

UNITED STATES DEPARTMENT OF AGRICULTURE

PART 1 of 6

REPORT OF INVESTIGATION

TITLE:

[Redacted]

Research Plant Pathologist
GS-0434-13
U.S. Department of Agriculture
Agricultural Research Service
Pacific West Area
Subarctic Agricultural Research Unit
University of Alaska Fairbanks
Fairbanks, Alaska 99775

CASE NUMBER:

ARS-2008-00542

CONTRACTOR:

Morales & Associates, LLC

INVESTIGATOR:

Martha M. Tsutsui

BASES AND CLAIMS:

Sex (female) + Disparate Treatment
Reprisal – unspecified prior EEO activity or
opposition of discrimination)

HOME ADDRESS:

[Redacted]

Fairbanks, Alaska 99712

REPRESENTATIVE:

Mr. Joe Josephson
Josephson & Associates
912 W. Sixth Avenue
Anchorage, AK 99501

I. CLAIMS IN THIS COMPLAINT

“Whether the agency subjected the complainant to discrimination and harassment, based on sex (female) and reprisal (unspecified prior EEO activity or opposition of discrimination) when:¹

1. On February 26, 2008, she was issued a letter of caution;
2. She was subjected to threats of termination (dates not provided);
3. She was subjected to public humiliation (dates not provided);
4. She was subjected to disrespectful behavior (dates not provided)

¹¹ The complainant may provide specific dates during the investigation, some allegations may be considered as background, while others may be deemed untimely.

5. She was subjected to open hostility (dates not provided);
6. She was subjected to intimidation (dates not provided);²
7. She was denied the opportunity to act as Research Leader (dates not provided)
8. She was subjected to having her peer-reviewed publications downgraded to research notes (dates not provided);
9. She was not allowed to hire permanent technicians (dates not provided)
10. She was not allowed to hire technicians at GS-7 level (dates not provided);
11. She received unfair performance appraisals (dates not provided)
12. On September 5, 2008, she was threatened for communicating EEO issues to various other people including the designated contact person for Civil Rights and Workplace Violence issues?"³

II. SUMMARY

Harassment (sex – female)

Whether complainant belongs to a protected group is addressed at Exhibits 1 and 9.

Whether complainant was subjected to ongoing harassment (non-sexual) is addressed at Exhibits 9 and 11.

Whether the harassment complained of was based on sex (female). But for the fact of this basis, she would not have been the object of harassment is addressed at Exhibit 9.

Whether the harassment complained of affected a term, condition, or privilege of employment is addressed at Exhibit 9.

Whether complainant can show that the employer knew or should have known of the harassment in question and failed to take prompt remedial action is addressed at Exhibit 9.

² Agency Acceptance Letter dated September 22, 2008 accepted Claims 1 through 6.

³ Agency Acceptance Letter dated November 24, 2008 amended the accepted claims to include claims 1 through 12.

Disparate Treatment (sex – female)

Whether complainant is a member in a protected group is addressed at Exhibits 1 and 9

Whether complainant was treated differently from similarly situated employees not in her protected group is addressed at Exhibit 9.

Whether compared employees are in the same chain of command or same work unit as complainant is addressed at Exhibit 7

Management Responses

Management's reasons for its treatment of complainant and compared employees is addressed at Exhibits 11 and 12

Pretext

Whether there is direct or circumstantial evidence that the agency's reason for its treatment of complainant is pretextual is addressed at Exhibits 9, 11 and 12.

Reprisal – Unspecified prior EEO activity or opposition of discrimination

Whether complainant previously engaged in protected activity or opposed unlawful discrimination is addressed at Exhibits 1 and 9.

Whether the agency was aware of complainant's activity is addressed at Exhibits 11 and 12.

Whether complainant was contemporaneously or subsequently adversely affected by some action of the agency is addressed at Exhibits 9 and 11.

Whether some nexus exists between complainant's activity and the adverse employment decision is addressed at Exhibit 9

Rebuttal

What did the agency say was the reason for the adverse employment decision is addressed at Exhibits 11 and 12

Pretext

Whether there is direct or circumstantial evidence that the agency's reason for the employment decision is pretextual is addressed at Exhibits 9, 11 and 12.

III. DESCRIPTION OF INVESTIGATION

Place of Investigation: Fairbanks, Alaska
Palmer, Alaska
Beltsville, Maryland
Albany, California

Dates of Investigation: October 2, 2008 to March 6, 2009

Investigative Method Used: Telephone interviews

IV. DESCRIPTION OF EXHIBITS

VOLUME I (Exhibits 1 through 8)

- Exhibit 1: Formal complaint of discrimination hereinafter complainant, dated June 16, 2008
- a. Complainant's EEO Complaint Timeline dated September 30, 2008
- Exhibit 2: EEO Counselor Report dated June 4, 2008 with attachments
- a. Notice of Right to File letter dated May 20, 2008
 - b. Extension of 30-day EEO Period letter dated May 1, 2008
 - c. Letter of Caution letter issued by Alberto Pantoja, Research Leader to complainant dated February 26, 2008
 - d. Complainant's Performance Plan for the period January 1, 2008 to September 30, 2008
 - e. SF-52, Request for Personnel Action, Recruit for Biological Science Technician, GS-5/6
 - f. Position Description, Biological Science Technician, GS-404-6
 - g. Complainant's Timeline of Interactions with Alberto Pantoja from September 1, 2004 through April 9, 2008
- Exhibit 3: Letter acknowledging receipt and acceptance of discrimination complaint to complainant from Kenneth Baisden, Sr., Division Chief, Employment Complaints Division, USDA, Washington, DC, dated September 22, 2008
- Exhibit 4: Amended letter acknowledging receipt and acceptance of discrimination complaint to complainant from Kenneth Baisden, Sr., Division Chief, Employment Complaints Division, USDA, Washington, DC, dated November 24, 2008

- Exhibit 5: Letter of Authorization to the investigator dated October 10, 2008⁴
- Exhibit 6: Letter from Complainant to Division Chief, Office of Adjudication and Compliance, USDA, Washington, DC stating acceptance letter dated September 22, 2008 inappropriately neglected to include allegations 7 through 12, dated September 30, 2008 (Source: Complainant)
- Exhibit 7 SARU Employee Listing dated September 28, 2008
Workforce Profile, ARS, SARU, Fairbanks, Alaska as of February 28, 2004
Workforce Profile, ARS, SARU, Fairbanks, Alaska as of February 29, 2008⁵
- Exhibit 8: Relationship of Affiants Chart (Source: Investigator)

VOLUME II (Exhibit 9 and 10)

- Exhibit 9: Affidavit of Loretta M. Winton, hereinafter complainant, female, Research Plant Pathologist, GS-0434-13, U.S. Department of Agriculture (USDA), Agricultural Research Service (ARS), Pacific West Area (PWA), Subarctic Agricultural Research Unit (SARU), University of Fairbanks Alaska (UAF), Fairbanks, Alaska, dated January 3, 2009 with attachments
- a. Attachments Part 1 (1 - 15)
 - b. Attachments Part 2 (1 - 14)
 - c. Attachments Part 3 (1 - 4)
- Exhibit 10: Complainant's Rebuttal Statement

VOLUME III (Exhibits 11 through 37)

- Exhibit 11: Affidavit of Alberto Pantoja (male), Research Leader/Location Coordinator, Research Entomologist, GS-0414-15, USDA, ARS, PWA, SARU, UAF, Fairbanks, Alaska, dated February 2, 2009, with attachments
- a. E-mail from Alberto Pantoja to SARU staff, Subject: Area Guidance on Recruitment Actions, dated April 19, 2005

⁴ Exhibits 1 through 5 were received in the case file with request for investigation.

⁵ Source of all documentation is Helena Thompson, EEO Specialist, ARS, Office of Outreach, Diversity & Equal Opportunity, Washington, DC, unless otherwise indicated.

- b. E-mail from complainant to Alberto Pantoja, Subject FW: Technician, dated November 1, 2004
- c. E-mail from complainant to Alberto Pantoja, Subject: KSA's, dated November 22, 2004
- d. E-mail from Franky Reese to complainant, Subject: FW Tech vacancy – 7PA616 52 # 04-5341-0117, dated February 15, 2007
- e. E-mail from complainant to Alberto Pantoja, Subject: FW – final review of tech vacancy, dated March 2, 2005
- f. E-mail from Janis Contento to Alberto Pantoja, Subject: Technician Announcement, dated April 11, 2007
- g. E-mail from complainant to Alberto Pantoja, Subject: Cooperative Research, dated November 1, 2004
- h. E-mail from Franky Reese to Alberto Pantoja, Subject: Tech position, dated November 2, 2004
- i. E-mail from Alberto Pantoja to complainant, Subject: Tech Hiring, dated November 9, 2004
- j. E-mail from Carol E. Lewis to Alberto Pantoja, Subject: Meeting April 28, 2008, dated April 7, 2008
- k. E-mail from Alberto Pantoja to complainant, Subject: Interaction with Staff members, dated August 28, 2008
- l. E-mail from Janis Contento to complainant, Subject: Property Information Request, dated August 18, 2008
- m. E-mail from complainant to Kelly Martin, Subject: Key to room 335, dated June 17, 2005
- n. E-mail from complainant to Alberto Pantoja, Subject: Outside activities and 2005 performance plan, dated November 17, 2005
- o. E-mail from Alberto Pantoja to complainant, Subject: Sampling in Palmer, dated August 12, 2005
- p. ARS, Agricultural Research Information System (ARIS) Publication Type by Author, Alberto Pantoja, Nancy Robertson, , and complainant, dated January 15, 2009
- q. E-mail from Andrew Hammond to Nancy Robertson, Subject: Publication Conflict, dated November 21, 2006
- r. USDA, ARS, SARU, ARS-115 Form Instructions Requirements
- s. E-mail from Alberto Pantoja to SARU staff, Subject: Guidance for Performance Appraisal Processing for the Cycle Ending March 31, 2008 and Performance Plans 2008:Action Due April 30, 2008, dated March 14, 2008
- t. E-mail from Juli Philbert to SARU staff, Subject: ARIS reminders, dated December 15, 2008
- u. Memo from Kit Hoyle, Chief, REE Services Branch to various, Subject: Guidance for Performance Appraisal and Award

Processing for the Cycle Ending September 30, 2008, dated August 28, 2009

- v. USDA, Performance Appraisal form
 - w. E-mail from complainant to Alberto Pantoja, Subject: Invoice from Oregon State, dated December 8, 2004
 - x. Cooperative Resolution Program, Resolution Agreement between complainant and Alberto Pantoja, dated September 8, 2006
- Exhibit 12: Affidavit of Andrew C. Hammond (male), Area Director, ES-0401-01, USDA, ARS, PWA, Albany, California, dated February 26, 2009
- Exhibit 13: Affidavit of Janis Contento (female), Administrative Officer, GS-341-12, USDA, ARS, PWA, SARU, UAF, Fairbanks, Alaska, dated February 15, 2009 with attachment
- a. E-mail dated February 24, 2009
- Exhibit 14: Affidavit of Cynthia K. Bower (female), Research Food Technologist, GS-1382-12, USDA, ARS, PWA, SARU, UAF, Fairbanks, Alaska, dated February 2, 2009
- Exhibit 15: Affidavit of Nancy L. Robertson (female), Research Plant Pathologist, GS-0434-12, USDA, ARS, PWA, SARU, Palmer, Alaska, dated February 3, 2009
- Exhibit 16: Affidavit of Jeffery Conn (male), Research Agronomist, GS-0471-13, USDA, ARS, PWA, UAF, SARU, Fairbanks, Alaska, dated February 10, 2009
- Exhibit 17: Affidavit of Peter J. Bechtel (male), Research Food Technologist, GS-1382-15, USDA, ARS, PWA, UAF, SARU, Fairbanks, Alaska, dated March 6, 2009
- Exhibit 18: Affidavit of Dennis J. Fielding (male), Research Entomologist, GS-0414-13, USDA, ARS, PWA, UAF, SARU, Fairbanks, Alaska, dated February 13, 2009
- Exhibit 19: Affidavit of Steven S. Seefeldt (male), Research Agronomist, GS-0471-14, USDA, ARS, PWA, UAF, SARU, Fairbanks, Alaska, dated February 3, 2009
- Exhibit 20: Affidavit of Cynthia J. Prucha (female), Human Resources Specialist, GS-0201-12, USDA, ARS, Headquarters/Administration & Financial Management/Human

- Resources Division, Western Services Branch, Beltsville, Maryland, dated February 5, 2009
- Exhibit 21: USDA, ARS, SARU, ARS-115 Form Instructions Requirements, Request to Submit Manuscript for Publication
- Exhibit 22: Section 6, SY Publications policy, undated
- Exhibit 23: Position Description, Biological Science Technician, GS-0404-07
- Exhibit 24: Position Description, Research Plant Pathologist, GS-0434-13
- Exhibit 25: Performance Appraisal, complainant, for periods ending, December 31, 2005, December 31, 2006, and December 31, 2007
- Exhibit 26: Memorandum from Dwayne R. Buxton, Director, PWA, to Research Leaders, et al, Subject: Area Guidance on Recruitment Actions, dated April 25, 2005
- Exhibit 27: SF-52, Request for Personnel Action, recruitment for various technician positions, various grades, various dates
- Exhibit 28: SF-50, Notification of Personnel Action, various selectees, various positions, various grades, various dates.
- Exhibit 29: Disciplinary Action taken against SARU employees by Alberto Pantoja from 2003 to 2008
- Exhibit 30: List of designated Acting Research Leader from April 2003 to October 2008 and Rotation Plan, SARU, dated July 2008
- Exhibit 31: USDA, Departmental Regulation 4070-735-001, Employee Responsibilities and Conduct, dated October 4, 2007
- Exhibit 32: USDA, ARS, Policies and Procedures, Title: Misconduct, Discipline and Adverse Action, Number 461.5, dated August 21, 1993
- Exhibit 33: Agency's FY 2008 Anti-Harassment Policy dated January 29, 2009
- Exhibit 34: USDA, ARS, Policies and Procedures, Title: Preventing Workplace Violence, Number 122.1, dated July 21, 2000
- Exhibit 35: USDA, ARS, Policies and Procedures, Title: ARS Performance Appraisal System, dated May 21, 1992

Exhibit 36: Investigator's Memo for the Record dated March 2, 2009

Exhibit 37: Investigator's Document Request with Agency's responses

V. **BACKGROUND STATEMENT**

➤ **Complainant's Contentions**

Dr. Loretta M. Winton (female), hereinafter **complainant**, Research Plant Pathologist, GS-0434-13, U. S. Department of Agriculture (USDA), Agricultural Research Service (ARS), Pacific West Area (PWA), Subarctic Agricultural Research Unit (SARU), University of Alaska Fairbanks (UAF), Fairbanks, Alaska has been in her present position for four years and six months, since June 3, 2004. She has been a Federal employee for the same period of time. Her immediate supervisor is Dr. Alberto Pantoja, Research Leader (RL). Dr. Pantoja has been her immediate supervisor since working for SARU. She states Dr. Pantoja as the RL handles the administrative paperwork for the unit. She states he has no background in plant pathology, is not qualified to supervise her in this area, and is extremely aggressive, unsupportive, and hostile. Her second line supervisor was Dr. Andrew Hammond, Associate Area Director until January 2008. Dr. Hammond is now the Area Director and due to "matrix management" she has never been told directly who her second level supervisor is, despite direct inquiries at new scientist (SY) training. She states she has communicated EEO related difficulties with Dr. Pantoja to Dr. Hammond and Dr. Dwayne Buxton (former Area Director until January 2008 on numerous occasions. She further states in an affidavit dated January 13, 2009 to the following in substance (Exhibit 9):

Complainant states Dr. Pantoja has set the tone in the Unit to be punitive, hostile, isolating, fear-driven and discriminatory against women scientists. She states he does not bully, micromanage, and hinder the male scientists to this degree. Complainant refers to numerous grievances and communiqué's that the agency knew or should have known of the harassment in question and failed to take prompt remedial action (Exhibits 9a, 9b, and 9c). She states the harassment has affected a term, condition, or privilege of employment because there has been a loss of annual bonuses (from inequitable appraisal ratings); discriminatory performance plans (with publication requirements that impacted her specifically); denied a workplace free of discrimination; forced to witness discrimination against other women (which is a form of harassment itself); deprived of resources provided to other SY's (additional technical support, permanent and higher wage technical support); and devalued in front of her peers.

Complainant states the timeline interactions with Dr. Pantoja (Exhibit 1a) describes in detail her prior EEO activity. She opposed the discriminatory practices when she filed numerous grievances and other communiqué's claiming discrimination and harassment and thereby brought the discriminatory behavior of Dr. Pantoja to the attention of upper management and human resources. She discussed the discriminatory behavior of Dr. Pantoja with coworkers. Dr. Pantoja has several times tried to hinder opposition to his

discriminatory practices (January 15, 2009; October 26, 2005, February 20, 2008, August 28, 2008, September 5, 2008) and threatened her performance appraisals and continued employment for communicating EEO issues to other people (February 20, 2008 and August 28, 2008). The latest threat (September 5, 2008 with Janis Contento in witness) included the SARU designated contact person for Civil Rights and Workplace Violence issues (Janis Contento) and Dr. Andrew Hammond, Area Director.

Claim 1: "On February 26, 2008, you were issued a letter of caution."

Complainant states Dr. Pantoja issued her a Letter of Caution on February 26, 2008. He asserted that she contacted the Human Resources Division and that as a result of her communication with Cindy Prucha, Human Resources Specialist, her technician was hired at a higher promotion potential (GS-7) than what was approved (GS-6) in the Annual Resource Management Plan System (ARMPS) (Exhibit 9a).

She responded to the letter by e-mail on February 27, 2008. Her response clearly demonstrated that she did not initiate contact with Ms. Prucha; rather she contacted her at the request of Dr. Pantoja. She also demonstrated that Dr. Pantoja himself, as well as Ms. Contento, indicated to her that the Full Promotion Potential of her technician was to remain GS-7, as it was for her prior technician. At no time was she informed that the position had been downgraded.

She is not aware of any policies or procedures in place for contacting persons not in her chain of command. She states Dr. Pantoja and Ms. Contento were both kept "in the loop". She did not contact Ms. Prucha. Ms Prucha called her and e-mailed her. She merely replied to Ms. Prucha's requests. She also had several communications with Dr. Pantoja before and after her contacts from Ms. Prucha.

She states male scientists are allowed permanent technicians at higher FPL than are female scientists (Dr. Nancy Robertson's technician is an exception because both her position and her tech position were created prior to Dr. Pantoja's arrival in Alaska). At no time was she informed that her technician position had been downgraded, while those for male scientists were being upgraded. Jeff Conn, Weed Scientist and Steve Seefeldt, Weed Scientist both got permanent FPL to GS-7, despite being in the same program as her. Joe Kuhl also got a FPL GS-7 technician authorized by Dr. Pantoja and even supervises extra technicians. This gave Dr. Kuhn a decided advantage for his research, productivity, and promotion potential. Male scientists were also allowed to write their own very specific KSA questions. Dr. Pantoja required the women scientists KSA's to be very general. Dr. Pantoja also required women scientists to interview technician candidates by committee. He did not require the male scientists to do the same.

She states the only way a position can be created and authorized for any particular GS level or term is via a SF-52, Request for Personnel Action. She states to try to scape-goat someone else's mistake on her, who is not a fund holder and has no authority to authorize hiring, is absurd. Ms. Contento, Administrative Officer, provided her a copy of the SF-