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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
SAN FRANCISCO REGIONAL OFFICE

LINDA DAVIS ANDERSON, Ph.D.))	Case No. 370-99-X2040
Complainant,))	
vs.))	COMPLAINANT'S
U.S. GEOLOGICAL SURVEY,))	POST-HEARING BRIEF
DEPARTMENT OF THE INTERIOR,))	
Agency.))	Hearing Date: June 13 & 14, 2000
_____))	

The Complaint filed by Dr. Linda Anderson came for hearing before Administrative Judge Daniel Leach on June 13 and June 14, 2000. Complainant submits this post-hearing brief in support of her complaint and her request for equitable relief in the form of front pay, compensatory damages, and injunctive relief, as discussed below.

I. STATEMENT OF FACTS

Complainant, Dr. Linda Anderson, was hired by the United States Geological Survey (“USGS”

or “the Agency”) in August or September of 1989, as a Hydrologist GS-11 (Exhs. A, B)¹ Prior to her hire by the Agency, Linda Anderson possessed a PhD in Earth Sciences, with an emphasis in Aquatic Geochemistry, from the University of California, Santa Cruz. Dr. Anderson had six months of post-doctoral experience and two professional publications to her credit. Dr. Anderson’s doctoral work had focused on metals, and the movement of metals through water; she possessed an immense amount of expertise in the metal chromium.

In June or July of 1989, Jim Davis and Doug Kent interviewed Dr. Anderson for the GS-11 Hydrologist position. Davis hired Anderson and she began working in August or September of 1989. Jim Davis, Project Chief, became her supervisor. Dr. Anderson was promised the opportunity to conduct the experimentation and analysis necessary to further her scientific development by publication as a “first author” in reputable scientific journals.

Davis’ project was conducting a series of experiments on the movement of certain metals, including Chromium, through groundwater. The experiments were unique in that they were being conducted on an actual aquifer in Cape Cod, Massachusetts, rather than on water in the laboratory. The were known as the “small-tracer” and “large-tracer” experiments. The Hydrologist position and Cape Cod experiments were opportunities for Dr. Anderson to apply her analytical chemistry background and specialized expertise in metals and their movement through water.

Dr. Anderson’s performance was exemplary. Dr. Anderson’s Performance Evaluations from 1989 through April of 1994 were Fully Successful or above. (EEO Exh. 15, Appellant’s Exh. EE) In

¹ All Exhibits are Complainant’s Exhibits unless noted as “EEO Exh.,” which are documents from the EEO investigation. The Agency did not introduce any exhibits at hearing,

1992, Jim Davis rated Dr. Anderson as “Outstanding,” the highest possible rating. (EEO Exh. 6, p. 031) Dr. Anderson’s evaluation for the period preceding the “Unacceptable” evaluation issued by Davis in January of 1995, was “Fully Successful.” (See, EEO Exh. 15, Evaluation from April 1, 1993 through January 31, 1994) The other scientists on the Davis project enjoyed working with Dr. Anderson, thought she was a tremendous resource, particularly as a chemist, and consulted with her often. (Coston testimony)

Dr. Anderson’s work ethic and scientific contributions were recognized by Jim Davis and the Agency prior to her EEO activity and complaints. In March of 1992, Jim Davis wrote a glowing recommendation of Dr. Anderson’s work ethic, research skills, and scientific contribution to his project. (Exh. F1) Contrary to what he alleged after Anderson’s EEO Complaints, in 1992 Davis accurately described Anderson’s role “like that of a (sic) independent researcher rather than the analytical support role described in her current position description.” (Exh. F1) Davis recognized that Anderson had “contributed in a significant way to project activities from the very beginning.” (Id.) Davis acknowledged Dr. Anderson’s initiative in developing “her own research project” within the small-scale tracer experiments. Davis found that Dr. Anderson’s analysis of 2000 samples from the 1989 small-scale tracer experiment “was completed in a timely fashion and data of very high quality were produced. . . “ (Id.)

In June of 1992, Fred Nichols, Chief, Branch of Regional Research (“Branch Chief”) awarded Dr. Anderson a Special Achievement Award. (Complainant’s Exh. JJ) She received a monetary award and a summary rating of “Outstanding.” This award recognized all of her scientific contributions during the period from April 1, 1991 through March 31, 1992, including her work on the ICPOAS machine. (Id) Although Dr. Anderson had no prior experience with this equipment, she quickly learned how to

set up, operate, troubleshoot and train others on its use. (Anderson and Bullen testimony)

In the beginning of November 1992, Dr. Anderson complained to Jim Davis that she and Jennifer Coston were doing double-duty on the more menial “chores” associated with Davis’ project. During this time, Dr. Anderson also disagreed with Davis’ decision to put himself, rather than Jennifer Coston, as first author on a paper which Coston had drafted and had provided the underlying analysis. (Coston testimony) After Anderson’s complaint of disparate treatment and disagreement with Davis, he retaliated. On November 16, 1992, he took away Anderson’s 4 day/10 hours per day schedule. (Exh. F2) Prior to this, such a schedule had been approved by and acceptable to Davis.

The retaliation against Anderson continued. On December 4, 1992, Davis called a meeting for December 14, 1992 regarding, “Publications, Scientific Opportunities, and Project Responsibilities.” (Exh. SS6) In his memo, Davis stated, “Please plan to meet at 4pm on Monday December 14, to discuss the topics above. Although it is my feeling that these issues have not been a problem on this project historically, comments made to me on several occasions over the past month indicate that at least one individual, if not more, thinks that there are problems in this area.” It is undisputed that Linda Anderson was the only one who had made comments to Davis on those topics over the past month. The other three project members addressed on the memo, Doug Kent, Chris Fuller, and Jennifer Coston, had remained silent about the “topics.” The other project members understood that Davis was referring to Anderson in his 12/4/92 memo. (Exh. SS6; Coston testimony)

At the December 14, 1992, meeting, Kent, Fuller and Coston mostly remained silent. Davis ran the meeting; Anderson maintained her opinion that it was inappropriate to remove Coston and substitute Davis as first author. (Coston testimony) Anderson reasoned that it was not right to switch authorship after Davis had promised it to Coston. (Id.) Anderson brought up the standards of the

American Geophysical Union regarding first authorship. (Coston testimony) At the meeting, Davis rejected those standards, stating that he would establish the guidelines for the project, on a “paper by paper basis.” (Coston testimony) The meeting ended as it had begun, with Davis claiming first authorship on the Coston paper. (Id.) The meeting also failed to produce objective standards to govern decision-making about authorship.

On January 21, 1993, Davis removed Anderson from her work on the large-scale tracer. (F3) This occurred roughly one month after the meeting about authorship and task distribution. (Exh. SS6; Exh. F3) Davis told Anderson that the “best course of action for the future” was for her to create a new job description, subject to his approval. (Id.) Davis did not remove any other project member from the large-scale tracer. Davis has never asked any other employee to create a new position for themselves at any point, let alone four years into their Agency tenure. All of the other project members understood that Davis had removed Anderson. (Coston testimony) Davis told Coston in a lunch meeting he initiated, which was not disclosed to Anderson, that he “didn’t feel they could work together anymore, and we needed to pull together and we couldn’t do that with Linda and he did not want her to participate.”² (Coston testimony)

On January 25, 1993, Anderson assured Davis that she wanted to continue her work on the large-scale tracer. (Exh. G) Diplomatically, Anderson stated, “I appear to have misconveyed my intentions and my commitment to the large scale tracer.” (Id.) Anderson hoped to “restore a mutually

² Davis also generated a secret two-page memo to Coston on February 14, 1993, to deny Anderson participation on Coston’s peer review panel, although Coston had invited her. Davis states, “I noticed something in your package that bothered me. I decided to let it slide, but after thinking about it, I decided the let it slide approach doesn’t work very well, especially for matters concerning Linda. I know that Linda reviewed your package, and maybe you included her name there either 1) to please her, or 2) because you see her as a significant collaborator. Either way, I don’t think that’s

productive relationship.” (Exh. G) Her memo had no effect: Davis never assigned her to the large scale tracer after January 21, 1993. (Davis Depo., 65:15-18)

On January 26, 1993, Davis responded to Anderson’s attempt to formulate a new position. (Exh. J) He criticized her proposal and began to criticize her work ethics. Davis included an event from 1989, and characterized work on the pH of a desorption step as an error, rather than an issue which Dr. Anderson had called to his attention prior to undertaking the experimentation. (Id; Anderson testimony)

On February 8, 1993, Dr. Anderson submitted yet another work plan, which was approved by Fred Nichols, Art White. After White’s approval, Davis approved the plan, but not before wrongly accusing Anderson of failing to timely submit the plan. (Exhs. K, L) Davis states, “You have had adequate time to think about your future research direction within the project and NRP. . . . If you have not done so by that time, I will draft a new position description myself for review by you and the Branch Chief.” (Exh. L) On February 14, 1993, Davis tried to exclude Anderson from participating on Jennifer Coston’s peer review panel, although Coston had specifically requested her membership and input. (Exh. SS5)

After her removal from the large-scale tracer, Anderson did transition to other work, including work on Art White and Tom Bullen’s project. This work was approved by Fred Nichols and Jim Davis.

Anderson also made efforts to formally transfer to the White/Bullen project. These efforts increased in the fall of 1994.

right.” (Exh. SS5) Davis never gave a copy of this to Anderson.

From October of 1994 to December 1994, Davis made continued requests for information and documents regarding her work in order to prepare her evaluation.³ On October 13, 1994, he asked Anderson, Fuller, Kent and Coston for a month-by month summary of scientific accomplishments and activities and a paragraph description for each element of their respective work plans. (Exh. N) Anderson provided this to Davis on October 20, 1994. (Exh. R1) On October 21, 1994, Davis asked Anderson, but not Fuller, Kent or Coston, for a “detailed data report that provides all information concerning the experiments you have conducted during the rating period.” (Exh. R2) This was to include, “all spreadsheet files, graphs and illustrations, tables, and other lists of data that you have collected over the course of the last rating period . . .” within 6 days. (Exh. R2) On October 26, 1994, Anderson timely complied. (Exh. S) On this same day, Anderson sent a memo to the Chief Hydrologist in Reston, Virginia, raising issues of disparate treatment, including the denial of her transfer to the White/Bullen project. (Exh. T)

On November 14, 1994, after Anderson’s complaint to the Chief Hydrologist, Davis removed Anderson’s ability to work for days per week (while receiving pay for three). (Exh. U; Anderson testimony) Davis informed her that if a five day schedule did not suit her she could “convert to a permanent part-time appointment,” which would be a further reduction in pay for Dr. Anderson. (Id.)

On November 15, 1994, Davis requested further documentation from Anderson, which he did not request from others. (Exh. V) On November 18, 1994, Anderson wrote a memo to Branch Chief Fred Nichols, noting her work and accomplishments, including her participation in Western Women of Water, which she had done primarily after work hours and on weekends. (Exh.W)

³ The Evaluation was to cover the period from February 1, 1994 to September 30, 1994. Davis finally issued the evaluation of Anderson on January 5, 1995 (EEO Exh. 16)

On November 21, 1994, Anderson complained directly to Jim Davis about his disparate treatment. She also refuted apparent criticisms of her work ethic which Davis was now raising. (Exh. X; see also Exh. Y, e-mail form of memo) Anderson noted that Davis was “using an arbitrary yard stick to evaluate my accomplishments,” and told Davis “your behavior is inappropriate.” (Exh. X) Anderson copied this complaint to Branch Chief Fred Nichols, the Assistant Branch Chief and Research Advisor Art White. (Id.)

Also on November 21, 1994, Anderson wrote a separate memo to Branch Chief Fred Nichols, concerning, “My Treatment.” (Exh. Z) Dr. Anderson stated that the “conflicts between Jim [Davis] and myself are a result of the instances listed below.” (Exh. Z) Anderson listed the issues of first authorship, failure to timely promote to GS-12, disagreement with authorship of the Coston paper, the equitable allocation of chores on the large-scale tracer, and the refused reassignment to the White/Bullen project. (Exh. Z) The Branch Chief’s response was this, “Your message dated Monday, November 21, 1994 has been read. The subject was performance review. Frederic H. Nichols.” (Exh. Z, p. 2)

On November 22, 1994, Robert Hirsh, the Chief Hydrologist, Reston, Virginia, responded to Anderson’s October 26, 1994 e-mail complaint. (Exh. H) Reston did not address the substance of any of her complaints except the issue of first authorship. He indicated that “each participant should work with the Project Chief [Jim Davis] to determine the relative levels of effort, with credit for formulation of the original ideas and interpretation of results typically having the most weight.” (Exh. H) He thanked Anderson “for sharing your concerns with me.” (Exh. H)

On November 28, 1994, Davis sent Anderson a 7-page memo. (EEO Exh. 10) Davis recited criticisms of Anderson’s work ethic, most of which were being articulated for the first time or which, if true, should have been raised in prior evaluations or discipline. (Id; see also, EEO Exhs. 6, 15; Exhs.

F1, EE, JJ)

On November 29, 1994, Jim Davis denied Dr. Anderson's request to attend the American Geophysical Union conference. (Exh. AA2) Davis allowed all of his other project members to attend.

On December 7, 1994, Anderson submitted more information requested by Davis for his completion of her evacuation. (Exh. BB)

On December 13, 1994, Anderson sent a memo responding to Davis' "communication" criticisms raised in his memo of November 28, 1994. Anderson stated that she had "in good faith sought interaction with you every other week, except when I was out of town. If I was unable to find you, I sent you a progress report via email, as we agreed to." Anderson further stated, "I feel that our communication has degenerated to the point where utilizing this avenue will be in my best interest. Your skewing of our conversations makes me reticent to have any interaction with you without a neutral party present." (Exh. DD) Anderson copied this to Fred Nichols, Andrea Alpine, Assistant Branch Chief, Fuller and White.

On December 19, 1994, Linda Anderson filed an EEO Grievance with an EEO Counselor. (EEO Exh. 1, p. 2-3) In this EEO complaint, she raised all of the issues of disparate treatment which had been raised in her previous memos to Davis, her Project Chief, Art White, the Research Advisor, Fred Nichols, the Branch Chief, and Robert Hirsch, the Chief Hydrologist for the Agency. (Id.)

Three weeks later, on January 5, 1995, Jim Davis issued a performance evaluation, rating Dr. Anderson "Unacceptable." (EEO Exh. 16) This is the lowest possible Agency rating. He discussed this with Dr. Anderson on January 9, 1995. (See, EEO Exh. 11, p. 1) Davis admitted in prior testimony that he had not given Anderson any prior notice of his intent to rate her "Unacceptable." (Davis depo., 104:15-22; 106:4-7)

On January 19, 1995, Davis wrote yet another memo to Anderson re: “Unacceptable Performance Rating.” (EEO Exh. 11) Among other things, Davis stated, “. . . if you do not meet the standards during this specific time period, you could be reassigned or a proposal could be made to demote or remove you from your position.” (Id.)

On January 30, 1995, Dr. Anderson requested that the Agency review the Davis evaluation. (EEO Exh. 12) She also set forth a factual, detailed response and rebuttal to Davis’ allegations of poor communication and poor work ethics contained in the “Unacceptable evaluation.” (Id.) She never received a written response. Nor did the Agency review Davis’ “unacceptable” performance evaluation of Anderson for the period from February 1 - September 30, 1994. The Agency allowed this evaluation to stand, to remain unquestioned and free of the most cursory review.

On February 3, 1995, Dr. Anderson resigned from her position as Hydrologist. (Exh. KK) Dr. Anderson resigned because, inter alia, “[t]he behavior of my project chief, Jim Davis, Solute Partitioning Project, Western Region, WRD, towards me has rendered my career at the Survey a dead end.” (Exh. KK) Anderson described her disparate treatment in summary as follows:

There is the tacit assumption that all Project chiefs treat their project members fairly and that all problems originate with the employee. The Survey managerial system has no mechanism to allow employees to voice issues, and if the Branch Chief chooses not to inquire, the employee’s view is never heard. My case is a good example, In January of 1993, when Jim Davis and I were first having visible problems, the chief, Branch of Region Research, Fred Nichols, should have required that Jim Davis and I sit down with a neutral arbitrator to deal with our miscommunication and to formulate a plan to address both of our issues. Instead, management chose to exclude me from the process, and I was told by Jim Davis that I was completely at fault.” (Exh. KK)

II. ARGUMENT

1. COMPLAINANT LINDA ANDERSON HAS PROVED A PRIMA FACIE CASE OF DISPARATE TREATMENT BECAUSE OF HER SEX BY SHOWING THAT JIM DAVIS TREATED HER DIFFERENTLY FROM SIMILARLY SITUATED MALE SCIENTISTS

Linda Anderson showed by a preponderance of the evidence that Jim Davis treated her less favorably than similarly situated male scientists on his project, including Doug Kent and Matthias Kohler. Evidence offered through the testimony of Jennifer Coston, Tom Bullen Art White, and Jim Davis supports such a finding.

During her employment at the Agency, Dr. Anderson was supervised directly by Jim Davis, Project Chief, and the Branch Chief, Fred Nichols. The Agency promoted Jim Davis to a ST 1304, the highest level in the federal government, over one year prior to the hearing date, and after Dr. Anderson had filed her EEO complaint. This fact alone indicates disparate treatment between male and female scientists at the USGS. Dr. Davis was promoted with a pending complaint of sex discrimination filed against him.

1. **Jim Davis Impeded Dr. Anderson's Ability to Publish as a First Author in Reputable Scientific Journals, Which is Required for Scientific Advancement**

It is undisputed that peer reviewed publications are a critical part of professional development. (Davis' Deposition, pg.72:12-17; see also, Bullen and Anderson testimony) On Jim Davis' team, the process for selection of the scientist who would publish as first author was permeated with subjectivity. No written, objective guidelines for the first authorship of papers by Agency employees. (Alpine testimony) There were no written or stated standards, until after Jim Davis rescinded Jennifer Coston's first authorship during November and December of 1992, just prior to Dr. Anderson's removal from the large-scale tracer. The subjectivity allowed the result which occurred: women scientists, such as Jennifer

Coston and Linda Anderson suffered under the unarticulated standards, which were subject to the changing decisions of Jim Davis.

Dr. Anderson was uniquely positioned to publish as first author. In 1989-1990 and beyond, Dr. Anderson was extensively involved in the small tracer, making trips to Cape Cod to participate in the experiments. Dr. Anderson was enthusiastic about her work on this project: it was one of a kind -- the only other was in Canada -- and the small tracer tests were taking place in an actual polluted aquifer in Cape Cod, Massachusetts, rather than merely in a laboratory. Dr. Anderson has specialized expertise in analytical chemistry which would benefit this set of experiments.

Although neither Jim Davis nor the Agency had any oral or written standards in place at the time, Dr. Anderson's laboratory work and analyses should have lead to a publication as a first author, according to the principles of the American Geophysical Union⁴. Dr. Anderson was the person with the most access to the experiments, the data they produced. Dr. Anderson had analyzed over 90% of all of the data, or 2000 samples, from the 1989 "small tracer" experiments. (Exh. F1, Davis Memo, dated 3/12/92) Dr. Anderson completed the most analysis of those experimental results.

Although Dr. Anderson performed almost all of the experiments and analysis, Jim Davis gave first authorship to a male scientist, Doug Kent. At that time, both Dr. Anderson and Dr. Kent were of the same rank and position--Hydrologist, GS-12. Five papers could have been generated from the data Dr. Anderson analyzed. However, Dr. Davis did not even suggest that Dr. Anderson take primary authorship on any one of five possible papers. Roughly nine years later, only two papers from the data analyzed by Dr. Anderson have been published, both containing the name of Doug Kent as first author. (Id.) Jim. Davis claimed credit as second author. Dr. Anderson was listed as third author.

Davis' reasons for denying Anderson authorship are pretexts for his discriminatory motive.

⁴ These standards were approximated by Fred Nichols in his hearing testimony. Thus, Anderson met the Agency's own belatedly issued standards as well.

Davis implied that Anderson did not meet the criteria for first authorship. Applying Davis' subjective standards, perhaps Anderson did not have a chance: Davis stated at the December 14, 1992 meeting, that the employee with the highest GS level would "take the lead," with the ultimate decision being made by the project chief, i.e. himself. (Coston testimony) At hearing, Davis grudgingly articulated standards very similar to those recommended by respected scientific societies: first authorship should go to one who "does the analytical work," "the interpretation of the data, who writes the data or models the data." Dr. Anderson fits all of those criteria with her work on the 1989 small scale tracer. Dr. Anderson had as much, if not more, right to first authorship of at least one paper as Doug Kent did.

2. Dr. Anderson's Promised Promotion to the Level of GS-12 Became a Transition from Part to Full-Time at the Same GS-11 Level Without Her Knowledge or Consent

Early in her tenure, Dr. Anderson was promised a promotion to GS-12 by Jim Davis. During the time period from 1989 to 1991, Dr. Anderson regularly inquired into publication and promotional opportunities. In 1991, Dr. Anderson inquired again about a GS-12 position. In response to her inquiry, Jim Davis went to Fred Nichols and they decided to put in for a change in Anderson's status from part-time to full-time permanent, still at the GS-11 level. They made this decision without discussing it with Dr. Anderson, and without her consent. (Anderson testimony)

Davis put through paperwork recommending the change from permanent part-time to full-time, still at the rank of a GS-11. He did not attempt to put through paperwork to achieve a GS-12 promotion. (Davis Depo., 34:11-14) Davis admitted in his deposition that he did not disclose this to Anderson prior to submitting the paperwork for the GS-11 full-time position. (Davis Depo., 47-48;

Anderson testimony)⁵ It was only after Anderson received notice of her status change, that she understood the GS-12 had not been accomplished. (Anderson testimony) In the meantime, roughly one year earlier, Davis had hired a scientist with no prior USGS experience into the Agency at the rank of GS-12.⁶ Mr. Kohler is now an independent contractor with the USGS, as he does not have citizenship to qualify as a permanent employee. Significantly, Dr. Anderson finally obtained the GS-12 promotion in 1992, based on the same documents she had submitted three years earlier, to support her hiring by the Agency.

3. Jim Davis obstructed Dr. Anderson's Transfer to the Kinetics of Water-Rock Interactions Project

In the fall of 1994, the Agency denied Dr. Anderson her request to transfer from Jim Davis's project to a Water Kinetics project supervised by Project Chief Art White, and his assistant, Tom Bullen. Without the permission of Dr. Anderson's Project Chief, Jim Davis, or the Branch Chief, Fred Nichols, a transfer was impossible. (Bullen, Anderson, Davis, Nichols testimony) As Tom Bullen

⁵ At the hearing, Davis contradicted his prior deposition testimony. Davis asserted that he had discussed his intent to submit paperwork for a GS-11 full-time position in lieu of the GS-12 promotion with Dr. Anderson.

⁶ Although Davis has alluded to Matthias' Kohler's alleged superior post-doc experience, the Agency has not produced evidence of the same. Davis further alleges that Dr. Anderson was allegedly likely to get laid off in her temporary status, because of statements allegedly made by Roger Wolfe. Again, the Agency has not produced evidence of any budgetary or staff cuts other than this hearsay testimony, and failed to call Mr. Wolfe.

testified, after his failed round of conversations with Davis and Nichols, “The issue was closed, because it could not be done without Project or Branch Chief approval.” (Bullen testimony) In the fall of 1994, Tom Bullen was a GS-14, and second in command on the Water Kinetics Project, under Art White, Project Chief.

Dr. Anderson thought that she had secured tacit approval from her Project Chief, Jim Davis. During her May 1993 performance evaluation, Davis promised, “If you want to transfer to another project, I will not stand in your way⁷.” In the fall of 1994, after Anderson’s issues with Coston’s first authorship, unequal work distribution, and after her removal from the large-scale tracer, Davis, however, was standing in her way.

1. Dr. Anderson possessed the Specialized Skills Required and Desired by the White/Bullen Project

Dr. Anderson possessed specialized skills for the work on the White/Bullen Project; that work was related to Agency goals. Dr. Anderson was very interested in working on the Kinetics of Water-Rock Interactions Project. The Project Chief at the time was Art White; his Assistant Project Chief was Tom Bullen. Given her expertise with chromium, Dr. Anderson could provide very specific skills and significant expertise on a series of experiments associated with this project. Dr. Anderson wanted to transfer to this project; Bullen and White wanted her to transfer as well.

Tom Bullen identified Dr. Anderson’s abilities to be a critical component of the work. White and Bullen’s project needed. Dr. Anderson specifically had the specialized ability to interpret aspects of the experiment relating to Chromium. The studies of the processes that fractionate stable isotopes of Chromium in natural systems by White, Bullen, Anderson were the only studies being done in the entire

⁷ Davis did not deny this in his testimony.

country. Bullen had observed that Dr. Anderson was an excellent scientist. Regarding Anderson's work on his project, Bullen testified, "You don't step into an isotope lab and do that work without a lot of skills." Over a period of roughly 20 years, he had admired her work ethics and her expertise in analytical chemistry, including trace metals, particularly Chromium. He had also heard from her colleagues at the Agency that Dr. Anderson was a diligent worker and an invaluable scientist in the lab⁸.

b. The Putative Reasons Offered by the Agency for Its Refusal to Approve Dr. Anderson's Transfer are Pretextual

The Agency failed to meet its burden of proof to show a legitimate, non-discriminatory reason for its refusal to transfer Dr. Anderson. The Agency apparently advances a defense that Dr. Anderson was "invaluable" to the Davis project. The factual record shows that this is pretextual. During the fall of 1994, when Davis is refusing to transfer Anderson, he is simultaneously dragging her through hoops to account for her allegedly poor communication and work ethics. Jim Davis was never able to answer persuasively why, if Anderson had become an unsatisfactory employee, he did not take the transfer as an opportunity to rid his project of her bad attitude and inferior skills. This is inherently illogical, and smacks of pretext.

⁸ Note that prior to this time period and before his conversations with Davis regarding the transfer, Bullen never heard anything negative from Jim Davis about Dr. Anderson's work ethics or work performance. (Bullen testimony)

Pretext is evident simply from a review of the incredible testimony of Nichols and Davis regarding their failure to approve the transfer. Pretext is eminently clear when this testimony is compared with that of Tom Bullen and Art while. Fred Nichols testified adamantly at hearing that it was his decision. According to Bullen, Nichols told him at the time that it was up to Jim Davis. At the time the decision was being made, neither Nichols and Davis could provide a cogent response, but gave Bullen the “run-around”: Nichols told him it was Jim Davis’ decision; Davis passed the buck back to Nichols.⁹

Bullen approached Jim Davis to achieve Anderson’s transfer with the full knowledge and support of Art White. Davis responded, “It’s not for me to decide; it’s a Branch Chief decision.” (Bullen testimony) Bullen immediately went to Branch Chief Fred Nichols. Nichols told him, “In the long-run, it’s really up to Jim [Davis].” (Id.) Bullen went back to Jim Davis, reiterating Dr. Anderson’s strengths, and lobbying strongly for her transfer. Davis repeated, “It’s not for me to decide.” (Id.) In this revolving door scenario, Bullen went back to Nichols, stating, “Fred, this is not working.” Nichols responded that it was “not my decision,” that he was “trying to stay out of this.” (Bullen testimony) Bullen tried to persuade Nichols to take an active role to resolve this situation. Fred Nichols responded, “No.” (Id.)

Given Nichols’ refusal to involve himself, Bullen made one final attempt to effect the transfer through Davis. Bullen testified that he “begged and pleaded” with Davis. Davis responded that Dr. Anderson “does not have the skills you need regarding Chromium isotopes. I’ll help you find someone else.” (Bullen testimony) Davis did not explain further. (Id.) Davis did not offer the names of any other

⁹ Bullen has no motive to be untruthful. He, unlike Fred Nichols, is not involved as a defendant or as a ratifying agent of the discrimination.

candidates. (Id.) This alone shows that the Agency's reasons for failing to approve the transfer are pretexts. Jim Davis was talking out of both sides of his mouth, telling Nichols that Anderson's "invaluable" to his Project, while telling Bullen she's not nearly valuable enough for anyone's project.

Fred Nichols' decision not to allow Dr. Anderson to transfer, also does not make sense given what he knew about the situation. Nichols admitted on cross-examination that the Chromium adsorption work by Dr. Anderson on the White/Bullen project was connected with the work on Davis' project. Nichols knew that White and Bullen was very supportive of Dr. Anderson's transfer, given her expertise as an analytical chemist and their strong working relationship. (Nichols cross) Nichols knew that the work Dr. Anderson had been doing with him in this area had been going extremely well, and that Dr. Anderson's specialized scientific expertise in the way metals behave was fundamental to the White/Bullen project. (White, Bullen testimony) Indeed, the work already done by Anderson and the work planned by Anderson on the White/Bullen project was an important area of Agency work, given that the chromium was one of the most important isotopic tracers to develop. (Bullen testimony)

The fact that the Agency's explanation is pretextual is further explained by Bullen's and White's assessment of Dr. Anderson's skills and abilities. Bullen disagreed with Davis' opinion; Bullen explained to Davis that Anderson possessed the exact background in trace metals which Bullen and White specifically required. He testified to Anderson's successful work in the area. Bullen testified that "She had the skills for Jim Davis to hire her five years before, the skills for Art White to want her . . ." At hearing, White maintained his surprise that the transfer had not occurred at the time; he was eager to have Anderson on his Project. (White testimony)

From the "run around," from what he knew of Anderson's work ethic, knowledge and ability, Bullen concluded that Davis "did not want Dr. Anderson to be around the USGS" He concluded that

Davis had made it impossible for Anderson to work on his project, and was now making it impossible for her to work on another project. (Bullen testimony) Bullen, now Research Advisor responsible for supervising the research of over 75 scientists, found Davis' behavior as an administrator unconscionable. Davis' behavior toward Dr. Anderson also impeded the progress of science, leaving untouched for over five years the groundbreaking and unique work that Dr. Anderson had begun on the White/Bullen project. (Id.)

Bullen also testified that he did not observe Jim Davis treating any other employee like he treated Dr. Anderson. The EEOC should draw the same conclusions. Davis' and Nichols' inconsistent "passing of the buck," refusal to use appropriate authority to effect the transfer or otherwise rectify the situation is a pretext for sex discrimination.

Finally, Nichols could not articulate any other efforts he had made to resolve the conflict between Davis and Anderson besides requiring her to remain under his supervision. (Nichols cross-examination) When Nichols was asked on cross what steps he took to determine whether staff could be switched between projects, he testified incredibly that it was "impossible," and that "no one was gonna give up anyone." The Agency failed to discuss Anderson's placement on any other Agency projects, although the Agency admits that vacancies existed in other parts of the organization. (Alpine testimony) In addition, temporary employees were being hired. (Alpine testimony) The skills that Anderson utilized on the White/Bullen project and the results gained were common to 7 or 8 projects within the Agency. (Bullen testimony) Transfer was not impossible; Cecily Chang had been transferred twice: once out from under the supervision of Jim Davis (when Jim Kuwabara became her *de facto* supervisor) and again from Jim Kuwabara's supervision to that of Carol Kendall. (Chang testimony)

4. Davis Treated Other Female Scientists in a Discriminatory Manner

Davis' attitude toward female scientists and the Agency's attitude toward discrimination is shown by their treatment of Cecily Chang. Ms. Chang testified credibly and with significant detail; her testimony is particularly credible, given her fear of reprisal as a result of her testimony at hearing . Although Jim Davis was her supervisor, he asked her "repeatedly" to see him outside of work. (Chang cross-examination) At that time, she was the only employee on his project. She generally "made excuses," complying on one occasion because she felt under pressure, because he was her supervisor. After this, Ms. Chang requested a transfer from Larry Shimmel, the head of the Research Project where she thought she could fit. Chang told Shimmel that Davis "made her feel uncomfortable and she did not want to date her boss." (Chang cross-examination) The Agency denied her transfer¹⁰.

After her transfer request, Davis called her into his office. He was angry, and yelled, "How dare you! I heard you feel I was trying to date you." Ms. Chang responded, "Not 'trying,' you were." Davis responded, "I was going to promote you, but now I'm not." At the time, Ms. Chang was a GS-9 and remained a GS-9 for six years, until she was transferred to Jim Kuwabara's project in 1986. A male scientist, Chris Fuller was hired in after Chang as a GS-12, full-time. This decision was made by the Project Chief, Jim Davis. Chang had interviewed Fuller for the position, on Davis' request. Chang remained part-time until 1988.

¹⁰ She did not file a complaint because she was "very young" and "very intimidated by her boss." Others at the Agency counseled her, but not regarding an EEO complaint.

Davis also let it be known around the Agency that Chang was "incompetent," although her performance evaluations are good and Davis never reported to her that her work was substandard in any way¹¹. This "badmouthing" was corroborated by another Project Chief, Carol Kendall. Despite Davis' outrageous conduct, Ms. Chang was forced to work under Davis' supervision from 1980-1986. The Agency ratified Davis' discriminatory and harassing conduct and failed to take prompt remedial action.

In December of 1992, Jim Davis denied another woman, Jennifer Coston, first authorship rights to a publication regarding the surface chemistry of particles. Dr. Coston had performed the laboratory experiments and the write-ups of the data from these experiments. Because of this work, Davis had promised her first authorship to Dr. Coston. Dr. Coston had completed a first draft of the paper. After the first draft, Davis made revisions on the paper and claimed first authorship for himself.¹²

B. THE AGENCY ENGAGED IN RETALIATION AGAINST LINDA ANDERSON FOR PRIOR PROTECTED EEO ACTIVITY

¹¹ Since 1994, Chang has received 2 monetary awards for her scientific work and has been rated fully successful. (Chang testimony)

¹² Davis' explanations for removing Coston as author are pretextual, as they change and conflict. Initially, Davis told Jennifer Coston that he needed to put his name as first author on her paper because he was up for promotion and needed such information in his "RGE" packet. (Coston testimony) At hearing, Davis testified that Coston's work on the paper "needed substantial editing" and that she "took too long" to write the paper. Notably, Doug Kent still has not published, in the year 2000, the second paper he was slated to publish as a result of the 1989 small tracer experiments. Davis has never rescinded the first authorship of Mr. Kent.

Although Davis engaged in disparate treatment prior to the end of 1992, including hiring a male scientist in as a GS-12, a level higher than Dr. Anderson despite her longer tenure, and denying her first authorship, their relationship was workable until that date. In December of 1992, Dr. Anderson “disagreed with his decision to put his [Davis’] name first on a publication that a junior female group member had generated the data for and written,” Jennifer Coston. (EEO Exh. 6, p. 024). After that, the relationship between Davis and Anderson “degenerated rapidly.” (Id.) Complainant has shown a prima facie case of retaliation under Title VII. Dr. Anderson has proved that 1) she engaged in protected activity under Title VII; 2) that the Agency took adverse employment decisions against her; and 3) that there is a causal link between her protected activity and the Agency’s action. *Anderson v. Reno*, 190 F. 3d 930, 949 (9th Cir. 1999), citing *Yartzoff v. Thomas*, 809 F. 2d 1371, 1375 (9th Cir. 1987). Notably, while Dr. Anderson only has to prove one instance of retaliation in order to show liability and damage, the Agency engaged in more than one incident of retaliation, as discussed below.

1. Jim Davis Removed Dr. Anderson From Her Work on the Large-Scale Tracer in January of 1993, in Retaliation For Protected EEO Activity

Dr. Davis’ removal of Dr. Anderson from the large scale tracer on January 21, 1993, was retaliatory. (Exh. F3) Anderson engaged in protected activity on two occasions during November-December 1992. Dr. Anderson disagreed when Davis removed Jennifer Coston as first author from a paper she had conducted the analysis for and had drafted. Davis substituted himself as first author. Dr. Anderson maintained her disagreement with Davis’ decision in a meeting held December 14, 1994. (SS6; Coston testimony)

Also in early November 1992, Dr. Anderson raised the issue of unequal distribution of chores on the large scale tracer. Anderson was concerned that the male scientists on the project, Doug Kent

and Matthias Kohler, were not doing their share of the chores, while she and Jennifer Coston were then being assigned those chores by Davis. Anderson and Coston were doing double-duty on the chores while Kent and Kohler were free to experiment, analyze, and write. It is undisputed that Linda Anderson and Doug Kent were at the same level (GS-12) and were performing the same kind of work at this time. (Davis depo, p.140) Doug Kent, Dr. Anderson's peer in every way, was freed completely from chores and allowed to focus on substantive scientific work and drafting papers, as was Matthias Kohler. It is undisputed that she raised these issues with Jim Davis during this time period. Davis characterized Anderson's complaints of disparate treatment as her resistance to "grunt work."

There is a causal connection between Anderson's protected activity of complaining of disparate treatment on the basis of sex and Davis' action of removing her from the large scale tracer on January 21, 1993. The connection is evident first from the two events' proximity in time. Davis removed Anderson from the experiment directly after Dr. Anderson disagreed with his decision to claim first authorship over Jennifer Coston, just one month after the meeting of December 14, 1994. The removal occurred roughly one month after Anderson complained regarding the unequal distribution of work on the large-scale trace around December of 1992.

The reasons offered by the Agency for Davis' conduct are pretextual.. First, Davis removed Anderson from the large scale tracer after he had identified Dr. Anderson as a major researcher on the large scale tracer experiments. Less than one year before he removed her, Davis wrote, "Linda plans to be a leading researcher in the group that will conduct a second large-scale tracer test at the Cape Cod site beginning next year." (Exh. F1, Davis Memo of March 11, 1992)

Second, Davis drafted a memo containing a barely veiled threat of adverse employment action against "one individual" who disagreed with his decision to substitute himself as first author on the Coston

paper. (Exh. SS6) In the memo Davis singles out one person, whom everybody on the project understood to be Dr. Anderson. (Coston testimony; Anderson testimony) “Although it is my feeling that these issues have not been a problem on this project historically, comments made to me on several occasions over the past month indicate that at least one individual, if not more, thinks there are problems in this area.” (Exh. SS6) Davis threatened that if “consensus” did not result, “it may be necessary to restructure the project and change position descriptions and scientific responsibilities.” (Exh. SS6) Roughly a month and a half later, Dr. Anderson was told by Dr. Davis that she needed to draft a new position description and that her “scientific responsibilities” had changed—she was no longer on the large scale tracer.

Third, the pretextual nature of Davis’ explanation is shown through the testimony of Jennifer Coston. Later, he Although Exhibit SS6 claims to desire “consensus,” and a “group process,” that is in no way what occurred. (Coston testimony) Davis’ use of the word “consensus” is a pretext for his desire that everyone, including Anderson, agree to have him, rather than Coston as first author. Davis controlled the meeting of December 14, 1994. Davis and Anderson were the only ones speaking. (Coston testimony) Anderson introduced the standards for first authorship defined by the American Geophysical Union and the American Chemical Society. Chris Fuller remained silent, as did Ms. Coston. (Coston testimony) The exchange between Davis and Anderson became “heated.”¹³ (Coston testimony) Significantly, nothing changed as a result of the meeting. “Consensus” was not reached. Anderson would not cede her position. Dr. Anderson was removed from the large scale tracer, one of the most significant scientific opportunities she had access to at the USGS, and one for which she had

¹³ This is one of the many areas where Davis shows a lack of credibility. Jennifer Coston described this exchange as “heated;” Davis adamantly denied this on cross-examination.

taken the job. (Anderson testimony) After January 21, 1993, Dr. Davis never assigned Dr. Anderson any additional work on the large-scale tracer experiment, and was told to write a new job description. (Davis Depo., p. 65:15-18; Exh. F3; Davis deposition pg.63:25-64:4; Davis cross-examination)

Fourth, Davis implied at the hearing that Anderson's removal was desired by her. The record shows that Dr. Anderson did not want to be removed from this project. Anderson testified that the work and scientific opportunities on this project were key factors in her decision to take the job. Further, she stated contemporaneously and unequivocally in response to Jim Davis' removal memo of January 21, 1993, "I appear to have misconveyed my intentions and my commitment to the large scale tracer." (Exh. G)

Finally, Davis admits that his January 21, 1993, removal was his effort to "rectify" Anderson's complaints about the unequal distribution of work. Davis admitted that Dr. Anderson "created" a this new position description specifically in response to his 1/21/93 memo. (Exhibit F3; Davis deposition pg.65:21-25) Removing Anderson from a key experiment and ordering her to re-write her job description does not seem like an appropriate response to her issues. Davis admits that he did not talk to Coston to find out whether Ms. Coston shared Anderson's concerns. Nor did Davis make an effort to speak with Kent or Kohler to determine whether they were shirking their fair share. He made no effort to look into the matter, reassign tasks, or find an alternate solution. He made no effort to assign Dr. Anderson more responsible tasks or to free her from double duty. His illogical and disproportionate response was to require Dr. Anderson to create an entirely new position description. Doug Kent, also a GS-12, was not asked to create a new job description or to leave the project, nor was Ms. Coston, who remained silent about first authorship and the unequal distribution of tasks. Dr. Anderson, had she a choice, would have remained on the large scale tracer. (Anderson Testimony) Dr. Davis, however, was

not giving her that choice. (Davis depo., 65:15-18)

2. Jim Davis Created an “Unacceptable” Performance Evaluation for Dr Anderson in Retaliation for Her Protected EEO Activity.

Barely one month after Davis received Dr. Anderson’s informal EEO memo (Exh. BB), and two weeks after Dr. Anderson filed her EEO grievance (EEO Exh.1, pp. 2-3), Davis issued an “Unacceptable” performance rating dated January 5, 1995, for the period of February 1, 1994 to September 30, 1994¹⁴. (EEO Exh. 11, p. 068) It was discussed with Anderson on January 9, 1995. Dr. Anderson refused to sign the evaluation, knowing it to be unjustified.

The criticisms of Jim Davis contained in the evaluation are the mechanism through which he retaliated against Linda Anderson. Davis did not timely issue the performance evaluation. (EEO Exh. 11) Davis issued the evaluation over three months late, after he had time to request and gather written documents, summaries, charts and graphs from Dr. Anderson. (See, Exhs. R1, R2, S, I2, U, V, W, X, Y, Z, AA1, BB, CC1, DD) Davis had the opportunity to gather all of Anderson’s documentation in an effort to find something with which to criticize her. This is exactly what he did. (Compare, EEO Exh. 12, pp. 091-098, Anderson’s Worksheet for February 1994 - September 1994; EEOC Exh. 16, p. 137, Davis’ recitation of the alleged inadequacy of Anderson’s experimentation by date).

¹⁴ Davis’ hearing testimony contradicts his prior deposition testimony. At deposition, Davis testified several times that the “Unacceptable” rating was a “mistake,” and “should have been minimally successful.” (Davis depo., 113:23-114:1; 114:3-6; 114:16) He testified twice at deposition that he had “checked the wrong box,” that the “Box unacceptable is checked in this performance appraisal but the rating was minimally successfully.” (Id., 113:23-114:1; 115:14-16)

Davis issued the evaluation after Anderson had made informal complaints of disparate treatment to Davis, the Branch Chief and the Chief Hydrologist, in Reston, VA, and after she had filed an EEO grievance pursuant to the Agency's internal EEO process. (Exhs. T, X, Y, Z, BB, EEO Exh. 1, p. 002-003) Davis' scrutiny and onerous information requests¹⁵, coming just after Anderson was denied a transfer to the Bullen/White project, made Anderson understand that Davis was making it impossible for her to remain on the job. Tom Bullen understood the same, as did Jennifer Coston. Ms. Coston testified that "he [Davis] was applying standards to her that he wasn't applying to the rest of us."

A threshold problem with the Evaluation, and one Complainant was prejudiced by at hearing, is that the Agency never allowed Dr. Anderson to proceed to an *ad hoc* committee review under its own procedures, as she requested. (See, EEO Exh. 1, pp. 004-006, Anderson's Formal EEO Complaint, p. 005) Dr. Anderson submitted a detailed written rebuttal to the evaluation. (EEO Exh. 12, pp. 077-084) The Agency failed to respond to her request for an *ad hoc* committee and to her written rebuttal. The Agency's utter abdication of its duty to investigate and respond to allegations of discrimination imprints Davis' conduct with a veneer of propriety. Because of the Agency's failure to timely convene an *ad hoc* committee, it has prejudiced Anderson's ability to contemporaneously rebut Davis' allegations contained in the evaluation (and his subsequent memo of January 19, 1995).

a. Davis' References to "Communication" Problems Do Not Meet the Agency's Burden to Articulate a Legitimate, Non-Discriminatory Reason for his Evaluation; They are Pretextual

The United States Supreme Court recently addressed the amount of evidence necessary to

¹⁵ Davis admitted in deposition he did not require this of anyone else. (Davis depo., 97:14-19)

prove pretext under Title VII in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. ____ (2000).

The Court held that “a plaintiff’s prima facie case, combined with sufficient evidence to find that the employer’s asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.” The issue before the Court was “whether a plaintiff’s prima facie case of discrimination (as defined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)), combined with sufficient evidence for a reasonable fact finder to reject the employer’s non-discriminatory explanation for its decision is adequate to sustain a finding of liability for intentional discrimination.”

Reeves, supra, 530 U.S. ____ (2000). The Court found that it was sufficient for proof of pretext if the fact finder did not believe the reasons offered by the Employer in explanation for its conduct. “. . .the Court of Appeals erred in proceeding from the premise that a plaintiff must always introduce additional, independent evidence of discrimination.” *Id.* So, too, the Agency’s and Jim Davis’ explanations for the discriminatory treatment of Dr. Linda Anderson must be rejected as pretextual because they are false.

Dr. Anderson has proved a prima facie case of discrimination and has shown that Davis’ alleged reasons for her “Unacceptable” performance rating are untrue. Davis states that from February 1, 1994 to September 30, 1994, Anderson “failed to meet the performance standards for Elements 2 and 3 . . . “ (EEO Exh. 11, p. 1) Davis articulates Anderson’s alleged failure regarding Element 2 as being “due to insufficient progress in research experimentation and a resistance to supervisory instructions.” (*Id.*) Taking the second part of Element 2 first, the record is absent of any “supervisory instruction” provided by Jim Davis to Linda Anderson. The record is absent of any “resistance” by Anderson to Davis’ instructions¹⁶. The Agency failed to submit one single document memorializing Davis’ alleged efforts to

¹⁶ This seems particularly evident given that the Agency did not introduce a single exhibit into evidence at the hearing.

communicate with Anderson during the evaluation period in question. If there was such a failure of communication on Dr. Anderson's part, why did her supervisor fail to document it?

Dr. Anderson introduced several documents illustrating some of her ongoing efforts to communicate with Jim Davis. (Exhs. I1, I2, K, DD) I1 is dated within the evaluation period, May 25, 1994, and contains 2 separate entries describing her scientific progress, including, "Met with Eaton. Started on developing a strategy to magnetically separate the fine fraction. Trouble shooting the removal of Ca and Mg in the column separation of Cr. Starting an oxidic experiment was impractical, because the desorption step would of (sic) fallen on the 3 day weekend. The radiotracer has come." Exhibit I2, dated October 26, 1994, and entitled, "This week's update" states, *inter alia*, "Hi Jim, I came to see you on Friday after I took my last sample but you had left. I wanted to let you know that I will not be leaving. I've worked hard to establish a career here at the survey and want to continue my work." I2 also provides an update on the experiments she was running that week, with very specific information about her progress. On December 13, 1994, Dr. Anderson drafted an e-mail to Jim Davis, which was copied to Nichols and others, stating, "I have, in good faith, sought interaction with you every other week, except when I was out of town." (Exh. DD) Davis failed to offer any testimony or documents specifically rebutting the inadequacy of these reports or the work summarized in these reports. Davis failed to offer any documents memorializing his efforts to communicate with Anderson.

Davis' "unacceptable" as to Element 3, "unsatisfactory communication of your research progress with the supervisor" fails for the same reasons discussed in the previous paragraph. As Dr. Anderson stated it well in her rebuttal to the evaluation, ". . . Jim Davis' disapproval of my behavior stems from my requesting appropriate treatment." (EEO Exh. 12, p. 082) Dr. Anderson was "communicating" with Dr. Davis prior to and throughout the Fall of 1994. Dr. Anderson spent over two months providing

voluminous documentation, including charts, graphs, written analyses, and copies of papers communicating with Davis. By this time, she had been removed from the large-scale tracer, had been denied a transfer which Bullen and White recommended, and had been called to account for her every move by providing voluminous documents over a two-month period. As Dr. Anderson stated it, “Jim Davis has misinterpreted my anxiety at approaching him as anger. This anxiety results from his inconsistent treatment of me from pleasant, interactive and complementary to antagonistic and demeaning.” (EEO Exh. 12, p. 082) Any reluctance to communicate with Davis at this point is reasonable given the discrimination and retaliation she had already suffered.¹⁷

b. Davis Allegations of “Insufficient Progress” Do Not Meet the Agency’s Burden to Articulate a Legitimate, Non-Discriminatory Reason for his Evaluation; They are Pretextual

Davis’ allegations of “insufficient progress in research experimentation,” in his tardy evaluation are pretextual and retaliatory. *Reeves, supra*. None of these alleged inadequacies were raised with Dr. Anderson at the time or soon after they allegedly occurred. They arose after Davis collected 2 months worth of documentation. (EEO Exh. 11) Notably, Davis attributes the alleged “performance problem” “to a behavioral or attitude problem that will be described further under Element 3.” (EEO Exh. 16, p. 137) As discussed above, “communication” and “attitude” problems are Davis' code word for pretext and reveal his inherent bias that somehow Dr. Anderson was stepping out of her proper role.

¹⁷ If Dr. Anderson felt any “resistance,” at this point, perhaps she explained it best in her December 13, 1994 memo. (Exh. DD)

Davis' criticisms are suspect also because they are not borne out by Dr. Anderson's prior performance, prior demonstrated work ethic or prior performance evaluations. (See, e.g., EEO Exh. 6, p. 031, "Outstanding" performance rating for 4/1/91-3/31/91) They are not supported by any prior discipline.¹⁸ Nor are Davis' allegations supported by the observations of other scientists. Tom Bullen, Art White, Peggy Delaney, Jane Reid and Jennifer Coston all testified about Dr. Anderson's scientific ability and hard work. Reid testified that Anderson, "works very hard and gives over 100%," including frequently reviewing scientific papers on her own time, at home.

In 1992, Davis was crediting Anderson with performing as "a (sic) independent researcher rather than the analytical support role described in her current position description." (Exh. F1) Davis commended Anderson for timely analyzing samples from the 1989 tracer project and the moving on "to develop her own research project . . ." and completing "a highly successful study of the rate and mechanisms of reduction of Cr(VI) . . ." (Id.) Anderson received a monetary award recognizing her

¹⁸ If the Agency attempts to provide a defense for Davis' conduct by pointing to Exh. J, his January 26, 1993 memo removing Anderson from the large-scale trace, this argument cannot be credited. First, this memo was created out of a retaliatory animus. Second, Davis' description of "4 months of time lost in experiments . . ." refers to an incident which occurred in 1989, four years prior to the memo itself, and five years prior to the retaliatory evaluation. It was not raised in any performance evaluation from 1989 to 1994. Third, Davis' allegation of "failure to heed guidance on my part o increase the pH of a desorption step. . ." was, in fact, an issue which Dr. Anderson had raised with Davis prior to undertaking the work. (Anderson testimony) He noted her remark, and authorized her to proceed. (Id.)

work ethic and work performance. (Cite) Tom Bullen commended Anderson for her work ethic and scientific work both in his testimony and in prior written documents. (EEO Exh. 12, p. 078, 085-086)

For example, Bullen states:

During the last rating period, Linda made some very important contributions toward achieving an ability to analyze Cr isotopes by solid-source mass sepectrometry. Foremost, she developed a complex chromatographic technique using ion exchange resins for the isolation of Cr from chemically-complex solutions. Development of this type of ion spearation technology is iterative and labor-intensive, and requires both accurate control of process chemistry and cleanliness of laboratory procedures. (EEO Exh. 12, p. 085)

Bullen testified that in no way were Dr. Anderson's work ethics below standard opposite.

The Agency's own procedures provide for regular opportunities for supervisors to raise issues of concern with his or her employees. Davis failed to utilize this procedure or its accompanying forms at any point in regards to Dr. Anderson. The Agency's performance evaluation form itself provides a blank for a "Progress Review," where a supervisor meets with the employee "within the first 8 months of appraisal period to discuss employee's accomplishments, any necessary revisions to Employee Work Plan, and any performance improvement or training needed." (Id, p. 126) According to the Agency's own procedures, if Davis had problems with Dr. Anderson's work ethic, he should have met with her on or before September of 1994 to discuss improvement. (Id.) He did not. Assuming *arguendo* that Dr. Anderson was the plodding, non-communicative employee that he belatedly claims she was, where is the written documentation, the paper trail of such consistently egregious conduct? Davis' allegations fly in the face of logic and common sense. Indeed, all of Dr. Anderson's previous performance evaluations, including the evaluation from the period from April 1, 1993 to January 1, 1994, were "Fully Successful." (EEO Exh. 15) As of January 1, 1994, Jim Davis seemed to understand that scientific work takes time and that Dr. Anderson was making progress. Note that there is not one other document created during

February 1, 1994 and September 30, 1994, besides the "Unacceptable" evaluation which documents Dr. Anderson's allegedly substandard progress.

Davis' alleged work ethic criticisms are not supported in fact. Davis states, "The employee made insufficient progress during the course of the rating period in the two subject areas of research described under Tasks A and B to meet the standard of satisfactory performance. Research conducted by the employee over the last two rating periods¹⁹ has been preliminary in nature and has not led to conclusive tests of hypotheses made or new knowledge or techniques which improve the chromium transport processes." (EEO Exh. 16, p. 137) Davis then lists Anderson's experimental research, and points out alleged inadequacies in Anderson's scientific work during the months of February, March, April, July, August and September of 1994.

Davis' criticisms regarding the "paucity of overall experimental research" had never been raised by him with Dr. Anderson before this Unacceptable rating. Nor does Davis explain what was allegedly lacking in any detail. In contrast, Dr. Anderson provided a detailed, single-spaced written rebuttal to Davis' retaliatory evaluation. (Anderson rebuttal; EEO Exh. 12, 077-084) A portion of her credible explanation follows:

As stated above, I feel that all of the experiments denoted were a significant and critical contribution to the overall objectives of the project, not minor experiments. The activities listed by Jim Davis incompletely outlines my scientific accomplishments during the review period.

For instance in notations #1, #2, and #3 in my performance evaluation, (See EEO Exh. 11, p. 073) I performed a number of experiments to identify an appropriate methodology to control

¹⁹ In the prior "Fully Successful" evaluation of Dr. Anderson from April 1, 1993 through January 1, 1994, Davis stated, "Substantial progress was made on developing a chromium separation technique that will allow the determination of stable Cr isotopic signatures of the background minerals and the Cr injected in a Capd (sic) Cod field tracer." (EEO Exh. 15, pp. 127-128) Davis' inconsistent statements about Anderson's work ethics and his revocation of a previous positive evaluation are evidence of his bias and lack of integrity.

both pH drift and silicon dissolution observed in my previous experiments. Other experiments on the Cape Cod sands had not measured Si concentrations, but pH drift had been a recurring problem. It had been suggested in a Project group discussion that the Si dissolution (which my calculations had suggested could be the cause of the pH drift) might be an artifact from the formation of colloids due to abrasion of sand particles during the mixing of the batch experiments. I also showed chemical evidence during the group discussion that the dissolution included both Si and Al suggesting that the increase in dissolved Si was from feldspars. I suggested that tracking the strontium concentration could evaluate whether feldspars or quartz was the primary source of the Si and the group thought that would be valuable information. (EEO Exh. 12, p. 080)

. . . In Jim Davis' example #6, (See, EEO Exh. 11, p. 073) during the stated time period (32 working days) of which I was in Menlo Park for 15 of those days, I ran two experimental suites which include a total of 11 experiments (Crox 14 and Crox 15), I accomplished mineral separations on the Franz magnetic separator, completed an overhaul of my experimental apparatus, and a detailed review of a colleagues paper.

The process of developing an experimental regime takes time. (Anderson testimony) Much scientific work occurs during down time—many experiments are of the “hurry up and wait” variety. (Bullen testimony) Davis' recitation is inaccurate and invalid because it is contrary to a meaningful scientific process. As Dr. Anderson testified, if Davis wanted her to simply come up with data, she could have performed rote experiment after rote experiment, as quickly as he desired. That was not her understanding of her work. In fact, that was not her role at the Agency, and was not the role she had played during the previous performance evaluation, from 4/1/94 - 1/30/94.

C. THE AGENCY HAD NOTICE OF AND RATIFIED DAVIS' DISPARATE TREATMENT AND RETALIATION

Throughout her tenure, Anderson raised informal and formal complaints of discrimination to the EEO Counselor, to the Agency's Chief Hydrologist, Robert Hirsch, to the Branch Chief, Fred Nichols, to Nichols' Assistant, Andrea Alpine, to the Research Director, Art White, to Jim Davis himself.

Perhaps it is indicative of the Agency's attitude and response to Anderson's complaints that the Assistant to the Branch Chief could not even testify as to whether the Agency had a federal Affirmative Action

Plan in place. (Alpine testimony)

Fred Nichols had notice that Dr. Anderson was complaining of disparate treatment and thereby engaging in protected activity. He admitted this in his testimony. Nichols violated Title VII by abdicating his role as Branch Chief and “going along” with Jim Davis.²⁰ His utter lack of appropriate action allowed Davis’ discriminatory conduct to go unchecked and served as silent but effective ratification. A review of his testimony regarding his response to Dr. Anderson’s removal from the large-scale trace illustrates his abdication of his duty in violation of federal anti-discrimination law.

At hearing, Nichols was shown F3, a copy of the January 21, 1993 memo from Jim Davis to Linda Anderson, removing her from the large-scale tracer project. His testimony reads roughly as follows:

Ms. Dryovage: You were on notice that Davis was unhappy with Dr. Anderson?

Mr. Nichols: Yes. I was assuming two talented individuals could work it out.

Ms. Dryovage: You learned things were not ‘being worked out’?

Mr. Nichols: Yes.

Ms. Dryovage: You were copied on the correspondence?

Mr. Nichols: Yes.

Ms. Dryovage: Did you take him into your office and admonish him for not resolving the problems?

Mr. Nichols: No. I was concerned about the difficulty but from what I learned she did

²⁰ Nichols described his management style in regard to Jim Davis by testifying that Davis was “supportive” of Anderson applying to enter the RGE system in 1992 (Exh. E) “so I went along.”

not want to resolve them.²¹

Ms. Dryovage: So you agreed with Dr. Davis' approach to handling Dr. Anderson?

Mr. Nichols: She was trying to work out a new project description to have more free time.

Ms. Dryovage: Did you find out they were not speaking?

Mr. Nichols: Yes.

The testimony continues:

Ms. Dryovage: Did Dr. Davis ever bring to your attention specific examples of work Dr. Anderson did not do?

Mr. Nichols: I don't think I was given that information. I do not recall the specifics of what she did not do.

Nichols thus admits that he was on notice of problems between Davis and Anderson as early as January 21, 1993. Nichols' response to this conflict was insufficient and does not constitute prompt remedial action. Nichols did not even authorize the most cursory investigation or attempt to discuss the situation with the two parties. His response, as Branch Chief and supervisor of Davis was to assume that "two talented individuals could work it out." Nichols also admitted that he was aware of the issues of disparate treatment which were being raised by Western Women of Water. These issues, contained in a written report (Exh. QQ) were communicated to him by Linda Anderson in the fall of 1994, during the same time when she was struggling with her own individual issues of discrimination by Davis.

²¹ Note that Nichols' information was gathered primarily, if not exclusively, from Dr. Davis. Dr. Nichols did not speak with Dr. Anderson.

Nichols had actual and/or constructive knowledge of Dr. Anderson's EEO complaints. First, Nichols knew that the problems between Davis and Anderson were so severe that she was attempting to transfer from Davis' project. Second, Nichols also admitted that he knew Dr. Anderson was considering leaving the Agency. (Nichols cross) His response to this was to be "supportive." However, he took no action to intervene and find a constructive solution which would allow Dr. Anderson to remain employed, despite the fact that all of her prior performance reviews were positive and the fact that she was being recruited by scientists from another project. Significantly, Nichols admitted that he never did any investigation into whether Davis' allegations were true, and simply accepted what Davis represented about Dr. Anderson at face value. Nichols admitted that he did not take any steps to transfer Dr. Anderson to any other U.S.G.S. job—not "to Bullen or otherwise." (Nichols cross-examination)

The Agency also knew that Dr. Anderson was not the first female scientist to request a transfer from Jim Davis' supervision. (Alpine testimony) According to Alpine, both Cecily Chang and Linda Anderson cited "conflicts" with Jim Davis, but neither of these incidents led to investigation or prompt remedial action. No investigation was undertaken despite the fact that the Agency itself admits that transfers are not common. (Alpine testimony) Alpine admits the Agency did not explore hiring a temporary employee to facilitate the transfer, although Alpine testified that temporary employees were being hired at the relevant time. (Id.)

Robert Hirsch, Chief Hydrologist for the Agency, had notice of and ratified Davis' disparate treatment and retaliation. On October 26, 1994, Dr. Anderson complained of disparate treatment to Robert Hirsch, Chief Hydrologist, in Reston, Virginia. She included a request for "fair treatment in my advancement and research opportunities, including the project's authorship policy and allocation of

workload." (Exh. T) Dr. Anderson further reported:

It was my, Tom's and art White's understanding, that once I completed the Cr(VI) experimental work critical to the Cape Cod Tracer tests, that I would be able to transition to that research opportunity. However, there appears to be no mechanism that will allow my transfer without the express approval of the individual with whom I am in conflict. Rather, my very difficult current work conditions are being used as a mechanism to force me to leave the NRP. (Exh. T)

Anderson specifically requested of Hirsch that she be allowed, "the opportunity to argue the merits of my request to transfer to work with Dr. Tom Bullen under the auspices of Dr. Arthur White's project, and for the chance to prove that I can make many valuable scientific and organizational contributions if given a supportive, collaborative research environment." (Exh. T)

Robert Hirsch forwarded his e-mail response to Fred Nichols by e-mail, "fnichols@CAMNL.wr.usgs.gov," as well as to Dr. Anderson, on November 22, 1994. (Exh. H) In his response, Dr. Hirsch ratified the conduct of Jim Davis:

The Project Chief is responsible for overseeing the work of project members to ensure that project activities are focused on the priority activities and that the established project, program, and Division goals are met. It is necessary, therefore, that each project employee understand these goals and work with the Project chief to see that they are achieved. Project members are also expected to work with the Project Chief in decisions regarding the publication of project results. (Id.)

Hirsch further ratified Davis' conduct regarding the denial of first authorship to Anderson:

The determination of authorship, for example, is typically based on the relative contribution of each participant, from formulation of the initial research ideas and strategy, though conduct of the research and the interpretation and write-up of the results. Thus, **each participant should work with the Project Chief** to determine the relative levels of effort, with credit for formulation of the original ideas and interpretation of results typically having the most weight. (Exh. H)

Hirsch's response fails to address what happens when the Project Chief applies these subjective standards to the routine detriment of female scientists on his project, such as Brigit Rea, Jennifer Coston,

and Linda Anderson. Hirsch fails to conduct or authorize an investigation, fails to call a meeting with the involved parties, fails to direct Nichols or any one else to take a greater role in rectifying the situation, and fails completely to respond to Dr. Anderson's specific request to "argue the merits" of her transfer with him or a neutral party. (Exh. H) On November 22, 1994, nearly one month after Dr. Anderson's memo of complaint, Hirsch writes the e-mail, then washes his hands of the matter.

Linda Anderson persisted in her efforts to resolve this situation short of leaving the Agency. On November 21, 1994, she sent an e-mail memo to James Davis regarding his untimely and contradictory complaints about her work performance for her September 30, 1994 Performance Appraisal. (Exh. Y) On this same date, she sent a memo directly to Fred Nichols, entitled, "My Treatment," which laid out the issues of disparate treatment which she took to the EEO counselor. (Exh. Z) In her e-mail of November 21, 1994, Dr. Anderson stated, "I feel that you are using an arbitrary yard stick to evaluation my accomplishments and that your behavior is inappropriate." (Id.) She copied this e-mail to Fred Nichols, Andrea Alpine, Chris Fuller and Art White on November 21, 1994. (Exh. Y) Not one of those individuals inquired into this statement further. Fred Nichols failed to speak with Dr. Anderson about the document, failed to speak with Dr. Davis, and failed to authorize an investigation. Fred Nichols took no action in response. By now, Dr. Anderson had raised issues of disparate treatment with Jim Davis, Fred Nichols, Andrea Alpine, Art White, and Robert Hirsch, yet nothing was done to assist her in any way, nothing was said to assure her that the issues were being addressed. To the contrary, Nichols responded coldly and without substance, "Your message dated Monday, November 21, 1994 (14:12:00) has been read. The subject was: performance review. Frederic H. Nichols." (Exh. Z, p. 2)

On December 7, 1994, Dr. Anderson requested an EEO counselor be present at her

performance evaluation. (Exh. BB) Anderson made this request while providing the final installment of the various documents Davis had been demanding over the previous two months. (Exh. BB) She addressed the cover memo to Jim Davis, and copied Fred Nichols, among others. Anderson wrote that the evaluation process “has been dragging on for two months now for no good reason.” (Exh. BB) Anderson requested that her evaluation be completed and that “an EEO counselor (sic) be present” at her performance review. (Id.) **As of December 7, 1994, both Davis and Nichols had actual knowledge of her EEO activity, although the above facts show that they had at least constructive knowledge much earlier.**

On December 13, 1994, Dr. Anderson repeated her request for the involvement of a neutral party. (Exh. DD) This e-mail was sent to Jim Davis, and copied to Fred Nichols, among others. (Id.) Again the Agency failed to respond. On December 19, 1994, Dr. Anderson filed an official EEO grievance. (EEO Exh. 1, pp. 2-3)

On January 30, 1995, Dr. Anderson invoked the Agency's internal process for protesting a performance evaluation. (EEO Exh. 6, p. 034; EEO Exh. 12; Anderson testimony) She selected her desired representatives for the ad hoc committee, and requested the same from the Agency. However, she received no response, and was never given the procedure to which she was entitled. (EEO Exh. 12)

Instead of responding to Dr. Anderson’s protest of the evaluation and request for an EEO process, the Agency ratified Davis’ conduct. Fred Nichols held a meeting with Davis and Anderson, where he refused to allow a witness to be present, and merely encouraged them to go to counseling together. He did not conduct nor authorize an investigation. He made no effort to speak with Dr. Anderson separately about her concerns.

Nichols further ratified Davis’ continued retaliation against Anderson. Nichols allowed Davis to

distribute a memo dated January 19, 1995. (EEO Exh. 11, p. 065-067) Fred Nichols was copied on this memo “Re: Unacceptable Performance Rating.” (Id., p. 067) In the memo, Davis, asserts:

from now until the end of the performance improvement period, I will work closely with you. Beginning January 31, 1995, you will meet every Tuesday morning at 10 a.m. in my office, at which time you will present a written summary of your progress, accomplishments, and scientific interpretations made on your research during the previous week. Graphs, data tables, and copies of laboratory notebook pages will be provided at each weekly meeting. If I am unable to meet at this time, I will designate another time frame within which to discuss this subject. A written summary of each meeting will be provided to you. (Id. at p. 066)

Davis also made clear that she could be fired, “In other words, if you do not meet the standards during this specific time period stated, you could be reassigned or a proposal could be made to demote or remove you from your position.” (Id. at p. 067) [Underline supplied by Davis] In other words, the discriminatory surveillance of Dr. Anderson’s work ethics was going to continue, with the approval of Nichols, until Davis could force her out for good. On January 30, 1995, Dr. Anderson drafted an eight-page rebuttal to the evaluation, which also went unanswered. by the Agency. (EEO Exh. 12; Anderson testimony)

D. COMPLAINANT IS ENTITLED TO AN AWARD OF FRONT PAY, COMPENSATORY DAMAGES, INCLUDING AN AWARD FOR EMOTIONAL PAIN AND SUFFERING, AND INJUNCTIVE RELIEF

Section 102(a) of the 1991 Amendments to Title VII of the Civil Rights Act authorizes an award of compensatory damages for all post-Act pecuniary losses (out of pocket expenses), and for non-pecuniary losses, such as, but not limited to, emotional pain, suffering, inconvenience, mental

anguish, loss of enjoyment of life, injury to character and reputation, and loss of health, in addition to equitable remedies (*status quo anti* relief). *Carl L. Mack v. Togo D. West, Jr. (Department of Veterans Affairs)*, Appeal No. 01983217, June 27, 2000; *Franklin W. Jones, Complainant, v. William S. Cohen, Secretary, Department of Defense, (Army & Air Force Exchange Service)*, EEOC No. 310-93-5078X, Appeal No. 01973551, 2000 EEOPUB LEXIS 2589, April 14, 2000. The Supreme Court has held that the EEOC has authority to award such damages in the administrative process. *West v. Gibson*, 119 S.Ct. 1906 (1999).

1. **EQUITABLE RELIEF**

The EEOC Regulations for Federal Employees require that when the Commissions finds that an employee was discriminated against, the agency shall provide relief, including, but not limited to “nondiscriminatory placement, with back pay computed in the manner prescribed by 5 C.F.R. 550-805, as well as expungement from the agency’s records any adverse materials relating to the discriminatory employment practice. As Dr. Anderson testified, because of Davis’ pervasive discriminatory and retaliatory conduct, and because the USGS managers took absolutely no action despite her informal complaints during the fall of 1994, she had no choice but to leave the Agency. In fact, the record evidence establishes that Mr. Davis, by blocking her transfer to the Bolen/White project and rating her performance unsatisfactory, was in the process of removing her for performance problems. (Testimony of White)

Dr. Anderson began working at the USGS as a skilled and committed scientist, and left as a humiliated, demoralized woman. As a result of her treatment at the Agency, including a false, discriminatory and retaliatory evaluation which she received in 1995 (four months after it was due), Dr. Anderson began to believe that she would leave science completely, and began to consider a future as a

gardener, as far away from the laboratory as possible. As a result, Dr. Anderson has been forced to leave a career in Hydrology, for which she had prepared throughout her PhD, and for which she had undertaken a specialized area of study in the movement of metals, particularly Chromium. Dr. Anderson almost left science entirely due to the Agency's unchecked discrimination and retaliation. She left this chosen field for one completely unknown and in which she had no prior training, Paleoceanography. Dr. Anderson would have been at the Agency likely for the duration of her career, if it had not been derailed by Davis' unaddressed discriminatory conduct.

Based on the evidence, Dr. Anderson is entitled equitable relief, namely, to be reinstated to a Hydrologist position²² and have her records expunged of the January 1995 adverse performance appraisal and any other adverse documents. In the alternative, as discussed *infra*, she is entitled to be made whole for these losses, which do not appear to be recuperable at any point in the near future, if ever.

2. PECUNIARY LOSSES

The EEOC's Management Directive, EEO MD-110, VIII, page 9-18 requires:

A. An Agency Shall Provide Full Relief After Finding Discrimination.

When an agency of the Commission finds that the agency has discriminated against an applicant or employee, the agency shall provide an appropriate remedy as explained in Part 1614, subpart E.

In tailoring a Title VII remedy, the EEOC Administrative Judge "has not merely the power but

²² One comparable male employee, Chris Fuller, Hydrologist, who has only a Masters degree, has been promoted to a GS-14 position.

the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.” *Harrison v. Dole*, 55 FEP Cases 1419, DC DC 1986) citing *Ford Motor Co v. EEOC*, 458 U.S. 219 at 233 (1982).

The Complainant is entitled to an award of back pay, as well as front pay. The purpose of front pay is to compensate successful plaintiffs for “the post-judgment effects of past discrimination. *Shore v. Federal Express Corp.* 77 F.2d 1155, 1158 (6th Cir. 1985). Front pay awards under Title VII are not subject to the statutory cap on compensatory damages. *Gotthardt v. National R.R. Passenger Corp.*, 191 F. 3d 1148 (9th Cir. 1999) [upholding an award of over \$600,000 in front pay]. In *Brinkley v. USPS*, EEOC No. 05980429 (August 12, 1999), the EEOC awarded \$152,034 for loss of future earnings, for a victim of sexual harassment environment discrimination and retaliation who could not return to work after the discrimination.²³

²³ In *Padilla v. Metro-North Commuter Railroad*, 92 F.3d 117, 72 FEP Cases 1748 (2nd Cir.), the Second Circuit approved an award of front pay for the next 25 years. The rate was measured by the difference between the plaintiff’s previous job and the lower-paying job he held at the time of judgment until he was 67 years old.

Normally, the agency is required to compute the pecuniary damages, based on it's pay and benefits charts. It is undisputed that complainant mitigated her damages by finding a soft-money research position at the University of California, Santa Cruz which pays \$12,000 per year less in wages and has no retirement benefits. Dr. Anderson testified that her wage loss is approximately \$12,000 per year, in addition to other benefits.²⁴ Dr. Anderson requests an award of approximately \$60,000 in back pay and \$120,000 to compensate her in the amount of lost future wages, plus benefits²⁵.

Agencies may remedy a discriminatory performance appraisal by improving the complainant's rating and provide bonus pay and benefits commensurate with the higher appraisal.²⁶ Dr. Anderson should be awarded comparable bonus awards and benefits, based on the evidence establishing that "but

²⁴ In fact, Dr. Anderson's position in Paleoceanography with the University of California, Santa Cruz, is a "soft money" position. This means that Dr. Anderson has to solicit funding for her position on a yearly or regular basis; if she does not obtain the necessary funding, she losses her position or works for free.

²⁵ This is the wage differential of \$12,000 per year multiplied by 10 years of future service, as Dr. Anderson is now 50 years of age.

²⁶ See, Douglas M .Staudmeister, "Grasping the Intangible: a Guide to Assessing Nonpecuniary Damages in the EEOC Administrative Process", *American University Law Review*, October, 1996, pages 7-8 <www.wcl.american.edu/pub/journals/lawrevstaudtxt.htm> citing *Rountree v. Department of Agriculture*, EEOC No. 01941906, 95 FEOR 3323 at XII-120 (1995).

for” the discrimination/retaliation, she would have received a satisfactory performance rating or better.

Agencies can also be ordered to provide back pay based on the career path complainant would have had, but for the discrimination/retaliation. In *Harrison, supra*, the court ruled that the plaintiff was entitled to back pay, based on promotions received after she resigned from the agency:

Failure to grant Ms. Howard back pay for the period after she left [the agency] conflicts with both parts of this duty – it neither compensates Ms. Howard for her injury, nor deters [the agency] from its discrimination. Furthermore, it would discourage a claimant from mitigating damages by accepting a position at another agency. Terminating back pay relief upon resignation, for instance, would penalize Ms. Howard for moving to ACTION where she was allowed to advance without discrimination.

Under the *Harrison* analysis, Dr. Anderson could be awarded back pay based on the career path of comparable employees, who were hired and/or promoted at higher grade levels.

The agency may claim that the back pay award should be cut because the complainant failed to mitigate her damages. However, since the USGS did not raise an issue concerning mitigation at the hearing, they should not be permitted to raise this issue after the record has closed. Moreover, the agency has the burden of showing that a wronged employee is not entitled to a full measure of relief by a **preponderance** of the evidence. See 29 C.F.R. 1614.501(d); *In re Pan Am World Airways, Inc.* 905 F.2d 1457, 53 FEP Cases 707 (11th Cir. 1990). The complainant is deemed to have mitigated if she tries to find a comparable job and settles for an inferior one. *Wilcox v. Stratton Lumber*, 921 F. Supp. 837, 75 FEP Cases (D. Me. 1996). In this case, Dr. Anderson fully mitigated her damages by obtaining another position shortly after she resigned from the USGS. She is therefore entitled to the difference between what she would have earned at the USGS and her earnings at UC-Santa Cruz.

3. NON-PECUNIARY DAMAGES

To receive an award of compensatory damages, a complainant must demonstrate that she has

been harmed as a result of the agency's discriminatory action; the extent, nature and severity of the harm; and the duration or expected duration of the harm. *Rivera v. Department of the Navy*, EEOC Appeal No. 01934157 (July 22, 1994), req. for reconsid. denied, EEOC Request No. 05940927 (December 11, 1995); *Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991*, EEOC Notice No. 915.002 at 11-12, 14 (July 14, 1992).

In *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 20-22, 63 FEP Cases 225 (1993), the Supreme Court held that an employee need not demonstrate that the conduct caused a tangible psychological injury. Non-pecuniary damages constitute the sums necessary to compensate the injured party for actual harm, even where the harm is intangible. *Carter v. Duncan-Higgins, Ltd.*, 727 F.2d 1225 (D.C. Cir. 1984). The award should take into account the severity and duration of the harm. *Carpenter v. Department of Agriculture*, EEOC Appeal No. 01945652 (July 17, 1995).²⁷ The amount of the award should not be "monstrously excessive" standing alone, should not be the product of passion or prejudice, and should be consistent with the amount awarded in similar cases. *Ward-Jenkins v. Department of the Interior*, EEOC Appeal No. 01961483 (March 4, 1999) (citing *Cygnar v. City of Chicago*, 865 F. 2d 827, 848 (7th Cir. 1989)).

The inclusion by Congress in the Civil Rights Act of 1991 of "loss of enjoyment of life" makes it clear that an award of "hedonic damages" is permissible. The hedonic value of life refers to "the value of the pleasure, the satisfaction, or the single "utility" that human beings derive from life, separate and apart

²⁷ Under the old 1614 regulations, the failure of the agency to evaluate a complainant's entitlement to compensatory damages has resulted in a remand for further investigation. For example, in *Smith v. Department of Treasury*, EEOC No. 01953182 (Sept. 8, 1995) OFO reversed and remanded the case for further investigation, where the manager allegedly discriminated by compiling adverse information on Mr. Smith, discussed this with other managers, which resulted in the cancellation of an assignment to which he had been detailed.

from the labor or earnings value of life.”²⁸ The “pleasure of life measure” is distinct from the impact associated with the onset of palpable pain and suffering and its consequences. See also, *Sherrod v. Barry*, 629 F. Supp. 159 (N.D. Ill. 1985).

The uncontroverted evidence in the record establishes complainant's entitlement to compensatory damages. A complainant's own testimony, along with the circumstances of a particular case, can establish mental or emotional harm. *Sinott v. Department of Defense*, EEOC Appeal No. 01952872 (September 19, 1996). See also, *Williams v. Trans World Airlines, Inc.*, 600 F. 2d 1267, 1273, 27 FEP Cases 487 (8th Cir. 1981) (“plaintiff’s own testimony may be solely sufficient to establish humiliation or mental distress.” Here, Complainant has gone much further. The record contains the testimony of Tom Bullen, Peggy Delaney, Jane Reid, William Anderson and Dr. Anderson’s own testimony.

Complainant testified that she experienced interference with family and marital relations, digestive problems, headaches, anxiety, sleeplessness, and exhaustion as a result of the discrimination.

Jane Reid, who has known Dr. Anderson since 1982, testified to observing a serious, marked change in Anderson’s demeanor. Reid knew Anderson had initially been happy to obtain the job with the Agency. Reid testified that prior to the discrimination, Anderson was “not a whiner or complainer,” and was in control emotionally. These qualities led Anderson’s colleagues to go to her for counsel and support. (Reid testimony) In the fall of 1994, Reid observed Anderson very upset in having to deal with Jim Davis; she saw her “quivering, nervous,” talking a lot, babbling. Tom Bullen, who has known Dr. Anderson for 20 years, noticed the same extreme change. Prior to the fall of 1994, Bullen would have described Anderson as outgoing, vibrant, gregarious, funny, nurturing. During the fall of 1994,

²⁸ M.L. Brookshire & S.V. Smith, *Economic/Hedonic Damages* 164 (1987).

Anderson came to Bullen from 10-20 times, usually around the end of the day, between 3:00-4:00 p.m., and broke down into tears. Bullen testified that Anderson could not understand why Davis was treating her the way he was, and why this was happening to her. Bullen himself found Anderson's emotional state disturbing, in comparison with her previous demeanor. He testified, "it really affected me," and that before sHe left, things were going progressively downhill.

After analyzing the evidence which establishes the stress and emotional discomfort sustained by complainant and upon consideration of damage awards reached in comparable cases, the complainant maintains she is entitled to an award of non-pecuniary damages in the amount of \$ 100,000.00. This amount takes into account the severity and duration of the harm done to complainant by the agency's discrimination and retaliation.. The Commission further notes that this amount meets the goals of not being motivated by passion or prejudice, not being "monstrously excessive" standing alone, and being consistent with the amounts awarded in similar cases. See *Cygnar v. City of Chicago*, 865 F.2d 827, 848 (7th Cir. 1989).

Dr. William Anderson, Dr. Linda Anderson's husband, testified poignantly and emotionally about the severe change in her demeanor due to her treatment at work, which has caused damage to their marriage as well.

Prior to the discrimination she suffered at the USGS, Bill Anderson found his wife to be an incredible person, who was hard-working, laughed easily, creative, active, with "tireless energy." She loved to get out and do things, including exercise and gardening, painting, arts, crafts and wood-working. Her family was important to her, she made them a priority, and family members sought out Linda to confide in her and for counsel.

Bill Anderson observed Linda Anderson to be a devoted, hard-working scientist interested in her

work and in her career. "She was always taking work home, devouring journals." She did a class in Denver "to show she was part of the team." Beginning around 1993, Bill Anderson saw all of this energy and activity "dissipate". "Linda's job was beating her up," her workplace became unjust and unhealthy. (William Anderson testimony) Bill attributes the beginning decline to Linda's involvement in the issue of Jennifer Coston's authorship. Jim Davis came to Linda and "confronted her about something she had not brought up to him," then Linda was called on the carpet in the meeting because of her disagreement." (Id.) Then, William testified, "right off her scientific involvement was curtailed -- she became a data collector, not a thinker."

In late 1994, it looked like Linda Anderson's career was at an end. It seemed that it couldn't work for her at the USGS. She seemed to be getting nowhere, and believed she might have to leave science. The "system did not allow for any recourse" – the system stopped her in her tracks and she lost her career. "To have her squashed like that . . ." was painful for both of them. (William Anderson testimony)

Bill Anderson testified that Linda, "lost her self esteem through all this process." She was not as happy as she had been. In contrast to their life before 1993, Linda didn't want to go out with him, she didn't want to be in public or go to family events. She wanted to be alone. Often, Linda felt sick or without energy to be around people--all her energy was going toward work.

Bill Anderson observed physical symptoms of Linda Anderson's treatment at work. In general, her health declined. She had frequent headaches, and would take pain pills at night. Often, she had insomnia. Linda began to suffer from 10-12 colds per year, whereas before, she had usually only gotten 1 per year. Her sensitivity to allergies increased. She retained body fluids and gained weight.

Bill Anderson painfully explained the effect of the discrimination on their relationship as "my

inability to comfort her." Linda was so emotionally and physically impacted, she withdrew, and did not want his solace. Their sexual relationship ended in 1993, around the same time of the Coston authorship issue, and to the present that relationship has not healed. At the end of 1994, Bill Anderson was considering leaving the relationship. Their marriage was especially fragile during this time. In April of 1995, they did not go on a planned vacation because of the trauma in their relationship still from the effects of Linda's treatment. They did spend two days crying during this period and decided to remain married.

The extent of Dr. Anderson's damages are summarized in the following chart:

PECUNIARY LOSSES	
Back Pay (February 1995 - present)	Over \$60,000
Retirement Benefits	
Sick leave (13 days per year * 5 years)	65 days
Annual leave (20 days per year * 5 years)	125 days
Medical Insurance, Life Insurance etc.	Exact amount unknown
Front Pay (10 years * 12,000)	Over \$120,000
Promotion to GS-14 (\$65,983-45,214)	\$20,769 * 3 years= \$62,307
Performance Awards and Bonuses	Exact amount unknown
SUBTOTAL - PECUNIARY	Over \$242,307.00

NON-PECUNIARY LOSSES	
Psychological Reactions	minimum \$50,000.00
Anxiety	
Shame, self-consciousness, low self-esteem	
Humiliation and Embarrassment	
Guilt, self-blame, isolation	
Physiological Reactions	minimum \$50,000.00
Sleeplessness	
Exhaustion/insomnia	
Headaches	
Gastrointestinal reactions	
Decrease immunities	
Sensitivity to allergies	
Weight fluctuations	
Sexual/marital problems	
Career-Related Effects	minimum \$ 75,000.00

Reputation damages	
Unfavorable performance evaluations	
Decreased job satisfaction	
Change in career goals	
Loss of Enjoyment of Life	minimum \$30,000.00
SUBTOTAL - NON-PECUNIARY	\$205,000.00

III. REMEDIES REQUESTED

The Complainant requests the following relief:

That the agency be ordered to take the following actions:

1. Reinstatement of complainant to a Hydrologist position at the U.S. Geological Survey, Menlo Park, California, together with \$240,000 in back pay and benefits, including any step and grade increases which complainant would have received from February 1995 to the present and front pay from the present for the next ten years, plus prejudgment interest from the date of her formal complaint.²⁹
2. Tender to complainant \$205,000 in compensatory damages for the harassment and retaliation Dr. Anderson experienced.
3. Purge all adverse documentation in complainant's official personnel file, including the

²⁹ The Supreme Court held in *Loeffler v. Frank*, 486 U.S. 549, 554-56, 46 FEP Cases 1659 (1988) that prejudgment interest is available in Title VII awards of back pay against the government.

performance evaluation issued in January 1995.

4. Complainant shall be awarded reasonable attorney's fees and costs.
5. The agency shall post an appropriate notice in the workplace for 180 days.

IV. CONCLUSION

For the foregoing reasons, Complainant requests that the Administrative Judge find that she was discriminated against based on her sex and retaliated for opposing unlawful practices and filing an informal EEO complaint, and award her appropriate relief.

DATED: July 21, 2000

Respectfully submitted,

MARY DRYOVAGE

Attorney for Complainant

LINDA DAVIS ANDERSON, PhD

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
SAN FRANCISCO REGIONAL OFFICE

LINDA ANDERSON,)
)
)
 Complainant,)
)
 vs.)
)
 U.S. GEOLOGICAL SURVEY,) **CERTIFICATE OF SERVICE**
 DEPARTMENT OF THE INTERIOR,)
)
)
 Agency.)
 _____)

I am a citizen of the United States and have an office in the County of San Francisco; I am over the age of eighteen years and not a party to the above-entitled action; my business address is, Law Offices of Mary Dryovage, 1231 Market Street, Penthouse West, San Francisco, CA 94103.

On July 21, 2001, I served the within **COMPLAINANTS POST HEARING BRIEF and COMPLAINANT'S EXHIBIT TT** on the parties in said action by placing a true copy thereof enclosed in a sealed envelope with postage fully prepaid in the United States mail at San Francisco, California, addressed as follows:

Karen D. Glasgow
U.S. Department of the Interior
Office of the Solicitor
San Francisco Field Office
600 Harrison, Suite 545 (415)744-4122 fax
San Francisco, CA 94107

I declare under penalty of perjury that the foregoing is true and correct and was executed on July 21, 2001 at San Francisco, California.