

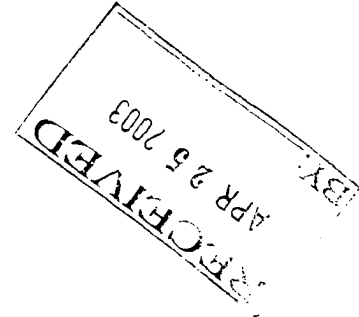


U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Denver District Office

303 East 17<sup>th</sup> Avenue, Suite 510  
Denver, CO 80203  
PH: (303) 866-1300 / 1301  
TTY (303) 866-1950  
FAX (303) 866-1386  
1-800-669-4000

April 24, 2003

Jean W. Riggs  
Office of Equal Employment Opportunity  
Department of Defense  
Defense Finance and Accounting Service  
1931 Jefferson Davis Highway, Suite 205  
Washington, D.C. 20376-5000

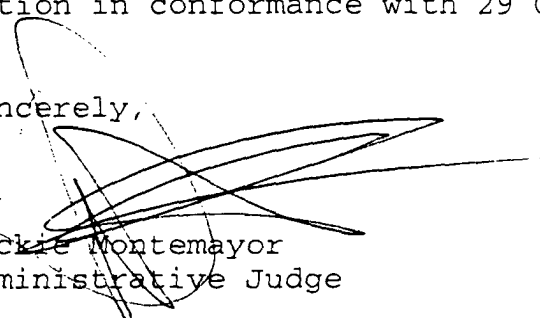


**RE:** EEO Complaints of John Mason v. Donald Rumsfeld  
Secretary, U.S. Department of Defense  
EEOC File No.320-A1-8267X  
Agency File No. DFAS-DE-DENV-01-002

Dear Ms. Riggs:

Enclosed please find a copy of the Decision in reference to the above captioned matters. I am submitting the decision for final action in conformance with 29 CFR Section 1614.

Sincerely,

  
Dickie Montemayor  
Administrative Judge

Enc. Hearing Record-Decision, Exhibits, Transcripts.

cc: Decision Only  
Frank Yount  
Barry Roseman  
John Mason



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Denver District Office

303 East 17<sup>th</sup> Avenue, Suite 510  
Denver, CO 80203  
PH: (303) 866-1300 / 1301  
TTY (303) 866-1950  
FAX (303) 866-1386  
1-800-669-4000

DECISION

COMPLAINT OF	/	
	/	
John Mason	/	EEOC CASE NUMBER
	/	320-A1-8267X
	/	
	/	
v.	/	
	/	
Donald H. Rumsfeld, Secretary,	/	
U.S. Department of Defense	/	AGENCY CASE NUMBER
	/	DFAS-DE-DENV-01-002

Complainant's Representative	Barry Roseman Roseman & Kazmierski LLC 1120 Lincoln Street, Suite 1607 Denver, CO 80203
Agency Representative	Frank Yount DFAS 6760 East Irvington, Place Denver, CO 80279
Agency	DFAS-Denver, Colorado
Nature of Complaint	Discrimination: Race, Color Reprisal
Administrative Judge	Dickie Montemayor 303 E. 17th Ave. Suite 510 Denver, CO 80203
Date of Hearing	January 15, 2003, February 6, 2003
Place of Hearing	Denver, CO

## I. INTRODUCTION

A hearing was conducted on the complaint of John Mason pursuant to his rights under EEOC Regulations for processing complaints of discrimination.

## II. BACKGROUND

Complainant contacted an EEO Counselor relative to allegations of discrimination based on race, African American, color (black), and reprisal against the Defense Finance and Accounting Service. The EEO counselor was unable to resolve the matters and Complainant filed formal complaints. The Agency conducted an investigation and after completion of the investigation, forwarded a copy of the investigation to Complainant who thereafter requested a hearing. The Agency requested the appointment of an EEOC Administrative Judge to conduct the hearing. The hearing was preceded by a mediation and pre-hearing settlement conference at which informal resolution was discussed. The parties were unable to resolve the matter informally therefore, the matter proceeded to hearing.

## III. ISSUE

1) Whether the Agency discriminated against Complainant on the basis of his race, African American, color (black), and/or reprisal when on June 29, 2000, he received summary ratings of

fully successful for the rating periods May 1, 1999, to September 30, 1999, and October 1, 1999, to April 30, 2000.

#### IV. FINDINGS OF FACT

Complainant at all times relevant to the complaint was employed by the Defense Finance Accounting Service. Complainant began working for the Air Force Finance and Accounting Service in June of 1983. He was first employed as an Operating Accountant GS-510-9/11. In 1987, Complainant transferred to the Military Pay directorate. In 1988, after working in the Military Pay directorate, he was promoted to the GS-12 level and held the position of Systems Accountant. The duties of the Systems Accountant required Complainant to "prepare changes to the manuals that the branch is responsible for." (H.T. 32). This meant that as laws and regulations changed Complainant was responsible for making the necessary changes to the manual. (H.T. 35). In order to accomplish this, Complainant researched the issue presented, prepared the necessary changes and submitted such changes to his supervisor for approval. The supervisor would then review the changes, identify any needed corrections and send the work product back to Complainant to make corrections. After Complainant made the changes, the work product was then sent out to the division chief for his/her signature. Revising the manuals amounted to approximately 20 per

cent of the total duties of the position. (H.T. 36). Complainant also had to address e-mails and phone inquiries primarily from professional finance officers at base level. (H.T. 37, Systems Accountant Position Description I.F. p. 85). Complainant was supervised during the early 1990's by Elouise Devine and in April of 1997, was supervised by Julia D. Agee, Chief of the Pay Guidance and Compliance Branch. There were seven Systems Accountants supervised by Ms. Agee during the time frame from May 1, 1999 to April 30, 2000, of these employees all were white except Complainant.

On or about November 12, 1997, Complainant filed a formal discrimination complaint against his supervisor Ms. Agee. (I.F. 283). In February of 1998, Complainant initiated EEO pre-complaint counseling. In this pre-complaint counseling Complainant alleged that Julia Agee discriminated against him and treated him differently in comparison to four other employees in the branch.<sup>1</sup>

During the time frame from May 1, 1999, to September 30, 1999, Complainant while employed in the Base Level Military Pay Guidance branch worked on various subject matter areas including, basic allowance for subsistence, vouchers, taxes, accessions, basic military training, special and incentive pays, cost of

---

<sup>1</sup>At the time of this pre-complaint EEO activity Julia Agee was known by her maiden name of Julia Summers.

living allowance, re-certification hostile fire pay/imminent danger pay, CZTE and bonus. He attended numerous Functional Requirement Reviews with customers and programmers providing them with entitlement procedural guidance. He reviewed researched and developed audit reports. (I.F. 291, OCI Transcript p. 14-22). During this same rating period Complainant undertook other new duties and responsibilities. He was advised that he would be working with the Embedded Operational Review Team. An embedded operational review is similar to an internal audit that looks at various critical processes of the Agency's operations. In the embedded operational review process, the reviewer first discusses the process with others to determine how they process documents and/or transactions. The reviewer then reviews the flow chart to determine whether the process actually follows the flow chart. If no problems were encountered the reviewer would write a report that consisted mainly of "boiler plate." (H.T. 79). If a problem was encountered then the reviewer would make findings and recommendations. Findings in this context, "would represent a problem that was severe enough to compromise the organizations processes." (H. T. 81). During the time through April 30, 2000, Complainant performed 15 reviews and identified 26 findings and wrote recommendations. (OCI Transcript p. 25). Of the findings and recommendations submitted all but one were accepted by the "customers or people in the directorate." (OCI Transcript p.

25).

On or about June 23, 2000, Julia Agee wrote an e-mail to the personnel department. In the e-mail, she advised that she had not provided Complainant with a copy of his performance plan for the new duties Complainant was assigned. (I.F. p. 190). Agee was advised to give Complainant either of two options, Complainant could sign a statement which indicated that he did not sign the performance plan but was aware of the ratings or he could sign the performance plan and extend the rating period 90 days. (I.F. 189). Complainant thereafter signed a statement indicating that he was aware of the requirements set forth in his performance plan although he did not sign it on or before January 31, 2000. (I.F. 183). Thereafter, on June 29, 2000, Complainant was provided with two appraisals one for his work from October 1, 1999, to April 30, 2000, and another for his work from May 1, 1999, to September 30, 1999. In the first appraisal he was rated as "met" in all categories and received a summary rating of "fully successful." (I.F. 27-28). In the second rating, he was also rated as "met" in all categories and received a summary rating of "fully successful." (I.F. 29-30). During the rating period in question, Complainant was the only employee that was assigned to work in two different areas i.e. the Military Pay areas and the Embedded Operational Review area.

Complainant's co-workers received more favorable appraisals

than he. For example, Samuel Chinnici was rated as "exceeds" in three elements and "met" in one element. He received an overall summary rating of "highly successful." (I.F. 192). Mary Cordean was rated as "exceeds" in two elements and "met" in three resulting in an overall summary rating of "highly successful." (I.F. 194-195). Vera Neuman was rated as "exceeds" in three elements and "met" in one resulting in an overall summary rating of "highly successful." Kathleen Schotka was rated as exceeds in to elements and "met" in two resulting in a overall summary rating of "highly successful." (I.F. 206-207). Karen Synn was rated as "exceeds in all elements and received an overall summary rating of "exceptional." (I.F. 210-211).

#### V. THE APPLICABLE LEGAL STANDARDS

In order to establish a case of unlawful discrimination, a Complainant must initially establish a prima facie case of discrimination. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). The elements of proof which comprise the Complainant's case will necessarily vary depending on the facts of the case. Moses v. Falstaff Brewing Corp., 550 F.2d 1113, 1114 (8th Cir. 1977); Burdine, supra at 253. If Complainant establishes a prima facie case, it has the effect of raising an inference of discrimination. Furnco Construction Co. v. Waters, 438 U.S. 567



(1978). If Complainant establishes a prima facie case the burden shifts to the Agency to articulate a legitimate, nondiscriminatory reason for the challenged action. Burdine at 253-4; McDonnell Douglas at 802. Complainant may then show that the reason articulated by the Agency is a mere pretext for discrimination. Burdine at 256; McDonnell Douglas at 804. St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993). The ultimate burden of persuading the trier of fact that the Agency discriminated against Complainant remains at all times with Complainant. To ultimately prevail, Complainant must prove, by a preponderance of the evidence, that the Agency's explanation is a pretext for discrimination. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000).

A) Prima Facie Case-Reprisal

The McDonnell Douglas paradigm set forth above applies equally to claims of reprisal. In order for the Complainant to prevail, he must establish a prima facie case. A prima facie case can be established by showing that he:

- 1) engaged in a protected activity;
- 2) that the Agency was aware of such activity;
- 3) that he suffered some adverse action; and
- 4) there is evidence tending to establish retaliatory motivation or, absent such evidence, that the Agency's actions followed the

protected activity within such a period of time that a retaliatory motive can be inferred. See Hochstadt v. Worcester Foundation for Experimental Biology, 425 F. Supp. 318 (D. Mass.), affd., 545 F. 2d 222 (1st Cir. 1976). As in the context of other forms of discrimination, the burden shifts to the Agency to articulate some legitimate non-discriminatory reason for its actions if the Complainant has presented a prima facie case. A Complainant may then show that the reason articulated by the Agency is a mere pretext for discrimination. Burdine at 256; McDonnell Douglas at 804. St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993). The ultimate burden of persuading the trier of fact that the Agency retaliated against the complainant remains at all times with the complainant.

I find that Complainant established by a preponderance of the evidence a prima facie case of reprisal. Complainant filed a prior EEO Complaint on November 12, 1997, and a pre-complaint that was initiated on February 26, 1998. (I.F. 283). There is no dispute that the Agency officials were aware of his prior complaint. (I.F. 390-391). It is also undisputed that the same person that was named in Complainant's prior complaint was his supervisor, Julia Agee, the same person who rated him. (I.F. 390-391). Similarly there is no dispute that Complainant received a "fully successful" performance appraisal. (I.F. 182). Thus, I find that he suffered an adverse action. This is

especially true given the fact that his co-workers received higher ratings than he and the undisputed evidence of record revealed that appraisals could play a role in the promotion process. See Johnson v. EEOC, EEOC Appeal No. 01872919(1988). I also find that the action took place within approximately two and one half years of his prior protected activity, a time frame within which retaliatory motives can be inferred. See Leatherman v. Secretary of the Navy, EEOC Appeal No. 01983615 (1999).

B) Prima Facie Case Race/Color Discrimination

In order to establish a prima facie case of race, and/or color discrimination Complainant must establish that he was a member of a protected class, he suffered an adverse action and persons outside of his protected class were treated more favorably than he. See Potter v. Goodwill Industries of Cleveland, 518 F.2d 864 (6th Cir. 1975). I find that Complainant has established a prima facie case of race, and/or color discrimination. Clearly the evidence is undisputed that he was a member of a protected class that he suffered an adverse action in the form of a performance appraisal lower than others outside of his protected class.

After Complainant has established the requisite inferences of discrimination, the Agency has a burden to articulate a legitimate, nondiscriminatory reasons for its action. Texas

Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). The Agency need not persuade the trier of fact that it was motivated by the proffered reason. Burdine, 450 U.S. at 254. Rather, the Agency may rebut the prima facie presumption of discrimination by clearly setting forth, through the introduction of admissible evidence, its reasons for not selecting appellant and selecting individuals outside of appellant's protected group(s). Id. The Agency's explanation for its actions must be legally sufficient to justify a judgment for the employer; the employer must "frame the factual issue with sufficient clarity so that the employee will have a full and fair opportunity to demonstrate pretext." 450 U.S. at 255-256; Parker v. United States Postal Service, EEOC Request No. 05900110 (April 30, 1990) (citing Burdine, 450 U.S. at 256). In further discussing this burden, the Commission has also explained that the burden of production is not onerous, but the Agency must nevertheless make some effort to furnish specific, clear and individualized explanations for the treatment accorded the effected employee. Brooks - Coleman v. USPS, EEOC Request No. 05930681 (1994). The Agency must give Complainant some rationale that provides him with an opportunity to satisfy his ultimate burden of proving that the proffered explanation was a pretext for discrimination. Id.

In this case, Ms. Agee set forth legitimate non-

discriminatory reasons for the Agency's actions. Specifically she asserted that Complainant was rated in such a fashion because in general Complainant's work was

not timely and it was not well written. There were fragmented sentences. The grammar was poor. His research was often very good, but it was balanced by an inability or apparent inability or difficulty, I should say, in providing the information to users. (H.T. 253).

Complainant was given two ratings one for the time he was in the Military Pay section and the other for the time he was in the Embedded Review section. More specifically Agee testified that for the first appraisal she rated Complainant as met in all categories because of the following:

1) Element 1E-Agee testified that Complainant was rated as met because, Complainant's work almost-required almost complete rewrite most of the time. (OCI Transcript p. 51,52). "Complainant's timeliness and his writings were not his strong suits." (I.F. 148, H.T. 258,259).

2) Element 2E-Agee testified that Complainant was rated as met because of "timeliness" and she asserted further that, "the technical advice was not correct without major input from the supervisor." (OCI Transcript p. 58). She also characterized his work as "rarely" complete. (H.T. 272). She further asserted that some

people complained about his work. (H.T. 272).

3) Element 3E-Agee testified that Complainant was rated as met in this element because, "while he may have worked well with some organizations, other organizations were not as pleased with his work." (OCI Transcript p. 62).

4) Element 4E-Agee testified that Complainant was rated as met in this element because, "timeliness, accuracy." (OCI Transcript p. 66).

5) Element 5E-Agee testified that Complainant was rated as met because, "he did noting more than--than is says...for a met rating....he often writes things that are fragmented. To my way of thinking, when I read what he's written I have to wonder sort of where's he going with it and have discussions with him and with other people to try and figure out where he was going." (OCI Transcript p. 68).

6) Element 6E-Agee testified that Complainant was rated as met in this element because "the timeliness factor and--concise and complete and acceptable for immediate release. That typically doesn't happen with Mr. Mason...." (OCI Transcript p. 70).

7) Element 7E-Agee testified that although Complainant was rated as met in this element, "he should have been

non-rated." (OCI Transcript p. 72).

Agee further testified that she rated Complainant over all "fully successful" because she believed his work was

not above standard but there are times -there are issues that are done well, and there are ...elements... that are performed well and met. And there are issues, or elements that are not quite as -- performed quite as well and [she] believe it balanced out to a fully successful. (OCI Transcript p. 74).

Complainant's second rating related to the Embedded Operational Review Section. Agee set for her rationale for rated Complainant as follows:

Element 1E-Auditing-Agee testified that Complainant was rated as met in this element because, "his work was -his research was actually done relatively well, and the recommendations were an issue. Often they were kind of leading down another path, and we would have to try and have meetings or discussions about them in order to bring them back to something that was plausible acceptable." (OCI Transcript p.77). She also asserted that Mason's work was often "delayed." (OCI Transcript p.80).

Element 2E-Evaluating-Agee testified that Complainant was rated met because she, "had to often question where he was going with the recommendations and ask him to correct errors sometimes, to the extent that he

would-audit or review...an area." (OCI Transcript p. 81).

Element 3E-Communicating-Agee testified that Complainant was rated as met in this element because of "suspense dates" and Complainant's writing was not "clear and concise." (OCI Transcript p.83).

Element 4E-Quality Liaison- Agee testified that Complainant was rated as met in this element because people became "very frustrated at various times trying to work with Mr. Mason." (OCI Transcript p. 88).

Agee further testified that Complainant was rated overall as fully successful because, "she didn't believe he exceeded the standard." (OCI Transcript p. 89). Considering the above referenced assertions by the Agency it is readily apparent that the Agency met its burden of articulating legitimate non-discriminatory reasons for its rating of Complainant.

Thus, the burden shifts to Complainant to prove that the Agency's assertions are pretext for reprisal and/or race discrimination. Any analysis of the question of pretext must first begin with the interview of Agee in the September 11, 2000, time frame. During this interview, the counselor reported that Agee, "remembered the last EEO complaint filed by Mason and that she felt bad that he elected to go the EEO route." (I.F. 15). I find this statement when considered in context with other



evidence of record to be evidence of retaliatory animus. See for example Hicks v. USPS, EEOC Request NO. 059930774 (1994), wherein the Commission found a per se violation existed when a Supervisor advised Complainant that he was upset with her filing an EEO complaint. While the facts of this case are distinguishable from Hicks, the expression of animus is similar and relevant.

The expression of animus is placed into context when analyzed against the backdrop of Agee's treatment of Complainant. Vera Neuman, the unofficial lead supervisor specifically testified that Agee was a shouter and would shout at people "talk about them and swear and cuss." (H.T. 379). She specifically testified that Agee's comments toward Complainant would have an "edge" and would be "sarcastic." Complainant described this treatment as "crass." Neuman also specifically testified that Complainant was "picked on more than the rest of us." (I.F. 416). When Neuman was asked to compare the degree of Agee's criticism of Complainant compared to others she noted that, "it was like she never wanted to look at [Complainant's] work." (H.T. 365). She further noted, "I don't know if it's a combination of those other things or what but it was more critical." (H.T. 365). In her affidavit, Kathleen Shotka testified that Agee was "abrupt, abrasive and dismissive" and she further asserted that Complainant "was treated worse than the rest." (I.F. p. 410).

The evidence of record established that Complainant's work was more harshly scrutinized than others. This enhanced scrutiny which held Complainant to different standards than others taints the entire performance appraisal process as it relates to Complainant and is in and of itself sufficient to establish pretext. In Frazier v. Treasury, EEOC Appeal No. 07A10053 (2003), the Commission found pretext in a case in which Complainant alleged that she had been retaliated against when, like in the present case, the evidence established that she was scrutinized and treated differently. Frazier specifically addressed the question of whether a Complainant that was issued a "fully successful" performance appraisal was retaliated against. The similarity of Frazier to the present case is clearly evident and similar results should follow.<sup>2</sup>

When the evidence that Complainant's work was more harshly scrutinized is analyzed in the context of other evidence a finding of pretext is even more compelling. The evidence established that Complainant's timeliness issues were not necessarily due to his failure to complete work on time but for other reasons beyond his control. Agee herself failed to timely review and return documents which he submitted to her. (CP. Ex.

---

<sup>2</sup>It should be noted that the Commission has also held that not only can increased scrutiny be evidence of pretext it can in and of itself render a Complainant aggrieved and constitute a separate actionable claim. See Ridder v. DOT, EEOC Appeal No. 01991152 (2000).

14-28). Then she attempted to shift the blame for the timeliness of the matters to him. Neuman testified that, "not all of those problems were of [Complainant's] own making. When [Complainant] first started with embedded review, he still had some projects he was carrying over from his previous job." (I.F. 415). She also directly asserted that some timeliness issues were the result of Agee's more critical review of Complainant's work. (I.F. 416). I find evidence of pretext in the fact that Complainant was penalized for timeliness despite the fact that he was loaded up with more work than others, had his work product more harshly scrutinized than others, had his work held up both because of heightened scrutiny, (which in turn required him to perform more editing and rewriting) and had his work delayed because Agee was slow in returning his work product to him.

Other significant evidence of pretext is found in the differing treatment and evaluation afforded Sam Chinnici. The evidence established that Complainant performed substantial reviews which included the rendering of "findings" (which were defined as a problem that could potentially compromise a system). Despite these "findings", he received a lower rating than Chinnici whose work resulted in far less findings and the issuance of what amounted to half page reports that were simply boilerplate documents. (CP. Ex. 8-11). Dorothy Trackler testified that Chinnici's work papers were "minimal" and that "it

appeared that he was doing minimal amount of work in order to complete the review." (H.T. 110). Neuman testified that Chinnici was rated "higher than his work performance merited." (I.F. 415). She further stated that "he did not expend the effort necessary to perform the reviews properly." (I.F. 415). When Agee was specifically questioned about her rating of Chinnici as exceeds despite the lack of findings and substantial written work product she became evasive and did not directly answer the question posed. (H.T. 433, 444). She was directly asked, "how can you come up with exceed if in fact as exhibit 8 reflects...the vast majority of [Chinnici's] operational reviews had no findings, no conclusions or-no observations." (H.T. 434). She responded,

if we were talking just on the embedded review side and there were mostly no finding, then perhaps if that's all I had to look at I would have written him as exceeded. I can't tell you what I would have done if he had to be rated. (H.T. 434).

Her response to the direct question does not make logical sense and appeared to be an attempt to sidestep the question. This detracts from Agee's credibility regarding the Chinnici issue. In general, Agee attempted to downplay and or minimize the importance of the "findings." I am not persuaded by her assertions in this regard as one of the "major duties" of the position was to identify "weaknesses and problems" and developing recommendations for revisions or modifications to existing

systems to improve effectiveness, efficiency and economy." (I.F. 85).

The credibility of the assertions of Agee regarding both the timeliness and quality of Complainant's work in comparison to other employees is also called into question by the lack of documentation. For example, when asked to characterize the differences in the work of others and for example the amount of rewrites and timeliness, she testified that others had "much less" rewrites and that the timeliness of others was "better." (H.T. 262). There is virtually no documentary evidence to analyze against these vague assertions and therefore these assertions cannot be afforded any evidentiary weight or credibility. Moreover, given the assertions of Agee that Complainant's work was so bad that for example it was "rarely" complete I find evidence of pretext in the fact that the Agency failed to provide any documentary evidence of such. A reasonable and logical inference to be drawn from the assertions of the Agency is that if Complainant's work was as deficient as claimed, the Agency would have retained some record documenting such. The failure of the Agency to provide any significant documentary evidence of its concerns regarding Complainant's allegedly sub par writing abilities is pretextual. In Frazier v. Treasury, EEOC Appeal No. 07A10053 (2003), the Commission specifically relied upon such a failure to support a finding of pretext.

Other evidence of pretext is found in the inconsistencies found in Agee's testimony regarding the application of standards. For example, Agee testified that an employee would meet a standard if their work was typically on time. She then testified that a person would exceed if their work was on time or ahead of time.. Thus a person could both exceed and meet if their work was on time. (H.T. 307). This appears to be internally inconsistent especially in view of the fact that she testified that Complainant's work was always late. Her own rating of Complainant would suggest that he work was on time under her formulation and could have merited the exceeds rating. Similarly, she testified that various employees including Garner and Evans work only required minor changes. (H.T. 311). She further testified that a person would meet this standard if their work was "normally acceptable with only minor corrections" and would exceed if "normally not requiring change." (H.T. 312). This testimony is inconsistent with the ratings given these employees. Under the standard outlined by Agee, Garner would have presumably met this standard yet, he was rated as exceeds in all elements. (I.F. 200).

Other compelling evidence of pretext is found in Agee's testimony surrounding the rating of Chinnici. She testified that his evaluations and reviews were very well done and thinking that he was rated on the specific element as "exceeds" proceeded to

characterize his work as exceeding the element. When it was brought to her attention that she only rated him met in that element she attempted to conform what she previously described as "exceeding" the standard to work of having met the standard. (H.T. 341-342). This evidence is important because it establishes the propensity of Agee to conform her testimony to justify her rating. The Commission has found the testimony of witnesses providing such malleable and inconsistent testimony not credible. In Morrisson v. USPS, EEOC Appeal No. 01940040, (1994), the Commission stated,

we find it is not unreasonable to conclude, as Appellant argues, that the SO would say anything necessary to justify...regardless of its accuracy or believability. Furthermore, we find that the SO's testimony is of such an incredible and inconsistent nature so as to render his motivations suspect.

Similar reasoning is applicable in the present case.

Other evidence of pretext was persuasively outlined by Complainant's counsel during closing statement. As noted by Complainant, evidence of pretext could be found in the Agency's failure to follow its own procedures. The Commission and the courts have repeatedly held that, "[e]vidence relevant to such a showing of pretext includes . . . disturbing procedural irregularities . . . and (2) the use of subjective criteria." Caldwell v. U.S. Postal Service, EEOC Appeal No. 01880601 (1988), Mohammed v. Calloway, 698 F.2d 395 (10th Cir.1983); Monroe v. Secretary of the Navy, EEOC Appeal No. 01940864 (1994). The

Commission however has cautioned that procedural irregularity in and of itself does not necessarily always result in a finding of pretext.

Complainant argued that one example of this failure to follow procedures was revealed when the Agency, in violation of established procedures, misstated the time frames for each of Complainant's appraisals in order to conceal the fact that Complainant was required to perform two separate jobs simultaneously. Other evidence of procedural irregularities exists in the record. For example, Complainant was not ever given his performance plan until after the end of the rating period for the position he began in June of 1999.

I find that these procedural irregularities directly relate to the believability of the Agency's characterization of Complainant's performance and are indicative of pretext. I therefore find that Complainant has established that he Complainant was the victim of unlawful retaliation.

In view of the fact that I have found that the Agency's actions were pretext for reprisal, the question becomes whether the Agency's asserted reasons were also pretext for race/color discrimination. As set forth in more detail above, there is significant evidence in the record of retaliatory animus. The ultimate issue of whether the Complainant has shown by a preponderance of the evidence that the Agency's actions were



also motivated by race discrimination is one that is resolved by analyzing the preponderant evidence. Reaching the ultimate issue presented, I find that Agee was not motivated by unlawful racial and/or color discrimination. See U.S. Postal Service Bd. Of Governors v. Aikens, 460 U.S. 711, 713-714 (1983). This finding is predicated upon the evidence and testimony of witnesses, in particular African American witnesses, who testified that Agee was not ordinarily inclined to practice racial discrimination. For example, Audrey Haynes testified that,

Ms. Agee was not that type of person. I never got race from her. I never got it from Mr. Jones. In that particular little section, which is very unique for military pay, we did not have that problem. As a person of color, I didn't feel that problem. (H.T. 227).

This evidence was further corroborated by Colonel Williams and Bob Jones. (H.T. 98).

## VI. CONCLUSION

I therefore find that although Complainant was the victim of unlawful retaliation he was not also the victim of unlawful racial and/or color discrimination.

## VII. COMPENSATORY DAMAGES

Complainant established liability, therefore the focus turns to the question of compensatory damages. Complainant asserted that he was entitled to compensatory damages for harm he suffered as a result of the unlawful actions. In order to establish entitlement to compensatory damages, Complainant must first show that he suffered harm. I find sufficient evidence in the record to establish that Complainant suffered harm. Complainant testified that he suffered mental and emotional distress. He indicated that he, "felt taken advantage of" and for all practical purposes, [he] contributed to the efforts that went into that operation and [he] made an impact." (H.T. 199). He further stated,

I was-I felt abused. I felt that this has been going on for so long, and all of this time, my-when that happened, it was like the world changed. I just woke up. All of a sudden, hello, I'm where I thought I would never be, and I've allowed something to happen to me that I swore I would make a difference, but I would also-I wouldn't give in. I wouldn't give up my integrity as a person, and that just blew me out of the water to see, all of a sudden, I've been doing all of this and I've just been-the best way I can describe it is used and abused. I wasn't happy. I felt enraged in a controlled sense because it became so obvious that they were doing things to me. It had to be that I tried to ignore. I was in denial for so long. When the light finally hit it's like, wow, look at this It's hard to describe other than that very emotionally-I was emotionally unhappy with all that. It just wasn't something I was pleased about. (H.T. 199).

Complainant also testified that he was "disappointed" and felt a "fairly high level of stress" with his overall appraisal.

(H.T. 130,134,135). He also testified that the appraisal caused some anxiety and sleeplessness. (H.T. 136). This evidence is sufficient to establish, by a preponderance of the evidence, that Complainant indeed suffered some emotional distress and harm. See Kuntz v. City of New Haven, 3 AD Cases 1590 (D. Conn. 1993) aff'd 29 F.3d 622 (2nd. Cir. 1993), cert. denied 115 S.Ct. 667 (1994), wherein the court found compensatory damages recoverable in a case wherein the plaintiff testified that he was "disappointed" and felt "stressful."

Having found sufficient proof of harm regarding the emotional distress issue, the next issue to be addressed is the question of causation. Complainant asserted generally that the emotional distress was a result of the treatment he received which I have found to be unlawful and retaliatory. Complainant's assertions of proximate cause are credible. I therefore find that Complainant has established that he suffered harm, which was proximately caused by the discriminatory actions of the Agency.

Hence, Complainant is entitled to recover pecuniary and non-pecuniary compensatory damages in an amount sufficient to make him whole for the harm suffered. See Carpenter v. Sect. Dept. Of Agriculture, EEOC Appeal No. 01945652 (1995). See also Finlay v. USPS, EEOC Appeal No. 01942985 (1997).

There are no precise formulas for determining the amount of compensatory damages and damage awards from the courts, and

juries have varied significantly depending on many fact-specific factors. In general however an award of compensatory damages should reflect the nature and severity of the harm. In affixing a proper amount of damages the damages must not be "monstrously excessive and that it be consistent with awards made in similar cases. See Cygnar v. City of Chicago, 865 F.2d 827 (7th Cir. 1989). See also Roundtree v. Glickman, EEOC Appeal No. 05950919 (1996).

Therefore, I find that the Agency is liable for the resulting damage of its discriminatory actions. I further find that a reasonable amount to compensate Complainant for the harm suffered is \$5,000.00 dollars. See for example, Apodaca v. VA, EEOC Appeal No. 01990542 (2002), wherein the Commission awarded \$5,000 in compensatory damages for emotional distress related to a performance appraisal.

#### VIII. ATTORNEY'S FEES AND COSTS

Pursuant to 29 CFR Section 1614.501(e)(2)(i) the Complainant was afforded thirty days to submit a verified petition for fees. The Agency was afforded thirty days within which to respond to Complainant's statement of fees. Complainant on March 6, 2003, submitted his petition for fees and costs which were not contested by the Agency.

The starting point for determining the amount of reasonable

attorney fees is the number of hours reasonably expended, multiplied by a reasonable hourly rate, an amount known as the "lodestar." 29 C.F.R. 1614.501(e) (2) (ii) (B); Bernard v. Department of Veterans' Affairs, EEOC Request No. 01966861 (July 17, 1998) (citing, Blum v. Stetson, 465 U.S. 886 (1984); and Hensley v. Eckerhart, 461 U.S. 424, 433-34 (1983)). In determining the number of hours expended, the Commission recognizes that the attorney "is not required to record in great detail the manner in which each minute of his/her time was expended." See Bernard, (citing, Hensley, 461 U.S. at 437, n. 12). However, the attorney does have the burden of identifying the subject matters in which he spent his time, which can be documented by submitting sufficiently detailed contemporaneous time records to ensure that the time spent was accurately recorded. See Bernard, (citing, National Association of Concerned Veterans v. Secretary of Defense, 675 F.2d. 1319 (D.C. Cir. 1982)). Further, a reasonable fee award may be assessed in light of the following factors, inter alia, (1) the time required (versus time expended) to complete the legal work; (2) novelty or difficulty of the issues; (3) the requisite skill to properly handle the case; (4) the degree to which counsel is precluded from taking other cases; (5) the customary fee by comparable attorneys in the community; (6) whether the fee is fixed or contingent; (7) time pressure involved; (8) the relief sought and results obtained; (9) the

experience, reputation, and ability of the attorney; (10) the undesirability of the case; (11) the nature and length of the attorney-client relationship; and (12) awards in similar cases. Cerny v. Department of the Army, EEOC Request No. 05930899 (1994) (citing, Johnson v. Georgia Highway, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974)).

Taking into account the above considerations, I have reviewed the record, and I am persuaded that the hours claimed by Complainant's counsel are reasonable, sufficiently documented and not contested by the Agency. It should be noted in reaching this conclusion that throughout the proceedings the Agency very vigorously defended the claim. Therefore, I find that Complainant is entitled to recover attorney's fees and costs in the amount of \$25,400.00 and costs in the amount of \$120.40.

#### IX. CORRECTIVE ACTION

The objective and purpose behind the remedies of Title VII of the Civil Rights Act is to place the party in the position he or she would have occupied, but for the discrimination or reprisal. See Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

- 1) the Agency shall cease and desist from engaging in any further retaliatory actions;
- 2) the Agency shall pay Complainant's reasonable attorneys fees and costs as set forth above;
- 3) the Agency shall take appropriate actions to eliminate any lingering negative effects from the discriminatory

actions. The Agency shall provide EEO sensitivity training to the involved managers to better inform them of their duties under the law. The Agency shall expunge the "fully successful" performance appraisals and replace them with "highly effective" performance ratings.

- 6) the Agency shall pay for all compensatory damages that are directly attributable to the Agency's actions including a lump sum payment of \$5,000.00 dollars in order to compensate Complainant for the mental and emotional harm suffered;
- 7) the Agency shall post the following notice:

#### Notice

1. This notice is being posted as part of the remedy agreed to pursuant to a Final Agency Decision which found that unlawful retaliation occurred at the DFAS in Denver Colorado.

2. Federal law gives our employees the right to be free from unlawful discrimination and retaliation for exercising rights under the EEO process.

Therefore:

WE WILL NOT engage in reprisal against employees in contravention of the civil rights laws.

WE WILL or have already implemented the remedial action determined appropriate in the Final Agency Decision.

We support and will comply with such federal laws in all respects and Will Not take any action against employees because they exercise any of their rights guaranteed by law.

Dated:

By:

(Name and Title)

X. NOTICE TO BOTH PARTIES

This is a decision by an Equal Employment Opportunity Commission Administrative Judge issued pursuant to C.F.R. §1614.109(b), 109(g) or 109(i). With the exception detailed below, the complainant may not appeal to the Commission directly from this decision. EEOC regulations require the Agency to take final action on the complaint by issuing a final order notifying the complainant whether or not the Agency will fully implement this decision within forty (40) calendar days of receipt of the



hearing file and this decision. The complainant may appeal to the Commission within thirty (30) calendar days of receipt of the Agency's final order. The complainant may file an appeal whether the Agency decides to fully implement this decision or not.

The Agency's final order shall also contain notice of the complainant's right to appeal to the Commission, the right to file a civil action in federal district court, the name of the proper defendant in any such lawsuit and the applicable time limits for such appeal or lawsuit. If the final order does not fully implement this decision, the Agency must also simultaneously file an appeal to the Commission in accordance with 29 C.F.R. §1614.403, and append a copy of the appeal to the final order. A copy of EEOC Form 573 must be attached. A copy of the final order shall also be provided by the Agency to the Administrative Judge.

If the Agency has not issued its final order within forty (40) calendar days of its receipt of the hearing file and this decision, the complainant may file an appeal to the Commission directly from this decision. In this event, a copy of the Administrative Judge's decision should be attached to the appeal. The complainant should furnish a copy of the appeal to the Agency at the same time it is filed with the Commission, and should certify to the Commission the date and method by which such service was made on the Agency.

All appeals to the Commission must be filed by mail, personal delivery or facsimile to the following address:

Director, Office of Federal Operations  
Equal Employment Opportunity Commission  
P.O. Box 19848  
Washington, D.C. 20036  
Fax No. (202)663-7022

Facsimile transmissions over 10 pages will not be accepted.

#### COMPLIANCE WITH AN AGENCY FINAL ACTION

An Agency's final action that has not been the subject of an appeal to the Commission or civil action is binding on the Agency. See 29 C.F.R. §1614.504 (1999). If the complainant believes that the Agency has failed to comply with the terms of its final action, the complainant shall notify the Agency's EEO Director, in writing, of the alleged noncompliance within thirty (30) calendar days of when the complainant knew or should have known of the alleged noncompliance. The Agency shall resolve the matter and respond to the complainant in writing. If the complainant is not satisfied with the Agency's attempt to resolve the matter, the complainant may appeal to the Commission for a

determination of whether the Agency has complied with the terms of its final action. The complainant may file such an appeal within thirty (30) calendar days of receipt of the Agency's determination or, in the event that the Agency fails to respond, at least thirty-five (35) calendar days after Complainant has served the Agency with the allegations of noncompliance. A copy of the appeal must be served on the Agency, and the Agency may submit a response to the Commission within thirty (30) calendar days of receiving the notice of appeal.

For the Commission:

It is so ORDERED.

  
Dickie Montemayor  
Administrative Judge

4/24/03

CERTIFICATE OF MAILING

For timeliness purposes, the EEOC will presume receipt of this document within five (5) calendar days of mailing. I certify that on April 24, 2003, I mailed the original with exhibits and hearing transcripts to:

I mailed a copy of the decision only to:

DFAS  
1931 Jefferson Davis Highway  
Suite 205  
Attn: Ms. Jean Riggs  
Director Office of Equal Employment Program  
Arlington, VA 22240

Barry D. Roseman  
Roseman & Kasmierski LLC  
1120 Lincoln Street, Suite 1607  
Denver, CO 80203

Frank Yount  
DFAS-GAC/DE  
6760 East Irvington Place  
Denver, CO 80279-8000

John Mason  
P.O. Box 140092  
Orlando, FL 32814-0092

  
Dana McCann  
EEOC