Google:

Sherry Strickland EEOC

Sherry R Strickland
910-592-8208
910-592-6514
7060 Hobbton Hwy
Clinton, NC 28328-5826

From: Sherry Strickland <sherryjstrickland63@hotmail.com>
Date: Fri, 25 Oct 2013 10:27:29 -0400

Subject: Facts About Val Applewhite

During Applewhite's holding the position of manager of the U.S. Census Bureau in Fayetteville:

1. She stated publicly that she "hates working with women". She admitted this to the whole office and to her superiors in Charlotte.
Her sexism toward women and her remarks led to claims of discrimination against the U.S. Census Bureau. These claims were supported by a finding by an administrative law judge with the Equal Employment Opportunity Commission.

2. She stated that Queen DeGraphenreid, noted local civil rights activist, was "too black for the Census" and DeGraphenreid was fired.
DeGraphenreid brought charges of discrimination against the U.S. Census Bureau. I have no knowledge about the findings.

3. Young black women were discriminated against in the office and referred to as "nigger girls". The offending racist had his N.T.E. date extended as a reward for his offenses and there was no record of any disciplinary action for his outright racism, yet the young black women who reported the discrimination stated that they were passed over for promotion.

Wonder is there a way for this information to be made available to the voters of Fayetteville who mistakenly believe that Applewhite represents them? If you're a woman in Fayetteville, you're not equal in Applewhite's eyes, and if you're a black woman, apparently that is even worse. That is a truly reprehensible kind of racism -- you don't even stick up for people like the one you see in the mirror.

I'd like Applewhite to willingly pull out of the Fayetteville mayor's race.

From: Sherry Strickland [mailto:sherryjstrickland63@hotmail.com]
Sent: Saturday, October 26, 2013 10:11 AM

Subject: RE: Facts About Val Applewhite

Sir,
With all that's gone on and going on with the IRS and their link to the rogue Democrats in charge, I would prefer to remain anonymous. I received a large sum of money in settlement from the U.S. Department of Commerce on behalf of the U.S. Census Bureau's discrimination of me. Although I have paid a large tax bite already on what is legally owed for this settlement, much of the award was legally non-taxable but could still be called into question by retaliatory IRS representatives.
Although the final determination is a matter of public record now and a pdf document online, many of the documents are sworn statements in a Report of Investigation which was completed by an independent contractor mandated by the E.E.O.C. process.
I have some suggestions as to folks who may be perfect for interview who could comment on these facts.
Queen DeGraphenreid would be perfect to interview. It's possible that a well prepared interview could draw her into the spotlight (which she loves dearly), and really put the spotlight on Applewhite. Many democratic voters would be really upset to learn of DeGraphenreid's story because of her age and her race. Me, not so much. The only story there was that I was a white woman who stood up and fought for black women and myself in a federal office building.
I was not in Applewhite's hierarchy; I was a coordinator, of sorts, out of the Charlotte Regional Office of the U.S. Census Bureau, and it was my job to report to Charlotte what was amiss and out of procedure in that office.
Another question to ask for that office was whether veterans were actually given their mandatory veteran's preference. I believe that is truly questionable, since those in admin who were involved in the selection process were not formally trained using the procedures mandated at the time. I reported this as well.
Al Howe, who later replaced Applewhite as manager, may be a good one to interview. He could be Republican. I would guess he may be. If you contact Howe you need to be as equally prepared, because he would have been involved in the veteran's preference issue, and may be quite guarded if he thought you were actually digging. He's a veteran as is Applewhite and may have reservations about outing her.
If you want my help, I'll willingly give it. I did what was right then. I stood up, and I'm still standing. But now that the IRS has gone radically partisan, I don't want my family to suffer financially because of my standing.
The emails which I sent from a .gov email address were forwarded to my personal email address so I may still have copies.
I can make myself available to you for the coming couple of weeks, but will have to plan around that.
Sher

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Raleigh Area Office

1309 Annapolis Drive
Raleigh, NC 27608-2129
(919) 856-4070
TTY (919) 856-4296
FAX (919) 856-4156

Sherry R. Strickland, Complainant,	)	EEOC Nos. 430-2008-00341x 430-2010-00106x
v.	)	Agency Nos. 07-63-00236D 09-63-00752
Rebecca M. Blank, Acting Secretary, Department of Commerce, Agency.	)	
	)	Date: November 1, 2011

DECISION

INTRODUCTION

This matter came before the United States Equal Employment Opportunity Commission (EEOC) pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, *et seq.* which prohibits discrimination on the basis of retaliation. All the necessary prerequisites for an EEOC Hearing have been satisfied, as set forth in the EEOC regulations at 29 C.F.R. §1614.101, *et seq.*, which govern the administrative processing of federal sector complaints of employment discrimination. The above-captioned complaint was heard on March 9-11, 2011,[1] before Anita F. Richardson, Administrative Judge, Equal Employment Opportunity Commission, of Raleigh, North Carolina. EEOC Regulation 29 C.F.R. §1614.109. It is upon the totality of the evidence that the following findings and conclusions are based.

APPEARANCES

At the hearing, Complainant was present and represented by attorney Caitlyn Thomson, and the agency was represented by attorney David Honness.

CLAIMS PRESENTED

Did the agency discriminate against Complainant on the basis of retaliation when the following events occurred:

[1] The undersigned requested that the agency provide records referenced during the hearing, and the agency provided the records on April 15, 2011. Further, the undersigned requested that Complainant clarify her request for damages (back pay and front pay). Per an extension, Complainant submitted this information on April 15, 2011. The agency responded on May 6, 2011. Any additional information provided by the parties outside of these specific requests was not considered in making this decision.

A. in September 2007, Complainant received a negative progress review;
B. on or about September 13, 2007, the agency reassigned Complainant from her position of Regional Technician to her prior position of Lead Field Representative;
C. since April 2009[2], the agency withheld work assignments from her; and
D. since November 2008, the agency did not select her for a Regional Technician position?[3]

FACTS[4]

The record reflects that Census operates in North Carolina out of the Charlotte Regional Office (RCO).

In addition, the Census Bureau conducts a decennial census each decade throughout the country. Twelve Regional Census Centers [Hereinafter RCC] manage the decennial operations. Each RCC manages the Local Census Office [Hereinafter LCO] within the region. In North Carolina, the Charlotte RCC managed decennial operations for the state.

Also, the record reflects that Complainant entered duty with the agency (RCC) as a temporary employee in 2000. She worked as an Enumerator for the 2000 Decennial Census. In December 2004, the agency (RCO) re-hired her as a Field Representative, and she became the Lead Field Representative [Hereinafter LFR] in March 2005. Her duty station was her home in Sampson County, North Carolina.

I. Agency No. 07-63-00236D

In June 2006, pursuant to an Internal Recruitment Bulletin [Hereinafter IRB], Complainant applied for the position as a Regional Technician [Hereinafter RT] for the agency's 2008 "Dress Rehearsal" of the decennial census. The agency (RCC) selected Complainant for the RT position (pay plan GG-0301-7/1), effective August 20, 2006. ROI 1 at 105. Her duty station was her home.

The 2008 Dress Rehearsal RT position was a temporary assignment not-to-exceed [Hereinafter NTE] August 5, 2007. However, according to the IRB, the initial term of employment was not-to-exceed two years, but "may be extended without competition for up to an additional two (2) year period." ROI at 1 at 113.

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[2] Complainant claimed that the agency withheld her work assignments since November 2008. However, in the acceptance letter, the agency identified the time period as April 14, 2009. Complainant did not challenge the accepted issue or request the Administrative Judge to amend the complaint. TR at 6-7. As such, she waived the right to challenge this partial dismissal. The agency's accepted issue stands.

[3] Via email dated February 25, 2011, Complainant (through her attorney) withdrew the claim of hostile work environment based on sex.

4 In reaching the decision, all evidence (including the Report of Investigation I (Bates Stamped 1-149) and Report of Investigation II (Bates Stamped 150-302), pleadings, Discovery Responses, Hearing Transcripts [Hereinafter TR], exhibits, and all other documents) was reviewed and considered.

Per a temporary employment agreement, the agency transferred Complainant from Regional Office Staff to 2008 Dress Rehearsal staff. Specifically, the agreement, the agency notified Complainant, "Census operations are short. This appointment cannot be made permanent. You may be released from service with the Census Bureau before the not-to-exceed date for this appointment if work or funds are no longer available." Agency Motion at Exhibit 5. Complainant signed the agreement on February 19, 2007.

As Area Manager [Hereinafter AM], Kim Frahn was Complainant's first level supervisor.

According to the position description, the RT was the "eyes and ears" and "arms and legs" of the Area Manager in the LCO and was the "first line of defense" by monitoring LCO activities. ROI 1 at 52. Her duties included working as a management consultant, providing technical assistance and advice, and/ or evaluating, managing, and reporting progress of LCO activities.

Although the RT did not have a direct line of supervision over LCO staff, the position description noted, RT "may be required to perform the duties of a manager or other roles in the LCO when employees quit or are released from employment." ROI 1 at 52. As such, prior to January 2007, the Recruiting Assistants [Hereinafter RAs] reported to Complainant and AM Frahn. AM Frahn testified that they "co-run" the operations with the RAs. TR at 469. Specifically, the RAs submitted their weekly reports to Complainant (TR at 47 and 52), and Complainant observed and supervised them. TR at 469. Also, he testified that Complainant had a "very good" relationship with the RAS. TR at 471.

In January 2007, the agency opened the Fayetteville LCO. The LCO Manager [Hereinafter LCOM] was Valencia Applewhite. As RT, Complainant was overseeing the operations at the LCO. TR at 471. At that time, Complainant no longer had any supervisory responsibility over the RAs, and the RAs reported to LCO management. However, Complainant continued to work with the RAs while the LCO staff was trained. TR at 469. The Assistant Manager for Recruitment [Hereinafter AMR] was the RAs first level supervisor, and the LCOM was their second level supervisor.

After the transfer of supervision of the RAs, AM Frahn deemed the first AMR (Queen DeGraphenreid) "extremely ineffectual" from day one. TR at 469. During this time period, he gave AMR DeGraphenreid a number of write-ups and chances to improve. TR at 470. AM Frahn testified, "When it is felt that it is not going to work out, I develop a paper trail." TR at 493. Despite these actions, AMR DeGraphenreid failed to improve over several months. As a result, he and Complainant "again stepped in" to supervise the RAs. TR at 470.

The record reflects that Complainant performed according to her RT performance standards. On March 28, 2007, AM Frahn wrote Complainant's Progress Review. He stated:

> [Complainant] has excelled at all critical elements. She has "adopted" a true Census environment attitude of "immediacy" and well informed of all census policies and procedure.

ROI 1 at 49.

Similarly, on July 17, 2007, AM Frahn wrote Complainant's second Program Review. He stated:

> [Complainant] has continued to meet/ exceed all critical elements of this performance evaluation. She has made herself "well versed" in all policies and procedures of the AC Operation, both production and Q.C., which made [Complainant] an irreplaceable "asset" in the LCO. She conducts herself in a truly professional manner, both in the LCO and the community.

ROI 1 at 49.

From May through August 2007, various situations occurred at the LCO in which Complainant believed LCO staff undermined her authority. On May 11, 2007, Complainant claimed that a female Field Operations Supervisor [Hereinafter FOS] (Kristi Newton) "verbally assaulted her." ROI 1 at 131-132. She discussed the matter with AM Frahn, but the record does not reflect any follow-up actions.

In June 2007, the agency terminated AMR DeGraphenreid. As a result, Complainant performed those AMR job duties, and the RAs once against reported to her.

At a later date, the agency hired the second AMR (Erica Muse-Hart), and the agency transferred the supervision of the RAs to AMR Hart. However, in July and August, AMR Hart was out of the office for extended periods of time, and the RAs once again reported to Complainant. AM Frahn testified that Complainant had to provide on the job training to AMR Hart and had to supervise the RAs when AMR Hart was on sick leave. TR at 470.

Effective August 5, 2007, the agency extended Complainant's promotion NTE August 4, 2008. ROI 1 at 108. When questioned if he had any concerns about Complainant's performance at this time, AM Frahn testified, "I might have had some, but not enough to document." TR at 524. He explained, "Everybody has bad hair days." TR at 525.

The record reflects that the RAs continued to seek guidance from Complainant when AMR Hart was in and out of the office. According to AM Frahn, the RAs continued to contact Complainant despite AMR Hart's return and proper training. He opined, Complainant "would not cut loose." TR at 476. He discussed the matter with LCOM, and "We both decided that it was time for [AMR Hart] to pull her weight. . . . So we both agreed that the RA, who should be supervised by the AMR, should report to [AMR Hart], and that they should not be reporting to [Complainant]." TR at 476-477. In essence, he wanted the LCO "to go back to the lines of authority." TR at 477. Therefore, he agreed with LCOM to instruct the RAs to report to AMR Hart. TR at 478.

Subsequently, on August 29, 2007, in an RA meeting, LCOM informed the RAs that they would be insubordinate and disciplined if they contacted Complainant or AM Frahn instead of AMR Hart. After the meeting, Complainant asked the RAs (in an email message) to provide minutes to the meeting "in the spirit of restoring a unified recruiting push." ROI 1 at 134. Later, Complainant discussed the matter with AM Frahn.

Initially, at the hearing, AM Frahn acknowledged that LCOM could not give Complainant a directive not to talk to the RAS because she was not Complainant's supervisor. TR at 505. He added that, at some point, he gave Complainant a directive not to communicate with the RAs and that she disobeyed this directive. When questioned about the timing of this directive, AM Frahn had "no idea" when he gave her the directive (TR at 500), but he knows that he told Complainant to refer the RAs' questions to AMR Hart (TR at 507). Later, AM Frahn contradicted himself. He testified that LCOM's directive to the RAs also applied to Complainant because she was in the meeting. TR at 506. In direct contrast to his earlier testimony, AM Frahn then testified that LCOM could give Complainant a directive. He explained, "It's one and the same. [LCOM] was speaking for me. . . ." TR at 532.

Also on or about August 29, 2007, Assistant Manager for Administration [Hereinafter AMA] Al Howe (male) criticized Complainant for having a messy work area. ROI 1 at 133.

In response to these and other events at the LCO, Complainant contacted AM Frahn and memorialized the incidents in email messages.

With regard to other situations, Complainant perceived them as sexist. For example, Complainant heard that someone posted a hand written sign labeled, "He-Man-Woman-Haters-Club" on the door to the computer room.[5] The record does not reflect that Complainant saw the sign, and the next day, the sign was removed.

Also, Complainant heard AM Frahn make the following joke, "Why is it so easy to get southern women pregnant?" The punch line is "because it takes her so long to say no" (with the word "no" drawn out in a southern accent. The record reflects that Complainant was born and raised in the South and that she admittedly speaks with a southern accent.

In addition, in a management staff meeting, LCOM stated, "That's why I hate working with women."[6] LCOM and AM Frahn discussed the matter. The next day, she repeated the comment in a meeting and explained why she made it.

Subsequently, on August 30, 2007, Complainant notified AM Frahn of the incidents in a telephone conversation. In an email identified as "eeo concerns," Complainant memorialized her complaints about the sign and LCOM's comment. She stated that, as a woman, she was offended. ROI 1 at 135.

The next day, Complainant and AM Frahn discussed the matter again.

In one email identified as "sexual discrimination," Complainant memorialized additional complaints. She stated that the women employees were forced to endure racist comments by a fellow employee and that the agency had failed to discipline that employee. In another email

[5] During the EEO investigation, employee April Davis acknowledged in a signed statement that she created the sign in response to two male employees who stated that she reminded them of the Darla character from the Little Rascals television show. ROI at 94.

[6] LCOM stated that she made the comment in reference to female employees who were arguing about donating money for another female employee's present. ROI at 85.

identified as "eeo," Complainant stated that she perceived a hostile work environment by LCOM and management employee Howe. ROI 1 at 137.

Notably, Complainant testified that AM Frahn did not address her concerns; however, he testified that he addressed each and every issue as they arose. Also, he stated that the subsequent investigations did not substantiate Complainant's claims. When questioned if he had any documentation of his investigations, AM Frahn responded, "No. I don't have time to sit around and write a bunch of e-mails when I am putting in a 16-hour day just putting fires out." TR at 511.

On September 5, 2007, AM Frahn notified Complainant via telephone that he would come to the Fayetteville LCO to discuss the situation with Complainant and LCOM. According to Complainant, she told AM Frahn that she intended to file an EEO complaint at that time.

That same day, Complainant submitted an email to her second level supervisor, William Burdoff. In the email, Complainant expressed her concern about her role once the LCO opened in January 2007. She cited incidents between herself, AM Frahn, AMA Howe, FOS Newton, and LCOM, and she discussed discriminatory practices (He-Man-Woman-Haters sign, LCOM's comment, and racist comments) at the LCO. Also, in this email message, Complainant told her second level supervisor that she intended to file an EEO complaint. The record does not reflect any response to her email.

On September 6, 2007, AM Frahn met with Complainant and LCOM. During the meeting, they discussed the RT's and LCOM's roles in the office. According to Complainant, LCOM used the meeting to tell Complainant what she would allow Complainant to do at the LCO and what LCOM would tolerate from Complainant. During the course of the meeting, Complainant expressed her dissatisfaction with AM Frahn's position, walked out of the meeting, and stated that she would address the situation further.

Subsequently, LCOM wrote a memorandum about the meeting. She expressed confusion about the "recent turn of events," identified "a negative effect" on the LCO staff, and stated, "I believe that my professional relationship with [Complainant] has suffered irreparable damage." Agency 9/16/10 Discovery at 306.

Over the next weeks, AM Frahn gave Complainant assignments out of the office. He testified that she could not be in the office anymore because "that's how disruptive she had become." TR at 510.

Believing that she was a victim of discrimination, on September 12, 2007, Complainant contacted an EEO Counselor. Specifically, she contacted the toll-free number for the EEO office.

A. <u>Performance Evaluation</u>

The next day, on September 13, 2007, AM Frahn completed Complainant's Progress Review. The Progress Review contained four critical elements measured in the following manner:

Performance Element	Individual Weight	Element Rating	Score
Customer Service	15	1	15
Data Collection Support	25	3	75
Recruitment and Administrative Support	30	3	90
Monitor and Evaluate Field Data Collection Operations	30	3	90
			270

ROI 1 at 123. Specifically, he marked the selection that her "review indicated performance is at Level 3 on all critical elements except a deficiency in the Customer Service critical element." Specifically, he stated:

- Failure/ Inability to communicate/ resolve "issues" with LCOM
- Failure/ Inability to communicate/ resolve "issues" with AMA
- Failure/ Inability to communicate/ resolve "issues" with AM
- Failure/ Inability to follow LCOM's directive of non-communication with RAs and failure to follow "chain of command"

ROI 1 at 50.

Per the performance rating chart, a score between 100 and 199 points warranted a Level 1 rating, and a score between 200 and 289 points warranted a Level 2 rating. However, Complainant did not receive a Level 2 rating. In his signed statement, AM Frahn stated, "Her failure to attempt to resolve these issues with the appropriate staff, resulted in a rating of "1" on her evaluation." ROI 1 at 79. As a result, Complainant received a Level 1 rating.

The record does not reflect any documentation of problems with Complainant. When questioned why he did not have such documentation, AM Frahn testified, "Sherry did an excellent job. Her performance went downhill probably quicker than any employee I'd ever worked with." TR at 493. He claimed that her insubordination and concerning behavior within the office caused "a critical situation overnight." TR at 494. Also, AM Frahn testified that he was "not an e-mail kind of person. I deal with it direct." TR at 504.

Also, on September 13, 2007, Complainant had her initial interview with the EEO Counselor.

B. <u>Demotion</u>

Subsequent to the progress review, AM Frahn removed Complainant from her position as RT and returned her to her position as LFR. In an email to Complainant, AM Frahn wrote, "It was my decision, after the events that have taken place over the past few weeks with no resolution or attempt at resolution, to reassign you back to your original position as LFR. I do not feel you are meeting the expectations in your temporary position as [RT]. . . ." ROI 1 at 140. Effective, September 30, 2007, the agency returned Complainant back to her position as LFR.

In the RT position, Complainant was a GG-0301-7/2 and worked a guaranteed full-time schedule (40 hour work week). Her salary was $38,105.[7] However, in the LFR position, Complainant became a GS-0303-5/9 and worked a part-time schedule that "varies." ROI 1 at 108-109;Agency 9/16/10 Discovery at 189-201. Her hourly rate was based upon an annual salary of $36,557.[8]

The record reflects that Complainant filed a formal complaint (Agency No. 07-63-00236D) on November 7, 2007.

In response to Complainant's claims, the agency stated the following.

With regard to the performance evaluation, AM Frahn stated that Complainant received a poor performance review because of her performance issues. Specifically, he cited her insubordination when she disobeyed his directions regarding the RAs and when she refused to get along with the LCO staff. Also, AM Frahn stated that he discussed and investigated each and every one of Complainant's claims and complaints that other employees made about Complainant "all the time." TR at 479 and 485. Despite these discussions, in the end the situations "just kept getting worse." TR at 480. More so, he characterized Complainant as a "by-the-book" person who had personality conflicts with other employees. TR at 479. Further, AM Frahn stated that Complainant refused to resolve problems with LCO staff and that he had to get involved. TR at 486. He perceived these problems with Complainant as "un-resolvable" and noted such on her performance evaluation. TR at 488. Notably, AM Frahn denied knowing that Complainant contacted an EEO Counselor when he issued the performance evaluation.

With regard to the demotion, AM Frahn stated that the agency demoted Complainant because she received a "1" rating in Customer Service and was not qualified to remain an RT.

II. Agency No. 09-63-00752

A. <u>Non-selection</u>

On April 22, 2008, the agency (RCC) advertised its intent to hire a few Regional Technicians (GG-0301-7 to GG-0301-12) agency's 2008 decennial census in North Carolina. The position was a two-year time limited appointment with a possible two year extension. The agency utilized two different recruiting bulletins to fill the positions.

First, the agency issued internal recruiting bulletin [Hereinafter IRB] No. 28-08-D10-IRB-051 with an interim closing date of May 9, 2008, but a closing date of "open continuously." While the agency was able to issue a referral list after the interim closing date, the agency continuously accepted applications and created referral lists as needed. ROI 2 at 232.[9]

[7] In 2008, the annual salary for the GG-0301-7/2 position was $39,273.
[8] In 2008, the annual salary for the GS-0303-5/9 position was $37,648.
[9] The record reflects that the agency amended the IRB (No. 28-08-D10-IRB-051A) on October 2, 2008, to include all U.S. citizens residing in York County, South Carolina.

The IRB was open to all current Census employees who resided in the state of North Carolina and York County, South Carolina.[10] Applicants who resided in certain locations/ counties within the seven areas of consideration (i.e. Fayetteville metropolitan area limited to Bladen, Cumberland, Harnette, Hoke, Johnston, Lee, Moore, Robeson, Sampson, and Scotland Counties) received first consideration for the positions. ROI 2 at 232.

Simultaneously, the agency issued external recruiting bulletin [Hereinafter ERB] No. 28-08-D10-ERB-051 with an interim closing date of May 9, 2008, but a closing date of "open continuously." ROI 2 at 255. While the agency was able to issue a referral list after the interim closing date, the agency continuously accepted applications and created referral lists as needed. ROI 2 at 255.[11]

The ERB was open to all U.S. citizens who resided in the state of North Carolina and York County, South Carolina. Applicants who resided in certain locations/ counties within the seven areas of consideration (i.e. Fayetteville metropolitan area limited to Bladen, Cumberland, Harnette, Hoke, Johnston, Lee, Moore, Robeson, Sampson, and Scotland Counties) received first consideration for the positions. ROI 2 at 255.

The record reflects that, on October 5, 2008, Complainant applied for the RT (GG-0301-09) position pursuant to IRB No. 28-08-D1-IRB-051. ROI 2 at. 249. Per email message in response to Complainant's inquiry, the Atlanta RCC instructed Complainant to apply for the RT positions as an internal applicant. Agency Supplemental Discovery at 331.

At an unidentified time, the agency rated Complainant as eligible for the GG-9 and GG-11 levels. ROI 2 at 253.

The agency's hiring regulations provide, "When you determine there is a sufficient number of internal candidates to consider for a particular vacancy, you **may** limit the area of consideration to current census employees." ROI 2 at 275 (emphasis added).

On June 2, 2009, the agency requested only selection certificates for the RT position in the Fayetteville metropolitan area from the ERB. TR at 307. The Selecting Official [Hereinafter SO] was Jess Avina. The record reflects that SO was aware of Complainant's prior EEO activity. TR at 316.

Initially, SO testified that the agency's policy (by the Summer 2009) was to hire external candidates to avoid taking away the agency's qualified internal employees. TR at 300, 306, 310, and 330. However, when questioned about the written policy, SO acknowledged that the agency did not have such a written policy. TR at 349-351. The Assistant Manager of Administration, Jeannie Presto, acknowledged that the agency did not have such a written policy. TR at 377.

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[10] The recruiting bulletin noted, "All current Census employees on a less than one year appointment, such as LCO employees, must apply to the external recruiting bulletin." ROI 2 at 232.

[11] The record reflects that the agency amended the ERB (No. 28-08-D10-ERB-051A) as well on October 2, 2008, to include all U.S. citizens residing in York County, South Carolina.

SO selected AMR Hart from the RT, GG-12, ERB selection certificate. ROI 2 at 265. He testified that the agency's policy is to hire the person at the highest grade level for which they qualify. TR at 308. Effective June 19, 2009, AMR Hart became the RT for the Fayetteville LCO.

From November 7, 2008, through August 28, 2009, the agency hired approximately 14 RTs in North Carolina. In addition to the one RT, GG-0301-12, position in the Fayetteville metropolitan area, the areas of consideration included other RT positions at varying pay levels in Charlotte, Greensboro, Catawba and Iredell, Durham, and Rest of State. ROI 2 at 266.

B. Work Assignments

In October 2008, Complainant applied for the Senior Field Representative [Hereinafter SFR] position. Effective November 23, 2008, the agency promoted her to the GS-0303-6/7 position, NTE May 22, 2009. The position was on a "mixed tour" schedule which means the work hours could range from 0-40 hours per week. ROI 2 at 207; Agency 9/16/10 Discovery at 122. Her hourly rate was based upon an annual salary of $39,762.[12] In this position, her first level supervisor was Craig Pickett (Survey Coordinator), and her second level supervisor was Lucinda Scurry-Johnson (Assistant Regional Director) [Hereinafter ARD].

The record reflects that both Coordinator and ARD were aware of Complainant's prior EEO activity. ROI 2 at 190 and 196; TR at 403. Depending on the survey, employee Feder Estelus supervised Complainant as well. He was not aware of her prior EEO activity. ROI at 193.

In general, the SFR received supervisory field representative training (TR at 396) and then survey specific training (TR at 397). Upon completion of the training, Coordinator would observe the SFR. TR at 400. At that time, Coordinator or Mr. Estelus would give the SFR an assignment. TR at 397-398. The assignments were based on geographical area. TR at 399. According to Coordinator, the surveys may or may not be conducted in each county. TR at 394. Some of the surveys lasted ten days to one month long. TR at 398. After the assignment, the SFR would get a team of FRs. TR at 398. Coordinator explained that SFRs could get approximately 30-40 hours of work per week (TR at 411) once they were properly trained after approximately four months (TR at 421).

Initially, Complainant was only trained on the American Community Survey, and she worked approximately 15 hours per week. TR at 88 and 97.

During the relevant time, the agency conducted approximately 15 surveys in Complainant's district. However, Complainant was not trained on most of these surveys between November 2008 and May 2009. The agency trained Complainant on the following surveys: Current Population Survey (February 2009), National Crime Victimization Survey (March 2009), National Health Survey (May 2009), and the Survey on Income and Program Participation (May 2009). According to Complainant, the agency did not assign her any field representatives.

[12] In 2009, the annual salary was $41,159.

At the hearing, Coordinator testified that Complainant was trained on a survey, was observed, and given an opportunity to "perfect those skills, and then move onto the other survey versus piling all of those on at one time." TR at 402. When questioned specifically why Complainant was not trained from February 2009 through May 2009, Coordinator testified, "So the gap is because she's just been trained on two surveys, like CPS and NCVS. So there's a time for her to work on those surveys before she get (sic) trained to the next survey." TR at 402.

However, Coordinator added,

> We did not get anymore work after the month of March for [Complainant]. For some reason [Complainant] was extremely difficult to locate, she was extremely difficult to contact. And I'm not sure at the time if whether or not it was a (sic) overload or perhaps it was too much stress where she had worked from one survey ACS and then she was trained on ADCAN, which did go away, but now she was being trained on multiple surveys. And I'm not sure if it was just more of a stress, but it was very difficult to locate [Complainant], and we didn't get anymore work out of her during that period.

TR at 402-403.

When questioned if he had any documentation of his attempts to reach Complainant, Coordinator stated that he had some emails, phone calls, and faxes from her daughters. TR at 406. He later clarified that these documents were from the time period after her training in May 2009. TR at 407. Coordinator acknowledged that he did not have any documentation to show that he was trying to reach Complainant. TR at 408, 422, and 423. Coordinator added, "'I'm not absolutely sure of every month that we called her, but it was several months after she was trained that we just could not reach her." TR at 417.

On May 23, 2009, the agency extended Complainant's SFR position, NTE November 21, 2009. Agency 9/16/10 Discovery at 121.

Once Complainant returned from her two-week survey training, she did not return to work due to illness. Believing that she was a victim of discrimination, on May 29, 2009, Complainant initiated a second complaint of employment discrimination based on retaliation and whistleblowing concerning falsification of data.[13]

On June 1, 2009, Complainant informed ARD that she had been having difficulties getting assignments. Specifically, in the email message she claimed that the agency had not given her

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[13] Complainant filed a formal EEO complaint (Agency No. 09-63-00752) on July 7, 2009. The agency issued a partial dismissal of the whistleblowing harassment. ROI 2 at 176. The record does not reflect that Complainant challenged the partial dismissal.

It is well settled that engaging in whistleblowing is not protected EEO activity. See *Reavill v. Department of the Navy*, EEOC Appeal No. 05950174 (July 19, 1996). Generally, whistleblower activities are outside the purview of the EEO process and not covered by the statutes enforced by the EEOC. *Giannou v. Department of Housing and Urban Development*, EEOC Request No. 05880911 (February 13, 1989); *Koliopoulos v. VA*, EEOC Request No. 05A60570 (April 20, 2006).

teams for the surveys on which she had been trained. Complainant attached emails dated May 4 and 22, 2009. ROI 2 at 215-217.

Subsequently, Complainant was out of work on sick leave from approximately May 29, 2009, until October 24, 2009. Notably, on June 29, 2009, Complainant admitted herself into Holly Hill Behavioral Hospital for major depressive episode, suicidal thoughts, and anxiety. She was released on July 6, 2009.

During this time period, the agency attempted to contact Complainant for work. ROI 2 at 224-228; Agency 9/16/10 Discovery at 170-176. On July 24, 2009, Complainant's physician diagnosed her as "disabled until further evaluation" with a major depressive episode. Agency 9/16/10 Discovery at 156. After receiving the appropriate medical information, in August 2009, the agency changed her work schedule to intermittent. Agency 9/16/10 Discovery at 120.

In October 2009, Complainant's physician released her to return to work. She testified that she told her physician that she did not want to lose her job and health insurance. As such, he told her to try to return to work.

Once her doctor cleared Complainant to work full-duty, the agency reinstated her to work on November 2, 2009. The agency assigned her to two mandatory re-training field observations.; however, Complainant cancelled these observations due to illness. On December 16, 2009, the agency issued Complainant a (final warning) directive to report to work on January 4, 2010. The agency attempted to contact Complainant between December 1, 2009, and January 4, 2010, to no avail. Complainant did not report to work. ROI 2 at 140. The record does not reflect that Complainant returned to work.

In response, Complainant testified, "I had not healed to the point that I could do it." TR at 114.

Subsequently, on January 14, 2010, the agency issued Complainant a Notice of Proposed Removal for unavailability to work and failure to follow a supervisory directive. Agency 9/16/10 Discovery at 133-136.

Effective, on February 5, 2010, the agency removed Complainant from service. Agency 9/16/10 Discovery at 117 and 124; Agency Motion for Summary Judgment at Exhibit 7.

In response to Complainant's claims, the agency stated the following. First, the agency stated that SO selected an RT, GG-12, from ERB No. 28-08-D10-ERB-051 and that the agency did not make a selection from IRB No. 28-08-D10-IRB-051. Since Complainant did not apply to the ERB, the agency did not and could not consider her. More so, the agency selected a candidate at the GG-12 level, and Complainant did not qualify for that selection. Secondly, the agency stated that Complainant was trained on surveys and conducted surveys according to her training if and when she was available. The agency stated that SFR work varied between 0-40 hours each week and that the work depended on the underlying work of the field representatives. The agency believed that Complainant got as much work as possible.

Damages

As a result of the agency's actions, Complainant testified that she suffered a loss of income and increased (revolving credit) debt. In addition, she suffered major depression, stress, anxiety, diarrhea, decreased mobility, and irritable bowel syndrome. She sought treatment from her primary care doctor, the nearby urgent care, a gastrointestinal specialist, and a counselor. According to Complainant, she was very sick and did not want to continue to live "like that." TR at 109.

Specifically, her husband testified about Complainant before and after the incidents. He described Complainant as outgoing and very social who avidly worked in church and in the community prior to August 2007. Also, he characterized her as a proficient worker who generally enjoyed her work with the agency. After September 2007, Complainant was very upset, could not sleep, withdrew from family and friends, cried frequently, and repeatedly talked about her work situation. TR at 456.

In June 2009, she voluntarily checked into Holly Hill Hospital for approximately seven days. Complainant characterized the experience as a nervous breakdown. Following her release from the hospital, she received follow-up care from a psychiatrist.

With regard to her progress, Complainant testified, "I have made a lot of progress in recovering. I feel more like myself, although I still do feel like I have a long way to go to get self confidence back to get back to the place that I was. My confidence has been shattered." TR at 110. She testified that she has low self confidence and stutters; however, she believes that she is ready to go back to work. Similarly, her husband noted that Complainant got worse for a while; however, in the past six months, she has improved. TR at 457.

When questioned about prior treatment for stress, anxiety, or depression, Complainant acknowledged the following. As a youngster, Complainant was fondled by a friend of the family. TR at 170. After the birth of her first child (TR at 112) and a failed relationship (TR at 175-176), Complainant suffered from anxiety/ depression. In May 2007, Complainant acknowledged experiencing stress on her new job and sought medical treatment for insomnia, weight loss, and a possible nervous breakdown. TR at 132-133. In January 2008, Complainant discovered a lump in her breast. TR at 19. In June 2009, Complainant reported a great deal of stress from her mother's breast exam and her husband's job loss. TR at 167. In August 2009, Complainant's husband took a job in Florida, and he is currently traveling for work. TR at 174.

APPLICABLE LAW

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 her 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. Worcestor 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.

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. Baldridge*, 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).

With regard to protected activity, 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. Opposition occurs when an employee informs an employer that she believes the employer is participating in prohibited behavior. Examples include complaining about discrimination, threatening to file a charge of discrimination, or picketing in opposition to discrimination. 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).

It is well settled that a violation of the anti-retaliatory provision can be found whether or not the challenged practice ultimately is deemed unlawful. In other words, the participation in protected activity or opposition to discrimination only needs to be based on a reasonable, good faith belief.

Further, the Commission has held that 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.

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 reprisal.

ANALYSIS AND FINDINGS

First, Complainant has established a *prima facie* case of reprisal discrimination. She is a member of the protected group by virtue of her protected activity. On August 30, 2007, Complainant informed AM Frahn (via email and telephone) that she believed the agency was discriminating against her based on sex (female). Once she complained about the various incidents at the agency, Complainant opposed discrimination. Furthermore, she notified both AM Frahn and his supervisor that she intended to file an EEO complaint about the incidents. The fact that the incidents were probably not sufficiently severe or pervasive enough to constitute sexual harassment is unimportant. Complainant had a reasonable and good faith belief that the incidents were discriminatory. Thus her activity was protected. Subsequently, she was subjected to adverse actions (i.e. negative performance evaluation, demotion, non-selection, and denied work assignments. These actions occurred in such a manner and within such a time period that one could infer a retaliatory motive.

Next, the agency has articulated the following legitimate, non-discriminatory reasons for its actions.

Performance Evaluation

The agency stated that Complainant received the negative performance evaluation because of her performance issues. Specifically, AM Frahn cited her insubordination when she disobeyed his directions regarding the RAs and when she refused to get along with the LCO staff. He stated that Complainant raised several complaints against the several employees at the LCOM and that

his investigations could not support her claims. As a result, the situations with Complainant "just kept getting worse." Further, AM Frahn stated that Complainant refused to resolve problems with LCO staff and that he had to get involved. He perceived these problems with Complainant as "un-resolvable" and noted such on her performance evaluation.

These reasons appear legitimate and non-discriminatory.

At this time, the burden shifts to Complainant. She asserted that the agency's reasons were a mask for discrimination. Specifically, Complainant stated that she received an unjustified negative performance evaluation and that her performance did not warrant a "1" rating in Customer Services. Further, Complainant stated that the agency's motivation for the negative performance evaluation was a her "failure/ inability to communicate/ resolve issues" and that these issues were in fact her EEO concerns.

The record supports her assertion. As stated above, Complainant received glowing performance evaluations in March 2007 and July 2007. Based on these evaluations, the agency extended Complainant's RT position in August 2007 for another year.

From August 29- September 5, 2007, Complainant notified AM Frahn about problems at the LCOM. In fact, she characterized these problems as EEO concerns based on sex and race. As the "eyes and ears" and "arms and legs" of the LCO, Complainant was supposed to report her concerns to AM Frahn. However, overtime AM Frahn did not want to continue receiving reports of problems at the LCO from Complainant. According to his testimony, AM Frahn could not substantiate Complainant's version of events and did not trust her reports. Yet, the record does not reflect documentation that AM Frahn in fact investigated each and every one of Complainant's claims. The fact that an experienced supervisor failed to document his investigations into Complainant's EEO concerns is unworthy of belief. The lack of documentation shows that AM Frahn lacks credibility about this matter.

In contradicting testimony, AM Frahn testified that Complainant had performance problems prior to September 6, 2007, and he testified that the situation with her became critical overnight. Yet the record does not reflect documentation that Complainant had performance problems and that AM Frahn discussed these performance problems with Complainant.

Again, the lack of documentation is probative. In earlier testimony, AM Frahn testified that he knew to document performance issues, or to create a "paper trail," when disciplining or terminating employees. He explained how he created such a paper trail with an ineffectual employee (AMR Degraphenreid). Nevertheless, he failed to create a paper trail with Complainant. The fact that an experienced supervisor failed to document Complainant's "poor" performance and mounting performance problems within a two week time period (August 29, 2007, through September 13, 2007) is extremely suspicious and unworthy of belief. The lack of documentation shows that AM Frahn lacks credibility about this matter as well.

Considering this information, AM Frahn's assertion that Complainant had performance problems is an incredulous claim.

As supervisor, AM Frahn was required to effectively address these personnel and performance issues and/ or to seek resolution. Rather, he placed Complainant in a confusing role and expected her to excel. Per the position description, Complainant was supposed to report problems and help the LCOM function. In reality, AM Frahn required her to serve many functions without clear directives. For example, Complainant was not a supervisor, but she supervised RAs under both AMR Degraphenreid and AMR Hart while they were in and out of the office. Yet, AM Frahn expected Complainant to know when to supervise, when to let the AMR flounder on her own, and when to relinquish supervision within a short, inconsistent time period (i.e. August 2007). Without clear directives, these expectations were unrealistic and counterproductive.

With regard to his directives to Complainant, AM Frahn's testimony was unconvincing. On one hand, AM Frahn testified that he gave Complainant a directive not to communicate with the RAs and that she disobeyed this directive. However, he could not provide the date or context of this directive. Then AM Frahn testified that he told Complainant to refer the RAs' questions to AMR Hart. Such ambiguity reflects that AM Frahn did not issue a clear directive to Complainant about the RAs in August 2007. Later, AM Frahn completely contradicted himself. He testified that LCOM's directive to the RAs also applied to Complainant because she was in the meeting and that LCOM could give Complainant a directive on his behalf.

As lateral colleagues, LCOM was not Complainant's Supervisor. Since they both reported to AM Frahn, they did not have any supervisory controls over the other. Henceforth, LCOM could not give Complainant a directive. As such, Complainant did not demonstrate a "Failure/ Inability to follow LCOM's directive of non-communication with RAs and failure to follow "chain of command." This insubordination remark on Complainant's performance evaluation is inaccurate and erroneous.

With regard to Complainant's failure/ inability to resolve issues with LCOM, AMA, and AM, the record reflects that AM Frahn did not give Complainant an opportunity to resolve these issues. He met with Complainant on September 6, 2007, and decided at that meeting to note her performance evaluation accordingly. When asked why he did not give Complainant an opportunity to improve, AM Frahn testified that her insubordination and concerning behavior within the office caused "a critical situation overnight."

Disturbingly, AM Frahn reassigned Complainant out of the office and failed to seek assistance from his supervisor or human resources officials about her personnel and performance issues. The marked difference between Complainant and AMR Degraphenreid appears to be that Complainant notified him that she had EEO concerns and that she was going to file an EEO complaint. His assertion that AMR DeGraphenreid received an opportunity to improve because she was never insubordinate is informative. As stated above, Complainant was not insubordinate. More so, the undocumented scene in the office appears to be Complainant abruptly leaving the meeting and threatening to take the matter to a higher authority. Similar to AMR Degraphenreid, Complainant did not exhibit concerning behavior within the office either.

Overall, AM Frahn issued Complainant an unjustified negative performance evaluation. She received the rating within one week of the September 6, 2007, meeting. AM Frahn lacks

credibility, and his rationale is unworthy of belief. As such, Complainant has shown that the agency was motivated by a retaliatory motive when she received the negative performance evaluation.

Demotion

The agency stated that Complainant was demoted because she received a rating of "1" in Customer Service. As a result, she received an overall rating of "1" on her performance evaluation. According to agency policy, Complainant could not retain her RT position.

This reason appears legitimate and non-discriminatory.

In response, Complainant asserts that she was demoted because she received an unjustified negative performance evaluation and that this negative performance evaluation was based on a retaliatory motive. The Commission has repeatedly held that if the underlying adverse action was retaliatory, the resulting adverse actions are discriminatory as well.

As stated above, the agency's negative performance evaluation was not substantiated and was based on a retaliatory motive. According to AM Frahn's testimony, the negative performance evaluation effectuated her demotion from RT to SFR. Accordingly, the demotion was based on a retaliatory motive as well. Therefore, Complainant has shown that the agency was motivated by a retaliatory motive when she was demoted.

Non-selection

The agency stated that SO made an external selection and that Complainant did not apply for to the ERB for the position. SO stated that the agency did not choose an internal candidate in order to avoid depleting qualified agency employees. Since Complainant did not apply to the ERB, the agency did not and could not consider her. More so, the agency selected a candidate at the highest grade level possible (GG-12 level), and Complainant did not qualify for that grade level. This reason appears legitimate and non-discriminatory.

The agency has discretion to manage its own business practices. The agency is in the best position to determine and evaluate the rationale to make selections from the external and/ or internal recruiting bulletins. Similarly, the agency is in the best position to make selections at the different grade levels. In this situation, Complainant had the opportunity to apply for both. However, at the direction of an office without authority to advise her, she chose to apply only to the IRB. The Agency selected from ERB GG-12 Cert. While Complainant was certainly qualified for the RT position, she was not qualified at this higher pay level.

Further, Complainant has not shown that the agency violated any policy or procedure when (1) SO requested Certs for the ERB only, (2) made the selection from the ERB only, or (3) made the selection at the highest pay level. Nor has Complainant shown that she was qualified for the GG-12 RT position or more qualified than AMR Hart for that position.

Without further evidence, Complainant has failed to demonstrate pretext with regard to the non-selection.

Work assignments

The agency stated that Complainant was trained on surveys and conducted surveys according to her training if and when she was available. The agency stated that SFR work varied between 0-40 hours each week and that the work depended on the underlying work of the field representatives. The agency believed that Complainant got as much work as possible.

This appears to be a legitimate and non-discriminatory reason for the agency's actions.

In response, Complainant asserts that she was willing and able to do more work; however, the agency did not properly train her and provide her opportunities to work more surveys.

The record does not accurately reflect exactly when and on which surveys Complainant was trained to conduct and when she was available to conduct these surveys. Specifically, the record does not reflect that Complainant was fully trained by March 2008 in order to work the 40 hours or so per week.

When questioned about the existence of such information, neither party was able to produce documentation to substantiate their positions. The record is devoid of training documents to show if and when Complainant was trained on a survey, and the record is devoid of documents reflecting when surveys were actually conducted in Complainant's service area. While Complainant claimed that she requested more work from Coordinator and agency officials, the record only reflects two emails in May 2009 in which she inquired about survey work prior to her leave of absence. Similarly, the agency was not able to produce documentation that Coordinator or others tried to contact Complainant about work opportunities before May 2009.

In that Complainant bears the burden of proof by a preponderance of the evidence, she has failed to meet her final burden.

CONCLUSION

The agency discriminated against Complainant when the agency gave her a negative performance evaluation and demoted her.

The agency did not discriminate against Complainant when the agency did not select her for the position of RT, and the agency did not provide her work assignments.

DAMAGES

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*].

In this case, complainant requested compensatory damages and attorney's fees. Specifically, she requested back pay ($70,406.05), front pay (ranging from $41,886 to $83,772), medical bills ($20,589.72), and $300,000 for compensatory damages,.

1. Pecuniary Damages

Pecuniary losses are out-of-pocket expenses that are incurred as result of the employer's unlawful action, including moving expenses, medical expenses, psychiatric expenses, physical therapy expenses, and other quantifiable out-of-pocket expenses. *Guidance* at 14.

For claims seeking pecuniary damages, objective evidence should include documentation of out-of-pocket expenses for all actual costs and an explanation of the expense. Further, future pecuniary losses are out-of-pocket expenses that are likely to be incurred after the resolution of the complaint. *Guidance, supra.*

Complainant requested back pay in the amount of $70,406.05 for loss salary as an RT. Also, she requested front pay in the amount of $41,886-$83,772 for loss salary as an SFR.

As an RT, Complainant would have earned approximately $110,651.29 (from October 2007 through February 2010). In contrast, Complainant earned $40,245.24 during this time period. Discovery Documents at 363-415.

In that Complainant has a duty to mitigate damages, the amount she actually earned will be reduced from her award.

Per the IRB, Complainant's initial appointment was not-to-exceed two years and may be extended an additional two years. Considering the exceptional job that Complainant performed at the agency in various positions including the RT position, the likelihood exists that the agency would have extended her appointment an additional two years. Therefore, Complainant is entitled to the RT salary from October 2007 through February 2010. The $110,651.29 salary will be reduced by the $40,245.24 that she in fact earned. Complainant is entitled to $70,406.05 for loss salary as an RT

Front pay is a form of equitable relief that compensates an individual when reinstatement is not possible in certain very limited circumstances. In general, reinstatement is preferred to an award of front pay. *Romero v. Department of the Air Force,* EEOC Appeal No. 01921636 (July 13, 1992). Awards of front pay imply that the complainant is able to work but cannot do so because of circumstances external to the complainant. *Goetze v. Department of the Navy,* EEOC Appeal Mo. 01991530 (August 22, 2001); *Brinkley v. United States Postal Service,* EEOC Request No. 05980429 (August 12, 1999). The Commission has identified three circumstances where front pay may be awarded in lieu of reinstatement, i.e., (1) where no position is available; (2) where a subsequent working relationship between the parties would be antagonistic; or (3) where the employer has a record of long-term resistance to anti-discrimination efforts. *York v. Department of the Navy,* EEOC Appeal No. 01930435 (February 25, 1994); *see also Cook v. United States Postal Service,* EEOC Appeal No. 01950027 (July 17, 1998); *Tyler v. United States Postal Service,* EEOC Request No. 05870340 (February 1, 1998).

The record reflects that Complainant is no longer working for the agency. Events following her negative performance evaluation and demotion (i.e. non-selection, denied work assignments, lump in her breast, and loss of husband's job) contributed to her inability to work as an SFR. In that Complainant did not amend her complaint to include her ultimate termination from the SFR position, an award of front pay for the SFR position is not appropriate. Therefore, Complainant is not entitled to front pay of any amount from the agency.

Complainant requested $20,589.72 for medical expenses from the following providers: Clinton Urgent Care, Howertown Family Medical, Lakeview Urgent Care, Licensed Clinical Social Worker Linda Newsome, Holly Hill Hospital, Fayetteville GI, Carolina Psychiatry, Cape Fear Hospital, Sampson Regional, and Walgreens Pharmacy. These expenses appear to be for treatment of her various medical conditions (emotional and physical manifestations) that arose after August 2007 through 2010. Although other factors contributed to her medical conditions, it is extremely difficult to sever the costs attributed only to the negative performance evaluation and demotion. Therefore, Complainant is entitled to $20,589.72 for medical expenses

2. Non-pecuniary Damages

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 overwhelming weight of evidence in this case is that Complainant suffered damages with regard to her successful claims of discrimination.

Complainant and her husband testified that she suffered major depression, stress, anxiety, diarrhea, decreased mobility, and irritable bowel syndrome. She sought treatment from her primary care doctor, the nearby urgent care, a gastrointestinal specialist, and a counselor. According to Complainant, she was very sick and did not want to continue to live "like that." Inevitably, she suffered a mental breakdown and was voluntarily hospitalized for approximately seven days.

Although the record reflects that Complainant suffered from some of these problems (i.e. depression and acute anxiety with specific triggers) prior to August 2007, her medical records substantiate that these problems were significantly exacerbated after the agency's adverse actions. In that the tortfeasor takes the victim as he/she finds the victim, the agency cannot be absolved from liability because Complainant had pre-existing conditions. Notably, subsequent to leaving the agency, Complainant has improved somewhat with residual low self-esteem.

In similar cases, the Commission has awarded the following amounts in damages depending on the nature, severity, and duration of the harm caused by the negative performance evaluation

and/ or demotion. *Rhodes v. AAFES*, EEOC Appeal No. 0720070049 (January 3, 2008) (awarding $30,000 in non-pecuniary damages when complainant experienced depression, stress, crying spells difficulty sleeping, acid reflux, and headaches; loss of enjoyment of time with her family; and financial constraints leading to moving back home with her mother); *Shahv. Department of Veterans Affairs,* EEOC Appeal No. 07A30040 (Sept. 30, 2003) (awarding $30,000 in non-pecuniary damages when complainant was, on the basis of retaliation, harassed and received a lowered proficiency report; complainant experienced anxiety, depression, stomach distress, chest palpitations, elevated blood pressure, and interference with social and family relationships); *Sugawara-Adams v. EPA*, EEOC Appeal No. 0720070050 (September 10, 2007) (awarding $50,000 for emotional and physical manifestations resulting from poor appraisal, demotion, and harassment); *McTeir v. Navy*, EEOC Appeal No. 07A30016 (March 2, 2004) (awarding $85,000 for emotional and physical manifestations resulting from negative performance evaluation and other harassment). *Conrad v. Department of Justice*, EEOC Appeal No. 0120090690 (April 9, 2010) (awarding $100,000 for reprisal based removal of supervisory duties in which complainant suffered major depression, hospitalization, anxiety, difficulty with family relationships, divorce, and diminished enjoyment of life) *Booker v. Defense*, EEOC Appeal No. 07A00023 (August 10, 2000) (finding that major depression that culminated into three suicide attempts and voluntary hospitalization warranted a large monetary award of $150,000).

The evidence supports a large monetary award because of the severity of Complainant's major depression and anxiety caused by the agency's actions. However, the fact that Complainant was hospitalized in June 2009 (approximately 21 months after the compensable claims) indicates that other factors contributed to her "nervous breakdown." In addition, Complainant has recovered to the point that she is able to return to work. As such, Complainant is entitled to $85,000 in compensatory damages.

3. Attorney's Fees and Costs

A. Complainant's Petition for Attorneys' Fees

Pursuant to orders issued by this Administrative Judge on August 8, 2011, complainant's counsel submitted a fee petition on August 23, 2011. The fee petition requested $34,557.50 for worked performed by attorneys Thomson and Judy Tseng (Complainant's former attorney of record), and for expenses in the amount of $442.75. The total amount requested was $35,000.25.

B. Agency's Responses

The agency's response was due by September 9, 2011. On September 12, 2011, the agency's new attorney of record (Rayna Eller) notified the undersigned that attorney Honness no longer worked at the agency and requested an extension of time to respond to the attorney's fee petition. Complainant's attorney did not raise an objection, and the undersigned extended the response deadline to September 23, 2011. The record does not reflect that the agency responded to Complainant's attorney's fee petition. This decision follows.

C. Analysis

By federal regulation, the Administrative Judge may award the employee reasonable attorneys fees and other costs incurred in the successful processing of an EEO complaint. 29 C.F.R. § 1614.501(e). Specifically, 29 C.F.R. § 1614.501(e)(iv) provides:

> attorney's fees shall be paid for services performed by an attorney after the filing of a written complaint, provided that the attorney provides reasonable notice of representation to the agency . . ., except that fees are allowable for a reasonable period of time prior to the notification of representation for any services performed in reaching a determination to represent the complainant.

To determine the proper amount of the fee, a lodestar amount is reached by calculating the number of hours reasonably expended by the attorney on the complaint multiplied by a reasonable hourly rate. *Blum v. Stenson*, 465 U.S. 886 (1984); *Hensley v. Eckerhart*, 461 U.S. 424 (1983).

In *Blum*, 465 U.S. at 895, the U.S. Supreme Court held that reasonable hourly rates are to be measured by the "prevailing market rates in the relevant community" for attorneys of similar experience in similar cases. *Also See Cooley v. Department of Affairs*, EEOC Request No. 05960748 (July 30, 1998). The Commission has long recognized that the relevant market for determining the hourly rate is where the complainant resides or where the hearing is held. *Ketchum, Jr. v. USPS*, EEOC Appeal No. 01A35285 (December 16, 2004), *request for reconsideration denied*, EEOC Request No. 05A50394 (January 31, 2005). The relevant market is not where the attorney of record practices.

The number of hours should not include excessive, redundant, or otherwise unnecessary hours. *Hensley*, 461 U.S. at 434 (1983); *Bernard v. Department of Veteran Affairs*, EEOC Appeal No. 01966861 (July 17, 1998).

In determining the number of hours reasonably expended, I recognize that the attorney "is not required to record in great detail the manner in which each minute of his time was expended." *Hensley*, 461 U.S. at 437, n.12. The attorney does not have the burden of identifying the subject matters in which he spent his time, which can be documented by submitting sufficiently detailed contemporaneous time records to ensure that the time spent was accurately recorded. *National Association of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319 (D.C. Cir. 1982). Counsel for the prevailing party should make a "good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary." *Hensley*, 461 U.S. at 434.

The Commission has held that it is not necessary to "perform a detailed analysis to determine precisely the number of hours or types of work for which no compensation is allowed; rather, it is appropriate to reduce the hours claimed by an across-the-board reduction." *Abbate v. Department of Navy*, EEOC Appeal No. 01971418 (March 24, 200) (citing, *Finch v. USPS*, EEOC Request No. 05880051 (July 15, 1988).

While a line by line analysis of the fee petition is not necessary, the record reflects the following. First, the complainant's attorneys are experienced attorneys with sound experience representing federal employees in EEO matters. Secondly, the number of hours expended by the attorneys appears consistent with other cases of these issues, complexity, and extended duration. As such, $34,557.50 in attorney's fees appears to be reasonable. Also, complainant provided sufficient documentation to support the request for expenses such as depositions, telecommunications, medical record fees, and mileage. As such, $442.75 in costs appears to be reasonable.

REMEDY[14]

Upon a careful review of the record, Complainant is entitled to the following remedies as a matter of law.

1. The agency shall pay Complainant pecuniary damages (back pay) in the amount of $70,406.05;
2. The agency shall pay Complainant pecuniary damages (medical expenses) in the amount of $20,589.72;
3. The agency shall pay Complainant non-pecuniary damages in the amount of $85,000;
4. The agency shall replace Complainant's negative performance evaluation dated September 13, 2007, with a satisfactory performance evaluation of Level "3:"
5. The agency shall pay Complainant's attorney reasonable attorney's fees and costs in the amount of $35,000.25;
6. 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);
7. The agency shall provide anti-retaliation training for AM Frahn; and
8. The agency shall post a notice that the agency has been found to have discriminated against an employee at Charlotte RCC in 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

[14] The agency's 40-day period for taking final action and determining whether it will implement these findings begins upon its receipt of this second decision concerning attorney's fees and costs and the hearings file. See EEO MD-110, p. 7-2, n. 2.

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.

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

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

cc: Strickland, Thomson, Eller, Commerce