite Americans take for granted."⁶ Statistics indicate that race is the most frequently cited discrimination basis under Title VII and ranks second among federal EEO complaints.⁷

Shortly after Title VII's enactment, the EEOC applied a broader interpretation to "race." In, 1973, the Commission ruled that if qualified Caucasian applicants were being denied job opportunities due to word-of-mouth recruitment, an employer's recruiting activity violated Title VII "to the extent that Caucasians as a class [we]re deprived of an equal opportunity to consider employment with Respondent."⁸ A few years later, the Supreme Court deferred to the EEOC's interpretation and held that Title VII's protections extended to all racial groups.⁹ With this broad prohibition in mind, the Supreme Court made clear "that Title VII tolerates no racial discrimination, subtle or otherwise."¹⁰

In the 21st century workplace, race discrimination has manifested in various forms that remain grounded in, but may go beyond, the individual employee's skin color. As the EEOC has indicated in its guidance on race and color discrimination, Title VII's prohibition of race discrimination encompasses ancestry, physical characteristics, race-linked illnesses, culture, perception, association, sub-groups, and reverse race discrimination.¹¹ Further, Title VII's prohibition on workplace race discrimination reaches racially hostile or abusive work environments.¹² Finally, through its E-RACE initiative,¹³ the Commission attempted to showcase contemporary types of race discrimination that are not always overt or commonplace and to reveal that no particular racial group has a monopoly on being the victim or the perpetrator.

Since most are familiar with traditional forms of race discrimination, such as disparate treatment in terms and conditions,¹⁴ racial harassment,¹⁵ job segregation,¹⁶ and racial stereotyping,¹⁷ the categories and cases below

will attempt to highlight newer types of race discrimination that have emerged in the 21st century federal, public, and private employment sectors.

Associational Discrimination

A mixing of races through friendships, romantic relationships, coworker alliances, and even marriage has existed since America's inception.¹⁸ Employment discrimination against an applicant or employee "because of his/her association with someone of a particular race," known as "associational discrimination" is unlawful.¹⁹ For example, it is unlawful to discriminate against a White person because he or she is married to an African American or has a multiracial child, or because he or she maintains friendships or otherwise associates with persons of a certain race."²⁰

To the extent that some have proclaimed that associational discrimination is not a viable claim if the aggrieved employee is not a member of the targeted or "disfavored" race, federal courts and the EEOC have reached a contrary conclusion. In short, when an employee is subjected to adverse action because an employer disapproves of interracial association, the employee suffers discrimination because of that employee's own race.²¹

In the following federal and private sector cases, we find that associational discrimination can manifest in unique ways.

In *Wiggins v. Social Security Administration*,²² Complainant filed a formal EEO complaint alleging that the Agency discriminated against her on the bases of her age, disability and race (African-American who associated with White individuals) when she was not selected for a Social Insurance Administrator position in Colorado. The Commission found that Complainant established a prima facie case of associational race discrimination because she showed that an actual relationship existed between her and an individual of another race (White managers) and there was substantial evidence in the record that Complainant's association with her White supervisors was held against her by her immediate supervisor. While the Agency stated that it chose the Selectee over Complainant because the Selectee was a "stronger" candidate based on her experience, qualifications, leadership and management philosophy, the Commission found that the Agency's reason was unworthy of belief. The record indicated that Complainant's qualifications were plainly superior to those of the Selectee, but the selecting supervisor, who was Black, nullified the selection process and chose the Selectee even though the recommending manager, who was White, recommended Complainant for the position. The Commission concluded that the selecting supervisor's decision was likely motivated by his desire to show the White managers that he was in charge. Lastly, there was substantial evidence indicating the selecting

supervisor had a philosophy of rewarding those Black employees who aligned themselves with him instead of the White managers.

In *Morgan v. Dep't of Agriculture*,²³ Complainant claimed that the Agency subjected him to discrimination and harassment based on national origin (association with Native Americans through his spouse and others). While the AJ determined that Complainant failed to establish any evidence showing that his association with Native Americans was related to the Agency's adverse actions to create a prima facie case of harassment, the Commission found there were genuine issues of material fact as to the nature of the Agency's motivations for its actions. For example, while the supervisor denied that he used derogatory terms to describe Native Americans or that he called them "whining Indians," other witnesses stated that Complainant told them that the supervisor used profane language. Further, a District Director stated in his affidavit that he felt the supervisor's actions may have been motivated by Complainant's association with Native Americans since the supervisor came into the Director's office and gave him three reasons to reassign Complainant, two of which had to do with Complainant's association with tribes.

In *EEOC v. Management Solutions, Inc.*,²⁴ a private sector litigation settlement, an apartment management company paid \$90,000 in monetary relief and agreed to provide affirmative relief to settle an EEOC lawsuit. The lawsuit alleged that the company violated Title VII by firing a White manager in retaliation for hiring a Black employee in contravention of a directive by one of the owners to maintain a "certain look" in the office, which did not include African Americans.

In *Holcomb v. Iona College*,²⁵ a White former employee of a college athletic department sued the college, alleging that his termination as associate head coach of the men's basketball team was based on race, namely his marriage to an African-American woman, in violation of Title VII. The Second Circuit held, for the first time, that an employer may violate Title VII if it takes action against an employee because of the employee's association with a person of another race. Further, the Court found that a reasonable jury could determine that Holcomb was fired in part because he was married to a Black woman based on evidence that included the college's vice-president's reaction to Holcomb's wedding invitation: "[Y]ou're really going to marry that Aunt Jemima? You really are a [n-word] lover."

In *EEOC v. Jax Inns Inc. d/b/a Spindrifter Hotel*,²⁶ the EEOC sued the defendant hotel on behalf of a White female former sales director claiming race discrimination in violation of Title VII. The Commission alleged that the defendant owner wrongfully terminated the female director when he realized that she had biracial children and had been associating with Black people. The defendant denied the allegations but paid \$99,000 to the director to resolve the lawsuit.

Biracial Discrimination

Biracial discrimination, a by-product of associational discrimination, is employment discrimination that targets persons because they are mixed-race.

In *EEOC v. Jefferson Pain & Rehabilitation Center*,²⁷ a private sector litigation settlement, the EEOC resolved a hostile work environment case in which a Caucasian-looking employee, who had a White mother and Black father, was repeatedly subjected to racially offensive comments about Black people after a White coworker learned she was biracial. When the biracial employee complained, she was told to "pray about it" or "leave" by the Asian owner; the employee resigned. The company agreed to pay \$45,000 to the biracial employee, to create a policy on racial harassment, and to train the owner, managers and employees about how to prevent and address race discrimination in the workplace.

In *EEOC v. Bolling Steel Co.*,²⁸ another private sector litigation settlement, a Virginia steel contractor settled for \$27,500 a Title VII lawsuit, charging that it subjected a biracial (Black/White) employee to harassment based on race and color and then retaliated against him when he complained.

Intersectional Discrimination

Title VII prohibits discrimination based on the intersection of two or more protected bases (e.g., race and sex). For example, Title VII prohibits discrimination against African American women even if the employer does not discriminate against White women or African American men.²⁹ When a complainant asserts an intersectional claim and offers the different treatment of comparators as evidence of bias or pretext,³⁰ the comparators are any individual who does not possess the intersection of bases that the complainant has (e.g., an Asian female complainant's comparators are persons who are not Asian females).³¹

In *Hamilton v. Geithner*,³² Gary Hamilton, a Black male industrial hygienist for the Internal Revenue Service (IRS), raised triable claims under Title VII of the 1964 Civil Rights Act that he was not promoted to manager because of his race and gender. A district court granted summary judgment to IRS on the hygienist's Title VII claims, reasoning that he could not show that his qualifications were so clearly superior to those of the White woman who was selected for the GS-14 safety/occupational health manager job, that a reasonable jury could find IRS's stated reasons for hiring Burrell were pretextual. Although Hamilton and the Selectee each received perfect scores on IRS's ranking of relevant knowledge, skills, and abilities, IRS officials testified that they chose selectee the Selectee because she performed better than Hamilton in the interview process. Hamilton also claimed that after he filed an EEO complaint in October 2003 alleging unlawful discrimination in the promotion process, IRS retaliated against him in January 2004 by selecting a White female employee instead of Hamilton for a temporary detail as a GS-14 manager. Partially reversing the District Court, the D.C. Circuit said the

combination of Hamilton's superior academic credentials and work experience, IRS's reliance on subjective factors to explain its promotion decision, and IRS's lack of contemporaneous documentary evidence to support its assertion that the Selectee performed better in interviews could allow a reasonable jury to find Agency's justifications were a pretext for race and sex discrimination. The Circuit Court added, "We believe that, when taken together, the evidence of a significant disparity in the candidates' qualifications, the highly subjective nature of the [Agency's] proffered nondiscriminatory explanation, and the absence of any contemporaneous documentation supporting that explanation could lead a reasonable jury to disbelieve the [Agency] and reach a verdict in Hamilton's favor."

In *EEOC v. Hamilton Growers, Inc.*,³³ a private sector litigation settlement, an agricultural farm in Georgia paid \$500,000 to a class of American seasonal workers, many of them African-American, who, the Commission alleged, were subjected to discrimination based on their national origin (American) and/or race (Black or Caucasian). The Commission's suit charged that the company unlawfully engaged in a pattern or practice of discrimination against American workers by firing virtually all American workers while retaining workers from Mexico during the 2009, 2010 and 2011 growing seasons. The Commission also alleged that Hamilton Growers fired at least 16 African-American workers in 2009 based on the intersectionality of their race and national origin as their terminations were coupled with race-based comments by a management official. Additionally, they and other American workers were provided lesser job opportunities when they were assigned to pick vegetables in fields which had already been picked by foreign workers, resulting in Americans earning less pay than their Mexican counterparts, and were regularly subjected to different terms and conditions of employment, including delayed starting times and early stop times, or being denied the opportunity to work at all, while Mexican workers were allowed to continue working. The settlement provides monetary relief to 19 persons who filed charges with the EEOC and other American workers harmed by the practices.

Federal EEO laws also protect individuals from discrimination because of the intersection of their race and a trait covered by another EEO statute, such as the Americans with Disabilities Act (i.e. race and disability) or the Age Discrimination in Employment Act (i.e. race and age).

In *Jones v. U.S. Postal Service*,³⁴ the Commission upheld an Administrative Judge's finding of discrimination on the bases of race (African-American), sex (female), and disability (cervical strain/sprain) when Complainant was not accommodated with a high back chair unlike her non-Black coworkers who requested accommodations. The Agency was ordered to provide Complainant with back pay for the period she was out of work due to the failure to accommodate, and Complainant was awarded \$2,250 in compensatory damages.

In *EEOC v. Wells Fargo Financial Michigan, Inc.*,³⁵ a private sector litigation settlement, a financial services company formerly located in various cities in Michigan settled for \$55,000 an age and race discrimination suit brought by the EEOC. The EEOC lawsuit alleged that Wells Fargo Financial failed to promote a highly qualified 47-year-old African-American loan processor based on age and race. The loan processor applied for a promotion but was passed over for five lesser qualified Caucasian women aged between 23 and 30, even though the processor had the best combination of relevant, objective scores that measured productivity, was "loan processor of the year" for 2007, the year immediately preceding the promotion decision, worked at one of the largest and most profitable offices in the relevant district, and was the "go-to person" for the district on loan processing.

Same Race Discrimination

Same race discrimination occurs when the victim and the person who inflicted the discrimination are the same race.³⁶ In *Castaneda v. Partida*,³⁷ the Supreme Court first rejected the assertion that "human beings would not discriminate against their own kind." In his concurring opinion, Justice Thurgood Marshall expounded that, while one would think the mere inclusion of decisionmakers and power holders of color will assure fairness and non-discrimination in all decision-making affecting persons of color, "[s]ocial scientists agree that members of minority groups frequently respond to discrimination and prejudice by attempting to disassociate themselves from the group, even to the point of adopting the majority's negative attitudes towards the minority."³⁸

Two decades later, the Court reiterated this principle in *Oncale v. Sundowner Offshore Services, Inc.*,³⁹ a same-sex harassment case, when it observed that "in the related context of racial discrimination in the workplace we have rejected any conclusive presumption that an employer will not discriminate against members of its own race." The Court observed that "[b]ecause of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of that group."⁴⁰

The EEOC also has acknowledged the viability of same-race discrimination in the federal sector realm. In *Complainant v. Dep't of the Air Force*,⁴¹ decades before *Oncale*, the EEOC rejected the erroneous notion that the inference of discrimination is negated if the alleged discriminator belonged to the same racial group as the victim. In this case, Complainant sought EEOC review of a decision by the Merit Systems Protection Board (MSPB) rejecting Complainant's allegations of discrimination based on race (Black) and sex (female) after she was treated differently than a White employee who was not disciplined for having a shortage of cash in her cash register while Complainant was removed from her sales store checker position for the same offense. MSPB decided that since the official who proposed Complainant's removal was a Black female and the deciding official was also Black, discrimination could not be found. While the EEOC ultimately concurred with

the finding of no discrimination, the Commission rejected MSPB's reasoning that persons of the same race and/or sex cannot discriminate against one another and noted that the fact that those agency officials who recommended and decided that Complainant be removed were of the same race and/or sex as Complainant does not automatically eliminate the possibility that Complainant's removal was a discriminatory agency action based on race and sex.

In *Fisher v. Mermaid Manor Home for Adults, LLC*,⁴² an African-American health care aide prevailed before a jury on her claims that an assisted living facility failed to adequately correct racial harassment and national origin discrimination directed at her by two Black co-workers who hailed from Jamaica and Haiti. Among other derogatory verbal and physical misconduct, the co-workers posted an Instagram photo of the aide comparing her to a fictional chimpanzee from the movie "Planet of the Apes." The facility was found liable under Title VII and New York's anti-discrimination law for failing "to cure the disease: 'hostility' between African American and Caribbean workers." The District Court rejected the facility's attempts to overturn the jury verdict but reduced the jury's award of \$275,000 to be commensurate with the statutory cap of \$75,000.

Perceived Race Discrimination

Perceived race discrimination is employment discrimination against an individual based on a belief that the individual is a member of a particular (and usually disfavored) racial group, regardless of how the individual identifies him or herself.⁴³ The most common factor is the person's skin color because "rather than indicating in positive terms what the race of the plaintiff is, [it] appears merely to indicate the negative, that he or she is not white, thus, essentially breaking race down into two categories, white and non-white."⁴⁴ It is the skin color leading to the perception that the person is 'different' from the white majority that leads to discrimination. (omitting internal citation).⁴⁵ The District Court explained:

This Court has never encountered an instance in which an employer admittedly first checked the pedigree of an employee before engaging in discriminatory conduct. "Historically, common notions of race divided people either along national lines or the perceiver's subjective evaluation of skin pigmentation.... The idea of race as an element of the history of ideas in this country has frequently been no more than a vehicle for racism, i.e., a presumed inherited defect in those who are not of the racist's kind, however he defines his kind."⁴⁶

With respect to perceived discrimination, the EEOC maintains that discrimination against an individual based on a perception of his or her race violates Title VII even if that perception is wrong.⁴⁷

In *Jones v. UPS Ground Freight*,⁴⁸ an African-American former employee, who worked as a delivery truck driver, was subjected to racial slurs by his instructor during his first week of employment with UPS. His instructor referred to him as an "Indian." Despite being informed that Jones was not an Indian, the instructor

replied: "I don't care what race you are, I trained your kind before." The Court opined, "Jones is neither Native American nor Indian. Nevertheless, a harasser's use of epithets associated with a different ethnic or racial minority than the plaintiff will not necessarily shield an employer from liability for a hostile work environment."⁴⁹

CONCLUSION

As these Title VII cases demonstrate, racial discrimination and harassment come in all guises. To be effective at its eradication, one must know the shape or form the discrimination may take and be prepared to eliminate it. It is not limited to the utterance of the "n-word" or other despicable or offensive racial remarks. Nor is it restricted to obvious race-based disparate treatment and symbols of hatred such as cross-burnings, nooses, or the letters "KKK." Unfortunately, racial discrimination in employment is much more wily and nuanced. With race discrimination claims, "context matters,"⁵⁰ and they should be viewed with the single focus of determining whether race played a role because "in resolving an individual's Title VII claim, the crux of the inquiry is the reason for a particular employment decision."⁵¹ For as the Supreme Court recently observed, "History demands that we continue to learn, to listen, and to remain open to new approaches if we are to aspire always to a[n] . . . order in which all persons are treated with fairness and equal dignity."⁵²

Footnotes

¹ Ms. Bruner is an attorney in the Office of Federal Operations, Appellate Review Programs. She wishes to thank OFO summer intern Laurel Michel for her federal sector research contribution.

² [42 U.S.C. § 2000e et seq. \(1964\)](#).

³ [42 U.S.C. § 2000e-2\(a\)\(1\)](#).

⁴ [540 U.S. 581, 608 \(2004\)](#).

⁵ [Id., at 608](#).

⁶ [110 Cong. Rec. 6552 \(1964\)](#) (statement of Sen. Humphrey).

⁷ For EEOC charges by private parties, <https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm>. For federal sector filings, <https://www.eeoc.gov/eeoc/statistics/nofear/appeals.cfm>. While reprisal is alleged the most in both the private and federal sectors, the protected activity on which the reprisal claim turns often involves allegations of race discrimination.

⁸ [EEOC Decision No. 74-31, 7 Fair Empl. Prac. 1326 \(1973\)](#).

⁹ [McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 278-79 \(1976\)](#) ("Title VII's terms are not limited to discrimination against members of any particular race").

¹⁰ [McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 \(1973\)](#).

¹¹ [EEOC Compliance Manual on Race and Color Discrimination § 15-II, No. 915.003 \(Apr. 19, 2006\) \(Race Discrimination Guidance\)](#).

¹² [Meritor Savings Bank v. Vinson](#) , 477 U.S. 57, 65 (1989) (noting that "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult").

¹³ In 2007, the EEOC launched the E-RACE (Eradicating Racism and Colorism from Employment) initiative to draw attention to traditional and contemporary issues associated with race and color discrimination in the modern American workplace. Additionally, E-RACE was implemented to strengthen the Commission's enforcement efforts and to educate the public and employers about the statutory right to work in an environment free of race and color discrimination. See <https://www.eeoc.gov/eeoc/initiatives/e-race/index.cfm>.

¹⁴ See, e.g., [Taryn S. v. Selective Service System, EEOC Appeal No. 0120113421 \(Nov. 3, 2015\)](#) (remanding for supplementation of the record where Agency withdrew employment offer after learning of Complainant's criminal conviction, then hired individual of different race with same conviction).

¹⁵ See [Alex W. v. Department of Energy, EEOC No. 0720130030 \(OFO Dec. 12, 2014\)](#) (finding discrimination in the case of an African-American Director of the Agency facility who was subjected to harassment when a supervisor discussed him in defamatory e-mails and newspaper articles, evidence revealed that his actions were based on Complainant's protected status as an African-American, and the facility had a history of subjecting African-American employees to extreme bigotry, including highly charged racial epithets (the n-word) and highly charged derogatory symbols of discrimination).

¹⁶ It is a violation of Title VII if employees of a certain race or races are segregated by being physically isolated from other employees or customer contact because of a belief that certain racial groups should only work in certain jobs. See [Goodman v. Lukens Steel Co., 482 U.S. 656, 668 \(1987\)](#) ("To require blacks to continue to work in lower paying and less desirable jobs, in units disparately black, is to discriminate against them in violation of the collective bargaining agreement (and, of course, also in violation of Title VII)") (quoting district court's decision at 580 F. Supp. 1114, 1160 (E.D. Pa. 1984)). See also [Cory V. v. Department of the Army, EEOC Appeal No. 0120072925 \(July 10, 2012\)](#) (finding discrimination where Commission found that the Agency's articulated reason for its action was a pretext for discrimination based on discriminatory epithets such as the "n-word" and "boy" that were used by management officials in reference to Complainant and based on

evidence that the Agency was racially segregated, as White employees were assigned to a separate side of the shop from Black employees); [Ferrill v. The Parker Group](#), 168 F.3d 468, 473 (11th Cir. 1999) ("a defendant who acts with no racial animus but makes job assignments on the basis of race can be held liable for intentional discrimination").

¹⁷ See, e.g., [Knight v. Nassau County Civil Serv. Comm'n](#), 649 F.2d 157, 162 (2d Cir. 1981) ("No matter how laudable [an employer's] intention might be ... the fact remains that [an employee] was assigned a particular job (against [her] wishes) because [her] race was believed to specially qualify [her] for the work. This is a violation of Title VII.").

¹⁸ In the United States, there has been "racial mixing" among "Whites," "Africans," "Native Americans," and individuals of other "racial" and "ethnic" backgrounds for more than three and a half centuries. [McMillan v. City of New York](#), 253 F.R.D. 247, 249 (E.D.N.Y. 2008). However, in 1967 in the case of [Loving v. Virginia](#), 388 U.S. 1 (1967), the Supreme Court was forced to address the propriety of "race mixing" and it ruled that Virginia's ban on interracial marriages was unlawful. In so doing, the Court rejected the trial judge's view that:

'Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.'

[Loving v. Virginia](#), 388 U.S. 1, 3 (1967) (quoting state trial court's opinion). At that time, Virginia was "one of 16 States which prohibit[ed] and punish[ed] marriages on the basis of racial classifications." *Loving*, 388 U.S. at 6 (1967).

¹⁹ [Race Discrimination Guidance § 15-II](#).

²⁰ [Id.](#)

²¹ See, e.g., [Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick & GMC Trucks, Inc.](#), 173 F.3d 988, 994-95 (6th Cir. 1999) (holding Title VII applicable to allegation that employee suffered discrimination because he had a biracial daughter); [Parr v. Woodmen of the World Life Ins. Co.](#), 791 F.2d 888, 892 (11th Cir. 1986) ("Where a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of his race."); [Rosenblatt v. Bivona & Cohen, P.C.](#), 946 F. Supp. 298, 300 (S.D.N.Y. 1996) ("Plaintiff has alleged discrimination as a result of his marriage to a black woman. Had he been black, his marriage would not have been interracial. Therefore, inherent in his complaint is the assertion that he has suffered racial discrimination based on his own race.").

²² [EEOC Appeal No. 07A30048 \(Jan. 22, 2004\)](#).

²³ [EEOC Appeal No. 0120072653 \(Aug. 29, 2008\)](#).

²⁴ [No. SA09CA0655XR \(W.D. Tex. May 7, 2010\)](#).

²⁵ [521 F.3d 130 \(2d Cir. 2008\)](#).

²⁶ [No. 3:04-cv-978-J-16MMH \(M.D. Fla. Consent decree filed Mar. 10, 2006\)](#).

²⁷ [No. 03-cv-1329 \(W.D. Pa. settled Mar. 10, 2004\)](#).

²⁸ [Civ. Action No. 7:06-000586 \(W.D. Va. Apr. 25, 2007\)](#).

²⁹ See [Jeffries v. Harris County Community Action Commission, 615 F.2d 1025, 1032-34 \(5th Cir. 1980\)](#) ("we hold that when a Title VII plaintiff alleges that an employer discriminates against black females, the fact that black males and white females are not subject to discrimination is irrelevant").

³⁰ We must keep in mind that comparative evidence is only one way of proving unlawful discrimination under Title VII, and not a critical or sole way as has been represented in some decisions. Nor is the employee's race discrimination vitiated by the employer's selection of a member of the same protected class. After the Supreme Court's admonition in an ADEA case that replacements do not need to be outside the protected age group, federal courts have resolved that "[a]n employee may be able to show that his race or another characteristic that the law places off limits tipped the scales against him, without regard to the demographic characteristics of his replacement." [Carson v. Bethlehem Steel Corp.](#), 82 F.3d 157, 158-59 (7th Cir. 1996).

³¹ See [Lam v. University of Hawaii](#), 40 F.3d 1551, 1561-62 (9th Cir. 1994) (holding lower court erred when it treated the claim of an Asian woman in terms of race or sex separately; lower court should have considered whether discrimination occurred because of the plaintiff's combined race and sex).

³² [666 F.3d 1344, 1352-57 \(D.C. Cir. 2012\)](#).

³³ [Civil Action No. 7:11-CV-00134-HL \(N.D. Ga. settlement announced Dec. 13, 2012\)](#).

³⁴ [EEOC Appeal No. 0720070069 \(Nov. 8, 2007\)](#).

³⁵ [Case No. 2:10-CV-13517 \(E.D. Mich. Mar. 22, 2012\)](#).

³⁶ [Race Discrimination Guidance § 15-II](#).

³⁷ [430 U.S. 482, 499-501 \(1977\)](#).

³⁸ [Id.](#) at 503 (Marshall, J., concurring).

³⁹ [523 U.S. 75, 78 \(1998\)](#).

⁴⁰ [Id.](#) See also [Johnson v. Zema Sys. Corp.](#), 170 F.3d 734, 745 (7th Cir. 1999) (Persons of a certain race might well harbor stereotypical views of other members of their own race and those stereotypical views might motivate decisions to discriminate).

⁴¹ [EEOC Appeal No. 03810077 \(Feb. 5, 1982\)](#).

⁴² [2016 BL 419185, No. 14-3461 \(E.D.N.Y. Dec. 16, 2016\)](#).

⁴³ [Race Discrimination Guidance § 15-II](#).

⁴⁴ [Perkins v. Lake County Dept. of Utilities](#), 860 F. Supp. 1262, 1273 (N.D. Ohio 1994).

⁴⁵ [Id.](#)

⁴⁶ [Id.](#) At 1273 (internal citation omitted).

⁴⁷ [Race Discrimination Guidance § 15-II](#).

⁴⁸ [683 F.3d 1283 \(11th Cir. 2012\)](#).

⁴⁹ See also, [EEOC v. WC&M Enterprises, Inc.](#), [496 F.3d 393, 402 \(5th Cir. 2007\)](#) (the Fifth Circuit expressly recognized a perceived discrimination claim as viable under Title VII. The Court decided that the evidence supported a claim that the plaintiff was harassed based on his perceived national origin. The Court ruled that a factfinder could reasonably conclude that the conduct was motivated by animus stemming from the salesman's religion and national origin).

⁵⁰ [Grutter v. Bollinger](#), [539 U.S. 306, 327 \(2003\)](#).

⁵¹ [Wal-Mart Stores, Inc. v. Dukes](#), [564 U.S. 338, 352 \(2011\)](#).

⁵² [Schuette v. BAMN](#), [134 S. Ct. 1623, 1637 \(2014\)](#).