

FACTS¹

The record reflects that Complainant worked as an Inventory Management Specialist, in the Business Office, Financial Management Department, at the agency's Federal Correctional Complex (FCC) in Butner, North Carolina. Her first level supervisor was Mary Doyle [Supervisor] (Caucasian), and her second level supervisor was Marie Wynia [Administrator] (Caucasian). As the Associate Warden, Michael Sepanek (Caucasian) was her third level supervisor. In 2008, Art Beeler (Caucasian) was the Warden of FCC Butner. When he retired from the agency, Sara Revell (Caucasian) became the Warden in January 2009.

While working at FCC Butner in 2006, Complainant filed an EEO complaint. TR at 61-62. At the hearing, Complainant testified that she was a witness in another EEO matter; however, she was not able to give the date.

A. On July 29, 2008, Administrator allegedly threatened to lower the communication element on Complainant's performance evaluation for failure to attend a recall meeting.

On July 28, 2008, Administrator sent a reminder email to all employees in the Business Office to attend the Complex Staff Recall meeting on July 29, 2008. ROI at 317. Complainant, Supervisor, and other Business Office staff did not attend the recall meeting. Administrator spoke with Supervisor about the staff's non-attendance, and Administrator stated that all staff was expected to attend. Supervisor conveyed the message to her staff.

In response, Complainant contacted Administrator. She stated staff was not required to attend recall meetings. She cited an agency feedback response in which a warden stated, "Although staff are encouraged to attend, attendance at Staff Recalls is not mandatory." ROI at 318. Administrator stated that Associate Warden wanted staff to attend recall meetings in order to enhance communications throughout FCC and that it was her expectation that her staff attend. When the two continued to disagree about the matter, Administrator stated that failure to attend the recall meetings could be a part of the communications element in Complainant's performance rating. TR at 161.

Complainant perceived Administrator's statement as a threat to lower the third element for communications on her performance evaluation.

On August 4, 2008, the union submitted an electronic mail message to Warden Beeler and Administrator (with carbon copies to union representatives, Complainant, and other African-American employees in Financial Management). Administrator forwarded the message to Associate Warden.

In the message, the union charged Administrator with creating a hostile work environment for people of color in Financial Management. Specifically, the union cited Complainant as well as two other African-American female employees in the department. The union claimed that Administrator discriminated against each of these women with regard to attendance at the recall

¹ In reaching the decision, all evidence, including the Report of Investigation [Hereinafter ROI], Pleadings, Hearing Transcripts [Hereinafter TR], exhibits, and all other documents were reviewed and considered.

meeting, training, and abusive language. The message included a written complaint by co-worker Brenda Glasper (African-American) about her hostile work environment experiences in Financial Management. TR at Complainant's Exhibit 1.

The union and agency officials met to discuss the matter. No further action occurred.

For the rating period April 1, 2008, through March 31, 2009, Complainant received an "Exceeds" rating for the communications element of her performance evaluation. ROI at 177.

B. On August 15, 2008, the agency required all employees in the Financial Management Department to take leave to attend a retirement party.

On August 15, 2008, the agency held a retirement party for an employee (Marie Hobgood). Complainant was out of the office that day and did not attend the party. For those employees in the Financial Management who attended the party, Administrator required them to take leave. Administrator cited a feedback response in which a warden stated,

Non-BOP events (such as baby showers, retirement parties, etc.) scheduled during normal duty hours require that a staff member attend during their 30-minute, duty free lunch period. If the event is scheduled for more than 30 minutes, the attending staff must request and receive approval for leave from their supervisor.

ROI at 320.

In an email to Warden Beeler, Complainant questioned if the department should charge leave for a retirement function at the institution if it lasts more than thirty minutes. Warden Beeler responded,

Technically leave is supposed to be used after 30 minutes. However, I allow supervisors the discretion of not charging leave as long as the celebration does not go much over an hour. After that, I have advised supervisory they need to look at charging leave and to make sure that they treat everyone in their department the same.

ROI at 325. In response, Complainant stated that no other department was required to submit leave to attend retirement functions at the institution and that Administrator was retaliating against Financial Management because they did not attend the recall meeting. ROI at 325. Warden Beeler offered to meet with Complainant to discuss the matter further; however, Complainant refused. She responded, "If you have elaborated all that you are going to on the subject, what is the point in meeting?" and "I see as usual, this is going nowhere. Thanks, but no thanks." ROI at 324.

At a later date, Warden Beeler decided to credit leave back to the staff who attended the retirement party.

C. On February 4, 2009, Complainant received notice that she was being investigated for use of profanity based on her statement to her first line supervisor, "I should have told him to kiss my black ass."

On January 7, 2009, Complainant and Associate Warden discussed via electronic mail a situation regarding Complainant's demeanor towards another division employee. Associate Warden told her, "[Complainant] this is not how we do business with other departments." ROI at 348. Complainant responded, "I always work as a team but I do not intend to beg them to pick up truck that they wanted." ROI at 348.

When Complainant told Supervisor about the situation, she further commented, "I should have told him to kiss my black ass."

Later, Supervisor informed Administrator about Complainant's comment. Administrator instructed her to write a memo about the "black ass" comment. Supervisor memorialized the comment. In the same memo, Supervisor also noted that Lt. Nancy Oberman (Caucasian) also made a profane statement to her. According to Supervisor, Lt. Oberman stated, "[I] don't give a flying fuck about the Augmentation Schedule." TR at Complainant's Exhibit 7.

Administrator forwarded the memo to Warden Revell. Warden Revell referred Complainant's comments for investigation. On February 4, 2009, Complainant learned that the agency was investigating her for unprofessional conduct when she made the "black ass" comment. TR at Agency's Exhibit 5.

Following the investigation, the agency sustained the charge of unprofessional conduct.

Believing that she was a victim of discrimination, Complainant contacted an EEO Counselor. She claimed that the agency discriminated against her based on race and in reprisal. Complainant stated that Administrator created a hostile work environment for minorities with regard to the recall meetings, leave procedures, and investigations. Also, she stated that Administrator and Associate Warden stopped speaking to the minorities in the office; yet, they freely laughed and conversed with the Caucasian employees. Finally, Complainant stated that Caucasian employees used profane language; however, they were not investigated.

At an unidentified time, Complainant told Administrator not to talk to her unless it was work related. TR at 62.

On June 29, 2009, Administrator issued Complainant a Notice of Proposed Suspension for Three (3) Calendar Days for unprofessional conduct. Specifically, Administrator stated that Complainant made the "black ass" comment to staff and that such a comment was unprofessional. TR at Complainant's Exhibit 2.

Complainant responded to the Notice. Several African-American and Caucasian employees in the Financial Management department signed statements that inappropriate language was used frequently in the department and that Administrator was aware of such behavior. TR at Complainant's Exhibit 3. In fact, co-worker Glasper stated that she informed Administrator that

another co-worker, Ann Neal (Caucasian), used abusive, foul, and unprofessional language towards her, that Administrator told her not to make a big deal of it, and that the agency did not investigate the matter further. TR at Complainant's Exhibit 4.

The agency's Program Statement 3420.09 requires agency employees to report violations of the Standards of Conduct to the appropriate authorities. ROI at 352 and 357. Specifically,

An employee may not use profane, obscene, or otherwise abusive language when communicating with inmates, fellow employees, or others.

ROI at 359.

The record does not reflect that the Administrator notified Lt. Oberman's supervisor about her use of profanity, that Warden Revell referred Lt. Oberman's comments for investigation, or that the agency otherwise investigated Lt. Oberman's use of profanity. Nor does the record reflect that Administrator referred co-worker Neal for investigation of her unprofessional conduct or inappropriate language.²

On August 26, 2009, Warden Revell advised Complainant that she would not take any action on the Notice of Proposed Disciplinary Action. TR at Agency Exhibit 11.

Subsequent to this complaint, Complainant testified that she has been investigated on two additional occasions. Also, she stated that she feels sick to her stomach when she comes to work, that she is very suspicious, and that she has experienced high blood pressure. As a result, Complainant has taken approximately 204.15 hours of annual leave and 163.5 hours of sick leave. TR at Complainant's Exhibit 12.

However, during *voire dire* of her medical records, Complainant acknowledged that she suffered from extremely high blood pressure prior to the incidents. Although she claimed that the condition was being managed and that she felt good (TR at 35), the medical records reflect that Complainant had extremely high blood pressure, pre-diabetes, a kidney condition, and sleep disturbances prior to the incidents. Further, she testified that, over time, she took approximately five to nine medications to manage her conditions. R at 48. In addition, Complainant testified about a personal tragedy that affected her family in the summer of 2009 and the stress of that situation on her.

Similarly, her husband, Reonard McFadden, testified that Complainant suffered from stress, headaches, and sleeplessness as a result of the agency's actions. With regard to his wife, he stated that "she is not real fun to be around." TR at 81.

In response to Complainant's claims, the agency stated the following. First, the agency stated that Administrator did not lower Complainant's communications element on her performance evaluation. The agency stated that attendance at the recall meetings were expected to enhance

² At an unidentified date in 2009, co-worker Glasper filed an EEO complaint regarding the hostile work environment created by co-worker Neal. At that time, the EEO office investigated the claim of hostile work environment. TR at 80.

communication of issues throughout FCC Butner, and that such an expectation was reasonable. Secondly, the agency stated that the agency enforced the 30 minute leave procedure was enforced applicably to all staff in Financial Management. The feedback response notified employees that they would need to take leave for events lasting longer than 30 minutes. And Associate Warden applied the same procedures to all staff in the departments that he supervised. After Complainant's raised concerns, Warden Beeler credited the leave to the affected staff (which did not include Complainant). Next, the agency stated that the agency was legally responsible for investigating inappropriate statements of a racial nature made by employees. Specifically, the agency stated that Complainant exhibited unprofessional conduct of a profane racial nature when she made the "black ass" comment about Associate Warden. Further, the agency stated that Complainant was not disciplined although the agency sustained the charges.

In addition, the agency stated that Complainant's contact was untimely with regards to the recall meeting and leave issues. Specifically, the agency stated that these events occurred on July 29 and August 15, 2008, respectively. In that Complainant did not contact an EEO Counselor until February 4, 2009, she failed to raise these issues with an EEO Counselor within the 45 day time period.

APPLICABLE LAW

I. TIMELINESS

EEOC Regulation 29 C.F.R. § 1614.107(a)(2) states that the Agency shall dismiss a complaint or a portion of a complaint that fails to comply with the applicable time limits contained in § 1614.105, § 1614.106 and § 1614.204(c), unless the Agency extends the time limits in accordance with § 1614.604(c).

EEOC Regulation 29 C.F.R. § 1614.105(a)(1) provides that an aggrieved person must initiate contact with an EEO Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of a personnel action, within 45 days of the effective date of the action. EEOC Regulation 29 C.F.R. § 1614.105(a)(2) allows the Agency or the Commission to extend the time limit if the appellant can establish that appellant was not aware of the time limit, that appellant did not know and reasonably should not have known that the discriminatory matter or personnel action occurred, that despite due diligence appellant was prevented by circumstances beyond his control from contacting the EEO Counselor within the time limit, or for other reasons considered sufficient by the Agency or Commission.

With regard to timeliness issues, the courts have delineated between discreet and non-discreet acts. Discreet acts are individual, separate, or distinct incidents. According to *Nat'l R.R. Passenger Corp, v. Morgan*, 536 U.S. 101, 114 (2002), discrete acts include "termination, failure to promote, denial of transfer, or refusal to hire." The Commission has interpreted this holding to require federal sector complainants to raise such issues with an EEO Counselor within 45 days of their occurrence. If a discrete act occurred before the 45-day filing period, then it will be untimely and unactionable.

In contrast, the Supreme Court has held that a hostile work environment claim is an amalgamation of incidents that collectively constitute one unlawful employment practice." *Id.* at 117. Unlike discrete acts, these indiscrete incidents that comprise a hostile work environment claim "cannot be said to occur on any particular day" and by their "very nature, involve repeated conduct." *Id.* at 115. Because a hostile work environment claim is comprised of various incidents, the entire claim is actionable if at least one incident occurred within the 45-day filing period.

II. STATES A CLAIM

EEOC Regulation 29 C.F.R. § 1614.107(a)(1) states that the Agency shall dismiss a complaint or a portion of a complaint that fails to state a claim under § 1614.103 or § 1614.106(a).

The Commission's federal sector case precedent has long defined an "aggrieved employee" as one who suffers a present harm or loss with respect to a term, condition, or privilege of employment for which there is a remedy. *Diaz v. Department of the Air Force*, EEOC Request No. 0593 [049] (April 21, 1994). In a hostile work environment claim, a complainant must show events, if proven to be true, were sufficiently severe or pervasive to alter the conditions of her employment. *See Cobb v. Department of the Treasury*, Request No. 05970077 (March 13, 1997).

The Commission has held that merely conducting an investigation into purported improper or illegal conduct does not cause any injury without more, for example, resulting disciplinary action. *Shelly v. Dep't of the Treasury*, EEOC Appeal No. 01996655 (Oct. 27, 2000). It has also applied this rule to the initiation of an internal investigation. *Martin v. Dep't of Justice (Federal Bureau of Prisons)*, EEOC Appeal No. 01A32934 (Sept. 17, 2003). The Commission has held that an employee cannot use the EEO complaint process to lodge a collateral attack on another proceeding. *See Wills v. Dep't of Defense*, EEOC Request No. 05970596 (July 30, 1998); *Kleinman v. U.S. Postal Service*, EEOC Request No. 05940585 (September 22, 1994); *Lingad v. U.S. Postal Service*, EEOC Request No. 05930106 (June 25, 1993).

However, the Commission has a policy of considering reprisal claims with a broad view of coverage. *See Carroll v. Dep't of the Army*, EEOC Request No. 05970939 (April 4, 2000). Under Commission policy, claimed retaliatory actions which can be challenged are not restricted to those which affect a term or condition of employment. Rather, a complainant is protected from any discrimination that is reasonably likely to deter protected activity. See EEOC Compliance Manual Section 8, "Retaliation," No. 915.003 (May 20, 1998), at 8-15; *Carroll*, EEOC Request No. 05970939.

III. BURDENS

In any proceeding, either administrative or judicial, involving a claim of employment discrimination, it is the burden of the Complainant to initially establish that there is some substance to his claim. In order to accomplish this burden, Complainant must establish a *prima facie* case of discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Hochstadt v. Worcester Foundation for Experimental Biology, Inc.*, 425 F. Supp. 318 (D. Mass. 1976), *aff'd* 545 F.2d 222 (1st Cir. 1976) (applying *McDonnell Douglas* to retaliation cases);

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

Under these standards, Complainant has the initial burden of establishing a *prima facie* case. The burden shifts to the agency to articulate a legitimate, nondiscriminatory reason for its employment decision. In this regard, the agency need only produce evidence sufficient “to allow the trier of fact rationally to conclude” that the agency’s action was not based on unlawful discrimination. Complainant then has the ultimate burden of demonstrating, by a preponderance of the evidence, that the legitimate, nondiscriminatory reason the agency articulated was not the true reason but was merely a pretext for discrimination. In making such a showing, subjective belief or speculations as to motive, intent, or pretext are not sufficient to satisfy Complainant’s burden. *Matsushita Elec. Indus. Co v. Zenith Radio Corp.*, 475 U.S. 574 (1986). Although the burden of production may shift, the burden of persuasion remains at all times on the Complainant. *Burdine* at 256.

A. Prima Facie Case of Race Discrimination

In the present complaint, complainant can establish a *prima facie* case of discriminatory non-selection by showing: (1) that she is a member of the protected group; (2) that she was subjected to an adverse employment action; and (3) that a similarly situated employee outside of her protected group was treated more favorably than she was treated or that there is a causal connection between her relationship in the protected group and the adverse action which, if unexplained, would support an inference of discrimination.

B. Prima Facie Case of Reprisal Discrimination

Complainant can establish a *prima facie* case discrimination for a claim of reprisal by showing the existence of four elements: (1) that she engaged in protected activity; (2) that the alleged discriminating official was aware of the protected activity; (3) that she was subsequently disadvantaged by an adverse action; and (4) that there was a causal connection between the protected activity and the adverse employment action. *See, Hochstadt, Id., see also Mitchell v. Baldrige*, 759 F.2d 80, 86 (D.C. Cir. 1985); *Burris v. United Telephone Co. of Kansas, Inc.*, 683 F.2d 339, 343 (10th Cir. 1982), *cert. denied*, 459 U.S. 1071 (1982).

The causal connection may be shown by evidence that the adverse action followed the protected activity within such a period of time and in such a manner that a reprisal motive is inferred. *Simens v. Department of Justice*, EEOC Request No. 05950113 (March 28, 1996) (citations omitted). Recent Supreme Court, District Court, and Commission decisions have found that the temporal proximity must be “very close.” *Clark County School District v. Breeden*, 533 U.S. 912 (2001) (action taken 20 months later suggested, by itself, no causality); *O’Neal v. Ferguson Construction Co.*, 237 F.3d 1248, 1253 (10th Cir. 2001) (noting that a three month period between protected activity and adverse action, standing alone, is insufficient to establish causation); *Heads v. USPS*, EEOC Appeal No. 01A51547 (June 2, 2005). Generally, the Commission has held that nexus may be established if the protected activity and the adverse action occurred within one year of each other. *Patton v. Department of the Navy*, EEOC Request

No. 05950124 (June 27, 1996) (the Commission held that a time span of over two years is not sufficient to show causality).

In addition, the Commission has held that the anti-reprisal provision of Title VII protects those who participate in the EEO process and also those who oppose discriminatory employment practices. Participation occurs when an employee has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing. Because the enforcement of Title VII depends on the willingness of employees to oppose unlawful employment practices or policies, courts have interpreted section 704(a) of Title VII as intending to provide 'exceptionally broad protection to those who oppose such practices'. . . ." *Whipple v. Department of Veterans Affairs*, EEOC Request No. 05910784 (February 21, 1992) (citations omitted). In addition, adverse actions need not qualify as "ultimate employment actions" or materially affect the terms and conditions of employment to constitute retaliation. *Lindsey v. USPS*, EEOC Request No. 05980410 (Nov. 4, 1999) (citing EEOC Compliance Manual, No. 915.003 (May 20, 1998)). Instead, the statutory retaliation clauses prohibit any adverse treatment that is based upon a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity. *Id.*

C. *Prima Facie Case of Harassment*

Harassment of an employee that would not occur but for the employee's race, color, sex, national origin, age, disability, religion, or participation in prior EEO activity is unlawful, if it is sufficiently severe or pervasive to alter the conditions of Complainant's employment. *Cobb v. Department of Treasury*, EEOC Request No. 05970077 (March 13, 1997). A single incident or group of isolated incidents will not be regarded as discriminatory unless the conduct is severe. *Walker v. Ford Motor Co.*, 684 F.2d 1355, 1358 (11th Cir. 1982).

In this complaint, Complainant can establish a *prima facie* case of harassment based on race and retaliation by showing: (1) she belongs to a statutorily protected group; (2) she was subjected to unwelcome conduct; (3) the harassment complained of was based on her membership in the protected groups; (4) the harassment had the purpose or effect of unreasonably interfering with her work performance and/or creating an intimidating, hostile, or offensive work environment; and (5) there is a basis for imputing liability to the employer. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993); *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64-65 (1986); 29 C.F.R. § 1604.11(a)(d)(1995); *Wibstadt v. USPS*, EEOC Appeal No. 01972699 (August 14, 1998); *McCleod v. SSA*, EEOC Appeal No. 01963810 (August 5, 1999). Specifically, the standard of vicarious liability for unlawful harassment by supervisors is: 1) an employer is responsible for the acts of its supervisors; and 2) employers should be encouraged to prevent harassment and employees should be encouraged to avoid or limit the harm from harassment. *Burlington Industries v. Ellerth*, 524 U.S. 742, 760-65 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775, 807, (1998). See also *EEOC Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors*, EEOC Notice No. 915.002 (June 18, 1999).

One must note that Title VII of the Civil Rights Act is intended to prohibit discrimination for specified reasons and is not designed to guarantee that employees always receive fair and objective treatment from their employers. Most importantly, Title VII does not protect an

employee against adverse treatment due simply to a supervisor's personality quirks or autocratic attitude. *Schaulis v. CTB/ McGraw Hill, Inc.*, 496 F.Supp. 666, 670 (N.D.Cal. 1980); *Morita v. Southern Cal. Permanente Medical Group*, 541 F.2d 217, 218-20 (9th Cir. 1976), *cert denied*, 429 U.S. 1050 (1977). In short, EEO laws are not intended to be a general civility code.

The Commission has repeatedly found that remarks or comments unaccompanied by a concrete agency action usually are not a direct and personal deprivation sufficient to render an individual aggrieved for the purposes of Title VII. *Backo v. USPS*, EEOC Request No. 05960227 (June 10, 1996); *Henry v. USPS*, EEOC Request No. 05940695 (February 9, 1995).

Whether the harassment is sufficiently severe to trigger a violation of Title VII must be determined by looking at all circumstances, including the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance. The conduct should be evaluated from the objective viewpoint of a reasonable person in the victim's circumstances. *Harris* at 23; Enforcement Guidance on *Harris v. Forklift Systems, Inc.*, EEOC Notice No. 915.002 (March 8, 1994).

Generally, an employer is liable for a hostile work environment unless the employer can demonstrate that it took appropriate and prompt action to remedy the situation. *Taylor v. Air Force*, EEOC Request No. 05920194 (July 8, 1992).

When an employer becomes aware of alleged harassment, the employer has the duty to investigate such charges promptly and thoroughly. See *EEOC Policy Guidance on Current Issues of Sexual Harassment* [Hereinafter Guidance], N-915-050, No. 137 (March 19, 1990); *Katz v. Dole*, 709 F.2d 251, 255-256 (4th Cir. 1983).

Specifically, the Commission's Guidance states,

When an employer receives a complaint or otherwise learns of alleged harassment in the workplace, the employer should investigate promptly and thoroughly. The employer should take immediate and appropriate corrective action by doing whatever is necessary to end the harassment, make the victim whole by restoring lost benefits or opportunities, and prevent the misconduct from recurring. Disciplinary action against the offending supervisor or employee, ranging from reprimand to discharge, may be necessary. Generally, the corrective action should reflect the severity of the conduct. . . . The employer should make follow-up inquiries to ensure the harassment has not resumed and the victim has not suffered retaliation.

The trier of fact will determine the appropriate remedial conduct based on the particular facts of the case (severity and persistence of the harassment, the effectiveness of any initial remedial steps). *Taylor v. Air Force*, EEOC Request No. 05920194 (July 8, 1992) at 6-7.

Legitimate, Non-discriminatory Reasons

Once Complainant establishes a *prima facie* case, the inquiry shifts from whether the complainant has established a *prima facie* case to whether she has demonstrated by preponderance of the evidence that the agency's reasons for its actions merely were a pretext for discrimination. *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 714-717 (1983).

Pretext

At that time, the burden shifts back to Complainant. Complainant must show that the agency's actions are pretext designed to cover up or mask discrimination. That is, the Complainant must demonstrate that the agency's reasons are unworthy of belief or motivated by discriminatory motives such as race or reprisal.

ANALYSIS AND FINDINGS

First, Complainant's claims with regard to the recall meeting and leave procedures are timely. As stated above, Complainant contacted an EEO Counselor on February 4, 2009. Earlier that day she learned that the agency was investigating her for unprofessional conduct. She claimed that Administrator created a hostile work environment for her based on race and reprisal. Notably, the recall meeting and leave procedures occurred on July 29 and August 15, 2008, respectively. While identifiable by date, these events were not discreet acts. As such, Complainant can include these earlier indiscrete incidents in her claim of hostile work environment because the last incident occurred within the 45-day time period. In light of the fact that the third incident was timely, all of the incidents are timely in the hostile work environment claim.

Secondly, Complainant states a claim upon which proper relief can be granted. When viewed separately, Complainant cannot establish that she is an aggrieved employee who suffered a harm or loss with respect to a term, condition, or privilege of employment. Specifically, Administrator did not lower the communications element on her performance evaluation, Administrator did not charge her leave to attend the retirement luncheon, and Warden Revell did not issue her discipline as the result of the investigation.

However, when viewed as a hostile work environment claim, the threat to lower the communications element, the threat to charge leave, and the investigation may be sufficiently severe or pervasive to alter her employment. In the alternative, when viewed as disparate treatment based on retaliation, these incidents may be enough to show the agency's actions were likely to deter employees from participating in the EEO process.

For example, in *De Vore v. Department of Justice*, EEOC Request No. 0520100546 (January 27, 2011), the complainant alleged that the warden initiated the internal investigation in reprisal for his participation and opposition EEO activity. The Commission found that such a claim stated a

claim of reprisal. See e.g., *Murphy v. United States Postal Service*, EEOC Appeal No. 0120102787 (Oct. 26, 2010).

The analysis is not on the actual investigatory process itself but the motivation behind the investigation.

Therefore, the trier of fact must conduct an analysis of the claims under the disparate treatment based on reprisal and hostile work environment theories of discrimination.

Next, Complainant can establish a *prima facie* case of reprisal discrimination with regard to the investigation. She participated in prior EEO activity in 2006. Although an EEO complaint is protected activity, she cannot show a causal connection between her activity in 2006 and the incident that occurred on February 4, 2009.

However, complainant has other protected activity. On August 4, 2008, the union, on Complainant's behalf and as her representative, accused Administrator of creating a hostile work environment and opposed such discrimination. By allowing the union to raise the racial hostile work environment for her, Complainant now participated in protected activity (through opposition) in 2008. Administrator was aware of the protected activity because she received the electronic message, forwarded it to Associate Warden, and participated in the subsequent discussion. The agency initiated the investigation into Complainant's unprofessional conduct less than six months after the protected activity. If unexplained, one could infer a discriminatory motive.

Further, the agency stated a legitimate, non-discriminatory reason for its actions. The agency stated that it has a responsibility to investigate unprofessional conduct. Specifically, the agency stated Complainant made a racially inappropriate comment about her third level supervisor (Associate Warden) to staff members. Per the EEOC regulations, the agency was required to investigate the matter. Although the investigation sustained the charge against Complainant, the agency did not discipline. These are legitimate, non-discriminatory reasons for the agency's actions.

At this time the burden shifts back to Complainant. She has demonstrated that the agency was motivated by a discriminatory motive. Complainant showed that other employees participated in unprofessional conduct; however, the agency did not investigate them. For example, co-worker Glasper filed an explicit complaint about co-worker Neal's numerous unprofessional, inappropriate, and profane comments about her. However, Administrator did not forward co-worker Glasper's memorandum for investigation, and the agency did not investigate co-worker Neal for unprofessional conduct at that time. Also, Supervisor included Lt. Oberman's unprofessional, inappropriate, and profane comment in the same memorandum as Complainant's "black ass" comment. However, Administrator nor Warden Revell acted on the information, and the agency did not investigate Lt. Oberman. In addition, several employees including Supervisor testified or stated that employees used profane language in the Financial Management department all the time without consequences.

While one notes that neither co-worker Neal or Lt. Oberman used a racial comment such as "black ass," both women used highly unprofessional, inappropriate, and profane comments nonetheless. The agency's own Program Statement 3420.09 and anti-harassment policy requires the agency to investigate any violations of the standards of conduct which includes profane, obscene, or otherwise abusive language to any fellow employees. These investigations should occur even if the perpetrator did not use racial adjectives and even if the perpetrator was not talking about a third level supervisor. For the agency to argue otherwise in this situation is disingenuous and devalues the agency's anti-discrimination policies.

In that co-worker Neal, Lt. Oberman, and others participated in unprofessional conduct but were not investigated, one must determine the agency's true motivating factor. Complainant asserted that the difference is her race and prior protected activity. The evidence supports her assertion.

By investigating Complainant alone, the agency condoned the unprofessional conduct of some employees while condemning the unprofessional conduct of others. As such, employees would be deterred from participating in protected activity or otherwise opposing discrimination if they would be investigated and possibly disciplined.

As such, the agency has retaliated against Complainant.

In light of this finding, an analysis of the hostile work environment claim is unnecessary.

CONCLUSION

The agency did not discriminate against Complainant and subject her to a hostile work environment on the bases of race (African-American) and in reprisal for protected activity, with regard to the recall meeting and leave procedures.

However, the agency did discriminate against Complainant on the bases of race and reprisal for prior protected activity, when the agency investigated her for unprofessional conduct on February 4, 2009.

When the trier of fact makes a determination that discrimination occurred, the agency must provide complainant with a remedy that constitutes full, make-whole relief to restore her as nearly as possible to the position she would have occupied absent the discrimination. *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976). In *West v. Gibson*, 119 S.C. 1906 (1999), the Supreme Court held that Congress afforded the Commission the authority to award compensatory damages in the administrative process. The statute authorizing compensatory damages awards limits the total amount that can be awarded each complaining party for future pecuniary and non-pecuniary losses to \$300,000. 42 U.S.C. § 1981a(b)(3).

To receive an award of compensatory damages, a complainant must demonstrate that she has been harmed as a result of the agency's discriminatory action; the extent, nature, and severity of the harm; and the duration or expected duration of the harm. *Rivera v. Department of the Navy*, EEOC Appeal No. 01934157 (July 22, 1994), req. for reconsideration denied, EEOC Request No. 05940927 (December 11, 1995); *Enforcement Guidance: Compensatory and Punitive Damages*

Available Under Section 102 of the Civil Rights Act of 1991, EEOC Notice No. 915.002 (July 14, 1992), at 11-12, 14 [Hereinafter *Guidance*].

Non-pecuniary losses are losses that are not subject to precise quantification including emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to professional standing, injury to character and reputation, injury to credit standing, and loss of health. Id at 14.

Objective evidence of non-pecuniary compensatory damages can include statements from complainant and from others, including family members, friends, and health care providers who can address the outward manifestations or physical consequences of emotional distress including sleeplessness, anxiety, stress, depression, marital strain, humiliation, emotional distress, loss of self-esteem, excessive fatigue, or a nervous breakdown. *Lawrence v. USPS*, EEOC Appeal No. 01952288 (April 18, 1996) (citing *Carle v. Department of the Navy*, EEOC Appeal No. 01922369 (January 5, 1993).

Generally, medical evidence is not required to support a claim of damages. *Lawrence v. USPS*, EEOC Appeal No. 01952288 (April 18, 1996); *Carpenter v. USDA*, EEOC Appeal No. 01945652 (July 17, 1995); *Bernard v. VA*, EEOC Appeal No. 01966861 (July 17, 1998). However, the Commission has noted in several cases that the failure to produce medical evidence can affect the amount of an award.

When calculating non-pecuniary damages, the trier of fact does not have a precise formula for determining non-pecuniary losses, except that the award should reflect the nature and severity of the harm and the duration or expected duration of the harm. *Loving v. Department of the Treasury*, EEOC Appeal No. 01955789 (August 29, 1997). Further, the award should be consistent with other awards in similar cases. *Hodgeland v. Department of Agriculture*, EEOC Appeal No. 01976440 (June 14, 1999).

A proper award of non-pecuniary damages should not be “monstrously excessive” standing alone, the product of passion or prejudice, and consistent with the amount awarded in similar cases. *Ward-Jenkins*, EEOC Appeal No. 01961483 (March 4, 1999) (citing *Cygnar v. City of Chicago*, 865 F.2d 827, 848 (7th Cir. 1989).

The Commission applies the principle that “a tortfeasor takes its victims as it finds them.” *Wallis v. USPS*, EEOC Appeal No. 01950510 (November 13, 1995) (quoting *Williamson v. Handy Button Machine Co.*, 817 F.2d 1290, 1295 (7th Cir. 1987). The Commission also applies two exceptions to this general rule. First, when a complainant has a pre-existing condition, the agency is liable only for the additional harm or aggravation caused by the discrimination. Second, if the complainant’s pre-existing condition inevitably would have worsened, the agency is entitled to a reduction in damages reflecting the extent to which the condition would have worsened even absent the discrimination; the burden of proof being on the agency to establish the extent of this entitlement. *Wallis, supra* (citing *Maurer v. US*, 668 F.2d 98 (2nd Cir. 1981); *Finlay v. USPS*, EEOC Appeal No. 01942985 (April 29, 1997).

The amount of compensatory damages awarded by the Commission has varied accordingly to the injury sustained by the Complainant in each case for example: *Terrell v. Dept. of Housing and*

Urban Development, EEOC Appeal No. 01961030 (Oct. 25, 1996) (\$25,000 award for emotional harm where discriminatory activity exacerbated, for at least two years, problems unrelated to discrimination); *Smith v. Dept. of Defense*, EEOC Appeal No. 01943844 (May 9, 1996) (\$25,000 award for emotional harm, where many aggravating factors not related to discrimination also were present); *Johnson v. Dept. of the Interior*, EEOC Appeal No. 01961812 (June 18, 1998) (award of \$35,000 for diagnosed depression and stress); *Wallis v. U.S. Postal Service*, EEOC Appeal No. 01950510 (Nov. 13, 1995) (\$50,000 award for aggravation of pre-existing emotional condition, where effects were expected to last at least seven years); *Carpenter*, EEOC Appeal No. 01945652 (award of \$75,000 for emotional distress resulting in Complainant's disability retirement); *Finlay v. U.S. Postal Service*, EEOC Appeal No. 01942985 (April 29, 1997) (\$100,000 award for emotional injury resulting in indefinite total disability).

Through credible testimony of Complainant and her husband, the evidence shows that Complainant suffered from stress, humiliation, unstable high blood pressure, emotional harm, mental anguish, loss of enjoyment of life, and increased sleep problems. The medical records reflect that Complainant experienced some anxiety and depression as well.

In this case, Complainant had preexisting medical factors (high blood pressure, pre-diabetes, a kidney condition, and sleep disturbances) that predated and continued throughout this investigation. Undoubtedly, her pre-existing medical conditions contributed to her emotional distress. In addition, subsequent to the investigation, Complainant suffered from an unimaginable personal tragedy that affected her family. As one can imagine, her loss contributed to her emotional distress as well.

Therefore, based on her emotional pain and suffering, Complainant is entitled to compensatory damages in the amount of \$15,000. This amount takes into account the severity and duration of the harm done to Complainant by the retaliatory investigation. Further, this amount takes into account that, unlike cases where greater damages were awarded, Complainant had serious pre-existing conditions and subsequent major life events. More so, Complainant's injury did not render her totally incapacitated either for work (i.e. an Outstanding performance appraisal) or in her personal life (i.e. taking care of her granddaughter). Finally, this amount meets the goals of not being motivated by passion or prejudice, not being "monstrously excessive" standing alone, and being consistent with the amounts awarded in similar cases. *See Cygnar*, 865 F.2d at 848; *AIC Security Investigations*, 823 F.Supp. 573 at 574.

REMEDY

Upon a careful review of the record, I find that complainant is entitled to the following remedies as a matter of law.

1. The agency shall pay Complainant non-pecuniary damages in the amount of \$15,000;
2. The agency shall restore 80 hours of annual leave and 80 hours of sick leave to Complainant's leave balance;³

³ While Complainant's medical records reflect that she received medical treatment during this time period, she was not able to positively ascertain which dates she used leave because of her pain and suffering. Complainant testified

3. The agency shall expunge Complainant's personnel files of any reference to the February 4, 2009, investigation;
4. The agency shall reimburse complainant reasonable costs associated with litigation of this complaint;
5. The agency shall take corrective, curative, or preventative action to ensure that similar violations of the law will not recur. *See* 29 C.F.R. §1614.501(a)(2);
6. The agency shall provide harassment and retaliation training for the Administrator, Associate Warden, and Warden Revell of the FCC Butner, North Carolina; and
7. The agency shall post a notice that the agency has been found to have discriminated against a current employee at the FCC Butner, North Carolina.

NOTICE

This is a decision by an Equal Employment Opportunity Commission Administrative Judge issued pursuant to 29 C.F.R. § 1614.109(b), 109(g) or 109(i). **With the exception detailed below, the complainant may not appeal to the Commission directly from this decision.** EEOC regulations require the Agency to take final action on the complaint by issuing a final order notifying the complainant whether or not the Agency will fully implement this decision within forty (40) calendar days of receipt of the hearing file and this decision. The complainant may appeal to the Commission within thirty (30) calendar days of receipt of the Agency's final order. The complainant may file an appeal whether the Agency decides to fully implement this decision or not.

The Agency's final order shall also contain notice of the complainant's right to appeal to the Commission, the right to file a civil action in federal district court, the name of the proper defendant in any such lawsuit and the applicable time limits for such appeal or lawsuit. If the final order does not fully implement this decision, the Agency must also simultaneously file an appeal to the Commission in accordance with 29 C.F.R. § 1614.403, and append a copy of the appeal to the final order. A copy of EEOC Form 573 must be attached. A copy of the final order shall also be provided by the Agency to the Administrative Judge.

If the Agency has not issued its final order within forty (40) calendar days of its receipt of the hearing file and this decision, the complainant may file an appeal to the Commission directly from this decision. In this event, a copy of the Administrative Judge's decision should be attached to the appeal. The complainant should furnish a copy of the appeal to the Agency at the same time it is filed with the Commission, and should certify to the Commission the date and method by which such service was made on the Agency.

that she took leave in the morning, or in the afternoon, or all day depending on how she was feeling. When questioned about specific dates, she acknowledged that she took time off work to attend to matters with her granddaughter. TR at 102. Although she was certain about some leave she used for conditions exacerbated by the alleged discrimination, she was not certain about other dates. TR at 104 and 113. Also, her request for damages included errors, and her medical records included visits for unrelated matters (i.e. sinusitis, urinary tract infection, shoulder pain). TR at Complainant's Exhibits 12 and 13(b). In that Complainant bears the burden to show her damages and she has not been able to accurately do so, she is not entitled to the 204.15 hours of annual leave and 163.5 hours of sick leave that she requested.

All appeals to the Commission must be filed by mail, personal delivery or facsimile to the following address:

Director
Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013
Fax No. (202)663-7022

Facsimile transmissions over 10 pages will not be accepted.

COMPLIANCE WITH AN AGENCY FINAL ACTION

An Agency's final action that has not been the subject of an appeal to the Commission or civil action is binding on the Agency. *See* 29 C.F.R. § 1614.504. If the complainant believes that the Agency has failed to comply with the terms of its final action, the complainant shall notify the Agency's EEO Director, in writing, of the alleged noncompliance within thirty (30) calendar days of when the complainant knew or should have known of the alleged noncompliance. The Agency shall resolve the matter and respond to the complainant in writing. If the complainant is not satisfied with the Agency's attempt to resolve the matter, the complainant may appeal to the Commission for a determination of whether the Agency has complied with the terms of its final action. The complainant may file such an appeal within thirty (30) calendar days of receipt of the Agency's determination or, in the event that the Agency fails to respond, at least thirty-five (35) calendar days after complainant has served the Agency with the allegations of noncompliance. A copy of the appeal must be served on the Agency, and the Agency may submit a response to the Commission within thirty (30) calendar days of receiving the notice of appeal.

It is so ORDERED.

Anita F. Richardson
Administrative Judge
Telephone: (919) 856-4070
Facsimile: (919) 856-4156
Anita.Richardson@eeoc.gov

Cc: McFadden, Mason, Bauch, BOP

CERTIFICATE OF SERVICE

For timeliness purposes, it shall be presumed that the parties received the foregoing Pre-hearing Memorandum within five (5) calendar days after the date it was sent *via* First Class Mail. I certify that on May 2, 2011, the foregoing Scheduling Order was sent *via* First Class Mail to the following:

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Anita F. Richardson
Administrative Judge