

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)

This document was prepared, but never submitted (since my attorney advised against being proactive)

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CYNTHIA BOWER, Ph.D.)
Complainant)
)
v.)
)
Thomas Vilsack)
Secretary,)
Agriculture, Department of,)
Agency)
_____)

EEOC No. 551-2009-00074X)
Agency No. ARS-2008-00696)

STEVEN R. GAFFIN
ADMINISTRATIVE LAW JUDGE

Date: June 1, 2009

Complainant's Motion for Summary Judgment
with Accompanying Exhibit

Comes now complainant, Cynthia Bower, Ph.D., by and through her attorney and designated representative, Joe. P. Josephson, of Josephson Law Offices LLC, 912 West Sixth Avenue, Anchorage Alaska 99501 and respectfully moves for entry of an order of Summary Judgment against the Agency. There is no genuine dispute concerning the following material facts: (1) that the complainant and all other female research scientists in USDA's Alaska unit of the Agricultural Research Service (ARS) from 2004 to present have been subjected to discrimination on the basis of gender in violation of Title VII of the Civil Rights Act of 1964; (2) that ARS administrative officials and Human Resource personnel were aware of the discrimination; (3) that no meaningful action was taken by the Agency to stop the discrimination; (4) that the Agency acted in bad faith during Complainant's Formal EEO complaint (ARS-2008-00696) when it fragmented the claims, refused to accept Complainant's clarifications and failed to issue a Report of Investigation within the allotted 180 days; and (5) that the Agency continues to act in bad

faith by refusing to fully respond to complainant's Discovery Requests and excluding complainant from the process by not sending copies of critical documents and communications to the complainant.

STATEMENT OF THE CASE

Complainant is a Research Food Technologist with the USDA Agricultural Research Service (ARS) working in the Subarctic Agricultural Research Unit (SARU) in Fairbanks Alaska. On 27 December 2007 Complainant filed a timely grievance with ARS Pacific West Area (PWA) management personnel (Andrew Hammond, Associate Area Director), describing discriminatory practices enacted by complainant's supervisor (Alberto Pantoja) against all the women research scientists in the unit. Complainant also noted that the supervisor had instituted a work environment extremely hostile to women. Even though Complainant was the third (of three) female research scientist to contact the PWA about the discrimination and hostile work environment at SARU, ARS administrators did not take meaningful action to stop the discrimination. Over the next six months Complainant filed six more timely grievances and numerous communiqués with ARS. Below is a list of the discriminatory behavior (prohibited by Title VII of the Civil Rights Act), which was perpetrated against the Complainant, apparently with tacit approval of all ARS administrators who were notified of this situation.

- I. Complainant was subjected to discriminatory treatment during the ARS hiring process in 2004. There is documentation of this event demonstrating that ARS personnel inappropriately lowered the point values for evaluation Factors I and II (factors which related to the job announcement, NOT complainant's qualifications)

to produce a score that resulted in a job offer to the complainant at a salary and GS level lower than that which was advertised on the job announcement. There can be no genuine issue of material fact concerning the misconduct in hiring that occurred. Five discovery requests were sent to the Agency to elicit additional information supporting this claim, but the Agency refused to respond. A negative inference should be drawn from the Agency's actions.

II. From the date of his arrival in 2003, the Research Leader (RL) refused to appoint female scientists as "acting" RL, whereas he appointed every male research scientist in Fairbanks regardless of GS level, length of time in the unit and probationary status. Despite numerous grievances and informal (within the ARS) EEO complaints by the women, the situation only changed in August 2008 after all three of SARU's women research scientists filed formal EEO complaints describing employment discrimination on the basis of sex (prohibited by Title VII of the Civil Rights Act of 1964, as amended in 1972 to apply to federal civilian Employment, 42 U.S.C. 2000e-16). Being excluded from the career-building opportunity of serving as acting RL has had a negative impact on the Complainant's promotion potential, professional stature and future employment opportunities. There is ample documentation of this event and there can be no genuine issue of material fact concerning the gender discrimination perpetrated against the Complainant and all the other women scientists at SARU until August 2008.

III. The Complainant is one of two women scientists in SARU's Fairbanks location who were given a disproportionate amount of time-consuming committee assignments by the RL. From Complainant's appointment in October 2004 until December 2006, only technicians and women research scientists were required to serve on the Safety committees and Environmental Management System (EMS) committee. No male research scientists were appointed until January 2007, AFTER the issue of discriminatory treatment had been repeatedly reported to administrative personnel at PWA (starting in 2005). In January 2007 a rotation schedule for committee membership was introduced, but discrimination continued in terms of the length of committee service (shortened from two years, as the original two women scientists had just served, to only one year as the first male scientist began his tenure) and assigned duties (which had been significantly more complex for the women than for the subsequently appointed male committee members who merely worked with the systems already in place). There is documentation of these events and there can be no genuine issue of material fact concerning the discrimination on the basis of sex (prohibited by Title VII of the Civil Rights Act of 1964, as amended) that was perpetrated against the Complainant and other women scientists at SARU in committee assignments.

IV. The Complainant and all women scientists in Fairbanks were subjected to discrimination while building their research programs when they were denied resources equivalent to those provided to the male scientists. In 2004 and 2005, four newly hired scientists (two women and two men) were instructed to hire their

technicians as GS 5 temporary employees. By 2007, every male scientist in Fairbanks (regardless of GS level, length of time in Alaska's ARS unit, or CRIS project assignment) had a permanent technician. It is now 2009 and the two female scientists in Fairbanks still have technicians with term positions, (ensuring continual program disruption as the technicians are recruited, hired, trained, then lost to permanent employment elsewhere). There is documentation of these events and there can be no genuine issue of material fact concerning the gender-based discriminatory practices levied against women scientists in Fairbanks during the technician hiring process.

- V. Complainant and all women research scientists in Alaska's ARS unit were incorrectly coded in official paperwork as having no supervisory stature (8 instead of 4 in Box 7 of the AD 332 Master Record / Individual Position Data form). All Category-1 research scientists are expected to supervise a technician and therefore are automatically accorded a supervisory code of 4. Even post-docs are given supervisory codes of 4. Assignment of non-supervisory status damages promotion potential and professional stature. There is an entire section dedicated to supervisory duties in every scientist's evaluation-for-promotion packet. The Complainant was inexplicably rated low in the supervisory category during hiring in 2004, as were the other women scientists in their subsequent promotion results. There is documentation of incorrectly assigned supervisory codes and there can be no genuine issue of material fact concerning this decreased supervisory stature accorded the women scientists in SARU. Five discovery requests were sent to the

Agency to elicit additional information supporting this claim, but the Agency refused to respond. A negative inference should be drawn from the Agency's actions.

VI. Complainant was denied promotion to GS 13 (December 2007), without explanation. The RL admitted that he had failed to support Complainant's promotion. Complainant filed a series of timely grievances asking for specific reasons for loss of promotion and asking for reevaluation, but no relief was granted. Instead, a training to explain the RPE (promotion) System was scheduled for SARU on 3 September 2008 by Eric Jang (ARS Tropical Plant Pests Research Unit in Hilo Hawaii) during which Dr. Jang noted that the accuracy rate for RPE is approximately 66%, (i.e. one out of every three ARS research scientists is judged incorrectly by the panel members, without effective recourse for correcting these career-damaging errors). Statistical evidence within the ARS suggests that female scientists are not recruited, promoted and/or retained at the same rate as male scientists. Since promotions are not based on any defined criteria, (e.g. specific number of publications, impact of research as reflected through the number of citations, etc...), it seems clear that the ARS's current promotion system represents a vehicle for perpetuating discrimination against women within the agency. Ten discovery requests were sent to the Agency to elicit additional information supporting this claim, but the Agency refused to respond. A negative inference should be drawn from the Agency's actions.

VII. Complainant and all women scientists at SARU were denied the valuable career advantage of mentoring by the RL. This was partially due to the RL's lack of expertise in any scientific field except entomology, but was also due to the RL's propensity to mentor only male scientists. The ARS Performance Appraisal System (P&P 418.3) requires "objective measures" when establishing performance plans for scientists. Outlining ways to exceed in performance is an important form of mentoring that takes place between a supervisor and an employee. Complainant's attempts to receive advice and guidance from the RL (so that Complainant could exceed on the annual performance rating) were continually rebuffed, resulting in a lower appraisal than warranted, whereas male scientists at SARU who were lavished with mentoring scored higher on their appraisals. Additionally, women scientists were expected to conceive, design and implement their research programs entirely by themselves, as would be expected of someone of a higher rank (e.g. GS 14 or 15 level scientist). It wasn't until Complainant had been denied promotion (after the critical first three years of program building had already elapsed, thereby rendering a mentor to be of little or no value) that PWA administrators allowed Complainant access to a mentor. There is documentation of these events and there can be no genuine issue of material fact concerning the lack of qualified leadership and mentoring resources available to the Complainant and other women scientists in SARU. Ten discovery requests were sent to the Agency to elicit additional information supporting this claim, but the Agency refused to respond. A negative inference should be drawn from the Agency's actions.

VIII. Complainant was subjected to discrimination during Conflict Resolution Training (January 2008). The RL, Alberto Pantoja, treated the Complainant and the other women research scientists in a manner that was clearly different from how he treated the men when he scheduled each woman to speak first in her project group, and then verbally harassed each woman following the presentation. There were numerous witnesses to this discriminatory event against the women scientists in SARU, including an ARS facilitator, Jeff Schmitt. There is documentation and there are witnesses to this event and there can be no genuine issue of material fact concerning the discriminatory misconduct that occurred. Five discovery requests were sent to the Agency to elicit additional information supporting this claim, but the Agency refused to respond. A negative inference should be drawn from the Agency's actions

IX. On 27 December 2007 Complainant filed a timely grievance with Andrew Hammond, Associate Area Director for the Pacific West Area, listing discriminatory acts by the RL, Alberto Pantoja, against the women scientists in SARU, (e.g. career-building opportunities were not equally apportioned, committee assignments were not equitable, etc...). Complainant also noted that SARU had been transformed into an extremely hostile work environment for women through the management style of the RL. Complainant requested that the EEO-unfriendly ARS leadership decisions that had so severely damaged her career be remedied. Because these acts of employment discrimination at SARU were in violation of

Title VII of the Civil Rights Act, Complainant sent copies of her grievance to the following ARS administrative and Human Resources personnel:

- Edward Knipling (ARS Administrator)
- Antoinette Betschart (ARS Associate Administrator)
- Karen Brownell (Director of Human Resources)
- Dwayne Buxton (ARS Pacific West Area Director)

29 C.F.R §1614.102 (a) requires the ARS to identify and eliminate discriminatory practices and policies. However, the aforementioned ARS personnel knowingly allowed the discrimination to continue. From January to May 2008, Complainant subsequently filed five more grievances outlining the discrimination against women research scientists at SARU. Each time Complainant received ARS responses discounting her claims and trivializing the severity of the situation. By this time, more ARS administrative personnel had been informed of the discrimination taking place at SARU, yet no meaningful action was taken by any of them:

- Robert Matteri (Assistant Area Director, ARS Pacific West Area)
- Molly Kretsch (Acting Associate Area Director, ARS Pacific West Area)
- James Bradley (ARS Deputy Administrator)

ARS's refusal to correct these EEO violations have resulted in tangible adverse employment actions that negatively impacted Complainant's career, and therefore

qualify as retaliation. This is a direct violation of 29 C.F.R. §1614.101(b): “No person shall be subject to retaliation for opposing any practice made unlawful by title VII of the Civil Rights Act (title VII)”. Additionally, Complainant received a written threat of reprisal in response to one of her grievances, helping her to recognize that her job was vulnerable if she continued to oppose discrimination within the ARS.

- X. Complainant was subjected to reprisal discrimination (by Rating and Approving Officials who both knew they were listed by name on Complainant’s Formal EEO complaint) resulting in a lower-than-warranted annual performance appraisal on November 5th 2008. The RL failed to provide “objective measures” (in accordance with the ARS Performance Appraisal System, P&P 418.3) when preparing Complainant’s performance plan. Complainant twice asked the RL (in writing) for advice and guidance for exceeding on the annual performance rating. The informal EEO counselor made a similar request on Complainant’s behalf as part of her Informal Resolution Attempt (ARS Case # 08-40). However, the RL refused to provide information and ultimately discounted Complainant’s extra work in two elements, resulting in a lower appraisal than was warranted. This form of reprisal has had both professional stature and monetary impacts on Complainant’s career. There is documentation of these events and there can be no genuine issue of material fact concerning the lack of qualified leadership and mentoring resources available to the Complainant and other women scientists in SARU. Two discovery requests were sent to the Agency to elicit additional information supporting this

claim, but the Agency refused to respond. A negative inference should be drawn from the Agency's actions

XI. Complainant was subjected to reprisal discrimination by the RL, Alberto Pantoja, when he willfully denied Complainant an opportunity to serve as Acting RL on March 20th 2009. Rule #3 from the official "Rotation Plan to select Acting RL" states that if an SY cannot serve when needed, the next SY in rotation will be selected. The RL was out of the office from 17 December 2008 until 06 January 2009 and three Acting RLs were appointed. The Acting RLs included Joe Kuhl (17-19 December 2008), Lori Winton (22-26 December 2008) and Peter Bechtel (29 December 2008 to 05 January 2009). Therefore, according to the Rotation Plan, the next opportunity for Acting RL should have been offered first to Dennis Fielding, followed by Jeff Conn, Lori Winton, Complainant, and then Steve Seefeldt (since Joe Kuhl had already quit by that time). Whether offers were made to Fielding, Conn, and Winton is not known. However, no offer was made to Complainant. Instead, Complainant was excluded from the career-building opportunity of serving as Acting RL and the appointment was inappropriately given to the person listed AFTER the Complainant on the rotation plan. There is documentation of these events and there can be no genuine issue of material fact concerning the blatant exclusion of the Complainant from career-building activities. This form of reprisal impacted the professional stature of the Complainant.

XII. Complainant was subjected to reprisal discrimination by the Research Leader, Alberto Pantoja, when he willfully denied Complainant an opportunity to fully serve as Acting RL on April 30th 2009. Dr. Pantoja refuses to assign tangible Acting RL responsibilities to women research scientists and instead delegates power (through WebTA) to a male scientist while he is away. On April 30th Complainant was the acting RL when a problem with one or more timesheets arose. Although it was not disclosed to Complainant at the time, an official approval was required. SARU's secretary, Juli Philibert, contacted the designated male with behind-the-scenes power (Dr. Dennis Fielding) and they resolved the problem without Complainant's knowledge or assistance. Because of the system instituted by the RL, Complainant is only allowed to serve as acting Research Leader in a diminished capacity with no real power and no responsibilities (e.g. Complainant is not made aware of who emailed in sick that day or who took annual leave nor is Complainant informed of problems within the unit and allowed to suggest a solution). There is documentation of these events and there can be no genuine issue of material fact concerning the exclusion of the Complainant from career-building activities. This form of reprisal impacted the authority and professional stature of the Complainant.

CONCLUSION

The complainant respectfully requests a summary judgment finding against the Agency as a matter of law based on complainant's twelve claims of discrimination (Exhibit 1), all

of which would be supported by material evidence if not for the Agency's failure to respond in good faith to complainant's discovery requests.

Complainant also requests: notification to all ARS employees in Alaska of their right to be free of unlawful discrimination and assurance that the particular types of discrimination found will not recur; approval of litigation in federal district court either through a suit brought by EEOC or through a Right to Sue notice awarded to the Complainant on July 26th 2009 (i.e. 180 days after filing a formal complaint); or full relief, including, but not limited to, a new job placement with back pay and interest, discontinuation of all discriminatory practices, and an opportunity to participate in employee benefits denied because of discrimination, all in accordance with 29 CFR 1614.501(a), (c).

Dated 1 June 2009

Respectfully submitted,

One Attachment:

Exhibit 1.) Complainant's twelve claims of discrimination (12_Claims.pdf)