



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

[REDACTED]
Terrie M.,¹
Complainant,

v.

Dr. Mark T. Esper,
Acting Secretary,
Department of Defense
(Defense Commissary Agency),
Agency.

Appeal No. 0120181358

Agency No. DECA000382017

DECISION

On March 10, 2016, 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 February 8, 2018, final decision concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Store Associate, 1104, GS-04, at the Agency's Bridgeport Commissary facility in Coleville, California.

On January 31, 2017, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the basis of sex (female) when, between May 17 and October 18, 2016, she was subjected to sexual harassment by the Store Manager.

The Agency accepted her complaint and conducted an investigation, which revealed the following pertinent facts:

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.

Complainant's first-line supervisor (male) (Supervisor) was a Supervisor Sales Associate and her second-line supervisor (male) was the Store Manager (Store Manager). Complainant alleged that Store Manager subjected her to non-sexual and sexual harassment, citing numerous instances from May to October 2016.

Complainant alleged that, since May 2016, work discussions with Store Manager would veer off into his personal life and that he continuously talked about his sex life. She alleged that he had a pattern of making sexually suggestive comments and discussed his affairs in the workplace. She alleged that, on June 11, 2016, when she was putting eye drops in her eyes, Store Manager said, "Let me do that for you. I am real good at putting things in." Complainant also alleged that, on July 14, 2016, Store Manager was discussing the women he had affairs with, including his "high school sweetheart" whom said he got pregnant three times, and his ability to get sex whenever he wanted, stating, "What Dave wants, Dave gets."

Co-Worker1 attested that Store Manager talked about his personal life in the store and recalled his saying, "What Dave wants, Dave gets." Supervisor attested that, on July 14, 2016, Complainant and Co-Worker1 were discussing their boyfriends or husbands and Store Manager walked up to them, but he does not remember if Store Manager discussed an affair. Another Store Associate (Co-Worker2) stated that she has heard Store Manager tell stories about when he was younger and in the Army having to do with women and his wife. Store Manager attested that they were all discussing their past relationships and admitted making comments about his high school sweetheart, but he denied saying "What Dave wants, Dave gets."

Further with respect to statements or discussions in the workplace, Complainant alleged that Store Manager said he would not clean the women's restroom because "women are dirty and bleed all over the place and are smelly."

Complainant also alleged that, on August 13, 2016, Store Manager accused her of yelling at him and stated, "What crawled up your ass?" She alleged that after this incident, he threatened to hit her with a cardboard roll and she told him to leave her alone.

Complainant alleged that, on August 14, 2016, when she told Store Manager she was not feeling well and might go home, he stated that she might be pregnant and told her about his wife stating that she (the wife) needed a pregnancy test and telling him, "Well, if you hadn't raped me, I wouldn't be asking for the test."

Complainant also alleged that, on August 20, 2016, Store Manager came to her and said, "Why don't you try smiling, Darling." She alleged that on August 30, 2016, she was at the register and he told her to smile. In response, she told him that if she wanted to smile, she would. She alleged that he told her, "I can make you smile." Supervisor attested that Store Manager often tells people, including customers, to smile, if they seem down. Store Manager attested that he tries to encourage all of his employees to smile when they are at the register but he denies calling her, "Darling."

In addition to these verbal interactions, Complainant also alleged that Store Manager physically touched her in a sexually suggestive or otherwise inappropriate way on multiple occasions. Complainant alleged that, on May 17, 2016, Store Manager hit her twice with a yardstick. She alleged that, while discussing an order, Store Manager hit her with the yardstick and stated, "Oh, now your boyfriend is going to wonder how you got that bruise." Later that day, when Store Manager was instructing her on how to order, Store Manager said, "Every time you miss something, I am going to hit you." Complainant alleged that she missed ordering some lunchmeat and he hit her again with the yardstick.

While no employees saw Store Manager hit Complainant with the yardstick, Co-Worker1 attested that Complainant told her what Store Manager did with the yardstick. She also attested that, a couple weeks later, she saw Store Manager with a yardstick and, when she stopped him, he told her that he was going to "straighten [Complainant] out." Co-Worker1 warned him not to hit Complainant and he laughed and said, "I'm going to show her how this is done." Supervisor attested that, while he saw Store Manager carrying the yardstick in May 2016, he thought it was to line up product on the shelves. Store Manager denied ever hitting Complainant with a yardstick.

Co-Worker2 also stated that Complainant told her about the incident with the yardstick. She also stated that Complainant told her that Store Manager put his hands on Complainant's lap during a meeting regarding her performance.

Complainant alleged that, on August 8, 2016, Store Manager called her into the office to give her an evaluation review. She alleged that she sat in a rolling chair a distance away from him and he pulled her chair next to his desk, and, after the review, he put his hand on the inside of her thigh and said, "See, it wasn't that bad." Complainant alleged that Store Manager had touched her in other areas before but never like this and she thought because she had not said anything about the previous incidents he was escalating his behavior. Co-Worker1 attested that, on August 15, 2016, Complainant told her about Store Manager placing his hand on her thigh during the performance evaluation discussion and she told Complainant to tell someone. Store Manager acknowledged calling Complainant into his office for the performance evaluation, but stated he never pulled her to his desk or placed his hand on her leg.

Complainant also alleged that, on August 16, 2016, while she was at the register, Store Manager tousled her hair and poked her in the ribs. When she told him to stop, he kept poking her and said, "Oh, you are ticklish?" She stated that, on August 20, 2016, Store Manager came behind her and put his hand on her back, and, on October 18, 2016, Store Manager placed his hand on her shoulder when telling her not to leave the pallet in the freezer.

Co-Worker2 attested that, between July and October 2016, she had seen Store Manager put his hands on Complainant's shoulders two or three times and said she noticed Complainant would get irritated, uncomfortable, or aggravated. Co-Worker1 stated she also saw Store Manager touch Complainant on the shoulder. Store Manager denied ever physically touching Complainant.

Witnesses attested to Store Manager's physically touching them in the workplace. Co-Worker1 attested that Store Manager would pull her hair clips out of her hair. Supervisor attested that Store Manager has put his hand on his shoulder when asking him to do something.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). When Complainant did not request a hearing within the time frame provided in 29 C.F.R. § 1614.108(f), the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). The decision concluded that Complainant failed to prove that the Agency subjected her to discrimination as alleged.

The instant appeal followed. On appeal, Complainant submits a statement that this process has been stressful and difficult. She is certain her negative experience is not isolated. She notes Store Manager has since quit his job and left the country. She states that it is too bad the Agency does not comply with its policy and core values and submits copies of internal Agency emails and policies regarding sexual assault awareness and prevention.

The Agency has not submitted a brief or statement in response to the appeal.

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").

Complainant alleges that she was subjected to sexual harassment. In considering whether the alleged actions, whether individually or collectively, constitute harassment, the Commission notes that in Harris v. Forklift Systems, the Supreme Court reaffirmed the holding of Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), that harassment is actionable if it is sufficiently severe or pervasive that it results in an alteration of the conditions of the complainant's employment. See EEOC Notice No. 915.002 (March 8, 1994), Enforcement Guidance on Harris v. Forklift Systems, Inc. at 3. To establish a claim of harassment a complainant must show that: (1) she belongs to a statutorily protected class; (2) she was subjected to unwelcome verbal or physical conduct involving the protected class; (3) the harassment complained of was based on the statutorily protected class; (4) the harassment had the purpose or effect of unreasonably interfering with his work performance and/or creating an intimidating, hostile, or offensive work environment; and (5) there is a basis for imputing liability to the employer. See McCleod v.

Social Security Administration, EEOC Appeal No. 01963810 (August 5, 1999) (citing Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982)).

Furthermore, in assessing whether the complainant has set forth an actionable claim of harassment, the conduct at issue must be viewed in the context of the totality of the circumstances, considering, *inter alia*, the nature and frequency of offensive encounters and the span of time over which the encounters occurred. See 29 C.F.R. § 1604.11(b); EEOC Policy Guidance on Current Issues of Sexual Harassment, N 915 050, No. 137 (March 19, 1990); Cobb v. Department of the Treasury, Request No. 05970077 (March 13, 1997). However, as noted by the Supreme Court in Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998): “simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the ‘terms and conditions of employment.’” The Court noted that such conduct “must be both objectively and subjectively offensive, [such] that a reasonable person would find [the work environment to be] hostile or abusive, and . . . that the victim in fact did perceive to be so.” *Id.* See also Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 752 (1998); Clark County School Dist. v. Breeden, 532 U.S. 268 (2001).

Unwelcome Conduct Based on Sex -Elements (1), (2), and (3)

With respect to element (1), the record establishes, and the Agency does not dispute, that Complainant, a female, is a member of a statutorily protected class. As concerning elements (2) and (3), Complainant alleged that she was subjected to both verbal statements and physical conduct of a sexual nature. While some of Complainant’s allegations were not witnessed, Co-Worker1 corroborated Complainant’s allegations regarding the July 14, 2016 incident where Store Manager discussed intimate details of his relationship with a woman whom he got pregnant 3 times, stating that “What Dave wants, Dave gets.” Co-Worker1 and Co-Worker2 corroborated Complainant’s general assertion that Store Manager subjected her to unwelcome conversations about his relationships with women. Store Manager conceded discussing his past relationships and making comments about the woman he got pregnant three times.

We also find that Complainant’s allegations that Store Manager hit her twice with a yardstick and that he placed his hand on her leg during her performance evaluation were sufficiently supported by Co-Worker1 and Co-Worker2, who, although not present, attested that Complainant told them about the incident. Co-Worker1 and Co-Worker2 also witnessed Complainant’s allegations that Store Manager would place his hands on her shoulders. Thus, we find the record establishes that Store Manager subjected Complainant to unwelcome verbal and physical conduct involving her sex and that the actions complained of were based on sex.

Unwelcome Conduct Sufficiently Severe or Pervasive -Element (4)

A review of the record reveals that Store Manager’s actions were sufficiently severe or pervasive to create an abusive working environment. His placing his hand on Complainant’s leg at her thigh, in and of itself, is sufficiently severe to constitute a hostile work environment. The Commission has stated that it “will presume the unwelcome, intentional touching of

[Complainant's] intimate body areas is sufficiently offensive to alter the condition of her working environment and constitute a violation of Title VII.” See Policy Guidance on Current Issues of Sexual Harassment, EEOC Notice No. N-915-050 (March 19, 1990); see also Haves v. U.S. Postal Serv., EEOC Appeal No. 01954703 (January 23, 1998) (finding that Complainant was subjected to unlawful sexual harassment based on one incident of physical touching of a sexual nature).

The evidence establishes by a preponderance of the evidence that Store Manager engaged in a pattern of offensive conduct towards Complainant, which included inappropriate statements, touching, and even hitting her with a yardstick. The evidence in the record also establishes by a preponderance of the evidence that Store Manager’s harassment was inflicted upon other women as well. Therefore, we find that the conduct was both severe and pervasive, and was sufficiently offensive to alter the conditions of Complainant's working environment.

Liability -Element (5)

As noted, Store manager was Complainant’s second-line supervisor. An employer is subject to vicarious liability for harassment when it is created by a supervisor with immediate (or successively higher) authority over the employee; See Burlington Industries, Inc., v. Ellerth, 524 U.S. 742, 118 s. Ct. 2257, 2270 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 118 S. Ct. 2275, 2292-93 (1998). When, as here, the harassment does not result in a tangible employment action the agency can raise an affirmative defense, which is subject to proof by a preponderance of the evidence, by demonstrating: (1) that it exercised reasonable care to prevent and correct promptly any harassing behavior; and (2) that complainant unreasonably failed to take advantage of any preventive or corrective opportunities provided by the agency or to avoid harm otherwise. See Burlington Industries, Inc., v. Ellerth, 524 U.S. 742, 118 s. Ct. 2257, 2270 (1998); and Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors, EEOC Notice No. 915.002 (June 18, 1999). However, the Agency has not raised such a defense in its final decision or on appeal.

Therefore, we find that the Agency is liable for Store Manager’s sexual harassment and any compensatory damages that Complainant may be entitled to for that harassment.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we REVERSE the Agency’s final decision and REMAND the matter to the Agency for further processing in accordance with this decision and the ORDER below.

ORDER

The Agency is ordered to take the following remedial action:

- I. The Agency shall immediately ensure that the Store Manager no longer has any supervisory/managerial authority over Complainant. In doing so, Complainant shall not be transferred to another position unless she consents to the reassignment.
- II. Within thirty (30) calendar days of the date this decision is issued, the Agency shall give Complainant notice of her right to submit objective evidence (pursuant to the guidance given in Carle v. Dep't. of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993)) in support of her claim for compensatory damages within forty-five (45) calendar days of the date the Complainant receive the Agency's notice. The Agency shall complete the investigation on the claim for compensatory damages within forty-five (45) calendar days of the date the Agency receives Complainant's claim/evidence for compensatory damages. Thereafter, the Agency shall process the claim in accordance with 29 C.F.R. § 1614.110.
- III. If Store Manager is still employed by the Agency, within 60 calendar days of the date of this decision, the Agency shall provide him with 16 hours of mandatory in-person sexual harassment training designed to make clear to him what constitutes prohibited behavior and how to prevent engaging in it in the future.
- IV. If the Store Manager is still employed by the Agency, within 60 calendar days from the date of this decision, the Agency shall consider discipline against him. The Commission does not consider training to be a disciplinary action. If the Agency decides to take disciplinary action, it shall identify the actions taken. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline. If Store Manager has left the Agency's employ, the Agency shall furnish documentation of his departure date.

The Agency is further directed to submit a report of compliance in digital format as provided in the statement entitled "Implementation of the Commission's Decision." The report shall be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Further, the report must include supporting documentation of the Agency's calculation of back pay and other benefits due Complainant, including evidence that the corrective action has been implemented.

POSTING ORDER (G0617)

The Agency is ordered to post at its Bridgeport Commissary facility copies of the attached notice. Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted **both in hard copy and electronic format** by the Agency within 30 calendar days of the date this decision was issued, and shall remain posted for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The

Agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material. The original signed notice is to be submitted to the Compliance Officer as directed in the paragraph entitled "Implementation of the Commission's Decision," within 10 calendar days of the expiration of the posting period. The report must be in digital format, and must be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

ATTORNEY'S FEES (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 (R0610)

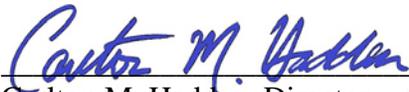
This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this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

facility or department in which you work. **Filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0815)

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

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

August 14, 2019

Date