



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

[REDACTED]  
Leora R.,<sup>1</sup>  
Complainant,

v.

Alex M. Azar II,  
Secretary,  
Department of Health and Human Services  
(Indian Health Service),  
Agency.

Appeal No. 0120180736

Agency No. HHS-HIS-0312-2016

**DECISION**

On December 19, 2017, Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's November 7, 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. For the following reasons, the Commission **AFFIRMS IN PART** and **REVERSES IN PART** the Agency's final decision.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant worked as a Clinical Nurse, Emergency Room (ER), GS-09, at the Kayenta Health Center located in Kayenta Arizona. On June 21, 2016, Complainant filed an EEO complaint alleging that the Agency subjected her to discrimination and a hostile work environment on the bases of race (African-American), color (Black), and in reprisal for prior protected EEO activity when:

1. On February 29, 2016, Complainant inquired about a deduction on her paycheck to her second-line supervisor (S2) (Native American, brown) and was incorrectly told she did not have any leave to use so Family Medical Leave Act (FMLA) and Leave without Pay (LWOP) was posted for both days;

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<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.

2. On January 31, 2016, Complainant was charged 11 hours and 30 minutes of LWOP;
3. On January 7, 2016, Complainant was charged seven hours of LWOP;
4. On December 3, 2015, Complainant was (a) told she is not being discriminated against and to be quiet about the EEO talk with her first-line supervisor (S1) (Native American, brown); and (b) S1 reported to Complainant a false statement that a Health Technician (HT1) (Native American, brown) made about her, regarding a conversation she had with HT1, which HT1 altered the context and the actual statement;
5. On December 1, 2015, Complainant asked, “Why is it when I work with a group in the ER it seems that I am the only one taking [patients]”
6. On November 25, 2015, Complainant informed S1 that another registered nurse [(RTN (Caucasian))] stated, “Since day one, [a coworker (ME) (Native American)] has carried on with negative gossip about [Complainant]. I believe if she is gossiping about [Complainant], she is likely gossiping about me. It seems as if she gets joy from bullying and harassing new employees in front of others. [Complainant] and I work very well together and as a team we support each other, but we don't get the same feeling working with [ME]”;
7. On November 7, 2015, Complainant was verbally degraded by a Clinical Registered Nurse (CRN) (Native American, brown) and other staff members;
8. On October 7, 2015, Complainant was denied overtime;
9. On August 5, 2015, Complainant was charged Absent Without Leave (AWOL); and
10. On June 21, 2015, Complainant was reprimanded by a Registered Nurse (RN1), for socializing with three other African-American co-workers in the lab.

The Agency initially dismissed Claim 1 for failure to state a claim and Claims 2 – 10 for untimely EEO contact. However, the Commission reversed the Agency’s dismissal finding that Claims 1-10 stated a cognizable claim of harassment since at least one incident (Claim 1) was timely raised.<sup>2</sup> See Leora R. v. Dep’t of Health and Human Srvs., EEOC Appeal No. 0120162702 (Oct. 27, 2016).

After the EEO investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an EEOC Administrative Judge. In accordance with Complainant’s request, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b).

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<sup>2</sup> The record reveals that EEO Counselor contact occurred on March 21, 2016.

The decision concluded that Complainant failed to prove that the Agency subjected her to discrimination, reprisal, or a hostile work environment as alleged. The instant appeal followed.

### FACTUAL BACKGROUND

#### *Claims 1-3 – January 7, 29 and 31, 2016 Leave Issues*

Complainant claimed that she had not requested Family Medical Leave Act (FMLA) leave, but rather annual leave and/or sick leave for the dates in question. Complainant also asserted that a Civilian Pay Technician (HR) who worked in the Human Resources payroll department, said there was no FMLA entered for her. Complainant stated that she was on leave from January 7 to February 5, 2016. On January 31, 2016, she noticed she was incorrectly charged LWOP.

S1 asserted that Complainant was constantly changing her leave requests. S1 recalled that Complainant's last scheduled work day was January 7, 2016, and that Complainant was taking the rest of the month off per doctor's orders for mental health leave. S1 also stated that it was difficult to calculate Complainant's leave with the constant changes in her schedule, and on Complainant's last days before leaving the facility, the timekeeper was still trying to figure out which type of leave was for which day Complainant was out. S1 stated that at the time Complainant's time-sheet was finalized, it showed a negative balance. S1 affirmed that she assumed Complainant had been asking for family leave without pay and donated hours and approved Complainant's request for the donated leave when it was determined she had exhausted her leave. S1 also recalled there was a mandatory webinar, which Complainant attended on the morning of January 7, 2016, but Complainant was granted leave after that. Complainant was to transfer to Oklahoma on February 7, 2016.

S2 recalled that on February 29, 2016, Complainant called in stating she was not coming in, and then did not come in for three days. S2 further stated that Complainant was taking a lot of leave and traveling home to see a sick family member. S2 asserted that when employees failed to submit leave in a timely manner, it caused problems. S2 further noted that when staff were having issues with their leave or had depleted leave and began accruing a negative balance, S2 would have to explain their balance in the Administrative Time and Leave Record (ATLR). S2 stated that Complainant never interacted with her and did not allege a hostile work environment.

S2 also stated that Complainant was scheduled to work on January 7, 2016, before taking leave. S2 noted that Complainant had exhausted her leave and it was hard for the timekeeper to track Complainant's leave because of the constant changing of Complainant's schedule. S2 noted that S1 may have reported Complainant's leave to S2 to avoid disarray and a last-minute "scramble" to find a replacement. S2 also asserted that Complainant did not come to her to voice any concern about harassment.

HR stated that she reviewed Complainant's records prior to her transfer to Oklahoma. HR further explained that for three or four weeks prior to Complainant's transfer, she had not been at work and there were several emails back and forth to get Complainant to submit proper documents and to account for her time and attendance because at the time Complainant left, she had a negative leave balance. HR noted that Complainant's last time-card went through, but it was incorrect. To correct the record, HR asked for the records from the timekeeper. HR explained that by the time Complainant got her paystub, Complainant saw that she was charged LWOP, but HR thought it was FMLA-LWOP. HR also stated that Complainant was aware of HR's response and had contacted HR via email. HR asserted that she explained to Complainant that she had insufficient leave, and the information that she gave to the new service unit in Oklahoma was from Complainant's timecards in the system. HR further explained that if employees did not have enough leave to cover time off, they were required to take LWOP. HR recalled that Complainant responded via email that she did not want to deal with the Kayenta service unit.

*Claim 4 –December 3, 2015 Discussion with S1*

The record shows that Complainant had a conversation with S1 on December 3, 2015, regarding allegations of race discrimination. During that conversation (which Complainant recorded), Complainant asked S1 to investigate her allegations of discrimination based on Complainant being the only African-American and Black person in the Kayenta Service Unit. The record establishes that S1 made the approximate statement, "You sent me an email saying you were being discriminated against with regard to [C1's] leave. That was none of your business, and this had nothing to do with race okay?" S1 also stated, "The other staff also see it as you discriminating against them because you are putting yourself differently ... the other staff are upset that you see this as a discrimination issue. I've worked with lots of people in the past, for many years, with many races, and never felt I've discriminated against anybody." S1 also told Complainant, "I don't think we're discriminating against you," and, "You need to calm down on that." On this same day, Complainant emailed the Regional EEO Manager (REM) and wrote, "I decided not to file. I have been threatened, reminded I was on probation, and told that they did not see any discrimination against me. I was told this today during a conference and that there would be an EEO filed against me (I am sure most info will be made up) if I pursue this so I'll just plan to leave and work elsewhere."<sup>3</sup>

On December 4, 2015, Complainant emailed REM, "I am just really fearful that there will be retaliation against me. I don't want to stir the pot, there was a call made to the police today to the facility, I am already here alone. I have to protect myself." On January 7, 2016, Complainant emailed REM stating, "I am really concerned about my wellbeing here at Kayenta.

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<sup>3</sup> Complainant asserted that she had a conversation with the Health Technician (HT) about a Madea movie, that featured Tyler Perry, an African-American actor and director. Complainant stated she had asked HT "Why would you ask me that? Because I'm the only Black person here?" Complainant asserted that S1 told her that HT was offended by the conversation and was considering filing an EEO complaint.

I am fearful of retaliation if I talk too much or talk to the wrong people but if I don't say something I may be at jeopardy here as well. I am not sure if I should speak to someone outside of Kayenta Service Unit because every move I make is being monitored and discussed with individuals who determine whether, or not I keep my job. I need to know what are my options?"

S1 maintained that it was not her policy to tell staff alleging discrimination that they are not being discriminated against and acknowledged her choice of language during the meeting was an error on her part. During this meeting, S1 told Complainant that if there were ever instances where she felt discriminated against, to report them back to her and she would do what was necessary to rectify the issue. S1 further stated that she has not been a supervisor long enough to know all the rules, and her supervisory skills may not be the best because she was not really sent to training for supervising, and there was no one to provide guidance. S1 also states that she is learning from her errors and hopes to not make the same mistake twice.

S2 stated that HT1 was an excellent nurse who told her (S2) that she did not trust Complainant and objected to Complainant always making statements about race. S2 explained that HT1 was bothered when Complainant made her question about the Madea movie to be about Complainant's race. According to HT1, Complainant stated, "It's because I'm Black, right?" and HT1 responded "No, it's not." S2 noted that type of speech was not tolerated. S2 also recalled that Complainant immediately backed off and said, "I'm kidding," but HT1 was very bothered and may have filed a complaint.

*Claim 5 – December 1, 2015 - Other Nurses Not Working (Co-Worker Harassment)*

Complainant stated that she sent an email to S1 on December 1, 2015 explaining when she worked with this group in the ER, she was the only one taking patients. Complainant recalled that there were usually four nurses and Complainant would have two or three beds. Complainant asserted she was taking all the patients, but the nurses that were Native American did not take any patients. Complainant contended that they were braiding each other's hair while Complainant was taking patients. Complainant presented no corroborating evidence in support of this claim, however.

S1 stated she did not recall being informed of any incident. S1 also noted that her whole email batch was deleted during the new computer replacement and office move, so she had very limited emails in her files. However, S1 recalled they usually had only three nurses on duty since they did not have a mid-shift nurse. S1 also explained that there were three nurses for the day shift and three nurses for nights.

*Claim 6 - Gossip*

Complainant stated that she had informed S1 that in June and August 2015, that ME was speaking negatively about her saying, "Who does she think she is working here?"

Complainant also asserted that in July 2015, RTN informed S1 by email that ME was being mean to her. Complainant learned of this when RTN forwarded that email to Complainant on or about November 25, 2015. Complainant claimed that before their conversation on December 3, 2015, S1 gave Complainant no more than a cursory response to her complaints. Neither Complainant nor RTN attributed the comments and gossip to Complainant's race; however, Complainant claimed that she was treated differently because she was the only African-American employee.

S1 stated that Complainant did come to her to tell her that ME was not treating her well. S1 further asserted that she issued ME a verbal warning telling her to stop such behavior and that any continuance of it would be more seriously dealt with. S2 stated that she had no knowledge of this claim.

The Lead Clinical Nurse (LCN) (Native American, brown) affirmed that ME had a bad attitude and poor communication skills. RTN also noted that she sent an email to S1 on May 28, 2015, describing a hostile work environment. RTN further stated that the Native American employees tried to make everything as difficult as possible and did not welcome anyone outside their race working there. RTN added that her eight-week assignment at the Kayenta Service Unit as a traveling nurse was awful and she felt discriminated even though she was only there for such a short duration. RTN affirmed that she experienced constant bullying by the Navajo employees, who did not like her because she is White.<sup>4</sup> RTN also asserted that the Native American employees were as mean to her as they were to Complainant. RTN recalled that Complainant would be conversing with others, trying to get help on something, and the Native American staff would accuse her of not doing her job.

*Claim 7 – Negative and Rude Tone on November 7, 2015*

Complainant asserted that CRN and other staff members spoke rudely to her in front of patients. Complainant noted that the only witnesses to these incidents were patients. However, Complainant stated that she sent an email to S1 notifying her that CRN was very rude to her, and there was a Health Technician (HT2) who was very nasty to her, but nothing was done about it. Complainant stated they would do things like yell at her or snatch something from her or tell her “No, you do it yourself.” Complainant did not indicate that she informed S1 that she believed that CRN and HT2's actions were discriminatory. Complainant claimed that they were all Navajo and she was the only person spoken to rudely.

S1 denied any knowledge of this claim. S2 stated that anytime the staff has issues within the department it is reported to the supervisor, but he had no knowledge of this claim.

LCN recalled that CRN spoke to many others in a negative tone, with a stern voice, and to the point. CRN stated that she did not think there was any discrimination and they all (i.e., the staff) laughed a lot. CRN also noted that “after hours we all socialized and [Complainant] made some racial remarks and we just blew it off. I'm kinda dumbfounded with regard to this claim.”

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<sup>4</sup> RTN did not provide any specific statements or incidents that would support her belief.

*Claim 8 – Overtime on October 7, 2015*

Complainant claimed that she had been working overtime since she started her employment. However, on October 7, 2015, Complainant alleged that the overtime signup sheet noted that the overtime signup sheet had a note by her name that stated, “Can work if nobody else wants the day.” Complainant asserted that she was the only individual with the notation next to her name which she claimed intentionally publicized to the staff that she was the only one denied overtime that day. No witnesses could verify this claim and there is no evidence related to the overtime sheet in the record.

S1 stated she could not respond to this claim because Complainant was mainly a night-time nurse. S1 further affirmed that they worked on a matrix and Complainant was in a separate matrix than other nurses who worked dayshifts. S1 asserted that she does not recall anything specific regarding that date. In addition, S1 recalled that Complainant received a lot of travel compensatory time because she was approved for a lot of training during the time she worked at the Kayenta Service Unit. S2 asserted that she had no knowledge of this claim.

*Claim 9 – AWOL on August 5, 2015*

Complainant asserted that on August 5, 2015, she needed to take her car for repairs and the closest repair shop was located six hours away in Albuquerque, New Mexico. Complainant explained that she called S1 early in the day explaining that she would not make it to work that evening because she was at the repair shop waiting on a part. Complainant recalled that S1 approved her leave via text message and said she would cover Complainant’s shift. Complainant further claimed that she assumed S1 referred to her entire shift, but S1 later said she (S1) thought it was for only two hours. Complainant claimed that at 11:00 p.m., S1 sent her a text asking where she was and noted Complainant would be charged Absent without Leave (AWOL). Complainant stated that she reminded S1 that she said she would cover for Complainant, but now S1 was not doing so. Complainant stated that she emailed the Acting Chief Executive Officer to explain and was told to speak with an EEO counselor.

Complainant also alleged that in November 2015, she witnessed S1 treat a Native American employee (C1) more favorably when she approved C1’s request on short notice for S1 to cover her shift because her car’s axle needed repair. Complainant contended that despite C1 failing to follow policy by calling in at least two hours before her shift was scheduled to start, S1 covered the shift and treated C1 more favorable than Complainant under similar conditions.

S1 asserted that on short notice, Complainant had called in to say that she would not be able to make it to work. S1 also indicated that it was difficult communicating with Complainant by cell phone because there was poor reception. S1 also asserted that Complainant should have been able to make it to work (albeit a little late). S1 recalled that she reminded Complainant regarding the leave denial that she was still on probation because Complainant had used a great deal of her leave and had also been off quite often for training.

S1 also recalled that Complainant was in S1's office on a later occasion when C1 called in requesting leave because the axle on her vehicle broke. S1 stated that Complainant made the comment right away that S1 was discriminating by granting leave to that staff member because she was Native American. S1 stressed that C1's leave request was not the same as Complainant's situation and noted that C1 called in with more than two hours of notice. In addition, S1 denied that her decision to charge Complainant with AWOL was based on race.

*Claim 10 – Complainant Told to Stay in ER on June 21, 2015*

Complainant stated that when she first arrived at the Kayenta Service Unit, there were three additional Black employees in the facility with her who she would socialize with during down times or breaks. Complainant said when there were patients she would be in the ER. Complainant recalled that on June 21, 2015, a Registered Nurse (RN1) told her that she was not allowed to leave the ER and go to other areas, then named the three Black employees' names. Complainant affirmed that she responded, "Those are the Black people and you're talking to a fourth Black person." Complainant stated RN1 responded, "I didn't say anything about color," then walked off and said, "I don't have time to argue with you about it." Complainant stated this conversation occurred in front of CRN. Complainant noted that she emailed S1 and S2 stating if she could not socialize with the other Black people specifically, she could resign and move on.

S1 affirmed that RN1 was a contract nurse and she was having an issue with Complainant leaving the Department without notifying her colleagues. S1 further stated that RN1 would not reprimand Complainant because she did not have that authority. However, S1 recalled that the Health Technicians agreed that it was difficult finding Complainant on several occasions. S1 noted that there was an emergency incident in triage and Complainant could not be found because she was socializing in the lab. S1 explained that Complainant was told that she needed to let the staff know of her whereabouts, because staff should not be looking for her in the event of an emergency. S1 asserted that this request had nothing to do with Complainant's race or the race of her co-workers.

S2 stated that when on duty, an employee was not supposed to leave the unit, especially at night because there was only a skeleton crew at that time, and an emergency case could enter at any moment. S2 also recalled that Complainant was found in the lab several times during her shift and told to tell her staff where she could be found when leaving the unit. S2 stated that he did not issue a reprimand, but a simple reminder to Complainant to exercise common courtesy to let colleagues know of her whereabouts.

### 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 Chapter 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”).

### *Hostile Work Environment*

To establish a claim of harassment a complainant must show that: (1) he or she belongs to a statutorily protected class; (2) he or she was subjected to harassment in the form of unwelcome verbal or physical conduct involving the protected class; (3) the harassment complained of was based on their statutorily protected class; (4) the harassment affected a term or condition of employment and/or had the purpose or effect of unreasonably interfering with the work environment and/or creating an intimidating, hostile, or offensive work environment; and (5) there is a basis for imputing liability to the employer. See Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982). Further, the incidents must have been “sufficiently severe or pervasive to alter the conditions of [complainant's] employment and create an abusive working environment.” Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993). The harasser's conduct should be evaluated from the objective viewpoint of a reasonable person in the victim's circumstances. EEOC Enforcement Guidance on Harris v. Forklift Systems Inc., EEOC Notice No. 915.002 at 6 (Mar. 8, 1994).

Complainant may establish a prima facie case of reprisal by showing that: (1) she engaged in protected activity; (2) the Agency was aware of the protected activity; (3) subsequently, she was subjected to adverse treatment by the Agency; and (4) a nexus exists between the protected activity and the adverse treatment. Whitmire v. Dep't of the Air Force, EEOC Appeal No. 01A00340 (Sept. 25, 2000). A nexus may be shown by evidence that the adverse treatment followed the protected activity within such a time and in such manner that a retaliatory motive may be inferred. See Clay v. Dep't of the Treasury, EEOC Appeal No. 01A35231 (Jan. 25, 2005); Dominica H. v. Dep't of Health and Human Servs., EEOC No. 0120150971 (Nov. 22, 2017).

The Commission has a policy of considering reprisal claims with a broad view of coverage. See Carroll v. Dep't of the Army, EEOC Request No. 05970939 (Apr. 4, 2000). Under Commission policy, adverse actions need not qualify as “ultimate employment actions” or materially affect the terms and conditions of employment to constitute retaliation. EEOC Enforcement Guidance on Retaliation and Related Issues, No. 915.004 § II.B(2) (Aug. 25, 2016). Burlington N. & Santa Fe Ry. Co v. White, 548 U.S. 53 (2006). The statutory retaliation clauses prohibit any adverse treatment that is based upon a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity. Lindsey v. U.S. Postal Serv., EEOC Request No. 05980410 (Nov. 4, 1999).

The preponderance of the evidence does not support a claim of discriminatory harassment based upon race or color. The record is devoid of evidence of discriminatory animus based on race or color on the part of any management official or coworker. Furthermore, the record does not support that the conduct at issue was sufficiently severe or pervasive.

However, the record supports a finding that S1 subjected Complainant to retaliatory harassment. It is undisputed that on December 3, 2015, Complainant came to S1 to raise a complaint of racial discrimination which is protected EEO opposition activity. The anti-retaliation provisions make it unlawful to discriminate against an individual because she has opposed any practice made unlawful under the employment discrimination statutes. Enforcement Guidance on Retaliation and Related Issues, No. 915.004 (Aug. 25, 2016), II(A)(2) (Retaliation Guidance). Protected “opposition” activity broadly includes the many ways in which an individual may communicate explicitly or implicitly opposition to perceived employment discrimination. *Id.* An example of opposition includes complaining to anyone about alleged discrimination against oneself or others. *Id.* at II (A)(2)(e).

In response to Complainant’s protected opposition activity, S1 made several statements including: “You sent me an email saying you were being discriminated against with regard to [C1’s] leave.<sup>5</sup> That was none of your business, and this had nothing to do with race okay?” The undisputed record also shows that in this same conversation, S1 reminded Complainant that she was still on probation. S1 also told Complainant: “I don’t think we’re discriminating against you,” and, “You need to calm down on that.” S1 also mentioned that Complainant’s co-workers may be filing an EEO complaint against Complainant. It is also undisputed that S1 discouraged Complainant from making “jokes” or comments on the floor to other employees accusing them of having an issue with her race. These statements resulted in an email by Complainant to the Regional EEO Manager (REM), the same day, stating Complainant felt threatened, and questioned whether she should file the discrimination complaint. Complainant also told REM that she wanted to transfer to a different facility, and that she was concerned for her wellbeing.

S1 stated that it was not her policy to tell staff alleging discrimination that they are not being discriminated against and admitted that her choice of language during the December 3, 2015 meeting was an error on her part. S1 asserted that she told Complainant that if there were ever instances where she felt discriminated against, to report them back to her and she would do what was necessary to rectify the issue. However, it is undisputed that Complainant came to her on December 3, 2015 with complaints of discrimination and S1 did nothing to investigate Complainant’s complaint. S1 also stated that she has not been a supervisor long enough to know all the rules, and her supervisory skills may not be the best because she was not really sent to training for supervising, and there was no one to provide guidance. S1 noted that she was learning from her errors and hoped to not make the same mistake twice.

We agree with the Agency’s final decision noting that the record shows Complainant felt threatened when S1 reminded Complainant of her probationary status, told her to “calm down on that,” with respect to her complaints of race discrimination, and denied that she and most everyone on her staff was engaged in discrimination against Complainant.

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<sup>5</sup> Complainant raised the issue of discrimination as alleged in Claim 9, pertaining to C1 being treated more favorably with respect to leave due to car trouble.

However, we disagree with the Agency's conclusion that Complainant has not met her burden to show, by a preponderance of the evidence, that she was subjected to retaliatory harassment because she failed to establish that the actions of S1 during the single meeting on December 3, 2015 "were severe and pervasive enough to alter Complainant's work performance." The threshold for establishing retaliatory harassment is different than for discriminatory hostile work environment. Retaliatory harassing conduct can be challenged under the Burlington Northern standard even if it is not severe or pervasive enough to alter the terms and conditions of employment. If the conduct would be sufficiently material to deter protected activity in the given context, even if it were insufficiently severe or pervasive to create a hostile work environment, there would be actionable retaliation." EEOC Enforcement Guidance on Retaliation and Related Issues, No. 915.004, Sect. II.B, e.g. 17; see also Burlington N. & Santa Fe Ry. Co v. White, 548 U.S. 53 (2006); see e.g., Martinelli v. Penn Millers Ins. Co., 269 F. App'x 226, 230 (3d Cir. 2008) (ruling that after Burlington Northern, an employee claiming "retaliation by workplace harassment" is "no longer required to show that the harassment was severe or pervasive").

The evidence clearly establishes that S1's conduct toward Complainant on December 3, 2015 was sufficiently material to deter protected activity in the given context (i.e., a new employee on probationary status, reminded of her employment status, told to essentially stop raising claims of race discrimination because her claims lack merit and told that her co-workers may file a complaint against her because they find her claims of race discrimination offensive). The record also shows that S1's conduct had the effect of deterring Complainant from pursuing an EEO complaint at that time.

While we find evidence that Claim 4 is sufficient to establish a claim of retaliatory harassment; we find, however, that the evidence in the record in support of the incidents in Claims 1-3 and 5-10 do not add support to Complainant's claim of retaliatory harassment. Specifically, with respect to Claims 1-3, we find insufficient evidence in the record to establish that the responsible management officials were motivated by Complainant's protected classes when it issued Complainant LWOP. With respect to Claims 5, 6 and 7, while the record shows that at least two of Complainant's co-workers treated her and others with disrespect and engaged in some level of bullying, the record does not establish that such conduct was motivated by retaliatory or discriminatory animus.

With respect to Claim 8, while S1 and S2 have little knowledge of this claim, Complainant failed to present evidence to establish that she was in fact denied overtime. Even assuming that Complainant was denied overtime, the record is devoid of evidence to establish that the responsible management official was motivated by unlawful discriminatory motives. With respect to Claim 9, the record establishes that Complainant and C1 are not similarly situated comparators. The record shows that Complainant had taken a substantial amount of leave prior to the day she called in about her car repair issues. The undisputed record shows that the cell connection was poor leaving communication regarding shift coverage between Complainant and S1 solely through means of texting. S1 believed that Complainant would only need two hours coverage and Complainant believed that S1 would cover her entire shift.

Since Complainant's shift was due to start at 11:00 p.m. that evening, S1 reasonably believed Complainant would be able to make it to work two hours late. The record is devoid of evidence to show that S1's belief was unreasonable or fabricated. We also find the record devoid of evidence to establish discriminatory or retaliatory animus on the part of S1 in issuing Complainant AWOL for failing to make it to work.

With respect to Claim 10, we find that Complainant failed to establish discriminatory motives on the part of management for asking Complainant not to leave the unit. While Complainant took it as racially motivated (rather than retaliatory), management explained that on several occasions Complainant could not be found during an emergency triage because she was socializing in the lab. S1 explained that Complainant was told that she needed to let the staff know of her whereabouts, because staff should not be looking for her in the event of an emergency. Complainant did not refute this assertion.

### CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we REVERSE IN PART the Agency's decision with regard to retaliatory harassment as evidenced in Claim 4 and AFFIRM IN PART as to all other claims. We REMAND the matter for further processing 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. 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 with appeal rights addressing the issues of compensatory damages no later than thirty (30) days after the completion of the investigation.
2. Within 90 days of the date this decision is issued, the Agency shall provide at least 16 hours of in-person or interactive EEO training to S1 regarding the right of employees to be free from harassment and retaliation for engaging in activities protected by Title VII of the Civil Rights Act of 1964.
3. Within 60 days of the date this decision is issued the Agency shall consider taking appropriate disciplinary action against S1. 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.

4. If S1 has left the Agency's employ, the Agency shall furnish documentation of her departure date. The Agency shall immediately post a notice 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 evidence that the corrective action has been implemented.

#### POSTING ORDER (G0617)

The Agency is ordered to post at Department of the Health and Human Services, Indian Health Service, Kayenta Health Center in Kayenta, Arizona facility copies of the attached notice. Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted **both in hard copy and electronic format** by the Agency within 30 calendar days of the date this decision was issued, and shall remain posted for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The Agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material. The original signed notice is to be submitted to the Compliance Officer as directed in the paragraph entitled "Implementation of the Commission's Decision," within 10 calendar days of the expiration of the posting period. The report must be in digital format and must be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

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

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

If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408.

A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See 29 C.F.R. § 1614.409.

Failure by an agency to either file a compliance report or implement any of the orders set forth in this decision, without good cause shown, may result in the referral of this matter to the Office of Special Counsel pursuant to 29 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

August 30, 2019

Date