U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Raleigh Area Office

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

TTY (919) 856-4296
Website: www.eeoc.gov

Elaine G. Turner, Complainant, v. Patrick R. Donahoe, Postmaster General, USPS, Agency.	) EEOC No. 430-2010-00065X) Agency No. 1K-276-0012-09))))))))) Date: April 30, 2012

DECISION

INTRODUCTION

This matter came before the United States Equal Employment Opportunity Commission (EEOC) pursuant to Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 *et seq*.[1], on the bases of disability and 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 30, 2011, and concluded on April 11, 2011, 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 Judy Tseng. The agency was represented by Attorney Frost Branon.

CLAIMS PRESENTED

---

[1]The Rehabilitation Act was amended in 1992 to apply the standards in the Americans with Disabilities Act (ADA) to complaints of discrimination by federal employees or applicants for employment. Congress amended the ADA in September 2008, and the ADA Amendment Act (ADAAA), became effective January 1, 2009. The Commission enacted regulations that implemented the ADAAA on March 25, 2011.

Did the agency discriminate against Complainant on the bases of disability (back injury: lower extremity radicular syndrome with significant spinal stenosis, disc herniations, and spondylolistethis) and in reprisal for prior protected activity, when from May 2008, through March 23, 2009, the agency subjected her to a hostile work environment and denied her reasonable accommodations?[2]

FACTS[3]

The record reflects that Complainant worked as a Mail Processing Clerk at the Processing and Distribution Center (P&DC) in Raleigh, North Carolina. Prior to the instant complaint, her first level supervisor was Carlton Jones (acting Manager Distribution Operations) and Acting 204B Supervisor Carolyn Perry. The Plant Manager was Denise Porter.

In June 2005, Complainant provided a letter on behalf of co-worker Nancy Jones. ROI at 94 and TR at 84. Overall, she believed that Manager Jones, "will smile in your face and do everything he can to hurt you." TR at 84.

On-the-job Injury

On or about January 19, 2007, Complainant was injured on the job. She received a diagnosis of low back pain with lower extremity radicular syndrome, significant spinal stenosis, disc herniations, and spondylolisthesis.[4]

As a result, Complainant experienced problems walking, standing, lifting, bending, kneeling, and stooping. Her restrictions varied over time as noted below. Complainant has received the following treatment: physical therapy, oral and epidural steroids, non-steroidal anti-inflammatories (Celebrex and Nabumetone), and pain killers (Hydrocodone). Her physician recommended surgery to alleviate the back pain; however, Complainant has refused this alternative.

The record reflects that Complainant was out of work until March 1, 2007. In a return to work form, Complainant's physician released Complainant to full duty for eight hours a day but wrote, "Patient must have a level stool or chair to sit on." ROI at 268 and 271. Shortly thereafter, he restricted her to working eight hours a day, 40 hours per week. ROI at 272-274.

On June 11, 2007, Complainant's restrictions included no lifting, pushing, or pulling more than 10 pounds. ROI at 275. These restrictions increased on June 18, 2007, to no lifting, pushing, or pulling more than 10 pounds and limited bending/ stooping, kneeling/ squatting, twisting, and standing. ROI at 276.

---

[2] In her original complaint, Complainant also claimed discrimination on the bases of race (Black), color (unspecified), sex (female), and age (Date of Birth: July 9, 1950). Via email dated March 16, 2011, Complainant withdrew these bases.

3 In reaching the decision, all evidence, including the Reports of Investigation, pleadings, Hearing Transcripts [Hereinafter TR], exhibits, and all other documents, was reviewed and considered.

[4] The undersigned takes judicial notice that spondylolisthesis is "a condition in which a bone (vertebra) in the lower part of the spine slips forward and onto a bone below it." http://www.nlm.nih.gov/medlineplus/ency/article/001260.htm.

During this time period, the agency assigned Complainant to light duty (for a non-job related condition) job assignments. ROI at 465 and 469. Over the next months, her lifting, pushing, and pulling restrictions increased to 20 pounds. ROI at 278-279. Finally, on September 5, 2007, Complainant was restricted to sedentary work. ROI at 280 and 471.

These restrictions increased on October 5, 2007, to no lifting, pushing, or pulling more than 10 pounds and limited bending/ stooping, kneeling/ squatting, twisting, and standing limited to 30 minutes. Complainant's physician restricted her to "sedentary work only." ROI at 281 and 473. The next week, Complainant's physician added to these restrictions, "No keying." ROI at 285.

Prior EEO activity

In response to Complainant's latest restrictions, on October 17, 2007, Supervisor Jones told Complainant that he could not accommodate her restrictions (i.e. no keying) and sent Complainant home. ROI at 284. She contacted an EEO Counselor and filed an EEO complaint (Agency case number 1K-276-0008-08) in November 2007. On July 27, 2008, Complainant withdrew this complaint. ROI at 105. Similarly, she filed a union grievance about the matter.

Limited Duty Job Assignments

At an unidentified time, Complainant filed a claim about her on-the-job injury with the Department of Labor's Office of Workers' Compensation (OWCP), and the claim was accepted on October 12, 2007.

Accordingly, the agency offered Complainant a modified, or limited duty, job assignment on October 25, 2007. In this limited duty job assignment, Complainant's duties included working manual letters in the PARS section. Her scheduled work hours were 9:00 a.m.- 5:30 p.m. ROI at 288.

As of October 29, 2007, Complainant's work restrictions included: no lifting, pushing, or pulling more than 20 pounds; limited bending/ stooping, kneeling/ squatting, twisting; standing limited to 30 minutes; and "Sedentary work only. No keying." ROI at 290.

On the different limited duty assignments, Supervisor Jones or 204 B Perry signed the forms.

Parking

Due to her back condition, Complainant had a difficult time walking from the employee parking lot to the building entrance. Specifically, she had to walk up an incline from the parking lot to the building. The record does not reflect the grade of the incline.

The record reflects that Complainant had a handicapped parking placard from the State of North Carolina Department of Motor Vehicles. The handicapped parking spaces in the rank and file employee parking lot are approximately 324.8 feet from the building entrance.[5] However, most times, the handicapped parking spaces in the employee parking lot were filled, and Complainant

[5] See email dated April 21, 2011, from Complainant's attorney. The agency did not challenge this information.

had to park elsewhere. TR at 118. For example, she illegally parked at the curb, took her personal items to her locker, clocked in, and then parked her car in a regular parking space. TR at 121. Complainant notified Supervisor Phillips about this arrangement so that he would know where she was.

Beginning in November 2007, Complainant made requests to park closer to the building. In a return to work note dated November 26, 2007, Complainant's physician wrote, "Needs parking place close to building entrance." ROI at 118.

Again on January 7, 2008, February 4, 2008, and March 12, 2008,[6] Complainant's physician repeated this request, "Needs parking place close to building entrance." ROI at 296-298. The record does not reflect that the agency provided a written response to Complainant's requests.

The P&DC has four parking lots: (1) South/ employee parking lot, (2) East/ administrative parking lot, (3) North/ BMEU parking lot, and (4) West/ maintenance area parking lot. In 2008, the agency had the following parking policy in effect.

> Parking in the Administrative Parking Area is restricted due to security concerns and parking limitations. It is reserved only for those with assigned parking spots. Administrative vehicles, designated visitors (with permit issued from Plant Manager's Office), and physically handicapped employees that work in the Administrative area of the building.[7]

The record reflects that the administrative parking lot is next to the building entrance. Specifically, only management level and administrative staff park in the administrative parking lot.

According to Complainant's count, the rank and file employee parking lot has 13 handicapped parking spaces and 453 regular employee parking spaces.[8] Per the agency's parking policy, the agency has handicapped spaces for 2% of its workforce, or 14 handicapped parking spaces, in the employee parking lot.

Plant Manager testified that an employee had a better chance getting a handicapped space at 9 a.m. because less people work on Tour II. TR at 197.

In addition to the handicapped spaces, the employee parking lot also includes designated parking spots for the presidents of the American Postal Workers union and the Mail handlers union. TR at 196.

In the administrative parking lot, the agency has three handicapped parking spaces. The customer parking lot has several handicapped spaces. However, the handicapped parking spaces in the administrative parking lot are reserved for employees in the administrative area, and the handicapped parking spaces in the customer parking lot are reserved for customers only.

---

[6] Complainant was out of work February 27-March 12, 2008. ROI at 374.
[7] See email dated March 31, 2011, from agency's attorney.
[8] See email dated April 26, 2011, from Complainant's attorney. The agency did not challenge this information.

The record reflects that employees submitted requests for reasonable accommodations to their supervisors and that the supervisors forwarded the requests to the District's Reasonable Accommodation Committee (DRAC). Although the Occupational Health Unit in Greensboro, North Carolina assisted in the process, the DRAC made all decisions.

According to an email dated October 23, 2008, Nurse Administrator left a message for Complainant "regarding her request for accommodation of parking on level ground and [to] have a rolling level straight back chair." ROI at 497. The record does not reflect that she and Complainant discussed this matter further. In addition, Nurse Administrator asked Supervisor Phillips to talk with Complainant about the requests and to instruct her to "submit medical documentation to back this up before it can go to DRAC." ROI at 497.

However, in contradiction to Nurse Administrator's response, Supervisor Phillips stated that the agency told Complainant to utilize her handicap parking sticker to park in the handicap parking spaces in the employee lot. He continued, "Now once those spots are filled, then she would have to park someone (sic) else- there are no designated spots other than handicapped." ROI at 749.

Complainant's Work Area

At unidentified times, Complainant had problems in her work area. For example, she did not know who her supervisor was and if she was supposed to submit leave slips to Supervisor Phillips or Manager Jones. TR at 19 and 63. Also, Complainant had to check the automation area and the contingency room on the other side of the building for her work schedule. TR at 19 and 63. Her work area was filled with heavy postcons that she could not move. TR at 20, 24, and 72. Complainant's staging postcon was blocked, and she could not access her work area at all. TR at 81 and 87. Mail that she was not working was left in her work tray. TR at 20, 72, and 83.

Although Complainant did not have direct evidence, she believed that Manager Jones' "stooges" (Robert Lassiter and Eric Johnson) were behind these physical problems in her work area. TR at 70. For example, she testified that she saw co-worker Lassiter put work in her area and that she told him to move it because it was not hers. TR at 165. Manager Jones testified that he was friends with co-workers Lassiter and Johnson. TR at 250 and 252.

The record reflects that Complainant was out of work from May 2, 2008, until August 6, 2008.[9] ROI at 314-316 and 332.

Private Disability Insurance Forms

In June 2008, Complainant submitted private disability insurance forms (from Trustmark Insurance, BFC Insurance, and Bank of America credit card services) for the agency to complete. Her daughter submitted the forms to 204B Perry.

---

[9] Complainant's physician referred her to a psychologist for evaluation of severe depression for being out of work. ROI at 378.

In a letter dated July 7, 2008, to Plant Manager, Complainant explained that she submitted the disability insurance forms to 204B Perry in June 2008 and that 204B Perry had not completed the forms. She requested that Plant Manager complete the forms as soon as possible. ROI at 126.

At an unidentified time, 204B Perry completed the forms. In her affidavit,[10] she wrote that she had never completed those types of forms and did not have the personal knowledge to complete them for Complainant. She wrote, "I did the best that I could." ROI at 782-783.

Shortly thereafter, on July 9, 2008, Complainant notified Plant Manager that 204B Perry had completed the forms incorrectly and/or omitted information. She stated that she could not submit the forms with incorrect or missing information. ROI at 128.

For example, in the Employer's Statement section of the Trustmark Insurance forms, 204B Perry omitted the employer's contact information, employee's job title, description of modified job duties, reason for stopping work, and date of on the job injury. ROI at 129. On the BFC form, 204B Perry omitted the date employee stopped working due to disability and incorrectly stated that Complainant did not work 30 or more hours per week. ROI at 130. In addition, on the Bank of America form, 204B Perry did not identify how many hour per week Complainant worked. ROI at 131.

After she did not receive a response from Plant Manager, Complainant wrote a letter to the agency's District Manager in Greensboro, North Carolina. In a letter dated September 2, 2008, she explained the situation with the disability insurance forms. Complainant requested that someone from his office could complete the forms. ROI at 134-135.

Shortly thereafter, Manager Jones called Complainant into his office and completed the forms.

In a letter dated September 17, 2008, District Manager Russell Gardner responded to Complainant. He explained that the matter had been addressed and the forms were completed. ROI at 136.

Despite these efforts, Complainant was not able to receive the private disability insurance reimbursements because the forms were not completed within the applicable time limits. TR at 135. However, she received a partial payment of $1,000. TR at 136.

Absence Notification Letter

On July 16, 2008, Manager Jones issued Complainant an Absence Notification Instructions letter. In the letter, Manager Jones stated that Complainant had been out of work since May 2, 2008, that she had not provided acceptable documentation to cover her absence, and that she would be considered absent without leave. The agency ordered Complainant to report for duty within five days of receiving the notice and to submit her documentation to the district's Occupational Health Unit for evaluation. ROI at 122.

---

[10] At an unidentified time, 204B Perry suffered a stroke, was out of work on extended sick leave, and was not expected to return to work. Therefore, she was not able to testify at the hearing. TR at 6.

The record reflects that Complainant's physician released her to return to work on August 1, 2008. ROI at 125.

As such, Complainant contacted the Occupational Health Unit and faxed copies of her medical information to Nurse Administrator Kathryn Sherrill; however, Nurse Administrator did not return her message until August 6, 2008. On that day, Nurse Administrator left a message that Complainant did not need clearance from her office to return to work. She instructed Complainant to take her medical information to her supervisor or manager upon her return to work. Nurse Administrator explained that prior to 2006 employees did have to clear Occupational Health before they could return to work. ROI at 820.

As a result of Manager Jones' directive, Complainant missed work on August 2 and 3, 2008. TR at 145.

Return to Work

Once Complainant returned to work, the agency once again offered her a limited duty job assignment working manual letters in PARS. Her scheduled work hours were 9:00 a.m. to 5:30 p.m., off days Monday and Tuesday. Supervisor Gregory Phillips signed the form. ROI at 193.

Complainant testified that she was not sure who her supervisor was. TR at 63. This misunderstanding caused problems with regard to work schedules, reporting times, and leave. Manager Jones testified that both he and Supervisor Phillips supervised Complainant. TR at 227. However, Supervisor Phillips wrote in his affidavit[11] that Complainant "was still primarily connected to [Manager Jones'] section." ROI at 748.

Other Requests for Reasonable Accommodation

In the return to work note on August 1, 2008, Complainant's physician noted "sedentary work only" and "Needs to park closer to building entrance." ROI at 125. Approximately two weeks later, on August 14, 2008, Complainant's physician wrote a note for Complainant to receive an adjustable straight back chair. ROI at 117.

During this time period, Complainant asked Supervisor Phillips for assistance. Specifically, she requested that he move heavy postcons[12] in and out of her work area. According to Complainant, he just looked at her, said he would get someone, sent someone after a long time, or did not respond to her request at all.

Overall, Complainant claimed that Supervisor Phillips did not assist her. As a result, she had to ask other employees such as Harold Coleman to help her. TR at 9. Co-worker Coleman recalled picking up and turning over Complainant's heavy work chair on multiple occasions. TR at 10.

---

[11] At an unidentified time, Supervisor Phillips retired from the agency and passed away. TR at 6.

[12] The undersigned takes judicial notice that a postcon is a postal container on rollers. Witnesses testified that postcons can weigh well over 200 pounds.

In contrast, Supervisor Phillips wrote in his affidavit that he had a "utility" person assigned to his section who assisted employees with work restrictions. ROI at 748. He did not identify the name(s) of the utility person(s)

However, Complainant repeatedly testified that Supervisor Phillips often did not help her or send someone to help her. TR at 95. On one day, she paged him, and he did not respond. At that time, Complainant contacted the Plant Manager's office. TR at 74. Plant Manager instructed her to process the issue through her chain of command. TR at 76.

When Supervisor Phillips learned about her contact with Plant Manager, he instructed her not to contact the Plant Manager because she did not run the floor. ROI at 749.

Interestingly, Complainant testified that Manager Jones had very little interaction with her at all. Specifically, she testified that she once walked up to Manager Jones to ask for his assistance, and he smiled and walked away from her before she reached him. Complainant testified that he had knowledge about her restrictions because she submitted her medical information and leave slips to both him and Supervisor Phillips.

Despite her earlier requests, Complainant still did not have an appropriate chair. On October 28, 2008, Complainant's physician wrote another note for her. He wrote, "I think if she could get an adjustable straight back and seat level chair, this would be the best for her at work." ROI at 140. Also, he reiterated the August 1, 2008, request for Complainant to park closer to the building entrance. ROI at 140.

According to Complainant, she asked Supervisor Phillips for a chair; however, he did not give her one. TR at 67. She had to walk around the building and locate her own chair. TR at 176. Although she located a chair, at times the chair was missing, broken, or stained. TR at 22-23, 67, and 85. She placed a cardboard box in the bottom of the chair to raise the height. TR at 68. Once she located a suitable chair, Complainant had to chain it to the case so that other individuals would not move it. TR at 68. As stated above, Complainant believed that Manager Jones' "stooges" were behind these problems in her work area. TR at 70.

At an unidentified time, Supervisor Phillips asked Complainant if she had submitted her retirement papers yet. TR at 105; ROI at 749.

With regard to her requests for reasonable accommodation, Complainant testified that one agency official asked if she had found a proper chair (TR at 119) and that another agency official asked if she had a handicapped sticker (TR at 120). When she responded affirmatively to both questions, the agency did not have any further discussions about her requests.

Change of Schedule

On October 1, 2007, the agency officially changed Complainant's work hours for her bid job from 6 a.m.-2:30 p.m. to 5 a.m.-1:30 p.m. ROI at 151. The record does not reflect that the change in her bid job hours affected the hours on her light duty assignment.

While Complainant was out of work, the agency officially changed her work schedule for her bid job once again. On May 27, 2008, her hours were changed from 5 a.m.-1:30 p.m. to 6 p.m.-2:30 p.m. (effective June 7, 2008). ROI at 150. The record does not reflect that the change in her bid job hours affected the hours on her light duty assignment.

On September 2, 2008, Complainant became aware that the agency changed the starting time on her badge. Instead of 9 a.m., the new starting time for her limited duty job assignment was 5:00 a.m. ROI at 600. Only supervisors had the authority to change the starting times on badges. Complainant requested that Supervisor Phillips correct the starting time. He told her not to worry about it. TR at 109. The record does not reflect that Complainant's pay or leave was affected because of the wrong starting time on her badge.

At various times from November 2008 through January 2009, Complainant's badge was missing from the badge rack. During these times, Supervisor Phillips told her not to worry about it, and he manually entered Complainant's time. TR at 110. The record does not reflect that Complainant's pay or leave was affected by the manual entries.

Additional Information

After returning to work on August 6, 2008, Complainant missed at least the following days: August 14, 15, and 30; October 5, and November 14, 15, and 19. ROI at 154.

On December 16, 2008, Complainant's physician wrote,

> Due to her back condition she will continue to have episodes of severe disabling back pain, specifically if she does any kind of physically demanding work. Lifetime restrictions of 10 lb. And no bending or stooping these are permanent (sic).

ROI at 385. Subsequently, he wrote that Complainant was disabled from May 10, 2008, through July 18, 2008, that her pain was severe and prevented her from working, and that she needed a period of rest between flare ups. ROI at 386. He amended his statement to include the dates of August 30, 2008, and November 15 and 19, 2008. ROI at 387.

The record reflects that Complainant's last day at work was January 23, 2009. Effective March 23, 2009, Complainant separated from the agency on medical disability.[13]

Following separation from the agency, Complainant applied for private disability insurance reimbursement for the period beginning January 24, 2009. Her claim was denied because her attending physician's statement did not certify the specific dates of her disability and her employer did not complete the employer's statement. TR at 136; ROI at 673-674, 677, 678, and 682-705.

---

[13] In a letter dated May 15, 2009, Complainant's physician wrote, "There is no expectation for this problem to resolve. I would suspect that the disability is permanent." ROI at 388.

In addition to suffering an on-the-job injury, Complainant experienced other life changing events. At an unidentified time, her son drowned. Also, she suffered an emotionally and physically abusive marriage which ended in divorce in 2003. TR at 164. Notably, Complainant testified that her ex-husband was friends with Manager Jones. TR at 154 and 163.

Instant Complaint

Believing that she was a victim of discrimination, Complainant contacted an EEO Counselor on February 11, 2009. She claimed that the agency discriminated against her based on race, age, physical disability, and in retaliation for EEO complaints (November 2007) and grievances (November 2007 and December 2008). ROI at 64.

In response to Complainant's claims, the agency stated the following. First, Manager Jones testified that he and Supervisor Phillips were both Complainant's supervisor. TR at 227. He explained that when he was the acting Manager, 204B Perry took his place, and she filled in for Supervisor Phillips. TR at 228 and 266.

Secondly, Manager Jones testified that other individuals on Tours 1 and 3 used her case and chair. TR at 236.

Next, Manager Jones testified that he was told to contact Human Resources (HR) to complete the private disability forms and that HR told him that it was not the agency's policy to complete such forms. TR at 244. He stated that the forms were not difficult to complete, but he did not feel comfortable signing something if he was not sure why Complainant was out on those dates. TR at 245. Once District Manager Gardner directed him to do so, either he or 204B Perry completed the forms. TR at 248-249.

In addition, Manager Jones could not recall the Absence Notification Instructions letter he sent to Complainant or the specifics about the situation. TR at 237-242. However, he stated that prior to 2009, employees who were out more than 21 days had to be evaluated by the Occupational Health unit. TR at 242. Similarly, Nurse Administrator stated that employees were once required to clear her office prior to returning to work; however, this policy changed before 2008.

Finally, Nurse Administrator stated that the DRAC did not meet with Complainant because she was accommodated with a sedentary job, handicap sticker, and an appropriate chair. ROI at 821.

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 his claim. In order to accomplish this burden, Complainant must establish a *prima facie* case of discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Hochstadt v. 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); *Prewitt v. United States Postal Service*, 662 F.2d 292 (5th Cir. 1981) (applying *McDonnell Douglas* to disability discrimination 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. 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 Disability Discrimination

According to the Rehabilitation Act, federal agencies have an affirmative duty to ensure that individuals with disabilities are provided with employment opportunities.

In order to claim the protections of the Rehabilitation Act under the denied reasonable accommodation and theory of harassment, complainant must establish coverage within the meaning of the Rehabilitation Act. In that the agency's actions occurred both before and after January 1, 2009, the claim of disability discrimination is analyzed under the ADA and ADAAA.

Prior to January 1, 2009, an individual with a disability is one who: (1) has a physical or mental impairment that substantially limits one or more major life activities; (2) has a record of such an impairment, or (3) is regarded as having such an impairment. 29 C.F.R. § 1630.2(g). In general, major life activities "are those basic activities that the average person in the general population can perform with little or no difficulty." 29 C.F.R. § 1630.2(j). Such major life activities include but are not limited to caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. *See*, 29 C.F.R. § 1630.2(i). Sitting, standing, lifting, and reaching are also recognized as major life activities. *Interpretive Guidance on Title I of the Americans with Disabilites,* Appendix to 29 C.F.R. § 1630.2(i).

An impairment is substantially limiting when it prevents an individual from performing a major life activity or when it significantly restricts the conditions, manner, or duration under which an individual with a disability can perform a major life activity. 29 C.F.R. §1630.2(j). The individual's ability to perform the major life activity must be restricted as compared to the ability of the average person in the general population to perform the activity. *Id*. The Commission has found that an employee who cannot lift more than 15 pounds is substantially limited in the major life activity of lifting. *Higgins v. USPS*, EEOC Appeal No. 07A30086 (September 14, 2005). Also, the trier of fact may consider mitigating measures.

More so, a "qualified individual with a disability" is a person "who has 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).

Subsequent to January 1, 2009, an individual with a disability is one who: (1) has a physical or mental impairment that substantially limits one or more major life activities; (2) has a record of such an impairment, or (3) is regarded as having such an impairment. 29 C.F.R. § 1630.2(g).

The term “substantially limits” shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. “Substantially limits” is not meant to be a demanding standard. 29 C.F.R. § 1630.2(j)(1)(i).

“An impairment is a disability within the meaning of this section if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly/ severely restrict, the individual from performing a major life activity in order to be considered substantially limiting. Nonetheless, not every impairment will constitute a `disability' within the meaning of this section.” 29 C.F.R. § 1630.2(j)(1)(ii).

In general, major life activities include, but are not limited to: (1) caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working; and (2) the operation of a major bodily function, including functions of the immune system, special sense organs and skin; normal cell growth; and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions. The operation of a major bodily function includes the operation of an individual organ within a body system. 29 C.F.R. § 1630.2(i).

The term “substantially limits” shall be construed broadly in favor of expansive coverage . . . . “Substantially limits” is not meant to be a demanding standard. 29 C.F.R. § 1630.2(j)(1)(i). In addition, the determination of whether an impairment substantially limits a major life activity must be made without regard to the ameliorative effects of mitigating measures (with the exception of “ordinary eyeglasses or contact lenses”). 42 U.S.C. § 12102(4)(E); 29 C.F.R. § 1630.2(j)(1)(vi).

The determination of whether an impairment substantially limits a major life activity requires an individualized assessment. However, in making this assessment, the term `substantially limits' shall be interpreted and applied to require a degree of functional limitation that is lower than the standard for `substantially limits' applied prior to the ADAAA. 29 C.F.R. § 1630.2(j)(1)(iv).

More so, an individual with a disability is qualified for a position if the person "who has 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).

Under the Commission’s regulations implementing both the ADA and ADAAA, a federal agency is required to make reasonable accommodations to the known physical limitations of a qualified individual with disability unless the agency can show that accommodation would cause an undue hardship. 29 C.F.R. §1630.9.

Reasonable accommodations include job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, or reassignment to a vacant position. See, *EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* (rev. October 17, 2002).

Notably, parking is considered a benefit of employment. Therefore, accessible, reserved parking may be a form of a reasonable accommodation. See 29 C.F.R. pt. 1630 app. § 1630.2(o) (1996). Generally, this means that if an employer provides parking spaces to all personnel, then an accessible space must be provided to an employee with a disability, unless it would pose an undue hardship. <u>See</u> 29 C.F.R. § 1630.2(o)(iii). *Pastva v. USPS*, EEOC Appeal No. 01986792 (June 9, 1999). However, one may consider whether the employer provides separate parking for managerial/ administrative staff, rank and file employees, and customers.

The responsibility for fashioning an appropriate reasonable accommodation is shared between the employer and employee and is best determined through a flexible, interactive process. 29 C.F.R. Appendix to Part 1630--Interpretive Guidance on Title I of the Americans With Disabilities Act, Section 1630.9. See also, *Hupka v. Department of Defense*, EEOC Appeal No. 02960003 (August 13, 1997). An agency is required to respond to an employee's request and to act promptly in providing the reasonable accommodation. *EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* (rev. October 17, 2002).

The duty to provide a reasonable accommodation is an ongoing obligation *Ralph v. Lucent Technologies, Inc.*, 135 F.3d 166, 171, 7 AD Cas. (BNA) 1345, 1349 (1st Cir. 1998); *Gravney v. Department of Labor*, EEOC Appeal No. 01966864 (October 30, 1997). This information may include obtaining medical documentation from an employee's physician.

When a discriminatory practice involves the denial of a reasonable accommodation, damages may be awarded if the agency fails to demonstrate that it made a good faith effort to provide the individual with a reasonable accommodation for her disability. 42 U.S.C. § 1981a (a)(3); *Morris v. Department of Defense,* EEOC Appeal No. 01962984 (October 1, 1998). "[Liability nevertheless depends on a finding that, had a good faith interactive process occurred, the parties could have found a reasonable accommodation that would enable the [individual with a disability] to perform the job's essential functions." *Kvorjak v. State of Maine,* 259 F.3d 48 (1st Cir. 2001). *See also EEOC v. United Parcel Serv., Inc.,* 249 F.3d 557 (6th Cir. 2001) (summary judgment reversed where there were disputed issues of material fact regarding whether an effective accommodation existed, where agency had failed to engage in the interactive process), *cert, denied*, 70 U.S.L.W. 3384 (U.S. Mar. 4, 2002); *Humphrey v. Mem'l Hosp. Ass'n,* 239 F.3d 1128 (9th Cir. 2001) (summary judgment was inappropriate because there were factual issues as to whether the employer's failure to continue engaging in the interactive process resulted in denial of an effective accommodation); *Rehling v. City of Chicago,* 207 F.3d 1009 (7th Cir. 2000) (employee cannot succeed on denial of reasonable accommodation claim solely on a showing that an employer failed to engage in the interactive process because that process is not an end in itself; rather, the employee must show that an inadequate interactive process resulted in an employer's failure to provide a reasonable accommodation).

A good faith effort can be demonstrated by proof that the agency, in consultation with the disabled individual, attempted to identify and make a reasonable accommodation. *See Schauer v. Social Security Administration,* EEOC Appeal No. 01970854 (July 13, 2001) (citation omitted).

With regard to the reasonable accommodation, the Commission notes that an employee must show a nexus between the disabling condition and the requested accommodation. *See Wiggins v. United States Postal Service*, EEOC Appeal No. 01953715 (April 22, 1997). Accordingly, an agency is not required to provide a reasonable accommodation if it does not assist the disabled employee to perform the essential functions of his or her position. *Sides v. United States Postal Service*, EEOC Appeal No. 01954971 (July 26, 2001). The agency must provide an effective accommodation for the complainant's disability that would enable the complainant to enjoy the same benefits and privileges of the job as enjoyed by non-disabled individuals. *Chausse v. National Security Agency*, EEOC Appeal No. 01A32552 (June 25, 2003).

More so, an agency is not limited to considering only those accommodations specifically requested by the employee. *Walsh v. U.S. Postal Service*, EEOC Appeal No. 01853056, (June 30, 1987). When the agency determines that the requested accommodation is impossible, "it [is] incumbent on the agency to engage in an interactive process to determine, what, if any accommodations could be provided so that complainant could perform the essential functions of [the] job." *Roberts v Department of Transportation*, EEOC Appeal No. 01970727 (September 15, 2000). As long as an accommodation is effective, the agency does not have to provide complainant with the accommodation of his choice. *EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* (rev. October 17, 2002). A determination of a reasonable accommodation must be ascertained on a case-by-case basis.

Prima Facie Case of Reprisal Discrimination

In addition, Complainant can establish a *prima facie* case discrimination for a claim of reprisal by showing the existence of four elements: (1) that he engaged in protected activity; (2) that the alleged discriminating official was aware of the protected activity; (3) that he 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).

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. Furthermore, under the Rehabilitation Action, protected activity occurs when an employee requests a reasonable accommodation. 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).

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.

Prima Facie Case of Harassment

Harassment of an employee that would not occur but for the employee's race, color, sex, national origin, age, disability, religion, or prior protected activity is unlawful, if it is sufficiently severe or pervasive to alter the conditions of complainant's employment. *Cobb v. Department of Treasury*, EEOC Request No. 05970077 (March 13, 1997). In order to establish a claim of harassment based on sex and retaliation, complainant must show that: (1) she belongs to a statutorily protected class; (2) she was subjected to unwelcome conduct (3) the conduct was related to and based upon his disability or protected activity; (4) the harassment had the purpose or effect of unreasonably interfering with her work performance and/or creating an intimidating, hostile, or offensive work environment; and (5) there is a basis for imputing liability to the employer, i.e., supervisory employees knew or should have known of the conduct but failed to take corrective action. *Harris v. Forklift Systems, Inc*., 510 U.S. 17 (1993); *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64-65 (1986); 29 C.F.R. § 1604.11(a)(d)(1995); *Wibstad v. USPS*, EEOC Appeal No. 01972699 (August 14, 1998); *McCleod v. SSA*, EEOC Appeal No. 01963810 (August 5, 1999).

A single incident or group of isolated incidents will not be regarded as discriminatory unless the conduct is severe. *Walker v. Ford Motor Co.*, 684 F.2d 1355, 1358 (11th Cir. 1982). Whether the harassment is sufficiently severe to trigger a violation of Title VII must be determined by looking at all circumstances, including the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance. The conduct should be evaluated from the objective viewpoint of a reasonable person in the victim's circumstances. *Harris* at 23; Enforcement Guidance on *Harris v. Forklift Systems, Inc.,* EEOC Notice No. 915.002 (March 8, 1994).

Legitimate, Non-discriminatory Reasons

Although the initial inquiry in discrimination cases usually focuses on whether the complainant has established a *prima facie* case, following this order of analysis is unnecessary when the agency has articulated legitimate, nondiscriminatory reasons for its actions. In such cases, the inquiry shifts from whether the complainant has established a prima facie case to whether he 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 this time, the burden shifts back to complainant. In this case, complainant must now 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 a discriminatory motive such as disability or in retaliation. The Supreme Court held, "A reason cannot be proved to be "a pretext for discrimination" unless it is shown both that the reason was false and that discrimination was the real reason." *St Mary's* at 515.

The Commission has held that an employer has the discretion to determine how best to manage its operations. As such, the employer may make decisions on any basis except a basis that is unlawful under the discrimination statutes. *Furnco Construction Co. v. Waters*, 438 U.S. at 576; *Nix v. WLCY Radio/Rayhall Communications*, 738 F.2d 1181 (11th Cir. 1984). In addition, an employer is entitled to make its own business judgments. The reasonableness of the employer's decision may of course be probative of whether it is pretext. The trier of fact must understand that the focus is to be on the employer's motivation, not its business judgment. *Loeb v. Textron*, 600 F.2d 1003(1st Cir. 1979), 1012 n.6.

ANALYSIS

<u>*Disability*</u>

Undoubtedly, Complainant is an individual with a disability under the ADA and ADAAA. Although Complainant vaguely testified that her back condition caused problems with walking, standing, lifting, bending, kneeling, and stooping, according to her work restrictions she was substantially limited in the major life activities of lifting (no more than 10 pounds) and standing (no more than 30 minutes).

With an accommodation (modification of her job duties to sedentary work only), Complainant was able to perform the essential functions of her mail processing clerk position in the PARS section. As such, Complainant was a qualified individual with a disability. Therefore, the agency had an obligation to participate in the interactive process and provide her a reasonable accommodation.

However, the record reflects that the agency failed to participate in the interactive process or otherwise accommodate Complainant. While the agency appropriately worked with OWCP to fashion a limited duty job assignment within her work restrictions, the agency's responsibility to Complainant under the ADA and ADAA did not end with her job duties. Both processes have separate laws and regulations that may utilize different standards for evaluating and accommodating employees. An employee's rights under the ADA and ADAAA are separate from her entitlements under OWCP. Thus, the agency had the responsibility to participate in the interactive process, to address concerns Complainant had about her work area, and to discuss other requests such as the adjustable chair and parking closer to the building.

The record reflects that the agency failed to participate in the interactive process.

Specifically, Complainant submitted multiple return to work slips in which her doctor recommended an adjustable chair and a parking space closer to the building. In November 2007, Complainant's physician first recommended a parking space closer to the building in a return to work slip. Similarly, Complainant's physician first requested an adjustable straight back chair in August 2008. Despite Manager Jones' and Supervisor Phillips' first hand knowledge of Complainant's chair and parking situation, they did not discuss the matter with her or the DRAC. In fact, Nurse Administrator eventually emailed Supervisor Phillips about Complainant's repeated requests months later on or about October 23, 2008. Even then, she told him to talk with Complainant and have Complainant submit additional medical information. Instead of complying with Nurse Administrator's instruction, Supervisor Phillips did nothing.

According to Complainant, an unidentified agency official asked her if she found a chair, and another unidentified agency official asked her if she had a handicapped parking sticker. The fact that Complainant eventually found a chair on her own does not absolve the agency of responsibility that the chair was often missing or broken before she chained it to her case. Likewise, the fact that Complainant had a handicapped parking decal from the state did not absolve the agency of responsibility that she could not find a parking space closer to the building. If the agency paid any attention to Complainant's medical situation, agency officials would have realized that Complainant's physician repeatedly made these requests even after Complainant found a chair on her own and after Complainant obtained a handicapped parking decal.

Agency officials quickly blame the DRAC for any breakdown in the reasonable accommodation process. Although the agency utilizes the DRAC to approve or deny reasonable accommodations, the supervisors and managers remain an integral part of the process to relay the employee's needs and the P&DC's abilities to the DRAC. They cannot abandon their roles because the agency utilizes a formal committee.

In this case, Supervisor Phillips, Manager Jones, Nurse Administrator, and the DRAC failed to talk with Complainant about her requests. This failure to talk with Complainant led to the agency's failure to accommodate her with regard to the chair and close parking.

Notably, at the hearing, the agency attempted to show that allowing Complainant to park in the administrative lot and/ or assigning Complainant a parking space in the employee lot would cause a slippery slope with other employees. While this assertion may be true, the agency has not effectively argued that other parking accommodations could not have been made. Examples of other accommodations include changing Complainant's reporting time to ensure that she would get a handicapped spot or providing a shuttle to and from Complainant's car in the regular parking lot. In that Complainant's physician did not specify how far Complainant could and could not walk up the incline, the agency should have explored the possibilities (i.e. requesting clarification from Complainant's physician of record, seeking assistance from Labor Relations Office about parking policy and exceptions, talking with Complainant about various parking alternatives). However, the agency failed to do so.

More so, Supervisor Phillips' failure to participate in the interactive process caused Complainant to experience problems in her work area. She advised him that heavy postcons or inappropriate mail was in her work area. At times he sent someone to assist her after extended wait, or he did not respond at all. Such flagrant disregard for an employee's welfare and safety is unacceptable under the applicable laws. An employee should not have to contact the Plant Manager's Office for assistance only to be told to go back to the supervisor who ignored her problem in the first place.

As a result of Supervisor Phillips' disregard for her work area, Complainant had to seek assistance from other employees, physically maneuver around heavy equipment, or improvise a work area. Per Supervisor Phillips' comment that the Plant Manager did not run the floor, he asserted his responsibility to ensure that the floor worked smoothly. He failed to meet his own assertion.

Overall, the agency's actions (i.e. October 23, 2008, email, one question conversations with Complainant in late October 2008, and directive not to contact Plant Manager) were lackluster attempts at the interactive process. The agency did not make a good faith effort to participate in the interactive process with Complainant to ensure that her ongoing needs were addressed. Most importantly, the agency did not identify and provide Complainant a reasonable accommodation with regard to an adjustable chair, parking closer to the building, or her work area. As such, the agency is liable for damages.

Reprisal

The record reflects that Complainant engaged in protected activity. She participated in the EEO process in November 2007, and she requested a reasonable accommodation multiple times in 2007 and 2008 (i.e. return to work slips). Although Supervisor Phillips and Manager Jones were aware of her requests for reasonable accommodation, only Manager Jones acknowledged that he was aware of her prior EEO activity. Because the protected activity occurred in 2007 and 2008, one can infer a causal connection between the events in this case.

Hostile Work Environment

In this case, Complainant belongs to the protected groups by virtue of her disability and prior protected activity. She was subjected to unwelcome conduct when the agency failed to accommodate her (i.e. chair, parking, and work area), failed to complete her private disability

insurance forms, issued Absence Notification Instructions letter, and caused problems with her badge.

Despite Complainant's claims, the record does not support that this unwelcome conduct was based on Complainant's disability or protected activity. The evidence shows that Manager Jones was not a well liked supervisor by other employees, including Complainant. Co-worker Jones testified about his questionable character and vindictiveness towards employees that he did not like. Complainant echoed these sentiments about Manager Jones who was friends with her ex-husband. She experienced problems with Manager Jones in the years immediately following her divorce (in 2003) through 2008. Both Complainant and co-worker Jones testified that Manager Jones' friends, or stooges, and the union officials did his bidding. Therefore, they experienced problems with these individuals as well.

Overall, Manager Jones' actions appear to be based on his disdain for Complainant who was the ex-wife of his friend. While he did not do anything specifically to her, he was apathetic about her work situation, private disability insurance forms, return to work dates, and her badge. As his friend, Supervisor Phillips expressed this same disdain for Complainant as well. Although unprofessional and inappropriate in the work place, their behavior would have occurred whether Complainant filed the prior EEO or requested a reasonable accommodation.

Without more evidence, Complainant cannot show that the agency's actions rose to the level of a hostile work environment based on disability or prior protected activity.

CONCLUSION

The agency discriminated against Complainant based on disability when the agency failed to accommodate her from November 2007 through January 2009.

The agency did not subject Complainant to a hostile work environment based on disability or prior protected activity.

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 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), 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*].

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).

Objective evidence of non-pecuniary compensatory damages can include statements from complainant concerning her emotional pain or suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to professional standing, injury to character or reputation, injury to credit standing, loss of health, and any other non-pecuniary loss that occurred. Statements from others, including family members, friends, and health care providers 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).

Non-pecuniary, compensatory damages are designed to remedy a harm and not to punish the agency for its discriminatory actions. See *Memphis Cmty. School Dist. v. Stachura*, 477 U.S. 299, 311-12 (1986) (stating that a compensatory damages determination must be based on the actual harm sustained and not the facts of the underlying case). The Commission notes that for a proper award of non-pecuniary damages, the amount of the award should not be "monstrously excessive" standing alone, should not be the product of passion or prejudice. and should be consistent with the amount awarded in similar cases. See *Ward-Jenkins v. Dept of the Interior*, EEOC Appeal No. 01961483 (March 4, 1999) (citing Cygnar v. City of Chicago, 865 F. 2d 827, 848 (7th Cir. 1989)).

In this case, Complainant stated that she suffered emotional and physical distress as a result of the agency's actions from May 2008 through March 2009. Such problems included exacerbated back pain, post traumatic stress disorder, diminished interest and participation in activities, feelings of detachment, depression, and difficulty sleeping and concentrating. The record reflects that Complainant experienced these problems as the result of several incidents in her life (i.e. son’s death, abusive marriage, divorce, incident with co-worker Jones in 2005, on-the-job work injury in 2007, prior EEO complaint in 2007, prognosis/ treatment of injury, the denied reasonable accommodations, and the alleged hostile work environment).

The agency’s liability is limited to the denied reasonable accommodations. However, the employer takes the victim as it finds her. In other failure to accommodate cases, while not on point, the Commission has compensated the complainant in the following ways. In *Pastva v.USPS*, EEOC Appeal No. 01A21610 (March 6, 2003), the Commission awarded $2,500 in compensatory damages for failure to provide a designated parking space for three months. In *Pleasant v. HUD*, EEOC Appeal No. 01A52841 (May 2, 2006), the Commission awarded $5,000 in compensatory damages for failure to provide the complainant an ergonomic chair for 18

months in which the complainant suffered pain, additional physical therapy, and felt humiliation). In *Wingett-Neal v. Department of the Energy*, EEOC Appeal No. 07A10071 (January 29, 2004), the Commission awarded the complainant $16,5000 with interest in compensatory damages for the agency's failure to accommodate her for four months from September 1996 through January 1997 while the complainant was still working. Also, in *Court v. USPS*, EEOC Appeal No. 07A10114 (May 15, 2003), the Commission awarded complainant $60,000 in compensatory damages for the agency's failure to accommodate complainant over 28 months while the complainant was still working.

Accordingly, I find that an award of <u>$30,000</u> in non-pecuniary compensatory damages reflects awards in similar cases. This amount takes into account complainant's exacerbated medical condition (severe back pain), is based on testimony and evidence, is not monstrously excessive given that complainant was not properly accommodated from November 2007 through January 2009, and reflects complainant's disability retirement in March 2009. While the agency cannot be held liable for all of Complainant's problems prior to November 2007, she did suffer physically and psychologically from her back pain and the agency's failure to accommodate her.

These proceedings were bifurcated, and on October 16, 2011, Complainant presented additional evidence on pecuniary damages. She claimed that she lost pay in the amount of $412.83, was not able to receive private disability insurance in the amount of $1500, and incurred $980 in medical expenses. Also, she claimed that she suffered financial problems which resulted in her filing for bankruptcy and borrowing money from family and friends.

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. To recover these damages, the complainant must prove that the losses occurred due to the agency's discriminatory conduct.

Based on the evidence, Complainant is entitled to be reimbursed for lost pay in the amount of $412.83, was not able to receive private disability insurance in the amount of $1500, and incurred $980 in medical expenses. Her award for past pecuniary damages are <u>$2892.83</u>.

Despite the statements in her affidavit, Complainant has not proffered evidence that the November 2009 bankruptcy directly resulted from the agency's failure to accommodate her. In that she never claimed or argued constructive discharge and that she never amended her complaint to include her retirement, the time period addressed by this decision is November 2007 through January 2009.

3. Attorney's Fees and Expenses[14]

Following the September 30, 2011, decision, the Administrative Judge allowed both complainant's attorney and the agency's attorney to submit petitions and responses for damages, attorney's fees, and expenses.

A. Complainant's Petition for Attorneys' Fees

Pursuant to orders issued by this Administrative Judge, complainant's counsel submitted a fee petition on October 17, 2011. The fee petition requested a total of $8,521.17. This fee included $180 consultation fee, $8,274.50 for 43.55 work hours, and $18.24 for expenses. In addition, Complainant requested reimbursement for a $250 fee by Attorney Andrew Brauer.

B. Agency's Responses

On October 31, 2011, the agency responded to the attorney's fee petition and contested the amount of attorney's fees. The agency argued that complainant's attorney's fees should be reduced by 15% because Complainant did not prevail on all claims.

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.

[14] The agency's 40-day period for taking final action and determining whether it will implement my 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.

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 attorney is an experienced attorney with sound experience representing federal employees in EEO matters. Secondly, the number of hours expended by the attorney, paralegal, and legal assistant appears consistent with other cases of these issues, complexity, and duration. As such, <u>$8,771.17 </u>in attorney's fees appears to be reasonable. Also, complainant provided sufficient documentation to support the request for expenses. As such, <u>$18.24</u> in costs appears to be reasonable.

With regard to the agency's argument that the fees should be reduced by 15%, Commission cases do not support this argument. The Commission has held that a prevailing complainant may not recover attorney's fees for work on unsuccessful claims. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). More so, the courts have held that fee applicants should exclude time expended on "truly fractionable" claims or issues on which they did not prevail. See *National Ass'n of Concerned Veterans (NACV) v. Secretary of Defense*, 675 F.2d 1319, 1337 n.13 (D.C. Cir. 1982). Claims are fractionable or unrelated when they involve "distinctly different claims for relief that are based on different facts and legal theories." Hensley, 461 U.S. at 434-35.

In this case, Complainant claimed that the agency discriminated against her and subjected her to a hostile work environment based on disability and in reprisal for prior protected activity when the agency failed to accommodate her from May 2008, through March 23, 2009. Her main claim is a failure to accommodate a disability. While she sites different bases (disability and retaliation) and two separate legal theories (failure to accommodate and hostile work environment), the unsuccessful basis (reprisal) and unsuccessful claim (hostile work

environment) are not truly fractionable or "distinct in all respects" from the successful one (failure to accommodate). See *Ferrall v. Navy*, EEOC Appeal No. 07A30054 (April 23, 2003). In that Complainant successfully proved that the agency failed to accommodate her, a reduction in attorney's fees would be inappropriate and is unnecessary in such a situation.

Accordingly, Complainant is entitled to attorney's fees and costs in the amount of $8,771.17.

REMEDY[15]

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 in the amount of $30,000;
2. The agency shall pay Complainant non-pecuniary damages in the amount of $2,892.83;
3. The agency shall pay Complainant's attorney reasonable attorney's fees and costs in the amount of $8,771.17;
4. 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);
5. The agency shall provide disability training for Manager Jones and Plant Manager; and
6. The agency shall post a notice that the agency has been found to have discriminated against an employee at P&DC in Raleigh, North Carolina.

NOTICE

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

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

[15] This decision is the final version which fully address compensatory damages, attorney's fees, and appeal rights. The agency's 40-day period for taking final action and determining whether it will implement my findings begin upon its receipt of this final decision. *See* EEO MD-110, p. 7-2, n. 2.

If the Agency has <u>not</u> 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 19848, Washington, D.C. 20036
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 this the 30th day of April 2012.

<u>*Anita F. Richardson*</u>
Anita F. Richardson
Administrative Judge
Anita.Richardson@eeoc.gov
Telephone: (919) 856-4070
Facsimile: (919) 856-4156

Cc: Turner, Tseng, Branon, USPS

CERTIFICATE OF SERVICE

For timeliness purposes, it shall be presumed that the parties received the foregoing DECISION within five (5) calendar days after the date it was sent *via* First Class Mail and/or electronic mail. I certify that on April 30, 2012, the foregoing DECISION was sent *via* First Class Mail and/ or electronic mail to the following:

Elaine G. Turner
6204 Quitman Trail
Raleigh, NC 27610-6170

Judy Y. Tseng
Attorney at Law
2000 Centre Green Way, Ste. 150
Cary, NC 27513-5756

R. Frost Branon, Jr.
USPS
Capital Metro Law Office- Charlotte
2901 Scott Futrell Drive
Charlotte, NC 28228-9910

NEEOISO-FAD
US Postal Service
P.O. Box 21979
Tampa, FL 33622-1979

Anita F. Richardson
Anita F. Richardson
Administrative Judge