U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
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[redacted]

Complainant,

v.

Eric Holder, Attorney General, U.S. Department of Justice (Federal Bureau of Prisons),

Agency.

) EEOC No. 480-2009-00327X
) Agency No. P-2008-0396

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Date: May 12, 2011

I. INTRODUCTION

Pursuant to 29 C.F.R. § 1614.109 of the Commission's regulations, a hearing was held on December 18 and 19, 2009, on the discrimination complaint filed by [redacted] ("Complainant") against the Department of Justice, Federal Bureau of Prisons ("Agency"). Twenty-one witnesses, including Complainant, testified, and three additional exhibits (i.e., Agency Exhibits 1-3, and Complainant Exhibits 1 and 2) were admitted into evidence at the hearing. Three additional exhibits (Declaration of James Pfannenstiel, Declaration of Levesta Wells with attachments & [redacted] Supplemental Statement on Retaliation with attachments) were admitted subsequent to the hearing, (AJ Exs. 1, 2 & 3)[1]

[1] Copies of the documents referred to in this Decision are being sent to the Agency's Supervisory Attorney, Robert Abraham, Complaint Adjudication Office, U.S. Department of Justice, Patrick Henry Building, 601 D Street, N.W., Suite 5300 , Washington, DC 20530, as indicated in the Order Entering Judgment which is concurrently issued with this Decision. Copies of the documents are not being sent to Complainant, Complainant's representative, or the Agency's attorney as these documents were either prepared by or served on the parties during the proceedings in this case.

II. ISSUES

1. Was Complainant discriminated against by the U.S. Department of Justice, Federal Bureau of Prisons (Agency) on the basis of disability (torn meniscus) or in retaliation[2] for prior EEO activity, when he was subjected to harassment in the form of write-ups, unwarranted comments, public criticism, and unusually close supervision, from February 2007 through May 29, 2008?

2. Was Complainant retaliated against by the U.S. Department of Justice, Federal Bureau of Prisons (Agency) for prior EEO activity when his request to use compensatory time was denied on April 25, 2008; when, on or about August 2008 a second evaluation of his performance was completed by Lt. Jackson, who did not supervise him during the relevant time period or when he was denied training from July 2008 to the present?[3]

[2] The Commission has held that a complainant may allege discrimination on all applicable bases, including sex, race, national origin, color, religion, age, disability and reprisal, and may amend his complaint at any time, including at the hearing, to add or delete bases without changing the identity of the claim. *See Sanchez v. Standard Brands, Inc.*, 431 F.2d 455 (5th Cir. 1970); *Dragos v. United States Postal Service*, EEOC Request No. 05940563 (January 19, 1995). During the hearing, Complainant raised a claim of retaliatory harassment which had not been previously raised in allegation #1 to the EEO counselor, in his formal complaint, or prior to the hearing in a request to amend. However, the claim was perfected during the hearing, and therefore, allegation #1 is amended sua sponte, to include the basis of retaliatory harassment.

[3] On November 25, 2009, Complainant was ordered to prepare a supplemental statement, describing all incidents and occurrences which he believed were discriminatory or retaliatory. Complainant provided his supplemental statement on December 17, 2009. The Agency responded to Complainant's supplemental statement on February 4 & 11, 2010, Complainant brought up addition allegations referencing a performance evaluation and denial of training. I find those allegations to be like and related with regard to Complainant's claim of a hostile work environment and therefore amend this complaint to add the allegations of performance evaluation and denial of training. (AJ Ex 1)

III. FACTS

1. Complainant is a Senior Officer Specialist, (SOS), GS-8, with the Bureau of Prisons (BOP). (HT1[4] P. 13, IF Tab 8)

2. Levesta Wells, Captain, GS-13, Metropolitan Correctional Center, San Diego, California (MCC), (limited disability in wrist and arms, prior EEO activity) arrived at the MCC in September 2005. Capt. Wells testified that all of the lieutenants supervised Complainant and he (Wells) supervised the lieutenants. The Associate Warden during the time relative to this complaint was Maureen Baird, GS-14, (no disability, prior EEO activity) and the Warden was Paula Jarnecke, (retired), (no disability, no prior EEO activity). (HT1 pp. 134, 135, 148, HT2 pp. 398-400, 408, IF Tabs 8, 9, 12)

3. Complainant's duties as a GS-8 officer include monitoring inmates, and searching for contraband/weapons and "from time to time, [he] may be authorized to carry firearms and to use physical force, including deadly force, to maintain control of inmates." (IF Tabs 8, 23)

4. In February 2007, Complainant slipped on a wet substance on the stairs at the MCC and fell on his knee. Complainant testified that the day after the fall, he went to the

[4] HT – Hearing Transcript
IF Ex – Investigative File Exhibit
A Ex – Agency Exhibit
C Ex – Complainant Exhibit
AJ E – Administrative Judge Exhibit

emergency room. Complainant was diagnosed with "left knee injury" and told to schedule an MRI. Complainant's undated discharge instructions stated that he should work "light duty, no prolonged standing, walking, heavy lifting for at least 2 weeks or until knee pain improves, whichever is later. We are awaiting MRI results to knee cause/extent of knee [injury]." After the MRI, he was diagnosed with a meniscus tear to his left knee. Dr. Lily Zhang's handwritten, undated letter to the Agency stated, "He is currently undergoing treatment with physical therapy . . . Please excuse him from jobs that require him to walk more than 50 yards at a time or climb more than 2 flights of stairs at a time." Complainant testified that he had to wear a brace to keep his knee aligned. He also stated that he could not be around the inmates. (HT1 p. 36, 38, IF Tabs 8, 19)

5. On June 7, 2007 after a follow up visit with Complainant, J. Michael Randall, MD, Resident Physician, Internal Medicine, noted the Complainant had "severe pain in his left knee due to complex meniscal tears with displaced meniscal fragment." Dr. Randall also noted that, due to the "severity" of his injury, Complainant was experiencing pain, even with the limitations that had previously been placed on Complainant's work duties, i.e., no walking more than 50 yards at a time or climbing more than 2 flights of stairs at a time. Dr. Randall therefore recommended that Complainant take a one month absence from work "to allow time for rest and healing." (C Tab 2, IF Tab 19 p. 215)

6. On July 9, 2007, after a follow up visit with Complainant, George Scott, M.D., Ph.D., Chief Medicine Resident Physician, Internal Medicine, confirmed the diagnosis of

"meniscus tears with displaced fragment." Dr. Scott also noted Complainant's continual pain which "limited his activity and ability to walk or climb stairs." Dr. Scott noted that Complainant had a pending surgical evaluation scheduled for July 13, 2007 and recommended that he "continue his absence from work until revaluation" at that appointment. (C Tab 2, IF Tab 19 p. 217)

7. Complainant was on light duty from February 2007 to April 2008. While on light duty his duties consisted of phone monitoring and receptionist duties. According to his assignment card, Complainant worked light duty in control and in the front lobby. Complainant was scheduled for and had orthopedic surgery on his knee in December 2007, with recovery anticipated to take four weeks. On January 28, 2008, Complainant notified Warden Jarnecke, through Captain Wells, that his rehabilitation had been extended and asked that he be excused from work until February 10, 2008 "due to complications of the surgery on December 18, 2007." (HT1 pp. 43, 46, 300, IF Tab 8, Tab 19 pp. 223-225)

8. Complainant's knee injury caused him to be hospitalized and to miss work for substantial periods of time from February 2007 through February 2008. After seeing his doctor in February 2007, Complainant requested and was placed on light duty as an accommodation to his injury. Complainant had surgery on his knee on December 18, 2007. In April 2008 he was released from medical restrictions and returned to full duty. (HT1 p. 43, C Tab 2, IF Tabs 8, 19 pp. 37, 43, 44, 46, 203-225)

9. Complainant stated that he was taking Percocet, ibuprofen, and Vicodin for his condition, and used a crutch. He also stated that when he was on light duty, he used a knee brace and a cane. (HT1 pp. 36, 38, IF Tab 8)

10. On April 17, 2007, Aaron Jackson, Lieutenant, Supervisory Correction Officer, instructed Complainant to go to the units and do urinalysis. Complainant testified that his task would have required him to go to a unit, physically get the inmate and bring him out while using a cane and having a brace on his knee. Complainant testified that he refused to do the task because of his medical restrictions and was thereafter accused of acting as if he did not want to work. Complainant also testified that he was later called in to Capt. Wells' office and again accused of not wanting to work. (HT1 pp. 53-55, 105, 206, 207, 210)

11. On May 31, 2007, Lt. Harris called Complainant and asked him to work the front desk. Complainant testified that the duties at the front desk include sitting at the front desk and watching people go through the metal detector, bending over to wand people and running items through the scanning machine. Lt. Harris testified that there is one 10 inch step that you have to descend to wand people and then ascend to get back to the desk. Lt. Harris stated that there was also occasional standing and walking about 5-6 feet to check the metal detector. After Complainant declined this assignment, Lt. Harris hung up the phone on him. Complainant had previously worked the front desk on February 20, 27, 28, March 3, 14, 20, & 21, 2007. (HT1 pp. 48, 49. 52, 53, 56, 98, 99-101, 108, 175, 176, 191, 196, 197, IF Tab 8)

12. Complainant's medical documentation was current through July 13, 2007. On June 11, 2007, Complainant requested Leave Without Pay through July 11, 2007. Complainant's June 11, 2007 memorandum to Capt. Wells indicated that Complainant had already exhausted his Continuation of Pay (COP) days (a payment through the workers' compensation system).

13. Complainant testified that, on July 11, 2007, he informed Captain Wells and Lieutenant Preston Benson, Administrative Lieutenant (no disability, prior EEO activity) that he was on light duty and that he was scheduled for a medical evaluation on Friday, July 13, 2007. He also stated that his doctor was not going to release him because he had surgery pending, and that he (Complainant) would bring in the paperwork the following week. Complainant's light duty schedule was Monday through Friday with Saturday and Sunday off. (HT pp. 56, 57, C Ex. 2, IF Tab 8)

14. Lt. Benson testified that he placed Complainant in AWOL status for July 15, 2007, because he (Benson) "didn't have any medical documentation to determine how to assign him." Therefore he (Benson) assigned Complainant to a "regular post" which started on Sunday, July 15, 2007. When Complainant did not show up for work on that Sunday, he was placed on AWOL. Lt. Benson also testified that Complainant was notified of the change through the "normal" notification process, i.e., release of the roster and placing the roster into the boxes of the officers. Complainant testified that he provided Lt. Benson with the required medical documentation on July 16, 2007. Lt. Benson apologized to Complainant because he (Complainant) was upset. By pay period 1,

January 18, 2008, the AWOL status had been removed from Complainant's Leave Record. (HT1 pp. 56, 57, 60, 61, 67, 69, 221, 222, 224, 228, 231, HT2 pp. 346, 387, 492, 493, A Ex. 3, C Ex. 2, IF Tabs 8, 14,19)

15. Complainant testified that when he checked his box before he left work on Wednesday, July 11, 2007 and when he came to work on Monday July 16, 2007 there was nothing in his box regarding a change in schedule. He also stated that he did not receive a telephone call telling him to come in to work on Sunday. Complainant stated that he brought in the required medical documentation as requested when he returned to work on Monday, July 16, 2007. (HT1 pp. 57, 60, 61, IF Ex 8)

16. On July 24, 2007, Complainant received his performance evaluation from Lt. Jackson, which rated him "Fully Satisfactory." Complainant testified that Lt. Jackson told him that he could not get a rating higher than Fully Satisfactory because he was on light duty and not performing his regular duties. Complainant testified that his performance had been previously rated as Outstanding and this was his first Fully Satisfactory rating. Complainant thereafter took the matter up with Capt. Wells, arguing that he should have received a higher rating for the work he performed monitoring the phones. Capt. Wells stated that the phone calls that Complainant monitored were "just basic in nature." Capt. Wells testified that Complainant's evaluation was based on his actual performance during the rating period and that it was a fair evaluation. (HT1 pp. 63-66, 70, 71, 73, 74, 79,110-112, 115, 141, 142, 158, 159, 180, 181, 272, 278, 288, 294, 295, 298, 300, HT2 pp. 407, 484, IF. Tabs 8, 12, 21)

17. Capt. Wells stated that in the Agency procedures, employees monitoring the phones are required to monitor at least twenty-five calls per shift. Capt. Wells testified that he requested a report on Complainant because he wanted to know how many calls Complainant was averaging per night. Capt. Wells testified that Complainant was often not at his post when he should have been. Capt. Wells stated that the report showed that on one night, Complainant had monitored only five calls. Therefore, on April 3, 2008, Capt. Wells told Lt. Jackson to counsel Complainant because Complainant had not monitored enough phone calls. Lt. Jackson counseled Complainant and told him that his phone monitoring needed to be improved to at least twenty-five calls per shift. Lt. Jackson wrote up the incident in the performance log but Complainant refused to sign off on it.

18. The matter was taken up to Guy Robert Pagli, Special Investigative Agent, (SIA) (no disability, no EEO activity), who requested an audit of all phone monitoring. The audit revealed variances in the amount of calls listened to on a daily basis. SIA Pagli testified that at the time there was no stipulation in the number of calls to be monitored per shift and Complainant also had other "reasonable" explanations, i.e., sometimes there were things out of his control, as to why on certain days there were fewer calls than on other days. SIA Pagli did not feel the write-up was justified and told Complainant that he would recommend to the associate warden that the write-up be changed to a non-rating. SIA Pagli testified that it was documented that Complainant had listened to the appropriate number of calls and that this incident would not affect his evaluation for the year. The negative log entry was subsequently rescinded. (HT1. pp 15, 16, 20, 21, 117-

119, 273-278, 281, HT2 pp. 375-379, 402-403, 415-418, 420, 424, 425, IF Tab 1 p. 27, IF Tabs 8, 12, 13)

19. On April 17, 2008, Complainant attempted to schedule a meeting with the Warden to talk to her about a "personal" matter and "something to do with [his] evaluations." The Warden referred the matter to Capt Wells, who called Complainant and subsequently approached him several days later asking what the matter pertained to. Complainant expressed to Capt. Wells that he did not want to discuss the matter with him; Complainant told Capt. Wells that he (Complainant) "no longer felt comfortable in his (Wells') department and [he had] serious issues with him (Wells)." Complainant did not get the opportunity to speak with either the warden or associate warden about his concerns. (IF Tabs 1, 8, 9, 12)

20. On April 22, 2008 Complainant stated that Capt. Wells asked him to sign a letter stating that he had "banged in" which means that an employee has taken leave in conjunction with his day off by calling in the day before or the morning of the day he took off. Complainant stated that he was not "banging in." He stated that he took sick leave for either a surgical evaluation or he was going to physical therapy based on the availability of his therapist. Capt. Wells denied that this incident occurred. (HT pp. 80, 81, HT2 p. 427, IF Tabs 8, 12)

21. On April 25, 2008, Complainant went to the firing range for a make-up session. One other employee attended the make up session. Capt. Wells stated that annual refresher

training consists of a large number of employees and the two part training normally takes a full day. Capt. Wells also stated that after the annual refresher training, the employees are allowed to go home instead of going back to work. Frank Morales, Firearms Instructor, (disability, no prior EEO activity) testified that he was one of the instructors during the make up session. Mr. Morales testified that they returned from the range somewhere between 11:30 am-12 noon. Prior to going to the range, Complainant had received an email from his supervisor, Lt. Sewell, saying he (Complainant) was to come back to work after firing at the range. Archie Perry, Senior Office Specialist, (disability, prior EEO activity) testified that as a former firearms instructor, the normal practice when you are done on the shooting range is to let people go because they are in civilian clothes and are "sweaty" and "dirty." Mr. Perry also testified that in his six years as a firearms instructor, he had never known of anyone being told to return to MCC at the conclusion of the training. After Complainant finished at the shooting range, he called Lt. Sewell asking why he had to come back to work. Capt Wells testified that Complainant had approximately six hours remaining on his shift when he was finished shooting. Captain Wells testified that he instructed Complainant to come back, because they had "pretty much a full day left" and he needed him to monitor the phones. Capt. Wells also stated that he was not going to let Complainant go home "for four or five hours of the day when he could simply be [there] helping get [their] percentage of phone monitoring up to par." Complainant ultimately took the matter to Associate Warden Baird, who granted him two hours of annual leave and instructed Capt. Wells to wait until 2:00 pm and then let Complainant go for the day. Capt. Wells testified that the other employee on the range

that day, Linda Reves, was not under his supervision. (HT1 pp. 13, 14, 22-24, 29-32, 85, 86, 137, 138, 142-145, 213, 214, HT2 pp. 403-405, 430-432, 439-441, IF Tabs 8, 9, 12)

22. In July 2008, Lt. Jeff Sewell assigned both Lt. Jackson and Lt. Edelman to rate Complainant's performance from March 23, 2008 through June 28, 2008. While the overall rating given to Complainant by Edelman and Jackson was the same, i.e., Exceeds, the comments by Lt. Jackson under "Performance Entry" included statements such as "a willingness to learn," "continues to grow," "appears to welcome the opportunity to improve his performance," and "appears capable." Complainant believed that those "were not good" comments. Capt. Wells maintained that through an "administrative oversight," Complainant's name was given to both Jackson and Edelman to provide log entries for the second quarter of 2008. Capt. Wells stated that the log entries signed by Lt. Jackson for March through June 2008 are not in Complainant's performance file. (AJ Exs. 1, 2 & 3)

23. Complainant maintained that from July 2008 to the present, he has been trying to go to the Computer Services department to train. He asserted that Capt Wells had approved 2-4 staff members in his department for year long training in other areas. He stated that when he initially requested training, Capt Wells denied the request citing too many staff out on loan. Complainant maintained that when two of the staff returned from year long training, he made another request for training and was again denied. Complainant stated that he was allowed to train for one week, but that training was not helpful. Capt. Wells stated that he has allowed a few officers to work temporarily in vacant periods for limited

periods of time, however, Complainant wanted the MCC to create a position in Computer Services for him to fill on an extended basis. Capt. Wells stated that would be a decision made by the Warden, with input from the Computer Services Manager and the Associate Warden of Custody. (AJ Exs. 1 & 3)

24. Complainant stated that in January 2009, Capt. Wells came into his unit. Complainant implied that Capt Well should not have been there because the floor Complainant was working on was not the "one for mainline." Complainant believed that this was Capt. Wells' attempt to "intimidate" and "discourage" Complainant. Capt. Wells stated that he "makes rounds through the institution all the time, routinely checking all floors and units and [has] not targeted [Complainant] or tried to intimidate him in any way." (AJ Exs. 1 & 3)

25. In April 2009, Complainant was assigned to D Unit. He stated that he was supposed to be relieved at 2:00pm. Complainant stated that at 1:59pm, he contacted Lt. Jackson to inform him that he had not been relieved. Complainant stated that he was not relieved until 2:20pm and he believed that this was done on purpose. Capt Wells stated that there are times when officers are relieved late and that compensatory time or overtime is provided when the officer brings the late relief to the shift lieutenant's attention. (AJ Exs. 1 & 3)

26. Lieutenant Michael Harris, Correctional Officer, Supervisor (disability, no prior EEO activity) testified that during the time of Complainant's injury, some officers thought that

Complainant was faking his injury. He also testified that the same officers who thought Complainant was faking his injury thought that other officers with slip and fall injuries were faking also. Capt. Wells testified that he questioned the validity of Complainant's injury because he believed that most of Complainant's sick leave was taken in conjunction with his days off. (HT1 pp. 52, 66, 84, 105, 174, 189, 208-210, 268, HT2 pp. 405, 406, 428)

IV. LAW

The Commission has jurisdiction over this Complaint pursuant to 29 C.F.R. Section 1614, and 42 U.S.C. Section 2000e-16.

In any proceeding involving a charge of discrimination, either judicial or administrative, it is the burden of the Complainant to initially establish that there is some substance to the allegation of discrimination.

In order to accomplish this burden, the complainant must establish a *prima facie* case of discrimination. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973); *Furnco Construction Corp. v. Waters,* 438 U.S. 567 (1978). This means that the complainant must present a body of evidence such that were it not rebutted, the trier of fact could conclude that unlawful discrimination did occur.

The *McDonnell Douglas* standards are flexible and must be adapted to the facts of each case. *Id.* at 802, n.13. *Hagans v. Andrus,* 651 F.2d 622, 624-626 (9th Cir. 1981). The

evidence required to establish a *prima facie* case varies from one case to the next. Direct evidence of discrimination is not necessary to prevail in a Title VII suit because "[t]here will seldom be 'eyewitness' testimony as to the employer's mental process." *U.S. Postal Service v. Aikens,* 469 U.S. 711, 716 (1983). Thus, a complainant may prove his case by using either direct or circumstantial evidence.

When a complainant must rely on indirect, or circumstantial, evidence of discrimination, the shifting burdens of *McDonnell Douglas* must be employed. The *McDonnell Douglas* burdens are designed so that the "plaintiff has her day in court despite the unavailability of direct evidence." *Trans World Airlines v. Thurston,* 469 U.S. 111, 105 S.Ct. 613, 622 (1985).

Once a complainant establishes a *prima facie* case, the burden of production shifts to the agency to articulate a legitimate, nondiscriminatory reason for its employment decision. *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 256 (1981). That is, it "... must clearly set forth, through the introduction of admissible evidence, reasons for its actions which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action." *St. Mary's Honor Center v. Hicks,* 509 U.S. 502 (1993), citing *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 254-255, n.8 (1981).

Should the agency carry its burden, the complainant must then prove by a preponderance of the evidence that the legitimate reasons offered by the Agency were not

its true reasons, but were a pretext for discrimination. *Burdine,* at 253. A reason cannot be proved to be pretext for discrimination "unless it is shown both that the reason was false and that discrimination was the real reason." *Hicks, supra.* "Proving the agency's reason false becomes part of the greater enterprise of proving that the real reason was intentional discrimination." *Id.* "In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose." *See, Reeves v. Sanderson Plumbing Products, Inc.,* 530 U.S. 133 (2000).

Once the Agency responds to the complainant's proof by offering evidence of the reason(s) for the Agency's actions, the trier of fact proceeds to decide the ultimate question: whether complainant has proven that the Agency intentionally discriminated against him because of his protected bases. *Id.*

The agency generally has broad discretion to set policies and carry out personnel decisions, and should not be second-guessed by the reviewing authority absent evidence of unlawful motivation. *Vanek v. Department of the Treasury*, EEOC Request No. 05940906 (January 16, 1997); *Kohlmeyer v. Department of the Air Force*, EEOC Request No. 05960038 (August 8, 1996); *Burdine*, 450 U.S. at 259.

Prima Facie Case – Disability

In a case of discrimination based on disability, the threshold question is whether the

person is an individual with a disability within the meaning of the applicable statute and implementing regulations. 29 C.F.R. § 1630.2, et seq. Although a strict *McDonnell Douglas* analysis is not used in disability cases, the complainant is still required to establish a *prima facie* case. *Pushkin v. Regents of the University of Colorado*, 658 F.2d 1372, 1385-87 (10th Cir. 1981). In order to present a *prima facie* case of discrimination based on disability, Complainant must show that (1) he is a qualified individual with a disability, or is perceived as disabled by the Agency; and (2) he was treated differently and less favorably than individuals not of his protected class, or the agency failed to make a needed reasonable accommodation, resulting in adverse treatment of Complainant. See, e.g., *Smith v. Administrator of Veterans Affairs*, 33 APD ¶ 34259 (C.D. Cal. 1983).

Section 706(6) of the Rehabilitation Act, 29 U.S.C. § 706(6), and 29 C.F.R. § 1630.2(f) define a disabled individual as "any person who (1) has a physical or mental impairment which substantially limits one or more of such person's major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment."

To prove such impairment "substantially limits a major life activity," the Complainant must show that he is unable to perform, or significantly restricted as to the condition, manner or duration under which he can perform one or more major life activities, which are defined as, "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i), (j).

If Complainant proves that he is impaired and that his major life activities are

substantially limited, he must then prove that he is a "qualified disabled person" before the burden shifts to the agency. Commission regulations define a "qualified individual with a disability" as "an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position." 29 C.F.R. § 1630.2(m).

A complainant has the burden to show that his limitations on a major life activity are substantial. See, e.g., *Colwell v. Suffolk County Police Department*, 158 F.3d 635, 643 (2d Cir. 1998). In order to show that he is substantially limited in a major life activity, a complainant will generally need to provide detailed medical evidence on the severity of the impairment, the duration of the impairment, and the permanent or long-term impact of the impairment. 29 C.F.R. § 1630.2(j)(2); *Ryan v. Gray & Rebecca*, 135 F.3d 867 (2d Cir. 1998).

To show that he is substantially limited, an individual will need to show that he is "significantly restricted" in performing a major life activity. It is not sufficient that an individual performs the major life activity in a manner that is different from the average person in the general population. *Albertson's, Inc. v. Kirkingburg*, 119 S.C. 2162, 2168 (1999). The fact that an impairment is permanent does not necessarily mean that it is substantially limiting. Conversely, an impairment need not be permanent to be substantially limiting. See EEOC Compliance Manual, § 902.4(d). Any impairment that is not permanent must significantly restrict an individual's life activities and be long-lasting, or have long-lasting residual effects that significantly restrict a major life activity. Id.; *McGee v. Secretary of Army*, EEOC Appeal No.

01933127 (March 17, 1994). Further, the relevant time for assessing whether a complainant is disabled is the time at which the accommodation is requested or disparate treatment is alleged. *Franklin v. U.S. Postal Service*, EEOC Appeal No. 07A00025 (January 19, 2001).

Prima Facie Case - Reprisal

As set forth in *McDonnell-Douglas Corporation v. Green*, 411 U.S. 792 (1973) and *Hochstadt v. Worcester Foundation for Experimental Biology*, 425 F. Supp. 318, 324 (D. Mass.), *aff'd*, 545 F.2d 222 (1st Cir. 1976), a complainant may establish a *prima facie* case of reprisal by showing that: (1) he engaged in a protected activity; (2) the agency was aware of the protected activity; (3) subsequently, he was subjected to adverse treatment by the agency; and, (4) a nexus exists between the protected activity and the adverse treatment. *See Whitmire v. Department of the Air Force*, EEOC Appeal No. 01A00340 (September 25, 2000).

The Commission has stated that adverse actions need not qualify as "ultimate employment actions" or materially affect the terms and conditions of employment to constitute retaliation. *See* EEOC Compliance Manual, Section 8: Retaliation (May 20, 1998); *Burlington Northern and Santa Fe Railway Company v. White,* 126 S.Ct. 2405 (2006) (finding that the anti-retaliation provision protects individuals from a retaliatory action that a reasonable person would have found "materially adverse," which in the retaliation context means that the action might have deterred a reasonable person from opposing discrimination or participating in the EEOC charge process); See also *Lindsey v.*

U.S. Postal Service, EEOC Request No. 05980410 (November 4, 1999). 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.*

The Commission has held that this 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. *See Lee v. Department of Interior*, EEOC Appeal No. 01A62376 (August 25, 2006) (citing *Simens v. Department of Justice*, EEOC Request No. 05950113 (March 28, 1996)). Complainant cannot prevail simply by showing that someone at the agency had knowledge of the protected activity. *Odom v. United States Postal Service*, EEOC Appeal No. 01842223 (June 2, 1986). In cases where temporal proximity between the agency's knowledge of protected activity is the basis for establishing the causal connection for a *prima facie* case, the proximity must be "very close." *Clark County School District v. Breeden*, 121 S.Ct. 2264 (2001), citing O(Neal v. Ferguson Construction Co., 237 F.2d 1248, 1254 (10th Cir, 2001); Richmond v. Oneok, Inc., 120 F.3d 205, 209 (10th Cir. 1997) (3-month period insufficient); Hughes v. Derwinski, 967 F.2d 1168, 1174-75 (7th Cir. 1992) (4-month period insufficient).

For the purpose of stating a claim of retaliation, a request for reasonable accommodation constitutes protected activity. *See, e.g., Wright v. CompUSA, Inc.*, 352 F.3d 472 (1st Cir. 2003) (discharged sales manager engaged in protected activity when he asked his employer to accommodate his attention deficit disorder by giving him more time to complete tasks, avoiding early meetings, and putting assignments in writing). *See also, Kershner v. Department of the Interior (National Park Service)*, EEOC Appeal No. 01995575, June 24, 2002, fn 3, citing EEOC

Compliance Manual, Section 8, "Retaliation" (May 20, 1998), at 8-6.

Hostile Work Environment- Prima Facie Case

In order to establish a claim of harassment due to a hostile work environment, a complainant must show that: (1) he is a member of a statutorily protected class; (2) he was subjected to unwelcome conduct; (3) the harassment complained of was based on his protected class; (4) the harassment had the purpose or effect of unreasonably interfering with his work performance and/or creating an intimidating, hostile, or offensive work environment; and, (5) there is a basis for imputing liability to the employer. *See Staib v. Social Security Administration*, EEOC Appeal No. 01A22011 (September 26, 2003) (citing *Flowers v. Southern Regional Physician Service Inc.*, 247 F.3d 229 (5th Cir. 2001) and *Fox v. General Motors Corporation*, 247 F.3d 169 (4th Cir. 2001)).

An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. *Burlington Industries, Inc. v. Ellerth*, 118 S.Ct. 2257 (1998); *Faragher v. City of Boca Raton*, 118 S.Ct. 2275 (1998). When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages. *Id*. The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer

or to avoid harm otherwise. Ellerth, 118 S. Ct. at 2270; Faragher, 118 S.Ct. at 2292. Both prongs of the affirmative defense must be met by the agency.

The harasser's conduct should be evaluated from the objective viewpoint of a reasonable person in the victim's circumstances. *See Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993); Enforcement Guidance on *Harris v. Forklift Systems, Inc.*, EEOC Notice No. 915.002 (March 8, 1994) (Guidance). In assessing allegations of harassment, the Commission examines factors such as the frequency of the alleged discriminatory conduct, its severity, whether it is physically threatening or humiliating, and if it unreasonably interferes with an employee's work performance. *See Harris,* 510 U.S. at 23; Guidance at 3, 6. Usually, unless the conduct is pervasive and severe, a single incident, or group of isolated incidents, will not be regarded as discriminatory harassment. *See Walker v. Ford Motor Company,* 684 F.2d 1355, 1358 (11th Cir. 1982). Moreover, the alleged harassing conduct must also be sufficiently continuous, not merely episodic, in order to be considered pervasive. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 786 (1998). In *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81 (1998), the Supreme Court found that the employment discrimination laws enforced by the Commission are not to be used as a "general civility code." Rather, they forbid "only behavior so objectively offensive as to alter the conditions of the victim's employment." *Id.* Title VII does not serve "as a vehicle for vindicating the petty slurs suffered by the hypersensitive." *Zabkowicz v. West Bend Co.*, 589 F.Supp. 780, 784, 35 EPD Paragraph 34, 766 [E.D. Wis. 1984]; *See also, Staton v. Department of Navy*, EEOC Appeal No. 01903774 (February 11, 1991). If the conduct at issue would not substantially affect the work environment of a reasonable person, no

violation should be found. *Id.* On the other hand, it is well established that an employer who creates or tolerates a work environment which is permeated with "discriminatory intimidation, ridicule, and insult," that "is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment," is in violation of the Commission's regulations. *See Meritor Savings Bank v. Vinson,* 477 U.S. 57 (1986).

Whether the conduct is sufficiently severe or pervasive is evaluated with a two-prong test with both an objective and a subjective element:

1) The conduct must be sufficiently severe or pervasive that a reasonable person viewing the conduct from the victim's perspective would find it hostile, offensive or abusive; and

2) The conduct must have been viewed in that fashion by the complainant at the time it occurred.

See, EEOC Policy Guidance on Current Issues of Sexual Harassment (effective October 25, 1988), (Commission Policy Guidance) p. 13. In its policy guidance statement, the Commission indicates that vulgar language that is trivial or merely annoying, would probably not establish such an environment. The Commission states that:

> In determining whether harassment is sufficiently severe or pervasive to create a hostile environment, the harasser's conduct should be evaluated from the objective standpoint of a reasonable person. [*Id.*]

Accordingly, the same policy applies to a gender-based, religious-based, and or reprisal-based hostile work environment, i.e., trivial or merely annoying behavior would probably not

establish such an environment, and the conduct should be evaluated from the standpoint of a reasonable person.

Title VII does not serve "as a vehicle for vindicating the petty slurs suffered by the hypersensitive." *Zabkowicz v. West Bend Co.*, 589 F.Supp. 780, 784, 35 EPD Paragraph 34, 766 (E.D. Wis. 1984); *See also, Staton v. Department of Navy*, EEOC Appeal No. 01903774 (February 11, 1991). If the conduct at issue would not substantially affect the work environment of a reasonable person, no violation should be found. *Staton, supra.*

The defenses open to the agency on the question of whether a hostile environment existed include: 1) The conduct did not occur; 2) The conduct was not unwelcome; 3) The conduct was not based on the complainant's protected status; or 4) The conduct was not sufficiently severe or pervasive to create a hostile environment. *See, Quinn v. United States Postal Service*, EEOC Appeal No. 05900546 (August 23, 1990). In addition, the agency has an affirmative defense on the issue of liability when the perpetrator is a supervisor. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998).

V. LEGAL ANALYSIS

The Ninth Circuit Model Civil Jury Instructions 1.11 provide:

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it. Proof of a fact does not necessarily depend on the number of witnesses who testify about it.

In considering the testimony of any witness, you may take into account:

(1) the opportunity and ability of the witness to see or hear or know the things testified to;

(2) the witness's memory;

(3) the witness's manner while testifying;

(4) the witness's interest in the outcome of the case and any bias or prejudice;

(5) whether other evidence contradicted the witness's testimony;

(6) the reasonableness of the witness's testimony in light of all the evidence; and

(7) any other factors that bear on believability.

Since Capt Wells denied "targeting" or "attempt[ing] to intimidate [Complainant] in any way, the credibility of the witnesses must be assessed. I found all of the witnesses to be credible, excluding Capt. Wells. All of the witnesses, excluding Capt. Wells made a point of making eye contact with me while testifying, with no indicia of mendacity or dishonesty. Although Capt. Wells made eye contact with me, his body language was stiff and rigid and he appeared angry and annoyed at having to testify. Complainant, on the other hand, though very emotional, appeared comfortable and was very detailed in his testimony. Moreover, the facts adduced at hearing show a pattern of "targeting" complainant and attempting to intimidate him as soon as complainant injured his knee and needed light duty. Therefore, I find Capt. Wells' testimony was not truthful and he was therefore, not a credible witness.

Disability - Prima Facie Case

Complainant has failed to prove that he was disabled or that the Agency considered him disabled during the time relevant herein. While it is clear from the medical documentation, that

Complainant had a torn meniscus, he cannot show that his impairment was substantially limiting.[5] Specifically, the undisputed evidence reveals that the injury to Complainant's knee, i.e., torn meniscus, was temporary. Complainant had limited use of his left knee for approximately fourteen (14) months - from February, 2007 to April, 2008. By April of 2008, Complainant had been released to return to work with no restrictions relative to his knee. It is well established that a complainant is precluded from coverage under the Rehabilitation Act where a physical impairment is temporary and of relatively short duration. *See,* 29 C.F.R. § 1630.2(j)(2) and App. at 353 (determining whether an impairment is substantially limiting, courts may consider the "nature and severity of the impairment," the "duration or expected duration of the impairment," and the "permanent or long term impact" of the impairment); *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 122 S. Ct. 681 (2002) (in interpreting factors in 29 C.F.R. § 1630.2(j)(2) for determining whether an impairment is substantially limiting, Court stresses that ADA's "substantially limits" requirement indicates that an impairment must interfere with a major life activity "'considerably' or 'to a large degree;'" thus, ADA was intended to apply to impairments whose impact is permanent or long term in nature); *see also, Pollard v. High's of Baltimore, Inc.*, 281 F.3d 462 (4th Cir. 2002), *cert. denied*, 123 S.Ct. 122 (2002) (back injury that prevented employee from working for nine months not substantial limitation); *Ogborn v. United Food and Commercial Workers Union, Local No. 881, et al.*, 305 F.3d 763, 767 (7th Cir. 2002) (citations omitted)("intermittent, episodic impairments such as broken limbs and appendicitis are not disabilities"). It is Complainant's burden to present sufficient evidence to substantiate his impairment and that the impairment substantially limits a major life activity, which he has failed to do.

[5] Complainant filed this formal complainant on May 28, 2008 and therefore the ADAAA, effective January 1, 2009 does not apply.

In addition, Complainant also failed to prove that the Agency regarded him disabled since there was testimony that many of the officers thought that Complainant was "faking" his injury and Capt. Wells questioned the validity of Complainant's injury, and the leave he requested because of it. Thus, they did not believe he was disabled but that he was *not* disabled and requesting favorable treatment.

Also, it is clear that Complainant, by virtue of being on light duty, was not performing all of the essential functions of his position as a Senior Officer Specialist. Specifically, the duties of an SOS include monitoring inmates, and searching for contraband/weapons and "from time to time, . . . to carry firearms and to use physical force, including deadly force, to maintain control of inmates." Clearly those duties required Complainant to walk, climb and have close contact/interaction with the inmates. Complainant could not perform many of these functions as required during the 14 months he suffered form the torn meniscus. Instead, Complainant's responsibilities were limited to phone monitoring and receptionist duties. I find that the instruction to Complainant to go to the units and do urinalysis on the inmates was outside of his medical restrictions, since he would have to go to the unit and physically get an inmate and bring him out while using a cane and brace on his knee, but because he was not disabled, this order did not amount to a failure to accommodate.

I also find that Complainant declined to perform a duty that was within his restrictions, i.e., working on the front desk. The front desk duty included occasional standing, walking about 5-6 feet, bending to wand individuals and ascending and descending one 10 inch step. Complainant's medical restrictions stated "no walking more than 50 yards at a time or climbing

more than 2 fights of stairs at a time." Clearly working the front desk was within those restrictions. In fact, Complainant had previously worked the front desk and there is no medical documentation to support a change in his restrictions that would exclude front desk duties as an accommodation to his injury.

Reprisal – Prima Facie Case

Complainant has established a *prima facie* case of retaliation for the denial of compensatory time, being placed in AWOL status, given a Fully Satisfactory performance rating, being written up in the performance log, unwarranted comments, counseling and the denial of training. In February 2007, Complainant made a request for light duty, which was also a request for reasonable accommodation of his injured knee. Complainant was on light duty from February 2007 to April 2008. Capt. Wells was Complainant's second level supervisor throughout the period and therefore, I find that he knew of Complainant's request for a reasonable accommodation (light duty).

The Agency articulated a legitimate nondiscriminatory reason for the denial of compensatory time. Complainant finished at the firing range anywhere from 4-6 hours before the end of his shift. Captain Wells testified that he instructed Complainant to come back, because they had "pretty much a full day left" and he needed him to monitor the phones and that he was not going to let Complainant go home "for four or five hours of the day when he could simply be [there] helping get [their] percentage of phone monitoring up to par." Complainant ultimately was granted two hours of annual leave by Associate Warden Baird, who instructed Capt. Wells to wait until 2:00 pm and then let Complainant go for the day.

Although it may have been fiscally irresponsible for the Agency to grant Complainant 4-6 hours of compensatory time, the Agency failed to refute the testimony that all employees taking training on the firing range were allowed to go home afterwards and that complainant was the only employee ever required to go back to work. Moreover, the agency offered no evidence to show that the percentage of phone monitoring was not "up to par." Considering that it was the normal practice to send the employees home after training, I find that Capt. Wells' reason for requiring Complainant to return to work was a pretext for retaliation. Capt. Wells could have allowed Complainant to use annual leave, which the Complainant was willing to do, as opposed to giving him compensatory time. His failure to do so was part of his unfair harassment of complainant, after complainant requested light duty. Ultimately Associate Warden Baird granted Complainant 2 hours of annual leave.

The Agency articulated legitimate nondiscriminatory reasons for its placing Complainant in AWOL status. Lt. Benson testified that Complainant was put in AWOL status because he had not brought in the required medical documentation to extend his light duty status. Complainant requested Leave Without Pay from June 11, 2007 through July 11, 2007. As of July 14, 2007 Complainant status was neither LWOP or on light duty. Lt. Benson testified that he placed Complainant in AWOL status for July 15, 2007, because he (Benson) "didn't have any medical documentation to determine how to assign him." Therefore Lt. Benson assigned Complainant to a "regular post" which started on Sunday, July 15, 2007.

Complainant denies that he was notified of the schedule change, and the Agency provided no evidence to show that Complainant was notified of the schedule change. Although

Complainant was responsible for providing the Agency with the necessary documentation to keep them apprised of his medical status, the Agency chose to change Complainant's schedule while he was on his day off and required him to return to work on what would have been his off day, without notifying him of the change. Although two days elapsed without the Agency having official notification of Complainant's medical status, when Complainant returned to work, which as far as he knew was his regular work day, he provided the necessary medical documentation. In fact, Complainant testified that he had informed management that he would bring the documentation in after his current medical documentation expired, which management could have assumed would have been on Complainant's next scheduled work day. I find the Agency's action of changing Complainant's day off, not notifying him of the change and then placing him in AWOL status, was an act of retaliation and harassment.

Regarding Complainant's Fully Satisfactory rating, Capt. Wells stated that the phone calls that Complainant monitored while on light duty, were "just basic in nature." Capt. Wells testified that Complainant's evaluation was based on his actual performance during the rating period and that it was a fair evaluation.

Complainant compared his evaluation to previous evaluations when he was fully performing the duties of Senior Officer Specialist where his performance had been evaluated at the "Exceeds" or "Outstanding" level. Complainant testified that Lt. Jackson told him that he could not get a rating higher than Fully Satisfactory because he was on light duty and not performing his regular duties. Lt. Jackson stated by affidavit that Complainant's attendance was an issue. However there is no mention of Complainant's attendance in the July 24, 2007

evaluation. Also, following Capt. Wells' line of thinking, no one whose duties were "just basic in nature" could ever be rated higher than Fully Satisfactory. I do not believe that would be the case. In fact, I find Lt. Jackson's comment, i.e., that Complainant could not get a higher rating because he was on light duty, to be a *per se* violation of the Rehabilitation Act. Therefore, I find the Agency's reason to be a pretext for discrimination.

Although Capt. Wells testified that he did not make "unwarranted comments" I find that he did accuse Complainant of "banging in" and "faking it." Complainant gave very credible, albeit emotional, testimony. Lt. Harris testified that during the time of Complainant's injury, some officers thought that Complainant was faking his injury. Capt. Wells testified that he questioned the validity of Complainant's injury because he believed that most of Complainant's sick leave was taken in conjunction with his days off. Although the Agency provided evidence of Complainant's numerous leave requests, Complainant had a serious knee injury and needed to take leave. Moreover, the agency offered no proof of a connection between the requests and Complainant's off days. In fact, Complainant stated that some of those absences were necessary because his day for therapy would be changed to Friday, i.e., the day before his official days off. Complainant stated that this is when Capt Wells accused him of "banging in" although Complainant had previously informed him that his therapy schedule was subject to change. (IF Ex 8 p. 26) Therefore, I also find the Agency's reason to be a pretext for discrimination, and its heightened scrutiny of complainant's leave requests harassing.

Regarding Complainant's training requests, Complainant testified that Capt Wells had approved 2-4 staff in his department for training in other areas for year-long training.

Complainant stated that when he initially requested training, Capt Wells denied the request citing too many staff out on loan. When two of the staff returned from year long training, Complainant made another request for training and was again denied. Capt. Wells stated that he has allowed a few officers to work temporarily in vacant periods for limited periods of time, but that, Complainant wanted the MCC to create a position in Computer Services for him to fill on an extended basis. However, the Agency provided no evidence that Complainant was seeking to have MCC create a position in Computer Services for him to fill on an extended basis; complainant merely asked to have computer training. Therefore, I find the Agency's explanation to be a pretext for discrimination.

Regarding counseling Complainant on the number of calls he monitored, it was established that complainant was not shirking his duty to monitor calls, but that Capt. Wells against over-scrutinized complainant's work, while ignoring that of others doing the same thing. When SIA Pagli audited all of the phone monitoring, he found variances in the amount of calls listened to on a daily basis. Capt. Wells claimed that in the Agency procedures, employees monitoring the phones are required to monitor at least twenty-five calls per shift, SIA Pagli testified that at the time there was no such stipulation in the number of calls to be monitored per shift. SIA Pagli also testified that Complainant had other "reasonable" explanations, i.e., sometimes there were things out of his control, as to why he monitored fewer calls on certain days than on other days. Finally, SIA Pagli stated that he did not feel the write-up was justified. Although the log entry was subsequently rescinded, I find that Capt Wells initiated this incident as part of his continued retaliatory harassment of Complainant.

Complainant alleged that the hostile work environment began in February 2007 and was continuing through January 2009, after he made a request for an accommodation for his injury. After this request, Complainant was denied compensatory time, placed in AWOL status, given a Fully Satisfactory performance rating, written up in the performance log, subjected to unwarranted comments, counseled and the denied training. When the totality of the circumstance from February 2007 through January 2009 are examined, I find and conclude that a reasonable person viewing the conduct from Complainant's perspective would find the discriminatory events sufficiently pervasive to change the terms and conditions of Complainant's employment, forcing him to work in a hostile, offensive, or abusive work environment, based on retaliation for requesting reasonable accommodation. This retaliatory conduct occurred over approximately a two year period and in some instances was either physically threatening or humiliating to Complainant. I further find and conclude that the Agency did not meet its burden of establishing an affirmative defense to Capt. Wells' reprisal-based harassment, because they did nothing to prevent or correct the harassing behavior. In fact, on April 17, 2008 when Complainant scheduled a meeting with the Warden about a "personal" matter and his evaluations, the Warden referred the matter to Capt Wells. At that time Complainant expressed to Capt. Wells that he did not want to discuss the matter with him and that he (Complainant) "no longer felt comfortable in his (Wells') department and that he had serious issues with Capt. Wells. Nevertheless, Complainant did not get the opportunity to speak with either the warden or associate warden about his concerns. I therefore find that there is a basis for imputing liability to the Agency.

[redacted] *Conclusion* [redacted]

For the reasons stated herein, I find that Complainant proved violations of the Rehabilitation Act, in that the Agency subjected him to work in a hostile and abusive working environment, in retaliation for requesting reasonable accommodation for his torn meniscus. Accordingly, I find that Complainant is entitled to compensatory damages and costs, as discussed below.

VI. COMPENSATORY DAMAGES AND COSTS

Legal Standards for an Award of Compensatory Damages

Section 102(a) of the 1991 Civil Rights Act (CRA) authorizes an award of compensatory damages for all post-Act pecuniary losses, *i.e.,* past pecuniary losses (out of pocket loss)[6], future pecuniary losses, and non-pecuniary losses, such as, but not limited to, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to character and reputation, and loss of health. In *West v. Gibson,* 527 U.S. 2121 (1999), the United States Supreme Court found that Congress afforded the Commission the authority to award such damages in the administrative process. The CRA authorizes an award of compensatory damages as part of make-whole relief for discrimination. Section 1981a(b)(3) limits the total amount of compensatory damages that may be awarded each complaining party for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other

[6]Past pecuniary losses are also not included in the caps and are fully compensable where actual out-of-pocket losses can be shown. Section 1981A(b)(3) limits only claims that typically do not lend themselves to precise quantification, i.e., future pecuniary losses and non-pecuniary losses.

nonpecuniary losses, according to the number of individuals employed by the respondent. The limit for a respondent who has more than 500 employees is $300,000. Under 42 U.S.C. § 1981A, compensatory damages do not include the traditional relief authorized by Title VII, *i.e.,* make-whole remedies, including backpay, interest on backpay, front pay and injunctive relief.

To receive an award of compensatory damages, Complainant must demonstrate that he 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), request for reconsideration denied, EEOC Request No. 05940927 (December 11, 1995); *Lawrence v. United States Postal Service,* EEOC Appeal No. 01952288 (April 18, 1996). *Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991,* EEOC Notice No. 915.002 at 11-12, 14 (July 14, 1992).

Complainant must support his claim for compensatory damages with objective evidence, which may include his own statements, statements from family members and friends, or statements and documents from health care providers which identify and describe physical or behavioral manifestations of mental or emotional distress. *Goodwin v. USAF,* EEOC Appeal No. 01991301 (October 18, 2000); *Carle v. Navy,* EEOC Appeal No. 01922369 (January 5, 1993).

Compensatory damages are awarded to compensate a complaining party for losses or suffering inflicted due to discriminatory acts or conduct. *Carey v. Piphus,* 435 U.S. 247, 254 (1978). Compensatory damages "may be had for any proximate consequences which can be

established with requisite certainty." 22 Am. Jur. 2d, *Damages,* Section 45 (1965). Thus, speculative damages will not be awarded, *i.e.,* there must be sufficient evidence to support the award. *Gunby v. Pennsylvania Elec. Co.,* 840 F.2d 1108, 1121 (3d Cir. 1988), citing *Erebia v. Chrysler Plastics Products Corp.,* 772 F.2d 1250, 1259 (6th Cir. 1985), *cert. denied,* 475 U.S. 1015 (1986).

The Commission recognizes that for a proper award of non-pecuniary damages, the amount of the award should not be the product of passion or prejudice, and should be consistent with the amount awarded in similar cases. *See, Ward-Jenkins v. Interior,* EEOC Appeal No. 01961483 (March 4, 1999) (citing, *Cygnar v. City of Chicago,* 865 F.2d 827, 848 (7th Cir. 1989)). The particulars of what relief may be awarded, and what proof is necessary to obtain that relief, are set forth in detail in the *EEOC's Enforcement Guidance, Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991* (July 14, 1992) ("Guidance"). Briefly stated, the Complainant must submit evidence to show that the Agency's discriminatory conduct directly or proximately caused the losses for which damages are sought. *Id.* at 11-12, 14; *Rivera v. Navy,* EEOC Appeal No. 01934157 (July 22, 1994). The amount awarded should reflect the extent to which the Agency's discriminatory action directly or proximately caused harm to the Complainant and the extent to which other factors may have played a part. *See, Guidance,* at 11-12. The amount of non-pecuniary damages should also reflect the nature and severity of the harm to the Complainant, and the duration or expected duration of the harm. *Id.* at 14. Thus, the critical question is whether the complaining party incurred the losses as a result of the employer's discriminatory action or conduct.

Objective evidence of non-pecuniary damages could include a statement by the Complainant explaining how she was affected by the discrimination. *See, Carle v. Navy,* EEOC Appeal No. 01922369 (January 5, 1993). Statements from others, including family members, friends, and health care providers could address the outward manifestations of the impact of the discrimination on the Complainant. *Id.* The Complainant could also submit documentation of medical or psychiatric treatment related to the effects of the discrimination. *Id.* However, evidence from a health care provider is not a mandatory prerequisite to establishing entitlement to non-pecuniary damages. *Sinnott v. Defense,* EEOC Appeal No. 01952872 (September 19, 1996). The more inherently degrading or humiliating the Agency's actions are, the more reasonable it is to infer that a person would suffer humiliation or distress from that action, and the less it is necessary to rely on evidence from a health care provider to justify a damages award. *See, Lawrence v. USPS,* EEOC Appeal No. 01952288 (April 18, 1996). Nevertheless, the absence of such supporting evidence could potentially affect the amount of damages that could be awarded in specific cases. *Id.*

Complainant's Evidence

Non-Pecuniary Damages

Complainant did not request a specific amount of non-pecuniary damages. However, I find that the preponderance of the evidence established that Complainant suffered emotional distress. Complainant's evidence of injury and causation consisted of testimony from the two clinical psychologists, his former girlfriend, his pastor and himself.

7. Agency shall ensure that Wells has no further opportunity to harass and intimate complainant by, at a minimum, ensuring that other supervisors monitor Wells' actions towards complainant, or by removing complainant from his supervision.

Veroneca Burgess
Administrative Judge
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