

INTRODUCTION

This book is a summary of notable cases, laws, and guidance through December 2025. 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. Although this text focuses on the timeframe ending in December 2025, beginning in 2025 and continuing, there have been policy changes which impact the areas of federal sector EEO law and practice discussed herein. We are including here a few examples, but keep in mind this is a non-exhaustive list.

On April 23, 2025, the President issued an executive order titled, “Restoring Equality of Opportunity and Meritocracy.” This executive order directed the elimination of the use of disparate impact liability “in all contexts to the maximum degree possible....” The executive order also directed the chair of the EEOC to “assess all pending investigations, civil suits, or positions taken in ongoing matters under every Federal civil rights law within their respective jurisdictions, including Title VII of the Civil Rights Act of 1964, that rely on a theory of disparate-impact liability, and shall take appropriate action with respect to such matters consistent with the policy of this order.” This EO impacts the review of cases discussed in the chapter on “Disparate Impact.”

On May 15, 2025, the U.S. District Court for the Northern District of Texas found portions of the EEOC’s *Enforcement Guidance on Harassment in the Workplace* regarding sexual orientation and gender identity, referenced in this text in the chapter on [Laws, Regulations, and Guidance](#), to be unlawful. Subsequently, in January 2026, the Commission voted 2-1 to rescind this Guidance. Also in May 2025, the Acting Chair of the EEOC issued a Memorandum entitled, Ending Unauthorized Monetary Sanctions Against Federal Agencies. This included the direction that the EEOC will no longer impose monetary sanctions against federal agencies, which impacts the cases discussed in the chapters on [Attorney Fees](#) and [Sanctions](#). In February 2026, the Office of Personnel Management and the EEOC issued guidance and a frequently asked questions guide regarding telework accommodations for disabilities in the federal government.

Given these and other developments, it is critical that practitioners avail themselves of the latest information issued by the EEOC, the federal courts, and other relevant government entities.

I. HOW TO USE THIS BOOK

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. This *EEO Update* begins with an article that is our overview of recent developments in federal sector EEO law in 2025. We elected to include fewer 2025 cases than in prior years for a few reasons. The 43-day federal government shutdown from October 1 through November 12, 2025, along with other factors, resulted in the EEOC issuing fewer decisions overall. Further, in what appears to be an attempt to quickly dispense a backlog of cases, many of the decisions issued in 2025 contained considerably less analysis tailored to the case being addressed. These summary affirmations are of little use to practitioners, and we decided not to include many of them.

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 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 2025, we have also added a few summaries of EEO regulations and other guidance that we believe are helpful, and still relevant, that predate 2004.

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 lengthier 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 founding author 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 with 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.

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 subsequently changed its docketing structure again, and now is docketing cases beginning with the year, followed by a consecutive numbered appeal (for example, docket number 2025000067).

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

Pregnant Workers Fairness Act	PWFA
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, 2024, 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

In *Almeta W. v. USPS*, 2023000363 (March 20, 2025), the Commission affirmed that under its regulations, agencies are not required to pay fees for successful representation by non-attorney representatives.

In *Bauer v. VA*, 2022004496 (April 3, 2025), the Commission determined that an agency must pay attorney fees incurred by the complainant on addressing the agency’s mishandling of the complaint after an AJ awarded remedies, which necessitated the complainant seeking relief from the Commission.

The Commission issued several decisions in 2025 addressing appropriate hourly rates. In *Latricia P. v. VA*, 2023005251 (January 22, 2025), the Commission affirmed its position that it generally accepts the *Fitzpatrick/Laffey Matrix* to determine the hourly rates for attorneys in the Washington, D.C. area, and approved the hourly rates of \$807 for a senior attorney and \$553 for an associate attorney pursuant to that matrix. The Commission rejected attempts by attorneys outside the Washington, D.C. area to claim *Fitzpatrick/Laffey* rates in *Cletus W. v. VA*, 2023004987 (May 30, 2025) and *Bryce A. v. Dept. of Army*, 2023000935 (September 29, 2025).

The attorney in *Mirtha H. v. USDA*, 2023000078 (March 10, 2025), failed to submit a sufficient fee petition supporting work of 30.5 hours such that legal fees were denied entirely. However, in *Latricia P. v. VA*, 2023005251 (January 22, 2025), the Commission found the agency improperly applied the requirements for submitting a fee petition by denying hours claimed by an associate attorney who did not submit a sworn declaration. The Commission noted that only the attorney of record must submit an affidavit.

Addressing across-the-board reductions, the Commission reduced one from 60% to 40% in *Chere S. v. USPS*, 2023000107 (May 19, 2025), where the claims for which the complainant did prevail were more significant than the claims on which she did not prevail, and in *Lorraine D. v. DHS*, 2023002521 (June 5, 2025), the Commission affirmed a 75% across-the-board reduction where the complainant only prevailed on one claim of *per se* reprisal out of ten raised claims.

Finally, in *Clarine L. v. Dept. of Transp.*, 2024001327 (March 24, 2025), the Commission ordered the agency to pay interest on attorney fees given the “extensive delay” of almost two years in responding to the fee petition, as well as costs incurred by the attorney to obtain compliance.

B. COMPENSATORY DAMAGES

Complainants who prevail on claims of discrimination but cannot provide evidence of substantial harm continue to receive minimal awards of nonpecuniary compensatory damages. In *Martina S. v. SSA*, 2023001106 (May 19, 2025), \$1,000 was appropriate for a complainant who only submitted an unsworn impact statement regarding her harm relating to a denial of telework. In *Mirtha H. v. USDA*, 2025001633 (March 19, 2025), the Commission agreed \$1,500 was proper where the majority of evidence presented by the complainant related to claims for which no discrimination was found. In *Krysten M. v. USPS*, 2023003262 (April 14, 2025), the Commission affirmed \$1,500 as appropriate where the complainant only expressed inconvenience and mental anguish as a result of being denied a proper area to express breastmilk on two occasions. In *Valerie L. v. USPS*, 2023003064 (April 2, 2025), the Commission agreed with the agency that \$5,000 was appropriate based on the complainant’s own affidavit describing harm. And in *Tressa L. v. Dept. of Air Force*, 2023004156 (April 23,

2025), the Commission increased an In *Larraine D. v. DHS*, 2023002521 (June 5, 2025), the Commission affirmed \$5,000 for harm relating to management pressuring the complainant about whether she was going to file a formal EEO complaint.

Addressing claims of damages for harm relating to unlawful medical disclosures, the Commission affirmed an award of \$2,000 in *Judson G. v. DOD*, 2023002881 (March 6, 2025), and increased an award from \$2,500 to \$5,000 in *Mary B. v. Dept. of State*, 2023001449 (June 3, 2025).

Moving to awards up to \$10,000, the Commission: increased an award from \$1,200 to \$6,000 in *Jacquetta C. v. VA*, 2023003054 (April 14, 2025), where the complainant and her children, coworkers and hairdresser described the harm she suffered; affirmed an award of \$8,000 in *Tommie R. v. EPA*, 2023001389 (January 8, 2025), where the complainant did not provide anything beyond his own statements that his preexisting conditions were exacerbated due to the agency's actions; and affirmed an award of \$10,000 where the complainant's preexisting conditions were likely aggravated, but the evidence presented by the complainant focused on documenting harm relating to incidents outside of the retaliation at issue.

In the up to \$50,000 range, all cases involved failure to accommodate disabilities. In *Ilesha P. v. DHS*, 2024000803 (July 1, 2025), the Commission increased an agency's award from \$4,000 to \$15,000 to compensate him for the 15 months he did not receive accommodation; in *Barney G. v. SSA*, 2023001792 (June 3, 2025), the Commission affirmed \$30,000 for a complainant where his wife testified he was irritable, angry, and sullen due to not being accommodated; and in *Cletus W. v. VA*, 2023004987 (May 30, 2025), the Commission affirmed \$44,845 in nonpecuniary compensatory damages where the complainant submitted statements from himself, his wife, and his friend as to the harm he suffered, which included financial stress, exacerbation of his preexisting PTSD, increased hypertension, stress, anxiety, suicidal ideations, depression, withdrawal from social situations and family, marital discord, loss of trust, embarrassment, hardship, inconvenience, and financial distress.

Addressing awards up to \$100,000, *Ileana R. v. DHHS*, 2023005296 (July 14, 2025), the Commission affirmed \$55,000 to a complainant subjected to sexual harassment who was a "shell of her former positive, outgoing and social" self. The Commission declined to increase the award, noting intervening causes of harm and lack of medical documentation for a portion of the relevant timeframe. In *Chere S. v. USPS*, 2023000107 (May 19, 2025), the Commission affirmed an AJ's award of \$60,000 in nonpecuniary compensatory damages to a complainant who prevailed on a claim of sexual harassment and presented her own affidavit and hearing testimony, as well as testimony of a coworker in support of her damages. And in *Bryce M. v. VA*, 2023002874 (March 10, 2025), the Commission increased the agency's award from \$35,000 to \$70,000 based on evidence from the complainant, his wife, mother, and stepfather about harm relating to his failure to receive accommodation for his disability.

Finally, in awards surpassing \$100,000: in *Latricia P. v. VA*, 2023005251 (January 22, 2025), the Commission increased the agency award from \$80,000 to \$110,000 based on harm described by the complainant, her boyfriend, her aunt, two coworkers, and her doctor. In *Oda H. v. DHHS*, 2022000945 (April 2, 2025), the Commission increased an AJ award from \$75,000 to \$120,000 based on evidence from the complainant, his nephew, and his daughter due to the life changes caused by the agency's actions, which included anxiety, exacerbation of PTSD-related symptoms, hoarding, and weight gain. In *Lachanda Sears v. DOJ*, 2024000703 (March 24, 2025), the Commission affirmed an AJ's award of \$142,141.67 in nonpecuniary compensatory damages based on statements of harm from the complainant, her former spouse, sister, friends, and colleagues. The complainant also provided documentation from her mental health care provider.

The agency succeeded in establishing a good faith effort defense such that it did not have to pay compensatory damages in *Carey G. v. Dept. of Air Force*, 2022003217 (May 22, 2025).

C. DISABILITY DISCRIMINATION

The complainant in *Elroy S. v. SSA*, 2024001446 (February 10, 2025), worked as an ALJ and could not establish that the agency erred in denying his request to telework full-time as a reasonable accommodation, as conducting in-person hearings was found to be an essential function of his position.

In *Melvin C. v. VA*, 2022004039 (June 5, 2025), the complainant, Recreational Assistant, Tai Chi Qi Gong Instructor, GS-06 with a veterans' hospital, did not succeed in demonstrating that the agency was required to provide him with an assistant so he could focus on teaching with his disabilities, as employers are not required to provide accommodations of choice.

The Commission addressed several cases involving requests for full-time telework, an accommodation we expect to see continued litigation regarding, given the return to work orders and other guidance being issued. In *Summer F. v. SSA*, 2024003070 (July 29, 2025), the Commission found that a claims technical expert's position required in-person duties, and that the agency provided effective alternative accommodations in response to her request for full-time telework. In *Dani D. v. VA*, 2023000910 (September 29, 2025), the Commission determined that a social worker need to be in the office to meet face-to-face with veterans and the offered alternative accommodations of three days per pay period of telework, a flex tour, personal protective equipment, a mobility scooter, an office with direct access to a restroom, a larger space for appointments with veterans to allow social distancing, and required masking for veterans meeting with the complainant were effective.

The burden to establish that it is more likely than not that a vacant, funded position for which the complainant is qualified to be reassigned to as a reasonable accommodation is on the complainant. In *Clelia W. v. DOD*, 2023005027 (February 26, 2025), the complainant was not able to meet this evidentiary burden, and the Commission affirmed the finding of no discrimination.

The Commission found that the agencies in *Sade M. v. SSA*, 2024001240 (March 10, 2025) and *Reuben D. v. VA*, 2024002240 (June 2, 2025), *recons. den.*, 2025003398 (December 15, 2025), properly established undue hardship defenses in response to requests for accommodation from the respective complainants.

D. HARASSMENT (NOT SEXUAL)

As noted above, in 2026, the Commission voted 2-1 to rescind its Enforcement Guidance on Harassment in the Workplace.

In terms of decisions issued in 2025: In *Jene M. v. VA*, 2022004049 (January 8, 2025), the Commission found the complainant established the agency subjected her to harassment based on her sex, as well as reprisal, based on actions taken by her supervisor. The complainant had supporting statements from coworkers who found the supervisor was agitated, confrontational, and treated women differently. The agency was liable for the harassment because although it took some actions to address the matter, including not allowing the supervisor on the floor when the complainant was present for about two months, the record did not reflect that the agency took any disciplinary action to address the supervisor's harassing conduct.

However, in *Orville D. v. USPS*, 2022003408 (March 5, 2025), the agency was not liable for harassment caused by a coworker as it initiated an investigation, thereafter demoted the harasser, and reassigned her so she did not have further interaction with the complainant.

E. HEARINGS (EEOC) AND AJ AUTHORITY

In notable decisions regarding hearing procedures, in *Willa B. v. VA*, 2023000960 (September 29, 2025), the Commission discussed the agency's use of directed verdict at hearing, noting the Commission's regulations make no mention of a directed verdict or equivalent, and the Federal Rule of Civil Procedure only mentions jury trials, while an EEO hearing is tantamount to a bench trial. The Commission found that the AJ's grant of a directed verdict should be considered as a thorough bench decision on the merits, and found no reversible error.

F. JOINT EMPLOYER

The Commission addressed whether employees of contracting agencies had standing to file EEO complaints against federal government agencies, and found there was a lack of sufficient control to establish a joint employer relationship in *Doria R. v. Dept. of Energy*, 2025003959 (December 8, 2025). However, there was sufficient control such that the complainants had standing to proceed with formal complaints against the federal government in *Simone J. v. Dept. of Army*, 2023004500 (February 13, 2025) and *Scarlet S. v. DOD*, 2024003145 (April 14, 2025).

G. RELIGIOUS DISCRIMINATION

After the Supreme Court issued its decision in *Groff v. USPS*, 600 U.S. 447 (2023), those in the federal sector field expected that the EEOC would seek to issue decisions incorporating the revised definition of undue hardship as set forth in that decision. In 2025, the EEOC issued two such decisions on the same day.

In *Augustine V. v. VA*, 2023004016 (August 4, 2025), the Commission found the agency failed to provide the complainant with an effective accommodation for her religious practice related to her Muslim faith, specifically a compressed work schedule to allow her to attend Friday afternoon prayer service. And in *Andy B. v. FRBG*, 2023002014 (August 4, 2025), the Commission found that the agency engaged in religious discrimination when it denied the complainant's request for an exemption from the agency's COVID-19 vaccine mandate and subsequently terminated him. The agency did not provide sufficient evidence to support its assertion that granting the exemption would create an undue hardship. The Commission further found the agency subjected the complainant to harassment based on his religious beliefs, including that other employees made derogatory and coercive comments about his decision to forgo vaccination for religious reasons.

H. REMEDIES AND OTHER RELIEF

The Commission issued a few decisions addressing appropriate calculations of back pay awards. In *Oda H. v. DHHS*, 2022000945 (April 2, 2025), the agency unsuccessfully argued that the complainant should not receive back pay for a period of time she was on LWOP due to failure to mitigate by not tending to her health. In *Shanice C. v. DHS*, 2024001000 (April 2, 2025), the Commission addressed what the appropriate period of back pay should be to comply with an AJ's order which presumed the complainant would begin to receive disability retirement benefits in December 2022, but did not actually received them until January 2024. And in *Bill A. v. Dept. of Air Force*, 2023002089 (September 30, 2025), the Commission affirmed the AJ's exclusion of back pay for the time period the complainant was unemployed but not looking for work and the time after he voluntarily quit his job as he failed to mitigate his damages.

I. REPRISAL/RETALIATION

The Commission found agencies engaged in *per se* retaliation in: *Karan F. v. DHS*, 2021002312 (May 20, 2025) (making jokes to the complainant's coworkers about developing PTSD in response to work events, making comments questioning the complainant's PTSD diagnosis, and referencing the complainant's attendance at a congressional hearing regarding the agency's handling of allegations of harassment) and *Almeta W. v. USPS*, 2023000363 (March 20, 2025) (postmaster telling a coworker that the complainant's grievances were creating problems in the office).

Anyone looking for discussions as to whether oppositional activity is considered reasonable should review *Edwardo V. v. DOD*, 2021003546 (January 14, 2025), addressing claims of retaliation from a mathematics teacher by a principal, which included issuing him a letter of reprimand referencing the complainant's EEO activity.

And in *Allan L. v. USDA*, 2023004756, 2023004757 (January 8, 2025), the Commission found the complainant was subjected to retaliation when management did not respond to his inquiries regarding a position he applied for and the application process, as an employee was advised not to respond because the complainant had made informal counseling contact.

J. SECURITY CLEARANCES

Addressing whether claims of discrimination fall into the rubric of a security clearance determination, and therefore out of the Commission's jurisdiction, the Commission affirmed the dismissals of a formal complaints in *Diego A. v. Dept. of Navy*, 2024004957 (February 20, 2025) (where the complainant was challenging whether placing a loss of jurisdiction letter into the his security file after his termination was retaliatory) and *Sanda N. v. Dept. of State*, 2024004296 (January 13, 2025) (where the complainant was alleging disability discrimination when the security investigator asked questions about her disability as that addressed the substance of a security clearance investigation).

K. SEX (GENDER) DISCRIMINATION

In *Colleen M. v. USPS*, 2023000970 (September 29, 2025), the Commission

found no discrimination, but noted that if the case had been brought after the implementation of the Pregnant Workers Fairness Act, the result may have been different. The complainant had been sent home for violating the dress code by wearing leggings, but under the PWFA, a pregnant employee may be entitled to wear maternity clothes that might otherwise violate an employer's dress code as long as the variance does not impose an undue hardship on the employer.

And in *Kasie L. v. USPS*, 2023000616 (August 4, 2025), in another case pre-dating the PWFA, the Commission found that the agency violated Title VII and the Pregnancy Discrimination Act when the complainant was prohibited from using a conference room for lactation, and instructed to use the restroom for a period of two weeks.

In *Nancy C. v. USPS*, 2024004182 (January 8, 2025), a case applying the PWFA, the Commission found the complainant established she was subjected to coercion, intimidation, threats, or interference as she was required to fill out a form every time she took a comfort break or restroom break as an accommodation for her pregnancy. The Commission otherwise found that the agency did accommodate the complainant by allowing her to take such breaks.

L. SUMMARY JUDGMENT

The Commission found EEOC AJs erred in granting summary judgment in the following cases because of improper credibility determinations or underdeveloped records in *Melissa F. v. DOD*, 2023001547 (May 15, 2025); *Patrick S. v. DOD*, 2022004301 (April 14, 2025); *Margorie F. v. VA*, 2023002041 (March 6, 2025); *Tressa L. v. USPS*, 2024000229 (February 12, 2025); *Sharolyn S. v. USPS*, 2023005233 (January 21, 2025).

In federal court cases, in *Lui v. DeJoy*, 129 F.4th 770 (9th Cir. 2025), the Court of Appeals for the Ninth Circuit vacated a grant of summary judgment to the U.S. Postal Service on the plaintiff's claims of disparate treatment, as well as her harassment claim. However, summary judgment on the retaliation claim was upheld. Of note in this decision, the district court found that Lui failed to establish a *prima facie* claim of discrimination because she did not show that she was treated less favorably than similarly situated employees. The Court of Appeals took the opportunity to address this "fourth element" of a *prima facie* claim, noting, "Showing such differential treatment is not an additional requirement under the fourth element of *McDonnell Douglas*. It is, instead, an alternative means of satisfying the fourth element. We therefore hold that Lui has satisfied the fourth element of the *prima facie* case. She was removed from her position as Shelton Postmaster and demoted to the position of Roy Postmaster at a lower salary. She was replaced by a white man. Those circumstances give rise to an inference of discrimination, and that is all she needs to show to satisfy the fourth element."

And in *Rosado v. Sec'y, Dep't of the Navy*, 127 F.4th 858 (11th Cir. 2025), the Court of Appeals for the Eleventh Circuit addressed what a plaintiff must demonstrate in order to survive summary judgment in a federal sector case noting, "the texts of the federal-sector provisions of Title VII and the Age Discrimination in Employment Act ('ADEA') don't require a plaintiff to prove that unlawful discrimination was a but-for cause of adverse employment action. And because a federal employee need not prove but-for causation, we've said that, to survive summary judgment, a federal employee doesn't have to satisfy the three-step *McDonnell Douglas* framework. That's the framework we often use to assess but-for causation on circumstantial-evidence claims of discrimination under the private-sector provisions of Title VII and the ADEA. Rather, a federal employee must show only that unlawful discrimination 'play[ed] any part' in the challenged employment decision."

M. TIMELINESS

The Court of Appeals for the Ninth Circuit issued an interesting decision addressing when the clock starts on statutory deadlines with regard to electronic transmission of Final Agency Decisions, which includes discussion of holdings in other circuits in *Asuncion v. Hegseth*, 150 F.4th 1252, 1256–59 (9th Cir. 2025). The Court of Appeals found that under the particular facts presented there, the plaintiff's attorney did not have effective notice of the nature of the FAD until he received by email a decrypted copy of it. As he filed suit in district court within 90 days of receiving the FAD his complaint was timely filed. The Court reversed the district court's grant of summary judgment and remanded the case.

And finally, in a warning to any attorneys who represent complainants with filing formal complaints, in *Harry E. v. USPS*, 2024002536 (April 15,

2025), the Commission affirmed the agency's dismissal of a complainant's formal complaint as the attorney representing the complainant improperly extended the deadline by two days for Christmas and New Year's Day during the 15-day filing period.

AGE DISCRIMINATION

I. PROOF OF AGE DISCRIMINATION A. IN GENERAL

Henry S. v. VA, 2019000301 (September 30, 2024).

Applying the standard set forth by the Supreme Court in *Babb v. Wilkie*, discussed below, the Commission found that the complainant, a part-time, fee-basis urologist at an agency's medical center in Fresno, California, established that age was a but-for cause of differential treatment in the decision-making process regarding the reduction in complainant's duties. Specifically, evidence in the record established that the chief of surgery harbored age-based discriminatory bias against complainant, including referring literature about older surgeons and expressing concerns about the complainant's surgical skills. However, the Commission further held that age was not the but-for cause of the ultimate decision to reduce the complainant's duties. Notably, the agency had hired three full-time salaried urologists and needed to assign them work before assigning work to fee-basis providers, as it was more cost effective. The Commission found that as age was not the but-for cause of the ultimate decision, complainant was only entitled to injunctive relief, and not to hiring, reinstatement, or back pay. The Commission ordered four hours of training, posting of notice, and consideration of discipline against the chief of surgery.

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.

Subsequent to the Supreme Court's decision, the district court granted summary judgment for the Secretary on Babb's sex and age discrimination claims. The case proceeded to trial on Babb's claims of retaliation and retaliatory harassment, and the jury returned a verdict for the secretary. Babb appealed the grant of summary judgment and the district court's jury instructions. In *Babb v. Sec'y, VA*, No. 23-10383, 2025 U.S. App. LEXIS 15820 (11th Cir. June 26, 2025), the Court of Appeals for the Eleventh Circuit affirmed the judgments of the district court.

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.

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.]

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.]

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.]

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.]

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 complainant 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.

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.]

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

The Commission affirmed the AJ’s decision, finding that the complainant, an aviation safety inspector, was not discriminated against on the basis

of age when he was decertified from inspecting B-727s and B-737s. The agency explained that the complainant was decertified because he was not scheduled for “currency” training in 2000, that budgetary constraints limited such training to employees serving as principal operations inspectors and assistant operations inspectors rather than geographic inspectors, such as the complainant, and the complainant failed to provide any evidence that the agency’s explanation was a pretext for age discrimination.

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

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

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

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

B. AGE DIFFERENCE EVIDENCE

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

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

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

[This case is also discussed in the “[Nonselection Claims](#)” chapter.]

***Davis v. USPS*, 01A54752 (November 7, 2005).**

The Commission agreed with the agency’s FAD, determining that a retired sales, service, and distribution associate failed to establish an inference of discrimination because she and the comparison employee were the same age. Complainant also failed to prove a *prima facie* case as to retaliation. The agency gave complainant an official discussion due to three unscheduled leave requests within a 90-day period. Complainant alleged disparate treatment on the basis of age and retaliation. In addressing the establishment of an inference of age discrimination, the Commission observed, “[w]hile there is no bright-line test for what constitutes ‘substantially younger,’ that term has generally been applied to age differences in excess of five years. See *Hammersmith v. SSA*, EEOC Appeal

No. 01A05922 (March 6, 2002).” As to retaliation, the Commission noted that “neither the passage of approximately twelve months between the protected activity nor the agency’s actions with respect to complainant’s work hours and work assignments give rise to an inference of retaliatory motive. We also note that nothing transpired subsequent to complainant filing her prior EEO complaint that would link to her instant complaint.”

***Grosjean v. First Energy*, 349 F.3d 332 (6th Cir. 2003), cert. den., 124 S. Ct. 2069 (2004).**

The Sixth Circuit Court of Appeals held that in the absence of direct evidence that the employer considered age to be significant, an age difference of six years or less between an employee and a replacement is not significant. The employee was replaced by another employee who was three years younger. The court made its determination after reviewing other decisions of other circuits and its own.

C. DIRECT EVIDENCE OF AGE DISCRIMINATION/ COMMENTS

***Barbara R. v. USDA*, 2022003131 (March 30, 2023).**

The Commission reversed an AJ’s finding of no discrimination after a hearing, and found that the agency subjected the complainant to disparate treatment and harassment based on her age and disability. The complainant worked as an SES-level Executive Officer and her supervisor repeatedly asked her when she was going to retire, told her she needed to get another job, and that he was going to eliminate her position and remove her staff. The supervisor also made disparaging comments regarding the complainant’s use of a scooter, which she used due to degenerative arthritis and a knee replacement. The Commission found that comments were frequent and constant, and the supervisor’s actions resulted in a tangible employment action, as the supervisor changed her duties and supervisory responsibilities, and the agency did not take any action to address the harassment by the supervisor. The Commission also found the complainant established pretext with regard to claims of disparate treatment.

[This case is discussed in more detail in the chapters on “[Disability Discrimination](#)” and “[Harassment \(Not Sexual\)](#).”]

***Geraldine G. v. USPS*, 0720140039 (June 3, 2016).**

[This successful claim of nonselection, where there was direct evidence of age discrimination, is discussed in section below, “[Nonselection Age Cases](#).”]

***Arroyo v. VA*, 0120121771 (July 11, 2012), recons. den., 0520120563 (January 25, 2013).**

The Commission reversed the FAD and concluded that the complainant presented direct evidence of age discrimination. The complainant, after retiring in 2005, decided to return to work and applied for positions with the agency the following year. The complainant was referred for consideration for the position of medical support assistant. The RO told the complainant’s colleague that he was “too old,” that she was seeking someone who would hang around a long time and that the complainant should enjoy his retirement. The RO selected an employee who had good performance appraisals. The complainant filed an EEO complaint and subsequently requested a FAD. The agency concluded that as the complainant could not provide any corroborating testimony of the conversation, the agency found that the complainant did not establish direct evidence of age discrimination and the agency articulated a legitimate, nondiscriminatory reason for its actions.

On appeal, the Commission concluded that the FAD erred because the complainant offered direct evidence that the RO made a statement that age was a motivating factor in the decision not to select the complainant. The Commission noted that the colleague provided an affidavit confirming the conversation, which the RO denied but failed to expand on any questions and the EEO investigator did not press the RO on the issue beyond asking the initial question. The Commission found that based on this evidence, the agency was liable for the complainant’s nonselection. The Commission noted that the agency had the opportunity to limit damages by demonstrating, through clear and convincing evidence, that it would have taken the same action even if it had not considered the discriminatory factor. The Commission found that the agency did demonstrate, through clear and convincing evidence, that the personnel action would have taken place absent discrimination because under the union agreement, first consideration must be given to internal candidates. As the selectee was

already an agency employee who had good evaluations and reputation for customer service, the Commission found that the agency would have taken the same action absent discrimination. The Commission ordered the agency to provide EEO training for the responsible management officials and consider taking disciplinary action against them. The complainant was not entitled to any relief.

[This case is also discussed in the “Evidence” chapter.]

Betz v. DHS, 578 F.3d 929 (8th Cir. 2009), cert. den., 130 S. Ct. 1911 (2010).

The Eighth Circuit Court of Appeals affirmed the district court with respect to Ms. Betz’s claims of discrimination on the basis of age and reprisal. Ms. Betz, for several years, was an employee of INS and eventually DHS. Over the course of that period, she received several desk audits and two grade-level upgrades. During one of these desk audits, she filed an EEO complaint. In 2003, Ms. Betz again requested a desk audit claiming that as a GS-7 she was performing the duties of a GS-11. When her supervisor refused her upgrade request, Ms. Betz resigned. She proceeded to file a claim contending that her supervisor refused to upgrade her due to her age and in retaliation for her previous EEO complaint. Ms. Betz also asserted that she was constructively discharged. The district court found against her on all claims.

She appealed on all issues arguing that the district court erred with respect to the age discrimination claim. The Eighth Circuit held that an employer’s false explanation may support, but does not require, an inference of discrimination. Under such a standard, the court gave due deference to the district court and decided not to disturb its ruling. The Eighth Circuit also agreed with the district court that a question posed by Ms. Betz’s supervisor, Mr. Cangemi, as to Ms. Betz’s retirement plans did not allow for an inference of discrimination. The court specifically noted that “[r]easonable inquiries into an employee’s retirement plans do not permit an inference of age discrimination” and that the district court’s failure to infer bias from Mr. Cangemi’s question could not be clear error. The Eighth Circuit also disagreed with Ms. Betz’s argument that the district court’s approach to determining which employees were similarly situated was too restrictive. The district court found her comparators were not similarly situated as they had different supervisors. The Eighth Circuit found no basis for disturbing the district court’s ruling and concluded that Ms. Betz’s evidence of age discrimination was, “at best, weak.”

Ms. Betz also argued that the district court’s erroneous exclusion of evidence prevented her from showing that her supervisor discriminated against her based on her age. The court did not put much stock in this argument, finding that the district court did not exclude the evidence that Ms. Betz, likely, did not offer. The Eighth Circuit further found that the materials to which she referred contained little or no evidence relating to the question of discriminatory animus.

The Eighth Circuit also concluded that she did not make out a case of constructive discharge. Though she was given an increased work load, the conditions were not objectively intolerable in light of the employee’s salary. The court “concluded that the District Court therefore did not err in finding that her working conditions were not objectively intolerable.”

Finally, the court affirmed the district court’s decision that Ms. Betz failed to contact an EEO counselor within 45 days of the date of the matters alleged to be retaliatory. She argued that her claim was not time-barred because it relied on a continuing violation that did not end until after September 21, 2003. The court noted that the continuing violation doctrine applies in hostile work environment claims. As she did not allege such a claim in the instant case, this doctrine was not applicable.

Aponte v. SSA, 0720080060 (March 31, 2009), recons. den., 0520100209 (March 18, 2010).

The Commission affirmed the AJ’s finding of discrimination on the basis of age (69) when complainant did not receive a Recognition of Contribution award (ROC) for FY 2006 and on the basis of his prior protected activity (pursuit of the instant complaint) when he was denied a request for limited assignment of duties. The AJ found that before the award nominations, the hearing office director, also complainant’s second-level supervisor, made age-derogatory comments about complainant during a grievance meeting. The AJ also found that, during their testimony, management witnesses all gave vague and subjective reasons for not giving complainant an ROC. The AJ noted that in his testimony, the hearing office director testified that

at the grievance meeting he treated complainant more severely because of his age so that the younger employees would respect him. Regarding the retaliation claim, the AJ found that in March 2007, complainant, in reliance upon Article 7, Section 8 of the CBA, requested an adjustment to his work assignments for medical reasons and that the reasons given by management were not credible. In particular, the AJ found that the agency’s action in denying the request was a weak attempt to hide a discriminatory motivation to prevent the complainant from invoking his privileges’ under the CBA. The Commission did, however, reverse an award of compensatory damages, holding that federal sector complainants are not entitled to compensatory damages in cases brought solely under the ADEA. This includes claims of reprisal where the prior protected activity was solely ADEA-related.

[This case is also discussed in the “Compensatory Damages.”]

Hamer v. USDA, 0720080061 (January 6, 2009).

The Commission rejected an agency appeal and affirmed the AJ’s finding of discrimination in violation of the ADEA when the complainant, the director of the agency’s Area One for Virginia, was subjected to various actions, including not being allowed to participate on a task force that would impact her Wytheville, VA office, removing from her supervision the Wytheville office, and reassigning her from the agency’s Lebanon, VA office to its Lynchburg, VA office, 150 miles from her home. The AJ dismissed complainant’s claims of sex and reprisal, but found sufficient evidence of age discrimination because complainant’s supervisor targeted older employees. The AJ noted that the supervisor utilized a retirement-eligible list to make reductions in the agency’s Virginia offices, attempted to force complainant to retire, conducted an unfair review of complainant’s office by hand-picking files to be scrutinized during an internal review by the state, “launched an unjustified and bizarre investigation against complainant without informing her; and temporarily removed complainant from supervision of the Wytheville office.” In concluding that the AJ’s decision was supported, the Commission deferred to the AJ’s credibility findings that the complainant’s supervisor was evasive regarding the reason he sent human resources to conduct an investigation in the Wytheville office. The Commission concluded:

Here, we find there is substantial evidence in the record to support the AJ’s finding of discriminatory intent on the basis of complainant’s age. We note that the AJ placed a substantial amount of weight on his credibility determinations and we defer to his determinations as objective evidence of the record does not contradict them.

Bedynek v. VA, 0720060054 (February 20, 2008).

The complainant proved that he was discriminated against on the basis of age, when he was not selected for a VRA counselor position. There were age-based comments about the selectee, such as that she had “energy,” was “young” and “flexible,” came from the “younger generation,” and could speak with the “talk of new veterans.” There was also a remedy issue where the agency argued that the complainant would not have been selected anyway (two other applicants had scores as high or higher). However, the agency failed to prove by clear and convincing evidence that the complainant would not have been picked absent the discrimination.

Tellez v. Dept. of Army, 01A40009 (May 26, 2004), vacated by 05A41133 (March 18, 2005)

The Commission reconsidered on its own motion and vacated a prior decision and issued a new decision which reversed the AJ and found direct evidence of age discrimination where the SO “espoused a policy of hiring ‘younger blood’ within the agency,” rejecting the agency’s assertion that it was engaged in legitimate succession planning. The complainant, a GS-13 Missile Engineer, alleged that he was discriminated against because of his national origin, age, and prior EEO activity when he was not selected for promotion to three GS-14 supervisory positions. An AJ and the Commission’s prior OFO Decision found no discrimination. The full Commission, in this decision, reversed the AJ and OFO, finding age discrimination. Although there were legitimate reasons for not selecting complainant on two of the three nonselections, and the Commission found no national origin or reprisal discrimination. There was also direct evidence of age discrimination. This included: senior management considered age as part of their “succession planning” for the future of the agency; a manager stated that younger people are more intelligent and technologically savvy; the selections at issue considered succession plans for the future of the agency as most of the agency’s senior level managers were retirement-