

**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
SAN FRANCISCO DISTRICT OFFICE**

BRIAN RAY,)	
)	EEOC Complaint No. 570-2015-00340X
Complainant,)	
)	Agency No. DOS-F-0273-13
v.)	
)	
JOHN KERRY, SECRETARY, UNITED STATES DEPARTMENT OF STATE,)	Administrative Judge David T. Kelley
)	
Agency.)	DATE: February 10, 2017
)	
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)	

**COMPLAINANT BRIAN RAY'S OPPOSITION TO AGENCY'S
MOTION FOR SUMMARY JUDGMENT**

Pursuant to 29 C.F.R. § 1614.109(g)(2) and Administrative Judge Kelley's Orders dated October 19, 2016 and February 1, 2017, Complainant Brian Ray (“Complainant” or “Mr. Ray”), through his counsel of record, hereby opposes the United States Department of State's (“Agency”) Motion for Summary Judgment in the above-captioned case. As set forth below, there is sufficient evidence to demonstrate triable issues of material fact regarding Mr. Ray's claims for retaliation for engaging in EEO activity, as well as discrimination¹ (sex, age), and maintenance of a hostile work environment. The opposition is based on this Opposition, the ROI in this matter and the attached Excerpts of Deposition of Brian Ray (Exhibit “A”).

The crux of Complainant's case is that the Susan Moorse/Tiffany Bartish management team created a hostile work environment for older workers, pushing them out through Performance Improvement Plans (“PIPs”), heightened scrutiny, and the like, while hiring younger workers based on clear, direct evidence of ageist animus: “We have to get rid of the old people.” This was combined

¹ Complainant respectfully withdraws his claim for discrimination based on race.

with yelling, foul language, taunts, and humiliation directed at older workers, and Mr. Ray in particular. As this hostile work environment developed, older workers began to engage in protected activity, calling upon management to stop, and Mr. Ray informed the Moore/Bartish regime that he would participate in that protected activity as a witness for his co-workers.

Thereafter, Mr. Ray's work environment worsened. Specifically, after informing of his supervisor that he would testify on behalf of two co-workers who alleged that they were suffered from discriminatory conduct, Ms. Bartish: (1) gave Mr. Ray his first unsuccessful performance evaluation of his career, which eventually resulted in a denial of his yearly "Within Grade Increase"; (2) interfered with his ability to take protected leave; and (3) created a hostile work environment in an attempt to force him out of the department.

Due to the multiple genuine issues of material fact, summary judgment is inappropriate in this matter, and Agency's Motion For Summary Judgment should be denied.

BACKGROUND

A cursory review of the complaints made by Mr. Ray make it evident that Complainant raised a mix of discrete acts as well as incidents that go to prove, according to him, a retaliation, discrimination, and hostile work environment. According to the United States Supreme Court, a hostile work environment claim is an amalgamation of incidents that "collectively constitute one unlawful employment practice." *AMTRAK v. Morgan*, 536 U.S. 101, 117 (2002). Unlike discrete acts, the incidents which comprise a hostile work environment claim "cannot be said to occur on any particular day" and by their "very nature, involve repeated conduct." *Id.* at 115.

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**COMPLAINANT'S RESPONSE TO AGENCY'S
STATEMENT OF MATERIAL UNDISPUTED FACTS**

#	Agency's Material Undisputed Fact	Complainant's Response
1.	Complainant began his employment with the Agency at the San Francisco Passport Agency ("CA/PPT/SF") on January 5, 1997 as a Passport Specialist. (Tab 1, January 5, 1997 SF-50).	UNDISPUTED.
2.	Complainant was promoted to become a Supervisory Passport Specialist with CA/PPT/SF on June 26, 2005. (Tab 2, June 26, 2005 SF-50).	UNDISPUTED.
3.	The Director of CA/PPT/SF at all relevant times was Susan Moorse. She is female, White, American, and over 40. (ROI at 00347-00348)	PARTIALLY DISPUTED. The Agency misstates the evidence. Ms. Moorse did not identify her National Origin as "American." Rather, she stated: "My maternal grandparents were from the United Kingdom, and my paternal grandparents were from Belgium." (ROI at 00348)
4.	At all relevant times, the Assistant Director of CA/PPT/SF was Qui Nguyen (Complainant's second-line supervisor). (ROI at 00373). He is male, Asian, Vietnamese and was 40 or over at the time of the relevant events. (ROI at 00373-374)	UNDISPUTED.
5.	From June 2011 to December 31, 2013, Tiffany Bartish was CA/PPT/SF's Adjudication Manager	PARTIALLY DISPUTED. The Agency misstates the evidence. Ms. Bartish was Mr.

	and Complainant’s direct supervisor. (ROI at 00239) She is female, White, American and was under 40 at the time of the relevant events. (ROI at 00239-00240)	Ray's direct supervisor until January 2014: “I was previously the complainant's supervisor from 6/11-1/14.” (ROI at 00239)
6.	From April 2014 through December 2014, Elizabeth Norris was CA/PPT/SF’s Adjudication Manager and Complainant’s direct supervisor. (ROI at 00380-00382) She is female, Hispanic, Honduran and under 40. <i>Id.</i>	PARTIALLY DISPUTED. Lacks foundation. The cited ROI excerpt does not support that Ms. Norris was CA/PPT/SF’s Adjudication Manager and Complainant’s direct supervisor “through December 2014.”
7.	At all relevant times, Sonia Crisp was the Director, Human Resources Division, Bureau of Consular Affairs. (ROI at 00141-00142,00147-00149)	PARTIALLY DISPUTED. Lacks foundation. The cited documents, dated September 11 and 18, 2014, do not support that Ms. Crisp's job title “[a]t all relevant times.” Moreover, she contradictorily self-identifies as a “Human Resources Officer” on September 11, 2014 and a “Director” on September 18, 2014. (<i>Compare</i> ROI at 142, 149)
8.	At all relevant times, James Herman was the Executive Director, Bureau of Consular Affairs. (ROI at 00103, 00156-00157)	PARTIALLY DISPUTED. Lacks foundation. The cited documents, dated August 7 and November 11, 2014, do not support that Mr. Herman was the Executive Director, Bureau of Consular Affairs “[a]t all relevant times.”
9.	At all relevant times, Angela Jenkins was a	UNDISPUTED.

	Supervisory Passport Specialist at CA/PPT/SF and reported to Tiffany Bartish. (ROI at 00243-00245) Ms. Jenkins is female, African-American, American and over 40. <i>Id.</i>	
10.	Per the Supervisory Passport Specialist performance plan: “[a] Supervisory Passport Specialist is a member of the agency/center management team and is responsible for supervising a team of passport specialists within an agency/center. Under the management of the Adjudication Manager, supervises the acceptance and adjudication of passport applications and authorization of issuance to qualified American citizens and nationals as provided by the laws and regulations of the United States[,] [d]irects the activities of passport specialists ranging in grade from GS-3 through GS-11. Ensures that specialists are properly trained and developed. Ensures that specialists are performing in accordance with the performance plan relevant to each specialist’s grade level and evaluates them based on those performance plans.” (ROI at 00250)	UNDISPUTED.
11.	For calendar year 2012, Ms. Bartish issued	PARTIALLY DISPUTED. The Agency

	<p>Complainant a performance appraisal with a Summary Level Rating of Fully Satisfactory (“2012 Performance Review”). (ROI at 00250-00257)</p>	<p>misstates the evidence: Complainant received a rating of “Fully Successful,” not “Fully Satisfactory.” (ROI at 256-257)</p>
12.	<p>In the 2012 Performance Review, Ms. Bartish noted the following:</p> <p>Although Brian excels at providing excellent customer service, for internal and external customers, he sometimes struggles to make difficult decisions. He has been working on and showing improvement in this area.</p> <p>Brian showed progress at holding his team accountable for performance issues with significant coaching. This rating cycle, he was able to provide feedback and guidance to help a team member successfully lower her reject ratings at the counter. Additionally, he helped the adjudicator learn to correct repeated issues involving the recording of her time and production. While Brian saw these issues through to fruition, he sometimes struggled to own the decision and speak with a unified management voice. This struggle interferes with his ability to independently initiate disciplinary actions when warranted. While Brian works hard to assist his adjudicators with questions or complicated cases, he needs to strengthen and regularize the feedback loop with his team.</p> <p><i>Id.</i></p>	<p>PARTIALLY DISPUTED. Incomplete. Ms. Bartish stated that Complainant “performed at the fully successful level in 2012, meeting all requirements for the GS-12 Supervisory Passport Specialist.” (ROI at 254) Moreover, his “performance this [calendar year 2012] period earned an overall rating of fully successful for meeting the terms of his work requirements in all performance elements.” (ROI at 255)</p>
13.	<p>In May 2013, Ms. Bartish provided Complainant with a mid-year performance appraisal (“May 2013 Interim Review”), which noted the following:</p> <p>In the coming quarter, I would like to see Brian</p>	<p>UNDISPUTED.</p>

	<p>focus on critical performance element 2, paying particular attention to keeping his team together during scheduling, accurately completing scheduling functions when drafting, maintaining appropriate staffing at the counter and coming to the morning scheduling meeting prepared with his requests and suggestions based on the day's staffing.</p> <p>As the senior supervisory passport specialist, Brian must focus on leadership and confident fulfillment of the manager's role. While Brian does not shy away from having difficult conversations when instructed, he is not proactive in doing so. As a supervisor he must work to further develop his skills in work commitment 1A, especially independently providing and documenting timely feedback and initiating disciplinary and performance-based action without first being instructed to do so. In order to do this, he may want to implement regular weekly feedback sessions with each member of his team. In this way, he will make sure he is taking the time before the meetings to analyze his team's performance data and developing specific feedback points. He can then use this information to better maintain his performance and feedback, so can provide concrete, specific examples of employee performance during end of year reviews.</p> <p>In the coming quarter, I would like Brian to focus on giving a clear, accurate and concise opinion on adjudication topics and in calibration meetings. Additionally, before the next midterm, I request Brian create and present a training session for adjudicators on an aspect of derivative citizenship. While the specifics will be his choice, the training may not last more than 40 minutes (including questions).</p> <p>ROI at 00262-00263.</p>	
14.	In September 2013, Ms. Bartish provided Complainant with a second mid-year	PARTIALLY DISPUTED. The mid-year appraisal contained a 13-point set of extra

<p>performance appraisal, with an unsuccessful performance rating (“September 2013 Interim Review”), which noted in part the following:</p> <p>Brian struggles with monitoring and documenting performance and providing timely feedback and keeping his supervisor informed as he does so. He has worked with the AM and improved at documenting performance discussions; however, he does not generally identify the need for or initiate disciplinary or performance action unless directed.</p> <p>[] Brian sometimes struggles with resolving complex cases independently and his performance in this function is [Not Successful.]</p> <p>Although Brian will often seek guidance from his colleagues regarding resource questions, he does not currently operate independently at the fully successful level for a supervisory passport specialist in this area... [], Brian struggles with aligning his staff and resources and consistently planning and assigning work...He does not successfully monitor workflow at the counter...</p> <p>Brian struggles with independently developing equitable, fair and accurate performance ratings of employees. His drafts of awards and evaluations require multiple revisions and often must be redrafted by upper management to avoid disadvantaging his employees.</p> <p>Brian’s oral communication is often unclear and disorganized, which results in undue time addressing issues. For example, when observed seeking guidance from other supervisors, the AM questioned some of his team members as to why. They reported they prefer to ask questions of others because of the time it takes for Brian to answer a question. Brian does not present questions or oral reports to his supervisor in a logical and understandable manner.</p>	<p>duties that no male supervisor had to achieve. (ROI-00134)</p>
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	ROI at 00256-00261	
15.	In September 2013, Ms. Bartish provided Angela Jenkins with a mid-year performance appraisal, with a Not Successful performance rating. (ROI at 00273-00275)	DISPUTED. Misstates the document. Ms. Jenkins received “FS” or “EE” for the following categories: Work Commitment 1A, 1B, and 1C, as well Critical Performance Elements 4 and 5. (ROI at 00273-00275)
16.	On November 13, 2013, Arlene Brandon of the Office of Civil Rights sent an email to Tiffany Bartish, Susan Moore and James Herman informing them that “the Department has accepted Brian Ray’s request to process his informal EEO complaint.” (ROI at 00370) The email further notified Ms. Moore and Ms. Bartish that they were “named as the management officials who allegedly committed the discriminatory action against” Complainant. <i>Id.</i>	UNDISPUTED. However, this is not Ms. Bartish's and Ms. Moore's first notice that Mr. Ray is engaged in protected activity. He engaged in protected activity by informing his supervisor, Ms. Bartish, in response to her question, that he would be a witness for Mr. Gezahegn's and Ms. Jenkins' EEOC claims in mid-August 2012. (Deposition of Brian Ray (“Ray Depo.”), 83:20-84:4)
17.	On December 3, 2013, Mr. Nguyen was notified of a scheduled Alternative Dispute Resolution (ADR) for Complainant’s EEO complaint when Mr. Nguyen was consulted on the appropriateness of a bargaining unit employee representing Complainant during such ADR. <i>See</i>	NOT DISPUTED.

	<p>Tab 3, Email excerpted from Agency Document Production, RAY 0708-0710. Mr. Nguyen was not copied on the original email notifying Ms. Bartish and Ms. Moorse of Complainant’s EEO complaint and that Complainant named them as the responsible management officials. (ROI at 00370)</p>	
<p>18.</p>	<p>In February, 2014, Complainant received his 2013 performance review in which Ms. Bartish gave him a Summary Level Rating of Not Successful (“2013 Performance Review”). (ROI at 00264-00272)</p>	<p>DISPUTED. The appraisal was presented to him by Ms. Bartish on December 20, 2013. (Ray Depo., 141:1-7)</p>
<p>19.</p>	<p>In the 2013 Performance Review, Ms. Bartish noted, in part, the following reasons for issuing Complainant the Not Successful rating:</p> <p>[Brian] successfully provides feedback to his employees on performance and conduct; however because of the high degree of oversight and assistance required by the Adjudication Manager (AM) to complete his supervisory duties, Brian is not successful in this element.</p> <p>In November, two fraud referrals signed by Brian were rejected by the Fraud Prevention Manager. Both applications were submitted without appropriate database checks or referral explanations. Although Brian continues to improve his adjudicative knowledge, he does not currently exhibit the expertise required to be fully successful as a supervisor in this element.</p>	<p>NOT DISPUTED, NOT COMPLETE.</p>

	<p>Although Brian has made progress with resource planning, he still struggles with appropriately aligning staff and resources and consistently planning and assigning work. He sometimes struggles to articulate local policy for assignments, including when his team is responsible for filling rotations and other positions...[h]e does not independently hold subordinates accountable for achieving organizational goals... [w]hile occasional errors are expected, the frequency and repetitive nature of Brian’s struggles to independently master resource planning necessitates a not successful rating.</p> <p><i>Id.</i></p>	
20.	<p>Ms. Bartish gave Angela Jenkins a Not Successful Summary Level Rating for her 2013 performance review. (ROI at 00246)</p>	<p>NOT DISPUTED.</p>
21.	<p>In January, 2014, Ms. Bartish left her position as Adjudication Manager and became a Program Coordinator. (ROI at 00239)</p>	<p>DISPUTED. Ms. Bartish ceased to be Mr. Ray's supervisor after December 2016.</p>
22.	<p>On January 13, 2014, Complainant sent Ms. Bartish an email, regarding an incident that occurred while Ms. Bartish was Complainant’s supervisor, which stated in part:</p> <p>Once again you failed to ensure my team’s Tatel was recorded correctly while I was out on vacation and once again my team’s MIS and Tatel was mishandled...[t]he problem you created by not promptly communicating this information to the time keeper Rachelle was that these changes were not reflected in pay period 25 when they happened and should have been recorded on the Tatel, which resulted in Wah’s leave balance being artificially inflated by 16 extra hours, <i>leaving me to clean up and fix this debacle</i> in pay period 26 to correct these mistakes.</p>	<p>PARTIALLY DISPUTED. Ms. Bartish was not Mr. Ray's supervisor on the date of the email. (Ray Depo., 29:14-30:25)</p>

	<p>This is not much different then the last time I went on vacation and you caused the entire Nathan Johnson debacle...you paid Nathan for the entire pay period 12, which he specifically asked not be paid for. <i>This represents 10 out of 10 errors, a 100% error rate.</i> After significant daily input from Specialist Nathan Johnson over several weeks, you still unbelievably made this <i>egregious error</i>, which took me several emails and phone calls to correct this <i>giant problem that you created</i>.</p> <p>This is exactly the kind of thing that can open the agency to more grievances and lawsuits when you <i>continually demonstrate this kind of gross negligence</i>. When you don't do tasks correctly the first time, it makes my job much more difficult than it has to be, if I continually have to clean up your omissions or commissions when you fail to follow national instructions and job tasks are done incorrectly. I simply do not have the time to continually clean up after you each and every time you mishandle my team's systems data in addition to all my regular Supervisory duties.</p> <p>ROI at 00161-00162 (emphasis added).</p>	
23.	<p>From on or around March 3, 2014 through on or around December 8, 2014, Complainant was on leave due to a serious medical condition. (ROI at 00141-00142; Tab 4, Excerpts from Deposition Transcript of Brian Ray ("Ray Depo.") at 179)</p>	<p>NOT DISPUTED. The condition was cancer, the treatment included a very invasive surgery, and was life-threatening.</p>
24.	<p>On or around April 2014, Mr. Nguyen notified Human Resources that Complainant's Within-Grade Increase should be denied due to the Not Successful 2013 Performance Review. (ROI at 00377)</p>	<p>NOT DISPUTED. This is the natural consequence of the retaliatory performance evaluations.</p>

25.	<p>On August 7, 2014, Executive Director Herman issued Complainant a Letter of Reprimand for Unprofessional and Disruptive Behavior due to his sending of the January 13, 2014 email to Ms. Bartish. (ROI at 00365-00366)</p>	<p>PARTIALLY DISPUTED. The alleged “unprofessional” aspect was the use of the word “debacle.” NOT DISPUTED that the letter was sent to Mr. Ray. However, the timing of the letter is suspect, as it was issued months after the alleged occurrence, and on the eve of Mr. Ray's testimony for his co-workers.</p>
26.	<p>On September 11, 2014, Ms. Crisp sent Complainant a letter stating in part that:</p> <p>From March 3, 2014 to present, you have been absent from duty due to a medical condition. By letter dated August 15, 2014, Dr. George Gavalos, your treating physician stated that ‘you have been ill and unable to attend work from September 1, through September 20, 2014.’</p> <p>An essential element of employment is to be at work when you are expected to be here. Your absence of over six (6) months has had an adverse impact on the organization’s ability to execute the mission and your position needs to be filled on a regular, full-time basis. Five passport specialists under your supervision have been reassigned to 3 other supervisors, including the Adjudication Manager which has increased the workload. In addition, the absence strains existing staffing shortages and has required the assistance of temporary GS-12 Supervisory support.</p> <p>Thus, you are hereby directed to return to work as a Supervisory Passport Specialist... on Monday, September 21.</p> <p>ROI at 00141-00142.</p>	<p>NOT DISPUTED that the letter was sent. DISPUTED that the conclusions set forth therein were non-retaliatory.</p>

27.	<p>On September 18, 2014, Ms. Crisp sent Complainant a letter stating in part that:</p> <p>You submitted a physician’s notice extending your absence to November 1, 2014. In addition, you requested to use your annual leave to extend your absence until December 9, 2014, based on your medical condition. However, the medical documentation you provided is not acceptable to support your continued absence and does not cover the period of absence you requested...</p> <p>Please submit a new leave request (OPM-71) and the required medical documentation as soon as possible or mandatorily no later than 15 calendar days. In the meantime, you will be carried in an AWOL status from September 22, 2014 until such medical documentation is received to support your continued absence. Once we have this updated medical certification the AWOL will be changed to an approved leave category.</p> <p>ROI at 00147-00149.</p>	<p>NOT DISPUTED that the letter was sent.</p> <p>DISPUTED that the conclusions set forth therein were non-retaliatory.</p>
28.	<p>Complainant returned to the office on or around December 8, 2014. Tab 4, Ray Depo. at 179.</p>	<p>NOT DISPUTED.</p>

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COMPLAINANT'S STATEMENT OF ADDITIONAL MATERIAL UNDISPUTED FACTS

1. Complainant is male, American, and was 40 or over at the time of the relevant events. (ROI-00082)
2. During his first 14 years of service at the Agency Mr. Ray received outstanding and excellent performance evaluations (ROI-00091)
3. On August 22, 2013, Mr. Ray engaged in protected activity by responding to Ms. Bartish's question stating that he was going to testify on behalf of his co-workers Gezhegn and Jenkins. (ROI-00091)
4. Ms. Bartish and Ms. Moorse were aware that Mr. Ray had filed an EEO Complaint prior to the 12/20/13 unsatisfactory performance evaluation. (ROI-00241; ROI-00349)
5. As early as the summer of 2013, Ms. Bartish was aware that Ms. Jenkins had filed an EEO Complaint alleging that she was the Responsible Management Official, since Ms. Bartish filled out her EEO affidavit in that matter some 5 months prior to filling out the affidavit in Mr. Ray's EEO matter. (ROI - 00245)
6. Mr. Ray had a history of fully successful and outstanding work performance prior to the Moorse/Bartish management regime. (Ray Depo., 84:9-13)
7. Complainant suffered an adverse employment action when Mr. Bartish issued him a negative interim performance evaluation on September 6, 2013. (ROI-0091)
8. Complainant suffered an adverse employment action when Mr. Bartish issued him a negative performance evaluation on December 20, 2013.(ROI-0091)
9. In or around April 2014, Complainant suffered an adverse employment action when he learned that CA/PPT/SF denied him a Within-Grade Increase in compensation based on Ms. Bartish's false 2013 Performance Evaluation.(ROI-0091)
10. Moorse and Bartish during the Moorse/Bartish management regime made numerous age-

related comments against older workers and Brian Ray in particular. (ROI-00047; Ms. Bartish and Ms. Moorese evidenced a direct discriminatory animus towards those over the age of 40 in the office by asking people, including Mr. Ray, when they would be retiring. (Ray Depo., 71:12-24). "I'll buy you strawberries when you retire" (Ray Depo., 71:17-18), "I'll write your resume for you." (Ray Depo., 71:18-24), "We need to get rid of the old people." (Ray Depo., 72:2-19). "You are too old to be driving a car like that"(Ray Depo., 69:25-70:8) "You are the father figure", (Ray Depo., 68:11-69:18); "Senior Ray" (Ray Depo., 87:8-89:15; ROI-00138); t "You know, if you were horse, what would happen to you? You know what we do with old horses. Basically we take you to the glue factory, take you out in an open field and shoot you." (Ray Depo., 232:23-233:11); Bartish was under "marching orders" by Ms. Moorese to "get rid" of four supervisors, all of whom at the time were over the age of 40 with the exception of Ms. Norris, the friend of Ms. Bartish. (ROI-00112); I Can't Wait For The New Hires to Start To Get Some Fresh Young Blood in Here." (ROI-00045).

ARGUMENT

As described below, Complainant has demonstrated that there are triable issues of material fact related to his claims for retaliation and discrimination based on gender, age, and national origin affiliation.

A. RELEVANT STANDARDS

The EEOC's regulations allow an Administrative Law Judge ("ALJ") to issue a decision without a hearing when he or she finds that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). This regulation is patterned after the summary judgment procedure set forth in Rule 56 of the Federal Rules of Civil Procedure. The United Supreme Court holds that summary judgment is appropriate where a court determines that, given the substantive legal and evidentiary standards that apply to the case, there exists no genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255

(1986). In ruling on a motion for summary judgment, a court's function is not to weigh the evidence, but rather to determine whether there are genuine issues for trial. *Id.* at 249. The evidence of the non-moving party must be believed at the summary judgment stage and all justifiable inferences must be drawn in the non-moving party's favor. *Id.* at 255. An issue of fact is “genuine” if the evidence is such that a reasonable fact finder could find in favor of the non-moving party. *Celotex v. Catrett*, 477 U.S. 317, 322-23 (1986); *Oliver v. Digital Equip. Corp.*, 846 F.2d 103, 105 (1st Cir. 1988). A fact is “material” if it has the potential to affect the outcome of the case.

If a case can only be resolved by weighing conflicting evidence, issuing a decision without holding a hearing is not appropriate. In the context of an administrative proceeding, an ALJ may properly consider issuing a decision without holding a hearing only upon a determination that the record has been adequately developed for summary disposition. *See Petty v. Dep't of Def.*, EEOC Appeal No. 01A24206, 2003 EEO PUB LEXIS 3923 (July 11, 2003). Finally, an ALJ should not rule in favor of one party without holding a hearing unless he or she ensures that the party opposing the ruling is given (1) ample notice of the proposal to issue a decision without a hearing, (2) a comprehensive statement of the allegedly undisputed material facts, (3) the opportunity to respond to such a statement, and (4) the chance to engage in discovery before responding, if necessary. According to the Supreme Court, Rule 56 itself precludes summary judgment “where the [party opposing summary judgment] has not had the opportunity to discover information that is essential to his opposition.” *Anderson*, 477 U.S. at 250. In the hearing context, this means that the ALJ must enable the parties to engage in the amount of discovery necessary to properly respond to any motion for a decision without a hearing. *Cf.* 29 C.F.R. § 1614.109(g)(2) (suggesting that an administrative judge could order discovery, if necessary, after receiving an opposition to a motion for a decision without a hearing).

For the reasons discussed below, the ALJ must conclude that this matter presents genuine issues

of material fact requiring a hearing on Complainant's retaliation, hostile work environment, and discrimination claims.

B. TRIABLE ISSUES OF MATERIAL FACT EXIST AS TO RETALIATION AND REPRISAL.

Complainant can establish a *prima facie* case of retaliation by presenting facts that, if unexplained, reasonably give rise to an inference of retaliation. *Shapiro v. Soc. Sec. Admin.*, EEOC Request No. 05960403, 1996 EEOPUB LEXIS 4793 (Dec. 6, 1996) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)). Specifically, in a retaliation/reprisal claim, and in accordance with the burdens set forth in *McDonnell Douglas*, as well as *Hochstadt v. Worcester Foundation for Experimental Biology*, 425 F. Supp. 318, 324 (D. Mass.), *aff'd*, 545 F.2d 222 (1st Cir. 1976), and *Coffman v. Dep't of Veteran Affairs*, EEOC Request No. 05960473, 1997 EEOPUB LEXIS 4199 (Nov. 20, 1997), Complainant may establish a *prima facie* case of retaliation/reprisal by showing that: (1) he engaged in a protected activity; (2) the agency was aware of the protected activity; (3) subsequently, he was subjected to adverse treatment by the agency; and (4) a nexus exists between the protected activity and the adverse treatment. *Whitmire v. Dep't of the Air Force*, EEOC Appeal No. 01A00340, 2000 EEOPUB LEXIS 6185 (Sept. 25, 2000).

Ample evidence supports Mr. Ray's *prima facie* case of retaliation: (1) he engaged in protected activity by informing his supervisor, Ms. Bartish, in response to her question, that he would be a witness for Mr. Gezahegn's and Ms. Jenkins' EEOC claims in mid-August 2013 (Ray Depo., 83:20-84:4); (2) within three weeks after engaging in protected activity, Ms. Bartish gave Mr. Ray an unsatisfactory interim review on September 6, 2013 (*Id.*); (3) in September 2013, Mr. Ray filed contacted the Office of Civil Rights and filed an EEO complaint which is the subject of this proceeding (Ray Depo., 83:6-10); (4) a mediation was scheduled on Mr. Ray's EEO complaint in early December, 2013, with Moore and Bartish to attend (ROI-00241); (5) Mr. Ray received a false Unsatisfactory

Performance Evaluation, which resulted in a denial of his yearly “Within Grade Increase” and therefore interfered with Mr. Ray's ability to take protected leave; and (6) created a hostile work environment in an attempt to force Mr. Ray out of the department.

1. Protected Activities

In mid-August 2013, Ms. Bartish asked whether Mr. Ray would be participating in the EEO process or would be serving as a witness in any EEO case. (Ray Depo., 83:20-84:4;140:1-16). Mr. Ray responded, “Yes, I'm being a witness for some of the specialists and some of the supervisors.” (*Id.*) Mr. Ray overheard the conversation between Mr. Gezahagen and Ms. Bartish, stating that Mr. Ray would be a witness for him in his EEO case. (Ray Depo., 167:7-168:11). Thereafter, Mr. Ray submitted Affidavits in support of EEO complaints by his co-workers: Mike Romano, Amha Gezahegn, Angela Jenkins, and Elizabeth Tekleabib, and testified in EEO proceedings in approximately October and November 2014. (Ray Depo. 14:12-15:9).

2. Adverse Actions

Within weeks of his first protected activity in mid-August 2013, Mr. Ray received an unsuccessful mid-year performance evaluation that was unlike any other he had previously received. First, it contained a listing of 13 additional duties and demands to which no other supervisor was subjected. (Ray Depo., 140:1-16) It contained actual rating numbers, which was also unprecedented (*Id.*). It was also unsuccessful, which Mr. Ray had never experienced in his 15 years with the Agency. (*Id.*).

On December 20, 2013, Within weeks of the scheduled mediation on Mr. Ray's September 2013 EEO complaint to the Office of Civil Rights, Mr. Ray received his first ever unsatisfactory performance evaluation. (Ray Depo., 141:1-7). This resulted in the June 6, 2014 “Within Grade Increase” denial, and as Mr. Ray was about to testify in the EEO complaints of his co-workers (Romano and Teklabib), he was issued a spurious letter of reprimand for using the word “debacle” in

an email (Ray Depo., 141:23-142:3).

In March 2014, Mr. Ray was diagnosed with cancer and throughout Summer 2014 was undergoing treatment, including surgery for a life-threatening condition. (Ray Depo., 142:23-147:6) Ms. Moore, and others peppered Mr. Ray at home during his recovery, repeatedly demanding duplicative acknowledgements from his treating physicians, relentless and duplicative requests, resulting in a threat to terminate his employment, by placing him on AWOL status. (*Id.*) These adverse actions occurred during the period Mr. Ray was designated as a supportive EEO witness for his co-workers Romano and Teklabib. (*Id.*).

The EEOC has found that the anti-retaliation provisions are exceptionally broad and encompasses actions that may not rise to the level of a “term, condition or privilege” of employment. Compliance Manual Section 8, “Retaliation,” No. 915.003 (May 20, 1998), at 8-15 (Retaliation Compliance Manual). *See also Complainant v. Lynch*, 2015 EEOPUB LEXIS 2099, *13, EEOC (IHS) 120130364, EEOC (IHS) 120130364 (E.E.O.C. July 31, 2015) (“Retaliation is any adverse treatment that is based upon a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity.”)

The EEOC's understanding of the purpose of anti-retaliation provisions under Title VII is also consistent with the U.S. Supreme Court's enunciation of the purpose of Title VII's anti-retaliation provision. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006) (“A provision limited to employment-related actions would not deter the many forms that effective retaliation can take. [A] limited construction would fail to fully achieve the antiretaliation provisions 'primary purpose,' namely, 'maintaining unfettered access to statutory remedial mechanisms.’”) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997)). Furthermore, regardless of the degree or quality of harm to the particular complainant, retaliation harms the public interest by deterring others from filing a charge. As observed in another context, civil rights laws do not exist solely for the benefit of aggrieved individuals, but also

for the public good and the national interest. Cf. *McKennon v. Nashville Banner Publ'g. Co.*, 513 U.S. 352, 358 (1995). One commentator has suggested that retaliation or the threat of retaliation, of whatever nature or severity, constitutes an attack on the integrity of the rule of law itself. See *R. George Wright, Retaliation and the Rule of Law in Today's Workplace*, 44 *Creighton L. Rev.* 749, 752, 767-68 (2011). Accordingly, an interpretation of Title VII that permits some forms of retaliation to go unpunished would undermine the effectiveness of the EEO statutes and conflict with the language and purpose of the anti-retaliation provisions.

More significant retaliatory treatment, however, can be challenged regardless of the level of harm. As the Ninth Circuit has stated, the degree of harm suffered by the individual “goes to the issue of damages, not liability.” *Hashimoto v. Dalton*, 118 F.3d 671, 676 (9th Cir. 1997). *Smith v. Secretary of Navy*, 659 F.2d 1113, 1120 (D.C. Cir. 1981) (“the questions of statutory violation and appropriate statutory remedy are conceptually distinct. An illegal act of discrimination--whether based on race or some other factor such as a motive of retaliation -- is a wrong in itself under Title VII, regardless of whether that wrong would warrant an award of [damages]”). The retaliation provisions set no qualifiers on the term “to discriminate,” and therefore prohibit any discrimination that is reasonably likely to deter protected activity. A violation will be found if an employer retaliates against a worker for engaging in protected activity through threats, harassment in or out of the workplace, or any other adverse treatment that is reasonably likely to deter protected activity by that individual or other employees. EEOC Compliance Manual on Retaliation, No. 915.003, at 8-14 through 8-16 (May 20, 1998); see *Marshall v. Holder*, 2009 EEO PUB LEXIS 3158, *11-12, 110 FEOR (LRP) 67, EEOC (IHS) 720080008, 110 FEOR (LRP) 67, EEOC (IHS) 720080008 (E.E.O.C. 2009) (citing *Smith v. Secretary of Navy*, 659 F.2d 1113, 1120 (D.C. Cir. 1981)).

Denial of a within-grade increase, attendant upon performance evaluation is an adverse action in federal sector employment. See, e.g. *Martinsen v. Dept. of Treasury, IRS*, 0120112969 (March 21,

2012), *recons. Den.* 0520120365 (November 15, 2012) (failure to restore four hours of annual leave an adverse action motivated by reprisal). *McMillan v. Dept. of Transp.* 07A40088 (September 28, 2004) *recons. den.*, 05A50171 (December 13, 2004) (denial of Superior Contributor increase held adverse action in reprisal case); *Coffee v. Dept. of Army*, 0120120117 (March 15, 2013) (failure to give level 4 performance rating adverse in retaliation case). Here, Mr. Ray received an unsatisfactory performance evaluation, for the first time in his 15 years with the department.

For examples of cases finding unlawful retaliation based on adverse actions that did not affect the terms or conditions of employment, see *Hashimoto*, 118 F.3d at 675-76 (retaliatory job reference violated Title VII even though it did not cause failure to hire); *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 986 (10th Cir. 1996) (instigating criminal theft and forgery charges against former employee who filed EEOC charge found retaliatory); *Passer*, 935 F.2d at 331 (canceling symposium in honor of retired employee who filed ADEA charge found retaliatory).

The Commission has also held that comments that, on their face, discourage an employee from participating in the EEO process are evidence of *per se* retaliation. See *Binseel v. Dep't of the Army*, EEOC Appeal No. 01964879, 1998 EEOPUB LEXIS 5419 (October 8, 1998) (complainant told by supervisor that filing an EEO complaint was not the way to receive a promotion). The EEOC has a policy of considering reprisal claims with a broad view of coverage. See *Carroll v. Dep't of the Army*, EEOC Request No. 05970939 (April 4, 2000). An employee can challenge actions that are not an “ultimate employment action” or that do not materially affect the terms and conditions of employment. *White*, 548 U.S. at 68. For claims of reprisal discrimination, a “materially adverse” action is one that would deter a reasonable person from opposing discrimination or participating in the EEO process. *Id.*

Commencing in September 2013, Mr. Ray filed his own EEO complaint, and his immediate supervisor, Ms. Bartish and Ms. Moore were aware of the filing of the EEO complaint because they were scheduled for an EEO mediation that did not resolve the charges. (ROI-00241).

C. TRIABLE ISSUES OF MATERIAL FACT EXIST AS TO AGE AND GENDER DISCRIMINATION.

Mr. Ray, at the time of his deposition was 57 years of age. (Ray Depo., 67:22-23), qualifying him for protection under the Age Discrimination in Employment Act (“ADEA”). The ADEA was made applicable to the Federal government by 29 U.S.C. § 633a, which provides that “[a]ll personnel actions affecting employees or applicants for employment who are at least 40 years of age . . . shall be made free from any discrimination based on age.” (*Id.*) A Federal employee may prove age discrimination by establishing that age was a factor in the challenged personnel action, even if it was not the “but-for” cause of that action. *Wingate v. U.S. Postal Service*, 118 M.S.P.R. 566, P 7 (2012).

An individual may also establish discrimination by “direct evidence,” which may be any statement made by an employer that (1) reflects directly the alleged discriminatory attitude, and (2) bears directly on the contested employment decision. *Arredondo v. U.S. Postal Service*, 85 M.S.P.R. 113, P 13 (2000). In this case, Complainant will prove age discrimination by presenting direct evidence.

There is ample support in the record that Ms. Moore and Ms. Bartish made numerous, repeated age-related comments in the Passport Office to others, and in particular directed to Mr. Ray.

a. Comments Regarding Retirement

Ms. Bartish and Ms. Moore evidenced a direct discriminatory animus towards those over the age of 40 in the office by asking people, including Mr. Ray, when they would be retiring. (Ray Depo., 71:12-24). This included, “I’ll buy you strawberries when you retire” (Ray Depo., 71:17-18), when Mr. Ray had never given any indication that we would be retiring and was nearly a decade away from retirement age. This included “I’ll write your resume for you” (Ray Depo., 71:18-24), when Mr. Ray

had never indicated any interest in moving his family away from the Bay Area for any reason.

b. “We need to get rid of the old people.”

Mr. Ray and Ms. Jenkins testified that Ms. Moore, in a meeting in 2012 stated “We need to get rid of the old people.” (Ray Depo., 72:2-19). This occurred throughout 2013, and Ms. Moore continued to mumble this as a mantra throughout that time period. (*Id.*) When Mr. Ray saw that the older workers were being forced out during this time period, he understood that Ms. Moore was acting upon her clearly-stated bias against the “old people” in the office. (Ray Depo., 72:12-16). It is difficult to imagine a more clear or direct articulation of ageist animus than this. As such, summary judgment is wholly inappropriate, especially given the fact that the Agency has still refused to present Ms. Moore for deposition in this matter, despite receipt of proper notices and efforts to meet and confer.

c. “You are too old to be driving a car like that.”

Ms. Moore spent an entire staff meeting talking about Mr. Ray's car, publicly humiliating him in a staff meeting. (Ray Depo., 69:25-70:8). This event included holding Mr. Ray up to ridicule, telling him, “You are too old to be driving a car like that,” and stating that the office should take pity on Mr. Ray and buy him a new car. (*Id.*)

d. “You are the father figure.”

While the term “father figure” can be used as a compliment, Ms. Moore used the term in a perjorative fashion when she first came to the San Francisco Passport office in 2008. As part of a trip to a training in Colorado, Ms. Moore made the comment that she could not believe that Mr. Ray was the father figure of the group. (Ray Depo., 68:11-69:18). This comment set the tone for the coming years when the pattern of hiring exclusively substantially younger workers while forcing out the older workers became the norm in the San Francisco passport office.

e. Referring to Mr. Ray as Señor or Senior Ray.

Mr. Ray testified that Bartish and her young protege, Ms. Norris, would call out and refer to Mr.

Ray as “Senior Ray” or “Señor Ray” when he would pass by and then burst into laughter. (Ray Depo., 87:8-89:15). This commenced in the summer of 2013 and continued thereafter. (*Id.*). This is corroborated by the Gezahegn affidavit. (ROI-00138)

f. Old Horse Comments.

On more than one occasion, Ms. Moore made statements to Mr. Ray, when he was limping with plantar fasciitis, that “You know, if you were horse, what would happen to you? You know what we do with old horses. Basically we take you to the glue factory, take you out in an open field and shoot you.” (Ray Depo., 232:23-233:11).

g. Marching Orders to Get Rid of Four Supervisors

The Blystad affidavit is uncontroverted, that Ms. Bartish was under “marching orders” by Ms. Moore to “get rid” of four supervisors, all of whom at the time were over the age of 40 with the exception of Ms. Norris, the friend of Ms. Bartish. (ROI-00112).

h. “I Can't Wait For The New Hires to Start To Get Some Fresh Young Blood in Here.”

In August 2013, Ms. Moore told the entire staff at a meeting that she could not wait for the new hires to start to get some “fresh young blood in here.” (ROI-00045)

Direct evidence of discriminatory motive may be any written or verbal policy or statement made by a respondent or respondent official that on its face demonstrates a bias against a protected group and is linked to the complained of adverse action. For example, in *Grant v. Hazelett Strip Casting Corp.*, 880 F.2d 1564, 1569, 51 EPD Par. 39,245 (2d Cir. 1989), the court found direct evidence of age discrimination where the company president said in a memo that he wanted a “young man ... between 30 and 40 years old,” and verbally that “I want a young man and that's what I want and that's what I'm going to have.” Evidence that an adverse action was taken on the basis of stereotyped attitudes about the charging party's class would also constitute direct evidence of

discrimination. In *Grant*, 880 F.2d at 1569, the court found direct evidence of age discrimination in that “the company's asserted justifications for preferring a younger worker abound with age stereotypes, such as the belief that older workers are less productive or would not want [the company's president] telling them what to do.” For a further discussion of types of direct evidence, see Volume II of the Compliance Manual, 604.3(c).

The case of *Geraldine G. v. Brennan*, 2016 EEOPUB LEXIS 1526, *11-12, EEOC (IHS) 720140039, EEOC (IHS) 720140039 (E.E.O.C. June 3, 2016) is instructive. In *Geraldine*, the EEOC upheld the ALJ's finding that the statements made by the IIC in the interview process, as attributed to him by Complainant and by App-1, constituted direct evidence of age discrimination. The ALJ found that Complainant testified that the IIC said to her in the interview, “I don't think you are supposed to ask this, but how many years of eligibility do you have left before you retire?” The EEOC found that given that the Postal Inspection Service, as a law enforcement agency, has a mandatory retirement age of 57, a question like this is inextricably linked to an employee's age.

The test set forth in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) is inapplicable where complainant presents direct evidence of discrimination. *TWA v. Thurston*, 469 U.S. 111, 121 (1985); see also *Terbovitz v. Fiscal Court of Adair County, Ky.*, 825 F.2d 111 (6th Cir. 1987) (“[direct evidence of discrimination, if credited by the fact finder, removes the case from McDonnell Douglas because the plaintiff no longer needs the inference of discrimination that arises from the prima facie case [using indirect evidence]”); *Siao v. Department of Justice*, EEOC Request No 05950921 (September 12, 1997).

2. Evidence of Disparate Treatment Based On Age and Gender

a. September 2013 Interim Performance Review

Mr. Ray testified that this September 2013 interim performance evaluation was unlike any that he had ever received previously, and it contained a listing of 13 demands that former Manager Bartish

imposed upon him in order to have achieve a successful annual performance review. (Ray Depo., 47:21-49:1; 140:1-16). Female supervisors had no such additional duties imposed upon them (Jenkins Aff., ROI-00134).

b. The December 2013 Annual Performance Review.

One of Ms. Bartish's 13 demands in the September 2013 interim review was for Mr. Ray to complete evaluations of his subordinates in no more than two drafts. (*Id.*) Before she ceased to supervise Mr. Ray, Ms. Bartish issued an unsuccessful performance evaluation to Mr. Ray and stated that Mr. Ray had not improved on the “no more than two drafts” demand. (*See* ROI-00260). However, Mr. Ray did complete all his subordinates' evaluations *in one draft with no revisions* as witnessed by his replacement manager, Mr. Silva. (Ray Depo., 49:2-19). Ms. Bartish had rated Mr. Ray “unsatisfactory” on his writing element before the evaluations were even due. (*Id.*) No other supervisor was subjected to this additional make-work contained in Ms. Bartish's 13 demands. (Ray Depo., 50:23-51:3).

Mr. Ray's then-comparator, Ms. Norris, received an Outstanding rating despite the fact that she did not perform one of the essential job functions of a supervisor: supervisory time and attendance sheets, and had not for the two years prior. Instead, she was promoted over the more qualified Mr. Ray and Ms. Jenkins. (Ray Depo., 233:15-234:13).

Mr. Ray had 15 years of outstanding and excellent performance reviews before his first-ever unsatisfactory performance evaluation. (Ray Depo., 78:12-17). A long period of positive evaluations followed by sudden unsatisfactory evaluations when a new manager arrives is circumstantial evidence that the proffered legitimate business reason is pretext. See *Ryan v. Shawnee Mission Unified Sch. Dist. No. 512*, 437 F. Supp. 2d 1233, 1259 (D. Kan. 2006); *McDonald v. Pierce Cty. Fire Prot. Dist.*

c. Unprecedented Use of Performance Improvement Plans for Supervisors

Prior to the Moorese/Bartish regime, no supervisor in the history of the Passport Division of the State Department had been placed on a Performance Improvement Plan. (Ray Depo., 75:20-22; ROI-00327). Yet in 2013, the Moorese/Bartish regime sought to put three supervisors on PIPs, all over the age of 40: Ray, Jenkins, and Gezahegn. Although not ultimately achieved, for still unexplained reasons, the Agency pulled back from this mass use of an unprecedented disciplinary tool in the San Francisco Passport Office. (*Id.*).

d. Denial of Within-Grade Increase

As set forth above, by failing to correct the false statements in the unsatisfactory performance evaluation, Bartish, Nguyen, and Moorese, allowed it to stand, resulting in Mr. Ray's first-ever denial of a "Within Grade Increase," causing him both pecuniary loss of the increase, but also a negative impact upon his ability to function and progress within the State Department.

e. Disqualification for Promotion

One of the deleterious effects of the Mr. Ray's first-ever unsatisfactory performance evaluation is its impact upon his career ladder, and his ability to promote. (Ray Depo., 78:11-23). Though Mr. Ray has applied at least three times since the unfounded, discriminatory, and retaliatory unsatisfactory performance evaluation, he has been rejected from promotions for which he was the most qualified. Further, the substantially younger Elizabeth Norris was promoted to fill the Adjudication Manager position vacancy left by Ms. Bartish, even though she was substantially less qualified than Mr. Ray or Ms. Jenkins, whom both had been set for PIP and therefore had been disqualified from promotion. (Ray Depo., 112:5-113:7). Mr. Ray has subsequently denied promotion to Customer Service Manager and Assistant Director positions based upon the unremedied false unsatisfactory performance

evaluation. (Ray Depo., 119:6-125:5)

D. TRIABLE ISSUES OF MATERIAL FACT EXIST AS TO MR. RAY'S HOSTILE WORK ENVIRONMENT CLAIM.

Harassment of an employee that would not occur but for the employee's race, color, sex, national origin, age, disability or religion is unlawful, if it is sufficiently patterned or pervasive. *McKinney v. Dole*, 765 F.2d 1129, 1138, (D.C. Cir. 1985).

In order to prevail on a claim of age-based harassment, Complainant must show that: (a) he was subjected to unwelcome verbal or physical conduct; (b) the unwelcome verbal or physical conduct was related to his age; (c) the harassment had the purpose or effect of unreasonably interfering with her work performance and/or creating an intimidating, hostile, or offensive work environment; and (d) some basis exists to impute liability to the employer, i.e., supervisory employees knew or should have known of the conduct but failed to take corrective action. *See Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993); *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64-65 (1986); 29 C.F.R. § 1604.11(a)(d) (1995); *Wibstad v. United States Postal Service*, EEOC Appeal No. 01972699 (August 14, 1998); *McCleod v. Social Security Administration*, EEOC Appeal No. 01963810 (August 5, 1999).

1. Unwelcome Verbal Conduct

There is ample evidence that former Manager Tiffany Bartish yelled and screamed profanities in the workplace, almost always directed at the older workers: Jeff Doyle (Ray Depo., 19:13-14) (“I can't take any more of Manager Bartish, her relentless jabbing and micromanaging.”); Mike Malari (Ray Depo., 16:21-17:6) (“I was treated like a wild animal by Manager Bartish and Director Moore.”); (Gezahegn Aff. ROI-00137) (“I ... heard former Manager Tiffany Bartish swearing out loud as well as continually mumbling foul words under her breath [sic] on a habitual basis anytime I or Brian Ray approached her.”)

There is evidence that former Manager Bartish stated she did not like the people whom she

supervised, who previously were all over the age of 40 with the exception of Ms. Norris. (Ray Depo., 23:23-24:2) (“When she was first removed, I asked her, I said 'I thought you like your job.' She said 'I do, but I don't like the people.'”)

Ms. Bartish's demand that Mr. Ray state where he was every minute of the day on a sign board outside his office was demeaning and was not required of younger or female workers. (Ray Depo., 41:11-43:25).

Ms. Bartish repeatedly used profane language in the workplace, often directed at Mr. Ray (Ray Depo., 96:6-98:15) (“dickhead,” “asshole”); (Ray Depo., 84:16-85:1) (“you stupid fucking Mexican”). Mr. Ray was threatened to be fired twice by Ms. Moorse, also unprecedented before the Moorse/Bartish regime. (Ray Depo., 105:4-106:25; 107:14-108:25).

Female supervisors were not required to have a sign on their door, stating where they were every minute of the day. (ROI-00135). This was humiliating for Mr. Ray, and was intended to single him out for ridicule. Ms. Bartish used a similar sign but only for stating when she was on vacation, not when she was using the restroom.

A hostile work environment claim is an amalgamation of incidents that “collectively constitute one unlawful employment practice.” *Morgan*, 536 U.S. at 117 (quotations omitted). Unlike discrete acts, the incidents that comprise a hostile work environment claim “cannot be said to occur on any particular day” and by their “very nature, involve repeated conduct.” *Id.* at 115. Because a hostile work environment claim is comprised of various incidents, the entire claim is actionable if at least one incident occurred within the filing period. *Id.* at 117; *see Hill v. Dept. of the Army*. EEOC Appeal No. 01A60228, 2006 EEOPUB LEXIS 1193 (March 21, 2006)(noting that in the federal sector EEO process the Complainant must raise at least one incident of the claim to an EEO Counselor within 45 days of its occurrence). A discrete act may be part of a hostile work environment claim. *See EEOC Compliance Manual*, § 2-IV(C)(1)(B) (May 12, 2000).

CONCLUSION

As the foregoing demonstrates, this matter is not one that can be resolved summarily. Multiple genuine issues of material fact are present in each claim for Retaliation, Discrimination and Hostile Work Environment. Classic instances of disputed fact such as Ms. Bartish claiming she never asked Mr. Ray whether he would be a witness in the EEO cases that were being filed in 2013, and Mr. Ray's unequivocal testimony in that regard cannot be made without assessing the credibility of the witnesses.

Respectfully submitted this 10th day of February, 2017

SMITH PATTEN

/s/ Dow W. Patten

DOW W. PATTEN

Attorney for Complainant

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CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing *COMPLAINANT BRIAN RAY'S OPPOSITION TO AGENCY'S MOTION FOR SUMMARY JUDGMENT* to be served on February 10, 2016, as follows:

Via Electronic Mail:

AGENCY'S REPRESENTATIVE

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EXHIBIT “A”

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U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
SAN FRANCISCO DISTRICT OFFICE

BRIAN RAY,

Complainant,

v.

EEOC No. 570-2015-00340X

Agency No. DOS-F-0273-13

JOHN F. KERRY, Secretary,

AJ: David T. Kelley

Department of State,

Agency.

_____ /

DEPOSITION OF BRIAN RAY

TUESDAY, DECEMBER 6, 2016

SAN FRANCISCO, CALIFORNIA

DEBORAH MAYER, CSR 9654, RPR CRR CRP CLR

ALDERSON COURT REPORTING

1 BE IT REMEMBERED, pursuant to Notice, that on
2 Tuesday, December 6, 2016, 9:06 a.m. - 5:42 p.m., at
3 San Francisco Passport Agency, 450 Golden Gate Avenue,
4 San Francisco, California, before me, Deborah Mayer, a
5 Certified Shorthand Reporter for the State of
6 California, there personally appeared:

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BRIAN RAY,

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10 called as a witness by the Agency, who, being by me
11 first duly sworn/affirmed, was thereupon examined and
12 testified as hereinafter set forth.

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1 A P P E A R A N C E S

2 FOR THE COMPLAINANT:

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10 FOR THE AGENCY:

11 U.S. DEPARTMENT OF STATE

12 BY: JULIE P. FALIS, ESQ.

13 BY: CARRIELYN GUYMON, ESQ.

14 Office of the Legal Advisor, L/EMP

15 2201 C Street N.W., Room 5425

16 Washington, DC 20520

17 (202) 679-9297

18 falisjb@state.gov

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21

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1 please.

2 (Perusing documents.)

3 BY MS. FALIS:

4 Q. Do you recognize this document?

5 A. Yes, this is the reason I'm here.

6 Q. And what is it?

7 A. This is the date and time and place where I'll
8 give a deposition of my own case.

9 Q. And we talked about, earlier, that you do not
10 believe that you had provided a deposition before; have
11 you ever provided any testimony under oath?

12 A. No.

13 Q. Have you ever provided an affidavit on
14 someone else's behalf?

15 A. Yes.

16 Q. And who would that be, or who would they be, to
17 the extent there's more than one?

18 A. Since I started participating in the EEO
19 process, I gave an affidavit for Mike Romano --

20 MR. PATTEN: Please spell that for the court
21 reporter.

22 THE WITNESS: Romano, R-O-M-A-N-O.

23 A. -- for former Supervisor Amha Gezahegn, former
24 supervisor Angela Jenkins. And I believe those were the
25 three that I provided affidavits for, and for their EEO

1 cases some date in the future, or Romano's has already
2 been settled. Oh, also for Elizabeth Tekleabib.

3 (Reporter clarification.)

4 THE WITNESS: T-E-K-L-E-A-B-I-B.

5 BY MS. FALIS:

6 Q. Were you finished with the people that you
7 listed?

8 A. And I also testified for both Romano and
9 Elizabeth Tekleabib in like October, November, of 2014.

10 Q. And other than these affidavits, as part of the
11 EEO process for Mr. Romano, Mr. Gezahegn, Ms. Jenkins,
12 Ms. Tekleabib, was there anybody else for whom you
13 provided an affidavit that was not part of an EEO
14 process?

15 A. No other written affidavits. There might have
16 been verbal conversations with the other employees that
17 had EEO cases or union grievances, or --

18 Q. And do you recall with whom you had a verbal
19 conversation such as the one you stated?

20 A. Yes, former employee Larry Malari (phonetic),
21 and former employee Jeff Doyle. I believe that's it.

22 Q. And can you recall the general substance of
23 your conversation with Mr. Malari and when?

24 A. It was in 2014, probably mid-year, summer of
25 2014.

1 Q. And do you recall the substance, the general
2 substance of the conversation?

3 A. Yes. He said he was severely discriminated
4 against.

5 Q. And did he call you or did you call him?

6 A. I can't remember. Might have been an e-mail
7 greeting or something.

8 Q. Was he -- was Mr. Malari a current employee at
9 the time --

10 A. No.

11 Q. -- that you had this conversation?

12 A. No. He had been removed from his position.

13 Q. And do you recall why he said, or why he
14 believed he was severely discriminated against?

15 A. Because he had worked for the Agency for 15
16 years, and he was -- or the Navy for 20, so he had 35
17 years of federal service, and he was forced -- either
18 forced to resign or -- I'm not sure what the exact --
19 what happened, but he was one of the casualties of 2013,
20 as were five other people with families.

21 Q. So my question was, why, to the extent that you
22 know, why did Mr. Malari believe he was severely
23 discriminated against, and you told me that he had
24 served for a period of time with the Agency and a period
25 of time with the Navy; is there anything else you recall

1 about what he said about why he was severely
2 discriminated against?

3 A. Yes.

4 Q. What was that?

5 A. He said "I was treated like a wild animal by
6 Manager Bartish and Director Moorese."

7 Q. Did he explain further what that meant?

8 A. No, but another employee told me what had
9 happened.

10 Q. And who was that employee?

11 A. Ronnie Jones.

12 Q. Is that a man or woman?

13 A. A woman.

14 Q. Who is Ms. Jones?

15 A. She's a Passport specialist that's been here
16 about 35 years -- over 30 years.

17 Q. And what did Ms. Jones tell you?

18 A. She said that she remembers this as if it was
19 yesterday, that Manager Bartish came out to the public
20 counter and she said I keep to myself. I don't get
21 involved in anybody else's business. This was one time
22 I'd heard the rumors about Tiffany, but this one time I
23 actually witnessed it. And she said that Tiffany came
24 up to the counter and screamed and yelled at Malari in
25 front of all the coworkers and in front of the public.

1 Assistant Director Qui tried to tell everyone
2 to delete it right away, cover up, like this didn't
3 really happen. I was out, so I didn't get -- I didn't
4 read it. I was out in 2014, most of 2014, recovering
5 from a major surgery.

6 Q. So just so I understand, is it your testimony
7 that the alleged verbal assault and daily harassment by
8 Ms. Bartish towards Mr. Malari, and the incident you
9 mentioned regarding Mr. Malari's Report of Investigation
10 or complaint, do you know if those are the reasons that
11 he believed, to the extent you know, that he felt like
12 he was treated like a "wild animal"?

13 A. It was the same story kind of from Jeff Doyle,
14 that he said, "I can't take any more of Manager Bartish,
15 her relentless jabbing and micromanaging."

16 Q. Is it fair to say that you may not know why
17 Mr. Malari felt he was treated like a "wild animal," why
18 he used those words in particular?

19 A. All his -- yes. All his exact reasons I might
20 not know. But I -- I did see Manager Bartish in the
21 workplace often using foul words, explicatives to get
22 her point across. It's no secret that she used foul
23 language in the workplace quite often. There's many
24 witnesses to that.

25 Q. Would you characterize how you believe you were

1 Q. And I should have asked before that: Do you
2 know what position she took after the Adjudication
3 Manager position?

4 A. Yes.

5 Q. What position was that?

6 A. It was a coordinator position where she would
7 no longer supervise anybody.

8 Q. And do you know the job duties that she was
9 doing?

10 A. Yes, a little bit. She was supposed to be
11 helping out with career services as a part of the
12 customer service staff.

13 Q. Do you know who she reported to?

14 A. I believe Barry Conway.

15 Q. And who is Barry Conway?

16 A. He's the Director of the Fraud Prevention
17 Managers.

18 Q. And where does he work?

19 A. In Washington, DC.

20 Q. Is that -- when you referred to headquarters"
21 is that Washington, DC?

22 A. Yes.

23 Q. Are you aware -- or what is your belief as to
24 why Tiffany Bartish left the State Department?

25 A. When she was first removed, I asked her, I said

1 "I thought you like your job." She said "I do, but I
2 don't like the people."

3 Q. Let me make sure I understand. When you
4 said -- what time period are we -- are you talking about
5 when she left?

6 A. That was December -- December 2013, when I
7 first asked her, you know, I thought you liked this
8 position. She's like, I do, but I don't like the people
9 that work here.

10 Q. Okay, so just to back up. So now you're
11 testifying that either -- sounds like before Ms. Bartish
12 left her position as Adjudication Manager, once it was
13 announced that she was moving to this new position, you
14 had a conversation with her about it?

15 A. Yeah.

16 Q. Did she approach you, or did you approach her,
17 how did that conversation come about?

18 A. She might have walked into my office as she was
19 commonly known to do, to look at what I'm working on, on
20 my computer, or -- and then sometimes just stand there
21 for periods of time.

22 Q. And what do you recall about this specific
23 conversation?

24 A. Just that I asked her, I thought you liked the
25 position. And she said "I do, but I don't like the

1 there was a problem, and to also show them copies that
2 I'd corrected the problem.

3 Q. And this was through e-mail?

4 A. Through e-mail, yeah. This is an e-mail.

5 Q. Is the e-mail to which you're referring, the
6 one that led to your letter of reprimand?

7 A. Yes.

8 Q. And do you recall what the letter of reprimand
9 was for?

10 MR. PATTEN: Objection, the document speaks for
11 itself. Testify as to your understanding.

12 MS. FALIS: You can answer.

13 THE WITNESS: Okay.

14 A. It was Geoffrey Matranga who wrote -- it was
15 for unprofessional behavior and creating a tirade
16 throughout the office. Sending an e-mail is not a
17 tirade.

18 BY MS. FALIS:

19 Q. Do you believe that the e-mail that you sent
20 was professional?

21 A. She was -- I'll answer that. There was no bad
22 language in it. It seemed to be that they were
23 splitting hairs over semantics, because all I was doing
24 was trying to show that there was a problem, and I
25 corrected it. But that's -- that's not why I believe I

1 got that letter of reprimand.

2 Q. But do you believe it was a professional
3 e-mail? Yes or no.

4 A. No, not -- not my best. But she also was no
5 longer my boss any more, so --

6 Q. Does it make a difference whether an e-mail is
7 professional based on whether somebody's your supervisor
8 or not?

9 MR. PATTEN: Vague and ambiguous. Go ahead.

10 A. I would -- you would show more deference to a
11 person if they're your boss than you would if they're
12 your subordinate. In other words, you could command
13 your subordinate to go do something, but you wouldn't
14 command your boss to go do the same thing. It's a chain
15 of command ranking. If the person holds a higher rank,
16 you give them that respect and dignity at least of that
17 position.

18 But could I have chosen -- they didn't like the
19 word "debacle." I said she created this "debacle." To
20 me, using that word isn't considered a tirade. There's
21 a difference between creating a tirade and disrupting
22 the whole office, and production is going down because
23 of it, and if it's still left it needed to be fixed, but
24 that's not where I left it. I pointed out the problem
25 and I fixed it.

1 template, then there's just where I'm going to make a
2 wish list, and I'm going to act on my own accord without
3 anybody's agreement, and I'm going to place all these
4 extra demands on a person that later, I thought --
5 originally, I thought well, Tiffany is probably doing
6 this to everyone. I didn't realize I was getting
7 disparate treatment. I thought she was asking all the
8 same demands of all supervisors. I had no idea until I
9 looked around. And then all I can tell is what I saw
10 and what I heard.

11 And like the signboard, for instance, I had to
12 buy a signboard at my own expense, no big deal. But I
13 had to detail my whereabouts for every minute of the
14 day, including assignments that were already scheduled,
15 like I'm a counter manager, I'm the communications
16 manager, I'm the desk manager.

17 Or if I'm in the bathroom, I had to say "I'm in
18 the boy's room." And not only that, but she even
19 said -- she put parameters on my --

20 Q. When you say "she," who are you referring to?

21 A. Oh, good point. Tiffany Bartish.

22 Q. Okay.

23 A. She did these extra demands in my interim
24 review. One of them was this -- I mean that wasn't
25 even -- this is just like icing on the cake, this

1 signboard. I'm the only one that had to have a
2 signboard, and detail my whereabouts for every minute of
3 the day, including the bathroom, when I went to lunch,
4 what she set parameters on. The other supervisors could
5 take lunch whenever they want.

6 Breaks? What's that? I wasn't allowed to take
7 breaks. Now, it's not that way. I can take a break if
8 I want. But then, it was like, she said in a meeting to
9 the supervisors, "Supervisors are not allowed to take
10 breaks." And Susan Moorse has agreed with that. So
11 that pretty much became a policy until -- and I've never
12 taken a break since.

13 Q. Do you recall the conversation when you say
14 that Tiffany Bartish instructed you to get -- when you
15 say a "signboard," is that a white board? Is that the
16 same thing?

17 A. An erasable board where I detail my whereabouts
18 for every minute of the day.

19 Q. And do you recall the conversation where she,
20 as you say, instructed you to get a signboard?

21 A. Yeah, she -- I remember she told me that I
22 needed to do this. It wasn't a recommendation, it was
23 basically I was ordered to do it.

24 Q. And do you recall what her exact words were,
25 basically?

1 A. "You need to get a signboard and write where
2 you're at, and also write when you take lunch, like
3 11:45 to 12:45." So I'd have to actually put the
4 parameters that I'm actually going to be at lunch on
5 that signboard. Then if I erase it, now I'm in
6 training, I'd have to write "training" and approximately
7 how long I'm be in that training.

8 Q. Do you recall the reason that she gave you for
9 why she, in your words, instructed you to get a
10 signboard?

11 A. She said something like I can never be -- she
12 made some accusation like I "can never be found," or
13 having one of the highest leave balances in the office
14 at the time. That's simply not true. I can always be
15 found. I'm the guy that never calls in sick until I had
16 this major operation. In fact, I still never call in
17 sick. If I'm out, it's because it's scheduled time to
18 be out.

19 And wouldn't you, if you were looking for
20 somebody in your house, say okay, maybe they're
21 upstairs, maybe they're downstairs, let me go check the
22 kitchen. She would just automatically say, oh, I don't
23 know where he is, I believe without even looking for me.
24 She just put that accusation out there, and that's why I
25 was made to have a signboard.

1 needed to report that you were going to the restroom?

2 A. I don't believe -- I don't believe so. It
3 just -- it just seemed like when I would put that, then
4 there was no more problems. There was no more
5 questions. But if I didn't put something, then it would
6 be like, "Where were you?" And I was like well, I was
7 here. "Well, where?" And that's the kind of
8 micromanagement and extra scrutiny I was getting that no
9 other employee was getting.

10 Q. You said that you stopped using the signboard
11 after Ms. Bartish left her position as Adjudication
12 Manager; who became, or who was your Adjudication
13 Manager in January of 2014?

14 A. Mike Silva, a person that had worked here for
15 47 years, had been Assistant Director and mostly
16 Customer Service Manager for the vast majority of those
17 years.

18 Q. He became the acting Adjudication Manager?

19 A. Um hum.

20 Q. Go ahead.

21 A. One of the conditions of my 9-6-13 interim
22 review that Tiffany gave me, one of the conditions was
23 that I would write performance drafts, no more than two
24 performance drafts, to be successful by the end of the
25 year. So that's a stipulation. That's one of those 13

1 demands, that I would write performance reviews with no
2 more than two drafts. And if I do it in no more than
3 two drafts, to be successful by the end of the year,
4 because it's a -- it's basically an attack on my writing
5 competency. So that's in the interim review, the 9-6
6 interim review. That's one of the points she made.

7 Q. I'm going to show you -- I'm not going to
8 introduce it into evidence, a document that's labeled
9 ROI00189. If you could take a look at this, it says on
10 the top: "Additional duty list." Is this the list to
11 which you're referring when you testified that that
12 Ms. Bartish created a, quote, "wish list"?

13 (Perusing documents.)

14 A. This is -- this is the list, yes, but this
15 isn't all-encompassing.

16 Q. What is this document? Do you recognize it?

17 A. Um hum. I took some things that had like
18 specific times right out of the 9-6-13 interim
19 performance review, that I'd have to do these things by
20 certain dates. So I took -- but this isn't everything.
21 This isn't everything. In my ROI, I argue from A to Z
22 about everything I disagree with in that interim review.
23 This is just -- this is just a quick list of things that
24 I have to do. But this isn't everything. One of the
25 demands in that review was "write a performance review

1 with no more than two drafts."

2 Now, she left 12-20, and she rated me
3 unsuccessful in that element, that writing element. But
4 it was sight-unseen; she'd never seen my reviews or
5 drafts because usually we wait for the whole performance
6 year to end. Then in January or February, that's when
7 we'd write those drafts. Well, since Mike Silva was
8 the acting AM at that time, he reviewed my performance
9 plans, and not one revision was necessary on not one
10 team member, and they passed.

11 But that's how I know Tiffany didn't see them,
12 because I hadn't written them yet by the time she gave
13 me the unsuccessful in that element, my writing element.
14 She hadn't even seen them. Sight-unseen. She hadn't
15 seen them. But Mike Silva passed them through with zero
16 revisions. I didn't have to rewrite one thing. I
17 didn't have to rewrite stuff before Tiffany got here or
18 after Tiffany got here. This all started when Tiffany
19 came on board, this massive revision stuff.

20 Q. Let me make sure I understand. Did she ask you
21 to prepare these drafts in advance of her leaving?

22 A. No. No. Because we usually don't have time to
23 prepare them until after the next year starts, and
24 they're not due until the end of February, so I have two
25 more months to prepare. So she didn't see them. She

1 didn't see them, so how can she rate me unsuccessful,
2 make it a condition of the 9-6, she's out 12-20, but yet
3 these aren't done until February, and Mike Silva passes
4 them without any revisions.

5 Q. So your understanding is she rated you
6 unsuccessful with regard to your writing due to the
7 writing of these two specific reviews which you had not
8 even done?

9 A. Right. Right.

10 Q. Okay. Can you tell me why you created this
11 list, this separate document.

12 MR. PATTEN: For reference, counsel is pointing
13 to ROI00189. Go ahead.

14 A. I said oh, gosh, if I'm going to be successful,
15 per her front page, to get us across the finish line,
16 she basically said if you do these things, you'll be
17 successful. So I said oh, I better do these things
18 then, although these aren't part of the standard
19 performance plan. These are just extra stuff that
20 Tiffany wanted. She wanted to make life difficult for
21 me, add more make-up work. So she did. I had to do all
22 these extra duties.

23 Then when I started asking the other
24 supervisors, they're like what in the world are you
25 doing? We're not doing those things. I just

1 figured some people might be the same for one or two,
2 but not all these. They're not all exactly the same.
3 We all have different issues with Tiffany.

4 So this was -- this was just extra burden,
5 extra work, to satisfy -- I was trying to make sure I
6 was successful by the end of the year, and I thought if
7 I did -- which I did. I performed as I always do. I
8 was training a new GS7 specialist who got an exceeds
9 expectations. I was also training a new supervisor,
10 Kirkland Kirk (phonetic), at the same time as taking on
11 all this additional, if you want to call it "wish list,"
12 and I did, I did everything.

13 Q. Where is -- Angela Jenkins testified something
14 to the effect of, you "showed her a list."

15 A. A handwritten list, yes, that's correct,
16 because I was like -- I was like, do you have to do all
17 these things? Are you made to do all these things that
18 I'm doing? And she said good lord, no. And I was like,
19 why am I doing all these things?

20 Then I asked Kirkland Kirk, are you doing all
21 these extra things by certain deadlines? And he said
22 no. They shook their heads. No, we're not doing -- he
23 was a brand-new supervisor.

24 Then I asked other supervisors, and they were
25 like no, we were wondering why you're -- and I was like

1 Q. And how about your age; in your complaint you
2 allege that you were discriminated against based on your
3 age. Do you believe Mr. Nguyen discriminated against
4 you based on your age?

5 A. Yes.

6 Q. And why -- what is your basis for that?

7 A. He's just going along with the former regime's
8 agenda. He's just saluting wisely, backing up higher
9 management officials.

10 Q. And you believe he was doing that based on your
11 age?

12 A. Sure. Age, and and retaliation.

13 Q. And other than Qui Nguyen, is there anybody
14 else who you believe discriminated against you based on
15 your age?

16 A. Yes.

17 Q. Who would that be?

18 A. Susan Moorse. And Manager Bartish.

19 Q. And why do you believe that Susan Moorse
20 discriminated against you based on your age?

21 A. The comments I heard.

22 Q. I should have asked, how old are you?

23 A. 57.

24 Q. And what year were you born? I'm not good with
25 the math.

1 A. 1960.

2 Q. Okay, thank you. Okay. So you allege that
3 Susan Moore made comments; is there any other basis
4 that you believe -- strike that, that was a very poor
5 question.

6 Other than alleged comments, are there other
7 bases that you believe Susan Moore discriminated
8 against you based on your age?

9 MR. PATTEN: Objection, the question is
10 misleading. It's not an alleged comment. Go ahead.

11 A. Okay. Yeah, it's actual -- actual comments. I
12 go with age, both what I saw and what I heard. And I
13 can do each one separately, what I heard first.

14 BY MS. FALIS:

15 Q. Okay.

16 A. What I heard first was comments -- I can give
17 you the exact comments and who said them.

18 Q. That would be helpful, thank you.

19 A. Okay, so we'll start with Ms. Moore. I was
20 going to a training in Colorado and gathered with a
21 group that was going to Colorado, and she said, "I can't
22 believe Brian's the father figure here going to this
23 training." And at first I didn't think too much of it.
24 But then later -- that was just the start at the
25 Colorado training.

1 One of our ladies was Operations Officer,
2 Argelis Lewis. She was over 40 years old at that time.
3 She was saying, "You're the father figure? So I'm her
4 father, too."

5 Q. What time period are we talking about?

6 A. That was back -- that was back in 2008. So it
7 starts off kind of there. And then --

8 Q. I'm sorry, let me just interrupt you there. Do
9 you know to what Susan Moorse was referring to when she
10 said "father figure"? Did she just walk up to the
11 group?

12 A. Yeah.

13 Q. Was there any context to it?

14 A. No, she just walked up and saw that we're all
15 gathered and knew that we're going to the CONGEN
16 training in Colorado, C-O-N-G-E-N training in Colorado,
17 and said, "I can't believe Brian's the father figure."
18 So that sets kind a little bit of the tone.

19 But then later she was always sending out
20 e-mails saying "look at all these positions." And then
21 Tiffany would -- it's both Tiffany and Susan working the
22 age -- Tiffany would say, "I encourage you all to apply
23 for these positions," and they're GS5 positions in some
24 other state was always encouraged to seek.

25 Then Tiffany -- or Susan, one day she spent the

1 entire staff meeting talking about my car, "I heard this
2 car and it sounded like something out of the Dukes of
3 Hazard, then I saw it was our own Brian Ray. You're too
4 old to be driving a car like that," in front of the
5 staff. This is in a staff meeting. Then she said,
6 "Maybe you can feel sorry for him and buy him a new
7 car." So public embarrassment, humiliation, in front of
8 the staff.

9 It seemed like she spent the whole staff
10 meeting talking about my car. She also said right
11 before the new people started, "I can't wait until the
12 new people start so we can get some fresh young blood in
13 here." And everyone knows what "fresh" means and
14 everyone knows what "young" means. Everyone had the
15 exact same -- the customer service managers -- again, an
16 age remark. "Father figure" is allusion to age.
17 "Too old to be driving that kind of car" is another age
18 comment.

19 Q. Can I interrupt you for a minute?

20 A. Sure.

21 Q. When you said she used the expression "fresh
22 young blood" --

23 A. Um hum.

24 Q. -- are you aware if the new people you referred
25 to, new people coming in, if they were all under 40?

1 A. Yes.

2 Q. And why do you believe that?

3 A. Oh, because this is what I saw. So I was
4 hearing those comments. But what was going on with them
5 was people, in 2013, five people lost their jobs that
6 had families, and they were all in their 50s and 60s.
7 And then they were replaced with 20-year-olds, people
8 like 28, 26. Every single one that was in their 50s and
9 60s has been either RIF'd, forced to resign, R-I-F, or
10 fired. So there was five families in 2013 that got that
11 treatment.

12 So it was what I was hearing and what I was
13 seeing, it was easy to put these two things together.
14 And there was several other age comments, things like
15 "When are you going to retire?" Always asking employees
16 that. Susan would do that.

17 Then Tiffany's like "I'll buy you strawberries
18 when you retire. I'll write your resume for you." Just
19 out of nowhere she'd jump in my face and say "I'll write
20 your resume for you." I had never said that, expressed
21 interest in working anywhere else. So it seemed like
22 she's constantly barraging me with surprises like that,
23 "I'll write your resume for you." I don't know where
24 that came from.

25 Q. Why do you believe that is based on age, that

1 that is an age-related comment?

2 A. Because they are always saying -- Susan was
3 always saying, "We need to get rid of the old people."
4 She would mumble that to herself almost in a drunken
5 stupor, "We need to get rid of the old people in 2011,
6 2012, March 2012." Then she even brought out a
7 retirement class because she was really trying to
8 retire a lot of us people that are in our 50s and 60s.

9 Then again -- and before in 2013. And I'm not
10 the only one that's heard that comment. Everyone -- she
11 would mumble to herself "We need to get rid of the old
12 people." That became a mantra in the office. So you
13 have that combined with the people that are actually
14 going out the door, the old people, um -- I'm not a
15 rocket scientist, and I don't think I need to be to
16 figure out what was going on here in 2013.

17 Q. So is it your testimony that Susan Moorese was
18 walking around the Agency mumbling to herself "We have
19 to get rid of old people"?

20 A. That, plus she was telling other management
21 officials, because other -- the customer service
22 manager, the former customer service manager Mike Silva
23 she was telling that. And he was saying, yeah, young
24 people. What she should have said was, we want to get
25 young people who are more computer savvy, not say "We

1 you saw documentation about Angela Jenkins and you being
2 put on a PIP; were you put on a PIP?

3 A. No.

4 Q. And are you aware whether Ms. Jenkins was put
5 on a PIP?

6 A. I don't know. She was removed --

7 MR. PATTEN: Objection, objection. You've
8 answered the question. Go ahead.

9 BY MS. FALIS:

10 Q. So to go back to my original question, are you
11 aware of any supervisor in San Francisco who was
12 actually put on a PIP?

13 MR. PATTEN: Same objection. Go ahead.

14 A. Not aware of any supervisor. They -- it's not
15 something that if somebody was, they're not going to say
16 oh, by the way, here let me show you what they're doing
17 to me. It's not something they're going to be proud of
18 and show anybody. They're probably going to keep it to
19 themselves because they're so embarrassed that they
20 can't believe that they're going on a PIP. There had
21 never been PIPs for supervisors that I'd ever heard of
22 prior to Tiffany coming on board.

23 BY MS. FALIS:

24 Q. So let's go back a second to your comment about
25 Susan Moorse. I just want to make sure I understand.

1 You clarified your testimony by saying that Susan Moorese
2 may have been "imbibing," to use your word, "over the
3 weekend," correct?

4 A. Um hum.

5 Q. So what I'm trying to understand, whether she
6 imbibed over the weekend, what that had to do with any
7 alleged mumbling she may have done about getting rid of
8 old people?

9 A. Because she's clearly stating that in the
10 office. She's clearly espousing that, that viewpoint,
11 and stating it. And then that's what's actually
12 occurring in reality.

13 Q. And what is the connection between whether or
14 not she imbibed alcohol over the weekend and comments
15 she may have made in the office about getting rid of old
16 people?

17 A. She should never say that, whether she drinks
18 alcohol or not. That's just something that you don't
19 say in the workplace. It's -- it's a comment that's
20 reprehensible on so many levels.

21 Q. Do you think she made that comment because she
22 had been imbibing over the weekend? I'm just trying to
23 understand the relevance of your mentioning her
24 "imbibing" over the weekend to any comments that she
25 made.

1 A. She talked to herself all the time. So that
2 was -- that was an issue.

3 Q. Do you believe that she was drinking alcohol
4 during the workday?

5 A. No, I don't think so, but -- I doubt that.

6 Q. Do you believe that alcohol led her to mumble
7 to herself?

8 A. Possibly.

9 Q. Okay.

10 A. I know she drinks, because Marita Floresca,
11 F-L-O-R-E-S-C-A, would always have parties for her
12 processing staff, and she'd invite Susan to these. And
13 it was obvious they were ordering drinks. Whether she
14 had a drinking problem or not, I don't know. But --

15 Q. Are there any other comments, age-related
16 comments that you heard in addition to the ones that
17 you've told us so far, by either Ms. Moorse or
18 Ms. Bartish?

19 A. I believe there is some other age comments.
20 Those are the ones that are most prominent in my mind.

21 Q. Is there anybody else other than Qui Nguyen,
22 Susan Moorse, or Tiffany Bartish who you believe
23 discriminated against you based on your age?

24 A. No.

25 Q. And are there -- other than comments, are there

1 actions that you believe were taken against you based on
2 your age by any -- by Qui, Susan, or Tiffany?

3 A. Yes, the negative interim review on 9-6, the
4 final unsuccessful review on 12-20, even though I did
5 all the demands. And consequently, then on June 6,
6 WGI denial based on that false -- that review filled
7 with false information, untrue statements, and absolute
8 outright fabrications of performance, things that did
9 not occur.

10 Q. Any other acts that you believe you were
11 subject to based on your age?

12 A. Yes, I believe that's -- well, Ms. Moore, it's
13 age and retaliation. I believe that's -- you know, I
14 was on an upward trajectory. I had all outstanding --
15 not all, outstanding or excellent ratings for 15 years.
16 It was destroying my trajectory, ability to be promoted,
17 by all of a sudden being labeled an "old person." And
18 now, my good name and reputation have been damaged to
19 such a point that I'm unable to be promoted in the State
20 Department because of the age and retaliation factors
21 that have been continuous, continuous violations of the
22 ADA, and 1967 -- and of the Civil Rights Act of 1964,
23 Title 7 violations.

24 Q. And you also alleged in your complaint national
25 origin discrimination; is that right?

1 funny and make a joke. So I thought okay, well, this is
2 just the first or second time. But by the seventh or
3 eighth time, it's not funny any more.

4 Q. And prior to September of 2013 when you filed
5 your complaint, your EEO -- I'll ask it this way.

6 Do you recall when you filed your EEO
7 complaint?

8 A. With the Office of Civil Rights?

9 Q. Correct.

10 A. September of 2013.

11 Q. And prior to September 2013, did you report any
12 of these comments that you say Tiffany Bartish said to
13 anybody?

14 A. Not until -- not until I got my interim review.
15 And I tried to go over it with her, because she'd give
16 it to me late at night. I hadn't seen it. Then when I
17 read it over the weekend, I was shocked because there
18 was never indication I was failing anything up to this
19 point. Even my mid-year I was passing.

20 But when I got that September 6th review and
21 I'm all of a sudden failing everything, all of a sudden
22 then I felt that that was -- that she was retaliating
23 against me because prior to that, in August, about mid
24 August, she asked, am I participating in the EEO process
25 or am I being a witness for anybody? And I said "Yes,

1 I'm being a witness for some of the specialists and some
2 of the supervisors." I told her that. So that's why I
3 felt like this 9-6 review was retaliatory. She just
4 wanted to pay me back.

5 Then when I went to talk to her about the
6 interim review, it was the most shocking statement. She
7 said, "I told you it's not grievable." Because it's an
8 interim review. An interim review is not grievable.

9 Same thing with the specialists. I went back
10 to talk to her that day because I'm still shocked. All
11 of a sudden I'm unsuccessful after 15 years of
12 outstanding and stellar performance? Every other
13 manager rated me outstanding or excellent. Now all of a
14 sudden I'm failing at everything? So I believed this
15 was retaliation.

16 When I went back the second time and asked her,
17 can we talk about my interim review? That's when she
18 looked me straight in the eye and said, "I told you, you
19 stupid fucking Mexican, it's not grievable, we're not
20 going to talk about this review any more." And that's
21 when I got up, and I'm done with her. I am done with
22 Ms. Bartish at that point. I am not going to listen to
23 anything she says. I'd lost all respect for her. I had
24 no respect, no human dignity as a person for her to talk
25 to me like that in her office. And that's not the only

1 thing I heard.

2 Q. What else did you hear?

3 A. Also -- let me go back. So for me, I was done.
4 That was it. I'm done.

5 So I immediately got on the phone, on 911, and
6 filed my complaint with the Office of Civil Rights. I
7 said, "How do we proceed from here?" And I said "is
8 something going to be done about this?" "Yes, by law,
9 Mr. Ray, we've taken notes of this, and we're going to
10 go forward with this. We're going to put your claim
11 in." And that's kind of where Tiffany and I parted
12 ways, although she asked for more stuff after she wasn't
13 my boss any more. She asked for more reviews, asked --
14 we were done. I'm not giving her anything.

15 Q. The comment that you stated a moment ago, that
16 she said to you, when you went to go talk to her about
17 your interim performance, were there any witnesses to
18 that discussion?

19 A. I don't know. There was people around the
20 area, so I'm hoping that somebody heard something.

21 Q. To your knowledge, do you know if anybody heard
22 anything?

23 A. I know there's people that sit very close,
24 right outside the door, so I'm hoping yes, that somebody
25 heard, heard her say it.

1 Q. Have you asked anybody whether they heard the
2 comment?

3 A. I believe the lady that usually sits in front
4 of her office was assigned at the counter. And then
5 we -- it's possible that we shut the door because when
6 we talk about reviews, we don't want anybody else to
7 hear our business. So it's possible that the door was
8 shut and I don't know if anybody heard it.

9 Q. But have you asked anyone whether they've heard
10 the comment?

11 A. I don't think I did. I think I was so shocked
12 that that's when I went, at lunch, on 911 and made my
13 call to the Office of Civil Rights. I think I was in so
14 much shock that I didn't even know where to start at
15 that time.

16 Q. Are there other comments that Tiffany Bartish
17 said to you with regard to either your wife's national
18 origin or the use of "Mexican" in a derogatory way?

19 A. Yes, she used to scream out "tough tacos."
20 Like let's say if Amha asked, hey, can I take that
21 training course? And she would yell out "tough tacos,"
22 then burst into laughter, thought that was hilariously
23 funny.

24 Q. Do you believe that expression "tough tacos"
25 was directed at you?

1 A. Yes. If I asked for something and she did the
2 same thing, "tough tacos," she would always say that,
3 "tough tacos." So it was like another Mexican food
4 item. She could have just easily said no, not until
5 next month. But she doesn't have to, you know, scream
6 out "tough tacos" then burst into laughter within
7 ear-shot of everybody within the office.

8 The age remarks too, you know, "Oh, there's
9 Senor Ray, Senor, Senor Ray." Then burst into laughter.
10 That was her protege, Elizabeth Norris, N-O-R-R-I-S.

11 Q. Let me make sure I understand. When you said
12 "she" and the "Senor Ray," you're referring to
13 Ms. Norris, not Tiffany Bartish, is that right?

14 A. No, they would both be together and then burst
15 into laughter. "Oh good morning, Senor Ray."

16 Q. And who would say "Good morning, Senor Ray"?

17 A. Tiffany and --

18 THE REPORTER: Excuse me, are we saying
19 "senior" or "senor"? I'm just trying to get the
20 verbiage.

21 A. Verbiage, that's fine. I think it's actually
22 both. "Oh, Senior Ray," sometimes "Senor." Sometimes
23 "Oh, Senor." Either way, it was kind of offensive
24 because they burst into laughter within earshot of
25 everybody that was around their offices.

1 BY MS. FALIS:

2 Q. So again, perhaps it's my own confusion. Do
3 you allege that Tiffany Bartish said to you "Senor Ray"?

4 MR. PATTEN: Objection, it's misleading.
5 He's testified under oath. It's not an allegation.
6 Go ahead.

7 A. I'd be coming in in the morning and I would
8 hear that as I walked down the hallway. Sometimes it
9 sounded like Tiffany's voice, other times it sounded
10 like Ms. Norris. And they were both together every
11 morning and every afternoon.

12 Q. Did you ever witness where you can pinpoint
13 that it was Ms. Norris who said "Senor Ray"?

14 A. Yes, if she was the only one in her office,
15 then I knew it was her. But if Tiffany was standing
16 there with her, and then they both burst into laughter,
17 I'm not always sure who said it first, or if they both
18 said it.

19 Q. Did their voices sound similar?

20 A. I mean -- no, no, I think sometimes it seemed
21 that if I walked into Tiffany's office and she said oh,
22 you know -- I'm the senior supervisor, so the word
23 "senior," "oh senior Ray," or "Senor Ray." Sometimes it
24 wasn't a joke, it was just an address.

25 Q. So is it your testimony that Tiffany Bartish

1 referred to you as senior, S-E-N-I-O-R, Ray?

2 A. Yes, and Senior Supervisor.

3 Q. And do you recall when she said that to you,
4 when she used that expression?

5 A. It was in the 2013 -- a lot happening between
6 July of 2013 and December.

7 Q. And how did you know whether she was -- given
8 the confusion we just had right now, how do you know
9 whether she was saying senior, S-E-N-I-O-R, on Senor,
10 S-E-N-O-R?

11 A. When Norris said it, it was Senor. When
12 Bartish said it, it was Senior, "Senior Supervisor."

13 Q. And why do you believe she was not saying
14 Senor, S-E-N-O-R?

15 A. Don't know.

16 Q. And Ms. Norris, do you know what her race is?

17 A. I heard she's from Honduras.

18 Q. And do you believe that she was making
19 discriminatory comments against you by calling you
20 Senor, S-E-N-O-R, Ray?

21 A. Yes.

22 Q. And why is that?

23 A. Because she burst into laughter with Tiffany,
24 and anybody else who was within earshot.

25 Q. Had you ever heard Ms. Norris use the word

1 profanity."

2 Can you tell me to whom are you referring, and
3 what were the circumstances?

4 A. I'm referring to Manager Bartish; in fact, the
5 vast majority of this.

6 Q. Do you recall a specific situation or situation
7 when Ms. Bartish yelled and used profuse profanity?

8 MR. PATTEN: Other than what he's already
9 testified to?

10 MS. FALIS: Correct.

11 A. Yes.

12 BY MS. FALIS:

13 Q. And what were those situations?

14 A. She came out of the -- when she started, she
15 started as a customer service manager, and she came out
16 of the information booth. She had a problem with some
17 customer, got in the yelling/screaming match, and she
18 came out right in front of -- it's in the old building.
19 On one door is communications, the other door is Liza
20 Blystad's office. Then there's a hallway. So it's a
21 three-way intersection, four-way with the info booth,
22 info, communications, Liza's office, and the hallway,
23 a four-way intersection.

24 She was screaming explicatives at the top of
25 her lungs. I came through the communications door and

1 she was looking directly at me. And Liza thought --
2 Ms. Blystad thought she was talking to her. Argelis
3 came out her door, the operations officer. All three of
4 us were standing there. And I saw the other two ladies,
5 their jaws were dropped, and mine must have dropped too.

6 Q. Do you recall specifically what the
7 explicatives were?

8 A. Yeah.

9 Q. Can you share with us what they were?

10 A. She was screaming: "You asshole, you
11 dickhead." And I saw Argelis's jaw drop. I saw Liza's.
12 We don't talk to customers like that. We certainly
13 don't talk to internal. So Liza thought, when we
14 talked, she thought wow. That's why she went to Susan
15 twice and Qui twice. This has got to stop. This is
16 just wrong. I thought she was talking to me because she
17 was looking directly at me.

18 Q. Do you know who she was talking to?

19 A. She was screaming out loud to herself, I
20 believe, because she'd had this bad interaction with a
21 customer. She walked down the hall to blow off steam.
22 Then she did this blow-up in front of Liza's office, I
23 came out of communications, the operations officer came
24 out of her door, and we were all in shock. We talked
25 about it at the lunch hour. We were like that's

1 shocking, somebody acts like this in the workplace.

2 We're a professional organization. Now we're somehow
3 instantly transformed into a blue-collar operation,
4 unexpected.

5 Q. Had you heard her use the term "asshole" before
6 in the workplace?

7 A. Yes.

8 Q. And when was that?

9 A. She would -- after an interaction with a
10 customer, she'd say: "That guy's an asshole." So
11 everyone's an "asshole," or a "dickhead" if they're a
12 male customer. I don't know the difference; seems like
13 everyone was to her. If you asked -- some, even the
14 processors, if you ever heard her swear, they would say
15 yes. Liza would say yes.

16 Q. Now the next part of -- on this document 0047,
17 the first paragraph, you say: "Intruding on my privacy
18 by pestering, spying and stalking." Are you referring
19 to Ms. Bartish here?

20 A. Yes.

21 Q. Can you tell us when she pestered, spied, and
22 stalked you?

23 A. Yes. I already had my signboard up, so there
24 was no reason. But she would come out to the counter
25 anyways to spy on me to make sure I'm there. When I was

1 surprise me. Because I got her not only up to speed,
2 but exceeding the standards.

3 BY MS. FALIS:

4 Q. Going back to that same paragraph, 0047, the
5 last sentence of that first paragraph you say: "I've
6 been threatened to be fired twice." Can you recall
7 those two incidents?

8 A. Absolutely.

9 Q. Can you tell me a little bit about that.

10 A. Yes.

11 Q. Please.

12 A. Sure. The first time was November 2012. I was
13 to do an emergency evacuation procedures PowerPoint
14 presentation training for the entire staff, not just
15 adjudicators, not just processors, everybody was to be
16 in attendance. And before that, about a week before I
17 did that training, in a supervisor's meeting,
18 Tiffany Bartish said, "If you and Dave Shaw don't have
19 that training done in less than an hour, I don't want
20 this thing going on forever, I'll fire you." And I
21 thought wow.

22 This is really -- this is now November 2011 --
23 sorry, November 2012, November 2012. This is before.
24 So this is the first indication I have that wow, what
25 kind of boss is she? Nobody's ever threatened to fire

1 me before. So I tried to make light of it. And please
2 don't laugh. I said, because Donald Trump had that show
3 The Apprentice where he fires people, I said, "Do you
4 want me to bring Donald Trump in here?" And she said
5 "No." And she put her hands on her hips and she said,
6 "I'll fire you myself." Quote/unquote. That was the
7 first time, in front of the other supervisors.

8 Q. And did you put on that presentation that you
9 spoke about?

10 A. I did put it on. And I did keep it under an
11 hour. But I don't think that's -- that's a fair way to
12 go into a training with that kind of -- if-I-don't-do-
13 it-I'm-fired attitude.

14 Q. And that interaction, or that incident you
15 believe that was based on discrimination?

16 A. I didn't know. That's why I thought she was
17 joking at first. In my mind I was like she must be
18 joking. If I don't do this in an hour I'm fired? What
19 kind of -- but then after, when I said "Do you want me
20 to bring Donald Trump in here," because he had that show
21 The Apprentice where he points a finger and tells them
22 "you're fired," then she said "no" and put her hands on
23 her hips and said, "I'll fire you myself," this is
24 serious. She's not joking. Wow, I'm shocked. I don't
25 know what to think.

1 Q. Correct me if I'm misstating what you said.
2 She said this to you and David Shaw?

3 A. No, David Shaw was not in there. He was at the
4 same level as her so he wasn't needing to be in there,
5 in that -- in that meeting.

6 Q. Can you say again then, the comment that you
7 said, I recall, had David Shaw's name in it.

8 A. It was a joint presentation between me and the
9 fraud manager for the Emergency Preparedness Training
10 for disasters and things here, where the exit doors are,
11 the fastest escape routes, that type of thing.

12 Q. David Shaw was doing that with you?

13 A. Yes.

14 Q. Thank you. And the second time you say you
15 were threatened to be fired, was that also by
16 Ms. Bartish?

17 A. Yes.

18 Q. Okay, if you could tell us a little bit about
19 that.

20 (Reporter clarification.)

21 A. The second time was, before Larry Malari
22 retired, who also had an EEO case against the Agency, he
23 wasn't retired, he actually -- I think he was actually
24 pushed out in 2013. And she said if any of you have
25 knowledge, because what he did was, he contacted OPM.

1 "young female supervisor" under number 3, you mean
2 Elizabeth Norris?

3 A. Right.

4 Q. Okay.

5 A. Then subsequently Elizabeth Norris takes
6 Tiffany's spot as the Adjudication Manager. She's
7 either in her late 20s, early 30s. After Tiffany left,
8 that's who was promoted in her spot. It's just that
9 there are certainly people more qualified with more
10 years of experience. Ms. Norris had just got her year
11 in time and grade, and me and Angela, now we can't apply
12 because we're unsuccessful, so we're completely
13 eliminated out of the process for applying for the
14 manager job. But she ends up bestowing that position on
15 her good friend.

16 Q. Do you know if Elizabeth Norris was -- if it
17 was a competitive -- if there was a vacancy, or if she
18 was -- I'm just trying to understand -- or if she was
19 just appointed into that position, just put in a
20 position?

21 A. I believe there was a vacancy, but it
22 advantaged her because she got an outstanding rating, as
23 all Tiffany's friends did. And we were disadvantaged
24 because we're completely unsuccessful. So on that
25 particular competitive opening, again, the older people

1 with more years -- I'm not the only older supervisor
2 here, there's Ms. Chavez, she's probably 60. There's
3 other people here that have way more years of
4 experience, way more qualified. But yet, because she
5 was advantaged with her outstanding rating, she gets the
6 spot, and us older people with terrible ratings, we
7 can't compete for the spot. We can't even apply.

8 Q. Do you know what Ms. Chavez' ratings have been?

9 A. No. She keeps that very close to the vest.
10 But she's -- she's been here longer than I've been here.

11 Q. Do you know if she applied for that vacancy?

12 A. I imagine she probably did. She's applied for
13 these other three vacancies that have come up this year,
14 last year and this year.

15 Q. Do you have any independent knowledge that
16 Ms. Chavez applied to the vacancies for which
17 Elizabeth Norris was selected?

18 A. No. But I know Angela did. And there's no way
19 Angela can get it with an unsuccessful rating. There's
20 no promotion possible at all.

21 Q. Now, you mentioned that you received your first
22 promotion, I think, in 2006, is that right?

23 A. Right. Right.

24 Q. After 2006, when was the first time that you --
25 how does it work for you to get promoted? Is it

1 A. Okay. So yeah, past the informal phase.
2 Then -- this is where it's connected -- then on 4-22-16,
3 which is just this year, was the closing for not just
4 one Adjudication Manager position but two Adjudication
5 Manager vacancies.

6 Q. So your November 2016 claim includes --
7 includes what? What are the bases for the complaint
8 that you filed in November of 2016?

9 A. Age, and retaliation.

10 Q. And what were the actions that you allege were
11 taken against you?

12 A. The fact that now there's been not just one
13 position, two, three, four positions, all within
14 basically a year's time, and I'm unable to, because of
15 the damage, I had an upward trajectory before Tiffany
16 got here, but the damage she's done to my good name and
17 reputation has now left me not able to be -- not able to
18 promote because of the actions of Susan Moorse, Qui.

19 There was no explanation as to why, as the
20 Senor Supervisor, I couldn't be promoted. It's always
21 the status quo answer: "Well, we just select the most
22 qualified." That certainly isn't true this time around.
23 Annie Hsia has time and grade, A-N-N-I-E, H-S-I-A, Hsia.
24 I trained Kirk Kirkland as a supervisor three years ago
25 when Tiffany started. Now he's got one of the

1 positions.

2 I figured for sure I'm going to get one of
3 these positions. Instead, they selected Annie Hsia
4 which is one year of time and grade. It's possible they
5 closed that position, Qui closed that second position of
6 Adjudication Manager, as a way for her to get her year
7 in time and grade and/or her security clearance. That's
8 the word out. That's people's widely-held belief, that
9 that job was held for her.

10 So it's not just age any more. This is just
11 continuous acts of retaliation. That has been the theme
12 of my case from -- practically from start to finish.

13 Q. Now, in these last two positions of this year
14 that you say you applied for the Adjudication Manager,
15 who are the selecting officials, or who was the
16 selecting official for that?

17 A. Okay. So so you're saying for the last two
18 positions?

19 Q. Correct.

20 A. David Tyler and Jeff McCarter.

21 Q. So the Director and Assistant Director?

22 A. Yes.

23 Q. And is it your claim that David Tyler and Jeff
24 McCarter were --

25 (Reporter clarification.)

1 Q. -- are you alleging that David Tyler and
2 Jeff McCarter were discriminating against you in that
3 non selection -- those non selections, excuse me?

4 MR. PATTEN: Objection, the documents will
5 speak for themselves. Go ahead and testify to your
6 understanding.

7 A. My understanding is yes. Everyone's well aware
8 by now of my EEO activity, but yet I was not selected
9 once again for either of the two openings. And I
10 believe that certainly when Mr. Tyler started, there was
11 pass-down information from Susan Moorse, or briefing.
12 And they said Susan Moorse had written something bad on
13 all of us going out the door. On a bad note, she wanted
14 to get one final stab in, and evidently she did. So
15 Mr. Tyler would have been aware of my EEO activity as
16 well as Jeff McCarter, Assistant Director, because when
17 Angel came on board, they were openly talking about
18 Mike Romano's EEO activity, saying yeah, the Agency
19 messed up when they brought Mike Romano back to work.
20 (Reporter clarification.)

21 A. He had been wrongly terminated, it had been
22 determined by a judge, and they put him back on the job
23 because he didn't do anything wrong. But they openly
24 talked about it, Angel Rivera, manager, and Jeff
25 McCarter, the new transfer manager, said yeah, they're

1 bringing this guy back and he's a bad employee because
2 he filed an EEO case. He's a bad employee, he filed an
3 EEO. They're openly talking about this. So of course I
4 would have no reason to believe they didn't talk about
5 my case.

6 They also complained about, oh, now we have to
7 retrain him and send him to the National Passport
8 Training Center all over again. Even though he's a
9 former JAG lawyer, he's a former JAG attorney, and even
10 though he's worked here for a number of years, he has to
11 get the training all over again, just as if he's a
12 brand-new employee. They kept complaining about this,
13 saying he gets all his benefits back, his year and a
14 half of pay, I mean everything was a complaint. It's
15 like this has already been decided by a judge. He gets
16 his job back. He gets made whole again.

17 They're going to give him his back pay and
18 they're going to give him -- also they're really
19 incredibly mad that they gave him his time, just as if
20 he'd been here every day for a year and a half. They
21 gave him his sick leave, his annual leave. He got all
22 those benefits back he would have had had he not been
23 terminated by Ms. Moore, had the wrongful termination
24 not took place.

25 Q. How do you know this? Did Michael Romano tell

1 you what he was getting back?

2 A. Everyone was talking, the whole Agency was
3 talking. This is a very small Agency. There's less
4 than a hundred people. Word travels fast.

5 Q. Did you review a copy of -- it was actually an
6 arbitrator; did you review a copy of the arbitrator's
7 decision in Mr. Romano's favor?

8 A. I have not. I did write, when I was contacted
9 by the union in the summer, if would I be willing to
10 make a statement for Mike Romano, attesting to his job
11 abilities, I did make that statement, and I also
12 testified for Mike Romano.

13 Q. So you testified that you applied to various
14 Adjudication Manager positions and Customer Service
15 Manager position; were there any other positions for
16 which you applied, after -- after 2012?

17 A. There was no openings in 2012. It was just
18 like Susan Moorse just kind of placed Tiffany right in
19 her position and it was almost like musical chairs. The
20 Fraud Manager would now be the Customer Service Manager,
21 and Tiffany, who started as Customer Service Manager,
22 would be the -- would be the Adjudication Manager. And
23 Dave Shaw, who was the Adjudication Manager, would now
24 be the Fraud Manager. And then Tracy Graff was put into
25 the Fraud Manager position, as far as I know, without

1 any announcement, without any --

2 Q. Would you say that's typical in Passport
3 Services?

4 A. No, this is very atypical, this sort of thing.
5 I've been here 15 years and have never seen this kind of
6 a management shake-up where people are trading positions
7 like we change our shoes. No. I never had seen this
8 before, people going out the door like Belinda Berry.

9 Janice Whittingham, she worked here 44 years,
10 Processing Chief. She came and complained to me that
11 the mechanism with which people are removed is that
12 she'd been outstanding, already at 44 years. Then when
13 Susan and Tiffany were here, all of a sudden next year,
14 excellent rating. Next year, fully. She knew what the
15 next year was going to be, unsuccessful. So she left on
16 her own accord but she felt she was pushed out. She
17 didn't want to go out on a bad note, so she left. She
18 left because she did not want to receive an unsuccessful
19 rating after 44 years of exemplary service to the
20 department.

21 Q. So from 2012 to the present, other than the
22 Customer Service Manager position for which Mike Silva
23 left, the Adjudication Manager position in 11-15, and
24 the two Adjudication Manager positions this year, are
25 there any other positions within the Department of State

1 to which you've applied?

2 A. No.

3 Q. And are there any positions outside of the
4 Department of State for which you've applied?

5 A. No.

6 MR. PATTEN: Is this a good time to take lunch?

7 MS. FALIS: Sure, absolutely. Off the record.

8 (Off the record at 12:55)

9 (Recess.)

10 (Back on the record at 13:37)

11 MS. FALIS: Okay, we are back after lunch
12 break. You are still under oath.

13 THE WITNESS: Yes.

14 BY MS. FALIS:

15 Q. Have you ever been nominated or received an
16 award at the State Department?

17 A. Yes.

18 Q. Do you recall when that was, or they were?

19 A. Yes. In 2010, I had an outstanding -- I got an
20 outstanding performance award as a supervisor, and in
21 2007 I got an outstanding performance award as a
22 supervisor. And when I came back to my desk, I'd been
23 gone a couple of days, when I came back I got two more
24 awards, plaque sitting on top of my desk, one signed by
25 Michelle Bonn (phonetic) for the ribbon-cutting ceremony

1 Q. Can you tell me specifically what it was that
2 she did that you were saying was retaliation? You said
3 a negative performance review was one.

4 A. Sure. I mean you want me to elucidate on the
5 forms review a little bit, or each different act?

6 Q. Each act, thank you.

7 A. So the first one was the 9-6. I felt that wow,
8 she really got back at me with this.

9 Q. That's the mid-year performance review?

10 A. Mid-year, unprecedented that we put ratings in
11 a mid-year. So -- but she did. She did basically put
12 me on notice, I guess, that hey, I'm going to fail you
13 by the end of the year. She had no intention of keeping
14 her word that wow, if I did this extra stuff, all these
15 extra demands, she had no intention of passing me, as I
16 pointed out in that writing element.

17 Q. Um hum.

18 A. And then when I got the 12-20, unsuccessful
19 again -- even the wording is not congruent with the
20 ratings. "He supports management," "unsuccessful."
21 There's positive things, but all it is is a checkbox at
22 the end. On each element you either check outstanding,
23 exceeds expectation -- actually, it's only exceeds,
24 fully, exceeds fully, and unsuccessful. And she would
25 just check "unsuccessful." Just a check box.

1 But I felt the 12-20 review was really
2 retaliation, reprisal for filing my claim, and for
3 being a witness, participating in the process for
4 Mike Romano. At that point, they probably didn't even
5 know about the Mike Romano and Elizabeth Tekleabib,
6 other than fact I told her I would be a witness. Then
7 it goes on from there.

8 Q. What are the other actions that you believe she
9 took in retaliation?

10 (Reporter clarification.)

11 A. Then on 6-16 I get a WGI denial. That's from
12 Qui. Okay, those first two are Tiffany; then Qui is
13 Tiffany's boss. Then I get the WGI denial on 6-16
14 because of that, because of those falsified performance
15 reviews with all those fabrications in there.

16 Then I get a letter of reprimand on August 9th,
17 August 9 -- so 6-16-14, WGI denial. So just to get the
18 dates straight: 9-6-13, interim review. 12-20, final
19 review, both unsuccessful. Those were definitely
20 attributable to Manager Bartish. Then we go on to 6-16.
21 I received a WGI denial based on false performance
22 fabrications she'd written up.

23 Then on August 9, on a Saturday, I get a letter
24 of reprimand, my very first one. They didn't like my
25 word choice, Ms. Norris said. They didn't like the

1 wording "Tiffany created this whole debacle." There
2 wasn't swear words in it, it wasn't a tirade, it didn't
3 "disrupt the office" as that letter said from Geoff
4 Matranga. But the reason I got the letter of reprimand
5 was because the Agency had to know who was going to
6 testify for Elizabeth Tekleabib's and Mike Romano's
7 litigation.

8 And as soon as my name came up, look at the
9 timing of this, I was going to testify -- it's supposed
10 to be summer; this comes up in August, on a Saturday.
11 The government's not even open on a Saturday. Looking
12 in the Agency documents, Martita Powers (phonetic) says
13 it would be inappropriate to wait this long, to wait any
14 longer. But yet Matranga was still, working with Qui
15 and Susan, they still whipped this thing up and sent it
16 to me on a Saturday when I'm at home recuperating from
17 an extreme diagnosis, cancer diagnosis.

18 Then on top of that, after that comes a letter.
19 Those were both -- Qui's internally involved in those,
20 and the WGI denial with James Herman and Jeff Matranga.
21 So we have these people. And Susan; she's getting
22 copies of all this.

23 Then when I go out in March for a very
24 high-risk surgery, and survive, while I'm out recovering
25 on 9-11 of all days, I get an e-mail from Patty Hayes, a

1 retired HR rep who always came back to help Susan Moorese
2 out. And it says basically: "No matter what your
3 medical condition is, excessive absenteeism can be cause
4 for an adverse action, including up to removal." So a
5 very -- and so I submitted all the paperwork to DRAD,
6 D-R-A-D, that's the office of reasonable accommodation,
7 maybe it's the department of reasonable accommodation,
8 okay. I submitted all the paperwork.

9 And then while I'm doing all that and going to
10 my doctor numerous times, even without appointments,
11 because they're saying if you don't do this -- even
12 though I'd already -- according to the FAM, Foreign
13 Affairs Manual, our guide, our Bible, it says an
14 employee can be given a return to duty letter only if he
15 "fails to provide regular status updates." I always
16 provided medical updates to Qui, the entire time. Every
17 time I got one, I turned it over to Qui, either I faxed
18 it to him, called him up, made sure he got it. So there
19 was no reason for me to get this return to duty letter.

20 It also says you're being gone from this Agency
21 this long is impeding the Agency's ability to carry out
22 its mission. Now which is it, am I this terrible
23 employee that needs to go on a PIP because I've gotten a
24 WGI denial and a letter of reprimand, or am I this
25 fantastic employee that now the Agency can't do it's

1 job, doesn't have the ability to get the job done
2 without me, without my presence? So I get that letter.

3 But one week later, I get a letter from Sonia
4 Crisp, HR Director. In the letter, the 9-18, I call it
5 the "threat letter" because it threatened that if you
6 don't get all these extra additional paperwork
7 certifications from your doctor, we will place you on
8 AWOL and all your federal benefits will be cut off.

9 And we want this not only now, not having two
10 weeks -- I've already got the one-week letter -- now I
11 have four days, two of which are business days. I only
12 have the 19th. I have to get it -- I had Friday and
13 Monday, and the weekend is not there. So I have to go
14 back in to the doctor again and again.

15 Meanwhile, everyone's saying this is FMLA
16 discrimination. Even the doctor's nurse, the doctor's
17 secretary, Ms. Garcia, said we've never seen anything
18 like this. So I would just keep showing up day after
19 day without an appointment asking for more stuff to type
20 up. He's not just any doctor; he's the Director of the
21 Chronic Pain Clinic at Kaiser Permanente, Dr. Quoc
22 (phonetic). He is the Director of the entire Pain
23 Clinic. He said, usually I give a doctor's note typed
24 up. Sometimes I get a second request; I give them the
25 exact same note, and sometimes they reject the second

1 one. But he said by the third one, I give them the
2 exact same note and they say wow, this is wonderful,
3 this is exactly what we wanted.

4 In this case he was having to keep generating
5 typing himself, more and more, relentless requests for
6 more and more of my HIPAA information requested by the
7 Privacy Act. Patty Hayes had insatiable requests day
8 after day, week after day, all the while, while I'm
9 trying to get better, for my personal medical
10 information.

11 Susan was in on it, Tom Reid (phonetic) was
12 in on the WGI denial, on the letter of reprimand, and
13 even in on the medical documentation. So it goes up
14 higher than Susan. Now, I know this now because I'm
15 reading the Agency production. That's why a lot of
16 times I say I'm shocked. I'm very surprised to read who
17 else was involved in this constant barrage of requesting
18 more and more documentation from my doctor.

19 He was getting upset with not wanting to give
20 out my personal information. He said it's protected.
21 He was upset with the constant -- me coming back and
22 asking for more, relentless requests for more and more
23 of my medical documentation. He said, "What don't they
24 understand about 'placed off work'? I believe I'm being
25 clear here."

1 And then Ms. Norris hops into the fray under
2 the auspices and guidance of Director Moorese, the new
3 Adjudication Manager promoted, and starts asking for
4 more of the same type of Privacy Act information and
5 HIPPA information protected by the Privacy Act. And she
6 wants to know -- she's even specifying that the doctor
7 has to say certain exact words. Patty Hayes is saying
8 "The doctor has to say incapacitating pain or injury."
9 Doctor complies. He does this. Then they start to
10 question more of this stuff. They question the
11 certification.

12 Sonia Crisp comes up with a list of her own
13 stuff. Yes, they have to know that I'm out sick and I'm
14 going to be out for a while, but they don't have to know
15 the details of which organs were worked on, which organs
16 were compromised. All that stuff was unnecessary to
17 keep asking, relentless requests.

18 And at that time, Ms. Norris, Patty Hayes, and
19 Qui were saying okay, well now that he's done everything
20 that Sonia Crisp asked for, let's tell him that we're
21 going to deny his annual leave and we'll approve his
22 sick leave.

23 So it's like keep telling him over and over
24 again your documentation is insufficient, which causes
25 me more trips to my doctor, which actually helped

1 sometimes because I got pain shots in my spine for
2 basically debilitating pain. He said, "Most people, you
3 just tell them it's a pinched nerve and they get it, but
4 you have far more than that." And he said, "I don't
5 know if they understand about 'placed off work.'" They
6 said well, can he work part-time --

7 MR. PATTEN: Let's wait for the next question.

8 THE WITNESS: Okay.

9 BY MS. FALIS:

10 Q. Why do you believe Patty Hayes retaliated
11 against you?

12 A. Because she wanted to -- it looks like -- it
13 appears like she wanted to please her good friend,
14 former Director Susan Moorse.

15 BY MS. FALIS:

16 Q. Do you believe that Patty Hayes was aware you
17 had filed an EEO complaint?

18 A. I believe yes, because I believe that Susan
19 would have told her, apprised her of the fact. I think
20 that everyone just operates independently of each other.

21 Q. Do you have any specific knowledge or evidence
22 that Susan Moorse told Patty Hayes --

23 MR. PATTEN: I'm sorry.

24 BY MS. FALIS:

25 Q. -- that you filed an EEO case?

1 Tiffany Bartish had been advised numerous times by
2 Supervisor Amha Gezahegn and Supervisor Angela Jenkins
3 that complainant was going to be a witness for their
4 formally accepted EEO cases and attest to the hostile
5 work environment." Do you see that?

6 A. Um hum.

7 Q. Do you know when Mr. Amha Gezahegn advised
8 Director Moorese and Tiffany Bartish that you were going
9 to be a witness in his formally accepted EEO case?

10 A. In the summer of 2013, he filed -- and I think
11 before Angela, before me, and he was bringing pictures
12 in to show Tiffany that we all go back a long ways, you
13 know, like 15, 17 years ago, here's pictures. So he was
14 bringing in pictures and showing her. Then he came to
15 my office and said, "I showed these to Tiffany to let
16 her know that we go back a long ways, and that you would
17 be testifying on my behalf whenever my case came up."

18 Q. Were you ever in the room or a witness to a
19 conversation that Mr. Gezahegn had with either Director
20 Moorese or Tiffany Bartish where he told them that you
21 would be a witness in his formally accepted EEO case?

22 A. My office was right next to Tiffany's and the
23 walls are really thin. I think there's only one piece
24 of sheetrock instead of the standard two. And I could
25 literally hear conversations without even trying to

1 listen. I could just be in my office and I would hear
2 the conversation.

3 Q. So again, did you overhear, through the walls,
4 the one layer of sheetrock, Mr. Gezahegn telling
5 Ms. Bartish that you were going to be a witness for his
6 formally accepted EEO case?

7 A. I believe so. And I think that he even came
8 right after and told me he told her that. So I know --
9 I know he told me that. And I believe I also picked it
10 up before he even told me. I think I picked up what the
11 conversation was about.

12 Q. And were you ever a witness to Mr. Gezahegn
13 telling Director Moorse that you were going to be a
14 witness for his formally accepted EEO case?

15 A. No. She's up at the other end, so the other
16 side of the building.

17 Q. Were you a witness, or did you overhear through
18 the wall Ms. Angela Jenkins telling Tiffany Bartish that
19 you were going to be a witness for her formally accepted
20 EEO case?

21 A. I don't believe I heard Angela's one. But I
22 definitely -- I know Amha, because Amha was very
23 persistent and would repeat day after day. But Angela,
24 Angela, I believe told me, or asked me, would you be --
25 or would you be willing to stand and tell the truth, or

1 MR. PATTEN: Just a quick follow-up.

2 EXAMINATION

3 BY MR. PATTEN:

4 Q. Going back to this document which is not made
5 an exhibit, the very first one we looked at after --
6 keep going. I'll direct your attention to --

7 MS. FALIS: This one, right, 4-5 to 4-8?

8 MR. PATTEN: Correct.

9 BY MR. PATTEN:

10 Q. Turn to number 00047. And look at the very
11 bottom of the page. There's an age-related statement
12 there under number 5.

13 A. 5, okay.

14 Q. Could you explain what that was?

15 A. Yes, that was --

16 MS. FALIS: Just so we're clear, you're
17 referring to the -- the portion, is that right?

18 MR. PATTEN: Correct.

19 MS. FALIS: Okay.

20 A. That was Ms. Moorse's statement.

21 BY MR. PATTEN:

22 Q. When did she make that statement?

23 A. It was made on two different occasions. I had
24 a very painful foot condition, I guess it's plantar
25 fasciitis or something, and I was limping around the

1 Agency. And Assistant Director Berry said, why don't
2 you go home and go see a doctor? You never take time
3 off anyway, you're a workaholic, go home, go see a
4 doctor.

5 But before I could leave, her office was right
6 next door to Director Moore, she said, "You know, if
7 you were horse, what would happen to you? You know what
8 we do with old horses." And that wasn't wasn't the
9 first time she'd said it. "Basically we take you to the
10 glue factory, take you out in an open field and shoot
11 you." So definitely it was an allusion to age again.

12 Q. Okay. I want to turn your attention to the
13 next page, 00048.

14 A. Okay.

15 Q. That first paragraph under number 4, who is
16 that referring to when it starts "The same young female
17 supervisor was given an outstanding rating and has not
18 done her supervisory time and attendance sheets for over
19 two years"; who was that?

20 A. That was the newly-promoted manager, Elizabeth
21 Norris.

22 Q. And how did you know she had not done her
23 supervisory time and attendance sheets?

24 A. Because she went on vacation, and I asked her,
25 "Where's your documentation for your team?" And she

1 said, "Oh, I let the timekeeper do that." And I said,
2 "You let the timekeeper? The timekeeper only inputs
3 data. If you don't tell her somebody's out, they could
4 be out on vacation for weeks on end and they're getting
5 paid routine duty. You have to tell the secretary on
6 the weekly, on the sheets, those TATEL sheets that go
7 back and forth."

8 Q. Did she respond?

9 A. She said, "Oh, I don't do those. I don't do
10 those."

11 Q. Is that something that a supervisor was
12 required to do?

13 A. Yes.

14 MR. PATTEN: Okay. That's all I have.
15 Thank you.

16 MS. FALIS: I have no further questions,
17 thank you for your time. I appreciate it. Off the
18 record.

19 (Deposition adjourned at 5:42 p.m.)

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1 Notice Date: December 19, 2016
2 Deposition Date: December 6, 2016
3 Deponent: Brian Ray
4 Case Name: Brian Ray v. U.S. Dept of State

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