# Withdrawal/Redaction Sheet
## Clinton Library

| DOCUMENT NO. AND TYPE | SUBJECT/TITLE | DATE | RESTRICTION |
|---|---|---|---|
| 001. memo | Arlene Davis to Thomasina V. Rogers re: exception (2 pages) | 8/19/1992 | P5 |
| 002. memo | To David Liss, Jim Sober re: memo (12 pages) | 5/3/1994 | P5 |
| 003. report | Wrenn Litigation (1 page) | n.d. | P6/b(6) |
| 004. report | McGovern v. Gallegos and EEOC (1 page) | n.d | P6/b(6) |
| 005. report | Wallace v. Gallegos (1 page) | n.d. | P6/b(6) |
| 006. letter | Sheila Owsley to Robert Bernard (2 pages) | 4/12/1994 | P6/b(6) |
| 007. letter | Johnny Mata to Evan Kemp Jr. (2 pages) | 2/17/1993 | P6/b(6) |
| 008. note | Discrimination in EEOC Houston Office (1 page) | n.d. | P6/b(6) |
| 009. report | Jackson v. Gallegos (1 page) | n.d. | P6/b(6) |
| 010. report | Terry v. Kemp (1 page) | n.d. | P6/b(6) |

**COLLECTION:**
Clinton Presidential Records
Domestic Policy Council
Stephen Warnath (Civil Rights)
OA/Box Number: 9593

**FOLDER TITLE:**
[Equal Employment Opportunity Commission Confirmation Briefing Materials] [3]

ds79

**RESTRICTION CODES**

**Presidential Records Act - [44 U.S.C. 2204(a)]**

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
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P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
RR. Document will be reviewed upon request.

**Freedom of Information Act - [5 U.S.C. 552(b)]**

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
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Case: National Council of EEOC Locals No. 216, AFGE, AFL-CIO and Equal Employment Opportunity Commission, FMCS No. 93-20443.

Factual Background:

This grievance was filed by the Union in 1993 on behalf of all bargaining unit employees, GS-11 and above. The Union contends that the EEOC has improperly exempted these individuals from the provisions of the Fair Labor Standards Act as it applies to overtime coverage. The Union's action covers some 1200 employees and over twenty-five different employment classifications. The Union has declined to further clarify the grievance to discuss specifically those grades and classifications which it believes should not be exempted. The grievance was not decided on the merits during its stages before the Agency. The Union has moved the matter to local arbitration and the Commission contends that the Union action was premature as well as impermissible.

Status:

The local arbitrator held a hearing in June of this year concerning the various preliminary issues, to include her jurisdiction to arbitrate the case. These issues will be briefed by August 1994 with a decision expected on the threshold issues in September. If the rulings are favorable to the Union the case could be remanded back to the Commission for a determination on the merits of the Union's claims.

Key Points:

- The Union is seeking relief extending six years back from the date of the grievance. This could result in substantial monetary liability should the Union ultimately prevail.
- Recent decisions of the Federal Labor Relations Authority concerning FLSA classification have resulted in substantial liability findings against several federal agencies.
- The Commission is reviewing its classification of the purportedly affected employees in the context of the litigation.
- The Union's attempt to invoke local arbitration procedures may be an impermissible attempt to avoid dispute over the issue of national arbitrators.
- Both the liability and possible relief phases of the arbitration hearing will result in the necessity to canvass all headquarters and field offices to gather information to assess potential liability.

NATIONAL COUNCIL OF EEOC LOCALS #216
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO
90 CHURCH STREET, ROOM 1504D
NEW YORK, N.Y. 10007

April 16, 1993

Patricia C. Johnson, Director
Office of Human Resources
Equal Employment Opportunity Commission
1801 L Street, N.W.
Washington, D.C. 20507

Dear Ms. Johnson:

The National Council of EEOC Locals No. 216, American Federation of Government Employees, AFL-CIO, consisting of its eight (8) affiliated locals (the Union), files a grievance against the U. S. Equal Employment Opportunity Commission (the Employer), pursuant to Article 43.00, Section 43.02(a) (3)(b) of the negotiated grievance procedures.

The National Council hereby files the following grievance on behalf of all bargaining unit employees (Headquarters and the Field Offices) GS-11 and above in the employ of the agency from 5/2/87 to the present and continuing.

The Union alleges that the Employer has violated the Collective Bargaining Agreement and the Fair Labor Standards Act by improperly classifying as exempt (the above class of bargaining unit employees) from payment of overtime under the Fair labor Standards Act under the "administrative and/or professional exemption" to the FLSA. 29 U.S.C. 213(a) and in violation of the Collective Bargaining Agreement, Article 32 Hours of Work, Article 33 Overtime and Article 35.00 Travel. Said classification is an intentional act by the employer and has deprived the employees of wages due and payable for work performed.

This violation of the Fair Labor Standards Act and the Collective Bargaining Agreement and related Articles is on-going and continuing violation.

<u>Remedies:</u>

There are two different statutory remedies involved in this grievance. One is the FLSA. The other consists of the statutory sections that apply to claims against the government generally. In this grievance the Union ask for the maximum relief provided by the Fair Labor Standard Act, including liquidated damages. That employees be paid liquidated damages in accordance with 29 U.S.C. 216 (b). which provides that an employer can be liable for

the amount of unpaid overtime compensation and an equal amount as liquidated damages. The Union request the award of backpay and liquidated damages in accordance with 5 U.S.C. 5596 for a period of six years prior to the date of the filing of this grievance.

The Comptroller General does not apply the FLSA statutory scheme when ruling on FLSA claims. Rather, it applies the six year statute of limitation contained in 31 U./S?.C. 71a and 237.

ATTORNEY'S FEES AND COSTS

29 U.S.C. 216(b) of the Fair Labor Standards Act mandates the payment of attorney's fees and costs of the prevailing party.

The Union request a discussion with management regarding this subject grievance.

A written decision by management is due no later than 15 calendar days after filing of this written grievance but no later than April 20, 1993.

Sincerely yours,

Edward A. Watkins
President

cc: Local Presidents
Bargaining Unit

- care you get outside the U.S. (but under certain conditions, care in Canada or Mexico might be covered)
- routine dental care and dentures
- routine checkups and the tests directly related to these checkups (except that some Pap smears and mammograms are covered)
- most immunization shots
- prescription drugs
- routine foot care
- medical tests for, and the cost of, eyeglasses or hearing aids
- personal comfort items, such as a phone or TV in your room

LOCAL ARBITRATION
FEDERAL MEDIATION AND CONCILIATION SERVICE

| | |
|---|---|
| In the Matter of:<br><br>NATIONAL COUNCIL OF EEOC LOCALS #216, AFGE, AFL-CIO,<br><br>and<br><br>EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, | Arbitrator Susan T. Mackenzie<br>FMCS CASE NO. 93-20443 |

**AGENCY PRE-HEARING SUBMISSION PURSUANT TO SECTION 44.07(c) AND MEMORANDUM ON THRESHOLD ISSUES**

## I. PROCEDURAL BACKGROUND AND FACTS

On April 16, 1993, Edward Watkins, President of the National Council of EEOC Locals #216 (the Union) submitted a grievance with the Equal Employment Opportunity Commission's (hereafter EEOC, Commission or Agency) "Director of the Office of Human Resources ... pursuant to Article 43.00, Section 43.02(a)(3)(b)" of the parties' CBA, purportedly on behalf of all bargaining unit employees (headquarters and field offices) GS-11 and above in the employ of the Agency from May 2, 1987 to the present and continuing. (Exhibit 1). The Union raised an Agency-wide issue alleging that the Commission had violated the CBA and the Fair Labor Standards Act, 29 U.S.C. § 213(a) (FLSA), as it pertained to the above class of bargaining unit employees. The grievance alleged that those employees had been improperly classified as exempt from payment of overtime under the "administrative and/or professional exemption" to the FLSA and in violation of the CBA,

Article 32, Hours of Work, Article 33, Overtime, and Article 35, Travel. Id. It further alleged that this classification was an intentional act and a continuing violation. No issues were raised by the Union concerning any specific action or decision by the Agency's New York District Office.

On April 30, 1993, after a Union refusal to grant an extension of time, the Agency responded by generally denying the grievance and by raising the issues of arbitrability and grievability based on non-compliance by the Union with various sections of the CBA. The Director of HRMS denied the grievance, stating:

> The matters raised in this grievance are not grievable;
>
> The matters raised are not arbitrable;
>
> The grievance is untimely;
>
> Claims for relief are time-barred;
>
> The Agency denies that it has violated the FLSA;
>
> The Agency denies that it has violated any law, rule or regulation;
>
> The Agency denies that employees at the GS-11 level and above are improperly classified as FLSA exempt;
>
> The matters raised by the Union are not within the scope of the CBA;
>
> The grievance does not comply with Section 43.07 of the CBA;
>
> The Union's delay in raising this matter is barred by laches;
>
> The Union has acquiesced in the Agency's designation for years and therefore has no standing to complain;
>
> The remedy sought is inconsistent with government-wide law, rule and regulations;
>
> The filing of a grievance "on behalf of" individuals seeking

retroactive relief exceeds the scope of the CBA; and

The grievance has been filed at an inappropriate level. (Exhibit 2).

On May 2, 1993, the Union sought review of the Director of HRMS' decision by the "Director of the Office of Management". (Exhibit 3). On May 19, 1993, the Agency through Kassie A. Billingsley, Acting Management Director, responded by seeking an extension of time and requesting a meeting with the Union to discuss the issues raised in the grievance. (Exhibit 4). On June 4, 1993, the Union denied the request for extension, declined to meet with management and attempted to invoke arbitration without specifying its authority for such action. (Exhibit 5).[1]

On June 21, 1993, the Agency advised the Union that the invocation of arbitration was premature since the Union had not moved the grievance forward to Step 3 of the grievance process as required by Article 43, Section 43.07 of the CBA. (Exhibit 6). The Agency never issued a Step 3 decision because the Union never moved the grievance to Step 3, instead invoking arbitration before the Agency issued a Step 2 decision.

Also on June 21, 1993, the National Council President requested that the Federal Mediation and Conciliation Service (FMCS) provide a list of arbitrators, invoking the provisions of

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[1] The Union did acknowledge that there had been ongoing telephone discussions with the Agency concerning its request for a sixty (60) day extension of time to respond to the Union's grievance at this level. The Union indicated that it had offered the Agency a conditional thirty (30) day extension of time for the response. Rather than await the Agency's response to its counter-proposal, the Union invoked arbitration on June 4, 1993.

the parties' CBA governing local arbitrations, Sections 44.05 and 44.06. (Exhibit 7a -- all exhibits concerning the selection process for the local arbitrator are appended as Exhibits 7a-j). The FMCS provided a list of arbitrators on June 28, 1993, all of whom were located in and around New York City. The Union does not and cannot dispute that this grievance was submitted to local arbitration. See Exhibits 7a, 7d.

On August 9, 1993, the Agency wrote to Bernard DeLurry, then Director of the FMCS, indicating that this grievance was clearly national in scope and that the Union's invocation of local arbitration procedures and the FMCS' apparent reliance thereon was invalid and the EEOC was therefore returning to the FMCS the list of local arbitrators. (Exhibit 7b). The Agency's letter also pointed out that the parties had an outstanding listing of national arbitrators which had been issued by the FMCS in June 1991 and that the appointment of a national arbitrator had been in contention since that time.

On August 20, 1993, the EEOC notified the Union of its intention not to participate in a strike of local arbitrators. (Exhibit 7c). The Union, by letter of August 24, 1993, unilaterally struck from the list of local arbitrators and selected the present Arbitrator as its first choice, again indicating that it was invoking the local arbitration process. (Exhibit 7d). By letter dated September 15, 1993, Jewell L. Myers, Director, Office of Arbitration Services, FMCS, responded to the Agency's August 9th letter and the Union's August 24th

letter. (Exhibit 7e). Ms. Myers at that time acceded to the Union's request and appointed the current Arbitrator.

Prior to receiving Ms. Myers' September 15th letter, the EEOC, on September 16, 1993, advised the FMCS of its objection concerning the Union's attempt at the unilateral appointment of an arbitrator. (Exhibit 7f). After receiving the FMCS' September 15th letter, the EEOC again on September 29, 1993 protested the FMCS' decision to make a unilateral appointment. (Exhibit 7g). By letter dated October 8, 1993, the FMCS summarily rejected the EEOC's protests indicating that the issue should be dealt with as a threshold issue before the Arbitrator . (Exhibit 7h). Following a teleconference held by the Arbitrator on October 5, 1993, and the receipt of the FMCS' letter of October 8th, the Agency on October 22, 1993, again wrote to the FMCS contesting the appointment of an arbitrator in this matter. (Exhibit 7i). The FMCS rejected the Agency's position on November 3, 1993, indicating that the issue should be resolved by the parties. (Exhibit 7j). By letter dated April 27, 1994, the Arbitrator scheduled a hearing on all threshold issues.

## II. THRESHOLD ISSUES TO BE DECIDED

The following threshold issues are in dispute concerning the arbitrability and grievability of the April 16, 1993, grievance filed by the Union with the Director of Human Resources Management Services (HRMS).

A. Whether it is appropriate for the Arbitrator to sit in resolution of the issue of the propriety of her own appointment.

B. Whether the Arbitrator has jurisdiction over the subject matter of this grievance.

C. Whether in these circumstances the Union could unilaterally select a local arbitrator to bypass the appointment of a national arbitrator, as contemplated by the Collective Bargaining Agreement (CBA).[2]

D. Whether the grievance is grievable because it did not comply with Article 43, Section 43.07 of the CBA.

E. Whether the grievance is arbitrable because it was not filed at the correct level.

F. Whether the grievance is arbitrable because it was moved to arbitration prematurely before a step 2 decision was issued, as required by Section 43.07 of the CBA.

G. Whether the grievance is arbitrable because it was not filed with the appropriate step 3 official as required by Section 43.07 of the CBA.

H. Whether the Union's request for a list of arbitrators was untimely.

I. Whether the Union's grievance on matters dating from May 1987 was untimely.

J. Whether the hearing on the threshold issues should be in Washington, D.C.; and how expenses incurred for that hearing should be borne by the parties?

Under the following terms of the CBA between the Parties the Agency is raising threshold issues in this Memorandum.

Article 43, Negotiated Grievance Procedures, Section 43.03, Questions of Grievability, states:

> ...In the event that the EMPLOYER should declare a grievance nongrievable or nonarbitrable, all disputes of grievability or arbitrability shall be referred to arbitration as a threshold issue. The

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[2] The Agency has previously provided the Arbitrator with copies of the present and the prior Collective Bargaining Agreements.

threshold issue may be decided on the basis of written submissions and must be decided first. In the event the Arbitrator decides the matter is grievable or arbitrable, it shall be referred back to Step 3 for a decision on the merits. No matter shall proceed to arbitration without a Step 3 merits decision.

All disputes as to the arbitrability or grievability of matters must be decided pursuant to Article 44, Arbitration, Section 44.02(c), National Arbitrators:

> (c) All disputes as to the arbitrability or grievability of a matter which were properly raised in accordance with Section 43.03 of the negotiated grievance procedures shall be referred to the Arbitrator as a threshold issue and shall initially be decided by the Arbitrator. Such issues shall be resolved in accordance with Section 43.03.[3]

## III. ARGUMENT

### A. The Arbitrator May Not Resolve the Issues of the Propriety of Her Appointment.

The grievance the Union has filed is a substantial one that is national in scope. The nature and extent of this grievance is inherently complicated and complex. The Arbitrator will be involved in making findings and conclusions concerning over twelve hundred Agency employees, employed in approximately twenty-seven different job classifications. This constitutes over 40% of the Commission's workforce. The Union has purportedly challenged the basis of each one of these twenty-seven job classifications as being exempt under the

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[3] Also addressed as a threshold issue is the location of the hearing on the threshold issues and how the parties should be responsible for the expenses incurred for witnesses appearing at the hearing.

administrative or professional exemptions to the FLSA. Moreover, the Union has raised several provisions of the CBA which it believes have been violated. In turn the Agency will be presenting numerous witnesses to justify its position on each of the job classifications at issue as exempt from the FLSA and to establish that it has complied with the CBA. Needless to say, it is almost a certainty that the arbitrator who will be hearing this grievance will be involved in a complex proceeding for an extended period to time, with the likelihood of multiple lengthy and involved hearings. As will be argued below, the EEOC contests whether this matter is properly before the current Arbitrator. The particular issue of the propriety of this Arbitrator's appointment should not be decided by the person who has, at minimum, the appearance of substantial pecuniary gain in the determination of that threshold issue.

Under these limited circumstance it is inappropriate for this Arbitrator, particularly where her appointment was unilateral, and who would derive potentially significant benefit from the appointment, to resolve the issue of whether her appointment to this matter was correct. See Pitta v. Hotel Ass'n of New York City, Inc., 806 F.2d 419, 424 (2d Cir. 1986)(risk of unfairness existed where arbitrator, sitting alone, could determine validity of his own dismissal from lucrative position).

> Because the subject of the arbitrable grievance directly concerns the arbitrator's own employment for what may be an extended period of time, impermissible self-interest requires his disqualification. ... An even stronger risk of unfairness exists here where the arbitrator, acting alone, determines the validity

of his own dismissal from a lucrative position.

Id. at 423-424.

While it is obvious that an arbitrator cannot and should not be recused from every decision involving her potential compensation, elementary fairness would dictate that an arbitrator should remove herself from a decision in which she has a personal stake, such as in the determination of her continuance in a potentially lucrative position. Id. Accordingly, because of this Arbitrator's inherent self-interest in this proceeding, she must be disqualified. Rather, a neutral arbitrator, unconnected with the substantive grievance, should resolve this issue.

B. The Local Arbitrator Does Not Have Jurisdiction Over the Subject Matter of This Grievance.

Issues concerning classification of bargaining-unit employees GS-11 and above are national issues involving all of the Agency's District and Headquarters Offices. National issues of this scope are akin to national negotiations under Article 4, Section 4.02 of the CBA, namely:

> ... National negotiations shall be conducted for those issues which affect more than one District Office and/or Headquarters Office ....

The grievance was filed at the Agency's national headquarters in Washington, D.C. and was signed and brought by the President of the National Council of EEOC Locals #216, the national governing body over the eight Union locals in the EEOC's headquarters and field offices. Moreover, this grievance challenges the classification of all bargaining-unit employees GS-11 and above in each of the EEOC's fifty-three offices around

the country and in its Washington, D.C. Headquarters. Specifically the Union states that the grievance is filed "on behalf of all bargaining unit employees (Headquarters and the Field Offices) GS-11 and above...." (Exhibit 1).

The issues raised by the Union concern over twelve hundred employees, employed in approximately twenty-seven (27) different job classifications. The decision to classify each of these jobs with respect to the FLSA is the responsibility of the Agency's Human Resources Management Services in Washington, D.C. The Agency has never made any Agency-wide job classification decisions with respect to the FLSA at the local level. Common sense dictates that local arbitration of these national issues could easily result in wide variations in the classification of particular employees and classes of employees, making personnel administration burdensome, costly, unfair, and unmanageable. The Local Arbitrator should not be able to find that an investigator in New York should not be exempt while an investigator in Detroit is exempt. Likewise, this Local Arbitrator should not be able to find that certain classes of employees, from attorneys to investigators, from computer specialists to program analysts on an Agency-wide basis should be exempt or non-exempt from the FLSA. This was not the intent of Agency or Union contract negotiators.

Article 44, Arbitration, Section 44.01, Purpose, states that "[i]ssues may be referred to a Local Arbitrator." Also, Section 44.07(a) Procedures for Arbitration, states that "[t]he

UNION may elect to invoke arbitration at the National level or Local level." The bargaining history of these provisions dictate that these provisions be interpreted in a reasonable way: Issues appropriate for local arbitration may be taken to a local arbitrator. Thus, a recent claim by employees of the Agency's Buffalo Local Office for overtime as a result of attending Americans with Disabilities Act training in Dallas was properly moved to arbitration before a local arbitrator in Buffalo. See Exhibit 8 Step 1 Grievance and Request for Arbitration Re: Buffalo Local Office. Such cases are essentially fact-specific and have little or no impact beyond the office involved. The language cited above would also permit a local issue to be bought before the parties' National Arbitrator. Thus, while a local case could be handled by a national arbitrator, the parties understood the possibility for a bottleneck developing if all requests for arbitration were funnelled through the national arbitrators. The option to select a local arbitrator in such instances obviously was a function of the parties' intent to provide a safety-valve against this possibility of undesirable delays for arbitration of matters having no national significance.[4] In the negotiations that led to the

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[4] In the typical local arbitration, the arbitrator will be called on principally to determine whether the grievant's or the Agency's version of facts is correct. In so doing, the arbitrator may interpret the CBA or interpret law or agency practice. As a further safeguard against local arbitrators improperly interpreting the CBA or making other errors having more than local impact, the parties are provided the right to appeal the local arbitrator's decisions to the national arbitrator. See CBA, Section 44.05.

implementation of the current CBA, the Union desired retention of local arbitrations for the purpose of allowing the Locals to retain control over local issues that were raised pursuant to the CBA. In addition, the Union expressed a desire to keep costs down by having local issues heard before a local arbitrator without incurring the expenses attendant to using a non-local national arbitrator.

Obviously, while a national arbitrator can arbitrate any issue generally without risk of adversely impacting the important national context of his or her ruling, the same cannot be said for local arbitrators, who by definition would not operate in the permanent and continuing context envisioned by the designation of national arbitrators. See Sections 44.02 and 44.03. It defies logic for issues of clearly national ramification to be resolved at the local level. Language in Sections 44.01 and 44.07(a) permitting the referral to national and local arbitrators is also found in the previous CBA (Article 49.00, Section 49.07(a)). However, no national issues were decided by a local arbitrator during the life of that agreement, although local issues were occasionally decided by the National Arbitrator. Consistent evidence of a party's past practice is indicative of that party's interpretation of that particular contract provision. See Elkouri and Elkouri, How Arbitration Works, Fourth Edition, 1985, BNA pp. 451-454; Fairweather, Practice and Procedure in Labor Arbitration, Second Edition, 1983, BNA p. 215. Clearly, past practice by the Agency and the Union supports having a National

Arbitrator decide issues that are national in scope, affecting a substantial number of Agency employees. While under the current contract no national issues have been resolved, under the previous contract, which contained similar language concerning local and national arbitrators, all national issues were decided by the National Arbitrator. See Decisions and Awards attached as Exhibit 9.[5] The Arbitrator should take administrative notice that Jerome H. Ross was the National Arbitrator selected by the Parties under the prior CBA.

Therefore, based upon logic, necessity, the intent of the parties, past practice and plain common sense, the national issues presented in this grievance are not arbitrable before the Local Arbitrator.

C. In These Circumstances the Union Could not Unilaterally Select a Local Arbitrator to Bypass the Appointment of a National Arbitrator, as Required by the CBA.

Because the subject matter of the Union's grievance is only appropriate for national arbitration, as stated previously, the Union's avoidance of that process by the unilateral appointment

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[5] Under the current CBA, one national issue, other than the present matter, has been moved to arbitration. That grievance concerned the Agency's performance appraisal system. The arbitration of that matter, in which the Agency chose not to participate, was purportedly resolved by an arbitrator designated by the Union as the National Arbitrator under Sections 44.02 and 44.03 of the CBA. (Emphasis added.) In addition, in another grievance the Union attempted to move national issues concerning the appraisal system before a local arbitrator. The issue was presented to the local arbitrator as to whether the matter was appropriate for local or national arbitration. The arbitrator did not reach that issue as he dismissed the grievance concluding it had been filed at the wrong level. In the Matter of AFGE, Local 3614 and EEOC, FMCS No. 92-20296 at p. 26 (Simpkins, April 8, 1994)(Exhibit 10).

of a Local Arbitrator is inconsistent with the following provision of the CBA:

> Article 44, Arbitration, Section 44.03, Selection of the National Arbitrators:
>
> The National Arbitrators shall be selected from a panel of 15 arbitrators requested from the Federal Mediation and Conciliation Service (FMCS) and will serve in a permanent capacity. ... The parties shall strike Arbitrators sequentially. ... Alternatively, the Parties may select a National Arbitrator who is acceptable to both Parties. (Emphasis added.)

At this stage this arbitration deals exclusively with the threshold issues of arbitrability generally and the jurisdiction of a local arbitrator to hear and decide the merits of the national issues presented.[6] While the unilateral selection of an arbitrator for a local arbitration is permitted by the CBA (Section 44.06), no such unilateral process is permitted in the selection of the National Arbitrators. Since the subject matter of the current grievance is only appropriate for national arbitration, the Union's unilateral selection of a local arbitrator here is clearly an attempt to elevate the Local Arbitrator to the position of de facto national arbitrator,

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[6] The issue relating to the jurisdiction of a local arbitrator to hear and decide the merits was raised during the selection process of this Arbitrator, and was not raised at Step 3 because there never was a Step 3 decision, nor even a Step 2 decision. Under Section 43.03 of the CBA, "[q]uestions of grievability or arbitrability based upon an Arbitrator's authority to rule on or hear an issue may be raised at any time." Thus, the issue above, which disputes the jurisdiction of the local arbitrator, is a proper threshold issue in this arbitration.

avoiding the selection process for national arbitrators.[7] Such action is inconsistent with Section 44.03 of the CBA.

D. The Grievance is Not Grievable Because it Did Not Comply With Section 43.07 of the CBA.

Article 43, Negotiated Grievance Procedures, Section 43.07 Regular Grievance Procedure, requires that a grievance be raised with specificity, namely:

> ... A written grievance at a minimum shall:
>
> (a) identify the employee and office;
> (b) identify the incident and date it occurred;
> (c) cite specific Article(s) and Section(s) of this Agreement or of regulations or law alleged to have been violated or misapplied;
> (d) specify how the Agreement, law or regulation has been violated;
> (e) specify the remedy sought; and
> (f) request discussion if desired. ...

The Union's grievance, involving in excess of twelve hundred employees and twenty-seven different job classifications, is woefully inadequate in this regard. The Union does not identify any specific employee or office where a violation allegedly occurred. The Union does not identify any particular incident or date that it contends the Agency violated the CBA or the FLSA. More importantly, the Union does not identify what classifications it is challenging or which specific positions it

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[7] It should be noted that the selection of national arbitrators under the current CBA has been a source of contention between the Parties virtually since the effective date of the CBA. The matter is currently pending before the United States Court of Appeals for the District of Columbia Circuit. Equal Employment Opportunity Commission v. Federal Labor Relations Authority, No. 94-1168 (D.C. Cir.). The Agency contends that the Union moved the current matter to local arbitration to avoid the ongoing issues concerning the appointment of national arbitrators.

contends are improperly classified as exempt from the FLSA. Here the Union states that it is filing its grievance on behalf of all bargaining unit employees, GS-11 and above, from "5/2/87 to the present and continuing". (Exhibit 1).

The Union never refers to any alleged incident or event that took place that was the genesis for its grievance, nor does it make an effort even to generally delineate between categories of employees, by classification or grade level. The grievance does not attempt to identify which exemptions applied by the Agency to particular positions or classifications are being challenged. Instead, in a blunderbuss approach, the Union alleges that the Agency misapplied the "administrative and/or professional" exemption to the FLSA and violated at least three provisions of the CBA. (Exhibit 1). The grievance also fails to specify how the Agreement, law or regulation has been violated. It never provides any specificity how the FLSA has been violated. This is equally true with regard to the particular provisions of the CBA that the Union contends were violated. Article 32, Hours of Work, consists of approximately two and one half pages of Sections and subsections, Article 33, Overtime, has almost one page of Sections, and Article 35, Travel, is approximately a page and three quarters of particular sections; however, the Union does not state how any of these Articles, Sections or Subsections were violated.

This grievance, in addition to showing complete disregard for the spirit of the CBA in terms of notice to the Agency,

evidences a desire to simply present the most broad, undefined claim possible, in the hope that some salient point may be contained therein. Section 43.07 is in the CBA for a reason. The filing of grievances should not be a matter of gamesmanship. To allow this grievance to proceed in such a fashion is to invite chaos. In essence, the Union has failed to state its claim and failed to comply with the provisions of Section 43.07, and its grievance should be dismissed.

E. The Dispute is Not Arbitrable Because it Was Not Filed at the Correct Level.[8]

Article 43, Sections 43.01 and 43.07 of the CBA, require that a grievance be filed with the appropriate Employer Representative at the lowest supervisory level with authority to resolve the matter. The Union filed the grievance with the Director, Human Resources Management Services. Here the Union is contractually obligated to "ascertain and file the grievance at the proper Management level". In the Matter of AFGE, Local 3614 and EEOC, FMCS No. 92-20296 at p. 26 (Simpkins, April 8, 1994)(The Union's failure to file its grievance with the appropriate Agency official for purposes of Step 1 necessitated a dismissal of its grievance)(Exhibit 10). Here, the Union should have ascertained that the appropriate place to resolve a grievance concerning the classification of employees under the

[8] The Agency relies upon this argument as a basis for dismissal of the grievance. Alternatively, the Agency is raising, infra, alternative arguments contending that if the Union did file its grievance at the appropriate level, it failed to follow the existing procedures for pursuing the grievance at Steps 2 and 3; that would also require dismissal of the grievance.

FLSA was with the Director, Employee Programs and Classifications Division, which is a subordinate division within HRMS. That Division is responsible for classifying all positions at the Agency and is specifically responsible for determining which positions are to be classified as exempt pursuant to the FLSA. Therefore, the grievance was improperly filed with the Director, HRMS for purposes of Section 43.07 and must be dismissed. Id.

F. The Grievance is Not Arbitrable Because it Was Moved to Arbitration Prematurely Before a Step 2 Decision Was Issued as Required by Section 43.07 of the CBA.

The grievance is not arbitrable because it was moved to arbitration prematurely before a Step 2 decision was issued, as required by Section 43.07 of the CBA.[9] On May 2, 1993, the Union sought review of the Director of Human Resources Management Services' decision by the Director of the Office of Management. (Exhibit 3). On May 19, 1993, the Agency, through Kassie A. Billingsley, Acting Management Director, responded by seeking an extension of time and requesting a meeting with the Union to discuss the issues raised in the grievance. (Exhibit 4). While the Agency was still considering the Union's conditional offer of

[9] As stated previously the Agency contends that Union failed to file its initial grievance at the appropriate level. Without waiving that argument, the Agency contends that the Union's subsequent actions were premature. Pursuant to the provisions of Article 43, Section 43.07, the Agency had to issue a decision within 15 days after the Union moved the grievance to Step 2. Here, the Agency received the Step 2 appeal on May 7, 1993. Ms. Billingsley timely requested an extension to file the Agency's response on May 19, 1993. The Agency and the Union, as of June 4, 1993, had at least three telephone conversations regarding the Agency's request for an extension of time. (Exhibit 5). Before the extension of time issue was resolved, the Union terminated its discussions with the Agency and invoked arbitration. Id.

a thirty (30) day extension of time to respond to the Union's Step 2 grievance, the Union attempted to invoke arbitration. (Exhibit 5). In fact the Union did acknowledge that there had been ongoing telephone discussions with the Agency concerning its request for a sixty (60) day extension of time to respond to the Union's grievance at this level. The Agency contends that it was proceeding in good faith upon the presumption that the Union was willing to grant some extension of time to permit a Step 2 response. The Union gave no prior notice that it was terminating the discussion of an extension, but simply avoided a Step 2 decision and its attendant review at Step 3 by moving to arbitration. Therefore, based upon the Union's failure to follow the procedures specified by Section 43.07, its present grievance must be dismissed. Alternatively, the Agency requests that if the grievance is not dismissed that the Arbitrator remand the grievance back to the Agency for the issuance of an appropriate step decision.

G. <u>The Grievance is Not Arbitrable Because it Was Not Filed With A Step 3 Official as Required by Section 43.07 of the CBA</u>.

The CBA requires that grievances, other than expedited grievances, must be pursued through three steps before they are ripe for arbitration. Sections 43.03, 43.07. Here the Union, by its own admission, only pursued the grievance through Step 1 and partially through 2.

The grievance at issue is an apparent broad-based challenge to the classification under the FLSA of all bargaining-unit

employees GS-11 and above. Such a challenge, with significant budgetary implications for the agency, should have been given the opportunity for review at all possible administrative levels prior to the invocation of arbitration. Indeed, even for the simplest grievance, the CBA envisions that there will be three levels of review. The CBA is explicit on this point and provides for no deviation from the three step process except for expedited grievances (those grievances concerning a removal or reduction in grade. Section 43.06). Three levels of grievance review allows for a thorough presentation and analysis of all the facts. Opportunity thereby exists for resolution of issues at several levels without resort to the more formal and expensive arbitration process. The Union was required to insure that its grievance received three levels of review, either by filing at the appropriate level initially, or if necessary by moving the matter to the Chairman's level. The option did not exist to simply avoid a Step 3 decision.

Instead, the Union sought arbitration after only two steps of the grievance process (although as argued above, the Union did not even wait for the exhaustion of the Step 2 process). This is a clear violation of the collective bargaining agreement and thus the matter is not arbitrable. Because the third step grievance was not filed in accordance with the requirements of the CBA - that is, since it was not filed with the third-level supervisory official with authority to resolve the matter, this grievance should be declared nonarbitrable and dismissed. Alternatively,

the Agency requests that if the grievance is not dismissed that the Arbitrator remand the grievance back to the Agency for the issuance of an appropriate step decision.

H. The Union's Request for a List of Arbitrators Was Untimely.

The Union invoked arbitration on June 4, 1993. Article 44, Arbitration, Section 44.06, Selection of the Local Arbitrator requires:

> When Local Arbitration is invoked, the UNION shall, within five (5) calendar days, request the FMCS to submit a list of seven arbitrators to the Union and the EMPLOYER's Labor Management Relations Division. Within five (5) calendar days after receipt of the list, the Parties shall select an Arbitrator by each alternatively striking off one (1) name from the list and the name remaining of said list shall be the Local Arbitrator.

On June 21, 1993, the Union requested the FMCS to provide a panel of arbitrators. The period between the invocation and the request was eighteen days, thirteen calendar days in excess of provisions pursuant to Section 44.06. The Union never requested any extension of time for this specific filing period.[10] Accordingly, the Union's complaint must be dismissed for its failure to comply with Section 44.06.

I. The Union's Grievance of Matters Dating From May 2, 1987 was Untimely.

The Union claims that the Agency's violation runs from May 2, 1987. Article 43, Section 43.07, requires that a written grievance must be filed within twenty (20) calendar days of the

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[10] As evidenced by the procedural background discussion and the exhibits referred therein, there is no dispute the Union did not request an extension to request a list of arbitrators from the FMCS.

incident giving rise to the grievance. See Six Community School District and Six Education Ass'n, 95 LA 1084 (Gallagher, 1990) (grievance filed on 11th day, where grievance must be filed within 10 days, is untimely). Oneida, County of and Oneida County Deputy Sheriff's Benevolent Ass'n, 95 LA 725 (Kelly, 1990) (grievance filed eight months after event untimely); Veterans Administration Regional Office and Government Employees, AFGE Local 2571, 92 LA 1211 (Stephens, 1989) (grievance filed eleven months after event untimely). The predecessor CBA that was in effect in 1987 required that written grievances be filed within twenty-five (25) days of the incident giving rise to the grievance. Article 47, Section 47.06. There is no record that the Union ever filed a prior grievance concerning the classification of bargaining unit employees under the "administrative and/or professional exemptions" to the FLSA. The Union has at all times been fully aware of the Agency's various classifications of its bargaining unit employees under the FLSA from 1987 to the present.

Certainly, this grievance can cover no violations pre-dating twenty days prior to April 16, 1993.[11] Hence, assuming arguendo that the Union has complied with the aforementioned provisions of

[11] The concept of expeditious action on the part of employees and their representatives is not foreign within the federal sector. EEOC regulations concerning employee pursuit of discrimination complaints require that such allegations be pursued to a counselor within forty-five days of the alleged discriminatory occurrence. 29 C.F.R. § 1614.105(a)(1). Likewise federal employees challenging adverse disciplinary or performance actions to the Merit Systems Protection Board must do so within twenty days of the effective date of the action at issue. 5 C.F.R. § 1201.22(b).

the CBA, it can only raise matters from April 16, 1993 to the present. All matters and claims pre-dating April 16, 1993 must be dismissed.

J. Whether the Hearing on the Threshold Issues Should be in Washington, D.C. and How Expenses Incurred for the Hearing Should be Borne by the Parties?

The hearing on the threshold issues should be in Washington, D.C. pursuant to the provisions of Article 44, Section 44.07(e), which states that "[n]ormally the arbitration hearing will be held at the EMPLOYER's site in the office where the grievance arose". As stated previously, the Union has raised issues national in scope that arose at the Agency's Headquarters in Washington, D.C. The Union's National President filed the grievance in Washington, D.C. The decisions at issue were made at the Agency's headquarters. Most of the Agency witnesses who will testify at the threshold hearing are located in Washington: Patricia Cornwell Johnson, the present Director, HRMS; Arlene V. Davis, Deputy Director, HRMS; Kassie A. Billingsley, Acting Management Director; Richard V. Roscio, CBA Negotiator, James R. Neely, Jr., CBA Negotiator, and Eugene Bell, Jr., Director, Employee Programs and Classification Division. Moreover the Agency's two counsel and its technical advisor are all located in Washington, D.C. Additionally, no event or any activity concerning the underlying substantive grievance occurred in New York. For the aforementioned reasons, the Agency contends that the hearing should take place at the Agency's Headquarters in Washington, D.C. pursuant to Section 44.07(e).

The Agency contends that all expenses incurred for the hearing must be borne by the Parties pursuant to the provisions of Article 44, Section 44.07(e). Section 44.07(e) provides that "Each Party shall be responsible for the travel and per diem expenses of its own witnesses and representatives unless otherwise agreed." Accordingly, the Agency contends that consistent with the aforementioned provision of the CBA, each Party shall be responsible for its own expenses incurred for its witnesses or representatives.

## IV. CONCLUSION

For the above stated reasons, the Agency seeks the following relief. As to the initial issue, the Arbitrator should conclude that another arbitrator should determine whether this grievance should proceed at the local level. Beyond that issue, if any issues of grievability are to be reached, the Arbitrator should conclude that the grievance at issue is non-grievable and should be dismissed. Should the Arbitrator reach any issues of arbitrability, the grievance should be declared non-arbitrable and dismissed. In essence, based upon the Agency's arguments and the record, the Arbitrator should conclude: (1) it is inappropriate for the Arbitrator to sit in resolution of the issue of the propriety of her own appointment; (2) the Arbitrator has no jurisdiction over the subject matter of this grievance, rendering the grievance non-arbitrable; (3) the grievance is further non-arbitrable because the unilateral appointment of a local arbitrator under the circumstances of this grievance is not

in compliance with the CBA; (4) the grievance is not grievable because it does not comply with Article 43, Section 43.07 of the CBA; (5) the grievance is not arbitrable because it was not filed at the correct level of supervision at HRMS; (6) the grievance is not arbitrable because it was moved to arbitration prematurely before a Step 2 decision was issued; (7) the grievance is not arbitrable because it was not filed with the Step 3 official as required by Section 43.07 of the CBA; (8) the Union's request for a list of arbitrators was untimely; (9) the matters raised in the grievance dating back to May 2, 1987 were untimely and therefore are not grievable; and (10) the hearing on the threshold issues should be in Washington, D.C. and the parties must bear their own expenses relating to witnesses appearing at the hearing. Alternatively, in the event the Arbitrator finds that the grievance is both grievable and arbitrable and within her jurisdiction as a Local Arbitrator, the remedy is that the Arbitrator remand the grievance back to the Agency for issuance of an appropriate step decision. Additionally, if the Arbitrator finds that the matters raised in the grievance are properly arbitrable, the Agency respectfully requests that this Arbitrator should transfer any future consideration of the grievance to a National Arbitrator to be selected by the Parties pursuant to the CBA.

## V. WITNESSES

1. Patricia Cornwell Johnson
   Director, Human Resources Management Services
   EEOC, 1801 L Street N.W.
   Washington, DC 20507

Ms. Johnson is expected to testify concerning the meaning of the current CBA, specifically its 3 step grievance procedure and the CBA's national and local arbitration provisions and the effect that a piecemeal determination of classification standards would have on the Agency's personnel management program as a whole. Ms. Johnson will further testify concerning her April 30, 1993 letter responding to the Union's grievance and with respect to the issue of the Union's premature invocation of arbitration.

2. Kassie Billingsley
Acting Management Director
EEOC, 1801 L Street N.W.
Washington, D.C. 20507

Ms. Billingsley is expected to testify concerning the the matters set forth in her letter to the Union dated May 19, 1993 concerning the Step 2 grievance and the Union's response to her letter.

3. Arlene V. Davis
Director, Employee and Labor Relations Division
EEOC, 1801 L Street N.W
Washington, D.C. 20507

Ms. Davis is expected to testify concerning her correspondence with the Union concerning the Union's attempt to move the grievance to arbitration.

4. Chester V. Bailey
Director, Milwaukee District Office
EEOC, 310 West Wisconsin Avenue, Suite 900
Milwaukee, WI 53203-2292

Mr. Bailey, management negotiator, is expected to testify concerning the 3 step grievance procedure and the meaning of the CBA's national and local arbitration provisions.

5. Richard V. Roscio
Assistant Legal Counsel
EEOC, 1801 L Street N.W.
Washington, DC 20507

Mr. Roscio, management negotiator, is expected to testify concerning the 3 step grievance procedure and the meaning of the CBA's national and local arbitration provisions.

6. James R. Neely, Jr.

Acting Deputy General Counsel
EEOC, 1801 L Street N.W.
Washington, DC 20507

Mr. Neely is expected to testify concerning the 3 step grievance procedure and the meaning of the CBA's local and national arbitration provisions.

7. Eugene Bell, Jr.
Director, Employee Programs and Classification Division, HRMS
EEOC, 1801 L Street, N.W.
Washington, D.C. 20507

Mr. Bell is expected to testify concerning his duties as the Director, Employee Programs and Classification Division, HRMS. Furthermore, Mr. Bell will testify concerning his office's contacts with the Union, concerning the subject matter of this grievance.

## IV. EXHIBITS

1. First-Step Grievance from Edward Watkins, President, National Council of EEOC Locals to the Director of the Office of Human Resource Management dated April 16, 1993.

2. Response to First Step Grievance from the Director of the Office of Human Resource Management dated April 30, 1993

3. May 2, 1993 Letter from Watkins to Kassie A. Billingsley, [Acting] Director, Office of Management

4. May 19, 1993, Letter from Billingsley to Watkins

5. June 4, 1993, Letter from Watkins to Arlene V. Davis, Director, Employee and Labor Relations Division

6. June 21, 1993, Letter from Davis to Watkins

7a. June 21, 1993, Letter from Watkins to Jewell L. Meyers, Director, Office of Arbitration Services, U.S. Federal Mediation and Conciliation Service

7b. August 9, 1993, Letter from Davis to FMCS

7c. August 20, 1993, Letter from Davis to Barbara B. Hutchinson, Esq.

7d. August 24, 1993, Letter from Hutchinson to FMCS

7e. September 15, 1993, Letter from FMCS to Hutchinson and Davis

7f. September 16, 1993, Letter from Davis to FMCS

7g. September 29, 1993, Letter from Davis to FMCS

7h. October 8, 1993, Letter from FMCS to Hutchinson and Davis

7i. October 22, 1993 Letter from Davis to FMCS

7j. November 3, 1993 Letter from FMCS to Davis

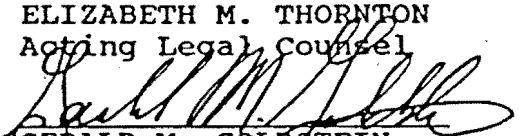
8. Step 1 Grievance and Request for Arbitration Re: Buffalo Local Office.

9. Decisions and Awards: In the Matter of National Council of EEOC Locals, No. 216, AFGE, AFL-CIO, FY 88 and FY 89 GPAR Appraisals,(Ross, January 20, 1989) and In the Matter of National Council of EEOC Locals, No. 216, AFGE, AFL-CIO, NA No. 1 Flexitime,(Ross, November 30, 1987).

10. In the Matter of AFGE, Local 3614 and EEOC, FMCS No. 92-20296, (Simpkins, April 8, 1994).

Respectfully submitted,

ELIZABETH M. THORNTON
Acting Legal Counsel



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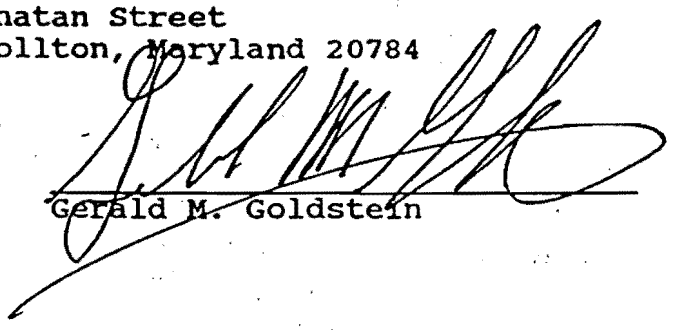
(202) 663-4667

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Agency Pre-hearing Submission Pursuant to Section 44.07(c) and Memorandum in Support of Threshold Issues, was served this 20th day of May, 1994, by first class mail, postage prepaid, on the following:

Susan T. Mackenzie
Arbitrator
845 West End Avenue
New York, New York 0025-4918

Barbara B. Hutchinson
Attorney
7907 Powhatan Street
New Carrollton, Maryland 20784



Gerald M. Goldstein

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ds79

**RESTRICTION CODES**

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**P1 National Security Classified Information [(a)(1) of the PRA]**
**P2 Relating to the appointment to Federal office [(a)(2) of the PRA]**
**P3 Release would violate a Federal statute [(a)(3) of the PRA]**
**P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]**
**P5 Release would disclose confidential advise between the President and his advisors, or between such advisors [a)(5) of the PRA]**
**P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]**

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**b(3) Release would violate a Federal statute [(b)(3) of the FOIA]**
**b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]**
**b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]**
**b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]**
**b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]**
**b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]**

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**RESTRICTION CODES**

**Presidential Records Act - [44 U.S.C. 2204(a)]**

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**RR. Document will be reviewed upon request.**

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# Withdrawal/Redaction Marker
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| DOCUMENT NO. AND TYPE | SUBJECT/TITLE | DATE | RESTRICTION |
|---|---|---|---|
| 007. letter | Johnny Mata to Evan Kemp Jr. (2 pages) | 2/17/1993 | P6/b(6) |

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**COLLECTION:**
Clinton Presidential Records
Domestic Policy Council
Stephen Warnath (Civil Rights)
OA/Box Number: 9593

**FOLDER TITLE:**
[Equal Employment Opportunity Commission Confirmation Briefing Materials] [3]

ds79

**RESTRICTION CODES**

**Presidential Records Act - [44 U.S.C. 2204(a)]**

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

| | | |
|---|---|---|
| BEATRICE RINCON-WALLACE, Plaintiff | * | H-93-0710 |
| vs. | * | CIVIL CASE NO. _____ |
| EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, EVAN KEMP, JR., CHAIRMAN, and HARRIET JOAN EHRLICH, DISTRICT DIRECTOR, Defendants | * | (JURY DEMAND) |

United States District Court
Southern District of Texas
FILED

MAR 11 1993

Michael N. Milby, Clerk

PLAINTIFF'S ORIGINAL COMPLAINT

Beatrice Rincon-Wallace (Rincon-Wallace) files this her Plaintiff's Original Complaint against the Equal Employment Opportunity Commission (EEOC), Evan Kemp, Jr. (Kemp), the Chairman of the EEOC, and Harriet Joan Ehrlich (Ehrlich), EEOC District Director for the Houston District Office in Houston, Texas, complaining of the matters stated hereafter in this complaint.

PARTIES

1. Beatrice Rincon-Wallace is a resident of Houston, Harris County, Texas, and she is and has been employed by the Equal Employment Opportunity Commission in the Houston District Office.

2. The Equal Employment Opportunity Commission is a federal governmental agency authorized by Congress according to the provisions of Article 42 U.S.C., Section 2000e-4, et seq. (as amended), to act in certain matters for enforcement of laws against discriminatory practices in employment, both within the government

and in private enterprise.

3. The Equal Opportunity Commission may be served with citation through its chairman, Mr. Evan Kemp, Jr., at EEOC headquaters located at 1801 L Street N.W., Washington, D.C. 20507.

4. Mr. Evan Kemp, Jr., Chairman of the Equal Employment Opportunity Commission, may be served with citation by delivery of a copy of the complaint to his offices of the EEOC, also located at 1801 L Street N.W., Washington, D.C. 20507.

5. Harriet Joan Ehrlich, Director of the EEOC District Office in Houston, Texas, may be served with citation at the Houston District Office located at 1919 Smith Street, 7th Floor, Houston, Texas 77002.

6. Both Mr. Kemp and Ms. Ehrlich have been named as defendants in this case only in the capacity of their individual EEOC positions as Director and District Director respectively, and not otherwise as individuals.

JURISDICTION AND VENUE

7. The matters made the basis of the claims of Ms. Rincon-Wallace have primarily occurred in Houston, Texas. Venue lies in the Southern District of Texas accordingly under the provisions of 28 U.S.C., Section 1391(e), as amended.

8. The matters made the basis of this case involvequestions arising under federal law, namely, matters of employment discrimination involving a federal employee, as authorized under Title VII of the Civil Rights Act of 1964, 42 U.S.C., Section 2000e, et seq., as amended in the Civil Rights Act of 1991.

9. Additional elements of jurisdiction arise under

additional sections and sub-parts of those civil rights acts.

10. The claims of Ms. Rincon-Wallace are of unlawful employment practices arising with the EEOC itself.

CLASS-ACTION CLAIMS POTENTIAL STATUS

11. Although this case is not filed as a class action at this time, leave of court may be sought later to expand this case to include the rights as a group of all female Hispanic employees in the Houston District office of the EEOC.

CASE BACKGROUND

12. Rincon-Wallace hwas been an employee of the Houston District office of the EEOC for the past 13 plus years, with the exception of a short period of absence during which she ran unsuccessfully for political office but was thereafter asked to return by Ms. Ehrlich.

13. Ms. Rincon-Wallace is a Hispanic female, and she has risen to the level of GS-12 investigator within the EEOC.

14. For Ms. Rincon-Wallace to now be promoted in normal progression through her current job duties, she would next be promoted to the position of a supervisor, at the GM-13 level.

15. The supervisors over the investigators are all GM-13 or higher, but none is a GS-13, which is an entirely different designation.

16. During the course of the 22 years of the EEOC District office in Houston, and during the more than 10 past years this office has been under the control of Ms. Ehrlich as its Director, no Hispanic female has been promoted to the GM-13 position levels within the Houston office. Of the two Hispanic females who have

been at that level, one was transferred into the Houston office already at that level, and the other was promoted to the GM-13 level as a part of her package promotion to another office in another district.

17. In October, 1991, a class complaint of discrimination was filed by over 15 EEOC employees in the Houston office complaining of the disparate treatment of Hispanics in promotion considerations in the Houston office. Ms. Rincon-Wallace was one of those complainants.

18. Prior to the filing of that disparate complaint in October, 1991, Ms. Rincon-Wallace had been highly regarded within the Houston office and had received numerous awards or distinctions in relation to her work, a partial list of which is attached as Exhibit #1 and incorporated herein, and her ratings had almost always been very high, but she has been consistently overlooked at time for promotions to supervisory positions, as have the other Hispanic females within the office.

19. Further complaints were made thereafter by Ms. Rincon-Wallace when unable to resolve the problem through Ms. Ehrlich, including reprisal discrimination charges filed in July, 1991, and again later in September, 1992, a copy of which is attached as Exhibit #2 and incorporated herein.

20. On September 1, 1992, three members of LULAC, an Hispanic organization, met with Ms. Ehrlich to to discuss and hopefully resolve the Hispanic female deficit at the GM-13 level in Houston. The LULAC representatives were Mr. Johnny Mata (LULAC District Director in Houston), Ms. Olga Solis (Hispanic Activist of Women's

Rights), and Judge Sylvia Garcia (Chief Municipal Judge for the City of Houston).

21. Although Ms. Rincon-Wallace was present at the start of that meeting, she was asked to leave by Ms. Ehrlich, and she was referred to by Ms. Ehrlich as a "disgruntled employee". This statement was made also in the presence of other EEOC employees at that time.

22. Although Ms. Rincon-Wallace provided the names of potential witnesses to the charge of discrimination filed by her, she was informed by the investigating officer in Washington that they did not have time to contact these witnesses of Ms. Rincon-Wallace and would therefore not contact them. A list of those witnesses is provided as Exhibit #3 attached hereto.

23. On December 17, 1992, without having interviewed any of Ms. Rincon-Wallace's witnesses, the EEOC issued a notice of final interview and provided Ms. Rincon-Wallace with the opportunity to file a formal charge at that time, a copy of which letter of notice is attached as Exhibit #4 hereto.

24. On about January 8, 1993, Ms. Rincon-Wallace filed her formal complaint with Mr. Kemp in Washington. A copy of that charge, along with letter to Mr. Kemp, and along with the supporting documents to her charge, are attached hereto as and incorporated herein as Exhibit #5 in their entirety as though fully restated.

25. Since the filing of Ms. Rincon-Wallace's charges of discrimination and retaliation by Ms. Ehrlich, further extreme pressure has been placed on Ms. Rincon-Wallace and the other

Hispanic female investigators or employees of the Houston office of the EEOC, placing these individuals under a much greater scrutiny and evaluation than other investigators in this office and generally harrassing these people in their work. In particular, extreme pressure has been placed on Ms. Rincon-Wallace of nature never before used against her.

26. Ms. Ehrlich has accused Ms. Rincon-Wallace of bringing the news media into their disputes, when such was not the case, and Ms. Ehrlich has acted in a hostile manner toward Ms. Rincon-Wallace, which hostility has only increased as of late and which appears to be intentional action designed to either force Ms. Rincon-Wallace to quit her job at the EEOC or to set up enough evidence against her to discharge her and get rid of her.

27. A statement of Mr. Jerry E. Jensen, a former supervisor in the Houston office familiar with Ms. Rincon-Wallace's work and also familiar with prior acts of retaliation of Ms. Ehrlich at the EEOC, evaluating his assessment and opinion of retaliatory conduct by Ms. Ehrlich against Ms. Rincon-Wallace is also attached as Exhibit #6 to demonstrate the curren state of hostility at the Houston EEOC office toward Ms. Rincon-Wallace by Ms. Ehrlich.

CAUSE OF ACTION- UNLAWFUL DISCRIMINATION

28. Based on the matters stated above, Ms. Rincon-Wallace now alleges that she has been unlawfully denied promotion to a supervisory level while working for the EEOC in Houston because she is an Hispanic female, both of which Hispanic and female are classes for which employment discrimination is prohibited under the 1964 and 1991 Civil Rights Acts.

29. Ms. Rincon-Wallace has been unlawfully discriminated against by the EEOC, the very agency charged with protecting the rights of individuals in their employment from such discriminatory practices as follows:

a) in individual treatment aimed specifically at her;

b) through the disparate impact treatment of the patterns and practices of the Houston office of the EEOC toward Ms. Rincon-Wallace and other Hispanic females; and,

c) through the retaliatory conduct of the Houston office, and especially Ms. Ehrlich, taken toward Ms. Rincon-Wallace.

30. As a result of the unlawful discrimination conduct, Ms. Rincon-Wallace has suffered damages as follows:

a) loss of promotion to GM-13 supervisory positions at the Houston office of the EEOC, along with pay and benefits increases resulting from such promotions;

b) extreme stress and mental anxiety, humiliation, and physical illness resulting from the additional unjustified pressures and actions; and,

c) fear for her very job and career at the EEOC.

31. As a result of the unlawful actions against her, Ms. Rincon-Wallace has been required to retain the services of the below-signed attorney to represent her interests in this case and has incurred obligation and debt for those legal services.

REMEDY SOUGHT

32. Ms. Rincon-Wallace files this lawsuit seeking the remedies available to her arising in matters founded in unlawful

discriminatory employment practices within a governmental agency. Ms. Rincon-Wallace, following service of citation and answer herein, seeks judgment of the Court against the Equal Employment Opportunity Commission, its chairman Evan Kemp, Jr., and its Houston District Director Harriet Ehrlich as follows:

a) promotion to the position of GM-13 level in the Houston District Office of the EEOC, along with full back pay and reinstatement of benefits from the earliest allowable time under the law to which Ms. Rincon-Wallace could have received a promotion to the GM-13 level;

b) injunctive relief of this Court to prohibit any further retaliatory conduct against Ms. Rincon-Wallace by the EEOC and by Ms. Ehrlich;

c) judgment for all damages suffered or sustained by Ms. Rincon-Wallace resulting from the unlawful conduct against her which may be allowed in addition to normal pay and benefits;

d) all reasonable attorney fees incurred as a result of this case; and,

e) such other geneeral relief to which she may show herself entitled.

Respectfully submitted,

Gregory L. Hennig
Federal Bar No. 4650
Texas Bar No. 09472500
2700 Post Oak Blvd., Suite 1530
Houston, Texas 77056
(713) 626-7800
(713) 626-0703 (FAX)

# Withdrawal/Redaction Marker
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| DOCUMENT NO. AND TYPE | SUBJECT/TITLE | DATE | RESTRICTION |
|---|---|---|---|
| 008. note | Discrimination in EEOC Houston Office (1 page) | n.d. | P6/b(6) |

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[Equal Employment Opportunity Commission Confirmation Briefing Materials] [3]

ds79

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DLINE EEOC sued in discrimination case
Byline: JERRY URBAN
Credit: Staff
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RCE HOUSTON CHRONICLE (HOU)
Edition: 2 STAR
Section: A
NEWS
Page: 35
(Copyright 1993)

An investigator with the Houston office of the Equal Employment Opportunity Commission has filed a lawsuit against the federal agency alleging that she has been passed over for promotion because she is a woman and Hispanic.

The lawsuit, filed late Thursday in federal court, claims the EEOC has discriminated against Beatrice Rincon-Wallace, 45, an investigator.

Last month, the League of United Latin American Citizens filed a third-party complaint with the EEOC in Washington, D.C., alleging the Houston EEOC office discriminated against Hispanic females in job promotions.

The EEOC is the federal agency that is responsible for enforcing laws against discrimination in work places.

Rincon-Wallace has worked at the Houston EEOC office for the past 13 years, except for a few months in 1988 when she unsuccessfully sought election to the state's House of Representatives.

Named as defendants in the lawsuit along with the EEOC are Evan Kemp Jr., chairman of the EEOC, and Harriet Joan Ehrlich, director of the EEOC district office in Houston.

Donna Guerrero, a spokeswoman for the EEOC in Houston, said the lawsuit is without merit.

The lawsuit, prepared by attorney Gregory Hennig, says Rincon-Wallace was among more than 15 Hispanic male and female employees in the EEOC Houston office who in October 1991 filed a complaint with the EEOC complaining of discrimination.

In July of 1991 and in September of 1992, Rincon-Wallace filed retaliation complaints against the EEOC's district director, Ehrlich. In January of this year, Rincon-Wallace made another retaliation complaint against the EEOC's district director.

Since the filing of the January complaint, according to the lawsuit, ""further extreme pressure has been placed on Ms. Rincon-Wallace and the other Hispanic female investigators or employees of the Houston office of the EEOC, placing these individuals under a much greater scrutiny and evaluation than other investigators in this office and generally harassing these people in their work.''

Rincon-Wallace is asking that the EEOC be ordered to promote her to a supervisory position, with back pay, and to refrain from any further retaliatory conduct.

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|---|---|---|---|
| 009. report | Jackson v. Gallegos (1 page) | n.d. | P6/b(6) |

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

---

KATHLEEN L. JACKSON
72 Park Forest Drive
Williamsville, New York 14221,

Plaintiff,

vs.

EVAN J. KEMP, JR., in his capacity as Chairman, Equal Employment Opportunity Commission
2401 "L" Street NW
Washington, D.C. 20507,

Defendant.

---

AMENDED COMPLAINT

CIV-88-0654C

Plaintiff, KATHLEEN L. JACKSON, by her attorneys, WILLIAM A. PRICE, ESQ., EMMELYN LOGAN-BALDWIN, ESQ., and DAVID GERALD JAY, ESQ., for her complaint alleges, upon knowledge with respect to herself and her own acts, and upon information and belief with respect to all other matters, as follows:

## I. NATURE OF THIS ACTION

1. This is an action seeking injunctive relief and monetary damages to redress intentional age and sex discrimination in federal employment, as well as retaliation for asserting rights designed to remedy such discrimination.

2. The Plaintiff, a senior employee of the Equal Employment Opportunity Commission ("EEOC"), was issued an "unacceptable" performance rating, was denied a scheduled within-grade salary increase, and was placed on a "performance improvement plan".

which could have resulted in her termination from employment, solely because of her age and sex, in violation of the Age Discrimination in Employment Act ("ADEA"), as amended, 29 U.S.C. §§ 621, et seq., and of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, et seq. ("Title VII"). Additionally, after Plaintiff consulted an EEO Counselor concerning the original wrongdoing, the Defendant agency engaged in various acts of retaliation, in further violation of the ADEA and Title VII. After the original Complaint in this action was filed, such acts of retaliation continued. Such retaliation and discriminatory treatment became a constant, daily occurrence and created working conditions so intolerable that Plaintiff was forced to resign her position.

3. Specifically, the Plaintiff seeks the upgrading of various performance ratings; a within-grade salary increase retroactive to March 27, 1988; the removal of any record of adverse disciplinary and/or performance-related action from her personal files and from any "deficiency file" maintained by the local and regional EEOC offices; back pay as of November 16, 1988, with accrued interest; appropriate front pay; and reimbursement of reasonable attorneys fees and expenses. Plaintiff also seeks injunctive relief designed to prevent future violations of the ADEA and Title VII, as well as to protect her against further reprisals and harassment.

## II. JURISDICTION AND VENUE

4. This Court has jurisdiction of Plaintiff's claims herein pursuant to 28 U.S.C. §§1331 and 1343; 29 U.S.C. §633a; and 42 U.S.C. §2000e-16(c).

5. Venue is proper in this district pursuant to 28 U.S.C. §1391.

## III. PARTIES

6. Plaintiff, KATHLEEN L. JACKSON, was born on P6/(b)(6) and is now 55 years old. She resides at P6/(b)(6), P6/(b)(6).

7. Plaintiff has been employed by the EEOC since October 25, 1975. She was employed as an Equal Opportunity Specialist (Employment), GS-11, Grade 6, assigned to the EEOC Buffalo Local Office. On November 15, 1988, Plaintiff resigned her position, effective November 16, 1988.

8. Defendant, EVAN J. KEMP, JR., is the duly appointed Chairman of the Equal Employment Opportunity Commission and is named herein in his capacity as the official head of the federal agency which employs the Plaintiff.

## IV. FACTS

9. At all times relevant herein, Plaintiff performed her duties in a fully successful, even outstanding manner. In

September, 1984, MS. JACKSON was granted a cash award for "sustained superior performance".

10. In her role as an employee of the EEOC and as an activist in various non-profit organizations, MS. JACKSON has achieved great respect within the human rights, political and legal communities. She has a widespread reputation as an articulate civil rights advocate; as a skilled, resourceful investigator; as an exceptional communicator with compelling command of both fact and law; and as an individual of the highest personal and professional integrity.

11. On March 10, 1988, the EEOC Buffalo Local Office Director, one JON PATTERSON, issued a final work performance appraisal which rated the Plaintiff as "Unacceptable".

12. This performance rating was accompanied by a lengthy narrative justification which was informed throughout by a biased system of case assignments; by a selective application of productivity standards; by a case status analysis which distorted and misrepresented Plaintiff's effectiveness; and by many inexplicable factual inaccuracies. A three-month disability leave was used to compute Plaintiff's elapsed case processing time.

13. Also on March 10, 1988, MS. JACKSON initiated informal contact with an EEO Counselor, the threshold step which is a necessary precondition to the filing of an ADEA or Title VII complaint by a federal employee.

14. In the course of investigating and conciliating Plaintiff's complaint, the EEO Counselor contacted Director PATTERSON. Eventually, on March 24, 1988, Director PATTERSON agreed to upgrade Plaintiff's performance appraisal from "unacceptable" to "marginal".

15. However, instead of upgrading the appraisal, between March 24 and March 28, 1988, Director PATTERSON undertook various acts of retaliation against MS. JACKSON, as follows:

(a) On March 28, 1988, issued a revised appraisal, dated March 23, 1988, even more negative and biased than the original, breaching his March 24th agreement made during the EEO conciliation process:

(b) denied Plaintiff's request for annual leave; and

(c) issued Plaintiff a written warning of disciplinary action.

16. Moreover, on March 28, 1988, Director PATTERSON also denied MS. JACKSON a within-grade salary increase. Instead, she was placed on a 90-day "Performance Improvement Plan", which established the possibility of Plaintiff's termination 30 days after the end of the Performance Improvement Plan period.

17. The process and manner which characterized the aforesaid performance evaluations violated various agency rules and regulations. Further, Director PATTERSON failed to provide Plaintiff will all documents upon which he relied in making the

performance evaluations, also in violation of various EEOC regulations, and applicable collective bargaining agreements.

18. Finally, Director PATTERSON has engaged in a relentless campaign of harassment against MS. JACKSON, continuing through the present date, including assignment of work task deadlines which are patently unrealistic; assignment of the most complex cases evaluated by application of average processing standards; monitoring of mail and phone calls; demands for unpaid overtime and weekend work; and unwarranted personal criticisms, publicized to other office personnel.

19. No other employee of the EEOC Buffalo Local Office received an "Unacceptable" evaluation during the tenure of Director PATTERSON, which began in January, 1987.

20. There are five Equal Opportunity Specialists currently employed at the EEOC Buffalo Local Office. The other employees are Director PATTERSON and three clerk/secretaries.

21. At 55 years old, MS. JACKSON is the oldest Equal Opportunity Specialist. The other four Equal Opportunity Specialists include three women and one male.

22. Of the other three female Equal Opportunity Specialists, one is aged in her early-30's, one is in her mid-30's, and one is in her late-30's. Director PATTERSON is about 47 years old. The male Equal Opportunity Specialist is about 39 years old.

23. Throughout, Plaintiff MS. JACKSON has been held to a higher performance standard than the other four Equal Opportunity Specialists. This different performance standard is not justified by any EEOC rule or regulation.

24. Additionally, MS. JACKSON has been subjected to discriminatory case assignments and application of performance standards. The Defendant agency has also relied upon inaccurate factual information, concerning the status of various cases assigned to MS. JACKSON and other Equal Opportunity Specialists, where it knew, or reasonably should have known, that such information was inaccurate.

25. Buffalo Local Office Director PATTERSON also has exhibited a distorted, negative and demeaning attitude toward the female Equal Opportunity Specialist employees, as in the following examples:

(a) On several occasions, he has stated that "there are too many girls in the office" and that "the office needed more men";

(b) The Director habitually referred to the females in the office as "girls", even after numerous complaints by the female professionals and by an EEO Counselor;

(c) He has made comments about female staff "rubbing their hips" and "switching their tails" around the office;

(d) He told female employees that "women who wear mini-skirts" are "sluts".

(e) He continually related female clothing styles with substantive ability and maintained that the wearing of skirts and heels gave the female employees "a more confident air".

26. The foregoing attitude toward women, coupled with the Plaintiff's seniority, stature and long history of expert performance, resulted in the wrongful evaluations and conduct recounted herein.

27. Such wrongful evaluations and conduct by Director PATTERSON had no legitimate business purpose and were solely the result of willful discrimination based upon age and sex, in violation of the Age Discrimination in Employment Act, 29 U.S.C. §621, et seq. and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e, et seq.

28. On April 11, 1988, pursuant to 29 U.S.C. § 633(d), Plaintiff filed a Notice of Intent to File a Civil Action with the Defendant agency, as a prerequisite to an ADEA lawsuit. On or about the same day, Plaintiff also filed a Complaint of Discrimination against the EEOC, based upon sexual discrimination. This latter filing is a prerequisite to a Title VII lawsuit, pursuant to 42 U.S.C. § 2000e-16.

29. The ADEA and Title VII differ in the length of the prescribed time period which must elapse between the filing of

the prerequisite administrative complaint and the filing of a lawsuit. Under the ADEA, thirty (30) days must elapse. 29 U.S.C. § 633(d). Under Title VII, the time period is one hundred and eighty (180) days. 42 U.S.C. § 2000-16(c).

30. Plaintiff now files causes of action under both the ADEA and Title VII, even though the Title VII period has not fully elapsed, for several reasons:

(a) The charges of age and sex discrimination are intertwined and, as such, must be asserted together to maintain the integrity of the complaint herein;

(b) The EEOC conducted a "review" of the ADEA complaint, which was so cursory that MS. JACKSON was not even interviewed;

(c) On May 25, 1988, the EEOC concluded "that there is no actionable claim" for age discrimination;

(d) Since the age and sex charges are interrelated, the EEOC has clearly prejudged the Title VII claim;

(e) Accordingly, delay would be the only purpose served by waiting to add the Title VII claim and the only result could be the removal of Plaintiff from her job in early August, 1988, thirty days after the ninety-day Performance Improvement Plan period;

(f) EEOC can always conduct a good faith investigation of the Title VII claim, irrespective of the filing of this lawsuit, and therefore incurs no prejudice; and

(g) The 180-day Title VII waiting period is not a jurisdictional prerequisite and this Court has ADEA jurisdiction in any event.

31. To the extent that any criticism of MS. JACKSON's performance is valid, it is because her high standards for complete and rigorous fact investigation conflict with recent EEOC policy which established rapid closure of cases as a measure of performance, a policy which values quantity over quality.

32. Where EEOC rapid case closure policy conflicts with EEOC statutory duties, criteria based upon such policy cannot provide a legitimate business reason defense for any performance appraisal or job-related action.

33. Since the filing of the original Complaint in this action on June 17, 1988, the relentless, continuing campaign of harassment cited in paragraph 18 therein was temporarily relieved. Either the Plaintiff or Director PATTERSON were absent from the office for a total of several weeks, due to vacations, personal leave, and agency business. During the months of July and August, there were settlement discussions between attorneys for each party. Accordingly, the harassment abated and various conciliatory acts occurred, including the completion of Plaintiff's Performance Improvement Plan on relatively favorable

terms on July 19, 1988; the granting of Plaintiff's within-grade pay increase on July 31, 1988; and a meeting between Plaintiff and the Regional Director on August 19, 1988.

34. However, at the end of August, 1988, Director PATTERSON resumed his program of harassment, false accusations, threats and abuses of authority, all directed solely at Plaintiff. Incidents were continuous and occurred nearly every day for two months, September and October 1988. Given the nature of Plaintiff's job and the role of Director PATTERSON as her immediate and only supervisor, it was not unusual for several incidents to occur in a single work day.

35. Plaintiff's duties involved the investigation and documentation of employment discrimination allegations. During the September-October, 1988 period, her workload averaged about 37 cases. A developed case file could contain hundreds of pages of evidence, as well as dozens of pages of investigator notes, analysis, and work logs. In their development and analysis of evidence, skilled investigators like the Plaintiff functioned much as lawyers and judges. An investigator is expected to recommend a case disposition, supported by a quality written evidentiary report. Investigators must also be able to evaluate damages and negotiate settlements. Director PATTERSON was charged with directing and evaluating the work conducted by Plaintiff and four other investigators. Since Director PATTERSON's authority extended from case assignments and scheduling investigative priorities through the approval of

evidentiary determinations and settlement resolutions, he had unlimited opportunity to criticize and countermand, to reschedule and revise, to disrupt and dispute, and generally to harass Plaintiff over endless issues, great and small, from high EEOC policy to minor matters of grammar and punctuation style. Some examples will illustrate what Plainiff endured every day:

(a) Investigators composed a weekly work plan, projecting specific work tasks for specific cases. Director PATTERSON would direct Plaintiff to do other work on other cases, then criticize her for not completing projected casework in the original work plan.

(b) Director PATTERSON, having approved a weekly work plan, would later select a case not in the work plan and set an arbitrary deadline for completion of that case or for completion of some work task related to the case. Through such conduct, he constantly defeated any attempt by Plaintiff to rationally schedule her caseload tasks and witness interviews.

(c) As Plaintiff would be at a critical stage in resolving a case, Director PATTERSON would demand she stop working on the case to produce a progress report on other cases, impeding her work on the current case.

(d) Director PATTERSON would demand a written report requiring lengthy analysis of an itemized list of case issues and then complain the report was too long, denying he had ever asked

for such a detailed report. Or he would ask for a short report, then complain it was too short. And so on.

(e) Director PATTERSON assigned case work deadlines with no regard for the complexity of a case. Since Plaintiff had been assigned the greatest number of complex and difficult cases, she was under constant pressure to meet unrealistic deadlines, providing the Director with weekly opportunities -- in addition to periodic performance evaluations -- to criticize Plaintiff's work production as measured by case closures and elapsed case processing time.

(f) One Monday, Director PATTERSON told Plaintiff to work on nothing else but one particular case and that there would be "dire consequences" for Plaintiff if the case were not resolved by the end of the week. Ultimately, Plaintiff developed a proposed resolution involving back pay damages of $18,000.00, plus job reinstatement. Plaintiff stated her belief that both parties would accept this settlement. Director PATTERSON, insisting that $18,000.00 <u>without</u> reinstatement was all the relief warranted by the case, directed Plaintiff to call the Charging Party and tell her that she must accept $18,000.00 as "full relief" or the EEOC would close her case. Plaintiff refused this directive, as being contrary to EEOC policy on "full relief".

(g) The Charging Party in the aforesaid case was a woman comparable in age and background to Plaintiff. Director PATTERSON stated his opinion that this woman "could not handle

the increased duties and she was not a good manager. She was probably burned-out. People change over the years and can't handle new situations." This case, which Director PATTERSON wanted to settle for $18,000.00, eventually settled for $28,500.00, after the New York City EEOC office assumed responsibility for settlement negotiations.

(h) Often, investigators must subpoena documents from respondent employers, an event which tolls the statute of limitations for any subsequent lawsuit. Director PATTERSON would ignore this tolling factor in setting case processing deadlines for Plaintiff. On one occasion, the Director informed Plaintiff to submit her evidence analysis report ("Investigator's Memorandum") and "Letter of Determination" on the same day that a subpoena response was due, a nearly impossible task.

(i) The examples listed above are not singular events. During September and October, hardly a day passed without the occurrence of at least one harassment incident. Aside from the cumulative emotional distress resulting from this continuous campaign of harassment, there was a disruptive impact upon Plaintiff's work production which, in turn, set her up for a poor performance evaluation no matter how hard she worked or how well she performed.

36. Within this debilitating work environment, Director PATTERSON engaged in the following misconduct:

(a) On several occasions between late March, 1988 and June, 1988, Plaintiff asked Clarence Funderbirk, the only male investigator, to witness conversations between herself and Director PATTERSON. In retaliation for this supportive behavior toward Plaintiff, Director PATTERSON denied Mr. Funderbirk a July, 1988 career ladder promotion and pay increase and otherwise harassed Mr. Funderbirk, who eventually took a disability leave in September and filed a Title VII retaliation charge against PATTERSON.

(b) On Thursday, October 27, 1988, at about 5:00 P.M., Director PATTERSON presented Plaintiff with her performance evaluation for the period March 1 through September 30, 1988. This evaluation rated her "Marginal" on "personal effectiveness" and included lengthy derogatory claims which were career impairing. Such claims were either untrue or were the direct result of circumstances generated by the Director's own conduct. This October, 1988 evaluation was also informed by the same biased application of performance criteria which tainted the Director's March 1988 appraisals. Director PATTERSON demanded that Plaintiff sign the evaluation immediately. Plaintiff became traumatically upset and physically ill. Before leaving work, she filled-out an application for leave form and submitted it to PATTERSON.

(c) On Saturday, Plaintiff received a letter from Director PATTERSON which disapproved her leave application, declared her "AWOL" for the October 28th workday, and directed

her to return to work on Monday, October 31, 1988 or be subjected to disciplinary action.

(d) Director PATTERSON was in New York City during the October 31 - November 4 work week. Each day, Plaintiff called in sick, speaking with another investigator, Elizabeth Cadle, who was Acting Director. In the Buffalo Office, a paycheck is customarily and routinely mailed to a sick employee. During their phone conversation on Tuesday, Plaintiff asked Ms. Cadle to mail her paycheck. On Friday, November 4th, when Plaintiff visited the office to submit her medical excuse, she was told by Ms. Cadle that Director PATTERSON had instructed her to withhold the paycheck until Plaintiff issued written mailing instructions. Ms. Cadle had been further instructed not to inform Plaintiff of this change in customary procedure unless Plaintiff raised the matter.

(e) Plaintiff's medical excuse supported a sick leave through November 18, 1988. On November 7, Director PATTERSON telephoned Plaintiff to inform her that the medical excuse was deficient and unacceptable. He directed her to report for work. Plaintiff submitted a more detailed medical letter two days later. On November 14, Director PATTERSON called to reverse his earlier decision, now accepting the first medical excuse but noting, correctly, that her accrued sick leave expired as of November 14.

(f) However, the reason Plaintiff had insufficient accrued sick leave to cover her until November 18th was due to

the wholly capricious failure of Director PATTERSON to sign and submit paperwork restoring three months sick leave credited to Plaintiff through a worker's compensation proceeding in 1987. The submission of such paperwork was a non-discretionary, ministerial act which Director PATTERSON refused to perform, despite repeated requests from Plaintiff, including a November 10, 1988 written request.

(g) On November 15, 1988, Plaintiff submitted her resignation, effective November 16, 1988, citing the Director's "harassment" which "has become intolerable".

37. With the exception of the retaliatory action directed against investigator Funderbirk, Plaintiff was the only Buffalo Office employee who was subjected to the aforementioned unfavorable and abusive treatment.

38. Throughout, and especially during the three week period preceding Plaintiff's resignation, the Defendant agency was informed, often in detail, about the aforementioned circumstances and events. Such information was conveyed directly from Plaintiff's attorney to the Defendant's Washington, D.C. attorney. Upon information and belief, the latter then relayed such information directly to supervising officials who had authority to investigate and restrain the misconduct of Director PATTERSON. Apparently such officials were unwilling or unable to undertake corrective action.

39. Throughout, the foregoing actions were motivated by illegal age, sex and retaliatory bias. Throughout, the EEOC and its employees and agents acted willfully and knowingly to deprive Plaintiff of federal statutory rights prohibiting age and sex discrimination in federal employment and protecting her from retaliation for the assertion of such rights. Such conduct is particularly wrongful where it involves the EEOC, the federal agency charged with enforcement of the same statutory rights and duties against all other government agencies and most private employers.

40. The relief demanded herein is essential to vindicate, guarantee and prevent interference with Plaintiff's constitutional and statutory rights. Plaintiff has suffered, and continues to suffer, loss of earning capacity, employment opportunity, career fulfillment, and personal dignity.

## PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that this Honorable Court enter judgment:

1. Declaring that the Equal Employment Opportunity Commission has engaged in willful acts of age discrimination against Plaintiff in violation of the ADEA, 29 U.S.C. § 633a.

2. Declaring that the Equal Employment Opportunity Commission has engaged in acts of sexual discrimination against Plaintiff in violation of Title VII, 42 U.S.C. § 2000e-16.

3. Declaring that the Equal Employment Opportunity Commission has engaged in acts of retaliation against Plaintiff, both before and after the filing of the original Complaint, in violation of Title VII, 42 U.S.C. § 20002-3(a) and § 2000e-16; and in violation of the ADEA, 29 U.S.C. § 632d and § 633a, and 29 C.F.R. § 1613.261.

4. Granting injunctive relief against the Equal Employment Opportunity Commission, as follows:

(a) Directing that Plaintiff's March 23, 1988 performance appraisal rating be upgraded to "Fully Successful", including removal of any derogatory language resulting from the improper discriminatory and retaliatory bias cited herein;

(b) Directing that Plaintiff's October 27, 1988 performance appraisal rating be upgraded to "Highly Effective", including removal of any derogatory language resulting from the improper discriminatory and retaliatory bias cited herein;

(c) Directing that any record of adverse disciplinary and/or performance-related action be removed from any and all personnel files maintained by the Defendant for Plaintiff, and from any and all "deficiency" files maintained by the Defendant at any location;

(d) Directing the Defendant to grant Plaintiff any and all within-grade salary increases consistent with "Fully Successful" 1988 performance appraisal rating(s);

(e) Directing the reinstatement of Plaintiff, together with all accrued civil service and collective bargaining agreement rights and benefits;

(f) Directing the Defendant, and its agents and employees, to refrain from any further violations of the ADEA and Title VII, including acts of retaliation and harassment against Plaintiff and any other Defendant employee providing testimonial evidence in this case.

5. Granting Plaintiff judgment against the Equal Employment Opportunity Commission for back pay, as measured by the differential between Plaintiff's salary as of March 27, 1988 and any within-grade salary increases consistent with "Fully Successful" 1988 performance appraisal rating(s); for back pay, as measured from the effective date of Plaintiff's November 16, 1988 resignation; for any and all applicable lost fringe benefits; for appropriate front pay; for all other economic loss; and for all appropriate accrued interest.

6. Awarding Plaintiff reasonable costs and expenses herein.

7. Awarding Plaintiff reasonable attorneys fees.

8. Granting such other and further relief as this Court may deem just, proper and equitable.

DATED: January 15, 1991

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# Suit accuses anti-bias agency of discrimination

## Amherst woman claims age, sex harassment forced her to resign from U.S. job

By DAN HERBECK
*News Staff Reporter*

An Amherst woman contends in a U.S. District Court lawsuit that age and sex discrimination led her to quit her job with the federal agency responsible for investigating such cases.

Kathleen L. Jackson, 59, claims her boss referred to women who wore miniskirts as "sluts," annoyed the women who worked for him by calling them "girls," criticized older workers and harassed Ms. Jackson to the point that she became ill and resigned.

Her former boss, Jon Patterson, director of the Buffalo office of the U.S. Equal Employment Opportunity Commission, denies the accusations.

The EEOC enforces federal laws barring discrimination in the workplace — whether by race, sex or age — yet the allegations of harassment involve in the agency's Buffalo office.

Three years after she quit her job and sued the government, the case has not come to trial. U.S. District Judge John T. Curtin met with attorneys on both sides of the case last week. William A. Price, Ms. Jackson's attorney, said a trial still appears at least a year away.

Ms. Jackson contends that Patterson drove her out of her job through harassment in 1987 and 1988.

Patterson, "would say things like, 'Somebody who has worked the same job for a long time, they just get burned out,'" Ms. Jackson said. "He had an attitude that if you were an older person, like me, you couldn't do the job anymore, you should get out."

On July 24, Curtin denied a government attorney's request that the case be dismissed. He said the accusations by Ms. Jackson are "sufficient to raise an issue of fact for the jury."

*See Lawsuit Page A17*

Kathleen L. Jackson still must wait another year for a trial.

# Lawsuit: Leadership of Thomas under attack

*Continued from Page 1*

Patterson, 51, said Ms. Jackson's complaints are untrue and unfair.

"There's nothing to it," Patterson said this week. "She will have her day in court.

"I think her problems had a lot more to do with her disagreement about the direction the agency took under Chairman Thomas," he added, referring to Clarence Thomas, the EEOC chairman at the time and now President Bush's nominee to the U.S. Supreme Court.

Although Thomas, who was EEOC chairman from 1982 to 1990, had no direct connection with the Jackson case, the lawsuit initially was filed against him. But now, the suit names Evan J. Kemp, who took over the position when Thomas became a federal appeals court judge.

Ms. Jackson, who went to work for the commission in 1973, is known in the Buffalo area as a former president of the Buffalo chapter of the National Organization for Women and a leader in the local movement for abortion rights. She also helped lead the effort to allow women as members of the Buffalo Club.

"I'm what you call a TOF — that's a 'tired old feminist,'" she said.

Ms. Jackson, who was makin $40,000 a year when she left he federal job, now makes considera bly less working as a grants coo dinator for Neighborhood Hou ing Services.

She said she remains angr about the changes made in th EEOC by Thomas and consider him a "frightening" choice for th Supreme Court.

"Before he took over, we vigor ously investigated every discrimi nation claim. After he took over the main focus was closing cases,' she said. "The agency became to tally pro-business; you took th employer's side. Anybody whc came with a complaint was to bc viewed as a kook, just another dis-gruntled worker."

Ms. Jackson said much of her problem stemmed from the agency's new direction under Thomas, and how Patterson put Thomas' directives into action in the Buffalo office. When she disagreed with Patterson on some cases, she said, he retaliated by giving her bad performance ratings and criticizing her work.

Patterson, an EEOC employee since 1978, disagrees. He said his ratings of Ms. Jackson were based on "her conduct and performance" rather than any personal disagreements.

"I think Judge Thomas brought some management tools that served us well," Patterson said. "He made us all focus more on law enforcement rather than on being a social service agency. That helped enable us to make clearer, quicker decisions on our cases."

Patterson said that his office consists of himself, four investigators and three clerical aides and that they handle all the discrimination complaints in the state outside New York City. The office examines about 300 complaints a year and closes about the same number of cases, he said.

If an investigation indicates that a person was discriminated against by an employer, Patterson said, the commission attempts to work out a settlement between the two parties. If no settlement can be achieved, he said, the commission files a federal lawsuit against the employer.

Court's order on Summary Judgment and Dismissal

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

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KATHLEEN L. JACKSON,

Plaintiff,

-vs- CIV-88-654C

EVAN J. KEMP, JR., in his capacity as Chairman, Equal Employment Opportunity Commission,

Defendant.

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APPEARANCES: WILLIAM A. PRICE, ESQ., Buffalo, New York, for Plaintiff.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Office of Legal Counsel (GERALD M. GOLDSTEIN, ESQ., of Counsel), Washington, D.C., for Defendant.

## BACKGROUND

Plaintiff, Kathleen L. Jackson, brings this suit for alleged age and sex discrimination on the job under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, et seq., and Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e, et seq. Ms. Jackson, employed from 1975 until late 1988 at the Equal Employment Opportunity Commission ("EEOC"), claims that her supervisor at the EEOC, Jon Patterson, harassed and discriminated against her to the point where she was forced to resign her position.

Ms. Jackson's suit was filed on June 17, 1988, prior to her resignation. It alleged that she

> [1] was issued an "unacceptable" performance rating, [2] was denied a scheduled within-grade salary increase, [3] was placed on a

RR 12/9/91

> "performance improvement plan" which could result in her termination from employment . . . [and (4)] after Plaintiff consulted an EEO Counselor concerning the original wrongdoing, the Defendant agency engaged in various acts of retaliation . . . .

Item 1, ¶ 2. These allegations were brought to the EEOC's attention when Ms. Jackson contacted EEOC counselors on March 10, 1988, and March 28, 1988. See Item 35, Exhs. A-D. Ms. Jackson also filed, pursuant to the ADEA, 29 U.S.C. § 633a(d), a Notice of Intent to File a Civil Action, Item 35, Exh. I, and, pursuant to Title VII, 42 U.S.C. § 2000e-16, a Complaint of Discrimination, Item 35, Exhs. E-H.

Subsequent to the filing of the federal suit, Ms. Jackson moved to file an amended complaint in this court incorporating allegations of discrimination by Mr. Patterson occurring after June 17, 1988. Item 30, ¶¶ 33-38. This motion was granted. Item 29. The amended complaint alleges that Mr. Patterson conducted a "program of harassment, false accusations, threats and abuses of authority, all directed solely at Plaintiff." Item 30, ¶ 34. Specifically, it alleges in detail that, between August and November, 1988, Mr. Patterson made unreasonable work demands on plaintiff, directed that she settle a case in violation of agency guidelines, made derogatory comments toward her, retaliated against a co-employee for assisting plaintiff, negatively evaluated plaintiff, and deprived plaintiff of sick leave to which she was entitled. Id. ¶¶ 35-38. The intensity of the pressure brought to bear by

Mr. Patterson allegedly forced plaintiff to resign from her position effective November 16, 1988.

Defendant moves to dismiss the allegations in plaintiff's amended complaint which postdate the allegations in the first complaint. Defendant argues that (1) plaintiff failed to exhaust her administrative remedies with respect to her allegations of constructive discharge, (2) she failed to demonstrate an equitable reason why the administrative filing requirements should be waived or extended, and (3) even if her claims are not barred by exhaustion, she has failed to make out a prima facie case of constructive discharge.

## FACTS

Plaintiff was born on P6/(b)(6). She worked at the EEOC from October 25, 1975, until November 16, 1988. At the time of her resignation, she was employed as an Equal Opportunity Specialist (Employment), GS-11, Grade 6, at the Buffalo EEOC office. In September, 1984, Ms. Jackson received a cash award for "sustained superior performance." Item 14, ¶ 9. In January, 1987, Jon Patterson became Director of the Buffalo EEOC office. From early 1987 until Ms. Jackson's resignation, Mr. Patterson was her immediate and only supervisor.

The first major incident addressed in the complaint occurred on March 10, 1988, when Mr. Patterson issued a final work performance rating for Ms. Jackson of "Unacceptable." Id. ¶ 11. This performance rating was accompanied by a lengthy

narrative negatively describing plaintiff's work. That same day, Ms. Jackson initiated contact with an EEOC counselor in an effort to resolve the dispute. The counselor interviewed both parties and, among other things, secured a promise from Mr. Patterson that he would be willing to upgrade plaintiff's evaluation to "Marginal." Item 35, Exh. A.[1]

Instead of following through with this promise, however, Mr. Patterson, between March 24 and March 28, 1988, undertook various acts of retaliation against plaintiff. He issued a revised appraisal more negative than the first, denied plaintiff's request for annual leave, and warned plaintiff in writing of disciplinary action. He also denied plaintiff a within-grade salary increase and placed plaintiff on a 90-day "performance improvement plan" ("PIP"), which, if not completed successfully, could have led to plaintiff's termination. Item 30, ¶¶ 15, 16. Ms. Jackson immediately contacted an EEOC counselor to air her claims of retaliation. Item 35, Exh. C. The counselor informed Ms. Jackson that no resolution could be reached about her allegations. Id. On April 10 and 11, 1988, Ms. Jackson filed her administrative complaints under the ADEA and Title VII with the EEOC. After rejection of her ADEA complaint on May 25, 1988, Ms. Jackson filed the present suit on June 17, 1988.

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[1] Ms. Jackson also complained that Mr. Patterson referred to women as "girls," and made other derogatory remarks indicating a sexist attitude. See Item 35, Exh. A; Item 30, ¶ 25.

Once the suit was filed, tensions temporarily cooled. Either Ms. Jackson or Mr. Patterson was gone from the office for a total of several weeks, and settlement discussions took place. Plaintiff completed her PIP on relatively favorable terms on July 19, 1988, she was granted a within-grade pay increase on July 31, 1988, and she met with the Regional Director on August 19, 1988. Item 30, ¶ 33. Plaintiff's negative rating was not expunged from her record, however. Nor was plaintiff granted her pay increase retroactively.

At the end of August, 1988, Director Patterson allegedly resumed his harassment of plaintiff. His actions included assigning plaintiff an unreasonable workload, changing her work abruptly and haphazardly, criticizing plaintiff for failing to follow his directives, making derogatory comments toward plaintiff and other women in the office, negatively evaluating plaintiff, and depriving plaintiff of sick leave to which she was entitled. Id. ¶¶ 35-38. These actions took place on a daily basis, with several incidents sometimes occurring on the same day. The constant pressure, coupled with Mr. Patterson's demand on October 27, 1988, that plaintiff sign a negative evaluation of her performance from March 1 through September 30, 1988, caused Ms. Jackson to become physically ill and apply for sick leave. On October 29, 1988, Ms. Jackson received a letter from Director Patterson disapproving her leave application, declaring her "AWOL" for October 28, and directing her to return to work on Monday, October 31, 1988, or face

disciplinary action. Ms. Jackson submitted a medical excuse which, on November 7, 1988, Mr. Patterson deemed unacceptable. Plaintiff submitted a more detailed medical letter two days later. Director Patterson then accepted the first medical excuse, but informed plaintiff her sick leave expired as of November 14. Plaintiff alleges that her sick leave would have extended longer except that Mr. Patterson had failed to submit routine paperwork crediting Ms. Jackson with additional sick leave. Item 30, ¶ 36. Rather than return to work under "intolerable" conditions, Ms. Jackson resigned on November 16, 1988. Ms. Jackson did not seek counseling, nor did she file an additional administrative complaint with the EEOC with respect to the matters that took place in August through November, 1988.

## DISCUSSION

### I. SUMMARY JUDGMENT

Defendant has moved for partial summary judgment. In order to prevail on its motion, defendant must show "that there is no genuine issue as to any material fact and that [it] is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A material fact is one "that might affect the outcome of the suit under the governing law . . . . ." Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. See also Taggert v. Time, Inc., 924 F.2d 43, 46 (2d Cir. 1991). The court "must resolve all

ambiguities and draw all reasonable inferences in favor of the party defending against the motion." Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 249 (2d Cir. 1985), cert. denied, 484 U.S. 918 (1987).

II. ARE THE ALLEGATIONS IN THE AMENDED COMPLAINT "REASONABLY RELATED" TO COMPLAINTS FILED BEFORE THE EEOC?

Defendant moves to dismiss the allegations of wrongdoing in plaintiff's amended complaint which occurred after June 17, 1988, the date Ms. Jackson filed this suit. These allegations amount to a claim of constructive discharge. Defendant argues that this court is without subject matter jurisdiction over these claims because plaintiff failed to exhaust her administrative remedies with respect to them. See Stewart v. United States Immigration & Naturalization Serv., 762 F.2d 193, 198 (2d Cir. 1985).

Plaintiff acknowledges that she did not file new administrative complaints concerning the events which transpired after June 17, 1988. Plaintiff also admits that she cannot now exhaust her administrative remedies. Item 34, at 2. However, there is no dispute that plaintiff filed timely administrative complaints and exhausted her administrative remedies with respect to the sex and age discrimination claims brought in the original complaint. If the incidents occurring after the filing of the EEOC claims are "reasonably related" to the charges filed with the EEOC, this court may entertain them. Owens v. New York City Housing Auth., 934 F.2d 405, 1991 WL 82488 (2d Cir. 1991);

Stewart v. INS, 762 F.2d at 198; Alemandral v. New York State Office of Mental Health, 743 F.2d 963, 967 (2d Cir. 1984); Kirkland v. Buffalo Bd. of Educ., 622 F.2d 1066, 1068 (2d Cir. 1980).

Applying this "reasonably related" test to the present facts, it can readily be seen that plaintiff's claim for constructive discharge is related to her earlier claims of harassment, promotion denial, and retaliation. An act is reasonably related to prior acts of discrimination if it "address[es] the same alleged course of discrimination," Alemandral, 743 F.2d at 967; Blesedell v. Mobil Oil Co., 708 F. Supp. 1408, 1420 (S.D.N.Y. 1989), or "constitute[s] allegations of continuing discrimination," Alemandral, 743 F.2d at 967; Blesedell, 708 F. Supp. at 1420, or if it "stems from" those prior incidents. Kirkland, 622 F.2d at 1068. Where retaliation has been alleged, and especially where claims of retaliation have been brought before the EEOC, subsequent acts of discrimination by the same party simply must be considered reasonably related to prior retaliatory acts. See Owens, 934 F.2d 405, 1991 WL 82488 ("when an employee brings a claim alleging retaliation for filing a complaint with the EEOC, the retaliation claim is deemed 'reasonably related' to the original EEOC filing. In such a case, the allegations of retaliation are seen as stemming from the earlier discriminatory incident . . . ").

> [T]here is a practical reason for treating retaliation in this way: having once been retaliated against for filing an

> administrative charge, the plaintiff will naturally be gun shy about inviting further retaliation by filing a second charge complaining about the first retaliation.

Malhotra v. Cotter & Co., 885 F.2d 1305, 1312 (7th Cir. 1989). See also Waiters v. Parsons, 729 F.2d 233, 237 (3d Cir. 1984) ("The rationale behind these decisions is that once the EEOC has tried to achieve a consensual resolution of the complaint, and the discrimination continues, there is minimal likelihood that further conciliation will succeed.").

In this case, the acts of Director Patterson alleged to have taken place between August and November, 1988, can all be seen as continuing, retaliatory acts of discrimination related to the prior difficulties raised by plaintiff in her EEOC filings. All of the alleged discrimination was perpetrated by the same person. It apparently intensified after Ms. Jackson brought her complaints.[2] Most importantly, the alleged acts of discrimination were similar. In March, as in November, Ms. Jackson complained that Mr. Patterson unfairly evaluated her, threatened her with disciplinary action, pressured her daily to put out more work, made derogatory comments toward her and others, and denied her requests for leave. The court therefore holds that the alleged acts of discrimination in plaintiff's

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[2] It is interesting to note that, whereas the first EEOC counselor appeared to elicit a somewhat conciliatory reaction from Director Patterson, see Item 35, Exh. A (first counselor's notes), the second counselor immediately informed Ms. Jackson after speaking with Mr. Patterson that "no resolution could be reached with management concerning her allegations." Id., Exh. C (second counselor's notes).

amended complaint are "reasonably related" to the acts of discrimination plaintiff raised before the EEOC. See Waiters, 729 F.2d at 238 (although "discriminatory officials and acts are different, the core grievance--retaliation--is the same" and is therefore reasonably related); Blesedell, 708 F. Supp. at 1420 (claim of constructive discharge reasonably related to prior complaints of discrimination).[3] Accordingly, this court has subject matter jurisdiction over these allegations.

III. HAS PLAINTIFF MADE OUT A PRIMA FACIE CASE OF CONSTRUCTIVE DISCHARGE?

Defendant argues that even if plaintiff's claims of constructive discharge are reasonably related to her earlier EEOC complaints, plaintiff's claims should be dismissed for failure to allege a prima facie case of constructive discharge.

"A constructive discharge occurs when the employer, rather than acting directly, 'deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation.'" Lopez v. S.B. Thomas, Inc., 831 F.2d 1184, 1188 (2d Cir. 1987) (quoting Pena v. Brattleboro Retreat, 702 F.2d 322, 325 (2d Cir. 1983) (quoting Young v. Southwestern Savings & Loan Ass'n, 509 F.2d 140, 144 (5th Cir. 1975)). See also Less, 705 F. Supp. at 114. To find a constructive discharge, "the trier of fact must be satisfied that

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[3] Defendant's reliance on this court's earlier decision, Less v. Nestle Co., 705 F. Supp. 110, 113 (W.D.N.Y. 1988), is misplaced, as that case did not involve claims of retaliation.

the . . . working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." Id. (quoting Pena, 702 F.2d at 325 (quoting Rosado v. Santiago, 562 F.2d 114, 119 (1st Cir. 1977)). See also Lopez, 831 F.2d at 1188. This objective standard is best applied by a jury. Watson v. Nationwide Ins. Co., 823 F.2d 360, 361 (9th Cir. 1987); Blesedell, 708 F. Supp. at 1420; Thames v. Maurice Sporting Goods, 686 F. Supp. 208, 213 (N.D. Ill. 1988).

The court concludes that Ms. Jackson has alleged sufficient facts that a jury could reasonably find her constructively discharged by Director Patterson's constant discriminatory pressure. If viewed in isolation, none of the specific acts allegedly taken by Mr. Patterson--the unfair evaluations, withholding of job promotions, threats of disciplinary action, unfavorable job assignments, pressure to put out more work, derogatory comments, or denial of requests for leave--would be so intolerable as to justify Ms. Jackson's resignation. See, e.g., Less, 705 F. Supp. at 114; Grant v. Morgan Guar. Trust Co., 638 F. Supp. 1528, 1539 (S.D.N.Y. 1986); Watson, 823 F.2d at 361. There must be "aggravating factors" to raise isolated instances of discrimination to the level of intolerability. Id.; Clark v. Marsh, 665 F.2d 1168, 1174 (D.C. Cir. 1981). A "continuous pattern of discriminatory treatment" can supply the aggravating factor. Id.; Watson, 823 F.2d at 361; Satterwhite v. Smith, 744 F.2d 1380, 1382 (9th Cir. 1984). In

this case, the allegations that Mr. Patterson pressured and harassed Ms. Jackson in face-to-face, daily meetings, see Rosado, 562 F.2d at 120 n.4, in the context of retaliation for Ms. Jackson's earlier, futile complaints to the EEOC--the very agency that employed her--are sufficient to raise an issue of fact for the jury.

Accordingly, defendant's motion for partial summary judgment is denied. Counsel are directed to write to the court not later than August 6, 1991, suggesting what discovery is needed in order to prepare this case for trial and suggesting cutoff dates for completion of discovery. If it appears that there may be legal problems involved in resolving discovery disputes or that motions in limine ought to be made to resolve some of the issues, the court shall be notified. Upon receipt of the letter communications, the court will issue an order.

So ordered.

JOHN T. CURTIN
United States District Judge

DATED: July 24, 1991

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| 010. report | Terry v. Kemp (1 page) | n.d. | P6/b(6) |

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[Equal Employment Opportunity Commission Confirmation Briefing Materials] [3]

ds79

**RESTRICTION CODES**

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P1 National Security Classified Information [(a)(1) of the PRA]
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P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

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b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

AO 440 (Rev 1/90) Summons in a Civil Action

# United States District Court

WESTERN DISTRICT OF TENNESSEE

JOSEPH RAY TERRY, JR.
Plaintiff,

v.

EVAN J. KEMP, JR.
Defendant.

## SUMMONS IN A CIVIL ACTION

CASE NUMBER: 92-2729

TO: (Name and Address of Defendant)

EVAN J. KEMP, JR.
CHAIRMAN, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
1801 L. Street N.W.
Washington, D.C. 20507

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon

PLAINTIFF'S ATTORNEY (name and address)

DONALD A. DONATI
DONATI AND ASSOCIATES, P.C.
629 Poplar Avenue
Memphis, Tennessee 38105

an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

J. FRANKLIN REIF

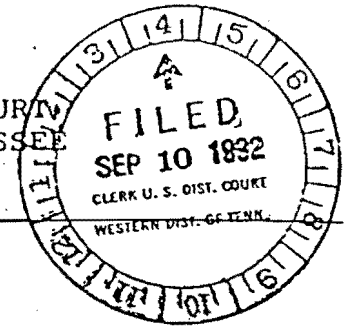
CLERK

DATE 9-10 92

Vicki Miles

BY DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION




| | | |
|---|---|---|
| JOSEPH RAY TERRY, JR., | ) | |
| Plaintiff, | ) | |
| v. | ) | CIVIL ACTION NO. |
| EVAN J. KEMP, JR., Chairman of the UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, | ) | 92-2729-MA/A |
| Defendant. | ) | JON P. McCALLA<br>JAMES H. ALLEN |

COMPLAINT

I.
Introduction

This action is brought by the Plaintiff, Joseph Ray Terry, aginst his employer, The United States Equal Employment Opportunity Commission seeking declaratory and injunctive relief as well as damages. As more specifically set forth below, Plaintiff asserts that he has been subjected to unlawful intentional discrimination on the basis of race and sex in violation of Title VII of the Civil Rights Act of 1964. Plaintiff further asserts that he has been subjected to unlawful retaliation in violation of Section 704(a) of Title VII.

II.
The Parties

1. The Plaintiff, JOSEPH RAY TERRY, JR., is a citizen of the United States and of the State of Tennessee, residing at all relevant times in the jurisdiction of the Western District of Tennessee.

2. The Defendant, EVAN J. KEMP., JR, is the Chairman of the United States Equal Employment Opportunity Commission [hereinafter "EEOC" or "Commission"] and, as such, is an Employer within the meaning of Section 717 of the Civil Rights Act of 1964 as amended by the Equal Employment Opportunity Act of 1972 and the Civil Rights Act of 1991, [hereinafter Title VII], 42 U.S.C. § 2000e-16.

3. At all relevant times herein, Defendant has continuously been an employer doing business in the State of Tennessee, the City of Memphis and the Western District of Tennessee, and has continuously had more than 15 employees.

4. At all relevant times herein, Defendant has continuously been an employer engaged in an industry affecting commerce under Section 701(b),(g) and (h) of Title VII, 42 U.S.C. §§ 2000e(b), (g) and (h).

## III.
## Jurisdiction

5. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 451, 1331, 1337 and 1343 and 42 U.S.C. § 2000e-5(f)(3), 5 U.S.C. § 5596, and the Civil Rights Act of 1991, Section 102 (b), 42 U.S.C. §§ 1981 (a) and (b) and 1988. This is a suit in law and equity instituted pursuant to Title VII, 42 U.S.C. § 2000e et seq. The Plaintiff also seeks relief under Title VII and under the Back Pay Act, 5 U.S.C. § 5596 for the Defendant's denial of Plaintiff's

right to equal employment opportunity in the federal government.

6. More than thirty days prior to the institution of this lawsuit, Plaintiff filed a charge and an amended charge with the Commission alleging continuing violations of Title VII by Defendant Employer and his agents. All conditions precedent to the institution of this lawsuit have been fulfilled.

## IV.
## Statement of Facts

7. Since at least February, 1985, Defendant has intentionally denied Plaintiff, a white male, promotion to the position of District Director of the Commission's Memphis District Office, a Senior Executive Service (hereinafter "SES") position, and otherwise has discriminated against him with respect to the terms, conditions, or privileges of employment on the basis his race (white) and sex (male).

8. Since at least February, 1985, Defendant has continued to discriminate against Plaintiff on the basis of race and sex, and in retaliation for Plaintiff's having previously filed charges of discrimination and retaliation against EEOC officials and having otherwise opposed practices made unlawful by Title VII.

9. Before and since the above date, Defendant has discriminated against Plaintiff on a continuing basis by refusing

to promote and/or select him for District Director and other SES positions within the EEOC, and has otherwise continued to discriminate against him with respect to the terms, conditions, or privileges of employment on the basis of:

(a) His race and sex in violation of Section 703(a)(1) of Title VII; and

(b) In retaliation for Plaintiff's having previously filed charges of discrimination and retaliation against EEOC officials and having otherwise opposed practices made unlawful by Title VII.

9. The discriminatory practices complained of above have deprived Plaintiff of equal employment opportunities and have otherwise adversely affected his status as an employee.

10. The unlawful employment practices complained of above were, and continue to be, intentional.

11. As a result of Defendant's continuing discrimination and retaliation against Plaintiff as described above, Plaintiff has suffered severe injury including, but not limited to, loss of income and benefits. In addition, Plaintiff has suffered emotional distress, embarrassment, mental anguish, loss of enjoyment of life, insomnia, humiliation and other non-pecuniary losses.

## V.
## Causes of Action

12. Plaintiff incorporates paragraphs 1 through 11 above as though specifically set forth herein, and for causes of action states as follows:

13. Defendant's actions constitute unlawful discrimination on the basis of race in violation of Section 703 of Title VII, as amended, 42 U.S.C. § 2000e et seq..

14. Defendant's actions constitute unlawful discrimination on the basis of sex in violation of Section 703 of Title VII, as amended, 42 U.S.C. § 2000e et seq..

15. Defendant's actions constitute unlawful retaliation in violation of Section 704(a) of Title VII, as amended, 42 U.S.C. § 2000e et seq..

## VI.
## Prayer for Relief

WHEREFORE, premises considered, Plaintiff respectfully prays that the Court cause service to issue in this case and set this matter for trial. Upon a hearing thereon, Plaintiff prays the Court grant the following relief:

1. A permanent injunction enjoining Defendant, his managers, executives, successors, assigns, and all persons in active concert or participation with him, from engaging in the discriminatory and retaliatory employment practices alleged above and any other

employment practice which discriminates against Plaintiff and other white males on the basis of race or sex or retaliates against persons for exercising their rights under the law.

2. Order Defendant, his officers, successors, assigns, and all persons in active concert or participation with him, to institute and carry out policies, practices, and programs which provide equal employment opportunities for white male employees and individuals who file charges and otherwise oppose Defendant's unlawful employment practices.

3. An Order instating Plaintiff to the position of District Director of the Memphis District Office, or an award of front pay until such time as that position becomes vacant. Alternatively, Plaintiff seeks to be placed in the position of District Director of the Atlanta District Office, the St. Louis District Office, or a comparable SES position to which Plaintiff is equitably entitled. In lieu thereof, Plaintiff requests an appropriate award of front pay until such time as he can be afforded rightful place relief;

4. An award of back pay, including, but not limited to, bonus awards, pay outs for performance, step increases, promotions, training, and other make whole relief;

5. An award of interest on back pay, benefits, bonuses, pay outs for performance, adjustments to pay and interest for taxation purposes and other monetary and make whole relief to which plaintiff may be entitled;

6. An award of all fringe and other benefits lost as a result of the Defendant's unlawful acts;

7. An award of seniority credit in the SES with all of its rights, privileges and benefits, including but not limited to satisfaction of probationary periods, sabbaticals, as well as educational opportunities afforded to similarly situated minorities and females, and other benefits from the earliest date of discrimination which the Court finds Plaintiff suffered;

8. An award of compensatory damages in an amount to be determined at the trial of this matter;

9. An award of all costs, disbursements and reasonable attorney's fees;

10. Such other relief as the Court deems just and proper.

RESPECTFULLY SUBMITTED,

DONATI AND ASSOCIATES, P.C.
629 Poplar Avenue
Memphis, Tennessee 38105-4509
(901) 521-0570

Donald A. Donati
Attorney at Law

Jeffery L. Atchley
Attorney at Law