



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Equal Employment Opportunity Commission

Los Angeles District Office

255 East Temple Street, 4th Floor

Los Angeles, CA 90012

Administrative Judge Dennis Carter

Direct No. (213) 894-1085

Fax No. (213) 894-5482

**PAUL LOOMIS,
Complainant,**

v.

**MICHAEL CHERTOFF, Secretary,
Department of Homeland Security,
Agency.**

)
) **EEOC No.: 340-2005-00070X**

)
) **AGENCY Nos.: TSAF-04-0353**
) **TSAF-04-0691**

) **DATE: September 27, 2006**

) **DECISION**

I. INTRODUCTION

Pursuant to 29 C.F.R. 1614.109 of the Commission's regulations, a hearing was held on the complaint filed by PAUL LOOMIS (hereinafter, Complainant) against the Department of Homeland Security, Transportation Security Administration (TSA), Palm Springs International Airport (PSIA), Palm Springs, California (hereinafter, Agency), on October 19-20 and November 16-17, 2005, at the PSIA, Palm Springs, California.

All procedural and administrative preconditions to the hearing were met. The parties were permitted to present testimonial and documentary evidence on the following issue:

II. ISSUE

Was the Complainant unlawfully retaliated against for prior EEO activity when Deputy Assistant Federal Security Director (DAFSD) Robert Berriman placed him on administrative leave on April 1, 2004, and Federal Security Director (FSD) Thomas Anthony terminated him on May 21, 2004?

III. PROCEDURAL MATTERS

The parties submitted written closing arguments which have been marked as post-hearing submissions (PHS). Complainant's written closing argument is PHS1 and the Agency's written closing argument is PHS2.

The parties also filed a Joint Motion For Release of Hearing Transcripts to Counsel For the Third and Fourth Days of Hearing, dated February 8, 2006 (AJE33), and Supplement to Joint Motion for Release of Hearing Transcripts to Counsel for the Third and Fourth Days of Hearing, dated February 8, 2006 (AJE34).

On February 17, 2006, Complainant's counsel made a written inquiry on the status of the parties' joint motion. [AJE35.] On February 23, 2006, the undersigned Administrative Judge issued a ruling "In RE: Release of Hearing Transcripts for Separate Unrelated Proceeding." [AJE36.] On March 15, 2006, Complainant's counsel withdrew his request for premature release the transcripts in the above-referenced case. [AJE37.]

On March 22, 2006, the Commission received the Agency's "Motion to Reopen the Hearing Record for Admission of New Evidence," dated March 21, 2006. [AJE38.] On March 22, 2006, the Commission received the Complainant's opposition to the Agency's motion. [AJE39.] The Agency's motion is hereby denied because the record was not held open for the admission of new evidence. After the hearing closed on November 17, 2005, the record was no longer open for admission of new evidence. Though the parties were permitted to submit written closing briefs, they are not evidence. Even if I allowed the admission of the documents the Agency submitted, it would not influence my decision because the decision of the Administrative Law Judge who heard Complainant's unemployment case is not proper collateral *estoppel* or *res judicata*, for reprisal for prior EEO activity was not examined or reviewed by the ALJ. Thus, the California Unemployment Insurance Appeals Board (CUIAB) Decision is irrelevant. Further, Agency counsel's argument that Complainant misrepresented to the CUIAB about whether I was going to issue a finding against the Agency is not impeachment evidence that is relevant to this case. What happens post-hearing is not relevant impeachment evidence.

IV. LAW

In any proceeding involving a charge of discrimination, either judicial or administrative, it is the burden of the Complainant to initially establish that there is some substance to the allegation of discrimination.

In order to accomplish this burden, the Complainant must establish a prima facie case of discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978). This means that the Complainant must present a body of evidence such that were it not rebutted, the trier of fact could conclude that unlawful discrimination did occur.

The *McDonnell Douglas* standards are flexible and must be adapted to the facts of each case. *Id.* at 802, n.13. *Hagans v. Andrus*, 651 F.2d 622, 624-626 (9th Cir. 1981). Thus, the evidence required to establish a *prima facie* case varies from one case to the next. Direct evidence of discrimination is not necessary to prevail in a Title VII suit because "[t]here will seldom be 'eyewitness' testimony as to the employer's mental process." *U.S. Postal Service v. Aikens*, 469 U.S. 711, 716 (1983). Thus, a complainant may prove his/her case by using either direct or circumstantial evidence.

Circumstantial Evidence

When a Complainant must rely on indirect or circumstantial evidence of discrimination, the shifting burdens of *McDonnell Douglas* must be employed. The *McDonnell Douglas* burdens are designed so that the "plaintiff has his[her] day in court despite the unavailability of direct evidence." *Trans World Airlines v. Thurston*, 469 U.S. 111, 105 S.Ct. 613, 622 (1985).

Once the complainant establishes a prima facie case, the burden of production shifts to the agency to articulate a legitimate, nondiscriminatory reason for its employment decision. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981). That is, it "'... must clearly set forth, through the introduction of admissible evidence,' reasons for its actions which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action." *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), citing *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254-255, n.8 (1981).

Should the Agency carry its burden and respond to complainant's *prima facie* showing by offering evidence of the reason(s) for the Agency's actions, the trier of fact proceeds to decide the ultimate question: whether complainant has proven that the Agency intentionally discriminated against him because of unlawful discrimination. *Id.* In order to convince the trier of fact that the Agency intentionally discriminated against him, Complainant must prove by a preponderance of the evidence that the legitimate reasons offered by the Agency were not its true reasons, but were a pretext for discrimination. *Burdine*, at 253. In order to show pretext, a complainant must present evidence that the agency's asserted reasons for its actions are not worthy of credence, and that the real reason for the agency's actions are discrimination. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993); *DesVergnes v. United States Postal Service*, 01A00806 (2000). A reason cannot be proved to be pretext for discrimination "unless it is shown both that the reason was false and that discrimination was the real reason". *Hicks, supra.* "Proving the agency's reason false becomes part of the greater enterprise of proving that the real reason was intentional discrimination. *Id.* "In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose." *See, Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 2108 (2000).

The agency generally has broad discretion to set policies and carry out personnel decisions, and should not be second-guessed by the reviewing authority absent evidence of unlawful motivation. *Vanek v. Department of the Treasury*, EEOC Request No. 05940906 (January 16, 1997); *Kohlmeyer v. Department of the Air Force*, EEOC Request No. 05960038 (August 8, 1996); *Burdine*, 450 U.S. at 259.

These general analytical principles are applicable to cases arising out of Title VII of the Civil Rights Act of 1964, as amended *Burdine, supra.*

It should be recognized that each complainant's allegation of discrimination is premised upon a particular set of facts and, therefore, the evidence required to establish a *prima facie* case must of necessity vary from one case to the next. Thus, a formula based on *McDonnell Douglas* must be adapted to the facts of each case. *Douglas v. Anderson*, 656 F.2d 528, 532 (9th Cir. 1981), citing *Hagans v. Andrus*, 651 F.2d 622, 624-625 (9th Cir. 1981).

Prima Facie Case - Reprisal

In order to present a *prima facie* case of reprisal, Complainant must show that (1) he has engaged in protected opposition to Title VII discrimination or participated in a Title VII proceeding (e.g., filing a discrimination complaint); (2) the Agency treated him adversely contemporaneous with or subsequent to his

EEO activity; and, (3) there is a causal connection between the protected activity and the adverse treatment. *See, e.g., Wrighten v. Metropolitan Hospitals, Inc.*, 726 F.2d 1346, 1354 (9th Cir. 1984). The United States Supreme Court clarified the “injury or harm” standard in the recent case of *Burlington Northern & Santa Fe Railway Co v. White*, 548 U.S. _____, 2006 WL 1698953 (June 22, 2006). In the *Burlington Northern* case, the U.S. Supreme Court held: “. . . a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, ‘which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.’” The Court then stated:

The anti-retaliation provision seeks to prevent employer interference with ‘unfettered access’ to Title VII’s remedial mechanisms. . . . It does so by prohibiting employer actions that are likely ‘to deter victims of discrimination from complaining to the EEOC,’ the courts and their employers. . . . And normally petty slights, minor annoyances, and simple lack of good manners will not create such deterrence. *See, 2 EEOC 1998 Manual*, §8, pp. 8-13.

To establish a causal connection, Complainant must show, by a preponderance of the evidence, that those responsible for the conduct at issue had knowledge of the prior EEO activity at the time the conduct occurred. *See Mason v. Tennessee Valley Authority*, EEOC Appeal No. 01840126 (December 31, 1984). The Complainant cannot prevail simply by showing that someone at the agency had knowledge of the protected activity. *Odom v. United States Postal Service*, EEOC Appeal No. 01842223 (June 2, 1986). In cases where temporal proximity between the agency’s knowledge of protected activity is the basis for establishing the causal connection for a *prima facie* case, the proximity must be “very close.” *Clark County School District v. Breeden*, 121 S.Ct. 2264 (2001), *citing O’Neal v. Ferguson Construction Co.*, 237 F.2d 1248, 1254 (10th Cir, 2001), *Richmond v. Oneok, Inc.*, 120 F.3d 205, 209 (10th Cir. 1997) (3-month period insufficient) *Hughes v. Derwinski*, 967 F.2d 1168, 1174-75 (7th Cir. 1992) (4-month period insufficient).

V. FACTUAL DISCUSSION/CREDIBILITY ASSESSMENTS

1. Prior EEO History. On December 5, 2003, Complainant contacted an EEO Counselor concerning three non-selections, and he identified the responsible management official as Robert Berriman. Though the three non-selections were initially a part of the above-referenced case, Complainant withdrew these issues and agreed to proceed only with the administrative leave/termination issue under the reprisal theory. [Hearing Transcript, October 19, 2003 (HT1), p. 6.] It is undisputed that because Complainant did not file his initial EEO complaint anonymously that the EEO Counselor discussed the matter with Mr. Berriman who suggested that the case “might be worth mediating.” [Report of Investigation (ROI), p. 36; HT, November 16, 2003 (HT3), p. 284.] FSD Thomas Anthony admitted that Complainant informed him that he had filed an EEO complaint regarding the three non-selections and that he identified DAFSD Berriman by name during a meeting with Complainant in January 2004. [ROI, p. 160-161; HT1, pp. 235-236.] Accordingly, I find that Mr. Berriman and Mr. Anthony were aware of Complainant’s prior EEO activity at the time they placed Complainant on administrative leave and then terminated his employment with the Agency.

2. Complainant was initially employed by the Agency on September 22, 2002 as a Transportation Security Screener, SV-0019-D, at Palm Springs International Airport (PSIA), Palm Springs, California. Complainant was hired during the first hiring cycle just after TSA was organized and became responsible for

security at PSIA. It is undisputed that Complainant trained many of his co-workers and some of his supervisors and managers on the proper screening of bags and passengers. Prior to being placed on administrative leave on April 1, 2004, Complainant had never been counseled or disciplined for poor performance or misconduct, nor was he subjected to retraining because of unfamiliarity with proper screening procedures and protocol. [HT1, pp. 28-29.]

3. On March 28, 2004, Complainant was assigned to screen bags at the Delta/United terminal, along with Dave Wilcox, Jason Sanchez, Angelina Aguilar, Lead Screener (LS) Jacquelyn Anderson, and Screening Supervisor (SS) Marsha Kessen. Also, present in the general area was Screener Lydia Lund. Earlier in the morning of March 28, 2004, Screener Aguilar accidentally pushed the emergency stop button as a bag was exiting the CTX machine. Complainant identified Screener Aguilar as the person who pushed the emergency stop button which caused the CTX machine to reset itself, and further delayed the processing of bags. [IR, p. 485.] Screener Aguilar denied pushing the button to SS Kessen and Complainant. [*Id.*] Later that day (March 28, 2004), Screeners Aguilar and Sanchez prepared unsworn and undated written statements that they witnessed Complainant fail to screen golf bags in accordance with the 40/40/20 protocol.¹ There was no specific time referenced in their statements except that it occurred during the A.M. shift between 4:00 A.M. and 12:30 A.M.

4. According to their unsworn statements, Screeners Aguilar and Sanchez accused Complainant of placing clean “ETD swipes” into the ETD machine² without swiping them on the appropriate places of the golf bag, but they did not mention how many golf bags they observed Complainant improperly screen; nor offer any explanation why they failed to directly ask Complainant why he was screening improperly; nor mention why they failed to immediately sound an alarm after they allegedly saw Complainant processing golf bags onto airplanes without properly screening them. [IR, pp. 462, 463.] There was no credible evidence that Screeners Aguilar and Sanchez could have reasonably and objectively observed whether Complainant was properly performing the required screening because they stood approximately 20-25 feet from Complainant and thus were unable to read the 40/40/20 protocol worksheet.

5. In her unsworn statement, Screener Aguilar stated that she informed LS Dave DePatie, who was working on the north end of the baggage claim area at the Alaska terminal, of what she saw, before she reported it to SS Kessen, the supervisor responsible for the employees working in the Delta/United terminal. [*Id.*, p. 462.] The Alaska terminal was not within close proximity to Delta/United terminal and was not as close as America West was.

6. In his unsworn statement, Screener Sanchez also stated that he reported what he saw to LS DePatie before reporting it to SS Kessen. [*Id.*, p. 463.] LS Amber Lawrence, who did not witness the March 28, 2004 incident, reported what she had been told by Screener Aguilar to SS Bernie Husen and then to Screening Manager (SM) Clare Eacott after she talked to SS Kessen. [*Id.* p. 464.] LS Lawrence stated that she went

¹The 40/40/20 protocol was a screening procedure that required the screeners to screen 40% of the bags full open, 40% limited open, and 20% closed.

²The ETD machine was a device for detecting explosive material, e.g., nitrates. The screener would use a white ETD swab and touch various high use areas of a bag for detection of explosive material. If none were detected, the ETD swipe could be reused.

higher in the chain of command because SS Kessen did not take any further action against Complainant other than to verify that he was following proper procedures. [*Id.*]

7. It was undisputed that LS DePatie did not personally observe the golf bag incident but reported second hand accounts to SS Gerald Couch. [*Id.*, p. 465.] In LS DePatie's unsworn statement, he stated that he remembered Screener Aguilar informing him around 8:15 to 8:30 A.M. that she observed Complainant fail to properly screen golf bags. [*Id.*] For her part, SS Kessen provided an unsworn statement reporting third hand accounts, *i.e.*, that LS Amber Lawrence had reported to her that LS Lawrence had been told that Complainant was not properly screening golf bags at approximately 8:15 A.M. [*Id.*, p. 470.]

8. SS Adam Alford learned of the March 28, 2004 screening issue involving Complainant on March 30, 2004 when he returned from his two days off. [HT3, pp. 7-8.] SS Alford testified that LS Lawrence told him what she had been told. SS Alford then had LS Lawrence and Screener Aguilar prepare written statements. [*Id.*, pp. 19-25.] SS Rebecca Millen credibly testified that she saw SS Alford and SS Duane Pico going in and out of the office where both LS Lawrence and Screener Aguilar were preparing their statements and that she heard and witnessed the following:

... I heard both Amber [Lawrence] and Angelina [Aguilar] ask Duane [Pico] and Adam [Alford] the following questions: 'Is this OK?', 'What should I put?', 'What else would you like me to put?', *etc.* At various times Duane was standing over Amber and patting her on the shoulder saying 'That's good' while reading what she had written. The process of the two women preparing these statements took about an hour, during which time they each conferred with supervisors Alford and Pico multiple times about what to write. [AJE19, p. 9; HT1, p. 390.]

9. LS Lawrence and Screener Aguilar's statements were provided to SM Eacott who in turn shared them with Deputy Assistant Federal Security Director (DAFSD) Robert Berriman. DFASD Berriman testified that he then used the information contained in these statements to start an investigation but only after he advised Federal Security Director (FSD) Thomas Anthony.³ [HT3, pp. 126-128.]

10. SM Eacott testified that she was informed by Supervisor Bernie Husen about the March 28, 2004 incident after he (Husen) had a conversation with LS Lawrence "... who had approached him regarding some improper screening that Marsha Kessen had handled, and she (Lawrence) wasn't satisfied with the way it was handled." [*Id.*, p. 390.] SM Eacott also testified that SS Kessen had informed LS Lawrence "... that she had handled it." [*Id.*, pp. 390-391.] SM Eacott also remembered SS Alford providing her with two statements from LS Lawrence and Screener Aguilar concerning the incident. [*Id.*, p. 392.] After SM Eacott informed DAFSD Berriman about the incident, he asked her to look into it. [*Id.*, p. 393-394.] Though SM Eacott remembered clearly that she talked to Screener Sanchez and LS DePatie, she at first claimed not to remember that she had called SS Kessen at home to find out what she did. [*Id.*, pp. 396-399.] SM Eacott testified that when SS Kessen returned to work, DAFSD Berriman had taken over as the lead investigator on the case, reducing SM Eacott's role to more of an assistant or witness during interviews. [*Id.*, p. 400.]

³DAFSD Berriman later proffered conflicting testimony on this point by stating that he began his investigation by interviewing LS Lawrence and Screener Aguilar before talking to FSD Anthony. *See*, paragraph 17 *infra*.]

11. SM Eacott testified that when Complainant was interviewed by DAFSD Berriman in her presence, Complainant told them that “. . . he was going the extra mile and screening with a full open, doing full open bag searches.” [*Id.*, p. 401.]

12. SM Eacott also testified that SS Kessen told her on the telephone on March 29, 2004 that Complainant was not using “ETD swipes” when screening golf bags, but that during a later conversation with SS Kessen she stated he had used the ETD swipes. [*Id.*, pp. 413-418.]

13. SS Kessen credibly denied telling SM Eacott that she caught Complainant engaging in an uncontained breach of security. [HT, October 20, 2005 (HT3), pp. 553-575.] She testified that she “never” said what SM Eacott’s statement attributed to her that made it sound like SS Kessen had witnessed Complainant not complying with the proper 40/40/20 protocol on screening golf bags. [*Id.*] SS Kessen further credibly testified that she told SM Eacott that Complainant was going further on his searches than the 40/40/20 protocol required and therefore, there had been no need to notify anyone because she did not consider there had been a violation. [HT, November 17, 2005 (HT4), pp. 472-474, 564-566.] SS Kessen witnessed Complainant open the bags and insert “blue tags on them when he didn’t have to” because he was required only to perform a closed bag search. [*Id.*, p. 472.] SS Kessen also credibly testified that during the relevant time period nobody informed her that Complainant was observed not swiping the bags with ETD traps. [*Id.*, p. 556.] Finally, SS Kessen credibly testified that at the time the PSIA bag screening procedure for golf bags was constantly being changed. Thus, she was always having to update the screeners on how “golf bags” were going to be “done that day.” [*Id.*, pp. 627-630.] Acting Supervisor Jacquelyn Anderson concurred with SS Kessen that the procedure for screening golf bags was in a constant state of flux “because some screening managers said we don’t need to do this or that, and so there was a real lack of consistency.” [HT1, pp. 256, 296.]

14. SS Alford did not observe Complainant screening golf bags on March 28, 2004 because that was his off day. [HT3, pp. 7-8.] SS Alford first became aware of the allegation against Complainant when LS Lawrence reported it to him on Tuesday, March 30, 2004 after he returned to work from his two days off. [*Id.*] SS Alford then testified that he considered the issue of such “magnitude” that he immediately had LS Lawrence (who did not witness the incident) and Screener Aguilar (who stated she witnessed the incident) prepare written statements about what they saw and heard because he anticipated that SM Eacott would want them. [*Id.*, p. 13 and pp. 19-25.] When he (Alford) was asked why he did not check with the two supervisors (Husen and Kessen) who were present and working on March 28, 2004, he incredibly testified, “I don’t recall if a supervisor that was there that morning was even there on that Tuesday. I don’t remember their schedule off the top of my head, but they weren’t where I was at, at least I remember that.” [*Id.*, p. 38.] When asked he would not have checked with the working supervisors to find out what they had done, his answer was non-responsive. He stated that it was his responsibility, “if nothing had been done,” to “check with the next level of management,” (SM Eacott) to see if she had been made aware of it. [*Id.*, pp. 40-41.] As stated, something had “been done,” and SS Alford could thus not explain his omission in any logical way.

15. SS Alford testified that he considered this issue of such “magnitude” to warrant his immediate reaction before checking with the two supervisors present on that day because he “nobody got back with LS

Lawrence⁴ and because:

Well, because bags that were not screened completely and considered cleared to go out into sterile area were, from what I was told again, were allowed to go out, and we had what we call a dirty sterile area, a dirty baggage area. So we had not had that before. So it was a first, yes, but that was a serious situation. So when I heard the concern of nothing had happened, my initial response as a supervisor, and I know my job, and my job is to make sure that things were dealt with in a timely manner. So that's why I reacted the way I did. [*Id.*, pp. 18-19; *see also*, pp. 28-30.]

16. Though SS Alford testified that something “. . . of this nature, of someone actually not screening or screening incorrectly and causing a breach, it's the first I had seen it . . .,” the preponderance of the evidence established that he himself had previously engaged in a practice known as “turbo” where not all baggage would be screened in accordance with the standard operating procedures (SOPs) as an expedited method of moving bags when it got busy. SS Alford explained at the hearing that “turbo” only meant that everybody had to work faster, and denied ever engaging in a practice known as “turbo.” Since multiple credible witnesses linked this terminology with SS Alford and Screener Winston Edwards, and they defined it as moving bags without screening all of them, I do not find SS Alford's explanation believable. In fact, he was not a credible witness. He clearly had his own agenda, which I find was motivated by reprisal-based animus. More specifically, SS Alford admitted that he informally counseled Complainant in or around January 2004 because Complainant had been complaining to a co-worker concerning his nonselections and had been making negative comments about management. As a result of Complainant's conversations with his co-worker, SS Alford threatened to remove Complainant from the “bomb appraisal team.” [*Id.*, pp. 51-52, pp. 65-66.] SS Alford also admitted that prior to this counseling session he informed DAFSD Berriman that he was going to talk to Complainant because he was being critical of management and that DAFSD Berriman concurred. [*Id.*, pp. 51-52.] When SS Alford was asked why he wanted Complainant removed from the bomb appraisal team, he testified:

. . . But, you know, if someone has those kind of negative feelings about management, regardless of who it is, they shouldn't be on some extra curricular type of team or committee. That should be someone who is an example and exemplary type of employee . . . And a little bit later . . . I had pulled [Complainant] in the office with another supervisor and talked to him.” [*Id.*, p. 53.]

SS Alford admitted that when he counseled Complainant, he (Complainant) asked, “if this had to do with his EEO” and SS Alford responded:

. . . I had told him specifically that, ‘Groups and different committees that are outside of your normal job description are kind of extra curricular. You're either voted on by your peers or you're selected to be on that group based on an exemplary work performance,’ or something along those line. ‘So if any one of us,’ and I included myself and the other supervisor in that room, or Paul, ‘were to do something to bring on disciplinary action or to be looked at upon this team or himself as negative, that

⁴It is undisputed that LS Lawrence was only a lead screener and not a higher level manager to whom Supervisor Kessen was required to report her findings.

you may not be allowed to stay on a group or a team like that.’ [*Id.*, pp. 54-55.]

SS Alford back-briefed DAFSD Berriman on how the informal counseling went, and DAFSD Berriman corroborated his testimony on this point. [*Id.*, pp. 75-76; HT3, pp. 191-192.] SS Alford also admitted that during the time period encompassing March 28, 2004, “. . . there had been so many changes” to the “national SOP on screening golf bags” that he was not a hundred percent sure what the protocol was, but he believed it to be a “40/40/20 protocol.” [*Id.*, pp. 76-78.] SS Alford did not prepare an affidavit or statement that would refresh his memory about the March 28, 2004 incident and he testified that he refreshed his memory by looking at a calendar and talking to counsel. [*Id.*, pp. 15-16.]

17. In conflict with his earlier testimony, DAFSD Berriman testified at hearing that his first course of action on March 31, 2004, after SM Eacott informed him of the allegation – before FSD Anthony appointed him as the inquiry officer later that same day – was to schedule Sanchez and Aguilar to talk to him. [*Id.*, p. 130; *cf.*, pp. 127-128; *but see*, paragraph 9 *supra*; HT3, pp. 131-133.] DAFSD Berriman then testified that it was only after he spoke with Sanchez and Aguilar that he met with FSD Anthony on March 31, 2004, and it was after that meeting that he was appointed to investigate the matter. [*Id.*, pp. 135-137.]

18. On March 31, 2004, FSD Anthony appointed DAFSD Berriman, as an “Inquiry Officer for an Informal Administrative Inquiry into the Alleged Mishandling of Checked Baggage Leading to a Security Breach.” [*Id.*, p. 449.] In the appointment letter FSD Anthony charged DAFSD Berriman as follows:

In accordance with TSA Management Directive No. 700.2 (Informal Administrative Inquiries), you are hereby appointed as the Inquiry Officer to carry out an informal inquiry into the alleged mishandling of baggage on March 28, 2004 which led to a security breach where uninspected checked baggage was allowed to be loaded onto and transported by commercial air carrier from the Palm Springs International Airport.

The purpose of this inquiry is to determine validity of the alleged situation, the involvement of TSA screening personnel and their supervisors in the event, and to determine the scope of the actual breach that might have occurred. You are to comply with the “General Guide for Informal Administrative Inquiries” which is attached to this appointment letter. You are to ascertain and consider the evidence on all sides of the situation, thoroughly and impartially, and make findings, conclusions, and recommendations to me that are warranted by the facts.

All recommendations must be consistent with the findings and conclusions and should be made in accordance with your understanding of the rules, regulations, policies, and customs of TSA. However, you should not make specific disciplinary action recommendations, but may recommend that I consider appropriate disciplinary action.

Given the severity and timing of the alleged event, I have chosen for this inquiry to fall under the abbreviated procedures as allowed in TSA Management Directive No. 700-2. As such a prompt response to this appointment letter is requested. Also, given the severity of the alleged event, you are requested to keep legal counsel advised as to all facts and findings related to this inquiry. [*Id.*, p. 449.]

19. The record evidence established that on March 31, 2004, DAFSD Berriman prepared a “Summary of Preliminary Information, Alleged, Uncontained Breach of Security, Sunday, March 28, 2004,” wherein he signed it as “Appointed Administrative Inquiry Officer.” [IR, pp. 455-458.] In that summary, DAFSD Berriman had already come to some conclusions about the guilt of Complainant, without having interviewed all relevant witnesses, asking more neutral questions (without bias against Complainant) or evaluating all of the facts. I find, therefore, that DAFSD Berriman’s investigation and final report were seriously flawed, hastily and unfairly accomplished and designed to “get” Complainant rather than fairly investigate allegations of impropriety.

20. FSD Anthony testified that even though he knew Complainant filed an EEO complaint about the nonselections, “it certainly wasn’t on [his] mind” when he appointed Mr. Berriman to be the Inquiry Officer. [HT, November 14, 2005 (HT4), p. 442.] On the other hand, FSD Anthony testified that if Mr. Berriman had told him or reminded him that Complainant had filed a recent EEO complaint against him, he would not have picked him to be the Inquiry Officer because it would have been a “conflict of interest.” [*Id.*; *see also*, p. 443.] The preponderance of evidence therefore clearly established a causal connection between Complainant’s protected activity and the adverse harm, *i.e.*, there were fewer than 45 days between Complainant’s formal EEO complaint against DAFSD Berriman and FSD Anthony appointing DAFSD Berriman to “investigate” Complainant for an alleged uncontained breach of security. The biased investigation led to administrative leave and ultimately, Complainant’s termination.

21. DAFSD Berriman admitted that he accepted the responsibility to conduct an investigation into the allegation against Complainant even though he knew that Complainant had recently filed an EEO complaint against him, and even though he had consulted with SS Alford before and after (Alford) counseled Complainant not to complain about his non-selections to co-workers. [HT3, p. 332.] DAFSD Berriman rationalized conducting the investigation himself by saying he did it, “Because I’m the boss. It was my work area. I would have been derelict by not immediately looking into this.” [HT3, pp. 267-268.] I find, as stated, that DAFSD Berriman did not conduct an impartial investigation; that he drew conclusions based on incomplete or contradictory evidence; that he knew SS Alford had not talked to the supervisors on duty; and that the biased conclusions led to Complainant’s termination. I further find that there is persuasive evidence DAFSD Berriman held Complainant’s EEO complaints against him and had an overt conflict of interest.

22. On March 31, 2004, LS DePatie and Supervisor Gerald Couch prepared written statements about what they had been told *via* hearsay.⁵ [*Id.*, pp. 465, 471.] Supervisor Couch stated that he remembered Mr. Sanchez telling him around 6:30 A.M. that Complainant was not properly performing the “40/40/20 procedure” when screening bags, “especially on golf bags.”⁶ [*Id.*, p. 471.] Supervisor Couch further stated that he told Mr. Sanchez to report the matter to Supervisor Kessen “since she was on the floor and [since Complainant] was on her team.” [*Id.*]

⁵It is unclear whether these statements were prepared at the request of DAFSD Berriman before he was appointed as the inquiry officer or immediately after.

⁶Though the implication behind Supervisor Couch’s statement was that other bags were not properly screened by Complainant, there was no credible evidence to support such an inference.

23. In accordance with FSD Anthony's charge, on April 1, 2004, DFASD Berriman met with SM Clare Eacott and Complainant to conduct an Informal Administrative Inquiry into the allegations of an "uncontained breach of security" that allegedly occurred on March 28, 2004. [IR, p. 472.] DAFSD Berriman obtained both an oral and a written statement from Complainant wherein he denied that he caused an uncontained breach of security. [IR, pp. 472 & 476.] Complainant credibly testified that nobody had told him that he was performing the 40/40/20 procedures in such a manner that it amounted to an uncontained breach of security on the day in question, and that the only thing that SS Kessen asked him to do was to read the SOP on "closed, limited & open bag searches" without any additional explanation. [*Id.*, p. 476.] SS Kessen corroborated Complainant's testimony. [HT4, pp. 472-474, 564-566.] Complainant further credibly testified that he had not been disciplined for poor performance in the past, and he had the reputation for "being as honest as the day's long," and he always went that extra mile when screening bags. [HT1, pp. 28-29, 65-73, 90.] SS Kessen corroborated Complainant's testimony. [HT4, pp. 472-474, 564-565.] SS Rebecca McMillen, Acting Supervisor Jacquelyn Anderson, and Screener Lydia Lund all testified that Complainant had the reputation for being an "excellent" screener. [HT1, pp. 247, 328-332, 358.]

24. DAFSD Berriman testified that even though Complainant denied intentionally committing an uncontained breach of security during his interview on April 1, 2004, he had "formed an opinion at that point that he was not being truthful with [him]." [HT3, p. 146.] When further questioned as to why he formed the opinion that Complainant was lying, DAFSD Berriman testified that he placed more credibility on the "two previous statements [from] the two screeners that [he] had talked to. . .," *i.e.*, Sanchez and Aguilar, than he did on Complainant's denial. [*Id.*] Upon further questioning, DAFSD Berriman testified that he believed Complainant was lying in this case because he believed Complainant had lied on his resume about his employment experience related to the nonselections for which he sat as the selecting official and over which Complainant filed an EEO complaint against him. [*Id.*, pp. 146-148.] DAFSD Berriman also testified that he believed Complainant was lying because of the "way he treated management," which appeared to relate back to the incident of Complainant discussing his nonselections and his dissatisfaction with management's nonselecting him with his co-workers.⁷ [*Id.*, *see also*, HT3, p. 191.] I find this is a very close to direct evidence or reprisal.

25. When DAFSD Berriman was asked why he did not officially interview all of the people who were present in the vicinity of Complainant's work area on March 28, 2004, *e.g.*, Jacquelyn Anderson (former acting supervisor and lead screener at PSIA who was working 10 feet from Complainant on March 28, 2004) and Lydia Lund (former transportation security screener who was working approximately 10-20 feet from Complainant's work area on March 28, 2004), he incredibly testified that he was unaware that there were other witnesses who were present on that date who observed anything. [HT1, pp. 261-262, 329-334.] In fact, Ms. Anderson credibly testified that she had approached DAFSD Berriman about making a statement the following day, March 29, 2004, as follows:

I went to Mr. Berriman and I offered to supply him with a statement. And I told him that I was less than 10 feet away from Mr. Loomis for the better part of the shift and that I observed his screening that entire time and that I wanted to, you know, write a statement to that effect. And he said that my

⁷ I find this is very close to direct evidence of reprisal.

statement wasn't necessary.

I think I actually argued with him. I said, 'How could it not be necessary? I was the lead supervisor at the time.'

. . . He said, 'If we need one, we'll let you know.' And I approached him on another occasion about two to three weeks later and offered to give him a statement again, and he still said he didn't want one. [HT1, pp. 262-262.]

After having had an opportunity to view the witnesses as they testified and observe their demeanor and intonation while testifying, I find former Acting Supervisor Anderson's testimony to be more credible than DAFSD Berriman's testimony. Therefore, I find DAFSD Berriman was effectively impeached on this issue, and I, accordingly, discredit DAFSD Berriman's testimony on this point.

26. Former Acting Supervisor Anderson further credibly testified that Complainant was an "excellent" screener and she used to "joke with him sometimes about how he's kind of a compulsive guy" about following Standard Operating Procedures. [HT1, p. 247.] She also testified that on March 28, 2004, she did not observe Complainant failing to properly screen golf bags, and that it was Complainant's normal mode of operation to "go over and above" when performing his job. [HT1, p. 251.] Ms. Anderson also credibly testified that "physical inspection is still the purest form of screening." [HT1, p. 298.]

27. Screener Lund testified that she had never observed Complainant intentionally fail to screen golf bags, that on March 28, 2004, she was working near Complainant, *i.e.*, approximately 10-20 feet away from him, that she could observe where he was standing, that she saw him screen golf bags that day, and that she did not observe Complainant appear to "pretend" to screen golf bags. [HT1, pp. 328-332.] Screener Lund also testified that no one in TSA management asked her about Complainant's actions on March 28, 2004 and that during Complainant's Employment Development Department (EDD) hearing in or around September 2004, DAFSD Berriman testified that he never questioned her Lund because she was too short to see. [*Id.*, pp. 332-333.] Screener Lund denied that she was too short to see. [*Id.*, pp. 333-334.] Screener Lund also credibly testified that it would be impossible for a single screener to screen 76 golf bags in an eight-hour shift. [*Id.*, pp. 334-335.] Finally Screener Lund testified that Screener Aguilar had a general reputation for not being truthful and that her co-workers and management knew that. [*Id.*, pp. 336-338.]

28. Former SS Rebecca McMillen testified that Complainant was an excellent screener and that the policies concerning the screening of golf bags at PSIA were constantly evolving and there was a point in time when golf bags were not screened and nobody was disciplined for it. [HT1, pp. 358, 362, 376.] Former SS McMillen further testified that even during her detail to Alaska, she heard about the method of screening used by SS Alford and Screener Edwards called, "turbo." [HT1, pp. 377-378; 387-388; *see also*, paragraph 16 *supra*.]

29. Aviation Security Inspector (ASI) Lawrence Ruiz came to the PSIA in December 2002 whereafter he also assumed the role of Assistant Federal Security Director (AFSD) for regulatory inspections. [HT1, pp. 395-399.] ASI Ruiz testified that if management believed that they had an uncontained breach of security, he

was the “subject matter specialist on it and [he] should [have been] made aware of it” so that he could conduct an investigation. [*Id.*, pp. 405-409.] ASI Ruiz testified that the first he heard of the golf bag incident was from Complainant, approximately “four to five days after the incident.” [*Id.*, p. 411.]

ASI Ruiz testified that under 49 C.F.R. 1540.105, if an employee is suspected of having “. . . intentionally violated or caused a circumvention of the securities system in place, then I would do the investigation,” *i.e.*, “I would be required to investigate it and submit a report to the FSD on what occurred, and to the point of, if there needs to be a criminal referral.” [*Id.*, pp. 419-421.] ASI Ruiz further testified that such an investigation could not be delegated. [*Id.*, p. 427.] The Agency failed to controvert or take exception to ASI Ruiz’ testimony. From the beginning the Agency referred to Complainant’s alleged misconduct as an “uncontained breach of security,” but tried to defend appointing DAFSD Berriman as the inquiry officer because it viewed the matter as a disciplinary process and not a breach of security issue that required getting ASI Ruiz involved. Accordingly, I find that the Agency failed to follow standard procedures and its own regulations from the inception of the investigation of Complainant.

30. Human Resource Specialist (HRS) Judith Homan testified that she confronted FSD Anthony and Administrative Officer (AO) David Slusher concerning “. . . people . . . being disciplined and [she] didn’t know anything about it [because] there’s a certain amount of record keeping that is required by the office of personnel management.” [HT2, pp. 642-643.] HRS Homan testified that she was so frustrated by FSD Anthony and AO Slusher preventing her from doing her job, that she asked to be transferred. [*Id.*, p. 645.] HRS Homan also testified that the first she heard of any disciplinary action concerning Complainant came from the Complainant and that management never brought her into the loop. [*Id.*, p. 658.] After Complainant informed her of his pending removal action and she learned that management was not allowing her to advise other employees of their rights under the Family Medical Leave Act and procedures, she went to inquire of AO Slusher why she was not being brought into the loop, and he told her, “Well, your job is just going to be paperwork.” [*Id.*, p. 660.] HRS Homan further testified that as an HR specialist in the past, when an investigation was being conducted, she would “. . . coordinate the fact finding, look at the facts, and make the recommendation.” [*Id.*, p. 663.] Concerning the allegations against Complainant, HRS Homan testified the following should have happened:

They should have contacted me and said, ‘This is the situation,’ and I would advise them on what kind of . . . statements that – or help them identify the people who would provide statements . . . relevant to the situation. Because a case has to be substantiated . . . you take the facts and look at them. And then I would have contacted headquarters, HR people, employee relations and discussed it with them, and then made my recommendations accordingly to management. [*Id.*, p. 664.]

HRS Homan testified that even though TSA had a progressive discipline policy, she was aware that management could terminate an employee for a “breach of security that they considered that egregious . . .” [*Id.*, pp. 671-672.] She said that policy was later tempered and the Agency gave the FSD the discretion to determine whether removal was appropriate. [*Id.*]

31. HRS Homan testified that on March 31, 2004 she was given a notice of 13-day suspension. [*Id.*, p. 681; AE4.] HRS Homan was disciplined for questioning management’s actions on several personnel issues

where she thought the Agency was doing something improper, but there is insufficient evidence that it had anything to do with prior EEO activity, and it was not clear whether it had anything to do with Complainant. [AE4.]

32. On April 3, 2004, DAFSD Berriman finished his investigation and summarized his findings, conclusions, and recommendations for FSD Anthony without interviewing and taking statements from all of the witnesses who were present and who observed Complainant performing his job screening golf bags on March 28, 2004. DAFSD Berriman found that Complainant “failed to utilize TSA Standard Operating Procedure while assigned to the Delta/United EDS/ETD area . . . [and] [b]y evidence of three independent witness statements and official TSA documents, up to seventy-six golf bags were fraudulently screened by TSS Paul Loomis and passed to the air carrier for transport on scheduled passenger aircraft.” [IR, pp. 450-452.] DAFSD Berriman further noted in his report that “STSS Marsha Kessen attempted to minimize her responsibility and failure to respond appropriately by providing false information” to him as the Administrative Inquiry Officer. [*Id.*]

33. On April 13, 2004, Deputy FSD (DFSD) Dan Greenhalgh issued a “Notice of Proposed Removal” to Complainant because FSD Anthony was unavailable. [IR, pp. 482-484.] The misconduct cited in the notice reads as follows:

On March 28, 2004, you failed to properly screen approximately seventy six golf bags. These improperly screened bags were then transferred to the air carrier for transport on scheduled passenger aircraft, resulting in an uncontained security breach. [*Id.*]

On April 14, 2004, Complainant acknowledged receipt of said notice. [*Id.*]

34. On April 21, 2004, Complainant provided a written response to the notice of proposed termination. [*Id.*, pp. 485-488.] In that response, Complainant stated that neither the two Leads nor the the two Supervisors assigned to the area ever notified him that he was screening golf bags improperly. Complainant further stated that on March 28, 2004, he was the only TSA screener who had two ETD alarms, which was evidence that he was doing his job. Complainant also questioned how he could have been seen to improperly screen up to 76 golf bags and nobody brought it to his attention. Complainant then identified how other TSA screeners had been improperly and intentionally jamming golf bags into the CTX machine and using a system called turbo to expedite the screening of golf bags and neither one of these systems were standard operating procedures and nobody was disciplined for engaging in such behavior. Finally, Complainant identified that even if the 40/40/20 protocol called for a closed bag inspection, he still opened the bag and inspected it, which was “going the extra step.”

35. On May 21, 2004, FSD Anthony issued a “Notice of Final Decision” to Complainant and in that decision he cryptically addressed some of Complainant’s points in his response and concluded that “the evidence is overwhelming that you failed to screen numerous golf bags.” [*Id.*, pp. 489-492.] FSD Anthony then noted that “I find that the allegation of misconduct is sustained by the preponderance of the evidence, including, but not limited to, your implicit acknowledgment of your failure to use appropriate screening procedures and the multiple witness statements that independently confirm your failure.” [*Id.*] FSD Anthony

did not elaborate on what the implicit acknowledgment of Complainant's failure to use appropriate screening procedures was, but referenced an Appendix 1, which was not provided because it was deemed SSI.⁸ [*Id.*]

36. The Agency called SS Dawn McClure as a witness in an apparent attempt to impeach the credibility of SS Kessen.⁹ At all relevant times, Ms. McClure was a Lead Transportation Security Screener (LS) at PSIA. On March 28, 2004, LS McClure was assigned to checkpoint screening, not in baggage screening where Complainant and SS Kessen were assigned. [HT4, p. 599.] SS McClure testified that on March 28, 2004, SS Kessen told her that they needed to counsel Complainant on proper screening procedures during his upcoming evaluation. [*Id.*, p. 600.] SS McClure testified that SS Kessen generally described Complainant's procedure for screening as merely opening a golf bag and inserting a notice and then sending the bags out. [*Id.*] SS McClure did not elaborate any further on how detailed Complainant's inspection was, and there was no mention of SS Kessen telling her that Complainant was or was not using ETD swipes on the golf bags, which is the alleged misconduct for which Complainant was terminated. SS McClure admitted that she and SS Kessen did not have a good relationship when SS Kessen was her immediate supervisor and she was a Lead Screener. SS McClure further testified that at the time she prepared her statement concerning what SS Kessen allegedly told her, she knew that "potentially . . . somebody would lose their job over this." [*Id.*, pp. 604-605.] However, SS McClure denied that she would write something that was not true even if she was "mad" at the person, and I find that there is no direct evidence that she was "mad" at Complainant at the time she prepared her statement. [*Id.*, p. 605.] Notwithstanding LS McClure having animosity towards SS Kessen at the time, I do not find that this is dispositive of Complainant's required performance on the day in question. SS Kessen described Complainant as an excellent screener who always went that extra step, therefore, the Agency did not support its allegation that Complainant failed to use ETD swipes on golf bags through SS McClure.¹⁰

37. As a result of this incident involving Complainant, SS Kessen was demoted and LS McClure was eventually promoted to SS Kessen's former position. [HT2, pp. 511-512; 597; 612.] SS McClure also testified that there was a constantly evolving policy on how to screen golf bags at the PSIA, and that in March 2004, she believed "it was full physical . . . that means you go through it from top to bottom. It's a physical check inside the – down the shoot of the golf bag, it's inside all of the pockets, it's inside the outside of the bag. I mean, you check every nook and cranny, and you do it physically without the use of the machine." [*Id.*, p. 614.] SS McClure further testified that the 40/40/20 check-off sheet that management said was evidence of Complainant not properly screening golf bags with the ETD machine was not evidence of any such misconduct. [*Id.*, p. 645.] More specifically, SS McClure testified that the 40/40/20 check-off sheet was used for "your standard set of luggage like just regular suitcases, duffle bags, and whatever, that would follow the 40/40/20 which would be 40 percent closed, 40 percent limited, and 20 percent full open. And those would just have check marks in them. But if there's a G in there, then that means it is a full physical and it's a golf

⁸SSI = Selective Security Information; the Agency uses this designation to identify information that is unreleasable because of special security considerations.

⁹Ms. McClure was promoted to SS later in mid-to-late 2004. [HT4, p. 597.]

¹⁰As noted in paragraph 37 immediately below, SS McClure believed that in March 2004, the SOP for screening golf bags at PSIA was to do a full physical inspection and the use of the ETD machine was not required. As the testimony of record established the underlying basis for the misconduct charge against Complainant was that he was not using ETD swipes on the golf bags he was screening on March 28, 2004. Therefore, SS McClure's testimony on this issue does not corroborate the Agency's misconduct charge, nor does it corroborate that SS Kessen was being untruthful.

bag.” [Id.] SS McClure then testified that the ETD machine was not to be used on the golf bags at that time. [Id.] SS McClure also testified that the SOPs don’t specifically refer to golf bags, but it was “kind of a Palm Springs thing because we have so many of them.” [Id., p. 618.]

38. SS McClure further testified that she was very fearful of DAFSD Berriman because he was the type of manager who “gets even.” [HT4, pp. 636-638; 649-653.] SS McClure specifically testified that based on her past experience with DAFSD Berriman that she feared if he found out about her testimony in this case that he would retaliate against her. [Id., pp. 649-650.]

39. The Agency did not call either Ms. Aguilar or Mr. Sanchez to the hearing to proffer sworn testimony under cross-examination. However, the Agency called LS DePatie who admitted that he did not witness Complainant fail to properly screen golf bags, as well as other Agency managers and supervisors (Thomas Anthony, Dan Greenhalgh, Robert Berriman, Clare Eacott, Adam Alford, Amber Lawrence, and Dawn McClure) who also did not witness Complainant engage in what they described as an “uncontained breach of security” on March 28, 2004.

40. Reprisal - Prima Facie Case Analysis. Complainant established a *prima facie* case of reprisal. It is undisputed that Complainant engaged in prior protected activity by filing an EEO complaint over three non-selections, specifically against DAFSD Berriman who he identified as the responsible management official (RMO). Complainant contacted an EEO Counselor on December 5, 2003 and the final interview was conducted on February 2, 2004. [IR, pp. 32-40.] On February 17, 2004, Complainant filed his formal EEO complaint. [IR, p. 1.] Both FSD Anthony and DAFSD Berriman admitted that they knew about Complainant’s EEO allegations prior to investigating him for an alleged uncontained breach of security, the issuance of a notice of termination, and the issuance of the final notice of termination. [See, paragraph 1 *supra*.] In accordance with the standard recently identified in the *Burlington Northern* case, I find that a reasonable employee would have found the challenged action, *i.e.*, the investigation and termination, “materially adverse” and “well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.” Additionally, I find that a causal connection exists because of the temporal proximity between Complainant’s prior protected conduct¹¹ and his current injury or harm, *i.e.*, the termination. Accordingly, I find that Complainant established a *prima facie* case of reprisal.

41. Pretext Analysis. The Agency generally argued that after Complainant’s alleged uncontained breach of security was brought to higher level management’s attention, particularly DAFSD Berriman and FSD Anthony, that the matter was investigated in the proper course of business and the appropriate decision was reached. More specifically, in its closing argument, the Agency argued that it terminated Complainant because “Complainant intentionally failed to screen golf bags on March 28, 2004,” and the preponderance of the evidence established that this was the sole motivation for the Agency’s action.¹² I disagree for the reasons

¹¹ Complainant first contacted an EEO Counselor on December 5, 2003, but when the issues could not be informally resolved, he filed his formal complaint on February 17, 2004, and on March 31, 2004, *i.e.*, fewer than 45 days later, he was being officially investigated for performance-based misconduct that was never brought to his attention on the day it allegedly occurred.

¹² The Agency provided no comparative data that other employees at PSIA, who engaged in similar transgressions to that which Complainant was accused of committing, were similarly treated. Agency management officials were on notice that other employees engaged in improper screening practices, *e.g.*, jamming golf bags into the CTX machine and using the “turbo” method for screening, but no investigation or

discussed below. Further, I find Complainant established that the Agency placed him on administrative leave and ultimately terminated him in retaliation for filing an EEO complaint and not for the reasons it articulated.

42. The Agency's investigation into the alleged uncontained breach of security began with loud hints of reprisal-based animus in that FSD Anthony was aware of Complainant's protected communication about three non-selections wherein he cited DAFSD Berriman as the responsible management official (RMO), but still appointed DAFSD Berriman to conduct an investigation. The timing between the non-selections, Complainant's EEO contact, his formal EEO complaint, and Complainant being investigated for an uncontained breach of security was so close that FSD Anthony should have been more circumspect in his decision to appoint DAFSD Berriman to investigate.

43. DAFSD Berriman had a clear conflict of interest and should not have accepted investigational responsibilities. His explanation, "Because I'm the boss; It was my work area; I would have been derelict by not immediately looking into this." was inadequate to excuse the conflict, and I infer he intentionally ignored it because he harbored resentment against Complainant for filing an EEO complaint against him. [See, paragraph 20 *supra*.] This is especially true in light of AIS Ruiz' testimony that the regulation required that he conduct the investigation into uncontained breach of security, DAFSD Berriman's similar inability to explain why he did not turn over the purported serious allegation to the designated investigating official.

44. The Agency did not credibly explain either why it failed to appoint a more neutral and detached inquiry officer, such as Human Resource Specialist Homan (or her equivalent) and/or the expert who was credentialed to run an investigation into an uncontained breach of security, *i.e.*, AIS Ruiz, both of whom were clearly more qualified and less biased than DAFSD Berriman. Therefore, I do not find credible the Agency's explanation for HRS Homan's suspension because this was a decision within the control of FSD Anthony. Further, it is suspicious that she was suspended on the day that DAFSD Berriman was appointed as the inquiry officer, and it is also convenient that he completed the investigation after she returned to duty.

45. As further evidence of the unfair, retaliatory nature of DAFSD Berriman's "investigation," the record evidence establishes that even before being appointed, he conducted a preliminary investigation, and then after being appointed, he immediately conducted another preliminary investigation, and another more formal investigation which he finalized on April 3, 2004, all within four days, and all pointing to Complainant's guilt. There is very little substantive difference between the preliminary investigation and the final investigative report. I find that there was a "rush to judgment," *i.e.*, that DAFSD Berriman decided in advance that Complainant was guilty of the alleged misconduct and conducted in order to support this assessment rather than objectively gather the facts. I infer from these facts that this was in retaliation for Complainant's charge of discrimination.

46. The preponderance of the evidence established that during DAFSD Berriman's investigation, he intentionally ignored potentially relevant witnesses (Anderson and Lund) without a credible explanation. Had he taken statements from both Anderson and Lund he would have learned that they both thought Complainant was an "excellent" screener and neither one of them had ever seen Complainant intentionally not screen a bag.

discipline was taken against them.

In fact, none of the witnesses who testified at the hearing, including all of the Agency witnesses, stated that they ever saw Complainant intentionally fail to properly screen a bag. The only two people who allegedly witnessed Complainant fail to properly screen bags were not called as witnesses to testify at the hearing, and their unsworn statements serve as the sole source of this allegation. The evidence revealed that neither was close enough to Complainant to accurately observe his actions and that both were biased against him or in favor of management.

47. The Agency never disputed that earlier on March 28, 2004 Complainant notified SS Kessen that Screener Aguilar accidentally pushed the emergency stop button, which delayed the processing of bags just after Complainant had cleared the CTX machine. DAFSD Berriman did not examine or evaluate this issue as affecting Screener Aguilar's credibility, nor even note this in his report for FSD Anthony or DFSD Greenhalgh to consider.

48. There was no evidence that DAFSD Berriman questioned Screeners Aguilar or Sanchez about their ability to observe the 40/40/20 protocol work sheet and Complainant's screening procedures at the time, or how their conclusions that he was not complying with required protocol, when they were both 20-25 feet away.

49. Because DAFSD Berriman failed to interview LS McClure (now Supervisory Screener), he did not learn that it was her belief as the Lead Screener on March 28, 2004 that the screeners were only required to visually inspect the golf bags, *i.e.*, full physical, without use of the ETD machine. SS McClure credibly testified that the 40/40/20 protocol sheet applied to all bags, but when the bag was a golf bag, a full visual inspection was required each and every time and the ETD machine was not to be used. [*See*, paragraph 37 *supra*.] The Agency did not produce any documentary evidence to rebut this testimony. Further, the national Standard Operating Procedures (SOPs) corroborated SS McClure's testimony on this issue. I find therefore that the preponderance of the evidence established that the national Standard Operating Procedure (SOP) for screening oversize bags, which includes golf bags, was to do a full physical inspection. Why such a fact is ignored is very troubling and clearly shows that there was a tremendous misunderstanding, even among those in lead and supervisory positions, as to how golf bags at PSIA were to be screened. DAFSD Berriman deliberately ignored the confusion concerning the SOPs for the proper screening of golf bags and instead, concluded Complainant had improperly done so.

50. In fact, DAFSD Berriman also ignored the issue of the constant change in policies for screening golf bags at the PSIA in his final report. All of the witnesses who testified at the hearing stated that the protocol for screening golf bags was constantly evolving and that the employees were generally uncomfortable about the proper procedure for the day. Complainant testified that he did a full physical inspection, SS Kessen testified that she saw Complainant doing a full visual inspection with a flashlight. Thus, there is considerable doubt in the record about whether Complainant even violated "policy" because there was significant difference of opinion about what "policy" was on any given day at PSIA.

51. Further evidence of reprisal-based animus and conflict of interest issues by DAFSD Berriman is established by his admission that he considered information that he obtained during the three selection processes involving Complainant. Specifically, DAFSD Berriman testified that he let his belief that Complainant "lied" on his applications concerning his law enforcement experience affect his assessment of

whether Complainant was telling the truth when he denied committing an “uncontained breach of security.” Rather than fully develop the record and interview all relevant witnesses and formulate probing questions that would enable DAFSD Berriman, as the Inquiry Officer, to objectively determine whether the preponderance of the evidence established that Complainant committed the alleged misconduct, he relied on the unsworn statements of two employees who were not even called or produced at the hearing on what they saw. DAFSD Berriman also testified that he did not rely on SS Kessen’s statement wherein she described how Complainant was properly following screening procedure, except that he was opening the bag for inspection on a closed bag inspection. Instead of relying on SS Kessen’s written statement where she specifically detailed what she observed Complainant doing on March 28, 2004, DAFSD Berriman chose to attach more weight to third party hearsay statements as to what SS Kessen allegedly said about what she saw, therefore concluding that SS Kessen “fabricated” her story to protect herself. The fact that DAFSD Berriman chose not to take statements from two eye witnesses who worked next to Complainant, who testified here that if they had been questioned by DAFSD Berriman they would have said Complainant was an “excellent” screener and they never observed Complainant fail to properly screen a bag on March 28, 2004 or any other day, further establishes that DAFSD Berriman was selectively collecting evidence to support his predetermined conclusion that Complainant was guilty. I further note that all other statements that DAFSD Berriman relied on were hearsay evidence by people not in a position to observe Complainant’s screening practices on the day in question.

52. DAFSD Berriman also did not take a statement from Screening Supervisor Rebecca Millen, for if he had, he would have discovered that she saw and overheard SS Alford and SS Pico, apparently collaborating with Screener Aguilar and LS Lawrence when they were preparing their statements on March 30, 2004. [*See*, paragraph 8 *supra*.]

53. I find that DAFSD Berriman’s reprisal-based animus began when he permitted SS Alford to counsel Complainant to not say negative things about management after his non-selections, which included allowing him to threaten to remove Complainant from the bomb appraisal team because he was complaining about his non-selections. Though DAFSD Berriman testified that he would not allow SS Alford to remove Complainant from the bomb appraisal team, he did not testify that he notified Complainant that the threat SS Alford made was merely an idle threat that would not be carried out. Further, I find that because DAFSD Berriman failed to objectively evaluate the tainted role that SS Alford played in the investigatory process when it was readily apparent, renders the entire investigation by DAFSD Berriman suspect and to reek of reprisal-based animus from the lowest level. In sum, if DAFSD Berriman had conducted a fair and impartial investigation he would have had to evaluate the following evidence: (1) SS Alford was seen by SS Millen collaborating with Screener Aguilar and LS Lawrence in preparing their statements about what they saw Complainant do or not do on March 28, 2004 when he was not present; (2) SS Alford elevated this issue of Complainant’s alleged misconduct to SM Eacott and ultimately to DAFSD Berriman without contacting the supervisors (Husen and Kessen) present on the date of the alleged misconduct to find out what they did to investigate and correct this issue; (3) as previously noted, just a few weeks prior to DAFSD Berriman’s investigation, SS Alford had counseled Complainant on refraining from making negative comments concerning his nonselections by management (DAFSD Berriman) or face removal from the bomb appraisal team; (4) finally, SS Alford had the reputation for engaging in the practice of “turbo,” which involved not following the national SOPs for screening golf bags without any disciplinary repercussions. Because DAFSD Berriman was aware, or reasonably should have been aware, of this information, I find that his failure to correct this issue and rely on

evidence tainted by SS Alford does not insulate his recommendations from SS Alford's reprisal-based animus towards Complainant.

54. DAFSD Berriman ultimately concluded in his final report that the evidence established that Complainant "failed to utilize TSA Standard Operation Procedure while assigned to the Delta/United EDS/ETD area . . . [and] [b]y evidence of three independent witness statements and official TSA documents, up to seventy-six golf bags were fraudulently screened by [[him] and passed to the air carrier for transport on scheduled passenger aircraft." Two of the independent witness statements were clearly from Screeners Aguilar and Sanchez, but as discussed above, the independence of Aguilar's statement is highly suspect since SS Alford was witnessed helping her with the statement. Further, it is not clear who the third independent witness was, for the Agency only identified two people as witnessing Complainant's alleged improper screening of golf bags and neither one testified at the hearing and neither one prepared a sworn affidavit. Also, I find it significant that DAFSD concluded that up to 76 golf bags were "fraudulently screened" when there was no such evidence. Neither Aguilar nor Sanchez referenced any particular number of golf bags in their statements. In fact, Screener Sanchez' statement merely references "the golf bag" (one) he allegedly saw Complainant not properly swipe, and Screener Aguilar mixed singular and plural usage and then she said she witnessed it "several times." Well, "Up to 76" golf bags clearly means more than several. Here, DAFSD Berriman failed to show that he even tried to ascertain the number of bags allegedly improperly screened. According to SS Kessen she specifically stated in her statement that she observed him do three closed bag searches and he opened each bag to put in a tag when it was not required. Further there was no evidence that 76 golf bags were even inspected by Complainant on the day in question. However, there was no evidence that anyone else continued inspecting the golf bags when Complainant went to lunch or that the 3 bags SS Kessen specifically observed Complainant inspect were subtracted out of the total number of golf bags inspected that day.

55. Even after Complainant responded to the Agency's notice of proposed termination and identified that nobody had ever told him on the day in question that he was improperly or fraudulently screening golf bags, and that he had the only two alarms during his bag inspections for that day, neither DAFSD Berriman nor FSD Anthony showed that they considered and objectively evaluated this evidence. When Complainant pointed out that other employees had not been following the national SOPs for screening golf bags without an investigation, by using the turbo method, as well as jamming golf bags into the CTX machine, FSD Anthony responded by saying, "the potential misconduct of other employees involved in this or any other incident is not relevant to my final decision." [IR, p. 490.] Interestingly, FSD Anthony then alludes to misconduct of Screener Aguilar, but failed to elaborate.

56. The purported investigation initiated by DAFSD Berriman was shoddy and did not meet even the barest standards of fairness and objectivity expected from an experienced law enforcement officer. The investigation was so replete with important omissions of testimony and its conclusions so based on half truths and inconsistencies – including about the very nature of the policy Complainant was found to have violated – that the only logical inference is that it was conducted for retaliatory reasons in order to punish Complainant for complaining about non-selection, a clear violating Title VII. It seems surprising the Agency would use it as a legal basis for terminating Complainant. The preponderance of the evidence establishes that there were other screeners, both lead and supervisory, engaging in practices that violated the national SOPs, no different or less serious from than which Complainant was accused of committing. Even if Complainant engaged in

the practice which he was accused of, which I find as a fact he did not, one of the main instigators of the investigation, *i.e.*, SS Alford, was known to engage in the “turbo” method in violation of the national SOPs on screening oversize bags and he was never investigated.

57. For the above stated reasons, I find that the preponderance of the evidence established that DAFSD Berriman engaged in unlawful reprisal against Complainant for filing a claim of discrimination and then discussing this fact with his co-workers. Further, because DAFSD Berriman was motivated by reprisal when he began the investigation and because FSD Anthony did not remove DAFSD Berriman from the picture, FSD Anthony is tainted by the same reprisal-based animus. Therefore, I find Complainant established retaliation when the Agency placed him on administrative leave and then ultimately terminated him and accordingly, he is entitled to both equitable and compensatory damages as discussed below.

VI. COMPENSATORY DAMAGES/ATTORNEY’S FEES & COSTS

Legal Standards for an Award of Compensatory Damages

Section 102(a) of the 1991 Civil Rights Act (CRA) authorizes an award of compensatory damages for all post-Act pecuniary losses, *i.e.*, past pecuniary losses (out of pocket loss)¹³, future pecuniary losses, and non-pecuniary losses, such as, but not limited to, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to character and reputation, and loss of health. In *West v. Gibson*, 527 U.S. 2121 (1999), the United States Supreme Court found that Congress afforded the Commission the authority to award such damages in the administrative process. The CRA authorizes an award of compensatory damages as part of make-whole relief for discrimination. Section 1981a(b)(3) limits the total amount of compensatory damages that may be awarded each complaining party for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, according to the number of individuals employed by the respondent. The limit for a respondent who has more than 500 employees is \$300,000. Under 42 U.S.C. § 1981A, compensatory damages do not include the traditional relief authorized by Title VII, *i.e.*, make-whole remedies, including backpay, interest on backpay, front pay and injunctive relief.

To receive an award of compensatory damages, Complainant must demonstrate that he has been harmed as a result of the Agency’s discriminatory action; the extent, nature, and severity of the harm; and the duration or expected duration of the harm. *Rivera v. Department of the Navy*, EEOC Appeal No. 01934157 (July 22, 1994), request for reconsideration denied, EEOC Request No. 05940927 (December 11, 1995); *Lawrence v. United States Postal Service*, EEOC Appeal No. 01952288 (April 18, 1996). *Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991*, EEOC Notice No. 915.002 at 11-12, 14 (July 14, 1992).

Complainant must support his claim for compensatory damages with objective evidence, which may include his own statements, statements from family members and friends, or statements and documents from

¹³ Past pecuniary losses are also not included in the caps and are fully compensable where actual out-of-pocket losses can be shown. Section 1981A(b)(3) limits only claims that typically do not lend themselves to precise quantification, *i.e.*, future pecuniary losses and non-pecuniary losses.

health care providers which identify and describe physical or behavioral manifestations of mental or emotional distress. *Goodwin v. USAF*, EEOC Appeal No. 01991301 (October 18, 2000); *Carle v. Navy*, EEOC Appeal No. 01922369 (January 5, 1993).

Compensatory damages are awarded to compensate a complaining party for losses or suffering inflicted due to discriminatory acts or conduct. *Carey v. Phipps*, 435 U.S. 247, 254 (1978). Compensatory damages "may be had for any proximate consequences which can be established with requisite certainty." 22 Am. Jur. 2d, *Damages*, Section 45 (1965). Thus, speculative damages will not be awarded, *i.e.*, there must be sufficient evidence to support the award. *Gunby v. Pennsylvania Elec. Co.*, 840 F.2d 1108, 1121 (3d Cir. 1988), citing *Erebia v. Chrysler Plastics Products Corp.*, 772 F.2d 1250, 1259 (6th Cir. 1985), *cert. denied*, 475 U.S. 1015 (1986).

The Commission recognizes that for a proper award of non-pecuniary damages, the amount of the award should not be the product of passion or prejudice, and should be consistent with the amount awarded in similar cases. *See, Ward-Jenkins v. Interior*, EEOC Appeal No. 01961483 (March 4, 1999) (citing, *Cygnar v. City of Chicago*, 865 F.2d 827, 848 (7th Cir. 1989)). The particulars of what relief may be awarded, and what proof is necessary to obtain that relief, are set forth in detail in the *EEOC's Enforcement Guidance, Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991* (July 14, 1992) ("Guidance"). Briefly stated, the Complainant must submit evidence to show that the Agency's discriminatory conduct directly or proximately caused the losses for which damages are sought. *Id.* at 11-12, 14; *Rivera v. Navy*, EEOC Appeal No. 01934157 (July 22, 1994). The amount awarded should reflect the extent to which the Agency's discriminatory action directly or proximately caused harm to the Complainant and the extent to which other factors may have played a part. *See, Guidance*, at 11-12. The amount of non-pecuniary damages should also reflect the nature and severity of the harm to the Complainant, and the duration or expected duration of the harm. *Id.* at 14. Thus, the critical question is whether the complaining party incurred the losses as a result of the employer's discriminatory action or conduct.

Objective evidence of non-pecuniary damages could include a statement by the Complainant explaining how he was affected by the discrimination. *See, Carle v. Navy*, EEOC Appeal No. 01922369 (January 5, 1993). Statements from others, including family members, friends, and health care providers could address the outward manifestations of the impact of the discrimination on the Complainant. *Id.* The Complainant could also submit documentation of medical or psychiatric treatment related to the effects of the discrimination. *Id.* However, evidence from a health care provider is not a mandatory prerequisite to establishing entitlement to non-pecuniary damages. *Sinnott v. Defense*, EEOC Appeal No. 01952872 (September 19, 1996). The more inherently degrading or humiliating the Agency's actions are, the more reasonable it is to infer that a person would suffer humiliation or distress from that action, and the less it is necessary to rely on evidence from a health care provider to justify a damages award. *See, Lawrence v. USPS*, EEOC Appeal No. 01952288 (April 18, 1996). Nevertheless, the absence of such supporting evidence could potentially affect the amount of damages that could be awarded in specific cases. *Id.*

Complainant's Evidence

Damages (Generally)

Complainant requested non-pecuniary damages in the amount of \$100,000.00 and pecuniary damages in the amount of \$10,000.00 (medical expenses), \$20,000.00 (loss of full market value in home because of premature sale because of termination action and resultant unemployment), \$255.00 (interest & transaction fees on home mortgage credit line created because of termination action), \$1,320.00 (storage unit rental charges incurred b/c loss of home to avoid foreclosure and need to store personalty), and \$40.00 (prescription medications for Lexapro & Xanax) for a total of \$31,615.00. The Complainant's evidence of injury and causation consisted of testimony from himself and testimony from his medical practitioner, Job Lopez, in addition to miscellaneous documentary evidence. [HT1, pp. 92-105, 130-182; 207-208, 230-232, 236-239; AJE15, pp. 20-23; AJE17, pp. 9-10.]

Non-Pecuniary

Complainant testified that being forced to take administrative leave and then ultimately being terminated caused him to suffer from insomnia, anxiety, depression, stress, and sexual dysfunction; additionally, it caused him tremendous mental anguish because he had to borrow on an equity line of credit on his home and then ultimately sell his house for less than full market value to avoid foreclosure. In addition, Complainant had to move and rent a room and put most of his things in storage; he also had to face the total embarrassment of being terminated for something he did not do. [*Id.*]

Complainant testified that he began seeking treatment from Nurse Practitioner (NP) Job Lopez in April 2004 and ceased seeing him in January 2005. NP Lopez corroborated Complainant's testimony that he suffered emotional anxiety and depression, as well as insomnia, stress, and sexual dysfunction. NP Lopez prescribed Complainant the anti-depressant Lexapro, 10 mg, to combat his depression, and the anxiolytic Xanax, .25 mg, for immediate treatment of anxiety on an as needed basis. NP Lopez testified that the prescriptions were continued through his treatment sessions which ended in January 2005.

I find that the preponderance of the evidence established that Complainant suffered from nine months of documented insomnia, anxiety, depression, stress, and ongoing sexual dysfunction; further I find that having to sell his home and move his personalty into storage and be reduced to renting a room in somebody else's home caused him tremendous embarrassment and humiliation. I also find that being wrongly accused of misconduct and then being terminated added to the tremendous stress and embarrassment for a former law enforcement officer because it seriously jeopardized the type of law enforcement jobs, if any, he could obtain in his future.

A number of Commission decisions have awarded non-pecuniary compensatory damages in cases which are comparable to the Complainant's. *See, Campos v. Justice*, EEOC Appeal No. 01A03368 (January 25, 2002) - national origin & reprisal when terminated - EEOC awarded \$52,000 in pecuniaries after Complainant established that he incurred debt, stopped attending family functions, and experienced worry, stress,

depression, loss of enjoyment of life, and humiliation, which was confirmed my statements from relatives; there was no medical evidence; *Arreola v. Justice*, EEOC Appeal No. 01A03342 (January 17, 2002) - national origin & reprisal when terminated - EEOC awarded \$52,000 in pecuniaries after Complainant established that he incurred debt, became delinquent in paying bills, suffered a negative credit rating, stopped attending family functions and experienced constant worry, stress, depression, loss of enjoyment of life, humiliation, sleeplessness, headaches, weight fluctuation, and a disruptions of his home live; affidavits from relatives submitted, but no medical evidence; and *McDonald v. Justice*, EEOC Appeal No. 01A31075 (August 2, 2004) - reprisal when constructively discharged - EEOC awarded \$40,000 after Complainant established that he was evicted from his home and had to live in his car, and had difficulty finding work; he also established that he experienced emotional stress and humiliation through corroborating testimony from a friend; no medical evidence submitted.

I find that the preponderance of the evidence established that the Complainant suffered emotional and psychological injuries which resulted from the Agency's unlawful reprisal, and there was no evidence that the Complainant suffered from any preexisting or contributing conditions. I further find that the Agency's illegal actions had a severe (five months) to moderate (4 months) impact on Complainant for a total of nine months impact. Complainant ceased seeking medical treatment in January 2005 and assumed a better paying job in March 2005. Accordingly, based on the foregoing evidence, I find that Complainant is entitled to non-pecuniary damages in the amount of \$45,000.00. This amount takes into account the severity and duration of the harm sustained by Complainant as a result of the Agency's actions, the amount he requested, and after giving due consideration of damage awards reached in comparable cases. I further note that this amount meets the goals of not being motivated by passion or prejudice, not being "monstrously excessive" standing alone, and being consistent with the amounts awarded in similar cases. *See, Cygnar v. City of Chicago*, 865 F.2d 827, 848 (7th Cir. 1989).

Pecuniary

Though I find that the preponderance of the evidence established that Complainant's unemployment status forced him to have to sell his home, Complainant is not entitled to recover damages associated with this claim because he failed to provide adequate documentation and evidence to support it. I note that Complainant jointly owned this home with another individual, but Complainant withdrew her as a witness so she was unavailable to corroborate his claim. Again, since Complainant failed to provide adequate documentation of his claim for reimbursement for his storage fee of \$1,320.00 and \$40.00 for prescriptions, I deny this claim. However, Complainant's claim for \$255.00 for interest and transaction fees on his home mortgage credit line, which were established as the result of Complainant trying to offset his lack of employment is hereby approved.

Equity

Complainant testified that he was unemployed for approximately 5 months, *i.e.*, April 21, 2004 through October 14, 2004. Further, from October 14, 2004 through March 23, 2005, he worked at \$1.44/hour less, *i.e.*, @ \$13.00/hour, for Casino Morongo as a uniformed security officer. Though Complainant failed to provide adequate documentation to substantiate the exact differences between his pay with the Agency and his pay

with Casino Morongo, he can provide same to Agency for an appropriate calculation. The same applies to Complainant's claim of lost back pay from April 21, 2004 through October 14, 2004. Since the Agency has the pay records, it can appropriately calculate what Complainant would have been paid during this period of time had he not been unlawfully terminated. Complainant claims it is in the vicinity of \$11,875.00, but that can be easily calculated.

Attorney's Fees and Costs

By regulation, a Federal Agency must award attorney's fees and costs, in accordance with existing law, for the successful processing of an EEO complaint. 29 C.F.R. Section 1614.501(e). The fee award is ordinarily determined by multiplying a reasonable number of hours expended on the case by a reasonable hourly rate, also known as a "lodestar." *See, Blum v. Stenson*, 465 U.S. 886 (1984); 29 C.F.R. Section 1614.501(e)(2)(ii)(B). In determining the number of hours expended, the Commission recognizes that the attorney "is not required to record in great detail the manner in which each minute of his time was expended." *See, Benard v. Department of Veterans Affairs*, EEOC Appeal No. 01966861 (July 17, 1998). However, the attorney does have the burden of identifying the subject matters in which he spent his time, which can be documented by submitting sufficiently detailed contemporaneous time records to ensure that the time spent was accurately recorded. *Id.* Further, in order to obtain an award of attorney's fees and costs, the Complainant must be considered a prevailing party. *See, Texas State Teachers Ass'n v. Garland, I.S.D.*, 489 U.S. 782 (1989).

Here, Complainant is a prevailing party entitled to recovery of reasonable attorney's fees and costs pursuant to 29 C.F.R. Section 1614.501(e) and the Commission's Management Directive 110 (MD-110). On July 19, 2006, I issued an Order notifying the parties that Complainant had prevailed on the forced administrative leave issue, as well as the termination issue, and that attorney's fees were in order. [AJE40; AJE41; AJE42.] On August 15, 2005, Complainant timely submitted his petition for attorney's fees. [AJE43.] On or about August 31, 2006, the Commission received a copy of the Agency's response. [AJE44.] The Agency objected to the claimed number of hours, hourly rate, fees, and costs. [*Id.*]

Reasonable Hourly Rate

For the purpose of determining the prevailing market rate, the relevant community is the area where the agency facility and complaint are located. *Black v. Secretary of the Army*, EEOC Appeal No. 01921158 (1993); *see also, McTier v. Navy*, EEOC Appeal No. 07A30016 (March 2, 2004). Here, the facility and complaint are located in Palm Springs, California. Mr. Steven E. Brown is a Ventura County, California attorney, and he requested reimbursement at higher rates than the agreed upon fee retainer rates of \$250.00 per hour for himself, \$175.00 per hour for attorney Daniel M. Goodkin, \$85.00 per hour for paralegals Maria Baro and Rosemary Lopez, and \$45.00 per hour for law clerk Brett Blumstein. I note that Complainant's attorney did not provide an affidavit from a similarly experienced counsel from Palm Springs concerning the usual and customary fees charged for performing similar work in Palm Springs. However, I concur with the Agency that the hourly rate of James DeAguilar, Complainant's former attorney, is more reflective of the prevailing market rate in the Palm Springs area since his local practice area includes Palm Springs, and he practices in Redlands, California, which is only 45 miles from Palm Springs.

After having reviewed Complainant's fee petition, I find that Complainant's counsel failed to show that the prevailing market for Palm Springs, California is \$375.00 per hour. Even if this issue was considered under a "fee enhancement" theory, which was not argued by Complainant's counsel, I do not find that a fee enhancement was warranted in this case. Mr. Brown seeks an increase of \$125.00 per hour for himself and an increase of \$75.00 per hour for Mr. Goodkin, which are substantial fee increases over the agreed upon fee rates in the retainer agreement signed by Complainant on June 21, 2005. Further, I find that the agreed upon hourly rate in the retainer agreement is not unreasonably low for the Palm Springs area. Counsel requests that the Commission defer to his past attorney's fees awards because that is what he has collected for successfully representing clients in the Los Angeles area. However, the Commission has long recognized that the prevailing market rate is established by the community where the Agency facility and complaint are located and Los Angeles is too distant to consider its rates as the prevailing market rate for Palm Springs. Therefore, as impressive as Mr. Brown's credentials are, they do not justify a fee enhancement in this case. The hourly rate of \$250.00 is not unreasonably low and the case did not involve a complex or novel issue that required superior litigation skills. *See, Ewers v. Air Force*, EEOC Appeal No. 01850792 (July 24, 2986). Accordingly, I find that \$250.00 per hour is very reasonable for Mr. Brown's service and \$175.00 per hour is equally reasonable for Mr. Goodkin's services.

Reasonable Hours Expended

Mr. Brown claimed 128.80 hours for his work on Complainant's EEO case, in addition to 11.7 hours for preparing the fee petition, and 48.85 hours for Attorney Goodkin's work. [AJE43, Exhibits A & B.] I concur with the Agency's argument and objection that Complainant's counsel should have adjusted his attorney's fees using a fifty percent (50%) reduction rather than a forty percent (40%) reduction. [AJE44.] There were a total of five (5) issues, three of which were nonselection issues, but Complainant withdrew those issues. Because the nonselection issues were withdrawn, sixteen (16) additional witnesses were also eliminated. After having reviewed the case file, including the transcripts and exhibits, I concur with the Agency that the three nonselection issues composed approximately fifty percent (50%) of the case and therefore, I find that Complainant's counsel should have reduced his fees by fifty percent (50%) for the period of June 20 through August 4, 2005, as opposed to voluntarily taking a forty percent (40%) reduction. *See, Hironaka v. USPS*, EEOC Appeal No. 01A14926 (March 28, 2002). Accordingly, Mr. Brown is entitled to attorney's fees at the rate of \$250.00 per hour times 23.67 hours for the period of June 20 - August 4, 2005 (47.33 hours divided by 2) for a total of **\$5,917.50**; Mr. Goodkin is entitled to attorney's fees at the rate of \$175.00 per hour times 8.7 hours for the period of June 20 - August 4, 2005 (17.4 hours divided by 2) for a total of **\$1,522.50**.

I concur with the Agency that the remaining hours, *i.e.*, 81.47 hours for Mr. Brown and 31.45 hours for Mr. Goodkin for representation during the period of August 5, 2005 through July 25, 2006, should be reimbursed at the full rate of \$250.00/hour for Mr. Brown and \$175.00/hour for Mr. Goodkin, totaling **\$20,367.50** (81.47 hours times \$250.00/hour) for Mr. Brown and **\$5,503.75** (31.45 hours times \$175.00/hour) for Mr. Goodkin.

I also concur with the Agency that the 11.7 hours Mr. Brown spent preparing Complainant's attorney's fees petition should be reimbursed at the full rate of \$250.00/hour, totaling **\$2,925.00** (11.7 hours times \$250.00/hour).

Accordingly, I find that the sum total for Mr. Brown is **\$29,210.00** (\$5,917.50 + \$20,367.50 + \$2,925.00) and for Mr. Goodkin is **\$7,026.25** (\$1,522.50 + \$5,503.75).

Attorney's Fees and Costs for Complainant's Prior Attorney, James DeAguilera

Complainant seeks reimbursement of the attorney's fees he paid to his former attorney in the amount of \$4,687.50. [AJE43, Exhibit K.] In Attorney DeAguilera's declaration he identifies that he spent 19.55 hours at \$250.00/hour representing Complainant. However, his billing statements, which were provided by Complainant, only established that he spent a total of 18 hours billable time representing Complainant. The Agency objects to Attorney DeAguilera's billing statements, asserting that they are too vague as to the work accomplished. The Agency also objects to reimbursement for attorney's fees incurred before Complainant filed his formal EEO complaint on the issues for which Complainant established Agency liability, *i.e.*, the formal EEO complaint signed on June 11, 2004 and date stamped as received by the Agency on June 23, 2004. [IR, IE3.]

Because Attorney DeAguilera's billing statements are not specific enough to distinguish which issues he was working on at any given time, I concur with the Agency that it is reasonable to assume that only 9.5 hours of billable time occurred during the period after Complainant filed his formal EEO complaint over the issues for which Complainant established liability. I will also assume that the work that his unidentified paralegal performed prior to May 4, 2004 is related to the nonselection issues and is not compensable. Further, since the three nonselections had not been withdrawn by Complainant during any period of time that Attorney DeAguilera represented him, I hereby find that these 9.5 hours shall be mathematically adjusted downward by fifty percent (50%). *See*, discussion *supra* under *Reasonable Hours Expended*. Accordingly, I find that Complainant is only entitled to recover attorney fees for representation by Attorney DeAguilera for 4.75 hours (.5 times 9.5 hours) at \$250.00/hour for a total of **\$1,187.50**.

Paralegal and Law Clerk Hourly Rate

Under 29 C.F.R. 1614.501 (e)(1) (iii), attorney fees are "allowable only for the services of members of the Bar and law clerks, paralegals or law students under the supervision of members of the bar . . ." Here, Mr. Brown seeks fees for his "paralegals" in the amount of \$930.75 for 10.95 hours of work (8.05 hours by paralegal Maria G. Baro and 2.90 hours by paralegal Rosemary Lopez) at \$85.00 per hour. Mr. Brown further seeks fees for paralegal Baro for her assistance in the preparation of the fee petition in the amount of \$467.50 for 5.5 hours of work. Mr. Brown additionally seeks fees for his "law clerk" in the amount of \$490.50 for 10.90 hours of work at \$45.00 per hour. Though the Agency objected to these requests because the Agency interpreted Complainant's fee petition as describing the work performed by the paralegals and law clerk as clerical in nature and not compensable, I disagree. The more clerical and mundane tasks performed by his legal assistants were recorded as "no charge," but the tasks of documenting files with appropriate entries after discussions with client and the Administrative Judge, as well as reviewing and updating the file, answering and making telephone calls on behalf of Mr. Brown concerning Complainant's EEOC case, assistance in preparing a fee petition, *etc.*, are legitimate fees and I find that they are recoverable and fully compensable. *See, Bryant v. Army*, EEOC Appeal No. 019112990 (April 6, 1992). Further, the evidence of record does not show that the work performed by the paralegals and law clerk were duplicative of work performed by the

attorney(s). *See, Lee v. Defense*, EEOC Appeal No. 01962241 (July 22, 1997).

Notwithstanding my ruling that the services of Mr. Brown's paralegals and law clerk are fully compensable, the following adjustments are hereby made to the paralegal and law clerk fees assessment based on the fifty percent (50%) reduction for fees charged during the period of June 20 - August 4, 2005. *See*, discussion *supra* under *Reasonable Hours Expended*. Paralegal Baro's hours are reduced from 2.4 hours to 1.2 hours, totaling a reimbursement for the period of June 20 - August 4, 2005 in the amount of **\$102.00**; Paralegal Lopez' hours are similarly reduced from 2.2 hours to 1.1 hours, totaling a reimbursement for the same period in the amount of **\$93.50**; Law Clerk Brett Blumstein's hours are reduced from 10.10 hours to 5.05 hours, totaling a reimbursement for the same period in the amount of **\$227.25**. The total amount compensable during this period is **\$422.75** (\$102.00 + \$93.50 + \$227.25).

Paralegal Baro's hours for the period of August 5, 2005 - July 25, 2006, *i.e.*, 5.65 hours, are fully compensable in the amount of **\$480.25** (5.65 hours times \$85.00/hour); paralegal Lopez's hours for the same period, *i.e.*, .7 hours, are fully compensable in the amount of **\$59.50** (.7 hours times \$85.00/hour); and law clerk Blumstein's hours for the same period, *i.e.*, .8 hours, are fully compensable in the amount of **\$36.00** (.8 hours times \$45.00/hour). The total amount compensable during this period is **\$575.75** (\$480.25 + \$59.50 + \$36.00).

Paralegal Baro's fees for preparation of the fee petition in the amount of **\$467.50** for 5.5 hours of work are hereby approved.

Accordingly, for the foregoing reasons, I hereby award fees for paralegal and law clerk time in the total amount of **\$1,466.00** (\$422.75 + \$575.75 + \$467.50).

Costs

Although the only recoverable costs cited in the regulations are for reporting fees, expert witnesses, and copying, the Commission has held that recoverable costs may include reasonable out-of-pocket expenses incurred during the normal course of representation and normally charged to a fee-paying private client in the normal course of providing representation. *See, Hatfield v. Navy*, EEOC Appeal No. 01892902 (December 12, 1989). Recoverable expenditures include costs associated with clerical work, postage, and telephone calls, as well as travel expenses, including air fare, hotel accommodations, meals, and car rental. To be reimbursed for these expenditures, the fee applicant must submit adequate documentation in support of the expenses incurred, *e.g.*, copies of the telephone bills or receipts. *See, Canady v. Army*, EEOC Request No. 05890226 (December 27, 1989).

Here, Complainant seeks reimbursement for litigation expenses and costs in the amount of \$2,250.92. [AJE43, Exhibit C.] The Agency objects to Complainant's request for reimbursement of fax costs and expert witness fees for Job Lopez because of inadequate documentation. [AJE44.] I concur with the Agency's argument that the costs of \$214.00 for outgoing faxes at the rate of \$1.00 per page are not justified without adequate documentation that these costs were incurred or that there is a verifiable basis for the \$1.00 per page charge. Further, there is no documentary evidence to support a claim that Complainant incurred a \$250.00

expert witness fee for the appearance of Job Lopez at the hearing. Accordingly, I hereby deny costs in the amount of \$464.00 (\$214.00 + \$250.00).

Because the minimal copying claimed here was performed in-office, it is not expected that receipts would be readily available. Further, I find that \$.10 per copy is reasonable and is hereby granted. I concur with the Agency that Complainant provided adequate documentation of the remaining costs, and therefore I hereby award costs in the amount of **\$1,786.92** (\$2,250.92 minus \$464.00).

VII. CORRECTIVE ACTION

In sum, the Agency shall provide the following make-whole relief and compensatory damages to the Complainant:

1. The Agency shall offer Complainant reinstatement into his former position, or one equal to it, and provide him back pay, minus any mitigation for his subsequent employment. Because this case involved a termination action, and I have ordered reinstatement, the Agency shall provide the required interim relief even pending an Appeal of this decision. *See*, 29 C.F.R. §1614.505

2. The Agency shall restore all annual and sick leave that would have accumulated for Complainant during the period from his termination through the time he is reemployed and provide him with any other equitable remedy to which he would otherwise be entitled had he not been subjected to unlawful reprisal.

3. The Agency shall compensate the Complainant for non-pecuniary damages in the amount of \$45,000.00.

4. The Agency shall compensate the Complainant for pecuniary damages in the amount of \$255.00.

5. The Agency shall ensure that the relevant management officials (FSD Anthony, DAFSD Berriman, SM Eacott, SS Alford, SS Lawrence, and LS DePatie) who were either directly or indirectly involved in the reprisal-based decision to terminate Complainant to undergo training and/or disciplinary action. Such training shall include, but is not limited to, EEO awareness training, especially focusing on reprisal. To the extent that the Agency still has functional control over those employees responsible for the illegal actions, the Agency shall require these employees to attend a minimum of forty (40) hours of EEO awareness training within one year.

6. The Agency shall prominently post at the Palm Springs International Airport, a notice of the finding of discrimination in conformity with Appendix A of 29 C.F.R. Part 1614. The notice shall indicate that it is being posted pursuant to this Decision.

7. Because the Complainant is a prevailing party he is entitled to award of reasonable attorney fees in the amount of \$38,889.75 (\$29,210.00 + \$7,026.25 + \$1,187.50 + \$1,466.00) and costs in the amount of \$1,786.92.

VIII. CONCLUSION

Complainant established by a preponderance of evidence that the Agency unlawfully retaliated against him when he was forced to take administrative leave and ultimately terminated as discussed herein. Complainant is therefore entitled to the relief identified.

For the Commission:



DENNIS CARTER
Administrative Judge