

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Milwaukee Area Office  
310 W. Wisconsin Ave., Suite 800  
Milwaukee, WI 53203

Bonnie Spencer )  
4501 Dakota Dr. )  
Madison, WI 53704 )

Bonnie Harper )  
P.O. Box 14752 )  
Madison, WI 53708 )

Donna Elmer )  
2517 Crest Line Road )  
Madison, WI 53704 )

Jacqueline Childs )  
3818 Clover Lane )  
Madison, WI 53714 )  
Complainants )

and )  
John E. Potter, )  
Postmaster General, )  
U.S. Postal Service )  
Agency )

EEOC No. 443-07-00027X  
consolidated

COMPLAINANT REPRESENTATIVE:

Sally Stix, Attorney  
700 Rayovac Dr., Suite 117  
Madison, WI 53711

AGENCY REPRESENTATIVE:

Kimberly Cates Wiseman  
Deputy Managing Counsel  
USPS Law Dept. - Western Area  
Dominion Plaza, South  
600 17<sup>th</sup> St., Suite 1705  
Denver, CO 80202-3333

ADMINISTRATIVE JUDGE:

Cheryl Kramer  
Administrative Judge- EEOC  
Suite 800  
310 West Wisconsin Avenue  
Milwaukee, WI 53203

## I. STATEMENT OF THE CASE

Pursuant to 29 C.F.R. 1614.109 of the Commission's regulations, a hearing was held on a complaint filed by Bonnie Spencer, Bonnie Harper, Donna Elmer and Jacqueline Childs against the United States Postal Service.

Ms. Childs, Spencer, Harper and Elmer will be referred to as the Complainants. The United States Postal Service will be referred to as the Agency.

Ten witnesses testified at the hearing held on January, 14 and 15, 2008. The Complainant offered exhibits one through 14 and the Agency offered exhibits 11 through 13. All exhibits were admitted into evidence.<sup>1</sup>

## II. ISSUES

Whether Complainants were discriminated against on the basis of disability when beginning in or about February 2006, they were repeatedly bypassed for overtime opportunities while non-disabled employees were not.

Whether Complainants were discriminated against on the basis of their sex when they were repeatedly bypassed for overtime opportunities provided to male employees who were similarly situated to Complainants.

Whether Complainants were discriminated against on the basis of their age when they were repeatedly bypassed for overtime opportunities provided to younger employees.<sup>2</sup>

Whether the method of assigning overtime at the Madison Processing and Distribution Center, specifically assigning overtime by operation, has a disparate impact upon disabled employees, female employees over age 40.<sup>3</sup>

Whether Complainants were discriminated against on the basis of their sex, age and disability when on July 3, 2007, September 3, 2007, and continuing they were not allowed to work on holidays.<sup>4</sup>

## III. FINDINGS OF FACT

A preponderance of the evidence establishes the following facts:

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<sup>1</sup> After the hearing, the arbitrator ruled in Complainants' grievance. The Agency's request to admit the arbitrator's decision is denied.

<sup>2</sup> These issues were framed in Complainants Brief p. 2., and are somewhat different than the issues stated in Complainants October 30, 2007 letter defining the issues. On March 11, 2007, Complainant withdrew the reprisal allegation.

<sup>3</sup> Summary judgment in favor of the Agency was granted on Complainants' disparate impact claim and is part of this decision.

<sup>4</sup> The last two issues are as stated in Complainant's October 30, 2007, letter defining the issues.

1. Complainant Childs, age 57, began her employment with the Agency in 1978 and since 1998 had been the general clerk for Tour 3 at the Madison, Wisconsin Processing and Distribution Center "P&DC." She works her regular schedule from 2:30 p.m. to 11:00 p.m. *Childs H.T. 43-45.*
2. Complainant Childs' duties and responsibilities include creating and maintaining a database for all employees in the Madison P&DC. She tracks the employee's particular job, who is on the overtime desired list, and who is on vacation, annual or emergency leave. *H.T. 45.*
3. Complainant Childs has osteoarthritis in her neck, hip, spine and knees and vascular disease. Her condition is permanent and limits her ability to walk, stand, climb stairs and repetitive twisting. *ROI Affidavit A p. 3; H.T. 60-62; Childs Exhibit 5.* She can only stand for five to ten minutes at a time and no longer than 10 to 15 minutes without significant pain. She is unable to walk without pain and can only walk one city block at a time. *ROI Childs Affidavit A p. 3; Childs Exhibit 5 p.1-2, 8.*
4. For years Complainant Childs was accommodated with respect to overtime work consistent with her restrictions, enabling her to work overtime in the handstamp area or sometimes pitching letters. *H.T. 73.*
5. Complainant Spencer is a 58 year old female who began her employment with the Agency in 1979 and currently works as a manual clerk on tour 3 from 4:00 p.m. to 12:30 a.m. at the Madison, Wisconsin P&DC. *ROI Spencer Exhibit 1.*
6. Complainant Spencer has carpal tunnel syndrome in both hands, tennis elbow and basil joint arthritis in her thumbs. *ROI Spencer Affidavit A p.2; H.T. 106-107.* She is permanently unable to push or lift items weighing more than 15 pounds or use either hand repetitively, or for fine manipulation. *H.T. 107-109; Spencer ROI Exhibit 3; ROI Spencer Affidavit A p.2.*
7. In May 1994, Complainant Spencer was given a rehabilitation job offer and is employed in the handstamp area performing a variety of duties on a chair with a back support such as weighing mail on a scale and using a rubber stamp to stamp mail. Complainant can also push a cart, or wuk, to collect mail. *ROI Spencer Exhibit 2.*
8. Complainant Elmer, a 62 year old female began her employment with the Agency in 1986 and in July 2006, began working as a manual clerk on tour 3 handstamp operations at the Madison, Wisconsin Processing and Distribution Center. *ROI Exhibit 1; H.T. 127-29.*
9. Complainant Elmer is deaf and has a permanent injury to her left knee. She cannot stand for longer than one hour, is limited in walking, and cannot kneel and has great difficulty climbing stairs. *H.T. 129-30; ROI Affidavit A p.10-12.*
10. She also suffers from arthritis in her right hand and wrist and hip pain with lower back spasms. *H.T. 129-30; ROI Affidavit A p.10-11.* She has permanent restrictions including no repetitive hand motion and is limited to lifting from five to 10 pounds. She is also restricted in bending, stooping, twisting, and standing over one hour per day. *Elmer Exhibit 5 p. 8.*
11. Complainant Harper, 57 years old, began her employment with the Agency in 1985 and in 1994 received a rehabilitation job offer in handstamp operations for her condition of right lateral epicondylitis. *H.T. 140-41; Harper Exhibit 5 p. 12-13; Harper ROI Exhibit 6.*
12. She was assigned to perform a variety of duties while seated at a chair with back support.

- She was also to push the wuk to the culling belt to collect mail for the handstamp area. *Harper ROI Exhibit 6; Exhibit 5 p. 11-12.*
13. Complainant Harper is deaf and has also been diagnosed with fibromyalgia, shoulder, neck and back problems, can only lift 10 pounds and has difficulty grasping. *H.T. 143-45; Exhibit 5 p. 1.* She is restricted from keying and reaching above her should level with her right arm. She cannot perform fine manipulation or firm grasping with her right hand and is limited to lifting 10 pounds. *Harper ROI Exhibit 6; Exhibit 5 p. 11-12; H.T. 143-45*
  14. Complainants work overtime primarily in the manual mail section, as opposed to the automated section of the P&DC. The manual sections consists of employees who work on “outgoing letters” (030, 040), which also includes pitching letters (044), rack operations (122), registry section, and handstamp (010), where many employees with restrictions are assigned. *H.T. 14, 16, 23, 39, 262, 267, 275.*
  15. Complainants work in handstamp which involves handstamping defective mail such as letters, flats or magazines and chunks or packages. *H.T. 57, 88.* Complainants work tour 3 which begins at 12:00 noon to 8:00 p.m., though there are many different start times on each tour. *H.T. 19.*
  16. Complainants work under both a national contract (*Agency Exhibit 13, p. 26-28*) and a local memorandum of agreement (*Complainant’s Exhibit 9 p. 17-18; 10 p.13*) which describes overtime assignments.
  17. Article 8.5 of the National Agreement between the United States Postal Service and the American Postal Workers Union, AFL-CIO provides that “[w]hen needed, overtime work for regular full-time employees shall be scheduled among qualified employees doing similar work in the work location where the employees regularly work.” “[E]mployees with the necessary skills having listed their names will be selected in order of their seniority on a rotating basis...” *Agency Exhibit 13, p.26.*
  18. Question number 9 of the Joint Contract Interpretation Manual of the United States Postal Service and the American Postal Workers Union, AFL-CIO asks whether a full-time employee on limited or light duty can be scheduled to work overtime. The answer provides that scheduling overtime for a full-time light or limited duty employee is dependent on whether the employee’s medical limitations allow the employee to perform the needed duties. *Agency Exhibit 14, p. 5.*
  19. Article 8.5 of the National Agreement also provides for the creation of overtime desired lists so when the need for overtime arises, employees with the necessary skills on the list will be selected in order of seniority on a rotating basis. *Agency Exhibit 14; Spencer ROI Exhibit 11 p.6.*
  20. Every calendar quarter, employees are given an opportunity to sign up for the overtime desired list (OTDL) for before tour overtime, after tour overtime, off day overtime or all three. *H.T. 26.* Employees can work two or four hours of overtime in addition to their eight hour shift. *H.T. 26.* On off day overtime employees are guaranteed eight hours of work. *H.T. 294.*
  21. There are hundreds of operation numbers which indicate where the employee is working within the Agency. The operation numbers are reflected on the employee’s clock rings. When an employee moves from one operation to another, the employee is to punch the new operation and the clock rings will reflect the employee, the operation and when the employee moved to that operation. Employees often do not utilize the electronic badge

- reader which would reflect a change in operations. *H.T. 24-25.*
22. The Madison facility changed the manner in which it called overtime. In the past management called overtime for all the work on the floor without regard to a specific operation. *Muenkel's H.T. 32-33.* Management referred to it as blanket overtime because everyone on the OTDL would be called to work overtime. *McMahon's H.T. 186; Barlow's H.T. 208.*
  23. Around October 2004, Wayne McMahon became the Plant Manager in Madison. *H.T. 181.* In August 2005, he changed the manner in which overtime was called. Managers were instructed to call overtime by specific operation rather than calling everyone on the OTDL list. *H.T. 186-87; 209-210.*
  24. McMahon instructed Michael Barlow Manager of Distribution Operations to assess in which particular operation overtime was needed and to call overtime only for that operation. Barlow instructed Complainants' direct supervisor, Supervisor of Distribution Operations Robert Anderson, to schedule a certain number of employees for overtime in a particular operation. *Barlow's H.T. 209-10; Anderson's H.T. 287-88.*
  25. Barlow essentially eliminated overtime for handstamp operations where Complainants, and other employees with restrictions, primarily worked. *Anderson's H.T. 289, 291.* Overtime was more frequently called for manual letters or manual rack operations which require standing and lifting. Because these duties are outside of Complainants' restrictions, they are frequently bypassed for overtime. *Child's ROI Affidavit B p.4.*
  26. Complainant Childs wrote the district manager informing him that the handstamp operation was overloaded with work, including first class mail which is the highest priority for expeditious processing. *H.T. p. 81-82; Mlakar H.T. 178; McMahon H.T. 193.*
  27. Barlow instructed Anderson to get a mail count in handstamp. Anderson tracked the mail in handstamp and sent a spreadsheet in a nightly email to Barlow in April, May, and June 2007. In August he sent the spreadsheet again, but stopped sending it when Barlow never responded. *H.T. 289-90.*
  28. Anderson noted that the volume of mail in handstamp was heavy over the time period he kept the spreadsheet, whereas it did not build up under the old system of assigning overtime. *H.T. 290.*
  29. Complainants were bypassed for overtime when the Agency moved employees from their primary position to positions that the bypassed disabled Complainants could have worked. The Agency had a method for assigning employees extra hours in handstamp without calling overtime for handstamp. The Agency moved employees from their primary position to positions in handstamp and other operations that the bypassed Complainants could have worked and scheduled overtime for operations the Complainants were restricted from.
  30. On March 6, 2007, management called overtime for the outgoing letter case and racks so all four Complainants were unqualified and bypassed for overtime. However, employee Greg Burr after punching into outgoing letters for half an hour, worked overtime in 044, pitching letters, which both Childs and Elmer are qualified to perform. Similarly, employee Jan Williamson never worked in racks, but worked target mail where both Spencer and Harper can work, and pitching letters where both Childs and Elmer can work. *Complainants' Exhibit 14 p. 2, 3; H.T. 265-68.*
  31. That same day Carol Treager worked for a half an hour in racks and then worked in 044 where both Spencer and Harper can work. Cheryl Amus also worked her overtime in

044. *Complainants' Exhibit 14 p. 6, 9; H.T. 268-69.*
32. Similarly, on September 16, 2007, Spencer and Elmer were bypassed for overtime when straight time employee Jan Williamson was moved from racks to handstamp for the whole day and employee Edgar Reeves worked overtime in racks. *Complainants' Exhibit 13 p. 3; H.T. 263-65.*
33. On November 5, 2007, Childs and Elmer were the only after tour employees bypassed for overtime. Instead management moved Barb Czygan, who was on straight time, to the handstamp area where Complainants were qualified to work and moved employees on overtime to work Czygan's regular assignment on outgoing letters, where Complainants were not qualified to work. *Complainants' Exhibit 12; H.T. 249-55.*
34. When Complainants' were scheduled for overtime, the duties they performed were scrutinized at a greater level than other employees. In a memorandum dated March 26, 2007, Plant Manager Wayne McMahon told Managers of Distribution Operations including Mike Barlow, that the Agency was doing well reducing overtime. McMahon noticed that Spencer and Harper worked on Saturday and instructed the manager of distribution operations to inform him of the specific overtime work they performed. *Complainants' Exhibit 11.*
35. McMahon recently changed the ways employees are called to work holidays. Only specific employees who need to be brought in to run specific operations are called to work holidays. *H.T. 212-13.* Fewer employees are now required to work some holidays. *H.T. 89-90.*
36. To determine where holiday work is needed, management reviews end of run reports to estimate volume based on the previous years and determines what machines will be needed and the number of employees needed to run them. There are no such reports for handstamp. *H.T. 220, 222*

### III. PRINCIPLES OF LAW & ANALYSIS

The law governing this case is Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e *et seq.*, (Title VII), Section 501 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 791 *et seq.*, and the Age Discrimination of Employment Act of 1967, 29 U.S.C. Section 621, *et seq.* (ADEA). Courts have applied to ADEA and disability cases, with appropriate modifications, the standards of Title VII. *See Norcross v. Sneed*, 755 F.2d 113 (8th Cir. 1985) (disability cases); *Trembath v. St. Regis Paper Co.*, 753 F.2d 603 (7th Cir. 1985) (age cases).

The standard which an individual Complainant must meet in order to establish a disparate treatment claim of discrimination is set out in *Board of Trustees v. Sweeney*, 439 U.S. 24 (1978); *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978); *McDonnell Douglas v. Green*, 411 U.S. 792 (1973). These cases establish that a Complainant must first make out a prima facie case of employment discrimination. Complainant must establish a prima facie case by demonstrating that he or she was subjected to an adverse employment action under circumstances that would support an inference of discrimination. *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 576 (1978). Proof of a prima facie case will vary depending on the facts of the particular case. *McDonnell Douglas*, 411 U.S. at 804 n.14. The burden then shifts to the employer or Agency to "articulate" a legitimate, non-discriminatory reason for taking the challenged action.

Subsequently, the burden returns to the Complainant to show that the employer's articulation is "pretextual." Complainant may meet this burden in one of two ways: either directly, by persuading the fact finder that the Agency more likely than not was motivated by a discriminatory reason, or indirectly, by showing that the Agency's reasons for its actions are not believable. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981).

At all times the burden remains with the Complainant to prove that the Agency intentionally discriminated against the Complainant. *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742, 2747 (1993).

#### A. Rehabilitation Act – Reasonable Accommodation

The law governing this case Section 501 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 791 et. seq. In order to establish disability discrimination, complainant must show that: (1) he or she is an individual with a disability, as defined by 29 C.F.R. § 1630.2(g); (2) he or she is a qualified individual with a disability pursuant to 29 C.F.R. § 1630.2(m); and (3) the agency failed to provide a reasonable accommodation. *Mackelpang v. USPS*, Appeal No. 0120060009 (Feb. 6, 2008), citing *Enforcement Guidance on Reasonable Accommodation*.

Under the Commission's regulations, an agency is required to make reasonable accommodation of the known physical and mental limitations of a qualified individual with a disability unless the agency can show that accommodation would cause an undue hardship. 29 C.F.R. § 1630.2(o) and (p).

In order to determine whether Complainant is entitled to a reasonable accommodation, one must first analyze whether complainant is an "individual with a disability" within the meaning of the Rehabilitation Act. An "individual with a disability" is one who (1) has a physical or mental impairment that substantially limits one or more major life activities, (2) has a record of such impairment, or (3) is regarded as having such an impairment. Major life activities include, but are not limited to, caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. Sitting, standing, lifting, and reaching are also recognized as major life activities. See Interpretive Guidance on Title I of the Americans With Disabilities Act, Appendix to 29 C.F.R. § 1630.2(i); see also *Haygood v. United States Postal Service*, EEOC Appeal No. 01976371 (April 25, 2000); *Selix v. United States Postal Service*, EEOC Appeal No. 01970153 (March 16, 2000).

The individual's ability to perform the major life activity must be restricted as compared to the ability of the average person in the general population to perform the activity. *Id.* The Commission also must consider any mitigating measures "both positive and negative ... when judging whether [complainant] is 'substantially limited.'" *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482 (1999). In addition, determinations regarding whether a complainant is an individual with a disability must be made on a case-by-case basis. *Long v. United States Postal Service*, EEOC Request No. 05A01062 (September 26, 2002). A complainant cannot be considered an individual with a disability simply because he or she has been diagnosed with a certain condition. *Sutton*, 527 U.S. at 483. Rather, a complainant must offer evidence to show the

substantial nature of his or her impairment. *Toyota Motor Mfg., Ky., Inc., v. Williams*, 534 U.S. 184, 197-198 (2002).

## 1. Jacqueline Childs

Complainant Childs is a 58 year old female who has osteoarthritis in her neck, hip, spine and knees. As a result of osteoarthritis, she has infections, edema and circulation problems in her legs. *ROI Childs Affidavit A p.3; H.T. 58-59*. She has vascular disease which has caused her to develop intermittent swelling and infections in her legs. *Childs Exhibit 5 p.1-2*.

Complainant's condition is permanent and limits her ability to walk, stand, climb stairs and twist repetitively. She can only stand for five to ten minutes at a time and no longer than 10 to 15 minutes without significant pain. She is unable to walk without pain and can only walk one city block at a time. *ROI Childs Affidavit A p. 3; Childs Exhibit 5 p.1-2, 8*. She cannot shop for groceries without rest, can no longer kneel in church and is limited in her ability to take baths and showers. *H.T. 60-62*.

Complainant is substantially limited in her ability to walk and stand in that she cannot walk for more than one city block at a time and can stand for no longer than 10 to 15 minutes. *See Rainbolt v. Dept. of Transportation*, Appeal No. 0120033857 (Feb. 1, 2007)(complainant was substantially limited in the major life activity of walking when he stated that his joints swell, that his legs do not support him and can give out at any time, and that he is in constant pain); *Glaude v. Dept. of Defense*, Appeal no. 01A33351 (March 16, 2006) (complainant's ability to stand was substantially limited considering the amount of time complainant was instructed by his doctors to sit/stand at work varied from being required to sit 8 hours per day to being unable to stand greater than 4 hours per day).

Considered as a whole, the medical documentation and testimony indicates that Complainant is substantially limited in walking and standing when compared with the average individual in the general population.

## 2. Bonnie Spencer

Complainant Spencer has carpal tunnel syndrome in both hands, tennis elbow and basil joint arthritis in her thumbs. *ROI Spencer Affidavit A p.2; H.T. 106-107*. She is permanently unable to push or lift items weighing more than 15 pounds or use either hand repetitively, or for fine manipulation. *H.T. 108-109; Spencer ROI Exhibit 3*. She is prevented from performing any fine manipulation tasks such as writing for any length of time, peeling vegetables or sewing. She is unable to engage in sports such as bowling and has difficulty gripping her car steering wheel. She takes Tylenol 3 with codeine for the pain. With medication she can go three hours before waking up, and without medications she is lucky to sleep one hour before waking up in pain. *ROI Spencer Affidavit A p.2; ROI Spencer Exhibit 3; H.T. 107-108, 100*.

Complainant is substantially limited in the major life activity of performing manual tasks and lifting. With respect to performing manual tasks, the Supreme Court stated that in order to be substantially limited in this major life activity, an individual must have an impairment that

prevents or severely restricts the individual from doing activities that are of central importance to daily life. *Toyota Motor Mfg., KY., Inc. v. Williams*, 534 U.S. 184, 122 S.Ct. 681 (2002). See *Kirkland v. Dept. of the Army*, Appeal No. 01A42874 (Sept. 28, 2005) (decision on the record inappropriate when complainant presented evidence that may be sufficient to indicate that she is substantially limited in performing manual tasks in that she must limit her repetitive motion in both hands, to include fingering, pinching, and gripping and has problems with other functions that are central to daily life such as combing her hair, bathing, and house cleaning).

Complainant's lifting restriction of 15 pounds is also a substantially limiting. See *Miller v. USPS*, Appeal No. 07A30110 (June 29, 2006) (based on Complainant's long-standing medical restriction of lifting over 20 pounds, Complainant's condition substantially limited her in the major life activity of lifting, and rendered her an individual with a disability).

### 3. Donna Elmer

Complainant has a permanent injury to her left knee. She is missing cartilage in her left knee and had a knee replacement in 2004. Knee pain restricts her daily activities. She cannot stand for longer than one hour, is limited in walking, and cannot kneel and has great difficulty climbing stairs. She suffers from knee pain daily and when it swells she must ice her knee three to four times per week. Knee pain restricts her ability to shop and although she takes medication, hip and knee pain cause her to lose sleep. *H.T. 129-30; ROI Affidavit A p.10-12.*

She also suffers from arthritis in her right hand and wrist and hip pain with lower back spasms. *H.T. 129-30; ROI Affidavit A p.10-12.* She has permanent restrictions including no repetitive hand motion or lifting from five to 10 pounds, bending, stooping, twisting, or standing over one hour per day. *Elmer Exhibit 5 p. 8.* She can only carry light items, and perform limited yard work. She can no longer mow the lawn or perform hand movements such as buttoning, writing and putting on earrings. *ROI Affidavit A p.10-11; H.T. 130, 132-33.*

Complainant is substantially limited in the major life activity of lifting (5 to 10 pound restriction) and standing (limited to one hour). See *Miller v. USPS*, Appeal No. 07A30110 (June 29, 2006) (complainant substantially limited her in the major life activity of lifting); *Glaude v. Dept. of Defense*, Appeal No. 01A33351 (March 16, 2006) (complainant's ability to stand was substantially limited).

### 4. Bonnie Harper

Complainant has tennis elbow, fibromyalgia and shoulder tendonitis. As a result of her right lateral epicondylitis, she received a rehabilitation job offer in 1994 in handstamp operations. She is restricted from keying and reaching above her shoulder level with her right arm. She can only perform occasional simple grasping with her right hand and occasional reaching above her shoulder level with her left arm. She can not perform fine manipulation or firm grasping with her right hand. *Harper ROI Exhibit 6; Exhibit 5 p. 11-12.*

She can only lift up to 10 pounds and is unable to grasp items. She can only use the teletype writer telephone for the deaf for 10 to 15 minutes due to pain. *H.T. 143-45.* She is no longer

able to garden, do ceramics, paint or sew. *H.T. 145.*

Complainant can only sleep two to four hours due to pain and takes narcotic medication as needed. *H.T. 143; Exhibit 5 p. 1.* Complainant is substantially limited in the major life activity of lifting (10 pound restriction) and performing manual tasks. *See Miller v. USPS*, Appeal No. 07A30110 (June 29, 2006) (lifting); *Kirkland v. Dept. of the Army*, Appeal No. 01A42874 (Sept. 28, 2005) (performing manual tasks).

A qualified individual with a disability is one who has the skill, experience, education, and other job-related requirements of the position in question, and who, with or without reasonable accommodation, can perform the essential functions of the position. 29 C.F.R. 1630.2(m). Complainants are qualified individuals with a disability in that they all satisfactorily perform the essential functions of their jobs. *Anderson H.T. 292.*

Under the Commission's regulations, an agency is required to make reasonable accommodation to the known physical and mental limitations of an otherwise qualified individual with a disability unless the agency can show that accommodation would cause an undue hardship. *Lawlor v. USPS*, EEOC No. 01991164 (Aug. 26, 2002). The employee must show a nexus between the disabling condition and the requested accommodation. *See Wiggins v. United States Postal Service*, EEOC Appeal No. 01953715 (April 22, 1997).

## 5. Overtime

### a. Management called overtime for operations with the intent to avoid assigning Complainants overtime

The Agency failed to show that it made reasonable accommodations such that Complainants were given equal opportunities to work overtime. Barlow essentially eliminated overtime for handstamp operations where Complainants, and other employees with restrictions, primarily worked. *Anderson's H.T. 289, 291.* Complainants' supervisor Bob Anderson was asked whether Barlow told him he did not want overtime for handstamp. He stated "In as many words, yes." *Anderson's H.T. 289.*

Handstamp operations, and the Complainants, were targeted and managers knew they would be expected to answer to McMahan should Complainants or employees with disabilities work overtime. McMahan denied questioning the use of light or limited duty employees on overtime. He stated that he was only concerned that managers were aware of the fact the light or limited duty employees worked overtime. If the supervisor was aware the employee worked overtime he "was OK with that." *H.T. 198.*

However, in a memorandum dated March 26, 2007, McMahan singled out three employees including Spencer and Harper and directed the managers to explain the specific overtime work they performed. *Complainants' Exhibit 11.* Not only did McMahan at first deny this instance of questioning his managers on the use of light or limited duty employees utilized on overtime, but he contradicted his testimony that he only wanted to make sure the supervisor was aware the employee worked overtime. The managers were expected to explain the duties these disabled

employees performed. *Complainants' Exhibit 11; H.T. 198-99.*

When questioned on the use of other employees scheduled overtime to perform handstamp duties, Barlow stated that other employees would have worked handstamp because of the rotation by seniority and that that 90 % or more of overtime is for stand up jobs. *ROI Childs, Affidavit B p. 5 # 6, 7.* Complainants successfully pointed out that they were wrongfully bypassed for overtime duties while work continued to build in the unit and other employees performed duties they were qualified to perform. The Agency moved employees from their primary position to positions that the bypassed Complainants could have worked while calling overtime in operations Complainants could not work. The Agency also had other employees punch into racks, a position Complainants could not perform, and shortly thereafter punch into pitching letters, a duty Elmer and Childs could perform. *Complainants' Exhibits 12-14; H.T. 249-69.*

Supervisor of Distribution Operations Bob Anderson's testimony is telling:

Q....do you believe that the complainants were being excluded from overtime, excluded when there is work that needs to be done?

A. They're being excluded from overtime **for work that will be done.** Management at this time is saying, "I'm not going to use overtime hours to do this mail."

*H.T. 291 (emphasis added).* Anderson acknowledged that the Agency was finding creative ways to complete the work in handstamp while denying Complainants overtime.

This case is similar to the facts in *Gil v. USPS*, Appeal No. 01990675 (Sept. 14, 2001). In *Gil* the Commission held that the Agency denied Complainant reasonable accommodation based on her supervisor's blanket policy excluding her from overtime based on her light duty restrictions absent any individualized assessment of whether or not she could participate in overtime with accommodation. Complainant was automatically disqualified without regard to the overtime tasks that needed to be performed on a given day or the amount of overtime work available. *Id.*

In *Gil*, the evidence established that on unspecified days there was enough overtime work for multiple employees some of whom were assigned for the entire overtime period to perform work within Complainant's restrictions. On other days there was only enough overtime for one employee, who would have been required to perform some tasks outside of Complainant's restrictions. The Commission concluded that the Agency did not fulfill its obligation to make a good faith effort to reasonably accommodate Complainant when evidence showed that on some days she could have performed the available overtime work. *Id.*

Similarly, in the instant case, the Agency moved employees from their primary positions to positions that the bypassed disabled Complainants could have worked while using overtime for the employees who replaced the employees moved from their primary assignment. Complainants established that work within their restrictions was available and they were wrongfully bypassed for overtime on some specified days when other nondisabled employees farther down on the OTDL worked overtime. *See Complainant's Exhibits 12-14.*

The Agency argued that Complainants' Exhibit 12 is irrelevant because Czygan worked in handstamp after Complainants tour. *Agency's Reply Brief p. 3-4*. The Agency's argument ignored the fact that after tour overtime for Complainants is exactly that, after their tour. Childs could have worked overtime in handstamp on November 5, 2007, had Czygan not been moved to handstamp and another employee lower on the OTDL been called for after tour overtime in Czygan's unit. *H.T. 252-53*. The Agency also argued that Exhibit 14 was irrelevant because it was unclear which duties were performed that day in operation 010 which encompasses several operations. *Agency's Reply Brief p. 4-5*. Childs credibly testified to the contrary, that as general clerk she was aware of duties performed on Sunday, and those duties would be in handstamp. *H.T. 274-75*.

The Agency's argument that Exhibit 13 is irrelevant is correct in that employees who work nonscheduled days are guaranteed eight hours. Therefore, employees may work less than eight hours in the operation called which Complainants cannot perform and may work other duties which Complainants can perform for a partial shift. When there is insufficient work within Complainants restrictions for the entire shift, Complainants cannot argue they should have been called for overtime. *Agency's Reply Brief p. 4-5; Exhibit 13 p. 4, 6; H.T. 263-65*.

However, on Sunday September 16, 2007, Spencer was bypassed for overtime when straight time employee Jan Williamson was moved from racks to handstamp for the whole day and employee Edgar Reeves worked overtime in racks. *Complainants' Exhibit 13 p. 3; H.T. 263-65*. Again, Complainants presented three specific instances when they were bypassed for overtime although duties they could perform were available and performed by another employee. The Agency did not make a good faith effort to reasonably accommodate Complainants when evidence showed that on some days they could have performed the available overtime work.

Anderson surmised that overtime for handstamp could have been deemed inefficient because damaged mail is already delayed and it would be insignificant to delay it another day. *H.T. 295*. However, not only did Complainants show that they were wrongly bypassed for overtime when other employees performed duties they could perform, but Anderson admitted that Barlow never shared his motivation as to why overtime was eliminated for handstamp. *H.T. 296*. More importantly, McMahon questioned his managers when he saw that disabled employees were utilized on overtime. Managers would be reluctant to call disabled employees for overtime knowing they would be expected to explain the precise duties they performed. *Complainants' Exhibit 11; H.T. 198-99*.

- b. No duty to extend accommodation beyond an individualized assessment of overtime available and capabilities

Complainants argued that the Agency should return to the method of assigning overtime before Barlow's arrival. Past practice included shifting employees from operation to operations by the totality of work to be performed, without excluding a certain operation. *Munkel's H.T. 30; Complainants' Brief p. 16*. The Agency's past practice in assigning overtime has also been referred to as blanket overtime. Complainants cite to the mission of the Agency which is to provide prompt and efficient service which is contrary to the buildup of mail in the handstamp operation. *Complainants' Brief p. 14-16, 26-28*.

Contrary to Complainants' argument, management has a right to determine that overtime is needed in one operation over another. However, management does not have a right to single out and bypass disabled employees without an individualized assessment of whether duties will be performed that are within Complainants' restrictions.

Complainants also argued that employees without restrictions should be moved out of straight time assignments, if disabled employees can perform the duties, and into a position which the disabled employees cannot perform. The disabled employees could then perform the displaced employees' straight time assignments on overtime and the straight time employee could perform the overtime work that is outside of the disabled employees' restrictions. This was not the past practice of the Agency and in fact would cause an undue hardship on the operations of the Agency for three reasons. *H.T. 293.*

First, tours have varying start times within each tour, making it difficult to switch employees' assignments who may work different hours. *H.T. 218.* Second, supervisors would have to be aware of all the limitations of each employee on a specific day which could be 15 to 20 employees. *H.T. 217.* Managers would not only have to keep in mind individual start times and end times, but each employee's own physical restrictions for each job. Lastly, straight time employees could complain and file grievances when displaced from their bid assignment to a possibly more strenuous position. The employee would be entitled to request a union steward who would be pulled off his assignment resulting in lost productive time for the employee on straight time and the union steward. *H.T. 218-19; 233-35.*

#### c.. Rehabilitation Act - Disparate Treatment

Complainants also established a prima facie case of disparate treatment disability discrimination. Complainants demonstrated that they were: 1) "individuals with a disability"; 2) qualified for the position held or desired; 3) subjected to an adverse employment action; and 4) the circumstances surrounding the adverse action gave rise to an inference of discrimination. *Luckie v. USPS*, Appeal No. 010061707 (April 20, 2007). When management effectively eliminated overtime for handstamp operations, and questioned the duties disabled employees were performing on overtime, coupled with moving employees in their primary assignment to handstamp operations while overtime employees worked the employee's primary assignment, created an inference of disability discrimination. The Agency's argument that overtime was simply not available in handstamp operations, or that it was merely an oversight on management's part that other employees worked in handstamp operations, was not believable. Complainants presented evidence of overtime opportunities they were qualified and eligible to work.

#### B. Holidays

Complainants failed to establish that they were wrongly bypassed for holidays. Not only did Complainants fail to offer any evidence that work was available within their restrictions on holidays they were not scheduled to work, but Complainants worked some holidays after July 2007. *H.T. 102, 124, 146.*

### C. Sex and Age Disparate Treatment Discrimination

In general, to establish a prima facie case of discrimination based on a sex, complainant must show that he or she belongs to a statutorily protected class and was accorded treatment different from that accorded persons otherwise similarly situated who are not members of the class. *Comer v. Federal Deposit Insurance Corporation*, Request No. 05940649 (May 31, 1996) (citing *Potter v. Goodwill Industries of Cleveland*, 518 F.2d 864, 865 (6th Cir. 1975)); *Rodriguez v. USPS*, EEOC No. 01973477 (Jan. 28, 2000). In order for two or more employees to be considered similarly situated, all relevant aspects of the employees work situation must be identical or nearly identical. *Godby v. Department of the Treasury*, EEOC Request No. 05960220 (May 7, 1998) (citing *Smith v. Monsanto Chemical Co.*, 770 F.2d 719, 723 (8th Cir. 1985)).

In order to establish a prima facie case of age discrimination, complainant must show that complainant was over forty years of age, that complainant was subjected to an adverse employment action and that complainant was treated less favorably than other similarly situated employees younger than complainant. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142 (2000); *Milketonas v. USPS*, EEOC No. 01A63149 (Sept. 8, 2006). Liability depends on whether the employee's age actually motivated the employer's decision. *Reeves*, 530 U.S. at 141. Complainants' age must have actually played a role in the employer's decision making process and had a determinative influence on the outcome. *Id.*

All the Complainants are females over 50 years of age. Complainants argued that as older disabled female employees they were bypassed for overtime more frequently than other employees, some younger and some male. *Complainants' Brief p. 25-26.*

In *Luckie v. USPS*, Appeal No. 010061707 (April 20, 2007), the Commission discussed similarly situated employees in a similar setting. In *Luckie*, Complainant alleged he was denied overtime and holidays when other limited duty employees were not. The Commission concluded that Complainant failed to establish a prima facie case of reprisal, race, sex, age, and disability because his comparators were not similarly situated as they were able to perform work functions that Complainant could not. *Id.* Similarly, Complainants' comparators are not similarly situated because they can perform duties Complainants could not. Complainants failed to show that other similarly situated employees were treated more favorably or create an inference of sex or age discrimination.

### D. Disparate Impact Claim

The United States Supreme Court has stated that summary judgment is appropriate when the adjudicator determines that no genuine issue of material fact exists and the moving party is entitled to a judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). A party opposing summary judgment must provide factual evidence sufficient to demonstrate the existence of a genuine issue of material fact. *Id.*

The mere existence of disputed facts will not preclude summary judgment. "[T]he disputed facts

must be ‘outcome determinative under the governing law.’” *Secretary of Labor, U.S. Dept. of Labor v. Lauritzen*, 835 F.2d 1529 (7<sup>th</sup> Cir. 1987), *cert. denied*, 488 U.S. 898 (1988). On a motion for summary judgment, “[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.” *Anderson* at 255. (Citation omitted.)

To establish a *prima facie* case under this theory, complainants must show that an agency practice or policy, while neutral on its face, disproportionately impacted members of the protected class through presentation of statistical evidence that demonstrates a statistical disparity that is linked to the challenged practice or policy. *Griggs*. See *Griggs v. Duke Power*, 401 U.S. 424 (1971); *Smith, et al., v. City of Jackson, Mississippi*, 544 U.S. 228 (2005) (ADEA authorizes recovery in disparate impact cases); *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 994 (1988) (complainants must present “statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion”).

Complainants must: (1) identify the specific practice or practices challenged; (2) show statistical disparities; and (3) show that the disparity is linked to the challenged practice or policy. *Id.* The burden is on complainants to show that “the facially neutral standard in question affects those individuals [within the protected group] in a significantly discriminatory pattern.” *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977); see also *Cameron v. USPS*, EEOC Request No. 07A40130 (Sept. 20, 2005).

Complainants failed to establish a *prima facie* case of disparate impact. Complainants failed to demonstrate that a statistical disparity existed that was linked to the challenged practice or policy. Complainant alleged that the practice at issue was management’s calling overtime for particular operations rather than basing overtime assignments on the totality of the work needed to be performed. *Complainant’s Response to Agency’s Motion for a Decision on the Record* p.8. However, complainants’ statistical evidence was insufficient to show that the Agency’s overtime practices caused a disparity in the selection of older, female or disabled workers.

The burden is on the complainant to show a statistical disparity. Complainant failed to demonstrate a statistical disparity on any basis. The only evidence Complainant presented was her argument that from January 2006, to the present, younger, non-disabled employees were offered overtime on at least 251 more days than the Complainants. *Complainant’s Response to Agency’s Motion for a Decision on the Record* p.8. Complainant presented no evidence of the age, sex, or the number of disabled, nondisabled or total employees in the unit.<sup>5</sup> Complainant failed to establish a *prima facie* case of disparate impact.

Pursuant to the four-fifths rule, a disparate impact is inferred if the members of the protected class are selected at less than four-fifths, or 80 percent of the rate of the non-protected group. *Dressler v. HUD*, EEOC No. 01A13837 (April 5, 2002). Neither Complainant nor the Agency analyzed the case under the four-fifths rule.

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<sup>5</sup> The Agency provided some information on the ages and sex of comparable employees. Only two employees under 40 were on the same overtime desired lists as Complainants and they averaged fewer weekly hours of overtime than Complainants. Further, females averaged more overtime hours than did males. *Agency’s Motion for a Decision on the Record* p.10.

For 2006 and 2007, Complainants (four older female disabled employees) averaged 10.84 hours of overtime on a weekly basis. *Agency's Motion for a Decision on the Record p. 4, #10, 11.* During that same time period, employees with no restrictions averaged 12.98 hours of overtime. *Agency's Motion for a Decision on the Record p. 4, #16, 17.* The four-fifths rule is not met because  $10.84/12.98 = 83.5$ . Complainants were selected 83.5% of the time. Therefore, the selection rate for Complainants is not less than 80% of the rate for the group of employees with no restrictions, and the four-fifths rule is not violated.

*See Cameron v. USPS*, EEOC Request No. 07A40130 (Sept. 20, 2005) (Complainant presented no evidence of number and age of employee in the office); *Fu v. EPA*, EEOC No. 0120063844 (Nov. 12, 2006) (Complainant did not provide adequate evidentiary or statistical support for disparate impact analysis).

## V. CONCLUSIONS OF LAW

In conclusion, Complainants having shown that they were not reasonably accommodated and that the Agency's legitimate nondiscriminatory explanation was not believable, it must be concluded that Complainants were discriminated against on the basis of disability when beginning about February 2006, they were repeatedly bypassed for overtime opportunities while non-disabled employees were not.

Complainants were not discriminated against on the basis of their age or sex when they were repeatedly bypassed for overtime.

Complainants were not discriminated against on the basis of their sex, age or disability when they were not allowed to work on holidays.

Complainants failed to show that assigning overtime by operation at the Madison Processing and Distribution Center created a disparate impact.

## VI. REMEDY

### A. BACKPAY & ACCOMMODATION

Complainants should be awarded back pay pursuant to 29 C.F.R. 1614.501(c).

Complainants claimed that back pay should be calculated on missed overtime opportunities, not average overtime hours for similarly situated employees. *Complainants' Reply Brief p. 6.* Complainants argued that they identified specific occasions when they could have worked their accommodated overtime jobs, but were bypassed, and when multiplying these examples over and over Complainants are entitled to hundreds of hours of lost overtime. *Complainants' Reply Brief p.5; Complainants Exhibit 1, 12-14.* Complainants' argument is based on the mistaken assumption that the Agency's policy of assigning overtime by operation is discriminatory.

Instead, Complainants should be compensated for overtime in the amount they would have worked absent the Agency's discriminatory refusal to make an individualized assessment of

Complainants capabilities and the work that would be performed. *Hunter v. USPS*, Petition No. 04A60007 (Jan. 13, 2006). In *Hunter*, the Commission rejected the Agency's argument that overtime should be calculated based on the average amount of overtime to similarly situated employees. *Id.* The fact that Complainant worked some general overtime did not excuse the Agency from compensating him for overtime he would have worked absent the Agency's discrimination. *Id.* The Commission noted that in the cases cited by the Agency **all** overtime was discriminatorily denied to complainants. *Id.* In the instant case, as in *Hunter*, Complainants worked some overtime. Compensating Complainants for the average number of overtime hours for similarly situated employees would not place them into the position they would have occupied if no discrimination occurred.

Complainants argued they were bypassed for hundreds of hours of overtime opportunities and showed specific occasions when they were qualified to work. Since Complainants were not qualified to perform duties on all hours of overtime opportunities missed and Complainants may have been compensated by the grievance procedure, (*Agency's Brief p. 11*), compensating Complainants for all hours bypassed would grant a windfall. Therefore, the Agency is ordered to calculate the back pay based on 25% of the amount of hours each Complainant was bypassed from February 2006, to the present. *See Complainants' Brief p. 5.6*

The Agency shall ensure that its overtime practices do not preclude members of a protected class, i.e., individuals with disabilities with the meaning of the Rehabilitation Act, from receiving overtime opportunities available to non-disabled employees.

## B. COMPENSATORY DAMAGES

Pursuant to section 102(a) of the Civil Rights Act of 1991, a complainant who establishes a claim of unlawful discrimination may receive, in addition to equitable remedies, compensatory damages for past and future pecuniary losses (i.e., out-of-pocket expenses) and nonpecuniary losses (e.g. pain and suffering, mental anguish). *Damiano v. United States Postal Service*, Request No. 05980311 (December 16, 1997); *Kelly v. Department of Veterans Affairs*, Appeal No. 0951729 (July 29, 1998).

### 1. Causation

To receive an award of compensatory damages a Complainant must demonstrate that he or she has been harmed as a result of the agency's discriminatory action. *Wilson v. Widnal, Secretary, Dept. of the Air Force*, EEOC No. 01955269, 97 FEOR 3208 (July 29, 1997). The record contained sufficient evidence to establish a causal relationship between the Agency's failure to provide overtime opportunities and Complainants' stress and resulting symptoms..

Complainant Childs testified that the change in overtime affected her emotionally and physically. As a result of the loss of overtime, her blood pressure increased and the stress at work caused her heart to race. *Complainant's H.T. 63-64; ROI Affidavit A p. 25*. As a result of depression and

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6 For example, Complainant Elmer claimed she was bypassed for overtime in the amount of 700 hours. Her back pay should be calculated for 175 hours times the rate of overtime pay.

suicidal thoughts, Complainant attended a ten week EAP session. *Complainant's H.T. 68; ROI Childs Affidavit A p. 25.* At an EAP counselor's suggestion, Complainant saw a counselor every two weeks through her health care provider. *H.T. 68-69.*

Complainant Elmer testified that the loss of overtime opportunities was very emotionally stressful and sometimes she cried. *H.T. 135.* She felt hurt and ashamed when she went home from work. *ROI Elmer Affidavit A p. 16.* In addition, the loss of overtime caused financial stress which impacted on her relationship with her husband. *H.T. 137.*

Complainant Spencer also testified that she experienced financial difficulties and suffered emotional and physical distress. *H.T. 112; Spencer ROI Affidavit A p.7; Spencer Exhibit 5 p.1.* The Agency argued that Complainant has been seeing a therapist since 1994, however Complainant testified that she increased her dose of anti-anxiety medication to treat the stress caused by her loss of overtime. She also testified that she used to see the therapist once or twice a month and now sees her weekly. *H.T. 109-110, 112; Spencer ROI Affidavit A p.7; Agency's Reply Brief p. 6.*

In August 2007, Complainant's therapist provided that since spring and summer 2007, Complainant has been highly distressed by her circumstances at work. She was very depressed and weepy for two to three months. She has numerous symptoms of depression such as feeling sad all the time, feeling hopeless about the future, loss of self-confidence, having suicidal thoughts and losing interest in people and activities. *Spencer Exhibit 5 p.1-3.* She also has pains in her neck and shoulder due to the stress, stomach problems, and cries frequently. *H.T. 110.* Complainant was diagnosed with depression within the low to severe range. *Spencer Exhibit 5 p.1-3.*

Complainant Harper testified that she experienced financial difficulties and feels depression and stress from the loss of overtime. After she received a letter from the EEO in September or October 2007, she went on Prozac. The letter made her so upset she got ill, vomited and went to the hospital. *H.T. 146-48.*

## 2. Non-pecuniary Damages

Damages for non-pecuniary losses should reflect the extent to which the Agency directly or proximately caused the harm and the nature and severity of the harm. *Rountree v. Glickman, Secretary, Dept. of Agriculture*, EEOC No. 01941906, 95 FEOR 3223 (July 7, 1995). The amount of a compensatory damage award is limited to the sums necessary to compensate complainant for the actual harm caused by the agency's discriminatory action and should take into account the severity of the harm and the length of time that the injured party has suffered the harm. *Jackson v. United States Postal Service*, EEOC Appeal No. 01972555 (April 15, 1999).

The type of objective evidence which may be used in assessing the merits of a request for compensatory damages includes statements from the complainant concerning her emotional distress and statements from others, including family members, friends and health-care providers who could address any outward manifestations or physical consequences of emotional distress. Other objective evidence would include documents showing out-of-pocket expenses related to

the injury. *Carle v. Department of the Navy*, EEOC Request No. 05900795 (Aug. 23, 1990).

The commission noted that for a proper award of nonpecuniary damages, the amount of the award should not be “monstrously excessive” standing alone, should not be the product of passion or prejudice, and should be consistent with the amount awarded in similar cases. *Jackson v. United States Postal Service*, EEOC Appeal No. 01972555 (April 15, 1999); *Cygnar v. City of Chicago*, 865 F.2d 827, 848 (7th Cir. 1989).

*See Jackson v. United State Postal Service*, Appeal No. 01972555 (April 15, 1999) (non-pecuniary damages reduced to \$30,000 when strong piercing racial statements permeated the atmosphere of the facility and complainant presented evidence from physicians, family members and friends concerning physical and emotional harm including anxiety, embarrassment, weight gain and humiliation, depression, high blood pressure, fatigue, sleeplessness, and forgetfulness sustained as a direct result of racial harassment); *Mullins v. United States Postal Service*, EEOC Appeal No. 01954362 (May 22, 1997) (\$10,000 awarded where evidence established that complainant’s depression which included features of helplessness, loss of concentration, poor memory, anxiety, attention, difficulty with trust, paranoia, low self-esteem, withdrawn behavior, loss of initiative and hostility was directly related to emotional damage complainant suffered as a result of sexual harassment and reprisal); *White v. Dept. of Veterans Affairs*, EEOC Appeal No. 0950342 (June 13, 1997) (\$5000 was an appropriate award of nonpecuniary damages when the evidence submitted was sparse but included a statement from a psychologist stating that appellant’s treatment at work caused him to suffer anxiety, depression, emotional fatigue and insomnia); *Foy v. USPS*, EEOC Appeal No. 01A51337 (March 18, 2005) (Complainant awarded \$2000 after testimony that the period of time he was denied reasonable accommodation was very stressful, and that he was frustrated, however, no medical evidence was presented and the duration of harm was short); *Erving v. Dept. of the Army*, EEOC Appeal No. 01961314 (January 8, 1999) (given the scant amount of evidence concerning appellant’s emotional harm, the Commission concluded that appellant was entitled to non-pecuniary damages in the amount of \$2000); *Weatherspoon v. United States Dept. of Agriculture*, EEOC Appeal No. 01966395 (March 4, 1999) (appellant entitled to non-pecuniary damages in the amount of \$1000 when she testified that she experienced headaches, an upset stomach, became distrustful, withdrawn and defensive but did not seek treatment nor present any supporting evidence);

In *Lawrence v. United States Postal Service*, EEOC Appeal No. 01952288 (April 18, 1996), the commission stated that neither evidence from a health-care provider nor expert testimony in general is a mandatory prerequisite for recovery of compensatory damages for mental or emotional distress. It emphasized however, that the absence of supporting evidence may affect the amount of nonpecuniary damages deemed appropriate in specific cases. In *Lawrence*, the Commission authorized an award of \$3000 in compensatory damages for emotional harm where appellant averred that she suffered from weight loss, nausea, stomach problems and headaches as a result of sexual harassment. *Id.*

All four Complainants testified that the loss of overtime opportunities caused stress or depression some resulting from financial difficulties. However, overtime opportunities are not guaranteed and in fact overtime has been reduced for all employees. *H.T. 184*. Therefore, little weight will be given to the stress caused by Complainants’ financial difficulties.

Childs testified that the change in overtime affected her emotionally and physically. Her blood pressure increased and the stress at work caused her heart to race. *Complainant's H.T.* 63-64; *ROI Affidavit A p.* 25. Childs did not see a doctor for her blood pressure or take medication for stress or anxiety. *Agency's Reply Brief p.* 6. As a result of depression and suicidal thoughts, she saw an EAP counselor and a therapist. *Complainant's H.T.* 68; *ROI Childs Affidavit A p.* 25; *H.T.* 68-69. Given Complainant's credible testimony of depression and her visits to two counselors, but her sparse testimony of the physical manifestations of the depression and sparse supporting medical documentation, it is recommended that Complainant Childs receive \$5000 in non-pecuniary damages.

Complainant Elmer testified that the loss of overtime opportunities was very emotionally stressful and sometimes she cried. *H.T.* 135. She felt hurt and ashamed when she went home from work. *ROI Elmer Affidavit A p.* 16. In her compensatory damages affidavit she responded that she was not experiencing any personal medical problems, nor obtained counseling. *ROI Elmer Affidavit A p.* 15. Given Complainant's sparse testimony and affidavit, it is recommended that Complainant Elmer receive \$2000 in non-pecuniary damages.

Complainant Spencer testified that she suffered emotional and physical distress as a result of the Agency's actions. *H.T.* 112; *Spencer ROI Affidavit A p.* 7; *Spencer Exhibit 5 p.* 1. Given Complainant's credible testimony of depression, the therapist's medical documentation of her many symptoms of depression, and her credible testimony that her medication and number of visits per month has increased, it is recommended that Complainant Spencer receive \$7000 in non-pecuniary damages. *H.T.* 109-110, 112; *Spencer ROI Affidavit A p.* 7; *Spencer Exhibit 5. Lloyd v. USPS*, EEOC Appeal No. 07A50071 (September 21, 2006) (Complainant awarded \$4000 when a pre-existing panic disorder was exacerbated, causing the complainant to become easily upset, experience a loss of appetite and sexual interest, become socially withdrawn, experience sleeplessness, and experience fear of losing his job).

Complainant Harper testified that she feels depression and stress from the loss of overtime. Any letter from EEO which made her ill in September or October 2007, dealt with her more recent EEO and therefore is irrelevant. *Agency's Reply Brief p.* 7; *H.T.* 146-48. Complainant is only entitled to damages for emotional distress caused by the loss of overtime. Further, any distress caused by the EEO process is not compensable. Given Complainant Harper's sparse testimony of the physical manifestations of any depression, it is recommended that complainant receive \$2000 in non-pecuniary damages.

In reaching this amount for each Complainant, I considered the nature and severity of the discrimination, as well as the nature and severity of Complainants emotional pain and suffering, and the scant amount of evidence concerning Complainant's emotional harm and related symptoms.

### C. OTHER REMEDIES

The Agency is directed to provide EEO training on disability discrimination for all managerial employees at its Madison P&DC. The training shall be mandatory and conducted by a qualified

trainer familiar with EEO instruction.

It is recommended that the Agency post at its Madison, Wisconsin, facility copies of the attached Notice. Copies of the Notice, after being signed by the Agency's duly authorized representative, should be posted by the Agency immediately upon receipt, and be maintained for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily placed. The Agency should take reasonable steps to ensure that the Notices remain visible to employees during all of the time that they are posted.

#### D. ATTORNEY'S FEES

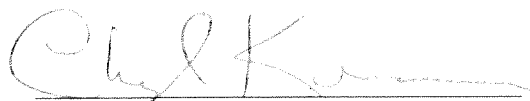
Complainant's attorney shall submit a verified statement of attorney fees to me and the Agency representative within 30 days of receipt of this letter. The verified statement should include the number of hours reasonably expended multiplied by a reasonable hourly rate. 29 C.F.R. 1614.501(e).

A statement of attorney's fees and costs must be accompanied by an affidavit executed by the attorney of record itemizing the attorney's charges for legal services. Pursuant to the EEO Management Directive 110- Chapter 11, VI- VII, a verified statement of fees and costs shall include the following:

1. A list of services rendered itemized by date, number of hours, detailed summary of the task, rate and attorney's name;
2. Documentary evidence of reasonableness of hours, such as contemporaneous time records, billing records, or a reasonably accurate substantial reconstruction of time records;
3. Documentary evidence of reasonableness of rate such as an affidavit stating the requested rate is the attorney's normal billing rate, a detailed affidavit of another attorney in the community familiar with the prevailing community rates for attorneys of comparable cases where a similar rate was accepted; and
4. Documentation of costs.

The Agency may respond to Complainant's statement of fees and costs within 20 days of receipt and complainant can reply within five days of receipt. If the Agency contests the fee request, it must provide equally detailed documentation in support of its argument. EEO MD 110, Chap. 11, VI- VII.

Signed and dated this 1<sup>st</sup> day of April, 2008.



Cheryl Kramer  
Administrative Judge

**NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
An Agency of the United States Government**

This Notice is posted pursuant to an Order dated by the United States Equal Employment Opportunity Commission (EEOC) which found that a violation of Section 501 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 791 et. seq. has occurred at this facility.

Federal Law requires that there be no discrimination against any employee or applicant for employment because of the person's RACE, COLOR, RELIGION, SEX, NATIONAL ORIGIN, AGE OR DISABILITY with respect to hiring, firing, promotion, compensation or other terms, conditions or privileges of employment. Title VII also prohibits retaliation against an employee because the employee participated in EEO activities.

The United States Postal Service supports and will comply with such Federal law and not take action against individuals because they have exercised their rights under law.

The United States Postal Service will ensure that management officials will abide by the requirements of all federal equal employment opportunity laws.

The United States Postal Service will not in any manner restrain, interfere, coerce, or retaliate against any individual who exercises his or her right to oppose practices made unlawful by, or who participates in proceedings pursuant to, Federal equal employment opportunity law.

Date Posted: \_\_\_\_\_

Posting Expires: \_\_\_\_\_

29 C.F.R. Part 1614