INTRODUCTION

This book is a summary of notable cases, laws, and guidance ending in December 2022. 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 2022. 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 2022, 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 Natania Davis and founding author 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.

Over the years, this *Guide* has adopted conventions of its own. Block quotations from EEOC and court decisions may omit footnotes and citations, and if that occurs, we do not use the "[Footnote omitted]" or "[Citation omitted]" signal. Block quotations will omit references to portions of the administrative record, e.g., "Agency Response to Appeal, Tab 4-0," or "Jt. App. 44." No ellipses are used when record references are dropped.

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 subsequently changed its docketing structure again, and now is docketing cases beginning with the year, followed by a consecutive numbered appeal (for example, docket number 2020000067).

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, 2022, as well as 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. AGE DISCRIMINATION

The Commission found complainants established claims of disparate treatment on the bases of age in *Brenda M. v. VA*, 2021003686 (December 5, 2022) (change in duty station found to be motivated by age) and *Mercedez A. v. DOJ*, 2021000657 (October 4, 2022) (removal of duties and nonselection for a promotion were because of age).

B. ATTORNEY FEES

In *Pérez-Sosa v. Garland*, 22 F.4th 312 (January 7, 2022), the Court of Appeals for the First Circuit addressed a district court's award of fees as part of a settlement agreement, and found the district court improperly disallowed time spent on settlement negotiations and preparing the plaintiff to testify at a deposition and trial in claims filed by his coworkers.

The agency was unsuccessful in arguing that as the complainant prevailed on a claim raised by the Commission itself and not by the complainant or his attorney, he was not entitled to attorney fees in *Harlan P. v. VA*, 2021001693 (August 22, 2022). The Commission found $10,000 to be an appropriate award of fees where the complainant only prevailed on a claim of *per se* retaliation in *Jane H. v. Dept. of Air Force*, 2022000355 (December 19, 2022), and the fee petition included broadly generic billing entries. In *Mike G. v. SSA*, 2021003869 (October 27, 2022), the complainant's attorney sought fees for work done prior to withdrawing a request for hearing, but the Commission agreed with the agency that there was no showing that any information gleaned in discovery was relied upon in the FAD finding discrimination and agreed $1,973.25 in fees was appropriate. In *Joshua F. v. VA*, 2021000615 (September 6, 2022), the Commission found the agency was sufficiently on notice of the complainant's representation such that fees for work performed were recoverable as there were emails between the attorney and an EEO specialist the month prior.

With regards to hourly rates, in *Rigoberto A. v. EPA*, 2021002128 (July 27, 2022), the Commission agreed with the agency that $250 per hour was a reasonable hourly rate for an attorney in Jasper, Georgia who had no prior experience with federal sector EEO complaints or appeals; in *Elliot J. v. SSA*, 2021004066 (July 18, 2022), the Commission found unsupported arguments from a Washington, D.C. attorney that rates higher than those set by the *Laffey* Matrix were warranted; and in *Felipa A. v. USPS*, 2022000547 (July 11, 2022), the Commission agreed with an AJ that the rates set forth by the *Laffey* Matrix did not apply to an attorney in Seattle, Washington.

In addressing across-the-board reductions, the Commission issued the following decisions finding a 50% reduction to be appropriate: in *Velva B. v. USPS*, 2020002159 (November 8, 2022), a class complaint, because the class did not prevail on the disparate impact claim, the fee petition contained many entries of clerical work, and there were vague descriptions of time spent; in *Erick N. v. Dept. of Army*, 2021004863 (November 2, 2022), where the complainant only prevailed on a single claim of *per se* retaliation; and in *Cynthia D. v. Dept. of Navy*, 2020002980 (July 21, 2022), where the complainant only prevailed on half of the claims raised, and that these claims were separate and distinct from the unsuccessful claims.

However, in *Larraine D. v. Dept. of Interior*, 2022002934 (July 11, 2022), *recons. den*., 2022004267 (December 6, 2022), the Commission declined to affirm the agency's 50% across-the-board reduction for billing entries being insufficiently specific or excessive, finding although they were not excessively detailed, the Commission could discern what work was being performed.

In *Carol P. v. SBA*, 2021004687 (March 9, 2022), the agency attempted to argue that having two attorneys represent complainant at the hearing was unreasonable, although the agency also had two attorneys attend. The Commission affirmed the junior-senior model of representation, and found the services were not duplicative, but rather complementary of each other. In *Zachery V. v. Dept. of Air Force*, 2022004037 (December 12, 2022), the Commission ordered the agency to pay interest on a payment for attorney fees that was unreasonably delayed by sixteen months as well as any additional reasonable fees and costs associated with the filing of the petition for enforcement.

And finally, in *Velva B. v. USPS*, 2020002159 (November 8, 2022), the Commission awarded $542,949.93 in costs for litigation of a class complaint, which included $300,498.19 for document hosting/e-discovery for the millions of electronic documents involved in the litigation, a website and a survey used to communicate with class members.

C. COMPENSATORY DAMAGES

We continue to see decisions where awards to complainants are limited due to lack of supporting evidence beyond the complainant's own statements, as well as failure to establish a nexus between the alleged harm and the agency's actions.

The Commission issued awards of less than $5,000 in the following cases: $1,000 in *Isaiah R. v. USPS*, 2021001506 (July 27, 2022), to a complainant who was embarrassed and sickened because his birthday was not announced at work to retaliate against him; $1,500 in *Mitzie W. v. Dept. of Navy*, 2020005115 (March 7, 2022), where complainant did not provide any evidence regarding financial, mental or physical harm, or statements from anyone other than herself; $2,000 in *Ingram v. Dept. of Army*, 2022002844 (August 22, 2022), for emotional harm where the complainant's medical information was improperly sent to several coworkers; $2,000 in *Hedy B. v. VA*, 2021002836 (June 7, 2022), based on the complainant's testimony that disclosure of her medical records caused her emotional distress, withdrawal, and difficulty concentrating; $2,000 in *Ebony M. v. USPS*, 2020004813 (January 12, 2022), where the complainant suffered embarrassment, humiliation, anxiety, loss of self-esteem, and loss of sleep for a period of approximately eight months after her supervisor disclosed her medical condition; $3,000 in *Rigoberto*

A. v. EPA, 2021002810 (July 21, 2022), for harm relating to disclosure of medical records where much of the supporting evidence submitted by the complainant related to unsuccessful claims; $3,000 in *Carlton T. v. USPS*, 2021002194 (August 24, 2022), for established suffering, given the complainant's preexisting medical conditions, due to *per se* retaliation; and $3,000 in *Jeffrey K. v. DHS*, 2020004403 (January 19, 2022), where the agency delayed in providing a reasonable accommodation, but the complainant did not submit significant evidence of harm.

The Commission found awards of $5,000 to be appropriate in: *Joanna G. v. DOD*, 2022002444 (December 7, 2022), (affirming an AJ's award to a complainant who was stressed and intimidated over an eight month period as a result of *per se* retaliation); in *Erick N. v. Dept. of Army*, 2021004863 (November 2, 2022) (holding although the complainant alleged other retaliatory incidents and claimed harm relating to them, he only prevailed on the single instance of *per se* retaliation); and in *Aron W. v. VA*, 2021002430 (September 21, 2022) (failure to receive religious accommodation caused embarrassment, discomfort, and humiliation).

The Commission affirmed agency awards of less than $10,000 to be appropriate in *Jane H. v. Dept. of Air Force*, 2022000355 (December 19, 2022) ($7,500 to a complainant subjected to *per se* retaliation, but who submitted evidence of harm relating to an unsuccessful hostile work environment claim) and *Harlan P. v. VA*, 2021001693 (August 22, 2022) ($8,500 for emotional distress relating to disclosure of EEO activity).

The Commission increased agency awards to less than $10,000 in the following cases: in *Lisa C. v. USPS*, 2021002674 (July 28, 2022), the Commission increased an agency's award from $1,500 to $7,500 where because of not being accommodated, the complainant felt judged at work, had problems sleeping, and needed medication for depression and anxiety. In *Jefferey K. v. USPS*, 2021001195 (June 15, 2022), the Commission increased an agency's award of damages from $750 to $6,500 where the agency engaged in *per se* retaliation when his supervisor threatened to burn down his house if he participated in EEO activity, but there was no evidence the complainant sought professional help, and he did not submit additional statements from friends or family members. In *Sheila O. v. DHHS*, 2021001250 (June 7, 2022), the Commission increased the agency's award from $4,000 to $6,000 where medical records were submitted, but they did not link the worsening of the complainant's preexisting medical conditions to the harassment.

The Commission increased agency awards to $10,000 in the following cases: in *Tomeka T. v. Dept. of Treasury*, 2022000651 (December 8, 2022), the Commission increased an agency's award from $4,500 to $10,000, where *per se* retaliation caused emotional distress, nightmares, anxiety, and migraines; in *Jazmine F. v. DOD*, 2021001591 (September 27, 2022), where the Commission disagreed with the agency that no award was appropriate and awarded $10,000 to a complainant who prevailed on a claim of retaliation and established she suffered from serious emotional, physical, and professional harm including impact on her reputation, feelings of hopelessness, and sought psychiatric care, including new diagnoses of anxiety, depression, adjustment disorder, and insomnia; and in *Leora R. v. DHHS*, 2020004621 (April 11, 2022), the Commission increased an award from $1,000 to $10,000, to a complainant who prevailed on a claim of *per se* retaliation and had a duration of harm of four months.

Addressing awards issued by AJ up to $10,000: in *Maxima C. v. Dept. of Air Force*, 2020005241 (June 7, 2022), *recons. den*., 2022003587 (November 8, 2022), the Commission found $10,000 appropriate to a complainant who prevailed on her claim that the agency failed to accommodate her disability and presented evidence that she suffered from increased back pain because of the lack of accommodation. And in *Deandrea M. v. USPS*, 20021000216 (February 9, 2022), the Commission increased an AJ's award from $5,000 to $10,000, where the complainant prevailed on a claim of sexual harassment but only presented generalized evidence of loss of sleep, embarrassment, and generalized stress.

In *Carroll R. v. Dept. of Treasury*, 2020002891 (February 14, 2022), the Commission reduced an AJ's award of compensatory damages from $275,000 to $10,000 because the evidence submitted of harm primarily related to unsuccessful claims, and the complainant asserted stress as a result of the EEO process, which is not recoverable.

Turning to awards of up to $50,000 concerning FADs issued by agencies: In *Calvin D. v. VA*, 2021002235 (August 30, 2022), the Commission affirmed the agency's award of $15,000 in compensatory damages to the complainant who submitted an affidavit from himself, but did not submit any other corroborating evidence in support of his claims of emotional and psychological suffering, and who attributed much of the harm to the loss of his job in 2019, which was not at issue in the complaint. In *Anna B. v. DOD*, 2021002342 (June 14, 2022), the Commission agreed with the agency that $15,000 was an appropriate award of compensatory damages to a complainant who submitted statements from herself, her mother, and an ER medical document alleging emotional distress, humiliation, embarrassment, loss of sleep and appetite, and crying spells.

In *Cecille W. v. USPS*, 2021001542 (September 28, 2022), the Commission increased an agency award from $22,500 to $30,000, noting testimony from the complainant's two sons, her friend of 15 years, and her mother who described the complainant as reclusive, downtrodden, turning to alcohol, paranoid, isolated, and stressed. In *Terrie M. v. Dept. of State*, 2021002279 (March 31, 2022), the Commission increased the agency's award from $12,000 to $30,000 to an employee not promoted based on her sex who experienced stress, feelings of inadequacy, hives, skin irritation, insomnia, hives, and hair loss, and was diagnosed with Adjustment Disorder, with Mixed Anxiety and Depressed Mood, although there was evidence of other stressors unrelated to the agency's actions. In *Michael G. v. VA*, 2021002218 (June 29, 2022), the Commission increased the agency's award of nonpecuniary compensatory damages from $30,000 to $35,000 where the duration of the harassment was 18 months, and the complainant suffered from stress, moodiness, loss of appetite, weight loss, and the harassment impacted his relationships with his wife and daughter.

In *Lelah T. v. DHS*, 2021001401 (August 16, 2022), the Commission affirmed $40,000 to be appropriate, noting that some of the statements submitted by the complainant in support of the claim for damages were not signed, but crediting evidence that she was distressed, humiliated, anxious, depressed, and had insomnia and negative eating habits as a result of the harassment. In *Irvin M. v. DHS*, 2020005333 (June 8, 2022), the Commission agreed $50,000 was an appropriate award, noting that the duration of harm from the 2011 nonselection lasted until 2016, when the complainant received an award of $10,000 in damages for subsequent discrimination in another case, and given evidence from the complainant and his wife of stress, anxiety, trouble sleeping, gastrointestinal issues, migraines, headaches, paranoia, and strain on family relationships.

Looking at awards in that same bracket issued by AJs, the Commission found up to $50,000 to be appropriate in the following cases: in *Cynthia D. v. Dept. of Navy*, 2020002980 (July 21, 2022), the Commission increased an AJ's award of nonpecuniary compensatory damages from $11,000 to $12,000, after the complainant suffered from insomnia for approximately six months after being subjected to sex-based harassment, as well as weight gain, hair loss, fear of going to work, and isolation from her family members. In *Ken E. v. DOD*, 2022002570 (September 27, 2022), the Commission affirmed the AJ's award of $20,000, based on the complainant's testimony that he struggled due to the lack of accommodations, felt discouraged and ineffective in his job, and had a "stifled" career trajectory and financial hardship as a result. In *Tera B. v. DHS*, 2022000082 (June 22, 2022), the Commission increased an AJ's award from $20,000 to $35,000, citing harm from 2015 which worsened through 2019, diagnoses of PTSD and depression, anxiety, crying spells, chest pains, difficulty breathing, dizzy spells, shakiness, hair loss, weight gain, sleeplessness, and a permanent tick. In *Nancey D. v. DOD*, 2022000526 (September 28, 2022), the Commission affirmed an AJ's award of $45,000 to a complainant who established sex-based harassment by a male coworker and experienced loss of confidence, feelings of being unsafe, stress, and breaking down in tears as a result.

In *Iris D. v. Dept. of Labor*, 2021001028 (May 4, 2022), the Commission affirmed an AJ's award of $45,000 in nonpecuniary compensatory damages to the complainant subjected to a racially hostile work environment who lost trust in others, and had resentment, paranoia, isolation, anxiety, heart palpitations, uncontrolled elevated blood pressure, and loss of consciousness. In *Carol P. v. SBA*, 2021004687 (March 9, 2022), the Commission affirmed the AJ's award of $50,000 in compensatory damages after the complainant was denied reasonable accommodation because testimony from complainant and family members demonstrated that she experienced mood swings, loss of joy, migraines, emotional distress, exacerbation of high blood pressure, sleeplessness, marital discord, and loss of self-esteem. In *Mercedez A. v. DOJ*, 2021000657 (October 4, 2022), the Commission affirmed the AJ's award of $50,000 in nonpecuniary compensatory damages where because of the agency's actions, for a period of approximately two years the complainant was anxious, depressed, began to withdraw from society, was frequently in tears, was sullen, she

dreaded going to work, her health deteriorated, her blood pressure went "sky high," and she was depressed.

Reviewing decisions issued by agencies where up to $100,000 in nonpecuniary damages was found appropriate: in *Larraine D. v. Dept. of Interior*, 2022002934 (July 11, 2022), *recons. den*., 2022004267 (December 6, 2022), the Commission agreed with the agency that $50,000 was appropriate for extreme stress, lack of social interactions, weight gain, depression, anxiety, insomnia, nightmares, and strains on the complainant's relationships with her husband and her son resulting from the Agency's harassing conduct and retaliatory actions, and affirmed the agency's increase to $51,246.40 to account for inflation.

In *Jona R. v. Dept. of State*, 2020004549 (March 31, 2022), the agency awarded $20,000 in compensatory damages, and the Commission found $60,000 to be more appropriate where lack of accommodation exacerbated the complainant's preexisting medical conditions, caused her stress, depression, anxiety, social withdrawal, and caused new problems including astroparesis, autonomic neuropathy, and hypoglycemic unawareness. In *Thersa E. v. USPS*, 2021005121 (June 29, 2022), the agency awarded $7,000 in nonpecuniary compensatory damages, and the Commission increased this to $65,000 on the basis that denial of her service dog for an extended period of time imposed additional risk to her health, as well as additional stress and mental symptoms.

In *William B. v. VA*, 2021002515 (July 26, 2022), the Commission affirmed an agency's award of $95,000 to a complainant who was not accommodated, but who did not seek medical or psychiatric counseling, and did not provide any supporting statements from family members, friends, health care professionals, or clergy members, or any medical documentation to support his asserted symptoms.

The Commission increased an agency's award from $17,500 to $100,000 in *Mirta Z. v. USPS*, 2021003272 (August 31, 2022), where the complainant's daughter described her mother as happy until she became "devastated" by the agency's actions, and that because of the lack of accommodation, she suffered from more severe seizures, multiple falls with injuries to her head, fatigue, crying spells, changes to her physical appearance, and financial distress. In *Clifford L. v. USPS*, 2021001926 (February 2, 2022), the Commission increased the agency's award from $25,000 to $100,000, to a complainant who did not receive accommodations for his blindness, and suffered from depression, suicidal thoughts, fatigue, muscle twitching, weight gain, panic attacks warranting multiple ER visits, and difficulty sleeping. In *Eve E. v. Dept. of Interior*, 2021003164 (August 17, 2022), the agency awarded $25,000 in nonpecuniary compensatory damages and the Commission increased the award to $100,000, crediting statements from the complainant and several family members attesting that the agency's actions changed her from a confident, active person to someone who was despondent and withdrawn, and suffered from humiliation, panic attacks, arrythmia, weight gain, loss of confidence, bouts of crying, a strain on the complainant's relationships with her husband, daughter, and other family members, and she received a diagnosis of Generalized Anxiety Disorder and Major Depressive Disorder.

In *Gena C. v. DHS*, 2021001179 (September 22, 2022), the Commission affirmed an agency's award of $100,000 to a complainant who established that the failure to receive workplace accommodations caused her to lash out at her parents and become estranged from her siblings, and she suffered from swelling in her joints, damage to her reputation, depression and PTSD.

Reviewing awards issued by AJs, the Commission found between $50,001 and $100,000 to be appropriate in the following cases.

In *Johnson P. v. VA*, 2021003266 (August 15, 2022), the Commission increased an AJ's award of damages from $15,000 to $70,000 after carefully considering the evidence presented by the complainant of psychological and physiological injuries, as well as the supporting case law in increasing the award. In *Tessa G. v. DHHS*, 2020004613 (August 29, 2022), the Commission increased an AJ's award from $42,500 to $75,000 where the complainant had panic attacks, crying spells, physical pain that her doctors told her was related to stress, depression, isolation, and humiliation. In *Anne M. v. Dept. of Interior*, 2021004318 (June 2, 2022), the Commission affirmed the AJ's award of $80,000, where the complainant sought help from a therapist, had depression, headaches, nightmares, crying spells, fear, and problems sleeping, and her therapist stated the complainant had been diagnosed with PTSD, anxiety, depression, and panic attacks, and she medically retired from the agency as a result. The Commission in *Lydia W. v. USPS*, 2021004453 (May 18, 2022), affirmed an AJ's award of $85,000 where the agency's actions exacerbated the complainant's preexisting depression, impacted her anxiety and ability to eat and sleep, caused nightmares and financial difficulties, diminished family relationships, and she experienced headaches and stomachaches.

In *Wiley G. v. Dept. of Navy*, 2022000605 (October 31, 2022), the Commission affirmed $100,000 where the complainant's preexisting PTSD and anxiety were exacerbated by the agency's actions, and he suffered from physical effects from the stress and anxiety including irritable bowel syndrome (IBS), headaches, elevated blood pressure, an ulcer, eczema, weight gain, panic attacks, and erectile dysfunction. In *Everette C. v. SSA*, 2021000753 (August 16, 2022), the Commission affirmed an award of $100,000 to a complainant who presented evidence at a damages hearing from himself, his two sons, and an EAP counselor that after he did not receive accommodation, his mental health deteriorated, his efforts to manage his preexisting depression required medication in addition to more frequent therapy, he became isolated, angry and unstable, he stopped taking care of himself in terms of eating, and he lost interest in keeping active physically. The duration of harm was no less than four years, and the impact on his relationships with his elder son never recovered.

With regard to awards of nonpecuniary compensatory damages over $100,000, the Commission increased AJ awards of damages in several cases: In *Billie S. v. DOJ*, 2022002502 (November 21, 2022), the Commission increased an AJ's award from $800 to $125,000, noting exacerbation of the complainant's preexisting conditions of hypertension and hypertensive cardiovascular disease, chest pains that required him to go to the ER, a diagnosis of anxiety and depression, panic attacks, trichotillomania (hair pulling disorder) which caused him to shave his hair and eyebrows, and impact on his marriage which sent them to marital counseling with their pastor. In *Willia M. v. VA*, 2020005021 (March 14, 2022), the Commission increased an AJ's award from $7,500 to $125,000, to a nurse who was subjected to harassment by a doctor which included an assault and as a result, she gained weight, her hair began to fall out, she sought counseling with EAP, and became withdrawn at work.

In *Melina K. v. VA*, 2021001468 (March 8, 2022), the Commission increased an AJ's award from $10,000 to $175,000, where the complainant was subjected to a physical assault, to include grabbing near her breasts, refusing to let her go even when complainant repeatedly screamed for him to do so, and the agency failed to take steps to separate her from the harasser. The complainant went from being friendly and a good worker to being quiet and non-communicative, had mental anguish, was diagnosed with PTSD, and sought therapy as well as counseling services through her bishop. And in *Doyle T. v. Dept. of Air Force*, 2022004281 (September 30, 2022), the Commission increased an AJ's award from $275,000 to the statutory maximum of $300,000 to a complainant who was subjected to more than eight years of harm after the agency failed to accommodate his disability and withdrew his tentative offer of employment.

The Commission also affirmed substantial awards issued by AJs: In *Felipa A. v. USPS*, 2022000547 (July 11, 2022), the Commission affirmed an AJ's award of $125,000 in nonpecuniary damages to a complainant where the duration of the harm began in 2014 and continued to the present day, and the complainant testified credibly regarding extreme distress, depression, anxiety, and she had sought physical and mental health help for various ailments, and took medication for anxiety, sleeplessness, and PTSD. In *Jason L. v. DOJ*, 2022000528 (June 21, 2022), the Commission affirmed an AJ's award of $200,000, where the complainant began to self-medicate and drink daily due to the agency's actions, his anxiety exacerbated such that he had to take sick leave, he felt embarrassment, he was depressed and secluded himself from friends and family, and continued to suffer from anxiety, depression, panic attacks, and insomnia, requiring daily medication. In *Doyle S. v. Dept. of Interior*, 2021003582 (April 12, 2022), the Commission found the AJ's award of $200,000 to a complainant who suffered from severe mental distress such that he became suicidal and required six weeks of in-patient mental health treatment, he would wear the same clothes for days, would have difficulty sleeping, and his wife described him as another child she had to care for.

Agencies are able to assert a good faith defense to claims of compensatory damages in cases alleging failure to accommodate disabilities. In *Fidela B. v. DOD*, 2021002428 (September 27, 2022), the Commission found the agency established a good faith defense to avoid liability for compensatory damages because although the agency denied the complainant's request for full-time telework, the agency regularly granted her requests for leave

when her disability precluded her from working in the office and also granted *ad hoc* telework when she was unable to continue working in the office due to her disability. And in *Shaniqua W. v. Dept. of Transp*., 2020004246 (January 13, 2022), the agency asserted a successful good faith defense to a claim for compensatory damages because a manager testified the complainant was offered the ability to take breaks to disengage and regroup when she felt she was having an anxiety attack, and she was allowed to have a third-party attend meetings to assist her in communicating with her supervisor.

Each year, we see numerous decisions denying requests for pecuniary damages for either lack of documentation of the incurred costs, or failure to establish a nexus between the costs and the agency's actions found to be discriminatory. However, this year, we did see a few notable awards of pecuniary damages. In *Doyle T. v. Dept. of Air Force*, 2022004281 (September 30, 2022), the Commission affirmed the AJ's award of $77,811.59 for out-of-pocket expenses relating to the complainant's bankruptcy proceedings, child support arrearages, mortgage interest and principal, and foreclosure proceedings. In *Thersa E. v. USPS*, 2021005121 (June 29, 2022), the Commission previously found the agency improperly denied the complainant's request to bring her service dog to work and subsequently awarded $4,200 for dog walker services incurred for that time period. And in *Jona R. v. Dept. of State*, 2020004549 (March 31, 2022), the complainant established entitlement to $6,191.76 in pecuniary damages, including 13 copays of $25 each for therapy appointments, $295 for missed appointment fees, $66.76 in costs for obtaining her medical records, and $5,800 in penalties from a TSP withdrawal.

D. DISABILITY

Complainants must demonstrate that they are qualified individuals with disabilities in order to be entitled to receive reasonable accommodations. In *Trina C. v. SSA*, 2021002464 (June 23, 2022), the Commission agreed with the agency that the complainant did not meet that showing because her stage four metastatic cancer and lymphedema on her left hand rendered her unable to perform the essential functions of her position, and the accommodations she was requesting would have resulted in the reassignment of essential functions.

In notable cases involving claims that agencies failed to provide effective reasonable accommodations: the Commission held in *Tanya D. v. DOJ*, 2022002544 (November 21, 2022), that the agency should have provided the complainant with a flexible schedule to attend medical appointments and physical therapy, and subsequent request for reassignment to another airport. In *Cheryl L. v. Dept. of Treasury*, 2021001710 (September 26, 2022), the agency improperly changed the day of complainant's in-office work day per week, which rendered his accommodation less effective. In *Bell G. v. USPS*, 2021002760 (June 27, 2022), the agency failed to show how it would have posed an undue hardship to provide the complainant with breaks at 5 P.M. and 8 P.M. so she could eat a small snack and take her medication. In *Tania O. v. DOD*, 2022000007 (May 24, 2022), the agency failed to provide reasonable accommodation for the complainant's mental disability (unspecified) in the form of having written instructions provided in lieu of in-person or telephone meetings.

In *Chanelle B. v. Dept. of Navy*, 2020004887 (February 24, 2022), the agency failed to accommodate a complainant with PTSD who requested a desk location that would not require her to face away from entrances or permit people to stand behind her. In *Jeremy C. v. Dept. of Treasury*, 2021001061 (May 3, 2022), the agency failed to provide a sign language interpreter for the complainant's orientation as a seasonal employee. In *Ken E. v. DOD*, 2022002570 (September 27, 2022), the agency failed to accommodate an employee with blindness when it denied his requests to make the agency's website and documents compliant with Section 508 of the Rehabilitation Act, which caused him to resign.

In *Ileen C. v. SSA*, 2021000865 (February 3, 2022), the agency failed to show how it would pose an undue hardship to allow a social insurance specialist who had allergies and other medical conditions to work from a single workstation she could adequately clean, instead of moving around from space to space during her work day. In *Vernie M. v. USPS*, 2020004103 (September 19, 2022), *recons. den*., 2023000262 (December 13, 2022), the agency denied the complainant's request for a disabled parking space, although it previously had provided the accommodation, and required her to walk from a farther parking space.

Teleworking as a reasonable accommodation continues to be the focus of decisions issued by the Commission each year. In *Minerva Z. v. VA*, 2021002154 (September 22, 2022), the agency could not show why it would have been an undue hardship to grant three days per week of telework to a complainant with anxiety and PTSD, instead of the two days per week it offered. In *Barney G. v. SSA*, 2021000802 (September 12, 2022), the agency did not show it would have been an undue hardship to provide the complainant an accommodation of teleworking four days per week. And in *Everette C. v. SSA*, 2021000753 (August 16, 2022), the agency failed to establish a lawful basis for its denial of a request for an increase from two to three days per week of telework to a complainant with mobility issues.

Moving on to other claims of disability discrimination: in *Mark F. v. DOD*, 2021000717 (June 6, 2022), the Commission found the agency did not have to excuse disrespectful and unacceptable conduct by an employee with Asperger Syndrome who was removed after inappropriate conduct during a training session two months after he was hired, which included throwing a book at a trainer, using an obscene gesture, hitting a cubicle, and slamming a door.

The Commission found several instances where agencies failed to demonstrate that complainants posed direct threats in the workplace such that rescission of conditional job offers were lawful. In *Antwan N. v. DHS*, 2022001315 (December 5, 2022), the agency failed to show that the complainant who was profoundly deaf could not safely perform the duties of a CBP agriculture specialist, as the agency did not demonstrate a high probability of substantial harm, that the complainant would pose a direct threat, and the agency failed to conduct an individualized assessment. In *Jeramy C. v. DOD*, 2021004849 (October 11, 2022), the Commission found substantial evidence supported the AJ's determination that the agency did not perform an individualized assessment of whether the complainant could perform the essential functions of the position of maintenance worker because of chronic lower back pain. In *Arturo B. v. DOD*, 2021003276 (August 29, 2022), the Commission found the agency relied upon generalized assumptions when it concluded the complainant, an applicant for employment as a police officer, was medically disqualified from his position because of his diagnosis of diabetes and withdrew an offer of employment.

The Commission found agencies unlawfully disclosed confidential medical information of employees in *Vickie P. v. Dept. of Army*, 2021000751 (September 26, 2022) (where the Commander copied the Non-Commissioned Officer in Charge on an email disclosing the complainant had a seizure disorder); *Mary B. v. USAID*, 2020004101 (September 6, 2022) (where the complainant's medical records, including information that she had a past medical history of alcohol dependency, were saved on a shared drive); and *Hilaria S. v. USDA*, 2020004101 (June 21, 2022) (where a supervisor forwarded a doctor's note, which contained details of the complainant's medical provider and her condition, to an acting administrator, a program manager, and an HR specialist/timekeeper without a need to know the information).

However, the agency avoided findings of unlawful medical disclosures in *Mitchell G. v. VA*, 2020004101 (May 4, 2022), where the Deputy contacted the complainant's physician to ask how long the complainant would be absent from work and the Commission found this inquiry was made out of business necessity, given the complainant's role in the agency as an associate nurse executive operations; and in *Colby S. v. DOD*, 2022001477 (November 2, 2022), where after the complainant, who worked as a fifth grade teacher, suffered a medical incident while teaching his class, the agency sent the parents of his students a letter carefully written in an appropriate manner to explain the situation and express support for the complainant without improperly disclosing any confidential medical information.

The Commission found agencies acted lawfully in sending employees to FFDEs in *Vance C. v. DHS*, 2021003856 (December 5, 2022) (the agency had a reasonable belief that the complainant may not be medically qualified to perform the essential functions of the TSO position because of epilepsy); *Tyson A. v. USPS*, 2021004945 (November 7, 2022) (where the complainant had been off work for 22 months); and *Anthony M. v. DHS*, 2021001275 (May 11, 2022), *recons. den*., 2022003406 (November 3, 2022) (where the complainant's FMLA request provided objective information from the complainant's healthcare provider that he may not be able to perform the essential functions of his job as a TSO because of sleep apnea which caused excessive daytime sleepiness).

E. EEO INVESTIGATIONS

The Commission vacated findings of no discrimination and remanded

complaints for supplemental investigations in *Tristan S. v. USPS*, 2021001742 (September 8, 2022) (where the investigation did not include evidence regarding whether there were vacant, funded positions to which the complainant could have been reassigned as a reasonable accommodation); *Hayden R. v. USDA*, 2021002640 (September 8, 2022) (where the record was insufficiently developed with regard to the complainant's claim under the Equal Pay Act because the investigator did not obtain information regarding the complainant's assertions that he performed work requiring equal skill, effort, and responsibility to the identified female comparators); *Jess P. v. DOD*, 2020005383 (July 18, 2022) (where the investigator did not obtain evidence for seven incidents accepted as part of the formal complaint and failed to obtain a statement from a crucial responding management official); and *Murray H. v. Smithsonian Inst.*, 2021000171 (January 11, 2022) (where the record in a nonselection case warranted further development with regard to how applicants under a Schedule A vacancy announcement were reviewed and considered).

F. EVIDENCE

In *Ellen M. v. USPS*, 2021003032 (September 15, 2022), the Commission took the unusual step of considering evidence submitted for the first time on appeal when it vacated a FAD finding no discrimination and ordered the agency to attempt to authenticate an audio recording provided by the complainant that allegedly captured the Postmaster stating, "I would help you 110%, but you continue to file EEOs against me."

G. GOVERNMENT EMPLOYEES RIGHTS ACT OF 1991

In *Brittney B. v. State of Alaska*, 1120130001 (May 12, 2022), the Commission found substantial evidence to support an ALJ's decision that respondent did not discriminate against the complainant in reprisal for protected EEO activity under GERA. The ALJ awarded sanctions of an adverse inference and $12,654.88 in attorney fees against the State of Alaska for failing to produce information related to the investigation on which respondent based its decision to terminate the complainant's employment. On the merits, the ALJ held that the complainant did not establish a *prima facie* claim of reprisal, and even if she had, respondent had established a mixed-motive defense. On appeal, the Commission found the award of sanctions was appropriate, but substantial evidence of record supported the ALJ's ultimate decision that the respondent did not retaliate against complainant. [Note: Gary M. Gilbert is counsel for the complainant in this complaint.]

H. HARASSMENT (NOT SEXUAL)

Every year, the Commission affirms findings of no discrimination in harassment claims because the conduct alleged is not sufficiently severe or pervasive, or is not linked to membership in protected classes. However, the Commission does issue a handful of decisions each year finding agencies subjected complainants to unlawful harassment, and this year was no exception.

In *Chanelle B. v. Dept. of Navy*, 2020004887 (February 24, 2022), the Commission found the complainant was subjected to harassment based on disability and reprisal where a supervisor complained about the administrative issues associated with the complainant's request for accommodation, he subjected the complainant's leave requests to additional scrutiny by requiring her to submit documentation to support requests for sick leave, charged her AWOL, demonstrated an indifference to the complainant's disability, and terminated her during her probationary period without any warning, counseling, or investigation.

In *Melanie F. v. DHS*, 2021002205 (September 26, 2022), the complainant, African-American, was subjected to race-based harassment when she returned from court to find a caricature of a monkey's face drawn on the whiteboard hanging in her private office, and after she reported it, she was involuntarily reassigned. In *Zonia C. v. DOJ*, 2021001326 (September 20, 2022), the complainant (Black) established a claim of race-based harassment when her supervisor used the word "cracker" when speaking with her about white employees and told her, "because they were both Black, they were going to have to stick together and stay away from the White people." The complainant was also denied adequate training and support, which was corroborated by other witnesses.

In *Anne B. v. DOD*, 2021000831 (September 8, 2022), the Commission detailed 26 incidents raised in support of a harassment claim and concluded the complainant established she was subjected to race and sex-based harassment, and there was a basis to impute liability to the agency. In *Anne M. v. Dept. of Interior*, 2021004318 (June 2, 2022), the complainant established she was subjected to harassment on the bases of race/national origin (Black Afro-Panamanian) when her supervisor made comments in her presence such as, "You know how…some of these Black females are," "[CW1] is afraid of me because I'm White and I am a racist and I don't like Black Hispanics," and stating that housing projects were "nasty," because they "housed Blacks and Hispanics." Although these comments were not directed to the complainant, the Commission found they were unwelcome and unreasonably interfered with her work environment.

In *Willia M. v. VA*, 2020005021 (March 14, 2022), the complainant, a registered nurse, established she was subjected to harassment based on her race and sex when a doctor subjected her to unwelcome verbal and physical conduct, including calling her a "monkey" and physically assaulting her. And in *James T. v. Dept. of Navy*, 2021001460 (February 22, 2022), *recons. den*., 2022002209 (September 19, 2022), the Commission found the complainant was subjected to race-based harassment where there was evidence in the record of use of the n-word and the phrase "hook nose" by coworkers, and the supervisor was aware of the harassment, but did not take any action to stop it.

The complainant in *Stanton S. v. VA*, 2022001199 (October 11, 2022), established retaliatory harassment where after he was reassigned as a result of prevailing on a prior claim of harassment, his supervisor mocked him, he was denied the ability to attend special in-person safety training, his ID card was not keyed to give him permission to work buildings, his supervisor marked him AWOL, directed coworkers to issue reports of contact against him, and told him he was under investigation by the VA police.

The Commission also issued decisions finding sex-based hostile work environments, which are distinguished from sexual harassment claims. In *Nancey D. v. DOD*, 2022000526 (September 28, 2022), a female teacher was subjected to sex-based harassment by a male coworker who would angrily and frequently interrupt her or cut her off during presentations, direct his questions to male administrators, reject the complainant's responses and seek a second opinion from male administrators, got in her face and shouted, "be quiet, I'm not talking to you," talked through her presentations, and laughed and mimicked her. This continued on a weekly basis for an entire school year, and the principal did not take appropriate steps to stop the harassment.

In *Cynthia D. v. Dept. of Navy*, 2020002980 (July 21, 2022), the Commission affirmed the AJ's finding that the complainant (female) was subjected to harassment on the basis of sex when her supervisor screamed at her for approximately five to ten minutes while standing roughly five inches from her face because he was upset about the quality of a draft document prepared by her and a male coworker, but the male coworker was not treated in a similar manner.

In *Nathanial H. v. Dept. of Interior*, 2021000613 (January 13, 2022), the agency conceded that it subjected the complainant to harassment based on sex (sexual orientation) but argued there was no basis to impute liability as the harassment did not result in a tangible employment action. The Commission disagreed, finding that the complainant was subjected to tangible employment actions including not being allowed to work a maxi-flex schedule, being required to notify his supervisor any time that he was leaving his workspace, and only being allowed to use certain doors for exiting and entering the workplace.

I. HEARINGS (EEOC) AND AJ AUTHORITY

The Commission appears to be signaling that default judgments against agencies must be reserved for the most egregious violations of Commission regulations. In *Bruce P. v. DOJ*, 2021004818 (March 7, 2022), the Commission found an AJ abused her discretion in granting default judgment against an agency for its delay in providing a timely and complete investigation because she did not analyze any prejudicial effect on the complainant; the consequences of the delay in justice; or the effect on the integrity of the EEO process. And in *Dalton E. v. DHUD*, 2019001739 (September 29, 2022), the Commission modified its appellate decision in *Dalton E. v. DHUD,* 0720170038 (November 30, 2018), on its own motion to find that imposition of default judgment was too severe of a sanction.

The Commission found sanctions against complainants too harsh in the following cases: In *Eldon P. v. Dept. of Navy*, 2022002176 (October 11, 2022), the Commission found the dismissal of a complaint was too

harsh of a sanction to a complainant who did not provide an accurate email address of record, failed to respond to voicemails from the AJ, and failed to respond to the order to show cause or notice of dismissal, and found the appropriate sanction was dismissal of the hearing request. The Commission found that AJs abused discretion in dismissing hearing requests as a sanction against complainants in the following cases: *Stuart M. v. GSA*, 2021005010 (November 21, 2022) (where the complainant did not show up for the prehearing conference, but the time zone was not included in the order and he promptly replied to the show cause order); *Clarine L. v. DHS*, 2020004391 (February 8, 2022) (where the AJ alleged the complainant engaged in *ex parte* communications but did not document them in the evidentiary record, and the complainant did not appear for a teleconference that was not scheduled through a formal scheduling order); and *Tessa L. v. Dept. of Labor*, 2020003668 (January 24, 2022) (where the complainant's only noncompliance was failing to timely file the PCI form).

However, the Commission affirmed the sanction against complainants of dismissal of hearings requests in these cases: In *Elvis G. v. Dept. of Commerce*, 2022000649 (September 12, 2022), where an AJ dismissed the complainant's hearing request for contumacious conduct including calling the AJ a "deceitful hack" and a "despicable cheat" and referring to agency counsel as "racist, unscrupulous, unethical, dishonest, deceitful, and [a] morally-debased criminal that was perpetuating a big racist lie." as well as engaging in witness tampering and threats against witnesses; in *Irene C. v. USPS*, 2021002236 (September 8, 2022), where the complainant did not appear for the initial conference or respond to the notice of intent to dismiss the hearing request, even though she was registered in the EEOC Public Portal and the AJ could see she accessed the order; in *Maryanne S. v. VA*, 2021002519 (August 22, 2022), where a complainant who did not file her prehearing report until the start of the conference and failed to provide sufficient justification for her conduct; in *Robby F. v. DHHS*, 2021003154 (July 11, 2022), where a complainant was not prepared to present his case at hearing and was unfamiliar with the record or the dates of the events raised in his complaint; and in *Otis P. v. VA*, 2020004334 (February 7, 2022), where the complainant failed to provide the EEO Investigator with his affidavit despite being granted several extensions, failed to appear at the prehearing teleconference, failed to comply with the AJ's order to supplement the investigative record, and failed to appear for a scheduled deposition undertaken for that purpose, without providing sufficient justification for his conduct.

J. LEGITIMATE NONDISCRIMINATORY REASONS (INADEQUACY OF)

Agencies failed to meet the burden of production to establish legitimate, nondiscriminatory reasons for its actions in *Alfonso T. v. DOD*, 2021003091 (August 17, 2022) (where the agency could not provide a specific, clear, and individualized explanation for why the complainant, a 56 year old African American, was not selected and management only provided general statements about the promotion selection process), in *Mercedes A. v. USPS*, 2021001289 (June 6, 2022), *recons. den*., 2022003895 (December 12, 2022) (where the agency could not explain why the complainant was subjected to an investigative interview the day after a supervisor completed her affidavit in complainant's EEO complaint); and in *Priscilla H. v. SSA*, 2021001678 (January 18, 2022), *recons. den*., 2022001994 (June 30, 2022) (in a nonselection claim where the agency did not include any evidence of the actual recommendations provided to the selecting officials, the reasons for the selections, or even provide the names of the supervisors who provided the recommendations).

K. NONSELECTION CLAIMS

In *Clarine L. v. Dept. of Transp*., 2020005402 (July 28, 2022), the Commission affirmed an AJ finding that the complainant's qualifications were plainly superior to the selectee including with regard to her education, experience, and training, and that sex and race were the cause of her nonselection. And in *Glynda S. v. U.S. Agency for Global Media*, 2020004387 (March 28, 2022), the Commission reversed the agency's final decision and found discrimination when the complainant, an African-American female over 40 who had engaged in prior EEO activity, was not considered for promotion, while younger white females were selected.

L. REMEDIES

With regard to an order of placement in the position sought, in *Alvaro P. v. Dept. of Air Force*, 2021004984 (March 14, 2022), the Commission found the agency did not meet its burden to show it offered the complainant a substantially equivalent position to the position he should have received absent discrimination, and it found the complainant presented sufficient evidence of the likelihood that but for the discriminatory nonselection, he would have subsequently been promoted.

Training is a key remedy in furtherance of avoiding future workplace discrimination and retaliation. However, in *Don F. v. SSA*, 2021005244 (May 12, 2022), the RMO who was ordered to attend eight hours of training failed to fully participate as she signed into the session on her phone and then proceeded to drive during the training. The Commission found this made a mockery of the process and ordered the RMO to attend the full training again. And in *Doyle S. v. Dept. of Interior*, 2021003582 (April 12, 2022), where the agency challenged a training order of at least 40 hours of training for broad categories of employees, the Commission found given the "highly troubling circumstances of this case [which] indicate a widespread and systemic ignorance of, or indifference to, the requirements of the Rehabilitation Act and the reasonable accommodation process, which contributed to the egregious nature of the Agency's unlawful actions," substantive training was appropriate.

M. REPRISAL/RETALIATION

In *Mac O. v. VA*, 2021004377 (November 29, 2022), the complainant established pretext with regard to his claims that the agency did not allow him, an associate director (chaplain) for diversity and connections, to conduct site visits on at least four different occasions. The Commission also applied the cat's paw theory to find the agency's direction not to communicate with employees would reasonably chill protected EEO activity, and that the complainant's fully successful rating, which was lower than the excellent rating previously received, served to further retaliate against the complainant. In *Neal O. v. USPS*, 2021002681 (June 13, 2022), the complainant established that his 12 prior EEO complaints and recent activity alleging harassment were the motivating factors in the complainant's removal after 26 years for allegedly posing a threat in the workplace.

The Commission found *per se* retaliation in the following cases: *Opal V. v. DOD*, 2021000649 (August 31, 2022) (where a supervisor brought up the complainant's EEO complaint during a performance review); *Terrell G. v. USPS*, 2020004972 (May 25, 2022) (where a station manager's act of speaking to her supervisor and her colleague about the complainant's sexual harassment complaint against her "could certainly be seen as reasonably likely to deter an employee from engaging in EEO activity"); *Mirtha H. v. USDA*, 2022005237 (May 9, 2022) (where a supervisor told two coworkers that their telework schedule was being reduced from three days to two days because "somebody filed something," and gestured with his head to the complainant's cubicle); *Larraine D. v. DHS*, 2021001090 (May 5, 2022), *recons. den*., 2022003561 (November 28, 2022) (where a second-line supervisor asked complainant if she intended to file a formal complaint and told her he could transfer her to a new supervisor, but that a transfer would be off the table if she did proceed with a formal complaint); *Shelby R. v. DHS*, 2020005406 (March 28, 2022) (where an assistant director warned the complainant that he risked termination if the accusations he was raising in his EEO complaint turned out to be untrue); *Kirby S. v. USPS*, 2020005006 (March 7, 2022) (where a supervisor stated he was angry and that "these things are nothing but lies" to a coworker after learning of the complainant's contact with an EEO counselor; and *Nathaniel S. v. DOJ*, 2021001013 (January 13, 2022) (where a supervisory special agent called a coworker into his office to show her his computer screen, which displayed a document showing that he had been named in the complainant's EEO complaint).

N. SECURITY CLEARANCES AND STATE SECRETS

The Commission agreed with the agency that the complainant in *Markus C. v. DHS*, 2022004363 (November 14, 2022), was challenging the substance of a security clearance decision when he alleged retaliation when he did not pass the security clearance for a TSO officer position. However, the complainant in *Sol W. v. DHS*, 2021003419 (June 27, 2022), could proceed in a claim of discrimination where the Agency rescinded his computer access, government-issued firearm, and credentials; and placed him on administrative duties because his complaint did not include claims challenging the agency's investigation or security clearance determination, and there is no need to review the agency's determination concerning the substance of a security decision. And in *Glynda S. v. Dept. of Commerce*, 2022000548 (April 18, 2022), the Commission found it had jurisdiction because the complainant was challenging the agency's decision to re-

review her security clearance, instead of applying reciprocity, and alleged that the agency conducted a suitability determination in a discriminatory manner which resulted in a delay and ultimately denial of her employment.

O. SEX DISCRIMINATION

In *Tammy C. v. DHS*, 2021002135 (August 30, 2022), the Commission affirmed summary judgment in the agency's favor in a claim alleging sex-based discrimination by a breastfeeding employee who worked as a TSO. The Commission found the complainant's ability to use lactation pods located past security was an effective accommodation, and the agency provided legitimate, nondiscriminatory reasons for requesting the complainant complete leave slips to account for any time spent pumping in excess of her allotted breaks. However, in *Lydia W. v. USPS*, 2021004453 (May 18, 2022), the Commission affirmed an AJ's finding of liability and award of remedies to a complainant who alleged discrimination based on her sex and reprisal when she was put on emergency placement in an off-duty status and subsequently issued a notice of removal based on concerns she was drunk, but a male employee was simply asked if he had been drinking and told to take some breath mints as his breath smelled of alcohol.

***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.