This material is part of a collection that documents the harassment, discrimination, and retaliation perpetrated against Alaska's women research scientists by their supervisor, with full knowledge (and arguably, "tacit approval") of their federal employer, the USDA Agricultural Research Service (ARS)

Cynthia Bower
OFO Docket # 0120120069
EEOC No. 551-2009-00074X
Re: Statement in Opposition to Agency's Request to Dismiss

Exhibit 1

Agency's Statement in Opposition to Appellant's Notice of Appeal

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of Federal Operations
P.O. Box 19848
Washington, D.C. 20036

CYNTHIA BOWER, Appellant, v. TOM VILSACK, SECRETARY, U.S. DEPARTMENT OF AGRICULTURE, Agency.	OFO Docket # 0120120069 Hearing # 551200900074X Agency # 200800696

AGENCY'S STATEMENT IN OPPOSITION
TO APPELLANT'S NOTICE OF APPEAL

The United States Department of Agriculture ("the Agency" or "the Department" or "the USDA"), by and through its representative and pursuant to 29 C.F.R. §§ 1614.403 and 1614.504(b), seeks dismissal of the appeal of Appellant Cynthia Bower ("Appellant") in the above-captioned matter. For the reasons set forth below, the Agency respectfully requests that the Office of Federal Operations ("OFO") of the United States Equal Employment Opportunity Commission ("EEOC" or the "Commission") dismiss Appellant's appeal.

Appellant has not raised any specific issue(s) on appeal. However, given the procedural history of this case, Appellant's appeal is undoubtedly a repeat of the non-compliance allegation she sent to the Agency on August 2, 2011.

The Agency provides this Statement In Opposition To Appellant's Notice of Appeal ("Opposition Statement") despite never receiving an appeal brief from Appellant and not being

aware of one having been filed with the OFO. The Agency's Opposition Statement is timely, as the Agency received Appellant's Notice of Appeal on October 25, 2011.[1]

PROCEDURAL HISTORY

Appellant and the Agency voluntarily entered into a settlement agreement on August 19, 2010 (the "Settlement Agreement"), resolving any and all complaints or claims of employment discrimination that Appellant had with the Agency. *See* Exhibit 1 of this Opposition Statement, the Settlement Agreement.

On August 2, 2011, almost a year after entering into the Settlement Agreement, Appellant submitted a letter to the Agency alleging Agency non-compliance with a provision of the Settlement Agreement ("Appellant's August 2, 2011 Non-Compliance Letter"). *See* Exhibit 2 of this Opposition Statement, Appellant's August 2, 2011 Non-Compliance Letter at pg. 2. Appellant's non-compliance allegation is that the Agency "refused to report [Appellant's] settlement income to the IRS (in accordance with Paragraph 2 of the Settlement Agreement AND as required by U.S. law)." *See Id.*

On September 16, 2011, the Agency submitted a response to Appellant's August 2, 2011 Non-Compliance Letter ("Agency's September 16, 2011 Non-Compliance Response"). *See* Exhibit 3 of this Opposition Statement, Agency's September 16, 2011 Non-Compliance Response.

After receiving the Agency's September 16, 2011 Non-Compliance Response, on September 29, 2011, Appellant filed the instant notice of appeal that the Agency now opposes.

[1] Sixty (60) days from October 25, 2011 is December 24, 2011. *See* 29 C.F.R. § 1614.403(f).

THE AGENCY HAS NOT BREACHED THE SETTLEMENT AGREEMENT BECAUSE THE AGENCY NEVER REFUSED TO REPORT APPELLANT'S SETTLEMENT PAYMENT TO THE IRS AND HAS PROPERLY REPORTED APPELLANT'S SETTLEMENT PAYMENT TO THE IRS

Appellant's non-compliance allegation, as contained in August 2, 2011 Non-Compliance Letter, is that the Agency "refused to report [Appellant's] settlement income to the IRS (in accordance with Paragraph 2 of the Settlement Agreement AND as required by U.S. law)." *See* Exhibit 2, Appellant's August 2, 2011 Non-Compliance Letter at pg. 2.

Appellant's non-compliance allegations are simply incorrect. First, the Agency never refused to report Appellant's settlement income to the IRS. Second, the Agency has properly reported Appellant's settlement income to the IRS. As such, the Commission must dismiss Appellant's appeal.

I. The Agency Never Refused To Report Appellant's Settlement Payment To The IRS.

The Settlement Agreement, at Paragraph 2, states in its entirety:

> *This paragraph has been removed to comply with USDA confidentiality requirements*

See Exhibit 1 of this Opposition Statement, Settlement Agreement at Paragraph 2 (emphasis added).

Appellant was paid the settlement payment of [redacted] (herein the "Settlement Payment") by the Agency on or about August 31, 2010. *See* Exhibit 4, Screen

Shot Establishing Payment of Settlement Sum to Cynthia Bower on or about August 30, 2010.

As stated in the Agency's September 16, 2011 Non-Compliance Response, as of September 16, 2011, the Agency inadvertently had not reported Appellant's Settlement Payment to the IRS. However, unlike what Appellant states in her August 2, 2011 Non-Compliance Letter, the Agency never **"refused"** to report her Settlement Payment to the IRS.

Conversely, in her August 2, 2011 Non-Compliance Letter, Appellant admits the Agency did make efforts to report Appellant's Settlement Payment to the IRS. Specifically, at Exhibit 2 of her August 2, 2011 Non-Compliance Letter, Appellant admits that on March 2, 2011, Appellant received an email from Ms. Kim Parks, of the Agricultural Research Service Fiscal Operations Branch, where Ms. Parks informs Appellant that Ms. Parks contacted the USDA National Finance Center on Appellant's behalf. Appellant's Non-Compliance Letter points out that Ms. Parks contacted the USDA National Finance Center regarding the issuance an IRS 1099 tax form in conjunction with the Settlement Payment. Specifically, in the timeline at Exhibit 2 of her August 2, 2011 Non-Compliance Letter, Appellant herself states:

2 March 2011

> Kim Parks (Kim.Parks@ars.usda.gov) emailed that she had left a message for the 1099 help desk at the National Finance Center regarding the issuance of a [IRS] 1099 form…

Although the Agency may have unintentionally and mistakenly omitted reporting Appellant's Settlement Payment to the IRS at the time it made the Settlement Payment to Appellant, the Agency never refused to report the payment.

II. The Settlement Agreement Provides No Deadline As To When The Agency Must Report Appellant's Settlement Payment To The IRS And The Agency Has Reported Appellant's Settlement Payment To The IRS.

The Settlement Agreement provides no timeline as to when the Agency is required to report the Settlement Payment to the IRS.

In any event, the Agency has remedied the inadvertent oversight of not reporting Appellant's Settlement Payment to the IRS at the same time the Settlement Payment was made. In accordance with Paragraph 2 of the Settlement Agreement, the Agency has indeed reported, via a Corrected 2010 IRS Form 1099, the Settlement Payment to the IRS. *See* Exhibit 5 of this Opposition Statement, Corrected 2010 IRS Form 1099 for Cynthia K. Bower.

For three reasons, the Agency correctly reported the Settlement Payment to the IRS using IRS Form 1099. First, despite being able to do so, the parties to the Settlement Agreement did not prescribe what tax form would be used in reporting the Settlement Payment. Second, the parties did not specifically designate any portion of the Settlement Payment for lost wages or other non-wage related compensatory damages. Rather, the parties designated the Settlement Payment as "payment of all pecuniary, non-pecuniary, or compensatory damages based on the allegations raised in her [EEOC case] up to and through the Effective Date of the Agreement." *See* Exhibit 3 of this Opposition Statement, Settlement Agreement at Paragraph 2. Third, the Settlement Payment constitutes payment "based on the allegations raised in [Appellant's EEOC case]" and Appellant's EEOC case was purely a claim under Title VII of the Civil Rights Act of 1964, and not the Equal Pay Act. As such, if Appellant's claims were decided at an EEOC hearing, there is no guarantee she would have received wages as remedies.

CONCLUSION

The Agency has complied with all terms of the Settlement Agreement. For the above reasons, the Commission should deny this Appeal in its entirety.

Date: December 22, 2011

Respectfully Submitted,

BROOKS LISWELL, ESQ.
Agency Representative
U.S. Department of Agriculture
Office of the General Counsel
Civil Rights Litigation Division, Room 3314
1400 Independence Ave., SW
Washington, DC 20250-1400
(202) 720-5326
(202) 720-4089 (FAX)
brooks.liswell@ogc.usda.gov

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Agency's Statement In Opposition To Appellant's Notice of Appeal has been sent by the following methods this the 22nd day of December 2011 to the following:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 77960
Washington, D.C. 20013

VIA CERTIFIED MAIL
7007071000013859382 7
RETURN RECEIPT

Cindy Bower
PO Box 1383
Kodiak, Alaska
99615

VIA FIRST CLASS MAIL
70070710000138593797
RETURN RECEIPT

Brooks Liswell

This material is part of a collection that documents the harassment, discrimination, and retaliation perpetrated against Alaska's women research scientists by their supervisor, with full knowledge (and arguably, "tacit approval") of their federal employer, the USDA Agricultural Research Service (ARS)

Exhibit 2

USDA's Violation of Settlement Agreement for 551-2009-00074X

Cynthia Bower
EEOC No. 551-2009-00074X
Re: Violation of Settlement Agreement by USDA ARS

United States Department of Agriculture
OGC-Civil Rights Litigation Division
1400 Independence Ave, SW
South Building, Room 3312
Washington D.C. 20250

August 2, 2011

Dear USDA Representative,

It has come to my attention that the U.S. Department of Agriculture (USDA) has violated the Settlement Agreement that we negotiated with the assistance of an Equal Employment Opportunity Commission (EEOC) mediator on August 19th, 2010. A copy of the Settlement Agreement has been attached as Exhibit 1.

According to Paragraph 2 of the Settlement Agreement:

Content removed due to confidentiality requirements associated with USDA Settlement Agreements

The Agency failed to abide by the terms of the Settlement Agreement when it refused to "report this amount to the IRS", despite my efforts to enlist their cooperation (Exhibit 2), supplemented with direct requests from the Internal Revenue Service (IRS) (Exhibit 3).

In addition to violating the terms of the Settlement Agreement, the USDA Agricultural Research Service (ARS) is also in violation of U.S. law (26 U.S.C. 6051), which requires an employer to furnish information returns (including annual W-2 Forms). Alternate tax documentation (such as a 1099 Form) is not appropriate for my Settlement income, since my EEOC case stemmed from wage-based complaints, which automatically require a W-2 Form (Exhibit 4).

Paragraph 13 of the Settlement Agreement stipulates:

Content removed due to confidentiality requirements associated with USDA Settlement Agreements

Cynthia Bower
EEOC No. 551-2009-00074X
Re: Violation of Settlement Agreement by USDA ARS

In Summary

1. The Agency failed to comply with terms of the Settlement Agreement by refusing to report my settlement income to the IRS (in accordance with Paragraph 2 of the Settlement Agreement AND as required by U.S. law).

2. I am providing written notice of the alleged noncompliance to both the USDA OGC-Civil Rights Litigation Division, and the USDA Director of the Office of Adjudication, as specified in Paragraph 13 of the Settlement Agreement.

3. This notice is timely (i.e. within 30 days of the date on which Complainant knew or should have known of the alleged noncompliance), since I first learned of the IRS's inability to enforce U.S. tax laws when I contacted their Tax Law Department on August 1st, 2011.

Therefore, pursuant to the Settlement Agreement, I am hereby requesting that the Agency immediately provide me with a W-2 Form to document the settlement income I received from the USDA in 2010, (an amount for which I was legally obligated to pay an additional to the IRS in April 2011).

I have abided by all terms of the Settlement Agreement and therefore I have an expectation that the Agency will likewise honor the terms of our Agreement. Thank you for your cooperation in this matter.

Sincerely,

Cindy Bower
PO Box 1383
Kodiak, AK 99615

Enclosures

Exhibit 1: Settlement Agreement
Exhibit 2: Timeline for Requesting a W-2 Form
Exhibit 3: IRS Request for W-2
Exhibit 4: U.S. Law Requires a W-2 not a 1099

This material is part of a collection that documents the harassment, discrimination, and retaliation perpetrated against Alaska's women research scientists by their supervisor, with full knowledge (and arguably, "tacit approval") of their federal employer, the USDA Agricultural Research Service (ARS)

Cynthia Bower
OFO Docket # 0120120069
EEOC No. 551-2009-00074X
Re: Statement in Opposition to Agency's Request to Dismiss

Exhibit 3

USDA's Untimely (and Unreadable) Response

This material is part of a collection that documents the harassment, discrimination, and retaliation perpetrated against Alaska's women research scientists by their supervisor, with full knowledge (and arguably, "tacit approval") of their federal employer, the USDA Agricultural Research Service (ARS)

U.S. DEPARTMENT OF AGRICULTURE
OFFICE OF ADJUDICATION AND COMPLIANCE

CYNTHIA BOWER,

Complainant,

v.

TOM VILSACK,
SECRETARY, U.S. DEPARTMENT OF AGRICULTURE,

Agency

On 19 Sept 2011, I received this undated (and unreadable) letter from the USDA. The letter was also untimely (i.e. postmarked AFTER the 35 days allowed by law). The proper headings (e.g. complaint numbers, etc…) were also missing. They wrote that they had received my August 2nd letter on Sept 6th, although they admit (on the Certificate of Service page) that they didn't send this letter until at least Sept 16th. Since the letter was not sent by certified mail, perhaps the USDA was hoping that there would be no record of their untimeliness.

AGENCY'S RESPONSE TO CYNTHIA BOWER'S ALLEGATIONS OF NON-COMPLIANCE WITH SETTLEMENT AGREEMENT

The United States Department of Agriculture's ("USDA") Agricultural Research Service ("ARS"), by and through its undersigned representatives, hereby timely responds to the Office of Adjudication's ("OA") inquiry, received by ARS on September 6, 2011, into Complainant Cynthia Bower's ("Complainant") allegations of non-compliance with a settlement agreement entered into by the Parties on August 19, 2010 (the "Settlement Agreement").

Complainant's non-compliance allegation, contained in her August 2, 2011, letter (the "August 2, 2011 Letter") is that the Agency "refused to report [Complainant's] settlement income to the IRS (in accordance with Paragraph 2 of the Settlement Agreement AND as required by U.S. law)." *See* August 2, 2011 Letter at pg. 2.

At this point in time, it appears that ARS accidentally did not report Complainant's settlement payment of _____ herein the "Settlement Payment") to the IRS after paying Complainant the Settlement Payment. However, Complainant is incorrect when she states that ARS "**refused**" to report her Settlement Payment to the IRS. Conversely, Complainant admits that ARS did make efforts to report Complainant's Settlement Payment to the IRS. Specifically, at Exhibit 2 of her August 2, 2011 Letter, Complainant states that on March 2, 2011, Complainant received an email from Ms. Kim Parks, of the ARS Fiscal Operations Branch, where Ms. Parks admits to contacting the National Finance Center regarding the issuance of a IRS 1099 tax form to Complainant in conjunction with the Settlement Payment. Specifically, in the timeline at Exhibit 2 of her August 2, 2011 Letter, Complainant states:

2 March 2011

> Kim Parks (Kim.Parks@ars.usda.gov) emailed that she had left a message for the 1099 help desk at the National Finance Center regarding the issuance of a [IRS]

1099 form…

Unfortunately, however, it would appear Complainant's Settlement Payment was accidentally never reported to the IRS. **Most significantly**, Complainant has not incurred any loss or damages as a result of the Settlement Payment not being reported to the IRS. Further, ARS is currently taking action to remedy this accidental oversight and is reporting the Settlement Payment to the IRS.

In her August 2, 2011 Letter, Complainant also appears to request that the Agency issue to her an IRS W-2 form rather than an IRS 1099 form in conjunction with the Settlement Payment.

The relevant provision of the Settlement Agreement, reproduced in its entirety directly below, does not prescribe what tax form Complainant is supposed to receive:

Paragraph removed in accordance with USDA confidentiality requirements

Nor does the Settlement Agreement set forth whether the Settlement Payment is for lost wages or for other non-wage related compensatory damages. As such, the Agency is not required, by the terms of the Settlement Agreement, to provide Complainant a W-2 for lost wages. Complainant's request for a W-2 is outside the terms of the Settlement Agreement.

However, in conjunction with reporting Complainant's Settlement Payment to the IRS, the Agency is also ensuring all appropriate tax forms are being issued to Complainant. If a W-2 is deemed the appropriate tax form, Complainant will be issued a W-2.

Respectfully submitted,

Brooks Liswell HT

BROOKS LISWELL
Agency Representative
U.S. Department of Agriculture
Office of the General Counsel

Civil Rights Litigation Division
1400 Independence Ave., SW
South Building, Room 3324C
Washington, DC 20250-1400
202-720-5326 (voice)
202-720-4089 (fax)
brooks.liswell@ogc.usda.gov

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Agency's Response to Allegations of Non-Compliance of Settlement Agreement has been sent by the following methods this the 16th day of September 2011 to the following:

U.S. Department of Agriculture
Office of Adjudication
1400 Independence Ave., S.W.
Washington, DC 20250-9410
202-690-2345 (fax)

VIA ELECTRONIC MAIL

Cindy Bower
PO Box 1383
Kodiak, Alaska
99615

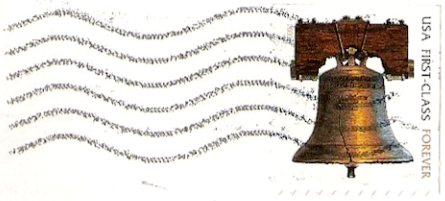
VIA FIRST CLASS MAIL

Helena Thompson
Equal Employment Opportunity Specialist

OGC-CRLO mail stop 1419

Brooks Liswell
U.S. Department of Agriculture
1400 Independence Ave., SW
South Building, Room 3324C
Washington, DC
20250-1400

BALTIMORE MD 212
16 SEP 2011 PM 6 T



Rcvd
19 Sept 2011

Cindy Bower
PO Box 1383
Kodiak, Alaska
99615

99615+1383

This material is part of a collection that documents the harassment, discrimination, and retaliation perpetrated against Alaska's women research scientists by their supervisor, with full knowledge (and arguably, "tacit approval") of their federal employer, the USDA Agricultural Research Service (ARS)

Exhibit 4

U.S. law requires a W-2 not a 1099

U.S. Law Requires a W-2 not a 1099

I am seeking a corrected W-2 Form from my 2010 federal employer, the USDA Agricultural Research Service, so that my EEOC-mediated settlement award can be documented. Due to the wage-based nature of my EEOC complaint, a W-2 Form should be issued, rather than a 1099 Form. The following information cites U.S. laws and regulations supporting the issuance of a W-2 form.

1) <u>USDA Awarded Taxable Settlement Money to Me</u>

- In August 2010, during an EEOC-mediated negotiation, I signed a settlement agreement with the USDA Agricultural Research Service (ARS) that listed the monetary award as "payment of all of pecuniary, non-pecuniary and/or compensatory damages based on allegations raised in EEOC 551-2009-00074X".

2) <u>Tax Documentation was Not Furnished by USDA</u>

- The USDA ARS did not provide tax forms to document my Settlement Award, in violation of:
    - U.S. Code Title 26 (section 6051), which requires an employer to furnish information returns (Form W-2, Wage and Tax Statement) to employees.
    - Entry #2 of the Settlement Agreement (negotiated between the USDA ARS and myself), which specified that "Taxes will not be taken from the amount being paid to Complainant, but the Agency will report this amount to the IRS."
- The USDA ARS also ignored two requests (March 18th and March 31st) from the IRS (Letter Number LTR0062C, for inquiry #0143075196), thereby forcing me to file Form 4852 (Substitute W-2) with my 2010 Tax Return, instead of the correct tax documentation.

3) <u>The USDA Award Settled a Wage-based Complaint</u>

- The out-of-court settlement agreement, which I negotiated with the USDA ARS on August 19th 2010, failed to the list the particular claims that were being settled (unfair hiring, promotion, and retention practices), nor did they allocate percentages of the award for back pay and front pay.
- The written settlement agreement listed the payment as remedying "pecuniary, non-pecuniary, and/or compensatory damages based on allegations raised in EEOC 551-2009-00074x", without specifically identifying the rights that were compromised by the Agency. In Alexander v. Internal Revenue Service, (72 F.3d 938, 942, 1st Cir.

1995), the court recognized the importance of determining which issues resulted in a monetary award.

- My EEOC complaint (#551-2009-00074X) stemmed from six wage-based grievances and two EEO complaints lodged against the agency.
    - **I was offered my job at lower GS and salary levels than the advertised position.** Unfair hiring practices due to gender discrimination constitute legal grounds for a plaintiff to receive back pay, (Title VII of the Civil Rights Act; The Equal Pay Act of 1963; Title 29 U.S. Code, Section 206 d).
    - **I was denied a promotion without being evaluated by objective, measurable criteria**. Settlement compensation for denial of promotion due to disparate treatment (employment discrimination) are considered to be wages, eligible for back pay, (Title VII of the Civil Rights Act; IRS Revenue Ruling 96-65).
    - **I was required to "voluntarily" resign as a condition of the Settlement Agreement *despite no wrongdoing on my part***. When I met with the USDA representatives and EEOC mediator on August 19th 2010, I had no intention of losing my job that day; however, my "voluntary resignation" was written into the settlement agreement by the USDA, which suggests that a component of the settlement award represents front pay. The USDA provided no other options for me to escape the harassment, discrimination, and retaliation being perpetrated against me by my ARS supervisor, a man who had been named as a Respondent by every woman research scientist working for ARS in Alaska since he became a supervisor in 2003. I was not allowed to prepare for the separation or to mitigate the impact of sudden unemployment (at a time when the U.S. unemployment rate was 9.6%). It is now August 2011, and I am still unemployed.
    - **The entire settlement award should be considered W-2 wages from back pay and front pay. T**he Lilly Ledbetter Fair Pay Act of 2009 allows back pay due to discrimination to be collected beyond three years.
        - Back Pay: GS 13 for six years, (a minimum of $64,000, plus over $11,000 in lost pay from the local Cost Of Living Adjustment).
        - Front Pay: I was a permanent USDA employee, with Superior annual performance ratings and an "h-index" (which measures scientific impact) over twice that of my GS-15 supervisor. I would likely have received an annual salary until my retirement,

had it not been for the unlawful activities of my supervisor.

4.) <u>Wage-based Settlements are Reported on a W-2 Form, (not a 1099)</u>

- Settlements resulting from wage-based claims (e.g. back pay and front pay) are reportable by the employer to the employee (and to the Social Security Administration) on a Form W-2.
    - The nature of my Back Pay claim is USDA's violation of:
        - Back Pay Act (5 U.S.C. § 5596(b)(1))
        - Equal Pay Act of 1963. (29 U.S.C. § 206(d))
        - Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, as amended by the Civil Rights Act of 1991
    - The nature of my Front Pay claim is USDA's violation of:
        - Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, as amended by the Civil Rights Act of 1991
        - Equal Pay Act of 1963 (29 U.S.C. § 206(d)).

5.) <u>W-2 Wages are Subject to Tax Withholding</u>

- U.S. Code Title 26 (section 6051) requires an employer to furnish information returns (Form W-2, Wage and Tax Statement) to the Social Security Administration, [according to Treas. Reg. §31.6051-2(a)].
- Federal Insurance Contributions Act (FICA) tax is owed on all remuneration paid by an employer to its employees, (See IRC §§ 3101; 3111).
- Back pay is considered wages for FICA, since individuals could not be made whole unless they received social security credit and any retirement benefits that would have resulted, [according to Internal Revenue Code § 3402(a)(1); Hemelt v. United States (supra 122 F.3d at 204); and Dotson v. United States (87 F.3d 682, 5th Cir. 1996)].
- The Social Security Administration is a benefits agency and must rely on the Federal Tax Authorities of the Internal Revenue Service to enforce penalties against employers who inaccurately report wages.