



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

[REDACTED]  
Phyllis F.,<sup>1</sup>  
Complainant,

v.

Alejandro N. Mayorkas,  
Secretary,  
Department of Homeland Security  
(Transportation Security Administration),  
Agency.

Appeal No. 0120150799

Hearing No. 430-2014-00176X<sup>2</sup>

Agency No. HS-TSA-01100-2013

**DECISION**

Complainant filed a timely appeal, pursuant to 29 C.F.R. § 1614.403(a), from the Agency's November 24, 2014, 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 REVERSES the Agency's final decision and REMANDS the matter in accordance with the ORDER below.

**ISSUE PRESENTED**

Whether the Agency's decision finding that Complainant did not establish that she was subjected to a hostile work environment on the bases of her sexual orientation or retaliation is supported by the preponderance of the evidence in the record.

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<sup>1</sup> 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.

<sup>2</sup> Complainant initially requested a hearing, but subsequently withdrew her request.

### FACTUAL BACKGROUND

At the time of events giving rise to this complaint, Complainant was serving in her probationary period as a Part Time Transportation Screening Officer (TSO) at the Pitt-Greenville Airport in Greenville, North Carolina.

In her complaint, Complainant alleged that a co-worker (TSO1) made several comments towards her about her sexual orientation which created a hostile work environment. Specifically, Complainant asserted that on February 13, 2013, while looking at a picture of her dogs, TSO1 approached her and said, "You are never going to have a man in your life as long as you have those two dogs." Complainant claimed that these types of comments occurred weekly, but that she did not complain about this incident immediately. Complainant further asserted that, on March 26, 2013, TSO1 interrupted a conversation she was having with another co-worker and stated, "You know they can mess around and have sex and do what they want I don't care, but I do not think same-sex couples should be allowed to get married."

Complainant alleged that she and another TSO (TSO2) raised the issue with their second-level supervisor, a Transportation Security Manager (TSM), and scheduled a meeting to discuss it. However, TSM cancelled the meeting and Complainant went to her union representative instead. Report of Investigation (ROI) at 340-341. Complainant did not hear back from her TSM about the incident until August 2013.

Complainant also asserted that on March 30, 2013, a co-worker (TSO3) informed her that she had overheard TSO1 and Complainant's first-line supervisor, a Supervisory Transportation Screening Officer (STSO), having a conversation about the sexual orientation of two officers. TSO3 advised Complainant that she heard her name mentioned in the conversation. Complainant averred that, after this event, she did not feel comfortable going to STSO about that harassment because he had informed TSO1 about her complaints. ROI at 347. Complainant averred she informed TSM about this incident as well.

Both STSO and TSM averred that the March 30, 2013 incident occurred while counseling TSO1 about the earlier statements. TSO1 responded to the allegation by averring that she was not aware of Complainant's sexual orientation at the time she made these comments.

The record contains corroborating testimony of TSO1's comments. TSO3 averred that she heard TSO1 make statements like this in the past and that it was clear that Complainant and TSO2 were offended by them. ROI at 541. She also averred that TSO1 made additional comments even after being told that they were offensive, and that management did not do anything to fix the hostile work environment. ROI at 553, 543. Another co-worker (TSO4) also averred that she believed that Complainant was being targeted because of her sexual orientation and EEO activity. ROI at 560, 566, 558.

Complainant asserted that management and her co-workers were aware of her complaints to management in March 2013, and they began retaliating against her for having complained. She contacted an EEO Counselor on April 2, 2013. Complainant stated that on April 7, 2013, TSO1 refused to take a bag that Complainant was passing to her until she placed it on the floor first and stated to Complainant that she “would not want to touch your hands and you report me for harassment.” ROI at 347. TSO1 does not dispute saying this. ROI at 531. Complainant also stated that in April 2013, TSO1 prohibited her from accessing and screening luggage, which was her assignment at the time. Complainant averred that, after this incident, she went to the checkpoint to work and informed the Lead TSO (LTSO1) about the incident. When TSO1 came back upstairs to the checkpoint, TSO1 allegedly remarked that she was “going to file an EEO complaint against [Complainant] because I did not do anything and she filed one against me.” ROI at 349. In response to this allegation, TSM averred that STSO counseled TSO1 about the incident and told her to stop the childish behavior because there were clearly issues between the two. In his affidavit, STSO averred it was merely a communication problem. ROI at p. 439, 457. However, TSO3 averred that she believed that this incident occurred because Complainant was pursuing the option of an EEO complaint. ROI at 545.

Although the record reveals that management sent an email on May 21, 2013, advising employees to be respectful of people’s orientations, Complainant asserted that the Agency’s efforts at ending the harassment were not sufficient. Complainant recalled requesting to be separated from TSO1 starting in March 2013, but she was informed that the airport was too small and only had one checkpoint, which would make such accommodation impossible. Complainant also averred that she asked TSM if she could get a transfer away from the harassment, but that TSM informed her that she had not been at the facility a year, which was required by the Collective Bargaining Agreement (CBA). TSM did not dispute this testimony and STSO averred that he did not remember Complainant asking for a transfer. STSO averred that he does not remember if Complainant asked to be separated or transferred. ROI at 440.

Complainant alleged that, in the meantime, the harassment continued. She claimed that on May 27, 2013, TSO1 remarked:

Those girls never told me they were gay, I could not tell by looking at them. I have a sister who is gay, and I don’t agree with her lifestyle, I still do not think gay people should be allowed to get married, I don’t believe in it. I do not know why those girls still have a problem with me.

ROI at 352.

In response, Complainant met with STSO and informed him that the comments were continuing, and that then-President Obama had advised that employees were entitled to equal rights in the workplace regardless of sexual orientation. In response, STSO told her that she should not discuss politics at work. ROI at 354. In an affidavit, TSO1 denied making this statement in front of Complainant. ROI at 533. STSO averred that he did not remember the incident.

When asked what actions he took in response to Complainant's allegations, STSO averred that he conducted daily shift briefings on hostile work environment, but he did not remember if he offered any preventative or corrective actions. ROI at 444.

Complainant also alleged that the Agency continued to retaliate against her in her performance rating when on July 7, 2013, she received only "Achieved Expectations" instead of "Exceeds Expectations." Complainant claimed that she should have received a higher rating because she had a clean disciplinary record and took on extra assignments. She further alleged that others did not perform extra assignments but received higher ratings. Complaint averred that when she asked STSO about her rating, she was told that she received a "3" for "Achieved Expectations" because she lacked experience. ROI at 358. Complainant then raised the matter with TSM, who changed the rating to an "Exceeded Expectations." TSM averred that he changed the rating when Complainant presented him with a list of her accomplishments. ROI at 461.

Complainant also claimed she was subjected to reprisal when she was not afforded advanced notice of overtime opportunities and was subjected to excess scrutiny at the checkpoint from the LTSO, which was embarrassing. TSO3 corroborated Complainant's testimony. ROI at 549-50.

Complainant continued to revisit her transfer request with TSM at her one-year anniversary. However, in August 2013, TSM informed Complainant that she had to apply through the National Voluntary Transfer Program. TSM also advised her that staffing levels were low and that any decision as to whether she could be transferred would need to take staffing levels into consideration. ROI at 404. Complainant stated that another female transferred to another airport but that management did not permit Complainant to do so.

Complainant also complained about the harassment to her third-level supervisor, the Assistant Federal Security Director (AFSD) in Raleigh, North Carolina. The record contains an August 14, 2013 email from Complainant to AFSD asking her for assistance. In the email, Complainant alerted AFSD to the harassment and her EEO complaint. Complainant also informed her that she had completed the National Voluntary Transfer application and requested a transfer to Santa Barbara, where there was an opening. AFSD inquired as to whether Complainant had been separated from the harasser and informed her that her transfer request would be investigated. ROI at 402. Complainant informed AFSD that she never received a response from TSM regarding her allegations and AFSD said she would follow up.

A few days later, on August 22, 2013, TSM sent Complainant a memo regarding her EEO allegations. Therein, TSM reported that he had completed an inquiry into Complainant's EEO complaint and he was able to substantiate only one incident because of a lack of corroborating evidence. He said the matter would be addressed with appropriate disciplinary action. However, there is no evidence that any disciplinary action was taken against TSO1 or any other individual.

In response to Complainant's allegations, AFSD averred that she contacted TSM in August 2013, and she was satisfied that he had dealt with the situation.

She added that she visited the Greenville, North Carolina facility in person on September 6, 2013, to discuss standards of conduct with Complainant and others. She also informed Complainant about the process of obtaining a transfer through the CBA. She noted that it was her belief that Complainant reacted negatively whenever she was with TSO1, and that Complainant was overly sensitive. She concluded that inappropriate comments were made, but there was insufficient evidence that TSO1 did this with intent to offend Complainant, and that “it is reasonable to believe that [TSO1] and [Complainant] have generational differences.” ROI at 497. With regard to separating Complainant and TSO1, she noted that because the airport had only one checkpoint it would be difficult to separate Complainant from TSO1.

Despite AFSD’s visit to the facility, Complainant claimed that TSO1’s harassment continued through the fall of 2013, in retaliation for filing a complaint. The record reveals that on October 19, 2013, Complainant contacted AFSD again about the harassment and “mental intimidation.” ROI at 715. In her email, Complainant again requested a transfer to get away from the harassment. AFSD again referred Complainant to the CBA and stated that she would have TSM speak with Complainant. ROI at 716. Complainant advised AFSD that she heard other TSOs and LTSO discussing whether they could have Complainant disciplined for having an attitude toward superiors. ROI at 719.

Two incidents occurred on October 23, 2013, which ultimately led to Complainant’s termination. Complainant claimed that at around 1:30-2:00 p.m., TSO1 made snide comments about her in front of passengers and tried to intimidate her. As a result, Complainant averred, she left her post because she was no longer felt comfortable working alongside TSO1. Complainant informed her Lead TSO (LTSO2) about the incident and then phoned TSM. Complainant averred that TSM assured her she would not have to work with TSO1 again, and she should come back in time for the next flight, approximately 2 hours later, when TSO1 would not be working. TSM’s testimony does not dispute this; rather, he averred that he told Complainant to come back two hours later and that he “gave her a pass” for the first incident. ROI at 1030.

Complainant averred that the second incident occurred soon after she returned around 4:00 p.m. She stated that to her surprise, TSO1 was at the US Airways counter, out of uniform. Complainant again believed that she was being intimidated and left the building. Complainant contacted her LTSO and TSM again and informed them that she did not feel safe and was going to see her doctor. At this point, TSM told Complainant she was acting like a baby and that she should return immediately. Complainant averred that she returned about 30 minutes later.

Complainant was charged with 3.15 hours of Absence without Official Leave (AWOL). Soon thereafter, on October 31, 2013, AFSD scheduled a meeting to discuss the AWOL charge, but Complainant did not have time to confer with her union representative. The meeting was rescheduled to November 6, 2013, but Complainant averred she did not have representation. Complainant alleged that during that meeting, AFSD informed Complainant that her complaints were a distraction to security and that they did not believe her harassment allegations. ROI at 375, 697. AFSD averred that Complainant was terminated because management had lost confidence in her ability to perform the job and because she presented a security risk when she left her post.

Complainant claimed that she was retaliated against when she was issued the AWOL and termination charges. She denied being absent for 3 hours and 15 minutes and alleged that others have been late for work or have walked off the job but were not similarly disciplined. TSM denied that others were treated more favorably when they were AWOL. However, TSO3 averred that TSO1 was AWOL many times and was not disciplined. ROI at 551.

Complainant also claimed that at this time a transfer to Santa Barbara was in the works, but on November 6, 2013, she was terminated. AFSD averred that Complainant was not eligible for a transfer because of the AWOL charge.

### PROCEDURAL BACKGROUND

On July 16, 2013, Complainant filed an EEO complaint alleging that the Agency discriminated against her based on her sex (female, lesbian),<sup>3</sup> and in reprisal for prior protected EEO activity when:

1. On February 18, 2013, TSO1 told Complainant, “You are never going to have a man in your life as long as you have those two dogs,” and “You need a man in your life in order for you to be happy and being here in Greenville is not where you’re going to find one.”
2. On March 26, 2013, TSO1 interrupted Complainant’s conversation with a third party and stated, “You know, they can mess around and have sex and do what they want, I don’t care, but I do not think same sex couples should be allowed to get married.”
3. On March 29, 2013, TSM told Complainant that he was too busy to meet with her to discuss the situation between Complainant and TSO1.
4. On March 30, 2013, another co-worker informed Complainant that TSO1 mentioned Complainant in a conversation about the sexual orientation of two officers.
5. On April 7, 2013, TSO1 placed a bag on the floor, instead of handing it to Complainant and stated, “I would not want to touch your hands and have you report me for harassment.”
6. On April 16, 2013, TSO1 did not let Complainant screen any bags and yelled at her.

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<sup>3</sup> In Bostock v. Clayton County, the Supreme Court held that discrimination based on sexual orientation or transgender status is prohibited under Title VII. 590 U.S. \_\_\_, 140 S. Ct. 1731 (2020); see also Baldwin v. Dep’t of Transportation, EEOC Appeal No. 0120133080 (July 15, 2015) (an allegation of discrimination based on sexual orientation states a claim of sex discrimination under Title VII because sexual orientation is inherently a sex-based consideration).

7. On May 27, 2013, TSO1 stated in Complainant's presence, "Those girls never told me they were gay. I could not tell by looking at them. I have a sister who is gay, and I don't agree with her lifestyle. I still do not think gay people should be allowed to get married. I don't believe in it. I do not know why those girls still have a problem with me."

Complainant also alleged that the Agency discriminated against her and subjected her to a hostile work environment based on sex (female, lesbian) and in reprisal (instant complaint) when:

8. Beginning in April 2013 to present, Complainant did not receive advanced notice to come in for extra hours like other TSOs received.
9. On June 2, 2013, Complainant related the incidents of May 27, 2013, to STSO, and when she said that President Obama stated that employees are entitled to equal rights in the workplace regardless of sexual orientation or gender identity, STSO warned Complainant not to talk about politics at work.
10. On July 7, 2013, S1 rated Complainant as "Achieved Expectations" while rating another TSO as "Exceeds Expectations."
11. On August 29, 2013, LTSO1 tried to embarrass Complainant when he stated, "I need to come over and look at the X-Ray to see what [Complainant] just called a bag check on to make sure it was necessary," and implied that Complainant was a child by asking if she needed to go the break room for a nap and snack.
12. On September 8, 2013, TSO1 entered the training room and disturbed Complainant's work by talking loudly on the phone, and she only ceased her behavior after Complainant reported her to LTSO2.
13. On October 22, 2013, LTSO1 stood directly behind Complainant while she was working the X-ray machine to correct her, to show his authority and embarrass her in front of other TSOs and passengers.
14. On October 23, 2013, TSO1 interrupted Complainant's conversation with a US Airways employee and gave her a look of contempt, which Complainant alleged is evidence of stalking, intimidation and scare tactics.
15. On October 31, 2013, AFSD scheduled an AWOL meeting with Complainant, but did not allow her time to find representation.
16. On November 6, 2013, Complainant received a notice of "Termination during Trial Period," effective November 1, 2013.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing but subsequently withdrew her request. Consequently, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b).

In its final decision, the Agency found that Complainant had not established her claims of discrimination. The Agency then addressed Complainant's disparate treatment claims, and it determined that she failed to present evidence of similarly situated individuals who were treated more favorably. The Agency also concluded that Complainant failed to establish that the Agency's reasons for its actions were a pretext for discrimination. Specifically, the Agency found no evidence that Complainant was denied additional overtime hours. Further, the Agency found no evidence that Complainant received a discriminatory rating since her rating was eventually raised after she complained. Finally, the Agency found Complainant was issued an AWOL charge and terminated from her position because she left her job twice in one day and presented a security risk.

The Agency also concluded that Complainant failed to establish that she was subjected to a hostile work environment. The Agency found that TSM and AFSD both investigated Complainant's allegations and informed all TSOs that they should abide by acceptable standards of conduct. The Agency determined that even if TSO1 made the February 18, 2013, and March 26, 2013, statements, she was not aware of Complainant's sexual orientation at the time she made the statements; further, the March 30, 2013 statement was made during a counseling session between STSO and TSO1. The Agency found that the remaining allegations did not occur as alleged or were not harassing. In sum, the Agency concluded that Complainant had not proved that the Agency subjected her to discrimination as alleged.

#### CONTENTIONS ON APPEAL

On appeal, Complainant argues that the Agency subjected her to a hostile work environment based on her sexual orientation when TSO1 made comments regarding Complainant's failure to conform to traditional female stereotypes. She asserts that these comments became pervasive in the workplace and went unaddressed by management. Complainant argues that management conducted only a verbal counseling of TSO1, which was insufficient. She submits evidence on appeal from AFSD suggesting that TSM's response was not an appropriate response to the harassment. Complainant claims that she sought a transfer to another airport to escape the harassment but was not allowed to transfer. Ultimately, Complainant asserts the harassment got so bad she was forced to leave her post, but she denies doing so for three hours. In that regard, she asserts others were also AWOL but were not similarly disciplined. Complainant also claims that she was subjected to retaliation when the Greenville Human Resources Office informed the Santa Barbara airport about her pending removal and EEO activity, and that the Agency failed to provide Complainant with a safe and discrimination-free workplace.

In response, the Agency first takes issue with the new documents Complainant submitted on appeal and claims they should not be made part of the record. The Agency contends that the documents were produced to or by Complainant during discovery while the case was initially before an EEOC AJ. The Agency asserts that Complainant cannot show that the evidence was not reasonably available during the hearing process and that she abandoned the hearing process without making them part of the record.

The Agency also argues that Complainant's disparate treatment claims fail because she did not identify similarly situated individuals who were treated more favorably. Further, it asserts that Complainant failed to prove that the Agency's reasons for terminating her were a pretext because the evidence revealed that Complainant walked off the job and created a security vulnerability. Accordingly, because of this discipline, Complainant was not available for transfer and her EEO activity played no part in the denial of transfer. Regarding the harassment claim, the Agency contends that the conduct was neither severe nor pervasive enough to constitute a hostile work environment, and it was not shown to be related to Complainant's sex, sexual orientation, or prior EEO activity.

### ANALYSIS AND FINDINGS

#### *Standard of Review*

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the Agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, at Chap. 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*

To establish a claim of harassment a complainant 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 employer. See Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982).

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).

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. (Enforcement Guidance), EEOC Notice No. 915.002 at 6 (Mar. 8, 1994). In determining that a working environment is hostile, factors to consider are the frequency of the alleged discriminatory conduct, its severity, whether it is physically threatening or humiliating, and if it unreasonably interferes with an employee's work performance. See Harris v. Forklift Systems, Inc., 510 U.S. at 17, 21 (1993); Enforcement Guidance at 6. The Supreme Court has stated that: "Conduct that is not severe or pervasive enough to create an objectively hostile work environment - an environment that a reasonable person would find hostile or abusive - is beyond Title VII's purview." Harris v. Forklift Systems, Inc., 510 U.S. at 22 (1993).

After a review of the record, we conclude that Complainant was subjected to harassment because of her sex because she was subjected to severe or pervasive comments which were premised on her sex; the sex of people she associated with; and included sex-based preferences, assumptions, expectations, stereotypes or norms. The record reveals that starting in February 2013, TSO1 made several offensive comments towards Complainant about her sexual orientation and suggested that she needed a man in her life. Complainant later overheard STSO and TSO1 discussing the incident, and TSO1 again remarked about gay marriage. Complainant also found this was offensive. TSO1 continued to make her disapproval of homosexuality and gay marriage known in May 2013. Complainant understood that TSO1 did not approve of her "lifestyle" and became fearful when working with TSO1, and thus the conduct unreasonably interfered with her work performance. Complainant has met her burden of establishing that she was subjected to a hostile work environment because of her sex.

Additionally, we also find Complainant has met her burden of proving she was subjected to retaliation because she complained about the harassment. Soon after Complainant complained in March 2013, co-workers and supervisors retaliated against her and subjected her to severe or pervasive comments, as well as humiliating conduct, about her EEO activity. For example, on one occasion, TSO1 refused to pass Complainant luggage without setting it on the floor first because she "would not want to touch [Complainant's] hands and have [Complainant] report [TSO1] for harassment." TSO1 also interfered with her work by limiting Complainant's access to luggage so she could not perform her assignment. Complainant's own supervisor, STSO, told her not to complain about EEO matters because she should not discuss politics at work. There is also evidence corroborating Complainant's claim that she was not provided opportunities for extra work assignments after she filed her EEO complaint. Despite Complainant's protests about the conduct, in August 2013, Complainant alleged that other TSOs publicly mentioned her complaints and voiced embarrassing and childish comments towards her. ROI at 710. For example, she claimed that LTSO remarked, "do you need to go into the break room for nap time and snack." Furthermore, she alleged that on September 3, 2013, STSO mentioned to all of Complainant's co-workers that "'someone' was complaining to [management at the Raleigh International Airport] that we are not taking things seriously." ROI at 711. After a review of the record, we find Complainant has proven she was subjected to retaliation for engaging in EEO activity.

*Agency Liability for Conduct of Co-workers*

Complainant's allegations involve both co-workers and supervisors. Regarding her co-workers, we note the Agency is responsible for acts of sexual harassment in the workplace only where the Agency knew or should have known of the conduct, and it failed to take immediate and appropriate corrective action. See 29 C.F.R. § 1604.11(d); see also EEOC Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors (June 18, 1999) at p. 5 (Commission's long-standing guidance on employer liability for harassment by co-workers remains in effect - an employer is liable unless it knew or should have known of the misconduct, unless it can show that it took immediate and appropriate corrective action).

The most troubling piece of this record is management's utter disregard of its responsibilities to appropriately address the co-worker harassment. The record reveals Complainant complained to her first-level supervisor (STSO) in March, her second-level supervisor (TSM) in April and then to her third-level supervisor (AFSD) in August 2013. At each stage, management's responses were inadequate. STSO spoke with TSO1 in a public place, which was not an effective or appropriate remedial measure. TSM did not provide immediate action because he conducted an investigation in July 2013, months after the initial incidents occurred. By this time, however, TSM said that he found insufficient corroboration. There is no information in the record as to the reason for this delayed investigation, and upon review, we find this inquiry did in fact reveal credible support for Complainant's claim that she was subjected to harassment. ROI at 392, 590.

While management may have spoken to the TSOs about their inappropriate conduct, their action failed to end the harassment. Rather, retaliation from co-workers, and ultimately from management, continued unaddressed. The record reveals that management identified Complainant's behaviors as the source of the problem, rather than the conduct of her coworkers. The failure of the local management to deal with the harassment was so evident that even AFSD acknowledged in an email to TSM on August 16, 2013, that he was not responding to the situation appropriately.

On appeal,<sup>4</sup> Complainant presented the following email from AFSD to TSM:

I read over the file here at RDU regarding [Complainant's] complaint. However, I did not see anything related to your final resolution. Also, I would hope that [TSO1] was issued at least a LOC for her inappropriate comments to [Complainant]. In her written statement, she admits to making the statements reference to gay marriage, not having a man and the dog. [TSO1's] statements are totally inappropriate and should have been addressed in writing, not verbally as it appears.

Question: did you respond to [Complainant] in writing?

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<sup>4</sup> There is no explanation from either party as to why this email was not in the ROI, or how Complainant obtained it to include with her appeal.

See Complainant's Appeal Brief at Exhibit 1.<sup>5</sup>

It was not until August 22, 2013, soon after this email, that TSM finally sent Complainant the results of her March 2013 allegations. After a review of the record, we find the Agency is liable for the harassment because it failed to take immediate and appropriate remedial actions to end the harassment.

The Agency is under an obligation to do "whatever is necessary" to end harassment, to make a victim whole, and to prevent the misconduct from recurring. Complainant v. Dep't of the Army, EEOC Appeal No. 0120091345 (February 1, 2012); see also Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, *supra* (stating that "remedial measures should be designed to stop the harassment, correct its effects on the employee, and ensure that the harassment does not recur"). Taking only a stop-gap remedial action does not absolve the Agency of liability where that action is ineffective. See Logsdon v. Dep't of Agriculture, EEOC Appeal No. 07A40120 (Feb. 28, 2006).

To the extent that the Agency could not separate the individuals due to the nature of the facility, it should have disciplined or transferred TSO1. Furthermore, Complainant repeatedly requested a transfer to escape the harassment, but this request was repeatedly denied because the CBA allegedly prohibited such a transfer. While we are skeptical that this explanation would suffice under the circumstances, we are unable to examine the CBA because it was not placed into the record. We also note the absence of any sexual harassment policy from the record, which further supports our finding that the Agency failed to establish that it took immediate and appropriate corrective action after it learned of the harassment.

### *Supervisory Harassment*

Complainant's harassment complaint also includes allegations that she brought against STSO, as well as TSM and AFSD, when she was issued a lower performance evaluation than she deserved,<sup>6</sup> and then terminated, allegedly because she was AWOL for 3.15 hours. An employer is subject to vicarious liability for harassment when it is "created by a supervisor with immediate (or successively higher) authority over the employee." Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 118 S.Ct. 2257, 2270 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 118 S.Ct. 2275, 2292-93 (1998). When the harassment does not result in a tangible employment action being taken against the employee, the employer may raise an affirmative defense to liability.

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<sup>5</sup> We are not persuaded by the Agency's confusing argument on appeal as to why we should disregard this evidence. Rather, we are concerned that this email was absent from the ROI, given its relevance to the question of whether the Agency took appropriate steps to correct the harassment. Additionally, we note that the record contains enough evidence showing that the Agency did not take sufficient steps to end the harassing conduct.

<sup>6</sup> The Agency changed Complainant's evaluation to an "Exceeded Expectations" after she complained.

The agency can meet this defense, which is subject to proof by a preponderance of the evidence, by demonstrating: (a) that it exercised reasonable care to prevent and correct promptly any harassing behavior; and (b) that appellant unreasonably failed to take advantage of any preventive or corrective opportunities provided by the agency or to avoid harm otherwise. Burlington Industries, Inc. v. Ellerth, 118 S.Ct. at 2270; Faragher v. City of Boca Raton, 118 S.Ct. at 2293; Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors, *supra*.

However, the affirmative defense is not available when the harassment results in a tangible employment action (e.g., a discharge, demotion, or undesirable reassignment) being taken against the employee. See *id.*, at IV(c). This sort of claim is analyzed like any other case in which a challenged employment action is alleged to be discriminatory. If the employer produces evidence of a nondiscriminatory explanation for the tangible employment action, a determination must be made whether that explanation is a pretext designed to hide a discriminatory motive. *Id.* If it is determined that the tangible action was based on a discriminatory reason linked to the preceding harassment, relief could be sought for the entire pattern of misconduct culminating in the tangible employment action, and no affirmative defense is available. If the tangible employment action was based on a non-discriminatory motive, then the employer would have an opportunity to raise the affirmative defense to a claim based on the preceding harassment. *Id.*

After a review of the entire record, Complainant established that the Agency's reasons for its performance rating and termination were a pretext to retaliate against her. Complainant alleged that she performed higher than her rating revealed, and when she challenged the rating, management changed it. With respect to the termination, the record does not contain documentary evidence of Complainant's comings and goings on the day in question, and there is conflicting evidence in the record as to how long Complainant was absent from the facility. Our review of the evidence reveals that TSM authorized Complainant's absence from the facility for two hours after the first incident occurred, since by that time TSO1's shift would have ended. ROI at 595, 1030. The second incident seemed to last no more than 30 minutes and occurred soon after Complainant's return to work around 4:00 p.m. Accordingly, we find insufficient evidence in the record which supports the Agency's finding that Complainant was AWOL for 3 hours and 15 minutes. Fellow TSOs corroborated Complainant's account that that other TSOs were absent from their positions on occasion but not similarly disciplined. ROI at 551.

Rather, we find that Complainant established the Agency's reason for issuing the termination was a pretext to retaliate against her. Notably, the undisputed reason Complainant left the facility was because the Agency failed to stop the harassment from TSO1. The record convinces us that Complainant felt unsafe, had pursued all available avenues to avoid the harassment, and found no other option but to leave and see her physician. Therefore, we find that Complainant's first excused absence, and subsequent shorter absence on October 23, 2013, were not legitimate reasons to terminate her employment, considering evidence that others were not similarly treated, as well as the Agency's failure to cure the ongoing harassment, which created an intolerable working environment. Accordingly, we find Complainant's termination was a pretext to retaliate against her for engaging in EEO activity.

### 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 final decision and REMAND the matter for further action in accordance with the ORDER below.

### ORDER

Unless otherwise specified herein, within one hundred and twenty (120) days from the date this decision is issued, the Agency shall take the following actions:

- 1) The Agency shall rescind the AWOL charge and Notice of Termination and retroactively restore Complainant to her position as Transportation Security Officer at the Greenville, North Carolina facility or to a substantially equivalent position at a mutually agreed upon location, including Santa Barbara, California. Preference in facilities shall be given to a location close to Complainant's residence. Complainant shall not be required to work at the Greenville, North Carolina facility if TSO1 and the other responsible management officials are still at this location. Complainant has fifteen (15) days to accept or decline the Agency's offer of reinstatement. If Complainant should decline the Agency's offer of reinstatement, the date of her declination shall be the end date for any back pay due Complainant.
- 2) The Agency shall determine the appropriate amount of back pay, with interest, and other benefits due Complainant since November 6, 2013, pursuant to 29 C.F.R. § 1614.501, no later than sixty (60) calendar days after the date this decision is issued. Complainant shall cooperate in the Agency's efforts to compute the amount of back pay and benefits due, and she shall provide all relevant information requested by the Agency. If there is a dispute regarding the exact amount of back pay and/or benefits, the Agency shall issue a check to Complainant for the undisputed amount within sixty (60) calendar days of the date the Agency determines the amount it believes to be due. 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." The Agency shall pay Complainant for her proven increased tax liability.
- 3) The Agency shall provide training to TSO1 and the LSTOs at the facility as well as responsible management officials, including STSO, TSM, and AFSD, regarding their responsibilities under EEO laws, with a special emphasis on retaliation and sex discrimination.
- 4) The Agency shall give Complainant a notice of her right to submit objective evidence and request objective evidence from Complainant in support of her request for compensatory damages. The Agency shall provide Complainant with sufficient explanation and specificity to allow her to reasonably respond to the Agency's request. Upon receipt of

Complainant's submission, the Agency shall conduct a supplemental investigation to determine the amount of compensatory damages due to Complainant, if any, and issue a decision on compensatory damages. The supplemental investigation and Agency decision shall be completed within sixty (60) days of the date the Agency receives Complainant's submission of objective evidence. A copy of the Agency decision on damages and supplemental investigation must be transmitted to Complainant and her named representative. A copy of the Agency decision on damages must be submitted to the Compliance Officer, noted below.

- 5) The Agency shall consider taking appropriate disciplinary action against TSO1 and the LTSOs, as well as all responsible management officials still employed by the Agency, including STSO, TSM, and AFSD. 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 any of the responsible management officials have left the Agency's employ, the Agency shall furnish documentation of their departure date(s).
- 6) The Agency shall pay Complainant's reasonable attorney fees as directed below.
- 7) The Agency shall post a notice of the finding of discrimination in accordance with the paragraph below.

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 facility at the Pitt-Greenville Airport in Greenville, North Carolina 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 (M0920)

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

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or

2. The appellate decision will have a substantial impact on the policies, practices, or operations of the agency.

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

Complainant should submit his or her request for reconsideration, and any statement or brief in support of his or her request, via the EEOC Public Portal, which can be found at

<https://publicportal.eeoc.gov/Portal/Login.aspx>

Alternatively, Complainant can submit his or her request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, a complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

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

Failure to file within the 30-day time period will result in dismissal of the party's request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. **Any supporting documentation must be submitted together with the request for reconsideration.** The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(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 16, 2021

Date