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**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF WASHINGTON**

KELLY O’KELL,

Plaintiff,

v.

RYAN ZINKE,

Defendant.

NO. 2:18-cv-00279-SAB

DECLARATION OF DEBORAH  
DIAMOND

I, Deborah Diamond, declare:

1. I am competent to testify and have personal knowledge about what is written in this declaration.

2. I have been retained by Ms. O’Kell to serve as an expert witness in the above-captioned action. Attached hereto as Exhibit A is a true and correct copy of

1 the expert witness report, dated September 20, 2019, that I have provided in this  
2 case.

3 I declare under penalty of perjury under the laws of the United States that the  
4 foregoing is true and correct.

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6 Dated this 20th day of February 2020.

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Deborah Diamond

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 5, 2020, I caused the forgoing to be electronically filed with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to all counsel of record.

*/s Matthew Crotty*  
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# EXHIBIT A

## **EXPERT WITNESS REPORT**

**O’Kell vs. Zinke  
Department of the Interior (DOI)  
Bureau of Reclamation (BOR)**

**Deborah Diamond**

### **I. BASIS FOR OPINIONS**

#### **I.A. Experience and Training**

- As EEO Officer for the Internal Revenue Service, I managed the EEO complaint, special emphasis, and affirmative action programs in a state under court directives to correct discriminatory practices. I conducted a number of interventions with managers/workgroups to accomplish EEO goals; chaired the EEO Advisory committee; served on several national EEO taskforces; and instructed a variety of EEO courses.
- As an EEO Investigator for the IRS, I conducted investigations of formal complaints and settled several at the informal level. I also served as an EEO Counselor in resolving informal complaints and writing up counseling reports.
- In my career as a federal manager, management official, and certified mediator, I have extensive knowledge of federal government human-resource policies and procedures.
- As an independent fact-finder and licensed Private Investigator, I have conducted over 300 investigations related to:
  - Discrimination complaints including age; race; color; sex; gender identity; sexual orientation; national origin; religion; disability; marital status.
  - Hostile Work Environment/Harassment complaints including sexual harassment; inappropriate language; bullying; threats of violence; conflicting communication styles; discordant work teams.
  - Retaliation complaints based on prior discrimination or harassment complaints.
  - EEO-related grievances including non-selection for promotion, managerial development, and/or training opportunities; performance evaluation ratings; violations of employee privacy.
  - Employee Misconduct allegations including falsified records; theft of government funds; theft of government property; misuse of the Internet; leaving the scene of an accident; abusing overtime; misuse of petty cash fund; circumvention of Accounts Payable procedures; suspicious cash transactions; attempt to interfere with garnishment; use and sale of drugs at the workplace; inappropriate personal relationship with subordinate; workplace violence; suitability to return to work (after DUI; vehicular homicide conviction).
  - Waste, Fraud and Abuse allegations including conducting private business on government time with government resources; procuring equipment for personal

- use; abuse of managerial authority; ethics violations; impermissible expenditures of state/federal funds; illegal tradeoffs with contractors.
- Management issues involving employee time reporting; travel vouchers; productivity; taxpayer/ratepayer complaints; disclosure and privacy; telecommuting.
- Whistleblower allegations including false reports to State agencies; false time accounting; false work records; using substandard construction materials; falsified credentials; false vouchers; false invoices; fleet management inefficiencies.
- Related training courses: EEO Legal Skills Course (Howard University); EEO Investigator Training (US Postal Service); IRS EEO Officer Management Development Program; IRS EEO Investigator Training; OPM EEO Counseling Course; Treasury Department EEO Counselor Training; Agency Grievance Examiner Training.
- I graduated from Carleton College and completed a Master's degree at the University of Lancaster (United Kingdom).
- I am a member of the Association of Workplace Investigators, the Washington Association of Legal Investigators, and the Washington Mediation Association.

The attached Exhibit A lists my federal-government clients, prior testimony, published reports, and compensation as an expert witness in this matter.

### **I.B. Documents Reviewed**

A complete list of the documents reviewed is contained in the attached Exhibit B.

In summary, I reviewed the complaint and answer, other pre-trial pleadings, and the written discovery and documents exchanged to date by plaintiff and defendant. These are the types of materials reasonably relied upon by experts in forming opinions about an employer's human resources-related practices. My review of these documents allowed me to learn and draw conclusions about the nature and complexity of the underlying complaint of age discrimination and retaliation. It also gave me the opportunity to evaluate the factual information that was available to Kelly O'Kell at the time of her employment and EEO complaint and the agency's investigation of her complaints.

In preparation for writing this report, I also consulted recognized authorities in the human resource field and the extensive guidance found on the EEOC, AWI and SHRM websites. Specific information relied upon in this report include:

- The Association of Workplace Investigators (AWI) website resources for members and Guiding Principles for Conducting Workplace Investigations.
- The EEOC website, including Enforcement Guidance: *Vicarious Employer Liability for Unlawful Harassment by Supervisors* June 18, 1999, EEOC Enforcement Guidance on Prohibited Employment Practices.

- *Investigating Harassment and Discrimination Complaints, A Practical Guide*, by Jan C. Salisbury and Bobbi Killian Dominick, 2004 Jossey-Bass/Pfeiffer.
- The Society for Human Resource Management (SHRM) website, including member resources on conducting investigations, and preventing retaliation and discrimination.

My methodology in analyzing the agency's response to Kelly O'Kell's complaints of age discrimination and retaliation and the agency's employment practices included a critical review and analysis of the above information, a critical review of the following information, and analyzing that information in light of the known facts of this case:

- Kelly O'Kell's EEO complaint ("the complaint") and witness statements.
- Department of the Interior Personnel Bulletin 18-01 Equal Opportunity and Workplace Conduct (effective 04/23/2018).
- The Department of the Interior's Investigator Guide to Conducting Administrative Investigations (December 2017).

## **II. SUMMARY OF OPINIONS**

I base my opinions on my education, training and professional experience, the documentary evidence cited in Exhibit B, and on the facts set forth in this report.

As explained in this report, I will be expressing opinions on the following subjects:

1. Employment Policies Relevant to this Case
2. EEO Complaint Procedures Relevant to this Case
3. Generally Accepted Standards of Practice for an EEO Investigation
4. Compliance with the agency's Anti-Retaliation Policies

The purpose of my testimony is to assist the trier of fact on issues involved in determining the adequacy of the investigation conducted by the agency in response to Kelly O'Kell's complaint of age discrimination and retaliation. My testimony will address established standards of practice and defendant's own policies and procedures relevant to workplace investigations and the prevention of discrimination and retaliation.

I reserve the right to supplement this report and to provide rebuttal testimony to any expert witness testimony which is offered on behalf of the Defendants. As of the date of this report, I have not had the opportunity to review deposition testimony by the relevant witnesses.

### III. FACTUAL BACKGROUND

#### III.A. Narrative Timeline of EEO and Disciplinary Process

- On 05/19/2016, Clint Wertz calls GS-11 Realty Specialist Kelly O’Kell to tell her she was not selected for a GS-12 Project Manager position.
- Kelly O’Kell alleges that at dinner that evening (05/19/2016), Sarah Maciel, a GS-09 Realty Specialist who served on the interview panel for the position, tells her that Deputy Manager Clyde Lay selected a woman who was “young and perky” and would bring new energy to the office.
- On 05/25/2016, Kelly O’Kell files an informal EEO complaint related to her non-selection, alleging disparate treatment based on sex and age (over 40). EEO Counselor Katheryn Hernandez does counseling intake.
- On 05/31/2016, Sarah Maciel complains to Realty Supervisor Anthony Ortiz that Kelly O’Kell engaged in inappropriate conduct on 04/19/2016 and 05/19/2016.
- On 06/02/2016, Anthony Ortiz suspends Kelly O’Kell’s teleworking. Kelly O’Kell complains to Dawn Wiedmeier that this action is retaliatory.
- On 07/21/2016, Anthony Ortiz issues Kelly O’Kell a Letter of Reprimand for inappropriate conduct around Sarah Maciel on 04/19/2016 and 05/19/2016.
- On 07/27/2019, Kelly O’Kell sends Anthony Ortiz her objections to the Letter of Reprimand and emails Area Manager Dawn Wiedmeier that the Letter of Reprimand is in retaliation for her filing an EEO complaint on 05/25/2016.
- On 08/24/2016, Anthony Ortiz upholds his decision to issue the Letter of Reprimand.
- On 08/25/2016, Kelly O’Kell files a formal EEO complaint claiming age discrimination.
- On 08/31/2016, Katheryn Hernandez completes the counseling report.
- [8 month gap]
- On 04/28/2017, Anthony Ortiz encourages Kelly O’Kell to consider going through the chain-of-command with any issues before contacting EEO or the Regional Office.
- On 05/12/2017, the agency issues Kelly O’Kell an acceptance letter for the following age discrimination claims:
  1. On May 19, 2016 you discovered that you were not selected for the Project Manager position, vacancy announcement number BR -PN-DE-CCA-16-185, BR-PN-V A-CCA-16-184;
  2. On June 2, 2016, your telework agreement was terminated;
  3. On or about July 20, 2016, you were charged AWOL;
  4. On July 21, 2016, you were issued a reprimand; and
  5. You were subjected to a hostile work environment from April 19, 2016 to August 25, 2016, when, in addition to the above listed claims:
    - a. In May 2016, Anthony Ortiz told you that you should apply for telework because of your age and later made comments about your age and retirement;
    - b. On or about May 3, 2016, Susan White yelled at you and Ortiz refused to report her behavior to her supervisor;
    - c. On or about August 3, 2016 your DOI Learn transcript was changed;

- d. On an unspecified date Ortiz defamed you when he was contacted by the Forest Service regarding a position you applied for; and
- e. Sarah Maciel treated you in a rude and unprofessional manner on multiple occasions and made accusations against you.
- On 08/09/2017, the agency authorizes contract EEO Investigator Michael Brown to conduct an investigation of Kelly O’Kell’s 08/25/2016 complaint.
- On 08/14/2017, Kelly O’Kell emails Regional Director Lorri Lee and alleges ongoing inappropriate treatment, including age discrimination and retaliation against her for prior EEO activity.
- On the same date (08/14/2017), Employee & Labor Relations Supervisor Kip Stover drafts a letter for Clyde Lay proposing removal of Kelly O’Kell for inappropriate emails she sent to the Regional Office and an external partner.
- On 08/17/2017, Kelly O’Kell asks the agency to accept her retaliation claims.
- From 09/13-14/2017, Kip Stover and Human Resources Officer Nate Shimatsu interview Kelly O’Kell and witnesses re: Kelly O’Kell’s 08/14/2017 allegations.
- On 09/14/2017, the same day Kelly O’Kell is interviewed by Kip Stover and Nate Shimatsu, Clyde Lay issues a proposed 3-day suspension letter to Kelly O’Kell.
- On 09/21/2017, Kelly O’Kell submits written objections to the 3-day suspension.
- On 09/29/2017, Kelly O’Kell makes an oral reply to Carolyn Chad.
- On 10/24/2017, Kelly O’Kell is rated Minimally Successful on the critical element “Providing for Excellence in Customer Service”, citing her inappropriate emails.
- On 10/27/2017, the agency issues Kelly O’Kell an amended acceptance letter for the following retaliation claims [numbering continued from 05/12/2017 letter]:
  - 6. On April 27, 2017, you were told that you had to fail your EPAP because you filed an EEO complaint; and
  - 7. From August 2016 to the present you were subjected to a hostile work environment.
- On 10/30/2017, Kelly O’Kell raises allegations of potential NEPA violations to Lorri Lee.
- On 11/08/2017, Carolyn Chad upholds the 3-day suspension decision. Kelly O’Kell serves the suspension from 11/15-17/2017.
- From 11/28-30/2017, Kip Stover and Nate Shimatsu conduct interviews related to Kelly O’Kell’s 10/30/2017 allegations of NEPA violations.
- By 12/20/2017, the respondents in Kelly O’Kell’s EEO complaint submit their affidavits to Michael Brown.
- On 02/08/2018, Michael Brown issues his Report of Investigation re: Kelly O’Kell’s 08/25/2016 complaint.
- On 02/26/2018, Realty Assistants Karissa Fromm and Barb Gentry submit complaints to Kip Stover re: Kelly O’Kell’s conduct at a 02/23/2018 meeting.
- On 03/08/2018, the agency authorizes contract EEO Investigator Hayward Reed to conduct an investigation of the 02/26/2018 complaints against Kelly O’Kell.
- From 03/14-15/2018, Hayward Reed interviews witness and gathers affidavits.
- On 03/28/2018, Hayward Reed issues his fact-finding report.
- On 04/02/2018, Nate Shimatsu sends Kelly O’Kell a summary of findings from the administrative investigations of her 08/14/2017 and 10/30/2017 complaints.

- On 04/03/2018, Kelly O’Kell tells Nate Shimatsu that the reports do not address the EEO crisis in the Ephrata office.
- On 04/11/2018, Kip Stover sends Clyde Lay, Marc Maynard, and Jonathan Brooks a copy of Hayward Reed’s report.
- On 05/14/2018, Marc Maynard issues a proposed removal letter to Kelly O’Kell.
- On 06/13/2018, Kelly O’Kell responds to the charges in the removal letter and also references age discrimination and retaliation.
- On 07/18/2018, Dawn Wiedmeier upholds the decision and terminates Kelly O’Kell.

## B. Juxtaposed Timeline of EEO and Disciplinary Process

The following chart juxtaposes the timeline of the EEO process and the disciplinary process related to Kelly O’Kell:

DATE	EEO TIMELINE	DISCIPLINARY TIMELINE
05/19/2016	Wertz tells O’Kell he non-selected her for Project Manager.	
05/19/2016	O’Kell alleges Maciel said “young and perky” selected. Maciel alleges O’Kell engaged in inappropriate conduct.	
05/25/2016	O’Kell files informal EEO complaint re: non-selection based on sex/age. EEO counseling intake.	Ortiz notifies O’Kell that negative statements re: management will not be tolerated.
05/26/2016		O’Kell complains to Ortiz about Maciel conduct. Ortiz gets statements.
05/31/2016		Maciel complains to O’Kell about O’Kell’s conduct.
06/01/2016	O’Kell complains to EEO counselor about Maciel’s conduct.	
06/02/2016	Ortiz suspends O’Kell telework. O’Kell complains to Wiedmeier about retaliatory action.	
06/30/2016	Wertz meets with O’Kell to discuss reasons for non-selection.	
07/15/2016	O’Kell leaves Ortiz meeting to report alleged retaliation. Ortiz tells O’Kell he will charge her AWOL.	Ortiz attempts to deliver letter of reprimand to O’Kell.

07/21/2016		Ortiz issues Letter of Reprimand to O’Kell re: inappropriate conduct around Maciel.
07/26/2016		Dubois complains to Ortiz about Maciel conduct.
07/27/2016	O’Kell alleges retaliation to Wiedmeier.	O’Kell sends Ortiz objections to Letter of Reprimand.
08/24/2016		Ortiz upholds Letter of Reprimand.
08/25/2016	O’Kell files formal EEO complaint claiming age discrimination.	
08/31/2016	EEO counseling completes report.	
	[8 month gap]	[7 month gap]
04/10/2017		Ortiz sends Maciel summary of discussion re: managing others’ perceptions of her behavior.
04/28/2017	Ortiz emails O’Kell to consider going through chain of command with issues before going to EEO or Regional Office.	
05/01/2017	O’Kell summarizes EPAP meeting with Ortiz. Alleges Ortiz said Lay ordered him to lower her EPAP because of EEO complaint.	
05/12/2017	Agency issues O’Kell acceptance letter for age discrimination issues.	
08/09/2017	Agency issues authorization letter for outside investigator Michael Brown to conduct O’Kell EEO complaint investigation.	
08/09/2017	Agency sends O’Kell Notice of Incomplete Investigation for failure to complete within 180 day timeframe.	
08/14/2017	O’Kell alleges harassment based on age discrimination and retaliation in email to Lee and voicemail to Stover.	Stover drafts proposed removal letter for Lay re: O’Kell.
08/17/2017	O’Kell asks agency to add retaliation issues.	
09/05/2017		Lay tells Stover Maciel does not want to be interviewed. Stover tells

		Lay he needs Maciel to refute O’Kell allegations.
09/13/2017-09/14/2017+09/22/2017		Stover and Shimatsu conduct interviews re: O’Kell 08/14/2017 allegations.
09/13/2017		O’Kell interviewed by Stover and Shimatsu re: her 08/14/2017 allegations of harassment.
09/14/2017		Lay issues proposed 3-day suspension letter to O’Kell.
09/21/2017		O’Kell submits written objections to 3-day suspension.
09/29/2017		O’Kell makes oral reply to Chad.
10/04/2017	O’Kell requests 14-day extension to submit affidavit.	
10/19/2017	O’Kell submits affidavit.	
10/24/2017		O’Kell rated minimally successful in “providing for excellence in customer service”.
10/27/2017	Agency amends acceptance letter to include retaliation and hostile work environment.	
10/30/2017	O’Kell alleges ongoing harassment to Lee.	O’Kell raises NEPA violations to Lee.
11/08/2017		Chad upholds 3-day suspension.
11/15/2017-11/17/2017		O’Kell serves 3-day suspension.
11/28/2017-11/30/2017		Stover/Shimatsu conduct interviews re: O’Kell NEPA complaint.
12/07/2017	Wertz submits affidavit.	
12/15/2017	Maciel submits affidavit.	
12/18/2017		O’Kell interviewed re: NEPA complaint.
12/20/2017	Chad and Law submit affidavits.	
01/13/2018	O’Kell declines opportunity to submit rebuttal.	
02/08/2018	Brown issues Report of Investigation.	
02/26/2018		Gentry and Fromm send complaints to Stover re: O’Kell conduct at 02/23/2018 meeting.
03/08/2018		Agency Regional Director contracts with outside investigator Reed.
03/18/2018	O’Kell alleges to Maynard that Brooks and Lay are continuing	O’Kell alleges to Maynard that Brooks and Lay are bribing employees to make false claims

	to harass and retaliate against her for EEO complaint.	against her to help them get her fired.
03/14/2018-03/15/2018		Reed conducts investigation interviews.
03/26/2018		Reed issues preliminary report.
03/27/2018		Reed conducts additional interview with Brooks.
03/28/2018		Reed issues revised report.
04/02/2018 04/03/2018	O’Kell responds to Shimatsu reports saying the EEO crisis was not addressed.	Shimatsu sends O’Kell reports from administrative investigations of her August and October 2017 complaints.
04/11/2018		Stover sends Reed report to Lay, Brooks, and Maynard.
05/14/2018		Maynard issues proposed removal letter to O’Kell.
06/13/2018	O’Kell references age discrimination and retaliation in response to removal letter.	O’Kell responds to removal letter.
06/26/2018		O’Kell makes oral reply to Stover and Wiedmeier.
07/18/2018		O’Kell is terminated.
08/31/2018	Kelly O’Kell files a civil suit after no final agency decision issued within 180 days.	

#### IV. APPLICABLE POLICIES AND STANDARDS

##### IV.A. Department of Interior and OPM Policies

The documents noted contain the following provisions that are relevant to Kelly O’Kell’s complaints of discrimination and retaliation and investigation of those complaints.

- **Department of the Interior, Bureau of Land Reclamation: Prevention and Elimination of Harassing Conduct: Implementing Procedures [for Department of the Interior Personnel Bulletin 18-01] (April 2018)**

##### 5. Policy

Reclamation is committed to providing a work environment free of discrimination and harassment based on race, color, religion, sex (including pregnancy and gender identity), sexual orientation, national origin, age, disability, genetic information (including family medical history), status as a parent, marital status, or political affiliation, and free from illegal retaliation. Reclamation will not tolerate any offensive harassing behavior against any Reclamation employee, intern, volunteer, contractor

or other non-Federal employee, visitor, or other member of the public. Reclamation also will not tolerate adverse treatment of employees because they report harassing conduct or provide information related to such complaints. The purpose of the Department's policy and these procedures is to ensure that Reclamation takes immediate and appropriate corrective action, including appropriate disciplinary action, to eliminate harassing conduct regardless of whether the conduct rises to the level of a violation of law. Therefore, the goal of the Department's policy and these procedures is to address harassing conduct at the earliest possible stage, before it becomes "severe or pervasive," i.e., harassment within the meaning of anti-discrimination law.

#### A. Prohibited Harassing Conduct

The conduct prohibited by the Department's policy and these procedures includes, but is broader than, the legal definitions of harassment and sexual harassment. Harassing conduct prohibited by the Department's policy and these procedures is defined as unwelcome conduct, verbal or physical, including intimidation, ridicule, insult, comments, or physical conduct, that is based on an individual's protected status or protected activities under the Department's policy and these procedures, when:

1. the behavior can reasonably be considered to adversely affect the work environment; or
2. an employment decision affecting the employee is based upon the employee's acceptance or rejection of such conduct.

Protected status is defined as an individual's race, color, religion, sex (including pregnancy and gender identity), sexual orientation, national origin, age, disability, genetic information (including family medical history), status as a parent, marital status, or political affiliation.

Although not every instance of inappropriate behavior may meet the legal definition of harassment, such behavior undermines morale and Reclamation's mission. Accordingly, the misconduct prohibited by the Department's policy and these procedures is broader than the definition of illegal harassment under Title VII of the Civil Rights Act to ensure that appropriate officials are notified of, and can promptly correct, harassing conduct.

Harassment becomes illegal when enduring the offensive conduct becomes a condition of continued employment or the conduct is sufficiently severe or pervasive as to create a work environment that a reasonable person would consider intimidating, hostile, or abusive. All harassing conduct, as defined above, is a violation of the Department's policy and these procedures.

Employees are subject to disciplinary action, up to and including removal from Federal service, for engaging in harassing conduct while in the workplace or in any

work-related situation, including while on official travel. Off-duty misconduct may subject the employee to potential discipline if the misconduct is likely to have an adverse effect on Reclamation (e.g., harassing a co-worker, visitor, contractor, or volunteer during off-duty hours). Harassing conduct can occur in person, in writing, or through phone calls, the use of social media, or other forms of technology.

#### B. Prohibited Retaliatory Conduct

It is a violation of the Department's policy and these procedures to retaliate against employees who engage in protected activity under these procedures. Protected activity includes reporting harassing, discriminatory, or retaliatory conduct; filing a claim of harassment; providing evidence in any investigation; or intervening to protect others who may have suffered harassing, discriminatory, or retaliatory conduct. A supervisor/manager may not fire, demote, harass, or otherwise take any personnel action against an individual for reporting an allegation of misconduct under these procedures.

It is important that supervisors/managers protect employees who report alleged harassing conduct, and do not take any retaliatory personnel action against these individuals in order to deter the employee from reporting harassing conduct or filing a complaint. A supervisor/manager found to have engaged in retaliation will be subject to disciplinary action.

Engaging in protected activity under these procedures does not shield an employee from all personnel actions. Supervisors/managers can take personnel actions, including discipline up to removal from Federal service, if they are motivated by non-retaliatory and non-discriminatory reasons that would otherwise result in such consequences (e.g., transferring an employee for legitimate business reasons or closely monitoring the performance of an employee on a Performance Improvement Plan).

#### E. Distinction from EEO and Other Remedial Procedures

The Department's policy and Reclamation's reporting procedures are separate and distinct from the EEO process, which focuses on making employees whole after they have experienced discrimination (including harassment) by issuing remedial relief, such as compensatory damages. These procedures do not replace an employee's EEO or other rights.

#### E. Servicing HR Offices

Servicing HR Offices are responsible for:

1. Receiving reports alleging violations of the Department's policy and these procedures, as described in Section 7, notifying and assisting the relevant

supervisors/managers in handling allegations of harassing conduct and taking corrective action as appropriate and necessary.

2. Tracking all reports made and actions taken pursuant to these procedures in line with the Department's Office of Human Resources case tracking procedures, and reporting on them to HRPPD.

3. Maintaining case files (similar to those for disciplinary/adverse actions) for all reports of alleged harassing conduct in accordance Department and Reclamation records management guidelines.

6. Providing advice and guidance to supervisors/managers on steps they should take to ensure safety of employees, conducting further investigations into reports alleged harassing conduct, and adjudicating the results of those investigations, including the initiation of appropriate corrective measures, to ensure compliance with these procedures.

9. Expeditiously initiating required documents to secure third-party support for investigations, acting as the point of contact for investigations undertaken by the supervisor/manager, Reclamation or other Department employee, or, in accordance with the Department's Investigator Guide to Conducting Administrative Investigations, serving as investigators of the report of alleged harassing conduct themselves.

#### D. Conducting Further Investigation

##### 1. Deciding Whether Further Investigation is Necessary:

If it is determined that an investigation is necessary, the servicing HR Office will ensure that the investigative process is initiated within *two business days* of the decision being made regarding the appropriate investigative entity (e.g., refer the case to the OIG, initiate the funding process and prepare a statement of work for a third-party investigator). The servicing HR Office will serve as the primary point of contact for logistics related to getting an internal or third-party investigator in place, as well as when the allegations have been referred for criminal investigation or to the OIG.

##### 2. Deciding Who Will Conduct the Investigation

If it is determined that further investigation is necessary, the following general guidelines will apply for choosing the type of investigation:

...All other allegations under these procedures may be handled by a third-party investigator, employee relations specialist(s), supervisor/manager, or another employee trained to conduct investigations. The supervisor/manager of the alleged harasser, in consultation with the servicing HR Office and SOL, will make the final decision about the investigation method based on the complexity and scope of the allegation(s) and the availability of qualified investigators.

##### 3. Conducting the investigation

All investigations must be conducted swiftly, impartially, and in a manner appropriate to the allegation. All investigations handled by a supervisor/manager, servicing HR Office employee, another employee trained to conduct investigations, or third-party investigator *must* be conducted in accordance with the Department's Investigator Guide to Conducting Administrative Investigations.

#### F. Responding to Reports of Alleged Harassment Raised in a Statutory, Administrative, or Negotiated Grievance Process

If an employee pursues a claim of harassment through the EEO process, an MSPB appeal, or a negotiated/administrative grievance, the Reclamation official who receives notice of such claim will promptly notify the supervisor/manager of the alleged harasser. That supervisor/manager has a duty to act promptly upon learning that harassing conduct has been alleged, must treat the notice as a report under these procedures, and must follow the steps outlined in this section, unless inconsistent with applicable regulatory or statutory requirements. It is possible that multiple inquiries into a given complaint may proceed in parallel.

- **Department of the Interior Notice of Rights and Responsibilities in the Discrimination Complaint Process** [Investigator's Note: signed by Kelly O'Kell 07/20/2016]

8. If you decide to pursue allegations of age discrimination through the EEO complaint process, you must exhaust the administrative procedures, including appeals to the EEOC or the MSPB, before filing a civil action in U.S. District Court. Administrative remedies are exhausted: (a) 180 days after filing a formal complaint if the agency has not taken final action.

12. If your formal complaint is accepted for processing, the agency will issue a letter that specifically states your allegations of discrimination and provides information regarding the processing of your complaint and your appeal rights. You will receive a copy of the EEO Counselor's Report, and your complaint will be investigated unless otherwise resolved.

13. You may file a formal complaint only on those matters that you specifically brought to the EEO Counselor's attention during the 30 days of pre-complaint counseling.

14. You may be able to amend your complaint with issues that are like or related to the claim(s) raised in the complaint. To request an amendment, you must send a letter to the Bureau EEO Officer or OCR Complaints Manager (OS Complaints) describing the new incident(s) and stating your desire to amend your complaint to include the new incident(s).

18. If your formal complaint is accepted, it will be investigated within 180 days. The investigation may be extended for up to 90 additional days with your permission. Upon completion of the investigation, the Bureau EEO Officer or the OCR Complaints Manager will provide you a copy of the Report of Investigation (ROI).

20. When the ROI is issued, you will be informed of your right to elect an immediate final decision on your complaint from the U.S. Department of the Interior, or to elect a hearing and decision from an EEOC Administrative Judge. You will have 30 days from receipt of the ROI to make either election.

If you make no election: the Director, Office of Civil Rights, U.S. Department of the Interior shall issue a final decision within 60 days of the end of the 30-day election deadline.

- **Department of the Interior Investigator Guide to Conducting Administrative Investigations (December 2017)**

1. B. Determining Who Investigates

In cases where a more formal inquiry is necessary, prior to assigning or contracting for an investigator, supervisors should consult an employee relations specialist in their servicing human resources office (ER POC) and an Office of the Solicitor (SOL) attorney to determine who should carry out the investigation. The following guidelines apply in making this decision:

Agency investigator: Any allegations not covered in the above categories may be carried out by a supervisor/manager or an employee relations specialist. If the investigation is assigned to an employee relations specialist (ER Investigator), this should be a different individual than the employee relations specialist who will be assisting the supervisor in taking any potential resulting disciplinary action (the Employee Relations Point of Contact, hereinafter the "ER POC"), so that the ER investigator maintains impartiality while conducting the investigation. It may be helpful to assign an employee relations specialist from a different HR office or region as the ER investigator in order to maximize confidence in the neutrality of the investigative process.

- 2.A. Investigative Plan

As described more fully below, it is crucial that the investigator remain neutral. Therefore, the goal of the investigation should not only be to collect evidence to prove the allegations, but also to collect evidence that could potentially disprove the allegations...Accordingly, the investigator should develop the investigative plan so as to proceed in a neutral fashion; the plan should not pre-suppose a particular outcome.

- 4.B. Order of Witnesses

The recommended sequence of interviewing witnesses is: (1) the individual who raised the allegation; (2) any subject matter experts (e.g., for an improper hiring allegation, a subject matter expert might be HR personnel); (3) any other witnesses; and (4) the individual who is the subject of the investigation. Interviewing the subject last enables the investigator to have as much testimonial evidence as possible before interviewing the subject of the investigation. However, this order may change depending on the specifics of the case. Earlier interview of the subject may be advisable. This decision should be made as part of process to develop the Investigative Plan. If, notwithstanding the potential benefits of interviewing the subject last, the investigator elects to interview the subject first in an investigation, the investigator must be willing to interview the subject again at the end to delve into facts learned from the other witnesses or conflicts between the subject's testimony and the testimony of other witnesses.

#### 4.C. Investigators Must Be Professional, Objective, Neutral and Fair

The investigator must be professional at all times. This requires the investigator to be objective, neutral and fair...Further, the investigator should not set out to prove a misconduct charge, but rather whether certain conduct occurred. The investigator's questions should seek to establish the facts, as opposed to eliciting conclusory statements.

#### 7.H. H. Do Not Decide Guilt or Innocence

It is the responsibility of the Agency, not the investigator, to issue a decision on the guilt or innocence of an employee who is alleged to have committed misconduct.

**THIS IS IMPORTANT:** The investigator should avoid making conclusions as to whether an employee can be charged with misconduct, whether those charges can be sustained, and whether discipline is appropriate. The investigator should make factual findings that the Agency can rely on in making decisions relating to whether or not to impose discipline.

- **Department of the Interior, Bureau of Reclamation Directives and Standards HRM 11-01: Telework**

5. Telework Principles. Telework is not a universal employee benefit; however, Reclamation will provide the opportunity to telework to all eligible employees in positions authorized for participation...Telework decisions will be based on management needs and performance.

- A. An eligible employee's decision to participate in Reclamation's telework program is entirely voluntary, unless telework is, a condition of employment.
- B. The teleworker may terminate teleworking without cause and at any time, unless telework is a condition of employment. The supervisor's decision to deny

or terminate teleworking must be based on business needs or employee performance, in accordance with requirements of this D&S, and not personal reasons.

7. Eligibility to Telework. All employees are eligible for telework unless a specific exception applies.

A. This D&S identifies the following exceptions to eligibility based on the 2010 Telework Act and the Department's Telework Handbook (370 DM 226).

(4) Employees with documented conduct issues as defined by 370 DM 752 (Discipline and Adverse Actions).

C. Periods of ineligibility based on criteria in Paragraph 7 .A. depends on the type of action taken against the employee and whether a non-permanent or permanent document is in the employee's e-OPF.

(1) For non-permanent documents, the prohibition from telework exists until the document is removed.

o **OPM Guide to Processing Personnel Actions March 2017**

Chapter 15 Placement in Nonpay or Nonduty Status [applies to SF-50 for Kelly O'Kell's termination]

Table 15.A. Documenting Placements in NonpayNonduty Status

Rule 18: Suspension that is effected under 5 U.S.C. chapter 75, i.e., under civil service adverse action procedures. NOAC Code: 450. Authority Code: VAC. Authority: 5 USC 7502. Required Remark Code S49. Remark: Reason for suspension: (state reason).

Chapter 31 Separations by Other than Retirement [applies to SF-50 for Kelly O'Kell's 3-day suspension]

4. Documenting Reason(s) for Separation

D. Agency Initiated Separations

(2) Employees with appeal rights.

When an employee serving on an appointment that does afford appeal rights is separated by the agency, the agency must summarize the reason(s) for the action in the Standard Form 50 remarks. The reason(s) must be consistent with any written reason(s) previously given the employee as the basis for his or her separation.

Rule 35: Based on employee's conduct or delinquency after entrance on duty (when work performance is not a factor). NOAC Code: 330. NOA: Removal. Authority Code: V6J. Authority: 5 USC 75 Postappt.

#### **IV.B. Generally Accepted Standards of Practice for EEO Investigations**

In my experience, the following are well-recognized and accepted authorities on the standards of practice for EEO workplace investigations relevant to this case. The practices discussed below are consistent with my experience conducting workplace investigations and are consistent with my observations of investigations conducted by other professionals.

##### **IV.B.1. The Equal Employment Opportunity Commission (EEOC)**

The EEOC is the federal agency charged with enforcing the laws against discrimination and retaliation in the workplace. The EEOC investigates charges of discrimination and issued this guidance for the benefit of its investigators and employers in 1999: *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors*, June 18, 1999. See Section V.C.1. Policy and Complaint Procedure.

##### **IV.B.2. The Association of Workplace Investigators (AWI)**

AWI is a national association whose mission is “to promote and support workplace investigations as a distinct area of expertise and to enhance the quality of workplace investigations.” <http://www.aowi.org/>. As a part of its mission, AWI adopted *Guiding Principles for Conducting Workplace Investigations* (“AWI Guidelines”). AWI also maintains a website with other investigation resources for members and the public.

##### **IV.B.3. The Society for Human Resource Management (SHRM)**

SHRM is an international membership organization devoted to human resource management. It has published numerous articles and conducted numerous presentations on how to conduct workplace investigations. The SHRM website has comprehensive resources for its members on conducting investigations, and preventing retaliation and discriminatory hiring. The SHRM website contains a number of articles regarding how to conduct a thorough investigation. One of its most recent guides is entitled “How to Conduct an Investigation”, July 23, 2015 (“SHRM Investigation Guide”).

##### **IV.B.4. Learned treatises**

There are numerous treatises published on the subject workplace investigations. One that I have used is published by Wiley, a global research company that seeks to “help customers become more effective in the workplace” and “brings to life the ideas and best practices of thought leaders in business, finance, ...workplace learning, management, [and] leadership...”. The treatise is entitled *Investigating Harassment and*

*Discrimination Complaints, A Practical Guide*, by Jan C. Salisbury and Bobbi Killian Dominick, Jossey-Bass/Pfeiffer 2004, (“Salisbury and Dominick, Investigation Guide”). It is described as a “hands-on guide for human resource professionals who are called upon to conduct a legally sound investigation into harassment, discrimination, or retaliation complaints.”

#### **IV.B.5. Internal Policies**

The Department of the Interior policies cited in Section IV.A. above have provisions that are consistent with the standards of practice articulated by the EEOC, AWI, SHRM, and in learned treatises. In addition to discussing the standards in detail, this report will also analyze application of these standards to the Department of the Interior’s investigation of Kelly O’Kell’s complaint.

### **V. DISCUSSION OF APPLICABLE POLICIES AND STANDARDS**

#### **V.A. Expectation: A Thorough Investigation by a Competent, Impartial Investigator**

##### **V.A.1. Generally Accepted Standards of Practice**

According to the Department of the Interior, Bureau of Land Reclamation: Prevention and Elimination of Harassing Conduct: Implementing Procedures [for Department of the Interior Personnel Bulletin 18-01] (April 2018), “All investigations must be conducted swiftly, impartially, and in a manner appropriate to the allegation.”

According to the Department of the Interior Investigator Guide to Conducting Administrative Investigations (December 2017), “If the investigation is assigned to an employee relations specialist (ER Investigator), this should be a different individual than the employee relations specialist who will be assisting the supervisor in taking any potential resulting disciplinary action (the Employee Relations Point of Contact, hereinafter the “ER POC”), so that the ER investigator maintains impartiality while conducting the investigation. It may be helpful to assign an employee relations specialist from a different HR office or region as the ER investigator in order to maximize confidence in the neutrality of the investigative process.”

The standards of practice explain what should be obvious when an employer commits to conducting a full, impartial investigation by a competent investigator. For example, the AWI Guidelines address the reasons that generally prompt an employer to conduct an impartial investigation. According to the Guidelines:

An impartial investigation is generally conducted so that an employer can determine what occurred when there are contested allegations affecting the workplace that involve a potential violation of the employer’s policies, standards, ethics, or the law. The point of an impartial investigation is to provide a fair and impartial process for the complainant and respondent

and to reach reasoned conclusions based on the information gathered.

The AWI Guidelines assume the investigation will include interviews with the complainant and the respondent or alleged wrongdoer. When there is conflict between the witnesses' testimonies, the AWI Guidelines state the complainant and respondent should be provided the opportunity to present their position and to correct or challenge statements which are contrary to their positions. The Guidelines also state that "specific admissions and denials should be sought" on the key issues.

Similarly, in their hands-on guide, Salisbury and Dominick discuss some of the basic expectations that apply to any investigation, namely, that the investigator will interview the complainant and the alleged wrongdoer and will ascertain the "who, what, where, when, and how often" as it relates to each alleged complaint. Salisbury and Dominick, Practical Guide p. 111.

The EEOC guidance on investigating sexual harassment complaints, which applies to any type of EEO investigation, sets forth these basic expectations for any workplace investigation:

...The investigator should question the charging party and the alleged harasser [or person accused of discrimination or retaliation] in detail. The Commission's investigation also should search thoroughly for corroborative evidence of any nature. Supervisory and managerial employees, as well as co-workers, should be asked about their knowledge of the alleged harassment [or discrimination].

#### Effective Investigative Process

An employer should set up a mechanism for a prompt, thorough, and impartial investigation into alleged harassment. As soon as management learns about alleged harassment, it should determine whether a detailed fact-finding investigation is necessary...If a fact-finding investigation is necessary, it should be launched immediately...The complainant should not be involuntarily transferred or otherwise burdened, since such measures could constitute unlawful retaliation...The employer should ensure that the individual who conducts the investigation will objectively gather and consider the relevant facts.

Regarding the selection of the investigator, the AWI Guidelines state that the investigator should be "impartial, objective, and possess the necessary skills and time to conduct the investigation." The Guidelines also state that the investigator should be someone who will be perceived as impartial. And the Guidelines provide that, when an in-house investigation is conducted, "the internal hierarchy of the organization should be considered in order to avoid the fact or perception of bias or compromised objectivity."

## V.A.2. Application of the Standards to the Investigation of Kelly O’Kell’s Complaint

### V.A.2.a. Investigations were not swift

The Department of the Interior allowed 349 days to elapse from the date Kelly O’Kell filed a formal EEO complaint to the date authorization letter was issued to an outside EEO investigator. An additional 183 days elapsed before the Report of Investigation (ROI) was issued. No final decision has been issued to date (1116 days elapsed).

The Bureau of Reclamation started the investigation of Kelly O’Kell’s 08/14/2017 and 10/30/2017 complaints by internal Bureau of Reclamation investigators under the Prevention and Elimination of Harassing Conduct Procedures 29 days/30 days (Bureau of Reclamation standard is within 2 days). The Report of Investigation was not issued until 230 days after the 08/14/2017 complaint and 155 days after the 10/30/2017 complaint.

In contrast, when Kelly O’Kell was the Respondent in the harassing-conduct complaints filed by Karissa Fromm and Barb Gentry, the Bureau of Reclamation hired an external investigator within 11 days; a Report of Investigation was issued within 31 days; and a decision (proposed termination of Kelly O’Kell) was issued within 36 days.

The following chart summarizes the investigations conducted related to Kelly O’Kell and indicates the actual processing time compared to the designated timeframes per EEOC and Department of the Interior/Bureau of Reclamation guidelines:

#	Type: Allegations	Complaint Filed Investigation Started Report Issued Decision Issued	Actual Elapsed Time	Timeframe per EEO/DOI Guidelines
1	EEO Complaint: Non-selection (age) and retaliation for filing complaint	Filed: 08/25/2016 Started: 08/09/2017 Report: 02/08/2018 Decision: None to date	--- 349 days 532 days 1116 days	Investigate within 180 days; final decision 60 days after requested
2	Harassing Conduct Complaint: Ongoing harassment of Kelly O’Kell	Filed: 08/14/2017 Started: 09/13/2017 Report: 04/02/2018	--- 29 days 230 days	HR contact within 3 days; start investigation within 2 days
3	Harassing Conduct Complaint: Ongoing harassment of Kelly O’Kell, plus alleged	Filed: 10/30/2017 Started: 11/28/2017 Report: 04/02/2018	--- 30 days 155 days	HR contact within 3 days; start investigation within 2 days

	NEPA violations by management			
4	Harassing Conduct Complaint: Harassment of Fromm/ Gentry by O’Kell	Filed: 02/26/2018 Started: 03/08/2018 Report: 03/28/2018 Decision: 05/14/2018	--- 11 days 31 days 36 days	HR contact within 3 days; start investigation within 2 days

The only investigation that was conducted “swiftly” by Bureau of Reclamation standards or “promptly” by EEOC standards was the investigation of Kelly O’Kell as the Respondent.

#### **V.A.2.b. Investigations were not impartial**

The investigations were not consistent with the above-cited Department of the Interior policies and basic standards of practice.

In the investigatory interviews for Kelly O’Kell’s 08/14/2017 and 10/30/2017 harassing-conduct complaints, Kip Stover and Nate Shimatsu asked witnesses about Kelly O’Kell’s conduct, as opposed to asking witnesses about whether Kelly O’Kell had been harassed by management based on age or retaliation for protected activity.

The Investigators failed to conduct interviews in a way that would have permitted them to reach an impartial determination on the merits of Kelly O’Kell’s discrimination and retaliation complaints. For example, the Investigators did not ask questions which would have elicited the testimony later provided by Louella Dubois or Stephon Rodgers.

In her 10/20/2018 Declaration, Louella Dubois details several age-related comments made by Clint Wertz. In his 10/22/2018 Declaration Stephon Rodgers stated that, when he was interviewed in 03/14/2018, Hayward Reed refused to identify himself and targeted Kelly O’Kell with leading questions. In his affidavit, Mr. Rodgers states that Kelly O’Kell was always helpful, polite, and professional and did not recall Kelly O’Kell ever being hostile or insubordinate. Similarly, in her 03/21/2018 affidavit, Dawn Morrow testified that Jon Brooks and Clyde Lay were the ones who created a hostile work environment, not Kelly O’Kell.

The Investigators permitted management officials to testify that they “did not recall” saying/doing things that would have been detrimental to them. A skilled investigator would have asked the witnesses to explicitly state whether they denied saying/doing what was alleged.

It is significant that several other employees in the Ephrata Field Office filed EEO complaints alleging disparate treatment based on age against the same management officials. A reasonably skilled and prudent investigator would have documented the existence and particulars of these potential comparators.

### V.a.2.c. Investigators Were Not Impartial

The Bureau of Reclamation's selection of Kip Stover as one of the investigators did not meet complaint procedure assurance that the investigator would be "impartial" and an "uninvolved" Human Resources representative.

Employee and Labor Relations Manager Kip Stover was assisting management in preparing a proposed 3-day suspension of Kelly O'Kell that was issued on the same day (09/14/2017) that she was interviewed by Kip Stover regarding her 08/14/2017 harassment and retaliation complaint against the same management.

Kip Stover was a fact witness and should not have been selected to serve as the investigator. A reasonably skilled and prudent investigator would insist upon interviewing Kip Stover given his role in assisting management with the discipline process.

Hayward Reed, the external independent investigator that Bureau of Reclamation selected to investigate the harassing-conduct complaint against Kelly O'Kell, was not licensed as a practicing attorney or a private investigator in the state of Washington, as required under RCW 18.165. [It should be noted that the Washington Department of Enterprise Services, which manages Master Contract #09514 for Personnel Investigations, interprets the RCW as requiring both attorneys and non-attorneys who conduct workplace investigations to be licensed as Private Investigators.]

The following chart summarizes the investigations conducted related to Kelly O'Kell and indicates whether the selection of the investigator(s) complied with Department of the Interior/Bureau of Reclamation policies:

#	Type: Allegations	Kelly O'Kell's Role	Investigator(s)	Investigator Selection Complied with Department of the Interior Policy?
1	EEO Complaint: Non-selection (age) and retaliation for filing complaint	Complainant	Michael Brown, Workplace Initiatives	Yes, conducted by independent investigator
2	Harassing Conduct Complaint: Ongoing harassment of Kelly O'Kell	Complainant	Kip Stover Nate Shimatsu	No, conducted by Bureau of Reclamation HR investigators involved in disciplining complainant
3	Harassing Conduct Complaint: Ongoing harassment of Kelly O'Kell, plus alleged	Complainant	Kip Stover Nate Shimatsu	No, conducted by Bureau of Reclamation HR investigators involved

	NEPA violations by management			in disciplining complainant
4	Harassing Conduct Complaint: Harassment of Fromm/ Gentry by O’Kell	Respondent	Hayward Reed, Reed & Reed	Yes, but conducted by independent investigator who was not licensed under RCW 18.165

#### **V.A.2.d. HR Department Had a Conflict of Interest**

Kelly O’Kell’s allegations presented Bureau of Reclamation’s Human Resource (HR) department with a potential for a conflict of interest that should have precluded anyone in the department from serving as the investigator of Kelly O’Kell’s complaints.

One of the basic duties of any HR representative is to ensure that managers do not engage in unlawful retaliation when disciplining employees. Both Kip Stover and Nate Shimatsu were actively engaged in assisting management in disciplining Kelly O’Kell.

This was a case for Bureau of Reclamation to hire a neutral, third-party investigator, given that allegations were leveled against managers who were working with HR to discipline and ultimately terminate Kelly O’Kell.

Instead, Kelly O’Kell was issued a proposed 3-day suspension letter (prepared by Kip Stover) the same day she was interviewed by Kip Stover and Nate Shimatsu regarding her 08/14/2017 harassing-conduct complaint.

For most human resource professionals, the decision to discipline Kelly O’Kell while the harassment investigation was in progress violates strong prohibitions against retaliation found in Department of the Interior internal policies and the applicable EEO laws.

#### **V.B. Expectation: The Investigator Will Prepare a Competent, Thorough Report.**

##### **V.B.1. Generally Accepted Standards of Practice**

##### **V.B.1.a. Salisbury and Dominick**

The treatise, *Investigating Harassment and Discrimination Complaints, A Practical Guide*, by Jan C. Salisbury and Bobbi Killian Dominick, Jossey-Bass/Pfeiffer 2004, (“Salisbury and Dominick, A Practical Guide”) addresses subjects consistent with the EEOC, AWI and SHRM guidelines. While Salisbury and Dominick focus on the investigation of allegations of sexual harassment, the principles which they discuss apply to any EEO complaint.

The authors point out that the investigator has a responsibility to make findings and to assess credibility. They recommend that the investigator consider the following

factors:

- the witness' opportunity or capacity to observe,
- the character of the witness or his or her reputation for truthfulness,
- prior inconsistent statements,
- bias, i.e., is the witness impartial or are his or her statements self-serving,
- contradiction and consistency,
- inherent improbability,
- demeanor, and
- corroborating evidence.

Salisbury and Dominick, A Practical Guide p. 117-120.

### **V.B.1.b. AWI Guidelines**

The Guidelines provide that the written report shall state the scope of investigation and the issues; shall explain the investigation process; shall discuss the evidence; identify the employer policies that are involved; the evidentiary standard; and shall state the investigator's findings and conclusions.

According to the Guidelines, the investigator should have a clear understanding of the standard to be used in evaluating the evidence, and should weigh the evidence in accordance with the standard. The Guidelines state that the investigator "should strive in good faith to make reasoned findings in accordance with the following generally accepted standard: Whether after weighing all the evidence it is more likely than not that the alleged incident occurred."

### **V.B.2. Application of Standards to the Department of the Interior's Investigation**

To date, the Department of the Interior has not issued a final decision letter regarding Kelly O'Kell's 08/25/2016 complaint, based on the Report of Investigation issued 02/08/2018.

Nate Shimatsu did not include an assessment of the witnesses' credibility in his 04/02/2018 report. This is noteworthy since his findings are based on crediting certain witnesses' statements over others.

Hayward Reed did not include an assessment of the witnesses' credibility in his 03/28/2018 report. This is noteworthy since Kelly O'Kell alleged ulterior motives for the complainants (Karissa Fromm and Barb Gentry). Hayward Reed did not draw factual conclusions or make findings that factored in testimony from Stephon Rodgers or Dawn Morrow that supported Kelly O'Kell's statements.

## VI. Non-Compliance with Bureau of Reclamation's Anti-Retaliation Policies

### VI.A. Department of the Interior, Bureau of Land Reclamation: Prevention and Elimination of Harassing Conduct: Implementing Procedures [for Department of the Interior Personnel Bulletin 18-01] (April 2018)

#### 5. Policy

Reclamation is committed to providing a work environment free of discrimination and harassment based...age...Reclamation also will not tolerate adverse treatment of employees because they report harassing conduct or provide information related to such complaints. The purpose of the Department's policy and these procedures is to ensure that Reclamation takes immediate and appropriate corrective action, including appropriate disciplinary action, to eliminate harassing conduct regardless of whether the conduct rises to the level of a violation of law. Therefore, the goal of the Department's policy and these procedures is to address harassing conduct at the earliest possible stage, before it becomes "severe or pervasive," i.e., harassment within the meaning of anti-discrimination law.

#### B. Prohibited Retaliatory Conduct

It is a violation of the Department's policy and these procedures to retaliate against employees who engage in protected activity under these procedures. *Protected activity* includes reporting harassing, discriminatory, or retaliatory conduct; filing a claim of harassment; providing evidence in any investigation; or intervening to protect others who may have suffered harassing, discriminatory, or retaliatory conduct. A supervisor/manager may not fire, demote, harass, or otherwise take any personnel action against an individual for reporting an allegation of misconduct under these procedures.

It is important that supervisors/managers protect employees who report alleged harassing conduct, and do not take any retaliatory personnel action against these individuals in order to deter the employee from reporting harassing conduct or filing a complaint. A supervisor/manager found to have engaged in retaliation will be subject to disciplinary action.

The following examples are a non-exhaustive list of actions that would be prohibited retaliation if they were taken because of, or were motivated by, an employee's protected activity: transferring the alleged victim or a witness against their will, ignoring or not communicating with the alleged victim or a witness, directing verbal or physical abuse towards the alleged victim or a witness, or not selecting the alleged victim or a witness for an employment opportunity.

Engaging in protected activity under these procedures does not shield an employee from all personnel actions. Supervisors/managers can take personnel actions, including discipline up to removal from Federal service, if they are motivated by *non-*

*retaliatory and non-discriminatory* reasons that would otherwise result in such consequences (e.g., transferring an employee for legitimate business reasons or closely monitoring the performance of an employee on a Performance Improvement Plan).

## **VI.B. Application of Standards to Kelly O’Kell’s Retaliation Complaint**

### **VI.B.1. Discipline following her initial EEO Complaint**

After Kelly O’Kell complained of age discrimination and filed an informal EEO complaint on 05/25/2016, Anthony Ortiz suspended Kelly O’Kell from teleworking and issued her a Letter of Reprimand dated 07/21/2016.

After Kelly O’Kell complained of age discrimination, retaliation, and harassing conduct to Lorri Lee on 08/14/2017, Clyde Lay issued her a Proposed Suspension letter dated 09/14/2017.

After Kelly O’Kell complained that the agency failed to address her EEO issues in Nate Shimatsu’s Investigation Summary and Closeout dated 04/02/2018, Marc Maynard issued her a Proposed Termination letter dated 05/14/2018.

The Investigations did not thoroughly investigate or definitively conclude that management’s actions were non-discriminatory or non-retaliatory.

## **VII. CONCLUSION**

There are generally accepted human resource and investigation standards of practice that apply when an employee complains of discrimination and retaliation. Similarly, there are recognized standards employers follow to ensure compliance with their EEO obligations.

The Department of the Interior did not follow its own policies and generally accepted standards when responding to and investigating Kelly O’Kell’s EEO complaint. There was sufficient evidence known and available to Department of The Interior for it to make findings and conclusions regarding the merits of Kelly O’Kell’s complaint.

The Bureau of Reclamation did not follow its own policies and generally accepted standards regarding the selection of an impartial investigator or a timely and complete investigation of Kelly O’Kell’s EEO, harassment, and retaliation complaints.



Deborah Diamond

Dated: 09/20/2019

## **Exhibit A**

### **Related Experience**

#### **Federal Government Clients**

- Federal investigation clients included: U.S. Geological Survey, Department of the Treasury, Internal Revenue Service, Department of Energy (Bonneville Power Administration and Hanford Nuclear Site), U.S. Postal Service, and Federal Emergency Management Agency (FEMA).
- Federal mediation clients included: Equal Employment Opportunity Commission, Department of the Treasury, Internal Revenue Service, U.S. Postal Service, Department of the Navy, Department of Homeland Security, U.S. Forest Service, Social Security Administration, and the Department of Agriculture.

#### **Prior Cases with the Department of the Interior**

As an independent investigator (subcontractor for EEONet), I conducted three investigations for the Department of the Interior U.S. Geological Survey 2012-2014. Authorization letters were issued within 60-90 of the initial formal complaint.

1. Alleged discrimination based on sex and age; reprisal for prior EEO activity.
2. Alleged discrimination based on religion; reprisal for prior EEO activity.
3. Alleged discrimination based on sex and national origin; reprisal for prior EEO activity.

#### **Prior Testimony**

- I have been deposed as the independent investigator on several occasions, but all cases were settled before trial.
- Depositions included: State of Washington (Green River College), Kitsap County, and the Port of Seattle.

#### **Published Reports**

- Under the Washington State Public Records Act, my redacted report regarding allegations of sexual harassment by the Commissioner of the Employment Security was published by the Seattle Times 03/15/2018  
<https://www.seattletimes.com/seattle-news/politics/washington-agency-leader-resigns-after-investigation-into-his-workplace-behavior/>
- A summary of my report re: inappropriate behavior and harassment by the President of Bates Technical College was published by the Tacoma News Tribune 02/16/2018  
<https://www.thenewstribune.com/news/local/article200543359.html>

**Statement of the Compensation**

- I am being compensated for my services as an expert witness at the rate of \$200 per hour.

## **Exhibit B**

### **Documents Reviewed**

1. Complaint
2. Answer
3. Court Scheduling Order
4. Stipulated Protective Order & Consent to be Bound
5. Defense Responses to Plaintiff Discovery Requests and Discovery Documents. (USA 1-7673; EEO 1-196)
6. Initial Disclosure documents.
7. Plaintiff's Responses and Supplemental Responses to Agency Discovery Requests