INTRODUCTION

This book is a summary of notable cases, laws, and guidance ending in December 2021. 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 2021. 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 2021, we have also added a few summaries of EEO regulations and other guidance that we believe are helpful, and still relevant, that predate 2004. We have not summarized all cases inclusive in those years, but have reviewed many of the more important cases.

Some of our case summaries are included in more than one topic area. For example, a case summary that addresses the three topic areas of disability, compensatory damages, and attorney fees may appear under all three headings. We have avoided repeating the full summary of these important cases in each of those areas by including an abbreviated case summary in each section and noting that the case is addressed in another topic area. To locate other references to the same case, please refer to the Table of Cases at the end of this book. Occasionally, where the summary is not very long, the full case summary is simply repeated in more than one section. Our summaries vary. For some cases, we have included only a very brief summary, while others receive a more lengthy treatment, which may include the Commission's or a court's explanation of how the court or Commission interprets an area of the law, if we think that information is helpful. As you examine an area in this book, please remember that it is not a comprehensive summary of the law. We are only trying to provide you with the latest developments. For a more comprehensive overview, we recommend that you do what we are likely to do, which is begin your search by using Natania Davis and Ernest Hadley's excellent reference, *A Guide to Federal Sector Equal Employment Law and Practice*, (Dewey Publications, Inc).

This book is intended as a reference, a quick way to read and use case summaries that reflect the latest thinking of the Commission and the courts in the area of equal employment opportunity, with federal sector employment as the primary focus. The *EEO Update* is designed to help in your understanding of the cases, but it is not a substitute for reading the entire decisions. It is a starting place, intended to give you a quick overview of recent case law. The cases included in this book—such as most of the substantive decisions issued by the full Commission—and the way in which we summarize a case reflects our opinion as to what is important. Under no circumstance should you rely on our summaries as legal advice or even as unquestionably accurate. This book is intended to provide an overview of the way in which the Commission is interpreting the EEO laws. It is essential that you read the cases.

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

A. LEGEND FOR CASE CITATIONS

The following legend should help you to understand the significance of the numbers of the EEOC's cases.

Note: Commission and Office of Federal Operations (OFO) decisions are indicated by a case name followed by a case number and the date of the decision. For example, *Smith v. SSA,* 01A5555 (October 19, 2007). Cases cited as "MSPB" or "MSPR" are Merit Systems Protection Board decisions. Other cases are court decisions.

Cases issued prior to January 2000 used an eight digit docket with the first two digits identifying the type of appeal (for example if the first two digits were "01" that would indicate an appeal filed by a complainant); the second two digits indicated the year the appeal was filed (for example, an "0199xxxx" would indicate an appeal filed by a complainant in fiscal year 1999); and the last four digits represented the consecutive numbered appeal (for example, docket number 01990001 was the first appeal by a complainant filed in fiscal year 1999).

Beginning with fiscal year 2000, the Commission replaced the two digits identifying the year with the letter "A" to represent the "0" for year 2000, plus one digit. Decisions in fiscal year 2000 were designated "A0"; decisions in 2001 were designated "A1"; and so forth. (Again, as an example, the docket number 01A00002 would indicate the second appeal filed by a complainant in fiscal year 2000).

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

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

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 2020000067).

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

B. TERMS OF REFERENCE

Administrative Judge ..... AJ

Administrative Law Judge ..... ALJ

Age Discrimination in Employment Act ..... ADEA

Alternative Dispute Resolution ..... ADR
Americans with Disabilities Act ..... ADA
ADA Amendments Act of 2008 ..... ADAAA
Collective Bargaining Agreement(s) ..... CBA
Equal Employment Opportunity Commission ..... EEOC or Commission
Employee Assistance Program ..... EAP
Equal Pay Act ..... EPA
Family and Medical Leave Act ..... FMLA
Federal Labor Relations Authority ..... FLRA
Final Agency Decision ..... FAD
Fitness for Duty ..... FFD
Fitness for Duty Exam(ination) ..... FFDE
Freedom of Information Act ..... FOIA
Leave Without Pay ..... LWOP
Merit Systems Protection Board ..... MSPB
National Security Agency ..... NSA
Office of Federal Operations ..... OFO
Office of Personnel Management ..... OPM
Office of Special Counsel ..... OSC
Office of Workers Compensation Program ..... OWCP
Older Workers' Benefits Protection Act ..... OWBPA
Performance Improvement Plan ..... PIP
Post Traumatic Stress Disorder ..... PTSD
Recommending Official ..... RO
Report of Investigation ..... ROI
Selection (or Selecting) Official ..... SO
Title VII of the Civil Rights Act of 1964 ..... Title VII

II. SUMMARY OF RECENT TRENDS IN THE LAW

As in the past, in this section we briefly summarize important decisions from the Commission issued in the past year, 2021, as well as a few circuit decisions and offer our comments about the significance of these, noting any trends. Readers are reminded that the case summaries are not intended to be used as a substitute for legal research or for reading the source materials, but rather should provide enough information about the case to determine if a particular case is one the reader may want to pull and read in its entirety.

A. ATTORNEY FEES

For many years, the Office of the U.S. Attorney for Washington, D.C. issued the *Laffey* Matrix, which served to set hourly rates for Washington, D.C. area attorneys accepted by the EEOC as reasonable. In 2021, that office issued the *Fitzpatrick* Matrix, researched and prepared by a Professor of Law at Vanderbilt Law School, which replaced the "*Laffey*" Matrix. It is available at https://www.justice.gov/usao-dc/page/file/1189846/download.

Turning to decisions from the OFO, in *Darrell K. v. DHS*, 2020001975 (August 2, 2021), the Commission found the agency improperly held that a complainant who was not represented for the liability stage of the case, but only for a successful damages award, was not entitled to recover attorney fees. The Commission ordered the agency to provide the attorney with an opportunity to submit his request for fees and costs. In *Barbara S. v. USPS*, 2020002285 (April 14, 2021), the agency argued that the complainant was not a prevailing party because she only prevailed on a technical claim of *per se* retaliation which the AJ added *sua sponte*. The Commission disagreed, noting that the complainant received remedies including $18,000 in compensatory damages, training, consideration of discipline for the supervisor, and posting of notice, and affirmed the award of $41,231.58 in fees, and $2,291.80 in costs.

Turning to across-the-board reductions, in *Roxane C. v. Dept. of Energy*, 2019004254 (July 26, 2021), the Commission found that hours spent at the hearing stage were compensable even though the complainant withdrew her hearing request, but applied a 50% across-the-board reduction because the complainant only prevailed on two out of nine claims. In *Heidi E. v. SSA*, 2020003219 (September 23, 2021), the Commission applied a 75% across-the-board reduction as the complainant did not prevail on a majority of her claims. In *Colene M. v. VA*, 2019005810 (July 19, 2021), the Commission affirmed the agency's decision to reduce fees by 80% as the complainant only prevailed on a claim of *per se* retaliation, which was fractionable from the remaining claims. In *Ricardo K. v. VA*, 2020003751 (November 16, 2021), the Commission agreed with the AJ that an across-the-board reduction in fees sought by 1/3 was appropriate as the complainant prevailed on default judgment as a sanction and the parties did not engage in discovery. In *Barbie W. v. Dept. of Army*, 2020002288 (July 28, 2021), the Commission found that the complainant's request for attorney fees should be reduced commensurate with her degree of success of the claims raised and ordered recovery of 1/18 of the fees sought as she only prevailed on one out of 18 claims.

B. CLASS ACTIONS

The Commission affirmed the AJ's certification of the following class in *Stan G. v. SSA*, 2020004534 (May 19, 2021): all African American male employees at the GS-14 level and below at the agency's headquarters in Baltimore, Maryland, excluding employees in the Office of Disability Adjudication and Review and field employees, for the time period of April 7, 2003, to the present, who were treated disparately and/or adversely impacted by the agency's awards programs in the awarding of monetary awards. The Commission remanded the case to the EEOC's Baltimore Field Office for further processing.

In *Felix Z., et al. v. DHS*, 2020005328 (April 29, 2021), the Commission affirmed the AJ's certification of the following class: whether the agency discriminated against the class members based on race/national origin (Hispanic/Puerto Rican) and association with others of Hispanic/Puerto Rican descent, when Border Patrol Agents were excluded and/or discouraged from applying and/or denied the opportunity to participate in a temporary duty assignment to Ramey Sector to conduct Border Patrol law enforcement operations, and to assist with ongoing humanitarian efforts due to Hurricane Maria.

C. COMPENSATORY DAMAGES

As we see every year, the Commission addressed awards of compensatory damages ranging from $1,500 upwards. However, 2021 also included several decisions where the OFO found AJs to be too generous in awards of compensatory damages, and adjusted them downward. For example, in *Lauren B. v. DOD*, 2021002454 (December 13, 2021), the Commission found the AJ erred in awarding $50,000 in nonpecuniary damages, because it related to harm arising from a claim that was not accepted or investigated, and reduced the award to $1,500 to reflect compensation for harm relating to the claim on which the complainant prevailed. In *Jill M. v. DOD*, 2021000550 (July 15, 2021), the Commission reduced an AJ's award of nonpecuniary compensatory damages from $125,000 to $30,000 because the complainant did not testify or present evidence that she sought medical treatment for the harm she suffered between 2008 and 2010.

In *Nicki D. v. EEOC*, 0720180023 (September 18, 2021), the Commission lowered an AJ's award of nonpecuniary damages from $200,000 to $85,000, finding the award to be monstrously excessive, and noting that awards are not intended to punish the agency for wrongdoing. The Commission further cited to the existence of complainant's preexisting medical conditions in support of its decision to lower the award. In *Kyle S. v. USDA*, 2019005694 (July 26, 2021), the Commission reduced an AJ's award of nonpecuniary compensatory damages from $200,000 to $100,000 where the complainant was subjected to harassment and denial of accommodation because the agency engaged in the interactive process in good faith, and therefore the complainant was not entitled to compensatory damages for the denial of reasonable accommodation.

And in *Susan B. v. Dept. of Army*, 2020001632 (June 16, 2021), the Commission reduced the AJ's award of nonpecuniary compensatory damages from $190,000 to $100,000 because the complainant had a preexisting medical condition, and that there were contributing factors to the claimed harm outside of the agency's actions, including significant anxiety caused by her OCD, and a contentious child custody battle with her ex-husband. And

in *Sona B. v. DHS*, 2021000656 (July 19, 2021), an AJ awarded $300,000 to a complainant who had been subjected to harassment and retaliation, but the Commission reduced the award to $200,000, noting that the complainant had other preexisting conditions, including depression, as well as other sources of emotional distress, including the recent loss of a young child.

Looking at other awards of nonpecuniary compensatory damages, starting with those under $5,000: In *Mafalda H. v. DHS*, 2020001497 (July 29, 2021), the Commission agreed that $1,500 was an appropriate award where the complainant did not provide medical documentation, and only submitted limited personal testimony; in *Natalie S. v. VA*, 2021000139 (April 27, 2021), the Commission affirmed the agency's award of $1,500 in nonpecuniary compensatory damages, for harm related to the complainant's union representative not being allowed to assist her in gathering documents for her EEO investigation; and in *Israel F. v. USPS*, 2020001565 (March 2, 2021), the Commission increased an agency's award of nonpecuniary compensatory damages $800 to $1,500, where the complainant experienced weight gain and was prescribed anti-anxiety medication one month after unlawfully being charged AWOL.

In *Michael M. v. USPS*, 2020001464 (August 3, 2021), the Commission increased an agency's award from $1,500 to $2,000, where the complainant's medical information was unlawfully disclosed; in *Marie M. v. VA*, 2020001458 (June 7, 2021), the Commission affirmed an award of $3,500 where the complainant prevailed on a single instance of *per se* retaliation but submitted that failed to link the claimed harm to the agency's actions; in *Irina T. v. VA*, 2020001946 (July 29, 2021), the Commission affirmed an agency's award of $5,000 where the complainant did not respond to the agency's requests for supporting evidence, but had testimony in her affidavit regarding harm to her blood sugar levels; in *Charlotte B. v. FDIC*, 2020003225 (June 3, 2021), the Commission increased an award of $5,000 where the complainant's medical condition was disclosed to an employee who had no need to know it which caused stress and anxiety; in *Felton A. v. USPS*, 2020002955 (May 24, 2021), the Commission increased an award from $2,000 to $5,000 where the complainant submitted testimony from his wife and a friend attesting to changes they observed, as well as documentation from his psychiatrist.

Turning to awards up to $10,000: in *Maria D. v. DOJ*, 2021001182 (December 2, 2021), the Commission affirmed an AJ's award of $7,000 where the complainant "suffered from stress, insomnia, and relationship/marital problems as a result of the discrimination at issue" and sought counseling with her husband; in *Trey M. v. USPS*, 2020002804 (April 26, 2021), *recons. den*., 2021003583 (September 16, 2021), the Commission affirmed an agency's award of $7,500 where some of the claimed harm related to intervening causes, such as a car accident, his wife's illness, and a friend's death; in *Ricardo K. v. VA*, 2020003751 (November 16, 2021), the Commission increased an AJ's award from $5,000 to $10,000, where the complainant experienced a change in his personality, anxiety, insomnia, high blood pressure, and weight fluctuations; and in *Joshua F. v. VA*, 2020003749 (July 28, 2021), the Commission increased an agency's award of compensatory damages from $3,500 to $10,000, where the complainant experienced financial stress, sadness, and depression after his tentative offer of employment was withdrawn because of his disability;

In awards ranging from $10,001 to $50,000: in *Wanita Z. v. VA*, 2020001077 (July 7, 2021), the Commission affirmed $11,000 to the complainant in nonpecuniary compensatory damages where much of the evidence submitted by the complainant related to harm outside of the finding of discrimination; in *Norberto G. v. DOD*, 2020000231 (January 8, 2021), the Commission increased the agency's award of nonpecuniary compensatory damages from $11,000 to $13,000, based on the complainant's statements that he was extremely upset and embarrassed after not being promoted, he lost enthusiasm for work and engaging with his colleagues, friends, and family, and he suffered from depression; in *Erik S. v. DOJ*, 2020004617 (December 13, 2021), the Commission affirmed an agency's award of $30,000 where the discrimination worsened the complainant's preexisting depression, and diagnoses of anxiety, ADHD, and PTSD; in *Stanton S. v. USPS*, 2019004097 (April 15, 2021), the Commission increased an agency's award from $10,000 to $30,000 to a complainant who was not provided with accommodation and subsequently removed based on difficulty sleeping, major depressive disorder, anxiety, mental suffering, hypertension, chest pains, loss of hair, and proof of prescribed medications for depression; the Commission increased an AJ's award from $15,000 to $50,000 in *Ryan O. v. VA*, 2020003815 (October 27, 2021), where the retaliatory negative job reference "resulted in the intentional infliction of emotional distress upon Complainant"; and in *Angelo P. v. DHS*, 2020000286 (May 24, 2021), the Commission increased an agency's award of compensatory damages from $20,000 to $50,000, where the complainant submitted statements from himself and his wife that he experienced depression, stress, anger, frustration, humiliation, sleep disturbance, migraines, paranoia, suicidal ideations, social withdrawal, marital strife, and a decline in his family relationships.

In *Darrell K. v. DHS*, 2020001975 (August 2, 2021), the Commission applied its holding in *Lara G. v. USPS*, 0520130618 (June 9, 2017), to find that cases awarding $35,000 were consistent with the harm suffered by the complainant who lost sleep, and experienced anger, depression, and isolation from his family and friends, but applying the present-day value of the comparable awards, the Commission increased the award to $47,417.34.

In awards going up to $100,000: in *Lexie T. v. DHS*, 2020000440 (July 15, 2021), the Commission increased an agency's award from $25,000 to $60,000 where "Complainant presented to her primary care physician with complaints of increased stress, depression, and anxiety because of her unexpected termination. Complainant asserted that her removal started a new episode of anxious and depressive symptoms with insomnia, fatigue, and feelings of hopelessness. Additionally, Complainant's wife and father submitted statements corroborating Complainant's reports of increased symptoms. Complainant's wife averred that she developed anxiety as a result of Complainant's condition and their relationship suffered"; in *Randolph T. v. Dept. of Army*, 2020004200 (December 13, 2021), the Commission increased an agency's award from $15,000 to $70,000, where the complainant suffered from aggravation of medical conditions, stress, and financial anxiety after not being accommodated for 16 months; in *Elise S. v. Dept. of State*, 2020004019 (November 22, 2021), the Commission increased the agency's award from $15,000 to $75,000 where the duration of harm was over seven years, and the complainant established mental anguish, chest pains, teeth grinding which resulted in several needing to be removed, headaches, fatigue, and nausea; in *Jacki A. v. DOJ*, 2020002100 (September 23, 2021), the Commission increased the agency's award from $45,000 to $85,000, where the duration of harm was two years, and the complainant submitted evidence of anxiety attacks, crying and shaking spells, suicidal ideation, humiliation, insomnia, nightmares, exacerbation of her preexisting depression and anxiety, increased drinking and smoking, and inability to tend to household tasks such as paying bills on time such that her family was evicted; in *Lauralee C. v. VA*, 2020000598 (September 21, 2021), the Commission affirmed an agency's award of $95,000 where the complainant's preexisting health conditions were exacerbated and she had emotional harm and financial stress from the agency's discriminatory termination of her employment; the Commission increased an agency's award from $15,000 to $100,000 in *Aileen C. v. USAID*, 2019004993 (August 2, 2021), where a discriminatory termination caused the complainant to postpone her treatment for Parkinson's disease, which she believed resulted in lost opportunity to delay and slow the progress of the disease.

Finally, in award over $100,000: in *Jeffry R. v. USPS*, 2020002824 (September 13, 2021), the Commission increased an agency's award of nonpecuniary compensatory damages from $35,000 to $140,000 because three years of not receiving accommodation resulted in the complainant suffering from depression, insomnia, anxiety, and financial strain which rendered him unable to meet his child support obligations such that he had go to court to request a reduction; in *Ashely H. v. NTSB*, 2020002145 (September 7, 2021), the Commission increased the award to a victim of sexual harassment from $110,000 to $175,000 where the duration of harm was at least six years, the complainant would need to continue treatment for her PTSD for the foreseeable future, and she provided evidence that she suffered from "major depression, severe headaches, vomiting, nightmares, anxiety, difficulty focusing, hypervigilance, flashbacks, nightmares, avoidance of social situations, suicidal ideation, difficulty sleeping, and panic attacks" as a result of the agency's actions. And in *Celinda L. v. VA*, 2020002892 (September 2, 2021), the agency issued a FAD awarding $75,000 to the victim of sexual harassment and the Commission increased it to $175,000, noting the egregious nature of the harassment and severity of the harm, which included physical assault, violent death threats, workplace groping, and solicitation of nude pictures, which were not stopped by agency management officials.

The Commission addressed two applications of the collateral course rule in *Jeffry R. v. USPS*, 2020002824 (September 13, 2021) and *Tien E. v. USDA*,

2020001343 (July 15, 2021), reiterating in both cases that complainants can recover the full amounts charged by the service provider in pecuniary damages, and the amount does not need to be reduced to reflect payments by insurance.

D. CONSTRUCTIVE DISCHARGE

In *Sandra A. v. Dept. of Navy,* 2020001588, 2021002131 (September 16, 2021), the Commission concluded that the agency's failure to provide the complainant with reasonable accommodation resulted in her constructive discharge from employment. The complainant had teleworked since 2012, which allowed her to work while managing her disability of Irritable Bowel Syndrome. When a new supervisor arrived and canceled all telework agreements, she requested telework, and after that was denied, she requested adjustment to her maxiflex schedule to allow her to work outside of core hours and on weekends to make up for lost time during the week. In response, the agency provided one day of telework as needed for flareups, but denied the request for a flexible schedule. The agency subsequently issued complainant a letter of requirement notifying her of unsatisfactory attendance and restricting her use of leave, and her supervisor repeatedly questioned her about her use of leave. The complainant ultimately resigned, which the Commission found was involuntary. In *Silas T. v. Dept. of Air Force,* 2019003996 (May 24, 2021), the complainant worked as a nonappropriated fund employee at the Chili's restaurant located in the agency's facility at Kadena Air Base in Okinawa, Japan, and was subjected to harassment and threats from a coworker, including, "You can't write up my daughter, I'm going to fuck you up," threatening to kill the complainant and repeatedly referred to him as a "faggot." The complainant resigned after learning that this coworker would be returning to work with him, and the Commission found given "the threats of violence and use of derogatory language, a reasonable person in Complainant's position would have found his working conditions to be intolerable. Further, the intolerable working conditions plainly arose from unlawful discriminatory conduct based on Complainant's sexual orientation."

E. COURT PROCEDURES AND ISSUES

In *Farrar v. Nelson*, 2 F.4th 986 (June 29, 2021), the Court of Appeals for the District of Columbia addressed whether the appellant was required to return the relief he received from the agency at the administrative level in order to file a lawsuit in district court, and determined he was not. The Court of Appeals held that the Rehabilitation Act "says nothing about requiring an employee to first disgorge, or offer to disgorge, an administrative remedy already received. Although Farrar could have returned, or offered to return, his award before filing suit, the statute doesn't require it. And we cannot read that requirement into the statute without rewriting it." The Court of Appeals reversed the district court's order dismissing the lawsuit and remanded it for further proceedings.

F. DISABILITY DISCRIMINATION

The Commission continues to find discrimination where agencies fail to provide effective accommodations to employees with disabilities. In *Tyson A. v. USDA* 2020000972 (August 16, 2021), the Commission found the agency failed to engage in the interactive process or provide effective accommodation to a complainant who worked as a food inspector in a slaughterhouse and needed accommodations due to problems breathing. In *Kyle S. v. USDA*, 2019005694 (July 26, 2021), the Commission found the agency denied the complainant the LWOP he needed while seeking medical treatment for a neurological condition. In *Thersa E. v. USPS*, 0120182764 (June 23, 2021), the Commission found the agency erred in not allowing the complainant to bring her medical alert dog to work as an accommodation, as the dog was trained to alert her to potential atrial fibrillation episodes. In *Mirta Z. v. USPS*, 2020000383 (January 28, 2021), the Commission found the agency had an obligation to provide a consistent daytime work schedule to the complainant who had epilepsy. And in *Lamar M. v. USPS*, 2019005929 (June 15, 2021) and *Darius C. v. USPS*, 2020000613 and 2021001698 (May 24, 2021), the Commission found the agency failed to accommodate employees who were hearing impaired when it did not provide interpreters for meetings. In *Darius C.*, one of the meetings was called to inform staff that someone on the worksite had tested positive for COVID-19.

The Commission also continues to find that delays in providing accommodation constitute denials of accommodation. In *Orlando O. v. USPS*, 2020003910 (December 7, 2021), the Commission found a three month delay in responding to the complainant's request to telework due to his Ulcerative Colitis constituted a denial. In *Susan B. v. Dept. of Army*, 2020001632 (June 16, 2021), the Commission found a four-month processing period to provide the complainant with necessary ergonomic equipment to accommodate her disabilities was a delay that constituted a denial. In *Barrett V. v. DOD*, 2021001566 (June 3, 2021), the Commission found the agency unreasonably delayed in processing the complainant's October 1, 2018 request for telework, as it waited until January 2019 to respond, and even then only approved for situational telework two days per week, not to exceed March 31, 2019. And in *Brittney B. v. DOD*, 2021002613 (September 2, 2021), the Commission found the agency failed to provide sufficient explanation for its 10-month delay in responding to the complainant's request for accommodation. The complainant worked as a store associate in an agency commissary and requested not to work in areas below 50 degrees due to her osteoporosis and knee replacements.

In *Nicki D. v. EEOC*, 0720180023 (September 18, 2021), the Commission affirmed an AJ's decision that the agency's failure to engage in the interactive process or offer an interim accommodation to the complainant resulted in failure to provide reasonable accommodation, and the subsequent removal for performance issues, stemmed from the lack of effective accommodations. And *Shanti N. v. DHHS*, 2019004882 (September 14, 2021), the Commission found that the agency only provided speculative reasons as to why it could not reassign the complainant, a GS-09 Staff Analyst who had a TBI, PTSD, and other conditions, as an accommodation. The agency did not conduct a search because management believed complainant would not be able to compete for vacancies because of Indian Preference policies, but "the validity of management's expressed concerns is called into question by the very fact that Complainant, despite not qualifying for the preference, was hired by the Agency into her position with HIS in the first place."

Concerning requests to telework as a reasonable accommodation: In *Fernanda H. v. SSA*, 2020004066 (December 21, 2021), the Commission found the agency failed to show how granting a fifth day of telework per week to a senior attorney advisor who suffered from migraines and asthma, would have posed an undue hardship, given the complainant was already teleworking four days per week; in *Bryce A. v. Export-Import Bank of the United States*, 2019004342 (September 23, 2021), the Commission, viewing the complainant's request as essentially requesting full-time telework, found the agency did not show it would have posed an undue hardship to grant the complainant's request to stay in Florida and not relocate to Washington, D.C. as an accommodation; in *Waltraud R. v. USDA*, 2020001535 (July 13, 2021), the Commission found the agency did not demonstrate it would have posed an undue hardship to grant the complainant's request to telework two days per week, as the agency only argued that it "did not lend itself to day-to-day operations of the unit."

However, in *Meaghan F. v. Dept. of Treasury*, 2019005325 (May 20, 2021), the Commission agreed with the agency that complainant did not demonstrate that providing the complainant with an emotional support animal was an effective accommodation, after a 60-day trial period, because the dog was ineffective in enabling complainant to perform the essential functions of her position, and was disruptive to the workplace. And in *Ryan C. v. Dept. of Army*, 2019005353 (March 23, 2021), the Commission found the agency did not have an obligation to offer telework to a nurse case manager as a reasonable accommodation because as a health care provider, the essential functions of his position required "constant interactions with patients and staff."

The complainant in *Lynette B. v. USPS*, 2020000092 (June 28, 2021), established pretext for discrimination when she was not issued a FY 2016 performance rating. The agency did not issue her a rating as she was on extended sick leave, but the agency's own policy stated that employees who are on FMLA or OWCP LWOP must be issued a rating and should be evaluated based upon his or her performance for the time period the employee was at work.

In *Cleveland C., et al. v. DOD*, 2020003894, 2020003895, 2020003896, 2020003897, 2020003898, 2020003899, 2020003900, 2020003901, 2020003902, & 2020003903 (November 17, 2021), the Commission found that the agency did not show a significant risk of substantial harm to justify a blanket policy requiring all police officer, including those with Pseudofolliculitis Barbae, to be clean shaven. The Commission held "the Complainants all qualified for the waiver, passed their annual mask fit tests, and there is no evidence that they were unable to perform the essential functions of their position with the waiver or that any incident occurred where they were in danger or risked danger to others due to a respirator mask failure in an emergency situation."

The Commission found agencies unlawfully disclosed employee confidential medical information in: *Jeanie P. v. DOJ*, 2021004664 (December 9, 2021) (during a meeting with three employees, the supervisor disclosed that the complainant was on stress leave and it was causing scheduling problems); *Bryce A. v. DHS*, 2020001712 (July 29, 2021) (the deciding official in a proposed suspension action shared medical information provided by the complainant in his response with the proposing official); in *Shaniqua W. v. Dept. of Army*, 2019005129 (July 19, 2021) (where the management official disclosed complainant's absence was due to medical reasons during a meeting with seven directors; *Alan N. v. DHS*, 2020001528 (April 8, 2021) (a supervisory border patrol agent inadvertently sent an email stating that the complainant had been transported to a medical center after experiencing a rapid heartbeat and tightness in his chest and left hand to 118 recipients, instead of the "Limited Incident Report Distribution List"); and *Alice S. v. DOD*, 2020000391 (February 11, 2021) (a second-level supervisor talked about the complainant's medical condition and reasonable accommodation without prompting during a meeting with two union officials).

G. GOVERNMENT EMPLOYEES RIGHTS ACT OF 1991

In an unpublished decision, the Court of Appeals for the Fifth Circuit in *Garcia v. EEOC*, 861 Fed. Appx. 592 (5th Cir. 2021 NP) addressed the EEOC's dismissal of petitioner's claims under the Government Employee Rights Act, and agreed that she did not have standing to proceed with her GERA claims, holding, "the fact that she was not selected for her job by an elected official is fatal to any claim under GERA."

H. HARASSMENT (NOT SEXUAL)

The Commission found harassment based on disability in *Damon Q. v. DOD*, 2020003388 (August 9, 2021), where a complainant whose left hand was amputated, was mimicked by his director and when he asked him not to mimic his impairment, the director became irate, "got in his face," and then followed closely behind him after the complainant walked away. After that incident, the complainant received communications about attendance at meetings. And in *Kyle S. v. USDA*, 2019005694 (July 26, 2021), the Commission affirmed an AJ's finding that the agency subjected the complainant to harassment based on his disability (neurological), which culminated in his termination. The Commission found management continued to make demands and threaten disciplinary action by telephone and email, knowing that complainant had a serious medical condition and needed more testing and evaluation in order to provide a specific diagnosis, and gave him conflicting information and pressing him for medical information and documentation he did not have.

The Commission found harassment based on national origin and sex in *Melissa M. v. DHS*, 2020001984 (August 5, 2021), where a supervisor constantly threatening complainant over her performance, falsely accusing her of performing poorly as a supervisor, and issued her an unsatisfactory performance rating and notice of demotion. The complainant presented evidence and supporting testimony that she was treated less favorably because of her national origin and sex.

The Commission found harassment based on retaliation in *Michael S. v. Dept. of Army*, 2020000817 (September 8, 2021), where the complainant, a recreation assistant at an MWR facility in Wisconsin, was assigned to work outside for 12 weeks after he reported sexual harassment. And in *Judie D. v. VA*, 2020002526 (September 7, 2021), the Commission found the complainant was subjected to harassment based on oppositional activity for reporting a manager "expresses deep rooted resentment towards women in the workplace." After the complainant made the report, the management official threatened her, shouted at her, intimidated her, asked other employees about her whereabouts, charged her AWOL, and threatened her with disciplinary action. The responsible management official did not provide a statement for the supplemental investigation, and there was no indication why. Further, the agency did not gather other relevant information and speculated in the FAD, without evidence, as to the management official's motivations.

The Commission found the agency failed to establish an affirmative defense to a claim of race-based harassment in *Caroline B. v. VA*, 2020000978 (September 16, 2021), where the complainant worked as a registered nurse at a VA medical facility in Decatur, Georgia. Family members of a patient made racially charged statements and otherwise harassed her while she was working, including a patient's wife stating, "[my husband] is white and he comes first [regarding daily care]," "I can't wait for Trump to take office and get rid of all of y'all," and "all of y'all are liars." She further alleges that the patient's family members referred to complainant and other staff as "the help" or "house staff." The Commission found that the complainant was subjected to race-based harassment for months, that the incidents were sufficiently severe or pervasive to constitute actionable harassment, and the agency failed to protect her from the harassment. The Commission noted its prior precedent that an agency can be responsible for the acts of non-employees, if the agency knows or should have known and failed to take corrective action, including employer liability for sexual harassment by inmates towards staff in prison facilities, and where agencies run healthcare facilities and employees are subjected to harassment from patients or visitors.

I. HEARINGS (EEOC) AND AJ AUTHORITY

In *Estell L. v. USPS*, 2019001532 (June 9, 2021), the Commission found the AJ engaged in an abuse of discretion when the complainant's attorney requested to postpone the hearing because her father had recently passed away, and the AJ refused. The complainant withdrew her hearing request, as she felt she could not represent herself *pro se*. The Commission found that the AJ abused her discretion by refusing to postpone the hearing, as there was a showing of good cause, vacated the FAD and remanded the matter for a hearing.

Addressing requests for sanctions, in *Melissa H. v. DHS*, 2021000696 (November 10, 2021), the Commission found default judgment for a 37-day delay in transmitting the ROI to the complainant was too harsh, as there was no evidence of harm to the complainant. In *Willa B. v. VA*, 2020003273 (August 9, 2021), the complainant requested default judgment after the agency issued a final decision 451 days late, but the Commission found the complainant did not show how she was prejudiced by the delay and ordered a posting of notice and training to EEO personnel instead.

And in *Cher C. v. DHS*, 2020003445 (August 9, 2021), although the complainant sought default judgment for a deficient initial ROI, a deficient and untimely supplemental ROI, and issuing a final decision over one and a half years late, the Commission found the appropriate sanction was

> to order the Agency to: (1) analyze its performance in conducting timely and adequate EEO investigations and issuing timely final decisions in accordance with the Commission's regulations during this Fiscal Year and the previous two fiscal years, and to report its findings to the EEOC. In the event the Agency finds it is not in compliance with the Commission's regulations on EEO investigations and final decisions, the Agency is directed to propose to the EEOC a corrective plan of action; and (2) provide training to its EEO personnel who failed to comply with our regulations.

The Commission issued the same sanction for similar conduct in other cases against DHS: *Derrick P. v. DHS*, 2020003291 (August 9, 2021), *Gia M. v. DHS*, 2020002745 (August 9, 2021), *Kathlyn K. v. DHS*, 2020002630 (August 9, 2021), *Mac. O. v. DHS*, 2020002744 (August 9, 2021), and *Tammy S. v. DHS,* 2020003444 (August 9, 2021).

In *Horace A. v. SSA*, 2019000742 (July 8, 2021), the Commission found an AJ abused her discretion in ordering the agency pay $10,829 in attorney fees as a sanction for the agency's delay in completing an adequate investigation, as the agency's actions did not substantially prejudice complainant because he was still able to engage in discovery.

The Commission found that AJs abused discretion in dismissing hearing requests as a sanction against complainants in the following cases: *Lenny W. v. USPS*, 2019001259 (September 13, 2021) (where the AJ did not provide the complainant the opportunity to respond before dismissing the hearing request); *Mindy W. v. VA*, 2020003067 (September 2, 2021) (where the AJ failed to issue a show cause order, and the agency did not notify the complainant's counsel of the scheduled initial conference even though the agency was on notice of the representation, and the complainant refused to go forward with the conference without her designated counsel); *Howard P. v. USPS*, 2020001623 (August 9, 2021) (where the complainant did not appear for a scheduled initial conference, and in response to the show cause order, the complainant stated he had lost his job and was under a great deal of stress and did not have an attorney); *Tynisha H. v. USPS*, 2020000367 (July 28, 2021) (where the complainant, who was represented by a non-attorney representative, attempted to but did not comply with the AJ's order to supplement the record. The Commission noted that further development of the record should have been the agency's responsibility); *Laura G. v. USPS*, 2020001387 (July 7, 2021) (where it was unclear whether the complainant actually received the orders with which the AJ alleged she

did not comply); *Diedre A. v. VA*, 2020001309 (June 16, 2021) (where the complainant failed to timely submit a prehearing statement prior to the start of discovery, but the agency also failed to submit such a statement); *Edward W. v. SSA*, 2019005957 (April 15, 2021) (where the complainant did not appear for an initial conference and did not cure alleged deficiencies in his discovery responses in the timeframe set, which was prior to the end of discovery); *Paul F. v. DHS*, 2019005369 (February 25, 2021) (where the complainant missed a deadline to submit a prehearing submission because he was caring for his children, caring for his mother, and dealing with the aftermath of his mother's death); *Sylvester C. v. USPS*, 2019004212 (February 2, 2021) (where the complainant did not submit a prehearing submission because he thought he had already provided the requested information); and *Sofia W. v. Dept. of Treas*., 2019001779 (February 2, 2021) (where the complainant did not file a witness and exhibit list prior to the agency's filing of a motion for summary judgment as she did not have any additional witnesses or exhibits to proffer).

The Commission found AJs acted appropriately in dismissing a hearing request as a sanction in *Dinah L. v. Dept. of Army*, 2020003164 (September 21, 2021) (where the complainant repeatedly failed to cooperate in responding to discovery requests, despite an order to compel her cooperation) and *Anne F. v. VA*, 2020002183 (May 24, 2021) (the complainant failed to respond to the acknowledgment order or the order to show cause, and although she claims she never received either, there was no change in her contact information and her claims appeared disingenuous).

The Commission continues to address the extent to which agency counsel can be involved in EEO investigations in the aftermath of *Annalee D. v. GSA*, 0120170991 (October 10, 2018), *recons. grant*. 2019000778 (November 27, 2019). In 2021, the Commission found no evidence of improper intrusion in *Lino L. v. USPS*, 2020000541 (May 25, 2021), where the OGC Attorney participated solely in informal resolution talks during the counseling stage and in *Kylee C. v. Dept. of Army*, 2020001154 (April 22, 2021), where agency counsel's participation during a fact-finding conference was not improper because there was no evidence that agency counsel "directed, controlled, interfered with, or overruled the investigator."

J. LEGITIMATE NONDISCRIMINATORY REASONS (INADEQUACY OF)

The Commission found agencies failed to meet its burden of production in *Pamala L. v. VA*, 2021001021 (December 13, 2021), a nonselection case where the agency only provided a scoring matrix which did not contain any information about the selectee, and there were no affidavits from the panel members, notes from the interviews, or even a resume or application about the selectee to support his allegedly superior qualifications and in *Xavier P. v. USPS*, 2020002539 (September 7, 2021), where complainant was denied a nonscheduled (NS) overtime opportunity and although a supervisor provided a statement, he did not explain why other employees who did not engage in protected activity were allowed to work overtime, while the complainant was not.

K. RELIGIOUS DISCRIMINATION

The Commission in *Bryce A. v. DHS*, 2020001712, 2021001457 (July 29, 2021), found the agency had not met its burden to show that granting the complainant's request to work credit hours so that he could attend prayers at a mosque on Fridays posed an undue hardship. The Commission noted that the complainant had been allowed to work these hours from August until October 2018 without incident, that the complainant identified work that he performed during these early morning hours, including that he met with other team members who also arrived at work before 6:00 A.M.

And in *Merlin W. v. Dept. of Navy*, 2020002711 (September 2, 2021), the complainant worked as a health physicist at the agency's Radiological Controls Office in Yokosuka, Japan and requested a waiver from the requirement to obtain a respirator qualification because of a beard he kept for religious reasons. The Commission found that although the agency ultimately did not enforce the requirement for the complainant to obtain a respirator certification, the agency did deny his request for religious accommodation, and directed his return rights shortly thereafter. The Commission found evidence in the record that there were possible alternative accommodations, including using a full hood that sealed at the neck, torso, or shoulders, instead of the face.

L. REMEDIES

The Commission found the respective complainants in *Aileen C. v. USAID*, 2019004993 (August 2, 2021) and *Kyong L. v. USPS*, 2020003693 (July 21, 2021), were not entitled to back pay because they did not make efforts to mitigate damages and did not explain their lack of effort.

In *Alesia P. v. DOJ*, 2020001024 (June 14, 2021), the agency challenged an order to provide training for the Warden, Deputy Wardens, Captains, Lieutenants, and other management personnel, as well as the staff psychologist, human resources director and OIA investigators at the facility where the harasser and the complainant were employed, but the Commission found the ordered remedy appeared tailored to supplement the training provided at the facility and to prevent the recurrence of the discriminatory conduct.

M. REPRISAL/RETALIATION

The Commission found retaliation in *Karolyn E. v. DHHS*, 2021003151 (October 19, 2021), where a supervisor issued the letter of reprimand 17 days after learning of the complainant's EEO activity, and there was contradictory testimony as to why the decision was made to issue a written reprimand instead of verbal counseling. In *Terrance A. v. Dept. of Treasury*, 2020002047 (September 13, 2021), the Commission found that the complainant established the agency retaliated against him for his prior EEO activity when it failed to timely approve, respond to, or follow through with processing the complainant's leave requests; denied the complainant's request to telework; removed the complainant's ability to telework one day per week; and issued the complainant a counseling memorandum.

The Commission found *per se* retaliation in *Bert P. v. Dept. of Army*, 2020003846 (November 15, 2021) (where a supervisor told an EEO counselor that "employees should have to pay to file an EEO complaint and only get it back if and when they may prevail"); *Mike T. v. VA*, 2020004555 (November 10, 2021) (a supervisor held complainant at the worksite for two hours attempting to persuade him to retract a statement he made as a witness for another EEO complaint); *Tomeka T. v. Dept. of Treasury*, 2020000390 (June 15, 2021) (when the complainant was called into a meeting, "threatened and repeatedly asked to tell him that she would not file any further charges or allege retaliation and warned that her work conditions would suffer if she continued to pursue her EEO case"); *Michael L. v. Dept. of Treasury*, 2020003199 (May 19, 2021) (where a supervisor unlawfully interfered with the EEO complaints process when he accused the complainant of lying to the EEO office); *Jane H. v. Dept. of Air Force*, 2020003198 (May 19, 2021) (where a supervisor accused the complainant of throwing him and another manager "under the bus" by filing an EEO complaint); and *Renae L. v. DHHS*, 2020000428 (April 29, 2021), *recons. den.* 2021004022 (October 13, 2021) (where a third-level supervisor approached complainant to ask, "if you are a witness for [C1's] EEO complaint." When the complainant denied that she was a witness, the supervisor responded, "I did not think you would, because your mother raised you better than that").

N. SEXUAL ORIENTATION

The Commission released a series of decisions in 2021 finding harassment based on sexual orientation. In *Thomasina B. v. DOD*, 0120141298 (February 9, 2021), *recons. mod*., 2021002395 (June 9, 2021), the Commission found that the complainant was subjected to sex-based harassment related to her sexual orientation which rose to the level of unlawful sexual harassment, where once her supervisors learned of her sexual orientation, they reprimanded complainant for interacting with a coworker for work-related reasons, denied her request to adjust her work hours, reassigned her to another building, and made negative comments in her performance evaluation. A coworker also subjected the complainant to harassment by telling her many times at work that homosexuality was wrong, it went against her religious beliefs, she was going to hell, her children would grow up to be gay, she needed to be saved, and she would pray for her. In *Phyllis F. v. DHS*, 0120150799 (February 16, 2021), the Commission found the complainant was subjected to harassment based on her sexual orientation when a coworker told her, "you are never going to have a man in your life as long as you have those two dogs," he did not think same-sex couples should be allowed to get married, although "they can mess around and have sex and do what they want," and discussed the complainant's sexual orientation with the complainant's first-level supervisor.

In *Foster B. v. DHHS*, 2019005682 (April 12, 2021), the agency found that a subordinate employee made inappropriate comments when he repeatedly called the complainant, "faggot," and publicly disparaged him for being gay, but concluded that as there were only nine incidents in a 21-month period, the incidents taken as a whole were not sufficiently severe or pervasive to constitute harassment. The complainant appealed, and the Commission noted that the use of the word "faggot" is a sex-based epithet and the complainant established actionable harassment. In a case also discussed in the chapter on "Constructive Discharge," in *Silas T. v. Dept. of Air Force*, 2019003996 (May 24, 2021), the complainant, who worked as a nonappropriated fund employee at the Chili's restaurant located in the agency's facility at Kadena Air Base in Okinawa, Japan, established that he was subjected to harassment based on his sexual orientation from his supervisor who stated that an incident was "as fucked up like two boys kissing," and from a coworker, who made threats of bodily harm and called him a "faggot."

In *Lynne E. v. VA*, 0120170202 (June 17, 2021), the Commission found the complainant was subjected to harassment based on her sexual harassment when her supervisor told her he knew she was a lesbian because he looked her up online and found a letter to the editor where she identified herself as a member of the LGBTQ community, a coworker told her she should work in Fairbanks, Alaska because there were more gay people there, and told her she could not "pay the gay card," and told another coworker, "Wasilla [was] not ready for this," referring to the complainant's sexual orientation, and that the supervisor should not have hired her. And in *Felix R. v. NASA*, 2019002240 (September 7, 2021), the Commission found the complainant was subjected to harassment based on his sexual orientation when his first-level supervisor made a comment at an office retreat, "Complainant came out to me last week. I said, 'Oh really, Barry Manilow,'" as well as referring to him and other employee as the "gay mafia," and cautioning him about favoring one group over another when the NASA LGBT group raised concerns that a Pride month proclamation had not been issued, and pondered whether a candidate for a position was gay, saying "he's gay," and later, "at least bi."

O. TIMELINESS

The Commission addressed several instances where agencies could not demonstrate that employees had knowledge of timeframe to contact an EEO counselor because of COVID-19. In *Tania O. v. DHHS*, 2021001497 (May 25, 2021), *recons. den*., 2021003814 (December 23, 2021), the Commission found that the agency did not establish that the complainant knew of the regulatory time limit, noting that the complainant stated, "the process was complicated by the restrictions due to the COVID-19 pandemic, whose onset was virtually contemporaneous with her separation from Agency employment." In *Reid J. v. USPS*, 2021001336 (January 22, 2021), the Commission reversed an agency's dismissal of a formal complaint for untimely EEO counselor contact because the agency

> provided no documentation reflecting Complainant's actual or constructive knowledge of the 45-day limitation period. While the Agency provided evidence of EEO posters in its Richmond facilities, there is no documentation reflecting EEO posters at the Ohio facility where Complainant was employed. Moreover, Complainant asserts that the outbreak of the pandemic, and his lack of access to a computer, further impeded any efforts he may have had during the relevant period, to pursue the EEO complaint process.

In *Annice F. v. VA*, 2020004519 (February 2, 2021), the Commission excused the complainant's late filing of her formal complaint because "Complainant stated that she lost three siblings between April 3, 2020 and July 17, 2020, and, that between November 2019 and July 17, 2020, she assisted with the care of her terminally-ill sister and the sister's four children who were 18 and younger. In addition, Complainant stated that the circumstances were further complicated by COVID-19 closures and societal changes, and the fact that her sister lived in Georgia and she lived in North Carolina."

The Commission found the complainant made contact with someone reasonably connected with the EEO process when she reported to a supervisor that a physician sexually assaulted her in *Mozelle G. v. VA*, 2021003660 (September 13, 2021).

***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

***Babb v. Wilkie*, 140 S. Ct. 1168 (2020).**

In an 8-1 decision authored by Justice Alito, the Supreme Court held that the plain meaning of section 633a(a) of the Age Discrimination in Employment Act (ADEA) requires that personnel actions be untainted by any consideration of age. However, to obtain relief available for claims of age discrimination, including "hiring, reinstatement, backpay, and compensatory damages," a plaintiff must show that age was a but-for cause of the challenged employment decision, noting, "if age discrimination played a lesser part in the decision, other remedies may be appropriate." The Supreme Court's decision discussed each of the important terms of the statute to derive their plain meaning, including "personnel actions," "free from," "discrimination based on age," and "shall be made." The Supreme Court also addressed its prior decision in *Gross v. FBL Financial Serv.*, 557 U.S. 167 (2009), which held that plaintiffs were required to prove that "age was the but-for cause of the employer's adverse action," and noted that the ADEA's private and public sector provisions are "couched in very different terms." The Court noted, "We are not persuaded by the argument that it is anomalous to hold the Federal Government to a stricter standard than private employers or state and local governments. That is what the statutory language dictates, and if Congress had wanted to impose the same standard on all employers, it could have easily done so." To obtain remedies to address the alleged injury, the Supreme Court held that plaintiffs must demonstrate that age was a but-for cause of the employment outcome. Compensatory damages were included in the Supreme Court's decision as one of the elements of relief available under the ADEA, although the statute does not include compensatory damages as a remedy in age cases, and the Civil Rights Act of 1990 did not amend the ADEA to include awards of compensatory damages in age cases. The Supreme Court noted that a plaintiff who did not succeed in showing but-for causation could seek injunctive or other forward-looking relief.

***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).**

Note: The Supreme Court issued a decision in 2020 in *Babb v. Wilkie*, discussed above, which addresses the burden of proof for establishing age discrimination in federal sector complaints.

The Supreme Court determined that the plaintiff in a private sector charge of discrimination 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