



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Willia M.,¹
Complainant,

v.

Denis R. McDonough,
Secretary,
Department of Veterans Affairs,
Agency.

Appeal No. 2020005021

Hearing No. 430-2016-00311X

Agency No. 200I-0544-2015105385

DECISION

On September 3, 2020, Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's August 31, 2020, final order concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. For the following reasons, the Commission MODIFIES the Agency's final order.

BACKGROUND

During the relevant time, Complainant worked as a Registered Nurse II at the Agency's William Jennings Bryan Dorn Medical Center in Columbia, South Carolina.

On October 23, 2015, Complainant filed an EEO complaint alleging that the Agency subjected Complainant to a hostile work environment on the bases of race (African American) and sex (female) when, in relevant part:

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.

3. On July 27, 2015, Staff Physician, Doctor 1 stated, "If we wanted to see monkeys, we would have gone to the zoo," in response to a statement by Co-Worker 1 (CW1) that she and Complainant did not get an invite to his birthday party.
4. On August 20, 2015, Doctor 1 assaulted Complainant when he picked up a Dell computer modem, monitor, keyboard, and mouse and threw it on top of CW1's desk.
5. On August 21, 2015, Doctor 1 stopped Complainant in the hall of the Urology Clinic and stated, "I shouldn't have acted like that yesterday; it wasn't anything personal against you or anybody else. It was just me, it was just me".
7. From August 20, 2015 until August 25, 2015, Doctor 1 was allowed to continue to work in the Urology Clinic with Complainant, despite Complainant's report of assault and discriminatory actions from Doctor 1.
10. On August 24, 2015 and August 25, 2015, while walking through the halls of the Urology Clinic, Doctor 1 would look and stare at Complainant to intimidate her.
13. On August 28, 2015, Nurse Manager instructed Complainant to avoid going to the basement until the issue with Doctor 1 was resolved, although Doctor 1 was allowed in the Urology clinic.²

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing and the AJ held a hearing on October 30, 2019.

On July 27, 2015, Complainant and CW1, an African American female, were talking with Doctor 1 about his birthday party. Per Complainant, Doctor 1 said that Doctor 2, the new chief of urology, was at the party. When CW1 asked why she and Complainant were not invited, Doctor 1 stated, "If we wanted to see monkeys, we would have went to the zoo." ROI at 115. CW2, a Caucasian female, was present for the incident, but said she believed that it was a joke referencing all of the urology nurses. ROI at 196.

² As outlined in greater detail below, the Commission finds that Complainant is appealing only the issues as listed above. To that end, we note that the Commission has the discretion to review only those issues specifically raised in an appeal. See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9, § IV.A.3 (Aug. 5, 2015). On appeal, Complainant did not contest the Agency's implementation of the AJ's decision of claims 1, 2, 3, 6, 8, 11-12, or 14-17; as such, we need not address these claims in the instant decision. Although Complainant did not contest the Agency's implementation of the AJ's decision of claim 3, given its inextricably intertwined nature with the remaining claims, it will be analyzed for the sole purpose of its relevance to the remaining claims on appeal.

Complainant testified that, prior to this comment, Doctor 1 was aggressive toward female nurses, calling them incompetent and getting upset if things were not done to his specifications. Hearing Record at 65. She and CW1 went on to testify that Doctor 1 treated the male nurse better than the female nurses. Hearing Record at 65-66, 100. CW1 also testified that Doctor 1 treated white, female nurses with less aggression than African American female nurses. Hearing Record at 100. CW2 confirmed that she had never heard Doctor 1 yell at any male nurse. Hearing Record at 142.

CW3 (African American, female) testified that she and Doctor 1 got along regarding patient care. Hearing Record at 186. She stated that she began work at the Agency in 2013 and worked in urology with Doctor 1 until 2014. Hearing Record at 180-81. She said that in the single year she worked with Doctor 1, she had no problems with him. Hearing Record at 186.

The record indicated that, on August 20, 2015, Doctor 1 assaulted Complainant and CW1. ROI at 155, 122, 144, and 183; Hearing Record at 15-16. Complainant testified that Doctor 2 and CW1 were discussing office furniture and supplies that needed to be moved, including a desk and computer. Doctor 1 arose, insisting that the computer and desk be moved together. To keep the computer from falling, CW1 moved the computer from off the desk to be moved to another desk, in an effort to keep the computer from falling. Complainant then testified that Doctor 1 arose from his desk, knocked Complainant against the wall and began grabbing CW1. Complainant testified that she opened the door to call for help and the janitor came down the hall. Hearing Record at 20-1.

After the assault, Complainant stated that he picked up the computer, took it down the hall, and threw it on the desk. ROI at 116. Complainant asserted that a police report was filed regarding the incident. ROI at 116. The record indicated that Doctor 1 did not assault anyone else; Complainant and the CW1 were the only two African American nurses on the team. ROI at 116, 122. Complainant testified that Doctor 1 only had physical interactions with her and CW1. Hearing Record at 67.

CW1 recounted the events surrounding both the “monkey” comment and the physical assault consistent with Complainant’s affidavit and testimony.³ Hearing Record at 84-7. She also stated that she believed Doctor 1 African American women differently than white and/or male staff, recounting that he had made a comment about her hair. Hearing Record at 88.

³ CW1 also filed a formal EEO complaint alleging harassment surrounding the same events regarding the “monkey” comment, a comment about her hair in its natural state, the physical assault with Doctor 1, and treatment immediately thereafter by Agency employees, including Nurse Manager. In CW1’s case, a different AJ found that, regarding all these issues, CW1 harassed due to her race and sex. The Agency implemented the AJ’s decision. Melina K. v. Dep’t of Veterans Affs., EEOC Appeal No. 2021001468 (Mar. 8, 2022).

Chief of Staff stated that the two nurses were not assaulted due to their sex or race, but he did not provide an alternative explanation. Rather, when he was asked if the assault was due to the nurses' race or sex, Chief of Staff cursorily replied, "No." ROI at 144. There is no evidence of record that any of the Agency's witnesses were present at the time of the assault. The Agency attempted to contact Doctor 1, but Doctor 1 did not return any communication; there is no testimony or responses, under oath, by Doctor 1 in the record. ROI at 156-57.

Agency police interviewed all of the relevant witnesses after the assault. Hearing Exhibit 3. The day of the assault and in a second interview, conducted on August 25, 2015, the police interviewed Complainant and CW1. Both women recounted the series of events consistent with their hearing testimony. Hearing Exhibits at 3, 6. Urology Chief told the police that he did not witness the incident, but he did speak to Doctor 1. Urology Chief told police that Doctor 1 admitted to pushing Complainant and CW1, but he refused to apologize; Urology Chief stated that Doctor 1 then went into his office and locked the door. Hearing Exhibits at 4.

Doctor 1 could not be located by Agency police on the day of the assault. Hearing Exhibits at 4. Agency police were unable to speak to Doctor 1 until August 25, 2015, five days after the assault. Hearing Exhibits at 6. The police report included Doctor 1's first account of the contact in which he stated that CW1 entered his office to move a desk. Doctor 1 initially stated that he asked CW1 to also move the computer, but she refused. Doctor 1 went on to report to police, "There was no hand contact, verbal slurs, or injuries. I acknowledge that I initiated the episode and should have handled it differently and made better decisions There are no excuses than I was completely absorbed in my work and was completely taken by surprise and did not take time to consider all ramifications." Hearing Exhibits at 6.

In his second account, when Agency police asked for him to repeat the events, Doctor 1 said that CW1 was instructed to move a desk. She moved a computer from the desk to a nearby table and, when Doctor 1 asked her to move the computer also, CW1 refused. Doctor 1 then stated that he put himself in front of the desk to hinder its removal, but CW1 nudged him out of the way. Agency police wrote in the report that Doctor 1 initially told him in this second recount that he never touched CW1, but he immediately looked at Agency police and told him she touched him as much as he touched her (Doctor 1 did not write that down, but stated it to Agency police twice, per the report). Hearing Exhibits at 6. Doctor 1 went on to tell Agency police that Complainant was in the hall, never entered the room, and he made no contact with her in the course of events. Hearing Exhibits at 6. Despite Doctor 1's assertion that Complainant was not in the room, he told Agency police that he apologized to Complainant; he did not explain to Agency police why he apologized to Complainant when he asserted that she was not in the room at the time. Hearing Exhibits at 6-7.

At the conclusion of the second statement, Doctor 1 said to Agency police, without provocation, "This has had me upset all weekend. I had never hit a woman before." He then, per Agency police, put his head in his hands, looked back up, and said, "But I didn't hit her." Hearing Exhibits at 7.

The day after the physical assault, Complainant recounted that she was walking in the hall and Doctor 1 put a folder up in her face and attempt to stop her. ROI at 116; Hearing Record at 28; Hearing Exhibits at 6. She said that he also would stand in her path and not get out of her way, staring at her in an intimidating fashion. ROI at 120. Associate Director attested that she cannot confirm that this happened but had no reason to believe it did not happen. ROI at 184. Complainant alleges that she notified Nurse Manager that this conduct occurred, but Nurse Manager did nothing to help her. ROI at 120.

Complainant testified that she asked about not working with Doctor 1 the day after the assault. She further testified that Nurse Manager stated, "Right now, patients need to be seen and you all have to work in the same clinic together." Hearing Record at 26-7. Complainant alleged that Nurse Manager asked Complainant and CW1 to undergo a mediation with Doctor 1 so that they could all work together and everything could go back to the way it was. ROI at 119. Nurse Manager confirmed in her testimony that Complainant emailed her on August 21, 2015, concerning Doctor 1, but that she took no action because "I know they was working with Doctor 1 about that." Hearing Record at 207.

Complainant stated that on August 24, 2015, when they asked Nurse Manager why they had to continue to work with Doctor 1, Nurse Manager said she was still waiting on instructions, but she would reply by the end of the day. However, Complainant said that Nurse Manager did not reply and did not perform any protective action. ROI at 119. Nurse Manager contradicted this by saying that Doctor 1 was removed from the floor on August 21, 2015. ROI at 162. Associate Director, however, supported Complainant's account, stating that Doctor 1 worked in the urology clinic until August 27, 2015, asserting that she strongly recommended that Doctor 1 be moved to a different area of the hospital. ROI at 185, 188.

Complainant stated that, at a point unspecified, it was decided that Doctor 1 would be moved to the basement and they should have no further contact with each other. ROI at 120. Complainant reported that, even after he was moved to the basement, Doctor 1 continued to come to the urology clinic until police escorted him out. ROI at 120, 122, 166. Police informed Doctor 1 that he was not allowed to be in urology clinic until the situation was resolved. ROI at 120, 166. Complainant stated that, while Doctor 1 came to the urology clinic, she was informed not to go to the basement so as to avoid Doctor 1. This was despite her assertion that the Agency police told her she was free to go wherever she chose in the hospital. ROI at 122.

Doctor 1 was suspended for the assault of Complainant and CW1. Chief of Staff and human resources recommended a 15-day suspension, but the director (Director) reduced it to three days. Hearing Record at 161. Chief of Staff was unable to explain why Director reduced the suspension by 12 days. Hearing Record at 163.

Complainant testified that, after the assault, everything in the work dynamic changed. Hearing Record at 37-9. She testified that, prior to the assault, the staff had a great relationship; people went to movies, baked desserts, and went to lunch together.

After, however, she testified the work environment became hostile and uncomfortable. She stated that she felt like people had to take sides and everything fell apart. Hearing Record at 37-9, 42. Nurse Manager testified that Complainant got very quiet and did not want to talk to anybody after the assault. Hearing Record at 206. CW2 stated that her work ethic remained good even after the assault. Hearing Record at 115. Complainant stated that, in addition to the psychological symptoms, she gained weight and her hair began to fall out. Hearing Record at 41. She testified she felt like she was “fighting too many people” for help with what happened to her. Hearing Record at 41. From a professional standpoint, Complainant asserted that she would not go into a room, alone, with any physician; she requested that a nurse accompany her. Hearing Record at 42. Complainant testified that she went through counseling with the Employee Assistance Program (EAP). Hearing Record at 39.

She explained that she had to continuously work with Doctor 1 who attacked her. She expressed, “...to be forced to have to constantly communicate and be in an environment with a person that attacked you is very intimidating. It's not a good situation. It's not a good place and it keeps mental -- everything about it was totally wrong.” ROI at 118. She said that she was unable to do her job due to being around Doctor 1. ROI at 118. She went on to state that she attended counseling but was no longer attending counseling because the Agency did not allot the time. ROI at 118. Complainant asserted that the Agency continued to have Doctor 1 work with her. ROI at 118.

On August 26, 2015, Nurse Manager called a meeting. ROI at 121, 166. Nurse Manager stated that she set up a private huddle for all of the urology nurses to “express their feelings, concerns, and open up to each other.” She said that most of the nurses expressed “sadness” for the situation. ROI at 166. Complainant stated that Nurse Manager stated that, “she was tired of everything that was going on in the clinic, the clinic was not running as it usually runs.” Per Complainant, Nurse Manager allowed everyone to speak. Complainant said that CW2 accused CW1 of creating a hostile work environment because she did not talk to the other staff members; CW2 argued that nobody was attacked but the meeting allowed the nurses to discuss their feelings about how CW1 treated the rest of the of the urology nurses after the assault. ROI at 121, 196-97. Complainant reported that she told the staff that they could not go back to how things usually run, because they were physically assaulted. ROI at 121. Complainant stated that, at the meeting, CW2 specified that prior to the attack, everyone got along well, they laughed and joked together. After, though, CW2 stated that they stopped joking and did not respond to colleagues. ROI at 122. Complainant felt as though the meeting was an attack on her and CW1. ROI at 121.

During the course of the hearing, the AJ asked for corroborating evidence as to Doctor 1's treatment of other nurses. When Complainant's representative offered Freedom of Information Act (FOIA) evidence from other nurses, the AJ replied, “I'm talking about live testimony. I don't want to read a document. I need somebody.” Hearing Transcript at 45.

The AJ issued a decision on November 20, 2019, finding that Complainant proved that the Agency subjected her to harassment, as alleged, regarding claims 3 and 11.

He found, however, that she did not prove that the Agency subjected her to harassment, as alleged, regarding claims 1, 2, 4-10, and 12-17. As remedy, the AJ awarded Complainant \$7500 in non-pecuniary compensatory damages.

The Agency subsequently issued a final order implementing the AJ's decision. The instant appeal followed.

CONTENTIONS ON APPEAL

Complainant contends that the AJ was biased against Complainant's representative. Complainant's representative charges that the AJ refused to allow them to produce more evidence to demonstrate that only black females were assaulted by Doctor 1. Complainant asserts that witnesses testifying on behalf of the Agency were biased because of their continued employment relationship with the Agency. Finally, Complainant argues that the awarded compensatory damages were too low, considering the actions of the Agency.

The Agency alleges that it is unclear what Complainant is seeking. They interpret her filing to mean that she is only challenging that she has not been paid. The Agency asserts that they are prepared to pay the judgment, but Complainant has not been paid because she has appealed the decision.

ANALYSIS AND FINDINGS

Preliminary Matters

As an initial matter, the Commission will address which issues are before the Commission on appeal. The Agency contends that they interpret Complainant's appeal to be only of the issue of whether she has been paid. The Commission cannot agree with the Agency's interpretation. Complainant specifically argues that the awarded compensatory damages were too low, making her petition clear as to an appeal of the amount of the award for non-pecuniary compensatory damages.

The Commission finds, however, that the filing is sufficient to find that Complainant is appealing the decision as to claims 4, 5, 7, 10, and 13. Complainant specifically challenges the AJ's assertion that race was not an issue, as two black females were assaulted. Complainant's representative also argues that the AJ was biased against Complainant's representative and did not afford Complainant the ability to enter relevant evidence. Moreover, Complainant requests that relevant management officials be disciplined. These statements challenge the appropriateness of the decision as a whole, not merely monetary damages. As such, the Commission finds that a full and fair reading of Complainant's appeal leads to the conclusion that she is challenging the decision, as related to Doctor 1, in its entirety.

The Commission notes that Complainant's representative asserts that the AJ in this case erred in declining to admit evidence that would support their case of disparate treatment of nurses based upon race. Neither Complainant nor her representative, however, has submitted the proposed evidence for the Commission to review. As such, we cannot consider whether evidence not presented with the appeal was relevant. That said, we are concerned that the AJ did not admit evidence presented in the way of discovery pursuant to FOIA evidence because, per the AJ, "I don't want to read a document. I need somebody. If there's other issues with other nurses and you believe it helps your case, I need somebody to tell me about it."

Standard of Review

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. Nat'l Lab. Rel. Bd., 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 Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), Chap. 9, at § VI.B.

Harassment

In the instant case, the AJ found that, with regard to claim 3, Complainant experienced harassment and discrimination as due to her race, but that with the remainder of the claims were not due to her race or sex. While we find that substantial evidence supports the AJ's decision with regard to claim 3, his decision with regard to claims 4, 5, 7, 10, and 13 are not supported by substantial evidence.

In Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993), the Supreme Court reaffirmed the holding of Meritor Savings Bank v. Vinson, 477 U.S. 57, 67 (1986), that harassment is actionable if it is "sufficiently severe or pervasive to alter the conditions of [a complainant's] employment and create a hostile or abusive working environment." The Court explained that an "objectively hostile or abusive work environment [is created when] a reasonable person would find [it] hostile or abusive" and the complainant subjectively perceives it as such. Harris, 510 U.S. at 21-22. Whether the harassment is sufficiently severe to trigger a violation of Title VII must be determined by looking at all the circumstances, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Id. at 23.

To establish a claim of harassment, Complainant must show that: (1) she is a member of a statutorily protected class; (2) she was subjected to unwelcome verbal or physical conduct involving the protected class; (3) the harassment complained of was based on the protected class; (4) the harassment 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. Humphrey v. U.S. Postal Serv., EEOC Appeal No. 01965238 (Oct. 16, 1998); 29 C.F.R. § 1604.11. With respect to element (5), an agency is subject to vicarious liability for harassment when it is created by a supervisor with immediate (or successively higher) authority over the employee. See Burlington Indus. Inc. v. Ellerth, 524 U.S. 742 (1998); Faragher v. City of Boca Raton, 524 U.S. 775 (1998).

However, where the harassment does not result in a tangible employment action, the Agency can raise an affirmative defense, which is subject to proof by a preponderance of the evidence, by demonstrating: (1) that it exercised reasonable care to prevent and correct promptly any harassing behavior; and (2) that complainant unreasonably failed to take advantage of any preventive or corrective opportunities provided by the agency or to avoid harm otherwise. See Burlington Industries, supra; Faragher, supra; Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors, EEOC Notice No. 915.002 (June 18, 1999).

In the case of co-worker harassment, an agency is responsible for acts of harassment in the workplace where the agency (or its agents) knew or should have known of the conduct, unless it can be shown 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 agency can raise an affirmative defense when it shows that it took immediate and appropriate corrective action. Id. What is 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 Taylor v. Dep't Of Air Force, EEOC Request No. 05920194 (July 8, 1992).

The harasser's conduct should be evaluated from the objective viewpoint of a reasonable person in the victim's circumstances. Enf't Guidance on Harris v. Forklift Sys., Inc., EEOC Notice No. 915.002 (Mar. 8, 1994). The evaluation "requires careful consideration of the social context in which particular behavior occurs and is experienced by its target." Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998).

In the instant case, Complainant is a member of a protected class, inasmuch as she is African American, and she is female. It is uncontested that Complainant was also the subject of unwelcome verbal and physical conduct which involving her protected class. As to verbal conduct, Doctor 1 called Complainant and CW1 "monkey" in reference to an invitation. Both CW1 and Complainant considered this a racial slur. We note that the use of the term "monkey" to refer to an African American is an historically offensive racial slur. See EEOC's Compliance Manual, Section 15 "Race and Color Discrimination," No. 915.00 (Apr. 19, 2006).

While the AJ found that this instance of claim 3, alone, was harassment as due to her protected class, the Commission notes that a pattern of harassment should not be ignored in a piecemeal manner. See Meaney v. Dep't of the Treasury, EEOC Request No. 05940169 (Nov. 3, 1994) (an agency should not ignore the "pattern aspect" of a complainant's claims and define the issues in a piecemeal manner where an analogous theme unites the matter complained of). As such, the Commission will determine whether there was a pattern of harassment as outlined in the claims on appeal. In this case, we find that it does.

The record clearly indicated that Complainant and CW1, both African American females, were physically assaulted by Doctor 1 as alleged in incident 4. The AJ found that this was not causally related to Complainant's protected classes, asserting, "I do not find the physical altercation occurred because of Complainant's race and/or sex just because it involved a white male and two black females." Rather, the AJ found that "[t]he incident occurred because CW1 and Doctor 1 had a disagreement over whether a computer would be removed from his office." Complaint File at 47. This finding is not supported by substantial evidence.

In finding this to be the case, the AJ relied upon a portion of Doctor 1's unsworn statement to Agency police, given five days after the assault, in which he stated that he wanted CW1 to move the computer but she refused as the sole reason for the assault, which is in contradiction to Complainant and CW1. While it is true that an AJ's determination as to credibility of a hearing witness will be accepted as true, this is not at issue in regard to these statements; the AJ made no credibility determinations regarding the hearing witnesses on this issue. Doctor 1 was not present at the hearing and did not provide testimony before the AJ. Moreover, Doctor 1 did not provide a sworn affidavit for the record; despite numerous attempts by the Agency to contact Doctor 1, he did not respond. The statement upon which the AJ relies is an unsworn statement provided to the investigating Agency police officer five days after the assault and that statement was reported in the police report. The statement provided by Doctor 1 to the officer contained numerous inconsistencies, with Doctor 1 initially asserting that there was no contact between him and CW1, later stating he had never hit a woman prior to that event, and then stating he did not hit CW1. Due to the conflicting information provided by Doctor 1 in the police report, and the fact that the statement upon which the AJ relied is in contradiction to both CW1 and Complainant, both of whom provided affidavits and testified, under oath, in two hearings consistent with this series of events, we find that a reasonable mind would not find this statement as adequate to support a conclusion. Universal Camera Corp., 340 U.S. at 477 (1951).

Regarding Complainant, Doctor 1 asserted that Complainant was not in the room, but that he apologized to her.⁴ Moreover, the AJ specifically did not approve the inclusion of Chief of Urology, who saw all parties, and spoke to Doctor 1, immediately after the incident.

⁴ Though Complainant did not raise this issue, the Commission is concerned that the AJ did not approve Chief of Urology as a witness for Complainant, although the Agency police interviewed him, and he confirmed that Doctor 1 admitted assaulting Complainant and CW1 and that he would not apologize. Hearing Record at 8. Chief of Urology was also in position to determine the immediate impacts of the assault on Complainant. Hearing Exhibits at 3-4.

As nobody who testified and/or presented testimony under oath contests that Doctor 1 assaulted Complainant, Chief of Urology was excluded by the AJ, and the report of the police officer's account of Doctor 1's statement indicated Doctor 1 reported that Complainant was not even in the room, the Commission finds that there is no evidence within the record which supports the AJ's finding that Doctor 1's assault of Complainant and CW1 was merely due to a disagreement. We find that no reasonable mind could determine that Doctor 1's double hearsay statement in the police report, in which he asserts that Complainant was not even in the room, could find this credible evidence, given that it is uncontested that the assault occurred. Universal Camera Corp., 340 U.S. at 477. Instead, we find that a preponderance of the evidence of record supports the conclusion that this physical assault and the subsequent continued contact between Doctor 1 and Complainant, as stated in incidents 4, 5, 7, 10, and 13, occurred as Complainant alleged and was based upon her protected classes.

We have considered the testimony of CW3, upon which the AJ relied, who is an African American female nurse at the same facility. She stated that she worked with Doctor 1 and got along well. The AJ considered her testimony in finding that the assault was not race or sex based. The Commission need not address whether CW3 was credible, though we have no reason to doubt that she is, because she is not a valid comparator to extrapolate Doctor 1's treatment of all African American female nurses during the relevant time period. CW3 worked with Doctor 1 from 2013 until 2014. She was not working in the same area, nor with Doctor 1, at the time of the harassment complained herein. As CW3 did not work in the area with Doctor 1 at the time of the incident, and there is no contemporaneous evidence to infer that Doctor 1 treated people the same, regardless of race, a reasonable mind would not find this testimony to be adequate to support the conclusion that Doctor 1 treated all African-American female nurses well during the time in question.

In short, the Commission finds that there is no credible evidence upon which the AJ made his decision that the altercation was merely about a disagreement in moving office furniture. Considering the above, the Commission finds that the unwelcome physical and verbal conduct, the harassment, was based upon Complainant's protected class.

The AJ went on to state that, even if this assault was motivated by bias, the Agency took prompt and effective measures in correcting the offending behavior. Again, we find that this is not supported by substantial evidence.

As noted above, in the case of co-worker harassment, an agency is responsible for acts of harassment in the workplace where the agency (or its agents) knew or should have known of the conduct, unless it can be shown 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 agency can raise an affirmative defense when it shows that it took immediate and appropriate corrective action. Id. What is 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 Taylor v. Dep't Of Air Force, EEOC Request No. 05920194 (July 8, 1992).

Complainant informed management of Doctor 1's conduct following the assault. Nurse Manager received an email from Complainant the day after the assault, requesting that he be moved, but Nurse Manager admitted she did nothing because she assumed that the assailant and the victims were working it out. It took several days to move Doctor 1; Doctor 1 worked in the same location as Complainant and CW1 for seven days, despite Assistant Director's belief that he should be moved. Thus, substantial evidence does not support that, upon Complainant's notification of the hostile work environment, that the Agency took prompt action.

Furthermore, we find that, once the Agency took action, the Agency has not shown that it was effective. Even when Doctor 1 was moved, he was only moved to a different floor in the same medical center. Prior to his being moved to the basement, he stopped Complainant in the hall and threw a folder near her face. He also stood in Complainant's way in the hallway, making her feel intimidated. Even after he was moved to the basement, Doctor 1 continued to come up to urology until he was escorted out by Agency police, indicating that his move was close enough to regularly occupy Complainant's work environment. Yet, while Doctor 1 continued to come to urology, Complainant was informed by Nurse Manager to not go to the basement. Restricting the victim of an assault but not the perpetrator does not constitute effective corrective action. As there is evidence that the harassment continued, even after Doctor 1's removal, which was delayed, any conclusion that measures enacted by the Agency were effective is not supported by substantial evidence.

In light of the above, the Commission finds, contrary to the AJ's decision, that Complainant has established that she was subjected to harassment based upon sex and race as alleged in claims 3, 4, 5, 7, 10, and 13. Furthermore, we conclude that the Agency is liable for the hostile work environment.

Compensatory Damages

To receive an award of compensatory damages, Complainant must demonstrate that she has been harmed as a result of the Agency's discriminatory action; the extent, nature, and severity of the harm; and the duration or expected duration of the harm. Rivera v. Dep't of the Navy, EEOC Appeal No. 01934157 (July 22, 1994), req. for recon. den'd, EEOC Request No. 05940927 (Dec. 11, 1995); Compensatory and Punitive Damages available Under Section 102 of the Civil Rights Act of 1991, EEOC Notice No. 915.002 (EEOC Notice No. 915.002) (July 14, 1992), at 11-12, 14. Compensatory damages may be awarded for past and future pecuniary losses (i.e., out-of-pocket expenses) and non-pecuniary losses (e.g., pain and suffering, mental anguish) which are directly or proximately caused by the agency's discriminatory conduct. EEOC Notice No. 915.002 at 8. The amount awarded should reflect the extent to which the agency's discriminatory action directly or proximately caused harm to the complainant and the extent to which other factors may have played a part. Id. at 11-12. The amount of non-pecuniary damages should also reflect the nature and severity of the harm to the complainant, and the duration or expected duration of the harm. Id. at 14, see Goetze v. Dep't of the Navy, EEOC Appeal No. 01991530 (Aug. 23, 2001)

This decision concerns the AJ's decision to award Complainant \$7,500.00 for non-pecuniary compensatory damages. Non-pecuniary losses are losses that are not subject to precise quantification, including emotional pain and injury to character, professional standing, and reputation. Id.

Evidence from a health care provider or other expert is not a mandatory prerequisite for recovery of compensatory damages for emotional harm. See Lawrence v. U.S. Postal Serv., EEOC Appeal No. 01952288 (Apr. 18, 1996) (citing Carle v. Dep't of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993)). Objective evidence of compensatory damages can include statements from Complainant concerning her emotional pain or suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to professional standing, injury to character or reputation, injury to credit standing, loss of health, and any other non-pecuniary losses that are incurred as a result of the discriminatory conduct. Id.

Statements from others including family members, friends, health care providers, other counselors could address the outward manifestations or physical consequences of emotional distress, including sleeplessness, anxiety, stress, depression, marital strain, humiliation, emotional distress, loss of self-esteem, excessive fatigue, or a nervous breakdown. Id. Complainant's own testimony, along with the circumstances of a particular case, can suffice to sustain her burden in this regard. Id. The more inherently degrading or humiliating the defendant's action is, the more reasonable it is to infer that a person would suffer humiliation or distress from that action. Id. The absence of supporting evidence, however, may affect the amount of damages appropriate in specific cases. Id.

There is no precise formula for determining the amount of damages for non-pecuniary losses except that the award should reflect the nature and severity of the harm and the duration or expected duration of the harm. See Loving v. Dep't of the Treasury, EEOC Appeal No. 01955789 (Aug. 29, 1997). Non-pecuniary compensatory damages are designed to remedy the harm caused by the discriminatory event rather than to punish the agency for the discriminatory action. Furthermore, compensatory damages should not be motivated by passion or prejudice or be "monstrously excessive" standing alone but should be consistent with the amounts awarded in similar cases. See Ward-Jenkins v. Dep't of the Interior, EEOC Appeal No. 01961483 (Mar. 4, 1999).

In the instant case, the AJ afforded Complainant \$7,500.00 in non-pecuniary compensatory damages. We note that the AJ based this award solely on the action alleged in claim 3. As the Commission has reversed the findings of the AJ on a number of incidents which constituted harassment, we find that the award does not address the harm caused by claims 4, 5, 7, 10, and 13. Therefore, based on the record and the Commission precedent, we find the award of \$7,500 insufficient.

Over the course of approximately one month, Doctor 1 subjected Complainant to harassment. Doctor 1 called Complainant a "monkey." Moreover, Doctor 1 assaulted Complainant.

Even after the assault, Nurse Manager kept Complainant in close proximity to Doctor 1, failing to separate them because she thought they were “working with Doctor 1 about that.” Doctor 1 continued to physically confront her and refused to get out of her way. Even after he was moved to another floor, Doctor 1 continued to come to her department.

Prior to the assault, the staff had a great relationship. They went to movies, baked desserts, and went to lunch together, frequently seeing each other outside of work hours. This changed after the assault, with the workplace becoming hostile and uncomfortable. Complainant stated that she felt like people had to take sides. She felt like she was “fighting too many people” for help with what happened to her. While CW2 testified that her work ethic remained strong, Complainant would not go into a room, alone, with any physician after the assault; she requested that a nurse accompany her. She gained weight and her hair began to fall out. Complainant sought counseling with the Agency’s EAP. Nurse Manager testified that Complainant got very quiet and did not want to talk to anybody at work after the assault.

Based on our review of the record and the finding of harassment based on claims 3, 4, 5, 7, 10, and 13, we conclude that an award of \$125,000.00 would better compensate Complainant for the egregious and physical, emotional and mental harm she suffered as a result of the harassment. The egregiousness of the Doctor’s actions, including physical assault, racial comments, and continued presence after the assault, as well as the Agency’s wholly ineffective response has warranted such an award.

We find that this award is consistent with similar awards provided by the Commission. See Stanton S., v. Dep’t. of Veteran Affs., EEOC Appeal No. 2019005938 (Sept. 14, 2020) (modifying the Agency’s award of \$110,000 this to \$175,000, noting the harmful effects Complainant experienced following two physical workplace assaults one month apart); Celinda L. v. Dep’t. of Veteran Affs., EEOC Appeal No. 2020002892 (Sept. 2, 2021) (increasing the award to \$175,000 where Complainant was subjected to sexual harassment and a hostile work involvement, when, over the course of two months, she was shown graphic pictures, received threats of violence, and was choked by an Agency Employee); Jackson v. Dep’t. of the Air Force, EEOC Appeal No. 0720110036 (Mar. 13, 2012) (affirming AJ’s award of \$125,000 for complainant who was subjected to sex-based harassment by supervisor that occurred over approximately 19 months, for emotional harm, mental anguish, loss of enjoyment of life, loss of self-esteem, injury to character and professional standing, marital strain, loss of health, sleep problems, anxiety, stress, depression, and humiliation); Melina K. v. Dep’t of Veterans Affs., EEOC Appeal No. 2021001468 (Mar. 8, 2022) (increasing AJ’s award of compensatory damages from \$10,000 to \$175,000 for complainant who was subjected to race and sex-based harassment by a co-worker occurring over approximately 18 months for emotional harm, a “shattered spirit,” and a diagnosis of PTSD after being the recipient of racial slurs and was physically assaulted).

Therefore, upon review of the record as a whole, we find that Complainant is entitled to \$125,000.00 in non-pecuniary compensatory damages. This award is less than that awarded in Melina K., because the evidence of record indicated that, in that case, the complainant was harassed by Doctor 1 for 18 months, as opposed to one month.

The assault and racial epithet, however, were the same. The Commission finds that this amount takes into account the severity and the duration of the harm suffered and is consistent with prior Commission precedent. We note that this award is not “monstrously excessive” standing alone, is not the product of passion or prejudice, and is consistent with the amount awarded in similar cases. See Jackson v. U.S. Postal Serv., EEOC Appeal No. 01972555 (Apr. 15, 1999) (citing Cygnar v. City of Chicago, 865 F. 2d 827, 848 (7th Cir. 1989)).

As the Commission has modified the finding of the AJ’s decision, we shall also modify the AJ orders accordingly.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the Agency’s decision concerning claims 1-3, 6, 8-9, 11-12, and 14-17, and REVERSE the Agency’s decision concerning claims 4, 5, 7, 10, and 13. The matter is REMANDED for the Agency to take action in accordance with our ORDERS below.

ORDER

The Agency is ordered to take the following remedial action, to the extent it has not done so already:

1. Within forty-five (45) days from the date this decision is issued, the Agency is directed to pay Complainant \$125,000.00 in non-pecuniary compensatory damages.
2. Within ninety (90) days from the date the decision is issued, the Agency is directed to conduct eight (8) hours of in-person or interactive training for Doctor 1, Nurse Manager, Assistant Director, Chief of Staff, and Chief of Urology. The Agency shall address management’s responsibilities with respect to eliminating discrimination in the workplace, with particular attention paid to preventing and remedying harassment. Within thirty (30) calendar days of the date the training is completed; the Agency shall submit to the Compliance Officer appropriate documentation evidencing completion of such training. If any of the named management officials is no longer employed by the Agency, the Agency shall furnish proof of the date(s) of separation.
3. Within sixty (60) days from the date the decision is issued, the Agency shall consider disciplining Doctor 1, Nurse Manager, Chief of Staff, and Chief of Urology. The Commission does not consider training to constitute disciplinary action. The Agency shall report its decision to the Compliance Officer. If the Agency decides not to issue any disciplinary action, it shall set forth the reason(s) for its decision. If any of the named management officials is no longer employed by the Agency, the Agency shall furnish proof of the date(s) of separation.

4. The Agency shall, within thirty (30) days of the date this decision is issued, post a notice in accordance with the Order below.

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

POSTING ORDER (G0617)

The Agency is ordered to post at its William Jennings Bryan Dorn Medical Center facility 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).

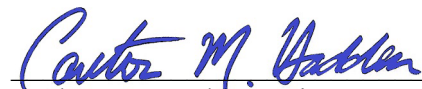
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (T0610)

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

March 14, 2022

Date