



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

[REDACTED]

Dollie T.,¹
Complainant,

v.

Sonny Perdue,
Secretary,
Department of Agriculture,
Agency.

Appeal No. 2019003298

Agency No. OCFO-2018-00291

DECISION

On April 11, 2019, 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 December 21, 2018² 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. Our review is de novo. For the following reasons, the Commission REVERSES the Agency's final order.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Human Resources Specialist, GS-201-11, in the Agency's Human Resources Management Division of the Office of the Chief Financial Officer at the National Finance Center in New Orleans, Louisiana.

On March 22, 2018, Complainant filed an EEO complaint wherein she claimed that the Agency discriminated against her and subjected her to a hostile work environment on the bases of her sex (female) and in reprisal for prior protected EEO activity when:

1. On January 23, 2018, senior management directed Complainant's reassignment to a new supervisor in the Employee Development Performance Management Branch;

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.

² The record reveals that Complainant did not receive the final decision until March 12, 2019.

2. On November 29, 2017, Complainant's Supervisor issued her a performance rating of "Meets Fully Successful" for the Customer Service and Communication element of her 2017 annual performance appraisal; and
3. On several dates, management subjected her to various acts of sexual harassment, including but not limited to:
 - a. Since September 2016, the Supervisor made sexual gestures toward Complainant including the sound of him licking his lips, moaning and eye-balling her movements;
 - b. Between October-November 2016, the Supervisor attempted to join Complainant on out of town trips, implying in a sexual way that they could spend time together;
 - c. On January 11, 2017, the Supervisor kissed Complainant's face while in the workplace;
 - d. On January 13, 2017, the Supervisor, in response to her complaint of being kissed, told Complainant he did not close his eyes, and that women at the Pentagon did not mind him kissing them, and that now I know who I can trust;
 - e. During the period of February 8, 2017 through April 27, 2017, the Supervisor continuously uttered comments concerning the manner in which Complainant dressed and her appearance and asked her to go out to eat on numerous occasions;
 - f. During August 2017, the Supervisor persisted in attending the same seminar Complainant was scheduled to attend;
 - g. On September 27, 2017, during a section meeting, the Supervisor commented that Complainant looked like his girlfriend and then attempted to explain that was not what he meant; and
 - h. During the period of September 28, 2017 through December 28, 2017, senior management delayed in responding to Complainant's allegations of sexual 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).

Complainant has been in her current position since 2014. Her Supervisor assumed his position in August 2016. With regard to claim (1), Complainant indicated she was reassigned because she requested to be removed from her Supervisor's supervision. However, Complainant asserted that the reassignment did not satisfy her request to be removed from Supervisor's supervision as she still had to work with him. Complainant stated that prior to being placed on permanent telework she used her leave or switched days off with a coworker to avoid being in the office on the same day as her Supervisor. According to Complainant, after her reassignment, her Supervisor's emails and tone during teleconferences became demeaning. Complainant claimed that his behavior was intimidating, and she would go out of her way to avoid him. Complainant maintained that her Supervisor continued to harass her after she told him he behaved inappropriately toward her and complained about him.

The Supervisor asserted that he did not reassign Complainant and she was performing her same duties. The Supervisor explained that he and the rest of the staff communicated with Complainant through her new Supervisor (S2). The Supervisor denied that his emails and tone were demeaning. The Supervisor asserted that Complainant was used to having her own way and did not react well to authority. The Supervisor claimed that Complainant was demeaning. According to the Supervisor, he told Complainant that she had changed and that her attitude was affecting the team's camaraderie. The Supervisor stated that Complainant and another employee were trained for promotion to manage the Office of Workers' Compensation Programs (OWCP) program. The Supervisor explained that the other employee received OWCP responsibilities due to Complainant's immaturity. The Supervisor asserted that this upset Complainant and she began to demonstrate a lack of teamwork and make meritless allegations.

S2 stated that the Supervisor would forward Complainant's assignments to him and he would forward them to Complainant. S2 asserted that Complainant performed her duties very well and is an excellent professional. S2 stated that Complainant went on military leave on March 19, 2018 and returned to the office on October 1, 2018. The Chief of the Administrative Management staff (hereinafter referred to as the Chief) stated that Complainant's reassignment and the communication through S2 were steps taken to accommodate her until the investigation into her harassment claims was concluded.

With regard to claim (2), Complainant asserted that she should have received a rating of "Outstanding" on the Customer Service and Communication element of her performance appraisal rather than a rating of "Meets Fully Successful". Complainant stated that her rating was lowered because she rejected her Supervisor's sexual advances. Complainant claimed that her Supervisor pointed out that her demeanor and mannerisms had changed. According to Complainant, she asked her Supervisor how this affected her ability to communicate and he replied they could talk about it later but did not. Complainant maintained that her Supervisor did not consider her accomplishments and that he failed to provide any negative feedback on her performance during 2017, including during her mid-year review.

Complainant argued that she went above and beyond her duties to assist customers with health benefits and retirement by presenting six retirement seminars in 2017, assuring the Agency's compliance by researching each employee's benefit entitlements, and by deploying to Shreveport to support human resources operations after a tornado while continuing to perform her regular duties. Complainant pointed out that she received "Outstanding" ratings in 2016 from her Supervisor and in 2015 from another Supervisor for the Customer Service and Communication element.

The Supervisor stated that he gave Complainant a lower rating in 2017 for Customer Service and Communication because she had a problem communicating with him, her peers, and customers. Specifically, the Supervisor explained that Complainant responded to his emails by "acknowledge" rather than answering his questions. According to the Supervisor, Complainant sent large amounts of data to her peers with little explanation. The Supervisor asserted that customer complaints were directed at Complainant and Complainant avoided verbal communication with her peers when customer issues arose. The Supervisor pointed out that Complainant received a rating of "Outstanding" in all of her other elements, and an overall rating of "Superior".

Complainant responded to her Supervisor's characterization of what occurred by stating that she had no problems communicating with her coworkers and no problems were brought to her attention. According to Complainant, she was asked to work on special projects and was assigned additional duties including assisting with a special project, writing an OWCP standard operating procedure, and creating process flows. Complainant maintained that she acknowledged every email she received, often responding with "acknowledged", and subsequent feedback. Complainant asserted that her communication with her Supervisor was by email and on the phone because he made her feel uncomfortable.

Several of Complainant's coworkers provided affidavits wherein they discussed her communication ability. The Chief of Support Services stated that Complainant communicated very well with him. A Program Analyst stated that she advised Complainant to appeal her rating based on her knowledge of Complainant's performance. This coworker noted that when she was Complainant's acting supervisor, Complainant went above and beyond her duties and took the initiative to assist with other customers, scheduled a meeting and prepared everything for the meeting.

A Human Resources Assistant stated that the Supervisor informed her that he rated everyone "Meets Fully Successful" for Customer Relations and Communication. This coworker asserted that Complainant did not have problems communicating, and in fact after the prior supervisor left, Complainant took the initiative to lead the team by initiating every meeting. The Human Resources Assistant asserted that the Supervisor told her that he did not like the way Complainant responded to his questions with the word "acknowledged". According to the Human Resources Assistant, she informed the Supervisor that the prior Branch Chief wanted the staff to acknowledge his emails that way.

A Human Resources/Benefits Specialist stated that Complainant's performance changed from the previous year. This coworker asserted that Complainant was a team player in 2015 and 2016. This coworker stated that she worked Complainant's files while she was on military leave and found Complainant made several serious mistakes. She acknowledged she was unaware what year the mistakes were made.

A Benefits Specialist stated that Complainant exhibited poor communication when she responded to emails with the work "acknowledged", including in response to her extensive emails. The Benefits Specialist asserted that Complainant deliberately did not communicate with her. According to the Benefits Specialist, when Complainant was on military leave, she covered Complainant's work and has found mistakes or oversights. Another Program Analyst (PA2) stated that Complainant and the Benefits Specialist do not have a good relationship. PA2 indicated that Complainant believed the Supervisor listened to the Benefits Specialist's opinion that she was not a good communicator.

With respect to Complainant's sexual harassment claim, Complainant stated that since September 2016, her Supervisor has made sexual gestures toward her. According to Complainant, the Supervisor looked at her, leaned back in his chair, touched himself and started to moan while slowly licking his lips. Complainant maintained that the Supervisor tried to hug her after a meeting and she pushed his hand away. Complainant stated that the Human Resources/Benefits Specialist told her that the Supervisor stared at her as she walked down the hall. Complainant claims that the Supervisor stared at other women and adjusted his private parts when they walked by him. Complainant noted that other women have complained about the Supervisor. Complainant stated that she asked her Supervisor to cease his behavior and complained to management after he ignored her repeated requests to stop.

The Supervisor asserted he made eye contact with Complainant as he would with any employee who came into his office. The Supervisor denied that he licked his lips, touched himself, or moaned while looking at her. Nonetheless, the Supervisor admitted that he tried to hug and kiss Complainant as he had done with other staff members. The Supervisor acknowledged that Complainant informed him that it made her feel uncomfortable. According to the Supervisor, after returning from the holiday break, he went around and hugged and kissed everyone on their cheek. The Supervisor claimed that he would not have tried to hug Complainant if he knew she was uncomfortable with hugs. The Supervisor denied that he stared at Complainant as she was walking down the hall. The Supervisor asserted that he looked at Complainant as he would any other employee.

S2 stated that he has seen the Supervisor hugging or attempting to hug female employees. S2 noted that the Supervisor has a reputation in the office for being overly flirtatious, hugging and kissing women, and inviting women out after work or on weekends to go drinking and partying. According to S2, a female employee complained to him that the Supervisor made her uncomfortable when he suggested they leave work together to shop for holiday decorations for the Supervisor's office. S2 maintained that the Supervisor regularly exhibits strange behavior and many people are uncomfortable around him in the workplace.

The Chief stated that Complainant informed him in late September or early October 2017 that she was uncomfortable being around her Supervisor because he was making sexual overtures toward her and she wanted him to stop. The Chief stated that he had not observed any issues between Complainant and her Supervisor. According to the Chief, in February 2017, Complainant and her Supervisor were deployed to an alternate worksite and worked side by side for long hours. The Chief stated that Complainant did not during this time raise with him any issues she had with her Supervisor. Additionally, the Chief pointed out that in May 2017, Complainant nominated the Supervisor for the military award given for supporting military employees, and that they attended the awards ceremony together.

The Program Analyst asserted that the Supervisor once turned around and leered at her while looking her up and down, licked his lips, moaned and commented he liked the way her boots look with what she was wearing. The Program Analyst stated that she asked the Supervisor never to speak to her that way again and she has not had another problem with him. Nevertheless, the Program Analyst stated that she does not feel comfortable around the Supervisor alone. The Program Analyst noted that he once gave her a brotherly hug, which though not inappropriate in her opinion, caused her to begin to avoid him. According to the Program Analyst, a female employee stated that she caught the Supervisor staring at her breasts. The Program Analyst stated that the Supervisor followed a young woman with his eyes while talking to her. Additionally, the Program Analyst asserted that she heard employees say they would not enter the Supervisor's office without someone accompanying them because of the way he looks at them.

The Human Resources Assistant stated that the Supervisor took her hand and pressed it against his lips for an extended time. The Human Resources Assistant noted that on October 5, 2017, she reported the Supervisor's behavior to the Chief. According to the Human Resources Assistant, the Chief informed her that he had received six or seven other complaints about the Supervisor's inappropriate behavior. The Human Resources Assistant maintained that the Chief told her that he would email the Supervisor to tell him not to kiss, hug, or touch anyone again and the complaints would be investigated that next week. The Human Resources Assistant stated that she was not contacted by an investigator, filed an EEO complaint, and decided to retire on December 29, 2017.

PA2 asserted that Complainant complained to her about the Supervisor's conduct shortly after the incidents happened. PA2 recalled that in 2016, Complainant came to her office upset and in tears after the Supervisor had either kissed her on the cheek or had tried to get close to her. According to PA2, Complainant told her that the Supervisor wanted to have a one-on-one meeting with her in his office, but Complainant did not go because he made her uncomfortable. PA2 stated that Complainant told her that she informed the Supervisor he could not hug her and to keep his distance, but he continued.

Complainant asserted that on several occasions, the Supervisor attempted to join her on work trips so they could spend time together. According to Complainant, she told her Supervisor that she was going to Shreveport to test the phone and computer systems and the Supervisor stated that he would go along to spend time with her.

Complainant indicated this made her uncomfortable. Additionally, Complainant noted that the Supervisor attempted to join her, the Benefits Specialist, and another coworker for a retirement seminar in Washington, D.C.

The Supervisor denied Complainant's claim that he wanted to go to Shreveport so he could spend time with her. The Supervisor maintained that he instead wanted to learn what Complainant and her coworker did for COOP but he was unable to attend their sessions. As for the seminar, the Supervisor stated that he attended the seminar so he could network with the customer leadership team. The Supervisor maintained that he did not recall telling Complainant he wanted to spend time with her, but stated he remembered proposing to the group that they attend the seminars, work and then possibly go out together.

The Human Resources Assistant stated that Complainant questioned why the Supervisor always wanted to travel with her on work trips and described it as creepy. The Human Resources Assistant asserted that Complainant complained to her on three occasions and appeared to be fearful. The Human Resources Assistant indicated that she had not heard the Supervisor asking other team members if they were going on trips or that he wanted to join them.

The Human Resources/Benefits Specialist stated that it was discussed that the Supervisor might attend training opportunities with the staff. She asserted that it was never implied that the Supervisor wanted to spend time alone with Complainant. The Benefits Specialist stated that the Supervisor was on military leave at the Pentagon during the retirement seminar but he came for her presentation and left. The Benefits Specialist claimed that the Supervisor stated he wanted to attend the seminar to meet the customers. PA2 asserted that Complainant was scheduled to attend the retirement seminar in 2016, but she told her that she was not going because she did not want to be there with the Supervisor.

Complainant stated that on January 11, 2017, the Supervisor came into her cubicle and kissed her on her right cheek near her mouth. Complainant maintained that she immediately told him to "get the f—k out" and he left. Complainant stated that she was in shock and took the next day off. According to Complainant, she returned to work on January 13, 2017, and read the Supervisor a statement she prepared. Complainant asserted that she told the Supervisor that she is married and that he demeaned and violated her. Complainant stated that she informed the Supervisor that she could no longer work late with him alone. Complainant claimed that the Supervisor responded, "Now I know who I can trust." Complainant asserted that the Supervisor further stated that he did not close his eyes when he kissed her and that women at the Pentagon did not have a problem with it. Complainant noted that the Supervisor did not kiss her again.

The Supervisor acknowledged that he kissed Complainant and mentioned that he embraced most employees with cheek to cheek kisses after the holiday break. The Supervisor noted that shortly afterwards Complainant informed him she was uncomfortable with this behavior. The Supervisor maintained that he apologized to Complainant and thanked her for telling him. According to the Supervisor, he is very diligent and sensitive toward Complainant and her feelings.

The Supervisor denied that he made the remarks that Complainant attributed to him after she read him her prepared statement. The Supervisor asserted that he has honored Complainant's wishes as best as possible.

Complainant stated that from February to April 27, 2017, and during their deployment to the alternate worksite in Shreveport, the Supervisor would tell her she looked nice and compliment her hair while looking her up and down once every other week. Complainant maintained that she told her Supervisor to stop complimenting her on her appearance. According to Complainant, the Supervisor asked her out on numerous occasions. Complainant acknowledged that she went to dinner with him once because she did not want a wall between them during their deployment. Complainant stated that her Supervisor did not act inappropriately on this occasion but she declined the three other occasions he asked her out. Complainant stated that her Supervisor continued to make gestures and compliment her. Complainant noted that after she declined to attend the Washington, D.C. seminar in August 2017, she was ignored and insulted in emails.

The Supervisor asserted that he does not recall asking Complainant out to eat other than the one occasion where they worked late to finish a report. The Supervisor pointed out that Complainant nominated him between January and March 2017 for the Supervisor's Patriot Award of Complainant's Military Service and Reserve Unit and that they sat together during the awards ceremony in May 2017. Further, the Supervisor stated that Complainant asked him to ride with her to put air in her tires. The Supervisor maintained that he complimented both men and women on their attire if it was professional, different, and made a statement. The Chief stated that he has heard Complainant ask female employees, including Complainant, to go out to eat and party.

Complainant stated that all of the Benefits Specialists were attending a seminar in Washington, D.C. in August 2017. Complainant claimed that for three weeks her Supervisor continuously asked her if she was attending the seminar after he learned she was not attending. Complainant asserted that she told him she was not attending each time he inquired.

The Supervisor maintained that on several occasions he asked employees, including Complainant, to confirm their attendance for the seminar sessions and to help manage customer expectations during the seminar. The Human Resources Assistant stated that the Supervisor told Complainant that the team needed her there and questioned why she was not going. The Human Resources Assistant indicated that she interpreted this as the Supervisor wanted Complainant to attend for her knowledge. PA2 stated that the Supervisor pressured Complainant to attend the seminar because the Benefits Specialist was not attending, and another employee was on military leave.

Complainant stated that prior to a meeting the Supervisor smiled and said she looked like his girlfriend. According to Complainant, the Supervisor proceeded to explain that his girlfriend was a Caucasian woman on Game of Thrones and he showed everyone her picture on his phone. Complainant stated that her Supervisor commented about her and the television character having similar hair. The Supervisor asserted that his remarks had no sexual connotation.

The Supervisor explained that Complainant wore her hair braided in two long ponytails like the character on Game of Thrones. The Human Resources/Benefits Specialist stated that she recalled the Supervisor making these comments, but she did not think it was sexually harassing.

Complainant stated that on September 28, 2017, she emailed the Chief to complain about her Supervisor's harassment and met with him the following day. Complainant stated that she informed the Chief that she was nervous and uncomfortable around her Supervisor. Complainant stated that the Chief told her she would be teleworking until further instruction, her complaint would be investigated, and someone would contact her for an interview in a few weeks. Complainant stated that she did not trust her Supervisor's first-line Supervisor to investigate the matter because her Supervisor had often commented that they had each other's backs. According to Complainant, she was not contacted for an interview and filed the instant complaint on December 28, 2017.

The Chief stated that he offered to have an employee outside the organization conduct the investigation. The Chief stated that he contacted the Director of Employee and Labor Relations for guidance on how next to proceed. The Chief asserted that he granted Complainant's request to work from home. In October 2017, the Supervisor's first-line Supervisor contacted Complainant for purposes of scheduling a factfinding meeting with her. However, Complainant refused because she did not think she would be objective and was too close to her Supervisor. The Chief subsequently informed the Director of Employee and Labor Relations about Complainant's position concerning the Supervisor's first-line Supervisor conducting the factfinding and the Director stated he would locate someone to perform the inquiry. The Chief stated that in the interim he issued the Supervisor strict instructions on how to behave, including ceasing any activity that could be misconstrued. The Chief stated that his detail ended by the time the Director found someone to conduct the inquiry.

The Director stated that he found someone to perform the inquiry before he was detailed in December 2017. According to the Director, the management inquiry was conducted in January 2018, and substantiated numerous factual issues related to Complainant's initial allegations and found additional issues and information concerning the Supervisor. The official who conducted the inquiry subsequently recommended that a formal personnel misconduct investigation be performed by another agency. Management referred the matter to the Food Safety and Inspection Service for a personnel misconduct investigation and also informed the NFC Deputy Director that it was advisable that the Supervisor be temporarily detailed from Human Resources until the investigation was completed.

Complainant stated that S2 informed her on January 31, 2018, that she was scheduled to meet with an investigator on February 2, 2018. Complainant asserted that after meeting with the investigator she continued to be subjected to a hostile work environment prior to her request on February 22, 2018, to be removed from direct communication with her Supervisor. Complainant stated in her February 22, 2018 request that the Supervisor continued to send her emails even though she had been removed from his direct supervision on January 23, 2018.

In the final agency decision, the Agency determined that Complainant established a prima facie case of sex discrimination as to her reassignment and her “Fully Successful” rating for the Customer Service and Communication element. The Agency further determined that management articulated legitimate, nondiscriminatory reasons for its actions. With respect to Complainant’s reassignment, the Agency stated that Complainant requested to be removed from under Supervisor’s supervision, and the Chief approved the request so as to accommodate Complainant until the investigation into her claims was concluded. The Agency noted that Complainant was reassigned and teleworked under S2’s supervision and continued performing her same duties. As for the “Fully Successful” rating, the Supervisor stated that Complainant was not responsive to her colleagues to assist in resolving issues when they arose and sent documentation to her coworkers with little explanation. The Agency determined that Complainant failed to establish pretext with regard to each claim of sex discrimination.

In terms of Complainant’s reprisal claim regarding her reassignment and the “Fully Successful” rating, the Agency determined that Complainant failed to set forth a prima facie case of reprisal. The Agency reasoned that Complainant had no EEO activity prior to the instant complaint. The Agency stated that the matters at issue occurred prior to Complainant’s EEO activity.

The Agency determined that the alleged incidents of sexual harassment constituted unwelcome conduct based on Complainant’s sex. The Agency further determined that the alleged behavior created an intimidating or hostile work environment. However, the Agency determined there was no basis for it to be liable. The Agency stated that management responded quickly to Complainant’s reported sexual harassment claim. The Agency pointed out that Complainant’s request to telework was approved and appropriate personnel were assigned to conduct an investigation. The Agency asserted that swift action was taken to address Complainant’s concerns and she experienced no further harassment from her Supervisor in the workplace. The Agency determined that it exercised reasonable care to prevent and promptly correct any alleged harassing behavior. Accordingly, the Agency found that Complainant’s sexual harassment claim failed.

CONTENTIONS ON APPEAL

On appeal, Complainant states that while the Agency took its time in reviewing her claim, she was seeking an escape from her hostile work environment. Complainant states that she volunteered for an active duty military tour in March 2018. According to Complainant, she is still on active duty because she never wants to see or hear her Supervisor again. Accordingly, Complainant requests that the Commission reverse the final decision.

ANALYSIS AND FINDINGS

Disparate Treatment

To prevail in a disparate treatment claim, Complainant must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Complainant must initially establish a prima facie case by demonstrating that she was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 576 (1978). Proof of a prima facie case will vary depending on the facts of the particular case. McDonnell Douglas, 411 U.S. at 802 n.13. The burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). To ultimately prevail, Complainant must prove, by a preponderance of the evidence, that the Agency's explanation is pretextual. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 120 S. Ct. 2097 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993).

Initially, we observe that the matter at issue in claim (1), Complainant's reassignment to a different supervisor, was part of the Agency's response to Complainant bringing the alleged sexual harassment to its attention. Rather than review this claim under a disparate treatment analysis, we shall address this matter later in this decision as part of Complainant's overall sexual harassment claim.

With respect to Complainant receiving a "Fully Successful" rating for the Customer Service and Communication element of her 2017 annual performance appraisal, we shall assume arguendo that Complainant set forth a prima facie case of sex discrimination. We note that the Agency determined that Complainant failed to set forth a prima facie case of reprisal in part because Complainant had no prior EEO complaints and Complainant's performance evaluation was issued prior to Complainant's EEO activity. However, Complainant clearly expressed opposition to alleged discriminatory sexual harassment when she reported her Supervisor's alleged conduct to the Chief on September 28, 2017. The Chief informed the Supervisor of the matter. Therefore, the Supervisor was aware that Complainant was opposing his alleged conduct and only two months later he gave Complainant the "Meets Fully Successful" rating at issue. Complainant has established a prima facie case of reprisal.

The Supervisor explained that Complainant was issued the "Meets Fully Successful" rating because she had a problem communicating with him, her peers and customers. The Supervisor noted that Complainant responded to his emails by the word "acknowledge" rather than answering his questions. The Supervisor stated that Complainant sent large amounts of data to her peers with little explanation. The Supervisor maintained that customer complaints were directed at Complainant and Complainant avoided verbal communication with her peers when customer issues arose. We find that the Agency articulated legitimate, nondiscriminatory reasons for issuing Complainant the "Meets Fully Successful" rating on the Customer Service and Communication element.

Complainant now bears the burden of establishing that the Agency's stated reasons are merely a pretext for discrimination. Shapiro v. Soc. Sec. Admin., EEOC Request No. 05960403 (Dec. 9, 1996). Complainant can do this directly by showing that the Agency's proffered explanation is unworthy of credence. Tx. Dep't of Cmty. Affairs v. Burdine, 450 U.S. at 256. Complainant argued that she had no problems communicating with her coworkers and no problems were brought to her attention throughout the year, including during her mid-year progress review. Complainant stated that she acknowledged every email she received, often responding with the word "acknowledged", and subsequently she provided feedback. Complainant explained that her communication with her Supervisor was by email and on the phone because he made her feel uncomfortable. Complainant argued that she assisted customers with health benefits and retirement by presenting six retirement seminars in 2017, assuring the Agency's compliance by researching each employee's benefit entitlements

A Program Analyst stated that she advised Complainant to appeal her rating based on her knowledge of Complainant's performance. The Program Analyst stated that when she was Complainant's acting supervisor, Complainant went above and beyond her duties and took the initiative to assist with other customers, scheduled a meeting and prepared everything for the meeting.

A Human Resources Assistant stated that Complainant did not have problems communicating, and in fact after the prior supervisor left, Complainant took the initiative to lead the team by initiating every meeting. The Human Resources Assistant stated that the Supervisor told her that he did not like the way Complainant responded to his questions with the word "acknowledged". The Human Resources Assistant asserted that she pointed out to the Supervisor that the prior Branch Chief wanted the staff to acknowledge his emails that way.

A Human Resources/Benefits Specialist stated that Complainant's performance changed from the previous year. This coworker asserted that Complainant was a team player in 2015 and 2016. A Benefits Specialist stated that Complainant exhibited poor communication when she responded to emails with the word "acknowledged", including in response to her extensive emails. The Benefits Specialist asserted that Complainant deliberately did not communicate with her. PA2 stated that Complainant and the Benefits Specialist do not have a good relationship.

We find that Complainant has established that the Supervisor's explanation for her "Fully Successful" rating was pretextual and intended to mask retaliatory motivation. We observe that Complainant received from the Supervisor a rating of "Exceeds Fully Successful" on the Customer Relations and Communication critical element of her performance evaluation for Fiscal Year 2016. We do not discern sufficient evidence that Complainant's performance in this critical element decreased in Fiscal Year 2017. Although it is clear that Complainant and the Benefits Specialist had a difficult relationship, we note it is evident from the record that the Benefits Specialist was very supportive in general of the Supervisor. Complainant's use of the term "acknowledged" to respond to her Supervisor's emails was the manner in which the prior Branch Chief wished the staff to take note of his emails.

We are mindful of the strong support that both the Program Analyst and the Human Resources Assistant gave on behalf of Complainant's communication skills. Although we do not perceive Complainant's sex as the basis for her lower rating, we do find that the Supervisor subjected her to reprisal. The performance evaluation was issued two months after the Supervisor learned that Complainant reported his alleged conduct to the Chief. It is apparent that the Supervisor intended to retaliate against Complainant by virtue of the "Meets Fully Successful" rating. Accordingly, we find that Complainant has demonstrated that she was subjected to reprisal for protected EEO activity.

Hostile Work Environment – Sexual Harassment

To establish a case of sexual harassment creating a hostile work environment, Complainant must show, by a preponderance of the evidence, that: (1) she belongs to a protected class; (2) she was subjected to unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature; (3) the harassment complained of was based on sex; (4) the harassment affected a term or condition of employment, either unreasonably interfering with the work environment or creating an intimidating, hostile, or offensive work environment; and (5) there is a basis for imputing liability to the employer. Humphrey v. U.S. Postal Serv., EEOC Appeal No. 01965238 (Oct. 16, 1998); 29 C.F.R. § 1604.11. The harasser's conduct should be evaluated from the objective viewpoint of a reasonable person in the victim's circumstances. See Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993); Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Enforcement Guidance on Harris v. Forklift Systems, Inc., EEOC Notice No. 915.002 (Mar. 8, 1994).

The Commission's guidelines on sexual harassment provide that "unwelcome" sexual conduct constitutes sexual harassment when "submission to such conduct is made either explicitly or implicitly a term of condition of an individual's employment." 29 C.F.R. 1604.11(a). "In determining whether unwelcome sexual conduct rises to the level of a 'hostile environment' in violation of Title VII, the central inquiry is whether the conduct 'unreasonably interferes with an individual's work performance or creates an intimidating, hostile, or offensive working environment.'" EEOC Policy Guidance on Current Issues of Sexual Harassment (March 19, 1990), p. 14; 29 C.F.R. 1604.11(a)(3); see also Harris v. Forklift Systems, Inc., 114 S. Ct. 367 (1993).

Sexual flirtation, innuendo, or vulgar language that is merely trivial or annoying will not establish a hostile environment. EEOC Policy Guidance, supra, p. 14. The harasser's conduct should be evaluated from the objective viewpoint of a reasonable person. Id. The Commission's Policy Guidance indicates that the following factors are pertinent to the inquiry: (1) whether the conduct was verbal or physical, or both; (2) how frequently the conduct was repeated; (3) whether the conduct was hostile and patently offensive; (4) whether the alleged harasser was a coworker or a supervisor; (5) whether others joined in perpetrating the harassment; and (6) whether the harassment was directed at more than one individual. EEOC Policy Guidance, supra, p. 14.

In order to avoid liability for sexual harassment by a supervisor, an agency must show that: (1) the acts or conduct complained of did not occur; (2) the acts or conduct complained of were not “unwelcome,”; (3) the alleged harassment was not “sufficiently severe or pervasive” to alter the conditions of the victim’s employment and create an abusive working environment; (4) immediate and appropriate corrective action was taken as soon as the employer was put on notice, and/or (5) there is no basis for imputing liability to the employer under agency principles. See Meritor Savings Bank v. Vinson, 477 U.S. 57, 67 (1986).

In the context of supervisory liability, the Commission distinguishes between harassment that results in a tangible employment action and harassment that creates a hostile work environment. Valles v. Dep’t of Def., EEOC Appeal No. 0120062663 (January 7, 2008) (citing Burlington Industries v. Ellerth, 524 U.S. 742, 760-65 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998); EEOC Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors (June 18, 1999)). In Ellerth and Faragher, the Supreme Court made clear that employers are subject to vicarious liability for the unlawful harassment by supervisors. The Court stated that an employer is always liable for a supervisor’s harassment if it culminates in a tangible employment action. Id. However, if it does not, the employer may be able to avoid liability or limit damages by establishing an affirmative defense that includes two elements: (a) the employer exercised reasonable care to prevent and correct promptly any harassing behavior; and (b) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. Id.

Whether an agency can prove the first element of that defense, i.e., that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior, depends on the circumstances of the particular situation. At a minimum, however, the employer must have a policy and complaint procedure against the harassment that contains the following elements: (1) a clear explanation of what constitutes prohibited conduct; (2) assurances that employees who bring complaints of harassment or provide information related to such complaints will be protected against retaliation; (3) a clearly described complaint process that provides possible avenues of complaint; (4) assurance that the employer will protect the confidentiality of harassment complaints to the extent possible; (5) a complaint process that provides a prompt, thorough and impartial investigation, and (6) assurance that the employer will take immediate and appropriate corrective action when it determines harassment has occurred. See Valles, EEOC Appeal No. 0120162663.

In the instant case, we find that the Supervisor’s conduct constituted sexual harassment as Complainant endured conduct that was sufficiently severe and pervasive to alter the conditions of her employment and created an abusive work environment. The Supervisor kissed Complainant on the cheek close to her lips without her consent and tried to hug her without her consent. The record indicates that the Supervisor licked his lips and ogled other women as well. Further, the Supervisor made comments about Complainant’s dress and appearance and persisted in asking Complainant out on several occasions despite her rejections.

With respect to the Supervisor comparing Complainant to his television “girlfriend” from Game of Thrones, we recognize this may have been intended by the Supervisor as a humorous remark, but it was an unwise comment in light of how he had previously been admonished by Complainant.

The Agency determined that it should not be liable for the Supervisor’s conduct because it exercised reasonable care to prevent and correct promptly the Supervisor’s harassing behavior. The Agency did take certain appropriate actions. Upon receiving Complainant’s complaint about her Supervisor, the Chief approved Complainant’s request to telework. The Chief also issued the Supervisor strict instructions on how to behave, including ceasing any activity that could be misconstrued. The Chief attempted to begin the factfinding process by having the Supervisor’s first-line Supervisor contact Complainant. The Supervisor’s first-line Supervisor and the Supervisor had a very close relationship and the work force, including Complainant, were aware of that. The Supervisor stated that he and his first-line Supervisor had each other’s backs. Complainant had a legitimate basis to be concerned as to whether an unbiased factfinding would take place. The Agency appropriately sought someone outside the internal office to perform the investigation. However, it was not until over three months later on January 31, 2018, that Complainant was contacted by an official outside the internal office. The Agency simply took too long and did not address this matter in a sufficiently prompt manner.

Further, with regard to Complainant’s reassignment, the Human Resources Assistant stated that on October 5, 2017, she informed the Chief that the Supervisor had kissed her hand without her consent for an extended period of time. The Human Resources Assistant stated that the Chief informed her he had six or seven complaints against the Supervisor for inappropriate behavior. During this period of time and until January 24, 2018, Complainant remained under the Supervisor’s supervision despite the fact that the Agency had constructive knowledge of the sexual harassment that Complainant had endured. See Taylor v. Jones, 653 F.2d 1193, 1197-99 (8th Cir. 1981) (employers usually will be deemed to know of sexual harassment that is openly practiced in the workplace or well-known among employees, e.g., where there is more than one victim); Mayer v. Dep’t of Homeland Sec., EEOC Appeal No. 0120071846 (May 15, 2009) (agency had constructive knowledge of sexual harassment because employees were aware that harasser was harassing complainant); Taylor v. Dep’t of the Air Force, EEOC Request No. 05920194 (July 9, 1992) (employers will generally be deemed to have constructive knowledge of harassment that is openly practiced in the workplace or is well-known among employees).

Although Complainant was eventually granted her request to be reassigned to a different supervisor, the Agency took too long to take this action and, in the meantime, Complainant was subjected to emails and other continued contact from the Supervisor. Indeed, in order to protect both Complainant and the staff in her unit as a whole, an action the Agency should have taken was the reassignment of the Supervisor. See Yael S. v. U.S. Postal Serv., EEOC Appeal No. 0120143125 (October 22, 2015). Given the multiple complaints lodged against the Supervisor, the Agency was truly remiss in allowing him to continue supervising Complainant and his team as a whole. Accordingly, we find that liability is imputed to the Agency for the unlawful sexual harassment that Complainant endured.

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 decision. We REMAND the matter for further processing in accordance with the ORDER below.

ORDER

The Agency is ordered to take the following remedial actions:

1. Within 60 days of the date this decision is issued, the Agency shall revise the rating on the Customer Relations and Communication element of Complainant's 2017 Fiscal Year performance appraisal to reflect a rating of "Exceeds Fully Successful". In addition, the Agency shall determine whether the change in this rating warrants a change in Complainant's overall performance rating from "Superior" to "Outstanding" and determine any other awards or quality step increases that would have accompanied the revised rating.
2. Within 60 days of the date this decision is issued, the Agency shall restore to Complainant any annual leave and/or sick leave that she utilized due to the Supervisor's sexual harassment.
3. Within 90 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 30 days after the completion of the investigation.
4. Within 90 calendar days of the date that this decision is issued, the Agency shall provide 16 hours of EEO training to the management official identified as the Supervisor, including at least eight hours of in-person or interactive training on Title VII with a specific focus on sexual harassment and the prohibition against reprisal for EEO activity. The management official identified as the Chief shall receive eight hours of in-person or interactive training on Title VII with a specific focus on sexual harassment. If either of these management officials have left the Agency's employ, the Agency shall furnish documentation of their departure dates.
5. Within 60 days of the date this decision is issued, the Agency shall consider taking disciplinary action against the responsible management official identified as the Supervisor. The Commission does not consider training to be disciplinary action.

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 their departure date.

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 of the Agency's calculation of back pay and other benefits due Complainant, including evidence that the corrective action has been implemented.

POSTING ORDER (G0617)

The Agency is ordered to post at its National Finance Center in New Orleans, Louisiana 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 (H1016)

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 the date this decision was issued. 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

September 16, 2020

Date