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

I. HOW TO USE THIS BOOK

This EEO Update begins with an article that is our overview of recent developments in federal sector EEO law in 2019. This book is formatted as an indexed summary divided into different chapters that cover various aspects of federal sector EEO law. The material is organized as follows: Article follows 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 issue with the most recent cases listed first. Though the material we cover was decided primarily over the period 2004 through 2019, we have also added a few summaries of EEO regulations and other guidance that we believe are helpful, and still relevant, that predate 2004. We have not summarized all cases inclusive in those years, but have reviewed many of the more important cases.

Some of our case summaries are included in more than one topic area. For example, a case summary that addresses the three topic areas of disability, compensatory damages, and attorney fees may appear under all three headings. We have attempted to address the full case summary, but the treatment of a case 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 may include the Commission’s or a court’s explanation of how the court interprets a law. We are only trying to provide you with the latest developments. For a more comprehensive overview, we recommend that you do what we are likely to do, which is begin your search by using Ernest Hadley’s excellent reference, A Guide to Federal Sector Equal Employment Law and Practice, (Dewey Publications, Inc.).

This book is intended as a reference, a quick way to read and use case summaries that reflect the latest thinking of the Commission and the courts in the area of equal employment opportunity, with federal sector employment as the primary focus. The EEO Update is designed to help in your understanding of the law, 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, 01ASS555 (October 19, 2007). Cases cited as “MSPB” or “MSPR” are Merit Systems Protection Board decisions. Other cases are court decisions.

Cases issued prior to January 2000 used an eight digit docket with the first two digits identifying the type of appeal (for example if the first two digits were “01” that would indicate an appeal filed by a complainant); the second two digits indicated the year the appeal was filed (for example, an “0199xxxx” would indicate an appeal filed by a complainant in fiscal year 1999); and the last four digits represented the consecutive numbered appeal (for example, docket number 01990001 was the first appeal by a complainant filed in fiscal year 1999). Beginning with fiscal year 2000, the Commission replaced the two digits identifying the year with the letter “A” to represent the “0” for year 2000, plus one digit. Decisions in fiscal year 2000 were designated “A0”; decisions in 2001 were designated “A1”; and so forth. (Again, as an example, the docket number 01A00002 would indicate the second appeal filed by a complainant in fiscal year 2000).

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

01 = An appeal by a complainant from a decision of an EEOC administrative judge or from a final agency decision (FAD) following an agency’s final action. (Appeals from a decision of an EEOC administrative judge filed by federal agencies are discussed below.) This is generally a decision by OFO. Occasionally, in cases of importance and/or precedent cases, the full Commission will issue a decision that is also numbered “01” and is signed by the Secretary of the Commission, for the Commission. We have not specified, in the case citation, all of the “01” cases, but we have, in some important cases, so indicated within our summaries.

02 = An appeal from a decision on a union grievance.

03 = A petition to review a decision of the MSPB.

04 = A request for enforcement by the EEOC or clarification.

05 = A request to reconsider a previous EEOC decision.

06 = Compliance matters.

07 = An appeal by an agency from a decision of an EEOC administrative judge. Where the complainant and the agency both file appeals, the docket number for the first filed appeal is used.

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

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

B. TERMS OF REFERENCE

Administrative Judge.................................................................AJ

Administrative Law Judge.....................................................ALJ

Age Discrimination in Employment Act.......................................................ADEA

Alternative Dispute Resolution .....................................................ADR

Americans with Disabilities Act....................................................ADA

ADA Amendments Act of 2008 ....................................................ADAAA

Collective Bargaining Agreement(s).....................................................CBA

Equal Employment Opportunity Commission ............EEOC or Commission

Employee Assistance Program ....................................................EAP

Equal Pay Act..............................................................................EPA

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

II. SUMMARY OF RECENT TRENDS IN THE LAW

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

A. ATTORNEY FEES

The Commission issued a number of interesting decisions regarding awards of attorney fees and costs in 2019, including some larger awards. In Glenn O. v. Dept. of Air Force, 0720180030 (August 20, 2019), the Commission awarded $225,082 in attorney fees for work in representing the complainant in a successful complaint alleging harassment and constructive discharge. In Kenneth M. v. SSA, 0720170035 (April 9, 2019), the Commission ordered the agency to pay $165,273 in attorney fees and $90,728.73 in expert fees for work performed in connection with a breach claim related to a 2002 class action. In Elly C. v. SSA, 0720140019 (June 26, 2019), the Commission ordered the agency to pay $762,659.19 in fees and costs of $23,571.73 to the attorneys representing a class, a drastic reduction from the $2,824,633.12 in fees and $333,845.00 in costs sought. The Commission awarded $253,460.80 in fees, and $8,952.28 in costs in Shameka M. v. VA, 0120170451 (April 24, 2019), where it noted the agency’s “scorched earth defense” contributed to the case not proceeding to a hearing, and entries were submitted for multiple paralegals. Finally, in Mario G. v. Dept. of Air Force, 0120180983 (June 11, 2019), the Commission applied a 75% across-the-board reduction where the complainant only prevailed on one of 15 claims raised.

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

B. CLASS ACTIONS

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

C. COMPENSATORY DAMAGES

Awards of nonpecuniary compensatory damages modified or affirmed by the EEOC in 2019 continued to run the gamut from $2,000 to $250,000. Looking at awards under $5,000, the Commission awarded $2,000 in Barbie W. v. Dept. of Army, 0120171302 (April 9, 2019), where much of the harm related to unsuccessful claims; $2,000 in Foster M. v. Dept. of Energy, 0120182008 (December 13, 2019), to a complainant who established limited harm after learning his medical records were kept in an unsecured binder; $2,000 to the complainant in Ramon R. v. USPS, 0120182822 (November 6, 2019), who suffered stress because the agency discriminated against her, but was not injured by the agency’s scorched earth defense; $2,000 to a complainant in Alline B. v. VA, 0120181662 (June 28, 2019), whose supervisor engaged in two instances of per se retaliation and the majority of her harm related to unsuccessful claims; $3,000 to the complainant in Devon H. v. DHS, 0120181822 (September 30, 2019), who was harmed after his confidential medical information was disclosed unlawfully on two occasions; $4,500 to the complainant in Ludie M. v. USPS, 0120170459 (May 9, 2019), recons. den. 2019005427 (December 12, 2019), where the complainant had only a limited duration of harm related to a per se violation claim.

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

Looking at cases awarding up to $10,000, the Commission affirmed...
Reviewing awards in the range of $50,001 to $100,000, the Commission affirmed the agency's award of $100,000 in Kerry S. v. Dept. of Air Force, 0120182301 (November 21, 2019), where the complainant submitted medical evidence and sworn statements from a colleague that she experienced debilitating headaches, anxiety, and sadness. The Commission increased the agency's award in Randolph A. v. VA, 0120181473 (September 19, 2019), from $75,000 to $100,000 where after not being selected, the complainant suffered from humiliation, anger, anxiety, depression, thoughts of suicide, persistent insomnia, and that she would not be able to take a break. The Commission found that the complainant was anxious, depressed, and that she would have sent herself to bed after work and that she would vomit at the thought of returning to the office. In Myrtle P. v. DHS, 0120180246 (March 19, 2019), the Commission increased an agency's award from $30,000 to $65,000 where the complainant submitted medical evidence that her preexisting medical condition, Graves disease, was exacerbated, she experienced sweating, fatigue, inability to sleep, nausea, skin rashes, vomiting, skin outbreaks, blurred vision, and hormone changes because of the agency's actions.

In a case where the complainant's fiancé broke off their approximately eight-month engagement, and a close relationship with her parents was destroyed, and she became withdrawn, guarded, and depressed. The Commission affirmed the AJ's award of $200,000 in Carmen C. v. USDA, 0720180029 (August 20, 2019), where the record included testimony from two of the complainant's psychologists in support of the claim for damages, and she was diagnosed with PTSD, depression, and anxiety. In Geraldine B. v. USDA, 0720180025 (June 5, 2019), the AJ awarded $250,000 and the Commission affirmed, noting that after the accommodation was revoked, the complainant's PTSD was exacerbated, she experienced weight gain, stomach pain, insomnia, headaches, and intense nightmares, and became reclusive. Finally, in Shameka M. v. VA, 0120172281, 0120181111, 0120181117 (April 4, 2019), the Commission increased an agency's award of $30,500 to $225,000 based on affidavits from complainant, a clergy member, complainant's long-time friend, complainant's adult son, and complainant's estranged husband, records from a psychologist and other health care providers, pharmacy records, and a psychological report prepared by a forensic psychologist which supported that the harassment experienced exacerbated her previously diagnosed depression, she developed panic disorder, alcohol abuse, and alcohol induced mood disorder, suicidal ideation, problems sleeping, severe impairment of concentration, moderately severe impairment of memory, blisters from scratching her skin due to stress, and as she had been too depressed to care for her youngest child, that child was exhibiting developmental delays.

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

The Commission increased awards issued by AJs in the following cases: from $5,000 to $10,000 to the complainant where the AJ looked at harm related to each of two successful claims in Marybeth C. v. DOJ, 0120180749 (August 20, 2019); increased the AJ's award from $13,000 to $15,000 in Bernard S. v. DOHS, 0120181509 (September 17, 2019), after the issuance of default judgment and the complainant had both preexisting conditions and intervening causes of harm; increased an AJ's award from $25,000 to $50,000 in Pamela W. v. VA, 0120171387 (May 2, 2019), because the AJ improperly limited the timeframe for harm as after she reported the harassment, instead of looking at the duration of harm; increased an AJ's award from $10,400 to $65,000 in Leota F. v. USPS, 0120180717 (August 22, 2019), where the complainant had anxiety attacks, crying spells, diarrhea, neck pain, headaches, was prescribed medication, and sought treatment from a chiropractor for the neck pain.
The Commission took the unusual step of reducing an AJ's award of nonpecuniary compensatory damages from $125,000 to $75,000 in Hayden R. v. USPS, 2019003428 (December 10, 2019), as the complainant only submitted his own statements and testimony in support of his claim, and he testified that his emotional harm preceded the events in the complaint by over two years.

**D. CONSTRUCTIVE DISCHARGE**

The Commission issued two cases on the same day finding that the respective complainants met the high burden of showing that a reasonable person would have felt compelled to resign given the working conditions experienced. In Glenna O. v. Dept. of Air Force, 0720180029 (August 20, 2019), a high school teacher at an agency school felt compelled to resign after she engaged in protected EEO activity, and as a result was subjected to a “reign of terror” by the principal and assistant principal.

**E. DISABILITY DISCRIMINATION**

Each year since the passage of the ADA Amendments Act sees less cases involving questions of whether an individual is considered an individual with a disability, or a qualified individual with a disability, as the scope of coverage was intended to be broad by Congress. The Commission addressed a few cases where the complainants were not considered qualified individual with disabilities. In Alonzo N. v. DHS, 0120172222 (February 15, 2019), recons. den. 2019002750 (June 25, 2019), alleged chemical sensitivities, which may have been masking an anxiety disorder, rendered a benefit authorize not qualified to perform her position.

The Commission continues to find agencies fail to accommodate employees with disabilities and subject them to unlawful disclosures of medical information each year. The Commission addressed a claim that a police officer was “regarded as” substantially limited in working after she suffered an allergic reaction while working out, and found the agency should have returned her to duty in Candi R. v. DOD, 0120172238 (February 28, 2019), where a supervisor and four of her coworkers accessed her VAMC patient medical records without a valid business-related reason for doing so.

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

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

Teleworking as an accommodation continues to be a hot topic. In 2019, the Commission found the agency did not need to provide a second telework day to comply with the guidelines of the non-voluntary v. Dept. of Interior, 0120172579 (February 14, 2019), because the staff was small, a majority of the work had to be performed in the office, including addressing a “steady flow” of walk-in customers and visitors, and there was not enough work that could be done remotely that would cover a second telework day. In Kiera H. v. SSA, 0120170813 (March 21, 2019), the essential functions of the complainant’s position as a claims/customer service representative required her to work five days per week. In Ebonique A. v. EPA, 0120172249 (February 26, 2019), the agency failed to provide extra time to complete his route to a city carrier who was down, but refused to take leave or come into the office.

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

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

The Commission affirmed agency decisions to send employees for fitness-for-duty examinations as being job-related and consistent with business necessity in Monroe M. v. USPS, 0120172250 (February 12, 2019) (employee was “argumentative,” incoherent); and “agitated and displayed an eventual loss of interest in a shoeshine of a coworker by a federal agent); in Assunta V. v. DOJ, 0120171966 (February 22, 2019) (based on records that the complainant was acting oddly, had slurred speech, made odd comments, and that she had dropped a bottle of pain medication and asked an inmate to help her clean it up); in Luvenia S. v. DOD, 0120172969 (February 26, 2019) (based on a coworker’s report that he felt threatened by the complainant’s behavior, the complainant expressed suicidal ideations, and when she
returned to the workplace, and she informed her supervisor that she had PTSD and may need emotional support); Lynette B. v. VA, 0120170682 (March 8, 2019) (after the complainant returned to work after a five-week absence, two coworkers and her supervisor observed her “leave a needle in a veteran patient’s arm after drawing blood; failing to load all labs into the transport box; disposing used needles in the regular trash instead of the needle box; displaying difficulty in placing the right label with the right color tube top; displaying confusion about what labs to pour off and what labs to freeze; and exhibiting an inability to follow more than simple one or two-step instructions”); Homer S. v. USPS, 0120181759 (August 16, 2019) (a tractor trailer operator underwent heart surgery and subsequently was involved in four work-related motor vehicle accidents and was found to be at fault for two of them); and Daman Q. v. USPS, 201900543 (December 10, 2019) (multiple management officials stated they witnessed the complainant, a city carman, moaning and groaning in pain, being unable to complete his route efficiently, dragging his leg, having difficulty bending, and straining to pick up a package).

F. EQUAL PAY ACT
Identifying comparators who performed the same duties is key to a successful EPA claim. In Casandra N. v. DHS, 0120171485 (March 14, 2019), the EPA claim failed because the identified male comparator performed duties of greater complexity as compared to the complainant. And in Sheryl S. v. Dept. of Army, 0120172747 (March 8, 2019), the complainant, a GS-09 Statistics Assistant, was not similarly situated to the male GS-11 Program Analyst because he produced reports and performed duties that the complainant did not perform. The complainant in Mercedez A. v. USDA, 0120170574 (March 7, 2019), recons. den. 2019004025 (October 17, 2019), did succeed in her claims of compensation discrimination under Title VII and the EPA, although she was assisted by an adverse inference entered into the record that a male comparator performed the same duties as her. And in Margaret M. v. VA, 0120170362 (February 21, 2019), a GS-15 General Surgeon showed that she was paid less than male surgeons because the agency only made vague references to male comparators having more surgical experience that was not supported by the record.

G. HARASSMENT (NOT SEXUAL)
The EEOC continued its focus on claims of workplace harassment in 2019. Successful harassment cases are fact-intensive and we recommend you read the cases to fully absorb what evidence was relied upon to conclude that complainants established claims that were sufficiently severe or pervasive, and related to membership in a protected class. In Elise S. v. Dept of State, 0120170164 (September 25, 2019), the Commission found the complainant established she was subjected to harassment based on her disability and protected EEO activity. In Lenny W. v. DHHS, 0120170311 (July 30, 2019), a deaf employee established claims of both supervisory harassment and coworker harassment. The complainants in Stanton S. v. VA, 0120170582 (April 16, 2019) and Gilda M. v. Dept of State, 0120182560 (December 11, 2019), respectively, did not provide a copy of the internal investigation conducted, and it delayed in taking steps to discipline the harasser until six months after the complainant reported the harassment.

In addressing affirmative defenses raised by agencies in response to harassment, the Commission found the agency succeeded in asserting such a defense in Gilda M. v. Dept of State, 0120182560 (December 11, 2019), but could not escape liability in Sharon M. v. Dept of Transp., 0120180732 (August 21, 2019), and the complainant did not provide a copy of the internal investigation conducted, and it delayed in taking steps to discipline the harasser during the investigative stage. However, agency defense counsel may not instruct officials to make statements that are untrue or make changes to any affidavit without the affiant’s approval of such changes. Agencies may also be assisted by agency defense counsel in informal resolution talks during the counseling stage so long as agency defense counsel suggests, but does not dictate, settlement terms.

The Commission found default judgment was warranted in Irvin M. v. DHS, 0120170498 (April 25, 2019), recons. den. 2019003430 (October 23, 2019), for the agency’s 150-day delay in issuing the FAD as ordered by the AJ after the complainant withdrew his hearing request and awarded remedies after finding the complainant established a prima facie case. In Jordon S. v. DOJ, 0120171870 (March 20, 2019), the Commission ordered training and posting of notice when the agency delayed more than a year in issuing a FAD. In Denise v. DHHS, 0120171448 (April 30, 2019), the Commission sanctioned the agency by ordering the agency to post notices and provide training to employees because it missed the ROIs due dates and issued the FAD 110 days late.

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

The Commission continued to affirm dismissals of hearing requests as sanctions against complainants who fail to comply with AJ orders and authority, including in Cornell S. v. USDA, 0120180632, 2019002470 (September 27, 2019), where the complainant did not call into the initial status conference or respond to the Notice of Intent To Dismiss Hearing Request; Carolyn M. v. USPS, 0120181158 (May 9, 2019), where the complainant refused to provide a sworn statement about her claims during investigation or discovery based on unsupported fears of reprisal; Monroe M. v. Dept of Transp., 0120170817 (March 26, 2019), where the complainant did not respond to discovery requests after being ordered to respond; Victor S. v. Dept of Army, 0120180831 (March 20, 2019), where the complainant engaged in undesignated “contumacious conduct”; and in 0120178083 (November 19, 2019). The Commission found default judgment was warranted in the complaints, respectively, established claims of race-based retaliation.

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

I. LEGITIMATE NONDISCRIMINATORY REASONS
If a complainant establishes a prima facie claim of discrimination, the agency then has the burden of production to articulate, with sufficient specificity, legitimate, nondiscriminatory reasons for the actions at issue. Every year, agencies fail to meet this burden and 2019 was no exception. In Ashlea P. v. DHS, 0120182299 (May 29, 2019), the agency only provided the general mechanics for the selection process at issue, and did not articulate with sufficient specificity why the complainant was not selected for two GS-15 positions and therefore the complainant prevailed on her claims of retaliation. In Jess P. v. DHS, 0120132186 (September 17, 2019), the agency found the complainant (male) was qualified, but did not sufficiently explain the scoring or ranking of the seven applicants who were selected over him, who included female applicants. The complainant established prima facie claims of national origin and religious discrimination in Erik S. v. DOJ, 0120119994 (September 27, 2019), and the agency failed to articulate why he was not selected, noting that the ROI lacked affidavits from the SO or any other agency witness with first-hand knowledge of the selection. And the complainant in Leon B. v. Dept of State, 0120182144 (November 5, 2019), had his candidacy for a Diplomatic Security Foreign Service Special Agent position terminated and the agency could not explain why, leaving the conclusion that such action was taken to discriminate against him based on his national origin and age. In a case not alleging nonselection, Annalise D. v. USPS, 0120189911 (October 30, 2019), the agency did not sufficiently articulate why the complainant, who was disabled, was paid less for performing the same job duties as other non-disabled employees.

For interesting academic reading on what is considered an “adequate”...
INTRODUCTION

F.3d 1078 (D.C. Cir. 2019).

*, 923 evidentiary proffer by the employer, we suggest you read the Court of

based on national origin.

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

K. RACE DISCRIMINATION

In Glenna D. v. Dept. of Air Force, 0720180026 (June 6, 2019), the Commission affirmed the AJ's finding of race discrimination where the complainant, who was African-American identified a white employee who performed the same work during the relevant timeframe and the agency could not articulate reasons for the difference in pay. In Marquis K. v. Dept. of Navy, 0720180014 (May 10, 2019), the Commission agreed with the AJ that the agency engaged in race discrimination when it terminated the complainant, who was African-American, during his probationary period based on unsubstantiated claims that he engaged in misconduct and was threatening, finding credible that his supervisors viewed him as a "big, Black man" and stereotyped him as aggressive and intimidating. The Commission found the agency disciplined African-American employees more harshly for the same conduct in Cathy V. v. USPS, 0120172200 (February 8, 2019), as compared to similarly-situated white employees. And in Rick G. v. DHS, 0720180009 (April 26, 2019), the AJ found, and the Commission affirmed, race discrimination when the complainant's Caucasian supervisor removed the complainant's credential which authorized him to receive firearms training because he believed the complainant, African-American, was not authorized to have a credential even though he had completed training at the Federal Law Enforcement Training Center.

L. RELIGIOUS DISCRIMINATION

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

M. REMEDIES AND OTHER RELIEF

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

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

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

N. REPRISAL/RETALIATION

Protected EEO activity can take several forms. Complainants can participate in the EEO process by requesting reasonable accommodation, alleging harassment, assisting a coworker by testifying or assisting in an EEO complaint, or proceeding an EEO case. Confining with their own EEO file records, complainants can also engage in EEO activity by opposing discrimination in the workplace. In Glenna O. v. Dept. of Air Force, 0720180030 (August 20, 2019); Cassandra L. v. DOD, 0720180029 (August 20, 2019); and Leora R. v. DHHS, 0120180736 (August 30, 2019), all three complainants established that they opposed discrimination in the workplace and their respective agencies subsequently retaliated against them. In Shantel H. v. DHS, 0120171646 (June 25, 2019), an AJ had dismissed a claim of retaliation on the basis that reporting claims of discrimination against American Indian/Alaska Native tribes receiving FEMA disaster services was not protected activity. The EEOC reversed that determination and remanded the case back to the EEOC Field Office for processing.

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

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

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

O. SECURITY CLEARANCES AND STATE SECRETS

Most decisions issued by the EEOC regarding security clearances surround whether or not an employee can raise something that occurred in relation to a security clearance as discriminatory. In Rich P. v. DOJ, 2019000745 (February 5, 2019), the Commission affirmed dismissal of a claim that alleged race, disability, and reprisal discrimination when the complainant was not accommodated during a polygraph examination and when he was subsequently notified that the revocation of his security clearance was affirmed as the EEOC cannot review determinations on the substance of a clearance decision. In 2019, the Commission reinstated three other complaints alleging discrimination that had been dismissed for relating to a security clearance determination. In Elias R. v. DHS, 2019000772 (February 15, 2019), the Commission held, “Complainant
claimed he was treated in a discriminatory manner in the administration of the polygraph exam, and was treated differently from other similarly situated individuals not of his race with regard to the Agency’s refusal to accept the results of a previous polygraph. While the polygraph might be reviewed while making a clearance decision, it was not the security clearance determination itself. The issues raised by Complainant can be properly adjudicated within the administrative EEO complaint process.” In Al H. v. Dept. of State, 01201821043 (June 18, 2019), the Commission clarified its prior holding in Schroeder v. DOD, 05930248 (April 14, 1994), and found the complainant could proceed on claims that he was subjected to disability discrimination and reprisal regarding his non-promotions and the delay in processing the renewal of his security clearance, when he formed a reasonable suspicion regarding discrimination during the periodic reinvestigation of his eligibility to maintain a security clearance. And in Tyson A. v. Dept. of Navy, 2019005159 (December 17, 2019), the Commission found that although the complainant could not allege discrimination for the agency’s decision not to grant the complainant an interim security clearance, he could proceed with a claim of discrimination regarding the agency’s decision to revoke his tentative hiring, which the agency alleged was revoked because a final adjudication on his clearance could take 9–18 months.

P. SEXUAL HARASSMENT

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

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

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

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

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.


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."


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 for a raise and that the 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.


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.

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.


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. Holowekci, 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.


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