



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

[REDACTED]
Ashely H.,¹
Complainant,

v.

Robert L. Sumwalt,
Chairman,
National Transportation Safety Board,
Agency.

Appeal No. 0120180038

Hearing Nos. 570-2015-00126X and 570-2016-00298X

Agency Nos. NTSB-2014-01 and NTSB-2015-01

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 August 25, 2017, 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., and Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, the Commission MODIFIES the Agency's final decision.

ISSUES PRESENTED

The issue presented is whether the Agency properly found that Complainant was denied reasonable accommodations for her disability, and that Complainant did not prove she was subjected to unlawful discrimination or harassment.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a GS-12 Contract Specialist within the Agency's Acquisition and Lease Management Division at Headquarters in

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.

Washington, D.C. In this position, Complainant primarily administered contracts and procured supplies and services to support the Agency's mission.

Complainant has been diagnosed with Post-Traumatic Stress Disorder (PTSD) since December 2013 and Diabetes since July 2014. Complainant maintains that her PTSD is associated with workplace sexual harassment she experienced by a male coworker (C1).

Agency No. NTSB-2014-01

Complainant filed two EEO complaints. The first complaint was filed on March 11, 2014. In this complaint, Complainant alleged that she was subjected to discrimination and harassment on the bases of sex (female) when:

- 1) C1 subjected her to sexual harassment; and
- 2) On or before November 5, 2013, the Agency knew or should have known of the harasser's history of abuse, failed to take corrective action, and failed to adequately respond to her reports of harassment.

Additionally, Complainant alleged that she was subjected to discrimination on the bases of disability and sex, and in reprisal for previous EEO activity when:

- 3) On or about November 20, 2013, the Agency denied her telework request, intimidated her, victimized her, and delayed offering her an alternative reasonable accommodation as well as delayed approving her leave under the Family and Medical Leave Act (FMLA);
- 4) On or about January 17, 2014, the Agency intimidated and frightened her at a meeting to discuss reasonable accommodations and FMLA;
- 5) On March 7, 2014, Complainant's telework request was temporarily approved for two days a week for a period of 30 days, instead of fulltime telework or administrative leave, which she had requested;
- 6) On or after November 21, 2013, her supervisor (S1) admonished her for using medical and other leave because of her disability, for her sexual harassment complaint, and for requesting leave in an emergency;
- 7) On or after November 21, 2013, S1 retaliated against her for filing a sexual harassment claim; and
- 8) On February 27, 2014, S1 changed her performance rating criteria/standards for 2014 and threatened to downgrade her 2013 performance rating.

Agency No. NTSB-2015-01

On April 10, 2015, Complainant filed a second EEO complaint, which alleged the following:

- 9) On July 10, 2015, S1 discriminated against her on the basis of disability and in reprisal for EEO activity when he disparately scrutinized the work she performed while teleworking by asking her for an update on what she was working on while teleworking;
- 10) On May 22, 2015, she was subjected to harassment and reprisal when a coworker (C2) told her that “they” [management] did not like it when C2 and Complainant talked, and “they” were going to tell Complainant she could not talk to C2 anymore, although no one told her such. Additionally, on April 2, 2015, C1 positioned himself directly behind Complainant at an Agency All-Hands meeting for five to 15 minutes, although he did not say anything to her;
- 11) On March 19, 2015, she was subjected to disability discrimination and reprisal when she received an assessment of her performance for the period covered by her performance improvement plan (PIP) issued by S1 on October 31, 2014, and the assessment placed her on probation for one year under the threat of immediate removal at any time;
- 12) On October 13, 2014, she was subjected to disability discrimination and reprisal when she was placed on a PIP, and on December 8, 2014, S1 refused to put anything in writing documenting her performance on the PIP; and
- 13) She was subjected to disability discrimination and reprisal when she exercised her right to use FMLA leave because of stress she experienced from being sexually harassed in the workplace.

Consolidation of Complaints and Amendment of Complainant’s Complaint(s)

After 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 requested a hearing. On March 27, 2017, the AJ consolidated both complaints.

Additionally, the AJ granted Complainant’s request to amend her complaint. In the amendments, Complainant alleged that the Agency subjected her to reprisal when:

- 14) S1 sent her four emails in 2014 that threatened her with adverse action; and
- 15) In August 2014, S1 issued her a counseling memorandum.

Complainant further alleged that she was harassed on the basis of sex when:

- 16) On July 27, 2016, C1 contacted her by email; and

- 17) On unspecified dates, C1 spoke to Complainant on three occasions by saying “hi” in the office when they passed by each other in the common area or hallway and she ignored him.

Complainant also alleged that the Agency retaliated against her and subjected her to sexual harassment when:

- 18) On July 28, 2016, Complainant requested a copier change to avoid contact with C1, and in response, she received an email from S1, which blamed her for C1 contacting her;
- 19) On July 20, 2016, Complainant received a performance appraisal which contained a false performance review period of January 1, 2016, to December 31, 2016; a false interim performance review; and at least two criteria changes and criteria that are subjective; and
- 20) After Complainant returned from sick leave on June 1, 2016, S1 and the Contracting Officer (CO) continued to have biweekly meetings with Complainant, even though she is the only Contract Specialist in the division to have these meetings to this extent.

Additionally, the AJ remanded Complainant’s claims to the Agency and ordered a supplemental investigation of the amendment claims. Further, the AJ concluded that “in light of Complainant’s medical limitations, the above-captioned matter is being remanded back to the Agency for a final agency decision”² pursuant to 29 C.F.R. § 1614.110(b). The Agency completed the supplemental investigation on June 7, 2017.

Final Agency Decision

In its decision, the Agency determined that Complainant first reported that C1 made “inappropriate comments” to her on November 5, 2013, but she told S1 that she did not want to go into detail at that time. The Agency also determined that, on November 20, 2013, Complainant told S1 that C1 had approached her in the file room, and she did not want to have any contact with him because of his inappropriate behavior. The Agency concluded that after receiving Complainant’s November 5, 2013, report, management instructed C1 that same day not to have any non-work-related contact with Complainant. The Agency further concluded that after Complainant’s November 20, 2013, report, management directed C1 not to have any contact with Complainant and to review the Agency anti-harassment policy. Additionally, the Agency noted that C1 was moved to another office corridor pending reassignment to another floor, and Complainant was offered a move to another location, which she declined. Further, the Agency determined that an investigation of the harassment allegations was conducted beginning on December 3, 2013, which found that C1 had made remarks to other female employees, but the previous remarks had not been reported to management.

² The record contains no information elaborating on this statement.

The Agency concluded that the alleged actions were not severe or pervasive enough to constitute a sexually-harassing environment. Additionally, the Agency determined that the Agency could not be liable for C1's actions because management's response to the harassment allegations was prompt and appropriate to address C1's actions, which included the incidents reported in November 2013 as well as alleged workplace interactions with C1 in March 2015 during a meeting and in 2016 when she was copied on an email sent by C1.

Regarding Complainant's claim that she was denied a reasonable accommodation for her disability, the Agency assumed that she is a qualified individual with a disability. The Agency found that Complainant did not prove she was denied a reasonable accommodation because she provided no evidence that she needed fulltime telework. The Agency noted that when Complainant informed the Agency that she needed fulltime telework or administrative leave in November 2013, management responded that it needed additional information to consider her request and invited her to a discussion with Human Resources (HR), but she did not present any documentation until January 14, 2014. The Agency further noted that, on January 17, 2014, Complainant met with S1 and HR and EEO officials to discuss her reasonable accommodation requests and, at the meeting, it was determined that leave would best support Complainant's needs. The Agency also noted that, on February 14, 2014, Complainant requested fulltime telework and assignment to procurements under \$25,000 as reasonable accommodations, and on March 4, 2014, the Agency approved Complainant for leave under FMLA and telework for two days per week as reasonable accommodations. The Agency concluded that it provided Complainant with an effective accommodation, and she was not entitled to her accommodations of choice.

Regarding the remaining claims, the Agency found that the Agency provided legitimate, nondiscriminatory explanations for its actions that were not shown to be pretext for unlawful discrimination. Therefore, the Agency concluded that Complainant failed to prove that the Agency subjected her to unlawful harassment or discrimination as alleged.

CONTENTIONS ON APPEAL

On appeal, Complainant mainly reiterates her claim that the Agency denied her a reasonable accommodation and subjected her to sexual and non-sexual harassment as well as disparate treatment. The Agency requests that we affirm its final decision.

ANALYSIS AND FINDINGS

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").

Sexual Harassment: Claims 1, 2, 16, 17, and 18

It is well-settled that sexual harassment in the workplace constitutes an actionable form of sex discrimination under Title VII. Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986). In order to establish a prima facie case of sexual harassment, the complainant must prove, by a preponderance of the evidence, the existence of five elements: (1) that she is a member of a statutorily protected class; (2) that she was subjected to unwelcome conduct related to her sex; (3) that the harassment complained of was based on her sex; (4) that 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) that there is a basis for imputing liability to the employer. See McCleod v. Soc. Sec. Admin., EEOC Appeal No. 01963810 (August 5, 1999) (citing Hanson v. City of Dundee, 682 F.2d 987, 903 (11th Cir. 1982)).

In this case, Complainant stated that C1 first sexually harassed her when he said that he would go to a hotel with her after she said that she was planning to stay at a hotel because work was being done on her house. Complainant further stated that C1 sexually harassed her next on October 18, 2011, by writing “[Complainant’s first name] sucks” on her whiteboard. Complainant also stated that, in August 2011, C1 told her that she could not bend down to put on lotion on her feet because her “joints” or breasts would get in the way, and a few days later, C1 sent her emails with links to websites selling bras and lotion. Complainant stated that, on November 17, 2011, C1 told her that he wanted to see her in a swimsuit, sent her emails with pictures of women in swimsuits, and said, “No baby girl it would look good on you: just keep shaking that ass.” Complainant further stated that, a few days later, C1 came by her office and she asked him why he would write something like that, and C1 responded that her “ass is big” and he wanted to “stick his dick in it.” Complainant stated that she then told C1 that his conduct was disrespectful, and C1 apologized and gave her unwanted gifts over the next several months.

Complainant further stated that, on March 5, 2012, C1 stopped by her office, and Complainant told him to stop giving her gifts, she did not believe in sex outside of marriage, and was not interested in any sort of relationship. Complainant stated that later on March 5, 2012, C1 sent an email to her and a female coworker entitled “Wow! Windex really does stop the streaking.” She stated that the email had a link to a video of a man streaking in public, which she found offensive and disgusting. Complainant stated that she then told C1 to never send her anything like that again, and C1 responded that she had not seen a penis in 20 years.

Complainant stated that, on March 29, 2013,³ C1 sent her an email with a link to a website selling bras and suggested that she try a particular style of bra called “the Helena.” Complainant also stated that, in March 2013, C1 came into her office and she said she had the best father in the world. She stated that C1 then said, “You can’t fuck your father; your father can’t take care of these [indicating the breast area of his chest] or what’s down there [gesturing to his crotch]. Only

³ The record indicates that this email was sent on March 29, 2012, not March 29, 2013.

I can take care of that.” Complainant further stated that, in April 2013, C1 came into her office and told her that he was going to tell coworkers that he and she had a sexual relationship.

Complainant stated that, on November 5, 2013, C1 came into her office, closed the door, and said, “It smells like you washed your panties today. Let me smell them.” Complainant further stated that C1 then came around her desk to get closer to her and said, “Let me smell it, let me smell it.” She stated that she then told C1 to get out of her office, but he just stood there after she repeatedly told him to leave. She stated that she wanted to scream for help, and C1 finally left after tears welled up in her eyes, her voice became high-pitched, and she reached for her hole puncher. Complainant stated that, on November 20, 2013, C1 approached her from behind and raised his voice as she continued to ignore him before he eventually walked away. Complainant further stated that C1 frequently talked about his ailing wife and said that she did not mind if he had sex with other women.

Complainant stated that she reported C1’s behavior to management on November 5, 2013, when C1’s behavior made her feel physically threatened. She stated that, at that time, she told S1 that C1 made “inappropriate gestures and comments that were graphic and sexual” and that she was afraid of what he would do to her. She stated that she followed up her conversation with S1 with an email documenting the conversation.

Complainant further stated that, on November 6, 2013, she told S1 that C1 was still contacting her, although she did not want to have any contact with him. Complainant stated that she spoke with S1 on November 20, 2013 and informed him that she would file a sexual harassment claim, and on the same day told the EEO Counselor about the November 5, 2013, incident and C1’s comments about her father and threat to spread rumors about her. She stated that she also told S1 that C1 approached her in the AD-20 file room, and she did not want any contact with him. Complainant stated that, on November 21, 2013, she emailed S1 to request to telework because she did not feel safe in her work environment, and on November 22, 2013, she called in sick again because she did not feel safe in the office.

Additionally, Complainant stated that she rejected management’s offer to move her to an office within sight of S1 and the Contracting Officer/Team Leader (CO) because they could not see who was coming in and out of the proposed office with the concrete wall between their offices and her proposed office. Complainant stated that C1’s office was only the next aisle over from Complainant’s office, and she would have continued working in the same environment as C1. She stated that it was still possible for C1 and her to pass each other in the corridors, in the break room, at the copier, and in the hallways because they were still on the same floor.

Upon review, we note that Complainant’s accounts of C1’s conduct is largely documented in the record. For example, the record contains a copy of C1’s November 17, 2011, email to Complainant in which he told Complainant to “just keep shaking that A*****” (elipses original) while sending her pictures of women in swimsuits. Report of Investigation (ROI) for Agency No. 2014-010, p. 120. The record also contains a copy of C1’s March 29, 2012, email to Complainant in which he sent a link to Complainant imploring her to try a style of bras.

Additionally, the record contains emails sent by C1 to Complainant regarding a man arrested for stripping and exposing himself in front of families watching a children's movie. We note that several coworkers attest that Complainant told them about C1's conduct at the time of the incidents. Further, the Agency does not dispute the veracity of Complainant's allegations. As such, we find Complainant's allegations about C1 to be credible.

Further, we find that C1's conduct toward Complainant was based on sex, which is buttressed by evidence that C1 engaged in similar sexually inappropriate conduct with many other female employees, but not with male employees. Additionally, we find that C1's conduct was disturbing and sometimes threatening and intimidating. Moreover, C1's conduct caused Complainant to develop PTSD and take extensive leave from the work. Further, we note that C1 engaged in the sexually offensive conduct repeatedly. As such, we find that C1's harassing conduct was both severe enough and, alternatively, pervasive enough, to create a hostile work environment. Therefore, we find that Complainant was subjected to sexual harassment.

Because Complainant established she was subjected to sexual harassment, our next inquiry is whether the Agency is liable for C1's conduct. 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, EEOC Notice 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. Taylor v. Dep't of Air Force, EEOC Request No. 05920194 (July 8, 1992).

The Agency maintains that it did not receive notice of C1's harassing conduct until Complainant explicitly told management she had been sexually harassed on November 20, 2013. However, we note that during the Agency's internal investigation of Complainant's harassment claim, the Management Support Specialist (MSS) reported that throughout his 12 years with the Agency, at least four or five women have asked him to talk to C1 about sexual conversations C1 had with them and wanted his conduct to cease. A Project Manager with a contractor reported that C1 communicated in a "sexual nature," and she heard him do this with Complainant. Additionally, a Program Analyst stated that C1 made a remark about her buttocks in 2009; an HR Specialist stated that she observed C1 make sexual remarks and leer at a female employee in late summer 2013; and a Management Support Specialist reported that C1 made sexual remarks about women's appearance. Further, the record reveals that, on September 5, 2005, the Agency issued C1 a letter of counseling after an employee complained that he had made sexual comments to her and recommended a lewd website featuring women engaged in sexual acts.

As such, we find that the Agency knew or should have known of C1's propensity to harass employees, including Complainant. See Complainant v. Dep't of Justice, EEOC Appeal No. 0120132393 (June 25, 2015) (agency knew of harasser's propensity to harass because of similar reported allegations against him in the past).

Moreover, while the Agency contends that employees did not report most of C1's harassing conduct, we are persuaded that C1's conduct was so widespread, so extreme, so continuous, and involved so many employees that management should have known about it.

We find that the Agency's counseling was insufficient because it did not stop C1's misconduct from recurring. In fact, the Agency's failure to take prompt, effective action to address C1's conduct left Complainant vulnerable to the very type of harassment she endured. Complainant's second-level supervisor (S2) stated that after Complainant alleged that C1 harassed her, S1 met with her to obtain additional information and offered her an office away from C1, but Complainant declined the offer. S2 further stated that the Division Chief discussed the matter with C1 and directed him to have no contact with Complainant. S2 also stated that C1 moved to another office located in a different hallway from Complainant as a preliminary measure until an office on a different floor was located for him. S2 stated that C1 was subsequently moved to the fifth floor in December 2013 and was again instructed not to have any contact with Complainant.

However, we find that these actions were likewise insufficient because they still exposed Complainant to C1. The Agency did not appropriately respond to the harassment until January 2017, when it belatedly reassigned C1 to another facility on days Complainant was in the office. Before the reassignment, Complainant had to endure traumatizing encounters with C1, which likely exacerbated her PTSD. Accordingly, we find that the Agency failed to take immediate and appropriate corrective action to address C1's conduct, and therefore is liable for subjecting Complainant to sexual harassment.

Reasonable Accommodation: Claims 3 and 5

Complainant alleges that she was denied a reasonable accommodation for her disability. To establish that she was denied a reasonable accommodation, Complainant must show that: (1) she is an individual with a disability, as defined by 29 C.F.R. § 1630.2(g); (2) she is a qualified individual with a disability pursuant to 29 C.F.R. § 1630.2(m); and (3) the Agency failed to provide a reasonable accommodation. See Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act (Enforcement Guidance on Reasonable Accommodation), EEOC Notice No. 915.002 (Oct. 17, 2002). Under the Commission's regulations, an agency is required to make reasonable accommodation to the known physical and mental limitations of a qualified individual with a disability unless the agency can show that accommodation would cause an undue hardship. See 29 C.F.R. §§ 1630.2(o), (p).

In this case, the Agency does not dispute that Complainant is a qualified individual with a disability. In a letter from a physician (Dr) dated January 14, 2014, Complainant requested a reasonable accommodation by disclosing that she suffered from Major Depression and PTSD because of workplace sexual harassment, and that she should have no contact with the perpetrator. Therefore, Dr recommended that Complainant be placed on administrative leave or telework until provided with a workplace that guaranteed no contact with the perpetrator.

While the Agency indicates that it ultimately reasonably accommodated Complainant by reassigning C1 to another office on days when Complainant worked in the office, it denied Complainant this reasonable accommodation for a prolonged period of time, until January 2017. The Agency contends that it nonetheless initially accommodated Complainant by approving her for leave under FMLA and telework for two days per week, with Mondays off. However, we note that we have held that forcing an employee to take leave when another accommodation would permit an employee to continue working is not an effective accommodation because the goal of the Rehabilitation Act is to accommodate an employee while working, if possible. See Lloyd E. v. Dep't of Transp. EEOC Appeal No. 0120150325 (Aug. 17, 2017). The Agency contends that allowing Complainant to telework fulltime would have constituted an undue hardship. However, the Agency has provided no evidence to prove that fulltime telework would have imposed an undue hardship beyond its bare assertion that it could not be granted because of “technical monitoring, sustained customer service, and workload.” As such, we find that Complainant was forced to take extensive leave because the Agency failed to provide her with the reasonable accommodation of fulltime telework that would have allowed her to continue working. Further, even if the Agency had shown that providing Complainant with fulltime telework would have constituted an undue hardship, it did not show that allowing Complainant to take administrative leave twice a week until it could reassign C1 to another facility would have been an undue hardship. Therefore, we find that the Agency denied Complainant a reasonable accommodation for her disability.

Additionally, we note that an agency is not liable for compensatory damages under the Rehabilitation Act where it has consulted with a complainant and engaged in good faith efforts to provide a reasonable accommodation but has fallen short of what is legally required. Yost v. U.S. Postal Service, EEOC Appeal No. 01A51457 (June 13, 2006). Conversely, an Agency is liable for compensatory damages where it has not demonstrated a good faith effort to reasonably accommodate complainant. See Jambora v. U.S. Postal Service, EEOC Appeal No. 07A40128 (May 16, 2006); Burchfield v. Dept. of the Treasury, EEOC Appeal Nos. 01970152 & 01971579 (Apr. 6, 2000), requests for reconsideration denied, EEOC Request No. 05A10354 (June 13, 2001), EEOC Request No. 05A00732 (Feb. 2, 2001). In this case, we find that the Agency promptly engaged in the interactive process with Complainant and offered her accommodations, although they did not meet the requirements of the Rehabilitation Act. We find that the Agency's actions reflect good faith efforts to reasonably accommodate Complainant, and therefore, Complainant is not entitled to compensatory damages for her reasonable accommodation claim. However, Complainant is entitled to prove she is entitled to compensatory damages related to her successful sexual harassment claim.

Disparate Treatment: Claims 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 19, and 20

Regarding the remaining claims that we have not addressed above under our reasonable accommodation and sexual harassment analyses, we note that, to prevail in a disparate treatment claim absent direct evidence of discrimination, Complainant must satisfy the evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973).

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. Corp. 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. Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). Once the Agency has met its burden, 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).

In this case, we assume arguendo that Complainant established a prima facie case of discrimination. Additionally, it is undisputed that Complainant is a qualified individual with a disability. Nonetheless, we find that the Agency provided legitimate, nondiscriminatory explanations for its actions. Specifically, for claim 4, S1 stated that when Complainant requested a reasonable accommodation, the Agency's formal reasonable accommodation process was initiated. He stated that Complainant's medical documentation was then sent to the Federal Occupation Health Service (FOH), and interactive meetings were held with Complainant beginning on January 17, 2014. S1 stated that at no time did he attempt to frighten, threaten, intimidate, or victimize Complainant.

Regarding claim 6, S1 stated that he did not penalize Complainant for taking FMLA leave, did not include the FMLA period in her PIP, and did not downgrade her performance evaluation because she was on FMLA leave. S1 further stated that, in an email dated October 3, 2014, he told Complainant that her allegation that he told her that he had concerns about her taking FMLA leave and was doubtful of her diagnosis was untrue.

Regarding claim 7, S1 stated that he did not retaliate against Complainant for filing a sexual harassment claim; instead, he had the matter investigated by an external investigator. Additionally, S1 stated that the matter was reported to C1's supervisor, who directed C1 not to contact Complainant.

With respect to claim 8, S1 stated that Complainant received a "Fully Successful" performance rating for 2013, which is the same rating she received for 2012. S1 further stated that he indicated to Complainant during her annual performance review that he considered Complainant at risk of not meeting the criteria for Fully Successful, but that he was giving her the benefit of the doubt. S1 stated that for the 2014 performance period, he added the same objectives and measures relating to customer service to all plans for members of his Division, including Complainant. S1 stated that he added two objectives to draw Complainant's focus to performance areas that needed improvement. S1 stated that at no time did he add objectives and measures to Complainant's performance plan or admonish her for using leave because of her disability or harassment complaint.

Regarding claim 9, S1 stated that since he became Complainant's supervisor, Complainant has consistently demonstrated a pattern of failing to expeditiously work through her assignments. S1 further stated that Complainant was physically in the office only on Wednesdays and Fridays, and on July 8, 2015, she asked to telework on Friday, July 10, 2015, because she had to be in the office for a meeting the previous day. However, S1 stated that Complainant did not come into the office on July 9, 2015, did not request that day off, and gave him no reason for her absence. S1 stated that he asked Complainant to confirm she worked on July 9, 2015, and to inform him what she planned to work on and accomplish on July 10, 2015. S1 further stated that Complainant provided him with a list of assignments that was insufficiently detailed for him to understand what she would work on and accomplish on July 10, 2015, and Complainant never provided the level of detail he had requested.

Regarding claim 10, S1 stated that he frequently saw Complainant and C2 talking for an extended period, and there was no business reason for them to talk regularly. S1 further stated that because C2 is an hourly contractor, CO spoke to C2 and told her that the Agency paid her to provide services under her contract and not to spend inordinate amounts of time socializing. However, S1 stated that, as far as he knew, C2 was not told to never talk to Complainant.

CO stated that he noticed that Complainant and C2 had long conversations, although Complainant had a lot of work to accomplish. He stated that he then told the Contracting Officer Representative (COR) that it might be a good idea to mention to C2 that she should limit her conversations with Complainant.⁴ COR stated that she told C2 that she was being paid to work, not to have long personal chats, but she did not talk to Complainant about the matter. COR further stated that she told C2 it was alright to talk to briefly to Complainant, but she should not sit around and talk to her.

Regarding claim 11, S1 stated that, on March 19, 2015, he told Complainant that she had met PIP requirements, but advised her that if her level of performance decreased to an unacceptable level within a year from the date of the PIP issuance, she may be demoted or removed from federal service, in accordance with standard Agency requirements. CO stated that he was present at Complainant's March 19, 2015, meeting with Complainant and witnessed S1 review Complainant's performance under the PIP. CO stated that S1 advised Complainant she had met PIP requirements, and the alleged "probation threat" uttered by S1 was merely Agency policy.

Regarding claim 12, S1 stated that he had "continuing, serious issues" with the quality of Complainant's work and her attention to detail, and he often requested changes and corrections to her first drafts. He stated that he received her second drafts, and they often contained many of the same mistakes as the first versions, which took up an inordinate amount of management's time. He stated that Complainant had many customer service and communication deficiencies, including her failure to promptly respond to customer inquiries. S1 stated that Complainant's deficiencies covered the "whole spectrum," from customer service to teamwork to communication to technical performance.

⁴ C2 was not interviewed for the EEO investigation.

S1 further stated that Complainant's PIP performance plan explicitly was linked to her performance plan and elements and told her how to improve her performance while offering her management's assistance. He stated that Complainant and S2 met with Complainant biweekly to help set her priorities and to discuss milestones and due dates. S1 stated that the Spreadsheet was another performance issue for Complainant, and she was the only employee who struggled to maintain and update it regularly. S1 stated that he did not recall refusing to commit her performance evaluation to writing, and his March 19, 2015, memo explicitly stated that her performance was Fully Successful.

Regarding claim 13, S1 stated that he did not tell Complainant he disliked her taking FMLA leave, nor did he penalize her for taking leave under FMLA. He further stated that he never discriminated against Complainant for taking leave under FMLA, and on October 3, 2014, he told Complainant that her claim that he expressed concerns about her taking FMLA leave and doubted her diagnosis was false. S1 stated that he did not downgrade Complainant's performance evaluation because she took FMLA leave, and in January 2014, she received maximum approval of 480 hours of FMLA leave.

With respect to claims 14 and 15, S1 stated that he could not find any such emails after searching for the purported emails. However, he stated that he did not speak to Complainant in a raised voice and was not condescending in his tone toward her. He further stated that he met with Complainant in her office on August 20, 2014, to discuss a work assignment, and in response, Complainant emailed him with concerns about the manner in which he had spoken to her. He stated that Complainant's email summary of the discussion made false allegations about him, including a claim that S1 purportedly made comments about her performance because of taking FMLA leave. S1 stated that he replied to Complainant's email and denied that his comments about her performance were made because of her FMLA leave. Additionally, S1 stated that he attached a counseling memo to his email, which contained a summary of his discussions with Complainant and identified his concerns about her failure to update spreadsheets and to complete mandatory trainings.

S1 further stated that in a September 12, 2014, email, he told Complainant that if her absences continued to place an unreasonable burden on the Agency, the Agency could initiate her proposed removal. He stated that he coordinated with HR to respond to Complainant's notification on September 12, 2014, at 1:01 p.m. that she was ill and would leave the office at 1:00 p.m. that day. He stated that Complainant had exhausted her final 1.5 hours of FMLA entitlement and had a "zero" leave balance. S1 stated that he wanted Complainant to know that her FMLA entitlement had been exhausted, her absence from work negatively impacted the efficiency of Agency operations and was "keenly felt" by the division, and that her if her absences continued to place an unreasonable burden on the agency, her proposed removal could be initiated. He stated that no adverse action was taken against Complainant.

Additionally, in his counseling memo, S1 reported that Complainant was being counseled for repeatedly failing to update the Employee Assignment Tracking Spreadsheet; failing to provide timely responses to customer inquiries; failing to complete mandatory training; and disregarding his emails. The memo warned Complainant that if her performance did not improve, she would be placed on a PIP to improve her performance.

With respect to claim 19, S1 stated that the dates of the appraisal period and the timeframe of the performance plan were consistent with those of other employees. S1 stated that performance periods are based on the calendar year and applied consistently. He stated that he described in detail his expectations for all objectives and elements contained in Complainant's performance plan when he provided it to her. S1 stated that Complainant was rated Fully Successful for the 2016 rating period.

Regarding claim 20, S1 stated that he held biweekly meetings with Complainant when she returned from sick leave on June 1, 2016, but Complainant was the only Contract Specialist whose performance necessitated regularly scheduled meetings to discuss workload status. S1 further stated that he met with other Contract Specialists on an "as-needed basis." CO stated that he and S1 held biweekly meetings with Complainant to provide updates on award statuses, to discuss acquisition strategies for assignments, and to put milestone schedules into place to assist in ensuring Complainant would meet deadlines. He stated that Complainant was the only Contract Specialist who consistently missed deadlines to complete contract actions and who did not communicate effectively about managing her workload.

Upon review of these claims, we find that Complainant did not show that these nondiscriminatory explanations are pretext for unlawful discrimination. In so finding, we note that, without a hearing on Complainant's disparate treatment and harassment claims, we are left with Complainant's and management's versions of events, which are mostly at odds with each other. As such, the evidence of record on these claims is, at best, in equipoise. See Complainant v. Dep't of Health and Human Servs., EEOC Appeal No. 0120122134 (Sep. 24, 2014) citing Lore v. Dep't of Homeland Sec., EEOC Appeal No. 0120113283 (Sep. 13, 2013) and Brand v. Dep't of Agric., EEOC Appeal No. 0120102187 (Aug. 23, 2012). Therefore, regarding these matters, we find that the Agency properly found that Complainant did not prove she was subjected to unlawful discrimination or harassment.

CONCLUSION

Accordingly, based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we find that the Agency erred when it found that Complainant was not denied a reasonable accommodation for her disability or subjected to sexual harassment for which the Agency is liable. Therefore, we REVERSE the Agency's findings regarding these claims and REMAND these matters to the Agency to take remedial action consistent with this decision and the ORDER set forth below. We otherwise AFFIRM the Agency's finding that Complainant did not prove she was subjected to unlawful harassment or disparate treatment regarding her remaining claims.

ORDER

The Agency is ordered to undertake the following remedial relief which, unless otherwise specified, shall be provided within one hundred twenty (120) days of the date on which this decision is issued:

1. The Agency shall provide Complainant with a reasonable accommodation by undertaking at least one of the following actions: 1) allowing Complainant to telework on days C1 is working in her office building; or 2) granting Complainant administrative leave on days C1 works in her office. The parties shall immediately engage in the interactive process to determine which reasonable accommodation is best for Complainant to perform the essential functions of her position.
2. The Agency shall ensure that C1 does not work in or come to Complainant's work facility at the same time she is assigned to the building. Additionally, the Agency must ensure that C1 does not contact Complainant at work, nor work with her.
3. The Agency will conduct and complete a supplemental investigation on the issue of Complainant's entitlement to compensatory damage associated with her sexual harassment. The Agency will afford Complainant an opportunity to establish a causal relationship between the sexual harassment and pecuniary or non-pecuniary losses, if any. Complainant will cooperate in the Agency's efforts to compute the amount of compensatory damages and will provide all relevant information requested by the Agency. The Agency will issue a final decision on the issue of compensatory damages. 29 C.F.R. § 1614.110. The final decision shall contain appeal rights to the Commission. The Agency shall submit a copy of the final decision to the Compliance Officer at the address set forth herein.
4. The Agency shall provide a minimum of eight (8) hours in-person EEO training to all supervisors, management, and personnel charged with responding to harassment allegations and requests for reasonable accommodations at Complainant's work facility in Washington, D.C. The training shall emphasize the Agency's responsibility to provide employees with a reasonable accommodation for disabilities, its general obligations under the Rehabilitation Act, and its duty to promptly and appropriately respond to harassment. The training shall also emphasize management's obligations to prevent retaliation under EEO regulations.
5. The Agency will consider disciplining Complainant's immediate and second-level supervisors (S1 and S2) regarding their failure to take appropriate action in response to C1's sexual harassment. The Agency shall report its decision. 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 reasons(s) for its decision not to impose discipline. If the responsible management officials are no longer in the Agency's employ, the Agency shall furnish evidence of their departure date(s).

6. The Agency shall restore any leave (including reimbursement for leave without pay) taken by Complainant because of its failure to provide her with a reasonable accommodation, as well as its failure to promptly and appropriately respond to her sexual harassment, until C1 was reassigned to another facility on days she worked at Headquarters.
7. The Agency shall pay any proven attorney's fees and costs Complainant incurred, if any, in accordance with the Order below.
8. The Agency shall post a notice of this finding of discrimination in accordance with the Order below.

The agency is further directed to submit a report of compliance, as provided in the statement entitled "Implementation of the Commission's Decision." The report shall include supporting documentation verifying that the corrective action has been implemented.

POSTING ORDER (G0617)

The Agency is ordered to post at its Washington, D.C. facilities 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 (H1016)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), 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 the date this decision was issued. 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 CFR § 1614.503(f) for enforcement by that agency.

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0617)

The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which 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 to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. A party shall have **twenty (20) calendar days** of receipt of another party's timely request for reconsideration in 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). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission. Complainant's request may be submitted via regular mail to P.O. Box 77960, Washington, DC 20013, or by certified mail to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period.

See 29 C.F.R. § 1614.604. The agency's request must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your 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)

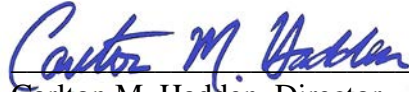
This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from 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 17, 2019

Date