



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of Federal Operations
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Washington, DC 20013

[REDACTED]
Madlyn F.¹,
and
Breshna Omarkhel a/k/a
Lashawn C.,
Complainants,

v.

Kelu Chao
Acting Chief Executive Officer,
US Agency for Global Media,
Agency.

Appeal No. 2019005498 and 2020003512

Agency No. OCR 18-01 and OCR-17-23

DECISION

On August 12, 2019, Madlyn F. 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 June 28, 2019, 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. and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq.²

On May 11, 2020, Lashawn C. filed an appeal with the EEOC, pursuant to 29 C.F.R. § 1614.403(a), from the Agency's April 9, 2020, final decision concerning her EEO complaint

¹ This case has been randomly assigned pseudonyms which will replace Complainants' names when the decision is published to non-parties and the Commission's website. We have also used the pseudonyms to refer to Complainants in the body of our decision.

² In Madlyn F.'s appeal, she submitted an affidavit stating that she received the Agency's final decision on July 12, 2019. Attached with her appeal was a copy of United States Postal Services (USPS) tracking sheet (7012 2920 0000 2141 4261) that indicated that the final decision was mailed on July 3, 2019. When the package could not be delivered, the USPS left a note for Madlyn F. to pick up the package from the postal office, the tracking number indicated it was picked up on July 12, 2019. The Agency did not dispute the appeal's timeliness.

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.

As the underlying facts are the same in both complaints, we have consolidated them for a joint appellate decision. See 29 C.F.R. § 1614.606. For the following reasons, the Commission AFFIRMS in part and REVERSES in part the Agency's final decision in both complaints.

ISSUE PRESENTED

The issue presented is whether Madlyn F. and Lashawn C. have shown by a preponderance of the evidence that the Agency subjected them to a hostile work environment and disparate treatment based on national origin, sex and in reprisal for prior protected EEO activity. Additionally, Madlyn F. also alleged discrimination and hostile work environment based on her age.

BACKGROUND

At the time of events giving rise to this complaint, both complainants worked as International Broadcasters, GS-12, for the Agency's International Broadcasting Bureau, Voice of America (VOA), South and Central Asia Division, Afghanistan Branch/Service, located in Washington, D.C. Madlyn F. worked in the Dari Division while Lashawn C. worked in the Pashto Division³.

Appeal No. 2019005498 and Agency No. OCR 18-01 (Complaint 1)

On October 17, 2017, Madlyn F. filed an EEO complaint alleging that the Agency subjected her to a hostile work environment and discriminated against her on the bases of national origin (Tajik), sex (female), age (63), and reprisal for prior protected EEO activity when:

1. Madlyn F. was subjected to discriminatory influence and acts she believed adversely affected her ability to perform her assignments and duties, to include, but not limited to, minimizing the presence of women on live television and radio by removing her television anchoring duties;
2. on June 28, 2017, Madlyn F. discovered she had not been selected for a promotion to the GS-13 level following a benchmark study; and
3. on October 19, 2017, Madlyn F. received a Letter of Reprimand.⁴

³ Throughout the record, Lashawn C. is at times referred to as working for the Dari Service. However, the Appeal File and the Report of Investigation lists Lashawn C.'s station as with the Pashto Service.

⁴ On February 23, 2018, Madlyn F.'s formal complaint was amended to include claim 3.

Appeal No. 2020003512 and Agency No. OCR-17-23

(Complaint 2)

On September 18, 2017⁵, Lashawn C. filed an EEO complaint alleging that the Agency subjected her to a hostile work environment and discriminated against her on the bases of her sex (female), her association with her husband and his national origin (Pakistan), and reprisal for her and her husband's protected EEO activity when:

1. between June 29, 2017, and July 2, 2017, Lashawn C. was treated less favorably than her male counterparts when five of them were promoted to the GS-13 level and she was not;
2. Lashawn C.'s duties were modified by the Managing Editor who, at the time, did not have supervisory responsibility over her;
3. on October 1, 2018, Lashawn C. was subjected to acts that made her feel uncomfortable and which she perceived as terrifying to include:
 - a. the Pashto Service Managing Editor insistence that Lashawn C. take off her shoes prior to appearing on camera, even though she made it clear that she was not comfortable with removing her shoes in front of people;
 - b. the Pashto Service Managing Editor insulted, shouted at, and humiliated her for not complying with her instructions to remove her shoes; and
 - c. that same day, the Pashto Service Managing Editor told Lashawn C. to "go do your legal things, you are an expert in it." Lashawn C. believed this was a reference to her participation in EEO activity.

The investigative record reflects the following pertinent matters relating to the subject claims of both Complaint 1 and Complaint 2.

In 2016, the VOA Director (United States, female, over 40, prior EEO activity) initiated the benchmark review shortly after becoming the director. Report of Investigation (ROI)⁶ at 148 and 240.

⁵ Lashawn C.'s formal complaint was later amended on October 3, 2018 and accepted by the Agency on November 2, 2018. One claim, regarding private messages that Lashawn C. and her husband sent to each other, which were later accessed and publicly shared by management, was dismissed on November 7, 2017. The Agency dismissed the claim for failure to state a claim in accordance with 29 C.F.R. §1614.107(a)(1). Lashawn C. did not contest this dismissal on appeal.

⁶ Throughout the decision the investigative report associated with Madlyn F. and Complaint 1 will be referenced as the Report of Investigation (ROI).

The VOA Director stated that the review was initiated because there had been no systematic reviews of GS grade-levels within VOA for many years. ROI at 148. The review was used to determine if positions were correctly classified and/or whether the duties of such positions had grown over time to warrant classification at a higher level. Id.

The benchmark review was not a competitive process, but one in which an individual employee was evaluated on his/her qualifications and performance. ROI at 148 and 265. The benchmarks were updated based on the Office of Personnel Management (OPM) classification standards. Id. The benchmark questionnaire contained three parts: Part 1: Content Preparation, Part 2: Indications, and Part 3: Attestation by Immediate Supervisor. Benchmark questionnaires were sent to supervisors which asked them to provide information, on a yes/no system, as to what duties the employee performed on a regular basis. The supervisor then sent the completed questionnaires to the Division Director (RMO1) for approval. From there, it was sent to the Office of Human Resources (OHR) for review and approval. Two HR specialists were primarily responsible for the benchmark review in question: HRS1 (United States, female, over 40, prior EEO activity) and HRS2 (United States, female, under 40, no prior EEO activity). ROI at 265.

In December 2016, Madlyn F. learned that television anchoring duties were to be removed from her and other female staffers. On December 23, 2016, Madlyn F. met with the Division Director (RMO⁷1, Afghanistan, male, over 40, prior EEO activity) and requested that he not remove her anchoring duties. ROI at 91. Madlyn F. asserted that she asked RMO1 why she and Lashawn C. were being removed as television anchors, and RMO1 purportedly stated that his decision was in response to concerns from the Afghan Service's local affiliate that the Taliban was putting pressure on the local service; specifically, that the Taliban had pressured an unidentified affiliate in Kabul about removing women that did not wear hijabs from the television news programs. ROI at 99. RMO1 also purportedly stated that he was replacing Madlyn F. and Lashawn C. with two male coworkers (CW1, male, national origin/age/prior EEO activity unknown) and (CW2, male, Tajik, under 40, unknown EEO activity), who he considered to be superior anchors.

RMO1 later denied making any statements that his decisions were associated with the Taliban and asserted that Madlyn F. fabricated parts of the December 23, 2016 meeting. ROI at 133. RMO1 asserted that the General Director⁸ of Afghan National Television complained about multiple anchors and wanted to limit the number of anchors on the air. ROI at 133. RMO1 asserted that he met with "all the managers" and they determined the anchor slots would be limited to the two best-qualified anchors. Id. RMO1 did not identify which managers these were, nor how management determined who was "best qualified." RMO1 stated that as the result of the meeting and assessment of who was "the best," Madlyn F. was no longer anchoring the show. Id. RMO1 asserted that "no one replaced for her support anchoring role. [RMO1 asserted that Madlyn F.] continue[d] to appear on Afghan Dari Television on [a] daily basis in different roles." Id. RMO1 acknowledged replacing

⁷ Responsible Management Official (RMO).

⁸ Not identified in the record.

Madlyn F. and Lashawn C. with two male anchors, but asserted that CW1 and CW2 were better qualified than Madlyn F. and Lashawn C.

The VOA Program Director (Taiwan, female, over 40, prior EEO activity) stated that anchoring duties were generally decided at the service level and that she was not involved in the decision. Madlyn F.'s direct supervisor, the Managing Editor for Radio/Television, Dari Group (S1, Afghanistan, female, over 40, no prior EEO activity) stated that the decision to remove anchoring duties from Madlyn F. and Lashawn C. was not appropriate. ROI at 199. S1 stated that the Managing Editor (RMO2, Afghanistan, male, under 40, no prior EEO activity), RMO1, and the Executive Producer⁹ made the decision to remove Madlyn F. and Lashawn C.'s anchoring duties, and that her opinion was never sought. ROI at 199 and 201. S1 stated that other staff members thought it was discriminatory to remove Madlyn F. and Lashawn C.'s anchoring duties and that many felt it was due to their sex. ROI at 202. Additionally, S1 stated that the Afghan Service suffered due to the "ethnic centric" decisions of upper management. ROI at 202.

On February 5, 2017, S1 completed the questionnaire and provided it to the RMO1. ROI at 403. S1 indicated on the questionnaire that Madlyn F. was performing five out of the seven GS-13 benchmarks and demonstrated each of the three skill set indicators referenced in the questionnaire. S1 stated that Madlyn F. was qualified for the GS-13 promotion. RMO1 signed off on the questionnaire, agreeing to S1's assessment.

The Program Manager (RMO3, United States, male, over 40, no prior EEO activity) stated that aside from delivering the benchmark results, he had little involvement in the process. ROI at 143. The VOA Program Director stated that she had no role in the benchmark review and that it was RMO1's and Office of Human Resources Director's (OHR Director, female, over 40, European, prior EEO activity) decision about who to promote. The OHR Director stated that Madlyn F. was denied the promotion due to HR's review of the questionnaire, which she asserted marked Madlyn F. as appropriately performing and being compensated at the GS-12 level. However, HRS1 and HRS2 both stated that Madlyn F. should have been promoted to GS-13 based on their reviews of the questionnaire.

On February 6, 2017, Lashawn C.'s supervisor, the Managing Director of Pashto Radio and Television (RMO4, Afghan-American, female, over 40, unknown prior EEO) submitted the benchmark questionnaire to RMO1. AF¹⁰ at 232. RMO4 marked that Lashawn C. was performing four out of the seven GS-13 benchmarks, and that she demonstrated each of the three skill set indicators referenced in the questionnaire. Id. RMO4 submitted the form to RMO1, who signed off on February 13, 2017, agreeing with the assessment. AF at 236.

⁹ Not identified in the record.

¹⁰ Throughout the decision the investigative report associated with Lashawn C. and Complaint 2 will be referenced as the Appeal File (AF).

Lashawn C. asserted that as soon as the results of the benchmark study came out, several of her GS-13 duties were removed. AF at 83.

On June 28, 2017, Madlyn F. discovered she had not been selected for a promotion to the GS-13 level following the benchmark study. Madlyn F. asserted that her non-promotion to GS-13, compared to the promotion of CW2, CW3, CW4, CW5, and CW6¹¹ was discrimination based on her age, sex, and nationality. ROI at 173. Madlyn F. asserted that the promoted men were performing the same duties as she was, but without her experience level. ROI at 97. Madlyn F. asserted that the promoted men were all later assigned additional anchoring duties, as well as team leader assignments that were previously performed by older women. Lashawn C. made similar remarks and asserted that she was just as qualified, if not more, than the five promoted men.

RMO4 asserted that Lashawn C. was not performing the same duties as CW3 and CW5, two individuals who received GS-13 promotions from the Pashto Service. AF at 84 and 176. RMO4 acknowledged that Lashawn C. did perform Team Lead duties, which is something reserved for GS-13 employees, but asserted that it was on an ad hoc basis. Moreover, RMO4 asserted that she only gave Lashawn C. the Team Lead duties because she wanted everyone to have a chance to serve in a team lead role. Id. RMO4 stated that CW5 was a shift editor/copy editor for the daily television programs, and that CW3 served as the shift editor for multiple radio shows. AF at 176. The EEO Investigator asked RMO4 several questions regarding the benchmark questionnaire. However, RMO4 repeatedly stated that she was unaware or did not know the answers to them. AF at 177 – 178. RMO4 did not indicate whether she thought Lashawn C. was working at the GS-13 level or not.

Lashawn C. asserted that RMO4's comparison of her to CW3 was inappropriate as CW3 was in radio, while she worked in television. AF at 223. Lashawn C. noted that CW5 was comparable to her, but there was no reason why he was promoted, and she was not. Id. Lashawn C. asserted that CW5 and her both had the same and/or very similar duties. For example, Lashawn C. asserted that both contributed to television, web and digital media production, anchoring, Team Lead duties, booking guests, and more. AF at 85 and 223. Moreover, Lashawn C. noted that after the benchmark questionnaire, she had certain duties, such as her Team Lead role, removed by RMO4 that were then transferred to CW5. AF at 223.

Lashawn C. asserted that the office was hostile, especially for women. ROI at 382. Madlyn F. noted an incident in which S1 complained of bullying by RMO1 and was reprimanded by him. ROI at 384. Lashawn C. noted that on top of the promotion denials, she and Madlyn F. were no longer able to edit or communicate with reporters in the field. Id. Lashawn C. noted that prior to the benchmark, she was the only female anchor in the Pashto division and Madlyn F. the only female anchor in the Dari division. ROI at 383.

¹¹ CW2 was of Tajik nationality, while CW3, CW4, CW5, and CW6 were of Pashtun nationality. All were male employees, under 40 years of age, and had been promoted to GS-13 during the benchmark review period.

Lashawn C. asserted that she, Madlyn F., and another colleague, also an International Broadcaster (IB, nationality unknown, female, over 40, unknown EEO activity) were the only three women not promoted, while the five male less-qualified colleagues were promoted. Id.

IB stated that, following the benchmark study, she felt that there were “devastating effects for [her] and other women, including [Madlyn F.], who were not selected for a promotion to GS-13.” ROI at 315. IB asserted that following the benchmark study, many duties were removed from female staffers, including team leadership roles; ability to edit material; and reduced communication with reporters in the field. Id. IB noted that RMO1 was a hostile manager and attested that during a routine meeting she questioned him why no women were selected for a GS-13 promotion. Following this meeting, IB asserted that RMO1 approached her and stated that she was asking a “dangerous question” and purportedly stated that women were illiterate. Id. at 317. RMO1 later denied making any such threats or statements.

Lashawn C. also asserted that she was target for discrimination and hostility from RMO1 based on her husband’s nationality and his EEO activity. Lashawn C. testified that her husband had previously accused RMO1 of favoritism because he had promoted several individuals who were from the same region in Afghanistan as RMO1 was from. AF at 133. Lashawn C. averred that for protesting about favoritism and whistleblowing, RMO1 issued a Letter of Reprimand (LOR) to her husband. Id. Lashawn C. noted that this LOR was later removed. Lashawn C. believed she was passed over for the promotion in retaliation for her husband’s protected EEO activity when the LOR was rescinded. Id.

S1 noted that around the time of the benchmark review, RMO1 asked if S1 thought CW2 and CW3 should be promoted. ROI at 200. S1 agreed that CW2 should be promoted but disagreed about CW3. Id. S1 stated that CW3 was not qualified to be GS-13, and that if he promoted CW3, other employees performing at the same level or above would complain. Id. S1 stated that RMO1 seemed upset by her opinion. Id. S1 was surprised to learn that CW3 was ultimately promoted while Madlyn F. was not. Id. S1 stated that Madlyn F. was just as qualified and should have received her GS-13 promotion. Id.

CW2 noted that Madlyn F. was just as good at her job as comparable employees. ROI at 395. CW2 stated that the margin of Pashtun employees is greater than that of Tajik employees. ROI at 398. CW2 noted that Pashto speakers were hired to work in Dari while no Tajik speakers was hired to work in the Pashto Division. Id. He stated that “[t]his has created a doubtful situation among the Tajiks (Dari native speakers) from the past. And it has been indicated as bias and unfair job opportunities.” Id.

The Senior Analyst (Afghanistan, male, over 40, unknown prior EEO activity) previously served as the Chief of the Afghan Service and was Madlyn F.’s second-line supervisor. ROI at 292. He also previously supervised all five promoted men. He stated that Madlyn F.’s performance was far superior to CW3 and CW4. ROI at 293. The Senior Analyst stated that Madlyn F. was

far more productive, (produced and broadcast far more and varied content, including radio, web and television); proactive (searched for new programming ideas and went out of her way to secure high-profile interviews in the US and Afghantsitant); and dogged in her pursuit of good stories that are the hall mark of the work [the Agency does]. He thought of her as one of the best journalists in the service.

ROI at 292. He reiterated that Madlyn F. was well-qualified for the GS-13 position. Id. He noted an incident in the past when Madlyn F. applied for a GS-13 vacancy and prior to him certifying her, RMO1 told him to stop the process because management did not want anymore GS-13 employees. ROI at 294. He later consulted with management regarding “too many 13s in the Afghan service” but could not confirm the veracity of RMO1’s statement. Id. The Senior Analyst noted that RMO1 and Madlyn F. were not on good terms, and he believed that RMO1 had stopped Madlyn F.’s previous GS-13 promotion, and possibly the one at issue, due to his personal feelings. Id.

Regarding CW4, the record indicated that he was not part of the original benchmark promotional study. However, when another individual who was set to receive the GS-13 promotion resigned, RMO1 informed RMO3 to substitute that “spot” with CW4. ROI at 131, and 176. On June 22, 2017, RMO3 emailed the OHR Director to inform her that the Agency was recommending CW4 for the promotion due to the prior employee’s resignation. ROI at 176. RMO1 stated that he discussed promoting CW4 with the RMO4. RMO3 asserted that CW4 was simply the “[n]ext person in line from Pashto Radio to qualify”. Id. RMO4 also agreed, and stated that CW4 was selected because he was second in line eligible for a promotion.

HRS1 affirmed that she received a request from RMO3 stating that the Division wanted to add CW4 to the list of promoted individuals. ROI at 330. HRS1 stated that the decision not to promote Madlyn F. came from RMO1 and she did not know why Madlyn F. was not considered for promotion. ROI at 328, 330. HRS1 noted that CW4 was ineligible for the promotion but was promoted nonetheless because RMO1 pushed the promotion through. ROI at 330. The OHR Director stated that she was unaware of this substitution. ROI at 266. The Executive Officer (United States, female, under 40, no prior EEO activity) also confirmed that the decision to promote CW4 came from RMO1.

RMO1 denied having any role in Madlyn F.’s lack of promotion. RMO1 noted that he had approved of S1’s assessment and asserted that Madlyn F. was among five employees in the Dari group initially deemed to be eligible for a benchmark promotion. ROI at 131. However, RMO1 asserted that OHR wanted the number of promotions for Dari group reduced. Id. He asserted it was ultimately OHR’s decision not to promote Madlyn F.. Id. RMO1 did not share which individuals were responsible for this decision within OHR,¹² nor did he provide the names of the

¹² From an EEO Investigator’s note: RMO1 was contacted on December 17, 2018, January 8 and January 25, 2019, and asked to respond to several follow-up questions regarding the hiring actions and perceived qualifications. Several questions were posed, most pertinent were who in HR made

other five individuals who were also not promoted. Both the VOA and OHR Director denied limiting how many employees could be eligible for GS-13 positions. ROI at 241 and 255.

The Executive Producer of VOA Central News (unknown nationality, female, over 40, unknown EEO activity) asserted that Madlyn F.'s performance was fair. ROI at 298. The VOA Executive Producer asserted that while Madlyn F. had good instincts for stories, and communicated well through written word, she was often disruptive and had interpersonal conflicts with many employees, though she did not specify which employees. Id. at 299-300. She did not find Madlyn F. to be more qualified than the men who were promoted, but noted that she had not worked with any of them in over six years. Id.

On September 11, 2017, Madlyn F. filed an appeal of the findings of the benchmark review to the OHR Director and requested an independent review of the classification of her position. Lashawn C. also filed an appeal of the review. The OHR assigned the reviews to an OHR contractor (HRS3, United States, over 40, male, prior EEO activity). The HRS3 conducted a year-long review of the classification of Madlyn F. and Lashawn C.'s GS-12 position. Madlyn F. asserted that the review was ultimately negatively impacted by RMO1 because he had discriminatorily stripped her of her anchoring duties in December 2016 which made her work appear less prominent. Lashawn C. shared the same concerns, noting that at the time of HRS3's review, she was no longer performing the higher-level tasks she had previously performed, such as Team Lead duties. Lashawn C. asserted that the HR department should have reviewed the roles prior to or during the benchmark study as that would have provided a more accurate depiction of duties.

On September 12, 2017, Madlyn F. sent an email to S1, RMO1, and several other management officials, expressing concerns of discrimination by RMO1. Madlyn F. asserted that RMO1 was stripping female anchors of their roles to appease the Taliban in Afghanistan. On October 19, 2017, Madlyn F. received a Letter of Reprimand (LOR). ROI at 444. RMO1 stated that Madlyn F.'s September 12, 2017 email damaged his reputation and undermined his authority. Id. at 134, 444. RMO1 stated that the LOR was also for Madlyn F. fabricating details of their December 23, 2016 meeting. Id. at 445. RMO3 stated that Madlyn F. was issued a LOR due to false allegations she brought against RMO1 and his personal and professional associations. Specifically, that he would sympathize and favor the Taliban, an organization he noted was "a terrorist fundamentalist group...with a clear record of brutality and inhuman treatment of women." Id. at 444. Interviewed management officials and colleagues, such as the Senior Analyst and IB, noted that they were unaware and did not suspect any Taliban influence in the Afghan service. Id. at 293 and 317.

the decision to reduce the number of GS-13 employees and who decided to remove Madlyn F.'s anchoring duties. On February 7, 2019, RMO1 responded to the EEO Investigator's inquiries by email explaining that he had been on extended leave and was unable to respond to the questions. RMO1 did not follow up with an actual response to the questions.

On December 12, 2017, Lashawn C. alleged that RMO2 removed her as a Pashto TV anchor and as a Facebook live host, and stopped her from posting to the Agency's Facebook account. AF at 88 and 134. Lashawn C. averred that RMO2 took these actions even though he was not in her supervisory chain, though she acknowledged that he was the Acting Service Chief at the time. Id. Lashawn C. asserted that these duties were removed because RMO1 and RMO2 did not like seeing females host shows. Id. Lashawn C. asserted that management finally hired another female host in 2018 after pressure to do so. Id.

RMO2 testified that he did not remove Lashawn C. from serving as television anchor. AF at 88 and 203. RMO2 stated that he only removed Lashawn C. as an editor of the VOA Facebook page. RMO2 averred that Lashawn C. refused to work from a VOA computer and instead used her private mobile phone to publish content on VOA official platforms. AF at 204. RMO2 determined that accessing and editing the VOA page from her private phone was "risky, unsanctioned and bears a number of technical flaws i.e. disappearance of image & teasers." AF at 88 and 161. RMO2 stated that Lashawn C. often posted broken web links and vague headlines. In consultation with RMO3, it was decided to remove Lashawn C.'s ability and status as a VOA Pashto Facebook page editor. AF at 88 and 161. This was explained to Lashawn C. in an email on December 12, 2017. AF at 161. RMO3's affidavit does not include a response to this claim.

Lashawn C. acknowledged using her private mobile phone but asserted that it was because she did not want to log into her private Facebook account at work. Aside from that acknowledgment, Lashawn C. asserted that RMO2's testimony was a mischaracterization of the incident. AF at 161. Additionally, Lashawn C. asserted that she had previously used her personal phone to post stories without issue for several months. Regarding the technical issues, she acknowledged that around the time of her removal from the editor's list, she had posted several stories that did not include pictures but asserted that those were broader technical issues that were later fixed.

On September 24, 2018, Madlyn F. was notified of the HRS3's findings; specifically, that her position was correctly classified at the GS-1001-12, level of performance. HRS3 similarly determined that Lashawn C. was also appropriately classified as a GS-12 employee.

On October 1, 2018, Lashawn C. asserted that RMO4 insisted that she remove her shoes prior to appearing on camera. AF at 89. Lashawn C. testified she was asked to remove her shoes three times by the Line Producer Assistant, the Floor Director and the Line Producer Assistant, just a few minutes before going on air. Lashawn C. noted that the staff could have easily fixed the height of the plasma television instead of requesting her to remove her shoes.

The Line Producer (male, age/national origin/EEO activity unknown) stated that on October 1, 2018, he asked RMO4 if he could ask Lashawn C. to remove her shoes because she was taller than the plasma television being used behind her. AF at 92 and 211. The Line Producer noted that the Director (not identified in the record) made the suggestion that Lashawn C. remove her shoes. AF at 92. RMO4 had no issue with the request.

The Line Producer then asked Lashawn C. if she could do so, and she replied, "Oh really, the next time you will ask me to take off my clothes." AF at 211-212. The Line Producer averred that he did not continue the conversation and that others in the control room could hear what she said. Id.

After the show was over, Lashawn C. testified that RMO4 yelled at her for not following orders. AF at 89. During the verbal altercation, RMO4 allegedly said Lashawn C. was an expert in legal actions and should engage in them. Lashawn C. took this to be an insult towards her prior EEO activity. Id. On October 3, 2018, Lashawn C. sent an email to the RMO3 regarding the incident. AF at 121. RMO3 investigated the situation and determined that RMO4 did not instruct staff to have Lashawn C. remove her shoes. AF at 207. However, after a meeting with OHR, RMO3, and the Union, a formal memorandum went to RMO4 stating that while it was not her decision to ask Lashawn C. to remove her shoes, it should not be done so in the future. AF at 91. RMO3 believed the situation was a misunderstanding and did not find evidence that RMO4 was harassing Lashawn C., nonetheless the formal memorandum was placed in RMO4's official personnel file. AF at 208.

RMO4 asserted that on October 1, 2018, she overheard Lashawn C. declining the Line Producer's request, and stating that if she removed her shoes, RMO4 would later ask her to "take off her clothes" as well. AF at 184. RMO4 found this insulting, and reported it to RMO3. AF at 187. RMO4 denied making any disparaging comments on EEO activity and asserted that she was confirming Lashawn C.'s rights to file an EEO complaint if she wished. AF at 91 and 185.

Agency Final Decisions for Complaint 1 and Complaint 2

At the conclusion of the investigation for Complaint 1, the Agency provided Madlyn F. with a copy of the report of investigation and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). In accordance with Madlyn F.'s request, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). The Agency determined that Madlyn F. failed to establish a prima facie case of discrimination based on her protected classes or in reprisal. The Agency further found that, even if she had, it determined that, aside from Madlyn F.'s conclusory statements, she had failed to produce any credible testimonial or documentary evidence to suggest that the Agency's reasons were pretext for discrimination. Thee Agency concluded that Madlyn F. failed to prove that it had subjected her to discrimination or hostile work environment as alleged.

At the conclusion of the investigation for Complaint 2, the Agency provided Lashawn C. with a copy of the report of investigation and notice of her right to request a hearing before an EEOC AJ. Lashawn C. timely requested a hearing. On February 12, 2020, the Agency filed a motion for summary judgment. On February 27, 2020, Lashawn C. filed a motion to withdraw her request for a hearing. That same day, the AJ granted Lashawn C.'s request and remanded the matter to the Agency for the issuance of a final Agency decision. In its final decision, the Agency concluded that Lashawn C. failed to prove that it had subjected her to discrimination or hostile work environment as alleged.

CONTENTIONS ON APPEAL*Complaint 1, Madlyn F.*

Regarding the removal of certain duties, notably her anchoring responsibilities, Madlyn F. asserts that the Agency failed to sufficiently proffer a legitimate, nondiscriminatory reason for its action. Madlyn F. alleges that RMO1 informed her that the decision was based on a local affiliate who claimed that the Taliban were unhappy with female anchors. Madlyn F. acknowledges RMO1's denial of such statement, but asserts that, even if RMO1 denied Taliban influence, he still failed to provide a legitimate, nondiscriminatory reason for removing her anchor duties. Madlyn F. notes that RMO1's other reasoning for her removal was that she was simply not as qualified as CW1 and CW2. However, Madlyn F. notes that RMO1 failed to provide how the qualification was determined and which managers were part of the decision process. Madlyn F. notes that S1 testified to having no say in the decision, and that had she been able to, S1 would have disagreed with the removal.

Regarding her GS-13 promotion denial, Madlyn F. notes that if it was based on her performance, which S1 had attested was at the GS-13 level, then she would have obtained the promotion but for RMO1's discriminatory actions. In explaining the denial, Madlyn F. asserts that the Agency provided testimony from management officials that were vague or contradictory. For example, RMO1 testified that OHR wanted to reduce the number of GS-13 employees, so while Madlyn F. was initially considered, OHR determined there were too many GS-13 employees. However, the OHR Director denied this. Madlyn F. also notes that when her appeal was denied, there was no mention that her promotion was related to the number of available GS-13 slots. While not specifically before the Commission, Madlyn F. also asserts that RMO1 has a history of bias against her. Madlyn F. details a prior incident where she was also denied a GS-13 promotion. Madlyn F. asserts that based on RMO1's inconsistent and often contradicted testimony, he more likely than not orchestrated the denial.

Madlyn F. further asserts that she was clearly subjected to a hostile work environment and notes that when she made her concerns known she was issued a letter of reprimand (LOR). Madlyn F. acknowledges that she sent multiple emails to management asserting that RMO1 stripped her and Lashawn C. of anchoring duties to appease the Taliban. Madlyn F. also affirms that she sent emails to upper management asserting that RMO1 created a "men dominated work environment" within the Afghan service that was similar to what women suffered under the Taliban in Afghanistan. However, Madlyn F. asserts that she was within her right to make these statements and that RMO1's reaction of issuing her a LOR was retaliatory on its face. Madlyn F. notes that RMO1 had a history of issuing LORs to anyone who raised issues with his conduct. For example, S1 was issued a LOR for raising concerns about RMO1's decisions.

The Agency did not provide a response brief.

Complaint 2, Lashawn C.

Regarding the non-promotion, Lashawn C. asserts that she was performing at the GS-13 level. Lashawn C. notes that her benchmark survey demonstrated that she was performing a majority, or 4 out of 7, GS-13 level benchmarks and had demonstrated each of the three skill sets referenced in the questionnaire. Yet, she was not promoted, and not provided with a clear explanation as to why. Lashawn C. also asserts that following her non-promotion, many of her duties were removed and transferred to CW5 without reason.

Lashawn C. also argues that her non-promotion was the result of her husband's national origin and in retaliation for his prior EEO activity. Lashawn C. asserts that RMO1 had a history of promoting people only from his tribe in Afghanistan, and her husband, who is Pakistani, formally complained about this favoritism. Lashawn C. states that RMO1 issued her husband a Letter of Reprimand, which he later successfully had removed as retaliatory. Lashawn C. asserts that RMO1 did not successfully retaliate against her husband and was seeking to punish her instead.

Lashawn C. also asserts that her appeal of the non-promotion was inappropriately conducted. Lashawn C. notes that HRS3 conducted a review of her role *after* her GS-13 duties were removed. Reviewing her role after the GS-13 duties were removed would have been counterproductive because it would clearly have indicated that she was not performing any GS-13 duties. Instead, Lashawn C. asserts that a review should have been conducted on the duties she was performing leading up to and during the benchmark study.

Alternatively, Lashawn C. asserts that if the matter is not found in her favor, then the complaint should be remanded because the FAD does not rest upon an appropriately developed record, in accordance with 29 C.F.R. § 1614.108. Lashawn C. did not discuss the remaining claims in her appeal brief.

The Agency requests that it be granted summary judgment and that Lashawn C.'s appeal be dismissed with prejudice. The Agency reiterates arguments made in its final Agency decision.

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").

ANALYSIS AND FINDINGS

Complaints Processing – Complaint 2

We note that, on appeal, Lashawn C. raised concerns with the processing of her complaint. Lashawn C. asserted that the Agency's final decision rested upon an inadequate record. Lashawn C. requested that should we not find in her favor, we should consider remanding the entirety of the complaint for a supplemental investigation. Upon review of the entire record, we note that while several affidavits were lacking in detail, and additional documents would have been helpful, the record is sufficiently developed for the purposes of our decision.

Disparate Treatment

A claim of disparate treatment is examined under the three-part analysis first enunciated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). For a complainant to prevail, she must first establish a prima facie case of discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination, i.e., that a prohibited consideration was a factor in the adverse employment action. McDonnell Douglas, 411 U.S. at 802, n. 13; Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978). The burden then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its actions. Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). Once the agency has met its burden, the complainant bears the ultimate responsibility to persuade the fact finder by a preponderance of the evidence that the agency acted on the basis of a prohibited reason. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993).

To establish a prima facie case of discrimination, a complainant must show that: (1) she is a member of a protected group; (2) she is qualified for the position; (3) she suffered an adverse employment action; and, (4) the circumstances give rise to an inference of discrimination. We note that, although a complainant bears the burden of establishing a "prima facie" case, Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252-53 (1981), the requirements are "minimal," St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 (1993), and complainant's burden is "not onerous." Burdine, 450 U.S. at 253.

The established order of analysis in discrimination cases, in which the first step normally consists of determining the existence of a prima facie case, need not be followed in all cases. Where the agency has articulated a legitimate, nondiscriminatory reason for its actions, the factual inquiry can proceed directly to the third step of the McDonnell Douglas analysis, the ultimate issue of whether complainant has shown by a preponderance of the evidence that the agency's actions were motivated by discrimination. U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 713-714 (1983).

For her claim of reprisal, a complainant must show that: (1) she engaged in a protected activity; (2) the agency was aware of the protected activity; (3) subsequently, she was subjected to adverse treatment by the agency; and (4) a nexus exists between the protected activity and the adverse treatment. Whitmire v. Dep't of the Air Force, EEOC Appeal No. 01A00340 (Sept. 25, 2000).

Hostile Work Environment

A harassment claim is examined under the standards set forth in Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993). See also Enforcement Guidance on Harris v. Forklift Systems, Inc., EEOC Notice No. 915.002 (Mar. 8, 1994). To establish this claim, 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.

The Supreme Court in Harris explained that an “objectively hostile or abusive work environment [is created when] a reasonable person would find [it] hostile or abusive” and the complainant subjectively perceives it as such. Harris, 510 U.S. at 21-22. Whether the harassment is sufficiently severe to trigger a violation must be determined by looking at all the circumstances, including “the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.” Id. at 23. A hostile work environment exists when the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the condition of the complainant's employment. See Harris, supra; see also Oncale v. Sundowner Offshore Svcs., Inc., 523 U.S. 75, 78 (1998).

With respect to element (5) of a harassment claim, an agency is subject to vicarious liability for harassment when it is created by a supervisor with immediate (or successively higher) authority over the employee. See Burlington Industries, Inc., v. Ellerth, 524 U.S. 742 (1998); Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors, EEOC Notice No. 915.002 (June 18, 1999).

Disparate Treatment & Hostile Work Environment - Complaint 1, Claim 3

Assuming, *arguendo*, that Madlyn F. has established a prima facie case of discrimination on her protected classes, regarding Complaint 1, claim 3, we determine that the Agency has articulated a legitimate, nondiscriminatory reasons for its action. First, we acknowledge that the record demonstrated a clear interpersonal conflict between Madlyn F. and RMO1. However, in claim 3, Madlyn F. sent several emails to management officials asserting that RMO1's decisions were guided by the Taliban, a known terrorist organization based out of Afghanistan. Madlyn F. did not provide evidence to support such a claim, but merely asserted her belief that RMO1 was influenced by the Taliban, and also ran Agency operations similar to the Taliban, in that women's roles were suppressed. In this matter, RMO1 issued Madlyn F. a Letter of Reprimand (LOR) for accusing him of managing operations similar to the Taliban and/or being influenced by the Taliban. Considering the weight of such accusation and the lack of evidence provided by Madlyn F., we find that the LOR was not issued with clear discriminatory or retaliatory animus.

Additionally, we find that Madlyn F. has not established her claim of harassment because there is no persuasive evidence that the alleged incident was based on Madlyn F.'s membership in her protected classes, and she failed to describe any severe or pervasive conduct that in any way altered her work environment or negatively impacted the terms and conditions of her employment in regards to Complaint 1, claim 3. Madlyn F.'s allegations that RMO1 was influenced by a known terrorist organization carries significant weight, and she bears the ultimate responsibility in demonstrating that the actions taken by the Agency, and specifically, RMO1, was discriminatorily influenced. See Oakley v. U.S. Postal Serv., EEOC Appeal No. 01982923 (Sept. 21, 2000). Yet, she does not provide evidence that the ensuing LOR issued was based on her protected classes or in retaliation. Instead, the record demonstrated that the LOR was a response to an unsupported accusation that RMO1 had ties to, or was influenced, by the Taliban. We find that under the standards set forth in Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993), Madlyn F.'s claim of a hostile work environment must fail. See Enforcement Guidance on Harris v. Forklift Systems, Inc., EEOC Notice No. 915.002 (Mar. 8, 1994).

Disparate Treatment & Hostile Work Environment - Complaint 2, Claim 3

Assuming, *arguendo*, that Lashawn C. has established a prima facie case of discrimination on her protected classes, regarding Complaint 2, claim 3, we determine that the Agency has articulated a legitimate, nondiscriminatory reasons for its action. Specifically, on October 1, 2018, several producers and assistants noted that Lashawn C. was taller than the plasma television that was being used to assist her broadcast. Due to the height difference, the television crew asked RMO4 if it was appropriate to ask Lashawn C. to remove her shoes. RMO4 agreed to the request. Lashawn C. argued that she found RMO4's request to be offensive, discriminatory, and hostile. The record demonstrated that the request did not come from RMO4. However, even if she had made the request, there was a legitimate, nondiscriminatory reason. Specifically, that the height differences made for an unlevelled shot, and that the television crew wanted to make the temporary, minor adjustment for the program shot that day. Lashawn C. did not provide persuasive evidence that the request was made with discriminatory animus.

Additionally, we find that Lashawn C. has not established her claim of harassment because there is no persuasive evidence that the alleged incident was based on Lashawn C.'s membership in her protected classes; and she failed to describe any severe or pervasive conduct that in any way altered her work environment or negatively impacted the terms and conditions of her employment in regard to claim 3. The record lacks evidence to support Lashawn C.'s assertions that RMO4 directed any staff with discriminatory or retaliatory intent when she purportedly requested that Lashawn C. remove her shoes prior to broadcasting, and the alleged altercation that ensued immediately after. Lashawn C. bears the ultimate responsibility in demonstrating that the actions taken by the Agency, and specifically RMO4, were motivated by discriminatory and/or retaliatory animus. See Oakley v. U.S. Postal Service, EEOC Appeal No. 01982923 (Sept. 21, 2000). In this matter, Lashawn C. has failed to provide such sufficient evidence. Accordingly, under the standards set forth in Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993), we find that Lashawn C.'s claim of a hostile work environment must fail. See Enforcement Guidance on Harris v. Forklift Systems, Inc., EEOC Notice No. 915.002 (Mar. 8, 1994).

Disparate Treatment - Complaint 1, Claims 1 and 2 and Complaint 2, Claims 1 and 2

Upon review of the record, we initially find that Madlyn F. and Lashawn C. have established a prima facie case of disparate treatment based on their sex. The record demonstrated that Madlyn F. and Lashawn C. are female; management was aware of this; both were qualified for the position by their educational background and years of experience; and, both were subjected to adverse employment actions.

Based on our review of the record, we also find, that Madlyn F. and Lashawn C. have established a nexus between their sex and the adverse employment action of having certain responsibilities, such as having anchoring and Team Lead duties removed. A review of the record demonstrated that Madlyn F. was removed from her television anchoring duties, along with Lashawn C. and IB. Moreover, the roles that Madlyn F. and Lashawn C. had previously occupied were transferred to two men, CW1 and CW2. Additionally, Lashawn C. had her Team Lead duties removed and those were transferred to another male employee, CW5.

Regarding the GS-13 promotional denial, we also find that Madlyn F. and Lashawn C. have established a nexus between their sex and the denial. Here, the record demonstrated that S1 assessed Madlyn F. to be performing GS-13 work and submitted the benchmark questionnaire to RMO1. RMO1 initially appeared to agree with S1's assessment, but contradictory statements in the record demonstrate that he may have later negatively influenced the decision and caused Madlyn F. to be denied the promotion. This is similar to Lashawn C.'s assertion, that RMO1 negatively influenced her promotion as well, and possibly altered RMO4's responses on the questionnaire. Still, both Madlyn F. and Lashawn C. were marked as meeting the majority of the GS-13 benchmarks, yet neither was promoted to GS-13. In support of their claims, Madlyn F. and Lashawn C. asserted that the Agency failed to provide a coherent explanation for the denial, and that many of the statements provided were contradictory and/or vague in detail. Moreover, we note that there were no details as to how the benchmark questionnaire was weighed, and which questions and indicators demonstrated GS-13 performance, and which did not. In this matter, Madlyn F. and Lashawn C. have presented facts that thus far reasonably give rise to an inference of sex-based discrimination.

Finding that both Madlyn F. and Lashawn C. have established a prima facie case of discrimination, we turn to the Agency to articulate legitimate, nondiscriminatory reasons for its actions. Here, the Agency asserted that neither Madlyn F. nor Lashawn C. performed at the GS-13 level per the benchmark questionnaire and simply did not qualify for the promotion. The Agency provided statements from the management officials attesting to this. However, upon review of the record, we find that the Agency has failed to meet its burden of articulating legitimate, nondiscriminatory reasons regarding the GS-13 promotional denials and the removal of various duties from both Madlyn F. and Lashawn C. Despite the size of the record, several responsible management officials failed to provide detailed and supported statements. For example, RMO1 provided vague statements that were often not supported by the record or provided statements that were refuted and/or contradicted by other relevant management officials.

Moreover, when given several opportunities to clarify his statements by the EEO Investigator, RMO1 failed to substantively respond. This is also true of RMO4, who was repeatedly questioned regarding the benchmark questionnaire, and yet responded only that she was unaware, did not know the answers, and/or could not recall right the answers.

In this matter, RMO1 has failed to provide sufficient details explaining why CW3 and CW4 were promoted but not Madlyn F. Here, S1 stated that RMO1 asked her if she thought CW2 and CW3 should be promoted. S1 agreed that CW2 should be promoted but disagreed about CW3. S1 stated that CW3 was not qualified to be GS-13 and testified that there was no justification in promoting CW3 but not Madlyn F.. S1 noted that RMO1 seemed upset by her opinion. The record has a variety of testimonies, such as from the Senior Analyst, that CW3 was not as qualified as Madlyn F., and yet received a promotion where Madlyn F. was denied one. RMO1 did not provide any details regarding such discrepancies.

Additionally, regarding CW4, it is notable that he was not part of the original benchmark study. Yet his promotion was pushed through by RMO3 and RMO1. HRS1 affirmed that she received a request from RMO3 stating that the Division wanted to add CW4 to the list of promoted individuals. There was no substantive or corroborated reason provided for this substitution and it is in direct contradiction to RMO1's claims that HR wanted to reduce the number of GS-13 employees. Indeed if HR wanted the numbers reduced, and RMO1 was as concerned as he alleged, he could have let the "spot" go unfilled. RMO1's only justification was that CW4 was "next" on the list for a promotion. Yet, it appears from the record that CW4 was not qualified for the position and was merely pushed through the process by RMO1.

The Agency repeatedly argued that Madlyn F. and Lashawn C. were not performing at the GS-13 level to qualify for the promotion. However, the statements provided by RMO1 were unsubstantiated and largely contradicted by several staff members, both at the management and subordinate level. The Agency merely agreed with RMO1's version of events and did not question the contradictory statements made against his claims. Additionally, RMO2, RMO3, and RMO4 also provided vague statements regarding their own roles in the claims. In sum, we find that the Agency's arguments were too speculative on its part as there was no corroborated information or affidavits provided by RMO1, RMO2, RMO3 and RMO4.

Accordingly, the Commission finds that the Agency failed to overcome Madlyn F. and Lashawn C.'s prima facie case of hostile work environment and sex-based discrimination,. Therefore, Madlyn F. and Lashawn C. prevail without having to prove pretext. Chhe v. Dep't of Housing and Urban Dev., EEOC Request No. 0720090008 (Aug. 6, 2010) (the consequence of an agency's failure to meet its burden of production under McDonnell Douglas is that the complainant, having established a prima facie case, prevails without having to make any demonstration of pretext), request for recon. den. EEOC Request No. 0520100584 (Jan. 27, 2011).

Even if we were to find the Agency's explanation sufficient to meet its burden under Burdine, supra, Madlyn F. and Lashawn C. have established, by a preponderance of the evidence, that the Agency's explanations are pretextual. See Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993).¹³

Based on the totality of the record, we find that both Madlyn F. and Lashawn C. are able to demonstrate, by a preponderance of the evidence, that the Agency's explanations are pretextual. We note here that there were contradictions and inconsistencies in both complaints. For example, RMO1 repeatedly provided statements that were contradicted by OHR staff, such as the OHR Director, and HRS1 and HRS2. Additionally, many statements provided by RMO1 ran counter to S1. Additionally, while Lashawn C. met the majority of the benchmark questionnaires indicating GS-13 performance, the explanation for her denial was also shrouded with inconsistencies. In both instances, the EEO investigators questioned RMO1 and RMO4 numerous times regarding the questionnaire, and each time both officials failed to provide a substantive response.

Moreover, Madlyn F. and Lashawn C. provided numerous testimonies from their colleagues supporting their claims sex-based discrimination¹⁴. For example, S1 repeatedly stated that Madlyn F. was performing at the GS-13 level; the Senior Analyst repeatedly praised Madlyn F.'s performance as far superior to CW3 and CW4; and, IB repeatedly asserted that RMO1 treated female staffers poorly and that both Madlyn F. and Lashawn C. were as qualified, if not more, than the men promoted.

In summary, we find that Madlyn F. established that the Agency violated Title VII, when it subjected her to sex-based discrimination with respect to Complaint 1, claims 1 and 2. However, she failed to show by a preponderance of the evidence that, more likely than not, the Agency subjected her to discrimination or a hostile work environment based on her protected classes or in reprisal in Complaint 1, claim 3. Similarly, we find that Lashawn C. established that the Agency violated Title VII, when it subjected her to a hostile work environment and discrimination with respect to Complaint 2, claims 1 and 2. However, she failed to show by a preponderance of the evidence that, more likely than not, the Agency subjected her to discrimination or a hostile work environment based on her protected class or in reprisal in claim 3.

¹³ Pretext can be demonstrated by showing such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the Agency's proffered legitimate reasons for its actions that a reasonable fact finder could rationally find them unworthy of credence. Opore-Addo v. U.S. Postal Serv., EEOC Appeal No. 0120060802 (Nov. 20, 2007), request for recon. denied, EEOC Request No. 0520080211 (May 30, 2008).

¹⁴ As we have found that Madlyn F. and Lashawn C. have established disparate treatment with respect to their sex, we need not address the other bases or their claim of harassment, because findings in those regards would not afford them greater relief.

CONCLUSION

Therefore, based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we MODIFY the Agency's final decisions. We REVERSE the Agency's final decisions with respect to Complaint 1 and 2, claims 1 and 2 and REMAND the matters in accordance with the ORDER below. We AFFIRM the Agency's decisions finding no discrimination with respect to Complaint 1 and 2, claims 3.

ORDER

The Agency is ordered to take the following remedial actions regarding claims Complaint 1, 1 and 2 and with Complaint 2, claims 1 and 2.

1. Within **sixty (60) calendar days** of the date this decision is issued, Madlyn F. and Lashawn C. will be promoted to the GS-13 grade-level. The promotion will be retroactive to the earliest effective date on which any of the male comparators cited herein was promoted to GS-13. All relevant benefits associated with the retroactive promotion will be provided.
2. Determine the appropriate amount of back pay, with interest, and other benefits due the Madlyn F. and Lashawn C., pursuant to 29 C.F.R. § 1614.501, no later than ninety **(90) calendar days** after the date this decision is issued. Madlyn F. and Lashawn C. shall cooperate in the Agency's efforts to compute the amount of back pay and benefits due and 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 Madlyn F. and Lashawn C. for the undisputed amount within 60 calendar days of the date the Agency determines the amount it believes to be due. Either 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 also pay compensation for the adverse tax consequences of receiving back pay as a lump sum. Madlyn F. and Lashawn C. have the burden of establishing the amount of increased tax liability, if any. Once the Agency has calculated the proper amount of back pay, Madlyn F. and Lashawn C. shall be given the opportunity to present the Agency with evidence regarding the adverse tax consequences, if any, for which Madlyn F. and Lashawn C. shall then be compensated.

3. Within **thirty (30) calendar days** of the date this decision is issued, Madlyn F. and Lashawn C. will identify television and/or radio duties, if any are applicable, that were removed and/or denied by RMO1, RMO2, RMO3, and/or RMO4 which are pertinent to their positions. The Agency shall reinstate Madlyn F. and Lashawn C. into these roles so long as the duties are pertinent to their GS-13 positions. Madlyn F., Lashawn C., and the Agency shall work together, within a reasonable amount of time, to fulfill this action.

4. The Agency shall conduct a supplemental investigation on compensatory damages, including providing Madlyn F. and Lashawn C. an opportunity to submit evidence of pecuniary and non-pecuniary damages. Thereafter, within **ninety (90) calendar days** of the date this decision is issued, the Agency shall determine the amount of compensatory damages to be awarded. Within thirty (30) days of determining the amount of compensatory damages, the Agency shall pay Madlyn F. and Lashawn C. the compensatory damages.
5. Within **ninety (90) calendar days** of the date this decision is issued the Agency shall provide eight hours of in-person or interactive training to RMO1, RMO2, RMO3, RMO4 regarding their responsibilities with respect to eliminating discrimination in the federal workplace.
6. Within **thirty (30) calendar days** of the date this decision is issued the Agency shall consider taking appropriate disciplinary action against RMO1, RMO2, RMO3, and RMO4. The Commission does not consider training to be disciplinary. The Agency shall report its decision to the Compliance Officer. If the Agency decides to take disciplinary action, it shall identify the action taken. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline. If any of the responsible management officials have left the Agency's employ, the Agency shall furnish documentation of their departure date(s).
7. The Agency shall post a notice in accordance with the paragraph entitled, "Posting Order."

The Agency is further directed to submit a report of compliance, as provided in the statement entitled "Implementation of the Commission's Decision." The report shall include supporting documentation verifying that the corrective action has been implemented.

POSTING ORDER (G0617)

The Agency is ordered to post at its Washington, District of Columbia offices 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 Madlyn F. and Lashawn C. 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 Complainants may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainants also have 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 Complainants 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 Complainants 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 (T0610)

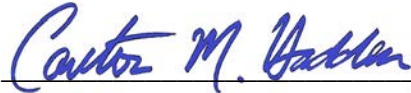
This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision on both that portion of your complaint which the Commission has affirmed and that portion of the complaint which has been remanded for continued administrative processing. 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 your appeal with the Commission, until such time as the Agency issues its final decision on your complaint.

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. If you file a request to reconsider and also file a civil action, **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 9, 2021

Date