



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

████████████████████
Thomasina B.,¹
Complainant,

v.

Lloyd J. Austin III,
Secretary,
Department of Defense
(Defense Logistics Agency),
Agency.

Request No. 2021002395

Appeal No. 0120141298

Agency No. DLAR-12-0064

DECISION ON REQUEST FOR RECONSIDERATION

On March 11, 2021, the Agency timely requested that the Equal Employment Opportunity Commission (EEOC or Commission) reconsider its decision in EEOC Appeal No. 0120141298 (February 9, 2021). 29 C.F.R. § 1614.405(c). Complainant, who is not represented, opposes the Agency's request. For the reason that follow, the Agency's request is GRANTED in part and DENIED in part, and the previous decision is MODIFIED accordingly.

BACKGROUND

At the time of events giving rise to this complaint, Complainant was employed by the Agency as an Inventory Management Specialist, GS-2010-09, Defense Logistics Agency (DLA) Aviation, Commodities Material Management Branch, Fuel Accessories Material Management Unit, at Tinker Air Force Base in Oklahoma City, Oklahoma.

Complainant filed an equal employment opportunity (EEO) complaint alleging, in relevant part, that she was discriminated against based on her sex (sexual orientation) when she was harassed from July 2010 to July 2012.

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.

After the Agency conducted an EEO investigation, Complainant elected an immediate final decision from the Agency rather than request a hearing before an EEOC Administrative Judge. Thereafter, the Agency determined that the EEO investigation was inadequate and conducted a supplemental investigation. Complainant again elected to have the Agency issue a final decision rather than request a hearing.

In its January 2014 final decision, the Agency found that while Title VII² prohibits sex stereotyping discrimination, Complainant failed to prove that such had occurred. Complainant appealed.

The previous decision noted that in Bostock v. Clayton County, 590 U.S. ___, 140 S.Ct. 1731 (2020), the Supreme Court held that discrimination based on sexual orientation and transgender status is prohibited by Title VII. It partly reversed the Agency's decision, finding Complainant was harassed based on her sexual orientation from July 2010 to July 2012, and that the Agency was liable for the harassment.

The finding of discrimination was based on the evidence of record, as summarized here:

Complainant started working for DLA in June 2006 and was promoted from the warehouse to her Inventory Management Specialist position in February 2010. The primary function of her new job was obtaining parts for Air Force maintenance shops, an apparently complex endeavor. When Complainant started in February 2010, she was assigned to service three Air Force maintenance shops. At least two were in Building 3001, one with a female Air Force shop manager (CW1). They became friends and, by July 2010, were in a romantic relationship which ended in May 2012.

Around July 2010, Complainant's ex-husband, who was also employed at the base, began spreading rumors at the facility that Complainant was gay and dating CW1. The evidence shows these rumors spread across the facility, and soon most coworkers and management officials were aware of Complainant's sexual orientation and relationship with CW1.

One of Complainant's coworkers (CW2) (heterosexual female) engaged in an ongoing campaign of verbally harassing Complainant with anti-gay remarks, saying she was going to hell and her kids would grow up gay, haranguing her about her sexuality and insisting she was harming her children, and saying homosexuality was an abomination in the eyes of God and she would pray for her because she was gay.

Around August 2011, Complainant reported CW2's harassment to a supervisor (S5). Complainant requested that they be separated and that CW2 be the one to be moved. S5 asked CW2 if she wanted to be moved, and she declined. S5 took no further action. After Complainant notified S5, the harassment continued, and CW2 proceeded to interfere with Complainant's work.

² Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq.

Complainant also told her acting second-level supervisor (S6) about CW2's offensive remarks about Complainant's sexual orientation. S6 held a meeting with the entire unit regarding what behaviors were acceptable and unacceptable, but there is no evidence in the record that he spoke with CW2 directly. Complainant stated the harassment did not stop until she and CW2, without the help of management, were able to work out their differences and agreed to work together.

Management officials also began taking action against Complainant because of her relationship with CW1. When Complainant's first-line supervisor (S1), second-line supervisor (S2), and the head of the Commodities Material Management Branch (S3) heard the rumors about Complainant and CW1, Complainant alleges they made "a big issue" out of the rumored relationship. For example, S1 walked into CW1's office where Complainant was going over a parts listing with CW1. S1 told Complainant to leave, and when she showed him the work they were doing, he told her to go to his office when she was done. When Complainant went to his office, S1 reprimanded Complainant for spending too much time in CW1's shop and not enough time at her desk.

In addition, in July 2010, Complainant requested a temporary change for a later start time for child-care reasons. At first the request was denied. However, later management conditioned its approval of the request on Complainant moving from CW1's building to another building. Management cited safety reasons for the condition, stating they did want Complainant to work alone during the last hour of her new schedule. However, as noted on our previous decision, a male coworker (Comparison 1) was granted a later start time to ride with his wife to work but was not similarly required to relocate from the building. Moreover, at a later date, Complainant was again granted a temporary request to work an hour later, but this time there was no similar concern for her safety.

In early 2011, Complainant was reassigned back to CW1's building based on her seniority. However, she was not allowed to service CW1's shop. CW1's flight chief felt service deteriorated after Complainant left and asked her then-supervisor (S4) if Complainant could return to servicing the shop, but S4 replied, "It's not going to happen." By April 2011, management again moved Complainant to another building. S4 noted that she, S2, and S3 made the ultimate decision to do this because they were jointly concerned that Complainant was socializing with CW1. Complainant was sent an email asserting there was no business-related reason for her to be in Building 3001 (CW1's building).

In June 2011, Complainant and another senior co-worker agreed to divide up the workload, leaving Complainant to work in the shop where CW1 worked. S5 did not approve and assigned CW1's shop to a new, less-experienced coworker (CW3). When CW3 was struggling to perform his duties and asked Complainant to help him, Complainant was told by S5 to leave the building and received a reprimand for providing assistance. CW3 stated in the record that he really needed Complainant's assistance because of his inexperience, but she was prohibited by supervisors from helping him.

Our previous appellate decision concluded that the cumulative effect of these incidents resulted in creating a hostile work environment for Complainant based on her sexual orientation in violation of Title VII.

In its request for reconsideration, Agency counsel argues, with citations to the record, that the previous decision should be reversed because its factual and legal conclusions were clearly erroneous. Complainant argues the previous decision should be upheld.

ANALYSIS

EEOC regulations provide that the Commission may, in its discretion, grant a request to reconsider any previous Commission decision issued pursuant to 29 C.F.R. § 1614.405(a), where the requesting party demonstrates 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. See 29 C.F.R. § 1614.405(c).³

Preliminary Matter – Consideration of Agency’s Brief

The Agency argues that the previous appellate decision did not consider its brief in opposition to Complainant’s appeal. It submits a declaration by a retired EEO Specialist stating that on May 19, 2014, he filed a legal brief with EEOC prepared by Agency counsel opposing Complainant’s appeal. It also submits a copy of the brief. While the declaration does not state the method of filing, we presume from the copy of the brief now provided that it was mailed to EEOC.⁴ There is no evidence, however, that this brief was received by EEOC and it was not in the appellate file for Appeal No. 0120141298 when the previous decision was written, and hence was not considered.

The Agency, in its request for reconsideration, has provided us with a copy of that brief. In reviewing this case, we now will consider the entire record, including the Agency’s May 2014 opposition brief.

³ In its request for reconsideration, the Agency argues for the first time that Complainant’s complaint should be dismissed because she failed to timely initiate EEO counseling. We note that the Agency’s own final decision did not dismiss the complaint for this reason nor did the Agency raise this matter on appeal. As such, we find the Agency has waived this argument and we will not address it further in this decision.

⁴ Even if it had been submitted by facsimile, our normal business practice was to document this in a log. EEOC’s relevant facsimile log contains no entry indicating this brief was received.

Harassment

A hostile work environment claim is comprised of a series of separate acts that collectively constitute one unlawful employment practice. National Railroad Passenger Corporation v. Morgan, 536 U.S. 101, 117 (2002). Unlike a claim which is based on discrete acts of discrimination, a hostile work environment claim is based upon the cumulative effect of individual acts that may not themselves be actionable. Id. at 115.

To establish a claim of harassment, a complainant must show that: (1) they belong to a statutorily protected class; (2) they were subjected to harassment in the form of unwelcome verbal or physical conduct involving the protected class; (3) the harassment complained of was based on their statutorily protected class; (4) the harassment affected a term or condition of employment and/or had the purpose or effect of unreasonably interfering with the work environment and/or creating an intimidating, hostile, or offensive work environment; and (5) there is a basis for imputing liability to the employer. See Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982). Further, the incidents collectively must have been "sufficiently severe or pervasive to alter the conditions of [complainant's] employment and create an abusive working environment." Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993).

It is uncontested that Complainant belongs to a class or group (sex – female; sexual orientation – gay) protected by Title VII. The Supreme Court has ruled it is impossible to discriminate against a person for being gay or transgender without discriminating based on sex as being gay or transgender are inextricably bound up with sex. Bostock v. Clayton County, 590 U.S. ___, 140 S.Ct. 1731, 1741 - 1742 (2020).

Harassment by Coworker (CW2)

Based on the evidence of record, our prior appellate decision concluded CW2 subjected Complainant to ongoing verbal harassment about her sexual orientation that amounted to a violation of Title VII. The Agency itself found in its FAD that CW2 repeatedly subjected Complainant to anti-gay remarks which created a hostile work environment. This finding is supported by the statements of Complainant and multiple witnesses. Moreover, the evidence shows that Complainant reported CW2's conduct to management officials but little action was taken to address the matter.

On request for reconsideration, Agency counsel argues that, even assuming CW2 subjected Complainant to a hostile work environment, it is undisputed that it only lasted to October 2011, not July 2012, and that the finding in our prior decision to the contrary therefore was clearly erroneous. In support of its argument that CW2 ceased making harassing comments to Complainant by October 2011, the Agency points to Complainant's affidavit that by late October 2011 she and CW2 had resolved their issues with one another. We add that their supervisor at the time (S7) stated that when he came to the unit Complainant and CW2 were getting along. In her opposition to the Agency request for reconsideration, Complainant does not dispute that CW2 ceased harassing her in October 2011.

Based on the above, we amend the finding in our previous decision to conclude that CW2 did not continue to discriminatorily harass Complainant beyond late October 2011.

Harassment by Management

The incidents at issue regarding actions by management officials are:

1. In 2010, S1 told Complainant while she was working in CW1's shop office that she was there too long, and later verbally counseling her for spending too much time in the shops she served rather than at her desk.
2. In July 2010, S3 required her to move away from Building 3001, where CW1's shop was located.
3. In early 2011, after returning to Building 3001, management stopped her from resuming service to CW1's shop despite the request of the Flight Chief that Complainant be assigned to the shop.
4. By email on April 21, 2011, S4 instructed Complainant to move to Building 2210 with the admonition that she need not come to Building 3001 (CW1's building) for any work-related reason.
5. Around June 2011, S5 denied Complainant permission to assist CW3 with his two shops, one of which was CW1's, and some months later counseled Complainant for doing so.

The Agency now argues that the record does not show incidents 1 and 5 were based on Complainant's sexual orientation because no evidence shows they were connected to separating her from CW1.

Regarding incident 1, we note that in his investigatory declaration, S1 stated, in the context of relating that Complainant was a very good friend of CW1, that he "wrote [Complainant] up" for spending too much time in CW1's shop. The Agency also argues that there is no evidence that when S1 verbally counseled Complainant he knew of her sexual orientation. S1 started supervising Complainant in July 2010 and stated that after a few months he figured out that she was gay. Given this, we infer S1 knew Complainant was gay when he counseled her in the winter of 2010.

Regarding incident 5, CW3 stated that after being hired in June 2011, he physically worked in an office with three other inventory management specialists – CW2, Complainant, and CW5 (who joined them in July 2011), and he was assigned two shops - CW1's and Shop 2. CW1 stated she had the largest shop in Flight, and suggested it had the highest number of orders. Complaint file at Adobe PDF 258, S/ROI Ex. B-21, Bates No. 224. CW3 stated that, of the people he worked with, the only experienced inventory management specialists were CW2 and Complainant, and that CW2 was unavailable to help him because she was working with CW5.

After writing that Complainant and CW1 were in a relationship, CW3 related that as a new employee he needed the assistance of an experienced inventory management specialist, but he witnessed management officials tell Complainant not to help him. Complaint file at Adobe PDF 204, S/ROI Ex. B-15, Bates No. 170. Complainant gave a similar account, except she stated that she asked S5 if she could help CW3 but S5 said no, and that some months later when she tried to help CW3 with one of his shops, S5 verbally reprimanded her. On reconsideration, the Agency argues that there is no evidence or even an allegation that Complainant tried to help CW3 with CW1's shop as opposed to Shop 2, that CW3 physically worked in CW1's shop, or that when Complainant tried to help CW3 she traveled to CW1's shop to do so. It also argues that Complainant's position description states the incumbent "may occasionally" work on the shop floor.

Regarding incident 5, the previous decision found that, but for the concern about CW1, there was no reasonable explanation for why S5 would not let Complainant help CW3 given that he was inexperienced and struggling with his two shops. One of these shops was headed by CW1, who stated she had the largest shop in the Flight and suggested it had the highest number of orders. We find the inference in the previous decision that S5 was motivated by wanting to keep Complainant away from CW1 is not clearly erroneous as not allowing Complainant to help CW3 with his two shops would work to separate her from CW1's shop. In his first investigatory declaration, S5 stated that he was not aware of Complainant's sexual orientation, but in his second stated Complainant was not shy about her sexual orientation and he learned about it after he began supervising the unit, and knew CW1 and Complainant were in a relationship. S5 initially hiding his awareness of Complainant's sexual orientation casts doubt on the probative value of his testimony.

Based the foregoing considerations, we find that the conclusion in the previous decision that incidents 1 and 5 were based on Complainant's sexual orientation was not clearly erroneous.

On reconsideration regarding incident 3, the Agency argues that the decision-maker did not know Complainant was gay or which shops she previously served when she assigned Complainant her shops upon her return to the building in early 2011. However, the evidence supports the previous decision's finding that S4 was involved in the decision not to resume Complainant's service there. It was around this time that CW1's flight chief told S4 that service to their shop deteriorated after Complainant no longer served it and asked if she could resume, to which S4 replied, "It's not going to happen." S4 gave a similar account of this exchange. Complaint file at Adobe PDF 238, S/ROI, Ex. B-19, at 6, Bates No. 204. Regarding S4's motivation, the Agency argues that S4 stated Complainant spent too much time away from her desk and not in her work area visiting other locations such as shops – not that she was visiting CW1's shop. We disagree. Regarding the March 2011 assignment decision, we find S4 specifically referred to CW1's shop, and at a minimum indicated S3 agreed not to allow Complainant to resume service to CW1's shop. Complaint file at Adobe PDF 237, S/ROI, Ex. B-19, at 5, Bates No. 203.

On incident 2, for the reasons already outlined herein, we find the previous decision's finding that S3's reason for relocating Complainant in July 2010, was pretext to mask sexual orientation discrimination was not clearly erroneous.

On reconsideration, the Agency argues that management's actions are better analyzed as a separate set of claims apart from Complainant being verbally harassed by CW2. While we agree the actions of managers and CW2 are not necessarily tied together, the record reflects that all involved were aware of Complainant's sexual orientation and her being in a relationship with CW1. Incidents 1 – 5 are united by the same theme; management taking actions to stop Complainant, based on her sexual orientation, from going to CW1's shop to keep them apart. Moreover, we note that the same management failed to take appropriate action to stop CW2's harassment of Complainant because of her relationship with CW1. We find that taken together, the alleged incidents constitute a hostile work environment in violation of Title VII.

To the extent management explained that it took actions because Complainant spent excessive time in CW1's shop which adversely impacted Complainant's work, the previous decision did not credit this explanation because there was nothing in the record showing that Complainant ever acted unprofessionally or that her presence in CW1's shop affected her ability to do her job. The previous decision observed that Complainant's performance ratings were nothing other than Fully Successful. We add that Fully Successful was highest rating possible. Further, Complainant earned a sustained superior performance award that stated her work was outstanding for 2011. The previous decision recounted that CW1's flight chief requested that Complainant resume servicing their shop because of her outstanding service. We add that CW1 stated she believed Complainant's in-person interaction with her mechanics was important because they were not necessarily articulate in explaining what they needed, and this saved them time. The previous decision found that other employees who were not gay socialized during work and were not counseled or relocated for this reason.

On the finding in the previous decision regarding incident 2 – that management conditioned the granting of Complainant's hardship request for a later start time on her moving out of the building housing CW1's shop (3001) – the Agency argues on request that there is no evidence Complainant worked in Building 3001 then, making this finding clearly erroneous. We disagree. After S2 initially denied Complainant's hardship request for a later start time by email on July 20, 2010, Complainant forwarded S2's disapproval to S3, who overruled S2. In the forward, Complainant's signature line included Building 3001. Complaint file, at Adobe PDF p. 507, ROI Ex. F-13, at Bates No. 211.

S3 stated he overruled S2's denial because while at that point S2 had no one working with an altered schedule, some employees in other areas under his supervision as head of the Commodities Material Management Branch did. S3 stated he and S2 conditioned granting Complainant an altered schedule on her relocating so she would not work alone for safety reasons. Complaint file, at Adobe PDF pp. 97, 100, 244 - 245, S/ROI Ex. B-4 at Bates Nos. 64, 66 & Ex. B-20, at 4-5, Bates Nos. 210 – 211. Complainant relocated in July 2010.

Complainant stated that during this time period Comparison 1 (male, married to a woman) performed the same duties as her. She noted that they both were granted a one hour later start time but, unlike her, he was permitted to work alone the last hour of his revised shift. The Agency argues that Complainant was not similarly situated to Comparison 1 because his schedule adjustment was granted before S2 became his supervisor, and S2 stated that Comparison 1 and Complainant did not do the same job. It argues that the previous decision's finding of pretext was clearly erroneous because it relied on Comparison 1 being similarly situated to Complainant, but he was not because the decision regarding him was made at a different time by a different supervisor (not S2). But the record reflects that S3 was involved in both decisions and played a leading role in requiring Complainant to relocate. Also, we find that that the previous decision did not solely rely on Comparison 1 in finding pretext on the July 2010 matter. The previous decision noted that in May 2011, unlike in July 2010, management granted Complainant's subsequent request to adjust her schedule without requiring her not to work alone. At the time, Complainant was not located in Building 3001. Complainant stated that S3 allowed her to work unsupervised for the last hour of this revised shift so long as she sent an email when she left every day.

The previous decision found that in early 2011, based on her seniority Complainant was reassigned to the building where CW1's shop was located, but in March 2011, to separate them, she was moved to another building. The Agency argues the previous decision got these moves backwards. We agree. The record reflects that effective January 18, 2011, S4 moved Complainant from Building 3001 to Building 2210, referred to as the CSD shop. Complaint file at Adobe PDF 103, S/ROI Ex. B-4, at Bates No. 69. Both S4 and Complainant state this occurred due to her lack of seniority. Complaint file at Adobe PDF 123, 237, S/ROI Ex. B-6 at 8, B-19 at 5, Bates No. 89, 203. Complainant stated that by email on March 2, 2011, S4 notified her she was being returned to her original work area, and then or shortly thereafter assigned her two shops, only one of which she originally had; Shop 2, not CW1's shop.⁵ Complaint file at Adobe PDF 123, S/ROI Ex. B-6 at 8, Bates No. 89.

The Agency also accurately recounts that in her investigatory declaration Complainant stated she was "verbally reprimanded" by S1 and S5. It argues that being verbally counseled is not a tangible employment action. We agree, but find it has no impact on the outcome of our decision. Complainant counters S1 stated he, "wrote her up" for being away from her desk.

⁵ Later, on April 20, 2011, S4 emailed Complainant that she wanted her to move to the SSC and advised she would not need to come to Building 3001 for any work-related reason. Complaint file at Adobe PDF 104, S/ROI Ex. B-4, at Bates No. 70. SSC refers to the Shop Service Center which is located in Building 2210. Complaint file at Adobe PDF 384, ROI Ex. F-3, at Bates No. 88. By June 2011, S4 moved Complainant to Building 3907 (new Fuel Building) because she wanted all her subordinates in the same location. In June 2011, Complainant worked there with coworkers CW2 and CW3, and in July 2011, CW5 joined them. The record suggests CW4 may have also been there from June – August 2011.

But the record contains no written reprimands or rebukes to her by S1 (or by S5), and Complainant does not contend she received any.

The Agency argues that there is no evidence S1 and S5's reproaches to Complainant about spending too much time away from her desk specifically regarded her visiting CW1's shop. In the context of stating that managers made a big issue of her working with CW1, Complainant stated that S1 verbally reprimanded her in the winter of 2010 for spending too much time in shops, and not enough at her desk. Complaint file Adobe PDF 120, S/ROI Ex. B-6 at 5, Bates No. 86. While Complainant stated she served Shop 2 and CW1's shop before being moved by S1 from Building 3001 to Building 2210 in January 2011, S4 related that Complainant served only CW1's shop. Complaint file at Adobe PDF 237, S/ROI Ex. B-19 at 5, Bates No. 203. CW1 stated that on one occasion when Complainant was in her shop going over a parts listing with her, S1 came by and told Complainant that she was there too long. While there is no written reprimand in the record, in his affidavit S1 stated, in the context of relating that Complainant was a "very good friend of CW1", that he "wrote [Complainant] up" for spending excessive time away from her desk. Complaint file at Adobe PDF 162, S/ROI Ex. B-10 at 4, Bates No. 128.

In sum, we conclude that even accepting some of the Agency's minor factual modifications, our previous decision correctly determined that the cumulative effect of the events established by the evidence resulted in a hostile work environment for Complainant based on her sexual orientation.

Imputing Liability to Agency

Once a hostile work environment is found, we must be determined whether the Agency should be held liable for its existence. An employer is subject to vicarious liability for unlawful harassment if the harassment was "created by a supervisor with immediate (or successively higher) authority over the employee." Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors, OLC Control Number EEOC-CVG-1999-2 (Jun. 18, 1999) (available at eeoc.gov). An employer is always liable for harassment by a supervisor on a prohibited basis that culminates in a tangible employment action. No affirmative defense is available in such cases. *Id.*

On request, the Agency argues that the previous decision's liability finding under this standard was clearly erroneous because of the harassing actions taken by the supervisors were not tangible. Where the harassment by a supervisor creates an unlawful hostile environment but does not result in a tangible employment action, the employer can raise an affirmative defense to liability, which it must prove by a preponderance of the evidence. The defense consists of two elements: (a) the employer exercised reasonable care to prevent and correct promptly any harassment; and (b) the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise. For larger employers, reasonable care generally requires establishing, disseminating, and enforcing an anti-harassment policy and complaint procedure and to take other reasonable steps to prevent and correct harassment, but a lack of a formal policy and complaint procedure will not defeat the affirmative defense if the employer exercised sufficient care through other means. *Id.*

On request, the Agency argues that it met its affirmative defense. Regarding element (a), the Agency argues that anti-harassment training was given to Complainant's organization in August 2009 and December 2011. The EEO investigator requested information on EEO/harassment training conducted in Complainant's organization. The Agency replied, "Harassment Training was conducted August 3 – 6, 2009" "Refresher 12/2011." Complainant joined the Commodities Material Management Branch after the first training. The EEO investigator asked for specific information on the training, including the list of attendees. However, no more information on the training was provided by the Agency. The Agency argues that EEO complaint rights (including for harassment) were posted on the organization bulletin's boards during at least 2011 and 2012. The distribution list for the posters includes DLA Aviation at Oklahoma City. But there is no affidavit, declaration or other information verifying the posters were posted on bulletin boards in any areas Complainant worked or would take breaks and were viewable. We find that the Agency did not meet element (a) of its affirmative defense. Accordingly, we need not address element b.

When the harassment is perpetrated by a co-worker, liability is imputed to the employer if it knew or should have known of the misconduct and failed to take immediate and appropriate corrective action. What is appropriate will necessarily depend on the facts of the particular case, the severity, and persistence of the harassment, and the effectiveness of any remedial step. *Id.* On reconsideration, the Agency argues S5 stated that around August 2011, Complainant told him CW2 was creating a hostile work environment and she could not get along with CW2, but Complainant never told him CW2 was harassing her because of her sexual orientation. Complainant stated that on several occasions she told S5 that CW2 harassed her and made comments about gays and how she was going to hell and her kids would grow up gay. Complaint file at Adobe PDF 491, ROI Ex. F-13 at 7, Bates No. 195. The Agency argues that to the extent there is a credibility dispute between Complainant and S5, it was improper for the previous decision to resolve it in Complainant's favor because there was no independent information in the record Complainant's version was more credible. Complainant counters that she complained to S5 on several occasions about CW2's harassment and homophobic remarks directed to her, and as found in the previous decision, her supervisors were aware as early as August 2011.

The Agency has not shown that the previous decision resolving the dispute between Complainant and S5 was clearly erroneous. First, as recounted above, S5 lost some credibility by changing his story about not knowing and then knowing Complainant's sexual orientation. Further, it is uncontested that before S6 left the Commodities Material Management Branch in August 2011, Complainant told him CW2 made offensive remarks to her about her sexual orientation. Complaint file Adobe PDF 181, 183, S/ROI Ex. B-12, Bates Nos. 147, 149. This makes it more likely than not that Complainant also told S5, and shows, in any event, that by August 2011, she had notified management of this. The finding in the previous decision that the corrective actions management took were insufficient to avoid Agency liability was not clearly erroneous.

Agency's Objection to Training Order

The Agency asserts that DLA employs around 1,100 people at Tinker Air Force Base, of which about 458 are in DLA Aviation and 599 in DLA Distribution. In 2011, DLA Aviation's Base Commodities Material Management Branch had 46 employees. The Agency argues that there is no evidence that the rumors spread beyond DLA Aviation's Commodities Material Management Branch of 46 staff, and that Complainant did not allege that it did. In reply, Complainant reiterates the findings in the previous decision but points to no evidence contradicting the Agency. None of people identified in the record who heard or allegedly heard the information conveyed in the rumors were outside the Commodities Material Management Branch, and all but one worked in Complainant's unit or were in her management chain. The Agency argues that the previous decision's finding that the rumors spread throughout its workforce at Tinker Air Force Base, meaning 1,100 people, was clearly erroneous and led to the sweeping order that all its base staff receive 8 hours of live training. We agree and, as such, the ordered training requirement below is narrowed.

CONCLUSION

After reconsidering the previous decision and the entire record, the Commission finds that the agency's request meets the criteria of 29 C.F.R. § 1614.405(c), and it is the decision of the Commission to grant the request, in part. The decision of the Commission in Appeal No. 0120141298 is MODIFIED. There is no further right of administrative appeal on the decision of the Commission on a Request to Reconsider.

ORDER

1. The Agency will immediately take steps to ensure that all harassment ceases and desists within DLA Aviation's Commodities Material Management Branch at Tinker Air Force Base. The Agency will ensure that it takes steps to immediately address any reports of harassment or discrimination brought to its attention.
2. The Agency shall undertake a supplemental investigation to determine Complainant's entitlement to compensatory damages under Title VII. Within 10 calendar days of the date of this decision, the Agency shall provide Complainant a point of contact to submit evidence of compensatory damages, give her guidance on what to provide consistent with Carle v. Department of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993) and/or EEOC's Enforcement Guidance: Compensatory and Punitive Damages Available under Sec 102 of the CRA of 1991, OLC Control No. EEOC-CVG-1992-3 (Jul. 14, 1992), and advise her she has 80 days from the date of this decision to submit the evidence to the Agency point of contact. The Agency shall issue a FAD addressing compensatory damages within 60 calendar days of the date it receives Complainant's damages submission, with appeal rights to this office. The Agency shall submit a copy of the FAD to the Compliance Officer at the address set forth below.

3. Within 120 days of the date on which this decision is issued, the Agency shall provide all management and employees at DLA Aviation's Commodities Material Management Branch at Tinker Air Force Base Workplace Civility and Bystander Intervention training with an added component on employees' rights and managements' responsibilities under Title VII in a matter DLA's EEO function deems appropriate.
4. The Agency shall consider taking disciplinary action against the responsible management officials listed in this decision and CW2. The Agency shall report its decision within 30 days of the date this decision is issued. If the Agency decides to take disciplinary action, it shall identify the actions taken. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline. The Commission does not consider training to constitute disciplinary action.

POSTING ORDER (G0617)

The Agency is ordered to post at its DLA Aviation's Commodities Material Management Branch at Tinker Air Force Base copies of the attached notice. Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted **both in hard copy and electronic format** by the Agency within 30 calendar days of the date this decision was issued, and shall remain posted for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The Agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material. The original signed notice is to be submitted to the Compliance Officer as directed in the paragraph entitled "Implementation of the Commission's Decision," within 10 calendar days of the expiration of the posting period. The report must be in digital format and must be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

ATTORNEY'S FEES (H1019)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), she/he is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. § 1614.501(e). The award of attorney's fees shall be paid by the Agency. The attorney shall submit a verified statement of fees to the Agency -- **not** to the Equal Employment Opportunity Commission, Office of Federal Operations -- within thirty (30) calendar days of receipt of this decision. The Agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

Under 29 C.F.R. § 1614.405(c) and § 1614.502, compliance with the Commission's corrective action is mandatory. Within seven (7) calendar days of the completion of each ordered corrective action, the Agency shall submit via the Federal Sector EEO Portal (FedSEP) supporting documents in the digital format required by the Commission, referencing the compliance docket number under which compliance was being monitored.

Once all compliance is complete, the Agency shall submit via FedSEP a final compliance report in the digital format required by the Commission. See 29 C.F.R. § 1614.403(g). The Agency's final report must contain supporting documentation when previously not uploaded, and the Agency must send a copy of all submissions to the Complainant and his/her representative.

If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See 29 C.F.R. § 1614.409.

Failure by an agency to either file a compliance report or implement any of the orders set forth in this decision, without good cause shown, may result in the referral of this matter to the Office of Special Counsel pursuant to 29 C.F.R. § 1614.503(f) for enforcement by that agency.

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (Q0610)

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 filed your appeal with the Commission. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. **Filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests.

Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

June 9, 2021

Date