UNITED STATES OF AMERICA
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
OFFICE OF FEDERAL OPERATIONS

THEODORE W. MORT,	)	EEOC Complaint No.
	)	480-2013-00261X
Complainant,	)	480-2014-00105X
	)	
v.	)	Agency Case No.
	)	66-000-0001-12
MEGAN J. BRENNAN,	)	66-000-0001-13
POSTMASTER GENERAL	)	
UNITED STATES POSTAL SERVICE,	)	Administrative Judge Katherine Kruse
	)	
Agency.	)	
	)	
	)	

APPEAL BRIEF

OF COMPLAINANT/APPELLANT THEODORE MORT

Complainant/Appellant Theodore Mort, through his undersigned counsel of record herein, hereby submits the following appeal brief of the Final Agency Action dated May 11, 2017. As set forth below, the Final Agency Action must be reversed.

I. INTRODUCTION

After dedicating 14 years of his life to law enforcement, Complainant Theodore Mort was removed from service as a United States Postal Inspector because he was perceived to have a mental disability and in retaliation for engaging in protected activity after he made complaints of harassment and discrimination.

The events that triggered Complainant's eventual removal from service involved an inexplicable series of trespasses by Complainant's supervisor (Mack Gadsden) at Complainant's

residence in the middle of the night, banging on his windows and doors. When Complainant reported this violent and harassing behavior, he was told that Gadsden "did nothing wrong". When local management would not address the issue, Mr. Mort made complaints of harassment and discrimination, and sought civil restraining order to prevent the conduct from occurring again.

Rather than responding per protocol to Complainant's complaints, by having the harassment investigation team assigned from headquarters in Washington, DC, the Service instituted investigations in to Complainant, held him out of service, and sent him for multiple fitness-for-duty examinations, that all found him fit to return to duty. Rather than return him to duty, the Service terminated Mr. Mort's employment based upon its "investigations". The investigations were clearly pretext for retaliation and discrimination.

Despite his treating physician and his employer's doctors stating he was fit to return to duty, Mort's supervisors continued to keep him out of work on administrative leave for over one year. Mort's supervisors at the United States Postal Service had no issues with his work performance prior to Mort reporting what Mort believed to be criminal actions of his supervisor and team leader, Mack Gadsden. Furthermore, his supervisors did not perceive him as a safety threat or danger to anyone prior to Mort accusing Gadsden of criminally trespassing onto his personal property in the early morning hours of Labor Day Weekend 2011. Mr. Mort's initial complaints regarding his supervisor trespassing on his property fell on deaf ears and his supervisors refused to either investigate the incident or take disciplinary action against his Gadsden.

In the days and weeks following the incident, Mr. Mort filed two official complaints with the Office of Inspector General; two police reports with the Fresno Police Department; and a

temporary restraining order against the supervisor alleged to have trespassed onto his property. Mr. Mort did all he could to obtain redress for what he believed to be a violation of his constitutionally protected rights. The combined effect of the incident and subsequent refusal to act on the part of his supervisors caused Mr. Mort to suffer work related stress, for which he requested stress leave. Once Mr. Mort took time off for stress related to the incident and filed complaints with outside agencies his supervisors responded by refusing to allow him to return to work and initiated an investigation of their own into Mort's alleged misconduct. After being on administrative leave for over one year Mort was terminated for alleged inaccuracies in police reports he filed related to his Gadsden's trespassing on his property. This termination was clearly retaliatory and illegal.

The present appeal concerns two separate EEOC case numbers, which were consolidated by Administrative Judge Katherine Kruse, over the Agency's objection. The full briefing on the Agency's Motion for Summary Judgment, which was granted in part and denied in part, and three days of hearing at the Federal Courthouse in Fresno, California on August 16, August 17, and August 18, 2016[1].

On April 11, 2017, Administrative Judge Kruse entered a HEARING DECISION AND ENTRY OF JUDGMENT. (Attachment "A", hereinafter "Decision"). On May 11, 2017, Edwin Bermudez, EEO Services Analyst, issued a NOTICE OF FINAL ACTION . (Attachment "B", hereinafter, "FAD"). In pertinent part, the FAD determined as to Mr. Mort:

> I have reviewed the entire record , including the investigative file and the transcript of the hearing held August 16-18, 2016, and *I agree with the Administrative Judge that you have not shown that you were the victim of illegal*

1 This location was ordered by the AJ, pursuant to repeated requests and unexplained delay by counsel for the Agency James Rickher, in determining an appropriate location, and verifying authorization to use the facilities. In the end, the Administrative Judge Kruse obtained approval for the location after the Agency's failure to do so and inexplicable delay in doing so.

discrimination. Consequently, I have decided to implement the decision of the AJ.

Id. , emphasis added. The FAD nowhere mentions the portion of the decision related to Mr. Mort's primary claim: that he was retaliated against for engaging in protected activity in violation of Title VII of the Civil Rights Act of 1964, as amended. Therefore, as an initial matter, the FAD, by not making any finding on Mr. Mort's retaliation claims, and limiting itself to the discrimination claims, the Agency has failed act.

At the outset of the hearing, Mr. Mort, through counsel of record noted to the AJ that another basis for discrimination and retaliation, other than that identified by Mr. Mort in his charges filed *pro se* was present and should be considered by the AJ: "regarded as" disability[2]. The AJ considered the arguments of counsel and considered this as a basis for the retaliation and discrimination claims. (Decision, pp. 2, 21).

II. PROCEDURAL HISTORY

On September 16, 2011, Adam Behnen placed Complainant/Appellant on Administrative leave, based upon his belief that Mr. Mort was disabled (*Behnen,* TR2, 153:11-154:24). Behnen did so under the perception of Mr. Mort's disability after complainant took a combination of sick/annual leave and was ordered to provide additional perceived disability medical documentation from the Complainants doctor/provider (even though prior medical documentation provided by the complainant to his supervisor was determined to be sufficient for approving the time as sick/annual leave combination).

The complainant's assigned equipment relied upon to perform his job duties were

2 Complainant's request to add disability as a basis was granted over Agency objection and confirmed during the hearing and by subsequent Order. (TR1:124-126, 128, 131-134,137; TR. 3:216-218; Order Confirming Grant of Request to Add Disability as a Basis, Sept. 1, 2016).

confiscated by Behnen's subordinate manager on September 19. 2011. The Agency approved the complainants leave time as covered by the Family Medical Leave Act. (IR #1 pg 267 -273).

On October 26, 2011, Complainant/Appellant contacted Agency EEO counselor Arlene Gordon (within 40 days from the alleged EEO violation).

On December 9, 2011, Complainant/Appellant formally filed the first EEO case.

On December 16, 2011, Agency EEO employee Brenda Thompkins dismissed Complainant/Appellant's EEO case.

On February 10, 2012, the Agency received an OFO acknowledgement that the Complainant/Appellant filed a timely appeal of the dismissal (within 20 days of dismissal).

On May 29, 2012, the Agency received an OFO order ordering the Agency to conduct an Investigation after the Agency inappropriately dismissed the case.

On January 5, 2013, Agency EEO Investigator Brian Nederloe sent the EEO Investigative file to the Complainant/Appellant, which was received on January 9, 2013 (395 days since formal EEO case filed)[3].

On February 7, 2013, EEO employee Christine Siegel Acknowledged receipt of the Complainant/Appellant's timely request for a AJ hearing.

On July 8, 2015 Summary Judgment was granted in part and denied in part in the first EEO case.

On July 13, 2015 Administrative Judge Kruse Orders the Agency to identify location for

3 The Agency EEOC data (Inspection Service) for FY2012 - Present posted on-line https://about.usps.com/who-we-are/no-fear-act/data/headquarters-inspection.htm remarkably claims that zero (0) cases were processed in excess of the required 360 day investigative period. *See* Management Directive 110 (MD-110), requiring the Agency to complete the investigation within the earlier of 180 days after the filing of the last amendment or not later than 360 days after the filing of the original formal complaint of discrimination.

hearing[4].

On August 16-18, 2016, AJ Kruse held an evidentiary hearing at the Federal Bankruptcy Court in Fresno, California.

On April 11, 2017, the assigned EEO Judge Katherine Kruse issued her decision (1,524 days from hearing request, well over 4 years).

III. LAW AND ARGUMENT

A. THE FAD DOES NOT IDENTIFY RETALIATION; THEREFORE, COMPLAINANT MUST BE RETURNED TO SERVICE.

The Final Agency Decision in this matter states that after careful review, the Agency finds that the actions taken against the Complainant were not discriminatory. The FAD makes no finding, despite having reviewed the entire record, concerning Complaint's claims of retaliation. Accordingly, by failing to make a finding that the adverse actions were not retaliatory, the Agency must return Complainant to service.

B. DEFAULT SHOULD BE ENTERED AGAINST THE AGENCY FOR FAILURE TO ADHERE TO THE MANDATES OF 29 C.F.R. §1614.108(f) BY FAILING TO COMPLETE THE INVESTIGATION WITHIN 360 DAYS.

The EEOC has a strong policy of ensuring compliance with the strict timelines set forth in the Code of Federal Regulations. *Harriet M., v. Mattis,* Appeal No. 0120141484 (January 30, 2017) recon. den. Appeal No. 0520170232 (May 25, 2017). The timelines set forth in the regulations are mandatory. In *Harriet M.,* the OFO reversed the agency decision and entered

4 The delays in bringing this matter to a hearing resulted in substantial prejudice to Complainant/Appellant. At least two witnesses, Dr. Dixon, who passed away during the pendency of the matter, and Oscar Villanueva, who was no longer subject to subpoena power, were unavailable to provide any testimony or be subject to any cross-examination.

default against the agency for its failure to complete the EEO investigation within the 180 day time frame set forth in 29 C.F.R. § 1614.108(e).

Here, because the charges were amended, the applicable time period is 360 days as set forth in 29 C.F.R. § 1614.108(f). It is undisputed that the agency failed to meet that 360 day deadline. Here, Complainant did not agree to an extension during the regulatory 360-day period, therefore, the Agency was required to complete the investigation of Complainant's complaint in or before December 2012. It did not do so until the following year, January 9, 2013.

Sanctions serve two purposes: they aim to deter the underlying conduct of the non-complying party and prevent similar misconduct in the future (*Barbour v. U.S. Postal Serv.*, EEOC 07A30133 (June 16, 2005)), while also providing equitable remedies to the opposing party. Given these dual purposes, sanctions must be tailored to each situation by applying the least severe sanction necessary to respond to a party's failure to show good cause for its actions and to equitably remedy the opposing party. R*oyal v. Dep't of Veterans Affairs*, EEOC Appeal No. 0720070045 (Sept. 10, 2007), recon den., EEOC Request No. 0520080052 (Sept. 25, 2009). Several factors are considered in "tailoring" a sanction and determining if a particular sanction is warranted: (1) the extent and nature of the non-compliance, and the justification presented by the non-complying party; (2) the prejudicial effect of the non-compliance on the opposing party; (3) the consequences resulting from the delay in justice; and (4) the effect on the integrity of the EEO process. *Gray v. Dep't of Defense,* EEOC Appeal No. 07A50030 (Mar. 1, 2007).

The effect on the integrity of the EEO process should not be underestimated when tailoring a sanction. *Cox v. Soc. Sec. Admin.*, EEOC Appeal No. 0720050055 (Dec. 24, 2009). "Protecting the integrity of the 29 C.F.R. Part 1614 process is central to the Commission's ability

to carry out its charge of eradicating discrimination in the federal sector." *Id*. The procedures contained in the Commission's regulations are no more or no less than the necessary means to eliminate unlawful employment discrimination in Federal employment. *Mach v. Dep't of Defense*, EEOC Appeal No. 0120080658 (Nov. 30, 2010). The Commission must ensure that all parties abide by its regulations; therefore, Complainant respectfully requests that Default is the appropriate sanction for the extreme delays in investigation and resolution of this matter.

C. THE INEXPLICABLE DELAYS IN ORDERING COMPLAINANT TO FFDE DEMONSTRATES THE PRETEXTUAL NATURE OF THE ORDERS.

In *Watkins v. USPS*, Appeal No. 0120092749 (June 29, 2012), recon. den. Request No. 0520120553 (January 30, 2013), a Postal Inspector (Program Manager), ISLE-14, in the Investigative Requirements & Solutions (IRS) Group/Group 6 Intelligence was subjected to harassment on the bases of sex, disability, and reprisal. The OFO reversed the AJ's Decision and the FAD, finding evidence that by ordering the Complainant to an FFDE after she made EEO complaints—even though she was ultimately not sent to an FFDE—that retaliation was present and actionable. "The Agency has a continuing duty to promote the full realization of equal opportunity in the employment, advancement, and treatment of employees. *Garcia v. Dep't of the Treasury,* EEOC Appeal No. 07A10040 (Jan. 13, 2003) (citing *Crespo v. U.S. Postal Serv.*, EEOC Request No. 05920842 (Sept. 17, 1993)). [Management] treated Complainant's harassment allegation and EEO Complaint as reasons to question Complainant's fitness for duty. Rather than encourage equal opportunity in the workplace, they punished Complainant for engaging in protected activity." Here, Mr. Mort was sent to two separate FFDEs, many months apart, with no on-the-job observations of behaviors that could justify such orders. Indeed, the Mr. Mort completed the first FFDE a total of 142 days since making the

statements comparing Gadsden's behavior to the ICE shooting.

Furthermore, in *Claudia A. v. TVA,* EEOC Appeal No. 0120120140 (May 1, 2014), the OFO reversed the agency's FAD, finding that "[a]lthough Complainant did not allege a violation of the Rehabilitation Act in this case, we find that a determination of whether such a violation occurred is required by the facts. In this regard, we note the Commission's decision in *Grayson v. USPS*, EEOC Appeal No. 0720080044 (January 6, 2009). In *Grayson*, an EEOC Administrative Judge (AJ) found a violation of the Rehabilitation Act when the agency ordered the complainant to undergo a fitness for duty examination. The complainant, in *Grayson*, however, had only alleged discrimination based on race (Black), sex (male), age (63) and retaliation pursuant to Title VII and the Age Discrimination in Employment Act of 1967. On appeal, among other things, the agency noted that the complainant had never raised a claim of disability discrimination. The Commission, however, upheld the AJ's finding of discrimination in violation of the Rehabilitation Act because (1) whether an employee is an individual with a disability is irrelevant to the issue of whether the agency properly required him to undergo a medical examination because the Rehabilitation Act's limitations regarding disability-related inquiries and medical examinations apply to all employees; and (2) the complainant's claim did not change and all the facts were sufficiently developed by both parties." *Id.* To the extent that violation of the Rehabilitation Act is presented by the facts of the present matter, such should have been addressed by the AJ in the decision.

In *Claudia A.,* much like the present case, the sole basis for ordering the employee to an FFDE was for conduct that occurred during an OIG investigation: "The Agency's sole reason for sending Complainant for a FFD evaluation and placing her on administrative leave was the

allegedly "extreme behavior" that she exhibited during the investigation of her complaints about the notes and the November 3rd interview with the OIG investigator." *Id.* Furthermore, just as occurred to Mr. Mort, in *Claudia A., "*prior to [his] interview with the OIG investigator there is no evidence of any concerns about [his] job performance nor was there any indication that [he] posed a direct threat to herself or others. Although we certainly do not condone Complainant's alleged behavior both before and during the meeting, we do not find that the behavior justified the Agency's medical inquiry almost two weeks later." The similarities between the present case and *Claudia A.* are striking. The "behavior" that Galletti testified was troubling and the basis for the FFDE, are indistinguishable from the "behavior" exhibited by *Claudia A.*, in her OIG investigation.

Furthermore, if the elapsing of 26 days was an indication of a lack of business necessity in *Claudia A.,* then surely the elapsing of 142 days between the allegations concerning the ICE incident and the first FFDE is clearly an indication that the FFDE is unjustified and likely pretext for reprisal.

E. THE ADMINISTRATIVE JUDGE ISSUED A PROTECTIVE ORDER CONCERING COMPLAINANT'S MEDICAL RECORDS WITH WHICH THE AGENCY HAS NOT COMPLIED.

The parties executed a Stipulation For Protective Order June 1, 2016, which provided that information designated as "Confidential" under that order be returned within 60 days of the conclusion of the final disposition. (Stipulation for Protective Order, Section 10, p. 8). The Agency has not done so, and is in violation of the Order. Complainant's medical records, submitted under that Order, remain in the custody of the Agency and its attorneys, in violation of that Order. This conduct is further evidence of the Agency's retaliatory animus towards

Complainant and a violation of his right to privacy of his medical information.

F. COMPLAINANT MOVED TO RECUSE COUNSEL FOR THE AGENCY, AND IN RESPONSE, THE AGENCY HAD EX PARTE COMMUNICATIONS WITH THE ADMINISTRATIVE JUDGE.

At the first day of hearing, on cross-examination, counsel for the Agency, James Rickher questioned Complainant about his claims that individuals were armed during a mediation, including Mr. Rickher himself. (*Mort* TR1, 230:20-242:4) In response the AJ accepted the Agency's proffer that it would provide some form of acknowledgment that the conflict articulated by Complainant was waived by the designee of the person in charge at the Agency. Rather than provide the information to Complainant, the approval or other information was sent directly, *ex parte* to the Administrative Judge.

Furthermore, although the Administrative Judge determined that an adverse inference would be issued for Agency's counsel's conduct (TR1, 245:17-246:21), that adverse inference is nowhere in the decision.

G. THE AJ LIMITED COMPLAINANT'S EXAMINATION OF NUNEZ, WHO PARTICIPATED IN THE DECISION TO TERMINATE COMPLAINANT, BY REFUSING TO PERMIT QUESTIONING ON COMPARATORS.

During the questioning of Nune, Complainant's counsel elicited the fact that Nunez had participated in the termination of others at the USPS. Counsel for the Agency objected, and Complainant proffered that the information was relevant as a comparator to Mr. Mort. The AJ sustained the objection stating that in order to be used as a comparator, another employee must be in the exact same supervisory chain. (*Nunez*, TR3, 94:11-97:8). That is simply not the state of the law, as comparators need not "be *identically* situated" to Complainant, e.g., having "the same supervisor, [being] subject to the same standards, and [engaging] in the same conduct."

Bowden v. Potter, 308 F. Supp. 2d 1108, 1117 (N.D. Cal. 2004) (analyzing comparator evidence in the context of the *prima facie* analysis). The *Bowden* Court explained:

> The relevance of such factors depends on the circumstances and nature of the case. The critical question is whether the plaintiff and the other employee are similarly situated in "all *material* aspects." [*McGuinness v. Lincoln Hall*, 263 F.3d 49, 53 (2d Cir. 2001)] (emphasis in original). For instance, an employee on an assembly line who physically assaults a co-worker is similarly situated to a supervisor who engages in similar conduct. A worker in the sales department who steals company property is similarly situated to one who works in customer service and commits the same act. The ultimate question that is informed by the similarly situated analysis is whether there is a basis for inferring discriminatory motive: Does the purported purpose of the challenged action require similar treatment of the two employees or does it justify different treatment due to differences in their status or situation rather than race? In the above examples, the fact that one employee is a supervisor or works in a different department is irrelevant to the purpose of the discipline. In other situations, those differences may be relevant. The issue of similarly situated status is therefore fact specific and defies a mechanical or formulaic approach. This is particularly so in view of the overarching predicate as to the relevance of the *McDonnell Douglas* test in the first place; as noted above, it is merely one method by which an inference of unlawful discrimination may be raised. *See Vasquez,* 349 F.3d at 640.

Id. Accordingly, the direct statements of retaliatory animus should have been considered by the Administrative Judge.

H. THE AJ COMMITTED ERROR IN NOT PERMITTING THE INTRODUCTION INTO EVIDENCE OF FALSE STATEMENTS MADE BY GALLETTI IN RESPONSE TO AN OWCP INVESTIGATION.

On cross-examination, Galletti testified that he had made responses to Complainant's separate OWCP complaint, and that everything in there was truthful. (*Galletti* TR3 53:4-13). He then recanted, after showing that he made untrue statements as to whether Fresno was a one-person domicile. (*Galletti* TR3 56:12-23). Galletti had no explanation for the false statement, yet the AJ refused to permit the statement to be introduced into evidence.

I. THE AJ'S SUMMARY ADJUDICATION THAT SEX COULD NOT BE A BASIS FOR COMPLAINANT'S COMPLAINTS IS ERROR.

In the Order Granting in Part and Denying in Part the Agency's Summary Judgment Motion, the AJ found insufficient evidence for sex to be a basis of discrimination or harassment. This is in spite of the testimony of female inspectors Diaz and Vincent that Gadsden's middle-of-the-night trespass would have made them wholly uncomfortable had it occurred to them (*Vincent* TR2, 29:17-30:14; 53:21-54:14; *Diaz* TR3, 157:4-19).

J. THE EXCLUSION OF STATEMENTS OF ANIMUS MADE DURING A SUPPOSED MEDIATION, WHILE THEN PERMITTING QUESTIONS ABOUT THE MEDIATION ON CROSS-EXAMIATION IS ERROR.

Complainant offered at summary judgment evidence of statements made prior to the termination decision that Agency representatives stated, "Drop your EEO case and resign or be fired". In rejecting this as evidence based on the mediation privilege, the AJ committed error by permitting extensive cross-examination of the Complainant concerning that mediation, of which the questioning counsel was a percipient witness. (*Mort,* TR1 226:17-231:7)

K. THE AJ DID NOT CONSIDER MULTIPLE ISSUES OF IMPEACHMENT PRESENT IN THE INVESTIGATIVE RECORD; AS SUCH, THE DECISIONS' FACTUAL FINDINGS ARE WITHOUT SUBSTANTIAL EVIDENCE.

At the outset of the three days of hearing, the AJ specifically noted that the entire investigative record was in evidence and that the parties should refrain from re-hashing anything in the investigative record (TR1, 5:19). The following is listing of these inconsistencies, contradictory statements, and information, not considered by the Administrative Judge and not

present in the Decision.

1. In Behnen's EEO affidavit (IR 617 # 16) he identifies Mack Gadsden and Anthony Galetti as witnesses to the discriminatory harassment complaint. However, in Behnen's EEO affidavit (IR 618 # 19 letters a, b, c) he denies any knowledge of a reporting of Complainant being exposed to a hostile work environment or harassment when on question #16 he identifies witnesses to Mr. Mort's complaint.

2. In Behnen's EEO affidavit (IR 608) he makes the false assertion that Mr Mort was unavailable or unable to perform the actions needed to obtain an Performance Appraisal when in fact he was available/able to complete necessary actions in conjunction with Agency Policy (IR 512) requiring issuance of an Performance Appraisal to all employees that work an excess of 60 days during an Fiscal Year.

3. In Behnen's EEO affidavit (IR 608 & 609) it is clear that he stated "don't know" whether Mr Mort requested a Performance Appraisal in response to questions c, d, e, f, g and h. Thereafter, on question I, Behnen responds that Galetti, in conjunction with Office of Counsel, handled Mr Mort's Performance Appraisal request. Further, on question #23 m (IR 620) Behnen states not only that he knew Mr. Mort requested an Performance Appraisal but identifies that Mort as being on leave and allegedly unavailable to receive an appraisal.

4. In Galetti's EEO affidavit in question #8e he responds N/A to the answer of when he became aware of this EEO complaint (IR 564). On or before November 24, 2011, Galletti was interviewed by an Agency EEO counselor Arlene Gordon (IR 163).

5. Further, In Galetti's EEO affidavit (IR 565 - 566) he claims that Mr Mort was unavailable or unable to perform the actions needed to obtain an Performance Appraisal when in

fact he was available/able to complete necessary actions in conjunction with Agency Policy (IR 512) requiring issuance of an Performance Appraisal to all employees that work an excess of 60 days during an Fiscal Year.

6. In Galetti's EEO affidavit answer to #10 (i) (IR 566) he answers that he followed Inspection Service practice in not issuing Mr Mort a Performance Appraisal. If this is true then Inspection Service practice is in violation of Agency Policy (IR 512).

7. In Galetti's EEO affidavit he asserts that Mr Mort was unavailable or unable to perform the actions needed to update his security clearance when in fact he was available/able to complete necessary actions (IR 574).

8. In Galetti's EEO affidavit answer to #16m he answers "No" in response to Mr Mort not enduring a negative effect from the suspension of his security clearance update when it is a condition of employment that Inspectors maintain a "Top Secret" security clearance to remain eligible for employment. (IR 575)

9. In Galetti's EEO affidavit answers to #21 (a)(b) (IR 578) he falsely answer that Mr Mort never reported being exposed/subjected to hostile or harassing environment.
In Galetti's EEO affidavit answers to #4 (a)(b) (IR 589) he falsely answer that Mr Mort never reported being exposed/subjected to hostile or harassing environment.

10. In Galetti's EEO affidavit answers to #3 (a)(b) he states that Mr Mort never reported being exposed/subjected to hostile or harassing environment, which was false. (IR 593)

11. In Galetti's EEO affidavit #21(c), 3 (c), and 4(c) he claims no knowledge that Nunez had conducted an investigation of Gadsden (his subordinate) regarding hostile or harassing environment alleged by Mr Mort in 2011. (IR 578) However, at the time Galletti

completed the EEO affidavit under penalty of perjury he in fact had a copy of the Nunez investigation of Gadsden, (October, 2011).

12. In Galetti's EEO affidavit #26 (a)(b) he asserted that both Gadsden and Tarver responded to the October 8, 2011, afterhours duty call when in fact Galletti himself personally took care of the call, and only afterwards Tarver made contact and Gadsden made no contact. (IR 582).

13. Galetti received the first of three EEO affidavits to complete before August 24, 2012. Galletti then ordered Mr. Mort to an FFDE for September 6, 2012 (IR 587 #2(a) based on his perception of Mr Mort's demeanor/behavior/disability some 94 days later after the June 5, 2012, pre-disciplinary meeting. (IR 598).

14. In Galetti's EEO affidavit (IR 592 #1(j)) he admits to violating Agency FFDE Policy (IR 540) by stating he is not obligated to inform Mr Mort as to the reason for the FFDE order.

15. While Mr. Mort was on approved sick leave Gadsden spoke to him via phone about work issues causing Mort to inform Gadsden not to call or contact him while he was on leave but Gadsden continued to e-mail and/or call Mr. Mort (IR 441 – 444)

16. It is undisputed that Gadsden facilitated a change in the after hour's duty rosters to show Mr. Mort was assigned after hours duty response during his approved leave as further attempt at harassment and abuse (Complainant Exhibit D). Behnen testified that this was wholly inappropriate (*Behnen* TR2, 154:25-155:10) The AJ Decision makes no note of this.

17. Gadsden states in his EEO affidavit that he had no knowledge of Mr.Mort complaining of being subject to an abusive or hostile environment. (IR 804 #14)

18. In Nunez' EEO affidavit (IR 836 #10 a - h) he asserts that he had no involvement in Mr Mort's FFDE request. However, Galetti obtained Nunez' authorization in requesting the FFDEs (IR 596) because Nunez' signature is listed as the authorizer. Nunez's answers in his EEO affidavit to questions #14 d – h, were "None" and "I don't know", which were clearly false (IR 838).

19. In Nunez' EEO affidavit answer to #19 he asserts that Mr. Mort never reported being exposed/subjected to hostile or harassing environment; however, Nunez was the Investigator that conducted Mr Mort's complaint investigation of Gadsden. (IR 839)

20. The OIG investigators (Musti & Thompson) report that both Galetti and Villanueva based their decision to terminate Mr. Mort's employment on an OIG report. That report contains serious misstatements, defects, and false assertions, including the following:

a. During their November 16, 2011, interview of Mr. Mort he provided them with initialed copies of this EEO complaint records (IR 710 # 1456-1463) as requested.

b. Thompson and Musti state in their respective Sept 2012 EEO Affidavits that they both are unaware of any EEO complaint by Mr Mort until 8/30/2012 (IR pages #626 question 8e and # 794 question 8e).

c. Thompson and Musti state in their respective EEO affidavits (IR 631 & 798) that Mr. Mort never reported an abuse, harassment and hostile work environment complaint. Mr. Mort complained about abuse, harassment and hostile work environment and they became aware of it via Mr. Mort's reports to them in September 2011. Thompson and Musti also utilized Nunez' investigative report in conducting the OIG investigation.

d. Thompson's EEO affidavit answers to #13 (a)(b) state "I don't know"

that Mr Mort reported being exposed/subjected to hostile or harassing environment. (IR 798)

e. Thompson's EEO affidavit answer to #13 (c) he responds "I don't know" that Nunez had conducted an investigation of Gadsden regarding hostile or harassing environment alleged by Mr. Mort in 2011 when at the time he completed the EEO affidavit he had in his possession a copy of the Nunez investigation of Gadsden since October 2011. (IR 799)

The foregoing items of impeachment were not considered by the AJ in determining the weight of evidence. Therefore, the AJ's Decision is not based upon substantial evidence.

L. THE ADMINISTRATIVE JUDGE'S DECISION MUST BE REVIEWED DE NOVO.

The standard of review is set forth in 29 C.F.R. §1614.405(a), which provides as follows:

> (a) The Office of Federal Operations, on behalf of the Commission, shall issue a written decision setting forth its reasons for the decision. The Commission shall dismiss appeals in accordance with §§ 1614.107, 1614.403(c) and 1614.409. The decision shall be based on the preponderance of the evidence. The decision on an appeal from an agency's final action shall be based on a de novo review, except that the review of the factual findings in a decision by an administrative judge issued pursuant to § 1614.109(i) shall be based on a substantial evidence standard of review. If the decision contains a finding of discrimination, appropriate remedy(ies) shall be included and, where appropriate, the entitlement to interest, attorney's fees or costs shall be indicated. The decision shall reflect the date of its issuance, inform the complainant of his or her or her civil action rights, and be transmitted to the complainant and the agency by first class mail.

Id. Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. National Labor Relations Board,* 340 U.S. 474, 477 (1951). A finding regarding whether or not discriminatory intent existed is a factual finding. See *Pullman-Standard Co. v. Swint,* 456 U.S. 273, 293 (1982).

An AJ's conclusions of law are subject to a *de novo* standard of review, whether or not a

hearing was held. Thus, on appeal, "the burden is squarely on the party challenging the [AJ's] decision to demonstrate that the [AJ's] factual determination are not supported by substantial evidence." EEOC Management Directive (MD-110), at 9-17.

While the credibility determinations of an AJ are entitled to deference due to the AJ's first-hand knowledge, through personal observation of the demeanor and conduct of the witness at the hearing. See *Esquer v. United States Postal Service*, EEOC Request No. 05960096 (September 6, 1966); *Willis v. Department of Treasury, EEOC Request* No. 05900589 (July 26, 1990). An AJ's credibility determination contradicts the testimony or the testimony so lacks in credibility that a reasonable fact finder would not credit it. *See* EEOC Management Directive 110, Chapter 9, § VLB. (November 9, 1999). However, no deference can be given where no credibility determination has been made by the AJ.

M. EVEN UNDER THE SUBSTNTIAL EVIDENCE STANDARD, THE DECISION IS UNSUPPORTED BY SUBSTANTIAL EVIDENCE.

1. The AJ Finding on Claim 1, For Failure to Provide a 2011 Performance Review Is Not Based On Substantial Evidence.

The AJ found that even though policy requires a merit performance evaluation if the employee works 60 days in any calendar year, that there was a purported legitimate reason for doing so: a hearsay statement by Inspector In Charge Galletti that he made a phone call to someone at some time and they said it was ok. (Decision, p. 14).

In support of this finding, the AJ cites to *Cleary v. Sebelius* EEOC App. No. 0120093835 (July 8, 2011). That decision dealt with a failure to be selected action by an FAA employee for a promotion. The employer offered factual rationale; i.e. that the complainant;s applications were incomplete, that in others he ranked too low to be included in the list, and in the remaining

applications, he did not meet the minimum qualifications or specialized experience. The employee/complainant offered no evidence that he was more qualified for the positions or that the proffered legitimate business reason was false. The Decision also cites to *Egolf v. Geithner* EEOC App. No. 0120092843 (September 29, 2011), a case decided without hearing, where on *de novo* review, the OFO affirmed the agency's findings against Complainant on hostile work environment and failure to accommodate. *Egolf* involved no direct mandate, like the merit performance evaluation mandate here, and is otherwise inapposite to the facts of this case.

In stark contrast to the employee in *Cleary v. Sebelius,* Complainant/Appellant here identified a mandatory policy: if an employee works 60 days in a calendar year, they must receive a performance evaluation. (*Behnen,* TR2 84*:1*-85:10). The Agency did not comply, and the only evidence in the record is an unverified, undated, undocumented hearsay communication with an unidentified person in Human Resources that provided no citation to rule, practice or regulation. (*Galletti* TR2, 43:1-44:23; *Behen*, TR2, 158:1-19). The Agency cited no document, no policy, practice or procedure, and did not refute the fact that Complainant/Appellant had made himself available during the entire time period of the review, as required. *Id.* Accordingly, the only admissible, credible evidence is that Complainant/Appellant was entitled to a performance evaluation, and did not receive one[5].

2. The AJ Finding on Claims 5 and 6 – Retaliatory OIG Investigations Are Not Supported By Substantial Evidence.

The Decision ignores the entire basis for these claims: i.e., that Mack Gadsden had admitted to the early morning hours trespass and banging loudly on Complainant/Appellant's

5 There is also evidence in the record that there was a reason for not giving Mort his performance evaluation: to limit his merit increase, to ensure that he would not return, and to protect Gadsden.

windows, rendering any further investigation moot. In support of the Decision, the AJ further cites the same wholly inapposite cases of *Egolf* and *Cleary*.

Indeed, the Decision makes no reference to the inherent lack of credibility of Behnen, who ordered the retaliatory investigations on Mr. Mort: (*Behnen,* TR, 155:11- 156:8) November 16, 2011, and again on April 18, 2012, interviews.

"The asserted legitimate, non-discriminatory reason for both interviews was that they were part of an OIG investigation into allegations that Complainant had engaged in misconduct. The Agency considered it necessary to conduct the second interview to find out more information in an attempt to assess Complainant's truthfulness. *Cleary*, EEOC App. No. 0120093835; *Egolf*, EEOC App. No. 0120092843." (Decision, p. 15).

3. The AJ Finding On Claim 7 Regarding Withdrawal of Complainant/Appellant's Security Clearance Was Unsupported By Substantial Evidence.

The AJ's decision cited to the following evidence of a legitimate business purpose to the withdrawal of Complainant/Appellant's security clearance: Galletti informed an investigator that Mr. Mort was on administrative leave, and that the investigator allegedly told Galletti that he would suspend Mort's security clearance until he was no longer on leave, (TR2:301; IR 574), and that "this is how such situations are handled". (IR 943). The decision was made either by the investigator or by the USPIS Security Investigative Service Center. (IR 943). The AJ again cites the inapposite authorities at *Cleary*, EEOC App. No. 0120093835; *Egolf*, EEOC App. No. 0120092843." (Decision, pp. 15, 16).

The foregoing again cites to no policy, no admissible evidence other than self-serving hearsay statements that some unidentified person told Galletti this is how it is going to be. The AJ made no

determination as to Galletti's credibility, after wide-ranging claims of lack of recall knowledge and a clear admission that he was "speculating" as to the process. (*Galletti,* TR2*,* 315:1-317:15.

4. The AJ's Findings On Claims 9 and 10 Regarding the Fitness For Duty Examinations Are Not Supported by Substantial Evidence.

As discussed more fully below in the section regarding the failure of the AJ to address the pretextual value of the Agencies violations of the Rehabilitation Act and its own policies for FFD exams, the findings that the Agency had set forth a legitimate business reason for sending Mr. Mort to two Fitness For Duty Examination, years apart, with no on-the-job observation of a performance issue is contrary to the great weight of authority and must be reversed.

5. The AJ's Conclusion of Law That Gadsden Was Not a Comparator Is Not In Line With EEOC Precedent.

The AJ's decision claims that Complainant cannot use Gadsden as a comparator because he was not identical to Mort, citing *Thrasher* and *Ochoa*. In *Thrasher v. U.S. Postal Serv.,* EEOC App. No. 0120111980 (July 27, 2012) the Commission held that comparators could not be used in disparate treatment analysis, when they were assigned to duties within medical restrictions that Complainant did not have. Here, in contrast, no such deviations were present; rather, the functions of Gadsden and Mort were exactly the same, respond to after-hours calls, nothing more.

In *Ochoa v. U.S. Postal Serv.*, EEOC App. No. 0320110005 (Sept. 27, 2012) the Commission found that the Complainant could not use comparators because those comparators did not (a) have open OWCP claims and received limited duty instead of light duty, (b) the comparators were not assigned to the same division, (c) some did not have the same job title, and (d) some had retired years ago. Here, both Gadsden and Mort had the same job title Postal Inspector, both worked in the same area, and no substantial differences between them were

present. Accordingly, this conclusion of law must be reversed.

6. The AJ's Conclusion of Law That The Rehabilitation Act Was Not Violated Is Error.

The AJ's decision cites to *Mayra S. v. PBGC*, EEOC Appeal No. 0320160066 (February 17, 2017) for the conclusion that sending Mr. Mort to three total FFDs was consistent with business necessity and was job-related. (Decision, p. 22). In *Mayra S.*, the complainant made **unsubstantiated and paranoid allegations:** "Petitioner accused them of breaking into her home, providing information to a transit officer about her location on a train, orchestrating things to happen to her at work and outside of work, listening to her work conversations, communicating with each other at work via earpieces, observing her at work via hidden cameras, and having a hidden agenda towards her." *Id.* Here, Mort simply reported that Gadsden had trespassed and banged loudly on his windows, facts admitted to by Gadsden before any investigation ever occurred.

More importantly, as the OFO set out in the *Mayra S.* decision, the AJ's decision here makes a critical legal error, in not engaging in the 4 part analysis required to determine wether the *employer* has met its burden to demonstrate *by objective evidence* the threat. As the OFO stated in *Mayra S.*:

> "Direct threat" means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. 29 C.F.R. § 1630.2(r). The determination that an individual poses a "direct threat" shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. *Id*. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. Id. In determining whether an individual would pose a direct threat, the factors to be considered include: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3)

> the likelihood that the potential harm will occur; and (4) the imminence of the potential harm.

Id. The AJ's decision did not do the legal analysis required to make a proper finding that a direct threat was present. As such, the Decision contains a critical error of law.

All the facts elicited in the Investigative Record at the hearing demonstrate that the duration, nature, likelihood and imminence of harm each were trivial to non-existent. This was confirmed by the content of each of the Fitness For Duty Examinations.

The AJ Decision cites *Elden v. DOI*, EEOC Appeal No. 0120122672 (February 24, 2017) for the legal conclusion that Complainant did not prove pretext. That case involved a "sit and reach" requirement that a military veteran could not fulfill. The Commission reversed the FAD, finding that the agency had not met its burden to demonstrate that the "sit and reach" requirement was job-related and consistent with business necessity. Similarly, here, there was no evidence introduced by the Agency that met its burden to demonstrate the "direct threat" factors cited above. All the investigations and examinations instituted by the Agency against Mort occurred shortly after he filed his EEO complaint, and Gadsden had admitted that he had trespassed and banged loudly in the early morning hours on Mort's property. There was simply nothing to investigate; therefore, the AJ's legal conclusion that Complainant cannot prove pretext is based upon a fundamental error of law.

The AJ Decision also cites *Kathleen P. v. Dep't of Homeland Sec.*, EEOC App. No. 0720150036 (September 26, 2016) in support of the same conclusion; however, that decision again cites to the legal principles that the AJ's Decision here ignored:

> Moreover, such a finding must be based on an individualized assessment of the individual that takes into account: (1) the duration of the risk; (2) the nature and severity of the

> potential harm; (3) the likelihood that the potential harm will occur; and 4) the imminence of the potential harm. 29 C.F.R. § 1630.2(r); *Chevron U.S.A. v. Echazabal*, 536 U.S. 73 (2002); *Cook v. State of Rhode Is., Dep't of Mental Health Retardation and Hospitals,* 10 F.3d 17 (1st Cir. 1993). A determination of significant risk cannot be based merely on an employer's subjective evaluation, or, except in cases of a most apparent nature, merely on medical reports. Rather, the agency must gather information and base its decision on substantial information regarding the individual's work and medical history. *Chevron U.S.A. v. Echazabal, supra.*

Id. The only evidence cited by the AJ's Decision in this regard are precisely that which is banned by the applicable legal standard: **subjective evaluation** of the supervisors. (Decision, pp. 21-23). Just as with Galletti's testimony about his use of the *Douglas* factors in determining the severity of the discipline to be imposed on Mr. Mort, it is clear that none of the supervisory personnel during this time period ever articulated any analysis of the required factors, while acknowledging that they regarded Mr. Mort as disabled. See, e.g., (*Behnen*, TR2 154:4-24).

7. The AJ Decision Failed to Determine Credibility: Whether Complainant's Supervisor Told Him Not To Respond to Duty Calls.

The Administrative Judge summarily concluded—taken as an absolute fact—that Mack Gadsden, Complainant's Supervisor had not instructed him to take the Memorial Day weekend off and not to respond to duty calls. (Decision, p. 4). Rather than consider any countervailing evidence presented by the Complainant, and without making any credibility determination that one witness was more credible than the other, the Administrative Judge simply disregarded Mr. Mort's sworn testimony:

> Q. Okay. Mr. Mort, let's move on. When did you first meet Mr. Gadsden?
>
> A. The last day of August 2011.
>
> Q. And where did that occur?

A. In Fresno.

Q. And how long was your interaction with -- your first interaction with Mack Gadsden?

A. Anywhere between an hour and a half to two, two and a half hours.

Q. And can you briefly describe for me what the interaction consisted of?

A. It was him relaying in a militaristic fashion how the team is going to function, and directives not -- there was no relay of information. I was trying to relay to him, where he would just direct me this is how Fresno is going to work, this is how Fresno is going to function. That was the content. And I explained to him during that conversation that I needed help down here. I was conducting the work of three inspectors, and I had been for quite some time, and I'm losing my mind, I'm -- I can't -- I'm having problems really functioning as a normal person, to continue this workload.

Q. And what was his response, if any?

A. I realize you're overworked, and I will get you help. We'll get more people down here. And don't -- this weekend is a long Labor Day weekend, don't worry about any duty calls. Stay away from work issues, just enjoy your life.

(TR1, 78:14-79:17). This failure to address the differing accounts of the initial instructions given to Mr. Mort is key to the Respondent's entire position that Mr. Mort was properly removed from service. Had the Administrative Judge made the appropriate credibility determination (that Gadsden had told Mort to take the time off,) the factual underpinning of the Agency's basis for removal would vanish.

8. The AJ Did Not Consider Statements of Animus.

The Administrative Judge unbelievably failed to consider evidence that demonstrated a clear animus towards Mort by Gadsden, that Gadsden had called Mort repeatedly, and angrily questioned Mort "why the fuck didn't you respond to my call?" (Decision, pp. 5-6). This level

of animus towards a Complainant at least bears analysis. However, the AJ Decision makes no mention of it.

The AJ did not make a credibility determination as required in citing Galletti's claim that he did not send Mr. Mort to the second FFD "because you filed an EEO". (Decision, p. 18 "Galetti did not tell Complainant he was being sent for the FFDEs because of his EEO claim. (TR2:310)"). This directly contradicts Mr. Mort's sworn testimony (*Mort,* TR1, 122:23-124:12).

This failure is a key reason why the FAD must be reversed. With respect to claims of reprisal, the Commission has stated,

> Direct evidence of a retaliatory motive is any written or verbal statement by a respondent official that s/he undertook the challenged action because the charging party engaged in protected activity. Such evidence also includes a written or oral statement by a respondent official that on its face demonstrates a bias toward the charging party based on his or her protected activity, along with evidence linking that bias to the adverse action. Such a link could be shown if the statement was made by the decision-maker at the time of the adverse action.

EEOC Compliance Manual Section 8, "Retaliation," EEOC Notice 915.003 § 8-II.E.1, at 8-17 (May 20, 1998) (EEOC Compliance Manual); *see also Bowers v. Dep't of Def.*, EEOC Appeal No. 0720070012 (Mar. 22, 2010) ("Direct evidence of retaliation is any written or verbal policy or statement made by an agency official that on its face demonstrates a bias against a protected group and is linked to the complained of adverse action"); *Tellez v. Dep't of the Army, EEOC* Request No. 05A41133 (Mar. 18, 2005).

If there is credible evidence that retaliation was a motive for the challenged action, a finding of reprisal should be found. Evidence concerning a legitimate motive for the action is relevant only to relief. EEOC Compliance Manual § II.E.1, at 8-16. Because the AJ did not make a credibility determination concerning the statement by Galletti that Mort was being

ordered to an FFDE "because [he] filed an EEO", the decision must be reversed.

Furthermore, the above-quoted language is *per se* retaliation. In *Eason v. Dept. of Navy*, EEOC Appeal No. 01A40247 (Sept. 8, 2005). the Commission held that the supervisor's timing and harsh words about EEO complaint (that complainant "had the nerve" to bring an EEO complaint against the supervisor) constituted a per se violation based on intimidation and interference with EEO activity and established a basis for compensatory damages (citing 29 C.F.R. §1614.101, 102, 102(5)). That is precisely what occurred here.

9. The AJ Did Not Consider The Contemporaneous Statements Made in Gadsden's Interview With Nunez In Determining Whether Discriminatory or Retaliatory Animus Was Present.

Contemporaneous statements, those made close in time to the events that are at issue are generally entitled to greater evidentiary weight. By relying on self-serving characterizations made many years later, the AJ committed error in holding that substantial evidence of a lack of discriminatory intent was present. The "investigator" Nunez[6], took Gadsden's statement that he "wanted make things right with Mort" is an acknowledgment of having breach some norm or protocol at the very least. However, this evidence was ignored in the AJ Decision.

N. THE ADMINISTRATIVE JUDGE COMMITTED ERROR BY DISREGARDING THE AGENCY'S MULTIPLE FAILURES TO FOLLOW PROTOCOLS.

1. Policy On Investigation of Harassment Complaints.

a. Nunez Dissembled Over Whether Harassment Complaints Are Ever Referred Back to Domicile From OIG.

6 The assignment of Nunez was contrary to Agency practice. Claims of Harassment in the workplace are routinely investigated by the Harassment Team out of Washington, D.C.. Here, Nunez was tapped on the shoulder by Villanueva, and after returning an investigation favorable to management, was promoted into that management from another office. (TR3, 90:1-18).

Complainant/Appellant offered uncontroverted evidence that the investigation of Mr. Mort's complaint of harassment in the workplace was handled out of policy. When questioned about whether he even viewed the complaint he was supposedly investigating, Mr. Nunez dissembled on the record repeatedly over the course of more than 10 pages of hearing transcript. (*Nunez*, TR3 104:4-110:15).

2. Galletti's Failure to Analyze And Apply the Douglas Factors.

Galletti testified that he used the *Douglas* factors in determining the level of discipline to apply; however, the testimony elicited at hearing demonstrated that the vast majority of factors weighed in favor of a lesser-level of discipline: (*Galletti,* TR3 26:6-
The alleged misconduct was not for gain, (*Galletti,* TR3 27:21-23), was not malicious, (*Galletti,* TR3 29:22-25), there were no false statements in any documents filed by Mort (*Galletti,* TR3 34:5-15), no prior history of discipline (*Galletti,* TR3 36:19-37:1), What about his job level and type of employment, contacts with the public, prominence of the position, were all "not negative" (*Galletti,* TR3 37:5-17) past work record, length of service, performance appraisals, ability to get along with fellow workers, dependability, effect on his supervisor's confidence, were all positives or neutral (*Galletti,* TR3 37:19-39:18). In sum, when only two of all these factors are a negative, and yet the most severe punishment is meted out, an inference ought to be drawn that other motivating factors were at play, including Galletti's perception that Mr. Mort was mentally disabled. (*Galletti,* TR2 28:15-29:6).

This failure of policy was ignored in the AJ Decision, to Complainant's prejudice. Instead, the AJ Decision simply states that supervisors had subjective beliefs about Mr. Mort, and therefore they had a legitimate reason for seeking the harshest discipline possible: termination of

a sworn officer.

3. Policy on Fitness For Duty Examinations.

The uncontroverted testimony is that the Agency used the FFD process for an impermissible purpose; to wit, to keep Mr. Mort out of service while they attempted to terminate him based on other claims.

> Q. Every single fact upon which the Service including you, Nunez and Mr. Villanueva proposed to terminate Mr. Mort were fully investigated and fully known prior to sending Mr. Mort on an FFD. Correct?
>
> A. I believe so. Yes.
>
> Q. So rather than terminate him then you decided to send him to an FFD, correct, and wait for a while?
>
> A. Yes, because we didn't know how long it would take to terminate him and we were concerned that he would hurt himself or others in the meantime.

(*Galetti*, TR2 56:14-24). Indeed, the evidence showed that Mr. Mort was not given an opportunity to explain the conduct that supposedly was the basis for sending him for a Fitness for Duty Examination, in violation of policy. (*Mort* TR1, 119:4-16). Pretext can be shown through an inexplicable deviation from standard practices. *See Kouvchinov v. Parametric Tech. Corp*., 537 F.3d 62, 68 (1st Cir. 2008). That is precisely what occurred here when the Agency violated the policy of permitting the employee to explain the behavior prior to sending them for FFD on the first FFD examination, and violated policy on the second FFD examination when there was no additional on-the-job observation that could form the predicate under the policy for another FFD.

Multiple FFDs by themselves are not necessarily unlawful; however, in the instances in which the EEOC has determined that multiple FFDs were permissible there was either (a)

inadequate medical documentation in the first instance, and/or (b) the FFD examinations found the employee unfit. *See, e.g., Gillins v. USPS*, Appeal No. 0120083145 (February 4, 2011) (three FFDs upheld where original doctor's note was inadequate and three FFDs found employee unfit).

The Rehabilitation Act places certain limitations on an employer's ability to make disability-related inquires or require medical examinations of employees only if it is job-related and consistent with business necessity. 29 C.F.R. §§ 1630.13(b), 1630.14(c). Generally, a disability-related inquiry or medical examination of an employee may be "job-related and consistent with business necessity" when an employer "has a reasonable belief, based on objective evidence, that: (1) an employee's ability to perform essential job functions will be impaired by a medical condition; or (2) an employee will pose a direct threat due to a medical condition." See Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the ADA (July 27, 2000) (Enforcement Guidance). "Direct threat" means a significant risk of substantial harm that cannot be eliminated or reduced by reasonable accommodation. 29 C.F.R. § 1630.2(r). It is the burden of the employer to show that its disability-related inquiries and requests for examination are job-related and consistent with business necessity. Enforcement Guidance, at 15-23.

"Direct Threat" has been interpreted very narrowly by the EEOC. For example, in *Snowden v. VA*, EEOC Appeal No. 0120083032 (September 9, 2011), the Commission held that an employee who pushed another employee with her chest was not a "direct threat" sufficient to warrant a psychiatric evaluation in violation of the Rehabilitation Act. In *Munford v. USPS*, EEOC Appeal No. 0120071416 (March 31, 2009), recons. den., 0520090405 (June 24, 2009) the

Commission found that the statement, "It's just too bad that I'm not allowed to have any sharp objects or I would use it on you" constituted a direct threat substantiating a psychological evaluation. The record here contains no such threats, nor any objective evidence that could support a "direct threat" analysis under the applicable authorities cited above.

In the final analysis, Galletti openly admitted on the record that he failed to follow USPS policy in ordering Mort to FFDEs. Galletti testified that he did not follow USPS policy in ordering Complainant to an FFDE. (*Galletti,* TR3, 65:20-66:4). The AJ's failure to identify this evidence of pretext is prejudicial error.

4. Failure To Follow Issuance of Performance Appraisal Policy.

The Agency failed to follow the Performance Appraisal Policy, justifying it, as set forth above, with unsubstantiated hearsay statements and calls to unidentified individuals who claimed that an emplo yee on leave would not get a performance review, despite having worked more than 60 days. The undisputed evidence is that Mr. Mort was available to interviewed by OIG, to meet with Galletti, to go to mediation, and to attend the FFDEs. There is no evidence, let alone substantial evidence that the Agency complied with the requirements set forth in the Managers Responsibility Policy (IR # 989 – 1029).

O. COMPALINANT PROVIDED AMPLE EVIDENCE AND FULL BRIEFING OF DAMAGES; THEREFORE REMAND IS UNNECESSARY.

MR. Mort seeks equitable and monetary relief for the damages he suffered as a result of the discrimination and retaliation he faced in the workplace. The appropriate inquiry must consider where Mr. Mort would be if Gadsden never trespassed on his property during the early morning

hours on Labor Day Weekend 2011. Mr. Mort most likely would still be thriving as an Inspector with all intentions of working until his retirement year of 2026. Accordingly, Mort is seeking to be reinstated to his position. Although reinstatement is preferred, front pay may be awarded if reinstatement is not feasible. Front pay is awarded to compensate the Complainant for lost future wages and benefits. Mort is also seeking damages for injuries he suffered because his supervisors perceived him as being disabled, illegally held him out of work, and subsequently terminated him after he made complaints related to his Gadsden's trespass. Your honor may also award a victim of discrimination backpay for any salary, raises, and fringe benefits lost as a result of a employer's discriminatory conduct. Mort is entitled to a backpay award that compensates him for the decreased earnings he suffered as a result of his former employer's discrimination, which began on September 16, 2011, the date his supervisor placed him on administrative leave and refused to allow him to return to work despite his doctor's clearance to do so.

From September 12, 2011 until his March 14, 2013 termination, the record indicates Mort's supervisors precluded him from working and ultimately removed him because they perceived him to be disabled based on a serious mental illness or infirmity. Mort initially took stress leave related to events surrounding his supervisor trespassing on his property over the Labor Day Weekend 2011. Prior to this weekend there were no documented complaints or records of disciplinary action taken related Mr. Mort's performance, and he was roundly perceived by many as a good inspector. (TR 2, 95:15-18). During the Labor Day Weekend Mort's new supervisor Mack Gadsden showed up at his home unannounced. It is undisputed by all the witnesses in the instant action that Gadsden's conduct of showing up to Mort's house in the very early morning hours or early morning hours, knocking on their front door, going around

to the back door, knocking on the back door, the back windows was unprecedented and out of the ordinary course of conduct. (TR2, 90:2-15).

After the incident at his home Mort's supervisor described his behavior as erratic. (TR2, 92:10-14). Mort's supervisor, Adam Behnen, testified that Mort was very uncomfortable with Mack's conduct at his home and that Mort wanted Gadsden arrested because he trespassed on his property without a search warrant. (TR2, 92:19-23). Immediately after the incident Mort requested time off for stress leave. Over the next several weeks Mr. Mort made a number of different reports: to the Fresno Police Department; to obtain a restraining order; to his Congressman; and to the Office of Inspector General. Mort testified that in a meeting with Behnen in the days following the incident, Behnen himself directed Mort to file a police report. (TR1, 111:12 – 112:8). Mort also testified that because he didn't have any protection after being stripped of his badge and gun, all he wanted was an authoritative body to recognize that what has happened to me is wrong, and to give me assurance that I need protection. (Id.)

Approximately one week after the incident Mort was cleared by his doctor to return to work. (Undisputed Fact 12). However, Mort's supervisors still perceived him as disabled and Mort was removed from duty and never allowed to return. The Agency required Mort to provide additional medical documentation in order to be cleared to return to work, which he provided on September 29, 2011, and Mort was notified on October 13, 2011 that the medical documentation provided by Mort was sufficient to establish his ability to return to work. (Undisputed Fact 20). Despite complying with the medical documentation request, Mort was illegally kept out of the workplace for over year because he was perceived to have a disability that precluded him from working as a Postal Inspector. Galetti, also Mort's supervisor at the time, testified that he was

concerned that Mort may hurt himself or others based on some of the information that -- some of the statements that he had made. (TR2 284:5-285:6.) Galetti testified that rather than terminate Mort right away they decided to send him to a Fitness For Duty Examination because they didn't know how long it would take to terminate him and were concerned that he would hurt himself or others in the meantime. (TR2: 312:14-313:3).

During the timeframe Mort was being kept out of work because he was perceived to have a mental disability, Mort's supervisors initiated an OIG investigation related to Mort allegedly engaging in criminal conduct in April 2011 and allegedly false statements in the police reports he filed related to the Labor Day incident at his home. (TR2 97:22-100:9). On March 14, 2013 Mort was informed he would be fired for cause.

Based on the foregoing evidence it is clear that Mort was illegally precluded from returning to work because his supervisors perceived him as being disabled on his mental health.

The purpose of awarding damages in an employment discrimination case is to make the victim whole for injuries suffered because of the discrimination. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418-19, 95 S. Ct. 2362, 2372, 45 L. Ed. 2d 280 (1975). A court may award a victim of discrimination backpay for any salary, raises, and fringe benefits lost as a result of a defendant's discriminatory conduct. *See Albemarle Paper*, 422 U.S. at 417-21.

1. Backpay

Complainant is entitled to a backpay award that compensates the decreased earnings he suffered as a result of his former employer's discrimination and retaliation**.** Accordingly, Complainant is entitled backpay as March 7, 2013, when Complainant was placed on Leave w/o Pay (LWOP) prior to termination on March 15, 2013, to present with reinstatement of leave

usage from Sept 6, 2011 to Sept 15, 2011 and reinstatement of all leave earned that was involuntarily cashed out to the Complainant after termination.

Mitigation is not an issue in the instant action. The burden to demonstrate failure to mitigate is on the defendant, who must show substantially equivalent positions were available and the Complainant did not use reasonable diligence to seek them out. *Taylor v. Invacare Corp.,* 64 F. App'x 516, 523 (6th Cir. 2003). A substantially equivalent position affords the terminated employee "virtually identical promotional opportunities, compensation, job responsibilities, working conditions, and status." *Rasimas v. Michigan Dep't of Mental Health,* 714 F.2d 614, 624 (6th Cir. 1983). Reasonable diligence is not an onerous burden and is evaluated in "light of the individual characteristics of the claimant and the job market." *Id.* Here, the Respondent employer did not meet its burden to show substantially equivalent positions existed or Complainant failed to exercise reasonable diligence to locate one. On the evidence presented, the respondent employer failed to meet its burden to prove Complainant did not mitigate his damages.

2. Lost Pension Benefits

With respect to the lost pension benefit award, Mort intended to retire in 2026 at the age of 57. (Exhibit W). Accordingly, Mort is entitled to the net value of his lost pension benefits based on this retirement date. Mr. Mort is entitled to potential pension benefits as they represent a tangible loss to him and a benefit that would have inured to him but for the unlawful termination by the employer.

3. Reinstatement Or Front Pay

Front pay is awarded to compensate the Complainant for lost future wages and

benefits. Although reinstatement is preferred, front pay may be awarded if reinstatement is not feasible. The employer did not address reinstatement, the preferred remedy in termination cases, nor whether it was inappropriate in this case or not. Considering evidence presented at the hearing noting Complainant's yearly compensation, his relatively young age, and the probable difficulty of finding comparable, full-time employment a significant front pay award is necessary in lieu of reinstatement.

4. Emotional Distress

Damages for emotional distress must be proven by competent evidence but this does not require medical support. A Complainant's burden can be carried by his own testimony and the circumstances of the case. Juries are accorded great discretion in determining the amount of damage awards, but damages must be proved; they must not be speculative. The only medical professional to testify in the instant action was Ms. Price-Sharps. Ms. Price-Sharps testified on Day 3 that she is a licensed psychologist who predominantly treats police officers and other first responders. She further testified that she is a member of the American Psychological Association, the Society for Police and Criminal Psychology, and the International Association of Chiefs of Police, Psych Section and that she the President for the Society for Police and Criminal Psychology.

Ms. Price-Sharps, testified that she began treating Mr. Mort in December of 2011. She testified that Mr. Mort was extremely distressed when he presented for treatment, he was almost unable to finish his thoughts, his sentences were coming out very fast, he was extremely distressed or appeared extremely distressed, he wasn't sleeping, said that he was very overwhelmed, very scared, and wasn't sure how to proceed. Ms. Price-Sharps testified that Mr.

Mort informed her that he had been working for the Post Office, and he was actually referred by the Post Office through their EAP. Ms. Price-Sharps testified that Mr. Mort informed her that he took a vacation and that when he came back his window in his house in his bathroom had been busted and he later found out that that was his boss, who trespassed on his property and he was extremely distressed and felt very unsafe.

In terms of Mr. Mort emotional distress damages Ms. Price-Sharps testified that because this is a work-related injury, and this is a work-related legal process, really healing Mr. Mort hasn't really started because we haven't been the legal process is still open. It's just his adrenalin is always so escalated from the PTSD. All if this stuff retriggers him.

When testifying about the possibility of Mr. Mort returning to work Ms. Price-Sharps testified as follows

> the problem that I see is that this injury happened on-the-job. And so when an injury -- it's been my experience when an injury happens on-the-job, then even going back into the workforce, even if it's in an unrelated field, it can be very triggering for somebody when the injuries have happened at work, with work personnel. You know, it's one thing if it's happening with the community, it's a whole other thing when it's happening with people that you work with. So he's very easily triggered at this point. He has very severe symptoms. I mean that's -- that in itself, to get that completely calmed down, is four years, five years, something like that. And then to get him to actually be able to return to work, and feel safe at work and not be retriggered at work and reinjured, just from the PTSD standpoint, that's another three, four, maybe five years. You know, it depends on other things -- you know, other things that are happening in the environment, et cetera, obviously, but just from what I have seen in my work, seven to ten years.

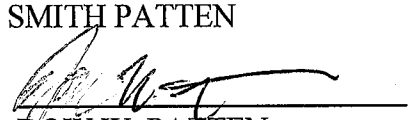
Based on the foregoing it is clear that Mr. Mort must be awarded damages for emotional distress.

IV. CONCLUSION

Based on the foregoing facts and law as applied, Mr. Mort respectfully requests that the Decision of Administrative Judge Kruse be reversed, and that the relief sought be Ordered.

Respectfully submitted this 10th day of July, 2017,

SMITH PATTEN



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CERTIFICATE OF SERVICE

I hereby certify that the attached BRIEF OF COMPLAINANT/APPELLANT THEODORE MORT was sent on July 16, 2017 via overnight mail and e-mail delivery to the following as noted:

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EEOC, P.O. Box 77960,
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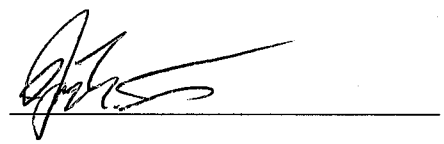

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