



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

[REDACTED]
Caroline B.,¹
Complainant,

v.

Denis R. McDonough,
Secretary,
Department of Veterans Affairs
(Veterans Health Administration),
Agency.

Appeal No. 2020000978

Hearing No. 410201800260X

Agency No. 200I05082017104668

DECISION

Complainant timely appealed to the Equal Employment Opportunity Commission (“EEOC” or “the Commission”) pursuant to 29 C.F.R. § 1614.403(a), from the Agency’s October 1, 2019 final order concerning an 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.

BACKGROUND

At the time of events giving rise to this complaint, Complainant was employed by the Agency as a Registered Nurse, Level II, at the Atlanta VA Medical Center (“Atlanta VAMC”) facility located in Decatur, Georgia.

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.

On November 19, 2017, Complainant filed a formal EEO complaint alleging:

- 1) From October 2016 through August 2017, she was subjected to a hostile work environment based on race (African American) when management failed to take appropriate action after she notified them that family members of a patient made racially charged statements to her and otherwise harassed her while she was working.
- 2) On November 2, 2017, her first level supervisor ("S1") retaliated against her for engaging in protected EEO activity by issuing her a counseling memorandum dated September 25, 2017.

After investigating her complaint, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an EEOC Administrative Judge ("AJ"). Complainant timely requested a hearing.

On May 3, 2019, the AJ issued an Order Granting Partial Summary Judgment for the Agency, which determined no discrimination was established with regard to Claim 1 of Complainant's complaint. A hearing was held on August 6, 2019 to address Claim 2. Four witnesses testified, including Complainant, who participated in the hearing *pro se*.

The record includes the following relevant evidence developed during the investigation and hearing.

On March 6, 2016, Complainant began working in the Community Living Center ("CLC-3") on the third floor of the Atlanta VAMC, which provided patients with short and long-term care. Complainant held a master's degree and over 20 years of experience caring for residents in long-term care facilities. At CLC-3, she was regularly assigned as the Charge Nurse, which entailed supervisory responsibilities.

During the relevant period, the Nurse Manager (race not identified in the record) was initially Complainant's first-level supervisor. However, by February 2017, the Nurse Manager went out on an extended leave and the Assistant Nurse Manager took on the role of Acting Nurse Manager and became Complainant's first level supervisor ("S1") (African American) for the remainder of the relevant time frame. Complainant's second level supervisor ("S2") (African American) was the Acting Associate Director, Nursing and Patient Care Services.

In October 2016, Complainant testified that she notified her first level supervisor at the time, the Nurse Manager, that family members of a patient resident ("R1") were subjecting her to racially charged language. Complainant said she reported that R1's wife ("RW") stated, "[my husband] is white and he comes first [regarding daily care]," "I can't wait for Trump to take office and get rid of all of y'all," and "all of y'all are liars." She further alleges that R1's family members referred to Complainant and other staff as "the help" or "house staff," an allusion to slavery terminology in the United States.

Complainant further alleged that RW subjected her to harassment by constantly instructing her on how to perform her job duties. According to Complainant, the Nurse Manager responded by advising her to “ignore them, they are just concerned about their loved one, and it will go away.”

In October 2016, the Nurse Manager called Complainant to her office, and informed her that “a couple of family members” complained about her socks. That day, Complainant had worn blue socks with the word “vote” written on them, as the election was coming up. The Nurse Manager informed her that they violated the Agency’s dress code and there would be “consequences” if Complainant wore them again. Complainant felt she had been targeted because of her race.

On October 17, 2016, according to Complainant, she met with her second-level supervisor (“S2”) for the first time, as the Nurse Manager never followed up on her harassment complaints. Complainant recalls that S2 told her she would “write up” the harassment as a concern. Complainant also stated that S2 responded “I know” when Complainant revealed that she believed R1’s family members were harassing her based on her race, yet no action was taken. Complainant testified in the record that she continued to feel targeted because of her race and it became difficult to complete her daily assignments.

Complainant states that she emailed management multiple times to report harassment and racially charged comments with no response.² In one instance, on an unspecified date, Complainant was verbally attacked by RW while she was talking to another supervisor. The supervisor told Complainant she would write up the incident, but to Complainant’s knowledge, nothing came of it. The ROI indicates that the supervisor did not respond to the EEO investigator’s requests for a statement.

While the hearing did not directly address Complainant’s harassment allegations, Complainant’s sworn hearing testimony reveals that she experienced harassment by R1’s family members, particularly RW, “almost every day in one form or another,” and indicated that the racially charged language was ongoing.

In February 2017, the Nurse Manager went on extended medical leave and S1 became Complainant’s supervisor. Both S1 and S2 deny knowledge of the allegations Complainant raised with the Nurse Manager, or the complaint about her socks. S2 testified that she did not interact with Complainant regularly, as S1 did, once she became Complainant’s supervisor, but “occasionally during my rounds on the unit where she worked.” Also, S2 stated in the ROI, “I’m aware of one incident [of harassment],” referring to a June 28, 2017 incident described below.

² In the ROI, Complainant indicates that she sent a number of emails alleging harassment and racially charged incidents, but the emails were not included in the record. There is also no testimony by the Nurse Manager, who was no longer with the Agency at the time of the investigation.

On June 28, 2017, Complainant recounts that she was providing care for R1 when RW told her that she was brushing his teeth incorrectly. Complainant responded to the effect that she knew what she was doing, noting that she had earned a master's degree in nursing. RW allegedly looked at her in the face and called her an "educated fool." Complainant told the other nurses on the hall and notified S1 that RW called her an "educated fool." S1 instructed her to write a statement. Complainant never received a reply from management. S1 testified that she also instructed Complainant not to speak about the incident in the hallway where other family members could overhear but denies Complainant's allegation that she was told never to speak of it again. S1 spoke with RW, who told her that she had made a comment that there are a lot of educated fools and that she did not directly call Complainant an educated fool. S1 states that she consulted with S2, who interviewed other employees who said they did not hear RW call Complainant an "educated fool," but that Complainant told them what happened. S2 concluded that no harassment was established.

On July 26, 2017, RW asked Complainant who was R1's assigned nurse, and when Complainant responded that she was, and showed RW that her name was written on the board in the hallway. RW then stated that she was "confused" because Complainant did not park her cart on the right side of S1's door. Complainant explained that it was not relevant where her cart was, did RW have concerns or questions, at which point RW complained to S1. S1 called Complainant and told her to "be mindful of how she spoke to family members." Complainant specifies that S1 said that they needed to handle their "high maintenance" residents and family members differently. When Complainant asked for clarification on "high maintenance" S1 allegedly responded: "You know the ones that's always looking for something wrong and always complaining." S1 directed her and other staff to complete the care for residents with family members with high demands first, so the family members would have nothing to complain about.

On August 6, 2017, Complainant was the assigned Charge Nurse. She was in the dining room assisting a resident when a nurse informed her that R1's daughter ("RD") reported that R1 was experiencing chest pain. Complainant approached R1 and RD, who were also in the dining room, took R1's pulse, and asked R1 if he had chest pain. R1 responded that he did not. Complainant testified during the hearing that based on her months of caring for R1, she was confident that he would report chest pain (or any pain) if he experienced it. Complainant advised R1's daughter that R1 said he did not have chest pain, but if she wanted, she could take him upstairs for a medical assessment. Complainant was also concerned about leaving the rest of the residents as she was the only staff member in the dining room.

RD finished feeding R1 his breakfast, then took him outside to sit under the breezeway for two and a half hours. When they came back to the floor, Complainant asked R1 if he had chest pain, and he said no. More staff were on the floor, so she "did a full work up" on R1. Complainant reported the results to the physician on duty, who confirmed that R1 did not need further assessment. Based on the investigative inquiry S1 and S2 initiated after the incident, R1 and RD then went to the day room, and a nurse noticed that RD was recording them with her cell phone under the table and asked her to stop. When RD refused, the nurse notified Complainant, who assessed the situation and called the VA Police and management.

The nurse witnessed the VA Police Officers approach RD, who asked to speak with them away from Complainant, saying she was “a part of the problem.”

Neither S1 nor S2 were on duty, but S2, who was closer to the facility, came to CLC-3 to address the situation. S1 counseled Complainant over the phone that advising RD to take R1 upstairs without a medical escort was inappropriate, and that Complainant could have called another nurse to cover the dining room. S1 and S2 initiated an inquiry and obtained witness statements from Complainant and other nurses on duty that day.

Complainant did not return to work and utilized the Employee Assistance Program (“EAP”) multiple times following the August 6, 2017 incident. She testified that she had been undergoing treatment for anxiety, including prescription medication, for months prior to the incident, due to stress caused by R1’s family members. She initiated the instant EEO complaint, and exhausted her leave, as the prospect of returning to work at CLC-3 provoked too much anxiety. Both S1 and S2 testified that they discussed the August 6, 2017 incident and the decision to issue a non-disciplinary September 25, 2017 Counseling Memorandum about the incident before they became aware of Complainant’s EEO activity.

On September 27, 2017, S1 warned Complainant, who had been on leave since the August 6, 2017 incident, and already been granted medical leave without pay, that she would be recorded as absent without leave (“AWOL”) if she did not start reporting for work. Before Complainant could respond, S1 received a phone call about a family emergency. S1 went on leave until October 16, 2017. Complainant remained on leave.

On October 16, 2017, S1 returned from leave to find a large backlog of work, including Complainant’s annual performance evaluation or “proficiency” and a counseling memorandum to address Complainant’s response during the August 6, 2017 incident.

On October 30, 2017, a Monday, S1 left Complainant a voicemail notifying her that her proficiency was complete and asking her to call back with a time she could come to the Atlanta VAMC and sign it. S1 intentionally did not mention the counseling memorandum, fearing it would deter Complainant from meeting with her. Complainant called back and agreed to meet with S1 that afternoon. Then, S1 left another voicemail canceling the meeting and asking to reschedule “another day . . . Tuesday, or Wednesday . . . or even Thursday or whatever.”

On October 31, 2017, S1 and S2 became aware of Complainant’s EEO activity related to the instant complaint after receiving emails from an EEO counselor. S1 received further details when she was interviewed by an EEO counselor for an hour on November 2, 2017. Immediately after the interview, S1 called Complainant three times in 20 minutes. Complainant was attending a seminar but, believing the matter must be urgent, she left the room to answer S1’s third call. S1 told Complainant that it was imperative that she come to VAMC Atlanta that day to sign her proficiency. Complainant explained about the seminar, but assured S1 that she would try. Complainant departed the seminar within an hour, then met with S1 and signed her proficiency. S1 also issued the counseling memorandum, which she said blindsided her.

The counseling memorandum dated September 25, 2017, articulated S1 and S2's finding that Complainant's actions on August 6, 2017, violated the standards for patient care, citing the relevant Agency policies. It also referenced several complaints RW and RD raised about Complainant on July 23, 2017, and on an unspecified day in July 2017, of which Complainant had never been informed. Complainant disputes the July complaints and questions why the Agency did not notify her and provide her with an opportunity to respond back when RW and RD lodged them. Complainant did not submit a rebuttal to the counseling memorandum, which was not officially a disciplinary action.

AJ's Decisions

On August 8, 2019, the AJ issued a bench decision following the hearing. On August 28, 2019, the AJ issued an Order Entering Judgment incorporating the bench decision and the partial grant of summary judgment by reference.

For Claim 1, the AJ found that a hearing was not warranted because Complainant was unable to show that some of the incidents occurred because of her race. With regard to the racially charged statements made by RW, the AJ reasoned that the harassment allegation in Claim 1(c) failed because "the Agency has shown that it took immediate and appropriate corrective action. Specifically, when management became aware of [RW's] conduct, they spoke with [RW] and emphasized that [RW] should treat the employees in a courteous manner. Management also monitored [RW's] conduct."

As for Claim 2, the AJ found that Complainant was subjected to adverse treatment when, on November 2, 2017, S1 called her and told her it was imperative that she come to the Atlanta VAMC to sign her proficiency because "being unnecessarily rushed to perform a task is a sufficiently material act to deter a reasonable person from engaging in future protected activity."

However, the AJ determined that the September 25, 2017 Counseling Memorandum was not, in itself, motivated by reprisal for Complainant's EEO activity because S1 and S2 credibly testified that they discussed it before they became aware of Complainant's EEO activity. Moreover, the Agency provided a legitimate, nondiscriminatory reason for issuing the Counseling Memorandum consistent with Agency policy and patient safety.

The AJ found S1's legitimate nondiscriminatory reasons for the delay in issuing Complainant's proficiency, the delay in issuing the Counseling Memorandum, and the erroneous date on the Counseling Memorandum to be "inherently plausible, and not unusual for a manager." Specifically, S1 explained that Complainant did not receive her proficiency when it was due in March 2017 because NM, who was supposed to issue it, was on extended leave. S1 was in an "acting capacity," she had less direct knowledge of Complainant's work, and for months, NM was expected to return, so she waited to issue the proficiency. The delay in issuing the Counseling Memorandum was due to S1's extended leave, and the backlog of work she returned to.

S1 credibly testified that she was extremely busy catching up following her unanticipated family leave, and she not prioritize writing the Counseling Memorandum, as Complainant had been on leave and was unavailable to sign it. S1 states that she began working on the memorandum on September 25, 2017, then neglected to change the date when she completed it.

Complainant did not offer any evidence to indicate that S1's explanations were pretext for discriminatory motivation. While her testimony revealed that she disagreed with the Agency's rationale for issuing the Memorandum, but she did not establish that the Memorandum was pretext for reprisal.

The AJ awarded Complainant \$500 in nonpecuniary compensatory damages for the inconvenience S1's retaliatory actions caused her on November 2, 2017. The AJ then ordered the Agency to restore any leave (annual, sick, and/or leave without pay) used by Complainant because of the reprisal to which she was subjected, instructing Complainant to provide the Agency with the number of hours to be restored, if any. The AJ also ordered the Agency to provide Complainant with a written notice addressing the reprisal, in accordance with 29 C.F.R. Part 1614.501(a)(5), including assurance that the Agency will prevent further retaliation, to provide S1 with a minimum of four hours of EEO training, with a focus on anti-retaliation laws, and to consider taking appropriate disciplinary action against S1. The AJ further ordered the Agency to post a notice electronically and a hard copy in a CLC-3 common area, informing employees that it engaged in discrimination in violation of Title VII.

The AJ explained that Complainant could not recover compensatory damages related to the stress she experienced as a result of receiving the September 25, 2017 counseling memorandum because Complainant did not establish that the counseling memorandum itself was issued as retaliation for her protected activity. The AJ also found that Complainant was not due reasonable attorney's fees and/or costs arising from her litigation of this complaint, as she was not represented by an attorney, and she did not identify any costs she incurred in the process of litigating this action.

The Agency issued a Final Order adopting the AJ's August 28, 2019 Decision and Order.

Complainant appealed, challenging the amount of compensatory damages awarded for Claim 2, and the AJ's decision to find no discrimination on Claim 1 without a hearing.

ANALYSIS AND FINDINGS

Claim 1 – Racial Harassment

The Commission's regulations allow an AJ to grant summary judgment when he or she finds that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). An issue of fact is "genuine" if the evidence is such that a reasonable fact finder could find in favor of the non-moving party. Celotex v. Catrett, 477 U.S. 317, 322-23 (1986); Oliver v. Digital Equip. Corp., 846 F.2d 103, 105 (1st Cir. 1988). A fact is "material" if it has the potential to affect the outcome of the case.

In rendering this appellate decision, we must scrutinize the AJ's legal and factual conclusions, and the Agency's Final Order adopting them, *de novo*. See 29 C.F.R. § 1614.405(a)(stating that a "decision on an appeal from an Agency's final action shall be based on a *de novo* review..."); see also Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO-MD-110), at Chap. 9, § VI.B. (as revised, August 5, 2015)(providing that an administrative judge's determination to issue a decision without a hearing, and the decision itself, will both be reviewed *de novo*).

To successfully oppose a decision by summary judgment, a complainant must identify, with specificity, facts in dispute either within the record or by producing further supporting evidence and must further establish that such facts are material under applicable law. Such a dispute would indicate that a hearing is necessary to produce evidence to support a finding that the agency was motivated by discriminatory animus.

On appeal, Complainant fails to identify, with specificity, facts in dispute, instead arguing that the AJ erred in denying her a hearing on the matter of harassment, because she notified the Agency "on a number of occasions. [the Agency] chose not to respond or intervene." She states that she can support her argument by providing email evidence, and she identifies three nurses and a nurse supervisor willing to testify on her behalf. However, Complainant already had ample opportunity to submit the emails and obtain witness statements. The AJ's October 22, 2018 Order Regarding Initial Conference, provided explicit instructions on how to submit evidence and what to submit, including emails and correspondence, no later than November 5, 2018.

Regardless, we conclude that the existing evidence of record, even without a hearing, shows that judgment in favor of the Agency was inappropriate. The evidence of record is sufficient to establish that Complainant repeatedly reported to management that she was subjected to race-based harassment by R1's family members over a period of months, and further shows that management's responses were inherently ineffective. The AJ erred by determining that the conduct directed at Complainant was not sufficiently severe or pervasive to establish harassment in violation of Title VII and overlooked the extent of the Agency's responsibility to protect its employees from non-employee harassment.

An agency must take reasonable care to protect its employees from discriminatory harassment. EEOC's *Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors* (June 18, 1999), Part V.C., Section 1 ("Policy and Complaint Procedure"). Pursuant to 29 C.F.R. § 1614.11(e), an agency (or its agents or supervisory employees) may be held liable for the acts of non-employees, if the agency "knows or should have known of the conduct and fails to take immediate and appropriate corrective action." Commission precedent supports that an agency's obligation to take appropriate and immediate corrective action in response to an allegation of non-employee harassment is not diminished when the complainant's job duties necessarily involve more interaction with non-employees, allowing for increased potential for non-employee harassment.

An example that has been discussed extensively is employer liability for sexual harassment by inmates toward the staff in prison facilities. See Larae S. v. Dep't of Justice, EEOC DOC 0120143209 (Mar. 9, 2017) Complainant v. Dep't of Justice, EEOC Appeal No. 0120081287 (Apr. 23, 2009), reconsideration denied, 0520090501 (Aug. 17, 2009) (discussing Freitag v. Ayers, 468 F.3d 535 (9th Cir. 2006)). Likewise, this obligation does not diminish when the non-employees at issue are customers, regardless of the underlying dynamic of reliance between employer and customer. This holds true, even where the employee's job responsibilities include treating customers with deference. See Silas T. v. Dep't of the Air Force, EEOC Appeal No. 2019003996 (May 24, 2021) (agency liable for harassment where management told the complainant, a server at a restaurant, that there was no basis for removing a customer who, on multiple occasions, harassed him during his shift, threatened him and called him a homophobic slur, because the harasser "was a paying customer"), citing Pinter v. Dep't of the Army, EEOC Appeal No. 01985163 (July 9, 1999) (the agency erred in ruling that the complainant failed to state a claim because the alleged harasser was "merely a patron" of appellant's work facility), citing Cf. Folkerson v. Circus Enterprises, Inc., 107 F.3d 754 (9th Cir. 1997); Powell v. Las Vegas Hilton Corp., 841 F. Supp. 1024, 1028 (D. Nev. 1992).

Significant to this case, the Commission has previously recognized that agencies running healthcare facilities have an obligation to protect their employees from discrimination and harassment by patients and their visitors. In Baker v. Department of Veterans Affairs, EEOC Appeal No. 0120071840 (July 20, 2007), we determined that a female nurse alleging that the agency failed to act on her repeated complaints that male residents at the facility where she worked regularly exposed themselves to her and watched pornographic videos within her view, stated a claim of harassment. The Commission rejected the agency's reasoning that because the complainant was a "Licensed Practical Nurse and makes bed checks or rounds between 12 midnight and 1:00 a.m. From the standpoint of a reasonable person and taking into account the daily duties of [the complainant] including the context in each of [the complainant's] claim[s], it would be reasonable to assume that these events would not be rendered as harassment and hostile work environment incidents." See also, Alonso T. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120151355 (Aug. 24, 2017), Raney v. Dep't of Veterans Affairs, EEOC Appeal No. 01976936 (Feb. 29, 2000).³

³ Also of note, Southwest Virginia Community Health System to Pay \$30,000 to Settle EEOC Sexual Harassment Suit (Oct. 23, 2013) (EEOC filed a lawsuit under Title VII with the U.S. District Court for the Western District of Virginia (Civil Action No. 7:12cv424) alleging that a receptionist at a nonprofit healthcare center complained to her supervisor about patient's sexually harassing conduct both in person and over the phone, over a period of months, but no action was taken to stop the abuse; resolved via settlement agreement where terms also included EEO training for management). Available at: <https://www.eeoc.gov/newsroom/southwest-virginia-community-health-system-pay-30000-settle-eeoc-sexual-harassment-suit>; Home Care Facility Sued By EEOC For Sexual Harassment (Sept. 27, 2010) (EEOC filed a lawsuit under Title VII with the U.S. District Court for the Southern District of Texas (Civil Action No 4:10-cv-03484) Synergy Home Care assigned two employees to care for a patient, who then subjected them to severe sexual harassment, including

It is well-settled that harassment based on an individual's race is actionable.⁴ To prove her harassment claim, Complainant must establish that she was subjected to conduct that was so severe or so pervasive that a "reasonable person" in her position would have found the conduct to be objectively hostile or abusive. See Enforcement Guidance on Harris v. Forklift Sys. Inc., EEOC Notice No. 915.002 (Mar. 8, 1994). Complainant must also prove that the conduct was taken because of her race. Only if Complainant establishes both of those elements--hostility and motive--will the question of Agency liability present itself. See Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, EEOC Notice 915.002 (Jun. 18, 1999), Enforcement Guidance on Harris v. Forklift Sys. Inc., EEOC Notice No. 915.002 (Mar. 8, 1994).

The evidence of record is sufficient to establish that R1's family members repeatedly made racially charged and/or offensive comments to Complainant. Moreover, Complainant, S1 and S2, all indicate, through their testimony, that R1's family members exhibited a heightened expectation of deference from Complainant. Complainant also provided many examples where S1 and S2 appeared to tolerate, and even reinforce, R1's family members' expectation of significant deferential treatment from her to an extent that it sometimes undermined her ability to effectively do her job. For example, when RW asked Complainant why she did not leave her cart to the right side of R1's door, and Complainant explained that the location of the cart was not relevant, but asked RW if there was anything she needed. RW left and complained to S1, who immediately instructed Complainant to be careful how she spoke with patients' families. Complainant testified that S1's response both encouraged RW's harassing behavior and had the effect of undermining Complainant professionally.

S2 conceded that she and Complainant had multiple conversations about R1's family members, particularly RW, including RW reference to her as "house staff." S2 also stated that she numerous complaints from other staff regarding RW's "aggressive" behavior and manner.

Taking into account all the evidence of record, we conclude that, as discussed in more detail earlier in this decision, RW's conduct towards Complainant and management's deference to it was sufficient to create a hostile work environment for Complainant.

groping them while they slept in their private quarters, which continued even when they and other employees notified several company officials, ultimately forcing the employees to quit their jobs.) available at <https://www.eeoc.gov/newsroom/home-care-facility-sued-eeoc-sexual-harassment>.

⁴ Although the Commission's decisions on non-employee harassment predominantly concern sexual harassment, the findings are still relevant to the instant complaint. See Hurt v. Dep't of the Army, EEOC Appeal No. 01933339 (Feb. 10, 1994) (an agency is as obligated to protect its employees from racial harassment as it is to protect its employees from sexual harassment citing 29 C.F.R. §1613.203(b), §1614.102(a)(3)).

To avoid liability for a hostile work environment/ harassment arising from the conduct of a non-employee, an agency can raise an affirmative defense by offering evidence that it took immediate and appropriate corrective action. See Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors, No. 915.002 (June 18, 1999). An appropriate remedial action will necessarily depend on the particular facts of the case, such as the severity and persistence of the harassment and the effectiveness of any initial remedial steps. See Larae S. v. Dep't of Justice, EEOC DOC 0120143209 (Mar. 9, 2017), citing Complainant v. Dep't of the Air Force, EEOC Request No. 05920194 (July 9, 1992).

Agencies have successfully established that they took “immediate and appropriate corrective action” after a complainant reported non-employee harassment by, among other things, submitting evidence of the remedial actions taken and the effectiveness of those actions. See Elenore F. v. United States Postal Serv., EEOC Appeal No. 0120171156 (July 17, 2018) (agency not liable for sexual harassment after the complainant reported that a male stranger inappropriately touched and kissed her while she was on her route, because evidence supported that management responded by immediately encouraging her to call the police, initiating OIG and supervisory investigations, reassigning her to another route, then to a call center position, and following the remedial actions, it is undisputed that no further harassing incidents occurred). In Larae S., the Agency established that it was not liable for harassment where the complainant, a prison guard, was subjected to sexually aggressive acts by inmates on numerous occasions, because the agency provided documentation that it took numerous and thorough corrective actions once it was on notice of the harassment. Among other things, the agency installed physical barriers to shield workers from inmates acting inappropriately or throwing projectiles, imposed disciplinary actions or withheld yard privileges as a consequence for harassing behavior, moved repeat offenders to designated cells with window covers, and collaborated with the U.S. Attorney’s Office to prosecute incidents of sexual aggression by inmates. Significantly, the agency in Larae S. empowered staff to file incident reports, which it continued to process, and led to tangible consequences for inmate harassers, decreasing the instances of harassment.

An example of a health facility employer avoiding liability for harassment by a non-employee can be found in Alonso T. v. Department of Veterans Affairs, where a nursing assistant was subjected to harassment by a patient’s wife (“PW”). EEOC Appeal No. 0120151355 (Aug. 24, 2017). As the complainant passed PW in the hallway, PW directed a racially charged epitaph at him. He immediately notified the charge nurse, who in turn notified the Nurse Manager. Both nurses supported the complainant when he asserted that he would no longer enter that patient’s room, and they both agreed that he should not have to work near the patient’s family when they visited. (The complainant specified that he did not want to be transferred). The Nurse Manager spoke with PW shortly after the incident, notifying her that her comment toward the complainant was unacceptable and inappropriate, and if PW acted inappropriately toward staff again, the Nurse Manager would call the police. PW claimed she had not acted inappropriately but the complainant was in the way while staff members were trying to lift the patient out of his wheelchair and were doing it wrong. The Nurse Manager reiterated that PW was not to make inappropriate comments to staff again.

The remedial actions described in Elenore F., Larae S., and Alonso T., all involved separating the complainant and the harasser to the extent practicable, and placing the harassers on notice (with the exception of Elenore F. where this was not possible) that they would be subject to a tangible consequence should the harassment continue. In each case, the complainant had access to effective reporting mechanisms to seek resolution after experiencing non-employee harassment. The evidence supported that the complainants' act of reporting the harassment led directly to immediate and appropriate action by the agencies.

The immediate and appropriate corrective actions identified in Elenore F., Larae S., and Alonso T., were demonstrably effective. Following the agencies' remedial action, the harassment either ceased (Elenore F. and Alonso T.) or decreased dramatically with demonstrated continued efforts by the agency (Larae S.). Conversely, instances where an agency takes remedial action, but the harassment reoccurs, are considered evidence of the agency's failure to take appropriate corrective action. See Lemons v. Dep't of Justice, EEOC Appeal No. 0120081287 (Apr. 23, 2009) (harassment escalated after the agency took remedial action) citing Logsdon v. Dep't of Agriculture, EEOC Appeal No. 07A40120 (Feb. 28, 2006) (taking only some remedial action does not absolve the agency of liability where that action is ineffective).

Simply initiating corrective action or taking remedial action that only has a temporary or partial impact on the alleged harassment is insufficient to establish an affirmative defense of immediate appropriate corrective action. In Lemons v. Department of Justice, the Commission determined that the agency's remedial action of instructing an inmate that the complainant repeatedly reported for harassment, "not to do it again," then returning him to the complainant's unit was not only ineffective, but made the complainant more vulnerable to harassment. See also, Trevor H. v. Dep't of Transportation, EEOC Appeal No. 0720140023, 2014 (July 24, 2014) (affirming finding of hostile work environment based on sexual orientation, where the AJ noted that the Agency failed to take strong action to protect its employees, but rather, "did nothing more than to tell both employees to behave professionally). Likewise, the Commission has long considered the duration of an agency's failure to respond once they are placed on notice of harassment when determining that an agency failed to take appropriate action. See, e.g. Trey M. v. United States Postal Serv., EEOC Appeal No. 0120180781 (July 23, 2019) (agency liable for harassment where it failed to take immediate and appropriate action, when, for nearly a year, the complainant reported ongoing harassment by a coworker ("C1") and the coworker's non-employee boyfriend, while on the job, and the agency erroneously told the complainant that the matter was "personal," refused to take any action other than providing C1 with information about the employee assistance program, then the agency assigned C1 to work Complainant's route, then subjected Complainant to threats of relocation, and transfer when she reported continuing harassment), see also, Silas.

Here, the record includes documentation that S1 and S2 took statements from staff following the June 28, 2017 "educated fool" incident and the August 6, 2017 incident, but there is no other evidence that S1, S2 or the Nursing Manager took similar action in response to the ongoing harassment Complainant contends occurred and was reported between October 2016 and August 2017.

Although S1 and S2 both state that they spoke individually with RW, and at “family meetings,” there are no contemporaneous notes about what was discussed, nor did they notify Complainant of any steps they were taking to end the alleged harassment.

In September 2017, S2, having received additional concerns from other staff regarding RW, organized a meeting with RW and several other Agency officials. The date of the meeting and the names of the additional participants were not included in the record, nor are there any meeting notes. According to S2, the meeting was productive and focused on how “the entire staff would work with [RW] and how [RW] could work with the staff in a collaborative environment.” This is insufficient to establish an affirmative defense of “immediate and appropriate corrective action.”

On November 21, 2017, in response to an information request from an EEO counselor, S2 submitted an email stating that the Agency took the following actions “to address [Complainant’s] concerns:”

1. S1 addressed Complainant’s concern through verbal conversations as they were presented to her.
2. Prior to these conversations with Complainant, she would meet with or call [RW] regarding the allegations.
3. Around June 2017, the CLC management team (Acting Nurse Managers, ANE and Nurse Educator) began making more frequent rounds (off tours, weekends and holidays) to monitor resident/family and staff interactions. During these rounds, conversations were held with staff regarding any concerns including family conflicts.
4. [S2] was also included in the rounding.
5. Staff meetings and daily huddles are in place to address any family concerns.
6. The hospital’s Customer Service department was contacted to assist in staff training and family concerns.
7. A meeting was held with [RW], [S1], nursing staff representative, [S2], psychologist and customer service representative to discuss concerns from both R1’s wife and nursing (tone and awareness of conversations, unit operations and how care is provided).

The AJ’s finding that “under the circumstances, the foregoing actions were really all the Agency could do to address the situation” is inconsistent with the Commission’s prior decisions addressing non-employee harassment.

For instance, the record is devoid of any evidence that management made any effort to separate Complainant from her harasser to the extent possible, or to establish and implement consequences for repeated harassing conduct by patients and their family members toward staff.

Moreover, the Agency's proffered evidence also does not show that the action it took was "immediate." The only date listed regarding the Agency's remedial action is "around June 2017." Complainant testifies that she first reported harassment by R1's family members to S2 in October 2016, and that she continued emailing S2 about additional incidents of harassment. S1 indicates that on multiple occasions, Complainant told her that she believed R1's family members were harassing her based on her race, which, along with Complainant's testimony, indicates that S1 was likely aware of the alleged harassment months before June 2017. S2's assertion that she was only aware of the June 2017 incident of harassment, which conflicts with Complainant's account, potentially conflicts with S1 and S2's testimony about holding family conferences with RW.

In addition, the evidence does not support that the Agency's corrective actions were "appropriate." The remedial actions S2 listed more likely to describe actions to appease the "high maintenance" family member rather than protecting Complainant from continued harassment. Significantly, Complainant was never included in these efforts or even aware of them. The record is devoid of agendas, meeting notes, calendar invites, action plans, or other documentation to commemorate that these meetings took place, their duration, and frequency. The record also lacks statements from any of the attendees other than S1 and S2, the responding management officials. Further, the cited corrective actions of daily staff meetings, additional rounds, and more conversations with staff about "family concerns" were demonstrably ineffective because Complainant again reported harassment by R1's family members to management in July 2017 and experienced harassment during the August 6, 2017 incident, when R1's daughter refused to stop recording her and other staff.

Additionally, and as with the previously discussed examples of agency liability for non-employee harassment, management failed to apply the Agency's own policies in response to reports of non-employee harassment. The Agency's own Anti-Harassment Policy states that a harasser may be a "non-employee," and that harassment can include, among other things, "slurs, epithets or name calling...intimidation, ridicule or mockery, insults or put-downs... that interfere with performance." Medical Center Memorandum, Office of the Director 00-51 Anti-Harassment Policy, P. 2(a), (e) (Feb. 26, 2015) ("Anti-Harassment Policy"). The Agency emphasizes: "*employees need to report harassment at an early stage to prevent its escalation,*" and "*unwelcome harassing conduct will not be tolerated.*" Anti-Harassment Policy, PP. 2(f), 3 (emphasis original). This selective enforcement of Agency policy supports Complainant's assertion that management fostered a culture of tolerance with respect to harassment by a patient's family members, and constitutes evidence that Management contributed to the harassment Complainant experienced.

In sum, we conclude that Complainant has established that she was subjected to discriminatory racial harassment in violation of Title VII that was ineffectively addressed by Agency management, resulting in Agency liability for its failure to protect Complainant from the harassment.

Claim 2 – Retaliatory Counseling Memorandum

Pursuant to 29 C.F.R. § 1614.405(a), all post-hearing factual findings by an AJ will be upheld if supported by substantial evidence in the record. Substantial evidence is defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 477 (1951) (citation omitted). A finding regarding whether or not discriminatory intent existed is a factual finding. See Pullman-Standard Co. v. Swint, 456 U.S. 273, 293 (1982). An AJ's conclusions of law are subject to a *de novo* standard of review, whether or not a hearing was held.

An AJ's credibility determination based on the demeanor of a witness or on the tone of voice of a witness will be accepted unless documents or other objective evidence so contradicts the testimony, or the testimony so lacks in credibility that a reasonable fact finder would not credit it. See EEOC Management Directive 110, Chapter 9, at § VI.B. (Aug. 5, 2015).

As an initial matter, we again note that the Agency has accepted the AJ's finding of retaliatory animus regarding the circumstances surrounding S1's issuance of the September 25, 2017 Counseling Memorandum, as well as the AJ's remedial order. Complainant has appealed the compensatory damages award on this claim.

We conclude that the AJ properly determined that Complainant failed to establish retaliation respect to the motivation behind the September 25, 2017 Counseling Memorandum (as opposed to S1's actions when issuing it). The Counseling Memorandum, which is not a disciplinary action, appears to be a reasonable response to the August 6, 2017 incident, when weighing the potential harm that could result from such a protocol violation and the expectations of an RN II, against Complainant's spotless disciplinary record. We acknowledge Complainant's emphasis on treating the residents she cares for with dignity by asking them directly how they are feeling and respecting their responses. It is also possible, based on the timeline of facts provided by Complainant during the hearing, that R1 may not have required an additional assessment for chest pains at all on August 6, 2017. Neither of these points refute the Agency's legitimate nondiscriminatory reason for issuing the Counseling memorandum, nor do they indicate pretext for retaliatory intent. It is undisputed that RD reported that R1 was experiencing chest pain, and Complainant's actions did not comport with Agency policy when responding to reports of chest pain. The risk associated with allowing a family member to accompany a loved one experiencing chest pain without a medical escort supports the Agency's policy of caution.

We also agree with the AJ's conclusion that the Memorandum's reference to complaints lodged by Complainant's harasser in July 2017 is insufficient to establish retaliatory motive given the previously discussed intervening events delaying S1 from issuing the Memorandum. Since we do not conclude that the Memorandum itself was motivated by unlawful retaliatory animus, we have no reason to alter the AJ's award of \$500 in compensatory damages for this claim.

CONCLUSION

Accordingly, the Agency's final order adopting the AJ's finding of reprisal for Claim 2, and the corresponding award of \$500 in compensatory damages is **AFFIRMED**.

The Agency's final order adopting the AJ's decision to grant summary judgment on Claim 1 is **REVERSED**. The matter is hereby **REMANDED** to the Agency for further processing in accordance with the following **ORDER**.

ORDER (C0618)

The Agency is ordered to take the following remedial action:

1. Compensatory Damages for Claim 2. To the extent it has not already done so, within thirty (30) calendar days of this decision, the Agency shall pay Complainant \$500 in compensatory damages for the unlawful retaliation related to Claim 2 of her complaint as already ordered by the AJ and accepted by the Agency.
2. Compensatory Damages for Claim 1. Within **thirty (30) calendar days** of this decision, the Agency shall notify Complainant that she has a right to submit evidence within **forty five (45) days** in support of her claim for compensatory damages with regard to Claim 1. This can include, but is not limited to, signed statements by Complainant, friends, family members, doctors or coworkers describing the harm Complainant experienced as a direct result of the harassment as provided in Carle v. Dep't of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993),⁵ as well as medical receipts (including prescriptions). If applicable, the Agency shall also pay Complainant a lump sum for tax consequences arising from a payment of compensatory damages. Complainant is responsible for providing the Agency with tax documentation establishing the amount owed in order to receive the lump sum payment(s).

⁵ **Information on Compensatory Damages:** EEOC MD-110, Ch. 11 § VII (Aug. 5, 2015) available at https://www.eeoc.gov/federal/directives/md-110_chapter_11.cfm, and N. Thompson, Compensatory Damages in the Federal Sector: An Overview, EEOC Digest Vol. XVI, No. 1 (Winter 2005) available at <https://www.eeoc.gov/federal/digest/xvi-1.cfm#article> (explains Carle v. Dep't of the Navy under the subsection "Proof of Damages").

- a. Within **forty-five (45) calendar days** of receipt of Complainant's evidence (or if Complainant fails to respond within **forty-five (45) days**), the Agency shall complete the investigation on the claim for compensatory damages and issue a final decision on the claim, with appeal rights to this Commission, in accordance with 29 C.F.R. § 1614.110.
 - b. Within **thirty (30) calendar days** of issuing the decision on compensatory damages, the Agency shall pay Complainant the determined amount of compensatory damages, and, explain to Complainant that she may accept the award and still appeal to this Commission if she disagrees with the outcome.
3. Provide Training to S1 and S2. Within **thirty (30) calendar days** of the date of this decision, S1 and S2 shall, either separately or together, complete a minimum of 2 hours of live one-on-one training. This single session training may be prepared/provided by an Agency employee or contractor with subject matter expertise to: (1) discuss the Agency's obligation under Title VII to protect its employees from non-employee harassment, (2) explain this decision and what, if anything, they should do differently in the future, (3) explain how microaggressions by non-employees can contribute to a hostile work environment, and (4) discuss ways to protect employees from overt harassment and/or microaggressions by patients and their visitors.
4. Disciplinary Action for S1 and S2. Within **sixty (60) calendar days** of the date of this Decision, the Agency shall consider taking appropriate disciplinary action against S1 and/or S2. The Agency shall report its decision to the EEOC 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. Training is not a disciplinary action.
5. Attorney's Fees and Costs. Complainant is *pro se*, so she is only entitled to costs (if any) associated with the processing of her complaint. Complainant may submit supporting documentation, such as receipts, to the Agency for reimbursement.
6. Post the attached Notice, in accordance with the "Posting Order" below.
7. Submit a Report of Compliance, as provided in the "Implementation of the Commission's Decision" section below. The Report shall include supporting documentation verifying that the corrective action has been implemented.

POSTING ORDER (G0617)

The Agency is ordered to post at the Atlanta VA Medical Center, Community Living Center ("CLC-3"), in Decatur, GA 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).

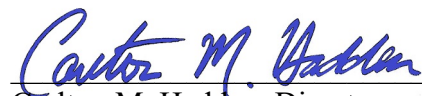
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (T0610)

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

September 16, 2021

Date