# Introduction

This book is a summary of notable cases, laws, and guidance ending in December 2018. 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 worked as a very talented paralegal with our Law Firm and is now in law school. We know he will be a talented attorney as well when he graduates, and we emphatically thank him for all of his assistance with this edition.

## 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 2018. 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).

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

In October 2013, the EEOC 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

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|---|---|
| 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, 2018, as well as a Supreme Court case and a few circuit decisions and offer our comments about the significance of these, noting any trends. Readers are reminded that the case summaries are not intended to be used as a substitute for legal research or for reading the source materials, but rather should provide enough information about the case to determine if a particular case is one the reader may want to pull and read in its entirety.

### A. ATTORNEY FEES

The Commission addressed whether the agency can be responsible for paying travel costs for an attorney who relocates away from the law firm's office during the pendency of a case to travel back for depositions and the hearing in *Ross H. v. USPS*, 0720180001 (May 17, 2018). The Commission agreed with the AJ that because the attorney had served as the lead attorney and had developed a rapport with the client, and because only half of the travel time was charged to the agency under Commission regulation, the travel costs were recoverable. In *Ileana H. v. DOJ*, 0420180004 (September 28, 2018), the Commission addressed a request from a complainant for an additional payment of attorneys' fees and costs as she alleged her attorney required her to pay 40% of the compensatory damages award under their contingency fee arrangement; the Commission declined, noting that any arrangements between the complainant and her attorney are private contractual matters not within the EEOC's purview. In *Ramon L. v. DOJ*, 0120161017 (May 29, 2018), the Commission agreed that a 40% across-the-board reduction was appropriate where the complainant only prevailed on one of five claims raised and there were many examples of excessive, duplicative, or unreasonable time claimed, and the claims were straightforward. And in *Isidro v. DHS*, 0720170026 (February 6, 2018), the Commission found that a complainant who prevailed on his claims under the EPA but not Title VII, could claim a portion of those fees as the Title VII claim "contained overlapping issues with the successful EPA claim."

The Commission addressed two cases where complainants retained counsel outside of where the case took place. In *Chere S. v. GSA*, 0720180012 (November 30, 2018), although the complainant's attorney argued that Washington, D.C. based *Laffey* rates were appropriate, the Commission found that as the case took place in Manhattan, the rates typical for New York, which were even higher than Washington, D.C. rates, were appropriate to use in calculating the hourly rates. In *Sallie M. v. USPS*, 0120170599, 0120170600 (April 10, 2018), *recons. den*. 0520180407, 0520180408 (October 25, 2018), the Commission found that the agency met its burden to show the complainant could have retained competent counsel in Tennessee, where she worked, and therefore *Laffey* rates for the Washington, D.C. area attorneys were not appropriate.

### B. CLASS ACTIONS

In *Velva B. v. USPS*, 0120182505 (November 7, 2018), the Commission found the agency acted improperly by issuing final actions awarding relief to individuals in the class when the AJ still retained jurisdiction over the class action. In *Murray H. v. Dept. of Transp*., 0720180008 (August 3, 2018), the Commission determined an AJ had only issued an interim decision modifying the definition of the class, and this interim decision could not be appealed as it was "not ripe for adjudication" before the Office of Federal Operations.

### C. COMPENSATORY DAMAGES

This past year saw a range of awards of nonpecuniary compensatory damages, and some large awards of pecuniary damages. In lower dollar awards, the Commission increased an award of $500 to $1,000, in recognition of the passage of time since the prior decision on which the award was based in *Darius C. v. USPS*, 0120171165 (October 12, 2018) and in *Becki P. v. Dept. of Transp*., 0720180004 (November 15, 2018), the Commission awarded $2,000 for an employee whose supervisor unlawfully disclosed her medical information. The Commission addressed three awards of compensatory damages to complainants who established *per se* claims of retaliation: in *Leonardo M. v. VA*, 0120172736 (December 7, 2018), the Commission agreed that $1,000 was appropriate for a complainant whose supervisor discussed his EEO complaint during his performance evaluation; in *Renato K. v. DHS*, 0120172853 (November 2, 2018), the Commission agreed with the agency that $3,500 was appropriate after a finding of *per se* retaliation; and in *Hugh B. v. IBWC*, 0120170001 (October 11, 2018), the Commission increased an award to $3,500 where a supervisor told six employees that the complainant had filed an EEO complaint and told one employee to be careful what he said.

In the range of awards from $5,001 to $10,000, the Commission: in *Will K. v. VA*, 0120172368 (December 20, 2018), increased an award to $7,500 where the complainant was "depressed a lot" and didn't see his family after the agency failed to accommodate him; in *Humberto P. v. USPS*, 0120161742 (September 7, 2018), affirmed an award of $10,000 for a complainant who only experienced four months of harm from the agency's failure to accommodate him; in *Miriam B. v. VA*, 0720150022 (March 20, 2018), *recons. den*. 0520180370 (October 12, 2018), the Commission found $7,500 appropriate for a complainant who did not demonstrate an extended period of harm; and in *Drew N. v. DHS*, 0120160208 (January 11, 2018), the Commission agreed with the agency that $10,000 was appropriate where the complainant alleged harm that related to issues on which he did not prevail.

Turning to awards ranging from $10,001 to $50,000 where the agency determined the award, the Commission increased an agency's award from $1,500 to $20,000 where the complainant demonstrated the agency's acts of retaliation exacerbated her preexisting medical conditions in *Sanora S. v. DHHS*, 0120171305 (December 21, 2018). The Commission also: increased an agency's award from $7,500 to $25,000 to a victim of race discrimination, finding a 2003 case awarding $15,000 to show similar harm and increasing the award to reflect the passage of time since that prior award in *Gerald L. v. TVA*, 0120171266 (October 23, 2018); increased an agency's award from $1,000 to $15,000 to a complainant who experienced shame, embarrassment, sleep problems, sadness, and withdrawal from friends and family in *Ethan M. v. USDA*, 0120170519 (October 12, 2018); increased an agency's award from $20,000 to $50,000 where the complainant established harm related to a successful claim of sexual harassment in *Branca B. v. Dept. of State*, 0120171031 (August 16, 2018); increased an award from $7,500 to $15,000 where the complainant's preexisting medical conditions were aggravated in *Dalton C. v. DHHS*, 0120170077 (March 27, 2018); and increased an award from

$5,000 to $50,000 in *Greg M. v. VA*, 0120160345 (January 31, 2018) where the complainant gained 100 pounds and felt hopeless and suicidal after the agency failed to accommodate his disabilities.

In cases in that range where the AJ determined the award, the Commission affirmed an award of $50,000 in *Bret E. v. USPS*, 0720180017 (August 31, 2018) where the complainant was angry, stressed, irritable, anxious, and had problems sleeping; increased an AJ's award from $20,000 to $30,000 in *Jasmine Y. v. Dept. of Army*, 0120171163 (August 14, 2018) where the complainant began to experience anxiety, chest pains, and suicidal thoughts; affirmed an award of $50,000 where the complainant established three and a half years of harm from workplace harassment in *Stefany D. v. VA*, 0720180002 (April 12, 2018), *recons. den.* 0520180415 (October 3, 2018); and increased an AJ's award from $5,000 to $50,000 where the complainant submitted evidence of her psychological and emotional harm in *Denise Y. v. Dept. of Interior*, 0120160694 (July 31, 2018).

Notable awards in the $50,001 to $100,000 range included: $60,000 to a complainant who became emotionally withdrawn and separated from his wife, and experienced extreme weight gain, insomnia, and migraine headaches in *Dalton E. v. DHUD*, 0720170038 (November 30, 2018); $75,000 (an increase from the agency's $25,000 award) in *Enriqueta T. v. VA*, 0120160638 (May 31, 2018) where the complainant sought medical treatment but could not continue it because she was a part-time employee without insurance; $90,000 in *Jade R. v. Dept. of Interior*, 0720170032 (March 22, 2018), where the complainant was unable to work and had to leave her position; $100,000 in *Margaret L. v. VA*, 0120150582, 0120171877 (April 17, 2018), where the complainant experienced emotional trauma, major depression, anxiety disorder and PTSD because of the harassment experienced; and *Stephanie A. v. DOD*, 0120161052 (June 5, 2018), where the Commission increased an agency's award from $60,000 to $100,000 where the complainant suffered from stomach ulcers, crying spells, anxiety, and irritable bowel syndrome, and she withdrew from her family, friends, and church activities.

The Commission saw an increase in awards over $100,000 in 2018, including: affirming an AJ's award of $180,000 in *Chere S. v. GSA*, 0720180012 (November 30, 2018) in a case where default judgment was issued against the agency and where the complainant contemplated suicide and was unable to take care of her children; increasing an award from $20,000 to $150,000 in *Taylor G. v. USPS*, 0120120164 (April 17, 2018), where the complainant was terminated and as a result lost his home of 15 years to foreclosure and had to file to bankruptcy and was on the verge of divorce from his wife; and $185,000 awarded in *Dionne W. v. Dept. of Air Force*, 0720150040 (March 27, 2018), where after default judgment was awarded against the agency, the AJ found the complainant suffered from humiliation, embarrassment, stress, anger, loss of joy, and damage to her career and reputation.

The Commission applied the same reasoning to three cases, *Taylor G. v. USPS*, 0120120164 (April 17, 2018), *Adina P. v. USPS*, 0720110016 (April 25, 2018), and *Amina W. v. Dept. of Educ*., 0120150644 (April 19, 2018), to hold that agencies are still liable for paying compensatory damages awards even if the complainant has filed for bankruptcy as the Commission is charged with enforcing anti-discrimination laws and remedying employment discrimination, and whether the complainant has an interest in the award is between the trustee and/or the bankruptcy court.

Turning to notable awards of pecuniary damages, the Commission awarded $107,381.60 in *Stephanie A. v. DOD*, 0120161052 (June 5, 2018) for the full value of medications and medical care, and awarded $135,519.12 in future pecuniary damages in *Margaret L v. VA*, 0120150582, 0120171877 (April 17, 2018) based on documentation that the complainant would require medical treatment until she retired in nine years.

### D. DISABILITY DISCRIMINATION

As we typically see every year from the Commission, this year brought some notable and interesting cases addressing claims of disability discrimination. In a consolidated case brought by ten complainants, *Cleveland C., Kenneth W., Terrell G., Marquis K., Roman G., Orlando B., Jeffery J., Shane L., Jay C., and Gilbert B. v. DOD*, 0120170405, 0120170406, 0120170407, 0120170408, 0120170409, 0120170410, 0120170411, 0120170412, 0120170413, 0120170414 (September 26, 2018), the Commission found the agency failed to view the claims as that of a potentially discriminatory qualification standard and did not conduct a proper individualized assessment to determine if the agency could accommodate the skin condition of Pseudofolliculitis Barbae, which required the complainants to not be clean shaven, while allowing the police officers to wear a protective mask. In *Marx H. v. Dept. of Navy*, 0120162333 (June 19, 2018), the Commission found the agency discriminated against the complainant for committing errors in her work and taking longer to complete her assignments when it was on notice of the complainant's need for accommodation because of a diagnosis of dementia. In *Huong A. v. USPS*, 0120161249 (May 9, 2018), *recons. den*. 0520180444 (September 14, 2018), the Commission found the agency could not demonstrate how it would have posed an undue hardship to allow the complainant to wear a prescribed neck brace while working. In *James R. v. EPA*, 0120122981 (April 4, 2018), the Commission found that summary judgment should have been granted in the complainant's favor, not the agency's favor, where the complainant needed accommodation because of heightened blood pressure he experienced while flying and it would not have been an undue hardship to continue to accommodate him. In *Jade R. v. Dept. of Interior*, 0720170032 (March 22, 2018), the Commission found the agency failed to accommodate the complainant who had bipolar disorder when it reassigned her away from the position she had held since 1987 and ignored her requests for assistance. In *Wilmer M. v. Dept. of State*, 0120160352 (February 22, 2018), the Commission prevailed on a claim that the agency failed to accommodate his PTSD by not engaging in the interactive process after he requested a reduction in distractions, private space, weekly meetings, and changes to his work schedule.

The Commission addressed two cases involving employees with hearing impairments. In *Hertha W. v. VA*, 0120162648 (February 22, 2018), the Commission agreed that the complainant could not be effectively accommodated to perform her position as a diagnostic radiologic technologist because she could not hear when more than one person spoke at a time, even with accommodation. In *Spencer T. v. USPS*, 0120162002 (January 25, 2018), the Commission found the agency could have implemented accommodations to allow the complainant to hear overhead pages in his workspace, but did not, resulting in liability under the Rehabilitation Act.

The Commission found that taking nine months to provide the complainant with an ergonomic chair, in *Ronnie R. v. DHHS*, 0120161406 (May 31, 2018) effectively constituted a denial of accommodation. However, taking four months to approve an FMLA request was found not to be an undue delay in *Mauricio C. v. VA*, 0120162551 (August 14, 2018). Addressing an argument of undue hardship, the Commission found, in *Leona L. v. DHS*, 0120152781 (March 5, 2018), that providing an employee with an entirely fragrance-free workplace was not reasonable.

Telecommuting as a reasonable accommodation continues to be a hot topic. In 2018, the Commission found in *Shae M. v. Dept. of Treasury*, 0120171808 (November 29, 2018), that an employee could not work from home because she required access to paper files with personally identifiable information in order to perform her work. In *Natalie S. v. VA*, 0120140815, 0120142049 (January 26, 2018), the Commission found that the agency should be provided a trial period of 30 days as a reasonable accommodation for an employee with performance problems, instead of denying the request outright. And in *Jody L. v. Dept. of Air Force*, 0120151351 (January 17, 2018), the Commission found the agency erred in removing a long-standing accommodation of remote work for an employee who was paralyzed from the waist down and could not commute when there was inclement weather in North Dakota.

Addressing claims that applicants or employees posed direct threats in the workplace, the Commission found and the complainant in *Merle S. v. DOD*, 0120160060 (September 14, 2018), could not safely perform his position because of a dependence on narcotics to manage his pain, and the complainant in *Rolf K. v. VA*, 0120161826 (March 27, 2018), could not safely work overtime on snow removal duties because of lifting restrictions. However, the agency failed to conduct an individualized assessment regarding the complainant's ability to safely perform his work based on a history of heart problems in *Mark D. v. DOJ*, 0120162225 (July 27, 2018) and the agency in relied on "speculative or remote risk" in *Iona A. v. DHS*, 0720160019 (January 9, 2018), when it withdrew a conditional offer of employment based on a diagnosis of arthritis.

The Commission found the respective agencies were justified in sending employees to FFDE in, among other cases issued by the Commission in 2018: *Bryce B. v. USPS*, 0120162556 (February 2, 2018) where the complainant had been absent for two months for medical reasons; *Brandon D. v. DHS*, 0120171233 (November 15, 2018) where the complainant drove erratically and used profanity while meeting with his supervisor; *Madeleine C. v. DHS*, 0120171512 (November 29, 2018) where the complainant's diabetes potentially impacted her ability to safely perform her position; and *Sherman K. v. VA*, 0120172137 (December 19, 2018) where the position required an annual physical to confirm physical fitness for the job.

### E. EEOC APPELLATE REVIEW

The Commission overturned the decisions of AJs in several cases in 2018. In *Joannie V. v. VA*, 0120182175 (November 14, 2018) and *Floyd C. v. VA*, 0120161198 (October 24, 2018), the Commission found the AJs erred in dismissing hearing requests as a sanction. In *Wilburn R. v. FDIC*, 0120142399 (July 31, 2018), the Commission remanded the case for a second hearing because the AJ made findings even though the court reporter had lost part of the hearing transcript. In *Elmer C. v. Dept. of Transp*., 0120150721 (February 15, 2018), the Commission found the AJ's decision was "flawed," in part because the AJ only made one credibility finding. In *Katharine B. v. USPS*, 0120170444 (December 7, 2018), the Commission found the AJ erred in allowing the alleged harasser to attend the hearing as an agency representative.

The Commission issued a series of decisions addressing claims by complainants that agencies have unduly delayed in issuing FADs. The Commission declined to issue sanctions in any of the following cases: *Jefferey G. v. SSA*, 0120140007 (January 31, 2018) (delay of 449 days); *Gilberto S. v. DOJ*, 0120162353 (March 22, 2018) (delay of over 500 days); and *Regina M. v. VA*, 0120170567 (September 6, 2018) (delay of more than a year). However, the Commission did find sanctions to be appropriate in three decisions issued later in the year. In *Calvin D. v. Dept. of Army*, 0120171662 (September 25, 2018), the Commission sanctioned the agency by ordering it to provide training and post notice after it delayed by 465 days. The Commission ordered the same sanctions in *Alda F. v. EPA*, 0120171676 (November 29, 2018) and *Crysta T. v. USDA*, 0120171275 (November 29, 2018), where the delays were more than two years and more than one year, respectively. In *Evelina M. v. VA*, 0120171018 (December 11, 2018), where the agency delayed more than 294 days, the Commission ordered the agency to provide training, post notice, and pay attorney fees, if any were incurred, for the filing of the appeal.

### F. HARASSMENT (NOT SEXUAL)

The Commission in *Janet B. v. USPS*, 0120151126 (February 15, 2018), found the agency subjected the complainant to harassment based on her disability (obsessive-compulsive disorder) when management micromanaged her routines, subjected her to scrutiny, overwhelmed her with instructions, and humiliated her by sending her to new employee training. The Commission in *Isidro A. v. USPS*, 0120182263 (October 16, 2018), found the agency subjected the complainant to race-based harassment when his white supervisor used "n-gger" and "you people" during a service talk. And in *Roderick P. v. VA*, 0120161268 (March 23, 2018), the agency was responsible for harassment caused by a white coworker to the black complainant when she hit a panic button and summoned agency police because she was "afraid" of him, would scream at him, would take long breaks such that the complainant missed his breaks, commented in his presence that the complainant only got his job because he was black, commented that she was afraid of the complainant "because he was a big black man," and would "go off" about President Obama which appeared to be tied to race. The Commission found two complainants who reported sexual harassment were subjected to hostile work environments based on this protected activity in *Taryn S. v. VA*, 0120162172 (September 14, 2018) and *Colleen M. v. DOJ*, 0120161381 (June 26, 2018).

The Commission found the agency could not assert affirmative defenses to claims of harassment in *Chi E. v. USPS*, 0120170068 (November 29, 2018) or *Danita S. v. Dept. of Transp*., 0120161096 (May 17, 2018), as the respective agencies did not take prompt and appropriate action to stop the harassment once it was on notice.

### G. HEARINGS (EEOC) AND AJ AUTHORITY

The Commission continues to affirm the use of default judgments as appropriate sanctions for improper conduct by agencies. In *Mirta Z. v. SSA*, 0720150035 (March 14, 2018), the Commission affirmed a grant of default judgment against an agency that refused to provide documents during discovery that it asserted were protected by the attorney-client privilege. In *Dionne W. v. Dept. of Air Force*, 0720150040 (March 27, 2018), the AJ issued default judgment after the agency failed to respond to discovery and did not appear at a status conference, and the Commission affirmed. In *Ross H. v. USPS*, 0720180001 (May 17, 2018), the Commission affirmed the AJ's grant of default judgment in complainant's favor because the agency failed to conduct a complete and thorough investigation into the complainant's complaint, including failing to include application materials or qualifications of the selectees for the positions at issue, the identity of the selectee for the position at issue in one of the claims, or interview notes for any of the positions. In *Miguelina S. v. DOJ*, 0720160012 (September 27, 2018), the Commission found the AJ did not abuse discretion by awarding default judgment after the agency did not complete its investigation until 330 days after the filing of the formal complaint. In *Chere S. v. GSA*, 0720180012 (November 30, 2018), the AJ properly issued default judgment where the agency filed a third motion to dismiss after being instructed that such a motion would be considered "frivolous motion practice." In *Dalton E. v. DHUD*, 0720170038 (November 30, 2018), the Commission found that the sanction of default judgment was appropriate given the agency's lengthy delay in supplying the ROI and failure to respond to the AJ's order to produce the investigation.

The Commission also addressed the issue of intrusion by agency counsel into EEO investigations and found sanctions to be appropriate where the record demonstrated that agency counsel charged with defending the agency's actions improperly inserted themselves in the EEO investigation. In *Josefina L. v. SSA*, 0120161760 (July 10, 2018), the Commission sanctioned the agency by ordering four hours of training on the proper separation between the investigative function and the defensive function to the agency's EEO management officials and Office of General Counsel attorneys where agency counsel assisted the supervisor with his affidavit responses. In *Annalee D. v. GSA*, 0120170991 (October 10, 2018), the Commission found the agency counsel assisted witnesses with their affidavit responses, accompanied a supervisor to the investigative interview, and indicated that the attorney was acting as his representative. The Commission ordered the agency to provide at least four hours of in-person training to its EEO management officials and personnel in the Office of General Counsel regarding their responsibilities concerning EEO case processing and the appropriate role of OGC in the EEO process.

The Commission also addressed a series of sanctions issued against complainants. In *Ervin A. v. DHS*, 0120172541 (October 23, 2018), the Commission found the AJ acted appropriately in dismissing the complainant's hearing request because of his repeated comments that he intended to file in federal District Court and statements that he believed the AJ was biased against him. In *Elvis G. v. USPS*, 0120170677 (September 5, 2018), the Commission agreed that the AJ acted appropriately by dismissing the complainant's hearing request because he disregarded his obligations in discovery. Similarly, in *Alonzo L. v. PBGC*, 0120171271 (August 2, 2018), the Commission affirmed dismissal of a hearing request because the complainant did not cooperate in discovery. And in *Coralee H. v. USPS*, 0120171741 (May 22, 2018), the Commission found the AJ did not abuse discretion when she dismissed the complainant's hearing request for failing to submit a prehearing report and failing to appear at the prehearing conference.

In *William G. v. VA*, 0120162273 (September 25, 2018), the Commission found the AJ properly excluded the complainant's representative from the hearing process for contumacious conduct, including "disrespectful responses to and personal attacks on the Agency attorney, his demands that the Agency attorney be removed from the case, and his 'seriously disruptive, obstructive, and unprofessional' conduct."

### H. LEGITIMATE NONDISCRIMINATORY REASONS

The Commission found that agencies failed to meet the burden to articulate legitimate, nondiscriminatory reasons with sufficient specificity such that the complainant could not establish pretext in the following nonselection cases: *William G. v. DOD*, 0120160837 (February 14, 2018); *Elliot J. v. SSA*, 0120161848 (February 22, 2018); *Toshia F. v. Dept. of Army*, 0120160388 (February 28, 2018); *Felisha A. v. DHS*, 0120162314 (June 5, 2018), *recons. den*. 0520180497 (September 27, 2018); and *Garret W. v. USPS*, 0120173051 (October 30, 2018).

### I. NATIONAL ORIGIN DISCRIMINATION

The Commission found the agency's English-only rule was not necessary for the safe or efficient operation of the agency and was therefore unlawful in *Minda W. v. Dept. of Navy*, 0120162040 (April 24, 2018).

### J. RACE DISCRIMINATION

The Commission in *Sol W. v. DOD*, 0720180018 (August 15, 2018) affirmed the AJ's determination that the agency discriminated against the complainant on the basis of her race (African-American) when it terminated her during her probationary period. And in *Hayden K. v. DOD*, 0120151347 (January 24, 2018), the Commission agreed with an AJ that the agency engaged in race discrimination when it terminated the complainant during his probationary period as a teacher at a Naval station in South Korea. In *Nathan S. v. DOJ*, 0120151282 (January 9, 2018), *recons. den*. 0520180229 (May 11, 2018), the Commission found the agency discriminated against the complainant on the basis of race (black) when it denied him training that was provided to his white coworkers.

### K. REMEDIES AND OTHER RELIEF

The Commission agreed with the complainant that in order to be an effective offer of reinstatement, the agency was required to offer a position where the complainant had relocated, as ordered by the AJ, in *Crysta T. v. VA*, 0120172513 (November 8, 2018). However, in *Dionne W. v. Dept. of Air Force*, 0720150040 (March 27, 2018), the Commission found the AJ's award of placement in an SES-level position when the position at issue in the nonselection claim was a GS-15 position without a guaranteed promotion to SES was an abuse of discretion.

With regard to notable decisions regarding awards of back pay, the Commission in *Miquel G. v. USPS*, 0420160025 (July 11, 2018) found the agency improperly deducted health insurance premiums from the award of back pay, but properly held that the complainant was not entitled to be reimbursed for a uniform allowance he did not wear while he was removed from the agency.

The Commission addressed a few claims for front pay in 2018. In *Carmina E. v. DOJ*, 0720150011 (January 9, 2018), the Commission found the award of front pay through the complainant's law enforcement retirement date was appropriate because it was unlikely the complainant would be able to return to working in a job with comparable wages due to the mental and emotional impairments caused by the agency's actions. In *Joseph B. v. VA*, 0120180746 (August 14, 2018), the Commission found the agency erred in mitigating his front pay award after he found work as front pay awards are not subject to mitigation.

### L. REPRESENTATION

The Commission agreed with the AJ in *In the Matter of Arnold T.*, 1120160001 (April 30, 2018) that a non-attorney representative engaged in contumacious conduct before the EEOC such that disqualification from representation of a complainant, as well as a 180-day ban from representing any other complainants before the EEOC was appropriate.

[Refer to *William G. v. VA*, 0120162273 (September 25, 2018) discussed earlier in this chapter under the heading, "Hearings (EEOC) and AJ Authority."

### M. REPRISAL/RETALIATION

Claims of retaliation continue to be a focus for the Commission and 2018 was no exception. In *Susann G. v. VA*, 0120162437 (May 25, 2018), *recons. den*. 0520180483 (September 27, 2018), the Commission found the agency retaliated against the complainant when it failed to promote her within a month of reporting that her supervisor was harassing her. In *Lelah T. v. USPS*, 0120172533 (October 24, 2018), the Commission determined that the agency retaliated against the complainant when it removed her from a detail after she reported sexual harassment. In *Elbert H. v. DOJ*, 0120170676 (October 31, 2018), the Commission found that threatening to send the complainant to a FFDE and leaving that threat hanging for four months was sufficiently chilling to constitute retaliation for filing a prior EEO complaint.

The Commission found the respective agencies retaliated against the complainants when it issued them lowered performance evaluations in *Giselle W. v. DOJ*, 0120162671, 0120162672, 0120162673 (May 14, 2018), *recons. den*. 0520180518, 0520180519, 0520180564 (September 27, 2018) and *Michelle N. v. VA*, 0120162415 (August 9, 2018). In *Eleni M. v. Dept. of Transp*., 0720160021 (July 25, 2018), a letter of counseling issued to a complainant who participated in an investigation of her supervisor's inappropriate conduct was found to be retaliatory. In *Ira P. v. Dept. of Transp*., 0720180007 (December 11, 2018), the complainant established the agency retaliated against her by issuing her a negative employment reference. In *Sallie M. v. USPS*, 0120172430 (October 16, 2018), the Commission found reassigning the complainant to a work facility closer to the house of the supervisor who sexually assaulted her, where he was home on administrative leave pending investigation, was retaliatory. In *Ahmad S. v. USPS*, 0120170386 (September 25, 2018), the Commission found the agency retaliated against the complainant when it reassigned him to another facility against his request after he reported a coworker was subjecting him to harassment based on his disability. And in *Denise Y. v. VA*, 0120150665 (February 28, 2018), the Commission found the agency retaliated against the complainant when she was terminated from the Podiatry Resident's Program and subsequently terminated from employment.

In *Candi R. v. EPA*, 0120171394 (September 14, 2018), the Commission found that although the disclosure was inadvertent, the act of sending an email to all Office of Regional Counsel attorneys with a copy of a management's signed affidavit in the complainant's EEO complaint "is reasonably likely to deter an employee from engaging in EEO activity and therefore constitutes reprisal."

Although employees who engage in protected speech should not face retaliation, there are limits to what is considered protected speech, as the Commission found in *Gerry W. v. DOD*, 0120171168 (October 11, 2018). There, "Complainant hurled inflammatory accusations about his supervisor and HR officials in emails that were needlessly copied to several senior management officials or the media, which we are persuaded was an effort to intimidate, taunt, and humiliate S1 and HR officials."

### N. SECURITY CLEARANCES AND STATE SECRETS

It is well-settled that the EEOC does not have jurisdiction to review revocations of security clearances for discriminatory reasons. However, the EEOC can review whether the decision to refer an employee for review of his or her security clearance is discriminatory. The Commission affirmed this holding in *Henry S. v. DOD*, 0720170020 (March 28, 2018) and *Jamison W. v. Dept. of State*, 0120182724 (November 6, 2018).

### O. SEXUAL HARASSMENT

The Commission found appropriate to reinstate untimely claims of sexual harassment raised by the complainants in *Margeret M., Arlette W., Shanti N. v. USPS*, 0120181973, 0120181974, 0120181975 (August 31, 2018) because the record included a copy of an internal investigation which indicated that at least seven other women alleged the manager subjected them to sexual harassment, including hugging them, grabbing their buttocks, and referring to women being on their knees. The Commission found based "on the unique facts of this case," "this is an appropriate case to excuse Complainant 1's failure to contact the appropriate EEO counselor within the regulatory 45-day period and to excuse the delay of Complainant 2 and Complainant 3 for filing their EEO complaints outside of the 15-day time limit."

In *Maxine C. v. USPS*, 0120162531 (September 12, 2018), the Commission disagreed with the agency's determination that the sexually-related conduct towards the complainant was not unwelcome because "there is no evidence that Complainant solicited S1's sexual comments, advances, or physical contact. The Agency claimed that Complainant sometimes laughed at S1's sexual advances rather than 'rebuffing' them, which did not place S1 on notice that his conduct was unwelcome. Complainant stated that her laughter was her way of letting him know that she was not interested." The Commission further found the agency was liable for this harassment because it did not do "whatever is necessary" to end and remedy the harassment. Similarly, in *Jenna P. v. VA*, 0120150825 (March 9, 2018), *recons. den*. 0520180337 (August 2, 2018), the Commission concluded the agency could not escape liability for subjecting the complainant to sexual harassment because it did not do enough to stop the harassment, including restoring leave and preventing the conduct from reoccurring.

In *Sallie M. v. USPS*, 0120172430 (October 16, 2018), the Commission determined that the agency could not establish an affirmative defense because the complainant had reported the harassment previously, but the agency did not take any action and the supervisor subsequently sexually assaulted the complainant. Further, the agency waited until six weeks after the internal investigation was completed to issue the notice of proposed removal to the supervisor, and the agency reassigned the complainant to a facility that was closer to the supervisor's home where he was on administrative leave, thus placing her in closer proximity to harm, as the supervisor had made threats against the complainant after she reported the harassment. In *Margaret M. v. VA*, 0120151790 (January 11, 2018), *recons. den*. 0520180255 (May 23, 2018), the Commission found the agency could not assert an affirmative defense to a claim of sexual harassment because the harasser was not disciplined, reassigned, or required to undergo remedial training and the only action taken by the agency was to place the complainant on administrative leave, which was contrary to the Commission's holdings that victims of discrimination should not be the ones reassigned.

However, in *Matilde H. v. VA*, 0120161189 (March 9, 2018), the Commission found that although the agency subjected the complainant, a WG-03 housekeeping aide, to sexual harassment by a coworker who slapped her on the buttocks, the agency was not liable because as soon as the complainant reported it, management investigated the claim, reprimanded the coworker and required both him and the supervisory chain to take anti-harassment training, and the conduct did not reoccur.

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

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

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

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

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

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

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

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

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

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

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

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

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

## I. PROOF OF AGE DISCRIMINATION

### A. IN GENERAL

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

majority opinion, joined by five other justices. Justices Roberts, Scalia, and Thomas dissented.

***Sprint/United Mgmt. Co. v. Mendelsohn*, 128 S. Ct. 1140 (2008).**

The Supreme Court vacated and remanded a Tenth Circuit age discrimination decision admitting "me too" evidence—testimony by nonparties alleging discrimination at the hands of persons who played no role in the adverse employment decision challenged by the plaintiff. The Court concluded in a unanimous decision that a *per se* rule of admissibility in such instances is inconsistent with Federal Rule of Evidence 403 which gives trial judges the discretion to weigh appropriate factors and to determine relevance.

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

***Carver v. DOJ*, 07A30025 (August 8, 2005), *pet. for enf.*, 0420060027 (December 12, 2007).**

The Commission agreed with the AJ and determined that the complainant had proven age discrimination when he was not hired as an Assistant U.S. Attorney in the Criminal Division of the Office of the United States Attorney for the Western District of Washington, finding, among other things, that the testimony of the SO, who asserted that complainant was not selected because of his performance during an interview, was not credible.

[This case is also addressed in the "Nonselection Claims" chapter.]

***Defrain v. DOD*, 0120061358 (April 3, 2007), *recons. den.*, 0520070526 (June 14, 2007).**

The Commission reversed the FAD, finding that the complainant proved age discrimination (DOB: 12/24/31) when the agency allowed his temporary appointment as a store clerk to expire.

[This case is also addressed in the "Nonselection Claims" chapter.]

***Phillips v. DHS*, 01A60736 (June 13, 2006), *recons. den.*, 05A60887 (July 26, 2006).**

The Commission affirmed the agency FAD finding no age discrimination where the complainant failed to prove that an agency's legitimate business reasons for its actions were a pretext for age discrimination when the complainant was passed over for an acting position.

[This case is also addressed in the "Nonselection Claims" chapter.]

***Harvey v. USPS*, 01A50210 (March 31, 2005).**

The Commission reversed an AJ's dismissal of claims on summary judgment and remanded for a hearing citing factual disputes in the record and the failure of the investigator to develop an appropriate record.

[This case is also addressed in the "EEO Investigations" chapter.]

***Miller v. USPS*, 01A54420 (September 28, 2005).**

The Commission agreed with the AJ's finding of age discrimination when the complainant, an officer in charge, was not selected for a Postmaster position.

[This case is also addressed in the "Nonselection Claims" chapter.]

***Moon v. USPS*, 01A41527 (June 10, 2005).**

Complainant, a district manager, who was allegedly pressured to retire, failed to prove his constructive discharge claim, in part because he failed to show that other individuals outside of his protected classes who were insubordinate were not pressured into retiring. Complainant's supervisor determined that the complainant was insubordinate because of the complainant's actions towards an agency manager of human resources, who alleged that she was harassed by the complainant to the point that she decided to apply for disability retirement. Complainant's supervisor also determined that the complainant could not effectively manage his personnel and discussed either a move to another district or complainant's retirement. The complainant chose to retire and filed an EEO complaint alleging that he was discriminatorily forced to retire, which in effect made a constructive discharge allegation. The AJ found no discrimination and the Commission affirmed, noting:

> Complainant failed to submit any evidence showing other District Managers, outside of [complainant's] protected classes, who were insubordinate, were not pressured into retiring. We find that complainant has failed to present evidence from which a reasonable fact-finder could conclude that the agency's action in pressuring complaint to retire was motivated by discriminatory animus toward complainant's protected classes. We find that the AJ correctly found no discrimination on the bases of race or age.

***Simas v. USDA*, 01A50718 (November 16, 2005).**

The Commission held that the complainant proved that the agency's reasons for failing to rehire her as a firefighter in favor of substantially younger males was a pretext for discrimination on the bases of both sex and age. The reasons offered by the agency and found pretextual included that the complainant did not want to work on under the supervision of the SO, poor performance and attitude, and a personality conflict with the SO and fellow crew members.

[This case is also addressed in the "Nonselection Claims" chapter.]

***Richards v. Dept. of Transp.*, 01A31490 (March 11, 2004).**

The Commission affirmed the AJ's decision, finding that the complainant, an aviation safety inspector, was not discriminated against on the basis of age when he was decertified from inspecting B-727s and B-737s. The agency explained that the complainant was decertified because he was not scheduled for "currency" training in 2000, that budgetary constraints limited such training to employees serving as principal operations inspectors and assistant operations inspectors rather than geographic inspectors, such as the complainant, and the complainant failed to provide any evidence that the agency's explanation was a pretext for age discrimination.

***Ansell v. Green Acres Contracting*, 347 F.3d 515 (3rd Cir. 2003).**

The Third Circuit Court of Appeals held that the trial court did not err in admitting evidence that the employer subsequently hired employees that were the same age as the plaintiff.

***Robinson v. VA*, 01A22254, 01A22253, 01A22272, 01A22591 (September 22, 2003).**

The Commission found that the complainants failed to prove that the agency discriminatorily gave preferential overtime to younger, intermittent firefighters over permanent firefighters. The agency argued that it drafted a Standard Operating Procedure as a cost-saving measure. The SOP assigned intermittent firefighters as first to be called for overtime duty because it was cheaper to pay the intermittent overtime than it was to pay overtime to the complainants, permanent firefighters. The complainants asserted that the agency's reason was a pretext for discrimination and that the SOP was drafted to purposefully shift all overtime hours to the younger, intermittent firefighters. The Commission found that complainants failed to prove disparate treatment, i.e., that the agency's reasons were pretextual, or that age actually played a role in the agency's decision-making process and had a determinative influence on the outcome. While it was not always cheaper to bring in intermittent firefighters for overtime, the evidence showed that this was more often than not the case. The record also showed that the SOP was later amended when it was determined that bringing in the intermittent firefighters for overtime was not always the most cost effective option. The complainants failed to introduce evidence showing that the policy was motivated by discriminatory animus based on age rather than concern about costs.

### B. AGE DIFFERENCE EVIDENCE

***Caldwell v. VA*, 0120055031 (October 17, 2007).**

Without a hearing, the Commission agreed with the AJ's decision in favor of the agency and determined that a less than two year age difference between the complainant and the selectee was insufficient to establish an inference of age discrimination. In affirming summary judgment for the agency, the Commission determined that complainant did not establish a *prima facie* case of age discrimination.

> The Supreme Court has held that because the ADEA prohibits discrimination on the basis of age and not class membership, the fact that a similarly situated comparative is substantially younger than the plaintiff is a far more reliable indicator of age discrimination than the fact the plaintiff was treated differently than someone outside his protected class. While there is no bright-line test for what constitutes "substantially younger," that term has generally been applied to age differences in excess of five years. In the instant matter, the…complainant is less than two years older than the selectee. We find this age difference to be insufficient to establish an inference of age discrimination. *See Hickman v. Department of Justice*, EEOC Appeal No. 01A11797 (December 20, 2001) (finding that a four year age difference between the complainant and the selectee is not sufficient to establish an inference of age discrimination).