Introduction

This book is a summary of notable cases, laws, and guidance ending in December 2017. 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. We would like to add a special note of appreciation for Christopher P. Byrd who served as our Editorial Assistant in preparing this edition of the EEO Update. Chris is a very talented paralegal and as he heads off to law school this fall, we're sure that he will someday soon be a talented attorney as well.

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 2017. 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 2017, 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.
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> 02 = An appeal from a decision on a union grievance.
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> 03 = A petition to review a decision of the MSPB.
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> 04 = A request for enforcement by the EEOC or clarification.
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> 05 = A request to reconsider a previous EEOC decision.
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> 06 = Compliance matters.
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> 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 handful of interesting cases decided by the Commission under the ADEA, and we begin our discussion with *Francesca V. v. VA,* 0120170632 (March 23, 2017), where the Commission found a settlement agreement did not meet the requirements of the Older Workers Benefit Protection Act of 1990 (OWBPA). We note our surprise how often defendants continue to struggle to comply with the requirements of the OWBPA nearly 30 years after its passage. In this instance, the Commission found the settlement agreement did not include language that complainant's waiver of her ADEA claims was knowing and voluntary and therefore the agency could not require a tender back of benefits and money paid after it determined the agreement was void and unenforceable. In an interesting age-related disparate impact claim, *Ervin A. v. VA,* 0120150155 (March 9, 2017), *recons. den.,* 0520170287, the Commission found no violation where complainant was determined not qualified because he did not meet a qualification standard for the job where his master's degree was from an institution that, at the time of his graduation, was not certified by the Council for Accreditation of Counseling and Related Educational Programs. The Commission reasoned that there was no showing of a statistical disparity, the average age of mental health counselors nationwide was 41.5 years and that there was evidence the qualification standard was based on factors other than age. We mention one finding of age discrimination, *Marine V., Louvenia S., Aline A., Doretta F., Isabel F., Jutta A., Allegra P., and Dominica H. v. SSA*, 0720170001, 0720170002, 0720170003, 0120170004, 0720170005, 0720170006, 0720170007, 0720170008 (March 20, 2017), where the EEOC found an AJ correctly determined that eight older GS-8 employees were subjected to age discrimination when they were not selected for positions at the GS-5/7 level with promotion potential to GS-11 after many did not score sufficiently high grades on a written test and all the selectees were in their twenties and thirties. The Commission found that the examination was geared toward recent college graduates, that schools received study guides for current students, and that the selection process did not take into consideration experience or performance at the agency.

B. ATTORNEY FEES

There were a number of decisions of interest this year from the EEOC addressing claims for attorney fees and we begin with cases concerning whether complainant was a prevailing party and thus entitled to an award of fees. In *Lindsey T. v. Dept. of Defense*, 0320150028 (March 16, 2017), the EEOC agreed with the MSPB that a petitioner was not a prevailing party and therefore not entitled to attorney fees after a mixed motive finding by an MSPB AJ. The Commission distinguished this case from other mixed motive cases cited by the petitioner, noting that in those other mixed motive cases, the complainant or appellant was awarded some relief. In this instance however, the Commission found that there was no relief awarded on the merits of the claim and the decision did not materially alter the legal relationship between the employee and the agency sufficient to warrant an award of legal fees. The Commission also found complainant was not a prevailing party for purposes of entitlement to attorney fees in an appeal in *Simon V. v. USPS*, 0120141013, 0120142516 (February 9, 2017), where the Commission denied a supplemental petition for attorney fees for time spent filing a brief in opposition to the agency's appeal that was later dismissed for untimely filing. The Commission held that the appeal would have been dismissed regardless of whether complainant filed a brief and therefore the additional attorney fees were not warranted.

A Commission decision of note concerning the hourly rate charged by counsel is *Demarcus I. v. Dept. of Defense*, 0120150529 (May 4, 2017), where an agency FAD reduced the hourly rate of complainant's Lynchburg, Virginia attorney from $200 to $150 per hour because the agency determined that the attorney did not have expertise in employment law. The Commission found an affidavit from another attorney in the Lynchburg area sufficient to support the higher prevailing market rate. And in *Man H. v. DHS*, 0120161218 (May 2, 2017), the Commission reversed an agency FAD that denied any attorney fees because of a lack of sufficiently detailed information regarding the work performed, and instead found that as a prevailing party the complainant was entitled to be compensated for the fees and remanded the matter to the agency with instructions for the attorney to submit an amended application for fees. Although the Commission's decision was generous to counsel, the authors think this is a merely what the agency should have done in the first place.

While reducing the amount of attorney fees awarded because a complainant prevailed in some, but not all, of the claims raised has always generated many appellate decisions from the Commission and this year was no exception. In *Karol K. v. Dept. of State*, 0120151671 (October 27, 2017), the Commission found an AJ erred in granting a reduction in the fees requested because complainant did not prevail on the basis of disability, holding that it was sufficiently entwined with the other claims such that a reduction was not appropriate. The Commission denied an agency argument on appeal that attorney fees should be reduced because complainant only prevailed in one of 15 claims in *Dominick J. v. DHS*, 0120170317 (September 20, 2017), because the claim was one of harassment, and it reversed an agency FAD that reduced attorney fees by 75% because complainant prevailed in only two of 13 claims in *Sang G. v. DHS*, 0120151360 (July 28, 2017), reasoning that the two successful claims were by far the most important and were reasonably entwined with the other 11 claims. And in *Lashawna C. v. Dept. of Labor*, 0720160020 (February 10, 2017), the Commission rejected an argument by the agency that attorney fees should be reduced by at least 80% because of success on only one of seven claims, with the EEOC finding the successful claim was one of harassment and the unsuccessful claims were intertwined and embedded in the harassment claim. In contrast, the time spent on an unsuccessful claim was struck by the Commission in *Micheline L. v. USPS*, 0120151957 (August 8, 2017), because there were two claims raised and they did not share a common core of facts, and a 50% reduction was determined to be appropriate in *Alvera L. v. DHS*, 0120150446 (August 9, 2017), where the successful claims had a different core of facts and an unrelated legal theory making it fractionable from the unsuccessful claims.

Among other cases where the Commission considered reductions to fee petitions were: *Nenita S. v. VA*, 0120151925 (May 23, 2017), where the Commission affirmed a reduction for excessive time spent deciding whether to take the case and time spent by an "expert attorney" to review the fee petition, but it allowed time charged by the "expert" for providing an affidavit in support of the fee petition; and *Emelda F. v. DHS*, 0720170024 (May 4, 2017), where the Commission affirmed an across-the-board

reduction of attorney fees because the fee petition included instances of double billing, administrative overhead and billing for unrelated matters.

Among other decisions of interest regarding petitions for attorney fees, we mention *Melina K. v. Dept. of Defense*, 0120152834 (August 10, 2017), where the Commission affirmed an agency decision that documentation in support of a claim for attorney fees and costs that included only an email from the attorney with the total amount sought was insufficient; *Dayle H. v. VA*, 0120150116 (April 18, 2017), *recons. den.*, 0520170329 (August 10, 2017), where the Commission found the agency, in challenging the hourly rate awarded to out-of-town counsel, did not meet its burden to show that retaining such counsel was unreasonable; and *Lauralee C. v. DHS*, 0720150002 (September 25, 2017), where the Commission found an award of attorney fees and costs by an AJ of $131,262.59, which was greater than the $122,150 requested by the attorneys, should be reduced to the amount requested because there was not documentation to support the higher award.

C. CLASS ACTIONS

There were several noteworthy decisions from the EEOC regarding class actions this year, all of which addressed issues of class certification. The Commission found that an EEOC AJ correctly determined a class complaint of deaf and hearing impaired employees at the Department of Agriculture should be certified as a class complaint in *Tessa L. v. Dept. of Agric.*, 0720170021 (November 3, 2017), because the approximately 40 employees who were affected by an agency decision on the funding of sign language interpreter services met the requirements for numerosity, commonality, and typicality and the class agent did not need to demonstrate they suffered or would suffer actual harm at this stage of complaint processing in order to be included in the count for purposes of numerosity. And in *Charley L., et al., v. Dept. of Labor*, 0120091988 (February 23, 2017), the Commission found an abuse of discretion when an AJ decertified a class as a sanction when the class agent submitted evidence in opposition to an agency motion to dismiss or, in the alternative, for summary judgment that had not been provided during the period for discovery. The Commission found the sanction too severe a punishment and that the evidence, affidavits from about fifteen class members and an expert's report, was later produced, observing that the expert report was not available during the time period providing for discovery and that the expert relied upon information obtained by class counsel from the agency's discovery responses. A decision from an EEOC AJ denying class certification in a complaint alleging African American employees at the GS-13 level and above were not given fair consideration in promotions was affirmed by the agency where the class agent speculated there could be hundreds of affected employees but offered little evidence to support the assertion. The Commission noted that there must be evidence of numerosity, and not mere speculation, and made similar comments regarding the criteria of commonality and typicality. Finally, in *Velva B. v. USPS*, 0720160006, 0720160007 (September 25, 2017), the Commission rejected an agency appeal of an EEOC AJ's finding of liability in a class complaint concerning claims of disability discrimination where the agency sought to challenge the requirements of commonality and typicality, with the Commission explaining that such attacks on class certification were too late and could not be raised in an appeal on the merits following a finding of unlawful discrimination.

D. COMPENSATORY DAMAGES

This was, in the opinion of the authors, a rather bleak year for plaintiffs in awards of compensatory damages, with fewer awards exceeding $100,000 than we have had since the early years after passage of the Civil Rights Act of 1991 which first provided for awards of compensatory damages in Title VII and ADA/Rehabilitation Act claims. Among the relatively nominal awards of $5,000 or less, the Commission affirmed agency FADs in: *Zenia M. v. Dept. of Army*, 0120151690 (August 2, 2017), awarding $3,000 to a complainant who did not provide a statement herself, but presented affidavits from her brother and a friend and a note from her doctor saying she suffered stress and tiredness with little to no tie to the symptoms to the discrimination; *Barabara C. v. Dept. of Army*, 0120151687 (August 2, 2017), awarding $4,500 to a victim of race discrimination who felt she was perceived as a bad person and who presented evidence that she had been treated for insomnia, depression, anxiety, stress, and hypertension, but where the Commission found there was a lack of evidence connecting the medical issues to the discrimination; *Harriet M. v. Dept. of Agric.*, 0120150114 (December 27, 2017), awarding $5,000 to the victim of disability discrimination and retaliation who submitted an affidavit stating she was depressed, tense, tearful, suicidal and sleepless but where there was also evidence these symptoms existed prior to the discrimination; *Levi P. v. USPS*, 0120151113 (November 9, 2017), awarding $5,000 to the victim of retaliation who suffered some emotional harm and financial strain, but much of the harm was not shown to be linked to the discrimination; and *Alena C. v. Dept. of Defense*, 0120152806 (March 9, 2017), awarding $5,000 to a complainant whose medical information was improperly disclosed and who suffered stress as a result.

The Commission also affirmed minimal awards of compensatory damages by AJs in: *Casie S. v. SSA*, 0120151599 (November 6, 2017), where an AJ found an award of $500 to a victim of retaliation with little evidence of emotional harm; and *Clemente M. v. Dept. of Army*, 0720140015 (March 16, 2017*), recons. den.*, 0520170273 (June 27, 2017), another retaliation case where the complainant was awarded $2,000 after she suffered generalized emotional distress but whose medical records did not connect the harm to the agency's retaliatory action. In perhaps the most interesting of these cases with awards of $5,000 or less, *Marcel M. v. USPS*, 0120151062 (May 17, 2017), the Commission tripled an AJ's award of $500 to a victim of retaliation whose supervisor did not remove a letter of warning after a one year period as required, with the EEOC determining the initial award was not sufficient to compensate her for the humiliation and embarrassment she suffered as a result, and instead determining that $1,500 was more appropriate.

Among the awards of compensatory damages over $5,000 but not more than $10,000 in cases where agencies issued FADs, we note the following cases of interest: *Wilda M. v. Dept. of Agric.*, 0120160712 (December 19, 2017), where the Commission reversed an agency FAD awarding no damages and instead awarded $7,500 to a complainant who became angry, upset, depressed, and lost self-esteem and motivation after not being selected for a position; *Fidelia F. v. Dept. of Agric.*, 0120150584 (April 11, 2017), where the Commission bumped up an agency award of $5,000 to $7,500 to the victim of age and sex discrimination who was not selected for a position and who experienced humiliation, helplessness, lowered self-esteem, weight gain and seizures (and who tried to submit additional evidence on appeal to support a higher award of damages, which was rejected by the Commission); *Elliot J. v. VA*, 0120151804 (July 13, 2017), *recons. den.*, 0520170524 (November 2, 2017), where the Commission affirmed an award of $8,000 to a complainant who almost lost his sobriety, smoked for the first time in 12 years, and had bouts of crying; *Bernetta B. v. Dept. of Educ.*, 0120161513 (August 23, 2017), where the Commission awarded $10,000 to a complainant not selected to a position after the agency argued complainant should receive no damages because her emotional harm was related to the stress of the litigation, but where the Commission agreed that although much of the harm was related to the stress of litigation, complainant also submitted evidence that she was inconvenienced and dismayed by the discrimination; *Melina K. v. Dept. of Defense*, 0120152834 (August 10, 2017), where the Commission affirmed an agency award of $10,000 to the victim of retaliation who alleged she suffered stress, depression and other emotional harm, but the Commission found assertions she gained 40 pounds, suffered hair loss and skin rashes lacked evidence of causation and occurred years after the retaliation; and *Stacie D. v. USPS*, 0120140918 (January 11, 2017), where the Commission increased an agency award of $5,000 in compensatory damages to $10,000 to a complainant whose medical information was improperly disclosed and where she suffered a variety of symptoms including anger, embarrassment, loss of sleep, weight gain, and she sought psychiatric care because of fear her medical information had been shared with other people.

Among the appellate cases in the under $10,000 range following decisions from an AJ, there was *Nicole T. v. Dept. of Defense*, 0120143019 (January 11, 2017), where the Commission affirmed an AJ's award of $8,000 to a complainant who suffered chest pains and headaches, hair loss, difficulty sleeping and a strained marriage after she was not provided reasonable accommodation and was sent home from work; *Karol K. v. Dept. of State*, 0120151671 (October 27, 2017), where the Commission affirmed an award of $10,000 to a complainant who experienced depression, felt numb, had crying spells, saw a psychiatrist briefly and occasionally had trouble sleeping, but some of the symptoms were partially related to matters not before the AJ; *Desire M. v. USPS*, 0120150824 (April 21, 2017), where the Commission increased an AJ's award to a complainant for stress and anxiety from $3,500 to $10,000 to be more in line with awards from other cases involving similar harm; *Lois G. v. USPS*, 0120150672 (February 28, 2017), where the Commission affirmed an award of $10,000 for emotional harm and rejected complainant's argument she should be compensated for the loss of her home, noting that complainant was deficient in her mortgage before she was subjected to disability discrimination; and *Lashawna C. v. Dept. of Labor*, 0720160020 (February 10, 2017), where the Commission affirmed an AJ's award of $10,000 to a Jewish complainant who became

"incredibly sad" after comments from her supervisor "dredged up horrific memories of the Holocaust and its impact on her family."

There were a number of interesting cases in the next category, awards greater than $10,000 but not more than $50,000, and we begin the discussion with cases on appeal from agency FADs where, yet again, overly modest awards by agencies were frequently increased on appeal. Note the frequent emphasis by the Commission on the duration of harm. In *Wilda M. v. USPS*, 0120141087 (January 12, 2017), the Commission bumped up an award of $10,000 in compensatory damages to $15,000 based on an unsworn affidavit of complainant and letters from family members and neighbors explaining that she became depressed and isolated, lost self-esteem, stopped socializing, and suffered various other symptoms "but was never formally diagnosed with depression by a psychiatrist"; in *Liza B. v. Dept. of Agric., 0120152098* (August 31, 2017), the Commission found an award of $5,000 was insufficient to compensate a complainant who was terminated from her employment instead of being offered a reassignment, and it instead awarded $22,500 (an amount the authors find surprisingly low) noting the complainant was financially ruined, had to apply for food stamps, lost her car which was a necessity in the rural area she lived, nearly lost her house, and suffered severe stress and depression; in *Roxane C. v. Dept. of Defense*, 0120170899 (December 29, 2017), the Commission bumped up an award of $21,000 to $35,000 where complainant suffered six years of harm after experiencing pregnancy discrimination that put stress on her marriage and caused other emotional harm, but where the Commission rejected an argument that it led her to undergo a tubal ligation to avoid further damage to her professional career; in *Kiara R. v. USPS*, 0120152620 (August 10, 2017), where the Commission rejected the agency's mere $3,000 award to a severely hearing impaired complainant who was denied reasonable accommodation that caused extreme stress and anxiety, feelings of isolation, difficulty sleeping, headaches, weight loss, and nausea, and instead entered an award of $25,000; *Sang G. v. DHS*, 0120151360 (July 28, 2017), where the Commission tweaked an award of $15,000 by the agency up to $25,000 largely because of evidence that after his termination, complainant could not afford mental health care, experienced depression over an extended time, separated from his wife, suffered damage to his relationship with his son, and was unable to find other gainful employment; and in *Dallas D. v. USPS*, 0120150319 (March 24, 2017), where the Commission increased an award of $12,000 to $30,000 to a complainant, denied reasonable accommodation, who suffered insomnia, depression, migraines, anxiety, humiliation, damage to her professional reputation, and damage to relationships with family and friends.

In contrast to the substantial number of cases where the Commission increased awards of damages after agency FADs in cases where the agency awarded over $10,000 but not more than $50,000, the Commission generally deferred to the discretion of its AJs. Thus, in *Margorie L. v. VA*, 0720170028 (November 16, 2017), the Commission affirmed an AJ's award of $15,000 to a complainant who was subjected to retaliation and as result, had an exacerbation of her preexisting conditions of PTSD and anxiety and experienced nightmares, sleeplessness, migraines, and difficulty getting out of bed; in *Minna Z. v. Dept. of Air Force*, 0720160009 (March 10, 2017), the Commission affirmed an AJ's award of $25,000 to a complainant who was denied reasonable accommodation and experienced insomnia, depression, migraines, anxiety, humiliation, and damage to relationships with family and friends; in *Velva B. v. Dept. of Navy*, 0120152226 (June 8, 2017), the Commission affirmed an AJ's award of $32,500 to a complainant who suffered three years of anxiety, depression, panic attacks, hopelessness, low self-esteem, and a strain on relationships with family and friends; and in *Augustine S. v. Dept. of Agric*. 0120152598 (December 8, 2017), the Commission affirmed an AJ's award of $50,000 to a complainant who had been denied reassignment as a means of reasonable accommodation and as a result increased drinking, had difficulty sleeping, worried about being fired, and lost interest in socializing with friends and family.

Agencies did not fare well on appeals from FADs of compensatory damages that ultimately ended in the range of over $50,000 but not more than $100,000, with dramatic increases on appeal before the Commission being the norm. In *Mardell B. v. SSA*, 0120172035 (October 31, 2017), the Commission found an award of $25,000 to be insufficient to compensate a complainant who was denied a space heater as an accommodation for a disability while working in a cold work environment, causing an exacerbation of her anemia and severe arthritis and resulting in depression and other emotional harm and boosted the award to $70,000; in *Demarcus I. v. Dept. of Defense*, 0120150529 (May 4, 2017), the Commission quadrupled an agency FAD award of $25,000 up to $100,000 where complainant was subjected to harassment on the basis of a disability and presented evidence from his physician, a psychiatrist, family members, friends and coworkers, all of whom corroborated his testimony that he suffered extreme emotional turmoil for 14 months in the workplace that then continued for more than four years resulting in marital and family strain, severe anxiety and stress, humiliation, and embarrassment, feelings of isolation, and other symptoms of PTSD requiring weekly therapy and medication; and in *Sherill S. v. Dept. of Air Force*, 0120160115 (April 5, 2017), the Commission increased more than seven fold an award of damages in an agency FAD from $10,000 t0 $75,000 to a complainant who was constructively discharged and, as a consequence, experienced significant emotional distress, digestive problems, and headaches.

In contrast, most awards from AJs were simply affirmed by the Commission, including: *Kevin B. v. DHHS*, 0720170014 (April 24, 2017), where the Commission affirmed an AJ's award of $60,000 to a complainant whose diagnosed bilateral flexor tendinitis was exacerbated and he developed carpal tunnel syndrome and suffered anxiety and other mental health consequences as a result; *Ileana H. v. Dept. of Justice*, 0720170016 (April 21, 2017), where the Commission affirmed an AJ's award of $75,000 to a complainant who was unlawfully suspended from her employment and, as a result, she suffered fear for her economic security, emotional distress and stomach disorders; and *Jackqueline G. v. Dept. of Justice*, 0720160022 (January 11, 2017), where the Commission affirmed an AJ's award of $75,000 to a complainant who suffered stress, anxiety, fear for her economic security, an increase in migraine headaches which were so severe as to cause temporary vision, speech loss, and numbness. In a rare modification to an award of compensatory damages from an AJ, in *Lois G. v. DHS,* 0120151972 (June 8, 2017), the Commission found an AJ erred in reducing by 50% an award of compensatory damages from $55,000 to $27,500 because complainant did not prevail on all issues in the complaint with the Commission finding the full award of $55,000 was warranted because the greater harm resulted from the successful claim of sexual harassment, which involved a sexual assault.

There were surprisingly few awards of compensatory damages over $100,000, but we note of particular interest *Lara G. v. USPS*, 0520130618 (June 9, 2017), where the Commission issued a decision, *sua sponte*, reopening a precious decision and in that portion we find of interest here, mildly increasing an award of compensatory damages by an AJ of $100,000 to $110,000, reasoning that the AJ relied on cases with comparable harm to determine an appropriate award but that the award should have considered the present day value in determining the award. Despite the fact that the increase in the award was relatively modest, the authors believe this to be a significant decision that we may see cited with some frequency to justify an increase in the rather tepid awards we have seen from the Commission in recent years. Other cases of interest with awards exceeding $100,000 include *Donita B. v. VA*, 0120160410 (October 18, 2017), where the Commission bumped an agency award in a FAD from $100,000 to $125,000 to a complainant who suffered depression, anxiety, sleeplessness, suicidal thoughts, and other harm; and *Lauralee C. v. DHS*, 0720150002 (September 25, 2017), where the Commission affirmed an award of $200,000 from an AJ to a complainant who was subjected to harassment based on sex and retaliation, and provided substantial medical documentation of her treatment for PTSD, depression, insomnia, gastrointestinal distress, irritable bowel syndrome, and temporomandibular joint disorder and who felt "hollow, exhausted, hopeless and helpless."

There were a handful of other cases concerning entitlement to compensatory damages that we thought worthy of mention, including: *Man H. v. DHS*, 0120161218 (May 2, 2017), where the Commission found the complainant, who had not presented medical documentation to support a claim for compensatory damages prior to the agency's issuance of a FAD and then submitted them for the first time on appeal, should not be barred from seeking damages because damages are only considered after a finding of discrimination. The Commission noted that it generally would not accept evidence during an appeal if it had been reasonably available prior to the appeal, but nonetheless remanded the case for the agency to consider an award of damages. In *Heidi B. v. DHHS*, 0520170099 (March 7, 2017), the Commission found the complainant's request to be "made whole" and that she reserved the right to request additional remedies to which she may be entitled was sufficient to preserve her right to compensatory damages. In *Lauralee C. v. DHS*, 0720150002 (September 25, 2017), the Commission affirmed an AJ's award of some $223,000 in pecuniary damages in addition to the $200,000 in nonpecuniary damages awarded. In *Demarcus I. v. Dept. of Defense*, 0120150529 (May 4, 2017), the Commission awarded five years of future pecuniary losses in the form of medical costs related to the complainant's diagnosis of PTSD, but in *Dallas D. v. USPS*, 0120150319 (March 24, 2017), the Commission denied a

request for some $67,000 for future costs of medical care, finding that the diagnosis of the medical conditions predated the discriminatory acts of the agency and that there was a lack of evidence to show a causal relationship between the need for medical treatment and the discrimination.

E. DISABILITY DISCRIMINATION

Disability claims continue to constitute the largest percentage of cases before the Commission and there were a number of cases we found of interest this year. In a "regarded as" or perceived disability case, *Elden R. v. Dept. of Interior*, 0120122672 (February 24, 2017), the Commission noted the expanded coverage intended by the ADAAA in finding discrimination where complainant could perform all of the duties of a GS-05 Wildlife Refuge position that also required some collateral law enforcement duties, but the agency required him to take an examination where he was not able to perform certain "sit and reach" exercises. The Commission found other employees had received a waiver of the sit and reach exercises ordered the complainant hired into the position. The EEOC also found discrimination in *Matilde M. v. SSA*, 0120140147 (January 17, 2017), when complainant, who suffered depression and anxiety, was told to remove a "Crown of Thorns" she kept at her cubicle because of fear that she was mentally unstable and might use it as a weapon.

The ADA and Rehabilitation Act make it unlawful to discriminate against an individual because of an association with someone who has a disability and the Commission had one such case of note this year, *Eleanore M. v. SSA*, 0720160024 (March 2, 2017), where the complainant was a single parent of a child with heart and lung conditions he had had since birth. The Commission affirmed the decision from an AJ finding management was "openly hostile" to complainant and belittled her in front of coworkers, which was related to intolerance with her need for leave to care for the child.

Other cases where the Commission found disability discrimination include *Pamala L. v. USPS*, 0120152493 (November 21, 2017), where the agency failed to provide a mail processing clerk with accommodations, including an ergonomic chair and a modification to work hours that would enabled her to perform the job; *Phoebe O. v. SSA*, 0120150304 (March 30, 2017), where the agency should have granted complainant's request for a narrower desk to enable her to access items in her office because of limited mobility related to herniated discs and bilateral tendinitis; and *Eileen S. v. USPS*, 0120150199 (March 24, 2017), where the agency failed to accommodate a city carrier who was unable to carry a mail satchel because of a neck injury but could have performed her duties using a push cart or carry the satchel on her hip.

Among those cases where the Commission found no violation were *Victor M. v. NSA*, 0120152103 (December 22, 2017), where the decision of an EEOC AJ was affirmed when a deaf employee was fired after the agency determined he was unable to perform the duties of a facilities manager even with accommodations and the agency made an unsuccessful effort to find a vacant funded position where he could be reassigned and *Alden V. v. Dept. of Defense*, 0120151743 (May 26, 2017), where a complainant who worked as a senior store associate in Germany injured himself at work and was terminated when he could no longer perform the essential functions of the job and the limitations set by his physician precluded any other vacant positions.

The Commission has repeatedly held that unreasonable delays in providing needed accommodations are a violation of the ADA and it found an unreasonable delay in *Lacy R. v. Dept. of Justice*, 0120152260 (November 22, 2017), where the agency took nearly two years to provide needed accommodations and the Commission found it was the equivalent of denying the requested accommodations.

Among other disability cases of note: the Commission remanded for further investigation a complaint in *Corrina M. v. USPS*, 0120150102 (November 22, 2017), where the agency found complainant unqualified because he could not meet the essential function of being regular in attendance, with the Commission noting that it previously held attendance could not be an essential function of the job; the Commission found a complainant was not entitled to an accommodation of choice in *Sylvester C. v. Dept. of Defense*, 0120151071 (May 19, 2017), where an employee with sleep apnea who worked as a motor vehicle operator was provided an accommodation to enable his vehicle to idle while he was making deliveries, but a request for a specific partner as a team driver could not be provided because that employee had been promoted and was no longer available.

An employer need not provide an accommodation if it can show that providing an accommodation would pose an undue hardship on the operations of the employer. In *Melania U. v. Dept. of Navy*, 0120150745 (April 27, 2017), an AJ issued summary judgment for the agency and found that providing 30 days of LWOP would have imposed an undue hardship based on testimony from five witnesses who said it would have caused the agency to fall significantly behind in processing and coding patient records, and the complainant was offered the ability to take the leave in shorter segments. But in *Joi J. v. VA*, 0120150921 (March 3, 2017), the Commission found it would not have been an undue hardship to excuse a nurse anesthetist who had a sleep disorder from being on-call in light of the fact that in her first 26 months of employment she had never been on call and was only needed because the agency decided to adopt an on-call rotation.

Among cases addressing specific requested accommodations, we include *Augustine S. v. Dept. of Agric*. 0120152598 (December 8, 2017), where the Commission determined the agency should have offered to return complainant to his former GS-11 position as he requested when he was unable to perform the duties of the position to which he had been promoted; *Victor S. v. USPS*, 0120160739 (October 18, 2017), where the Commission found that after the facility where complainant worked was closed, the agency should have reassigned complainant to a vacant clerk position rather than just providing part time work; and *Julius C. v. Dept. of Air Force*, 0120151295 (June 16, 2017), where the Commission found the agency failed to properly consider reassignment to a complainant suffering from dermatitis who had severe rashes and itching working in the building to which he was assigned.

The Commission found an agency failed to provide reasonable accommodation in *Lloyd E. v. Dept. of Transp.*, 0120150325 (August 17, 2017), when it granted a change to complainant's start time from 7:00 to 8:00 A.M., but required the complainant, who had depression and sleep apnea, to take one hour of leave every day rather than allowing the employee to work an extra hour at the end of the day.

Teleworking as a reasonable accommodation continues to be a topic of discussion and the Commission considered several cases where it was the requested accommodation, including *Alejandrina L. v. Dept. of State*, 0120152145 (November 16, 2017), where the Commission found that the agency should have accommodated the complainant by allowing her two consistent telework days each week and *The Estate of Doria R. v. NSF*, 0120152916 (November 9, 2017), where the Commission found the agency should have allowed a complainant with cancer to telework after a car accident caused her spine to become brittle and her doctor was concerned that commuting by public transportation could have caused paralysis. However, in *Avery R. v. Dept. of State*, 0120151816 (September 22, 2017), the Commission agreed with the agency that as the bulk of the complainant's work was classified, thus requiring him to be in the office, the agency's offer to allow him to take preapproved situational telework when specific assignments could be designated for at-home work was an effective accommodation.

Agencies can send employees for medical examinations and take them out of the workplace if they can demonstrate concern over the employee posing as a direct threat in the workplace. The respective agencies met this burden in *Foster M. v. Dept. of Energy*, 0120152280 (December 27, 2017), where a truck driver who couriered nuclear weapons and weapons grade nuclear materials was removed from his assignment and sent for a fitness-for-duty examination after coworkers expressed concerns about his driving and sleeping habits; *Marya S. v. PBGC*, 0320160066 (February 17, 2017), where an employee was sent for a fitness-for-duty examination after she asserted that her supervisors broke into her home and were observing her through the use of transit officers, earpieces, and hidden cameras; *Eryn O. v. DHS*, 0120152233 (December 19, 2017), where the agency sent a complainant for a fitness-for-duty examination before returning her to her supervisory transportation security officer duties where she had been absent on FMLA for six months and her medical documentation did not indicate she could return to work; and *Buster D. v. USPS*, 0120151128 (July 6, 2017), where the agency questioned the complainant's ability to safely perform his job duties after he returned to work after having a seizure and had issues safely performing his job.

All employees, regardless of whether or not they have disabilities, are entitled to have their medical information kept confidential by their employer by regulation. The Commission found violations of this regulation in *Foster M. v. Dept. of Energy*, 0120152280 (December 27, 2017), where the agency kept a binder which all employees had access to in order to write down what prescription medications they were taking; *Freddy V. v. Dept. of Interior*, 0120152121 (November 29, 2017), where a supervisor discussed the fact that the complainant was having knee surgery with another subordinate; *Mario G. v. Dept. of Air Force*, 0120150193 (October

19, 2017), where a supervisor left an email referencing the complainant's injury, surgery, and limitations sitting face-up on a table where other employees could see it; and *Velva B. v. USPS*, 0720160006, 0720160007 (September 25, 2017), a class-action where the Commission found discrimination, including "rampant reports of confidential medical files being left on supervisors' desks, on copy machines, in the trash, and otherwise not properly secured."

Finally, in *Davina W. v. SSA*, 0120162615 (January 18, 2017), the Commission found the AJ did not properly address a complainant's requests for accommodation during the discovery phase of her complaint, including her requests for the deposition to take place beginning in the afternoon to allow her medication to kick in, and agreeing for the deposition to take place over two days.

F. EEO INVESTIGATIONS

It seems every year we comment on the frequency with which agencies lose cases because of inadequate investigations and this year is no exception, as we further discuss in the chapter on "Hearings (EEOC) and AJ Authority." However, the Commission seemed unusually reluctant to punish agencies and instead reversed agency FADs and ordered supplemental investigations in: *Nadene M. v. VA*, 0120170553 (December 28, 2017), where the Commission ordered a supplemental investigation after finding that there was not an adequate record to adjudicate claims of disability discrimination, noting in particular that there was a lack of evidence as to whether complainant was required to work outside her medical restrictions and what efforts the agency made to reassign complainant; *Darleen R. v. VA*, 0120152909 (November 3, 2017), where the Commission ordered a supplemental investigation to address aspects of complainant's OWCP claim and efforts to seek reassignment; *Harriet J. v. Dept. of Agric.,* 0120152130 (October 12, 2017), an EPA claim where the Commission ordered additional investigation into the chain of command of comparator employees, the duties they performed, and their salaries; *Gena C. v. DHHS*, 0120151764 (June 7, 2017), where the Commission ordered a supplemental investigation because the record did not include interview notes or scoring sheets from the interview process and the selectee's performance reviews, among other things; *Emiko S. v. Dept. of Commerce*, 0120170543 (April 27, 2017), where the Commission found there was insufficient evidence to determine if the substance of comments and criticism directed toward complainant could be corroborated or demonstrated sexist attitudes as complainant alleged; *Kory V. v. Dept. of Defense,* 0120150981 (April 4, 2017), where the Commission remanded for further investigation to obtain, among other things, the applications of the other candidates for the job at issue; *Brendon L. v. Dept. of Labor*, 0120150926 (March 9, 2017), where the agency failed to obtain affidavits from complainant's second, third and fourth line supervisors in a claim of discrimination that culminated in complainant's termination; *Susie K. v. USPS*, 0120150160 (March 8, 2017), where the agency neglected to obtain affidavits from any of the nine witnesses identified by complainant to support of her claim of harassment and instead only statements from management; *Waneta F. v. USPS, 0120151508* (February 10, 2017), a pregnancy discrimination claim where the agency neglected to gather information about the agency's articulated legitimate nondiscriminatory reasons or any evidence of pretext; and *Latoyia B. v. USPS*, 0120142860 (December 16, 2016), *recons. den.*, 0520170148 (June 6, 2017), a harassment claim where the agency failed to obtain statements from coworkers identified by complainant as having relevant knowledge.

G. EQUAL PAY ACT

There were few decisions from the EEOC raising claims under the EPA that we found worthy of mention and only one found a violation. In that case, *Heidi B. v. DHHS*, 0120152308 (June 3, 2016), *recons. grant.,* 0520170099 (March 7, 2017), the Commission found a female GS-12 Human Resources Specialist who was performing classification duties was performing substantially similar work as a GS-13 male coworker who worked for the same supervisor. The Commission rejected the agency's defense that it relied upon a factor other than sex because the male HR Specialist was already a GS-13 when he transferred into the position, noting that a job classification system is not a valid defense to an EPA violation if it does not accurately reflect the duties performed within the different classifications. Among the EPA claims where the Commission found no violation, there was *Kenneth H. v. Dept. of Justice*, 0120160581 (December 20, 2017), where the agency hired a female clinical psychologist at a higher rate of pay than a male complainant, and the explanation, that a provision permitted higher compensation to persons who had superior qualifications, was a factor other than sex; *Josephine S. v. Dept. of Army*, 0120151324 (July 26, 2017), where the complainant was unable to establish that the work performed was of equal skill, effort and responsibility as a proposed comparator employee; *Belia A. v. Dept. of Agric.*, 0120160403 (May 10, 2017), where the Commission found placing two higher graded employees in complainant's organizational unit was a factor other than sex because it was part of a nationwide reorganization; and *Stefan C. v. DHS*, 0120132211 (April 24, 2017), where the complainant could not demonstrate that the named comparator performed substantially similar work.

H. EVIDENCE

The most interesting decision from the Commission addressing issues of evidence was *Celine B. and Miles N. v. Dept. of Navy*, 0320170021 (May 3, 2017), a race discrimination case that came to the Commission on a Petition for Review of an MSPB decision finding no discrimination when the petitioner, an African-American detective, was furloughed and others were not. The Commission determined that the MSPB made an incorrect application of a legal standard regarding direct evidence, finding that derogatory racial comments evidenced direct evidence of racial bias, but that there was not evidence that the remarks were related to the furlough decision, which relied upon the fact that complainant was not a first responder. There was a handful of decisions applying the mixed motive analysis, including: *Thomas M. v. Dept. of Energy*, 0120152584 (December 14, 2017), where the Commission found a decision to remove the warrant authority of a contract specialist was impermissibly motivated by disability discrimination, in addition to performance concerns, and thus awarded only declarative relief and attorney fees; *Sean T. v. USPS*, 0120150928 (December 5, 2017), where an AJ found complainant's termination was motivated both by retaliation and union activity, but the agency showed by clear and convincing evidence that it would have made the same decision even if complainant had not engaged in protected activity; and *Herb S. v. Dept. of Agric.*, 0120141055 (February 28, 2017), where the EEOC applied a mixed motive analysis and found that considerations of race and retaliation motivated complainant's nonselection, but that the selectee was better qualified and would have been selected even absent the unlawful considerations.

I. HEARINGS (EEOC) AND AJ AUTHORITY

In the years since the Commission amended its regulations to provide for more potent sanctions, they have become a powerful tool in ensuring compliance with Commission regulations and orders. Of course, the ultimate sanction is the issuance of a default judgment, and that's precisely the sanction imposed against the agency in *Jeremy S. v. VA*, 0120142917 (February 9, 2017), after the agency did not start the investigation for some 332 days after the filing of the complaint and in the interim the complainant died (although near the end of the 180 days for investigation, complainant signed an agreement to extend the time to complete the investigation). The Commission commented that "… the agency is in need of a reminder of its obligation to comply with the requirement to commence and complete the EEO investigation within 180 days of the filing of the complaint." The Commission has long been reluctant to dismiss a complainant in its entirety as a sanction against a complainant (it is more likely to dismiss the hearing request and order a FAD), but there have been rare instances of the Commission dismissing the entire claim and it did so in *Edmond C. v. VA*, 0120170879 (March 7, 2017), *recons. den.*, 0520170250 (July 14, 2017), after finding that the complainant engaged in a variety of sanctionable misconduct, the most egregious of which was posting a confidential deposition on YouTube in violation of a protective issued by the AJ.

The Commission affirmed AJs' decisions not to draw an adverse inference as a sanction for having destroyed documents in two cases; *Ashely H. v. DHS*, 0120170945 (November 9, 2017), where it concurred with the AJ's determination that although interview notes from a selection were destroyed, there was sufficient evidence available from the testimony of the selection panel members and other sources; and *Herb S. v. Dept. of Agric.*, 0120141055 (February 28, 2017), where it similarly found that, despite the destruction of relevant evidence, there was other evidence to support a director's assessment of the qualifications of applicants.

When the Commission began awarding monetary relief as sanctions, it provided a means of policing compliance without considering the more draconian use of default judgment and it continues to be effective, but seldom used, and we saw a couple of instances this year. In *Truman B. v. Dept. of Army*, 0120140418 (April 10, 2017), *recons. den.*, 0520170351 (September 7, 2017), the Commission ordered payment of legal fees for the appeal of a FAD as a sanction for delays and for the failure to complete the investigation (and also awarded fees for complainant's work in responding to the agency's unsuccessful request for reconsideration), but found no agency liability on the merits of the claim; and in *Emelda*

F. v. DHS, 0720170024 (May 4, 2017), the Commission affirmed an AJ's award of partial attorney fees after the agency initially refused to process complainant's EEO claims because the initial counselor contact was initiated by counsel for complainant and it improperly refused to proceed the claim unless complainant personally filed, which had resulted in the AJ issuing a show cause order as to why the case should not have been dismissed for untimely contact with an EEO counselor.

Excluding evidence including the testimony of one or more witnesses as a sanction is another not uncommon result, and we note two such instances this year: *Idell M. v. Dept. of Defense,* 0120151274 (May 5, 2017), *recons. den.*, 0520170399 (September 8, 2017), where the Commission found no abuse of discretion in the AJ's decision to exclude the testimony of two of complainant's witnesses, allowing a statement from one into the record and disallowing the other because counsel could not adequately explain the nature of the testimony and failure to actually speak with the witness before the hearing; and *Charley L., et al., v. Dept. of Labor*, 0120091988 (February 23, 2017), *recons. den.*, 0520170312 (May 12, 2017), where the Commission reversed the decision of an AJ that had excluded testimony of an expert witness and the expert witness' report because it was not disclosed in discovery, with the Commission finding there was good cause for the failure to disclose at that stage of the proceeding.

While the Commission has always been reluctant to sanction a complainant with dismissal of the complaint in its entirety, it provides significant discretion to its judges to dismiss the request for hearing and instead remand the case to the agency for issuance of a FAD when the complainant's conduct warrants. Such was the case in: *Judson G. v. VA*, 0120151916 (November 22, 2017), where the AJ dismissed the request for hearing because of "disruptive and defiant conduct" including accusing the AJ of being "corrupt and biased"; *Syreeta P. v. Dept. of State*, 0120170424, 0120160508 (October 25, 2017), where the AJ dismissed the request for hearing for failure to comply with orders of the AJ to explain her need for additional time related to medical issues; *Rosie T. v. Dept. of Labor*, 0120152363 (September 21, 2017), where the AJ dismissed the request for hearing for complainant's failure to twice appear for deposition; *Josephine S. v. Dept. of Army*, 0120151324 (July 26, 2017), where the complainant did not appear for some five hours after the hearing started; *Tristan W. v. USPS*, 0120152084 (July 11, 2017), where the Commission affirmed the AJ's dismissal of the request for hearing for failure to follow orders, even though the complainant was homeless and had no fixed address; *Selina S. v. DHS*, 0120150723 (April 18, 2017), where the complainant repeatedly filed pleadings without seeking leave from the AJ as she had been ordered to do; and *Al W. v. Dept. of Army*, 0120150119 (March 3, 2017), another instance where the complainant, who was *pro se*, failed to comply with orders from the AJ.

However, the Commission found AJs overstepped their discretion in dismissing hearing requests in *Jennifer K. v. Dept. of Navy*, 0120171630 (June 26, 2017), where the Commission found the AJ erred when she dismissed the request for hearing because the complainant, who worked for the agency in San Diego, although her official duty station was Norfolk, Virginia, had disregarded the agency's notice that she should file a request for hearing in Charlotte, North Carolina and she instead filed it in Los Angeles with the EEOC finding there was no evidence the complainant violated any order of the Commission; and *Elsa R. v. USPS*, 0120150202 (February 3, 2017), where the AJ dismissed the hearing requests for failure to follow orders of the AJ, but on appeal the Commission found it was in error as the complainant had not agreed to accept service by email.

In other cases concerning hearing procedures: in *Gilbert B. v. USPS*, 0120150707 (February 28, 2017), the Commission found harmless error when: an AJ permitted a witness to testify by telephone, which the Commission had previously prohibited in most instances in *Louthern v. USPS*, 01A14521 (May 17, 2006), noting that in this instance neither party objected and the witness' credibility was not at issue; the Commission also found harmless error when an AJ conducted a hearing by videoconference with no objection by either party; in *Vickey S. v. DHS*, 0120151009 (April 11, 2017), the Commission found no support to the complainant's assertion that the AJ demonstrated bias when speaking *ex parte* to agency counsel as the discussion was entirely procedural in nature; the Commission admonished the agency for issuing a FAD after complainant requested a hearing in *Jonathan V. v. DHHS*, 0120152151 (November 30, 2017), and ordered the FAD vacated and returned to an AJ for hearing; and in *Horace L. v. VA*, 0120151719 (November 8, 2017), the Commission affirmed an AJ's decision that found no discrimination despite the agency's failure to retain records as required by Commission regulations at 29 CFR 1602.14, but also ordered that the agency notify all appropriate supervisors and managers of the duty to comply with that requirement and receive appropriate training.

J. LEGITIMATE NONDISCRIMINATORY REASONS

There are two cases we found of interest addressing the adequacy of an agency's legitimate nondiscriminatory reasons. In most years we comment on the frequency with which agencies fail to meet the minimal burden to articulate its reasons for challenged employment actions and this year we focus on just one, *Danielle H. v. Dept. of Defense*, 0120152515 (October 19, 2017), where the Commission found the agency had no explanation for why the complainant was denied a Quality Step Increase (QSI) after her second line supervisor had approved it and that the only explanation for not promoting her when all other staff were promoted, which was a supervisor's comment that he thought other senior managers had a "personal vendetta" against her, did not meet the agency's burden. In *Ardelle P. v. VA*, 0120151734 (May 12, 2017), the Commission affirmed an AJ's finding of no discrimination, but the Commission included language we believe practitioners will find worth reviewing as it discusses the extent to which the Commission will not "second guess" an agency's business decisions.

K. NATIONAL ORIGIN DISCRIMINATION

We mention only a single case addressing claims of national origin discrimination this year, *Riley G. v. USPS*, 0120152053 (August 10, 2017), where the Commission found a novel argument by a complainant that he was subjected to discrimination because of a combination of being of Puerto Rican descent and born in New York, which he referred to as being "Newyorican," could state a viable claim of discrimination, although in this instance, the agency articulated legitimate nondiscriminatory reasons for its actions. The Commission noted that it takes a "broad view" of national origin, and although both Puerto Rico and New York are in the United States, it could be a basis for a claim of national origin discrimination.

L. PROCEDURES

Agencies continue to aggressively dismiss claims for failure to state a claim and as a result, every year the Commission remands a large number of these cases back to the agency after the overzealous dismissals. This year, among those decisions the Commission reversed included: *Felton A. v. USPS*, 0120172031 (September 25, 2017), where the Commission found a claim that complainant was denied access to an agency facility while others were permitted entry and his medical records were improperly disclosed when he was placed on a threat assessment list stated a claim; *Theresa E. v. Dept. of Agric.*, 0120172207 (September 21, 2017), where allegations of race discrimination when complainant was told she could not ask for assistance from coworkers and was given an undesirable work space was found to state a claim because there were seven other allegations as part of the allegation; *Adah P. v. Dept. of Interior*, 0120170966 (June 20, 2017), where a claim of nonselection was reinstated when complainant did not apply for a position because she was told not to apply and the Commission found this to be an exception to the requirement that one must actually apply for a position to state a claim for nonselection; *Fonda M. v. NTSB*, 0120171020 (May 3, 2017), where a complaint concerning a mid-year review was found to state a claim because it included written comments that were placed in her personnel file; *Arturo A. v. USPS*, 0120170630 (March 23, 2017), where complainant had not checked disability discrimination on the formal complaint form but the Commission found it could be inferred because he included comments such as that because of his medical condition he had to wear soft sole shoes; *Darin B. v. OPM*, 0120161068 (March 6, 2017), where the Commission found complainant stated a claim of sex (transgender discrimination) when he alleged his FEHB health insurance carrier denied coverage for nipple areola reconstruction; *Nieves P. v. USPS*, 0120171477 (June 9, 2017), finding a viable claim of harassment when complainant's supervisor was allegedly leering and staring at her and followed her into the restroom; *Tyree B. v. Dept. of Defense*, 0120171368 (May 15, 2017), finding a complaint stated a claim of retaliation where complainant was held to a different performance standard than other employees; *Cruz M. v. SSA*, 0120151259 (May 9, 2017), finding eight days of racially charged comments and criticism of complainant's accent was sufficient to state a claim of harassment; *Mohammad M. v. Dept. of Army*, 0120170250 (March 10, 2017), where allegations of unwarranted criticism of performance, counseling memorandums, being sent home from work, denial of reasonable accommodation and placement on leave restriction stated a cause of action for harassment based on sex, disability and age; *Kenneth W. v. USPS, 0120170445* (February 15, 2017), finding a claim of harassment when false reports about complainant were made to management and the police; and *Arlette W. v. Dept. of Army*, 0120162589 (January 5, 2017), finding allegations that a job offer was rescinded, access to a work area was removed, eligibility for telework was challenged and complainant was threatened with AWOL stated a claim of harassment.

Among other agency FADs that dismissed claims of retaliation for failure to state a claim that were reversed on appeal by the Commission included: *Yun C. v. USPS*, 0120172485 (December 28, 2017), finding a threat by a manager to employees who participated in the investigation of an EEO complaint would have chilling effect on employees pursuing their EEO rights; *Joel M. v. Dept. of Transp.*, 0120171980 (October 19, 2017), finding an email instructing employees to delete certain information "in accordance with an agreement" unnecessarily made others aware of complainant's EEO activity and could have a chilling effect; *Shaniqua S. v. Dept. of Army*, 0120171781 (September 8, 2017), finding a comment that "She won't work here again—she has a lawsuit against us" sufficiently stated a claim of retaliation; *Nicolasa M. v. USPS*, 0120170652 (March 24, 2017), finding that comments from an EEO counselor discouraging the complainant from filing a complaint ("you are putting your name out there, putting a negative on you") stated a claim of retaliation; *Wilfredo B. v. Dept. of Navy*, 0120170327 (March 3, 2017), finding that, contrary to the agency's FAD, a complainant who voiced opinions about perceived favoritism engaged in protected activity and thus could raise a claim of retaliation; *Maya F. v. Dept. of Army*, 0120161971 (February 23, 2017), finding that participation in the grievance process may constitute protected activity; *Hannah C. v. USPS*, 0120170352 (February 22, 2017), finding that complainant stating she intended to use the EEO process was protected activity sufficient to support a claim of retaliation; *Valentine S. v. Dept. of Interior*, 0120170221 (January 5, 2017), finding that a complainant who was told he had to move his manufactured home off agency land stated a cause of action; and *Violet F. v. Dept. of Navy*, 0120161918 (February 17, 2017), where a cautionary conduct warning placed in a supervisor's file stated a claim of retaliation.

Those few cases we thought worthy of mention where the Commission affirmed agency FADs and agreed that complaints failed to state a claim included: when the agency denied a employee's request to participate as an agency employee in a city sponsored LGBT parade in *Mike S. v. Dept. of Army*, 0120170169 (February 23, 2017); when the agency denied a complainant official time in *Jacinto Q. v. USPS*, 0120171399 (May 31, 2017); and several cases in which the Commission found the complaints did not state a claim because they constituted a collateral attack in another forum: when the agency garnished complainant's wages (a collateral attack on the Debt Collection process) in *Jona R. v. USPS*, 0120171121 (June 22, 2017); when the agency denied overtime for conducting official union business (a collateral attack on the collective bargaining process); in *Wes S. v. USPS*, 0120161214 (February 17, 2017), when the agency denied Continuation of Pay benefits (a collateral attack on the OWCP process); and when the agency acted to deny unemployment benefits (a collateral attack on the unemployment compensation process) in *Wilfred M. v. DHHS*, 0120152453 (February 22, 2017).

Among other cases in Procedures chapter, we found noteworthy two cases where the Commission reversed agency FADs that had dismissed complaints as moot: *Glenna D. v. USPS*, 0120170914 (May 4, 2017), where complainant was charged AWOL while on jury duty and the agency tried to argue it was moot because it later changed the leave to LWOP; and *Donovan O. v. USPS*, 0120170521 (April 14, 2017), where the agency argued a claim was moot because two letters of warning were removed as the result of a settlement of a grievance, but the Commission found the claim survived because it raised broader allegations of a "psychological war" against complainant. We found *Joette R. v. Dept. of Navy*, 0120171421, 0120171422, 0120141423, 0120141424 (May 12, 2017), *recons. den.*, 0520170409, 0520170410, 0520170411, 0520170412 (September 8, 2017), of interest, where the Commission warned complainant and her representative her filings bordered on an abuse of process after she filed 91 complaints in one month. There were two cases where agencies were reversed after issuing FADs that dismissed complaints for failure to prosecute: *Angelica P. v. EEOC*, 0120170446 (December 18, 2017), where the Commission found complainant had already provided sufficient information after responding to multiple communications from the investigator and the dismissal for not responding to one email was unwarranted; and *Bret B. v. Dept. of Air Force*, 0120171656 (September 13, 2017), where, after complainant died, the agency dismissed the complainant because his representative did not respond to correspondence within 15 days as requested, but it was unclear if the correspondence had been received.

We also note *Gearldine B. v. Dept. of Labor*, 0120142157 (February 1, 2017), where the Commission found the agency erred when it refused to consolidate two otherwise unrelated claims from the same complainant, noting that even though the investigation of the first complaint was already completed, it was more efficient to process the claims together; *Nakesha D. v. USPS*, 0120170728 (March 7, 2017), where the agency oddly tried, albeit unsuccessfully, to dismiss a claim for lack of standing because complainant was no longer an employee in a complaint that included an allegation of unlawful termination; *Hortencia R. v. SSA*, 0120150228 (May 3, 2017), *recons. den.*, 0520170373 (August 24, 2017), where the Commission found insufficient evidence to support complainant's assertion that the General Counsel's office improperly interjected itself in the investigation, instead finding the lawyers advised managers that their affidavits used identical information, apparently because an investigator drafted the affidavits with identical language, and the Commission cautioned the agency about intrusion in the investigative process; and *Sherita V. v. Dept. of Army*, 0120170840 (February 7, 2017), *recons. den.*, 0520170208 (May 10, 2017), where the Commission reversed a "conditional" agency FAD that lacked sufficient analysis of the claims.

M. RACE DISCRIMINATION

Of the appellate decisions addressing allegations of race discrimination, we find two worthy of mention here: *Tricia B. v. VA*, 0120150474 (November 17, 2017), where the Commission affirmed an AJ's decision finding no discrimination in a claim alleging harassment when the words "n_____," "monkey" and "slaves in chains" were said in the workplace, because the context of the use of the words made clear it was for training and not intended to be offensive; and *Erwin B. V. DHS*, 0120151276 (May 15, 2017), *recons. den.*, 0520170446 (November 3, 2017), where the Commission found race discrimination when complainant was given two letters of counseling but other non-Hispanic employees who engaged in the same or similar conduct were not given such letters.

N. RELIGIOUS DISCRIMINATION

Reasonable accommodation of religious beliefs, an entirely different and lower standard than reasonable accommodation of a disability, has been the subject of more Commission decisions in recent years and we mention three such cases in our summary this year. In *Mac O. v. USPS*, 0120152431 (November 29, 2017), the Commission found the failure to accommodate a Seventh Day Adventist by allowing him to be off on Saturdays violated Title VII because, while paying other employees premium pay may have been more than a *de minimus* burden on the agency and thus not required by law, the agency's failure to consider voluntary shift swaps evidenced a failure to accommodate. But in *Shad R. v. Dept. of Navy*, 0320170048 (November 16, 2017), the Commission concurred with the MSPB that there was no violation where an observant Muslim who worked as a civil service mariner was denied a request to be excused from wearing a protective mask for firefighting and was subsequently terminated from employment. One other claim, this one alleging religious harassment, worth mentioning is *Lashawna C. v. Dept. of Labor*, 0720160020 (February 10, 2017), where the Commission found statements by the supervisor to a Jewish employee that he had "been working like a Hebrew slave" because of her work schedule was found to be among comments that created a hostile work environment.

O. REMEDIES AND OTHER RELIEF

The Commission, much like the federal courts, assumes great flexibility in structuring appropriate relief to victims of discrimination and we mention here several cases we found of interest addressing remedies other than compensatory damages (which are discussed in the chapter on Compensatory Damages). Possibly one of the most important decisions from the Commission this year was *Geraldine G. v. USPS*, 0420170001 (May 4, 2017), where the Commission granted a petition for enforcement finding that the agency failed to comply with an order to place the complainant in a substantially similar position in St. Paul, Minnesota, when it instead offered positions in New York, Washington, and other cities. The Commission, accepting the agency's representation that there were no comparable vacant positions in St. Paul, ordered the agency to bump the individual encumbering the St. Paul position, pronouncing that "bumping the incumbent employee is the only remedy that would make the Petitioner whole under the circumstances."

Among other remedies cases of note was *Selene M. v. TVA*, 0420170027 (December 15, 2017), where the Commission ordered a permanent full time position to a long term contractor who was the victim of harassment and retaliation, rejecting an agency assertion, in response to a petition for enforcement filed by the complainant, that neither the AJ who heard the case nor the Commission had the authority to order such relief because the complainant had been a contractor, not a permanent employee. In *Levi P. v. DHS*, 0420160007 (November 2, 2017), the Commission, considering a petition for enforcement, revisited a prior decision ordering the agency to pay all costs associated with a medical suitability determination and found the agency was still not in compliance when it did away with the requirement to submit to a medical examination, but permitted

individuals to supplement the record, at their expense, with additional medical information. In *Karol K. v. Dept. of State*, 0120151671 (October 27, 2017), the Commission agreed that an AJ, who issued default judgment in a claim involving a nonselection for a GS-14 position should have ordered the complainant to be placed in the job as a GS-14.

The Commission also denied a claim for front pay in *Nicole T. v. Dept. of Defense*, 0120143019 (January 11, 2017); ordered back pay to continue beyond the date a complainant was approved for SSDI benefits and continuing until a vacant position became available, and not to deduct the SSDI benefits from the front pay award in *Liza B. v. Dept. of Agric.*, 0120152098 (August 31, 2017); ordered an agency to recalculate a back pay award and provide evidence of how it calculated the award in *Chanelle B. v. Dept. of Justice*, 0420150013, 0420130021 (April 27, 2017); denied a challenge from complainant as to the method used to calculate loss of overtime in *Thaddeus et al. v. USPS*, 0120142085, 0120142086, 0120142087 (January 31, 2017); and found that an AJ's order requiring EEO training for all supervisors at an agency facility was overly broad as there was only one responsible management official and the training order should have been thusly limited in *Margorie L. v. VA*, 0720170028 (November 16, 2017); and finally, the Commission provided some useful and comprehensive guidance about precisely what constitutes sufficient EEO training after a finding of discrimination in *Selene M. v. TVA*, 0420170027 (December 15, 2017).

P. REPRISAL/RETALIATION

The EEOC, as always, had plenty of appellate cases addressing allegations of retaliation, and we have chosen the ones we think most interesting. The Commission found that after complainant raised allegations of sexual harassment against a senior employee assigned to mentor her, she was subjected to retaliation when she was denied an opportunity to work with a second employee who wanted to mentor and collaborate with the complainant in *Vickie P. v. VA*, 0120150493 (December 19, 2017). Among other cases of retaliation, in *Trina C. v. Dept. of Justice*, 0120131971 (May 12, 2017), an agency trial attorney on detail to the U.S. Embassy in Iraq, who filed a claim of discrimination and also sent an email opposing "sexism," was found to have been the victim of reprisal when she was denied a request to extend her detail, given an unfair performance evaluation and not fairly considered for other assignments; in *Clemente M. v. Dept. of Army*, 0720140015 (March 16, 2017*), req. for recons. den.*, 0520170273 (June 27, 2017), a complainant whose former supervisor reported derogatory information to complainant's new duty station was found to be the victim of retaliation, with the Commission rejecting the agency's assertion that there was no temporal proximity because the email was sent five months after a settlement of the prior claim; in *Leonarda S. v. VA*, 0120152303 (November 17, 2017), the Commission found retaliation when the complainant was reassigned after she complained of discrimination, noting that it was generally inappropriate to reassign the victim alleging harassment; and in *Lewis Z. v. Dept. of Air Force*, 0720170013 (April 6, 2017), *mod. on other grounds*, 0520170331 (September 8, 2017), the Commission found that a complainant who withdrew a complaint after the supervisor was instructed to apologize to him was the victim of retaliation when, immediately thereafter, complainant's third level supervisor solicited comments to support reassigning the complainant to a position that required a longer commute.

The Commission also resuscitated a claim of retaliation in *Leanne H. v. SSA*, 0120140090 (April 21, 2017), that had been dismissed by an AJ because the alleged adverse action occurred five years after the protected activity, with the EEOC noting that temporal proximity was only one way to establish a *prima facie* claim of retaliation and that here, the complainant sought to submit other evidence to show retaliatory intent. The Commission also found in *Octavio C. v. Dept. of Interior*, 0120150460 (August 16, 2017), that comments to a complainant, including that him contacting an EEO counselor was weighing heavily on the supervisor's mind, was sufficient to state a claim of retaliation; in *Sofia W. v. VA*, 0120151077 (May 26, 2017), an EEO counselor improperly sought to dissuade complainant from filing a complaint; in *Giselle W. v. Dept. of Justice*, 0120152281 (May 2, 2017), the Commission reversed an AJ's decision and found, as did the agency, that a threat from a supervisor in an EEO affidavit that expressed outrage at the EEO process and included his belief that he needed to report complainant for making knowingly false statements in his complaint would chill others from filing claims; and in *Celine D. v. USPS*, 0120150178 (March 2, 2017), *recons. den.*, 0520170258 (June 15, 2017), the Commission agreed with an AJ that a manager accusing a complainant of providing false information in the EEO process, in front of coworkers, was a *per se* violation.

Q. SETTLEMENT

Both sides must receive something of value for a settlement agreement to be binding and the Commission found such consideration lacking and set aside agreements in: *Ellsworth S. v. GSA*, 0120161965 (July 28, 2017), where the agency promised merely to send an email to agency officials informing them of complainant's title and duties; *Willy B. v. USPS*, 0120170796 (June 8, 2017), where the agency simply agreed to provide reasonable accommodation to complainant, which it was already legally obligated to provide; *Celine D. v. DHS*, 0120152838 (May 4, 2017), *recons. den.,* 0520170381 (September 15, 2017), where the only obligation the agency took on in the settlement was to allow complainant to review her personnel records for errors; *Goldie S. v. USPS*, 0120171073 (April 17, 2017), where the agency agreed to provide assistance to complainant in her job twice a month if it determined it was needed; *Genny L. v. Dept. of Defense*, 0120170908 (April 17, 2017), where the agency promised only to provide training to two managers whom complainant alleged had sexually harassed her; and *Doria D. v. USPS*, 0120161094 (February 23, 2017), where the agency's only promise was to continue to search in good faith for a position within complainant's medical restrictions, to which she was already entitled.

There must also be a "meeting of the minds," and the Commission found an agreement void because of such lack of mutual understanding in *Russell C. v. USPS*, 0120172651 (November 8, 2017). The Commission also found additional terms included in a "gentleman's agreement" were not part of an agreement in *Retha W. v. Dept. of Agric.*, 0120151000 (March 24, 2017), even though they were discussed in emails, because they were outside the "four corners of the agreement." We mention one case under the Older Workers Benefit Protection Act, *Francesca V. v. VA*, 0120170632 (March 23, 2017), where the Commission found one term unenforceable but, because the OWPBA language was not included, complainant had the choice of accepting the agreement without that term or to reinstate her claim without first having to tender back relief.

There were few cases alleging breaches of agreements this year and we included *Ervin A. v. USPS*, 0120170772 (April 27, 2017), where the Commission found no breach because agreements are generally not intended to last indefinitely and after 13 years, a promise not to assign complainant to work on Saturdays or Sundays was no longer enforceable; and *Lenita T. v. USPS*, 0120170679 (February 23, 2017), where, in obvious contrast, the Commission found the use of "always" to promise complainant a start time of 7:30 A.M. meant just that, and an agency effort to adjust it to 8:15 A.M. was a breach of the agreement. We also mention *Complainant v. DHS*, 0120122693 (June 10, 2014), *recons. grant.*, 0520140553 (March 15, 2017), where the settlement agreement had promised to remove all references to a termination and replace it with a resignation for personal reasons, and the Commission had previously found a breach when it revealed to another agency the circumstances of the resignation, but on reconsideration found the complainant had waived any nondisclosure.

The Commission also found no merit to an agency argument in *Darrin F. v. USPS*, 0120173054 (December 6, 2017), that a settlement agreement was void because the signing management officials did not have the authority to settle; found no valid agreement in *Reita M. v. VA*, 0120171138 (April 21, 2017), *recons. den.*, 0520170378 (September 14, 2017), where complainant asserted the agency made promises at a mediation that were never executed in a written agreement; refused to consider evidence of comments at a mediation offered by complainant in addressing a claim of breach in *Beth G. v. Dept. of Justice*, 0120170315 (March 10, 2017), noting that such communications were confidential and not to be used in subsequent proceedings; found complainants were entitled to attorney fees following evidence of a breach in *Kiara R. v. DHS*, 0120172774 (October 31, 2017) and *Cherilyn C. v. Dept. of Energy*, 0120170497 (March 27, 2017); and found untimely an allegation of a breach of a settlement agreement in *Zula T. v. Dept. of Army*, 0120162640 (January 4, 2017), where complainant failed to notify the proper agency officials within 30 days of learning of the breach.

R. SEX (GENDER) DISCRIMINATION

We make note of two cases alleging sex discrimination this year. In *Waneta F. v. USPS*, 0120151508 (February 10, 2017), the Commission ordered further investigation in light of the Supreme Court's decision in *Young v. UPS* to focus on how it treated requests for light duty assignments from other employees who made such requests for reasons other than pregnancy. And in *Trina C. v. Dept. of Justice*, 0120131971 (May 12, 2017), the Commission found complainant was subjected to pervasive unwelcome conduct based on her sex that included comments from her supervisor that women were lazy and could not perform their jobs, yelling at women,

removing assignments from women, imitating their voices, mocking and ignoring them at meetings, and commenting on clothes worn by women.

S. SEXUAL HARASSMENT

The recent publicity in the media regarding workplace sexual harassment will likely have a future impact in Commission processing of such claims, but it comes too late for our discussion of cases on appeal to the Commission last year. We include in this year's review: *Nieves P. v. USPS*, 0120171477 (June 9, 2017), where the Commission reinstated a claim of sexual harassment that alleged complainant's supervisor did such things as leering, staring, and following her into the restroom; *Tammy S. v. Dept. of Army*, 0120150936 (March 3, 2017), where the Commission found a claim of sexual harassment failed to state a claim because it alleged only two incidents from a coworker (a comment about her dress and gesture seemingly related to her cleavage) that did not rise to threshold of being severe or pervasive; and *Vickie P. v. VA*, 0120150493 (December 19, 2017), where the Commission found allegations that a mentor referred to her repeatedly as "girl," made inappropriate sexually explicit comments and asked if she would have an affair, did not support a claim of sexual harassment because the use of "girl' was not intended to be sexual and the other actions were either taken out of context or did not rise to threshold of being severe or pervasive.

The Commission found the agency successfully raised affirmative defenses to otherwise viable claims of sexual harassment in: *Larae S. v. Dept. of Justice*, 0120143209 (March 9, 2017), where complainant was subjected to heinous harassment from inmates at a prison, but the agency took prompt and immediate steps to address the harassment, including discipline against inmates (including prosecution), providing portable screens to shield her and others from future incidents, and installing video cameras, among other actions; *Darlena H. v. VA*, 0120151838 (November 29, 2017), where a union president, who was a coworker, made numerous sexual comments and touching, including a sexual assault on complainant, but the agency avoided liability when it immediately directed him not to contact complainant, moved his duty station to another building, conducted an investigation, and contacted police and, as a result, there was no further harassment; and in *Macy B. v. USPS*, 0120162279 (May 15, 2017), *recons. den.*, 0520170406 (September 20, 2017), where the complainant's supervisor engaged in harassing actions that included such comments as he would like to have his way with her, but an AJ dismissed the claim on summary judgment, finding the complainant knew she could have reported the conduct but "just didn't," and the agency had an appropriate policy in place, but complainant did not report the behavior until after she left the agency.

T. SEXUAL ORIENTATION

We note two cases in this chapter this year including *Jules H. v. SSA*, 0120130874 (February 28, 2017), where the Commission relied on its ground-breaking 2015 decision in *Baldwin v. Dept. of Transp.* to reverse an AJ's decision that dismissed a claim for failure to state claim that had been pending since 2013. In other case, *Mike S. v. Dept. of Army*, 0120170169 (February 23, 2017), the Commission found no discrimination when an agency employee was denied a request to participate in a city sponsored LGBT pride parade, finding that there had been no effort to keep him from participating as a private citizen but that he had no personal entitlement to participate in his professional capacity.

U. SUMMARY JUDGMENT

In a relatively quiet year for cases considering AJs' grants of summary judgment, we mention just a handful of cases. The Commission set aside a decision granting summary judgment in *Hester S. v. USPS*, 0120152890 (December 20, 2017), where the AJ first granted complainant's motion to amend to add six additional allegations (which were never investigated), but then granted the agency's motion for summary judgment before allowing any discovery, which the Commission found was error. The Commission also reversed decisions granting summary judgment in *Dotty C. v. VA*, 0120161636 (September 21, 2017), where five of complainant's nine coworkers stated they believed a letter of reprimand was related to complainant's protected class, and the Commission found the AJ erred by using summary judgment as a "trial by affidavit" rather than convening a hearing to assess credibility; *Lynwood R. v. SSA*, 0120150434 (December 21, 2017), where the AJ erred in granting summary judgment because there were disputes of material facts about whether numerous condescending comments about complainant's disability (Achnodropasic Dwarfism) was a reason for his nonselection; *Annice F. v. Dept. of Agric.*, 0120170506 (September 19, 2017) and *Eleanore M. v. USPS*, 0120141194 (March 24, 2017), where summary judgment was not appropriate in failure to accommodate claims; *Celinda L. v. Dept. of Army*, 0120143152 (December 19, 2017), where summary judgment was reversed because the AJ failed to properly consider issues of credibility when complainant received a letter of reprimand just nine days after engaging in protected activity, and there was testimony from a coworker that complainant's supervisor treated complainant differently because of her age; *Calvin D. v. USPS*, 0120140022 (February 2, 2017), where summary judgment was reversed because there was a material fact in dispute regarding whether complainant was given assignments outside of his medical limitations; and *Macy B. v. VA*, 0120160475 (November 14, 2017), where the Commission found the AJ improperly made credibility findings favoring complainant's supervisor in a claim of sexual harassment

V. TIMELINESS

We have mentioned in previous editions of the EEO Update that the remarkably brief statute of limitations imposed on federal employees (45 days to initiate EEO counseling), and the rigid timeframes to which they must adhere to pursue a claim, has led to a culture where the Commission liberally applies the principles of tolling, waiver and estoppel. Many federal agencies, however, apply a more rigid standard in assessing timeliness of claims when considering whether to dismiss them pursuant to 29 CFR 1614.107 and, as a result, we often see cases reinstated by the Commission that had been dismissed by the agency as untimely. Note in particular the frequency with which the Commission reinstated claims filed one day late in our discussion below.

We first discuss cases involving questions of timely EEO counselor contact. In *Gladys K. v. USPS*, 0120170084 (February 24, 2017), the Commission reversed an agency dismissal, finding persuasive complainant's sworn statement she contacted an EEO counselor within 45 days. The Commission waived the deadline in *Adam F. v. Dept. of Army*, 0120161402 (February 15, 2017), where the complainant was an applicant for employment and did not know of the 45 day deadline for counselor contact and in *Kennith M. v. USPS*, 0120170876 (March 10, 2017), the Commission found complainant did not have reasonable suspicion to trigger the 45 day statute of limitations until several months after he was suspended, when he learned a coworker of another race engaged in similar conduct but was not suspended. Similarly, in *Wes S. v. USPS*, 0120161214 (February 17, 2017), the Commission reinstated a complaint, finding the time for EEOC counselor contact did not begin to run until complainant learned of two comparator employees who were treated differently. Complaints were also reinstated in *Nia G. v. VA*, 0120170943 (June 23, 2017), where the Commission found contact was timely where complainant contacted someone logically connected with the EEO process (the EEO Manager); *Carter R. v. U.S. Comm'n on Civil Rights*, 0120170069 (February 6, 2017), where a complainant contacted the EEOC Los Angeles office which the Commission found to be reasonably connected with the EEO process (but compare to *Lela M. v. USPS*, 0120172450 (October 18, 2017), discussed below); *Marina A. v. Dept. of Army*, 0120170394 (February 3, 2017), where the Commission found complainant called the EEO office but her calls were not returned; and *Vern R. v. Dept. of Navy*, 0120170890 (March 9, 2017), where the Commission excused otherwise untimely contact because complainant had been forced into a nonpay status which the Commission described as warranting tolling because of the "unique facts" of the case.

The Commission found contact was also timely in *Larae S. v. Dept. of Army*, 0120171091 (May 3, 2017) and *Lashawna C. v. Dept. of Labor*, 0720160020 (February 10, 2017), reasoning that the claims were of a hostile work environment and therefore continuing in nature; and *Kristie D. v. Dept. of Army*, 0120170856 (March 24, 2017) and *Selene M. v. Dept. of Transp.*, 0120170303 (January 11, 2017), where the Commission relied on the Lilly Ledbetter Act to conclude that complainants made timely contact within 45 days of receiving their last paycheck.

The Commission affirmed the dismissal for untimely contact in *Alejandrina L. v. Dept. of Justice*, 0120162354 (March 6, 2017), where complainant called the EEO Office asking for a specific counselor but, upon learning the counselor was out of the office for a while, did not indicate an intent to pursue a claim or ask if there was another counselor available.

We begin our discussion of timeliness issues in the filing of formal complaints this year with *Lyle P. v. DHHS*, 0120172461 (November 28, 2017), where the agency dismissed the race discrimination claim because the formal complaint was filed beyond the 15 day period following the notice of right to file. But the Commission reversed, noting there was no firm evidence, such as a certified mail receipt, to document when the complainant, a contractor with the agency, received the notice, observing the "serious nature" of the claim and the "brevity" in the lateness of the

filing. The EEOC waived the deadline for filing a formal complaint in *Nicol K. v. USPS*, 0120172677 (October 11, 2017), and found that a certified mail receipt was not sufficient proof because someone at complainant's apartment building signed for the mail, but did not immediately forward the notice of right to file. The Commission also reinstated complaints in *Sierra P. v. SSA*, 0120160031 (April 20, 2017), where the tracking information for receipt of the notice of right to file merely stated "status not available" and *Edward W. v. VA*, 0120171943 (October 17, 2017), where the Commission applied principles of estoppel when complainant's counsel wrote the counselor and indicated settlement discussions from mediation were continuing and expressing his understanding the formal complaint need not be filed until after the discussions were exhausted.

The Commission also found the deadline for filing a formal complaint should be tolled in *Lino L. v. USPS*, 0120172544 (October 19, 2017), where the complaint was filed one day late and complainant included an obituary showing his father-in-law had just passed away; *Deena B. v. Dept. of Interior*, 0120172266 (September 6, 2017), where complainant filed one day late because of medical issues related to treatment for meningitis; *Karlene G. v. USPS*, 0120170265 (February 23, 2017), where the Commission excused a one day delay in filing a formal complaint where complainant was being treated for depression and anxiety that affected her memory; *Louvenia S. v. Dept. of Air Force*, 0120171261 (May 10, 2017), where the Commission excused a one day delay in filing the formal complaint, seemingly because of the serious nature of the claims; and *Dolly H. v. USPS*, 0120170042 (February 1, 2017), where the Commission excused a one day delay when complainant became confused because she had two claims being processed at the same time.

But the Commission affirmed a dismissal where it found not credible a complainant's assertion that neither she nor her attorney knew of the 15 day deadline until shortly before it passed in *Anette B. v. Dept. of Transp.*, 0120170755 (May 24, 2017). And the Commission sustained agency dismissals for an untimely formal complaint in *Fernanda H. v. DHHS*, 0120170032 (April 13, 2017), where the complainant refused to accept the notice in person and twice refused to pick up the certified mail or return the counselor's telephone calls advising that it had been sent by certified mail and in *Lela M. v. USPS*, 0120172450 (October 18, 2017), where the complainant sent the formal complaint to the EEOC rather than the agency, and the Commission noted she had been given clear instructions that she did not follow.

W. OTHER CASES OF INTEREST

Among other cases of interest this year, there was: *Otis B. v. USPS*, 0120150223 (March 16, 2017), where the Commission found an African-American complainant who only worked for three days before quitting after a white coworker referred to him as "boy" and he was denied a request to transfer elsewhere had not met the high standard to establish a constructive discharge claim; *Brenton W. v. Dept. of Transp.*, 0120130554 (June 27, 2017), a successful disparate impact claim of age discrimination where the Commission provided substantial guidance on the distinctions between age discrimination in the federal sector and the private sector, and explained the elements of proof needed to establish disparate impact age discrimination in the federal sector; *Ollie N. v. DHS*, 0120150591 (February 23, 2017), a case that, among other things, raised an allegation of denial of official time when complainant was granted 9 hours of time to participate in mediation, but denied time for the following day when he asserted he was too upset to work, and the Commission found no right to additional official time; and *Lenny W. v. DHS*, 0120152418 (November 28, 2017) and *Palmer P. v. Dept. of State*, 0120150756 (May 3, 2017), *recons. den.*, 0520170398 (September 13, 2017), two cases where the Commission found it had no jurisdiction over challenges to substantive decision granting or denying security clearances.

***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.