



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

[REDACTED]  
Kayce L.,<sup>1</sup>  
Complainant,

v.

Xavier Becerra,  
Secretary,  
Department of Health and Human Services  
(Centers for Disease Control and Prevention),  
Agency.

Appeal No. 2019002439

Agency No. HHS-CDC-0054-2014

**DECISION**

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

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant worked as a Travel Specialist, GS-6, at the Agency's Office of Infectious Disease (OID), National Center for HIV/AIDS, Viral Hepatitis, STD and TB Prevention (NCHHSTP) in Atlanta, Georgia. Report of Investigation (ROI), at 49.<sup>2</sup> The Supervisor Program Specialist, GS-12, (female, African American) was assigned as Complainant's first-level supervisor (S1). Complainant was also supervised by the Management Officer (male, Caucasian) and the Deputy Director (male).

---

<sup>1</sup> 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.

<sup>2</sup> Page numbers refer to the Bates page numbers appearing at the bottom center of each page of the ROI.

According to Complainant, on October 28, 2013, in a meeting, S1 told her to get out of the Agency because upper management did not like her, the Management Officer was out to get her, and that she needed to get out of the “god damn” Union because it was never going to allow her to go anywhere in her career. ROI at 127. S1 denied making the comments and denied that the meeting or incident ever took place. Also, according to Complainant, the Support Specialist asked why she was not attending the Christmas party and asked if she celebrated Christmas. Id. at 129-30. Complainant apparently replied that she is a Jehovah’s Witness and does not celebrate Christmas. Id. Complainant averred that the Support Specialist “looked at her as if she had a disease” and rolled her eyes. Id. The Support Specialist did not recall having any interaction with Complainant on the day in question and maintained that the incident did not occur as Complainant alleged.

Complainant additionally averred that on January 9, 2014, she overheard a coworker (C1) make the comment to another coworker (C2) that she (Complainant) thinks “she is cute because she is built like a Black girl” and that she (Complainant) “is bad news and not your friend.” Id. at 131-32. Complainant maintained that such comments were made about her multiple times in hallways and in the elevator. Id. But C1 maintained that she had no idea who Complainant was and that she did not make any such comment. C2 similarly averred that she did not recall the comment being made to her by C1.

Complainant further attested that the Deputy Director sexually harassed her on multiple occasions, which continued to the present. Complainant stated that the Deputy Director would stare at her chest, and he also put his hand on her left leg and “rolled his hand down” during two separate staff meetings. Id. at 133-35. Complainant said that she simply “scooted over” when the Deputy Director first put his hand on her leg. Id. She said that when this occurred a second time, she left in the middle of the meeting. Id. Complainant added that she told the Deputy Director to stop because the touching of her leg during the meeting was making her feel uncomfortable. Id. Complainant averred that the Deputy Director would also often come into her cubicle and put his hands on her shoulders, as if he were massaging her. Id. Complainant further stated that the Deputy Director would lean over her while showing her something on her computer, invading her personal space. Id. Complainant stated that the Deputy Director also asked her to lunch and/or dinner, but she rebuffed his advances. Id. Complainant attested that the Deputy Director punished her for rebuffing him by assigning her extra duties, refusing her requests for training, assigning her duties outside of her position description, and yelling and cursing at her in his office regarding the processing of employees travel preparations. Id. at 53. Complainant also attested that the Deputy Director would often call her into his office and “vent in a loud, angry voice while throwing things such as pens and pencils across the room.” Id. at 154.

Complainant explained that she discussed the Deputy Director’s behavior with several of her coworkers. Complainant further explained that she reported the Deputy Director’s behavior just a few weeks after it first occurred to the Director, who simply shook his head in disbelief. Id. at 134. Complainant maintained that nothing was done to resolve the situation, and so the harassment continued. Id. Complainant stated that she further reported the Deputy Director’s harassment to S1, the Management Officer, and a Consultant with the Agency. Id.

According to Complainant, these management officials ignored her complaints about the Deputy Director's harassment towards her. Id.

Nevertheless, both S1 and the Management Officer denied that Complainant ever reported the Deputy Director's behavior to them, and so they were unaware of the Deputy Director's alleged harassment. However, several of Complainant's coworkers averred that Complainant had confided in them that the Deputy Director had been subjecting her to sexual harassment. The Senior Budget Analyst specifically attested that Complainant would come into her office, almost on a weekly basis, to vent about the Deputy Director violating her personal space and making her feel uncomfortable by asking her out and making inappropriate comments. Id. at 208. The Senior Budget Analyst said that she had witnessed the Deputy Director throw tantrums and yell as if Complainant was his "soundboard" on a few occasions. Id. The Senior Budget Analyst further averred that Complainant visited her office on several occasions crying over the Deputy Director's behavior towards her. Id.

The Team Lead similarly attested that Complainant also came to him on occasions to talk about the Deputy Director's inappropriate behavior and that the Deputy Director had touched her inappropriately during a meeting. Id. at 205. The Team Lead averred that Complainant explained to him that she had scheduled a meeting with the Management Officer to discuss the Deputy Director's conduct, and that Complainant later discussed the Management Officer's lack of concern for addressing the alleged harassment. Id. The Team Lead added that he told Complainant that it seemed as if nothing would come as a result of her meeting with the Management Officer. Id.

The Resource Management Team Lead also explained that she was frequently a "comforting ear" for Complainant, and that Complainant expressed her extreme discomfort with the Deputy Director's behavior. Id. at 223. The Resource Management Team Lead stated that she had seen the Deputy Director in Complainant's office many times, but she had not witnessed anything more than what she perceived to be an encroachment of Complainant's personal space. Id. She mentioned she felt this to be unusual, but she had never directly witnessed the Deputy Director touch or address Complainant inappropriately. Id.

The Public Health Advisor Supervisor likewise maintained that Complainant had mentioned that the Deputy Director had touched her leg and asked her out to dinner. Id. at 199. The Public Health Advisor attested that the Deputy Director had harassed her in the past as well, but she did not complain because she would have been the first woman to have come forward. Id. The Public Health Advisor said that she was afraid to come forward because the Deputy Director was highly regarded within the Agency. Id. Another Team Lead, and two more employees, similarly stated that Complainant had mentioned that the Deputy Director had been harassing her.

Complainant claimed, moreover, that S1 improperly scored her with the unsatisfactory rating of 2.06 for her mid-year performance review and placed her on a Performance Assistance Plan (PAP). Id. at 157-58.

Complainant believed that S1's review of her performance was especially improper because S1 would reportedly make comments to her, such as "Stop trying to act Black," "Are you sure you're not Black?" and "Don't worry, we all know you're Black." Id. at 139.

In the PAP issued to Complainant dated May 4, 2014, S1 noted that Complainant had failed to respond to customers concerning their travel tickets in a timely manner and failed to edit documentation to ensure the accuracy and completeness of travel reports, among other things. Id. at 335-40. Complainant was then subsequently placed on a Performance Improvement Plan (PIP) by S1 on September 22, 2014. Id. at 341-44. Therein, S1 noted that Complainant was rated, "Achieved Unsatisfactory Results" for her Customer Service rating. Id. S1 specifically noted that Complainant did not document and resolve complaints without assistance from her peers. Id. S1 further wrote that Complainant did not complete tasks in a timely manner and did not keep her customers up to date on their travel. Id. S1 also wrote, in the PIP, that Complainant received more than three customer complaints and a complaint from the Senior Federal Agency Travel Administrator (FATA). Id. S1 noted, for example, that the Senior FATA asked Complainant to correct a travel voucher for an employee, but Complainant required constant assistance from her peers to complete this task. Id.

On October 16, 2014, Complainant received a Counseling Memorandum from S1. Id. at 345-346. In the Memorandum, S1 noted that when she presented Complainant with the PIP on September 25, 2014, Complainant spoke in a loud and rude tone during the entire meeting. Id. S1 wrote that Complainant engaged in verbal abuse during the meeting, was not able to control her temper, and said she was being retaliated against, among other things. Id. S1 additionally noted that Complainant complained that she (S1) had been allowing her peers to call her a "wigger," which meant "white [N-word]." Id.

The Support Services Specialist observed, however, that Complainant was under extreme distress due to S1's behavior towards Complainant. Id. at 202. The Support Services Specialist explained that one day she was in the copy room and Complainant came in shaking and she thought she would have to call an ambulance for Complainant. Id. According to the Support Services Specialist, Complainant proceeded to discuss the harassment she was experiencing from S1 and how often it was occurring. Id.

Complainant additionally stated that on December 12, 2014, she was informed that was going to be transferred to another team away from S1's supervision, so she could get a new start. Id. at 146-47. Complainant maintained that the transfer was good for her, as she noticed a more positive working environment. Id. Nevertheless, Complainant subsequently received her end-of-the year performance evaluation with the unsatisfactory rating of 2.06 from S1. Id. at 148-49.

On April 8, 2014, Complainant filed an EEO complaint alleging that the Agency discriminated against her and subjected her to harassment on the bases of race (Caucasian), national origin (German, Persian), sex (female), religion (Jehovah's Witness, Jewish), and reprisal for prior protected EEO activity when:

1. On October 28, 2013, S1 told her to get out of the Agency because management do not like her, the Management Officer is out to get her, and she needs to get out of the god damn union because if she does not she is never going to go anywhere in her career.
2. On December 12, 2013, the Business Services Support Specialist approached her and berated her for not attending the office Christmas party.
3. On January 9, 2014, she overheard a coworker comment to another coworker about her that she "thinks she is cute because she is built like a Black girl" and that she (Complainant) "is bad news and not your friend."
4. She has been subjected to sexual harassment by the Deputy Director from 2006 and continuing when he made unwanted advances toward her. The Deputy Director punished her for rebuffing him by assigning her extra duties, refusing her requests for training, assigning her duties which are outside of her position description, and yelling and cursing at her in his office regarding the processing of employees travel preparations.
5. On January 13, 2014, S1 told her to get the hell out of my office when she tried to explain to S1 that she had not been trained on the proper procedures for processing travel, among other things.
6. On July 28, 2014, she was given an unsatisfactory mid-year performance review with a rating of 2.06.
7. On May 5, 2014, she was placed on a Performance Assistance Plan (PAP).
8. On September 22, 2014, she was placed on a Performance Improvement Plan (PIP).
9. On October 16, 2014, she was issued a Counseling Memorandum.
10. On December 12, 2014, she was advised that her supervisor would change from S1 to another supervisor on another team.
11. On January 29, 2015, she received a 2.06 on her end of year performance evaluation

Following the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). In accordance with Complainant's request, the Agency issued a final decision (FAD) pursuant to 29 C.F.R. § 1614.110(b). The decision concluded that Complainant failed to prove that the Agency subjected her to discrimination as alleged.

The Agency specifically found that Complainant did not establish that her allegations occurred as she alleged with regard to claims 1-3, and 5. In so finding, the Agency noted that there was no evidence to corroborate Complainant's version of events with regard to her allegations that S1 subjected her to a hostile work environment. The Agency determined, moreover, that Complainant's allegations were not severe or pervasive enough to establish a hostile work environment.

The Agency also found that Complainant did not establish that she was subjected to sexual harassment with regard to claim 4. The Agency noted that several witnesses reported that Complainant was so devastated by the Deputy Director's harassing behavior that she frequently vented about his conduct and was seen crying and shaking in their offices. But the Agency noted that no witnesses specifically observed the sexual harassment even though Complainant asserted that the events occurred in the workplace. The Agency further noted that while some witnesses described the Deputy Director as becoming angry and even throwing things, there was insufficient evidence to show that the Deputy Director sexually harassed Complainant.

The Agency further found that management articulated legitimate, nondiscriminatory reasons for its actions regarding claims 6-11, and that Complainant did not establish that its reasons were pretextual based on her protected classes. The Agency determined that Complainant did not show that it was motivated by discriminatory animus based on her protected classes, and therefore Complainant did not establish that she was subjected to disparate treatment as alleged.

#### CONTENTIONS ON APPEAL

On appeal, Complainant, through her attorney, asserts that the Agency should be sanctioned in the form of a default judgment for failing to issue its final decision within 60 days of receiving notification that Complainant had requested an immediate final decision from the Agency. Complainant states that she made an election for a final decision on July 13, 2015, after receiving the Report of Investigation, but the Agency did not issue its decision until years later on February 14, 2019.

Complainant also maintains that she was subjected to a hostile work environment by the Deputy Director who had touched her leg, rubbed her shoulders, stared at her chest, looked down her blouse, and repeatedly asked her out to lunch and dinner. Complainant states that she rebuffed the Deputy Director's advances and told him to stop his behavior, but his conduct towards her continued. Complainant states that numerous coworkers confirmed that Complainant had informed them of the sexual harassment she was experiencing from the Deputy Director. Complainant maintains that a coworker confirmed that she was also harassed by the Deputy director and chose to transfer. Complainant asserts that another coworker witnessed the Deputy Director encroaching on her personal space, among other things. Complainant states that this coworker mentioned that the Deputy Director had a reputation and history for being unethical and retaliatory towards female employees and caused a number of individuals to leave his department.

Complainant asserts, moreover, that six of her coworkers confirmed that she frequently complained about the harassment and that she was so upset by the harassment that she was seen shaking and crying. Complainant additionally maintains that she was subjected to numerous comments from S1 based on her race, including “stop trying to be Black,” and “don’t worry we all know you’re Black,” among other inappropriate comments.

The Agency has not filed a brief in response to Complainant’s appeal.

### STANDARD OF REVIEW

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

### ANALYSIS AND FINDINGS

#### *Complainant's Request for Default Judgment as a Sanction for Untimely Issuance of FAD*

Complainant, through her attorney, asserts that the Agency should be sanctioned in the form of a default judgment for failing to issue its final decision within 60 days of receiving notification that she had requested an immediate final decision from the Agency.

We note that our regulations require agency action in a timely manner at many points in the EEO process. Tammy S. v. Dep't of Def., EEOC Appeal No. 0120084008 (June 6, 2014). Compliance with these timeframes is not optional; as the Commission stated in Royal v. Dep't of Veterans Affs., EEOC Request No. 0520080052 (Sept. 25, 2009), “the Commission has the inherent power to protect its administrative process from abuse by either party and must insure that agencies, as well as complainants, abide by its regulations.” Because of the length of time it can take to process a federal sector EEO complaint, any delays in complying with the time frames in the regulations can impact the outcome of the complainant's claims. Id.

Here, we find that the Agency failed to comply with the Commission's regulations. In so finding, we note that on July 13, 2015, Complainant made her election for an immediate final agency decision in accordance with EEOC regulation 29 C.F.R. § 1614.108(f). We note that pursuant to 29 C.F.R. § 1614.110(b), EEOC regulations provide that an agency shall issue the final decision within 60 days of receiving notification that a complainant has requested an immediate decision. Therefore, the Agency was required to issue its final decision by September 11, 2015. However, the Agency did not issue its final decision until February 14, 2019, which was 1,312 days after Complainant’s July 13, 2015, request for an immediate final decision.

Therefore, the Agency's final decision is vastly untimely, and the Agency has not explained its reasons for this excessive delay.

Although the Agency failed to timely issue a final decision as required by our regulations, it did not act in a manner to warrant the sanction of a default judgment against it. See, e.g. Josefina L. v. Soc. Sec. Admin., 0120142023 (July 19, 2016), req. for recon. denied, EEOC Request No. 0520170108 (Feb. 9, 2017) (finding that the Agency's 571-day delay in issuing the decision did not warrant sanctions, as complainant did not show she was prejudiced by the delay); Abe K. v. Dep't of Agric., EEOC Appeal No. 0120141252 (Nov. 4, 2016) (declining to sanction an agency that issued a decision after approximately 326 days when complainant failed to show that he was prejudiced by the delay); Jocelyn R. v. Dep't of Def., EEOC Appeal No. 0120152852 (Mar. 11, 2016) (citing Vunder v. U.S. Postal Serv., EEOC Appeal No. 01A55147 (May 12, 2006) (declining to sanction an agency that issued a decision after approximately 371 days)); Anthony M. v. Dep't of the Air Force, EEOC Appeal No. 2019003380 (Sept. 22, 2020). In the instant case, we find that Complainant has not shown she was prejudiced by the delay and we note that Complainant did not avail herself with the opportunity to file an appeal with the Commission when no final decision was forthcoming. As such, under the specific circumstances present, we decline to sanction the Agency for its delay in issuing the final decision.

While we will not impose a default judgment in the present case, we do find the Agency's failure to abide by the regulations reflects negatively on the Agency's support for the integrity of the EEO process. Beatrice B. v. Dep't of Veterans Affs., EEOC Appeal No. 2019001641 (Sept. 17, 2020) (The Commission declined to issue a sanction where following a supplemental investigation, the Agency delayed in issuing a final decision for over eight months). As a result, we will notify Federal Sector Programs (FSP) which monitors the federal agencies' EEO programs of the Agency's failure to comply with the regulations regarding the timely issuance of final agency decisions.

#### *Disparate Treatment (Claims 6-9, and 11)*

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



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

We note that, although a complainant bears the burden of establishing a “prima facie” case, Tex. Dep’t of Cmty. Affairs v. Burdine, 450 U.S. 248, 252-53 (1981), the requirements are “minimal,” St. Mary’s Honor Ctr. v. Hicks, 509 U.S. 502, 506 (1993), and complainant’s burden is “not onerous.” Burdine, 450 U.S. at 253.

Here Complainant is a member of a protected class due to her race, and she suffered adverse employment actions. We further find that Complainant has provided evidence that the circumstances surrounding the employment actions gave rise to an inference of discrimination. In so finding, we note that Complainant averred that S1 said to her “Stop trying to act Black,” “Are you sure you’re not Black?” and “Don’t worry, we all know you’re Black.” We note in the Counseling Memorandum issued to Complainant, S1 noted that Complainant complained that she (S1) had been allowing her peers to call her a “wigger,” which meant “white [N-word].” ROI, at 135. Further, according to the Support Services Specialist, Complainant discussed the discrimination she was experiencing from S1 and how often it was occurring. Id. at 202. Moreover, no other employees in the record specifically corroborated S1’s assertions that Complainant was a poor performer with respect to customer service. We therefore find that the record in this case supports an inference of race discrimination. As such, we find that Complainant has established the relatively light burden of a prima facie case of discrimination based on race.

The burden now shifts to the Agency to articulate legitimate, nondiscriminatory reasons for its actions. We note that S1 rated Complainant with “Achieved Unsatisfactory Results” for her Customer Service rating. S1 specifically noted, in Complainant’s PIP, that Complainant did not document and resolve complaints without assistance from her peers. S1 further wrote that Complainant did not complete tasks in a timely manner and did not keep her customers up to date on their travel. S1 also noted that Complainant received more than three customer complaints from her customers and from the Senior FATA. However, no coworkers or management officials, including the Senior FATA, submitted affidavits for the record specifically supporting S1’s account of Complainant’s unsatisfactory performance regarding her customer service. We also note that the EEO Investigator requested affidavits from nine more of Complainant’s coworkers, but the investigator was not able to successfully obtain affidavits from these individuals. ROI at 6.

We note that EEOC regulations provide that the Agency and any employee of a Federal agency shall produce such evidence as the investigator deems necessary. 29 C.F.R. § 1614.108(c)(1).

The regulations further provide that when the Agency against which a complaint is filed, or its employees fail without good cause shown to respond fully and in timely fashion to requests for . . . affidavits . . . the investigator may note in the investigative record that the decisionmaker should, or the Commission on appeal, may in appropriate circumstances: (i) draw an adverse inference that the requested information, or the testimony of the requested witness would have reflected unfavorably on the party refusing to provide the requested information; (ii) consider the matters to which the requested information or testimony pertains to be established in favor of the opposing party; (iii) exclude other evidence offered by the party failing to produce the requested information or witness; (iv) issue a decision fully or partially in favor of the opposing party; or (v) take such other actions as it deems appropriate. 29 C.F.R. § 1614.108(c)(3). Here, the Agency has not responded to Complainant's appeal and the record does not reflect why nine coworkers and management officials did not provide the requested affidavits despite the attempts by the investigator.

When a party fails to produce relevant evidence within its control, the failure to produce such evidence raises an inference that the evidence, if produced, would prove unfavorable to that party. See 29 C.F.R. § 1614.108(c)(3)(i). Here, we find it appropriate to draw an adverse inference against the Agency that the missing affidavits would have established that S1 was motivated by discriminatory animus and that her reasons with regard to claims 6-9 and 11 were pretextual based on Complainant's race.<sup>3</sup>

#### *Sexual Harassment by Deputy Director (Claim 4)*

To establish a claim of sexual harassment, Complainant must show that: (1) she belongs to a statutorily protected class; (2) she was subjected to unwelcome conduct related to her sex, including sexual advances, requests for favors, or other verbal or physical conduct of a sexual nature; (3) the harassment complained of was based on sex; (4) the harassment had the purpose or effect of unreasonably interfering with her work performance and/or creating an intimidating, hostile, or offensive work environment; and (5) there is a basis for imputing liability to the employer, in other words, did the agency know or have reason to know of the sexual harassment and fail to take prompt remedial action. See Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Humphrey v. U.S. Postal Serv., EEOC Appeal No. 01965238 (Oct. 16, 1998). The harasser's conduct should be evaluated from the objective viewpoint of a reasonable person in the complainant's circumstances. Enforcement Guidance on Harris v. Forklift Systems Inc., EEOC Notice No. 915.002 (Mar. 8, 1994).

---

<sup>3</sup> We decline to consider whether the Agency subjected Complainant to discrimination on the remaining bases regarding Claims 6-9, and 11, as no additional relief would be available for Complainant if she were to prevail on those bases.

In the instant case, we note that Complainant attested that the Deputy Director would stare at her chest, look down her blouse, touched her leg inappropriately at staff meetings, rubbed her shoulders, invaded her personal space, repeatedly asked her out to lunch and dinner, and would angrily yell and throw objects, among other things. Complainant specifically stated that the Deputy Director would stare at her chest, and he also put his hand on her left leg and “rolled his hand down” during two separate staff meetings. ROI, at 133-35. Complainant said that she simply “scooted over” when the Deputy Director first put his hand on her leg. Id. She said that when this occurred a second time, she left in the middle of the meeting. Id. Complainant added that she told the Deputy Director to stop because the touching of her leg during the meeting was making her feel uncomfortable. Id. Complainant averred that the Deputy Director would also often come into her cubicle and put his hands on her shoulders, as if he were massaging her. Id. Complainant further stated that the Deputy Director would lean over her while showing her something on her computer, invading her personal space. Id.

Complainant stated, moreover, that the Deputy Director also asked her to lunch and/or dinner, but she rebuffed his advances. Id. Complainant attested that the Deputy Director punished her for rebuffing him by assigning her extra duties, refusing her requests for training, assigning her duties outside of her position description, and yelling and cursing at her in his office regarding the processing of employees travel preparations. Id. at 53. Complainant also attested that the Deputy Director would often call her into his office and “vent in a loud, angry voice while throwing things such as pens and pencils across the room.” Id. at 154.

We note that several of Complainant’s coworkers averred that Complainant had confided in them that the Deputy Director had been subjecting her to sexual harassment. We note, for example, that the Senior Budget Analyst specifically attested that Complainant would come into her office, almost on a weekly basis, to vent about the Deputy Director violating her personal space and making her feel uncomfortable by asking her out and making inappropriate comments. Id. at 208. The Senior Budget Analyst said that she had witnessed the Deputy Director throw tantrums and yell as if Complainant was his “soundboard” on a few occasions. Id.

The Public Health Advisor Supervisor attested that Complainant had mentioned to her that the Deputy Director had touched her leg and asked her out to dinner. Id. at 199. The Public Health Advisor attested that the Deputy Director had harassed her in the past as well, but she did not complain because she would have been the first woman to have come forward. Id. The Public Health Advisor said that she was afraid to come forward because the Deputy Director was highly regarded within the Agency. Id. We note that evidence of the general work atmosphere, involving employees other than the complainant, is relevant to the issue of whether there existed a hostile work environment in violation of Title VII. Complainant v. Dep’t of Justice, EEOC Appeal No. 01953231 (Dec. 16, 1997) (citations omitted). Another Team Lead, and two more employees similarly stated that Complainant had mentioned that the Deputy Director had been harassing her.

We note that the Agency acknowledges, in its FAD, that several witnesses reported that Complainant was so devastated by the Deputy Director’s harassing behavior that she frequently vented about his conduct and was seen crying and shaking in their offices.

The Agency also acknowledges, in its FAD, that witnesses described the Deputy Director as becoming angry and even throwing things.

Complainant additionally explained that she reported the Deputy Director's harassment just a few weeks after it first occurred to the Director, who simply shook his head in disbelief. *Id.* at 134. Complainant maintained that nothing was done to resolve the situation, and so the harassment continued. *Id.* Complainant stated that she further reported the Deputy Director's harassment to S1, the Management Officer, and a Consultant with the Agency. But nothing was done to address the Deputy Director's harassment.

As noted above, we note that the EEO Investigator requested affidavits from nine more of Complainant's coworkers, which included the Director. But the investigator was not able to successfully obtain affidavits from these individuals. We therefore find it appropriate to draw an adverse inference against the Agency. As such, we find that had these affidavits been provided, they would have further corroborated Complainant's claims that the Deputy Director had been subjecting her to a hostile work environment. Therefore, we find that Complainant established elements (1), (2), (3), and (4) of her claim of sexual harassment.<sup>4</sup> We also find, regarding element (5), that had the Director provided the requested affidavit, his sworn statement would have reflected that he knew of the sexual harassment by the Deputy Director but failed to take prompt remedial action. Thus, we determine that the Agency is liable for the sexual harassment.

### CONCLUSION

Accordingly, based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we REVERSE the Agency's final decision regarding claims 4, 6-9, and 11.<sup>5</sup>

We AFFIRM the Agency's final decision with respect to claims 2 and 10.<sup>6</sup> We REMAND the complaint for further proceedings consistent with this decision and the Order of the Commission set forth below.

---

<sup>4</sup> The Commission has stated that it "will presume the unwelcome, intentional touching of [Complainant's] intimate body areas is sufficiently offensive to alter the condition of her working environment and constitute a violation of Title VII." See Policy Guidance on Current Issues of Sexual Harassment, EEOC Notice No. N-915-050 (March 19, 1990); see also Haves v. U.S. Postal Serv., EEOC Appeal No. 01954703 (Jan. 23, 1998) (finding that complainant was subjected to unlawful sexual harassment based on one incident of physical touching of a sexual nature).

<sup>5</sup> We note that Complainant does not specifically address the Agency's findings with regard to claims 1, 3, and 5 on appeal. We therefore decline to address these claims, as 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 (MD-110), at Chap. 9 § IV.A.3 (Aug. 5, 2015).

ORDER

The Agency is ordered to undertake the following remedial actions:

1. Within thirty (30) calendar days of the date that this decision is issued, the Agency shall take all necessary steps to ensure that Complainant has no contact with the Deputy Director and provide her with a designated management official to inform if subsequent acts of alleged harassment occur by the Deputy Director or other individuals.
2. Within thirty (30) calendar days of the date that this decision is issued, the Agency shall expunge the unsatisfactory mid-year and the end of year performance evaluation Complainant received on January 29, 2015, from all personnel and associated Agency records. The Agency shall replace the rating with a satisfactory rating.
3. Within thirty (30) calendar days of the date that this decision is issued, the Agency shall expunge from its records any documentation relating to the Counseling Memorandum, Performance Improvement Plan (PIP), Performance Assistance Plan (PAP), and any other documents associated with the actions found to be discriminatory
4. Within one hundred and twenty (120) calendar days from the date this decision is issued, the Agency shall provide a minimum of eight hours of in-person EEO training to all management and supervisory officials at its Office of Infectious Disease, NCHHSTP, in Atlanta, Georgia, regarding their responsibilities under Title VII, with special emphasis on the duty to avoid discrimination and to prevent, address, and correct harassment.
5. Within thirty (30) calendar days of the date that this decision is issued, the Agency shall consider taking appropriate additional disciplinary action against S1 and the Deputy Director. The Commission does not consider training to be disciplinary action. The Agency shall report its decision to the compliance officer. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline. If either S1 or the Deputy Director has left the Agency's employ, the Agency shall furnish documentation of the departure date.
6. Within fifteen (15) calendar days of the date this decision is issued, the Agency shall give Complainant a notice of the right to submit evidence in support of a compensatory damages claim, within forty-five (45) calendar days of the date Complainant receives the Agency's notice. The Agency shall complete the investigation on the claim for compensatory damages within forty-five (45) calendar

---

<sup>6</sup> We find that even assuming the incidents with regard to claims 2 and 10 occurred as alleged, the incidents were not severe or pervasive enough to rise to the level of a hostile work environment.

days of the date that the Agency receives Complainant's claim for compensatory damages. Thereafter, the Agency shall issue a final decision pursuant to 29 C.F.R. § 1614.110(b).

7. The Agency is further directed to submit a report of compliance, as provided in the statement entitled "Implementation of the Commission's Decision."

#### POSTING ORDER (G0617)

The Agency is ordered to post at its Office of Infectious Disease, NCHHSTP 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).

#### ATTORNEY'S FEES (H1019)

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

#### IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

Under 29 C.F.R. § 1614.405(c) and §1614.502, compliance with the Commission's corrective action is mandatory. Within seven (7) calendar days of the completion of each ordered corrective action, the Agency shall submit via the Federal Sector EEO Portal (FedSEP) supporting documents in the digital format required by the Commission, referencing the compliance docket number under which compliance was being monitored. Once all compliance is complete, the Agency shall submit via FedSEP a final compliance report in the digital format required by the Commission. See 29 C.F.R. § 1614.403(g). The Agency's final report must contain supporting documentation when previously not uploaded, and the Agency must send a copy of all submissions to the Complainant and his/her representative.

If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a).

The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See 29 C.F.R. § 1614.409.

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

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 30, 2022

Date