



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Charlotte District Office

129 West Trade Street, Suite 400  
Charlotte, NC 28202  
(704) 344-6682  
TTY (704) 344-6684  
FAX (704) 344-6734 & 6731

IN THE MATTER OF: )  
)  
Cheryl L. Williams, )  
Complainant, )  
)  
v. )  
)  
John E. Potter, )  
Postmaster General, )  
United States Postal Service, )  
Agency. )

EEOC No.: 140-2005-00313X  
  
Agency Nos.: 4C-290-0005-05  
4C-290-0057-05

**DECISION**

**I. INTRODUCTION**

On March 16-17, 2006, the above-captioned complaint was heard before Kelly A. Davis, Administrative Judge, Charlotte District Office, Equal Employment Opportunity Commission at Conway, South Carolina; additional telephonic testimony was taken on April 19 and 20, 2006. Cheryl L. Williams (hereinafter, Complainant) alleged that she was discriminated against in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., and Section 501 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 791 et seq. It is upon the totality of the evidence that the following decision is based.

**II. APPEARANCES**

The Complainant was present at the hearing and represented by Nancy A. Chiles, Esq., and Anne E. Mjaatvedt, Esq. The Agency was represented by Brian J. Odom, Esq.

**III. CLAIMS**

Whether or not the Agency discriminated against Complainant based on race (African-American), disability (job injury/shoulder), and/or reprisal (prior EEO activity) with regard to the following claims:

- (1) harassment; and
- (2) failure to accommodate?<sup>1</sup>

#### IV. FINDINGS OF FACT<sup>2</sup>

1. Complainant is employed by the Agency as a Window/Distribution Clerk at its Conway, South Carolina Post Office. Her non-scheduled days are Saturday and Sunday; her tour begins at 8:10 a.m. and ends at 5:30 p.m. She has a lunch break and two ten-minute breaks per day. IR 1 at Exh. 14.

2. On May 23, 2002, Complainant sustained an on-the-job injury to her left shoulder. She was diagnosed with right shoulder impingement caused by repetitive work. She had pre-surgical intervention from 2002 until 2004, which included doctor's visits and therapy, but her condition did not improve. HT at 15-16. Complainant was also in a motor vehicle accident on April 24, 2003, which aggravated her shoulder symptoms. HT at 35-36. On January 29, 2004, Complainant had surgery on the shoulder, but that too failed to correct her symptoms. She was out of work following the surgery until August 2004. HT at 16-17.

3. On August 6, 2004, Postmaster Luke Black, in a letter addressed to the "Physician of Cheryl Williams," indicated that "work under any and all restrictions is available" for Complainant. He goes on to state that he personally talked with Complainant on four occasions by phone within the past two weeks and that she "has demonstrated that she has the ability to answer and place phone calls to me as well as others." Black indicated that the Agency could provide work within these same conditions and that he was attaching a limited duty job offer to the letter for the physician's review. CE 5, p. 3302. On that same date, Black telephoned Complainant's house and told her if

---

<sup>1</sup>Although a third claim, concerning a letter of warning, was set forth in the Memorandum Order following the pre-hearing conference and at the beginning of the hearing, that allegation is addressed in the context of Complainant's harassment claim.

<sup>2</sup>Hereinafter, Investigative Report for Agency No. 4C-290-0005-05 = IR 1; Investigative Report for Agency No. 4C-290-0057-05 = IR 2; Hearing Transcript = HT; Exhibit = Exh.; Agency's Exhibit = AE; and Complainant's Exhibit = CE.

she did not come to work the following Monday, August 9, 2004, she would be terminated. As a result of this call, Complainant experienced chest pains and shortness of breath and her daughter contacted Emergency Medical Services (EMS). HT at 40; CE 1, p. 0014.

4. On August 9, 2004, Complainant did not report to the Conway Post Office; instead, she went to see her physician, Dr. Patrick Denton. Dr. Denton completed a Duty Status Report in connection with Complainant's Office of Workers' Compensation Program (OWCP) claim. Her physician indicated that she could return to light duty work on August 10, 2004, and that work should be sedentary in nature with no lifting over 5 pounds and no repetitive overhead work. IR1 at Exh. 4.

5. On August 10, 2004, Complainant returned to work and Postmaster Black made an Offer of Modified Assignment (Limited Duty) to her. The duties of this modified assignment consisted of: (1) answering phones; (2) computer work; (3) filing; and (4) any other duties assigned by management within her restrictions. Complainant accepted the offer on August 10, 2004. IR 1 at Exh. 3.

6. In an October 4, 2004 Duty Status Report, Dr. Denton indicated that Complainant could lift no more than one pound continuously and no more than 10 pounds on an intermittent basis. He reiterated those same restrictions in an October 29, 2004 Duty Status Report. IR 1 at Exh. 4.

7. Dr. Denton also completed a Work Capacity Evaluation on October 4, 2004. Dr. Denton noted that Complainant has right shoulder impingement syndrome with limitations to her right shoulder and that she had reached maximum medical improvement. Dr. Denton noted the following limitations: (1) reaching above shoulder no more than two hours per day; (2) pushing no more than two hours per day; (3) pulling no more than two hours per day; and (4) lifting no more than one hour per day, with a maximum weight of 15 pounds. IR 2 at Exh. 4.

8. When Complainant returned to work on October 4, 2004, following her appointment with Dr. Denton, Supervisor Juanita Burnett, who had begun work at Conway that same day, approached her

and asked her if she had paperwork for her. Burnett then instructed Complainant, who is right handed, to box mail with her left hand. Complainant had difficulty performing this task and it caused pain in both shoulders and swelling in her hand. HT at 48-51.

9. On October 19, 2004, Burnett called Complainant into the office and made another Offer of Modified Assignment to Complainant. The duties of this modified assignment consisted of: (1) performing all window duties with the exception of handling parcels of 15 pounds or more; (2) other duties as assigned to include RTS,<sup>3</sup> second notices for certified; and (3) other duties as assigned by her supervisor while maintaining her restrictions. The physical requirements of this modified assignment are: (1) no lifting, exceeding 15 pounds; and (2) no reaching above shoulders for over two hours. The offer was made by Burnett and signed by Complainant on October 19, 2004. IR 1 at Exh. 3.

10. On October 21, 2004, Complainant approached Burnett after working 2 ½ hours of window duties and asked if she could perform other duties. Burnett refused and said that Complainant needed to obtain medical documentation if she could not perform the duties. When Complainant asked for leave to go to the doctor, that request was refused. HT at 53-54.

11. On October 22, 2004, at approximately 12:40 p.m., a customer came to Complainant's window to pick up a certified letter. As she was proceeding to the certified case, Edna Sipes, another window clerk and a union steward, walked into her with a package, shoved her, and told her to get out of the way; Sipes made contact with Complainant's injured right shoulder. Complainant reported the incident to Black when it first happened, but he told her that she had to wait until the supervisor came back from lunch. When she entered a conference room to try to report it to Burnett, where Black and Labor Relations Specialist Jim Stih were also present, Burnett told her to go to lunch. When she tried to talk to Burnett about it after lunch, Burnett told her to read over some service talks and write a statement and they would talk about it the following Monday. HT at 54-57.

---

<sup>3</sup>Return to Sender.

12. While Burnett was refusing to discuss the Sipes incident with Complainant, she was accepting statements from Sipes and her witnesses. Sipes wrote her own statement<sup>4</sup> and obtained statements from her co-workers between 12:50 p.m. and 1:07 p.m. Complainant wrote her statement at 3:37 p.m. Management allowed Sipes to put her statement and the statements of her witnesses in the facility supervisor's file on Complainant. Sipes was also allowed to put statements from co-workers, which Sipes solicited, about alleged previous incidents into that file. CE 5, pp. 3254, 3312-3316.

13. Complainant requested that Burnett review the videotape from the video camera that is directed on the front window. Burnett told her there was nothing on the video. HT at 58.

14. Complainant went to the Marion County Medical Center Emergency Department on the night of October 22, 2004, complaining of right shoulder pain after being struck with a box. She was treated for a deep bruise/contusion. CE 3, pp. 0327-0335.

15. On October 25, 2004, Complainant filed a Notice of Occupational Disease and Claim for Compensation stemming from the confrontation she had with Edna Sipes on October 22, 2004. On the form, Complainant noted "co-worker caused trauma to chest and right shoulder." IR at Exh. 5. Complainant was seen for the injury in the Emergency Department of Marion County Medical Center and diagnosed with a deep bruise (contusion). IR 1 at Exh. 5.

16. On November 1, 2004, Complainant contacted an EEO Counselor regarding allegations of failure to accommodate and harassment. Sometime between that date of contact and the date the Counselor submitted her report on December 16, 2004, the Counselor spoke to both Supervisor Juanita Burnett and Postmaster Luke Black. IR 1 at Counselor's Report.

---

<sup>4</sup>Sipes' statement begins as follows: "At approximately 12:40 today a big black male approached my window with several huge packages, one of which was so big that a white male gentleman put it on the counter for the customer." CE 5, p. 3314.

17. On November 10, 2004, Complainant submitted a Claim for Reimbursement for Expenditures on Official Business in connection with official travel to Florence, South Carolina on November 8, 2004. IR at Exh. 7. Although Burnett instructed Complainant to submit the request for reimbursement, she did not provide any assistance to her with regard to the e-Travel system, a Web-based system that automates the expense management process, until February 28, 2005. IR 1 at Exh. 8 and Exh. 18. Complainant finally received reimbursement for her travel on March 2, 2005. IR 1 at Exh. 9.

18. On November 15, 2004, Complainant reported to her window and found a gorilla sticker in her stamp drawer. Complainant reported the sticker to Burnett, who peeled it off and responded, "Oh, I saw that." Burnett did nothing about the sticker. HT at 69-73.

19. Complainant was absent from work on November 17, 18, and 19, 2004, and requested sick leave as a result of pain in her right shoulder. IR 1 at Exh. 10. Complainant was required to submit documentation to support this absence. Her family nurse practitioner saw her on November 17, 2004, and indicated that she could return to work on November 22, 2004. The nurse practitioner saw Complainant again on November 19, 2004, and noted that Complainant stated that she was unable to perform job duties due to bilateral shoulder pain. She also noted that Complainant was scheduled for an MRI. When Burnett refused to accept either of these notes as acceptable documentation to support Complainant's absence, Complainant saw Dr. Denton at Pee Dee Orthopaedic Associates on December 6, 2004. Dr. Denton indicated that Complainant was unable to work from November 17 through November 19, 2004. IR 1 at Exh. 11.

20. On November 23, 2004, Burnett allowed Complainant to work on RTS mail, but required her to sit on a backless stool. Other employees who were given that assignment were allowed to sit in a chair with a back at a desk. HT at 205-206.

21. In a December 6, 2004 Duty Status Report, Dr. Denton indicated again that Complainant could lift no more than one pound continuously and no more than 10 pounds on an intermittent basis. The

report also stated that Complainant could work 8 hours per day, but required a 15-minute break every two hours. These limitations are reiterated by the physician in a February 2005 Duty Status Report and in a May 2, 2005 Duty Status Report. IR 1 at Exh. 4; IR 2 at Exh. 4.

22. On December 7, 2004, Complainant filed a formal EEO complaint concerning the matters she brought to the attention of an EEO Counselor on November 1, 2004. IR 1 at Formal Complaint.

23. On December 9, 2004, Burnett issued Complainant a letter of warning for failure to follow instructions. The letter noted that Burnett had instructed Complainant to bring acceptable documentation to support her unscheduled absence from work November 17, 2004, through November 19, 2004. The letter of warning went onto state that Burnett instructed Complainant that acceptable documentation must state Complainant was unable to perform her duties at work on the specified dates. According to the letter, Complainant failed to follow Burnett's instructions to provide acceptable medical documentation to support her absence from work. IR 1 at Exh. 12.

24. Complainant and her union filed a grievance over the letter of warning. On January 7, 2005, Labor Relations Specialist Jim Stih and Edna Sipes, the union steward, reached a step two settlement of that grievance. They agreed that the letter of warning would be pulled 18 months from the date of issue if there were not violations similar in nature. IR 1 at Exh. 13.

25. On December 24, 2004, Burnett sent part-time flexible employees home and granted one full-time regular employee (Edna Sipes) leave, while other full-time regulars, including Complainant and two other employees who were also on limited duty, were required to work their designated holiday. Sipes filed a class action grievance over the incident, which was resolved at step two of the grievance procedure. She and Stih agreed that she, as the senior full-time regular who worked the holiday,<sup>5</sup> would be paid 50% additional premium for 8 hours and that management will schedule for holidays in accordance with the national agreement. IR 1 at Exh. 16.

---

<sup>5</sup>Sipes worked some time that day before she was granted the requested leave. HT at 319.

26. On January 31, 2005, Complainant again contacted an EEO Counselor. This contact concerned being required to work on Christmas Eve; the alleged violation of her rights by the Agency and the union with regard to the settlement on the letter of warning; and being given a pre-disciplinary interview regarding delayed Express Mail. IR 1 at Counselor's Report.

27. Complainant filed a formal EEO complaint, dated March 16, 2005, concerning the matters she contacted the Counselor about on January 31, 2005. This formal complaint was subsequently consolidated by the Agency with the formal complaint filed on December 7, 2004.

28. After Ron Morris, another limited duty co-worker, went out on sick leave in March 2005, Burnett assigned Sipes to be Complainant's lunch relief. Sipes was consistently late in relieving Complainant. HT at 89-90.

29. During the spring of 2005, Burnett required Complainant to see Dr. Denton every 28 days. Dr. Denton did not, however, need to see Complainant anymore, as there was nothing else he could do for her. HT at 91-92. Dr. Denton wrote a letter to that effect on May 4, 2005. CE 2, p. 0066.

30. In a statement dated May 3, 2005, submitted to Complainant's OWCP caseworker, Sherri Gore, Burnett alleged that Complainant was defrauding OWCP by using it to pay for her automobile accident injuries. At the close of her statement, Burnett expresses three concerns: (1) is OWCP paying for Complainant's automobile accident injuries; (2) did Complainant use OWCP coverage for her court case; and (3) was she seeing the same doctor in Florence for both claims and, if so, how did she keep them separate? CE 2, p. 0098

31. On May 3, 2005, Complainant contacted an EEO Counselor again alleging matters related to failure to accommodate and harassment. IR 2 at Counselor's Report. On June 13, 2005, Complainant filed a formal complaint, alleging constant harassment. IR 2 at Formal Complaint.

## V. APPLICABLE LAW

The burden of proof in discrimination cases is generally allocated according to the standard established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). This case set forth a three-tier test for determining whether there has been discrimination in violation of Title VII. The complainant has the initial burden of showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not such actions were based on discriminatory criteria. Once a prima facie case has been established, the burden of going forward shifts to the employer to articulate some legitimate, nondiscriminatory reason for the challenged action. If the employer articulates such a reason, the burden is then on the complainant to prove, by a preponderance of the evidence, that the legitimate reason offered by the employer was not its true reason, but a mere pretext for discrimination. See *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993); *Prewitt v. U.S. Postal Service*, 662 F.2d 292 (5<sup>th</sup> Cir. 1981) (*McDonnell Douglas* framework applies to disability cases).

## VI. ANALYSIS & FINDINGS

In order to establish a prima facie case of disability discrimination, Complainant must prove, by a preponderance of the evidence, that she was treated differently than individuals not within her protected group, or that the Agency failed to make a needed reasonable accommodation, resulting in adverse treatment of Complainant. See *Sisson v. Helms*, 751 F.2d 991, 992-93 (9<sup>th</sup> Cir.), cert. denied, 474 U.S. 846 (1985). As a threshold matter, Complainant must establish that she is a "qualified individual with a disability" within the meaning of the Rehabilitation Act of 1973. The Act's implementing regulation defines "individual with a disability" as a person who has, has a record of, or is regarded as having a physical or mental impairment which substantially limits one or more of that person's major life activities. 29 C.F.R. § 1630.2(g)<sup>6</sup>; *Sutton v. United Air Lines*,

---

<sup>6</sup>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. Since that time, the ADA regulations set out at 29 C.F.R. Part 1630 apply to complaints of disability discrimination in the federal sector.

*Inc.*, 119 S. Ct. 2139, 2141-42 (1999) (A disability exists only where an impairment substantially limits a major life activity . . .).

The term "substantially limits" means: unable to perform a major life activity that the average person in the general population can perform; or significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform the same major life activity. 29 C.F.R. § 1630.2(j)(1). Major life activities include functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 29 C.F.R. § 1630.2(i). Factors to be considered in determining whether an individual is substantially impaired in a major life activity include: the nature and severity of the impairment; the duration or expected duration of the impairment; and the permanent or long-term impact, or the expected permanent or long-term impact of or resulting from the impairment. 29 C.F.R. § 1630.2(j)(2).

I find that Complainant is an individual with a disability. Her injury to her right shoulder substantially limits her ability to perform manual tasks and to lift. She was diagnosed with right shoulder impingement as a result of an on-the-job injury in May 2002. Complainant and her husband testified that she has been limited in caring for herself, both prior to and following her January 29, 2004 surgery. For instance, she wears a wig because she is unable to wash or style her hair; she has difficulty washing her back or performing personal hygiene requiring the use of her right shoulder or hand; she is unable to perform household activities such as making beds, vacuuming, and sweeping; she requires assistance with grocery shopping; and she is unable to do gardening or yard work.<sup>7</sup> She also has a permanent 15-pound lifting restriction. I therefore find that, when Complainant's restrictions are viewed as a whole, she has a substantial limitation in the major

---

<sup>7</sup>I do not find that Complainant's testimony is contradicted by the report from her evaluation at McLeod Work Recovery Center on July 26, 2004. CE 2, p. 0170. I note that report is almost two years old, and Complainant testified that her condition worsened after she returned to work in August 2004.

life activity of performing manual tasks. *See Adcock v. Department of the Air Force*, EEOC Request No. 05A20692 (September 23, 2002).

Accordingly, I will move to the second part of this inquiry: whether Complainant is a "qualified individual with a disability." The inquiry here is whether Complainant can perform the essential functions of her position, with or without reasonable accommodation. *See* 29 C.F.R. § 1630.2(m). I find that Complainant is a qualified individual with a disability. Specifically, I find that she was qualified to perform the modified assignments that she accepted, as set forth in those job descriptions. There has been no dispute that Complainant could perform the job as set forth in the description. In addition, I note that Postmaster Black testified that he never had any problem with Complainant's work, that she worked well. HT at p. 541. Accordingly, I find that Complainant is a qualified individual with a disability and is entitled to the protection of the Rehabilitation Act.

#### *Failure to Accommodate Claim*

An agency is required to make reasonable accommodations to the known physical and mental limitations of qualified individuals with disabilities unless it can demonstrate that doing so would impose an undue hardship upon its operations. 29 C.F.R. § 1630.9(a). Reasonable accommodation may include job restructuring, reassignment to a vacant position, or modified work schedules. 29 C.F.R. § 1630.2(o). Factors to consider in determining whether any of these accommodations would impose an undue hardship include the size and budget of the program, the type of operation and the nature and cost of the accommodation. 29 C.F.R. § 1630.2(p).

I find that the Agency failed in its affirmative duty to provide Complainant with reasonable accommodations. Specifically, Complainant repeatedly informed Juanita Burnett that she was in pain when working continuously on the window and asked to perform the other duties listed in the modified job assignment, but that request was denied.<sup>8</sup> Accordingly, I find that the Agency failed

---

<sup>8</sup>Although Burnett denied that Complainant ever complained about her job assignment causing her pain, I did not, in general, find Burnett to be a credible witness. Regarding her demeanor, she was not responsive, on cross-examination, to many of the questions asked and often

to accommodate Complainant when it required her to work on the window full-time, without any relief. In addition, I note Black's insistence that she return to work before she was released by her doctor. Specifically, he threatened to terminate her if she did not return to work or that if she did not accept the modified assignment, her OWCP case would be closed. Further, I note Burnett's assignment that Complainant complete RTS mail on a stool with no back and her requirement that Complainant, who is right-handed, box mail with her left hand. Further, the Agency has made no showing that working Complainant within the restrictions set forth in her modified job description would have imposed an undue hardship on its operation. I therefore find that the Agency violated the Rehabilitation Act when it worked Complainant outside of her medical restrictions.

*Harassment*

To prevail on a claim of harassment, Complainant must show that: (1) she is a member of a statutorily protected class; (2) she was subjected to harassment in the form of unwelcome verbal or physical conduct involving the protected class; (3) the harassment complained of was based on the statutorily protected class; and (4) the harassment affected a term or condition of employment and/or had the purpose or effect of unreasonably interfering with the work environment and/or creating an intimidating, hostile, or offensive work environment. See *Finney v. Department of the Treasury*, EEOC Appeal No. 01A10260 (August 27, 2002); *Humphrey v. United States Postal Service*, EEOC Appeal No. 01965238 (October 16, 1998); 29 C.F.R. § 1604.11. See generally *Taylor v. Department of the Air Force*, EEOC Request No. 05920194 (July 8, 1992). In *Rideout v. Department of the Army*, EEOC Appeal No. 01933866 (November 22, 1995), the Commission stated that in order to determine whether a work environment is objectively hostile or abusive, the trier of fact must consider all of the circumstances, including the following: the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive

---

appeared annoyed. In addition, some of her testimony was simply not credible. For instance, her testimony that documents concerning Complainant's court case about her automobile accident just mysteriously appeared on her desk was not believable. Neither was her testimony that she had never seen the documentation that Edna Sipes gathered and did not know how it wound up in the facility supervisor's file for Complainant, a file for which Burnett was responsible.

utterance; and whether it unreasonably interferes with an employee's work performance. *Harris v. Forklift Systems*, 510 U.S. 17, 23 (1993).

I find that Complainant, as discussed previously, has shown that she belongs to the protected group with regard to her claim of disability-based harassment as she has shown that she is a qualified individual with a disability. In addition, I find that she has established that she is a member of the protected group with regard to her claim of race-based harassment as she is African-American. Finally, she has established that she belongs to the protected class with regard to reprisal, as she has been engaged in ongoing EEO activity since November 1, 2004, and management officials were aware of that activity.

Further, I find that Complainant has established that she was subjected to harassment in the form of unwelcome verbal or physical conduct involving the protected classes. For instance, prior to her release by her doctor, Postmaster Black threatened to terminate her if she did not return to work. In addition, he told her if she did not accept the modified offer, her OWCP case would be closed. I do not find Black's denial of these threats credible, as his own August 6, 2004 letter belies his overanxiousness to return Complainant to work before she had been released by her physician. Further, I note Burnett's refusal to accept a series of notes from Complainant's physicians asking that she be excused from work in November 2004, although the final note clearly complied with Burnett's instruction to obtain documentation that she was unable to perform her duties at work on the specified dates. Burnett also wrote a letter to OWCP accusing Complainant of fraud, with no evidence to support her allegation. I note the October 22, 2004 incident with Sipes, wherein Sipes deliberately hit Complainant in her injured shoulder with a package. Equally as troubling is the fact that the statements of Sipes and her witnesses found their way into Complainant's file, maintained by her supervisor, something which even Postmaster Black found inappropriate. Finally, the timing of certain events leads one to conclude that certain unwelcome verbal or physical conduct involved retaliation. For instance, Complainant submitted her original claim for travel reimbursement on November 10, 2004, nine days after her initial contact with an EEO Counselor, and Burnett knew of that contact no later than December 16, 2004, and refused to provide Complainant with any

assistance in processing her travel until February 28, 2005. In addition, Complainant was denied leave on Christmas Eve, just a few days after Burnett testified she became aware of Complainant's EEO activity.<sup>9</sup>

I also find that the harassment complained of was based on the statutorily-protected classes, as many of the comments in question were directly related to Complainant's disability. In addition, it is clear that many of the actions were based on race as well, particularly those involving Sipes. For instance, I note Ron Morris' testimony about Sipes' treatment of both African-American employees and African-American customers. As for the customers, that treatment included raising her voice at those customers, telling those customers to get back in line, and other incidents of rudeness. As for employees, Morris testified that the only employees he ever saw Sipes argue with were both African-American, Complainant and a former employee. Finally, I note that Sipes' own statement about the October 2004 incident with Complainant is a very telling document, wherein she referred to her African-American customer as a "big black male" and her Caucasian customer as a "white male gentleman." I also find that some of the harassment was based on retaliation, particularly the refusal on Burnett's part to assist Complainant with her travel for months following Complainant's initial complaint and requiring Complainant to work on Christmas Eve.

Finally, I find that the harassment had the purpose or effect of unreasonably interfering with the work environment and creating an intimidating, hostile, or offensive work environment. For example, I note Complainant's testimony that Agency officials were constantly picking on her. Further, the physical assault by Sipes would create an intimidating work environment for any reasonable person. Regarding that incident, I find that Complainant was a far more credible witness than Sipes. For instance, her demeanor, when she was questioned by Complainant's Counsel, was quite defensive; she even went so far as to say that she was being put on trial. HT at 325. Accordingly, I find that the treatment Complainant suffered, largely from Burnett and Sipes, but also from Postmaster Black,

---

<sup>9</sup>Burnett testified that she became aware of Complainant's EEO activity on December 18, 2004, although the record establishes that she had to have been aware by December 16, 2004, when the Counselor submitted her report.

resulted in an intimidating, hostile, and offensive work environment in which Complainant was ostracized and humiliated. In addition, I find that the harassment affected a term or condition of Complainant's employment when she was issued a letter of warning for failure to follow instructions, despite the fact that she followed those instructions.

Regarding alleged harassment by a co-worker, an employer is liable if it knew or should have known of the misconduct and failed to take immediate and appropriate corrective action. *Serh v. U.S. Postal Service*, EEOC Appeal No. 01A11289 (September 9, 2002). Regarding alleged harassment by supervisors, the Commission distinguishes between harassment that results in a tangible employment action and harassment that creates a hostile work environment. An employer is always liable for a supervisor's harassment if it culminates in a tangible employment action. Accordingly, the Agency is liable for the tangible employment action that Complainant received as a result of Burnett's harassment, *i.e.*, the letter of warning. If the harassment does not culminate in a tangible employment action, the employer may be able to avoid liability or limit damages by establishing an affirmative defense that includes two necessary elements: (1) the employer exercised reasonable care to prevent and correct promptly any harassing behavior; and (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. *Id.* (citing *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998) and *Farragher v. City of Boca Raton*, 524 U.S. 775 (1998)).

I do not find that any of these elements have been established. As for the harassment by Sipes, the Agency knew or should have known of her misconduct and failed to do anything about it. Complainant specifically complained of the October 2004 incident to Burnett, but Burnett gathered statements from Sipes' witnesses first and then allowed those statements to be placed in Complainant's file. Further, I note Ron Morris' testimony that Sipes' dislike of Complainant was well known in the Conway Post Office. In addition, Morris complained of Sipes' treatment of African-American customers to both Burnett and Black, evidencing at least their awareness of Sipes' general racial animus. As for the harassment by supervisors, that harassment resulted in at least one tangible employment action, *i.e.*, the issuance of the letter of warning, for which the Agency is

automatically liable. Although Burnett claimed that the LOW was issued because of Complainant's failure to follow instructions, Complainant made every effort to comply with those instructions and her last note, from Dr. Denton, does comply as it indicates that Complainant was unable to perform her duties at work on the specified dates. As for the hostile work environment harassment, the Agency was placed on notice of Complainant's general hostile work environment claim with the filing of her formal complaint and took no action. Accordingly, I find that the Agency failed to exercise reasonable care to prevent and correct promptly any harassing behavior. I also find that the Agency has not shown that Complainant unreasonably failed to take advantage of any preventive or corrective opportunities provided by it or to avoid harm otherwise. I therefore find that the Agency has failed to establish an affirmative defense under *Farragher* and *Ellerth* and is therefore liable for the harassment which Complainant was subjected to by Burnett, Black, and Sipes.

## VII. EQUITABLE RELIEF

As part of her claim for damages, Complainant requests a "sick leave audit" for the dates of October 21, and November 17-21, 2004. Specifically, if the record reflects that she was forced to use sick leave on those dates, as opposed to OWCP leave or leave without pay (LWOP), she would like for her sick leave to be restored. A claim for the restoration of leave is a claim for equitable relief. *McGowan-Butler v. Department of the Treasury*, EEOC Request No. 05940636 (September 9, 1994). In addition, the Commission has held that a successful Title VII complainant is entitled to reimbursement of sick leave taken as a direct result of unlawful discrimination. *Harris v. Department of the Air Force*, EEOC Request No. 05901142 (January 11, 1991). Accordingly, I find that Complainant is entitled to such a "sick leave" audit and the restoration of any sick leave taken on October 21, and November 17-21, 2004.

## VIII. COMPENSATORY DAMAGES

Section 102(a) of the Civil Rights Act of 1991 (1991 CRA), 105 Stat. 1071, Pub. L. No. 102-166, codified at 42 U.S.C. § 1981a, authorizes an award of compensatory damages as part of make-whole relief for intentional discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended. Section 1981a(b)(2) indicates that compensatory damages do not include back pay,

interest on back pay, or any other type of equitable relief authorized by Title VII. Section 1981a(b)(3) limits the total amount of compensatory damages that may be awarded each complaining party for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses, according to the number of individuals employed by the respondent. The limit for a respondent who has more than 500 employees is \$300,000. 42 U.S.C. § 1981a(b)(3)(D).

In *Jackson v. U.S. Postal Service*, EEOC Appeal No. 01923399 (November 12, 1992), recon. denied, EEOC Request No. 05930306 (February 1, 1993), the Commission held that Congress afforded it the authority to award such damages in the administrative process. The United States Supreme Court reached a similar conclusion in *West v. Gibson*, 119 S. Ct. 1906 (1999), holding that the Commission has authority under Title VII to award compensatory damages against federal agencies in employment discrimination cases.

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. 01934156 (July 22, 1994), recon. denied, EEOC Request No. 05940927 (December 11, 1995); *Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991*, EEOC Notice No. N 915.002 at 11-12, 14 (July 14, 1992). "[C]ompensatory damage awards must be limited to the sums necessary to compensate [a complainant] for actual harm, even if the harm is intangible." *Id.* at 13 (citing *Carter v. Duncan - Higgins, Ltd.*, 727 F.2d 1225 (D.C. Cir. 1984)). Thus, a compensatory damages award should reimburse a complainant for proven pecuniary losses, future pecuniary losses, and non-pecuniary losses. Pecuniary losses are out-of-pocket expenses, including medical expenses and other quantifiable costs. *See Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991*, at 8. Non-pecuniary losses are those intangible losses, not subject to precise quantification, e.g., emotional pain and 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 10.

Complainant has confined her compensatory damages claim to non-pecuniary damages. In *Carle v. Department of the Navy*, EEOC Appeal No. 01922369 (January 5, 1993), the Commission described the type of objective evidence that an agency may obtain when assessing the merits of a complainant's request for emotional distress damages:

[E]vidence should have taken the form of a statement by appellant describing her emotional distress, and statements from witnesses, both on and off the job, describing the distress. To properly explain the emotional distress, such statements should include detailed information on physical or behavioral manifestations of the distress, information on the duration of the distress, and examples of how the distress affected appellant day to day, both on and off the job. In addition, the agency should have asked appellant to provide objective and other evidence linking . . . the distress to the unlawful discrimination. . . .

Objective evidence may include statements from the complainant concerning his or 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 losses that are incurred as a result of the discriminatory conduct. Statements from others, including family members, friends, and health care providers could address the outward manifestations or physical consequences of emotional distress, including sleeplessness, anxiety, stress, depression, marital strain, humiliation, loss of self-esteem, excessive fatigue, or a nervous breakdown. Objective evidence may also include documents indicating a complainant's actual out-of-pocket expenses related to medical treatment, counseling, and so forth, related to the injury caused by the respondent's discriminatory action.

At the hearing, Complainant testified to the damage caused by the failure to accommodate her disability and the harassment she endured. Specifically, she has had multiple admissions to the hospital for treatment of heart palpitations, stress, and acute anxiety symptoms. Those acute anxiety symptoms included pain in her chest, palpitations, numbness, and hyperventilating. Complainant also testified to other forms of emotional distress, including waking up in the middle of the night crying and diminished libido. HT at 97-111.

Complainant's husband, Joe Williams, also testified to the effects of the discrimination. He described the changes that he saw in Complainant after Burnett became her supervisor. Specifically, she has been upset a lot, crying both on the job and at home. It also affected Complainant's sleeping; she would wake him up at night because of problems with her arm or because she was upset about work. He also testified to EMS having to come to their house on several occasions because of panic attacks. Finally, he testified that Complainant's anxiety about her job has affected their relationship. HT at 330-334.

Complainant also submitted some medical records in support of her claim. For instance, on the date that Black called her and told her she would be terminated if she did not return to work, August 6, 2004, Complainant was transported by the Horry County EMS to the Marion County Medical Center Emergency Room. She complained that she was "being harassed at work about [her] inability to work due to a workman's comp. injury." Complainant was diagnosed as having acute anxiety syndrome. As a follow-up to the emergency room visit, she was seen at Aynor Family Practice on August 10, 2004, for problems with anxiety. She reported that she was waking up during the night feeling short of breath and with numbness in her arms. Complainant was diagnosed as having anxiety attacks. CE 3.

I find that this testimony and evidence establishes that Complainant has suffered nonpecuniary losses directly attributable to the discrimination. I find that her testimony and that of her husband clearly established the effects that the discrimination has had on Complainant's life, including a basic lack of enjoyment of life. The Agency offered no evidence to dispute or contradict the damages evidence offered and presented by Complainant. In addition, it made no showing that it made good faith efforts to reasonably accommodate Complainant. *See Galos v. U.S. Postal Service*, EEOC Appeal No. 01A04409 (September 12, 2002).

Having determined that Complainant proved that she suffered emotional distress causally connected to Agency action, I must next determine the amount of compensatory damages to be awarded for that harm. In determining the amount of a compensatory damages award, I am guided by the principle

that such an award is limited to the sums necessary to compensate Complainant for the actual harm caused by the Agency's discriminatory actions and must attempt to affix a reasonable dollar value to compensate him for that portion of his damages that was caused by the Agency's discrimination. EEOC Notice No. N 915.002 at 13.

It is a Commission goal to make non-pecuniary damage awards consistent with awards in similar cases. *Chow v. Department of the Army*, EEOC Appeal No. 01981308 (August 5, 1999). In *Carpenter v. Department of Agriculture*, EEOC Appeal No. 01945652 (July 17, 1995), the Commission awarded \$75,000.00 in a failure to accommodate case which resulted in emotional harm to Complainant which damaged his relationships with family and friends and reduced his quality of life, as well as resulting in some physical manifestations such as a digestive disorder. In *Quinn v. Social Security Administration*, EEOC Appeal No. 01976921 (May 18, 2000), the Commission awarded the complainant \$50,000.00 where he was harassed on a daily basis for three years and suffered from depression, insomnia, and anxiety for at least seven years. In *Finlay v. United States Postal Service*, EEOC Appeal No. 01942985 (April 29, 1997), the Commission awarded \$100,000 in nonpecuniary damages in order to compensate the complainant for severe psychological injuries over four years. The complainant's condition, which was expected to continue for an indeterminate period of time, included ongoing depression, frequent crying, concern for physical safety, lethargy, social withdrawal, concern for physical safety, recurring nightmares and memories of harassment, a damaged marriage, stomach distress, headaches, and weight gain. The complainant's clinical psychologist diagnosed post-traumatic stress disorder, late onset; major depression, single episode; and severe stress. In *Kelly v. Department of Veterans Affairs*, EEOC Appeal No. 01951729 (July 29, 1998), request for reconsideration denied, EEOC Request No. 05981118 (September 30, 1999), the Commission awarded \$100,000 in nonpecuniary damages to compensate the complainant for emotional distress caused by the Agency's reprisal and discrimination based on sex. The complainant's symptoms included frequent panic attacks, depression, anxiety, nervousness, nightmares, cognitive problems, crying spells, suicidal thoughts, headaches, muscle tension, and insomnia. A psychiatrist who examined the complainant diagnosed her as suffering from Post-

Traumatic Stress Syndrome; another diagnosed an Adjustment Disorder ruling out Major Depression.

In *Santiago v. Department of the Army*, EEOC Appeal No. 01955684 (October 14, 1998), the Commission awarded \$125,000 in non-pecuniary damages for emotional distress, i.e., depression, anxiety, paranoia, confusion, moodiness, insomnia, social withdrawal, tearfulness, fatigue, loss of libido, loss of self-esteem, chest and stomach pains, digestive problems, and incidents of shortness of breath. The complainant repeatedly sought medical treatment for her problems, including an invasive diagnostic procedure, after she was removed in 1993. The duration of the complainant's emotional and psychological distress and physical illness was found to be from November 21, 1991, to the date she was removed, February 12, 1993. In *Chow v. Department of the Army*, EEOC Appeal No. 01981308 (August 5, 1999), the Commission found that the complainant was entitled to \$100,000 in non-pecuniary damages for her emotional and physical problems caused by sexual harassment and reprisal. The complainant's symptoms included abdominal and chest pains, headaches, difficulty breathing and sleeping due to nightmares, weight gain, hair loss, depression, and social withdrawal. Her psychologist treated her with both an anti-anxiety and an anti-depressant medication.

Having carefully considered the facts of this case, I find that Complainant is entitled to non-pecuniary damages in the amount of \$100,000.00. In reaching this amount, I have considered a number of factors. For example, I considered the nature and severity of the discrimination, as well as the nature and severity of Complainant's emotional pain and suffering. I have also considered the fact that Complainant has offered some objective evidence to corroborate her claim, in the form of medical records. In addition, her husband testified to the effects of the emotional distress. Based on these considerations, I find that \$100,000.00 is a proper award for the non-pecuniary damages which Complainant has suffered.

Conclusion

I find that Complainant proved, by a preponderance of the evidence, that she was discriminated against as alleged.

Remedy

I find the following relief is appropriate:

- (1) The Agency shall tender to Complainant non-pecuniary compensatory damages in the amount of \$100,000.00.
- (2) The Agency shall restore to Complainant any sick leave used on October 21, and November 17-21, 2004.
- (3) The Agency shall completely expunge the December 9, 2004 Letter of Warning from Complainant's Official Personnel Folder.
- (4) All the information gathered by Edna Sipes regarding the October 22, 2004 incident, as well as other alleged incidents involving Complainant, shall be redacted from Complainant's facility supervisor file.
- (5) The Agency shall afford EEO training regarding the Rehabilitation Act and Title VII to Burnett, Black and Sipes.
- (6) The Agency shall post a notice that discrimination has been found to have occurred at its Conway, South Carolina Post Office.

July 19, 2006  
Date

Kelly A. Davis  
Kelly A. Davis  
Administrative Judge