



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of Federal Operations
P.O. Box 77960
Washington, DC 20013

[REDACTED]
Wilma R.,¹
Complainant,

v.

Pete Buttigieg,
Secretary,
Department of Transportation
(Federal Aviation Administration),
Agency.

Appeal No. 2023003301

Agency No. 2022-29615-FAA-06

DECISION

Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's April 17, 2023 final decision concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. For the following reasons, we REVERSE the Agency's final decision.

ISSUES PRESENTED

The issues presented concern whether the Agency subjected Complainant to discrimination based on sex (female) when she was sexually harassed by an Aviation Medical Examiner and had details of the examinations disclosed by a management official.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as an Air Traffic Control Specialist at the Agency's Northwest Mountain District Air Traffic Control Tower in Hillsboro, Oregon.

¹ This case has been randomly assigned a pseudonym which will replace Complainant's name when the decision is published to non-parties and the Commission's website.

On October 15, 2022, Complainant filed an EEO complaint alleging that the Agency discriminated against her based on sex (female) when:

1. On June 26, 2022, an Aviation Medical Examiner (the Examiner) required Complainant to disrobe in front of him, offered no gown, used sandpaper to prep her skin, and took a long time to complete an electrocardiogram (EKG).
2. On June 29, 2022, and July 7, 2022, a coworker informed Complainant that a management official informed her coworkers of Complainant's report of sexual harassment allegations and disclosed details of the examination to male coworkers.

The investigation revealed the following pertinent information.

On June 26, 2022, Complainant met with an Aviation Medical Examiner (the Examiner) for an Agency mandated physical examination. The Examiner was on a list of recommended medical providers that could be used by employees for their physical examinations. However, the Examiner was not a federal employee. As part of the examination, Complainant was required to undergo an electrocardiogram (EKG). Report of Investigation (ROI). at 111-112; 116; and 142.

Complainant recalled that when she arrived, the Examiner was the only one in the clinic. During the appointment, Complainant asserted that the Examiner asked her to completely undress, refused to leave the room, did not provide a gown, and did not allow her to have a chaperone present in the room. Complainant informed the Examiner that she was uncomfortable with the situation, but he responded that, "we need to get the exam done." Complainant stated that the Examiner then sandpapered her chest to get a good contact with the electrodes, and that the procedure took longer than usual because the machine was old. Complainant stated that the situation made her feel incredibly uncomfortable and caused her to have a lot of anxiety when seeking medical care.

Complainant stated that upon leaving the appointment, she reported the incident to her supervisor (female) via text message. During their exchange, the Supervisor shared with Complainant that the Examiner had also asked her to disrobe and remain without a gown. ROI at 137. They also expressed surprise about the advanced age of the Examiner and the age of the EKG machine that he used. ROI at 137. Complainant later met the Supervisor in person to discuss the situation. The Supervisor asked Complainant to email the Flight Surgeon's Office with a statement, and Complainant later did so. ROI at 111-112; 116.

On June 28, 2022, the Supervisor emailed the Air Traffic Manager (the Manager), who was Complainant's second line supervisor, and informed him about the incident. The Supervisor also reported the incident to the District Aviation Medical Examiners (AME) office. The Supervisor recommended that the Examiner be removed from the list of doctors that employees can choose for their physical examinations. The AME Office subsequently initiated an investigation into the Examiner's conduct and ultimately removed him from the list on August 26, 2022.

According to Complainant, on June 29, 2022, the Air Traffic Control Specialist (the Specialist 1), who was one of her coworkers, approached her and informed her that the Supervisor had shared details about Complainant's physical examination to the males in the control tower. Complainant subsequently started getting comments and questions from her coworkers such as, "she's [i.e., the Supervisor] saying you had your boobs out and there was no gown," and people asked if it was true that she was "topless and alone with the [Examiner]". Complainant recalled that others allegedly shamed her for staying and insinuated that inappropriate non-exam related activities happened during her procedure. Complainant asserted that the situation increased her anxiety, caused her to take sick leave to further avoid discussions of the event, caused her to leave work early, and she sought therapy to help her cope. Complainant believed that the Supervisor told the story as a "fun story" where Complainant was the butt of the joke. ROI at 113-114.

The Supervisor acknowledged that she talked to others with upcoming exams to warn them that the Examiner was old, using old equipment, and did not complete the required paperwork. The Supervisor also acknowledged that she may have said the Examiner was inappropriate during exams, but she did not recall sharing the details of Complainant's examination with subordinates. However, she acknowledged that she told the Management and Program Assistant (the Assistant) that the Examiner was inappropriate, and asked the Assistant to try to remove the Examiner so others would not choose him for their physical examinations. The Supervisor emphasized that it was not her intent to make jokes of the situation, and that she took the matter very seriously. ROI at 130-132.

The Specialist 1 confirmed that on June 29, 2022, he was in the office with the Assistant and another coworker when the Supervisor asked the Assistant to report the Examiner because he was inappropriate with Complainant. Someone asked what happened, and the Supervisor detailed that the Examiner was inappropriate with Complainant during a procedure. Specifically, that Complainant was alone in the room with the Examiner who used sandpaper on her skin in order to use the EKG machine. He noted that the Supervisor appeared angry at the Examiner, and was trying to resolve the problem, but at the same time appeared to be gossiping about the situation. The Specialist 1 stated that it was inappropriate for the Supervisor to share the details of Complainant's exam. The Specialist 1 sought Complainant out to inform her what happened, and that Complainant responded with disbelief, shock, upset, angry, and was clearly hurt. Two additional Air Traffic Control Specialists (Specialists 2 and 3) also recalled that the Supervisor told several people working in the tower about Complainant's medical exam, namely that Complainant got sandpapered on the chest for the EKG, that she was alone with the Examiner, and had no chaperone present. ROI at 167-168; 172. Specialist 3 added that she noticed that the Supervisor disseminated information about Complainant's examination to only the men. ROI at 173.

The Manager stated that he was not aware of Complainant's allegations regarding the Supervisor allegedly sharing details with her coworkers until he was contacted by the EEO Counselor on August 1, 2022. The Manager stated once he learned of the allegations, he went to the Supervisor and told her to stop immediately. ROI at 127; 142-145; 153.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). In accordance with Complainant's request, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b), which concluded that Complainant failed to prove that the Agency subjected her to a hostile work environment and discrimination as alleged.

Complainant then filed the instant appeal.

CONTENTIONS ON APPEAL

On appeal, Complainant argues that it was clear that she had established a prima facie case of harassment and that the Agency's decision should be overturned. Complainant contends that she had proven that she was sexually harassed by the Examiner. Additionally, Complainant asserts that there is a basis for imputing liability to the Agency. Complainant acknowledges that the Supervisor promptly reported the Examiner, which eventually led to his removal from the physician's list. However, she asserts that after she reported the sexual harassment to the Supervisor, the Supervisor harassed her by disseminating inappropriate gossip to her male coworkers. Noting that the Supervisor's actions have caused her to have extreme anxiety, and embarrassment, she states that she has had to take sick leave to avoid her coworkers and seek therapy. Complainant argues that the Supervisor's disclosure and continued gossip clearly exposes the Agency to liability.

The Agency opposes the appeal and argues that the Examiner's actions did not constitute sexual harassment and merely reflected an older doctor using the methods taught to him when using an older, less-reliable EKG machine. Furthermore, the Agency argues that the Supervisor disseminated information about Complainant's examination to the Assistant, who had a need to know, as he had been assigned to schedule employees for physicals. Ultimately, the Agency asserts that while Complainant successfully demonstrated her inclusion in a protected class, she failed to present sufficient evidence that any of the incidents identified as part of her hostile work environment claim had a discriminatory motive based upon her sex.

STANDARD OF REVIEW

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the Agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, at Chapter 9, § VI.A. (Aug. 5, 2015) (explaining that the de novo standard of review "requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker," and that EEOC "review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission's own assessment of the record and its interpretation of the law").

ANALYSIS

Agency Liability for Non-Employee Harassment

In order to establish a prima facie case of sexual harassment, a complainant must prove, by a preponderance of the evidence, the existence of five elements: (1) that she is a member of a statutorily protected class; (2) that she was subjected to unwelcome conduct related to her sex; (3) that the harassment complained of was based on her sex; (4) that the harassment had the purpose or effect of unreasonably interfering with her work performance and/or creating an intimidating, hostile, or offensive work environment; and (5) that there is a basis for imputing liability to the employer. Celine B. v. Dep't of Navy, EEOC Appeal No. 2019001961 (Sept. 21, 2020); see also Enforcement Guidance on Harassment in the Workplace, EEOC Notice No. 915.064 (April 29, 2024) (hereinafter referred to as the “Harassment Guidance”).

Initially, we find that Complainant established a prima facie face of sexual harassment regarding the conduct of the Examiner. The record demonstrates that: Complainant is female; she was subjected to unwelcome conduct and harassment related to her sex as she was required to be naked for the exam without the provision of a requested robe, and having her chest sanded by the Examiner, whose past practices with females suggest that this was not an isolated incident; which clearly created a hostile/offensive work environment since the exam was required for work; and there is a basis for imputing liability as the Agency required the exam for her employment.

Ultimately, however, we do not find the Agency liable for the Examiner's conduct. The Harassment Guidance at Section IV.B.3. provides that employees are protected against unlawful harassment by non-employees. Section IV.C.3. provides that an employer is liable for a hostile work environment created by a non-employee if the employer was negligent because it unreasonably failed to prevent the harassment; or it failed to take reasonable corrective action in response to harassment about which it knew or should have known. Complainant reported the incident to the Supervisor, who promptly reported it the relevant officials, both Agency and non-Agency. An investigation was conducted by the AME Office, which led to the Examiner's removal from the list of medical providers, approximately two months after the initial report. As soon as the Agency was aware of the Examiner's actions, immediate and appropriate action was taken that ultimately led to his removal. As the Agency's response to Complainant's report of harassment was prompt and effective, we find that the Agency is not liable for the Examiner's conduct.

Agency Liability for Supervisor Harassment

To establish a claim of discriminatory harassment Complainant must show that she: (1) belongs to a statutorily protected class; (2) was subjected to harassment in the form of unwelcome verbal or physical conduct involving the protected class; (3) the harassment complained of was based on the statutorily protected class; (4) the harassment affected a term or condition of employment and/or had the purpose or effect of unreasonably interfering with the work environment and/or creating an intimidating, hostile, or offensive work environment; and (5) there is a basis for imputing liability to the Agency, her employer. See Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982).

Initially, we find that Complainant established a prima facie face of sex-based harassment regarding the actions of the Supervisor. Complainant is female; she was subjected to unwelcome conduct and harassment related to her sex when the Supervisor shared details of the sexual harassment to Complainant's male colleagues; which clearly created a hostile/offensive work environment since the Supervisor's actions adversely affected her interactions with her colleagues and caused Complainant to relive the trauma of the exam.

With respect to element (5), our Harassment Guidance states that if the harasser is a supervisor (but not a proxy or alter ego) and the hostile work environment does *not* include a tangible employment action, the employer is vicariously liable for the actions of the harasser. See Harassment Guidance at Section IV. However, the employer may limit its liability or damages if it can prove the Faragher-Ellerth affirmative defense. Id. To prevail on this defense, the employer must show that: (1) it exercised reasonable care to prevent and promptly correct any harassing behavior; and (2) the complainant unreasonably failed to take advantage of any preventive or corrective opportunities provided by the agency or to avoid harm otherwise. Id. at Section IV.C.2.

Here, the record clearly demonstrates that Complainant made the Supervisor aware of the sexual harassment by the Examiner. While we acknowledge that the Supervisor took prompt action to have the Examiner removed, this does not negate her subsequent inappropriate and harassing behavior. By broadcasting the harassment to male employees, the Supervisor engaged in sex-based harassment that clearly created a sex-based hostile work environment. Therefore, the Agency is vicariously liable for the Supervisor's actions. As the Agency did not argue, in relevant part, that Complainant failed to take advantage of the Agency's complaint procedure, we find that the Agency cannot limit its liability or damages under the Faragher-Ellerth affirmative defense.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we REVERSE the Agency's finding of no discrimination and REMAND the matter for further processing as specified in our ORDER.

ORDER (E0224)

The Agency is ordered to take the following remedial actions:

- I. Within **sixty (60) calendar days** of the date this decision is issued, the Agency shall restore or compensate Complainant for any leave that Complainant used from June 29, 2022, as a result of the Supervisor's actions. Complainant shall cooperate with the Agency in this regard.
- II. Within **ninety (90) calendar days** of the date this decision is issued, the Agency shall conduct a supplemental investigation with respect to Complainant's entitlement to compensatory damages, including providing Complainant an opportunity to submit

evidence of pecuniary and non-pecuniary damages. For guidance on what evidence is necessary to prove pecuniary and non-pecuniary damages, the parties are directed to EEOC Enforcement Guidance: Compensatory and Punitive Damages Available Under § 102 of the Civil Rights Act of 1991 (July 14, 1992) (available at eeoc.gov). Complainant shall cooperate with the Agency in this regard. The Agency shall issue a final decision addressing the issue of compensatory damages no later than **thirty (30) calendar days** after the completion of the investigation.

- III. Within **ninety (90) calendar days** of the date this decision is issued, the Agency shall provide two (2) hours of in-person or interactive training to the Supervisor² regarding her responsibilities with respect to eliminating discrimination in the federal workplace. The training must emphasize the Agency's obligations to both promptly and effectively respond to allegations of harassment. The Agency shall provide the Commission with documentation that this training occurred as ordered.

For assistance in obtaining the necessary training, the Agency may contact the Commission's Outreach, Training and Engagement Division via email, at FederalTrainingandOutreach@eeoc.gov. The Agency shall provide the Compliance Officer with proof of attendance, as well as the contents and materials it used for the training. If the Supervisor has left the Agency's employ, the Agency shall furnish documentation of her departure date.

- IV. Within **sixty (60) calendar days** of the date this decision is issued, the Agency shall consider taking appropriate disciplinary action against the Supervisor. The Commission does not consider training to be disciplinary. The Agency shall report its decision to the Compliance Officer. If the Agency decides to take disciplinary action, it shall identify the action taken. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline. If the Supervisor has left the Agency's employ, the Agency shall furnish documentation of her departure date.

- V. The Agency shall post a notice in accordance with the paragraph entitled, "Posting Order."

The Agency is further directed to submit a report of compliance in digital format as provided in the statement entitled "Implementation of the Commission's Decision." The report shall be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Further, the report must include supporting documentation that the corrective action has been implemented.

POSTING ORDER (G0617)

The Agency is ordered to post at its Northwest Mountain District Air Traffic Control facility in Hillsboro, Oregon, copies of the attached notice.

² The Supervisor is identified on page 127 of the ROI.

Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted **both in hard copy and electronic format** by the Agency within 30 calendar days of the date this decision was issued, and shall remain posted for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The Agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material. The original signed notice is to be submitted to the Compliance Officer as directed in the paragraph entitled "Implementation of the Commission's Decision," within 10 calendar days of the expiration of the posting period. The report must be in digital format and must be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

ATTORNEY'S FEES (H0124)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), they are entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. § 1614.501(e). The award of attorney's fees shall be paid by the Agency. The attorney shall submit a verified statement of fees to the Agency -- **not** to the Equal Employment Opportunity Commission, Office of Federal Operations -- within thirty (30) calendar days of receipt of this decision. The Agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

Under 29 C.F.R. § 1614.405(c) and §1614.502, compliance with the Commission's corrective action is mandatory. Within seven (7) calendar days of the completion of each ordered corrective action, the Agency shall submit via the Federal Sector EEO Portal (FedSEP) supporting documents in the digital format required by the Commission, referencing the compliance docket number under which compliance was being monitored. Once all compliance is complete, the Agency shall submit via FedSEP a final compliance report in the digital format required by the Commission. See 29 C.F.R. § 1614.403(g). The Agency's final report must contain supporting documentation when previously not uploaded, and the Agency must send a copy of all submissions to the Complainant and his/her representative.

If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See 29 C.F.R. § 1614.409.

Failure by an agency to either file a compliance report or implement any of the orders set forth in this decision, without good cause shown, may result in the referral of this matter to the Office of Special Counsel pursuant to 29 C.F.R. § 1614.503(f) for enforcement by that agency.

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0124.1)

The Commission may, in its discretion, reconsider this appellate decision if Complainant or the Agency submits a written request that contains arguments or evidence that tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the agency.

Requests for reconsideration must be filed with EEOC's Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration**. A party shall have **twenty (20) calendar days** from receipt of another party's request for reconsideration within which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015).

Complainant should submit their request for reconsideration, and any statement or brief in support of their request, via the EEOC Public Portal, which can be found at <https://publicportal.eeoc.gov/Portal/Login.aspx>. Alternatively, Complainant can submit their request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, a complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

An agency's request for reconsideration must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Either party's request and/or statement or brief in opposition must also include proof of service on the other party, unless Complainant files their request via the EEOC Public Portal, in which case no proof of service is required.

Failure to file within the 30-day time period will result in dismissal of the party's request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. **Any supporting documentation must be submitted together with the request for reconsideration.** The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(f).

COMPLAINANT’S RIGHT TO FILE A CIVIL ACTION (R0124)

This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency or filed your appeal with the Commission. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by their full name and official title. Failure to do so may result in the dismissal of your case in court. “Agency” or “department” means the national organization, and not the local office, facility or department in which you work. **Filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant’s Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

June 26, 2024
Date