UNITED STATES
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
INDIANAPOLIS DISTRICT OFFICE

NANCY E. WHITAKER,	)	
	)	
Complainant,	)	EEOC NO. 470-2008-00182X
	)	
v.	)	AGENCY NO. DD-FY07-103
	)	
ROBERT M. GATES,	)	
SECRETARY, UNITED STATES	)	DAVID R. TREETER
DEPARTMENT OF DEFENSE,	)	ADMINISTRATIVE JUDGE
	)	
Agency.	)	
	)	

DECISION AND ORDER ENTERING JUDGMENT1

I. Introduction and Statement of Legal Claim

This complaint is brought under Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e *et seq.*, and Section 501 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 791 et seq. This DECISION is issued pursuant to the regulations governing discrimination complaints filed by federal employees. 29 C.F.R. §1614.109.

On or about August 17, 2007, the Complainant, Nancy E. Whitaker ("Whitaker"), filed a Complaint of Employment Discrimination with the Agency. On November 23, 2007, the Agency accepted Whitaker's complaint, and an investigation ensued. On or about July 8, 2008, Whitaker requested a hearing before an Administrative Judge of the Equal Employment Opportunity Commission. The Agency did not dismiss any claims prior to the request for a Hearing.

An administrative hearing was held in this matter on March 30-31, 2010, addressing the

1 It is noted that this written decision is issued following the rendering of a bench decision on April 15, 2010. The transcript of the bench decision was edited for spelling, punctuation, paragraphing, and addition of appropriate legal citations.

following claims:

A. Did the United States Department of Defense discriminate against [redacted] on bases of her race and disability by subjecting [redacted] to a hostile work environment?

B. Did the United States Department of Defense discriminate against [redacted] on bases of her race and disability when it did not extend her temporary appointment for the 2007-2008 school year?

The Equal Employment Opportunity Commission hereby submits its analysis and conclusions regarding the challenged claims.

II. Analysis

An analysis of this matter requires a two-step inquiry. First, the legal standards governing a case of employment discrimination must be addressed. Second, the governing legal standards must be applied to the facts of the instant case so that it may be ascertained whether the Complainant was the victim of unlawful employment discrimination.

A. Governing Legal Standards

1. Disability Coverage

Under all theories of disability discrimination brought under the Rehabilitation Act, the Complainant bears the threshold evidentiary burden of coming forward with credible evidence as part of her prima facie showing that: (1) the Complainant is an individual with a "disability"; and (2) the Complainant is a "qualified individual with a disability." Simply stated, as part of her threshold burden, the Complainant must demonstrate that she is a member of the class of employees who are protected by the Rehabilitation Act's prohibition against employment discrimination.

In analyzing a disparate treatment claim under the Rehabilitation Act, where the agency denies that its decisions were motivated by a complainant's disability, and there is no direct

evidence of discrimination, the Commission applies the burden-shifting method of proof set forth in McDonnell-Douglas Corporation v. Green, 411 U.S. 792 (1973). Heyman v. Queens Village Comm. for Mental Health for Jamaica Cmty. Adolescent Program, 198 F.3d 68 (2d Cir. 1999); Swanks v. WMATA, 179 F.3d 929, 933-34 (D.C.Cir. 1999).

Under this analysis, in order to establish a prima facie case, a complainant must demonstrate that: (1) she is an "individual with a disability;" (2) she is "qualified" for the position held or desired; (3) she was subjected to an adverse employment action; and, (4) the circumstances surrounding the adverse action give rise to an inference of discrimination. Lawson v. CSX Transportation, Inc., 245 F.3d 916 (7th Cir. 2001). The burden of production then shifts to the Agency to articulate a legitimate, non-discriminatory reason for the adverse employment action. In order to satisfy her burden of proof, a complainant must then demonstrate, by a preponderance of the evidence, that the agency's proffered reason is a pretext for disability discrimination. Id.

As an initial matter, in order to establish a prima facie case of disability-based discrimination under the Rehabilitation Act, a complainant must demonstrate that she is an "individual with a disability" within the meaning of the Act. An "individual with a disability" is one who: (1) has a physical or mental impairment that substantially limits one or more major life activities; (2) has a record of such impairment; or, (3) is regarded as having such an impairment. See 29 C.F.R. § 1630.2(g).

This determination "proceeds in three steps:" (1) identifying a physical or mental impairment; (2) deciding whether a life activity affected by the impairment is a "major life activity;" and, (3) determining "whether the impairment substantially limits the major life activity." Bragdon v. Abbott, 524 U.S. 624, 631 (1998); Lawson v. CSX Transportation, Inc.,

245 F.3d 913 (7th Cir. 2001).

Major life activities include, but are not limited to, "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." See 29 C.F.R. § 1630.2(i). The Interpretive Guidance to these Regulations further specifies that "other major life activities include, but are not limited to, sitting, standing, lifting, and reaching." See 29 C.F.R. Part 1630 Appendix § 1630.2(j).

Generally, "substantially limiting" means: "unable to perform a major life activity that the average person in the general population can perform; or, significantly restricted as to the condition, manner, or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity." See 29 C.F.R. § 1630.2(j)(1).

In determining whether a complainant is substantially limited in a major life activity, the Commission must consider the nature and severity of the impairment, the duration or expected duration of the impairment, and the permanent or long-term impact resulting from the impairment. See 29 C.F.R. § 1630.2(j)(2). An impairment is substantially limiting if it lasts for more than several months and significantly restricts the performance of one or more major life activities during that time. See EEOC Enforcement Guidance on the Americans With Disabilities Act and Psychiatric Disabilities (March 25, 1997) (Guidance). In addition, some conditions may be long-term, or potentially long-term, in that their duration is indefinite and unknowable, or is expected to be at least several months. Such conditions, if severe, may constitute disabilities. See Guidance, at question 7.

Additionally, the effects of any "[mitigating] measures--both positive and negative--must be taken into account when judging whether that person is 'substantially limited.'" Sutton v.

United Airlines, 527 U.S. 471, 482 (1999); Albertsons, Inc., v. Kirkinburg, 527 U.S. 555, 565-566 (1999); Murphy v. United Parcel Service, 527 U.S. 516, 521-523 (1999). Moreover, an individualized assessment "is particularly necessary when the impairment is one whose symptoms vary widely from person to person." See Toyota Motor Mfg., Ky, Inc., v. Williams, 534 U.S. 184, 195 (2002).

Even having established that she is an individual with a disability, a complainant must still show that she is a "qualified" individual with a disability within the meaning of 29 C.F.R. § 1630.2(m). A "qualified" individual with a disability is one who satisfies the requisite skill, experience, education and other job related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of the position. See 29 C.F.R. § 1630.2(m); see also 29 C.F.R. § 1630.3 (exceptions to definition).

An individual is "regarded as" having an impairment, if she: (1) has a physical or mental impairment that does not substantially limit major life activities, but is treated by an agency as having such a limitation; (2) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or, (3) does not have a physical or mental impairment, but is treated by an agency as having a substantially limiting impairment. De La Garza v. U.S .Postal Service, EEOC Appeal No. 01995346 (September 26, 2002) (citing 29 C.F.R. § 1630.2(k)(1)).

2. Disparate Treatment Law

In the absence of direct evidence of discrimination, a claim alleging disparate treatment is examined under the three-part test set forth in McDonnell-Douglas. Under this analysis, a complainant initially must establish a prima facie case of discrimination by presenting facts that,

if unexplained, reasonably give rise to an inference of discrimination. St Mary's Honor Center. v. Hicks, 509 U.S. 502, 507 (1993); Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981); McDonnell-Douglas, 411 U.S. at 802. The burden then shifts to the agency to articulate a legitimate, nondiscriminatory reason for the challenged actions. Burdine, 450 U.S. at 253-54; McDonnell-Douglas, 411 U.S. at 802. Ultimately, a complainant must prove, by a preponderance of the evidence, that the agency's articulated reason for its actions was not its true reason, but a sham or pretext for unlawful discrimination. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 143 (2000); Hicks, 509 U.S. at 511; Burdine, 450 U.S. at 252-53; McDonnell-Douglas, 411 U.S. at 804.

In the case at bar, the Complainant can establish a prima facie case of discrimination by showing that: (1) she is a member of a protected class; (2) she was qualified for the position at issue; (3) she was not extended in her appointment; and, (4) an individual outside of her protected class was treated more favorably. Lucas v. Department of the Army, EEOC Appeal No. 01A43697 (March 30, 2005); Williams v. Department of Education, EEOC Request No. 05970561 (August 6, 1998); Enforcement Guidance on O'Connor v. Consolidated Coin Caterers Corp., EEOC Notice No. 915.002 (September 18, 1996).

Pretext can be demonstrated by "showing such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the [agency's] proffered legitimate reasons for its action that a reasonable fact-finder could rationally find them unworthy of credence." Dalesandro v. U.S. Postal Service, EEOC Appeal No. 01A50250 (January 30, 2006) (citing Morgan v. Hilti, Inc., 108 F.3d 1319, 1323 (10th Cir. 1997)).

3. Hostile Environment Law

In order to establish a claim of harassment due to a hostile work environment, a

complainant must show that: (1) she is a member of a statutorily protected class; (2) she was subjected to unwelcome conduct; (3) the harassment complained of was based on her protected class; (4) the harassment had the purpose or effect of unreasonably interfering with her work performance and/or creating an intimidating, hostile, or offensive work environment; and (5) there is a basis for imputing liability to the employer. Staib v. Social Security Administration, EEOC Appeal No. 01A22011 (September 26, 2003).

The harasser's conduct should be evaluated from the objective viewpoint of a reasonable person in the victim's circumstances. Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993); Enforcement Guidance on Harris v. Forklift Systems, Inc., EEOC Notice No. 915.002 (March 8, 1994) (Guidance). In assessing allegations of harassment, the Commission examines factors such as the frequency of the alleged discriminatory conduct, its severity, whether it is physically threatening or humiliating, and if it unreasonably interferes with an employee's work performance. Harris, 510 U.S. at 23; Guidance at 3, 6. Usually, unless the conduct is pervasive and severe, a single incident, or group of isolated incidents, will not be regarded as discriminatory harassment. Walker v. Ford Motor Company, 684 F.2d 1355, 1358 (11th Cir. 1982). Moreover, the alleged harassing conduct must also be sufficiently continuous, not merely episodic, in order to be considered pervasive. Faragher v. City of Boca Raton, 524 U.S. 775, 786 (1998). In Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 81 (1998), the Supreme Court found that the employment discrimination laws enforced by the Commission are not to be used as a "general civility code." Rather, they forbid "only behavior so objectively offensive as to alter the conditions of the victim's employment." Id. On the other hand, it is well established that an employer who creates or tolerates a work environment which is permeated with "discriminatory intimidation, ridicule, and insult," that "is sufficiently severe or pervasive to alter

the conditions of the victim's employment and create an abusive working environment," is in violation of the Commission's regulations. Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986).

B. Findings of Fact and Conclusions of Law

The facts pertinent to this case are relatively straightforward. Whitaker retired from the Army after serving over twenty years of active duty. She has been certified by the United States Department of Veterans Affairs as thirty percent or more disabled. Whitaker's race is African-American.

Since 1994, the Agency has operated a domestic school system under the name Department of Defense Domestic Dependent Elementary and Secondary Schools. Whitaker began her employment with the Department in 2005 as a Training Instructor on an Excepted Service NTE appointment to run from June 22, 2005 to June 15, 2006.

During the time that Whitaker served an NTE appointment at Fort Campbell, the Community Superintendent was Martha Brown. Brown was responsible for overseeing the operation of the schools. Whitaker worked at Barkley Elementary School (BES"). The Principal of BES and Whitaker's second level supervisor was Madeline Haller. The Assistant Principal of BES and Whitaker's first level supervisor was Annie Metcalfe.

During the first half of the 2005-2006 school year, Haller selected Whitaker on an as needed basis to perform duties as a substitute special education teacher at BES. In mid-term of the 2005-2006 school year, a full-time special education teacher vacancy opened at BES. Haller received a list of candidates for the position, and, on January 3, 2006, she hired Whitaker to fill it. At that point, Whitaker was converted to the position of Teacher for Severely Impaired/Multiple Disability students on an Excepted Service NTE Appointment to expire on August 1, 2006.

Whitaker's performance during the period January through June 2006 was generally good. Metcalfe indicated that Whitaker had a few problems but nothing noteworthy, and Whitaker was rated fully successful on her appraisal. As a result, on July 30, 2006, Haller extended Whitaker's appointment for one year, to expire on July 29, 2007.

On May 18, 2007, Haller notified Whitaker that the temporary appointment under which she had been hired would be expiring and that the appointment would not be extended. The notice indicated that Whitaker's last day of work would be the final day of classes for the year, May 25, 2007. The failure to extend Whitaker's appointment is the focus of the complaint in this case.

Before addressing the facts and circumstances surrounding that decision, the Administrative Judge will address the matter of coverage under the Rehabilitation Act. For the reasons discussed herein, the Administrative Judge finds that Whitaker is not disabled within the meaning of the Rehabilitation Act and is, therefore, not entitled to the protection afforded by the statute.

Whitaker described one actual impairment, a back injury. Whitaker has an arthritic condition in her back that prevents her from prolonged standing, walking with rest breaks, and lifting greater than forty pounds. Whitaker never discussed this condition or the limitations with Haller or Metcalfe, and the managers were not aware that Whitaker had such limitations. The Administrative Judge draws three conclusions from the facts and circumstances. First, Whitaker's evidence does not describe a substantial limitation of a major life activity; second, Haller and Metcalfe were not aware of the impairment or the limitations such that they could have taken adverse actions based upon them; and third, Whitaker indicated at the Hearing that she was relying on a theory that the Agency regarded her as being disabled based on the medical

incidents of April 30 and May 2, 2007 abandoning her claim of coverage under the first prong.

Whitaker's theory is that the Agency, specifically Haller and Metcalfe, regarded her as disabled based upon two incidents on April 30, 2007, and May 2, 2007. On those days Whitaker left BES to go to the base hospital, complaining of chest pains. The hospital released her within a few hours, and she returned to work either the next day or the following day. Whitaker indicated to the managers that she had possible stress or anxiety and had to wear a heart monitor for a few days. Whitaker never indicated any diagnosis of a heart condition, and she never indicated any need for an accommodation of her impairment.

With regard to the medical incidents, Metcalfe and Haller believed that Whitaker had suffered some anxiety, nothing more. Whitaker makes much of the fact that someone brought a defibrillator to the classroom when it was reported that she had chest pains. In fact, she insists that it was Haller who brought the medical device to the classroom, a matter denied by Haller. The Administrative Judge finds that it does not matter who brought the device to the classroom, nor is it significant to the analysis here that the defibrillator was brought into the classroom. At the time of the incident, everyone involved in the matter, including Whitaker, Wimberly, and Haller believed that Whitaker may have been having a heart attack. Under the circumstances it would have been surprising if someone had not brought the defibrillator to the scene. Nothing can be read into this. A medical emergency was occurring, and everyone reacted in a predictable way.

Importantly, nothing happened afterward that would indicate that Haller or Metcalfe considered Whitaker to be disabled. They accepted the information provided by Whitaker regarding her hospital visit and her subsequent monitoring. Neither made any statement that would indicate they believed this was anything but what Whitaker said it was. In short, Whitaker

has come forward with no probative evidence to show that Haller and Metcalfe regarded her as being disabled. Therefore, the Administrative Judge concludes that Whitaker is not disabled within the meaning of the Rehabilitation Act, and he finds that the Agency did not discriminate against Whitaker based upon a disability.

Before discussing the decision to not extend Whitaker, the Administrative Judge must comment on the allegations of race discrimination in general. Those allegations are problematic because Haller was the deciding official at every point in Whitaker's short career at BES. Haller hired Whitaker as an NTE substitute teacher in the Fall of 2005, knowing that she was Black. She then hired her as a full-time NTE Teacher in January 2006. Next, Haller extended Whitaker's appointment to include the 2006-2007 school year. Later, near the end of that school year, Haller made the decision to not extend the appointment. Therefore, Haller took several beneficial employment actions towards Whitaker and a single adverse action, all the while knowing Whitaker's race. Importantly, Whitaker has come forward with no evidence to establish that Haller developed a bias against her based on her race after having made three decisions favorable to her. Finally, Whitaker worked in the same room with Pamela Wimberly who is also Black. Haller extended Wimberly's appointment at the end of the 2006-2007 school year. Whitaker would have the Administrative Judge believe that, at the same time that Haller is supposedly discriminating against her based upon her race, Haller is treating the other Black employee favorably by extending her appointment. Such a conclusion defies logic. Rather, the logical conclusion is that some factor other than race motivated Haller.

Haller made the decision not to extend the appointment after consulting with Metcalfe, Brown, and Pat Wilson, the District Director for Special Education, regarding a variety of performance and interrelationship issues Whitaker had with both administrators and school staff.

The specific reason for not extending [redacted]'s appointment is recorded in [redacted]'s Performance Appraisal Form, August 1, 2006, to May 25, 2007. On that form, [redacted] commented that discussions had taken place during the school year in regard to [redacted] testing, school policies, and working with support staff.

Testimony was elicited from several witnesses regarding the three alleged problem areas. First, the dispute involving the [redacted] testing arose when a parent insisted that a child be given the test. The matter was discussed in a Case Study Committee ("CSC") meeting with [redacted] present. Prior to the meeting, [redacted] had opposed the student taking the [redacted] test. The test is very long, and [redacted] did not believe that the student could pass it. Later, [redacted] learned that the student had taken the test, and she felt strongly that [redacted] had convinced the parents to have their child take the test. [redacted] was aware at the time of the CSC meeting on [redacted], that [redacted] was unhappy with the proposal to give the student the [redacted] testing with modifications, yet she supported giving the test.

Second, [redacted] believed that [redacted] was failing to follow school policies. The major example cited by [redacted] and [redacted] involved a field trip. For budgetary reasons, the district suspended field trips and limited special education field trips to on-post destinations. [redacted] was notified of this, but she observed another teacher preparing for a field trip, so she decided to ask [redacted] if she could take her class to an off-post location. When [redacted] refused to allow the trip, [redacted] asked [redacted]. When [redacted] refused, [redacted] called [redacted], the [redacted] Manager at the [redacted], seeking permission. [redacted]'s difficulty here is that, had she stopped after her request was refused by her supervisor, the incident would have amounted to little or nothing. Instead, [redacted] continued seeking a favorable result by going to the next level, thereby incurring the displeasure of management.

The third reason given for not extending [redacted]'s appointment is the most difficult for her. Considerable testimony was presented at the Hearing to show that [redacted] had some difficulties with the other employees, especially the Aides. According to the credible evidence, several Aides complained to [redacted] and [redacted] about working with [redacted]. For instance, Aide [redacted] made several complaints; Aide [redacted] indicated that she did not want to return to work with [redacted], and Aide [redacted] complained about the way [redacted] talked to him. [redacted] and [redacted] received more complaints about [redacted] than any other teacher.

[redacted] admitted that she had issues with the Aides, particularly [redacted]. The situation with [redacted] culminated in an incident in which [redacted] took the class on an outing and left [redacted] behind. This was problematic because [redacted]'s job was to provide assistance to a specific student. As a result of [redacted]'s actions, the student was left without an assistant and [redacted] was left very upset.

[redacted]'s co-worker, [redacted], testified that she generally got along fine with [redacted], however, they had difficulties at times. [redacted] believed that [redacted] tried to teach the students things that were too advanced. For example, [redacted] introduced abstract concepts that the students could not grasp, and she tried to teach the students three digit arithmetic, a skill beyond their abilities. [redacted] described [redacted] as an individual who wanted to do her own thing, making it difficult to act as a team with her.

A particular concern for the Administrative Judge in this Hearing was the lack of documentation kept by [redacted] and [redacted]. [redacted] indicated on the performance appraisal that she had discussions with [redacted] regarding the alleged shortcomings. The only documentation presented was a cryptic note that [redacted] had saved in a file she took with her when she left Federal employment and which was produced only when the Administrative Judge directed its

production at the Hearing. The lack of documentation would normally raise a concern regarding the credibility of the Agency's articulated reasons for its actions; however, in this case, Whitaker admitted that she had discussions with management regarding her performance, although she believed Haller and Metcalfe overstated their allegations.

The Administrative Judge finds that the Agency has articulated legitimate and non-discriminatory reasons, as stated above, for not extending Whitaker's appointment. Further, the Administrative Judge finds that Whitaker has failed to come forward with evidence sufficient to show that the articulated reasons are pretexts for discrimination. Therefore, the Administrative Judge concludes that the Agency did not discriminate against Whitaker on either her race or disability in not extending her appointment.

In fairness to Whitaker, the Administrative Judge notes that he agrees with her assessment that Haller and Metcalfe tended to overstate and exaggerate their allegations regarding her employment. For instance, the presence and removal of the "Wall" in the classroom was not Whitaker's fault. The "Wall" was simply an excess bookshelf for which there was not space in the classroom. Its removal depended on the maintenance department taking action. Metcalfe and Haller are stretching credulity to lay this at Whitaker's door.

Likewise, Haller and Metcalfe make much of Whitaker holding a CSC meeting on a Wednesday in violation of their policy. However, the scheduling of the meeting required the input and participation of Metcalfe. Metcalfe can hardly complain about a matter in which she was complicit and in which she raised no contemporaneous objection.

The Administrative Judge finds that the main points made by Haller and Metcalfe were supported by the credible and probative evidence, and that finding supports the conclusion that the Agency did not discriminate against Whitaker. Nonetheless, the fact that Haller, in

particular, felt the need to overstate her position is perplexing. Fortunately for her, the testimony of the other witnesses, especially Wimblerly and Metcalfe, was sufficiently probative and credible to support the main points of the case.

Finally, the Administrative Judge addresses the hostile environment claim. This claim appears to be an afterthought for both parties, but its presence demands attention. The Administrative Judge concludes that Whitaker cannot establish a prima facie case of hostile environment discrimination. First, with regard with disability harassment, Whitaker cannot prevail because, as discussed above, she is not a disabled person under the statute.

Second, the conduct to which Whitaker was subjected amounts to the normal and expected trials and tribulations of the workplace. Whitaker has described no severe and pervasive behavior that would constitute actionable harassment.

Finally, Whitaker has come forward with no evidence that the conduct to which she was subjected had anything to do with her alleged disability or race. Management had no knowledge of Whitaker's back impairment and there was no adverse evidence regarding the events of April 30 and May 2, 2007, other than during those few days.

Based upon the foregoing, the Administrative Judge concludes that Whitaker has failed to establish the first prong of the prima facie case as to her alleged disability. She has also failed to establish the third and fourth prongs of the prima facie case because the alleged conduct was not based upon her protected EEO classes and the conduct was not sufficiently severe and pervasive as to constitute actionable harassment.

III. Decision

Therefore, it is the decision of the Equal Employment Opportunity Commission that the preponderance of the evidence does not support a finding that the United States Department of

Defense discriminated against Nancy E. Whitaker on bases of race and disability by subjecting her to a hostile work environment.

Also, it is the decision of the Equal Employment Opportunity Commission that the preponderance of the evidence does not support a finding that the United States Department of Defense discriminated against Nancy E. Whitaker on bases of race and disability when it did not extend her temporary appointment for the 2007-2008 school year.

For the reasons set forth herein, judgment in the above-captioned matter is hereby entered in favor of the Agency.

IV. Notice

This is a decision by an Equal Employment Opportunity Commission Administrative Judge issued pursuant to 29 C.F.R. § 1614.109(b), 109(g) or 109(I). With the exception detailed below, the Complainant may not appeal to the Equal Employment Opportunity Commission directly from this decision. Equal Employment Opportunity Commission 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 Equal Employment Opportunity 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 Equal Employment Opportunity 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 Equal Employment Opportunity 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 Equal Employment Opportunity 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 Equal Employment Opportunity Commission, and should certify to the Equal Employment Opportunity Commission the date and method by which such service was made on the Agency.

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

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

Facsimile transmissions over ten (10) pages will not be accepted.

V. Compliance With An Agency Final Action

An Agency's final action that has not been the subject of an appeal to the Equal Employment Opportunity Commission or civil action is binding on the Agency. *See* 29 C.F.R. § 1614.504. 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 Equal Employment Opportunity 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 the 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 Equal Employment Opportunity Commission within thirty (30) calendar days of receiving the notice of appeal.

IT IS SO ORDERED, on MAY 11 2010.

FOR THE COMMISSION:

David R. Treeter
Administrative Judge

CERTIFICATE OF SERVICE

The undersigned certifies that the enclosed **DECISION AND ORDER ENTERING JUDGMENT**, Hearing Transcript, and Joint Hearing Exhibit were mailed by first class United States Mail on MAY 11 2010, to the following individual:

[redacted]
Department of Defense Education Activity
Equal Employment Opportunity Office
4040 North Fairfax Drive
Arlington, VA 22203-1634

The undersigned further certifies that the enclosed **DECISION AND ORDER ENTERING JUDGMENT** was mailed by first class United States Mail on MAY 11 2010, to the following individuals:

[redacted]
Nancy E. Whitaker
1579 Churchill Court
Clarksville, TN 37042

[redacted]
Chungsoo J. Lee
EEO 21
148 E. Street Road, Suite 321
Festerville, PA 19053

[redacted]
John Chamblee
Assistant General Counsel
Office of the General Counsel
Department of Defense Education Activity
700 Westpark Drive, 3rd Floor
Peachtree, GA 30269

FOR THE COMMISSION:

Lisa Reid

Lisa Reid
Office Automation Assistant