



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

[REDACTED]
Rosamaria F.,¹
Complainant,

v.

Thomas B. Modly,
Acting Secretary,
Department of the Navy,
Agency.

Appeal No. 0120181068

Agency No. DON-17-00030-01579

DECISION

On February 6, 2018, 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 January 8, 2018, 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, the Commission MODIFIES and REMANDS the Agency's final decision for further processing.

ISSUES PRESENTED

Whether the Agency subjected Complainant to discriminatory harassment on the bases of race (African-American) and reprisal when her first-line supervisor allegedly permitted a working environment where she was subjected to a hostile work environment by a contract employee.

Whether the Agency's anti-harassment policy adequately addresses the Agency's legal obligation to prevent harassment in the workplace in accordance with the Commission's Management Directive 715 (MD-715).

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.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Secretary, NK-0318-II, for Strategic Systems Programs Headquarters at the Washington Navy Yard in Washington, D.C.

On May 20, 2017, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of race (African-American) and in reprisal for prior protected EEO activity arising under Title VII when on or about March 3, 2017, her first line supervisor allegedly permitted a working environment where she was subjected to a hostile work environment by a contract employee (Information Technology Manager, Caucasian).

During the EEO investigation, Complainant recounted several incidents of harassment by the contract employee. Specifically, Complainant alleged that the contract employee told another employee, "If you see [Complainant] turn the other way." Complainant maintained that the contract employee also referred to Complainant as "trouble" and allegedly told Complainant's new Assistant Branch Chief to "watch out for [Complainant]." She declared that the contract employee sought to dissuade her from engaging in EEO activity by making statements that were critical of her prior EEO activity and even tried to remove a printer from her desk. She reasoned that the contract employee may have learned about her prior EEO activity from her supervisor, an individual whom she had previously named as a responsible management official and/or witness in 18 EEO complaints (excluding instant complaint). Complainant indicated that she became very suspicious about the true motivations of the contract employee when the Agency's EEO counselor only spoke to her supervisor and the Assistant Branch Chief during the informal EEO process and did not interview the contract employee or other witnesses. She emphasized that management did not respond to her cries for help and that the Agency's harassment policies only address sexual harassment and never nonsexual harassment.

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 EEOC Administrative Judge (AJ). In accordance with Complainant's request, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). The decision concluded that Complainant failed to prove that the Agency subjected her to discrimination as alleged.

ANALYSIS AND FINDINGS

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 (EEO MD-110), 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").

Harassment Claims

For Complainant to prevail on her allegation of harassment, she must show that: (1) she belongs to a statutorily protected class; (2) she 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 her 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. See Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982). The harasser's conduct should be evaluated from the objective viewpoint of a reasonable person in the victim's circumstances. Enforcement Guidance on Harris v. Forklift Systems, Inc., EEOC Notice No. 915.002 at 6 (Mar. 8, 1994). Further, the incidents must have been "sufficiently severe or pervasive to alter the conditions of complainant's employment and create an abusive working environment." Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993); see also Oncale v. Sundowner Offshore Services, Inc., 23 U.S. 75 (1998).

To establish a claim of retaliatory harassment by a coworker (in addition to showing that the harassment is motivated by protected EEO conduct), Complainant must show that: (1) the coworker's retaliatory conduct is sufficiently severe so as to dissuade a reasonable worker from making or supporting a charge of discrimination; (2) supervisors or members of management have actual or constructive knowledge of the coworker's retaliatory behavior; and (3) supervisors or members of management have condoned, tolerated, or encouraged the acts of retaliation, or have responded to the complaints so inadequately that the response manifests indifference or unreasonableness under the circumstances. Hawkins v. Anheuser Busch, Inc., 517 F.3d 321 (6th Cir.2008); See Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S. 53, 68 (2006); see also, Owen v. Peake, 2008 WL 4449011, at 4 (S.D. Ohio 2008); Satterfield v. Karnes, 736 F. Supp. 2d 1138, 1170 (S.D. Ohio 2010).

After careful consideration of the record, we conclude that the Agency properly found that Complainant failed to persuasively show that she was subjected to a hostile work environment. In reaching this conclusion, we considered Complainant's contention that the contract employee subjected her to harassment on the bases of race and reprisal; however, we find that the preponderant evidence fails to establish a causal link between the contract employee's actions and Complainant's protected characteristics.²

Regarding the printer incident, we note that the contract employee stated that he allowed Complainant to keep her printer as a courtesy even though he was technically required to take away Complainant's printer because a Presidential Directive required agencies to reduce their IT equipment footprints.

² Because Complainant has failed to demonstrate a causal link between the alleged harassment and her protected characteristics, we need not consider whether the alleged 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.

The Chief Information Officer, in contrast, averred that the contract employee removed Complainant's printer because the Agency implemented a "Printer Reduction Plan." While we note that there is a discrepancy as to whether the contract employee removed Complainant's printer, we find that the preponderant evidence fails to show that the contract employee acted with discriminatory or retaliatory motive with regard to Complainant's printer.

As for the alleged remarks, the record reflects that the contract employee admitted that he said, "Here comes trouble," as Complainant approached him; however, he explained that he made the comment in jest because Complainant always turned to him for assistance with IT issues even though he did not deal with everyday IT issues. The contract employee, however, outright denied telling Complainant's colleagues to "turn the other way" and "watch out for her." While we acknowledge Complainant's disagreement with the contract employee's explanations, we note that Complainant requested a final decision from the Agency. In so doing, Complainant waived her right to request a hearing before an EEOC Administrative Judge, where she could have engaged in discovery and cross-examined witnesses such as the contract employee. Therefore, we can only evaluate the facts based on the weight of the evidence presented to us. Based on the totality of the record before us, we find that Complainant has not established that she was subjected to harassment on the bases alleged.

Breach of EEO Confidentiality

Notwithstanding our finding of no discrimination with regard to Complainant's alleged harassment claims, we find that the Agency subjected Complainant to discrimination on the basis of reprisal when Complainant's supervisor revealed Complainant's protected EEO activity to the Fire Control and Guidance Branch Deputy. We remind the Agency that complainants are generally entitled to confidentiality with regard to their EEO complaints.³ Our review of the affidavit from the Fire Control and Guidance Branch Deputy shows that the Agency fell short of its legal obligation to ensure confidentiality.

As a general matter, the statutory anti-retaliation provisions prohibit any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter a reasonable employee from engaging in protected activity. Burlington N. and Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006). Although petty slights and trivial annoyances are not actionable, adverse actions or threats to take adverse actions such as reprimands, negative evaluations, and harassment are actionable. Enforcement Guidance on Retaliation and Related Issues, EEOC Notice No. 915.004 (Enforcement Guidance on Retaliation), at § II. B. (Aug. 25, 2016).

³ We note that an agency cannot guarantee complete confidentiality, because it cannot conduct an effective investigation without revealing certain information to the alleged harasser and potential witnesses. However, information about the allegation of harassment should be shared only with those who need to know about it. Records relating to harassment complaints should be kept confidential on the same basis. See Enforcement Guidance on Retaliation, Part V(C)(1)(c)("Confidentiality").

Given the importance of maintaining “unfettered access to [the] statutory remedial mechanisms” in the anti-retaliation provisions, we have found a broad range of actions to be retaliatory. For example, we have held that a supervisor threatening an employee by saying, “What goes around, comes around” when discussing an EEO complaint constitutes reprisal. Vincent v. U.S. Postal Serv., EEOC Appeal No. 0120072908 (Aug. 3, 2009), req. for recons. den., EEOC Request No. 0520090654 (Dec. 16, 2010). We have also found that a supervisor attempting to counsel an employee against pursuing an EEO complaint “as a friend,” even if intended innocently, is reprisal. Woolf v. Dep’t of Energy, EEOC Appeal No. 0120083727 (June 4, 2009) (violation found when a Labor Management Specialist told the complainant, “as a friend,” that her EEO claim would polarize the office).

Similarly, the Commission has held that disclosure of EEO activity by a supervisor to coworkers constitutes reprisal. Complainant v. Dep’t of Justice, EEOC Appeal No. 0120132430 (July 9, 2015) (reprisal found where a supervisor broadcasted complainant’s EEO activity in the presence of coworkers and management); see also Melodee M. v. Dep’t of Homeland Sec., EEOC Appeal No. 0120180064 (June 14, 2019) (affirming agency’s finding of reprisal when complainant’s second level supervisor disclosed complainant’s EEO activity to others). We have also found reprisal where a human resources (HR) employee inadvertently negatively left a message on a complainant’s voicemail regarding the settlement of a prior EEO complaint. Complainant v. Dep’t of Justice, EEOC Appeal No. 0720120032 (May 1, 2014) (complainant subjected to retaliation when a HR employee and coworker inadvertently left message on complainant’s work voicemail berating her and using strong language while discussing settlement of complainant’s prior EEO complaint);

In this case, the record clearly shows that the Fire Control and Guidance Branch Deputy, when questioned about how she learned about Complainant’s prior EEO activity, responded with the following: “I was told by the Branch Head at the time, [Complainant’s supervisor], that [Complainant] has made EEO complaints in the past.” See Affidavit of T.J.Y., Complaint File, pg. 9. By the Agency’s own admission, the Fire Control and Guidance Branch Deputy did not supervise Complainant. See Memorandum from Agency Representative, id. at pg. 5. As such, Complainant’s supervisor should not have disclosed Complainant’s prior EEO activity to the Fire Control and Guidance Branch Deputy. We find that this disclosure, on its face, discourages participation in the EEO process and constitutes reprisal.

In reaching this conclusion, we are mindful that Complainant did not allege that she was subjected to discrimination on the basis of reprisal when her supervisor disclosed her protected EEO activity to the Fire Control and Guidance Branch Deputy. Nevertheless, in our prior decisions, we have found reprisal even where a complainant did not claim reprisal. For example, in Light v. Dep’t of Vet. Aff., EEOC Appeal No. 0120111229 (Nov. 22, 2011), the Commission affirmed the agency’s finding of reprisal when complainant’s second-level supervisor admitted to telling complainant that she took offense at complainant’s complaints about discrimination. req. for recons. den., EEOC Request No. 0520120207 (June 6, 2012).

Though the complainant in Light did not raise reprisal as a basis, the Commission affirmed the agency's finding that the evidence developed during the EEO investigation violated the "letter and spirit of EEO law which requires agencies to promote and support the full realization of equal employment opportunity." As in Light, supra, we too conclude that the evidence in this case manifestly demonstrates a violation of the "letter and spirit of EEO law which requires agencies to promote and support the full realization of equal employment opportunity." The only question that remains for us to decide is the appropriate remedy.

To remedy findings of discrimination, the Commission is authorized to award compensatory damages as part of "make whole" relief for a complainant. However, not all violations necessarily entitle a complainant to individual relief. Vincent v. U.S. Postal Serv., EEOC Appeal No. 0120072908 (Aug. 3, 2009) (citing Binseel v. Dep't of the Army, EEOC Request No. 05970584 (Oct. 8, 1998)). Rather, the action giving rise to the damages must be intentional. Id.

Our prior decisions establish that complainants are entitled to compensatory damages for the unlawful disclosure of their EEO activity. For example, in Light, supra, we awarded compensatory damages even though Complainant did not prevail on any of her individual claims of discrimination. In rejecting the agency's conclusion that complainant was not entitled to compensatory damages because she did not prevail on her underlying claims, we expressly found that the complainant was indeed entitled to compensatory damages because the agency's actions were likely to deter protected activity by complainant or others. Id.

The Commission has also awarded compensatory damages even where the agency claimed that the unlawful disclosure of a complainant's EEO activity was inadvertent. See Candi R. v. Envtl. Prot. Agency, EEOC Appeal No. 0120171394 (Sept. 14, 2018) (holding that the asserted inadvertent nature of the disclosure of complainant's EEO activity did not negate the fact that sending these emails to all her colleagues would be reasonably likely to deter an employee from engaging in EEO activity and therefore constituted reprisal warranting the imposition of compensatory damages); req. for recons. den., EEOC Request No. 2019000393 (Feb. 8, 2019). We shall do the same in this case, as it clear from the record that Complainant's supervisor acted affirmatively (i.e., made the disclosure) to unlawfully disclose Complainant's protected EEO activity. See also Melodee M., supra.

For the above reasons, we find that Complainant was subjected to unlawful reprisal in the disclosure of her EEO activity by her supervisor and that compensatory damages may be awarded should Complainant be able to show she suffered a compensable harm as a result of the disclosure.

Sufficiency of the Agency's Anti-Harassment Policy

As we have serious concerns regarding the Agency's handling of harassment claims, particularly with regard to the Agency's legal obligation to ensure the confidentiality of such claims, we take this opportunity to review the Agency's anti-harassment policy in its entirety. See Executive Order 11478, Sec. 3 ("The Equal Employment Opportunity Commission shall be responsible for directing and furthering the implementation of the policy of the Government of the United States

to provide equal opportunity in Federal employment for all employees or applicants for employment.”). After careful consideration of the record, we find that the Agency’s anti-harassment policy does not adequately address the Agency’s legal obligation to prevent harassment in the workplace.⁴ We conclude that the Agency’s anti-harassment policy is not in accord with the Commission’s Management Directive 715 (MD-715) because the Agency’s policy statement does not effectively communicate EEO policies and procedures regarding harassment. Because the preponderant evidence suggests this failure may have contributed to the unlawful disclosure of Complainant’s protected EEO activity, as discussed above, we remind the Agency of its legal obligations as set forth below and direct the Agency to comply with the remedial actions listed in the Order herein.

Federal Agencies Are Legally Obligated to Establish and Maintain Effective Anti-Harassment Programs

The Commission’s MD-715 is the policy guidance which the Commission provides to federal agencies for their use in establishing and maintaining effective programs of equal employment opportunity under Title VII and the Rehabilitation Act. MD-715 provides a roadmap for ensuring that all employees and applicants for employment enjoy equality of opportunity in the federal workplace regardless of race, sex, national origin, color, religion, disability, or reprisal for engaging in prior protected EEO activity. Compliance with MD-715 is mandatory for all Executive agencies. See MD-715 (“Responsibilities”) (“Agency Heads are responsible for the following: 1. Ensuring compliance with this Directive and those implementing instructions issued by EEOC in accordance with existing law and authority.”). See also 29 C.F.R. § 1614.103(b)(2) (“This part applies to... Executive agencies as defined in 5 U.S.C. 105...”); and 29 C.F.R. § 1614.102(e) (“Agency [EEO] programs *shall* comply with this part and the Management Directives and Bulletins that the Commission issues.”) (emphasis added).

It is critical to understand the legal requirements with which agencies must comply in order to avoid liability for harassment. Following the United States Supreme Court’s decisions in Faragher v. City of Boca Raton, 524 U.S. 775 (1998) and Burlington Indus. v. Ellerth, 524 U.S. 742 (1998), the Commission issued Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors in 1999, advising employers (both public and private sector) to establish anti-harassment policies that contain, at a minimum, the following elements:

- A clear explanation of prohibited conduct, including a reference to all of the protected bases;
- Assurance that employees who make claims of harassment or provide information related to such claims will be protected against retaliation;
- A clearly described complaint process that provides accessible avenues for complainants;
- Assurance that to the extent possible, the employer will protect the confidentiality of the individuals bringing harassment claims;

⁴ We note that in the Report of Investigation Complainant raised concerns about the lack of information about non-sexual harassment being posted in her workplace.

- A complaint process that provides a prompt, thorough, and impartial investigation; and
- Assurance that the employer will take immediate and appropriate corrective action when it determines that harassment has occurred.

The Commission subsequently issued MD-715 on October 1, 2003, which applied the minimum standards and guidelines set forth in Faragher, supra and Ellerth, supra to the federal sector (i.e., federal agencies). See Model EEO Programs Must Have An Effective Anti-Harassment Program, n. 8.⁵ Sections II (A) and (C) of MD-715 expressly require federal agencies to establish and maintain effective affirmative programs of equal employment opportunity, which show demonstrated commitment from agency leadership and ensure management and program accountability. To this end, agencies must issue a written policy statement signed by the agency head that expresses commitment to EEO and a workplace free of discriminatory harassment, and the development of a comprehensive anti-harassment policy to prevent harassment on all protected bases, including race, color, religion, sex (sexual or nonsexual), national origin, age, disability, and reprisal. In this regard, a comprehensive anti-harassment policy that complies with MD-715 should: establish a separate procedure outside of the EEO complaint process; require a prompt inquiry of all harassment allegations to prevent or eliminate conduct before it rises to the level of unlawful harassment; establish a firewall between the EEO Director and the Anti-Harassment Coordinator to avoid a conflict of interest; and ensure that the EEO Office informs the anti-harassment program of all EEO counseling activity alleging harassment. See Instructions to Federal Agencies for MD-715 Section I The Model EEO Program, Part III. Element C (B); see also Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, Part V(C)(1)(“Policy and Complaint Procedure”).

It is simply not enough to create an anti-harassment policy. MD-715 expressly requires agencies to effectively communicate EEO policies and procedures to all employees. Specifically, agencies must inform their employees of their rights and responsibilities pursuant to the EEO process, anti-harassment program, alternative dispute resolution (ADR) process, reasonable accommodation program, and behaviors that could result in discipline. Methods of dissemination include training, webinars, brochures, emails, or other types of written communication. Instructions to Federal Agencies for MD-715 Section I The Model EEO Program, Part I. Element A (B).

We remind agencies that failure to effectively communicate anti-harassment policies not only violates MD-715 but may also expose them to liability. In this regard, we note that the first prong of the affirmative defense for harassment liability under Faragher, supra, and Ellerth, supra, requires a showing by the employer that it undertook reasonable care to prevent and promptly correct harassment.

⁵ MD-715 provides that “[t]he EEOC will also supplement this Directive on an as-needed basis through the issuance of additional guidance and technical assistance.” See MD-715 (“Introduction”). Also, our report, Model EEO Programs Must Have An Effective Anti-Harassment Program, is available at https://www.eeoc.gov/federal/model_eeo_programs.cfm.

Such reasonable care generally requires an employer to establish, disseminate, and enforce an anti-harassment policy and complaint procedure and to take other reasonable steps to prevent and correct harassment. We emphasize that a federal agency's formal, internal EEO complaint process does not, by itself, fulfill its obligation to exercise reasonable care. That process only addresses complaints of violations of the federal EEO laws, while the Court, in Ellerth, made clear that an employer should encourage employees "to report harassing conduct before it becomes severe or pervasive." Ellerth, 118 S. Ct. at 2270. Furthermore, the EEO process is designed to assess whether the agency is liable for unlawful discrimination and does not necessarily fulfill the agency's obligation to undertake immediate and appropriate corrective action. See Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors at n. 57.

In this case, while we acknowledge that the Agency issued a Workplace Anti-Harassment Policy Statement on May 1, 2018, outlining its obligation to prevent harassment, we conclude that this policy fails to effectively communicate EEO policies and procedures in accordance with MD-715 because it does not: 1) clearly establish the complaint procedure, including the appropriate channels for filing a complaint, that is separate from the EEO process; and 2) ensure confidentiality to the extent possible.

Failure to Clearly Describe the Complaint Procedure

Regarding the first deficiency, we note that the Agency's Workplace Anti-Harassment Policy Statement states that "any Sailor, Marine, or civilian employee who encounters workplace harassment should report the incident through appropriate channels." As noted above, however, MD-715 requires agencies to clearly inform their employees of their rights and responsibilities pursuant to their anti-harassment programs. While we acknowledge that the Agency's policy statement informs employees of their right to "report the incident through appropriate channels," we find this rather vague statement to be inconsistent with MD-715 because it does not notify employees of who they may approach to raise claims. As explained in our report, Model EEO Programs Must Have An Effective Anti-Harassment Program, a model EEO program must clearly describe the complaint process, particularly the agency officials who can receive harassment claims. We further explained in our report that agencies, in establishing model EEO programs, should consider designating at least one official outside an employee's chain of command to accept claims of harassment. Indeed, agencies should ideally provide multiple points of contact for the employee, such that all claims need not go through the chain of command. In this case, it is clear that the Agency did not designate anyone to be the "go to" person for reporting harassment, much less multiple points of contact.⁶

⁶ We acknowledge that the ROI contains PowerPoint slides titled "EEO Essentials for Non-Supervisory Personnel" that contains the contact information for the Agency's EEO personnel. ROI, pg. 000122. We emphasize, however, that MD-715 still requires agencies to establish and maintain written anti-harassment policies consistent with MD-715.

We emphasize the importance of clearly delineating channels of communication for reporting harassment, particularly in light of cases such as this where a complainant does not feel comfortable approaching the very people who are responsible for the conduct they are reporting or have reported in the past.⁷

Moreover, we note that agencies, as part of their legal obligation to establish procedures to prevent all forms of discrimination, including harassment, must identify the investigation process, including where to file the complaint, who will conduct the investigation, and who will make the decision for corrective action. See Model EEO Programs Must Have An Effective Anti-Harassment Program, Part I (C). Here, our review of the Agency's Workplace Anti-Harassment Policy Statement, shows that the Agency simply noted that its anti-harassment policy is "separate and apart from any administrative, negotiated grievance, or statutory complaint process that covers allegations of harassment, such as the Equal Employment Opportunity complaint process." There is no mention of where an employee must go to file a complaint, who will conduct the investigation, and who will make the decision for corrective action. To fulfill its legal obligations under MD-715, the Agency should develop complaint procedures that are separate from the EEO process and clearly establish the complaint procedure in accordance with our guidelines. See Model EEO Programs Must Have An Effective Anti-Harassment Program.

To establish a clearly-described complaint process, the policy must contain the time frames and responsible officials for the intake, investigation, and decision-making stages of the process. Two EEOC appellate decisions provide guidelines for time frames involving prompt investigations and immediate corrective actions. For the investigation to be prompt, an EEOC decision found the agency should have started the investigation within 10 days of receiving notice of a harassment allegation. See Complainant v. Dep't of Veterans Affairs, EEOC Appeal No. 0120123232 (May 21, 2015); see also MD-715, Part G, Question C.2.a.5. As to immediate corrective actions, another EEOC decision found the agency should have reached a decision and taken corrective action within 60 calendar days of receiving notice of the allegation. See Tammy S. v. Dep't of Defense (Defense Intelligence Agency), EEOC Appeal No. 0120084008 (June 6, 2014). As such, the Agency's policy must include time frames for the intake, investigation, and decision-making stages of the anti-harassment complaint process.

Failure to Ensure Confidentiality to the Extent Possible

Finally, with regard to the second deficiency, we again remind the Agency that complainants are generally entitled to confidentiality with regard to not only their EEO complaints, but their claims of harassment as well. Indeed, the right to confidentiality is an important hallmark of a model EEO program.

⁷ In her rebuttal to her supervisor's affidavit, Complainant stated that she did not discuss the contract employee's comments with her supervisor because, for all she knew, her supervisor could have been the person who discussed her prior protected EEO activity with the contract employee, which led the contract employee to call her "trouble." ROI, pg. 239.

As explained in our Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, an employer should clearly inform its employees that it will protect the confidentiality of harassment allegations to the extent possible. See Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, Part V(C)(1)(c)(“Confidentiality”). While we recognize that an employer cannot guarantee complete confidentiality, since it cannot conduct an effective investigation without revealing certain information to the alleged harasser and potential witnesses, information about the allegation of harassment should be shared only with those who need to know about it. Records relating to harassment complaints should be kept confidential on the same basis. *Id.* Federal agencies, as part of their legal obligation to establish and maintain model EEO programs under MD-715, must ensure the confidentiality of all harassment allegations, to the extent possible, and effectively communicate to employees that their EEO activity will not be disclosed without their authorization, except in limited circumstances as provided by law.

Our review of the Agency’s Workplace Anti-Harassment Policy Statement reveals serious shortcomings with regard to this obligation. In this regard, we note that the Agency’s policy statement makes no assurances that the Agency will protect the confidentiality of individuals bringing harassment complaints to the fullest extent possible. In fact, the Agency’s policy statement contains no mention of any right to confidentiality.

This is a clear failure to communicate, which undermines the effectiveness of the Agency’s anti-harassment program, as managers may unknowingly violate the law and employees may be discouraged from reporting harassment without assurances of confidentiality. MD-715 expressly requires management and program accountability, which involves putting employees and management officials on notice of their rights and responsibilities. As was demonstrated in this case where a Complainant’s supervisor disclosed her EEO activity to someone without a need to know, it is critically important that an agency’s anti-harassment policy inform its employees of the legal obligation to ensure the confidentiality of Complainant’s protected EEO activity, including harassment allegations.

Summary of Policy Deficiencies and Corrective Action

The Commission finds that the Agency’s Workplace Anti-Harassment Policy Statement does not meet the standards as required by MD 715, our Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors and our Model EEO Programs Must Have An Effective Anti-Harassment Program guidance. In particular, the Agency’s policy does not set out with specificity the complaint procedures by which an employee may raise a claim of harassment, including time frames for the processing of the harassment allegations as well as naming officials who can receive such claims. Second, the Agency’s policy does not provide notice of the requisite confidentiality accorded to the filing of claims of harassment.

Pursuant to 29 C.F.R. § 1614.501(a)(2), to remedy a finding of discrimination, the Commission may order an agency to provide corrective, curative or preventive actions to ensure that violations of the law similar to those found will not recur. Here, as discussed above, the Agency's anti-harassment policy does not comply with the Commission's MD-715 policy guidance because it does not clearly establish the complaint procedure, including the appropriate channels for filing a complaint, and ensure confidentiality to the extent possible. We would be remiss to take no action to correct the Agency's clear violations of MD-715. As the Agency is not in compliance with MD-715 regarding its anti-harassment policy, under circumstances that are capable of being repeated, we order the Agency to seek technical assistance from the Commission's Office of Federal Operations, Federal Sector Programs, and to correct the deficiencies in the policy identified above. This will ensure that the agency is taking the necessary preventive steps to avoid liability for harassment in the future.

CONCLUSION

Based on a thorough review of the record, we **MODIFY** the Agency's final decision as set forth herein and **REMAND** the matter to the Agency for further processing in accordance with the **ORDER** below.

ORDER⁸

1. Within **ninety (90) calendar days** of the date this decision is issued, the Agency shall undertake a supplemental investigation concerning Complainant's entitlement to compensatory damages and determine the amount of compensatory damages due Complainant in a final decision with appeal rights to the Commission.

The Agency shall pay this amount to Complainant within **thirty (30) calendar days** of the date of the determination of the amount of compensatory damages. If there is a dispute regarding the exact amount of compensatory damages, the Agency shall issue a check to Complainant for the undisputed amount. Complainant may petition for enforcement or clarification of the amount in dispute. The petition for clarification or enforcement must be filed with the Compliance Officer, at the address referenced in the statement entitled "Implementation of the Commission's Decision."

2. Within **thirty (30) calendar days** of the date of this decision, the appropriate Agency EEO component shall request technical assistance from the EEOC, Office of Federal Operations, Federal Sector Programs (FSP), on revising its anti-harassment policy to conform to the standards set forth in MD-715.

⁸ Because the record reflects that the responsible management official (Complainant's supervisor) is an active duty military officer, we cannot order the Agency to provide training and consider disciplinary action, as we have no authority over active duty military personnel.

Within **sixty (60) calendar days** of the date this decision, the Agency shall revise its anti-harassment policy to FSP's satisfaction and the Agency shall promptly reissue a new anti-harassment policy statement signed by the agency head.

To fulfill its legal obligation to effectively communicate EEO policies and procedures to all employees, the Agency shall disseminate its revised anti-harassment policy statement **within thirty (30) calendar days** of issuing the revised policy statement. Methods of dissemination include training, webinars, brochures, emails, or other types of written communication. Instructions to Federal Agencies for MD-715 Section I The Model EEO Program, Part I. Element A (B).

3. Within **thirty (30) calendar days** of the date this decision is issued, the Agency shall post a notice in accordance with the paragraph entitled "Posting Order."

POSTING ORDER (G0617)

The Agency is ordered to post at its Strategic Systems Programs Headquarters in Washington, D.C., copies of the attached notice. 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 (H1019)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), she is 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 (M0617)

The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which 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 to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. A party shall have **twenty (20) calendar days** of receipt of another party's timely request for reconsideration in 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). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission. Complainant's request may be submitted via regular mail to P.O. Box 77960, Washington, DC 20013, or by certified mail to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

The agency's request must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your 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(c).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

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 his or her 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

February 14, 2020

Date