EEOC (IHS) 0720160006; 2017 EEOPUB LEXIS 3245

U.S. Equal Employment Opportunity Commission

September 25, 2017

Appeal Nos. 0720160006 & 0720160007, Hearing No. 520-2010-00280X, Agency No. 4B-140-0062-06

Reporter
2017 EEOPUB LEXIS 3245 *; EEOC (IHS) 0720160006

[TEXT REDACTED BY THE COURT] Velva B., [1] Class Agent, v. Megan J. Brennan, Postmaster General, United States Postal Service, Agency

Core Terms

disability, rehabilitate, qualified individual, class member, limited-duty, reasonable accommodation, phase, confidential, medical information, modify, notice, mail, eligible, team, retire, disparate, medical record, standby, carrier, email, reassessment, necessary work, roll, disclosure, hostile, headquarter, harassment, resign, jobs, calendar

Opinion By: [*1] For the Commission by Carlton M. Hadden, Director, Office of Federal Operations

Opinion

DECISION

Pursuant to EEOC Regulation 29 C.F.R. § 1614.606, the Commission exercises its discretion and consolidates the above-referenced appeals for decision. Following a November 12, 2015; final order on a class complaint, the Agency filed a timely appeal which the Commission accepts for de novo review pursuant to 29 C.F.R. § 1614.405(a). On appeal, the Agency requests that the Commission affirm its rejection of an Equal Employment Opportunity Commission Administrative Judge's (AJ's) finding of class-wide discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act) , as amended, *29 U.S.C. § 791* et seq. [2] The Agency also requests that the Commission affirm its rejection of the relief ordered by the AJ as well as the AJ's finding in favor of the Class Agent on her individual claim. For the following reasons, the Commission AFFIRMS the Agency's final order in part, and REVERSES the Agency's final order in part.

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[1] This case has been randomly assigned a pseudonym which will replace Complainant's name when the decision is published to non-parties and the Commission's website.

[2] The Class Period began on May 6, 2006, and ended on July 1, 2011. The Americans withDisabilities Act Amendments Act of 2008 (ADA-AA) went into effect on January 1, 2009, and made a number of significant changes to the definition of disability under the Americans with Disabilities Act and the Rehabilitation Act. For those individuals subjected to adverse employment actions under the Agency's National Reassessment Program (NRP) that occurred before January 1, 2009, including the Class Agent, the Commission will use the analytical framework as it existed before the enactment of the Americans with Disabilities Act Amendments Act of 2008 to determine whether those class members are individuals with disabilities when reviewing claims brought under the remedial phase of this proceeding.

[*2]

ISSUES PRESENTED

Whether the Class Agent established, by a preponderance of the evidence, that the Agency officials charged with implementing the National Reassessment Program (NRP) between May 5, 2006, and July 1, 2011, subjected injured-on-duty (IOD) employees who were qualified individuals with disabilities to a pattern and practice of disability discrimination in regard to the terms, conditions, and privileges of employment in violation of Section 501(g) of the Rehabilitation Act, *29 U.S.C. § 791*(g), which incorporates by reference Section 102(a) of the Americans with Disabilities Act of 1990, *42 U.S.C. § 12112*(a).

Whether the Class Agent established, by a preponderance of the evidence, that the Agency officials charged with implementing the NRP between May 5, 2006 and July 1, 2011, conducted a class-wide medical inquiry that was not job-related and consistent with business necessity in violation of *29 U.S.C. § 791*(g), which incorporates by reference Section 102(d)(4)(A) of the Americans with Disabilities Act/ *42 U.S.C. 12112*(d)(4)(A).

Whether the Class Agent established, **[*3]** by a preponderance of the evidence, when acting under the auspices of the NRP, the Agency officials and managers charged with implementing the NRP caused confidential medical information pertaining to class members to be accessed by unauthorized persons in violation of *29 U.S.C. § 791*(g), which incorporates by reference Sections 102(d)(3)(B), (d)(3)(C), and (d)(4)(C) of the Americans with Disabilities Act, *42 U.S.C. §§ 12112*(d)(3)(B), (d)(3)(C), and(d)(4)(C).

BACKGROUND

PROCEDURAL HISTORY

When these events began over ten years ago, the Class Agent worked as a Mail Handler at the Post Office in Rochester, New York. She had suffered an on-the-job injury in 1997 and had been performing successfully in a limited-duty Carrier Technician position since 1999. On May 19, 2006, she was called into her supervisor's office and informed that her assignment had been assessed under the NRP, and that, as a result of that assessment, the Agency had determined that no work was available for her. At the conclusion of the meeting, she was told that she could file a claim with the Office of Workers Compensation Programs (OWCP) and was escorted **[*4]** from the premises. Her OWCP claim was approved the following month.

On September 1, 2006, the Class Agent filed an appeal with the Merit Systems Protection Board (MSPB) after the Agency denied her request that she be restored to her limited-duty position. In McConnell v. United States Postal Service, MSPB Appeal No. NY-0353-06-0381-I-1 (June 1, 2007), the MSPB dismissed her appeal for lack of jurisdiction after finding that she failed to present any evidence in support of her claim that the managers who engineered her dismissal were told not to offer her an assignment during the reassessment process. The MSPB further noted that, in light of its dismissal, it could not consider her claim of disability discrimination.

On August 7, 2007, the Class Agent filed the instant class complaint, in which she alleged that the senior executives who devised and directed the implementation of the NRP had subjected all IOD employees to a pattern and practice of disability discrimination. The Administrative Judge (AJ) assigned to the case defined the class as consisting of rehabilitation and limited-duty IOD employees whose positions had been assessed under the NRP since May 5, 2006. The **[*5]** AJ categorized the Class Agent's claims into four broad categories: withdrawal of reasonable accommodations; hostile work environment; disclosure of confidential medical information; and disparate impact. Over the Agency's objections, the AJ certified the complaint as having met the prerequisites of numerosity, commonality, typicality, and adequacy of representation. The Agency argued vigorously that the class complaint could not be certified because the class members were identified as IOD employees, not as qualified individuals with disabilities, and were consequently ineligible for Rehabilitation Act protection. In response, the AJ held that, because the determination of whether one met the eligibility requirements to bring an action under the Rehabilitation Act was necessarily an individualized process, such eligibility would have to be determined during

the remedies phase, when the class members themselves would come forward. In [TEXT REDACTED BY THE COURT], et al. v. United States Postal Service, EEOC Appeal No. 0720080054 (January 14, 2010), the Commission affirmed the AJ's decision.

After a discovery process that lasted for nearly six years, both parties submitted **[*6]** motions for summary judgment to the AJ. At the same time, the Agency filed three other motions, in the first of which it renewed its eligibility argument. The Agency argued that the Commission lacked jurisdiction over the claims of class members who received "no-work-available" (NWA) determinations pursuant to the NRP, and that the AJ improperly authorized some 3,300 individuals who were never assessed under the NRP to file individual complaints. On June 4, 2015, the AJ denied all of the Agency's motions and issued her Report of Findings and Recommendation to Grant Agency's Motion for Summary Judgment on Class Claims in Part and Grant Agency's Supplement to Summary Judgment Motion in Part and Grant Class Agent's Motion for Summary Judgment on Class-Wide Liability in Part (the Class Order), in which she recommended a grant of partial summary judgment in favor of the Agency on the disparate impact claim and a grant of partial summary judgment in favor of the Class Agent on the remaining claims. Record at 26865-26957. The AJ recommended an additional finding that the class had been subjected to a pattern and practice of disparate treatment by those responsible for implementing the NRP. **[*7]** The AJ finalized the Class Order on September 21, 2015. On February 8, 2016, the Agency issued a final order in which it rejected the Class Order except for the finding of no disparate impact, and simultaneously filed the instant appeal.

THE NATIONAL REASSESSMENT PROGRAM

The NRP's principal proponents and architects were the Health and Human Resources Manager (the HHR Manager) and the Director of the Agency's Workers Compensation Office (the WCO Director), both of whom were stationed at the Agency's headquarters in Washington, D.C. These officials maintained that the purpose of the NRP was to improve operational efficiency by eliminating so called "make-work" performed by IOD employees, which they characterized as tasks that did not contribute to or otherwise support delivery of the mail. Record, p. 13529. As the WCO Director stated in his testimony at another class proceeding arising out of the NRP, its purpose was to ensure that IOD limited-duty and rehabilitation employees were performing work that was necessary to mail delivery. Record, pp. 13141, 14924. Of particular note is that the NRP was characterized as a return-to-work program, as opposed to a cost-savings program, **[*8]** as understood by the Government Accountability Office and by the HHR Manager's successor. Record at 13676-13677, 13679, 13680-13681, 13815-13816, 13912, 15268, 16031.

Our decision in EEOC Appeal No. 0720080054 provides a concise but comprehensive overview of the NRP, which we will reproduce here. The NRP was developed jointly by the Agency's Injury Compensation and Labor Relations Offices. Record at 13879. As was discussed in the above-referenced decision, the NRP was divided into two phases. Phase 1 is documented at Record at 12919-12967. Phase 2 is documented at Record at 12968-13131.

Phase 1

Phase 1, which consisted of thirteen steps, entailed identifying all IOD employees who, as previously noted, were either in limited-duty or rehabilitation status. The HHR Manager and the WCO Director instructed injury compensation specialists from the Agency's 74 district offices to prepare "activity files" for all employees classified as either limited duty or rehabilitation. Headquarters personnel then met with senior management at the district level to explain the NRP process. District-level injury compensation personnel were instructed to review the medical records of **[*9]** all employees who were in a limited-duty or rehabilitation assignment to ensure that their medical information was current. If an employee's file was lacking current medical documentation, district-level medical or injury compensation staff was to request an update from the employee. Headquarters provided a form letter to request the medical documentation. Any medical updates were noted in an "NRP worksheet," which was used throughout the entire NRP process to track each employee.

At this stage, the employees were unaware of the NRP process. However, the form letters for both the limited-duty and rehabilitation employees included language setting specific time frames for providing updated medical information and warning that failure to respond could result in the withdrawal of their assignments.

Next, management verified that, for every limited-duty and rehabilitation employee, the current job offer matched the tasks actually being performed. An NRP workbook, or activity file, was created for each employee tracked under the NRP. These workbooks were prepared by members of the District Assessment Team (DAT) for each district, which typically included an Operations Manager, **[*10]** specialists from Injury Compensation and Labor Relations, and members of the medical staff. They contained records relating to the employee's medical condition, modified job assignment, OWCP claims, and information related to any EEO matter, grievance, MSPB proceeding, settlements or any other decisions pertinent to the employee. They would be used during the second phase of the NRP to determine whether and to what extent work was available. After Phase I had been validated in each district, that district was authorized by headquarters to begin Phase 2.

Phase 2

In Phase 2, which consisted of eighteen steps, a headquarters team leader met with personnel in the district office to train them on this aspect of the NRP process. At this point, the union was first informed of the NRP. The districts were instructed to update the NRP workbooks to have all employees who had reached maximum medical improvement (MMI) listed on the rehabilitation tab, and the non-MMI employees listed on the limited-duty worksheet. NRP teams from the nine Agency areas met with the District Assessment Teams (DATs) in the districts for each of those areas, who then presented their lists of what they **[*11]** identified as necessary work. "Necessary Work" was defined as any tasks that are determined by management to be essential for an operation and/or function considered essential to the Agency's mission of delivering the mail. Necessary tasks were specific to districts and individual facilities and had to be approved by senior management.

The Area and District NRP teams then identified the local commuting areas for each installation. They then met to identify potential positions for all limited-duty and rehabilitation employees within the local commuting area. NRP documentation states that "[e]very reasonable effort must be made to identify" these potential positions. If a DAT was unable to locate a modified position in a local commuting area, it was to contact the Area and Headquarters NRP Team Leaders for assistance in expanding the search beyond the district boundaries. The Operations Manager submitted the "Proposed Duties for Rehabilitation Modified Position" worksheet to the employee's supervisor to identify a potential rehabilitation modified position. The Operations Manager then instructed the supervisor to complete and return the worksheet. Next, the supervisor listed the **[*12]** "identified necessary tasks and the average approximate time" for each identified task. The supervisors were instructed to include "as much information as possible" to aid the DAT when it completed the formal modified position job offer.

The Operations Manager verified the "proposed duties against necessary tasks" identified by the supervisor against an installation or facility necessary tasks master list. If any changes were made, the operations team member informed the employee's supervisor of the changes. If a modified position was found, the district NRP team would hold an interview with the affected employee; "[t]he interactive interview had to be conducted exactly in accordance with the interactive interview script for job offers." Headquarters directed who was to be present at the meeting in addition to the employee: a note taker and the members of the DAT.

At the meeting the employee was presented with a position that fit within his or her restrictions. If the employee had questions or chose to use the 14-day timeframe before signing the modified position offer, a second interview would be held. The NRP workbook would be updated to reflect any additional information **[*13]** obtained during the interviews.

If, however, the Agency was unable to find a modified position to offer, the employee was brought in for a meeting wherein he or she was told that there was "no work available." As noted above, this is what happened to the Class Agent.

Agency headquarters issued a very specific script that was to be followed during the "no work available" (NWA) meeting. During this meeting, the NRP team member leading the discussion explained the NRP process and then proceeded to tell the employee that the reassessment team had determined that no work was available. The employee was told that there would be a second meeting in two weeks to "finalize" the reassessment process. Again, headquarters directed the District NRP team, monitored by the Area Injury Compensation Team member, to have a second meeting "in compliance with the script for the second interview." The employee was advised that, if he or she presented updated medical documentation at the second meeting, the Reassessment Team would review that information and make a new determination as to that employee's status under the NRP. If, however, the employee did not present any new medical documentation, **[*14]** the second meeting would serve only to inform the employee of the final determination of "no work available." Once an employee was placed in NWA status, that individual was placed on Leave without Pay/Injured-On-Duty (LWOP/IOD) status, told to collect their personal belongings, and was escorted from the premises. NWA employees were also told that they were eligible to apply for worker's compensation benefits with OWCP.

Results

The NRP was in existence from May 6, 2006, to July 1, 2011. Record at 1160-1162, 1194-1196, 13704-13707. It had commenced as a pilot program in the districts of New York-Metro, San Diego, and Western New York before being rolled out as a national program at the start of Fiscal Year (FY) 2007. Of the employees reviewed during the pilot program, 413 were given new assignments, and 182 were told that no work was available for them. We noted in our decision in Appeal No. 0720080054 that, of the 2,423 IOD employees in the entire Northeast Area whose positions were assessed under the NRP, 71 were sent home with no job offer being made. The AJ found that, by the time the program had concluded in July of 2011, of all the IOD employees throughout the entire **[*15]** Agency who had been subjected to an NRP assessment:

. 76,066 had fully recovered and had returned to full duty in their pre-injury positions;

. 7,406 had received no changes in assignment during the NRP;

. 15,130 had been given new, changed, or modified assignments as a result of the NRP;

. 9,985 had received a total or partial no-work available determination; and

. 33,959 had retired, resigned, or separated during the NRP period.

Record at 26872.

THE ADMINISTRATIVE JUDGE'S POST-DISCOVERY RULINGS AND FINDINGS

On February 21, 2013, at the close of discovery, the AJ issued an order denying the Agency's motion to redefine the class and remand the class complaint with respect to class members with mixed cases (the Mixed Case Order). The AJ held that because the NRP was not a matter that was appealable to the Merit Systems Protection Board (MSPB), any separations that came about as a result of the NRP were not mixed cases. [3] Mixed Case Order, Record at 4076.

[*16]

On June 4, 2015, the AJ issued an order granting the Class Agent's motion to de-subsume from the class those individuals who were never made subject to the NRP (the De-Subsume Order). The Order clarified who was to be considered a member of the class; namely, those employees who: (1) were in limited-duty or rehabilitation status between May 5, 2006, and July 1, 2011; (2) have either been placed on the NRP worksheet and had medical documentation requested; or (3) had an NRP activity file created wherein confidential medical information may have been revealed. Those employees whose names were placed in an NRP workbook with no further action being taken were not considered to be part 'of the class. De-Subsume Order, Record at 27348-27349.

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[3] A mixed case is a case involving a claim of discrimination related to or stemming from an action that can be appealed to the MSPB.See generally 29 C.F.R. § 1614.302.

As noted above, on June 4, 2015, after receiving motions for summary judgment from both parties, the AJ issued a report of findings and recommendation to grant the Agency's motion for summary judgment, in part; to grant the Agency's supplement to summary judgment motion, in part; and to grant the Class Agent's motion for summary judgment on class-wide liability, in part (the Class Order). Overall, the AJ found that, while the stated purpose **[*17]** at the outset of the NRP -- eliminating make work"-- was legitimate, that purpose had "morphed" into "getting rid of as many limited-duty and rehabilitation employees as possible regardless of the work they were doing, either by returning them to full duty or sending them to the OWCP rolls. Class Order, pp. 1-2. Due to the size of the case file and the length of the Class Order, we will summarize the AJ's findings as follows:

1. The Class Agent failed to show that the NRP had a disparate impact on employees with disabilities. Class Order, pp. 54-58.

2. Individual class members did not have to prove that they are qualified individuals with disabilities until the remedies phase of the pattern-and-practice proceeding. Class Order, pp. 59-60.

3. Although the NRP's stated purpose was to eliminate "make work," its real purpose was to provide a mechanism for getting as many limited-duty and rehabilitation employees out of injured-on-duty status as possible, either by returning them to full duty or moving them to the workers' compensation rolls. Class Order, pp. 60-61, 66-69.

4. The NRP policy documents did not provide for the redaction of employees' medical diagnoses, **[*18]** which resulted in unauthorized disclosure of medical information. Class Order, pp. 61-66.

5. Under the auspices of the NRP, the Agency withdrew reasonable accommodations that it had previously granted from employees subject to NRP review without showing that continued maintenance of those accommodations was causing an undue hardship upon its operations. Class Order, pp. 69-71.

6. Pursuant to the NRP between 2006 and 2007, the Agency made NWA determinations without referring the affected IOD employees to the DRAC. The AJ noted that high level officials were actually hesitant to let these employees know about their DRAC rights out of concern that doing so would unnecessarily lengthen the process. She further found that the Agency did not begin to include DRAC references for those receiving a job offer until February 2009. She also noted that the DATs were asking more interactive questions during NRP Phase II interviews than they had previously. She noted, however, that those employees who were receiving NWA determinations still were not being given interactive interviews. Class Order, pp. 71-72.

7. Damages were not available for employees who quit or retired during the **[*19]** NRP process because it could not be determined whether the Agency had taken reasonable accommodations away from them. Class Order, p. 72

8. There were flaws with the NRP that put it at odds with the Rehabilitation Act.

a. The "necessary work" criterion utilized by the NRP was not in compliance with the Rehabilitation Act. Class Order, pp. 73-75.

b. The NRP process was not interactive. Class Order, pp. 76-77.

c. The NRP did not include an individualized assessment of each IOD employee. Class Order, pp. 77-78.

9. Finally, in targeting IOD employees, officials acting under the auspices of the NRP had subjected them to disparate treatment because of their disabilities. Class Order, pp. 78-84.

10. In subjecting IOD employees to the NRP, the Agency created a hostile work environment for injured-on-duty employees, many of whom were individuals with disabilities, particularly by putting them in fear of losing their jobs and being forced to look for new jobs at Walmart. Class Order, pp. 84-91.

11. Among the remedies the AJ ordered was that any headquarters official who was primarily responsible for continuing the process of finding work for IOD employees **[*20]** after the NRP had expired was to be given 8 hours of training on the Rehabilitation Act. Class Order, p. 92.

On September 21, 2015, the AJ issued a final report of findings and recommendations in which she incorporated the findings and recommendations from the June 2015 Class Order. The AJ also noted that Class Counsel had

asked for a delay on an attorney's fees ruling until after the Commission's Office of Federal Operations had ruled on her liability finding.

CONTENTIONS ON APPEAL

The Agency submitted three briefs on February 8, 2016, in which it presented six contentions on appeal, summarized below as follows:

1. In reviewing the record, the AJ applied an incorrect standard of "more likely than not," as opposed to "de novo," which led to the AJ finding class-wide liability based on a mere prima facie inference of disability, making inappropriate credibility determinations, and finding certain facts and ignoring other facts. Brief in Support of Appeal of Administrative Judge's Order (AB1), pp. 8-17.

2. The class should have been decertified at the close of discovery for failure to meet the prerequisites of commonality and typicality due to the Class **[*21]** Agent's failure to identify a class of employees protected by the Rehabilitation Act. AB1, pp. 17-36.

3. The class is not entitled to summary judgment on the claims regarding withdrawal of reasonable accommodations, hostile work environment, disparate treatment, or wrongful disclosure of medical information. AB1, pp. 37-84

4. The remedies ordered by the AJ were in violation of the Commission's regulations in that training was beyond the proper scope of relief and attorney's fees were improperly severed and deferred. AB1 84-87.

5. A complaint of discrimination based on a "no work available" determination made by the Agency pursuant to the NRP raises a mixed case that can only be adjudicated by the Merit Systems Protection Board. Brief in Support of Appeal from AJ's Order Denying Agency's Motion to Redefine the Class (AB2), pp. 2-3, 7-24. [4]

6. While the AJ properly de-subsumed from the class approximately 3,300 individuals who were never assessed under the NRP, the AJ improperly ordered that these individuals be given 45 days from the date they receive notice that they are not members of the class to initiate a disability discrimination complaint regarding any events **[*22]** that occurred during the class period. Brief in Support of Appeal from AJ's Order Granting Class Agent's Motion to De-Subsume Those Not Subject to the NRP (AB3), pp. 2, 6-9.

The Class Agent, through Counsel, initially submitted a brief on December 10, 2015, in which she argued that, in one of her preliminary relief orders, the AJ improperly precluded those class members who resigned or retired following their receipt of a "no work available" notice pursuant to **[*23]** the NRP from seeking damages. Class Agent's Brief in Support of Cross Appeal of AJ's Preliminary Relief Order (AB4), p. 4. The Class Agent submitted a second brief on March 24, 2016, (AB5) in which she responds to each of the Agency's points of contention raised in its three appeal briefs:

1. The class complaint continues to satisfy the prerequisites of numerosity, commonality, typicality, and adequacy of representation. AB5, pp. 10-15.

2. The AJ acted within her discretion in deciding not to hold a hearing on this case and applied the correct legal standard in her findings and recommendations. AB5, pp. 16-20.

3. It is not necessary to establish that class members are qualified individuals with disabilities during the liability phase of a pattern-and-practice claim of disability discrimination; such a finding is appropriate during the remedies phase of the proceeding. AB5, p. 31.

4. The evidentiary record supports the AJ's findings and recommendations concerning withdrawal of previously-granted reasonable accommodations, disparate treatment, harassment, and wrongful disclosure of confidential medical information. AB5, pp. 31-65.

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[4] The Merit Systems Protection Board has ruled multiple times that neither the NRP itself nor any actions stemming from the NRP constitute appealable actions to that body. See, e.g. *Luna v. U.S. Postal Service, 114 M.S.P.R. 273, 279 (2010); Bruton v. U.S. Postal Service, 114 M.S.P.R. 365, 372 (2010); Carlos v. U.S. Postal Service, 114 M.S.P.R. 553, 557 (2010); Rodriguez-Moreno v. U.S. Postal Service, 115 M.S.P.R. 103, 111 (2010).* Accordingly, we will not address this contention.

5. Injured-on-duty employees **[*24]** were segregated from the rest of the workforce when they were forced to report to standby rooms. AB5, pp. 61-62.

6. The Commission properly asserted jurisdiction over the claim involving class members who received a no-work-available determination under the NRP. AB5, pp. 66-70.

7. The Commission should affirm the AJ's preliminary relief order authorizing those not subject to the NRP to initiate individual complaints of discrimination. AB5, p. 71.

8. The remedies ordered by the AJ were proper. AB5, pp. 71-72.

STANDARD OF REVIEW

In rendering this appellate decision, we must scrutinize the AJ's legal *and* factual conclusions, and the Agency's final order adopting them, de novo. See 29 C.F.R. § 1614.405(a) (stating that a "decision on an appeal from an Agency's final action shall be based on a de novo review . . ."); see also Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (MP-110), at Chap. 9, § VI B (Aug. 5, 2015) (both the Administrative Judge's determination to issue a decision without a hearing, and the decision itself, are subject to de novo review). This essentially means that we should look at this case with **[*25]** fresh eyes. In other words, we are free to accept (if accurate) or reject (if erroneous) the AJ's and Agency's factual conclusions and legal analysis - including on the ultimate fact of whether intentional discrimination occurred, and on the legal issue of whether any federal employment discrimination statute was violated. See id. at Chap. 9, § VI.A. (explaining that the de novo standard of review "requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker," and that EEOC "review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission's own assessment of the record and its interpretation of the law").

ANALYSIS AND FINDINGS

ADMINISTRATIVE JUDGE'S APPLICATION OF "MORE LIKELY THAN NOT" STANDARD

The Agency argues at the outset that the AJ applied an incorrect standard of review of "more likely than not" in finding liability. In raising this argument, however, the Agency confuses the concepts of "standard of review" and "burden of proof." The de novo standard of review we apply to **[*26]** the AJ's factual and legal rulings on summary judgment is detailed above. With respect to the burden of proof appropriate to the findings on the merits of the class action, as the party bringing the class complaint, the Class Agent has the burden to establish, by a preponderance of the evidence, that the actions taken by the HHR Manager, the WCO Director and other officials responsible for implementing the NRP caused a class of qualified individuals with disabilities to be deprived of the rights granted to them under the Rehabilitation Act. "Preponderance of the evidence" is defined as "more likely than not." See, e.g., Curry v. Department of Justice, EEOC Appeal No. 01A41202 (Apr. 28, 2005); Galos v. United States Postal Service, EEOC Appeal No. 01986031 (Sept. 6, 2002).

The Commission's regulations allow an AJ to issue a decision on summary judgment if the AJ finds that the evidentiary record raises no genuine issue of material fact that would warrant a hearing. 29 C.F.R. § 1614.109(g). An issue of fact is "genuine" if the evidence is such that a reasonable fact finder could find in favor of the non-moving party. *Celotex v. Catrett, 477 U.S. 317, 322-23 (1986).* **[*27]** A fact is "material" if it has the potential to affect the outcome of the case. Abeijon v. Dept of Homeland Security, EEOC Appeal No. 0120080156 (Aug. 8, 2012). The evidence of the non-moving party must be believed at the summary judgment stage and all justifiable inferences must be drawn in the non-moving party's favor. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).* To prevail, the Agency must show either that a genuine issue of material fact exists that would justify holding a hearing or that no genuine issue of material fact exists that could conceivably lead to a finding of liability.

CERTIFICATION OF THE CLASS

The Agency argues on appeal that the class should be decertified for failure to meet the prerequisites of commonality and typicality. The Commission disagrees. An Agency may not challenge the appropriateness of class

certification on appeal when the merits of a class complaint have been decided. Belia S. v. Dept. of Justice, EEOC Request No. 0520130561 (Aug. 12, 2014), citing Hyman v. Dept. of Health & Human Services, EEOC Appeal No. 01840707 (Sept. 9, 1986) (the merits of the complaint having been decided, the agency may **[*28]** not challenge appropriateness of class certification on appeal). See also Fed. R. Civ, P. 23(c)(1)(C) (an order that grants or denies class certification may be altered or amended *before final judgment*) (emphasis added), cited in *Microsoft Corp. v. Baker, U.S. , 137 S.Ct. 1702, 1711 (2017);* and *Gutierrez v. Johnson & Johnson, 523 F.2d 187, n. 12 (3d. Cir. 2008)* & *McNamara v. Felderhof, 410 F.3d 277, 279 (5th Cir. 2005)* (a district court is free to reconsider its class certification ruling as often as necessary *before final judgment*) (emphasis added). Here, the AJ issued her decision on the merits of the class complaint on September 21, 2015, finding class-wide Agency liability on the merits under the Rehabilitation Act. Accordingly, the Commission will entertain no further arguments regarding certification of the class.

ELIGIBILITY FOR REHABILITATION ACT PROTECTION IN A CLASS COMPLAINT

In accordance with the Rehabilitation Act, no federal employer may discriminate against a qualified individual on the basis of disability in regard to terms, conditions, and privileges of employment. *42 U.S.C. § 12112* **[*29]** (a). In determining whether there has been a violation of section 501(g) of the Rehabilitation Act, we apply the same standards that are applied under Title I of the Americans with Disabilities Act of 1990 *(42 U.S.C. 12111* et seq.). *29 U.S.C. § 701*(g).

The theory of discrimination in a pattern and practice case such as this is that the Agency "regularly and purposefully" treated members of a protected less favorably than individuals not in that group. Carey v. Defense Contract Management Agency, EEOC Appeal No. 01A53389 n. 3 (Sept. 1, 2006), citing *International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 (1977).* The Class Agent must establish, by a preponderance of the evidence, that discrimination was the Agency's standard operating procedure; the regular rather than the unusual practice. See *Teamsters, 431 U.S. at 336;* Tarrats, et al. v. Federal Deposit Insurance Corporation, EEOC Appeal No. 01A41422 (Nov. 15, 2004).

When a class alleges a broad-based policy of employment discrimination, it may pursue its pattern or practice claims in a bifurcated proceeding. In its **[*30]** first stage, the Class Agent must establish that unlawful discrimination has been a regular procedure followed by an employer. *EEOC v. Bass Pro Outdoor World, LLC., 826 F.3d 791, 797 (5th Cir. 2016),* citing Teamsters, supra, at 336 n. 16. Single, insignificant, isolated acts of discrimination are not enough to prove a pattern or practice, nor are sporadic incidents. Id. Instead, the Class Agent must show that the denial or rights was repeated, routine, or of a generalized nature. Id. If the Class Agent meets her initial burden, a subsequent remedial phase determines the scope of individual relief. Id., citing *Teamsters, 431 U.S. at 361.*

We begin by determining whether the Class Agent is an individual with a disability. A disability is defined as an impairment that substantially limits a major life activity; a record of such an impairment; or being regarded as having such an impairment. See *42 U.S.C. § 12102*(1); 29 C.F.R. § 1630.2(g). Because she was removed from her position in 2006, prior to the enactment date of the Americans with Disabilities Act Amendments Act (ADAAA), we must analyze **[*31]** her claim under the pre-ADAAA framework. As a threshold matter, the Class Agent must establish that she is a person who has, has a record of, or is regarded as having a physical or mental impairment which substantially limits one or more of his major life activities, i.e., caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. An impairment is substantially limiting when it prevents an individual from performing a major life activity or when it significantly restricts the condition, manner, or duration under which an individual can perform a major life activity. Abeijon, EEOC Appeal No. 0120080156 (citing 29 C.F.R. § 1630.2(j)).

The Class Agent sustained an on-the-job injury on January 2, 1997, while delivering mail during winter weather. Record at 15288-15289. She was diagnosed with lumbar stenosis, which eventually became a chronic degenerative condition characterized by loss of soft tissue between the discs in the spinal column, the effects of which were permanent. Record at 15290-15291, 15327. In September 1997, she had a lumbar laminectomy and follow-up physical therapy for 90 days. Record at 15292, 15327-15329. She **[*32]** remained out of work until

January of 1998. Record at 15293. When she returned, she was placed under medical restrictions that included no lifting over ten pounds, no standing for more than one hour, no bending, twisting up to only 15 degrees, and working up to 4 hours per day. The Class Agent underwent a follow-up medical examination in December of 2002. The examining physician noted that she still had significant stenosis as well as neurogenic claudication. [5] Record at 15313,15293-15294, 15297, 15330, 15332, 15336.

We find that the Class Agent's condition meets the definition of a disability under the Rehabilitation Act as it existed prior to the enactment **[*33]** of the ADAAA. She had in place a medical restriction that prevented her from lifting more than ten pounds, and according to her medical documentation, that restriction was permanent. Our pre-ADAAA precedent holds that permanent inability to lift more than 10 pounds is a substantial limitation in the major life activity of lifting. Gil v. U.S. Postal Service, EEOC Appeal No. 01990675 (Sept. 14, 2001); Chau-Phan v. U.S. Postal Service, EEOC Appeal No. 01985730 (July 13, 2001); Selix v. U.S. Postal Service, EEOC Appeal No. 01970153 (Mar. 16, 2000). Therefore, the Class agent is an individual with a disability.

We must next determine whether the Class Agent is a *qualified* individual with a disability. A qualified individual with a disability is an "individual with a disability 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 such position. *42 U.S.C. § 12111*(8); 29 C.F.R. § 1630.2(m). After remaining out of work for approximately one year, the Class **[*34]** Agent returned to work and was offered several limited-duty assignments within her medical restrictions; most recently as a Carrier Technician on September 25, 1999. Record at 15296-15298, 15330-15331. She held this position until her departure on May 19, 2006. Her duties included serving as Safety Captain, handling the address management system, carrier casing, answering the telephone, helping carriers with mark-up mail, and other duties as needed. Record at 15273, 15299-15311, 15337, 15340, 15419. Until the NRP meeting in May 2006 which resulted in her losing her job, she had been meeting the performance expectations of her modified position while having her restrictions accommodated. The Class Agent is therefore a qualified individual with a disability.

The next question is whether the Class Agent's status as a qualified individual with a disability extends to the class. A Class Agent typically establishes a prima facie case of pattern or practice discrimination either by a combination of anecdotal and statistical evidence or by gross statistical disparities alone. Peterson & Trammel v. Dept. of the Air Force, EEOC Appeal No. 01942838 (Sept. 8, 1988), citing *Hazelwood School District v. United States, 433 U.S. 299, 307 (1977).* **[*35]** The class agent here established that those responsible for developing and implementing the NRP engaged in practices against individuals who were or might be disabled. She identified the class as consisting of IOD employees who were in limited-duty or rehabilitation positions when they were assessed by the NRP and suffered adverse consequences as a result of those assessments.

The Agency contends that the mere fact that the class members were injured and receiving benefits under the Federal Employee's Compensation Act (FECA) did not make them qualified Individuals with disabilities. It correctly points out that, under the Commission's own policy guidance, entitlement to compensation under FECA is not synonymous with Rehabilitation Act coverage. See EEOC Enforcement Guidance: Workers Compensation and the ADA, EEOC Notice No. 915.002, Questions 1, 15, and 25 (Sept. 3, 1996); Stewart v. U.S. Postal Service, EEOC Appeal No. 01996211 (June 17, 2002).

There is, however, substantial overlap between the two statutory schemes in their applications to real-life situations, a fact ignored by the Agency on appeal but readily understood by the agency officials who were carrying **[*36]** out Phase I of the NRP. They had carefully scrutinized the medical records of over 100,000 IOD employees. One of those records is the Form CA-17, a duty-status report form routinely used by the OWCP. It includes information concerning an injured employee's diagnosis, condition, and work restrictions. Record at 12939-12946. For example, the CA-17 from one of the Class Agent's anecdotal witnesses indicated that he was diagnosed with tendonitis of the

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[5] "Neurogenic claudication" is a symptom of lumbar stenosis and is defined as an inflammation of the nerves emanating from the spinal cord, characterized by leg pain or numbness that occurs when standing or walking. Farlex,The Free Dictionary, *http://www.medical-dictionary* the. free dictionary.com/neurogenic+ claudication (last visited July 28, 2016).

rotator cuff and was restricted from lifting more than 10 pounds, kneeling, bending, stooping, and reaching above the shoulder. Record at 15483. Another witness was diagnosed with severe carpal tunnel syndrome and also suffered from the residual effects of a back injury. He had medical restrictions that included sitting, pushing and pulling, and reaching above the shoulder. Record at 15508. The CA-17 of a third witness indicated that he was diagnosed with a contusion of the lower back from which he experienced chronic pain, and was restricted in the activities of lifting more than 15 pounds, climbing, kneeling, twisting, and reaching above the shoulder. Record at 15766, 15770. A fourth witness was diagnosed with repetitive motion injuries **[*37]** to the left shoulder, right arm, and right elbow, carpel tunnel syndrome, and nerve impingement within the rotator cuff. He was under restrictions that included intermittent walking, climbing, pulling, pushing, driving a vehicle, and operating machinery. Record at 15842-15843, 15846-15847. All of these individuals were performing the functions of their limited duty or rehabilitation positions when they were assessed under the NRP.As can be seen from the foregoing examples, although the Form CA-17 is used for determining an IOD employee's eligibility for compensation under FECA, it can also constitute compelling prima facie evidence that the employee in question has a disability as defined by the Rehabilitation Act. The presence of this form in the medical records of all those IOD employees is enough to raise the inference that a substantial number of those who were given new assignments or NWA determinations under the NRP were qualified individuals with disabilities. This is all that is required for a showing that the Class Agent's status as qualified individual with a disability extends to members of the class.

On appeal, the Agency contends that since eligibility for Rehabilitation **[*38]** Act protection requires an individualized inquiry, proof of one's status as a qualified individual with a disability cannot occur during the liability stage of a Teamsters-type proceeding. Expecting every potential class member to undertake the individualized inquiry that the Rehabilitation Act requires during the liability phase of the Teamsters process is inherently impractical, unworkable in practice, and would effectively bar the use of class complaints as a means of challenging workplace policies that discriminate against individuals with disabilities. Such a result would clearly be contrary to Congress's intent in enacting the Rehabilitation Act and the ADA. [6]

[*39]

A far more efficient and effective way to resolve the individualized-inquiry dilemma is to require prospective class members to prove that they are qualified individuals with disabilities during the remedies phase of the Teamsters proceeding, as opposed to the liability phase. The remedies stage is where proof of one's status as a qualified individual with a disability under the Rehabilitation Act naturally aligns with proof of one's membership in a class under Teamsters. The Rehabilitation Act's jurisdictional requirement is just one more element of proof necessary to establish class membership and entitlement to relief. Assuming that prospective class members can prove that they were adversely affected by being assessed under the NRP, requiring them to also prove that they are qualified individuals with disabilities is the best way to ensure that only those who meet the Rehabilitation Act's prerequisite will be awarded a remedy.

DISPARATE IMPACT

The AJ ruled that the Class Agent failed to show that the NRP had a disparate impact upon qualified individuals with disabilities. Class Order, pp. 2, 54-58. On appeal, class counsel acknowledged this finding and noted **[*40]** that

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[6] A primary purpose of the ADA, and by extension theRehabilitation Act, is to eliminate discrimination against individuals with disabilities. *42 U.S.C. § 12101*(b)(1). In enforcing these statutes, the Commission's responsibility is to eliminate employment policies and practices that purposefully or effectively discriminate against qualified individuals with disabilities because of their disabilities. Consequently, the Commission is not compelled to interpret the Rehabilitation Act or the ADA in a manner that conflicts with its mandate. See Haywood C. v. U.S. Postal Service, EEOC Appeal No. 0120132452 (Nov. 18, 2014) (referring to the fact that the Commission is not bound by federal circuit court precedent for purposes of adjudicating federal sector complaints). See also, e.g. Huddleson v. U.S. Postal Service, EEOC Appeal No. 0720090005 n. 6 (Apr. 4, 2011); Tuttle v. U.S. Postal Service, EEOC Appeal No. 0720080025 n. 2 (Mar. 5, 2009) (rejecting lower court case law inconsistent with Commission precedent).

neither party appealed the AJ's ruling thereon. AB5, p. 6 n. I. Accordingly, the disparate impact claim is not before us on appeal and will stand as ruled upon by the AJ.

DISPARATE TREATMENT

In its appeal brief, the Agency argues that, because the disparate treatment claim was not one of the four claims that the Commission certified in Appeal No. 0720080054, it cannot be raised on summary judgment and must therefore be dismissed. AB1, p. 78. Because the AJ's decision on summary judgment is subject to our review de novo, that argument is irrelevant. So long as there is sufficient evidence in the record to fairly and reasonably rule upon the disparate treatment claim on its merits, we can and will do so.

Disparate treatment claims arise from language in the Americans with Disabilities Act prohibiting covered entities from classifying an employee in a way that adversely affects the opportunities or status of such employee. *Hoffman v. Caterpillar. Inc., 256 F.3d 568, 572 (7th Cir. 2001),* citing *42 U.S.C. § 12112*(b)(1). See also 29 C.F.R. § 1630.5. To prevail in a class claim of disparate treatment in connection with **[*41]** the NRP, the Class Agent would have to prove, by a preponderance of the evidence, that the HHR Manager, the WCO Director, and other officials involved in the development and deployment of the NRP were motivated by unlawful considerations of the class members' disabilities when they subjected IOD employees to NRP assessments and took follow-up actions to those assessments under the auspices of the NRP. See *Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 143 (2000).*

The first step in that process would be for the Class Agent to establish a prima facie case of disability discrimination. To do so, she must first demonstrate that the class members belong to a protected group. In light of our discussion above, we find that the Class Agent has met her burden by submitting CA-17 forms and other medical records pertaining to the IOD employees in limited duty and rehabilitation positions who were affected by the NRP. Given the extensive documentation of permanent and long-term impairments and limitations contained in those records, the likelihood that a substantial number of IOD employees were also qualified individuals with disabilities under the Rehabilitation **[*42]** Act is high. This is sufficient for the Class Agent to establish that the class members fall under the protection of the Rehabilitation Act, thereby clearing the first hurdle of the prima facie case.

In addition to protected-group membership, the Class Agent must show that the class members are similarly situated to employees outside of their protected group, and that they were treated differently than those employees. Idell M. v. U.S. Postal Service, EEOC Appeal No. 0120132276 (Dec. 9, 2015), citing *Potter v. Goodwill Industries of Cleveland, Inc., 518 F.2d 864, 865 (6th Cir. 1975).* The facts will necessarily vary and the specification of prima facie proof is not necessarily applicable in every respect to differing factual situations. *McDonnell Douglas Corporation v. Green, 411 U.S. 792, 802 n.13 (1973).* Moreover, comparative evidence is only one way to establish a prima facie case; there are other ways of making such a showing. Pruneda v. U.S. Postal Service, EEOC Appeal No. 0720050014 (June 4, 2007) (citing *O'Connor v. Consolidated Coin Caters Corp., 517 U.S. 308 (1996))* (reassigning only limited-duty letter carriers **[*43]** to an undesirable pre-dawn shift with extremely short notice) .

According to the Agency's own estimates, approximately 15,000 IOD employees received new assignments as a result of their NRP assessments. Another 10,000 IOD employees received determinations of total or partial NWA, while another 34,000 IOD employees separated while the NRP was in effect. This means that thousands of IOD employees may have been adversely affected by being assessed under the NRP. This evidence is more than sufficient to establish a prima facie case of class-wide disability discrimination.

The burden now shifts to the Agency to articulate a legitimate, nondiscriminatory reason for utilizing the NRP. Complainant v. Dept. of Veterans Affairs, EEOC Appeal No 0120120184 (Aug. 6, 2015), citirg *Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).* According to the HHR Manager and the WCO Director, the stated purpose of the NRP was to ensure that IOD employees were performing only work that was necessary to the Agency's mail delivery operations. Record, pp. 13141, 13529, 13676-13677, 13679, 13680-13681,

13815-13816, 13912, 14924, 15268, 16031. We agree that, **[*44]** on its face, this reason is legitimate and nondiscriminatory.

To ultimately prevail, the Class Agent must prove, by a preponderance of the evidence, that the Agency's explanation for the NRP is pretextual, i.e., not the real reason but, rather, a cover for disability discrimination. *Reeves 530 U.S. at 143; St. Mary's Honor Center v. Hicks, 509 U.S. 502, 519 (1993).* In this case, the Class Agent can demonstrate pretext by presenting documents or sworn testimony from other witnesses tending to show such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the legitimate reason proffered by the NRP's architects to justify that program's existence that a reasonable fact-finder could rationally find that ostensibly legitimate reason to be a sham. See Hicks, supra, at 515; *Burdine, supra;* Opare-Addo v. U.S. Postal Service, EEOC Appeal No. 0120060802 (Nov. 20, 2007), request for reconsideration denied, EEOC Request No. 0520080211 (May 30, 2008). Indicators of pretext can include discriminatory statements or past personal treatment attributable to the HHR Manager, the WCO Director, or **[*45]** others who supported and assisted in the implementation of the NRP; comparative or statistical data revealing differences in treatment across disability lines; unequal application of Agency policy; deviations from standard procedures without explanation or justification; or inadequately explained inconsistencies in the evidentiary record. Mellissa F. v. U.S. Postal Service, EEOC Appeal No. 0120141697 (Nov. 12, 2015).

In Pruneda v. United States Postal Service, supra, noted above and explained in more detail here, the Commission found that the Agency had discriminated against the complainant on the basis of disability by reassigning her to a shift that started at 2:30 a.m. The complainant was in a limited-duty position, having previously suffered on-the-job injuries to her shoulder and knee. She and many other limited-duty carriers had been reassigned by the Postmaster to the 2:30 a.m. shift. The complainant alleged that the purpose behind the creation of this shift was to force injured carriers to resign, take disability retirement, or quit. The Commission found that the Postmaster who had created the shift had reviewed the Form CA-17's of the limited-duty and rehabilitation **[*46]** carriers, and had made the decision to reassign those carriers based on what was in those documents. The Postmaster had reassigned only limited-duty carriers, primarily selecting those who were clearly substantially limited in at least one major life activity. She had done this with extremely short notice, disregarding the protocol established by its applicable Employee and Labor Relations Manuals. The AJ found that the manner in which the Postmaster selected the workers for the 2:30 a.m. shift was sufficient to establish a prima facie case. Ultimately, the Commission agreed with the A3's finding of liability, noting that the Postmaster had accessed the Form CA-17's of limited-duty and rehabilitation carriers. The Commission found that this was enough to infer that the Postmaster had the requisite awareness of their disability status and the intent to act upon that awareness.

Similarly, the massive evidentiary record of statements made by various Agency officials in the instant case extensively documents the real reason for the NRP's existence, which was to move as many IOD employees as possible back to full duty in their pre-injury jobs or onto the OWCP rolls for eventual outplacement. **[*47]** As did the Postmaster in Pruneda, the hundreds of area and district managers who collectively implemented the NRP had reviewed the Form CA-17s and other confidential medical information of thousands of potentially disabled IOD employees, and had decided that they were going to take accommodations away from limited-duty and rehabilitation employees, without regard to whether they were qualified individuals with disabilities, on the basis of that information.

We disagree with the AJ in terms of how she characterized the purpose of the NRP as "morphing" from legitimate to unlawful. This was not a situation in which the purpose of the NRP started out as eliminating make-work and then "devolved" into removing IOD employees. Rather, as noted above, ample evidence establishes that moving limited-duty and rehabilitation employees off the IOD rolls, regardless of whether they were qualified individuals with disabilities, was the primary motivation that drove the HHR Manager and the WCO Director before the NRP was even contemplated. In implementing the NRP, these officials disregarded the Agency's obligations under the Rehabilitation Act, and had done so in a fashion that could only **[*48]** be described as cavalier. As far back as April 2001, representatives from the OWCP warned the HHR Manager that the Career Guidance and Placement Program for Injured Employees that he was championing at the time (a forerunner to the NRP), the purpose of which was to expand outplacement for partially disabled workers, "[went] far beyond the legal and organizational

framework which supports the existing DOL/Agency rehabilitation agreement." The OWCP concluded that it was "unable to endorse this radical revision," explicitly warning the HHR Manager that his plan, if implemented, would result in a violation of the Rehabilitation Act and other statutes. Record at 14909-14912.

There are extensive email trails in which the HHR Manager and the WCO Director communicated to their superiors, including the Postmaster General, about how the NRP was going to reduce IOD rosters by thousands of likely-disabled employees. Here are just a few:

. In emails from April and October 2006, the HHR Manager informed members of the leadership team that the NRP would reduce the number of IOD employees by about 14,000. Record at 13812-13814.

. In an email to all of the senior leadership team **[*49]** on August 18, 2006, the HHR Manager reported that there were 34,000 IOD employees in limited-duty or rehabilitation positions, who collectively represented about $ 2.5 billion in salary and benefits. He explicitly stated that the NRP would reduce that number by 12,000 to 15,000 over a three-year period, and that approximately 8,500 employees would be completely off the rolls. He further pointed out that some employees on the OWCP rolls would be "channeled into the outplacement rehabilitation program." Record at 13879. In an email from February 2007, the HHR Manager estimated that 80% of those who received NWA determinations would go into the OWCP Vocational Rehabilitation Program for outplacement. Record at 13817.

. In an email dated July 31, 2007, the Vice President for Employee and Labor Relations described goals for fiscal year 2008 as completing the NRP in 27 districts, reducing the number of employees in limited-duty and rehabilitation positions by 30%, with a stretch goal metric of 40%. Record at 13860.

. In an email dated February 2, 2009, the WCO Director pointed out that two areas, the Southwest and the Pacific, did not report any retirements or resignations during **[*50]** the quarter, and that this did not make sense. The tone of the email suggested that the WCO Director was displeased over the issue. Record at 13826-13827.

. Sometime in 2009, the HHR Manager gave the WCO Director a Postal Career Executive Service Award for Agency-wide NRP results in reducing the IOD rolls by 8,000

. employees over the two years FY 2007 and FY 2009 at a cost savings of $ 300 million. Record at 13829.

Every one of these emails, and numerous others, lays bare the intensity with which the NRP teams at the Agency's headquarters, areas, and districts pursued their goal of reducing the IOD rolls. Their statements clearly and unequivocally contradict the stated explanation for the existence of the NRP as a means to eliminate unnecessary work. Record at 13729-13730, 13812-13814, 13817-13818, 13880-13883, 13905, 1417-14820, 15087, 15094, 15264.

The intent to move IOD employees out of their limited-duty and rehabilitation jobs was reflected in comments made over the years not just by management, but by the rank and file as well. For instance, in an email exchange that occurred on September 14, 2004, while the pilot versions of the NRP were being implemented, **[*51]** the HHR Manager reported to the Postmaster General that 338 employees had been outplaced and that they had exceeded the goal of outplacing 317 employees, to which the Postmaster General replied, "338 it is and welcome to Walmart." Record at 14820-14821. In a slide-show presentation that occurred in February 2005, before the roll-out of the full program, the HHR Manager indicated that it was not just managers obsessing about reducing the ranks of IOD employees who thought the NRP was a good idea. The HHR Manager reported hearing comments that were hostile to IOD employees coming from non-IOD employees, including comments such as, "Way past due," "It's about time," "See you bums at Walmart," "Get rid of them all," and a reference to IOD employees as "dead weight." Record at 13811. In an email to senior leadership dated March 14, 2007, the HHR Manager expressed concern that managers were sending employees home without those employees being assessed under the NRP. He warned against this practice, saying that employees would "go home, collect 75% of their salary tax free and believe once again that they have a free lunch." Record at 14817.

The HHR Manager, the WCO Director, and the **[*52]** Postmaster General all acknowledged in their depositions that, while the NRP was being undertaken, many employees had expressed fears that they would lose their jobs

and would end up working at Walmart, which the HFIR Manager characterized as "not the employer of choice." .The WCO Director stated that he had encountered those concerns frequently, both from the unions and in employee town halls. Record at 13597-13598, 13630-13631, 14926. According to a number of employees, the fear that people would lose their jobs as a result of the NRP was rampant, pervasive, and at times had been fueled by managers. Record at 14856, 15383, 15482-15492, 16165-16169, 16184, 16223-16224, 16364, 16399, 16400, 16578-16579, One witness stated in response to an interrogatory that he was advised to retire early during an NRP meeting because he was "adding hours to the office budget," or words to that effect. Record at 16266. Perhaps one of the more telling incidents occurred in July of 2010. The NRP Team Leader of the Fort Worth District sent a congratulatory email to members of his team, in which he lauded them for reaching the goal of reducing "our current NRP employees on rolls by 25%." The background **[*53]** music used with the message was a song entitled, "Cripple Creek." Even the WCO Director admitted that it was inappropriate. Record at 13579, 13883, 13888-13890.

Taken together, these numerous statements contradict the explanation of the NRP's purpose offered by its architects and advocates. These statements also critically undermine their credibility as witnesses. In addition, the record discloses a number of irregularities that cast further doubt upon the NRP as a means to eliminate "make-work." A report by a pair of industrial psychologists stated that the NRP had not been validated, that it lacked a reliable job-analysis component, that it had not been properly monitored or audited, that it was not interactive despite being described as such, and that it was not consistent with professional standards and guidelines pertinent to the development of human resource systems. Record at 2977-2980, 2986-3010, 15467-15468. A DAT member who was trained by the WCO Director testified that, during the training sessions, there was never any discussion of Agency policies other than the written NRP guidelines. Record at 13599-13601, 13872-13875.

The report from the industrial psychologists **[*54]** also stated that no standard was ever articulated for determining what constituted "necessary work." The WCO Director admitted in his deposition that the term "necessary work" was strictly a creature of the NRP. Record at 13592-13594. Neither the HHR Manager's successor, who took over towards the end of the NRP, nor the Human Resource Management Specialist, who worked with the HHR Manager and the WCO Director, were able to recall being given a definition of "necessary work." Record at 13682, 13747, 14924. As noted above, several arbitrators had held in grievance proceedings that use of the so-called "necessary work standard" was in violation of the Agency's ELM-546 manual, which referred to "adequate" work, not "necessary" work. Record at 14809, 15106, 15398, 15621-15623. The practical effect of the NRP's failure to define "necessary work" is that the district NRP teams were left to decide on their own what work was necessary. This had consequences in that, after employees who were given NWA determinations had left the workroom floor, tasks that were thought to be "make work," such as mark-ups, casing mail, making express mail deliveries, and other functions turned out to be essential **[*55]** to the timely processing and delivery of mail. None of that work disappeared after the IOD employees who had been doing it had left the premises. Other employees had to step in and take over, which left many facilities short-staffed. Record at 260-261, 15552, 15741-15742, 16038, 16063-16066, 16230-16231, 16173-16177, 16181-16183. In turn, this led to slow-downs and bottlenecks in delivery operations. Record at 13824, 14705-14706, 15358-15360, 15370, 15373-15378, 15388-15390, 15392-15395, 15401, 15403, 15406-15407, 15410-15411.

The HHR Manager's successor, when asked whether the NRP was necessary, responded that, while it was still necessary to review job offers to ensure that work was still adequate, available, and consistent with employees' medical restrictions, it was not necessary to create a process and name it. Record at 13683. She testified that she thought that the NRP was a return-to-work program that was never designed or intended to be a cost-saving measure. Record at 13680-13681. This was the view of the NRP taken by the Government Accountability Office (GAO) as well. Her assessment is borne out by the fact that the payments the Agency had to make to the Department **[*56]** of Labor to cover its share of OWCP outlays had gone up over the life of the NRP, forcing the Agency to create a "return to work" initiative. According to the financial history summary set forth in the Agency's 2011 Annual Report to Congress, workers' compensation outlays increased as follows between FY 2007 and FY 2011:

FY 2007	$ 880,000,000
FY 2008	$ 1,227,000,000
FY 2009	$ 2,223,000,000
FY 2010	$ 3,566,000,000
FY 2011	$ 3,672,000,000

This time frame virtually coincided with the years that the NRP was in existence. Between FY 2007 and FY 2011, the Agency's workers' compensation expenses increased from $ 880 million to $ 3.7 billion, an increase of 417%. Record at 14838-14839, 15097, 15100-15102. The sharpest jump, an increase of $ 1.3 billion dollars, occurred between FY 2009 and FY 2010, not coincidentally the most active period of the NRP. What these figures make obvious is that the NRP did not even live up to its purpose of saving costs. The Agency's financial situation became so precarious that in December of 2012, the Postmaster General directed the Health and Resource Management Group to implement a nation-wide return-to-work initiative, pursuant **[*57]** to which injured employees who had the ability to work would be invited to return and would be given modified assignments. Record at 13685, 14837, 15136. The goal of this initiative was to return 60% of the NWA employees to the Agency's active rolls. Record at 26914-26918.

A number of employees who were placed in NWA status had filed grievances challenging the actions that resulted from their NRP assessments, and had prevailed. The Arbitrators hearing those grievances found that in subjecting these employees to actions flowing from the assessments they received under the NRP, the Agency had violated Article 19 of the collective bargaining agreement by failing to adhere to the procedures specified in Agency manuals EL 307, EL 505 and ELM 546. Record at 14865-14893, 15046, 15056-15057, 15059, 15065, 15398, 15561, 15603, 15621-15623, 15694, 16057-16061, 16063-16066, 16285.

The Class Agent testified that, during the NRP meeting that took place on May 19, 2006, neither she nor her Union Representative were given a chance to ask questions. The Union representative stated in a sworn declaration that there was no interactive discussion with the Class Agent regarding other jobs and **[*58]** tasks that she could perform. At the end of the meeting, the Class Agent was told to clean out her locker and was escorted off the premises. The escort took place in the presence of her colleagues, which she characterized as "about as hostile as you could get." She testified to being emotionally traumatized by the sudden and unexpected dismissal. The Class Agent's account of the incident is corroborated by that of her union representative, who notes that, in addition to the Class Agent, 20 other IOD employees who had received NWA determinations were escorted out in a similar fashion, and that they all had the same reaction. Finally, the Class Agent testified that the "make work" duties that she had been performing were still being done by other employees. Record at 171, 256, 258-261, 15314-15320, 15322-15323, 15340-15346, 15353-15355, 15381-15383, 15396-15397.

Based on the foregoing, we find that, while operating under the auspices of the NRP, the HHR Manager, the WCO Director, and other Agency officials who supported and assisted in implementing that program violated Section 501(g) of the Rehabilitation Act, which incorporates by reference Sections 102(a) and 102(b)(1) of the **[*59]** Americans with Disabilities Act, by classifying IOD employees who were qualified individuals with disabilities, including the Class Agent, in a way that adversely affected their opportunities and their status, as defined in Section 102(b)(1) of the Americans with Disabilities Act. We conclude that the Agency does not raise any genuine issue of material fact that would warrant a hearing on this issue. To be eligible for relief at the remedies stage of this proceeding, class members must establish that they are qualified individuals with disabilities. The Class Agent is eligible for immediate relief, having established that she is a qualified individual with a disability.

WITHDRAWAL OF REASONABLE ACCOMMODATIONS

The Class Agent and her anecdotal witnesses were assessed under the NRP. As previously inferred from the NRP's statistics, tens of thousands of IOD employees were either given new assignments, placed on total or partial NWA status and removed from the rolls, had their hours reduced, or were separated during the NRP period. [7]

[*60]

The Americans with Disabilities Act provides two avenues of relief for qualified individuals with disabilities who have been denied reasonable accommodation. As used in Section 102(a) of the Americans with Disabilities Act, the term "discriminate against a qualified individual on the basis of disability" includes:

> (A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or
>
> (B) denying employment opportunities to an employee who is an otherwise qualified individual with a disability if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant.

42 U.S.C. § 12112(b)(5); 29 C.F.R. § 1630.9. Section 102(b)(1)(A) of the Americans with Disabilities Act makes clear that the Agency is required to reasonably accommodate the known limitations of a qualified individual with a disability, unless **[*61]** it can show that doing so would cause an undue hardship to its operations. See 29 C.F.R §§ 1630.2 (o) and (p); EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act (Enforcement Guidance), EEOC Notice No. 915.002 (Oct. 17. 2002); Barney G. v. Dept. of Agriculture, EEOC Appeal No. 0120120400 (Dec. 3, 2015).

As previously noted, the Class Agent was a qualified individual with a disability who had been performing the essential functions of her position since she received the modified assignment in September 1999. On May 19, 2006, the Agency took her modified assignment away from her. The Agency's EEO Manager and an attorney-advisor who worked in the EEO Office both confirmed that the Class Agent's modified assignment could properly be characterized as a reasonable accommodation. Record at 13847-13848, 13856.

In order to justify its action under Subsection (A), the Agency must show that allowing the Class Agent to remain in her position would have caused an undue hardship to its mail delivery operations. "Undue hardship" means an action requiring significant difficulty or expense when considered in light **[*62]** of such factors as the nature and cost of the accommodation, the overall financial resources of the facility and the Agency, the size of the Agency, and the type of operation. See *42 U.S.C. § 12111*(10); 29 C.F.R. § 1630.2(p). As we have seen, the tasks the Class Agent was performing which the Agency characterized as "make work" under the NRP did not disappear when she went off the clock. That work was still being done, and being done by employees who were pulled from other jobs. This led to staff shortages that negatively impacted the flow of mail. The result of the Agency's removal of the Class Agent (and presumably other IOD employees) from the rolls under the NRP is that it clearly demonstrated that the animus directed toward reducing the IOD rolls was not driven by considerations of efficiency, as the Agency contends. We therefore find that the Class Agent established that the Agency unlawfully deprived her of a reasonable accommodation in violation of Section 102(b)(5)(A) of the Americans with Disabilities Act.

Section 102(b)(1)(B) prohibits . denying employment opportunities to an employee who is an otherwise qualified individual with a disability **[*63]** if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee. *Nawrot v. CPC Intern, 259 F.Supp.2d 716, 724 (N.D. Ill. 2003).* The regulations clarify that § 12112(b)(5)(B) requires a complainant to show that he or she was denied an employment opportunity because the employer knew the complainant would require a reasonable accommodation. Id., citing 29 C.F.R. § 1630.9(b). Not only was the Agency aware that the Class Agent needed an accommodation, it was most likely aware that the Class Agent already had a reasonable accommodation by having reviewed her medical documentation. Despite the presence of clearly defined reasonable accommodation

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[7] Not all of the employees who separated between May 5, 2006, and July 1, 2011, did so as a result of the NRP

procedures set forth in EL-307, the Agency unilaterally withdrew the Class Agent's modified position without giving her any say in the matter. We find the WCO Director's response -- that reasonable accommodations were available only for injuries that were non-work-related -- to be completely lacking in credibility. Accordingly, we find that the Class Agent established that the Agency deprived her of the opportunity for ongoing gainful employment **[*64]** because, as an IOD employee, she was a qualified individual with a disability in need of a reasonable accommodation. The Agency's action was in violation of Section 102(b)(5)(B) of the Americans with Disabilities Act.

The record contains medical documents, depositions, interrogatories and other evidentiary records pertaining to approximately twenty witnesses who were members of the class. Like the Class Agent, they claimed that they were successfully performing the essential functions of their modified positions, yet preexisting reasonable accommodations were taken away from them as a result of the assessments they received under the NRP. The claims of six of those witnesses are briefly summarized below. We note that these summaries are intended to be illustrative, not definitive.

Anecdotal Witness -- Shreveport, Louisiana (AW-Louisiana)

AW-Louisiana suffered a knee injury in April of 2001, the effects of which had become permanent by 2002. He was placed under medical restrictions that included no standing for more than 2 hours at a time, no lifting more than 20 pounds, no climbing stairs, no stooping, bending, twisting, or driving for more than 6 hours per day. **[*65]** In 2002, he was assigned to the position of Program Evaluation Guide (PEG) Coordinator. His duties included working with the safety office, handling OSHA paperwork and audits, serving as a driving instructor, teaching safety classes, and assisting safety coordinators at all of the individual post offices in the district. He worked at this position for nine years at 40 hours per week, and had received several cash awards for outstanding performance. In July 2010, pursuant to the NRP, he was removed from his job as PEG Coordinator and assigned to case mail for carriers. This work was available for only 4 hours per day. In October 2010, he was informed at an NRP meeting that work was no longer available and sent home. He testified that no one had been performing his PEG Coordinator duties since he had left that position, and that several facilities had failed their audits for the first time in years. Record at 16188-16200, 16204-16212, 16219-16221, 16226-16231, 16237-16238.

Anecdotal Witness -- Baltimore, Maryland (AW-Maryland)

AW-Maryland suffered an on-the-job injury in January 2005, the effects of which became permanent. She was given a modified full-time assignment in **[*66]** August 2008, the duties of which consisted of performing clerk work and carrier duties, 1 to 2 hours of driving, express mail delivery as needed, filling box section floats and letters, throwback case work, and filing letter and flat-sized mail into distribution files. Her restrictions included intermittent lifting of no more than 5 pounds, carrying for 5 hours, 1 hour of grasping, and fine manipulation limitations. On August 21, 2010, at an NRP meeting, she was told that she could no longer perform her limited-duty work for 8 hours per day. Instead, she was given a modified assignment to work for 1 to 2 hours per day casing and delivering mail. She would receive 7 hours of pay per day from the OWCP. She testified at a deposition that other employees were doing some of the work that she had been doing before she was given her NRP reassignment. AW Maryland filed a successful grievance on the matter, in which the arbitrator held that the Agency violated Article 19 of the Collective Bargaining Agreement by taking away cross-craft work to which she was entitled under Employee & Labor Relations Manual (ELM) 546. Record at 16057-16061, 16063-16066, 16068-16077, 16128-16129, 16131.

[*67] Anecdotal Witness -- Lansing, Michigan (AW-Michigan)

AW-Michigan had suffered an on-the-job injury to his ankle that resulted in his being placed under medical restrictions for an extended period of time. While under those restrictions, he was given a modified assignment that consisted of casing mail, sorting manual letters, boxing mail, and express mail sorting, scanning, and dispatching for between 6 and 8 hours per day. On or about April 30, 2010, he was called into his supervisor's office, whereupon the supervisor read to him an NRP letter in the presence of the union steward. The letter was an NWA determination and AW-Michigan was being told that he would be sent home. He testified at his deposition that the supervisor could not provide any answers to his questions. He also testified that he was given no warning prior to

the NRP meeting and that, after he left, other employees were performing the duties that he had been doing in his modified assignment. Record at 16026-16031, 16033-16034, 16038, 16042-16043, 16051.

Anecdotal Witness -- Clearwater, Florida (AW-Florida)

AW-Florida sustained a work-related injury in 1985. In 1996, she filed a claim with OWCP **[*68]** and was assigned limited-duty work in a modified carrier position that included administrative tasks, answering telephones, special projects, mark-ups, second notices, returns, assisting dispatch in bringing in mail, and delivering mail. She worked full time in this position for well over 20 years. Sometime in early 2009, AW-Florida was summoned to attend an NRP meeting at which she was told that an unsuccessful search had been conducted for available work, and that she could request a reasonable accommodation. On June 3, 2009, the District Reasonable Accommodation Committee recommended that she continue to be accommodated in her then-current modified carrier position. Nevertheless, at a second NRP meeting held in July 2009, the NRP team leader again informed her that there was no necessary work available for her within a 50-mile radius. On August 13, 2009, she was offered a rehabilitative job consisting of a six-hour auxiliary route, but found out two weeks later that the route exceeded her restrictions. In September 2009, she had her final NRP meeting and, as a result, was placed on administrative leave and escorted out of the building. In sustaining the grievance that AW-Florida **[*69]** subsequently filed, the Arbitrator found that the standard "necessary work" applied by management was improper. He noted that the term "necessary work" was nowhere to be found in the ELM-546 or EL-505 Handbooks. He also found that management had altered the criteria for creating modified assignments by determining that work could not come from bid positions, noting that no language in EL-505 or ELM-546 supported that interpretation, and that the application of that criterion directly contradicted EL-505. Record at 15603-15605, 15621-15623, 15625-15630, 15632-15634, 15650. 15660-15661, 15666, 15693-15695.

Anecdotal Witness -- Providence. Rhode Island (AW -- Rhode Island)

AW-Rhode Island was given a modified carrier position in February 1996 that was adjusted to correspond with his medical restrictions. His duties within that job included answering telephones, serving as station editor, retrieving mail from collection boxes, and shuttling vehicles to and from the maintenance facility. Deliveries were later added to his duties. He was working a full-time schedule. In April 2009, after his first NRP meeting, his hours were reduced from 8 to 5 per day, which forced him to **[*70]** use his accumulated sick and annual leave to make up the difference. On August 21, 2009, he was told that there was no longer any necessary work available for him and that he needed to go home. He testified that he was called to his final meeting while in the middle of a delivery. He eventually retired. Record at 15496-15520. 15524, 15526-25537, 15539-15540, 15542-15544, 15546, 15549-15554, 15557-15558.

Anecdotal Witness -- Merced, California (AW -- California)

AW-California was injured on duty in January of 2000 and was given a rehabilitation job that included carrying mark-up mail, delivering express mail, road map construction, computer data entry, filing, and casing mail on individual routes. He was given another rehabilitation job offer with slightly different duties in July of 2004 and was told that his duties would only change due to the needs of the service or a change in his medical restrictions. In March 2010, he was told that the Agency could not identify operationally necessary work for him within his restrictions and was told not to report for duty. He eventually retired. He put in a request for an accommodation with the District Reasonable Accommodation **[*71]** Committee, but the Committee did not respond to him until after his retirement. Record at 15827-15832, 15837-15838, 15840-15849, 15858, 15869, 15882, 15887-15888.

Assuming that these witnesses and the thousands of other class members were qualified individuals with disabilities when they were assessed under the NRP, they were entitled to remain in their limited-duty or rehabilitation positions unless the Agency could demonstrate that allowing them to do so would impose an undue hardship upon its operations. As can be seen from the statements of these witnesses, taking IOD employees out of their jobs resulted in decreased operational efficiencies and increased costs, which completely undercuts the Agency's undue hardship defense under Section 102(b)(5)(A).

As to its liability under Section 102(b)(5)(B), the Agency has no defense. As we found above, the driving force behind the NRP was not to eliminate unnecessary work. As reflected in the emails of the HHR Manager, the WCO Director, and other senior executives and managers involved, with the NRP, the driving force was to eliminate limited-duty and rehabilitation positions. As a policy, the NRP was an instrument that effectively **[*72]** deprived thousands of people of their livelihoods because of the need to work in modified positions. Based upon a review of the medical documentation of the Class Agent's anecdotal witnesses, we find that in all likelihood that many, if not most, of the class members were qualified individuals with disabilities who were successfully performing the essential functions of those positions. [8]

Many employees who were given NWA determinations were told that they could not be reassigned to positions beyond a 50-mile radius from their current duty stations. Had the HHR Manager or the WCO Director consulted with the EEO Office at the inception of the NRP, they would have been informed that NWA employees had to be referred to a DRAC before being let go. The fact that the Agency started to do this in the latter years of the program's existence **[*73]** vindicated the concerns raised by the Agency's senior EEO officials. Record, pp. 13963-13964. The HHR Manager and the WCO Director would also have been informed that EL-307 and the Agency's guidance on reasonable accommodation made provisions for reassignments beyond the fifty-mile limit imposed under the NRP. Record at 13963-13964, 13969, 14973, 15199-15202.

Based on the foregoing, we find that while operating under the auspices of the NRP, the HHR Manager, the WCO Director, and other Agency officials who supported and assisted in implementing that program violated Section 501(g) of the Rehabilitation Act, which incorporates by reference Sections 102(a) and 102(b)(5) of the Americans with Disabilities Act, by withdrawing modified work assignments that it had previously granted to IOD employees who are individuals with disabilities. In so doing, the Agency failed to make reasonable accommodations to the known limitations of otherwise qualified individuals with disabilities, as defined in Section 102(b)(5)(A). The Agency also denied employment opportunities to IOD employees who were qualified individuals with disabilities because of the need for reasonable accommodation, as defined **[*74]** in Section 102(b)(5)(B). We conclude that the Agency has not raised any genuine issue of material fact that would warrant a hearing on this issue. To be eligible for relief at the remedies stage of this proceeding, class members must establish that they are qualified individuals with disabilities. The Class Agent is eligible for immediate relief, having already established that she is a qualified individual with a disability.

HOSTILE WORK ENVIRONMENT

Harassment of employees that would not occur but for their disability is unlawful if severe or pervasive. Wibstad v. U.S. Postal Service, EEOC Appeal No. 01972699 (Aug. 14, 1998). To prevail on a claim of class-wide harassment, the Class Agent must prove, by a preponderance of the evidence, that because of their status as individuals with disabilities, class members were subjected to conduct so severe or pervasive that a reasonable person in their position would have considered it hostile or abusive. See *Harris v. Forklift Systems, Inc., 510 U.S. 17, 22 (1993).* That conduct should be evaluated from the objective viewpoint of a reasonable person in the victims' circumstances. Enforcement Guidance on Harris **[*75]** v. Forklift Systems, Inc., EEOC Notice No. 915.002 (March 8, 1994). Only if the Class Agent satisfies her burden of proof with respect to both of these elements, motive and hostility, will the question of Agency liability for discriminatory harassment present itself. Complainant v. Dept. of Veterans Affairs, EEOC Appeal No. 0120132783 (Sept. 11, 2015). See also, e.g., Dayle H. v. Dept. of Veterans Affairs, EEOC Appeal No. 0120130097 (June 15, 2016), citing *Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982).*

The existence of the first element, motive, has been proven. The NRP, the reason behind the actions taken by the HHR Manager, the WCO Director, the DATs, and other officials, has been shown to be discriminatory in that it targeted IOD employees, many of whom are qualified individuals with disabilities. Accordingly, any action taken by Agency officials in support of or furtherance of the NRP between May 5, 2006, and July 1, 2011, will be regarded as

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[8] As we stated above, whether individual class members are actually qualified individuals withdisabilities will be determined during the remedial phase of this class proceeding.

being motivated by unlawful considerations of the class members' disabilities. The only remaining question for liability is whether that conduct is severe or pervasive enough to be considered unlawful. **[*76]**

It bears repeating that, in general, neither single isolated acts nor sporadic incidents are enough to prove a pattern or practice of discrimination. *EEOC v. Bass Pro Outdoor World, LLC, supra,* citing *Teamsters, supra.* See also, e.g., Complainant v. Dept. of the Navy, EEOC Appeal No. 0120140786 (June 20, 2014) (supervisor's single, isolated suggestion that complainant apply for a greeter position at Walmart not sufficiently severe or pervasive to constitute harassment); Thomas v. U.S. Postal Service, EEOC Appeal No. 0120081659 (Sept. 3, 2009) and Gregory v. U.S. Postal Service, EEOC Appeal No. 01A43820 (Sept. 10, 2004. The Agency contends on appeal that the conduct complained of consisted only of the "Walmart" comments and similar comments by the Postmaster General, the HHR Manager, and the WCO Director, which were made to each other in emails and were not even directed toward the IOD employees. But it was not just those comments that fueled the fire.

Throughout the Agency there was a pervasive fear among IOD employees that being subjected to the NRP would cause them to lose their jobs with the Agency and have to work in less-desirable **[*77]** jobs for employers such as Walmart or McDonald's, a fear that was stoked not only by managers but by other employees. The WCO Director acknowledged that he encountered anxiety among TOD employees again and again relayed by the unions and at employee town hall meetings. Record at 13597-13598. Rumors were being spread and derogatory comments were being made, sometimes by managers and supervisors, and sometimes by other employees. Record at 13630-13631, 13811, 14817, 14840, 14826, 14853, 14856, 15492, 16043-16045, 16224, 16578-16579. When the HHR Manager was asked in his deposition where employees' concern about ending up at Walmart came from he replied, "from all over the place." He admitted that he went to "so many meetings," and that he heard those rumors "from the unions and at town halls." Record at 13630-31. When the pilot program for what would become the NRP was rolled out in February 2005, comments from non-IOD employees that were incorporated into a power-point presentation included, "way past due," "look for some miracle recoveries," "see you bums at Walmart," "it's about time," "have people sitting around the office doing minor jobs; makes you want to puke," "get rid of them **[*78]** all," "dead weight," and "good riddance." Record at 13811. The Postmaster General at the time admitted that he talked with the HHR Manager and the Senior Vice President for Human Resources about working with outside employers to find jobs for people whose jobs had changed to the point where they could no longer sit to do their work. Record at 14826. In a discussion that took place in September of 2010 concerning an upcoming meeting with a delegation from the China Post organization, the Manager of Complement Staffing and Field Policy made a joke about China Post taking some of their NRP employees. Record at 14840, 14853-56. An anecdotal witness from Radford, Virginia testified that the Postmaster called him into her office and told him that they were going to transfer him to a "public sector" job, and when he asked whether she meant that he could be working at Walmart, the Postmaster replied, "[I]t could mean that." Record at 15491-92. An anecdotal witness from Lansing, Michigan testified that he heard comments about injured-on-duty employees such as "sick laymen," "lazies," and "fakers." Record at 16043-45. An anecdotal witness from Santa Clarita, California testified in her deposition **[*79]** that an NRP representative who was "very derogatory" in his tone and demeanor said that there were "going to be a lot of sorry 'rehabs' working at Walmart soon." Record at 16578-79.

Just as a single comment in Brown v. United States Postal Service, EEOC Appeal No. 0720060086 (Oct. 31, 2008), request for reconsideration denied, EEOC Request No. 0520090179 (Feb. 5, 2009), that Tour Supervisor Brown should quit the agency and become a greeter at K-Mart, gave rise to a hostile environment by aggravating Ms. Brown's pre-existing PTSD, so too did conduct of the officials carrying out the NRP give rise to a hostile environment by stoking the fear and anxiety that existed among IOD employees that they would lose their jobs. In both Brown and the instant case, the conduct by Agency management aggravated the environment.

The NRP teams' pursuit of their objectives during both phases of the program had a palpably demoralizing effect that was felt in every district. During Phase I, NRP assessors were pressuring employees to provide their medical information. Employees were warned, in accordance with scripts provided to the assessors by the headquarters NRP team, that if they **[*80]** did not provide the requested information within two weeks, their limited-duty or rehabilitation assignments might be withdrawn. Several witnesses testified that they were constantly being pressured by NRP clerks to get updates from their doctors, even after they provided the requested information.

Record at 16181-16184, 16305-16307, 16313. Others testified that they felt harassed because of the entire NRP process. Record, pp. 12321-12322. The WCO Director appeared to "go ballistic" when one district reported no retirements or resignations. Record at 13826. And the "Cripple Creek" incident only exacerbated the situation. Record at 13579, 12888-12890.

Perhaps the most glaring examples of hostility were the dismissals of IOD employees who, like the Class Agent, were given NWA determinations and ordered to leave. Step 14 of Phase II explicitly required that, upon completion of the second no-work-available interview, employees would be given the opportunity to clear out their lockers and gather their personal belongings. Afterward, they would be asked to turn their identification badges and would be immediately escorted out of the building. Record at 12992, 13064, 13766. The Class **[*81]** Agent described how emotionally traumatized she was by the incident. Record at 15353-15355. The Class Agent's union representative testified that he watched 20 other IOD employees being escorted out in a similar fashion, and with similar reactions. He noted that the escorts would walk the employees right through the middle of the workroom floor. Record at 15382. Other witnesses reported the same experience, with one testifying that he felt "ambushed." Another stated that she felt that she was being treated like a criminal. Record at 15604-15605, 15679-15680, 15694, 15810-15813, 16041, 16582. Eventually, the EEO Office heard of the practice and expressed concerns about it to the HHR Manager and the WCO Director. Record at 13842-13845.

Ultimately, it was all of the actions taken by Agency officials to execute the NRP, and not just the Walmart comments, that gave rise to the hostile work environment. The only remaining question on this issue is the extent to which the Agency is liable. The Commission's policy guidance on vicarious liability for harassment states that an employer is always liable for harassment by a supervisor which culminates in a tangible employment action. Enforcement **[*82]** Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors , EEOC Notice No. 915.002 (June 18, 1999). A "tangible employment action" is characterized by the fact that it requires an official act; it usually inflicts direct economic harm; and it is usually initiated by a supervisor or other individual acting with the Agency's authority. Id. Removals stemming from NWA determinations would fall within the definition of tangible employment actions. New modified assignments might be considered tangible employment action if they cause harm to the individual or otherwise leave the individual less well-off than he or she was in the previous assignment. For those employees who separated voluntarily, either through retirements or resignation, they would have to prove that they were constructively discharged in order for their retirement or resignation to be considered a tangible employment action.

IOD employees who returned to full duty as a result of the NRP and those whose positions did not change after being audited by the NRP were nevertheless subjected to the hostile work environment and are entitled to claim relief, unless the Agency can show that it exercised **[*83]** reasonable care to prevent and promptly correct any harassment and that the employee failed to take advantage of any preventive or corrective opportunities provided by the employer to avoid harm otherwise. EEOC Enforcement Guidance on Vicarious Liability, supra. As we stated previously, the acts of harassment committed by Agency officials in carrying out the mandate of the NRP to reduce the IOD rolls were numerous and pervasive. Towards the end of the program, the Agency did modify its Phase 2 procedures to explicitly allow for referrals to a DRAC, but only did so after being reminded of its Rehabilitation Act obligations by the EEO Office. By then, most of the damage already had been done. Until those changes were made, IOD employees who received an adverse assessment under the NRP had no recourse. Consequently, the Agency cannot invoke the affirmative defense against the Class Agent's hostile environment claim.

Based on the foregoing, we find that, while operating under the auspices of the NRP, the HHR Manager, the WCO Director, and other Agency officials who supported and assisted in implementing that program violated Section 501(g) of the Rehabilitation Act, which incorporates **[*84]** by reference Section 102(a) of the Americans with Disabilities Act, by subjecting TOD employees assessed under the NRP to a hostile work environment and by subjecting to tangible employment actions IOD employees given NWA determinations, IOD employees given new modified assignments, and possibly IOD employees who voluntarily separated via resignation or retirement. We conclude that the Agency has not raised any genuine issue of material fact that would warrant a hearing on this issue. To be eligible for relief at the remedies stage of this proceeding, class members must establish that they are qualified individuals with disabilities. They must also establish that they suffered compensable harm for which

damages may be awarded. Those class members who were subjected to tangible employment actions may be eligible for equitable remedies such as reinstatement and back pay. The Class Agent is eligible for immediate relief, having established that she is a qualified individual with a disability and that she was subjected to a tangible employment action.

SEGREGATION OF IOD EMPLOYEES

The Commission has held that segregation of a class of workers, if established, would support a finding **[*85]** of discrimination. See Walton v. Dept. of the Army, EEOC Appeal No. 0120072925 (Jul. 10, 2012), request for reconsideration denied, EEOC Request No. 0520120598 (Feb. 7, 2013) (White employees assigned to a separate side of a workshop from Black employees); Pruneda, supra (all workers reassigned to newly created 2:30 a.m. to 11:00 a.m. shift were limited-duty employees or "rehab" employees in modified carrier positions). In order to establish class-wide liability, the Class Agent would have to show that officials who ordered that IOD employees be placed in standby rooms had done so under the auspices of the NRP and that those placed in standby rooms were physically separated from the rest of the workforce.

A number of the Class Agent's anecdotal witnesses testified in their depositions that they had been ordered to report to standby rooms following NRP interviews. One witness from Kenosha, Wisconsin had received a notification on November 25, 2009, that as a limited-duty employee who had reached her level of maximum medical improvement, she would need to clock in on "standby time and report to a room in the basement. Record at 15890. She testified that the room was **[*86]** cold and infested with mice, and that she had to go to her union representative to find another location for her. Record at 15906. A witness from Boston testified that in September of 2008, she was sent to a room called "the fishbowl" and kept off the workroom floor along with 30 other people. Record at 16165-16167. A third witness, from Yuba City, California, also testified that she was forced to sit in a basement room alone during May of 2007, but also stated that other injured employees were doing work that she had done for the past several years. Record at 16444-16445. Yet another witness, from Denton, Texas, testified that after his ergonomic chair was taken way in April 2010, he and another IOD employee were sent to a standby room referred to as "the exercise room," and that he filed a grievance on the matter which was settled prior to arbitration. Record at 16656-16658.

In June of 2009, a number of email exchanges took place between area and district officials in Dallas and Fort Worth, and the HHR Manager and WCO Director on the subject of standby rooms. Record at 14858-14861. In an email dated June 17, 2009, the WCO Director informed the local DAT members that use of a **[*87]** standby room for injured workers would "not be in the best interest of the Agency and would not be supported by headquarters. " Record at 14860. Later that day, the HHR Manager sent an email to the DAT leader in Dallas telling him, "don't even think about" using standby rooms. Record at 14859. On June 23, 2009, the WCO Director advised the DAT leader in Dallas that if standby rooms were necessary, decisions to utilize such rooms should be made on a case-by-case basis, that a single location should not be designated, and that standby time should be utilized for both injured and non-injured employees. The WCO Director emphasized that what needed to be avoided was the placement of only injured employees on standby time in a separate room. Record at 14858.

On appeal, the Agency noted that the AJ rejected the Class Agent's argument that the use of standby rooms created a hostile work environment because the Class Agent had not shown that standby rooms were used as part of the NRP Policy. AB1, p. 55. Based on her interpretation of the June 2009 email conversations and the documents and testimony from the anecdotal witnesses, the AJ determined that there was insufficient evidence to show **[*88]** that standby rooms were used as part of the nationalized NRP policy. Class Order, pp. 46-50, 84-85. We agree with the AJ's assessment. There is no question that a number of IOD employees were sent to standby rooms. What we cannot determine from the testimony of, and records pertaining to, the anecdotal witnesses is whether IOD employees were actually separated from non-injured employees, as they clearly were in Pruneda, nor whether the practice of sending employees to standby rooms was widespread or confined to a just a few districts. Moreover, the lack of specific references to standby rooms in the NRP documentation, which apparently led to the email exchange between the headquarters NRP team and the local officials in Dallas and Fort Worth, together with the email conversations themselves, tends to show that the use of standby rooms was never contemplated as

being necessary to the implementation of the NRP. Accordingly, we find that the evidence of record is not sufficient to support a conclusion that IOD employees who were directed to report to standby rooms were sent there under the auspices of the NRP or were segregated from the rest of the workforce in violation of Section **[*89]** 102(a) of the Americans with Disabilities Act.

DISABILITY-RELATED MEDICAL INQUIRY

A covered entity shall not make inquiries of an employee as to the nature or severity of the disability unless such examination or inquiry is shown to be job-related and consistent with business necessity. *42 U.S.C. 12112*(d)(4)(A); 29 C.F.R. § 1630.13. The Americans with Disabilities Act, which applies to federal employees pursuant to the Rehabilitation Act Amendments of 1992 prohibits disability-related inquiries, including inquires as to the nature and severity of a disability, unless such inquiries are shown to be job-related and consistent with business necessity. Enforcement Guidance of Disability-Related Inquiries and Medical Examinations, EEOC Notice No 915.002 (July 27, 2000). Furthermore, the restriction applies to all employees, not just those who can establish that they are qualified individuals with disabilities. Complainant v. Dept. of Energy, EEOC Appeal No. 0120131126 (Dec. 19, 2013); Hartless v. U.S. Postal Service, EEOC Appeal No. 0120101017 (June 4, 2010).

An inquiry is disability-related if it is likely to elicit information about **[*90]** a disability. See Tones v. Dept. of Veterans Affairs, EEOC Appeal No. 0120061190 (Feb. 6, 2008) (supervisor's contact with complainant's physician as to whether complainant could do his physical therapy at a VA medical center not job-related and consistent with business necessity); Chambliss v. Social Security Administration, EEOC Appeal No 01A21179 (Mar. 19, 2003) (supervisor asking complainant to announce at staff meeting that she required hospitalization for bi-polar disorder not job-related and consistent with business necessity). Disability-related inquiries include asking employees to provide medical documentation regarding their disabilities. Enforcement Guidance on Disability-Related Inquiries, supra, at Question 1.

As we noted extensively above, in Phase I of the NRP, teams gathered and scrutinized the medical records of over 100,000 IOD employees. Those records included statements of diagnoses and prognoses, Form CA-17's and other forms required by the Department of Labor for the purpose of obtaining workers' compensation benefits. According to a memorandum template entitled, "National Reassessment Process Phase 1," the goal of the process was to ensure that **[*91]** all limited duty and rehabilitation employees have "a current medical on file," and that teams of management members from operations, medical, labor relations, and injury compensation would be established to complete this process. Record at 12934. Step 5 of Phase 1 required medical staff to review such information from treating physicians as diagnosis and type of injury, and to direct employees to provide medical updates. Record at 12919, 12922-23.

The form-letters and scripts mandated by the NRP leadership group at the Agency's headquarters explicitly called for IOD employees to be warned that if they did not submit updated medical information within two weeks of the request, their modified limited-duty and rehabilitation assignments might be withdrawn. Step 6 of Phase I required that managers determine appropriate action to be taken for those employees who fail to comply with requests for updated medical information. Record at 12920, 12945-51.

The inquiries carried out in accordance with Phase I of the NRP were not merely "likely" to elicit information about IOD employees' disabilities; they were guaranteed to elicit that information. The WCO Director himself confirmed **[*92]** the extensiveness of the NRP's recordkeeping operations and the thoroughness of its records. He described how a comprehensive file was maintained for each IOD employee that included anything related to the injury, including medical updates, from the time the injury was sustained until the present. Record at 13733. He emphasized that the medical documentation was key to everything that was done with the IOD' employees. Record at 13727.

There is no question that Phase I of the NRP meets the statutory definition of a disability-related medical inquiry. Indeed, by the WCO Director's own admission, this medical inquiry was part and parcel of the NRP; in fact, it was the NRP's central element. As such, it must be job-related and consistent with business necessity to be considered

lawful. A disability-related medical inquiry is justified if the employer has a reasonable belief, based on objective evidence that: an employee's ability to perform essential job functions will be impaired by a medical condition; or an employee will pose a direct threat due to a medical condition. Enforcement Guidance on Disability-Related Inquiries, Question 5. Objective evidence is reliable information, **[*93]** either directly observed or provided by a credible third party that an employee may have or has a medical condition that will interfere with his or her ability to perform essential functions of the job or will result in a direct threat. O'Malley v. U.S. Postal Service, EEOC Appeal. No. 01994945 (Sept. 26, 2002) citing Clark v. U.S. Postal Service, EEOC Appeal No. 01992683 (Nov. 21, 2001). See also Estate of Schauf v. Dept. of the Air Force, EEOC Appeal No. 01A42440 (Jan. 26, 2006), request for reconsideration denied, EEOC Request No. 05A60456 (Mar. 17, 2006); Complainant v. U.S. Postal Service, EEOC Appeal No. 0120120559 (Mar. 10, 2015).

It is not enough for a management official to merely suspect that an employee is unable to perform the essential functions of his or her job or poses a direct threat when ordering a medical inquiry. Such suspicions must be supported by enough documentation to establish that they are reasonable under the circumstances that the situation presents. Those responsible for implementing Phase I of the NRP based their inquiries solely on the status of the IOD employees as limited-duty or rehabilitation, without any evidence that those **[*94]** employees were not performing the essential functions of their positions or that they posed a direct threat to themselves or others by remaining in their positions. The Class Agent, the other anecdotal witnesses, and presumably the other class members were performing the essential functions of their positions when they were asked to submit medical documentation pursuant to steps 5 and 6 of Phase I. Therefore, the Agency has not shown that Phase I of the NRP was job-related and consistent with business necessity.

Based on the foregoing, we find that, while operating under the auspices of Phase I of the NRP, the HHR Manager, the WCO Director, and other Agency officials who supported and assisted in implementing that program violated Section 501(g) of the Rehabilitation Act, which incorporates by reference Section 102(d)(4)(A) of the Americans with Disabilities Act, by subjecting IOD employees assessed under the NRP to a disability-related medical inquiry that was not job-related and consistent with business necessity. We conclude that no genuine issue of material fact exists on this issue that would warrant a hearing. To be eligible for relief at the remedies stage of this proceeding, **[*95]** class members must show that they suffered compensable harm as a result of being subjected to the unlawful disability-related medical inquiry for which damages may be awarded. The Class Agent is eligible for immediate relief, having established that she was subjected to an unlawful disability-related medical inquiry.

DISCLOSURE OF CONFIDENTIAL MEDICAL INFORMATION

Section 102(d) of the Americans with Disabilities Act, and by extension Section 501(g) the Rehabilitation Act, specifically prohibits the disclosure of medical information except in certain limited situations. Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act , EEOC Notice No 915.002, Question 42 (Oct. 17, 2002). Information obtained regarding the medical condition or history of any employee is subject to the requirements of subparagraphs (B) and (C) of Paragraph (3). *42 U.S.C. § 12112*(d)(4)(C). In particular:

> B. Information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate files and is treated as a confidential medical record, except that: **[*96]**
>
> i. Supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;
>
> ii. First aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and
>
> iii. Government officials investigating compliance with this chapter shall be provided relevant information on request.
>
> C. The results of such examination are used only in accordance with this subchapter.

42 U.S.C. § 12112 (d)(3); 29 C.F.R. § 1630.14(c). To the disclosure exceptions listed in Section 102(d)(3), our policy guidance adds two more:

. The information may in certain circumstances be disclosed to workers' compensation offices or insurance carriers; and

. Agency officials may be given the information to maintain records and evaluate and report on the Agency's performance in processing reasonable accommodation requests.

Policy Guidance on Executive Order 13164: Establishing Procedures to Facilitate the Provision of Reasonable Accommodation , Question 20 (Oct. 20, 2000). All medical information that an Agency obtains in connection **[*97]** with a request for reasonable accommodation must be kept in files separate from the individual's personnel file. Id. Those who have access to employees' medical information may not disclose that information except under the five circumstances listed above. See id.

As with medical inquiries, the confidentiality requirement is not limited to individuals with disabilities. Pleasant v. Dept. of Housing and Urban Development, EEOC Appeal No. 0120083195 (July 2, 2012); Hampton v. U.S. Postal Service, EEOC Appeal No. 01A00132 (Apr. 13, 2000). Anyone whose confidential medical information has been disclosed in a manner other than pursuant to one of the five disclosure exceptions listed in the statute, the regulations or our policy guidance may bring an action for violation of the Rehabilitation Act. Baker v. Social Security Admin., EEOC Appeal No. 0120110008 (Jan. 11, 2013) (the limited exceptions for disclosure apply to confidential medical information concerning any employee).

The AJ based her finding of confidentiality breach on the fact that the NRP did not require the redaction of IOD employees' medical diagnoses prior to providing the NRP activity files **[*98]** to the DATs and other personnel charged with completing NRP objectives. The AJ noted that, in the absence of an explicit mandate to redact, some districts did so while at least one did not. Class Order, pp. 61-66. The Agency responded that the inclusion of a redacting requirement was not necessary, and that NRP teams were warned of Agency policies and procedures requiring redaction and did redact. The Agency contends that there was only one known incident of unauthorized disclosure in a single district office, and that there was no evidence of widespread unauthorized disclosure. AB1, pp. 78-84. For the reasons outlined below, we find that the Agency's breach of confidentiality of medical records extended far beyond mere failure to redact.

The Commission regards documentation of the individual's diagnosis or symptoms as confidential medical information. Tyson v. U.S. Postal Service, EEOC Appeal No. 01992086 (Aug. 23, 2002), citing ADA Enforcement Guidance: Pre-Employment Disability-Related Questions and Medical Examinations n. 26 (Oct. 10, 1995). In its response to the first set of interrogatories dated August 22, 2011, the Agency stated, incredibly, that records generated **[*99]** by Health and Resources Management that contain medical restrictions, such as the Form CA-17, are not medical records. Record at 4841. A review of the Form CA-17 itself indicates otherwise. On question 5 of the form, the employee is asked to describe how the injury occurred and the parts of the body affected. Question 8 asks the physician whether the history of the injury given by the employee corresponds to the description in question 5. Question 9 asks for a description of clinical findings. Question 10, as we noted earlier, asks for a diagnosis due to the injury; and Question 11 asks about other disabling conditions. Record at 12939-12946. Form CA-17's thus contain information about symptoms and diagnoses, and therefore constitute medical records.

When asked in his deposition whether there were any guidelines about safeguarding the information in the medical records with Health and Resources Management, the HHR Manager replied that he did not recall. He also testified that the national medical director and national medical administrator were the two people responsible for safeguarding medical records. Record at 1195-1196. The National Medical Administrator testified that medical **[*100]** files were maintained in a double-locked facility and that files were in locked in rooms that were accessible only by occupational health personnel. He admitted, however, that NRP medical records were maintained by Injury Compensation. Record at 14816. As the WCO Director himself acknowledged and as we reported above, those NRP files (the workbooks) contained extensive medical documentation. Record at 13727, 13733.

The plain language of Section 102(d)(3)(B) and the identically worded regulation in 29 C.F.R. § 1630.14(c) unambiguously specify that medical information must be collected and maintained on separate forms and in

separate medical files. Mayo v. Dept. of Justice, EEOC Appeal No 0720120004 (Oct. 24, 2012). In Mayo, we found that the Agency violated the confidentiality provision of the Rehabilitation Act when it placed the complainant's medical information, including information pertaining to his diagnosis, in an "adverse action" file maintained in its Office of Human Resource Management. We found it irrelevant that these adverse action files were restricted personnel files; they did not meet the statutory definition of separate medical files. Likewise, it did **[*101]** not matter that the Agency disclosed nothing in the complainant's files to any unauthorized third party. We held that the Agency's failure to maintain the complainant's medical information in separate medical files constituted a per se violation of the confidentiality clause of the Rehabilitation Act, even in the absence of unauthorized disclosure. In this case, it does not matter if no unauthorized persons accessed the NRP files, whether maintained in the Health and Resource Management office or in the NRP workbooks. The mere presence of medical information outside of areas separately designated for the purpose of maintaining confidential medical files is enough to trigger a violation of the confidentiality provision of the Rehabilitation Act.

There were unauthorized disclosures, however: those that may have been mandated by NRP procedure and those that occurred due to lack of oversight, owing to the NRP's failure to include explicit instructions on maintaining and protecting the confidentiality of medical information. As to the first group of disclosures, Step 6 of Phase I required the collaboration of district medical staff, district injury compensation specialists, operations **[*102]** supervisors, and labor relations representatives in updating the NRP workbook corresponding to each IOD employee. Record, pp. 12944-12950. Leaving aside the medical staff, who would have to evaluate the information as a matter of course, the only individuals who might have been eligible to access confidential medical information are the injury compensation specialists, who, if the circumstances are appropriate, would fall under the workers' compensation office exception. In this situation, however, they do not because, as we have already found, the NRP was discriminatory and therefore the results of the examinations of those records were not used in accordance with the Americans with Disabilities Act, as required by Section 102(d)(3)(C) thereof. The other two groups, the operations specialists and the labor relations specialists, do not fall within any of the five excepted categories. A technician who worked on preparing NRP workbooks confirmed that medical documentation that indicated that an IOD employee had permanent restrictions was included in those files. Record at 13743. When asked whether there were any other employees who were involved in creating them, she responded that **[*103]** two postmasters would come in from the field and help with them. Record at 12742.

Of equally great concern are the rampant reports of confidential medical files being left on supervisors' desks, on copy machines, in the trash, and otherwise not properly secured. The Commission has found confidentiality breaches in a wide variety of circumstances. See Baker v. Social Security Admin., EEOC Appeal No. 0120110008 (Jan. 11, 2013) (leaving copy of complainant's report of asthma attack on copier raises genuine issue of material fact whether violation occurred); Bennett v. U.S. Postal Service, EEOC Appeal No. 0120073097 (Jan. 11, 2011) (release of medical records to state court in response to a subpoena in a civil action); Philbert v. Dept. of Veterans Affairs, 0720090041 (May 5, 2010) (supervisor twice accessed complainant's medical records without complainant's knowledge or authorization); Grazier v, Dept. of Labor, EEOC Appeal No. 0120102711 (Sept. 30, 2010) (disclosure of complainant's medical records to union steward where complainant had not asked for union representation and objected to union steward's presence at conference); Scott v. U.S. Postal Service, EEOC **[*104]** Appeal No. 0120103590 (Sept. 19, 2012) and Young v. U.S. Postal Service, EEOC Appeal No. 0120112626 (Oct. 3, 2011) (disclosure of complainant's confidential medical information to others present at investigative interview); and Tyson v. U.S. Postal Service, supra, (manager mailed letters to 32 postmasters at other facilities that disclosed medical diagnosis and symptoms, notwithstanding that breach was part of manager's effort to find vacant position for complainant). In each of these situations, with the exception of the Baker case, medical records that were otherwise maintained in secure areas were disclosed due to a mistaken belief that it was appropriate to do so. In other words, the records were under control, but were released due to errors of judgment.

What we have here, by contrast, are reports from all over the country of medical files containing Form CA-17's and other confidential medical information being left in open, freely accessible areas. Witnesses from Florida, Illinois, Washington State, California, and Maryland all reported that they had seen their confidential medical information lying around in publicly accessible areas and unlocked rooms, such **[*105]** as supervisors' desks, copy machines,

and the workroom floor, and that this was going on "all the time." Record at 15479, 15688-15689, 15748-15749, 15825, 16232-16233, 16387-16390. A witness from Illinois reported that supervisors in his facility would have employees in modified positions making copies of other employees' medical records, and that he found a copy of his Form CA-17 that was made by another employee in a trash can. Record at 15472, 15479. Witnesses from Washington State and California testified that their supervisors had not only their files with Form CA-17's in it but those of other people as well strewn all over their desks. Record at 16000, 16501. The California witness also averred that her supervisor would put the files in the top drawer of his desk, where people looking for a rubber band or a paper clip could go into that drawer and easily access those files. Record at 16501-16502. Another witness from California stated that she had observed Form CA17s left sitting out on fax machines for days, and that such occurrences were happening all the time. Record at 15872-15873. A witness from Baltimore reported that her medical records had actually disappeared, and that **[*106]** after she had painstakingly reproduced them, they had "miraculously" reappeared. She also reported that she did not think anyone continued to lock up the folders. Record at 16107-16108, 16122-16127. Contrary to the Agency, we find that these were not isolated occurrences, but rather were commonplace across many districts.

Based on the foregoing, we find that while operating under the auspices of the NRP, the HHR Manager, the WCO Director, and other Agency officials who supported and assisted in implementing that program violated Section 501(g) of the Rehabilitation Act, which incorporates by reference Sections 102(d)(3)(B) and (d)(3)(C), and Section 102(d)(4)(C) of the Americans with Disabilities Act, by failing to maintain the confidentiality of the medical records of IOD employees who were assessed under the NRP. We conclude that no genuine issue of material fact exists on this issue that would warrant a hearing. To be eligible for relief at the remedies stage of this proceeding, class members must show that they suffered compensable harm as a result of having the confidentiality of their medical information compromised. The Class Agent is eligible for immediate relief because **[*107]** she has established that the confidentiality of her medical records was compromised as a result of Phase I of the NRP.

REMEDIES

Notice of Entitlement to Relief to Class Members

The Agency must notify class members of this final action and relief awarded through the same media employed to give notice of the existence of the class complaint. The notice, where appropriate, must include information concerning the rights of the class members to seek individual relief and of the procedures to be followed. Notice must be given by the Agency within 10 days of the transmittal of the final action to the agent. 29 C.F.R. § 1614.204(k).

Elimination of the Discriminatory Policy or Practice

When discrimination is found, an Agency must eliminate or modify the employment policy or practice out of which the complaint arose. 29 C.F.R. § 1614.204(1)(1). When the NRP came to an end on July 1, 2011, the Vice President for Employee Resources Management put out a memorandum in which she set forth guidelines to be used when trying to find adequate work for IOD employees. She ordered that assignments for limited-duty and rehabilitation employees continue to be made in compliance **[*108]** with all applicable federal laws, regulations, collective bargaining agreements, and operations manuals. Record at 13704. These guidelines, among other things, eliminated the "necessary work" standard that was used in the NRP and made explicit provision for referrals to the DRACs. Record at 13704-13707. The HHR Manager and the WCO Director, the officials who developed the NRP and oversaw its implementation, have long since retired, which is the reason that the AJ ordered that the officials responsible for implementing the post-NRP process of finding adequate work for IOD employees be given 8 hours of training on the Rehabilitation Act. This is well within both the scope of relief and the AJ's discretion. Ongoing training is also necessary because there will eventually be turnover in these positions and the incoming Agency officials will need to be trained.

Relief

Relief for the Class Agent

When discrimination is found on a class complaint, the Agency must also provide individual relief, including an award of attorney's fees and costs to the Class Agent. 29 C.F.R. § 1614.204(1)(1). The Class Agent, by virtue of being a qualified individual with a disability who **[*109]** was subjected to an assessment under the NRP, which resulted in her being subjected to disparate treatment and harassment, having her reasonable accommodation in the form of a modified work assignment withdrawn, being subjected to an unlawful disability-related medical inquiry, and having her confidential medical information removed from a secure area and accessed by individuals not authorized to do so, is eligible for compensatory damages and equitable relief in accordance with EEOC Regulation 29 C.F.R. § 1614.501.

The Class Agent is entitled to attorney's fees in accordance with EEOC Regulation 29 C.F.R. § 1614.501(e). The Agency contends on appeal, however, that the AJ improperly granted the Class Agent's request to defer submission of attorney's fees and costs until after a ruling from the Commission. Specifically, the Agency argues that the language in 29 C.F.R. § 1614.501(e)(2)(i) which states that the Complainant's attorney shall submit a verified statement within 30 days of receiving the [Administrative Judge's] decision, makes submission of a fee request within that time frame mandatory. AB1 85-86. We find that the AJ's decision to defer a final assessment of attorney's **[*110]** fees and costs until after the appellate ruling was proper and entirely within the AJ's discretion.

Rules Governing Relief for the Class

The procedures under which class members may claim relief are set forth in EEOC Regulation 29 C.F.R. § 1614.204(1)(3):

> When discrimination is found in the final order and a class member believes that he or she is entitled to individual relief, the class member may file a written claim with the head of the Agency or its EEO Director within 30 days of receipt of notification by the Agency of its final order. Administrative judges shall retain jurisdiction over the complaint in order to resolve any disputed claims by class members. Where a finding of discrimination against a class has been made, there shall be a presumption of discrimination as to each member of the class. The claim must include a specific detailed showing that the claimant is a class member who was affected by the discriminatory policy or practice, and that this discriminatory action took place within the period of time for which class-wide discrimination was found in the final order. The Agency must show by clear and convincing evidence that any class member **[*111]** is not entitled to relief. The administrative judge may hold a hearing or otherwise supplement the record on a claim filed by a class member. The Agency or the Commission may find class-wide discrimination and order remedial action for any policy or practice in existence within 45 days of the agent's initial contact with the Counselor. Relief otherwise consistent with this part may be ordered for the time the policy or practice was in effect. The Agency shall issue a final order on each such claim within 90 days of filing. Such decision must include a notice of the right to file an appeal or a civil action in accordance with subpart D of this part and the applicable time limits.

A finding of class-wide discrimination raises the presumption that a claimant who establishes that he or she is a member of the class is entitled to equitable relief unless the Agency shows, by clear and convincing evidence, that the claimant would not have been entitled to that remedy even absent discrimination. 29 C.F.R. § 1614.501(c)(1); Complainant v. Dept. of Agriculture, EEOC Appeal No. 0120131896 (May 22, 2014); Davis v. Dept. of Justice, EEOC Request No. 05931205 (Sept. 1, 1994); *Day v. Mathews, 530 F.2d 1083, 1085 (D.C. Cir. 1976).* **[*112]** A claimant who seeks compensatory damages must submit sufficient evidence establishing a causal connection between being subjected to an NRP assessment or acts flowing from that assessment and any harm the claimant suffers. See Hensley v. Tennessee Valley Authority, EEOC Appeal No. 0120072458 (Nov. 10, 2008); Morgan v. Dept. of the Army, EEOC Appeal No. 01944845 (Oct. 1, 1998), citing Terrell v. Dept. of Housing and Urban Development, EEOC Appeal No. 01961030 (Oct. 25, 1996).

Relief for All Class Members

All class members who had their medical documentation placed in NRP workbooks, reviewed by individuals who were not within any of the five excepted confidentiality categories, or left in unsecured areas may bring a claim for

damages in accordance with the procedures set forth in 29 C.F.R. § 1614.204(1)(3) as a result of our findings that the NRP constituted an unlawful disability-related medical inquiry that caused and resulted in confidential medical information being placed in unauthorized areas and accessed by unauthorized persons.

All class members who were subjected to an assessment of their eligibility for "necessary work" pursuant to the NRP, **[*113]** upon a showing that they are qualified individuals with disabilities and that they suffered harm, may bring a claim for damages in accordance with the procedures set forth in 29 C.F.R. § 1614.204(1)(3) as a result of our finding that the implementation of the NRP caused them to be subjected to a hostile work environment.

Relief for Class Members Who Received a No-Work-Available Determination

Class members who were subjected to an assessment of their eligibility for "necessary work" pursuant to the NRP, upon a showing that they are qualified individuals with disabilities, received a total or partial "no work available" determination, and were removed, transferred to the OWCP rolls, had their work hours reduced, or suffered any other harm or loss as a result of being assessed under the NRP, may bring a claim for damages and equitable relief in accordance with the procedures set forth in 29 C.F.R. § 1614.204(1)(3) as a result of our finding that the implementation of the NRP caused them to be subjected to disparate treatment and have their reasonable accommodations withdrawn.

Relief for Class Members Who Received a New Work Assignment

Class members who were **[*114]** subjected to an assessment of their eligibility for "necessary work" pursuant to the NRP, upon a showing that they are qualified individuals with disabilities, and received a new work assignment that resulted in a loss or harm to any term, benefit, condition or privilege to his or her employment with the Agency that resulted from being assessed under the NRP, may bring a claim for damages and equitable relief in accordance with the procedures set forth in 29 C.F.R. § 1614.204(1)(3) as a result of our finding that the implementation of the NRP caused them to be subjected to disparate treatment and have their reasonable accommodations withdrawn.

Relief for Class Members Who Separated, Resigned, or Retired During the NRP Period

We agree with the Class Agent that by ruling that damages were not available for employees who quit or retired during the NRP process, the AJ improperly cut off their avenue of recourse. Class members who were subjected to an assessment of their eligibility for "necessary work" pursuant to the NRP, upon a showing that they are qualified individuals with disabilities, that they separated, retired, or resigned during the period that the NRP was in **[*115]** effect, and that their separation, retirement, or resignation was in actuality a constructive discharge that resulted from being assessed under the NRP, may bring a claim for damages and equitable relief in accordance with the procedures set forth in 29 C.F.R. § 1614.204(1)(3) as a result of our finding that the implementation of the NRP caused them to be subjected to disparate treatment and have their reasonable accommodations withdrawn. To establish constructive discharge, the class member would have to show that the Agency, by means of the NRP, made working conditions so difficult that any reasonable person in the class member's position would have felt compelled to quit. Clemente M. V. Dept. of Veterans Affairs, EEOC Appeal No. 0120160661 (Mar. 11, 2016), citing Caron-Coleman v. Dept. of Defense, EEOC Appeal No. 07A00003 (Apr. 17, 2002). The Commission has established three elements which a complainant must prove to substantiate a claim of constructive discharge: (1) a reasonable person in the complainant's position would have found the working conditions intolerable; (2) conduct that constituted discrimination against the complainant created the intolerable working conditions; **[*116]** and (3) the complainant's involuntary separation, retirement, or resignation resulted from the intolerable working conditions. Clemente M., supra, citing Walch v. Dept. of Justice, EEOC Request No. 05940688 (Apr. 13, 1995).

Those IOD Employees Not Subject to the NRP

During the course of the litigation, it came to light that approximately 3,300 IOD employees were never assessed under the NRP. Upon the Agency's motion, the AJ ordered that these individuals be de-subsumed from the class and be sent letters notifying them that they were found not to meet the definition of class membership. The AJ also

ordered that these 3,300 individuals be advised that any previously filed individual EEO complaints that they filed would be de-subsumed and allowed to proceed as individual complaints. The AJ further ordered that the notice advise these individuals that they had 45 days from receipt of the notice to initiate an individual complaint of disability discrimination regarding events that occurred between May 5, 2006, and July 1, 2011. On appeal, the Agency challenged this remedial language as overbroad and improperly permitting new disability discrimination claims arising from **[*117]** any event that occurred during the class period, including claims arising from events totally unrelated to the NRP that would otherwise be time-barred. AB3, pp. 2, 7-9. In response, the Class Agent argued that the AJ's order should be upheld in its entirety. AB5, p. 71.

We agree with the Agency on this point. Among these 3,300 IOD employees who were never assessed under the NRP, only those who had pre-existing individual complaints that were subsumed and will be de-subsumed should be allowed to go forward on those complaints. The Agency correctly points out that events occurring during that period that were unrelated to the NRP would be long time-barred, unless timely complained about. The Class Agent has not cited any legal authority to support her position that the AJ's order be allowed to stand. Accordingly, the Agency shall issue the required notice pursuant to the order for relief in the instant case, but without the language authorizing those who did not have previously filed individual complaints to initiate new complaints.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, we AFFIRM the Agency's final order adopting the AJ's **[*118]** finding that the Class Agent failed to establish that the NRP had a disparate impact upon qualified IOD employees with disabilities; we REVERSE the Agency's final order rejecting the AJ's findings that the Class Agent established that the NRP subjected qualified IOD employees to disparate treatment and resulted in IOD employees with disabilities having their reasonable accommodations withdrawn, and that the NRP resulted in IOD employees being subjected to disability-based harassment and having their confidential medical information accessed by unauthorized persons. Based on a de novo review of the record, we further find that Phase I of the NRP constituted an unlawful medical inquiry to which the class of IOD employees was subjected.

ORDER (D0617)

To the extent that it has not already done so, the Agency is ORDERED to take the following remedial action:

1. Within sixty (60) calendar days after the date that this decision is issued, the Agency shall offer to reinstate the Class Agent to her former position as a Carrier Technician at the Post Office in Rochester, New York, retroactive to May 19, 2006. The offer shall be made in writing. The Class Agent shall have **[*119]** fifteen (15) calendar days from receipt of the offer to accept or decline the offer. Failure to accept the offer within 15 days will be considered a declination of the offer unless the Class Agent can show that circumstances beyond her control prevented a response within the time limit.

2. The Agency shall determine the appropriate amount of back pay, with interest, and other benefits due the Class Agent, pursuant to 29 C.F.R. § 1614.501, no later than sixty (60) calendar days after the date this decision is issued. The Class Agent shall cooperate in the Agency's efforts to compute the amount of back pay and benefits due, and shall provide all relevant information requested by the Agency. If there is a dispute regarding the exact amount of back pay and/or benefits, the Agency shall issue a check to the Class Agent for the undisputed amount within sixty (60) calendar days of the date the Agency determines the amount it believes to be due. The Class Agent may petition for enforcement or clarification of the amount in dispute. The petition for clarification or enforcement must be filed with the Compliance Officer, at the address referenced in the statement entitled "Implementation **[*120]** of the Commission's Decision." If the Class Agent declines to accept the offer of retroactive reinstatement or fails to respond the offer within fifteen (15) calendar days of receipt of the offer, her entitlement to back pay and the other aforementioned equitable remedies will cease upon the date she actually or effectively declines.

3. Within sixty (60) calendar days after the date this decision is issued, the Agency shall conduct a supplemental investigation pertaining to the Class Agent's entitlement to compensatory damages incurred as a result of the Agency's discriminatory actions. See Feris v. Environmental Protection Agency, EEOC Appeal No, 01934828 (Aug. 10, 1995), request for reconsideration denied, EEOC Request No. 05950936 (July 19, 1996); Rivera v. Dept. of the Navy, EEOC Appeal No. 01934157 (July 22, 1994); Carle v. Dept. of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993). See also Turner v. Dept. of the Interior, EEOC Appeal Nos. 01956390 & 01960518 (Apr. 27, 1998); Jackson v. U.S. Postal Service, EEOC Appeal No. 01923399 (Nov. 12, 1992), request for reconsideration denied, EEOC Request No. 05930306 (Feb. 1, 1993). The Agency shall afford **[*121]** the Class Agent sixty (60) calendar days to submit additional evidence in support of her individual claim for compensatory damages. Within thirty (30) calendar days of its receipt of the Class Agent's evidence, the Agency shall issue a final decision determining the Class Agent's entitlement to compensatory damages, together with appropriate appeal rights.

4. The Agency shall process the Class Agent's request for attorney's fees associated with this class litigation, as discussed below.

5. The Agency shall immediately and thereafter take meaningful and effective measures to ensure that discrimination against qualified individuals with disabilities, particularly injured-on-duty employees who are currently working in, who apply for, or who are being evaluated for limited-duty and rehabilitation positions, does not continue. The Agency shall monitor these measures for at least five (5) years to ensure that their implementation produces effective and tangible results. The Agency shall report these measures and results as part of its barrier analysis in its annual MD-715 report for the next five (5) years. The measures in question shall include the following:

a. All officials, **[*122]** managers, and employees who are responsible for finding adequate work for employees who are injured on duty will be given at least 8 hours of training annually on the Agency's responsibilities to provide reasonable accommodations to qualified individuals with disabilities under the Rehabilitation Act. This training must include a segment on the relationship between the Agency's obligations under the Rehabilitation Act and under the Federal Employee Compensation Act, as explained in our enforcement guidance entitled: Workers Compensation and the ADA, EEOC Notice No. 915.002 (Sept. 3, 1996), which can be found at: *www.eeoc.gov/policy/docs/workcomp.html*. The training must also include a segment on ensuring that employees'medical information, including Form CA-17's and other relevant documents, remains confidential at all times.

b. The Agency shall make certain that, in whatever process it utilizes to find adequate work for injured-on-duty employees who need to be placed into limited-duty or rehabilitation assignments, such employees are notified at the beginning of and throughout that process that if they meet the statutory requirements of the Rehabilitation Act, they have the **[*123]** right to request a reasonable accommodation, and explain the procedures for doing so as they are set forth in EL-307. Employees shall also be notified that the process of finding adequate work necessarily entails that compensation specialists and other personnel may need access to their confidential medical information in order to assist them in finding adequate work, and that the confidentiality of such medical documentation will be maintained at all times. The Agency shall ensure that information pertaining to reasonable accommodations and confidentiality of medical documentation is included in any printed and electronic materials pertinent to the process of finding adequate work for injured-on-duty employees.

6. Within ten (10) calendar days of the date this decision is issued, the Agency shall notify the members of the class of this decision and available relief through the same media employed to provide notice of the existence of the class complaint. The notice shall include the following provisions:

a. Within thirty (30) days of receipt of notification of this decision, a class member who believes that he or she is entitled to individual relief must file a written **[*124]** claim with the Agency or with its EEO director. The claim must include a specific, detailed showing that the claimant was subjected to an evaluation under the National Reassessment Program between May 5, 2006, and July 1, 2011 (hereinafter referred to as the class period), as well as of the consequences of that evaluation: being returned to full duty;

receiving no change in limited-duty or rehabilitation assignment; receiving a new limited-duty or rehabilitation assignment; receiving a total or partial "no work available" determination; and separating, resigning, or retiring during the period that the NRP was in effect.

b. All those who were evaluated under the National Reassessment Program during the class period may put in a claim for damages to the extent that they can provide a specific and detailed showing that they suffered compensable harm as a result of being subjected to an unlawful medical inquiry or having their confidential medical information accessed by unauthorized persons. All class members are eligible for relief under this provision.

c. Those who were evaluated under the National Reassessment Program during the class period and who wish to file a claim seeking **[*125]** relief from harassment, disparate treatment, or having their reasonable accommodations withdrawn must provide a specific and detailed showing that they were qualified individuals with disabilities at the time of the violation. Those who were evaluated before January 1, 2009, are subject to the definition of disability under the Rehabilitation Act as it existed prior to the enactment of the Americans with Disabilities Act Amendments Act of 2008. Those who were evaluated on or after January 1, 2009, are subject to the definition of disability under the Rehabilitation Act as amended by the Americans with Disabilities Act Amendments Act of 2008.

d. Those who were evaluated under the National Reassessment Program during the class period who wish to file a claim for damages resulting from unlawful harassment must provide a specific and detailed showing that they were qualified individuals with disabilities at the time of their evaluation, and that they suffered compensable pecuniary or nonpecuniary harm as a result of the National Reassessment Process.

e. Those who were evaluated under the National Reassessment Program during the class period, who present a specific and detailed **[*126]** showing that they were qualified individuals with disabilities at the time of their evaluation and were given a new limited-duty or rehabilitation assignment that resulted in a loss or harm to a term, condition, privilege or benefit of their employment with the United States Postal Service may put in a claim for additional damages and equitable relief to the extent such harm or loss was attributable to such new limited duty or rehabilitation assignment.

f. Those who were evaluated under the National Reassessment Program during the class period, who were qualified individuals with disabilities at the time of their evaluation and who were given a total or partial no-work-available determination that resulted in being placed into OWCP, having reduced work hours, or otherwise suffering a loss or harm to a term, condition, privilege, or benefit of employment with the United States Postal Service may put in a claim for additional damages and equitable relief to the extent such harm or loss was attributable to receiving the total or partial no-work-available determination.

g. Those who were evaluated under the National Reassessment Program and separated resigned, or retired during **[*127]** the class period and who wish to file a claim for relief must present a specific and detailed showing that they were qualified individuals with disabilities at the time of their evaluation and that they were constructively discharged as a result of that evaluation. To prevail in a constructive discharge claim, the claimant must establish that the National Reassessment Program evaluation or any consequences flowing from that evaluation made his or her working conditions so difficult that a reasonable person in his or her position would have felt compelled to separate, resign, or retire.

h. Within ninety (90) calendar days of receiving an individual claim, the Agency will issue a final decision on that claim. That decision will include a notice of the right to file an appeal or a civil action within the applicable time limits.

7. Within ten (10) calendar days of the date this decision is issued, the Agency shall notify the 3,300 members of the class who were never assessed under the National Reassessment Program that they are not members of the class, that their previously-filed individual EEO complaints, if any, have been de-subsumed from the class, and that they are free **[*128]** to pursue those individual complaints. The notice shall not include language to the effect that those who had not previously filed in individual EEO complaint will be given 45 days from receipt of the notice to initiate a new individual complaint.

8. The Agency is further directed to submit a report of compliance in digital format as provided in the statement entitled "Implementation of the Commission's Decision." The report shall be submitted via the Federal Sector EEO Porta) (FedSEP). See 29 C.F.R. § 1614.403(g). Further, the report must include supporting documentation of the Agency's calculation of back pay and other benefits due the Class Agent, including evidence that the corrective action has been implemented.

POSTING ORDER (G0617)

The Agency is ordered to post at its facilities around the country copies of the attached notice. Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted **both in hard copy and electronic** format by the Agency within 30 calendar days of the date this decision was issued, and shall remain posted for 60 consecutive days, in conspicuous places, including all places where **[*129]** notices to employees are customarily posted. The Agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material. The original signed notice is to be submitted to the Compliance Officer as directed in the paragraph entitled "Implementation of the Commission's Decision," within 10 calendar days of the expiration of the posting period. The report must be in digital format, and must be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

FOR THE COMMISSION:

Bernadette B. Wilson
Acting Executive Officer
Executive Secretariat

SEP 25 2017
Date

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