

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
SAN FRANCISCO DISTRICT OFFICE
350 THE EMBARCADERO, SUITE 500
SAN FRANCISCO, CA 94105-1260

Edward S. Sherman
7484 Monet Place
Rohnert Park, CA 94928

EEOC NO: 550-2008-00300X

Complainant

AGENCY NO: 4F-940-0030-08

v.

John E. Potter, Postmaster
General, U.S. Postal Service

Respondent

DECISION OF ADMINISTRATIVE
JUDGE PURSUANT TO
29 CFR § 1614.109(i)

COMPLAINANT'S REPRESENTATIVE:

Cindi Fox
Law Offices of David Handsher
345 Franklin Street
San Francisco, CA 94102

AGENCY'S REPRESENTATIVES:

Robert O'Connell & Monique Rutter
USPS Law Department
390 Main St., Suite 740
San Francisco, CA 94105

HEARING DATES:

January 7, 12, 16, 2009 and
August 13, 2009

HEARING LOCATION:

San Rafael & San Francisco, CA

ADMINISTRATIVE JUDGE:

Jeanne M. L. Player

DATE OF DECISION:

October 27, 2009

REFERENCE CODES:

HT: HEARING TRANSCRIPT
IF: INVESTIGATIVE FILE
CE: COMPLAINANT'S EXHIBIT
AE: AGENCY'S EXHIBIT
AJE: ADMINISTRATIVE JUDGE'S
EXHIBIT

I. INTRODUCTION

The complaint of discrimination filed by Edward Sherman against the United States Postal Service was docketed on June 26, 2008. The complainant has satisfied the administrative prerequisites, and this case is properly before an Administrative Judge for a Decision. I conducted a hearing on the complaint pursuant to 29 CFR § 1614.109 of the Commission's regulations on January 7, 12, and 16, 2009 and August 13, 2009. Fifteen witnesses testified at the hearing. The following documents were admitted into the record: Complainant's Exhibits 1-11 and Administrative Judge's Exhibit 1. The complainant's petition for attorney's fees and costs and the agency's response are made part of the record as AJE:2 and AJE:3, respectively.

II. ISSUES

Has the complainant proven that in retaliation for engaging in protected activity,¹ (1) he was subjected to a continuous pattern of harassment by co-worker Dana Morgan and the agency failed to take appropriate action to prevent and remedy the harassment, and (2) the retaliatory harassment and the agency's failure to act led to the complainant's involuntary retirement/constructive discharge?

III. APPLICABLE LAW

Title VII of the Civil Rights Act of 1964, as amended by the

¹ The complainant withdrew the bases of color (white), religion (Jewish), age (56), and mental disability (major depression).

Equal Employment Opportunity Act of 1972 (Title VII), prohibits discrimination in federal employment based on race, color, religion, sex, and national origin. 42 U.S.C. § 2000e-16.

Pursuant to the regulations of the Equal Employment Opportunity Commission, no person shall be subject to retaliation for opposing any practice made unlawful by the statutes enforced by the EEOC, or for participating in any stage of administrative or judicial proceedings under those statutes. 29 CFR § 1614.101(b).

Hostile Work Environment Harassment

The statutes enforced by the EEOC are violated when employees are required to work in a discriminatorily² hostile or abusive environment; that is, when the work environment 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 environment.'" Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993); Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986). See generally, Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998) (Title VII forbids behavior "so objectively offensive as to alter the 'conditions' of the victim's employment"). Whether an environment is "hostile" or "abusive" is determined by the totality of the circumstances. "These may include the frequency of the discriminatory conduct; its

² To state a claim based on retaliation, the complainant must show that he engaged in protected activity and that the employer knew about the protected activity.

severity, whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Harris v. Forklift Systems, supra.

To establish employer liability for hostile work environment harassment by a co-worker, the complainant must demonstrate that the employer knew, or should have known, of the harassing conduct and failed to take prompt and effective remedial action to end the harassment. 29 CFR § 1604.11(d).

Constructive Discharge

To establish a "constructive discharge" in a harassment case, the employee must show that "the abusive working environment became so intolerable that [his] resignation qualified as a fitting response." Pennsylvania State Police v. Suders, 542 U.S. 129 (2004). The inquiry is objective. An employee's "reasonable decision to resign because of unendurable working conditions is assimilated to a formal discharge for remedial purposes." Id.

IV. ANALYSIS

A. Findings of Fact

The complainant, Edward Sherman, was hired by the United States Postal Service (agency) in August 1981. He worked as a Letter Carrier in the Main Post Office in San Rafael, California, during his more than 27-year career. IF:428. Mr. Sherman was subjected to unlawful hostile work environment harassment by a co-

worker for which the agency is liable from August 2003 until his involuntary retirement/constructive discharge effective on April 1, 2009.

The Postal Service Policy on Workplace Harassment provides:

All managers and supervisors are responsible to prevent harassment and inappropriate behavior that could lead to illegal harassment and must respond promptly when they learn of such conduct. Any manager or supervisor who receives a complaint must see that a prompt and thorough investigation is conducted and ensure the harassment/inappropriate conduct does not happen again. . . . When harassment or inappropriate conduct is found, managers must take prompt and effective corrective action.

IF:479-480.³

The harassment of Mr. Sherman began a short time after his wife, Susan Turney, transferred to the Carrier Unit in which the complainant also worked. A few weeks after her transfer in July 2003, another Letter Carrier, Dana Morgan, "entertain[ed]" his co-worker friends (usually David Steele, Gary Tremblay and Frank Porter) by holding up and commenting on pictures of scantily-clad women: "Don't you like this woman's breasts? Boy I'd like to squeeze hers, and "I'd like to get her down on her knees. I'd like to do her from behind." HT:15. Ms. Turney complained to her supervisor, Darwin Richeson, about these offensive and sexist comments which had gone on for 15 minutes. Mr. Richeson told the

³ This Policy is dated September 25, 2006. Substantially similar policies were in effect for many years prior to this date.

men to "tone it down," and he got ear plugs for Ms. Turney. HT:13-14, 16.

Prior to August 2003, Mr. Sherman had been on friendly terms with Mr. Morgan. This changed abruptly after his wife complained to management about his sexist comments. Within a week, Mr. Morgan took a large dolly and intentionally ran it into Mr. Sherman's stacked mail, knocking over the mail and cutting the complainant's shin. He then yelled and flailed his arms, complaining falsely that Mr. Sherman had called him an "asshole." Mr. Richeson treated Mr. Sherman as if he were at fault and Mr. Morgan as if he were the victim. HT:22; 477-478.

Mr. Morgan also began to verbally harass Mr. Sherman, "castigating" him, as Letter Carrier Sandra O'Dwyer put it, for supporting Ms. Turney instead of joining in the sexist jokes. HT:95. Mr. Morgan told Mr. Sherman that he should "keep [his] bitch under control;" commented that "if it was my wife, I'd just slap her, and she wouldn't be reporting to management anything I was doing;" referred to Mr. Sherman as "pussy whipped" and to Ms. Turney as a "bitch" and a "dumb blond." HT:466. Mr. Sherman complained to Mr. Richeson about Mr. Morgan's conduct and comments, but no action was taken.

By the point in August 2003 when Mr. Sherman was complaining about Mr. Morgan's conduct, San Rafael management knew already that Mr. Morgan had a history of harassing his co-workers because they

knew that he had been harassing Letter Carrier Nancy Tuller since October 2001. Ms. Tuller had complained to her supervisors repeatedly, but without success. Beyond rolling his eyes, asking why she was doing this to him, and branding her as the "troublemaker," Postmaster Howard White did nothing to stop Mr. Morgan's tirades against her. Finally, she was compelled to ask the Postmaster for a one-year leave of absence to start January 1, 2004, because she "could not take it anymore." HT:121-128, 134-139. Mr. Richeson acknowledged that Mr. Morgan had harassed Ms. Tuller and that he (Morgan) was not disciplined for his conduct. HT:185.

On October 9, 2003, in the midst of complaints about Mr. Morgan from Mr. Sherman, Ms. Turney, and Ms. Tuller, Postmaster White received a report, "Investigation into an Allegation of Sexual Harassment," which had been prompted by Susan Turney's complaint about sexual harassment occurring on August 6, 2003. After interviewing witnesses about the sexually explicit comments and photographs of women, described above, the investigator concluded that Ms. Turney had been sexually harassed, that such harassing conduct was "endemic of the atmosphere in the San Rafael Post Office," that Dana Morgan was the ring leader, and that "if this situation is not addressed it will continue unabated and at the very least continue to make working conditions uncomfortable for other employees." IF:140.

The investigator's report provided notice, again, to the Postmaster and his supervisors of Mr. Morgan's conduct and the harassment occurring at the San Rafael Post Office. Management received further notice one week later, on October 16, 2003, when the resolution of Susan Turney's grievance charging Gary Tremblay with intentional physical contact and harassment⁴ provided for "eliminat[ion]" of the hostile work environment, a training class at San Rafael about sexual harassment, and upholding the Postmaster's "zero tolerance" memo of June 26, 2003. IF:123.

As is patently obvious from subsequent events, Postmaster Howard White neither took, nor directed anyone else to take, any meaningful action in response to the investigation findings or the grievance resolution to remedy the harassment or to uphold the agency's Policy on Workplace Harassment which required that when "harassment or inappropriate conduct is found, managers must take prompt and effective corrective action." [Emphasis added.] IF:479-480. Postmaster White offered no coherent or credible explanation for his failure to act and his complete disregard for the agency's anti-harassment policy. HT:364-367.

Meanwhile, Mr. Morgan's campaign against Mr. Sherman intensified. As Ms. Turney described it, Mr. Morgan stood in the

⁴ This grievance involved an incident on September 19, 2003, when Mr. Tremblay, one of Mr. Morgan's friends, ran into Ms. Turney with mail flats in the small "hot case" area and then accused her of assaulting him. HT:68.

middle of the work area and while looking at Mr. Sherman, announced: "Anybody that screws with me, I'm going to hound them for the rest of their days." HT:24-25.⁵ Mr. Morgan and his cohorts began to move the complainant's equipment, place garbage in his mail case before he came to work, and steal or smash his lunch left in his case. Although Mr. Morgan was never caught doing these things, he and his cohorts had bragged about doing similar things to other people in the past, and Mr. Sherman and others heard him sing songs from CDs that Mr. Sherman had reported missing from his work area. Mr. Morgan also interfered with the complainant's mail so that he could not find it to deliver in a timely manner. Mr. Sherman suspected that Mr. Tremblay was the one who scratched the paint on his car with a key because Mr. Tremblay had bragged about doing this to the vehicles of other people, including a supervisor. HT:469-473. In response to Mr. Sherman's complaints, Mr. Richeson told him to put on head phones, to ignore the comments of Mr. Morgan and the others, and to report what was missing. HT:484-485.

In August 2004, Mr. Morgan staged the first of his parties to celebrate that Mr. Sherman and Ms. Turney were going on vacation. He brought food and paraded around the unit saying: "We are free. I'm having a party. They are leaving." When Mr. Sherman told Mr. Morgan that his actions were "hateful," Mr. Morgan coined the term

⁵ Ms. Turney reported this threat to management but no action was taken. HT:25.

"hate party" which he used in subsequent years. HT:486-489. Similar "parties" were held just before the complainant and his wife went on vacation in 2005, 2006, and 2007.

Since August 2003, Ms. Turney asked to have her case moved to another unit to get away from Mr. Morgan and his cohorts. Finally, after she reported sexual graffiti ("suck my cock") on her case in August 2004, she was moved to another work unit. HT:17.

Another outside investigation of conduct at the San Rafael Post Office was conducted in late 2004 at the request of Harriet White, Manager of Human Resources, San Francisco District. Todd Risby, Labor Relations Specialist, prepared a Fact Finding Report on allegations of inappropriate behavior by Dana Morgan, Gary Tremblay, David Steel, Mark Singh, and Frank Porter from August 6, 2003⁶ through September 2004. CE:6. The Report was issued on October 18, 2004. Mr. Sherman and Ms. Turney were interviewed along with those named as engaging in inappropriate behavior. Mr. Morgan was particularly vitriolic in his interview comments about Mr. Sherman and Ms. Turney. Although Postmaster White received a copy of the Report, he claimed he did not remember whether Scott Tucker⁷ had instructed him to do anything in response. Mr. White did not take any action on his own initiative in response to the

⁶ The correct year is 2003, not 2004.

⁷ Ms. Turney had written to Mr. Tucker, Regional Manager in the San Francisco District, asking for help with the San Rafael work environment. CE:2.

findings, and he did not even talk to Mr. Morgan about the language he had used when talking about Mr. Sherman and Ms. Turney. HT:371-376. Postmaster White's stated reaction to the Report at the hearing, that he was "amazed" to learn what was "going on," is highly disingenuous and utterly lacking in credibility. HT:371.

Postal Service staff from outside the San Rafael Post Office came to San Rafael on November 15 and 29, 2004. They were charged with holding mediation sessions to resolve the problems in the work place. Although Mr. Morgan's four cohorts were invited, only Mr. Sherman, Ms. Turney, Mr. Morgan, and Postmaster White participated. Immediately after these sessions, Mr. Morgan breached the first item in the agreement, "[t]hat strict confidentiality would be maintained about the details of who said what during both mediation sessions." IF:121. He broadcast and tormented Mr. Sherman with statements and information the complainant had revealed in good faith at the mediation, particularly Mr. Sherman's fears for his son serving in the military and about to deploy to Iraq. Mr. Morgan said to anyone who would listen that he wished Mr. Sherman's son would get hit by a bomb and die in Iraq. He whistled or turned on an animated toy to play Taps. He read the casualty reports from the newspaper. He and his cohorts stood behind the complainant's mail case and when the complainant turned around, they made comments such as: "Somebody from Rohnert Park died today over there. Somebody from Santa Rosa died . . . Oh, I wish somebody who

has a son over there would die over there, and we can read his name to everybody." HT:494. He also said that he wished Mr. Sherman's son would run over a roadside mine. HT:495. See also, HT:38 (Turney); 326-327 (Hahn).

Mr. Sherman was extremely upset and he complained many times to management about Mr. Morgan's outrageous comments and conduct. Mr. Richeson told him that the Postmaster would take action if things got "out of control." HT:493. No action was taken to address or remedy Mr. Sherman's complaints.

Mr. Sherman's mail case finally was moved out of Unit 4 in 2005. The relief was temporary, however, because Mr. Morgan became a reserve letter carrier and was able to bid on T-6 and temporarily open routes near Mr. Sherman's new location. He continued his abusive comments and conduct against Mr. Sherman, regularly and loudly reminding the complainant (and anyone who supported Mr. Sherman) that he would "get back at" anybody who screwed with him. HT:496. Mr. Sherman reported this to Mr. Richeson. CE:3-CE:5. Another supervisor, Valerie Flippin, witnessed Mr. Morgan verbally attack Mr. Sherman in a meeting she had called on April 26, 2005. CE:5. Neither Mr. Richeson nor Ms. Flippin took any action.

In addition to San Rafael management's knowledge of Mr. Morgan's abusive conduct, the Postmaster and his supervisors also knew that Mr. Morgan routinely made false accusations against targeted co-workers. HT:383. Nonetheless, in June 2006,

management accepted Mr. Morgan's often-repeated false allegations that the complainant and his wife had been "stealing from" or "cheating" the Post Office. HT:103, 505-506. Notices of Removal were issued to both Mr. Sherman and Ms. Turney on the grounds that they had extended their lunch breaks by 10 minutes. Postmaster White inexplicably approved this harsh action even though both employees had clean discipline records and he had never approved the termination of anyone else for the same reason, and despite his admission that he did not consider Mr. Morgan to be credible. HT:386.

Notably, the termination notices were issued to Mr. Sherman and Ms. Turney less than four weeks after a Settlement Agreement was reached in Ms. Turney's EEO complaint alleging co-worker harassment. IF:429-435.

Mr. Sherman and Ms. Turney were out of work for three months. Mr. Sherman filed an EEO complaint alleging that his removal was in retaliation for his opposition to harassment. The terminations were rescinded in the grievance process, and Mr. White signed the Settlement Agreement resolving Mr. Sherman's EEO complaint. IF:433-435.⁶

Mr. Morgan continued to harass and torment Mr. Sherman after the complainant returned to work in August 2006. By 2007, Mr.

⁶ Mr. Sherman's termination is not an issue in this case as it had been raised and resolved in a prior EEO complaint.

Sherman had become increasingly concerned about his safety, particularly when he was delivering mail on his hilly route which had many steep ravines, because of tampering with his Postal vehicle.⁹ On March 15, 2007, he completed a Report of Hazard, Unsafe Condition or Practice form reporting a second flat tire in a week, the consequence of a slashed tire and a missing valve stem cap. IF:266. Although Mr. Sherman was told that the Postal Service had investigated these incidents, no investigation actually was conducted. HT:508-513.

On August 2, 2007, Mr. Sherman was on a steep street on Mt. Tamalpias when his breaks failed. The emergency break did not slow the postal vehicle to a stop until he was just 10 feet from going over the side of the road into a steep canyon. IF:268. He continued to have problems with his Postal vehicle, including one occasion when the breaks locked and another incident when the truck overheated because the fan belt had been removed. HT:508-513; 581-584. Postal management cavalierly failed to take any action to address these egregious and life-threatening safety hazards to which Mr. Sherman was subjected.

⁹ Mr. Sherman's personal vehicle, which he parked in the Post Office lot, also was damaged. Letters such as "FU" were scratched into the paint, the hubcaps were taken so often that he finally removed them entirely, valve stems on his tires were taken, the car was dented, and the windshield was cracked. He reported this vandalism to his supervisors and the Postmaster, but no meaningful action was taken. HT:578-580.

Mary Vitorelo became the supervisor of Mr. Sherman (and Mr. Morgan) in August or September of 2007. Mr. Sherman told her about Mr. Morgan's past harassment and asked her to monitor the situation. She told him that she would make up her own mind. HT:514-515.¹⁰ Supervisor Richeson credibly testified that he, as a fellow supervisor, told Ms. Vitorelo about Mr. Morgan's prior harassment of the complainant and others as well as of Mr. Morgan's pattern of making false accusations. HT:178-179.

Supervisor Vitorelo ignored the negative information she had been provided about Mr. Morgan. On October 12, 2007, she charged Mr. Sherman with harassing Mr. Morgan based on a complaint from Mr. Morgan. She issued a 14-day suspension to Mr. Sherman after he returned from leave in November 2007. IF:276-277. She charged that he had engaged in violent and threatening behavior in October 2007, relying solely on Mr. Morgan's false claim that at 7:15 a.m. in the men's restroom, Mr. Sherman had "violently kicked" a stall door "in an attempt to intimidate another employee present in the restroom" and then had called Mr. Morgan "fat boy." IF:276.

Ms. Vitorelo had no factual basis for the charges against Mr. Sherman. Mr. Sherman told her that he had not been anywhere near the bathroom at 7:15 a.m. on the date in question (HT:518-519), and

¹⁰ Ms. Vitorelo also "blew off" similar reports about Mr. Morgan's behavior from Lori Wise, Ronald Huhn, and Eric Jones who had told her about Mr. Morgan's hostility toward Mr. Sherman and others. HT:433.

Mr. Richeson, who was in the bathroom at the time, did not see or hear Mr. Sherman. I do not credit Ms. Vitorelo's assertions that she saw Mr. Sherman exit the bathroom and that she did not know about Mr. Morgan's proclivity for making false statements and his vendetta against Mr. Sherman. Her explanation to justify the suspension was implausible and internally contradictory, and she displayed a clear bias against Mr. Sherman during her testimony. HT:609-629; IF:445-447.¹¹ In addition, her asserted rationale is contrary to the credible testimony provided by every other witnesses with knowledge, including Chief Union Steward Anthony Gallardo, Letter Carriers Ronald Huhn and Lori Wise, and Supervisor Richeson. HT:8 (Stipulation 3); 198-201, 221-222; 272-277; 341-342, 345-346; 429-430. See also, IF:288-294 (grievance documents).

Mr. Sherman was distraught when he received the Suspension Notice on November 20, 2009, after returning from vacation. He immediately took an anti-anxiety pill and just wanted to keep taking his pills until he felt better. He contacted his doctor and went to the Kaiser Permanente psychiatry clinic. He was referred to the Intensive Outpatient Program (IOP) where for one month, he received therapy and treatment designed to stabilize his condition and to teach him to function despite his mental anguish. Mr.

¹¹ Ms. Vitorelo's description of Mr. Sherman's reaction upon receiving the suspension notice is preposterous. HT:630-632.

Sherman was off work from November 20, 2007 until early January 2008. HT:521-522.

On January 22, 2008, Mr. Sherman handed Ms. Vitorelo a doctor's note stating that his work assignment should be separated from Dana Morgan and that if this could not be done, Mr. Sherman should be regarded as unable to work. IF:323, 461. On January 23, 2008, about 30 minutes after Mr. Sherman reported to work, he heard Mr. Morgan and saw that he was casing the mail route next to him. Mr. Sherman left the area to look for a supervisor. When he finally was able to speak to Ms. Vitorelo, she ordered him back to work. Then, after he filled out a sick leave form, she followed him outside and threatened that he did not have the right to leave. Mr. Sherman, who had taken his anxiety medication after encountering Mr. Morgan, became even more anxious as a result of Ms. Vitorelo's treatment. IF:326.

While the record contains conflicting testimony about whether Mr. Morgan should have been permitted under the union contract or local practice to move to a new route (coincidentally, a route next to Mr. Sherman's route) on January 23, 2008, this matter need not be resolved. The salient fact is that San Rafael management, including Supervisor Vitorelo, knew of Mr. Sherman's serious psychiatric condition and recent treatment and, just the day before, she had received a doctor's note indicating that he could not work near Mr. Morgan. Ms. Vitorelo's refusal to honor the

restriction and her hostile reaction forced Mr. Sherman to leave work and caused him even more psychological distress. HT:524-526.

Mr. Sherman remained in precarious psychological and physical health throughout 2008. His prescription medications and regular therapy sessions enabled him to function enough to work. Although he made every effort to avoid Mr. Morgan, he was in a constant state of fear about what Mr. Morgan might do next. When an opportunity to take early retirement (and to keep his health insurance) was presented to Postal Service employees at the end of 2008, he concluded that he had no choice but to take this offer despite the adverse financial consequences of doing so. He made the irrevocable decision to accept the package with an effective retirement date of April 1, 2009. HT:537-538.

Mr. Sherman's co-workers unequivocally confirmed the harassing and abusive conduct of Mr. Morgan and his cohorts, and they further noted that these individuals made trouble for anyone who spoke to or supported the complainant and his wife. HT:O'Dwyer, Tuller, Jones, Gallardo, Huhn, R.Wise, L.Wise. These employees described an unhappy, inhospitable, and sometimes scary working environment which they attributed to management's failure to address or control Mr. Morgan's yelling, ranting, threatening comments, and name-calling. Many employees were intimidated into silence. They were afraid of incurring Mr. Morgan's wrath if they complained because the supervisors told Mr. Morgan who had made the complaints against

him and he would "go off" on them. HT:109, 112-113; 150, 161-162. Other employees recognized the futility of complaining to supervisors who took no action against Mr. Morgan. HT:331-332. Nancy Tuller described her overwhelming dread and fear of coming to work from late 2001 until late in 2003 when she could not take it any longer and secured a one-year leave of absence before her mental health was damaged further. By the time she returned to work in 2005, Mr. Morgan had "moved on" to tormenting Mr. Sherman and Ms. Turney. HT:121-130. Letter Carrier Ronald Huhn testified that Mr. Morgan yells on the workroom floor daily; that he is loud, obnoxious, and sometimes aggressive. HT:326-328. See also, HT:150-153 (Jones). Sandra O'Dwyer stated, and others including Supervisor Richeson confirmed, that Mr. Morgan made fabricated charges, exaggerated events, and played the victim. HT:97.

Many employees besides Mr. Sherman reported the conduct of Mr. Morgan and his cohorts to the Postmaster and their supervisors. HT:8 (Stipulation 1). Supervisors told employees to "ignore" Mr. Morgan when he ranted and yelled. HT:161. The Postmaster told his supervisors that when anything happened, to "write it down." HT:173. Mr. Richeson acknowledged, however, that he did not write down the verbal complaints he received from Mr. Sherman and Ms. Turney. HT:174.

Union President and Chief Steward Anthony Gallardo discussed the employee complaints he received about Mr. Morgan with San Rafael

management on many occasions. He and others asked that Mr. Morgan be reassigned to another facility. The Postmaster steadfastly maintained that he was powerless to do this because of the union contract and because he had to follow progressive discipline. Mr. Gallardo credibly testified that Postmaster White terminated another employee who had exhibited aggressive behavior, and that under the collective bargaining contract, progressive discipline was not required to support a removal if the behavior was sufficiently egregious and in violation of the "zero tolerance" policy. HT:317-319; 254-255, 281-285; IF:159, 181-183.

In addition to receiving numerous reports from employees, Postal Service managers personally saw and heard many instances of Mr. Morgan's contentious behavior and abusive comments during the more than five-year period relevant to this case, but no action ever was taken to stop this conduct. Supervisor Darwin Richeson confirmed that Mr. Morgan frequently was loud and abusive, and that his screaming would continue for several minutes. Mr. Richardson also stated that he knew Mr. Morgan was not truthful and that what he said was not to be trusted. Between 2003 and 2005, Mr. Richeson stated, Mr. Morgan had made false allegations about various individuals at least 30 to 40 times. Mr. Richeson reported Mr. Morgan's untrustworthiness and proclivity for making false accusations, particularly for the purpose of getting targeted co-workers in trouble, to the Postmaster and other supervisors,

including Mary Vitorelo when she became the complainant's and Mr. Morgan's supervisor in 2007. Postmaster White also agreed that Mr. Morgan was not credible. HT:175-196, 201, 212, 386.

Mr. Morgan was scheduled to be a witness in this case. During a short break on the first day of the hearing, he arrived at the Postmaster's office and began to rant and rave about how he was not coming into a room with what he deemed to be a racist poster on the wall, he yelled about his own EEO complaint, and he boasted that he was going to sue the Postmaster.¹²

My observations of Mr. Morgan's conduct for less than five minutes provided graphic support for the descriptions by Mr. Sherman and numerous other witnesses of Mr. Morgan's aggressive behavior, the impact of his conduct on the overall work environment, and their fears about their personal security at and outside of work. There is no dispute that all agency management officials involved in this case knew about this conduct. There also is no dispute that the Policy on Workplace Harassment was completely ignored and that no meaningful action whatsoever was taken over a period of more than five years to prevent or remedy his continuing abusive, intimidating, and egregious conduct. HT:8 (Stipulations).

¹² Mr. Morgan's testimony was postponed until the Postal Inspection Service could be arranged for security. Fearing Mr. Sherman's reaction to Mr. Morgan's appearance, the complainant's counsel withdrew Mr. Morgan as a witness, and he did not testify. HT:248-249.

As a consequence of management's failure and refusal to act, the complainant's working environment became intolerable. Mr. Sherman credibly testified that given his experiences over so many years in which his complaints were ignored, he did not believe that management ever would take action against Mr. Morgan or do anything to improve the situation; indeed, things likely would get worse. Mr. Sherman had been treated for anxiety disorders since 2005 and was diagnosed with Major Depression in January 2008, both conditions attributable solely to the hostile environment in which he worked. His mental and physical health continued to decline. Mr. Sherman had planned to retire in November 2013. HT:448, 536. Considering all of the circumstances, Mr. Sherman concluded that he had no option other than to terminate his employment with the Postal Service when an early retirement option became available. HT:536-537. Any reasonable person in his position would have reached the same conclusion.

B. Analysis of the Law

1. Harassment Claim

To prevail on a claim of hostile work environment harassment by a co-worker, the complainant must prove that he was required to work in an intimidating, abusive, and hostile environment, that the agency knew, or should have known, about the harassment, and that the agency failed to take prompt remedial and preventive action. The complainant has established both elements of this claim.

The substantial evidence cited above, as well as significant additional evidence of record not recounted in this already lengthy Decision, demonstrates that Dana Morgan, aided by several other co-workers, began a campaign of harassment against Mr. Sherman in August 2003 after Mr. Sherman's wife complained to management about regular and recurring sexually explicit and offensive comments and conduct by Mr. Morgan and the others. Mr. Sherman protested the harassment to which he was subjected as well as the harassment of his wife. As early as October 9, 2003, a Report on the investigation of Ms. Turney's complaints of sexual harassment by San Francisco District Labor Relations concluded that Ms. Turney was sexually harassed, that harassing conduct was "endemic of the atmosphere in the San Rafael Post Office," and that Dana Morgan was the ring leader. The report warned that "if this situation is not addressed it will continue unabated" IF:140.

Despite this explicit and well-founded notice to Postmaster White, for the next five years Mr. Morgan was permitted to continue "unabated" his abusive and intimidating conduct toward Mr. Sherman and others. He used derogatory terms to describe the complainant and his wife. He broadcast his wish that Mr. Sherman's son would die in Iraq and repeatedly made general comments about Iraq war casualties. He interfered with the complainant's work and took or ruined personal items from the complainant's work space. He carried out his threats to "pay back" Mr. Sherman and other people who

complained about him. He made false accusations which, notwithstanding Mr. Morgan's reputation for mendacity and Mr. Sherman's spotless record, were used by San Rafael management to terminate Mr. Sherman (and Ms. Turney) in 2006, and to suspend Mr. Sherman for 14 days in November 2007.

The Postmaster and his supervisors knew what Mr. Morgan was doing and saying during the more than five-year period from August 2003 through January 2009, and the Postmaster and Supervisor Richeson admitted that Mr. Morgan was not believable. Nonetheless, the Postmaster inexplicably took absolutely no action to stop Mr. Morgan or to remedy the abusive situation which Mr. Sherman, among others, reported and complained about over and over again during this period, and he continued to accept Mr. Morgan's accusations against others and denials of his own misconduct. Indeed, San Rafael management contributed to the hostile work environment by issuing a groundless 14-day suspension based solely on a non-credible accusation made by the known harasser. Mr. Morgan was never disciplined for his acts of harassment against Mr. Sherman or any other employee. HT:259-260.¹³ And despite countless requests by Mr. Sherman and others to move Mr. Morgan to another facility, San Rafael management steadfastly refused to consider this option.

¹³ The only discipline that management ever considered against Mr. Morgan involved his conduct toward a supervisor.

2. Constructive Discharge Claim

To prove a constructive discharge, Mr. Sherman must show that the employer engaged in illegal conduct and that the conduct would have been intolerable to a reasonable person, such as by showing unceasing and unremedied harassment creating a hostile work environment. I have found that Mr. Sherman was subjected to frequent and continuing abusive, intimidating, and egregious conduct by Mr. Morgan for more than five years, that agency management officials knew about the conduct during this entire period, and that they failed to address, correct, or prevent the harassment. Numerous co-worker witnesses described the nature and extent of Mr. Morgan's aggressive behavior, the toxic effects of his conduct on the entire work place and against Mr. Sherman in particular, and their own fears for their personal security at and outside of work given Mr. Morgan's free reign at the San Rafael Post Office. Finally, as is noted above, my own observations of Mr. Morgan's demeanor and conduct provided vivid confirmation of the testimony of Mr. Sherman and other witnesses concerning Mr. Morgan's unrelenting and aggressive conduct.

Over the years, the abusive working environment became utterly intolerable and unendurable for Mr. Sherman. As management had never taken any remedial action in the past, he had no reason to expect that they ever would. His fear that Mr. Morgan might set him up to be fired was entirely reasonable because, at this point, his

14-day suspension still was active. HT:596. Mr. Sherman also had a well-founded fear for his physical safety due to multiple incidents of tampering with his Postal vehicle which management did nothing to address. Ms. Turney testified that Mr. Sherman retired because he simply could not stand the work environment any longer, (HT:56), and his treating psychologists concurred that Mr. Sherman was forced to take early retirement to escape his work environment. HT(McClannahan):16; HT:(Kittredge):16-17. Considering the serious and continuing decline of his mental and physical health, Mr. Sherman's determination that he could not continue to work at the San Rafael Post Office was an objectively reasonable decision.

Mr. Sherman credibly testified that he would have been able to continue working and would not have applied for the early retirement option if Mr. Morgan had been transferred to another facility. HT:538. One week before the hearing, Mr. Morgan was notified verbally that he would be reassigned elsewhere. Mr. White's explanation for the timing of this decision is nothing short of astonishing. He testified that he made the decision to reassign Mr. Morgan "[f]or safety and other reasons and from our testimony. Just reflecting back on all the actions that Mr. Morgan had been involved in, and then recently he was involved with something else, I thought it was in the best interest to put him somewhere else." [Emphasis added.] HT:357. The fact that the Postmaster found a way to transfer Mr. Morgan only after Mr. Sherman had exercised the

irrevocable retirement option (and one week before the hearing in this case) can only be viewed as a callous act of retaliation by the very manager who, for over five years, had refused to remedy long-term and egregious co-worker harassment and had, instead, taken steps to get rid of Mr. Sherman (2006 termination, 2007 14-day suspension) for complaining about the unlawful conduct.

V. FINDINGS AND CONCLUSIONS

Based on the foregoing, I find that in retaliation for engaging in protected activity, Mr. Sherman was subjected to a continuous pattern of egregious harassment by a co-worker which the agency knew about and failed to remedy and that the retaliatory harassment and the agency's failure to act caused the complainant's involuntary retirement/constructive discharge. I conclude that the agency has violated Title VII and the EEOC's regulations prohibiting retaliation.

VI. REMEDIES

Once discrimination has been proven, the complainant is entitled to appropriate remedies and relief, as delineated in 29 CFR § 1614.501. I find that the complainant is entitled to, and the agency is ordered to provide: the following relief:

A. Injunctive Relief

1. Back Pay and Benefits

Mr. Sherman is entitled to an award of back pay (including pay increases), plus interest, and all lost benefits (including

applicable Social Security and retirement contributions, health insurance, and participation in savings plans) retroactive to April 1, 2009. Pennsylvania State Police v. Suders, supra. This amount should be reduced by the amount he actually has received, if any, in retirement benefits. This award should include payment for 196 hours of leave without pay that he took for medical appointments from January 4, 2007 through October 28, 2008, and for 16 hours of annual leave that he lost because he was on leave without pay as a result of the agency's discrimination. CE:10, p.2.¹⁴

Once the agency has calculated the proper amount of back pay, the complainant should be given an opportunity to present the agency with evidence regarding adverse tax consequences, if any, for which complainant shall then be compensated. The calculation of additional tax liability must be based on the taxes the complainant would have paid had he received the back pay in the form of regular salary during the back pay period, versus the additional taxes he must pay due to receiving the back pay lump sum award in 2009 or whenever this Decision is implemented.

The complainant also presented evidence, which the agency does not dispute, that from September 2006 through January 20, 2009,¹⁵ he

¹⁴ The record does not indicate that Mr. Sherman lost any pay as a consequence of the suspension. If he actually did lose pay, he must be compensated for pay lost because of the discriminatory 14-day suspension.

¹⁵ This is erroneously noted as 1/20/08.

used 343 hours of sick leave for medical absences attributable to the agency's retaliatory harassment. CE:10, p.1. These hours, and eight additional sick leave hours that he lost because he took leave without pay (CE:10, p.2), should be reccredited and added to his years of service as is permitted under the Civil Service Retirement System, requiring recalculation of his retirement benefits.

2. Front Pay and Future Benefits

The complainant also seeks payment for lost future wages. Front pay is compensation for the post-judgement effects of past discrimination, awarded to effectuate the "make whole" purposes of Title VII. Pollard v. E.I. DuPont De Nemours & Co., 532 U.S. 843 (2001). The purpose of front pay is to make the complainant whole; that is, to place him in the same position he would have been in absent discrimination. The decision to grant front pay and the amount, if granted, is within the discretion of the trier of fact. Lussier v. Runyon, Postmaster General, 3 A.D.Cas. (BNA) 223 (D.Me. 1994), aff'd, 50 F.3d 1103 (1st Cir. 1995). The fact that calculating front pay involves some degree of speculation does not preclude such an award; it is a "risk that the [employer] must bear" once discrimination is proven. Julian v. City of Houston, 314 F.3d 721 (5th Cir. 2002).

Mr. Sherman testified that he had planned to retire in November 2013. HT:536. I fully credit this testimony which was corroborated by his son, and no evidence was presented to the contrary. HT:448-

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449. As the agency's unlawful actions are the sole cause of his early retirement decision, I find that the complainant is entitled to an award of front pay from the date this Decision is implemented (when the back pay period ends) until November 30, 2013.¹⁶

The front pay amount should be calculated based on what Mr. Sherman's pay rate would have been if he had continued to work as a Letter Carrier at the San Rafael Post Office until November 30, 2013. As with the back pay award, the front pay amount must include a deduction of the retirement benefits he is receiving, as appropriate. In addition, as with the back pay award, once the agency has calculated the proper amount of front pay, the complainant should be given an opportunity to present the agency with evidence regarding adverse tax consequences, if any, for which complainant shall then be compensated. The calculation of additional tax liability must be based on the taxes the complainant would have paid had he received the front pay in the form of regular salary during the front pay period, versus the additional taxes he must pay due to receiving the front pay lump sum award in 2009 or whenever this Decision is implemented.

¹⁶ This award is supported by the evidence. Mr. Sherman would not have retired if Mr. Morgan had been moved from the San Rafael facility before he accepted the irrevocable retirement offer, and he had planned to work until his wife was eligible to retire in November 2013. HT:536-539. The fact that he was eligible for full retirement at the end of August 2011 is not controlling because there is no evidence that he planned to retire at that time.

In addition to front pay, the complainant is entitled to all benefits that he would have received if he had continued to work until November 30, 2013, including health insurance, retirement contributions,¹⁷ and savings plan benefits.

3. Additional Injunctive Relief

a. The agency shall remove from the complainant's official personnel file and all other formal and informal files maintained by the agency concerning the complainant all documents reflecting the suspension notice issued in 2007, all documents related to that suspension, and all documents otherwise critical of his work performance, attendance, or any other aspect of his employment that were placed in his files after August 2003, as a consequence of the unlawful harassment.

b. The agency shall post a Notice for a minimum of 60 days in a conspicuous location at all Postal Stations in or under the jurisdiction of the San Rafael, California, Post Office informing all employees that a violation of Title VII of the Civil Rights Act of 1964, as amended, and the EEOC's regulations prohibiting retaliation has occurred at the San Rafael Main Post Office, and assuring employees that they have a right to be free from harassment and retaliation for engaging in protected activity.

¹⁷ Continued retirement contributions and higher annual pay will require further recalculation of the complainant's retirement benefits.

c. Within 60 days of the effective date of this Decision, the agency shall provide in-person training to all individuals who at any time since August 2003 have been supervisors, managers, and Postmasters in all postal facilities in San Rafael, California, including but not limited to Howard White, Mary Vitorelo, and Darwin Richeson, on what constitutes harassment, particularly harassment by a co-worker, the obligation of all managers and supervisors to investigate and address harassment, and how to promptly and effectively remedy such harassment. The agency must certify to the Postal Service Law Department in San Francisco within 30 days after this training is conducted that the training has been completed. Monitoring of the implementation of the training shall occur at the discretion of the agency and the Law Department.

B. Compensatory Damages

1. Pecuniary Compensatory Damages

Mr. Sherman presented evidence, which the agency does not refute, documenting medical co-payments that he has made or may be required to make in the future. Mr. Sherman is entitled to reimbursement of documented co-payments for prescription medications of \$230 to Kaiser Permanente from February 5, 2007 through October 15, 2008. CE:10, p.4. He is entitled to payment of \$385 in medical treatment co-payments made from September 20, 2006 through January 15, 2008. CE:10, p.5; IF:317. He is entitled to the co-payments that have accrued since January 17, 2008, which he will have to pay

himself if his workers' compensation claim is not accepted by the Department of Labor, in the amount of \$765 through January 20, 2009. CE:10, p.3. As all of these expenses are solely attributable to the agency's discriminatory conduct, the complainant is entitled to be reimbursed for these amounts.

2. Non-Pecuniary Compensatory Damages

A complainant subjected to intentional discrimination may recover compensatory damages in the administrative process against a federal entity. 42 U.S.C. § 1981a; West v. Gibson, 527 U.S. 212 (1999). A complainant may establish a prima facie entitlement to compensatory damages for non-pecuniary losses with objective or other evidence that he has suffered damages that are linked to the unlawful discrimination. Mims v. Secretary, Department of the Navy, EEOC No. 01933956 (1993). Objective evidence can include medical documentation and statements from the complainant, family members, or co-workers concerning the existence, nature, severity, and manifestations of the complainant's emotional pain and suffering, mental anguish, loss of health, loss of enjoyment of life, or other non-pecuniary losses incurred as a result of the discriminatory conduct. Taylor v. Secretary, Department of the Navy, EEOC No. 01940376 (1994). An award of compensatory damages for non-pecuniary losses should reflect the extent to which the agency directly or proximately caused the harm and the extent to which other factors also caused the harm. Roundtree v. Dept. of Agriculture, EEOC No.

01941906 (1995). The agency is responsible for injury it caused to a complainant whose heightened emotional sensitivity results in greater emotional harm than might have been suffered by a less vulnerable individual. Wallis v. U.S. Postal Service, EEOC No. 01950510 (1995), citing Williamson v. Handy Button Machine Co., 817 F.2d 1290 (7th Cir. 1987) (tortfeasor takes its victims as it finds them).

The burden then shifts to the agency to present evidence tending to mitigate or abate the damages. The agency bears the burden of establishing that an adjustment in the damages claimed is necessary. Mims v. Navy, *supra*, citing Barnes v. United States, 685 F.2d 66 (3d Cir. 1982) (wrongdoer should bear the risk of uncertainty in calculation of damages).

Mr. Sherman seeks compensation for psychological and physical injury. He presented his own testimony, that of his son, his wife, seven co-workers, and three medical professionals who treated him-- Dr. Terry McClannahan, Mr. Peter Chinnici, and Dr. Lindsay Kittredge, and medical documentation of his clinical visits and prescription medications. CE:8; IF:306-318.

Mr. Sherman's first visit with his psychologist, Dr. Kittredge, occurred in February 2005. CE:8-A. He reported sleep problems and anxiety from work-related stress. Dr. Kittredge, who continues to treat Mr. Sherman as his primary treating provider on the Kaiser Permanente team, stated that he has suffered from chronic stress

throughout the period of treatment. He has been and is anxious, fearful, and hypervigilant, has trouble sleeping, has nightmares, ruminates about the Post Office, and has a diminished interest in associating with people. The acuteness of his symptoms and the intensity of the stressors led to his referral for medication so that he could function. The sole cause of Mr. Sherman's psychological condition is his situation at work.

Dr. Kittredge initially diagnosed Mr. Sherman with TMJ, a stress-related disorder, but agreed with Dr. McClannahan's diagnosis of Depression in January 2008, after she saw the complainant's test results. She also has determined that Mr. Sherman suffers from Post Traumatic Stress Disorder (PTSD) based on his symptoms and the fact that he was confronted with threats at work on a regular but unpredictable basis from co-workers and management, including verbal threats, and threats to his personal safety (Postal vehicle tire was slashed, valve cap was missing, brakes failed and locked on his hilly route, and the vehicle over-heated).

Dr. Kittredge testified that Mr. Sherman was forced to take early retirement to escape the bully at work. If this individual had been moved to another location, Mr. Sherman would not have had to retire early. While Mr. Sherman's symptoms are less severe since his retirement because he is not going into a "battle zone" every day, his symptoms remain, he continues to ruminate about his work situation, and he still worries about where he might encounter his

tormenter, Mr. Morgan. Dr. Kittredge stated that given her prognosis that Mr. Sherman will continue to have problems coping with his forced retirement from his employer of over 25 years, she planned to continue appointments with Mr. Sherman once or twice a month for the indefinite future. HT(Kittredge):7-19.

Mr. Sherman went to the Kaiser Psychiatry Department clinic for an urgent appointment on November 20, 2007, after receiving the Notice of 14-day Suspension, where he explained that he was under unbearable stress at work. CE:8-C, p.1. Given the complainant's "very distressed presentation," the psychotherapist on duty took him off work and recommended that he attend the Intensive Outpatient Program (IOP).

Mr. Sherman entered the IOP on November 26, 2006, and was placed in the group run by Peter Chinnici, Licensed Clinical Social Worker and Psychotherapist in the Kaiser Psychology Department in San Rafael. Mr. Chinnici described Mr. Sherman at their first meeting as extremely distraught and upset about a co-worker's long-term harassment of him and his wife. Mr. Sherman was severely depressed, extremely anxious, harbored suicidal thoughts, and was afraid to go back to work. Mr. Chinnici removed Mr. Sherman from work for four weeks so that he could attend the intensive program four days per week with group meetings and individual case management sessions.

