



# The DIGEST Of Equal Employment Opportunity Law

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## *ANNUAL COMPILATION ISSUE*

Selected Notable EEOC Decisions from FY 2017 on:

[Agency Processing](#)

[Attorney's Fees](#)

[Class Complaints](#)

[Compensatory Damages](#)

[Dismissals](#)

[Findings on the Merits](#)

[Under the ADEA](#)

[Under Rehabilitation Act](#)

[Under Title VII](#)

[Under Multiple Bases](#)

[Retaliation](#)

[Official Time](#)

[Remedies](#)

[Sanctions](#)

[Settlement Agreements](#)

[Stating a Claim](#)

[Summary Judgment](#)

[Timeliness](#)

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

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*(Volume 1 of the Fiscal Year 2018 Digest contains the EEOC's Annual Compilation Issue - a sampling of federal sector decision summaries of note from the prior fiscal year (2017), as selected by Digest staff from among the decisions issued by EEOC during that fiscal year. Some summaries that also appeared in previous issues of the Digest are reprinted here for the convenience of readers. The summaries are neither intended to be exhaustive or definitive as to the selected subject matter, nor are they to be given the legal weight of case law in citations. For summaries of decisions involving claims of harassment, see "Findings on the Merits" by statute, as well as "Under Multiple Bases."*

*During Fiscal Year 2017, the Commission redacted Complainants' names when it published decisions, and all federal sector appellate decisions issued for publication used a randomly generated name as a substitute for*

*the name of the complainant. This randomly generated name first name and last initial was assigned using a computer program that selects names from a list of pseudonyms and bears no relation to the complainant's actual name. This change was made to address privacy concerns and to ensure consistency with the Commission's approach in the rest of its enforcement work and the investigations of complaints. - Ed.)*

## SELECTED EEOC DECISIONS

### Agency Processing

**Agency Improperly Processed Complainant's Request for EEO Counseling.** Complainant contacted an EEO counselor concerning alleged workplace harassment and sought a transfer as a remedy, referencing her medical condition. The Agency processed the matter as a reasonable accommodation request only and not as a request to initiate the EEO process. The Commission found that the Agency failed to provide complainant with EEO counseling, but instead conducted its own internal investigation from which it procedurally dismissed the complaint. The Commission stated that the Agency improperly dismissed Complainant's allegations prior to giving Complainant the right to file a formal complaint. [Estefana M v. Dep't of the Navy, EEOC Appeal No. 0120170646 \(Sept. 12, 2017\).](#)

**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, and 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 \(Apr. 6, 2017\)](#).

**Agency Failed to Properly Process Complaint After MSPB Found No Jurisdiction.** Complainant filed an EEO complaint alleging a discriminatorily hostile work environment which ultimately led to a constructive demotion. An EEOC Administrative Judge (AJ) subsequently dismissed Complainant's request for a hearing, reasoning that the claim involved a demotion which was appealable to the Merit Systems Protection Board (MSPB), and the Agency issued a final decision agreeing with the AJ. According to the record, Complainant appealed the demotion to the MSPB and the MSPB dismissed the appeal for lack of jurisdiction. On appeal, the Commission stated that when the MSPB denies jurisdiction in a mixed case complaint, the Agency must recommence processing of the matter as a non-mixed EEO complaint. Therefore, the Agency was ordered to forward the complaint for an administrative hearing. [Herb P. v. Dep't of Justice, EEOC Appeal No. 0120142584 \(Nov. 22, 2016\)](#).

**Agency Failed to Separate Mixed and Non-Mixed Claims.** Complainant filed an EEO complaint, which she amended several times, raising numerous issues of discrimination, including an indefinite suspension. The Agency issued several acceptance letters, and notified Complainant that it considered the matter concerning the indefinite suspension to be a mixed-case complaint. Upon completion of the investigation, Complainant requested a hearing before an EEOC AJ with regard to all of the issues raised. The Agency subsequently issued a final decision on all claims and notified Complainant that she had the right to appeal the decision to the MSPB. Complainant then filed an appeal with the MSPB. The MSPB AJ dismissed the appeal without prejudice, and the EEOC AJ granted the Agency's motion to dismiss Complainant's hearing request. Complainant subsequently filed an appeal with the Commission. On appeal, the Commission noted that the indefinite suspension was the only matter appealable to the MSPB. The Agency, therefore, should have bifurcated the claim, and notified Complainant of her right to request a hearing with an EEOC AJ on all the non-mixed allegations. The Commission ordered the Agency to submit the non-mixed claims for a hearing before an EEOC AJ. [Chasity C. v. Dep't of Homeland Sec., EEOC Appeal No. 0120140557 \(Nov. 4, 2016\)](#); see also [Freddie M. v. Dep't of Interior, EEOC Appeal No. 0120141374 \(Dec. 16, 2016\)](#) (the Commission did not have jurisdiction to consider Complainant's removal because the Agency correctly provided Complainant with appeal rights to the MSPB for that matter. Complainant's claims regarding assignment of duties and suggestions that he retire were not appealable to the MSPB and the Agency failed to separate these matters and process them

under the EEO regulations. The Agency should have issued a final decision with MSPB appeal rights only on the mixed allegations).

## Attorney's Fees

**Commission Modified Attorney's Fees Award.** Following a hearing, an EEOC Administrative Judge (AJ) found that the Agency failed to reasonably accommodate Complainant's disability. Complainant withdrew a second allegation during the hearing. The Agency fully implemented the AJ's decision, and ultimately issued a decision on Complainant's request for attorney's fees, which was modified by the Commission on appeal. The Commission initially found that the hourly rate claimed by Complainant's attorney was reasonable given that he had been practicing labor and employment law for over 50 years. The Commission also noted that it was reasonable for a second attorney, who billed at a lower rate, to assist in determining whether the firm should represent Complainant. The Commission declined to affirm the Agency's across the board reduction in fees, finding that the billing entries were sufficiently specific and not excessive or duplicative. The Commission also stated that while the AJ found disability discrimination, all of the alleged bases concerned a common core of facts, and the relief ordered overlapped any relief the AJ could have ordered for other bases. The Commission found that the billing entries generally showed which hours were spent on the withdrawn claim, and the Commission deducted those hours rather than use an across the board reduction. The Commission did use a 50 percent reduction for entries related to both claims. [Micheline L. v. U.S. Postal Serv., EEOC Appeal No. 0120151957 \(Aug. 8, 2017\)](#).

**Attorney's Fees Award Modified.** In a prior decision, the Commission found that Complainant was subjected to retaliatory harassment, but was not discriminated against when she received a Letter of Warning. The Commission ordered the Agency, among other things, to investigate Complainant's entitlement to reasonable attorney's fees. The Agency reduced the requested fees and awarded a total of \$1,890. On appeal, the Commission found that Complainant requested an appropriate hourly rate, but that the Agency's calculation of fees should be modified to reasonably reflect the hours expended during the case based on limited success and limited representation provided. Complainant was also not entitled to fees claimed after the attorney withdrew from her case, or time spent on an unsuccessful Motion to Stay. The record contained no evidence that the attorney participated in or conducted discovery. The Commission agreed with the Agency that clerical work was not reimbursable as it is generally viewed as part of an attorney's overhead. The Commission found that an across the board reduction of 50 percent in the requested amount of attorney's fees was appropriate. [Trina C. v. U.S. Postal Serv., EEOC Appeal No. 0120150407 \(July 20, 2017\)](#).

**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 based on 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 \(May 23, 2017\)](#).

**Commission Modified Award of Attorney's Fees.** The Agency found that Complainant was subjected to unlawful discrimination with regard to a single claim that her medical records were improperly disclosed to others in her workplace. The Agency found no discrimination with regard to the remaining claims of disparate treatment and harassment. The Agency ultimately reduced the amount of claimed attorney's fees based upon the fact that Complainant prevailed on only one claim. On appeal, the Commission found that the Agency properly excluded payment for time expended by Complainant herself. The Commission further stated that the record supported the Agency's decision to reduce the requested fees and costs in light of Complainant's limited success in prevailing on only one claim which involved simpler facts and a narrow issue. Many of the hours claimed were not connected to the issue on which Complainant prevailed and the Commission found that a reduction of 90 percent was appropriate. The Commission did find, however, that Complainant's attorney properly supported his hourly rate and the Agency did not present any specific evidence to support its decision to reduce the hourly rate for the attorney or his paralegal. Therefore, the Commission increased the award of attorney's fees to \$7,940.00. The Commission concluded that the attorney failed to provide supporting documentation for the claimed costs. [Wilda M. v. Dep't of Homeland Sec., EEOC Appeal No. 0120142660 \(Dec. 2, 2016\)](#).

## Class Complaints

**Disability Discrimination Found in Class Complaint.** The Commission affirmed the AJ's determination, on summary judgment, that the Agency violated the Rehabilitation Act on a class-wide basis (affecting thousands of employees) when it implemented its National Reassessment Program (NRP). The AJ found that while the stated purpose of the NRP was to save money by eliminating "make work" positions, the true purpose was to remove limited-duty employees who were injured on duty and rehabilitation employees from the agency's rolls, without regard to their rights and the Agency's obligations under the Rehabilitation Act. The Commission affirmed the AJ's finding that the senior Agency officials who devised and implemented the NRP engaged in a pattern and practice of discrimination against the Agency's disabled employees through class-wide disparate treatment. According to the record, the Agency accomplished its aim of purging employees with medical

restrictions from the workplace by removing existing accommodations and/or by failing to engage in the interactive process. The Commission further found that the Agency subjected employees assessed under the NRP to a discriminatory hostile work environment through numerous and pervasive hostile actions, including on the spot dismissals in which employees were escorted out of the building in a humiliating manner; constant pressure to provide more medical documentation; derogatory and threatening remarks made in the workplace; and Agency managers repeatedly stoking the fears that these employees would lose their jobs. The Commission also concluded that the first phase of the NRP constituted an unlawful disability-related medical inquiry that was not job-related and consistent with business necessity, and the Agency violated the medical confidentiality provisions of the Rehabilitation Act when it failed to redact employee medical documentation, and left medical files containing confidential medical information in open, freely accessible areas.

The Commission ordered the Agency to retroactively reinstate the Class Agent to her former position, and pay her appropriate back pay and benefits, as well proven compensatory damages. With regard to the other class members, the Commission explained that expecting every potential class member to undertake the individualized inquiry that the Rehabilitation Act requires during the liability phase would be inherently impractical and unworkable in practice, and would effectively bar the use of class complaints as a means of challenging workplace policies that discriminate against individuals with disabilities. Instead, the Commission required prospective class members to prove that they are qualified individuals with disabilities during the remedies phase of the proceeding, because that is where proof of one's status as a qualified individual with a disability under the Rehabilitation Act naturally aligns with proof of one's membership in a class. The Commission ordered the Agency, among other things, to notify class members of the finding of discrimination and allow them to file claims for individual relief. [Velva B. v. U.S. Postal Serv., EEOC Appeal No. 0720160006 \(Sept. 25, 2017\)](#).

**Class Certification Properly Denied.** Complainant filed a class complaint alleging the Agency discriminated against him based on 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 \(Apr. 6, 2017\)](#).

**No Requirement to Notify Potential Class Members When Class Complaint Dismissed.** Complainant filed a class complaint, but withdrew his request for class certification before the Administrative Judge (AJ) could rule on the matter. The AJ dismissed the class complaint and directed the Agency to resume processing the individual complaint. The Agency rejected the AJ's instruction to also notify members of the class of their right to initiate EEO counseling or file individual complaints. On appeal, the Commission stated that it has previously held that where class certification is denied and never certified, there is no regulatory requirement that an agency notify potential class members, whether named or not, of the dismissal of the class or of their right to file individual complaints. The Commission noted that the decisions upon which the AJ relied addressed the need to inform class members when a class has been decertified. [Lynwood R. v. Dep't of Justice, EEOC Appeal No. 0720160025 \(Jan. 11, 2017\)](#).

**Class Certification Granted.** The Commission reversed the AJ's finding that the Class Agent failed to satisfy the requirements for class certification. While the AJ found that the class complaint did not meet the numerosity requirement, the Class Agency submitted a list of 20 putative class members on appeal and stated that the potential class could be as large as 800. The Commission found that the Class Agent provisionally met the numerosity requirement. The Commission found that the Class Agent's allegations that the Agency failed to offer a job swap to employees at one facility or give these employees the opportunity to accept a separation payout were straightforward and clear such that the Class Agent met the commonality requirement. The Commission modified the class definition, however, to include only race and color as bases given that not all of the putative class members were of the same sex. Finally, since there was no information regarding whether the class was adequately represented by counsel, the Commission provisionally certified the class on the condition that the Class Agent obtain legal counsel who is experienced in representing class complainants in the federal sector. The complaint was remanded to allow the Class Agent an opportunity to provide evidence to satisfy the adequacy of representation requirement as well as provide evidence that the proposed class can meet the numerosity requirement. [Valentin P., et al. v. Dep't of the Army, EEOC Appeal NO. 0120113722 \(Dec. 6, 2016\)](#).

## Compensatory Damages

*(The decisions below are a selected sampling of recent awards of compensatory damages. See, also, "Findings on the Merits," and "Remedies" this issue. - Ed.)*

**Commission Affirmed AJ's Award of \$200,000 in Non-Pecuniary Damages.** An AJ issued a default judgment in favor of Complainant as a sanction for the Agency's failure to complete an investigation, and subsequently awarded Complainant \$200,000 in non-pecuniary compensatory damages. The Commission affirmed the AJ's award on appeal. Complainant submitted medical evidence showing that, in addition to experiencing a "reactivation" of previously diagnosed Post Traumatic Stress Disorder, Complainant experienced several new medical conditions due to the Agency's discriminatory harassment including depression, insomnia, pancreatitis, irritable bowel syndrome and temporomandibular joint disorder. Complainant stated that she felt exhausted and hopeless, could not exercise due to severe anxiety resulting in panic attacks, and rarely left her house due to constant fear. The AJ attributed some of the harm Complainant suffered to her pre-existing condition. Nevertheless, Complainant was subjected to severe ongoing harassment, and the Agency failed to take any preventative or corrective measures to address her work environment. The Commission found no reason to lower the AJ's award which considered the duration, nature, and severity of the harm, and the existence of a previous condition, and was consistent with prior Commission precedent. The Commission also affirmed the AJ's award of pecuniary damages, and reduced the award of attorney's fees to correct a mathematical error. [Lauralee C. v. Dep't of Homeland Sec., EEOC Appeal No. 0720150002 \(Sept. 25, 2017\)](#).

**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 Damages to \$110,000.** The Commission found that the Agency's award of \$30,000 in non-pecuniary damages to each of three Complainants was not sufficient to compensate them for discriminatory harassment. The Commission found that the Director's violation of Complainants' privacy by filming them while they used the bathroom significantly affected them. Each Complainant indicated that, in the years since these events, they continue to have feelings of anxiety and fear that they are being watched. Two Complainants still work in the same building where the incidents occurred and still must use the same bathroom where their privacy was violated. One Complainant averred that she still fears using public restrooms for fear of being recorded. Another Complainant similarly stated that she has a hard time using public restrooms and continues to feel compelled to check for recording devices. The third Complainant averred that she covers herself when she uses the bathroom or a dressing room for fear of being recorded, and checks smoke detectors and mirrors to make sure that her privacy is not being violated. In addition, all three Complainants expressed the continued negative impacts of the event, some three years later, on their ongoing sense of mental well-being and their trust of others. After careful consideration of the evidence of record, the Commission found that the Complainants' request of an award of \$110,000 each for non-pecuniary compensatory damages was appropriate. [Scarlet M., Maxima R., Sharolyn S. v. Dep't of the Navy, EEOC Appeal Nos. 0120162856, 0120162855, 0120162816 \(Jan. 30, 2017\).](#)

**Commission Increased Award of Non-Pecuniary 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 \$95,000 in Compensatory Damages.** The AJ awarded Complainant \$95,000 in non-pecuniary compensatory damages after finding the Agency discriminated against Complainant in reprisal for prior EEO activity but not on the basis of race. On appeal, the Commission initially found that substantial evidence in the record supported the AJ's finding that Complainant failed to prove her claim of racial harassment. The Commission also affirmed the AJ's award of damages. The AJ indicated that Complainant experienced embarrassment, stress, loss of professional standing, one panic attack, and the exacerbation of her lupus symptoms for approximately 18 months. The Commission found that Complainant failed to present sufficient evidence to support a higher award to compensate her for the loss of her home, and the dissolution of her marriage. [Cher B. v. Dep't Of Veterans Affairs, EEOC Appeal No. 0120140445 \(Jan. 9, 2017\).](#)

**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 Increased Agency's Award of Compensatory Damages to \$65,000.** The Agency found that the Complainant was discriminated against based on disability because the Agency denied her a reasonable accommodation. The Agency awarded Complainant \$2,048 in pecuniary damages and \$30,000 in non-pecuniary compensatory damages. The Commission increased the award of pecuniary damages to \$65,000 on appeal. The undisputed evidence showed that, as a result of the Agency's discrimination, Complainant suffered from stress, nervousness and anxiety. Complainant also had to have surgery on her wrist due to the Agency's

failure to provide her with an ergonomic workstation. Complainant indicated that her hypertension was exacerbated by the stress that she experienced at work when her accommodation requests were denied. After her physician recommended therapy, Complainant met with her Pastor and went to church to help alleviate her stress. Complainant maintained that her personality has changed, and she has become quieter and does not go out as much. According to Complainant, many of her symptoms and conditions have persisted to the present, including her sleeplessness. She has difficulty turning the pages of books or magazines and writing her names on checks. The Agency acknowledged that Complainant credibly testified to the duration and emotional stress she experienced, and proved that the emotional distress was caused by the discriminatory conduct. The Commission found that an award of \$65,000 was consistent with awards in similar cases. [Dayle H. v. Dep't Of Veterans Affairs, EEOC Appeal No. 0120140883 \(Jan. 17, 2017\)](#).

**Commission Increased Award of Non-Pecuniary Compensatory Damages to \$60,000.** In a previous decision, the Commission found that the Agency subjected Complainant to a hostile work environment based on disability, and ordered the Agency to, among other things, investigate Complainant's claim for damages. The Agency ultimately awarded Complainant \$15,000 in non-pecuniary compensatory damages. On appeal, the Commission found that the Agency's award was not sufficient, and increased the award to \$60,000. Complainant claimed that the harassment exacerbated her pre-existing condition and caused her to be more anxious and stressed. She also noted that she had difficulty sleeping, gained weight, suffered embarrassment and humiliation, lost interest in outside activities, and feared losing her job. The evidence showed that Complainant increased her visits to her psychologist during the period in question, and the psychologist confirmed that Complainant experienced "significant anxiety symptoms" due to work-related events. Complainant also submitted statements from family members and co-workers to support her claim. While the Commission recognized that Complainant had a pre-existing condition, the evidence showed that the discriminatory harassment exacerbated her condition, and there was ample evidence attesting to the negative effects of the harassment. Therefore, the Commission found that an award of \$60,000 more appropriately compensated Complainant. The Commission found that Complainant was also entitled to \$7,007.21 in pecuniary damages to compensate her for medical co-pays, prescription medication, and mileage to and from her doctor's office. [Roxanna B. v. U.S. Postal Serv., EEOC Appeal No. 0120143067 \(Nov. 7, 2016\)](#).

**Commission Increased Award of Damages to \$60,000.** The Commission previously affirmed the Agency's finding that it failed to reasonably accommodate Complainant. Following an investigation of Complainant's claim for damages, the Agency awarded Complainant \$10,500 in non-pecuniary damages. On appeal, the Commission affirmed the Agency's decision not to award pecuniary damages, finding insufficient documentary proof to support such an award. The Commission, however, increased the award of non-pecuniary damages to

\$60,000. The Agency conceded that Complainant established a nexus between the harm he sustained and the discrimination. The record evidence confirmed that over a three-year period, Complainant experienced an exacerbation of his pre-existing conditions caused by stress created by the Agency's discriminatory actions. Complainant stated that he experienced anxiety, irritability, insomnia and loss of consortium, and indicated that he did not go out socially. He also noted that he experienced headaches, and night sweats, and was forced to increase his medication when the Agency refused to accommodate him. The evidence supported Complainant's assertion that his condition had stabilized prior to the discrimination, and the Agency was liable for the worsening of Complainant's condition. [Irvin W. v. Dep't of State, EEOC Appeal No. 0120141773 \(Oct. 28, 2016\)](#).

**Commission Affirmed AJ's Award of \$55,000 in Compensatory Damages Without Reduction.** 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 reasonable to conclude that Complainant's 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 Agency's Award of Damages to \$30,000.** In a prior decision, the Commission found that the Agency denied Complainant reasonable accommodation and subjected him to a hostile work environment based on his disability. The Agency conducted a supplement investigation and awarded Complainant \$12,000 in non-pecuniary compensatory damages. The Commission increased the award to \$30,000 on appeal. Complainant stated that he suffered extreme stress and marital problems, exacerbation of his pre-existing conditions, abdominal pain, and isolation from his family. Complainant also indicated that he attempted suicide due to the discrimination. Complainant's wife corroborated his claim, and he submitted statements from several family members who indicated they witnessed Complainant's mental anguish due to the stress from his work situation. The Commission agreed with the Agency that Complainant failed to prove his claim for pecuniary damages. [Dallas D. v. U.S. Postal Serv., EEOC Appeal No. 0120150319 \(Mar. 24, 2017\)](#).

**Commission Increased Award of Damages to \$30,000.** The Commission previously found that the Agency did not make a good faith effort to reasonably accommodate Complainant and ordered the Agency to investigate Complainant's claim for damages. The Agency subsequently awarded Complainant \$4,500 in non-pecuniary damages, and the Commission increased the award to \$30,000 on appeal. Complainant stated that the failure to provide her with accommodation for three months caused her to suffer mental anguish, as well as eye strain, and pain in her hip and back for an extended period. Complainant provided a letter from her husband stating that Complainant experienced setbacks which required more trips to the doctors for evaluation and treatment. Given the Agency's failure to address a situation that was inherently degrading and humiliating, the Commission found that an award of \$30,000 was reasonable to compensate Complainant. [Marguerite W. v. Dep't of Labor, EEOC Appeal No. 0120142727 \(Dec. 21, 2016\)](#).

**Commission Increased Agency's Award of Damages to \$25,000.** The Commission previously found that the Agency discriminated against Complainant based on disability when it failed to provide her with an interpreter, and ordered the Agency to investigate Complainant's claim for damages. The Agency subsequently awarded Complainant \$3,000, and the Commission increased the award to \$25,000 on appeal. Complainant clearly stated that she suffered emotional distress for over 22 months when the Agency failed to provide her with a sign language interpreter on several occasions. Complainant stated that she constantly feared that she missed information when she did not understand what was being said at meetings, and worried she was not properly performing her work. Complainant also experienced difficulty sleeping, recurring headaches, weight loss,

nausea, and anxiety. Complainant's mother provided an affidavit in support of Complainant's claim. The Commission found that Complainant's request for \$25,000 in damages was reasonable considering the harm Complainant experienced and Commission precedent in claims involving the denial of reasonable accommodation. The Commission found that the Agency properly denied Complainant's request for pecuniary damages because she failed to provide supporting evidence. [Kiara R. v. U.S. Postal Serv., EEOC Appeal No. 0120152620 \(Aug. 10, 2017\)](#).

**Commission Affirmed AJ's Award of \$25,000 in Damages.** An AJ found that the Agency discriminated against Complainant based on her disability when it did not provide her with reasonable accommodation, and awarded her, among other things, \$25,000 in compensatory damages. The Agency did not challenge the finding of discrimination, and the Commission affirmed the AJ's award of damages on appeal. Complainant suffered insomnia, depression, migraines, anxiety, humiliation, damage to professional reputation, diminished quality of life, damage to relationships with friends and family, and the aggravation of preexisting mental and physical conditions. The Commission found that the award was consistent with awards in similar cases. [Minna Z. v. Dep't of the Air Force, EEOC Appeal No. 0720160009 \(Mar. 10, 2017\)](#).

Commission Increased Agency's Award of Non-Pecuniary Damages to \$22,500. Following a finding that it failed to reasonably accommodate Complainant's disability, the Agency awarded her \$5,000 in non-pecuniary damages. The Commission increased the award to \$22,500 on appeal. Complainant stated that she stopped working due to the discrimination, was financially ruined, had to go on food stamps, lost her car, and had to borrow money from her daughter. She stated that she experienced severe stress, and depression, and neglected her hygiene. She had trouble concentrating, frequently cried, and had trouble completing basic tasks. Complainant's family members corroborated her claim. The Commission noted that Complainant's depression and anxiety were partly due to her declining physical health and not the Agency's discrimination. The Commission increased the award of pecuniary damages, finding that it was more likely than not Complainant's anxiety and depression were caused both by not being provided work and her reaction to her declining physical health. [Liza B. v. Dep't of Agric., EEOC Appeal No. 0120152098 \(Aug. 31, 2017\)](#).

**Commission Affirmed Agency's Award of \$20,000 in Non-Pecuniary Damages.** The Agency found that Complainant was discriminated against when she was not selected for a position and awarded her \$20,000 in non-pecuniary damages. The Commission affirmed the award on appeal. Complainant stated that she suffered stress, anxiety, loss of enjoyment of life, and loss of a second income. Complainant's claim was supported by her sister and another witness. The Commission noted that Complainant did not challenge the Agency's finding of no harassment by her supervisor, and there was no evidence that Complainant ever pursued her claim regarding other non-selections. The Commission found that the evidence supported the Agency's award of

non-pecuniary damages resulting from one nonselection. The Commission also found that Complainant was not entitled to pecuniary damages because she did not provide specific evidence to support her claim. [Alvera L. v. Dep't of Homeland Sec., EEOC Appeal No. 0120150446 \(Aug. 9, 2017\)](#).

**Commission Increased Agency's Award of Damages to \$15,000.** The Commission previously found that the Agency harassed Complainant because of her race, and the Agency awarded Complainant \$10,000 in non-pecuniary compensatory damages. The Commission increased the award to \$15,000 on appeal. Complainant stated that the harassment made her depressed, and she became isolated, lost her self-esteem and experienced crying spells. She also suffered from anxiety which exacerbated her arthritis. Complainant submitted statements from family members and neighbors in support of her claim. The Commission noted that the harassment occurred over less than two months, after which time Complainant successfully secured a transfer and indicated that her mood markedly improved. The Commission found that an award of \$15,000 was appropriate given the evidentiary record. [Wilda M. v. U.S. Postal Serv., EEOC Appeal No. 0120141087 \(Jan. 12, 2017\)](#).

**Commission Affirmed Agency's Award of \$12,000 in Non-Pecuniary Damages.** The Agency found that Complainant was discriminated against based on race and disability when she was denied reasonable accommodation, and awarded her \$12,000 in non-pecuniary compensatory damages. The Commission affirmed the award on appeal. The Commission declined to consider new evidence submitted on appeal including a statement from Complainant's mother and a letter from Complainant's medical provider. This evidence was not submitted during the relevant time period to support her claim for damages. In addition, both Complainant and her husband attributed the exacerbation of Complainant's existing medical condition to the stress of processing her EEO complaint and actions which were not related to the denial of accommodation. Complainant was not entitled to damages for stress related to the EEO process, and was not entitled to damages associated with her claim of harassment for which she did not prevail. The Commission concluded that the Agency's award of \$12,000 was supported by the record. The Commission also found that Complainant was not entitled to pecuniary damages. [Starr R. v. Gen. Serv. Admin., EEOC Appeal No. 0120143031 \(Jan. 12, 2017\)](#).

**Commission Increased Award of Damages to \$12,000.** The Commission increased the Agency's \$8,500 compensatory damages award to \$12,000, finding the Agency's award inadequate to compensate Complainant for the harassment he received. Complainant stated that he experienced a loss of self-esteem, and felt intimidated, sad and depressed. He also indicated that he did not feel safe using the restroom at work and the discrimination negatively impacted his relationship with his girlfriend and daughter. The Commission rejected the Agency's argument that Complainant's membership in a class action settlement should be considered when

awarding damages, noting that there was no evidence in the record that Complainant received any payment as a result of the class action. [Don S. v. U.S. Postal Serv., EEOC Appeal No. 0120142824 \(Dec. 22, 2016\)](#).

**Commission Affirmed Award of \$10,000 in Non-Pecuniary Damages.** The Commission affirmed the AJ's award of \$10,000 in compensatory damages following a finding of sex discrimination. Complainant testified that she experienced weight loss, severe anxiety, depression, stress, low libido, and was prescribed anti-anxiety medication. She also stated that these conditions negatively impacted her marriage. [Wilda M v. U.S. Postal Serv., EEOC Appeal No. 0120160472 \(Aug. 25, 2017\)](#).

**Commission Reversed Agency's Denial of Damages and Awarded \$10,000.** The Commission previously found that the Agency discriminated against Complainant when it failed to select her for a position, and instructed the Agency to investigate her claim for damages. The Agency issued a final decision finding that Complainant was not entitled to an award of damages. On appeal, the Commission reversed the Agency's decision and awarded Complainant \$10,000 in non-pecuniary damages. Complainant suffered from a "state of disbelief" at her nonselection, and a loss to her professional standing, and was prevented from applying to higher grade positions or for professional training. The Commission noted that Complainant presented minimal evidence of her emotional distress caused by the discrimination, and attributed the majority of her distress to the "inconvenience" of participating in the EEO process which is not compensable. [Bernetta B. v. Dep't of Educ., EEOC Appeal No. 0120161513 \(Aug. 23, 2017\)](#).

**Commission Affirms Agency's Award of \$10,000 in Non-Pecuniary Damages.** In a prior decision, the Commission found that the Complainant was subjected to unlawful retaliation, and ordered the Agency to investigate her claim for damages. The Agency later issued a decision denying Complainant's request for pecuniary damages and awarding \$10,000 in non-pecuniary damages. On appeal, the Commission affirmed the Agency's award. Complainant and her husband stated that Complainant was emotionally harmed by the retaliation. Complainant stated that her professional reputation was harmed, and she experienced stress and depression. While Complainant submitted medical documentation to support her claim, the Commission found inconsistencies between that evidence and Complainant's statements. Specifically, the medical documentation addressed symptoms Complainant experienced nearly four years after the retaliation. The Commission agreed with the Agency's determination that Complainant was not entitled to pecuniary damages, because she failed to provide any evidence to support that claim. [Melina K. v. Dep't of Def., EEOC Appeal No. 0120152834 \(Aug. 10, 2017\)](#).

**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 Agency's Award of Damages to \$10,000.** After the Commission found that the Agency violated the Rehabilitation Act when it disclosed Complainant's medical records, the Agency awarded Complainant \$5,000 in non-pecuniary compensatory damages. The Commission increased the award to \$10,000 on appeal. Complainant averred that her medical records were released to five people, including the Supervisor she had accused of discrimination. She stated that this caused her stress and embarrassment. Complainant also stated that she experienced loss of sleep, upset stomach, weight gain, and high blood pressure. She sought psychiatric counseling and was prescribed medication. Complainant's husband corroborated her claim, and the record included documentation from her doctor. The Commission also found that Complainant was entitled to pecuniary damages in the amount of \$333.38 for co-pays and medication. [Stacie D. v. U.S. Postal Serv., EEOC Appeal No. 0120140918 \(Jan. 11, 2017\)](#).

**Commission Increased Award of Damages to \$10,000.** In a prior decision, the Commission found that the Agency did not make a good faith effort to reasonably accommodate Complainant on three occasions. Following an investigation, the Agency awarded Complainant \$6,000 in non-pecuniary damages, and the Commission increased the award to \$10,000 on appeal. Complainant stated that he experienced anxiety and mental anguish due to the Agency's failure to provide him with an interpreter. Complainant also provided a letter from his wife attesting to his claim of emotional harm. Given the Agency's conduct in failing the address a situation that was inherently degrading and humiliating, the Commission found that an award of \$10,000 was appropriate to compensate Complainant. The Commission affirmed the Agency's denial of Complainant's claim for pecuniary damages because Complainant did not provide adequate evidence to support his claim. [Harry E. v. Dep't of Def., EEOC Appeal No. 0120141679 \(Nov. 3, 2016\)](#).

**Commission Affirmed AJ's Award of \$8,000 in Non-Pecuniary Damages.** Following a hearing, an AJ found that the Agency discriminated against Complainant based on her disability when it failed to accommodate her and sent her home from work. The AJ awarded Complainant \$8,000 in non-pecuniary compensatory damages and the Commission affirmed the award on appeal. Complainant testified that she suffered chest pain and

headaches as a result of the Agency's failure to accommodate her disability. She also experienced hair loss, sleep loss, loss of concentration, a strained marriage and bouts of crying. Complainant's son corroborated her claim. The record supported the AJ's decision. The Commission affirmed the Agency's back pay award, and found that Complainant was not entitled to front pay as substantial evidence showed that she was not available to return to work. [Nicole T. v. Dep't of Def., EEOC Appeal No. 0120143019 \(Jan. 11, 2017\)](#).

**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 an 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 \(Apr. 11, 2017\)](#).

**The Commission Affirmed Agency's Award of \$5,000 in Damages.** The Commission affirmed the Agency's award of \$5,000.00 in non-pecuniary compensatory damages following a finding that Complainant was subjected to a per se violation of the Rehabilitation Act when her medical information was disclosed and she was required to complete a pre-employment physical examination. Complainant provided no medical documentation but stated that the examination was invasive and she experienced swelling and pain from the blood draw. Complainant's claim was supported by three witnesses who indicated that Complainant skipped family dinners, and was distraught, angry, embarrassed, disappointed and felt violated. The Commission found that the harm was not severe or long term and the award was consistent with awards in similar cases. [Alena C. v. Dep't of Def., EEOC Appeal No. 0120152806 \(Mar. 9, 2017\)](#).

**Commission Affirmed Agency's Award of \$4,500 in Non-Pecuniary Damages.** In a prior decision, the Commission found that Complainant was discriminated against when she was not selected for two positions. Following an investigation, the Agency awarded Complainant \$4,500 in compensatory damages. The Commission affirmed the award on appeal. The Commission noted that Complainant had provided limited evidence of harm suffered due to discrimination. Complainant submitted notes from several physicians that failed to connect her medical condition to the discrimination. Specifically, one of the notes stated Complainant suffered from job-related stress in 2008, several months prior to the discriminatory event. Complainant also

submitted a sworn statement describing the discrimination as a painful experience that resulted in her believing she was perceived as a bad person, and indicating that she had been treated for insomnia, depression, anxiety, hypertension and stress. The Commission concluded that the Agency's award of \$4,500 was appropriate. [Barbara C. v. Dep't of the Army, EEOC Appeal No. 0120151687 \(Aug. 2, 2017\)](#).

**Commission Affirmed Agency's Award of \$3,000 in Non-Pecuniary Damages.** In a prior decision, the Commission found that Complainant was discriminated against when she was not selected for two positions. Following an investigation, the Agency awarded Complainant \$3,000 in compensatory damages. The Commission affirmed the award on appeal. Complainant did not provide a sworn statement but submitted a letter from her brother contending she experienced turmoil due to the discrimination, as well as migraines, chest pain, insomnia, anxiety and bouts of depression. A friend stated in a letter that Complainant had been tired and unable to rest and that the discrimination had been a strain on her family. Complainant also provided a physician's letter indicating that she had been in treatment since 2012, which the Commission noted was three years after the discrimination occurred. Noting that Complainant had provided limited evidence of harm suffered due to discrimination, the Commission concluded that the \$3,000 award was appropriate. [Zenya M. v. Dep't of the Army, EEOC Appeal No. 0120151690 \(Aug. 2, 2017\)](#).

**Commission Affirmed Agency's Award of \$3,000 in Non-Pecuniary Damages.** Following a finding that Complainant was discriminated against when he was not selected for a position, the Agency awarded Complainant \$3,000 in non-pecuniary damages. The Commission affirmed the award on appeal. While Complainant and his wife and son testified that he experienced emotional distress due to the discrimination, the Commission found little to no evidence linking the emotional distress to the non-selection rather than other alleged acts. Complainant's evidence, instead, showed that most of his injuries could be attributed to other matters, including problems with the Internal Revenue Service, his removal, and drug use. The Agency's award adequately compensated Complainant for the physical and emotional harm he suffered as a result of the discriminatory non-selection. [Archie G. v. Dep't of Justice, EEOC Appeal No. 0120141305 \(Nov. 30, 2016\)](#).

**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-Ed.)*

**Complaint Improperly Dismissed as Moot and for Failure to Cooperate.** The Commission reversed the Agency's dismissal of the complaint as moot and for failure to cooperate. The Agency dismissed the complaint as moot after Complainant died and Complainant's non-attorney representative failed to timely respond to a 15-day email requesting information about Complainant's executor/administrator. The Commission has held that a complaint with potential monetary relief survives the death of complainant and is not moot. The Commission also found the email to Complainant's representative did not include an essential notice of proposed dismissal, was only sent on one occasion, and there was no evidence it was mailed to Complainant's or his representative's address of record, or that the representative ever received the notice. [Bret B v. Dep't of the Air Force, EEOC Appeal No. 0120171656 \(Sept. 13, 2017\)](#).

Agency Improperly Dismissed Claim on Grounds that Matter Not Raised with Counselor

. Complainant filed a formal EEO complaint alleging that her duty description was changed to include additional duties. The Commission found that the Agency improperly dismissed the complaint on the grounds Complainant failed to raise the matter with the EEO Counselor. The EEO Counselor stated that Complainant alleged that black employees were given more work, and work of a more complicated nature, than white employees. Further, the Notice of Final Interview expressly identified the matter alleged as "uneven distribution of the workload." Therefore, the formal complaint raised a claim that was like or related to the matters for which Complainant sought counseling. [Jones A. v. Dep't of the Navy, EEOC Appeal No. 0120172294 \(Aug. 30, 2017\)](#); see also [Ezra P. v. Dep't of the Navy, EEOC Appeal No. 0120172301 \(Sept. 6, 2017\)](#).

**Dismissal of Claim for Failure to State a Claim and Being Moot Reversed.** Complainant filed a formal complaint of discrimination alleging that a supervisor changed clothes in public spaces such as conference rooms or unlocked rooms because there was no specific changing area in the workplace. On appeal, the Commission found that the Agency improperly found that the complaint did not state a claim. In finding that the practice of changing in the workplace had been going on for years, and that Complainant failed to substantiate her claims, the Agency improperly addressed the merits of the complaint without first conducting a factual investigation. In addition, the Commission found that the matter was not moot because Complainant indicated that she continued to see the supervisor changing clothes in rooms that have indoor windows and did not have locked doors. [Sanjuanita A. v. Dep't of the Air Force, EEOC Appeal No. 0120171122 \(Aug. 10, 2017\)](#).

**Agency Dismissal of Claim as Moot and for Failure to State a Claim Reversed.** The Agency issued Complainant a Notice of Removal from his position. Although the notice was successively purged and rescinded, Complainant filed a formal complaint of discrimination. The Agency determined that Complainant failed to state a claim and that his complaint was moot due to the withdrawal of the notice pursuant to a grievance decision. On appeal, the Commission found that Complainant's claim was improperly dismissed as moot because the Agency failed to provide evidence that the Notice of Removal was rescinded and purged. Complainant also requested compensatory damages. Therefore, the Commission could not find that the effects of the alleged discrimination were completely and irrevocably eradicated. The Commission also found that Complainant submitted documentation regarding his injury as background information, and the Agency improperly dismissed the complaint as a collateral attack on the Office of Worker's Compensation Programs (OWCP) process. The Commission advised Complainant to contact the AJ assigned to his prior case if he wished to amend that complaint. [Taylor G. v. U.S. Postal Serv., EEOC Appeal No. 0120171687 \(July 19, 2017\)](#).

**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 \(June 2, 2017\)](#), request for reconsideration denied EEOC Request No. [0520170470](#) (Oct. 17, 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 \(May 18, 2017\)](#); *see also* [Dixie B. v. Dep't of the Navy, EEOC Appeal No. 0120161740 \(Oct. 7, 2016\)](#) (Complainant filed a formal EEO complaint alleging that the Agency retaliated against her when it forwarded an email from Complainant's representative to the AJ presiding over her prior EEO case. The Commission found that the Agency properly dismissed the complaint as a spin-off from an existing EEO complaint, noting that the allegations did not form the basis for an EEO complaint independent from the initial complaint. Complainant was instructed to raise these allegations with the AJ presiding over the underlying complaint).

**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 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 (two 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 \(Apr. 14, 2017\)](#); *see also* [Josefina L. v. U.S. Postal Serv., EEOC Appeal No. 0120171246 \(Aug. 2, 2017\)](#) (although the two complaints were similar, they were not identical because they addressed incidents that occurred on different dates); [Hannah C. v. Dep't of Agric., EEOC Appeal No. 0120162350 \(Dec. 22, 2016\)](#) (the Agency improperly dismissed Complainant's complaint alleging that it failed to provide her with reasonable accommodation as identical to a previous complaint because while the present complaint concerned the same subject matter, it involved a different and subsequent time-period).

**Complaint Properly Dismissed as Being Previously Raised in Grievance Process.** The Agency properly dismissed the complaint on the grounds that Complainant previously raised the matter in the grievance process. Complainant first filed a grievance regarding the denial of her request for telework, and the record showed that claims of discrimination were permitted to be raised under the collective bargaining agreement. While Complainant asserted that her EEO complaint was based upon race, the grievance and EEO complaint clearly concerned the same matter, and adding a basis to Complainant's EEO complaint did not alter her initial election of the grievance process. [Beth G. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120170983 \(Mar. 30, 2017\)](#); **see also** [Meghann M. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120172083 \(Aug. 11, 2017\)](#) (Complainant initially elected to pursue her claims in the grievance process, and asserted that she was subjected to a hostile work environment. The collective bargaining agreement allowed for claims of discrimination to be raised in the grievance process, and Complainant could have raised her allegations of discrimination had she chosen to do so. Complainant's decision to rescind her grievance did not change her original election to address those matters in the grievance and she was not entitled to file a subsequent EEO complaint on the same matters).

**Agency Improperly Dismissed Claim of Harassment.** A review of the EEO Counselor's report along with Complainant's formal complaint showed that Complainant alleged that the Agency subjected him to a pattern of discriminatory harassment and hostile work environment. While the Agency determined that the complaint consisted of two incidents, Complainant alleged that he was harassed on numerous occasions about his job performance and was ultimately disciplined for failing to perform his job. The Agency improperly treated the two incidents in a piecemeal manner, dismissing one for failure to state a claim and one for failure to timely contact an EEO Counselor. When the two incidents were viewed in the context of Complainant's claim of harassment, they stated a viable claim. Further, some of the incidents occurred within the 45-day limitation period preceding Complainant's initial EEO contact. Therefore, the Commission remanded the matter for processing. [Cristobal A. v. U.S. Postal Serv., EEOC Appeal No. 0120170871 \(Mar. 24, 2017\)](#); *see also* [Ernie S. v. Dep't of the Navy, EEOC Appeal No. 0120170661 \(Mar. 29, 2017\)](#) (the Agency improperly fragmented Complainant's hostile work environment claim, and dismissed one claim for failure to timely contact an EEO Counselor and the remainder

for failure to state a claim. Complainant alleged that he was subjected to an ongoing hostile work environment in retaliation for prior EEO activity, and at least one incident occurred within the 45-day period preceding his EEO contact); [Stacie D. v. Dep't of the Army, EEOC Appeal No. 0120170925 \(Mar. 14, 2017\)](#) (the Agency improperly fragmented Complainant's claim of ongoing discriminatory harassment/hostile work environment and dismissed some claims for failure to state a claim and some claims for failure to timely contact an EEO Counselor. A fair reading of the formal complaint reflected that Complainant claimed that she was subjected to a series of related incidents of harassment by various Agency officials, some of which occurred within the 45 days preceding her EEO contact. Therefore, the dismissal was improper because Complainant alleged a cognizable claim of harassment that was timely raised); [Arlette W. v. Dep't of the Army, EEOC Appeal No. 0120162589 \(Jan. 5, 2017\)](#) (Complainant alleged a number of incidents that, when viewed together, were sufficiently severe or pervasive to state a viable hostile work environment claim. In addition, some of the incidents occurred within the 45 days preceding Complainant's EEO contact); [Isabelle G. v. Nat'l Reconnaissance Office, EEOC Appeal No. 0120142354 \(Dec. 2, 2016\)](#) (the Agency improperly dismissed certain allegations because the incidents collectively made up a viable hostile work environment claim. Therefore, the entire claim was actionable. Further, at least one incident occurred within the filing period); [Helen G. v. Dep't of Homeland Sec., EEOC Appeal No. 0120142819 \(Dec. 21, 2016\)](#) (the AJ improperly fragmented Complainant's hostile work environment claim and dismissed some allegations for failure to state a claim and some for failure to timely contact an EEO Counselor. The Commission stated that this fragmentation compromised Complainant's ability to present an integrated and coherent claim. Complainant stated a cognizable claim of discriminatory harassment, and several of the incidents cited occurred within 45 days of the date she contacted the EEO Counselor. The Commission noted that while several incidents could be considered untimely discrete acts, those matters should be considered as evidence in support of the overall harassment claim. The matter was remanded to an administrative hearing); [Aleshia C. v. Dep't of Health & Human Serv., EEOC Appeal No. 0120162727 \(Nov. 16, 2016\)](#) (a fair reading of Complainant's formal complaint showed that Complainant claimed she was harassed through a variety of events that encompassed more than the single incident cited by the Agency. Therefore, Complainant stated a viable hostile work environment claim. In addition, at least one incident comprising Complainant's claim of hostile work environment harassment occurred within the 45-day limit, and, as such, Complainant's EEO contact was timely).

**Agency Dismissal of Complaint on Grounds of Mootness Improper.** Complainant filed a formal complaint alleging discriminatory hiring and promotion on the bases of sex and reprisal. Complainant initially accepted a temporary position and continuously sought a permanent position with the Agency, but was passed over multiple times in favor of male co-workers. She was repeatedly promised a full-time position by supervisors only to have those offers rescinded. Eventually, Complainant was converted to permanent status. The Agency

dismissed her complaint reasoning that the matter was moot once Complainant was converted to a permanent employee. On appeal, the Commission noted that a complaint is only moot if it can be said with assurance that there is no reasonable expectation that the alleged violation will recur; and interim relief or events have completely and irrevocably eradicated the effects of the alleged discrimination. The Commission found that while it could be said with assurance that Complainant's offer of a full-time position would not be rescinded, the second prong was not satisfied. Complainant continued to suffer the harms resulting from the delay including lost seniority, retirement, leave accrual, and income differential, for which there was a remedy. The Commission found that Complainant provided sufficient evidence to warrant an investigation and accordingly remanded the matter to the Agency. [Erika H. v. Dep't of the Army, EEOC Appeal No. 0120162843 \(Feb. 7, 2017\)](#).

**Agency Improperly Dismissed Complaint for Failure to Cooperate.** The Commission reversed the Agency's decision dismissing Complainant's complaint for failure to cooperate. The Agency requested that Complainant clarify her complaint and provide the name of her representative on 3 occasions or face dismissal of her complaint. Complainant failed to respond to the Agency's request. The Commission found sufficient information in the record to define and investigate the complaint. Specifically, Complainant alleged that she was subjected to harassment by a specific official and included several incidents to support her claim. The Commission found no evidence of contumacious conduct by Complainant. [Zonia C. v. Dept. of the Army, EEOC Appeal No. 0120170268 \(Jan. 4, 2017\)](#).

**Complaint Improperly Dismissed on Basis that Complainant Elected MSPB Appeal.** The Commission reversed the AJ's dismissal of a complaint alleging disparate treatment as to two performance evaluations, a charge of AWOL, and hostile work environment harassment on the grounds that the matters were raised in an appeal with the MSPB. The Commission found that while Complainant pursued a claim of termination with the MSPB, a fair reading of the remaining allegations revealed that the harassment claim and allegations of disparate treatment were separate issues. These matters were not before the MSPB and should be processed as an EEO complaint over which the Commission has jurisdiction. [King D. v. Dep't of the Army, EEOC Appeal No. 0120162282 \(Dec. 29, 2016\)](#).

## Findings on the Merits and Related Decisions

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

### 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 record also included 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 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 \(June 29, 2017\)](#).

**Commission Affirmed AJ's Finding of Age Discrimination Regarding Non-Selections.** Complainants filed EEO complaints alleging that the Agency discriminated against them based on age when they were not selected for Claims Representatives positions. After holding a hearing, the AJ found that Complainants established that the Agency's legitimate, nondiscriminatory reasons were a pretext for age discrimination. In finding that Complainants established pretext, the AJ reasoned that the Agency evaluated Complainants based solely on an exam score and did not consider their qualifications, job performance, appraisals, or experience with the Agency. On appeal, the Commission found that substantial evidence in the record supported the AJ's finding of age discrimination. The Commission stated that the Agency used the exam to screen out internal employees and recruit younger external hires for Claims Representative positions. The Commission also noted that the Agency later hired younger external applicants from local colleges noncompetitively without using the exam. The Agency failed to show that Complainants would not have been selected for the positions even absent discrimination. The Agency was ordered, among other things, to place each Complainant into a Claims Representative position in a mutually acceptable location with appropriate back pay and benefits. [Marine V., et al. v. Soc. Sec. Admin., EEOC Appeal No. 0720170001, et al. \(Mar. 20, 2017\)](#).

#### **Under the Rehabilitation Act**

**Failure to Accommodate Found.** Complainant requested to change to a later shift or be allowed to report one hour later as a reasonable accommodation. Following a hearing, the AJ found that the Agency accommodated Complainant by allowing him to report to work one hour later and use one hour of leave. On appeal, the Commission disagreed with the AJ's conclusion that the Agency met its reasonable-accommodation obligation, noting that forcing an employee to take leave when another accommodation would permit an employee to continue working a full day is not an effective accommodation. In this case, there was an alternative accommodation that would have allowed Complainant to continue working a full day, specifically allowing Complainant to report for work one hour later and work a full day, and the Agency did not show that it would have incurred a significant difficulty or expense if it had allowed Complainant to do so. There was no evidence that this proposed schedule change would have been unduly disruptive to other employees. The Agency's assertion that allowing Complainant to report to work one hour later would not be fair to the other employees did not establish undue hardship. Consequently, the Commission found that the Agency denied Complainant a reasonable accommodation when it refused to permit him to report to work at the later time. The Commission separately affirmed the AJ's finding of no discrimination regarding Complainant's termination during his probationary period. As a remedy for the Agency's failure to provide a reasonable accommodation, the Commission ordered the Agency, among other things, to investigate Complainant's claim for damages, and provide applicable training to the responsible management officials. [Lloyd E. v. Dep't of Transp., EEOC Appeal No. 0120150325 \(Aug. 17, 2017\)](#).

**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 \(June 16, 2017\)](#).

**Denial of Reasonable Accommodation Found.** The Commission found that the Agency discriminated against Complainant based on disability when it denied her reasonable accommodation for her condition. Medical documentation in the record supported a finding that Complainant was an individual with a disability because she had a physical impairment that substantially limited her in the major life activity of carrying. Further, the Agency conceded in its final decision that Complainant was otherwise qualified, and could perform the essential functions of her position, with or without reasonable accommodation. The Commission found that the Agency did not provide Complainant with the requested accommodation, not to carry a satchel, or with an alternative accommodation. Although Agency policy required carriers to carry the satchel, the Commission noted that the Agency could have modified the policy and prior managers allowed Complainant to deliver mail without carrying a satchel for five years. Complainant offered alternative suggestions including using a push cart, carrying the satchel on her arm, and wearing the satchel around her hips. Nevertheless, the Agency insisted she carry the satchel on her shoulder. The Commission stated that offering Complainant the alternative of carrying the satchel on her shoulder was not an effective accommodation because her medical documentation explicitly stated she was unable to carry the satchel due to a neck injury. The Agency did not show that allowing Complainant to not carry the satchel on her shoulder would cause an undue hardship, and Agency policy explicitly allowed for the use of a double satchel, which could be worn around the waist. The Commission affirmed the Agency's finding that Complainant failed to prove her claim of discrimination with regard to a suspension. The Agency was ordered, among other things, to investigate Complainant's claim for damages, and pay her appropriate back pay and benefits. [Eileen S. v. U.S. Postal Serv., EEOC Appeal No. 0120150199 \(Mar. 24, 2017\)](#).

**Commission Finds Agency's Application of "Sit and Reach" Component of Physical Fitness Test Discriminatory.** Complainant filed an appeal from the Agency's final decision finding that he was not discriminated against based on his disability when he was terminated from his Wildlife Refuge Specialist position. A medical examination certified that Complainant was qualified and able to perform the duties of the position in accordance with Agency standards and guidelines. Complainant passed all components of the fitness test except the "sit and reach" requirement due to his lack of flexibility resulting from prior back and neck injuries. On appeal, the Commission found that Complainant was a qualified individual with a disability, and that

the Agency was unable to demonstrate that the "sit and reach" requirement was a job-related business necessity. The record supported Complainant's assertion that he could perform all the physical duties of the position and Complainant successfully performed the duties of the position for many months before he was terminated. No management official articulated how the requirement related to any of the functions of the position, and the requirement was waived for a similarly situated individual in another region. In addition, the Agency did not provide any evidence suggesting that Complainant posed a direct threat to the health and safety of himself or others. Accordingly, the Commission found that the Agency discriminated against Complainant based on his disability when it terminated him from his position. The Agency was ordered, among other things, to offer Complainant a permanent Wildlife Refuge Specialist position or an equivalent position, with appropriate back pay and benefits, and investigate his claim for damages. [Elden R. v. Dep't of the Interior, EEOC Appeal No. 0120122672 \(Feb. 24, 2017\)](#).

**Disability Discrimination Found.** The Commission found that the Agency discriminated against Complainant based on her disability when it asked Complainant to remove a Crown of Thorns from her cubicle. The Agency did not dispute Complainant's assertion that other employees were allowed to have religious symbols at their desks. While a supervisor stated that Complainant's co-workers complained, the Agency did not present any statements from co-workers to corroborate this assertion. The Commission found that the Agency asked Complainant to remove the item because of the perception that Complainant was "unstable" and the Crown could be used as a weapon. Based upon the record, however, the supervisor had no more reason to believe that Complainant would become violent than any other employee. The Commission concluded that the supervisor's decision appeared grounded in stereotypes about people with mental health conditions, and the Agency conceded that it directed Complainant to remove the Crown based upon the alleged perception by co-workers about Complainant's condition. The Commission affirmed the Agency's finding that it did not deny Complainant a reasonable accommodation, and found that Complainant failed to prove her claim of harassment. The Agency was ordered, among other things, to investigate Complainant's claim for compensatory damages, take steps to ensure that all disability discrimination ceases and desists in the facility, permit Complainant to display the Crown of Thorns in her workspace, and provide training for management officials at the facility. [Matilde M. v. Soc. Sec. Admin., EEOC Appeal No. 0120140147 \(Jan. 17, 2017\)](#) .

**Denial of Reasonable Accommodation, Disability Discrimination, and Harassment Found.** The Commission found that the Agency failed to reasonably accommodate Complainant's disability, discriminated against her when it issued her a counseling letter and admonished her, and subjected her to a hostile work environment. Complainant asked to be able to excuse herself as needed to adjust her insulin pump, check her blood sugar in a private area, and eat if necessary, and provided medical documentation to support her

request. The Commission noted that these types of accommodation are often needed by employees with diabetes, and the Agency did not provide evidence that it would have been an undue burden to provide them to Complainant. The Commission rejected the Agency's assertion that it accommodated Complainant, stating that the Agency only offered Complainant accommodations available to the general workforce and did not address Complainant's specific needs. Complainant's supervisor also failed to respond to Complainant for two months despite the fact that her medical documentation indicated that a delay could result in severe medical consequences. The Commission noted that while the Agency approved Complainant's request for leave, its own inaction and delay on Complainant's request for accommodation drove Complainant out of the workplace for a significant period of time and resulted in the need for her to request the leave. The Agency then used Complainant's leave status as an excuse to halt the interactive process that could have provided her with reasonable accommodation. The Commission stated that forcing an employee to take leave when another accommodation would permit the employee to continue working is not an effective accommodation. Therefore, the Commission concluded that the Agency did not act in good faith and was liable for compensatory damages. The Commission also found that Complainant was subjected to disability discrimination and retaliation when her supervisor issued her a counseling letter and admonished her, and that these incidents, when considered with the denial of accommodation, constituted a hostile work environment. The Agency was ordered, among other things, to provide Complainant with reasonable accommodation, restore all leave taken because of the denial of accommodation, pay appropriate back pay, and investigate her claim for damages. [Denese G. v. Dep't of the Treasury, EEOC Appeal No. 0120141118 \(Dec. 29, 2016\)](#).

**Agency Failed to Accommodate Complainant.** The Commission found that the Agency failed to reasonably accommodate Complainant who was hearing impaired when it conducted an unscheduled service talk without providing a sign language interpreter. While the Agency stated that it attempted to accommodate Complainant the following day at another meeting, that meeting never occurred because no sign language interpreter appeared for the second service talk. The Agency failed to make a good faith effort to accommodate Complainant. The Agency was ordered, among other things, to ensure that Complainant is provided with a qualified interpreter when required, provide training to the involved managers and supervisors on the issue of reasonable accommodation, and investigate his claim for damages. [Darius C. v. U.S. Postal Serv., EEOC Appeal No. 012016004 \(Nov. 1, 2016\)](#).

**Failure to Accommodate Found.** The Commission found that the Agency violated the Rehabilitation Act when it denied Complainant's requests to return to the night shift and work with a 20-pound lifting restriction as a reasonable accommodation. The Commission noted that the Agency's claim of undue hardship was significantly undermined by the fact that other employees with similar lifting restrictions were permitted to work.

Management witnesses attempted to justify this by stating that these employees were receiving worker's compensation. The Commission explained that while the purpose of the worker's compensation law is to provide a system for securing prompt and fair settlement of employees' claims for occupational injury and illness, the Rehabilitation Act is broader, prohibiting federal agencies from discriminating against all qualified individuals because of disability, whether work-related or not. If an agency reserves light duty positions for employees with occupational injuries, the Rehabilitation Act requires it to consider assigning an employee with a disability who is not occupationally injured to such positions as a reasonable accommodation. The Agency cannot establish undue hardship by asserting it needs to reserve light duty for employees approved by worker's compensation. The Agency was ordered, among other things, to permit Complainant to return to the night shift, restore any leave used as a result of the denial of accommodation, and pay Complainant any back pay he lost due to the denial of accommodation. The Commission affirmed the Agency's finding that Complainant failed to prove his claim of ongoing discriminatory harassment. [Will K. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120142904 \(Oct. 18, 2016\)](#).

#### **Under Title VII**

**AJ's Finding of Race Discrimination Affirmed.** Complainant filed a formal EEO complaint alleging, among other things, that the Agency discriminated against him when it did not select him for an Assistant Special Agent in Charge position. Following a hearing, the AJ found that the Agency failed to articulate a legitimate, nondiscriminatory reason for Complainant's non-selection. While the Agency asserted that Complainant was not promoted because he did not pass an annual physical fitness exam, Agency managers testified that the supervisory position would involve more administrative work than Complainant's position and there would not be a substantial change in the physical requirements. Further, the AJ noted that the selection criteria was changed for one candidate who did not meet the requirements but not for Complainant. Complainant also stated that the Director, who was extensively involved in the selection yet did not testify at the hearing, made several comments that revealed a discriminatory intent. The AJ questioned the Director's credibility, finding that there were considerable gaps in the Director's statements. The Commission affirmed the AJ's findings on appeal, and noted that even if the Agency met its burden of providing a legitimate reason for Complainant's non-selection, the evidence supported a finding of pretext. Specifically, Complainant was considered the best candidate by his second-level supervisor, and the record showed that Complainant was better qualified than the selectee. The Agency was ordered, among other things, to place Complainant into the position or a similar position, with appropriate back pay and benefits, and pay him proven compensatory damages. [Kenny C. v. Dep't of Def., EEOC Appeal No. 0720150030 \(Aug. 29, 2017\)](#).

**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 \(May 15, 2017\)](#), request for reconsideration denied EEOC Request No. [0520170446](#) (Nov. 3, 2017).

**Religious Harassment Found.** After a hearing, an AJ issued a decision finding that Complainant proved she was subjected to religious harassment when, during an e-mail conversation about Complainant's work hours and schedule, her supervisor made a reference to being a "Hebrew slave." The Commission affirmed the AJ's decision, noting that it was undisputed that the supervisor sent the e-mail with the comment to Complainant. The Commission found that the use of the term "Hebrew slave" was unwelcome because the term "Hebrew" sometimes was considered archaic or offensive when used to generally refer to contemporary Jewish persons, and coupled with the word "slave," was particularly negative and offensive to a Jewish person. Additionally, the term "Hebrew slave" pertained specifically to Jewish persons, and as such, was inherently based on religion. The AJ properly concluded that supervisors should know that Jews have been subjected to genocide, anti-Semitism and slavery, and that workplace jesting regarding slavery in reference to a specific protected group which has experienced slavery was "profoundly inappropriate." With regard to the Agency's liability, the Commission noted that the anti-harassment policy in the record was issued months after the incident, and there was no evidence detailing how the policy was disseminated, or that Complainant was specifically provided with a copy of the policy. Thus, under the standards of vicarious liability, the Agency was liable for the supervisor's harassment because there was no evidence that the Agency exercised reasonable care to prevent and correct the harassment, or that Complainant unreasonably failed to take advantage of any preventive or corrective opportunities. The Commission affirmed the AJ's determinations with respect to remedies and ordered the Agency, among other things, to pay Complainant \$10,000 in proven non-pecuniary compensatory damages, and \$10,980 in attorney's fees. [Lashawna C. v. Dep't of Labor, EEOC Appeal No. 0720160020 \(Feb. 10, 2017\)](#).

**Under Multiple Bases**

**Race and 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 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 Agency also 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 \(May 12, 2017\)](#).

**Sexual Harassment and Retaliation Found.** Following a hearing, the AJ found that the Agency subjected Complainant to sexual harassment and retaliation. The Commission affirmed the AJ's findings on appeal. Assuming, arguendo, that the Unit Leader (S1) was a co-worker rather than a supervisor, the Commission found that the Agency was still liable for S1 's actions because it knew about S1 's conduct and did not take immediate and appropriate corrective action. Specifically, while the Agency took measures to stop the harassment, it did not take any action to correct its effects on Complainant or ensure that similar sexual harassment by another employee did not take place. The Commission agreed with the AJ that although the Agency promptly removed S1 from the workplace, it did not take any action to prevent further retaliatory harassment. In addition, the Agency did not communicate to or educate the rest of the staff that sexually harassing conduct was against Agency policy and would not be tolerated. The Commission concluded that the AJ's findings were supported by substantial evidence in the record. The Commission rejected the Agency's assertion that the "but for" standard articulated in [University of Texas Southwestern Medical Center v. Nassar, 133 S.Ct. 2517 \(2013\)](#) applied to Complainant's retaliation claim, stating that the Commission has previously held that the standard does not apply to retaliation claims by federal sector employees. The Agency was ordered, among other things, to issue Complainant an "Outstanding" performance evaluation, and pay proven compensatory damages and attorneys' fees. [Heidi B. v. Dep't of Homeland Sec., EEOC Appeal No. 0720140004 \(Feb. 2, 2017\)](#).

**Commission Affirms AJ's Finding of Race and Age Discrimination.** Following a hearing, the AJ found that the Agency discriminated against Complainant on the bases of race and age when it did not select him for a Contracting Officer position. The AJ determined that Complainant's qualifications were plainly superior to the Selectee's qualifications in that Complainant had more years of contracting experience, had contracting experience involving more complex matters and higher monetary amounts, and had more years of supervisory experience. The AJ also found that the Selecting Official's testimony about the Selectee's qualifications was not credible and was not supported by the documentation in the record. On appeal, the Commission concluded that the AJ's finding was supported by substantial evidence, and agreed with the AJ that the Agency's legitimate, nondiscriminatory reason for not selecting Complainant was a pretext for race and age discrimination. While the Agency asserted that the Selecting Official's selection history precluded a finding of discrimination, the Commission stated that selection history is not controlling, and the AJ reasonably relied upon Complainant's prior performance appraisal as an indicator of his performance. Further, the AJ was entitled to draw a

reasonable inference from the fact that the Selecting Official did not contact Complainant's supervisor despite having contacted the Selectee's most recent supervisor. The Agency was ordered, among other things, to offer Complainant the position, pay him appropriate back pay and benefits, and pay him \$5,000 in proven compensatory damages. [Neil M. v. Dep't of Agric., EEOC Appeal No. 0720140005 \(Dec. 9, 2016\)](#).

### **Retaliation**

**Retaliation Found.** Complainant filed an EEO complaint alleging, among other things, that his supervisor made remarks about his EEO activity. On appeal, the Commission found that the supervisor's actions constituted retaliation. Complainant engaged in protected EEO activity when he contacted an EEO counselor, and the supervisor was aware of that activity. The supervisor then contacted Complainant and made a number of comments about Complainant's EEO activity including that an email he received regarding the matter was "weighing on [his] mind." The supervisor acknowledged asking Complainant why he had filed when he did, and stating Complainant "pulled the trigger too soon." The supervisor also stated that the EEO process was probably "not the most enjoyable path for anyone involved." Further, he appeared to offer Complainant an incentive for withdrawing from the EEO process, by telling him that, if rumors of changes in management occurred and he had a good evaluation in hand, he, the supervisor, would have another conversation with senior management about a position for Complainant. The Commission found that the supervisor engaged in conduct that was designed to intimidate and/or interfere with Complainant's EEO activity, and the supervisor's comments would be reasonably likely to deter employees from exercising their EEO rights. The Commission affirmed the Agency's finding of no discrimination regarding the remaining allegations in the complaint. The Agency was ordered, among other things, to investigate Complainant's claim for damages, and provide training to the supervisor. [Octavio C. v. Dep't of the Interior, EEOC Appeal No. 0120150460 \(Aug. 16, 2017\)](#).

**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's decision, 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 \(Apr. 6, 2017\)](#).

**Commission Affirmed AJ's Finding of Retaliation.** Complainant filed a complaint alleging, *inter alia*, that he was subjected to reprisal discrimination when the Deputy Commander sent an e-mail containing information about Complainant's convictions to Complainant's new duty station. The AJ issued a decision on summary judgment finding that the Agency retaliated against Complainant when it took that action. The AJ noted that the Deputy Commander was not required to report this information and had no reason to reach out to officials at Complainant's new duty station. The AJ concluded that Deputy Commander contacted Complainant's duty station in order to interfere with Complainant's employment. On appeal, the Commission affirmed the AJ's finding of retaliation. The Chief Information Officer stated that he could see no reason for Deputy Commander to send the e-mail through unofficial channels, especially because the e-mail was unsecured and contained Complainant's personally identifiable information. The Commission found it more likely than not that the Deputy Commander was motivated by unlawful retaliatory animus when she sent the e-mail. The Commission affirmed the AJ' findings that Complainant failed to prove his claims of race and sex discrimination, or his additional claim of retaliation. The Agency was ordered, among other things, to pay Complainant \$2,000 in proven compensatory damages and provide training for the responsible officials with a specific emphasis on retaliation. [Clemente M. v. Dep't of the Army, EEOC Appeal No. 0720140015 \(Mar. 16, 2017\)](#), request for reconsideration denied EEOC Request No. [0520170273](#) (June 27, 2017).

**Per Se Retaliation Found.** Complainant filed a formal EEO complaint alleging that his supervisor told a co-worker that Complainant had filed a prior EEO complaint and left documents pertaining to the complaint on his desk in plain view of the co-worker. The Commission found the supervisor's actions constituted per se retaliation. While the Agency asserted that there was no evidence that the incident occurred, the record contained a sworn affidavit from the co-worker attesting to the incident. In addition, the co-worker reported the incident to Complainant shortly after it happened, and Complainant stated that the co-worker had no prior knowledge of his complaint. The Commission found the supervisor's general assertion that he "did not recall" speaking to the co-worker about any EEO complaints was not persuasive. The Commission acknowledged that there was no evidence Complainant suffered an adverse employment action as a result of the incident, but the Commission found that the supervisor's discussion of an EEO complaint and lack of discretion regarding documents pertaining to the complaint constituted per se retaliation. These actions would be reasonably likely to deter Complainant and others from engaging in protected EEO activity. The Agency was ordered, among other things, to investigate Complainant's claim for damages, and provide appropriate training to the supervisor. [Renato K. v. Dep't of Homeland Sec., EEOC Appeal No. 0120141861 \(Dec. 16, 2016\).](#)

**Per Se Retaliation Found.** Complainant filed a formal EEO complaint alleging, among other things, that the Agency retaliated against her when it issued her a proposed 30-day suspension. An AJ found that Complainant failed to prove a nexus between her prior EEO activity and the Agency's allegedly retaliatory actions. Upon review of the record, the Commission found that the supervisor created a chilling effect on the EEO process when he specifically mentioned allegations of discrimination made by Complainant in his proposal for her 30 day suspension. While the supervisor stated that he issued the proposed suspension because of the tone of Complainant's emails rather than the content, the Commission found that the supervisor's specifically citing Complainant's allegations of harassment and discrimination in a disciplinary proposal had a chilling effect on the EEO process. The Commission noted that the length of the proposed suspension appeared excessive given Complainant's alleged conduct. Therefore, the Commission found that the proposed suspension was per se retaliation. The Commission affirmed the AJ's finding that Complainant failed to prove her claims of discriminatory harassment and disparate treatment. [Odilia M. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120150311 \(Nov. 3, 2016\).](#)

## Official Time

**Official Time Discussed.** The Commission agreed with the AJ 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 \(June 8, 2017\)](#).

**Commission Affirmed Agency's Decision Denying Official Time.** In a previous decision, the Commission ordered the Agency, among other things, to issue a decision addressing Complainant's claim that he was denied official time. After investigating the matter, the Agency determined that Complainant was not entitled to official time for the requested period because he was not in a duty status. The Commission affirmed the Agency's decision on appeal. The Commission noted that employees are entitled to a reasonable amount of official time to present a complaint or respond to Agency requests for information "if otherwise on duty." In this case, Complainant did not dispute the Agency's assertion that he was not in a duty status or show that he was otherwise on duty. [Romeo K. v. U.S. Postal Serv., EEOC Appeal No. 0120150118 \(Feb. 7, 2017\)](#).

**Commission Affirmed Agency's Decision on Official Time.** The Commission found that the Agency properly addressed Complainant's allegations that she was denied official time as a separate claim. Complainant made a request for four hours of official time to complete pre-complaint intake forms, and two hours to meet with the EEO Counselor. The Agency granted Complainant 30 minutes for each request. Complainant's EEO Counselor confirmed that 30 minutes was the average amount of time it took to complete EEO paperwork, and the Commission's regulations provide that pre-complaint counseling should take less than 30 minutes. The Commission rejected Complainant's argument that 30 minutes was insufficient for her representative to assist her in identifying the issues and determining how to proceed with her claim. The Commission noted that Complainant was already familiar with the EEO process and did not explain why she needed longer to complete the paperwork. While Complainant stated that 30 minutes was not enough time for her representative to accompany her in person, the Commission's regulations provide that complainants may consult with their representatives by phone and Complainant acknowledged that she utilized that option. Therefore, the evidence in the record established that 30 minutes was a reasonable amount of official time for both of Complainant's requests. [Mozelle G. v. U.S. Postal Serv., EEOC Appeal No. 0120161951 \(Oct. 19, 2016\)](#).

## Remedies

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

**Remedies Discussed in Case Involving Default Judgment.** Following a hearing, an AJ imposed a default judgment against the Agency as a sanction based on the actions of its attorney. Specifically, the AJ found that the Agency's attorney obtained a draft of a partial hearing transcript following the first two days of the hearing, and did not provide a copy to Petitioner, thereby obtaining an unfair tactical advantage over Petitioner during the remainder of the hearing. The Commission affirmed the AJ's issuance of the sanction, and later issued a decision clarifying the remedies available in the case. The Commission agreed with the Agency that since the AJ issued a default judgment as a sanction for the actions of the Agency's attorney, it was not appropriate to order the Agency to provide training for and consider disciplining Petitioner's supervisor. The Commission found that it would be inappropriate, based on the evidence of record, to impute any discriminatory action on the part of the supervisor. [Damaris M. v. Pension Benefit Guar. Corp., EEOC Petition No. 0420170007 \(July 14, 2017\)](#).

**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 \(May 4, 2017\)](#).

**Remedies Discussed.** The Agency fully implemented the AJ's finding that Complainant was discriminated against when she was not selected for a Lead Supervisory Social Worker position. Complainant ultimately appealed to the Commission, asserting that she was not awarded back pay, or a promotion to a Lead

Supervisory Social Workers position, and Agency officials had not been disciplined. The Commission found that the Agency, in issuing verbal instructions and counseling the responsible officials, complied with the portion of the final decision requiring it to consider disciplinary action. However, the Agency was not in compliance with that portion of the decision requiring it to calculate and award Complainant back pay and offer Complainant an available Lead Supervisory Social Worker position or substantially equivalent position. The Agency did not present sufficient evidence to show how it calculated back pay, and the Agency did not present sufficient evidence to suggest that the Senior Supervisor Social Worker position it offered Complainant was the equivalent to a Lead Supervisory Social Worker position. [Nevada R. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120140904 \(Jan. 18, 2017\)](#).

**Petitioner Entitled to Reimbursement for Leave Used Due to Discrimination.** The Commission granted Petitioner's petition for enforcement, finding that the Agency failed to comply with the Commission's order to compensate Petitioner for leave without pay used as the result of the Agency's retaliation. In its previous decision, the Commission ordered the Agency to calculate the monetary and/or retirement value of Petitioner's leave from the time he left the workplace until his resignation, and pay Petitioner the equivalent monetary value of that leave. The Agency did not previously contest Petitioner's request for compensation for the leave he used due to the retaliatory harassment. The Commission stated that paying Petitioner the monetary value of the leave constituted make-whole relief, and, contrary to the Agency's assertion, the relief was available even though Petitioner did not prevail on a constructive discharge claim. [Donny F. v. Dep't of Homeland Sec., EEOC Petition No. 0420160031 \(Jan. 5, 2017\)](#).

**Training for Management Officials Sufficient.** An AJ found that the Agency subjected Complainant to a hostile work environment and race discrimination. The Commission found that the AJ's order directing the Agency to provide training to all employees at Complainant's facility was overly broad as there was no evidence of a facility-wide culture of discrimination. The Commission found, instead, that requiring the Agency to provide eight hours of training to the management officials in Complainant's chain of command and the Human Resources Specialist was sufficient. [Joey B. v. Dep't of Veterans Affairs, EEOC Appeal No. 0720160023 \(Dec. 21, 2016\)](#).

**Back Pay Discussed.** In a previous decision, the Commission found discrimination and ordered the Agency to calculate back pay and pay Petitioner within 60 days of the order. Petitioner brought an enforcement action against the Agency, claiming that the Agency failed to properly calculate the back pay owed to her by not including per diem payments for her deployment periods. The Commission found that the Agency properly did not include per diem payments in the back pay award as per diem is not considered compensation under the Back Pay Act. The Commission did agree with Petitioner, however, that the Agency improperly calculated her

back pay award by subtracting unemployment compensation benefits from the total. The Commission has previously stated that an agency may not deduct unemployment benefits from a back pay award, and the Commission ordered the Agency to pay Petitioner the amount that was deducted, as well as any other applicable benefits due Petitioner. [Corazon P. v. Dep't of Homeland Sec., EEOC Appeal No. 0420150004 \(Oct. 26, 2016\)](#).

## Sanctions

**AJ Did Not Abuse Discretion in Dismissing Hearing Request as Sanction.** The AJ dismissed Complainant's hearing request for failure to comply with discovery orders. On appeal, the Commission found that the AJ did not abuse her discretion in sanctioning Complainant. The AJ found that Complainant failed to comply with three orders, and refused to produce requested documents or provide responsive answers to interrogatories. The AJ gave Complainant multiple opportunities to provide information during discovery, and Complainant failed to do so. The Commission found that the AJ acted within the bounds of her regulatory authority to conduct the hearing when she dismissed the hearing request. The Commission also affirmed the Agency's finding of no discrimination. [Barbara C. v. Gen. Serv. Admin., EEOC Appeal No. 0120162358 \(Aug. 31, 2017\)](#).

**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 regarding the underlying issues in the complaint. [Emelda F. v. Dep't of Homeland Sec., EEOC Appeal No. 0720170024 \(May 4, 2017\)](#).

**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 \(Apr. 10, 2017\)](#).

**AJ Did Not Abuse Her Discretion in Dismissing Hearing Request as Sanction.** The Commission found that the AJ did not abuse her discretion in ordering the dismissal of Complainant's hearing request as a sanction for Complainant's failure to cooperate with a discovery order. The Commission noted that an AJ has broad authority to regulate the conduct of a hearing. Complainant asserted that she was hospitalized due to a medical condition and was unable to complete the interrogatories by the deadline. Neither Complainant nor her attorney, however, informed the AJ or the Agency of the two-day hospital stay until more than three weeks after the deadline for submitting the interrogatories had passed. The Commission affirmed the Agency's finding that Complainant failed to prove her claims of harassment and disparate treatment discrimination. [Dona A. v. Soc. Sec. Admin., EEOC Appeal No. 0120150376 \(Mar. 29, 2017\)](#).

**Commission Affirmed AJ's Dismissal of Complaint as Sanction.** The Commission affirmed the AJ's dismissal of Complainant's entire complaint for contumacious conduct. Complainant's contumacious conduct had gone on for several years, and included posting a confidential video deposition on youtube.com despite a protective order to the contrary; falsely accusing Agency Counsel of a history of accusing him of contumacious conduct; reporting Agency Counsel to the bar association; filing a meritless motion for sanctions against the Agency; and engaging in ex parte communications. The AJ noted that Complainant had a history of contumacious conduct before three other AJs that continued despite the imposition of similar sanctions. Therefore, a more severe sanction was required in this case. [Edmond C. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120170879 \(Mar. 7, 2017\)](#); see also [Alfred S. v. Soc. Sec. Admin., EEOC Appeal No. 0120140900 \(Jan. 6, 2017\)](#) (the Commission affirmed the AJ's dismissal of Complainant's complaint as a sanction for contumacious conduct. The AJ had previously sanctioned Complainant for similar conduct, and Complainant, an attorney, failed to respond to the Agency's discovery requests for more than one year, caused the Agency to cancel scheduled depositions multiple times, and destroyed relevant evidence by deleting e-mails).

**AJ Erred in Excluding Evidence in Case of Class Certification.** In a prior decision, the Commission reversed the Agency's decision not to implement the AJ's decision to certify the class and determined that certification was appropriate. The matter was remanded to the AJ for continued processing, and after the close of discovery, the Agency filed a motion to decertify the class and a motion for summary judgment. The Class Agent submitted 15 affidavits from putative class members, as well as a report from the Class Expert in response to the Agency's motion. The AJ, as a sanction, excluded the evidence submitted by the Class Agent, and issued a decision decertifying the class. On appeal, the Commission noted that a sanction must be tailored in each case to appropriately address the underlying conduct of the party being sanctioned. In this case, the sanction imposed played a dispositive role in the AJ's decision to decertify the class. The Commission found that the sanction was overly harsh. The excluded evidence was submitted in response to the Agency's motion for summary judgment and was not available to the Class Agent during discovery. The Class Agent, as the non-moving party, was entitled to submit affidavits not drafted during discovery in order to oppose the Agency's assertion that there was no dispute of material fact. The Agency did not establish that it suffered sufficient prejudice to justify the sanction imposed by the AJ, and the Commission found that a more tailored approach to the situation would have been to reopen a limited discovery period. The Commission vacated the decision to decertify the class and remanded the matter for continued adjudication on the merits. [Charley L., et al. v. Dep't of Labor, EEOC Appeal No. 0120091988 \(Feb. 23, 2017\)](#); request for reconsideration denied EEOC Request No. [0520170312](#) (May 12, 2017).

**Commission Issued Default Judgment Against Agency as Sanction.** According to the record, the Agency did not begin an investigation until 322 days after the complaint was filed, and ultimately issued a decision finding no discrimination in the matter. The Commission's regulations require an agency to complete an investigation of a formal EEO complaint within 180 days unless the parties agree to extend the period for not more than an additional 90 days. While Complainant agreed to an extension, the investigation was not completed until well beyond the extension period, and the Agency provided no explanation for the delay in initiating and completing the investigation. The Commission stated that compliance with the timeframes set forth in the regulations is not optional, and noted that the Agency had been subjected to default judgments three times for the same infraction of failing to initiate an investigation within 180 days. The Commission found that the Agency's extraordinary tardiness undermined the integrity and effectiveness of the EEO process, and deprived Complainant of the opportunity to participate in the investigation. Therefore, the Agency's delay warranted the severe sanction of granting default judgment in favor of Complainant. While the Commission found that the record did not show that the alleged incidents were sufficiently severe or pervasive to establish a discriminatory hostile work environment, there was sufficient evidence to support Complainant's entitlement to relief for the denial of compensatory time. The Agency was ordered, among other things, to investigate the claim for compensatory damages, and provide appropriate training for EEO managers and staff. [Jeremy S. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120142917 \(Feb. 9, 2017\)](#).

**Agency's Failure to Timely Complete EEO Investigation Results In Default Judgment.** On appeal, Complainant argued, among other things, that the Commission should sanction the Agency for failing to conduct a timely investigation of her complaint by issuing a default judgment in her favor. The record reflected that Complainant filed her EEO complaint on September 26, 2011, and on June 8, 2012, Complainant requested a hearing before an AJ when she did not receive the Agency's report of investigation (ROI) after 180 days. The Agency began its investigation on July 30, 2012, and completed its investigation on August 27, 2012. The Commission found that the Agency did not comply with the Commission's regulations, and did not show good cause for its actions when it failed to complete its investigation within 180 days of the filing of Complainant's complaint. The Commission further found that the most appropriate sanction was a default judgment in Complainant's favor. However, Complainant was not entitled to individual relief because substantial evidence supported the AJ's finding that the Agency's actions were not based on Complainant's race or sex. [Harriet M. v. Dep't of Def., EEOC Appeal No. 0120141484 \(Jan. 30, 2017\)](#); *request for reconsideration denied* EEOC Request No. [0520170232](#) (May 25, 2017).

## Settlement Agreements

**Breach of Settlement Found.** The parties entered into a settlement agreement which provided, in pertinent part, that the Agency's Administrative Officer (AO) would provide a neutral reference to potential employers. The Commission found that the Agency breached the agreement when two supervisors provided information beyond what was specified in the agreement to the Office of Personnel Management (OPM). According to the record, OPM contacted an Agency official as part of a background investigation on behalf of Complainant's prospective employer. The Commission found that the OPM inquiry fell within the scope of the settlement agreement. While Complainant properly referred OPM to the AO, the AO was out of the office on detail and made no arrangements to provide the neutral reference required by the agreement. OPM's request was then inappropriately referred to Complainant's former supervisors. The Commission noted that if Complainant wished to reinstate his complaint, he would have to return any benefits received under the agreement and, therefore, the Agency's records would no longer reflect that Complainant resigned for personal reasons.

[Humberto P. v. Dep't of Homeland Sec., EEOC Appeal No. 0120152191 \(Aug. 9, 2017\).](#)

**Breach of Settlement Found.** Complainant and the Agency entered into a settlement agreement that included a confidentiality clause with an exception for circumstances where disclosure to specific parties was necessary for the Agency to implement the other settlement terms or resolve disputes over compliance. Complainant alleged that a supervisor announced to a second supervisor in front of Complainant's co-workers that Complainant had entered into a "Last Chance Agreement." On appeal, the Commission found that the Agency breached the settlement when the supervisors verbally discussed the agreement in front of Complainant's co-workers who were not authorized to know about the settlement agreement and did not fall within the exceptions to the confidentiality clause. Complainant requested to reinstate his underlying EEO claim, and the Commission noted that if the complaint was reinstated, the parties must be returned to the status quo at the time they entered into the settlement agreement, including the reinstatement of Complainant's Notice of Removal. [Allen M. v. U.S. Postal Serv., EEOC Appeal No. 0120171147 \(July 20, 2017\).](#)

**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 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 \(Apr. 21, 2017\)](#), *request for reconsideration denied* EEOC Request No. [0520170378](#) (Sept. 14, 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.** The Commission reversed the Agency's decision finding no breach of settlement, and reinstated the underlying complaint, stating that the settlement agreement was 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 "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 \(Apr. 17, 2017\)](#).

**Settlement Agreement Voidable Due to Mutual Mistake and Violated the OWBPA.** Complainant and the Agency entered into a settlement agreement that provided, among other things, that the Agency would initiate the restoration of the necessary amount of sick leave so that Complainant would retire with a balance equivalent to one year in addition to her other years of service. When the Agency attempted to implement the agreement, it was advised that crediting sick leave beyond what an employee could have earned while employed was considered an inappropriate use of retirement benefits. Complainant did not dispute that the term of the agreement at issue violated federal law and that the parties made a mutual mistake in including it.

Therefore, the term was unenforceable and the Commission agreed with the Agency that the provision was void. The settlement agreement also violated the Older Workers' Benefits Protection Act's (OWBPA) by including a tender back requirement as a condition for alleging breach. Further, the OWBPA requires that a waiver of an age discrimination claim be "knowing and voluntary," which includes the requirement that such waivers be free of mistakes of material fact. The Commission stated that because the mutual mistake regarding the sick leave provision was material and the agreement contained other valuable consideration, the agreement was voidable. Complainant was to, therefore, be given the option of either accepting the agreement without the sick leave provision, or voiding the entire agreement and having her complaints reinstated without being required to tender back the other benefits and money she received from the Agency. [Franchesca V. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120170632 \(Mar. 23, 2017\)](#).

**Breach of Settlement Found.** Complainant and the Agency entered into a settlement agreement which provided, among other things, that Complainant would "always have the start time of 7:45 am." The Commission found that the Agency breached the agreement when it changed Complainant's start time. While the Agency asserted that it changed Complainant's start time due to a change in circumstances, the Commission found no ambiguity in the agreement. Clearly, the language of the agreement meant that Complainant's start time would "always" be 7:45 regardless of the circumstances. The Commission has held that, when an individual bargains for a position without any specific terms as to length of service, it would be improper to interpret the reasonable intentions of the parties to include placement in a particular position forever. Under the circumstances in this case, however, the Agency agreed to always provide Complainant with the specific start time. The Agency was ordered to specifically comply with the terms of the agreement and return Complainant to the agreed upon 7:45 starting time. [Lenita T. v. U.S. Postal Serv. EEOC Appeal No. 0120170679 \(Feb. 23, 2017\)](#).

**Breach of Settlement Found.** The parties entered into a settlement agreement that provided, among other things, that the Agency would pay Complainant \$3,000 in compensatory damages within 60 days. In addition, the Agency agreed to credit 497 hours of sick leave to Complainant for future use. On appeal, the Commission found that the Agency breached the agreement when it did not credit Complainant with the sick leave hours for 15 months. While the agreement did not provide a specific time for the Agency to credit the sick leave, the Commission stated that 15 months was unreasonable. The Agency was ordered to notify the Complainant of her option to either reinstate her claim or to elect specific performance of the agreement. [Stella K. v. U.S. Postal Serv., EEOC Appeal No. 0120160137 \(Feb. 9, 2017\)](#).

**Breach of Settlement Found.** Complainant alleged that the Agency breached a settlement agreement which stated that the Agency would perform route inspections for Complainant and a co-worker. The Agency asserted

that the current Station Manager attempted to cure the breach when she learned of it but was unable to do so because Complainant was off work due to an injury. The Commission initially noted that when a settlement agreement does not provide a time frame for performance, performance is required within a reasonable amount of time. In this case, Complainant worked for approximately eight months after the parties executed the settlement agreement before sustaining an injury that caused him to be off work. Complainant stated that he reminded one of the management officials who signed the agreement of the route inspection almost weekly. The Commission found that eight months was not a reasonable amount of time for the Agency to comply with the terms of the agreement, and the fact that Complainant was off work did not absolve the Agency of the breach. The Agency was ordered to notify Complainant of the option to return to the status quo prior to the execution of the agreement or to allow the terms of the agreement to stand. [Clayton C. v. U.S. Postal Serv., EEOC Appeal No. 0120150920 \(Feb. 7, 2017\)](#).

**Commission Found Agency Breached Settlement Agreement.** Complainant alleged that the Agency was in breach of two provisions of a settlement agreement requiring the Agency to refer Complainant's initial application for consideration as a candidate for an RN Case Manager (Gastroenterology) position, and to select from the next five ranked applicants should the first-choice applicant decline the position. The Agency attempted to cure the breach by submitting Complainant's application for an identical position with a later application deadline and different applicants. Based on the plain meaning rule, the Commission determined that the Agency failed to specifically perform its obligation under the terms of the agreement. The parties specifically identified a vacancy announcement in both provisions of the agreement, and the Agency was aware that identical positions could be listed under different vacancy announcement numbers at the time the parties entered into the agreement. Even though the position descriptions were identical, each vacancy announcement was advertised for a different application time frame, thereby garnering different applicant pools. While Complainant was not guaranteed an RN Case Manager position, the probability that she would be selected and the time of her selection was increased based on the application time frame and the applicant pool. The matter was remanded to the Agency for specific performance. [Amie H. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120162734 \(Jan. 17, 2017\)](#).

**No Breach of Settlement Found.** The Commission has held that where a settlement agreement provides for a position and does not specify the duration of that position, it is reasonable to assume that the parties do not intend that the position will last forever. Here, the Commission applied this rule where the settlement agreement was silent regarding the possibility of future reassignments. Given that the agreement in this case specifically stated, "The parties understand that there is no guarantee that the modified job will last forever or that the days off will stay the same as things may change....," the Commission found that the Agency did not

breach the agreement. In so finding, it noted that the terms of Complainant's modified job continued for approximately one and one-half years after the execution of the settlement agreement. [Brandon D. v. U.S. Postal Serv., EEOC Appeal No. 0120150945 \(Mar. 17, 2017\)](#); see also [Susie K. v. Small Bus. Admin., EEOC Appeal No. 0120170341 \(Mar. 9, 2017\)](#), request for *reconsideration denied* EEOC Request No. [0520170294](#) (June 22, 2017) (the Commission affirmed the Agency's finding that it did not breach the settlement agreement requiring that Complainant be placed in a position at a particular location when, after 8 years, Complainant was designated to be moved to another location. The Commission held that the agreement did not specify a term of placement, or require Complainant to be allowed to remain at the location indefinitely, and there was no evidence of bad faith by the Agency).

**Breach of Settlement Found.** The Agency and Complainant reached a settlement agreement in 2014 which provided, in pertinent part, that Complainant would be able to check his blood sugar in the morning, combine his breaks and lunch, and take an additional break if needed. The agreement was to remain in effect for the duration of Complainant's employment with the Agency. In 2016, Complainant received a letter stating that going forward he would be allowed to use leave in combination with or in addition to his breaks and lunch period as a reasonable accommodation for the condition "for which [he] was previously allowed to combine [his] breaks." On appeal, the Commission found that the Agency breached the agreement during the two-month period in 2016. Even though the Agency correctly asserted that it had 35 days to cure a breach, the Commission stated that did not mean that it could unilaterally cancel the agreement that had been in effect for almost two years, and then reinstate it at a later date. Therefore, the Commission ordered the Agency to reimburse Complainant for any leave he used to accommodate his condition during the period in question, and pay Complainant attorney's fees incurred as a result of the breach. [Colby S. v. U.S Postal Serv., EEOC Appeal No. 0120162345 \(Dec. 2, 2016\)](#).

**Settlement Agreement Void and Did Not Comply with OWBPA.** Complainant initiated the EEO process regarding claims of age discrimination. Complainant then entered into a settlement agreement with the Agency to resolve the matter. After Complainant subsequently claimed breach of the agreement, the Agency found that the settlement agreement did not comply with the provisions with the Older Workers' Benefit Protection Act (OWBPA). The OWBPA, which amended the ADEA, provides the minimum waiver requirements for ADEA claims. To meet the standards of the OWBPA, a waiver of a complainant's rights to pursue relief for his claims of discrimination based on age, such as that contained in the settlement agreement at issue herein, would not be considered knowing and voluntary unless at a minimum: the waiver is clearly written, from the viewpoint of the employee; the waiver specifically refers to rights or claims under the ADEA; the employee does not waive rights or claims following execution of the waiver; valuable consideration is given in exchange for the waiver;

the employee is advised in writing to consult with an attorney prior to executing the agreement; and the employee is given a "reasonable" period of time in which to consider the settlement agreement. On appeal, the Commission noted that the subject agreement did not state that Complainant was waiving her rights under the ADEA, and Complainant was not advised in writing to consult with an attorney before executing the agreement. The record also did not reflect that Complainant was given a reasonable period of time in which to consider the settlement. Therefore, the Commission found that the entire agreement was void. [Lelah T. v. U.S. Postal Serv., EEOC Appeal No. 0120151856 \(Oct. 19, 2016\)](#).

**Settlement Agreement Void for Lack of Consideration.** Complainant and the Agency entered into a settlement agreement providing, in pertinent part, that the Agency would "consider" information provided by Complainant regarding how he believed he exceeded his performance objectives. Complainant alleged that the Agency breached the agreement when it did not change his rating after receiving his information. The Commission found that the settlement agreement was void for lack of consideration. On appeal, the Commission noted that generally, the adequacy or fairness of the consideration in a settlement agreement is not at issue, as long as some legal detriment is incurred as part of the bargain. In this case, the agreement only required the Agency to consider the information provided by Complainant and did not require the Agency to change the rating in question. The Commission concluded that the Agency incurred no legal detriment and ordered the Agency to reinstate the underlying complaint. [Cory C. v. Dep't of the Army, EEOC Appeal No. 0120162470 \(Oct. 28, 2016\)](#).

**Breach of Settlement Found.** Complainant alleged that the Agency was in breach of a settlement agreement between the parties when the Agency failed to reimburse him for leave and convert time originally counted as Leave Without Pay (LWOP) to paid time. The Agency found that it had partially performed in that it restored applicable amounts of annual and sick leave. The Agency asserted that there was a mutual mistake as to the amount of LWOP and Complainant actually used less LWOP than specified in the agreement. The Agency noted that the parties reformed the agreement to reflect the accurate amount but that changes in the payroll system caused "difficulties" in making the necessary corrections. On appeal, the Commission found that the Agency breached the agreement. The Commission noted that the Agency did not take actions to correct Complainant's records until after the 60-day period specified in the agreement, and six months later had still not converted the accurate amount of LWOP to paid time. Complainant did not express a preferred remedy, and the Commission ordered the Agency to offer Complainant the option of either specific performance or reinstatement of the underlying claim. [Cyrus H. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120162157 \(Oct. 3, 2016\)](#).

**Breach of Settlement Found.** Complainant entered into a settlement agreement with the Agency that provided, in relevant part, that the Agency would promote Complainant, and pay her \$23,889.60 minus deductions such as both state and federal taxes. Complainant alleged that the Agency breached the agreement when it did not pay her the full amount specified, and the Commission agreed with Complainant on appeal. The Commission rejected the Agency's assertion that the amount identified in the agreement resulted from "an error in calculation" by the Agency official engaged in the settlement effort and that Complainant was only entitled to \$3,132.20 in back pay. The agreement specifically provided that the Agency would pay Complainant the full amount stated, which was articulated in two provisions both by word and by number. Further, the Commission found it "curious" that none of the five Agency officials who signed the agreement detected the alleged error in the agreed upon amount. Therefore, the Agency was ordered to comply with the agreement and pay Complainant the specified amount. [Jenee W. v. Dep't of State, EEOC Appeal No. 0120143015 \(Oct. 3, 2016\)](#).

## Stating a Claim

**Complainant Stated Viable Claim of Discrimination.** Complainant filed a formal complaint alleging that the Agency subjected him to harassment and discrimination when it issued him a letter of warning and required him to modify his time and attendance record to reflect four hours of Absence Without Leave. Complainant asserted that others, including management officials, were allowed to submit corrected attendance sheets. On appeal, the Commission concluded that the Agency erred in dismissing the complaint because the issuance of a letter of warning instead of allowing Complainant the opportunity to submit an amended time and attendance sheet was sufficient to render Complainant aggrieved. Further, while the Agency asserted that the warning was not placed in Complainant's personnel file, such action is usually only relevant when the Agency has rescinded a written warning and replaced it with a discussion. [Peter L. v. Dep't of Agric., EEOC Appeal No. 0120171643 \(Aug. 15, 2017\)](#).

**Claim Involving Threat of Harm Stated Viable Claim.** The Commission found that Complainant's allegation that his supervisor called him derogatory names and threatened him with bodily harm stated a viable claim of discrimination. Complainant noted that the alleged conduct violated the Agency's policy against workplace violence and caused Complainant to report the incident to the police. [Ross H. v. U.S. Postal Serv., EEOC Appeal No. 0120172050 \(Aug. 10, 2017\)](#); see also [Stuart M. v. U.S. Postal Serv., EEOC Appeal No. 0120171845 \(Aug. 2, 2017\)](#) (Complainant's claim alleging discriminatory harassment when he was "yelled at, screamed at and assaulted by his supervisor" on one date was adequate to state a claim of harassment).

**Agency Improperly Addressed Merits of Claim in Dismissal.** The Commission found that the Agency improperly dismissed Complainant's claim that she was removed from her managerial position and given no significant work for months. While the Agency asserted that the action arose from a pending investigation into

potential wrongdoing, that rationale addressed the merits of the complaint without a proper investigation. Complainant stated that no other manager had been subjected to these actions under similar circumstances, and the Commission concluded that Complainant stated a viable claim. [Cecile S. v. U.S. Postal Serv., EEOC Appeal No. 0120171548 \(July 21, 2017\)](#); see also [Amad C. v. U.S. Postal Serv., EEOC Appeal No. 0120171983 \(Aug. 3, 2017\)](#) (the issue of whether the comparator was similarly situated and had been treated more favorably than Complainant went to the merits of the complaint and was irrelevant to the procedural issue of whether Complainant stated a justiciable claim under Title VII).

**Complainant's Assertion that Agency Denied Him the Right to Participate in EEO Process States a Viable Claim.** The Commission found that the Agency improperly concluded that Complainant alleged he was precluded from representing other employees in the EEO process. Complainant, instead, asserted that he was himself barred from participating in the EEO process. Complainant stated that the Agency refused to provide him with EEO counseling and would not allow him to participate in the mediation process due to a stereotypical negative perception of him as a larger dark-complexioned African-American male. The Agency acknowledged that Complainant was not allowed to participate in mediation, and the Commission concluded that the Agency improperly dismissed the complaint. [Lavern B. v. U.S. Postal Serv., EEOC Appeal No. 0120171308 \(July 20, 2017\)](#).

**Complainant Stated Viable Claim of Discrimination Regarding Nonselection.** 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 \(June 20, 2017\)](#); see also [Francis A. v. U.S. Postal Serv., EEOC Appeal No. 0120170649 \(Mar. 24, 2017\)](#) (although generally an Agency's decision not to make a selection for a particular position does not render a complainant aggrieved, in this case, Complainant claimed that the Agency's decision not to fill the position was based upon a discriminatory motive, that is to prevent him from bidding on the position because of his disability); [Kyle S. v. Dep't of the Navy, EEOC Appeal No. 0120162485 \(Jan. 30, 2017\)](#) (the essence of Complainant's claim was that the Agency, through the named responsible management officials, intentionally prevented him from becoming an applicant for the position he had held as a contractor once it was converted to a federal civil service position. Complainant alleged that this was done because he would have been the best qualified candidate, since he had successfully performed in the position in question for the past three years,

and that the named officials were motivated by discriminatory animus to favor a Caucasian woman. The Commission noted that when a complainant claims the agency discouraged him from applying for a position, or that the application process was secretive, to avoid giving the position to him for discriminatory reasons, he states a viable claim of employment discrimination).

**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, beyond disputing Complainant's claims as false or untruthful, and 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 \(Apr. 28, 2017\)](#).

**Complaint Stated Viable Claim of Harassment.** The Agency dismissed Complainant's complaint 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 [Theresa E. v. Dep't of Agric., EEOC Appeal No. 0120172207 \(Sept. 21, 2017\)](#) (a fair reading of the complaint in conjunction with the related EEO counseling report showed that Complainant was alleging she had been subjected to disparate treatment and harassment based in a series of related incidents that included, but were not limited to, the two incidents in her formal complaint); [Cornell S v. Dep't of Def., EEOC Appeal No. 0120171482 \(Sept. 13, 2017\)](#) (Complainant provided a comprehensive annotation of instances of harassment and a pattern of abuse by supervisors, including being treated with hostility, subjected to profanity, being ridiculed in front of others, observing management indifference to racial epithets including the "N" word, being subjected to improper inquiries to his medical condition, and witnessing agency indifference to confrontations between coworkers. Commission determined complainant had alleged a pattern of harassment over a significant time to state a viable claim of harassment/hostile work environment); [Arthur F v. U.S. Postal Serv., EEOC Appeal No. 0120172162 \(Aug. 22, 2017\)](#) (Complainant's appeal, formal complaint, and pre-complaint documents show that he raised numerous incidents of harassment over a 3-month period beyond the 2 incidents cited by the Agency); [Cassey B. v. U.S. Postal Serv., EEOC Appeal No. 0120171799 \(Aug. 15, 2017\)](#) (a fair reading of the record showed that Complainant asserted a claim of denial of reasonable accommodation and harassment. Complainant indicated that she has a medical condition which causes her to go to the bathroom frequently, and the Station Manager harassed her for using the bathroom and rushed her to return to work. Based on the totality of the complaint, the Commission found that Complainant had sufficiently stated a claim of a pattern of harassment); [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); [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); [Lois G. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120171106 \(Apr. 17, 2017\)](#) (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 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); [Priscila F. v. U.S. Postal Serv., EEOC Appeal No. 0120170664 \(Mar. 21, 2017\)](#) (An examination of the EEO Counselor's report showed that, in addition to the claims referenced by the Agency, Complainant raised many more incidents of alleged harassment that occurred over a longer period of time. While each of the allegations by themselves may have appeared to concern relatively minor matters, considering the incidents together, Complainant asserted sufficiently pervasive harassment to state a cognizable claim requiring further investigation); [Terrell C. v. Dep't of the Navy, EEOC Appeal No. 0120162622 \(Nov. 10, 2016\)](#) (while each of Complainant's allegations alone may have appeared relatively minor, the incidents considered together stated a viable claim of discriminatory harassment. Complainant asserted in his formal complaint that several supervisors made harassing comments to him, and the EEO Counselor's report includes additional incidents which were spread over a long period of time. Complainant asserted that the supervisors were aware of his EEO activity and harassed him in an attempt to either terminate him or force him to retire); [Ebony M. v. Dep't of the Navy, EEOC Appeal No. 0120162650 \(Oct. 24, 2016\)](#) (the EEO Counselor's report showed that Complainant alleged many more harassing incidents beyond those identified in her formal complaint which, while alone appeared to concern relatively minor matters, when considered together asserted sufficiently pervasive harassment to state a cognizable claim).

**Complaint Stated Viable Claim of Sex and Disability Discrimination.** The Commission held that Complainant, a transgender male, stated a cognizable claim of sex discrimination when he alleged that his Federal Employee Health Benefits insurance plan denied pre-authorization for nipple-areola reconstruction. This procedure is a type of gender reassignment surgery commonly used to treat gender dysphoria in transgender persons transitioning from female to male. The Commission has long held that since insurance coverage is a fringe benefit of employment, the denial of insurance coverage concerns a term, condition or privilege of employment. Further, Complainant's failure to appeal the matter through the Agency's regulatory process does not preclude him from asserting a viable EEO claim. The Commission noted that the dismissal of Complainant's disability claim would be improper because, without an investigation, Complainant did not have the opportunity to adduce evidence, and accordingly the record was silent as to whether Complainant's gender

dysphoria resulted from a physical impairment. [Darin B. v. Office of Pers. Mgmt., EEOC Appeal No. 0120161068 \(Mar. 6, 2017\)](#).

**Complainant Stated Viable Claim of Race Discrimination and Retaliation.** The Commission found that Complainant's claim that the Agency discriminated against her when a manager reported her to the U.S. Attorney's Office for allegedly having a patient's medical record in her possession stated a viable claim of discrimination and retaliation. Complainant asserted that the Agency's action ultimately led to the revocation of her nursing license. While the Agency asserted that the claim constituted a collateral attack on the adjudicatory process of the State Board of Nursing, the Commission stated that the complaint alleged discrimination and retaliation by Agency personnel, including the Manager's reporting Complainant in the first place. [Margot Y. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120170617 \(Feb. 8, 2017\)](#).

**Complainant's Allegation that the Agency Disclosed her Medical Records Stated Viable Claim.**

Complainant asserted that the Agency violated the Rehabilitation Act when it disclosed her medical condition to a U.S. Senator. The Rehabilitation Act provides that, with limited exceptions, information obtained regarding the medical condition or history of any employee shall be treated as a confidential medical record. By its terms, this requirement applies to confidential medical information obtained from "any employee," and is not limited to individuals with disabilities. Although not all medically-related information falls within this provision, documentation or information of an individual's diagnosis or symptoms is medical information that must be treated as confidential except in certain circumstances described in the Commission's regulations. Accordingly, the Commission found that Complainant has alleged a viable claim of unlawful medical disclosure, and dismissal was not appropriate. The Commission affirmed the dismissal of Complainant's claim regarding information provided to OWCP. [Dominica H. v. U.S. Postal Serv., EEOC Appeal No. 0120170228 \(Feb. 2, 2017\)](#); see also [Billie M. v. U.S. Postal Serv., EEOC Appeal No. 0120171452 \(Aug. 11, 2017\)](#) (Commission reversed Agency's dismissal of complaint alleging the Agency improperly made inquiries to his health care providers in violation of the Rehabilitation Act).

**Agency Found to Be Joint Employer.** The Commission found that the Agency improperly dismissed Complainant's complaint, because the Agency sufficiently controlled the manner in which Complainant performed his job to qualify as his joint employer. An Agency Coordinator served as Complainant's first-line supervisor, set Complainant's work hours, kept a personnel file on Complainant, provided input into his performance appraisals, and approved his time cards. In addition, other Agency managers directly requested Complainant's assistance with a variety of work-related issues, and Complainant worked on Agency premises using Agency equipment for approximately 15 years. [Terrence H. v. Dep't of Def., EEOC Appeal No. 0120170295 \(Jan. 18, 2017\)](#); see also [Annie F. v. Dep't of the Navy, EEOC Appeal No. 0120171794 \(Sept. 21,](#)

[2017](#)) (an Agency supervisor acknowledged that Complainant received her daily direction from another Agency employee, Complainant worked on Agency premises, and the Agency conceded the laptop she used was provided by the Agency. Further, the record reflected that Complainant served the Agency for years. The Agency clearly had input into whether Complainant's employment continued, and, therefore, the Agency exercised and had the right to exercise sufficient control over Complainant's employment to be deemed her joint employer); [Maximo L. v. U.S. Postal Serv., EEOC Appeal No. 0120171565 \(Aug. 29, 2017\)](#) (while the Agency did not provide paid leave, retirement or health benefits or pay taxes, it did exercise sufficient control over Complainant's employment to qualify as his employer. Complainant used Agency equipment, and visited Agency facilities many times each day. The Agency required Complainant to follow a particular schedule, assigned him additional tasks, specified precise start and end times, and instructed Complainant on the route he must follow. The record showed that Agency employees oversaw Complainant's duties, and, contrary to the Agency's assertion, effectively decided to remove Complainant from his position); [Bobbye C. v. Nat'l Aeronautics & Space Admin., EEOC Appeal No. 0120171320 \(July 18, 2017\)](#) (the Agency had sufficient control over how Complainant performed her job to qualify as her joint employer. Complainant worked on Agency premises using Agency equipment, performed Agency mission work for a long duration of time, and was required to work Agency core hours. The Agency conceded that its employees had the right to assign Complainant tasks); [Gerald K. v. Dep't of the Army, EEOC Appeal No. 0120150250 \(Mar. 23, 2017\)](#) (the Commission found that this dismissal was improper and that the investigation and analysis of the joint employer relationship was considerably deficient. The Agency failed to address more than two of the relevant factors for analysis of the joint employer relationship and focused only on the fact that Complainant performed work pursuant to a contract between the federal government and an outside organization, and the outside organization, not the federal government, controlled the pay and benefits of Complainant. However, the Commission found that the Agency was involved in approving leave requests, and an Agency official directly supervised Complainant. Agency officials set Complainant's working hours, provided his travel and granted him access to the Agency's classified computer networks. The parties do not dispute that Complainant worked on the Agency's premises. The Commission found that the Agency exercised sufficient control over the Complainant's position to qualify as his employer for the purpose of the EEO complaint process); [Hortencia R. v. Dept. of the Army, EEOC Appeal No. 0120170723 \(Mar. 9, 2017\)](#) (the Agency exercised sufficient control over Complainant's job such that it qualified as a joint employer. The staffing company had no on-site supervisor, and an Agency supervisor assigned complainant work. The Agency's Safety Officer gave Complainant a step-by-step procedure manual with his expectations; an Agency supervisor verbally counseled complainant; Complainant worked on Agency premises using Agency equipment during Agency operating hours; and the Agency possessed joint power to terminate Complainant's employment); [Liz M. v. Dep't of](#)

[Justice, EEOC Appeal Nos. 0120162835, 0120170199 \(Feb. 2, 2017\)](#) (Complainant clearly alleged that the Agency's actions resulted in her termination from employment. She asserted that the Agency, and not the contractor, had the sole authority to provide her with a medical clearance to return to work. When she was denied that clearance, her termination followed. The Commission has found that when a staffing firm terminates a worker after an agency communicates it no longer wants the worker's services, the action supports a finding that the agency has joint or de facto power to discharge the worker. As the essence of this complaint concerns the denial of the medical clearance, a decision solely made by the Agency, the Commission found that the Agency possessed sufficient control over Complainant's position to qualify as her joint employer); [Spencer T. v. Dep't of the Army, EEOC Appeal No. 0120162010 \(Nov. 18, 2016\)](#) (the Agency had sufficient control over how Complainant performed his job to qualify as a joint employer. Complainant worked on Agency premises using Agency equipment, and the Agency identified the hours and days Complainant worked. Complainant asserted that an Agency manager stated that he would fire contract instructors immediately, and the staffing firm supervisor implied that the Agency manager had some control over contractors' employment); [Serita B. v. Dep't of the Army, EEOC Appeal No. 0120150846 \(Nov. 10, 2016\)](#); (the Agency exercised the requisite control over the means and manner of Complainant's work to qualify as a joint employer for purposes of the EEO process. While Complainant was placed at the Agency by a staffing firm, the Agency controlled how Complainant performed her job, assigned her work, set deadlines, advised her on her performance and demeanor, and assigned her additional projects. Complainant served the Agency for a significant period of time, worked on Agency premises using Agency equipment, and the Agency set her hours. Complainant alleged discrimination when she was terminated and the staffing firm expressed a belief that it was required to comply with the Agency's request to terminate Complainant); *but see* [Reuben D. v. Dep't of Def., EEOC Appeal No. 0120171263 \(Aug. 2, 2017\)](#) (Complainant was an employee of a staffing firm that provided stocking services at a naval base commissary. The staffing firm had hired Complainant, paid Complainant, conducted Complainant's performance evaluations, and provided an on-site supervisor who assigned Complainant's work, set his schedule and approved his leave. The staffing firm provided all equipment to perform the job except a forklift. Complainant's statement that he was demoted after having been banned from the worksite suggested that he was retained by the staffing firm after he no longer worked on-site at the Agency, indicating additional control by the staffing firm over his employment. Therefore, the Agency had insufficient control over Complainant's position to qualify as his joint employer); [Luvenia S. v. Nat'l Intelligence Agency, EEOC Appeal No. 0120170733 \(May 19, 2017\)](#) (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); [Corie E. v. Dep't of Energy, EEOC Appeal No. 0120160842 \(Mar. 23, 2017\)](#) (Complainant worked for the contractor auditing the quality of services provided by the Agency and did not perform any services for the Agency itself. Complainant received all of her assignments from the contract supervisor and worked under his direction on the contractor's premises and used the contractor's equipment. Further, the contractor paid Complainant's compensation and benefits); [Priscilla F. v. Dep't of the Navy, EEOC Appeal No. 0120170656 \(Feb. 22, 2017\)](#) (while Complainant worked on Agency premises using Agency tools, she was assigned tasks by a staffing firm supervisor who supervised her everyday work. The staffing firm set Complainant's schedule, approved her leave requests, and paid her wages and benefits. Further, Complainant's allegations show that the staffing firm was responsible for her removal. Therefore, the Agency did not sufficiently control Complainant's employment to be deemed a joint employer); [Lu T. v. Dep't of Energy, EEOC Appeal No. 0120150914 \(Jan. 13, 2017\)](#) (while Complainant performed her duties at an Agency facility using Agency equipment, the contractor was responsible for Complainant's schedule, salary, leave, insurance, retirement benefits, and tax documentation. The Agency's control over Complainant's position was essentially limited to where she performed her duties and the Agency did not exercise sufficient control over Complainant's position to qualify as a joint employer); [Tabetha M. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120150813 \(Dec. 19, 2016\)](#) (while Complainant performed her work at Agency facilities using Agency equipment and her work was part of the regular business of the Agency, the record showed that she was hired and paid by a university and was granted an unpaid appointment to the Agency in order to use its laboratories. Most significantly, Complainant was directly supervised by a university employee and not Agency personnel, and the university supervisor provided Complainant with performance plans, assignments, and evaluations and was ultimately responsible for disciplining and terminating Complainant. Therefore, the Agency did not exercise sufficient control over Complainant's position to qualify as a joint employer); [Eve E. v. Dep't of Def., EEOC Appeal No. 0120162250 \(Nov. 22, 2016\)](#) (the Agency was not a joint employer for purposes of the EEO complaint process. Agency staff gave Complainant assignments, reviewed and gave feedback on her performance, and had input into her performance appraisal, and Complainant worked on Agency premises using Agency equipment. A fair reading of Complainant's complaint, however, showed that it mostly concerned her termination which was initiated by the staffing firm. There was no indication that anyone from the Agency

was involved in that decision, and the Commission concluded that the Agency did not have de facto power to terminate Complainant as evidenced by the staffing firm continuing to employ her and offering her alternative positions).

**Complainant Stated Viable Claim of Retaliation.** The Commission found that Complainant's allegation that her manager's attorney threatened her with a lawsuit stated a viable claim of retaliation. The Commission stated that being threatened with a lawsuit would clearly deter an employee from engaging in protected EEO activity. [Dixie K. v. U.S. Postal Serv., EEOC Appeal No. 0120170226 \(Jan. 11, 2017\)](#).

**Complaint Improperly Dismissed for Failure to State a Claim.** Complainant alleged the Agency subjected him to discrimination based on religion when he was not added to the appropriate pay plan in order to work and train as a firefighter. Complainant objected to using a social security number (SSN), citing certain Bible passages. The Agency dismissed the complaint for failure to state a claim, stating that Complainant cannot be placed on the pay plan without a valid SSN. On appeal the Commission determined that Complainant stated a valid claim, specifically, that the Agency failed to provide him with a requested religious accommodation. The Agency's assertion regarding the reasons Complainant could not be placed on the pay plan go to the merits of the complaint and are irrelevant to the procedural issue of whether he states a justiciable claim. [Horacio M. v. Dept. of Agric., EEOC Appeal No. 0120162384 \(Dec. 7, 2016\)](#).

**Complaint Alleging Change in Start Time Stated Viable Claim.** The Agency dismissed the complaint on grounds that Complainant failed to allege that he was aggrieved by a 15-minute change in his start time. On appeal, the Commission found that Complainant did sufficiently allege he was aggrieved by the change in his start time. Specifically, Complainant stated that as a result of his new start time, he was excluded from a number of early morning activities available to other mail carriers, including casing his mail, attending morning stand-up talks, and a morning break. Additionally, he noted that the relief carrier, who took over his route on his off days and was not of his race, remained on the earlier start time. [Wilburn M. v. U.S. Postal Serv., EEOC Appeal No. 0120162757 \(Dec. 2, 2016\)](#).

**Complainant Stated Viable Claim of Retaliation.** The Commission found that Complainant's claim regarding a letter of warning (LOW) stated a viable claim of retaliation. The record revealed that the letter was later reduced to an official discussion pursuant to a grievance. The Commission has held, however, that claims of retaliation are not limited to actions affecting a term, condition, or privilege of employment. Instead, a claim of retaliation can be made when Agency actions would cause a reasonable employee to be dissuaded from participating in the EEO process. In this case, the Commission found that a LOW, even when later reduced,

could reasonably deter an employee from participating in the EEO process. [Billy L. v. U.S. Postal Serv., EEOC Appeal No. 0120170009 \(Nov. 23, 2016\)](#).

**Complainant Stated a Viable Claim of Disability Discrimination.** The Commission found that the Agency mischaracterized Complainant's claim, and a fair reading of the complaint in conjunction with the EEO counseling report showed that she was alleging that the Agency failed to accommodate and harassed her. Complainant asserted that the Agency received documentation concerning her medical condition and its effects and limitations, and rather than accommodating her disability, the Agency attempted to force her to go to her doctor every time she had an incident related to her condition. The Commission found that, taken as a whole, and given Complainant's condition, she stated a viable claim of disability discrimination and harassment. [Alvera L. v. U.S. Postal Serv., EEOC Appeal No. 0120162802 \(Nov. 22, 2016\)](#).

**Complainant Stated Viable Claim.** The Commission found that Complainant's allegation that she was given a new modified job offer assigning her to a different schedule stated a viable claim. Contrary to the Agency's assertions, the claim was not a collateral attack on the OWCP adjudicatory process. While OWCP "approved" the position, it appeared that this was only for purposes of finding that the position met Complainant's work restrictions from her work-related injury. The Agency itself made the decision to change Complainant's tour of duty, and Complainant alleged an injury or harm to a term, condition or privilege of employment. [Emelda F. v. U.S. Postal Serv., EEOC Appeal No. 0120162786 \(Nov. 15, 2016\)](#); see also [Julieta B. v. U.S. Postal Serv., EEOC Appeal No. 0120172104 \(Aug. 23, 2017\)](#) (the Agency improperly viewed Complainant's claim as a collateral attack on the OWCP process. Instead, the Commission found that Complainant alleged that she was not reasonably accommodated and was sent home from work); *but see* [Casandra N. v. U.S. Postal Serv., EEOC Appeal No. 0120171590 \(July 21, 2017\)](#) (Complainant's claim that Agency managers did not properly submit forms for her OWCP claim, resulting in its denial, was properly dismissed for failure to state a claim. Matters concerning an OWCP claim should be raised with the Department of Labor and not in the EEO process); [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); [Tricia B. v. U.S. Postal Serv., EEOC Appeal No. 0120171239 \(May 2, 2017\)](#) (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 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 OWCP proceeding at the proceeding itself since any remedial relief available to Complainant would be through the OWCP process); [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); [Natalya B. v. U.S. Postal Serv., EEOC Appeal No. 0120170400 \(Feb. 23, 2017\)](#), request for reconsideration denied EEOC Request No. [0520170268](#) (June 22, 2017) (The Agency properly dismissed Complainant's claim that she received only partial continuation of pay through the Office of Workers' Compensation Programs (OWCP). Ultimately, Complainant's concerns involved a dispute over receipt of payment that must be raised with OWCP. The Commission found that the EEO process was not the proper forum for Complainant to address her concerns regarding continuation of pay).

**Complainant Stated Viable Claim of Disability Discrimination.** Complainant filed a complaint alleging unlawful employment discrimination when the Agency failed to provide an interpreter during a pre-disciplinary interview. The Commission found that the Agency improperly dismissed the complaint for failure to state a claim. The Agency asserted that there was no interview and Complainant was not subjected to discipline. Complainant was clearly alleging that he was denied accommodation and not challenging the interview. Further, it was clear from the record that some discussion occurred on the date in question. Therefore, Complainant stated a viable claim of disability discrimination. [Britt S. v. U.S Postal Serv., EEOC Appeal No. 0120170110 \(Nov. 4, 2016\)](#).

**Former Employee Stated a Viable Claim.** The Commission found that the Agency improperly dismissed a complaint of retaliation from a former employee. Complainant asserted that Agency management retaliated against him when it provided a negative reference to a potential employer. The Commission noted that a former employee may state a viable claim which arose from his employment with the Agency even if the disputed action occurred after the termination of the employment relationship. In this case, Complainant was not challenging his non-selection for the position, but the actions and motivation of the Agency managers in providing the negative reference. [Arnoldo P. v. Dep't of Def., EEOC Appeal No. 0120152924 \(Oct. 25, 2016\)](#); see also, [Kristofer D. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120170140 \(Nov. 29, 2016\)](#) (the Agency dismissed the complaint for failure to state a claim, reasoning that the Complainant, who was participating in a work study program, was not an Agency employee. The Commission noted, however, that Complainant previously worked for the Agency for approximately five years and as a former employee stated a viable claim

of retaliation. The Commission ordered the Agency to also investigate whether Complainant qualified as a common law employee of the Agency).

**Complaint Filed by Complainant's Estate Properly Dismissed.** Complainant's father filed a formal EEO complaint on behalf of Complainant's estate. The Commission affirmed the Agency's dismissal of the complaint for failure to state a claim, noting that there was no evidence Complainant contacted the EEO office or anyone logically connected with the EEO process prior to his death. Therefore, Complainant's father did not have standing to file the complaint. [Marcellus M. v. Soc. Sec. Admin., EEOC Appeal No. 0120171994 \(Aug. 11, 2017\)](#).

**Agency Properly Dismissed Claim by Volunteer.** The Commission found that Complainant's volunteer work at the Agency did not render her an employee for purposes of the EEO process because her volunteer work would not have regularly led to official employment. Complainant understood that the Agency lacked paid positions to offer, and she acknowledged that she expected to work without financial compensation. While the Agency provided housing for Complainant and reimbursed her for meals and mileage, the Agency did not pay Complainant for her work. The Commission found that the housing and reimbursement were incidental to an otherwise gratuitous arrangement. Further, Complainant intended to return to her undergraduate studies. Therefore, the complaint was properly dismissed. [Julieta B. v. Dep't of the Interior, EEOC Appeal No. 0120171843 \(Aug. 9, 2017\)](#).

**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, 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 \(Apr. 14, 2017\)](#).

**Agency Properly Dismissed Complaint Regarding Grievance Process.** Complainant filed a formal complaint alleging that while he accepted a pre-arbitration offer concerning his removal, he later became aware that a similarly situated comparator only received a Letter of Warning. The Commission found that Complainant's challenge to the Agency's conduct during pre-arbitration constituted an inappropriate attempt to

use the EEO process to collaterally attack the Agency's actions during the arbitration process. Moreover, the discovery of a new comparator did not give rise to a new complaint. The Commission noted that the issue of Complainant's actual removal from Agency employment was pending on appeal in a separate complaint. [Jonathon M. v. U.S. Postal Serv., EEOC Appeal No. 0120170300 \(Jan. 11, 2017\)](#); see also [Terrance S. v. U.S. Postal Serv., EEOC Appeal No. 0120171198 \(June 30, 2017\)](#) (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); [Earlie C. v. U.S. Postal Serv., EEOC Appeal No. 0120170210 \(Jan. 11, 2017\)](#) (the Commission affirmed the Agency's dismissal of Complainant's complaint alleging discrimination regarding a grievance settlement, because the complaint was a collateral attack on the negotiated grievance proceeding); [Porter H. v. U.S. Postal Serv., EEOC Appeal No. 0120162638 \(Oct. 28, 2016\)](#); *request for reconsideration denied* EEOC Request No. [0520170122](#) (April 5, 2017) (the Commission affirmed the Agency's dismissal of the complaint for failure to state a claim, finding that Complainant was attempting to use the EEO process to lodge a collateral attack against the grievance process. Complainant cannot use the EEO process to challenge a grievance settlement and must instead raise his claims in that process).

**Complaint Properly Dismissed for Failure to State a Claim.** Complainant alleged discrimination related to his dismissal from an active military position. The Commission's regulations do not apply to uniformed members of the military. The courts have held that, unlike civilian employees, military personnel with the reserve components are not covered under Title VII, and thus the Commission's jurisdiction does not extend to military personnel. [Alvaro M. v. Dep't of Def., EEOC Appeal No. 0120162658 \(Jan. 18, 2017\)](#), *request for reconsideration denied* EEOC Request No. [0520170216](#) (June 6, 2017).

**Commission Affirmed Dismissal of Complaint.** The Commission affirmed the Agency's dismissal of a Supervisor's claim that a union official brought false and unfounded claims against him. The Commission found that allowing Complainant's claim to go forward would have a chilling effect on the union official's exercising his right to bring claims, in his official capacity. [Roland T. v. U.S. Postal Serv., EEOC Appeal No. 0120161209 \(Jan. 5, 2017\)](#).

**Complaint Properly Dismissed Where Matter Not Related to Complainant's Employment.** Complainant filed a formal complaint alleging that the Agency denied him medical services and falsified an entry into his medical record. The Commission found that the Agency properly dismissed the complaint because the claim did not relate to a term, condition, or privilege of Complainant's employment. [Sol W. v. Dep't of Veterans](#)

[Affairs, EEOC Appeal No. 0120162859 \(Nov. 23, 2016\)](#); *request for reconsideration denied* EEOC Request No. [0520170159](#) (April 5, 2017).

**Complaint Regarding Office of Internal Affairs Investigation Properly Dismissed.** The Commission found that the Agency properly dismissed the complaint for failure to state a claim. Complainant alleged discrimination and retaliation when the Agency's Office of Internal Affairs (OIA) sustained a charge against him of misuse of government funds. Complainant conceded that the Agency did not impose any disciplinary action on him as a result of the investigation, and the Commission has previously held that, in most circumstances, merely conducting an internal investigation into purported misconduct does not, without more, render a complainant aggrieved. [Elvis G. v. Dep't of Justice, EEOC Appeal No. 0120162717 \(Nov. 15, 2016\)](#); *requests for reconsideration denied* EEOC Request No. [0520170111](#) (March 29, 2017).

## Summary Judgment

**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 filed a complaint alleging, among other things, that she was subjected to sexual harassment by her Division Chief (Chief). Complainant specifically alleged that the Chief repeatedly contacted her requesting that she meet him after duty hours, and on one occasion coerced her into engaging in sexual relations with him. Following an investigation, the AJ issued a decision without a hearing finding no discrimination. On appeal, the Commission determined that the record evidence supported the AJ's finding that the Agency was not liable for the harassment. The Commission noted that the harassment did not involve a tangible employment action. Further, the Agency demonstrated that it exercised reasonable care to prevent and correct promptly any harassing behavior, and that Complainant unreasonably failed to take advantage of preventive or corrective opportunities. The Agency had an anti-harassment policy and Complainant admitted that she was trained on the Agency's policy. Although Complainant maintained that she was subjected to harassing conduct by the Chief since June 2010, she did not report his behavior until on or

around May 25, 2012. Complainant subsequently testified that she suffered no further harassment after her report. Moreover, the Chief was removed from his position and issued a "No Contact" order. Therefore, the Commission found that the Agency took immediate action as described above to end the harassment. The Commission also found that Complainant failed to prove her claim of disparate treatment discrimination. [Alvina S. v. Dep't of Def., EEOC Appeal No. 0120141853 \(Jan. 30, 2017\)](#), *request for reconsideration denied* EEOC Request No. [0520170230](#) (May 25, 2017).

**Summary Judgment Affirmed.** The Commission affirmed the AJ's issuance of a decision without a hearing finding that Complainant failed to prove her claims of discrimination. Complainant argued that there were genuine issues of material fact as to whether the Agency engaged in the interactive process, and whether the Agency "enforced" the accommodation. The Commission determined that the evidence in the record clearly established the Agency engaged in the interactive process and accommodated the Complainant. The record showed that Complainant requested and was granted leave without pay for the two days specified, and there was no evidence that Complainant requested advanced leave. Further, while Complainant requested a totally fragrance free environment, the Commission has previously determined that such a request can pose an undue hardship to an agency. The Agency properly initiated the interactive process and provided a number of alternate accommodations including moving Complainant's work station, changing office cleaning supplies to those recommended by Complainant, and banning the use of cleaning supplies without management's approval. The Agency also granted Complainant paid and unpaid leave as requested. Therefore, the Commission concluded that it was appropriate for the AJ issue a decision without a hearing and affirmed the AJ's finding of no discrimination. [Letty K. v. Soc. Sec. Admin., EEOC Appeal No. 0120142135 \(Nov. 30, 2016\)](#).

**Summary Judgment Reversed.** Complainant filed an EEO complaint alleging that the Agency discriminated against her when it issued her a reprimand. An AJ subsequently issued a summary decision finding no discrimination. Complainant contended that there was no factual basis for the reprimand and stated that her supervisor made no effort to determine whether there were legitimate reasons before issuing the reprimand. Upon review of the record, the Commission found that the AJ erred in issuing a decision without a hearing because there were genuine issues of material fact in this case regarding pretext. Specifically, the Commission noted that Complainant provided statements from several co-workers in support of her opposition to summary judgment who stated that during the relevant time Complainant was a good worker and, she was targeted by management for disciplinary action. The Commission noted that five of the nine co-workers who provided statements on Complainant's behalf felt that management took actions against Complainant because of one or more of her protected bases. The Commission remanded this matter for a hearing. [Dotty C. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120161636 \(Sept. 21, 2017\)](#).

**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 \(June 6, 2017\).](#)

**Summary Judgment Reversed.** The Commission found that the AJ erred in issuing a decision without a hearing. The record contained conflicting evidence as to whether management violated Complainant's standing medical restriction when it required him to work on the dock. Complainant, a Mail Handler, averred that, on multiple occasions, management required him to stand for up to one hour continuously; that he asked management if he could sit; and that management did not respond or provide a chair. In contrast, management averred that it did not recall if Complainant requested a chair while on the dock; that it would have provided the chair if he had asked; that it instructed him not to work outside of his restrictions; that it told him to sit down if he needed to; and that the duty of scanning on the dock, as described in the limited-duty modified assignment offer, did not violate his restrictions. In addition, the record contained conflicting evidence as to whether management violated Complainant's simple grasping restriction when it required him to "tray up" movies. Complainant averred that management forced him to grasp and "tray up" movies continuously "for hours at a time" and "all day." In contrast, management averred that the duty of traying movies, as described in the offer, did not violate Complainant's restrictions. Therefore, the Commission found that there was a genuine issue of fact as to whether management forced Complainant to perform work that violated his work restrictions. The issue was material to the disposition of Complainant's complaint because it affected whether the Agency provided him with a reasonable accommodation. The Commission remanded this matter for a hearing. [Calvin D. v. U.S. Postal Serv., EEOC Appeal No. 0120140022 \(Feb. 2, 2017\).](#)

**Summary Judgment Reversed.** The AJ issued a decision without a hearing finding that the Agency took immediate and appropriate corrective action with regard to a supervisor's racial harassment of Complainant. On appeal, the Commission remanded the matter for a hearing, finding that the record was not sufficiently developed to determine the sufficiency of the Agency's response to Complainant's allegations. The events that prompted Complainant to complain were not in dispute, and, therefore, the record supported a finding of a hostile work environment. The Commission noted that the AJ accepted the Agency's assertions regarding the corrective actions taken, notwithstanding disputed issues of fact, including whether the remarks continued for at least a week following Complainant's reporting the matter to management. Further, the record required development regarding the period of time between Complainant reporting the harassment to management and the start of management's investigation. [Leif S. v. Dep't of Def., EEOC Appeal No. 0120140516 \(Dec. 23, 2016\).](#)

**Summary Judgment Reversed.** Complainant filed a formal EEO complaint alleging, among other things, that she had been subjected to a discriminatorily hostile work environment based on sex when her female supervisor made allegedly sexual comments to her, inquired about her sexual preferences, and sought her company outside of work. The AJ granted a motion for a decision without a hearing in favor of the Agency. On appeal, the Commission found that the AJ's issuance of a decision without a hearing was not appropriate because the record was not sufficiently developed, and there were genuine issues of material fact and witness credibility. The Commission initially found that the AJ improperly dismissed three claims, stating that the matters were part of the underlying harassment claim. The Commission stated that if Complainant's allegations regarding comments made by her supervisor were proven true, the comments would clearly be evidence that Complainant was subjected to unwelcome sexual comments and advances. Complainant also alleged that once she refused the supervisor's advances, the supervisor took actions which, if true, would be sufficient to establish a discriminatory hostile work environment. Therefore, the Commission found that there was a genuine issue of material fact regarding the supervisor's denial, as well as the need for credibility determinations. The Commission also found that the record regarding a negative job reference by the supervisor needed to be further developed. The Commission concluded that a hearing was required in this case, and remanded the complaint. The Commission affirmed the finding that the Agency did not disclose confidential medical information. [Cathy M. v. Dep't of Agric., EEOC Appeal No. 0120140008 \(Nov. 16, 2016\).](#)

**Summary Judgment Reversed.** Complainant alleged that he was discriminated against when the Agency failed to comply with his physical restriction, and did not assign him to an area with overtime opportunities. The AJ granted the Agency's request for a decision without a hearing, and found no discrimination. On appeal the Commission agreed with Complainant that there was a genuine issue of material fact concerning whether the

Agency treated Complainant less favorably than it treated similarly-situated employees outside of his protected groups. Specifically, Complainant identified five comparators who he claimed had similar medical restrictions and were accommodated in their original positions. The record contained no information regarding these individuals, and the AJ accepted management's assertions that the comparators had different restrictions. The Commission stated that the AJ essentially rendered credibility determinations in favor of the Agency which were inappropriate at the summary judgment stage. The Commission also found genuine issues of material fact regarding whether the Agency's reason for the actions, specifically that Complainant's position could not be modified to accommodate him, was a pretext for discrimination. Therefore, the matter was remanded for a hearing. [Bill A. v. Dep't of the Army, EEOC Appeal No. 0120131989 \(Oct. 26, 2016\)](#).

## Timeliness

**Agency Improperly Dismissed Complaint for Failure to Timely Contact EEO Counselor and Failure to Timely File Formal Complaint.** The Commission found that the Agency improperly dismissed Complainant's complaint for failure to timely contact an EEO Counselor. According to the record, Complainant appealed the termination of her supervisory status to the MSPB within 45 days, and the MSPB ultimately dismissed the appeal for lack of jurisdiction. The Commission's regulations provide that the date on which a complainant files an MSPB appeal is deemed to be the date of initial EEO Counselor contact. In addition, the Agency failed to support its dismissal of the complaint as untimely. While the Agency asserted that Complainant received notice of her right to file a formal complaint on March 9, 2017, the Agency failed to provide adequate proof, such as a tracking record, to show that Complainant received the notice on that date. Therefore, the Commission reversed the Agency's dismissal. [Aurore C. v. Dep't of the Army, EEOC Appeal No. 0120171991 \(Aug. 9, 2017\)](#).

**Complainant Timely Initiate Claim that He Was Denied Reasonable Accommodation.** Complainant alleged, among other things, that the Agency denied his request for a reserved handicapped parking space, and the Commission found that Complainant's request for a reserved handicapped parking space constituted a request for a reasonable accommodation. The Commission noted that the duty to reasonably accommodate is ongoing, and, as such, at the time Complainant contacted the Counselor, he was alleging that the Agency remained unwilling to provide him with the accommodations he still needed. Therefore, the Commission remanded the failure to accommodate claim for further processing. The Commission affirmed the dismissal of additional claims raised in the complaint. [Albert S. v. Dep't of Homeland Sec., EEOC Appeal No. 0120152324 \(Aug. 15, 2017\)](#); *see also* [Roy E. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120171944 \(Aug. 2, 2017\)](#) (Complainant raised a timely claim that he was denied a shift change as a reasonable accommodation. The Commission noted that because employers have an ongoing obligation to provide reasonable

accommodations, failure to provide such an accommodation constitutes a violation each time the employee needs it); [Devona V. v. Dep't of Homeland Sec., EEOC Appeal No. 0120141665 \(Dec. 15, 2016\)](#) (the Commission reversed the Agency's dismissal of two allegations concerning the denial of accommodation for failure to timely contact an EEO Counselor, stating that because an employer has an ongoing obligation to provide a reasonable accommodation, failure to provide such accommodation constitutes a violation each time the employee needs it. At the time when Complainant contacted the Counselor she was alleging that the Agency remained unwilling to provide her with the accommodations she needed).

**Complaint Improperly Dismissed for Untimely EEO Contact.** The Commission reversed the Agency's dismissal of Complainant's complaint for untimely counselor contact. Complainant submitted a copy of an email from an employee in the Office of Resolution Management confirming that Complainant called twice to request counseling within the 45-day period but the matter was not assigned to a Counselor. In addition, Complainant alleged that she was subjected to a hostile work environment which included at least one incident within the 45-day limitation period. [Lillian C.v. Dep't of Veterans Affairs, EEOC Appeal No. 0120171242 \(July 7, 2017\)](#).

**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 \(June 23, 2017\)](#); see also [Marguerite W. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120170318 \(Mar. 9, 2017\)](#) (Complainant's timely contact with the Agency's local EEO office at the facility where she worked was "logically connected" to the EEO process. Complainant exhibited an intent to begin the EEO process multiple times within the 45-day limitation period by telephone and e-mail. The Agency did not prove that Complainant was aware of the need to contact the Office of Resolution Management); [Sadie M. v. U.S. Postal Serv., EEOC Appeal No. 0120161299 \(Jan. 4, 2017\)](#); request for reconsideration denied EEOC Request No. [0520170209](#) (May 4, 2017) (Complainant satisfied the requirement that she timely initiate EEO contact by sending an e-mail to the Agency's Deputy Postmaster General, who was logically connected to the EEO process. The e-mail had a subject line reading "EEO Issues," demonstrating an intent to begin the EEO process within the 45-day period. Complainant also claimed she was subjected to a hostile work

environment, and various incidents comprising Complainant's claim occurred within the 45-day period. Therefore, Complainant's entire harassment claim was actionable); [Tiffanie S. v. Dep't of Agric., EEOC Appeal No. 0120162471 \(Dec. 29, 2016\)](#) (Complainant timely initiated her EEO claim when she sent correspondence to an EEO Investigator and EEO Specialist regarding the matters. Those individuals were logically connected with the EEO process and by indicating that she was being subjected to retaliation for a prior complaint, Complainant exhibited the intent to begin the EEO process. Further, several incidents comprising Complainant's ongoing hostile work environment claim occurred within the 45-day period preceding her EEO contact).

**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 \(June 2, 2017\)](#).

**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 [Neville B. v. Dep't of Transp., EEOC Appeal No. 0120171474 \(Aug. 23, 2017\)](#) (various incidents alleged as part of Complainant's hostile work environment claim occurred within the 45-day period preceding his EEO contact, and, therefore, the claim was timely raised. In addition, Complainant alleged he was seeking reasonable accommodation. The Agency had an ongoing responsibility to provide reasonable accommodation each time Complainant needed it, and Complainant's EEO counselor contact was found to be timely); [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); [Shayna P. v. Dep't of Veterans Affairs., EEOC Appeal No. 0120160452 \(Apr. 27, 2017\)](#) (Complainant's entire claim that she was subjected to a hostile environment when she and several African American co-workers were subjected to racial epithets by Agency management for several months was timely raised since various incidents included in the claim occurred within the filing period); [Malcolm N. v. Soc. Sec. Admin., EEOC Appeal No. 0120162612 \(Jan. 11, 2017\)](#) (Complainant's harassment claim included two incidents specifically within the 45-day limitation period. The Commission has held that an entire claim of harassment is actionable so long as at least one incident occurred within the filing period, and, therefore, the Commission found that the contact with the EEO Counselor was timely).

**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 \(Apr. 6, 2017\)](#).

**Complainant Timely Contacted EEO Counselor upon Learning of Discrimination.** The Commission reversed the Agency's dismissal of Complainant's complaint alleging that the Agency discriminated against him when it issued him a Notice of Suspension for untimely EEO counselor contact. The Commission found that

Complainant did not become aware of discrimination at the time the Notice was issued, but later when he learned a similarly situated co-worker committed the same act but was not disciplined. Complainant then contacted an EEO Counselor within 45 days of suspecting discrimination. [Kenneth M. v. U.S. Postal Serv., EEOC Appeal No. 0120170876 \(Mar. 10, 2017\)](#).

**Complaint Improperly Dismissed for Untimely EEO Counselor Contact.** An AJ dismissed Complainant's complaint for failure to timely contact an EEO Counselor, noting that Complainant did not assert that he was unaware of the applicable limitation period. The Commission found, however, that the Agency did not have evidence to support that Complainant had actual or constructive knowledge of the limitation period. Complainant was an applicant for employment and did not have an opportunity to review the Agency's EEO material or receive EEO training. Therefore, the Commission found that Complainant's explanation that he was waiting for a decision from the Office of Personnel Management (OPM) before initiating an EEO complaint demonstrated a lack of knowledge of the EEO process. Complainant contacted an EEO Counselor only four days after receiving a decision from OPM. Thus, the Commission found that the dismissal of the complaint was improper. The Commission rejected the Agency's argument on appeal that the complaint should also be dismissed for failure to state a claim, noting that the Agency's assertion regarding the reason it rescinded an offer of employment went to the merits of the complaint. [Felton A. v. Dep't of Justice, EEOC Appeal No. 0120170271 \(Feb. 24, 2017\)](#), *request for reconsideration denied* EEOC Request No. [0520170255](#) (June 22, 2017); *see also* [Kristopher M. v. Dept. of State, EEOC Appeal No. 0120172462 \(Sept. 15, 2017\)](#) (Complainant was an applicant and not an employee of the Agency, and the Agency provided no documentation showing Complainant's actual or constructive knowledge of the 45-day time limitation period for contacting and EEO counselor. The Commission found a screenshot of the 45-day time limitation posted on the Agency's website did not amount to constructive knowledge of the limitation period); [Isabel F v. U.S. Postal Serv., EEOC Appeal No. 0120171949 \(Sept. 12, 2017\)](#) (Complainant was an applicant not an employee, and may not have been aware of the time limits even though EEO notices with the time limits were posted. The Commission also found that a reasonable suspicion of discrimination evolved over a period of time, from the initial interview process, through complainant's drug testing a month later, through complainant's never receiving any precise information regarding her status).

**Agency Improperly Dismissed Formal Complaint Due to Untimely EEO Counselor Contact.** The Agency failed to analyze the timeliness of the instant EEO Counselor contact under the Lilly Ledbetter Fair Pay Act which applies to all claims of discrimination in compensation. Complainant's contact was within the requisite 45 days of receipt of her last paycheck, and was thus timely. The Commission reversed the Agency's final

decision dismissing Complainant's formal complaint for untimely EEO Counselor contact and remanded the matter to the Agency. [Selene M. v. Dep't of Transp., EEOC Appeal No. 0120170303 \(Jan. 11, 2017\)](#).

**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 \(June 22, 2017\)](#); see also [Jene M v. Dep't of Transp., EEOC Appeal No. 0120172088 \(Sept. 12, 2017\)](#) (the Agency properly dismissed two claims which Complainant raised with an EEO counselor nearly a year prior to filing a formal complaint but previously withdrew because at that time she wished to pursue the issues through a non-EEO process. The Commission rejected Complainant's contention the first 2 claims should be considered part of an ongoing hostile work environment, stating that pursuing non-EEO avenues does not toll the time limits for timely EEO counseling requests. The Commission reversed the Agency's dismissal of a third claim for untimely counseling because the denial of work assignments was alleged to be an ongoing matter of a hostile work environment).

**Complaint Properly Dismissed for Untimely EEO Counselor Contact.** 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 filed an appeal with the Commission from the Agency's dismissal of his complaint alleging discrimination 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 \(Apr. 14, 2017\)](#).

**Attempting to Resolve Matter Through Human Resources Does Not Toll Limitation Period for Initiating EEO Contact.** The Agency dismissed Complainant's complaint on the grounds that he failed to timely contact an EEO Counselor, and the Commission affirmed the dismissal on appeal. When asked by the EEO Counselor why he failed to initiate his EEO complaint within the 45-day limitation period, Complainant stated that he first tried to resolve the matter through the Human Resources Office. The Commission has consistently held that internal appeals or informal efforts to challenge an agency's adverse action do not toll the time limit to contact an EEO Counselor. Complainant failed to present any persuasive arguments or evidence warranting an extension of the limitation period. [Melvin C. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120170837 \(March 21, 2017\)](#); see also [Marina A v. Dep't of Homeland Sec., EEOC Appeal No. 0120161200 \(Sept. 14, 2017\)](#) (time limits were not tolled by Complainant's pursuit of a remedy through the agency's internal appeal process).

**Complaint Properly Dismissed for Failure to Timely Contact EEO Counselor.** The Commission found that the AJ properly dismissed Complainant's complaint for failure to timely contact an EEO Counselor. Complainant did not contact an EEO Counselor until almost six months after the effective date of her termination. The record showed that Complainant had engaged in prior EEO activity, and, as such, she knew or should have known of the 45-day limitation period. While Complainant filed a grievance challenging her termination, the Commission has consistently held that the use of Agency procedures, including union grievances, does not toll the time limit for contacting an EEO Counselor. [Dotty C. v. Tenn. Valley Auth., EEOC Appeal No. 0120150689 \(Feb. 9, 2017\)](#).

**Complaint Properly Dismissed for Untimely EEO Counselor Contact.** According to the record, Complainant did not initiate EEO contact for over seven years from the time she was assigned higher level duties. The Commission noted that Complainant had filed other EEO complaints and was presumed to know of the 45-day limitation period for contacting an EEO Counselor. While Complainant asserted that she feared reprisal, the Commission has repeatedly held that the mere fear of reprisal was not sufficient to extend the limitation period. The Commission has also held that a complainant must act with due diligence in the pursuit of

her claim or the doctrine of laches may apply. Given that Complainant presented no persuasive arguments or evidence warranting an extension of the limitation period, the Commission found that the Agency properly dismissed the complaint for failure to timely contact an EEO Counselor. [Joleen M. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120170329 \(Jan. 11, 2017\)](#), request for reconsideration denied, EEOC Request No. [0520170167](#) (March 30, 2017).

**Complainant Provided Sufficient Justification to Excuse Her Delayed Filing of the Formal Complaint.**

The Commission found that Complainant provided sufficiently persuasive evidence that she had become so mentally incapacitated during the relevant period that she was rendered unable to meet the deadline for filing a timely formal complaint. Specifically, she provided medical documentation from two medical professionals who noted that Complainant was experiencing debilitating anxiety symptoms and was unable to complete and submit a formal complaint by the 15-day deadline. One medical provider who had been treating Complainant for severe anxiety stemming from workplace harassment and bullying since December 2016, stated that during the time in which the complaint was to be submitted, Complainant was experiencing crippling anxiety associated with various physical symptoms. Given these circumstances, and the short amount of time which elapsed between the expiration of the fifteen-day limitation period and the Agency's receipt of the formal complaint, just four days, the Commission determined that there was sufficient justification for exercising its discretion to excuse the delay in the filing of the formal complaint. [Jutta A. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120172048 \(Sept. 22, 2017\)](#).

**Formal Complaint Timely Filed.** The Commission reversed the Agency's dismissal for failing to timely file a formal complaint. The record contained a notice of the right to file a formal complaint signed by the EEO Counselor on a certain date, a printout stating the notice was "delivered, left with individual" on a date 3 days later, and an acknowledgement of receipt signed by Complainant 9 days after that. It was not clear from the printout that Complainant or a member of her household of suitable age or discretion had received the Notice and the Agency failed to address the inconsistency of dates of delivery/receipt. Therefore, the Commission considered Complainant's filing the complaint within 15 days of the latest delivery date to be timely. [Beth G. v. Dep't of Transp., EEOC Appeal No. 0120171429 \(Aug. 25, 2017\)](#).

**Commission Estopped Agency from Applying Time Limit for Filing Complaint.** The Commission reversed in part the Agency's dismissal of Complainant's formal complaint for filing one day after the 15-day deadline. Complainant e-mailed the EEO Specialist three days after receiving a Notice of Right to File, requesting a one-day extension of time because she would be on temporary duty (TDY) in another state until the deadline and her documentation was at her regular duty station. Complainant sent three subsequent e-mails, explicitly requesting additional extensions, but received only one response stating that her request could only be

"forwarded up to the EEO chain." The Commission noted that Complainant diligently made numerous attempts to seek an extension; that the time limit was subject to waiver, estoppel and equitable tolling; that it was the Agency that had placed her on TDY; and that the Agency had failed to inform her she could file her supporting documentation at a later date. The Commission affirmed the dismissal of one allegation of retaliation for failure to state a claim. While Complainant alleged retaliation for filing a Uniformed Services Employment and Reemployment Rights Act (USERRA) complaint with the Department of Labor, prior USERRA activity with the Department of Labor is not prior protected activity covered by Commission-enforced employment discrimination laws. [Celeste P. v. Dep't of the Navy, EEOC Appeal No. 0120171542 \(Aug. 3, 2017\)](#).

**Commission Found Sufficient Justification to Toll Limitation Period for Filing Complaint.** The Agency dismissed Complainant's complaint as untimely, stating that Complainant failed to file the complaint within 15 days of when she "opened and viewed" an email which included a Notice of Right to File as an attachment. Complainant asserted that she did not open the attached Notice until 10 days later. The record showed that Complainant's representative sent an email to an EEO Counselor and other Agency officials questioning the Agency's tracking system and what "clicking on" an email would prove. There was no evidence regarding when the Agency replied to the representative's concerns, and the Notice itself stated that a formal complaint must be filed within 15 days of "first accessing" the Notice. Therefore, the Commission found that the Agency itself contributed to the misunderstanding regarding the start of the time limitation, and exercised its discretion to waive the limitation period. [Devona V. v. Dep't of Homeland Sec., EEOC Appeal No. 0120171555 \(July 21, 2017\)](#).

**Commission Reversed Agency Decision of Untimely Complaint.** Complainant initiated contact with an EEO Counselor alleging discrimination based on sex and age. Following this, Complainant was informed that a formal EEO complaint should be filed within 15 calendar days of issuance of the Notice of Right to File. The notice was transmitted to Complainant via email. The Agency ultimately issued a final decision dismissing the claim on the grounds of untimeliness. On appeal, Complainant claimed that the EEO Counselor informed her that she had 15 calendar days to file from the date on which she opened the email and told Complainant not to open the email until she was ready. The record included supporting emails exchanged between Complainant and a former HR Specialist. The Commission noted that Complainant relied on statements from an Agency EEO Official when she waited to open the email, and, therefore, the Commission found sufficient justification to excuse the delay in filing. [Theresa B. v Dep't of Transp., EEOC Appeal No. 0120171839 \(July 18, 2017\)](#).

**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 \(May 10, 2017\)](#); see also [Sierra P. v. Soc. Sec. Admin., EEOC Appeal No. 0120160031 \(Apr. 20, 2017\)](#) (the Agency failed to meet its burden of providing sufficient evidence reflecting Complainant's receipt of the Notice of Right to File on the date alleged by the Agency. While the record included a USPS tracking number, that 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); [Louise S. v. Soc. Sec. Admin., EEOC Appeal No. 0120161705 \(Jan. 4, 2017\)](#) (while the Agency asserted that it sent Complainant a notice of right to file a formal complaint by United Parcel Service (UPS), the Agency failed to provide a copy of the UPS tracking receipt signed and dated by Complainant indicating she received the notice on the date the Agency alleged she did).

**Complaint Timely Filed.** Complainant received a notice of right to file a formal complaint on July 14, 2016. The record showed that Complainant sent an unsigned formal complaint in an envelope postmarked July 25, 2016. The complaint was date stamped as received on July 28, 2016. Complainant then timely submitted a signed complaint after receiving a letter from the Agency notifying him of the lack of a signature and advising him to respond within 15 days. The Commission found on appeal that the complaint was timely filed because Complainant promptly cured the lack of a signature when he sent his complaint the second time. [Heath P. v. U.S. Postal Serv., EEOC Appeal No. 0120170335 \(Jan. 17, 2017\)](#).

**Commission Found Sufficient Evidence to Toll Limitation Period.** The Commission reversed the Agency's dismissal of Complainant's complaint as untimely filed. Complainant provided evidence of a serious medical condition resulting in the premature delivery of her baby and need for medical attention. Although Complainant's medical documentation did not explicitly establish that she was totally incapacitated during the entire filing period, the Commission found sufficient justification to excuse the brief one day delay. [Kina V. v. U.S. Postal Serv., EEOC Appeal No. 0120170248 \(Jan. 4, 2017\)](#); *request for reconsideration denied* EEOC Request No. [0520170186](#) (Apr. 27, 2017).

**Complaint Properly Dismissed as Untimely.** The Commission found that the Agency properly dismissed Complainant's complaint because she failed to file her formal complaint within 15 days of receiving notice of the right to do so. While Complainant asserted that the Agency did not send a copy of the notice to her non-attorney representative, that rationale was not sufficient to extend the filing period. Pursuant to the Commission's regulations, the time frame for filing a complaint is calculated from the date material is received by the complainant unless she is represented by an attorney. [Madlyn F. v. U.S. Postal Serv., EEOC Appeal No. 0120172267 \(Sept. 5, 2017\)](#).

**Fear of Reprisal Insufficient to Toll Time Limitation for Filing Complaint.** Complainant received delivery of the notice of right to file a formal complaint (notice) on December 20, 2016. Although the notice indicated that Complainant had to file a formal complaint within 15 calendar days of its receipt, Complainant did not file a formal complaint until February 3, 2017, which was beyond the limitation period. Complainant acknowledged that the formal complaint was untimely filed, but stated that he feared retaliation from the Agency if he filed a formal complaint. The Commission has held that the fear of retaliation is not sufficient to toll the applicable limitation periods, and, therefore the complaint was properly dismissed. [Percy K. v. Dep't of State, EEOC Appeal No. 0120171867 \(July 13, 2017\)](#).

**Complaint Properly Dismissed as Untimely.** Complainant failed to file a formal complaint within 15 days of receiving notice of the right to file. While Complainant asserted that he has medical conditions that affect his

energy levels and memory, he failed to provide medical documents to support a finding that he was so incapacitated throughout the applicable period that he was prevented from timely filing his complaint. Therefore, Complainant failed to present adequate justification for extending the filing period, and his complaint was properly dismissed. [Harvey G. v. U.S. Postal Serv., EEOC Appeal No. 0120170163 \(Feb. 23, 2017\)](#); see also [Nicki B. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120161138 \(Dec. 15, 2016\)](#) (while Complainant asserted that she was using leave to care for her mother and was not "in a frame of mind" to make important decisions, she did not provide any supporting evidence such as medical documentation that she was so incapacitated during the applicable 15-day period as to prevent her from timely filing her complaint).