Introduction

This book is a summary of notable cases, laws, and guidance ending in December 2019. It is intended to help the reader keep abreast of the latest developments in our employment discrimination laws, with an emphasis on federal sector employment, and to provide an easy reference for recent cases in particular areas of employment discrimination law. Our laws, as they are interpreted, are our collective national conscience, which evolves over time. Congress enacts laws—such as those that prohibit employment discrimination—and then adjudicatory bodies—such as our federal courts and the U. S. Equal Employment Opportunity Commission (the EEOC or Commission)—breathe life into those laws through their decisions.

I. HOW TO USE THIS BOOK

This *EEO Update* begins with an article that is our overview of recent developments in federal sector EEO law in 2019. This book is formatted as an indexed summary divided into different chapters that cover various aspects of federal sector EEO law. The material consists of our Overview Article followed by chapters that consist primarily of case summaries, but also including summaries of changes in EEO laws, new Commission regulations, and other Commission guidance. Most chapters are divided into sections. Each section is subdivided by year, with cases within each year set forth alphabetically. Cases issued after September 2014 are organized by the date of issuance with the most recent cases listed first. Though the material we cover was decided primarily over the period 2004 through 2019, we have also added a few summaries of EEO regulations and other guidance that we believe are helpful, and still relevant, that predate 2004. We have not summarized all cases inclusive in those years, but have reviewed many of the more important cases.

Some of our case summaries are included in more than one topic area. For example, a case summary that addresses the three topic areas of disability, compensatory damages, and attorney fees may appear under all three headings. We have avoided repeating the full summary of these important cases in each of those areas by including an abbreviated case summary in each section and noting that the case is addressed in another topic area. To locate other references to the same case, please refer to the Table of Cases at the end of this book. Occasionally, where the summary is not very long, the full case summary is simply repeated in more than one section. Our summaries vary. For some cases, we have included only a very brief summary, while others receive a more lengthy treatment, which may include the Commission's or a court's explanation of how the court or Commission interprets an area of the law, if we think that information is helpful. As you examine an area in this book, please remember that it is not a comprehensive summary of the law. We are only trying to provide you with the latest developments. For a more comprehensive overview, we recommend that you do what we are likely to do, which is begin your search by using Ernest Hadley's excellent reference, *A Guide to Federal Sector Equal Employment Law and Practice*, (Dewey Publications, Inc).

This book is intended as a reference, a quick way to read and use case summaries that reflect the latest thinking of the Commission and the courts in the area of equal employment opportunity, with federal sector employment as the primary focus. The *EEO Update* is designed to help in your understanding of the cases, but it is not a substitute for reading the entire decisions. It is a starting place, intended to give you a quick overview of recent case law. The cases included in this book—such as most of the substantive decisions issued by the full Commission—and the way in which we summarize a case reflects our opinion as to what is important. Under no circumstance should you rely on our summaries as legal advice or even as unquestionably accurate. This book is intended to provide an overview of the way in which the Commission is interpreting the EEO laws. It is essential that you read the cases.

A. LEGEND FOR CASE CITATIONS

The following legend should help you to understand the significance of the numbers of the EEOC's cases.

Note: Commission and Office of Federal Operations (OFO) decisions are indicated by a case name followed by a case number and the date of the decision. For example, *Smith v. SSA,* 01A5555 (October 19, 2007). Cases cited as "MSPB" or "MSPR" are Merit Systems Protection Board decisions. Other cases are court decisions.

Cases issued prior to January 2000 used an eight digit docket with the first two digits identifying the type of appeal (for example if the first two digits were "01" that would indicate an appeal filed by a complainant); the second two digits indicated the year the appeal was filed (for example, an "0199xxxx" would indicate an appeal filed by a complainant in fiscal year 1999); and the last four digits represented the consecutive numbered appeal (for example, docket number 01990001 was the first appeal by a complainant filed in fiscal year 1999).

Beginning with fiscal year 2000, the Commission replaced the two digits identifying the year with the letter "A" to represent the "0" for year 2000, plus one digit. Decisions in fiscal year 2000 were designated "A0"; decisions in 2001 were designated "A1"; and so forth. (Again, as an example, the docket number 01A00002 would indicate the second appeal filed by a complainant in fiscal year 2000).

Effective October 1, 2006, the Commission began replacing the two-character designations for the fiscal year with a four digit designation. The first two digits of an EEOC case number indicated the type of case, as follows:

> 01 = An appeal by a complainant from a decision of an EEOC administrative judge or from a final agency decision (FAD) following an agency's final action. (Appeals from a decision of an EEOC administrative judge filed by federal agencies are discussed below.) This is generally a decision by OFO. Occasionally, in cases of importance and/or precedential cases, the full Commission will issue a decision that is also numbered "01" and is signed by the Secretary of the Commission, for the Commission. We have not specified, in the case citation, all of the "01" cases, but we have, in some important cases, so indicated within our summaries.
>
> 02 = An appeal from a decision on a union grievance.
>
> 03 = A petition to review a decision of the MSPB.
>
> 04 = A request for enforcement by the EEOC or clarification.
>
> 05 = A request to reconsider a previous EEOC decision.
>
> 06 = Compliance matters.
>
> 07 = An appeal by an agency from a decision of an EEOC administrative judge. Where the complainant and the agency both file appeals, the docket number for the first filed appeal is used.

The Commission has recently changed its docketing structure again, and now is docketing cases beginning with the year, followed by a consecutive numbered appeal (for example, docket number 2019000067).

In October 2013, the EEOC started redacting the names of federal sector employees who file EEO complaints in case captions and replacing the names with the term "Complainant." As you will see in this text, we follow this format for decisions issued after that date. In October 2015, the EEOC announced that it would begin using randomly generated names to replace the generic term "Complainant" in case captions. We again have followed this format for decisions issued after that date. Although the Commission has retroactively applied randomly generated names to some cases issued before this effective date, we have not revised such citations.

B. TERMS OF REFERENCE

Administrative Judge	AJ
Administrative Law Judge	ALJ
Age Discrimination in Employment Act	ADEA
Alternative Dispute Resolution	ADR
Americans with Disabilities Act	ADA
ADA Amendments Act of 2008	ADAAA
Collective Bargaining Agreement(s)	CBA
Equal Employment Opportunity Commission	EEOC or Commission
Employee Assistance Program	EAP
Equal Pay Act	EPA
Family and Medical Leave Act	FMLA

Federal Labor Relations Authority ..... FLRA
Final Agency Decision ..... FAD
Fitness for Duty ..... FFD
Fitness for Duty Exam(ination) ..... FFDE
Freedom of Information Act ..... FOIA
Leave Without Pay ..... LWOP
Merit Systems Protection Board ..... MSPB
National Security Agency ..... NSA
Office of Federal Operations ..... OFO
Office of Personnel Management ..... OPM
Office of Special Counsel ..... OSC
Office of Workers Compensation Program ..... OWCP
Older Workers' Benefits Protection Act ..... OWBPA
Performance Improvement Plan ..... PIP
Post Traumatic Stress Disorder ..... PTSD
Recommending Official ..... RO
Report of Investigation ..... ROI
Selection (or Selecting) Official ..... SO
Title VII of the Civil Rights Act of 1964 ..... Title VII

II. SUMMARY OF RECENT TRENDS IN THE LAW

As in the past, in this section we briefly summarize important decisions from the Commission issued in the past year, 2019, as well as a Supreme Court case and a few circuit decisions and offer our comments about the significance of these, noting any trends. Readers are reminded that the case summaries are not intended to be used as a substitute for legal research or for reading the source materials, but rather should provide enough information about the case to determine if a particular case is one the reader may want to pull and read in its entirety.

A. ATTORNEY FEES

The Commission issued a number of interesting decisions regarding awards of attorney fees and costs in 2019, including some larger awards. In *Glenna O. v. Dept. of Air Force*, 0720180030 (August 20, 2019), the Commission awarded $225,082 in attorney fees for work in representing the complainant in a successful complaint alleging harassment and constructive discharge. In *Kenneth M. v. SSA*, 0720170035 (April 9, 2019), the Commission ordered the agency to pay $165,273 in attorney fees and $90,728.73 in expert fees for work performed in connection with processing a breach claim related to a 2002 class action. In *Elly C. v. SSA*, 0720140019 (June 26, 2019), the Commission ordered the agency to pay $762,659.19 in fees and costs of $23,571.73 to the attorneys representing a class, a drastic reduction from the $2,824,633.12 in fees and $533,845.00 in costs sought. The Commission awarded $253,460.80 in fees, and $8,952.28 in costs in *Shameka M. v. VA*, 0120172281, 0120181116, 0120181117 (April 4, 2019), where it noted the agency's "scorched earth defense" contributed to the higher fees, and that the complainant repeatedly attempted to settle the case beginning in 2012. In *Doria R. v. NSF*, 0120181319 (September 10, 2019), the Commission increased the awarded fees from $96,537.50 to $148,887.50 in fees and $2,851.38 in costs for work performed in a failure to accommodate case.

The Commission addressed hourly rates for attorneys outside of Washington, D.C. including attorneys in Chattanooga, Tennessee in *Dexter K. v. USDA*, 0120181516 (September 11, 2019); Las Vegas, Nevada in *Porter H. v. DHS*, 0120170947 (March 6, 2019); Jonesboro, Georgia in *Vaughn C. v. Dept. of Air Force*, 0120181371 (September 4, 2019); San Antonio, Texas in *Victor S. v. USPS*, 0120180983, 0120160739 (April 16, 2019); and the Bay Area in California in *Tessa G. v. USPS*, 0120182836 (November 21, 2019).

The complainant in *Cassandra L. v. DOD*, 0720180029 (August 20, 2019), was represented by a non-licensed attorney and therefore could not claim fees. However, the complainant did establish entitlement to $31,232.53 in litigation costs, which included travel expenses for depositions and the hearing, and witness fees.

The EEOC favors issuing across-the-board reductions where the time spent on fee petitions is found to be unreasonable, instead of engaging in a line-by-line review of the number of hours sought. The Commission addressed a number of across-the-board reductions in 2019 and affirmed a 30% across-the-board reduction of fees for limited success obtained for the complainant and because the attorney got into a "fruitless argument" with the EEO investigator in *Bernard S. v. DHHS*, 0120181509 (September 17, 2019). In *Wayne C. v. Dept. of Transp*., 0120182783 (November 29, 2019), as the complainant only prevailed on one of two claims, the Commission applied a 25% across-the-board reduction, and then applied a 20% across-the-board reduction because of duplicative and excessive billing. The Commission in *Lisa T. v. VA*, 0120180962 (June 28, 2019), affirmed a 40% across-the-board reduction because the complainant only prevailed on three of five claims raised in the formal complaint. In *Odis H. v. DOD*, 0120171383 (March 28, 2019), the Commission agreed with the AJ's application of a 50% across-the-board deduction for excessive billing. The Commission applied a 15% across-the-board reduction, modifying the AJ's application of a 75% across-the-board reduction because the complainant did not prevail on all claims raised and some excessive and redundant billing was included in the fee petition in *Alexia D. v. USPS*, 0120170451 (April 24, 2019). In *Porter H. v. DHS*, 0120170947 (March 6, 2019), the Commission implemented a 60% across-the-board reduction because the claimed time was unreasonably excessive on its face, and the attorney spent unnecessary time and attention on issues that were not novel. The Commission affirmed a 33% across-the-board reduction in *Elliot J. v. Dept. of Commerce*, 0120171366 (April 25, 2019), where the case did not proceed to a hearing, and entries were submitted for multiple legal professionals working on the case, including nine attorneys and four paralegals. Finally, in *Mario G. v. Dept. of Air Force*, 0120180942 (June 11, 2019), the Commission applied a 75% across-the-board reduction where the complainant only prevailed on one of 15 claims raised.

And in *Ludie M. v. USPS*, 0120170459 (May 9, 2019), *recons. den*. 2019005427 (December 12, 2019), the Commission agreed with the AJ that the complainant did not establish entitlement to attorney fees because she only prevailed on a claim of *per se* retaliation and that issue was not raised by the attorney, but rather the AJ while attempting to settle the case after the second day of the hearing.

B. CLASS ACTIONS

The Commission found a class of African-American female employees at a specified agency facility were disparately impacted when they were not promoted from the GS-11 to the GS-12 level in *Elly C. v. SSA*, 0720140019 (June 26, 2019). And in *Mario H. v. Dept. of Army*, 0120171707 (February 6, 2019), the Commission remanded a class complaint because the AJ improperly denied class certification without first allowing discovery.

C. COMPENSATORY DAMAGES

Awards of nonpecuniary compensatory damages modified or affirmed by the EEOC in 2019 continued to run the gamut from $2,000 to $250,000. Looking at awards under $5,000, the Commission awarded $2,000 in *Barbie W. v. Dept. of Army*, 0120171302 (April 9, 2019), where much of the harm related to unsuccessful claims; $2,000 in *Foster M. v. Dept. of Energy*, 0120182008 (December 13, 2019), to a complainant who established limited harm after learning his medical records were kept in an unsecured binder; $2,000 to the complainant in *Pamila R. v. USPS*, 0120182822 (November 6, 2019), who suffered stress because the agency discriminatorily denied her overtime, but primarily was impacted by the intervening cause of harm of her husband's illness; $2,500 to the complainant in *Alline B. v. VA*, 0120181662 (June 28, 2019), whose supervisor engaged in two instances of *per se* retaliation and the majority of her harm related to unsuccessful claims; $3,000 to the complainant in *Devon H. v. DHS*, 0120181822 (September 30, 2019), who was harmed after his confidential medical information was disclosed unlawfully on two occasions; $4,500 to the complainant in *Ludie M. v. USPS*, 0120170459 (May 9, 2019), *recons. den*. 2019005427 (December 12, 2019), where the complainant had only a limited duration of harm related to a *per se* violation claim.

The Commission awarded $5,000 in the following cases: *Wayne C. v. Dept. of Transp*., 0120182783 (November 29, 2019), whose attorney represented he did not suffer any damages, but where it appeared the Commission suffered heartburn at awarding over $133,000 in fees and nothing to the complainant; *Phillis W. v. VA*, 0120180863 (June 5, 2019), where the complainant had substantial preexisting medical conditions; *Ronnie R. v. DHHS*, 2019001754 (May 7, 2019), where the complainant experienced pain after not receiving a needed ergonomic chair for three months; and *Kyong L. v. USPS*, 0120170623 (February 21, 2019), where the complainant's assertion of harm started many years prior to the discrimination claims at issue.

Looking at cases awarding up to $10,000, the Commission affirmed

$7,000 to the complainant in *Hermila B. v. VA*, 0120171916 (February 7, 2019), who was "extremely upset' after finding out her medical records were unlawfully accessed by her coworkers; $8,000 in *Arnoldo E. v. VA*, 0120171928 (February 7, 2019), where the complainant's preexisting PTSD was exacerbated after not being provided an accommodation; $8,500 to the complainant in *Cortez J. v. DOD*, 0120182712 (November 29, 2019), who prevailed on one of 12 claims raised and much of the harm he articulated related to the unsuccessful claims; affirmed $10,000 awarded by the agency in *Victor S. v. USPS*, 0120181004, 0120160739 (May 8, 2019), where the complainant provided "little detail" regarding a nexus between the discrimination and the harm; affirmed an agency's award of $10,000 in *Nila S. v. Dept. of Treas*., 2019000420 (May 8, 2019), where much of the harm related to an OWCP claim and a near-death experience and PTSD suffered after a private surgery; affirmed an AJ's award of $10,000 in *Alexia D. v. USPS*, 0120170451 (April 24, 2019), based on evidence that the complainant was anxious, depressed, and lost sleep after having been sent home.

The Commission increased the agency's awards in the following cases: awarded $6,000, up from $4,000, in *Vena H v. DOD*, 0120172589 (February 8, 2019), where the complainant testified she felt depressed, stressed, and her stomach hurt because of the discrimination; modified an award from $1,000 to $10,000 in *Harold M. v. Dept. of Air Force*, 2019002082 (April 30, 2019), where the complainant attested to emotional distress, anguish, and minor bouts of depression but did not submit objective evidence; awarded $10,000 instead of $5,000 in *Davida L. v. VA*, 0120172609 (February 15, 2019), where the agency's reprisal aggravated preexisting medical conditions; increased an award from $7,000 to $10,000 in *Keri C. v. DHS*, 0120171541 (April 12, 2019), where the complainant established her mental health was exacerbated by not being accommodated; increased from $7,000 to $10,000 where the complainant's wife testified the complainant was humiliated, stressed, and angry when he was not promoted in *Cleveland C. v. DOJ*, 0120171384 (March 5, 2019), and increased an award from $500 to $10,000 in *Gia M. v. DOD*, 0120172952 (February 8, 2019), for a complainant who did not receive reasonable accommodations and increased her use of pain medication and became withdrawn and isolated.

Looking at awards of nonpecuniary compensatory damages ranging from $10,001 to $50,000, the Commission: increased an agency's award from $2,000 to $20,000 in *Orlando O. v. EPA*, 0120182452 (December 10, 2019), where the complainant was physically ill, had sleeping problems and family problems after being unlawfully referred for an investigation; in *Pamala L. v. USPS*, 0120181511 (September 27, 2019), increased the agency's award from $20,000 to $25,000 because the complainant had several intervening causes of harm during the same time period, including a car accident and her sister's illness; modified an agency's award from $10,000 to $40,000 in *Melodee M. v. DHS*, 0120180064 (June 13, 2019), where the agency improperly looked at the nature and severity of the discrimination instead of the harm; increased the agency's award from $15,000 to $50,000 in *Dexter K. v. USDA*, 0120181516 (September 11, 2019), where the complainant was demoralized, emotionally devastated, and depressed after being passed over for promotion; and in *Marybeth C. v. DHHS*, 0120170811 (June 11, 2019), increased an agency's award from $30,000 to $50,000 where the complainant experienced harm for over a year after not being accommodated; increased an agency's award from $5,000 to $50,000 in *Yvette H. v. DOD*, 0120172249 (March 21, 2019), where the complainant suffered great fatigue, pain, and elevated blood pressure, but could not take any pain medication while working as her job required her to handle money.

The Commission affirmed an agency's award of $50,000 in *Denese L. v. Dept. of Interior*, 0120170716 (May 2, 2019), based on testimony from the complainant and her husband that she experienced anxiety, headaches, problems sleeping, loss of enjoyment of life, and that her physician confirmed she had become depressed and suffered emotional and mental harm and lost her love of her work.

The Commission affirmed an award of $20,000 issued by an MSPB AJ in *Alena C. v. Dept. of Interior*, 0320150061 (November 13, 2019), where the complainant only submitted a 13-page affidavit in support of her claim for damages. The Commission affirmed awards issued by AJs of $16,000 in *Kerry B. v. VA*, 0120180317 (May 31, 2019), where the complainant's existing back injury was exacerbated after not being accommodated and $15,000 in *Jess P. v. DOD*, 0120180553 (May 31, 2019), where much of the articulated harm related to claims on which the complainant did not prevail. The Commission also found the AJ's award of $20,000 to be appropriate in *Rick G. v. DHS*, 0720180009 (April 26, 2019), based on the complainant's testimony that he felt humiliated, afraid he would lose his job, had problems sleeping, and sought help from an EAP counselor.

Reviewing awards in the range of $50,001 to $100,000, the Commission affirmed the agency's award of $100,000 in *Karry S. v. Dept. of Air Force*, 0120182301 (November 21, 2019), where the complainant submitted medical evidence and sworn statements from a colleague that she experienced debilitating headaches, anxiety, mental anguish, stress, acne breakouts, stomach problems, weight loss, night sweats, and insomnia because of the agency's actions. The Commission increased the agency's award in *Randolph A. v. VA*, 0120181473 (September 19, 2019), from $75,000 to $100,000 where after not being selected, the complainant suffered from humiliation, anger, anxiety, depression, thoughts of suicide, persistent insomnia which prevented him from being able to safely operate a car due to excessive daytime sleepiness, obstructive sleep apnea which required surgery, and financial difficulties which required him to take out a second mortgage on his home with his wife. And in *Iliana S. v. DOJ*, 0120181195 (June 12, 2019), the Commission increased an agency's award from $12,000 to $75,000 where the harm lasted 16 months and the complainant wept uncontrollably, developed suicidal thoughts, would crawl into bed after work and "effectively ceded all childrearing duties to her husband," and that she would vomit at the thought of having to return to the office. In *Myrtie P. v. DHS*, 0120180246 (March 19, 2019), the Commission increased an agency's award from $30,000 to $65,000 where the complainant submitted medical evidence that her preexisting medical condition, Graves disease, was exacerbated, she experienced twitching, fatigue, inability to sleep, nausea, sleep fluctuations, vomiting, skin outbreaks, blurred vision, and hormone changes because of the agency's actions.

In a case we think illustrates the lengths the Commission will go to in order to avoid awarding the statutory cap of $300,000, the Commission affirmed an AJ's award of $250,000 in *Taunya P. v. USPS*, 0720180022 (September 27, 2019), where as a result of the agency's failure to accommodate the complainant, she suffered additional nerve damage and was told she could not carry a pregnancy as it might lead to paralysis. In *Glenna O. v. Dept. of Air Force*, 0720180030 (August 20, 2019), the Commission affirmed an AJ's award of $125,000 where the complainant's fiancé broke off their approximately eight-month engagement, and a close relationship with her parents was destroyed, and she became withdrawn, guarded, and depressed. The Commission affirmed the AJ's award of $200,000 in *Cassandra L. v. DOD*, 0720180029 (August 20, 2019), where the record included testimony from two of the complainant's psychologists in support of the claim for damages, and she was diagnosed with PTSD, depression, and anxiety. In *Geraldine B. v. USDA*, 0720180025 (June 5, 2019), the AJ awarded $250,000 and the Commission affirmed, noting that after her accommodation was revoked, the complainant's PTSD was exacerbated, she experienced weight gain, stomach pains, insomnia, headaches, and intense nightmares, and became reclusive. Finally, in *Shameka M. v. VA*, 0120172281, 0120181116, 0120181117 (April 4, 2019), the Commission increased an agency's award of $30,500 to $225,000 based on affidavits from complainant, a clergy member, complainant's long-time friend, complainant's adult son, and complainant's estranged husband, records from a psychologist and other health care providers, pharmacy records, and a psychological report prepared by a forensic psychologist which supported that the harassment experienced exacerbated her previously diagnosed depression, she developed panic disorder, alcohol abuse, and alcohol induced mood disorder, suicidal ideation, problems sleeping, severe impairment of concentration, moderately severe impairment of memory, blisters from scratching her skin due to stress, and as she had been too depressed to care for her youngest child, that child was exhibiting developmental delays.

In that same case, *Shameka M*., the Commission awarded $7,614.40 in past pecuniary damages for anti-depressants prescribed as a result of harm related to the sexual harassment and $44,173.20 in expected future pecuniary damages.

The Commission increased awards issued by AJs in the following cases: from $5,000 to $10,000 to the complainant where the AJ looked at harm related to each of two successful claims in *Marybeth C. v. DOD*, 0120180749 (August 20, 2019); increased the AJ's award from $13,000 to $15,000 in *Bernard S. v. DHHS*, 0120181509 (September 17, 2019), after the issuance of default judgment and the complainant had both preexisting conditions and intervening causes of harm; increased an AJ's award from $25,000 to $50,000 in *Pamula W. v. VA*, 0120171387 (May 2, 2019), because the AJ improperly limited the timeframe for harm as after she reported the harassment, instead of looking at the duration of harm; increased an AJ's award from $10,400 to $65,000 in *Leota F. v. USPS*, 0120180717 (August 22, 2019), where the complainant had anxiety attacks, crying spells, diarrhea, neck pain, headaches, was prescribed medication, and sought treatment from a chiropractor for the neck pain.

The Commission took the unusual step of reducing an AJ's award of nonpecuniary compensatory damages from $125,000 to $75,000 in *Hayden R. v. USPS*, 2019003428 (December 10, 2019), as the complainant only submitted his own statements and testimony in support of his claim, and he testified that his emotional harm preceded the events in the complaint by over two years.

D. CONSTRUCTIVE DISCHARGE

The Commission issued two cases on the same day finding that the respective complainants met the high burden of showing that a reasonable person would have felt compelled to resign given the working conditions experienced. In *Glenna O. v. Dept. of Air Force*, 0720180030 (August 20, 2019), the complainant engaged in EEO activity, after which she was subjected to a campaign of harassment by agency supervisors with the intent of denying her a promotion, terminating her, and having her professional license revoked. In *Cassandra L. v. DOD*, 0720180029 (August 20, 2019), a high school teacher at an agency school felt compelled to resign after she engaged in protected EEO activity, and as a result was subjected to a "reign of terror" by the principal and assistant principal.

E. DISABILITY DISCRIMINATION

Each year since the passage of the ADAA Amendments Act sees less cases involving questions of whether an individual is considered an individual with a disability, or a qualified individual with a disability, as the scope of coverage was intended to be broad by Congress. The Commission addressed a few cases where the complainants were not considered qualified individuals with disabilities. In *Lavonia M. v. SSA*, 0120172221 (February 15, 2019), *recons. den*. 2019002750 (June 25, 2019), alleged chemical sensitivities, which may have been masking an anxiety disorder, rendered a benefit authorizer not qualified to perform her position.

The Commission continues to find agencies fail to accommodate employees with disabilities and subject them to unlawful disclosures of medical information each year. The Commission addressed a claim that a police officer was "regarded as" substantially limited in working after she suffered an allergic reaction while working out, and found the agency should have returned her to duty in *Candi R. v. DOD*, 0120172238 (February 28, 2019). In *Nancy D. v. DHS*, 0120172931 (February 22, 2019), *recons. den*. 2019002702 (June 21, 2019), COTR functions were found to be an essential function of the position such that it did not need to be removed as a reasonable accommodation. In *Alana W. v. SSA*, 0120180037 (April 17, 2019), a paralegal with anxiety and depression requested lowered performance standards, which the agency is not required to provide as a reasonable accommodation. And in *Tera B. v. VA*, 0120171354 (April 24, 2019), *recons. den*. 2019004135 (August 28, 2019), a full-time physician position required someone who could work in the duty location, and b able to stand for long periods of time, requirements the complainant could not meet and therefore she was not qualified.

The Commission found that agencies failed to accommodate the following employees: In *Wade K. v. DHHS*, 0120180367 (September 25, 2019), the agency could not show it would have posed an undue hardship to modify the work schedule of a complainant instead of requiring him to work a rotating shift; in *Elise S. v. Dept. of State*, 0120170164 (September 25, 2019), the agency could not explain why it could not provide a flexible alternative work schedule and the ability to move a complainant's lunch break to minimize leave usage; in *Ashely v. NTSB*, 0120180038 (September 17, 2019), the Commission found the agency could have allowed the complainant to telework full-time after she was diagnosed with PTSD and depression after being sexually harassed; in *Lenny W. v. DHHS*, 0120170311 (July 30, 2019), the agency should have provided effective accommodations, including interpretation services, to an employee who was deaf; in *Augustine V. v. USPS*, 0120180469 (July 24, 2019), the Commission found the agency should have provided extra time to complete his route to a city carrier who required additional time to urinate because of a medical condition; in *Geraldine B. v. USDA*, 0720180025 (June 5, 2019), the agency unlawfully revoked the complainant's accommodation of not having to work the front desk, which caused her to have a panic attack in the workplace; in *Irina T. v. VA*, 0120180568 (April 3, 2019), the Commission found the agency should have granted the complainant LWOP as an accommodation instead of charging her AWOL; and in *Aldo B. v. DHHS,* 0120172838 (February 21, 2019), the Commission found the agency needed to provide interpreters to an IT specialist who was profoundly deaf, as using Instant Messenger, email, a note pad, and a white board to communicate was ineffective.

The agency failed to provide interpretation services for hearing impaired employees in *Coralee H. v. USPS*, 0120172277 (February 15, 2019), and *Alonzo N. v. USPS*, 0120181502 (September 17, 2019). Delay in providing reasonable accommodations constituted denials of accommodation in *Ruben T. v. DOJ*, 0120171405 (March 22, 2019); *Patricia W. v. DHS*, 0120172637 (March 26, 2019), *recons. den*. 2019003714 (October 11, 2019); and *Jeffry R. v. USPS*, 0120180058 (September 6, 2019). And failing to provide the simple accommodation of ergonomic chairs resulted in findings of discrimination in *Rochelle F. v. USPS*, 0120171406 (March 5, 2019) and *Kiera H. v. USPS*, 0120172032 (March 21, 2019).

Teleworking as an accommodation continues to be a hot topic. In 2019, the Commission found the agency did not need to provide a second telework day to a Senior HR Specialist in *Katherina A. v. Dept. of Interior*, 0120172579 (February 14, 2019), because the staff was small, a majority of the work had to be performed in the office, including addressing a "steady flow" of walk-in customers and visitors, and there was not enough work that could be done remotely that would cover a second telework day. In *Kiera H. v. SSA*, 0120170813 (March 21, 2019), the essential functions of the complainant's position as a claims/customer service representative required her to be in office as she met in-person with applicants three days per week, and answered a telephone line that was hard wired into the office and could not be forwarded for two days per week. Further, in *Sherill S. v. Dept. of Air Force*, 0120180827 (July 16, 2019), the Commission found five days per week of telework was not the only effective accommodation as the complainant could take breaks and rest in the workplace. The complainant, a contract specialist, in *Amie H. v. VA*, 2019001599 (October 31, 2019), did not have to be provided five days of telework per week because her position required her to have face-to-face interaction with contractors and clients, and she was offered teleworking two days per week, a private office, a change in her tour of duty, access to a private restroom, and a white noise generator to accommodate her PTSD and irritable bowel syndrome. Finally, in *Chanelle B. v. Dept. of Army*, 0120182515 (November 5, 2019), the Commission found the agency acted appropriately in rescinding a telework agreement where the complainant failed to comply with the guidelines and could not work when the system was down, but refused to take leave or come into the office.

In claims of direct threat, the Commission found in *Joshua F. v. VA*, 0120181309 (August 30, 2019), that the agency did not show the complainant posed a threat to himself or others because of a color perception deficiency. The agency regarded him as color blind and unable to work as a motor vehicle operator, but did not address how he held a CDL and previously worked as a mass transit bus operator with his limitations. In *Alonzo N. v. DHS*, 0120180739 (June 21, 2019), the Commission found that the agency failed to demonstrate a significant risk of substantial harm to the health and safety to complainant when the agency withdrew his conditional offer of employment for a Deportation Officer position because he had received a mechanical artificial aortic heart valve replacement and took anti-clotting medication, even though at the time he worked as a Border Patrol Agent, which had more physical demands.

The Commission found the agency unlawfully disclosed employee medical documents in *Felton A. v. USPS*, 0120182134 (December 17, 2019), where a supervisor released the complainant's medical condition to a union steward; *Rigoberto A. v. EPA*, 0120180363 (September 17, 2019), where the Assistant General Counsel provided a copy of the complainant's medical records to the U.S. Attorney's Office, ostensibly for *Giglio* issues; in *Augustine V. v. USPS*, 0120180469 (July 24, 2019), when the complainant's supervisor issued him a direct order to include his medical information (bladder problem) on a form posted on employee desks where they can be viewed by others; *Salvatore B. v. USPS*, 0120180949 (June 13, 2019), when a supervisor disclosed to the complainant's coworker that the complainant had medical restrictions and was performing a particular position because of a worker's compensation claim; *Porter P. v. USPS*, 0120171893 (March 27, 2019), when the complainant's medical records were kept in a driver's personnel file, instead of a separate medical file; and *Dixie B. v. VA*, 0120170175 (March 26, 2019), where the complainant's supervisor and four of her coworkers accessed her VAMC patient medical records without a valid business-related reason for doing so.

The Commission affirmed agency decisions to send employees for fitness-for-duty examinations as being job-related and consistent with business necessity in *Monroe M. v. USPS*, 0120172250 (February 12, 2019) (employee was "argumentative," incoherent," and "agitated and displayed an unusual level of interest in a shooting of a coworker by a federal agent); *Assunta V. v. DOJ*, 0120171966 (February 22, 2019) (based on reports that the complainant was acting oddly, had slurred speech, made odd comments, and that she had dropped a bottle of pain medication and asked an inmate to help her clean it up; *Luvenia S. v. DOD*, 0120172969 (February 26, 2019) (based on a coworker's report that he felt threatened by the complainant's behavior, the complainant expressed suicidal ideations, and when she

returned to the workplace, and she informed her supervisor that she had PTSD and may need emotional support); *Lynette B. v. VA*, 0120170682 (March 8, 2019) (after the complainant returned to work after a five-week absence, two coworkers and her supervisor observed her "leave a needle in a veteran patient's arm after drawing blood; failing to load all labs into the transport box; disposing used needles in the regular trash instead of the needle box; displaying difficulty in placing the right label with the right color tube top; displaying confusion about what labs to pour off and what labs to freeze; and exhibiting an inability to follow more than simple one or two-step instructions"); *Homer S. v. USPS*, 0120181759 (August 16, 2019) (a tractor trailer operator underwent heart surgery and subsequently was involved in four work-related motor vehicle accidents and was found to be at fault for two of them); and *Damon Q. v. USPS*, 2019000543 (December 10, 2019) (multiple management officials stated they witnessed the complainant, a city carrier, moaning and groaning in pain, being unable to complete his route efficiently, dragging his leg, having difficulty bending, and straining to pick up a package).

F. EQUAL PAY ACT

Identifying comparators who performed the same duties is key to a successful EPA claim. In *Casandra N. v. DHS*, 0120171485 (March 14, 2019), the EPA claim failed because the identified male comparator performed duties of greater complexity as compared to the complainant. And in *Sheryl S. v. Dept. of Army*, 0120172477 (March 8, 2019), the complainant, a GS-09 Statistics Assistant, was not similarly situated to the male GS-11 Program Analyst because he produced reports and performed duties that the complainant did not perform. The complainant in *Mercedez A. v. USDA*, 0120170574 (March 7, 2019), *recons. den*. 2019004025 (October 17, 2019), did succeed in her claims of compensation discrimination under Title VII and the EPA, although she was assisted by an adverse inference entered into the record that a male comparator performed the same duties as her. And in *Margeret M. v. VA*, 0120170362 (February 21, 2019), a GS-15 General Surgeon showed that she was paid less than male surgeons because the agency only made vague references to male comparators having more surgical experience that was not supported by the record.

G. HARASSMENT (NOT SEXUAL)

The EEOC continued its focus on claims of workplace harassment in 2019. Successful harassment cases are fact-intensive and we recommend you read the cases to fully absorb what evidence was relied upon to conclude that complainants established claims that were sufficiently severe or pervasive, and related to membership in a protected class. In *Elise S. v. Dept. of State*, 0120170164 (September 25, 2019), the Commission found the complainant established she was subjected to harassment based on her disability and protected EEO activity. In *Lenny W. v. DHHS*, 0120170311 (July 30, 2019), a deaf employee established claims of both supervisory harassment and coworker harassment. The complainants in *Stanton S. v. VA*, 0120170582 (April 16, 2019) and *Gilda M. v. Dept. of State*, 0120182560 (December 11, 2019), respectively, established claims of race-based harassment. And the complainants in *Mario K. v. USPS*, 0120172206 (February 15, 2019), *Henry L. v. Dept. of Army*, 0120172820 (February 25, 2019), and *Glenna O. v. Dept. of Air Force*, 0720180030 (August 20, 2019), *Leora R. v. DHHS*, 0120180736 (August 30, 2019), all established retaliatory harassment.

In addressing affirmative defenses raised by agencies in response to harassment, the Commission found the agency succeeded in asserting such a defense in *Gilda M. v. Dept. of State*, 0120182560 (December 11, 2019), but could not escape liability in *Sharon M. v. Dept. of Transp*., 0120180192 (September 25, 2019), because the agency did not provide a copy of the internal investigation conducted, and it delayed in taking steps to discipline the harasser until six months after the complainant reported the harassment.

H. HEARINGS (EEOC) AND AJ AUTHORITY

A sigh of relief from agency representatives across the country could be heard when the Commission granted reconsideration of its prior decision in *Annalee D. v. GSA*, 0120170991 (October 10, 2018), *recons. grant*. 2019000778 (November 27, 2019). In 2018, the Commission found the agency impermissibly interfered with the EEO investigation when agency counsel assisted witnesses with their affidavit responses, accompanied a supervisor to the investigative interview, and indicated that he was acting as the supervisor's representative. The Commission in granting the request for reconsideration found that the prior decision involved a clearly erroneous interpretation of material fact or law and "there is no evidence in this case that the Agency's Office of General Counsel improperly intruded upon, interfered with, or negatively influenced the EEO process." The Commission clarified, "agency defense counsel may assist agency management officials and witnesses in the preparation of their affidavits during the investigative stage. However, agency defense counsel may not instruct officials to make statements that are untrue or make changes to any affidavit without the affiant's approval of such changes. Agencies may also be assisted by agency defense counsel in informal resolution talks during the counseling stage so long as agency defense counsel suggests, but does not dictate, settlement terms."

The Commission found default judgment was warranted in *Irvin M. v. DHS*, 0120170498 (April 25, 2019), *recons. den*. 2019003340 (October 23, 2019), for the agency's 150-day delay in issuing the FAD as ordered by the AJ after the complainant withdrew his hearing request and awarded remedies after finding the complainant established a *prima facie* case. In *Jordon S. v. DOJ*, 0120171870 (March 20, 2019), the Commission ordered training and posting of notice when the agency delayed more than a year in issuing a FAD. In *Denisse Y. v. DHS*, 0120171448 (April 30, 2019), the Commission sanctioned the agency by ordering the agency to post notices and provide training to employees because it issued the ROI 105 days late and issued the FAD 110 days late.

The Commission found sanctions were not warranted in *Douglas F. v. CFPB*, 0120170529, *recons. den.* 2019005467 (December 10, 2019), where a three month delay in completing an investigation was explained by four amendments and 19 incidents involved in the complaint or in *Marcos S. v. USDA*, 0120171782 (February 7, 2019), where the agency was 59 days late in issuing the FAD.

The Commission continued to affirm dismissals of hearing requests as sanctions against complainants who fail to comply with AJ orders and authority, including in *Cornell S. v. USDA*, 0120180632, 2019002470 (September 27, 2019), where the complainant did not call into the initial status conference or respond to the Notice of Intent To Dismiss Hearing Request; *Carolyn M. v. USPS*, 0120181158 (May 9, 2019), where the complainant refused to provide a sworn statement about her claims during investigation or discovery based on unsupported fears of reprisal; *Monroe M. v. Dept. of Transp*., 0120170817 (March 26, 2019), where the complainant did not respond to discovery requests after being ordered to respond; *Victor S. v. Dept. of Army*, 0120180831 (March 20, 2019), where the complainant engaged in undescribed "contumacious conduct"; *Alden G. v. SSA*, 0120170849 (February 15, 2019), where the complainant disobeyed a protective order, even blacking out the reference to the document as being subject to the protective order; and *Carter R. v. Dept. of Navy*, 0120173003 (February 26, 2019), where the complainant refused to respond to requests for admissions.

In *Rico M. v. DHS*, 0120180644 (May 30, 2019), the Commission found the AJ did not abuse discretion when dismissing the complainant's motion to amend to include a sex-based compensation discrimination claim in response to the agency's motion for summary judgment "given the advanced stage of case processing on the instant formal complaint at the time of the motion."

I. LEGITIMATE NONDISCRIMINATORY REASONS

If a complainant establishes a *prima facie* claim of discrimination, the agency then has the burden of production to articulate, with sufficient specificity, legitimate, nondiscriminatory reasons for the actions at issue. Every year, agencies fail to meet this burden and 2019 was no exception. In *Ashlea P. v. DHS*, 0120182299 (May 29, 2019), the agency only provided the general mechanics for the selection process at issue, and did not articulate with sufficient specificity why the complainant was not selected for two GS-15 positions and therefore the complainant prevailed on her claims of retaliation. In *Jess P. v. DHS*, 0120132186 (September 17, 2019), the agency found the complainant (male) was qualified, but did not sufficiently explain the scoring or ranking of the seven applicants who were selected over him, who included female applicants. The complainant established prima facie claims of nationals origin and religious discrimination in *Erik S. v. DOJ*, 0120181994 (September 27, 2019), and the agency failed to articulate why he was not selected, noting that the ROI lacked affidavits from the SO or any other agency witness with first-hand knowledge of the selection. And the complainant in *Leon B. v. Dept. of State*, 0120182144 (November 5, 2019), had his candidacy for a Diplomatic Security Foreign Service Special Agent position terminated and the agency could not explain why, leaving the conclusion that such action was taken to discriminate against him based on his national origin and age. In a case not alleging nonselection, *Annalee D. v. USPS*, 0120180911 (October 30, 2019), the agency did not sufficiently articulate why the complainant, who was disabled, was paid less for performing the same job duties as other non-disabled employees.

For interesting academic reading on what is considered an "adequate"

evidentiary proffer by the employer, we suggest you read the Court of Appeals for the District of Columbia's decision in *Figueroa v. Pompeo*, 923 F.3d 1078 (D.C. Cir. 2019).

J. NATIONAL ORIGIN DISCRIMINATION

In *Eric S. v. DOD*, 0120171646 (February 8, 2019), the Commission found a supervisor instructing employees, "English! English!" on a specific date constituted an English-only rule that was not necessitated by business necessity, and therefore subjected the complainant to discrimination based on national origin.

K. RACE DISCRIMINATION

In *Glenna D. v. Dept. of Air Force*, 0720180026 (June 6, 2019), the Commission affirmed the AJ's finding of race discrimination where the complainant, who was African-American identified a white employee who performed the same work during the relevant timeframe and the agency could not articulate reasons for the difference in pay. In *Marquis K. v. Dept. of Navy*, 0720180014 (May 10, 2019), the Commission agreed with the AJ that the agency engaged in race discrimination when it terminated the complainant, who was African-American, during his probationary period based no unsubstantiated claims that he engaged in misconduct and was threatening, finding credible that his supervisors viewed him as a "big, Black man" and stereotyped him as aggressive and intimidating. The Commission found the agency disciplined African-American employees more harshly for the same conduct in *Cathy V. v. USPS*, 0120172200 (February 6, 2019), as compared to similarly-situated white employees. And in *Rick G. v. DHS*, 0720180009 (April 26, 2019), the AJ found, and the Commission affirmed, race discrimination when the complainant's Caucasian supervisor removed the complainant's credential which authorized him to receive firearms training because he believed the complainant, African-American, was not authorized to have a credential even though he had completed training at the Federal Law Enforcement Training Center.

L. RELIGIOUS DISCRIMINATION

The rise of e-commerce has resulted in an increase in Sunday deliveries in many areas, and an attendant uprise in requests for religious accommodation by USPS employees not to work on those days. An agency does not need substantial evidence to establish undue hardship in response to requests for religious accommodations, but it must make some minimal effort to see if other employees will agree to swap shifts or volunteer to work on Sundays. In 2019, the EEOC issued three cases with similar fact patterns: *Stanton S. v. USPS*, 0120172696 (February 5, 2019); *Melania U. v. USPS*, 0120180092 (May 15, 2019), and *Heidi B. v. USPS*, 0120182601 (November 8, 2019). In all three cases, USPS employees requested not to work on Sundays because of religious reasons. And in all three cases, the Commission found that the agency only speculated that granting the requests would pose an undue hardship, instead of exploring voluntary substitutions or swaps, lateral transfers, or changes in job assignments in order to grant the requests.

M. REMEDIES AND OTHER RELIEF

Appropriate remedies, which included reinstatement, back pay, and front pay for a joint employee of a staffing firm and the agency was addressed in *Glenna O. v. Dept. of Air Force*, 0720180030 (August 20, 2019), a must-read for any practitioner dealing with a case involving joint employment. The Commission addressed what proper reinstatement looked like for employees with differing circumstances in *Marquis K. v. Dept. of Navy*, 0720180014 (May 10, 2019), where the complainant was terminated ten months into a four-year apprenticeship program; and *Lazaro G. v. Dept. of Commerce*, 0120170802 (May 17, 2019), *recons. den*. 2019004115 (September 17, 2019), where the position required a periodic suitability investigation. What constitutes a substantially equivalent position for purposes of reinstatement was addressed in *Deon C. v. Dept. of Commerce*, 0120180586 (May 7, 2019) and *McKinley P. v. USPS*, 2019005014 (September 24, 2019).

Addressing awards of back pay, the Commission found the complainant in *Liza B. v. USDA*, 0120181688 (September 6, 2019), was only entitled to about five weeks worth until she became unable to work in any position due to "anger management issues." In *Felicidad S. v. USPS*, 0120180637 (June 4, 2019), the Commission found the agency improperly deducted union dues from an award of back pay as the complainant paid those dues out of pocket while employed. And in *Sherrill S. v. Dept. of Air Force*, 2019001468 (June 5, 2019), the Commission found that the complainant earned more in an active-duty military status after being terminated, such that any back pay award would constitute an improper windfall to her.

The complainant in *Israel F. v. DHS*, 0120171103 (May 17, 2019), proved entitlement to $28,687 in increased tax liability for receiving six years of back pay in a single year, as well as payment of $2,400 for the service of a CPA to establish that entitlement.

N. REPRISAL/RETALIATION

Protected EEO activity can take several forms. Complainants can participate in the EEO process by requesting reasonable accommodation, alleging harassment, assisting a coworker by testifying or assisting in an EEO complaint, or proceeding with their own EEO cases. Complainants can also engage in EEO activity by opposing discrimination in the workplace. In *Glenna O. v. Dept. of Air Force*, 0720180030 (August 20, 2019); *Cassandra L. v. DOD*, 0720180029 (August 20, 2019); and *Leora R. v. DHHS*, 0120180736 (August 30, 2019), all three complainants established that they opposed discrimination in the workplace and their respective agencies subsequently retaliated against them. In *Shantel H. v. DHS*, 0120181619 (June 25, 2019), an AJ had dismissed a claim of retaliation on the basis that reporting claims of discrimination against American Indian/Alaska Native tribes receiving FEMA disaster services was not protected activity. The EEOC reversed that determination and remanded the case back to the EEOC Field Office for processing.

The Commission found retaliation where the complainants participated in the EEO process in *Felton A. v. USPS*, 0120182134 (December 17, 2019), where the complainant engaged in protected activity by representing a coworker and was barred from entering the workplace, and *Rick G. v. DHS*, 0720180009 (April 26, 2019), where management officials took actions to discredit the complainant and tarnish his reputation after he engaged in EEO activity. And in *Wanita Z. v. VA*, 0120171549 (May 17, 2019), the Commission found the agency retaliated against the complainant for requesting reasonable accommodation when it issued her a monthly progress review which stated the complainant was unsatisfactory in her interpersonal skills during a time when she was teleworking full-time as a reasonable accommodation.

In *Rigoberto A. v. EPA*, 0120180363 (September 17, 2019), the Commission found retaliation where the agency specifically referenced the complainant's EEO activity as a reason for its decision to remove the complainant from his position; however, the Commission found the agency would have taken the same action even absent the retaliation and therefore the complainant was not entitled to any personal relief. In contrast, in *Lauralee C. v. VA*, 0120170883 (February 28, 2019), the Commission found direct evidence of retaliatory *animus* when the complainant complained of sexual harassment to the Secretary of the Agency, and the agency issued her a letter of admonishment, placed her on administrative leave, and subsequently removed her from her position. The Commission concluded that the agency could not prove that it would have taken the same action absent the retaliatory motivation of the supervisors, and awarded reinstatement with back pay and other remedies.

The Commission found agencies engaged in *per se* retaliation in *Sang G. v. VA*, 0120170604 (March 20, 2019), where a supervisor told the complainant and his union steward that his "primary duty is not to file EEO complaints, it's to serve veterans and [his] job duties are to serve veterans"; in *Bryant F. v. DHS*, 0120171192 (July 2, 2019), when a human resources employee contacted the EEO counselor to ask why the complainant was meeting with her; and in *Terisa B. v. DOD*, 0120180570, 0120181692, 2019002121 (September 4, 2019), where the supervisor told the complainant that complaining about EEO issues was causing him extra work and stress, he did not feel her complaints constituted real EEO complaints, management sees her as someone who does not work well with others due to her EEO complaints, and that if she continued to complain, her employment may be terminated during her probationary period.

O. SECURITY CLEARANCES AND STATE SECRETS

Most decisions issued by the EEOC regarding security clearances surround whether or not an employee can raise something that occurred in relation to a security clearance as discriminatory. In *Rich P. v. DOJ*, 2019000745 (February 5, 2019), the Commission affirmed dismissal of a claim that alleged race, disability, and reprisal discrimination when the complainant was not accommodated during a polygraph examination and when he was subsequently notified that the revocation of his security clearance was affirmed as the EEOC cannot review determinations on the substance of a security clearance decision. However, in 2019, the Commission reinstated three other complaints alleging discrimination that had been dismissed for relating to a security clearance determination. In *Elias R. v. DHS*, 2019000772 (February 15, 2019), the Commission held, "Complainant

claimed he was treated in a discriminatory manner in the administration of the polygraph exam, and was treated differently from other similarly situated individuals not of his race with regard to the Agency's refusal to accept the results of a previous polygraph. While the polygraph might be reviewed while making a clearance decision, it was not the security clearance determination itself. The issues raised by Complainant can be properly adjudicated within the administrative EEO complaint process." In *Al H. v. Dept. of State*, 01201821043 (June 18, 2019), the Commission clarified its prior holding in *Schroeder v. DOD*, 05930248 (April 14, 1994), and found the complainant could proceed on claims that he was subjected to disability discrimination and reprisal regarding his non-promotions and the delay in processing the renewal of his security clearance, when he formed a reasonable suspicion regarding discrimination during the periodic reinvestigation of his eligibility to maintain a security clearance. And in *Tyson A. v. Dept. of Navy*, 2019005159 (December 17, 2019), the Commission found that although the complainant could not allege discrimination for the agency's decision not to grant the complainant an interim security clearance, he could proceed with a claim of discrimination regarding the agency's decision to revoke his tentative hiring, which the agency alleged was revoked because a final adjudication on his clearance could take 9–18 months.

P. SEXUAL HARASSMENT

The agency was liable for harassment created by a male supervisor in *Terri M. v. DOD*, 0120181358 (August 14, 2019), who talked about his sex life in the workplace, made sexually suggestive comments, told the complainant, "I am real good at putting things in," joked about raping his wife, hit the complainant twice with a yardstick, placed his hand on the inside of her thigh during a performance evaluation discussion, poked her in the ribs, placed his hands on her shoulders, and pull her hair clips out. In *Shameka M. v. VA*, 0120172281, 0120181116, 0120181117 (April 4, 2019), the agency had constructive knowledge dating back to 2010 of the harasser's offensive behavior, and therefore was liable created by his actions towards the complainant which included making offensive statements and sexual gestures, rubbing his groin against her, pinching her arms, showing her photos and videos of nude women on his cell phone, and taking a three-inch pocket knife out of his pocket, flicking it at the complainant and saying, "I will cut you" on multiple occasions.

In claims of coworker harassment, the Commission found in *Ashely v. NTSB*, 0120180038 (September 17, 2019), that the agency was on notice of the coworker's inappropriate workplace behavior as early as 2005, but did nothing to stop it. As such, the complainant established she was sexually harassed and the agency was liable when this same coworker told her he wanted to go to a hotel with her, wrote "[Complainant's first name] sucks" on a white board, told her that she could not bend down to put lotion on her feet because her breasts would get in the way, sent her a website selling bras and lotions, told her that he wanted to see her in a swimsuit and sent her pictures of other women in swim suits, told her, "just keep shaking that ass," said that he wanted to "stick his dick in it," and asked to smell her underwear. In *Trey M. v. USPS*, 0120180781 (July 23, 2019), the complainant established a claim of coworker harassment for which the agency was liable when a female coworker texted him six times after he told her he was not interested in a romantic relationship, left him a personal note, and had her boyfriend, who was not an agency employee, vandalize the complainant's car and threaten and harass the complainant to the point that he obtained a restraining order. Although the complainant reported the harassment, the only action taken by the agency was to refer the coworker to EAP, finding that the matter was "personal" and not work related.

The respective agencies did succeed on affirmative defenses in *Delfina Y. v. Dept. of Treas*., 0120182347 (May 22, 2019), by immediately investigating the incident, placing the coworker on administrative leave and reassigning him after he returned, and offering the complainant telework and the opportunity to change her work location; and in *Hester S. v. VA*, 0120172300 (March 8, 2019), where the agency conducted an internal investigation, separated the complainant and the coworker, disciplined the coworker, and the conduct did not reoccur. With regard to harassment created by supervisors, in *Coralee H. v. Dept. of Navy*, 0120182639 (December 17, 2019), the Commission found the agency established an affirmative defense because it had a policy stating that harassment is not tolerated with a telephone number to report harassment, provided EEO training to the complainant and other employees (including the manager) over a period of years, and once it learned of the conduct, placed the manager on administrative leave, launched an investigation, and recommended that he be terminated

The Commission credited an agency's explanation that a coworker was not sexually harassing the complainant when he sent her an email referring to "genital man" and a "massage," but rather that he had dyslexia and the misspellings were unintentional in *Robyn Q. v. DOJ*, 2019001458 (September 30, 2019).

***Shea v. Kerry, Sec'y of State*, 796 F.3d. 42 (D.C. Cir. 2015).**

The U.S. Court of Appeals for the District of Columbia Circuit addressed an appeal from the U.S. District Court for the District of Columbia granting summary judgment in favor of the agency and affirmed its judgment. At issue was a hiring plan in place from 1990 to 1992 with a goal of increasing racial diversity among the officer corps in the Foreign Service. A white employee, William Shea, alleged that the hiring plan caused him to enter the Foreign Service at a lower level because he was not a minority applicant (he joined during the two years the plan was in effect). The 1990–1992 affirmative action plan targeted minority applicants and provided one benefit: that the agency did not need a "certificate of need" showing that there were no internal applicants who could be hired in place of an outside hire. The case had a lengthy procedural history, starting when Shea filed an administrative grievance in 2001. After Congress enacted the Lilly Ledbetter Fair Pay Act of 2009, the U.S. District Court found his claims were timely and addressed the merits. The District Court granted summary judgment finding that although Shea established a *prima facie* case of discrimination under Title VII, the agency demonstrated it acted pursuant to a lawful affirmative action plan. As Shea had not presented evidence to show the plan was not valid, the District Court granted summary judgment in favor of the agency. The Circuit Court affirmed the finding and outlined the history of court decisions addressing affirmative action plans.

The Circuit Court agreed that the agency established that the affirmative action plan established two general conditions: it rested on an adequate factual predicate justifying its adoption and it refrained from "unnecessarily trammeling" the rights of white employees. The Circuit Court found that as Shea did not show the agency's justification was pretextual, the grant of summary judgment was proper.

***Biondo v. City of Chicago*, 382 F.3d 680 (7th Cir. 2004), *cert. den.*, 543 U.S. 1152 (2005).**

In affirming the trial court's finding of liability as to a racially discriminatory Chicago Fire Department promotion process, the circuit rejected the employer's argument that its discriminatory practice was justified by a compelling interest in avoiding disparate impact discrimination. The court noted, "[i]f avoiding disparate impact were a compelling governmental interest, racial quotas in public would be the norm."

***Straughn v. Dept. of Commerce*, 01A24320 (April 21, 2004).**

The Commission determined that the complainant was not entitled to personal relief, even though the agency impermissibly considered sex in advancing a female applicant in the selection process for a supervisory position because complainant would not have been selected anyway.

The complainant, a GS-13 Criminal Investigator, alleged he was subjected to unlawful discrimination when he was not selected for a GS-14 Supervisory Criminal Investigator position. In its FAD, the agency admitted to impermissibly considering sex in referring candidates, and that one female candidate was referred "solely to appease [an agency official's] desire for diversity [in the] candidates." Because of the acknowledgment of discrimination, the Commission first noted, relying on *Pryor v. USPS*, 05980405 (August 6, 1999), *Day v. Mathews*, 530 F.2d 1083 (D.C. Cir. 1976), and 29 CFR 1614.501(b)(l), that the agency's burden of proof obligation is an "onerous" clear and convincing standard "inasmuch as the employer's unlawful acts caused the difficulty in determining what would have resulted if there had been no discrimination." In determining that the complainant was not entitled to relief, the Commission stated that: "[w]e find that the agency has shown by clear and convincing evidence that complainant would not have received the position in the absence of discrimination." At the same time, the Commission made clear that: "[r]egardless of the fact that the agency was able to establish that it would not have selected complainant, even absent the unlawful discrimination, the complainant is entitled to declaratory relief, injunctive relief, attorney fees and costs."

***Gratz v. Bollinger*, 539 U.S. 244 (2003).**

The Supreme Court determined that the University of Michigan's consideration of race in its current undergraduate admissions policy was not narrowly tailored to achieve an asserted interest in diversity and violated the Equal Protection Clause. The policy at issue automatically distributed 20 points (one fifth of the available points) to guarantee admission to every single "under-represented minority" applicant solely because of race.

***Grutter v. Bollinger*, 539 U.S. 306 (2003).**

The Supreme Court concluded that the University of Michigan Law School's narrowly tailored use of race in admissions decisions furthered a compelling interest in obtaining the educational benefits that come from a diverse student body and was not prohibited by the Equal Protection Clause. The policy at the UM Law School was to achieve student body diversity in relation to its admissions policy. The admissions policy focused on a student's academic ability, coupled with a flexible assessment of a student's talents, experiences, and potential. Admission officials were required to evaluate applicants based on all information available in the file, including a personal statement, letters of recommendation, an essay describing how the applicant would contribute to law school life and diversity, the applicant's grade point average (GPA), and Law School Admissions Test (LSAT) score. Officials also looked beyond grades and scores to what were called "soft variables," such as the recommenders' enthusiasm, the quality of the undergraduate institution, the applicant's essay, and the areas of difficulty of undergraduate course selection. While the policy did not define diversity solely in terms of racial and ethnic status, and did not restrict the types of diversity contributions eligible for "substantial weight," it did reaffirm the law school's commitment to diversity with special reference to the inclusion of African-Americans, Hispanics, and Native American students who otherwise might not be represented in the student body in meaningful numbers. By enrolling a "critical mass" of under-represented minority students, the policy sought to ensure their ability to contribute to the law school's character and to the legal profession.

After the law school denied admission to petitioner Grutter, a white Michigan resident with a 3.8 GPA and 161 LSAT score, she filed the instant lawsuit, claiming that the university discriminated on the basis of race and in violation of the Fourteenth Amendment and other authorities. A majority of the Supreme Court: (1) endorsed Justice Powell's view in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), that student body diversity is a compelling state interest in the context of university admission; (2) found that all government racial classifications must be analyzed by a reviewing court under strict scrutiny; (3) deferred to the law school's educational judgment that diversity is essential to its educational mission; and (4) determined that the law school's admission program bore the hallmark of a narrowly tailored plan. As to this last point, the University's policy considered race or ethnicity only as a "plus," was flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and did not establish quotas or put applicants in separate admissions tracks. The program was flexible enough to ensure that each applicant was evaluated as an individual and not in a way that made race or ethnicity the defining feature of the application. The law school engaged in a highly individualized review of each applicant's file, giving serious consideration to all of the ways an applicant might contribute to a diverse educational environment.

I. PROOF OF AGE DISCRIMINATION

A. IN GENERAL

***Enriqueta v. Dept. of Army*, 0120143049 (September 2, 2016).**

The Commission found that the agency discriminated against the complainant on the basis of her age when it did not recommend to her staffing firm that she receive a raise after her first 90 days in the position. The complainant worked as an instructor in the agency's training and development branch and filed a complaint alleging discrimination when she did not receive pay raises after her 90-day performance review and the following year's performance evaluation. She also alleged retaliation when she was subsequently terminated. After the agency dismissed her complaint on the basis that she was not an agency employee, the Commission reinstated her complaint, finding that she qualified as a joint employee of both the agency and the staffing firm in Appeal No. 0120113542 (August 21, 2013). The agency subsequently investigated the complaint and issued a FAD finding no discrimination. The Commission found that the complainant established a *prima facie* case of age discrimination as she was recommended for a raise by her team leader, but the recommendation "was not moved forward by higher level government management." The record identified other employees who received raises and the Commission concluded that although these comparator employees were not similarly situated in all respects, there was evidence sufficient to raise an inference of age discrimination. The Commission found that the agency did not provide a credible reason for not recommending the complainant receive a pay increase after her first 90-days of employment and to the extent that the agency's management official alleged it was because the complainant's performance was mediocre, the Commission found that unsupported by the evidence of good performance in the record, and noted that the agency concluded in its own FAD that some of the agency management official's statements were called into question. The Commission did find that the agency articulated legitimate, nondiscriminatory reasons for its decision not to recommend a raise after her performance evaluation (budgetary restrictions) and that it was not involved in the staffing firm's decision to terminate the complainant. As the Commission had previously found the agency was a joint employer of the complainant, the Commission ordered the agency to pay the complainant back pay for the period of time she should have received the pay raise.

***Kristy D. v. Dept. of Interior*, 0720160003 (August 10, 2016).**

The Commission refused the agency's request to reject the finding of discrimination and order of relief from the AJ in a claim of sex and age discrimination filed by a 71 year-old employee. The complainant worked as a deputy regional director and had been with the agency for 34 years, receiving exceptional and superior ratings during this time. In 2010, her supervisor, a 47 year-old male employee, notified her that she was going to be reassigned to another division and she would be terminated if she refused the reassignment. The complainant did not want to be reassigned but accepted the new position and the agency subsequently filled her former position with a younger, male employee. The complainant filed an EEO complaint and after a hearing, the AJ found that the complainant proved that the articulated reason for the reassignment, that the new division required the complainant's leadership, was pretext for discrimination. On appeal, the agency argued that the complainant failed to show how the agency subjected her to adverse treatment given that she was reassigned to another position at the same grade. The Commission noted that an adverse action "merely requires a tangible change in the duties or working conditions constituting a material employment disadvantage" and that the complainant testified that she did not want to be transferred and the reassignment moved her from working in an area where she had a lot of expertise to one of which she had very little knowledge. The agency also argued that it had articulated legitimate, nondiscriminatory reasons for reassigning complainant, namely that the agency needed her leadership in the new position. The Commission found this explanation was undermined by the fact that the agency threatened the complainant with termination if she did not accept the reassignment and agreed with the AJ that the agency's argument that it would not really have terminated the complainant had she failed to accept the reassignment unworthy of belief. The Commission also affirmed the AJ's award of remedies.

[This case is also referenced in the "Compensatory Damages" and "Sex (Gender) Discrimination" chapters.]

***Ford v. Dept. of Navy*, 629 F.3d 198 (D.C. Cir. 2010).**

The DC Circuit reversed the district court's bench decision; the circuit determined that the Supreme Court's decision in *Gross v. FBL Financial Services, Inc*., 129 S. Ct. 2343 (2009), foreclosing mixed motive age claims, does not apply to federal employees.

[A summary of this case is found in the "Evidence" chapter.]

***Gross v. FBL Fin. Services, Inc.*, 557 U.S. 167, 129 S. Ct. 2343 (2009).**

The Supreme Court determined that the plaintiff must demonstrate a "but for age" motive, and there are no mixed motive cases under the ADEA. Here, Supreme Court revisited the subject of the ADEA in a case that makes clear that there are no mixed motive cases under the ADEA and the burden is on the plaintiff or complainant to establish that the challenged employer's action would not have been taken "but for" age. In *Gross*, the plaintiff filed a complaint alleging his employer discriminated against him because of his age by demoting him and giving some of his former duties to a younger employee. Gross introduced evidence to show that the demotion was due at least in part because of his age. The district court included a jury instruction that it must find for Gross if it found that his age was a "motivating factor" in the decision to demote him. The Supreme Court held that an employer in an ADEA case is never required to bear the burden of proving that it would have taken the same action absent a discriminatory motive. Instead, the employee "retains the burden of persuasion to establish that age was the 'but for' cause of the employer's adverse action." The Court explained:

> This Court has never held that this burden-shifting framework applies to ADEA claims. And, we decline to do so now. When conducting statutory interpretation, we "must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination." *Federal Express Corp. v. Holowecki,* 552 U.S. [128 S. Ct. 1147, 1153, 170 L. Ed. 2d 10, 17] (2008). Unlike Title VII, the ADEA's text does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor. Moreover, Congress neglected to add such a provision to the ADEA when it amended Title VII to add §§ 2000e-2(m) and 2000e-5(g)(2)(B), even though it contemporaneously amended the ADEA in several ways, *see* Civil Rights Act of 1991, § 115, 105 Stat. 1079; *id*., § 302, at 1088.

The Court held that there can be no mixed motive claims under the ADEA and summed up the burdens of proof, as follows:

> We hold that a plaintiff bringing a disparate-treatment claim pursuant to the ADEA must prove, by a preponderance of the evidence, that age was the "but-for" cause of the challenged adverse employment action. The burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision.

***Gomez-Perez v. Potter*, 128 S. Ct. 1931 (2008).**

The Supreme Court reversed the First Circuit and held that the ADEA provides a cause of action for retaliation by federal employers against federal employees who complain of age discrimination. Myra Perez, a Postal Service clerk in Puerto Rico, complained that she was subjected to various forms of retaliation after she filed an age discrimination complaint, including that her supervisor made groundless complaints about her and falsely accused her of sexual harassment. She filed a federal court complaint which was dismissed on the grounds that 29 USC § 633a(a), the ADEA provision applicable to federal employees that prohibits "discrimination based on age," does not cover retaliation. The First Circuit Court of Appeals affirmed the dismissal (at 476 F.3d 54 (1st Cir. 2007)), creating a split in the circuits.

The Supreme Court held that Ms. Perez could proceed with her complaint of retaliation for having filed an EEO case based upon age. There is an implied cause of action for retaliation for complaining about age discrimination, according to the Court, because the age discrimination proscribed in the ADEA quite naturally includes discrimination on account of having complained about age discrimination. Justice Alito wrote the