



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
P.O. Box 77960
Washington, D.C. 20013

[REDACTED]
Carroll R.,¹
Complainant,

v.

Janet L. Yellen,
Secretary,
Department of the Treasury
(Internal Revenue Service),
Agency.

Appeal No. 2020002891

Hearing Nos. 460-2016-00163X, 460-2018-00002X

Agency Nos. 16-0044-F, 16-0671-F

DECISION

Simultaneously with its May 20, 2019, final order, the Agency filed an appeal to the Equal Employment Opportunity Commission (EEOC or Commission) pursuant to 29 C.F.R. §1614.403(a). On appeal, the Agency requests that the Commission affirm its rejection of an EEOC Administrative Judge's (AJ) finding of discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. The Agency also requests that the Commission affirm its rejection of the relief ordered by the AJ. For the following reasons, the Commission MODIFIES the Agency's final order.

BACKGROUND

At the time of events giving rise to these complaints, Complainant worked as an Internal Revenue Agent, GS-13, in the Internal Revenue Service (IRS) Large Business and International Division (LB&I) facility in Houston, Texas. Complainant has held this permanent position since he was hired by the IRS in April 2003, although he has had temporary promotions to other positions. As an Internal Revenue Agent, Complainant was responsible for conducting independent examinations and related investigations of complex tax returns filed by large business, developing examination procedures, conferring with taxpayers or their representatives to explain the accounting issues and the applicability of pertinent tax laws, and providing

¹ This case has been randomly assigned a pseudonym which will replace Complainant's name when the decision is published to non-parties and the Commission's website.

technical and procedural guidance and examination skills. Some of the complex cases were referred to as coordinating industry cases (CIC) and Complainant over the years worked on different CIC cases.

Around 2006, Complainant was competitively selected as an Acting Team Manager. Upon completion of the Acting Team Manager assignment, Complainant received a satisfactory evaluation, operational review, and a cash bonus. Thereafter, in or around 2007, Complainant was competitively selected for the Advanced Management Selection Development (AMSD) program. The AMSD program provided Acting Team Manager assignments that normally lead to a permanent Team Manager placement in three to 24 months. Through the AMSD program, Complainant was temporarily placed in a GS-14 position.

Prior EEO Activity

Prior to the filing of the instant formal EEO complaints, on April 13, 2008, Territory Manager JKE² informed Complainant and recommended that it would be necessary for the Complainant to stay in the AMSD program for a longer period of time to allow for closer supervision. This extension was denied by JKE's supervisor. Complainant was removed from the AMSD program when the extension of his AMSD program was rejected and contacted an EEO Counselor regarding his removal. On May 19, 2008, Complainant filed EEO Complaint No. C14HOU08007 and EEO Case IRS-08-0550 (the 2008 Complaint) alleging a violation under Title VII.

The 2008 Complaint was resolved in a settlement agreement on August 4, 2008, wherein the Agency agreed, upon satisfactory performance by Complainant on the complex/CIC cases he was currently working on, he would be reinstated to the AMSD program (the 2008 Settlement Agreement). The 2008 Settlement Agreement stated, "per the AMSD Program this is a temporary promotion which can be made permanent with satisfactory completion and an available assignment." Complainant agreed to withdraw his EEO complaint, with prejudice, provided that the Agency transferred him to the Large and Mid-Size Business Division, Team 1243, and, upon satisfactory performance on his cases, an available AMSD position.

Thereafter, in 2009, the AMSD program no longer accepted applications from LB&I and was effectively closed to Complainant and other employees within LB&I. Complainant was never able to attain a position in the AMSD program because available assignments no longer existed.

Events Following Complainant's 2008 Settlement Agreement

JKE was Complainant's first-level supervisor and later his second-level supervisor during the time period of 2007 to 2009. JKE was involved in Complainant's hiring in 2003. JKE, like Complainant, was an African-American male.

² Agency personnel other than Complainant are referred to herein by their initials.

JKE remained Complainant's indirect supervisor through 2010. JKE stated in the three years he directly and indirectly supervised Complainant, Complainant made clear his career and promotional aspirations on at least a semiannual basis, specifically for a GS-14 position. Senior Territory Manager KMK was Complainant's second-level supervisor from February 8, 2015 to February 7, 2016. Thereafter, KMK was promoted to a program manager position. Supervisory Revenue Agent CMD was Complainant's first-level supervisor from January of 2012 to February 2015 and served as Team Manager. Supervisory Revenue Agent DDC was Complainant's first-level supervisor in January 2005, and then again from February 2015 to November 2015. Since February 7, 2016, Territory Manager EEJ has been Complainant's second-level supervisor and assisted Complainant's participation in the petroleum industry collateral subject matter experts' group (also known as the OILERS). Since July 26, 2016, Complainant's first-level supervisor has been Supervisory Revenue Agent JWC.

Acting Director of Field Operations KE was the senior executive assigned to the Agency's Houston area and had an indirect supervisory role over Complainant. KE was involved in the selection of some vacancy announcements including Acting Team Manager and Team Manager for LB&I. KE was also the Agency official who approved Complainant's grade reduction to GS-13 when Complainant was informed that he was removed from the AMSD program in 2008. KE and KMK worked closely together during the incidents at issue.

On October 2, 2015, Complainant initiated contact with an EEO Counselor alleging discrimination and hostile work environment based on protected status.

Complaints at Issue³

Agency No. 16-0044-F

On December 30, 2015, Complainant filed an EEO complaint, Agency No. 16-0044-F, alleging that the Agency discriminated against him and subjected him to harassment on the bases of race (African-American), color (black), sex (male), age, disability, and in reprisal for prior protected EEO activity (2008 complaint alleging violation under Title VII) when:⁴

Issue No. 1: In or around 2002, Complainant applied to a position with the Agency. While Complainant was not selected for the position, he was a highly-qualified candidate based on his vast experience as a Certified Public Accountant, Personal Financial Specialist, and Certified Financial Planner. Complainant also maintains a distinguished military record as a former Commissioned Officer in the U.S. Army.

³ The complaints were consolidated by the AJ's Remand Order, dated February 6, 2017, and the amended claim was accepted by the AJ's Order, dated October 12, 2017.

⁴ These claims are stated as accepted by the Agency and also as defined by the AJ. Claims 2, 3, 4, 7, 8, and 15 were dismissed by the AJ and are not at issue in this appeal.

Issue No. 5: In or around 2007, former Team Manager MTV who retired in 2017, stated to Complainant, "African-American CPAs are doing business for the most affluent people in Texas and they cut corners," or words to that effect.

Issue No. 6: On or about April 13, 2008, Complainant was subsequently demoted from Acting Team Manager with AMSD. Notably, KE authorized and signed Complainant's demotion paperwork. However, KE was not in Complainant's chain of command and he never reported directly or indirectly to KE.

Issue No. 9: In or around 2008, and continuing to the present, Complainant applied for over 30 GS-14 and Team Manager positions at the Agency. Although Complainant was considered "best qualified" for several of those positions, he was not chosen for any of the aforementioned positions.

Issue No. 10: In or around 2010, EEJ was overheard stating: "Three highly qualified African-American Agency employees in the Houston-Leland office have been targeted as not to succeed by the Agency Management Team," or words to that effect.

Issue No. 11: In or around February 2010, Complainant applied for a Team Manager position in which no other employee expressed an interest. Complainant was rated, once again, as "best qualified." However, KMK not only rejected Complainant for the position, she also selected a lesser-qualified employee without conducting an interview. KMK failed to consider Complainant's outstanding evaluations, performance awards, publications, teaching, and participation in the Career Assistance Mentoring Program.

Issue No. 12: In or around December 2010, Complainant was advised by National Treasury Employees Union (NTEU) steward, BT, to transfer from Natural Resources and Construction (NRC) due to the retaliation he was suffering after filing an EEO complaint in 2008. Complainant moved to Pre-filing and Technical Guidance in the Large Business and International Division.

Issue No. 13: In or around February 2011, Complainant incorrectly received a negative Mid-Term Evaluation from Joint Committee Team Manager CCD. When Complainant attempted to discuss the evaluation with CCD, he did not receive a response. This negative evaluation prevented Complainant from making presentations in Houston and Dallas, Texas, and other areas of the country, as well as blocked Complainant's opportunity to travel and train with the Senior Joint Committee reviewer, and also prevented Complainant from receiving valuable training and experience.

Issue No. 14: In or around May 2011, Coworker AHS and Coworker DR conducted a Joint Committee presentation for KE's and KMK's Territories in the Houston Leland Building, which is Complainant's place of duty.

Complainant offered his assistance as a co-presenter, but he was denied despite having an extensive history of successful presentations. CCD incorrectly explained to Complainant that DR had more Joint Committee experience than Complainant and that is why she was selected instead. However, Complainant and DR began working at Joint Committee at the same time. Further, AHS was hired two years after Complainant and Complainant was AHS's "on the job" instructor.

Issue No. 16: In or around 2013, during an interview for a promotion, KMK referred to Complainant in a condescending manner. Specifically, KMK denoted Complainant as the "[Complainant's nickname] guy thing," or words to that effect.

Issue No. 17: From in or around 2013 through 2014, CMD confirmed that the Agency was targeting Complainant for his prior EEO activity in 2008. CMD also informed Complainant that other Agency employees who possessed a Career Learning Plan were obtaining requested acting assignments. These acting assignments lead directly to promotional opportunities. To date, despite being qualified, Complainant has not received any acting assignment that would allow for his promotion.

Issue No. 18: In or around May and July of 2014, Complainant received absolutely no acting assignments, while a Caucasian male peer received one acting assignment and a Caucasian female peer received two acting assignments.

Issue No. 19: In or around February 2015, Complainant was transferred back to NRC. Upon his return, Complainant was immediately subjected to an extremely hostile working environment. As an example, KMK frequently micro-managed Complainant. She also would regularly monitor and question any and all actions taken by Complainant in carrying out his duties and responsibilities.

Issue No. 20: In or around February 2015, DDC called Complainant into her office and told him that she was "very angry" about Complainant's initial EEO complaint, or words to that effect.

Issue No. 21: On or about April 29, 2015, Complainant notified the Agency that it failed to abide by their portion of the 2008 Settlement Agreement. While Complainant withdrew his formal EEO complaint based upon the Agency's assertions, the Agency has specifically failed to reinstate Complainant to the AMSD program.

Issue No. 22: On or about June 26, 2015, Complainant's Career Learning Plan (CLP) was submitted to DDC. The CLP requested that Complainant be assigned as Acting Team Manager; however, it was ignored by DDC and KMK, who is the Agency official who decides on Acting Team Manager assignments.

Issue No. 23: In or around August 2015, Chief of Worklife and Wellness Programs DHJ, IR-04, who was Complainant's coworker at LB&I, said to Complainant that AHS had been recruited for an acting assignment and promoted to GS-14. DHJ said that this was unusual because the Agency reached across multiple organizational structures to promote AHS.

Issue No. 24: On or about August 19, 2015, upon returning from sick leave, Complainant learned that he was transferred from a major global oil and gas case to a much smaller, lower-profile matter, without cause or justification, which had little, if any, opportunity for promotion.

Issue No. 25: On or about September 14, 2015, during a power point presentation attended by over 30 Agency employees, KMK presented a slide entitled, "What Baggage Might Be Attached to You?" The presentation specifically addressed the consideration of an employee's "baggage" during the Agency's selection process. KMK indicated that factors outside of the application and Employee Personnel File (EPF) are used to determine who will be selected for a position. Complainant questioned KMK regarding the information used for selecting individuals for promotion and how one would determine what was considered "baggage." KMK replied that "Perception is reality," or words to that effect.

Issue No. 26: On or about September 17, 2015, KMK arbitrarily lowered Complainant's Leadership Readiness Rating from "Ready Now" to "Not Ready" without cause or justification. The downgrade was effectuated without any explanation.

Issue No. 27: On or about September 18, 2015, the President, National Treasury Employees Union, Chapter 222, advised Complainant that any factors used to determine employment and promotion outside of the application and EPF violates Agency policy.

Issue No. 28: On or about September 18, 2015, upon review of his Employee Performance File, Complainant learned that several significant current year contributions were omitted, including, but not limited to: (a) a letter of appreciation for Complainant's presentation on the Oil and Gas Unit II class; and, (b) e-mail correspondence with recommended changes to a Notice of Proposed Adjustment template for the benefit of the entire global case team.

Issue No. 29: On or about October 5, 2015, Complainant learned that Coworker LHM, who is far less qualified than Complainant and has no managerial experience, was appointed as Acting Team Manager of Complainant's team.

Issue No. 30: On or about October 21, 2015, Complainant met with KMK, who provided Complainant with an overview of the skills and experience KMK believed necessary for a promotion to a managerial or technical GS-14 position. After Complainant cited examples of his competency and skills, KMK explained that being assigned to Acting Team Manager greatly enhances the qualifications that are desired for the application process, implying that, because Complainant had not received an assignment as an Acting Team Manager, it had affected his applications.

Issue No. 31: On or about October 26, 2015, Complainant was offered and accepted a 10-day acting assignment as a GS-14 Account Coordinator for a Coordinated Account Program. However, the prior four acting assignments for this position were for up to 120 days for other employees, including four Agency employees outside Complainant's protected status.

Issue No. 32: Shortly after October 26, 2015, Coworker MDB was assigned as an acting Account Coordinator for a 120-day period, while Complainant had received only a 10-day assignment.

Issue No. 33: In or around December 2015, after approximately three months of determined attempts by Complainant to revise the September 2015 Leadership Readiness Rating, KMK finally complied and properly restored the rating to "Ready Now."

Issue No. 34: On or about January 8, 2016, EEJ told LHM that, "[Complainant] has not done or shown me anything as a GS-13 Agent" or words to that effect.

Issue No. 35: On or about January 11, 2016, MBD, who had been assigned as an acting Account Coordinator for a 120-day period, was reassigned to her role as Team Member due to prior obligations for that role. MBD continued to retain full GS-14 pay for the 120 days, even after she was reassigned as Team Member.

Issue No. 36: On or about January 11, 2016, Complainant learned KMK and EEJ had rejected him for the long-term GS-14 Account Coordinator Acting assignment. Instead, KMK and EEJ selected a different Agency employee as the permanent GS-14 Account Coordinator, notwithstanding that the employee was physically located in a different territory in New Orleans, Louisiana, which will require her to travel to Houston, Texas, on a monthly or quarterly basis.

Issue No. 37: On or about January 11, 2016, LHM informed Complainant of EEJ's statement from on or about January 8, 2016. Complainant expressed his concerns over the negative comment, noting that he possessed email correspondence from EEJ and performance appraisals providing positive feedback regarding his work.

Issue No. 38: On or about January 12, 2016, LHM e-mailed EEJ to inform her, inter alia, that although Complainant only received a short acting Account Coordinator assignment, Complainant exhibited an "excellent job" and he demonstrated that he can "step up and play a more significant role when needed."

Issue No. 39: On or about January 12, 2016, Complainant communicated with a different Team Manager to follow-up on his prior conversation with LHM. Complainant, once again, expressed his concern that EEJ's unfounded negative comments unjustly tarnish his reputation and credibility.

Agency No. 16-0671-F

On November 7, 2016, Complainant filed EEO complaint Agency No. 16-0671-F alleging that the Agency discriminated against him on the bases of race (African-American), color (black), sex, age, disability, and in reprisal for prior protected EEO activity (2008 complaint alleging violation under Title VII) when:

Issue No. 40: On February 18, 2016, at a grievance meeting, KMK interrupted Complainant with an offensive comment.

Issue No. 41: On June 22, 2016, Complainant was denied the opportunity to be a presenter at a briefing for certain Agency Executives.

Issue No. 42: On July 19, 2016, Complainant learned that his Coordinated Assurance Program issues for a current case were reassigned, and he was not given Primary Team Coordinator permissions in the Issue Management System.

Issue No. 43: On July 21, 2016, Complainant was not selected for the position of Team Manager, IR-0512-04, under Vacancy Announcement Number 16CS6-LBM0354-0512-04-CC.

Issue No. 44: On July 29, 2016, Complainant was not selected for the position of Supervisory Revenue Agent, GS-0512-14, under Vacancy Announcement Number 16CS6-LBB0473-0512-14-CC.⁵

Amended Claim

On June 28, 2017, Complainant filed an amendment to his consolidated EEO complaints alleging that the Agency discriminated against him on the bases of race (African-American), color (black), sex, age, disability, and in reprisal for prior protected EEO activity (2008 complaint alleging violation under Title VII) when:

Issue No. 45: On or about June 21, 2017, Complainant received an erroneous Leadership Succession Review (LSR) report where the Agency's management impermissibly downgraded and rated him one level below the next step in the following competencies: (1) Leading Others with Managing Performance; and (2) Business Results with Problem Solving and Decision Making, Leveraging Resources, and Strategic Planning and Implementation.

⁵ Although this position is listed in the AJ's decision as Supervisory Revenue Agent, the record reflects that the position was a Senior Revenue Agent.

Procedural Background

At the conclusion of the investigation of Complainant's complaint, Agency No. 16-0044-F, the Agency provided Complainant with a copy of each report of investigation and notice of his right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant requested a hearing. Upon Complainant's motion, the AJ reinstated claims 1-28 which the Agency had dismissed and remanded the complaint to the Agency for investigation in congruence with Complainant's second complaint. Upon completion of the investigation on both complaints, Complainant requested a hearing and the AJ consolidated the complaints.

After the completion of the discovery period, the Agency filed a Motion to Dismiss and Motion for Partial Summary Judgment. Complainant filed a response in opposition. In that response, Complainant withdrew the bases of sex, age, and disability for both complaints and the amended claim. The AJ did not issue a ruling on either parties' filings. The complaints proceeded to a hearing before the AJ.

Hearing on Both Complaints

The AJ held a hearing on August 9-10 and September 25-26, 2018. As an initial matter at the hearing, the Agency renewed its motion to dismiss claims 1-27, 30, 35, and 37-39 as the subject of an August 4, 2008 EEO settlement agreement, for untimely EEO Counselor contact, and/or for failure to state a claim. The AJ granted dismissal with regard to claims 2, 3, 4, 7, 8, and 15. The AJ found each issue as written failed to state a claim under Title VII and constituted factual statements without alleged harm suffered by Complainant. Additionally, the AJ found that all claims which referenced the 2008 Settlement Agreement or any acts related to the settlement agreement would be retained, not as support for an ultimate finding of breach of the settlement, but rather as background for an allegation of a hostile work environment based on reprisal. The AJ did not address the Agency's arguments with regard to timeliness of EEO Counselor contact. During the hearing, 20 witnesses testified, including Complainant.

Complainant's Testimony

Complainant testified that, as a result of filing his prior EEO complaint, he has been effectively blocked from succeeding within the Houston office by KMK and EEJ. Complainant testified he has received a rating of "outstanding" or "fully successful" since before he filed his first EEO complaint. Complainant is a Certified Public Accountant (CPA) and former military service member. Complainant testified that, after his 2008 complaint, he was never selected for permanent GS-14 positions, acting positions with GS-14 status, or experience which would bolster his chances to be selected for a technical, managerial, or executive position at the GS-14 grade level.

Complainant testified that Coworker KSG told him that KMK and EEJ specifically retaliated against him and blocked him from the Best Qualified list for Senior Revenue Agent while advancing MBD's case experience in order for MBD to be selected. Complainant stated that frequently only senior territory managers like KMK and EEJ had knowledge of open GS-14 positions and that he was blocked from those positions. Complainant testified that those senior managers made the decisions on those positions, sometimes without posting notice of the vacancy. Complainant alleged that they maintained a "not to succeed" list of individuals who they were not going to promote. Complainant stated that he was told he and a couple other African-American employees were on the "not to succeed" list.

Complainant testified that after not receiving senior positions or assignments despite his requests for career elevation, in January 2016 his team lead at the time (LHM) emailed EEJ describing Complainant's superior qualifications and recommended him for a more senior role. Complainant was given a copy of the email by LHM but Complainant was never given any positions or assignments thereafter. Complainant stated that, on the contrary, some of his tasks on particular cases were taken away in July 2016. Complainant stated that EEJ informed him that the reason his tasks were reassigned from him was to accommodate a new GS-14 Senior Revenue Agent, JWC, who was coming onboard.

Complainant testified that he was repeatedly removed from his assigned CIC cases, which he stated provide experience and sometimes are required for certain GS-14 vacancy postings. After he was removed from another CIC case in or around September 2015, Complainant and around 30 other employees attended a Senior Team Coordinator Program training hosted by KMK and EEJ. Complainant explained that the function and purpose of the training was to teach potential candidates how to improve their abilities during an interview and inform them how the selections were made. During the presentation, KMK presented several slides about "baggage", and stated that certain employees have baggage attached to them. Complainant testified that KMK stated that this baggage, even though it may or may not be true, will affect the outcome of the selection process. Complainant testified that KMK stated comments such as "Perception is reality" and "The IRS memory is long, like an elephant's trunk." Complainant stated that he followed up with her after the training and "[KMK] said that your EEO activity is baggage, and it will harm your ability to get promoted." When questioned on her alleged statements during the hearing, KMK denied making such statements about Complainant's EEO activity.

Additionally, Complainant testified that it was his belief that KMK was purposely excluding him from certain vacant positions because, as a senior territory manager, KMK selected the application-vacancy questions. Complainant stated that, on or around October 21, 2015, he met with KMK to discuss the skills and experience necessary for a promotion to a managerial or technical GS-14 position. Complainant stated that KMK explained that being assigned as Acting Team Manager enhances the qualifications for managerial positions. Complainant testified that, despite his requests, he had yet to be noncompetitively or competitively selected for an Acting Team Manager position.

Additionally, Complainant testified that because KMK was in charge of selecting the vacancy application qualifications and questions, he believed she was effectively excluding him from managerial positions by adding qualifications that she knew Complainant had not attained yet.

Complainant also testified about a grievance meeting regarding Complainant's annual evaluation on February 18, 2016. The meeting was attended by Complainant, KMK, and the Chief Union Steward, who was a Senior Revenue Agent. During the meeting, Complainant testified, as corroborated by the Chief Union Steward, that KMK stated, with a negative tone of voice, that KMK did not care that Complainant was a CPA.

JKE's Testimony

JKE provided testimony at the hearing about Complainant and his (JKE's) opinion based on his 41 years working for the Agency. When questioned whether KMK and KE were influencing other managers to have a negative opinion of Complainant, JKE stated his belief that they influenced other management officials. Additionally, JKE stated that another management official directly questioned his hiring of another qualified African-American employee (DHJ) and said something like "Not another [Complainant's name]". JKE testified that KE, as executive assistant to the industry director, more than likely would have been aware of Complainant's EEO activity.

Additionally, JKE testified that he believed KMK had a negative impact on Complainant's ability to climb the career-ladder in Houston by influencing managers. JKE testified that Complainant was negatively impacted by not having been selected for positions or promotions, or offered the opportunities to improve his experience in order to attain open positions. JKE testified that it was unusual for someone as well-qualified as Complainant not to attain a GS-14 position in the 11 or 12 years he had tried, when considering how many openings and promotion opportunities have been available to that office. JKE verified that personnel issues were openly discussed amongst territory managers like KMK. JKE testified that he had no knowledge of KMK or KE making derogatory comments about Complainant's race or EEO activity.

DHJ's Testimony

DHJ testified about the culture of the Houston office and his personal knowledge of Complainant's career path. In his affidavit, when asked about an unwritten "not to succeed" list of African-Americans, DHJ stated he does not know if there was an unwritten list as Complainant described but he did believe that some very qualified African-Americans were not afforded the same detail, temporary promotions, or permanent promotion opportunities as others. DHJ added that there seemed to be a connection between African-American employees in LB&I Houston who are supported by JKE who do not receive support and promotion opportunities by management. At the hearing, DHJ restated these beliefs but then also stated that the statements were meant generally and not with regard to one particular protected class. DHJ stated that the executive, territory, and senior manager positions in LB&I in Houston during the time in question would be the individuals to make the determinations on career advancements.

DW's Testimony

Coworker DW, an Internal Revenue Agent, was also called to testify at the hearing. Around 2009 or 2010, Complainant served as Acting Team Manager and DW's supervisor for a time. During that time JKE was DW's second-level supervisor. DW testified at the hearing that she learned of Complainant's EEO activity through the Agency's Houston office "rumor mill" after Complainant's 2008 Settlement Agreement. DW stated that years before she learned of Complainant's instant complaints, someone within the Agency told her that Complainant was no longer in the management program and had been filing EEO complaints and grievances. When questioned on whether rumors typically go around about personnel actions, DW confirmed anything is subject to the rumor mill in Houston.

DW also confirmed that she did not get along with Complainant. She admitted that, during the time Complainant supervised her as Acting Team Manager, she would discuss her complaints about Complainant with her husband, who worked for the headquarters staff of the LB&I. At the time DW was a direct-report to Complainant, DW's husband directly reported to KE. Complainant testified that, while KE was not in his direct chain of command, KE signed off on his removal from the AMSD program in 2008. Complainant testified that "there was a lot of negative things being said through [DW's] husband, that went through NRC headquarters that were totally unfounded."

KSG's Testimony

Coworker KSG, a Senior Internal Revenue Agent, testified that he had worked with Complainant since he (KSG) started with the Houston office. KSG testified it took him two or three years to attain GS-14 status as a revenue agent in Houston. He noted that Complainant, in the time he (KSG) has been there, has not been promoted or given an acting assignment nor, he believes, given the opportunity to act as "CAP Coordinator" or Senior Revenue Agent on a particular case. KSG stated that he believed it was unusual for Complainant not to be promoted to GS-14, assuming he was submitting applications, over the 12 to 15-year period Complainant had been there.

KSG also testified about the rumor mill in the Agency's Houston office. KSG testified that he learned of Complainant's EEO activity when he overheard another employee and MBD discussing Complainant's complaint. KSG also stated he had heard his manager discussing Complainant's complaint. KSG testified that he believed management in the Houston office has a negative opinion about filing EEO cases. KSG stated that he overheard managers discussing EEJ's 200-page response to Complainant's EEO investigation, and some of the other managers were laughing about it, saying it was excessive.

BT's Testimony

BT, who was aware of Complainant's 2008 Settlement Agreement due to her role as a union steward, testified at the hearing that the Agency's Houston office had a negative culture towards African-American or black employees. BT stated that, in her role as a union steward, she would work with individuals considering filing grievances when they were not selected for positions and she would review the data on applicants and selectees. BT stated that it was her opinion that Complainant experienced backlash as a result of his prior EEO activity when the Agency failed to provide him promotional opportunities. BT testified that during the timeframe of 2008 - 2016, there was little to no African-American males in LB&I.

Additionally, BT stated that she had a lot of experience in the EEO process outside of the grievance filing process she was involved with. When asked whether she believed Complainant's EEO activity impacted him in any way within the Agency, she responded affirmatively that the rumor mill at the Agency is "probably 99 percent correct when you talk to people." BT testified that it was her belief Complainant had been blackballed because "it's not like there is a long line of people wanting to go into management, not here in Houston." BT stated, in her opinion, there could be "no other reason other than the fact he filed an EEO" complaint in 2008 and again in 2015. BT testified the Houston office provides a lot of opportunities for managerial, supervisory roles but admitted she was not involved in the hiring process for those positions.

CMD's Testimony

CMD testified that she directly supervised Complainant from January 2012 to February 2015. CMD testified that it took her five years as a revenue agent to reach the GS-14 level. During that time, CMD stated, Complainant was an outstanding employee whom she believed was rated outstanding on performance evaluations. CMD testified that only territory managers can give grade-level increases, including temporary assignments to GS-14. She inquired with her supervisor at the time whether Complainant could receive a temporary GS-14 assignment but, to her knowledge, nothing came from her inquiry. During that time, CMD acknowledged, two other White revenue agents⁶, who were similarly-situated to Complainant, were granted promotional acting assignments. CMD denied telling Complainant that he was targeted for his EEO activity or that lesser-qualified individuals were receiving temporary promotions while he was not.

KMK's Testimony

KMK testified she was the Territory 1 Manager, which was Complainant's territory as a revenue agent in LB&I. KMK was also Complainant's direct supervisor for one year between 2015-2016. KMK testified that, during that time, she gave Complainant one acting GS-14 position for ten days. KMK testified it was a courtesy "because all of these people that are on the list, as I mentioned, we knew from experience that a lot of these people had been applying for positions."

⁶ One of these individuals was AHS.

During the same time frame, KMK confirmed, she had noncompetitively promoted several other GS-13 Revenue Agents for periods of 120 days, and confirmed that each of those five other employees promoted was white and Caucasian.

KMK testified that she was made aware of Complainant's EEO filing in April 2015 but denied reviewing the filing at the time to see Complainant's 2008 Settlement Agreement within that documentation. When questioned about the presentation in 2015 and reference to "baggage," KMK stated that she did not believe baggage would refer to someone's EEO activity because in an ideal interview process, hiring managers would not know about someone's EEO activity. KMK denied that any actions she took or any part she had in the hiring process for which Complainant was an applicant were based on Complainant's race, color, or EEO activity. KMK denied that she wrote the questions used for vacancy announcements or in the hiring process so as to exclude Complainant. KMK denied the existence, to her knowledge, of a "not to succeed" list. KMK testified that, for the selections she was a part of, Complainant was either not on the Best Qualified list, had answers to interview questions which were inferior to other candidates, or was not more qualified than the ultimate selectee.

When questioned whether she had changed Complainant's 2015 LSR rating, KMK affirmed she had. KMK testified that she initially rated Complainant as "not ready" for the 2015 LSR cycle. LSR cycles are two-year cycles with ratings at the end of the cycles. However, upon learning a previous manager had given Complainant an LSR rating in a prior LSR cycle as "ready," KMK changed Complainant's rating to "ready" to conform with the previous manager's rating. KMK testified that, whether or not she believed he was "not ready," it was "worth giving [either Complainant or previous manager] the benefit of the doubt because his prior manager, who had seen him for more than ... a few months had determined that [Complainant] was 'ready now' at that point in time."

EEJ's Testimony

EEJ testified at the hearing that she has been the Territory 2 Manager for approximately five years and that Complainant started in her territory in 2016. EEJ testified she was consistently made aware of Complainant's career aspirations by his current supervisor, JWC, and his previous acting supervisor, LHM. EEJ testified that, pursuant to a blackout memo issued in the end of 2015 by the Agency concerning reorganization, all temporary promotions were frozen starting in February 2016.

EEJ testified that she sat on the hiring panel for at least three GS-14 positions that Complainant applied for, as well as served as selecting official for other GS-14 positions Complainant applied for. EEJ testified that Complainant was not selected for any of those positions. EEJ admitted that Complainant "certainly meets the minimum requirements for Grade 14" both in a technical role and a managerial role. EEJ also testified Complainant generally did very well in interviews, but was never rated the highest. On cross examination, EEJ admitted that, for one vacancy, two of the lowest-rated individuals on interviews were African-Americans with prior EEO activity.

EEJ testified that Complainant's responses to interview questions were not as strong as other candidates, including JWC, for one of the GS-14 vacancies. EEJ testified that Complainant was considered a subject matter expert (SME) on the oil and gas industry and has participated as a presenter on those matters within the Agency.

EEJ testified that, even prior to her appointment as Territory 2 Manager and prior to the blackout memo, Territory Managers (including KMK), maintained a list of individuals managers desired to place in acting assignments or temporary promotions. EEJ testified that, prior to her, KMK maintained the list for Territories 1 and 2 and, to her recollection, Complainant was on that list.

KE's Testimony

KE testified that while she was an Executive Assistant in 2008, she had no knowledge of Complainant's EEO activity. KE admitted that she approved Complainant's change of grade to a lower grade in 2008, which was marked as "termination of temporary promotion" for his removal from the AMSD program (the subject of Complainant's 2008 Settlement Agreement). After she (KE) moved laterally to Territory Manager, Complainant fell under her chain of command. KE testified that she has served on interview panels for candidates including Complainant since that time. KE testified that the interview panels compose the interview questions and that all candidates are asked the same questions. KE stated that she did not find it unusual for someone with Complainant's tenure and experience at the Agency not to receive a promotion since 2008. KE testified that it is Complainant's manager's responsibility to try to facilitate assignments which would promote those GS-14 opportunities. KE and KMK worked closely together as peers over the years at the Houston office. EEJ took over KE's position as Territory 2 Manager after KE moved roles.

AJ Decision

The AJ issued a decision on April 9, 2019, finding that Complainant was subjected to a hostile work environment based on his race, color, and prior EEO activity.

In the decision, the AJ found that the Agency primarily retaliated against Complainant due to his prior EEO activity. The AJ was not persuaded by the Agency's arguments that Complainant was not qualified for vacancies because he lacked experience. The AJ found that, after Complainant initiated his protected EEO activity, the Agency refused to provide him the requisite experience through temporary promotions and acting assignments. Moreover, the AJ described Complainant's superior experience and qualifications as "jumping off the page as compared to selectees." The AJ found that Agency employees' and supervisors' open discussions, and even laughing comments, about Complainant's pending EEO matters established *per se* retaliation. Additionally, the AJ found that KMK's comments that applicants with "baggage" are less likely to be promoted was further evidence of *per se* retaliation, given her admission that "baggage" could refer to Complainant's "reputation" for filing EEO complaints.

Additionally, the AJ found that the Agency exhibited discriminatory animus towards Complainant and subjected him to a hostile work environment based on his race and color. The AJ noted that Complainant's testimony as to KMK's reputation for using the "n" word and KMK's unusually high level of animosity towards Complainant during the February 2016 grievance meeting, as well as DW's display of vitriol at the EEO hearing left no doubt that some of the Agency's actions were based on Complainant's protected classes. As such, the AJ found that the Agency's stated reasons for its actions were provided in an attempt to hide the true reasons: retaliatory and discriminatory animus.

The AJ noted that the length of time Complainant suffered additional emotional harm resulting from the Agency's actions was approximately ten years. Complainant and his physician testified that Complainant experienced intermittent insomnia, anxiety, heart palpitations, some digestive issues, nervousness, and headaches. Complainant also testified that, as a result of stress from the incidents alleged, he experienced marital problems, disinterest in his church activities, and had to use more leave as a result of the alleged harassment and to work on his EEO cases.

As relief, the AJ awarded Complainant: \$275,000 in nonpecuniary, compensatory damages; retroactive promotion to Senior Revenue Agent, GS-14, effective November 26, 2013; back pay,⁷ with interest if applicable, and other benefits pursuant to 29 C.F.R. § 1614.105, from November 26, 2013, to March 27, 2019; a lump sum payment designed to offset Complainant's increased tax liability stemming from the lump sum back pay; and restoration of leave in the amount of 500 hours for the period 2013-2018. Additionally, the AJ awarded Complainant all damages sought including: out-of-pocket medical expenses in the amount of \$6,653.37; out-of-pocket, non-attorney fee litigation costs in the amount of \$1,295.14; \$85,421.50 in attorney's fees and other professional fees, including expert witness fees; attorney litigation costs in the amount of \$10,355.37; \$5,149.31 in credit card interest on attorney's fees; and interest on the pecuniary damages, nonpecuniary damages, attorney's fees and costs accruing at the maximum legal rate until the Agency paid all damages, fees, and costs awarded. Moreover, the AJ ordered the Agency to post a written notice⁸ at the facility that discrimination had been found on an EEO complaint and required training for all staff in the LB&I division of the Agency's Houston District regarding the provisions of Title VII.

⁷ The AJ found, in the alternative, Agency shall determine the appropriate amount of front pay (with interest if applicable) and other benefits due pursuant to 29 C.F.R. § 1614.105, for a Senior Revenue Agent position, for a period of no less than two years (with interest calculated from March 27, 2019).

⁸ The AJ's decision ordered a notice of the discrimination finding to be posted for "ninety (120) days", but a review of the transcript of the bench decision indicates the AJ noted specifically posting should be for 120 days.

The Agency subsequently issued a final order rejecting the AJ's finding that Complainant proved that the Agency subjected him to discrimination as alleged. Simultaneously with its issuance of the final order, the Agency filed this appeal.⁹ Complainant also filed what he characterized as an "appeal" of the final order to the Commission, but which is simply a request to affirm the AJ's decision.

CONTENTIONS ON APPEAL

On appeal, the Agency requests this Commission reverse the findings of the AJ and find that Complainant failed to establish discrimination as alleged. The Agency challenges the AJ's credibility determination and argues that management officials' testimony was not inconsistent but instead showed that Complainant's experience was not on par with other selectees. The Agency argues that the AJ erred in finding that Complainant was not placed on the Best Qualified List, was plainly more qualified than the selectees, and was targeted by the Agency in retaliation for his EEO activity. The Agency contends the AJ based those findings on the uncorroborated, uncertain testimony of Complainant at trial and nothing else. Furthermore, the Agency maintains the AJ erred in denying the Agency's Motion to Dismiss with regards to claims 1, 5-6, 9-14, 16-23, 25, 27, 30, 35, and 37-39 as the subject of an August 4, 2008 EEO settlement, for untimely EEO Counselor contact, and/or for failure to state a claim.

Additionally, the Agency also challenges the remedial awards, including damages, attorney's fees, and costs. From the outset, the Agency maintains that the AJ erred in awarding a retroactive promotion effective November 26, 2013, prior to Complainant's first timely GS-14 non-selection claim, *i.e.*, issue 44, occurring on July 20, 2016. The Agency argues Complainant's supplemental damages petition should be stricken from the record. The Agency contends that nonpecuniary damages should be reduced because, even if Complainant experienced discrimination, Complainant's medical testimony supports only an aggravation of pre-existing medical conditions, and Complainant's testimony makes clear that he was not personally subjected to any overt racism. The Agency contends the AJ's award is monstrously excessive and inconsistent with the Commission's precedent in similar circumstances. With regard to attorney's fees, while the Agency does not dispute the reasonableness of the rates charged, it does dispute the hours expended and compensable. The Agency also challenges the costs awarded, including the interest on attorney's fees.

Complainant, as noted, requests this Commission affirm the AJ's decision and relief granted.

⁹ To the extent Complainant argues in his brief on appeal that the Agency failed to issue a final order within 40 days of the AJ's decision, we find the record directly contradicts this assertion. The Agency issued a final order rejecting the AJ's decision on May 20, 2019, which Complainant contends was the last day to timely issue a final order in accordance with 29 C.F.R. §1614.604(d). On the same day, the Agency filed an appeal to the Commission via FedSep and attached notice of the Agency's intention not to fully implement the AJ's order, which the Agency stated constituted its final order, as well as Complainant's rights to appeal.

ANALYSIS AND FINDINGS

Standard of Review

Pursuant to 29 C.F.R. § 1614.405(a), all post-hearing factual findings by an AJ will be upheld if supported by substantial evidence in the record. Substantial evidence is defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 477 (1951) (citation omitted). A finding regarding whether or not discriminatory intent existed is a factual finding. See Pullman-Standard Co. v. Swint, 456 U.S. 273, 293 (1982). An AJ's conclusions of law are subject to a *de novo* standard of review, whether or not a hearing was held. See, e.g., Tannerhill v. U.S. Postal Serv., EEOC Appeal No. 01A34002 (Sept. 30, 2004).

Credibility Findings by the AJ

An AJ's credibility determination based on the demeanor or the tone of voice of a witness will be accepted unless documents or other objective evidence so contradicts the testimony or the testimony so lacks in credibility that a reasonable fact-finder would not credit it. See EEOC Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), Chap. 9, at § VI.B. (Aug. 5, 2015). In this case, we note that the AJ rendered credibility determinations that ultimately led to the AJ's finding of discrimination. With regard to DW, the AJ noted that DW's “display of vitriol at hearing leave no doubt that some of the Agency's actions were based on Complainant's protected class.” The AJ found that DW's testimony and actions showed her distaste for Complainant and that there was “something else underneath” that distaste which the AJ found to be racial animus towards Complainant.

The AJ found Complainant's wife credible and stated that she provided “eloquent, powerful and poignant testimony” about the Agency's impact on Complainant's enjoyment of life, interpersonal relationships with his family, and his ability to function as a Deacon in their church. The AJ went as far as to note that it was one of the most powerful testimonies ever heard by the AJ. Additionally, the AJ found credible BT's testimony that within the Agency there was a “negative culture” towards African-Americans.

The AJ found KMK's testimony less credible and was skeptical of KMK's knowledge of the events or contradicting statements. The AJ determined that KMK's reference to Complainant's “baggage” and admission that baggage could be referring to his reputation was additional evidence that retaliation was part of the Agency's failure to promote Complainant. The AJ noted that testimony from multiple Agency officials detailed Complainant's reputation for filing EEO complaints, as Complainant's pending EEO complaints and prior EEO activity were openly discussed within the workplace. The AJ noted that when KMK was presented with her own prior sworn statement from her deposition, which contradicted her testimony, KMK changed her testimony and stated that “baggage” could mean reputation.

The AJ observed that, despite KMK's assertions that reputation was not considered in the selection process, the entire purpose of the presentation KMK gave was to teach individuals at the facility about interviewing and emphasize to the audience how to present their best self during the interview process. KMK was presenting as an expert on the Agency's selection process. The AJ noted that on cross examination KMK changed her response, which the AJ found showed pretext and bias at play by Agency officials.

We find that substantial evidence in the record supports the AJ's finding that KMK made contradictory statements regarding the meaning of "baggage" and also supports the AJ's finding that testimony from Agency officials established Complainant had a reputation within the office for filing EEO complaints. Moreover, the AJ noted that KMK's inability to recall a 2016 grievance meeting, during which other witnesses credibly testified that KMK was engaged in a heated argument with Complainant, played a role in casting serious doubt on her credibility.

As for KE's testimony, the AJ found her testimony with regard to KE's involvement in Complainant's removal from the AMSD program to be "wholly inconsistent and unworthy of credibility." The AJ was persuaded by JKE's testimony with regard to his knowledge while serving as Executive Assistant for EEO matters within the Agency, and KE's previous role as Executive Assistant. JKE testified that KE, as Executive Assistant to the Industry Director, more than likely would have been aware of Complainant's EEO activity. The AJ found Agency officials' testimony about Complainant's non-selections to be "rehearsed recitation[s] of implausible explanations" for the Agency's actions.

Additionally, the AJ found direct evidence of retaliatory animus in the testimony from multiple Agency officials that Complainant's pending EEO complaints and prior activity were openly discussed. The AJ found that no management official took responsibility for the decision, much less provided a reason for the decision to not select Complainant.

We find that any inconsistency in KMK, KE, and other RMOs' testimony, as noted by the AJ, is material because it speaks to their credibility. As such, we find that the Agency failed to show that we should not accept the AJ's credibility determinations.

Agency's Motion to Dismiss

Initially, we address the Agency's contentions on appeal regarding the manner in which the AJ processed the complaint before the EEOC Hearings Unit. The Agency initially dismissed Complainant's claims 1 – 23, 25, 27, 29, 30, and 32. Over the Agency's objections, the AJ reversed the dismissal, without specifically addressing the grounds upon which dismissal was not warranted, and remanded for investigation the original, amended, and second complaints. The Agency renewed its motion to dismiss after Complainant filed a request for hearing, and again, before the start of the hearing.

As an initial matter at the hearing, the AJ heard arguments on the motion for dismissal from both parties and granted dismissal with regard to claims 2, 3, 4, 7, 8, and 15.¹⁰ On appeal, the Agency contends the AJ erred in denying the Agency's Motion to Dismiss with regard to Issues 1, 5-6, 9-14, 16-23, 25, 27, 30, 35, and 37-39 for untimely EEO Counselor contact, for failure to state a claim, and/or as the subject of the August 4, 2008 EEO settlement.¹¹

Under 29 C.F.R. §1614.105(a)(1), complaints of discrimination should be brought to the attention of the EEO Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of a personnel action, within 45 days of the effective date of the action. The Commission has adopted a "reasonable suspicion" standard (as opposed to a "supportive facts" standard) to determine when the 45-day limitation period is triggered. See Howard v. Dep't of the Navy, EEOC Request No. 05970852 (Feb. 11, 1999). Thus, the time limitation is not triggered until a complainant reasonably suspects discrimination, but before all the facts that support a charge of discrimination have become apparent. Complainant v. U.S. Postal Serv., EEOC Appeal No. 0120120499 (Apr. 19, 2012). The Supreme Court has held that a complainant alleging a hostile work environment will not be time barred if all acts constituting the claim are part of the same unlawful practice and at least one act falls within the filing period. See Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (June 10, 2002). The Court further held, however, that "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges." Id. Finally, the Court held that such untimely discrete acts may be used as background evidence in support of a timely claim. Id.

We find that Complainant initiated contact with an EEO Counselor on October 2, 2015, alleging discrimination and hostile work environment. The Agency maintains that all claims arising on or before August 18, 2015, are time-barred, which includes claims 1, 5-6, 9-14, and 16-23. To support its argument, the Agency provided evidence of Complainant's notice of his obligation to seek EEO counseling within 45 days through mandatory NO FEAR Act briefings that Complainant completed throughout his years with the Agency, including as recently as July 30, 2015. Complainant did not initiate EEO Counselor contact until October 2, 2015.

The Agency's motion to dismiss contends that, while these untimely claims can be used for background in support of Complainant's overall hostile work environment claim, he cannot recover for these issues because they were untimely raised. Additionally, the Agency argues that claim 21 is an untimely claim of breach of the 2008 Settlement Agreement and should be dismissed pursuant to 29 C.F.R. §1614.504(a).

On appeal, Complainant does not address the Agency's arguments that the AJ erred in not dismissing these claims. We have, however, reviewed Complainant's arguments in pleadings and at the hearing before the AJ.

¹⁰ Complainant does not challenge the dismissal of these claims on appeal.

¹¹ The Agency clarified in their brief on appeal that while they initially argued Claim 24 was untimely raised with an EEO Counselor, further review indicates this claim was timely raised.

Complainant contended that, while these claims were untimely raised, they were investigated pursuant to a remand order issued by the AJ and should be a part of the EEO complaint.

Upon review, we find that claims 1, 5-6, 9-14, and 16-23 were not timely raised with an EEO Counselor and that Complainant has failed to establish how these untimely claims are a part of the same unlawful practice alleged in timely-raised claims. We will use these claims, however, as background evidence to support Complainant's remaining claims of discrimination.

We turn to the Agency's arguments that claims 25, 27, 30, 35, and 37-39 were erroneously not dismissed by the AJ for failure to state a claim. We note that an agency shall accept a complaint from an aggrieved employee or applicant for employment who believes that he or she has been discriminated against by that agency because of race, color, religion, sex, national origin, age or disabling condition. 29 C.F.R. §§ 1614.103, 1614.106(a). The Commission's federal sector case precedent has long defined an "aggrieved employee" as one who suffers a present harm or loss with respect to a term, condition, or privilege of employment for which there is a remedy. Diaz v. Dep't of the Air Force, EEOC Request No. 05931049 (Apr. 21, 1994). If a complainant cannot establish that they are aggrieved, the Agency shall dismiss a complaint for failure to state a claim. 29 C.F.R. § 1614.107(a)(1).

In determining whether a harassment complaint states a claim, the Commission has repeatedly examined whether a complainant's harassment claims, when considered together and assumed to be true, are sufficient to state a hostile or abusive work environment claim. As such, a claim of harassment may survive if it alleges conduct that is sufficiently severe or pervasive to alter the conditions of the complainant's employment. See Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993). However, we have repeatedly found that allegations of a few isolated incidents of harassment usually will not be sufficient to state a harassment claim. See Phillips v. Dep't of Veterans Affairs, EEOC Request No. 05960030 (July 12, 1996); Banks v. Dep't of Health and Human Servs., EEOC Request No. 05940481 (Feb. 16, 1995).

As Complainant is raising a reprisal claim, we note that the Commission previously has stated that adverse actions need not qualify as "ultimate employment actions" or materially affect the terms and conditions of employment to constitute retaliation. Complainant v. U.S. Postal Serv., EEOC Request No. 05980410 (Nov. 4, 1999). Instead, claims based on statutory retaliation clauses are reviewed "with a broad view of coverage. Under Commission policy, a complainant is protected from any retaliatory discrimination that is reasonably likely to deter ... complainant or others from engaging in protected activity." Complainant v. U.S. Postal Serv., EEOC Appeal No. 0120070788 (Mar. 29, 2007).

In the instant case, claims 27, 30, 35, and 37-39 do not allege any actions that would be reasonably likely to deter Complainant or others from engaging in the EEO process. Nor did Complainant show that he was harmed by these claims. However, reviewing claim 25 with this broad view, we find that claim 25 could reasonably deter Complainant or others from engaging in the EEO process.

Additionally, as Complainant argued before the AJ, three days or less after this incident, Complainant's LSR rating was lowered. Claim 25 directly goes to KMK's view of EEO activity in the selection process, knowledge of Complainant's desire for promotional opportunities, and knowledge of Complainant's EEO activity. We find that, taking this broad view, given the evidence and considering the claims together, claim 25 points directly to Complainant's allegation of a hostile work environment where the "rumor mill" and culture of the Houston office with regard to protected activity would be reasonably likely to deter an individual from engaging in the EEO process.

Accordingly, we dismiss claims 1, 5-6, 9-14, 16-23, 27, 30, 33, 35, and 37-39. However, these claims will be used as background evidence of discrimination in support of Complainant's remaining claims. As detailed, we find the AJ erred by not dismissing these specific claims. Furthermore, we find that claim 33 does not state a claim of harm independent from claim 26. Therefore, we dismiss claim 33 for failure to state a claim pursuant to 29 C.F.R. § 1614.107(a)(1).

Notwithstanding the Agency's arguments, we find that the AJ did not err in retaining claim 25. Additionally, claims 40-45, which were not challenged on procedural grounds by the Agency, remain. The remaining claims for analysis are claims 24-26, 28, 29, 31, 32, 34, 36, and 40-45.

Retaliation

We will first address Complainant's claims of retaliation, as the AJ found the Agency retaliated against Complainant based on his prior EEO activity. The AJ found that Complainant established that he was subjected to a hostile work environment based on reprisal.

For a retaliatory harassment claim, the alleged retaliatory actions need not impact a term, condition, or privilege of employment. See Burlington Northern and Santa Fe Railway Co. v. White, 548 U.S. 53 (2006). A complainant need only show that a materially adverse action "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." Id. 548 U.S. at 68. The Commission's guidance states if the conduct would be sufficiently material to deter protected activity in the given context, even if it were insufficiently severe or pervasive to create a hostile work environment, there would be actionable retaliation. EEOC Enforcement Guidance on Retaliation and Related Issues, No. 915.004 (August 25, 2016).

Complainant established that he engaged in protected EEO activity at the latest in August 2008 when he signed a settlement agreement. Complainant testified that, as a result of his EEO activity, he was passed over for promotions and open positions, including temporary or acting assignments which would improve his experience within the Agency and support a lateral career move. KMK stated at the hearing that she learned of Complainant's EEO activity in April 2015, although she attempted to argue that, while she saw documents that dealt with an EEO settlement, she thought the documents were related to a grievance Complainant had filed previously.

Complainant testified that KMK had stated that part of the “baggage” used when reviewing candidates for open positions was their reputation for filing EEO complaints. Additionally, Complainant’s EEO activity was the subject of the facility’s “rumor mill.”

Complainant also testified that, after KMK learned of his EEO activity on or before April 2015, his major global oil and gas case was taken away from him and he was given a much smaller, lower-profile matter, which limited his opportunities for promotion (claim 24). He stated that the reassignment of his CIC caseload occurred under KMK’s supervision on August 19, 2015, after he returned from sick leave. KMK admitted that she reassigned Complainant’s caseload in August 2015 as a “part of kind of a movement.” KMK did not detail others who had major cases reassigned. KMK stated that after Complainant was moved to the new case, she believed an opportunity would arise for Complainant to serve as a team coordinator. KMK stated that this opportunity would be beneficial to Complainant because she noticed he had trouble taking directions from both senior team coordinators on his new assignment. KMK stated that the reason for the reassignment was so Complainant could serve as a team coordinator. However, KMK stated that she determined that serving as a team coordinator would be beneficial for Complainant only after he had been reassigned and then noted his difficulty working with his new senior team coordinators. When the opportunity for team coordinator did not materialize due to taxpayer situations, Complainant was not transferred back to his major case. KMK and EEJ both admitted that Complainant was an experienced Revenue Agent who would work on specialized CIC cases, was a member of the OILERS, and would serve as a presenter during trainings/conferences. KMK stated that, when serving as rater, Complainant received positive evaluations and acknowledged that Complainant did a good job. EEJ admitted that Complainant at a minimum met the qualifications for a GS-14 Revenue Agent and was a subject matter expert on oil and gas cases. Despite this, Complainant’s cases were reassigned, and Complainant was assigned less-complex cases, which impeded his ability to use his case experience on vacancy applications.

JKE’s testimony corroborated Complainant’s belief that KMK and KE had a negative impact on Complainant’s promotional and career experience opportunities. JKE also testified that EEJ, who was a manager in the Houston office and Complainant’s second-level supervisor, was frustrated by all the photocopying for Complainant’s EEO activity and EEO hearings.

With regard to claim 25, the AJ found that KMK’s use of the term “baggage” to screen potential applicants for positions included having a reputation for engaging in EEO activity. When KMK was presented with the slide from the September 2015 presentation warning employee applicants against having “baggage attached to them,” KMK admitted that baggage could mean “reputation.” The AJ noted that when KMK was presented with her own prior sworn testimony from her deposition, which contradicted this statement, KMK changed her testimony and stated that she does not consider reputation when interviewing candidates, because she believes it is not a permissible topic during an interview. We note, however, that the entire purpose of the presentation was to teach individuals at the facility about interviewing and to emphasize to the audience how to present their best self during the interview process.

During the hearing, when Complainant's counsel asked KMK directly whether "baggage" can mean someone's EEO activity, KMK replied "I don't think so. You wouldn't know about anybody's EEO activity." The AJ noted that, given KMK's admission that "baggage" could refer to "reputation" for filing EEO complaints, applicants with "baggage" are less likely to be promoted. Later during the hearing, KMK testified that "baggage could mean a lot of things, but whatever it is, it's left at the door." DDC testified to telling KMK about Complainant's EEO activity in 2015. KMK admitted that she received the request for an affidavit before the October 2015 "baggage" training, despite her contentions she did not open the file that contained details about Complainant's 2008 Settlement Agreement. KMK also testified that, while she originally thought she had learned of Complainant's EEO activity in December 2015, she "subsequently learned that [she] had really been aware of it in April 2015." KMK stated that she was shown a document from the National Treasury Employees Union which detailed Complainant's EEO settlement. KMK stated that she assumed it was a grievance and later, looking back at the document, realized it was an EEO settlement. The AJ noted KMK testified to knowing about Complainant's EEO activity in 2015.

Three days after the "baggage" incident, KMK lowered Complainant's LSR rating from "Ready" to "Not Ready" in September 2015, but then later raised it again to "Ready" in December 2015 (claim 26). KMK lowered the rating days after Complainant confronted her about his EEO activity impacting his ability to attain an open GS-14 position and raised the rating in December 2015, after Complainant contacted an EEO Counselor in October 2015 to file the instant complaint.

Turning to claim 28 (Employee Performance File), assuming the noted documents were not included in his personnel file, Complainant failed to allege that he suffered any harm as a result, let alone allege that these documents were not included based on his protected status. DDC, who was Complainant's first-line supervisor at the time, stated that there is no Agency guidance on the type of documents that must be included in the employee personnel file. Additionally, DDC stated that it was her practice to include formal documentation such as workload reviews, case reviews, and annual appraisals in the employee personnel files of those under her supervision. Complainant has not provided any persuasive evidence that the documents that purportedly were missing from his employee personnel file were missing because of discriminatory animus. We therefore find no discriminatory animus with regard to claim 28.

With regard to a presentation for IRS Executives on June 22, 2016 (claim 41), EEJ testified that, to her knowledge, Complainant did not request to have a more active participation role. EEJ testified that Complainant was considered a subject matter expert on the oil and gas industry and had participated as a presenter on those matters within the Agency. Additionally, while Complainant did not deliver the introductory remarks, EEJ testified that Complainant was invited to the meeting and participated fully when questions were asked with regard to each team member's assigned cases. Complainant did not provide any evidence that he requested and was denied the opportunity to present, let alone any evidence that such denial was based on a protected status. Accordingly, we find no discriminatory animus with regard to claim 41.

With regard to the LSR Report (claim 45), Complainant challenges his rating in different categorizations that are used to determine the overall LSR rating. A review of the record indicates that in June 2017, JWC rated Complainant “Ready Now” instead of the only other rating option “Not Ready.” Complainant does not challenge the “Ready Now” rating. Rather, Complainant argues that in the “Competencies” categories for the overall rating, he was rated in a lower category (“Employee” versus “Front-Line Managerial”) in three of seven behavioral categories where JWC did not directly supervise him. Complainant has not shown how these lower competencies impacted his “Ready Now” rating or were causally related to his protected status. We therefore find no discriminatory animus with regard to claim 45.

JKE testified that the Houston managers and employees had a rumor mill and openly discussed EEO complaints, often laughingly. Multiple witnesses acknowledged discussions of Complainant’s current complaint. Testimony supports Complainant’s claims that, not only were his complaints openly discussed, but managers laughed about his complaints in front of other managers and Complainant’s peers. JKE confirmed that word gets around through the rumor mill when someone files an EEO complaint. JKE testified to KMK laughing to him about EEO matters. BT testified that the rumor mill is 99% correct and that the rumor was that Complainant was blackballed for filing EEO complaints, which management feels negatively about. DW also testified to hearing that Complainant filed another complaint and discussing Complainant’s complaints with other employees, including CW’s husband in LB&I executive management.

We find that substantial evidence in the record supports a finding of retaliation. We find that the comments by management were likely to deter a reasonable employee from engaging in protected activity and have a potentially chilling effect on the EEO process. Accordingly, the Commission finds that Complainant has established that he was subjected to a retaliatory hostile work environment with regard to claims 24 (transfer), 25 (“baggage” incident), 26 (LSR rating), 34 (“not shown me anything” comment), and 40 (CPA comment). Although the AJ found *per se* reprisal, we need not address that finding because the preponderance of the evidence establishes the existence of a retaliatory hostile work environment.¹²

Discrete Acts

The AJ’s decision reflects a finding of discrimination based on Complainant’s protected status (black, African-American, reprisal) for a non-selection. However, the AJ failed to identify which position the AJ found was discriminatory. The AJ issued relief for a Senior Revenue Agent, GS-14, effective November 26, 2013.¹³

¹² Additionally, we need not address the claims of harassment based on race or color, as Complainant would not be entitled to any additional relief for such a finding.

¹³ A review of the record shows no selection occurred on that day. The closest non-selection date was November 22, 2013, the date of non-selection for Lead IRA, Team Leader, GS-14, Vacancy No. 13CS6-LBB1548-0512-14-NR. However, with no discussion by the AJ, a different position title, no reference to a vacancy number, and a different effective day, it would be mere

Yet, a review of the record indicates no Senior Agent, GS-14, position was effective November 26, 2013. The AJ awarded relief for a discriminatory non-selection, without discussion, for a job vacancy that did not exist and is too vague. More importantly, as discussed, nothing in this non-selection award was timely brought before an EEO Counselor. There are no timely discrete acts for which the AJ found discrimination.

Nevertheless, we address the two timely raised non-selections in claims 43 (Team Manager non-selection) and 44 (Supervisory Revenue Agent non-selection). With regard to Claim 43, the Agency stated that the hiring official (a retired Agency manager whom Complainant did not list in his complaint) selected the candidate with the highest interview score for the position of Supervisory Internal Revenue Agent (Team Manager), Vacancy Number 16CS6-LBM0354-0512-04-CC. The AJ points out that Complainant's application for this vacancy was rated higher than the ultimate Selectee (JWC) by the Agency's human resources hiring officials. Testimony at the hearing clarified that the applications are rated by the Agency's human resources office to determine a "best qualified" (BQ) list, and from that BQ list, the hiring panel will select candidates to interview. For this vacancy, Complainant was interviewed and the panel of three rated each candidates' interview responses to determine a final score for each candidate interviewed from the BQ list. Complainant was rated lower with regard to leadership competencies. JWC, the selectee for this vacancy, scored the highest in that category and overall in the interviews. The Commission has previously held that the impression a candidate makes at an interview can determine whether or not they are selected. See Complainant v. Dep't of the Air Force, EEOC Appeal No. 01822116 (Mar. 11, 1983) (holding that candidates' performance at interviews as Agency's reason for selection was legitimate and nondiscriminatory); Yancey v. Dep't of Defense, EEOC Appeal No. 01985517 (August 7, 2001) (holding that "while complainant would have preferred that the candidates be evaluated with a greater emphasis on their past records as opposed to impressions garnered during the interviews" the agency's heavy emphasis on the interviews was non-discriminatory). Complainant has not shown that the Agency's reasons for not selecting him are unworthy of belief. Once again, we emphasize that the AJ never specifically found that the non-selection in claim 43 was discriminatory.

Regarding claim 44, Complainant has not carried his burden of demonstrating that he is plainly more qualified than the selectees for the position of Senior Revenue Agent, GS-0512-14, Vacancy Number 16CS6-LBB0473-0512-14-CC. KMK was the selecting official for this posting. KMK testified that her selections for the new permanent GS-14 non-managerial Senior Revenue Agent positions were part of an effort to convert almost 700 temporary GS-14 Senior Team Coordinator, Lead Revenue Agent, Senior International Examiner, and other positions into a single permanent GS-14 position nationwide. KMK made 15 selections for the Houston post of duty. KMK explained that Complainant was not considered for this vacancy because he was not on the BQ list.

speculation as to what the AJ found. Regardless, the AJ found no timely discrete acts to be discriminatory.

All 15 selectees had experience at the GS-14 level as a Senior International Examiner, Senior Team Coordinator, Account Coordinator, or other position at that level. KMK testified that individuals within Complainant's protected status were among those selected for these positions. The human resources department reviewed Complainant and other candidates' applications and only forwarded those rated BQ to the hiring panel for consideration for an interview. We find Complainant was not the "overwhelmingly superior candidate." Once again, we emphasize that the AJ never specifically found that this non-selection in claim 44 was discriminatory.

Further, we note that in the absence of evidence of unlawful discrimination, the Commission will not second guess the Agency's assessment of the candidates' qualifications. Texas Dep't. of Community Affairs, 450 U.S. at 259. At all times, the ultimate burden remains with Complainant to demonstrate by a preponderance of the evidence that the Agency's reasons were not the real reasons and that the Agency acted on the basis of discriminatory animus. Complainant failed to carry this burden. As a result, the Commission finds that Complainant has not established that the Agency discriminated against him based on his race, color, or in reprisal for prior EEO activity when it did not select him for a position as a temporary or permanent GS-14 employee.

Relief

We note at the outset that, based on our finding of no discrimination on any non-selection claim, Complainant is not entitled to retroactive promotion, back pay, or front pay. We next address the Agency's argument that Complainant's supplemental damages petition should be stricken from the record. We find that, even if the AJ erred in allowing Complainant to file a supplemental damages petition, the Agency has had the full opportunity to address the supplemental petition on appeal and has done so. We will address the Agency's arguments in our decision.

Nonpecuniary, Compensatory Damages

Nonpecuniary, compensatory damages are losses that are not subject to precise quantification, *i.e.*, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to professional standing, injury to character and reputation, injury to credit standing, and loss of health. See Enforcement Guidance: Compensatory and Punitive Damages Available under §102 of the Civil Rights Act of 1991 (EEOC Guidance), EEOC Notice No. 915.002 at 10 (July 14, 1992). Objective evidence in support of a claim for non-pecuniary damages claims includes statements from Complainant and others, including family members, co-workers, and medical professionals. See *id.*; see also Carle v. Dep't of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993). Nonpecuniary damages must be limited to compensation for the actual harm suffered as a result of the Agency's discriminatory actions. See Carter v. Duncan-Higgans, Ltd., 727 F.2d 1225 (D.C. Cir. 1994); EEOC Guidance at 13. Additionally, the amount of the award should not be "monstrously excessive" standing alone, should not be the product of passion or prejudice, and should be consistent with the amount awarded in similar cases. See Jackson v. U.S. Postal Serv., EEOC Appeal No. 01972555 (April 15, 1999) (citing Cygnar v. City of Chicago, 865 F.2d 827, 848 (7th Cir. 1989)).

At the outset, we note Complainant is only entitled to damages for the timely claims upon which we have found discrimination, i.e., claims 24 (transfer), 25 (“baggage” incident), 26 (LSR rating), 34 (not shown me anything comment), and 40 (CPA comment). We find that the record contains evidence that Complainant suffered physical and emotional harm resulting from the Agency’s retaliatory hostile work environment.

Complainant testified that he suffered harm as a result of the Agency’s failure to promote him and the egregious retaliation he experienced. Specifically, Complainant testified that he suffered from sleeping problems, heart palpitations, high blood-pressure, digestive issues, anxiety, stress, harm to his reputation, humiliation, and loss of enjoyment of life. He stated that the Agency’s actions created harm to his marriage and negatively impacted his whole family. Further, he explained that he stopped being a Deacon in his church because he did not have the time or the emotional ability to continue. In addition, he stated that he has had to work straight through the weekend on EEO matters.

In her June 28, 2018 statement attached to Complainant’s Pre-hearing report, Complainant’s wife noted that in recent years the quality of their family life has been affected by the extreme amount of time Complainant focuses on his discrimination complaint. She described him as extremely stressed out, hard to talk to, short tempered, and pre-occupied. She noted his “deep concern” over how he has been overlooked for promotions. Further, Complainant’s wife testified at the hearing that, as a result of the Agency’s actions, Complainant was no longer at peace and was very troubled by what was happening at work. She stated that the changes in Complainant began in 2008 or 2009, after he was demoted. Complainant’s wife explained that for the last ten years he has not been sleeping well. She noted that he was anxious and obsessed with keeping his EEO papers organized. She stated he experienced stress, had crying episodes, and always had a cloud hanging over him. Further, she noted that every conversation with him focused on something going on at work or how he was not being treated fairly.

As part of his Pre-Hearing Report, Complainant provided a March 29, 2018 letter from Doctor A noting that for the past three years Complainant has complained of debilitating stress related to his work environment and has experienced elevated blood-pressure which was often difficult to manage due to his overwhelming stress. Doctor A also noted that Complainant has experienced disrupted sleep, melancholy moods, and tension-related headaches. She stated that he has been prescribed medications in an attempt to control his blood pressure, anti-anxiety medications to help him deal with day-to-day activities, and medications for hypertension and tension headaches. Complainant also provided documentation that he received treatment from Doctor B for heart palpitations in January 2015 and for chest pain and cardiac arrhythmia in January - February 2018. Doctor A stated, “Complainant’s focus and distraction related to EEOC and hostile work environment most definitely have adversely affected his mental and physical health.”

At the hearing, Doctor A testified that she has treated Complainant since 2015 and that she sees him 3-4 times per year for intermittent insomnia, anxiety, heart palpitations, some digestive issues, nervousness, and headaches, which she opined were stress-related.

Doctor A stated that she has prescribed Complainant blood-pressure medication, headache medication, and medication for gastritis. Further, she stated that she referred Complainant to Doctor B, who is a cardiologist. Doctor A acknowledged that she did not review Complainant's medical records from his primary care physician before 2015. However, she opined that, even if the symptoms were pre-existing, they were becoming more severe and unmanageable.

We note that on cross-examination Doctor A admitted:

Well, the problem is I never have treated him outside of that environment. So I didn't see what life was like for him or what his symptomology was before he underwent stress. My opinion is that the stress that he has experienced on the job or his employment issues have (sic) contributed significantly, but I also think there may be genetic and also environmental factors.

(Transcript Vol. 2, pp. 465 - 466).

Upon review, we find that Complainant linked his stress directly to incidents with DDC and KMK between February and late fall of 2015, including humiliation at work for having his CIC cases taken away from him, his colleagues openly discussing his credentials and lack of career advancement, as well as his EEO activity. Complainant also detailed how his coworkers were well aware that he was not getting acting assignments as others did, which he attributed to KMK, EEJ, and KE's retaliation for his 2008 Settlement Agreement. Complainant also linked his stress to the "baggage" discussion during the presentation by KMK and EEJ with over thirty employees observing, as raised in Issue No. 25 ("baggage" incident), all of which occurred in the latter part of 2015.

However, we note that the evidence provided reflects that much of Complainant's physical and psychological symptoms were attributable to sources in addition to the incidents of retaliatory harassment, such as the 2008 demotion, the multiple non-selections, and the other incidents found not to be discriminatory. Further, we note the testimony of Complainant, his wife, and Doctor A reflect that Complainant experienced stress as a result of the EEO process. We note that a complainant is not entitled to nonpecuniary damages for the stress and inconvenience associated with pursuing the EEO process. See Tyrone D. Dep't of Homeland Security, EEOC Appeal No. 2019002906 (Aug. 18, 2020) (citing Renato K. v. Dep't of Homeland Sec., EEOC Appeal No. 0120172853 (Nov. 2, 2018) (excluding damages associated with the EEO process, as opposed to damages caused by the discrimination)).

After a thorough review of the record, and given the severity, nature, and duration of the distress experienced by Complainant as a direct result of the retaliatory harassment in claims 24-26, 34, and 40, we find that an award of \$15,000 in nonpecuniary, compensatory damages to be more appropriate.

We find that this amount is not motivated by passion or prejudice, is not “monstrously excessive” standing alone, and is consistent with the amounts awarded in other cases. See Ethan M. v. Dep’t of Agriculture, EEOC Appeal No. 0120170519 (Oct. 12, 2018), request for recon. denied, 2020000210 (Feb. 5, 2020) (awarding \$15,000 for retaliation where Complainant experienced shame, embarrassment, withdrawal from family, friends, and activities, anxiety, sleep problems, and sadness); Bernard S. v. Dep’t of Health and Human Services, EEOC Appeal No. 0120181509 (Sept. 17, 2019) (awarding \$13,000 where Complainant experienced significant stress, depression, insomnia where other factors had played a role in his stress).

Pecuniary Damages

Pecuniary damages are quantifiable out-of-pocket expenses incurred as a result of the Agency’s discriminatory actions. Enforcement Guidance: Compensatory and Punitive Damages Available under Section 102 of the Civil Rights Act of 1991 (Compensatory Damages), OLC Control No. EEOC-CVG-1992-3 (July 14, 1992). Damages for past pecuniary damages will not normally be granted without documentation such as receipts, records, bills, cancelled checks, or confirmation by other individuals of actual loss and expenses. Liz M. v. U.S. Postal Serv., EEOC Appeal No. 0720180020 (Oct. 18, 2018), (citing Margaret L. v. Dep’t of Veterans Affairs, EEOC Appeal No. 0120150582 (Apr. 17, 2018); Drew N. v. Dep’t of Homeland Sec., EEOC Appeal No. 0120160208 (Jan. 11, 2018); Melina K. v. Dep’t of Def., EEOC Appeal No. 0120152834 (Aug. 10, 2017)).

Damages are only appropriate if they are directly or proximately caused by the Agency’s discrimination. See Compensatory Damages. The AJ awarded out-of-pocket medical expenses in the amount of \$6,653.37. The Agency argues that no pecuniary damages should be awarded. Alternatively, the Agency argues that if there is a pecuniary damage award, it should be limited to the \$750.00 payment to Doctor A for her appearance at the hearing.

The record contains a summary entitled “Medical Expenses Related to Job Stress and Health Issues” listing charges from 2008 – 2018. As the first incident of retaliatory harassment occurred on August 19, 2015, we find any claimed medical expenses prior to that date are not recoverable. The only two charges listed that occurred after August 19, 2015 are a March 2018 charge for Dr. B in the amount of \$905.34 and a charge in July 2018 for Doctor A in the amount of \$750.00. Regarding the payment for Doctor B’s expenses, although we find causation exists, we note that the testimony of Complainant, his wife, and Doctor A reflected that other factors played a role in Complainant’s physical and emotional symptoms. Thus, we find the claimed medical expenses of \$905.34 should be reduced by 75%, and we award pecuniary damages in the amount of \$226.33. Regarding the \$750.00 paid to Doctor A, Complainant noted this was for “Office Shut-Down expense due to appearance at EEO hearing.” We note that, under the AJ’s award of professional fees, the AJ included an award for expert witnesses. We find that the requested \$750.00 in pecuniary damages for payment to Doctor A is not compensable as pecuniary damages, but is more appropriately considered as expert fees, which we address separately under “Attorney’s Fees and Costs,” below.

Leave

The AJ awarded restoration of leave in the amount of 500 hours for the period of 2013 – 2018. Complainant testified at the hearing that in August 2015, as a result of an interaction with DDC and KMK on a global case, he was “totally stressed out” and as a result he took two weeks of sick leave. He stated when he returned from sick leave, he was removed from the global case and transferred to a lesser profile case (claim 24). Thus, the two weeks of leave in August 2015 preceded the earliest incident found to be discriminatory and therefore is not recoverable. In addition, Complainant stated that he took two weeks of leave due to an incident in front of a taxpayer which he attributed to the harassment he experienced at work in 2015. We find no nexus between this request for leave and our finding of discrimination. Complainant also testified generally that he had to take a lot of sick leave as a result of the work environment. Further, he stated that he had to take annual leave “to get some extra rest to keep going.” Upon review, we find Complainant is not entitled to any leave restoration as he has not directly connected any of the claimed leave to the finding of retaliatory harassment.

Other Relief

We note that the AJ awarded Complainant retroactive promotion and backpay or, in the alternative, front pay. Based on our finding of no discrimination as to any non-selection claim, Complainant is not entitled to retroactive promotion, back pay, or front pay.

Attorney’s Fees and Costs*Complainant’s Costs*

The AJ awarded Complainant personal costs in the amount of \$1,295.14. On appeal, the Agency argues that a review of the bills submitted by Complainant does not evidence what the printing was and for what purpose, or where the mailing and faxing was sent. Thus, the Agency argues that we should reverse the AJ’s award of \$1,295.14 for mailing, faxing, and printing costs. Complainant contends that substantial evidence supports the AJ’s award.

Complainant supplied a list of expenses from August 8, 2016, through July 21, 2018, listing various amounts for faxing, mailing, “USB,” copies, scanning, office supplies, and “PC basic station time/minute.” Complainant also provided copies of various receipts from FedEx, the U.S. Postal Service, and Office Depot.

Upon review, we find that the AJ’s award of \$1,295.14 for non-attorney fee litigation costs was improper. Specifically, we find that Complainant did not provide sufficiently detailed evidence that any of the personal costs claimed were directly related to the processing of his case.

Credit Card Interest

The AJ awarded Complainant's credit card interest on legal fees in the amount of \$5,149.31. On appeal, the Agency argues that the AJ erred in awarding damages related to Complainant's participation in the EEO process, including interest on credit cards used to pay his attorney's fees. Complainant argues that the AJ properly determined that he was entitled to interest for legal fees expended on his credit card. Upon review, we find that the AJ erred in awarding credit card interest, as Complainant did not clearly establish that the interest was directly attributable to the legal costs incurred rather than other outstanding charges to that account. See Roxane C. v. Dep't of Energy, EEOC Appeal No. 2019004254 (July 26, 2021); Denise L v. Dep't of the Interior, EEOC Appeal No. 0120170716 (May 2, 2019); Arreola v. Dep't of Justice, EEOC Appeal No. 01A03342 (Jan. 17, 2002).

Attorney's Fees

By federal regulation, the agency is required to award attorney's fees and costs for the successful processing of an EEO complaint in accordance with existing case law and regulatory standards. 29 C.F.R. § 1614.501(e)(1)(ii). To determine the proper amount of the fee, a lodestar amount is reached by calculating the number of hours reasonably expended by the attorney on the complaint multiplied by a reasonable hourly rate. Blum v. Stenson, 465 U.S. 886 (1984); Hensley v. Eckerhart, 461 U.S. 424 (1983).

There is a strong presumption that the number of hours reasonably expended multiplied by a reasonable hourly rate, the lodestar, represents a reasonable fee, but this amount may be reduced or increased in consideration of the degree of success, quality of representation, and long delay caused by the agency. 29 C.F.R. § 1614.501(e)(2)(ii)(B). The circumstances under which the lodestar may be adjusted are extremely limited, and are set forth in EEO MD-110, at Chapter 11, § VI.F. A fee award may be reduced: in cases of limited success; where the quality of representation was poor; where the attorney's conduct resulted in undue delay or obstruction of the process; or where settlement likely could have been reached much earlier, but for the attorney's conduct. Id. The party seeking to adjust the lodestar, either up or down, has the burden of justifying the deviation. Id.

All hours reasonably spent in processing the complaint are compensable, but the number of hours should not include excessive, redundant or otherwise unnecessary hours. EEO MD-110, at Chapter 11, § VI.F (citing Hensley, 461 U.S. at 434; Bernard v. Dep't of Veterans Affairs, EEOC Appeal No. 01966861 (July 17, 1998)). The Commission has ruled that, when reviewing fee petitions which contain many excessive, redundant, unnecessary or inadequately documented expenditures of time, in lieu of engaging in a line-by-line analysis of each charge claimed, the Commission may calculate the number of hours compensable by applying an across-the-board reduction to the number of hours requested. See Bernard v. Dep't of Veterans Affairs, EEOC Appeal No. 01966861 (July 17, 1998).

Attorney's fees may not be recovered for work on unsuccessful claims. Hensley, 461 U.S. at 434-35. Courts have held that fee applicants should exclude time expended on “truly fractionable” claims or issues on which they did not prevail. See Nat’l Ass’n of Concerned Veterans v. Sec’y of Defense, 675 F.2d 1319, 1327 n.13 (D.C. Cir. 1982). Claims are fractionable or unrelated when they involve distinctly different claims for relief that are based on different facts and legal theories. Hensley, 461 U.S. at 434-35. In cases where a claim for relief involves “a common core of facts or will be based on related legal theories,” however, a fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit. Id. at 435. “The hours spent on unsuccessful claims should be excluded in considering the amount of a reasonable fee only where the unsuccessful claims are distinct in all respects from the successful claims.” EEO MD-110, at Ch. 11 § VI.F (citing Hensley, 461 U.S. at 440).

The AJ awarded attorney’s fees and other professional fees, including expert witness fees, in the amount of \$85,421.50. A review of the attorney’s fees petition shows that 456 hours were billed (at hourly rates ranging from \$175.00 to \$265.00) for a total request of \$85,421.50 in attorney’s fees. The Agency does not challenge the hourly rates charged by Complainant’s attorneys, and we find them reasonable. However, we find that the AJ erred in awarding the full amount of attorney’s fees requested. Rather, we find a reduction is warranted given the billing at the full hourly rate for travel time,¹⁴ the presence of several duplicative and excessive billing entries, the attorneys’ failure to indicate how they allocated time between the tasks relating to the successful claim and those that were unsuccessful, and the fact that Complainant did not prevail on the majority of his claims which we find were fractionable from the retaliatory harassment claim upon which he succeeded. Thus, we reduce the award of attorney’s fees by 75% and find Complainant is entitled to attorney’s fees in the amount of \$21,355.37. See Altman v. Army, EEOC Appeal Nos. 01A10691, 01A01571 (Jun. 20, 2002) (upholding 70% across the board reduction of attorney’s fees).

Expert Fees

A prevailing complainant is entitled to expert fees as part of recoverable attorney’s fees. 42 U.S.C. § 1988. The fee is not limited to per diem expenditures, but includes all expenses incurred in connection with the retention of an expert. Id. The record contains evidence that Complainant paid Doctor A \$750.00 for her appearance at the hearing on August 10, 2018. Thus, we find Complainant is entitled to payment of \$750.00 for Doctor A’s appearance.

¹⁴ Commission decisions have found that an attorney's travel time is not compensable at an attorney's full reasonable hourly rate, but is instead compensated at half the attorney's reasonable hourly rate. See Mica B. v. General Services Administration, EEOC Appeal Nos. 2019000424, 2019001054 (Aug. 12, 2020).

Attorney's Costs

A prevailing party is entitled to recovery of costs, including witness fees, transcript costs, and printing and copying costs. 29 C.F.R. § 1614.501(e)(2)(ii)(C). In addition, we have held that recoverable costs may include reasonable out-of-pocket expenses incurred by the attorney during the normal course of representation, such as costs associated with mileage, postage, telephone calls, and photocopying. Diaz v. Dep't of Justice, EEOC Appeal No. 0120101054 (Jul. 18, 2012) (citing Poquiz v. Dep't of Homeland Sec., EEOC Appeal No. 0720050098 (Apr. 10, 2008), request for recon. denied 0520080524 (Jun. 19, 2008)).

The AJ awarded litigation costs/expenses in the amount of \$10,355.37. The Agency argues that the AJ erred in granting Complainant's request for \$10,355.37 for litigation expenses because Complainant failed to produce any receipts or bills to verify the costs associated with these expenses. The Agency requests that no litigation expenses be awarded.

We find that the record contains insufficient documentation to support all of the costs claimed in the itemized listing. Specifically, we note that for laser printing and postage there is no explanation as to the documents printed or mailed. For telephone calls, there are telephone numbers listed without indicating who was called or why there was a call. In addition, we note charges are listed for airfare, Lyft, meals, parking, and postage, all without accompanying receipts to verify the specific costs for which reimbursement is requested. In sum, Complainant has not presented sufficient information in the record for the Commission to determine the amount of costs to which he is entitled. Thus, we exercise our discretion and reduce the award of costs by 75%, and award attorney's costs in the amount of \$2,588.84. See Sanora S. v. U.S. Postal Serv., EEOC Appeal Nos. 0120133235, 0120140921 (citing Poquiz v. Dep't of Homeland Sec., EEOC Appeal No. 0720050098 (Apr. 10, 2008), request for recon. denied, 0520080524 (Jun. 19, 2008)).

CONCLUSION

After a thorough review of the record, and for the foregoing reasons, we MODIFY the Agency's final order to reflect a finding that the Agency discriminated against Complainant on the basis of reprisal when he was subjected to the incidents identified in claims 24, 25, 26, 34, and 40, of his formal EEO complaint. We REMAND this matter to the Agency for further proceedings consistent with this decision and the Order of the Commission, below.

ORDER

To the extent that it has not already done so, the Agency is ORDERED to take the following actions:

1. Within 60 days of the date this decision is issued, the Agency shall pay Complainant \$15,000.00 in nonpecuniary, compensatory damages.

2. Within 60 days of the date this decision is issued, the Agency shall pay Complainant \$226.33 in pecuniary damages.
3. Within 60 days of the date this decision is issued, the Agency shall pay Complainant \$21,355.37 in attorney's fees, \$2,588.84 in costs, and \$750.00 in expert witness fees.
4. Within 90 days of the date this decision is issued, the Agency shall provide eight hours of in-person or interactive EEO training for KMK and EEJ. The training shall emphasize management officials' obligation to not to engage in reprisal in violation of EEO statutes.
5. Within 60 days of the date this decision is issued, the Agency shall consider taking appropriate disciplinary action against KMK and EEJ. If the Agency decides to take disciplinary action, it shall identify the action taken. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline. If any of the responsible management officials have left the Agency's employment, then the Agency shall furnish documentation of their departure date(s).

POSTING ORDER (G0617)

The Agency is ordered to post at its IRS Houston, Texas facility copies of the attached notice. Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted **both in hard copy and electronic format** by the Agency within 30 calendar days of the date this decision was issued, and shall remain posted for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The Agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material. The original signed notice is to be submitted to the Compliance Officer as directed in the paragraph entitled "Implementation of the Commission's Decision," within 10 calendar days of the expiration of the posting period. The report must be in digital format and must be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

ATTORNEY'S FEES (H1016)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), he is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. § 1614.501(e). The award of attorney's fees shall be paid by the Agency. The attorney shall submit a verified statement of fees to the Agency -- **not** to the Equal Employment Opportunity Commission, Office of Federal Operations -- within thirty (30) calendar days of the date this decision was issued. The Agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

Under 29 C.F.R. § 1614.405(c) and §1614.502, compliance with the Commission's corrective action is mandatory. Within seven (7) calendar days of the completion of each ordered corrective action, the Agency shall submit via the Federal Sector EEO Portal (FedSEP) supporting documents in the digital format required by the Commission, referencing the compliance docket number under which compliance was being monitored. Once all compliance is complete, the Agency shall submit via FedSEP a final compliance report in the digital format required by the Commission. See 29 C.F.R. § 1614.403(g). The Agency's final report must contain supporting documentation when previously not uploaded, and the Agency must send a copy of all submissions to the Complainant and his/her representative.

If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See 29 C.F.R. § 1614.409.

Failure by an agency to either file a compliance report or implement any of the orders set forth in this decision, without good cause shown, may result in the referral of this matter to the Office of Special Counsel pursuant to 29 C.F.R. § 1614.503(f) for enforcement by that agency.

STATEMENT OF RIGHTS - ON APPEAL RECONSIDERATION (M0920)

The Commission may, in its discretion, reconsider this appellate decision if Complainant or the Agency submits a written request that contains arguments or evidence that tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the agency.

Requests for reconsideration must be filed with EEOC's Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration.**

A party shall have **twenty (20) calendar days** from receipt of another party's request for reconsideration within which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015).

Complainant should submit his or her request for reconsideration, and any statement or brief in support of his or her request, via the [EEOC Public Portal, which can be found at https://publicportal.eeoc.gov/Portal/Login.aspx](https://publicportal.eeoc.gov/Portal/Login.aspx). Alternatively, Complainant can submit his or her request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, a complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

An agency's request for reconsideration must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Either party's request and/or statement or brief in opposition must also include proof of service on the other party, unless Complainant files his or her request via the EEOC Public Portal, in which case no proof of service is required.

Failure to file within the 30-day time period will result in dismissal of the party's request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. **Any supporting documentation must be submitted together with the request for reconsideration.** The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).

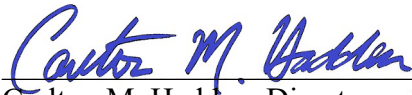
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (T0610)

This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. You have the right to file a civil action in an appropriate United States District Court within ninety (90) calendar days from the date that you receive this decision on both that portion of your complaint which the Commission has affirmed and that portion of the complaint which has been remanded for continued administrative processing. In the alternative, you may file a civil action after one hundred and eighty (180) calendar days of the date you filed your complaint with the Agency, or your appeal with the Commission, until such time as the Agency issues its final decision on your complaint. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. If you file a request to reconsider and also file a civil action, filing a civil action will terminate the administrative processing of your complaint.

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of federal Operations

February 14, 2022

Date