



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

[REDACTED]
Susan M.,¹
Complainant,

v.

Carlos Del Toro,
Secretary,
Department of the Navy,
Agency.

Appeal No. 2022001003

Agency No. DON 21-68520-00305

DECISION

On December 12, 2021, Complainant filed an appeal, pursuant to 29 C.F.R. § 1614.403(a), from the Agency's November 8, 2021 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.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Public Affairs Specialist (PAO) at the Agency's Naval Air Systems Command (NAVAIR), Commander, Fleet Readiness Centers (COMFRC) in Patuxent River, MD.

On April 5, 2021, Complainant filed a formal complaint alleging that the Agency subjected her to sexual harassment on the basis of sex (female). In support of this claim, she raised the following allegations:

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.

1. In or around January 2020, the Rear Admiral² (male) asked her to do him a favor by speaking to her husband on a matter and suggested she wear sexy lingerie to persuade him.
2. On several occasions in or around August 2020, when the Rear Admiral gave her a “high-five,” he interlaced his fingers with hers.
3. In or around October 2020, while the Rear Admiral was recalling a story, he demonstrated the event that had taken place by turning her around and placing his back to her back.
4. In or around October or November 2020, the Rear Admiral, while standing by her desk, asked if a picture of her was a profile picture or a “porn” picture.
5. In or around November 2020, the Rear Admiral asked her what was wrong with her hair, commenting that, “it looked like you had a little morning action.” When Complainant told him that she had had her hair on, he again alluded to her sex life.
6. On or about December 6, 2020, the Rear Admiral grabbed her face and kissed her on the mouth.

The Agency accepted the claims and conducted an investigation which produced the following evidence and findings.

The Agency’s own investigation found that the Rear Admiral engaged in conduct towards Complainant that was inappropriate and violated the Agency’s policies on sexual harassment. The Rear Admiral admitted that his conduct was inappropriate in that he should not have kissed Complainant on December 6, 2020. Based on this evidence, it is essentially undisputed that the Rear Admiral engaged in conduct that was inappropriate and based on Complainant’s sex. The incidents Complainant raised were substantiated and were serious enough to warrant an Inspector General (IG) investigation and the removal of Rear Admiral as Commander of COMFRC.

Complainant stated that, because of the sexual harassment by the Rear Admiral, she tried to avoid any physical contact with him.

² Complainant clarified during the investigation that the alleged harasser, a Rear Admiral, was the Commander of Fleet Readiness Centers, in charge of a workforce of more than 20,000 military and civilians; she was a civilian employee in that command; and, while he was not one of her direct supervisors, she worked with him on an almost daily basis on internal and external communications for the command. The Vice Admiral, Commander NAVAIR (“Vice Admiral”) was the Rear Admiral’s supervisor.

Complainant asserted that Rear Admiral was mainly responsible for the environment at COMFRC. She contended that because of the harassment she moved to another area in NAVAIR to avoid working with Rear Admiral. Complainant stated that the new position was not comparable to her PAO position at COMFRC, and the job duties and tasks were menial and entry-level. She maintained that she eventually applied for and was selected for another position.

At the conclusion of the EEO investigation, Complainant was provided with a copy of the report of investigation and notice of her right to request either a final agency decision or a hearing before an EEOC Administrative Judge (AJ). Complainant elected an Agency decision. Consequently, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). The decision concluded that Complainant had proven her allegations of unlawful sexual harassment.

However, the Agency also concluded that Complainant failed to demonstrate that there is a basis for imputing liability to the Agency. Based on the evidence in the record, the Agency determined that management appropriately took immediate and effective remedial action in response to Complainant's report of the harassment and, upon substantiating her allegations, removed Rear Admiral from his Command position. Therefore, the Agency reasoned that liability for Rear Admiral's conduct cannot be imputed to the Agency.

Complainant filed the instant appeal.

ANALYSIS AND FINDINGS

It is well-settled that harassment based on an individual's sex is actionable. See Meritor Savings Bank FSB v. Vinson, 477 U.S. 57 (1986). In order to establish a claim of harassment, the complainants must show that: (1) they belong to the statutorily protected class; (2) they were subjected to unwelcome conduct related to their membership in that class; (3) the harassment complained of was based on sex; (4) the harassment had the purpose or effect of unreasonably interfering with their work performance and/or creating an intimidating, hostile, or offensive work environment; and (5) there is a basis for imputing liability to the employer. See Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982). The harasser's conduct should be evaluated from the objective viewpoint of a reasonable person in the victim's circumstances. Enforcement Guidance on Harris v. Forklift Sys. Inc., EEOC Notice No. 915.002 (March 8, 1994).

Here, the Agency concedes that that Complainant established elements 1 through 4 of her sexual harassment claim. However, it argues that Complainant failed to establish a basis for imputing liability to the employer, as required by element 5.

As an initial matter, we note that the Rear Admiral appears to be the highest-ranking Agency official at the COMFRC facility. The Commission has recognized the "alter ego" theory of liability in a harassment case where the harasser is of sufficiently high rank to be treated as the Agency's proxy, resulting in his conduct being directly imputed to the Agency. See Sebek v. Department of Justice, EEOC Appeal No. 07A00005 (March 8, 2001).

The instant case appears to be an appropriate situation to apply this principle and find the Agency liable for the Rear Admiral's misconduct towards Complainant.

Moreover, even without using this theory, an employer 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 Industries, Inc. v. Ellerth, 524 U.S. 742, 118 S.Ct. 2257, 2270 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 118 S.Ct. 2275, 2292-93 (1998). However, where the harassment does not result in a tangible employment action (e.g., a discharge, demotion, or undesirable reassignment), such as here, the employer can raise an affirmative defense, which is subject to proof by a preponderance of the evidence, by demonstrating that it exercised reasonable care to prevent and correct promptly any harassing behavior; and the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer 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).

The Agency argues that it avoids liability for the actions of Rear Admiral because it had an anti-harassment policy and procedures in place,³ and once it was informed of Rear Admiral's conduct, it took prompt action to correct the actions of Rear Admiral. This, however, only establishes the first prong of the test described above for the Agency's affirmative defense.

The second prong of the affirmative defense requires a showing by the employer that the aggrieved employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." Faragher, 118 S. Ct. at 2293; Ellerth, 118 S. Ct. at 2270. The burden lies with the employer to prove that the employee's failure to complain was unreasonable. EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, EEOC No. 915.002 (June 18, 1999). In the case at hand, it is undisputed reflects that Complainant reported the sexual harassment to the Agency's EEO office on December 14, 2020, within days of the December 6, 2020 incident where the harassment escalated to include a physical element (kissing her). The EEO office immediately reported the matter to the Vice Admiral, who was the Rear Admiral's commanding officer, who in turn directed the IG to conduct an investigation. Based on the results of that investigation, the Vice Admiral removed Rear Admiral from his command position. As such, the evidence of record simply does not support a finding that Complainant unreasonably delayed or failed to take advantage of the Agency's preventative or corrective opportunities.

In some circumstances, such as the one at issue, unlawful harassment will occur and harm will result despite the exercise of requisite legal care by the employer and employee.

³ Complainant acknowledged that the Agency had a policy on preventing sexual harassment. She maintained that the policy was posted in Building 448 in the main hallway with all the other policies. Complainant further acknowledged that she had received an in-person training from the Agency on reporting/preventing sexual harassment in the workplace, as well as on-line training.

For example, if an employee's supervisor directed frequent, egregious racial epithets at him that caused emotional harm virtually from the outset, and the employee promptly complained, corrective action by the employer could prevent further harm but might not correct the actionable harm that the employee already had suffered. In these circumstances, the employer will be liable because the defense requires proof that it exercised reasonable legal care *and* that the employee unreasonably failed to avoid the harm. As the Court explained in Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257 (1998), vicarious liability sets a "more stringent standard" for the employer than the "minimum standard" of negligence theory. Id. at 2267.

While this result may seem harsh to a law-abiding employer, it is consistent with liability standards under the anti-discrimination statutes which generally make employers responsible for the discriminatory acts of their supervisors. If, for example, a supervisor rejects a candidate for promotion because of national origin-based bias, the employer will be liable regardless of whether the employee complained to higher management and regardless of whether higher management had any knowledge about the supervisor's motivation. Harassment is the only type of discrimination carried out by a supervisor for which an employer can avoid liability, and that limitation must be construed narrowly. The employer will be shielded from liability for harassment by a supervisor only if it proves that it exercised reasonable care in preventing and correcting the harassment and that the employee unreasonably failed to avoid all of the harm. If both parties exercise reasonable care, the defense will fail. EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, EEOC No. 915.002 (June 18, 1999); see also Complainant v. Dep't. of the Army, EEOC Appeal No. 0120111865 (July 9, 2014).

Accordingly, because the Agency cannot establish its affirmative defense, we find that it is liable for the harassing conduct of Rear Admiral sufficient to create a hostile and offensive work environment.

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 and REMAND the matter for further action in accordance with the ORDER below.

ORDER

The Agency is ordered to take the following remedial action:

1. Within 90 days of the date this decision is issued, the Agency shall conduct a supplemental investigation with respect to Complainant's claim of compensatory damages related to the finding of sexual harassment in the instant decision. The Agency shall allow Complainant to present evidence in support of her compensatory damages claim. See Carle v. Dep't of the Navy, EEOC No. 01922369 (Jan. 5, 1993). Complainant shall cooperate with the Agency in this regard. The Agency shall issue a final decision addressing the issues of compensatory damages and costs, no later than 30 days after the completion of the investigation.

2. Within 90 days of the date this decision is issued, the Agency shall provide training for the management at its Naval Air Systems Command (NAVAIR), Commander, Fleet Readiness Centers (COMFRC) in Patuxent River, MD, particularly regarding recognizing a hostile work environment. The Agency shall address management's responsibilities with respect to eliminating harassment in the workplace.

3. Within 60 days of the date this decision is issued, and to the extent it has not already done so, the Agency shall consider taking appropriate disciplinary action against Rear Admiral. If the Agency decides to take disciplinary action, it shall identify the action taken. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline. If Rear Admiral leaves the Agency's employment, then the Agency shall furnish documentation of his departure date.

4. Within 30 days of the date this decision is issued, the Agency shall post notices in accordance with the paragraph 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). Further, the report must include supporting documentation of evidence that the corrective action has been implemented.

POSTING ORDER (G0617)

The Agency is ordered to post at its Naval Air Systems Command (NAVAIR), Commander, Fleet Readiness Centers (COMFRC) in Patuxent River, MD 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 (H0610)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), he/she 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 this decision becoming final. 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 (R0610)

This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency, or filed your appeal with the Commission. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. **Filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

June 12, 2023
Date