



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Melissa M.,¹
Complainant,

v.

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

Appeal No. 2020001984

Agency No. HS-TSA-01892-2018

DECISION

Complainant timely filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's December 12, 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. For the following reasons, the Commission MODIFIES the Agency's final decision.

ISSUES PRESENTED

The issues presented on appeal are: (1) whether Complainant established that the Agency's proffered explanation for its actions was pretext to mask discrimination on the bases of national origin, sex, age, and reprisal; and (2) whether Complainant established that she was subjected to a hostile work environment based on her protected classes, as alleged.

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

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Supervisory Transportation Security Inspector (STSI), J Band, with the Agency's Compliance Department, at the McCarran International Airport, in Las Vegas, Nevada. Report of Investigation (ROI), at 37. The Assistant Federal Security Director for Inspections served as Complainant's first-level supervisor (S1) (Caucasian, male).

Complainant's duties included supervising a team of Transportation Security Inspectors (TSIs) called the "Surface Team" to inspect vulnerable areas of concern for a given stakeholder. The Surface Team conducts inspections as part of the Baseline Assessment Security Enhancement (BASE) program, which is a vulnerability assessment of a surface stakeholder. Id. at 164-165. Vulnerabilities identified during the BASE are called Security Action Items (SAIs). Id. After briefing the stakeholder on SAIs that were discovered during the BASE, the Surface Team is responsible for performing Risk Mitigation Activity for Surface Transportation (RMAST). Id. RMAST are activities to address the SAIs that were discovered, including a wide variety of stakeholder outreach events, encompassing training, briefings, assistance with creating documentation, and high visibility surge activities. Id.

The Surface Team can also conduct a Security Enhancement Through Assessment (SETA). SETA is testing of a transportation system performed in conjunction with the stakeholder's management. Id. For example, during the BASE, bus drivers are required to perform a security sweep of their buses at the beginning and end of their shifts. Id. To test this, the TSI may place an unattended bag inside the bus prior to operations to determine if the bus driver is actually performing the security sweep. Id. The Surface Team can additionally conduct an Exercise Information System (EXIS). Id. EXIS is a dynamic table-top exercise used to test and evaluate the stakeholder's ability to respond and recover from a significant terrorist attack. Id. After the BASE is completed, and SAIs are identified, the stakeholder could be provided with the RMAST, SETA, and EXIS in order to mitigate or fully address those SAIs. Id.

On November 9, 2017, Complainant's first-level Supervisor (S1) issued her an overall rating of "Unacceptable," for her Fiscal Year (FY) 2017 performance appraisal. Complainant received a score of "1" for competency related to her supervision of team members. Id. at 116. Thereafter, on November 30, 2017, S1 issued Complainant with a Notification of Unacceptable Performance/Improvement Period Notice (IPN). The IPN allowed Complainant to raise her performance level to "Achieved Expectations" during the period of December 1, 2017, through March 9, 2018.

On December 26, 2017, Complainant filed a complaint with the Agency's Anti-Harassment office, alleging that S1 had been subjecting her to a hostile work environment. Id. at 726. Subsequently, on March 9, 2018, S1 provided Complainant with notice that she had successfully completed the IPN and raised her performance level. Id. at 116. As a result, on April 27, 2018, S1 re-issued Complainant her FY2017 performance appraisal, changing her rating of "1" to a

rating of “3” to “Achieved Expectations” for the competency as a supervisor rating. Id. Complainant however felt that she deserved a “4” for the competency as a supervisor rating.

Meanwhile, on April 24, 2018, S1 directed Complainant to complete time off award forms for all her subordinate team employees in the amount of 16 hours. Id. at 113. Complainant recalled that on April 25, 2018, S1 announced that all employees in the Compliance Department were going to receive a time-off award in the amount 16 hours for performing well in the performance of their duties. Id. Complainant maintained that she never received a time-off award after that announcement. S1 explained, however, that Complainant did not receive a time-off award because no one in management was issued a time-off award at that time. Id. at 362. S1 averred that only subordinate employees were issued the time-off awards. Id.

On May 11, 2018, an employee with the Agency at Detroit Metro Wayne County Airport issued a Fact-Finder’s Report regarding Complainant’s allegations of harassment against S1. Id. at 726-736. The report concluded that S1 did not harass or retaliate against Complainant and the evidence suggested that S1 took appropriate actions to address deficiencies in Complainant’s work performance. Id. On May 30, 2018, the Regional Director issued Complainant a letter regarding the investigation on her allegations of harassment. Id. at 290. The letter explained that a fact-finding inquiry was conducted regarding Complainant’s allegation against S1 and upon completion of the inquiry, the report was forwarded to the Appointing Official and the Agency’s Anti-Harassment Program Coordinator. Id. The letter also stated that the matter was appropriately reviewed by the Appointing Official and was now concluded, but if other concerns were discovered, management would take appropriate action. Id.

A little more than a month later, S1 sent Complainant an email on July 6, 2018, writing that Complainant’s performance had showed a steady decline since the IPN ended. Id. at 561-562. Therein, S1 specifically wrote that Complainant did not complete development plans for subordinate employees until June 30, 2018, when the plans were originally to be completed by April 6, 2018. Id. S1 also noted that there was the perception that Complainant was not holding a subordinate employee accountable for his poor performance. Id. S1 additionally noted that there were frustrations among Complainant’s subordinate team members regarding an exercise in which the team was asked to discuss their feelings towards each other. Id.

On October 29, 2018, S1 issued Complainant with a rating of “Unacceptable,” for her FY2018 performance appraisal. Complainant received a “0.0” for the Supervisory Skills critical element/core competency. Id. at 171. Complainant was also issued a Notice of Proposed Demotion (NOPD) on October 29, 2018, which noted that Complainant’s performance during the FY2018 rating period in the Supervisory Skills critical element/core competency was determined to be unacceptable. Id. at 163-170 The NOPD proposed to demote Complainant from an STSI, J Band, to the TSI position at the I Band level. Id. The NOPD noted that Complainant failed to attain the minimally acceptable level of performance outlined in the FY2018 Employee Performance Management Program. Id. In the NOPD, S1 wrote, among other things, that Complainant showed a lack of supervisory skills with respect to the management of Surface Team members. Id.

S1 specifically noted in the NOPD, in pertinent part, that Team members were reluctant to accept or implement Complainant's ideas and appeared not to take Complainant seriously. Id. S1 also noted that Complainant allowed a Lead TSI to control the dialogue and tempo of team meetings, which minimized Complainant's leadership presence. Id. S1 noted that Complainant had allowed this Lead TSI to control team operations, which led to mistakes that negatively impacted the team and the Agency. Id. Additionally, in the NOPD, S1 wrote that three team members advised him in separate emails that they were not comfortable in taking part in an exercise wherein Complainant asked team members to express their feelings about working with each other. Id. S1 noted, moreover, that the Surface Team led by Complainant performed approximately six times more RMAST activities than required. Id. S1 wrote that the work plan required 24 RMAST activities, yet the Surface Team performed 133 RMAST activities. Id. S1 further noted that, in most cases, the Surface Team only occasionally interacted with the stakeholder's employees and a vast majority of these RMAST activities were ineffective. Id. S1 also wrote that the Surface team completed no SETA and EXIS in FY2018, among other things. Id.

The NOPD was effectuated on February 4, 2019, noting that the best course of action was to demote Complainant to a non-supervisory TSI position. This Demotion Notice was signed by S1 and the Deputy Federal Security Director.

Meanwhile, on June 3, 2018, Complainant contacted an EEO Counselor and filed an EEO complaint on August 27, 2018, as amended, alleging that the Agency subjected her to discrimination and harassment on the bases of national origin (Hispanic, Mexican)², sex (female), age, and reprisal for prior protected EEO activity when:

1. On April 25, 2018, S1 did not give her a 16-hour time-off award, despite issuing time-off awards to other employees;
2. On April 27, 2018, she was issued an unfair performance rating;
3. On April 30, 2018, S1 yelled, "In my office now" to her;
4. On May 8, 2018, management failed to provide her with a copy of her performance rating;
5. On October 29, 2018, she was issued with a Notice of Proposed Demotion (NOPD)³; and

² To the extent that Complainant identified her race as "Hispanic", we note that the Commission views "Hispanic" to denote national origin, rather than race.

³ We note that the NOPD was not effectuated by the Agency until February 4, 2019, after Complainant filed her EEO complaint. Notwithstanding, the Commission has held that where an individual initiated the EEO process on a proposed action and the agency ultimately carries out

6. On October 29, 2018, she was issued an unfair performance rating.

Following 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). The Agency concluded that Complainant failed to prove that the Agency subjected her to discrimination as alleged.

The Agency specifically found that it articulated legitimate, nondiscriminatory reasons for its actions, which Complainant did not show were pretextual. With regard to claim 1, the Agency noted that no supervisory officials in either department were receiving time-off awards at the time. The Agency also noted, regarding claim 2, that Complainant successfully completed the IPN and so her overall rating was increased to “Exceeded Expectations.” In addressing claims 5 and 6, the Agency noted that Complainant successfully completed the IPN but reverted to her previous level of performance, resulting in an unsatisfactory rating for the “Supervisory Skills” competency. The Agency found that Complainant did not show that its actions were due to her national origin, sex, age, or protected EEO activity. The Agency also found that Complainant did not establish that she was subjected to a hostile work environment regarding claims 3 and 4, as she did not establish that the Agency was motivated by discriminatory or retaliatory animus.

CONTENTIONS ON APPEAL

Complainant’s Brief on Appeal

On appeal, Complainant, through her representative, believes that she did not receive a time-off award because she filed an EEO complaint against S1 in November 2017 as well as an internal harassment complaint naming S1 on December 26, 2017. Complainant also believes, regarding claim 2, that her rating should have been higher because she performed certain tasks around the office that she did not get credit for, such as multitasking, being flexible, and participating in special assignments. With respect to claim 3, Complainant asserted that an employee corroborated her allegations that on April 30, 2018, S1 pointed at her and stated in a very angry loud voice, “You, in my office, now!” Complainant asserts that this comment and direction by

the proposed action, the otherwise premature claim merges with the effectuated action. See Siegel v. Dep’t of Veterans Affairs, EEOC Request No. 05960568 (Oct. 9, 1997).

S1 was very aggressive towards her and loud enough for other employees to hear. Complainant maintains that S1 has a history of talking to her in a loud, angry, and demeaning tone.

Complainant further asserts that on May 8, 2018, she emailed S1 asking him to provide her with documentation regarding what they discussed during her mid-term review. Complainant asserts, however, that S1 did not respond to her email. Complainant additionally contends that the Agency said she successfully completed the IPN in March 2018 but then waited seven months to say that she did not maintain a satisfactory performance on October 29, 2018. Complainant states that she was not even issued the “Notice of Demotion” until February 4, 2019. She believes this delay by the Agency demonstrates that the Agency was motivated by discriminatory and retaliatory animus. In addressing claim 6, Complainant recalled that prior to receiving her year-end performance rating for FY2018, she provided S1 with a 22-page self-assessment, listing all her activities and achievements for FY2018. Complainant maintained that she had been a supervisor for seven years and only started receiving poor ratings after she engaged in protected EEO activity against S1.

Agency’s Response

In response, the Agency maintains that the decision to demote Complainant was only based on her poor performance and not her protected bases. The Agency also notes that Complainant’s initial complaints of harassment were investigated by an employee with the Agency at Detroit Metro Wayne County Airport who found that S1 acted appropriately in addressing Complainant’s performance deficiencies. The Agency contends that the record is replete with management’s repeated efforts to correct Complainant’s performance deficiencies. The Agency asserts that Complainant has not come forward with any evidence showing that its legitimate, nondiscriminatory reasons were pretextual.

STANDARD OF REVIEW

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

ANALYSIS AND FINDINGS

Disparate Treatment (Claims 5⁴ and 6)

⁴ The Commission properly may assume initial jurisdiction of a mixed-case issue (i.e., an adverse action which is properly within the jurisdiction of the MSPB) when, for example, the

To prevail in a disparate treatment claim absent direct evidence of discrimination, a complainant must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973). A complainant carries the initial burden of establishing a prima facie case by demonstrating that she was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Constr. Co. v. Waters, 438 U.S. 567, 576 (1978). Proof of a prima facie case will vary depending on the facts of the particular case. McDonnell Douglas, 441 U.S. at 802 n. 13. The burden then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its actions. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). Once the agency has met its burden, the complainant bears the ultimate responsibility to prove, by a preponderance of the evidence, that the reason proffered by the agency was a pretext for discrimination. Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133, 143 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993).

Complainants may establish a prima facie case of race, national origin, and sex discrimination by providing evidence that (1) that she is member of a protected class; (2) she suffered an adverse employment action; and (3) either that similarly-situated individuals outside her protected classes were treated differently, or other circumstances surrounding the adverse employment action give rise to an inference of discrimination. McDonnell Douglas, 411 U.S. at 802; Reeves v. Sanderson Plumbing, 530 U.S. 133, 142 (2000); Bodett v. CoxCom, Inc., 366 F.3d 736, 743-44 (9th Cir. 2004) (internal quotation marks omitted).

We note that, although a complainant bears the burden of establishing a “prima facie” case, Tex. 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.

In the instant case, we find that Complainant has established a prima facie case discrimination with regard to her sex and national origin. Complainant is a Hispanic female who was subjected to adverse actions by the Agency, including a demotion and an unsatisfactory performance appraisal.

allegation is so firmly enmeshed in the EEO process that it would unduly delay justice and create unnecessary procedural complications to remand it to the MSPB. See Richardson v. Dep't of Veterans Affairs, EEOC Appeal Nos. 01982915, 01984977 (Nov. 5, 2001). In this case, given the passage of time and to avoid unnecessary procedural complications, we find that Complainant's demotion claim is so firmly enmeshed in the EEO process that it would better serve the interests of administrative economy to address it in the instant appeal. See Williams v. Dep't of Justice, EEOC Appeal No. 07A40006 (Apr. 23, 2004) (finding complainant's demotion claim was properly addressed by the AJ for it was so firmly enmeshed in the EEO process that to remand to the MSPB would be improper and that it would better serve the interests of administrative economy to address the disposition of the complaint at the Commission on appeal).

Therefore, Complainant has met the first two prongs of a prima facie case of sex and national origin discrimination. We also find that Complainant has demonstrated circumstances giving rise to an inference of discrimination, as further explained below.

The burden now shifts to the Agency to articulate legitimate, nondiscriminatory reasons for its actions. With regard to claims 5 and 6, S1 specifically noted, in pertinent part, that Team members were reluctant to accept or implement Complainant's ideas and appeared not to take Complainant seriously. S1 also noted that Complainant allowed a Lead TSI to control the dialogue and tempo of team meetings, which minimized Complainant's leadership presence. S1 noted that Complainant had allowed this Lead TSI to control team operations, which led to mistakes that negatively impacted the team and the Agency. S1 further indicated that three team members advised him in separate emails that there were not comfortable in taking part in an exercise wherein Complainant asked team members to express their feelings about each other. S1 noted, moreover, that the Surface Team led by Complainant performed approximately six times more RMAST activities than required. S1 wrote that the work plan required 24 RMAST activities, yet the Surface Team performed 133 RMAST activities. S1 further noted that, in most cases, the Surface Team only occasionally interacted with the stakeholder's employees and a vast majority of these RMAST activities were ineffective. S1 also indicated that the Surface Team completed no SETAs and EXISs in FY2018, among other things.

To ultimately prevail, Complainant must prove, by a preponderance of the evidence, that the Agency's explanation is pretextual. Reeves, 530 U.S. at 143; Hicks, 509 U.S. at 519. We find that Complainant has clearly done so in the present case, and the Agency erred in finding otherwise. We note that the Supreme Court has held that the fact-finder may find pretext where she determines that the Agency's articulated reason is unworthy of belief. Reeves, 530 U.S. at 133. In the instant case, we find that Complainant has established that the Agency's nondiscriminatory reasons are unworthy of belief.

In so finding, we note that Complainant supervised approximately seven TSIs, yet the Agency's ROI only included affidavits from two of the TSIs supervised by Complainant. One of these TSIs (TSI-1) (African-American male), explained that Complainant did not adequately supervise a subordinate employee. ROI, at 396. However, TSI-1 also attested that S1 improperly evaluated Complainant's performance based on the fact that the Surface Team performed 133 RMAST activities. TSI specifically attested:

Q: To your knowledge, in FY 2018, were the surface team inspectors conducting excessive RMAST inspections which were not tied to a vulnerability that had been identified during an initial assessment?

A: No, that is incorrect. The way RMAST works, we're only supposed to conduct 25 a year minimum. The RMASTs that are conducted on the strip and are connected to RTC, the public bus service in Las Vegas. The strip route produces the most revenue in the united states [sic] to give you an idea how busy it is.

Because of concern for terrorist activity (October 1, 2017 shooting) and the fact that there are so many bus stops on the strip, we try to stay up on passenger/ tourist movement so we can know what's busy and what's not busy.

[S1]has not been through surface training and never goes out with the surface team. [S1] is aviation/ airport centric; he assumes an excess of RMAST inspections have been conducted without consulting surface inspectors, but that is not accurate.

Id. at 395.

TSI-1 additionally attested that S1 improperly held Complainant responsible for the fact that the Surface Team completed no SETAs and EXISs in FY2018. TSI1 explained as follows:

Q: To your knowledge, in FY 2018, were the surface team inspectors not conducting EXIS or SETA?

A: In 2018, it was not part of our work plan to conduct SETAs. EXIS can only be available from what TSA Headquarters offers. We can't conduct it on our own; they have to come conduct it. We tried to conduct one, but the dates didn't match up for what TSA Headquarters offered. TSA Headquarters has to set it up; it's very engaged.

Id. at 395-396.

TSI-1 additionally answered as follows:

Q: Is Complainant responsible for the type of testing and number of tests that are in your work plan.

A: No, Washington sends out the work plan for the office. It was not until 2019 that SETA testing was included in our work plan. . . .

Id.

The second subordinate TSI team member (TSI-2) (Mexican, Hispanic, Female), who submitted an affidavit for the ROI, attested as to her belief that S1 subjected Complainant to discrimination based on her national origin and sex. TSI-2 specifically observed that S1 did not treat Complainant in the same manner as other male supervisors. TSI-2 attested that S1 had a more cordial relationship with male supervisors and gave more substantial assignments to male supervisors as well. Id. at 391. TSI-2 observed that "in weekly staff meetings [S1] sometimes asks questions of the supervisors, and, most of the time, he goes to the male supervisor or the Lead TSIs (Caucasians) instead of [Complainant]." Id. TSI-2 further answered the investigator's questions for the ROI as follows:

Q: Do you have any reason to believe [S1] treats Hispanic subordinates differently than he treats subordinates of other races? If so, please explain what incident(s) or observation(s) led you believe this.

A: Definitely. I'm not going to generalize it to all Hispanics, but what I've seen is that this differential treatment is limited to Mexicans born in Mexico. There is another Hispanic in the office who was born in the U.S. and I haven't seen [S1] treat that Hispanic any differently than any other employee. It is only [Complainant] and I who are treated differently by him. . . .

Id.

TSI-2 also attested as follows as to her belief that S1 had been subjecting Complainant to discrimination and harassment:

Specifically, Mexican women are the only ones I have seen receive disparate treatment and harassment. Women of other races are treated well by [S1], such as the Lead TSIs, who are White women. TSI . . . who is White, was given more opportunities by [S1] . . .

Id. at 391-392.

Another TSI (TSI-3), but who was not supervised by S1, believed that Complainant may have been subjected to discrimination by S1. TSI-3 attested that “[i]n the past has shown favoritism to non-Hispanics in the office. The opportunities were always given to the same people. I really feel this is very unfair . . .” Id. at 383.

Based on the affidavits of the TSIs presented by the Agency in the ROI, we find that Complainant has established by a preponderance of the evidence in the record that the Agency’s legitimate, nondiscriminatory reasons for its actions were pretextual based on her sex and national origin. In so finding, we note that while TSI-1 did corroborate S1 assertion that Complainant was not adequately supervising a subordinate employee, TSI-1 also attested that S1 was improperly holding Complainant accountable for things she (Complainant) was not responsible for, including conducting excessive RMAST inspections and for the fact that the Surface Team completed no SETAs and EXISs, among other things. Combined with TSI-1’s statement that S1 was improperly holding Complainant accountable for things she was not responsible for, and TSI-2’s affidavit, among other evidence in the record, we find it more likely than not that S1 was motivated by discriminatory animus based on Complainant’s sex and national origin when he issued Complainant with the Notice of Proposed Demotion (later effectuated on February 4, 2019) and the unacceptable performance rating for FY2018 on October 29, 2018.⁵

⁵ Given our conclusion that Complainant established that she was subjected to discrimination based on sex and national origin, we need not address Complainant's allegation of discrimination

Hostile Work Environment

Harassment of an employee that would not occur but for the employee's race, color, sex, national origin, age, disability, religion or prior EEO activity is unlawful, if it is sufficiently patterned or pervasive. Wibstad v. U.S. Postal Serv., EEOC Appeal No. 01972699 (Aug. 14, 1998) (citing McKinney v. Dole, 765 F.2d 1129, 1138-39 (D.C. Cir. 1985)); EEOC Enforcement Guidance on Harris v. Forklift Systems, Inc., at 3, 9 (Mar. 8, 1994). A single incident or group of isolated incidents will not be regarded as discriminatory harassment unless the conduct is severe. Walker v. Ford Motor Co., 684 F.2d 1355, 1358 (11th Cir. 1982). Whether the harassment is sufficiently severe to trigger a violation of Title VII 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. Harris v. Forklift Systems, 510 U.S. 17 (1993).

To establish a claim of hostile environment harassment, Complainant must show that: (1) she is a member of 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 the statutorily protected class; (4) the harassment affected a term or condition of employment and/or had the purpose or effect of unreasonably interfering with the work environment and/or creating an intimidating, hostile, or offensive work environment; and (5) there is a basis for imputing liability to the employer, See Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982).

In the instant case, as noted above, Complainant established that S1 was motivated by discriminatory animus based on her national origin and sex. The record reflects that S1 was constantly threatening Complainant over her performance, falsely accusing her of performing poorly as a supervisor. As a result, S1 improperly issued Complainant an unsatisfactory performance rating and Notice of Demotion on October 29, 2018. S1's reasons for issuing Complainant with the poor performance rating and the Notice of Demotion were not fully supported by the record, as explained above. As such, we find that Complainant has established that S1's actions were related to her sex and national origin. Therefore, we find that Complainant has established the first three prongs of the prima facie case of a hostile work environment based on sex and national origin.

Objectively Hostile or Abusive Work Environment

Turning now to the fourth prong, we note that whether or not an objectively hostile or abusive work environment exists is based on whether a reasonable person in complainant's circumstances would have found the alleged behavior to be hostile or abusive.

based on reprisal or age, as under the circumstances of this case, a finding on the bases of reprisal or age would not entitle her to any greater relief.

The incidents must have been “sufficiently severe and pervasive to alter the conditions of complainant's employment and create an abusive working environment.” Harris, 510 U.S. at 17, 21; see also Oncale, 523 U.S. 75 (1998). To ascertain this, we look at the totality of the circumstances, including the frequency of the discriminatory conduct; its severity; whether it was physically threatening or humiliating, or a mere offensive utterance; whether it was hostile or patently offensive; whether the alleged harasser was a co-worker or a supervisor. See Harris, 510 U.S. at 17, 23.

Here, we find that S1's actions were sufficiently severe and pervasive to alter the conditions of Complainant's employment and create an abusive working environment. We find that a reasonable person would find that the cumulative effect of S1's actions created a hostile work environment. In so finding, we note that TSI-3 averred, in pertinent part, as follows:

I have observed [Complainant] stressed, upset, angry and even at sometimes near to tears. When I would ask her what was wrong, she would often state [S1] yelled at her for something. Other times she would say [S1] was constantly telling her she was failing her Performance Improvement Plan (PIP).

ROI, at 382-383.

As explained by TSI-1 above, the record simply does not fully support S1's reasons for issuing Complainant with the poor rating and the Notice of Demotion. We find that Complainant clearly demonstrated, by the totality of the circumstances, that she had been subjected to a hostile work environment based on her sex and national origin. As such, Complainant has met prong four of the prima facie case of a hostile work environment.

Liability

We now consider whether the Agency is liable for this harassment. In the context of supervisory liability, employers are subject to vicarious liability for unlawful harassment by supervisors. Farragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Industries v. Ellerth, 524 U.S. 742 (1998). The standard of liability set forth in these decisions is premised on two principles: (1) an employer is responsible for the acts of its supervisors, and (2) employers should be encouraged to avoid or limit the harm from harassment. In order to accommodate these principles, the Court held that an employer is always liable for a supervisor's harassment if it culminates in a tangible employment action.

In the instant case, there is no dispute that S1 was responsible for evaluating Complainant's performance and was responsible for providing direction to Complainant regarding the duties she needed to perform. We also note that based on our findings above, Complainant was subjected to a hostile work environment, resulting in a tangible employment action; namely, a poor annual performance rating and a demotion. As such, we find that the Agency is liable for the harassment directed towards Complainant by S1.

CONCLUSION

Therefore, 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 with regard to claims 3, 5, and 6.⁶ We affirm the Agency's final decision with respect to claims 1, 2, and 4.⁷

ORDER

The Agency is ordered to take the following remedial actions within one hundred and twenty (120) calendar days of the date this decision is issued:

1. The Agency shall give Complainant a notice of her right to submit objective evidence (pursuant to the guidance given in Carle v. Dep't of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993)) in support of his claim for compensatory damages within forty-five (45) calendar days of the date Complainant receives the Agency's notice. The Agency shall complete the investigation on the claim for compensatory damages within forty-five (45) calendar days of the date the Agency receives Complainant's claim for compensatory damages. Thereafter, the Agency shall process the claim in accordance with 29 C.F.R. § 1614.110.
2. The Agency shall offer Complainant reinstatement into her former Supervisory Transportation Security Inspector position, J Band, retroactive to the effective date of Complainant's demotion, with all the rights, benefits, and privileges of that position. The Agency shall afford Complainant 15 days to determine whether to accept reinstatement. Should Complainant reject the offer of reinstatement, Complainant's entitlement to back pay shall terminate as of the date of rejection.
3. The Agency shall determine the appropriate amount of back pay, with interest, and other benefits due to Complainant, pursuant to 29 C.F.R. § 1614.501. The back pay award shall reflect all career ladder promotions to which an employee in Complainant's position who performed in a fully successful manner was entitled. Complainant 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 the Complainant for the undisputed amount within 60 calendar days of the date the Agency determines the

⁶ We consider claim 3 as part of the overall pattern of harassment towards Complainant.

⁷ We find that Complainant did not establish that she was subjected to discrimination with regard to claims 1, 2, and 4. We note, with respect to claim 1, that there is no evidence in the record refuting S1's explanation that no supervisors or management officials were issued time-off awards during the relevant time. We can also find no evidence that S1's changing of Complainant's rating from a "1" to a rating of "3" to "Achieved Expectations" for the competency as a supervisor rating with respect to her FY2017 performance appraisal was due to discrimination. There is also no evidence that Complainant was not provided a copy of her performance rating regarding claim 4.

amount it believes to be due. Complainant may petition for enforcement or clarification of the amount in dispute.

4. The Agency shall also pay compensation for the adverse tax consequences of receiving back pay as a lump sum. Complainant has the burden of establishing the amount of increased tax liability, if any. Once the Agency has calculated the proper amount of back pay, Complainant shall be given the opportunity to present the Agency with evidence regarding the adverse tax consequences, if any, for which Complainant shall then be compensated.
5. The Agency shall expunge its records of any and all references to the FY2018 Unsatisfactory Performance Appraisal issued to Complainant on October 29, 2018 and remove any related Agency records of actions that this decision has found to be discriminatory. The Unsatisfactory Performance Appraisal shall be replaced by a Satisfactory Appraisal.
6. The Agency shall provide EEO training to the management official identified as the Assistant Federal Security Director (S1), including at least eight hours of in-person or interactive training on Title VII focusing on harassment and discrimination. If this management official has left the Agency's employ, the Agency shall furnish documentation of his departure date.
7. The Agency shall consider taking disciplinary action against the responsible management official identified as the Assistant Federal Security Director (S1). The Commission does not consider training to be disciplinary action. The Agency shall report its decision to the Compliance Officer. If the Agency decides to take disciplinary action, it shall identify the action taken. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline. If the Assistant Federal Security Director (S1) has left the Agency's employ, the Agency shall furnish documentation of their departure date.

The Agency is further directed to submit a report of compliance in digital format as provided in the statement entitled "Implementation of the Commission's Decision." The report shall be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). 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 Compliance Department, McCarran International Airport, 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).

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 (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

August 5, 2021
Date