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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16-35217
D.C. No. 3:14-cv-05164-RBL

[Filed April 27, 2018]

JOANN S. HATCH,
Plaintiff-Appellant,

v.

MEGAN J. BRENNAN, Postmaster General; UNITED STATES POSTAL SERVICE,
Defendants-Appellees.

MEMORANDUM[*]

Appeal from the United States District Court
for the Western District of Washington
Ronald B. Leighton, District Judge, Presiding

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

App. 2

Submitted March 7, 2018[**]
Portland, Oregon

Before: FISHER, N.R. SMITH, and HURWITZ, Circuit Judges.

JoAnn Hatch appeals a summary judgment in favor of the United States Postal Service in this action raising discrimination and retaliation claims under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12111 *et seq.*, and § 501 of the Rehabilitation Act, 29 U.S.C. § 791. We affirm.

1. The substantive standards of the ADA govern § 501 claims. *Lopez v. Johnson*, 333 F.3d 959, 961 (9th Cir. 2003). "Discrimination and retaliation claims under the ADA are both subject to the burden-shifting framework outlined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–04 (1973)." *Curley v. City of N. Las Vegas*, 772 F.3d 629, 632 (9th Cir. 2014). Thus, Hatch bore the initial burden of pleading discrimination. *McDonnell Douglas*, 411 U.S. at 802. Once she did so, the Postal Service was required to present a "legitimate, nondiscriminatory reason" for the challenged conduct. *Id.* at 802–03. If it did so, the burden returned to Hatch to show that the proffered nondiscriminatory reason was pretextual. *Id*. at 803–04.

2. The Postal Service produced specific, nondiscriminatory explanations for Hatch's allegedly disparate treatment, and Hatch failed to present "specific, substantial evidence" that these explanations

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[**] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

were pretextual. *See Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 890 (9th Cir. 1994) (quoting *Steckl v. Motorola, Inc.*, 703 F.2d 392, 393 (9th Cir. 1983)).

a. Hatch presented no evidence that the Postal Service put her on light duty status as pretext for discrimination. The letter she received from her supervisor simply informed her that she "may" seek light duty status, among other options including requesting "resolution through the District Reasonable Accommodation Committee." And, Hatch's subsequent letter requesting light duty describes her choice as "a win/win."

b. Hatch presented no evidence that the Postal Service's explanation for its failure to provide her with 40 hours of work per week—the requirement under the applicable collective bargaining agreement to first ensure that employees not on light duty receive 40 hours—was a pretext for discrimination. Indeed, she presented no evidence that similarly situated nondisabled employees on light duty status worked 40 hours per week. As the district court noted, "the light-duty program could not have had the effect of discriminating against [Hatch] on the basis of her disability, because the Postal Service treated her the same way as every other unassigned employee on light-duty status."

c. Hatch also claims that the Postal Service discriminated against her by denying her various jobs. But, she presented no evidence that the Postal Service's explanation—that the collective bargaining agreement required that those jobs be awarded to employees with greater seniority—was pretextual. *See U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 416 (2002).

d. Finally, Hatch claims that a letter sent to her about her options after the District Reasonable Accommodation Committee ("DRAC") had been unable to find her a full-time position demonstrates that the Postal Service wanted Hatch to resign. However, the letter, which is purely informational, does not suggest that Hatch change her employment status.

3. Hatch claims that the Postal Service retaliated against her because she requested a reasonable accommodation in March 2010 and filed EEO complaints. To establish a prima facie case of retaliation, the "temporal proximity" between the protected activity and adverse employment activity typically "must be very close." *Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273–74 (2001) (noting that a 3-month period was insufficient to establish causation) (internal quotation marks and citation omitted). But all alleged acts of retaliation in this case occurred either before or many months after the protected activities. Nor did Hatch present "evidence of a pattern of antagonism following the protected conduct." *Porter v. Cal. Dep't of Corrs.*, 419 F.3d 885, 895 (9th Cir. 2005) (internal quotation marks omitted).

4. Hatch's argument that the Postal Service did not act in good faith in considering her accommodation requests also fails. Although the DRAC's process was perhaps not speedy, there is no evidence of bad faith. *See Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1089 (9th Cir. 2002).

AFFIRMED.

RAYMOND C. FISHER, Circuit Judge, concurring in part and dissenting in part:

I agree with the majority in most respects, but dissent from paragraphs 2, 2a and 2b of the memorandum disposition. I would reverse the district court's summary judgment ruling on Hatch's disparate treatment claim. The majority does not dispute Hatch established a prima facie case of disability discrimination under the *McDonnell Douglas* framework in connection with her being transferred to light duty status, an inferior position that does not guarantee full time work. The Postal Service, however, failed to meet its burden to offer a legitimate nondiscriminatory reason for ordering Hatch to request light duty. The majority points to a letter Hatch received from her supervisor, Sara Lovendahl, informing her she "may" seek light duty status, and Hatch's subsequent letter requesting light duty.

Hatch's declaration, however, states she met with Lovendahl who "directed' her to make the light duty request because of her medical restrictions even though she "had no desire to do" so. This unambiguous declaration is sufficient to create a triable issue over whether Hatch voluntarily made the request or felt compelled to do so because of her boss' directive. The Postal Service does not explain what motivated Lovendahl to tell Hatch she needed to request light duty, what Lovendahl meant when she told Hatch her position was "going away," or why Lovendahl told Hatch she needed to bid on every open position.

Without evidence demonstrating a legitimate nondiscriminatory reason for ordering Hatch to request light duty, the *McDonnell Douglas* analysis should

have ended. I therefore respectfully dissent from the portion of the majority's disposition affirming the district court's summary judgment on Hatch's claim of intentional discrimination insofar as it concerns her transfer to light duty status.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CASE NO. C14-5164 RBL
HONORABLE RONALD B. LEIGHTON

[Filed February 26, 2016]

JOANN S HATCH,
Plaintiff,

v.

PATRICK R DONAHOE, Postmaster General, United States Postal Service, et al.,
Defendants.

ORDER GRANTING DEFENDANTS' MOTION AND DISMISSING PLAINTIFF'S REMAINING CLAIMS
DKT. #21

THIS MATTER comes before the Court on Defendant Postmaster General's Motion for Summary Judgment [Dkt. #21]. The Court partially granted the Postmaster General's motion on January 12, 2016 [Dkt. #33], but it did not consider Plaintiff Joann Hatch's

unaddressed claims.[1] Instead, the Court gave her an opportunity to file a surreply [Dkt. #38].

Hatch was a United States Postal Service unassigned regular employee on light-duty status. She suffers from relapsing-remitting multiple sclerosis. At bottom, she claims the Postal Service violated the ADA and the Rehabilitation Act by placing her on light-duty status, which *had the effect of discriminating against her on the basis of her disability* because it allowed the Postal Service to reduce her hours under its collective bargaining agreement. The Postal Service argues that (1) Hatch failed to administratively exhaust her claims; and (2) its light-duty program is not discriminatory, because disabled and non-disabled employees may (voluntarily) request light-duty work, and it does not guarantee anyone full-time work. Hatch argues that she raised these claims before an administrative law judge. She also argues that she only requested light-

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[1] Hatch argued that the Court should deny summary judgment on four claims of discrimination that the Postal Service failed to address: whether the Postal Service violated the Rehabilitation Act of 1973 by (1) classifying her based on her MS in a way that adversely affected her opportunities, (2) participating in a contract that subjected her to discrimination based on her MS, (3) utilizing criteria or methods of administration that discriminated against her based on her MS, and (4) using qualification standards that excluded her from positions for which she was qualified. [Dkt. #25]. She termed these claims "disparate impact claims." Hatch now argues that the unaddressed claims are violations of the Americans with Disabilities Act under 42 U.S.C. § 12112(b)(1)–(6). She asserts that these claims are sometimes referred to as "discriminatory impact claims," although they are more accurately described as "adverse effect claims." The Court will set nomenclature aside and will consider the substance of her four remaining claims.

duty status because the Postal Service told her she needed to do so in order to receive a reasonable accommodation for her MS, and that by misleading her, the Postal Service was able to reduce her hours.

DISCUSSION

I. Standard of Review.

Summary judgment is proper "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In determining whether an issue of fact exists, the Court must view all evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor. *See Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248–50 (1986); *see also Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996). A genuine issue of material fact exists where there is sufficient evidence for a reasonable factfinder to find for the nonmoving party. *See Anderson*, 477 U.S. at 248. The inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id*. at 251–52. The moving party bears the initial burden of showing no evidence exists that supports an element essential to the nonmovant's claim. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Once the movant has met this burden, the nonmoving party then must show the existence of a genuine issue for trial. *See Anderson*, 477 U.S. at 250. If the nonmoving party fails to establish the existence of a genuine issue of material fact, "the

moving party is entitled to judgment as a matter of law." *Celotex*, 477 U.S. at 323–24.

II. Hatch Administratively Exhausted her Claims.

The Postal Service argues Hatch failed to administratively exhaust her remaining claims because she advanced disparate *treatment*, not disparate *impact*, theories before the EEOC, and these theories are not reasonably related. Hatch argues that her claims fell within the EEOC's investigation, so were administratively exhausted, and therefore not barred from consideration.

A federal employee cannot bring a discrimination claim unless she has exhausted her administrative remedies. *See Brown v. GSA*, 425 U.S. 820, 832 (1976). To do so, she must initiate contact with the EEOC within forty-five days of the alleged discriminatory act's occurrence and must file a claim with the offending agency. *See Leorna v. United States Dep't of State*, 105 F.3d 548, 550 (9th Cir. 1997); *Johnson v. United States Treasury Dep't*, 27 F.3d 415, 416 (9th Cir.1994); *Boyd v. Unites States Postal Serv.*, 752 F.2d 410, 414 (9th Cir.1985). The employer bears the burden of proving that its employee failed to administratively exhaust her claim. *See Kraus v. Presidio Trust Facilities Div./Residential Mgmt. Branch*, 572 F.3d 1039, 1046 n.7 (9th Cir. 2009).

A court may consider a claim that was not included in an EEOC charge if it falls within an EEOC investigation "reasonably … expected to grow out of" the discrimination charge or if it actually fell within the scope of the EEOC's investigation. *See Rollins v.*

Traylor Bros., No. C14-1414 JCC, 2016 WL 258523, at *14 (W.D. Wash. Jan. 21, 2016) (citing *E.E.O.C. v. Farmer Bros. Co.*, 31 F.3d 891, 899 (9th Cir. 1994)). "Such claims may also be considered if they are like or reasonably related to the allegations contained in the EEOC charge." *See id*. (internal punctuation omitted) (citing *B.K.B. v. Maui Police Dep't*, 276 F.3d 1091, 1100 (9th Cir. 2002)).

Hatch's EEO discrimination complaint contained similar factual allegations as does her complaint here. While she did not explicitly discuss the light-duty program's or the CBA's effects, they were discussed during the EEOC's investigation. The Postal Service has not shown Hatch failed to administratively exhaust her claims.

III. The Postal Service's Light-Duty Program is Not Discriminatory.

The Postal Service argues that its light-duty program is not discriminatory because it affects disabled and non-disabled employees equally. Hatch argues that if she had not needed a reasonable accommodation, the Postal Service would not have directed her to request light-duty work, and she would not have been subjected to a reduction in her hours.

The Postal Service's light-duty program is distinct from its process for accommodating disabilities. Any injured or ill employee may voluntarily request light duty work from her local postmaster under the CBA. Full-time work is not guaranteed, and no work may be given to a full-time regular employee's detriment. Disability determinations are made by an entirely different entity, the District's Reasonable

Accommodation Committee. The Committee is comprised of Postal Service managers, human resources personnel, labor representatives, and sometimes medical personnel. It (and not the local postmaster) considers whether an employee is disabled under the Rehabilitation Act. A disabled employee may ask this Committee to reasonably accommodate her disability by adjusting non-essential aspects of her position.

Hatch acknowledged these differing processes in her March 2010 letter to Sara Lovendahl, the Vancouver Postmaster General. She requested both a light-duty assignment *and* a reasonable accommodation for her MS:

> It has become necessary for me to request a light duty assignment per Article 13 of the National Agreement within my restrictions as indicated in the enclosed letter from my physician and copies of previously submitted documentation. I am also requesting reasonable accommodation.
>
> I am seeking to create a win/win situation by providing labor the U.S. Postal Service needs while taking essential steps to ensure stability of my health.

See Dkt. #22, Whitehead Dec., Ex. E. Hatch's letter undermines her claim that she sought light-duty status as a reasonable accommodation; she clearly made a distinction between them. She understood that the Committee evaluated reasonable accommodation requests. Her letter also suggests that she had sufficient familiarity with the light-duty provisions of the "the National Agreement" (the CBA) to understand

that the program does not guarantee full-time work and is voluntary for all employees, whether or not disabled.

Even if Lovendahl did "direct" her to request light-duty work, however, the light-duty program could not have *had the effect of discriminating against her on the basis of her disability*, because the Postal Service treated her the same way as every other unassigned employee on light-duty status. It reduced her (and their) hours after an audit revealed the Postal Service was overstaffed, not because of her disability. There is no evidence to the contrary.

CONCLUSION

The Postal Service did not discriminate against Hatch. Accordingly, its Motion [Dkt. #21] is GRANTED. Hatch's remaining claims are DISMISSED with prejudice.

IT IS SO ORDERED.

Dated this 26th day of February, 2016.

/s/ Ronald B. Leighton
Ronald B. Leighton
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CASE NUMBER: C14-5164 RBL

[Filed February 29, 2016]

JOANN S HATCH,
Plaintiff,

v.

PATRICK R DONAHOE, PostmasterGeneral, United States Postal Service, et al.,
Defendants.

JUDGMENT IN A CIVIL CASE

☐ **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

XX **Decision by Court**. This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

THE COURT HAS ORDERED THAT

The Postal Service did not discriminate against Hatch. Accordingly, its Motion FOR Summary Judgment [Dkt.#21] is GRANTED. Plaintiff's

remaining claims are DISMISSED with prejudice.

DATED this 29th day of February, 2016.

s/William M. McCool
William M. McCool, Clerk

s/Jean Boring
Jean Boring, Deputy Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CASE NO. C14-5164 RBL
HONORABLE RONALD B. LEIGHTON

[Filed January 12, 2016]

JOANN S HATCH,
Plaintiff,

v.

PATRICK R DONAHOE, Postmaster General, United States Postal Service, et al.,
Defendants.

ORDER GRANTING SUMMARY JUDGMENT
DKT. #21

THIS MATTER is before the Court on Defendant Postmaster General's Motion for Summary Judgment [Dkt. #21]. Plaintiff Hatch is a longtime clerk for the United States Postal Service who suffers from relapsing-remitting multiple sclerosis. She claims the Postal Service violated the Americans with Disabilities Act and the Rehabilitation Act of 1973 by adhering to a system that, because of her disability, denied her full employment opportunities between July 2010 and August 2013 and by retaliating against her for

requesting a reasonable accommodation and filing grievances.[1] *See* 42 U.S.C. § 12101 *et seq.*; *see also* 29 U.S.C. § 701 *et seq*. The Postal Service argues that it employed Hatch less than full-time because an audit revealed it was overstaffed, so it reallocated work; and it was contractually obligated to first provide full-time work to regular employees, which Hatch was not.

The Postal Service operates under a collective bargaining agreement with the American Postal Workers Union. (Whitehead Dec., Ex. I, CBA). Under the CBA, "unassigned" full-time regular employees do not have permanent assignments. Instead, they work on various tasks identified by management. To obtain a permanent assignment, an unassigned employee must be the most senior bidder qualified for an available position. Any ill or injured employee may request light-duty work. Full-time work is not guaranteed to those on light-duty status, and no work may be given to the detriment of an assigned full-time regular employee. (Whitehead Dec., Ex. I, CBA at 13.3.B, 13.4.C.). Any disabled employee may request a reasonable accommodation. When addressing these requests, the District's Reasonable Accommodation Committee need not eliminate a job's essential functions, such as its start time.

Hatch first notified the Vancouver Post Office of her MS in 2004. In 2005, she became an unassigned regular employee. In March 2010, she requested light-duty work. (Whitehead Dec., Ex. E, Hatch Letter). Her

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[1] Hatch abandons her age discrimination and hostile work environment claims. [Dkt. #25 at 25]. Those claims are DISMISSED with prejudice.

physician recommended that her job functions be modified so that she would only need to intermittently stand and walk no more than two hours per shift, intermittently lift no more than twenty-five pounds, work in an air conditioned environment during the summer, and not work variable shifts or start before 7 am. (Whitehead Dec., Ex. F and AA, Physician Letters). Hatch met with the DRAC in July 2010. It determined that she is disabled under the Rehabilitation Act and sought to reasonably accommodate her MS.

Also in July 2010, the Postal Service conducted a Function Four audit. The auditors concluded that the Vancouver office was overstaffed by approximately five clerks, and so recommended staffing reductions and scheduling changes. The office abolished some positions and eliminated part-time work. For the next three years, Hatch worked intermittently, until the Postal Service found her an assigned position as a PM registry clerk, which she holds today.

Hatch sues the Postal Service arguing that during that time, it failed to reasonably accommodate her MS, treated her differently than other non-disabled employees, and retaliated against her for requesting accommodations for her MS and filing Equal Employment Opportunity complaints. The Postal Service argues that it did not discriminate against Hatch; rather, the CBA required it to give full-time work to regular employees before those on light-duty status, and the Vancouver Office did not have enough productive work to go around. Hatch argues that she can survive the Postal Service's motion for summary judgment, because its proffered explanation for how it treated her is merely pretext for discrimination.

Summary judgment is proper "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In determining whether an issue of fact exists, the Court must view all evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor. *See Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248–50, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986); *see also Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996). A genuine issue of material fact exists where there is sufficient evidence for a reasonable factfinder to find for the nonmoving party. *See Anderson*, 477 U.S. at 248. The inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id*. at 251–52. The moving party bears the initial burden of showing no evidence exists that supports an element essential to the nonmovant's claim. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986). Once the movant has met this burden, the nonmoving party then must show the existence of a genuine issue for trial. *See Anderson*, 477 U.S. at 250. If the nonmoving party fails to establish the existence of a genuine issue of material fact, "the moving party is entitled to judgment as a matter of law." *Celotex*, 477 U.S. at 323–24.

The ADA prohibits employers from discriminating against their employees by denying them reasonable accommodations or by adhering to practices that produce disparate impacts based on disability. *See* 42 U.S.C. § 12112. The Rehabilitation Act and retaliation

claims analysis apply the same standards as the ADA. 29 U.S.C. § 794(d); *see also Scott v. Mabus*, 618 Fed. App'x 897, 901 (9th Cir. 2015) (citing *Coons v. Sec'y of U.S. Dep't of Treasury*, 383 F.3d 879, 887 (9th Cir. 2004)).

The ultimate question before the Court is whether Hatch has demonstrated that the Postal Service's proffered nondiscriminatory reason for her treatment—that the CBA required it to first give full-time work to regular employees not on light-duty status—is merely a pretext for discrimination. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) (explaining that the complainant bears the initial burden of establishing a prima facie case of discrimination; the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the employee's rejection; and the complainant bears the ultimate burden of showing employer's proffered reason was pretextual); *see also U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 406, 122 S.Ct. 1516, 252 L.Ed.2d 589 (2002) (The ADA ordinarily does not require an employer to assign a disabled employee to a position that would violate its established seniority system when making a reasonable accommodation.); *Coghlan v. American Seafoods Co. LLC*, 413 F.3d 1090, 1093 (9th Cir. 2005) (citing *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993)) (disparate treatment); *Hardage v. CBS Broadcasting Inc.*, 427 F.3d 1177, 1188 (9th Cir. 2005) (retaliation).

A plaintiff may meet the burden of showing pretext using either direct or circumstantial evidence. *See Coghlan*, 413 F.3d at 1094–95. Direct evidence, if

believed, proves discriminatory animus without the need for inference or presumption. *See id.* at 1095. Circumstantial evidence points to bias or demonstrates the employer's proffered explanation is unworthy of credence. *See id*. Circumstantial evidence must be specific and substantial to defeat the employer's motion for summary judgment. *See id*. (citing *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1222 (9th Cir. 1998)). Hatch argues that she can meet this burden in three ways.

First, she argues her supervisor directed her to request light duty status, and the DRAC unnecessarily evaluated her ability to perform in a position before assigning it to her and failed to timely communicate with her.

Hatch's allegation that her supervisor instructed her to request light-duty status cannot overcome the Postal Service's showing: a letter from Hatch to her supervisor requesting light-duty work, which she described as a "win/win" for herself and the Postal Service. (Whitehead Dec., Ex. E, Hatch Letter). The DRAC needed to evaluate Hatch's performance to ensure it could reasonably accommodate her MS without compromising an essential function of the job. By determining that it could not change a position's start time, the Postal Service did not discriminate against her. Communicative lapses alone do not suggest discriminatory animus.

Second, Hatch argues a letter the Vancouver Postmaster, Sara Lovendahl, sent her explaining that she *may* be eligible for optional or disability retirement or resignation is direct evidence of disparate treatment. She also argues she was treated differently than three

other employees: Jeffrey Ledbetter, Sue Glaser, and Matt Leighty. She claims the Postal Service's explanation for why it lessened her workload is unworthy of credence because factual disputes exist and it failed to show that other factual disputes do not exist.

Lovendahl's letter outlined options available to Hatch, including a more expansive geographic search for available positions. (Hatch Dec., Ex. 5, Lovendahl Letter). It contains no evidence of discriminatory animus, and did not require her to change her employment status. Also, unlike Hatch, Ledbetter was not on light-duty status and Glaser had an assigned position; the CBA required the Postal Service to give them full-time work. Conversely, the Postal Service produced evidence that Leighty and Hatch were treated similarly: both had their hours reduced when productive work was unavailable. (Whitehead Dec., Ex. J, at 12–13). Hatch's reasons why the Court should discredit the Postal Service's nondiscriminatory explanation are not sufficient and substantive enough to demonstrate pretext. *See Coghlan*, 413 F.3d at 1095.

Third, Hatch attempts to show that the Postal Service's reasons are pretextual by arguing that the Postal Service suddenly started treating her antagonistically in March 2010, such as by threatening (but not punishing) her with criminal prosecution for photocopying certified-mail second-notices and using her light-duty status to justify reducing her work. She claims this treatment was in retaliation for her requesting the Postal Service accommodate her MS and for two grievances she filed.

Only non-trivial employment actions that would deter reasonable employees from complaining about discriminatory acts constitute actionable retaliation. *See Hardage*, 427 F.3d at 1189. Hatch's interpretation of events, without more, cannot overcome the Postal Service's explanation for its treatment of her: the audit demonstrated that the Postal Service did not have sufficient work to assign her because it needed to first staff full-time regulars.

Hatch has failed to provide sufficient evidence of pretext on any of these claims.[2] She has not raised a genuine issue of material fact regarding the Postal Service's nondiscriminatory reason for lessening her hours between July 2010 and August 2013. Accordingly, the Postal Service's Motion for Summary Judgment [Dkt. #21] is GRANTED, and these claims against it are DISMISSED with prejudice.

IT IS SO ORDERED.

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[2] Hatch argues that the Court should deny summary judgment on four claims of discrimination the Postal Service failed to address in its motion: whether the Postal Service violated the Rehabilitation Act of 1973 by (1) classifying her based on her MS in a way that adversely affected her opportunities, (2) participating in a contract that subjected her to discrimination based on her MS, (3) utilizing criteria or methods of administration that discriminated against her based on her MS, and (4) using qualification standards that excluded her from positions for which she was qualified. The Court is inclined to grant summary judgment sua sponte. Hatch may file a surreply within ten days of this Order.

Dated this 12th day of January, 2016.

/s/ Ronald B. Leighton
Ronald B. Leighton
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16-35217
D.C. No. 3:14-cv-05164-RBL Western District of Washington, Tacoma

[Filed July 6, 2018]

JOANN S. HATCH, Plaintiff-Appellant,	)
v.	)
MEGAN J. BRENNAN, Postmaster General; UNITED STATES POSTAL SERVICE, Defendants-Appellees.	)

ORDER

Before: FISHER, N.R. SMITH, and HURWITZ, Circuit Judges.

The panel has voted to deny the petition for panel rehearing. Judges N.R. Smith and Hurwitz have voted to deny the petition for rehearing en banc, and Judge Fisher so recommends. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and rehearing en banc, **Dkt. 42**, is **DENIED**.

APPENDIX F

29 U.S.C. § 791 - Employment of individuals with disabilities

(a) Interagency Committee on Employees who are Individuals with Disabilities; establishment; membership; co-chairmen; availability of other Committee resources; purpose and functions

There is established within the Federal Government an Interagency Committee on Employees who are Individuals with Disabilities (hereinafter in this section referred to as the "Committee"), comprised of such members as the President may select, including the following (or their designees whose positions are Executive Level IV or higher): the Chairman of the Equal Employment Opportunity Commission (hereafter in this section referred to as the "Commission"), the Director of the Office of Personnel Management, the Secretary of Veterans Affairs, the Secretary of Labor, the Secretary of Education, and the Secretary of Health and Human Services. Either the Director of the Office of Personnel Management and the Chairman of the Commission shall serve as co-chairpersons of the Committee or the Director or Chairman shall serve as the sole chairperson of the Committee, as the Director and Chairman jointly determine, from time to time, to be appropriate. The resources of the President's Disability Employment Partnership Board and the President's Committee for People with Intellectual Disabilities shall be made fully available to the Committee. It shall be the purpose and function of the

Committee (1) to provide a focus for Federal and other employment of individuals with disabilities, and to review, on a periodic basis, in cooperation with the Commission, the adequacy of hiring, placement, and advancement practices with respect to individuals with disabilities, by each department, agency, and instrumentality in the executive branch of Government and the Smithsonian Institution, and to insure that the special needs of such individuals are being met; and (2) to consult with the Commission to assist the Commission to carry out its responsibilities under subsections (b), (c), and (d) of this section. On the basis of such review and consultation, the Committee shall periodically make to the Commission such recommendations for legislative and administrative changes as it deems necessary or desirable. The Commission shall timely transmit to the appropriate committees of Congress any such recommendations.

(b) Federal agencies; affirmative action program plans

Each department, agency, and instrumentality (including the United States Postal Service and the Postal Regulatory Commission) in the executive branch and the Smithsonian Institution shall, within one hundred and eighty days after September 26, 1973, submit to the Commission and to the Committee an affirmative action program plan for the hiring, placement, and advancement of individuals with disabilities in such department, agency, instrumentality, or Institution. Such plan shall include a description of the extent to which and methods whereby the special needs of employees who are individuals with disabilities are being met. Such plan shall be updated annually, and shall be reviewed

annually and approved by the Commission, if the Commission determines, after consultation with the Committee, that such plan provides sufficient assurances, procedures and commitments to provide adequate hiring, placement, and advancement opportunities for individuals with disabilities.

(c) State agencies; rehabilitated individuals, employment

The Commission, after consultation with the Committee, shall develop and recommend to the Secretary for referral to the appropriate State agencies, policies and procedures which will facilitate the hiring, placement, and advancement in employment of individuals who have received rehabilitation services under State vocational rehabilitation programs, veterans' programs, or any other program for individuals with disabilities, including the promotion of job opportunities for such individuals. The Secretary shall encourage such State agencies to adopt and implement such policies and procedures.

(d) Report to Congressional committees

The Commission, after consultation with the Committee, shall, on June 30, 1974, and at the end of each subsequent fiscal year, make a complete report to the appropriate committees of the Congress with respect to the practices of and achievements in hiring, placement, and advancement of individuals with disabilities by each department, agency, and instrumentality and the Smithsonian Institution and the effectiveness of the affirmative action programs required by subsection (b) of this section, together with recommendations as to legislation which have been

submitted to the Commission under subsection (a) of this section, or other appropriate action to insure the adequacy of such practices. Such report shall also include an evaluation by the Committee of the effectiveness of the activities of the Commission under subsections (b) and (c) of this section.

(e) Federal work experience without pay; non-Federal status

An individual who, as a part of an individualized plan for employment under a State plan approved under this chapter, participates in a program of unpaid work experience in a Federal agency, shall not, by reason thereof, be considered to be a Federal employee or to be subject to the provisions of law relating to Federal employment, including those relating to hours of work, rates of compensation, leave, unemployment compensation, and Federal employee benefits.

(f) Standards used in determining violation of section

The standards used to determine whether this section has been violated in a complaint alleging nonaffirmative action employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201–12204 and 12210), as such sections relate to employment.

29 U.S.C. § 792 - Architectural and Transportation Barriers Compliance Board

(a) Establishment; membership; chairperson; vice-chairperson; term of office; termination of membership; reappointment; compensation and travel expenses; bylaws; quorum requirements

(1) There is established within the Federal Government the Architectural and Transportation Barriers Compliance Board (hereinafter referred to as the "Access Board") which shall be composed as follows:

(A) Thirteen members shall be appointed by the President from among members of the general public of whom at least a majority shall be individuals with disabilities.

(B) The remaining members shall be the heads of each of the following departments or agencies (or their designees whose positions are executive level IV or higher):

(i) Department of Health and Human Services.

(ii) Department of Transportation.

(iii) Department of Housing and Urban Development.

(iv) Department of Labor.

(v) Department of the Interior.

(vi) Department of Defense.

(vii) Department of Justice.

(viii) General Services Administration.

(ix) Department of Veterans Affairs.

(x) United States Postal Service.

(xi) Department of Education.

(xii) Department of Commerce.

The chairperson and vice-chairperson of the Access Board shall be elected by majority vote of the members of the Access Board to serve for terms of one year. When the chairperson is a member of the general public, the vice-chairperson shall be a Federal official; and when the chairperson is a Federal official, the vice-chairperson shall be a member of the general public. Upon the expiration of the term as chairperson of a member who is a Federal official, the subsequent chairperson shall be a member of the general public; and vice versa.

(2)

(A)

(i) The term of office of each appointed member of the Access Board shall be 4 years, except as provided in clause (ii). Each year, the terms of office of at least three appointed members of the board?[1] shall expire.

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[1] So in original. Probably should be "Access Board."

(ii)

(I) One member appointed for a term beginning December 4, 1992 shall serve for a term of 3 years.

(II) One member appointed for a term beginning December 4, 1993 shall serve for a term of 2 years.

(III) One member appointed for a term beginning December 4, 1994 shall serve for a term of 1 year.

(IV) Members appointed for terms beginning before December 4, 1992 shall serve for terms of 3 years.

(B) A member whose term has expired may continue to serve until a successor has been appointed.

(C) A member appointed to fill a vacancy shall serve for the remainder of the term to which that member's predecessor was appointed.

(3) If any appointed member of the Access Board becomes a Federal employee, such member may continue as a member of the Access Board for not longer than the sixty-day period beginning on the date the member becomes a Federal employee.

(4) No individual appointed under paragraph (1)(A) of this subsection who has served as a member of the Access Board may be reappointed to the Access Board more than once unless such individual has not served on the Access Board for a period of two

years prior to the effective date of such individual's appointment.

(5)

(A) Members of the Access Board who are not regular full-time employees of the United States shall, while serving on the business of the Access Board, be entitled to receive compensation at rates fixed by the President, but not to exceed the daily equivalent of the rate of pay for level IV of the Executive Schedule under section 5315 of title 5, including travel time, for each day they are engaged in the performance of their duties as members of the Access Board; and shall be entitled to reimbursement for travel, subsistence, and other necessary expenses incurred by them in carrying out their duties under this section.

(B) Members of the Access Board who are employed by the Federal Government shall serve without compensation, but shall be reimbursed for travel, subsistence, and other necessary expenses incurred by them in carrying out their duties under this section.

(6)

(A) The Access Board shall establish such bylaws and other rules as may be appropriate to enable the Access Board to carry out its functions under this chapter.

(B) The bylaws shall include quorum requirements. The quorum requirements shall provide that (i) a proxy may not be counted for purposes of

establishing a quorum, and (ii) not less than half the members required for a quorum shall be members of the general public appointed under paragraph (1)(A).

(b) Functions It shall be the function of the Access Board to—

(1) ensure compliance with the standards prescribed pursuant to the Act entitled "An Act to ensure that certain buildings financed with Federal funds are so designed and constructed as to be accessible to the physically handicapped", approved August 12, 1968 (commonly known as the Architectural Barriers Act of 1968; 42 U.S.C. 4151 et seq.) (including the application of such Act to the United States Postal Service), including enforcing all standards under such Act, and ensuring that all waivers and modifications to the standards are based on findings of fact and are not inconsistent with the provisions of this section;

(2) develop advisory information for, and provide appropriate technical assistance to, individuals or entities with rights or duties under regulations prescribed pursuant to this subchapter or titles II and III of the Americans with Disabilities Act of 1990 (42 U.S.C. 12131 et seq. and 12181 et seq.) with respect to overcoming architectural, transportation, and communication barriers;

(3) establish and maintain—

(A) minimum guidelines and requirements for the standards issued pursuant to the Act commonly known as the Architectural Barriers Act of 1968;

(B) minimum guidelines and requirements for the standards issued pursuant to titles II and III of the Americans with Disabilities Act of 1990;

(C) guidelines for accessibility of telecommunications equipment and customer premises equipment under section 255 of title 47; and

(D) standards for accessible electronic and information technology under section 794d of this title;

(4) promote accessibility throughout all segments of society;

(5) investigate and examine alternative approaches to the architectural, transportation, communication, and attitudinal barriers confronting individuals with disabilities, particularly with respect to telecommunications devices, public buildings and monuments, parks and parklands, public transportation (including air, water, and surface transportation, whether interstate, foreign, intrastate, or local), and residential and institutional housing;

(6) determine what measures are being taken by Federal, State, and local governments and by other public or nonprofit agencies to eliminate the barriers described in paragraph (5);

(7) promote the use of the International Accessibility Symbol in all public facilities that are in compliance with the standards prescribed by the Administrator of General Services, the Secretary of

Defense, and the Secretary of Housing and Urban Development pursuant to the Act commonly known as the Architectural Barriers Act of 1968;

(8) make to the President and to the Congress reports that shall describe in detail the results of its investigations under paragraphs (5) and (6);

(9) make to the President and to the Congress such recommendations for legislative and administrative changes as the Access Board determines to be necessary or desirable to eliminate the barriers described in paragraph (5);

(10) ensure that public conveyances, including rolling stock, are readily accessible to, and usable by, individuals with physical disabilities; and

(11) carry out the responsibilities specified for the Access Board in section 794d of this title.

(c) Additional functions; transportation barriers and housing needs; transportation and housing plans and proposals

The Access Board shall also (1)(A) determine how and to what extent transportation barriers impede the mobility of individuals with disabilities and aged individuals with disabilities and consider ways in which travel expenses in connection with transportation to and from work for individuals with disabilities can be met or subsidized when such individuals are unable to use mass transit systems or need special equipment in private transportation, and (B) consider the housing needs of individuals with disabilities; (2) determine what measures are being taken, especially by public and other nonprofit agencies

and groups having an interest in and a capacity to deal with such problems, (A) to eliminate barriers from public transportation systems (including vehicles used in such systems), and to prevent their incorporation in new or expanded transportation systems, and (B) to make housing available and accessible to individuals with disabilities or to meet sheltered housing needs; and (3) prepare plans and proposals for such further actions as may be necessary to the goals of adequate transportation and housing for individuals with disabilities, including proposals for bringing together in a cooperative effort, agencies, organizations, and groups already working toward such goals or whose cooperation is essential to effective and comprehensive action.

(d) Electronic and information technology accessibility training

Beginning in fiscal year 2000, the Access Board, after consultation with the Secretary, representatives of such public and private entities as the Access Board determines to be appropriate (including the electronic and information technology industry), targeted individuals and entities (as defined in section 3002 of this title), and State information technology officers, shall provide training for Federal and State employees on any obligations related to section 794d of this title.

(e) Investigations; hearings; orders; administrative procedure applicable; final orders; judicial review; civil action; intervention

(1) The Access Board shall conduct investigations, hold public hearings, and issue such orders as it deems necessary to ensure compliance with the

provisions of the Acts cited in subsection (b). Except as provided in paragraph (3) of subsection (f), the provisions of subchapter II of chapter 5, and chapter 7 of title 5 shall apply to procedures under this subsection, and an order of compliance issued by the Access Board shall be a final order for purposes of judicial review. Any such order affecting any Federal department, agency, or instrumentality of the United States shall be final and binding on such department, agency, or instrumentality. An order of compliance may include the withholding or suspension of Federal funds with respect to any building or public conveyance or rolling stock found not to be in compliance with standards enforced under this section. Pursuant to chapter 7 of title 5, any complainant or participant in a proceeding under this subsection may obtain review of a final order issued in such proceeding.

(2) The executive director is authorized, at the direction of the Access Board—

(A) to bring a civil action in any appropriate United States district court to enforce, in whole or in part, any final order of the Access Board under this subsection; and

(B) to intervene, appear, and participate, or to appear as amicus curiae, in any court of the United States or in any court of a State in civil actions that relate to this section or to the Architectural Barriers Act of 1968 [42 U.S.C. 4151 et seq.].

Except as provided in section 518(a) of title 28, relating to litigation before the Supreme Court,

the executive director may appear for and represent the Access Board in any civil litigation brought under this section.

(f) Appointment of executive director, administrative law judges, and other personnel; provisions applicable to administrative law judges; authority and duties of executive director; finality of orders of compliance

(1) There shall be appointed by the Access Board an executive director and such other professional and clerical personnel as are necessary to carry out its functions under this chapter. The Access Board is authorized to appoint as many administrative law judges as are necessary for proceedings required to be conducted under this section. The provisions applicable to administrative law judges appointed under section 3105 of title 5 shall apply to administrative law judges appointed under this subsection.

(2) The Executive Director shall exercise general supervision over all personnel employed by the Access Board (other than administrative law judges and their assistants). The Executive Director shall have final authority on behalf of the Access Board, with respect to the investigation of alleged noncompliance and in the issuance of formal complaints before the Access Board, and shall have such other duties as the Access Board may prescribe.

(3) For the purpose of this section, an order of compliance issued by an administrative law judge shall be deemed to be an order of the Access Board

and shall be the final order for the purpose of judicial review.

(g) Technical, administrative, or other assistance; appointment, compensation, and travel expenses of advisory and technical experts and consultants

(1)

(A) In carrying out the technical assistance responsibilities of the Access Board under this section, the Board may enter into an interagency agreement with another Federal department or agency.

(B) Any funds appropriated to such a department or agency for the purpose of providing technical assistance may be transferred to the Access Board. Any funds appropriated to the Access Board for the purpose of providing such technical assistance may be transferred to such department or agency.

(C) The Access Board may arrange to carry out the technical assistance responsibilities of the Board under this section through such other departments and agencies for such periods as the Board determines to be appropriate.

(D) The Access Board shall establish a procedure to ensure separation of its compliance and technical assistance responsibilities under this section.

(2) The departments or agencies specified in subsection (a) of this section shall make available to the Access Board such technical, administrative, or

other assistance as it may require to carry out its functions under this section, and the Access Board may appoint such other advisers, technical experts, and consultants as it deems necessary to assist it in carrying out its functions under this section. Special advisory and technical experts and consultants appointed pursuant to this paragraph shall, while performing their functions under this section, be entitled to receive compensation at rates fixed by the Chairperson,[2] but not exceeding the daily equivalent of the rate of pay for level 4 of the Senior Executive Service Schedule under section 5382 of title 5, including travel time, and while serving away from their homes or regular places of business they may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 5703 of such title 5 for persons in the Government service employed intermittently.

(h) Omitted

(i) Grants and contracts to aid Access Board in carrying out its functions; acceptance of gifts, devises, and bequests of property

(1) The Access Board may make grants to, or enter into contracts with, public or private organizations to carry out its duties under subsections (b) and (c).

(2)

(A) The Access Board may accept, hold, administer, and utilize gifts, devises, and bequests of property, both real and personal, for

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[2] So in original. Probably should not be capitalized.

the purpose of aiding and facilitating the functions of the Access Board under paragraphs (2) and (4) of subsection (b). Gifts and bequests of money and proceeds from sales of other property received as gifts, devises, or bequests shall be deposited in the Treasury and shall be disbursed upon the order of the Chairperson.[2] Property accepted pursuant to this section, and the proceeds thereof, shall be used as nearly as possible in accordance with the terms of the gifts, devises, or bequests. For purposes of Federal income, estate, or gift taxes, property accepted under this section shall be considered as a gift, devise, or bequest to the United States.

(B) The Access Board shall publish regulations setting forth the criteria the Board will use in determining whether the acceptance of gifts, devises, and bequests of property, both real and personal, would reflect unfavorably upon the ability of the Board or any employee to carry out the responsibilities or official duties of the Board in a fair and objective manner, or would compromise the integrity of or the appearance of the integrity of a Government program or any official involved in that program.

(3) Omitted.

(j) Authorization of appropriations

There are authorized to be appropriated for the purpose of carrying out the duties and functions of the Access Board under this section $7,448,000 for fiscal year 2015, $8,023,000 for fiscal year 2016, $8,190,000 for fiscal year 2017, $8,371,000 for fiscal year 2018,

$8,568,000 for fiscal year 2019, and $8,750,000 for fiscal year 2020.

42 U.S.C. § 12112 - Discrimination

(a) General rule

No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction

As used in subsection (a), the term "discriminate against a qualified individual on the basis of disability" includes—

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration—

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5)

(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to

screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

(c) Covered entities in foreign countries

(1) In general

It shall not be unlawful under this section for a covered entity to take any action that constitutes discrimination under this section with respect to an employee in a workplace in a foreign country if compliance with this section would cause such covered entity to violate the law of the foreign country in which such workplace is located.

(2) Control of corporation

(A) Presumption

If an employer controls a corporation whose place of incorporation is a foreign country, any practice that constitutes discrimination under this section and is engaged in by such corporation shall be presumed to be engaged in by such employer.

(B) Exception

This section shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

(C) Determination For purposes of this paragraph, the determination of whether an employer controls a corporation shall be based on—

(i) the interrelation of operations;

(ii) the common management;

(iii) the centralized control of labor relations; and

(iv) the common ownership or financial control,

of the employer and the corporation.

(d) Medical examinations and inquiries

(1) In general

The prohibition against discrimination as referred to in subsection (a) shall include medical examinations and inquiries.

(2) Preemployment

(A) Prohibited examination or inquiry

Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

(B) Acceptable inquiry

A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.

(3) Employment entrance examination

A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if—

(A) all entering employees are subjected to such an examination regardless of disability;

(B) information obtained regarding the medical condition or history of the applicant is collected

and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that—

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) government officials investigating compliance with this chapter shall be provided relevant information on request; and

(C) the results of such examination are used only in accordance with this subchapter.

(4) Examination and inquiry

(A) Prohibited examinations and inquiries

A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

(B) Acceptable examinations and inquiries

A covered entity may conduct voluntary medical examinations, including voluntary medical

histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

(C) Requirement

Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject to the requirements of subparagraphs (B) and (C) of paragraph (3).

42 U.S.C. § 12113 - Defenses

(a) In general

It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.

(b) Qualification standards

The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

(c) Qualification standards and tests related to uncorrected vision

Notwithstanding section 12102(4)(E)(ii) of this title, a covered entity shall not use qualification standards, employment tests, or other selection criteria based on an individual's uncorrected vision unless the standard, test, or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and consistent with business necessity.

(d) Religious entities

(1) In general

This subchapter shall not prohibit a religious corporation, association, educational institution, or society from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

(2) Religious tenets requirement

Under this subchapter, a religious organization may require that all applicants and employees conform to the religious tenets of such organization.

(e) List of infectious and communicable diseases

(1) In general

The Secretary of Health and Human Services, not later than 6 months after July 26, 1990, shall—

(A) review all infectious and communicable diseases which may be transmitted through handling the food supply;

(B) publish a list of infectious and communicable diseases which are transmitted through handling the food supply;

(C) publish the methods by which such diseases are transmitted; and

(D) widely disseminate such information regarding the list of diseases and their modes of transmissability?[1] to the general public.

Such list shall be updated annually.

(2) Applications

In any case in which an individual has an infectious or communicable disease that is transmitted to others through the handling of food, that is included on the list developed by the Secretary of Health and Human Services under paragraph (1), and which cannot be eliminated by reasonable accommodation, a covered entity may refuse to assign or continue to assign such individual to a job involving food handling.

(3) Construction

Nothing in this chapter shall be construed to preempt, modify, or amend any State, county, or local law, ordinance, or regulation applicable to food handling which is designed to protect the public health from individuals who pose a significant risk to the health or safety of others, which cannot be eliminated by reasonable accommodation, pursuant

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[1] So in original. Probably should be "transmissibility".

to the list of infectious or communicable diseases and the modes of transmissability[1] published by the Secretary of Health and Human Services.

42 U.S.C. § 12201 - Construction

(a) In general

Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790 et seq.) or the regulations issued by Federal agencies pursuant to such title.

(b) Relationship to other laws

Nothing in this chapter shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this chapter. Nothing in this chapter shall be construed to preclude the prohibition of, or the imposition of restrictions on, smoking in places of employment covered by subchapter I, in transportation covered by subchapter II or III, or in places of public accommodation covered by subchapter III.

(c) Insurance

Subchapters I through III of this chapter and title IV of this Act shall not be construed to prohibit or restrict—

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[1] So in original. Probably should be "transmissibility".

(1) an insurer, hospital or medical service company, health maintenance organization, or any agent, or entity that administers benefit plans, or similar organizations from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or

(2) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or

(3) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.

Paragraphs (1), (2), and (3) shall not be used as a subterfuge to evade the purposes of subchapter?[1] I and III.

(d) Accommodations and services

Nothing in this chapter shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit which such individual chooses not to accept.

(e) Benefits under State worker's compensation laws

Nothing in this chapter alters the standards for determining eligibility for benefits under State

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[1] So in original. Probably should be "subchapters".

worker's compensation laws or under State and Federal disability benefit programs.

(f) Fundamental alteration

Nothing in this chapter alters the provision of section 12182(b)(2)(A)(ii) of this title, specifying that reasonable modifications in policies, practices, or procedures shall be required, unless an entity can demonstrate that making such modifications in policies, practices, or procedures, including academic requirements in postsecondary education, would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations involved.

(g) Claims of no disability

Nothing in this chapter shall provide the basis for a claim by an individual without a disability that the individual was subject to discrimination because of the individual's lack of disability.

(h) Reasonable accommodations and modifications

A covered entity under subchapter I, a public entity under subchapter II, and any person who owns, leases (or leases to), or operates a place of public accommodation under subchapter III, need not provide a reasonable accommodation or a reasonable modification to policies, practices, or procedures to an individual who meets the definition of disability in section 12102(1) of this title solely under subparagraph (C) of such section.

APPENDIX G

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of Federal Operations
P.O. Box 77960
Washington, DC 20013

Sandra M. McConnell et al., a/k/a
Velva B.,[1]
Complainant,

v.

Megan J. Brennan,
Postmaster General,
United States Postal Service, Agency.

Request Nos. 0520180094 & 0520180095

Appeal Nos. 0720160006 & 0720160007

Hearing No. 520-2010-00280X

Agency No. 4B-140-0062-06

[Dated March 9, 2018]

DECISION ON REQUEST FOR RECONSIDERATION

[1] This case has been randomly assigned a pseudonym which will replace the Class Agent's name when the decision is published to non-parties and the Commission's website.

On October 30, 2017, the Agency timely requested that the Equal Employment Opportunity Commission (EEOC or Commission) reconsider its decision in EEOC Appeal Nos. 0720160006 & 0720160007 (September 25, 2017), which found that it violated Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. EEOC regulations provide that the Commission may, in its discretion, grant a request to reconsider any previous Commission decision issued pursuant to 29 C.F.R. § 1614.405(a), where the requesting party demonstrates that: (1) the appellate decision involved a clearly erroneous interpretation of material fact or law; or (2) the appellate decision will have a substantial impact on the policies, practices, or operations of the agency. See 29 C.F.R. § 1614.405(c).

BACKGROUND

This matter concerns a class of Agency employees consisting of rehabilitation and limited-duty injured-on-duty (IOD) employees whose positions were assessed by the Agency's National Reassessment Program (NRP) between May 5, 2006 and July 1, 2011. The class claims were categorized into four broad categories, three of which are relevant here: withdrawal of reasonable accommodations; hostile work environment; and disclosure of confidential medical information.

In our decision in EEOC Appeal Nos. 0720160006 & 0720160007, in relevant part, we reversed the Agency's final order rejecting the findings of discrimination made by summary judgment by an EEOC Administrative Judge (AJ) in favor of the class in her

June 4, 2015 preliminary decision,[2] which she later finalized. Our previous decision affirmed the AJ's findings that the Class Agent established that the NRP subjected qualified rehabilitation and limited-duty IOD employees to disparate treatment and resulted in rehabilitation and limited-duty IOD employees with disabilities having their reasonable accommodations withdrawn, as well as being subjected to disability-based harassment and having their confidential medical information accessed by unauthorized persons. Based on a *de novo* review of the record, we also found that Phase 1 of the NRP (the process used to identify all IOD employees who were either in limited-duty or rehabilitation status) constituted an unlawful medical inquiry to which the class of rehabilitation and limited-duty IOD employees were subjected.

The AJ also issued a separate preliminary decision on June 4, 2015, making findings of discrimination in favor of the Class Agent *as an individual.* The AJ accurately recounted that in EEOC Appeal No. 0720080054 (January 14, 2000), we had previously found that the Class Agent was a qualified individual with a disability. The AJ determined, in relevant part, that the Class Agent was discriminated against based on her disability when she was disparately treated and her reasonable accommodation was withdrawn. The Agency also rejected this finding. In EEOC Appeal Nos. 0720160006 & 0720160007, we found that the Class Agent, having established that she is a qualified individual with a disability, was eligible for immediate relief regarding disparate treatment and withdrawal of

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[2] The AJ finalized both her preliminary decisions on September 21, 2015.

reasonable accommodation. We found that the Class Agent was eligible for immediate relief for a hostile environment, having established she is a qualified individual with a disability who was subjected to a tangible employment action. We further found that having established that she was subjected to an unlawful disability-related medical inquiry and the confidentiality of her medical records were comprised via Phase 1 of the NRP, the Class Agent was eligible for immediate relief.

The Agency now requests that we reconsider our decision in EEOC Appeal Nos. 0720160006 & 0720160007.

ANALYSIS AND FINDINGS

In its request for reconsideration, the Agency essentially presents many of the same arguments already raised and considered in our previous decision. We emphasize that a request for reconsideration is not a second appeal to the Commission. See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), Chap. 9, § VII.A (as revised August 5, 2015). Rather, a reconsideration request is an opportunity to demonstrate that the appellate decision involved a clearly erroneous interpretation of material fact or law, or will have a substantial impact on the policies, practices, or operations of the Agency. The Agency has not done so here.

In its request for reconsideration, the Agency argues, like it did before, that the AJ applied the incorrect standard of review of "more likely than not" in finding liability, and now argues that the previous decision

repeated this error. As found in our previous decision, the Agency confuses the concepts of "standard of review" and "burden of proof." Contrary to the Agency's argument, the Commission has routinely ruled that after an AJ determines there is no genuine issue of material fact in dispute, on summary judgment the complainant carries the burden of proof by the preponderance of the evidence (more likely than not) that discrimination occurred. See e.g., McCready v. Dep't of Veterans Affairs, EEOC Appeal No. 0120062351 (Aprill, 2003); Mallis v. United States Postal Service, EEOC Appeal No. 01A55908 (October 3, 2006); Complainant v. Equal Employment Opportunity Commission, EEOC Appeal No. 0120092463 (August 28, 2014).

The Agency also again argues that there are genuine issues of material fact in dispute. For example, the Agency recounts a passage in the previous decision that the Class Agent's evidence contradicted the explanation of the NRP's purpose and critically undermined Agency witnesses' credibility thereon. The Agency argues that it is improper to make credibility determinations in deciding whether there are genuine issues of material fact. While we agree with the Agency's statement of the law, we disagree that the previous decision in any way relied on credibility determinations in affirming the AJ's decision on summary judgment. The previous decision found that the " ... massive evidentiary record ..." "... documents ..." the real reason for the NRP's existence, which was to move as many IOD employees as possible back to full duty in their preinjury jobs or onto the Office of Workers' Compensation Program (OWCP) rolls for eventual outplacement. We found, in essence, that the evidence

of the real reason was so overwhelming that there was no genuine issue of material fact thereon, despite some witness testimony to the contrary. For the reasons found in the previous decision, we find that there were no genuine issues of material fact in dispute.

The Agency argues, like it did on appeal, that the AJ incorrectly found that no portion of the class and the Class Agent's individual claims were "mixed" (included matters appealable to the Merit Systems Protection Board (MSPB)), and now argues that the previous decision repeated this error. We disagree. As found in the previous decision, the MSPB has ruled multiple times that the NRP class action complaint is not mixed. We add that the MSPB also found that the Class Agent's individual claim is not mixed, explicitly concluding it did not have jurisdiction over her appeal and thus could not consider her disability discrimination claim. MSPB Decision NY-0353-06-0381-I-1, 2007 WL 2239099 (June 1, 2007).

Arguing that the medical inquires it made in Phase 1 of the NRP were lawful, the Agency avers that the previous decision erred in finding that these inquiries violated the Rehabilitation Act. However, the previous decision determined that unlawfully based their medical inquiries solely on the status of the IOD employees, without any evidence that those employees were not performing the essential functions of their positions or that they posed a direct threat to themselves or others by remaining in their positions. The Agency argues that in evaluating whether class members could perform the essential functions of their positions, the previous decision erred in considering their modified assignments as their positions instead

of their positions of record. We disagree. In a prior decision affirming the AJ's certification of this class, we found that where an employee has performed a modified position for an extended amount of time, it is that position which is considered for purposes of determining whether the employee is a qualified individual with a disability. EEOC Appeal No. 0720080054 (Jan. 14, 2010). EEOC Appeal No. 0720080054 is final, has become the law of the case, and is consistent with other decisions regarding modified positions unrelated to the class action. See e.g., Huddleson v. United States Postal Service, EEOC Appeal No. 0720090005 (Apr. 4, 2011). Huddleson contained case cites of other Commission cases holding the same. We find, for the same reasons in our previous decision, that the referenced medical inquiries violated the Rehabilitation Act.

The Agency further argues that the previous decision erred in assuming that all modified assignments provided to class members were reasonable accommodations (in other words, did not consist only of "make work"). In the context of making this contention, the Agency argued again that we should look at class members' positions of record, not the referenced modified positions in determining the Agency's reasonable accommodation obligations. As already noted, we have specifically rejected this argument. In reaching the finding of liability, we properly determined that the modified assignment of the Class Agent, as well as the class members, was properly characterized as a reasonable accommodation. As such, we determined that these employees were entitled to remain in their limited-duty or rehabilitation positions unless the Agency could demonstrate that allowing

them to do so would impose an undue hardship on its operations. We then went on to conclude that the Agency failed to establish undue hardship. We found that the driving force behind the NRP was not to ensure that rehabilitation and limited-duty IOD employees were performing only work that was necessary to the Agency's mail delivery operations, as contended by the Agency, but to move as many of them as possible back to full duty in their preinjury jobs or onto the OWCP rolls for eventual outplacement, and this was motivated by discriminatory animus (disparate treatment).

The Agency argues that the previous decision erred in considering the Class Agent's individual claim of hostile work environment because she did not appeal the AJ's finding that she was not entitled to damages on this matter. The Agency refers to the AJ's findings that the Class Agent as an individual offered no evidence that she was ever told that she would end up at Walmart or feared having to work there due to the NRP, and accordingly is denied damages related to this specific claim.

But the previous decision did not rule on the Class Agent's individual claim regarding Walmart. Rather, we ruled that the Class Agent was eligible for immediate relief for being subjected to a hostile work environment since she established that she is a qualified individual with a disability who was subjected to a tangible employment action – taking her modified assignment away from her.

Contending that the previous decision does not contain a complete statement of the Commission's procedures for evaluating individual claims on remand, the Agency

asks for clarification/elaboration thereon. It explains that while the previous decision referenced the individual claim relief procedures for class members in 29 C.F.R. § 1614.204(1)(3), it did not reference the additional procedures set forth in Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), Chap. 8, PartXII.C (as revised August 5, 2015). In the previous decision's order, we directed the Agency to notify the 3,300 members of the class who were never assessed under the NRP that they are not members of the class, that their previously-filed individual EEO complaints, if any, have been de-subsumed from the class, and that they are free to pursue those individual complaints. The Agency asks for confirmation that individuals who failed to meet the class definition should be de-subsumed.

In opposition to the Agency's appeal, the Class Agent argues that the Commission's order in its previous decision and regulations are clear on how to manage the individual claim relief process, and the same order explicitly identified who was to be de-subsumed. She argues that the AJ is the appropriate person to manage the individual claim relief process for class members, and to the extent the Agency has questions about this or who should be de-subsumed, they should be directed to the AJ (who on remand will retain jurisdiction over the class complaint). We agree.

After reviewing the previous decision and the record, the Commission finds that the request fails to meet the criteria of 29 C.F.R. § 1614.405(c), and it is the decision of the Commission to deny the request: The decision in EEOC Appeal Nos. 0720160006 & 0720160007 remains

the Commission's decision. There is no further right of administrative appeal on the decision of the Commission on this request. The Agency shall comply with the orders below.

ORDER (D0617)

To the extent that it has not already done so, the Agency is ORDERED to take the following remedial action:

1. Within sixty (60) calendar days after the date that this decision is issued, the Agency shall offer to reinstate the Class Agent to her former position as a Carrier Technician at the Post Office in Rochester, New York, retroactive to May 19, 2006. The offer shall be made in writing. The Class Agent shall have fifteen (15) calendar days from receipt of the offer to accept or decline the offer. Failure to accept the offer within 15 days will be considered a declination of the offer unless the Class Agent can show that circumstances beyond her control prevented a response within the time limit.

2. The Agency shall determine the appropriate amount of back pay, with interest, and other benefits due the Class Agent, pursuant to 29 C.F.R. § 1614.501, no later than sixty (60) calendar days after the date this decision is issued. The Class Agent shall cooperate in the Agency's efforts to compute the amount of back pay and benefits due, and shall provide all relevant information requested by the Agency. If there is a dispute regarding the exact amount of back pay and/or benefits, the Agency shall issue

a check to the Class Agent for the undisputed amount within sixty (60) calendar days of the date the Agency determines the amount it believes to be due. The Class Agent may petition for enforcement or clarification of the amount in dispute. The petition for clarification or enforcement must be filed with the Compliance Officer, at the address referenced in the statement entitled "Implementation of the Commission's Decision." If the Class Agent declines to accept the offer of retroactive reinstatement or fails to respond the offer within fifteen (15) calendar days of receipt of the offer, her entitlement to back pay and the other aforementioned equitable remedies will cease upon the date she actually or effectively declines.

3. Within sixty (60) calendar days after the date this decision is issued, the Agency shall conduct a supplemental investigation pertaining to the Class Agent's entitlement to compensatory damages incurred as a result of the Agency's discriminatory actions. See Feris v. Environmental Protection Agency, EEOC Appeal No. 01934828 (Aug. 10, 1995), request for reconsideration denied, EEOC Request No. 05950936 (July 19, 1996); Rivera v. Dept. of the Navy, EEOC Appeal No. 01934157 (July 22, 1994); Carle v. Dept. of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993). See also Turner v. Dept. of the Interior, EEOC Appeal Nos. 01956390 & 01960518 (Apr. 27, 1998); Jackson v. U.S. Postal Service, EEOC Appeal No. 01923399 (Nov. 12, 1992), request for

reconsideration denied, EEOC Request No. 05930306 (Feb. 1, 1993). The Agency shall afford the Class Agent sixty (60) calendar days to submit additional evidence in support of her individual claim for compensatory damages. Within thirty (30) calendar days of its receipt of the Class Agent's evidence, the Agency shall issue a final decision determining the Class Agent's entitlement to compensatory damages, together with appropriate appeal rights.

4. The Agency shall process the Class Agent's request for attorney's fees associated with this class litigation, as discussed below.

5. The Agency shall immediately and thereafter take meaningful and effective measures to ensure that discrimination against qualified individuals with disabilities, particularly injured-on-duty employees who are currently working in, who apply for, or who are being evaluated for limited-duty and rehabilitation positions, does not continue. The Agency shall monitor these measures for at least five (5) years to ensure that their implementation produces effective and tangible results. The Agency shall monitor these measures and results as part of its barrier analysis in its annual MD-715 report for the next five (5) years. The measures in question shall include the following:

    a. All officials, managers, and employees who are responsible for finding adequate work for employees who are injured on duty will be given at least 8 hours of training annually on the Agency's responsibilities to provide

reasonable accommodations to qualified individuals with disabilities under the Rehabilitation Act. This training must include a segment on the relationship between the Agency's obligations under the Rehabilitation Act and under the Federal Employee Compensation Act, as explained in our enforcement guidance entitled: Workers Compensation and the ADA, EEOC Notice No. 915.002 (Sept. 3, 1996), which can be found at: www.eeoc.gov/policy/docs/workcomp.html. The training must also include a segment on ensuring that employees' medical information, including Form CA-17's and other relevant documents, remains confidential at all times.

b. The Agency shall make certain that, in whatever process it utilizes to find adequate work for injured-on-duty employees who need to be placed into limited-duty or rehabilitation assignments, such employees are notified at the beginning of and throughout that process that if they meet the statutory requirements of the Rehabilitation Act, they have the right to request a reasonable accommodation, and explain the procedures for doing so as they are set forth in EL-307. Employees shall also be notified that the process of finding adequate work necessarily entails that compensation specialists and other personnel may need access to their confidential medical information in order to assist them in finding adequate work, and that the confidentiality

of such medical documentation will be maintained at all times. The Agency shall ensure that information pertiaining to reasonable accommodations and confidentiality of medical documentation is included in any printed and electronic materials pertinent to the process of finding adequate work for injured-on-duty employees.

6. Within ten (10) calendar days of the date this decision is issued, the Agency shall notify the members of the class of this decision and available relief through the same media employed to provide notice of the existence of the class complaint. The notice shall include the following provisions:

   a. Within thirty (30) days of receipt of notification of this decision, a class member who believes that he or she is entitled to individual relief must file a written claim with the Agency or with its EEO director. The claim must include a specific, detailed showing that the claimant was subjected to an evaluation under the National Reassessment Program between May 5, 2006, and July 1, 2011 (hereinafter referred to as the class period), as well as of the consequences of that evaluation: being returned to full duty; receiving no change in limited-duty or rehabilitation assignment; receiving a new limited-duty or rehabilitation assignment; receiving a total or partial "no work available" determination; and

separating, resigning, or retiring during the period that the NRP was in effect.

b. All those who were evaluated under the National Reassessment Program during the class period may put in a claim for damages to the extent that they can provide a specific and detailed showing that they suffered compensable harm as a result of being subjected to an unlawful medical inquiry or having their confidential medical information accessed by unauthorized persons. All class members are eligible for relief under this provision.

c. Those who were evaluated under the National Reassessment Program during the class period and who wish to file a claim seeking relief from harassment, disparate treatment, or having their reasonable accommodations withdrawn must provide a specific and detailed showing that they were qualified individuals with disabilities at the time of the violation. Those who were evaluated before January 1, 2009, are subject to the definition of disability under the Rehabilitation Act as it existed prior to the enactment of the Americans with Disabilities Act Amendments Act of 2008. Those who were evaluated on or after January 1, 2009, are subject to the definition of disability under the Rehabilitation Act as amended by the Americans with Disabilities Act Amendments Act of 2008.

d. Those who were evaluated under the National Reassessment Program during the class period who wish to file a claim for damages resulting from unlawful harassment must provide a specific and detailed showing that they were qualified individuals with disabilities at the time of their evaluation, and that they suffered compensable pecuniary or nonpecuniary harm as a result of the National Reassessment Process.

e. Those who were evaluated under the National Reassessment Program during the class period, who present a specific and detailed showing that they were qualified individuals with disabilities at the time of their evaluation and were given a new limited-duty or rehabilitation assignment that resulted in a loss or harm to a term, condition, privilege or benefit of their employment with the United States Postal Service may put in a claim for additional damages and equitable relief to the extent such harm or loss was attributable to such new limited duty or rehabilitation assignment.

f. Those who were evaluated under the National Reassessment Program during the class period, who were qualified individuals with disabilities at the time of their evaluation and who were given a total or partial no-work-available determination that resulted in being placed into OWCP, having

reduced work hours, or otherwise suffering a loss or harm to a term, condition, privilege, or benefit of employment with the United States Postal Service may put in a claim for additional damages and equitable relief to the extent such harm or loss was attributable to receiving the total or partial no-work-available determination.

g. Those who were evaluated under the National Reassessment Program and separated resigned, or retired during the class period and who wish to file a claim for relief must present a specific and detailed showing that they were qualified individuals with disabilities at the time of their evaluation and that they were constructively discharged as a result of that evaluation. To prevail in a constructive discharge claim, the claimant must establish that the National Reassessment Program evaluation or any consequences flowing from that evaluation made his or her working conditions so difficult that a reasonable person in his or her position would have felt compelled to separate, resign, or retire.

h. Within ninety (90) calendar days of receiving an individual claim, the Agency will issue a final decision on that claim. That decision will include a notice of the right to file an appeal or a civil action within the applicable time limits.

7. Within ten (10) calendar days of the date this decision is issued, the Agency shall notify the

3,300 members of the class who were never assessed under the National Reassessment Program that they are not members of the class, that their previously-filed individual EEO complaints, if any, have been de-subsumed from the class, and that they are free to pursue those individual complaints. The notice shall not include language to the effect that those who had not previously filed in individual EEO complaint will be given 45 days from receipt of the notice to initiate a new individual complaint.

8. The Agency is further directed to submit a report of compliance in digital format as provided in the statement entitled "Implementation of the Commission's Decision." The report shall be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Further, the report must include supporting documentation of the Agency's calculation of back pay and other benefits due the Class Agent, including evidence that the corrective action has been implemented.

POSTING ORDER (G0617)

The Agency is ordered to post at its facilities around the country copies of the attached notice. Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted **both in hard copy and electronic format** by the Agency within 30 calendar days of the date this decision was issued, and shall remain posted for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The Agency shall take reasonable steps to ensure that said

notices are not altered, defaced, or covered by any other material. The original signed notice is to be submitted to the Compliance Officer as directed in the paragraph entitled "Implementation of the Commission's Decision," within 10 calendar days of the expiration of the posting period. The report must be in digital format, and must be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

ATTORNEY'S FEES (H1016)

If the Class Agent has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), she is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. § 1614.501(e). The award of attorney's fees shall be paid by the Agency. The attorney shall submit a verified statement of fees to the Agency -- not to the Equal Employment Opportunity Commission, Office of Federal Operations -- within thirty (30) calendar days of the date this decision was issued. The Agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0617)

Compliance with the Commission's corrective action is mandatory. The Agency shall submit its compliance report **within thirty (30) calendar days** of the completion of all ordered corrective action. The report shall be in the digital format required by the Commission, and submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The Agency's report must contain supporting documentation, and the Agency must send a copy of all

submissions to the Complainant. If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See 29 C.F.R. § 1614.409.

CLASS AGENT'S RIGHT TO FILE A CIVIL ACTION (R0610)

This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court within ninety (90) calendar days from the date that you receive this decision. In the alternative, you may file a civil action after one hundred and eighty (180) calendar days of the date you filed your complaint with the Agency, or filed your appeal with the Commission. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department

head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. Filing a civil action will terminate the administrative processing of your complaint.

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:

/s/ Carlton M. Hadden
Carlton M. Hadden, Director
Office of Federal Operations

MAR 09 2018
Date