

The *Digest*  
Of Equal Employment Opportunity Law



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Carlton M. Hadden, Director, OFO  
Jamie Price, Assistant Director, OFO's Special Services Staff



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### Digest Staff

Editor: Robyn Dupont

Writers: Lucy Allen, Diana Arrieta, Lauren Bridenbaugh, Robyn Dupont, Eric Loose, Melissa Perry, Rae Raucci, Alisa Silverman

The Digest is available online through EEOC's homepage at  
[www.eeoc.gov/federal/digest/index.cfm](http://www.eeoc.gov/federal/digest/index.cfm).

*(The Commission will now redact Complainants' names when it publishes decisions. There will be no change with regard to the way in which the Commission communicates its decisions to the parties. 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.)*

### **SELECTED EEOC DECISIONS**

#### **Agency Processing**

**Agency Improperly Denied Complainant Access to EEO Process.** Complainant contacted the Agency's EEO Office and attempted to file a complaint. An Agency EEO Specialist acknowledged receiving Complainant's pre-complaint paperwork. The Assistant Director of EEO subsequently informed Complainant, however, that the Agency would not process his EEO claims because it did not appear that he was an employee of the Agency. Although the Agency did not provide Complainant with appeal rights, he contacted the Commission with regard to the Agency's failure to process his claim. The Commission stated that while the Agency determined that Complainant was not an employee or applicant for employment, it was improper for the Agency to deny Complainant EEO counseling and the opportunity to file a formal complaint. Therefore, the Agency was ordered to process the matter pursuant to the EEOC's regulations. [Complainant v. Dep't of Justice, EEOC Appeal No. 0120150096 \(February 12, 2015\)](#).

**Complaint Improperly Dismissed After Hearing Request Made.** Complainant filed a formal complaint with the Agency alleging reprisal. Complainant requested a hearing before an Administrative Judge (AJ), which the Agency transmitted to the Commission in order for an AJ to be assigned. The Agency, however, subsequently issued a final decision dismissing the formal complaint for failure to state a claim. The Commission determined that once a request for a hearing is made, the Agency cannot dismiss the formal complaint. In this case, the Agency completed its investigation and Complainant timely requested a hearing, and therefore, the dismissal was improper. [Complainant v. U.S. Postal Serv., EEOC Appeal No. 0120142997 \(January 14, 2015\)](#); [request for reconsideration denied, EEOC Request No. 0520150218 \(June 24, 2015\)](#).

#### **Attorney's Fees**

**Attorney's Fee Award Modified.** The AJ found that the Agency retaliated against Complainant when it terminated her during her probationary period. After the Agency filed a motion for reconsideration, Complainant retained an attorney to assist with her claim. The attorney filed a response to the Agency's motion, and the Agency subsequently issued a final order adopting the AJ's finding of retaliation. The Agency then reduced the number of hours claimed by



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Complainant's attorney for work performed on the claim. On appeal, the Commission noted that generally, two hours of time is sufficient for counsel to consider whether or not to represent a complainant. In this case, however, Complainant had been represented by another person who passed away while the complaint was pending, and the attorney had to consider a lengthy record. Further, Complainant was given only 20 days to respond to the Agency's motion. Therefore, it was improper for the Agency to exclude time spent by the attorney prior to making an appearance in the case. The Commission did exclude 1.5 hours for work regarding Complainant's life insurance policy. [Complainant v. Dep't of Veterans Affairs, EEOC Appeal No. 0120121159 \(March 27, 2015\)](#).

**Complainant Entitled to Attorney's Fees Based on Rate Where She Was Working.** The Agency awarded attorney's fees based on the hourly rate of the city in which Complainant lived rather than the city in which Complainant's attorney practiced. On appeal, the Commission agreed with Complainant that she was entitled to an award of attorney's fees based upon the reasonable hourly rate in Washington DC where her attorney practiced law. Complainant stated that her Supervisor required her to work in the Washington DC area three days per week during the relevant period. Therefore, even though Complainant requested that correspondence be sent to her permanent home address, the Commission found that it was reasonable for Complainant to retain counsel in the area she was living and working most weekdays when she was available to meet with counsel. The Commission did reduce the claimed hours by 60 percent because Complainant did not prevail on her claim of harassment. [Complainant v. U.S. Postal Serv., EEOC Appeal No. 0120140049 \(March 25, 2015\)](#).

### 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.)*

**Commission Increased Agency's Award of Damages to \$150,000.** In a previous decision, the Commission found that the Agency subjected Complainant to a discriminatory hostile work environment and denied him reasonable accommodation. Following a supplemental investigation, the Agency awarded Complainant \$13,000 in non-pecuniary compensatory damages. On appeal, the Commission increased the award to \$150,000. Complainant stated that the Agency's discriminatory actions led him to skip family dinners, become less communicative, have difficulty sleeping, and become isolated at work and home. He had panic attacks which created problems with his blood pressure. The Commission determined that Complainant experienced embarrassment, humiliation, panic attacks, anxiety, and sleeping problems, and withdrew from his family and co-workers. The Commission previously found that Complainant was subjected to harassment nearly every day for almost two and one-half years, and the harassment was perpetrated not only by co-workers but also by management officials. Complainant's wife provided an affidavit supporting his claim, stating that Complainant described the situation as "torture." The Commission concluded that an award of \$150,000.00 in non-pecuniary damages was appropriate considering the severity of the harm suffered, and was consistent with prior Commission precedent. The Commission found that Complainant failed to support his assertion that he would not have undergone cochlear implant but for the



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harassment, and, therefore, Complainant was not entitled to pecuniary losses. [Complainant v. U.S. Postal Serv., EEOC Appeal No. 0120141161 \(February 3, 2015\)](#).

**Commission Increased Agency's Award of Damages to \$100,000.** The Commission previously found that the Agency discriminated against Complainant when it failed to reasonably accommodate his disability. In the underlying decision, the Commission increased the Agency's award of non-pecuniary damages from \$30,000 to \$100,000. While Complainant's asthma and depression predated the discrimination, Complainant stated that the failure to accommodate aggravated those preexisting conditions. The Agency failed to search for a suitable reassignment for Complainant and kept him working for five months in a position that exposed him to toxic irritants resulting in both physical and psychological harm. Complainant felt humiliated, depressed, and anxious, and experienced sleep disturbances and severe mood changes. His wife corroborated these symptoms. The Commission agreed with the Agency that Complainant did not establish entitlement to pecuniary damages for medical expenses since the documentation presented did not establish a sufficient link between the services and the discrimination. [Complainant v. Dep't of Veterans Affairs, EEOC Appeal No. 0120140216 \(February 25, 2015\)](#).

**Commission Increased AJ's Award of Damages to \$60,000.** After finding that the Agency failed to reasonably accommodate Complainant's disability, the AJ awarded Complainant \$45,000 in nonpecuniary damages. The Commission increased the award to \$60,000 on appeal based on objective evidence which established that the discrimination caused Complainant emotional distress for an extended period of time. Complainant stated that she suffered acute exacerbation of severe anxiety and depression, hair loss, weight gain, sleeplessness and migraines. Complainant's medical records confirmed her assertions. [Complainant v. Dep't of Transp., EEOC Appeal No. 0120120933 \(February 20, 2015\)](#).

**AJ's Award of \$50,000 in Non-pecuniary Damages Affirmed.** An AJ found that the Agency discriminated against Complainant with regard to his performance appraisal, a transfer, and two nonselections. As relief, the AJ ordered the Agency, among other things, to pay Complainant \$50,000 in compensatory damages. The Agency adopted the AJ's findings of discrimination, but rejected the award of compensatory damages as excessive. Complainant cross-appealed, requesting an increase in the damage award. The Commission found substantial evidence in the record to support the AJ's award of \$50,000. In a detailed analysis, the AJ considered Complainant's wife's credible testimony regarding his mood and temper, as well as their ensuing divorce. Complainant's wife noted that the family learned to "walk on eggshells," and would stay away from Complainant after the work week. Additionally, Complainant testified to feeling hopeless and "held hostage" by the repeated denial of transfers. [Complainant v. Dep't of Justice, EEOC Appeal No. 0720140012 \(January 22, 2015\)](#).

**Commission Affirmed Agency's Award of \$10,000 in Damages.** The Commission previously found that the Agency failed to select Complainant because of his responses to an impermissible medical inquiry. The Agency conducted a supplemental investigation and awarded Complainant \$10,000 in non-pecuniary compensatory damages. The Commission affirmed the award on appeal. The Agency provided a detailed analysis of the record which



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included an affidavit in which Complainant denied having any medical or psychological problems as a result of the nonselection. Further, Complainant's sick leave record did not suggest any adverse health effects associated with the action. Complainant's extended absence 18 months later was not due to the denial of a promotion but was related to a change in Complainant's work assignment. The Commission agreed with the Agency that more weight should be given to a psychiatrist's contemporaneous submission than to that of a social worker four years after the incident. Therefore, the Commission concluded that the award of \$10,000 was sufficient to compensate Complainant for his feelings of depression, anger, sorrow and loss of self esteem. The Commission also affirmed the Agency's denial of Complainant's claim for pecuniary damages. [Complainant v. U.S. Postal Serv., EEOC Appeal No. 0120140548 \(March 20, 2015\)](#).

**Commission Increased Award of Compensatory Damages to \$10,000.** In a previous decision, the Commission found that the Agency failed to provide Complainant with reasonable accommodation and discriminated against her on the basis of disability when it threatened her with discipline. The Agency subsequently awarded Complainant \$7,000 in non-pecuniary damages, and the Commission increased the award to \$10,000 on appeal. The Commission found that Complainant properly submitted evidence in the form of her statement as well as statements from a co-worker and two relatives showing that the Agency's denial of reasonable accommodation exacerbated her multiple sclerosis, which caused Complainant to experience pain, sleeplessness, crying spells, and muscle spasms. Complainant also experienced desperation, humiliation, depression, anguish, anxiety, and despair. In light of this evidence, the Commission concluded that an award of \$10,000 was appropriate. The Commission denied Complainant's request for pecuniary damages because she was unable to submit evidence of actual loss or expense. Complainant offered bills for physical therapy, but was unable to connect the treatment to the Agency's failure to accommodate. [Complainant v. Dep't of the Treasury, EEOC Appeal No. 0120133266 \(February 11, 2015\)](#); [request for reconsideration denied, EEOC Request No. 0520150280 \(July 30, 2015\)](#).

**Commission Affirms Agency's Award of \$500 in Damages.** The Commission previously ordered the Agency to investigate Complainant's claim for damages after finding that it discriminated against him when it did not permit him to wear a jacket on two occasions. The Agency ultimately awarded Complainant \$500 in non-pecuniary damages, and the Commission affirmed the award on appeal. While Complainant requested compensation for emotional harm for discrimination that had been ongoing since 2001, the Commission found discrimination only with regard to two incidents that occurred in 2010. The Agency's award took into account the severity and duration of the harm, and was consistent with Commission precedent. The Commission further found that Complainant did not establish entitlement to any past or future pecuniary losses. [Complainant v. U.S. Postal Serv., EEOC Appeal No. 0120123142 \(March 20, 2015\)](#).

### Dismissals

*(See also by category, this issue.)*



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**Complaint Improperly Dismissed as Stating the Same Claim as Prior Complaint.** While the Agency asserted that Complainant raised the same matter in a prior complaint which he then withdrew, the Agency failed to include any information about the previous matter. Thus, the dismissal was improper. The Commission rejected the Agency's assertion that Complainant previously withdrew his complaint, stating that the Agency did not provide a withdrawal form or e-mail suggesting the Complainant withdrew the matter. The record showed instead that the Agency issued Complainant a Notice of Right to File after the date it claimed Complainant withdrew his complaint, and Complainant filed his formal complaint within 15 days. [Complainant v. Dep't of Transp., EEOC Appeal No. 0120150200 \(March 31, 2015\)](#).

**Complaint Improperly Dismissed as Untimely and for Failure to State a Claim.** Complainant filed a formal EEO complaint alleging that the Agency discriminated against her in reprisal for prior EEO activity when an EEO Officer questioned her about an ongoing complaint, pressured her to state that the matter had been resolved, and refused to allow her to contact her attorney. The Agency dismissed the formal complaint as untimely, and for failure to state a claim. On appeal, the Commission noted that Complainant received a Notice of the Right to File a Formal Complaint on July 18, 2014, and filed her formal complaint on August 4, 2014, the first business day following the expiration of the filing period on Saturday August 2. In addition, while the Agency argued that the EEO Officer was not in Complainant's chain of command and did not work on her original complaint, the Commission found that the alleged Agency actions would create a chilling effect on Complainant's and other employees' pursuit of the EEO complaint process. [Complainant v. Dep't of the Army, EEOC Appeal No. 0120143216 \(February 4, 2015\)](#).

**Dismissal of Complaint Improper.** Complainant alleged that the Agency discriminated against him and subjected him to harassment including giving him subjective rather than objective performance standards and a written reprimand, and placing him on a leave restriction. The Agency dismissed the complaint for failure to properly respond to the Agency's written request for information. In addition, the Agency determined that Complainant's claim that he was issued a reprimand was rendered moot, and his claim regarding leave restriction was untimely raised with the EEO Counselor. On appeal, the Commission reversed the Agency's decision. The Commission found that Complainant responded in a timely manner to the Agency's request for information and a fair reading of the complaint form in conjunction with the related EEO counseling report revealed that Complainant provided much more information about his claim than the Agency acknowledged. Essentially, Complainant alleged that he was being subjected to an ongoing hostile work environment at the hands of his named immediate supervisor and upper-level manager. In his response to the Agency's request for additional information, Complainant included numerous e-mails involving controversies he had with upper-level management concerning the three cited matters, as well as additional incidents supporting his claim of hostile work environment. As for the Agency's dismissal for mootness, the Commission determined that while the rescission of the reprimand might have rendered a stand-alone claim concerning the issue moot, the issuance of the reprimand and its rescission remained viable as evidence in support of Complainant's hostile work environment claim. Finally, the Commission determined that some of the alleged incidents occurred within the 45-day limitation period, and



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therefore, the hostile work environment claim was timely raised with the EEO Counselor. [Complainant v. Dep't of the Army, EEOC Appeal No. 0120140788 \(February 3, 2015\).](#)

**Dismissal of Complaint on Bases of Proposed Action and Untimely EEO Counselor Contact Improper.** Complainant filed a formal complaint alleging that the Agency discriminated against him when it issued him a proposal for a four-day suspension, and subjected him to internal investigations. The Agency investigated the matters, but after Complainant requested a hearing, the Agency moved to have the complaint dismissed. The Agency asserted that Complainant was issued a Letter of Reprimand in lieu of the proposed suspension, and that matter was not raised in the EEO complaint. The Agency also argued that Complainant failed to timely contact the EEO Counselor. Complainant noted that the Agency failed to recognize his claim of retaliatory harassment. The AJ granted the Agency's motion to dismiss the complaint as a whole. On appeal, the Commission initially stated that the Agency failed to properly characterize Complainant's claim of hostile work environment harassment. Complainant alleged a series of events which occurred over approximately a two-year period, and the Agency treated the matters in a piecemeal manner. Further, the EEOC's regulations specify that dismissal of a complaint for alleging a proposed action is not proper in a claim of retaliation, and, in any event, the proposed suspension merged into the Letter of Reprimand to constitute an adverse personnel action. With regard to the issue of timeliness, the Commission found that Complainant alleged a claim of harassment when he was subjected to internal investigations, greater scrutiny, and disciplinary actions. Complainant made contact with the EEO Counselor within 45 days of at least one of the events he raised in support of his claim of harassment. Therefore, the Commission found that the Agency's dismissal was not appropriate. [Complainant v. Dep't of Justice, EEOC Appeal No. 0120142770 \(January 29, 2015\).](#)

**Complaint Improperly Dismissed for Untimely EEO Counselor Contact and Failure to State a Claim.** During the relevant time period, Complainant worked as a pharmacist through a staffing agency at an Agency facility. Complainant filed an EEO complaint alleging that the Agency subjected her to a hostile work environment, gave her undesired assignments, and reduced her work hours to zero. The Agency dismissed the complaint as a whole for failure to state a claim, stating that it was not Complainant's employer. The Agency also dismissed the first two matters for failure to timely contact an EEO Counselor, the hostile work environment issue for failure to identify a specific instance of harassment, and the reduction in work hours because it did not affect a term, condition or privilege of employment. On appeal, the Commission found that the dismissal was improper. With regard to the hostile work environment, Complainant provided emails detailing instances of harassment, including being socially isolated, selective reports of medication incidents, near errors, and errors, and threats of negative performance assessments if she complained. On appeal, Complainant added other examples in support of her claim. Taken together, the Commission determined that these acts were sufficiently pervasive and severe to alter Complainant's employment conditions.

With regard to the issue of timeliness, the Commission noted that the Agency's EEO Office mistakenly turned Complainant away in August 2011, advising her that the claim could not be processed by the Agency. Complainant then filed a charge with the Commission. Thus, Complainant did not sit on her rights after the initial contact, and the Commission found that she



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timely raised the issues regarding the reassignments and reduction in work hours. The Commission also found that Complainant timely raised the issue of harassment because a number of specific incidents occurred within 45 days of Complainant's contact with the Agency's EEO Office. Finally, the Commission found that the Agency exercised sufficient control over Complainant's position to qualify as a joint employer for purposes of the EEO complaint process. While the staffing firm paid Complainant and provided related benefits, the Agency directly supervised, scheduled, and evaluated complainant's work; made recommendations regarding leave requests; and twice reassigned her. Work was performed on Agency premises, using Agency instrumentalities throughout this continuing relationship. [Complainant v. Dep't of the Air Force, EEOC Appeal No. 0120142407 \(January 28, 2015\)](#).

**Complaint Improperly Dismissed as Being Moot.** Complainant filed a formal complaint based on reprisal on June 6, 2014, after believing she was subjected to sexual harassment. The Agency dismissed the complaint on the grounds of mootness, finding Complainant had entered into a settlement agreement in April 2014 that resolved a January 2014 EEO complaint. The Agency reasoned the instances alleged in the June complaint were similar to the basis for the Complainant's grievances filed in March and April 2014 which were voluntarily dismissed by the agreement. The Commission found the dismissal improper. A review of the record showed the April agreement settled a September 2013 complaint which had been based on age discrimination and reprisal in relation to the reassignment of duties. The June 2014 complaint involved discipline after reporting sexual harassment and was therefore a different claim. Since Complainant did not initiate contact with an EEO Counselor for the instant complaint until May 6, 2014, it was not a pending EEO complaint when the April agreement was executed. The Commission found that while the alleged events may have occurred prior to the execution of the agreement, they were not covered by the settlement. [Complainant v. Dep't of the Army, EEOC Appeal No. 0120142716 \(January 8, 2015\)](#).

**Complaint Properly Dismissed as Raising the Same Claim.** Complainant filed a formal complaint alleging the Agency discriminated against her based on race and in reprisal for prior protected EEO activity. Following an investigation, the Agency dismissed the complaint on the grounds that it concerned the same matter as a prior informal EEO complaint. On appeal, the Commission noted that complainants who seek counseling for an allegation but never file a formal complaint are deemed to have abandoned the matter and cannot raise it in a subsequent complaint. Here, Complainant raised the same issues in this complaint regarding compensation she received during a specific 17 month period, as she had in a prior informal complaint. The Commission agreed with the Agency that the matters raised were the same, and found that Complainant abandoned her claim when she did not file a formal complaint after she initially raised the issue. [Complainant v. Dep't of Def., EEOC Appeal No. 0120140929 \(January 6, 2015\)](#).

**Agency Improperly Dismissed Claim for Being Moot and Failure to State a Claim.** Complainant alleged that he was harassed and discriminated against by his Supervisor including being subjected to unwanted touching, compliments, and intrusion into his personal space, being placed on Absence Without Official Leave and being denied a union representative. Complainant also raised matters regarding his requests for leave under the



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Family Medical Leave Act. The Agency dismissed the complaint for failure to state a claim, and mootness. The Commission initially noted that the Agency mischaracterized the essence of the complaint and confined the harassment claim to only certain incidents. A fair reading of the complaint revealed that Complainant appeared to be alleging that his Supervisor engaged in a pattern of harassment. Further, while Complainant took disability retirement subsequent to filing his complaint, Complainant stated in his formal complaint that the alleged discrimination caused medical and psychological distress. Because he could have sought compensatory damages, the agency was on notice for a claim, and dismissing the complaint as moot improperly denied Complainant the opportunity to pursue his claim for compensatory damages. [Complainant v. Dep't of the Navy, EEOC Appeal No. 0120142708 \(January 6, 2015\)](#).

### Findings on the Merits and Related Decisions

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

#### Under the Pregnancy Discrimination Act

**Commission Found Discrimination Based on Pregnancy and Sex.** Complainant alleged that her Supervisor subjected her to discrimination and harassment based on her sex and pregnancy, including threatening her with termination, denying her leave for pre-natal care, disabling her government e-mail account, and ultimately terminating her. Complainant indicated that while the Agency subsequently rescinded her termination months later, it did not assign her to a different supervisor. Complainant stated that because the Agency refused to grant her request to be assigned to a different supervisor, she was had no choice but to resign, resulting in a constructive discharge. The Commission found that the Supervisor's reasons for Complainant's termination were unworthy of belief and pretext for discrimination based on Complainant's sex and pregnancy. The Supervisor denied Complainant leave for pre-natal appointments and sickness, and several employees indicated that the Supervisor did not treat women as well as men. Complainant was threatened with termination on her first day, and a co-worker was coerced into accusing Complainant of wrongdoing. The Commission also found that Complainant was subjected to a hostile work environment and subsequently constructively discharged when the Agency canceled her termination, but failed to assign her to a different supervisor. The Supervisor, by his actions, clearly expressed hostility toward Complainant due to her sex and pregnancy, and the Agency knowingly placed her back into a hostile work environment. The Commission concluded that a reasonable person in Complainant's position would have found the working conditions intolerable. The Agency was ordered, among other things, to offer Complainant retroactive reinstatement away from the Supervisor, with appropriate back pay and benefits, and investigate her claim for damages. [Complainant v. Dep't of the Air Force, EEOC Request No. 0520140092 \(February 12, 2015\)](#).

#### Under the Rehabilitation Act

**Denial of Reasonable Accommodation Found When Agency Failed to Provide Interpreter.** Complainant filed an appeal from an Agency decision finding, among other things, that it did not fail to accommodate Complainant's disability. Complainant alleged that the Agency failed to



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provide her with a sign language interpreter for meetings including safety talks. The Agency conceded that Complainant was a qualified individual with a disability, and the record showed that the Agency provided an interpreter during Complainant's initial training period. The Agency acknowledged, however, that it did not provide Complainant with an interpreter for standup meetings or safety talks. Further, the Postmaster stated that she was unaware of the requirement to provide an interpreter. The Commission rejected the Agency's rationale that it did not provide Complainant with an interpreter because she was able to read lips and did not specifically request one, finding that the Agency was obligated to provide an interpreter for work meetings as a reasonable accommodation even if Complainant did not request one. The Commission noted that the Agency did not claim that providing an interpreter would have constituted an undue hardship. The Agency was ordered, among other things, to investigate Complainant's claim for compensatory damages, and, since she had been reinstated pursuant to a pre-arbitration settlement, provide complainant with a sign language interpreter at meetings and safety talks. [Complainant v. U.S. Postal Serv., EEOC Appeal No. 0120122130 \(March 11, 2015\)](#).

**Disability Discrimination Found.** Complainant worked at an Agency nuclear plant. Complainant alleged that the Agency discriminated against him on the basis of disability when, due to his detached retina and monocular vision, he was not allowed to work as a dual-rate foreman and was not allowed to travel to perform certain work. After the Agency issued a final decision finding no discrimination, Complainant requested reasonable accommodation in the form of a waiver of a vision test. The Agency required employees in the foreman position to comply with Department of Transportation (DOT) regulations, part of which was a vision test which required applicants to have binocular vision. The Agency did not respond to Complainant's request to waive this test as an accommodation. Complainant applied for and was rejected for a position at least partly based on his failure of the vision test. Complainant filed another EEO complaint, and the Agency concluded that Complainant was not a qualified individual with a disability and was not subjected to discrimination.

The Commission found that, while Complainant did not ask for a "reasonable accommodation" verbatim, the Agency should have been on notice that he was requesting such. The Commission, additionally, found that the Complainant was an individual with a disability because his vision impairment substantially limited a major life activity, and that the Agency discriminated against the Complainant based on this disability. Complainant met all of the qualifications for the job except the requirement that his vision conform to DOT regulations. The Agency failed to conduct an individualized assessment of Complainant, and instead dismissed him immediately due to his impairment. The Agency failed to show that the DOT regulations that it adopted and relied upon in denying Complainant's application were a business necessity, and the Agency had full discretion in choosing whether or not to require applicants to comply with DOT regulations. Complainant was qualified for the position that he was seeking, and would have been selected as a permanent foreman if not for the Agency's discrimination. The Agency was ordered, among other things, to offer Complainant the position with appropriate back pay and benefits, and provide him with reasonable accommodation. [Complainant v. Tenn. Valley Auth., EEOC Appeal Nos. 0120093256 & 0120111968 \(February 20, 2015\)](#).



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**Denial of Reasonable Accommodation Found.** Complainant alleged that the Agency denied him a reasonable accommodation for his disability in the form of a hardship transfer to another office. After six months of commuting, Complainant's condition worsened and he asked to work from home one hundred percent of the time. Complainant submitted a statement from his physician recommending that, in order to prevent the worsening of Complainant's condition, he should work from home all the time to avoid prolonged driving. The Agency's Supervisory Human Resources Specialist and Disability Program Manager denied Complainant's request to telework one hundred percent of the time on the basis that driving and commuting to work was not considered to be a major life activity or function. The Agency allowed Complainant to telework three days per week and to report to the office one day per week, but concluded that not all of the essential functions of Complainant's job could be performed from a remote location, and that the requested accommodation would require removal of essential job functions. Complainant began using sick or unscheduled annual leave on each day that he was scheduled to report to the office. The Agency then issued Complainant an official reprimand.

Following a hearing, the AJ found that the Agency discriminated against Complainant when it failed to reasonably accommodate his condition, and the Commission affirmed the finding on appeal. The Commission determined that Complainant was qualified for his position, and substantial evidence supported the AJ's finding that Complainant's inability to work at the Minneapolis office did not result in any significant deficiencies in his job performance. Further, the Agency did not demonstrate that Complainant's requested accommodations would constitute an undue hardship, especially given the fact that Complainant received a "fully successful" performance evaluation while telecommuting 100 percent of the time. The Agency was ordered, among other things, to provide Complainant with reasonable accommodation, and pay Complainant \$15,000 in proven non-pecuniary damages. [Complainant v. Dep't of Housing & Urban Dev., EEOC Appeal No. 0720130029 \(February 12, 2015\).](#)

### Under Title VII

**Sex Discrimination Found with Regard to Reassignment.** Complainant filed an appeal from an Agency decision finding that it did not discriminate against him on the basis of sex when it denied his request for a reassignment. On appeal, the Commission found that Complainant established a prima facie case of sex discrimination and the Agency failed to provide a legitimate, nondiscriminatory reason for denying the reassignment. The record contained the minutes from the Career Board meeting during which Complainant's request was denied. The minutes, however, contained only the names of the officials present. The remaining content of the meeting was redacted without explanation. The minutes did not specifically show which Career Board members denied Complainant's request or provide any information regarding the reason for the decision. The Agency, in fact, acknowledged the failure to provide a substantive reason for denying Complainant's request for reassignment. The Commission was not persuaded by the Agency's general assertion that transfer decisions were discretionary and consistent with staffing needs. The Agency was ordered, among other things, to investigate Complainant's claim for damages, and offer him reassignment. [Complainant v. Dep't of Justice, EEOC Appeal No. 0120123094 \(March 9, 2015\);](#) [request for reconsideration denied, EEOC Request No. 0520150309 \(August 11, 2015\).](#)



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### Under Multiple Bases

**Agency Failed to Articulate Legitimate, Non-Discriminatory Reason for its Actions.** Complainant filed an EEO complaint alleging race and sex discrimination after he was reassigned to a different Agency facility and his prior position and duties were given to another employee. According to the Agency, the Supervisor who reassigned Complainant told the EEO Counselor that Complainant had been reassigned due to Agency needs. The Supervisor, however, never provided an affidavit during the investigation because he resigned from the Agency. The Agency found the EEO Counselor's report articulated the Supervisor's legitimate, non-discriminatory reason for the reassignment and that Complainant had not presented evidence to rebut this explanation. On appeal, the Commission found the Agency failed to articulate a legitimate, non-discriminatory reason for its action because the record did not contain evidence from any appropriate Agency official articulating the Agency's reasons for the reassignment. The Commission stated that even if it were to accept the asserted Agency reason as valid, it was too generalized and vague for Complainant to rebut and, therefore, would not constitute a sufficient legitimate, nondiscriminatory reason. The Commission did find evidence, however, that the reassignment was made for unlawful discriminatory motives. Specifically, three of Complainant's co-workers averred that his reassignment appeared to be a demotion motivated by Complainant's race, and one co-worker related the reassignment to Complainant's sex. Thus, the Commission found that the Agency failed to overcome Complainant's prima facie case of race and sex discrimination. [Complainant v. Dep't of Homeland Sec., EEOC Appeal No. 0120140085 \(January 15, 2015\).](#)

### Retaliation

**Retaliation Found with Regard to Letter of Counseling.** The Commission found, among other things, that the Agency retaliated against Complainant when it issued him a Letter of Counseling (LOC). Complainant's Supervisor participated in a hearing on Complainant's prior EEO complaint approximately four months before he issued Complainant the LOC, and the outcome of the prior complaint was pending at that time. While the Agency asserted that the LOC was issued because of conduct issues, the Commission found that reason to be a pretext for retaliation. The record showed that Complainant was outspoken and not timid about voicing his opinion. The record, however, did not support the Agency's contentions regarding the various incidents cited in the LOC, and the Agency did not provide any explanation as to why it did not obtain statements from the various management officials involved. The Commission also stated that the Agency failed to follow its own Resource Guide regarding the issuance of discipline which specified that employees be interviewed. There was no mention in Complainant's performance appraisals of any conduct issues. Thus, Complainant established that the Agency's articulated reasons for the LOC were a pretext for retaliation. The Commission found no evidence of age discrimination or a discriminatory hostile work environment. The Agency was ordered, among other things, to investigate Complainant's claim for damages, and expunge all references to the LOC from Complainant's personnel records. [Complainant v. Dep't of Commerce, EEOC Appeal No. 0120120157 \(March 24, 2015\).](#)



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**Commission Affirmed AJ's Finding of Retaliation.** Complainant filed an EEO complaint alleging, among other things, that the Agency retaliated against him when it terminated him from his position for violating a Last Chance Agreement (LCA). Complainant missed a collection box when delivering his route and the Agency cited this infraction as grounds to invoke termination under the terms of the LCA. After holding a hearing, the AJ found that Complainant established discrimination based on reprisal. Specifically, Complainant demonstrated that a missed collection box was not the type of infraction to incur discipline, that neither of the involved Supervisors had ever issued so much as a letter of warning for a missed collection box, and that the Agency exaggerated its concern over the potentially delayed mail in order to terminate Complainant. On appeal, the Commission affirmed the AJ's finding of retaliation. The Commission rejected the Agency's arguments that the Supreme Court's decision in [University of Texas Southwestern Medical Center v. Nassar, 133 S.Ct. 2517 \(2013\)](#) necessitated reversal of the AJ's decision. The Commission has previously held that the "but for" standard discussed in [Nassar](#) does not apply to retaliation claims by federal sector applicants or employees under Title VII or the ADEA because the relevant federal sector statutory language does not contain the "because of" language on which the Supreme Court based its holdings in [Nassar](#) and in [Gross v. FBL Financial Services, Inc., 557 U.S. 167 \(2009\)](#). The Commission affirmed the AJ's award of non-pecuniary compensatory damages in the amount of \$10,000, and ordered the Agency, among other things, to offer Complainant reinstatement to his position with appropriate back pay and benefits. [Complainant v. U.S. Postal Serv., EEOC Appeal No. 0720120041 \(March 12, 2015\)](#).

**Commission Affirmed AJ's Finding of Retaliation.** The AJ, after holding a hearing, found that the Agency retaliated against Complainant when it terminated him during his probationary period. The Commission affirmed the AJ's finding on appeal. The Commission rejected the Agency's argument that Complainant did not establish a prima facie case of retaliation because when he initially met with an EEO Counselor, he did not allege discrimination based on his membership in a protected class. The record was clear that Complainant initiated contact with the EEO Counselor and used the EEO process before his termination. Thus, he engaged in prior protected EEO activity. Further, the record contained conflicting evidence as to the reasons for Complainant's termination. While Complainant's first-line Supervisor cited performance problems, Complainant's mentor did not observe any such issues. The AJ observed that the mentor was in a better position to have first-hand knowledge of Complainant's work, and repeatedly found that the Supervisor's testimony was not credible. Therefore, the Commission concluded that the AJ's finding of retaliation was supported by substantial evidence. The Agency was ordered, among other things, to offer Complainant the opportunity to either complete the remainder of his probationary period under different managers, or receive front pay for 2 years, and to pay Complainant \$25,000 in proven compensatory damages. [Complainant v. Soc. Sec. Admin., EEOC Appeal No. 0720130027 \(March 4, 2015\)](#).

**Retaliation Found with Regard to Removal.** Complainant was placed into an Administrative Assistant position at an Agency facility by a private staffing firm. She alleged that she was terminated from her employment in reprisal for providing a statement for an investigation of her Agency Supervisor. On appeal, the Commission initially found that the Agency was a joint employer. The Commission also found that the Agency retaliated against Complainant when it



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terminated her. The Commission determined that despite ongoing animosity between Complainant and her Agency Supervisor, the reasons given for her termination were a pretext for reprisal. Complainant expressed concern about retaliation prior to acting as a witness in the investigation of her Supervisor, just eight days before the Agency requested that she be terminated. The Commission did not find a credible non-discriminatory reason for Complainant's termination. At the time of her termination, the Agency told Complainant that she created a hostile environment. Complainant's co-workers and managers, however, submitted statements commending Complainant's work and professionalism, and Complainant's relationship with her supervisor at that time was not particularly acrimonious relative to any other period of her employment. Additionally, the Commission found that Complainant carried the preponderance of the evidence that her termination was a pretext for discrimination. The Commission noted that rather than viewing the history between Complainant and her Supervisor as a possible non-discriminatory reason for her termination, it made Complainant more vulnerable to reprisal. A complainant already in a difficult relationship with her supervisor is more likely to be discouraged from participating in protected activity if pre-existing discord is too readily accepted as a defense. The Agency was ordered, among other things, to pay Complainant appropriate back pay and benefits, and investigate her claim for damages. [Complainant v. Dep't of Homeland Sec., EEOC Appeal No. 0120142302 \(January 28, 2015\).](#)

### Mixed Motive

**Mixed Motive Discussed in Case Alleging Religious Discrimination.** The Commission found that certain comments by an Agency management official constituted direct evidence of religious discrimination. Specifically, a Unit Chief commented that Complainant had a spiritual disconnect, questioned whether Complainant loved Jesus and God, and said that she did not think God wanted Complainant to be at the Agency. A co-worker confirmed that Complainant told her about the Unit Chief's comments, and noted that the Unit Chief had made comments about other employees not being Christian. Further, the Unit Chief acknowledged speaking to Complainant about his Christianity, and described herself as sounding "preachy." Nevertheless, the Commission stated that discrimination was one of multiple motivating factors in the case, and the Agency established that it would have taken the same actions toward Complainant, specifically giving him an "Unacceptable" performance rating, and recommending his termination, even absent the discrimination. The record showed that Complainant had a confrontation with a co-worker, as well as performance issues, and was placed on a Performance Improvement Plan prior to being assigned to work with the Unit Chief. Therefore, Complainant was not entitled to personal relief. The Commission also concluded that Complainant did not establish that he was constructively discharged. The Agency was ordered, among other things, to provide appropriate training for the Unit Chief. [Complainant v. Dep't of Justice, EEOC Appeal No. 0120122878 \(March 27, 2015\).](#)

### Remedies

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



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**Agency Failed to Comply with Commission's Order to Retroactively Place Petitioner into Position.** Upon finding discrimination, the Commission ordered the Agency, among other things, to offer Petitioner retroactive placement into a Labor Relations Specialist EAS-17/19 position. In response to a petition for enforcement, the Commission found that the Agency had not complied with its prior order. The record showed that the position was a career ladder position to the EAS-19 level, and the Commission agreed with Petitioner that he should have been retroactively placed at the EAS-17 level, and retroactively promoted 18 months after the appointment date. Contrary to the Agency's assertion, Petitioner did not reject its offer but merely sought clarification as to the career ladder promotion. Further, the Commission stated that Petitioner's appointment should be retroactive to the date the Selectee was officially placed into the position as reflected on the Selectee's Personnel Action form. [Complainant v. U.S. Postal Serv., EEOC Petition No. 0420140007 \(February 19, 2015\).](#)

### Sanctions

**Dismissal of Hearing Request with Prejudice as Sanction Not Proper.** Complainant advised the AJ that he wished to pursue a global settlement on all of his claims through mediation, including matters raised in a complaint that was still under investigation. The AJ agreed to this approach, and established a deadline for the parties to submit either a settlement agreement or motion for dismissal, without prejudice, of the hearing request. After the parties were unsuccessful in reaching a settlement agreement and did not file a motion for dismissal, the AJ dismissed the hearing request with prejudice. The Commission found that the AJ abused his discretion by sanctioning Complainant. The record was clear that the agreed-upon purpose of the dismissal without prejudice was to allow the hearing request to be refilled upon completion of the investigation in the related complaint. Further, Complainant explained that the Agency refused to agree to a dismissal without prejudice after the parties could not reach a settlement agreement. The Commission stated that while Complainant should have notified the AJ of the Agency's refusal, the omission was not sufficient to justify dismissal of the hearing altogether. At best, any failure was the joint responsibility of both parties and did not justify the imposition of a sanction on only Complainant. Since the Commission found no prejudice to the Agency by Complainant's actions, it remanded the matter for a hearing. [Complainant v. Dep't of the Army, EEOC Appeal No. 0120130347 \(March 31, 2015\).](#)

**Dismissal of Hearing Request as Sanction Was Proper.** The AJ dismissed Complainant's hearing request as a sanction for failing to comply with an order to apprise the Agency in writing of her settlement demands. On appeal, the Commission stated that when a party fails to respond to an order of an AJ, the AJ may, as appropriate, take action against the non-complying party. Complainant stated that she presented the required information to the Agency representative, and submitted her attorney's telephone records, which appeared to show that her attorney was in contact with the Agency during the relevant time period. The Commission, however, was not persuaded by these documents, noting that Complainant's signed statement amounted to a bare assertion without supporting evidence, and the attorney's records did not reveal what was discussed during the telephonic contacts. Therefore, the AJ did not abuse her discretion when she dismissed Complainant's hearing request for failure to follow an order. The Commission also found that Complainant failed to meet her burden to show that the Agency's



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legitimate reasons for denying her promotion were a pretext for discrimination. [Complainant v. Dep't of Commerce, EEOC Appeal No. 0120140776 \(February 13, 2015\)](#); request for reconsideration denied, [EEOC Request No. 0520150277 \(July 20, 2015\)](#).

### Settlement Agreements

**Breach of Settlement Found.** Complainant alleged that the Agency breached a settlement agreement when it did not provide him with a neutral letter of recommendation or expunge his termination from all of his personnel records. The Commission agreed that the Agency breached the agreement. While the Agency asserted that it removed the reference to Complainant's termination from his Official Personnel Record, Complainant's Manager continued to maintain information regarding the termination in a management file which was inconsistent with the terms of the agreement. The Commission rejected the Agency's assertion that a subsequently signed release relieved it from complying with the agreement, stating that the language of the agreement clearly showed that the parties intended to be bound by its terms which constituted the "entire agreement." [Complainant v. U.S. Postal Serv., EEOC Appeal No. 0120130621 \(March 19, 2015\)](#).

**Breach of Settlement Found.** Complainant and the Agency entered into a settlement agreement which provided that the Agency would cancel a two-day suspension if Complainant did not commit any misconduct that warranted discipline before a specific date. The Commission found that the Agency breached the agreement when it failed to cancel the suspension. While the Agency indicated that Complainant was under investigation for misconduct that occurred prior to the specified date, a logical reading of the relevant settlement provision required the Agency to remove the suspension unless disciplinary action was actually issued before the specified date. To find otherwise would allow the Agency to never comply with the agreement by keeping the subsequent matter "under investigation." The Commission found that the Agency had ample time to decide if the misconduct warranted disciplinary action prior to the deadline in the settlement agreement. Therefore, the Agency was ordered to cancel the suspension. [Complainant v. Dep't of Homeland Sec., EEOC Appeal No. 0120150057 \(February 20, 2015\)](#); request for reconsideration denied, [EEOC Request No. 0520150298 \(July 11, 2015\)](#).

**Breach of Settlement Found.** The parties reached a settlement in which the Agency committed to post certain guidelines regarding religious expression, as well as the website link (URL) for the guidelines. The settlement included a provision to substitute other postings if needed, provided they explicitly mentioned the guidelines by title or website. The Human Resources department declined permission to post the preferred guidelines and used a substitute which failed to include mention of the preferred guidelines or a URL. The Agency found substantial compliance because the postings addressed the subject matter generally. The Commission, however, found the specificity of the language controlling. Therefore, because the agreement explicitly required reference to the preferred guidelines or URL, the Agency failed to establish compliance with the agreement. [Complainant v. U.S. Postal Serv., EEOC Appeal No. 0120140455 \(January 15, 2015\)](#).



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**Breach of Settlement Found.** The parties entered into a settlement agreement in September 2013 that provided, in pertinent part, that the Agency would directly notify Complainant and other applicants of the results of the fellowship application process and make such notification part of the normal application process. Prior to signing the agreement, Complainant informed the Agency she wanted certain provisions of the agreement deleted. Complainant subsequently signed a copy of the agreement in which she crossed out these provisions. The final copy of the signed agreement included these provisions. In April 2014, Complainant alleged the Agency was in breach of the settlement agreement for failing to strike the requested provisions and for failing to directly notify her of the results of the fellowship application process. On appeal, the Commission found all the provisions of the agreement were valid and binding on both parties based on the plain meaning of the agreement. The Commission further determined that the Agency had not met its burden under the agreement because it did not email Complainant directly about the fellowship results. The Agency also provided no evidence to show that management made the notice part of the normal application process. Thus, the Agency was ordered to reinstate the underlying EEO complaint. [Complainant v. Nat'l Aeronautics & Space Admin., EEOC Appeal No. 0120142820 \(January 13, 2015\).](#)

### Stating a Claim

**Alleged Threats by Management Official Stated Viable Claim of Retaliation.** Complainant's allegation that the Officer in Charge stated he would make Complainant's life a "living hell" if he did not sign retirement papers stated a viable claim of retaliation. Viewing the allegations in the light most favorable to Complainant, being threatened in such a way rendered him aggrieved. [Complainant v. U.S. Postal Serv., EEOC Appeal No. 0120150181 \(March 17, 2015\).](#)

**Complaint and Pre-complaint Documents Reflect a Claim of Age Discrimination.** A fair reading of the complaint and pre-complaint documents, as well as Complainant's statement on appeal showed that Complainant was in essence alleging age discrimination with regard to the change in his schedule. While the basis may not have been expressly articulated, Complainant emphasized his age and seniority several times. Additionally, the change in Complainant's non-scheduled day off addressed a personal loss or harm to a term, condition or privilege of employment. [Complainant v. U.S. Postal Serv., EEOC Appeal No. 0120150380 \(March 10, 2015\).](#)

**Nature of Alleged Comments Sufficiently Severe to State Viable Claim of Harassment.** Complainant's claim that, on one occasion, a co-worker called him a "homo," and said Complainant was "living in sin" and would go to hell stated a viable claim of sex-based harassment. The hateful nature of the alleged comments, coupled with the alleged lack of adequate response from management was sufficiently severe to require further investigation. [Complainant v. U.S. Postal Serv., EEOC Appeal No. 0120133382 \(February 11, 2015\).](#)

**Agency Improperly Addressed Underlying Merits of Issue in Dismissing Claim.** In its decision dismissing Complainant's issue concerning insurance coverage, the Agency improperly addressed the merits of the underlying claim. Specifically, the Agency made several assertions regarding Complainant's health insurance plan. The Commission has stated that the first issue



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in the analysis of this type of claim of discrimination is whether the challenged term or provision of the employer provided health insurance plan is, in fact, a “disability-based distinction.” Therefore, evidence, rather than mere assertions, must be gathered during an investigation concerning the actual provisions at issue, and whether or not the distinctions drawn are based on disability. [Complainant v. Office of Pers. Mgmt., EEOC Appeal No. 0120142797 \(February 9, 2015\)](#); see also, [Complainant v. Dep’t of the Army, EEOC Appeal No. 0120150452 \(March 17, 2015\)](#) (Complainant’s allegation that he was not promoted stated a viable claim of discrimination. The Agency’s assertion that his name was not forwarded to the Selecting Official addressed the merits of the claim and was irrelevant to the procedural issue of whether he stated a viable claim).

**Agency Improperly Dismissed Claim as Collateral Attack on OWCP Process.** Complainant’s allegation that the Agency discriminated against him when it told him it had no work for him after he refused to accept a modified job offer stated a viable claim. A fair reading of the complaint showed that it was not a collateral attack on the OWCP process, but rather a claim of a denial of reasonable accommodation of Complainant’s disability-related medical restrictions. Complainant asserted that he was already working in a modified position which accommodated his restrictions, but the Agency stopped accommodating him when he did not accept the offer of a new position. The Commission noted that the duty to accommodate is independent of whether OWCP decides an employee should be offered a specific position. [Complainant v. U.S. Postal Serv., EEOC Appeal No. 0120150024 \(February 6, 2015\)](#); see also [Complainant v. U.S. Postal Serv., EEOC Appeal No. 0120150197 \(February 12, 2015\)](#) (a fair reading of the complaint and EEO counseling report shows that the Complainant was asserting that the job offer made to him did not comply with his medical restrictions, and, therefore, Complainant was arguing that the Agency refused to accommodate him. The Agency erred in defining the claim as a collateral attack on the OWCP process); but see, [Complainant v. U.S. Postal Serv., EEOC Appeal No. 0120142865 \(January 22, 2015\)](#) The Agency properly dismissed Complainant’s complaint alleging that the Agency controverted her accident claim with the OWCP. The Commission found that Complainant was attempting to use the EEO process to address an issue which had already been decided in her favor in the OWCP forum. The proper forum for contesting the outcome of an OWCP claim was with the Department of Labor).

**Complainant Stated a Viable Claim of Discrimination.** The Agency improperly dismissed Complainant’s claim of discrimination on the grounds that she did not apply for the position cited in her formal complaint. While Complainant conceded that she did not apply for the position, she alleged that the qualifications for the position detailed in the vacancy announcement were changed so that she and other African American females in the office were ineligible. Complainant stated that she performed the duties of the position in an acting capacity, and asserted that she was actively discouraged from applying for the position based on a discriminatory motivation. Therefore, Complainant stated a viable claim. [Complainant v. U.S. Postal Serv., EEOC Appeal No. 0120143106 \(January 30, 2015\)](#).

**Complainant Stated a Viable Claim of Sex Stereotyping.** The Commission found that Complainant’s allegations of harassment stated a viable claim of sex discrimination. The fact



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that Complainant characterized the basis of discrimination as sexual orientation did not otherwise defeat a valid claim. Complainant alleged a plausible sex stereotyping case which would entitle him to relief under Title VII. Complainant alleged that he was subjected to a hostile work environment including co-workers making sexually suggestive comments to him, using a high pitched voice when talking to Complainant, and asking Complainant if he was wearing a dress and high heels. The Commission found that the claim of harassment was based upon the perception that Complainant did not conform to gender stereotypes of masculinity, and therefore, stated a claim of sex discrimination under Title VII. [Complainant v. Dep't of Veterans Affairs, EEOC Appeal No. 0120120387 \(January 28, 2015\)](#).

**Complainant Stated a Viable Claim of Retaliation.** Complainant's claim that the Agency subjected her to a pre-disciplinary interview and intimidated her by discussing evidence from a prior EEO complaint stated a viable claim of retaliatory harassment. The Commission found that the actions raised in the complaint would be reasonably likely to deter Complainant or others from engaging in protected activity. In addition, Complainant provided evidence on appeal that the interview resulted in a 14-day suspension. [Complainant v. U.S. Postal Serv., EEOC Appeal No. 0120142959 \(January 22, 2015\)](#).

**Agency Improperly Dismissed Claim as Collateral Attack on OIG Process.** Complainant alleged that the Agency retaliated against him when it issued him a Notice of Removal for improper conduct following an investigation by the Office of the Inspector General. The Commission found that the Agency improperly dismissed the complaint for failure to state a claim. A fair reading of the complaint and EEO counseling material showed that the claim concerned the removal action. While adjudication of the claim would by necessity involve an examination of the OIG investigation, the complaint did not constitute a collateral attack on the investigative process. Further, while the Notice was rescinded, Complainant raised a viable claim of retaliation with regard to the issuance of the Notice. [Complainant v. U.S. Postal Serv., EEOC Appeal No. 0120142821 \(January 16, 2015\)](#); see also [Complainant v. U.S. Postal Serv., EEOC Appeal No. 0120142813 \(January 22, 2015\)](#) (Complainant's allegation that she was treated more harshly than similarly situated employees when subordinates' complaints about her were referred to the OIG for investigation did not constitute a collateral attack on the OIG process. Instead, Complainant asserted that complaints about a similarly situated white manager were informally resolved by the Agency).

**Agency Improperly Defined Claim of Harassment.** The Agency improperly limited Complainant's claim to only two specific incidents. A fair reading of the complaint, EEO counseling report, and statement submitted on appeal indicated that Complainant was alleging that she was subjected to ongoing harassment by a co-worker because of her race that included threats of physical violence. Complainant also stated that she reported the matter to management but no action was taken. Therefore, viewing the claim in the light most favorable to Complainant, the allegations were sufficient to state a viable claim of harassment. [Complainant v. Soc. Sec. Admin., EEOC Appeal No. 0120142842 \(January 16, 2015\)](#).

**Agency Improperly Dismissed Claim of Retaliation.** Complainant's assertion that the Agency disclosed private and confidential records from an EEO proceeding, made threats



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against him, issued warnings, and harassed him stated a viable claim of retaliation. A fair reading of the complaint, in conjunction with the related EEO counseling report, revealed that Complainant was alleging that the Agency's Special Counsel transmitted a confidential document from another employee's EEO complaint to an outside arbitrator in order to discredit Complainant. The Commission found that the actions cited would create a chilling effect on Complainant's and other employees' pursuit of the EEO process such that Complainant's allegations stated a cognizable claim. The Commission further found that Complainant was not making an impermissible collateral attack on the grievance process. [Complainant v. Pension Benefit Guar. Corp., EEOC Appeal No. 0120143006 \(January 15, 2015\)](#); [request for reconsideration denied, EEOC Request No. 0520150231 \(July 21, 2015\)](#).

**Complaint Stated a Viable Claim of Disability Discrimination.** Complainant alleged disability discrimination with regard to events that occurred during a meeting with several management officials concerning her medical restrictions. The Commission found that the events cited, including Complainant being treated disrespectfully, told she had too many doctors, and management implying she did not want to work, stated a viable claim of harassment when considered in light of her requests for accommodation of her medical restrictions. In addition, the Rehabilitation Act provides for the protection of medical information, and therefore, Complainant's assertion that her restrictions were improperly discussed also stated a viable claim. Complainant's allegation that she was not provided with accommodation stated a claim as well. [Complainant v. U.S. Postal Serv., EEOC Appeal No. 0120142937 \(January 13, 2015\)](#).

**Agency is Joint Employer for Purposes of EEO Complaint Process.** Although Complainant was paid by the staffing firm, the Agency conceded that it assigned him projects. Complainant was also supervised by an Agency employee, worked on Agency premises using Agency equipment and materials, there was a continuing relationship with the Agency, and performed work that was part of the Agency's mission. The Agency also did not dispute that it made the decision to terminate Complainant's services. [Complainant v. Dep't of Transp., EEOC Appeal No.0120150318 \(February 27, 2015\)](#); [see also, Complainant v. Dep't of the Interior, EEOC Appeal No. 0120142623 \(January 29, 2015\)](#) (The evidence showed that Complainant was paid a fixed price for one year of services and did not receive retirement benefits. The Agency, however, entered into a personal service contract directly with Complainant whereby it specified his duties and responsibilities, and monitored his performance. The Agency controlled the means and manner of Complainant's job and renewed his contract 13 times. Therefore, Complainant was a de facto employee of the Agency for purposes of the EEO complaint process); [Complainant v. Dep't of the Army, EEOC Appeal No. 0120142750 \(January 28, 2015\)](#) (While a contractor provided Complainant with leave and benefits and withheld taxes, and Complainant referred to herself as a contractor, Complainant performed duties related to military intelligence in a top secret Agency facility, using tools, equipment and materials provided by the Agency. Complainant asserted that she worked on a different floor than the contract supervisor and reported to Agency employees, and it appeared from the record that Complainant sought and obtained Agency approval with respect to leave and duty hours. Finally, Complainant raised numerous incidents of harassing comments and behavior that were perpetuated by an Agency Supervisor and co-worker and witnessed by most of the Agency employees on her team. The Commission found that the allegations reflected a measure of control over



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Complainant's work environment by Agency officials, and, as such, the Agency exerted sufficient control to be considered a joint employer); [Complainants v. Dep't of Justice, EEOC Appeal Nos. 0120141963 & 0120141762 \(January 28, 2015\)](#) (While Complainants worked on premises provided by a staffing firm, performed work requiring a high level of expertise, and received wages and benefits from the staffing firm, the record showed that an Agency manager routinely assigned one Complainant projects and duties, and dictated the other Complainant's schedule, travel and contacts. The Complainants also stated that the staffing firm was not involved in their daily work. The Agency set Complainants' work hours and their work directly related to the Agency's mission. Finally, there was no dispute that the Agency made the decision to end Complainants' services); but see, [Complainant v. Dep't of the Navy, EEOC Appeal No. 0120132837 \(January 28, 2015\)](#) (While Complainant performed work at an Agency workspace using Agency equipment, the contract between the Agency and the contractor provided that the contractor was responsible for developing the framework for the program, providing training, and ensuring that personnel completed all necessary functions. In addition, Complainant was supervised by an employee of the contractor, and the contractor controlled the means and manner of Complainant's employment); [Complainant v. Nuclear Regulatory Comm'n, EEOC Appeal No. 0120142033 \(January 28, 2015\)](#) (the Agency conceded that its staff gave Complainant assignments, and the Agency designated Complainant's hours and where his work was performed and provided him with the tools and equipment needed to perform his duties. The staffing firm, however, handled Complainant's pay and benefits, and Complainant's duties were not related to the Agency's mission. After Complainant had an altercation with an Agency employee, the Agency asked that the staffing firm find a resolution other than terminating Complainant, but the staffing firm conducted its own fact finding investigation and decided to reassign Complainant to other clients. This indicated that the staffing firm retained full power over Complainant's employment); [Complainant v. Dep't of Veterans Affairs, EEOC Appeal No. 0120142458 \(January 13, 2015\)](#) (Complainant was a patient at an Agency facility who was provided with a rehabilitation opportunity under the Agency's Compensated Work Therapy program, a statutorily authorized program in which participants are not "held or considered as employees." Thus, Complainant's complaint failed to state a viable claim).

**Agency Improperly Fragmented Claim of Ongoing Harassment.** The Agency improperly fragmented Complainant's claim of ongoing discriminatory harassment by dismissing the complaint for failure to state a claim. A fair reading of the complaint showed that Complainant claimed she was subjected to a series of related incidents of sexual harassment including being grabbed and shaken, sent to another location, and not allowed to make a presentation. Complainant stated that after she reported the initial incident, she was subjected to a hostile work environment. These matters taken together stated an actionable claim of harassment. [Complainant v. Dep't of Justice, EEOC Appeal No. 0120140381 \(January 9, 2015\)](#).

**Complaint Stated a Viable Claim of Sex and Retaliation.** Complainant's claim that the Agency discriminated against her when it did not select her for a temporary promotion and harassed her stated a viable claim of sex discrimination and retaliation. With regard to the promotion, the Agency's assertions that the selecting official was not aware of Complainant's EEO activity and Complainant was not qualified go to the merits of the complaint and were not relevant to whether the matter stated a justiciable claim. In addition, Complainant stated that at



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a holiday party during which her participation was mandatory, a co-worker hung a sign on her back which made a sexual reference and made suggestive comments about her, and after the event numerous co-workers continued making such comments. Complainant also stated that management officials were present but did not intervene, and photos of her wearing the sign were posted on the Agency's intranet site. The Commission concluded that, when viewed collectively, the incidents stated an actionable claim of harassment. [Complainant v. Dep't of the Army, EEOC Appeal No. 0120142868 \(January 8, 2015\)](#).

**Agency Improperly Dismissed Claim of Retaliation.** The Agency improperly dismissed Complainant's claim that it retaliated against her for prior protected EEO activity when her former Supervisor made unfavorable comments on her Performance Appraisal. Complainant stated that she was never counseled on the matters and always received favorable appraisals prior to filing an EEO complaint. The Commission concluded that the allegations, when viewed in the light most favorable to Complainant, were sufficient to state a viable claim of retaliation. [Complainant v. Dep't of the Navy, EEOC Appeal No. 0120142889 \(January 8, 2015\)](#).

**Complaint Stated a Viable Claim of Hostile Work Environment.** Complainant's claim that the Agency discriminated against her when her Supervisor threatened her with pre-disciplinary interviews stated a viable claim of hostile work environment. Complainant stated that she was being singled out in her all-male office, and other employees who committed the same infractions were not subjected to pre-disciplinary interviews or discipline. The Commission noted that while interviews by themselves may not state a claim, in this case Complainant stated that they were being used to harass her because of her sex. Complainant's claim that a Manager rescinded a grievance settlement did not state a separate claim under the EEOC's regulations, the action may be considered as possible evidence in the harassment claim. [Complainant v. U.S. Postal Serv., EEOC Appeal No. 0120142642 \(January 6, 2015\)](#).

**Agency Properly Dismissed Claim Regarding Union Activity.** The Agency properly dismissed Complainant's claim that it undermined his position as a Union Director and failed to notify him of certain positions. The proper forum for Complainant to have raised his challenges to actions involving his role as a Union Director was within the processes provided for under the collective bargaining agreement and statutes concerning union rights. It was inappropriate to use the EEO process to collaterally attack actions involving the collective bargaining process. [Complainant v. U.S. Postal Serv., EEOC Appeal No. 0120150009 \(February 6, 2015\)](#); [see also Complainant v. U.S. Postal Serv., EEOC Appeal No. 0120150140 \(February 23, 2015\)](#) (Complainant's claim that he lost a position in a union election allegedly due to posters on display at the worksite did not allege a loss or harm to a term, condition or privilege of employment, and was properly dismissed for failure to state a claim).

### Summary Judgment

**Summary Judgment Affirmed.** The Commission affirmed the AJ's decision on summary judgment finding that the Agency did not retaliate or discriminate against Complainant when it did not select her for the position of Deputy Ethics Counselor. While Complainant argued that the Selecting Official should have known of her prior EEO activity, the AJ assumed that



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Complainant established a prima facie case of retaliation. Therefore, the matter was not a material issue of fact. Further, the record was adequately developed, and the Agency articulated legitimate, nondiscriminatory reasons for choosing the Selectee, specifically he had more experience doing similar work, had a law degree, and performed better during the interview. Complainant failed to offer any evidence to show that the Agency's stated reasons for not selecting her were not worthy of credence or motivated by discriminatory or retaliatory reasons. [Complainant v. Dep't of the Interior, EEOC Appeal No. 0120121833 \(March 4, 2015\)](#).

**Summary Judgment Affirmed in Part.** Complainant alleged that she was discriminated against based on race and reprisal when a manager inappropriately intervened in her personal affairs. Complainant aimed to organize an event coinciding with Black History month, and a co-worker made comments that Complainant found offensive. After Complainant wrote a letter to the co-worker, she noted that her Supervisor "badgered" her about it when Complainant stated that she would not pursue the matter further. In a separate instance, Complainant alleged that a Hearing Office Chief Administrative Law Judge inappropriately entered a conference room during an EEO counseling session between Complainant, an employee Complainant was representing, and an EEO counselor who was attending by telephone. Complainant stated that the Judge yelled at her, and made her hang up the call. The AJ issued a summary judgment decision finding no discrimination on either allegation. On appeal, the Commission found that summary judgment was appropriate with regard to the first claim given that the Agency did not subject Complainant to discriminatory treatment or harassment when it questioned her about an accusatory letter she sent to a co-worker. With regard to the second claim, however, the Commission found that there were genuine issues of material fact concerning the incident with the Judge. Specifically, there were questions regarding the manner in which the Judge confronted Complainant, as well as the circumstances surrounding Complainant's use of the room. Thus, the Commission remanded the second claim for an administrative hearing. [Complainant v. Soc. Sec. Admin., EEOC Appeal No. 0120110253 \(February 20, 2015\)](#).

**Decision on Summary Judgment Reversed.** The Commission found that there were genuine issues of material fact regarding Complainant's claims that he was subjected to a hostile work environment and that the Agency removed his hiring duties. Complainant stated that he was told he should not hire African Americans, and that after he did so, the Agency retaliated against him. The individual named by Complainant denied making the statement. Complainant's statement, if true, could lead a fact finder to conclude that it was retaliatory animus that motivated the Agency's subsequent acts after Complainant failed to follow a hiring directive. The Commission noted that it was not making any judgment about the veracity of the statements, but that they were the type of evidence that was appropriate for cross-examination, elaboration and credibility determinations. Further, there was no explanation why the EEO Investigator did not interview an individual who Complainant stated told him was also advised not to hire African Americans. The conflicting statements required that a hearing be held in the matter. [Complainant v. Dep't of the Interior, EEOC Appeal No. 0120112380 \(March 24, 2015\)](#).

**Decision on Summary Judgment Reversed.** Complainant, who has hearing loss in one ear, filed a formal complaint alleging discrimination when the Agency placed him on restricted duty status and gave him a lower performance rating. On appeal from an AJ's decision on summary



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judgment, the Commission found that there were genuine issues of material fact with regard to whether the use of a hearing aid would be a reasonable accommodation during a hearing test, and if so, whether it would eliminate the risk of harm or reduce it to an acceptable level. The Agency asserted that Complainant posed a direct threat due to his hearing loss because as a Special Agent, the ability to localize sounds in the field is essential to the performance of his law enforcement duties. The Agency further contended that a hearing aid could not be a reasonable accommodation because it could break, malfunction, or become dislodged during a law enforcement scenario. The Commission stated, however, that the record contained evidence that could undermine the Agency's arguments. Specifically, the record showed that the Agency allows individuals with vision impairments to wear glasses during medical examinations and in the field. The Agency acknowledged the conflicting vision and hearing policies but was not able to rectify the conflict. Therefore, the Commission concluded that a hearing was necessary. [Complainant v. Dep't of the Treasury, EEOC Appeal No. 0120110248 \(February 20, 2015\)](#).

**Decision on Summary Judgment Reversed.** The Commission found that the AJ erred when she concluded that there was no genuine issue of material fact in the case. In finding no discrimination, the AJ relied on the Agency's reasons for its actions, but failed to analyze evidence which could dispute the Agency's stated reasons. For example, while the Agency alleged that Complainant's request for work at home was denied because it did not have a formal "work at home" policy, the Commission found that several other individuals within the Agency were permitted to work at home, casting doubt on the Agency's motives for denying Complainant's request. Furthermore, while the Agency argued that Complainant was relocated to another office for operational needs, Complainant asserted that an official told her that other employees were afraid of her following her hospitalization. The Commission also noted that the AJ failed to consider Complainant's claim of discrimination and harassment based on sex stereotyping or the Agency's disclosure of her medical information. Thus, the Commission found that there were many unresolved issues which required a thorough assessment following an administrative hearing. [Complainant v. U.S. Postal Serv., EEOC Appeal No. 0120120413 \(February 11, 2015\)](#).

**Decision on Summary Judgment Reversed.** The Commission found that the issuance of a decision without a hearing on Complainant's claim of disability discrimination was not appropriate given that there were material issues in dispute as to whether Complainant was substantially limited in a major life activity. While the AJ focused on Complainant's statement that he could drive to and from work, walk around his work area, and take care of his personal needs, Complainant also stated that his medical condition caused chronic severe pain, severe muscle spasms, and weakness and numbness in both legs and his lower back. Complainant asserted that his condition significantly affects his ability to walk, sit, stand, lift, work and sleep. The Commission also found insufficient evidence in the record to establish whether or not the Agency provided Complainant with an effective accommodation. Therefore, a hearing was necessary in this case. [Complainant v. Dep't of the Navy, EEOC Appeal No. 0120120645 \(February 6, 2015\)](#).



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**Decision on Summary Judgment Reversed.** Complainant worked as a Letter Carrier in a facility which for several decades delivered mail on Sunday, but not Saturday, in order to accommodate the Saturday day of worship for the large Seventh Day Adventist population in the city. In 2011, the delivery schedule was changed so mail would be delivered on Saturday and not on Sunday. Complainant notified the Officer-in-Charge (OIC) that he was a Seventh Day Adventist and could not work on Saturdays. He requested the OIC provide reasonable religious accommodation that would keep him from being required to work on Saturdays. The OIC informed Complainant he could request annual leave or leave without pay on Saturdays but that the collective bargaining agreement required these requests be approved in order of the requestor's seniority. The OIC also suggested Complainant explore trading schedules with other carriers. The Commission found that summary judgment was not appropriate in the case because genuine issues of material fact existed which could only be resolved through a hearing. Specifically, the Commission found significant issues of material fact including whether it would impose an undue hardship on the Agency to revisit its decision to change the schedule, whether the Agency's efforts to provide Complainant with a religious accommodation were adequate and effective, and what the impact of the Agency's agreements with its union had on this matter and whether efforts could have been made to negotiate exceptions with the union. The Commission remanded the complaint for an administrative hearing. [Complainant v. U.S. Postal Serv., EEOC Appeal No. 0120140854 \(January 28, 2015\)](#).

### Timeliness

**Complainant Timely Contacted EEO Counselor.** The Commission found that the Agency failed to meet its burden of obtaining sufficient information to support its decision that Complainant's contact with the EEO Counselor was not timely. Complainant asserted that he placed a call to the Agency's National EEO Complaint line within 45 days of his nonselection, and presented telephone records as proof that he intended to pursue an EEO complaint. The Agency did not show why it had no record of Complainant's contact resulting in a complaint. The Agency's articulated reason for the nonselection went to the merits of the claim and was irrelevant to whether he made timely EEO contact. [Complainant v. U.S. Postal Serv., EEOC Appeal No. 0120143230 \(February 19, 2015\)](#).

**Complainant Timely Contacted EEO Counselor Upon Reasonably Suspecting Discrimination.** The Agency improperly dismissed Complainant's complaint for untimely EEO Counselor contact, finding that Complainant should reasonably have known of the discrimination at or around the time of the denial of her request for reassignment. Complainant stated that she was originally told that her request was denied because of her attendance record and did not suspect discrimination until she later learned that other male employees with similar attendance records were reassigned to the position she sought. Thus, Complainant did not develop a reasonable suspicion of discrimination until March 2014, and contacted the EEO Counselor within 45 days. [Complainant v. U.S. Postal Serv., EEOC Appeal No. 0120142960 \(February 6, 2015\)](#); see also [Complainant v. Dep't of Justice, EEOC Appeal No. 0120150047 \(March 10, 2015\)](#) (Complainant asserted that he did not reasonably suspect discrimination with regard to his nonselection until he spoke with an Agency Test Coordinator who advised him that the Selecting Official had given other reasons for not hiring Complainant than those he gave



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Complainant. At that time, Complainant suspected he was being retaliated against and contacted an EEO Counselor within 45 days); but see [Complainant v. Gen. Serv. Admin., EEOC Appeal No. 0120150065 \(February 6, 2015\)](#), request for reconsideration denied, [EEOC Request No. 0520150281 \(May 28, 2015\)](#) (Agency properly dismissed Complainant's complaint for untimely EEO Counselor contact because Complainant should have reasonably suspected discrimination when a co-worker allegedly told her more than one year before she contacted an EEO Counselor that one member of the interview panel made a comment about her age. Further, Complainant had constructive knowledge of the applicable time limitation when she completed No Fear Act Training approximately five months before her EEO contact).

**Complaint Improperly Dismissed for Untimely EEO Counselor Contact.** Complainant was injured while working for the Agency in Qatar in April, 2013. She ultimately returned to the United States for treatment and surgery, and filed a formal EEO complaint alleging that the Agency discriminated against her when it filled her position in Qatar. Complainant sought contact with an EEO Counselor on June 18, 2014, stating that she had attempted to resolve EEO issues through the Agency in March 2014, but was informed that nothing could be done. On July 2, 2014, Complainant initiated contact with the United States Office of Special Counsel, and she alleged that she was downgraded in pay based on the incident in Qatar which curtailed her work period abroad. The Agency dismissed the complaint on the basis of untimely contact with an EEO counselor. On appeal, the Commission concluded that the crux of Complainant's argument was that she was subjected to unlawful compensation discrimination and was seeking back pay. In this case, Complainant's last paycheck, which was received within the 45-day limitation period for initiating EEO contact, served as an effective action for her complaint. Therefore, Complainant's EEO contact was timely. [Complainant v. Dep't of Def., EEOC Appeal No. 0120143013 \(January 30, 2015\)](#).

**Complaint Improperly Dismissed for Untimely EEO Counselor Contact.** The Agency dismissed Complainant's complaint, asserting that he did not contact an EEO Counselor within 45 days of his allegedly discriminatory non-selection. On appeal, Complainant stated that he contacted an EEO Counselor within the applicable limitation period, but was told to collect additional evidence regarding the Selectee's qualifications before filling out an intake form. Complainant submitted a copy of e-mail correspondence to the EEO Counselor showing that he did in fact raise the issue of his non-selection within 45 days and indicated that he had difficulty contacting a named Agency official. Therefore, the Commission found that Complainant's EEO contact was timely. [Complainant v. Dep't of the Navy, EEOC Appeal No. 0120143204 \(January 29, 2015\)](#).

**Complaint Improperly Dismissed for Untimely EEO Counselor Contact.** Complainant alleged that the Agency discriminated against him when it did not select him for a specific position. The Agency dismissed the complaint for untimely EEO Counselor contact, and the Commission reversed the dismissal on appeal. While the Agency alleged that Complainant was sent an e-mail on February 20, 2014, notifying him of his non-selection for the position, Complainant argued that he did not see the e-mail, explaining that he learned of the selection on March 24, 2014, when the person who was chosen started working. Complainant contacted an EEO counselor within 45 days of that date. The Commission found that the Agency failed to



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provide adequate proof that Complainant was aware of his non-selection prior to March 24, 2014, the date the Selectee started working in the position. As such, the Commission stated that Complainant's EEO counselor contact of April 16, 2014 was within the forty-five day limitation period from when he reasonably suspected discrimination. [Complainant v. Dep't of the Air Force, EEOC Appeal No. 0120142948 \(January 23, 2015\)](#).

**Complaint Properly Dismissed for Untimely EEO Counselor Contact.** Complainant alleged discriminatory reprisal in the form of denied travel pay between March and August, 2013. Complainant raised the issue with his union, and was informed in February, 2014, that they would not reimburse him. Complainant initiated contact with an EEOC counselor on March 9, 2014, and subsequently filed a formal complaint. The Commission upheld the Agency's dismissal for failure to timely contact an EEO Counselor. The denial of travel pay occurred on August 31, 2013. At that time, the 45-day time limitation was triggered under the "reasonable suspicion" standard. The Commission has consistently held that the utilization of agency procedures, union grievances, or other remedial processes does not toll the limitation period for contacting an EEO Counselor. Thus, Complainant's choice to address the matter with his union did not excuse the delay in contacting a Counselor. Complainant did not allege that he was unaware of the applicable limitation period. [Complainant v. U.S. Postal Serv., EEOC Appeal No. 0120142698 \(January 8, 2015\)](#).

**Waiver of Time Limitation for Filing Complaint Appropriate.** While the record demonstrated that Complainant did not file her formal complaint within the 15 day limitation period, Complainant stated that she attended mediation during which the Mediator represented that the matter would be taken care of and Complainant should not worry about it. Given the brief four-day delay, the Commission found that a waiver of the time limitation was appropriate. [Complainant v. Dep't of Veterans Affairs, EEOC Appeal No. 0120150288 \(March 19, 2015\)](#).

**Complaint Improperly Dismissed as Untimely.** The Agency dismissed Complainant's complaint as untimely, asserting that it notified Complainant of her right to file a formal complaint by e-mail on the same day it sent her the notice via certified mail. The Commission rejected the Agency's argument, stating that the record showed that Complainant filed her complaint 12 days after receiving the notice by certified mail. Therefore, her complaint was timely filed. [Complainant v. Dep't of Justice, EEOC Appeal No. 0120150239 \(March 18, 2015\)](#).

**Complaint Improperly Dismissed as Untimely.** The Agency dismissed Complainant's formal complaint as untimely, stating that Complainant received notice of her right to file a complaint on November 4, 2013, but did not actually file her complaint until April 2014. On appeal, the Commission found that Complainant was confused by the Agency's processing of her complaint. Specifically, the record showed that Complainant received an e-mail from the Agency in October 2013 stating that the claim had been accepted for mediation. Complainant attempted to clarify the situation through telephone calls and e-mails to Agency EEO Officials, and the Agency issued Complainant a second notice of her right to file a complaint in April 2014. Complainant filed her complaint within 15 days of receiving that notice. The Commission found that the Agency's dismissal was improper given the contradictory information she received



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regarding the status of her claim. [Complainant v. Dep't of Veterans Affairs, EEOC Appeal No. 0120142918 \(January 22, 2015\)](#).

### ARTICLE

*(The following article is not intended to be an exhaustive or definitive discussion of a complex area of law, nor is it intended as legal advice. The article is generally based on EEOC documents available to the public at the Commission's website at <http://www.eeoc.gov/>, as well as on Commission case law and court decisions. Some EEOC decisions cited may have appeared in previous editions of the Digest.)*

### **Competing Rights: Religious Expression versus Harassment in the Workplace**

*By Robyn Dupont, Melissa Perry & Alisa Silverman*

#### **Introduction**

Title VII protects workers from employment discrimination based on their religion and requires reasonable accommodation of employees' sincerely held religious beliefs, observances, and practices when requested, unless accommodation would impose an undue hardship on business operations.<sup>1</sup> The Free Exercise Clause of the First Amendment to the United States Constitution reads, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Thus, there could be a conflict between an employee's right to religious expression in the workplace and the countervailing right of other employees to be free from a hostile work environment. Agencies should be aware of the factors that could contribute to unlawful religious harassment in the workplace and how these relate to their duty to accommodate their employees' religious expression.

#### **Background**

##### **Religious Accommodation**

Title VII requires an employer to reasonably accommodate an employee's religious needs, including the need for religious expression in the workplace. Religious accommodations come up most frequently when employees need time off from work for religious reasons, have a religious need to proselytize or make religious statements, or are compelled by their religion to wear particular religious symbols or clothing. The requirement to provide religious accommodation is subject to one exception, specifically if an employer demonstrates that accommodation would result in undue hardship to the conduct of its business.<sup>2</sup> The Supreme

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<sup>1</sup> 42 U.S.C. 2000e(j); [EEOC Compliance Manual, Section 12, Religious Discrimination, No. 915.003 \(July 22, 2008\)](#).

<sup>2</sup> [29 C.F.R. § 1605.2\(b\)](#).



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Court has defined undue hardship as an accommodation that would require more than a de minimis cost.<sup>3</sup>

### Hostile Work Environment

In addition to requiring that employers religiously accommodate their employees, Title VII also prohibits hostile work environments based upon any of the protected categories, including religion. Therefore, religious expression which is sufficiently harassing so as to create a hostile work environment could constitute a violation of Title VII. An unlawful hostile environment based on religion might take the form of either verbal or physical harassment or the unwelcome imposition of religious views or practices on an employee.<sup>4</sup>

Title VII is violated where the workplace is “permeated with ‘discriminatory intimidation, ridicule, and insult’ that is ‘sufficiently severe or pervasive to alter the conditions of an individual’s employment and create an abusive work environment.’”<sup>5</sup> To establish a case of religious harassment, an employee must show that the harassment was: (1) based on religion; (2) unwelcome; (3) sufficiently severe or pervasive to alter the conditions of employment by creating a hostile work environment; and (4) that there was a basis for employer liability.<sup>6</sup> The first element can be met regardless of whether the harassment is motivated by the religious beliefs or observances, or lack thereof, of either the harasser or the targeted employee, and harassment can be based on religion even if religion is not explicitly mentioned.<sup>7</sup>

Allegations of religious harassment may include anti-religious slurs, attempts to insert a religious element into the workplace, such as mandatory meetings with Bible Study, or individuals engaging in proselytizing in an attempt to convert non-believers. In such cases, it is necessary to evaluate the surrounding circumstances to determine whether or not the conduct or remarks are unwelcome.<sup>8</sup> Unwelcome religiously motivated conduct is not unlawful unless the individual subjectively perceives the environment to be abusive or the conduct is severe or pervasive enough to create an environment that a reasonable person would find hostile or abusive.<sup>9</sup>

### The Interplay Between Religious Accommodation and Hostile Work Environment

As noted, employers need to balance the rights of employees to express their religious beliefs with the rights of other employees to be free from religious harassment under Title VII. An employer never has to accommodate the expression of a religious belief in the workplace

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<sup>3</sup> [Trans World Airlines v. Hardison, 432 U.S. 63 \(1977\).](#)

<sup>4</sup> [EEOC Compliance Manual, Section 12-III\(A\)\(2\).](#)

<sup>5</sup> See [Harris v. Forklift Sys. Inc., 510 U.S. 17, 21 \(1993\)](#) (quoting [Meritor Sav. Bank v. Vinson, 477 U.S.57, 65 \(1986\)](#)).

<sup>6</sup> See [Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 \(1986\)](#).

<sup>7</sup> [EEOC Compliance Manual, Section 12-III\(A\)\(2\)\(a\).](#)

<sup>8</sup> *Id.*

<sup>9</sup> [Harris, 510 U.S. at 21-22; Faragher v. City of Boca Raton, 524 U.S. 775, 788 \(1998\).](#)



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where such an accommodation could potentially constitute harassment of co-workers, because that would pose an undue hardship for the employer.<sup>10</sup> Therefore, while Title VII requires employers to accommodate an employee's sincerely held religious belief in engaging in religious expression or proselytizing, an employer does not have to allow such expression if, for example, the conduct constitutes potentially unlawful religious harassment of a co-worker who found it unwelcome or the conduct otherwise interferes with the operation of the business.<sup>11</sup> Although religious accommodations that infringe on co-workers' ability to perform their duties or subject co-workers to a hostile work environment will generally constitute undue hardship, general disgruntlement, resentment, or jealousy of co-workers will not.<sup>12</sup> Undue hardship requires more than proof that some co-workers complained. A showing of undue hardship based on co-worker interests generally requires evidence that the accommodation would actually infringe on the rights of co-workers or cause disruption of work.<sup>13</sup>

In Chalmers v. Tulon Co.,<sup>14</sup> the Fourth Circuit determined that an employer did not discriminate against a management-level employee when it fired her after she sent letters to her colleagues at their homes articulating her religious beliefs and questioning the colleagues' behavior. For example, one letter, sent to the employee's direct supervisor stated in part, "All you have to do is go to God and ask for forgiveness before it's too late." Another letter stated, "God can put a sickness on you that no doctor can ever find out what it is," implying her sins caused her illness. The Fourth Circuit found that Chalmers failed to establish a prima facie case of discrimination, but analyzed the merits of Chalmers' request for religious accommodation under Title VII. Without significantly addressing the harassment elements in this case, the Court acknowledged that if the employer permitted Chalmers to write the letters, it could subject itself to religious harassment lawsuits. Additionally, the Court noted that Title VII does not require an employer to allow an employee to impose religious views on others. In analyzing the effect of the letters on employees, the Court noted the letters "impose[d] personally and directly on fellow employees, invading their privacy and criticizing their personal lives." Thus, the Court presumed that these letters were objectively harassing.

In Ervington v. LTD Commodities, LLC,<sup>15</sup> the Seventh Circuit upheld plaintiff's discharge for violating the company's anti-harassment policy by distributing religious tracts that negatively depicted Muslims and Catholics. Plaintiff claimed proselytizing was part of her religious practice, and that company was obligated to accommodate her communications to co-workers. The Court agreed with company that it would pose an undue hardship to accommodate offensive or unwelcome communications that were potential religious harassment of others. After a prior incident, plaintiff had been admonished that personal beliefs should only be discussed during breaks and with willing participants.

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<sup>10</sup> [EEOC Compliance Manual, 12-III\(C\)](#).

<sup>11</sup> [Id.](#)

<sup>12</sup> [Id.](#)

<sup>13</sup> [Id.](#)

<sup>14</sup> [101 F.3d 1012 \(4th Cir. 1996\)](#).

<sup>15</sup> [2014 WL 554534 \(7th Cir. 2014\)](#).



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In Peterson v. Hewlett-Packard Co.,<sup>16</sup> the Ninth Circuit held that the employer did not violate Title VII when it terminated a Christian employee for insubordination after he responded to the employer's diversity initiative by prominently posting biblical scriptures condemning homosexuality and refusing to remove them when asked to do so. The posting was a violation of the employer's voluntarily-adopted harassment policy, and it would have been an undue hardship not to enforce it. The Court found that there was no evidence that the employee was terminated because of his religious views, but rather because of his refusal to stop harassing co-workers by removing his postings.

In Scott v. Montgomery County School Bd.,<sup>17</sup> the plaintiff alleged that her supervisor subjected her to religious discrimination when he gave her negative performance evaluations, resulting in non-renewal of her contract. There was evidence she had declined her supervisor's invitations to join his Bible study group and to attend a religious retreat, and had told him she was not comfortable joining in his daily prayer or devotional before work. The Court held a reasonable jury could find that the supervisor knew his overtures were unwelcome but persisted, and plaintiff's continued rejection led him to evaluate her work more harshly.

### Commission Decisions

In Juhl v. Dep't of Justice,<sup>18</sup> Complainant, a Correctional Counselor, had religious paraphernalia including four or five Bibles, a few religious pamphlets, a picture of Jesus Christ, and a statue of the Madonna displayed in her office. Inmates complained to her supervisor about the items and expressed concern about complainant trying to convert them. Complainant's Supervisor instructed Complainant to remove two bibles, and two religious pamphlets from her office to "tone it down" and keep in line with a professional atmosphere. The Commission noted that it is generally difficult for an employer to establish that permitting an employee to keep a Bible on her desk, or other expression of her religious beliefs in a private work station would create an undue hardship. However, where the employee counsels clients, a religious display may be perceived as the Agency's endorsement of a particular religion. In this case, the record did not support a finding that Complainant engaged in religious counseling or proselytizing of inmates. The Agency argued that since Complainant was a Counselor to inmates, it would be an undue hardship to allow Complainant to have all of her religious articles, because inmates would perceive her as biased, and not concerned about those who held other religious beliefs. The Commission found, however, that the Agency did not document the complaints or introduce evidence that Complainant's counseling was actually impacted by the religious items on her desk.

In Garcia v. Dep't of Agric.,<sup>19</sup> Complainant alleged that he had been constructively discharged based in part on his religion. Specifically, Complainant stated that his Supervisor tried to convert him to the Mormon faith by keeping religious literature and playing religious

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<sup>16</sup> [358 F.3d 599 \(9th Cir. 2004\)](#).

<sup>17</sup> [963 F. Supp. 2d 544 \(W.D. Va. Aug. 5, 2013\)](#).

<sup>18</sup> [EEOC Appeal No 01983150 \(September 28, 2001\)](#).

<sup>19</sup> [EEOC Appeal No. 01831493 \(April 13, 1984\)](#).



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tapes in his office, and by sending Mormon missionaries to Complainant's home. Complainant considered some of his conditions of employment coercive, and the adverse treatment followed his decision to not convert to Mormonism. While the Commission found that Complainant established a prima facie case of religious discrimination, the record indicated that the supervisor kept the religious material in his office for his private use during his lunch period. In addition, Complainant initiated religious discussions with the supervisor by asking questions about his faith. Complainant acknowledged that the supervisor never invited him to join the Mormon church and did not express any opinions about Complainant's religion. Further, there was no evidence that the supervisor sent missionaries to Complainant's home. Therefore, the Commission concluded that Complainant failed to prove that he was discriminated against based on his religion.

### Conclusion

Federal employees' religious expression is protected by Title VII. Title VII further protects employees from harassment based on their religion. Agencies should be mindful of the factors that can contribute to religious harassment in the workplace and how these factors interplay with the duty to accommodate employees' religious expression.

Resources for Additional Information:

Religious Garb and Grooming in the Workplace: Rights and Responsibilities  
[www.eeoc.gov/eeoc/publications/qa\\_religious\\_garb\\_grooming.cfm](http://www.eeoc.gov/eeoc/publications/qa_religious_garb_grooming.cfm)

Fact Sheet on Religious Garb and Grooming In the Workplace  
[www.eeoc.gov/eeoc/publications/fs\\_religious\\_garb\\_grooming.cfm](http://www.eeoc.gov/eeoc/publications/fs_religious_garb_grooming.cfm)

EEOC Compliance Manual: Religious Discrimination (2008)  
[www.eeoc.gov/policy/docs/religion.html](http://www.eeoc.gov/policy/docs/religion.html)

Questions and Answers: Religious Discrimination in the Workplace (2008)  
[www.eeoc.gov/policy/docs/qanda\\_religion.html](http://www.eeoc.gov/policy/docs/qanda_religion.html)

Best Practices for Eradicating Religious Discrimination in the Workplace (2008)  
[http://www.eeoc.gov/policy/docs/best\\_practices\\_religion.html](http://www.eeoc.gov/policy/docs/best_practices_religion.html)