INTRODUCTION

This book is a summary of notable cases, laws, and guidance ending in December 2016. 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 2016. 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 2016, 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).

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.

The first two digits of an EEOC case number indicate 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.

A brief note about changes in the Commission's docket numbering system.

Effective on October 1, 2006 (for Fiscal Year 2007), the EEOC began using a new database for docketing appellate cases. Readers may remember that the Commission had a so-called "Y-2K" problem with its earlier database that required it to use the letter A to designate cases docketed after January 1, 2000. Cases prior to January 2000 use 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 are designated "A0"; decisions in 2001 are 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).

The new docketing data base cures the Y2K problem by replacing the two character designations for the fiscal year with a four digit designation. As an example, the docket number 0720080003 indicates an agency appeal (the first two digits "07" shows the appeal was filed by the agency) filed in fiscal year 2008 (the "2008" that follows the "07") and that it was the third such appeal by an agency docketed by the EEOC that fiscal year (the "0003" that follows the year).

In October 2013, the EEOC began removing the names of federal sector employees who file EEO complaints for 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, 2016, 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. AGE DISCRIMINATION

There were a number of interesting age discrimination cases decided by the EEOC this year, including four instances where the Commission set aside settlement agreements because they did not comply with the language of the Older Workers Benefit Protection Act (OWBPA): *Woodrow F. v. SEC*, 0120162241 (December 14, 2016); *Lelah T. v. USPS*, 0120151856 (October 19, 2016); *Bret E. v. USPS*, 0120160286 (January 21, 2016); and *Tera B. v. Dept. of Treasury*, 0120140630 (January 19, 2016). The Commission found direct evidence of age discrimination in *Geraldine G. v. USPS*, 0720140039 (June 3, 2016), where a SO asked applicants how many years they had before mandatory retirement, questioned whether the applicants were actually interested in the job or just wanted free relocation to a place where they wanted to retire, and ultimately selected a 34 year old for the position. In other ADEA claims, the Commission found age discrimination in *Enriqueta v. Dept. of Army*, 0120143049 (September 2, 2016), a joint employer complaint where the complainant was recommended for a pay increase after 90 days, but the agency manager refused; *Kristy D. v. Dept. of Interior*, 0720160003 (August 10, 2016), where the Commission upheld a decision by an AJ finding that the agency unlawfully forced a 71 year old employee to accept a directed reassignment to another job and then replaced her with a younger male employee; and *Donna W. v. Dept. of Transp.*, 0720160002 (August 17, 2016), *recons. den*., 0520160522 (December 13, 2016), where the Commission affirmed an EEOC judge's finding that the agency discriminated against a complainant with 12 years of experience when it passed over him and selected a 24 year old with less than three years of experience.

B. ATTORNEY FEES

Ever since passage of the Civil Rights Act Amendments of 1991 provided for compensatory damages, litigation in EEO federal sector cases have become increasingly more complex and Commission awards of attorney fees have become more robust. In general, complainants' counsel fared well in decision issued in 2016, with most awards of attorney fees sustained; but there were a number of instances where fees were substantially reduced. The Commission awarded $18,462 in attorney fees in *Selma D. v. Dept. of Educ.*, 0720150015 (April 22, 2016), for work done by an attorney, who only represented the complainant in seeking compensatory damages following an agency FAD that found discrimination. As has been the Commission's practice for many years, the fees were awarded to Washington, D,C. area attorneys at the so-called *Laffey* rate, a legal fees market rate matrix issued by the U.S. Attorney General's Office reflecting the current market rate for attorneys in fee shifting cases in the D.C. area. The Commission affirmed an AJ's award of attorney fees by an AJ in *Selma D. v. Dept. of Educ.*, 0720150015 (April 22, 2016), rejecting an argument by the agency that neither compensatory damages nor attorney fees should be awarded because the agency had made a good faith effort to provide reasonable accommodation. The Commission also found an award of attorney fees appropriate at the *Laffey* matrix rates in *Lionel A. v. USPS*, 0520140531 (July 26, 2016) and *Margaret L. v. DHUD*, 0120150433, 0120160089 (June 2, 2016), *recons. den*.,0520160423, 0520160433 (November 30, 2016), and noted in the latter case that an agency's reduction of 50% because complaint prevailed only on claims of retaliation was excessive and that a 10% across-the board reduction was more appropriate to address any duplicate or excessive billing that resulted in a total award of $217,943 in attorney fees. The Commission also found that an AJ erred in not setting rates under the *Laffey* matrix in *Grant A. and Val L. v. Dept. of Agric.*, 0120132145, 0120132146 (January 8, 2016).

Complainants fended off agency appeals of awards of attorney fees in *Alene S. v. USPS*, 0720150033 (April 6, 2016), where the Commission affirmed an AJ's award of $400 per hour for an attorney in Denver, Colorado noting that although the fee agreement provided for an hourly rate of $350, it also allowed for future increases; *Bok T. v. SSA*, 0720150014 (March 31, 2016), where the Commission rejected an agency argument that an AJ's award of $450 per hour was excessive with the Commission holding that a $50.00 per hour increase was reasonable because of additional experience the attorney gained during the time he represented the complainant; and *Hannah C. v. Dept. of Justice*, 0720150004 (March 10, 2016), where an AJ reduced the hourly rate for a representative who had not yet been admitted to the bar and the Commission rejected an agency's argument on appeal that the fees should be further reduced to $100 per hour.

Complainant's counsel did not fare so well in *Nenita S. v. USPS*, 0120141180 (September 14, 2016), when the Commission agreed with the agency argument that some billing entries were excessive or inflated, including 11 hours spent drafting a 10-page reply brief that merely repeated previous arguments that was reduced to 6 hours, and several claims for excessive review of correspondence that were reduced from over an hour in each instance to a more modest half hour; or in *Selene M. and Waneta F. v. Dept. of Navy*, 0120150370, 0120150371 (April 20, 2016), where the Commission affirmed an agency reduction of attorney fees, finding that representation on an appeal should not have required the 255 hours sought and finding instead that about a fifth of the hours sought, 51 hours, was appropriate and also found that the nearly 40 hours claimed to prepare a fee petition was excessive and that 8 hours was sufficient. Complainant's counsel also failed in an appeal of attorney fees in *Leonarda S. v. VA*, 0120141533 (August 24, 2016), where the Commission found an AJ's determination that $300 per hour was an appropriate hourly rate for a solo practitioner in the Dallas-Fort Worth area and rejecting the $463 per hour sought by the attorney. And in *Anne C. v. DHUD*, 0720160017 (September 9, 2016), the Commission deducted some $16,000 in attorney fees because of vague billing language including phrases such as "work on file," "review a file," "review documents," "review emails, and "conference calls." In *Marcellus M. v. Dept. of Justice*, 0120152864 (May 6, 2016), the Commission found a 50% reduction of requested attorney fees was appropriate where the complainant's submission did not specify which EEO case the work was done for and the bills were heavily redacted, and in *Wilda M. v. DHS*, 0120142660 (December 2, 2016), the Commission upheld a 90% reduction in the number of hours of attorney fees where complainant prevailed on a claim of improper medical disclosure but failed to prevail on a claim of harassment. The Commission found it appropriate to reduce some fees claimed in *Emiko S. v. Dept. of Transp.*, 0120161130 (July 19, 2016), *recons. den*., 0520160486 (November 6, 2016), where the fee petition included time for clerical tasks, including the time spent drafting and noticing a change of address, and organizing files and binders.

The Commission affirmed a drastic reduction of legal fees in *Adam F. v. Int'l Boundary & Water Comm'n*, 0120142479 (July 8, 2016), holding that an agency FAD appropriately limited attorney fees to about 1/16 of that requested because complainant prevailed on only a single claim of retaliation. But the Commission rejected an agency's requests to further reduce an award of attorney fees where an AJ awarded $31,113 of the $58,029 sought and Complainant prevailed on five of 11 claims.

C. CLASS ACTIONS

There were two cases raising class claims we find of note this year; both cases concerned the certification process and in both instances the Commission reversed decisions from AJs that had denied class certification. In *Candice B. v. DHS*, 0120160714 (June 1, 2016), *recons. den*., 0520160429 (November 2, 2016), the Commission certified a sex-based class action challenge to an agency policy requiring Customs and Border Protection Officers to pass a test requiring candidates to complete 24 pushups in one minute. And in *Valentin P. v. Dept. of Army*, 0120113722 (December 6, 2016), the Commission provisionally certified a class based on race when alleged members of the class were not offered job swap benefits and voluntary separation incentive payout during implementation of the Base Closure and Realignment Commission recommendations.

D. COMPENSATORY DAMAGES

Awards of nonpecuniary compensatory damages continue to lag behind those awarded by juries in civil actions with only minimal upward creeping that we believe has not even kept pace with inflation. In addition, awards approaching the statutory cap of $300,000 provided for in the Civil Rights Act Amendments of 1991 are quite rare. The focus from the Commission continues to be on the nature, severity, and duration of the harm. Notice however, there were few successful agency appeals, whereas complainants fared much better, with a few damage awards from AJs increased and quite a number of appeals from agency FADs resulting in a higher award of damages. As usual, there were many modest awards and those awards of $5,000 or less this year included: *Merilyn W. v. USPS*, 0120140433 (April 8, 2016), where the Commission increased an award from an AJ from $1,000 to $2,000 to a complainant whose medical information about a miscarriage was improperly released and she testified it was "upsetting" because she did not want to keep reliving the miscarriage; *Archie G. v. Dept. of Justice*, 0120141305 (November 30, 2016), where complainant was awarded $3,000 because he became upset about the discrimination but he also had other causes of emotional harm, including problems with the IRS and resigning from his job because of cocaine use; *Onie R. v. Dept. of Defense*, 0120141870 (June 16, 2016), where the Commission increased an award of $500 to $3,000 finding that, although complainant submitted extensive medical documentation, there were preexisting conditions that contributed to feelings of anxiety, intimidation, disrespect, sleep loss, fatigue and difficulty concentrating; *Marcellus M. v. Dept. of Justice*, 0120152864 (May 6, 2016), where the Commission increased the award from an agency FAD from $2,000 to $3,500 to a complainant who testified he suffered depression, loss of self-esteem and enjoyment of life, stress, humiliation, anxiety and injury to professional standing, but presented no corroborating evidence; *Wilda M. v. DHS*, 0120142660 (December 2, 2016), where the Commission rejected an appeal of an agency award of $4,000 to a complainant who testified she experienced "emotional panic," broke out in hives and had high blood pressure and her husband testified complainant lacked motivation and consumed more sweets and alcohol; *Neil M. v. Dept. of Agric*., 0720140005 (December 9, 2016), where the Commission affirmed a $5,000 award from an AJ based on complainant's own testimony that he experienced mental anguish, frustration and pain; *Levi P. v. DHS*, 0120142758 (November 4, 2016), where the Commission bumped up an award from an agency FAD from $1,500 to $5,000 for a complainant who testified he had to "put his life on hold" because of the agency's actions; *Sherman K. v. USPS*, 0120142089 (June 28, 2016), where the Commission affirmed an agency award of $5,000 to a complainant who experienced difficulty at home and work but who had preexisting medical conditions and other causes of his mental health problems; *Eve E. v. DHS*, 0120141606, 0120161392 (May 24, 2016), where the Commission affirmed an award of $5,000 to a complainant who presented testimony from family members that she experienced anger, frustration and depression and that she was demoralized; and *Jamey M. v. Dept. of Navy*, 0120130913 (March 15, 2016), where the Commission set aside an AJ's determination not to award any damages and instead awarded $5,000 to a complainant who suffered anxiety and stress.

There were two Commission decisions awarding $10,000, *Harry E. v. Dept. of Defense*, 0120141679 (November 3, 2016), where the Commission increased an award of $6,000 from an agency FAD to a complainant who was subjected to an inherently degrading and humiliating situation corroborated by testimony from his wife; and *Mike G. v. Dept. of Agric*., 0120152027 (September 8, 2016), where the Commission rejected an agency FAD that awarded no damages to a complainant who was denied reasonable accommodation, and who experienced exacerbation of his depression and PTSD and who had a diminished quality of life, financial problems, and difficulty sleeping.

Awards above $10,000 to $50,000 were a bit more plentiful than in recent years, and included *Don S. v. USPS*, 0120142824 (December 22, 2016), where the Commission increased an award of $8,500 to $12,000 where complainant testified he had a loss of self-esteem, felt sad and depressed and his relationship with his girlfriend and his daughter were affected; *Elvera S. v. USPS*, 0120141452 (February 23, 2016), where the Commission affirmed an award of $12,000 from an AJ where complainant was emotional, depressed, had chest pains, anxiety, and panic attacks; *Kristy D. v. Dept. of Interior*, 0720160003 (August 10, 2016), where the Commission affirmed an AJ award of $15,000 to a complainant who experienced stress, anxiety, exacerbation of a preexisting acid-reflux condition and damage to her reputation; *Davina W. v. Dept. of Justice*, 0120142526 (July 26, 2016), where the Commission affirmed an AJ award of $15,000 to a complainant who experienced a variety of symptoms of emotional harm including difficulty sleeping, headaches and anxiety, and whose husband testified she was angry, distant and withdrawn; *Ashlea P. v. USPS*, 0120141369 (April 19, 2016), where the Commission enlarged an award of damages from the $6,000 awarded in an agency FAD to $20,000 to a complainant, who had been subjected to sexual harassment when, among other things, a coworker exposed his penis numerous times, and as a result she developed anxiety, gastrointestinal problems, and fear of being alone and was prescribed anxiety and mood drugs; *Margaret L. v. DHUD*, 0120150433, 0120160089 (June 2, 2016), *recons. den*.,0520160423, 0520160433 (November 30, 2016), where, after an entry of default judgment to complainant, the Commission awarded $25,000 for the exacerbation of preexisting physical impairments, including fibromyalgia, irritable bowel syndrome and a compromised immune system, rejecting the agency's argument that compensatory damages should not be awarded because complainant prevailed by default judgment rather than on the merits; *Marguerite W. v. Dept. of Labor*, 0120142727 (December 21, 2016), where the Commission found an agency award of $4,500 lacking and instead awarded $30,000 to a complainant who experienced "inherently degrading and humiliating" comments about her disability and lack of accommodation and who suffered increased physical pain because of the failure to provide her reasonable accommodation; *Edgardo D. v. Dept. of Agric*., 0120131723 (January 15, 2016), where the Commission increased an award from an AJ from $10,000 to $30,000 because of an exacerbation of complainant's preexisting condition of schizophrenia; *Shanel G. v. PBGC*, 0720160001 (August 10, 2016), where the Commission affirmed an AJ award of $37,625 to a complainant who suffered insomnia, weight gain, anxiety, panic attacks, and hair loss; *Alex W. v. Dept. of Energy*, 0520150214 (May 3, 2016), where the Commission affirmed a decision from an AJ awarding $42,500 to a complainant who experienced professional and personal shame and embarrassment and was disgraced in the community; and *Tyrone D. v. Dept. of Defense*, 0720160005 (June 16, 2016), where the Commission affirmed an AJ's award of $50,000 to a complainant who suffered sleeplessness, frustration, and emotional distress.

Awards between $50,000 and $100,000 were sparse again this year. There were several awards of $60,000 including *Roxanna B. v. USPS*, 0120143067 (November 7, 2016), where complainant presented evidence from a psychologist, family members, and coworkers to show that her previous conditions of OCD and anxiety were exacerbated, she gained weight, lost interest in outside activities and experienced physical symptoms of colitis and chest pains; *Irvin W. v. Dept. of State*, 0120141773 (October 28, 2016), where the Commission increased an award from an agency FAD of $10,500 to $60,000, finding the higher amount was appropriate where, over a period of more than three years, complainant suffered an exacerbation of preexisting conditions and anxiety, irritability, insomnia, loss of consortium, night sweats, and headaches; *Selma D. v. Dept. of Educ*., 0720150015 (April 22, 2016), where the Commission upped by an additional $20,000 an award of damages by an AJ where the Commission found the AJ's award was insufficient to compensate the complainant who experienced an exacerbation of her preexisting conditions of depression and high blood pressure. The Commission also affirmed an award by an AJ of $75,000 in *Meghann M. v. SSA*, 0720150028 (March 15, 2016), to a complainant whose preexisting conditions were exacerbated and who experienced stress, humiliation, anxiety, sleeplessness, and depression, but also did not prevail on all her claims. And the Commission dramatically bumped up the award from an agency FAD from $15,000 to $80,000 in the *Emmett W. v. Dept. of Agric*., 0120143098 (May 3, 2016), where complainant's preexisting conditions of PTSD and traumatic brain injury caused him to file for bankruptcy and the evidence supporting his claimed included testimony about his deteriorating financial circumstances, that his three children living with him were placed on state-funded Medicaid, his reputation was ruined, and the record included testimony from his wife about his deterioration into depression and feelings of worthlessness.

As is often the case, among cases with awards above $100,000, there

tended to be significantly more and more reliable evidence to support the claim. The Commission again dramatically increased an award from an agency FAD, this time from $20,000 to $125,000 in *Vaughn C. v. Dept. of Air Force*, 0120151396 (April 15, 2016), where complainant was constructively discharged after being subjected to racial discrimination causing him to seek assistance from mental health professionals, he experienced anxiety, difficulty concentrating, loss of appetite, high blood pressure, severe headaches and feelings of hopelessness with evidence from health care providers, family members, and coworkers. The Commission also increased an award of compensatory damages made by an AJ from $50,000 to $150,000 in *Emiko S. v. Dept. of Transp*., 0120161130 (July 19, 2016), *recons. den*., 0520160486 (November 6, 2016), where complainant endured emotional and social harm for more than seven years and also experienced financial hardship, loss of enjoyment of life, loss of sense of purpose and damage to relationships, corroborated by testimony from friends and family members. The Commission affirmed an award by an AJ of $192,500 in nonpecuniary damages in *Erwin B. v. USPS*, 0720150029 (March 15, 2016), where complainant's diabetes became uncontrolled, he suffered financial hardship and pawned his musical instruments, suffered paranoia, crying spells, saw a therapist for symptoms of depression and PTSD, and had adverse impacts on his life, marriage, financial circumstances, and health. And in a rare instance where an EEOC AJ actually awarded $300,000 in compensatory damages, *Alene S. v. USPS*, 0720150033 (April 6, 2016), the Commission reduced the award to $200,000, despite the AJ's conclusion that the evidence demonstrated that the complainant may never work again because of the agency's actions. The complainant suffered from headaches, sleeplessness, "hives so extreme they are difficult to treat" and she became so untrusting it became difficult for her to leave her home. The Commission found persuasive the agency's argument that the award should be reduced because she had preexisting conditions, but we think the judge's decision was well reasoned and that this is simply further proof the Commission misinterprets the 1991 Civil Rights Act Amendments and considers the statutory cap to be a baseline for the maximum harm, rather than a true statutory cap to which larger awards are reduced.

There was one decision of note concerning the availability of the so-called good faith defense available to employers who make reasonable efforts to provide reasonable accommodation even if those efforts are found to be insufficient. In *Darius C. v. USPS*, 0120160004 (November 1, 2016), the Commission found the defense was not available where the agency gave only "tepid assurance" that a sign language interpreter would be available for a safety talk and that its actions were no more than "lip service" to the requests for reasonable accommodation, and ordered a supplemental investigation to determine damages.

There were few decisions of note concerning pecuniary damages, but those we include are: *Billi D. v. DHS*, 0120143081 (September 8, 2016), denying a claim for more than $10,000 in medical and educational expenses because there was no evidence to link the claim to the discriminatory actions; *Emiko S. v. Dept. of Transp*., 0120161130 (July 19, 2016), *recons. den*., 0520160486 (November 6, 2016), denying a claim for tuition costs to a complainant who alleged she had to go back to college to obtain other marketable skills where the Commission found it was a decision to pick the "best option" rather than having no choice; *Ashlea P. v. USPS*, 0120141369 (April 19, 2016), where the Commission awarded the cost of therapy bills to a victim of sexual harassment but denied a claim for other medical expenses because a lack of evidence to show a causal relationship to the discrimination; and *Beatrice B. v. SSA*, 0120152297, 0420150014 (April 7, 2016), where the AJ awarded additional principle on student loans the complainant could not pay them but denied a request for interest on the funds concluding the AJ had addressed the matter adequately.

E. DISABILITY DISCRIMINATION

We begin our discussion of recent cases concerning disability discrimination with a quirky decision where an EEOC AJ granted summary judgment and the Commission agreed that summary judgment was appropriate, just not for the agency as the judge had ruled, but rather in favor of the complainant. In *Johana S. v. Dept. of Agric*., 0120131304 (July 1, 2016), the AJ found complainant, a criminal investigator whose work included marijuana eradication in cooperation with local law enforcement agencies, not to be a qualified individual with a disability, but the Commission disagreed, finding that the agency had been accommodating complainant who had difficulty walking, by allowing her to remain in a helicopter during drug eradication and concluded that the agency improperly lowered her performance rating.

There were a couple instances where agencies jumped the gun and dismissed complaints prematurely including *Xochitl B. v. Dept. of Air Force*, 0120160228 (January 21, 2016), *recons. den*., 0520160149 (March 2, 2016), where the complainant identified his disability as a broken arm and the Commission found that the agency should have gathered information about the duration and severity to determine if the impairment was simply transitory and minor and ordered the agency to investigate the claims; and in *Roxane C. v. USPS*, 0120131635 (July 19, 2016), the Commission found an AJ improperly granted summary judgment to the agency and should have considered whether complainant, who requested accommodations because of pregnancy, was a qualified individual with a disability, and if so, whether she should have been provided modifications to lifting requirements and to her break schedule.

Among the interesting findings of disability discrimination this year, we include *Denese G. v. Dept. of Treasury*, 0120141118 (December 29, 2016), where the Commission found the agency failed to act in good faith to provide reasonable accommodation to an employee with diabetes who asked to be excused from meetings to adjust her insulin pump, check her blood sugar and eat, if necessary, to avoid a hypoglycemic event; *Denese L. v. Dept. of Interior*, 0120130297 (May 13, 2016), where the Commission found the agency failed to provide reasonable accommodation when it did not permit complainant, who had been diagnosed with breast cancer, to participate in the leave share program and did not consider reassignment as a reasonable accommodation when she was no longer able to perform the essential functions of her job; *Selma D. v. Dept. of Educ*., 0720150015 (April 22, 2016), where the Commission found a failure to accommodate a complaint with ADHD who had worked for the agency for over 30 years but experienced difficulty when moved from an office to a cubicle and requested accommodations including a flexible work schedule and telework; *Melani F. v. DHS*, 0720150027 (March 15, 2016), where the Commission rejected an agency appeal and found the agency failed to provide reasonable accommodation to a transportation security officer with dyslexia who had successfully performed the job for many years, but when required to take a proficiency test with true/false and multiple choice questions, asked to have someone read the questions to her; *Latarsha A. v. FERC*, 0120123215, 0120131079 (March 15, 2016), *recons. den*., 0520160278, 0520160279 (July 19, 2016), where the Commission found a failure to accommodate some of the requests made by a trial attorney, who had a multitude of physical disabilities, dismissing the agency's assertion that delays in providing automatic doors at her duty station were the fault of GSA and not the agency, and also finding a failure to accommodate when the accessible entrance was blocked with maintenance equipment, and when the agency did not provide assistance to move office spaces or permit telework during construction in the building; *Arnoldo P. v. USPS*, 0120123216 (January 8, 2016), where the Commission found a failure to accommodate a complainant, who had hearing loss and Meniere's disease who requested to work in a low noise environment for part of the day, and his request was not even considered for several months; *Michelle G. v. Dept. of Treasury*, 0120132463 (May 13, 2016), where the Commission found an 18-month delay in responding to a request from an employee with attention deficit disorder to work in a quiet area as a reasonable accommodation constituted a failure to provide reasonable accommodation; *Yvette H. v. Dept. of Defense*, 0120140365 (August 29, 2016), where the Commission found a failure to accommodate when the agency denied a request for a 10 minute break every hour that was needed because of a variety of physical impairments; and *Freddie M. v. Dept. of Defense*, 0120140976 (January 8, 2016), *recons. den*., 0520160210 (August 3, 2016), where the Commission found telling an employee with a knee disability to figure out a solution for parking was not sufficient, and holding that the agency should have designated an appropriate parking space as other employees had reserved parking spaces.

The Commission found no violation in *Lowell H. v. VA*, 0120140609 (April 8, 2016), where a claims examiner, who suffered a wrist injury and was unable to meet a production standard, was reassigned to a lower grade position because there were no available positions at the same grade; *Dwayne F. v. Dept. of Navy*, 0120143267 (March 11, 2016), *recons. den*., 0520160294 (July 19, 2016), where the Commission found the agency was not required to remove the task of painting ships as requested by a painter with a spine condition, as it was an essential function of the job; *Letty K. v. SSA*, 0120142135 (November 30, 2016), where the Commission found the agency had provided sufficient accommodations to an employee with asthma and other respiratory impairments by offering to move her work station and to ban certain office cleaning supplies requested by complainant; *Lupe M. v. USPS*, 0120162330, 0120160611 (November 4, 2016), where the Commission found the agency made its obligation to provide reasonable accommodation to our hearing impaired employee by providing an on-site interpreter as needed, rejecting complainant's assertion that a fulltime interpreter was required.

Cases involving concerns about risk of harm and the application of the direct threat defense are especially difficult and there were several such cases from the Commission this year. We begin with those cases where the Commission found liability, including *Madelaine G. v. Dept. of State*, 0120141877 (October 25, 2016), a case in which the agency conceded that it had failed to conduct the individualized assessment required by the Rehabilitation Act and ADA when considering whether complainant, an administrative officer at the U.S. Embassy in Kabul posed a direct threat when it was learned she had been, but was no longer using, a medication, Leflunomide, for treatment of arthritis that had been banned by the DoD for use in Afghanistan, and where there was no assessment of the risk of harm from her use of the medication or its impact on her ability to perform the job; and *Dong F. v. Dept. of Interior*, 0120140109 (June 3, 2016), where the Commission also found the agency did not complete an individualized assessment when it concluded that a color blind complainant could not work as a seasonal park ranger, a job he had been performing in an exemplary manner for three years, because he failed a color test for colorblindness, and there was evidence complainant had adapted to his condition and that it had no impact on his job performance.

The Commission found no violation in *Clinton C. v. Dept. of Navy*, 0120142575 (December 2, 2016), where the agency took 18 days to determine that complainant, a law enforcement officer, did not pose a direct threat and where complainant was able to perform other police duties throughout the time he was not authorized to carry a weapon and other officers were required to requalify for use of a firearm had similar delays; *Madelaine G. v. Dept. of State*, 0120141877 (October 25, 2016), where the Commission found the agency had a reasonable belief that complainant posed a direct threat based on objective evidence when it placed a postal worker in emergency off-duty status after she expressed suicidal thoughts about driving a postal vehicle into oncoming traffic; and *Merrill O. v. VA*, 0120142823 (February 17, 2016), where the Commission found the agency had a reasonable belief that complainant, who had diabetes, could not safely perform the essential functions of his job because he had outbursts when his blood sugar was low and therefore sending him for a fitness-for-duty examination was not a violation of law.

Although the Rehabilitation Act and ADA provide substantial limitations as to when an employer may seek medical information and when it may be disclosed, there are many circumstances when it is permissible. The Commission found no violation: when a manager made an offhand comment about ADHD in reference to himself and complainant where there was no release of medical information in *Lea P. v. USPS*, 0120142646 (December 7, 2016); when a supervisor told a telephone caller that complainant was on sick leave where there was no mention of the specific reasons for the absence in *Cathy M. v. Dept. of Agric*., 0120140008 (November 16, 2016); and when agency employees were given access to medical information for the purpose of responding to a request for reasonable accommodation in *Barbie W. v. VA*, 0120140439 (September 9, 2016).

But the Commission found agencies unlawfully accessed medical records in *Melani F. v. VA*, 0120142156 (June 23, 2016), where the complainant was also a patient at a VA facility and the records were improperly accessed; violated the Rehabilitation Act's requirement to keep medical records confidential and segregated from other agency files in *Michelle G. v. Dept. of Treasury*, 0120132463 (May 13, 2016) and in *Denese L. v. Dept. of Interior*, 0120130297 (May 13, 2016), when the respective agencies co-mingled medical records with other personnel records; violated the Rehabilitation Act's confidentiality provisions in *Buster D. v. Dept. of Agric*., 0120141171 (March 11, 2016), when an employee disclosed complainant's medical records to a union steward who had no need to know of it during a removal action, and in *Arnoldo P. v. USPS*, 0120123216 (January 8, 2016), when a supervisor failed to secure confidential medical information properly and left it on his desk for a week. And in *Haydee A. v. DHS*, 0120132668 (January 19, 2016), the Commission reiterated its previous holding that a complainant need not prove that there was an actual unauthorized disclosure to prevail in a claim that the employer failed to maintain records in a confidential manner and separate from other personnel records.

F. EEO INVESTIGATIONS

The adequacy of investigations undertaken pursuant to the federal sector complaints process was again the subject of a number of Commission decisions this year. The most surprising of these decisions was *Vance C. v. USPS*, 0120141820 (November 18, 2016), where the Commission had previously found the agency's investigation to be inadequate and remanded it for supplemental investigation, and in finding that the investigation was still inadequate, it merely ordered the agency yet again to complete an appropriate investigation, noting that it still failed to articulate a legitimate, nondiscriminatory reason. Other cases where the EEOC found the investigation to be inadequate and ordered supplemental investigations included *Laurence L. v. Dept. of Army*, 0120140944 (November 18, 2016), where the Commission set aside an agency FAD and ordered the agency to explore why an initial vacancy announcement was canceled; *Bill A. v. Dept. of Army*, 0120131989 (October 26, 2016), where the Commission set aside an EEOC AJ's decision granting summary judgment and instead ordered the agency to conduct an investigation about whether other positions may have been available to which the complainant could have been reassigned as reasonable accommodation; *Anisa U. v. USPS*, 0120141580 (July 20, 2016), where the Commission ordered further investigation to determine whether other allegedly similarly situated individuals were in the same protected class as the complainant; and *Byron E. v. TVA*, 0120140939 (June 9, 2016), where the Commission found an investigation inadequate because it contained no explanation for why a SO considered previous disciplinary action as a criteria for selection.

G. EQUAL PAY ACT

There were more cases decided under the EPA than usual this year, which may be a sign of a trend. Among findings of discrimination, the agency was found to have violated the EPA in *Heidi B. v. DHHS*, 0120152308 (June 3, 2016), where the complainant, a GS-12 HR specialist was paid at a lower rate than a male GS–12 HR specialist and where the Commission rejected an argument by the agency that the difference was dictated by the fact that the female employee had only competed for a job with promotion potential to the grade 12 whereas the male employee had competed for a job with promotional potential to grade 13; and *Gabriele G. v. DHS*, 0120141757 (May 13, 2016), where a female transportation security officer was not given an opportunity to negotiate her starting salary as was a male comparison employee, and as result was she was paid less than this male counterpart in violation of the EPA. Of these cases where the EEOC found no violation of the EPA, we mentioned only *Audrea L. v. VA*, 0120151628 (May 13, 2016), where the Commission affirmed an agency FAD agreeing that the agency's explanation that the grade and step was established by a Nurse Professional Standards Board and the disparity in pay was because of factors other than sex including specialty schedules and relocation incentives.

H. HARASSMENT (NOT SEXUAL)

There were a variety of decisions finding discrimination in claims of harassment including one on the basis of age, *Bryan T. v. DHS*, 0120122110 (March 18, 2016), where the evidence in the ROI included corroborating statements from four employees that the complainant was called "an old ugly Irish guy" and on appeal complainant submitted a statement signed by 17 people who also attested to hearing the supervisor make disparaging comments about complainant's age and heritage. There was one finding of harassment based on disability that we find of note this year, *Denese G. v. Dept. of Treasury*, 0120141118 (December 29, 2016), where a diabetic employee was wrongly accused of texting during a meeting when in reality she was adjusting an insulin pump and where the agency also failed to provide reasonable accommodation by providing a private area and time to check her blood sugar. The Commission affirmed an agency finding of no discrimination in *Art B. v. Smithsonian Inst*., 0120142109 (August 23, 2016), despite the fact that the complaint was told he was being transferred because he was an "unruly Nigga" and "the whitest Black man that ever worked there" reasoning that there was no basis to impugn liability to the agency because the complainant did not show the jokes were unwelcome as he too often engaged in joking banter, he was same race and color as the responsible management officials, and the agency took prompt corrective action once it learned of the comments. We note one case alleging harassment based on reprisal, *Shanel G. v. PBGC*, 0720160001 (August 10, 2016), a finding of harassment where, after filing a complaint of discrimination, complainant was approved for less training than coworkers, management failed to respond to her requests for critical communications in a timely manner, and management marginalized the complainant's supervisory role.

I. HEARINGS (EEOC) AND AJ AUTHORITY

The Commission continues its recent trend of relying on sanctions to ensure compliance with its regulations and orders from EEOC AJs and from OFO with a number of decisions we find to be of significance. We begin with *Candance C. v. GSA*, 0720160013 (August 8, 2016), a case where the Commission affirmed an AJ's grant of default judgment as a sanction for the agency's failure to produce the complaint file in a timely fashion, despite an order to show cause from the judge and a motion for sanctions

filed by the complainant, to neither of which the agency responded. The Commission rejected the agency's argument that it should be excused because the failure was the result of "a mailroom issue" and that the AJ was partly to blame because the judge waited five months after the hearing request to issue the order requiring the agency to produce the complaint file. In contrast, in *Erika H. v. Dept. of Air Force*, 0120150284 (October 14, 2016), the Commission found an AJ had not erred in declining any sanctions against the agency for its delay in producing the ROI where the AJ issued a show cause and the agency complied and produced the ROI and the complainant did not show any evidence of how she had been prejudiced by the delay.

Where complainant fails to timely respond to orders of the AJ or to discovery requests, Commission practice in recent years has been to dismiss the request for hearing but not the claim in its entirety, instead remanding the case for issuance of a FAD. The Commission followed that precedent in *Frederick A. v. Dept. of Navy*, 0120140377 (June 15, 2016), where the Commission reversed an AJ's decision to dismiss the complaint in its entirety and instead ordered issuance of a FAD. The Commission also found dismissal of the request a hearing and the issuance of a FAD to an appropriate sanction in: *Jannet O. v. Dept. of Navy*, 0120141390 (November 23, 2016), where the complainant failed to comply with an order to compel discovery by not submitting information about lost wages and compensatory damages; and in *Eyrn O. v. VA*, 0120131752 (January 8, 2016), where the complainant failed to show good cause for failing to file a prehearing submission or attend a scheduled prehearing conference. However, the Commission found dismissal of the request for a hearing too harsh a sanction in *Ada L. v. USPS*, 0120141610 (February 18, 2016), where the complainant failed to timely submit a prehearing submission but filed one in response to an order to show cause after obtaining new counsel and arguing he had otherwise generally complied with orders of the judge.

In other Commission decisions concerning sanctions, the Commission affirmed an AJ's award of attorney fees incurred by complainant's counsel for preparing for a settlement conference where the agency served notice of its unavailability for a conference by regular mail just two days before the conference, and complainant and counsel appeared because they had not yet received notification of the agency's request to reschedule.

There were two decisions from the Commission addressing the use of telephonic or video hearings. Although previous Commission decisions have indicated that telephonic hearings are strongly disfavored, the EEOC found an AJ did not abuse discretion in *Neil M. v. Dept. of Agric.*, 0720140005 (December 9, 2016), by conducting a telephonic hearing when the judge was unexpectedly absent during the scheduled date, asked the parties if there were any objections to the hearing proceeding by telephone, and neither party objected. And in *Clement M. v. Dept. of Navy*, 0120140861 (October 19, 2016), the Commission found no abuse of discretion when an AJ held the hearing by video conference where the AJ notified the parties of his intent to hold the hearings by video conference and neither party objected. But in *Trina C. v. USPS*, 0120142617 (September 13, 2016), when a manager accused of sexual harassment did not testify at a hearing because he had retired, the Commission found it was an abuse of discretion for the AJ to make a credibility determination that his testimony denying that he grabbed the complainant around the waist and kissed her neck was more believable than the complainant's in-person testimony. But the Commission found no error when an AJ permitted affidavits from treating health care professionals in lieu of live testimony over the objection of the agency which argued it was deprived of an opportunity to cross examine the witnesses. The Commission agreed with the AJ that the agency could have taken the deposition of the physicians during discovery and found complainant's assertion that the cost of $500 per hour for live testimony was prohibitive and warranted reliance on the written evidence.

J. INDEPENDENT CONTRACTORS

The question of when independent contractors may also be employees of the federal government continues to generate significant decisions from the Commission and there are a number of such decisions this year. The Commission found no employee-employer relationship in *Tabetha M. v. VA*, 0120150813 (December 19, 2016), where a research assistant employed by Vanderbilt University Medical Center was found not to be an employee of the VA where she was hired by, received compensation and benefits from, was strictly supervised by and terminated by the contractor; in *Eve E. v. Dept. of Defense*, 0120162250 (November 22, 2016), where the employing staffing firm was determined not to be a joint employer with the government, in large part because complainant was offered two other positions by the staffing firm; and *Shakia H. v. CIA*, 0120161007 (May 26, 2016), where complainant was found not to have standing to bring an EEO complaint against the agency where she reported to a supervisor of the staffing firm, was paid directly by the contractor, and her work did not contribute to the agency's mission; and in *Chrystal S. v. Dept. of Navy*, 0120160889 (May 11, 2016), where complainant was found not to be a joint employee in part because she was paid a flat fee for training sessions she conducted for the agency 6 to 12 times each year for four years.

Complainants were found to have standing to bring complaints of discrimination in a variety of cases including *Serita B. v. Dept. of Army,* 0120150846 (November 10, 2016), where the Commission took the opportunity to reaffirm its use of the so-called *Ma* factors and provide considerable guidance about when independent contractors are employees for purposes of Title VII, finding that under the facts of this particular instance, complainant was an employee because the agency controlled how she performed her job, the work was performed on agency premises using agency equipment, and the agency had *de facto* authority to terminate her employment. The Commission also found complainants were employees for purposes of Title VII in: *Emma B. v. Dept. of Navy*, 0120160878 (May 3, 2016), where complainant worked for a staffing firm but received daily assignments from agency employees; *Rina F. v. VA*, 0120160808 (April 21, 2016), where the Commission found persuasive the fact that the agency was involved in complainant's selection, she reported directly to agency managers to receive work assignments, submitted leave requests to the agency employees, and was provided with an agency laptop and email address; *Daisy W. v. DHHS*, 0120160511 (April 5, 2016), where complainant was found to be a joint employee and because she reported to and received assignments from agency officials, worked on long-term research projects in an agency lab using agency equipment; *Breanna S. v. Dept. of Defense*, 0120142256 (March 23, 2016), where complainant worked for a staffing firm but was considered a joint employee because she reported to a government employee, the agency provided work assignments and she was required to be on call 24 hours a day; *Clement D. v. Dept. of Interior*, 0120142894 (March 8, 2016), where complainant, a contract translator/case worker, was considered an agency employee because the agency set the terms of employment, controlled the means and manner of performance, and provided office space, supplies and equipment to perform the job he had held for 14 years which was critical to the mission of the agency; and *Helen G. v. Dept. of Army*, 0120150262 (February 11, 2016), where complainant was found to be a joint employee of the agency and General Dynamics because agency officials had control over her daily work, she worked on agency premises with agency equipment, and she attended and participated in the agency's staff meetings.

K. LAWS, REGULATIONS, AND GUIDANCE

In 2016 the EEOC provided additional guidance on a variety of employment discrimination matters. These include the 2016 EEOC *Enforcement Guidance on Retaliation and Related Issues* that, in particular, provides specific examples of what is and is not protected activity under the opposition laws of Title VII. The Commission also published *Enforcement Guidance on National Origin Discrimination* finally revising and updating the guidance last issued in 1998.

L. MIXED CASES

Mixed cases continue to be the scourge of federal sector employment law and this year, as usual, there were a number of significant decisions. We suspect that EEOC AJs sometimes find dismissing a complaint as mixed to be a means of lessening their dockets and this year we saw several decisions from AJs reversed. The Commission resurrected a complaint of discrimination and harassment in *King D. v. Dept. of Army*, 0120162282 (December 29, 2016), after an AJ dismissed the complaint after learning the complainant appealed his removal the MSPB, with the Commission concluding that collateral estoppel was inapplicable. The Commission also found that an AJ's decision erred in finding claims of demotion and loss of pay were inextricably intertwined with a claim of hostile work environment based on disability and in *Glenna O. v. Dept. of Defense*, 0720150017 (April 14, 2016), held that complainant had the right to pursue the harassment claim before the EEOC. Of particular interest is the fact that it was the agency that brought the appeal seeking to overturn the decision of the AJ. In other cases of note, in *Ike D. v. VA*, 0120140592 (January 12, 2016), the Commission reversed an agency decision dismissing a discrimination complaint brought by a chaplain who was removed from his employment finding that his claims of ongoing harassment should not have been dismissed as being inextricably intertwined with the claims raised before the MSPB, and *Jasper S. v. USPS*, 0120142316 (May 4, 2016), where the Commission remanded a complaint after the MSPB found it did not have jurisdiction over a claim of disability discrimination that complainant was not permitted to return to work after an on-the-job injury.

M. NATIONAL ORIGIN DISCRIMINATION

We noted earlier that the EEOC issued updated guidance on national origin discrimination and in addition there were a couple decisions of note regarding national origin discrimination claims. Most interesting was *Genny L. v. Dept. of Defense*, 0120122795 (February 23, 2016), where the Commission reversed an agency final decision and found complainant established national origin discrimination when she was told she could not go directly to a contractor because of an alleged language barrier. The Commission noted that the agency did nothing to determine if there was in fact a language barrier and provided no evidence that it interfered with complainant's work. The other decision we include here is *Raquel T. v. Dept. of Defense*, 0120141502 (September 14, 2016), *recons. den*., 0520170031 (January 18, 2017), where the Commission noted that it lacked jurisdiction over the denial of a top secret clearance where the clearance was denied because complainant's mother was a Canadian citizen and the Commission noted that citizenship is distinct from national origin discrimination.

N. OFFICIAL TIME

The Commission decisions concerning the denial of official time for prosecuting EEO complaints continue to focus on the question of what is a reasonable amount of time. In *Virginia K. v. Dept. of Treasury*, 0120142662 (December 28, 2016), the Commission found the agency should have provided 15 hours of official time for complainant to complete a declaration from the investigator that included 80 questions, rather than the six hours that had been approved. In other cases of note, the Commission found 30 minutes of official time to complete the complaint forms was reasonable in *Mozelle G. v. USPS*, 0120161951 (October 19, 2016), and that 11.5 hours was a reasonable amount of time for complainant's representative, an agency employee, to prepare a notice of appeal and brief in support of the appeal. And finally in *Thomasina B. v. VA*, 0120162480 (November 10, 2016), the Commission noted its longstanding determination that official time was only available in the administrative forum and not in a civil action, but did find that denial of official time to attend the depositions of management officials in her complaint in United States District Court stated a claim of retaliation.

O. PROCEDURES

The Commission found that a change in start time states a claim of discrimination in *Wilburn M. v. USPS*, 0120162757 (December 2, 2016), but found that being denied access to a vehicle maintenance break room that required complainant to cross the street, did not result in a tangible harm and therefore did not state a cause of action in *Jeromy C. v. USPS*, 0120162783 (November 29, 2016). The Commission found the cancelation of the selection process potentially rendered complainant aggrieved and remanded for further investigation in *Florentino S. v. USPS*, 0120162274 (September 9, 2016); found an allegation of sexual favoritism to state a claim in *Ron W. v. USPS*, 0120161361 (June 8, 2016); found that denial of a lateral transfer sufficiently stated a cause of action in *Karren N. v. Dept. of Justice*, 0120160848 (April 15, 2016); found that the assignment of duties that were more physically demanding would state a cause of action in *Damion L. v. USPS*, 0120141579 (April 13, 2016); and found an allegation that the agency's consideration of criminal records was sufficient to state an cause of action under a disparate impact theory of discrimination in *Trent M. v. USPS*, 0120160640 (April 12, 2016).

The Commission found that a postmaster's apology to a complainant who alleged that he was instructed not to speak in Spanish was not a sufficient reason to dismiss the complaint for failure to state a claim in *Irwin R. v. USPS*, 0120160726 (March 9, 2016), and found in *Octavio C. v. USPS*, 0120160986 (April 19, 2016), that employees who alleged they were told to speak Spanish and that they should take note that when they crossed the border into this country there is a sign that said USA stated a claim. The Commission also found that complaints of discrimination stated a cause of action in: *Mathew R. v. Dept. of Army*, 0120160416 (February 5, 2016), where the complainant alleged he found an offensive photograph of a Native American at his work site; and *Celine D. v. USPS*, 0120152203 (February 5, 2016), where complainant alleged her personnel files had been intermingled with her medical files that the Commission explained would constitute a *per se* violation of the Rehabilitation Act.

Agencies seldom fare well when they aggressively dismiss claims of a hostile work environment and this year we saw several such claims reinstated. In *Tim H. v. USPS*, 0120162126 (September 1, 2016), the Commission found a viable claim of harassment where complainant was required to seek permission every time he wanted a break or to use the restroom, while others were not. The Commission also found that complainants alleged sufficient incidents to support a claim of harassment in *Zola R. v. Dept. of Agric*., 0120161927 (August 26, 2016), where complainant was placed under investigation for misconduct and proposed for a 14 day suspension; and in *Vernie M. v. USPS*, 0120160771 (May 12, 2016), where complainant alleged she was told managers thought she would "play the race card," she was called "ghetto" and ignorant, and her supervisor screamed at her and physically threatened her.

We have often commented in previous editions of the *EEO Update* that federal agencies are too quick to dismiss claims of retaliation for failure to state a claim and once again this year the Commission reversed and remanded quite a number of such cases. Among those cases where the agency FAD was set aside and the matter remanded were: *Arnoldo P. v. Dept. of Defense*, 0120152924 (October 25, 2016), where the agency was alleged to have provided a poor reference that led to complainant not being selected; *Tyson A. v. USPS*, 0120162211 (September 9, 2016), complainant was charged LWOP and issued a letter of warning; *Elayne C. v. Dept. of Labor*, 0120162090 (August 26, 2016), where a complainant's supervisor threatened that she was going to "get even" with complainant for assisting a coworker with an EEO complaint; *Zonia C. v. VA*, 0120161120 (April 14, 2016), where complainant's supervisor acted angrily toward her; *Princess B. v. VA*, 0120143221 (March 29, 2016), *recons. den*., 0520160320 (July 20, 2016), where complainant, a former employee, alleged retaliation when she was not provided with documents necessary for her to apply for other positions was found to state a claim; *Alisa M. v. USPS*, 0120160750 (March 10, 2016), where a copy of an email between two managers referencing complainant's EEO complaint was left in view of other employees was found to state a claim of retaliation; and *Clinton R. v. USPS*, 0120160120 (February 18, 2016), where complainant was ordered to perform janitorial duties outside his work as a maintenance supervisor.

One case where the Commission sustained a dismissal for failure to state a claim was *Isaiah v. SSA*, 0120141758 (June 2, 2016), where the Commission found that a claim of sex discrimination by a male complainant who was sent home for wearing shorts did not state a claim.

Given the extensive delays in processing of EEO complaints in the federal sector, we find with increasing frequency cases where a deceased complainant's heirs seek to pursue the claim. Although the law is well established that a cause of action survives the complainant's death after the filing of the formal complaint, in *Wilbert W. v. VA*, 0120160204 (May 11, 2016), the Commission made clear that the estate may seek compensatory damages even where the complainant had not explicitly requested such relief or presented evidence of compensatory damages before his or her death.

P. RELIGIOUS DISCRIMINATION

Religious discrimination and accommodation of religious beliefs has had considerable exposure in the media recently and also generated a number of interesting cases from the Commission this past year. We began with *Woodrow B. v. SSA*, 0120141211 (September 8, 2016), *recons. den*., 0520170004 (December 14, 2016), where the Commission found no failure to accommodate a complainant's religious beliefs when he was denied two weeks of religious compensatory time to enable him to take a vacation and "reflect on his Christian beliefs" noting that the requested time off was not for activities compelled by the complainant's belief in the tenants of a religion. There was also no violation found in *Solomon B. v. DHS*, 0120140422 (September 8, 2016), where the complainant requested a later start time to allow him to perform his morning prayers, but declined an agency offer to start work at 9:00 A.M. because he did not want to work past 5:00 P.M. with the Commission commenting that he had not indicated his reasons for not working beyond 5:00 were related to his religious beliefs. The Commission also found no violation of Title VII in *Kiara R. v. Dept. of Air Force*, 0120131844 (January 19, 2016), where the agency denied a request by complainant to take her lunch break at 3:00 P.M. in order to fast as part of her religious beliefs, because granting the request would have violated the union's negotiated agreement.

Q. REMEDIES AND OTHER RELIEF

Crafting an appropriate remedy often seems a Solomon-like task and some of this year's decisions from the EEOC reflect similar creative solutions. Among the interesting decisions from the EEOC is *Toney E. v. Dept. of Agric*., 0420150019 (March 18, 2016), where the Commission found complainant had been subjected to race, national origin, and age discrimination and that the appropriate remedy was to remove the incumbent and place the complainant in the position. In ordering the agency to bump the incumbent, the Commission noted that there was substantial case law to support the bumping of an incumbent when placing an aggrieved individual in the position was the only remedy that would make them whole under the circumstances.

Other cases of note include *Emiko S. v. Dept. of Transp*., 0120161130 (July 19, 2016), *recons. den*., 0520160486 (November 6, 2016), where an AJ found disability discrimination when the agency withdrew a conditional offer of employment because it believed complainant posed a direct threat due to a vision impairment, finding that the agency had not conducted an individualized assessment and ordered that it do so and, if she passed such assessment, to reinstate the offer of employment. On appeal, the Commission had a slightly different spin on the events and found that, as a result of the failure to conduct the individual assessment, the agency did not grant complainant reasonable accommodation in the form of a waiver of vision requirement and therefore ordered the agency to reinstate the conditional offer of employment. In *Lonny H. v. DHS*, 0120141222 (June 30, 2016), the Commission found that reinstatement was not appropriate where the complainant was subsequently terminated and in *Rhea H. v. EPA*, 0120142029 (November 23, 2016), the Commission held that, when complying with an order to reinstate a complainant into a position that the complaint was not selected, the agency may tweak the job duties, as long as the position where the complainant is placed remains substantially equivalent to the original position.

Creative counsel occasionally seek a promotion as relief even when there was no actual promotion at issue, such as in *Hannah C. v. Dept. of Justice*, 0720150004 (March 10, 2016), where an AJ found a reprimand was issued for discriminatory reasons and was persuaded by complainant's argument that but for the reprimand, complainant would subsequently have been promoted and therefore ordered the promotion as one element of relief. On appeal, however, the Commission noted that complainant had not even applied for promotion stating that with the reprimand on her record, she believed it would be futile, and the Commission found the judge abused his discretion as entitlement to a promotion was simply too speculative.

Among other EEOC cases addressing remedies in Title VII cases, there was: *Donna W. v. Dept. of Transp.*, 0720160002 (August 17, 2016), *recons. den*., 0520160522 (December 13, 2016), where the Commission found no error when an AJ awarded back pay to a complainant who retired, explaining that the complainant credibly testified that she would have continued to work for a few more years; and *Terrie M. v. Dept. of Air Force*, 0120152627 (June 16, 2016), where a complainant was awarded lost revenues for running a women's volleyball camp;

In previous editions of the *EEO Update*, we have discussed a variety of decisions that address when back pay should be calculated using a periodic method and this year we saw a classic example in *Vaughn C. v. Dept. of Air Force*, 0420160004 (April 15, 2016), where the agency determined that because complainant mitigated damages by finding a higher paying job, he was not entitled to any back pay. But the Commission disagreed, and found that the complainant was entitled to full back pay between the time he left the agency and when he began employment in the new higher paying position.

R. REPRISAL/RETALIATION

Findings of retaliation were abundant this year, as is often the case, but the number of *per se* violations was a bit surprising. In one of the few decisions from the EEOC this year that was circulated to the entire Commission and therefore has significant precedential value, *Illiana S. v. EEOC*, 0120123242 (July 11, 2016), *recons. den*., 0520160482 (December 13, 2016), a case where the EEOC itself was the defendant, the Commission found it had retaliated against an employee because she had taken disability-related leave and her performance appraisal was lowered from the outstanding rating she had received in prior years to a fully successful. Among other findings of retaliation, there was *Roxane C. v. Dept. of Defense*, 0120142863 (July 19, 2016), where a complainant was removed from a training opportunity after having contacted an EEO counselor and filed a formal complaint of discrimination; *Mitchell v. VA*, 0120141025 (May 27, 2016), another case where a performance appraisal was lowered after a supervisor told the complainant, "I don't appreciate you threatening to file an EEO suit every time you are unhappy;" *Hannah C. v. Dept. of Justice*, 0720150004 (March 10, 2016), where the agency initiated an investigation against the complainant days after settling a prior EEO complaint; *Meghann M. v. SSA*, 0720150028 (March 15, 2016), where the agency detailed and then reassigned the complainant after she filed a complaint and acknowledged it was so that she could have "a cooling-off period"; *Renato K. v. DHS*, 0120141861 (December 16, 2016), where the Commission found a *per se* violation when a supervisor discussed the complainant's EEO complaint with a coworker and left documents related to her complaint in plain view on his desk where anyone could see them; *Odilia M. v. VA*, 0120150311 (November 3, 2016), where the Commission found a *per se* violation when complainant was proposed for a 30-day suspension even though the proposal was later withdrawn because it explicitly accused the complainant of having been "confrontational and disrespectful while accusing your supervisor of discrimination"; *Mindy O. v. DHS*, 0720150010 (September 2, 2016), where the Commission found a *per se* violation after a manager held a meeting with staff and said, among other things, that they could file complaints of discrimination but if they did, "he would make sure that they received further and further more serious discipline before their complaints were even heard"; *Matt A. v. VA*, 0120161100 (August 17, 2016), where a second level supervisor made hostile comments to a complainant's first-line supervisor, including calling the complainant a "troublemaker" and chastising the immediate supervisor for allowing employees to file complaints; *Ivan V. v. VA*, 0120141416 (June 9, 2016), another case where the Commission found a *per se* violation when managers investigating a complaint of discrimination asked a witness if he too was going to "play the Latino card"; *Daniell F. v. Dept. of State*, 0120140403 (March 18, 2016), another finding of a *per se* violation where complainant's allegations of discrimination were found to be without merit but an AJ found retaliation when a manager discussed complainant's EEO complaint with one of complainant's subordinate employees; and *Shanel G. v. PBGC*, 0720160001 (August 10, 2016), where an AJ found retaliation when complainant was provided less training then peers and he was marginalized in performing his management duties.

S. SETTLEMENT

Most of the appeals regarding settlement agreements fall into one of two categories: whether the agreement itself is valid and whether there has been a breach of the agreement. Among those cases where the Commission addressed whether the agreement was enforceable, there were several that were found to be void for lack of consideration including: *Cory C. v. Dept. of Army*, 0120162470 (October 28, 2016), where the only relief promised by the agency was merely to consider information from the complainant in support of a higher performance rating; and *Garland C. v. USPS*, 0120160643 (March 31, 2016), where the agreement promised only that the agency would meet with complainant within 72 hours if he had a conflict with another employee and, because the agreement did not even define what a conflict was, the Commission held the only benefit promised to complainant was the right to request a meeting.

The Commission also found several settlement agreements void for failing to comply with the Older Workers Benefit Protection Act, OWBPA, including: *Lelah T. v. USPS*, 0120151856 (October 19, 2016), where the agreement did not explicitly indicate complainant was waiving her rights under the ADEA and did not advise her of the right to consult with counsel or provide a reasonable time to consider the agreement; *Woodrow F. v. SEC*, 0120162241 (December 14, 2016), where the Commission found an agreement lacking because it did not adequately provide time to consider the agreement, generally 21 days, because there had been material changes to the offer that should have restarted the running of the 21-day period; and *Hester S. v. EEOC*, 0120121983 (October 24, 2016), where the Commission took the opportunity to modify previous Commission precedent and held that a complainant may settle ADEA claims even prior to filing a complaint of discrimination but none-the-less, set aside this particular settlement agreement, where the Commission itself was the defendant agency, noting that it did not comply with the requirement of explicitly identifying a waiver of ADEA claims and did not provide sufficient time to consider the agreement.

Among those cases where the Commission found there had been a breach of the agreement, there was *Isidro A. v. Dept. of Air Force*, 0120160486 (April 5, 2016), where the Commission found the agency breached the agreement when supervisors in complainant's chain of command knew of the terms of the agreement and the Commission found they did not fall into the narrow exception for agency employees who had a need to know; *Celinda L. v. DHS*, 0120141120 (August 26, 2016), where a settlement agreement provided for a neutral reference and confidentiality but the agency provided a copy of the settlement agreement to the state's Department of Labor after complainant applied for unemployment benefits, that the Commission found violated the terms of the agreement; *Lovella S. v. Dept. of Defense*, 0120161966 (August 19, 2016), where the agency promised to withdraw and remove a letter of reprimand but later referenced this letter of reprimand when it issued a notice of proposed suspension; *Colby S. v. USPS*, 0120162345 (December 2, 2016), where the agency notified complainant two years after a settlement agreement that it had determined the agreement was in violation of the CBA, but then two months later issued a second letter reinstating the agreement and, despite the agency's argument that it had cured the breach, the Commission ordered restoration of leave taken as result of the rescission and payment of legal fees incurred to correct the breach; and *Verdell A.*

v. DHS, 0120152922 (February 23, 2016), where the agency promised to remove complainant from under his first and second line supervisors but then breached the agreement some two months later when a reorganization sent complainant back to the same chain of command.

Other decisions regarding settlement agreements worthy of mention include *Branda M. v. VA*, 0120152563 (January 12, 2016), where the Commission found there was no binding settlement agreement where a final draft was signed by complainant and his attorney and returned to the agency which, despite assurances it would sign the agreement, never did and advised that it changed its mind and decided not to settle; and *Tera B. v. Dept. of Treasury*, 0120140630 (January 19, 2016), where the Commission found that an oral settlement agreement entered into the record by a court reporter immediately before a scheduled hearing did not comply with the requirements of the OWBPA.

T. SEX (GENDER) DISCRIMINATION

There were a number of interesting Commission decisions involving allegations of sex discrimination and we begin our discussion with a pregnancy-related discrimination case, *Roxane C. v. Dept. of Defense*, 0120142863 (July 19, 2016), where the Commission found discrimination after a pregnant defense liaison officer was told she could not participate in a 14-week training program because the agency was concerned, without any objective evidence, that the physical nature of the training would cause harm to her child. In another pregnancy discrimination case, *Roxane C. v. USPS*, 0120131635 (July 19, 2016), the Commission reversed a decision granting summary judgement by an AJ where complainant was asked if she was actually pregnant and was refused reasonable accommodation, which the Commission determined should have been analyzed under the framework set forth in the recent Supreme Court decision in *Young v. UPS*.

In other cases, the Commission found that the agency improperly dismissed a claim alleging complainant was not provided with appropriate space for lactation in *Heidi B. v. DHHS*, 0120152308 (June 3, 2016); found sex discrimination when a complainant was permanently removed from her position and detailed to another, while a male comparator was not treated in a similar fashion and the agency refused to produce the male comparator to testify at hearing, alleging that the complainant was simply trying to embarrass him in *Meghann M. v. SSA*, 0720150028 (March 15, 2016); found that although complainant was treated differently than a male counterpart, there was no violation of Title VII because there was a *bona fide* occupational qualification that required the complainant to work on a female passenger screening assignment in *Zula T. v. DHS*, 0120142146 (August 16, 2016); and the Commission reversed an agency dismissal of a complaint filed by a transgender employee who was not permitted to present at an agency meeting in female attire, noting that not allowing someone to dress as the gender in which they identify is severe enough to constitute a hostile work environment in *Hillier v. Dept. of Treasury*, 0120150248 (April 21, 2016).

U. SEXUAL HARASSMENT

Sexual harassment claims has been another frequent topic in the media in recent months and we selected a handful of cases issued by the Commission for discussion this year. In a case with facts that seems to resemble the script for a television series, *Scarlet M., Maxima R., Sharolyn S. v. Dept. of Navy*, 0120150940, 0120150941, 0120151220 (April 13, 2016), the Commission found liability where the director of an ammunition plant was found to have installed a hidden video camera in the women's bathroom and hooked it up to a television in his office. The agency argued that there should be no liability because it was not a hostile work environment as none of the women knew about the camera. The Commission rejected this argument and an argument that there should be no liability because the agency took immediate corrective action when it learned of the incident. The Commission found liability, reasoning that the director was the highest ranking agency official at the facility and, as such, he was the alter ego for the agency and his conduct was directly imputed to the agency.

It is uncommon to find that a single incident rises to the threshold of being sufficiently severe or pervasive, but such was the case in *Trina C. v. USPS*, 0120142617 (September 13, 2016), where the complainant alleged a manager grabbed her around the waist and kissed her on the neck. The Commission reasoned that the manager's actions constituted overtly sexual bodily contact that rose to the level of harassment. The Commission also found liability in *Blanca B. v. Dept. of State*, 0120151376 (July 7, 2016), where complainant's second line supervisor asked her for a kiss, made excuses for complainant to visit his office, told sexual and dirty jokes, made comments about sexual movies, and once tried to force her hand on his penis, among other actions.

V. SUMMARY JUDGMENT

A disproportionate number of decisions granting summary judgment are issued by a relatively small subset of AJs within the Commission, and every year we see a substantial number of reversals with this year proving no exception. Every year one of the more frequent reasons for reversing these summary judgment decisions is because the presiding AJ improperly made credibility determinations. In *Bill A. v. Dept. of Army*, 0120131989 (October 26, 2016), the Commission found that an EEOC AJ erroneously rendered credibility determinations in favor of the agency by accepting as credible management assertions that coworkers identified by the complainant as similarly situated were not. And in *Kennith H. v. DHS*, 0120120255 (May 25, 2016), the Commission found the AJ improperly made credibility determinations of complainant's supervisor while considering summary judgment, rather than taking the facts in the light most favorable to the complainant. The Commission also found there was a dispute of material fact about whether coworkers were similarly situated in *Tania O. v. VA*, 0120142224 (April 14, 2016). Among the other interesting cases where the Commission overturned summary judgment decisions, were *Lenny W. v. VA*, 0120140073 (December 30, 2016), where the Commission found a hearing was necessary to determine whether allegations that an employee improperly accessed complainant's medical records stated a claim; *Joelle L. v. USPS*, 0120150121 (October 28, 2016), where the Commission found an AJ improperly dismissed a case alleging sexual orientation; *Roxane C. v. USPS*, 0120131635 (July 19, 2016), where the Commission found summary judgment inappropriate both because complainant was entitled to try to show coworkers were treated more the favorably and because there was a question as to why the agency could not accommodate pregnant workers when it accommodated other employees who suffered on-the-job injuries.

W. TIMELINESS

It is rare for federal sector cases to make it to the Supreme Court but one such case did so in 2016, *Green v. Brennan*, 136 S. Ct. 1769 (2016), resolving a split in the Circuit courts about when the 45-day period to contact an EEO counselor begins in a claim of constructive discharge. In an allegation that an employee was constructively discharged, the Supreme Court held that the 45-day window begins running only after the employee resigns and not, as the government argued, when the employer commits the last act alleged to be discriminatory.

The unusually short statute of limitations of only 45 days to initiate EEO counselor contact is only one of the reasons there are so many cases that address timeliness every year. Agencies are required to post a notice of the 45-day requirement to initiate counseling and failure to do so may warrant waiver of the argument as to timeliness, as was the case in *Vickey S. v. USPS*, 0120162558 (December 28, 2016). In *Linn A. v. SSA*, 0120161923 (August 19, 2016), the Commission found that the 45-day timeframe was inapplicable because complainant twice called the EEO Office within that time period and was told someone would return a call, which never happened, and in *Cary R. v. USPS*, 0120161347 (May 27, 2016), the 45-day limit was waived when a deaf applicant for employment tried using the video relay service to initiate contact but was never able to do so successfully. The 45-day limit was also waived in *August V. v. Dept. of Transp*., 0120142165 (January 6, 2016), where the Commission found that the poster providing information about the time limits on display at the workplace was mostly illegible. In contrast, the Commission found no reason to waive the 45-day limit in *Maranda B. v. USPS*, 0120152879 (February 4, 2016), where the agency presented evidence that the poster was placed in a visible location and was accessible, and in *Stephen F. v. Dept. of Defense*, 0120161909 (August 11, 2016), the complainant's contact was found to be untimely because he did not rebut the presumption that he should have known after the agency demonstrated evidence that an EEO poster containing the timeframe was on the bulletin board (there was a similar result in *Valorie M. v. USPS*, 0120161716 (July 7, 2016), *recons. den*., 0520160473 (September 16, 2016)).

There were a handful of cases addressing timeliness that were interesting, but merely followed longstanding Commission precedent, such as: *Felisha A. v. SSA*, 0120161557 (July 15, 2016), where the Commission found the agency did not have sufficient information to show complainant received the notice of right to file; *Buck H. v. Dept. of Transp*., 0120152830 (April 14, 2016), *recons. den*., 0520160350 (July 27, 2016), where the Commission noted that an agency may be estopped from asserting untimely contact with a counselor if it provides incorrect information and the complainant relies on it, as was the case here; *Chas T. v. USPS*, 0120162642 (October 20,

2016), where the Commission found the time for filing was tolled where an otherwise untimely contact with an EEO counselor (some six months after the events of the claim) was reasonable because the complainant could not have had a reasonable suspicion of discrimination until he learned another employee was treated differently than him; *Tiffanie S. v. Dept. of Agric.*, 0120162471 (December 29, 2016), where the Commission found that contacting an EEO investigator rather than an EEO counselor was sufficient to timely initiate the EEO process because the investigator was reasonably connected to the EEO process; *Jesse A. v. SSA*, 0120161463 (July 7, 2016), where the Commission found timely contact when an applicant for employment at SSA sent a letter to the EEOC seeking to file a charge and subsequently received a telephone call from an EEOC judge telling her to contact the agency and that the contact was timely; and *Nick N. v. Dept. of Navy*, 0120151489 (May 4, 2016), where the Commission found the agency failed to serve the notice of right to file on complainant's attorney and therefore excused the filing of a formal complaint that was a few days late.

Among other cases concerning timeliness, in *Linn L. v. Dept. of Treasury*, 0120170023 (December 23, 2016) (a case that we think well illustrates why the EEOC reverses so many agency dismissals for timeliness), the Commission reversed an agency FAD that dismissed a complaint as untimely where complainant tried to fax her formal complaint at 11:02 P.M. and, after receiving a failure notice, faxed both the formal complaint and a copy of the failed fax notice to the agency the following day; in *Lonny C. v. Dept. of Defense*, 0120161861 (October 11, 2016), the Commission set aside in agency FAD that dismissed a complaint as untimely where complainant's counsel sent multiple emails seeking to initiate EEO contact on behalf of the complainant but later discovered the email address was incorrect; and in *Yessenia H. v. USPS*, 0120161354 (June 3, 2016), the Commission reinstated the complaint that have been dismissed by an agency FAD because the formal complaint had not been signed by the complainant, finding that complainant later signed the complaint that cured the defect.

The Commission found good cause to extend the deadline for filing a formal complaint where complainant's father died one day before the deadline to file in *Camie B. v. Dept. of Army*, 0120162689 (November 23, 2016); where complainant needed emergency medical care 12 days after receiving her right to file a formal complaint in *Zandra N. v. USPS*, 0120161756 (July 15, 2016); where the notice of right to file a formal complaint was sent by UPS and signed for by complainant's son and the agency presumed without any evidence that he was of a suitable age to sign in *Christopher E. v. VA*, 0120170054 (December 9, 2016); and where the complainant used the agency's interoffice mail that took eight days to be delivered, resulting in what otherwise would have been the untimely receipt in *Lilian C. v. Dept. of Interior*, 0120161072 (June 9, 2016).

Although the cases above illustrate the lengths that the Commission goes to excuse untimely filings, there are limits, such as *Abraham G. v. Dept. of Navy*, 0120162080 (October 25, 2016), where the Commission found untimely a formal complaint filed 29 days late after the complainant's representative twice mailed envelopes to the agency that would have been timely but neither contained the formal complaint; and *Brant C. v. Dept. of Defense*, 0120161939 (August 10, 2016), *recons. den.*, 0520170006 (December 7, 2016), where the Commission found no justification for the failure to contact an EEO counselor for more than 784 days from the alleged discrimination, rejecting complainant's argument that he had been deployed overseas to locations without prominently displayed EEO posters. And proving the old adage about what is good for the goose, the Commission dismissed two agency appeals, in one instance because the agency did not simultaneously file the appeal with the issuance of the final action, *Selene M. v. TVA*, 0720150024 (October 18, 2016); and in the other, *Porter H. v. DHS*, 0720140018 (March 11, 2016), *recons. den.*, 0520160240 (July 19, 2016), the Commission found that the agency did not comply with the AJ's order to provide interim relief.

***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.